2012 IL App (1st) 103213-U

FIRST DIVISION
September 28, 2012

No. 1-10-3213

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
	)	the Circuit Court
Plaintiff-Appellee,	)	of Cook County
	)	
v.	)	No. 10 CR 3213
	)	
	)	
KEVIN OLIS,	)	Honorable
	)	Carol A. Kipperman,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE KARNEZIS delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant was proven guilty beyond a reasonable doubt. The trial court did not err in allowing a non-IPI jury instruction, in limiting cross-examination and in allowing photographs to be sent to the jury. Defendant was not denied a fair trial by the prosecutor's statements in closing argument.

¶ 2 Following a jury trial, defendant Kevin Olis was convicted of two counts of aggravated driving under the influence (DUI) causing the death of Lydia Salmanis (625 ILCS 5/11-501(d)(1)(F) (West 2008)) and one count of causing an accident resulting in

injury or death (625 ILCS 5/11-401(a) (West 2008)). Defendant argues: (1) the State failed to prove him guilty beyond a reasonable doubt; (2) the trial court erred in giving the jury a non-IPI instruction defining alcohol; (3) the court erred by limiting defense counsel's cross-examination of a State's witness regarding the change in protocol of testing blood alcohol concentration in diabetics; and (4) the prosecutor made improper comments in closing argument. For the following reasons, we affirm defendant's conviction.

¶ 3 BACKGROUND

¶ 4 Defendant was charged by way of indictment with two counts of aggravated DUI causing the death of Lydia Salmanis and one count of causing an accident resulting in injury to or death of the victim. Defendant was convicted on all counts and was sentenced to a total of four years' imprisonment. The following evidence was adduced at trial.

¶ 5 On May 23, 2008, Ben Vargas was working security at Tonic Bar at the corner of Roosevelt Road and Merengo Street in Forest Park, Illinois. Joseph Riddle was also working at Tonic Bar as a bartender that night. Around midnight, both Vargas and Riddle were working in Tonic's beer garden, which is behind the bar and surrounded by a seven foot high wooden lattice fence. Vargas saw Salmanis walk out of a neighboring bar with two men. She was laughing and appeared to be intoxicated. The men continued to walk down the alley. Salmanis fell in the alley and laid down there.

¶ 6 Vargas told Riddle about what he saw and grabbed his flashlight. He shined the

flashlight in Salmanis' eyes trying to get her attention. She sat up, waived and said, "Whoo," before lying back down. As Vargas and Riddle were about to get her, Vargas saw a dark-colored Ford van make a left-hand turn and drive northbound in the alley. Vargas pointed his flashlight at the van as it was coming down the alley. Vargas heard a "crunch" along with someone saying "ah," but did not see the van run over Salmanis. Salmanis was dragged about twenty feet. The van did not slow down and Vargas did not see the brake lights for the van illuminate until after the victim was struck. Riddle testified that the van was not driving very fast, but did not brake when it hit Salmanis and did not swerve away.

¶ 7 Vargas told Riddle to tell the head bouncer what happened. Vargas tried to jump over the fence but had difficultly. When he got over the fence, he saw the van pulling away. He didn't see anyone get out of the van or anyone standing by Salmanis. Riddle ran out of the front door of the bar and saw the person who he thought might have been the passenger in the van on his cell phone. Riddle thought the person might have been calling 911. He saw the driver of the van standing near the driver's side door but did not see the driver approach Salmanis. The driver got back into the van and drove away.

¶ 8 Walter Dougenson, a paramedic with the Forest Park Fire Department, and his partner responded to a call of a pedestrian struck by a vehicle. When they arrived, they saw Salmanis lying face down with her legs curled under her torso. She had multiple abrasions on her chest, legs and upper extremities, and deformities to her right arm and

lower legs. She also had a skull avulsion. She was moved into the back of the ambulance, where CPR was performed. When they attempted chest compressions, they felt bone-on-bone as a result of broken bones in her sternum area. They were unable to revive her and she was pronounced dead.

¶ 9 Forest Park police Officer Robert Kendall was on patrol and received a radio call of a possible hit and run. The suspected vehicle was described as a dark-colored Ford van with a side stripe. Minutes later, he saw a blue Ford van with a grey strip traveling northbound on Harlem. Officer Kendall activated his emergency lights and pulled the van over. Officer Kendall approached defendant, who had exited the vehicle. Defendant produced his driver's license and insurance card. Officer Kendall informed defendant that a van with a similar description was involved in a hit and run. Defendant told Officer Kendall that he was returning from dropping a friend off at Carol's Bar. When asked, defendant denied striking anyone. He then said, "he thought he ran over a ball." Defendant also stated that, "if he struck anybody, he didn't see her," although Officer Kendall had not disclosed the gender of the victim.

¶ 10 Defendant told Officer Kendall that Wallace a/k/a "Danny" Wiggam was a passenger in his van that night. When asked, defendant stated he was drinking a few hours ago at the race track. Defendant's eyes were glassy but he did not stumble or have difficulty standing. Defendant was arrested and transported to the Forest Park police station.

