

No. 1-09-2621

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08CR23388
	)	
MARCUS HUGLE,	)	Honorable
	)	John J. Fleming,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE PUCINSKI delivered the judgment of the court.  
Presiding Justice Gallagher and Justice Lavin concurred in the judgment.

**ORDER**

*HELD:* Defendant's conviction upheld where: the trial court's failure to admit substantive evidence did not constitute plain error; trial counsel did not provide ineffective assistance; and the State proved defendant guilty of aggravated domestic assault beyond a reasonable doubt.

Following a jury trial, defendant Marcus Hogle was convicted of aggravated domestic battery and sentenced to 15 years' imprisonment. Defendant appeals his conviction arguing: (1) the trial court erred in failing to admit, as substantive evidence, a letter and affidavit completed by the victim indicating someone other than defendant attacked her; (2) he was deprived of his

constitutional right to effective assistance of trial counsel when counsel failed to have the victim's exculpatory letter and affidavit admitted as substantive evidence; and (3) the State failed to establish that defendant inflicted great bodily harm on the victim, and thus failed to prove him guilty of the charged offense beyond a reasonable doubt. For the reasons set forth herein, we affirm the judgment of the trial court.

### BACKGROUND

On November 24, 2008, defendant's girlfriend, Aleshia Thomas, was beaten and stabbed. Defendant was subsequently charged in connection with the offense. Specifically, he was charged with one count of residential burglary (720 ILCS 5/19-3(a) (West 2006)), two counts of aggravated domestic battery (720 ILCS 5/12-3.3(a) (West 2006)), four counts of aggravated battery (720 ILCS 5/12-4(a), 720 ILCS 5/12-4(b)(1) (West 2006)), and one count of battery (720 ILCS 12-3(a)(1) (West 2006)). The cause proceeded to a jury trial.

Jerry Paster testified that in November 2008, he was living in a two-bedroom apartment located at 4410 ½ South Drexel with his girlfriend, Tina Williams, and the victim, Aleshia Thomas. At that time, the victim was dating defendant, whom Paster referred to as Bebop. Defendant did not live at the apartment with them, but would regularly spend the night with Thomas at their residence. On November 24, 2008, at approximately 6:30 p.m., defendant and Thomas began fighting after defendant observed Don, one of their acquaintances, trying to sell Thomas merchandise that he had collected from a dumpster located behind the Family Dollar Store. Defendant and Thomas were in Thomas' bedroom and Paster could observe them from his vantage point in the kitchen. Paster saw defendant strike Thomas with his hand "[a]ll over."

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They continued arguing for approximately 30 minutes and then Thomas hit defendant, knocking him to the ground. Defendant got up and repeatedly yelled, “You tough now?” He then pushed Thomas onto her bed and struck her repeatedly in the face and head with his fists. Paster asked defendant to stop hitting Thomas, but defendant told him to mind his business. Defendant then went into the kitchen where Paster was washing dishes, grabbed a knife, and walked back toward Thomas’ bedroom. Defendant encountered Thomas in the hallway and stabbed her below her left shoulder with the knife.

Thomas and defendant then returned to her bedroom and continued arguing. Defendant asked Thomas to give him a small mirror that was on her dresser. When Thomas refused to do so, defendant grabbed the mirror himself and hit her head with it. The mirror shattered and Thomas began bleeding from the area above her eye. Paster told defendant that Thomas had to go to the hospital to receive treatment for her injuries, but defendant informed her that she “wasn’t going nowhere.” Defendant subsequently changed his mind and told her she could leave to seek medical attention. He then threw the knife in the kitchen sink and walked out of the apartment. Thomas also left the apartment. Paster retrieved the knife from the kitchen sink and placed it on top of the refrigerator for safekeeping.

Approximately 10 minutes later, Paster’s girlfriend arrived at the apartment. At that time, Paster had located a mop and bucket, intending to clean up the blood, but his girlfriend advised him to leave the mess so that the police could observe the scene. Several police officers arrived shortly thereafter and he informed them about the altercation. Thomas returned to their apartment later that night after receiving medical treatment. She “was all taped up and wrapped

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up” and looked “like the mummy.” Paster did not see defendant until the following evening when he arrived at the apartment at approximately 6:00 or 7:00 p.m. At that time, Thomas was lying down in her bedroom. When he entered the apartment, defendant yelled that he came back “to open her stitches back up.” Defendant grabbed a can of corn and walked toward Thomas’ bedroom, but Paster and several of his friends intervened, and Thomas was able to sneak out of the apartment while they distracted defendant. When defendant discovered that Paster helped Thomas leave, defendant pushed him and then struck Paster in the head. Paster retaliated and pushed defendant back and defendant fell down the staircase. Thereafter, police arrived at the scene and Paster identified defendant as the individual who had stabbed Thomas the previous night, and informed them that defendant had just attacked him. The officers then stopped defendant who was walking away from the residence, and placed him in the back of the squad car. Thomas was brought to the scene in the back of another police vehicle and she identified defendant as the man who attacked her the previous night. Paster then accompanied Thomas to the police station and they both provided statements to the detectives investigating the attack. Thereafter, Paster returned to his apartment with one of the investigating officers so that the officer could retrieve the knife that defendant had used during the attack.

