2019 IL App (2d) 160852-U
No. 2-16-0852
Order filed May 8, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ANGEL L. MOLINA, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Boone County. No. 15-CM-711 Honorable C. Robert Tobin III, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Hutchinson and Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: There was sufficient evidence to prove defendant guilty beyond a reasonable doubt; the trial court acted within its discretion in allowing the jury to hear a 9-1-1 recording three times; and the State's remarks during rebuttal closing argument did not constitute error. Therefore, we affirmed.

¶ 2 Following a jury trial, defendant, Angel L. Molina, was convicted of two counts of misdemeanor domestic battery (720 ILCS 5/12-3.2(a)(1), (a)(2) (West 2014)) and sentenced to 24 months' conditional discharge. On appeal, he argues that: (1) he was not proven guilty beyond a reasonable doubt; (2) the trial court deprived him of a fair trial by allowing the jury to hear a 9-1-1 recording three times; and (3) the State made misstatements of law during rebuttal

closing argument, and the individual and cumulative effect of the remarks deprived him of a fair trial. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On October 13, 2015, the State charged defendant by information with two counts of misdemeanor domestic battery. The first count alleged that on July 24, 2015, defendant caused bodily harm to Mirian Molina, a family or household member, in that he struck her in the head. See 720 ILCS 5/12-3.2(a)(1) (West 2014). The second count was identical except that instead of alleging bodily harm, it alleged contact of an insulting or provoking nature. See 720 ILCS 5/12-3.2(a)(2) (West 2014).

¶ 5 Defendant's trial began on September 8, 2016. According to the evidence presented, defendant and Mirian were married and had five children, including Vanessa, Amanda, and Natasha. In 2015, only Natasha, their youngest child, was living with them. On the night of July 24, 2015, Vanessa and Amanda brought 16-year-old Natasha home. She had run away because her parents had taken her phone, and she had been gone for three days.

¶ 6 Amanda Molina, age 20 as the time of trial, testified as follows. She currently had a felony charge against her for aggravated battery to a police officer, but the State's Attorney's Office had not promised her anything in exchange for her testimony. However, she was required to testify as a condition of her bond.

¶ 7 When she, Vanessa, and Natasha arrived at their parent's home on July 24, 2015, Amanda got into an argument with defendant. Mirian got between them and tried to mediate. Then, Mirian and Vanessa asked Amanda to leave the house. Amanda went outside and sat in her car, waiting for Vanessa. She heard yelling and screaming and went back to the house to see what was happening. The door was locked, so Amanda knocked, and Natasha came down the

stairs and opened it. Defendant and Mirian came out of the kitchen, "and there was still a lot of yelling going on, a lot of commotion ***." Vanessa told Amanda to call the police to diffuse the situation, and she did. Amanda "had a lot of adrenalin and confusion and still was kind of angry and spiteful toward [defendant] because of the argument that happened." Amanda waited outside for the police to come because she "still had a lot of negative feeling and animosity toward" defendant.

¶ 8 Amanda denied seeing defendant strike Mirian in the face that night. She did not think that she told the police that she saw defendant hit Mirian, because she was outside the house and did not see anything. If she told the police anything like that, "it was probably because of the adrenalin and confusion and the spite that [she] was feeling with the emotion all going on."

¶ 9 Mirian did not have a swollen eye when Amanda first arrived at the house. Amanda did not remember if Mirian had a swollen eye right before Amanda called 9-1-1. However, in Amanda's written statement to the police, she stated that Mirian had a swollen eye when Amanda went back into the house. Amanda's written statement was admitted into evidence. It states:

> "I picked up my younger sister, whom [*sic*] had run away, and dropped her off at my parents' house. My father and I had a verbal argument. My mom was trying to restrain him. I went to my car & I heard my older sister screaming, as well as my mom. I ran to the door & my younger sister, who was running downstairs to see what happened[,] let me in. My mom walked around the corner into the living room with a swollen puffy eye. My dad was saying he was sorry & didn't mean to. I called the police & left outside.
>
> My mother did <u>not</u> have a swollen eye prior to me walking out of the house."

(Emphasis in original.)

¶ 10 Officer John Coduto of the Belvidere police department provided the following testimony. On July 24, 2015, he was dispatched to defendant's house. Upon arriving, he found Amanda in the front yard, crying so profusely that it was hard for her to talk. Officer Coduto told her to try and calm down. She said that she had seen defendant punch Mirian. Officer Coduto knocked on the front door, and Mirian answered. He asked her to step out on the porch while two other officers went inside. Officer Coduto noticed that the area below her right eye was swollen and red. He explained what Amanda had told him, and Mirian reached inside the house and turned off the porch light so that he could not see her face anymore. He tried to use his flashlight to see the injury, but Mirian covered her face and turned away. Officer Coduto asked to take photos of her eye, but she refused and said that nothing had happened.

¶ 11 Officer Coduto then went inside and talked to defendant for a few minutes before placing him under arrest for domestic battery. As they were walking to the squad car, defendant looked over to Amanda and yelled, " 'Look what you've done.' " Officer Coduto had listened to the 9-1-1 call and identified the voice as Amanda's. Amanda gave a written statement to the police on the date of the incident.

¶ 12 The trial court admitted the 9-1-1 recording into evidence, over defendant's objection, and played it for the jury. In the recording, Amanda is crying and having difficulty talking. She can be heard stating twice, "My dad just punched my mom in the face." She also says that her dad "just hit [her] mom" in the eye and that the eye was swollen. The recording is about three minutes long.

¶ 13 Defendant moved for a directed verdict, and the trial court denied defendant's motion.