¶ 11 After speaking with defendant, Officer Kendall went to the scene to locate

Wiggam. Officer Kendall found Wiggam in Carol's Bar and placed him under arrest. Wiggam was transported to the Forest Park police station.

¶ 12 When Officer Kendall arrived at the police station, sometime before 12:50 a.m., defendant was being held in the processing room. Officer Kendall informed defendant of his *Miranda* rights from a pre-printed form and defendant initialed each line and signed his name. Officer Kendall also informed defendant of the Warnings to Motorist because defendant was to undergo a breathalyzer test.

¶ 13 Because none of the Forest Park police officers were certified breathalyzer officers, Officer Kendall called the River Forest Police Department to send a certified officer. River Forest police sergeant Christopher Pate, a certified breathalyzer officer, arrived at the station at 12:50 a.m. Sergeant Pate noticed that the breathalyzer machine at the Forest Park police station was the EC/IR machine and was approved by the State of Illinois and the Illinois Department of Public Health as an authorized breathalyzer machine. The corresponding log book indicated that the machine had been certified accurate by the Illinois State Police on May 7, 2008.

¶ 14 The breathalyzer was administered by Sergeant Pate. The result of the breathalyzer test was .089 at 1:13 a.m. Defendant signed the printed results. After the test results were obtained, Officer Kendall and Detective Frey of the Forest Park Police Department went to the victim's residence and notified her boyfriend of her death. The officers then went to Tonic Bar and spoke with Vargas and Riddle and made arrangements for them to come to the station to provide a statement.

¶ 15 When they returned to the station, Detective Frey spoke with defendant inside an interview room at 2:46 a.m. Detective Frey informed defendant of his *Miranda* rights and defendant signed the form acknowledging the waiver of his rights. Officer Kendall was also present in the interview room. A videotape of the interview was played at trial.

¶ 16 Dr. Ponni Arunkumar performed an autopsy on the victim. Dr. Arunkumar testified that an external examination of the victim's body revealed multiple abrasions on her face, neck, cheek, abdomen and extremities and multiple bruises on her face and abdomen. She also had a laceration that had an evulsion of skin called degloving, on her forehead and the top of her head. X-rays revealed that she dislocated her first cervical vertebra, fractured her third cervical vertebra, and multiple rib fractures and a fractured right scapula. Toxicology revealed that the victim had a blood alcohol level of .385, which the doctor testified was very high, and opined that the victim would have suffered impaired consciousness.

¶ 17 Dr. Arunkumar also opined that the victim was still alive at the time she was struck because the abrasions to her body, as well as the injuries to her head were red, which indicated hemorrhages. In her expert opinion, Dr. Arunkumar determined that the victim's injuries were consistent with blunt force trauma and the cause of death was multiple injuries due to a motor vehicle striking a pedestrian.

¶ 18 Investigator Ron Sachtleban, a criminalistics investigator for the Cook County Sheriff's Police, along with his partners William Edwards and James Ollie, inspected and photographed defendant's van after the incident. Under the front passenger side

of the van, Investigator Sachtleban noticed fibers that appeared to be consistent with the victim's jacket that was recovered from the scene. He also found what appeared to be blood under the passenger side frame and hair on the tailpipe. He collected the fiber and hair samples and took swabbings of the suspected blood. Photographs were taken of the van and the area surrounding where the victim was struck. Investigator Sachtleban collected some of the victim's items left at the scene including two shoes, two halves of a jacket and a purse.

¶ 19 Barry Krikav testified for defendant. On May 23, 2008, he went to the Maywood Park Race Track with Tad Moseel and Danny Wiggam. Defendant arrived after him at about 9:30 p.m. Krikav, Mossell and defendant's brother Sean Olis left the race track at about 11:15 and dropped Sean off at a friend's house before going to Carol's Bar. As he parked his car outside of Carol's Bar, he saw paramedics. Krikav and Mossell walked toward the alley where Wiggam was standing with Eric Jones. He saw the victim's body lying on the ground. Krikav and Mossell went into Carol's Bar.

¶ 20 Mossell testified that he Krikav, Sean Olis and Wiggam arrived at the race track at between 8:00 p.m. and 8:30 p.m. on May 23, 2008. He testified that he saw defendant at the race track between 9:30 p.m. and 10:00 p.m. and bought defendant a Jack Daniels and Diet Coke. When they left, Wiggam drove with defendant to Carol's Bar. Mossell dropped Sean Olis off at a friend's house before arriving at Carol's Bar. When he arrived he saw emergency and police vehicles in the alley. He also saw Wiggam and Eric Jones in the alley. He walked into Carol's Bar but left a short time

later when he saw Wiggam being arrested. He went to the police station and waited an hour but never saw Wiggam.

¶ 21 Mossell testified on cross-examination that he saw defendant drink two drinks that night. Mossell never saw defendant eat anything that night and did not hear him complain about his blood sugar. Defendant also did not have any trouble speaking that night and was not slurring his words.

