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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 11 CR 02476
)	
HASAN PERRYMAN,)	Honorable
)	Mary Margaret Brosnahan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE EPSTEIN delivered the judgment of the court.
Presiding Justice Howse and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not clearly err in denying defendant's challenge to the State's use of peremptory challenges. The evidence was sufficient to prove defendant guilty of aggravated battery beyond a reasonable doubt and did not fatally vary from the allegations of the indictment. The aggravated battery statute was not vague as applied to defendant. The State was entitled to charge defendant with multiple counts of aggravated battery stemming from the same acts. Defendant forfeited his challenge to the trial court's evidentiary rulings.

¶ 2 Defendant Hasan Perryman was convicted of aggravated battery for making insulting or provoking physical contact with Marlene Urbina, a City of Chicago Traffic Management Authority (TMA) employee who wrote him a parking ticket. Defendant appeals his conviction, alleging: (1) that the trial court erred in denying his challenge to the State's peremptory challenges pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986); (2) that the evidence adduced at trial did not prove that defendant made insulting or provoking contact as stated in the indictment;

(3) that the phrase "insulting or provoking" contact in the battery statute is unconstitutionally vague as applied to his conduct; (4) that the State improperly charged him with two counts of aggravated battery for a single act; and (5) that the trial court erred in excluding evidence that Urbina had a pending civil suit against him and sent him a message via Facebook. We find that the trial court did not clearly err in denying defendant's *Batson* challenge, that the evidence was sufficient to prove defendant's guilt beyond a reasonable doubt and did not fatally vary from the allegations in the indictment, that there was no vagueness in the application of the aggravated battery statute to defendant's conduct, that the State properly charged different theories of aggravated battery based upon the same acts, and that defendant forfeited his challenge to the trial court's evidentiary rulings. We affirm defendant's conviction.

¶ 3

I. BACKGROUND

¶ 4 The State charged defendant with two counts of aggravated battery. Count 1 alleged that defendant knowingly caused bodily harm to Marlene Urbina by striking her in the face. Count 2 alleged that defendant "knowingly without lawful justification made physical contact of an insulting or provoking nature with Marlene Urbina, *** to wit: struck Marlene Urbina about the face." Both counts were enhanced from battery to aggravated battery based on the fact that Urbina was a public employee engaged in her authorized duties at the time of the incident.

¶ 5

A. Jury Selection

¶ 6 During jury selection, the State exercised four peremptory challenges. Defendant alleged that the State used those challenges in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), as three of the four venirepersons struck by the State were African-American. The trial court asked the State to provide race-neutral explanations for its peremptory challenges. As to venireperson Charles Wright, the State noted that he had been mugged in the past "and nothing had been done

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about it." The State also noted, "He stated that he has five children. We believe that Mr. Wright would be sympathetic towards the defendant just based on the number of children in his family." With respect to venireperson Kyra Thompson, the State cited the fact that her father had been in prison for her entire life and that she believed he was innocent. As to venireperson Kenneth Allen, the State noted that he had spent time in prison and had seven different dates of birth listed in his criminal history. After hearing these explanations, the court denied defendant's *Batson* challenge, stating, "I believe the state has given race neutral reasons as to challenges for [Wright, Thompson, and Allen]. So your motion for a *Batson* [*sic*] will be respectfully denied."

¶ 7 At the conclusion of the trial, the trial court made note of the racial composition of the venire. The court stated that the panel at issue consisted of 20 prospective jurors. The court noted that three jurors were excused for cause. The court reiterated that the State exercised four peremptory challenges, three of which were directed toward African-American venirepersons Wright, Thompson, and Allen. The court indicated that the defense used four peremptory challenges and noted the race and gender of those four individuals. The court concluded that, of the remaining venirepersons who made it onto the jury, four were white males, four were white females, and one was an African-American female. The court did not state the names of those people who were ultimately empanelled on the jury.

¶ 8 Defendant filed a motion for a new trial, alleging, *inter alia*, that the trial court erred in denying his challenge to the State's racially discriminatory peremptory challenges. In support of that argument, defense counsel asserted, "[T]here were seven venire persons that had children in the same age range as Wright. In addition to that there were four white jurors, I believe, that were victims of unsolved crimes." The trial court stated that there was "nothing to show that this was a pretextual exclusion of a juror," and denied defendant's motion.

¶ 9

B. Trial Proceedings

¶ 10 Marlene Urbina testified that, on January 14, 2011, she was working as a TMA officer in Chicago, citing vehicles for parking violations. Around 4:50 p.m. that day, Urbina was near Clark Street and Grand Avenue, when she noticed several cars parked in an alley and began to ticket them. As she ticketed the cars, several men emerged from a doorway and Urbina told them to move their cars. Urbina said that she did not notice any signs for Rosati's Pizza on any of the cars.

¶ 11 Urbina testified that defendant approached her and asked her what she was doing. Urbina explained that she had ticketed his car. Urbina testified that defendant got closer to her, yelling and swearing at her. She said that, as she reached for the radio on her hip, defendant punched her in the side of her head. She reached for the radio a second time, when defendant hit her in the forehead. She testified that she managed to grab her radio and bring it to her face, when defendant punched her hand and caused the radio to collide with her mouth. She testified that defendant hit her again, causing the stem of the radio to go into her eye. According to Urbina, defendant then pushed her into a fence and she fell to the ground. Urbina testified that, after the incident, her nose was bloody, the inside of her upper lip was cut, and her eyes were irritated.

