2018 IL App (3d) 150323-U

Order filed June 6, 2018
Modified Upon Denial of Rehearing September 5, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-15-0323
v.	)	Circuit No. 14-CF-610
	)	
DAVETT FISHER,	)	The Honorable John P. Vespa,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Presiding Justice Carter concurred in the judgment.
Justice Holdridge dissented.

ORDER

¶ 1 *Held*: The trial court's decision to remove defendant's son from the courtroom during a portion of the closing argument, and during the return of the jury's verdict, did not violate defendant's right to a public trial. The trial judge's denial of defendant's proposed jury instruction was not an abuse of discretion. The prosecutor's comments during closing arguments did not deprive defendant of a fair trial. Finally, the trial court properly considered the degree of great bodily harm the defendant personally inflicted upon the victim.

¶ 2 The State charged Davett Fisher (defendant) with aggravated domestic battery. After a jury trial, defendant was convicted of the offense and was sentenced to six years' imprisonment. Defendant appeals. We affirm.

¶ 3 FACTS

¶ 4 On August 18, 2014, defendant was arrested in the early morning hours at 1205 N.E. Glendale Avenue, for aggravated domestic battery that occurred on August 17, 2014, in violation of section 12-3.3(a) of the Criminal Code of 2012 (Code) (720 ILCS 5/12-3.3(a) (West 2014)). The information stated, in relevant part, that defendant:

> "In committing a battery to Crystal Savage, a family or household member of the defendant, knowingly caused great bodily harm to Crystal Savage by striking her on the face."

During pretrial proceedings, defendant waived counsel and elected to proceed *pro se.*

¶ 5 The jury trial took place on March 2, 2015, and March 3, 2015. Crystal Savage (the victim), reported that defendant beat her and fractured her jaw on August 17, 2014. During the late evening of August 16th into the early morning hours of August 17th, the victim, defendant, their fifteen-month-old daughter, and defendant's young son, Fisher Jr., were in the home. After defendant fell asleep while watching television, the victim began looking through defendant's cell phone. Defendant woke up and asked the victim what she was doing. The victim told defendant she was looking at the messages on his phone. Defendant followed the victim to the upstairs bedroom where he talked about "male friends" the victim had while defendant was in prison. The victim testified, "And then out of nowhere [defendant] just hits me, punches me in the face." The victim told defendant to leave. Defendant went downstairs and gathered his belongings, but did not leave. Defendant "was just there wasting time" and "pacing."

¶ 6 Suddenly, defendant pushed the victim into the bathroom and repeatedly struck her "everywhere." Defendant punched and choked the victim. The victim testified that she scratched defendant's face while he was choking her.

¶ 7 The victim screamed for defendant to stop and crouched down by the bathtub. While the victim was crouched down by the bathtub and covering her face, defendant started stomping on her body with his shoe. At some point, defendant kicked the victim's face and caused her to momentarily lose consciousness. Defendant kept leaving then returning to the bathroom and making physical contact with the victim. However, according to the victim, when their daughter began to cry, defendant left the bathroom and the victim snuck out of the bathroom. The victim ran out of the house to her neighbor's house for help, but no one answered the door. When the victim returned to her home, defendant was no longer present in the house and the victim blacked out. The victim woke up the next morning, went to another neighbor's house, and called the police.

¶ 8 After the police arrived at the neighbor's house and interviewed the victim, a neighbor transported the victim to the emergency room at Saint Francis Hospital. The victim was diagnosed with a right jaw fracture and remained in the hospital for the next three days. During her hospitalization, the victim had jaw surgery where the surgeon put two permanent metal plates in her jaw to hold her jaw together. The victim had her jaw wired shut for four weeks and was limited to a liquid diet. The victim had a second surgery to have the wires removed from her mouth.

