2020 IL App (4th) 190094-U

NO. 4-19-0094

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
May 8, 2020
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
JOSEPH R. PERRY,	)	No. 17CF610
Defendant-Appellant.	)	
	)	Honorable
	)	Adam M. Dill,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Steigmann and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: The State's evidence was sufficient to prove defendant guilty of aggravated driving under the influence, defendant is not entitled to a new trial, and the circuit court did not abuse its discretion in sentencing defendant to four years' imprisonment.

¶ 2 In May 2017, the State charged defendant, Joseph R. Perry, by information with one count of aggravated driving under the influence of a drug (DUI) (625 ILCS 5/11-501(a)(6), (d)(1)(F) (West 2016)). After an October 2018 trial, a jury found defendant guilty of the charge. Defendant filed a motion for a judgment of an acquittal notwithstanding the verdict or, in the alternative, a motion for a new trial. After a January 2019 hearing, the Champaign County circuit court denied defendant's posttrial motion. At a February 2019 hearing, the court sentenced defendant to four years' imprisonment.

¶ 3 Defendant appeals, contending (1) the State's evidence was insufficient to prove

him guilty beyond a reasonable doubt of aggravated DUI; (2) the circuit court erred by allowing Dr. Henry Moore, a trauma surgeon, to testify about the cause of the victim's death; (3) defendant was denied effective assistance of counsel because counsel failed to object to the admission of the results from his blood and urine tests; (4) the court erred by declining to give defendant's proposed jury instruction on the issue of proximate cause; and (5) the court abused its discretion by sentencing defendant to four years' imprisonment. We affirm.

¶ 4 I. BACKGROUND

¶ 5 The State's sole charge in this case alleged defendant drove a motor vehicle on December 28, 2016, at a time when he had an amount of a drug, substance, or compound in his breath, blood, or urine resulting from the unlawful use or consumption of cocaine and was involved in a motor vehicle accident that resulted in the death of Marjorie Roberts, and the violation was a proximate cause of Roberts's death. In July 2018, defendant filed a motion *in limine*, asserting the coroner's summary and Roberts's death certificate should be excluded from evidence because no autopsy was done on Roberts. The motion also sought to prohibit Jeff Zumwalt, the deputy coroner, and Paul Kursell, a nurse, from giving an opinion about Roberts's cause of death. In October 2018, defendant filed a second motion *in limine*, seeking to prohibit Dr. Moore from testifying about Roberts's cause of death. After a hearing, the circuit court granted defendant's first motion *in limine* without objection but denied defendant's second motion *in limine*.

¶ 6 On October 16, 2018, the circuit court commenced the jury trial in this case. The State presented the testimony of (1) Brandon Duvall, Roberts's grandson; (2) Dr. Moore, Roberts's treating physician in the emergency room; (3) Lisa Dixon, witness; (4) Brian Ahsell, police officer; (5) Russel Beck, police officer; (6) David Butler, police officer; (7) Sarah

Maxwell, nurse; (8) Mark Huckstep, evidence custodian; (9) Lora Furlong, Illinois State Police, evidence technician; (10) Alexandra Baluka, Illinois State Police forensic scientist; and (11) James Bednarz, Champaign police detective. The State also presented several exhibits, including a surveillance video of the accident. At the close of the State's evidence, defendant moved for a directed verdict, which the circuit court denied. Defendant did not present any evidence. The evidence relevant to the issues on appeal follows.

¶ 7 Duvall testified he last saw Roberts alive at 5 p.m. on the date of her death. Duvall had dropped her off at her home, which was a block from where she was struck by the vehicle. Roberts did not drive and used a walker to get around. She did enter her home unassisted on the date of her death. Duvall was at the hospital due to Roberts's accident within an hour of dropping her off at her home that day. Moreover, Duvall testified Roberts regularly frequented Blue Star convenience store (Blue Star) and Krispy Krunchy Chicken (Chicken Restaurant) on Bradley Avenue. At the time of her death, Roberts was able to get to those places on her own with the aid of a walker.

¶ 8 Dr. Moore testified he was employed by Carle Foundation Hospital as the head director of trauma services and the associate medical director for general surgery and neurology. In addition to medical school, Dr. Moore completed a five-year residency in general surgery and a one-year program for critical care and trauma. The circuit court first found Dr. Moore was an expert in "[t]rauma surgery and the medical determinations attendant thereto." Dr. Moore treated Roberts on December 28, 2016. When Roberts arrived in the emergency room, she was in cardiopulmonary arrest, which means her heart had stopped. The emergency medical technicians were performing cardiopulmonary resuscitation (CPR) on Roberts. Dr. Moore performed an initial assessment on Roberts and found Roberts had some instability of her high

neck, deformities of both upper extremities, subcutaneous emphysema, and an unstable right knee. As to her neck, Dr. Moore explained one of the bones was probably out of place. He was concerned Roberts had a high spinal cord injury. Since they were never able to resuscitate Roberts, Dr. Moore did not confirm whether Roberts had a spinal cord injury. Dr. Moore also explained subcutaneous emphysema is air underneath the skin, which indicates air is coming out of a lung. Air usually escapes from a lung when a rib's fractured edge pokes the lung. A hole in the lung is called a pneumothorax. Dr. Moore testified Roberts probably had a small to moderate right pneumothorax, which they treated with needle decompression. Dr. Moore and the other medical professionals performed life saving measures for 15 minutes on Roberts but were unsuccessful. In his career, Dr. Moore had seen between 5000 to 8000 injuries from motor vehicle accidents. Dr. Moore explained Roberts had "quite a bit of force applied to her body," which only happens when someone is hit by a car, involved in a motor vehicle accident, or falls from a great height.