Officer Timothy Moriarty testified that on November 25, 2008, at approximately 6:46 p.m., he and his partner, Officer Andy Moy, responded to a 911 emergency call regarding a battery in progress at 4300 South Drexel. As Officer Moriarty drove through the alley west of that location, he and his partner were stopped by Jerome Paster who pointed at defendant. Defendant was heading northbound from that location and Paster told Officer Moriarty to “go get

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him.” After defendant was detained, Thomas identified him as the man who had beaten and cut her the previous night. Defendant was then arrested and transported to the police station.

Thereafter, Officer Moriarty accompanied Paster back to Paster’s apartment where he retrieved the knife involved in the prior evening’s altercation. When they arrived at the apartment, Paster directed him to the kitchen and pointed to the top of the refrigerator where a serrated steak knife with a black handle had been placed. Officer Moriarty recovered and inventoried the weapon.

On cross-examination, Officer Moriarty acknowledged that he did not see visible blood stains on the knife and that he used his bare hands to place the knife in the inventory bag. Officer Moriarty explained that his priority was to recover the knife, not to retrieve fingerprints from the weapon. When he was in Paster’s residence, Officer Moriarty looked around the kitchen, but did not look at any of the bedrooms and did not observe any blood evidence. Officer Moriarty also did not attempt to locate a broken mirror or bloody towels. He explained that when he accompanied Paster back to the apartment, his sole purpose was to recover the knife used in the attack against Thomas.

Aleshia Thomas testified pursuant to a subpoena. She indicated that she met and started dating defendant in the summer of 2008. Thomas confirmed that she resided in a two-bedroom apartment with Jerry Paster and that defendant would stay with her. Initially, Thomas acknowledged that she was stabbed in her shoulder on November 24, 2008, but stated that she did not remember who stabbed her. She indicated that a lot of people were in the apartment that evening, including Paster and defendant. Thomas indicated that a male attacked her, but denied that Paster was the man who stabbed her. After the trial court admonished Thomas that she was

testifying pursuant to subpoena and had sworn to tell the truth, Thomas admitted that defendant was the man who hit her in the face with a mirror and stabbed her in the arm. After the attack, Thomas ran out of the apartment and used a stranger's cell phone to call an ambulance. She was subsequently transported to the emergency room at Provident Hospital, where doctors stitched her face and taped her arm. She arrived back at the apartment early the next morning and saw defendant later that day when he came to the apartment and started arguing with Paster. While they were arguing, Thomas left through the back door. Once outside, Thomas encountered and spoke to police officers. She denied identifying defendant as her assailant that evening.

Thomas acknowledged that she had seen defendant regularly since his arrest and indicated that she loved him and still considered him to be her boyfriend. Thomas also acknowledged that she forgave defendant and made efforts to try to get him out of trouble. Specifically, she admitted that she wrote a letter to the judge and completed an affidavit wherein she stated that defendant was not the person who attacked her, which was a lie.

On cross-examination, Thomas further acknowledged her efforts to help defendant. In her three-page letter addressed to Judge Fleming, Thomas indicated that she attempted to talk to the State on two occasions because she did not want to press charges against defendant. But, the State's Attorney she spoke with told Thomas she could be prosecuted for changing her story. Thomas acknowledged that when she signed the affidavit, she understood it to mean that the information she stated therein was truthful. The same information was contained in both the affidavit and the letter, namely, that defendant was not the person who stabbed her. Thomas admitted that she had sworn to tell the truth before the jury and that her current testimony was

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different from the accounts she provided in the letter and her sworn affidavit. Thomas also acknowledged writing two letters to defendant wherein she indicated that she knew defendant did not stab her. Finally, Thomas admitted that she had Paster complete an affidavit on defendant's behalf as well.

On the evening of the attack, Thomas confirmed that Paster was in the kitchen washing dishes and was able to see into her bedroom. Neither he, nor any of the other people present in the apartment that night came to her aid when defendant hit her with the mirror. She suffered two injuries from the attack: a cut above her eye caused by the mirror and a stab wound to her shoulder. When shown the knife that Officer Moriarty collected and inventoried from her apartment, Thomas denied it was the weapon used during the attack and explained that the knife with which she was stabbed was smaller. When Thomas spoke with police the night after the attack, she provided them with an account of the assault that differed from the accounts contained in her letter to Judge Fleming, her affidavit, and her letters to defendant.

On redirect examination, Thomas admitted that she told ambulance personnel and a nurse at Provident Hospital that her boyfriend had stabbed her. She also identified defendant as her attacker when she spoke to Detective Lewis and the Assistant State's Attorney (ASA) investigating the case. After providing these statements, Thomas acknowledged that she started to feel guilty about getting defendant in trouble and started writing letters to him while he was in jail.

Ellen Moran, an investigator with the Cook County State's Attorney's Office, testified that she received an assignment on February 26, 2009, to collect a buccal swab standard from

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Thomas. Investigator Moran collected the sample and tendered it to the Chicago Police Department Crime Laboratory.

