2015 IL App (2d) 140192-U
No. 2-14-0192
Order filed January 30, 2015

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of De Kalb County.
Plaintiff-Appellee,	)	
v.	)	No. 11-CF-770
JAY M. TROUT,	)	Honorable Robbin J. Stuckert,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Zenoff and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's conviction for aggravated battery is affirmed.

¶ 2 Following a bench trial, the court convicted defendant, Jay M. Trout, of aggravated battery. 720 ILCS 5/12-3.05(b)(2) (West 2011). The court found that defendant struck his son, W.T., who was under age 13, causing bodily harm (but not great bodily harm), in that he caused his son to suffer a perforated ear drum. The court rejected defendant's common-law defense of reasonable parental discipline. The court also rejected defendant's theory that the perforation

was caused not by the force of being hit, but by an infection. The court sentenced defendant to 30 months' probation.

¶ 3 On appeal, defendant challenges: (1) several evidentiary rulings; (2) the court's denial of his motion for a directed finding; and (3) the sufficiency of the evidence. For the reasons that follow, we reject each of defendant's arguments and affirm.

¶ 4 I. BACKGROUND

¶ 5 This criminal case arises out of a relatively contentious family situation. Defendant and Jill Emetti have two children together, W.T. (a son, age 12) and T.T. (a daughter, age 8). Defendant and Emetti never married. They have appeared in family court for approximately 15 different causes in as many years. Prior to the incident at issue, defendant had had custody of W.T. since he was two years old. Emetti had had custody of T.T. since she was born (in her words, in exchange for "signing over" custody of W.T.). Each parent enjoyed visitation. Immediately after the offense, Emetti had custody of both W.T. and T.T. However, W.T. did not want to live with Emetti, and, in proceedings not detailed here, it was decided that W.T. would live with his paternal aunt, Kelly Ash. Defendant's visitations with W.T. have been limited since the incident.

¶ 6 The offense occurred at approximately 5 p.m., on October 21, 2011, at defendant's Maple Park home. Defendant told both W.T. and T.T. that it was time to get ready for a visitation exchange. Defendant told W.T. to clean his room before they left. After 45 minutes, W.T. had made no progress on his room. When defendant asked W.T. why he had not cleaned his room, W.T. "mouthed off" and answered something to the effect of "not feeling like it." Under the State's theory of the case, defendant then slapped W.T. "hard" with an open palm across the face and ear and punched him with a closed fist in the upper leg/buttocks area while W.T. curled up in

a corner and asked him to stop. Under defendant's theory of the case, defendant slapped W.T. on the top of the head and slapped him on the buttocks, telling him to hurry along and clean his room. Either way, W.T. shortly thereafter suffered a perforated ear drum, the cause of which was debated at trial.

¶ 7 A. Section 115-10 Hearing

¶ 8 On July 25, 2012, the trial court conducted a section 115-10 hearing (725 ILCS 5/115-10 (West 2011)) over the course of several days to determine the admissibility of W.T.'s out-of-court statements concerning the offense. The court evaluated the reliability of W.T.'s statements made to Emetti, Maple Park police officer Maria Colletti, Department of Children and Family Services (DCFS) investigator Judith Dugue, and De Kalb County Sheriff detective Sarah Frazier. The court ultimately admitted these statements to be heard at trial, with an exception set forth below.

¶ 9 The court ruled that portions of W.T.'s videotaped interview with Frazier would not be admitted. Frazier conducted a 20-minute video interview of W.T. a little over a month after the offense, on November 29, 2011. Defendant argued that the statements made in the video were not reliable, were potentially the result of manipulation, and should be excluded in their *entirety* because: (1) Frazier had been trained by the police rather than by the children's advocacy center; (2) Frazier's written report accompanying the video consisted only of a statement that the advocacy center had contacted her to conduct the interview, and it was written the day before the interview took place rather than after the interview; and (3) the interview took place a little over a month after the offense (although the statute specifically allows for statements made within three months of the offense, even if the victim turns 13 during that time (725 ILCS 5/115-10 (West 2011)).

¶ 10 The court rejected these arguments to exclude the statements made to Frazier, noting that the video itself provided evidence that the interview was properly conducted, regardless of who trained Frazier and regardless of what written reports documented the interview. It disagreed that the length of time following the offense compromised the reliability of the statements. Seemingly unprompted, however, the court clarified that it would consider only the video statements pertaining to the incident at issue. It would disregard the last several minutes of the interview, which began with the question, "Did you ever see him spank your little sister?" Defendant did not object to this subject matter limitation, although he would later object at trial.

¶ 11 B. Trial

¶ 12 1. The State's Case

¶ 13 i. Frazier's Testimony and the Video

¶ 14 Frazier testified that she interviewed W.T. on November 29, 2011. She has been a detective for 19 years, and she has interviewed over 1,000 crime victims. She has interviewed approximately 500 victims of domestic violence, 50 to 100 of whom were children. In 2007, she participated in a 40-hour class called "Finding Words." There, she learned to ask children questions in a manner that is not leading or suggestive.

¶ 15 The State then played the video interview for the court. As to the incident, W.T. told Frazier that defendant was mad at him because he did not clean his room. He knew defendant was mad, because defendant's face was red. He was scared by the way defendant walked toward him. He had never seen defendant like that. Defendant said something to the effect of "all you ever do is mess around." W.T. went to a corner. Defendant hit him across the face, on the ear, with an open or cupped palm. This caused W.T. to fall down. Then, defendant punched W.T. on the upper leg. After defendant hit W.T. near the ear, W.T.'s ear hurt. It rang. It never felt like

that before. W.T. went outside because he thought defendant might hit him again. He went outside without his shoes. Defendant followed him outside and told him to come back in the house. W.T. waited one or two minutes, until he thought defendant had calmed down and it was "safe." When W.T. returned to the house, T.T. helped him clean his room. W.T. thought T.T. may have seen defendant hit him, but then she ran upstairs. When defendant dropped off W.T. at the visitation exchange, defendant apologized for hitting him. W.T.'s ear stopped hurting within two hours. Frazier asked W.T. about the incident in various ways, such that he consistently described the key components of the incident at least twice throughout the interview.

¶ 16 Frazier next asked W.T. about *other* incidents wherein defendant hit him or T.T., for disciplinary reasons or otherwise. Again, the trial court had ruled at the section 115-10 hearing that *that* portion of the interview would not come into evidence. The court would consider only those statements pertaining to the charged offense. The court renewed that ruling at trial. Although defendant had not objected at the section 115-10 hearing, he objected at trial. He argued that the evidence would not be "complete" unless the entire video was admitted. The court rejected defendant's argument.

¶ 17 In the contested portions of the video, W.T. described three earlier incidents where defendant hit him or T.T. One occurred when W.T. was 8 or 9 years old, and defendant spanked him with an open palm. The other occurred a few years prior to the current incident, on a family trip to New Orleans. Defendant, Emetti, W.T., and T.T. were on the trip. W.T. yelled at T.T. Defendant reacted to W.T.'s misbehavior by "yanking" W.T.'s ear, but it did not hurt. Additionally, W.T. witnessed defendant spank T.T. with an open palm after she refused to eat her lunch. Defendant spanked her and then made her stand in a corner.

