2016 IL App (4th) 130808-U

NO. 4-13-0808

FILED
January 21, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
ALBERT FLEMING,	)	No. 12CF1644
Defendant-Appellant.	)	
	)	Honorable
	)	John R. Kennedy,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justice Harris concurred in the judgment.
Justice Turner specially concurred in part and dissented in part.

ORDER

¶ 1 *Held*: Defendant's conviction and sentence are affirmed where (1) the trial court did not err in denying defendant's motion to suppress evidence of his blood draw, (2) the evidence presented was sufficient to convict defendant of aggravated DUI, and (3) his nine-year sentence for aggravated DUI was not excessive.

¶ 2 In June 2013, a jury convicted defendant, Albert Fleming, of aggravated driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(d)(1)(F) (West 2012)) and leaving the scene of an accident involving death (625 ILCS 5/11-401(b) (West 2012)). In September 2013, the trial court sentenced defendant to consecutive terms of nine years' imprisonment for the aggravated DUI conviction and five years for the leaving-the-scene conviction.

¶ 3 Defendant appeals, arguing (1) the trial court erred in denying his motion to suppress evidence of his blood draw, (2) the evidence presented was insufficient to prove beyond

a reasonable doubt his DUI was a proximate cause of the victim's death, and (3) his nine-year sentence for aggravated DUI was excessive. We affirm.

¶ 4 I. BACKGROUND

¶ 5 On October 15, 2012, the State charged defendant, then 20 years old, with aggravated DUI for driving under the influence of alcohol (count I) and leaving the scene of an accident involving death (count II). The State later charged defendant with an additional count of aggravated DUI for driving with a blood alcohol content (BAC) of 0.08 or more (count III). The charges stemmed from an October 12, 2012, accident where a pedestrian, Anthony Pauls, was struck and killed by a vehicle driven by defendant while Pauls was crossing the street. The State alleged defendant's DUI was a proximate cause of Pauls' death.

¶ 6 During defendant's trial, Argelia Simon testified she was driving on University Avenue in Urbana, Illinois, on October 12, 2012, at approximately 11:50 p.m. Simon observed traffic moving slowly around Race Street when she noticed a person lying on the road. She then pulled into a parking lot and called 9-1-1.

¶ 7 Urbana police officer Elizabeth Ranck testified she was dispatched to an accident at University Avenue and Race Street on October 12, 2012. Ranck described the intersection as a four-lane road with two lanes in each direction. It had a posted speed limit of 35 miles per hour. According to Ranck, it was a well-lit intersection with a stoplight. Pauls was lying in the eastbound lane of traffic, near the sidewalk. Ranck testified she did not observe any skid marks on the road.

¶ 8 Dr. John Scott Denton testified he performed the autopsy on Pauls and determined the cause of death was multiple injuries as a result of being struck by a motor vehicle.

According to Denton, Pauls' blood tested positive for alcohol and his BAC was 0.258.

¶ 9 Urbana police officer Jay Loschen testified he observed defendant's vehicle in his rearview mirror on October 12, 2012, at approximately 11:51 p.m., while he was waiting for the light to change at the intersection of Cunningham and University Avenues. Loschen was in the northbound lane of Cunningham Avenue. Loschen testified defendant's windshield was so severely damaged he could barely see through it. Loschen proceeded north, while defendant proceeded west on University Avenue. Loschen made a u-turn and was able to get behind defendant's vehicle. Defendant turned north on Broadway Avenue and then west on Park Street. Continuing westbound on Park Street, defendant turned right on Church Street and proceeded northwest. Loschen proceeded to stop the vehicle after it failed to make a complete stop at a stop sign.

¶ 10 As Loschen approached the vehicle, he could smell the odor of alcohol. When Loschen asked what shattered the windshield, defendant responded the vehicle had been hit with a tree branch about an hour earlier. Loschen also noticed defendant and his two passengers had shards of glass on their clothing. When Loschen called in defendant's license information to dispatch, he learned of the vehicle-pedestrian accident at University Avenue and Race Street. Taking a closer look at defendant's vehicle, Loschen observed hair and blood in the windshield as well as blood on the trunk. When defendant stepped out of the vehicle, Loschen could smell the odor of alcohol coming from his mouth. Defendant initially denied drinking any alcohol. Loschen testified he did not have defendant perform any field-sobriety tests because he was confident defendant was the one who struck Pauls and, as a result, he would be required to submit to a blood draw as it was an accident involving personal injury.

