

NOTICE  
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2012 IL App (4th) 100397-U

Filed 2/14/12

NO. 4-10-0397

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
KENDALL GUNN,	)	No. 09CF1381
Defendant-Appellant.	)	
	)	Honorable
	)	Charles M. Feeney,
	)	Judge Presiding.

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JUSTICE KNECHT delivered the judgment of the court.  
Justices Appleton and McCullough concurred in the judgment.

**ORDER**

¶ 1 *Held:* The court affirmed the trial court's determination defendant voluntarily, knowingly, and intelligently waived his *Miranda* rights because this finding was not against the manifest weight of the evidence. The court also held the trial court did not consider the victim's death as an aggravating factor when sentencing defendant for first-degree-murder (720 ILCS 5/9-1(a)(2) (West 2008).

¶ 2 On January 15, 2010, a jury convicted defendant, Kendall Gunn, of first-degree murder in the stabbing death of Shane Howard. Before trial, defendant filed a motion to suppress a statement made to detectives during his interrogation, arguing he "did not knowingly, intelligently and voluntarily waive his *Miranda* rights [because his] mental deficiencies prevented him from making a legally sufficient decision to waive those rights." After hearing testimony from three detectives, two experts (one retained by the State and one by the defense), and personally viewing portions of the audio and video-recorded interrogations in this case and in a previous

case, the trial court denied the motion, finding defendant knowingly and intelligently waived his *Miranda* rights. See *Miranda v. Arizona*, 384 U.S. 436 (1966). On March 15, 2010, defendant filed a motion for a new trial, based partly on the claim the trial court erred in refusing to grant his motion to suppress his statement. In April 2010, the court denied the motion and sentenced defendant to 35 years in prison. Defendant filed a motion to reconsider sentence, which the court denied.

¶ 3 On appeal, defendant argues the trial court erred in (1) denying his motion to suppress his statement because the evidence did not establish he voluntarily, knowingly, and intelligently waived his *Miranda* rights, and (2) considering the victim's death as an aggravating factor when death is implicit in first-degree murder. We disagree and affirm.

¶ 4 I. BACKGROUND

¶ 5 On December 15, 2008, the State charged defendant by information with one count of first-degree murder (720 ILCS 5/9-1(a)(2) (West 2008)) for the death of Shane Howard, which occurred three days earlier. On December 30, 2008, defendant was indicted for two counts of murder (720 ILCS 5/9-1(a)(1) (West 2008)) and one count of first-degree murder (720 ILCS 5/9-1(a)(2) (West 2008)). The charges stemmed from a December 12, 2008, altercation involving defendant and Howard. Defendant and Howard were both at a house party. According to Howard's cousin, Zachary, who was also present at the party, defendant and Howard were involved in several confrontations. During one of these confrontations, Howard pulled out a knife; Zachary believed Howard carried this knife on a strap on his arm. Howard did not try to stab defendant during this confrontation, but defendant and Howard remained in a stand-off. Later, after a large fight broke out, Zachary found Howard outside; Howard had been fatally

stabbed with his own knife.

¶ 6 On May 14, 2009, defense counsel filed a motion to suppress a statement defendant made to detectives after his arrest. The motion alleged "[d]efendant did not knowingly, intelligently and voluntarily waive his *Miranda* rights in that the Defendant's mental deficiencies prevented him from making a legally sufficient decision to waive those rights."

¶ 7 The trial court held a hearing on defendant's motion in September 2009, at which several detectives and two experts testified. Detective Swartzentruber testified first about a videotaped interview he conducted with defendant in an unrelated case in January 2008. A portion of this interview portraying the detective explaining the *Miranda* warnings to defendant was published by the State. Detective Swartzentruber testified nothing indicated defendant had difficulty understanding his rights during the interview and defendant "verbally said that he understood and \*\*\* was shaking his head yes." The record shows Detective Swartzentruber read defendant his *Miranda* warnings sentence by sentence, stopping to ask defendant if he understood each specific right before moving on to the next sentence. On cross-examination, Detective Swartzentruber stated he did not feel it was necessary to ask specific questions regarding the warnings to make sure defendant understood all the words because he assumed defendant was functioning at a sophomore level in school.