¶ 14 Mirian testified for the defense as follows. When Natasha came home, the family was

relieved. They were also very concerned and upset because they had not known where she was for three days, and they found out that she had been staying with a boy. Upon entering the house, Natasha went to her room. Amanda was trying to give Mirian and defendant advice, but it was not helpful at the time because they were feeling very emotional, so Mirian asked her to leave. Everyone was getting "kind of loud with each other." Mirian wanted to talk to defendant alone in the kitchen and guided him with her hand in that direction. He was facing her, and she was pushing on his chest. At that time and thereafter, "he might have flailed his hands," but that was how people in their culture expressed themselves. Mirian wanted to talk to Natasha in the morning, while defendant wanted to talk to her that night, and they were arguing about it. Mirian denied that defendant made contact with her face at any time. Within minutes, the police arrived. Mirian was overwhelmed with everything that was happening and with so many squad cars showing up. All the neighbors also came outside, and Mirian felt like they were staring at her, so she shut off the light and told the police that she was fine.

¶ 15 Vanessa Landingham testified that when she and Amanda brought Natasha home, Vanessa told Natasha to go straight to her room. Vanessa then told her parents that it would be best to wait a while before they spoke to Natasha. Vanessa went upstairs, and she heard defendant and Amanda arguing loudly. Vanessa came downstairs, and Mirian told Amanda to leave so that tensions would not be as high. Amanda left crying, and Vanessa locked the door behind her. Mirian told defendant to stay in the kitchen and discuss what they should do about Natasha. Mirian was "holding him back, pushing him back towards the kitchen." The three of them went to the kitchen, and Mirian and defendant continued to argue. It was getting more heated, and Mirian began to cry. Mirian and defendant got a little closer into each other's faces, and they were also using their hands to "talk." Mirian was overwhelmed and left the kitchen, still

crying. Amanda came back in and asked if she should call the police, and Vanessa answered in the affirmative. Vanessa stayed with her parents to make sure they were separated. She never saw defendant punch Mirian, but she did see flailing hands.

¶ 16 Before closing arguments, the defense objected to the State replaying the 9-1-1 tape, arguing that it was the equivalent to testimony, and that it would improperly highlight the evidence. The trial court overruled the objection, stating "This case comes down to you either believe the statement that was made in the 9-1-1 call, and the statement here and the tone of the voice I think is important for the jury to hear." The State played the recording during rebuttal closing argument.

¶ 17 During deliberations, the jury asked to hear the 9-1-1 recording for a third time. The defense objected, stating that the jury had already heard it twice and that it would unfairly emphasize the evidence. The trial court allowed the jury to hear it again, stating:

> "Again, different than a transcript, I think this one is important for them based on tone and such. They've one way or the other got to find that Amanda was either lying on the stand or lying in there, and I think it's the tone of the voice of the 911 that is important for them, so I do distinguish from that and a transcript."

The jury ultimately found defendant guilty of both counts. Defendant elected to immediately proceed to sentencing. The trial court sentenced him to 24 months' conditional discharge.

¶ 18 On September 12, 2016, defendant filed a motion for a new trial and directed finding. The trial court denied the motion on October 11, 2016, and defendant timely appealed.

¶ 19 II. ANALYSIS

¶ 20 A. Sufficiency of the Evidence

¶ 21 Defendant first argues that the State failed to prove him guilty beyond a reasonable doubt. When examining the sufficiency of the evidence, we must determine 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. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *People v. Collins*, 106 Ill. 2d 237, 261 (1985). The trier of fact has the responsibility to assess witnesses' credibility, weigh their testimony, resolve inconsistencies and conflicts in the evidence, and draw reasonable inferences from the evidence. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). We will not reverse a criminal conviction based on insufficient evidence unless the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of the defendant's guilt. *People v. Gray*, 2017 IL 120958, ¶ 35.

¶ 22 For count 1, the State was required to prove that defendant: (1) knowingly (2) without legal justification (3) caused bodily harm (4) to a family or household member. 720 ILCS 5/12-3.2(a)(1) (West 2014). For count 2, the State had to prove that defendant: (1) knowingly (2) without legal justification (3) made physical contact of an insulting or provoking nature (4) with a family or household member. 720 ILCS 5/12-3.2(a)(2) (West 2014). Defendant contests only the first and third elements of each of the charges.

¶ 23 Regarding the third element of each charge, defendant argues that the State failed to present evidence that anyone saw him strike Mirian. Defendant highlights that Amanda and Vanessa unequivocally testified that they did not see him hit Mirian, and Mirian also denied being struck by him. Defendant argues that the State cannot rely on Amanda's written statement to the police because she did not say that Mirian had a puffy eye as a result of a blow from defendant or that Amanda saw defendant strike Mirian. Defendant maintains that Amanda may

have told the police that he struck Mirian not because she saw it happen, but rather because she may have believed it happened because of the anger and animosity she had towards him. Defendant argues that inferring that Amanda saw him hit Mirian is unreasonable and amounts to unwarranted speculation. See *People v. Mpulamasaka*, 2016 IL App (2d) 130703, ¶ 71 ("Although we must allow all reasonable inference from the record in favor of the State, we may not allow unreasonable or speculative inferences.")

¶ 24 Regarding the first element of each charge, defendant argues that the State failed to prove that even if he made physical contact with Mirian, he did so "knowingly." A person acts knowingly if he is "consciously aware that the result is practically certain to be caused by his conduct." 720 ILCS 5/4-5 (West 2014). Defendant notes that intent is an essential element of battery, and that the State had the burden of proving that his conduct was knowing or intentional as opposed to accidental. See *People v. Lee*, 2017 IL App (1st) 151652, ¶ 19.

¶ 25 Defendant analogizes this case to *Lee*. There, a nurse attempted to remove a cross from the defendant's neck, and the defendant tried to stop her. *Id.* ¶ 6. The nurse ended up being struck by the cross, and the defendant was convicted of aggravated battery. *Id.* ¶¶ 2-5. The appellate court concluded that the "circumstantial evidence in this case and [the] defendant's conduct on the evening in question do not support the inference that [the] defendant intended to strike" the nurse, and it therefore reversed his conviction. *Id.* ¶¶ 21, 23.

