2019 IL App (5th) 150487-U

NO. 5-15-0487

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Marion County.
	)	
v.	)	No. 14-CM-118
	)	
BRYCE WESTBROOK,	)	Honorable
	)	Mark W. Stedelin,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE BOIE delivered the judgment of the court.
Justices Welch and Cates concurred in the judgment.

ORDER

¶ 1 *Held*: In a domestic battery trial, the defendant failed to establish that his counsel was constitutionally ineffective, or that plain error resulted, due to the admission of out-of-court statements of the victim, out-of-court statements of an eyewitness, and out-of-court statements contained in a 9-1-1 recording; the victim's out-of-court statements were admissible as excited utterances, and there is no reasonable probability the jury would have acquitted the defendant had the other out-of-court statements been excluded.

¶ 2 A jury convicted the defendant, Bryce Westbrook, of domestic battery in violation of section 12-3.2(a) of the Criminal Code of 2012 (720 ILCS 5/12-3.2(a) (West 2014)). Specifically, the jury found that the defendant punched his girlfriend, Kandra Means, in the face during the early morning hours on June 30, 2014. As a result of his conviction,

the circuit court sentenced the defendant to 2 years of probation subject to 90 days in the Marion County jail. In this direct appeal from his conviction and sentence, the defendant asks us to reverse his conviction and remand for a new trial, arguing that his trial counsel was constitutionally ineffective for failing to object to evidence that, he argues, was inadmissible and prejudicial hearsay evidence that he punched Kandra. Alternatively, he argues that the admission of the evidence amounted to plain error. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 The events leading up to the altercation between Kandra and the defendant began in the evening on June 29, 2014, when Kandra and her cousin, Heather Jolliff, planned an evening of drinking alcohol at two bars in Centralia, Illinois. At that time, the defendant and Kandra had been in a relationship for a number of years, and they had one child together, a two-year-old daughter. At the time of trial, they had two children, the daughter and a newborn baby boy. On the night of the incident, Kandra arranged for the defendant's sister, Brandi Westbrook, to babysit while she and Heather were out that evening. Heather arranged for her friend, Brian Queen, to serve as their designated driver. Brian had never met Kandra prior to that evening.

¶ 5 The threesome visited the two bars that evening and into the early morning hours of the next day. After the last bar closed, Kandra had Brian drive her and Heather to Brandi's house so Kandra could pick up her children. The evidence presented at the defendant's trial centered on events that occurred at Brandi's house after Kandra, Heather, and Brian arrived to pick up the children.

¶ 6 At the trial, Heather told the jury that Kandra did not get into any fights at any of the bars they visited and that Kandra did not have any preexisting injuries or sustain any new injuries while they were at the bars. According to Heather, when they arrived at Brandi's house, Kandra got out of Brian's car, told Heather not to leave her, and walked up to the house. The defendant arrived at Brandi's house shortly after they arrived, and Heather saw both Kandra and the defendant go inside Brandi's house.

¶ 7 Kandra was inside the house for approximately five minutes when Heather heard a "loud screaming noise." She testified that she then went inside the house through the front door and saw the defendant "punch [Kandra] in the face" with his fist. She testified that there were approximately five children inside the house who were "all screaming and crying." She yelled at the defendant, "What the hell are you doing?" and threw down her purse to intervene. Brandi, however, told Heather to leave the house.

¶ 8 During his testimony, Brian told the jury about arriving at Brandi's house and Kandra going inside. He also testified that Kandra did not have any injuries before she entered the house. According to Brian, Kandra had left her cell phone in the car, so Heather exited the car and approached the house to give Kandra her phone. Heather then returned to the car and told him to "call the cops." Brian then called 9-1-1.

¶ 9 During the State's direct examination of Brian, it moved to publish to the jury a recording of Brian's 9-1-1 call. Outside the presence of the jury, the defendant's attorney objected to the admission of the recording on the basis that Brian's statements on the recording constituted inadmissible double hearsay. The State responded that it was not offering the contents of the recording as proof of the truth of any of Brian's statements on

the recording but that it was offering the recording only for the limited purpose of explaining Brian's course of conduct. The defendant's attorney replied, "If that is the case, Your Honor, I would just ask my objection be sustained as far as it goes for the truth of the matter asserted. However, I will ask for a limiting instruction to the jury at this time as well."