¶ 18 ii. T.T.'s testimony

¶ 19 T.T. testified that, on the day of the incident, she heard defendant tell W.T. to clean his room, which was located in the basement. When defendant first told W.T. to clean his room, W.T. left to go into the basement. Later, defendant went downstairs to see if W.T. had cleaned his room. T.T. went downstairs with him. Defendant stood in the doorway of W.T.'s bedroom. W.T. was on his bed, playing with his iPod. Defendant started yelling at W.T., saying "Why didn't you clean your room? Why? Why? I told you to." Defendant continued to "get louder," and he rested his hand on a nearby gumball machine. W.T. looked "panicked" ("it wasn't his normal face"), and he ran underneath defendant's arm, between defendant and the gumball machine. T.T. got out of the way so that W.T. could leave. W.T. ran to a different corner of the basement, where he "curled up like in a ball." (T.T. demonstrated W.T.'s position as she testified, bringing her knees to her chest and wrapping her arms around her knees.) T.T. then left the basement. However, she soon heard W.T. crying, so she went back downstairs and she saw defendant punching W.T. on the leg and stomach. She heard W.T. say, "Dad, please stop. Don't hurt me." She saw defendant punch W.T. like this "only a couple" of times, because, after "like five seconds," she ran back upstairs. T.T. ran back upstairs because she was "very upset. [She] didn't know what to do." She tried to "think straight," but she could not. Approximately 15 seconds later, W.T. came upstairs. T.T. could see that he was crying. W.T. walked "normal speed," but, when he got to the front door, he ran outside. Defendant called W.T. back, and, shortly thereafter, they left to go to the visitation exchange. At the visitation exchange, defendant and W.T. stayed outside the cars for a while. T.T. heard defendant apologize to W.T., "just saying 'I'm sorry'." T.T. then got into Emetti's car and told her what happened.

¶ 20 During cross-examination, T.T. clarified that the punch was a "hard" punch. Additionally, she clarified that, after W.T. ran outside, but before they left for the visitation exchange, W.T. went back downstairs to clean his room. She helped him.

¶ 21 The defense asked T.T. whether she talked about the case with Emetti. T.T. said that she only talked about it shortly after the incident at the police station.

¶ 22 On the next trial date, the defense approached the bench, essentially stating it believed that T.T. had been coached. The defense stated that defendant's sister, Ash, overheard a conversation outside the courtroom between T.T. and Emetti. Ash alleged that Emetti asked T.T., " 'How did you do?'." T.T. purportedly responded, " 'I did good. They tried to mess me up, but I said what you told me to say'." The court then stated that, in balance, it observed Ash herself "making faces" at T.T. "throughout" the testimony. The court did not mention it for the record at the time. Rather, it "looked" at Ash, and Ash stopped. The court decided that it would talk to T.T. *in camera*, and that, in the future, Ash would be excluded from the courtroom. The court had "concerns about everybody's behavior" as far as placing inappropriate pressure on the minor children. (We infer that the *in camera* discussion resolved the court's credibility concerns as to T.T., because the court rendered a positive assessment of her credibility in its subsequent oral ruling.)

¶ 23 iii. Emetti's Testimony

¶ 24 Emetti testified that, on the day of the incident, she had arranged to meet defendant at a gas station for a visitation exchange. T.T. left defendant's car first, and she let herself into Emetti's car. T.T. immediately told Emetti about the incident. As Emetti listened, she observed defendant and W.T. outside the vehicle. Defendant was holding W.T. by the arms, and W.T. was

wiping away what looked like tears. Then, W.T. got into Emetti's car. Defendant and Emetti did not talk about the incident.

¶ 25 After the exchange, when Emetti was alone with the children in the car, she asked W.T. if he was okay. W.T. answered that his ear hurt "really bad." When she asked W.T. why his ear hurt, W.T. answered that "his dad had hit him [o]n the side of the head twice and he could barely hear out of his ear and it was very painful." W.T. looked like he had been crying; his face and eyes were "red and puffy." When Emetti asked W.T. why defendant hit him, W.T. answered that it was because he had not cleaned his room.

¶ 26 While still in the car, Emetti called defendant to ask what happened. However, he responded that he did not "know what [she was] talking about." Next, she called her close friend, Laura Tews. Tews, who is a medical assistant, agreed to look for any potential injury to W.T. Specifically, Emetti feared a concussion at that point, because it seemed to her that W.T.'s eyes were dilated. Emetti drove straight to Tews's house in Geneva. Tews was not home yet, so W.T. and Tew's son played video games in the basement while they waited for her.

¶ 27 During cross-examination, the defense asked Emetti questions regarding her relationship with defendant. As neither party has ever disputed, the two have appeared in family court over multiple matters. Emetti was currently in the process of seeking increased child support from defendant. Emetti has always wanted custody of both W.T. and T.T. Emetti denied speaking with T.T. about the incident so as to influence T.T.'s testimony.

¶ 28 iv. Tews's Testimony

¶ 29 Tews testified that, when working as a medical assistant, she often performs "triage," which involves making an initial assessment of a patient before the doctor sees the patient. Tews examined W.T. for signs of injury. One side of his face was red. This was unlike other times

she had observed him socially. His skin behind his ear was purple in color. However, Tews did not get the impression that W.T. was emotionally distraught. Tews and Emetti discussed the matter, and Emetti decided that they should go to the police station.

¶ 30 Tews and Emetti left the house with W.T., T.T., and Tews's son. They went to the Geneva police station. The Geneva police told them to go to the Maple Park police station, because the incident occurred in Maple Park. On the way to the Maple Park station, W.T. and Tew's son noticed a haunted house at the Kane County fair grounds. They asked to go, and the adults consented and waited in the car with T.T. The boys were only gone for five minutes. They quickly returned to the car and said the haunted house was "stupid" and "lame." Tews then drove the group to the Maple Park police station and, later, to the emergency room at Delnor Hospital in Geneva.

¶ 31 During cross-examination, the defense elicited that from Tews that she did not "think much" of defendant. Additionally, while Tews considered W.T.'s injury "urgent," she did not consider it an "emergency."

¶ 32 v. Colletti's Testimony

¶ 33 Colletti testified that she interviewed W.T. at the Maple Park police station several hours after the incident took place. Before speaking with W.T., Colletti spoke with Emetti, who told her that defendant struck W.T. in the ear and that she planned to take W.T. to the hospital. Colletti interviewed W.T. in the presence of Emetti and T.T. W.T. was quiet, and, in Colletti's view, apprehensive and reticent. After asking W.T. "several times" what happened, W.T. responded that defendant hit him twice with an open palm on the right side of the face, ear, and cheek. Defendant also punched him on the upper thigh. W.T. stated that defendant was "very

angry," because he, W.T., had not cleaned his room. W.T. was "scared" and asked defendant not to hit him, but defendant hit him anyway. W.T. told Colletti that his ear hurt.

¶ 34 Colletti photographed W.T.'s face and ear, and the photographs were later marked as the State's exhibit Nos. 2 and 3. On the photographs, the area where defendant hit W.T. appeared red, as did the area behind the ear. Colletti testified that, in reality, the skin discoloration looked darker, closer to a bruise. Additionally, Colletti circled an area on the photograph representing a bump that she saw on W.T.'s forehead.

¶ 35 Colletti called defendant's cell phone, having received the number from Emetti. Defendant told Colletti that he had been angry at W.T. for failing to clean his room. However, he denied hitting W.T. and stated that any mark on W.T.'s face must be acne. When asked by the State whether the redness on W.T.'s face possibly could have been acne, Colletti said no.

