2015 IL App (2d) 121360-U
No. 2-12-1360
Order filed July 22, 2015

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).

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 11-CF-647
VINCE VARELA,	)	Honorable Mark L. Levitt,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justice Zenoff concurred in the judgment.
Justice Hutchinson dissented.

ORDER

¶ 1 *Held*: The State's evidence was sufficient to prove defendant guilty of aggravated domestic battery and three counts of domestic battery (enhanced). The evidence was not closely balanced and therefore unpreserved errors in the prosecutor's rebuttal arguments were not plain error. We affirmed.

¶ 2 Defendant, Vince Varela, was convicted of aggravated domestic battery (720 ILCS 5/12-3.3(a-5) (2010) and three counts of domestic battery (enhanced) (720 ILCS 5/12-3.2(a)(1) (2010)). Defendant appeals, arguing that the State failed to establish guilt beyond a reasonable doubt. Alternatively, defendant argues that the evidence was closely balanced and the

prosecutor's improper remarks in rebuttal argument amount to plain error, entitling him to have his convictions reversed and this cause remanded for new trial. The State argues that the prosecutor's rebuttal argument did not deny defendant the right to a fair trial, and the evidence presented at trial was sufficient to convict defendant beyond a reasonable doubt of the charged offenses. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 On February 10, 2011, defendant was involved in an altercation with his girlfriend, Christine Quenaud (Christine), with whom he shared an apartment in Fox Lake. Defendant was charged with the following offenses: (1) count I – aggravated domestic battery (720 ILCS 5/12-3.3(a-5) (West 2010)) (strangling Christine Quenaud); (2) count II – domestic battery (enhanced) (720 ILCS 5/12-3.2(a)(1) (West 2010)) (pushing the body of Christine Quenaud); (3) count III - domestic battery (enhanced) (720 ILCS 5/12-3.2(a)(1) (West 2010)) (pushing Christine Quenaud into a window); (4) count IV – domestic battery (enhanced) (720 ILCS 5/12-3.2(a)(1) (West 2010)) (striking Christine Quenaud in the face); (5) count V - domestic battery (enhanced) (720 ILCS 5/12-3.2(a)(1) (West 2010)) (kicking Christine Quenaud in the head); (6) count VI - interference with reporting domestic violence (720 ILCS 5/12-6.3(a) (West 2010)) (preventing Christine Quenaud from calling 911); and (7) count VII – animal cruelty (510 ILCS 70/3.01 (West 2010)) (kicking Christine Quenaud's dog).

¶ 5 The domestic battery counts were enhanced based upon defendant's 2005 conviction of domestic battery. Prior to trial the court granted the State's motion *in limine* to introduce evidence of defendant's commission of the 2005 domestic battery involving a different victim on the issue of defendant's intent and propensity. See 725 ILCS 5/115-7.4 (West 2010) (evidence in domestic violence cases). Defendant does not challenge that ruling on appeal. Prior to trial,

defendant served notice on the State that he would rely on the affirmative defense of self-defense.

¶ 6 The case proceeded to trial before a jury. Prior to opening statements the trial court instructed the jury that "remarks by the attorneys are not evidence and should not be considered by you as evidence." Christine Quenaud testified that on February 10, 2011, she was defendant's girlfriend and had been living with him in a studio apartment in Fox Lake along with her dog Izzie. On that evening, she was working at CVS Pharmacy in South Barrington, where she was employed as a supervisor. She left work at about 10:15 p.m. and drove home. When she arrived at the apartment, the door was locked and her dog was barking. Christine said that defendant had the only key to the apartment and he was not at home. Defendant also had Christine's cell phone, so she went to a neighbor's apartment to borrow a phone to call defendant. After leaving a message, Christine received a return call from defendant on the neighbor's phone. Defendant told Christine that he was at a bar and told her to come to the bar to get the key. When Christine arrived at the bar she could not get in because she did not have her identification with her. Another patron summoned defendant, who came outside and gave Christine the key. Defendant told Christine that he would get a ride home from a friend. Christine drove home and took the dog out for a walk. Shortly thereafter, defendant was dropped off by his friends. Christine testified that defendant walked up to her and tried to give her a hug. When she turned away defendant began yelling at her. Defendant told her that he was angry that he had to come home and he thought she was being cold. Once inside the apartment defendant told Christine that she had ruined his evening, that she was the worst girlfriend, and that other girls wanted him. Christine testified that defendant looked "pretty drunk" and smelled of alcohol.

¶ 7 Christine said that they also yelled about the fact that she did not have a key and had to go get the key from defendant. She was also upset because defendant had locked her dog in the crate. She said she was dressed in her shoes, pants and winter coat. Defendant grabbed her by her shoulders and pushed her against and then pulled her off the window. Defendant beat her head against the wooden crossbar of the window three or four times. He then threw her onto the bed, put one hand on her throat, choking her, and the other hand over her mouth so she could not breathe or scream. When asked how long she thought this went on, Christine said, "[I]t felt like forever. If I had to guess, three or four minutes." She said she was terrified. While defendant held his hands on her neck and mouth he asked her, "are you going to be good now?" Christine felt like she was going to black out and she started to see stars. She then bit defendant's hand that was covering her mouth, and defendant bit her back on one of her arms. She got up and grabbed her cell phone which defendant had placed on the dresser or side table. As she tried to call 911, defendant grabbed the cell phone and smashed it on the ground.

¶ 8 Christine testified that she went near the door that would lead out of the apartment and she called her dog. Defendant kicked the dog away and began hitting Christine in the face with his hands. She could not recall if defendant's hands were open or in a fist. Christine told defendant that she thought he broke her nose, and defendant said, "I will show you how a broken nose feels." She ducked and ended up on her knees. While she was on her knees, defendant kicked Christine in the back of the head three or four times. She said she had bumps on her head that evening or the next morning. After kicking her, defendant grabbed Christine's hair and pushed her into the bathroom shower. She was still fully dressed, including wearing her coat. Defendant turned on the water to wash off the blood. She estimated that defendant held her in

the shower a few minutes or less. Defendant then left the bathroom, and Christine got out. She was still bleeding from her nose and lip.

¶ 9 As she was trying to leave the apartment with her dog, defendant said that he would not let her have her dog and he was going to kill the dog. Defendant then smashed a piece of glass that was sitting on the side table and he cut his hand open. When he went into the bathroom to clean his hand, Christine took off her belt, placed it on her dog's neck, and left the apartment. She drove to her parents' house about 20 minutes away. At her parents' home, she changed clothes and her parents drove her to the hospital. Christine identified photographs of her taken at the hospital.

¶ 10 Christine testified that while at the hospital she was interviewed by a police officer. She was released from the hospital at 3 or 4:00 in the morning and returned to her parents' home, where she was living at the time of trial. Christine had not seen defendant again until the trial.

¶ 11 On cross-examination, Christine stated that she was interviewed by Officer Lewis at the hospital in the presence of medical personnel. She also said that she wrote a statement a few days later. She could not remember if she told Officer Lewis about being choked. After reviewing Officer Lewis' report, defendant's counsel asked, "[b]ut you didn't tell Officer Lewis anything at all about being choked, did you, about being strangled?" Christine replied, "[a]pparently not."

¶ 12 Christine could not recall exactly how long she and defendant argued. She denied throwing a mirror at defendant. She said she could not remember how many times defendant hit her in the face. When shown her handwritten statement that she made on February 13, 2011, Christine acknowledged that she did not include information about defendant kicking her dog.

She could not remember how long defendant choked her. With regard to her injuries, Christine said that she was still bleeding when she got into her car to drive to her parents' home.

¶ 13 On re-direct examination Christine testified that she had not seen Officer Lewis' four page report before testifying. She believed that she told Officer Lewis about defendant kicking the dog. She also said that her right eye was black as a result of defendant striking her. Other than biting defendant she denied hitting defendant in any way.