Jennifer Belna, a forensic scientist employed by the Illinois State police, testified that she received an assignment to examine the knife believed to be connected to the attack on Thomas. She conducted a visual exam on the knife under normal light and did not observe any blood-like stains on the blade or the handle. She then conducted tests on the knife and concluded that there was blood present on the knife. On cross-examination, Belna indicated that the testing she performed did not permit her to date the blood present on the knife; rather, the testing simply allowed her to discover the presence or absence of blood evidence.

Janice Martino, a forensic scientist with the Illinois State police, performed DNA analysis on a swab taken from the knife blade. Martino discovered a mixture of two human DNA profiles on the knife. One of the DNA profiles was a female profile and was a match for Thomas' DNA profile based on the buccal standard Thomas had provided. The other profile Martino discovered was a male DNA profile, but it was not suitable for comparison to any other profile.

Lisa Gilbert, a latent print examiner employed by the Illinois State Police Forensic Science Center, conducted a fingerprint examination on the knife recovered in the case. She discovered that there were no latent prints on the knife that were suitable for comparison. Gilbert explained that it did not mean that the knife had not been touched; rather, it simply meant that the condition of the knife was not conducive to attracting and holding a latent print. Gilbert also acknowledged that an item's exposure to water, heat, or extreme dry conditions affect whether a latent print remains on an object.

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Officer Gerardo Mandrigal testified that he was on duty with his partner Eric Gonzalez on November 24, 2008. At approximately 10:50 p.m., he and his partner responded to a call in the area of 4410 South Drexel. He observed Thomas receiving treatment from Chicago Fire Department paramedics. At that time, she was bloody and crying. After his partner spoke to Thomas, Officer Mandrigal went to the apartment where the attack had occurred. He observed a smear of blood and pieces of glass in one of the bedrooms. Officer Mandrigal then left to look for defendant. He did not observe anyone in the apartment while he was looking around and did not speak to Jerry Paster that evening. Officer Mandrigal did not call for an evidence technician to be dispatched to the apartment because he saw that most of the blood and glass evidence had been cleaned up. On cross-examination, he acknowledged he did not look in the garbage to see if it contained any rags that had been used to clean up the blood. He also failed to look for the knife.

Richard Jurek, a paramedic employed by the Chicago Fire Department, testified that he responded to a 911 call regarding a stabbing victim on November 24, 2008, at approximately 10:46 p.m. As he and his partner were driving east on 44th Street, Thomas approached their ambulance. She was hysterical and crying and had blood on her head and chest. She had a jacket on, but was not wearing a top so Jurek provided her with a sheet to cover herself. When he examined Thomas, he observed a laceration over her left eyebrow, a stab wound to her left arm, and a scrape to her right arm. When Jurek asked her how she had been injured, Thomas informed him that her boyfriend hit her in the head with a mirror and stabbed her with a kitchen knife. The laceration on Thomas's head was consistent with the type of injury caused by a

mirror. On cross-examination, Jurek acknowledged that he did not find any glass in Thomas' scalp or on her clothing.

Rita Sherrard, a registered nurse employed at Provident Hospital, testified that she was working in the emergency room on November 24, 2008. That evening, she treated Thomas, who arrived at the emergency room via ambulance at approximately 11:00 p.m. Thomas had a 3-inch laceration above her eye, a swollen eye, and a laceration on her shoulder that appeared to be a stab wound. Thomas received pain medication, antibiotics and sutures. On cross-examination, Nurse Sherrard acknowledged that X-rays did not reveal any damage to Thomas' internal organs or arteries. Moreover, Thomas' injuries did not require any emergency resuscitation. Nurse Sherrard completed a chart regarding the treatment she provided to Thomas. She did not indicate that any glass shards were found on Thomas' person.

Thereafter, the State rested its case and defendant elected to exercise his right not to testify. The defense did not present any witnesses. The parties then partook in a jury instruction conference with the trial court. During the conference, defense counsel requested that Thomas' letters and affidavit be admitted into evidence, but did not request them to be sent back with the jury to be considered as substantive evidence. Thereafter, the parties delivered closing arguments and the trial court provided the jury with the relevant, agreed-upon instructions.

After the jury had been instructed, defense counsel sought an additional instruction permitting the jury to consider Thomas' letters and affidavit as substantive evidence. Specifically, defense counsel argued that the items should be considered substantive evidence because Thomas "presented an alternative version of what occurred" in those documents. The

trial court disagreed, finding that the letters and affidavit were used for impeachment purposes but “[t]hey didn’t come in under [section 115-10.1 of the Illinois Criminal Code] as substantive evidence, so they can go into evidence, but they are not going to be published to the jury because it’s only impeachment.” The court explained that pursuant to section “[115-10.1] it’s not every time someone admits a prior inconsistent statement [that evidence is admitted substantively.] They admitted a prior inconsistent statement. If they denied the prior inconsistent statement, it comes in under [115-10.1] Here [Thomas] admitted that she made these, so it’s not every inconsistent statement that makes it substantive evidence.” The court also found that the defense failed to lay a proper foundation to admit the documents substantively because counsel did not question Thomas about the specific details she provided in her affidavit and letters; rather, counsel simply asked her if she completed the documents. The court explained, “[p]art of laying the necessary foundation is asking whether [she] made an inconsistent statement, which I think must direct the attention [of the] witness [to] the time, place and circumstances and its substance.” Pursuant to the court’s ruling, the documents would be admitted as exhibits but would not be published to the jury.