¶ 8 Detective Fanelli, one of the detectives assigned to investigate the Howard murder testified next. He stated he and Detective Dick (the lead investigator) conducted an audio and video-recorded interview with defendant at the Bloomington police department. He was present when Detective Dick read defendant his *Miranda* rights. Detective Fanelli testified he did not observe any verbal or physical indication defendant did not understand his *Miranda* rights, and

further, defendant indicated he did understand his rights and "was absolutely willing to talk with us." Detective Fanelli further testified he did not question defendant's mental abilities at any time during the interview. He was unable to recall when defendant was arrested, but he testified several hours passed between his arrest and the interview, which was not unusual because there were so many other witnesses to interview first.

¶ 9 Detective Dick testified he was the lead detective assigned to investigate Howard's death and led the interrogation of defendant. The State admitted and played a recording of the interrogation at the hearing. The recording established the following dialogue between Detective Dick and defendant:

"[Q. By Detective Dick.] Okay, secondly before we talk to you, I'm sure you've seen this on T.V. and in movies a hundred times um you know it's not that big of a deal but it's one of those things that we have to go, to go through also. You have the right to remain silent; anything you say can be used as evidence against you. You have the right to an attorney before questioning and have him with you during questioning, if you can't afford an attorney one will be appointed to represent you free of charge. Do you understand all that?

[A. By defendant.] Mm hmm

[Q.] \*\*\* [A]re you willing to talk to us a little bit about uh what happened last night?

[A.] Mm hmm.

\* \* \*

[Q. Y]ou got some really important decisions to make here in the next few minutes okay. Some decisions that are going to affect you know the entire rest of your life okay um you know there's certain, people make certain decisions um based on certain things that are going on at the spur of the moment um you know. What I'm getting at is we need to hear what happened from you and we need to hear the truth okay even if it may not make, paint you in the best light um we need to know what happened because like I said people make decisions and there's all these outside factors that are effecting [sic] those decisions that they make and some crazy things can happen okay.

[A.] Mm hmm."

¶ 10 Detective Dick testified defendant gave no indication he did not understand his *Miranda* rights, and further, he appeared to understand Detective Dick's questions and respond accordingly throughout the interrogation. Detective Dick stated defendant reviewed a diagram of the murder scene with him and attempted to assist police in locating the knife used in the stabbing. He was unaware defendant had a learning disability but testified he would have read the *Miranda* warnings a second time and asked defendant to explain what the warnings meant if he had been aware of this.

¶ 11 The State's expert, Dr. Stanislaus, a forensic psychiatrist, testified she was retained "specifically to look at the competency [of defendant] to waive [his] *Miranda* rights[.]"

so she did a "thorough psychiatric evaluation." On cross-examination, she stated she was retained to evaluate defendant's fitness and competency. To prepare for her evaluation, she reviewed defendant's police interrogations, school records, a report written by Dr. Fritz (the defense expert), and investigative reports. She met with defendant at the jail for approximately 1 hour and 15 minutes to do the evaluation. She began her interview with defendant by discussing the reason for the evaluation and asking defendant questions concerning his custody and the night of his arrest. Testifying as to what defendant told her, Dr. Stanislaus stated

"the police did tell him that he had the right to be silent, anything you say will be held against you in a court of law, but he said that he did not know that he could have a lawyer at the time, but then he added, stated ['] I wanted to talk to them, I wanted to let them know what happened, I wanted to let them know that no one else did it but me.['] "

When she specifically asked defendant if he would have done something differently if he had a lawyer, he responded "I did not know that it was bad or not to talk to them." Dr. Stanislaus testified she viewed the videotapes of both interviews (the unrelated 2008 case and the current case) and defendant "seemed to understand what was going on around him" and understood his *Miranda* rights. She also stated defendant's responses to the second *Miranda* rights reading (in the current case) was similar to the first reading. In both, defendant indicated he understood his rights and proceeded with the interviews.

¶ 12 Dr. Stanislaus further testified at one point during the interrogation in this case, defendant lied to the detectives regarding the location of the knife. Later, defendant told the

detectives he wanted to tell the truth about where the weapon was and assisted them in attempting to locate it. Dr. Stanislaus stated this was important because it showed defendant

"was fully involved in the processing and saying his story and kind of going through what he was going to say for every question asked, took his time to think about it, gave the response, and weighed the pros and cons of giving his responses at the time, so he seemed very involved in the interrogation process itself."

¶ 13 Defendant was allowed to speak with his father after the initial police interview and the recording showed defendant's father instructing him not to speak with the police without an attorney and providing him with an attorney's business card. Dr. Stanislaus testified this exchange between defendant and his father demonstrated defendant knew at the time, "he had access to an attorney and had the number, but he still chose not to call for an attorney at that time."