¶ 22 Eric Jones testified that he arrived at the race track between 7:30 and 8:00 p.m. on May 23, 2008, with Sarren Macri. He saw defendant arrive a couple of hours later. When he left the race track, he was dropped off at his house. He drove his own car to Carol's Bar. He parked his car and saw a group of people standing in the alley. He approached Wiggam who was in the alley kneeling down next to someone lying on the ground. Wiggam didn't respond when Jones asked him what was going on. Jones walked into the bar after paramedics arrived. Jones admitted that he did not spend much time with defendant that night so he did not know how much defendant had to drink. In his opinion, defendant was not under the influence of alcohol based on his ability to walk in the parking lot.

¶ 23 Lauren Sherman, Wiggam's girlfriend before he died of heart failure, testified that defendant arrived at the race track at about 9:30 p.m. on May 23, 2008. She knew defendant had diabetes. She left the race track between 10:30 and 11:00 p.m. that night.

¶ 24 Amy Schultz testified that she and defendant were close friends for ten years

and she knew he had diabetes and tested his blood sugar three to five times per day. She delivered defendant's insulin, blood kit and syringes to an officer at the Forest Park Police Station after learning that defendant had been arrested.

¶ 25 Brendan Olis, defendant's brother, was also at the race track that night with James Olis. He arrived about 8:30 p.m., but didn't see his brother until about 10:00 p.m. He did not see his brother drinking anything that night. When Brendan and James left the race track, defendant did not appear to be under the influence of alcohol. After dropping James off, he went home. He testified that he had seen defendant under the influence of alcohol on prior occasions, but in his opinion, defendant was not under the influence of alcohol that night. Defendant did not complain that his blood sugar was low or that he was not feeling well from his diabetes.

¶ 26 James Olis testified that he did not see defendant eat anything at the race track that night and assumed defendant was drinking Diet Coke. Defendant did not appear to be impaired and never told James that he did not have his insulin kit with him or needed to borrow insulin from him.

¶ 27 Defendant testified on his own behalf. Defendant testified that he is a Type 1 diabetic and takes two types of insulin to treat his illness. On May 23, 2008, he took insulin after he woke up and again before he had dinner, at about 6:00 p.m. He took another shot of insulin at about 9:00 p.m., before he went to the race track.

¶ 28 He drove his blue van to the race track and met some friends. He drank two Diet Cokes with Jack Daniels. When he was ready to leave, he met Wiggam in the

bathroom and offered to give him a ride to Carol's Bar. Defendant testified that when he left the racetrack he was not under the influence of alcohol.

¶ 29 As he turned into the alley near Carol's Bar, he felt some resistance under the van. Wiggam said, "Jesus Christ, it feels like you're on top of something." Defendant told him, "It feels like I'm on top of a basketball." Wiggam told him to stop but defendant pulled forward. Wiggam got out of the van. When defendant exited, Wiggam walked to the back of the van Wiggam told him that he ran over a woman. Defendant saw a "hump" in the alley and did not see any injuries to the victim's face or body. Wiggam had his phone in his hand and defendant told to him to call the police. Defendant got back into the van and told Wiggam he was going to park the van.

¶ 30 Instead of parking, defendant drove away because he panicked. He continued driving until he got to Harlem Avenue. He parked his van in front of 1031 Elgin Street, the house where his children lived with his ex-wife. When he saw the house was dark he did not know what to do so he drove to the corner and turned onto Harlem Avenue. He was on his way home to talk to his father and then to the Forest Park Police Station but was stopped by Officer Kendall.

¶ 31 When Officer Kendall stopped defendant he placed defendant in the back of his squad car and drove defendant to the scene. He was then driven to the Forest Park Police Station where he spoke with Officer Kendall and Detective Frey. Several hours later, while he was still at the station, a police officer brought him his blood kit. His blood sugar was 468 so he took a shot of insulin.

¶ 32 On cross-examination, defendant testified that he told Detective Frey that when he pulled into the alley he felt some resistance under then van, but he "never saw a thing." He did not recall telling officers that he thought he ran over a ball and did not remember saying, "If I did hit her, I didn't see her."

¶ 33 Defendant also testified that while at the station, he told officers that he was in "bad shape" and needed his medicine and blood testing kit or he would need to go to County hospital. Defendant did not tell Detective Frey that he needed to go to the hospital or needed medicine.

¶ 34 Dr. Ronald Henson testified as to his qualifications to testify as an expert. Dr. Henson testified as to his educational background and his prior work experience. Dr. Henson stated that he had been licensed as a breath alcohol testing operator in 1981 and became a licensed instructor in 1988. He testified that he currently worked as the president of Berron Consulting Company and had been retained by defense counsel to review the material in this case and render an expert opinion, for which he was paid $3000.

¶ 35 Dr. Henson testified that he was familiar with the breath test machine EC/IR and the variables that affect its accuracy. He explained that the operator’s manual states that the ER/IR measures ethyl, methyl, and isopropyl alcohol. Ethyl alcohol is the type that is found in alcoholic beverages for consumption, methyl alcohol is used as a cleaning agent and isopropyl alcohol is commonly referred to as rubbing alcohol. Dr. Henson testified that he was aware that a person with diabetes can exhibit symptoms of

intoxication and that some breath testing devices can be influenced by diabetes.