¶ 26 Defendant argues that, similarly, here the State failed to present sufficient evidence that he intended to cause bodily harm to Mirian or make physical contact of an insulting or provoking nature with her. He highlights Mirian's testimony suggesting that if there was any physical contact, it was accidental rather than intentional. She testified that she was pushing on defendant's chest with her hand to lead defendant to the kitchen, and that he might have flailed

his hands during their emotional argument. Defendant cites *People v. Kotlinski*, 2011 IL App (2d) 101251, ¶ 55, where the court stated, "The State must present sufficient evidence from which an inference of knowledge can be made, and any such inference must be based on established facts and not pyramided on intervening inferences." Defendant argues that there are no facts on which the State can establish a reasonable inference that he intended to cause Mirian bodily harm or contact of an insulting or provoking nature. He argues that the State presented no evidence that he was angry with her and struck her as an expression of his anger.

¶ 27 Defendant maintains that he is not relying on inconsistencies between the 9-1-1 call and Amanda's testimony in raising the issue of reasonable doubt. He argues that they are both consistent on the issue that the State presented no evidence that Amanda saw him strike Mirian. Defendant contends that even if he made contact with Mirian, the call and testimony do not conflict with each other on the fact that there is no evidence that he intended to cause bodily harm or make physical contact of an insulting or provoking nature.

¶ 28 We conclude that there was sufficient evidence to prove defendant guilty of both counts beyond a reasonable doubt. For the third elements of the crimes, that defendant caused bodily harm and made physical contact of an insulting or provoking nature with Mirian, the State essentially had to prove that defendant struck Mirian. The evidence showed that the family was emotional because Natasha had just been brought home after running away. Further, Mirian testified that she and defendant were arguing about whether they should talk to Natasha immediately or later. Amanda's written statement stated that her mother did not have a puffy eye before Amanda left the house; that Amanda heard screaming while she was outside and she walked in to see her mother with a swollen, puffy eye; and that defendant said that he was sorry and "didn't mean to." On the 9-1-1 recording, Amanda is crying and repeatedly states that

defendant "just punched [Mirian] in the face," and she also says that defendant "just hit" Mirian in the eye. Officer Coduto testified that Amanda was in the front yard when he arrived, and she was crying so hard that it was hard for her to talk. He told her to calm down, and she then said that she had seen defendant punch Mirian. When Officer Coduto talked to Mirian, he saw that the area below her right eye was swollen and red. When he told her what Amanda said, Mirian turned off the light so that he could not see her face anymore, and when he tried using his flashlight, she covered her face and turned away. Officer Coduto asked to take photos of her eye, but she refused and said that nothing had happened. When defendant was being led away from the house in handcuffs, he yelled, " 'Look what you've done' " to Amanda. All of this evidence, taken together, leads to the reasonable inference that defendant struck Mirian. Although at trial Mirian denied that he made any contact with her face, this testimony is undermined by the evidence that her eye area was swollen, and, in any event, it was a credibility determination/conflict in the evidence for the jury to resolve.

¶ 29 The State also provided sufficient evidence that defendant knowingly hit Mirian. "By its very nature, knowledge ordinarily is proved by circumstantial evidence." *Kotlinski*, 2011 IL App (2d) 101251, ¶ 55. In this case, the evidence showed that the family was in an emotional situation and that, at one point, defendant and Mirian were arguing in close proximity. The argument was serious enough that Vanessa testified that she stayed with her parents to make sure that they were separated and that she told Amanda to call the police. Amanda wrote in her statement that, after Amanda saw Mirian with a swollen eye, defendant was saying he was sorry and did not mean to. Further, Officer Coduto testified that defendant yelled " 'Look what you've done' " at Amanda after his arrest. Unlike in *Lee*, viewing this evidence in the light most favorable to the State, a

rational trier of fact could find that defendant knowingly struck Mirian, and that such contact both caused bodily harm and was of an insulting and provoking nature.

¶ 30 B. 9-1-1 Recording

¶ 31 Defendant next argues that the trial court deprived him of a fair trial by allowing the State to play the 9-1-1 recording in rebuttal closing argument and during jury deliberations, after it had already been played during the State's case-in-chief.

¶ 32 1. Standard of Review

¶ 33 Defendant recognizes that in *People v. Gross*, 265 Ill. App. 3d 74, 76 (1994), the court applied an abuse-of-discretion standard when reviewing the trial court's decision to allow counsel to replay excerpts from a videotape during closing argument, analogizing it to reading from the record during closing argument. However, defendant argues that we should review this issue *de novo* because the trial court's exercise of discretion was frustrated by an erroneous understanding and application of the law. See *People v. Caffey*, 205 Ill. 2d 52, 89 (2001) (courts will review evidentiary ruling *de novo* where the trial court's exercise of discretion has been frustrated by the application of an erroneous rule of law).

¶ 34 Defendant points out that in allowing the jury to hear the 9-1-1 recording the second and third times, the trial court emphasized the importance of the jury hearing Amanda's tone and determining whether she was lying during the call or on the witness stand. See *supra* ¶¶ 16-17. Defendant argues that the trial court's statements reflect a misunderstanding and distortion of the State's burden of proof, and that the "correct standard for consideration of the evidence in a criminal trial is not whether one side is more believable, but whether, taking all of the evidence into consideration, guilt as to every essential element of the charge has been proven beyond a reasonable doubt." *People v. Wilson*, 199 Ill. App. 3d 792, 797 (1990). Defendant maintains that

the jury could have rationally acquitted him without finding that Amanda lied on the 9-1-1 tape but told the truth at trial, in that the jury could have disbelieved Amanda on both the tape and her testimony, leading to reasonable doubt, or the jury could have believed that defendant accidentally made contact with Mirian.

¶ 35 Defendant further argues that the trial court's emphasis on the jury's assessment of Amanda's tone of voice during the recording neglects the legal proscription against emphasizing one piece of evidence at the expense of another. See *People v. Ammons*, 251 Ill. App. 3d 345, 347 (1993) (reading from a trial transcript during closing argument is improper because the jury must consider all of the testimony, without overemphasis on any portion of it by verbatim repetition at the end of trial). Defendant contends that the jury already heard Amanda's tone of voice the first time and did not need to hear the tone again.