¶ 9 On cross-examination, the victim acknowledged that during a prior hearing, she testified that she placed a knife under her pillow after returning from the first neighbor's home because the victim feared defendant might return that night. The victim admitted she telephoned

defendant from the hospital and asked defendant to come to pick up their daughter and return her cell phone. The victim did not feel threatened by defendant at the hospital because she knew defendant could not hurt her there.

¶ 10 Next, the State called defendant's son, Fisher Jr., who was ten years old and in the fifth grade at the time of the trial. The trial judge stated that he was concerned about having a ten-year-old "go through something like this, the experience of testifying in a courtroom when dad is on trial." Defendant stated he did not object to the child testifying and in fact, defendant wanted his son to testify.

¶ 11 The parties agreed to special arrangements to make the child more comfortable testifying in the courtroom. For example, the parties stayed seated during the questioning, with his birth mother, Ebony Smith, and the judge seated on either side of the child's chair. The court cautioned the parties regarding his concerns about the child's well being.

> "I'm sure it goes without saying, but I think I would be remiss if I did not say it, if you want to anger a judge, be mean to a ten-year-old in front of that judge. That's how you anger me. It's one of the best ways. I'm guessing a father is not going to do it and I'm guessing prosecutor Larson is not going to do it. But in addition to me disapproving, guess what, there are 13 other people that don't like watching a ten-year old get, I don't know, verbally abused. I cannot imagine either one of you doing that, but I think it is something that needs to be said though."

¶ 12 Fisher Jr. testified that on August 17, 2014, he was at the victim's house with his father, sitting in the living room on the couch. According to the child's testimony, his father and the victim went upstairs. Fisher Jr. heard defendant hitting the victim while they were upstairs and stated that he "heard the smacks." When the couple came downstairs and started arguing his

father put the victim in the bathroom and said he was going to "whoop her" again. Then, defendant went into the bathroom and started hitting the victim again. The child heard the victim screaming, and heard his father knocking stuff down, but did not see the victim hit defendant.

¶ 13 Fisher Jr. left in the car with his father. Fisher Jr. could not remember what time it was when they left, but it was early in the morning and still dark outside.

¶ 14 Officer Matt Legaspi, patrolman for the city of Peoria, testified that he was dispatched to 1205 N.E. Glendale in Peoria on August 17, 2014, at about 7:30 a.m. where he spoke to the victim. Officer Legaspi saw contusions, swelling, redness, and marks on the victim's face and photographed these injuries. Officer Legaspi testified as follows:

> "She basically said that her boyfriend, [defendant] had been released from prison earlier in the year and he was staying with her at that address. Last night or that last night from when she was talking to me, somewhere around 11:30, she said that they got into an argument upstairs in a bedroom at which time the argument was over [defendant] being upset with her sleeping with other men while he was in prison. That's what the argument was about. The argument turned violent with him attacking her up in the bedroom. She said she was hit by him in the face probably about 20 times.
>
> And then she tried to leave. He wouldn't let her leave. She wanted to call the police, tried to use her cell phone. He took that away from her.
>
> So for the next several hours into the early morning hours she said that she tried to leave, wouldn't let him leave and wanted her phone and he wouldn't give her the phone.

> At some point around 3:30 she said that he forced her into the bathroom, pushed her down in the bathtub, choked her, and then began stomping on her, on her head. And she believed she went out unconscious at that time.
>
> She said she woke around 7:00 in the morning, went to the neighbors to call and have them call police and that's when we got the call."

Officer Legaspi later received a call from the hospital and learned the victim was being admitted and was receiving treatment for a broken jaw.

¶ 15 Officer Caleb Cunningham, a police officer with the city of Peoria, interviewed defendant after placing him under arrest. Defendant told Cunningham that he did not like the fact that the victim had been smoking weed and having other men at the house. Defendant stated that he went upstairs to the bathroom to flush the victim's weed down the toilet and the victim punched and scratched defendant. Defendant admitted that he pushed the victim off of him but denied hitting the victim or taking her cell phone.

