2015 IL App (2d) 140301-U
No. 2-14-0301
Order filed July 23, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RODNEY McDOWELL, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 13-CM-2683 Honorable John A. Noverini, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Hutchinson and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: Where the facts, when viewed in the light most favorable to the prosecution, are inadequate to support a conviction for the offense of domestic battery (knowingly making contact of an insulting or provoking nature with a family or household member) defendant's conviction is reversed.

¶ 2 Following a bench trial, defendant Rodney McDowell was found not guilty of domestic battery for allegedly causing bodily harm to his wife (720 ILCS 5/12-3.2(a)(1) (West 2012) but guilty of domestic battery in that he made physical contact of an insulting or provoking nature with her (720 ILCS 5/12-3.2(a)(2) (West 2012). On appeal, defendant contends that the State failed to prove him guilty of knowingly making contact of an insulting or provoking nature with

a family or household member. Specifically, defendant argues: (1) the trial court erred in allowing the state to prove the victim was a family or household member through hearsay testimony without laying a sufficient foundation; (2) the trial court erred in admitting a 911 recording; and (3) the evidence was insufficient to convict him of domestic battery. For the following reasons, we reverse the trial court's judgment finding defendant guilty of domestic battery based upon physical contact with his wife of an insulting or provoking nature (720 ILCS 5/12-3.2(a)(2) (West 2012).

¶ 3 I. BACKGROUND

¶ 4 Evidence at trial established that on July 7, 2013, defendant, along with his wife Andrea and their five-year-old son, attended a party at the home of Rachel and Eric Larson in Hampshire, Illinois. Rachel Larson testified that she works with Andrea and that Andrea is one of her best friends. Over defense counsel's hearsay objection Rachael testified that defendant was Andrea's husband. The party began at about 3:00 p.m. and lasted until around 2:00 a.m. and was attended by approximately 40 people. At the party the guests played "beer pong."

¶ 5 Rachael testified that Andrea was about 4 feet 11 inches tall and weighed about 100 pounds. She did not witness the incident that resulted in defendant's arrest. At the completion of Rachael's direct testimony defense counsel renewed his hearsay objection which the trial court again overruled. Defense counsel declined the opportunity to cross-examine Rachael.

¶ 6 Christopher Szydlowski testified that he attended the party at the Larson's house. He said that defendant and all of the other adults were drinking alcohol. Sometime after 1:00 a.m. there was an altercation between defendant and Szydlowski's friend, Matt Bryne. There were five or six people near defendant and three or four people near Bryne who were trying to "keep the peace." Szydlowski said that defendant "had pushed through the crowd–she (defendant's

wife) was one of the people in there and she was pushed on the ground." (Defense counsel entered a continuing objection to witnesses identifying Andrea as defendant's wife). At that point someone who Szydlowksi did not identify told him to call 911, which he did. The trial court, pursuant to a pre-trial ruling on the State's motion *in limine*, allowed all but the last minute of the 911 recording to be played in open court. The following is a transcript of the conversation between the 911 dispatcher and Szydlowski that was received in evidence:

> "911 Operator: Cellular 911. Location of your emergency?
>
> Caller: 820 Katherine Lane—
>
> 911 Operator: (interrupting) In what town?
>
> Caller: Ah, we have some kind of domestic disturbance. There's a guy who is very drunk and pushing over his wife and injuring her and possibly—
>
> 911 Operator: (interrupting) Anybody need the paramedics?
>
> Caller: No one needs the paramedics, but we need someone, ah, an officer now please.
>
> 911 Operator: O.K., and you said 820 Katherine Lane?
>
> Caller: Correct.
>
> 911 Operator: O.K. Are they outside?
>
> Caller: Yeah, we're all outside.
>
> 911 Operator: Are they separated at this time?
>
> Caller: We're trying to separate him, but he's drunk and just pushing his wife and everyone over (unknown male interjects) They have to get out here—he just hit his wife.

911 Operator: I understand that. I have officers coming. She doesn't need the medics?

Caller: No. She's O.K. We picked her up and she's fine, but he is extremely intoxicated and violent right now.

911 Operator: Anyone have any weapons?

Caller: No, no weapons.

911 Operator: O.K., what's your name?

Caller: I'm Chris.

