2012 IL App (2d) 110677-U
No. 2-11-0677
Order filed December 19, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiff-Appellee,	)	
v.	)	No. 09-CF-2815
RYAN A. SCHILLER,	)	Honorable Gary V. Pumilia,
Defendant-Appellant.	)	Judge, Presiding.

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

ORDER

¶ 1 *Held*: (1) The defendant was convicted beyond a reasonable doubt of first degree murder; and (2) the trial court did not err in failing to respond to an allegation that raised a question of the trial court's impartiality.

¶ 2 Following a bench trial, the defendant, Ryan Schiller, was convicted of first degree murder (720 ILCS 5/9-1(a)(2) (West 2008)) for killing his then girlfriend, Amanda Reed. The defendant was sentenced to 28 years' imprisonment. On appeal, the defendant argues that (1) his conviction should

be reduced to involuntary manslaughter and (2) the trial court erred in failing to respond to an allegation that raised a question of the trial court's impartiality. We affirm.

¶ 3 BACKGROUND

¶ 4 On September 30, 2009, the defendant was charged by indictment with first degree murder (720 ILCS 5/9-1(a)(2) (West 2008)). The indictment alleged that the defendant caused the victim's death by asphyxia by placing his knee on the victim's back while holding her down on a bed. The indictment further alleged that the defendant knew that his actions created a strong probability of death or great bodily harm.

¶ 5 From May 16 to May 19, 2011, the trial court conducted a bench trial on the charge against the defendant. Diane Reed, the victim's mother, testified that in September 2009, the 27-year-old victim lived in the Beechwood Apartments in Loves Park with a roommate, Liz Kolosa. The victim had been dating the defendant. A week before the victim's death, Reed went to a concert near Chicago along with the defendant and the victim. At one point, she observed that the victim was upset and crying. She also observed that, on the bus ride home, the defendant and the victim were "squished" together on a seat in the bus, sleeping.

¶ 6 Paula Schwartz testified that she worked at Tod's Bar with the victim. On September 2, 2009, the victim came into the bar with the defendant. The victim asked for some money in advance of her September 4 payday. Schwartz gave her $150. The victim and the defendant stayed for a half-hour, drinking beer. The two were not getting along as the defendant seemed upset. At one point, the victim went to the restroom and the defendant drank her beer. When she returned, the victim ordered a shot and the defendant was not pleased. When the victim tried to talk with Schwartz, the defendant put his hand over the victim's mouth. She pushed it away and the defendant said "I'll kill

you." The two left together five minutes later, and Schwartz watched them through a window. She saw the defendant push the victim on the neck to get her into their car. Schwartz acknowledged that she did not refer to the defendant's comment about killing the victim in the statement that she gave to the police on September 8, 2009.

¶ 7 Melissa Sadler testified that she was one of the victim's best friends. On the evening of September 3, 2009, she went out with the victim and some others, but not the defendant. The victim was frustrated that the defendant kept trying to call her and stated that she "needed her space." After a night spent at a couple of bars and someone's boat, Sadler and the victim went to the victim's apartment. Sadler left the victim alone for a short time before returning at around 2 a.m. The victim was still alone, so Sadler decided to stay the night. She got into bed with the victim, and fell asleep. At some point Sadler got up and went to the bathroom. In the process she locked herself out of the bedroom, so she went to the kitchen to wait for someone to help her. The defendant then entered the front door of the apartment, using his keys.

¶ 8 The defendant asked Sadler who was in the bedroom with the victim, and Sadler told him no one. The defendant was able to unlock the bedroom door, and then went inside and tried to wake the victim up. Sadler went into the room and got her purse and keys , and left the apartment. It was around 4 a.m. She saw the defendant "moving [the victim's] face" trying to wake her up. The victim made a moaning noise and appeared to be alive. The victim did not appear to have any bruises on her face at that time. Sadler got halfway down the road when she remembered she had left her cell phone at the apartment, so she went back and walked into the victim's bedroom. The defendant was still on the edge of the bed trying to wake up the victim. Sadler took her phone off

the bed and left. She believed that the victim was alive at that time. The defendant was not acting in a violent manner.

