No. 2—09—0682
Order filed February 16, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

VILLAGE OF ROUND LAKE,	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 08—DT—3398
	)	
MIKE D. FOREMAN,	)	Honorable
	)	Patrick N. Lawler,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Presiding Justice Jorgensen concurred in the judgment.
Justice Bowman specially concurred.

ORDER

Held: Trial court did not err in denying defendant's motion for a directed verdict on charge that defendant drove with a blood-alcohol content in excess of 0.08, where evidence showed that defendant consumed a significant amount of alcohol before driving, recklessly caused a traffic accident, showed physical symptoms of intoxication before and after driving, and refused to take a breath test, and where a later blood test showed his blood-alcohol content to be 0.089.

Trial court did not err in restricting defendant's cross-examination of the emergency room physician who treated defendant after the accident As to two of the objections the trial court sustained, defendant did not make a sufficient offer of proof to support an appellate argument. As to the remaining challenged objection, defendant sought to elicit an opinion on a matter of common knowledge, and so the testimony would have been cumulative. Moreover, any error in the exclusion of the testimony was harmless.

Trial court erred in restricting defendant's ability to argue that the prosecution failed to establish that his blood-alcohol content taken an hour after the accident reflected his blood-alcohol content when he was driving. The error, however, was harmless.

Defendant forfeited for appellate review issue of whether the prosecution denied him a fair trial by asserting in closing argument that, when a person refuses to submit to a blood or breath test during an investigation for DUI, "there is a certain presumption *** that they know how those tests are going to turn out."

INTRODUCTION

Defendant, Mike Foreman, appeals his convictions for driving with a blood alcohol concentration (BAC) of 0.08 or above (625 ILCS 5/11—501(a)(1) (West 2008)) and driving while under the influence of alcohol (625 ILCS 5/11—501(a)(2) (West 2008)). Defendant argues that the trial court erred by (1) restricting both his cross-examination of a prosecution witness and his closing argument; and (2) denying his motion for a directed verdict at the close of the prosecution's case. Defendant also argues that the Village's comment at closing argument undermined the presumption of innocence and denied him a fair trial. We affirm.

BACKGROUND

On November 10, 2008, the car defendant was driving rear-ended a truck stopped at a traffic light. Defendant was hospitalized and later arrested. He was charged by the Village of Round Lake (the Village) with driving with a BAC of0.08 or above, driving under the influence of alcohol, and failing to reduce speed to avoid an accident (625 ILCS 5/11—601(a) (West 2008)).

The case proceeded to jury trial. The defense made this remark in its opening statement:

"While he is at the hospital, [defendant] finds himself in a paper gown and at the hospital, having not fully recalled what exactly happened. And it is at this point that the police officer starts accusing him of driving under the influence of alcohol; basically tells

him, You are under arrest for driving under the influence of alcohol. [Defendant] becomes angry at this point, very angry.

You are not going to hear any testimony about his blood alcohol level."

The Village's first witness was Dennis Kampe, who testified that, at about 11 p.m. on November 10, 2008, he was traveling westbound on Route 134 when he stopped at a red light at Fairfield Road. About ten seconds after stopping, his truck was struck from behind by another vehicle. The collision was "violent" and pushed Kampe's truck forward its entire length and a half. After the impact, Kampe walked back and looked into the other car. Defendant was the driver, and there was a male passenger in the front seat. Defendant was slumped over the steering wheel. Kampe saw two areas of "spidered" glass on the windshield where it appeared defendant's and the passenger's heads had hit. Both men were unresponsive. Kampe believed he smelled the odor of an alcoholic beverage in the car. Kampe flagged down friends who were following him in another car and had them call 911. About three or four minutes later, police and paramedics arrived.

The Village's next witness was Floyd Storm, who was defendant's passenger at the time of the accident. Storm testified that he and defendant had been friends for several years but were friends no longer. Storm stated that, at about 10 p.m. on November 10, 2008, he and defendant drove in defendant's car to Sharky's Bar in Round Lake. There, they played pool and consumed alcohol. Defendant ordered a pitcher of beer and Storm ordered one mixed drink. Storm and defendant had come to Sharky's from Storm's house but did not have any alcohol there. Storm finished his one mixed drink at Sharky's but did not have any of defendant's beer. When they left Sharky's just before 11 p.m., Storm noticed that the pitcher defendant had ordered was three-fourths empty. Storm did not know whether there was any beer left in the glass defendant was using. Storm had drunk

alcohol on many prior occasions with defendant and had never seen him forget about a glass of beer and pour or request another.

Storm testified that when they left Sharky's, defendant was "slurring [his words] a little bit" and he "[m]ight have been swaying a little bit." Storm, however, had seen defendant "inebriated" on prior occasions but on this occasion had no concern over defendant's condition. Also, Storm knew defendant to be a "really good driver" who never had been in a car accident. Hence, Storm "didn't think twice" about having defendant drive. When defendant got into the car, he appeared to look for something on the floor. He looked again as he drove out of Sharky's parking lot. As they drove away from Sharky's, defendant accelerated normally and Storm noticed nothing unusual in his driving. After driving about one mile on Route 134, defendant rear-ended a truck. Storm testified:

> "[W]e were going and just picking up speed just likely anybody normally would. And I don't know if he wasn't paying attention or what, something caught his attention; something else but the road caught his attention. And we rear-ended a truck at about 40, 45 miles an hour without him—he didn't even try to stop. I don't think he even saw the truck at all. We just hit it without even trying to stop."

Asked what might have distracted defendant, Storm testified that defendant "might have just glanced down again to look for whatever he was looking for." Storm acknowledged that he did not see the truck before the collision.