¶ 11 Urbana police officer Michael Cervantes testified he was present when Loschen pulled defendant over. Cervantes found a pint bottle of Hennessy cognac under the front passenger seat. Approximately three-quarters of the bottle was gone. Cervantes testified he smelled a fruity odor coming from defendant. While Cervantes did not characterize the odor as alcohol, he smelled the same fruity odor coming from defendant as he did from the passenger, who admitted drinking Hennessy "all day."

¶ 12 Urbana police officer Matthew Mecum testified he responded to Loschen's traffic stop of defendant. Upon his arrival, he observed a large hole in the vehicle's windshield as well as "streak marks" coming over the top of the vehicle. Police believed the vehicle was involved in the accident and Mecum was instructed to drive defendant to the hospital. Mecum testified when he entered the squad car where defendant had been sitting, he noticed the strong odor of an alcoholic beverage. Mecum escorted defendant out of that squad car and into his, which was about 20 yards away. According to Mecum, defendant was having trouble maintaining his balance. Mecum also observed defendant had bloodshot eyes.

¶ 13 At the hospital, defendant initially told Mecum his car was hit by a branch. However, after Mecum told him they found blood and hair on the windshield, defendant asked if the person he hit was okay. Defendant then admitted hitting Pauls with his car and stated he was intoxicated at the time. Defendant admitted he shared a bottle of Hennessy before leaving his house that evening. According to defendant, he did not stop because he was looking for a place to park. While talking with Mecum at the hospital at approximately 1 a.m., defendant stated he no longer felt intoxicated. At that point, Mecum testified he read defendant the warning to motorist, which explains the consequences for refusing to take a breath, blood, or urine test.

Mecum testified defendant stated he would cooperate with the testing. Mecum explained defendant then provided blood and urine samples in Mecum's presence. Defendant's blood was drawn at 1:44 a.m., approximately two hours after the accident. The results of the blood test showed defendant had a BAC of 0.11.

¶ 14 David Smysor, an investigator with the Urbana police department, testified University Avenue, where the accident occurred, was flat, straight, and five lanes wide. According to Smysor, the weather was clear on the night of the accident and the intersection was controlled by a traffic light. He took multiple photographs of the area, showing it was well-lit by numerous street lamps, which were working properly. Smysor interviewed defendant at approximately 2:48 a.m., approximately three hours after the accident. The interview, which was recorded, was played for the jury.

¶ 15 During the interview, defendant admitted he was intoxicated at the time he hit Pauls but stated he was no longer intoxicated at the time of the interview. Defendant also stated he "felt [he was] under the influence" at the time of the accident. Defendant started drinking Hennessy around 11:15 or 11:30 p.m. and had approximately half a pint. Defendant stated Pauls ran across the street from defendant's left side and hit the vehicle before he could brake. Defendant stated he tried to brake but it was too late. Defendant maintained he was not trying to run away from the accident. Instead, defendant explained, he was trying to find a place to park when the police stopped him.

¶ 16 Defendant took the stand and testified he only drank between three to five sips of Hennessy. Defendant maintained he did not feel the effects of the alcohol he consumed at the time he struck Pauls. According to defendant, he was driving in the right-hand lane when Pauls

ran into the left side of his car. Defendant testified he tried to brake but it happened so fast he could not avoid Pauls. Defendant explained when he told police he felt "intoxicated" and "under the influence," he only meant to say he had something to drink. Defendant believed a person is under the influence when he has had any amount of alcohol to drink, no matter how little. Defendant also testified he initially left the scene because he was scared but was heading back when the police stopped him.