¶ 12 Urbina testified that, after pushing her, defendant moved his car. She used her radio to call TMA dispatch and describe what had happened. A recording of Urbina's radio call was played for the jury. Urbina testified that, after she called dispatch, defendant returned to the alley. At that time, Urbina's supervisor arrived, followed by an ambulance.

¶ 13 Lorane Selders, Urbina's supervisor at TMA, testified that she arrived at the scene of the incident after receiving Urbina's call over the radio. Selders testified that Urbina had blood

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dripping from her nose and she was crying. Selders testified that defendant approached her, asked her if she was from TMA, and said that he had been "involved with" Urbina.

¶ 14 Chicago Police Officer Oscar Simmons responded to the incident on January 14, 2011. Simmons testified that, when he saw Urbina, she had blood coming out of the center of her face near her nose. Defendant approached Simmons and Simmons arrested him. Simmons showed Urbina defendant's identification and she identified him as the person who hit her. Simmons testified that defendant did not cause any trouble while he was in custody.

¶ 15 Assistant State's Attorney Jessica McGuire testified that she questioned defendant in relation to the incident on January 14, 2011. Defendant told McGuire that he was a delivery driver for a restaurant and that he had parked his car in the alley while he waited in the restaurant. Defendant told McGuire that he saw Urbina writing a ticket for his car and he tried to speak with her about it, but she turned away from him when he tried to talk to her. Defendant said he grabbed Urbina's left shoulder and "turned her around so that they would be face to face when they were talking," and that Urbina cursed at him. Defendant admitted that he grabbed the lapel of Urbina's jacket and yelled at her. Defendant said that Urbina appeared to reach for the radio on her right shoulder while he yelled at her. Defendant stated that he saw that Urbina's nose was bleeding but he did not know why; he surmised that she hit herself in the face with her radio.

¶ 16 Urbina testified that an ambulance brought her to the hospital after the incident. Urbina did not have any broken bones or require any stitches for her injuries. Urbina left the hospital that same night. Urbina did not return to work at TMA for 12 months while she received psychiatric treatment. She said that she received worker's compensation during that time.

¶ 17 The parties stipulated that, on January 14, 2013, an attorney filed a civil complaint against defendant on Urbina's behalf and that the complaint sought monetary gain. The trial court

precluded defendant from introducing the complaint itself as evidence. Urbina testified that she had hired the lawyer who filed the suit only to work on her worker's compensation claim. She said that she was unaware of any pending suit against defendant.

¶ 18 Defendant also sought to introduce evidence that Urbina had sent defendant a request to be her "friend" on Facebook. Defendant proposed admitting a copy of an email defendant had received indicating that Urbina had sent him a friend request. Outside the presence of the jury, Urbina told the court that she had not sent defendant a friend request; rather, she tried to look at his Facebook profile to see if he had posted anything about the case. The trial court excluded evidence of the Facebook request.

¶ 19 Defendant testified that, on January 14, 2011, he was working as a delivery driver for Rosati's Pizza. Around 4:30 p.m., he arrived at work and parked his car in the alley behind the restaurant. His car had signs for Rosati's on the front passenger's side window and the rear driver's side window. Defendant always parked in the alley while working.

¶ 20 While waiting in the restaurant, defendant looked outside and saw Urbina writing a ticket for his car. Defendant went outside and told Urbina that he worked at Rosati's and that he was going to move his car when he made a delivery. Defendant said that his manager told him to park in the alley and Urbina told him that she did not care what his manager told him. Urbina then handed him a ticket.

¶ 21 Defendant testified that he felt disrespected by Urbina and that this upset him. Defendant tried to continue talking to Urbina but she ignored him. Defendant testified that, in order to get her attention, he touched her jacket "just like a child trying to get their *[sic]* parents' attention." Urbina and defendant then began to yell and curse at each other. Defendant denied making any other physical contact with Urbina during the argument.

¶ 22 Defendant testified that Urbina had a radio clipped to the lapel of her jacket. She tried to use this radio to call the police during their argument. Defendant approached her, asking why she was calling the police, and Urbina backed away from him. Defendant testified that Urbina abruptly pulled the radio off of her jacket and struck herself in the face with it, bloodying her nose. Defendant testified that Urbina started to cry and looked panicked. Defendant denied striking Urbina in the face. He said that he never intended to hurt Urbina at any time during their interaction.

¶ 23 Defendant moved his car out of the alley and then returned to Rosati's. On his way back to the restaurant, he asked Urbina if she needed anything and she told him to stay away from her. When the police arrived, defendant went outside to speak with them. Defendant said that Officer Simmons put him in the back of a squad car.

¶ 24 Defendant's girlfriend, Valencia Walker, and his uncle, Dexter Wilborn, both testified that, in January 2011, defendant had a reputation for being a peaceful and law-abiding person among his friends and family. Walker had known defendant since December 9, 2007 and Wilborn had known defendant for 39 years.

