2018 IL App (2d) 160292-U
No. 2-16-0292
Order filed September 5, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. FERNANDO LEYVA, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 14-CM-5274 Honorable Kathryn Karayannis, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Hudson and Justice Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The evidence was sufficient to convict defendant of domestic battery based on physical contact of an insulting or provoking nature. Also, the trial court did not abuse its discretion in its evidentiary rulings or in failing to declare a mistrial.

¶ 2 A jury convicted defendant, Fernando Leyva, of one count of domestic battery, based on physical contact of an insulting or provoking nature. 720 ILCS 5/12-3.2(a)(2) (West 2014). After denying a motion for a mistrial, the court sentenced defendant to 12 months' conditional discharge. Defendant appeals, challenging the: (1) sufficiency of the evidence; (2) admission of

prior consistent statements; and (3) trial court's refusal to declare a mistrial when the victim testified to defendant's prior bad acts. We reject defendant's arguments and affirm.

¶ 3 I. BACKGROUND

¶ 4 At approximately 10 p.m. on December 27, 2014, there was a domestic disturbance in the Elgin home defendant shared with his ex-wife, Cecilia Huichapa, and their three sons, E.L., M.L., and J.L., then ages 16, 9, and 2. Cecilia placed a 9-1-1 call, and Elgin police officer Justin Brown responded to the dispatch. Brown arrested defendant. The State charged defendant with two counts of domestic battery.

¶ 5 Count I, as amended, read:

> "Domestic Battery/Bodily Harm: On or about December 27, 2014, in violation of 720 ILCS 5/12-3.2(a)(1), Fernando Leyva, hereinafter referred to as the defendant, knowingly caused bodily harm to Cecilia Huichapa, a family or household member of the defendant, *in that the defendant struck Cecilia Huichapa* on or about the body, said offense occurring in Kane County, Illinois." (Emphasis added.)

¶ 6 Count II, as amended, read:

> "Domestic Battery/Insulting or Provoking: On or about December 27, 2014, in violation of 720 ILCS 5/12-3.2(a)(2), Fernando Leyva, hereinafter referred to as the defendant, knowingly made contact of an insulting or provoking nature with Cecilia Huichapa, a family or household member of the defendant, *in that defendant struck and/or poured beer* on or about the body of Cecilia Huichapa, said offense occurring in Kane County, Illinois." (Emphasis added.)

¶ 7 The case proceeded to trial. During opening statements, the State began: "[N]o good deed goes unpunished." It promised to show that Cecilia allowed defendant to live with her,

because he had no place else to go. On the night in question, he drank and was argumentative. He poured beer on her head and he hit her. Defendant opened by stating that Cecilia was not doing a good deed. Rather, defendant lived in the home to help support and raise the children. He would show that "we are here today," because Cecilia wanted to "get [him] out of the house" and "move on with her life."

¶ 8 A. The State's Case

¶ 9 1. Justin Brown

¶ 10 Brown testified that, on the date in question, he responded to a dispatch call concerning a domestic battery at defendant's residence. When he arrived, he could hear a loud, older man inside yelling. Upon entering the home, he saw that it was defendant. Cecilia was hiding behind a mattress toward the front of the house. She was crying and visibly upset. Her hair was wet and it smelled of beer. At first, Brown did not notice any injuries, but, on closer examination, he noticed a "redness and a small scratch to [the] left side of her eye [and] face and cheek area." Brown spoke with defendant, who told him that "nothing happened," it was a verbal incident, and he did not want to talk about it. Brown opined that defendant was under the influence of alcohol. Brown based his opinion on: "[Defendant's] demeanor, the way he was upset. I smelled alcohol coming from his breath and the way he spoke to me, the short period he did, it appeared to be slurred speech." Brown spoke with the two older children. Brown did not speak with the youngest child, because he typically refrains from interviewing very young children.

¶ 11 On cross-examination, Brown acknowledged that he failed to include in his report that defendant appeared intoxicated. Defendant left peacefully with police; he did not resist arrest.

¶ 12 2. Cecilia Huichapa

¶ 13 Cecilia testified with the help of a translator. On the date in question, she lived with her three children and defendant, from whom she had been divorced for three years. Defendant slept in the living room. The State asked:

"Q. Why was the defendant staying with you in December of 2014?

A. Because after *he was in jail* for---

THE DEFENSE: Objection, your Honor. May we approach?" (Emphasis added.)

Defense counsel moved for a mistrial. She argued that the State "just asked a question to elicit that my client was in jail." The State assured the court that it had not intended to elicit such a response. It had only asked why defendant was living in the home. The court denied the motion. It instructed the jury to disregard Cecilia's answer. The State resumed questioning, asking: "Were you providing the defendant a place to live because he had no place to live at that time?" Cecilia answered yes.