¶ 9 Elizabeth Kolosa, the victim's roommate, testified that the victim and the defendant had been dating during the summer of 2009. On September 3, 2009, according to Kolosa, the victim planned to hang out with a number of her friends on a friend's boat. The victim did not want to see the defendant that night. Kolosa worked that night until 11 or 11:30 p.m., went home and changed her clothes, and then went out with another girlfriend. She stayed at a bar until closing. Upon returning home, she saw both the victim and Sadler in the apartment. Kolosa went straight to her bedroom and did not wake up until 10 or 11 a.m.

¶ 10 When she got up, Kolosa did her laundry and some other chores. The door to the victim's room remained closed, and she did not hear anything inside. That night, Kolosa went to work, and afterwards she returned home, changed clothes, and went out again. After drinking at a number of bars and other locations, she went home with three men, arriving at the apartment between 4 and 5 a.m. She heard a couple of barks from the victim's dog coming from inside the victim's bedroom. She then opened the door to let the dog out and saw the victim lying on the bed. She shook the victim, who was very stiff. After two of the other men who entered the apartment with Kolosa checked the victim, one of them called 911.

¶ 11 On cross-examination, Kolosa acknowledged that the victim and the defendant seemed to care for each other. The two had a "rocky" relationship and they fought with each other, but "not to a great extent." When she reached the victim by phone on the night of September 3, the victim sounded intoxicated. When she talked with the police after the victim's body was found, she stated that she thought that the victim may have "overdrank."

¶ 12 Officer Joshua Hecker of the Loves Park police department arrived at the victim's apartment at 5:30 a.m. on September 5. He observed that the victim's head was on a pillow and her feet were at the end of the bed, as if she was taking a nap. A blanket covered her body up to her chest. He saw some bruising on her face and dry blood from her nose. He tried but could not find a pulse. The television was on, and there was a glass pipe with some burnt residue on the night stand.

¶ 13 Michelle Messley, a paramedic, testified that she found the victim lying on her back, in bed. She was wearing a bra, and had a bed sheet pulled up to her waist. Her eyes were open and deep purple, with "splotches" on both cheeks, a bloody upper lip, and more splotches on her right wrist, which appeared to be swollen.

¶ 14 Officer Howard Dean of the Loves Park police department testified that he went to the scene around 7:30 a.m. and retrieved a t-shirt from a garbage dumpster next to the victim's apartment building. The t-shirt, along with vaginal swabs from the victim's autopsy, was taken to the Rockford crime laboratory for testing. The t-shirt had blood on it that was consistent with the victim's. Human DNA matching the defendant's profile was found on the vaginal swab.

¶ 15 Dr. Larry Blum, a forensic pathologist, conducted the victim's autopsy on September 6. He noted a number of external injuries: linear scratches and abrasions over the right temporal area and around the nostrils; the lips were swollen and contused; the left cheek was bruised; there was an abrasion on the right side of the upper part of the neck; a contusion on the right arm inside the elbow; large contusions on the back of both hands and left fourth finger; and various contusions on the legs. There were no bruises on the chest or upper abdomen, or any damage to the front of the throat and neck area. The whites of the eyes showed some scleral hemorrhaging, which could have been caused by trauma, asphyxia (oxygen not getting into the body), a hard cough or sneeze, or the victim could

have simply woken up with it. Dr. Blum could not rule out hypoxia or asphyxia as causes of the hemorrhaging.

¶ 16 An internal examination showed bruising of the right temporalis muscle (the right temple). The heart and cardiovascular system were fine. The lungs showed pulmonary vascular congestion and edema, with fluid coming up into the airways. There was no brain trauma or skull fracture.