¶ 25 The jury was instructed as to both counts of aggravated battery. Separate instructions defined battery as the intentional or knowing infliction of bodily harm and as "physical contact of an insulting or provoking nature." The instruction as to the elements of aggravated battery based on insulting or provoking contact indicated that the State had to prove "[t]hat the defendant made physical contact of an insulting or provoking nature with Marlene Urbina."

¶ 26 In its closing argument, the State argued that, even if the jury believed that defendant did not punch Urbina, it could still find that he caused bodily harm to her:

"Let's focus again on that first part, that he intentionally or knowingly or by any means causes bodily harm. What does that mean by any means? That means when he punches her and causes her injury, that's by any means. That means when she's got that radio and she's crying for help and he knocks it into her face, that's by any means.

And even if you accept the defendant's assertion that he—preposterous assertion, sort of creepy assertion, that he reached around her and gently touched her like a child would touch their parent, that contact, and if that contact led to bodily harm that's contact by any means causing bodily harm. We have proven that."

¶ 27 The jury acquitted defendant of count 1—aggravated battery based on bodily harm—but convicted him of count 2—aggravated battery based on insulting or provoking contact. The trial court sentenced defendant to two years' probation. Defendant appeals.

¶ 28 II. ANALYSIS

¶ 29 A. Jury Selection

¶ 30 Defendant first contends that he should receive a new trial because the State used three peremptory challenges to exclude African-American venirepersons based on their race. The State contends that defendant forfeited this claim and that it excused those three African-American venirepersons for racially neutral reasons. We find that the trial court did not clearly err in finding that the State's race-neutral explanations for striking these jurors were not pretextual.

¶ 31 In *Batson v. Kentucky*, 476 U.S. 79, 89-96 (1986), the United States Supreme Court held that the State violates the equal protection clause of the United States Constitution when it uses peremptory challenges to exclude members of a venire from jury service based upon their race. The Court set forth a three-part test to determine whether the State had committed such a violation. *Id.* at 96-98. "First, the defendant must make a *prima facie* showing that the prosecutor

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has exercised peremptory challenges on the basis of race." *People v. Easley*, 192 Ill. 2d 307, 323 (2000). "Second, if the defendant has made a *prima facie* showing, the burden then shifts to the State to provide a race-neutral explanation for excluding each venireperson in question." *Id.* at 323-24. During the second step, "the trial court focuses on the *facial* validity of the prosecutor's explanation. The explanation need not be persuasive, or even plausible." (Emphasis in original.) *Id.* at 324. The defense may then rebut the prosecutor's reasons as being pretextual. *Id.* "Third, the trial court *** weighs the evidence in light of the *prima facie* case, the prosecutor's reasons for challenging the venireperson, and any rebuttal by defense counsel [to] determine whether the defendant has met his or her burden of proving purposeful discrimination." *Id.*

¶ 32 As an initial matter, we note that the trial court did not conduct a full *Batson* inquiry in this case. Instead, after finding that defendant made a *prima facie* case and hearing the State's proffered race-neutral explanations for its peremptory challenges, the court denied defendant's motion. The court did not hear argument from defendant about whether those explanations were pretextual and did not state that it believed the State's explanations to be genuine. Defendant, however, does not seek remand for additional proceedings pursuant to *Batson*. Defendant has thus forfeited any challenge to the adequacy of the *Batson* hearing by failing to object to the trial court's procedure at the time of the hearing, in his motion for a new trial, or before this court. See *People v. Jackson*, 357 Ill. App. 3d 313, 328 (2005) (finding that defendant forfeited his claim that "the trial court improperly collapsed the three stages of the *Batson* hearing" by failing to raise it at trial). We thus review defendant's claim in the same manner as he presents it: as though a full *Batson* hearing was conducted below.

¶ 33 Before reaching the merits of defendant's *Batson* claim, we must address the State's claim that defendant forfeited review of this issue by failing to note the races of the members of the

jury on the record. A defendant raising a *Batson* challenge on appeal bears the burden of preserving the record, including the identity and race of the venirepersons. *People v. Johnson*, 183 Ill. 2d 176, 190 (1998). Any ambiguities in the record as to the racial composition of the venire are construed against the defendant. *Id.* The State is correct that the record does not disclose the race of every member of the venire. Defendant did preserve the fact that three of the State's four peremptory challenges were used against Charles Wright, Kyra Thompson, and Kenneth Allen, and that each of these venirepersons were African-American. Based on the trial court's identification of the racial composition of the jury at the close of defendant's trial, we can also ascertain the races of some members of the jury. The trial court noted that, of the first panel of 20 venirepersons, all four men who were selected for the jury were white. The four male jurors selected from that panel were Charles Stoub, Eric Heikkinen, Paul Vrbancic, and Patrich Napue. We can thus compare the characteristics of Wright, Thompson, and Allen with the characteristics of Stoub, Heikkinen, Vrbancic, and Napue in assessing defendant's argument. Where the record does not contain facts supporting defendant's claims, however, we will construe that absence against him.