¶ 36 Dr. Henson testified that a blood test, rather than a breath test, is a preferred method of testing someone who is diabetic. Dr. Henson explained that blood is required because acetone is a component of a person with diabetes and that acetone transforms into isopropyl alcohol when it is eliminated from the body and therefore isopropyl alcohol will register on the EC/IR. The ER/IR cannot distinguish between isopropyl alcohol and ethanol.

¶ 37 Dr. Henson testified that he is not a doctor that specializes in diabetes or any other kind of medical doctor. He based his opinion on the physiological effects of alcohol on a diabetic based on lectures he attended, studies he read, and his experience with the type of breathalyzer test used in this case. Dr. Henson referred to three studies, none of which used the same type of breathalyzer machines used in this case. He also testified that he is aware that the State of Illinois defines alcohol as "ethanol (commonly referred to as grain alcohol), ethyl alcohol, alcoholic beverages, alcoholic liquor, isopropanol or methanol."

¶ 38 Dr. Henson also testified that his company has purchased two breathalyzer machines from eBay and from a redistributor but that these machines do not have the same software as currently being used. Over the objection of the State, the court allowed Dr. Henson to testify as an expert on the EC/IR machine and the testing of the machine.

¶ 39 Dr. Henson further testified that he never conducted any human testing with

isopropyl alcohol because it would be dangerous because isopropyl alcohol is highly toxic. Dr. Henson testified that the breath ticket for this case showed that it was taken at 1:13 a.m., but the machine could not measure defendant's blood alcohol content an hour earlier. The machine only measures the blood alcohol content at the time the sample is taken. Dr. Henson opined that the breathalyzer result in this case was not reliable because of defendant's diabetic condition.

¶ 40 On cross-examination, Dr. Henson testified that he did not conduct any testing on diabetics with the EC/IR machine, nor was he aware of these types of studies having been done. Dr. Henson explained that a blood test allows for a separate reading of blood alcohol concentration for each different type of alcohol. Dr. Henson stated that he was not an expert on diabetes and did not know whether a person could not produce acetone unless they did not have any sugar left in their body. He was aware that a person with low blood sugar could exhibit symptoms similar to someone who was intoxicated.

¶ 41 After hearing all of the evidence, the jury convicted defendant on all three counts. The court sentenced him to concurrent terms of four years' imprisonment, four years' imprisonment and one year inprisonment. It is from this judgment that defendant now appeals.

¶ 42 ANALYSIS

¶ 43 Defendant first claims that the State failed to prove him guilty beyond a reasonable doubt. However, defendant bases his argument on his contention that the

trial court erred in allowing the State to include a non-IPI jury instruction and on the court's decision to restrict cross-examination of a defense witness, rather than on the sufficiency of the evidence against him.

¶ 44 When a defendant is challenging the sufficiency of the evidence, the relevant inquiry is whether, after viewing all of the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Smith*, 185 Ill. 2d 532, 541 (1999). The trier of fact is in the best position to determine the credibility of the witnesses, to resolve any inconsistencies or conflicts in their testimony, to assess the proper weight to be given to their testimony and to draw reasonable inferences from all of the evidence. *People v. Cochran,* 323 Ill. App. 3d 669, 679 (2001).

¶ 45 Initially, defendant cited the correct standard of review, but failed to make any argument relating to the State's failure to prove the elements of the offenses of aggravated DUI causing the death of Lydia Salmanis or causing an accident resulting in the injury or death of the victim. In his reply brief, defendant admits that the evidence established that defendant, had two drinks on the night of the incident and ran over Salmanis as she lay across the alley, causing her death. Defendant argues that the State failed to prove that defendant's BAC at the time of the accident was above a .08 from "ingested ethanol or ingested isopropanol."

¶ 46 Defendant's entire argument is premised on Dr. Henson's theory of biotransformation. Dr. Henson testified that diabetics produce acetone which can be

biotransformed into isopropyl alcohol, which would register on a breathalyzer. However, defendant fails to recognize that the jury in this case heard the testimony of the witnesses, and was able to accept or reject their testimony, including Dr. Henson's. It is well-established that the trier of fact is free to accept or reject as much or as little of a witness's testimony as it pleases. *People v. Howard*, 376 Ill. App. 3d 322, 329 (2007).

¶ 47 The State's evidence showed that defendant had drinks at the race track and left in his van to go to a bar. On his way, defendant ran over and killed Salmanis. His subsequent blood alcohol content measured at .089, over the legal limit. Viewing the evidence in the light most favorable to the State, we conclude that the jury could have found that the State proved that defendant ingested alcohol, had an alcohol level above .08 while driving a car and caused Salmanis' death beyond a reasonable doubt.

¶ 48 Defendant next claims that the trial court committed reversible error by providing a non-Illinois Pattern Jury Instruction (IPI) defining alcohol to include non-ingested isopropanol.

