NOTICE
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2012 IL App (4th) 110296-U

Filed 2/16/12

NO. 4-11-0296

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
DEEPAK MONSINGH,	)	No. 10CM146
Defendant-Appellant.	)	
	)	Honorable
	)	John C. Costigan,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justice Steigmann concurred in the judgment.
Justice Appleton specially concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court held the following: (1) the State presented sufficient evidence to prove defendant guilty beyond a reasonable doubt; (2) prior inconsistent statements were properly admitted as substantive evidence pursuant to section 115-10.1 of the Code of Criminal Procedure (725 ILCS 5/115-10.1 (West 2010)); (3) the introduction of consistent prior statements are allowed pursuant to section 115-10.1 (725 ILCS 5/115-10.1 (West 2010)), so long as the prior statements are inconsistent with the testimony; and (4) defendant was provided effective assistance of counsel.

¶ 2 In August 2010, a jury convicted defendant, Deepak Monsingh, of domestic battery. The trial court sentenced defendant to 24 months' court supervision immediately following the verdict. On September 10, 2010, the State filed a motion to reconsider void sentence. On September 16, 2010, defendant filed a motion for a new trial. On December 23, 2010, the court denied defendant's motion for a new trial, and because a void sentence was

originally imposed, resentenced defendant to 18 months' conditional discharge. In January 2011, defendant filed a *pro se* motion to reconsider sentence. On March 9, 2011, defense counsel filed a supplemental motion to reconsider ruling and a motion for a new trial. On March 16, 2011, the court denied defendant's motion to reconsider sentence and motion for a new trial.

¶ 3 Defendant appeals, arguing the following: (1) the State failed to prove him guilty beyond a reasonable doubt; (2) the trial court erred by permitting the victim's prior written and videotaped statements to be admitted as substantive evidence; (3) the trial court erred in allowing the State to admit improper cumulative evidence; and (4) he was denied effective assistance of counsel. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In January 2010, the State charged defendant with two counts of battery (720 ILCS 5/12-3(a)(2) (West 2010)) and one count of domestic battery (720 ILCS 5/12-3.2(a)(2) (West 2010)). The charges stemmed from a domestic incident involving defendant, Judith Burk (defendant's wife) and Aaron Burk (defendant's stepson).

¶ 6 During defendant's August 2010 trial, Normal police officers Shane Bachman and Ann Frye testified they were dispatched to defendant's home on January 25, 2010, in response to a domestic disturbance call. Bachman testified Judith told him "she was standing in the doorway and was shoved [by defendant]." Aaron told Bachman Judith was pushed by defendant and he was trying to break up an altercation between his mother and defendant resulting in a "brief scuffle." Aaron told Bachman after he had gone back into the house, defendant "charged back into the house and choked him." Bachman recalled observing (1) Judith with an ice pack on her left wrist and (2) red marks on the right side of Aaron's neck. Before leaving the scene, Bachman

left written statement forms with Judith and Aaron and told them to fill them out describing how the incident occurred and return them at their earliest convenience. On cross-examination, Bachman testified defendant was not aggressive when Bachman arrived at the residence.

¶ 7 Frye testified upon her arrival she noticed scratch marks on Aaron's neck and hands. Frye spoke with defendant and asked if there had been an argument or fight earlier in the day. Defendant explained he was taking a nap when Judith came in and told him Aaron crashed his car into defendant's van. Defendant was upset and told Judith "he was too mad and didn't want to talk to [Aaron about the accident]" so Judith had Aaron leave the house. When Aaron returned, defendant told Frye Aaron approached him and said "I heard you wanted to talk to me" but defendant was confused because he did not want to talk to him. Defendant saw Judith was leaving with the car keys and he did not want to be left alone with Aaron, so he ran to the door and "slammed it open," trying to get the keys out of Judith's hands so he could leave. After defendant shoved the door open, defendant told Frye Aaron started hitting defendant. Defendant stated he never hit Aaron and put his own hands over his head until Aaron stopped hitting him. Once Aaron stopped hitting him, defendant told Frye he walked back inside but Aaron continued screaming and cursing at him. According to Frye, defendant then told her "[h]e didn't like the way [Aaron] was talking to him and calling him names, so he walked over and put his hands on his throat and began choking him." Frye testified defendant told her defendant did not have any marks, scratches, or injuries on him, and she did not observe any marks on him when he lifted his shirt up to show her. After speaking with Bachman and comparing stories, police arrested defendant. On cross-examination, Frye stated defendant was wearing long sleeves and was not aggressive or disrespectful to her.