¶ 9 When Dr. Moore was asked for his opinion on the cause of Roberts's death, defendant objected based on Dr. Moore not being qualified to give an expert opinion on the cause of death. The circuit court overruled the objection after a lengthy side bar outside the presence of the jury. Dr. Moore opined Roberts died from blunt force trauma to her entire body. Since it was reported Roberts had been hit by a vehicle, Dr. Moore assumed the source of the trauma was the motor vehicle. Dr. Moore explained Roberts's injuries were consistent with her receiving a large amount of force transmitted on the right side of her body. Roberts likely had more injuries that Dr. Moore did not observe. Dr. Moore testified he was not trained in pathology and had never performed an autopsy. He had also never before been qualified to testify as an expert witness on the cause of a person's death.

¶ 10 Dixon testified she was born and raised in the area and returned to live in Champaign in 1997. On the evening of December 28, 2016, Dixon was driving on Bradley Avenue to meet friends in downtown Champaign. Dixon stopped at the stop sign at the corner of Bradley Avenue and McKinley Avenue, which was a four-way stop. She was located in the right lane closest to the curb and was heading east on Bradley. A pickup truck was stopped in the lane to the left of her and was also heading east. Dixon did not know the time but noted the sky was dark. She and the pickup truck took off from the four-way stop at around the same time. The pickup was going a little faster than she was and ended up ahead of her car in the left lane. Dixon did not think the pickup's speed was excessive. At some point, Dixon heard a loud sound, and the pickup stopped. She estimated the pickup was "at least half, if not more, of a car length in front of [her]" in the other lane when she heard the loud sound. Dixon could definitely see the pickup's taillights. Dixon did not see the pickup hit anything and did not see anyone crossing the road prior to her hearing the loud sound.

¶ 11 After hearing the loud sound, Dixon observed a body "flying in an arc form" through the air along with a wheelchair or walker. She explained the force of the impact forced the body into the air and she had to look in an upwards direction to see the body. The body and wheelchair/walker landed in her lane in front of her car. She testified the body and device was about 20 feet in front of her car. After Dixon saw the body on the ground, she slowed to a stop. Dixon made sure another car was not next to her and then got out of her car. About the same time, defendant walked to the back of his pickup and stated, "I didn't see her, I didn't see her." Additionally, Dixon testified the surveillance video, which was the State's exhibit No. 4, fairly and accurately depicted the collision scene as she saw it. During her testimony, the State played a short segment of the surveillance video showing defendant's pickup truck striking Roberts.

¶ 12 Officer Ahsell testified a call came in for an accident near the intersection of Bradley and Willis Avenues at 5:52 p.m. on December 28, 2016, and he was on the scene about five minutes later. Officer Ahsell described the area where the incident occurred. Bradley Avenue is an east-west running street. Willis Avenue runs north-south and then dead-ends into Bradley Avenue. North of the intersection of Bradley and Willis is a small strip mall with the Chicken Restaurant and Blue Star. Willis Avenue is a residential area. According to Officer Ahsell, at the time of the call, it was dark outside, but there were streetlights on the road.

¶ 13 Officer Ahsell conducted an investigation at the scene. He spoke with Dixon but not defendant. The closest he got to defendant was about 15 feet. Officer Ahsell did not observe defendant displaying signs of impairment. Officer Ahsell did not issue defendant any citations while he was at the scene. He also observed the victim being rolled to the ambulance when he arrived on the scene.

¶ 14 Officer Beck testified he is a crime scene technician and was asked by Detective Bednarz to assist with the investigation of the crash on December 29, 2016. Officer Beck took photographs of defendant's truck and performed evidence collection. Officer Beck did not find any drug paraphernalia in defendant's truck.

¶ 15 Officer Butler testified he was the first officer on the scene. When he arrived, Officer Butler observed a pickup in the north lane of the eastbound traffic, and an elderly female lying in the south lane of eastbound traffic. The elderly woman was between 70 and 80 years old and was wearing a red shirt and blue pants. He started performing CPR on the woman and continued until emergency personnel arrived.

¶ 16 Additionally, Officer Butler testified the pickup truck was in front of the Blue Star. From his police work, he was familiar with the Blue Star. According to Officer Butler, it

was a fairly busy store with a lot of foot traffic entering and leaving the business. The Blue Star was also busy in the evening. The area in front of the Blue Star did not have a pedestrian crosswalk. Moreover, Officer Butler testified the intersection of Bradley and Willis was not the best lit intersection. Officer Butler also explained McKinley Avenue is one block west of Willis Avenue.

¶ 17 Officer Butler further testified he spoke with defendant at the scene. Defendant stated he turned left onto Bradley Avenue from McKinley Avenue and was heading eastbound. He was going about 15 to 20 miles per hour when he struck what he thought was an animal. Officer Butler testified the speed limit on Bradley Avenue was 35 miles per hour. When defendant struck the animal, he slammed on his brakes. Defendant noted a car had turned its bright lights on right before he stuck the victim and he had a difficult time seeing. Defendant stated the bright lights blinded him.

¶ 18 Since it was a serious accident, Officer Butler asked defendant if he was on any sort of drugs or alcohol, and defendant replied in the negative. While Officer Butler was talking with defendant, he was looking for any indicators of impairment. Officer Butler did not observe defendant displaying any signs of impairment. Officer Butler asked defendant if he was willing to consent to blood and urine tests at the hospital to look for alcohol or drugs. Defendant answered in the affirmative. Officer Butler took defendant to Carle Foundation Hospital for the testing and remained with defendant while the DUI test kit was completed. After the DUI kit was completed, Officer Butler placed the box containing the completed kit in the refrigerator in the evidence room at the police department.

¶ 19 Maxwell testified she was the nurse who completed the DUI kit on defendant and gave the completed kit to the police officer with defendant. Huckstep testified he was the police

department's evidence custodian, and he delivered defendant's DUI kit to Baluka at the Illinois State Police's toxicology laboratory on December 29, 2016. Furlong testified she is an evidence technician for the Illinois State Police toxicology laboratory. She was not at work on December 29, 2016. When she returned to work on January 3, 2017, the contents of defendant's DUI kit were still sealed, and she labeled the vials in the DUI kit for testing by Baluka.