¶ 17 Ronald Henson, Ph.D., an expert in the behavioral manifestations of a DUI suspect, testified on defendant's behalf. The trial court denied defendant's request to allow Henson to testify as an expert in retrograde extrapolation. Henson testified although defendant had a 0.11 BAC two hours after the accident, that number depends on the recentness of consumption and how defendant's body treats alcohol. According to Henson, defendant's behavioral manifestations at the time of the traffic stop were not what one would expect from a BAC of 0.11 two hours later. Henson opined he could not determine within a reasonable degree of scientific certainty whether defendant was under the influence of alcohol at the time of the accident.

¶ 18 At the conclusion of the trial, the jury found defendant guilty of aggravated DUI based on driving under the influence of alcohol (count I) but acquitted him of aggravated DUI predicated on having a BAC of 0.08 or more (count II). The jury also found defendant guilty of leaving the scene of an accident involving death.

¶ 19 On August 15, 2013, the trial court sentenced defendant to nine years' imprisonment for his aggravated DUI conviction and five years in prison for the leaving-the-scene conviction. The court found consecutive sentences were mandatory.

¶ 20 On August 26, 2013, defendant filed a motion to reconsider the sentence, which the trial court denied.

¶ 21 This appeal followed.

¶ 22 II. ANALYSIS

¶ 23 On appeal, defendant argues (1) the trial court erred in denying his motion to suppress evidence of his blood draw, (2) the evidence presented was insufficient to prove beyond a reasonable doubt his DUI was a proximate cause of the victim's death, and (3) his nine-year sentence for aggravated DUI was excessive.

¶ 24 A. Motion To Suppress

¶ 25 On June 13, 2013, prior to trial, defendant filed a motion to suppress all evidence of his blood draw, arguing such warrantless searches are a violation of his rights under the United States and Illinois Constitutions. U.S. Const., amend. IV; Ill. Const. 1970, art. I, § 6.

¶ 26 During the hearing on defendant's motion, Officer Mecum testified when he arrived at the hospital, he informed the nurse he would be requesting that defendant provide blood and urine samples. Shortly thereafter, Mecum read defendant the *Miranda* warnings (see *Miranda v. Arizona*, 384 U.S. 436 (1966)). Mecum also read defendant the warning to motorist. Mecum explained he was requesting blood and urine samples because of the injuries to Paul and the fact defendant admitted drinking. Defendant said he would cooperate. According to Mecum, defendant cooperated and "had no issue with me having the nurse collect blood and urine."

¶ 27 The following colloquy took place between the State and Mecum:

> "Q. *** [Y]ou didn't hold the defendant down to take blood out of him, did you?

A. No. In fact, he informed me twice, on two separate occasions, that he would cooperate with me.

Q. So he was very clear with you that he was going to cooperate with the blood draw and urine test—draw.

A. Yeah, that's correct.

Q. And you read him the Warning to Motorist before you did that?

A. Yes.

Q. Okay. And you explained what that was to him?

A. Yes.

Q. And he voluntarily submitted to the blood test?

A. As far as I'm concerned he did. He again, once I read the Warning to Motorist, he informed me that he will cooperate with me, and I mean, I don't have any problems with him. He was very cooperative."

¶ 28 Defendant testified police told him he was being transported to the hospital for a blood draw. He did not believe he had a choice to refuse the blood draw. According to defendant, when the nurse came into the room, the officer told him, " 'you can do this the easy way or the hard way'." However, on cross-examination, defendant admitted he allowed the nurse to take samples of his blood and urine.

¶ 29 Defendant's counsel maintained defendant did not consent to the blood draw and it was taken in violation of *Missouri v. McNeely*, 569 U.S. __, 133 S. Ct. 1552 (2013). Counsel

argued *McNeely* stood for the proposition a DUI arrest is not in and of itself an exigent circumstance justifying an involuntary blood draw. According to counsel, the police had more than enough time to obtain a search warrant between the time he was initially stopped and the time his blood was taken. Counsel also argued the fact defendant did not physically resist the blood draw does not mean he consented.

¶ 30 Following the hearing, the trial court denied defendant's motion. The court found *McNeely* distinguishable because that case did not involve a death and the defendant did not consent to a blood draw. Instead, the court found section 501.6 of the Illinois Vehicle Code (Vehicle Code) (625 ILCS 5/11-501.6 (West 2012)), which implies a driver's consent to a blood draw when he is involved in an accident involving death, applied. The court noted Mecum read defendant the warning to motorist prior to the blood draw and defendant voluntarily consented to it.