¶ 10 The circuit court allowed the admission of the 9-1-1 recording "for the limited purpose to explain the course of conduct and not for the truth of the matters explained." Prior to publishing the recording to the jury, the circuit court instructed the jury as follows:

> "Ladies and Gentlemen, you are now going to hear a [9-1-1] tape. I want to instruct you at this point it's being submitted for a limited purpose. The limited purpose is just to explain the situation. It's not being offered to prove the truth of what was said in the [9-1-1] tapes, just as to what happened, and to explain the course of conduct."

¶ 11 The recording was then played to the jury. On the recording, Brian can be heard first telling the 9-1-1 operator his location, which was Brandi's residence. He then told the operator that "there's a guy beating the hell out of a girl." He told the operator that he did not see the incident but that his "friend did though." He stated that he did not know the name of the person being hit but that she was his friend's cousin. He also stated that he did not know the name of the man that was involved but was told that his name was Bryce. While he talked to the 9-1-1 operator, he reported that "they were arguing right now on the front lawn." The operator asked Brian to ask his friend for her cousin's name.

Brian can be heard on the recording asking Heather for Kandra's name and then giving that information to the 9-1-1 operator. An unidentified voice on the recording indicated that a police officer was en route to Brian's location. Brian's conversation with the 9-1-1 operator ended when police officers arrived at the scene.

¶ 12 At the trial, Officer Timmons testified that when he arrived at Brandi's house, he first met Heather on front lawn. During direct examination, the State asked Timmons to tell the jury what Heather told him about the incident, and the defendant's attorney objected on hearsay grounds. In the presence of the jury, the State responded that it was not offering Heather's statement for its truth but that "[m]uch like the 911 tape, it goes to explain the officer's course of conduct." The defendant's attorney responded, "I would ask for a limiting instruction if it comes in for that limited purpose." The court allowed the admission of this testimony "for the limited purpose." Prior to allowing the State to continue with its direct examination, the court told the jury, "Once again, Ladies and Gentlemen, it's not being offered for the truth of the actual [*sic*] what she reported, just that she reported it."

¶ 13 Officer Timmons then told the jury, "Heather told me that [the defendant] punched [Kandra] and had beat her up." He testified that Heather "[s]aid she went in the house and she saw the physical of [the defendant] beating Kandra and then his sister, Brandi, told Heather to leave."

¶ 14 Officer Timmons testified that the next person he spoke to was the defendant, who was standing outside holding one of the children. The defendant told Timmons that he did not know why the police were called.

¶ 15 Timmons then went inside Brandi's house and saw Kandra, who, according to Timmons, "had a golf ball-sized knot on her head and blood all over her face and clothing, shirt, pants." Timmons described Kandra as being "extremely upset" and that she was "crying and emotional." Without any objection from the defendant's attorney, Officer Timmons then told the jury about statements Kandra made to him in response to his question about "what happened." Specifically, Timmons testified, "She told me [the defendant] had punched her in the face several times while she was on the couch in the apartment, said that she was able to stand up and made her way to the bathroom, where he was still punching her, and she actually fell into the bathtub. With a closed fist." According to Timmons, Kandra told him that she was eventually able to make it outside where her argument with the defendant continued and that she would have to buy Brandi a new couch because there was blood all over it.

¶ 16 Timmons testified that after the officers at the scene "had Kandra outside," he returned to Brandi's front door and knocked on it in order to speak with her. He told the jury that Brandi partially opened the door a few inches but was "not real cooperative." According to Timmons, Brandi said that she "basically, just heard yelling and screaming" and "never saw anything."

¶ 17 Timmons testified that, after speaking with Brandi, he returned to Heather and spoke with her a second time. With respect to this second conversation with Heather, Timmons testified, without objection from defense counsel, as follows:

> "Heather said that *** [o]nce [the last bar] closed, she came back with Kandra to pick up her kids—Kandra's kids. She said whenever she got out of the vehicle that

Kandra told her not to leave. So she was in the residence for a few minutes, and that's when Heather went inside and saw where [the defendant] was punching *** Kandra."

¶ 18 Timmons took photographs of Kandra's injuries, and five of these photographs were admitted into evidence and published to the jury.