¶ 8 At defendant's trial, Judith testified there was a disagreement which started because Aaron slid on ice while backing his car out of the garage and slid into defendant's van. When asked what her reaction was, Judith stated "[i]t was an accident" and she was not worried or scared about how defendant would react, other than he would likely be upset as would anyone whose vehicle gets hit. Judith testified after Aaron returned to the residence, he and defendant "discussed what happened about the accident." Judith admitted voices were raised and defendant was upset. Judith stated it was time for defendant to go to work, and she was going with him, so she started to walk outside, at which point defendant came up behind her to go with her. Defendant placed his hand on her back to "guide her" as if to say "come on, let's go." When asked if defendant placed one or two hands on her, Judith responded "I don't know. I was going out the door. You know I would say a one-hand guide to say 'come on, let's go.' It wasn't a push. It was a guide. 'Come on, it's time to go to work.' " Judith testified she tripped on the trim work going out the door and stumbled. Prior to this, Judith stated the argument had ended.

¶ 9 When asked what happened after she stumbled, Judith stated:

> "Well, it all kind of just transpired all very quickly. I don't know how to explain it. It just happened very fast. I was going out the door, [defendant] was guiding me, and we were going out, and at the same time he was guiding me out, and then that's when [Aaron] thought that he was pushing me out the door when he wasn't. He was just guiding me out the door, and then that's when my son reacted and then that's when—
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> ***

[Aaron j]ust came up and started pushing on [defendant] to start with.

Judith further stated defendant did not swing at Aaron at all, and was only trying to protect himself from Aaron's swings. Judith testified she tried to break them up and partially succeeded, but defendant and Aaron were never fully separated. The argument continued into the living room, at which time defendant tried to subdue Aaron by putting his arm around Aaron and bringing Aaron down to the floor. Defendant was lying by Aaron on the floor with his arm across Aaron's upper chest or upper neck area. Judith called 9-1-1.

¶ 10 Judith testified she called 9-1-1 because she was worried the fight would continue and she would not be able to break it up. Earlier, she had injured her hand, but could not recall how. By the time the officers arrived, Judith stated the fight was finished. Judith did not remember "telling the officer that the [d]efendant had shoved [her] in the back with both of his hands" and did not recall saying she was pushed at all.

¶ 11 The day after the incident, Judith made a written statement. This written statement was admitted into evidence as State's exhibit No. 1, over defense counsel's objection it was not an inconsistent statement. The statement was read into the record. In the written statement, Judith wrote she told defendant Aaron hit his van and defendant got verbally upset. Five minutes later, she stated defendant "came out of the bedroom yelling and saying '[Aaron] shouldn't have [a] license, he doesn't know how to drive.' " Judith told defendant she would do his delivery route because defendant was yelling " 'I'm going to get pulled over all night because of this.' " A few minutes later, defendant stated Aaron " 'has to come home sometime, and Mommy won't be here to protect him.' " Judith sent a text message to Aaron to let him know she

was going to do defendant's route because she did not want Aaron to come home when she was not there. Aaron called her and told her he would be home in five minutes, so Judith waited.

¶ 12 When Aaron got home, Judith wrote he and defendant got into a verbal argument and she knew she "couldn't leave them alone and do the route, so [she] told [defendant] 'come on, you are doing the route [with me].' " Defendant asked her where the keys were and she told him she had them. Judith's statement further stated:

> "I had opened [the] interior living room door partially and had [the] storm door open, half through [the] doorway when I was pushed from behind by [defendant]. Next thing I know, I hear Aaron saying 'you don't hit or push my mom.' [T]hey were in a physical fight on the patio. I broke them up. Got Aaron into [the] house in [the] living room. Then [defendant] came into [the] house and they got into another physical fight. I stepped in to break it up. My left hand got hurt immediately. I couldn't break up fight.
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> Called 911. Almost entire time I was on phone, [the] altercation was going on. I heard Aaron say 'choke hold.' I was yelling [the[entire time while on [the] phone 'police hurry.' Finally they just stopped fighting. Then police showed up."

¶ 13 In response to Judith's written statement "I broke them up. Got Aaron into house in living room," the State asked her whether the statement meant defendant was out the front door someplace and Aaron was in the living room. Judith responded "[t]hey were always together. At some point the distance between them was always a continuous. There was never a

big separation between the two of them." The State also asked Judith "[w]hen you say in your statement, 'I broke them up and then they got into another physical fight,' you're saying that's all one thing?" Judith responded, "Right. I never really totally got them physically separated."