¶ 17 Dr. Blum testified that he believed that the victim died of traumatic asphyxia. Asphyxia causes problems for the brain, heart, and lungs. Traumatic asphyxia occurs when asphyxia develops due to an impairment of breathing, such as a heavy weight on the chest which limits chest and lung capacity. Dr. Blum concluded that the victim's abrasion, swelling, and bruising of the lips and nose was evidence of occlusion or semi-occlusion, which could have caused a loss of consciousness and death due to a lack of oxygen. Someone straddling the victim's body, putting weight on her chest or back, would cause asphyxia. The interval between the trauma and death could have ranged from multiple seconds to a few minutes. A person could continue to breathe for a few minutes after the asphyxia-inducing trauma. Loss of consciousness would have come before death; there was no way to tell how long it would have lasted.

¶ 18 Dr. Blum further testified that the victim's toxicology reports showed that her blood-alcohol level was .276, three times the legal limit. The laboratory analysis also indicated that she had consumed marijuana in the "near past." Generally, the combination of marijuana and alcohol would have affected alertness, judgment, perception, and reaction time. High levels of alcohol slow down a person's ability to breathe and could have contributed to the victim's death.

¶ 19 On cross-examination, Dr. Blum stated that he could not "necessarily" say that something was held over the victim's nose or mouth, but there was trauma and swelling in that area so he

believed there "could have been" some occlusion. Abrasions and contusions are blunt force injuries, and those on her hands and knuckles could have been caused by striking someone or something. The injuries on the backs of the hands were consistent with defensive wounds.

¶ 20 Dr. Blum further stated that in his 31 years of practice, he had never seen another body with similar injuries in which the death had been caused intentionally. It would have been an unusual way to commit a murder. The autopsy indicated that there was a physical altercation, but it did not indicate that the victim was beaten to death.

¶ 21 Officer Erik Meadors of the Loves Park police department testified that he was doing surveillance of the defendant's vehicle at 8:30 a.m. on September 5, 2009. He observed an SUV slowly drive by the defendant's vehicle. The driver and the passenger of the SUV stared at him and then continued driving. The SUV then parked in another lot. The defendant got out and walked into a white house nearby. The SUV backed out and drove away at a high rate of speed. Officer Meadors attempted to follow the SUV, but was unable to. He then returned to his original location. Five minutes later, he observed the defendant come out of the house, wearing a different shirt than he had worn earlier. The defendant got into his vehicle and drove away. Officer Meadors then followed and arrested the defendant on the basis that the defendant's license was revoked and there were outstanding warrants for his arrest.

¶ 22 The defendant was subsequently interrogated at the Winnebago County Justice Center over a six-hour period. The interrogation was videotaped. The videotape reveals that the defendant was informed of his *Miranda* rights at the outset of the interrogation. During the first two to three hours of the interview, the defendant told the police that he had last seen the victim at her apartment on Friday morning, September 4. They had an argument and a fight. The victim accused the defendant

of "cheating" on her, and during the fight he had to restrain her physically because she was hitting, biting, and kicking him. The defendant indicated that he then left the victim's bedroom and went to sleep on the living room couch. He got up the next morning, talked with the victim's sister on the phone, and then went to work.

¶ 23 Approximately three hours into the interview, Detective Lindberg told the defendant that the victim was dead. The defendant seemed surprised and appeared to cry. The defendant then gave the detectives more information about how he restrained the victim during the fight: he wrapped his arms around her upper body, and his legs around her buttocks and upper legs, holding her face down into the bed. He told her to calm down, and when she stopped struggling, he gave her mouth-to-mouth resuscitation and chest compressions, as he remembered from high school. He also demonstrated how he got on her back, with her face down, and how she fell on her back when he pulled his arms away. He pulled the blanket up to her chest when he left, and at that point he did not think that she was alive. He was scared.