Round Lake police officer Nicole Wirtz was the Village's next witness. Wirtz testified that that, at 11 p.m. on November 10, 2008, she received a dispatch to investigate a car accident at Route 134 and Fairchild Road in Round Lake. Wirtz and the three other responding units took only a

minute or two to get to the scene because they were already in the area. Upon arriving, Wirtz saw that a sedan had rear-ended a pickup truck. Wirtz went to the sedan and observed defendant in the driver's seat leaning over the steering wheel. Defendant "smelled like he had been drinking that evening." Defendant told Wirtz that he was hurt. An ambulance arrived about a minute or two after the police did. After defendant was placed in the ambulance, Wirtz went in also and spoke with him. Wirtz informed defendant that she would be following the ambulance to the hospital. She asked defendant where he had been driving from before the accident, and defendant replied that he had been at Sharky's bar. When Wirtz asked defendant whether he had been drinking, defendant replied that he drank two beers at Sharky's. Defendant seemed "lethargic"; he was "thick-tonged" and "slurred" his words. His eyes were "red, glassy, bloodshot" and "partially shut." Wirtz again smelled alcohol on defendant. Witz acknowledged that she did not know what defendant's mannerisms or speech were like before the accident.

Wirtz testified that the ambulance took defendant to Condell Hospital in Libertyville. Wirtz followed and arrived at Condell at about 12:20 a.m. Nurses informed Wirtz that defendant was undergoing a CAT scan. Wirtz waited for defendant, who returned from the procedure at about 12:50 a.m. Wirtz then informed defendant that she was conducting a DUI investigation. (Elsewhere, Wirtz implied that it was then that she informed defendant that he was under arrest for DUI.) Defendant protested, and Wirtz observed that defendant still appeared as before; his eyes were red, his spurred slurred, and he was lethargic. As Wirtz read various required forms to defendant, he told her to "[s]ave her fucking speech." Wirtz then asked defendant if he would consent to a blood test, and he refused saying, "No, I am not taking any fucking tests." Defendant spoke very loudly. He was also "[r]ude" and "belligerent" toward the nurses who were attending him and attempted to

remove his catheter and IVs. When Wirtz allowed defendant a phone call, a nurse dialed the phone for him. Defendant's speech, however, was "very difficult to understand," and the nurse initially dialed the number incorrectly, at which defendant became angry and berated her coarsely. Wirtz denied that defendant became angry only after she informed him that he was conducting a DUI investigation; Wirtz said that defendant had become "irritated" earlier at the scene when she asked him whether he had been drinking. Wirtz acknowledged, however, that defendant appeared more angry at the hospital than at the accident scene. Wirtz further acknowledged that she did not mention in her report that defendant appeared angry at the accident scene.

Wirz testified that, sometime after 2 a.m., the hospital released defendant to Wirtz' custody. Defendant still seemed "agitated." Wirtz handcuffed defendant and placed him in the back seat of her squad car. When Wirtz went around and got into the driver's seat, she smelled the odor of an alcoholic beverage in the car. At the police station, Wirtz asked defendant to submit to a Breathalyzer test, and he refused.

Wirtz testified that, based on her police training and experience, and her prior work as a bartender where she learned to "tell if [a person is] drunk," she believed that defendant was under the influence of alcohol.

The Village next called Dr. Mark Vaselakos, who testified that he was the emergency room physician at Condell on the night of November 10, 2008. Sometime between 11 and 11:30 p.m. on that date, defendant was brought to the emergency room at Condell. Dr. Vaselakos learned that defendant had been in a car accident. Defendant was wearing a cervical collar in case of a neck injury. As was his normal procedure in the emergency room, Dr. Vaselakos's initial step was to take a patient history from defendant. Defendant smelled of an alcoholic beverage. Though defendant

spoke very loudly and swore at Dr. Vaselakos and other personnel, Dr. Vaselakos would not characterize defendant as "angry" that night. Dr. Vaselakos testified that defendant's speech was slurred and difficult to understand. Since defendant had been in an accident, Dr. Vaselakos ordered a CAT scan to ensure that the speech impediment was not due to some injury. Dr. Vaselakos also ordered blood testing, for several reasons. First, it was standard procedure at Condell to take blood tests from injured patients. Second, it was necessary to determine defendant's blood chemistry before the CAT scan. Third, it was necessary, as with all trauma patients, to determine whether defendant was under the influence of alcohol so that medical personnel would know whether he was feeling pain normally. When Dr. Vaselakos ordered the blood test, he did not know whether the police had arrived at the hospital. Dr. Vaselakos ordered the blood test for medical, not investigative, reasons.

Dr. Vaselakos explained that blood testing is done in-house at Condell. He identified Village Exhibit 1 as the lab report of defendant's blood test. Dr. Vaselakos noted that the document reported a blood serum alcohol level of 105 milligrams per decileter, which converted to a blood alcohol concentration (BAC) of 89 grams per 100 millileters, or 0.089. See 625 ILCS 5/11—501.2(a)(5) (West 2008) ("Alcohol concentration shall mean either grams of alcohol per 100 millileters or grams of alcohol per 210 liters of breath"); 20 Ill. Adm. Code § 1286.40 (2001) ("The blood serum or blood plasma alcohol concentration result will be divided by 1.18 to obtain a whole blood equivalent"). Dr. Vaselakos testified that Condell considers any patient with a BAC in excess of 0.08 to be under the influence for medical purposes. Dr. Vaselakos testified that he also believed defendant was under the influence based on the odor of alcohol on his breath and his demeanor, specifically his slurred speech, elevated voice, and verbal abuse of Vaselakos and the other medical personnel. Dr.

Vaselakos based this opinion on his years of experience as a physician, during which he had seen hundreds of intoxicated persons.

Dr. Vaselakos noted that Village Exhibit 1 stated that defendant's blood sample was "slightly hemolyzed." Dr. Vaselakos explained that "[a] hemolyzed blood sample occurs when a few of the blood cells inside a tube lyse, or they break open." Hemolyzation can cause slight elevation of potassium and electrolyte levels. Dr. Vaselakos "conjectur[ed]" that it is "possible" that hemolyzation may also elevate BAC levels. In defendant's sample, however, electrolytes and potassium were normal and there was no indication that hemolyzation affected the sample.

Dr. Vaselakos was then asked about the CAT scan of defendant. Dr. Vaselakos acknowledged that if the patient moves during the scan, the image will not be accurate. Dr. Vaselakos was not present for defendant's CAT scan and did not know whether defendant was strapped down for the scan, but Dr. Vaselakos did know that the scan was successful and showed defendant had no internal injuries.

On cross-examination of Dr. Vaselakos, this exchange occurred:

"Q. [Defense attorney:] Doctor, are you familiar with retrograde extrapolation?

