2019 IL App (3d) 160670-U

Order filed June 10, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 14th Judicial Circuit,
	)	Henry County, Illinois.
Plaintiff-Appellee,	)	
	)	Appeal No. 3-16-0670
v.	)	Circuit No. 16-CF-151
	)	
JOSHUA M. HEINZ,	)	
	)	Honorable Terrence M. Patton,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE SCHMIDT delivered the judgment of the court.
Justice Holdridge concurred in the judgment.
Justice McDade, dissented.

ORDER

¶ 1 *Held*: (1) The admission of a nontestifying witness's statement that defendant had "hurt" her did not amount to clear or obvious error so as to allow review under the plain error doctrine. (2) Defendant's jail phone calls were stipulated evidence and were not admitted pursuant to the tacit admission rule. (3) The State proved defendant guilty of domestic battery beyond a reasonable doubt.

¶ 2 Defendant, Joshua M. Heinz, appeals his convictions for two counts of domestic battery, arguing (1) the court erred in admitting a nontestifying witness's statement that defendant had "hurt" her, (2) the court erred when it considered defendant's failure to deny the allegations in a

jail phone call as tacit admissions, and (3) the State did not prove defendant guilty beyond a reasonable doubt. We affirm.

¶ 3 I. BACKGROUND

¶ 4 An information charged defendant with (1) home invasion (720 ILCS 5/19-6(a)(2) (West 2016)) for entering the home of Thomas Feliksiak, (2) aggravated domestic battery (*id.* § 12-3.3(a-5)) for placing his hands around Emily Hintze's neck and impeding her breathing, (3) criminal trespass to a residence (*id.* § 19-4(a)(2)) for entering Thomas's home, (4) theft (*id.* § 16-1(a)(1)) for taking Emily's cell phone, (5) interfering with the reporting of domestic violence (*id.* § 12-3.5(a)) for preventing Emily from calling 911 by taking her phone, and (6) three counts of domestic battery (*id.* § 12-3.2(a)(1), (a)(2)) for grabbing Emily's throat, ripping her hair out, and pushing her.

¶ 5 On the day of the scheduled trial, the State moved for a continuance, stating that two witnesses were not present: Emily and Joni Feliksiak. The State had been unable to serve Emily, and she had told the State that she did not intend to testify at the trial. The State indicated that they did not have any evidence that Emily's unwillingness to participate resulted from defendant's threats. The court denied the motion. The case then proceeded to a bench trial.

¶ 6 Thomas testified that he owned and lived in a house in Colona. Emily was Thomas's stepdaughter. He had known her since she was two years old. He believed that Emily lived with defendant at the time of the incident, but he did not know for sure. Thomas had met defendant two or three times previously at his house with Emily. On April 19, 2016, Emily went to Thomas's house with some of her belongings. Emily had a designated room at Thomas's house, even though she did not live there, and he welcomed her presence anytime. Thomas was in his bed sleeping on April 19, at approximately 8 a.m., when he heard Emily scream, "Dad, Dad, help

me." He did not know that she was in the house at the time, but recognized her voice. Thomas stated, "I got up out of my room and come down the hallway, and [defendant] was running across and going out *** through the kitchen to the back door and out *** to the backyard." Emily "was crying. She was beat up." The State asked, "[I]s that what she told you?" Defendant objected on hearsay grounds. The court asked the State to elicit some clarification. Thomas stated he saw Emily had red spots on her neck that appeared to be fresh. He also noticed hair on the floor that he recognized as Emily's because it was the same length and color. He had never found clumps of hair like that in his house before. Emily was crying and told Thomas "that [defendant] had taken her phone and hurt her." Thomas did not specifically remember what Emily had stated. He could tell that she was upset. He never actually saw defendant interact with Emily. The court denied defendant's objection, stating, "Under Illinois Rule of Evidence *** 803, paragraph 2, the Court finds that that was an excited utterance, a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Thomas stated that he did not know Emily to have a history of self-harm.