¶ 20 Baluka testified she was a forensic scientist for the Illinois State Police. In addition to obtaining her bachelor's and master's degrees, Baluka completed an 18-month training program in the field of toxicology through the Illinois State Police. Baluka had performed analyses for controlled substances in more than 3500 cases. She had testified as an expert witness in the field of forensic toxicology in 22 cases. Defendant did not object to the State tendering Baluka as an expert witness in forensic toxicology. Baluka testified she did not discover any alcohol in defendant's blood sample. The preliminary drug screen on defendant's urine was positive for cocaine and cocaine metabolites. Baluka then did confirmatory testing on defendant's urine. The tests confirmed cocaine and cocaine metabolites in defendant's urine. Baluka also found Levamisole in defendant's urine, which is a dewormer often used as a cutting agent with cocaine. Baluka explained cocaine has a very short half-life. Thus, if cocaine is found in the blood or urine, it is typically within 24 hours of its use. Baluka then performed a quantitation of the amount of cocaine present in defendant's blood sample. Defendant's blood had cocaine at a level of less than 100 micrograms per liter and cocaine metabolites at a level of 1700 micrograms per liter. While the amount of cocaine in defendant's blood was on the low side, the amount of the cocaine metabolite Baluka detected in defendant's blood was the highest she had ever reported. With her testing, Baluka was unable to determine the amount of cocaine defendant used.

¶ 21 Last, Detective Bednarz testified he was assigned to investigate Roberts's death. He was the person who obtained the surveillance video from the Blue Star, had Officer Beck photograph defendant's truck, and interviewed defendant on January 17, 2017. During that interview, defendant told Detective Bednarz he took a left on to Bradley Avenue heading eastbound from McKinley Avenue. As he approached the area of Willis Avenue, a vehicle coming towards him flashed the high beams, and then almost immediately, he hit something. Defendant stated the high beams blinded him. Defendant thought he had hit an animal. When he got out of his pickup, defendant observed he had hit a person. In hindsight, defendant realized the high beams were flashed to warn him of something in the road. Detective Bednarz asked defendant if anything bad was going to come back on the blood and urine tests, and defendant said absolutely not. Additionally, Detective Bednarz testified no police officers or witnesses reported defendant was driving erratically or in a dangerous manner or in violation of any traffic laws.

¶ 22 Detective Bednarz also described the area of the fatality. He considered the area to be high traffic for both pedestrians and vehicles. Across the street from the Blue Star is a residential area. Also, after the block of businesses containing the Blue Star, that side of the street is also residential. At the time of the accident, there was not a crosswalk in front of the Blue Star. Thus, Roberts was struck in the middle of the road because a crosswalk was not available at the intersection. Detective Bednarz stated there were street lights and ambient lights in the area, but he did not consider it to be a well-lit area. He noted some of the lighting in the surveillance video comes from the Blue Star itself. After Roberts's death, another pedestrian fatality occurred in the same vicinity.

¶ 23 At the conclusion of the trial, the jury found defendant guilty of aggravated DUI.

Defendant filed a motion for a judgment of an acquittal notwithstanding the verdict or, in the alternative, a motion for a new trial, asserting (1) the State did not prove defendant guilty beyond a reasonable doubt, (2) the circuit court erred by not granting a directed verdict at the close of the State's evidence, (3) the court erred by overruling his objection to the State's foundation for the surveillance video, (4) the court erred by not giving defendant's proposed jury instruction for proximate cause, (5) the State did not lay a proper foundation for the results of defendant's blood and urine tests, and (6) the court erred by qualifying Dr. Moore to testify as an expert witness on the cause of Roberts's death. At a January 2019 hearing, the court denied defendant's posttrial motion.

¶ 24 After its ruling on defendant's posttrial motion, the circuit court addressed the matter of sentencing. The court found extraordinary circumstances did exist in this case and thus probation was an option. As such, the court wanted defendant to complete a DUI substance abuse evaluation. Defendant had started the evaluation process, but a problem had arisen with him providing an updated driving record. Defendant was still waiting on a final written report. The court continued the sentencing hearing since the DUI substance abuse evaluation was not completed.

¶ 25 On February 1, 2019, the circuit court held the sentencing hearing. The court did receive the DUI substance abuse evaluation on the day of the hearing. The State presented the testimony of Officer Corey Christensen, who stopped defendant's vehicle for going 70 miles per hour when the speed limit was 55 miles per hour on October 25, 2018. Defendant did not have a valid driver's license at the time. Officer Christensen only gave defendant a ticket for driving without a valid driver's license because defendant was cooperative and cordial. The State also presented the testimony of Cindy Gooch, Roberts's daughter. Gooch testified Roberts was 76

years old when she died. Defendant presented the testimony of his wife, Lynn Perry. Lynn testified defendant was the primary breadwinner in the family, and she confirmed with his employer defendant would have a full-time job if he was placed on probation. Defendant and Lynn lived with their eight-year-old son and their 26-year-old son and his family. Lynn's parents also resided with them. Since the accident, defendant had not been himself and was very sad. Defendant was close to his children. Defendant made a statement in allocution apologizing for Roberts's family's loss but stating her death was not all his fault.

¶ 26 The circuit court did not find probation was appropriate for defendant and sentenced him to four years' imprisonment. In doing so, the court agreed with defendant the facts of his case were extraordinary, as most aggravated DUIs involve a traffic violation. However, the court did not find defendant's history, character, and rehabilitative potential contained extraordinary circumstances that would require the court to sentence defendant to probation. The court stated it must sentence defendant to the Department of Corrections. The court explained it had hoped defendant would immediately get the DUI substance abuse evaluation and immediately engage in the recommended treatment. Defendant did not do so. The court then noted defendant's criminal history of two domestic battery convictions (1995 and 1997) and an illegal transportation of alcohol conviction in 1997. With the 1997 domestic battery, defendant was ordered to complete a substance abuse evaluation, and defendant was discharged from treatment for lack of participation. He did end up successfully completing treatment, but it took two tries. The court also noted defendant's recent driving without a valid driver's license. Additionally, the court pointed out defendant did not acknowledge using the cocaine that was the basis for his aggravated DUI conviction in this case to both the evaluator who drafted defendant's presentence investigation report and the person who completed the DUI

substance abuse evaluation. In mitigation, the court found defendant was a family man and was remorseful for his actions.