Following deliberations, the jury returned with a verdict finding defendant guilty of aggravated battery and aggravated domestic battery. Defendant filed a posttrial motion and a supplement thereto, seeking a new trial, which the trial court subsequently denied. The trial court then presided over defendant’s sentencing hearing, and after hearing the evidence advanced in aggravation and mitigation, sentenced defendant to 15 years’ imprisonment for aggravated domestic battery and 10 years’ imprisonment for aggravated battery and merged the two counts.

This appeal followed.

## ANALYSIS

### I. Admissibility of Evidence

Defendant first argues that the trial court erred in refusing to admit as substantive evidence, a letter and affidavit completed by Thomas, indicating that someone other than defendant caused her injuries. Specifically, he argues that the trial court erred in finding that counsel failed to satisfy the foundational requirements to admit the documents substantively. Defendant argues that the foundation requirements to use a document for impeachment purposes and to admit the document substantively pursuant to section 115-10.1 of the Illinois Code of Criminal Procedure of 1963 (Criminal Code) (725 ILCS 5/115-10.1 (West 2008)) are the same and there was never any dispute that counsel laid a proper foundation to impeach Thomas regarding her prior inconsistent statements. Even if defense counsel failed to technically lay a proper foundation, defendant nonetheless argues that counsel substantially satisfied the purpose of the foundation requirement, and accordingly, Thomas' affidavit and letters should have been admitted as substantive evidence. Defendant acknowledges that he did not specifically seek a new trial in his posttrial motion based on the trial court's failure to allow the jury to consider the documents as substantive evidence; rather, he simply disputed the timing pursuant to which the evidence was admitted, arguing that: "The Court erred in not allowing the letters and affidavits to go back to the jury until after Defendant rested and after closing arguments." Nonetheless, he argues that the issue should be reviewed for plain error.

The State responds that defendant forfeited appellate review of this issue because he

failed to make a timely objection at trial or raise the issue with specificity in his posttrial motion. Moreover, the State argues that the trial court correctly found that defendant could not admit Thomas' letter and affidavit as substantive evidence because he failed to lay a proper foundation for the evidence. Although Thomas was asked whether she completed the documents, she was not asked about each of the statements contained within those documents. Specifically, she was not asked whether she identified defendant's other girlfriend as the person who attacked her.

To properly preserve an issue for appeal, a defendant must object to the purported error at trial and specify the error in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988); *People v. Bannister*, 232 Ill. 2d 52, 65 (2008). A defendant's failure to abide by both requirements results in forfeiture of appellate review of his claim. *Enoch*, 122 Ill. 2d at 186; *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007).

Here, defendant did not issue a timely objection at trial or raise this issue with specificity in his posttrial motion. During the jury instruction conference, defense counsel did not initially request the letters and affidavit to be admitted substantively. After the jury had been instructed, however, defense counsel indicated he had changed his mind and wanted the jury to consider the documents as substantive evidence. Later, in his posttrial motion, defendant did not seek a new trial based on the trial court's ruling that the documents could not be admitted substantively; rather, he merely disputed the timing of the admission of the documents into evidence. Accordingly, we find that defendant failed to properly preserve this issue for appeal. *Enoch*, 122 Ill. 2d at 186; *Piatkowski*, 225 Ill. 2d at 564.

The plain error doctrine, however, provides a limited exception to the forfeiture rule. 134

Ill. 2d R. 615(a); *Bannister*, 232 Ill. 2d at 65. It permits review of otherwise improperly preserved issues on appeal if the evidence is closely balanced or the error is of such a serious magnitude that it affected the integrity of the judicial process and deprived the defendant of his right to a fair trial. 134 Ill. 2d R. 615(a); *Bannister*, 232 Ill. 2d at 65. The first step in any such analysis is to determine whether any error actually occurred *People v. Walker*, 232 Ill. 2d 113, 24-25 (2009). If an error is discovered, the defendant then bears the burden of persuasion to show that the error prejudiced him under either prong. *People v. McLaurin*, 235 Ill. 2d 478, 495 (2009). Keeping these principles in mind, we review defendant's claim.