¶ 31 The trial court also found defendant's testimony police told him his blood would be taken " 'the easy or the hard way' " was not credible. The court noted it "had the opportunity to observe both persons" and found what Mecum described was a situation where defendant was "at all times cooperating with him." According to the court, the fact defendant had been cooperating the whole time "makes it somewhat ridiculous that [Mecum] would make a statement such as, [']we're going to do this the hard way or the easy way.['] "

¶ 32 On appeal, defendant argues the trial court erred in denying his motion to suppress evidence obtained by the warrantless blood draw. Specifically, defendant contends such a blood draw is constitutional under *McNeely* only where there are exigencies beyond probable cause to

believe the defendant is under the influence of alcohol. Defendant maintains no such additional exigencies were present in this case.

¶ 33 In reviewing a trial court's denial of a motion to suppress, we apply the two-part standard of review the United States Supreme Court set forth in *Ornelas v. United States*, 517 U.S. 690, 699 (1996). See also *People v. Luedemann*, 222 Ill. 2d 530, 542, 857 N.E.2d 187, 195 (2006) (adopting the two-part standard of review from *Ornelas*). We give deference to a trial court's findings of fact and credibility determinations, unless such findings are against the manifest weight of the evidence. *People v. Almond*, 2015 IL 113817, ¶ 63, 32 N.E.3d 535; *People v. Johnson*, 384 Ill. App. 3d 409, 412, 893 N.E.2d 275, 278 (2008). However, we review *de novo* the ultimate legal question of whether suppression of the evidence was required. *People v. Gherna*, 203 Ill. 2d 165, 175, 784 N.E.2d 799, 805 (2003).

¶ 34 The fourth amendment of the United States Constitution and article I, section 6, of the Illinois Constitution of 1970 both protect the right of individuals to be free from unreasonable searches. U.S. Const., amend. IV; Ill. Const. 1970, art. I, § 6. "[A] warrantless search of the person is reasonable only if it falls within a recognized exception." *McNeely*, 569 U.S. at __, 133 S. Ct. at 1558. A blood test to determine a defendant's BAC is a search subject to the warrant requirement. *McNeely*, 569 U.S. at __, 133 S. Ct. at 1558. Exceptions to the warrant requirement include, *inter alia*, exigent circumstances and consent. *McNeely*, 569 U.S. at __, 133 S. Ct. at 1559; *People v. Hasselbring*, 2014 IL App (4th) 131128, ¶ 42, 21 N.E.3d 762 (quoting *People v. Pitman*, 211 Ill. 2d 502, 523, 813 N.E.2d 93, 107 (2004), citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973)) (" 'A well-settled, specific exception to the fourth amendment's warrant requirement is a search conducted pursuant to consent.' ")

¶ 35 In *McNeely*, the Supreme Court considered whether the natural dissipation of alcohol in the bloodstream qualified as "a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases." *McNeely*, 569 U.S. at __, 133 S. Ct. at 1556. The Court found the metabolization of alcohol did not present a *per se* exigency allowing nonconsensual, warrantless blood tests in all DUI cases. *McNeely*, 569 U.S. at __, 133 S. Ct. at 1563. While the metabolization of alcohol "may support a finding of exigency in a specific case," it does not do so categorically. *McNeely*, 569 U.S. at __, 133 S. Ct. at 1563. "Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances." *McNeely*, 569 U.S. at __, 133 S. Ct. at 1563.

¶ 36 Importantly, *McNeely* addressed the very narrow question of whether a *nonconsensual*, warrantless blood test is categorically reasonable. *McNeely*, 569 U.S. at __, 133 S. Ct. at 1556. Here, however, the trial court found defendant had consented to the blood draw. Thus, for *McNeely* to be applicable to this case, we must first determine whether the court erred in finding defendant consented to the blood draw. For the reasons that follow, we find it did not.