¶ 14 Judith further testified she was never worried about a physical fight between defendant and Aaron because they had never been in a physical confrontation before; neither had ever "laid a hand on the other one." She stated defendant was only protecting himself, was not being aggressive and was only subduing Aaron. When asked what she meant by " 'I heard Aaron say "choke hold" ' " in her written statement, Judith responded "[i]t was because he had him down, holding him down." Judith admitted some things in her written statement were not entirely accurate, but stated she was "extremely stressed out at this time. They had arrested my husband. *** This was something that has gotten blown completely out of proportion." Judith testified she wanted the charges to go away but indicated she was not making up her current testimony to try and persuade anybody. She stated she was telling the truth about the inaccuracies in her prior statement.

¶ 15 Judith acknowledged she again spoke with the police three days later at the police department, at which time she gave a video-recorded statement. She had not calmed down by this time because the domestic-violence people were continuously calling her and she "was kind of being brain-washed" by them. When she gave her recorded statement, Judith testified she told them things she did not now believe to be true because she was so stressed out. The State noted there was a stipulation to the foundation of Judith's videotaped statement and it was admitted into evidence as State's exhibit No. 2 and played for the jury in its entirety. When asked whether her statement to the police was different than her live testimony, Judith responded it was "[a] little

bit" different but she did not intentionally lie to the police, she was still upset and got some of the details wrong. The State asked Judith what made her remember the events as she does now, and she responded that she talked with Aaron and defendant.

¶ 16 On cross-examination, Judith testified she had been married to defendant for six years and there had never been a violent confrontation before. She never saw defendant swing at Aaron and defendant was only trying to protect himself from Aaron. Last, Judith testified Aaron had some speeding tickets and anger problems for which he was currently being treated.

¶ 17 The State also called Aaron to testify. Aaron testified he was backing his car out of the garage on January 25, 2010, when it slipped on ice, causing him to hit defendant's van, breaking its taillight. Aaron went inside to tell defendant immediately afterward. He was not worried or scared about what defendant's reaction would be. Aaron testified defendant was not too upset—he was not yelling or screaming, never called Aaron names, nor did he accuse Aaron of being a bad driver. However, Aaron thought he saw defendant push his mother, Judith, out the door, and so he came to her defense and started hitting defendant on the front porch. Aaron stated Judith got ~~in~~ between him and defendant in an attempt to separate them, but she did not succeed. Aaron testified the physical confrontation continued into the living room, where defendant subdued him by grabbing and holding him. When the police officers arrived, Aaron acknowledged telling one of the officers defendant pushed his mother and he fought with defendant because he did not want his mom to get hurt. Aaron did not recall telling the officer defendant grabbed him by the neck.

¶ 18 Aaron testified he gave a written statement explaining what happened the same day of the incident but testified when he wrote the statement he "wasn't positive what exactly

happened." Aaron read his written statement out loud and it was admitted into evidence as State's exhibit No. 3, without objection. Aaron wrote in his statement after he walked in the door, defendant "told [him he] need[s] to learn how to drive and started cursing at [him] and calling [him] names." His mother, Judith, then started to walk out the door to do defendant's route at which point defendant

> "slammed [the] front door into [the] wall and made a hole and pushed her into [the] screen door on [the] front porch and that's when I started defending her to protect her by hitting [him]. She managed to get me inside. [He] [*sic*] after me[,] hit me and I started to hit him. He put me in a choke hold, [I] couldn't move. He put all his weight on me. I managed to out swinging [*sic*] [him] again and my mom got hit sometime in [the] struggle."

After reading his written statement, Aaron testified defendant did not curse or call him names, but he wrote his statement while "in the heat of the moment" and he was upset. Aaron admitted he made up some details about the incident. When speaking with Judith and defendant a couple weeks after the incident, Aaron testified he "found out what actually had happened."

¶ 19 Aaron acknowledged he also gave a video-recorded interview at the Normal police station three days after the incident. Aaron's videotaped statement was admitted into evidence as State's exhibit No. 4, without objection, and played for the jury in its entirety. After the video was played, Aaron testified he "was telling the truth for the most part," but he "didn't have the full side of the story" at the time. Aaron admitted he may have misled the officer by saying defendant pushed Judith without qualifying his statement in any way, because he ~~just~~

assumed he pushed her. Aaron again testified defendant was not yelling, raising his voice, cursing, or calling him names during the altercation.

¶ 20 On cross-examination, Aaron testified defendant never physically hurt him or his mother before. Aaron stated he was angry when he attacked defendant, and admitted stating on the video he tried to "eye-gouge" defendant. He further testified he had a hard time breathing when defendant was subduing him because defendant was on top of him, not because he was being choked.

