No. 1-08-2037

FIFTH DIVISION
March 11, 2011

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. 07 CR 12484
	)	
KENTE BANKS,	)	Honorable
	)	Victoria A. Stewart,
Defendant-Appellant.	)	Judge Presiding.

JUDGE EPSTEIN delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

ORDER

Held: Conviction affirmed, but sentence vacated and case remanded for a new sentencing hearing where trial court during first sentencing hearing had failed to: (1) accept evidence in aggravation and mitigation; (2) consider mitigating factors; and (3) provide defendant an opportunity to make statement in allocution.

Following a bench trial, defendant Kente Banks, was found guilty of two counts of heinous battery, two counts of aggravated domestic battery, and two counts of aggravated battery. He was found not guilty of unlawful restraint. Mr. Banks was sentenced to 20 years in prison for

the first count of heinous battery. He now appeals both his conviction and his sentence. We affirm the conviction, vacate the sentence, and remand for a new sentencing hearing.

I. BACKGROUND

On May 21, 2007, at approximately 10 or 10:30 p.m., Hazel Richardson, and defendant, who was her boyfriend, argued over an affair he was having with another woman. During the argument, Ms. Richardson was burned with hot soup. She sustained second-degree burns on her chest and neck, as well as permanent disfigurement. Mr. Banks was arrested a week later on May 29, 2007.

On June 5, 2007, Ms. Richardson went to court and obtained an order of protection against Mr. Banks. In her sworn written petition, she stated:

> "On or about 3/22/07 [*sic*], the defendant after a verbal altercation threw boiling hot soup in the petitioner's face and chest. Defendant also threatened to kill petitioner by phone after she obtained an emergency order of protection."

As to the "effects" of this incident, Ms. Richardson alleged in the petition that she was "fearful of further abuse, causing [second] degree burns on her neck [and] chest [and] pain."

Mr. Banks's trial commenced on March 13, 2008. The State presented two witnesses, Hazel Richardson and Officer Kinney. Defendant testified on his own behalf. The following evidence was adduced at trial.

Hazel Richardson

Ms. Richardson testified that Mr. Banks was her live-in boyfriend at the time of trial and was also her boyfriend on May 21, 2007. She also testified that she was under a doctor's care

and was being treated for breast cancer with chemotherapy and medications. She was suffering from cancer on May 21, 2007.

Ms. Richardson stated that, on May 21, 2007, Mr. Banks arrived home at approximately 10 or 10:30 p.m. He had called her previously and asked her to make soup for him. She made clam chowder on the stove. She stated that when defendant came home, she was sitting on the bed in the bedroom, and that Mr. Banks came into the bedroom. She had previously put the soup in a bowl.

Ms. Richardson said that she was "mad" and she was arguing with defendant about a woman. She stated that Mr. Banks was sitting with the soup and was going to eat it, but that he then got up and was "walking around." She was following him and arguing with him, but he was ignoring her.

She said that she followed defendant into the bathroom where he was sitting down, on either the tub or the toilet, holding his soup. She stated that she "was in his face over him arguing." Ms. Richardson stated that Mr. Banks started to get up and she pushed him, at which point, the "bowl flew up, and it fell on the floor on me." When she was asked what happened to the contents of the bowl, *i.e.* the soup, she stated that it "flew on me." She testified that the soup was hot, and she suffered burns behind her ear and on her chest. The parties stipulated that Ms. Richardson had a scar, "approximately one to two inches below her ear lobe, *** approximately two inches in length and at a diagonal angle immediately below her ear lobe."

Ms. Richardson testified that after the soup was on her, she was burning and panicking. She stated that she ripped off her shirt and that defendant helped her wipe off the soup. She then

"jumped in the shower to get cooled."

Ms. Richardson said that the police arrived later, but she only spoke to them through the window and told them Ms. Richardson was not there. Ms. Richardson said that Mr. Banks was still in the house with her when they refused to allow the police inside. She stated that he left the house the next morning, but that she could not remember whether he left the house before she did. She testified that she went to the hospital, by herself, at approximately 3 or 4 a.m. on May 22, 2007, at which time, she thought that defendant was still at their home.

Ms. Richardson stated that she was treated at the hospital and that she talked to a police officer at the hospital. She explained to him what had happened.

Ms. Richardson testified that she believed that she went to court twice on this case. At trial, she identified pictures that had been taken of her on May 24, 2007, and said that the pictures showed the areas where she was burned by the soup. The pictures were admitted into evidence without objection.

According to Ms. Richardson, she called the police on May 29, 2007. She went to court and asked for an order of protection. Ms. Richardson said that she was angry when she made her statements under oath to secure the violation of an order of protection. In the petition for the order of protection, she said that "[o]n or about 3/22/07 [*sic*], the defendant after a verbal altercation threw boiling hot soup in the petitioner's face and chest."

Although Ms. Richardson stated in the petition for the order of protection that "[d]efendant also threatened to kill [her] by phone after she obtained an emergency order of protection," at trial she stated that she had never said that defendant threatened her. Ms.