¶ 14 Dr. Stanislaus acknowledged defendant had a full scale intelligence quotient (IQ) of 54 in 2002, and a more recently tested full scale IQ of 69. She stated the improvement in the score was not unusual because people improve over time as they are exposed to more general knowledge. A score between 50 and 70 qualifies as "skilled mild retardation" but after considering adaptive functions such as self-care and day-to-day planning, she believed defendant's IQ was around 70 and concluded he "had the capacity to understand [his *Miranda*] rights and behave competently."

¶ 15 During her evaluation of defendant, Dr. Stanislaus conducted several tests. She stated defendant was oriented to time, place, and person, and he understood why he was in jail.

She asked him to explain what "don't cry over spilled milk" meant and he responded "don't cry over something that means nothing, don't worry about it" but he never heard the phrase "the early bird gets the worm" before. Dr. Stanislaus testified defendant was able to describe similarities between a number of different items such as an apple and orange are both fruit and a table and chair both have legs. Further, she asked defendant to do a serial subtraction, which tests how much attention and focus a person can bear. She recalled defendant was able to do a serial-three subtraction accurately, showing he was able to pay attention and concentrate, although he did have difficulty with serial-seven subtraction, which was explained by his mathematical difficulty. Dr. Stanislaus stated defendant was able to recall current events and was aware of what was going on in the news at the time. Throughout her evaluation, Dr. Stanislaus testified defendant was calm and engaging. She stated defendant exhibited this same demeanor during the police interrogation, based on her observation of the video-recording.

¶ 16 On cross-examination, Dr. Stanislaus agreed with defense counsel in order to knowingly and intelligently waive *Miranda* rights, a suspect must understand what an attorney does, what an attorney is going to do, and how having an attorney will play out in the suspect's case. Dr. Stanislaus believed defendant had this understanding. The following discussion occurred:

"Q. [By defense counsel:] And you think [defendant] had that understanding?

A. [By Dr. Stanislaus:] I believe he had the understanding, especially when his dad came in the middle of the room, explained the whole process very clearly, gave him the card, told him what to

do, and still [defendant] chose not to do that. So, to me, that shows that he understood.

Q. But when [defendant's father] came to discuss this with [defendant], he didn't tell him what the attorney would do for him. He just told him he needed one. He told him he needed one there and he shouldn't talk without one, right?

A. Yes.

Q. But he never told him what the attorney's going to do that you can't do for yourself if you waive your right, did he?

A. He did not say that. He said he needed an attorney.

Q. So how do we know that [defendant] understood what the job of the attorney was and how that was going to impact on him if he waived the right to one?

A. Now, at least at the time of my evaluation, at least he knew what the role of an attorney is. \*\*\* [H]e knew that you were his attorney, he trusted you, he believed that you were going to do a good job for him. He said at the time I was doing his evaluation, which was much later than when he had confessed, \*\*\* he had a good understanding of what the role of an attorney is.

Q. Well, what you've described here, he understood that I was on his side, sort of?

A. Not just on your side. I believe he said that you were

going to do a good job for him and help him.

Q. But he didn't say anything specific about how this was going to happen?

A. He did not say how that was going to happen.

Q. And that's what I'm getting at. Did you ask him any questions that indicated to you that he had the knowledge or understanding of how an attorney that helps him in this situation that he was in?

A. He just said that if I had an attorney, he may have, I don't know what I was saying. There's a sentence I would like to read. This is the [*sic*] what he stated. I asked him if he's [*sic*] done something with a lawyer, did you not know that it was bad or not to talk to them, meaning the interrogator, but he also said that I wanted to let them know what happened. He said, I wanted to let them know that no one else did it but me, so he wanted to really work with the interrogators and tell them what happened. So he was wanting to give that information, and after that time, [it] was more important to give that information.

Q. Well, I think nobody in this room is going to disagree that he wanted to talk to the interrogators, that's very clear, he did, and he did talk to them; but what's not clear is whether he understood what were the implications, indications of talking to them

and what a lawyer could do with that information, and you haven't been able to tell me anything he told you with regard to that. Is there anything else you'd like to add that would help us in that regard?

A. No."

¶ 17 Dr. Stanislaus further testified she did not ask defendant any questions specifically regarding the meanings of any of the words in the *Miranda* warning. Based on her observation of the interview, she felt defendant was cooperating because he wanted to tell the investigators what happened rather than out of fear.

