No. 2—10—0132
Order filed April 12, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of McHenry County.
Plaintiff-Appellee,	)	
v.	)	No. 07—CF—1145
DUSTIN P. GOY,	)	Honorable Sharon L. Prather,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Burke concurred in the judgment.

ORDER

Held: The trial court did not err in denying defendant's motion to suppress or in its evidentiary rulings; the State proved beyond a reasonable doubt that defendant did not act in self-defense; and defendant's challenge to the trial court's decision to deny his motion to dismiss the indictment was moot.

Following a bench trial, defendant, Dustin P. Goy, was convicted of involuntary manslaughter (720 ILCS 5/9—3(a) (West 2008)) and sentenced to four years' imprisonment. On appeal, defendant argues that: (1) the trial court erred in denying his motion to suppress his statements to police; (2) the trial court improperly considered inflammatory remarks made after a statement of identification; (3) the trial court improperly considered irrelevant actions and

statements; (4) the State failed to prove that he was not acting in self-defense; and (5) the trial erred in denying his motion to dismiss the indictment for first-degree murder and aggravated battery. We affirm.

I. BACKGROUND

Defendant was initially charged by complaint on September 10, 2007, with aggravated battery (720 ILCS 5/12—4(a) (West 2008)). The complaint alleged that on September 9, 2007, defendant punched Anthony Carlsen in the face, causing Carlsen to become unconscious and strike his head on the pavement. On December 12, 2007, defendant was charged in a two-count indictment with first-degree murder (720 ILCS 5/9—1(a)(2) (West 2008)) and aggravated battery for the same incident. On February 27, 2008, defendant moved to suppress statements he made while in police custody. A hearing on the motion took place on June 5, 2008. The parties stipulated to the admission of the videotape of defendant's interrogation. The State then called Crystal Lake Detective Michael Gasparaitis as a witness. Gasparaitis testified as follows. On September 9, 2007, at about 4 p.m., he and his partner went to defendant's apartment. They asked if they could speak to defendant at the police station about an incident that had occurred at The Cottage bar. Defendant agreed. The interview was videotaped and a portion of the tape was played in open court. At the hearing, Gasparaitis identified a copy of *Miranda* waiver form that defendant signed, and the document was admitted into evidence. Gasparaitis testified that the interview lasted about 1½ hours. During that time, defendant never indicated that he wished to cease the questioning, nor did he ask for a lawyer. The detectives never threatened defendant or made him any promises.

On cross-examination, Gasparaitis testified that he read defendant his *Miranda* rights and then had him review the form. When defendant was reviewing his rights, he asked if he was waiving

the rights or could "fall back" on them. He also asked if he was being charged with anything. As to the latter question, Gasparaitis just kept asking defendant to sign the waiver form. In response to the former question, Gasparaitis told defendant that he could stop talking to them at any time he wanted.

Defendant again asked if he was being charged. Gasparaitis again did not answer the question but said that he needed to sign the form indicating that he understood. Defendant asked, "I'm not waiving these rights, right?" Gasparaitis replied no. He asked defendant to sign the form so that they could talk. Gasparaitis agreed that nothing on the form stated that a defendant could reinstitute his rights after waiving them.

On re-direct, Gasparaitis testified that he told defendant that he could stop the interview at any time.

The trial court adjourned and continued the matter to review the recorded interview. The hearing was continued to July 22, 2008. At that hearing, the trial court accepted into evidence a certified statement of defendant's prior conviction, which the State offered as evidence of defendant's prior experience in determining whether he made a knowing, intelligent waiver. The parties also argued the suppression issue.

The trial court issued its ruling on September 3, 2008. The trial court found as follows. Defendant was 30 years old, appeared to be of average intelligence, appeared calm and cooperative during the interview, and did not appear to be suffering from any physical or mental impairment. Further, it was not defendant's first encounter with law enforcement. The interview began at about 4:30 p.m. and lasted about 1½ hours. The detectives were calm and polite during the interview, and their behavior was not aggressive or coercive. The trial court quoted from the dialogue between

defendant and Gasparaitis during the beginning of the interview and stated that "[o]n five separate occasions in the beginning of the tape[,] Gasparaitis correctly advises the Defendant that he has the right to stop the questioning at any time he chooses to do so." The trial court found based on the totality of the circumstances that defendant was advised of his *Miranda* rights prior to questioning and "stated that he understood those rights and proceeded to answer questions without requesting an attorney or indicating that he did not want to speak to police." The trial court therefore found that defendant's statements were made knowingly and voluntarily, and it denied defendant's motion to suppress.

On May 8, 2009, a number of matters were before the trial court. The State had filed a motion *in limine* to admit evidence of defendant's "aggressive behavior" in the bar prior to his interaction with Carlsen. The trial court reserved its ruling on the motion.

On October 14, 2009, the State dismissed the previously-indicted charges and was given leave to charge defendant by information with involuntary manslaughter. Defendant waived any formal defects on the newly-filed information and waived his right to a preliminary hearing. He also waived his right to a jury trial.

Defendant's bench trial began on October 19, 2009. The parties stipulated to the following facts. On September 9, 2007, Carlsen weighed 280 pounds and defendant weighed 150 pounds. At the time the incident occurred, Carlsen had a blood alcohol level of .240 and had cocaine in his blood.

The parties also stipulated to the admission of the videotape of defendant's interview with police and the foundation of 911 calls made from the scene.

At trial, Gasparaitis testified as follows. As part of his initial investigation into what occurred at The Cottage bar, he met with Nicholas Danielson. He showed Danielson a photo line-up. The State asked Gasparaitis if Danielson was able to make an identification, and the defense objected based on hearsay. The State cited section 115—12 of the Code of Criminal Procedure of 1963 (Code of Criminal Procedure) (725 ILCS 5/115—12 (West 2008)). Defense counsel stated he would withdraw his objection as long as the State was not attempting to elicit what Danielson said after the identification. Gasparaitis testified that Danielson identified defendant in the line-up. The State then asked "how he recognized or was able to identify that defendant, that photograph?" Defense counsel objected on the basis that anything Danielson said after he identified defendant would be hearsay. The trial court overruled the objection. Gasparaitis testified that Danielson said, "that's the guy that sucker punched" Carlsen. The defense renewed its objection, and the trial court sustained the objection and struck the disputed statement. Gasparaitis testified that Nathan Hughes also identified defendant in the line-up as being at The Cottage on the evening in question. Gasparaitis further testified that on September 9, 2007, he went to the residence of Ryan Wyse and Toby Speechly as part of his investigation. The driveway had shattered glass on it.