Richardson admitted that she said in the petition that she was "fearful of further abuse." Ms. Richardson said that she signed the portion of the petition outlining the penalty for perjury, but claimed during trial that she "didn't read it."

When Ms. Richardson was asked whether she called the police on May 29, 2007, after defendant contacted her, she testified that she did not remember because she was taking a lot of drugs. The assistant state's attorney requested that she be allowed to treat Ms. Richardson as an adverse witness. The court asked defense counsel if he wished to be heard on that issue. Defense counsel stated that he did not believe Ms. Richardson was being hostile. The court noted that Ms. Richardson "testified it's been over a year and she does not recall based on the fact she was using drugs at the time." The court ruled on the State's request by saying it would allow some "latitude" to the assistant state's attorney.

Ms. Richardson testified that the drugs to which she had referred were for her treatment. She said that she was not sure of the date on which she called the police. She stated that she did not remember defendant calling her after being served with an order of protection. She also testified that she did not remember if he called and threatened to kill her. Ms. Richardson said that she did remember going to court to testify about this case but she did not remember the specific date of June 5, 2007.

Ms. Richardson stated that she had testified at the preliminary hearing that before Mr. Banks came to her apartment on the evening in question, he called and asked her to make him clam chowder. She also stated that she testified at the preliminary hearing that when she asked defendant a question, "[h]e said I was making him mad asking him his business" and that he was

"getting angry." She also admitted that she testified at the preliminary hearing that Mr. Banks "got up, went into the kitchen, and [she] went into the bathroom," and that "I was at the sink. When I turned, I turned to him, and he threw soup on me." She also admitted at trial that she testified at the preliminary hearing that the soup that Mr. Banks threw on her was still in the pot that she had put on the stove, that she had never turned it off, and that the last time she had seen the soup it was heating on the stove.

Ms. Richardson said that she stated at the preliminary hearing that defendant would not let her call the police, kept telling her to "shut up," "didn't want anybody to hear," and "didn't want the police to come." Ms. Richardson also said that she testified at the preliminary hearing as follows: "I was crying. I guess he saw how bad it was. I asked him to leave so I could go to the hospital myself." Ms. Richardson claimed that she was telling the truth during the trial, and not during her testimony at the preliminary hearing.

On cross-examination, Ms. Richardson testified that she called Mr. Banks's attorney to tell him that the soup spilled on her accidentally. Immediately thereafter, the following occurred:

> "[DEFENSE COUNSEL]: Now, you also tried to call the State's Attorney before today and tell them that --
>
> [ASSISTANT STATE'S ATTORNEY]: Objection. I would like an offer of proof.
>
> [THE COURT]: Overruled. I am going to give counsel latitude.
>
> [ASSISTANT STATE'S ATTORNEY]: How is he going to prove it up?
>
> [THE COURT]: The witness has either indicated she lied under oath when she went to court in June, which means she's perjured herself, or she's perjuring herself before me today. I am going to give counsel latitude as to his cross-examination because she, too, can have criminal charges filed against her for perjury and testifying falsely in court and filing false police reports. Ask your question."

On further cross-examination, Ms. Richardson testified that she was angry with defendant because she found out that he was dating a woman named Gloria. Ms. Richardson testified that she was also angry because she was sick, he was not paying attention to her, he was going to leave her, and she would be by herself. She said that she was sick and needed somebody to help her.

Ms. Richardson then testified that she pushed defendant and that was how the soup landed on her. At that point, the trial judge interrupted and stated as follows:

> "[THE COURT]: I am going to take a break. Call the Public Defender's Office. I appoint the Public Defender's Office to represent her. I am going to have her sanctioned for lying under oath."

After a recess, defense counsel resumed his cross-examination of Ms. Richardson. She testified that defendant "didn't mean to throw the soup on me." She testified that after she pushed defendant, "[a]ll I know is I was burned after that."

Officer Kinney

The State's next witness was Officer Kinney. Officer Kinney testified that, on May 22, 2007, at approximately 5:55 a.m., he responded to an assignment of a battery victim at Jackson Park Hospital. When he arrived at the hospital, he interviewed Ms. Richardson, who was in a bed in the emergency room. Officer Kinney was alone with Ms. Richardson when they spoke. He asked her to explain what happened. He said that she told him that she and her boyfriend, Kente Banks, who was at her house, got into an argument, and he "took hot soup and threw it on her." Officer Kinney said that when he spoke to Ms. Richardson, he "could tell she was very visibly upset." He also stated: "She looked as though she had been crying for a while. She just

had a hard time giving the story out because she looked upset."

Kente Banks

After the trial court denied Mr. Banks's motion for a directed verdict, he testified on his own behalf. According to defendant, on May 21, 2007, at approximately 11:00 p.m., he arrived home. His girlfriend, Ms. Richardson, was making soup for him. They were arguing about another woman, Gloria, when Ms. Richardson brought the soup to him in the bathroom. Defendant testified that, at the time, he was sitting on the toilet. When asked if he threw soup on Ms. Richardson, he denied it and testified as follows: "I get up, and she throw the soup on me. I move it out of my face, and the soup spilled on her." He also testified that he stuck out his arm because he could not eat the food at the same time that he was using the bathroom. Mr. Banks said that Ms. Richardson "pushed" him and the soup spilled on her. He stated that "[i]t was an accident."