¶ 19 Timmons testified that he arrested the defendant at the scene, and the defendant agreed to talk to him at the police station. During questioning, the defendant told Timmons that he did not know what happened. When Timmons told the defendant that there was a knot on Kandra's head, he responded, "Could have been caused by you."

¶ 20 The State called Kandra to testify about the events that evening, and she told the jury that she loved the defendant and that they were still together in a relationship at the time of the trial. She did not recall talking to Officer Timmons the morning of the attack, did not recall telling Timmons that the defendant had punched her, and did not recall telling him that the blood on her clothing came from being punched by the defendant. She told the jury that she was injured that night in a bar fight. She admitted that when she arrived at Brandi's house to pick up her children, she got into an argument with the defendant, but she told the jury that the argument never became physical and that the defendant never hit her.

¶ 21 The defendant presented Brandi's testimony in his defense. She told the jury about Kandra coming to her house "inebriated" at around 5:30 in the morning on the day of the incident. She testified that Kandra had been at her house for about 15 minutes when the defendant arrived to get their kids. Brandi told the jury that Kandra and the defendant

started arguing, when a girl whom she did not know started opening her front door. She testified that she stopped the door and said, "I don't know you, you can't come in here." Sometime later, the police showed up at her front door. She explained that she was in the same room with Kandra and the defendant the entire time they argued, that she never saw the argument become physical, and that she never saw the defendant strike Kandra. On cross-examination, she stated that she did not remember telling Officer Timmons that she only heard yelling and screaming and did not see anything.

¶ 22 Prior to closing arguments, the circuit court conducted a jury instruction conference. The defendant's attorney had prepared two jury instructions based on Illinois Pattern Jury Instructions, Criminal, No. 3.11 (approved Oct. 17, 2014) (hereinafter IPI Criminal No. 3.11). The instructions would have instructed the jurors that they could consider a witness's prior inconsistent statement only for the limited purpose of deciding the weight to be given to the witness's testimony. During the jury conference, the defendant's attorney stated, "given the fact that [Kandra's prior inconsistent statements] were admissible under the excited utterance exception, technically we wouldn't use 3.11, I do not believe, so I would ask to withdraw [the defendant's IPI Criminal No. 3.11 instructions]." During the conference, the defendant's attorney also stated that "[t]he very first instruction [IPI Criminal No. 1.01] does cover the issue of any evidence that's received for a limited purpose should not be considered by you for any other purpose."

¶ 23 During closing argument, the prosecutor directed the jury's attention to Kandra's out-of-court statements to Officer Timmons as follows:

> "I would also like you to consider the fact that what Kandra told the police officers, that is evidence. That is something you can consider. It's called an excited utterance. She was upset, she was crying, it was the first [*sic*] fresh event had happened, and she told the police officers that [the defendant], this defendant, had punched her in the head."

¶ 24 The prosecutor also focused on Brian's, Heather's, and Brandi's in-court testimony as well as the photographs of Kandra's injuries. The prosecutor did not refer to the 9-1-1 recording or direct the jury's attention to any of Heather's out-of-court statements to Officer Timmons.

¶ 25 During her rebuttal argument, the prosecutor again emphasized Kandra's out-of-court statement to Officer Timmons as follows: "Do you believe Kandra when she gave the statement to the police officer at the scene when her memory was freshest and she hadn't been influenced by anyone and she had this injury that just occurred on her head, or do we believe her now that she's had over a year to think about the repercussions of the police being called that night?"

¶ 26 The prosecutor noted that Kandra "gave a statement" that the defendant had "punched her" and a statement that Brandi's couch was "covered with blood to the point where she felt like she was going to have to replace the couch for Brandi." The prosecutor emphasized, "That is evidence." The prosecutor also emphasized Heather's in-court testimony without referring to her out-of-court statements to Officer Timmons. The prosecutor concluded her rebuttal, "And if you believe Heather and you believe the excited utterance that Kandra made at the scene that [the defendant] had punched her in

the head, and you look at this picture and you think she was telling the truth, if you believe those two things, then I have *** proved this defendant guilty of Domestic Battery beyond a reasonable doubt."