911 Operator: Chris, what's your last name?

Caller: Uh, Szydlowski.

911 Operator: Spell that for me.

Caller: S like Sam. Z-Y-D-L-O-W-S-K-I.

911 Operator: What's the phone number for you?

Caller: 847 –XXX-XXXX (privacy).

911 Operator: Are you guys in front or are you in back?

Caller: We're in the front. It's a, it's a townhouse complex.

911 Operator: Do you know who these people are?

Caller: We're, uh, we're all out right here.

911 Operator: Do you know who are they are though? Do you know what [*sic*] they're [sic] name is?

Caller: Uh, his name is Rodney, it's something or other, I don't know the last name, no.

911 Operator: Do you know what her name is?

Caller: Uh, her name is Andrea. [Yell in background.]

911 Operator: O.K. Are they still, uh, goin' at it or are they separated right now?

Caller: Uh, we're***we've separated them, but he's still belligerent and attempting to like, ah, just push other people and everything like that."

¶ 7 Szydlowski testified that he made the 911 call "right away" after Andrea was pushed and fell to the ground. Szydlowski acknowledged that his statement to the 911 dispatcher that defendant was "injuring" his wife was not the case despite the fact that she hit the asphalt driveway.

¶ 8 On cross-examination, Szydlowski explained that defendant "pushed through the crowd of people and [Andrea] was in there and she fell." He said that Andrea was "part of a group of people" who were trying to hold defendant back and defendant "didn't aim at pushing his wife." Szydlowski said that he had been drinking and was intoxicated when he made the 911 call. The call ended as the police arrived.

¶ 9 Tyler Fillip testified that he attended the Larson party. He testified that shortly after 1:00 a.m. defendant became aggressive towards Matt Bryne. Fillip testified that defendant's wife "was trying to get him to leave. And then she got in the middle of it. And that's when she was pushed to the ground."

¶ 10 On cross-examination, Fillip acknowledged that he was under the influence after drinking "out of a keg" at the party. Fillip described defendant's aggression as "[e]levating his voice and had to be held back by guys. He was going after a certain person." Fillip also described the pushing incident:

> "The way I saw it, she walked up to the group of people. And he didn't realize who was in the way. He was trying to get at Matt. And he pushed with two hands his wife to the ground. It just happened to be her."

¶ 11 Fillip explained that when defendant pushed his wife there were "guys holding him back, hands on his chest to make sure he didn't go any farther." Fillip did not see any injuries on Andrea. When the police arrived, Fillip was one of the first people to speak to the police. Fillip said the party continued until about 3:00 a.m.

¶ 12 Matt Bryne testified that he met defendant for the first time at the Larson party. Shortly after 1:00 a.m., defendant started to "become combative." Bryne said that defendant did not want to leave the party and he told Andrea he did not want to leave. Defendant "started getting angry." Bryne said Andrea went inside and at that point defendant approached Bryne and tried to attack him. Defendant made no physical contact with Bryne because Bryne's friends were holding him back. Bryne testified that at that point Andrea came back outside and tried to calm defendant down and "tried to also hold him back and then he pushed her to the ground." Bryne said defendant placed both hands on Andrea's shoulders and pushed her to the ground. He said Andrea fell backwards, striking the pavement, first her back and then her head. Bryne testified that before defendant pushed Andrea she pushed him first. He acknowledged that he did not include in his written statement to police that defendant's wife pushed him first. Bryne then said he was no longer sure whether "the wife or anyone else pushed the defendant" before he pushed Andrea to the ground. Bryne testified that after being pushed to the ground Andrea "started crying and I believe she went inside this time."

¶ 13 On cross-examination, Bryne estimated that he drank "about six beers" while at the party. Bryne said he was undefeated in six games of "beer pong." Bryne denied seeing anyone pouring

"over-proof rum into a cup" and giving it to defendant before defendant came after Bryne. Bryne testified that four or five people were trying to hold defendant back at the time defendant pushed his wife. Bryne said it appeared defendant was trying to push his wife because he "placed both hands on her shoulders and pushed his wife to the ground." After defendant's wife went to the ground, defendant continued to come after Bryne. Bryne acknowledged that he did not like defendant. Bryne testified that his friends were able to keep defendant from getting to Bryne. Bryne testified that after being pushed to the ground defendant's wife began crying and went inside. Bryne admitted that it was actually during a beer pong that defendant started getting angry. Bryne described beer pong as a drinking game played on an eight-foot table. Each team has ten cups. Players try to land a ping pong ball into the other team's cups which are partially filled with beer. When that happens, "you drink the beer." You keep going until all the cups are eliminated. At the beginning of the game two to four ounces of beer are poured into each cup. Bryne said he was undefeated that night.

