FIFTH DIVISION
July 15, 2011

No. 1-09-1890

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County, Illinois.
	)	
	)	
	)	No. 09 CR 3001091
v.	)	
	)	
JAMES AMIRANTE,	)	Honorable
	)	Joel Greenblatt,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE JOSEPH GORDON delivered the judgment of the court.

Justices Howse and Epstein concurred in the judgment.

ORDER

Held: Defendant waived his challenge to the admissibility of a 911 tape on foundational grounds by failing to raise that issue at trial and in a post-trial motion. Further, the evidence presented at trial was sufficient to sustain defendant's conviction where circumstantial evidence sufficiently established the identity of the speaker in the 911 tape. Additionally, the facts that the tape was admitted pursuant as an exception to the hearsay rule, and that the victim refused to sign the complaint did not render the evidence

presented at trial insufficient to sustain defendant's conviction. In addition, defendant waived any objection to the variance between the complaint and the proof introduced at trial by failing to raise that objection at trial. Finally, the evidence was sufficient to sustain defendant's conviction for domestic battery where it sufficiently established that the victim had shared a residence with defendant.

¶ 1 Defendant James Amirante was convicted of domestic battery for causing bodily harm to Rachel Witt. Those charges were made in connection with an incident which took place on February 25, 2009, in Palatine, Illinois. On appeal, defendant contends that his conviction should be reversed because the State failed to prove him guilty beyond a reasonable doubt where: (1) the State did not sufficiently establish the identity of the speaker in a recorded 911 call introduced into evidence; (2) the 911 tape was unreliable; and (3) Witt did not sign a complaint and did not appear in court. Defendant further contends that his conviction should be reversed and his cause remanded for a new trial because the trial court improperly admitted the recorded 911 call, and because he was convicted of "shared residence" domestic battery even though he was not charged with that offense.

¶ 2 A complaint was filed against defendant on February 26, 2009, stating that defendant committed the offense of domestic battery against Rachel Witt. The complaint further states, in support of that claim, that on February 25, 2009, defendant, knowingly and without legal justification, caused bodily harm to Rachel Witt, girlfriend of the defendant, in that he cut her on the left thumb with a knife, causing a small bleeding laceration in her thumb. The complainant is Officer Bruce Morris, who signed and verified the complaint, being duly sworn, as a true

statement.

¶ 3 At trial, the State called Ms. Christine Gonzalez, a dispatcher who testified that at about 2:40 pm in the afternoon in question, she answered a 911 call that was a hangup. Pursuant to their standard procedure, Gonzalez called that number back to verify whether help was needed and if so, to get additional information. Although Gonzalez could not initially recall that incident, her memory was refreshed when she reviewed the State's exhibit 3A, which was the case report that she wrote at the time of the phone call. According to Gonzalez, when she called that number back someone named Rachel Witt answered the phone. That phone call was recorded and the tape was preserved as part of the course of normal operations at that dispatch. Gonzalez brought a copy of that recording to court, and testified that to the best of her knowledge, it was a true and accurate copy of the conversations between herself and Witt on or about February 25, 2009. The trial court then allowed the State to publish the contents of the recorded tape over defense counsel's objection that the contents of the tape were inadmissible hearsay because the declarant was unavailable and her statements are testimonial, as explained in *Crawford v. Washington*, 541 U.S. 36 (2004). Before the tape was played, defense counsel presented to the court a transcript made from a copy of the recorded phone call, not as an exhibit, but to make it easier for everyone to follow along. Counsel for the State did not object to the document and stated that it was an accurate transcript of the tape.

¶ 4 The audiotape of the 911 phone call was played in open court and not transcribed by the court reporter. A copy of the transcript presented by defense counsel is now part of the supplemental record, which the trial court allowed defendant to file, having found that such

transcript is a true and accurate copy of the tape utilized at trial.

¶ 5 The transcript revealed the following exchange:

"D[ispatcher]: 911 where do you need assistance?

C[aller]: Hello.

D: Hi. This is the police department. What...

C: Hi. I just had my boyfriend come after me with a knife.

D: Where are you?

C: 1487 N. Denton. I'm trying to leave the house and he's blocking me from leaving.

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D: In what town?

C: Palatine Illinois.

D: In Palatine, okay. Hold on one second, let me get'em started okay. Where's he at right now?

C: He left.

D: He left.

C: He told me if I, he told me if I called the police, he'll get my kid taken away from me. So I called a few minutes ago and somebody called me back and I said there was no problem, I was just trying to leave and then he came after me with a knife. He just fled, he just left.

D: Okay, hold on one second. Okay, did he hurt you?

C: He cut my finger a little bit. I was able to get the phone. When he realized I

called 911 he dropped, and he left really fast, 'cause he didn't want to get caught.

D: Okay, uh, did he leave, did he leave on foot?

C: Yeah he did. He hit my daughter with a toy.

D: Okay, okay.

C: She's 18 months old. He hit her with a toy. He threatened to get her taken away and then came after me, and...

D: Okay. Does anyone need an ambulance? Does she need an ambulance.

C: No she's alright.

D: How about you for your finger.

C: No, it's just a little cut.

D: Okay, hang on. Give me a description of him. Is he white, black, Hispanic?

C: He's white, 5'5". He's got dark brown hair. He's got a hat on a black coat, jeans and tan boots.

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D: Tan boots. Okay. You're sure he didn't leave in a car. Does he have a car?

C: No he has a car, but he's drunk so he couldn't drive it. I was actually gonna leave in his car and go home.

D: Okay he is intoxicated?

C: Yeah.

D: Okay where's the knife? Did he take it with him or did he leave it there?

C: He probably dropped it. I don't know what he did with it to be honest with you.

D: Okay.

C: He had a big knife. He told me he was going to kill me about 15 minutes ago. He told me if I called the police, he'd get my kid taken away. I was just trying to leave and then he hit me with something. I started yelling at him and I..

C: He hit my daughter she's 18 months old, so I pushed him away from her. And then...

D: Okay. What's his name?

C: James Amirante. He goes by Jimmy.

D: Wait, wait, wait. Spell that last name.

C: A-m-i-r-a-n-t-e.

D: Alright, James. And what's his middle initial?

C: R.

D: R. What's his date of birth?

C: June June uh 20, 1979.

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D: Okay what's your name?

C: My name is Rachel Witt.

D: W-i-t-t.

C: Correct.

D: What's your middle initial?

C: M.

***.

D: Okay. What's your date of birth?

C: May 19, 1989.

D: Okay hang on one second. And you don't know where he went?

C: No he just left. As soon as... [h]e was dragging the phone away from me 'cause I was trying to call the I?? When he came around the door with the knife and I and I and I had him in the door and he was stronger he pushed open the door.

D: Okay. Is this? I'm sorry to cut you off. Is this a house or an apartment?