***

A. I am not sure what you are talking about here.

Q. Well, the phenomenon or scientific occurrence of a person's alcohol content and how that changes over time, the causes, so forth, that type of thing; ***; I understand it was retrograde extrapolation; are you familiar with the principles behind the fluctuating levels of alcohol in a person's system; perhaps causes?

A. I am not sure I am following your questioning, but continue please.

Q. Well, Doctor, would you agree that a person's alcohol level at Point A does not necessarily reflect what that alcohol level was at Point B?

MR. GINGISS [Prosecuting attorney]: I will object to foundation.

THE COURT: Sustained.

The jury will disregard.

MR. POWELL: Doctor, you testified that the alcohol content was .089 after you do the conversion, following the same standards that the Village uses in this case; what time were those blood samples drawn?

A. I would have to look at the laboratory sheet [Village Exhibit 1] to determine that.

Q. Would it be on [Village Exhibit 1]?

A. That would be when the lab reported the study.

Q. You don't know when exactly the—

A. I don't have a specific time in front of me.

Q. Is it fair to say that when you ordered the test that yielded a blood alcohol content of, let's say, in this case, a .089, okay?; is it fair to say, then, that earlier, let's say, 11:00 p.m., on that date, that most likely it is a different level?

MR. GINGISS: Objection, Judge.

THE COURT: Sustained.

The Jury will disregard.[1]

MR. POWELL: Can you tell me what [defendant's] blood alcohol content was at 11:00 p.m.?

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[1] Defendant does not challenge this specific ruling. We insert it here for context.

MR. GINGISS: Objection.

THE COURT: Sustained.

The Jury will disregard it.

* * *

Q. Officer [*sic*], I have one final question for you, I promise: What was [defendant's] blood alcohol content at the time of the accident?

MR. GINGISS: Objection.

THE COURT: Sustained.

The Jury will disregard."

Defendant made no offer of proof in connection with any of these barred inquiries.

After Dr. Vaselakos's testimony, the Village rested. Defendant moved for a directed verdict, which the trial court denied. The defense presented no evidence.

Prior to closing arguments, the Village made a motion *in limine*:

"I would move to bar the defense from arguing anything about retrograde extrapolation in any form. No evidence came in on that; including the fact that—I mean, we all know that you can't—at least, that they can't instantaneously take a blood sample at the scene.

And the case law is clear that subsequent breath tests absent testimony or retrograde extrapolation to the contrary are considered valid.

So, I would also ask to bar [the defense] from arguing that that was not his blood alcohol content at the time he was driving."

Defense counsel responded:

"[Defendant] is specifically charged with having a blood alcohol content above .08

at the time he was driving.

[Dr. Vaselakos] did not testify as to what time this blood was drawn. He didn't know how the blood was drawn.

I certainly believe that I should be allowed to argue a natural inference that—I am not going to specifically use the word 'retrograde extrapolation'; but I believe I should be allowed to argue, you now [*sic*], a person's blood alcohol at 11:00 versus some later time may not be the same. It is a rational inference."

The trial court answered:

"It is a rational inference except where we don't have any evidence to the contrary. We don't know if he was going up or going down since I prohibited, based on the testimony and the offers that were made, any testimony about retrograde."

The court granted the Village's motion.

During its closing argument, the Village stated:

"[Defendant's blood] was analyzed at the lab at Condell Hospital, the lab that [Dr. Vaselakos] normally used. And *** it came back with a—I guess we would call it— a raw score of 105. You will see that on the lab report that goes back with you. The lab report shows that that was analyzed at midnight."

The Village also stated:

"[Defendant] refused to take a blood test voluntarily when Officer Wirtz asked him. And he refused to take a Breathalyzer test..

Now, really, I suppose nobody knows the degree that they are impaired more than the

person themselves. And when they refuse to take those tests, there is a certain presumption here that they know how those tests are going to turn out."

Defense counsel did not object to these remarks.

At the beginning of its closing argument, the defense said:

"Now, I said to you in my opening statement that you are not going to hear testimony about [defendant's] blood alcohol content at the time he was driving. That's what this case is all about."

The defense's further remarks prompted objections by the Village:

"You will be instructed on the law. And I will go through that at this time. One of the instructions you will receive will say: To sustain a charge of driving under the influence of alcohol, the following two propositions must be proven: That the defendant drove a vehicle; clearly, he did; and, specifically, at the time the defendant drove the vehicle, he was under the influence of alcohol.

Those words are in the law. They have meaning. There was no testimony at all regarding what [defendant's] blood alcohol content was—"

MR GINGISS: Objection.

THE COURT: Sustained.

The Jury will disregard."

Later, defense counsel said:

"I would like to talk to you about the lab reports—or, the blood tests.

[Dr. Vaselakos] testified that he didn't see who took the test; how they took the test; or when they took the test.

And the law specifically requires that the Village prove beyond a reasonable doubt that at the time, 11:00 p.m., [defendant] was driving he had a blood alcohol content—

MR. GINGESS: Objection.

THE COURT: Sustained."

The court had the jury leave, and then this exchange occurred.

"THE COURT: Mr. Powell, you have now twice violated my ruling on the motion *in limine*; directly violated; not once, but twice.

MR. POWELL: Judge, I don't believe I have. Mr. Gingiss asked that I be prohibited from arguing retrograde extrapolation.

THE COURT: He also asked that you not be able to argue what the blood level was at the time of the accident.

I granted both of those."

The jury convicted defendant on both counts of DUI and on the failure-to-reduce-speed count. Defendant filed a motion for a new trial, which the court denied. Defendant appeals the DUI convictions alone.

ANALYSIS

Defendant argues that the trial court erred by (1) denying his motion for a directed verdict at the close of the Village's case; (2) barring him from asking Dr. Vaselakos whether he agreed that "a person's blood alcohol level at Point A does not necessarily reflect what that alcohol level was at Point B," and whether he knew defendant's BAC at the time of his arrest; (3) barring defendant from arguing in closing that the Village failed to prove defendant's BAC at the time of his arrest; and (4) failing to grant a new trial based on the Village's comment in closing argument that, when

a person refuses to submit to blood or breath tests during an investigation for DUI, "there is a certain presumption *** that they know how those tests are going to turn out."

