2019 IL App (2d) 180619-U
No. 2-18-0619
Order filed September 16, 2019

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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 McHenry County.
Plaintiff-Appellee,	)	
v.	)	Nos. 16-CM-2186 16-CM-2187
JUSTIN M. HUBLY,	)	Honorable Robert A. Wilbrandt, Jr. and Joel D. Berg,
Defendant-Appellant.	)	Judges, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Jorgensen and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's convictions of battery and unlawful delivery of alcohol to a minor were affirmed. The trial court's conclusion that the State's evidence derived from a legitimate source that was wholly independent of defendant's compelled statements was not clearly erroneous. The evidence was sufficient to support the convictions on the particular counts that defendant challenged on appeal.

¶ 2 Following a bench trial in the circuit court of McHenry County, the court found defendant, Justin M. Hubly, guilty of two counts of battery (physical contact of an insulting or provoking nature) (720 ILCS 5/12-3(a)(2) (West 2016)) and four counts of unlawful delivery of alcohol to a minor (235 ILCS 5/6-16(a)(iii) (West 2016)). The court sentenced defendant to

conditional discharge on the battery charges and to supervision on the delivery-of-alcohol charges. Defendant appeals, arguing that the court erred in its ruling with respect to his "motion to suppress evidence and dismiss complaints/informations." Defendant also contends that the evidence was insufficient to sustain three of his convictions. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant worked as a music teacher at Crystal Lake Central High School (the school) from 2004 through 2016. In October 2016, the school's administration received information that defendant, who was 34 years old at the time, may have engaged in inappropriate conduct with former students after their graduation. Before contacting the police, the administration investigated the allegations internally. As part of that investigation, the administration asked defendant to sign what defendant calls a "*Garrity* notice," which refers to *Garrity v. State of New Jersey*, 385 U.S. 493 (1967) (statements compelled by an employer upon threat of termination may not be used against the employee in a criminal prosecution). In that notice, the administration informed defendant that his refusal to answer questions would be considered insubordination and would justify disciplinary action; his answers, however, could not be used against him in any criminal proceedings. Defendant signed that notice and then answered certain questions. After interviewing defendant, the administration continued its internal investigation before turning the matter over to the Crystal Lake Police Department, which conducted its own investigation.

¶ 5 The school's administration and the police ultimately received information that defendant kissed and/or groped two former students and that he provided alcohol to five underage former students. In case number 16-CM-2186, defendant was charged by superseding information with

battery for touching Rebecca Polk's breasts sometime between June 1 and July 31, 2016. Defendant was also charged in that case with unlawful delivery of alcohol to a minor for giving Polk alcohol during the same time period. In case number 16-CM-2187, defendant was charged with battery for touching Nicole Dombrowski's thigh, kissing her neck, and/or kissing her mouth on October 7, 2016. Defendant was charged with four additional counts of unlawful delivery of alcohol to a minor in case number 16-CM-2187 for giving Dombrowski alcohol on October 7, 2016, and for giving Trevor Bryan, Katie Murphy, and Jennifer Anderson alcohol on December 30, 2015. Though never formally consolidated, the two actions were heard together during both pretrial motion practice and trial.

¶ 6 A. Motion to Suppress/Dismiss

¶ 7 Defendant filed a "motion to suppress evidence and dismiss complaints/informations" based on the *Garrity* notice that he signed during the school administration's investigation. The court, Judge Berg presiding, held an evidentiary hearing on defendant's motion.

¶ 8 1. *The Evidence*

¶ 9 The evidence showed the following. Sometime in October 2016, Amy Rzepecki, who was a teacher at the school, was contacted by Michael Penza, a former student. Penza told Rzepecki that he had been at defendant's house the previous weekend, that defendant gave him alcohol, and that "there was inappropriate kissing and touching." Penza also informed Rzepecki that defendant engaged in the same kind of behavior with Dombrowski the previous summer. Rzepecki relayed this information to the school's assistant superintendent of human resources, Randy Davis.

¶ 10 On October 19, 2016, defendant met with Davis, Steve Olson (the school's principal), and a union representative. Davis asked defendant to sign the following *Garrity* notice, which

was entitled "Notice to Employee Re: Investigation":

> "As your current employer, Community High School District No. 155[ ] has the right to require you to participate in its investigation of your alleged misconduct. Furthermore, because your answers to some of the questions we will ask you today are potentially self incriminating, we have a duty to advise you that you may be eligible for immunity from criminal prosecution on the basis of your answers. Stated another way, nothing you say in this interview can be used against you in any criminal proceedings. However, having been given immunity, you are hereby warned that because of that immunity, you may not refuse to answer the questions on the ground that the answers may incriminate you. Accordingly, if you refuse to answer the questions, your refusal will constitute insubordination, and you will be subject to discipline up to and including your dismissal."

Defendant signed this form, thereby indicating that he "acknowledge[d] receiving the above notice and warning of [his] limited immunity rights."

¶ 11 According to Davis, he first asked defendant during the October 19, 2016, meeting if he had former students at his house on the night of October 7. Defendant answered "yes" and indicated that Dombrowski was at his house. Davis then asked if there was any kissing or inappropriate touching. Defendant answered "yes." Davis asked if there was alcohol present. At that point, the union representative stopped the meeting and indicated that he wished to contact the Illinois Education Association. Defendant's recollection of the October 19 meeting was substantially similar to Davis's recollection. Defendant also acknowledged telling Davis during this meeting that he had kissed Dombrowski.

¶ 12 The meeting resumed the following morning, on October 20, 2016. This time, a union

representative from the Illinois Education Association was present. The evidence was conflicting as to exactly what occurred at this meeting. Davis testified that he followed up with the same final question from the day before, asking defendant whether alcohol was present and if he gave alcohol to "this person" (presumably, Dombrowski). According to Davis, defendant responded that alcohol was present but that he did not give alcohol to "the person." On direct examination, Davis maintained that he did not ask defendant any further questions on October 20. On cross-examination, however, Davis indicated that he also asked defendant whether Penza had been to defendant's house on October 7 and whether there was any inappropriate contact. Davis testified that defendant acknowledged that Penza had been to his house, denied inappropriate contact, and said that Penza had supplied the alcohol. Apart from talking to defendant about Dombrowski and Penza, Davis did not recall asking defendant for names of other people who had visited his house.

¶ 13 Defendant's recollection of the October 20, 2016, meeting differed from Davis's recollection. According to defendant, Davis recapped the questions from the previous day and then asked him if there was any sexual activity that occurred on October 7 with Dombrowski. Defendant testified that he answered "yes" but insisted that nothing more than kissing had occurred. Defendant claimed that Davis then asked him if other former students had been to his house, at which point defendant began to "name some names." Although defendant believed that he provided additional names, he specifically recalled telling Davis about Allysa Teeter, Maggie Gomberg, Penza, Tanner Larkins, and Polk. Defendant testified that Davis asked him if he had any sexual contact with those students and that he responded "no."