C: It's a townhouse.

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D: Alright, alright. Did you see which way he went?

C: No, ma'am. I didn't. I'm sorry. He probably went toward Smith Road. His dad's coming to pick him up right now.

D: And what kind of car does his dad drive?

C: A black Mercedes, but his dad's about an hour away so I don't know where he could have went.

D: Okay.

C: He might have called a cab or something to pick him up and take him to his grandma's house. Police officers are in front right now.

D: Okay go talk to them, okay.

C: Alright, thank you.

D: You're welcome, bye bye."

¶ 6 After the tape was played, Gonzalez testified that one of the voices on the tape was her own and the other was someone who identified herself as Rachel Witt, and that to the best of her recollection, that was her entire conversation with her. According to Gonzalez, Witt sounded upset and winded during that conversation. Gonzalez admitted, on cross-examination, that she had never heard Witt before that phone call and would not know what her voice normally sounded like. She stated that only a "couple of seconds" elapsed between the time Gonzalez picked up a hangup phone call and when she called that number back. Gonzalez further acknowledged that she was not aware of any prior 911 phone calls made by Witt, in which she told a dispatcher that there was no problem. She explained that there were thirteen dispatchers who could have answer that prior call.

¶ 7 After Gonzalez' testimony, the State moved to admit the tape into evidence, which the trial court allowed over defense counsel's renewed objection on the grounds that the contents of that recording are inadmissible hearsay under *Crawford*, 451 U.S. 36, because the caller's statements were testimonial in nature and the declarant was not available for cross-examination. In doing so, the trial court found that the contents of the tape were admissible as an excited utterance, and that it was not testimonial in nature.

¶ 8 Palatine police officer Bruce Morris testified three times throughout the proceedings, first when he was called by the State during its case-in-chief, again when he was called by defendant, and again, as discussed later, during the State's rebuttal. When called by the State, the officer testified that on February 25, 2009, at about 2:00 pm, he was dispatched to 1487 North Denton

Drive, in Palatine, Illinois, in response to a domestic violence call. According to Officer Morris, the dispatcher had informed him that there had been a domestic disturbance between a man and a woman, during which the woman was cut with a knife. When Officer Morris arrived, there were other officers already at the scene, and he observed a female, who later identified herself as Rachel Witt, standing outside the garage with her 19-month old daughter. Witt appeared agitated and upset, and the officers did not find any offenders that were involved in the incident at that location.

¶ 9 Officer Morris observed Witt speak on the telephone shortly after arriving at the scene, and she handed the phone to him. The officer spoke to the person on the line, defendant's father Sam Amirante, who Officer Morris knew as a former judge at the Third District.

¶ 10 Additionally, Officer Morris observed a small laceration on the webbing area of Witt's left hand by her thumb, which was about a quarter of an inch in size and appeared to have been caused by a sharp object. He also saw a trace amount of blood on that area of Witt's hand, and while it appeared to have some dried blood on it, there was no scab or scarring. When he asked Witt what had caused an altercation between herself and other individuals living at the address, Witt told the officer that she and defendant had been fighting all day. Witt did not allow her injuries to be photographed, and refused to sign a complaint. Officer Morris stated that he secured the scene to make sure that defendant was not present, and that after a quick plain view search of the residence, he did not find a knife. Further, the officer did not see any smashed toys or any indication of a fight or struggle within the house.

¶ 11 Officer Morris ascertained, through Witt, bond slips and defendant himself that defendant

lives at that residence. According to Officer Morris, Witt informed him that she also resided at that address. The officer further testified that Witt was moving personal items out of that residence, such as diaper bags, baby clothes and toys, and loading them into a vehicle, and that he assisted her in doing so. He then followed Witt to the police station. Officer Morris further stated that while Witt refused to sign a complaint, he later determined, after speaking to his supervisors, that a complaint had to be signed.

¶ 12 The officer further testified that he spoke to defendant on the phone shortly after the incident and explained that he was investigating the matter and that he would like to speak to defendant at a later date. Defendant responded that he was at his attorney's office and that he would speak to Officer Morris when he was needed. According to Officer Morris, defendant subsequently went to the police station, where he was placed under arrest.

¶ 13 Officer Morris acknowledged, on cross-examination by defense counsel, that he did not state in his police report that Witt's wound appeared to be fresh or bleeding. He further acknowledged that the address listed for Witt in his report was 1909 West Addison, in Chicago, Illinois, not the address in Palatine. The officer further testified on cross-examination that when Witt described the incident, she told him that she observed defendant pick up a knife while they were in an argument, she then went into a bedroom to call 911. She explained to the officer that when she attempted to close the door, defendant forced his way into the bedroom where she was trying to hide and a physical struggle ensued. She did not give the officer additional details of how her hand was cut. On re-direct examination, Officer Morris testified that Witt told him that defendant was holding a knife when he came after her in the bedroom and that he still had the

knife while he was trying to force the door open and they physically struggled. While defense counsel objected to that line of questioning based on hearsay, the trial court overruled it, finding that defense counsel had "opened that door" during his cross-examination of the officer.

¶ 14 When called by defense counsel, Officer Morris further testified that Witt told him that defendant smashed a toy on the ground which struck her daughter in the eye, but that he had not thrown the toy at the child. He further stated that Witt told him that during her struggle with defendant, she tried to close the door while defendant put his arm between the door and the door jamb. Officer Morris did not observe any bruises, marks or other indication of a struggle on defendant at the time of his booking, and with regard to Witt, the officer also did not see any bruises or marks other than the cut on her left hand. In addition, the officer stated that Witt drove to the police station in a white Chevy Tahoe that belonged to defendant, and was waiting for defendant's father to assist her in going home. Further, other than the aforementioned struggle, Witt never told Officer Morris that defendant hit her at any other time, or that he had ever threatened to kill her. Additionally, the officer stated that Witt initially cooperated with the investigation, but did not want to pursue charges against defendant. Officer Morris never saw Witt appear in court, and while she was subpoenaed to appear in court, the Cook County deputy sheriff was unable to serve her.

¶ 15 After the State rested, defendant called Andrea Jabbour, who is Sam Amirante's legal assistant, and a co-worker and friend of defendant. Jabbour stated that she had worked for Sam Amirante for about one year, and that she knew defendant for at least that same amount of time. Jabbour further testified that at about 2:36 pm in the afternoon in question, she received a call

from defendant's father, who asked her to pick defendant up at a restaurant called the Paletine Inn and drive him to his grandmother's house. Defendant's father told her that defendant had been involved in a confrontation with Witt and needed to leave his house. Jabbour then drove to that restaurant, where defendant was waiting for her outside. According to Jabbour, defendant was wearing blue jeans, brown work boots, a white t-shirt, a wool jacket and a hat. Jabbour further testified that defendant appeared disturbed or nervous at that time, but he did not appear intoxicated. His speech was not slurred, his eyes were not bloodshot and she did not smell alcohol. Jabbour then dropped defendant off at his grandmother's house, which Jabbour was unsure whether it was located in Palatine or Arlington Heights, and was back at the office by 3:00 pm.