¶ 27 On February 1, 2019, defendant filed a timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 606 (eff. July 1, 2017). Accordingly, this court has jurisdiction of defendant's appeal under Illinois Supreme Court Rule 603 (eff. Feb. 6, 2013).

¶ 28 II. ANALYSIS

¶ 29 A. Sufficiency of the Evidence

¶ 30 Defendant contends the State's evidence was insufficient to prove beyond a reasonable doubt he committed the offense of aggravated DUI. Specifically, he contends the evidence was insufficient to prove (1) the actual cause of Roberts's death and (2) his driving was the proximate cause of Roberts's death. The State disagrees asserting its evidence was sufficient. Our supreme court has set forth the following standard of review for insufficiency of the evidence claims:

> "When considering a challenge to the sufficiency of the evidence, a reviewing court must determine whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the required elements beyond a reasonable doubt. [Citation.] [I]t is not the function of this court to retry the defendant. [Citation.] All reasonable inferences from the evidence must be drawn in favor of the prosecution. [I]n weighing evidence, the trier of fact is not required to disregard inferences which flow normally from the evidence before it, nor need it search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt. [Citation.] We will not reverse the trial court's judgment unless the evidence is so unreasonable,

improbable, or unsatisfactory as to create a reasonable doubt of the defendant's guilt. [Citation.]" (Internal quotation marks omitted.) *People v. Newton*, 2018 IL 122958, ¶ 24, 120 N.E.3d 948.

¶ 31 The State's charge in this case is based on a violation of section 11-501(a)(6) of the Illinois Vehicle Code (Vehicle Code), which prohibits a person from driving a vehicle when "there is any amount of a drug, substance, or compound in the person's breath, blood, other bodily substance, or urine resulting from the unlawful use or consumption of a controlled substance listed in the Illinois Controlled Substances Act [720 ILCS 570/100 *et seq*. (West 2016)] ***." 625 ILCS 5/11-501(a)(6) (West 2016). This provision is a strict liability violation. See *People v. Martin*, 2011 IL 109102, ¶ 26, 955 N.E.2d 1058. In other words, a driver with controlled substances in his or her body violates section 11-501(a)(6) simply by driving. *Martin*, 2011 IL 109102, ¶ 26. A person who violates section 11-501(a)(6) commits aggravated DUI if "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(d)(1)(F) (West 2016). "[S]ection 11-501(d)(1)(F) requires a causal link only between the physical act of driving and another person's death." *Martin*, 2011 IL 109102, ¶ 26.

¶ 32 1. *Cause of Death*

¶ 33 Defendant first contends the State failed to prove beyond a reasonable doubt the cause of Roberts's death. Defendant's argument focuses solely on Dr. Moore's testimony.

¶ 34 In support of his argument, defendant cites *People v. Brown*, 57 Ill. App. 3d 528, 373 N.E.2d 459 (1978). There, the reviewing court reversed the defendant's murder conviction because the State's evidence was insufficient to show an act by the defendant caused the victim's

death. *Brown*, 57 Ill. App. 3d at 332-33, 373 N.E.2d at 462-63. Specifically, the State had failed to present evidence of a causative relationship between the wounds inflicted by the defendant and the death of the victim from a pulmonary embolism *11 days after* the defendant's actions. *Brown*, 57 Ill. App. 3d at 332, 373 N.E.2d at 462. As the reviewing court in *Brown* recognized, "[e]xtensive medical testimony is not always necessary to show this causal relationship between death and an act of the defendant." *Brown*, 57 Ill. App. 3d at 531, 373 N.E.2d at 461. It further explained strenuous technical explanations for the cause of death are not necessary when the facts show an obvious association between the defendant's act and death and the connection between the two is easily understood from common knowledge. *Brown*, 57 Ill. App. 3d at 531, 373 N.E.2d at 461-62. However, when causative factors of the victim's death are less than obvious and beyond the perception of the general public, particular expert medical testimony is necessary to prove the connection between criminal activity and the victim's death. *Brown*, 57 Ill. App. 3d at 531, 373 N.E.2d at 462. While *Brown* involved facts where the cause of death was not obvious, the case before us involved facts with an obvious causation.

¶ 35 Here, the surveillance video showed Roberts, who was elderly, was alive and walking with the assistance of a walker before being struck by defendant's truck around 5:52 p.m. on December 28, 2016. Defendant told police officers he was going 15 to 20 miles per hour when his car struck Roberts. Thereafter, emergency personal brought Roberts into the emergency room at Carle Foundation Hospital. Roberts was in cardiopulmonary arrest when she arrived at the emergency room. Hospital personal tried lifesaving measures for 15 minutes and were unsuccessful. In this case, the victim died shortly after defendant's actions. Dr. Moore, one of Roberts's treating physicians, observed numerous injuries to Roberts's body that "seemed to be isolated primarily on the right side of her body." Those injuries included bilateral arm

fractures, neck instability, air in the subcutaneous tissue (indicating a hole in the lung), and a deformity of the right knee. Such injuries were consistent with a large amount of force transmitted to her on the right side of her body. According to Dr. Moore, Roberts's injuries were consistent with a motor vehicle collision. Even without Dr. Moore's ultimate opinion Roberts died from blunt force trauma from being hit by a vehicle, the evidence showed a connection between Roberts's death and defendant striking her with his vehicle because the connection between defendant's actions and Roberts's cause of death was not a complex one. Accordingly, we find the State's evidence was sufficient to find beyond a reasonable doubt defendant's striking Roberts with his pickup was the cause of Roberts's death.