The State then stated that its next witnesses' testimony related to the motion *in limine* regarding defendant's prior conduct. It stated that it would be asking to proffer if it were a jury trial, but because it was a bench trial, it would like to call the witnesses and then have the trial court decide whether it would consider the testimony. The defense noted its continuing objection to the testimony but agreed to the procedure.

Jeremy Smith provided the following testimony. He and defendant were mutual acquaintances. They were at the same wedding reception on September 8, 2007, but did not really

interact there. They both went to The Cottage bar afterwards, as did other people from the reception. While Smith was playing darts at the bar, he felt liquid on his pants. He turned around and realized that defendant had spit at him through a drinking straw. Smith verbally "protested." Defendant was laughing and then said, "let's go"and moved toward Smith in an agitated manner. Other people quickly got between them and broke it up. Later they apologized to each other, had a drink at the bar together, and went their separate ways. When Smith had a drink with defendant, he believed they were "fine" and there were "no issues." Other people had told Smith that defendant was trying to be funny.

When the trial resumed the next day, the State was given permission to offer further argument on the "sucker punch" comment. The trial court reversed itself again and allowed the testimony to stand.

Nathan Hughes then testified to the following. He was with his friend Henry Naughton at The Cottage bar on the evening in question. He observed a group of dressed-up people come in; they said that they were coming from a wedding. The group included defendant. Hughes observed defendant spit a drink at another man from the group. Defendant and the man exchanged words but then "[n]othing ever really came of it." Defendant apologized to the man, and they shook hands. Hughes never thought that defendant and the man were going to get into a physical confrontation. About 15 to 30 minutes later, defendant was talking to Naughton and said, "I'm going to fight." They thought defendant was joking until he asked Naughton "if he had his back." Hughes now thought defendant was serious, and he and Naughton decided to leave. Hughes later identified defendant in a photo line-up. Hughes agreed that he saw Smith push defendant that evening, but defendant did not do anything in response.

Ryan Wyse testified as follows. He was at the wedding reception and went to The Cottage bar afterwards with others. While playing darts, he saw defendant spitting a drink on Smith. Smith was upset and asked defendant what he was doing. Defendant smirked and did not think it was serious. Toby Speechly stepped between defendant and Smith. Speechly told defendant that Smith was one of their friends and they did not know why defendant was spitting his drink on him. Defendant seemed agitated. Wyse left the bar with Speechly before the incident with Carlsen. When Wyse was later approached by the police, he told them that if there was a fight, defendant was probably involved. Wyse agreed that this statement was pure speculation.

Wyse and Speechly went home to the townhouse they shared. Wyse went down to his garage to smoke a cigarette, and he also had a glass of wine. A taxi pulled up and defendant got out. Defendant was angry, got within six inches to one foot of Wyse, and asked why Wyse had given the police his name. Wyse said that he assumed that defendant was part of the fight based on what he has witnessed of defendant's behavior at The Cottage. Wyse went to sleep. In the morning, he saw that the wine glass he had brought outside was smashed on the driveway.

Wyse agreed that he was friends with Smith but not defendant. Wyse wrote in a statement to police that he did not like defendant. Wyse explained that prior to that evening, Wyse knew defendant but did not hang out with him; he had "no preference" for defendant. However, after the events of that night, he did not like defendant. Wyse also told the police that defendant left his townhouse the same night, but Wyse agreed that the statement was an assumption, and he did not know if defendant had slept at his place. Wyse further agreed that he did not know who broke the wine glass, but he told police that defendant had broken it.

Peter Pritchard testified that in the early morning hours of September 9, 2007, he was at the Brink Street Bar, where his girlfriend, Kimberly LaPointe, was bartending. Four men who were nicely dressed came into the bar, and Pritchard spoke with defendant. Defendant talked about his family, was polite, and did not seem agitated. Later, another person named "Steve" came into the bar and tried to buy shots. LaPointe would not sell him any, and Steve "got a little lippy" saying that he would give her money if she showed him her breasts. Defendant asked Pritchard how much he would have to pay to see them, but it was "bar talk" that Pritchard took as a joke. Defendant and his friends helped LaPointe tell the guy to leave.

Kimberly LaPointe testified that on September 8, around 6:30 p.m., defendant came into the Brink Street Bar. He said he was going to a wedding and asked for directions. He came back around 1:30 or 1:40 a.m. with three other men. Defendant was a little louder than before, but nothing unusual. Defendant was trying to order a shot, but LaPointe did not serve him because another man walked in and defendant's friends were walking in and out. It was near the end of the night and LaPointe figured they would have to leave soon anyway. When asked if defendant made any comments about an altercation earlier in the evening, LaPointe testified that when one of defendant's friends walked back in, defendant looked at him and said something to the effect of "don't worry about it; that guy deserved it." LaPointe agreed that while defendant and his friends were at the bar, another man walked in "acting crazy, obnoxious" and made a rude comment. She, defendant, and defendant's friends asked the man to leave. After the man left is when defendant made the comment about "that guy deserved it." LaPointe agreed that she told the police that defendant said, "that guy deserved to be punched." Defendant did not fight with anyone at the Brink Street Bar, and he and his friends left when the bar was closing without any issue.