¶ 14 After meeting with defendant on those two occasions, the school's administration continued its internal investigation. According to Davis, he and Olson interviewed Penza on

October 21, 2016. Davis provided the following summary of that interview. Penza told Davis that he went to defendant's house on October 7 and was given alcohol by defendant. Penza informed Davis that he and defendant discussed "life issues," as Penza was "not feeling well at that time emotionally." Penza related to Davis that defendant sat next to him, rubbed his leg, and "then there was inappropriate kissing and clothes came off down to the underwear." Penza indicated to Davis that he reported this incident after talking to Dombrowski and learning that the "same kind of situation" happened with her. Davis asked Penza if other students had gone over to defendant's house. Penza responded by giving Davis the following names: Anderson, Dombrowski, Giovanna Doty, Polk, and Bryan.

¶ 15 Davis and Olson subsequently interviewed Bryan. Davis recalled that interview as follows. Davis asked Bryan if he had been to defendant's house at any time over the past summer since graduating high school. Bryan responded that he had been to defendant's house several times. Davis asked if there was alcohol present. Bryan said "yes," adding that defendant "made it a strict law or regulation within his home that no cell phones were to come out." Bryan told Davis that he nevertheless had a video containing defendant's voice and depicting a person dancing in defendant's home. (Other evidence introduced at the hearing established that the person on the video was Murphy.) Davis asked Bryan if there were other students involved, and Bryan "relayed some of the same names" and also gave Davis a couple more names. Davis remembered Bryan mentioning Doty in particular, but Davis did not recall the other names that Bryan provided.

¶ 16 Davis then contacted Delmar Dade, who was both a school resource officer and a Crystal Lake police officer. Davis provided Dade with the information that had been gathered from the students. Dade told Davis to suspend the internal investigation and that the Crystal Lake Police

Department would take it over.

¶ 17 2. *Arguments and Rulings*

¶ 18 Following the presentation of evidence, defendant requested a continuance to subpoena the notes that Davis took during the October 19 and 20, 2016, meetings with defendant. The court denied that oral motion but indicated that the matter could be reopened if the notes were subsequently obtained and they unveiled relevant information. The State stipulated to the authenticity of the *Garrity* notice that defendant signed. In light of that stipulation, the court determined that case law established that the State had the burden of demonstrating "what is *** and is not admissible and why."

¶ 19 The State conceded that case law prohibited it from admitting into evidence the actual statements that defendant made to Davis during the meetings on October 19 and 20, 2016. The State argued, however, that all other evidence pertaining to the incidents charged in the superseding informations was admissible, as it came from independent and legitimate sources. In that respect, the State proposed that defendant merely confirmed during the October 19 and 20 meetings what the administration already knew from Penza's report to Rzepecki. The State noted that the administrators subsequently spoke with Penza, who led them to additional witnesses. Those witnesses, in turn, provided the evidence that formed the basis for the criminal charges.

¶ 20 Defendant, on the other hand, argued that case law broadly prohibited "the use of any compelled statement as an investigatory tool or a lead or focusing on a witness and focusing on a strategy." Defendant acknowledged that the administration was aware of Penza's and Dombrowski's names before Davis met with defendant on October 19 and 20, 2016. Nevertheless, defendant proposed that the State could not "use" Penza or Dombrowski (*i.e.*,

present evidence regarding defendant's interactions with those two individuals), because defendant, after receiving immunity, confirmed to Davis certain information about those incidents. (Defendant abandoned this particular argument in his motion to reconsider and does not raise it on appeal.) Defendant further contended that all of the other individuals who were mentioned in the superseding informations (Polk, Bryan, Murphy, and Anderson) were identified through defendant's statements to Davis. Defendant thus maintained that the State could not use any evidence that flowed from his statements, including any evidence that came to light by following up on the leads that he provided.

¶ 21 The court granted defendant's "motion to suppress evidence and dismiss complaints/informations" in part and denied the motion in part. Specifically, the court barred use at trial of any statements that defendant made on October 19 and 20, 2016; all other evidence that would otherwise be admissible was not barred. On appeal, the parties focus primarily on the findings that the court made in its detailed written order denying defendant's motion to reconsider. Thus, it is unnecessary to recount the court's initial oral explanation of its ruling.

¶ 22 3. *Motion to Reconsider*

¶ 23 Defendant moved the court to reconsider its ruling, attaching as exhibits Davis's notes from the October 19 and 20, 2016, meetings. Those notes show that the October 19 meeting proceeded more or less as both Davis and defendant had described it in their testimony. With respect to the October 20 meeting, however, the notes indicate that Davis asked defendant whether there was "a meeting of former students in [his] home during this past summer." Defendant responded by providing information about an unnamed person whom he described as being 24 years old at the time. (That description does not match any of the former students who testified for the State at defendant's trial.) Davis then asked, "Were there any male former

students?" In response to that question, defendant mentioned that Larkins and Penza stopped by. Defendant then denied to Davis having physical or sexual contact with Larkins or Penza. In his motion to reconsider, defendant asked the court to dismiss "all counts of [the] information[s] that contain victims other than Michael Penza or Nicole Dombrowski in that they were the only individuals named and known by school and government [*sic*] prior to the *Garrity*" notice.

¶ 24 At the nonevidentiary hearing on the motion to reconsider, defense counsel argued that, after defendant was given the *Garrity* notice, any information that flowed from his compelled statements was "protected." That was so, defense counsel contended, irrespective of whether the investigating authorities could have obtained the same information from Penza or Bryan had they interviewed those witnesses before interviewing defendant. Essentially, defense counsel argued that, once Davis compelled defendant to answer questions about his interactions with students other than Penza and Dombrowski, Davis could not thereafter question Penza on that particular topic, even though Davis was aware of Penza's name and allegations before defendant's interview. During the hearing, defense counsel provided the court with unspecified additional case law, which counsel claimed showed that courts were "very strict" in interpreting the prohibition on the use of compelled statements. Presumably, given the court's subsequent mention of these cases in its written ruling, two of the cases that defense counsel tendered to the court were *United States v. McDaniel*, 482 F.2d 305 (8th Cir. 1973), and *United States v. North*, 910 F.2d 843 (D.C. Cir. 1990), *withdrawn and superseded in part on reh'g by United States v. North*, 920 F.2d 940 (1990).

¶ 25 During the hearing, the State responded that the focus should be on the information that defendant provided through his compelled statements, not what questions were asked of him. In other words, Davis could not use defendant's compelled statements if they did not contain any

information. In that respect, the State noted that defendant mentioned to Davis that Penza and Larkins had been to his house. The State emphasized that Davis was already aware of Penza's name before defendant was interviewed. Additionally, the State characterized Larkins as "irrelevant" to the analysis, insofar as he was not "used" during the investigation and his name did not appear in the informations.