¶ 14 Officer Robert Lewis of the Fox Lake police department testified that on February 10, 2010, he was dispatched to the Northern Illinois Medical Center for a call that a battery victim was in the emergency room. Officer Lewis identified a photograph of Christine. When Lewis arrived at the hospital Christine's parents were in the room and Christine was wearing a c-collar. Christine's face and eyes were swollen. He testified that there were some "lacerations to her face, what appeared to be a swollen face, bruising, a laceration to it, fat lips, bloody lips." Lewis described Christine's demeanor as "fearful" and she was crying. He had no reason to believe that she was under the influence. Lewis was in the emergency room with Christine for about 30 minutes, until she was sent off for a CAT scan.

¶ 15 Lewis said that after he interviewed Christine he returned to the Fox Lake police department and then went to Christine and defendant's apartment. He saw blood on the snow outside the apartment. When he knocked on the apartment door no one answered, but the door became ajar. Lewis and his fellow officers entered the apartment, which was unoccupied. Photographs were taken of the apartment's exterior and interior, which he described in some detail. Photographs taken outside were of the blood in the snow. The inside photographs showed a blood spatter on a wall, blood stains on or about the bathroom sink, a blood stained mattress with bloody tissues on it, and a small table or nightstand next to the mattress with a

broken mirror on top of it. Lewis said he took the photo of the nightstand because "this was described by the victim as something that happened."

¶ 16 After leaving the apartment Lewis and the other officers went to defendant's last known address, which was defendant's mother's house. Defendant's mother answered the door and went to get defendant. Lewis described defendant as six feet tall and weighed around 215 pounds. Defendant appeared to be intoxicated and agitated.

¶ 17 On cross-examination Lewis acknowledged that he did not document in his report that defendant was intoxicated. He also acknowledged that defendant became agitated only after he was placed under arrest. Lewis said he saw bandages on defendant's hand and leg.

¶ 18 Lewis said that he did not recall Christine telling him that defendant strangled her and that he would likely write down such a statement. He destroyed the notes of his conversation with Christine after he wrote his report. Christine did not tell Lewis about defendant placing his hand over her mouth or that she bit defendant's hand. Lewis did not see a broken cell phone in the apartment. If the cell phone had been in the apartment he would have take a photograph of it. Lewis noted that no forensic testing was requested in this case.

¶ 19 On cross-examination. Lewis said that Christine did not appear intoxicated in any way. Christine later provided a written statement to the Fox Lake police department. He said that forensic blood testing was not done on the blood because it was not something that they normally did, unless it was for a murder or "something more significant." He said that he spoke to Christine for about 10 minutes of the 30 minutes he was with her in the emergency room.

¶ 20 Camille Colon testified that she was a previous girlfriend of defendant and had dated him in 2004 and 2005. At one point she lived with defendant at his mother's house but she moved out in August 2005. Camille said that on October 29, 2005, defendant called her. He was drunk

and told her that he hated her, that she had ruined his life, and that he did not want to see her ever again. On the evening of October 30, 2005, Christine attended a Halloween party with friends. During the party, Camille received several telephone calls on her cell phone from defendant asking if he could come and pick her up. She told him that she was not going to meet with him. The last time he called her he told her to meet him on the train tracks or he was going to kill himself. She told him to "go ahead and park on the train tracks and wait" for her. She ended the conversation and she did not answer any more calls until she was dropped off at her house by her friends. Defendant called her and asked her where she was, and she said she was in front of her house. Camille then realized that defendant had been parked down the street from her house because he then pulled up to the front of her house. Defendant said she was sorry and he wanted to talk to her and he just needed a friend.

¶ 21 Camille told defendant that she would not go anywhere with him but she was willing to listen to him. Defendant invited her to get into his car to talk. When Camille got into the car, defendant began driving. Camille asked him where he was going and she told him that she could not go anywhere because her mother was watching her daughter. Defendant continued driving and he said Camille "looked like a fucking whore. He then began to beat her. She said defendant punched her in the head, pulled her hair and punched her up and down her body, wherever he could reach, as he drove. This went on all the way from Round Lake to Ingleside. When she tried to call 911, defendant broke her cell phone and tried to shove the broken pieces into her mouth. At one point, Camille tried to escape by jumping out of the car but defendant grabbed her by the hair. The harder she tried to fight back, the harder he hit her. Camille balled up on the floor of the front seat until defendant arrived at his house. Defendant then dragged her out of the car and into the basement where defendant continued to beat her "all night long."

Camille said that he kicked her, yanked her hair, threw her to the floor and punched her in the head. At times she would black out only to be awakened by defendant, who would start beating her again. After passing out for the last time Camille did not wake up again until the next morning.[1]

¶ 22 Camille testified that she sustained bruises on her body, knots and bumps on her head and marks on her neck. Defendant drove Camille to her home and dropped her off. Camille was crying and upset, her clothes were ripped and she was barefoot. She walked two blocks to a friend's house who took her to the police station.

¶ 23 On cross-examination Camille denied that she was kicked out of defendant's mother's home. She also denied that defendant broke up with her. Instead, Camille testified that she packed up her things while defendant was gone and took off. She broke up with defendant because they fought all the time. On those prior occasions, she said she tried to defend herself unsuccessfully.

¶ 24 After being beaten in the basement Camille was treated for several hours at the hospital. Camille then clarified that the beating did not take place at defendant's mother's home, but that it took place at his friend's home who was not home at the time. When asked why she accepted a ride from him after the beating, she said that she had no other way to get home.

¶ 25 The State then introduced a certified copy of defendant's conviction for domestic battery involving the October 30, 2005, incident.

¶ 26 Dr. Daniel Campagna, an emergency medicine physician, testified that he treated Christine on February 11, 2011 for injuries she sustained in an assault. Based on a "triage

[1] The trial court barred Camille from testifying that when she woke up her panties were missing.

assessment" Christine was put in a cervical collar and placed into a "feeder" room where Campagna treated her. Christine told him that she had been assaulted by her boyfriend or ex-boyfriend. She complained of injuries to her face and the back of her neck, and she said she had a headache. She described her pain as a "10 out of 10." She said she had been hit, choked and kicked. Over defense counsel's general objection, Campagna testified that the injuries Christine presented with were consistent with her being hit, choked and kicked. Campagna ordered CAT scans of Christine's brain, face and neck. He said Christine had quite a bit of facial swelling, abrasions and some tenderness to the side of her face and the back of her neck. There was swelling and abrasions to the right side of her face, below her eye, right cheek and right upper lip. Campagna said that according to hospital notes, Officer Lewis came into the room at 2:19 a.m. and Christine was taken for CAT scans at 2:40 a.m. Christine was given ibuprofen for pain and Xanax to control her anxiety.

¶ 27 According to Campagna, a person can be choked or strangled without any mark being left on the neck. He said that if someone were to grab the throat with their fingers and dig them in, he would possibly expect to see bruising. However, if a person came up behind someone and squeezed laterally the carotid arteries, the victim could lose consciousness in a few seconds and there would be no marks. He noted that "seeing stars" can be a sign of being choked.

¶ 28 On cross-examination, Campagna said that whether or not marks appear on the neck of a person being choked depends upon which blood vessel is compromised. Christine told him that she was choked, but he did not see any marks on her neck. He said that redness in the neck is what you might observe in a case of choking. The only injury he observed to Christine's neck was the tenderness at the back of her neck that she complained of on palpation. He did not observe any bumps to the back of her head, and he would have expected to see swelling in that

area based upon the history given. According to Campagna, when someone suffers traumatic injury to the face, there may be more dramatic signs of bruising several days later.

¶ 29 Karen Quenaud, Christine's mother, testified that around midnight on February 11, 2011, Christine came into her house and up into the bedroom she shared with her husband, and woke them both up. Christine's voice was trembling, she was crying, and she seemed terrified. She appeared to be in shock and she was soaking wet. At that point, Christine was not wearing her coat. Karen had Christine change clothes and she and her husband drove Christine to the hospital. Defense counsel did not cross-examine Karen.

¶ 30 At the close of the State's evidence defendant made a motion for a directed verdict on all counts. The trial court granted the motion on the animal cruelty charge, but denied the motion as to all the other counts.