Charyn Ullrick provided the following testimony. Carlsen had been her next door neighbor. On September 8, 2007, Ullrick was hosting a party for her husband in a side room at The Cottage bar. Carlsen was there, and his demeanor was "[h]appy." Ullrick left the party a little after 1 a.m. on September 9 to take gifts to her car. She was accompanied by Mary Lou Geib. Ullrick moved her car closer to the main entrance of the bar. After she parked, she saw Carlsen's wife standing in the middle of the street. Four men dressed in formal attire were standing nearby in a C formation around Carlsen. They appeared to be having a conversation, and from their body language and demeanor, it did not seem friendly. It appeared that voices were raised, and Carlsen and his wife appeared agitated. A taller man (who the parties later stipulated was Ryan Sullivan) pushed Carlsen to the ground with two hands to his chest. Carlsen fell with his butt hitting the ground first. He then fell all the way back, and his head either made contact with the ground or it came close. However, the contact with his head would have been insignificant because the primary impact was to Carlsen's butt. Ullrick ran over and positioned herself between Sullivan and Carlsen, facing Sullivan. Sullivan appeared upset and was yelling and making motions with his arms. Ullrick was yelling at Sullivan to get away and calm down. She saw Carlsen beginning to get up and the other three men starting to walk away. Carlsen started walking towards the three men with his palms up, in a "W" formation, saying " 'I didn't do nothin'; I didn't do nothin'. " Carlsen got within three feet of the three men. Ullrick turned around to dial 911 while returning to the bar to get help. She heard a big thud and then deafening silence. She turned back and saw Carlsen spread eagle on the ground, Geib next to his head, and Carlsen's wife screaming. The four men were running away. Ullrick called 911 and went to get her husband. When she returned, Carlsen was still laying down and there was blood on the ground.

Nicholas Danielson provided the following testimony. He was working as a bouncer for The Cottage bar on the night of September 8, 2007. Around 1:15 or 1:30 a.m., he was outside the bar's entrance to check patrons' identification. He noticed a man on the ground outside the parking lot area, about 50 or 60 feet away. Danielson went over to see what was going on. There were eight people at the scene: two "older" men in their 40s; two women, and four younger men in tuxedos or suits. When Danielson got to the scene, the man who had fallen down was standing again. Danielson grabbed a taller man in formal attire by his suit and told him that the police were coming, and he should relax. At this point, the older men were behind Danielson and people were shouting. The man Danielson had grabbed was looking past Danielson and not responding. Danielson turned around and saw that Carlsen and Carlsen's friend were back to back so that they could see what was going on from every angle. Danielson approached them to try to settle the situation. Carlsen's friend pushed Danielson, and then Carlsen pushed a formally-dressed person to the ground. That man got up.

Carlsen turned towards defendant. Until this point, Danielson had not seen defendant involved in the altercation. Danielson had been at the scene for about one minute total. Danielson was six feet behind Carlsen, looking at his back, when he saw defendant strike Carlsen across the face with a closed fist. Carlsen had been to the left of defendant, turning to see him, and they were face- to-face when defendant punched him; defendant was not face-to-face with Carlsen when he started throwing the punch. Danielson agreed that he provided testimony in September 2007 and when asked, "where did [defendant] come from in the moments before he struck" Carlsen, Danielson had replied, "I can't say exactly but he was behind him to his left side right like right around here

and kind of came around and he had a good one or two steps before he swung and hit him across the face." The punch hit the left side of Carlsen's face.

Danielson further testified that when defendant hit Carlsen, Carlsen's hands were at his side. Danielson did not see Carlsen push or lunge at defendant prior to the punch. Danielson described the punch as being like "a knock-out punch in a boxing match." It made a very loud noise. The punch caused Carlsen's eyes to roll back and his body to swing around. It seemed like he was completely knocked out from the punch. After Carlsen fell, defendant made a physical flexing motion with his arms and said things like, "Do you feel lucky; do you want some of this" in a loud, aggressive manner. Afterwards the younger men, including defendant, walked away. Danielson later identified defendant in a photo line-up as the person who struck Carlsen.

Forensic pathologist Ponni Arunkumar testified as follows. On September 18, 2007, she performed an autopsy on Carlsen. Arunkumar did not notice any external injuries to Carlsen's hands, arms, or face. There was a laceration measuring 2.1 by 1 inches on the back of his head, which was caused by blunt force. Underneath the laceration there was bruising or bleeding to the scalp. Carlsen's skull was fractured up from the hole through which the spinal cord passes. A significant amount of force is required to fracture the skull. Underneath the skull there was a hemorrhage beneath the dura, which was the outermost of three membranes covering the skull, on the right side. The injuries to Carlsen's head were consistent with him falling and hitting the back of his head on a paved surface. There was bruising on the front of the brain consistent with the brain moving forward when Carlsen hit the back of his head; it was not consistent with being struck with a fist on the front of his face. The left side of Carlsen's head had a hemorrhage beneath the scalp which was consistent with being struck by a fist. The injuries were consistent with multiple impacts,

meaning that the damage to the left area of the head was separate from the impact that caused the hemorrhage on the back of the head. Arunkumar opined that the cause of death was "cranial cerebral injuries due to blunt head trauma due to assault."

Arunkumar agreed that she did not know that Carlsen had fallen down twice on the night in question. She also did not know at the time of her report that he had a blood alcohol level of .240 or cocaine in his system, though it would not have affected her findings. She agreed that his injuries could have been caused by hitting his head in more than one fall.

The trial court heard argument on the motions *in limine* regarding defendant's conduct prior to and after the altercation with Carlsen, including: the spitting incident; defendant's statement to Hughes that he wanted to fight somebody; and defendant's statement at the Brink Street Bar that "that guy deserved it." The trial court stated that it would admit the testimony of Smith, Hughes, Pritchard, and LaPointe, because the probative value of the testimony outweighed its prejudicial effect. The trial court stated that the evidence was relevant to defendant's intent, state of mind, and "who was the aggressor in these incidents."

The defense then stated that Danielson did not testify to the "sucker punch" comment, so his testimony was not admissible under section 115—12. The trial court stated that Danielson was subject to cross examination on the issue and that Gasparaitis's testimony was admitted as an exception to the hearsay rule. According to the trial court, the statement was not offered for the truth of the matter asserted but rather was offered for the statement that Danielson made to Gasparaitis during the course of identification.