¶ 14 Cecilia testified to the incident as follows. Late in the evening, Cecilia was in the kitchen, preparing dinner for E.L. Defendant arrived home and, immediately, he began to antagonize Cecilia by asking her questions. Cecilia sensed that he was looking for a fight, so she did not answer him. E.L. saw that defendant "wanted to cause a problem," so he took his meal upstairs. Cecilia left the kitchen and sat in the living room, watching television with her two youngest children. J.L., her youngest son, sat on her lap. Defendant came into the living room and continued to antagonize Cecilia with questions. When she did not answer, he began to record her with his cell phone and make faces at her. He was drinking, and he held a beer in his hand. Cecilia turned her own cell phone at him, including a flash, to show him that it was not pleasant to be recorded. However, Cecilia did not really record him. She "fake recorded" him. Indeed, defendant did not like it. He continued to yell, and he walked over to Cecilia and poured

beer all over her head while her son was still on her lap. Cecilia tried to get away from him, and defendant followed, calling her a whore and a f*** b***. She walked toward the hallway by the staircase, heading to her bedroom. She did not make it. She felt defendant hit her in the face. It happened so fast that she could not see whether he hit her with a closed or an open fist. She went down to the ground. She landed partially on the stairs, which caused further bruising. Defendant fell on top of her. They had a hard time getting up, because the floor was wet with beer. M.L. witnessed the entire incident. E.L. came downstairs toward the end of the incident, and he separated Cecilia and defendant. Then, Cecilia went into the bathroom and called 9-1-1.

¶ 15 During cross-examination, the defense tried to establish that Cecilia had a motive to falsely accuse defendant. Cecilia wanted to be a U.S. citizen. First, she sought to obtain a green card based on her marriage with defendant. Post-divorce, the defense theorized, she pursued an alternative avenue toward citizenship, obtaining a "U visa" in exchange for testifying for the State in a criminal case:

> "Q. And isn't it also true that you want to get a special visa for people who testify in cases just like this?
>
> A. If I could, yes.
>
> * * *
>
> Q. This U visa would be your first step to becoming a U.S. citizen, right?
>
> A. Yes.
>
> Q. When you were married to [defendant], you went through the process to try to get a green card to be here legally too, didn't you?
>
> A. *He was the one who brought me here illegally*. He paid for me to be brought over.

[Objection, non-responsive, sustained.]

Q. You did try to get a green card before? Yes or no?

A. Yes. He filed the papers for me or he tried.

Q. And you didn't get one?

A. No, because *he was committing fraud—*

THE DEFENSE: Objection. *** [N]on-responsive.

THE COURT: Well, I am not certain that it is [non-responsive]. If you want a yes or no answer, tell her you want a yes or no answer." (Emphases added.)

¶ 16 Also on cross-examination, Cecilia acknowledged that she did not tell the 9-1-1 operator that defendant hit her. The operator specifically asked if defendant was violent, and Cecilia answered that he was just yelling. Cecilia explained that she understood the operator's question, but she was afraid of defendant: "[H]e is always threatening me not to say anything to the police…" and "I was afraid. That's the reason I didn't say it over the phone. But when the police arrived and I felt like they could protect me, then that's when I told the whole truth." The defense played the 9-1-1 tape for the jury.

¶ 17 3. M.L.

¶ 18 M.L., now age 11, testified to the incident. He was watching television in the living room with his mother and younger brother. His younger brother was next to his mother on the couch. His father was asking his mother questions that she did not want to answer. He began to record her with his phone. She began to record him, to show him what it would feel like. He was yelling at her. He walked toward her and tried to remove the phone from her hand. In attempting to grab the phone, he spilled beer on her head. Spilling the beer was an "accident." Defendant was trying to take the phone. His mother said she was going to call the police and left

to go to her bedroom. His father followed her, yelling. He hit her on the head, and she fell to the ground. His father fell on top of his mother. M.L. pulled on his father's shirt, because he was afraid for his mother. Then, E.L. came downstairs and separated his parents.

¶ 19 On cross-examination, the defense asked M.L. about his preparation for trial:

"Q. [M.L.], a minute ago do you remember when the state's attorney just asked you about the difference between a truth and a lie?

A. Uh-huh.

Q. You knew they were about to ask you that question, didn't you?

A. Um, yeah.

Q. And it's because they talked to you before you came up here to testify; correct?

A. Uh-huh.

Q. And did they talk to you about how you should answer that question?

A. No.

Q. But before you came up, they did tell you that they would ask that question?

A. Yes.

Q. Was that today or before today?

A. Today.

* * *

Q. So they did talk to you about a lot of things that you were gonna say; correct?

A. Yes.

Q. Did they talk to you about the police report?

A. Um, yeah. Um, they told me about the police report because I wouldn't really remember much of what happened, so they told me to see if I just remember part of it.

Q. So because this was so long ago, you would have trouble remembering exactly what happened; correct?

A. Um, *I remembered like most of it but I wouldn't remember every detail* about it.

Q. So the state's attorney helped you earlier this morning to remember every detail; is that right?

A. Um, yeah.

Q. If it wasn't for them, there are certain things that you just said that maybe you wouldn't have remembered?

A. Yeah.

Q. And now as we are talking, *there is really no way to tell* what you would have remembered versus what you now remember; would that be fair to say?

A. Um, yes." (Emphases added.)

Defendant also asked M.L. if he spoke with his mother about the incident. M.L. said, "not much." However, today his mother talked to him about the incident to see if he remembered it.