¶ 49 During the jury instruction conference, the State proposed a non-IPI instruction defining alcohol as "ethanol (commonly referred to as grain alcohol), ethyl alcohol, alcoholic beverages, alcoholic liquor, isopropyl, or methanol." Defense counsel objected to the instruction on the basis that it was a non-IPI instruction and suggested that the jury should decide the definition of alcohol. Defense counsel further argued that defendant did not drink alcohol. Rather, that he injected insulin into his body which manufactures acetone and the acetone is biotransformed into isopropanol. The State

countered that it “patterned this after the definition * * * located in 20 Illinois Administrative Code, Section 1286.10 under "Definitions"." The State further added that, under the law, it did not matter how the isopropanol got into defendant's body, but whether the isopropanol, which is included in the definition of alcohol, was in defendant's body.

¶ 50 After taking it under advisement, the court ultimately ruled that the jury should receive the non-IPI instruction containing the definition of alcohol as well as the pattern instruction for alcohol concentration. The court stated, "given the evidence in this case and the issue with regard to the type - - the different types of alcohol, including ethanol and isopropanol, the Court feels that for the edification of the jury they should be given that instruction." Therefore, the jury received the following instructions:

> “‘Alcohol’ means ethanol commonly referred to as grain alcohol, ethyl alcohol, alcoholic beverages, alcoholic liquor, isopropanol or methanol.”

and

> "The term alcohol concentration means either grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath. Alcohol concentration may be determined by analysis of a person's breath, blood, urine or other bodily substance."

¶ 51 Jury instructions are necessary to provide the jury with the legal principles applicable to the evidence presented so that it may reach a correct verdict. *People v. Hopp*, 209 Ill. 2d 1, 8 (2004). Supreme Court Rule 451(a) (177 Ill. 2d R. 451(a))

provides that whenever the IPI contains an applicable jury instruction and the court determines that the jury should be instructed on the subject, "the [IPI instruction] shall be used unless the court determines that it does not accurately state the law." Where no IPI instruction exists on a subject, as in this case, the court has the discretion to give a non-pattern jury instruction. *People v. Ramey*, 151 Ill. 2d 498, 536 (1992). The trial court determination will not be disturbed absent an abuse of discretion. *People v. Jackson*, 331 Ill. App. 3d 279, 290 (2002).

¶ 52 *People v. Kamide*, 254 Ill. App. 3d 67 (1993), is instructive here. In *Kamide*, the defendant was convicted of driving under the influence of alcohol with an alcohol concentration of .10 or more. The defendant presented the testimony of a chemist who testified that defendant's use of Ventolin, a bronchial dilator inhaled by asthmatics, prior to his arrest would register as ethanol, a type of alcohol different from the kind normally consumed to become intoxicated. *Id* at 68. During deliberations, the jury sent a note asking "Is the consumption of venelyn [sic] considered consumption of alcohol?" The judge did not answer the question and instructed the jury to continue deliberating.

¶ 53 On appeal, this court found that the trial court erred in failing to provide a definition of alcohol in response to the jury's question. The court stated,

> "Chemical analyses of a person's breath are to be performed in accordance with the standards set forth by the Department of Public Health. We may take judicial notice of these standards which are set forth by the Administrative Code. That part of the Code deals with the testing of breath,

> blood and urine for alcohol, and in its definition section it defines 'alcohol' as 'ethanol', commonly referred to as ethyl alcohol or alcoholic beverage.'
>
> * * *
>
> In this case, the jurors demonstrated confusion over the meaning of the word 'alcohol'. Despite the State's argument that such a word has a common meaning so that no additional definition is needed, we believe that the word 'alcohol' does need an additional definition in that the Department of Public Health regulations specifically define 'alcohol' to mean only one type of alcohol, ethanol, and expert testimony in this case demonstrated that the type of alcohol contained in defendant's asthma spray and possibly reflected by the breathalyzer readout is a different type of alcohol. Because the jury demonstrated confusion as to a question of law, we hold that the trial court committed reversible error by refusing to provide the jury with an instruction on the definition of 'alcohol'." *Id* at 72.

¶ 54 While *Kamide* differs factually from the instant case, it cites with approval the use of a non-pattern IPI instruction to define alcohol when an issue arises concerning the effect of medications on the breathalyzer test. In this case, Dr. Henson testified about the different types of alcohol: ethyl, methyl, and isopropyl. Dr. Henson explained to the jury that ethyl alcohol is the type of alcohol that would be in a beverage for human consumption, methyl alcohol is used as a cleaning agent and isopropyl alcohol is commonly referred to as rubbing alcohol. Dr. Henson agreed that the Illinois

Administrative Code defined alcohol as "ethanol (commonly referred to as grain alcohol), ethyl alcohol, alcoholic beverage, alcoholic liquor, isopropanol or menthol..."

¶ 55 Dr. Henson testified that a person with diabetes produces acetone that is biotransformed into isopropyl alcohol when it is eliminated from his or her body. Dr. Henson theorized that the type of alcohol that registered on the breathalyzer given to defendant was isopropyl alcohol, not the type of alcohol found in beverages for human consumption. Dr. Henson further testified that a person with diabetes should be given a blood test rather than a breathalyzer because of the biotransformation and its effect on breathalyzer results. Given the evidence in this case, we cannot say that the trial court abused its discretion in determining that a non-IPI definition of alcohol be included in the jury instructions.