¶ 16 Dr. Francis McBee Orzulak testified that he treated the victim's fractured jaw at OSF Saint Francis Hospital in Peoria. The doctor explained the victim's jaw fracture was in an atypical location that requires more force to fracture the bone and in the doctor's opinion, only significant trauma would cause the victim's jaw fracture. A dental surgeon performed an operation on the victim which required opening up and exposing the victim's jaw, realigning it, and putting a metal plate in to keep it in alignment. The dental surgeon then had to wire the victim's jaw shut to immobilize the jaw. The victim left the hospital with her jaw wired shut and she was put on a liquid diet.

¶ 17 Defendant testified that on the night in question, he returned home and watched television with his son and the victim. He fell asleep in the upstairs bedroom and woke up due to "a

forceful thump" on his chest. He saw the victim standing there with a knife in her hand and asking him, "who are these B's in this phone that you talking to?" Defendant testified that he grabbed the victim's wrists "in self-defense," and that defendant struck the victim in self-defense. Defendant testified that he swung at the victim three or four times before successfully getting the knife away from the victim and went downstairs. Defendant testified that the victim was never unconscious.

¶ 18 Defendant grabbed his work clothes and asked his son, who was sitting on the couch, to take some things to the car. When the victim came downstairs, defendant told her that he did not want her around him and asked her to go into the bathroom. Defendant testified that there was no further physical confrontation between defendant and the victim. Defendant testified that the victim later called him from the hospital and asked defendant to come to the hospital. Defendant stayed at the hospital for an hour and then left with their daughter. The victim gave defendant a kiss when he left.

¶ 19 On cross-examination, defendant testified that the victim came at him with a knife requiring him to act in self-defense. The following exchange between the prosecutor and defendant occurred:

> "Q. And you heard the testimony of your son and [the victim] that there was no knife present. You are disagreeing with that?
>
> A. She testified that she had [a] knife.
>
> Q. No. She testified she had a knife after you left the house, after this entire incident. I'm asking you do you disagree with the testimony of both your son and [the victim] that there was no knife present when this incident occurred?
>
> A. My son never testified about a knife.

Q. Okay. You don't recall that testimony?

A. He was never questioned about a knife.

Q. Okay. Well, if you don't recall it, that's fine.

How -- are you saying then that Ms. Savage broke her own jaw?

A. No."

¶ 20 During cross-examination, defendant stated, "I didn't want to hit her. I just-- I was so scared at the time. My adrenaline is pumping. I'm scared." Defendant denied he attacked the victim in the downstairs bathroom and testified the victim's jaw was fractured in the bedroom.

¶ 21 During the jury instructions conference, defendant requested that the court instruct the jury based on Illinois Pattern Jury Instructions (IPI No. 5.01B "Knowledge-Willfulness") based on his contention that the State did not prove he knowingly fractured the victim's jaw. In response, the prosecutor argued the definition of "knowledge" was within the jury's common understanding, and IPI No. 5.01B should not be given prior to a question from the jury regarding knowledge. The court stated, "I will not be allowing 5.01B to be given" because "it will only serve to confuse the jury."

¶ 22 In addition, defendant requested the trial court to provide instructions pertaining to the uncharged offense of reckless conduct over the State's objection. The court refused defendant's request to instruct the jury on the offense of reckless conduct after finding reckless conduct was not a lesser included offense to the offense of aggravated domestic battery.

¶ 23 During the State's initial closing argument, the prosecutor stated:

"As you will recall, the defendant's son, Davett Jr. got -- testified today and yesterday, and what he said was, I saw my dad follow Crystal Savage up the stairs. I heard smacks. I heard her screaming. They-- then they came downstairs

where they went into the bathroom. I didn't see a knife and I never saw her strike him. That's what the defendant's son said."

The prosecutor continued:

"The ten-year-old boy, Davett Fisher Jr., that came in here and testified before you is not Crystal Savage's son. It's just [defendant's] son. But he came in, he told the truth, he testified honestly in an incredibly, frankly, difficult situation that must have been very uncomfortable for him, but he told you the truth."