The admissibility of evidence falls within the sound discretion of the trial court and, accordingly, such an evidentiary ruling will not be reversed absent an abuse of that discretion. *People v. Caffey*, 205 Ill. 2d 52, 89 (2001); *People v. Hatchett*, 397 Ill. App. 3d 495, 506 (2009). An out-of-court statement that is offered to prove the truth of the matter asserted is hearsay, and is generally inadmissible unless it falls within a specific exception to the hearsay rule. *People v. Banks*, 237 Ill. 2d 154, 180 (2010); *People v. Mims*, 403 Ill. App. 3d 884, 897 (2010). One exception to the hearsay rule permits the use of prior inconsistent statements of a testifying witness. *People v. McCarter*, 385 Ill. App. 3d 919, 930 (2008). This exception is set forth in section 115-10.1 of the Criminal Code, which provides:

“In all criminal cases, evidence of a statement made by a witness is not made inadmissible by the hearsay rule if:

(a) the statement is inconsistent with his testimony at the hearing or trial,  
and

(b) the witness is subject to cross-examination concerning the statement,

and

(c) the statement-

(1) was made under oath at a trial, hearing or other proceeding, or

(2) narrates, describes, or explains an event or condition of which the

witness had personal knowledge, and

(A) the statement is proved to have been written or signed by the witness, or

(B) the witness acknowledged under oath the making of the statement either in his testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought, or at a trial, hearing or other proceeding \*\*\*.” 725 ILCS 5/115-10.1 (West 2006).

Even if a statement does not meet the requirements set forth in section 115-10.1 of the Criminal Code, it may nonetheless be used for impeachment purposes. 725 ILCS 115-10.1 (“Nothing in this Section shall render a prior inconsistent statement inadmissible for purposes of impeachment because such statement was not recorded or otherwise fails to meet the criteria set forth herein”); *People v. McCarter*, 385 Ill. App. 3d 919, 932 (2008); *People v. Crowe*, 327 Ill. App. 3d 930, 937-38 (2002).

Ultimately, before a witness’ prior inconsistent statement can be admitted into evidence, counsel must lay a proper foundation in order to avoid unfairly surprising the witness and to

permit the witness to explain the prior inconsistency. *People v. Cobb*, 97 Ill. 2d 465, 479 (1983); *People v. McDonald*, 276 Ill. App. 3d 466, 475 (1995). To lay a proper foundation, counsel must direct the witness to the time, place and circumstances under which the prior statement was made as well as the substance of the statement. *Cobb*, 97 Ill. 2d at 479; *People v. Robinson*, 368 Ill. App. 3d 963, 982 (2006). Although the witness must be confronted with the substance of her statement, counsel need not question the witness about each component of the prior statement to satisfy the foundational requirements to admit a prior inconsistent statement. *People v. Dixon*, 28 Ill. 2d 122, 124 (1963); *Robinson*, 368 Ill. App. 3d at 982. As long as counsel's questions sufficiently protect the witness against unfair surprise and provides her with an opportunity to explain the prior statement, counsel " 'substantially satisf[ies] the reasons for the rule requiring a foundation' " and the statement should be admitted. *Cobb*, 97 Ill. 2d at 480, quoting *People v. Henry*, 47 Ill. 2d 312, 322 (1970).

Here, the evidence defendant wanted to admit as substantive evidence consisted of a letter and an affidavit which were completed by Thomas. In these documents, Thomas provided a number of statements and accusations, most notably identifying defendant's other girlfriend as the one who caused her injuries. In her letter addressed to Judge Fleming, Thomas stated that on the evening of the attack, "some darkskin [*sic*] female" arrived at her apartment looking for defendant. She and the woman started to argue and defendant tried to intervene but then "allowed this woman to \*\*\* stab me and throw a mirror cutting my face[,] lip and arm." Thomas stated that she told the police that defendant caused those injuries "out of anger." She further revealed that she tried to rectify the situation and "tried to talk too [*sic*] the State lady two times

to tell what happen [sic] why [she] have [sic] didn't want to press any charges" but "the lady told [her] [she] can go to jail" for lying.

Thomas provided similar information in her sworn affidavit, wherein she stated: "The person I got attacked by I believe is also [defendant's] girlfriend. [Defendant] tried to break us up also hitting me in the face a couple of times. After being injured by this woman I felt like someone has [sic] to pay for this. The next day [defendant] refused to give me her name and address for the police. I was very hurt and frustrated. I accused him."

Thomas was first confronted with the letter and affidavit on direct examination. Thomas acknowledged that she stated in both the letter and the affidavit that defendant was not the one who stabbed her and indicated that these accounts were not true. Thereafter, on cross-examination, in response to defense counsel's questioning, Thomas again acknowledged that she denied that defendant was the person who stabbed her in the letter she wrote to Judge Fleming and in her sworn affidavit. Although Thomas identified defendant's other girlfriend as the attacker in those documents, the record reveals that defense counsel never confronted Thomas with that specific statement. Indeed, defendant's other girlfriend was never discussed at any time during the trial.