¶ 37 "Consent to a blood test need only be voluntary in order to provide a valid basis for an exception to the warrant requirement." *People v. Harris*, 2015 IL App (4th) 140696, ¶ 49, 32 N.E.3d 211. Whether consent is voluntarily given is a question of fact determined from the totality of the circumstances, and the State bears the burden of proving consent was voluntary. *People v. Anthony*, 198 Ill. 2d 194, 202, 761 N.E.2d 1188, 1192 (2001). As stated, we afford great deference to the trial court's factual findings and will reverse those findings only if they are against the manifest weight of the evidence. *Gherna*, 203 Ill. 2d at 175, 784 N.E.2d at 805.

¶ 38 Here, Mecum read defendant the warning to motorist, which informed him of the consequences for refusing the test. See 625 ILCS 5/11-501.1(c) (West 2012). The warning was read to defendant before he consented to the blood draw. Thus, defendant was aware he could refuse the draw. Defendant testified he allowed the nurse to take his blood. Mecum testified defendant was cooperative and consented to the draw. The trial court found defendant's representations to the contrary were not credible. We will not second-guess the trial court's findings with regard to witness credibility. See *People v. McBride*, 2012 IL App (1st) 100375, ¶ 19, 972 N.E.2d 1173; *People v. Alvarez*, 2012 IL App (1st) 092119, ¶ 51, 970 N.E.2d 516 (trial court's credibility findings are given greater weight as the court saw and heard the witnesses testify).

¶ 39 Moreover, our review of the record does not indicate defendant was anything but cooperative throughout his interactions with police or that his consent was involuntarily given. See *Schneckloth*, 412 U.S. at 225-26 (quoting *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961)) (a defendant's consent is involuntary if " 'his will has been overborne and his capacity for self-determination critically impaired' "). Indeed, the record does not suggest the police unduly influenced defendant or otherwise coerced him to obtain his consent. As such, the trial court's finding defendant voluntarily consented to the blood draw was not against the manifest weight of the evidence. Accordingly, the court did not err in denying defendant's motion to suppress.

¶ 40 B. Sufficiency of the Evidence

¶ 41 Defendant next argues the evidence presented was insufficient to prove beyond a reasonable doubt his DUI was a proximate cause of the victim's death.

¶ 42 The relevant inquiry when reviewing a challenge to the sufficiency of the evidence is whether, viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *People v. Johnson*, 392 Ill. App. 3d 127, 130, 924 N.E.2d 1019, 1022 (2009). We view the evidence in the light most favorable to the prosecution and allow all reasonable inferences from that evidence to be drawn in favor of the prosecution. *People v. Cunningham*, 212 Ill. 2d 274, 280, 818 N.E.2d 304, 308 (2004). A reviewing court will not reverse a criminal conviction unless the evidence was so unsatisfactory, improbable, or implausible as to justify a reasonable doubt as to the defendant's guilt. *People v. Latto*, 304 Ill. App. 3d 791, 798, 710 N.E.2d 72, 78 (1999). "The trier of fact has the responsibility to determine the credibility of witnesses and the weight given to their testimony, to resolve conflicts in the evidence, and to draw reasonable inferences from that evidence." *Johnson*, 392 Ill. App. 3d at 130, 924 N.E.2d at 1022.

¶ 43 Section 11-501 of the Vehicle Code (625 ILCS 5/11-501 (West 2012)) sets forth the elements of a misdemeanor offense, then provides sentencing enhancements based upon the presence of other factors. *People v. Van Schoyck*, 232 Ill. 2d 330, 337, 904 N.E.2d 29, 32-33 (2009). Aggravated DUI occurs when an individual commits some form of misdemeanor DUI and other circumstances are present. *People v. Quigley*, 183 Ill. 2d 1, 10, 697 N.E.2d 735, 739 (1998).

¶ 44 Section 11-501 of the Vehicle Code provides, in relevant part, the following:

> "(a) A person shall not drive or be in actual physical control of any vehicle within this State while:

(1) the alcohol concentration in the person's blood or breath is 0.08 or more based on the definition of blood and breath units in Section 11-501.2 [(625 ILCS 5/11-501.2) (West 2012)];

(2) under the influence of alcohol;

* * *

(d) Aggravated driving under the influence of alcohol, other drug or drugs, or intoxicating compound or compounds, or any combination thereof.