¶ 26 The court issued a written order denying defendant's motion to reconsider. The court framed the question as "whether evidence obtained after [defendant] gave his statements can be used against him at trial." The court explained that defendant argued that his statements "impermissibly focused the investigation," whereas the State contended that its evidence, or at least the source of that evidence, was known to authorities before defendant gave his statements. The court noted that defendant relied on federal cases, including *North* and *McDaniel*, which broadly prohibit all uses of compelled testimony, not just uses which result in the presentation of evidence at trial. The court recalled that, during the October 20, 2016, interview, Davis asked defendant whether other students had been at his house, and defendant named Penza and Larkin. According to the court,

> "Under *North* and *McDaniel*, that compelled disclosure confirmed there had been more than one gathering, which led the officers to explore additional avenues of investigation. This focusing of the investigation is a nonevidentiary use of [defendant's] compelled statement, and *North* and *McDaniel* require suppression of all evidence obtained through nonevidentiary uses."

The court expressed surprise, however, that neither defendant nor the State cited the First District's opinion in *People v. Haleas*, 404 Ill. App. 3d 668 (2010), which rejected the line of federal cases upon which defendant relied. The court detailed the disagreement among the

federal courts of appeal regarding so-called "nonevidentiary" uses of compelled statements, such as focusing the investigation. The court noted that *Haleas* held that, when addressing nonevidentiary uses of compelled statements, the relevant issue is whether the prosecution's use of the statements was "tangential" as opposed to "substantial."

¶ 27 Purporting to apply the "*Haleas* test," the court found that Penza and Dombrowski were occurrence witnesses who were "known to authorities" before Davis interviewed defendant. In the court's view, Penza and Dombrowski thus provided sources of information that were obtained "wholly independent of [defendant's] compelled statements." The court further found that Davis obtained Bryan's name from Penza, and Bryan was another occurrence witness who provided additional information. The court reasoned that "Bryan's name was gathered independent of [defendant's] statement," as defendant had named only Penza (whose name Davis already had) and Larkins. According to the court, "independent of any other source of the information," Bryan then led the authorities to Polk.

¶ 28 The court mentioned that Davis's notes did not support defendant's claim that he gave Polk's name to Davis during the October 20 meeting. Even so, the court noted that defendant testified that, when speaking to Davis, he denied any wrongdoing with respect to his gatherings with the various students. Therefore, the court found that "any evidence gathered to the contrary is a tangential use of [defendant's] compelled statement." Furthermore, the court determined that defendant's claim that his statements focused the investigation by alerting investigators to other meetings at his house with former students was belied by Penza's initial report to Rzepecki. Specifically: "Mr. Penza told them from day one of his own experiences and of Ms. Dombrowski's similar experiences on a different date. The investigators thus knew from the outset about multiple meetings at [defendant's] house involving alcohol, former students, and

inappropriate touching." In the court's view, "[a]ny claim that Mr. Penza wouldn't have been interviewed but for [defendant's] compelled statements strain[s] credulity."

¶ 29 B. Trial and Sentencing

¶ 30 The matter proceeded to a bench trial before Judge Wilbrandt. The court found defendant guilty of battery with respect to Polk and Dombrowski. The court also found defendant guilty of unlawful delivery of alcohol to a minor with respect to Polk, Dombrowski, Bryan, and Murphy. The court found defendant not guilty, however, of unlawful delivery of alcohol to a minor with respect to Anderson. The court sentenced defendant to conditional discharge on the battery charges and to supervision on the delivery-of-alcohol charges. Defendant timely appealed.

¶ 31 II. ANALYSIS

¶ 32 Defendant challenges the court's ruling on his "motion to suppress evidence and dismiss complaints/informations." He also challenges the sufficiency of the evidence supporting his two battery convictions and his conviction of providing Polk with alcohol.

¶ 33 A. Motion to Suppress/Dismiss

¶ 34 According to defendant, Davis used his compelled statements as an investigatory lead to identify complaining witnesses who were not previously known to either Davis or law enforcement. Defendant maintains that this incriminating information ultimately led to the charges in counts I and II of case number 16-CM-2186 and counts III and IV of case number 16-CM-2187 (*i.e.*, all counts of the superseding informations not dealing with Dombrowski or Anderson). From this premise, defendant proposes that all evidence that was obtained as a result of Davis's use of the compelled statements should have been suppressed and the charges based on such evidence dismissed. As part of his overarching argument, defendant takes the positions

that (1) the trial court applied incorrect legal principles by determining that Davis used defendant's statements to "focus the investigation," which the court believed was a "nonevidentiary" and "tangential" use of the statements, (2) the State failed to prove that the evidence that was used to obtain the charges, and which the State proposed to use at trial, was derived from a "legitimate and wholly independent source," (3) alternatively, we should reject *Haleas*, to the extent that it purportedly adopted an "evidentiary vs. nonevidentiary" framework, and we should instead hold that prosecuting authorities may not use an immunized statement in any respect, and (4) also in the alternative, assuming that the trial court correctly found that Davis's use of defendant's statement was "nonevidentiary," the court's finding that the use was "tangential" was clearly erroneous.

¶ 35 The State responds that (1) the trial court did not err in following the "sound" holding of *Haleas*, (2) the trial court did not err in finding that the State's use of evidence was "nonevidentiary" and had an "independent source," and (3) the trial court's finding that the use of evidence was "tangential" was not clearly erroneous.

¶ 36 To the extent that we are tasked with determining whether the trial court used the correct legal principles, that is a question of law and our review is *de novo*. *Haleas*, 404 Ill. App. 3d at 677. Where the court used correct legal principles, however, we apply the clearly erroneous standard to evaluate the court's ultimate conclusion as to whether the State's evidence was tainted. *Haleas*, 404 Ill. App. 3d at 677.

¶ 37 The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const., amend. V. That prohibition applies to the states by virtue of the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1, 6 (1964). To understand how the Fourteenth Amendment impacts the case at bar, it is

necessary to begin with a summary of *Garrity v. State of New Jersey*, 385 U.S. 493 (1967), and *Kastigar v. United States*, 406 U.S. 441 (1972).

¶ 38 In *Garrity*, the Supreme Court held that—where police officers were informed during an investigation by their state's Attorney General that (1) their statements could be used against them in state criminal proceedings, (2) they had the right to refuse to answer questions if such answers would incriminate them, but (3) their refusal to answer would subject them to removal from their office—the officers' answers were coerced and the prosecution could not use those statements against the officers in any criminal case. *Garrity*, 385 U.S. at 494-95, 497. According to the Court: "We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic." *Garrity*, 385 U.S. at 500.