¶ 14 Bryne insisted that there was only beer in the cups and said he had "no idea" why defendant came after him. He said he did not remember anyone pouring "over-proof rum" into a cup and giving it to defendant. Bryne said he did not recall saying anything inflammatory to defendant before the altercation. Bryne's conversations with defendant earlier in the evening "were decent." There was no winner in the last game of beer pong because "that game never ended." On re-direct, Bryne said the game never ended because "that's when he (defendant) started to get angry." The State rested their case.

¶ 15 The trial court denied defendant's motion for directed verdict. Defendant testified that he was 32 years' old and was married to Andrea, and they had a five-year-old son. Defendant testified that they arrived at the Larson party at about 4:00 p.m. He drank a moderate amount of

alcohol while at the party. While playing a game of beer pong, he had a verbal altercation with Matt Bryne. Defendant said he took a break from the game to relieve himself. When he returned he was told that a shot had been made and it was his turn to drink. When he did so his throat burned and he coughed up the liquid. Defendant testified that Bryne laughed and thought it was funny. The game "escalated" to being a lot more competitive. Defendant said he made a shot, made a gesture and began walking away. Bryne said something to him about being a cheater. About 20 minutes after taking the drink that burned his throat his wife noticed he was unhappy, and he told her what had occurred. People attending the party were restraining him. Because both he and his wife had been drinking, defendant said there was no way they were going to drive 30 minutes home to Streamwood with their five-year-old.

¶ 16 Defendant testified that after he spoke to his wife several men were restraining him. They ripped his shirt and he had claw marks on his neck. One of Bryne's female friends hit defendant in the face. Defendant said that Bryne made comments to him which prompted him to approach Bryne. It was at that point that he started getting restrained by several people. Defendant said that he did do a lot of fighting to try to get away from the group of men, but he never did "get to Matt" who was his "target." Defendant denied ever intentionally pushing his wife. He said he did not know he pushed her over. He said that grown men were hanging on all sides of him and he was struggling to get out of that group. Defendant said he could not see Bryne, but he was "assuming" Bryne was coming at him because Bryne was walking towards defendant when the group of men "jumped on" him. When the police arrived defendant "backed off."

¶ 17 On cross-examination, defendant said that if his wife came into contact with him it was because she was trying to defend him. He denied pushing his wife. Defendant admitted he was

telling the three to five men restraining him to "get the f*** off." Defendant said he could not see Bryne, who was his target, and he was not winning the battle to get free. Defendant was 6 feet tall and weighed 215 pounds. Andrea was 5 feet tall and weighed 100 pounds. Defendant explained that Andrea did not confront him in a "harmful way." He said Andrea wanted to leave. Defendant said that he had six to eight beers during the beer pong tournament.

¶ 18 Andrea testified for the defense. She said that while at the Larson's party someone came inside and said there was "feuding" between defendant and one of the other guys. This occurred at about 1:30 a.m. Her son was already in bed and had fallen asleep. Andrea went outside and spoke to defendant. After speaking to defendant Andrea went to the couple's car to put their son's toys in the car. She said that upon her return, a disagreement, not a fight, had begun between defendant and Bryne. Defendant was being restrained by a group of men. Andrea denied that defendant had pushed her. She said that she did fall, but never hit her head. When the police arrived Andrea told them "this was an accident."

¶ 19 On cross-examination, Andrea said she had around four alcoholic drinks between 5:00 p.m. and 1:30 a.m., "when everything went south." Andrea said her husband moved her out of the way and that the fall was accidental. She acknowledged that she told the police that the fall was "accidental" and that her husband was "just a dumbass." Andrea said she did not push her husband before she was pushed by him. She said he "moved her out of the way because he was going after Matt."