(1) Every person convicted of committing a violation of this Section shall be guilty of aggravated driving under the influence of alcohol, other drug or drugs, or intoxicating compound or compounds, or any combination thereof if:

* * *

(F) the person, in committing a violation of subsection (a), was involved in a motor vehicle *** accident that resulted in the death of another person, when the violation of subsection (a) was a proximate cause of the death[.]" 625 ILCS 5/11-501 (West 2012).

¶ 45 Here, defendant was found guilty of aggravated DUI under section 501(d)(1)(F) of the Vehicle Code. A person commits aggravated DUI under that section when a person's DUI results in a death and the DUI is a proximate cause of that death. 625 ILCS 5/11-501(d)(1)(F) (West 2012).

¶ 46 Defendant contends the State failed to prove his driving was the proximate cause of Paul's death where defendant's impairment was minimal at best and the accident was unavoidable because Pauls was himself intoxicated and ran in front of defendant's vehicle. However, Illinois courts have recognized the defendant's intoxication is not required to be the sole cause of the accident. See *People v. Merritt*, 343 Ill. App. 3d 442, 448, 797 N.E.2d 1103, 1107 (2003) ("The fact that the victim's actions were also a proximate cause of his injuries does not warrant reversal of defendant's conviction. A person commits aggravated DUI when his or her driving under the influence 'was *a* proximate cause of the injuries' [citation], not the sole and immediate cause of the victim's injuries.") (Emphasis in original.); *People v. Ikerman*, 2012 IL App (5th) 110299, ¶ 49, 973 N.E.2d 1008 ("The offense of aggravated DUI is committed when a person's driving under the influence is a proximate cause of the victim's injuries, not the sole and immediate cause of the injuries."); *Johnson*, 392 Ill. App. 3d at 131-32, 924 N.E.2d at 1023 ("Evidence [the victims] may have run a red light does not negate defendant's actions as being a proximate cause of the victims' injuries. While defendant's actions were not the sole and immediate proximate cause of the victims' injuries in this case, the evidence sufficiently established his actions were a proximate cause and satisfied the elements for a conviction of aggravated DUI.").

¶ 47 In this case, the State presented sufficient evidence from which the jury could reasonably infer defendant's intoxication was a proximate cause of Pauls' death. While

defendant admitted he had been drinking and was under the influence of alcohol, he argues his impairment was minimal. However, his BAC was 0.11 more than two hours after the accident. Moreover, Officer Mecum testified defendant smelled of alcohol, had bloodshot eyes, and was having trouble maintaining his balance. As such, the jury was entitled to infer defendant was intoxicated to the point of impairment at the time of the accident.

¶ 48 Further, defendant was driving in the far right lane nearest the sidewalk of a five-lane roadway. The evidence presented demonstrated the road was well-lit and without any obstructions. Pauls, coming from defendant's left, crossed four of the five lanes before being struck by defendant's vehicle. The record indicates defendant failed to take any evasive action to avoid the accident. Officer Ranck testified no skid marks were present at the scene. Defendant admitted by the time he saw Pauls, it was too late to brake. Loschen testified he not only observed hair and blood in the shattered windshield but also blood on the vehicle's trunk. The jury could conclude Pauls was struck at such a speed he rolled over the roof of the vehicle and onto its trunk before falling to the street. Defendant admitted he had been drinking and was under the influence of alcohol. It is not unreasonable for the jury to conclude a sober driver in defendant's place would have seen Pauls and taken steps to avoid the accident. We note, despite the fact Pauls was lying in the roadway after being struck, he was not hit by any additional vehicles.

¶ 49 After considering this evidence, the jury could have reasonably concluded defendant's driving while under the influence of alcohol was a proximate cause of Pauls' death. In other words, the jury could have reasonably found defendant's driving under the influence of

alcohol was a natural or probable sequence which caused the death. As this court has previously stated:

> "[I]n the case of a defendant convicted of DUI, the law holds him accountable for precisely those harms actually risked by his conduct—namely, that he might seriously injure pedestrians on or next to the roadway ***. All of this is fully foreseeable, and no stretch of logic is required to view the injuries caused as those actually risked by the conduct of driving drunk." *People v. Martin*, 266 Ill. App. 3d 369, 380, 640 N.E.2d 638, 646 (1994).