¶ 7 Suzanne Bogart testified that she was the chief of police for the City of Colona. She was dispatched to Thomas's residence at approximately 8:19 a.m. on April 19, 2016. She spoke with Emily in the entryway. Emily "was rather hysterical. She was crying, hiccupping when she was talking, had a hard time catching her breath as she was talking. Crying and very upset." Defendant was not there when she arrived. Bogart noticed a clump of hair on the ground and said "it was fairly long and *** quite a wide chunk of hair." She observed that the hair matched Emily's hair. She did not perform any testing on the hair to confirm that it was Emily's. Emily had a bare spot in the middle of her head at the base of her neck and stray hairs lying on her

shoulder. It looked, to Bogart, that the clump of hair had come from the bare spot. Bogart also saw red marks on Emily's neck. She took photographs, which the State entered into evidence.

¶ 8 The parties stipulated to the admittance of four recorded phone calls that defendant made from the jail. Two of the calls were between Emily and defendant. The other two were between Joni and defendant. The two CDs on appeal contain over 400 recorded phone conversations. The court specifically stated that only the four conversations played in court would be entered into evidence and considered. The record on appeal is unclear as to which of the audio files were the four entered into evidence.

¶ 9 The State rested, and defendant moved for a directed verdict on all counts. The court granted the motion for six of the counts, and the case proceeded on the two counts of domestic battery that alleged defendant had grabbed Emily's throat and ripped out her hair.

¶ 10 Frederick Raymond Glessner Jr. testified that he had been defendant's neighbor for 14 years. On April 19, defendant approached him and looked scared. Defendant told him "that Emily called the cops on him for battery." He also told Frederick that "before [defendant] left, [Emily] just started hitting herself, and [defendant] was taking video of it" on his phone. Glassner did not have the video, and defendant did not enter the video into evidence.

¶ 11 Lisa Glessner testified that she met defendant through her husband, Frederick, and had known him for about six years. Lisa had met Emily approximately 10 times. She had seen Emily punch herself in the face in December 2015, which she told Officer Ryan Tone in a recorded statement. Lisa said that defendant could be "walking out of the room and [Emily] didn't like it and she'd start getting mad, to most of the time she was just fine and all of a sudden she'd just get mad, start hitting herself, pulling hair out, to throwing things even at people." She said, "I think one time I saw a knife get thrown. I believe that's correct, like a machete-type-looking

knife, or a brick one time, too." She admitted that she might have memory issues because of substance abuse, which she had also told Tone.

¶ 12 Trey Heinz testified that he was defendant's 13-year-old son. He used to live with defendant, but at the time of trial only stayed with him on weekends. Trey stated that Emily dated defendant and used to live with them for approximately four months. He said he saw Emily self-harm, stating: "She pulled out her hair. Like, she would always, like, grab her neck and choke herself, hit herself in the face, and, like, cut her wrists and stuff." He saw her self-harm more than 10 times. Trey stated, "She would always, like, start arguments with [defendant]. Like if [defendant] came and sat out on the couch by me and talked to me, then she would, like, start arguing and stuff, and then she would, like, have a little temper tantrum because she wasn't getting her way." He saw this on multiple occasions and said "she would always do it to herself and make it look like [defendant] did it."

¶ 13 The court found defendant guilty on both counts of domestic battery, stating:

> "Now, the State has proved beyond a reasonable doubt that they are family or household members. There is no question that they had a dating relationship and lived together for a while, and there's no question that somebody pulled out her hair and somebody grabbed her by the neck and left red marks. The only question is has the State proved that the defendant did it, or is there reasonable doubt as to whether the defendant did it or whether Emily did it? They were the only two there at the time, so one of the two of them did that.
>
> So I look at what the evidence is. Emily is not here to testify. That by itself is not fatal to the case. The State has elements it has to prove.

> What evidence it uses to prove that, it doesn't matter what that evidence is, as long as it's proof beyond a reasonable doubt. In murder cases, the victim never testifies, because the victim is dead, so you don't have to have the victim.
>
> The Defense asks that the Court infer that she is not here because she lied about this and she doesn't want to answer questions about it. That is a possibility. That could be why she's not here. She could also not be here because she's afraid of what's going to happen, that she's afraid when the defendant gets out, he'll get her and Joni Feliksiak, like he threatened to do on the April 23rd, 2016, phone call to Joni Feliksiak, the second phone call he made to her. She might be scared because she was telling the truth the first time, and the Court dismissed the case anyway. We don't know. It could be any one of those things. We just don't know. So the Court is not going to infer anything, because that would just be pure speculation on the Court's part."