¶ 16 Additionally, Jabbour testified on cross-examination that she did not know if Witt was defendant's girlfriend and had not known her to live at defendant's house. Jabbour stated that while she drove defendant to his grandmother's house, he told her that he had a few arguments with Witt and she refused to leave, so he "took the initiative and left the house."

¶ 17 Defendant then called defendant's father Sam, who stated that he received a phone call from defendant at approximately 2:32 pm on the day of the incident. Sam could hear Witt's voice in the background yelling "I'll kill you motherfucker," and "I'm going to get you." Sam further testified that defendant told him in a calm manner "[d]ad, Rachel is flipping out again. What am I going to do? She's hitting me. She's yelling." In response, Sam told defendant to leave the house, which defendant did. Defendant's father further stated that he asked defendant whether he had laid a hand on Witt, defendant responded that he had not. After that phone call

with defendant, Sam called Jabbour on her cell phone to pick him up.

¶ 18 According to Sam, he spoke to defendant a number of times during that incident, and never overheard Witt say anything about a knife. Sam later gave Witt a ride to her home, which was in Chicago. He acknowledged that he saw several of Witt's belongings in defendant's car, which she had driven to the police station, and answered yes when asked if he helped her unload those belongings at her "grandmother's house." Sam further stated that he had spoken to Witt after the incident, and within the week before trial.

¶ 19 On cross-examination, defendant's father testified that he did not know whether defendant and Witt were ever dating, and stated that answering that question would call for a "conclusion" on his part. He acknowledged that he had known Witt for about one year, and that he had seen Witt and defendant together in a social setting. Sam further stated that he knew that Witt visited defendant's home in Palatine, but he did not know whether Witt was living with defendant and could not say whether he had seen Witt's personal belongings at defendant's home. In addition, defendant's father stated that he was aware that at one point Witt was pregnant, but did not know whether defendant was the father of her child.

¶ 20 Sam further stated that he went to the Palatine police department on the day in question and spoke to police personnel about the incident involving defendant and Witt. He spoke to Officer Morris a number of times, but Sam stated that he was never asked about what he heard Witt say to defendant during the incident. Sam further acknowledged that later that night, he brought defendant to the police station after Officer Morris contacted Sam and told him that defendant was going to be arrested. In addition, defendant's father stated that when he became

aware of the allegations against defendant, he told the officers, not in a formal interview, that he "heard this girls flipping out." At that time, he also told the watch commander about the threats that he heard Witt make against defendant and that she had struck defendant.

¶ 21 After the defense rested, the State called investigator Ralph Chiczewski, who testified that since March 25, 2009, Investigator Chiczewski tried to serve Witt approximately four times at two different addresses. One of those addresses was defendant's address at 1487 North Denton Avenue in Palatine, and the other being 1909 West Addison in Chicago, where she went after the incident. The investigator further testified that he was ultimately unable to serve Witt, and that he learned from Witt's neighbors that she lived at the 1487 North Denton address. In addition, investigator Chiczewski stated that he first attempted to serve Witt at the 1909 Addison address, but speaking to Witt's mother at that address led him to the address at 1487 North Denton.

¶ 22 As previously mentioned, the State re-called Officer Morris during rebuttal. At that time, the officer testified that on the evening of the incident, defendant's father went to the Palatine police station. The officer stated that he had known Sam for several years as the presiding judge in Officer Morris' traffic key. In addition, the officer testified that although Witt did not want to press charges, his supervisors informed him, after reviewing Officer Morris' report, that this case necessitated an arrest. The officer further stated that once the decision was made to charge defendant, he went to defendant's home, but nobody answered the door. Officer Morris then tried to call defendant, and after leaving him a voice mail, the officer called defendant's father.

¶ 23 Sam subsequently brought defendant to the police station at about 10:00 pm that night,

and while defendant and his father were both cordial with the police officers and defendant was compliant, there was a disagreement with Sam. Officer Morris stated that defendant appeared to be intoxicated, in that he had an odor of alcoholic beverages in his breath, glassy eyes, slurred speech and admitted to the officer that he had drunk a fifth of rum.

¶ 24 According to Officer Morris, defendant's father was at the police station approximately half an hour, during which time he spoke to Officer Morris and other officers. Officer Morris testified that during that conversation, Sam alluded to a confrontation between defendant and Witt, but the officer could not recall whether Sam told him that Witt had struck defendant, or whether Sam told him that he heard Witt's statements over the phone as he spoke to defendant that day. According to Officer Morris, Sam told him that when he spoke to defendant, he was told that Witt and defendant had been arguing all day. However, the officer stated that Sam did not tell him that he overheard Witt over the phone saying to defendant "I will kill you, M-F," or "I'm going to get you."

¶ 25 On cross-examination, Officer Morris acknowledged that he did not write a report relating the conversation that he had with defendant's father. He also acknowledged that he did not mention defendant's apparent intoxication in his police report.

¶ 26 After the parties' closing arguments, the trial court found defendant guilty of domestic battery. In doing so, the court noted that it was hard to believe that Witt would know defendant's birth date if they had not been in a relationship, but that it would not make that "quantum leap" because it was not necessary. The court then found that it was clear that the parties had a shared residence. The trial court further found that the 911 tape was admissible evidence because it was

clear from the tape that the complaining witness was agitated and excited, and that the questions asked by the dispatcher were nonprosecutorial, and were appropriate to determine what emergency services were needed at the scene.

¶ 27 The trial court subsequently sentenced defendant to 18 months conditional discharge, domestic violence counseling, 10 days in the sheriff's work alternative program, 30 days in-patient treatment at Haymarket and no contact with Witt. Defendant filed a motion for a new trial and a supplemental post-trial motion in which he claimed that there was insufficient foundation to establish the identity of the caller heard on the recorded 911 call, which was denied. In addition, defendant filed a postjudgment motion to modify the conditions of the sentence and vacate the no-contact provision because Witt was, at that time, pregnant with defendant's child and did not want an order of protection from defendant. The trial court denied that motion, noting that Witt was the complaining witness in a different felony case which was then pending against defendant.