¶ 36 2. *Proximate Cause*

¶ 37 Defendant also contends the State's evidence was insufficient to prove defendant's driving was the proximate cause of Roberts's death.

¶ 38 With aggravated DUI under section 11-501(d)(1)(F), the defendant's violation of section 11-501(a) must be a proximate cause of the victim's death. *Martin*, 2011 IL 109102, ¶ 25, 955 N.E.2d 1058. In other words, section 11-501(d)(1)(F) requires a causal link only between the physical act of driving and the victim's death. *Martin*, 2011 IL 109102, ¶ 26. As in civil cases, our supreme court has held proximate causation in criminal cases consists of two elements: cause in fact and legal cause. *People v. Hudson*, 222 Ill. 2d 392, 401, 856 N.E.2d 1078, 1083 (2006). Cause in fact exists when a defendant's conduct is a material element and a substantial factor in bringing about the injury, which means the injury would not have occurred absent the defendant's conduct. *People v. Mumaugh*, 2018 IL App (3d) 140961, ¶ 28, 94 N.E.3d 237. On the other hand, legal cause presents a question of foreseeability, and "the relevant inquiry is 'whether the injury is of a type that a reasonable person would see as a likely result of

his or her conduct.' " *Hudson*, 222 Ill. 2d at 401, 856 N.E.2d at 1083 (quoting *First Springfield Bank & Trust v. Galman*, 188 Ill. 2d 252, 258, 720 N.E.2d 1068, 1072 (1999)). Moreover, the defendant's driving need only be a proximate cause of the driver's death, not the sole proximate cause. *Mumaugh*, 2018 IL App (3d) 140961, ¶ 35; see also *People v. Way*, 2017 IL 120023, ¶ 36, 89 N.E.3d 355 (emphasizing a sole proximate cause defense was not appropriate in that case unless there was evidence the defendant's sudden unforeseeable medical condition was the sole proximate cause of the collision and not just a proximate cause). With an alleged violation of section 11-501(d)(1)(F), the central issue at trial is proximate cause, not impairment. *Martin*, 2011 IL 109102, ¶ 26.

¶ 39 Defendant first suggests the State's evidence was insufficient to prove proximate cause because he did not violate a traffic regulation. In support of his argument, defendant notes multiple witnesses testified defendant did not commit any traffic offenses. Moreover, Dixon, who was driving in the lane next to him, also did not see Roberts crossing the road. Additionally, defendant notes Detective Bednarz's testimony he did not find any person who described defendant's driving as erratic, dangerous, or in violation of any traffic laws. Defendant cites the cases of *Martin*, 2011 IL 109102, ¶¶ 3, 28; *People v. Turner*, 2018 IL App (1st) 170204, ¶ 80, 97 N.E.3d 140; and *People v. Johnson*, 392 Ill. App. 3d 127, 131, 924 N.E.2d 1019, 1022 (2009), where the defendants had committed traffic offenses and were found to be a proximate cause of the victims' injuries. However, defendant does not cite a case holding a defendant must commit a traffic violation to be considered a proximate cause of the victim's injuries. Thus, we disagree with defendant's suggestion the lack of a traffic violation prohibits the State from establishing proximate cause.

¶ 40 Defendant also argues Roberts's actions were an intervening cause negating any

proximate cause on his part and, in support of his argument, cites *Galman* and *Mumaugh*. In *Galman*, 188 Ill. 2d at 260, 720 N.E.2d at 1073, our supreme court held the defendant's illegal parking of a tanker truck near an intersection was not the proximate cause of a pedestrian's fatal injuries. The pedestrian did not cross the street in the marked crosswalk but, instead, attempted to cross the street in the middle of the block, which was immediately in front of the parked tanker truck. *Galman*, 188 Ill. 2d at 254, 720 N.E.2d at 1070. Her view of the road was obstructed, and she was struck by a vehicle in the middle of the street. *Galman*, 188 Ill. 2d at 254-55, 261, 720 N.E.2d at 1070, 1073. While the supreme court found the parked tanker truck was a cause in fact of the pedestrian's injuries, it concluded the truck was not the legal cause of the pedestrian's injuries. *Galman*, 188 Ill. 2d at 260, 720 N.E.2d at 1073. The court explained the dispositive question was "whether it was reasonably foreseeable that violating a 'no parking' sign at mid-block would likely result in a pedestrian's ignoring a marked crosswalk at the corner, walking to mid-block, and attempting to cross a designated truck route blindly and in clear violation of the law." *Galman*, 188 Ill. 2d at 261, 720 N.E.2d at 1073. The court answered the question in the negative. *Galman*, 188 Ill. 2d at 261, 720 N.E.2d at 1073. It noted the pedestrian's decision to jaywalk was "entirely of her own making." *Galman*, 188 Ill. 2d at 261, 720 N.E.2d at 1073. The supreme court emphasized the driver of the tanker truck "neither caused [the pedestrian] to make that decision, nor reasonably could have anticipated that decision as a likely consequence of [his] conduct." *Galman*, 188 Ill. 2d at 261, 720 N.E.2d at 1073.

¶ 41 In *Mumaugh*, 2018 IL App (3d) 140961, ¶ 36, the victim was also a pedestrian, and she was "walking in the middle of a dark, unlit, rural road at 10:30 p.m. on a moonless night wearing dark clothing and no reflectors." The reviewing court found such conduct was not foreseeable by the defendant and noted a reasonable person would not foresee the accident in

that case was the " 'likely result' of his conduct when he was driving normally (non-negligently), below the posted speed limit with functioning headlights, and within his proper lane of traffic." *Mumaugh*, 2018 IL App (3d) 140961, ¶ 36. It noted there was no evidence the defendant's driving was improper in any way and, at the time of the accident, the victim was not in an area where the defendant should have known or expected a pedestrian to be. *Mumaugh*, 2018 IL App (3d) 140961, ¶ 36. The reviewing court concluded none of the evidence at trial suggested the defendant's driving was even a contributing proximate cause of the victim's injuries and found the victim was the sole proximate cause of her injuries. *Mumaugh*, 2018 IL App (3d) 140961, ¶ 36.

