2017 IL App (2d) 150688-U
No. 2-15-0688
Order filed June 23, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of De Kalb County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 13-CM-190
	)	
TREVOR SABIN,	)	Honorable
	)	Robert P. Pilmer,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Hudson and Justice Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: The evidence was sufficient to support the defendant's convictions of domestic battery, but a new trial was required where the defendant was denied due process by the State's use of impeachment evidence as substantive evidence and the trial court's refusal to instruct the jury on the issue of self-defense.

¶ 2 The defendant, Trevor Sabin, appeals his conviction of two counts of domestic battery (720 ILCS 5/12-3.2 (West 2012)), arguing that (1) his convictions should be reversed because the State failed to prove his guilt beyond a reasonable doubt; or (2) he should be granted a new trial because he was denied a fair trial. As we agree with his latter contention, we vacate his convictions and remand for a new trial.

¶ 3 I. BACKGROUND

¶ 4 On February 10, 2013, following a fight with his 13-year old daughter, K.S., the defendant was arrested and charged with domestic battery. The fight occurred in the home of Terry Marshall-Ruby, K.S.'s grandmother. K.S., her sisters, and the defendant lived with Marshall-Ruby, who acted as a mother to the girls.

¶ 5 Before trial, the State moved *in limine* for a ruling allowing it to introduce at trial statements made by K.S. to various witnesses about the incident. Those statements would ordinarily be inadmissible as hearsay. The State argued that, under section 115-10.1 of the Code of Criminal Procedure (Code) (725 ILCS 5/115-10.1 (West 2012)), such statements could be admitted as substantive evidence in the event that K.S. was unavailable to testify at trial (for example, if K.S. became unable to remember the details of the incident or her later statements to others). The defendant conceded that K.S.'s statements would be admissible for the limited purpose of impeachment but argued that any determination regarding the substantive use of the statements could not be made prior to trial. The trial court agreed and deferred ruling on the issue until trial. The defendant later notified the State that he intended to raise the defense of self-defense.

¶ 6 The defendant's trial before a jury commenced on November 17, 2014. The State's first witness was K.S. She testified that she remembered the fight clearly. That morning, she had returned from spending the night at the home of Thad Smith. Smith's daughters were friends of K.S., and Smith's son was her boyfriend. When she came home, she saw her video camera in the kitchen and believed that her sisters had been messing with it. She got angry with the defendant for not watching them and began yelling at him. He did not call her any names. She hit the defendant in the face, and then went into Marshall-Ruby's bedroom. She slammed the

door in the defendant's face, and as she did so, he put out his hand to block the door from hitting him and the door broke. She began telling Marshall-Ruby that she was angry and wanted to return to the Smiths' house. Marshall-Ruby said she could go, but the defendant said she could not leave, so she pushed him and slapped him on the side of his head. The defendant then held her down on the bed so that she could not keep hitting him. The defendant held her down with one hand; his other hand was holding her legs so that she could not kick him. Marshall-Ruby told the defendant to just let K.S. go and tried to pull him away. The defendant released K.S. and, after she left the bedroom, he punched a hole in the wall because "he was mad." K.S. left her home and returned to the Smith house.

¶ 7 When K.S. got to the Smith house, they told her that her lip was "busted open." She had not felt any injury, and there was only a little blood from her teeth. She told Smith that she and the defendant had gotten into an argument. K.S. did not tell Smith that the defendant had beaten her, but Smith "assumed" that and called the police. She did not recall telling Smith that the defendant had called her a dirty whore, or that he had "just beat the shit out of [her]," or that she had been punched four to five times. She did tell Smith that the defendant broke the door because she had slammed it and he was blocking it, and that the defendant held her down to stop her from hitting him.

¶ 8 After the police came, K.S. spoke with a police officer. She did not tell the officer that the defendant had hit her—Smith said that. She told the officer she did not know how she got a bloody lip. She did not have a bloody lip when she went into Marshall-Ruby's bedroom earlier. The officer asked her if she had any other injuries and she said she had a bump on her head, but she did not say that her father caused the bump. K.S. also spoke with Christina Gardner, an investigator with the Department of Children and Family Services (DCFS). She did not recall

telling Gardner that the defendant hit her because she called him stupid, or that the defendant split her lip or punched her and caused bumps on her head. She had fallen onto the bed when her feet slipped as she swung at the defendant. He then held her down as she continued to try to hit him. K.S. still lived with the defendant. She did not talk with him about her testimony at trial.