On cross-examination, defendant testified that the soup was "kind of warm" when it spilled. He claimed that Ms. Richardson was holding the bowl of soup with both hands as he stood up from the toilet. He then said that "the soup probably spilled." He also testified that the soup spilled out in front of Ms. Richardson, it fell to the ground, and "came up and burned her."

Defendant was found guilty of two counts of heinous battery, two counts of aggravated domestic battery, two counts of aggravated battery, and not guilty of unlawful restraint. The trial court denied defendant's motion for a new trial, stating she found his testimony not to be credible. Mr. Banks was sentenced to 20 years in prison on the heinous battery charge. The trial judge denied his motion for a new sentence. This appeal followed.

II. ANALYSIS

Defendant appeals both his conviction and his sentence. As to his conviction, he argues the State failed to meet its burden of proving him guilty beyond a reasonable doubt; that the trial court's admonitions to Ms. Richardson deprived defendant of due process of law; and that the trial court improperly admitted Officer Kinney's testimony corroborating Ms. Richardson's prior inconsistent statement because his testimony constituted impermissible hearsay. Regarding his sentence, Mr. Banks contends that his sentence was excessive, and also argues that the trial court failed to hold a proper sentencing hearing.

A. Sufficiency of Evidence

Defendant challenges the sufficiency of the evidence. He argues that the State failed to prove him guilty of heinous battery beyond a reasonable doubt because the State did not establish the knowing mental state required by statute. The statute on heinous battery provides:

> (a) A person who, in committing a battery, *knowingly* causes severe and permanent disability, great bodily harm or disfigurement by means of a caustic or flammable substance, a poisonous gas, a deadly biological or chemical contaminant or agent, a radioactive substance, or a bomb or explosive compound commits heinous battery. (Emphasis added.) 720 ILCS 5/12-4.1 (West 2000).

Thus, as an essential element, the State must prove that defendant's conduct was knowing or intentional, and not accidental. *People v. Phillips*, 392 Ill. App. 3d 243, 258 (2009). "A person acts knowingly when he is consciously aware that a particular result is practically certain to result from his conduct." *People v. Cooper*, 283 Ill. App. 3d 86, 93 (1996), citing 720 ILCS 5/4-5

(West 1992). Because of its very nature, knowledge is ordinarily proven by circumstantial evidence, rather than by direct proof. *People v. Sedlacko,* 65 Ill. App. 3d 659, 663 (1978); *accord In re Keith C.*, 378 Ill. App. 3d 252, 260 (2007).

Mr. Banks now contends that Ms. Richardson's testimony, coupled with his testimony, demonstrated that the soup was spilled accidentally. The State contends that the evidence established that defendant intentionally threw boiling soup on Ms. Richardson that caused permanent disfigurement.

A criminal conviction will not be set aside on review unless the evidence is "so unreasonable, improbable or unsatisfactory as to create a reasonable doubt of the defendant's guilt." *People v. Rowell*, 229 Ill. 2d 82, 98 (2008). When considering a challenge to the sufficiency of the evidence, the question for a reviewing court 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.) *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S. Ct. 2781, 2788-89, 61 L. Ed. 2d 560, 573 (1979); *People v. Phelps*, 211 Ill. 2d 1, 7, (2004). It is not the function of a reviewing court to retry a defendant. *People v. Ward*, 215 Ill. 2d 317, 322 (2005). It is the responsibility of the trier of fact, and not this reviewing court, to determine witness credibility, the weight to be given the testimony, and the reasonable inferences to be drawn from the evidence. See, *e.g.*, *People v. Agnew-Downs*, 404 Ill. App. 3d 218, ___ (2010). This is especially true where the evidence is conflicting. *People v. Mullen*, 141 Ill. 2d 394, 403 (1990); see also *People v. McCoy*, 378 Ill. App. 3d 954, 963 (2008) (where a defendant testifies to a different version of events than that presented by the State's

witnesses, it is for the trier of fact to determine which version to believe).

"The standard for reviewing the sufficiency of the evidence in a bench trial is the same as in a jury trial." *People v. Leach*, No. 1-07-1448, slip op. at 11 (Ill. App. November 12, 2010). In a bench trial, it is for the trial judge, sitting as the trier of fact, to make the determinations of witness credibility, the weight to be given the testimony, and the reasonable inferences to be drawn from the evidence. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009).

Applying these principles to the instant case, we conclude that there was sufficient evidence if believed by the trier of fact to support defendant's conviction. Defendant correctly notes that Ms. Richardson testified during trial that the soup spilled out of the bowl and landed on her accidentally. This trial testimony, however, was countered by Ms. Richardson's prior testimony under oath at the preliminary hearing.