¶ 31 Defendant testified that at the time of trial he was living with his mother. He identified photographs of the building where he shared an apartment with Christine. Defendant's testimony matched Christine's regarding her phone call to him to get the key to the apartment. Defendant denied being drunk that evening. He said that when Christine came to get the key he told her he would be home later and he went back into the bar. Defendant said his friend Sean Hartman's mother drove him home. Before going home they stopped at a gas station to get cigarettes. When he got home, he went into the apartment, sat down on the bed, and got undressed. Christine and the dog were not in the apartment. When Christine got home, he was sitting on the bed and Christine immediately started yelling at him about being out and why he did not invite her. According to defendant, Christine approached him and started slapping and hitting him. He held Christine's arms and told her to stop. She then did stop and walked into the bathroom. He denied striking Christine or slamming her head against the window sill or beam.

Defendant said he was "kind of angry, upset, sad, and really in shock." He said that he and Christine had been having emotional issues recently and he had asked her to move out. Defendant testified that the next thing that happened was that Christine came out of the bathroom with a mirror in her hands. As defendant stood up, Christine threw the mirror at him, which he blocked with his hand, breaking the mirror and cutting his hand, leg and foot. He was only dressed in his underwear and he was not wearing boots. He then identified photographs of his hand, leg, foot and face which were taken a few days after the incident. Defendant estimated that the cut on his leg was an inch-and-a-half long. After he cut his leg it started bleeding profusely. The blood got on the floor, mattress, and everywhere he walked. He again denied striking, kicking or choking Christine. He also denied being drunk.

¶ 32 Defendant said that he tried to leave the apartment but Christine was blocking him. She told him she was sorry, that she did not mean it, and she tried to "neutralize the situation." He told Christine that he did not want to be with her and that he had had enough. Because she was blocking his exit, defendant said she shoved Christine out of the way so he could make his way out. Defendant said she fell to the left, toward the refrigerator. He then ran to his neighbor's to call his mother to come and get him out of there. He saw Christine leave the apartment as he was calling his mother. After she left, defendant went back into the apartment to get dressed and to clean his wounds. According to defendant, the blood on the bathroom sink depicted in the State's photograph was from his cut.

¶ 33 On cross-examination, defendant acknowledged that he had Christine's cell phone with him at the bar when she called him about the key. He told her to come to the bar. He said the dog was in its crate when he left to go to the bar. Defendant estimated that Christine was 5 feet tall and weighed about 180 pounds and that he was 6'2" and 215 pounds or more. He said that

the pieces of mirror depicted in the State's exhibit number six fell onto the table after it broke. He pointed out that some pieces were upside down and some were facing up. The mirror was "16 or 12 inches by like 10." Defendant was shown defense exhibit number eight, a picture of his face, and he acknowledged that he his face was not hurt, but he explained that he blocked the mirror when it was thrown at him. According to defendant, the cut on his leg occurred when the mirror shards fell on his leg and foot.

¶ 34 Defendant said the neighbors whose phone he borrowed to call his mother were named Mike and Tom. He did not know their last names because he never asked them. He had not spoken to them since the incident and he did not know if they still lived there. Defendant acknowledged that he had Christine's cell phone on the night of the incident, that it was in his pocket the last time he checked, and he did not pay attention to where the cell phone went. He said the mirror Christine threw at him came from the cabinet over the sink and it was a sliding mirror.

¶ 35 Defendant testified that he did not call the police. He was angry when he found out why the police had come to his mother's house. According to defendant, when Christine left the house she was not soaking wet at all. He acknowledged that he had never seen the injuries on Christine before, but assumed that "the refrigerator gave her these injuries." The blood in the snow shown in the photographs was from his foot and whatever else was bleeding. Although defendant testified that he did not have any resentment toward Christine, he acknowledged that he told Officer Lewis he was "upset with the bitch." He said that he had referred to Christine as a "bitch" between one and five times in the past.

¶ 36 Defendant acknowledged that he had no injuries on his face but said that it was "a little bit swollen." He maintained that he did not push Christine very hard, but just enough to move

her out of his way. After Christine left, he went back to his apartment to clean up and to lock everything up. Defendant said he had a copy of Officer Lewis' reports for about 16 months and that he had been reading them "on and off."

¶ 37 Defendant's mother, Sandra Prez, testified that she received a call from defendant around midnight on February 11, 2011, and went to pick him up at his apartment. Defendant sounded upset but not drunk. He did not talk much. He told her that he had been in a fight and that he was bleeding from his hands and his leg. Ms. Prez said that when they got to her home she saw some "deep cuts on his hands, on his thigh and on his foot." She helped clean defendant up and told him she would take him to the emergency room in the morning to get stitches if needed. Ms. Prez testified that when the police met with defendant at her house to arrest him that defendant was not under the influence.

¶ 38 Prez said that Camille lived in her house six or seven years ago. When Camille came to live with her she knew it was temporary. Camille had a two-year-old daughter at the time.

¶ 39 On cross-examination, Prez explained that defendant also moved out of her home. She suggested to Camille that she should leave, but she did not remember whether she also asked defendant to leave. Prez was shown defendant's exhibit ten, the photograph of his foot. She said she really could not say there was a cut. She said, "I really don't know, I feel bad about saying it." Defendant rested.

¶ 40 The State called Officer Dawn Deservi in rebuttal. Deservi testified that she assisted in the arrest of defendant, and in her opinion defendant was intoxicated. She did not write a report; however, she reviewed Lewis' report. In Lewis' report, he indicated that other people observed defendant to be intoxicated, but Lewis himself did not note that he observed defendant to be intoxicated. Deservi did not believe defendant needed medical attention.

¶ 41 Prior to closing arguments the trial court again instructed the jury that the attorneys' arguments were not evidence and that any statements not supported by the evidence should be disregarded. During the State's closing argument the prosecutor argued that the evidence did not support defendant's self defense claim. The prosecutor argued, without objection, that "[t]he defendant has to explain how this woman got all of these injuries***he has got to explain it." The prosecutor also argued that Dr. Campagna testified that Christine's injuries were consistent with what she said. Defense counsel argued that Christine's testimony should not be believed because she did not tell Officer Lewis about the choking, about "seeing stars," that there were no marks on her neck, there were no bumps on the back of her head, and the CT scan was negative. Counsel argued that defendant's story made more sense, and invited the jury to compare Christine's testimony to defendant's testimony. Defense counsel referred to the witness stand as the "hottest seat in the house." Counsel told the jury that defendant "chose to take the hot seat, and he knew that you would be skeptical but he did it anyway." Regarding the testimony of Camille Colon, counsel told the jury "I know there was a conviction so something must have happened."

¶ 42 During rebuttal argument the prosecutor again argued that Dr. Campagna testified that Christine's injuries were consistent with what she presented with. While referencing defense counsel's comment about the "hot seat," the prosecutor commented:

> "The toughest seat in this courtroom is literally being Christine or Camille sitting in this chair and testifying in front of this defendant and in front of strangers, that is the toughest seat in this house.
>
> Frankly, the evidence in this case is really overwhelming. The defendant has a right to a jury trial, he has exercised that right."

¶ 43 Defense counsel objected, and the trial court sustained the objection. The prosecutor continued, saying "[t]he trial—we have given him the trial." After another objection the trial court instructed the prosecutor to "move on."

¶ 44 During rebuttal argument the prosecutor commented that "[t]he defendant had to testify and the mother even admitted she had to get him out of the house." Defense counsel's objection to this remark was sustained. The prosecutor continued "[s]he had to get him out of the house. That is right, the defendant never has to testify, but in this case the defendant has to explain what happened." Defense counsel objected again, and the objection was sustained. The prosecutor then commented that "[h]e still can't explain the soaking wet thing. He just can't do it." There was no objection to this comment.

¶ 45 Defendant made a motion for a mistrial at the conclusion of the prosecutor's rebuttal argument. The trial court denied the motion stating:

> "I listened with caution to the State's argument. I quickly sustained the objections to what I deem to be an area that the State was going into maybe unintentionally certainly towing the line that would have been inappropriate but not going beyond it. The defense properly interposed objections which were sustained. The comment about subpoena power, the State is correct, that comment alone is appropriate and the other objections were sustained and I think that they were harmless given the context, I think, that the State was in the passion of the argument inadvertently heading someplace that the State didn't want to go.
>
> Your motion for mistrial is denied."