¶ 24 The defense rested without calling any witnesses. At the close of the trial, the trial court found the defendant guilty of first degree murder. The trial court explained that, in the police interview, the defendant admitted that, in order to control the victim, he held the victim down by placing his knee on her back and holding the back of her neck, which forced her face down. The defendant apparently realized that his actions had caused the victim to stop breathing as he had attempted to perform CPR on her following their struggle. The trial court found that this part of the defendants' statements was corroborated by Dr. Blum's testimony who found that the victim had a bruise on her back and a mark on the back of her neck. The victim died from traumatic asphyxia, which could have resulted from the defendant holding the victim down while placing his knee on

her back. The trial court further found that the victim's injuries to her neck were consistent with how a witness had seen the defendant and victim interacting two nights before the victim's death—the defendant controlling the victim by holding the back of her neck. The trial court further rejected defense counsel's argument that the defendant's actions constituted involuntary manslaughter rather than first degree murder. Specifically, the trial court rejected the defendant's argument that the victim had died accidently as a result of a mutual struggle. The trial court noted that, based on the record and its observations of the defendant, the defendant was bigger than the victim. The trial court additionally noted that most of the injuries that the defendant claimed that he suffered from the fight were to his front while the injuries the victim suffered were to her back. The trial court found the injuries the victim purportedly inflicted on the defendant were consistent with injuries one would inflict when trying to fight for her life. The trial court found, therefore, that defendant's actions were done intentionally with the intent to harm the victim and were not done recklessly. The trial court determined that the defendant knew the consequences of his actions, explaining:

> "Even young children are aware that placing an object such as a pillow over the face of someone can cause them to suffocate. There is no difference between placing a pillow over someone's face and pushing their face into a pillow; the results are the same."

¶ 25 On June 27, 2011, following the denial of the defendant's posttrial motion, defense counsel advised the trial court that the defendant wanted to inform the trial court that there was a "Facebook" page showing that the judge's daughter was a "friend" of the victim's sister. The trial court told defense counsel "Thank you" and proceeded to sentencing. The trial court sentenced the defendant to 28 years' imprisonment. On July 15, 2011, the defendant filed a timely notice of appeal.

¶ 26 ANALYSIS

¶ 27 The defendant's first contention on appeal is that he was not convicted beyond a reasonable doubt of first degree murder. The defendant insists that, at most, he could only be found guilty of involuntary manslaughter because the State failed to prove that he acted with conscious awareness that the victim's death or great bodily harm was practically certain to result from his actions.

¶ 28 It is not the province of this court to retry the defendant. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). The relevant question 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.' " (Emphasis in original.) *Id.* at 261, quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The sufficiency of the evidence and the relative weight and credibility to be given the testimony of the witnesses are considerations within the exclusive jurisdiction of the fact finder. *People v. Jimerson*, 166 Ill. 2d 211, 214 (1995). The evaluation of the testimony and the resolution of any conflicts or inconsistencies which may appear are also wholly within the province of the finder of fact. *Collins*, 106 Ill. 2d at 261-62. Nonetheless, where the record leaves a reasonable doubt, a reviewing court must reverse the judgment. *People v. Smith*, 185 Ill. 2d 532, 542 (1999). A court of review has a duty to carefully review the evidence and to reverse the conviction of the defendant when the evidence is so unsatisfactory as to raise a serious doubt as to the defendant's guilt. *People v. Estes*, 127 Ill. App. 3d 642, 651 (1984).

¶ 29 The defendant was charged with first degree murder under section 9-1(a)(2) of the Criminal Code of 1961 (720 ILCS 5/9-1(a)(2) (West 2008)). A person is guilty of the offense of first degree murder under that section when, without lawful justification, he kills someone, knowing that his acts created a strong probability of death or great bodily harm to that individual. 720 ILCS 5/9-1(a)(2) (West 2008). On the other hand, a person commits involuntary manslaughter when he

unintentionally kills another individual without lawful justification and his acts which cause the death are likely to cause death or great bodily harm and are performed recklessly. See 720 ILCS 5/9-3 (West 2008).