¶ 34 "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005). The prosecutor's explanation must show a "specific bias" with respect to "the particular cause to be tried" rather than a belief that the excluded venireperson would sympathize with the defendant based upon their shared race. *People v. McDonald*, 125 Ill. 2d 182, 198-99 (1988). We afford a trial court's findings regarding racial discrimination "great deference" and will not set aside those findings unless they are clearly erroneous. *People v. Rivera*, 221 Ill. 2d

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481, 502 (2006). "A trial court's decision will be deemed 'clearly erroneous' if the reviewing court is left with a definite and firm conviction that a mistake has been committed." *People v. Sipp*, 378 Ill. App. 3d 157, 169 (2007).

¶ 35 In order to establish an equal protection violation requiring reversal, " '[a] single invidiously discriminatory act' " is all that is required. *McDonald*, 125 Ill. 2d at 198-99 (quoting *Batson*, 476 U.S. at 95-96). We thus review the State's explanations for excluding each African-American venireperson individually. *People v. Kindelan*, 213 Ill. App. 3d 548, 555 (1991).

¶ 36 1. *Charles Wright*

¶ 37 At the *Batson* hearing, the State offered two reasons for excluding Wright: (1) that he had been mugged in the past "and nothing had been done about it"; and (2) that he had five children and "would be sympathetic towards the defendant just based on the number of children in his family."

¶ 38 Although defendant contends that Wright shared characteristics with white jurors Melissa Riley, Paula Zito-Baysinger, and Robert Calkins, the record does not reflect the races of Riley, Zito-Baysinger, or Calkins. Although defendant asserted that "seven venire persons [*sic*] *** had children in the same age range as Mr. Wright [and that] there were four white jurors *** that were the victims of unsolved crimes," he failed to identify which venirepersons or jurors he was referring to. In describing the racial composition of the jury after trial, the court noted that four white women and one black woman had been selected from the same panel as Wright. The court did not clarify the races of Riley or Zito-Baysinger, however. The trial court did not say anything regarding the racial composition of the second panel of venirepersons, from which Calkins was chosen. Defendant has thus forfeited his contention that these jurors' characteristics undermine the State's race-neutral explanations for excluding Wright.

¶ 39 Defendant also contends that juror Vrbancic, who was white, had been a victim of a burglary that was never solved, undermining the State's first alleged race-neutral explanation for striking Wright. The fact that both Wright and Vrbancic had been victims of unsolved crimes tends to undermine the State's explanation for challenging Wright. The State's other purported race-neutral explanation is also problematic. The State claimed that Wright's having five children, ages 18, 16, 14, 11, and 5, made him sympathetic to defendant. Each of the white men selected from the same panel had children. Stoub had three children, ages 37, 33, and 27. Heikkinen had two children, ages 12 and 8. Vrbancic had two children, ages 14 and 11. Napue had two children, ages 13 and 11. The fact that the State did not challenge white jurors with children the same ages as Wright's "is evidence tending to prove racial discrimination." *Miller-El*, 545 U.S. at 241. It is also unclear how having five children would make Wright more sympathetic to defendant. Defendant had no children himself and was not a child at the time of the offense.

¶ 40 We cannot conclude, however, that the trial court was clearly erroneous in finding that the State's first explanation was not pretextual. The trial court could have rationally found that Wright's traits, taken together, made him a less desirable juror from the State's perspective. See *People v. Hudson*, 157 Ill. 2d 401, 431 (1993) ("[A] venireperson possessing an unfavorable trait may be accepted as a juror while another venireperson possessing that same negative trait, but also possessing other negative traits, may be challenged."). Only one venireperson whose characteristics we can compare to Wright was both a victim of an unsolved crime and had children. That venireperson was Vrbancic. Wright had five children and Vrbancic had two children. The State explained that Wright's having five children, coupled with his being a victim of an unsolved crime, made him less desirable as a juror:

"[H]e had been mugged in the past and nothing had been done about it. He stated that he has five children. We believe that Mr. Wright would be sympathetic toward the defendant just based on a number of children in his family.

We believe he would harbor ill will by way of not having his case being mugged [sic] followed up on."

The State's explanation for striking Wright, therefore, included both that he had been the victim of an unsolved crime and that he had five children in his family. Those characteristics set him apart from the other venirepersons, including Vrbancic. The trial court was better positioned to assess the credibility of this explanation than this court. See *People v. Benson*, 266 Ill. App. 3d 994, 1001 (1994) ("A trial judge is in the best position to *** evaluate the prosecutor's explanation for exercising a peremptory challenge."). We thus cannot conclude that the trial court clearly erred in finding that the State's race-neutral explanation was not pretextual.

¶ 41

2. *Kyra Thompson*

¶ 42 The State claimed that it excused Thompson because she said that her father had been wrongfully incarcerated for her entire life. Although Thompson said she could be fair to both parties despite this fact, we find that this reason was not pretextual. The State could reasonably conclude that Thompson was biased against the State because it had wrongfully imprisoned her father. Cf. *People v. Jackson*, 281 Ill. App. 3d 759, 773 (1996) (potential hostility toward police officers was a sufficient race-neutral reason for excluding a juror). Defendant points to no white jurors who shared this characteristic with Thompson. We find that the trial court did not clearly err in finding that the State's reason for excluding Thompson was not pretextual.