ANALYSIS

¶ 28 On appeal from the trial court's judgment, defendant first contends that his conviction should be reversed, and his cause remanded for a new trial, because the trial court erred in admitting the tape of Witt's 911 phone call into evidence. At trial, defendant objected to the 911 tape on the ground that it violated the Confrontation Clause under *Crawford*. On appeal, however, he does not challenge the admissibility of the 911 tape on the grounds that it was

hearsay[1] or that it violated his right to confront his accuser, but raises this challenge solely on foundational grounds because the identity of the speaker was never established. While he does not challenge the admissibility of the tape on hearsay or Sixth Amendment grounds, he raises those arguments, as discussed below, as a challenge to the sufficiency of the tape to prove that he committed battery against Rachel Witt. The State responds that defendant forfeited his challenge to the admissibility of the tape because he failed to raise this objection at trial or in a written postjudgment motion. According to the State, while defendant objected to the admission to the tape on the grounds that it violated the Confrontation Clause, he did not object to the tape's admissibility on foundational grounds.

¶ 29 It is well established that to preserve an issue for review, a defendant must both object at trial and include the alleged error in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Thus, where a defendant raises an issue in a posttrial motion but does not object at trial, that issue is forfeited. See e.g. *People v. Fillyaw*, No. 1632350 slip op, *12 (defendant forfeited a claim on appellate review where he raised it for the first time in a posttrial motion). Here, when defendant objected to the 911 tape at trial, he based that objection specifically on a claim that it violated the Confrontation Clause under *U.S. v. Crawford*. At no time during trial did defendant raise the issue of whether the State had presented sufficient foundation with respect to the identity of the caller heard on the tape. Although defendant raised that specific issue in a supplemental posttrial motion, he did not raise that objection at trial, and therefore, failed to

[1]Defendant does not challenge the trial court's finding that the contents of the tape fall under the excited utterance exception to the hearsay rule.

preserve that issue for appellate review.

¶ 30 Notwithstanding the forfeiture rule, we note that Illinois Supreme Court Rule 615(a) (eff. Jan. 1, 1967), creates an exception to that rule by allowing reviewing courts to note "plain errors or defects affecting substantial rights." Under the plain error rule, a reviewing court may consider a forfeited error "when the evidence in a case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence" or "when the error is so serious that the defendant was denied a substantial right, and thus a fair trial." *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). Our supreme court explained that the closely balanced prong of the plain error doctrine "guards against errors that could lead to conviction of an innocent person," and the substantial-rights prong "guards against errors that erode the integrity of the judicial process and undermine the fairness of defendant's trial." *Herron*, 215 Ill. 2d at 186.

¶ 31 However, where a defendant neither argues that the evidence was closely balanced nor shows that the errors were so serious that they must be remedied to preserve the integrity of the judicial process, he waives any argument that plain error should be invoked on review. *People v. Greer*, 336 Ill. App. 3d 965, 981 (2003). Since defendant in this case has not argued that his claim should be reviewed under the plain error doctrine because the evidence was closely balanced or that he was denied a substantial right, he waived that argument.

¶ 32 Moreover, even if we were to review defendant's contention under the plain error doctrine, that would not change our conclusion. It is well established that in order for plain error to exist, we must first determine if an error actually occurred. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008).

¶ 33 According to defendant, there was insufficient foundation establishing the identity of the caller heard on the 911 tape because there was no testimony as to whether the voice heard on the tape was, in fact, Witt's. Defendant maintains that since there was no evidence that the voice on the tape was Witt's, the identity of the caller was not sufficiently established and the trial court erred in admitting the tape into evidence.

¶ 34 The admissibility of evidence at trial is within the sound discretion of the trial court, and that court's rulings will not be overturned absent showing of an abuse of discretion. *People v. Illgen*, 145 Ill. 2d 353, 364 (1991). Sound recordings which are otherwise competent, are admissible only if proper foundation is laid to ensure its reliability and authenticity, including identification of the voices. *People v. Rios*, 145 Ill. App. 3d 571, 582 (1986). Further, our supreme court has held that " 'telephone conversations, the substance of which is relevant and material to the issues, are competent provided that the identity of the person with whom the conversation was had is established by direct evidence or *facts and circumstances*.' " *People v. Edwards*, 144 Ill. 2d 108, 167 (1991), quoting *People v. Nichols*, 378 Ill. 487, 490 (1941).

¶ 35 In *Edwards*, 144 Ill. 2d at 167, our supreme court held that the tape recordings of telephone calls for ransom were properly admitted as evidence that defendant committed kidnaping and murder where there was no direct evidence of the caller's identity, but there was sufficient circumstantial evidence of defendant's identity as the caller to establish proper foundation. The State, in that case, introduced into evidence the tape recordings of ransom calls made by defendant to the victim's wife, but did not introduce evidence of recognition of defendant's voice. *Edwards*, 144 Ill. 2d at 167. The circumstantial evidence presented to

establish the identity of the caller included the testimony of an acquaintance of defendant's, who saw defendant on the phone inside a telephone booth within minutes from the time one of the calls was made. *Edwards*, 144 Ill. 2d at 167. Additionally, an officer testified that he saw a "white male," which fit defendant's description, at the telephone booth where another ransom call had been traced to, within seconds of the time the call was placed. *Edwards*, 144 Ill. 2d at 167-68. While defendant's wife testified that the caller's voice was the same in all four ransom calls, and recognized her husband's voice in one of them, she did not identify defendant as the caller. While the State did not introduce any evidence with respect to the recognition of defendant's voice in that case, the supreme court found that the circumstantial evidence of defendant's identity as the caller was nevertheless sufficient to establish foundation by which the tapes were admitted as evidence that defendant committed the offense charged. *Edwards*, 144 Ill. 2d at 167.

¶ 36 In this case, while there was no testimony that the voice on the tapes of the 911 call was Witt's, the person who spoke to the 911 dispatcher on that call identified herself as Rachel Witt, and gave her date of birth as May 19, 1989, which defendant has not challenged. In addition, she gave the dispatcher her location as 1487 North Denton Avenue, in Palatine, Illinois, which is defendant's address, and where Officer Morris spoke to Witt minutes later. Further, the caller gave the dispatcher defendant's name, middle initial and nickname, his physical description and date of birth, which has also not been challenged, and described his clothing. Jabbour, a defense witness, testified to the clothing that defendant was wearing that day, which matched the description given the dispatcher on the 911 phone call. The caller also told the 911 dispatcher

that her boyfriend had cut her finger, and Officer Morris testified that he observed a small laceration on the webbing near Witt's left thumb. Additionally, the caller told the dispatcher that she and defendant had a physical struggle when she tried to close a bedroom door and he tried to open it and enter, which according to Officer Morris' testimony, was substantially what Witt told him at the scene. Under these circumstances, we conclude that there was sufficient evidence of Witt's identity as the caller to establish foundation by which the tape of the 911 phone call was admitted into evidence. Accordingly, the trial court did not abuse its discretion in admitting the tape into evidence, and there would, therefore, be no error, even if the doctrine of plain error had not been forfeited.