¶ 39 The petitioners in *Kastigar* were subpoenaed to appear before a federal grand jury. *Kastigar*, 406 U.S. at 442. Anticipating that the petitioners would invoke their privileges against self-incrimination, the government sought an order directing them to answer questions and produce evidence pursuant to the "use and derivative-use" immunity accorded by section 6002 of Title 18 of the United States Code. *Kastigar*, 406 U.S. at 442, 449; 18 U.S.C. § 6002. That statute provided, in relevant portion:

> "[T]he witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution

> for perjury, giving a false statement, or otherwise failing to comply with the order." 18 U.S.C. § 6002.

The petitioners contended that this statutory immunity "was not coextensive with the scope of the privilege against self-incrimination, and therefore was not sufficient to supplant the privilege and compel their testimony." *Kastigar*, 406 U.S. at 442. The district court rejected that argument and held the petitioners in contempt when they refused to answer questions pursuant to their grant of immunity. *Kastigar*, 406 U.S. at 442. The Supreme Court granted *certiorari* to determine whether the petitioners' testimony could be compelled merely by granting "use and derivative-use immunity" (*i.e.*, "immunity from the use of compelled testimony and evidence derived therefrom") or whether it was necessary to grant the petitioners "transactional immunity" (*i.e.*, "immunity from prosecution for offenses to which compelled testimony relates"). *Kastigar*, 406 U.S. at 443.

¶ 40 The Court held that the "use and derivative-use" immunity contemplated by the statute passed constitutional muster, explaining:

> "While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader. Transactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege. The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being 'forced to give testimony leading to the infliction of penalties affixed to . . . criminal acts.' Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities

> from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." *Kastigar*, 406 U.S. at 453 (quoting *Ullmann v. United States*, 350 U.S 422, 438-39 (1956)).

According to the court, "use and derivative-use" immunity appropriately " 'leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege' in the absence of a grant of immunity." *Kastigar*, 406 U.S. at 458-59 (quoting *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52, 79 (1964)).

¶ 41 The Court then addressed the petitioners' argument that "use and derivative-use" immunity would not adequately protect them from the various possible incriminating uses of their compelled testimony, such as law enforcement or prosecutors obtaining leads, names of witnesses, or other information that might result in a prosecution. *Kastigar*, 406 U.S. at 459. Specifically, according to the petitioners, "[i]t will be difficult and perhaps impossible *** to identify, by testimony or cross-examination, the subtle ways in which the compelled testimony may disadvantage a witness, especially in the jurisdiction granting the immunity." *Kastigar*, 406 U.S. at 459. The Court rejected this argument, reiterating that the statute at hand provided "a sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived therefrom." *Kastigar*, 406 U.S. at 460. The Court stated: "This total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an 'investigatory lead,' and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures." *Kastigar*, 406 U.S. at 460 (quoting *Albertson v. Subversive Activities Control Board*, 382 U.S. 70, 80 (1965)). The Court continued: " 'Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of

showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.' " *Kastigar*, 406 U.S. at 460 (quoting *Murphy*, 378 U.S. at 79 n.18). The court asserted that this burden of proof "is not limited to a negation of taint," but rather "imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Kastigar*, 406 U.S. at 460.

¶ 42 *Kastigar* thus established a procedure that applies where a state or the federal government pursues criminal charges against a person after he or she provided compelled testimony pursuant to a grant of "use and derivative-use" immunity. The Court in *Kastigar* did not cite *Garrity*, and *Garrity* did not involve any issue of immunity. Nevertheless, " '[a]lthough *Garrity* does not expressly invoke the protections of *Kastigar*, every [federal] circuit to have addressed the issue has held that a government employee who has been threatened with an adverse employment action by her employer for failure to answer questions put to her by her employer receives immunity from the use of her statements or their fruits in subsequent criminal proceedings.' " *Haleas*, 404 Ill. App. 3d at 675 (quoting *United States v. Slough*, 677 F. Supp. 2d 112, 132 (2009)); see also *People v. Smith*, 399 Ill. App. 3d 534, 539 (2010) (discussing "*Garrity* immunity").

¶ 43 In the 47 years since *Kastigar* was decided, the federal courts of appeal have struggled to define its scope. The particular question that divides the courts is whether and to what extent *Kastigar* bars so-called "nonevidentiary" uses of a defendant's immunized statements. In *United States v. McDaniel*, 482 F.2d 305 (8th Cir. 1973), for example, the Eighth Circuit Court of Appeals held that even though there was an independent source for the evidence that was adduced at the defendant's trial, the government also had to prove that the prosecutor, who

admittedly read the defendant's immunized grand jury testimony before the indictments were returned, did not use that immunized testimony "in some significant way short of introducing tainted evidence." *McDaniel*, 482 F.2d at 311. According to *McDaniel*:

> "Such use could conceivably include assistance in *focusing the investigation*, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy.
>
> *Kastigar*, after all, proscribed 'any use, direct or indirect . . . .' And, indeed, if the immunity protection is to be coextensive with the Fifth Amendment privilege, as it must to be constitutionally sufficient, then it must forbid all prosecutorial use of the testimony, not merely that which results in the presentation of evidence before the jury." (Emphasis added). *McDaniel*, 482 F.2d at 311 (quoting *Kastigar*, 406 U.S. at 460).

Not all courts have agreed with *McDaniel*'s apparent categorical prohibition against nonevidentiary uses of immunized statements. See *Haleas*, 404 Ill. App. 3d at 677-80 (explaining the conflicting views that have emerged in the federal case law). In *Haleas*, the only Illinois case to have addressed the issue, the court held that *Kastigar* does not bar all nonevidentiary uses of compelled statements, just those which are "substantial" rather than "tangential." *Haleas*, 404 Ill. App. 3d at 681.

¶ 44 Here, the trial court issued a detailed order denying defendant's motion to reconsider its ruling on defendant's "motion to suppress evidence and dismiss complaints/informations." The court ultimately found that the State's evidence came from sources that were independent of defendant's compelled statements and that the only evidence that was inadmissible were defendant's actual statements to Davis. Defendant isolates aspects of the court's reasoning and attempts to demonstrate error therein. Specifically, defendant criticizes the court's comment that

defendant's statements to Davis during the October 20, 2016, meeting resulted in a "focusing of the investigation," which constituted a nonevidentiary use of defendant's statement. In defendant's view, rather than serving to "focus the investigation," his statements to Davis were put to an evidentiary use, as they provided an "investigatory lead" that ultimately resulted in his criminal charges. Defendant also disagrees with the court's finding that, because defendant denied any wrongdoing in his conversations with Davis, "any evidence gathered to the contrary is a tangential use of his compelled statement." In this respect, defendant asks us to depart from the framework that the First District adopted in *Haleas* regarding substantial versus tangential nonevidentiary uses of compelled statements.