¶ 42 This case is distinguishable from both *Galman* and *Mumaugh*. Here, the intersection near where Roberts attempted to cross Bradley Avenue lacked a crosswalk. Thus, there was not a specific location for pedestrians to cross Bradley Avenue, unlike the area in *Galman*. Moreover, unlike in *Mumaugh*, the area where the accident occurred was considered a high-traffic area for both vehicles and pedestrians. One side of Bradley Avenue was residential, and the other side was commercial with the Blue Star and the Chicken Restaurant. Moreover, the accident occurred around 6 p.m., a normal time for pedestrians to be outside. Given the aforementioned facts, it is foreseeable a pedestrian would be in the roadway. While it was already dark outside, there were some streetlights and ambient lighting from the commercial businesses. The victim in this case was moving very slowly and had already crossed the centerline of Bradley Avenue when she was struck by defendant's pickup truck. Roberts walked from the brighter side of the street to the darker side of the street. Moreover, Dixon was able to stop in time to avoid hitting Roberts, who had landed in Dixon's lane after being struck by defendant's pickup. Dixon had been stopped at the same intersection as defendant, and

defendant had accelerated faster from the stop than Dixon. Additionally, it is a reasonable inference from the evidence Dixon would not have seen Roberts because defendant's pickup truck, which was in front and to the left of her car, would have blocked her view. The jury also got a chance to watch the accident on a surveillance video from the Blue Star and could observe defendant's driving. A reasonable person could find defendant had an opportunity to view Roberts and slow down before the flash of an oncoming driver's lights and impact with Roberts. A reasonable person could also find defendant was driving too fast in the dark in an area where pedestrians would be common. While Roberts's decision to cross a street in the dark with limited mobility was a proximate cause of the accident, the State presented sufficient evidence for the jury to find beyond a reasonable doubt defendant's driving was also a proximate cause of the accident. We do not find this is a case where the victim's actions were the sole proximate cause of the accident as a matter of law.

¶ 43 Accordingly, we find the State's evidence in this case was sufficient to prove defendant guilty beyond a reasonable doubt of aggravated DUI.

¶ 44 B. Admissibility of Dr. Moore's Testimony

¶ 45 Defendant next argues the circuit court erred by allowing Dr. Moore to testify as to his opinion on the cause of Roberts's death when he was not qualified to make that determination. We review a circuit court's decision to admit evidence, including expert witness testimony, under an abuse of discretion standard. *People v. Lerma*, 2016 IL 118496, ¶ 23, 47 N.E.3d 985. An abuse of discretion occurs only when the circuit court's decision was " 'arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it.' " *Lerma*, 2016 IL 118496, ¶ 23 (quoting *People v. Rivera*, 2013 IL 112467, ¶ 37, 986 N.E.2d 634). The State contends defendant fails to establish the circuit court abused its discretion when

it allowed Dr. Moore's testimony as to the cause of Roberts's death.

¶ 46 Under Illinois law, an individual will be permitted to testify as an expert if his or her experience and qualifications afford him or her knowledge that is not common to lay persons and where such testimony will aid the trier of fact in reaching its conclusion. *Lerma*, 2016 IL 118496, ¶ 23. In exercising its discretion, the circuit court carefully considers the necessity and relevance of the expert testimony in light of the particular facts of the case before admitting the expert testimony for the jury's consideration. *Lerma*, 2016 IL 118496, ¶ 23. "Expert testimony addressing matters of common knowledge is not admissible 'unless the subject is difficult to understand and explain.' " *Lerma*, 2016 IL 118496, ¶ 23 (quoting *People v. Becker*, 239 Ill. 2d 215, 235, 940 N.E.2d 1131, 1142 (2010)). Additionally, a person can be permitted to testify as an expert if the person's experience and qualifications afford him or her knowledge that is not common to the average layperson and will assist the jury in evaluating the evidence and reaching a conclusion. *People v. Lovejoy*, 235 Ill. 2d 97, 125, 919 N.E.2d 843, 858 (2009). "There are no precise requirements regarding experience, education, scientific study, or training." *Lovejoy*, 235 Ill. 2d at 125, 919 N.E.2d at 859.

¶ 47 As previously stated, this case did not involve strenuous, technical medical knowledge and testimony to show Roberts's cause of death. Dr. Moore's medical training as a trauma surgeon and experience in treating victims of motor vehicle accidents is sufficient experience and knowledge for him to make a determination of the cause of death in this case. Dr. Moore was able to confirm Roberts's injuries were consistent with blunt force trauma and the force was of a large amount and to the right side of her body. He also explained such force can only come from being stuck by a vehicle, being in a motor vehicle accident, or falling from a large height. Such information is outside common knowledge. Dr. Moore pronounced Roberts

dead 15 minutes after she arrived in the emergency room after being struck by a motor vehicle. Thus, we find Dr. Moore had sufficient experience and qualifications to opine Roberts died from blunt force trauma from being struck by a motor vehicle. Dr. Moore did not give an opinion outside his medical knowledge like the forensic pathologist in *People v. Perry*, 147 Ill. App. 3d 272, 275, 498 N.E.2d 1167, 1169 (1986), cited by defendant. Accordingly, we find the circuit court did not err by allowing Dr. Moore to opine on the cause of death on the facts of this case.

¶ 48 C. Ineffective Assistance of Counsel

¶ 49 Defendant further argues he was denied effective assistance of counsel because trial counsel did not move to exclude the results of defendant's blood and urine tests and object to the admission of the results at trial. Specifically, he contends the State did not show Baluka, the forensic scientist who performed the tests on defendant's blood and urine, was qualified under section 11-501.2(a) of the Vehicle Code (625 ILCS 5/11-501.2(a) (West 2016)). The State suggests this issue may be more appropriate for collateral proceedings. We disagree and address the issue.