The court discussed Thomas's testimony and the testimony of defendant's witnesses. It then said,

> "The phone calls from the jail. The defendant's first call to Emily, right off the bat he says, 'Got one question. Is 60 years of my life worth what happened?' But then there's no further conversation about exactly what happened. Then it goes into 'Fuck you.' 'No, fuck you. Who you fucking? Why you fucking around on me? You bitch,' you know. 'You're the dumb ass.' Really wonderful stuff.

The second phone call, again, her saying all that stuff. He's telling her, 'You fucking started it every time.' So the Court found it interesting that at no time during his two conversations with Emily did he say, 'Why are you lying? Why are you making this up?' He's saying, 'Is 60 years of my life worth it? You're the one who started it. What are you going to do to get me off these fucking charges, and when are you going to do it? Nobody is going to love you like I will.' He spends about as much time talking about her sleeping around on him and throwing out names and asking if she had sex with them than talking about why he's in jail.

It's when he talks to Joni Feliksiak on April 23rd, the first phone conversation—that's when he says, 'I did not touch that girl,' and he yells and cusses at Joni. There's a call back on the 23rd. He says, 'If she—if she writes a letter and comes to court on Monday and drops the charges, I'll tell her where her phone is.' He again says he did not touch her. So to Emily he's saying, 'You started it. You start it every time.' To Joni, he says 'I never touched her.' He's also yelling and cussing at Joni and ends it by saying, you know, when he gets out, he says, 'I'll get you and your daughter, too. Emily.' I mean, that phone call is a guy out of control.

One thing I agree with that [the State] says is this testimony that Emily is always the one that always starts it, that's a bunch of bull. You listen to these two conversations. This is a dysfunctional relationship, no question about it.

> Another thing I agree with [the State] on is there was testimony from the defense witnesses that, you know, after she gets mad at him, for example, when he leaves the room, she starts self-hurting herself. In this case, I mean, Thomas was there as the defendant was leaving. There was—there was no time for her to self-hurt herself because she was mad because he was leaving. And he was going out the back door, too, not going out the front door.
>
> This is a circumstantial evidence case. That's what it is, because the victim is not here, so the Court has to rely on circumstantial evidence, and when I look at these phone calls, when I look at the evidence that we do have about what happened, the time frame of it, the screaming—and that didn't look to me like a huge house. I mean, there's screaming, and Thomas gets up, so I don't find that this has been some long knockdown, drag-out fight and he's sleeping through it all. I mean, he hears yelling and screaming, he gets up to go see what happened. So this is something that happens quickly. He gets up; the defendant is leaving; she's got marks around her neck; her hair is pulled out; she's hysterical.
>
> He calls her from the jail, and not once does he say, 'Why are you lying about me? Why are you making this up?' It's 'Why do you want to send me for 60 years? You started it. What are you going to do to get me off these charges?' That's not—those are not the actions of someone who is being set up and being framed and didn't do anything at all."

The court sentenced defendant to 24 months' probation.

¶ 14 II. ANALYSIS

¶ 15 On appeal, defendant argues (1) the court erred in allowing Thomas to testify about Emily's statement that defendant had "hurt" her, (2) the court erred when it considered defendant's failure to deny the allegations in a jail phone call as tacit admissions, and (3) the State did not prove defendant guilty beyond a reasonable doubt. We will consider each argument in turn.

¶ 16 A. Out-of-Court Statement by Nontestifying Witness

¶ 17 Defendant first contends that the court erred in admitting Emily's statement that defendant had "hurt" her since she did not testify. In doing so, defendant raises two arguments: (1) the unreliable statement did not qualify as an excited utterance, and (2) allowing the statement violated his confrontation clause rights as the statement was testimonial. Defendant admits that he forfeited this issue by failing to raise it in his posttrial motions. He, therefore, asks us to consider the issue under the plain error doctrine. Because we cannot say that the statement was clearly or obviously unreliable or testimonial in nature, we find that the plain error doctrine does not apply, and defendant has forfeited the issue.