¶ 21 On redirect-examination, Aaron again stated defendant was not choking him, and he only said " 'choke hold' " because he was having a hard time breathing. Aaron admitted there was some tension and defendant was a little upset, so when he saw defendant's hand on his mother's back and his mother move a short distance, he assumed defendant pushed her and immediately started hitting defendant.

¶ 22 After these four witnesses testified, the State rested. Defense counsel moved for a directed verdict, arguing the State failed to provide evidence sufficient to satisfy all of the elements of the charges against defendant. Defense counsel argued the prior written and videotaped statements were consistent with the trial testimony and the State was simply using a " 'word push' " to qualify them as inconsistent statements. Defense counsel also stated "it's obvious the child was attacking and my client was defending himself." The trial court denied the oral motion for a directed verdict, finding when viewed in the light most favorable to the State, there was sufficient evidence, to support all three counts.

¶ 23 The defense called Sherry Emberton. Sherry testified she was defendant's next door neighbor and had known him for approximately three years. She stated defendant was an

extremely nice guy—very friendly, personable, and helpful to herself and her husband. Sherry further testified defendant did not have a reputation for violence.

¶ 24 Defendant testified Judith woke him from his nap on the day of the incident to inform him Aaron hit his van. Defendant got out of bed a short time later and, upon learning Aaron was not home, went to inspect the damage. There was a big a dent on the rear passenger side of his van and the taillight was broken. Defendant acknowledged he was "very upset" because his job requires he drive over 200 miles per night, and believed he would get pulled over because of the broken taillight. Defendant stated Aaron had an attitude when he came home and said " ' so you want to talk to me?' " In response, defendant told Aaron " ' I don't want to talk to you.' " A verbal argument ensued between defendant and Aaron, with Aaron cussing at defendant.

¶ 25 Defendant testified Judith agreed to drive the route and because he did not want to be left alone with Aaron, who had "a tendency to just fly off the handle for everything," defendant followed Judith out of the house. He put his hand on the small of her back and said " 'come on, lets go.' " At that point, defendant was attacked from behind. The force of Aaron's attack caused defendant to stumble, which in turn caused Judith to stumble out of the doorway. Defendant stated it all happened so fast and at some point, Judith got between them and hurt her hand. Defendant testified, "I certainly don't know how it got hurt. Neither did I do it, nor Aaron do it, and I didn't se[e] anybody hit her, so we assumed it happened when she was trying to separate us." Once he and Aaron were back in the house, Aaron lunged at him again, and to defend himself, defendant "got a hold of [Aaron] and we fell to the ground and I kept him down there. I never at any point caused any harm to him by hitting him or willfully hurting him. I was

just holding him down till [*sic*] he calmed down." Defendant stated he could understand if Aaron had trouble breathing because defendant was a "heavy person" and he was lying on top of Aaron, trying to subdue him, while Aaron was swinging at him wildly. At this point, defendant testified Judith called the police. While she was on the phone with the police, defendant let go of Aaron and both of them got up from the floor, ending their physical altercation.

¶ 26 On cross-examination, defendant denied ever putting his hands on Aaron's throat and did not recall telling the police officer he had. Defendant did recall telling the police officer " 'I got him in my arms and took him down and held him down.' " Defendant testified he was not allowed to talk to Judith or Aaron for three weeks following the incident. Since the incident approximately seven months ago, defendant admitted he spoke with Aaron once about the incident and three or four times with Judith.

¶ 27 On redirect-examination, defendant testified he and Aaron's relationship had improved since the incident. Aaron was taking medication to deal with his anger issues, which helped calm him down. The defense rested.

¶ 28 The jury found defendant guilty of one count of domestic battery (720 ILCS 5/12-3.2(a)(2) (West 2010)) after finding (1) defendant knowingly made physical contact of an insulting or provoking nature with Judith and (2) Judith was a family or household member at the time of the incident. On the day of the verdict, defendant was sentenced to 23 months' court supervision . In September, 2010, the State filed a motion to reconsider void sentence because the Unified Code of Corrections expressly prohibits court supervision for domestic battery. 730 ILCS 5/5-6-1(c)(i) (West 2010). A few days later, defendant filed a motion for a new trial, arguing the State failed to prove every material allegation of the offense, and the trial court erred

in admitting the following evidence over objection: (1) Judith's signed statement; (2) Judith's video-recorded interview; (3) Aaron's signed statement; and (4) Aaron's video-recorded interview.