¶ 9 On cross-examination, K.S. said that she hit the defendant "a lot" and kicked him twice before he stopped her by holding her legs. K.S. denied telling Smith that she had been punched in the face four to five times. On re-direct, K.S. testified that she had told Smith that she had head-butted the defendant's hand, not that the defendant had hit her and bloodied her lip.

¶ 10 The State next called Marshall-Ruby. She testified to a similar version of events: K.S. became angry after coming home from a friend's house; K.S. argued with the defendant and then came into Marshall-Ruby's bedroom; K.S. did not have any injuries to her face at that point; K.S. slammed the door on the defendant and he broke one panel of it when he put up his hand to block it; the two were screaming and K.S. started hitting the defendant; K.S. hit the defendant at least three times before he pushed her away; he pushed K.S. down on the bed and held her by holding her jaw; and Marshall-Ruby told the defendant to let K.S. go and grabbed his arm. Marshall-Ruby was also trying to calm the defendant down, telling him to just leave and she would talk to K.S. She picked up the phone to try to call her oldest daughter but the defendant flung his arm back, knocking the phone out of her hand. K.S. screamed, "don't punch me." However, Marshall-Ruby was right next to them and she did not see the defendant hit K.S. After the defendant released K.S. and she was leaving, he said, "this is what a punch is" and punched the wall, making a hole in it.

¶ 11 K.S. went back to the Smith house. Marshall-Ruby went there to pick her up. When she saw K.S., K.S. had a little cut on her lip. Marshall-Ruby recalled speaking with Smith and

telling him that the defendant "took it too far" and that K.S. needed to "watch her mouth." She did not recall saying that the defendant hit K.S., or that the defendant hit her "too hard" or "too many times." Marshall-Ruby did not recall speaking with Gardner or telling Gardner that she didn't see the defendant hit K.S., but "there was a lot going on so [she] couldn't say it didn't happen."

¶ 12 Marshall-Ruby testified that photos of the defendant's arms, showing bruises and scratches, accurately depicted what his arms looked like the day after the incident when he had shown her his arms. He did not have any marks on his face. She did not recall telling a police officer whom she spoke with that she might have left marks or bruises on the defendant's arms, because she did not know at that point that the defendant had any such marks or bruises. The marks "came when [she] was gone" retrieving K.S. from the Smith house.

¶ 13 The State then called Smith. Smith testified that K.S. had spent the night at his family's house and left at about 10:30 the next morning. When she left, she had no injuries on her face and nothing was bleeding or swollen. He next saw K.S. about an hour later when she walked into his house, crying and upset. Her lip was cut and swollen and she had some marks on her face. According to Smith, K.S. "just walked in the house and she said my dad just beat the shit out of me." K.S. also told Smith that the defendant had called her a dirty whore and a slut. (The defense objected to this question on the basis of hearsay; the trial court overruled the objection.) K.S. told Smith that she had been hit six or seven times. He did not recall K.S. saying anything about head-butting the defendant's hand, or about hitting or attacking the defendant in any way. Smith called 911.

¶ 14 The police arrived at Smith's house. He spoke with them very briefly and they immediately began interviewing K.S. At some point, maybe an hour later, Marshall-Ruby came

to his house. In his presence, Marshall-Ruby said that the defendant hit K.S., and that he "took it too far" and hit K.S. "too many times." Marshall-Ruby also said that K.S. needed to watch her step. On cross-examination, Smith conceded that he might have told the police that K.S. said she had been hit four or five times, not six or seven; he did not know the exact number. When she returned to his house, K.S. had marks on the side of her face—not black and blue marks but "red, fresher, something had just happened" marks. Although K.S. was upset and crying, the redness he saw was not from her being upset.

¶ 15 Sycamore Police Officer Ryan Hooper testified that he responded to Smith's 911 call. He spoke with Smith and then K.S. K.S.'s bottom lip was swollen and bloody, and she was dabbing her mouth with a bloody rag or paper towel. When Hooper began testifying about what K.S. told him, defense counsel made a hearsay objection. The trial court overruled it. Hooper then testified that K.S. said the defendant hit her in the face and head with his hand, causing her bloody lip. When the State asked if K.S. said whether the defendant had hit her with both an open hand and a closed fist, the defense again objected, asserting improper impeachment. At a sidebar, defense counsel noted that K.S. had never been asked this question at trial, so it could not be admitted for impeachment purposes and was simply inadmissible hearsay. The trial court sustained the objection.