¶ 27 The jury retired to the jury room and returned with a guilty verdict 10 minutes later. As a result of the domestic battery conviction, the circuit court sentenced the defendant to 2 years of probation subject to 90 days in the Marion County jail. The defendant now appeals his conviction and sentence.

¶ 28 ANALYSIS

¶ 29 On appeal, the defendant argues that his attorney provided ineffective assistance of counsel in failing to exclude the out-of-court statements that he hit Kandra. Specifically, the out-of-court statements that the defendant argues should have been excluded are: (1) Officer Timmons's testimony about Kandra's out-of-court statement that the defendant hit her, (2) the 9-1-1 recording that was played to the jury which included Brian's out-of-court statement, which was based on Heather's out-of-court statement (double hearsay), that the defendant hit Kandra, and (3) Officer Timmons's testimony about his two conversations with Heather during which she made out-of-court statements that the defendant hit Kandra.

¶ 30 To succeed on his claim of ineffective assistance of trial counsel, the defendant is required to establish the two prongs of the test set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984). Under the first prong of the two-part *Strickland* test, a defendant must demonstrate that counsel's performance "fell below an objective standard of reasonableness." *Id.* at 688. To satisfy the second prong, a defendant must show that

he was prejudiced as a result of counsel's deficient performance. *Id*. at 687. A showing of prejudice requires proof of a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Id*. at 694. A court need not consider the deficiency prong where the defendant fails to establish prejudice under the second prong. *Id.* at 697.

¶ 31 The defendant's claim that his attorney was ineffective is based on an argument that his attorney failed to exclude prejudicial hearsay evidence. Rule 801 of the Illinois Rules of Evidence defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ill. R. Evid. 801(c) (eff. Jan. 1, 2011).

¶ 32 I. Kandra's Out-of-Court Statements

¶ 33 The defendant argues that his attorney was ineffective for failing to object to Officer Timmons's testimony about Kandra's out-of-court statements that the defendant struck her. Kandra's out-of-court statements were admitted for the truth of the matters that Kandra asserted, *i.e.*, that the defendant hit her. Accordingly, Kandra's out-of-court statements were hearsay. However, at the trial, the parties agreed that Kandra's hearsay statements were admissible as substantive evidence under the excited utterance exception to the hearsay rule.

¶ 34 On appeal, the defendant does not offer any analysis to establish that Kandra's statements were not properly admitted under the excited utterance exception, and we believe that Kandra's out-of-court statements were properly admitted under this exception. At a minimum, the record fails to establish that this evidence would not have

been admissible under this exception had the defendant's attorney raised an objection. Accordingly, with respect to Kandra's out-of-court statements, the defendant has failed to establish the first prong of the *Strickland* standard, *i.e.*, that his attorney's performance fell below an objective standard of reasonableness in failing to object.

¶ 35 For a hearsay statement to be admissible under the excited utterance exception, (1) there must have been an occurrence that was sufficiently startling to produce a spontaneous and unreflecting statement, (2) there must have been an absence of time between the occurrence and the statement for the declarant to fabricate the statement, and (3) the statement must relate to the circumstances of the occurrence. *People v. Williams*, 193 Ill. 2d 306, 352 (2000). Courts use a totality-of-the-circumstances analysis to decide whether a statement is admissible under the excited utterance exception. *Id.* The analysis involves consideration of several factors, including the passage of time, the declarant's mental and physical condition, the nature of the event itself, and whether the statement is in the declarant's self-interest. *People v. Sutton*, 233 Ill. 2d 89, 107 (2009). The critical inquiry is whether the statement was made while the excitement of the event predominated. *People v. Smith*, 152 Ill. 2d 229, 260 (1992). No one factor is determinative, and each case must rest on its own facts. *People v. Gwinn*, 366 Ill. App. 3d 501, 517 (2006).

¶ 36 In the present case, Timmons testified that he spoke with Kandra when she was still crying and emotionally upset from the attack. Timmons described her as being "extremely upset" and saw that she had a golf ball-sized knot on her head and blood on her face and clothing. Under these facts, Kandra's out-of-court statement that the

defendant hit her qualified as an excited utterance. See *Gwinn*, 366 Ill. App. 3d at 517-18 (domestic violence victim's statement to a police officer was admissible as an excited utterance where victim, in response to officer's question, told the officer that the defendant punched her in the face; victim was crying, trembling, and visibly shaken, with blood on the bridge of her nose and her left eyelid was swollen shut); *People v. Connolly*, 406 Ill. App. 3d 1022, 1026 (2011) (domestic violence victim's statement was admissible as an excited utterance where it was made "within a relatively short time span following the occurrence" and while she was "in a nervous, upset, and agitated condition, directly related to the event").