¶ 29 In December 2010, the trial court denied defendant's motion for a new trial, finding the following: (1) the evidence supported the jury's finding of guilt; (2) Judith's signed statement was properly admitted as State's exhibit No. 1; (3) there was a stipulated foundation for Judith's video-recorded interview and no objection made when the State moved to admit it as State's exhibit No. 2 and show it to the jury; and (4) Aaron's signed statement was admitted without objection as State's exhibit No. 3. The court did not mention State's exhibit No. 4 in its order, which was Aaron's video-recorded interview. The parties stipulated a void sentence was entered, and pursuant to an agreed recommendation, defendant was sentenced to 18 months' conditional discharge.

¶ 30 II. ANALYSIS

¶ 31 On appeal, defendant makes the following arguments: (1) the State failed to prove him guilty beyond a reasonable doubt; (2) the trial court erred by allowing Judith and Aaron's written and videotaped statements to be admitted as substantive evidence; (3) the trial court erred in allowing the State to admit improper cumulative evidence; and (4) defendant was afforded ineffective assistance of counsel.

¶ 32 A. Sufficiency of the Evidence

¶ 33 When the sufficiency of the evidence for a criminal conviction is in dispute, we must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt.

People v. Wheeler, 226 Ill. 2d 92, 114, 871 N.E.2d 728, 740 (2007) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). For a reviewing court to set aside a criminal conviction on grounds of insufficient evidence, the evidence submitted must be so improbable or unsatisfactory there exists a reasonable doubt of the defendant's guilt. *People v. Maggette*, 195 Ill. 2d 336, 353, 747 N.E.2d 339, 349 (2001). This standard of review applies to both direct and circumstantial evidence. *Wheeler*, 226 Ill. 2d at 114, 871 N.E.2d at 740. It is the function of the fact finder to assess the credibility of witnesses, weigh evidence presented, resolve conflicts in the evidence, and draw reasonable inferences from the evidence, and its determination is entitled to great deference. *People v. Moss*, 205 Ill. 2d 139, 164-65, 792 N.E.2d 1217, 1232 (2001).

¶ 34 Defendant was charged with two counts of battery and one count of domestic battery. Evidence was presented at trial in the form of written statements by Judith and Aaron written shortly after the incident which accused defendant of pushing Judith out the door and choking Aaron. Officers Bachman and Frye corroborated the allegations included in the written statements. Officer Bachman testified both Judith and Aaron told him defendant pushed Judith, and Aaron told him defendant choked him. Officer Frye stated defendant admitted to her he choked Aaron. Additionally, the jury viewed videotaped statements given by Judith and Aaron just days after the incident.

¶ 35 While Aaron and Judith changed their version of events at trial and testified defendant never pushed Judith but merely "guided" her and defendant never choked Aaron but merely "subdued" him, the jury could reasonably believe the version of events asserted in the prior statements, which were given within days of the incident. Judith and Aaron admitted at trial their original stories changed only after discussing the incident with defendant and each

other. Defendant initially denied ever discussing the incident with Aaron and stated he only discussed it with Judith "very recently." However, when pressed, defendant admitted he had discussed the incident with Aaron "just over the last few days" and with Judith three or four times. Additionally, defendant's trial testimony did not match up with what Officer Frye stated he told her. According to Officer Frye, defendant was trying to get the keys out of Judith's hand, but defendant testified he was "guiding" her out the door with his hand on her back.

¶ 36 It was the jury's job to weigh the conflicting evidence presented and assess the credibility of the witnesses. Viewing the evidence in the light most favorable to the State, as required, we find sufficient evidence was presented to support the jury's determination defendant was guilty of domestic battery against Judith beyond a reasonable doubt.

¶ 37 B. Evidentiary Rulings on Prior Inconsistent Statements

¶ 38 Defendant next argues the trial court erred by permitting Judith and Aaron's prior written and videotaped statements to be admitted as substantive evidence, because the statements were "essentially consistent." The State responds the court did not err in admitting these statements because they were admissible under section 115-10.1 of the Code of Criminal Procedure of 1963 (Criminal Procedure Code) (725 ILCS 5/115-10.1 (West 2010)). We agree with the State.

¶ 39 Section 115-10.1 provides:

> "In all criminal cases, evidence of a statement made by a witness is not made inadmissible by the hearsay rule if
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> (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 ***, or

(C) the statement is proved to have been accurately recorded by a tape recorder, videotape recording, or any other similar electronic means of sound recording." 725 ILCS 5/115-10.1 (West 2010).

Defendant asserts the admission of these prior inconsistent statements is dependent on the language of the statute, rather than the trial court's discretion and should be reviewed *de novo*. We disagree. The determination of whether a prior statement is inconsistent within the meaning of section 115-10.1, so as to be admissible as substantive evidence, is within the trial court's sound discretion, and thus is reviewed for abuse of discretion. *People v. Harvey*, 366 Ill. App. 3d 910, 922, 853 N.E.2d 25, 35 (2006); *People v. Flores*, 128 Ill. 2d 66, 87-88, 538 N.E.2d 481, 489

(1989).