¶ 16 Hooper continued with his testimony. After he spoke with K.S., he went to Marshall-Ruby's house and spoke with the defendant. This occurred within 15 minutes of his initial response to the 911 call. The defendant was "somewhat agitated" and did not have any visible injuries. The defendant said that K.S. became upset about her video camera and began yelling and arguing with him in the living room. K.S. went into her grandmother's room and the defendant followed her in. K.S. slapped and hit him, so he pushed her onto the bed and held her

down with his hands on her head. Her head only hit the mattress, nothing else. Hooper asked the defendant if he had any marks or injuries from K.S. hitting him, and the defendant said no. The defendant was wearing a short-sleeved shirt that day. Shown photographs of the defendant's arms, Hooper testified that on that day he did not notice any of the scratches or bruises shown in the photographs. However, Hooper did not check the defendant's body, as the defendant had denied any injuries. Hooper asked the defendant how K.S.'s lip became bloody, and the defendant said it must have happened when he was holding her down. Hooper arrested the defendant and put him in the back of a police car.

¶ 17 Marshall-Ruby arrived home while Hooper was speaking with the defendant. Hooper spoke with her after he arrested the defendant. She told him that she tried to pull the defendant away from K.S. and that the defendant might have a mark or bruise on him from that. Hooper then spoke with K.S. again. She told him that she had bumps on her head, behind her right ear. He could not see them under her hair, and she guided his hand to them. One was about the size of a nickel and the other was about the size of a dime; both were about a quarter-inch high. Hooper also went to the bedroom where the fight took place and saw that one of the panels on the door had been punched out and there was a hole punched in a wall. K.S. told him that, after the defendant released her, she ran into the bathroom to hide. She heard him punch the wall and the door, and heard him arguing with Marshall-Ruby. She looked out the door and saw the defendant slap the phone out of Marshall-Ruby's hand. Hooper then identified the pictures he took at the scene, which were admitted into evidence and published to the jury.

¶ 18 On cross-examination, Hooper said that he had spoken with K.S. twice, and her second statement was more detailed. In the second interview, K.S. said she had called the defendant names and had slapped him once, after which he had hit her in the mouth and pushed her down

on the bed. Asked why he had not arrested K.S., who admitted having hit the defendant, Hooper replied that K.S. hitting the defendant did not "give [the defendant] cause to punch a juvenile in the face," given that the defendant was an adult.

¶ 19 There was a delay before the next witness was available, and the trial court excused the jurors and began to go over the proposed jury instructions with the attorneys. The first issue arose with the State's proffered instruction no. 12, the relevant part of which stated that the prior inconsistent statement of a witness "ordinarily" could be considered by the jury "only for the limited purpose of deciding the weight to be given" to the testimony of that witness at trial. The defendant did not object to this instruction and in fact argued that it was appropriate. The defendant reminded the trial court of its earlier ruling on the State's motion *in limine* and argued that neither K.S. nor Marshall-Ruby had been "unavailable" within the meaning of section 115-10.1 of the Code (725 ILCS 5/115-10.1 (West 2012)). Thus, the testimony of Smith, Hooper, and Gardner (who was to testify next) could be admitted only for the purpose of impeachment. The State responded that this argument was largely correct, "with the exception of the one statement that was made to Thad Smith and came in really as an excited utterance, [which] was that dad – my dad beat the shit out of me." The State agreed that "the rest of the statements would be impeachment."

¶ 20 The discussion moved on to instructions nos. 14 and 15, which were alternate versions of the same pattern jury instruction. Instruction no. 14 defined the crime of domestic battery as follows: "A person commits the offense of Domestic Battery (Count I) when he knowingly without legal justification and by any means causes bodily harm to any family or household member." Instruction no. 15 was the same but omitted the phrase "without legal justification." The defense argued that the evidence supported the giving of instructions on self-defense (the

only legal justification raised by the defendant), as both K.S. and Marshall-Ruby had testified that K.S. hit the defendant first. The State countered that instructions on self-defense were not appropriate unless the defendant admitted that he committed the conduct with which he was charged. The trial court reserved the issue—which affected several sets of alternate jury instructions—for later ruling, and proceeded to identify the remaining instructions as to which there was no dispute.

¶ 21 The final witness was Gardner. She testified that she had interviewed K.S. on the day of the fight. K.S. had said that she and the defendant had gotten into an argument; he had hit her because she called him stupid; he had slapped her on the right side of her face; she in return had slapped him in the face; he then hit her a few more times and split her lip; he slammed her down on a bed and held her down; and she had bumps on her head because he punched her.