¶ 36 During cross-examination, the defense asked about potential inconsistencies in Colletti's testimony *vis a vis* her written report. For example, although Colletti had seen the photographs that would become exhibit Nos. 2 and 3 before finishing her written report, she did not note in her written report that the photographs failed to capture the bruising that she would later testify was present. The defense also established what could be considered shortcomings in Colletti's interview technique. For example, Colletti failed to ask W.T. any questions concerning whether and under what circumstances defendant had ever hit W.T. in the past.

¶ 37 vi. Duarte's Testimony

¶ 38 Doctor Carlos Duarte testified that he saw W.T. in the emergency room hours after the incident, at approximately 11 p.m. Although the ear was not Duarte's area of expertise, he had examined "thousands" of ears in the emergency room setting. Duarte recalled that W.T. complained of pain, decreased hearing, and a "hissing sound" in his right ear. In examining

W.T., Duarte found that W.T.'s left ear was "normal." A healthy eardrum is usually "shiny, round, flat, can be a little pink in color or whitish transparent." W.T.'s right ear, however, had a rupture in the tympanic membrane, commonly known as the ear drum. Duarte explained that ruptures generally could be caused by trauma, a "very" loud noise (such as a gunshot), or infection. Duarte recalled W.T.'s "defect" to be "wedge shaped," "opaque," and "cobblestoned" in appearance. There was a small drop of blood near the rupture. The membrane was inflamed, but there was no sign of fluid (as Duarte believed would be present in an infection). Because Duarte saw no signs of infection, he did not prescribe treatment to fight an infection. Rather, Duarte believed that the perforation was caused by trauma, and, so, he merely ordered that the ear be covered with a cotton ball to protect the ear drum. Duarte referred W.T. to an ear, nose, and throat specialist to monitor healing.

¶ 39 During cross-examination, the defense questioned Duarte's belief that the rupture was caused by trauma. The defense questioned whether Duarte simply accepted the information contained on the intake form that W.T. had been hit. It asked Duarte why he did not question W.T. further about the incident. Duarte explained that, as an emergency room physician, his role was not so much to determine causation, but to determine an initial course of treatment. Additionally, he did not feel obligated to act as a mandatory reporter of potential child abuse in this instance, because he knew that the incident had already been reported. Although Duarte did not look for causation, he could say for certain that the rupture had occurred within the last 24 hours. Regardless of whether the cause was trauma, infection, or a very loud noise, a small amount of blood may accompany any rupture when the membrane tears. That small amount of blood usually disappears within 24 hours. Moreover, while a rupture due to trauma or due to a

very loud noise would appear similar, a rupture due to infection would appear different in that there would be fluid.

¶ 40 The defense explored other potential causes for the perforation. If a person already had an inflamed membrane, shouting loudly into a person's ear could cause a perforation. Additionally, hypothetically, loud music could cause a perforation, as could pinching one's nose and blowing out. However, during re-direct, Duarte clarified that he had never actually seen a patient who suffered a perforated ear drum from a shout or loud music.

¶ 41 vii. Hulett's Testimony

¶ 42 Doctor Kevin Hulett testified that he examined W.T. four days after the incident, on October 25, 2011, as a result of Duarte's referral. Hulett is an otolaryngologist, treating the ear, nose, and throat. He completed his residency in that specialty at Loyola University. For the last 15 years, he has been working at Delnor Hospital and at Central Du Page Hospital. Typically, he treats one perforated, or ruptured, ear drum per week.

¶ 43 As to W.T.'s ruptured ear drum, Hulett measured that the perforation took up 15% of the size of the dime-sized ear drum. He did not recall there being any blood. He expected the ear drum to heal spontaneously, without treatment, within a few months. In general, a perforated ear drum can cause pain. Later, a patient may feel plugged and experience some amount of hearing loss. Often, within a "short period of time," the patient may become asymptomatic. Whether the perforation has healed may be determined by physical observation and by a follow-up hearing test. Hulett conducted a follow-up examination on W.T. on December 20, 2011, and, at that time, W.T. had healed.

¶ 44 Generally, perforations have many causes. Causes include any kind of blow to the ear, diving into a pool off a diving board, foreign bodies in the ear, surgery, and infectious processes.

Here, Hulett saw no sign of infection. Infections are typically treated with antibiotic drops or medications. If the injury *had* been caused by infection, and W.T. had *not* taken an antibiotic, fluid would have remained in the ear when Hulett examined W.T. four days after the initial perforation. Also, Hulett would have expected to see lingering signs such as "inflammation of the ear drum, inflammation of the middle ear mucosa, [] drainage, debris in the middle ear space, and in the external auditory canal." Hulett stated that "it would be unusual for [an] infection to go away within a matter of days to the point where there's no evidence of an infectious process going on." As Hulett did not see any sign of infection, he, too, declined to prescribe antibiotics.

¶ 45 During cross-examination, Hulett stated that, at the time he first examined W.T., he could not say with certainty exactly when the injury occurred. Hulett was not familiar with the term "cobblestone appearance," as that term related to a perforated ear drum (and as noted by Duarte). Hulett did not observe the angle of the perforation, *i.e.*, whether the perforation slanted "inward" or "outward." That was not something he was looking for; rather, he was "treating the problem at hand."

¶ 46 viii. Cowan's Testimony

¶ 47 Cameron Cowan, who holds a doctorate degree in audiology and who works for Hulett, testified that she also examined W.T. on October 25, 2014. She determined that W.T. suffered from mild, conductive hearing loss in his right ear. She classified the loss as "mild," because only the capacity to hear the lower pitches was diminished. She explained that "conductive" hearing loss meant that the loss occurred in the outer or middle ear, as opposed to the inner ear. Loss in the outer or middle ear is (typically) not permanent.

¶ 48 During cross-examination, Cowan stated that she first saw W.T. on October 25, 2014. She conceded having no baseline for his hearing capacity prior to the incident. However, on

redirect, Cowan clarified that only W.T.'s right ear evinced signs of diminished hearing. (And, as stated in Hulett's testimony, W.T.'s right ear had returned to normal hearing by December 20, 2011.) Cowan had no opinion as to the cause of the perforation.

¶ 49 ix. Dugue's Testimony

¶ 50 Dugue testified that she interviewed W.T. one day after the incident, on October 22, 2011. Dugue has been a DCFS investigator for 18 years, and she has undergone training to interview children. She conducts approximately 20 child interviews per month. Dugue interviewed W.T. in Emetti's home. However, she interviewed W.T. alone.

¶ 51 Dugue asked W.T. "what happened at his father's house," and W.T. answered that he did not clean his room and his father got mad at him. His father hit him with an open hand on the face and with a closed fist on the buttocks area. After his father hit him, W.T. went outside. His father followed him, and, while outside, apologized for hitting him. W.T. believed that T.T. may have witnessed the incident.

¶ 52 During cross-examination, Dugue stated that, prior to conducting the interview, she received information about the incident from a hotline call. She did not read a police report. Dugue did not observe or feel the reported bump on the forehead. When she asked W.T. about it, he said that he never had a bump. Dugue did observe redness on W.T.'s face, near his ear, and a small bruise on W.T.'s buttocks area. As protocol demanded, Dugue called Emetti into the room when she looked for the bruise on the buttocks. That bruise was so small that it took Dugue and Emetti a "long time" before they saw it. Dugue did not take any pictures of the red face or of the bruise.