¶ 56 Defendant argues that the trial court improperly restricted cross-examination of Officer Kendall regarding an alleged change in protocol requiring blood tests for DUI suspects with diabetes.

¶ 57 During cross-examination of Officer Kendall, the following colloquy occurred:

> "DEFENSE COUNSEL: Okay. Now are there any guidelines that Officer Pate talked to you about or that you are aware of somebody that suffers from Type 2 diabetes?
>
> "OFFICER KENDALL: Yes. But as far as the breathalyzer given at the time, we didn't have that discussion because it wasn't an issue at the time or I wasn't aware of any problems that we had to look for as far as that.

DEFENSE COUNSEL: You weren't aware of this back then in 2008 or in this particular case?

OFFICER KENDALL: That's correct. I wasn't aware of this particular case that that was an issue with him.

DEFENSE COUNSEL: Now, it was become protocol in Forest Park that if someone does suffer from diabetes, a blood test is a preferred method of exacting blood samples, isn't that true..

PROSECUTOR: Objection

COURT: Sustained."

¶ 58 During a sidebar, defense counsel argued

"Judge, it's my position that it's highly relevant if in fact the Breathalyzer machine, that was working that night was improperly working. In other words that if we have a certified breath Tech coming in here and notes of a person who suffers from diabetes, whether it's type 1 or type 2, it is in the manuals that they are to take a blood test. That a blood test is the preferred method of extracting an alcohol level in somebody's system."

¶ 59 The State argued,

"Judge, my objection was to remedied procedure. Now they do a blood test and involvement - - first of all, Officer Kendall is not a certified breath operator. He had no knowledge necessarily of procedure of what they are.

> Secondly, there is no evidence that he knew it was type 2 diabetes. Thirdly, we have not been tendered any manual. [Defense counsel] believes and is insistent it's in there.
>
> This happened in 2008. Whatever happened in 2010 or 7 - - 2007 in Forest Park is irrelevant. The jury needs to hear what the standards were in 2008. If Mr. Goggin wants to call Officer Kendall back in rebuttal, then he can ask him on his case in chief * * *."

The court ruled, "[t]he evidence is that he didn't know at the time, therefore, any question on that would not be relevant."

¶ 60 The sixth amendment of the United States Constitution (U.S. Const., amend. VI), guarantees the right of an accused to confront witnesses against him through cross-examination. *Pointer v. Texas*, 380 U.S. 400 (1965). A defendant may not be deprived of his right to cross-examine witnesses against him but a trial court may limit the scope of cross-examination. *People v. Criss*, 294 Ill. App. 3d 276, 279 (1998). With respect to rulings limiting cross-examination, it is well established that the scope of cross-examination rests largely in the discretion of the trial court, and unless the court abuses that discretion there is no error. *People v. Owens*, 102 Ill.2d 88, 103 (1984). "The confrontation clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way or to whatever extent the defense desires." (Emphasis in original.) *People v. Averhart*, 311 Ill. App. 3d 492, 497 (1999), citing *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985). To determine the

constitutional sufficiency of cross-examination, a court looks to what defendant was allowed to do, not what he was prohibited from doing. *Averhart*, 311 Ill. App. 3d at 497. The test is whether the limitation on cross-examination created a substantial danger of prejudice by denying a defendant his right to test the truth of the testimony at issue. *Averhart*, 311 Ill. App. 3d at 497. Thus, if the entire record shows that the trier of fact was aware of adequate factors to determine whether the witness is worthy of belief, mere prohibition of cross-examination on other areas of inquiry will not give rise to a constitutional question. *Averhart*, 311 Ill. App. 3d at 497; *People v. Sykes*, 341 Ill. App. 3d 950, 978 (2003).

¶ 61 Viewing the transcript of defense counsel's cross-examination of Officer Kendall, we cannot say that the trial court abused its discretion in limiting cross-examination of Officer Kendall with respect to any alleged change in protocol adopted by the Forest Park police as to the preferred method of obtaining a blood alcohol level from a diabetic. Defense counsel extensively cross-examined Officer Kendall regarding his involvement in the case, the circumstances surrounding defendant's arrest, defendant's oral statement, what he saw at the scene, Wiggam's arrest and his subsequent conversation with Wiggam, the breathalyzer being administered to defendant, and what he learned from Riddle and Vargas. Officer Kendall, who was not a certified breath tech, testified he was not aware at the time defendant was given the breathalyzer that defendant was diabetic. Therefore, any change in the procedure in testing diabetics would be irrelevant and the trial court properly limited cross-examination on that

subject.

¶ 62 Defendant next argues that the trial court abused its discretion in permitting the jury to see prejudicial photographs. In the instant case defendant only objected to six (Exhibits 2, 16(a),18, 20, 21 and 25) of the State's 57 exhibits. Exhibits 2, 16(a), 18, 20 and 21 are photographs showing Salmanis' injuries. Exhibit 25 is a photograph of the scene, which shows blood smears on the ground and articles of Salmanis' clothing. Defendant argues that allowing the jury to view these highly graphic photographs was highly prejudicial and only served to inflame the jury.