¶ 24 After the State's initial closing argument, outside of the presence of the jury, the court commented:

"I just noted that the ten-year old, Davett Fisher is here in the courtroom. I do not want that to be the case. I don't want him hearing things. And God bless him for the great job he did yesterday and today. Man, you were fantastic, very good. You did Franklin proud. Say that for a third time. I would rather not have him here to see how it is going to go with his dad. Would you mind taking him out in this hall or wherever?"

The record reveals the minor left the courtroom without an objection from either side.

¶ 25 During defendant's closing argument, he emphasized the victim's testimony was inconsistent and suggested the victim and the biological mother of his son joined together to influence the child's recollection and testimony. Defendant admitted that he and the victim "had an altercation" but denied he knowingly fractured the victim's jaw. Defendant argued, "I seen what she had in her hand. Yes, I tried to defend myself. Nothing more."

¶ 26 Defendant asked the jury to recall that when his son testified, the child did not want to say that he saw the victim outside the home or confirm whether the confrontation took place during the day or night.

¶ 27 In the State's rebuttal closing argument, the prosecutor addressed defendant's position that he did not knowingly cause great bodily harm by stating:

> "For you to define -- for you to find the defendant guilty, he doesn't have to know that she will suffer a fracture to her jaw for you to find him guilty. What he has to know is that when he's going to move his fists, he is going to hit her. Whatever injury that results from that is what it is. That's not what we have to establish for you to find him guilty. That's not what knowingly means. What it means is he's -- knows that he is going to strike her. He strikes her. Whatever injury follows from that, we don't have to show he knew when he hit her he was going to fracture her jaw. That's not what it means."

The prosecutor also rebutted defendant's commentary of his son's testimony as follows:

> "And, finally, if I understood the defendant correctly, it sounded to me like he was accusing his ten-year-old son of coming in here and not telling the complete truth. That's what it sounded like. Ladies and gentlemen, he came in here and did something that is incredibly difficult for a child to do and he told you honestly what happened because that's exactly what happened."

¶ 28 The court read the jury instructions and the jury retired to begin deliberations. After the jury left the courtroom, the court cautioned both sides to be civil to each other while the jury decided the case. The court stated, "I don't want you getting into any trouble with each other or anybody else." In addition, the court explained that if the court pressed a button near his left

hand, deputies would swarm in to maintain decorum in the courtroom. After this discussion, the court stated that he did not want Fisher Jr. present in the courtroom for the verdict.

¶ 29 During deliberations, the jury requested to view the transcript of Fisher Jr.'s testimony because some jurors could not hear some of the child's answers. The trial court granted the jury's request. The court delivered two copies of the transcript of Fisher Jr's testimony to the foreperson of the jury at 3:27 p.m. on March 3, 2015. At 3:41 p.m. that day, the jury reached a verdict. Before the jury returned to the courtroom, the court observed that a crowd was present in the courtroom for the verdict. The court instructed the spectators to refrain from making outbursts, cheering, cursing, and other similar conduct. Once again, after the jury returned to the courtroom, the court announced, "So there will be no response from anyone in the courtroom when the verdict is read. Violating this order will subject you to a contempt of court finding."

¶ 30 The trial court read the verdict. The jury found defendant guilty of aggravated domestic battery.

¶ 31 Defendant filed a *pro se* motion for a new trial, arguing, among other things, the evidence was insufficient to prove the defendant's guilt beyond a reasonable doubt. The prosecutor misstated the law during closing arguments and the court erred by refusing several jury instructions tendered by the defense. The trial court denied defendant's *pro se* motion for a new trial.

¶ 32 At a sentencing hearing on May 1, 2015, the State argued that defendant should receive a sentence at or near the maximum sentence for a class 2 felony, which is seven years. The prosecutor argued:

"The victim here had two surgeries. She had a broken jaw. She will have a plate in her jaw for the rest of her life. We are talking about a significant incident and a significant injury here."