¶ 46 The jury returned verdicts of not guilty of domestic battery (enhancement, kicking Christine Quenaud in the head) and interference with reporting domestic violence (preventing

Christine Quenaud from calling 911). Defendant was found guilty of aggravated domestic battery (strangling Christine Quenaud) and three counts of domestic battery (enhanced) for pushing Christine into a window, striking her in the face, and pushing her body. Defendant's post-trial motion was denied and he was sentenced to probation. Defendant has timely appealed.

¶ 47 II. ANALYSIS

¶ 48 On appeal, defendant argues that the evidence at trial was insufficient to convict and that all of his convictions must be reversed. Alternatively, defendant argues that the State's improper rebuttal arguments deprived him of a fair trial where the evidence was closely balanced. We take each argument in turn.

¶ 49 A. Guilt Beyond a Reasonable Doubt

¶ 50 Defendant's first contention on appeal is that his convictions must be reversed because the State's evidence failed to establish guilt beyond a reasonable doubt. Defendant argues that the testimony of Christine Quenaud was contradicted by the testimony of Dr. Campagna in that he did not observe any marks on her neck and he did not observe any bumps on the back of her head. Defendant also argues that Christine did not tell Officer Lewis that defendant had choked her. Defendant contends that Christine's testimony was "improbable and inconsistent," and because her claims were "contradicted by the physical evidence and the testimony of other witnesses" his convictions must be reversed.

¶ 51 When presented with a challenge to the sufficiency of the evidence, it is not the function of the reviewing court to retry the defendant. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). Rather, "'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact would have found the essential elements of the crime beyond a reasonable doubt.'" (Emphasis in original.) *People v. Collins*, 106 Ill. 2d 237, 261

(quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The trier of fact is responsible for weighing the evidence, assessing the credibility of witnesses, and drawing reasonable inferences and conclusions from the evidence. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). A jury's findings concerning credibility are entitled to great weight. *People v. Wheeler*, 226 Ill. 2d 92, 115 (2007). "Accordingly, a conviction will be reversed where the evidence is so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of a defendant's guilt." *Id.* (citing *People v. Smith*, 185 Ill. 2d 532, 542 (1999)).

¶ 52 Defendant was convicted of one count of aggravated domestic battery and three counts of domestic battery (enhanced). In order to prove defendant guilty of aggravated domestic battery in violation of section 12-3.2 of the Criminal Code of 1961 (720 ILCS 5/12-3.2 (West 2010)) the State was required to prove that: (1) defendant knowingly caused bodily harm to Ms. Quenaud; (2) that he did so by strangling her; (3) that she was defendant's family or household member at the time of the offense; and (4) that defendant was not justified in using the force he used. The jury was instructed that "'strangle' means intentionally impeding the normal breathing or circulation of the blood of an individual by applying pressure on the throat or neck of that individual or by blocking the nose or mouth of that individual." 720 ILCS 5/12-3.3(a-5) (West 2010). In order to prove defendant guilty of counts II through IV, domestic battery (enhanced), the State was required to prove that: (1) defendant knowingly caused bodily harm to Ms. Quenaud; (2) that she was defendant's family or household member at the time of the offense; and (3) defendant was not justified in using the force that he used. 720 ILCS 5/12-3.2(a)(1) (West 2010). Count II alleged that defendant pushed the body of Ms. Quenaud, count III alleged that defendant pushed Ms. Quenaud into a window, and count IV alleged that defendant struck Ms. Quenaud in the face.

¶ 53 Defendant's argument that the evidence was insufficient to establish guilt beyond a reasonable doubt amounts to an attack on Ms. Quenaud's credibility. He argues that her testimony was contradicted by the physical evidence and the testimony of other witnesses. For example, defendant argues that the "only potential injury in the picture is a possible puffy lip." We have considered all of the evidence, including the evidence of Christine's injuries. The injuries depicted in the photographs are consistent with the multiple areas of injuries that Dr. Campagna described in his testimony. Our "mandate to consider all the evidence does not necessitate a point-by-point discussion of every piece of evidence as well as every possible inference that could be drawn therefrom" *Wheeler*, 226 Ill. 2d at 117. Matters of conflict in the testimony as well as issues of credibility are for the trier of fact to resolve. *People v. Brown*, 2013 IL 114196, ¶ 48. While defendant's testimony conflicted with Christine's testimony regarding the altercation in their apartment, defendant admitted that he caused the injuries to Christine that are depicted in the photographs when he pushed Christine into the refrigerator.

¶ 54 Defendant argues that his "version of what had happened was corroborated by the physical evidence found at the apartment and substantiated by the physical injuries suffered by [him]." The argument section of defendant's brief does not address the effect the testimony of Camille Colon may have had on the jury's decision to reject his self-defense claim. During his direct testimony defendant did not address Camille Colon's testimony regarding the 2005 offense. On cross-examination, when the prosecutor asked defendant if he knew Camille Colon defense counsel objected on the grounds that the question was beyond the scope of direct. The prosecutor then agreed to avoid further questions on the topic. Despite defendant not having testified about the 2005 offense on direct examination it cast doubt on his defense of self-defense, and cast doubt on his credibility. See *People v. Stevens*, 2014 IL 116300, ¶ 20 (it was

proper for trial court to allow cross-examination about a prior sexual assault admitted to show propensity despite defendant not having testified about it on direct examination). Likewise, the defendant does not address the testimony of the State's witnesses (Christine, Officer Lewis, and Officer Deservi) that he was intoxicated, which also affected his credibility. The credibility of defendant's testimony, like that of any witness, was for the jury to decide and they were entitled to accept or reject all or a part of his testimony. *People v. Luckett*, 339 Ill. App. 3d 93, 103 (2003).

¶ 55 In support of his argument that the evidence in this case is insufficient to convict him, defendant cites to *People v. Smith*, 185 Ill. 2d 532 (1999) and *People v. Schott*, 145 Ill. 2d 188 (1991). Neither case supports defendant's argument. In *Smith*, the supreme court held that the State's evidence was insufficient to convict where the State's case hinged on the testimony of one chief witness, the only witness that directly linked the defendant to the crime. *Smith*, 185 Ill. 2d at 542. The State's chief witness' testimony was directly contradicted by the testimony of two other witnesses. *Id*. The court also observed that the chief witness was repeatedly impeached with a written statement she had given to a defense investigator. *Id*. at 544. The chief witness testified that she did not use drugs every day during the time of the shooting, yet she signed a written statement saying that she did. *Id*. Finally, the chief witness had a motive to falsely implicate the defendant because a possible alternative suspect was her sister's boyfriend and the police suspected her sister of providing the gun to the shooter. *Id*.

¶ 56 In *Schott*, our supreme court held that the State's evidence was insufficient to convict the defendant of indecent liberties with a child (the defendant's stepdaughter). The court stated that the victim's testimony was so lacking in credibility that it left a reasonable doubt as to defendant's guilt. The victim admitted that she had lied to a judge when she had previously

falsely accused her uncle of molesting her and she had a motive to lie about the defendant because she wanted him to leave the house. The victim had also recanted the allegations. *Schott*, 145 Ill. 2d at 207-09.

¶ 57 The alleged inconsistencies in Christine's testimony come nowhere close to the problems identified by our supreme court in *Smith* or *Schott*. As the court explained in *People v. Cunningham*, 212 Ill. 2d 274 (2004), "[t]estimony may be found insufficient under the *Jackson* [*Collins*] standard, but only where the record evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt." *Id*. at 280. It is the fact finder's job to judge how flaws in part of a witness's testimony affect the credibility of the whole. *Id*. at 283. The fact finder's judgment in that regard must be reasonable in light of the record. *Id*. "In some cases a reviewing court may find, after considering the whole record, that flaws in testimony made it impossible for any fact finder reasonably to accept any part of it." *Id*.

¶ 58 In this case, there is nothing in the record showing that the only reasonable inference is that the questionable parts of Christine's testimony make the whole of her testimony unworthy of belief. This is not a case like *Smith* or *Schott*, where the record showed that the victim had a motive to falsely accuse defendant. Nor is this a case where the witness' description of the offense is incredible on its face. *Id*. (citing *People v. Coulson*, 13 Ill. 2d 290, 296 (1958)).

¶ 59 After considering all of the evidence in the light most favorable to the prosecution, we hold that the evidence presented at trial was sufficient to convict defendant on all four counts.