¶ 63 Generally, if photographs are relevant to prove facts at issue, the photographs are admissible at trial unless their nature is so prejudicial and so likely to inflame the jury that their probative value is outweighed. *People v. Kitchen*, 159 Ill. 2d 1, 34 (1994). Photographs of a decedent may be admitted to prove the nature and extent of injuries and the force needed to inflict them, the position, condition and location of the body, and the manner and cause of death, to corroborate a defendant’s confession, and to aid in understanding the testimony of a pathologist or other witness. *Kitchen*, 159 Ill. 2d at 34. Such photographs may aid the jury in understanding the testimony at trial. *People v. Chapman*, 194 Ill. 2d 186, 220 (2000). Even a photograph that is gruesome is admissible if it is relevant to corroborate oral testimony or to show the condition of the crime scene. *People v. Armstrong*, 183 Ill. 2d 130, 147 (1998). The decision to admit photographs into evidence is a matter left to the sound discretion of the trial judge and will not be disturbed absent an abuse of discretion. *Kitchen*, 159 Ill. 2d at 34.

¶ 64 Defendant cites *People v. Garlick*, 46 Ill. App. 3d 216 (1977), in support of his argument. In *Garlick*, although the defendant admitted killing the victim and asserted insanity as an affirmative defense, a gruesome photograph of the decedent's massive head wound was admitted at trial. The defendant appealed and argued that the photograph of the decedent's head should not have been admitted because it was irrelevant and prejudicial given his admission that he committed the offense. The appellate court agreed with the defendant and ruled that because the defendant admitted killing the victim and the only issue in the case was the defendant's sanity, the trial court erred in allowing the photograph to go to the jury because the photograph was needlessly prejudicial. *Garlick*, 46 Ill. App. 3d at 223.

¶ 65 *Garlick* is distinguishable. The six photographs at issue here were relevant to aid the jury in understanding the testimony of Paramedic Dougenson and Dr. Arunkumar. Furthermore, the photographs were probative of whether Salmanis was dead before she was run over as defense counsel argued. Dr.Arunkumar testified that the red hemorrhaging shown in the photographs was consistent with Salmanis being alive when defendant ran her over. The photograph of the scene showed where Salmanis' body was found in the alley and the location of and the type of clothing that she wore. We conclude the prejudicial effect of the photographs did not outweigh their probative value and the trial court did not abuse its discretion in allowing the jury to view them during deliberations.

¶ 66 Last, defendant argues that he was prejudiced by various comments made by

the prosecution during rebuttal closing argument.

¶ 67 At the forefront, it is important to note that the parties disagree on the standard of review for issues relating to closing argument. Defendant claims that our supreme court's ruling in *People v. Wheeler*, 226 Ill. 2d 92, (2007), is instructive. In *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007), our supreme court held that whether a prosecutor's remarks are so egregious as to require a new trial presents a question of law that is reviewed *de novo*. However, the *Wheeler* court also cited with approval *People v. Blue*, 189 Ill. 2d 99 (2000), wherein the court applied the abuse of discretion standard to review a prosecutor's remarks during closing argument. *Wheeler*, 226 Ill. 2d at 121.

¶ 68 We recognize that our appellate courts are divided on the standard of review for closing remarks. *People v. Maldonado*, 402 Ill. App. 3d 411, 421 (2010). However, this division of this district has noted the conflict but has declined to determine the appropriate standard of review, where the result would be the same regardless of the standard applied. See *Maldonado*, 402 Ill. App. 3d at 422; *People v. Anderson*, 407 Ill. App. 3d 662, 676 (2011). Because we would reach the same result under either standard, we will refrain from discussing the applicable standard until our supreme court resolves the conflict. *Anderson*, 407 Ill. App. 3d at 676.

¶ 69 Before we reach the merits of defendant's claim, we must address the State's argument that defendant has forfeited several of the issues he now raises because he failed to object at trial and/or failed to include the specific issue in his postrial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). In his reply brief, defendant admits

that trial counsel failed to object to "a good number" of the comments complained. Our careful review of the record in this case reveals that defendant did indeed forfeit the issues as noted. However, we may consider plain errors or defects that affect substantial rights, even though the errors were not raised at trial. 134 Ill.2d R. 615 (a); *People v. Herron*, 215 Ill. 2d 167, 187 (2005). The plain error doctrine allows consideration of an otherwise forfeited error when:

> "(1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence." In the first instance, the defendant must prove 'prejudicial error.' That is, the defendant must show both that there was plain error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him. In the second instance, the defendant must prove there was plain error and that the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *Herron*, 215 Ill. 2d at 178-79.