¶ 18 Illinois Supreme Court Rule 615(a) provides that, "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court."

> "A 'plain error' is an error that is *clear* or *obvious*. *People v. Piatkowski*, 225 Ill. 2d 551, 564-65 n.2 (2007). Thus, under the plain-error doctrine, the existence of an error is not enough to avert a forfeiture, even if the error is genuinely an error. Not even reversible error is enough. '[S]hort of a conclusion that an asserted error is a "plain" one, the so-called plain

> error doctrine offers no basis to excuse a procedural default. [Citation.] The point is crucial, for while all plain errors are reversible ones, not all reversible errors are also "plain" for purposes of Rule 615(a).' *People v. Keene*, 169 Ill. 2d 1, 17 (1995). The plain error doctrine is not a backdrop to catch merely arguable issues that could have been raised in the trial court. The error had to be manifest or patent." (Emphasis in original.) *People v. Hammons*, 2018 IL App (4th) 160385, ¶ 17.

¶ 19 "Hearsay evidence is an out-of-court statement offered to prove the truth of the matter asserted, and it is generally inadmissible due to its lack of reliability unless it falls within an exception to the hearsay rule." *People v. Olinger*, 176 Ill. 2d 326, 357 (1997). For the excited utterance exception to the hearsay rule to apply, "there must be an occurrence sufficiently startling to produce a spontaneous and unreflecting statement, there must be an absence of time for the declarant to fabricate the statement, and the statement must relate to the circumstances of the occurrence." *People v. Sutton*, 233 Ill. 2d 89, 107 (2009). Courts look to the totality of the circumstances to determine whether a statement is admissible under the excited utterance exception. *People v. Williams*, 193 Ill. 2d 306, 352 (2000). Evidentiary rulings are within the sound discretion of the circuit court, and we review those rulings with deference to the circuit court. *People v. Caffey*, 205 Ill. 2d 52, 89 (2001). "An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *Id.*

¶ 20 Defendant does not contend that the evidence in question failed to meet any of the three elements of the excited utterance exception to the hearsay rule. Instead, defendant solely challenges the reliability or trustworthiness of Thomas's testimony regarding Emily's statement

because he did not remember exactly what she said. We do not find that allowing the evidence under the excited utterance rule was clearly or obviously an abuse of discretion. A reasonable person could find Thomas's testimony sufficiently reliable and trustworthy so to justify its admission.

¶ 21 Alternatively, defendant contends that the admission of this testimony violated his sixth amendment rights. Under the sixth amendment, a criminal defendant has the right to confront the witnesses against him. U.S. Const., amend. VI. The confrontation clause prevents a "testimonial" hearsay statement of a declarant from being admitted against a criminal defendant unless the declarant is unavailable to testify and defendant had a prior opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

> "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 822 (2006).

Our supreme court in *People v. Stechly*, 225 Ill. 2d 246, 281-82 (2007), developed a two-part framework for determining whether a statement is testimonial. To be testimonial, a statement "must have (1) been made in a solemn fashion, and (2) been intended to establish a particular fact." *People v. Cleary*, 2013 IL App (3d) 110610, ¶ 56 (citing *Stechly*, 225 Ill. 2d at 281-82). "[A] statement cannot fall within the Confrontation Clause unless its primary purpose was

testimonial." *Ohio v. Clark*, 576 U.S.___, ___, 135 S. Ct. 2173, 2180 (2015). "[T]he relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred." *Michigan v. Bryant*, 562 U.S. 344, 360 (2011). Statements to individuals other than law enforcement officers "are much less likely to be testimonial than statements to law enforcement officers." *Clark*, 576 U.S. at ___, 135 S. Ct. at 2181.