¶ 36 As defendant recognizes, the playing of the 9-1-1 recording can be analogized to reading from trial transcripts. See *Gross*, 265 Ill. App. 3d at 76. In *Gross*, the appellate court reviewed this issue for an abuse of discretion (*id.*), as did the court in *People v. Graves*, 2012 IL App (4th) 110536, ¶ 40. See also *People v. Davies*, 50 Ill. App. 3d 506, 514 (1977) (it was within the trial court's discretion to permit counsel to read from trial transcript during closing argument). Similarly, in *People v. Pierce*, 56 Ill. 2d 361, 363 (1974), our supreme court held that whether to allow the jury to review testimony during deliberations is within the trial court's discretion. It thereafter reaffirmed this holding. See *People v. Williams*, 173 Ill. 2d 48, 87 (1996); *People v. Franklin*, 135 Ill. 2d 78, 104 (1990); *People v. Olinger*, 112 Ill. 2d 324, 349 (1986); *People v. Autman*, 58 Ill. 2d 171, 176 (1974); *People v. Queen*, 56 Ill. 2d 560, 564 (1974).

¶ 37 *De novo* review "is only proper when the trial court misinterprets an evidentiary rule so that the issue presented is solely a legal one." *People v. Zimmerman*, 2018 IL App (4th) 170695,

¶ 66; see also *Caffey*, 205 Ill. 2d at 89-90 (where trial court based the evidentiary rulings on the case's specific circumstances and not on a broadly applicable rule of law, the court reviewed the rulings using an abuse of discretion standard); *People v. Gonzalez*, 2018 IL App (1st) 152242, ¶ 78 (*de novo* review applies to an evidentiary ruling if the question concerns how to correctly interpret a rule of law). Here, the trial court was not interpreting an evidentiary rule as a matter of law, so *de novo* review is inappropriate. Rather, we will apply an abuse of discretion standard in reviewing the trial court's decision to allow the playing of the recording during closing argument and in response to the jury's request. A trial court abuses its discretion where its decision is arbitrary, fanciful, or unreasonable to the extent that no reasonable person would agree with it. *People v. Peterson*, 2017 IL 120331, ¶ 125.

¶ 38 2. Whether the Trial Court Abused its Discretion

¶ 39 Defendant argues that replaying the 9-1-1 recording during closing rebuttal argument and jury deliberations unfairly emphasized its credibility to the exclusion of substantial, contradictory evidence. He cites *People v. Hoggs*, 17 Ill. App. 3d 67, 70 (1974), and *Ammons*, 251 Ill. App. 3d at 347, where the courts stated that it was improper for a prosecutor to read from a transcript or memorandum in closing argument. In *Hoggs*, the court further stated: "The jury must pass upon the whole testimony free of the over-emphasis given any portion of it by verbatim repetition during the trial's waning moments." *Hoggs*, 17 Ill. App. 3d at 70. In *Ammons*, during closing rebuttal argument, the State replayed the defendant's 18-minute audiotaped statement to the police. *Ammons*, 251 Ill. App. 2d at 347. The court recited the aforementioned principles, concluding that allowing the State to replay the tape was improper, dramatically overemphasized its credibility, and severely prejudiced the defendant, and that the error had not been invited by him. *Id.*

¶ 40 Defendant argues that as in *Ammons*, the trial court here overemphasized the 9-1-1 recording by allowing the prosecutor to replay it during closing argument, thereby unfairly bolstering the credibility of the recording from the jury's perspective. Defendant maintains that Amanda explained the inconsistency in the 9-1-1 call and her testimony by stating that she was beset by strong emotions and anger against him when she made the call. Defendant argues that allowing the recording to be replayed during rebuttal closing argument put him at a serious disadvantage because the jury heard Amanda's, Vanessa's, and Mirian's testimony only once, and because the defense could not respond to the recording after the rebuttal.

¶ 41 Defendant argues that the trial court compounded the error by allowing the jury to hear the 9-1-1 recording again during deliberations. Defendant maintains that the error is comparable to the prejudicial impact of admitting prior consistent statements. Defendant cites *People v. Miller*, 302 Ill. App. 3d 487, 492 (1998), where the court stated that prior consistent statements are generally inadmissible because a jury is more likely to believe something that is repeated. Defendant argues that the jury may have believed the content of the 9-1-1 call and the prosecutor's interpretation of it not because the call had more inherent validity than the testimony of defendant's family, but because the call was repeated three times as compared to testimony that was presented only once.

¶ 42 Defendant further argues that the State's closing rebuttal argument exacerbated the harmful effect of the error. According to defendant, the State made misstatements of law to unfairly bolster the credibility of the 9-1-1 call by erroneously suggesting that circumstantial evidence intrinsically carries more weight than direct evidence. Defendant cites the following statements:

> "[PROSECUTOR:] Now, the State's case rests on circumstantial evidence, and it explains everything. Often circumstantial evidence can be the most powerful. Why? Because it has no relationship to the defendant. It has nothing to gain.
>
> [DEFENSE COUNSEL:] Objection, your Honor. The State has argued that circumstances are irrelevant.
>
> THE COURT: Overruled. You can consider it.
>
> "[PROSECUTOR:] *** Circumstantial evidence has nothing to gain. It's also no [*sic*] biased or prejudiced in any way. And it does not change its story."

Defendant argues that the law does not presume that circumstantial evidence carries more weight than direct evidence. See *People v. Robinson*, 14 Ill. 2d 325, 331 (1958) (no legal distinction between direct and circumstantial evidence as to the weight and effect thereof). Defendant argues that the prosecutor wrongly sought to inculcate the jury that circumstantial evidence is by its very nature more persuasive and credible than direct evidence and that the jury should apply this legal distinction to the 9-1-1 recording and reject defendant's family's testimony.