¶ 37 Although the record does not establish the exact time span between the defendant's domestic violence attack and Kandra's out-of-court statement, the record suggests that Timmons's conversation with Kandra occurred within a relatively short time span following the attack. Brian talked to the 9-1-1 operator while Kandra and the defendant were still arguing on Brandi's front lawn, and the call ended when police arrived at the scene. When Timmons arrived, he immediately began questioning witnesses, including Kandra. The record, therefore, suggests that Kandra did not have any time for reflection prior to her statements to Timmons.

¶ 38 These facts establish that Kandra's statement to Officer Timmons fits within the purpose for allowing the admission of excited utterances. " 'Since [an excited utterance] is made under the immediate and uncontrolled domination of the senses, rather than reason and reflection, and during the brief period when consideration of self-interest could not have been fully brought to bear, the utterance may be taken as expressing the

real belief of the speaker as to the facts just observed by [her].' " *People v. Damen*, 28 Ill. 2d 464, 471 (1963) (quoting *Keefe v. State*, 72 P.2d 425, 427 (Ariz. 1937)). Also, the fact that Kandra's statement was made in response to Timmons's question of "what happened" does not destroy its spontaneity. *People v. Shum*, 117 Ill. 2d 317, 343 (1987).

¶ 39 Because the totality of the circumstances supports the admission of Kandra's statements as substantive evidence under the excited utterance exception to the hearsay rule, the record does not support the defendant's claim of ineffective assistance of counsel with respect to the admission of this evidence. *People v. Lucious*, 2016 IL App (1st) 141127, ¶ 33 ("Necessarily, counsel cannot be deemed ineffective for failing to raise an objection to admissible evidence—such an objection would be futile.").

¶ 40 The defendant argues, alternatively, that the admission of Kandra's out-of-court statement constituted plain error. Under the plain-error doctrine, a reviewing court may consider a forfeited issue if a clear and obvious error occurred and either: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant or (2) the error is so serious that it affected the fairness of the defendant's trial and undermined the integrity of the judicial process. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 41 As noted above, however, no error occurred as a result of Kandra's out-of-court statement being admitted as substantive evidence under the excited utterance rule. "[W]ithout error, there can be no plain error." *People v. Smith*, 372 Ill. App. 3d 179, 181 (2007).

¶ 42 II. Heather's Out-of-Court Statements and the 9-1-1 Recording

¶ 43 Next, the defendant takes issue with Officer Timmons's testimony about two conversations he had with Heather in which Heather made out-of-court statements that she witnessed the defendant hit Kandra. The defendant also takes issue with the admission of the recording of Brian's 9-1-1 call. Again, these issues are presented to us under claims of ineffective assistance of counsel or, alternatively, plain error.

¶ 44 With respect to Timmons's first conversation with Heather, the defendant's attorney objected on the basis of hearsay. The circuit court, however, allowed the testimony over the defendant's objection. The court allowed the evidence, not for the truth of Heather's out-of-court statements, but for the limited purpose of explaining Timmons's course of conduct in investigating the incident. Prior to allowing Timmons to testify about Heather's out-of-court statements, the circuit court instructed the jury that her statements were not being offered for the truth of what she reported to Timmons, just that she reported it.

¶ 45 Likewise, with respect to the 9-1-1 recording, when the court admitted the recording, it did so over defense counsel's hearsay objection and admitted the recording for the limited purpose of explaining Brian's course of conduct, not as proof of the matters that Brian reported. The court also instructed the jury not to consider Brian's out-of-court statements on the recording as evidence of the truth of his assertions.

¶ 46 As noted above, hearsay has a two-part definition: (1) out-of-court statements (2) that are offered for the truth of the matter asserted. Out-of-court statements that are not offered for the truth of the matter asserted but are offered for some other relevant

purpose are not hearsay. *People v. Williams*, 181 Ill. 2d 297, 313 (1998). For example, the supreme court has stated that "a hearsay statement is allowed where it is offered for the limited purpose of showing the course of a police investigation where such testimony is necessary to fully explain the State's case to the trier of fact." *Id*.