¶ 22 Here, Emily screamed, "Dad, Dad, help me." Thomas got up and went to the kitchen, where he saw defendant run out the backdoor. Emily was crying and upset and told Thomas that defendant had "hurt" her. Emily was not speaking to law enforcement in a formal fashion, but was instead crying and talking to Thomas. We cannot say that Emily's statement was clearly or obviously testimonial so as to allow review under the plain error doctrine.

¶ 23 B. Tacit Admission

¶ 24 Next, defendant contends that the court erred in considering his lack of denial in a jail phone call as an admission under the tacit admission rule. He, again, admits that he forfeited this issue, but asks that we consider it under the plain error doctrine. We find that the court did not admit the lack of denial into evidence under the tacit admission rule, but instead admitted it as a stipulation by the parties.

¶ 25 At the outset, we note that defendant does not provide any indication of which of the over 400 recorded phone calls contained on the two CDs were played in court and entered into evidence. The audio files are not marked with any identifying information, so we have no way of knowing which four were considered by the court. Any deficiencies in the record will be

construed against the appellant. *People v. Hunt*, 234 Ill. 2d 49, 58 (2009). Therefore, our review is limited to the circuit court's reiteration of the phone calls in its judgment.

¶ 26 Illinois Rule of Evidence 801 (eff. Oct. 15, 2015), defines statements that are inadmissible at trial as hearsay and statements that are admissible at trial as nonhearsay. One such nonhearsay statement is a statement by a party-opponent, which includes "a statement of which the party has manifested an adoption or belief in its truth." Ill. R. Evid. 801(d)(2) (eff. Oct. 15, 2015). These adopted statements are called tacit admissions.

> "The tacit admission rule provides, 'When a statement that is incriminating in nature is made in the presence and hearing of an accused and such statement is not denied, contradicted, or objected to by him, both the statement and the fact of his failure to deny it are admissible in a criminal trial as evidence of the defendant's agreement in its truth.' " *People v. Colon*, 2018 IL App (1st) 160120, ¶ 17 (quoting *People v. Soto*, 342 Ill. App. 3d 1005, 1013 (2003).

¶ 27 We find that the court did not apply the tacit admission rule here. The tacit admission rule provides an avenue by which a party could bring in evidence that may be otherwise inadmissible. Stated another way, the tacit admission rule concerns the admittance of evidence. Here, the phone calls were not entered into evidence through the tacit admission rule; instead the parties stipulated to their admittance. When stipulating to the phone calls, defendant did not limit the purpose for which such evidence could be considered. Moreover, we find no clear or obvious error in the way the court considered the phone calls.

¶ 28 C. Sufficiency of the Evidence

¶ 29 Lastly, defendant argues that the State did not prove him guilty beyond a reasonable doubt. We find that the circumstantial evidence presented through the testimony of Thomas and Bogart and the phone calls was sufficient to convict.

¶ 30 "When presented with a challenge to the sufficiency of the evidence, it is not the function of this court to retry the defendant." *People v. Collins*, 106 Ill. 2d 237, 261 (1985). Rather, " 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "This means the reviewing court must allow all reasonable inferences from the record in favor of the prosecution." *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). "A criminal conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt." *Collins*, 106 Ill. 2d at 261. We give great deference to the trier of fact. See, *e.g.*, *People v. Saxon*, 374 Ill. App. 3d 409, 416-17 (2007).

> "[I]n a bench trial, it is for the trial judge, sitting as the trier of fact, to determine the credibility of witnesses, to weigh evidence and draw reasonable inferences therefrom, and to resolve any conflicts in the evidence. [Citations.] A reviewing court will not reverse a conviction simply because the evidence is contradictory [citation] or because the defendant claims that a witness was not credible." *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009).

¶ 31 In order for defendant to be convicted on both counts of domestic battery, the State had to prove (1) defendant acted knowingly and without legal justification, (2) he caused bodily harm to

Emily, and (3) Emily was defendant's family or household member. 720 ILCS 5/12-3.2(a)(1) (West 2016). Family or household members include people who share or formerly shared a dwelling and people who had or have a dating relationship. *Id.* § 12-0.1. Bodily harm is defined in this context as "some sort of physical pain or damage to the body, like lacerations, bruises, or abrasions, whether temporary or permanent." *People v. Cisneros*, 2013 IL App (3d) 110851, ¶ 14.