¶ 43 Last, defendant argues that the error is reversible because the recording was the critical piece of evidence without which the State would have very little, if any, evidence that he committed a battery.

¶ 44 We conclude that the trial court acted within its discretion in allowing the recording to be played during closing argument and in response to the jury's request to hear it again. Although *Hoggs* and *Ammons* seem to contain a blanket prohibition about reading from a transcript or during closing argument, to which playing the recording can be analogized, the choice as to

whether allow such activity is within the trial court's discretion, as previously discussed. See *supra* ¶ 36.[1]

¶ 45 This case in analogous to *Gross*. There, the prosecutor played excerpts from the defendant's 45-minute videotaped interview with the police during closing argument, and the prosecutor played another excerpt during closing rebuttal argument. *Gross*, 265 Ill. App. 3d at 76-77. The appellate court held that the trial court did not abuse its discretion in allowing the State to replay the tape. *Id.* at 77. The court stated that properly-admitted evidence may be displayed during closing argument, and a prosecutor may dwell on the testimony of a particular witness. *Id.* It stated that the excerpts were a small fraction of the entire tape and an even smaller fraction of the entire record. *Id.* The court further stated that the excerpts were presented to demonstrate an inconsistency with either other statements on the tape or with testimony. *Id.* The court distinguished the case before it from *Ammons*, stating that there the State replayed an 18-minute audiotaped statement in its entirety during closing argument, and the recording was substantially similar to the defendant's testimony, with the result that playing it in its entirety placed undue emphasis on its contents. *Id.* The court stated that, in contrast, the recorded statement in the case before it was substantially dissimilar from the defendant's testimony, and rather than placing an undue emphasis on the contents of the recorded statement, it facilitated the demonstration of inconsistencies. *Id.* See also *Graves*, 2012 IL App (4th) 110536, ¶ 41 (no error in the trial court allowing the State to replay portions of a videotape during closing argument where it had been properly admitted into evidence, only limited excerpts were played, and it

[1] We also note that our prior discussion cited supreme court cases, whereas *Hoggs* and *Ammons* are appellate court cases, and that we largely relied on more recent appellate court precedent.

consisted of a small part of the State's closing); *People v. Forcum*, 344 Ill. App. 3d 427 (2003) (no error in the trial court permitting the prosecutor to replay an answering machine message and read a portion of a letter the defendant had written, as the recording and letter had been admitted into evidence, the jurors had the opportunity to examine the letter themselves, and the prosecutor's reading of the letter was accurate and constituted only a small portion of the State's closing argument).

¶ 46 The reasoning in *Gross* applies equally here. The 9-1-1 recording was admitted into evidence and therefore could be used during closing argument. Unlike *Ammons*, which had an 18-minute recording, here the recording was only about three minutes. Further, as defendant repeatedly emphasizes, the recording highlighted inconsistencies with Amanda's testimony, as opposed to being substantially similar. Finally, the recording took up just a small part of the State's rebuttal closing argument. We will examine the State's closing argument remarks about circumstantial evidence in conjunction with defendant's last argument on appeal, regarding alleged errors in closing argument. For purposes of the current issue, we note that we ultimately reject defendant's assertion that the prosecutor misstated the law in his comments, so it does not support defendant's contention of error here. In sum, we hold that the trial court acted within its discretion in allowing the State to replay the 9-1-1 recording during its rebuttal closing argument.

¶ 47 We likewise conclude that the trial court did not abuse its discretion in allowing the jury to hear that recording again, during deliberations, at its request. "In determining whether to grant or refuse a request by the jury to rehear a piece of evidence, the trial court must determine whether review of the evidence would be helpful or harmful to the jury's deliberations." *People v. Alvarado*, 2013 IL App (3d) 120467, ¶ 15. In *Alvarado*, 2013 IL App (3d) 120467, ¶¶ 15-16, the reviewing court held that the trial court did not abuse its discretion in allowing the jury to

rewatch a recording of the defendant's interrogation during deliberations. The court stated that the defendant's state of mind was at the heart of the case, and the interrogation provided valuable information about the defendant's view of events and clues as to his state of mind. *Id.* ¶ 16. Additionally, in *Autman*, 58 Ill. 2d at 176, our supreme court held that the trial court erred by denying the jury's request to review testimony in two trials, because the trial court did not believe that it had the discretion to consider the request. The supreme court stated that the error was not harmless in one trial because the testimony of one individual was in conflict with the testimony of two others, and in the second trial the request may have related to critical testimony. *Id.* at 176-77.

¶ 48 Thus, the fact that the 9-1-1 recording could be interpreted to conflict with Amanda's testimony weighed in favor of allowing the jury to hear it again. Further, as the trial court stated in overruling defendant's objection to replaying the recording, the recording revealed both Amanda's original version of events and her tone of voice, which could be used to assess her credibility at that time and on the witness stand. We also note that the recording is not easy to comprehend because Amanda is crying and very emotional, which would also support allowing the jury to hear it a third time. Accordingly, the trial court's decision to allow the jury to hear the recording during its deliberations was not an abuse of discretion.

¶ 49 C. Rebuttal Closing Argument

¶ 50 Last, defendant argues that the prosecutor made misstatements of law during rebuttal closing argument, and that the individual and cumulative effect of those remarks deprived him of a fair trial.

¶ 51 A prosecutor has wide latitude in making a closing argument and may comment on the evidence and any fair, reasonable inferences arising from the evidence. *People v. Glasper*, 234

Ill. 2d 173, 204 (2009). A prosecutor may also comment on witnesses' credibility and respond to statements by defense counsel that invite a response. *People v. Burman*, 2013 IL App (2d) 110807, ¶ 25. We view the challenged remarks in the context of the entire closing argument. *Glasper*, 234 Ill. 2d at 204. Where a prosecutor makes numerous improper remarks, we may consider their cumulative impact rather than viewing them in isolation. *People v. Clark*, 335 Ill. App. 3d 758, 764 (2002). However, improper remarks constitute reversible error only if they result in substantial prejudice to the defendant, such that absent the remarks, the verdict would have been different. *People v. Branch*, 2018 IL App (1st) 150026, ¶ 32. Our supreme court has applied both a *de novo* (*People v. Wheeler*, 226 Ill. 2d 92, 121 (2007)) and abuse of discretion standard of review (*People v. Blue*, 189 Ill. 2d 99, 128 (2000)) for the trial court's rulings on closing argument. We do not attempt to select one standard because we would reach the same result under either standard for the remarks for which defense counsel raised objections. See *People v. Bona*, 2018 IL App (2d) 160581, ¶ 57.