A prior inconsistent statement is admissible for substantive use pursuant to section 115-10.1 of the Code of Criminal Procedure of 1963. 725 ILCS 5/115-10.1 (West 2010). It provides, in pertinent part, as follows:

> "Admissibility of Prior Inconsistent Statements. In all criminal cases, evidence of a statement made by a witness is not made inadmissible by the hearsay rule if
>
> (a) the statement is inconsistent with his testimony at the hearing or trial, and
>
> (b) the witness is subject to cross-examination concerning the statement, and
>
> (c) the statement-
>
> (1) was made under oath at a trial, hearing, or other proceeding[.] " 725 ILCS 5/115-10.1 (West 2010).

Here, Ms. Richardson's prior statements were inconsistent with her trial testimony and were made under oath during a preliminary hearing in this case. She was also subject to cross-examination concerning the statements. Thus, Ms. Richardson's prior inconsistent statements were admissible for substantive use.

Her testimony at the preliminary hearing was evidence that Mr. Banks intended to throw the soup at her. Ms. Richardson testified at the preliminary hearing that, when she asked Mr. Banks a question, "[h]e said I was making him mad asking him his business." She testified that he was "getting angry." Ms. Richardson was asked, "[w]hat happened next" and she responded that Mr. Banks "got up, went into the kitchen, and [she] went into the bathroom." She said, "I was at the sink. When I turned, I turned to him, and he threw soup on me." She testified that the soup was still in the pot that she had put it in and the stove had not been turned off. She stated that defendant would not let her call the police, kept telling her to "shut up," and that "he didn't want anybody to hear," and "he didn't want the police to come." Ms. Richardson also testified at the preliminary hearing as follows: "I was crying. I guess he saw how bad it was. I asked him to leave so I could go to the hospital myself." These statements, if believed, precluded any notion that Ms. Richardson's burns were accidental. Her testimony at the preliminary hearing, admissible for substantive use by the State, would support the trial court's finding of the knowing mental state required by the statute.

The trial court, as trier of fact, was aware of the prior inconsistent statements, made under oath in the preliminary hearing in this case, in which Ms. Richardson stated that defendant threw boiling hot soup in her face and chest. It was the role of the trier of fact, in addition to making

credibility determinations, to determine how much weight to give to the testimony. The trial court was entitled to credit Ms. Richardson's prior inconsistent statements and disregard defendant's testimony. Clearly, the trial court believed Ms. Richardson's prior inconsistent statements, and not her version at trial.

While it is true that Ms. Richardson disavowed her prior statements during trial, that is precisely the situation that section 115-10.1 of the Code was enacted to address. As this court has noted, a substantive policy reason for the statute was to prevent a witness "from backing away from a former statement made under circumstances indicating it was likely to be true by merely denying the statement. [Citation.]" *People v. Craig*, 334 Ill. App. 3d 426, 442 (2002).

Moreover, Ms. Richardson's prior inconsistent statements in her petition for an order of protection were also properly admitted as substantive evidence. In addition to statements made under oath at prior hearings, discussed earlier, section 115-10.1 of the Code of Criminal Procedure also provides, in pertinent part, as follows:

> "Admissibility of Prior Inconsistent Statements. In all criminal cases, evidence of a statement made by a witness is not made inadmissible by the hearsay rule if
>
> (a) the statement is inconsistent with his testimony at the hearing or trial, and
>
> (b) the witness is subject to cross-examination concerning the statement, and
>
> (c) the statement-
>
> * * *
>
> (2) narrates, describes, or explains an event or condition of which the witness had personal knowledge, and

(A) the statement is proved to have been written or signed by the witness[.] 725 ILCS 5/115-10.1 (West 2010).

Ms. Richardson conceded at trial that she signed the petition for the order of protection, in which she stated that defendant threw "boiling hot soup" in her face and on her chest. She further stated that defendant's actions had caused second degree burns on her neck and chest, had caused pain, and that she was "fearful of further abuse."

The State additionally notes that Ms. Richardson's denials at trial were impeached by her testimony that she obtained an order of protection following this incident. The State asserts that there would be no reason for Ms. Richardson to state that she was "fearful of further abuse" if it was true that the soup had spilled on her accidentally, as she later claimed at trial. Additionally, the State has noted that "the simple fact that [Ms.] Richardson was frightened enough of defendant to obtain the order of protection is strong circumstantial evidence that defendant had intentionally hurt her badly."

The court clearly found incredible Mr. Banks's version that, as he and Ms. Richardson were arguing, she brought a small bowl of "kind of warm" soup to him in the washroom where he was sitting on the toilet, and that, as he got up, she threw the soup on him and when he moved it out of his face, it spilled on her. The court also rejected defendant's slightly different version that as he stood up, the soup "probably spilled" and "fell to the ground" and then "came up and burned her."

Mr. Banks additionally contends, however, that Ms. Richardson's prior inconsistent statements which were disavowed by her at trial were insufficient to prove he had the requisite

"knowing" mental state because there was no properly admitted corroborative evidence. He argues that Officer Kinney's corroborative testimony was inadmissible hearsay. We will further address defendant's hearsay argument below as defendant has also raised it as a separate issue.