Defendant acknowledges that counsel did not confront Thomas with each detail contained in the letter and affidavit, but argues that counsel nonetheless substantially satisfied the foundational requirements. We agree. Thomas was alerted to the time, place, and circumstances pursuant to which she wrote the letter and affidavit. She was also alerted to the substance contained in those documents, namely that she denied that defendant was the individual who

attacked her. *Cf. People v. Galindo*, 95 Ill. App. 3d 927, 934 (1981) (counsel failed to lay a proper foundation for a prior inconsistent statement when he merely asked the witness if, at any time, the witness provided a statement to police and did not engage in any inquiry as to the content of the statement). Because Thomas testified that the accounts of her attack contained in both the letter and affidavit were untrue, it was not necessary for counsel to specifically inquire as to each of the specific details contained therein. See *McDonald*, 276 Ill. App. 3d at 477 (counsel did not need to engage in an inquiry as to each of the details contained in the prior inconsistent statement when witness admitted all the information contained therein was untrue). The record thus shows that the purpose of the foundational requirements were satisfied so as to eliminate the element of unfair surprise to Thomas. Moreover, Thomas was given an opportunity to explain the inconsistency between her trial testimony and prior statements, and did so by explaining that she felt remorse that defendant had been arrested for the attack because she still loved him. Accordingly, we find that the trial court erred in finding that defendant failed to properly lay the foundation to admit Thomas' affidavit and letters as substantive evidence. Having found that the trial court erred, we must now determine whether the error constitutes plain error.

As a general rule, the trial court's failure to admit substantive evidence does not necessarily mandate reversal of a defendant's conviction. See, e.g., *People v. Thomas*, 220 Ill. App. 3d 110, 121 (1991); *People v. Broadnax*, 177 Ill. App. 3d 818 (1988). Here, defendant contends that the trial court's error constituted plain error under both prongs. Specifically, he argues that the error constitutes plain error because the evidence was closely balanced as there

was no forensic evidence connecting him to the crime. With respect to the second prong, defendant argues that the court's refusal to admit Thomas' letter and affidavit as substantive evidence deprived him of his right to present a meaningful complete defense and present evidence of a third party's guilt.

Initially, we disagree that the evidence was closely balanced, such that the error threatened to tip the scales of justice against defendant. Thomas was not the only witness to identify defendant as her assailant. Jerry Paster also positively identified defendant as Thomas' assailant. Moreover, although Thomas subsequently provided a different version of the attack in her letter and affidavit, the information she provided on the day of, and the day following her attack was consistent with Paster's account as well as the account she provided at trial. Specifically, she informed responding paramedic Richard Jurek that defendant was the source of her injuries when she was receiving medical treatment shortly after the attack. In addition, Officer Moriarty testified that Thomas identified defendant as her assailant the day following the attack.

We also observe that Thomas' affidavit is not entirely exculpatory as it does not completely absolve defendant or eliminate him as the cause of at least some of her injuries. Indeed, while Thomas stated that she "got attacked" by defendant's other girlfriend, she stated that defendant "tried to break us up also hitting me in my face a couple of times." While defendant correctly observes that there was no direct forensic evidence linking defendant to the crime, we note that the State did present physical evidence establishing that Thomas' blood was recovered from the knife in addition to a male DNA blood profile. Given the evidence against

defendant, we therefore disagree that the substantive use of Thomas' letter and affidavit identifying a female, specifically, defendant's other girlfriend, as her assailant would have likely resulted in a different verdict. Moreover, we similarly disagree that the trial court's ruling deprived defendant of his right to present a defense and argue that a third party committed the attack on Thomas because the information contained in the documents was presented to the jury. Here, Thomas was impeached with her letter and affidavit and the relevant information contained in those documents, namely that she stated someone other than defendant attacked and stabbed her, was presented to the jury. Indeed, Thomas acknowledged during her direct and cross-examination that she had denied defendant's involvement in her attack in both documents. Accordingly, defendant was permitted to present his defense and argue that a third party committed the crime. See *Thomas*, 220 Ill. App. 3d at 121-22 (finding the trial court's failure to admit a police report as substantive evidence was harmless because the relevant information, contained therein, was brought before the jury). Accordingly, we do not find that the trial court's error constitutes plain error and requires reversal of defendant's conviction.

## II. Ineffective Assistance of Counsel

Defendant next asserts that he was deprived of his constitutional right to effective assistance of counsel when counsel failed to impeach Jerry Paster with a sworn affidavit he allegedly completed and signed, in which he indicated that someone other than defendant attacked Thomas.<sup>1</sup>

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<sup>1</sup> We also observe that defendant, as an alternative argument, also argued in his brief that counsel was ineffective for failing to lay a proper foundation to admit Thomas' documents

The State responds that defense counsel did not render ineffective assistance by failing to impeach Paster with the affidavit. The State contends that counsel provided competent representation and that defendant cannot satisfy the prongs of the *Strickland* test to establish that he was denied his constitutional right to effective assistance of counsel.

Every criminal defendant has a constitutional right to receive effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I § 8; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 2063, 80 L. Ed. 2d 674, 691-92 (1984). To prevail on a claim of ineffective assistance of trial counsel, the defendant must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984) and establish that: (1) counsel's performance fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced defendant. *People v. Albanese*, 104 Ill. 2d 504, 525 (1984); *People v. Baines*, 399 Ill. App. 3d 881, 887 (2010). With respect to the first prong, the defendant must overcome the "strong presumption" that counsel's action or inaction was the result of sound trial strategy. *People v. Jackson*, 205 Ill. 2d 257, 259 (2001); *People v. Shelton*, 401 Ill. App. 3d 564, 584 (2010). To satisfy the second prong, the defendant must establish that but for counsel's unprofessional errors, there is a reasonable probability that the trial court proceeding would have been different. *People v. Peebles*, 205 Ill. 2d 480, 513 (2002). A reasonable probability that the trial result would have differed is "a probability sufficient to substantively; however, because we have already found that counsel did lay a proper foundation to satisfy the admissibility requirements of section 115-10.1 of the Criminal Code, we need not consider this alternative argument on appeal.

undermine confidence in the outcome-or put another way, that counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair." *People v. Evans*, 209 Ill. 2d 194, 220 (2004). A defendant must satisfy both the performance and prejudice prongs of the *Strickland* test to prevail on an ineffective assistance of counsel claim. *Evans*, 209 Ill. 2d at 220; *People v. McCarter*, 385 Ill. App. 3d 919, 935 (2008).

