

**NOTICE**  
Decision filed 07/08/14. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2014 IL App (5th) 120510-U

NO. 5-12-0510

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

**NOTICE**  
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Fayette County.
	)	
v.	)	No. 11-CM-175
	)	
DANIEL C. MARSTON,	)	Honorable
	)	Allan F. Lolie,
Defendant-Appellant.	)	Judge, presiding.

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JUSTICE CATES delivered the judgment of the court.  
Presiding Justice Welch and Justice Stewart concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* There was no plain error where the State properly laid a foundation for the introduction of a video into evidence, the circuit court did not abuse its discretion when it allowed the DVD to be admitted into evidence, and the State proved the defendant guilty beyond a reasonable doubt.
- ¶ 2 On September 22, 2011, the defendant, Daniel C. Marston, was charged with one count of domestic battery, a Class A misdemeanor, in that he knowingly made physical contact of an insulting or provoking nature to A.M., his 15-year-old daughter. Following a bench trial, the defendant was convicted of domestic battery and was sentenced to a term of probation. The defendant appeals from his conviction.

¶ 3

## BACKGROUND

¶ 4 On November 16, 2011, the defendant filed a motion to suppress a video that A.M. had secretly made of the defendant striking her. He argued that the DVD was of poor quality and that it was difficult to see what was taking place in the video because of the lighting. The court denied the defendant's motion to suppress. The matter was set for a bench trial.

¶ 5 Prior to the bench trial, the defendant filed a notice of intent to use the defense of reasonable parental discipline. The defendant noted that Illinois law is not entirely clear on the exact legal status of the common law defense of reasonable exercise of parental discipline, but that he planned to present the defense out of extreme caution.

¶ 6 On July 27, 2012, the court held a bench trial. At the beginning of the bench trial, the court stated that it had viewed the video in chambers prior to the start of the trial in order to save time. The State indicated that the DVD the court watched for the motion to suppress was the same DVD the court had watched in chambers prior to the bench trial. Defense counsel indicated that he was not sure how many versions of the DVD existed, and that he had concerns about the quality of the DVD and the fact that they did not all sit down and watch the DVD together with the benefit of audio. Defense counsel also stated that the defendant had not seen the entire DVD because it was unwatchable on defense counsel's computer. Defense counsel then asked for a recess so that the defendant could watch the DVD. The court stated that the defendant was entitled to see the evidence against him and that they would watch the DVD in open court. The parties viewed most of the DVD in open court on the court's laptop computer, until the video froze.

Thereafter, the defendant waived viewing the remainder of the video and the matter proceeded to trial.

¶ 7 In the video, A.M. is seen taking clothes from a dresser and throwing them on the ground. She then sits down on the dresser, which has a mirror attached to the back of it. Moments later, the defendant enters the room. The defendant tells A.M. to clean up the mess she made. He appears agitated. Then, the defendant grabs A.M. by the neck and pushes her against the mirror. She bounces off of the mirror. The defendant then releases A.M. Seconds later, he asks A.M. a question. When she responded by shrugging, the defendant slaps A.M. with an open hand across her face.

¶ 8 A.M. identified the defendant as her father in open court. She testified that she set up a video camera to record the exchange between her and the defendant. She testified that nothing had been edited or removed from the video, and that it fairly and accurately depicted what happened on the day of the incident. She further testified to having set up the camera, hiding it behind a bag so the defendant could not see the red recording light, and making the recording.

¶ 9 In his testimony, the defendant admitted that he slapped A.M. with his hand. He denied that he grabbed A.M. by the throat, and said that he only grabbed her by the jaw line.

¶ 10 The court found that the defendant had grabbed A.M. by the neck and slammed her against the mirror, that A.M. was not in a position where she was about to strike the defendant, and thus the defendant's actions were not committed for purposes of self-defense. When A.M. shrugged in response to one of the defendant's questions, the

defendant slapped her face. The court noted that the defendant used a number of curse words during the exchange with A.M. The court ultimately found that the defendant's behavior "was not reasonable under the circumstances, despite the child's disrespect," and that the defendant was guilty of domestic battery.

¶ 11 The court sentenced the defendant to 12 months of probation and ordered him to pay fines. The defendant appeals.