Regarding Mr. Banks's contention that there was no properly admitted corroborative evidence, there are numerous appellate court decisions that have held that, even without other corroborative evidence, a recanted prior inconsistent statement admitted as substantive evidence can support a conviction. *People v. Thomas*, 354 Ill. App. 3d 868 (2004); *People v. Craig*, 334 Ill. App. 3d 426, 438 (2002), *People v. Williams*, 332 Ill. App. 3d 693, 696 (2002); *People v. Morrow*, 303 Ill. App. 3d 671, 677 (1999); *People v. Zizzo*, 301 Ill. App. 3d 481, 489-90 (1998); and *People v. Curtis*, 296 Ill. App. 3d 991, 999 (1998); see also *People v. Island*, 385 Ill. App. 3d 316, 347 (2008); *People v. Cox*, 377 Ill. App. 3d 690, 700 (2007). Additionally, as the *Curtis* court explained: one standard of appellate review applies to all properly admitted evidence, including evidence of recanted prior inconsistent statements. *Curtis*, 296 Ill. App. 3d at 999. Thus, Ms. Richardson's prior inconsistent statement alone, if believed, was sufficient evidence that defendant had the knowing mental state required by the statute, and could also support the conviction. Corroborative evidence was not required. Nonetheless, the severe injuries that Ms. Richardson sustained corroborated her prior testimony that defendant "threw *hot* soup on her." We will not overturn the findings of the trier of fact because it cannot be said that the evidence here was so unreasonable, improbable or unsatisfactory as to create reasonable doubt of the defendant's guilt. *Rowell*, 229 Ill. 2d at 98. In view of this conclusion, we need not address defendant's alternative argument that this court reduce his convictions to reckless conduct.

B. Trial Court's Admonitions to Ms. Richardson

Defendant next argues that he was deprived of due process of law as a result of the trial court's admonitions to Ms. Richardson. He specifically argues that "the trial judge's repeated intimidating comments and threats regarding perjury and criminal charges to Hazel Richardson during Richardson's testimony, which caused Richardson to change her testimony and become non-responsive, and which demonstrated that the trial judge prejudged Richardson's credibility, deprived Kente Banks of due process of law." The State argues that the trial court's interjections were proper; were made to protect Ms. Richardson, who was facing potential criminal charges; and did not have the effect that defendant claims they did on her subsequent testimony, in that she did not change her testimony or become non-responsive.

In support of his argument that he was denied due process of law by the trial judge's comments, Mr. Banks relies primarily on the cases of *Webb v. Texas*, 409 U.S. 95, 93 S. Ct. 351, 34 L. Ed.2d 330 (1972) and *People v. King*, 154 Ill. 2d 217 (1993). As Mr. Banks correctly notes in his brief, those cases stand for the proposition that although a trial judge has the discretion to admonish a witness about his right to counsel and the consequences of lying under oath, a trial judge may not violate a defendant's due process right with improper admonitions that are "excessive, incorrect, or threatening." Thus, "[f]or a trial judge's admonitions to a potential witness to violate the due process rights of the accused, the admonitions must be somehow improper." *King*, 154 Ill. 2d at 224. The *King* court explained that the specific facts and circumstances of each case must be considered in making this determination. *King*, 154 Ill. 2d at 225.

After the trial court permitted the State to treat Ms. Richardson as an adverse witness, the State questioned her as to her testimony at the preliminary hearing. Ms. Richardson stated that she did testify at the preliminary hearing that defendant threw soup on her but "that wasn't true." Later, during Ms. Richardson's cross-examination by Mr. Banks's attorney, the following colloquy took place:

> "[DEFENSE COUNSEL]: Now, you also tried to call the State's Attorney before today and tell them that --
> [ASSISTANT STATE'S ATTORNEY]: Objection. I would like an offer of proof.
> [THE COURT]: Overruled. I am going to give counsel latitude.
> [ASSISTANT STATE'S ATTORNEY]: How is he going to prove it up?
> [THE COURT]: The witness has either indicated she lied under oath when she went to court in June, which means she's perjured herself, or she's perjuring herself before me today. I am going to give counsel latitude as to his cross-examination because she, too, can have criminal charges filed against her for perjury and testifying falsely in court and filing false police reports. Ask your question."

During further cross-examination by Mr. Banks's attorney, Ms. Richardson testified that the soup spilled on her after she pushed Mr. Banks. At that point, the court interrupted and stated as follows:

> "[THE COURT]: I am going to take a break. Call the Public Defender's Office. I appoint the Public Defender's Office to represent her. I am going to have her sanctioned for lying under oath."

Considering the specific facts and circumstances of the instant case, while we do not approve of the form of the admonitions, we do not find them of a nature to have violated defendant's due process rights. A trial judge's remarks are proper "if they are neutral, and if the judge gives the witness additional time to decide whether to testify as well as to consult with counsel." *People v. Vaughn*, 354 Ill. App. 3d 917, 926 (2004), citing *People v. Sowewimo*, 276

Ill. App. 3d 330, 339 (1995) and *People v. Johnson*, 262 Ill. App. 3d 781, 795 (1994). Ms. Richardson continued to testify after she was admonished by the trial court. Contrary to defendant's assertions, she did not change her testimony or become unresponsive.