¶ 18 Defense expert, Dr. Stephen Fritz, a clinical psychologist, was the last to testify. He had examined defendant for a total of four to five hours on at least two occasions. The initial purpose of his examination was to determine if defendant's memory was impaired, but by the second testing, the purpose was specifically to see if defendant made a knowing and intelligent waiver of his *Miranda* rights. To prepare for his meetings with defendant, Dr. Fritz examined case-study evaluations, individual education plans, grade transcripts, achievement testing, police reports, and a video of defendant's interrogation.

¶ 19 Dr. Fritz testified he evaluated defendant's comprehension of the *Miranda* warnings using a battery of tests, many of which are commonly given by psychologists and generally accepted in the psychological community. These tests included the Benton Visual Retention Test, Rey 15-Item Test, Memory Malingering, Wechsler Adult Intelligence Scale, Wechsler Memory Scale, Wide Range Achievement Test, and four tests designed to specifically assess a person's understanding and ability to knowingly and intelligently waive their *Miranda*

rights. The *Miranda* specific tests included Completion of *Miranda* Right's Test, Comprehension of *Miranda* Rights Recognition, a Comprehension of *Miranda* Vocabulary Test, and a Function of Rights and Interrogation Test.

¶ 20 Dr. Fritz explained the purpose of each test. The Benton Visual Retention Test is used to see if people have had a stroke or other brain damage that might cause cognitive problems; defendant showed no signs of brain damage. The Rey 15-Item Test and the Memory Malingered tests are designed to assess a person's motivation for taking the tests, specifically to measure whether the test taker is trying to manipulate the results. Dr. Fritz stated defendant showed no signs of manipulation. The Wechsler Intelligence Scale test is the "gold standard" in the psychological community for measuring IQ, but it also gives information about the subject's verbal comprehension, perceptual organizational skills, working memory, and processing speed. Defendant's results were consistent with previous IQ scores and indicated he fell in the developmentally delayed range. Dr. Fritz testified defendant's verbal comprehension was moderately impaired and 99 out of 100 people would score higher than he did in that area. The Wechsler Memory Scale test includes another battery of tests designed to assess a person's visual memory and complex and simple oral memory. The complex oral memory portion of the test asks the subject to recall as much information as they can immediately after hearing a paragraph of information and again in 30 minutes. Dr. Fritz testified defendant's performance on this portion indicated he was in the borderline range of intellectual functioning. Defendant produced better results on other portions of that test. The Wide Range Achievement Test measures a person's reading, spelling, and arithmetic level and is generally used to determine if the subject suffers a learning disorder.

¶ 21 Dr. Fritz indicated the *Miranda* specific tests had been generally accepted in the psychological community for at least four to five years and results of these tests have been admitted in court prior to the instant case. He testified the results of the *Miranda* specific tests were consistent with the other tests defendant took.

¶ 22 During the Completion of *Miranda* Rights test, a subject is read each one of the four *Miranda* rights and then is asked to restate what those rights are in his own words. The results of those responses are scored from a zero to two percent basis, with a perfect score being eight. Defendant received an overall score of six on this test, within normal range. Dr. Fritz, however, testified "[defendant] cannot minimally adequately explain his right to counsel with an attorney prior to interrogation."

¶ 23 The Comprehension of *Miranda* Rights Recognition test is designed specifically for people with poor verbal skills and to some extent tests one's ability to think abstractly. During this test, the subject is read one of the *Miranda* rights followed by another statement either very similar to or very different from the right. The subject is then asked whether the statement means the same thing as the right. Dr. Fritz stated defendant did "rather poorly" on this test, receiving a score of 8 out of a possible 12, placing him in the moderately impaired range.

¶ 24 The Comprehension of *Miranda* Rights Vocabulary test asks the subject to define four or five words taken from the *Miranda* warnings. Dr. Fritz testified defendant was unable to "accurately identify several of the words." He could not recall how many specifically but stated he believed it was three words.

¶ 25 The Function of Rights and Interrogation test involves reading the subject

statements about a person who is involved in a variety of situations, such as being interrogated by the police, meeting with an attorney, and appearing in court. The subject is then asked hypothetical questions about each scenario. Dr. Fritz stated defendant's "ability to explain the function of his rights during [the] interrogation [scenario] was moderately impaired while his other two were not impaired at all."