¶ 20 The police did not tell her why her husband was being arrested. She was told that he was being arrested for a "time out" to "calm down." Andrea did not ask that the police be called. She said that her fall to the ground was brief and that she "stood right back up." Andrea told the police that there was a "fight going on against Matt." She found out the next day when she went

to pick her husband up that he was being charged with domestic battery. Andrea acknowledged that she refused to fill out a written statement. She was not asked to be photographed. The defense then rested.

¶ 21 The State called Hampshire police officer Peter Velez on rebuttal. Velez testified that he responded to the 911 call of a domestic battery at the Larson home. Velez was the first officer to arrive. According to Velez, defendant was intoxicated and his shirt was ripped. Velez had a brief conversation with Andrea where he asked her to make a written statement and to be photographed. She refused both. Velez did not explain whether this conversation occurred outside the Larson home or later that morning at the Hampshire police station. Velez saw no injuries on Andrea.

¶ 22 On cross-examination, Velez said that he transported defendant to the police station and spoke to defendant for several hours. None of their conversations concerned the incident at the Larson house. Defendant talked about his college wrestling career at Iowa State, his work and staying in shape. Velez did not know who made the decision to charge defendant with domestic battery. He said it was probably a sergeant on the scene who made that decision. Velez said he did not tell defendant he was arrested for domestic battery. He said if he had arrested defendant for domestic battery he would have noted that in his report, which he did not.

¶ 23 During closing argument, the State commented that Andrea was never cooperative, but she "doesn't get to determine whether a crime was committed or not." The State argued that it did not need direct testimony from her in order to "indicate whether she was insulted or provoked." It also argued that pushing someone "with two hands hard enough for them to hit an asphalt driveway and hit their head and that individuals starting crying, it's clear that not only was that insulting or provoking, but you hit your head on a hard surface like that, that there was

bodily harm." The State contended that the trial court could infer that Andrea was insulted or provoked from Bryne's testimony that Andrea was crying. Specifically, it said:

> "Defendant was so intent on getting to Matthew Bryne over a game of beer pong, over some dreamt up belief that this person put something in his drink that he acted in complete and utter disregard for his wife who is half his weight, who was not a collegiate wrestler. And he shoved her to the ground and he committed a domestic battery."

¶ 24 Defense counsel argued that there was insufficient evidence to find that defendant knowingly pushed his wife to the ground. He argued that there was no inference to be made because both defendant and Andrea said it did not happen. Counsel emphasized that Andrea testified, consistent with what she told the police, that this was an accident. Counsel argued that "insulting or provoking" should not be inferred from the testimony of "one person out of the army of witnesses" that she was crying. Counsel emphasized that when Andrea went to the ground, defendant was being restrained by a group of people. He argued that "there certainly are times that you can infer a battery or domestic battery would be insulting or provoking. This isn't one of them."

¶ 25 In rebuttal, the State argued "[e]ven his wife admits that she ended up on the ground afterwards. It's clear. It's beyond a reasonable doubt that he pushed her and that he committed domestic battery."

¶ 26 The trial court found defendant not guilty of domestic battery for allegedly causing bodily harm (720 ILCS 5/12-3.2(a)(1) (West 2012), and guilty of domestic battery for making contact with his wife of an insulting or provoking nature. 720 ILCS 5/12-3.2(a)(2) (West 2012). Defendant timely appeals.

¶ 27 II. ANALYSIS

¶ 28 On appeal, defendant raises three issues: (1) the trial court erred in allowing the state to prove a material element of domestic battery, *i.e.*, that the victim was a family or household member, solely through hearsay testimony without laying a sufficient foundation; (2) the trial court erred in admitting a 911 recording; and (3) the evidence was insufficient for the trial court to find him guilty of domestic battery beyond a reasonable doubt. We will address each argument in turn.

¶ 29 A. Victim's Status as Family or Household Member

¶ 30 Defendant first argues that the trial court committed error in allowing the State to prove an element of domestic battery, that Andrea was a family or household member, through hearsay testimony that lacked an adequate foundation. Specifically, he refers to Rachel Larson's testimony that she was Andrea's best friend and her co-worker. Larson, over defendant's objection, was allowed to testify that defendant was Andrea's husband. Defendant maintains that there was an inadequate foundation for Larson's testimony that he and Andrea were husband and wife because Larson never testified as to how she knew defendant and the victim were married.