As a general rule, decisions counsel makes regarding the cross-examination and impeachment of a witness are matters of trial strategy and will not support an ineffective assistance of counsel claim. *People v. Pecoraro*, 175 Ill. 2d 294, 326-27 (1992); *People v. Strickland*, 399 Ill. App. 3d 590, 605 (2010); *People v. Clay*, 379 Ill. App. 3d 470, 481 (2008). In evaluating whether counsel rendered ineffective assistance by failing to impeach a witness with a prior inconsistent statement, "[t]he value of the potential impeaching material must be placed in perspective." *People v. Jimerson*, 127 Ill. 2d 12, 33 (1989).

Here, the record contains an affidavit allegedly completed by Jerry Paster, which states:

"On the morning of Nov 22nd Alisha [*sic*] came from the hospital upset and afraid from being in a serious altercation with Marcus's other girlfriend. Alasha [*sic*] confided in me that she accused Marcus of her injuries, not knowing who his girlfriend was. We discussed what she had told the police so if anything else transpired that Marcus would be the one blamed."

At trial, counsel cross-examined Paster but did not ask him about the affidavit; rather, counsel questioned Thomas about Paster's affidavit and she indicated that in her efforts to help defendant, she requested Paster to complete the affidavit on defendant's behalf. During the trial,

outside of the presence of the jury, defendant raised the issue of Paster's affidavit with the court, stating that Paster's affidavit contradicted witness testimony but was "signed up under a false name." Thereafter, during closing arguments, counsel informed the jury that they could infer that the information contained in Paster's affidavit was similar to that which was contained in Thomas' affidavit.

Based on this evidence, we do not conclude that counsel's failure to impeach Paster with the affidavit constituted ineffective assistance. Thomas admitted that she convinced Paster to complete the affidavit containing false information because she loved defendant and wanted to help him. Moreover, defendant himself brought to the court's attention that there were potential issues with the validity of the signature on the affidavit. We reiterate that decisions of counsel regarding the cross-examination and impeachment of witnesses are generally immune from ineffective assistance of counsel claims (*Clay*, 379 Ill. App. 3d at 481) and find that counsel's decision not to impeach Paster with an affidavit of questionable evidentiary value was not unreasonable. Even if counsel's decision not to question Paster about the affidavit was unreasonable, we still nonetheless find that defendant's ineffective assistance of counsel argument fails because he cannot satisfy the prejudice prong of the *Strickland* test. Indeed, we are unable to conclude that but for counsel's failure to question Paster himself about the affidavit that the trial result would have differed. The jury heard evidence that both Thomas and Paster completed affidavits containing false information; however, based on the totality of the evidence presented before the jury, the jury returned with a verdict finding defendant guilty of aggravated domestic assault. Accordingly, we find that defendant did not receive ineffective representation

at trial.

### III. Sufficiency of the Evidence

Finally, defendant argues that the State failed to prove that he inflicted “great bodily” harm on Thomas, and therefore failed to prove him guilty of the offense aggravated domestic battery beyond a reasonable doubt. Specifically, defendant contends the State simply established that Thomas’ injuries consisted of eye swelling, a laceration above her eye that required stitches and a laceration to her shoulder. While Thomas’ injuries constitute bodily harm, defendant argues that they were not severe enough to constitute great bodily harm. Accordingly, defendant maintains his aggravated domestic battery conviction must be vacated and the cause remanded for re-sentencing on simple domestic battery.

The State responds that it established that defendant repeatedly punched Thomas in the face, stabbed her in the arm, and broke a mirror over her head. The State maintains that these injuries are consistent with great bodily harm and that a reasonable jury could have found defendant guilty of aggravated domestic battery, predicated on great bodily harm, beyond a reasonable doubt.

Due process requires proof beyond a reasonable doubt to convict a criminal defendant. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). In reviewing a challenge to the sufficiency of the evidence, it is not the reviewing court’s role to retry the defendant; rather, it must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found each of the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560, 573 (1979);

*People v. Ward*, 215 Ill. 2d 317, 322 (2005); *People v. Hayashi*, 386 Ill. App. 3d 113, 122 (2008).