¶ 26 On September 25, 2009, after hearing oral argument, the trial court denied defendant's motion to suppress his statement. The court found defendant was clearly in custody at the time he was questioned and the *Miranda* warnings were "given in a way that demeaned the significance of it" but did not "tremendously demean[ ]" them. Further, the court pointed out Detective Dick told defendant "you got some really important decisions to make here in the next few minutes. Some decisions that are going to affect you \*\*\* the rest of your life." The court stated even though Detective Dick "lower[ed] the significance of *Miranda*, he turn[ed] around and \*\*\* impresse[d] upon the defendant the significance of this decision he's going to make, and that this decision could have lifelong implications." The court also found the additional statement given by the detective increased the voluntary nature of defendant's statement. While the court acknowledged defendant may have been young with a below-average intelligence, he also had two key experiences which bolstered his understanding of his rights: (1) the prior interrogation in 2008, and (2) the conversation with his father, which was recorded. Based on the totality of the circumstances, the court concluded defendant's waiver of his *Miranda* rights was knowingly and intelligently made.

¶ 27 The case proceeded to a jury trial. Defendant renewed his objection to the admissibility of his in-custody statement prior to Detective Dick testifying, and the trial court

allowed a continuing objection during his testimony. On January 15, 2010, defendant was convicted of first-degree murder (720 ILCS 5/9-1(a)(2)(West 2008)). On March 15, 2010, defendant filed a motion for new trial in which he argued the trial court erred in refusing to grant his motion to suppress his statement. On March 19, 2010, the trial court denied the motion and proceeded to sentencing.

¶ 28 At the sentencing hearing, the State called several witnesses to read victim-impact statements. The State also called Detective Dick, who played an audio recording of a phone conversation between defendant, his mother, and a friend, which indicated a lack of remorse on defendant's part.

¶ 29 The defense called defendant's second-grade teacher, who testified defendant "has a severe problem interpreting what people say to him, he has an auditory receptive problem. It takes him a while to understand. He has to kind of reason it out in his head." She also testified defendant was diagnosed with attention-deficit/hyperactivity disorder (ADHD) in second grade, which his parents declined to treat with medication, and, defendant was easily distracted by noises and impulsive in his behaviors, which led to discipline problems. Last, she stated she also taught defendant when he was 17 years old and only considered a freshmen because he had not earned enough credits to be a sophomore or junior.

¶ 30 Psychiatrist, Terry Killian testified for the defense. He evaluated defendant for approximately 2 hours and 30 minutes and found defendant had a learning disability in reading, writing, and mathematics, which he characterized as "moderately severe." Specifically, Dr. Killian testified defendant struggled with abstract thinking, which "would make it difficult for him, in a stressful situation, to plan out a reasonable course of action." In an emergency

situation, Dr. Killian stated defendant's inability to think reasonably would be exacerbated. He concluded defendant

"would have difficulty reacting to a very stressful and emergency situation because of his impaired intellectual functioning, which includes a low IQ, learning disabilities, impaired processing, difficulty thinking abstractly, and then also because of his attention—the impulsivity that is party of his [ADHD], as well as from growing up with some abuse and neglect."

¶ 31 The State recommended a sentence of 45 years. Defense counsel stressed the factors in mitigation, including (1) defendant's lack of criminal history; (2) defendant was acting under "strong provocation"; (3) the unlikelihood defendant would commit another crime; and (4) defendant's mental impairment. The trial court considered the evidence presented at trial, the presentence investigation, the history, character, and attitude of defendant, the victim-impact statements, and defendant's statement in allocution. In discussing the factors it considered in aggravation, the court stated "obviously the very nature of this offense caused and of course threatened serious physical harm to another. The defendant in fact killed another human being." The court also pointed out defendant did have a criminal history, although not a substantial one, and so the court did not place a lot of weight on this factor. The court stated deterrence, however, is a significant factor in this type of crime. Additionally, the court acknowledged the victim had actually brought the knife to the party and conducted himself inappropriately; however, the court did not find defendant acted under "strong provocation" because defendant was substantially larger than the victim. Additionally, the court was unable to find defendant's

criminal conduct was the result of circumstances unlikely to recur because of his impulsivity problems, although it found defendant was remorseful. The court sentenced defendant to 35 years in prison.

¶ 32 On March 23, 2010, defendant filed a motion to reconsider sentence. On April 28, 2010, the trial court denied the motion. This appeal followed.