¶ 43

3. *Kenneth Allen*

¶ 44 With respect to Allen, the State said it excused him because he had been incarcerated twice for drug convictions and had seven different dates of birth listed in his criminal history. These reasons are sufficiently race neutral. See *People v. Lovelady*, 221 Ill. App. 3d 829, 838-39 (1991) (stating that a venireperson's "arrest record" can qualify as a race-neutral reason to excuse him or her). Defendant does not argue—and the record does not show—that any other venirepersons with a similar history of convictions were selected for the jury. We conclude that the trial court did not clearly err in finding that the State's reasons for excluding Allen were not pretextual.

¶ 45

B. Evidence of Insulting or Provoking Contact

¶ 46 Defendant contends that the evidence at trial did not prove that he made insulting or provoking contact with Urbina where "the jury clearly rejected the prosecution theory that [defendant] punched Ms. Urbina in the face [and] concluded that the insulting and provoking conduct occurred when [defendant] touched Ms. Urbina's coat to get her attention." Defendant further contends that the indictment failed to notify him that his touching Urbina's jacket was being asserted as insulting and provoking contact. We conclude both that the State's evidence was sufficient to prove defendant guilty beyond a reasonable doubt and that the evidence at trial did not vary from the charging instrument.

¶ 47

1. *Sufficiency of the Evidence*

¶ 48 Defendant contends that we should review the sufficiency of the State's evidence *de novo* because it involves the legal question of whether his conduct constituted "physical contact of an insulting or provoking nature" sufficient to support his aggravated battery conviction. 720 ILCS 5/12-3(a)(2), 12-3.05(d) (West 2010). We disagree.

¶ 49 When a defendant challenges the sufficiency of the State's evidence, we review whether a rational trier of fact could have found that the evidence at trial, when viewed in the light most favorable to the State, proved beyond a reasonable doubt each of the elements of the charged offense. *People v. Wheeler*, 226 Ill. 2d 92, 114 (2007). "The trier of fact is best equipped to judge the credibility of witnesses, and due consideration must be given to the fact that it was the *** jury that saw and heard the witnesses." *Id.* at 114-15. A jury's credibility findings carry great weight and we will find them insufficient "only where the record evidence compels the conclusion that no reasonable person could accept [them] beyond a reasonable doubt." *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004).

¶ 50 We recognize that, in certain cases, courts have found the *de novo* standard of review appropriate when analyzing whether undisputed evidence suffices to establish the statutory elements of an offense. *E.g.*, *In re Ryan B.*, 212 Ill. 2d 226, 231; *People v. Smith*, 191 Ill. 2d 408, 411 (2000); *People v. Chirchirillo*, 393 Ill. App. 3d 916, 921 (2009). In this case, however, the evidence was disputed. Urbina testified that defendant punched her several times in the head and face and shoved her into a fence. Defendant testified that he did not strike Urbina and that Urbina hit herself in the face with her radio. *De novo* review is thus inappropriate in this case.

¶ 51 The evidence, when viewed in the light most favorable to the State, was sufficient to prove that defendant made insulting or provoking contact with Urbina. Urbina testified that defendant punched her several times and pushed her against a fence. Any one of those acts alone would constitute insulting or provoking contact. See *People v. Lynch*, 104 Ill. 2d 194, 208 (1984) ("[A]ny physical contact with an individual of an insulting or provoking nature constitutes a battery. [Citation.] Thus, an intended push or slap may constitute a battery under our statute ***."). Urbina's testimony was not so inherently incredible that no reasonable jury could accept

her testimony as proof beyond a reasonable doubt. Urbina's testimony, standing alone, is sufficient to sustain defendant's conviction. See *People v. Fultz*, 2012 IL App (2d) 101101, ¶ 45 ("[T]he testimony of a single credible witness, even if it is contradicted by the defendant, may be sufficient to sustain a conviction."). The witnesses to the aftermath of the incident also corroborated Urbina's testimony. Both Selders and Officer Simmons testified that they saw Urbina bleeding from her nose and crying. Selders also testified that defendant admitted to having been "involved with" Urbina. A rational jury could have concluded that, based on this evidence, defendant committed aggravated battery beyond a reasonable doubt.

¶ 52 Defendant assumes too much in his assertion that the jury "clearly rejected" the State's evidence that defendant punched Urbina when it acquitted him of aggravated battery based on bodily harm. We may not infer a jury's findings of facts or judgments of a witness's testimony from a not guilty verdict alone:

"All that [a] not guilty verdict means is that the State failed to produce sufficient evidence from which the jury believed defendant had been proved guilty beyond a reasonable doubt. No inferences can be drawn from the verdict which necessarily indicate the jury's opinion on any particular aspect of the case or any particular evidence which the jury considered." *People v. Ellis*, 39 Ill. App. 3d 766, 769 (1976).

In contravention of this principle, defendant would have us infer that, because the jury acquitted him of aggravated battery based on bodily harm, it necessarily rejected all of Urbina's testimony. We cannot draw this conclusion from the not guilty verdict alone. We decline to speculate as to the findings of fact or credibility determinations underlying the jury's verdicts.