We believe that the instant case is distinguishable from *Webb v. Texas*, 409 U.S. 95, 93 S. Ct. 351, 34 L. Ed.2d 330 (1972), one of the cases relied upon by defendant. In *Webb*, the trial court did not merely warn a witness but, rather, threatened the defense's sole witness who then refused to testify. On its own initiative, the trial judge stated as follows:

> "Now you have been called down as a witness in this case by the Defendant. It is the Court's duty to admonish you that you don't have to testify, that anything you say can and will be used against you. If you take the witness stand and lie under oath, the Court will personally see that your case goes to the grand jury and you will be indicted for perjury and the liklihood (*sic*) is that you would get convicted of perjury and that it would be stacked onto what you have already got, so that is the matter you have got to make up your mind on. If you get on the witness stand and lie, it is probably going to mean several years and at least more time that you are going to have to serve. It will also be held against you in the penitentiary when you're up for parole and the Court wants you to thoroughly understand the chances you're taking by getting on that witness stand under oath. You may tell the truth and if you do, that is all right, but if you lie you can get into real trouble. The court wants you to know that. You don't owe anybody anything to testify and it must be done freely and voluntarily and with the thorough understanding that you know

> the hazard you are taking." *Webb v. Texas*, 409 U.S. at 95-96, 93 S. Ct. at 352, 34 L. Ed. 2d 330.

After this admonition, the witness refused to testify and was excused by the court. The *Webb* court held that the trial court's threatening manner in admonishing the defendant's sole witness "effectively drove [the] witness off the stand, and thus deprived the petitioner of due process of law under the Fourteenth Amendment." *Webb*, 409 U.S. at 98, 93 S. Ct. at 353, 34 L. Ed.2d at 333. The admonition in the instant case, as well as its impact on the witness, falls well short of that given by the trial judge in *Webb v. Texas.*

The other case cited by defendant, *People v. King*, 154 Ill. 2d 217 (1993), is also distinguishable. In *King*, prior to the codefendant testifying at defendant's trial, the court admonished the codefendant as follows:

> "[Defense counsel] is going to call you as a witness on behalf of the-of the defendant. You have a right to testify if you wish to. You also have a right, because you still are in jeopardy, so to speak, some things can happen to you which could effect [*sic*] your freedom, et. cetera [sic], because you have not been convicted. You have a right to exercise your Fifty [*sic*] Amendment right and not testify for fear that what ever you might testify to could be used against you. I have to tell you that.
>
> And I also would like to know if you're going to testify on behalf of [the defendant] or are you going to assert your right as your counsel has advised you to?" *King*, 154 Ill. 2d at 222.

Following this admonition, the codefendant pled the Fifth Amendment and did not testify at defendant's trial. *King*, 154 Ill. 2d 217. The admonitions in the instant case are distinguishable.

The instant case is similar to *People v. Davis*, 88 Ill. App. 3d 265 (1980). In *Davis*, the trial court declared two State witnesses to be hostile, and then warned each that if his answers were substantially different on a material point from prior sworn testimony, he could be charged with perjury or contempt of court. *Davis*, 88 Ill. App. 3d at 269. The trial court qualified its warning as follows:

> "[I am] not telling you what you have to testify to, but I am telling you right now if your answers differ substantially from this prior trial, the State's Attorney could bring a charge of purgery (*sic*). * * *
>
> I do not mean to intimidate you, I mean to warn you of the consequences of what will happen if you do not answer the questions the same as the other trial because that, you see, would place two inconsistent statements under oath, do you understand what I mean?
>
> And this is a textbook definition of purgery (*sic*) that was explained to you. I am not even going to bring the charge, the State's Attorney would make that decision and another judge hear it, but I am warning you for your own benefit as an individual who is testifying here that you could be subjected to a criminal prosecution if your answers differ substantially." *People v. Davis*, 88 Ill. App. 3d at 269-70.

The *Davis* court held that this admonition was not error. As the *Davis* court explained, taking the

specific warning in the context of the record, it was obvious that the trial judge "did not intimidate the witnesses but merely informed them of the applicable law." *Davis*, 88 Ill. App. 3d at 270. In concluding that the trial court's admonition was "informative and not threatening," the *Davis* court also distinguished the admonition from the one given by the trial court in *Webb v. Texas*.