¶ 20 On redirect, the State asked:

"Q. [M.L.], we had a chance to talk a little bit earlier today; right?

A. Yes.

Q. That was the first time me and you ever talked; is that true?

A. Yes.

Q. You also got to talk with Sarah a little bit as well; is that true?

A. Yes.

Q. And was that the first time you ever talked to Sarah before?

A. Yes.

* * *

Q. [M.L.], did I tell you what to say when you got up here today?

[Objection, relevance, overruled.]

A. No.

Q. Did Sarah tell you what to say when you got up here today?

A. No.

[Objection, relevance, overruled.]

Q. Did I tell you there w[ere] two important things for you to remember today?

A. Yes.

THE DEFENSE: Objection, your Honor. Hearsay. It's not relevant. May we approach?

THE COURT: You don't need to approach. The objection is overruled. Counsel, you got into this. They can rehabilitate the witness.

Q. [M.L.], did I tell you there [are] two important things to remember today?

A. Yes.

Q. What are those two things?

A. To tell the truth and to speak loudly."

¶ 21 On recross-examination, the defense asked:

"Q. [M.L.], [the state's attorney] just asked you about two things [he] told you to remember; correct?

A. Yes.

Q. But he also told you earlier that he was going to ask you about the difference between telling the truth and lying; correct?

A. Yes.

Q. And he also talked to you earlier today and talked to you about this incident; correct?

A. Yes.

Q. And he talked to you earlier today about what you saw in terms of your dad hitting your mom, correct?

A. Yes.

Q. And he went through all of that with you this morning before you testified; correct?

A. Yes."

¶ 22 The State moved to recall Brown to rehabilitate M.L. Defendant objected, arguing that the State should not be able to introduce prior consistent statements to bolster its witness's credibility. The State replied: "I would agree that the testimony of M.L. on direct is consistent with what he told Officer Brown. However, on cross, [the defense] *implied and essentially alleged that [we] told M.L. what to say today*. The allegation is that M.L. is lying because [we] told him what to say. I am allowed to rehabilitate him by showing that he had a prior consistent statement." (Emphasis added.) The court agreed with the State and allowed it to recall Brown for the purpose of rehabilitating M.L., to show that his testimony was not a recent fabrication.

¶ 23 4. Justin Brown

¶ 24 Brown testified that M.L. described the incident as follows. Defendant came home and started yelling at, and recording, Cecilia. Defendant "dumped" beer on Cecilia's head while she

sat on the couch. Cecilia then got up and "ran" away. Defendant followed her. Defendant spilled more beer, slipped, and began punching Cecilia in the face. M.L. began to cry when he told Brown that his father punched his mother in the face. So, Brown stopped questioning M.L.

¶ 25 On cross-examination, Brown testified that he did not ask M.L. whether defendant acted intentionally or accidentally when he poured beer on Cecilia's head.

¶ 26 B. Defendant's Case

¶ 27 Defendant testified that he was living with Cecilia to spend more time with the children and to help pay for utilities. The defense asked if Cecilia was seeing someone new, and the State's objection to the question was sustained. The defense then asked if Cecilia had ever asked defendant move out, and defendant answered "yes." Later, the defense asked what precipitated the fight, and defendant stated that *he* told Cecilia he was going to move out, and this upset her.

¶ 28 Defendant described the incident as follows. He arrived home late in the evening. His youngest child was asleep in a bedroom. E.L. and M.L. were in the living room. He and Cecilia were also in the living room. They were both drinking. They were not getting along. He told Cecilia that he planned to move out in 30 days. Cecilia became upset and started recording him. The light on her phone was so bright that he had to put a towel in front of his face to avoid the glare. He told her to stop and walked toward her. He took one step forward and she took one step back. "I'm the one walking forwards." They performed this dance, step by step, out of the living room and into the hallway by the staircase. All the while, they yelled at one another. Cecilia tripped and brought him down with her. Beer spilled all over the floor. He fell on top of her, but it was an accident. He had never been violent toward her. "It was a total accident."

¶ 29 On cross-examination, defendant admitted that he did not tell Brown that he fell on top of Cecilia because he slipped on beer. However, he did not have time. Brown arrested him before he could tell his whole story.

¶ 30 Following closing argument, the jury found defendant guilty of Count II, domestic battery based on knowingly making physical contact of an insulting or provoking nature, but not guilty of Count I, domestic battery based on knowingly causing bodily harm.

¶ 31 Posttrial, defendant moved, *inter alia*, for a mistrial. He pointed to Cecilia's testimony that defendant had recently been in jail. The State had not moved, pretrial, to admit prior criminal history. The information was prejudicial, and there was no way for the jury to unhear it. Defendant also pointed to Cecilia's cross-examination testimony that he had committed fraud when he helped her apply for a green card. The State responded that defendant had received a fair trial. The court agreed, and it denied the motion. It sentenced defendant to 12 months' conditional discharge. This appeal followed.

¶ 32 II. ANALYSIS

¶ 33 Defendant challenges: (1) the sufficiency of the evidence; (2) the admission of M.L.'s prior consistent statements; and (3) the fairness of his trial, based on Cecilia's testimony of his prior bad acts. For the reasons that follow, we reject each of these arguments.