¶ 37 Defendant's reliance on *Smith v. Seiber*, 127 Ill. App. 3d 950 (1984), and *Holland v. O'Shea*, 342 Ill. App. 127 (1950), for the proposition that a telephone conversation is inadmissible without recognition of the speaker's voice, is misplaced. In *Smith*, 127 Ill. App. 3d at 956, the court held that testimony with regard to a telephone conversation that she had with defendant's wife was admissible regardless of whether she recognized defendant's wife's voice because the call was answered at defendant's place of business and the conversation was about defendant's business. In *Holland*, 342 Ill. at 128-29, where the court held that testimony with respect to a telephone conversation was inadmissible not only because the witness did not recognize the other speaker's voice, but also because there was no other evidence of the identity of the speaker to establish foundation.

¶ 38 Defendant next contends that his conviction should be reversed because the State failed to prove beyond a reasonable doubt that he committed domestic battery against Witt, or for that

matter, any battery. Similarly to his previous contention, defendant now argues that the contents of the 911 call were insufficient to establish that he committed battery because the identity of the caller not sufficiently established. He further maintains that the contents of the 911 phone call were unreliable hearsay which, even in conjunction with Officer Morris' testimony, are insufficient to prove that he committed domestic battery. In addition, defendant argues that the evidence was insufficient to sustain his conviction because Witt refused to sign a complaint and avoided participating in the proceedings.

¶ 39 In a bench trial, it is for the trial court, the trier of fact, to weigh the evidence and draw reasonable inferences therefrom, resolve any conflicts in that evidence and determine the credibility of the witnesses. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). As the trier of fact, the court is not required to accept any possible explanation consistent with the defendant's innocense, and a reviewing court will not reverse a conviction merely because certain evidence is contradictory or because defendant alleges that a witness is not credible. *Siguenza-Brito*, 235 Ill. 2d at 228-29.

¶ 40 Under the Illinois Criminal Code of 1961, a person commits domestic battery when he knowingly or intentionally without legal justification causes bodily harm to a family or household member. 720 ILCS 5/12.3.2(a)(1) (West 2009). In addition, the Illinois Code of Criminal Procedure of 1963 defines "family or household members" to include "persons who share or formerly shared a common dwelling," as well as "persons who have or have had a dating or engagement relationship." 725 ILCS 5/112A-3(3) (West 2009).

¶ 41 As discussed above, we have already concluded that the State presented sufficient

circumstantial evidence to establish that the caller heard on that tape was Witt. Thus, such circumstantial evidence was sufficient to permit the trial court to infer that Witt was the caller heard on the recorded 911 call.

¶ 42 Moreover, defendant contends that the evidence adduced at trial was insufficient to sustain his conviction because the 911 tape was hearsay evidence which violated his right to confront his accuser. Defendant argues that the testimony on the tape was unreliable because it violated his Sixth Amendment right to confrontation, and because it was hearsay, which, according to defendant, is inherently unreliable.

¶ 43 Defendant does not show that failure to meet the *Crawford* standard renders the evidence insufficient. Rather, failure to meet the *Crawford* standard would render that evidence inadmissible. In point of fact, however, we note that contrary to defendant's contention, Witt's testimony on the tape does not violate defendant's right to confrontation under the Sixth Amendment. The Supreme Court has held that the Confrontation Clause of the Sixth Amendment bars " 'admission of testimonial statements of a witness who did not appear at trial unless he was unable to testify, and the defendant had a prior opportunity for cross-examination.' " *Davis v. Washington*, 547 U.S. 813, 821 (2006), quoting *Crawford v. Washington*, 547 U.S. 36, 53-54 (2004). However, the Court in *Davis*, 547 U.S. at 821-22, held that when statements made in the course of police investigation to assist the police during an emergency, those statements are nontestimonial, and therefore, not subject to the Confrontation Clause.

¶ 44 In *Davis*, 547 U.S. at 817-18, the victim of a domestic disturbance made several statements to a 911 operator with regard to what her attacker was doing. In that same call, the

victim also told the operator the defendant's name, that he was at home at first, and then left the house. *Davis*, 547 U.S. at 818. That victim did not testify at the defendant's trial, and the trial court allowed into evidence the 911 tape. *Davis*, 547 U.S. at 818. In affirming that ruling the Supreme Court found that the admission of the tape did not violate defendant's right to confrontation because they were not made to establish some past fact, but to describe an ongoing emergency which required police assistance, and were therefore, nontestimonial. *Davis*, 547 U.S. at 827-29. More recently, in *People v. Chmurra*, 401 Ill. App. 3d 721, 723-26 (2010), this court found that a domestic battery victim's statements to the 911 operator were not inadmissible under *Crawford*, even though they were made after she fled to a neighbor's house. The court found that those statements were nontestimonial because the operator's questions about the incident were made to determine whether medical attention was needed, whether her son was in danger and what behavior the police may expect when confronting her husband. *Chmurra*, 401 Ill. App. 3d 721, 723-26; see also *People v. Dominguez*, 382 Ill. App. 3d 757, 767-68 (2008) (tape of 911 call from a domestic battery victim was nontestimonial where she frantically told the operator that she was fleeting defendant and what her injuries were). Thus, even if a victim's statements are about past events, they are not deemed testimonial under *Crawford* if the declarant was not simply recounting the events, but made those statements to assist law enforcement during an ongoing emergency.

¶ 45 In this case, Witt told the 911 dispatcher that she just had her boyfriend come after her with a knife, and said "I'm trying to leave the house and he's blocking me from leaving." Witt then told the dispatcher that when she got to the phone, defendant left the house. Gonzalez, the

dispatcher, then asked Witt several questions with respect to whether she or her daughter were hurt, where her location was, and what defendant was wearing. Gonzalez testified at trial that Witt sounded upset and winded during the call. It appears that those statements were made to enable police assistance during an ongoing emergency, since Gonzalez' questions were made to ascertain whether an ambulance was needed and to elicit information that would allow police to identify defendant. Accordingly, those statements were nontestimonial and therefore not barred by the Confrontation Clause.

¶ 46 We next note that defendant's argument that because the 911 tape is hearsay, it lacks reliability, similarly unpersuasive. It is well recognized that hearsay statements which fall under the excited utterance exception to the hearsay rule are deemed reliable because they are made in the "absence of time to fabricate." *People v. Victors*, 353 Ill. App. 3d 801, 809 (2004); see also *White v. Illinois*, 502 U.S. 346, 355-56 (1992) (recognizing that excited utterances are made in contexts providing substantial guarantees of trustworthiness). Furthermore, this court has found that where hearsay testimony is admitted as an excited utterance from a declarant who is unavailable for cross-examination with regard to the accuracy of his perception, factors relating to such accuracy could be developed through examination of other witnesses at trial and argued to the fact finder to discredit the reliability of that declaration. *People v. Fields*, 71 Ill. App. 3d 888, 894 (1979). Thus, the weight and credibility to be given to those statements would be properly considered by the trier of fact in reaching a finding. See *Fields*, 71 Ill. App. 3d at 894 (affirming a conviction where the testifying witness, a police officer, was properly allowed to testify to defendant's license plate number which he learned from speaking to several bystanders

and admitted as an excited utterance).