The trial court denied defendant's motion for a directed finding. Defendant's witness, Dr. Jerrold Blair Leikin, who the parties stipulated was an expert in toxicology, testified as follows.[1] Alcohol affects the brain by, among other things, impairing judgment, increasing risk taking behavior, and impairing balance. Alcohol heightens emotional stress and can result in impulsive and aggressive behavior. Cocaine causes, among other things, impaired judgment, aggressive behavior, and impulsive behavior. It can cause paranoia and psychosis. When alcohol and cocaine are taken together they form a unique drug or metabolite called cocaethylene, which accentuates the effects of either substance taken alone.

Leikin could not offer an opinion as to what time Carlsen ingested cocaine. Alcohol increases reaction time, so it could take longer for someone to react to a person throwing a punch at him. Intoxicated individuals are less likely to brace themselves when falling. Leikin did not review the police reports in this case and did not have a specific opinion of whether Carlsen was aggressive on September 9, 2007, other than that he was more likely to be aggressive due to the drugs.

The trial court issued its ruling on October 22, 2009, finding as follows in relevant part. Carlsen died due to blunt head trauma caused by an assault. He had a fractured skull on the back of his head and a left temporal hemorrhage consistent with being struck by a fist. Defendant admitted in his statement to the police that he punched Carlsen. Danielson also testified that he saw defendant deliver what he described as a knock-out punch. There was no evidence that Carlsen "in any way acted in an aggressive manner" towards defendant. There were no words or physical contact

[1]Leikin actually testified prior to defendant's motion for a directed finding because the parties agreed to allow him to testify amidst the State's witnesses to accommodate his schedule.

between them. Ullrick testified that after Carlsen was first pushed to the ground, he put his hands in the air with his palms up saying, " 'I didn't do nothin', I didn't do nothin.' " The trial court found that Carlsen's gesture was one of disbelief. The only evidence of physical contact by Carlsen was that he had pushed an acquaintance of defendant to the ground after Carlsen had first been pushed to the ground by someone in defendant's party.

The trial court further stated that it was:

> "of the opinion that the defendant did not act in self-defense but rather that he acted in retaliation and revenge. The Court did not find the statements of the defendant made to the Crystal Lake police to the extent that he feared that Mr. Carlsen was going to push or tackle him to be credible. If the defendant did in fact possess these beliefs the Court finds those beliefs based upon the evidence presented were unreasonable."

The court found that defendant's act was reckless and that he disregarded a substantial and unjustifiable risk. It concluded that the State had carried its burden of proof and that defendant was guilty of involuntary manslaughter.

On December 2, 2009, the trial court denied defendant's motion for a new trial. The trial court sentenced defendant on January 15, 2010, and he timely appealed.

II. ANALYSIS

A. Motion to Suppress

Defendant first argues that the trial court erred by denying his motion to suppress his statements to the police. Our supreme court has held that, when reviewing rulings on motions to suppress, we should accord great deference to the trial court's factual findings and reverse those findings only if they are against the manifest weight of the evidence. *People v. Pitman*, 211 Ill. 2d

502, 512 (2004). Such deference is based on the recognition that the trial court is in a superior position to determine and weigh the witnesses' credibility, observe their demeanor, and resolve conflicts in their testimony. However, we review *de novo* the ultimate ruling on the motion to suppress. *Pitman*, 211 Ill. 2d at 512.

A defendant has the right against self-incrimination (U.S. Const., amends. V, XIV; Ill. Const. 1970, art. I, §10), which includes the right to an attorney (*People v. Chapman*, 194 Ill. 2d 186, 208 (2000)). Still, a defendant may waive these rights, providing that the waiver is voluntary, knowing, and intelligent. *Id.* at 208. A valid waiver of *Miranda* rights has two distinct components. *People v. Scott*, 148 Ill. 2d 479, 509 (1992). First, it must have been voluntary in the sense that it was given as a free and deliberate choice rather than as a result of intimidation, coercion, or deception. *Id.* Second, it must be knowing and intelligent. *See id.* For a waiver to be knowing and intelligent, a defendant is not required to know and understand the far-reaching legal and strategic effects of waiving his *Miranda* rights. *People v. Braggs*, 209 Ill. 2d 492, 515 (2003). Rather, he must " 'know what he is doing' so that 'his choice is made with eyes open' "; he must have " 'a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.' " *People v. Bernasco*, 138 Ill. 2d 349, 360 (1990) (quoting *Patterson v. Illinois*, 487 U.S. 285, 292 (1988)). The State has the initial burden of proving, by a preponderance of the evidence, that the defendant made a voluntary, knowing, and intelligent waiver of his rights. *Chapman*, 194 Ill. 2d at 208-09. If the State establishes its *prima facie* case, the burden shifts to the defendant. *Scott*, 148 Ill. 2d at 510. Whether a waiver is knowing and intelligent depends on the facts and circumstances of the case, including the defendant's background, experience, and conduct (*Braggs*, 209 Ill. 2d at 515) and the details of the interrogation (*Chapman*, 194 Ill. 2d at 208). A trial court's determination

of whether a defendant intelligently and knowingly waived his *Miranda* rights is a factual question and will not be reversed unless it is against the manifest weight of the evidence. *People v. Daniels*, 391 Ill. App. 3d 750, 780 (2009).

Defendant's argument is based on what occurred at the beginning of his interview with the police, as shown in the videotape and described in Detective Gaspairitis's testimony during the hearing on the motion to suppress. The video shows Gaspairitis telling defendant that he is going to read him his *Miranda* warnings because they will be questioning him about something. Gaspairitis obtains defendant's permission to videotape the interview. He next says, "then there's a *Miranda* form to sign off; its just to sign off that *I read* you *Miranda* warnings. Then we'll speak about the incident." (Emphasis added.) Gaspairitis reiterates the permission to videotape the interview. Then he reads defendant each *Miranda* right, asking after each one if defendant understands. Defendant replies in the affirmative each time. At the end, Gaspairitis asks if defendant would still like to speak to the detectives, and defendant says yes. Gaspairitis hands defendant a paper, saying the form is a "*waiver* of *Miranda* rights" and "these are the *Miranda* warnings I read you." (Emphasis added.) Gaspairitis asks defendant to read each one, initial, and sign on the bottom line.