¶ 32 Defendant does not challenge that Emily sustained bodily harm or that Emily was a family or household member. Moreover, the evidence established that Emily had red marks on her neck and a chunk of hair pulled out of her head, which would be considered bodily harm, and defendant's own witness, Trey, testified that Emily and defendant had dated and lived together. Therefore, both of those elements of the offense were met.

¶ 33 Instead, defendant solely argues that the evidence did not prove that he caused the bodily harm. We disagree. Thomas testified that he heard Emily scream, "Dad, Dad, help me." He then left his bedroom and went to the kitchen. At that point, he saw defendant run out the backdoor, and observed Emily crying and she told Thomas that defendant "had taken her phone and hurt her." Emily had red marks on her neck and a large chunk of hair missing from the back of her head. The chunk of hair was discovered on the floor. "[T]he testimony of a single witness, if positive and credible, is sufficient to convict, even though it is contradicted by the defendant." *Siguenza-Brito*, 235 Ill. 2d at 228. Further, defendant confirmed that he took her phone when he spoke on the phone to Joni. In the phone calls, defendant told Emily that she always started it and asked, "Is 60 years of my life worth what happened?" He told Joni that he did not touch Emily, but said "If she—if she writes a letter and comes to court on Monday and drops the charges, I'll tell her where her phone is." He cursed at both Emily and Joni and told Joni, "I'll get you and

your daughter, too." While defendant's witnesses testified that Emily was prone to self-harm, the court could have inferred, as it did, that there was not enough time between Emily screaming for Thomas and Thomas arriving in the kitchen for Emily to hurt herself. Taking the evidence in the light most favorable to the State, we find that the State proved defendant guilty beyond a reasonable doubt.

¶ 34 In coming to this conclusion, we reject defendant's contention that he could not be convicted where the court did not hear any evidence from anyone who actually observed defendant grab Emily's neck or pull out her hair. Defendant contends that there are no cases "where a reviewing court has upheld the conviction of a defendant for causing 'bodily harm' to a person where that person failed to testify about the bodily harm in open court and no one observed how the 'bodily harm' occurred, first hand." However, defendant fails to cite to any case law that states that the victim or an eyewitness must testify in order to prove a criminal act. Our supreme court has "consistently held that a conviction may be based solely on circumstantial evidence." *People v. Patterson*, 217 Ill. 2d 407, 435 (2005); see also *People v. Brown*, 2013 IL 114196, ¶ 49; *People v. Hall*, 194 Ill. 2d 305, 330 (2000). Moreover, we note, as the circuit court did, that a rule requiring the victim or an eyewitness to testify would result in very few murder convictions.

¶ 35 III. CONCLUSION

¶ 36 For the foregoing reasons, we affirm the judgment of the circuit court of Henry County.

¶ 37 Affirmed.

¶ 38 JUSTICE McDADE, dissenting:

¶ 39 Defendant and Emily were the only persons present during their altercation, making this a classic he said/she said situation. From the outset the relative credibility of the parties was a

critical factor in deciding what actually happened. But Emily was not present in court, so *her* credibility could not be weighed or evaluated.

¶ 40 Her absence was not because she was dead or had been injured to such an extent that she was unable to appear. Rather it was because she did not want to testify and had apparently evaded the State's service of a notice to appear or a subpoena. More specifically, she was not present because the trial court refused the State's request for a continuance to allow the State to compel her appearance—a decision which was fully within the court's discretion.

¶ 41 But once the court heard the testimony of two defense witnesses who swore that they had personally seen Emily choke herself, hit herself, and pull out her own hair on multiple occasions and a third witness who testified that defendant had told him, in recounting the incident, that that was what Emily had done on the instant occasion, an evaluation of *her* credibility and, thus, her sworn testimony became essential to the search for truth in this case. I believe the trial court should have revisited its denial of the State's request for a continuance and allowed the prosecution time to secure Emily's testimony.