I. Motion for a Directed Verdict

We address first defendant's argument that the trial court erred by denying his motion for a directed verdict at the close of the Village's case. " 'A motion for a directed verdict asserts only that as a matter of law the evidence is insufficient to support a finding or verdict of guilty. The [motion] requires the trial court to consider only whether a reasonable mind could fairly conclude the guilt of the accused beyond a reasonable doubt, considering the evidence most strongly in the People's favor.' " *People v. Kelley*, 338 Ill. App. 3d 273, 277 (2003), quoting *People v. Withers*, 87 Ill. 2d 224, 230 (1981); see also 725 ILCS 5/115—4(k) (West 2008). The defense admits for purposes of the motion the truth of the facts stated in the prosecution's evidence. *Kelley*, 338 Ill. App. 3d at 277. Whether a motion for a directed verdict was properly denied is a question of law subject to *de novo* review. *Id.,* citing *Withers*, 87 Ill. 2d at 230. In reviewing the trial court's ruling, we do not consider defendant's claims of error in the curtailment of his cross-examination of Dr. Vaselakos and his closing argument.

Defendant was tried on two counts of DUI: driving with a BAC of 0.08 and over (the (a)(1) count) and driving while under the influence (the (a)(2) count). Defendant moved for a directed verdict on both counts but challenges here only the denial with respect to the (a)(1) count. He argues that the Village failed to prove that his BAC was 0.08 or more when he drove his car. Defendant argues that Village Exhibit 1, the lab report from Condell and the only documentation of defendant's BAC, was inadequate proof of his BAC at 11:00 p.m., the time of the accident. Defendant notes that Village Exhibit 1 bears the time designation of "12:00 [a.m.]," but claims that neither that document

nor any other evidence at trial established what "12:00 [a.m.]" signifies. Though Dr. Vaselakos testified that "12:00 [a.m.]" was "when the lab reported the study," defendant argues that Dr. Vaselakos was not competent to testify on that matter because he neither drew nor tested the blood and so had no personal knowledge of what "12:00 [a.m.]" purported to signify or whether that time was reported accurately. Defendant cites *People v. Seider*, 98 Ill. App. 3d 175, 187 (1981), for the proposition that, generally, "testimony as to the witness' opinion is not admissible into evidence" and that the witness' testimony "must be confined to statements of fact of which the witness has personal knowledge." It was defendant, however, who elicited the testimony from Dr. Vaselakos as to what the time designation on Village Exhibit 1 signifies. "A party cannot complain of error that he himself injected into the trial." *People v. Johnson*, 368 Ill. App. 3d 1146, 1155 (2006).

Nor is it proper for us to consider even the appropriate weight to be given Dr. Vaselakos's testimony on Village Exhibit 1, because in reviewing the denial of a directed verdict we do not judge the credibility of the witnesses or the weight of the evidence (*People v. Tibbs*, 57 Ill. App. 3d 1007, 1013 (1978), quoting *United States v. Conti*, 339 F.2d 10, 13 (6th Cir. 1964)) but take as true the facts stated in the prosecution's case (*Kelley*, 338 Ill. App. 3d at 277). We give full credit, then, to Dr. Vaselakos's testimony that, according to Village Exhibit 1, defendant's blood test result was reported at 12 a.m. We agree with the Village that, if the test was only reported at 12 a.m., the "actual blood draw must have been performed even earlier." Not only is this a matter of common sense and logic, it is implicit in Dr. Vaselakos's testimony, which differentiated between when the "blood samples were drawn" and when "the lab reported the study." It further follows as a matter of logic and common experience that both the blood draw and the actual blood test must have preceded the reporting of the test at 12 a.m.

The absence of a blood test closer in time to the accident was not fatal to the Village's evidence on the (a)(1) count. "Since it is unlikely that a blood sample would be drawn at the exact time of an accident," the prosecution is able to rely on evidence of a later BAC in attempting to meet its burden of proof under section (a)(1). *People v. Johnigk*, 111 Ill. App. 3d 941, 944 (1982). Delay between arrest and testing "goes to the weight given the results, viewed in the light of the totality of circumstances." *People v. Zator*, 209 Ill. App. 3d 322, 332 (1991); see, *e.g.*, *People v. Kappas*, 120 Ill. App. 3d 123, 129 (1983) ("Since there was additional evidence which supports the finding that at the time he was driving defendant's [BAC] was at or above the level proscribed by statute, the fact that there was a 38-minute period between the time he was observed driving and the time he was tested by a breathalyzer should not result in [the] jury's verdict being overturned"). The prosecution may couple proof of a later BAC with corroborative evidence, such as the amount of alcohol the defendant consumed prior to driving and the apparent effects of that alcohol as shown in defendant's appearance and demeanor and the nature of his driving. There are multiple examples of this in Illinois case law.

In *People v. Caruso*, 201 Ill. App. 3d 930, 942-43 (1990), the appellate court upheld defendant's conviction for driving with a BAC of 0.10 or more, though his BAC was not tested until one hour after the police observed him driving. In addition to that later BAC of 0.18, the court relied on "evidence that defendant's car was facing south in a northbound lane of traffic, that he had an odor of [an] alcoholic beverage, slurred speech, and glassy eyes, and that he admitted drinking five vodka tonics [in the six hours preceding his arrest]." *Id.* at 943.

In *People v. Newman*, 163 Ill. App. 3d 865, 868-69 (1987), the defendant's BAC was not tested until 30 minutes after he was stopped for failing to dim his headlights and for driving erratically

by weaving in his lane. The appellate court upheld the defendant's conviction for driving with a BAC of .10 or more, based on (1) the later BAC of 0.13; (2) defendant's driving infractions; (3) the observations made of him by police, including that he smelled of an alcoholic beverage and had glassy and bloodshot eyes; (4) his poor performance on field sobriety tests; and (5) his admission that he had four alcoholic drinks in the 2 1/2-hour period before driving. *Id.* at 868-89.