¶ 53 x. W.T.'s Testimony

¶ 54 When W.T. testified, he recanted portions of his earlier statements made to investigators, creating a different picture of what had occurred in October 2011. W.T. stated that, on the day of the incident, defendant told him to clean his room. He said, "okay, whatever," and went downstairs. He stayed downstairs for about one hour. When defendant came downstairs and asked why he had not cleaned his room, he "mouthed off" and said that he "didn't feel like it." Defendant then slapped W.T. on the top of the head—not across the face and ear—and "then slapped [him] on the butt and told [him] to 'hurry up, you got to go to your mom's house'." He was not afraid of defendant. He did not run outside the house after being hit.

¶ 55 The State asked W.T. what would happen if his father were found guilty. W.T. answered, "What do you mean? I'd be living with my aunt. I wouldn't see my dad for six years or for however long the lawyers say." The State asked who told him that. W.T. answered, "[defendant's] lawyers."

¶ 56 The State then attempted to impeach W.T. with his prior statements to investigators Colletti, Dugue, and Frazier. Again, he told each of these investigators that defendant struck him across the face and ear, not on the top of the head. As to Colletti and Dugue, W.T. stated he did not remember telling them that defendant struck him across the face and ear. As to Frazier, W.T. remembered telling her that defendant struck him across the face and ear. However, this was a lie. He only told Frazier this because his mother told him to. His mother told him that, if he told investigators "the story" she wanted him to tell, then he could return to his father. He also remembered telling Frazier that he was afraid. However, this was also a lie prompted by his mother.

¶ 57 The State next introduced substantive evidence pursuant to section 115-10.1 (725 ILCS 5/115-10.1 (West 2011)) of the Code of Criminal Procedure of 1963 that was inconsistent with

W.T.'s testimony. This evidence was a signed statement, dated January 9, 2012. The January 2012 statement was made in conjunction with a family court matter, wherein W.T. sought to leave his mother's custody (ultimately resulting in his placement with his aunt, Ash). The January 2012 statement read in part:

> "4. My father slapped me with an open palm.
>
> 5. Subsequently, my ear felt as if it had cotton in my ear. I then held my nose, closed my mouth and attempted to clear my ears. After doing that several times a release of air came through my ear."

¶ 58 The defense objected on two grounds, arguing that: (1) the statement was not inherently inconsistent with the testimony; and (2) it was not clear that W.T. had signed the statement. The court overruled the objection. It found that the statement was inconsistent with the testimony because the statement alleged a slap that caused the ear to feel different, whereas the testimony alleged a slap to the top of the head that had no effect on the ear. And, as will be detailed further in our analysis, the court also found that, although W.T. could not remember signing the statement, he admitted that it was his handwriting.

¶ 59 During cross-examination, W.T. discussed the above-quoted paragraphs of his signed statement. He said that those paragraphs were not true. Rather, he had an existing earache prior to the slap. The slap did not cause his ear to hurt, because the slap was "way above" his ear. It was not a hard slap. It was "just a little slap." He understood that defendant slapped him to discipline him, because he did not clean his room and because he "talked back." After defendant slapped him, he cleaned his room. He was not afraid of defendant. If it were up to him, he gladly would have gone back to defendant's house that night.

¶ 60 2. Defendant's Motion for a Directed Finding

¶ 61 At the close of the State's evidence, the defense moved for a directed finding. It argued that the State did not sufficiently prove that defendant caused W.T.'s ear drum to rupture. Neither Duarte nor Hulett testified as "expert" witnesses, stating their opinions within a reasonable degree of medical certainty. Additionally, it argued that the State did not disprove defendant's affirmative defense of reasonable discipline. In its view, "[t]his particular case boils down to something that's occurred probably to every male child ever, again, a slap on the back of the head. Sit up straight, you're in your grandma's house. That's it."

¶ 62 The State responded that defendant improperly invoked the causation requirements used in civil medical malpractice cases. As to any affirmative defense, the State argued that a blow to the face that led to a ruptured ear drum exceeded the bounds of reasonable discipline. After entertaining argument, the court denied the motion.

¶ 63 3. Defendant's Case

¶ 64 i. DeBartolo's Testimony

¶ 65 Doctor Hansel Marion DeBartolo, Jr., testified that W.T. has been his patient since 2008. Here, he was testifying not just as a treating physician, but as an expert witness. He is an otolaryngologist, treating the ear, nose, and throat. He has been practicing for 40 years. In the last 20 years, although he still performs tympanic membrane surgeries, his practice has moved more toward plastic surgery. DeBartolo has served as an expert witness in many court cases. He estimated that he served as an expert in one case per month over the last 40 years (nearly 500 cases). Primarily he served as an expert in civil cases. This may be his first criminal case. It is possible that there have been one or two others.

¶ 66 Between 2008 and June 2009, DeBartolo saw W.T. 11 times. W.T. had a history of fluid in his ear (and he also required treatment for a mild thyroid enlargement). Four months after the

incident, in February and in March of 2012, DeBartolo examined W.T. regarding the perforated ear drum. DeBartolo determined that W.T.'s hearing was "normal" in both ears. He observed that the perforation appeared "well-healed." DeBartolo believed that the perforation was caused by fluid pressing on the ear drum from the inside, because there was a scar on the outside of the ear drum made by the healing flaps of membrane. The scar showed that the angle of perforation was from the inside out. Additionally, DeBartolo believed that that perforation was caused by fluid pressing on the ear drum, because, on the day of the injury, Duarte noted the ear drum to have a "cobblestone appearance." DeBartolo stated that a "cobblestone appearance" indicates an infection, and, in his view, it is unfortunate that no one who examined W.T. in the days surrounding the incident seemed to understand that. Finally, DeBartolo believed that the perforation was caused by fluid pressing on the ear drum, because signs of external force were lacking. The amount of force needed to perforate an ear drum from the outside was significant, about "120 mm of mercury pressure," or about the amount of pressure felt on an arm during the "tightest" part of a blood pressure reading. If this amount of force was applied, one would expect to see greater injury to the face than was documented. DeBartolo asked W.T. about the October 2011 incident, and W.T. stated that defendant hit him with a "very minor" amount of force. In general, DeBartolo did not consider a perforated ear drum to be a "grave injury." He stated that it was a "routine occurrence" in teenage boys with fluid in their ears. In his experience, fluid (or infection) is the most common cause of rupture. Any fluid causing the rupture would evaporate "very quickly." He is not sure he has ever seen a rupture caused by a slap to the face.

¶ 67 During cross-examination, DeBartolo stated that, prior to the February 2012 examination, he had not seen W.T. since June 2009. He did not see W.T. at all in 2010 or in 2011. He did

"not recall" whether he had already agreed to be an expert when he examined W.T. in February and March of 2012. DeBartolo was paid $700 per hour to be an expert in this case, which included reviewing the medical records. He asked for two separate retainer payments equating to 3 or 5 hours each, and he estimated that he billed for less than 10 hours total (*i.e.*, less than $7,000).