The video shows defendant reading and initialing the rights. When he gets to the bottom of the form, he asks, "By waiving them, I can't just fall back on them?" He also asks if he is being charged with anything. Gasparaitis tells defendant he can stop talking any time he wants. Gasparaitis says once defendant signs the form and they start talking, if defendant does not want to talk anymore, he can stop talking. Defendant asks again if he is being charged, and Gasparaitis tells defendant he needs him to sign the form indicating that he understands. Defendant asks, "I am not

waiving these rights, right?" Gasparaitis says, "No, no." He said that the form says that "I *read* you your *Miranda* warnings." (Emphasis added.) He tells defendant that he can institute his rights at any time and stop talking. Defendant notes that the form says that he is waiving his rights. Gasparaitis states, "just because you are signing that now, you can institute your rights at any time."

Defendant argues that the sole reason for confusion in the exchange was Gasparaitis's tactics, in that Gasparaitis claimed that he was having defendant sign an affirmation that he read him his rights rather than that defendant had been read his rights, understood those rights, and was knowingly and intelligently giving up those rights. According to defendant, he questioned several times whether he was waiving his rights and the consequences of the waiver. Defendant argues that when he asked for clarification, Gasparaitis either would not answer or avoided clearing up the confusion he caused. Defendant maintains that his waiver was not intelligent because Gasparaitis told him, point blank, that he was not waiving his *Miranda* rights.

We conclude that the trial court's finding that defendant knowingly and intelligently waived his rights is not against the manifest weight of the evidence. Defendant does not dispute the trial court's findings that he is of average intelligence; that both he and the detectives were calm throughout the interview; and that the detectives were polite and not aggressive. Instead, defendant bases his argument on the accuracy of the information conveyed to him by the police. The videotape shows that defendant was read his *Miranda* rights and indicated after each one that he understood. He was then asked if he would still like to speak to the detectives, and he agreed. Although Gasparaitis said at times that the form was to show that he *read* defendant his *Miranda* rights, he also told defendant he was giving him a "*waiver* of *Miranda* rights form," (emphasis added) thereby clearly indicating its nature, which is also explained in the form itself. Viewed in context,

defendant's questions about whether he was waiving his rights appeared to refer to whether he was permanently waiving his rights, as shown by his question of whether he could "fall back" on them. Gasparaitis correctly answered this question several times by stating that defendant could stop talking and "institute" his rights at any time. Gasparaitis's repeated use of the word "institute" also conveyed that defendant was waiving his rights in the first instance. Defendant proceeded to sign the form and did not thereafter invoke his *Miranda* rights. Further, a certified statement of defendant's prior conviction was entered into evidence, indicating that he most likely had some prior familiarity with *Miranda* warnings. Considering the facts and circumstances of the case, the trial court did not err in denying defendant's motion to suppress.

B. Post-Identification Statement

Defendant next argues that the trial court improperly considered Gasparaitis's testimony that Danielson identified him as the man who "sucker punched" Carlsen. Defendant argues that identification was not an issue, so the defense did not object to the fact that Danielson identified defendant, but the State went beyond a statement of identification in an effort to introduce the inflammatory descriptor of the quality of the act. Defendant argues that the statement here was both after the identification and not a statement of identification, so it does not fit the hearsay exception of section 115—12 .

Evidentiary rulings are within the trial court's discretion and will not be reversed absent a clear abuse of discretion. *People v. Wheeler*, 226 Ill. 2d 92, 132 (2007). An abuse of discretion occurs only where the trial court's decision is arbitrary, and no reasonable person would adopt that view. *Id.* Section 115—12 of the Code of Criminal Procedure, entitled "Substantive Admissibility of Prior Identification" states that a statement is not inadmissible as hearsay if: (1) the declarant

testifies; (2) the declarant is subject to cross-examination concerning the statement; and (3) the statement "is one of identification of a person made after perceiving him." 725 ILCS 5/115—12 (West 2008). Statements of identification are not limited to a witness's actual identification, but include the "entire identification process," including both identification and nonidentification evidence. *People v. Tisdel*, 201 Ill. 2d 210, 219 (2002); see *People v. Thorne*, 352 Ill. App. 3d 1062, 1075-76 (2004) (victim identified the defendant with more specificity when he told the officer what role he played during the robbery, so the statement was admissible under section 115—12); *People v. Bowen*, 298 Ill. App. 3d 829, 835-36 (1998) (trial court properly admitted officer's testimony that witness identified a photograph of the defendant as the person who shot the victim); see also Cleary & Graham §611.16 at 520 (9th ed. 2009) ("Statements of identification [may] include a short summary description of the conduct of the identified individual, made contemporaneously with the identification").

We conclude that the trial court acted within its discretion in allowing the statement into evidence. Although defendant argues that identification was not at issue, in a criminal trial "the prosecution is allowed to prove every element of the crime charged and every relevant fact, even if the defendant offers to stipulate to those same facts." *People v. Hobley*, 159 Ill. 2d 272, 316 (1994). Thus, the State was allowed to introduce all relevant evidence related to identification. Further, even if Danielson did not utter the phrase "sucker punched" in the same breath as naming defendant, stating it immediately after would still qualify the statement being part of the identification process in terms of timing. The substance of the statement also qualifies as identification evidence, as it conveys information of what Danielson was identifying defendant as doing. *Cf. Bowen*, 298 Ill. App. 3d at 833-36 (statement the defendant was the person "who shot" the victim was identification

evidence). We also agree with the State that it is a reasonable inference that the "sucker punch" Danielson mentioned to the police is the same type of "knock-out punch" that he testified to at trial in describing the type of punch defendant threw, and that Danielson was available for cross-examination on this issue.