We disagree with Mr. Banks's contention that the trial judge's comments here "indicated she had already made up her mind about Ms. Richardson's credibility, concluding that she was, in fact, lying under oath." Here, Ms. Richardson testified that her prior testimony under oath was "not true." As the State correctly notes, unlike the situation in the cases cited by defendant, the trial judge here did not threaten Ms. Richardson "beforehand" of the implications of perjury, "implying an expectation that she would lie on the stand." Rather, in the instant case, the trial court admonished Ms. Richardson "*only* in response to her testimony which evidenced that she committed perjury either at the preliminary hearing *or* was currently committing perjury." (Emphasis added). The State notes additionally that, unlike the scenarios in *Webb* and *King*, Ms. Richardson continued to testify following the trial court's admonitions.[1]

We do, however, question the need for the trial judge's last comment: "I am going to have her sanctioned for lying under oath." Although this comment did not rise to the level of a

[1]Defendant points out that after the admonition, Ms. Richardson did say "He threw the soup on me." This response, however, when taken in the context of the question regarding her testimony at the preliminary hearing, does not amount to a change in testimony. Her next response was that "the soup landed on her' which was consistent with her prior testimony. Moreover, after the admonition, Ms. Richardson continued to testify that defendant "didn't mean to throw the soup on me." Also, after the admonition, she testified that "after [she] pushed him, shortly after that, the soup was on [her] person."

threat of conviction for perjury, we believe it came close. Assuming the trial judge intended to have Ms. Richardson sanctioned, the trial judge did not specify whether the sanctions would be for Ms. Richardson's trial testimony or for her prior testimony at the preliminary hearing. Thus, she made the comment without deciding *which* of the two had constituted "lying under oath." Further, in her remarks to Ms. Richardson, the court included the possibility that she could be sanctioned "for filing false police reports." The police reports in this case would have reflected the version that defendant "threw" the soup on Ms. Richardson. The court's inclusion of this warning demonstrates that in the court's view it was possible that the false statement was that defendant "threw" the soup, and not that it spilled accidentally. Nonetheless, we believe the comment should not have been made at that time. As no sanctions ultimately were imposed, the comment was also unnecessary. The admonition here was not so improper as to have violated defendant's due process rights.

C. Officer Kinney's Testimony

Mr. Banks next argues that the trial court erred in allowing the State to introduce hearsay evidence through Officer Kinney. The State argues that defendant has waived this issue, but further contends that Officer Kinney's testimony was properly admitted under the excited utterance exception to the hearsay rule.

For a hearsay statement to be admissible under the excited utterance or spontaneous declaration exception: (1) there must be an occurrence sufficiently startling to produce a spontaneous and unreflecting statement; (2) there must be an absence of time for the declarant to fabricate the statement; and (3) the statement must relate to the circumstances of the occurrence.

People v. Sutton, 233 Ill. 2d 89, 107 (2009); *People v. Poland*, 22 Ill. 2d 175 (1961). In deciding whether a hearsay statement is admissible under the excited utterance or spontaneous declaration exception, courts use a totality of the circumstances analysis. *People v. Williams*, 193 Ill. 2d 306, 352 (2000). "This analysis involves the consideration of several factors, including time, 'the nature of the event, the mental and physical condition of the declarant, and the presence or absence of self-interest.'[Citation.]" *Williams*, 193 Ill. 2d at 306.

Mr. Banks asserts that Officer Kinney's testimony was inadmissible because Ms. Richardson's statement was made "nearly eight hours after the incident, far too long for the excited utterance or spontaneous declaration exception to apply." This argument relates to the second factor listed earlier, and whether there was "an absence of time for the declarant to fabricate the statement." *Sutton*, 233 Ill. 2d at 1070. A court "must determine from the entirety of the surrounding circumstances whether there was an opportunity for reflection and invention." *People v. Chatman*, 110 Ill. App. 3d 19, 26 (1982). The time factor is "an elusive element that will vary with the particular facts of each case." *Chatman*,110 Ill. App. 3d at 26, quoting McCormick on Evidence § 297, at 706 (Cleary 2d ed. 1972).

A statement related to a startling event "made while the declarant was under the stress of excitement caused by the event" qualifies as an excited utterance. *People v. Thomas*, 178 Ill. 2d 215, 238 (1997). The State asserts that the instant case is analogous to *People v. Gwinn*, 366 Ill. App. 3d 501 (2006). In *Gwinn*, however, the victim was " 'rocking' on the couch, crying, trembling, visibly shaken, and noticeably injured and in pain at the time she made the statement." *Gwinn*, 366 Ill. App. 3d at 518. Moreover, she made the statement 15 minutes after the incident.

We agree with defendant that *Gwinn* is distinguishable and that "the State cannot establish that the excitement of the event predominated when Ms. Richardson spoke to Officer Kinney such that it could be admitted as an excited utterance." Although Officer Kinney testified that when he spoke to Ms. Richardson, he "could tell she was very visibly upset" and further stated that "[s]he looked as though she had been crying for a while," almost eight hours had elapsed between the time Ms. Richardson was burned by the scalding soup and the time she told Officer Kinney that defendant threw it on her. We believe that, in view of the particular facts here, the second factor has not been met. We agree with defendant that Ms. Richardson's statement to Officer Kinney was not an excited utterance and the trial court erred in allowing the State to introduce this hearsay evidence.