¶ 30 The basic difference between involuntary manslaughter and first degree murder is the mental state that accompanies the conduct causing death. *People v. DiVincenzo*, 183 Ill. 2d 239, 249 (1988). For first degree murder, a defendant must know his acts create a strong probability of death or great bodily harm—that is, he must be "consciously aware that such result is practically certain to be caused by his conduct." *Id.* at 250. To be guilty of involuntary manslaughter, a defendant must recklessly perform acts likely to cause death or great bodily harm. *Id.* A person acts "recklessly" when he consciously disregards a substantial and unjustifiable risk that his acts are likely to cause death or great bodily harm to another, constituting a gross deviation from the standard of care which a reasonable person would exercise in the situation. 720 ILCS 5/4-6 (West 2008). "In general, a defendant acts recklessly when he is aware that his conduct might result in death or great bodily harm, although that result is not substantially certain to occur." *DiVincenzo*, 183 Ill. 2d at 250. Recklessness therefore typically involves a lesser degree of risk than conduct that creates a strong probability of death or great bodily harm. *Id.* Although not dispositive, certain factors that may suggest whether a defendant acted recklessly include: (1) the disparity in size and strength between the victim and the defendant; (2) the brutality and duration of the beating, and the severity of the victim's injuries; and (3) whether a defendant used his bare fists or a weapon, such as a gun or a knife. *Id.* at 251.

¶ 31 Here, there was ample evidence that the defendant killed the victim. The defendant acknowledged that he placed his knee on the victim's back while he held her head down. The

defendant further acknowledged that his actions caused the victim to stop breathing. The defendant's statements were corroborated by Dr. Blum, who determined that the victim died from asphyxiation due to a large object being placed on her back (such as the defendant's knee) while her face was down. Thus, the issue becomes whether the defendant knew that his acts created a strong probability of death or great bodily harm.

¶ 32 We agree with the trial court's analogy that, just as one should realize that holding a pillow over another person's face for a prolonged period of time will cause that person to die, one should also realize that forcing a person's face into a pillow will have the same effect—causing that person's death. Dr. Blum estimated that the victim's death took "multiple seconds to just a few minutes." We believe that this amount of time was sufficient for the defendant to realize that, if he did not stop forcing the victim's face into the pillow or bed, she would die. Because the defendant did not stop, the trial court could reasonably determine that the defendant knew that his acts created a strong probability of the victim's death or her great bodily harm and therefore he was guilty of first degree murder. *Compare People v. Leach*, 2012 IL 111534, at ¶ 147-153 trial court could reasonably determine that the defendant knew that his acts of applying pressure to the victim's throat for three to six minutes created a strong probability of her death or great bodily harm) *and People v. Eddmonds*, 101 Ill. 2d 44, 62 (1984) (trial court could infer that 185-pound defendant knew that his actions of placing all of his weight upon a 55-pound nine-year-old boy while pushing the boy's face into a pillow created a strong probability of death or great bodily harm).

¶ 33 The defendant insists that his killing of the victim was accidental and that he should only have been convicted of involuntary manslaughter. The defendant points to the testimony of the victim's mother and the victim's roommate that he and the victim would frequently fight, then make

up. He argues that what happened on the morning of September 4 was nothing different than what happened before as he and the victim were just engaging in a mutual fight. He did not intend to kill her. He argues that his lack of intent to kill was corroborated by Sadler, who testified that the two times that she saw the defendant on the morning of September 4, he was not acting violently towards the victim. The defendant also emphasizes Dr. Blum's testimony that, in his opinion, the victim had not been killed intentionally. Further, the defendant argues that his actions following the victim's death (discarding a bloody shirt, having a friend circle the block before dropping hm off near his home) were consistent with how someone would act if he had accidently killed someone.