In *Kappas*, 120 Ill. App. 3d at 129, the appellate court upheld the defendant's conviction for driving with a BAC of 0.10 or more where the defendant's BAC was 0.11 thirty-eight minutes after he was observed driving erratically and was stopped by police. The court found adequate evidence of defendant's guilt in his weaving in and out of his lane, the open containers of beer and whiskey in his car, the smell of an alcohol beverage on his breath, his poor performance on field sobriety tests, and his admission that he drank three beers before driving. *Id.* at 124-25, 129.

The Village presented evidence comparable to that in *Caruso*, *Newman*, and *Kappas.* Defendant (who, according to Storm, his friend of several years, was generally a good driver) struck a car from behind without any attempt to stop. The testimony was consistent that the accident occurred around 11 p.m. As noted, in construing the evidence in the light most favorable to the Village, we conclude that defendant's BAC was tested within (but likely near) an hour after the accident. At that time, defendant's BAC was 0.089—over 10 percent higher than the legal limit. As in the above cases, there was corroborating evidence that defendant's BAC was at the prohibited level earlier when the accident occurred.

First, according to Storm, defendant drank three-fourths of a pitcher of beer within the 45 minutes preceding the accident. Though Storm claimed, based on having seen defendant drunk, that he had no concern that night about defendant's condition, Storm acknowledged that defendant was

"slurring" his words and "swaying" "a little bit." Officer Wirtz testified that, when she arrived at the accident scene and spoke to defendant, he had an odor of an alcoholic beverage, had "red, glassy, bloodshot eyes" that were "partially shut"; he was "thick-tongued, "slurred" his words, and was "lethargic." These observations were confirmed by Dr. Vaselakos, who testified that, when defendant arrived at the hospital between 11 and 11:30 p.m., he smelled of an alcoholic beverage and his speech was slurred and very difficult to understand. According to Dr. Vaslelakos, defendant also spoke loudly and swore at him and the other medical personnel. When Wirtz next saw defendant at 12:30 a.m. after he underwent the CAT scan, his appearance and speech were as she had observed them an hour and half before. Wirtz testified that defendant's speech was so distorted that the nurse who was assisting him with his phone call initially misdialed because she could not understand him. Wirtz and Dr. Vaselakos both believed, based on defendant's appearance and demeanor, that defendant was under the influence of alcohol. Wirtz also testified that defendant twice refused to submit to a breath or blood test.[2] See *People v. Johnson*, 218 Ill. 2d 125, 140 (2005) (evidence of defendant's refusal to take a test designed to determine blood-alcohol content is admissible as proof of consciousness of guilt). Taking as true the facts stated in the Village's case regarding (1) defendant's accident, (2) his condition as observed by Storm before the accident, and by Wirtz and Dr. Vaselakos after the accident; (3) the opinions of Wirtz and Dr. Vaselakos that defendant was under the influence of alcohol, (4) defendant's refusal to take a blood or breath test; and (5) the BAC result reported approximately an hour after the accident, we cannot say as a matter of law that the

[2]Apparently, Wirtz's request for a blood test from defendant came after the blood test ordered by Dr. Vaselakos. Possibly, Wirtz was not aware that Condell had tested defendant's blood.

Village failed to establish the elements of the (a)(1) charge. Therefore, the trial court did not err in denying defendant's motion for a directed verdict.

II. Cross-Examination of Dr. Vaselakos

Next, we review the trial court's restrictions on the defense's cross-examination of Dr. Vaselakos. "A criminal defendant has a fundamental constitutional right to confront the witnesses against him and this includes the right to conduct a reasonable cross-examination." *People v. Coleman*, 206 Ill. 2d 261, 278 (2002). The trial court, however, "enjoys discretion to impose reasonable limits on such cross-examination to assuage concerns about harassment, prejudice, jury confusion, witness safety, or repetitive and irrelevant questioning." *People v. Blue*, 205 Ill. 2d 1, 13 (2001). The trial court's restriction of cross-examination will not be disturbed absent a clear abuse of discretion. *People v. Leak*, 398 Ill. App. 3d 798, 822 (2010). The abuse-of-discretion standard is the most deferential standard of review next to no review at all. *In re D.T.*, 212 Ill. 2d 347, 356 (2004). An abuse of discretion occurs when the trial court's decision is so arbitrary, fanciful, or unreasonable that no reasonable person would agree with it. *People v. Campos*, 349 Ill. App. 3d 172, 175 (2004).

We begin with these two related questions that were asked of Dr. Vaselakos: (1) "Can you tell me what [defendant's] blood alcohol content was at 11:00 p.m.?"; and (2) "What was [defendant's] blood alcohol concentration at the time of the accident?" Objections to both questions were sustained, but defendant failed to lay a proper groundwork for an appellate argument on those rulings. Each question was subject to different interpretations. Defendant could have been asking Dr. Vaselakos whether he believed himself capable of calculating defendant's BAC at the time of the accident based on the BAC as reported in Village Exhibit 1. Alternatively, the questions could

be read as assuming that Dr. Vaselakos had the capability to make that calculation and asking him to calculate defendant's BAC at the time of the offense. Or, defendant could have been asking Dr. Vaselakos not for any opinion, but for whether he knew of any documentation purporting to report defendant's BAC at the time of the accident.

On the second construal, the question was clearly improper. The rates of absorption and elimination of alcohol by the human body are matters within the province of experts. See *People v. Barham*, 337 Ill. App. 3d 1121, 1133 (2003) ("The process and rate at which alcohol is eliminated from the body are complicated scientific matters that are beyond the skill, knowledge, and comprehension of the average person"); *People v. Rice*, 40 Ill. App. 3d 667, 671 (1976) ("The rates of absorption and oxidation of alcohol, into and out of the bloodstream, *** have generally been considered proper subjects for expert testimony"). To calculate defendant's BAC at the time of the accident from the BAC reading at Condell, Dr. Vaselakos would have had to engage in retrograde extrapolation, or the scientific derivation of a prior BAC from a later BAC utilizing rates of absorption and other factors particular to the person (see *People v. Hood*, 213 Ill. 2d. 244, 250 n.1 (2004)).