¶ 12 ANALYSIS

¶ 13 On appeal, the defendant argues (1) that it was plain error for the circuit court to find him guilty of domestic battery in a bench trial without first considering all of the behavioral circumstances of his 15-year-old daughter and defendant's intent while imposing reasonable discipline on her, and (2) that the court's admission into evidence of the DVD recorded by the victim was plain error because the State failed to lay a proper foundation. We will first address whether it was plain error for the circuit court to allow the DVD as evidence.

¶ 14 The State contends that the defendant has forfeited his challenge to the admission of the DVD on the grounds that the State failed to lay a proper foundation because the defendant did not raise this objection at trial and did not include it in a posttrial motion. We agree. The defendant objected to the admission of the DVD because the video was of low quality and the DVD could not be played on a DVD player but only on a computer. The defendant agrees that he did not include his objection in a posttrial motion, but argues that this issue should be reviewed under the plain error doctrine.

¶ 15 As the State correctly asserts, in order to preserve an issue for appeal, a defendant must first object to the issue during trial and then include the issue in a posttrial motion regardless of whether it is a jury trial or a bench trial, or the issue is forfeited on appeal. *People v. Johnson*, 214 Ill. App. 3d 1087, 1089 (1991); *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). The plain error doctrine provides a limited exception to the forfeiture rule and permits the review of issues that were not preserved for appeal. Under the plain error doctrine, this court will review forfeited challenges when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, or (2) a clear or obvious error occurred, and the error is so serious that it affected the fairness of the defendant's trial and the integrity of the judicial process, regardless of the closeness of the evidence. Ill. S. Ct. R. 615(a) (eff. Apr. 15, 2014); *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). In addressing a defendant's plain error argument, we must first determine whether an error even occurred. *People v. Bannister*, 232 Ill. 2d 52, 65 (2008). If we find that an error did occur, the defendant then has the burden to show that the error prejudiced him under either prong of the doctrine. *People v. McLaurin*, 235 Ill. 2d 478, 495 (2009).

¶ 16 "The decision to admit a piece of evidence rests in the sound discretion of the circuit court." *People v. Dennis*, 2011 IL App (5th) 090346, ¶ 27. An abuse of discretion occurs when the circuit court's ruling is fanciful, unreasonable or when no reasonable person would adopt the court's view. *People v. Taylor*, 2011 IL 110067, ¶ 27. Video evidence may be introduced as substantive evidence provided that a proper foundation is laid. *Id.* There are two ways to provide a foundation for the admission of an audio or

visual recording. *Dennis*, 2011 IL App (5th) 090346, ¶ 22. A witness may testify that the recording accurately represents what he or she previously saw or heard. *Id.* Alternatively, the "silent witness" theory may be used to authenticate videotapes when there is no testimony of a witness with personal knowledge of what the tape portrays. *People v. Vaden*, 336 Ill. App. 3d 893, 898 (2003). In *Taylor*, the Illinois Supreme Court set forth a list of factors to assist in determining whether a proper foundation has been laid for videos to be admitted as substantive evidence, which are: "(1) the device's capability for recording and general reliability; (2) competency of the operator; (3) proper operation of the device; (4) showing the manner in which the recording was preserved (chain of custody); (5) identification of the persons, locale, or objects depicted; and (6) explanation of any copying or duplication process." *Taylor*, 2011 IL 110067, ¶ 35. However, this is a nonexclusive list, and the circumstances of each case will always differ. *Id.* ¶¶ 34, 35.

¶ 17 In this case, the video was authenticated by A.M. because she had personal knowledge of what occurred on the video and testified that it fairly and accurately depicted the day of the incident. This testimony provided a proper foundation for the admission of the DVD. Even if this were not so, the video was authenticated under the "silent witness" theory. A.M. testified that she set up the video camera in her bedroom. She further testified that nothing was removed from the recording and the DVD fairly and accurately depicted what happened on the day of the incident. She clearly identified the defendant in the video as her father and pointed him out in open court. She testified that she frequently used the camera or her phone to make videos. She also explained the

process of capturing the video. She hid the camera behind a bag so that the defendant would not see the red light, and then pressed the record button. We find, therefore, that the State laid a proper foundation for the introduction of the video, and the circuit court did not abuse its discretion when it allowed the video to be introduced into evidence.