Having determined that an error occurred, we next address the State's argument that the error was at most harmless. Not every erroneous admission of evidence requires reversal. *People v. Rozo*, 303 Ill. App. 3d 787, 790 (1999). A new trial is warranted only where the evidence improperly admitted (1) was so inflammatory that it deprived the defendant of a fair trial or (2) appears to have affected the outcome of the trial. *People v. Forcum*, 344 Ill. App. 3d 427, 444 (2003.) The Illinois Supreme Court has stated that the admission of hearsay evidence is harmless error where there is no reasonable probability that the fact finder would have acquitted the defendant absent the hearsay testimony. *People v. Nevitt*, 135 Ill. 2d 423, 447 (1990).

Defendant acknowledges the principle that "[a]t a bench trial, the trial judge is presumed to know the law and to consider only proper evidence in rendering judgment." *People v. Duff*, 374 Ill. App. 3d 599, 605 (2007). He asserts, however, that "the trial judge's finding in this case

is inconsistent with her disregarding the improperly-introduced hearsay." We disagree.

As the State notes, and our review of the record confirms, the trial court did not even mention Officer Kinney's testimony when announcing its finding of guilt, indicating that it gave the testimony little, if any, weight. The trial judge expressly stated: "The testimony before me is the Defendant's testimony, as well as the complainant." The trial court then explained that it found defendant's testimony incredible. The trial court was also in the best position to determine the credibility of Ms. Richardson's testimony at trial and was aware of Ms. Richardson's statements made during the preliminary hearing.

Defendant also argues that the admission of Officer Kinney's testimony was reversible error because it was the only corroborative evidence of Ms. Richardson's prior inconsistent statement. However, we have earlier explained that even without other corroborative evidence, a recanted prior inconsistent statement can support a conviction. See, *e.g.*, *People v. Thomas*, 354 Ill. App. 3d 868 (2004).

The State has raised an additional argument as to why the admission of Officer Kinney's testimony amounted to harmless error: it was merely cumulative of other substantive evidence. We agree. The Illinois Supreme Court has noted that in making the determination of whether the erroneous admission of hearsay testimony is harmless, a reviewing court will consider the effect that the hearsay evidence had on the properly admitted evidence. *People v. Colon*, 162 Ill. 2d 23, 34 (1994). The *Colon* court explained that where the admission of hearsay evidence is merely cumulative of it constitutes harmless error. *Colon*, 162 Ill. 2d at 35; see also *People v. Becker*, 239 Ill. 2d 215 (2010) (erroneous admission of hearsay statements was harmless as

cumulative and duplicative of properly admitted evidence).

In the instant case, Officer Kinney's testimony regarding the statements that Ms. Richardson made to him was merely cumulative of other properly admitted substantive evidence. The hearsay testimony was cumulative to both Ms. Richardson's testimony at the preliminary hearing that defendant threw the soup on her that was still in the pot, and Ms. Richardson's statement in her petition for the order of protection that "defendant after a verbal altercation threw boiling hot soup in [her] face and [on her] chest." Thus, there was sufficient evidence to sustain the finding of guilty without Officer Kinney's testimony. We further note that the properly admitted evidence from Ms. Richardson was more detailed than that of Officer Kinney. See *People v. Becker*, 239 Ill. 2d 215 (2010) (noting that properly admitted evidence contained more detail than hearsay statements at issue). In the instant case, the erroneous admission of the hearsay testimony could not have affected the outcome of the trial. Moreover, as earlier noted, there is no indication that the trial judge even considered Officer Kinney's testimony.

We conclude that the admission of Officer Kinney's testimony was harmless error and the remaining evidence was sufficient to prove defendant guilty beyond a reasonable doubt.

D. Sentence

The final argument raised by Mr. Banks concerns his sentence. He argues that his 20-year sentence was excessive. Although defendant raises several grounds in support of his argument, we agree with his contention that the trial judge failed to hold a complete sentencing hearing. Our review of the record, specifically the transcript of the "sentencing hearing," shows that Mr. Banks is correct in stating that his sentencing hearing was "hardly the statutorily-

required hearing during which the judge is to accept evidence and arguments in aggravation and mitigation, to allow the defendant to address the court, and to weigh all of the appropriate factors before imposing sentence." See 730 ILCS 5/5-4.1(a)(West 2007); 730 ILCS 5/5-5.3.1(a)(West 2007).

During Mr. Banks's sentencing hearing, the trial court failed to: (1) accept evidence in aggravation and mitigation; (2) consider mitigating factors; and (3) provide defendant an opportunity to make a statement in allocution. The record shows that, at sentencing, the assistant state's attorney stated: "Judge, the Defendant has no background." At that point, without inviting or allowing any additional input from either side, or the defendant personally, the trial judge immediately imposed the 20-year sentence. Based upon the record before this court and the fact that the record contains no evidence offered by the State in aggravation, it is difficult to understand why defendant, a 43-year old with no prior felony convictions, would be sentenced to anything more than the minimum required sentence of six years in prison.

We agree with defendant that he is entitled to a proper sentencing hearing. Therefore, we vacate defendant's sentence and remand this case for a new sentencing hearing which shall comport with all applicable constitutional and statutory provisions.

III. CONCLUSION

For the foregoing reasons, we affirm defendant's conviction; vacate defendant's sentence; and remand the case to the circuit court of Cook County for a new sentencing hearing consistent with this order.