¶ 22 The defense moved for a directed verdict, arguing that the only substantive evidence presented thus far was that the defendant had not struck K.S.—both K.S. and Marshall-Ruby testified that he merely restrained her, and that her injured lip was not caused by a blow from the defendant. As for the other testimony, it was merely impeachment and could not be considered as substantive evidence. Finally, there was evidence that the defendant acted justifiably in self-defense. The State argued that there was evidence supporting all of the elements of the offense, and the standard was simply whether a reasonable juror could find for the State. The trial court denied the motion. It then suggested that they return to the issue of whether the jury should be instructed on self-defense.

¶ 23 The State indicated that it wished to withdraw the jury instructions mentioning legal justification or self-defense and instead give instructions that omitted all such language, because the defendant was not entitled to that language. The State argued that the defendant could not

claim self-defense because that defense required that the defendant admit the charged offense but provide some evidence showing that his conduct was justified. Here, the State claimed, the defendant had denied striking K.S.

¶ 24 The defense protested that she had just been provided with the case cited by the State and had not had a chance to read it. The defense also argued that the State was in essence contending that in every case of self-defense, a defendant had to testify that he committed the charged offense. Further, the evidence clearly showed that the defendant had made contact with K.S. in a manner that would be a battery but for the fact that he was responding to being struck himself and was simply trying to prevent additional injury by restraining K.S. That evidence was sufficient to entitle the defendant to an instruction on self-defense (and the corresponding "legal justification" language in the pattern jury instruction).

¶ 25 The trial court indicated that it agreed with the State:

> THE COURT: I understand that, I'm not trying to -- but I think -- I mean, I think the instructions are going to have to be somewhat consistent with some testimony in this case, and I'm not sure that I've heard enough at this point to get you to self-defense.
>
> MS. AL-HENAEY [Defense attorney]: Judge, Terry Marshall-Ruby and [K.S.] testified to the same set of events, that [K.S.] walked into her mother's room, and that she slapped Trevor Sabin, and Trevor Sabin held her down on the bed, and [K.S.] was kicking and punching him.
>
> If that's not self-defense, the act of holding her down is a battery. That would be a battery.

So if there's no instruction as to is he allowed to do that if somebody is hitting him, I -- I think that's incorrect. *** I mean, the State has to prove beyond a reasonable doubt that this happened without legal justification, so --

THE COURT: Well, no, I don't think so.

All right. Well, let me do this. Again, I'm going to allow the State to withdraw their No. 14, so that puts us to No. 15, which is -- I mean, at this point I think -- I mean, I understand there's a difference in the testimony, and they've got to decide who do they want to believe but, I mean, I think that's what it is. I don't think it's an issue of self-defense.

I mean, she may have -- she may truly have been the aggressor in all of this, and if that's what they choose to believe and they choose to believe what she says happened as opposed to what Mr. Smith said she told him and what Officer Hooper says [K.S.] told him or Ms. Gardner, what she says [K.S.] told her, I mean, that's up to them, but I don't know that that gets you all into the self-defense.

I mean, there's different versions of what happened but, I mean, the gist of your argument or your theory, as I understand it, is basically that, you know, she -- there was an argument, he was just trying to calm her down, she lashed out at him, as a result of lashing out at him, he held her down, somewhere in the course of that she cut her lip, got a swollen lip, whatever. So I'm not minimizing it, but that's kind of the gist of it.

MS. AL-HENAEY: Judge, I understand that. As far as the events, though, if the State's evidence is showing that Mr. Sabin grabbed her by her shoulders and put her on the bed, that's a battery.

[K.S.] didn't consent to that, it's of a physical and insulting nature.

So unless we're allowed to instruct them as to the legal justification requirement, then they're going to find him guilty, because that's what the law would say, that he caused a physical and insulting contact.

THE COURT: It depends who they believe, so -- so I think at this point again, the State's withdrawing their 14. I'm going to give No. 15 over defendant's objection.

MS. AL-HENAEY: Judge, if this is the route that we're going to go, then I would for the record ask for some more time so that I can -- I can research this. The State just handed me a case just now, and made this argument in the middle of jury instructions, and I'd like a chance to rebut it with either case law of my own or distinguish the case that was given to the Court, and I --

THE COURT: Okay. Well, I'm not going to do that. I mean, we're here at trial now, it's --

MS. AL-HENAEY: What the State is essentially trying to do is force my client to testify. That's what they're trying to do.

THE COURT: Well, no. I mean, I think they -- there has to be -- there has to be evidence, there has to be some testimony as to the nature of the self-defense, and --

MS. AL-HENAEY: And Judge --

THE COURT: -- I'm saying at this point there hasn't been.