At the sentencing hearing, the trial court made the following findings:

"In aggravation, the defendant's conduct caused or threatened serious harm. The defendant has a history of prior delinquency or criminal activity. The sentence I'll be giving is necessary to deter others from committing the same crime. That's it for statutory factors in aggravation.

In mitigation, they are -- None. I further find that a sentence of probation or conditional discharge would deprecate the seriousness of the offender's conduct and would be inconsistent with the ends of justice."

The court sentenced defendant to six years' imprisonment in the Illinois Department of Corrections.

¶ 33 ANALYSIS

¶ 34 We first address whether defendant was denied the right to a public trial. The right to a public trial protects all phases of the trial, not just the right to publicly present evidence and witnesses. *People v. Cooper*, 365 Ill. App. 3d 278, 282 (2006). However, the right to a public trial is not absolute. *Cooper*, 365 Ill. App. 3d at 281. There are some circumstances when closure or partial closure is essential when narrowly tailored by the trial court. *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 501, 510 (1984).

¶ 35 The State correctly identifies that an abuse of discretion standard applies when a reviewing court considers whether a trial judge's decision to exclude certain spectators from the courtroom was appropriate. See *Cooper*, 365 Ill. App. 3d at 282. A trial court abuses its

discretion only where its rulings are "arbitrary, fanciful or unreasonable" or "where no reasonable man would take the view adopted by the trial court." *People v. Anderson*, 367 Ill. App. 3d 653, 664 (2006). We also reiterate the "timeless adage that the trial judge is in charge of his or her courtroom and any decision regarding courtroom procedures." *People v. Johnson*, 356 Ill. App. 3d 208, 210 (2005).

¶ 36 Here, the trial court did not close any portion of the evidentiary phase of the jury trial to members of the general public or the press. After Fisher Jr.'s testimony and before closing arguments, the court observed that defendant's ten-year-old son might benefit from moving into the hallway. Later before the verdict was rendered, the court stated Fisher Jr. should not be present in the courtroom for the verdict. We agree these decisions resulted in a "partial closure" of the trial proceedings. See *Cooper*, 365 Ill. App. 3d at 282. The question of whether a partial closure resulted from an abuse of judicial discretion requires a fact-intensive inquiry based on the totality of the circumstances. *People v. Evans*, 2016 IL App (1st) 142190, ¶ 9.

¶ 37 As an initial matter, defendant failed to object to the exclusion of Fisher Jr. from the courtroom before closing arguments and when the court announced the jury verdict. In addition, defendant's motion for a new trial did not include a challenge to these decisions. Hence, we consider whether plain error applies. Existing precedent recognizes that a violation of the right to a public trial should be viewed as structural error. See *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907-08 (2017).

¶ 38 The United States Supreme Court has recognized that safeguarding "the physical and psychological well-being of a minor" is a compelling interest that may justify closure of a courtroom in certain circumstances, as to be determined on a case-by-case basis. See *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 607-09 (1982). In this case,

Fisher Jr. was the only eyewitness to an incident of purported domestic violence. Consequently, there was a substantial likelihood that defendant would have to discredit his son's credibility during defendant's *pro se* closing argument.

¶ 39 Once the court noticed the child was seated in the courtroom during closing arguments, the court waited for a logical point to momentarily excuse the jury. After excusing the jury, the judge tactfully brought the minor's presence to the attention of both sides by stating:

> "I just noted that the ten-year old, Davett Fisher is here in the courtroom. I do not want that to be the case. I don't want him hearing things. And God bless him for the great job he did yesterday and today. Man, you were fantastic, very good. You did Franklin proud. Say that for a third time. I would rather not have him here to see how it is going to go with his dad. Would you mind taking him out in this hall or wherever?"