Defendant cites *People v. Ethridge*, 243 Ill. App. 3d 446, 468 (1993), but that case is inapposite. In *Ethridge*, the appellate court held that it was not an abuse of discretion for the trial court to allow the State's expert in toxicology to calculate what the defendant's BAC would have been at the time of the accident given certain hypothetical facts. Defendant argues that, as Dr. Vaselakos was asked about actual not hypothetical facts, he was on even stronger footing than the expert in *Ethridge*. The issue, however, concerns not actual versus hypothetical facts but of

competence to testify in the first instance. There was no question in *Ethridge* that the expert was qualified in

toxicology and particularly in retrograde extrapolation. Dr. Vaselakos, by contrast, was not qualified as a toxicologist and hence was not competent to testify as to rates at which the body absorbs alcohol.

Defendant's argument on appeal presumes an interpretation along the lines of the third alternative outlined above. That is, he claims his questions were meant to establish only "the concrete fact that the prosecution's only blood test witness could not testify to the timing of the test on personal knowledge." Defendant, however, should have made an offer of proof below to clarify his purpose in asking Dr. Vaselakos those questions. As the supreme court has said:

> "When a trial court refuses evidence, no appealable issue remains unless a formal offer of proof is made. [Citation.] The purpose of an offer of proof is to inform the trial court, opposing counsel, and a reviewing court of the nature and substance of the evidence sought to be introduced. [Citations.] Where it is not clear what a witness would say, or what his basis would be for saying it, the offer of proof must be considerably detailed and specific. A reviewing court can thereby know what was excluded and determine whether the exclusion was proper. [Citations.] 'The failure to make an adequate offer of proof results in a waiver of the issue on appeal.' [Citation.] *People v. Peeples*, 155 Ill. 2d 422, 457-58 (1993).

An offer of proof is not required where it is apparent that the trial court clearly understood the nature and character of the evidence sought to be introduced, or where the question itself and the circumstances surrounding it show the purpose and materiality of the evidence. [Citations.]" *People v. Peeples*, 155 Ill. 2d 422, 457-58 (1993).

The requirement of an offer of proof applies to adverse rulings on cross-examination. See *People v. Jones*, 174 Ill. App. 3d 737, 748 (1988) ("when the record does not show *** cross-examination was erroneously proscribed, further argument by counsel and an offer of proof is required in order to show an abuse of discretion"); *cf. People v. Kellas*, 72 Ill. App. 3d 445, 454 (1979) (holding that "an offer of proof is not required when a witness is being cross-examined and the cross-examination is erroneously proscribed," and implying that an offer of proof was unnecessary because the trial court's error in curtailing cross-examination was apparent on the record). Because it was unclear what defendant sought to elicit with these questions, defendant was required to make an offer of proof. His failure to make that offer precludes our review of the trial court's ruling that precluded Dr. Vaselakos from answering those questions.

Defendant also failed to make an offer of proof after the trial court barred Dr. Vaselakos from testifying whether he "agree[d] that a person's blood alcohol level at Point A does not necessarily reflect what that alcohol level was at Point B." Unlike with the other questions at issue , however, no offer of proof was necessary because there was no ambiguity as to what defendant sought to elicit from Dr. Vaselakos, namely an acknowledgment that blood alcohol levels within the human body are subject to fluctuation. While the rate, and underlying physiology, of that fluctuation are matters within the province of experts, it is commonly known that such fluctuation occurs. See *People v. Hood*, 343 Ill. App. 3d 1245, 1258 (2003) (Cook, J., dissenting on other grounds) ("It is common knowledge that immediately after the consumption of alcohol, the body goes through a period of absorption, or rising blood-alcohol level, and then through a process of elimination, or falling blood-alcohol level"), citing *People v. Beck*, 295 Ill. App. 3d 1050, 1062 (1998) (in prosecution for reckless homicide based on defendant's intoxication while driving, defense counsel was not ineffective for

failing to seek admission of second blood alcohol test, which showed drop in defendant's BAC from 0.392 to 0.08 in the hours following the incident, because there was ample other evidence of defendant's intoxication, and, since the tests were hours apart, "it would have been only natural for those results to have revealed a diminishing blood alcohol level"); *State v. Pilotti*, 99 Conn. App. 563, 578, 914 A.2d 1067, 1077 (2007) (jury entitled to apply "common knowledge *** that a person becomes sober gradually"); *Commonwealth v. Ramirez*, 44 Mass. App. Ct. 799, 802, 694. N.E.2d 46, 49 (1998) ("it [is] within the common knowledge of jurors that an intoxicated person, once he stops drinking, becomes less intoxicated over time"); *State v. Conway*, 75 Or. App. 430, 435, 707 P.2d 618, 620 (1985) (jury entitled to make inferences based on "the common knowledge that alcohol dissipates" over time).

Because what defendant sought from Dr. Vaselakos was simply affirmation of a commonly known fact, the trial court did not err in barring the inquiry. See *People v. Montgomery*, 18 Ill. App. 3d 828, 834 (1974) (no error in declining to give instruction on statutory definition of "knowingly" and "intentionally," because "[b]oth terms have plain meanings within the jury's common knowledge"); *Herglund v. New York, Chicago & St. Louis R.R. Co.*, 1 Ill. App. 3d 968, 678 (1971) (no error in excluding photographs offered to show that a railroad engine is taller than an automobile, "a fact of universal common knowledge").

Defendant argues, however, that the exclusion of Dr. Vaselakos's testimony on whether blood-alcohol levels fluctuate must have given the jury the impression that they were required to take defendant's BAC reading at Condell as definitive of his BAC at the time of the accident.

Defendant is mistaken. The jury was instructed, consistent with section 11—501(a)(1) of Illinois Vehicle Code (Code) (625 ILCS 5/11—501(a)(1) (West 2008)), that in order to find defendant

guilty of driving with a BAC of 0.08 or more, the Village had to prove that defendant had that BAC "at the time [he] drove [the] vehicle." "The jury is presumed to follow the instruction that the court gives it." *People v. Taylor*, 166 Ill. 2d 414, 438 (1995). In requiring proof of a 0.08 or greater BAC during a certain period (namely when the defendant drove or was in physical control of a vehicle) and not earlier or later, section 11—501(a)(1) implies that a person's BAC is not fixed at 0.08. Thus, the instruction on the elements of section 11—501(a)(1) count reaffirmed for the jury what was a matter of common knowledge and, hence, what they did not need Dr. Vaselakos to tell them: that the blood-alcohol level of a person fluctuates. Moreover, the Village's closing argument reveals that it did consider it established as a matter of law that defendant's BAC at Condell reflected his BAC at the time of the accident. Rather, the Village emphasized the temporal proximity of the Condell reading and cited corroborative evidence that defendant's BAC at the time of the accident was 0.08 or more Consequently, there is no reasonable chance that any error in the exclusion of Dr. Vaselakos's testimony on the fluctuation of blood-alcohol levels could have influenced the jury's verdict. See *People v. Nitz*, 219 Ill. 2d 400, 410 (2006) (defining harmless error).