¶ 50 This court analyzes ineffective assistance of counsel claims under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Evans*, 186 Ill. 2d 83, 93, 708 N.E.2d 1158, 1163 (1999). To obtain reversal under *Strickland*, a defendant must prove (1) his counsel's performance failed to meet an objective standard of competence and (2) counsel's deficient performance resulted in prejudice to the defendant. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163. To satisfy the deficiency prong of *Strickland*, the defendant must demonstrate counsel made errors so serious and counsel's performance was so deficient that counsel was not functioning as "counsel" guaranteed by the sixth amendment (U.S. Const., amend. VI). *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163. Further, the defendant must overcome the strong

presumption the challenged action or inaction could have been the product of sound trial strategy. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163. To satisfy the prejudice prong, the defendant must prove a reasonable probability exists that, but for counsel's unprofessional errors, the proceeding's result would have been different. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163-64. The *Strickland* Court noted a court should address prejudice rather than whether counsel's representation was constitutionally deficient when to do so is easier. *Strickland*, 466 U.S. at 697.

¶ 51 In DUI prosecutions, evidence of a person's "concentration of alcohol, other drug or drugs, or intoxicating compound or compounds, or any combination thereof in a person's blood or breath at the time alleged, as determined by analysis of the person's blood, urine, breath, or other bodily substance, shall be admissible." 625 ILCS 11/501.2(a) (West 2016). Several provisions apply to the admissibility of such evidence. One of the provisions is the following:

> "Chemical analyses of the person's blood, urine, breath, or other bodily substance to be considered valid under the provisions of this Section shall have been performed according to standards promulgated by the Department of State Police by a licensed physician, registered nurse, trained phlebotomist, licensed paramedic, or other individual possessing a valid permit issued by that Department for this purpose. The Director of State Police is authorized to approve satisfactory techniques or methods, to ascertain the qualifications and competence of individuals to conduct such analyses, to issue permits which shall be subject to termination or revocation at the discretion of that Department and to certify the accuracy of breath testing equipment. The Department of State Police shall prescribe regulations as necessary to implement this Section." 625 ILCS

11/501.2(a)(1) (West 2016).

"Failure to comply with section 11-501.2 and the regulations promulgated thereunder renders the results of chemical tests inadmissible in a DUI prosecution." *People v. Maas*, 2019 IL App (2d) 160766, ¶ 63, 137 N.E.3d 897.

¶ 52 If defendant's counsel would have objected to the admission of defendant's blood and urine results based on the lack of evidence of Baluka's permit, the State would have had an opportunity to remedy any deficiencies in the foundational proof for the admissibility of the blood and urine results. See *People v. Rodriguez*, 313 Ill. App. 3d 877, 887, 730 N.E.2d 1188, 1196 (2000) (noting "the lack of a timely and specific objection deprives the State of the opportunity to correct any deficiency in the foundational proof"). The record does not suggest Baluka lacked a valid Illinois State Police permit. In fact, Baluka was employed by the Illinois State Police Division of Forensic Services. She had issued reports on toxicology analyses for controlled substances in over 3500 cases and had testified as an expert witness in 22 cases. Such evidence suggests Baluka had a valid Illinois State Police permit to perform the toxicology analyses in this case. Thus, had defense counsel raised an objection to the admission of the test results based on the lack of evidence of Baluka's permit, the State could have cured the defect. Accordingly, we find defendant cannot establish the prejudice prong of the *Strickland* test, and thus defendant has failed to show ineffective assistance of counsel.

¶ 53 D. Jury Instruction

¶ 54 Defendant also asserts the circuit court erred by declining to give the jury instruction on proximate cause he proposed. Defendant's instruction was based on *Mumaugh*, 2018 IL App (3d) 140961, which we discussed in analyzing the sufficiency of the State's evidence on proximate cause. The State contends the circuit court properly gave Illinois Pattern

Jury Instructions, Criminal, No. 23.28a (4th ed. 2000) (hereinafter IPI Criminal 4th).

¶ 55 " 'The sole function of instructions is to convey to the minds of the jury the correct principles of law applicable to the evidence submitted to it in order that, having determined the final state of facts from the evidence, the jury may, by the application of proper legal principles, arrive at a correct conclusion according to the law and the evidence.' " *People v. Nere*, 2018 IL 122566, ¶ 29, 115 N.E.3d 205 (quoting *People v. Ramey*, 151 Ill. 2d 498, 535, 603 N.E.2d 519, 534 (1992)). Generally, we review whether the circuit court erred in refusing a particular jury instruction under an abuse of discretion standard. *Nere*, 2018 IL 122566, ¶ 29. However, whether a particular jury instruction accurately conveyed to the jury the law applicable to the case is an issue we review *de novo*. *Nere*, 2018 IL 122566, ¶ 29.

¶ 56 Here, the circuit court gave the proximate cause instruction based on IPI Criminal 4th No. 23.28a. Illinois Supreme Court Rule 451(a) (eff. Apr. 8, 2013) provides, in pertinent part, the following:

> "Whenever Illinois Pattern Jury Instructions, Criminal, contains an instruction applicable in a criminal case, giving due consideration to the facts and the governing law, and the court determines that the jury should be instructed on the subject, the IPI Criminal instruction shall be used, unless the court determines that it does not accurately state the law."

Citing *Mumaugh*, 2018 IL App (3d) 140961, ¶ 36, defendant asserts IPI Criminal 4th No. 23.28a is not an accurate statement of law because it does not mention intervening causes. However, the reviewing court in *Mumaugh* held the defendant was not a proximate cause of the victim's injuries because the accident was not foreseeable and thus legal cause was not established. *Mumaugh*, 2018 IL App (3d) 140961, ¶¶ 28, 36. In *Mumaugh*, the victim's conduct was the sole

proximate cause of her injuries and not an "intervening cause." See *Mumaugh*, 2018 IL App (3d) 140961, ¶ 36.