¶ 31 Evidentiary rulings are committed to the sound discretion of the trial court and will not be reversed unless the court abused that discretion. *People v. Boclair*, 129 Ill. 2d 458, 476 (1989). An abuse of discretion will be found only where the ruling of the trial court is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court. *People v. Hall*, 191 Ill. 2d 1, 20 (2000). Illinois Rule of Evidence 803 provides that there are exceptions to the hearsay rule, even though the declarant is available as a witness. Ill. R. Evid. 803 (eff. Jan. 1, 2011). Specifically, Rule of Evidence 803(19) provides for the following exception:

> "(19) Reputation Concerning Personal History or Family History. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption or marriage, ancestry, or other similar fact of personal or family history." Ill. R. Evid. 803(19) (eff. Jan. 1, 2011).

¶ 32 Defendant notes that there is little guidance in Illinois case law on this issue and cites to *State v. Taylor*, 240 S.W.3d 789 (S. Ct. Tenn. 2007), for the proposition that a person who wishes to testify to someone's reputation must demonstrate that he or she knows the person and is truly familiar with the "community" in which the reputation is formed and that the basis of the reputation is therefore likely to be reliable. The *Taylor* court noted that in their analysis of Tennessee Rule of Evidence 803(19), the authors of *Tennessee Law and Evidence* stated that:

> "[t]he rule permits reputation evidence to be used to prove various aspects of pedigree, including birth, adoption, relationship, marriage, divorce and death. This proof is considered sufficiently reliable to be presented to the trier of fact since rarely will general understandings of family and associates about such important matters be wrong." *Taylor*, 240 S.W. 3d at 798 (quoting Neil P. Cohen et al., *Tennessee Law of Evidence* § 8.24[2] (5th ed. 2005)).

¶ 33 We do not disagree with defendant's argument that in order to testify as to reputation concerning personal or family history it must be shown that the witness is familiar with the community in which that reputation is formed. In the present case, a proper foundation for Larson's testimony was established. Larson works with Andrea and is one of her best friends. In either community, as a co-worker or as a best friend, trustworthiness in reputation evidence can be found "when the topic is such that the facts are likely to have been inquired about and that

persons having personal knowledge have disclosed facts which have thus been discussed in the community, and thus the community's conclusion, if any has been formed, is likely to be a trustworthy one." 5 Wigmore, Evidence § 1582, p. 545 (Chad-bourn Rev. 1974). Proof of marriage by evidence of reputation in the community is universally conceded to be proper. 5 Wigmore, Evidence § 1602. In the trial court, defendant's objection was based on hearsay. Specific statements concerning an individual's personal or family history are governed by Illinois Rule of Evidence 804(4) (eff. Jan. 1, 2011). None of the witnesses who identified Andrea as defendant's wife described statements of either Andrea or defendant concerning their marriage. We find no error in the trial court's ruling permitting Larson to testify that defendant and Andrea were husband and wife. Szydlowski, Fillip and Bryne also referred to Andrea as defendant's "wife." It is clear from the evidence that these three witnesses met defendant for the first time at the Larson party. Defendant, Andrea and their son arrived at the party together. There was no evidence offered that either defendant or Andrea made statements to Szydlowksi, Fillip or Bryne concerning their marriage so the hearsay exception for statements of personal or family history provided by Rule 804 does not apply. Further, the evidence that defendant and Andrea, along with a five-year-old boy, attended a beer drinking party together, standing alone, does not satisfy the requirements of Rule 803(19). However, in light of the fact that defense counsel did not cross-examine Larson, the trial court error, if any, in allowing Szydlowksi, Fillip and Bryne to testify that Andrea was defendant's wife was harmless.