¶ 33 II. ANALYSIS

¶ 34 A. *Miranda* Waiver

¶ 35 In reviewing a trial court's ruling on a motion to suppress evidence, courts of review apply a bifurcated standard. *Ornelas v. United States*, 517 U.S. 690, 699 (1996); *People v. Luedemann*, 222 Ill. 2d 530, 542, 857 N.E.2d 187, 195 (2006). The ultimate question of whether defendant's statement was voluntary is reviewed *de novo*. *Luedemann*, 222 Ill. 2d at 542, 857 N.E.2d at 195. On the other hand, the question of whether a defendant knowingly and intelligently waived his *Miranda* rights is factual in nature and reviewed under a manifest-weight-of-the-evidence standard. *Id.* This is true because trial courts are in the best "position to determine the credibility of witnesses, observe witnesses' demeanor, and resolve conflicts in their testimony." *People v. Pitman*, 211 Ill. 2d 502, 512, 813 N.E. 2d 93, 100-01 (2004).

¶ 36 A person accused of a criminal offense is constitutionally entitled to the assistance of counsel and to remain silent during in-custody interrogation. *Miranda*, 384 U.S. at 478-479. Any statements obtained in derogation of those rights are inadmissible in a later criminal prosecution unless those rights were voluntarily, knowingly, and intelligently waived. *Id.* at 479; *People v. Bernasco*, 138 Ill. 2d 349, 352, 562 N.E.2d 958, 959 (1990). A defendant validly waives *Miranda* when he (1) freely and deliberately (voluntarily) relinquishes the right, rather

than through intimidation, coercion, or deception, and (2) is fully aware of both the nature of the right he is abandoning and the consequences of his decision to do so. *Moran v. Burbine*, 475 U.S. 412, 421 (1986). At a hearing on a motion to suppress, the State has the burden of demonstrating, by a preponderance of the evidence, the *Miranda* waiver was the product of (1) an uncoerced choice and (2) the requisite level of comprehension. *Id.*; *People v. Reid*, 136 Ill. 2d 27, 54, 554 N.E.2d 174, 186 (1990); *People v. Braggs*, 209 Ill. 2d 492, 505, 810 N.E.2d 472, 481 (2003).

¶ 37 Defendant argues his statement should have been suppressed by the trial court because the evidence established he did not voluntarily, knowingly, and intelligently waive his rights. In determining whether a waiver is knowing and intelligent, the court must look at the specific facts and circumstances, including the defendant's background, experience, and conduct. *People v. Braggs*, 209 Ill. 2d 492, 515, 810 N.E.2d 472, 487 (2003). A defendant's limited intellectual capacity should be considered but does not, by itself, render a statement inadmissible. *People v. Foster*, 168 Ill. 2d 465, 476, 660 N.E.2d 951, 956 (1995). A defendant need not have "the ability to understand far-reaching legal and strategic effects of waiving one's rights" but must have "the ability to understand the very words used in the warnings." *People v. Bernasco*, 138 Ill. 2d 349, 363, 562 N.E.2d 958, 964 (1990).

¶ 38 Defendant asserts his verbal waiver of his *Miranda* rights is irrelevant because the State did not demonstrate he understood the nature of each right being abandoned and the consequences of his decision. At defendant's hearing to suppress his statement, the State examined three detectives, two of whom were present during *Miranda* warnings in this case and one who read defendant his warnings in a prior unrelated case. Each detective testified defendant

gave no indication that he did not understand his rights. Further, the video and audio-recorded interrogations in both cases were published by the State and viewed by the trial court. Detective Swartzentruber did a better job reading defendant the *Miranda* warnings in the unrelated case and ensuring defendant understood each individual right before reading the next one. In this case, Detective Dick downplayed the *Miranda* warnings initially, stating they were "no big deal," and then reading the warnings in full. Detective Dick then asked defendant if he understood his rights and defendant responded "mmm hmm." Shortly thereafter, however, and prior to defendant making any incriminating statements, Detective Dick stressed the significance of the situation by stating to defendant "you got some really important decisions to make here in the next few minutes okay. Some decisions that are going to affect you know the entire rest of your life." Defendant chose to speak to the detectives after these admonishments.

¶ 39           After the initial interrogation, the record shows defendant's father was allowed into the room to speak with him. Defendant's father clearly told him not to speak with the police without an attorney present and gave defendant an attorney's business card. Defendant's father did not, according to the video, feel it was necessary to explain to defendant why an attorney was needed, and the trial court could have inferred from the record defendant's father believed his son understood the reasons for having an attorney. Even after defendant's conversation with his father, however, he chose to speak with Detective Dick and demonstrated the way he swung the knife at the victim. The fact defendant chose to speak with Detective Dick after his father told him not to does not necessarily mean defendant was unable to understand why he needed an attorney. It is just as likely defendant chose to cooperate with the police despite that knowledge.