¶ 60 B. State's Rebuttal Argument

¶ 61 Defendant next contends that remarks made by the prosecutor during her rebuttal argument require that defendant's convictions be reversed and the case be remanded for a new trial. In his brief defendant quotes nine comments that he believes to be prejudicial. Together,

these comments comprise just one and one-third pages of the transcript. The parties' closing arguments total 50 pages of transcript. Defendant acknowledges that he did not object to all of the complained of remarks at trial or include them in a post-trial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) ("*[b]oth* a trial objection *and* a written post-trial motion raising the issue are required for alleged errors that could have been raised during the trial (emphasis in original)). Defendant argues, however, that we should excuse the forfeiture under the plain error doctrine. Under plain error review, we may reach an otherwise forfeited issue if a clear and obvious error occurred and: (1) the evidence is closely balanced; or (2) the error "is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007); see also *People v. Thompson*, 238 Ill. 2d 598, 613-14 (2010) (equating the second prong of plain error review with structural error). Defendant argues that the challenged remarks are reviewable under the "closely balanced evidence" prong of the plain error doctrine. In plain error review, the defendant carries the burden of persuasion, and if the defendant fails to meet that burden, we will honor defendant's procedural default. *People v. Walker*, 232 Ill. 2d 113, 124 (2009). Defendant must show both that there was plain error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him. *People v. Herron*, 215 Ill. 2d 167, 186 (2005). The first step in plain error review is to determine whether any error occurred. *Thompson*, 238 Ill. 2d at 613.

¶ 62 It is well settled that prosecutors are entitled to wide latitude in closing argument, and even improper remarks do not merit reversal unless they result in substantial prejudice to the defendant. *People v. Kitchen*, 159 Ill. 2d 1, 38 (1994). During closing argument it is proper for a prosecutor to comment on the evidence or reasonable inferences drawn from the evidence,

respond to comments made by defense counsel that invite a response, and comment on the credibility of witnesses. *People v. Burman*, 2013 IL App (2d) 110807, ¶ 25. A "prosecutor's comments in closing argument will result in reversible error only when they engender 'substantial prejudice against the defendant to the extent that it is impossible to determine whether the verdict was caused by the comments or the evidence.'" *People v. Macri*, 185 Ill. 2d 1, 62 (1998). "In reviewing allegations of prosecutorial misconduct, the closing arguments of both the State and the defendant must be examined in their entirety, and the complained-of remarks must be placed in their proper context." *Kitchen*, 159 Ill. 2d at 38.

¶ 63 We recognize that there is division among districts of the Illinois appellate court on the standard of review for closing arguments. *People v. Legore*, 2013 IL App (2d) 111038, ¶ 48. The confusion comes from two Illinois Supreme Court cases. In *People v. Wheeler*, 226 Ill. 2d 92 (2007), the supreme court held that whether a prosecutor's remarks are so egregious as to require a new trial presents a question of law, which is reviewed *de novo*. *Id*. at 121. However, the *Wheeler* court also cited with approval its earlier decision in *People v. Blue*, 189 Ill. 2d 99 (2000), where the court applied the abuse of discretion standard of review to the prosecutor's closing arguments. *Wheeler*, 226 Ill. 2d at 121 (citing *Blue*, 189 Ill. 2d at 128). The supreme court has also stated, "[a]lthough the prosecutor's remarks may sometimes exceed the bounds of proper comment, the verdict must not be disturbed unless it can be said that the remarks resulted in substantial prejudice to the accused, such that absent those remarks the verdict would have been different." *People v. Pasch*, 152 Ill. 2d 133, 185 (1992). This court has stated that "because the result would be the same applying either standard to the facts before us, we would wait for the supreme court to resolve the conflict." *People v. Burman*, 2013 IL App (2d) 110807, ¶ 26. That same logic applies to the instant case. We note that a long line of Illinois Supreme

Court cases have held that a trial court's determination of the propriety of remarks by a prosecutor will not be overturned absent an abuse of discretion. See *People v. Peeples*, 155 Ill. 2d 422, 483 (1993); *People v. Sims*, 192 Ill. 2d 348 (2000).

¶ 64 Defendant argues that the prosecutor "made comments in summation that misstated the facts, misled the jury, and shifted the burden of proof to defendant." We examine each of the remarks in context in order to determine the existence, if any, of error. All of the complained of remarks were in rebuttal.

¶ 65 Defendant first argues that it was error for the prosecutor to remark, "[t]he fact that the doctor came in and I [*sic*] was her treating physician, I am here to report what I saw. Doctor, are those injuries consistent with how she presented with her complaint? Yes, they are." Defendant argues that there was no testimony from Dr. Campagna to support this argument. Rather, he argues that the premise for the argument came from "the leading and loaded compound question of whether the 'injuries' Quenaud 'presented with' were consistent with being choked, kicked and punched, to which Dr. Campagna answered, "yes." Defendant made a general objection to the question during Dr. Campagna's testimony which was overruled.

¶ 66 Grounds not specified in an objection are forfeited where the specific ground of objection was not apparent from the context. *People v. Miller*, 173 Ill. 2d 167, 191 (1996); Illinois Rule of Evidence 103(a)(1) (eff. Jan. 1, 2011). The ground for defense counsel's objection was not apparent from the context. Forfeiture aside, we find no error in the remark. While Dr. Campagna testified that there were no visible injuries on Christine's neck, she complained of being choked, on palpation she had tenderness in the back of her neck and said that the pain level was 10 out of 10. She was also placed in a cervical collar and was given medication for pain. We disagree with defendant's argument that the jury was misled into believing that Campagna

"saw" injuries. Dr. Campagna also testified that he would have expected to see swelling in the back of Christine's head given the history she gave of being kicked. The fact that the jury found defendant not guilty of aggravated domestic battery based on kicking "tends to show that the jury was closely scrutinizing the evidence rather than being swayed by the prosecutor's comments." *People v. Taylor*, 53 Ill. App. 3d 810, 817 (1977).

¶ 67 Defendant next argues that it was improper for the prosecutor to state the following in rebuttal:

> "Okay, she went to the doctor. I think your notes will indicate what she told the doctor about the choking. The doctor knew about the assault, he knew about the hitting in the head, he knew about the kicking. Are her injuries consistent with what she said? His answer was yes. His answer was yes. His answer was yes. Are they consistent? Yes."

¶ 68 Defendant argues that these comments by the prosecutor misstate the evidence. We disagree. The prosecutor did not argue that Dr. Campagna "saw" injuries to Christine's neck. During his closing argument defense counsel stressed that Christine did not tell Officer Lewis that defendant strangled her. The prosecutor was entitled to respond to this argument by emphasizing that during the same period where Christine apparently did not mention being "strangled" by defendant to Officer Lewis, she obviously told Dr. Campagna and the triage nurse that she had been choked. After this complained of remark the prosecutor continued, "[n]ow, she *said* she was choked. [Emphasis added.] Is that consistent with what she presented with? Yes, that is very definite. That is what the doctor said; he has no dog in this fight." We conclude that the prosecutor did not misstate the evidence when viewing the remarks in context.

¶ 69 Third, defendant argues that it was improper for the prosecutor to comment that "[n]ow, the other thing that is interesting. Officer Lewis' police report, probably a five page report, the only person that has had Officer Lewis' report is defendant." Defense counsel's objection to this remark was overruled. The prosecutor continued, stating "[t]hat is the only one who has got Officer Lewis' report." The court *sua sponte* said, "[t]hat will be sustained." The prosecutor continued to explain the circumstances surrounding Christine's oral statement to Officer Lewis. She asked the jury, "[t]he woman is in this condition. We know from the hospital records that Officer Lewis is talking to her for approximately 20 minutes, and she is responsible for what Officer Lewis is putting down in his report. She is responsible, how does that work?" An objection to this comment was overruled. During his closing argument defense counsel argued that Christine's failure to tell Lewis about being choked showed that her testimony about being choked was false. Defense counsel argued that if Christine lied about being "strangled" or "choked" the jury would have to vote not guilty. It is clear that a prosecutor may respond to comments made by defense counsel in closing argument that clearly invite a response. *People v. Johnson*, 208 Ill. 2d 53, 113 (2003). That the trial court paid close attention to the argument is clear from the record. The trial court allowed the State to rebut defense counsel's argument that the omission in Lewis' report was explained by the evidence that Christine "told the hospital that she was choked."