¶ 34 A. Sufficiency

¶ 35 Defendant challenges the sufficiency of the evidence. In Count II, at issue here, the State charged that defendant committed domestic battery in that he knowingly made physical contact of an insulting or provoking nature with Cecilia, a household member, "in that [he] *struck* and/or poured beer on or about [her] body." (Emphasis added.) To obtain a conviction, the State was required to prove beyond a reasonable doubt that: (1) defendant knowingly made physical

contact of an insulting or provoking nature; and (2) the victim was then a family or household member to defendant. 720 ILCS 5/12-3.2(a)(2) (West 2014). A person acts "knowingly" when "he or she is consciously aware that the result is practically certain to be caused by his [or her] conduct." 720 ILCS 5/4-5(b) (West 2014).

¶ 36 Defendant challenges the "knowing" element. He points to M.L.'s testimony that he "accidentally" poured beer on Cecilia and his own testimony that it was all a "total accident." Defendant focuses exclusively on the allegation that he spilled beer on Cecilia, not that he struck her. He argues that, in this case, *de novo* review is warranted.

¶ 37 First, we summarily reject defendant's argument that, in this case, *de novo* review is appropriate. This is a traditional sufficiency-of-the-evidence case, and the standard of review is highly deferential. We review the evidence in a light most favorable to the State and consider whether any rationale juror could have found the essential elements of the crime beyond a reasonable doubt. *People v. Gray*, 2017 IL 120958, ¶ 35. It is the jury's responsibility to resolve conflicts in testimony, weigh the evidence, and draw reasonable inferences from the facts. *Id*. We will not substitute our judgment for the jury's on these points. *Id*. And, we will reverse a conviction based on insufficiency of the evidence only where the evidence is so "unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of the defendant's guilt." *Id*.

¶ 38 Second, we reject defendant's premise that the jury had to find that defendant knowingly poured beer on Cecilia. Rather, as charged by the State in Count II, and as presented at trial, there were two points of alleged contact: when defendant poured beer on Cecilia and when defendant struck Cecilia. We disagree that the jury did not believe that defendant struck Cecilia, simply because it found defendant "not guilty" of Count I, domestic battery, bodily harm. The jury could have convicted defendant of Count II, domestic battery, physical contact, because it

believed that defendant struck Cecilia, but did not cause bodily harm. Defendant does not challenge the sufficiency to convict for domestic battery based on physical contact of an insulting or provoking nature in that he struck Cecilia. Therefore, our sufficiency analysis could end here.

¶ 39 Nevertheless, we choose to address, and reject, defendant's claim that he did not knowingly pour beer on Cecilia. The jury could have inferred that defendant knowingly poured beer on Cecilia from Cecilia's testimony that he poured beer on her in a controlled response to her cell-phone use. Cecilia's testimony is sufficient to support the conviction. See, *e.g.*, *People v. Dunmore*, 389 Ill. App. 3d 1095, 1101 (2009) (testimony of a single witness, if positive and credible, is sufficient to convict). Moreover, the jury was not required to accept M.L.'s conclusion that defendant accidentally spilled beer. It was free to discount M.L. altogether, or it was free to accept M.L.'s proffered facts but reach a different conclusion. See, *e.g.*, *People v. Billups*, 318 Ill. App. 3d 948, 954 (2001) (a jury may attribute different weight to different portions of a witness's testimony). For example, M.L. testified that defendant was the aggressor, defendant yelled at his mother, and defendant tried to yank a phone out of his mother's hands while she sat beside a small child, all while he held a beer. Most people know that, if one lunges for an object while holding an open liquid, that liquid is practically certain to spill. That the liquid here was beer, that defendant yelled and struggled with Cecilia while it spilled, and that Cecilia sat next to a small child made the resulting contact all the more insulting. After the first beer spilled, defendant did not apologize or set down the beer. Rather, defendant continued to yell at and chase Cecilia into another room. In the next room, during the next point of physical contact, defendant spilled more beer on Cecilia. Thus, from Cecilia's testimony and from large

portions of M.L.'s testimony, a rational trier of fact could have inferred that defendant knowingly spilled beer on Cecilia and he knew that contact was insulting or provoking.

¶ 40 Generally, the evidence in this case was far stronger than defendant acknowledges. Cecilia and M.L. both testified that defendant was the aggressor. In fact, defendant inadvertently conceded that he was the aggressor: "I was the one walking forwards." He followed her from the kitchen, to the living room, to the hallway. He could have let Cecilia walk away from him. Brown's personal observations were consistent with Cecilia and M.L.'s testimony that defendant was the aggressor, he was drunk, and that he poured beer on Cecilia. When Brown arrived at the scene, he could hear defendant yelling. Upon entering the home, he saw Cecilia cowering behind a mattress. She was crying and visibly upset. Her hair was wet and smelled of beer. (The jury also saw photos of Cecilia's wet hair and upset appearance.) Defendant appeared to be under the influence of alcohol; his breath smelled of alcohol and his speech was slurred.