¶ 53 When a defendant challenges the sufficiency of the State's evidence on appeal, we are tasked with determining whether, viewing the evidence in the light most favorable to the State,

there was sufficient evidence to prove him guilty beyond a reasonable doubt. Beyond that inquiry, we will not speculate as to the jury's findings of fact or credibility determinations. We conclude that there was sufficient evidence at trial to convict defendant of aggravated battery beyond a reasonable doubt.

¶ 54

2. *Fatal Variance*

¶ 55 Defendant also contends that the indictment did not adequately notify him of the offense of aggravated battery based on insulting or provoking contact because the indictment alleged that he struck Urbina, but the State's evidence at trial failed to prove that he struck her. We find that there was no variance between the indictment and the State's evidence at trial and that, even assuming a variance existed, it was not fatal.

¶ 56 The State "must prove the essential elements of the charging instrument." *People v. Lattimore*, 2011 IL App (1st) 093238, ¶ 67 (quoting *People v. Rothermel*, 88 Ill. 2d 541, 544 (1982)). "In order for a variance between an indictment and proof at trial to be fatal, the difference must be material and of such a character as to mislead defendant in his defense or expose him to double jeopardy." *People v. Burdine*, 362 Ill. App. 3d 19, 24 (2005). We review *de novo* the sufficiency of the charging instrument. *People v. Guerrero*, 356 Ill. App. 3d 22, 26 (2005).

¶ 57 In this case, there was no variance between the allegations of the indictment and the evidence adduced at trial. The State charged defendant with committing aggravated battery when he "made physical contact of an insulting or provoking nature with Marlene Urbina, *** to wit: struck Marlene Urbina about the face." At trial, Urbina testified that defendant punched her several times in the head and face and shoved her against a fence. This evidence mirrored the indictment's allegations.

¶ 58 Defendant maintains that, because the jury acquitted him of "bodily harm" aggravated battery, it must have concluded that he did not strike Urbina. According to defendant, the jury must have believed his testimony that the only contact he made with Urbina was lightly touching her jacket. As we explained above, we cannot draw this inference from the jury's not guilty verdict. The acquittal does not prove that the jury found that defendant did not strike Urbina. There was thus no variance between the evidence at trial and the indictment.

¶ 59 Even if defendant could establish a variance between the evidence at trial and the indictment, it would not be fatal. "If the essential elements of an offense are properly charged but the *manner* in which the offense is committed is incorrectly alleged, the error is one of form." (Emphasis in original.) *Lattimore*, 2011 IL App (1st) 093238, ¶ 67; see also *Burdine*, 362 Ill. App. 3d at 24 ("When a crime can be committed by several acts, *** a variance between the act named in the indictment and the act proved will not be fatal."). Any variation between the fact alleged in the indictment—striking Urbina in the face—and the evidence at trial would relate to the manner in which the offense was committed. That would constitute a mere formal error and would not create a fatal variance between the indictment and the evidence at trial.

¶ 60 There is also no indication that any variance in the evidence misled the defense. Defendant testified that he did not punch or push Urbina; he testified that he simply touched her jacket to get her attention. If believed, that testimony could serve as a defense to either form of battery with which he was charged. Defendant does not suggest how he was unable to prepare his defense or how any of the State's evidence resulted in unfair surprise. Defendant also cannot show that any variance exposed him to double jeopardy. The indictment identified the nature, date, and place of the incident and would thus bar defendant's subsequent prosecution for the

same offense. *Burdine*, 362 Ill. App. 3d at 24. We reject defendant's contention that the indictment suffered a fatal variance.

¶ 61 In a related argument, defendant contends that the State misleadingly argued that "any contact" could constitute an aggravated battery in its closing argument, thereby causing the jury to find him guilty of aggravated battery based on his lightly touching Urbina's jacket. Defendant misconstrues the record. The State argued, "[E]ven if you accept the defendant's assertion that *** he reached around her and gently touched her ***, *and if that contact led to bodily harm* that's contact by any means *causing bodily harm*." (Emphases added.) The State thus argued that the jury could find that "any contact" could qualify as a battery, provided that contact caused bodily harm. As defendant was acquitted of the "bodily harm" count of aggravated battery, he cannot show that the jury was misled by the State's comment. See *People v. Runge*, 234 Ill. 2d 68, 142 (2009) (improper remarks in closing argument are reversible error "only if *** the improper remarks were so prejudicial that real justice was denied or that the verdict resulted from the error."). The jury instructions also correctly defined the elements of aggravated battery the State had to prove beyond a reasonable doubt. We presume that the jury followed the court's instructions. *People v. Taylor*, 166 Ill. 2d 414, 438 (1995). The accurate instructions provided to the jury thus cured anything misleading about the State's argument. See *People v. Harris*, 225 Ill. 2d 1, 33 (2007) (considering the fact that the jury was properly instructed in finding that a prosecutor's improper arguments were not prejudicial).

¶ 62 There was no variance between the indictment and the evidence adduced at trial. Even if such a variance had existed, it was not fatal to the indictment. We therefore reject defendant's challenge to the charging instrument.