Ultimately, it is the State's burden to prove each element of the charged offense beyond a reasonable doubt. *People v. Nowicki*, 385 Ill. App. 3d 53, 90 (2008). Here, defendant was charged with, and convicted of, aggravated domestic battery predicated on great bodily harm. 720 ILCS 5/12-3.3 (a) (West 2008) ("A person who, in committing a domestic battery, intentionally or knowingly causes great bodily harm \*\*\* commits aggravated domestic battery"). Accordingly, one of the elements the State was required to prove was that defendant inflicted "great bodily harm" on Thomas. 720 ILCS 5/12-3.3(a) (West 2008). Courts have repeatedly recognized that the term "great bodily harm" is not susceptible to a precise definition but agree that it requires an injury greater than one inflicted during an ordinary battery. *In re J.A.*, 336 Ill. App. 3d 814, 815-16 (2003); *People v. Figures*, 216 Ill. App. 3d 398, 401 (1991). With respect to the term "bodily harm" as it pertains to a simple battery, our Supreme Court has stated: "Although it may be difficult to pinpoint exactly what constitutes bodily harm for the purposes of the statute, some sort of physical pain or damage to the body, like lacerations, bruises or abrasions, whether temporary or permanent, is required." *People v. Mays*, 91 Ill. 2d 251, 256 (1982). Accordingly, " '[b]ecause great bodily harm requires an injury of a graver and more serious character than an ordinary battery, simple logic dictates that the injury must be more severe than that set out in the *Mays* definition. The word 'great' must be given effect in construing the aggravated battery statute; statutes should be interpreted so that no word or phrase is rendered superfluous or meaningless.' " *In re J.A.*, 336 Ill. App. 3d at 816, quoting *Figures*,

216 Ill. App. 3d at 401. Whether the victim's injuries rise to the level of great bodily harm is "neither dependent upon hospitalization of the victim, nor the permanency of his disability or disfigurement." *People v. Jordan*, 102 Ill. App. 3d 398, 401 (1991). Ultimately, whether the defendant inflicted great bodily harm upon the victim is a question for the trier of fact (*People v. Crespo*, 203 Ill. 2d 335, 344 (2001); *In re J.A.*, 336 Ill. App. 3d at 816) and depends upon the evidence presented at trial (*See generally People v. Psichalinos*, 229 Ill. App. 3d 1058, 1069 (1992) (finding sufficient evidence of great bodily harm where the defendant punched the victim in the nose twice, breaking the victim's nose and bruising the victim's face); *People v. Matthews*, 126 Ill. App. 3d 710, 715 (1984) (finding sufficient evidence of great bodily harm where the defendant struck the victim in the head with a baseball bat three times even though the victim did not require medical attention and characterized her injury as "only" a bruise).

Here, the evidence presented at trial established that defendant punched Thomas repeatedly all over her body, stabbed her with a serrated steak knife and smashed a mirror over her head. As a result, Thomas suffered a laceration above her left eye, a swollen left eye, and a stab wound to her left shoulder. Rita Sharrard, the nurse who helped to treat Thomas indicated that the laceration above Thomas' left eye was approximately 3-inches in length. Officer Gerardo Mandrigal and paramedic Richard Jurek observed Thomas shortly after the attack and noted that she was covered in blood. The medical treatment Thomas received included stitches above her eye and tape to her shoulder. Jerry Paster indicated that when Thomas returned to the hospital, she "looked like a mummy" because she was "all taped up and wrapped up." Although the element of great bodily harm is not susceptible to a precise definition, we conclude that based

on the evidence presented at trial, a rational trier of fact could have found that defendant inflicted great bodily harm on Thomas.

In so finding, we are unpersuaded by defendant's reliance on our previous decisions in *In re T.G.*, 285 Ill. App. 3d 818 (1996) and *In re J.A.*, 376 Ill. App. 3d 814 (2003), in which we found that there was insufficient evidence that the defendants inflicted great bodily harm on their stabbing victims. In *In re T.G.*, the victim was stabbed three times, and testified that he felt the first stab, comparing it to "like being poked with a pen or pencil." *In re T.G.*, 285 Ill. App. 3d at 846. Because the record failed to contain any evidence concerning whether the victim felt the other two stabs or any evidence regarding the extent or nature of his injuries, we found that the element of great bodily harm was not proven beyond a reasonable doubt and reversed the defendant's conviction for aggravated battery predicated on great bodily harm. *Id.* Similarly, in *In re J.A.*, the victim, who was stabbed once, described the injury as a "pinch." *In re J.A.*, 376 Ill. App. 3d at 818. The record did not contain any evidence as to whether the victim bled or any other evidence concerning the size, depth or length of the wound. *Id.* Accordingly, we reversed the defendant's conviction for aggravated battery predicated on great bodily harm, reasoning that "[p]roof of great bodily harm \*\*\* requires more than evidence of a single stab wound of indeterminate size, which felt like a pinch and for which an indeterminate number of stitches were advised by someone unnamed." *Id.* at 818-19. Unlike those prior cases, the record in this case contains evidence of the injuries defendant inflicted upon Thomas as well as the medical treatment that she received. Accordingly, we conclude that the State presented sufficient evidence that defendant inflicted great bodily harm on Thomas and affirm his conviction for

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aggravated domestic battery.

#### CONCLUSION

For the reasons contained herein, we affirm the judgment of the trial court.

Affirmed.