¶ 40 " '[A] witness' prior testimony does not need to directly contradict testimony given at trial to be considered 'inconsistent,' as section 115-10.1 of the Criminal Procedure Code uses that term.' " *People v. Grayson*, 321 Ill. App. 3d 397, 409, 747 N.E.2d 460, 470 (2001) (quoting *People v. Edwards*, 309 Ill. App. 3d 447, 458, 722 N.E.2d 258, 266 (1999) (Steigmann, J., specially concurring)). The term "inconsistent" in section 115-10.1 is not limited to direct contradictions but also includes " 'evasive answers, silence, or changes in position.' " *Grayson*, 321 Ill. App. 3d at 409, 747 N.E.2d at 470-71 (quoting *Edwards*, 309 Ill. App. at 458, 722 N.E.2d at 266 (Steigmann, J., specially concurring) (citing *Flores*, 128 Ill. 2d at 87, 538 N.E.2d at 488)). "[T]he definition of inconsistency does not require a direct contradiction, but only a tendency to contradict the witness's present testimony." *People v. Lee*, 243 Ill. App. 3d 745, 749, 612 N.E.2d 922, 924 (1993).

¶ 41 Judith's written statement contradicted her trial testimony. In her written statement, given the day after the incident, she wrote she "was pushed from behind by [defendant]." During defendant's trial, however, she testified she was not pushed, rather defendant simply placed his hand on her back as if to guide her out the door. These two statements are clearly inconsistent—Judith was either pushed or she was guided.

¶ 42 Aaron's written statement, given the same day as the incident, also contradicts his trial testimony. In his written statement, Aaron wrote defendant was cursing at him and calling him names but at trial he testified defendant was not calling him names, yelling, or screaming at him. Additionally, Aaron wrote defendant "slammed [the] front door into [the] wall and made [a] hole and pushed [Judith] into [the] screen door on the front porch". At trial he stated

defendant simply placed his hand on Judith's back in order to guide her out the door, rather than push her as he initially believed. Aaron also wrote defendant put him in a choke hold, but at trial Aaron testified defendant never even touched his neck. The statements made in Aaron's written statement directly contradict his trial testimony.

¶ 43 This court was not initially provided with a copy of Judith's or Aaron's video-recorded statements, even though they were both admitted into evidence and played in their entirety for the jury. Defendant, as appellant, "bears the burden to present a record on appeal sufficient to support his claims of error, and this court will resolve any doubts arising from an incomplete record against the appellant." *People v. Mitchell*, 395 Ill. App. 3d 161, 165-66, 916 N.E.2d 624, 628 (2009) (citing *People v. Lopez*, 229 Ill. 2d 322, 344, 892 N.E.2d 1047, 1060 (2008)). On our own motion, this court requested and received a copy of these exhibits. We were unable to view the videos, either due to corruption or the format of the videos. We do not believe the absence of the recordings hinders our review, but conclude both the defendant and the State failed in their responsibility to submit a full record to this court.

¶ 44 Defendant argues the video-recorded statements should not have been admitted because they were not inconsistent statements. After Judith's video was played, she testified she "[g]ot some of the details wrong" during the recording. After Aaron's video was played, questioning from the State indicates Aaron made the following statements during his video-recorded interview: (1) defendant pushed Judith with both hands; (2) it was a "good push"; and (3) defendant had him in a headlock.

¶ 45 Defendant argues Judith and Aaron "were making candid efforts to correct the record and provide an explanation of the events that transpired on the day in question which were

realized after a highly emotional situation had calmed." Defendant contends their trial testimonies were not recantations but rather were "specific recounts of an incident that was inaccurately described for the police on a prior occasion." We find the written statements and what we are able to ascertain from the record regarding the video-recorded statements directly contradict the witnesses' trial testimony and are inconsistent as defined in section 115-10.1 of the Criminal Procedure Code. (725 ILCS 5/115-10.1 (West 2010)). The trial court did not abuse its discretion by admitting this evidence.