¶ 63

C. Vagueness

¶ 64 Defendant next contends that the aggravated battery statute is unconstitutionally vague as applied to his act of touching Urbina's jacket to get her attention. Defendant avers that an ordinary person of average intelligence would not be on notice that lightly touching someone's jacket constitutes "contact of an insulting or provoking nature" under the aggravated battery statute. 720 ILCS 5/12-3(a)(2), 12-3.05(d) (West 2010).

¶ 65 The constitutionality of a statute is a question of law subject to *de novo* review. *People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 290 (2003). Statutes are presumed to be constitutional and the party challenging the constitutionality of the statute bears the burden of clearly establishing its invalidity. *Id.*

¶ 66 Vagueness challenges stem from the due process clause's notice requirement. U.S. Const. amend. XIV; Ill. Const. 1970, art. I, § 2; *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988); *Wilson v. County of Cook*, 2012 IL 112026, ¶ 21. A criminal statute is vague if it: (1) fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits so that one may act accordingly; or (2) fails to provide reasonable standards to law enforcement to ensure against authorizing or encouraging arbitrary and discriminatory enforcement. *Hill v. Colorado*, 530 U.S. 703, 732 (2000); *Wilson*, 2012 IL 112026, ¶ 21. A statute is unconstitutionally vague "only if its terms are so ill-defined that the ultimate decision as to its meaning rests on the opinions and whims of the trier of fact rather than any objective criteria or facts." *People v. Einoder*, 209 Ill. 2d 443, 451 (2004).

¶ 67 Defendant's argument is again premised upon the flawed assumption that, in acquitting him of "bodily harm" battery, the jury necessarily credited his testimony that he only made

contact with Urbina when he lightly touched her jacket. As we have explained, we cannot draw that conclusion from the jury's not guilty verdict.

¶ 68 We have also concluded that the phrase "contact of an insulting or provoking nature" was not unconstitutionally vague in an analogous context. In *People v. Taher*, 329 Ill. App. 3d 1007, 1010 (2002), the defendant was convicted of domestic battery for making "contact of an insulting or provoking nature" with his wife. *Id.* at 1010. The defendant's wife testified that he grabbed her, threw her to the ground, and stuck his foot in her mouth. *Id.* at 1011. The defendant testified that he only tickled his wife's stomach, which made her angry. *Id.* The court found that "a person of ordinary intelligence would undoubtedly conclude" that the act of throwing someone to the ground and forcing his foot into that person's mouth would be insulting or provoking contact. *Id.* at 1016. The court also determined that the phrase "contact of an insulting or provoking nature" would not lead to arbitrary enforcement because "the words 'insulting' and 'provoking' are commonly used words that are neither vague nor difficult for the average person to define." *Id.*

¶ 69 We find that this case is similar to *Taher*. Urbina testified that defendant punched her several times and shoved her into a fence. An ordinary person of average intelligence would undoubtedly conclude that those acts constitute contact of an insulting or provoking nature. We also agree with the *Taher* court that the terms "insulting" and "provoking" do not encourage arbitrary enforcement because they are common words that sufficiently limit the conduct punishable by the aggravated battery statute. Like the *Taher* court, we conclude that the phrase "contact of an insulting or provoking nature" was not vague as applied to defendant.

¶ 70 D. Multiple Counts of Aggravated Battery

¶ 71 Defendant argues that the trial court erred in denying his motion to dismiss one count of the indictment. Defendant contends that the indictment was deficient because the State charged

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him with two counts of aggravated battery based upon the same act and the State was required to elect which count it would proceed on. Defendant is incorrect.

¶ 72 We review the sufficiency of the indictment *de novo*. *People v. Edwards*, 337 Ill. App. 3d 912, 921 (2002).

¶ 73 "When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense." 720 ILCS 5/3-3(a) (West 2010). "Two or more offenses may be charged in the same indictment, information or complaint in a separate count for each offense if the offenses charged *** are based upon *the same act* or on 2 or more acts which are part of the same comprehensive transaction." (Emphasis added.) 725 ILCS 5/111-4(a) (West 2010). "Where it is clear that they grow out of the same act or transaction, separate and distinct offenses may be charged in the same indictment and stated, in different ways, in as many different counts as deemed necessary." *People v. Gray*, 402 Ill. 590, 592 (1949). "A prosecutor is required to elect upon which count of an indictment he will rely for conviction only when the offenses charged in the different counts are actually distinct from each other and do not arise out of the same transaction." *Id.*; see also *People v. Watson*, 103 Ill. App. 3d 992, 998 (1982) ("In a case involving only one offense, the prosecution may proceed under as many counts as are necessary to meet the variations of proof required and will not be required to elect one or the other.").

¶ 74 In this case, the State charged defendant with alternative theories of aggravated battery: one based upon bodily harm, the other based on insulting or provoking contact. 720 ILCS 5/12-3(a), 12-3.05(d) (West 2010). Both of these charges stemmed from the same act—striking Urbina in the face. The State was entitled to allege alternative theories of liability for this single act and was not required to elect one count or the other.