¶ 41 Cecilia and M.L. both testified that Cecilia and defendant fought over her phone while Cecilia sat next to, or was holding, her youngest child. During the struggle, he poured beer all over her. She fled, and he continued to pursue her. Cecilia and M.L. both testified that defendant hit Cecilia, and she fell to the ground. And, they both testified that E.L. separated Cecilia and defendant.

¶ 42 Moreover, there were weaknesses in defendant's testimony. For example, defendant provided several, somewhat conflicting explanations as to how the dispute started and why Cecilia was motivated to accuse him. First, he tried to show that Cecilia had a new romantic interest, and she wanted defendant out of the house. When objections to that line of questioning were sustained, defendant tried to show that Cecilia was upset that he was going to move out of the house and stop paying utilities.

¶ 43 Other aspects of defendant's testimony may have come across as incredible as well, such as when he said that the light from Cecilia's cell phone was so bright that he had to cover his face with a towel. Apparently, this helped to show that his vision was impaired and he more readily fell with Cecilia when she tripped. Still other portions of defendant's testimony simply conflicted with that of Cecilia, M.L., and Brown. For example, defendant testified that E.L. was downstairs, not upstairs. He also testified that J.L. was asleep in bed, not with Cecilia on the couch. At some point, when there were too many problematic discrepancies between defendant's version of events and those of the other three witnesses, the jury was likely to discount defendant's version altogether. We understand that it is not defendant's burden to prove his innocence. However, when a defendant chooses to testify, the jury may weigh any inconsistent or implausible statements against him. *People v. Scott*, 2018 IL App (2d) 151056, ¶ 28. Here, the weaknesses in defendant's testimony hurt his case and highlighted the strength of the State's case as to Count II. The evidence was more than sufficient to convict.

¶ 44 B. M.L.'s Prior Consistent Statements

¶ 45 Defendant argues that the court abused its discretion in admitting M.L.'s prior consistent statements through Brown's testimony. Prior consistent statements have the potential to unfairly bolster a witness's credibility, because jurors tend to believe a statement that is repeated. *People v. Miller*, 302 Ill. App. 3d 487, 492 (1998). Therefore, prior consistent statements are generally inadmissible. *People v. Lambert*, 288 Ill. App. 3d 450, 453 (1997). However, prior consistent statements can be admissible to rehabilitate a witness, if there has been a charge or implication that: (1) the witness's testimony is a recent fabrication, and the witness told the same story before the alleged recent fabrication; or (2) the witness was motivated to testify falsely, and the witness told the same story before the alleged motive to testify falsely came into existence. *Id.*

These are the only two exceptions; prior consistent statements may not be used to rehabilitate a witness following a standard impeachment or a charge of mistake or inaccuracy. *Miller*, 302 Ill. App. 3d at 492. We review a court's decision to admit prior consistent statements for an abuse of discretion. *Lambert*, 288 Ill. App. 3d at 453. A court abuses its discretion when its decision is arbitrary, fanciful, or unreasonable or when no reasonable man would adopt its view. *People v. Illgen*, 145 Ill. 2d 353, 364 (1991).

¶ 46 Specifically, defendant argues that the State did not satisfy the requirements of the first exception, implication of recent fabrication. Indeed, a "charge of recent fabrication is not made simply by questioning the witness as to whether the witness went over his testimony or rehearsed his testimony with opposing counsel." *People v. Dupree*, 2014 IL App (1st) 111872, ¶ 42. Most witnesses go over their testimony with counsel prior to trial. *Lambert*, 288 Ill. App. 3d at 455. So common is rehearsal that, if it were alone sufficient to imply fabrication, the exception would swallow the rule. *Id.*

¶ 47 As we will explain, we disagree that defendant merely questioned M.L. about rehearsing his testimony with the State. Defendant also asked M.L. if he spoke with Cecilia about the incident, and M.L. answered that Cecilia had asked him questions that morning to see if he remembered the incident. This case is different from the cases cited by defendant in that the alleged recent fabrication was not motivated by the witness's self-interest. Rather, defendant's line of questioning implied a special type of recent fabrication, memory manipulation. Defendant's questions repeatedly challenge the integrity of M.L.'s memory. One case cited by defendant, *Dupree*, which we will discuss, involved a charge against the integrity of the adult witness's memory. However, this case is somewhat unique, in that it involves a child witness. Where a defendant implies that the State used its rehearsal with a child witness to tell him or her

what to say, the defendant may trigger the recent-fabrication exception. *People v. Thomas*, 278 Ill. App. 3d 276, 282 (1996). We defer to the trial court in its assessment that defendant's line of questioning triggered the recent-fabrication exception to the rule against prior consistent statements by implying that the State and, to a lesser degree, Cecilia, manipulated M.L.'s memory and told him what to say.