Defendant argues that the trial court's comment that the statement was not hearsay shows that it did not accept the statement under section 115—12, because that section allows such testimony to come in as substantive evidence. Even if this were true, however, we may sustain a trial court's evidentiary ruling on any appropriate basis, regardless of whether the trial court relied on that reasoning or whether the trial court's reasoning was correct. *Kimble v. Earle M. Jorgenson Co.*, 358 Ill. App. 3d 400, 408 (2005); see also *People v. Villa*, 403 Ill. App. 3d 309, 319 (2010) (we may affirm the trial court's decision to admit evidence on any basis supported by the record).

Furthermore, even if, *arguendo*, the trial court should have sustained defendant's objection to the phrase, we conclude that any error was harmless. In determining whether an error is harmless, the question is whether it appears beyond a reasonable doubt that the error did not contribute to the verdict. *People v. Stechly*, 225 Ill. 2d 246, 304 (2007). Our supreme court has identified three approaches for making this assessment: (1) focusing on the error to determine whether it might have contributed to the conviction; (2) determining whether properly-admitted evidence overwhelmingly supports the conviction; and (3) determining whether the improperly-admitted evidence is merely cumulative or duplicative of properly-admitted evidence. *People v. Becker*, 239 Ill. 2d 215, 240 (2010). Here, the first approach applies to the "sucker punch" comment. The relative physical positions of defendant and Carlsen when the punch occurred were clearly at issue during the trial, as was the question of whether defendant acted in self-defense. During the course of the trial, the

trial court stated at one point that the "sucker punch" comment was not being offered for the truth of the matter asserted, but rather that it was being offered to show the statement that Danielson made when identifying defendant. Later, in ruling on defendant's guilt, the trial court noted that defendant admitted to punching Carlsen and that *at trial*, Danielson described it as a knock-out punch. In arriving at its conclusion that defendant did not act in self-defense, the trial court found that Carlsen did not act in an aggressive manner towards defendant, in that there was no physical contact or words exchanged between them, and that the gesture Carlsen was making before the punch was one of disbelief. It found defendant's statement to the police that he feared that Carlsen was going to push or tackle him to not be credible. Given that the trial court treated the manner and motivation of the punch as disputed questions of fact, articulated that it was not treating the sucker punch comment as the truth of the matter asserted, and did not rely on the comment in making its findings, an error in allowing Gasparaitis to testify that Danielson identified defendant as the person who "sucker punched" Carlsen was harmless beyond a reasonable doubt.

C. Testimony Regarding the "Spitting Incident"

Defendant next argues that the trial court improperly considered as other-crimes evidence testimony about the incident in which he spit a drink through a straw at Smith. The decision of whether to admit other-crimes evidence is within the trial court's sound discretion. *People v. Dabbs*, 239 Ill. 2d 277, 284 (2010). Evidence of other crimes is admissible if it is relevant to show anything other than a defendant's propensity to commit crimes. *Id.* at 283. Thus, it is admissible to show, among other things, motive, intent, identity, and accident or absence of mistake. *Id.* Still, such evidence will be excluded if its probative value is substantially outweighed by its prejudicial effect. *Id.* at 284. Where evidence of other crimes is offered to show *modus operandi* or a common

design or plan, there must be a high degree of identity between the crime charged and the other offense. *People v. Cruz*, 162 Ill. 2d 314, 349 (1994). If the other-crimes evidence is offered to show something other than *modus operandi*, such as an innocent frame of mind or the presence of criminal intent, only "general areas of similarity" are required. *Id.* at 349-50. Defendant argues that spitting a drink through a straw at Smith is not similar at all to the altercation with Carlsen, so the trial court should not have considered it.

The State argues that the focus was on defendant's behavior following his act of spitting his drink, and that the testimony did not implicate the rule regarding "other-crimes" evidence. Defendant responds that the State argued below that the testimony fell under the other-crimes evidence rule and the trial court accepted it as such, so the State may not now change its position. However, as stated, we may sustain a trial court's evidentiary ruling on any basis supported by the record, regardless of the trial court's reasoning. *Kimble*, 358 Ill. App. 3d at 408.

We agree with the State's argument that the testimony was admissible outside of the other-crimes evidence rule, finding its citation to *People v. Begay*, 377 Ill. App. 3d 417 (2007), particularly relevant. There, the defendant was charged with armed violence and aggravated battery. At trial, the victim testified that the defendant, his former girlfriend, pushed her way into his apartment and ultimately hit him in the forehead with a knife. *Id.* at 418. The victim's son testified that prior to the defendant entering, he heard a " 'splatter' " outside of something hitting a car. *Id.* at 419. Later that day, he went outside and saw that the victim's car and the car of a female friend of the victim's had been hit with eggs. *Id.* at 420. For her part, the defendant testified that she went to the victim's apartment to have sex with him; she saw the victim's car but did not see any egg spattered on it; the

victim attacked her with a knife; and she saw the victim jerk the knife towards his face just before she escaped and ran away. *Id.*

On appeal, the defendant argued that the trial court erred in allowing prejudicial other crimes evidence of the cars being egged. The appellate court noted that the crime of aggravated battery required poof that the defendant intentionally or knowingly caused great bodily harm or permanent disfigurement. The court stated that where a defendant denies the intent to harm in such a case, the State must prove the intent through circumstantial evidence. The court reasoned that the testimony regarding the egging was relevant to the issue of whether the defendant went to the victim's apartment as an angry aggressor or to just have sex with him. *Id.* at 421. "Therefore, the egging did not constitute other crimes evidence, but was circumstantial evidence relevant and probative to the issue of defendant's intent when she visited the victim's apartment." *Id*; see also *People v. Jones*, 269 Ill. App. 3d 797, 804 (1994) (evidence of weapons and cash found in the defendant's basement was not evidence of other crimes but rather circumstantial evidence to prove the defendant's intent to deliver a controlled substance).