¶ 52 Defendant argues that the prosecutor misstated the law when stating:

> "Now, make no mistake about it, in order to find the defendant guilty, you are going to have to believe that the wife and the two daughters would come into court, take the oath to tell the truth, sit on the stand, and lie to protect the defendant. You will have to believe that in order to find the defendant guilty."

Defendant recognizes that defense counsel did not object to the alleged improper statements or mention them in the motion for a new trial, thus forfeiting them for review. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). However, defendant asks that we review the forfeited statements for plain error. The plain error doctrine allows a reviewing court to consider an unpreserved error where either (1) a clear error occurs and the evidence is so closely balanced

that the error alone threatened to tip the scales of justice against the defendant, or (2) a clear error occurs that is so serious that it affected the trial's fairness and challenged the integrity of the judicial process. *People v. Sebby*, 2017 IL 119445, ¶ 48. In applying the plain error test, the first step is to determine whether a clear and obvious error occurred. *Id.* ¶ 49.

¶ 53 Defendant argues that the prosecutor's suggestion that the jury had to convict him if it found that his family members were lying was a serious misstatement of the law that distorted and lessened the State's burden of proof. Defendant again cites the statement in *Wilson*, 199 Ill. App. 3d at 797, that "[t]he correct standard for consideration of the evidence in a criminal trial is not whether one side is more believable, but whether, taking all of the evidence into consideration, guilt as to every essential element of the charge has been proven beyond a reasonable doubt." Defendant argues that, contrary to the prosecutor's remarks, a rational jury could have acquitted him even if it found that his family members were lying, based on a reasonable doubt from the insufficiency of the State's evidence, or because it could have determined that any physical contact was accidental instead of intentional. Defendant argues that the prejudice was increased for this and all of the challenged remarks because they occurred during rebuttal closing argument, so defense counsel did not have an opportunity to respond. See *Mpulamasaka*, 2016 IL App (2d) 130703, ¶ 110.

¶ 54 We conclude that the prosecutor's remarks do not constitute error, as they were in response to defense counsel's line of argument (see *Burman*, 2013 IL App (2d) 110807, ¶ 25 (during closing argument, the prosecutor may respond to comments made by defense counsel that invite response)) and did not improperly shift the burden of proof. Defense counsel argued in closing that the State's action of impeaching Amanda with her written statement and its cross-examination of her was to show that she was "a liar." She further argued that when Amanda

called 9-1-1, she was not testifying or promising to tell the truth, whereas she was when she came to court. Defense counsel argued that if Amanda was not telling the truth in her testimony, there would be no reason to believe anything that came out of her mouth, whether from the recording or in court. She argued: "In this case you have only two choices. She is a liar or she doesn't know what happened. If she is telling the truth, then you have heard no evidence that [defendant] committed a crime." Defense counsel went on to state that Mirian credibly testified that nothing happened, and that Vanessa credibly testified that Mirian was pushing defendant in the chest and that they were both flailing their arms, which defense counsel argued may have resulted in accidental contact.

¶ 55 Thus, defense counsel told the jury that it had to decide that Amanda was either lying or telling the truth in her testimony, and if she was telling the truth, there was no evidence that defendant had committed a crime. She also argued that Mirian and Vanessa testified credibly, and their testimony showed that either defendant did not hit Mirian or did so accidentally. The prosecutor responded to this argument with the disputed statement, essentially that to find defendant guilty, the jury would have to find that Amanda, Mirian, and Vanessa all lied at trial to protect defendant. The prosecutor could comment on their credibility. See *Burman*, 2013 IL App (2d) 110807, ¶ 25 (a prosecutor may comment on a witness's credibility); *People v. Smith*, 2014 IL App (1st) 103436, ¶ 72 (prosecutor's comments suggesting that the defendant was fabricating his testimony was not erroneous because the prosecutor made the remark in the context of argument about evidence contradicting the defendant's testimony). He argued that they had a reason to lie due to bias, in that they loved defendant and had a natural impulse to protect a family member. The prosecutor stated that the jury would receive an instruction that its role was to judge the believability of the witnesses and the weight to be given to their testimony. The

prosecutor then went through the evidence that the State was relying on, arguing that it proved the State's case beyond a reasonable doubt.

¶ 56 Accordingly, viewing the remarks as a whole, the prosecutor did not tell the jury that it had to convict defendant simply if the jurors believed that defendant's family was lying in their testimony. Rather, the prosecutor portrayed it as one step in finding defendant guilty, in response to how defense counsel framed the issue in defendant's closing argument. Moreover, the trial court subsequently informed the jury that the State had to prove the elements of the offenses beyond a reasonable doubt, thereby clearly stating the State's burden of proof. As we have found no error in the challenged statement, there can be no plain error (see *People v. Alexander*, 2017 IL App (1st) 142170, ¶ 46), and therefore no basis for reversal.

¶ 57 Defendant next challenges the prosecutor's following statements that the law required the jury to disregard Mirian's testimony that she pushed defendant:

> "[PROSECUTOR:] *** And also the fact that the victim claimed to be pushing the defendant in the kitchen is legally irrelevant in this case.
>
> [DEFENSE COUNSEL:] Objection, your Honor.
>
> THE COURT: Overruled. I'll allow it.
>
> [PROSECUTOR:] You cannot consider that. There is no assertion of self defense.
>
> [DEFENSE COUNSEL:] Objection.
>
> THE COURT: Overruled."