¶ 48 To imply that the State used the rehearsal to supplant the memory of its young witness is to imply an impropriety on the State's part and to exploit the obvious vulnerability of its witness's demographic, *i.e.*, that children are suggestible. To be competent to testify, a child must be able to communicate his independent recollection of an incident. See, *e.g.*, *Hollaris v. Jankowski*, 315 Ill. App. 154, 159 (1942) (eight-year-old child was not a competent witness where he agreed that, the more others talked about the incident, the less he knew about it, and maybe his brother really told him what happened.) Rehabilitating a witness following the charge of memory manipulation is different than rehabilitating a witness following memory lapse, mistake, or inaccuracy. The trial court was present to assess the tone of defendant's questions and their potential impact on M.L. and the jury. It was best equipped to determine whether defendant unfairly attacked M.L.'s integrity as a witness, implying that he did not have an independent recollection of the incident, that the State told him what to say, and that, prior to his testimony at trial, he had not necessarily told a substantially similar story. A dry transcript gives no indication of the tone or demeanor of either the attorney or the witness. We must, therefore, assume that the tone was noted by the trial court and that it supported its ruling to allow the rehabilitation of M.L. Depending on the tone, the following exchange could trigger the admission of prior consistent statements:

"Q. Did they talk to you about the police report?

A. Um, yeah. Um, they told me about the police report because I wouldn't really remember much of what happened, so they told me to see if I just remembered part of it.

Q. So, because this was so long ago, you would have trouble remembering exactly what happened; correct?

A. Um, *I remembered most of it but I wouldn't remember every detail about it.*

Q. So the state's attorney helped you this morning remember every detail; is that right?

A. Um, yeah.

Q. If it wasn't for them, there are certain things that you just said that maybe you wouldn't have remembered?

A. Yeah.

Q. And now as we are talking, *there is no way to tell* what you would have remembered versus what you now remember; would that be fair to say?

A. Um, yes." (Emphases added.)

M.L. began answering in sentences, explaining that he remembered almost everything. However, as defendant pressed, M.L. began to agree unequivocally with defendant's characterizations. Defendant's last question is especially concerning, as he implied that M.L.'s true memory merged with the State's rehearsal. M.L. went from saying he remembered almost everything to unequivocally agreeing that there was "no way to tell" what he would have remembered had the State not helped him. Later, on recross-examination, defendant implied that the State introduced the topic of defendant hitting Cecilia: "And he talked to you earlier today about what you saw in terms of your dad hitting your mom." The court could have reasonably determined that defendant's line of questioning charged or implied recent fabrication.

¶ 49 This case is similar to *Thomas*, 278 Ill. App. 3d at 282. There, an eight-year-old child witnessed the beating of another child. During cross-examination, she admitted that she had rehearsed her testimony with the State. The defendant asked her if the State had helped her with her answers, and she said yes. The defendant then asked if the State helped her with "a lot" of answers and whether she could remember which answers she had been given and which she remembered on her own. The trial court allowed the child's prior consistent statements through the testimony of two investigators, one of whom was an assistant state's attorney, to show that the child told the same story nine months prior. The appellate court affirmed, explaining that the defendant's line of questioning "raised an inference, if not a direct charge, that [the child's] testimony was fabricated immediately prior to trial." *Id*.

¶ 50 Here, the charge of impropriety is similar, albeit more subtle, in that defendant asked whether the State helped M.L. remember what happened, rather than whether it helped him with "the answer." However, the Appellate Court found that the circumstances in *Thomas* were far over the line, "raising an inference, if not a direct charge" of recent fabrication and allowing for, in just proportion to the strength of the charge, *two* rehabilitation witnesses to reiterate the child's statements made months earlier. The strength of the *Thomas* court's admonishment left room for subtler cases to satisfy the recent-fabrication exception. In both *Thomas* and here, the implication was that the State told the child what to say. This is particularly true where, in both cases, the defendant asked the child whether he could distinguish his independent memories from the memories that had been prompted by the State. These sorts of subtleties call for deference to the trial court and its perception of the impact of defendant's questioning of the child.

¶ 51 The rehearsal case cited by defendant, *Lambert*, is distinguishable. *Lambert* involved an adult witness who rehearsed his testimony with the State. However, there was no implication

that the State manipulated the witness's memory, prompting him to tell a new story for the first time. All but one of defendant's cases, *Miller*, which we will address, involved adult witnesses. Even if the memory-manipulation aspect were present in those cases, the witnesses in those cases were not as susceptible to the implication.

¶ 52 Other courts have found that over-the-top comments attacking the integrity of a witness's memory—as opposed to memory lapse, mistake, or inaccuracy—warrant the admission of prior consistent statements. In *Dupree*, defense counsel went beyond basic impeachment when he asked whether the discrepancies between the witness's prior statement and his trial testimony were due to his "enhanced memory." *Dupree*, 2014 IL App (1st) 111872, ¶ 43. This allowed the State on redirect to introduce a prior consistent statement. Admittedly, the *DuPree* court discussed only fleetingly the propriety of admitting the prior consistent statement, its focus being on defense counsel's ineffective performance in opening the door to its admission. *Id*. ¶ 44. However, it is telling that the *Dupree* court took accepted that defense counsel's reference to the witness's "enhanced memory" satisfied the recent-fabrication exception. The *DuPree* witness was the adult driver of a car involved in fatal gunfire. It should not have been surprising that opposing counsel would try to reveal personal bias. The facts in the instant case are far more compelling. The implication here was not that M.L. acted alone in fabricating a new story, but, rather, that the State was the conspiring party who improperly manipulated his memory and "told him what to say." And, defendant's initial line of questioning covered more than four pages of transcript, far more lengthy comments than the single comment in *Dupree*.