Here the central question at trial was whether defendant was acting in self-defense when he punched Carlsen. Self-defense contains the following elements: (1) unlawful force was threatened against the defendant; (2) the defendant was not the aggressor; (3) the danger of harm was imminent; (4) the use of force was necessary; (5) the defendant actually and subjectively believed that a danger existed that required the use of the force applied; and (6) the defendant's beliefs were objectively reasonable. 720 ILCS 5/7—1 (West 2008); *People v. Lee*, 213 Ill. 2d 218, 225 (2004). Many of the elements of self-defense as applied here, such as whether defendant believed that Carlsen represented a danger that required the use of force applied, relate to defendant's intent, which, as in *Begay*, the

State had to prove by circumstantial evidence. Defendant's behavior in the bar that same night is relevant and probative to determining this intent. Particularly, Smith testified that defendant spit a drink at him for no reason. When Smith turned around and confronted defendant, defendant said "let's go"and moved toward Smith in an agitated manner. Wyse similarly testified that defendant was agitated, to the extent that Wyse later told police that if there was a fight, defendant was probably involved. Hughes testified that after the spitting incident, defendant told Hughes's friend Naughton, "I'm going to fight." They thought defendant was joking until he asked Naughton "if he had his back." They then believed that defendant was serious about fighting and decided to leave. In defendant's favor, Hughes testified that Smith had pushed defendant but defendant did not act physically in return. In sum, whether defendant was acting aggressively in the bar and indicated a desire to fight is circumstantial evidence relevant to defendant's intent when he punched Carlsen, so the trial court acted within its discretion in allowing testimony surrounding the "spitting incident" into evidence.

D. LaPointe's Testimony

Defendant further argues that the trial court erred in considering LaPointe's testimony about what he said at the Brink Street Bar, which the State had offered as a statement against interest. Defendant argues that although the State claimed that he was referring to Carlsen when allegedly stating "that guy deserved it," LaPointe's testimony shows that the comment was directed at an obnoxious patron who was asked to leave. According to defendant, because the State was not able to tie the comment to Carlsen, it was irrelevant and should not have been considered by the trial court.

As stated, LaPointe, the bartender at the Brink Street Bar where defendant and his friends went after the fight with Carlsen, was asked if defendant made any comments about an altercation earlier in the evening. She testified that when one of defendant's friends walked back in, defendant looked at him and said something to the effect of "don't worry about it; that guy deserved it." On cross-examination, LaPointe testified about the obnoxious bargoer and agreed that defendant made his comment after the man was kicked out. On re-direct examination, LaPointe agreed that she told the police that defendant said, "that guy deserved to be punched." LaPointe also testified that defendant did not fight with anyone at the Brink Street Bar.

We recognize that a rational trier of fact could infer from the testimony that defendant was referring to the obnoxious bargoer when stating "that guy deserved it." However, a rational trier of fact could also infer that defendant was referring to Carlsen, especially in light of LaPointe's testimony that she told the police that defendant said, "that guy deserved to be punched" and that defendant did not fight with anyone at the Brink Street Bar. It is up to the trier of fact resolve conflicts in the evidence and draw reasonable inferences from the evidence. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). Because the trier of fact could find that the statement pertained to Carlsen, it is probative in assessing the central issue in the case of whether defendant punched Carlsen in self-defense. Therefore, the trial court did not abuse its discretion in allowing LaPointe's testimony into evidence. See *Wheeler*, 226 Ill. 2d at 132 (evidentiary rulings are within the trial court's discretion and will not be reversed absent a clear abuse of discretion).

E. Sufficiency of the Evidence

Defendant next argues that he was not proven guilty beyond a reasonable doubt. The standard of review for a claim of insufficiency of the evidence is the same for both bench trials and

jury trials. *People v. Leach*, 405 Ill. App. 3d 297, 311 (2010). The standard is whether, after viewing 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. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *People v. Collins*, 106 Ill. 2d 237, 261 (1985). The trier of fact has the responsibility to assess witnesses' credibility, weigh their testimony, resolve inconsistencies and conflicts in the evidence, and draw reasonable inferences from the evidence. *Sutherland*, 223 Ill. 2d at 242. We will not set aside a criminal conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 225 (2009).

Defendant notes that the issue is whether he acted in self-defense but contends that the trial court went out of its way to avoid ruling on the burdens and presumptions of self-defense. According to defendant, the trial court manufactured a theory of "retaliation and revenge" even though those words and theory were not contained in the evidence presented, making such a finding against the manifest weight of the evidence. Defendant notes that the trial court found no evidence that Carlsen "in any way acted in an aggressive manner towards" him, but he argues that, to the contrary, the evidence showed the following. Carlsen engaged in a verbal dispute with a group of men. After getting nose-to-nose with one of them, Carlsen was pushed. At that time, the three men not involved in any physical altercation, including defendant, walked away. Carlsen, who was 280 pounds, lumbered after them with his hand out and palms up. He had cocaine and alcohol in his system, a combination which makes a person aggressive. Carlsen and his friend closed in on the group and Carlsen's friend pushed the bouncer. Carlsen shoved one man in the group to the ground. Carlsen turned to the smallest man of the group, defendant, who threw a single punch. Defendant argues that

his videotaped statement is consistent with these facts, and to find that the danger to him was not reasonable or probable amounts to a finding that neither he nor the State's two occurrence witnesses are credible.