¶ 40           Defendant also argues Dr. Stanislaus' testimony fell "painfully short of establish-

ing that [defendant] made a voluntary, knowing and intelligent waiver." Dr. Stanislaus testified she was hired to perform a "competency to waive *Miranda* rights evaluation" although she later stated on cross-examination she was hired to evaluate defendant's fitness and competency. She met with defendant for approximately 75 minutes to do a psychiatric evaluation. She also reviewed defendant's police interrogations, school records, a report written by Dr. Fritz, investigative reports, and the videotapes of both the interrogation in this case and the unrelated 2008 case. She acknowledged defendant had an IQ of 69, but believed it to be closer to 70 after considering his adaptive functions. Although she agreed a score between 50 and 70 qualifies as "skilled mild retardation" she concluded defendant "had the capacity to understand [his *Miranda*] rights and behave competently."

¶ 41 Defendant argues his expert, clinical psychologist Steven Fritz, did a more comprehensive evaluation to determine specifically if defendant understood his *Miranda* rights. Dr. Fritz spent four to five hours with defendant and conducted a battery of tests, some of which were *Miranda* specific (Grisso tests). Defendant argues the following conclusions made by Dr. Fritz support his assertion he did not knowingly and intelligently waive his rights: (1) defendant could not "adequately explain his right to counsel with an attorney prior to interrogation" and could not explain what the phrase "right to an attorney" meant; (2) performed in the moderately impaired range on the Comprehension of *Miranda* Rights recognition test; (3) could not accurately define several words in the *Miranda* warnings; (4) 99 out of 100 people would score higher in language comprehension than he did; and (5) defendant's verbal comprehension, perceptual organization skills, and working memory were in the borderline intellectual functioning range. Further, Dr. Fritz stated defendant's ability to "appreciate the significance of waiving

his right[s] was very definitely impaired by his verbal comprehension deficits and what appeared to be his limited ability to understand the nature of the interrogation and also the right to counsel." Although Dr. Fritz may have made the above conclusions, the State points out he also testified (and wrote in his report) defendant "may not have made a knowing waiver." On cross-examination, Dr. Fritz agreed he may have made a knowing waiver, but he stated whether defendant made a knowing waiver "is a decision for the trier-of-fact, not necessarily for [me]."

¶ 42 It is the province of the trial court to decide how much weight to accord expert testimony. See *People v. Kolakowski*, 319 Ill. App. 3d 200, 214, 745 N.E.2d 62, 75 (2001). The trial court was not required to accept Dr. Fritz's conclusions over Dr. Stanislaus's merely because Dr. Fritz conducted the *Miranda* specific "Grisso" tests. Further, the court was allowed to weigh the testimony of the three detectives as well as view portions of the two audio and video-recorded interrogations itself before making a final determination on whether defendant voluntarily, knowingly, and intelligently waived his *Miranda* rights. The trial court was in the best position to determine the credibility of witnesses and resolve any conflicts in their testimony. The court determined defendant voluntarily, knowingly, and intelligently waived his *Miranda* rights. This determination is not against the manifest weight of the evidence.

¶ 43 B. Consideration of Victim's Death in Aggravation

¶ 44 Defendant next challenges the trial court's recitation of the victim's death as an aggravating factor because death is implicit in first-degree murder. A trial court should not consider a factor inherent in the offense as aggravation when sentencing a defendant. *People v. Cszaszar*, 375 Ill. App. 3d 929, 951, 874 N.E.2d 255, 274 (2007), (citing *People v. Saldivar*, 113 Ill. 2d 256, 272, 497 N.E.2d 1138, 1145 (1986)). Whether a trial court relied on an improper

aggravating factor involves the application of law to uncontested facts and is reviewed *de novo*. *People v. Watkins*, 325 Ill. App. 3d 13, 18-19, 757 N.E.2d 177, 122 (2001).

¶ 45 The State argues under the rule of invited error, defendant is barred from complaining of an error defense counsel induced the trial court to make. See *In re Detention of Swope*, 213 Ill. 2d 210, 217, 821 N.E.2d 283, 287 (2004). We disagree. At the sentencing hearing, defense counsel made the following remarks: "I did note that under aggravation, there were only two [aggravating factors] that really applied to my client in this case. First of all, that his conduct caused or threatened serious harm; that goes without saying." As defendant points out in his supplemental brief, the comment made by defense counsel was not improper because causing or threatening serious harm is one of the aggravating factors set forth in section 5-5-3.2(A)(1) of the Unified Code of Corrections (730 ILCS 5/5-5-3.2(a)(1) (West 2008)). Defense counsel's statement did not invite the trial court to consider the fact the victim died in determining an appropriate sentence.