¶ 70 Defendant's fourth claim regarding improper argument was the prosecutor's statement, "[y]ou know what, Christine read the six pages she had never seen it before because she is not allowed to see the report." An objection to this remark was sustained. The trial court's prompt curative action in sustaining defense counsel's objection, together with giving proper jury instructions, cured any prejudice that may have resulted from this comment. *Id*. at 116. As our

review of the record reveals, the trial court repeatedly instructed the jury that "[n]either opening statements nor closing arguments are evidence, and any statement or argument made by the attorneys which is not based on the evidence should be disregarded."

¶ 71 Fifth, defendant argues that it was improper for the prosecutor to state "[t]he defendant had to testify and the mother even admitted she had to get him out of the house." An objection to this remark was promptly sustained. Similarly, the sixth complained of remark, "[t]hat is right, the defendant never has to testify, but in this case the defendant has to explain what happened" was also met with an objection that was sustained. While it is clear from the entire context of the closing arguments that the prosecutor's comments were an attempt to respond to defense counsel's "hot seat" comment and the necessity that defendant testify credibly, these comments were improper. On appeal, the State concedes that these remarks were improper "in that, had the objections to the comments not been sustained, the jury might have construed them as tending to shift the burden of proof to defendant," citing to *People v. Trask*, 167 Ill. App. 3d 694, 713 (1988). The State argues that the errors in the instant case were rendered harmless by both the trial court's immediate corrective action in sustaining the objections and giving proper instructions to the jury. Defendant argues that the trial court's sustaining of the objections did not cure the error "since the prosecutor persisted in making similar comments." We agree with the State. Contrary to defendant's contention, these two remarks were brief and isolated, taking up only a few lines of an otherwise lengthy and proper argument. See *People v. Runge*, 234 Ill. 2d 68, 142 (2009) (a significant factor in reviewing the impact of a prosecutor's allegedly improper comments on a jury verdict is whether the comments were isolated and brief within the context of a lengthy closing argument). Any prejudice that may have resulted from these brief remarks was cured by the trial court in promptly sustaining objections and giving proper jury

instructions. *Johnson*, 208 Ill. 2d at 116. Defendant argues that the prosecutor "persisted in making similar comments." We disagree. The final three complained of remarks were proper rebuttal remarks.

¶ 72 The seventh statement defendant complains of is the prosecutor's comment "[h]e still can't explain the soaking wet thing. He just can't do it." Defendant claims that in arguing that defendant could not explain "the soaking wet thing," the prosecution misstated the evidence and improperly bolstered Christine's credibility. We disagree. Christine's testimony that defendant held her in the shower was corroborated by her mother. Karen Quenaud's testimony that when Christine arrived at her home she was "soaking wet." Defense counsel did not cross-examine Karen. During his closing argument defense counsel asked the jury to "compare" defendant's testimony to Christine's. Defense counsel argued that defendant's story made more sense. Counsel also argued that the evidence did not corroborate Christine's testimony. The prosecutor's comment, when viewed in context, was an invited response to defense counsel's argument. Statements will not be held improper if they were provoked or invited by defense counsel's argument. *People v. Kirchner*, 194 Ill. 2d 502, 553 (2000). Christine testified that defendant held her in the shower to wash the blood off and that when she left the apartment she was soaking wet. This fact was corroborated by Karen Quenaud's testimony. The prosecutor was merely commenting on the evidence presented and the reasonable inferences drawn therefrom when comparing defendant's testimony to Christine's. "If a defendant chooses to give an explanation for his incriminating situation, he should provide a reasonable story or be judged by its improbabilities." *People v. Hart*, 214 Ill. 2d 490, 520 (2005). When it is clear that the testimony of a defendant and that of the State's witnesses cannot both be true "[t]he prosecutor

may ask the jury to compare the defendant's story with that of other witnesses to decide what actually happened." *People v. Washington*, 101 Ill. App. 3d 409, 413 (1981).

¶ 73 The eighth comment that defendant takes issue with was the prosecutor's reference to Christine's testimony that she got hit in the head: "[s]he did say she got hit in the back of the head and had bumps. Could she have had bumps? Of course. Could the doctor have missed it, or maybe it grew later?" Defendant claims that this comment misstated the evidence. We disagree. The prosecutor merely was contrasting Christine's testimony with Dr. Campagna's testimony. In any event, the jury acquitted defendant on count V, which alleged that defendant kicked Christine in the head. If anything, this shows that the jury paid close attention to the testimony and defendant suffered no prejudice, even if we were to agree with defendant's characterization. Accordingly, defendant did not suffer any prejudice from this remark.

¶ 74 Finally, defendant argues that the prosecutor made an improper negative comment about defendant's choice to take this case to trial when she said, "[t]he defendant has a right to a jury trial, he has exercised that right." We disagree. First, the reference was not negative; it was neutral and merely stated the obvious. See *People v. Barney*, 176 Ill. 2d 69, 73 (1997) (when a prosecutor states to the jury that a defendant's testimony is biased he is merely stating the obvious). Second, the trial court promptly sustained an objection to this argument which cured any prejudice that might have resulted from the remark. We reject defendant's comparison of the prosecutor's remark in the instant case to the comments of the prosecutors in *People v. Herrero*, 324 Ill. App. 3d 876 (2001) and *People v. Libberton*, 346 Ill. App. 3d 912 (2004). In each of those cases the prosecutor made negative statements regarding the defendant's decision to exercise his constitutional right to a jury trial. Nevertheless, in both cases the defendants' convictions were affirmed. In *Libberton*, this court said that the evidence was sufficiently strong

"that we can presume that the State's closing argument did not affect the verdict, and under the general standard there is no reversible error." *Libberton*, 346 Ill. App. 3d 924. In *Herrero*, the appellate court affirmed the defendant's conviction, finding that the comments were harmless in light of the strength of the State's case. *Herrero*, 324 Ill. App. 3d at 888.

¶ 75 Defendant cites to *People v. Yonker*, 256 Ill. App. 3d 795 (1993), for the proposition that even a single improper comment that shifts the burden of proof to the defendant can constitute reversible error. In that case, the defendant, charged with first degree murder, testified that he acted in self-defense. During closing arguments the prosecutor commented:

> "There is only one question that needs to be answered in order to arrive at a fair verdict and that one question is to you believe the defendant? That's how simple this case is. So should you believe the defendant? That's the question that needs to be answered.
>
> ******
>
> So, the question becomes do you believe him? The only way that you can return a verdict of anything other than guilty of first degree murder is if you believe him. That's the only way. If you don't believe that story then he's guilty of first degree murder." *Id.* at 797-98

¶ 76 The defendant's attorney failed to object to either of these comments. On appeal, the First District held that the statement was a "flagrant misstatement of the law because it shifted the burden of proof to the defendant to establish that he was not guilty of the offense." *Id.* at 800. The court concluded that the error was fundamental and denied defendant a fair trial, therefore satisfying the second prong of the plain error doctrine. *Id.* at 800. The comments by the prosecutor in the present case pales by comparison to the improper remarks in *Yonker*.

Unlike that case, the trial court in the instant case took prompt corrective action in sustaining objections to the remarks.

¶ 77 The appellate court in *Yonker* did state that "'to misstate the burden of proof or standard of review, to any extent, compromises the fairness of the judicial process and shall not be tolerated." *Id*. at 799 (quoting *People v. Wilson*, 199 Ill. App. 3d 792, 797 (1990)). However, our court explained in *People v. Euell*, 2012 IL App (2d) 101130, that this statement in *Wilson* and therefore *Yonker*, understates the defendant's burden to establish plain error. We said, "as the *Yonker* court itself pointed out, '[i]mproper comment is plain error [only] when it is either so inflammatory that the defendant could not have received a fair trial or so flagrant as to threaten a deterioration of the judicial process." *Id*. ¶ 21. As this court stated in *Euell*, when there was no objection to the burden-shifting remarks or corrective action by the trial court, the remarks do not warrant reversal unless they could have affected the jury's verdict. *Id*. ¶ 22.