¶ 34 B. Admission of the 911 Recording

¶ 35 Next, defendant argues that the trial court abused its discretion in admitting the 911 recording of Szydlowski's conversation with the 911 dispatcher. Prior to trial, the State filed a motion *in limine* to admit the 911 tape. In its motion, which the trial court granted, the State

cited to *Davis v. Washington*, 547 U.S. 813 (2006). The State argued that the statements on the 911 recording in the present case should be considered non-testimonial under *Davis*. On appeal, defendant argues that the factors outlined in *Davis* and in *People v. Spicer*, 379 Ill. App. 3d 441, 453 (2007) were not satisfied and therefore the trial court abused its discretion in admitting the 911 recording. In *Davis* and *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court addressed the admissibility of statements to law enforcement by non-testifying witnesses. In *Davis*, the court repeated its holding in *Crawford* that the confrontation clause of the Sixth Amendment bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Davis*, 547 U.S. at 821 (quoting *Crawford*, 541 U.S. at 53-54). The present case does not involve a confrontation clause issue. The 911 caller, Szydlowski, testified. Defendant raised no objection to the admissibility of the 911 recording as an excited utterance under Illinois Rule of Evidence 8.03(2) (eff. Jan. 1, 2011). We find no basis to disturb the trial court's ruling admitting the recording, although it did so under the mistaken belief that a confrontation clause analysis was necessary.

¶ 36 C. Sufficiency of the Evidence

¶ 37 Defendant next argues that the evidence at trial was insufficient to prove him guilty of domestic battery. 720 ILCS 5/12-3.2(a)(2) (West 2012). Specifically, the defendant contends that the State failed to prove that defendant knowingly pushed his wife and even if he did so, that she was "insulted or provoked" by the contact which occurred while defendant was struggling to break free from four or five adult men who were holding him back. Defendant acknowledges that Bryne testified that defendant pushed Andrea, but argues that Bryne's testimony is "scarred with inconsistencies" as well as Bryne's admitted prejudice against defendant. Defendant argues

that Andrea's statement to the police immediately after the incident that "the push was an accident" and her husband was a "dumb ass" was credible, and was corroborated by the testimony of all the other witnesses except Bryne.

¶ 38 In response, the State argues that even if defendant is correct that the contact occurred while defendant was struggling or pushing others to break free, under the doctrine of transferred intent, defendant's conviction should be affirmed.

¶ 39 When a defendant challenges the sufficiency of the evidence supporting his or her conviction, we review the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Collins*, 214 Ill. 2d 206, 217 (2005). "Under this standard of review, it is the responsibility of the trier of fact to 'fairly***resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.'" *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009) (quoting *People v. Howery*, 178 Ill. 2d 1, 38 (1997) (quoting *Jackson v. Virginia*, 4443 U.S. 307, 319 (1979)). A reviewing court will not substitute its judgment for that of the trier of fact on issues involving the weight of the evidence or credibility of witnesses. *People v. Cooper*, 194 Ill. 2d 419, 430-31 (2000). A criminal conviction will not be reversed unless the evidence is so improbable or unsatisfactory as to create a reasonable doubt of defendant's guilt. *Howery*, 178 Ill. 2d at 38. These same principles apply regardless of whether the defendant received a bench or jury trial or whether the evidence is direct or circumstantial. See *Cooper*, 194 Ill. 2d at 431. The fact that a judge or jury accepted testimony does not guarantee it was reasonable to do so. While the fact finder's decision to accept testimony is entitled to great deference, it is not conclusive and does not bind the reviewing court. *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004).

¶ 40 With these principles in mind, we consider defendant's challenge to the sufficiency of the evidence against him. In order to prove defendant guilty of domestic battery, the State was required to prove four elements beyond a reasonable doubt. Specifically, the State must prove that defendant: (1) intentionally or knowingly; (2) without legal justification; (3) made physical contact of an insulting or provoking nature; (4) with a family or household member. 720 ILCS 5/12-3.2(a) (West 2012).

¶ 41 As to the first element, defendant argues that the trial testimony was insufficient to support a finding that defendant "knowingly" committed a domestic battery against Andrea McDowell. Defendant argues that the evidence established that defendant pushed through a crowd as opposed to a specific person, his wife. A person "acts knowingly" if he is consciously aware that his conduct is of such nature that it is "practically certain" to cause the result proscribed by the offense. 720 ILCS 5/4-5(b) (West 2012). All of the witnesses, with the exception of defendant, testified that at the time Andrea went to the ground it was defendant's push that caused her fall.