¶ 68 When DeBartolo asked W.T. about the October 2011 incident:

> "[W.T.] really deemphasized. He said it was basically a complaint his mother had made against his father, and I know that his father has always brought him in and I know his father is a loving parent and I didn't have any reason to doubt what the child was telling me."

W.T. told DeBartolo that he was more afraid of living with his mother, because she had a new stepchild who was bigger than W.T. This child hit W.T. with much greater force than defendant had ever hit him.

¶ 69 ii. W.T.'s Testimony

¶ 70 W.T. again testified to the October 2011 incident. He stated that his father slapped him on the top of the head and "slapped [his] bottom[,] as in to tell [him] to hurry up." The slap to the top of the head did "not really" cause any pain. He did not cry. He did not ask defendant to stop hitting him. His ear felt no different after defendant hit him. T.T. was not in the basement when defendant slapped the top of his head. Contrary to T.T.'s testimony, defendant did not punch W.T. in the stomach.

¶ 71 W.T. stated that he suffers from eczema, which causes "red marks on your body and your face, I guess." The defense asked W.T. to turn his right cheek to the court. The court noted that

"there is a red mark or red that appears from his ear down to his cheek." Additionally, W.T. stated that he suffers from acne, which caused the bump on his forehead noted by Colletti.

¶ 72 During cross-examination, the State asked W.T. if he had the red mark when he testified the day before, during the State's case-in-chief. W.T. answered, "Yes." The State asked W.T. if he (purposely) scratched his face before he came into the courtroom. W.T. answered, "No."

¶ 73 4. Trial Court's Ruling

¶ 74 The court found defendant guilty as to count II, aggravated battery against a person under age 13, causing bodily harm (but not great bodily harm). 720 ILCS 5/12-3.05(b)(2) (West 2011). The court explained its ruling. It found, *inter alia*, that T.T. "credibly testified." It recounted those parts of T.T.'s testimony it found pertinent. T.T. stated that W.T. looked panicked, "not his normal face." T.T. saw defendant punch W.T., and she heard W.T. ask him to stop. Emetti stated that W.T. had been crying when he first got into her car. He complained that his ear hurt. Colletti also stated that W.T. reported being stuck in the ear. In balance, the court acknowledged that the State's exhibit Nos. 2 and 3 did not show the bruise that Colletti claimed to have seen. Still, the evidence in the Frazier video also supported the conviction. Further, the court noted that neither Duarte nor Hulett observed signs of, or sought to treat, infection contemporaneous with the incident, leaving trauma as the cause.

¶ 75 The court found that each of the two defense witnesses had credibility problems. As to W.T., the court stated that his testimony "belie[d] his taped interview with [Frazier]. Clearly, the minor has been in the custody of his father for the majority of his life and has a motive to recant his previous statements, being made well aware that if [defendant is] convicted of [a class X felony], a six-year term [i]s mandatory." As to DeBartolo, the court stated that, "[a]lthough [it] finds that Dr. DeBartolo is a qualified expert, his testimony was not without bias [as to the cause

of the injury] based on his statements regarding the dynamics of the parents' troubled relationship and his personal opinions of the defendant's character which are clearly outside any expert medical opinion." The court did, however, accept DeBartolo's testimony in deciding that a perforated ear drum constituted only bodily harm, not great bodily harm.

¶ 76 The court rejected defendant's affirmative defense of reasonable discipline. It stated that the degree of the injury *and* evidence of defendant's demeanor at the time of the incident (as established through T.T.'s testimony that she ran from the basement and W.T.'s interview statements that he was "scared" and ran out of the house) proved that defendant did not calmly attempt to discipline W.T., but, rather, lashed out in anger. The court sentenced defendant to 30 months' probation.

¶ 77 II. ANALYSIS

¶ 78 On appeal, defendant challenges: (1) several evidentiary rulings, including the admission or exclusion of (a) the Frazier video, (b) the section 115-10.1 signed statement, (c) Duarte's "non-expert" testimony as to causation, and (d) Collettti's testimony concerning her October 2011 phone call to defendant; (2) the trial court's denial of his motion for a directed finding; and (3) the sufficiency of the evidence. For the following reasons, we reject each of defendant's arguments.

¶ 79 A. Evidentiary Rulings

¶ 80 Each of the trial court's evidentiary rulings is be reviewed for an abuse of discretion. See, *e.g.*, *People v. Zurita*, 295 Ill. 2d 1072, 1077 (1998) (specifically concerning section 115-10.1); *People v. Land*, 241 Ill. App. 3d 1066, 1079 (1993).

¶ 81 1. The Frazier Video

¶ 82 Defendant argues that the court erred in admitting only those portions of Frazier's video interview that pertained to the charged incident. He argues that, under the "doctrine of completeness," where a party submits a *portion* of an out-of-court conversation, the opposing party has a right to bring out *all* of that conversation on cross-examination. *People v. Weaver*, 92 Ill. 2d 545, 556 (1982). Thus, defendant contends that the entire interview should have been considered, particularly those portions where W.T. described prior spankings.

¶ 83 The supreme court has already rejected the sort of "sweeping assertion" made by defendant that, when part of a statement is admitted into evidence, a defendant has the right to introduce "the rest" of the statement. See *People v. Olinger*, 112 Ill. 2d at 337. In fact, the *Weaver* court's ruling was far narrower, addressing only those additional portions of the statement introduced by the State that were necessary to prevent the trier of fact from being misled. *Id.*, citing *Weaver*, 92 Ill. 2d 556-57.

¶ 84 In *Weaver*, the defendant, a high school teacher, was alleged to have shot her husband in the back of the head while he slept and then set fire to the body. The night of the murder, she ran from her home, carrying her 9-year-old daughter, to a neighbor's house. She told the neighbor: "'There is a fire, call the fire department and the police.' " She also told the neighbor that there were two men in her home with guns and provided details about the men. However, the neighbor was only allowed to testify that the defendant asked her to call the fire department and that defendant asserted that there were two men in her home with guns. The neighbor was *not* allowed to testify as to the details about the men with guns or even that the defendant provided details, whatever they may be. The supreme court held this to be error. It reasoned:

> "[B]y allowing the jury to hear only part of what [the defendant] said, [the jury] may have been misled into thinking that she had given no details about the men she claimed

> had entered her home. Under the circumstances, this may have made jurors more likely to believe that the story was false. A person whose spouse has just been murdered by two armed intruders is likely to say more about the matter than [the neighbor's] testimony indicated." *Weaver*, 92 Ill. 2d at 556.

¶ 85 Thus, *Weaver* concerns a one-time excited utterance made by the defendant. Without a more complete version of the out-of-court statement, the jury may have been misled. This was particularly true because the desired evidence could only be brought forth through the admission of the more complete statement. For example, the defendant in *Weaver* could only establish that she told her neighbor details about the armed men—thus demonstrating actions consistent with a victim—if the neighbor was allowed to testify that the defendant indeed told her details about the armed men.

¶ 86 In contrast, here, the omission does not prevent the court from getting a full picture of W.T.'s statements concerning the charged offense. The trial court stated that it would consider only those statements pertaining to the charged offense ("it [will] be limited to the incident and the statements that he made regarding that as well"). W.T.'s statements concerning the charged offense are preserved in video, and the court can evaluate for itself W.T.'s recount of that incident. Either the court believed that, on the day in question, defendant did hit W.T. with unreasonable force or it did not. Evidence of past reasonable acts of discipline are not necessary to correct any impression created by W.T.'s recount of the events at issue. The omission of the latter part of the video regarding other events does not cause the trier of fact to be misled, nor would the inclusion of that latter part help to clarify W.T.'s statements about the events in question. We cannot say that the trial court abused its discretion in limiting the video evidence to those portions concerning the charged incident.