¶ 70 However, before we can consider defendant's claims under the plain error doctrine, we must consider whether plain error occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 71 It is well settled that prosecutors are afforded wide latitude in closing argument, and even improper remarks do not merit reversal unless they result in substantial prejudice to the defendant. *Kitchen*, 159 Ill. 2d at 38. During closing argument, the

prosecutor may properly comment on the evidence presented or reasonable inferences drawn from that evidence, respond to comments made by defense counsel which clearly invite response, and comment on the credibility of witnesses. *People v. Rader*, 178 Ill. App. 3d 453, 466 (1988). In reviewing whether comments made during closing argument are proper, the closing argument must be viewed in its entirety, and remarks must be viewed in context. *Kitchen*, 159 Ill. 2d at 38

¶ 72 Defendant argues that the State mischaracterized the process of biotransformation and hyperglycemia when the prosecutor argued that if defendant had not taken his insulin his blood sugar would be lower and therefore no acetone would be produced in the lungs and isopropanol would not be detected. Defendant urges that there was no evidence in the record to support this argument and Doctor Henson testified otherwise. Specifically, in rebuttal, the prosecutor argued:

> "Additionally, the other interesting thing about his theory is that they are talking out of two sides of their mouth. Because Mr. Henson told you that when a person's body has no sugar they produce acetone. The defendant then got on the stand and told you that his sugar level was 436, I believe, that night.
>
> Now, that was obviously later on after he had not been drinking anymore, after he got his machine at some stage. 436 is what he said that number was, and he told you that's really high sugar. Well, he can't have high sugar if you're producing acetones, according to Mr. Henson's testimony.
>
> You produce the acetone if you have low sugar. His sugars are

> astronomical for a - maybe not astronomical, but very high for a diabetic. His sugar was 436. He couldn't have even been producing acetone. And, if he wasn't producing acetone, he should have had no isopropanol made from the acetone."

¶ 73 We reject defendant's contention that this argument was improper. "To be proper, closing argument comments on evidence must be either proved by direct evidence or be a fair and reasonable inference from the facts and circumstances proven." *People v. Hood*, 229 Ill. App. 3d 202, 218 (1992). Our review of the record shows that this argument was based on Dr. Henson's and defendant's testimony. Dr. Henson testified that he agreed that one of the articles he relied on discussed that when a person's body runs out of sugar, it begins to produce acetone. Dr. Henson also testified that "[t]he body transforms the acetone into isopropyl alcohol in riding it or eliminating it from the human body." Defendant testified that when he tested his blood sugar at the police station several hours after his arrest, his blood sugar was 468 and he took a shot of insulin. Defendant also testified that before he left for the race track his blood sugar was 200, which was slightly high for him, so he took a shot of insulin.

¶ 74 Defendant also argues that he was prejudiced when the prosecutor made disparaging remarks about defense counsel and a defense witness. Specifically, defendant argues that the prosecutor committed reversible error when she: (1) referred to Dr. Henson as Mr. Henson at least twice; (2) attempted to impugn Dr. Henson's integrity by calling his theory of biotransformation a "red-herring" and "what he is

selling" and referring to him as a "professional expert for the defense" and his testimony as "non-sense"; and (3) referred to the defense as talking out of "both sides of their mouths" and "trying to confuse the jury."

¶ 75 Considering these complained of comments in the context of the entire closing argument, we find that defendant was not prejudiced by any comments made by the State in closing argument. Defendant has taken phrases out of context in an attempt to demonstrate how he was prejudiced. Our reading of the closing argument in this case in its entirety shows that the State's arguments were directed at the trial strategy employed by defense counsel and his theories as presented to the jury. Furthermore, it was proper for the State to comment on the credibility of Dr. Henson, who defendant called upon to render an expert opinion in this case.

¶ 76 Defendant also argues that the prosecution committed error when it improperly defined reasonable doubt for the jury during rebuttal argument. The prosecutor stated,

> "And I'm confident that when you do that you're going to see that the State has met their burden. The burden is beyond a reasonable doubt. It's a burden that's met every day in courthouses throughout this country. Beyond a reasonable doubt is not beyond any doubt. It's not beyond a scintilla of a doubt."

¶ 77 Defense counsel objected and the trial court sustained the objection. However, defendant failed to include this issue in his posttrial motion and therefore has forfeited the issue. *Enoch*, 122 Ill. 2d at 186.

¶ 78 Defendant argues that error occurred and therefore plain error analysis is proper.

We disagree. In *People v. Edwards*, 55 Ill.2d 25, 35 (1973), the prosecutor argued to the jury that reasonable doubt is determined by the standard of "reasonableness" and was not the same as "beyond any doubt" or "beyond any possible doubt." Our supreme court rejected the argument that the prosecutor's remarks minimized the reasonable doubt standard and found no error that required reversal, but cautioned "it would have been better practice not to attempt to define the term 'reasonable doubt' either in *voir dire* or closing argument." *Id* at 35.

¶ 79 Similar to the court in *Edwards*, we find that no error occurred in this case. The jury in this case was properly instructed on reasonable doubt and we must presume that the jurors followed the court's instructions. *People v. Bell*, 113 Ill. App. 3d 588, 601 (1983). Therefore, we find no error occurred and plain error analysis is unnecessary.

¶ 80 CONCLUSION

¶ 81 Based on the foregoing, the judgment of the trial court is affirmed.

¶ 82 Affirmed.