¶ 47 Here, the 911 tape was admitted under the excited utterance exception to the hearsay rule, which has inherent weight insofar as it does not require unavailability of the declarant. See e.g. *White*, 502 U.S. at 355-56. Moreover, while Witt was not available for cross-examination, defendant could, and did in fact, examine other witnesses with regard to factors relating to the veracity of Witt's statements. He called his father, who testified that defendant had told him that it was Witt who had hit defendant and was "flipping out," just before defendant left the house. Further, defendant elicited testimony from Officer Morris that he did not see signs of a struggle. However, despite such evidence of the unreliability of the 911 tape, Officer Morris also testified to what Witt told him at the scene, namely, that she and defendant argued all day, he picked up a knife and came towards her, and they struggled while he was trying to open a door and she tried to close it. The officer also testified that he observed a laceration near Witt's thumb, which corroborated her statements to the 911 operator. Under those circumstances, while the 911 tape was hearsay, it possessed the inherent reliability of an excited utterance, and the totality of the evidence adduced at trial was sufficient to allow a reasonable trier of fact to infer that defendant did, in fact, cut Witt's left hand beyond a reasonable doubt.

¶ 48 Defendant's reliance on *People v. McCoy*, 44 Ill. 2d 458 (1970) and *Looby v. Buck*, 20 Ill. App. 2d 156 (1959), is misplaced. Unlike the taped testimony in this case, the hearsay testimony in *McCoy*, 44 Ill. 2d at 459-60, was introduced through the State's Attorney, who was the State's only witness, and there was no evidence that the testimony from the witnesses who told him about the automobile accident in question could be verified in any way. Further, in *Looby*, 20 Ill.

App. 2d at 161, the hearsay evidence presented at trial was not an excited utterance, and nothing in the record established that the declarant had personal knowledge upon which he had based his out-of-court statement. In contrast, the 911 tape in this case contained excited utterances describing a recent incident, and were made by the victim of the alleged battery.

¶ 49 We now turn to defendant's contention that the evidence was insufficient to sustain his conviction because Witt refused to sign a complaint, did not appear in court and avoided participating in the proceedings. He argues that Witt's actions in not signing the complaint or testifying in the proceedings tends to discredit her statements to the dispatcher and to Officer Morris as to how she was cut. According to defendant, it would have been natural for a victim to file a complaint and testify against the accused, and Witt's failure to sign the complaint and reluctance to participate in the proceedings therefore, discredit her prior statements that defendant cut her.

¶ 50 However, the complaint against defendant does not constitute evidence of the offense charged, and the victim's refusal to sign it does not repudiate evidence already provided. Additionally, we can only speculate the reasons for Witt's reluctance to participate in the proceedings against defendant, and such refusal on her part does not deter the trial court from drawing the inference of defendant's guilt based on other evidence presented at trial. We recognize that Witt, the alleged victim of domestic battery, chose not to pursue charges against defendant, did not testify against him, and while investigator Chiczewski tried to serve her with subpoenas to appear in court, she appears to have avoided service. Nevertheless, the evidence on record also indicates that at the time of the offense, that she told the dispatcher that she had been

attacked by her boyfriend, and she told Officer Morris that she lived with defendant. The evidence further indicates that defendant's father helped Witt move her belongings to another location after the incident, and that he has spoken to her since that time. In addition, Witt's statements to the 911 dispatcher as to how she was cut, namely, that she tried to close a bedroom door, defendant picked up a knife and the two of them physically struggled, was consistent with the statement that she gave Officer Morris at the scene. Under these circumstances, it would have been permissible for a trier of fact to conclude that defendant did, in fact, commit battery against Witt, and that her reluctance to pursue charges and participate in the proceedings is explained by her young age, and her relationship with defendant and his family.

¶ 51 Defendant further maintains that it was a violation of his right to due process to allow the police to sign the complaint where the victim, was not a minor. Additionally, he argues that the complaint was unverified, and therefore defective, because it was based on hearsay evidence, namely, Witt's statements to Officer Morris.

¶ 52 We note that while defendant purported to frame those arguments as a challenge to the sufficiency of the evidence to sustain his conviction, those are challenges to the validity of the complaint. As such, it is well established that where a defendant fails to object to the form of a complaint at trial, he waives any alleged defects in the complaint and therefore, cannot raise that issue for the first time on appeal. *People v. Jenkins*, 20 Ill. App. 3d 727, 731 (1974). In fact, as previously noted, the failure to raise an issue other than a challenge to the sufficiency of the evidence in a written post-trial motion results in the waiver of that issue on appeal. *Enoch*, 122 Ill. 2d at 186-190. In this case, defendant did not challenge the validity of the complaint in a pre-

trial motion, during trial, or in a post-judgment motion and has, therefore, waived that issue on appeal.

¶ 53 Furthermore, even assuming, *arguendo*, that defendant had not waived his challenges to the validity of the complaint, those contentions lack merit. With respect to defendant's contention that his right to due process was violated because it was Officer Morris, rather than Witt, who signed the complaint, that argument is unpersuasive. Defendant appears to argue that allowing Officer Morris to sign the complaint violated due process because a complaint signed by a party other than the victim is fatally defective. However, nothing in the Illinois Code of Civil Procedure requires the victim of a misdemeanor to be the signatory of the complaint, and Illinois courts have recognized instances where a charge was properly initiated by a complaint signed by a third party.

¶ 54 The Code of Criminal Procedure provides that, in Illinois, prosecution may be commenced by a complaint, an information, or an indictment. 725 ILCS 5/111-1 (West 2009). In addition, the statute requires a criminal charge to allege the commission of the offense by: (1) stating the name of the offense; (2) citing the statutory provision allegedly violated; (3) setting forth the nature and elements of the offense charged; (4) stating the date and county of the offense as definitely as can be done; and (5) stating the name of the accused, if known. 725 ILCS 5/111-3(a). It also provides that "a complaint shall be sworn to and signed by the complainant; provided that when a peace officer observes the commission of a misdemeanor and is the complaining witness, the signing of the complaint by the peace officer is sufficient to charge defendant with the commission of the offense." 725 ILCS 5/111-3(b). Nothing in the language

of the statute requires that the victim of a misdemeanor, such as domestic battery, must be the person who signs the complaint. Further, while the Code requires the complaint to be verified, the right to be charged by a verified complaint is waived if defendant proceeds to trial without raising any objections. *People v. Wydra*, 265 Ill. App. 3d 597, 609-10 (1994).