¶ 53 Finally, we distinguish *Miller*, 302 Ill. App. 3d at 492, the only case cited by defendant involving a child witness. There, during direct examination, the six-year-old witness testified that she saw the defendant, her father, in possession of a gun minutes before the murder. During

cross-examination, she testified that she had never seen a gun before and she did not know what a gun looked like. The court allowed the child's prior consistent statements to rebut the charge of recent fabrication through the testimony of an investigating officer. The officer testified that she asked the child to describe the gun used in the incident, and the child was able to do so (albeit confusing the colors gold and silver). The appellate court ruled that the trial court had erred in admitting the prior consistent statement through the testimony of the investigating officer. *Id*. It explained that, when a witness has been impeached, it does not follow that there has been a charge of recent fabrication. *Id*. Similarly, "the mere fact that the defense elicited testimony on cross-examination that contradicted [the witness's] earlier testimony does not imply a charge of fabrication." *Id*.

¶ 54 Thus, in *Miller*, the admission of the prior consistent statement accomplished precisely what the general rule against prior consistent statements seeks to prevent: the unfair bolstering of one version of events over the other, based on mere repetition. There was no charge of recent fabrication. There was only a six-year-old child testifying in a self-contradictory manner. The jury should have been left to resolve the discrepancies in her testimony. Here, in contrast, the child witness testified in an internally consistent manner, until the defense pursued a line of questioning that suggested that the State had manipulated his memory to the point where there was "no way to tell" what he had always known to be true and what he had been reminded of just that day. The court did not abuse its discretion in determining that these circumstances satisfied the recent-fabrication exception.

¶ 55 We acknowledge that, in arguing that defendant had triggered the recent-fabrication exception, the State did not specifically use the terms memory manipulation or supplanted memory. However, we believe that is what it was driving at when it urged that defendant's

questioning "went well beyond [the topic] of rehearsal" and that rehabilitation was necessary to show that it did not do anything "improper" in preparing M.L., nor did it "tell him what to say." In any case, we determine that the transcripts support the implication of recent fabrication, and we may affirm the trial court's evidentiary ruling on any basis supported by the record. *People v. Barnes*, 2017 IL App (1st) 143902, ¶ 52.

¶ 56 Next, we disagree that the prior consistent statements were improperly used as substantive evidence. Even where prior consistent statements are properly admitted for rehabilitative purposes, they may not be used as substantive evidence. *People v. Smith*, 362 Ill. App. 3d 1062, 1080-81 (2005). Use of prior consistent statements as substantive evidence may constitute reversible error where it can be said that the improper use bore on the jury's determination of guilt or innocence. *Lambert*, 288 Ill. App. 3d at 460. Ideally, when admitting prior consistent statements, the court will issue a limiting instruction, informing the jury that the prior consistent statements are to be used for rehabilitative purposes only. *Miller*, 302 Ill. App. 3d at 494-95. Here, defendant did not request a limiting instruction and has, therefore, forfeited any complaint of its absence. *Smith*, 362 Ill. App. 3d at 1082-83.

¶ 57 Defendant points to two instances of alleged improper use. First, during closing, the State argued: "Now, how do we know he poured beer on her head? You heard from Officer Brown. There was definitely beer on her hair." This statement properly recalls Brown's direct observation that Cecilia's hair was wet and smelled of beer

¶ 58 Second, also during closing, the State argued: "[Cecilia] testified truthfully, and so did [M.L.]. He told you that the most important thing for him to do was to tell the truth and speak loudly. He told the truth, ladies and gentleman. But he didn't only tell you the truth yesterday.

He told Officer Brown the truth back on December 27[,] 2014. He told Officer Brown, he hit my mom. Ladies and gentleman, that's what this comes down to. That man hit Cecilia Huichapa."

¶ 59 Admittedly, the second comment pushes the boundaries of proper use. The State may not argue that the prior consistent statement was the truth. See *People v. Walker*, 211 Ill. 2d 317, 343-45 (2014) (improper to send the prior consistent written statement back to the jury without a limiting instruction). "Where the State argues that a prior consistent statement is the truth, and the jury is not instructed that the evidence should be considered for a limited purpose, the statement is being used as substantive evidence." *Dupree*, 2014 IL App (1st) 111872, ¶ 49 (citing *Walker*, 211 Ill. 2d at 345).

¶ 60 However, we believe that, in context, the State properly refuted that M.L.'s testimony was a recent fabrication. The State argued that M.L. was credible. It referenced that portion of M.L.'s testimony wherein the defense implied that the State had manipulated M.L.'s memory. It reminded the jury that it had only told M.L. to tell the truth and to speak loudly. It then urged that M.L. did just that, where he told the same story at trial and on the day of the incident. The story was not a recent fabrication.