¶ 45 As explained above, there is conflicting case law in the federal courts regarding whether and to what extent *Kastigar* bars nonevidentiary uses of compelled statements. The present case, however, does not require us to enter that debate. When courts have addressed nonevidentiary uses, it has been in the context of contemplating the subtle and perhaps even subconscious ways that the prosecution team or its witnesses may have been influenced by their exposure to an immunized statement. See, *e.g.*, *McDaniel*, 482 F.2d at 311-12 (addressing the effects on the prosecutor); *United States v. Slough*, 641 F.3d 544, 550 (D.C. Cir. 2011) (addressing the effects on the prosecution's witnesses). The trial court's remark in its order that two particular federal cases, if followed, would "require suppression of all evidence obtained through nonevidentiary uses" is puzzling. Nonevidentiary uses, by definition, do not result in obtaining evidence. Despite what the trial court may have suggested, neither the facts adduced at the evidentiary hearing nor defendant's arguments presented any issue regarding nonevidentiary uses of a compelled statement. Specifically, defendant never questioned whether the prosecutors were subtly or subconsciously influenced by their exposure to his compelled statements. Likewise,

there was no indication that any former student who testified for the State at defendant's trial was ever made aware of defendant's statements. Instead, defendant argued that the school's administration used his compelled statements to obtain the names of witnesses who subsequently provided evidence against him. Under these circumstances, the only question implicated by defendant's "motion to suppress evidence and dismiss complaints/informations" was whether the prosecution affirmatively proved that the evidence it proposed to use at trial was "derived from a legitimate source wholly independent of the compelled testimony." *Kastigar*, 406 U.S. at 460. We therefore express no opinions as to (1) whether and to what extent *Kastigar* applies to nonevidentiary uses of compelled statements, (2) whether *Haleas* adopted the proper framework by distinguishing been tangential and substantial nonevidentiary uses, or (3) how to differentiate between using a compelled statement to focus the investigation (a supposedly nonevidentiary use) versus using that statement as an investigatory lead (a supposedly evidentiary use).

¶ 46 Although the court made superfluous comments about evidentiary versus nonevidentiary uses, we determine that it is unnecessary to remand this matter for further proceedings. We disagree with defendant that the distinction between evidentiary and nonevidentiary uses was the "lynchpin" of the court's finding that the State's evidence was not tainted. To the contrary, the court ultimately determined that the State's evidence derived from sources that were wholly independent of defendant's compelled statements. That was the proper inquiry, and the court made explicit findings in that respect. We emphasize that "[w]e review the trial court's judgment, not its reasoning, and we may affirm on any basis called for by the record." *People v. Mueller*, 2018 IL App (2d) 170863, ¶ 16.

¶ 47 We thus turn to defendant's argument that Davis used his compelled statements to identify and question complaining witnesses who were not previously known to either Davis or

law enforcement. To recapitulate, the evidence established the following timeline of events. First, Penza, a former student at the school, told a teacher that (1) he had been to defendant's house the previous weekend, (2) defendant gave him alcohol, (3) "there was inappropriate kissing and touching," and (4) defendant had engaged in the same kind of behavior with Dombrowski the previous summer. The teacher then relayed that information to Davis, one of the school's administrators. Before contacting Penza, Dombrowski, or the police, Davis met with defendant on two separate occasions, and defendant gave statements that were compelled within the meaning of *Garrity*. Specifically, defendant told Davis that (1) Dombrowski had recently been at his house, (2) he kissed her, (3) although alcohol was present during that encounter, he did not give alcohol to Dombrowski, and (4) Penza had also been to his house, but no inappropriate contact occurred and Penza supplied the alcohol. Although Davis did not recall asking defendant for the names of other people who had visited his house, defendant testified that he told Davis that the following former students had been to his house and that he had no sexual contact with them: Teeter, Gomberg, Penza, Larkins, and Polk. Davis's notes of the meeting, however, indicate that Davis asked defendant whether any male former students had been to his house the previous summer, and defendant mentioned Larkins and Penza. After meeting with defendant, the school's administration interviewed Penza, who said that (1) he recently went to defendant's house, (2) defendant gave him alcohol, (3) "there was inappropriate kissing and clothes came off down to the underwear," (4) he decided to report this incident after speaking with Dombrowski and learning that the "same kind of situation" happened with her, and (5) other students—including Anderson, Dombrowski, Doty, Polk, and Bryan had also been to defendant's house. The school's administration then interviewed Bryan, who said that (1) he had been to defendant's house several times since graduating high school, (2) alcohol was

present, and (3) other students (whose names Davis did not recall except for Doty) had also been involved. Bryan further indicated during his interview that he was in possession of a cell phone video depicting Murphy that was taken at defendant's home. The administration subsequently turned the investigation over to the police department, which conducted its own investigation. Defendant was ultimately charged by superseding informations with battery as to Polk and Dombrowski and providing alcohol to Polk, Dombrowski, Bryan, Murphy, and Anderson.

¶ 48 Based on these facts, the court found that the State's evidence came from sources that were independent of defendant's compelled statements. According to the court, although they were not interviewed until after defendant gave his compelled statements, Penza and Dombrowski were both occurrence witnesses and were both known to authorities before defendant's statements. Therefore, the court found, "those sources of information were obtained wholly independent of the compelled statements." In the court's view, it would "strain credulity" to claim that Penza—having informed a teacher that defendant was associated with underage drinking and inappropriate sexual contact involving former students—"wouldn't have been interviewed but for [defendant's] compelled statements." The court further found that Penza led authorities to Bryan and other independent occurrence witnesses who had been to gatherings at defendant's house when alcohol was present. The court noted that, contrary to what defendant said in his testimony, Davis's notes indicated that defendant provided only two names to Davis: Penza and Larkins. The court also rejected defendant's argument that his compelled statements "focused the investigation by cluing investigators in on other meetings at his house with former students." Specifically, the court found that such argument was not consistent with the evidence, which showed that "Mr. Penza told them from day one of his own experiences and of Ms. Dombrowski's similar experiences on a different date." Thus, the court

explained, "[t]he investigators *** knew from the outset about multiple meetings at [defendant's] house involving alcohol, former students, and inappropriate touching."

¶ 49 The court's findings were fully supported by the evidence and were not clearly erroneous. It is clear that the court did not credit defendant's testimony that he mentioned Polk's name to Davis. Even if the court had believed defendant's testimony on that issue, however, defendant never claimed to have told Davis about Bryan, Murphy, or Anderson. The only point that we would add to the court's explanation is that, although Davis's notes show that defendant disclosed Larkins's name to Davis, the school's administration did not interview Larkins, there were no allegations relating to Larkins in the informations, and Larkins did not testify at trial. The evidence showed that the prosecution met its burden under *Kastigar* to prove that the evidence it proposed to use was "derived from a legitimate source wholly independent of the compelled testimony." *Kastigar*, 406 U.S. at 460. Accordingly, the court's ruling with respect to defendant's "motion to suppress evidence and dismiss complaints/informations" (*i.e.*, denying the motion apart from suppressing defendant's actual statements to Davis) was not clearly erroneous.