¶ 46 Defendant also argues corroborating evidence must be presented where a conviction is predicated upon prior inconsistent statements of a witness. This court expressly rejected this argument in *People v. Curtis*, 296 Ill. App. 3d 991, 999, 696 N.E.2d 372, 378 (1998). In *Curtis*, we stated:

> "When an accused is convicted and appeals, one standard applies to all evidence. Evidence of prior inconsistent statements—even if the declarant has recanted those statements—should be treated no differently.
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> ***
>
> Once a jury or trial court has chosen to return a guilty verdict based upon a prior inconsistent statement, a reviewing court not only is under no obligation to determine whether the declarant's testimony was 'substantially corroborated' or 'clear and convincing,' but it may *not* engage in any such analysis. To the extent that any of our sister districts have held otherwise, we deem such holdings incon-

> sistent with supreme court teachings, and we decline to follow those decisions." (Emphasis in original.) *Id.*

In support of his argument, defendant cites *People v. Parker*, 234 Ill. App. 3d 273, 600 N.E.2d 529 (1992) (Fifth District), and *People v. Arcos*, 282 Ill. App. 3d 870, 875, 668 N.E.2d 1177, 1180 (1996) (First District). Curtis also cited those cases and stated "[w]e are not convinced that these cases stand for the proposition [that a recanted prior inconsistent statement admitted under section 115-10.1 is not sufficient to sustain a conviction], but if they did, we would decline to follow them." *Curtis*, 296 Ill. App. 3d at 996-97, 696 N.E.2d at 376-77.

¶ 47 Additionally, defendant cites *People v. Brown*, 303 Ill. App. 3d 949, 709 N.E.2d 609 (1999), where the First District reversed the defendant's murder and attempted murder convictions because the only evidence linking him to the victim's murder was a disavowed witness statement. *Id*. at 965-66, 709 N.E.2d at 621. However, five years later in *People v. Thomas*, 354 Ill. App. 3d 868, 878-79, 821 N.E.2d 628, 636-37 (2004), the First District distinguished *Brown*, finding as follows:

> "reversal was warranted because the only evidence linking the defendant to the crime was a statement made by a witness two years after the crime, and that statement was disavowed by the witness at the defendant's trial. *** [B]ecause the witness' prior statement implicating the defendant was uncorroborated and *was not made contemporaneously with the crime*, it was insufficient as proof beyond a reasonable doubt." (Emphasis added.) *Id*. at 878, 821 N.E.2d at 636-37.

¶ 48 However, Judith's and Aaron's written and video-recorded statements were made contemporaneously with the incident at issue. Aaron wrote his statement the same day as the incident and Judith wrote hers the following day. Both parties gave their recorded statements only three days after the incident. Corroborating evidence was not necessary.

¶ 49 C. Cumulative Evidence

¶ 50 Defendant next argues the trial court erred in allowing the State to admit improper cumulative evidence pursuant to section 115-10.1, resulting in undue prejudice to defendant, and an unjust conviction. Specifically, defendant argues the trial court allowed the State to unfairly bolster its case against defendant by the admission of consistent cumulative repetitive evidence, *i.e.*, the prior statements, causing the jury to place disproportionate significance on those prior statements. Defendant quotes *People v. Smith*, 139 Ill. App. 3d 21, 33, 486 N.E.2d 1347, 1355 (1985), in support of his argument. *Smith* stated, "[p]eople tend to believe that which is repeated most often, regardless of its intrinsic merit, and repetition lends credibility to testimony that it might not otherwise deserve." *Id.* In *Smith*, the First District concluded "[e]vidence of a statement made by a witness out of court but harmonizing with his testimony is inadmissible except where he is charged with recent fabrication or his opponent raises an inference that he has a motive to testify falsely." *Id.* at 32, 486 N.E.2d at 1354. Defendant also cites a Fifth District case which held "a witness may not testify as to statements he made out of court for the purpose of corroborating his testimony given at trial." *People v. Hudson*, 86 Ill. App. 3d 335, 339, 408 N.E.2d 325, 328 (1980).

¶ 51 We have determined the prior statements are inconsistent with the trial testimony, so neither *Smith* nor *Hudson* are applicable here.

¶ 52 The State also points out pursuant to section 115-10.1, "evidence of a statement made by a witness is not made inadmissible by the hearsay rule if *** the statement is *inconsistent with his testimony at the hearing or trial*." (Emphasis added.) 725 ILCS 5/115-10.1 (West 2010). In this case, the prior written statements may be consistent with the videotaped statements, although we cannot be sure because we have not been provided with the videotaped statements. Regardless, section 115-10.1 does not prohibit the introduction of consistent prior statements, so long as the prior statements are inconsistent with the testimony. See *People v. Johnson*, 385 Ill. App. 3d 585, 608, 898 N.E.2d 658, 679 (2008) (holding "[c]onsistency is measured against a witness's trial testimony: inconsistent statements are inconsistent with trial testimony; consistent statements are consistent with it. [Citations.] The rule against admission of consistent statements exists because they needlessly bolster the witness's trial testimony. [Citations.] Obviously, inconsistent statements [do not]."); *People v. Maldonado*, 398 Ill. App. 3d 401, 423, 922 N.E.2d 1211, 1229 (2010) (agreeing with *Johnson* and holding "the introduction of more than one statement that is inconsistent with a witness's trial testimony, whether or not such statements are consistent with each other, is proper.").