If it's going to change -- I mean, and I understand. It may only be able to change if your client testifies. I'm not trying to have him testify, I don't want him to testify if he doesn't want to testify, but I'm just saying that in order to maintain that defense, it's -- you have to have -- you have to say yeah, I hit her in the mouth.

MS. AL-HENAEY: Judge, the – there's no law, no statute that says it has to come from the defendant. There's already in evidence, I believe the wording is any evidence that there was physical contact between the two.

THE COURT: No. Self-defense is an affirmative defense, and it's got to be raised by the defendant. In all the cases cited with that, the defendant admits that he committed the act in question, but that the reason for it is that he thought he had to defend himself against the use of force by the other person. So that's what --

MS. AL-HENAEY: And Judge, I'm not sure of the answer, but again, I would like some time to investigate it and research it.

THE COURT: You know what? I'm not going to give you time now, because we're going to finish the trial but, you know, should they convict your client, you can always bring a motion as to that and list it as my error for not doing that, so – so over your objection, I'm going to give No. 15."

Following the same reasoning, the trial court refused to include any instructions on the issue of self-defense.

¶ 26 The sole witness for the defense was Hooper (recalled), who confirmed that he had not asked K.S. or Marshall-Ruby to write a statement about the fight, and he had not asked them to make recorded statements using the video equipment in his squad car. The case then moved to closing arguments.

¶ 27 The State acknowledged that there was "a lot of conflicting testimony" about whether the defendant caused bodily harm to K.S. but told the jury that if they went through the evidence, it would be "really quite clear what happened." There was physical evidence—K.S. was unharmed when she left the Smith home at 10:30 but had a bloody lip when she returned about an hour

later. The photographs taken that day showed the injury. Smith had also testified that, when K.S. "first walked in the door moments after this encounter had happened with her father," she said that her father had called her a dirty whore, that he just beat the shit out of her, and that he punched her four or five times. The State then spoke at length about the testimony of Hooper and Gardner as to K.S.'s statements about the fight, going over the testimony in detail. It emphasized that these statements were made on the day of the fight, when K.S.'s recollection "was the best it would be, *** moments after what happened."

¶ 28 The State then told that jury that there was circumstantial evidence too: the defendant had broken a panel of the bedroom door and had punched a hole in the wall. Marshall-Ruby testified that she had tried to pull the defendant away from K.S. and calm him down. Further, Hooper had said that the defendant had no injuries on the day of the fight, but somehow the later photographs showed scratches and bruises to his arms. The State then argued that K.S.'s testimony itself was circumstantial evidence:

> "And lastly, the last piece of circumstantial evidence we believe shows that we've proven our case beyond a reasonable doubt is [K.S.]'s testimony. Now, obviously, [K.S.]'s testimony in court is very different from what Officer Hooper says she told him, from what Thad Smith said she said, and from what Christina Gardner spoke to her about, but she also testified that she has a good relationship with her father now, and so even now today in court, she's trying to protect her father by changing her story and by telling you that she was the aggressor, that she as a 14-year-old on the day that this happened was the aggressor against that defendant, her father, an adult male."

¶ 29 The defendant's closing argument pointed out the discrepancies in the State's case, including the lack of injuries consistent with a large man such as the defendant punching a 13-

year old girl repeatedly in the face, and the trial testimony by K.S. and Marshall-Ruby that, although K.S. and the defendant argued and K.S. hit him, he did not strike her. The defense then explained the use of prior inconsistent statements in some detail, noting that they could be considered to impeach the credibility of testimony given at trial, but not as substantive evidence of what happened, saying that "it's *** not which story you believe."

¶ 30 On rebuttal, the State noted that it needed to prove only two elements, both of which had been proven: family relationship, and bodily harm or contact of an insulting or provoking nature. The State drew attention to the fact that there were no jury instructions on self-defense, and the jury was not to consider whether the defendant's use of force was justified. The State then addressed the credibility of the witnesses, saying that it was "a huge part of this case." The State encouraged the jury to compare K.S.'s testimony at trial with her earlier statements as reported by Smith, Hooper, and Gardner. At no point during the State's closing arguments did the defendant object.

¶ 31 The jury convicted the defendant on both counts of domestic battery. The defendant moved for a new trial, arguing that the evidence was insufficient to convict him and that he was entitled to an instruction on self-defense. The trial court denied the motion without explanation, and sentenced him to 18 months of probation.