¶ 50 Defendant proposes that the court merely speculated that Penza, when interviewed by Davis after Davis had already procured defendant's compelled statements, would have volunteered information about students other than Dombrowski absent some "prompting" by Davis. The evidence showed, however, that Davis did not prompt Penza in any fashion. Davis merely questioned Penza about the same matters on which he had previously questioned defendant. The trial court drew a reasonable inference in concluding that Davis would have asked the same questions of Penza, and that Penza would have provided the same answers, had Davis interviewed Penza before interviewing defendant.

¶ 51 Defendant compares his case to *United States v. Pagnotti*, 507 F. Supp. 2d 494 (M.D. Penn. 2007). In that case, the district court dismissed an indictment pursuant to *Kastigar* where (1) the defendant was not under investigation before he was compelled to give incriminating testimony before a grand jury and (2) his testimony provided the "crucial link in the chain of evidence" tying him to criminal activity. *Pagnotti*, 507 F. Supp. 2d at 501. Indeed, Mr. Pagnotti's transactions initially appeared legitimate to investigators, but his compelled testimony was deemed suspicious and prompted an inquiry into his affairs. *Pagnotti*, 507 F. Supp. 2d at 501. *Pagnotti* is distinguishable. Given that all of the evidence that the State intended to use at defendant's trial traced backed to Penza, who was known to authorities before defendant was interviewed and had already made allegations against defendant, defendant's statements did not provide the crucial link in the chain of evidence that tied him to criminal activity.

¶ 52 B. Sufficiency of the Evidence—Polk

¶ 53 Defendant next argues that the evidence was insufficient to sustain his convictions of battery and unlawful delivery of alcohol to a minor with respect to Polk, because her testimony was so unreasonable and improbable as to raise a reasonable doubt of his guilt.

¶ 54 Polk testified at defendant's trial as follows. She graduated from the school in 2014, and defendant was her musical director. For the first two years after she graduated, she worked at the school as the assistant choreographer for productions. As part of that experience, she developed a professional relationship with defendant that turned into a very close friendship. She saw defendant around 10 times during the summer of 2016, which was the summer when she turned 20 years old.

¶ 55 Polk recalled one particular occasion in late June or early July 2016 when she went to defendant's house around 9 or 10 p.m. Defendant had a shot of tequila waiting for her when she

arrived and handed it to her. She believed that defendant was consuming alcohol as well. According to Polk: "We were just talking about a lot of random stuff. And then somehow—I don't remember exactly—he started talking about boobs, and he said that I had nice boobs, and then he grabbed mine." Specifically, she stated that defendant quickly grabbed her breast under her clothing, squeezed, let go, and then removed his hand. Polk described feeling "taken aback," "shocked," and "grossed out." She nevertheless "laughed it off" at the time because she was uncomfortable, she did not know how to react, and she thought that defendant was drunk. She told him that she needed to go home. She gave him an excuse, but the real reason was that she was uncomfortable and wanted to leave. She did not tell anybody about this incident "for a while." She eventually told Bryan, who was one of her friends from high school.

¶ 56 On cross-examination, Polk acknowledged having told a detective in November 2016 that defendant touched her *over* her clothing. Addressing this discrepancy, she testified that "[t]hat's what [she] remembered then," although she "remembered differently now." According to Polk, her memory was better now because she had "thought about it more." Defense counsel also asked her whether she had spoken to other people, including Bryan and Penza. She responded that she had "[n]ot really" talked to those people about what happened to her. She acknowledged that, throughout the summer of 2016, defendant helped her with a college dance class that she was taking. To that end, she continued to text defendant, meet up with him, and solicit his help in the months after he allegedly grabbed her breast. For example, she texted him in October 2016 that she "missed him very much." She agreed that she was "not unaccustomed to drinking" during the summer of 2016. She had her own fake ID, and she sometimes ordered her own alcoholic beverages.

¶ 57 On re-direct examination, Polk testified that she maintained a friendship with defendant after he grabbed her breast. She explained that, although she was very uncomfortable when it happened, she brushed it off at the time as being "no big deal," as defendant apologized to her and she thought that he "was just drunk." On re-cross examination, she acknowledged that she stopped texting defendant in the fall of 2016 after she talked to Penza and Bryan and "realized there was *** something wrong," in that "it was more than just [her] that [defendant] was doing bad things to."

¶ 58 Defendant testified that Polk was his friend and that they saw each other seven times during the summer of 2016. He denied that Polk ever came inside his residence or that he provided alcohol to her at his home. Defendant testified that he and Polk continued to speak with each other and see each other after the incident that she described in her testimony. According to defendant, Polk never indicated to him any displeasure with anything that he had done. On cross-examination, defendant clarified that he was not claiming that Polk had never been in his home, but only that she was not in his home during the summer of 2016. He denied giving Polk a shot of tequila, denied touching her breast, and denied joking with her about "boobs." Defendant expressed his belief that all of the former students who testified against him at his trial, except for Dombrowski, were lying at Bryan's behest.

¶ 59 The court found defendant guilty of both battery and unlawful delivery of alcohol to a minor with respect to Polk. The court explained that, in general, it found that "the testimony of the students was essentially credible, and that the testimony of the Defendant was less so." The court later mentioned that it specifically found Polk's testimony credible. Although defendant suggested during his testimony that there was a conspiracy against him, the court found that there was "no credible evidence of any concerted effort to fabricate or tell untruths."

¶ 60 We cannot set aside a criminal conviction "unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt." *People v. Collins*, 106 Ill. 2d 237, 261 (1985). We do not retry the defendant; instead " 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *Collins*, 106 Ill. 2d at 261 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

¶ 61 "A person commits battery if he or she knowingly without legal justification by any means *** makes physical contact of an insulting or provoking nature with an individual." 720 ILCS 5/12-3(a)(2) (West 2016). Additionally, "No person, after purchasing or otherwise obtaining alcoholic liquor, shall sell, give, or deliver such alcoholic liquor to another person under the age of 21 years, except in the performance of a religious ceremony or service." 235 ILCS 5/6-16(a)(iii) (West 2016). Defendant does not dispute that, if Polk were to be believed, the State presented evidence establishing each element of both offenses. Defendant nevertheless contends that Polk's testimony was unreasonable, improbable, and generally unworthy of belief. In that respect, he emphasizes that (1) she continued her friendship with him after the alleged incident, (2) she told a police officer that defendant grabbed her breast over her clothing, not under it, and (3) she stopped communicating with defendant after speaking with Penza. Defendant also suggests that we should evaluate Polk's testimony in light of his own "detailed denial."