¶ 78 Reviewing the allegations of prosecutorial misconduct in the context of the entire arguments of the prosecution and the defense, the evidence at trial as well as the corrective action taken by the court, we find no reversible error. Since there is no reversible error, there can be no plain error. We also note that even if we were to find that there was error, such that "it is impossible to determine whether the verdict of the jury was caused by the comments or the evidence," defendant has not shown that the evidence was closely balanced. *People v. Macri*, 185 Ill. 2d 1, 62 (1998).

¶ 79 Evidence has been found to be closely balanced where there are two opposing versions of events and there is "no extrinsic evidence presented to corroborate or contradict either version***." *People v. Naylor*, 229 Ill. 2d 584, 607 (2008). *Naylor* does not stand for the proposition that evidence is "closely balanced" when the defense's version of events differs from

the State's version and both versions match up with or are consistent with the physical evidence. *People v. Lopez*, 2012 Il App (1st) 101395, ¶ 88. There was no issue in this case as to who caused the injuries that Christine suffered during the altercation. Since the State's evidence did not contain any evidence of self-defense, defendant had to present some evidence that his use of force was justified in order to be entitled to a self-defense instruction. *People v. Cox*, 100 Ill. App. 3d 272, 281 (1981); *People v. Tyler*, 188 Ill. App. 3d 547, 552 (1989). In "making a determination of whether the evidence is closely balanced, a reviewing court must make a commonsense assessment of the evidence within the circumstances of the individual case." *People v. Belknap*, 2014 IL 117094, ¶ 2. While Christine's version of events was not corroborated in every detail, her version of events was consistent with the physical injuries she sustained and the testimony of the State's other witnesses. We agree with the State that the photographs of Christine's injuries do not look like she was pushed into a refrigerator; rather she looks like she was "pretty much beaten." The photographs are consistent with Dr. Campagna's description. Christine's lips are bloody and badly swollen, she has bruising underneath and around her right eye, her nose appears swollen and she has linear abrasions on her nose and cheeks. Christine's mother corroborated her testimony as to her injuries, her emotional condition and the fact that she was "soaking wet."

¶ 80 With respect to defendant's version, we find it implausible in light of the evidence. As we said, defendant claimed that Christine was the initial aggressor and he acted only in self-defense. On this point, the testimony of defendant was severely impeached by the testimony of Camille Colon. As our supreme court said in *People v. Donoho*, 204 Ill. 2d 159 (2003), evidence of other crimes is generally inadmissible to demonstrate the charged crime. Such evidence is not considered irrelevant; instead, it is objectionable because such evidence has too much probative

value. *Id*. at 170 (citing *People v. Manning*, 182 Ill. 2d 193, 213 (1998)). In *People v. Dabbs*, 239 Ill. 2d 277 (2010), our supreme court, in upholding the constitutionality of section 115-7.4 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-7.4 (West 2008)), said "[e]vidence that defendant has been involved in a similar incident may persuade a jury that the present victim is worthy of belief because her experience in *corroborated* by the experience of another victim of the same abuser." (Emphasis added.) *Id*. at 293. Defendant was the only witness who could have thrown light on Colon's testimony. We also note that the State's attempt to cross-examine defendant on the Colon matter was not beyond the scope of defendant's direct testimony. See *People v. Stevens*, 2014 IL 116300, ¶ 24 (it is proper on cross-examination to develop all circumstances within the knowledge of the witness which will explain, qualify, discredit or destroy his direct testimony). We also note that defendant's injuries and the photographs do not corroborate his version. The photographs of the broken mirror on the table shows that the largest piece of the mirror is underneath an ashtray that is full of ash and cigarette butts, more consistent with the mirror being on the table when defendant punched the table as Christine described. Defendant testified that he "blocked" the mirror with his hand. The injury to defendant's hand that he said came from the mirror is in the outside knuckle of his middle finger, not on the palm side as one would expect to see if defendant raised his hand to "block" the mirror. The photograph of defendant's foot injury shows at best a very slight abrasion, not a cut. While defendant's version might not be impossible, it was for the jury to determine the credibility of the witnesses and the weight to be given the "extrinsic" evidence.

¶ 81 Finally, we note that there were four potential witnesses, presumably under defendant's control, who he could have called to throw light on the events that led to his arrest—defendant's two neighbors, from whom he borrowed a phone to call his mother, as well as his friend Sean

Hartman and Hartman's mother. The State drew the jury's attention to defendant's omission in rebuttal, noting that defendant had subpoena power. The trial court overruled defendant's objection to the remark and defendant did not raise the issue in this appeal. The jury was entitled to consider this fact in their credibility assessment. *People v. Giraud*, 2011 IL App (1st) 091261, ¶ 47 (citing *People v. Williams*, 40 Ill. 2d 522, 528-29 (1968)). We also consider this fact in our "common sense assessment" of the evidence in this case. In rejecting defendant's argument that the evidence was closely balanced, we also note that three witnesses testified that he was intoxicated, making him a poor historian of the relevant events. Also, his conduct, after Christine left the apartment, was not consistent with a person who was supposedly acting in self-defense. Defendant did not call the police or an ambulance. Instead, he opted to clean up and flee to his mother's house. See *People v. Blair*, 2011 IL App (2d) 070862, ¶ 43 (rejecting the defendant's closely-balanced, plain error argument in a self-defense/aggravated domestic battery case). In sum, the evidence in this case was anything but closely balanced.

¶ 82 III. CONCLUSION

¶ 83 We hold that the evidence presented by the State was sufficient to convict. We also hold that defendant suffered no prejudice from improper rebuttal remarks from the prosecutor where the trial court took prompt corrective action in sustaining objections to the remarks and properly instructed the jury. Defendant's convictions are therefore affirmed.

¶ 84 Accordingly, the judgment of the circuit court of Lake County is affirmed.

¶ 85 Affirmed.

¶ 86 JUSTICE HUTCHINSON, dissenting:

¶ 87 I respectfully dissent.

¶ 88 Apparently, when it comes to prosecutorial misconduct, "[i]t is easier to get forgiveness than permission." Arthur Bloch, *Murphy's Law Book Two: More Reasons Why Things Go Wrong* (1980). That is, if a prosecutor were to seek permission to shift the burden of proof to a defendant or to remark on a defendant's decision to be tried by a jury before presenting closing or rebuttal argument at trial, the trial court would deny the request. However, if a prosecutor were to shift the burden with such remarks or comment on a defendant's right to a jury trial and then ask for forgiveness on appeal for doing so, the prosecutor is more likely to get away with it. Prosecutorial misconduct has an unfortunate history of a lack of consequences, which results in the distrust of the system and undermines the fair administration of justice. Hon. Alex Kozinski, *Criminal Law 2.0*, 44 Geo. L.J. Ann. Rev. Crim. Proc. iii (2015). This premise is even more fundamentally unjust as it applies to criminal prosecutions, and I believe the prosecutor's comments during rebuttal argument in the present case constituted reversible error. Furthermore, I would apply the plain-error doctrine because I believe the evidence was closely balanced. I reject any implication that, even if there was overwhelming evidence of guilt, the prosecutor may take liberties with a defendant's rights. I write to express my continued stance not to condone prosecutorial misconduct. See *People v. Libberton*, 346 Ill. App. 3d 912, 925-27, 940-42 (2003) (Hutchinson, J., dissenting).