¶ 42 We conclude that the State's evidence was sufficient to establish that defendant acted knowingly while attempting to break away from the group that was holding him back. Defendant testified that the pushing was an effort to defend himself against the group that prevented him from getting to his "target,"Bryne. The State's evidence was also sufficient to establish that defendant was acting without legal justification. He used force against the group, who were trying to prevent defendant from attacking Bryne. From the evidence, the trial court could have concluded that it was defendant who initially provoked the use of force against himself. As such, he was not entitled to use such force as an excuse unless he reasonably believed he was "in imminent danger of death or great bodily harm, and that he [had] exhausted

every reasonable means to escape such danger***." 720 ILCS 5/7-4(c)(1) (West 2012); see *People v. Johnson*, 247 Ill. App. 3d 578 (1993) (initial aggressor may use additional force in self-defense only if he is threatened with death or great bodily harm and has no reasonable means of escape). As the State points out in their brief, under the doctrine of transferred intent, even if the pushing was aimed at other people restraining defendant rather than Andrea specifically, defendant's knowledge or intent can be transferred. *People v. Dorn*, 378 Ill. App. 3d 693, 698 (2008) (one who does an unlawful act is liable for the natural and probable consequences of such act). As we have previously indicated, the State's evidence was sufficient to establish the fourth element, that Andrea was a family or household member of defendant.

¶ 43 The third element of domestic battery, proof that defendant made contact of an insulting or provoking nature with Andrea, is sorely lacking. The State acknowledges that Andrea denied that she was insulted or provoked by the push that caused her to fall to the ground. However, it argues that even if the victim does not explicitly testify that he or she was insulted or provoked by a defendant's contact, " the trier of fact may take into account the context in which a defendant's contact occurred to determine whether the touching was insulting or provoking." *People v. Fultz*, 2012 IL App (2d) 101101, ¶ 49.

¶ 44 In *Fultz*, the defendant was charged with making "insulting or provoking" contact with a police officer by pushing the officer in the chest while the officer was attempting to arrest the defendant's mother. The evidence in *Fultz* established that the defendant was part of a group of people who were yelling at the group of officers on the scene before the contact occurred. The defendant stepped between the arresting officer and the defendant's mother, placed both of his hands on the officer's chest and stated, "[y]ou are not taking my mom." The police officer did not testify that he found the contact to be insulting or provoking, rather, he testified only that he

moved defendant out of the way and kept walking. The defendant was convicted of aggravated battery of a police officer. On appeal, we held that the trier of fact may take into account the context in which a defendant's contact occurred when determining whether the touching was insulting or provoking, including the parties' relationship. *Id*. at ¶ 49 (citing *People v. DeRosario*, 397 Ill. App. 3d 332, 334 (2009)). Also, the victim does not have to testify that he or she was provoked because the trier of fact could make that inference from the victim's reaction at the time. *Id*. (citing *People v. Wrencher*, 2011 IL App (4th) 080619, ¶ 55).

¶ 45 The present case does not involve a situation comparable to the circumstances in *Fultz*. Here, Andrea was not silent as to whether or not she was insulted or provoked, as was the case in *Fultz*. Instead, Andrea testified that she was not insulted or provoked. Her reaction was to get off the ground and tell the responding officer that "the push was accidental" and that her husband was "just a dumb ass."

¶ 46 For obvious reasons, the State did not call Andrea as a witness at trial. In closing argument, the State acknowledged that Andrea was not cooperative from the very beginning. She did not want her husband arrested and insisted that she was fine. Unlike many domestic battery cases where the victim is either not called by the State as a witness, or where he or she recants an earlier version to the police or others, there was no impeachment of Andrea. On cross examination of Andrea, the State did not ask her whether she cried after going to the ground or whether she ran into the Larson home, as Bryne described. In fact, Bryne was the only witness who testified that defendant placed his hands on Andrea's shoulder and pushed her to the ground. Likewise, Bryne was the only witness who testified that Andrea cried and went inside. In closing argument and in its brief on appeal, the State relies on Bryne's testimony that Andrea "started crying and went inside" as proof that she was insulted or provoked. While it is true that

the testimony of a single witness may be sufficient to convict even if contradicted by the defendant, that testimony must be "positive and credible." *Siguenza-Brito*, 235 Ill. 2d at 228.