¶ 46 The State also asserts defendant forfeited this issue by failing to raise it in his motion to reconsider sentence. See *People v. Reed*, 177 Ill. 2d 389, 395, 686 N.E.2d 584, 587 (1997). We agree the issue has been forfeited unless defendant can show plain error. Illinois Supreme Court Rule 615(a) (eff. Jan. 1, 1967) provides "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." Errors that would otherwise be forfeited will be reviewed "when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence." *People v. Herron*, 215 Ill. 2d 167, 186-187, 830 N.E.2d 467,

479 (2005). Defendant asserts the evidence on which the trial court based defendant's sentence was closely balanced.

¶ 47 The issue revolves around the following comments made by the trial court during sentencing: "So as to the factors in aggravation, the defendant's conduct, obviously the very nature of this offense caused and of course threatened serious physical harm to another. *The defendant in fact killed another human being.*" (Emphasis added.) The court also announced:

"It is very difficult \*\*\* to overlook the fact that the victim is the individual that brought the knife to the party, and the conduct of the victim at the party is also very much considered by this Court.

The Court considers though, the tremendous impact the defendant's conduct had. *This is a most serious offense that we have as the class of offenses go, the offense of murder. And it caused a tremendous harm to obviously Mr. Howard, his family, but to his community.*" (Emphasis added.)

Defendant argues these comments made by the trial court show that the victim's death was factor considered in aggravation. We disagree.

¶ 48 In *People v. Tucker*, 245 Ill. App. 3d 722, 727, 614 N.E.2d 1265, 1268 (1993), the Fifth District (quoting *People v. Saldivar*, 113 Ill. 2d 256, 269, 497 N.E.2d 1138, 1143 (1986)), stated "the degree of harm caused the victim '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.*' " (Emphasis in original.)

Likewise, "in a conviction for murder it is not impermissible for the sentencing court to consider

the force employed and the physical manner in which the victim's death was brought about."

*People v. Andrews*, 105 Ill. App. 3d 1109, 1113, 435 N.E.2d 706, 708 (1982). Additionally, the First District stated " '[i]t is unrealistic to suggest that the judge sentencing a convicted murderer must avoid mentioning the fact that someone has died or risk committing reversible error.' "*Tucker*, 245 Ill. App. 3d at 727, 614 N.E.2d at 1269 (quoting *People v. Barney*, 111 Ill. App. 3d 699, 679, 444 N.E.2d 518, 525 (1982)). Further, the Second District reiterated:

"a factor implicit in the offense should not be used in aggravation in sentencing. [Citation] [T]he trial court may [, however,] properly consider the degree of harm inflicted by a defendant in fashioning a sentence for an offense where serious bodily harm is implied, [although] it may not focus on the end result of the harm, the death of the victim, if such death is implicit in the offense."

*People v. Malin*, 359 Ill. App. 3d 257, 264, 833 N.E.2d 440, 446 (2005).

In *Malin*, the trial court stated " '[o]ne factor in aggravation is the defendant inflicted death upon four individuals.' " *Id.* at 260, 833 N.E.2d at 443. The appellate court found although the trial court made the statement regarding inflicting death, it did not consider the victim's death in imposing the sentence for reckless homicide. This determination was clarified by the trial court's statement in denying the motion to reconsider—the only factor in aggravation it relied on was the need for deterrence. *Id.* at 264, 833 N.E.2d at 446.

¶ 49 At defendant's hearing on his motion to reconsider, the trial court stated it "specifically addressed the \*\*\* IQ issues of the defendant [and] the impulsive nature of the

defendant. [It also] consider[ed] the minimal criminal history and provocation by the victim."

The court also stated:

"The harm was tremendous. This was a brutal attack. There were three significant stab wounds to the victim \*\*\* including the lethal wound. \*\*\* And so this shows a brutal nature of the defendant in committing that act, and the court quite honestly feels that the sentence given was just."

The trial court clarified it was looking at the brutal nature of the attack and the manner in which the death occurred during sentencing rather than the ultimate fact the defendant's conduct resulted in death. At defendant's trial, the forensic pathologist who performed the autopsy on the victim testified there were three stab wounds, one of which went through the victim's heart.

¶ 50 We hold the trial court commenting on the victim's murder does not show it relied on an improper aggravating factor in sentencing defendant.

¶ 51 III. CONCLUSION

¶ 52 For the foregoing reasons, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as cost of this appeal.

¶ 53 Affirmed.