¶ 34 We acknowledge that different people could draw different inferences from the defendant's conduct preceding and following the victim's death. However, as set forth above, our standard of review on appeal 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.' " (Emphasis in original.) *Collins*, 106 Ill. 2d at 261, quoting *Jackson*, 443 U.S. at 319. The central issue in this case is what the defendant was thinking when he placed his knee on the victim's back and forced her face into the bed until she stopped struggling with him and died. There were no witnesses to this event other than the defendant. Reed's and Sadler's testimony sheds little light on what occurred between the defendant and the victim when they were alone on the morning of September 4. Their testimony supports neither the inference that the defendant acted intentionally or recklessly when he killed the victim.

¶ 35 Further, although Dr. Blum testified that he did not believe that the defendant intentionally killed the victim, it was for the trial court to make that legal determination. We note that Dr. Blum reached his conclusion without having the benefit of all the other evidence in this case, such as being

able to view the defendant's lengthy videotaped statement. Moreover, it was for the trial court to draw the inferences regarding the defendant's behavior following the victim's death. Although the trial court could infer that, after the victim's death the defendant was acting liked a scared person who had accidently killed someone, the trial court could equally infer that the defendant was acting like someone who was trying to get away with murder. Based on our standard of review, we cannot say that the inferences that the trial court drew from the evidence were improper. Accordingly, there was ample evidence for the trial court to conclude that the defendant had committed first degree murder.

¶ 36 In so ruling, we find the defendant's reliance on *People v. Jones*, 404 Ill. App. 3d 734 (2010), *People v. Hamilton*, 48 Ill. App. 3d 456 (1977) and *People v. Hancock*, 113 Ill. App. 3d 564 (1983) to be misplaced. In each of those cases, the defendants' conviction for first degree murder or voluntary manslaughter was reduced to involuntary manslaughter. In *Jones*, the defendant killed the victim by placing his foot between the victim's neck and chest. The victim died as a result of asphyxiation. The defendant's actions were observed by an independent witness. The State did not establish how long the defendant was applying pressure to the victim's neck. The medical examiner testified that it would have required only 4.4 pounds of pressure to the victim's neck for at least one minute to cause asphyxiation by compression of his jugular vein. (This was in contrast to 33 pounds of pressure to the windpipe or 66 pounds of pressure to the vertebral arteries that run in the spinal column to cause asphyxiation). The reviewing court found that the State did not establish that the defendant had the requisite intent to commit murder. *Jones*, 404 Ill. App. 3d at 747. The reviewing court explained:

> "The evidence presented at trial does not support an inference that a layperson such as defendant knew or should have known that applying 4.4 pounds of pressure for at least one minute was sufficient to cause [the victim] to asphyxiate or that this pressure need not have been applied directly to the jugular vein but instead could have been applied to the soft tissue on the front or side of the neck. In addition, there is nothing in the record to suggest that defendant was aware of the various degrees of pressure that, when applied to certain parts of a person's body, will cause a person to asphyxiate." *Id.*

¶ 37 We believe that the key facts in *Jones* are substantially different from the key facts at issue herein. In *Jones*, the defendant caused the victim to die by asphyxiation, even though he did not cover the victim's mouth or nose, by applying minimal pressure to the victim's chest. Here, the defendant asphyxiated the victim by placing substantial pressure on the victim's back and causing the victim's mouth and nose to be at least partially obstructed. Although the evidence in *Jones* did not suggest that the defendant knew that his conduct could kill the victim, we believe that, in the case herein, any reasonable person in the defendant's position should have realized that his conduct created a strong probability of the victim's death or great bodily harm.

¶ 38 In *Hamilton*, the defendant and the victim engaged in a mutual struggle in which a gun went off and killed the victim. *Hamilton*, 48 Ill. App. 3d at 457. Here, although the defendant indicated in his statement that he and the victim were engaged in a mutual fight, there was ample evidence that the defendant was able to overpower the victim and continue to hold her down even after she had stopped struggling with him. As such, *Hamilton* is not applicable.