¶ 47 We conclude that Bryne's testimony was not credible. He was impeached by his bias against defendant and not a single witness corroborated his claim that Andrea cried and went inside as a reaction to the push. In fact, in the 911 recording Szydlowski stated that the group of people was "all outside." He described Andrea as "fine." If Andrea were crying, one would reasonably expect that Szydlowski would have included that description in his report to the 911 dispatcher. The recording establishes that the entire group was still outside when the police arrived, including Andrea. Officer Velez, who spoke to Andrea at the scene and was within "two to three" feet of her, did not describe her as crying. Officer Velez never asked defendant anything about the incident at the Larson home and speculated that it was probably a sergeant at the scene who made the decision to charge defendant with domestic battery.

¶ 48 The testimony of the State's own witnesses, Szydlowski and Fillip, both corroborated Andrea's testimony that she was pushed to the ground accidentally. Szydlowski testified that defendant pushed through the crowd " and she was in there and she fell." Fillip testified that while a group of men were trying to hold defendant back "[h]is wife was trying to get him to leave. And that's when she was pushed to the ground." Notably absent from the State's case against defendant were any of the three to five men who were physically restraining him when the push occurred. While none of the State's witnesses, other than Bryne, were asked whether Andrea was crying or went inside, the evidence as a whole is completely inconsistent with Bryne's testimony. Bryne's admitted bias against defendant, together with the clear absence of any evidence to corroborate his claims that Andrea cried and went inside, makes his testimony unworthy of belief. We find that it was unreasonable for the trial court to accept the

uncorroborated testimony of an admittedly biased witness over the unimpeached testimony of the victim which was corroborated by the other eyewitnesses. While we allow all reasonable inferences from the record in favor of the prosecution, we are not at liberty to allow unreasonable inferences. *Cunningham*, 212 Ill. 2d at 280 (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

¶ 49 The State argues that *People v. Nichols*, 2012 IL App (4th) 110519, supports its theory that the trial court in this case could infer that Andrea was insulted or provoked. In *Nichols*, the defendant was charged with aggravated battery by making contact of an insulting or provoking nature with a corrections officer. See 720 ILCS 5/12-3(a)(2) (West 2010). The defendant, a prison inmate, was accused of throwing an unknown liquid on the face of the officer. The officer testified that after the liquid was thrown on him he "followed protocol by cleaning himself and seeking examination in the prison health care facility." *Nichols*, 2012 IL App (4th) 110519, ¶ 43.

¶ 50 The State also relies on *People v. Dorn*, 378 Ill. App. 3d 693 (2008), another case involving aggravated battery to a corrections officer. In *Dorn*, the defendant, an inmate, was being escorted by a corrections officer past another inmate who was also being escorted by a corrections officer. The defendant spit at the other inmate and missed, but the spit hit a corrections officer. On appeal, the appellate court held that the doctrine of transferred intent applied. The court said, "[u]nder the transferred-intent doctrine, so long as the State proved defendant had the requisite intent as to inmate Moore, and that hitting Officer Brownfield was a natural and probable consequence of that act, the requisite intent transferred to Officer Brownfield." *Id.* at 700. The court noted that it had "previously found that spitting constitutes contact of an insulting or provoking nature." *Id.* at 698 (citing *People v. Peck*, 260 Ill. App. 3d 812, 814-15 (1994). " For hundreds of years, the common law has regarded deliberate spitting

on someone as a battery." *People v. Wrincher*, 2011 IL App (4th) 080619, ¶ 55. Unlike an act of spitting, there is nothing in the nature of defendant's actions or Andrea's reaction, aside from Bryne's incredible testimony, to allow an inference that Andrea was insulted or provoked. As we have explained, the relationship between defendant and the victim, as well as the context of the act, is important in determining whether the contact was insulting or provoking. In the present case, the victim was defendant's wife, who was intervening on his behalf. This context does not give rise to an inference that she was insulted or provoked.

¶ 51 After reviewing the entire record in the light most favorable to the prosecution, we hold that the State's evidence was insufficient to prove beyond a reasonable doubt that defendant made contact of an insulting or provoking nature with Andrea McDowell. Accordingly, we reverse the judgment of the trial court finding defendant guilty of domestic battery. 720 ILCS 5/12-3.2(a)(2) (West 2012).

¶ 52 III. CONCLUSION

¶ 53 For all the foregoing reasons, the judgment of the circuit court of Kane County is reversed.

¶ 54 Reversed.