¶ 40 The court asked the child's chaperone if he or she "would mind" taking the child into the hallway or some other place. Defendant did not object when his ten-year-old son left the courtroom or when the trial court announced the court did not want the child in the courtroom for the verdict.

¶ 41 In hindsight, father did question the accuracy of his son's recollection during closing arguments. The State's closing argument also articulated that defendant would like the jury to conclude his son was not a credible witness. Further, it is clear from the record that the court was concerned that emotions were high for those supporting each side of the domestic violence charges. Obviously, some of the parties present were not strangers to each other. In fact, the court cautioned the spectators from causing a disturbance while waiting for the jury verdict. The court repeated the instruction for the "crowd" of spectators to remain silent and civil when the verdict was announced.

¶ 42 We point out that the child was present for the State's closing argument and left the courtroom thereafter. We conclude that the alleged partial closure of the courtroom was no broader than necessary to minimize the emotional impact that closing arguments and/or an adverse verdict could have on the child. Neither parent contested the trial court's reasoning as stated by the court. Defendant's failure to object when the child stepped into the hallway for defendant's closing argument, the State's rebuttal argument, and the announcement of the verdict, suggest the trial court's approach was well received by both sides. In addition, there were no other reasonable alternatives or special conditions that the court could have imposed to protect the minor child from hearing emotionally harmful commentary during his father's *pro se* closing argument, the State's rebuttal argument, or as the crowd reacted to the jury verdict. For these reasons, we conclude that defendant's constitutional right to a public trial was not violated. Here, the trial court's observation that the child might benefit from waiting in the hallway during closing arguments and the return of the verdict was limited in scope. The court did not exclude any other member of the public or press from any phase of this jury trial. We conclude the court's precautionary measures to protect the child from disturbing remarks of others, was rationally related to the tender age of the eyewitness, and did not constitute an abuse of discretion.

¶ 43 Next, defendant claims that the trial court erroneously refused to instruct the jury on the lesser included offense of reckless conduct. In this case, defendant's affirmative defense of self-defense was based on defendant's admission that he deliberately struck the victim when acting in self-defense. Self-defense presupposes the knowing and intentional use of force in defense of one's person. See *People v. Chatman*, 381 Ill. App. 3d 890, 897-98 (2008); see also *People v. DeMumbree*, 98 Ill. App. 3d 22, 25 (1981). Reckless conduct requires a different mental state.

The record in this case does not include direct or circumstantial evidence that defendant inflicted harm recklessly. Thus, we conclude that the trial court did not abuse its discretion in determining that there was insufficient evidence to warrant an instruction on reckless conduct.

¶ 44 Next, defendant claims the prosecutor misstated the law during the State's rebuttal closing argument. It is well settled that in order to preserve a claim that a prosecutor made improper statements during closing arguments, a defendant must object to the offending statements both at trial and in a written posttrial motion. *People v. Wheeler,* 226 Ill. 2d 92, 122 (2007); *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). In this case, defendant failed to raise an objection to the State's comments during closing argument. Yet, the doctrine of forfeiture is a limitation on the parties, not the reviewing court. *Jackson v. Board of Election Commissioners of City of Chicago,* 2012 IL 111928, ¶ 33. Consequently, we elect to review the propriety of the State's rebuttal argument.

¶ 45 The elements of aggravated domestic battery contained in section 12-3.3(a) of the Code (720 ILCS 5/12-3.3(a) (West 2014)), state:

> "(a) A person who, in committing a domestic battery, knowingly causes great bodily harm, or permanent disability or disfigurement commits aggravated domestic battery."

The case law provides that "knowingly" for purposes of aggravated battery means that a defendant must be consciously aware that his conduct is practically certain to result in great bodily harm. See *People v. Willett*, 2015 IL App (4th) 130702, ¶ 51.