¶ 87 2. Section 115-10.1 Signed Statement

¶ 88 Defendant next argues that the court erred in admitting the following signed statement, which stated in part:

> "4. My father slapped me with an open palm.
>
> 5. Subsequently, my ear felt as if it had cotton in my ear. I then held my nose, closed my mouth and attempted to clear my ears. After doing that several times a release of air came through my ear."

Again, W.T. made this statement in the context of a custody matter. The court admitted the statement pursuant to section 115-10.1, which states in pertinent part:

> "In all criminal cases, evidence of a statement made by a witness is not made inadmissible by the hearsay rule *if* (a) the statement is *inconsistent with his testimony* at the hearing or trial, *and* (b) the *witness is subject to cross-examination* concerning the statement, *and* (c) the statement (1) was made under oath at a trial, hearing, or other proceeding, or (2) narrates, describes, or explains an event or condition of which the *witness has personal knowledge*, *and* (A) the statement is *proved* to have been *written or signed by the witness*, or (B) the witness acknowledged under oath making the statement ***." (Emphases added.) 725 ILCS 5/115-10.1 (West 2011).

Section 115-10.1 further provides that "[n]othing in this section shall render a prior inconsistent statement inadmissible for purposes of impeachment because such statement *** fails to meet the criteria set forth herein." *Id.*

¶ 89 Defendant argues that two section 115-10.1 requirements have not been met: (1) the statement is not inconsistent; and (2) the statement was not proved to have been written or signed by the witness. A statement is "inconsistent" within the meaning of section 115-10.1 if it has a

tendency to contradict the trial testimony. *Zurita*, 295 Ill. 2d at 1076. A direct contradiction is not required; evasive answers, silence, and changes in position qualify for admission. *Id*. at 1077.

¶ 90 Here, the statement at issue is inconsistent with the trial testimony. The statement says that defendant slapped W.T., and, as a result, or at least contemporaneously (*i.e.*, "subsequently"), W.T.'s ear felt different ("my ear felt as if it had cotton in [it]"). In contrast, the trial testimony is that, after the slap, W.T.'s ear did *not* feel different. Rather, defendant slapped W.T. lightly on the top of the head and buttocks, so as to tell him to hurry up. The trial court did not abuse its discretion in determining that the written statement and the trial testimony each presented a different account of the incident.

¶ 91 Defendant next argues that the State failed to prove that W.T. signed the statement, because W.T.'s testimony that he signed the statement was equivocal. Contrary to defendant's intimation, a witness's reluctance to claim the prior statement as his own does not prevent its admission as substantive evidence. It is still within the trial court's purview to consider the offered evidence and evaluate the credibility of the witness's equivocal or evasive response. The statute anticipates that a witness may deny having signed the prior statement. Presumably, that is one reason why subsection (c)(2)(A) allows for the admission of the statement if it is "proved" to have been signed, and subsection (c)(2)(B) allows for the admission of the statement if the witness "acknowledges" under oath that he or she made the statement. 725 ILCS 5/115-10.1 (c)(2)(A), (B) (West 2011). Indeed, if witnesses were always candid and truthful, there would be little need for statutes such as section 115-10.1 in the first place.

¶ 92 Here, the State informed the court that the written statement was prepared by W.T.'s own attorney in the context of a family court matter, wherein W.T. sought to leave his mother's

custody. W.T. himself agreed that his attorney had prepared a written statement for him. When first asked whether his signature appeared at the bottom of the written statement, W.T. answered:

> "A. From a while ago, yeah.
>
> Q. So that is your signature?
>
> A. Yeah."

After defense counsel objected to the admission of the signed statement, W.T. became more evasive. The State asked W.T. if he remembered signing the statement. He answered no. The following exchange took place:

> "Q. You do acknowledge it's your signature?
>
> A. Yes. My signature doesn't look like that anymore, I mean, I don't remember—yeah.
>
> Q. Just a few moments ago—
>
> THE COURT: Yes, that is your signature? Is that what you just said yeah to? She asked you two questions, I'm just asking what you're responding.
>
> A. I mean, yeah, it looks like it from a while ago.
>
> Q. Okay. And just a few minutes ago you testified under oath that that is your signature.
>
> A. Yeah.
>
> Q. Okay. Is that your signature?
>
> A. I don't remember signing it, but it kind of looks like my signature.
>
> Q. Is that your signature?
>
> A. Since I don't remember signing it, I mean—
>
> Q. That's a yes or no question, sir.

A. I don't—it looks like it, but I do not remember signing that.

THE COURT: Okay.

Q. Permission to treat this witness as hostile, Judge?"

The Court never expressly ruled on the State's request but stated that it did have "some concerns," presumably regarding W.T.'s level of candor. The State then proceeded to ask W.T. details about his representation during the custody proceedings.

¶ 93 The evidence sufficiently supported the trial court's determination that W.T. signed the written statement. W.T. readily accepted ownership of the signature before he realized his father's attorney was going to object. Indeed, the signature reasonably looks like that of a 12-year old, with each letter in the name clearly expressed. Additionally, W.T. agreed, albeit somewhat evasively, that his own attorney prepared the document.

¶ 94 Defendant contends that the State did not lay a proper foundation for the written statement. The State must lay a proper foundation, whether a prior inconsistent statement is introduced as substantive evidence pursuant to section 115-10.1 or merely for impeachment. *People v. Halbeck*, 227 Ill. App. 3d 59, 62 (1992). A proper foundation includes directing the witness toward the time, place, circumstances, and substance of the statement. *Id.* The witness then must have the opportunity to explain the inconsistency. *Id.*

¶ 95 Here, the State *did* direct W.T. to the time, place, circumstances, and substance of the statement. The State reminded W.T. that the statement was made by his own attorney in the context of the custody matter. W.T. agreed that his attorney prepared such documents for him to sign. The State instructed W.T. to read the statement to himself. The State offered W.T. the opportunity to explain the inconsistency. W.T.'s explanation was that he did not remember. The

key is that W.T. was given the opportunity to explain the inconsistency. The fact that he was unable to do so convincingly does not render the statement inadmissible.

¶ 96 In any case, we fail to see the prejudice. The complained of statement just as easily could have been used to defendant's advantage. True, the statement is substantively damaging in that it links the slap to the ear injury. However, the statement *could* have provided a basis for a reasonable defense. That is, defendant hit W.T. with an amount of force consistent with reasonable corporal punishment, but, because W.T.'s ear was already in a weakened state (infected or prone to infection), the slap caused his ear to feel as though it had cotton in it. When W.T. tried to "blow out" the cotton feeling, the rupture occurred. The court then would have to decide whether this sort of "tiered" causation theory was consistent with defendant's affirmative defense of reasonable parental discipline.

¶ 97 3. Dr. Duarte's Testimony

¶ 98 Defendant argues that the trial court erred in "permitting" Duarte's "opinion" testimony as to causation. Defendant cites to civil tort cases for the proposition that a medical expert must testify that his opinions are based on "a reasonable degree of medical certainty or on specialized knowledge and experience." See, *e.g.*, *Soto v. Gaytan*, 313 Ill. App. 3d 137, 140 (2000) (concerning the admissibility of the expert testimony in a personal injury case).