¶ 47 On appeal, the State argues that this evidence was properly admitted to explain Brian's course of conduct (the 9-1-1 recording) and Officer Timmons's investigative steps (Heather's out-of-court statement). Also, the State argues that nothing in the record indicates that the jury disregarded the court's limiting instructions. See *id.* at 314 ("We must presume, absent a showing to the contrary, that the jury followed the trial judge's instructions in reaching a verdict.").

¶ 48 However, with respect to the admission of Timmons's second conversation with Heather, the defendant's attorney did not raise any objection, and the circuit court did not give any limiting instruction with respect to the purpose of its admission. The testimony, therefore, was presented to the jury without any limitation on its purpose.

¶ 49 The defendant argues that, with respect to all of this evidence, regardless of any limiting instructions, he was denied his constitutional right to effective assistance of counsel or, alternatively, that plain error occurred because the evidence improperly bolstered Heather's credibility with prior consistent statements and because the evidence was not necessary to explain any course of conduct.

¶ 50 In support of his argument, the defendant cites *People v. Boling*, 2014 IL App (4th) 120634, ¶ 108, where the court discussed the danger of misuse of allowing out-of-court statements for the purpose of explaining a course of police conduct. The *Boling*

court indicated that investigatory steps taken by a police officer are rarely more than marginally relevant, but the risk of jury misuse of the information is substantial. *Id.* See also *People v. Trotter*, 254 Ill. App. 3d 514, 527 (1993) ("there is a distinction between an officer testifying to the fact that he spoke to a witness without disclosing the contents of that conversation and an officer testifying to the contents of the conversation").

¶ 51 Here, the defendant argues that the State did not need to present Heather's out-of-court statements to the jury in order to explain Officer Timmons's course of conduct. Instead, the defendant argues, it would have been sufficient for the State to have Timmons merely testify that he spoke with Heather upon arriving at the scene and that he spoke with Heather again after speaking with Kandra. With respect to the 9-1-1 call, the defendant argues that it would have been sufficient had Brian merely testified that he called 9-1-1 and had Officer Timmons testified that he responded to the scene in response to the call. The defendant argues that it was unnecessary for Timmons to tell the jury what Heather told him and that it was unnecessary to play the 9-1-1 recording to the jury.

¶ 52 We are aware of the danger in admitting out-of-court statements for the limited purpose of "explaining a course of police conduct." We agree that, depending on the facts of each case, such evidence can be misused by the jury and can unnecessarily expose the jury to prejudicial out-of-court statements when the content of the statements has little relevance in explaining a police officer's course of conduct. However, in the present case, as we have outlined above, the defendant presents these issues based on a claim of ineffective assistance of counsel and, alternatively, under the first prong of the plain-error rule. Our supreme court has stated that the analysis for an ineffective assistance of

counsel claim based on an evidentiary error is similar to the analysis for first-prong plain error "insofar as a defendant in either case must show he was prejudiced." *People v. White*, 2011 IL 109689, ¶ 133. Here, we believe the defendant's arguments fail because he cannot show prejudice. Therefore, we need not delve into the parameters of "explaining the course of conduct" exception to the hearsay rule or whether the exception was properly applied in this case.

¶ 53 The defendant argues that he was prejudiced by the admission of Heather's out-of-court statements and the 9-1-1 recording because Heather was the only eyewitness who testified at the trial that he hit Kandra, while two other eyewitnesses, Kandra and Brandi, testified that he did not hit Kandra. The defendant, therefore, describes the evidence as being two-to-one to his advantage. The defendant argues that by including Heather's out-of-court statements and the 9-1-1 recording, the State was allowed to improperly bolster the credibility of its only eyewitness with her prior consistent statements, thereby unfairly tipping the weight of this closely balanced eyewitness evidence to its favor.