¶ 46 Here, in defendant's closing argument, defendant told the jury that he did not know that the consequences of his actions would be practically certain to cause the victim's jaw to be fractured. In response to defendant's remarks, the State argued as follows:

> "[F]or you to define – for you to find the defendant guilty, he doesn't have to know that she will suffer a fracture to her jaw for you to find him guilty. What he has to know is that when he's going to move his fists, he is going to hit her. Whatever injury that results from that is what it is. That's not what we have to establish for you to find him guilty. That's not what knowingly means. What it means is he's – knows that he is going to strike her. He strikes her. Whatever injury follows from that, we don't have to show he knew when he hit her he was going to fracture her jaw. That's not what it means."

¶ 47 We conclude that the prosecutor's comments during the State's rebuttal, when placed in the proper context and in light of defendant's closing arguments, did not misstate the law. Knowledge does not require this defendant knew the victim's jaw would shatter but instead required the State to show that the number and nature of the physical blows defendant delivered to the victim's body created a strong probability of some type of great bodily harm to the victim. Therefore, we reject defendant's argument that the prosecutor misstated the law regarding defendant's state of mind.

¶ 48 Additionally, defendant argues that the trial court abused its discretion by refusing his request to provide the jury with IPI No. 5.01B "Knowledge-Willfulness." Generally, a jury need not be instructed on the term "knowingly" because the term has a plain meaning within the jury's common knowledge. *People v. Sanders*, 368 Ill. App. 3d 533, 537 (2006). However, a trial court may instruct the jury where further clarification is requested, when the original instructions are insufficient, or when the jurors are manifestly confused. *Id*. We review a trial court's decision to give or refuse a particular jury instruction for an abuse of discretion. *People v. Dorn*, 378 Ill. App. 3d 693, 698 (2008).

¶ 49 Importantly, the committee comments to the IPI Criminal 4th No. 5.01 state: "The Committee takes no position as to whether this definition should be routinely given in the absence of a specific jury request." Illinois Pattern Jury Instructions, Criminal, No. 5.01B (approved Oct. 28, 2016). In this case, the jury did not request any clarification regarding the meaning of the term "knowingly" or show any sign of confusion. Thus, the trial court did not abuse its discretion by declining to instruct the jury on the definition of knowledge.

¶ 50 In addition, defendant claims he was denied a fair trial on the ground that the prosecutor misstated Fisher Jr.'s testimony about a knife. Again, defendant did not preserve this argument for our review, but contends that we should review the issue for plain error. In order to evaluate whether plain error applies, we must first determine whether any error is present in this record. See *People v. Thompson,* 238 Ill. 2d 598, 613 (2010).

¶ 51 Here, the prosecutor's closing arguments were based on reasonable inferences drawn from Fisher Jr.'s testimony. Moreover, the jury requested and received a copy of the transcript of Fisher Jr.'s testimony. Therefore, to the extent that any confusion resulted from the prosecutor's comments regarding the minor's testimony, we conclude that any purported misstatement by the prosecution was cured once the jury had an opportunity to read the testimony that the jury heard in the courtroom. Finally, defendant argues that the cumulative effect of the prosecutor's alleged improper statements during closing arguments warrants reversal. As explained above, we conclude the prosecutor's rebuttal arguments did not inject error into the proceedings.

¶ 52 Lastly, defendant argues that when sentencing defendant, the trial court improperly considered as an aggravating factor that defendant's conduct caused or threatened serious harm since this element is inherent in the offense of aggravated domestic battery. The State argues the trial court properly considered the serious degree of great bodily harm to the victim. Again,

defendant admits that he failed to preserve this issue in a motion to reconsider the sentence. However, defendant urges this court to conclude the plain error doctrine applies.