We conclude that defendant was proven guilty of involuntary manslaughter beyond a reasonable doubt. The evidence, viewed in the light most favorable to the State, showed the following. Defendant was acting somewhat aggressively in the bar prior to the altercation, moving toward Smith in an agitated manner and saying "let's go" after Smith confronted defendant about spitting a drink on him. Defendant also told Hughes and Naughton that he was going to fight and asked if Naughton "had his back." Later that evening, Carlsen and his friend were outside with defendant and three of defendant's friends. Sullivan pushed Carlsen to the ground. Defendant and two of his friends started walking away. Carlsen started walking towards the men with his palms up saying, "I didn't do nothin'; I didn't do nothin.' " At some point in this sequence Carlsen's friend pushed the bouncer, Danielson, to the ground, and Carlsen then pushed one of defendant's friends to the ground. Carlsen was to defendant's left, turning to see him, when defendant took one or two steps forward and punched him across the face. At this time, Carlsen's hands were at his sides. The punch, which made a very loud noise, was like "a knock-out punch in a boxing match," and it seemed to render Carlsen unconscious. He fell back and hit his head on the pavement. Afterwards, defendant said things like, "Do you feel lucky; do you want some of this" in a loud, aggressive manner. Defendant and his friends left the scene and went to the Brink Street Bar, where defendant told one of his friends, "that guy deserved it" or "that guy deserved to be punched."

The elements of involuntary manslaughter are: (1) the defendant performed an act; (2) the act unintentionally caused the death of another; (3) the act was likely to cause death or great bodily

harm; and (4) the act was performed recklessly. 720 ILCS 5/9—3(a) (West 2008); *People v. Smith*, 149 Ill. 2d 558, 563 (1992). It is undisputed that the first two elements of involuntary manslaughter are satisfied, as defendant's admitted act of punching Carlsen caused his death. Regarding the third element, the altercation took place on a paved surface, and Danielson testified that defendant took one or two steps before punching Carlsen and that the punch was very loud and appeared to knock Carlsen out. Under these circumstances, the punch was likely to at least cause great bodily harm, thereby satisfying the third element. *Cf. People v. Milligan*, 327 Ill. App. 3d 264, 267 (2002) ("closed head injury"and abrasions and bruising constituted great bodily harm); *People v. Parr*, 35 Ill. App. 3d 539, 542 (1976) (rational jury could have found that the defendant's act of striking the victim with his fist was likely to cause death or great bodily harm). The fourth element requires proof that the act was performed recklessly. A person acts recklessly when he "consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow *** and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." 720 ILCS 5/4—6 (West 2008). Delivering such a forceful punch to someone who is not expecting it and is standing on a paved surface can certainly be categorized as reckless behavior. *Cf. Parr*, 35 Ill. App. 3d at 542 (rational jury could have found that the defendant's act of striking the victim with his fist was reckless).

Defendant does not dispute that the elements of involuntary manslaughter are satisfied but rather argues that he was acting in self-defense. As stated, the elements of self-defense are: (1) unlawful force was threatened against the defendant; (2) the defendant was not the aggressor; (3) the danger of harm was imminent; (4) the use of force was necessary; (5) the defendant actually and subjectively believed that a danger existed that required the use of the force applied; and (6) the

defendant's beliefs were objectively reasonable. 720 ILCS 5/7—1 (West 2008); *Lee*, 213 Ill. 2d at 225. Once a defendant raises self-defense, the State has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense, in addition to proving the elements of the crime charged. *Id.* at 224. The State need only negate one element of self-defense for the defendant's self-defense claim to fail. *People v. Dillard*, 319 Ill. App. 3d 102, 106 (2001).

We conclude that a rational trier of fact could determine that the first and third elements of self-defense (that unlawful force was threatened and the danger of harm was imminent) were not satisfied. Although Carlsen had pushed one of defendant's friends, he did not verbally threaten defendant and was merely turning towards defendant when defendant punched him. Significantly, Danielson testified that Carlsen's hands were at his sides when defendant hit him. In this manner, the trial court's finding that Carlsen had not "in any way acted in an aggressive manner towards" *defendant* is not against the manifest weight of the evidence, as a rational trier of fact could determine that Carlsen's act of turning in defendant's direction was not an act of aggression towards him. The trial court also found that defendant's statement on the videotape that he thought Carlsen was going to push or tackle him to not be credible. Such credibility determinations were properly up to the trial court as the trier of fact, and this determination negates the fifth element of self-defense. Further, if defendant was truly not in fear of being harmed by Carlsen, a reasonable inference is that his decision to punch Carlsen was to retaliate for Carlsen having pushed his friend, in accordance with the trial court's findings. The trial court further found that if defendant did believe that Carlsen was going to push or tackle him, the belief was unreasonable, contrary to the sixth element. A rational trier of fact could arrive at this conclusion, as bouncer Danielson was breaking up the altercation and Carlsen was in the process of just turning towards defendant when

defendant punched him. Further, the sixth element requires that the defendant's belief that the amount of force used was necessary was objectively reasonable, but defendant's decision to use a "knock-out" punch when the altercation had up to that time only involved pushing could be labeled as objectively unreasonable. In sum, the State presented sufficient evidence for the trial court to have rejected defendant's claim of self-defense beyond a reasonable doubt.

F. Motion to Dismiss Indictment

Last, defendant argues that the trial court erred in failing to grant his motion to dismiss the indictment against him. Defendant argues that the prosecutor violated his due process rights in seeking the indictment because the prosecutor misstated the law to the grand jury; made misleading statements; and testified in his remarks to the grand jury. The State argues that the issue is moot because it dismissed the indictment during the course of the proceedings. We agree with the State.

All felony prosecutions in Illinois must be charged either by information or indictment. 725 ILCS 5/111—2(a) (West 2008). If the State charges a defendant by information, the defendant is entitled to a preliminary hearing to determine whether probable cause exists to believe that the defendant committed the offense. *Id.* Here, the State charged defendant by indictment with first-degree murder and aggravated battery, but it subsequently dismissed that indictment and charged defendant by information with involuntary manslaughter. Defendant waived his right to a preliminary hearing on the involuntary manslaughter charge.

A question is moot where there is no longer an actual controversy or it is not possible to grant effective relief. *People v. Wiley*, 333 Ill. App. 3d 861, 864 (2002). Here, the State already dismissed the indictment against defendant, so determining whether the trial court should have granted

defendant's motion to dismiss the indictment would have no practical effect. Accordingly, the issue is moot, and we do not address it.

III. CONCLUSION

For the foregoing reasons, we affirm the judgment of the McHenry County circuit court.

Affirmed.