¶ 61 To whatever extent the State's second comment was improper, reversal is not warranted. Critically, defendant did not object to this comment or request a limiting instruction. Moreover, the State's closing comment was far less an invitation to view the evidence substantively than would be sending Brown's written report of his interview with M.L. back to the jury, as would be analogous to *Walker*. Rather, the comment was brief and cannot be said to have undermined the fairness of defendant's trial. The admission of M.L.'s prior consistent statements and the State's brief reference to them in closing do not warrant a new trial.

¶ 62 C. Mistrial

¶ 63 Last, defendant argues that the trial court abused its discretion in denying his motion for mistrial based on Cecilia's testimony of his prior bad acts. On direct examination, Cecilia testified that defendant had been in jail. On cross-examination, Cecilia testified that defendant brought her into the U.S. illegally and that she could not obtain a green card because defendant committed fraud.

¶ 64 Evidence of other crimes is generally inadmissible, because it may cause the jury to believe that the defendant is a bad person deserving of punishment. *People v. Robinson*, 167 Ill. 2d 53, 62 (1995). However, the admission of improper evidence does not necessarily warrant a mistrial. "A mistrial should be awarded where there has been an error of such gravity that it has infected the fundamental fairness of the trial, such that continuation of the proceeding would defeat the ends of justice." *People v. Sims*, 167 Ill. 2d 483, 505 (1995). A defendant in a criminal case is entitled to a fair trial, not a perfect trial. *People v. Coleman*, 2014 IL App (5th) 110274, ¶ 177 (the defendant, accused of murdering his wife, was not entitled to a new trial when a witness volunteered that the defendant previously beat his wife). Factors to consider in deciding whether to grant a mistrial are whether: (1) the witness volunteered the problematic testimony as opposed to the State eliciting it in bad faith; (2) objections to the testimony were sustained, the answer was stricken, or the jury was told to disregard it; (3) the defendant was given full latitude during cross-examination of the witness concerning the problematic testimony, as well as other topics that might bear on the witness's credibility; and (4) the prejudice was *de minimis* due to overwhelming evidence. See, *e.g.*, *Sims*, 167 Ill. 2d at 505; *Coleman*, 2014 IL App (5th) 110274, ¶¶ 140-141. We will not disturb the court's denial of defendant's request for a mistrial unless its decision was an abuse of discretion. *People v. Sims*, 167 Ill. 2d 483, 505 (1995).

¶ 65 Here, defendant focuses on why the complained-of portions of Cecilia's testimony were improper. We agree that they were improper. However, defendant's argument that they warranted a mistrial is insufficient and conclusory. Setting aside defendant's summation of the problematic testimony itself and his recitation of black-letter-law, his argument reads in its entirety: "The State's eliciting and prompting [Cecilia] to essentially refer to [defendant] as a criminal and [that he] had committed fraud could not be unheard by the jury. There was an unreasonable risk that the jury could have relied on this improper information in reaching a guilty verdict."

¶ 66 First, we note that Cecilia's testimony that defendant had committed fraud occurred during cross-examination. The State cannot be said to have elicited it, and defendant, given wide latitude on cross-examination to challenge Cecilia's credibility, risked that Cecilia would say something damaging to his case. Defendant tried to establish that Cecilia had a motive to falsely accuse him. His theory was that Cecilia hoped to receive a U visa in exchange for testifying for the State in a criminal trial. And, Cecilia originally sought defendant's help in becoming a citizen, but, post-divorce, he was of no use to her. In pursuing the second part of his theory, defendant chose to ask about his own involvement in Cecilia's citizenship status. He chose to take this risk, and he was not successful. Moreover, after testing the water with the first risky question, he chose to ask the second. As noted by the court, he did not guard against unwanted responses by specifying in each instance that Cecilia provide a yes-or-no answer.

¶ 67 As to Cecilia's earlier statement that defendant had been in jail, the trial court believed the State that it had not intended to elicit testimony of prior bad acts. Rather, the State simply had asked Cecilia why defendant was living with her.

¶ 68 The trial court's determination of the State's intent was reasonable. As foreshadowed in opening statements, the question of why defendant was living with Cecilia laid the groundwork for each party's respective theory of the case. Per the State's theory, "no good deed went unpunished." Defendant lived with Cecilia because he had no place else to go. Per defendant's theory, he lived with Cecilia to help raise the children and pay the utilities. When he told her he was moving out, she became angry and made false accusations. In this context, the State had a legitimate reason for asking the question. It asked the question to refute defendant's theory of the case. Additionally, defendant's living situation was relevant to an element of the offense, *i.e.*, that he and Cecilia were members of the same household. We will not upset the court's assessment that the State did not purposefully invite Cecilia's statement.

¶ 69 Further, we agree with the State that the court minimized the potential for prejudice by sustaining the objection to Cecilia's answer and affirmatively telling the jury to disregard it. And, at the end of trial, it gave the jury the standard instruction to disregard any testimony to which an objection was sustained. Also, the testimony was relatively brief. The testimony did not render the trial unfair, and the court did not abuse its discretion in denying defendant's motion for a mistrial.

¶ 70 III. CONCLUSION

¶ 71 For the aforementioned reasons, we affirm the trial court's judgment.

¶ 72 Affirmed.