¶ 53 A trial court must determine the proper penalty to be imposed based on the particular circumstances of each individual case. *People v. Saldivar*, 113 Ill. 2d 256, 268 (1986). We recognize that "a single factor cannot be used as both an element of the offense and as a basis for imposing a harsher sentence than might otherwise have been imposed upon the defendant." *People v. Holman*, 2014 IL App (3d) 120905, ¶ 68. This rule against double enhancement presumes the legislature considered the factors inherent in the offense when assigning the appropriate range of punishment for that offense. *Id.*

¶ 54 However, the nature of great bodily harm, when unusually excessive, may properly be considered by the court when imposing sentence without constituting double enhancement. In *People v. Saldivar,* our supreme court explained that public policy demands that varying degrees of harm should have an impact on the varying range of punishment the trial court imposes. Our Supreme Court stated as follows:

> "While the classification of a crime determines the sentencing range, the severity of the sentence depends upon the *degree of harm* caused to the victim and as such may be considered as an aggravating factor in determining the exact length of a particular sentence, *even in cases where serious bodily harm is arguably implicit in the offense for which a defendant is convicted.*"

Saldivar, 113 Ill. 2d at 269.

¶ 55 In this case, the treating physician testified that the fracture point in the victim's jaw was in a location that is infrequently broken and would have required a significant amount of force. Based on the unique facts present in this record, we conclude the trial court properly considered

the degree of great bodily harm the defendant personally inflicted upon the victim. Therefore, we reject defendant's argument that the trial court erred by considering a factor inherent in the offense of aggravated domestic battery when imposing a sentence higher than the statutory minimum sentence.

¶ 56 CONCLUSION

¶ 57 Defendant's conviction and the judgment of the circuit court of Peoria County is affirmed.

¶ 58 Affirmed.

¶ 59 JUSTICE HOLDRIDGE, dissenting.

¶ 60 I respectfully dissent. I agree with the majority that a partial closure occurred in this case. *Supra* ¶ 36. However, I disagree with the majority's conclusion that this partial closure was no broader than necessary to "minimize the emotional impact" and rationally related to the tender age of the eyewitness. *Supra* ¶ 42. Citing *Globe Newspaper*, 457 U.S. at 607-09, the majority states that the United States Supreme Court has recognized that safeguarding the physical and psychological well-being of a minor is a compelling interest that may justify closure of a courtroom on a case-by-case basis. *Supra* ¶ 38. To cite the Court verbatim, it stated, in the context of cases involving sex offenses against minors, "[a] trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a *minor victim*." (Emphasis added.) *Id.* at 608.

¶ 61 In this case, Davett Jr. was a witness—not a victim—and at the time he was removed from the courtroom, he was a mere spectator. The judge removed Davett Jr. on his own initiative because he felt that the setting of closing arguments and the reading of the verdict was somehow inappropriate. The record shows that the only person concerned about Davett Jr.'s presence in

the courtroom was the judge. At no time did Davett Jr. express that he did not want to be present. Even assuming that Davett Jr., at 10 years old, was too young to understand, neither of his parents found it necessary to remove him.

¶ 62 The majority's conclusion that remaining in the courtroom for the remainder of the proceedings would emotionally impact Davett Jr. is unpersuasive considering the circumstances of this case. At the time he was removed, he had already witnessed the acts that led to his father's criminal charges and testified against his own father. Davett Jr. knew at the time of his removal that his testimony and his father's testimony conflicted. Nothing could have been said during the remainder of the proceedings that would inform Davett Jr. of anything that he did not already know. Nonetheless, reasonable alternatives to this *sua sponte* closure existed. The judge could have simply asked Davett Jr. if he wanted to remain present for the remainder of closing arguments and the reading of the verdict. If the judge felt that Davett Jr. was too young to make this decision, he could have asked the defendant or Davett Jr.'s mother.

¶ 63 Upon denial of rehearing, the majority further justifies its conclusion on this issue by finding that the record demonstrates that "emotions were high" in the courtroom and there were concerns that a crowd in the courtroom may respond to the reading of the verdict. *Supra* ¶¶ 29, 41. I note that neither party made this characterization of the trial's environment in their briefs or oral arguments.

¶ 64 For the foregoing reasons, I would find that the defendant's constitutional right to a public trial was violated and reverse and remand for a new trial.