¶ 32 II. ANALYSIS

¶ 33 On appeal, the defendant raises three arguments. First, he contends that his convictions should be reversed because there was insufficient evidence to prove his guilt beyond a reasonable doubt. In the alternative, he argues that he should be granted a new trial because he was denied a fair trial by (a) the State's use of impeachment evidence as substantive evidence in its closing, and (b) the trial court's refusal to instruct the jury regarding self-defense. (The

defendant also argues that, in the event we find he forfeited his second argument by failing to object to the State's closing, we should find that his attorney rendered ineffective assistance. As we find that plain error allows us to consider the issue, we do not reach the ineffective-assistance argument.)

¶ 34 A. Sufficiency of the Evidence

¶ 35 The defendant argues that the evidence of his guilt was insufficient to sustain his convictions because the only occurrence witnesses who testified—K.S. and Marshall-Ruby—denied that he intentionally struck K.S. These witnesses also denied that they had ever told Smith, Hooper, or Gardner otherwise. Further, the relatively minor nature of the injury to K.S.'s lip was at odds with the story that the defendant beat K.S., striking her repeatedly in the face and head. As to the bumps on K.S.'s head, there was no substantive testimony connecting them to the fight—the testimony of Hooper and Gardner regarding K.S.'s statements to them about the bumps could be considered solely as impeachment evidence, not as substantive evidence of what actually occurred.

¶ 36 The State responds that there was other direct evidence of the defendant's guilt, including the physical evidence of K.S.'s injured lip, which appeared during the hour when she was home before returning to the Smith residence. In addition, the State argues that all of K.S.'s statements to Smith were substantive evidence because they fell within the "excited utterance" exception to the hearsay rule. Finally, the circumstantial evidence such as the damage done to Marshall-Ruby's door and wall by the defendant during the incident and Marshall-Ruby's testimony that he knocked the phone out of her hand corroborated the depth of the defendant's rage, supporting an inference that he also struck K.S.

¶ 37 In evaluating the sufficiency of the evidence, it is not the province of this court to retry the defendant. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). The relevant question is " 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *Id*. (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The weight to be given to the witnesses' testimony, the determination of their credibility, and the reasonable inferences to be drawn from the evidence are all matters within the jurisdiction of the trier of fact. *People v. Smith*, 185 Ill. 2d 532, 542 (1999); *Collins*, 106 Ill. 2d at 261-62. Likewise, the resolution of any conflicts or inconsistencies in the evidence is also within the province of the fact finder. *Collins*, 106 Ill. 2d at 261-62. We will set aside a criminal conviction only "where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt." *Smith*, 185 Ill. 2d at 542.

¶ 38 After reviewing the record, we find that the substantive evidence of the defendant's guilt identified by the State was sufficient to permit a reasonable juror to conclude that the defendant knowingly caused bodily harm to K.S. and made contact of an insulting and provoking nature. The defendant protests that, even if K.S.'s initial statement to Smith—that he "beat the shit out of" her—qualified as an excited utterance, the State never laid the foundation for the admission of her other supposed statements (regarding the defendant calling her names and the number of times he hit her) under that hearsay exception. But even if we ignore the latter statements, K.S.'s statement that the defendant beat her, coupled with the evidence of her injury and the testimony regarding the defendant's violent mood, adequately supported the defendant's convictions. We reject the defendant's challenge to the sufficiency of the evidence.

¶ 39 B. Use of Impeachment Evidence As Substantive Evidence

¶ 40 The defendant's second argument concerns the State's improper use of evidence admitted solely for impeachment purposes as if that evidence were substantive. The evidence at issue includes all of the testimony of Hooper and Gardner about what K.S. and Marshall-Ruby said about the fight, and Smith's testimony about all of K.S.'s statements except her excited utterance that her father had just beaten her. The distinction between these two ways of considering evidence—as impeachment or as substantive evidence of the offense—is subtle and crucial.

¶ 41 Someone else's report about what a witness said is hearsay, which is inadmissible unless it falls within a recognized exception to the hearsay rule. *People v. Cruz*, 162 Ill. 2d 314, 359 (1994) ("What a witness states out of court and out of the presence of the defendant is pure hearsay and incompetent as substantive evidence."). However, under certain circumstances, the credibility of a witness may be impeached through the introduction of an earlier statement made by that witness that is inconsistent with the witness's current testimony. *Id*. at 358; Ill. R. Evid. 607 (eff. Jan. 1, 2011). The limitations on the admission of such evidence are of paramount importance:

> "[I]t must be borne in mind that the purpose of such impeachment evidence is to destroy the credibility of the witness and *not* to establish the truth of the impeaching material. [Citation.] Prior inconsistent statements, with the exception of those admissible under section 115-10 of the Code ***, are not to be treated as having any substantive or independent testimonial value." (Emphasis in original.) *Cruz*, 162 Ill. 2d at 359.