¶ 53 In this case, the prior statements were all inconsistent with the testimony provided at trial, and the trial court did not err in allowing those previous statements to be admitted.

¶ 54 D. Ineffective Assistance of Counsel

¶ 55 Last, defendant asserts he was denied affective assistance of counsel because trial counsel (1) failed to adequately examine the State's witnesses and (2) failed to object to Judith's prior video-recorded statement and both of Aaron's prior statements being admitted as inconsistent statements.

¶ 56 "To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *People v. Petrenko*, 237 Ill. 2d 490, 496, 931 N.E.2d 1198, 1203 (2010). To establish deficient performance, the defendant must show his attorney's performance fell below an objective standard of reasonableness. *People v. Evans*, 209 Ill. 2d 194, 219-20, 808 N.E.2d 939, 953 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Prejudice is established when a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Evans*, 209 Ill. 2d at 219-20, 808 N.E.2d at 953 (citing *Strickland*, 466 U.S. at 694). A defendant must satisfy both prongs of the *Strickland* standard, and the failure to satisfy either prong precludes a finding of ineffective assistance of counsel. *People v. Clendenin*, 238 Ill. 2d 302, 317-18, 939 N.E.2d 310, 319 (2010).

¶ 57 1. *Cross-Examination*

¶ 58 Defendant first asserts trial counsel failed to adequately cross-examine the State's witnesses. We disagree.

¶ 59 The decision whether to cross-examine or impeach a witness is generally a matter of trial strategy which will not support a claim of ineffective assistance of counsel. *People v. Pecoraro*, 175 Ill. 2d 294, 326, 677 N.E.2d 875, 891 (1997). Trial counsel's professional judgment on the manner in which to cross-examine a witness is entitled to substantial deference, and to prevail on an ineffectiveness claim, the defendant must show counsel's approach was objectively unreasonable. *Id.* at 326-27, 677 N.E.2d at 891. Counsel's determination regarding what matters to object to and when to object typically fall within the trial strategy category. *Id.* at 327, 677 N.E.2d at 891.

¶ 60 Defense counsel cross-examined all four of the State's witnesses. Defendant asserts a review of the record will show defense counsel did nothing to expose the inaccuracies of Judith's and Aaron's different accounts of the incident on cross-examination. However, our review of the record indicates defense counsel did elicit answers from Judith which suggested it was the force of Aaron hitting defendant which pushed her out the door, defendant had never been violent in the past, and Aaron had several traffic tickets and anger problems. Additionally, cross-examination of Aaron revealed defendant had not choked Aaron as suggested in prior statements and had never been violent toward Aaron. Cross-examination of the police officers revealed defendant was not aggressive or disrespectful to them. Based on the record, and the deference afforded to counsel, defendant has not shown counsel's cross-examination of the State's witnesses was objectively unreasonable. Defendant cannot meet the first prong of *Strickland*.

¶ 61 2. *Failure To Object to the Introduction of Prior Statements*

¶ 62 Defendant also contends counsel was ineffective for erroneously stipulating to the introduction of Judith's video-recorded statement and both of Aaron's prior statements, thus depriving the trial court of the opportunity to determine the probative versus prejudicial value of the evidence. We disagree.

¶ 63 As we explained above, the prior statements were properly admitted as inconsistent statements pursuant to section 115-10.1 of the Criminal Procedure Code (725 ILCS 5/115-10.1 (West 2010)). ~~As such,~~ Defendant's argument has no merit, as any objection by defense counsel would have been fruitless. Defendant cannot satisfy the second prong of *Strickland* because the prior statements would have been admitted over objection, and thus, defendant was not prejudiced

by their admittance.

¶ 64 III. CONCLUSION

¶ 65 For the foregoing reasons, we affirm the trial court's judgment. As part of our judgment, we award the State its $75 statutory assessment against defendant as cost of this appeal.

¶ 66 Affirmed.

¶ 67 JUSTICE APPLETON, specially concurring:

¶ 68 I concur with the result reached by the majority but write separately to express that had not the State provided as substantive evidence the statements taken by the police and reduced to writing, I would have voted to reverse. The reason I would have done so is that the video statements given by the victims were played for the jury but were unreviewable by this court due to the parties providing to this court a corrupted or unplayable copy of those video statements.