III. Defendant's Closing Argument

Next, defendant argues that the trial court improperly restricted his closing argument. A criminal defendant has a constitutional right to present a closing argument at his trial. *People v. Faria*, 402 Ill. App. 3d 475, 483 (2010). "[F]or the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt." *Herring v. New York*, 422 U.S. 853, 862 (1975). Still, the trial court has broad discretion to limit the defense's closing argument. *Faria*, 402 Ill. App. 3d at 483.

The Village made a motion *in limine* to bar the defense from arguing "retrograde extrapolation" and from arguing "that [the 0.089 BAC reading at Condell] was not [defendant's] blood alcohol content at the time he was driving." Defense counsel responded that he simply wanted to argue that "a person's blood alcohol at 11:00 [p.m.] versus some later time may not be the same," which counsel insisted was a "rational inference." Granting the Village's motion, the trial court commented:

> "It is a rational inference except where we don't have any evidence to the contrary. We don't know if he was going up or going down since I prohibited, based on the testimony and the offers that were made, any testimony about retrograde."

It appears the trial court reasoned that, since there was no evidence that defendant's BAC when he drove was *not* 0.089, defendant was not entitled to argue that the Village did not prove the BAC element of the (a)(1) charge. The premise that defendant did not present evidence disputing the significance of the 0.089 reading is not factually accurate. Though there was no evidence of any other blood test, defendant elicited evidence disputing the Village's claim that his physical condition before and after the accident was consistent with his having a prohibited BAC at the time he was driving. Yet the deeper, legal error by the trial court was in supposing that it ever became defendant's burden to prove that his BAC was not at the prohibited level when he drove. There was no legal presumption in effect that the 0.089 reading reflected defendant's earlier BAC. As for the trial court's remark that "we don't know if [defendant] was going up or going down," such evidence might aid the prosecution in proving a prohibited BAC based on a later blood test, but the defendant facing an (a)(1) charge need not himself produce such evidence in order to contest the charge. The burden is rather the prosecution's from first to last.

At closing argument, the trial court made manifest that its intent truly was to bar, as the Village requested, any argument from the defense "that [the 0.089 BAC] was not [defendant's] blood alcohol content at the time he was driving." First, when defense counsel emphasized that it was the Village's burden to prove that defendant had a prohibited BAC at the time he drove his vehicle, and then further commented that "[t]here was no testimony at all regarding what his blood alcohol content was—," the Village interjected with an objection, which the trial court sustained. Second, when defense counsel noted (accurately) that Dr. Vaselakos was unable to say specifically when the blood test at Condell occurred, and emphasized that the Village needed to prove that defendant had a prohibited BAC at 11 p.m. (or at an earlier point when defendant was driving), the Village again objected, and the trial court sustained it. Following those rulings, the court affirmed that its intent was (consistent with the Village's motion *in limine*) that defendant "not be able to argue what the blood level was at the time of the accident." Since it was precisely the Village's burden to prove "what the blood level was the time of the accident," defendant had the right at closing argument to contest the Village's proof on that crucial element of the (a)(1) charge. It hardly bears stating that where, as here (and in *Caruso*, *Newman*, and *Kappas*) the prosecution's evidence to support an (a)(1) charge consists not of a contemporaneous blood or breath test (which is seldom possible in DUI cases) but of evidence of the defendant's physical condition at the time of the accident as well as a later blood or breath test, the defendant is entitled to dispute that this evidence proves beyond a reasonable doubt that he had a prohibited BAC at the time of the accident.

The Village argues that the trial court's aim was simply to stop the defense from "introduc[ing] the subject of retrograde extrapolation." The Village suggests that retrograde extrapolation was implicitly invoked in the defense's argument (as the Village paraphrases it) that,

because "the prosecution did not prove what the defendant's BAC was at the time he was driving, *** [the BAC] might have been lower than the blood draw at the hospital indicated, and thus below 0.08." We see this argument, however, as nothing more than a negation of the Village's theory. The Village, lacking evidence of a blood or breath reading contemporaneous with the accident, relied on contemporaneous observations of defendant's condition as well as on a later BAC. Where the Village argued that the evidence was sufficient, defendant denied it was so. The Village submitted that the blood draw was "analyzed at midnight," while defendant sought to argue that Village Exhibit 1 was inconclusive as to when the actual draw occurred. The defense's argument was no more an improper attempt to argue extrapolation than was the Village's argument. We conclude that the trial court's curtailment of the closing argument was an abuse of discretion.

Defendant claims the error "eviscerat[ed]" his case, but in our view the error was harmless because the defense still was able to convey his argument that the Village did not prove that he drove with a prohibited BAC. In his opening statement, defense counsel remarked to the jury that they were "not going to hear any testimony about [defendant's] blood alcohol level." Continuing with this theme at the outset of his closing argument, counsel said,

> "Now, I said to you in my opening statement that you are not going to hear testimony about [defendant's] blood alcohol content at the time he was driving. That's what this case is all about."