¶ 54 We disagree with the defendant's argument. A trial is not a quantitative balance where a count of witnesses on each side is taken and weighed to determine the truth. *People v. Zazzetti*, 69 Ill. App. 3d 588, 592 (1979). Instead, the supreme court has stated, "In determining whether the evidence adduced at trial was close, a reviewing court must evaluate the totality of the evidence and conduct a qualitative, commonsense assessment of it within the context of the case." *People v. Sebby*, 2017 IL 119445, ¶ 53. "A reviewing court's inquiry involves an assessment of the evidence on the elements of the charged offense or offenses, along with any evidence regarding the witnesses' credibility." *Id*.

¶ 55 Here, the State's evidence of the defendant's guilt did not rest entirely or even substantially upon Heather's credibility. As noted above, the State presented Kandra's excited utterance as substantive evidence that the defendant hit her. As we explained, Kandra made this statement when she was still extremely upset shortly after her fight with the defendant and before she had any time to reflect on what she would say to Officer Timmons. This type of evidence is admissible as an exception to the hearsay rule because, as we have explained, the utterance may be taken as expressing the real belief of the speaker as to the facts just observed by her.

¶ 56 More importantly, the defendant's argument that the evidence was closely balanced fails to acknowledge or account for Brian's testimony. The record established that Brian was a disinterested witness, having first met Kandra on the evening of the incident and having no knowledge of the defendant prior to the incident. Nothing in the record established that he would have any motivation to testify falsely, and his testimony was not otherwise impeached in any way.

¶ 57 Brian drove Heather and Kandra to the two bars prior to driving them to Brandi's house. He specifically testified that Kandra did not have any injuries before she went inside Brandi's house. A commonsense assessment of Brian's testimony includes an acknowledgement that he would have been keenly aware had Kandra sustained the prominent golf ball-sized injury to her forehead at one of the bars and had been bleeding in his car prior to arriving at Brandi's house. The obvious conclusion from Brian's testimony was that Kandra was hit after she went inside Brandi's house, not at a bar as she tried to get the jury to believe. Brandi, the defendant, and crying children were the

only individuals inside Brandi's house. Of those individuals, it was undisputed that Kandra got into a argument with only the defendant.

¶ 58 We also find it compelling that the defendant's witness, Brandi, did not tell the jury that Kandra arrived at her house with a preexisting golf ball-sized knot on her head and blood on her clothes, although Brandi was able to tell the jury that Kandra arrived at her house "inebriated." The jurors viewed photographs of Kandra's injuries, could see the prominence of the knot on Kandra's forehead, and could conclude that the injury was not something that Brandi or Brian would have overlooked.

¶ 59 When Brian's testimony is considered in conjunction with Kandra's excited utterance that the defendant hit her, the evidence in this case (excluding Heather's testimony, her out-of-court statements, and the 9-1-1 recording) was far from closely balanced evidence. It was overwhelming. Therefore, Heather's in-court testimony was not significant with respect to the strength of the State's evidence establishing the defendant's guilt. We also note that the State did not rely on the 9-1-1 recording or Heather's out-of-court statements in its opening statement or closing argument. Compare *People v. Jura*, 352 Ill. App. 3d 1080, 1090 (2004) ("the State substantively relied on the improper hearsay in opening statement and closing argument.").

¶ 60 For these reasons, we are confident that the admission of Timmons's testimony of Heather's out-of-court statements and the admission of the 9-1-1 recording did not change the outcome of this case. *People v. Warlick*, 302 Ill. App. 3d 595, 601 (1998) ("Erroneous admission of hearsay will not be held reversible if there is no reasonable probability the jury would have acquitted the defendant had the hearsay been excluded.").

Accordingly, the defendant has failed to establish the second prong of the *Strickland* standard and has failed to establish the first prong of the plain-error rule with respect to the admission of Heather's out-of-court statements and the 9-1-1 recording. See *White*, 2011 IL 109689, ¶ 134 ("It is clear in this case, having reviewed the record, that defendant cannot show prejudice. There is no reason to go further for purposes of either an ineffective assistance analysis or one founded upon the closely balanced prong of plain error. Both analyses are evidence-dependent and result-oriented. Even if we were to assume, *arguendo*, there was error in the admission of evidence ***, the evidence against defendant is such that he cannot show prejudice for purposes of either analysis.").

¶ 61 CONCLUSION

¶ 62 For the foregoing reasons, the defendant's conviction and sentence are hereby affirmed.

¶ 63 Affirmed.