¶ 99 Defendant's reliance on civil tort law is misplaced. As we will address further below, in this criminal, aggravated battery case, the State was required to prove beyond a reasonable doubt that defendant caused W.T. bodily harm. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). This can be proved by circumstantial evidence. *People v. Slim*, 106 Ill. 2d 302, 307 (1989) (a court may draw reasonable inferences from the evidence). And, certainly, a treating physician who saw W.T. within hours of the incident can testify as to his impressions of W.T.'s health at that

time without being admitted as an "expert" witness rendering "opinion" testimony as those terms are thought of when considering whether to "permit" the testimony. *Cf. People v. Tara*, 367 Ill. App. 3d 479, 482, 489 (where a veterinarian specializing in animal behavior examined an alleged vicious dog eight months after an attack and offered opinion as to why it acted the way it did).

¶ 100 Rather, Duarte's status as an emergency room physician who had treated "thousands" of ear issues was simply a factor for the court to consider in assessing his credibility and determining how much weight to afford to the testimony. See *id*. Duarte's testimony was valuable to the State because, if believed, it showed that the perforation occurred within 24 hours of the emergency room examination (*i.e.*, within the time-frame of the slap and consistent with W.T.'s numerous statements that his ear began to hurt after the slap). Additionally, Duarte was the only doctor to examine W.T. within hours of the incident, and he did not see what he considered to be any signs of infection, nor did he prescribe treatment for infection. These circumstances, along with information on the intake sheet that W.T. had been slapped, caused Duarte to conclude that trauma caused the perforation. The defense had the opportunity to cross-examine Duarte regarding his observations and conclusions, eliciting an acknowledgement from Duarte that he did not ask W.T. about being slapped but merely accepted the intake sheet on that point. The trial court was free to weigh this information along with the other evidence in making its factual determinations.

¶ 101 We will address defendant's remaining contentions as to why the court should have favored DeBartolo's testimony over Duarte's in our sufficiency analysis.

¶ 102 4. Colletti's October 2011 Phone Call to Defendant

¶ 103 Defendant complains that the court should not have permitted Colletti to testify that, when she called defendant on his cell phone, he admitted being angry with W.T. but denied

hitting him. Defendant contends that this was damaging to his case because the court likely "consider[ed] denials by [defendant] as further evidence of guilt." Defendant acknowledges that, in general, a witness may testify that a defendant denied guilt in the course of a telephone conversation. See, *e.g.*, *People v. Abrego*, 142 Ill. App. 3d 973, 981 (1986). However, defendant argues that, here, the State did not lay a proper foundation to establish that he was, in fact, the person on the other end of the phone call.

¶ 104 A mere assertion by a telephone caller as to his or her identity, being hearsay, is not sufficient to establish identity. *People v. Caffey*, 205 Ill. 2d 52, 94 (2001). However, identity may be established where the witness testified that he or she knew the accused and could identify his voice *or* where there was other corroborative evidence from which identity could be reasonably determined. *Abrego*, 142 Ill. App. 3d at 981-82; see also Ill. R. Evid. 901(a), (b)(4), and (b)(6) (eff. Jan. 1, 2011) (concerning identification as a condition precedent to admission (a), allowing for contents, substance, or internal patterns (b)(4), as well as surrounding circumstances, to show the person answering the phone call to be the one called (b)(6)). In *People v. Gray*, 209 Ill. App. 3d 407, 414 (1991), the court determined that the corroborative evidence was sufficient to establish identity where it would be highly improbable that any other telephone user had the same name and was able to converse with the caller concerning particulars of the case.

¶ 105 As in *Gray*, it is highly improbable that any other person aside from defendant would be able to converse with Colletti about the particulars of the case. The speaker knew W.T.'s and Emetti's names. He knew that W.T. had not cleaned his room and that there had been a dispute. This, in addition to the fact that Colletti called the number Emetti provided, constitutes enough circumstantial evidence from which a trier of fact could find defendant's identity confirmed.

¶ 106 B. Directed Finding

¶ 107 Defendant argues that the trial court erred in denying his motion for a directed finding at the close of the State's evidence. The trial court should grant a defendant's motion for a directed finding where, at the close of the State's evidence, the evidence is insufficient to support a finding of guilt. See 725 ILCS 5/115-4(k) (2012); *People v. Cazacu*, 373 Ill. App. 3d 465, 473 (2007). The trial court must consider only whether a reasonable mind could fairly conclude the guilt of the accused beyond a reasonable doubt, considering the evidence in the State's favor. *People v. Withers*, 87 Ill. 2d 224, 230 (1981). We review *de novo* the court's decision to deny a motion for a directed finding. *People v. Connolly*, 322 Ill. App. 3d 905, 913-17 (2001).

¶ 108 Here, however, defendant has forfeited review of the denial of his motion for a directed finding. Where, as here, a defendant chooses to present evidence following the denial of his motion for a directed finding and fails to renew his motion at the close of all the evidence, he forfeits review of the court's ruling on the motion. *Cazacu*, 373 Ill. App. 3d at 473. We presume this is because the challenge essentially would be subsumed by a sufficiency challenge. If justice demanded an isolated review of the directed-finding ruling, we would do so. Here, however, circumstances do not so demand. Regardless, although defendant has forfeited his directed-finding argument, we will consider, and ultimately reject, his challenges to the sufficiency of the State's case in our general sufficiency analysis.

¶ 109 C. Sufficiency

¶ 110 Defendant argues that the evidence was insufficient to convict him of aggravated battery. When a defendant challenges the sufficiency of the evidence, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Collins*, 106 Ill. 2d at

261. During a bench trial, it is the trial court's responsibility to assess the credibility of the witnesses, weigh testimony, resolve inconsistencies, and draw reasonable inferences from the evidence. *Slim*, 127 Ill. 2d 302. A court of review will not substitute its judgment for that of the trial court on issues of credibility or assignment of weight. *People v. Jasoni*, 2012 IL App (2d) 110217, ¶ 19. However, if the evidence is so improbable or unsatisfactory that, even accounting for the deference to be given to the trial court's impressions, it necessarily creates a reasonable doubt as to defendant's guilt, the conviction should be set aside. *Lipscomb-Bey*, 2012 IL App (2d) 110187, ¶ 21.

¶ 111 Here, defendant was convicted under subsection 3.05(b)(2) of the Criminal Code. That subsection states in pertinent part:

> "(b) *** A person who is at least 18 years of age commits aggravated battery when, in committing a battery, he or she knowingly and *without legal justification* by any means: *** (2) *causes bodily harm* or disability or disfigurement to any child under the age of 13 years ***." (Emphasis added.) 720 ILCS 5/12-3.05(b)(2)(West 2011).

The alleged bodily harm here, as set forth in the charging instrument, is a perforated ear drum. Defendant argues that the State: (1) failed to prove each of the elements of aggravated battery, particularly, that the slap *caused* the perforated ear drum; and (2) the State failed to defeat defendant's common-law affirmative defense of reasonable parental discipline. See, *e.g.*, *Green*, 2011 IL App (2d) 091123. We will address each argument in turn.