¶ 55 In fact, courts of this state have recognized that a complaint may be signed by a third party, and upheld convictions based on complaints that were signed by someone other than the complaining witness. In *Jenkins*, 20 Ill. App. 3d at 731, the court held that a complaint was not fatally defective where it named one person as the complainant, but was signed by the victim's mother. *Jenkins*, 20 Ill. App. 3d at 731 The complaint in that case was signed by someone other than the complainant, and bore no verification. *Jenkins*, 20 Ill. App. 3d at 731. While the court noted that normally a complaint would be fatally defective if it names one complainant, is signed by someone else and bears no verification, it found that defendant had waived the verification requirement by failing to raise an objection at trial. *Jenkins*, 20 Ill. App. 3d at 731. It then found that, since the lack of verification had been waived, the errors on the complaint were not sufficient to devitalize it. *Jenkins*, 20 Ill. App. 3d at 731.

¶ 56 In this case, Officer Morris was named as the complaining witness and the signatory of the complaint against defendant. Although he was not the alleged victim, he positively verified the complaint as a sworn statement. Thus, although Witt refused to sign the complaint, and the police department signed it instead, that practice does not appear to violate Illinois law, or cause the complaint to become fatally defective.

¶ 57 Defendant's reliance on *People v. McCall*, 42 Ill. App. 2d 295 (1963), is misplaced. That

case involved a complaint which was deemed defective because it named one person as the complaining witness, was signed by another, and there was no verification. *McCall*, 42 Ill. App. 2d at 297. In this case, it is rather clear the Officer Morris was the complainant, "for Rachel Witt," that he signed the complaint, and verified it accordingly.

¶ 58 Defendant's argument that the complaint was tantamount to being unverified because Officer Morris, who signed it as the complaining witness, based his knowledge on hearsay, is similarly unpersuasive. We first note that since defendant failed to object to any defects in the complaint, he waived his right to be charged by a verified complaint. *Wydra*, 265 Ill. App. 3d at 609-10. Additionally, while section 111-3(b) of the Criminal Code requires complaints to be sworn to, courts will not look beyond a positive verification to ascertain whether the accusation is based on information and belief. *People v. Mourning*, 37 Ill. App. 3d 945, 949 (1976).

¶ 59 In *Mourning*, 37 Ill. App. 3d at 946-47, defendant filed a motion to dismiss a complaint against him where the complainant testified at a hearing that the victim was his son and that he acquired information giving rise to the complaint from conversations with his son and from reading statements from other witnesses. In dismissing the complaint, the trial court found that the complaint was based on "information and belief," and was therefore, insufficient. *Mourning*, 37 Ill. App. 3d at 947. The reviewing court, in reversing the trial court's dismissal, found that there was no authority for the proposition that the trial court may look beyond the face of a criminal complaint to controvert matters sworn to therein, or for the proposition that hearsay information in a complaint would be insufficient to support such complaint. *Mourning*, 37 Ill. App. 3d at 949. Thus, it concluded that while the complainant's statements were based on

hearsay, the complaint had been sufficient to survive dismissal. *Mourning*, 37 Ill. App. 3d at 950. Accordingly, a complaint is sufficient to comply with the statutory requirements if it is verified based on information and belief, even if it is hearsay. *Mourning*, 37 Ill. App. 3d at 949; accord *People v. Olive*, 248 Ill. App. 220, 225 (1928) (complaint made against defendant was not defective where the sheriff who signed and verified the complaint admitted on cross-examination that he did not have first-hand information of the offense).

¶ 60 Lastly, we note that while it was not argued, we must nevertheless consider whether the evidence adduced at trial established that when defendant caused bodily harm to Witt, he did so knowingly or intentionally. This court has found that the mental state required to establish domestic battery is that the defendant committed the act "knowingly or intentionally," and that the criminality of defendant's conduct, therefore, depends on whether he acted with the requisite state of mind, or whether his conduct was accidental. *People v. Robinson*, 379 Ill. App. 3d 679, 684-85 (2008). It is the responsibility of the trier of fact to determine whether defendant's conduct was knowing or intentional, or whether it was accidental. *Robinson*, 379 Ill. App. 3d at 685.

¶ 61 In that case, the sole testifying witness was a police officer who was dispatched to an apartment in response to a domestic disturbance call. *Robinson*, 379 Ill. App. 3d at 680. At that location, the officer observed a hole punched in a wall, a shattered mirror and a broken glass door, and defendant in that case was acting irrational, screaming and "out of control." Additionally, the officer spoke to the victim in that case, who told him that defendant was her boyfriend and that he punched her in the face. *Robinson*, 379 Ill. App. 3d at 680-81. After

defendant was convicted, he argued on appeal that the evidence was insufficient to establish that he acted with the intent to strike the victim because it was more likely that any blow he struck was accidental while he was out of control. *Robinson*, 379 Ill. App. 3d at 683. The reviewing court, in affirming his conviction, found that while it was possible for the trier of fact to infer that his strike was accidental, the trial court could have rationally concluded that defendant acted knowingly or intentionally in hitting the victim. *Robinson*, 379 Ill. App. 3d at 685. In doing so, it stated:

> "In support of the argument that he struck [the victim] accidentally, defendant notes the lack of evidence that [the victim] suffered any injury. He points out that us used great force when punching the wall, the mirror, and the glass door, and he asserts that he would likely have used commensurate force against [the victim], had he actually punched her. This is a possible inference from the evidence, but it is no more than that. The trial court could rationally conclude that defendant acted knowingly or intentionally, but was able to resist using the same amount of force against [the victim] that he used against inanimate objects in the apartment." *Robinson*, 379 Ill. App. 3d at 685.

¶ 62 Thus, as the court in *Robinson* demonstrated, a defendant's intent may be inferred from his conduct surrounding the act in question and from the act itself. Accordingly, evidence that a victim received injury from the accused, such as testimony that the accused hurt the victim, combined with evidence that defendant engaged in conduct that would cause such injury, is sufficient to infer the defendant acted knowingly or intentionally, even if it is also possible to

infer that the injury was accidental. That determination is within the purview of the trier of fact. See also *People v. Phillips*, 392 Ill. App. 3d, 243, 259 (2009) ("intent may be inferred (1) from the defendant's conduct surrounding the act and (2) from the act itself.")

¶ 63 In this case, the State introduced the recorded 911 phone call in which the caller identified as Rachel Witt told the dispatcher that her boyfriend had tried to block her from leaving and had come after her with a knife. When the dispatcher asked the caller if she was hurt, the caller replied "[h]e cut my finger a little bit," and said that he "dropped it," which appears to refer to the knife. Additionally, the State introduced the testimony of Officer Morris, who saw a small laceration in the webbing area near Witt's left thumb, and learned from Witt that she and defendant had been arguing all day, and that defendant had picked up a knife and struggled with Witt as he tried to enter into a bedroom while Witt tried to close the door and keep him outside of it.