Defendant argues that one of his principal theories of defense was that any contact with Mirian was accidental. He maintains that the fact that Mirian was pushing defendant, when considered in context with the surrounding circumstances, conveyed the defense theory to the jury that during the course of their verbal argument, defendant may have made inadvertent contact with

Mirian. Defendant points out that there was testimony that they were both flailing their arms around this time. Defendant contends that, therefore, it was not legally irrelevant, as the prosecutor told the jury, but rather, crucial to the defense theory that no intentional or knowing physical harm or provoking contact occurred. Defendant argues that prejudice was increased for this and the remaining challenged remarks because the trial court overruled defense counsel's objections to the statements. See *Mpulamasaka*, 2016 IL App (2d) 130703, ¶ 110.

¶ 58 Defendant analogizes this case to *People v. Carbajal*, 2013 IL App (2d) 111018, ¶ 35, where the State made remarks implying that the defendant had to prove his innocence. The State also improperly implied that the jury should find the defendant guilty based on the evidence presented by the State, as opposed to considering all of the evidence. *Id.* ¶ 36-37. Defendant argues that here the State made a similar improper argument by explicitly telling the jury that the law precluded it from considering one of his defense theories.

¶ 59 We conclude that the prosecutor did not misstate the law or shift the burden of proof in his comments. In defense counsel's closing argument, she said that Vanessa "saw her mother pushing, restraining, shoving [defendant] right on the chest." Thus, defense counsel strongly emphasized Mirian's physical actions towards defendant. However, defendant never asserted the affirmative defense of self-defense in this case. Therefore, the prosecutor responded to this statement by saying that Mirian's action of pushing defendant was legally irrelevant, and he specifically tied it to the subject of self-defense. That is, even though Mirian had been pushing defendant, that action did not give him legal justification to knowingly hit her. The prosecutor's statement was legally accurate. Significantly, the prosecutor never stated that the jury could not consider evidence that both Mirian and defendant were flailing their arms, which was the heart of the defense theory that any contact was accidental and not knowing.

¶ 60 Defendant further argues that the prosecutor improperly attributed to defense counsel the assumption that victims will always cooperate with the prosecution and tell the truth, and then improperly argued that this assumption did not apply to domestic battery victims. Defendant cites the following lengthy portion of the argument, with the sections of emphasis as noted:

> "[PROSECUTOR:] *Now, the defendant's attorney's closing argument is based on an assumption.* And you as triers of fact should not make assumptions. I'll give you an example. A man is driving down the street in his car, a cop pulls him over and gives him a ticket. The guy decides, I'm going to go to trial. So he goes to trial in front of the judge. At the end of the trial, the judge says, well, I'm going to find you guilty, and this is why: You were driving a red car; and whenever I see people driving red cars, they are always speeding, so that is how I know you are speeding. At a gut level you know that that is not the right way to base your verdict, on an assumption, so you shouldn't base your verdict on an assumption either.
>
> And it's an assumption that you might not even be aware of. So what is that assumption? *The assumption is that a victim or a witness to a crime will always come into court, testify truthfully, cooperate with the prosecution. That is the assumption.*
>
> [DEFENSE COUNSEL:] Objection, your Honor. I didn't make that argument.
>
> THE COURT: Overruled.
>
> [PROSECUTOR:] Normally that does hold true. In a burglary case, the defendant breaks into the guy's vehicle, takes his radio, the case goes to trial, yeah, the victim comes in and says, yeah, that is my radio. I didn't give him permission to take my radio. DUI, an officer stops someone, arrests him for DUI, it goes to trial. Yeah, the officer comes in and testifies. Identity theft, someone takes someone's credit card and goes out

on a spending spree, it goes to trial; yeah, the victim comes in and says, I never gave them permission to use my credit card. *So in those situations you would expect the victim and the witness to cooperate with the prosecution.*

[DEFENSE COUNSEL:] Objection, your Honor. I never said anything about cooperate with the prosecution.

THE COURT: Overruled.

[PROSECUTOR:] *But domestic batteries are different.*

[DEFENSE COUNSEL:] Objection, your Honor.

THE COURT: Overruled.

[PROSECUTOR:] Why are they different? Because of the word domestic. The victim and the witness have a family or a household member relationship with the defendant. They care about him. They love him, and it's that relationship that really is not found in other types of cases that is critical to understand --

[DEFENSE COUNSEL:] Objection, your Honor.

THE COURT: Overruled." (Emphases added.)

¶ 61 Defendant argues that the prosecutor's argument was highly prejudicial because calling a class of witnesses incentivized to lie and unwilling to cooperate with the State's Attorney's office improperly places the integrity of the State's Attorney's office as an issue before the jury. Defendant maintains that it also wrongly allowed the prosecutor to inject his personal opinion about the veracity of an entire class of witnesses. See *People v. Davis*, 287 Ill. App. 3d 46, 57 (1997) (prosecutor improperly voiced his personal opinion and used the integrity of the State's Attorney's office in commenting that the defense witnesses were the worst liars he had ever seen testify for a defendant); *People v. Valdery*, 65 Ill. App. 3d 375, 378 (1978) (prosecutor erred in

voicing personal belief in witnesses' testimony and placing the integrity of the State's Attorney's office behind their credibility by saying that they had the highest integrity and character that he had seen).