¶ 89 In the present case, the comments that defendant "had to testify" and "has to explain what happened" improperly shifted the burden of proof and are substantively the same as the prosecutor's comments in *People v. Carbajal*, 2013 IL App (2d) 111018, in that the defendant's testimony did not prove his innocence. In *Carbajal*, this court concluded that the State's comment that the defendant's testimony "does not prove [his] innocence in any way" improperly shifted the burden. We also noted that the State argued that the defendant failed to put in a

statement to police that his intent for entering the school was to persuade his friends to come out. The State argued during closing argument, "[t]hat right there proves your innocence, and [the defendant] didn't put that in his statement," and this court found that the comment also improperly shifted the burden. *Carbajal*, 2013 IL App (2d) 111018, ¶¶ 33-35. Importantly, the trial court in *Carbajal* sustained the defendant's objection to the second comment and admonished the jury that the defendant was presumed innocent. *Id.*

¶ 90 " 'There is a great deal of difference between an allegation by the [State] that defendant did not prove himself innocent and statements regarding the relevancy or credibility of a defendant's case.' " *Carbajal*, 2013 IL App (2d) 111018, ¶ 34 (quoting *People v. Phillips*, 127 Ill. 2d 499, 527 (1989)). Similar to the circumstances in *Carbajal*, the prosecutor in this case went beyond commenting on the relevance and credibility of defendant's testimony. The prosecutor initially noted that defendant "had to testify." Following an objection, which the trial court sustained, the prosecutor clarified that defendant "never has to testify, but in this case the defendant has to explain what happened." While the prosecutor was free to note that Christine's testimony regarding the "soaking wet thing" was not contradicted, a criminal defendant is never under an obligation to prove his innocence or to explain anything. Following a second objection, which the trial court again sustained, the prosecutor argued that defendant "can't explain the soaking wet thing. He just can't do it." The comments here, like those in *Carbajal*, gave the jury the impression that defendant was required to prove his innocence by explaining the "soaking wet thing." The prosecutor's clear message to the jury was that defendant was obligated to explain what transpired on February 10, 2011, to prove his innocence. This was error.

¶ 91 With respect to the police report, the prosecutor did more than simply note that Christine had not seen the report before testifying. Instead, the prosecutor went far beyond that and told

the jury that Christine "is not allowed to see the report." Illinois Supreme Court Rule 415 (eff. Oct. 1, 1971) provides that, unless otherwise specified, "neither the counsel for parties nor other prosecution or defense personnel shall advise persons having relevant information *** to refrain from *** showing opposing counsel any relevant material, nor shall they impede opposing counsel's investigation of the case." The language provided in Rule 415 "is quite broad and appears to prohibit impeding an investigation regardless of the context in which the investigation occurs." *People v. Spates*, 143 Ill. App. 3d 563, 565 (1986). In this case, there is no basis to conclude that Christine could not have gained access to Officer Lewis's report before testifying.

¶ 92 I also believe that the prosecutor's reference to defendant's decision to exercise his right to a jury trial constituted error. Arguments that serve no purpose other than to inflame the jury constitute error; closing arguments must be viewed in their entirety and "the allegedly erroneous argument must be viewed contextually." *People v. Blue*, 189 Ill. 2d 99, 127-28 (2000). A negative comment about a defendant's exercise of his constitutional rights is improper absent invitation. *Libberton*, 346 Ill. App. 3d at 939. As I have previously remarked, " 'while we expect prosecutors to prosecute "with earnestness and vigor" (*Id.* at 925 (Hutchinson, J., dissenting)) and to " 'strike hard blows,' " prosecutors are " 'not at liberty to strike foul ones' " *Id.* (Hutchinson, J., dissenting (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

¶ 93 In this case, after viewing both defense counsel's closing argument and the prosecutor's rebuttal in context, I maintain that the prosecutor's reference to defendant's decision to exercise his right to a jury trial was improper. Defense counsel noted that defendant, as the accused, was in the "worst seat in the house" and noted that defendant decided to testify at trial. The plain reading of that statement is that defense counsel referred to defendant's right to be presumed innocent and to testify at trial. The prosecutor, nonetheless, used defense counsel's statements as

an opportunity to cast in a negative light defendant's decision to exercise his right to a jury trial. That decision, however, was not relevant to defense counsel's belief that defendant, as the accused, would be viewed with skepticism but that he nonetheless decided to testify. Further, that the prosecutor made the statement almost immediately after commenting that Christine and Camille were in "the toughest seat in the courtroom" bolsters my conclusion. The two comments could have been construed as suggesting that the reason Christine and Camille were in "the toughest seat in the courtroom" resulted from defendant's choice to have a jury trial, which forced them to testify. Thus, the prosecutor improperly commented on defendant's decision to exercise his right to a jury trial without responding to defense counsel's closing argument. See *People v. Smith*, 402 Ill. App. 3d 538, 548-49 (2010) (rejecting the State's argument that a prosecutor's improper comment on the defendant's failure to testify was invited by defense counsel's closing argument).

¶ 94 It is important to remember that the prosecutor made all of these comments during rebuttal. The jury had already heard the prosecution's closing argument and a responsive closing argument from defense counsel. Defendant had no further opportunity to respond. Rebuttal was the last argument that the jury would hear before deliberating, and the prosecutor inexplicably told the jurors that Christine was "not allowed" to see the police report that she provided. In my opinion, that comment, and the others, during that moment in the proceedings, was very significant.

¶ 95 I believe that these three improper statements culminated in " 'a pervasive pattern of unfair prejudice to the defendant's case' " which created reversible error. *People v. Beltran*, 2011 IL App (2d) 090856, ¶ 61 (quoting *Blue*, 189 Ill. 2d at 139-40, and noting that a court can consider the cumulative effect of improper arguments rather than assess the prejudicial effect of

each comment in isolation). Simply put, after the close of evidence and after the jurors had already heard the State's closing argument and a responsive closing argument from defense counsel, the State (1) shifted the burden of proof to defendant; (2) incorrectly stated that Christine was not allowed to review a police report before testifying; and (3) cast a negative light on defendant's decision to exercise his right to a jury trial.

¶ 96 I believe the prosecutor's comments during rebuttal closing argument constituted reversible error under the plain error doctrine because the evidence was closely balanced. See *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005) (stating that "the plain-error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence").

¶ 97 The circumstances in the present case are similar to *People v. Naylor*, 229 Ill. 2d 584 (2009). In *Naylor*, our supreme court found that the evidence was closely balanced. It rejected the State's argument that the matter involved more than a credibility determination even though, as the State noted, two officers testified that the defendant sold drugs to them, funds used to buy the drugs were returned to the purchasing officers by the arresting officer, and the defendant stipulated that tinfoil packets inventoried by police officers tested positive for heroin. *Id.* at 606-08. The supreme court opined that there was an opposing version of events and no extrinsic evidence corroborated or contradicted either version. *Id.* at 607.

¶ 98 In the present case, the extrinsic evidence was contradicted by defendant's and Christine's testimony. While there was medical testimony regarding Christine's injuries, that testimony did not support her claims that she had bumps on the back of her head as a result of defendant kicking her. In addition, although the medical expert testified that Christine's injuries

were consistent with being hit, kicked, and choked, he also testified that he formed no opinion as to whether her injuries resulted from defendant's actions. Moreover, while there was immediate outcry, Christine's testimony was inconsistent with what she initially told police, as reflected in the police report.

¶ 99 Further, in reaching its determination, the *Naylor* court noted that the State argued in its brief that, "based on the statements by the trial court [which was the trier of fact], it is clear that it *believed* the testimony of the officers and rejected [the] defendant's testimony." (Emphasis in original.) *Id.* The supreme court noted that "the State acknowledges that [the] defendant's convictions turned on the trial court's assessment of credibility." *Id.* Here, whether the jury could have believed Christine's testimony over defendant's testimony is a distinct issue from whether the evidence was closely balanced for the purpose of invoking the plain-error doctrine. In this case, as in *Naylor*, the fact finder was presented with two versions of what transpired that night, *i.e.*, whether defendant or Christine was the aggressor. Both Christine's and defendant's testimony had significant gaps that, while the jury was free to resolve, cannot be ignored for the purpose of plain-error review.

¶ 100 Trust in the judicial system is harmed when a defendant does not receive a fair trial because of prosecutorial misconduct. The issue is not simply based on the quantum of evidence, but rather, the issue is trust. When prosecutors infringe on a defendant's fundamental rights, trust in the system is broken. Such is the case here. I believe that prosecutorial misconduct should not go unrecognized in any case. We encourage the proliferation of prosecutorial misconduct when we fail to address the serious nature of this issue, and in doing so, we ultimately engender substantial prejudice against a defendant and cast doubt on the reliability of the judicial process. See *Blue*, 189 Ill. 2d at 138. Having reviewed the prosecutor's comments

and the State's evidence, I would apply the plain-error doctrine to reverse and remand for a new trial.

¶ 101 For these reasons, I respectfully dissent.