¶ 64 The evidence presented at trial shows not only that defendant had been arguing with Witt and was struggling to enter the room while she tried to keep him out, but also that he picked up a knife during that argument and kept it during their physical struggle. Thus, Witt's statement to the dispatcher that defendant "cut my finger a little bit," after saying that he came at her with a knife, coupled with her statements to Officer Morris that she and defendant had been arguing all day and they physically struggled when he tried to open a bedroom door, would have permitted a rational trier of fact to infer that defendant acted knowingly or intentionally when he caused bodily harm to Witt.

¶ 65 Defendant next contends that if his conviction is not reversed, it should be modified to

battery and remanded for resentencing. Although not raised at trial, defendant not contends, for the first time on appeal, that he may not be convicted of domestic battery based on the fact that he shared a residence with Witt because he was charged with domestic battery based only on the allegation that Witt was his girlfriend.

¶ 66 As previously mentioned, the complaint in question charged defendant with domestic battery pursuant to 720 ILCS 5/12-3.2(a)(1) (West 2009), which provides that "[a] person commits domestic battery if he intentionally or knowingly without legal justification by any means: *** [c]auses bodily harm to any family or household member as defined in subsection (3) of Section 112A of the Code of Criminal Procedure of 1963, as amended." Further, section 112A-3(3) of the Illinois Code of Criminal Procedure defines household members as including, among others, "persons who share or formerly shared a common dwelling," and "persons who have or have had a dating or engagement relationship."

¶ 67 We note at the outset, that "[a]n error predicated upon a variance between a charging instrument and the proof at trial cannot be raised for the first time on appeal." *People v. Mehelic*, 152 Ill. App. 3d 843, 851 (1987); see also *People v. Faulkner*, 64 Ill. App. 3d 453, 455 (1978); *People v. Tucker*, 35 Ill. App. 3d 630, 633 (1976). Since defendant objects to the variance between the language in the complaint and the evidence presented at trial for the first time on appeal, he has therefore, waived that challenge.

¶ 68 Notwithstanding the waiver, it is well established that in order for a variance between a charging instrument and the proof presented at trial to be fatal, the difference must be material and of such character as to mislead defendant in his defense or expose him to double jeopardy.

People v. Davis, 82 Ill. 2d 534, 539 (1980); *People v. Burdine*, 362 Ill. App. 3d 19, 24 (2005), citing *People v. Williams*, 299 Ill. App. 3d 143, 151 (1998), citing *People v. Rothermel*, 88 Ill. 2d 541 (1982). Additionally, it has been held that in determining whether a charging instrument is fatally defective, the test is whether the offense charged is sufficiently set forth so that an accused can properly prepare his defense and raise the judgment as a plea in bar to later prosecution for the same offense. *People v. Taylor*, 84 Ill. App. 3d 467, 469 (1980).

¶ 69 In *People v. Santiago*, 279 Ill. App. 3d 749, 753 (1996), the court found that defendant had not been prejudiced where the information named as the victim someone who was not even present at the incident, because the trial court mentioned the correct victim at trial, and denied involvement in the incident involving the actual victim. See also *Davis*, 82 Ill. 2d at 537-39 (complaint that charged defendant with disorderly conduct in that he threatened the victim's grandson, when he only threatened the victim herself, did not mislead the defendant in preparing his defense, which alleged that he did not threaten the victim, but merely conversed with her).

¶ 70 As previously mentioned, the complaint in this case filed against defendant charged him with "domestic battery in that he knowingly and without legal justification, caused bodily harm to Rachel Witt, girlfriend of the defendant, in that said defendant cut her on the left thumb with a knife, causing a small bleeding laceration." The trial court, in finding defendant guilty, commented:

¶ 71 "*** With regard to [defense counsel's] argument that an element of the offense of the State's case is lacking in that there has been no establishing of a dating relationship or a shared residence, I find it hard to believe that Ms. Rachel Witt, a 19-year-old, would know the

defendant's birth date had they not had a dating relationship, but I won't make that quantum leap because it is not necessary. It is clear that there was a shared residence, and I so find."

¶ 72 Defendant did not raise the variance issue at trial, nor did he assert that he was surprised or prejudiced by proof that Witt had lived with him. Even on appeal, he does not claim that he was prejudiced by the fact that the complaint stated that Witt was his girlfriend while the State introduced evidence that they shared a residence. Moreover, the evidence showed that defendant came prepared to contest evidence of residence sharing as a basis to establish the relationship. He introduced testimony from his father and Jabbour that they did not know that Witt lived at defendant's residence, and his father's testimony that he did not see Witt's personal belongings at defendant's residence and that her home was at the 1909 West Addison address. While that testimony was not sufficient, as discussed below, to cast doubt onto the trial court's finding of a shared residence, the introduction of such testimony indicated that he was well aware a shared residence was going to be used to establish his relationship with Witt. Further, it is clear that defendant's conviction would bar any future prosecutions of the incident in question. Accordingly, we conclude that the variance between the complaint and the evidence presented at trial was not fatal.

¶ 73 Defendant, nevertheless, contends that his conviction should be modified because the State failed to prove beyond a reasonable doubt that Witt had shared a residence with defendant and was, therefore, not a household member as defined by 725 ILCS 5/112A-3(3). This argument is a challenge to the sufficiency of the evidence, and as previously discussed, we must determine whether any rational trier of fact, after viewing the evidence in the light most favorable

to the State, could have found this element beyond a reasonable doubt. *Jackson*, 433 U.S. at 319.

¶ 74 While defendant anticipated that the State would present evidence that the parties shared a residence and attempted to negate it, the evidence introduced at trial was sufficient to permit the trial court to make such an inference. Officer Morris testified that Witt informed him that she lived at the 1487 North Denton address, which was also defendant's residence. While the officer wrote in his report that Witt's address was at 1909 West Addison, he stated that on the date of the incident, he helped Witt move personal belongings out of that residence and load them into defendant's car. Although defendant's father testified that he did not know whether Witt had lived with defendant and stated that he drove her home in Chicago, he acknowledged that he helped Witt unload her personal belongings from defendant's can and move them into her grandmother's house. In addition, investigator Chiczewski testified that when he was attempting to serve Witt with a subpoena, he ascertained through her neighbors and from Witt's mother that her address was 1487 North Denton. Thus, notwithstanding defendant's father's ignorance as to whether defendant and Witt had lived together, the trial court heard testimony from Officer Morris and investigator Chiczewski indicating that they did. Under these circumstances, we conclude that the evidence presented at trial was sufficient to allow a rational trier of fact to infer that Witt shared, or had formerly shared a residence with defendant.

¶ 75 Finally, the State requests that this court require defendant to pay costs and a fee of $100 to the State for having to defend this appeal, which we grant pursuant to *People v. Nicholls*, 71 Ill. 2d 166 (1978).

¶ 76 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

Affirmed.