¶ 50 In sum, the evidence presented was sufficient to prove beyond a reasonable doubt defendant's DUI was a proximate cause of Pauls' death.

¶ 51 C. Excessive-Sentence Claim

¶ 52 Finally, defendant argues the trial court abused its discretion in sentencing him to nine years' imprisonment for aggravated DUI. Specifically, defendant contends his sentence was excessive where (1) the trial court's use of the need to deter others as the sole factor in aggravation was erroneous and (2) the court had an improper personal policy of imposing significant prison terms for aggravated DUI offenders.

¶ 53 In sentencing defendant to nine years in prison, the trial court stated it considered "the nature and circumstances of the offense, the presentence investigation report, *** the [Treatment Alternatives for Safe Communities] report that was part of the presentence process, the evidence offered in mitigation, both written and the testimony," as well as the parties' arguments and defendant's statement in allocution. In mitigation, the court considered

defendant's rehabilitative potential, his employment, his pursuit of higher education, his family structure, his remorse, and the fact defendant lacked a prior criminal history. The court found the statutory factor in aggravation was the need to deter others from committing the same crime.

¶ 54 The sentence for a defendant convicted of aggravated DUI resulting in the death of one person is 3 to 14 years in prison "unless the court determines that extraordinary circumstances exist and require probation." 625 ILCS 5/11-501(d)(2)(G) (West 2012). Thus, defendant's nine-year prison sentence is well within the statutorily permissible range for the offense. (We note the State requested a maximum sentence of 14 years' imprisonment.)

¶ 55 "A sentence within statutory limits will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense." *People v. Fern*, 189 Ill. 2d 48, 54, 723 N.E.2d 207, 210 (1999). "A reviewing court must afford great deference to the trial court's judgment regarding sentencing because the trial judge, having observed the defendant and the proceedings, has a far better opportunity to consider such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, and habits." *People v. Romero*, 387 Ill. App. 3d 954, 978, 901 N.E.2d 399, 420 (2008) (citing *Fern*, 189 Ill. 2d at 53, 723 N.E.2d at 209).

¶ 56 In this case, defendant contends his sentence was excessive where the trial court's use of the need to deter others as the sole factor in aggravation was erroneous. Specifically, defendant maintains the court's finding that a lengthy sentence was needed to deter others from committing the same crime was based on conjecture.

¶ 57 While "[t]he actual deterrent effect of a sentence is, necessarily, always somewhat speculative," "it is still a proper factor to consider." *People v. Weiser*, 2013 IL App (5th)

120055, ¶ 38, 993 N.E.2d 614; *People v. Garibay*, 366 Ill. App. 3d 1103, 1109, 853 N.E.2d 893, 898 (2006) (in sentencing a defendant, the court should consider the nature of the crime, the protection of the public, deterrence, punishment, and defendant's rehabilitative potential). Indeed, this court has previously held the need for deterrence may be a substantial factor in aggravation. See *People v. Cameron*, 189 Ill. App. 3d 998, 1009, 546 N.E.2d 259, 266 (1989) (finding that the court properly considered deterrence as the only substantial aggravating factor). Here, the trial court gave its reasons for finding a lengthy prison term necessary to deter others from committing aggravated DUI. We do not find the court's reliance on the deterrent factor inappropriate under the circumstances of this case.

¶ 58 Defendant also argues the trial court erred in sentencing him pursuant to an improper personal policy of imposing significant prison terms for aggravated DUI offenders. We disagree.

¶ 59 A sentence is improper if it is based on a trial court's personal sentencing policy. *People v. Scott*, 2015 IL App (4th) 130222, ¶ 46, 25 N.E.3d 1257. "[A] trial judge abuses his discretion when he arbitrarily denies an allowable sentence because the defendant falls within his category of 'disfavored offenders.' " *Scott*, 2015 IL App (4th) 130222, ¶ 46, 25 N.E.3d 1257 (quoting *People v. Bolyard*, 61 Ill. 2d 583, 587, 338 N.E.2d 168, 170 (1975)).