¶ 39 In *Hancock*, the defendant was convicted of murdering her child by throwing her into a lagoon. The reviewing court reduced the defendant's conviction to involuntary manslaughter after

finding that the State had failed to satisfactorily establish the requisite mental state necessary to sustain a conviction for murder. *Hancock*, 113 Ill. App. 3d at 574. Here, based on the defendant's statement and Dr. Blum's testimony, the trial court could readily determine that the defendant knew that his acts created a strong probability of the victim's death or her great bodily harm when he placed his knee on her back and held her face down until she stopped breathing. See *People v. Starks*, 190 Ill. App. 3d 503, 509 (1989) (mental state may be inferred from the character of the assault and other circumstances).

¶ 40 The defendant's second contention on appeal is that the trial court erred when it failed to address a possible appearance of impropriety. The defendant argues that when he made the accusation that the trial court's daughter was a "Facebook friend" of the victim's sister, the trial court should have responded to the allegation "rather than casually proceeding to sentence him." The defendant contends that this court should remand this cause for a hearing on the matter, "with directions to vacate the judgment and order a new trial in the event the allegations of impropriety are established."

¶ 41 The substitution of judge is governed solely by section 114-5 of the Code of Criminal Procedure of 1963 (the Code). 725 ILCS 5/114-5 (West 2008); *In re Marriage of O'Brien*, 2011 IL 109039, ¶ 26. After a substantive ruling has been made, a defendant may move at any time for a substitution of judge for cause, supported by affidavit. Upon the filing of such a motion, a hearing shall be conducted by a different judge. 725 ILCS 5/114-5(d) (West 2008). Judges are presumed impartial and the burden of overcoming the presumption by showing prejudicial trial conduct or personal bias rests on the party making the charge. *O'Brien*, 2011 IL 109039, at ¶ 31. Allegations that the trial judge has created an appearance of impropriety, without evidence that the judge is

actually prejudiced against the defendant, are not enough to require the judge to be removed from the case. *Id.* at ¶ 43.

¶ 42 Furthermore, although the Judicial Code provides that a judge should avoid impropriety and the appearance of impropriety in all of the judge's activities (Ill. S. Ct. R. 62 (eff. Oct. 15, 1993)) and therefore recuse if his impartiality may reasonably be questioned (Ill. S. Ct. R. 63 (eff. April 16, 2007)), recusal is a decision that rests exclusively within the determination of the individual judge. *Id.* at ¶ 45. The Judicial Code cannot be used by a party or his lawyer as a means to force a judge to recuse himself once the judge does not do so on his own. *Id.*

¶ 43 Here, the defendant never specifically requested that the trial judge be removed from his case. The defendant did not comply with any of the requisites of section 114-5 of the Code which governs the substitution of judges. Rather, the defendant did nothing more than allege the possible appearance of impropriety on the judge's behalf, which is not a basis to force the removal of a judge. See *id.* The defendant acknowledges that he did not allege that the trial court was prejudiced against him, but argues that we should nonetheless remand for a hearing so that the issue of whether the trial court was prejudiced against him can be addressed. As the defendant made no effort to comply with section 114-5 of the Code in the trial court, we decline to remand to give him a second opportunity to comply with the Code now.

¶ 44 Finally, we note that the defendant points to two foreign authorities regarding ethical guidelines for the judiciary concerning "Facebook" accounts. However, where our supreme court has already spoken on an issue, it is improper for us to depart from supreme court precedent. See *O'Casek v. Children's Home & Aid Society of Illinois*, 229 Ill. 2d 421, 440 (2008). We therefore

decline the plaintiff's invitation to consider those foreign authorities to the extent that they are inconsistent with *O'Brien*.

¶ 45 CONCLUSION

¶ 46 For the reasons stated above, we affirm.

¶ 47 Affirmed.