¶ 18 Because no error occurred, a plain error analysis is unnecessary. Further, if we were to conduct a plain error analysis, we would conclude that no plain error occurred because the evidence was not closely balanced, nor was the error so egregious that it undermined the fairness of the defendant's trial or the integrity of the judicial process. First, the defendant admitted that he had struck A.M. Second, the defendant used the video as a part of his own defense, arguing that in the video, it appeared as if A.M. was going to strike him before he struck her.

¶ 19 The defendant also argues that it was plain error for the circuit court to find him guilty of domestic battery without considering the surrounding facts and A.M.'s behavior leading up to and during the occurrence. Initially, we note that the plain error doctrine is an exception to the forfeiture rule. However, a defendant's claim that the State did not prove him guilty beyond a reasonable doubt is not subject to the forfeiture rule and may be argued for the first time on direct appeal. *People v. Lucas*, 231 Ill. 2d 169, 174-75 (2008). Consequently, we review the defendant's claim on the merits without addressing the plain error doctrine.

¶ 20 When reviewing the sufficiency of the evidence used to convict a defendant, a reviewing court asks whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the

crime beyond a reasonable doubt. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011). We will not reverse a conviction unless the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt. *People v. Collins*, 214 Ill. 2d 206, 217, 291 (2005). This standard applies in both jury and bench trials. *People v. Belknap*, 2013 IL App (3d) 110833, ¶ 81.

¶ 21 A person commits domestic battery when he knowingly, without legal justification by any means, makes physical contact of an insulting or provoking nature with any family or household member. 720 ILCS 5/12-3.2(a)(2) (West 2010). Here, there is no dispute that A.M. was the defendant's daughter. Furthermore, the defendant does not deny that he slapped A.M. The defendant argues, however, that his act of slapping A.M. with an open hand was justified because it was reasonable parental discipline.

¶ 22 While parents have a general right to privacy in the manner in which they raise their children, that right must be balanced against the State's legitimate interest in preventing the mistreatment of children. *In re B.H.*, 389 Ill. App. 3d 316, 320 (2009). The parental right to discipline a child is not a statutory affirmative defense, but is embedded in the common law. *People v. Green*, 2011 IL App (2d) 091123, ¶ 16. The general rule arising from the common law is that parents may take reasonable steps to discipline their children when necessary. *Id.* This rule, like self-defense, is a legal justification for an otherwise criminal act. *Id.* Thus, in order to show that a parent was not justified in the discipline he or she used on a child, the State must prove the parent guilty beyond a reasonable doubt as to the affirmative defense as well as all the other elements of the offense. *Id.* The factors a court uses to determine whether the parental

discipline exceeds the bounds of reasonableness are not limited to the degree of injury inflicted upon the child, but also include the likelihood of future punishment that might be more injurious, the psychological effects of the discipline on the child, and whether the parent was calmly attempting to discipline the child or whether the parent was lashing out in anger. *Id.* ¶ 24.

¶ 23 Here, a rational trier of fact could conclude that the defendant committed the offense of domestic battery and that his actions exceeded the bounds of reasonable parental discipline. Prior to slapping A.M., the defendant had already grabbed her by the neck and had shoved her against the mirror with such force that the mirror shook and A.M.'s head bounced forward and back from the impact. It is obvious that the defendant was not calmly disciplining a misbehaving child. Instead, the defendant seemed unable to control his anger. This is especially apparent when A.M. shrugged and the defendant immediately slapped her—which appeared to be a spontaneous reaction by the defendant and not a calmly planned form of discipline. The interaction may have started as an instance where the defendant was going to properly discipline A.M., but unfortunately the defendant overstepped the bounds of reasonableness. While A.M. may have been disrespectful, disobedient, and suffered no lasting physical injury, the defendant was not justified in his method of parental discipline.

¶ 24

#### CONCLUSION

¶ 25 For the foregoing reasons, the judgment of the circuit court of Fayette County is affirmed.

¶ 26 Affirmed.