Here, the parties agree on certain facts about the testimony at issue: it was not admissible as substantive evidence under section 115-10, but it was admissible as impeachment evidence.[1]

[1] The latter concession was made by the defendant's attorneys both at the hearing on the State's motion *in limine* and at trial, and thus we need not address the possibility that the

The question is whether the State improperly attempted to use this testimony as if it were substantive evidence—*i.e.*, as if it established the truth of the earlier statements made by K.S. and Marshall-Ruby.

¶ 42 We find that the State unquestionably crossed this line. In *Cruz*, our supreme court found that the State sought to use impeachment testimony about a witness's prior inconsistent statements as substantive evidence when the State (1) referred repeatedly to the substance of the witness's alleged earlier inconsistent statements during closing argument, and (2) asked the jury to weigh the witness's current testimony at trial against the testimony of others about her statements. *Cruz*, 162 Ill. 2d at 364-65. That is exactly what occurred here.

¶ 43 The State argues that the defendant failed to object to its improper statements during closing, and thus he has forfeited any claim of error. The defendant contends that the issue should be reviewed for plain error.

¶ 44 Under Illinois Supreme Court Rule 615(a), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." Ill. Sup. Ct. R. 615(a) (eff. Jan. 1, 1967). Plain-error review permits us to consider a forfeited claim of clear error where the evidence is so closely balanced that the error alone might have resulted in the defendant's conviction, or where, regardless of the closeness of the evidence, the error is so

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testimony was not admissible as impeachment, either. See Ill. R. Evid. 607 (the party calling a witness may introduce the witness's prior inconsistent statement as impeachment only if the witness's testimony has affirmatively damaged that party's case); *Cruz*, 162 Ill. 2d at 359-61 (explaining the rationale for this rule). In this case, even if the State had not called K.S. and Marshall-Ruby, the defendant would likely have done so to support his claim of self-defense. At that point, the State could have presented the prior inconsistent statements as impeachment.

serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *People v. Sargent*, 239 Ill. 2d 166, 189 (2010). The first step in plain-error analysis is to determine whether a clear or obvious error occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Here, we have already found that such an error occurred. And in light of the competing stories offered by the parties, it is likely that the improper substantive use of the testimony at issue affected the overall fairness of the trial. *Sargent*, 239 Ill. 2d at 189. We thus find that the error was not forfeited.

¶ 45 The State also argues that the error was harmless because there was other evidence supporting the verdict and the trial court properly instructed the jury that prior inconsistent statements of a witness ordinarily should be considered only for their impeachment value. But the State itself noted that the credibility of the witnesses was a "huge issue in this case," making its improper use of the evidence to establish what actually occurred more serious. And, as the court in *Cruz* noted, jury instructions may not cure the prejudice flowing from such an error: "It is well recognized that jurors may find it difficult to consider prior inconsistent statements solely to determine credibility and may afford such testimony substantive value." *Cruz*, 162 Ill. 2d at 366. Accordingly, we may find reversible error even where the jury was properly instructed regarding its consideration of prior inconsistent statements. See *People v. Bailey*, 60 Ill. 2d 37, 44 (1975) (finding error and granting new trial despite jury instruction where prosecution improperly asked jury to consider witness's prior inconsistent statements as substantive evidence).

¶ 46 C. Denial of Instruction on Self-Defense

¶ 47 Even if the State's attempt to have the jury improperly weigh the prior inconsistent statements of K.S. and Marshall-Ruby did not in itself require a new trial, we would grant a new

trial on the basis of the third claim of error raised by the defendant: the trial court's refusal to instruct the jury on self-defense.

¶ 48 To support a claim of self-defense, the record must contain evidence that (1) force was threatened against the defendant; (2) the defendant was not the aggressor; (3) the danger of harm was imminent; (4) the force threatened was unlawful; (5) the defendant actually believed that a danger existed and that the kind and amount of force he used were actually necessary to avert the danger; and (6) defendant's beliefs were reasonable. *People v. Dunlap*, 315 Ill. App. 3d 1017, 1025 (2000). Self-defense is an affirmative defense, and once a defendant raises it, the State has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense, in addition to proving the elements of the charged offense. *People v. Lee*, 213 Ill. 2d 218, 224 (2004).