¶ 75 Defendant maintains that the State could not proceed on both counts of aggravated battery because "[t]wo counts of battery based on the same alleged act are not multiple separate offenses." Defendant is incorrect. An indictment charges separate offenses "if it charges a single offense in more than one way." *People v. Iniguez*, 361 Ill. App. 3d 807, 817 (2005). For example, in *Iniguez*, the State charged the defendant with two counts of murder, one alleging that the defendant intentionally or knowingly shot the victim and the other alleging that the defendant shot and killed the victim knowing that the shooting created a strong probability of death or great bodily harm. *Id.* This court found that the indictment "charge[d] defendant with distinct offenses: first degree murder under section 9-1(a)(1) of the [Criminal] Code and first degree murder under section 9-1(a)(2) of the Code." *Id.*

¶ 76 In this case, like *Iniguez*, the State charged defendant with two distinct offenses. Under section 12-3.05(d) of the Criminal Code of 1961 (Code), a person commits aggravated battery when he or she commits a battery and the victim occupies a particular status. 720 ILCS 5/12-3.05(d) (West 2010). In order to prove a battery, the State may either prove that the defendant caused bodily harm under section 12-3(a)(1) of the Code, or made insulting or provoking physical contact under section 12-3(a)(2) of the Code. 720 ILCS 5/12-3(a) (West 2010). Like the indictment in *Iniguez*, the indictment in this case charged defendant with distinct offenses arising from distinct statutory subsections carrying different evidentiary requirements. We reject defendant's contention that the alternative theories of liability advanced by the State constituted duplicate charges for the same offense.

¶ 77 Much of the authority cited by the defendant relates to the one-act, one-crime doctrine, which prohibits multiple *convictions* for the same act. See *People v. Crespo*, 203 Ill. 2d 335, 342-45 (2003); *People v. Segara*, 126 Ill. 2d 70, 76-77 (1988). As defendant repeatedly points

out, he was not convicted of both counts of battery. Defendant's reliance on the one-act, one-crime doctrine is therefore misplaced.

¶ 78 Defendant also contends that his prosecution for two counts of aggravated battery violated double jeopardy principles, as it exposed him to the threat of receiving two punishments for the same offense.¹ "[T]he prohibition against double jeopardy protects a defendant against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense." *People v. Henry*, 204 Ill. 2d 267, 290 (2003). "[W]here *** the same act constitutes a violation of two distinct statutory provisions, but each offense requires proof of an additional fact not required to prove the other offense, the two offenses are not the same for double jeopardy purposes." *Id.*; see also *Blockburger v. United States*, 284 U.S. 299, 304 (1932). Defendant's double jeopardy claim fails

¹ Defendant raises this claim under "[t]he doctrine of multiplicity," citing federal precedent. Federal courts prohibit multiplicity in an indictment because it "exposes a defendant to the threat of receiving multiple punishments for the same offense in violation of the Double Jeopardy Clause of the Fifth Amendment." *United States v. Starks*, 472 F.3d 466, 468-69 (7th Cir. 2006). Defendant contends that no Illinois court has expressly adopted the concept of multiplicity as defined in federal courts and urges us to do so. As we apply the same test to double jeopardy claims that federal courts apply to multiplicity claims, it is unnecessary to decide whether to recognize the doctrine of multiplicity. Compare *id.* ("The traditional test of multiplicity determines whether each count requires proof of a fact which the other does not." (Internal quotation marks omitted.)) with *People v. Henry*, 204 Ill. 2d 267, 290 (2003) ("[W]here *** the same act constitutes a violation of two distinct statutory provisions, but each offense requires proof of an additional fact not required to prove the other offense, the two offenses are not the same for double jeopardy purposes."). We review defendant's claim in the context of binding double jeopardy precedent.

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because he was not punished twice for a single act: he was acquitted of one count of aggravated battery and convicted of the other. We thus reject defendant's double jeopardy claim.

¶ 79 The State was entitled to charge defendant with multiple counts of aggravated battery based upon different theories of liability. The State did not have to elect to prosecute defendant on only one count. We affirm the trial court's denial of defendant's motion to dismiss.

¶ 80 E. Exclusion of Evidence of Civil Complaint and Facebook Request

¶ 81 Finally, defendant avers that the trial court erred in excluding two pieces of evidence: (1) a civil complaint filed against defendant on Urbina's behalf; and (2) a request Urbina sent to defendant asking him to be "friends" on Facebook. Illinois Supreme Court Rule 341(h)(7) requires that an appellant's brief "contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." Ill. S. Ct. R. 341(h)(7). "[I]t is well settled that *** bare contentions that fail to cite any authority do not merit consideration on appeal." *In re Marriage of Johnson*, 2011 IL App (1st) 102826, ¶ 25; see also *Young v. Johnson*, 2011 IL App (2d) 110287, ¶ 20 (finding that the plaintiff forfeited an argument he "mention[ed] *** only fleetingly in his initial brief, and completely abandon[ed] *** in his reply brief."). Defendant cited no authority to support these arguments in his opening brief. In his reply brief, defendant abandoned the issue entirely. Defendant has forfeited review of these rulings and we decline to address them.

¶ 82 III. CONCLUSION

¶ 83 For the reasons stated above, we affirm defendant's conviction and sentence.

¶ 84 Affirmed.