¶ 60 While defendant argues the trial court had an improper personal sentencing policy, he admits the court did not state such a policy on the record. Instead, defendant contends such a personal policy is the only reasonable conclusion to be drawn from his nine-year sentence. However, we find no suggestion in the record the court was adhering to a rigid personal sentencing policy. *Cf. People v. Daly*, 2014 IL App (4th) 140624, ¶ 36, 21 N.E.3d 810 (finding

the trial court's comments at sentencing implied an aggravated DUI offender would not receive probation without regard for the specific facts of the case). Here, the court stated defendant's sentence was necessary to deter others from committing aggravated DUI. This, by itself, does not suggest an unyielding and impermissible personal sentencing policy. See *Scott*, 2015 IL App (4th) 130222, ¶ 49, 25 N.E.3d 1257.

¶ 61 In sum, the record reveals the trial court considered the appropriate factors in aggravation and mitigation. The court fashioned a sentence within the statutory range. While defendant emphasizes the factors in mitigation, the court was not required to place more weight on those factors than on the need to deter others from committing similar crimes. See *People v. Malin*, 359 Ill. App. 3d 257, 265, 833 N.E.2d 440, 447 (2005) (citing *People v. Gagliani*, 251 Ill. App. 3d 1019, 1029, 623 N.E.2d 887, 894 (1993)). We will not substitute our judgment for that of the trial court merely because we might have weighed the sentencing factors differently. *People v. Streit*, 142 Ill. 2d 13, 19, 566 N.E.2d 1351, 1353 (1991). The trial court did not abuse its discretion in sentencing defendant to nine years' imprisonment for aggravated DUI.

¶ 62 III. CONCLUSION

¶ 63 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2014).

¶ 64 Affirmed.

¶ 65 JUSTICE TURNER, specially concurring in part and dissenting in part.

¶ 66 I respectfully dissent from the majority's affirmation of the trial court's sentencing judgment. Rarely does a reviewing court overturn a sentence which falls within the prescribed statutory range. Nonetheless, this court does not merely give blind approval to the sentencing decisions of trial judges. See *People v. Stacey*, 193 Ill. 2d 203, 209-10, 737 N.E.2d 626, 629 (2000) (declaring a reviewing court can find a sentence excessive if the trial court abused its discretion). I find this to be one of those extraordinary instances where I am compelled to express my disagreement with the sentence imposed, and I would find the trial court abused its discretion in sentencing defendant to a nine-year term of imprisonment for aggravated DUI.

¶ 67 I begin by noting defendant has prudently not appealed his five-year sentence for leaving the scene of an accident involving death. This sentence will be served consecutively to any sentence imposed for aggravated DUI. In this case, in spite of numerous statutory mitigating factors, the State inexplicably requested the maximum for each crime, for a total sentence of 29 years. Absent extended-term implications, the State's recommended sentences could not have been more, even if defendant had had an extensive adult and juvenile criminal history. Here, he has no history of any kind whatsoever. While I certainly recognize the State's obligation to zealously represent the people of this state, I also note the State's obligation to seek justice. Ill. R. Prof. Conduct R. 3.8 (eff. Jan. 1, 2010).

¶ 68 As for the trial court, I am fully aware it mentioned and described all of the numerous factors in mitigation before announcing its sentence. However, I cannot discern how or where the court applied them unless it began its sentencing assessment by accepting the State's recommendation for the maximum as a valid starting point. If deterrence alone trumps all

acknowledged factors in mitigation, then the codified factors are rendered meaningless. See 730 ILCS 5/5-5-3.1 (West 2012).

¶ 69 In closing, it would be an unforgivable oversight not to mention the senseless and tragic death of Anthony Pauls. The grief and loss suffered by his family and friends are obvious, and his father's victim-impact statement is heart wrenching to read for anyone, particularly for any parent. If the sentence to which I object could change the circumstances, or even relieve the despair of family and friends, I would forego this dissent. However, because I know it cannot do the former and I believe it cannot do the latter, I do not join the majority in affirming the trial court's sentence on defendant's aggravated DUI offense. I do, however, concur in all other respects with the majority's decision and analysis.