¶ 49 It is long established in Illinois that "a defendant is entitled to instructions on those defenses which the evidence supports," even if the supporting evidence is "slight." *People v. Everette*, 141 Ill. 2d 147, 156 (1990). Thus, as long as there is some evidence which, if believed by the jury, would support a claim of self-defense, a trial court must instruct the jury on that defense. *People v. McDonald*, 2016 IL 118882, ¶ 25; *Everette*, 141 Ill. 2d at 156-57; see also *People v. Crane*, 145 Ill. 2d 520, 526 (1991) ("A defendant is entitled to an instruction on his theory of the case if there is some foundation for the instruction in the evidence"). The evidence supporting the instruction need not be tendered by the defendant: the relevant evidence may be offered by the State. *People v. Lyda*, 190 Ill. App. 3d 540, 545 (1989).

¶ 50 Here, two witnesses testified that K.S. attacked the defendant and that the injuries she sustained resulted from his attempt to restrain her and prevent her from injuring him. This

testimony easily meets the "some evidence" threshold necessary to entitle the defendant to instructions on self-defense.

¶ 51 The State argues that there was ample evidence suggesting that the defendant's conduct did not qualify as self-defense. For instance, the defendant followed K.S. into the bedroom even after she attempted to walk away from him. This argument—which is about whether a jury could or should have found the defense meritorious—is not on point. The issue here is whether the jury should have been instructed on the defense to begin with, and on that issue, the test is whether some evidence supported the claim of self-defense. That test was met here. See *id.* ("A defendant is entitled to present his theory of defense even if the trial court believes that the evidence offered in support of that defense is inconsistent or of doubtful credibility."). To the extent that the trial court determined that the evidence did not support the giving of self-defense instructions, the trial court abused its discretion. *Crane*, 145 Ill. 2d at 526 (if there is some evidence supporting a claim of self-defense, "it is an abuse of discretion for the trial court to refuse to so instruct the jury").

¶ 52 In this case, it appears that the trial court's refusal to instruct the jury on self-defense rested not so much on a determination that there was insufficient evidence to support the instruction as on a mistaken view of the law. The trial court believed that it should not give the instruction if the defendant had not admitted that he committed the offense with which he was charged. This belief, and the trial court's application of the relevant legal principles, was error.

¶ 53 Relying on this court's decision in *People v. Chatman*, 381 Ill. App. 3d 890 (2008), the State argued that, because the defendant had not admitted "striking" K.S., he was not entitled to an instruction on self-defense. This argument misreads *Chatman*, a factually distinct case in which the issue was whether the trial court erred in giving a self-defense instruction that (a) was

requested by the State, not the defendant, and (b) improperly informed the jury that the defendant was the initial aggressor instead of leaving that determination to the jury. *Id*. at 900-02. (Indeed, given its unusual facts, *Chatman* has limited relevance to most ordinary jury instruction cases.) It is true that the affirmative defense of self-defense generally rests on the premise that a defendant used force against someone but asserts that the use of force was legally justified by a reasonable belief that the force used was necessary to protect the defendant from harm. See *Everette*, 141 Ill. 2d at 162. Nevertheless, this premise—that the defendant used force against someone—need not arise by a formal concession of culpability. Indeed, our supreme court has held that a defendant is entitled to have the jury instructed on self-defense even when he also claims that the harm to the victim was accidental, so long as the record contains some evidence supporting self-defense. *Id*. at 154-55 (reviewing case law holding that the purported "inherent contradiction" between the theories of self-defense and accident was not determinative and did not prevent the giving of an instruction on self-defense where that instruction was otherwise proper). Here, the trial court erred in concluding that it need not instruct the jury on self-defense because the defendant had not expressly conceded committing domestic battery.

¶ 54 Further, even if the defendant was required to concede, in some fashion, that he had used force against K.S., the record clearly shows that he had done so. Although the defense attorney argued that the defendant had not "struck" or "beaten" K.S., it was undisputed that he held her down on a bed against her will. As the defense correctly noted in its arguments to the trial court, that conduct constituted a battery—the foundation of a domestic battery charge—unless it was legally justified. There was no basis for the trial court's belief that the defendant was required to make some further admission. To the extent that the trial court's decision was based on such a supposition, that decision was erroneous. The trial court's improper refusal to instruct the jury

on self-defense requires a new trial to enable the defendant to fully present his case, including all the defenses constitutionally available to him. See *People v. Cacini*, 2015 IL App (1st) 130135, ¶ 59 (new trial necessary where trial court failed to properly instruct the jury on self-defense).

¶ 55 III. CONCLUSION

¶ 56 For the reasons stated, the judgment of the circuit court of De Kalb County is vacated and we grant the defendant's request for a new trial. The cause is remanded for further proceedings consistent with this order.

¶ 57 Vacated and remanded.