¶ 62 We hold that the State proved defendant guilty beyond a reasonable doubt with respect to the two convictions arising out of his conduct toward Polk. This was a classic "he said, she said" case. The trial court was charged with evaluating witness credibility and assessing any flaws in

the testimony. See *People v. Cunningham*, 212 Ill. 2d 274, 283 (2004) ("[I]t is for the fact finder to judge how flaws in part of the testimony affect the credibility of the whole."). Contrary to what defendant argues, Polk's continued friendship with him after the alleged groping incident did not necessarily undermine her credibility. She had a plausible explanation for continuing to associate with him. She testified that defendant apologized to her and that she initially chalked the incident up to defendant being drunk. Considering that defendant was her close friend, it is understandable that she was willing to forgive an isolated incident of this nature. It is also understandable that Polk's view of the incident, and of defendant generally, would change once allegations surfaced that he had acted inappropriately toward other former students. To the extent that defendant suggests that Polk's testimony was unworthy of belief merely because she stopped communicating with him after speaking with her friends, the trial court found that there was no conspiracy to testify falsely.

¶ 63 The trial court was aware that Polk told a police officer that defendant touched her over her clothing. The court mentioned this discrepancy in its order yet found Polk to be a credible witness. Our inquiry is limited to determining whether, "after considering the whole record, *** flaws in testimony made it impossible for any fact finder reasonably to accept any part of it." *Cunningham*, 212 Ill. 2d at 283. There are innocuous reasons why Polk may have initially told the police that defendant touched her over her clothing rather than under it. Perhaps she was embarrassed. Perhaps she did not want to see defendant get in too much trouble. Perhaps, as she testified, her memory simply changed as time passed. Under the circumstances, the trial court was not unreasonable in crediting Polk's testimony over defendant's testimony.

¶ 64 Defendant analogizes his case to *People v. Smith*, 185 Ill. 2d 532 (1999), and *In re Christian W.*, 2017 IL App (1st) 162897, where the reviewing courts reversed convictions

stemming from witness testimony that was unreliable and thoroughly discredited. The single discrepancy that defendant identifies in Polk's testimony (whether the contact was over her clothing or under her clothing) does not come close to the serious deficiencies in the complaining witnesses' testimony that were at issue in *Smith* and *Christian W.*

¶ 65 C. Sufficiency of the Evidence—Dombrowski

¶ 66 Finally, defendant argues that the State failed to prove beyond a reasonable doubt that he committed a battery against Dombrowski. Specifically, he contends that, "even taking Dombrowski's version of events as true, the State's evidence was insufficient as a matter of law to prove that [he] committed the offense of battery." In that regard, he asserts that the guilty finding "criminalized otherwise innocent romantic advances occurring in the context of courtship." Defendant also maintains that the State failed to prove that he acted knowingly.

¶ 67 Dombrowski testified that she graduated from the school in 2015 and that defendant was her choir and musical director. She maintained a relationship with defendant after graduation. They were friends, and he would give her advice and guidance as she struggled with being homesick during the transition from high school to college. In October 2016, she made plans via text to go over to defendant's house on October 7 to hang out, talk, and catch up. She knew that she was going to be drinking, so she asked her sister to be the designated driver. Her sister dropped her off at defendant's house between 10:30 and 11 p.m. She brought a bottle of wine to defendant's house, and she made plans for her sister to pick her up at 1 a.m.

¶ 68 According to Dombrowski, she and defendant were alone at his house that night. They drank alcohol and sat on the couch talking for a while. They were just talking when defendant "leaned forward, kind of got up on his knee, and began kissing [her] on [her] mouth and then stuck his tongue down [her] throat and began kissing [her] neck as well." Asked what she meant

when she said that defendant stuck his tongue down her throat, she said: "Like in a very aggressive way he kind of forced his tongue into my mouth." As defendant kissed her, his hands were rubbing her thighs and stomach, and he put his hand up her shirt and attempted to grab her breast. He was not successful in grabbing her breast, however, because she "squirmed away." In doing so, she did not actually leave the couch, but she "just moved back a little bit and kind of wiggled." Asked what, if anything, she was doing while this was happening, she responded that she was not doing anything and "was not reciprocating the action." After defendant stopped kissing her, he said that this would not affect anything between them, because they were friends. According to Dombrowski, while defendant kissed her and rubbed her thighs, she felt very uncomfortable and scared. She also felt uncomfortable and violated when she felt his hand going toward her breast. She did not say anything to him about this incident, though.

¶ 69 Dombrowski explained that she and defendant then talked for about 30-45 minutes. Defendant's demeanor was "very flirtatious and very forward, and he was sitting very close to [her]." Defendant kissed her again. She felt uncomfortable and scared, but she did not say anything to defendant about this kiss. Asked why she stayed on the couch between the first and second kisses, she said that she "didn't really have anywhere else to go." Her phone was on the table in a different room, she was feeling very scared, and she was trying to think of a way that she could get back to her phone to have her sister pick her up. She retrieved her phone and texted her sister 15-20 minutes after defendant kissed her the second time. As she was leaving, defendant hugged her and attempted to kiss her again, but she backed away when he leaned in. On the car ride home, she started crying and told her sister what had happened. She then told her parents, some friends, and, ultimately, a police officer. At no time during these events did she ask defendant to kiss or touch her.

¶ 70 On cross-examination, Dombrowski testified that she went to defendant's house that night for the purpose of consuming alcohol. She acknowledged that she never said "no" to defendant. She also acknowledged that she sent numerous texts to one of her friends that night, so her phone was indeed present and available to her. Asked whether defendant stopped when she "made a motion away, *** pushed his hands away," she responded in the affirmative. On re-direct examination, she clarified that, although defendant stopped when she "pushed" his hand away, he tried to kiss her that second time. She also testified that, between the first kiss and the second kiss, she had access to her phone. She did not recall, however, whether she sent any text messages during that particular time. On re-cross examination, she was shown copies of her text messages with defendant leading up to her arrival at his house on October 7, 2016. Those texts made it clear that defendant and Dombrowski both contemplated getting intoxicated.

¶ 71 Dombrowski's sister, Natalie, testified that Dombrowski seemed panicked and had a shaky voice in the car after visiting with defendant on the night in question. According to Natalie, Dombrowski then told her what happened at defendant's house.

¶ 72 Defendant testified that Dombrowski came to his house on October 7, 2016. According to defendant, after drinking some alcohol, Dombrowski returned from a bathroom break and sat "a lot closer" to him on the couch than she had before. A little bit later, they kissed. She never asked him to stop, she did not push him away, and she did not verbally reprimand him. He then went to the kitchen to make another drink, and they sat back on the couch and talked for another 45 minutes or an hour until she left. He never stopped her from leaving earlier, and he observed that she had a phone available to her the entire time. She gave him a hug goodbye when she left.