¶ *62* Defendant additionally cites *People v. Townsend*, 136 Ill. App. 3d 385, 402 (1985) (Pincham, J., dissenting), where the dissenting justice cited *United States v. Young*, 470 U.S. 1, 18 (1985), for the proposition that the prosecutor's vouching for the credibility of witnesses has two dangers. First, it can convey the impression that evidence not known to the jury but known to the prosecutor supports the charges, which jeopardizes the defendant's right to be tried solely on the basis of evidence presented to the jury. *Townsend*, 136 Ill. App. 3d at 402 (Pincham, J., dissenting). Second, the prosecutor's opinion carries with it the endorsement of the government and may induce the jury to trust the government's judgment rather than its own view of the evidence. *Id.*

¶ 63 Defendant asserts that the first danger manifested itself here because the prosecutor's revelation that defendant's family members did not cooperate with the State's Attorney's office is outside the record, as was the prosecutor's statement that witnesses of crimes generally tell the truth but domestic battery victims do not. Defendant argues that the second danger is also present here because the prosecutor's comments were designed to undermine defendant's family members' credibility by lumping them with the entire class of all family members of defendants in domestic violence cases. Defendant argues that the argument also undermined the fact-finding authority of the jury by asking it to trust the State's Attorney's office's opinion of the witnesses rather that allow the jurors to make their own judgment.

¶ 64 It is true that prosecutors may not argue assumptions or facts not based upon evidence in the record (*People v. Porter*, 372 Ill. App. 3d 973, 978 (2007)), and we caution the State that it is

a better practice to refrain from making generalizations about "classes" of people, such as domestic violence victims. Nevertheless, we conclude that the prosecutor's statements cannot be considered error in this case because they were in response to and invited by defense counsel's closing argument. See *People v. Legore*, 2013 IL App (2d) 111038, ¶ 55 ("if defense counsel provokes a response in closing argument, the defendant cannot complain that the State's reply in rebuttal argument denied him a fair trial"). As discussed, defense counsel argued that when Amanda called 9-1-1, she was not testifying or promising to tell the truth. See *supra* ¶ 55. Defense counsel further stated:

> "[Amanda] was not focused on telling the truth at that time to the dispatch officers or explaining what happened exactly. She just wanted the police to come.
>
> However, when she came into court and testified, she swore under oath to tell the truth. It's at that point that it's most important to get all facts out straight. Now, if you consider it from that perspective, you can listen to the evidence and consider her testimony in a consistent manner. But according to the State, only the 911 tape is true, and their own witness who came into court and testified, she must have perjured herself. If that is true, then why should you believe anything that comes out of her mouth, whether on the tape or here in court, if she is the type of person who is going to come into court and lie to your faces."

¶ 65 As such, defense counsel asserted that because Amanda came to court to testify and swore an oath to tell the truth, her testimony was true. Defense counsel contrasted the testimony with the 9-1-1 call, saying that Amanda's statements there were less credible there because she was "not focused on telling the truth at that time." The prosecutor responded to this line of argument by stating that defense counsel's argument was based on the assumption that crime

victims/witnesses to the crime will testify truthfully in court, and while that was generally true, domestic batteries were different because the victim/witnesses have a family or household relationship with the defendant. The prosecutor continued:

> "We have a father and two daughters. We have a husband and a wife. That is the relationship in this case. And the natural impulse we have is to protect family members. *So there is a reason why they are not going to come into court and testify consistently with the 911 call*, come into court and cooperate with the State. They love the defendant, and that is what is happening here." (Emphasis added.)

Thus, the prosecutor directly tied his commentary to defense counsel's argument that Amanda's in-court testimony should be believed over her 9-1-1 call. He then went through each of the family members' biases towards defendant.

¶ 66 We further find this case readily distinguishable from the cases on which defendant relies. In both *Davis*, 287 Ill. App. 3d at 57, and *Valdery*, 65 Ill. App. 3d at 378, the prosecutors voiced their personal beliefs about the witnesses' credibility, thereby placing the integrity of the State's Attorney's office behind those opinions. *Townsend* conveyed why these errors were prejudicial. *Townsend*, 136 Ill. App. 3d at 402 (Pincham, J., dissenting). However, here the prosecutor never voiced his personal opinion about the witnesses' credibility. To the contrary, after the disputed remarks, the prosecutor stated that only the jurors were the judges of the believability of witnesses and the weight to be given to each of them.

¶ 67 Finally, defendant reasserts his argument previously set forth, that the prosecutor misstated the law by arguing that circumstantial evidence is more powerful than direct evidence. See *supra* ¶ 42-43. We again find no error, as this remark was in response to defendant's closing argument (see *Burman*, 2013 IL App (2d) 110807, ¶ 25 (during closing argument, the prosecutor

may respond to comments made by defense counsel that invite response)) and did not misstate the law. As repeatedly discussed, defense counsel argued that Amanda's in-court testimony, which the parties appear to label as direct evidence, was more reliable than her out-of-court 9-1-1 recording, which the parties label as circumstantial evidence.[2] After the prosecutor's disputed remarks (see *supra* ¶ 42), he stated that the circumstantial evidence in this case was the 9-1-1 call being placed in the first place, the tone of Amanda's voice during the call, Amanda's demeanor with the police officer, and the fact that Mirian had an injury to her eye. Contrary to defendant's argument, the prosecutor did not say that circumstantial evidence was to automatically be given more weight than direct evidence, but rather that it often "can be the most powerful." Our supreme court has stated something similar. See *People v. Heep*, 302 Ill. 524, 529 (1922) (circumstantial evidence "is oftentimes more reliable than direct evidence"). In *Robinson*, 14 Ill. 2d at 331, which defendant cites, the court stated that there is no legal distinction between direct and circumstantial evidence to support the proposition that a conviction may be based on circumstantial evidence alone; the court did not say that a jury must always weigh direct and circumstantial evidence equally. The prosecutor here went on to contrast the circumstantial evidence with testimony, which he described as being subject to change based on bias or prejudice. Accordingly, the disputed statements were made as a response to defendant's closing argument and did not misstate the law.

¶ 68 As we have rejected defendant's individual contentions of error regarding the prosecutor's remarks during rebuttal closing argument, it follows that there was no cumulative error. See *People v. Everhart*, 405 Ill. App. 3d 687, 705-06 (2010) (no accumulated error where none of the separate claims amounts to reversible error).

[2] We express no opinion as to whether these labels are correct.

¶ 69 III. CONCLUSION

¶ 70 For the reasons stated, we affirm the judgment of the Boone County circuit court.

¶ 71 Affirmed.