¶ 57 In *People v. Cook*, 2011 IL App (4th) 090875, ¶ 30, 957 N.E.2d 563, this court rejected the argument the foreseeability component of proximate causation is inadequately stated by IPI Criminal 4th No. 23.28a. We found IPI Criminal 4th No. 23.28a incorporated the element of foreseeability in the phrase "in the natural or probable sequence," which is consistent with the law on proximate cause. *Cook*, 2011 IL App (4th) 090875, ¶ 30. "No more explicit or in-depth instruction was required to state fully and accurately the law on proximate cause as it relates to aggravated DUI." *Cook*, 2011 IL App (4th) 090875, ¶ 30.

¶ 58 Defendant suggests *Cook* is no longer good law because it was decided before *Mumaugh*. However, *Mumaugh* clarifies the case law on proximate cause only by showing a situation where the accident was not foreseeable, and thus the defendant's actions were not a proximate cause of the victim's injuries. *Mumaugh* did not alter the proximate cause analysis. Thus, we find *Cook* is still good case law.

¶ 59 Accordingly, we find the circuit court did not abuse its discretion by declining to give defendant's tendered proximate cause instruction.

¶ 60 E. Sentence

¶ 61 Last, defendant argues the circuit court abused its discretion by sentencing defendant to four years' imprisonment despite its finding the circumstances of the offense were extraordinary. The State contends defendant forfeited this issue by failing to raise it in a motion to reconsider his sentence. Defendant agrees and asserts we should review the issue under the plain-error doctrine (Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967)).

¶ 62 The plain-error doctrine permits a reviewing court to consider unpreserved error

under the following two scenarios:

> "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Sargent*, 239 Ill. 2d 166, 189, 940 N.E.2d 1045, 1058 (2010).

¶ 63 We begin our plain-error analysis by first determining whether any error occurred at all. *Sargent*, 239 Ill. 2d at 189, 940 N.E.2d at 1059. If error did occur, this court then considers whether either of the two prongs of the plain-error doctrine has been satisfied. *Sargent*, 239 Ill. 2d at 189-90, 940 N.E.2d at 1059. Under both prongs, the defendant bears the burden of persuasion. *Sargent*, 239 Ill. 2d at 190, 940 N.E.2d at 1059.

¶ 64 This court has explained appellate review of a defendant's sentence as follows:

> "A trial court's sentencing determination must be based on the particular circumstances of each case, including factors such as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. [Citations.] Generally, the trial court is in a better position than a court of review to determine an appropriate sentence based upon the particular facts and circumstances of each individual case. [Citation.] Thus, the trial court is the proper forum for the determination of a defendant's sentence, and the trial court's

> decisions in regard to sentencing are entitled to great deference and weight. [Citation.] Absent an abuse of discretion by the trial court, a sentence may not be altered upon review. [Citation.] If the sentence imposed is within the statutory range, it will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense." (Internal quotation marks omitted.) *People v. Price*, 2011 IL App (4th) 100311, ¶ 36, 958 N.E.2d 341 (quoting *People v. Hensley*, 354 Ill. App. 3d 224, 234-35, 819 N.E.2d 1274, 1284 (2004)); see also *People v. Alexander*, 239 Ill. 2d 205, 212-13, 940 N.E.2d 1062, 1066 (2010).

¶ 65 Section 11-501(d)(2)(G) of the Vehicle Code provides the following:

> "A violation of subparagraph (F) of paragraph (1) of this subsection (d) is a Class 2 felony, for which the defendant, unless the court determines that extraordinary circumstances exist and require probation, shall be sentenced to: (i) a term of imprisonment of not less than 3 years and not more than 14 years if the violation resulted in the death of one person; or (ii) a term of imprisonment of not less than 6 years and not more than 28 years if the violation resulted in the deaths of 2 or more persons." 625 ILCS 5/11-501(d)(2)(G) (West 2016).

The aforementioned section has been interpreted to require both (1) extraordinary circumstances and (2) those extraordinary circumstances require probation. *People v. Vasquez*, 2012 IL App (2d) 101132, ¶ 61, 971 N.E.2d 38. A defendant may present evidence of "*any* relevant extraordinary circumstances, whether it be extraordinary circumstances surrounding the offense,

his or her life, or the combination of both." (Emphasis in original.) *Vasquez*, 2012 IL App (2d) 101132, ¶ 63. The circuit court then determines whether the defendant's evidence establishes circumstances so extraordinary probation is required. *Vasquez*, 2012 IL App (2d) 101132, ¶ 63.

¶ 66 Defendant argues the circuit court erred by not sentencing him to probation because the court believed the statute required extraordinary circumstances in both the circumstances of the offense and defendant's life before it could sentence defendant to probation. We disagree. While the circuit court could have used more clear language, the crux of the court's lengthy explanation for why it did not sentence defendant to probation was because of defendant's failure to admit and address substance abuse issues. Even with the extraordinary circumstances, the circuit court has the discretion to not sentence the defendant to probation. See *Vasquez*, 2012 IL App (2d) 101132, ¶ 63. If the circuit court actually believed it wanted to sentence defendant to probation and was prohibited from doing so, it would have sentenced defendant to the minimum prison term possible, which is three years. Moreover, the court made it clear it was considering probation at the hearing on defendant's posttrial motion and wanted defendant to complete the DUI substance abuse evaluation to assist the court in determining the appropriateness of probation. Here, the record shows the circuit court carefully weighed the sentencing factors in determining probation was not appropriate and a sentence of four years' imprisonment was appropriate. Accordingly, we find the circuit court did not abuse its discretion in sentencing defendant. Since we have found no error, we do not address the applicability of the plain-error doctrine.

¶ 67 III. CONCLUSION

¶ 68 For the reasons stated, we affirm the Champaign County circuit court's judgment.

¶ 69 Affirmed.