¶ 73 On cross-examination, defendant testified that he had known Dombrowski since she was a freshman in high school. He acknowledged that it was a fair statement to say that he had

mentored her. He was 34 years old in October 2016, and she was 19 years old. He explained that he and Dombrowski "kissed mutually," but he denied putting his tongue in her mouth or putting his hand up her shirt. Asked if he touched her thighs with his hand, he responded, "I think I had to have been the way we were sitting, yes." According to defendant, he, not Dombrowski, stopped the kissing. He claimed that he told her: "I don't want to do this. We're friends. I don't want this to change our friendship." He denied kissing her again after that, and he said that he was not drunk that night. He did not think that Dombrowski lied about a lot of things in her testimony. With that said, he believed that "the actual kiss itself was misconstrued, and it wasn't portrayed to the Court in a way that it happened." On re-direct examination, defendant testified that Dombrowski never gave him any indication that the kissing was offensive to her.

¶ 74 The court found defendant guilty of both battery and unlawful delivery of alcohol to a minor with respect to Dombrowski (on appeal, defendant challenges only the battery conviction). The court found the testimony of the former students to be more credible than defendant's testimony, and the court rejected defendant's suggestion that the witnesses conspired against him. The court made the following factual findings with respect to the contact between defendant and Dombrowski:

> "The two sat on Defendant's couch. Defendant kissed Nicole, kissed her throat, and put his hand up her shirt. She pushed at his hand and squirmed away. Nicole felt 'very scared and uncomfortable—violated.' She had never asked Defendant to kiss or touch her, nor did she consent to being kissed or touched. Defendant advised that 'this wouldn't affect anything,' that they could 'still be friends,' but later Defendant kissed her again."

In explaining its finding of guilt with respect to the battery, the court stated:

> "Here, the evidence and circumstances show that Defendant was originally engaged in what was described as an 'authoritarian friendship' with the students. There was no indication of any dating relationship or any possible romantic involvement with any of them. Instead, the students, several of whom were involved in Defendant's musical theater productions, were engaged in a type of mentor relationship with the Defendant while they attended college. The evidence shows that the students did not believe that the nature of their relationship with Defendant had changed to a romantic or even potentially romantic one, nor did they give their consent to such a change.
>
> Defendant kissed Nicole Dombrowski and put his hand up her shirt. She pushed at his hand and squirmed away. Later, Defendant kissed her a second time. Nicole felt 'very scared,' in 'panic,' 'shaken up,' and 'violated.' The court feels the evidence and circumstances clearly show Defendant knowingly made non-consensual contact of an insulting or provoking nature with Nicole Dombrowski."

¶ 75 The parties dispute the applicable standard of review. Defendant argues that we should review his conviction (or at least his argument about whether the contact was insulting or provoking) *de novo*. The State, however, notes that the facts are indeed disputed on material points, including what touching occurred, how many kisses occurred, who stopped the kissing, and "whether there was a 'romantic' or a 'mentoring' relationship involved." Accordingly, the State submits that we should apply the highly deferential standard of review from *Collins*: " 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " *Collins*, 106 Ill. 2d at 261 (quoting *Jackson*, 443 U.S. at 319). We agree with the State. The

facts, as well as the reasonable inferences to be drawn from those facts, were and continue to be subject to dispute. See *People v. Rizzo*, 362 Ill. App. 3d 444, 448-49 (2005) (the *Collins* standard applied where the defendant challenged the fact-finder's determination that the elements of the crime were satisfied, and where such determination rested on the inferences to be drawn from the evidence).

¶ 76 We hold that a rational trier of fact could have determined that defendant's contact with Dombrowski was insulting or provoking. When assessing whether contact is insulting or provoking, it is important to consider the context in which the contact occurs. See *People v. Peck*, 260 Ill. App. 3d 812, 814 (1994) (" '[A] particular physical contact may be deemed insulting or provoking based upon the factual context in which it occurs.' " (quoting *People v. d'Avis*, 250 Ill. App. 3d 649, 651 (1993))). The evidence supported the trial court's conclusion that defendant was a mentor and a close friend to Dombrowski rather than a prospective romantic partner. In that respect, the court was entitled to consider that defendant was Dombrowski's former teacher, that he continued to help her with her college coursework, and that he was 15 years her senior. The evidence showed that defendant and Dombrowski planned an evening together at his house during her weekend home from college to chat and drink alcohol. Even if defendant could have reasonably misconstrued their get-together as a date, the evidence, when considered in the light most favorable to the State, did not support defendant's argument that he merely made "[a] reasonable romantic physical advance." Defendant did not simply go in for a first kiss. Instead, according to Dombrowski, he "forced his tongue" into her mouth in "a very aggressive way," rubbed her thighs and stomach, and put his hand up her shirt and attempted to grab her breast. To the extent that the circumstances may have led defendant to

subjectively believe that he was justified in making a romantic physical advance, a reasonable finder of fact could have believed that the way defendant went about this was unreasonable.

¶ 77 Citing *People v. DeRosario*, 397 Ill. App. 3d 332 (2009), and *People v. Wilkinson*, 194 Ill. App. 3d 660 (1990), defendant asserts that "courts that have considered batteries under similar circumstances have placed great weight on whether the defendant was aware that the complaining witness was not interested in his advances, but continued his physical contact anyway." Contrary to what defendant appears to imply, those cases do not hold that a man is entitled to grab or kiss a woman unless and until she rejects his advances. Nevertheless, as explained above, the evidence here indeed showed that defendant kissed Dombrowski after she rebuffed him. Specifically, Dombrowski testified that she did not reciprocate defendant's romantic gestures, but instead "squirmed away" from him, "moved back a little bit and kind of wiggled," and/or pushed his hands away. Defendant kissed her again 30-45 minutes later and then tried to kiss her a third time as she left his house. Under these circumstances, the evidence was sufficient to sustain the trial court's finding that the contact at issue was insulting or provoking.

¶ 78 Defendant also argues that the State failed to prove that he acted knowingly. His argument in this respect substantially mirrors his argument about the "insulting or provoking" element of the battery statute: *i.e.*, that he "reasonably believed that his romantic advances were both wanted and reciprocated," given that Dombrowski never conveyed her feelings of fright or discomfort to him. For the same reasons articulated above, we reject these arguments and hold that the evidence was sufficient to justify the court's conclusion that defendant acted knowingly.

¶ 79 III. CONCLUSION

¶ 80 For the reasons stated, we affirm the judgment of the circuit court of McHenry County.

¶ 81 Affirmed.