¶ 112 1. Causation

¶ 113 As to whether defendant's use of force led to the perforated ear drum, the State introduced evidence that the perforation occurred contemporaneously, or, at least, within the same time frame as the slap. W.T. told three witnesses (Emetti, Colletti, and Frazier) that, after

defendant slapped him, his ear hurt. Specifically, W.T. told Frazier that his ear "rang" and that it never felt like that before. Likewise, W.T. signed a statement, albeit in the context of the custody case, that, after defendant slapped him, it felt as though he had cotton in his ear. Further, Duarte, the emergency room physician, testified that the perforation occurred the day of the incident. He saw blood near the perforation, which would dry up and disappear within 24 hours of the tear.

¶ 114 The State also introduced evidence that defendant's theory of causation, *i.e.*, infection, was unlikely. Duarte testified that, if the rupture were due to infection, he would have expected to see fluid in the ear. He saw no fluid in the ear on the day of the incident, and, therefore he did not prescribe treatment for an infection. When Hulett examined W.T. four days later, he also saw no fluid. He believed that if an infection had caused the rupture, and that infection had not been treated with an antibiotic, there would still be fluid four days later. This is not to say that the State's evidence concerning causation is perfect (for example, it is possible that the "cobble-stone" appearance noted by Duarte *did*, as testified to by DeBartolo, signify infection). We merely hold that the trial court, who was charged with resolving discrepancies in the evidence, was justified in finding that the State proved its theory of causation and, as set forth below, in finding that defendant's alternative theory was not credible.

¶ 115 The trial court was not required to agree with DeBartolo that an ear infection caused the rupture. See, *e.g.*, *Villareal v. Peebles*, 299 Ill. App. 3d 556, 562 (1998) (the court need not accept the opinion of one expert, even where that expert's testimony is not directly countered by another expert). Unlike the State's witnesses, DeBartolo did not examine W.T. the day of, or within days of, the incident. The court may have reasonably attributed less weight to DeBartolo's testimony that W.T. had a history of infections than it otherwise would, given that

DeBartolo had not seen W.T. in the two-plus years preceding the incident. Moreover, DeBartolo never testified that any of W.T.'s previous infections had ever led to a painful rupture, as he believed that such an infection did, coincidentally, on the same day of the incident. Here, on top of potential problems with DeBartolo's theory, the court expressly stated that it found DeBartolo to be biased by his personal feeling that defendant was a loving father (and, therefore, was unlikely to have struck W.T. with significant force).

¶ 116 Perhaps the evidence that had the most potential to create a reasonable doubt in the State's case was DeBartolo's testimony that the rupture left an outward-slanting scar, indicating internal fluid pressure rather than external force. However, even though defendant appears to believe otherwise, we are not convinced that the trial court completely disregarded testimony concerning the scar's slant. If, for example, the court considered the possibility that the slap aggravated an already sensitive ear such that the force of being struck prompted fluid to come out, this would not be inconsistent with the scar's formation. And, in any event, a slap that aggravated the already sensitive ear can still be said to have caused the bodily harm of the ear rupture. See, *e.g.*, *People v. Brackett*, 117 Ill. 2d 170, 178 (1987). Given that the trial court expressly found DeBartolo to be biased and expressly credited doctors who saw no sign of infection at the time of the injury, we cannot reverse on this point. The State proved the element of causation.

¶ 117 2. Affirmative Defense

¶ 118 Accepting that the State proved each of the elements of aggravated battery, including the contested element of causing bodily harm, we now consider defendant's affirmative defense. A parent's right to discipline a child is not a statutory defense, but "the common-law rule that parents may take [] reasonable steps to discipline their children when necessary[] is, like self-

defense, a legal justification for an otherwise criminal act." *Green*, 2011 IL App (2d) 091123, ¶ 16. To sustain a conviction for aggravated battery where the defendant asserts his parental right to discipline, the State must prove beyond a reasonable doubt that the discipline used exceeded the bounds of reasonableness. *Id.*

¶ 119 The degree of injury inflicted upon the child is not the exclusive or determinative factor in determining whether the discipline exceeded the bounds of reasonableness. *Id.* ¶ 24. Other factors include: (1) the likelihood that future punishment might be more injurious (a potential for escalation); (2) whether the parent was calmly trying to discipline the child or whether the parent lashed out in anger; and (3) whether the child will suffer negative psychological effects. *Id.*

¶ 120 In *Green*, the 10-year-old victim kicked his mother's car in anger, because he was not able to attend a school dance. The mother, who later explained that she found the boy's behavior to be very disrespectful, "disciplined" him by hitting him many times with a snow brush outside the school. The boy lay in a supine position as the mother stood over him and hit him with the object. The boy was crying and trying to defend himself. Several witnesses asked her to stop. When one witness called the police, the mother took the boy and drove away. The boy stuck his hands out the window, as though asking for help. *Id.* ¶ 25. The authorities later inspected the boy but found no visible sign of injury. *Id.* ¶ 7.

¶ 121 The court held that, although there were no visible signs of injury, the mother still exceeded the bounds of reasonableness. *Id.* ¶ 25. The court would not make a *per se* rule that injury was required, and would, instead, allow for trial courts to make a case-by-case determination based on the unique factual circumstances of the case. *Id.* ¶ 26. Therefore, while bodily harm is an element of aggravated battery, bodily harm is not needed to prove unreasonable discipline.

¶ 122 Here, the evidence supported the trial court's findings that defendant's actions were not reasonable. The State and defendant each presented different versions of the incident. The State's evidence, collectively, tended to characterize the incident as somewhat violent, rash, and frightening to W.T. and T.T., wherein defendant hit W.T. with enough force to cause injury. Defendant's evidence, on the other hand, tended to characterize the incident as a minor, deserved slap ("sit up straight; you're at your grandmother's house" or a slap on the buttocks to "hurry up"), or, at a most, a more forceful, yet still legally protected, exercise in corporeal punishment. For the reasons that follow, we hold that the State presented sufficient evidence from which a rational trier of fact could conclude beyond a reasonable doubt that defendant acted unreasonably and with unwarranted force.

¶ 123 T.T., who the court found credible after an *in camera* interview, testified that defendant's actions were forceful and "scary." She stated that she witnessed defendant hit W.T. "hard" and this caused her to run upstairs and "tr[y] to think straight." The weight to be afforded to T.T.'s testimony, considering, for instance, that a child may be easily frightened, was for the trial court to determine.

¶ 124 Like T.T., W.T. initially reported that defendant hit him in anger, as introduced by the section 115-10 witnesses. For example, in the Frazier interview, W.T. stated that he was scared by the way defendant walked toward him; he had never seen defendant look like that. W.T. further stated that defendant hit him hard enough to cause him to fall down. Then, defendant punched him in the leg/buttocks area. After defendant hit him, W.T. went outside. He did not go back inside until he thought defendant had calmed down and it was "safe." W.T. consistently reported this version of events in the months following the incident.

¶ 125 W.T. and T.T.'s initial characterization of the incident is not one of calm discipline. Rather, the characterization was of a fearful, out-of-character occurrence. This, combined with the fact that W.T. did, in fact, sustain an injury, was sufficient for the court to find beyond a reasonable doubt that defendant did not exercise reasonable discipline in striking W.T.

¶ 126 III. CONCLUSION

¶ 127 For the aforementioned reasons, we affirm the trial court's judgment.

¶ 128 Affirmed.