The Village did not object to these remarks. Defense counsel proceeded with a thorough challenge to the Village's evidence. Notably, counsel recapitulated the Village's evidence of defendant's physical appearance and demeanor after the accident, and counsel proposed various respects in which the evidence was weak. The Village likewise addressed this evidence in its closing statement, casting

the evidence (of course) in a more favorable light than did defense counsel. By relying on the evidence of defendant's physical condition after the accident, the Village indicated that it did not consider it established as a matter of law that defendant's BAC at Condell reflected his BAC at the time of the accident. The substance of the parties' closing arguments would have conveyed to the jury that, despite the rulings against the defense, the jury was not required to take the 0.089 reading as definitive of defendant's BAC earlier that night but that there remained a factual issue as to what that reading, combined with other evidence, established as to defendant's BAC at the time he was driving. Nothing in the court's instructions to the jury suggested that they were divested of the obligation to consider, based on all the evidence, whether defendant's BAC was 0.080 or more at the time of the accident

Finally, we note that defendant's allegations of trial error with respect to his cross-examination of Dr. Vaselakos and his closing argument are all directed at the (a)(1) count because they concern the effect of the alleged errors on defendant's ability to challenge the Village's proof that he drove with a prohibited BAC. Defendant, however, was convicted under both the (a)(1) count and the (a)(2) count, the latter of which did not require proof of defendant's blood-alcohol concentration. See 625 ILCS 6/11—501(a)(2) (West 2008). We may affirm defendant's conviction for DUI in the absence of proof of defendant's BAC, so long as the evidence shows beyond a reasonable doubt that defendant drove while under the influence of alcohol. See *People v. Niemiro*, 256 Ill. App. 3d 904, 912 (1993). Defendant does not address whether there were sufficient "external indicators of [his] intoxicated condition" (*id.*) to show that he was under the influence of alcohol. In any case, we think there was sufficient evidence to support a conviction on the (a)(2) charge in the quantity of alcohol defendant

consumed, his reckless driving, his physical condition and demeanor as observed before and after the accident, and his refusal to take a blood or breath test as requested by Office Witz.

IV. The Village's Closing Argument

Defendant's final argument is that he was denied his right to a fair trial when the Village's attorney made this comment in closing:

> "Now, really, I suppose nobody knows the degree that they are impaired more than the person themselves. And when they refuse to take [blood or breath] tests, there is a certain presumption here that they know how these tests are going to turn out."

Defendant argues that, contrary to his constitutional presumption of innocence, this comment invited the jury to presume his guilt based on his refusal to take blood or breath tests as requested by Wirtz. Defendant, however, did not object to this comment when it was made, and therefore forfeited the issue for appellate review. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (to be preserved for appellate review, an issue must be raised in a trial objection and asserted in a posttrial motion). The plain-error doctrine bypasses normal forfeiture principles (*People v. Herron*, 215 Ill. App. 3d 167, 178-29 (2005)), but defendant does not invoke the doctrine. We decline, therefore, to address the issue.

For the reasons stated above, we affirm the judgment of the circuit court of Lake County.

Affirmed.

JUSTICE BOWMAN specially concurring:

Although I concur with the ultimate outcome, I write specially because I do not agree with some of the analysis contained in the majority's order. First, I disagree with the majority that defendant was required to make an offer of proof when the trial court barred his questions of Dr.

Vaselakos on cross-examination. As the majority properly stated "An offer of proof is not required where it is apparent that the trial court clearly understood the nature and character of the evidence sought to be introduced, or where the question itself and the circumstances surrounding it show the purpose and materiality of the evidence," citing *Peeples*, 155 Ill. 2d at 457-58. Defendant posed the following questions: (1) "Can you tell me what [defendant's] blood alcohol content was at 11:00 p.m.?"; and (2) "What was [defendant's] blood alcohol concentration at the time of the accident?" Unlike the majority, I believe these questions were apparent attempts to attack the credibility of the Village's BAC evidence; specifically, to illuminate the fact that there was a delay between the time of the accident and the time of the blood testing. Because the purpose and materiality of the evidence was obvious and its nature was apparent to the court, I do not believe defendant was required to make an offer of proof,[3] especially as part of cross-examination.

With that being said, I believe we are not precluded from reviewing defendant's claims of error as to these questions, and I would find that the trial court abused its discretion in barring defendant from posing these questions to Dr. Vaselakos. Any delay between the time of the incident and the time of the testing goes to the weight given to the results, viewed in light of the totality of the circumstances. *People v. Zator*, 209 Ill. App. 3d 322, 332 (1991). Any limitation of cross-examination is within the sound discretion of the trial court, and we will not interfere unless there has been an abuse of discretion resulting in manifest prejudice to the defendant. *People v. Green*, 339 Ill. App. 3d 443, 455 (2003). Here, I believe defendant was prejudiced by his inability to attack the reliability of the Village's evidence of his BAC, which therefore prohibited the jury from hearing facts

[3] To the extent the majority attributes these questions to be attempts at introducing retrograde extrapolation evidence, I agree that defendant would have been required to present an expert. However, I disagree that was defendant's intent with these questions.

from which it could assess the weight to be placed on the evidence. See *People v. Bell*, 373 Ill. App. 3d 811, 813 (2007) ("The right to cross-examine is not absolute and is satisfied when 'the defendant is permitted to expose the fact finder to facts from which it can assess [the] credibility and reliability of the witness." (Citation omitted)). Defendant's questions were part of cross-examination and the court's ruling improperly restricted defendant's right to cross-examine the witness about his knowledge of defendant's blood alcohol level at the time of the accident. The primary reason the Village introduced the BAC testimony was to prove defendant's intoxication at the time of the accident. Defendant's questions on cross-examination were proper to attack the weight that should have been given to the Village's evidence. Therefore, I would find the trial court abused its discretion in overly restricting defendant's cross-examination of the doctor.

Despite the trial court's errors in its rulings on cross-examination and closing argument, I agree with the majority that the errors in this case were harmless. As the majority points out, the absence of a blood test closer to the time of the accident was not fatal to the Village's case, and coupled with the remaining evidence, the evidence of defendant's guilt was sufficient. Storm testified that defendant consumed three-fourths of a pitcher of beer within 45 minutes of the accident and described defendant as slurring his words and swaying. Officer Wirtz testified that when she arrived on the scene, defendant smelled of alcohol, had red, glassy and bloodshot eyes, and was slurring his words. Dr. Vaselakos also stated defendant smelled of alcohol, slurred his speech, and was speaking loudly and swearing at the staff. Further, defendant rear-ended a pick-up truck without even slowing down before impact. Therefore, despite the delay in testing, I agree with the majority that the Village's corroborative evidence was sufficient to support the convictions in this case.