2012 IL App (2d) 120395-U
No. 2-12-0395
Order filed December 20, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 99-CF-2328
KEVIN ILLESCAS,	)	Honorable George J. Bakalis,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Zenoff and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: It was proper for the trial court to bar the defense expert from opining that defendant was not driving under the influence, to refuse to publish the expert's curriculum vitae to the jury, and to deny defendant's motion for a continuance. In addition, defendant's claims of misconduct by the State or its expert were either forfeited or lacked merit. In rejecting these errors, no cumulative error occurred, and the judgment was affirmed.

¶ 2 After a jury trial, defendant, Kevin Illescas, was found guilty of driving under the influence (DUI) (625 ILCS 5/11-501(a)(2), 11-501(d)(1)(A), 11-501(d)(2)(B) (West Supp. 2009)). Because it was his third DUI violation, defendant was sentenced as a Class 2 felon to two months' periodic

imprisonment and two years' probation. On appeal, defendant argues that the trial court erred by: (1) limiting his expert witness from rendering an opinion that he was not driving under the influence; (2) refusing to tender his expert's curriculum vitae (CV) to the jury; and (3) denying his motion for a continuance. In addition, defendant argues that the "repeated misconduct" of the State and its expert denied him a fair trial, as did the cumulative effect of all the errors alleged above. We affirm.

¶ 3 I. BACKGROUND

¶ 4 A. Pretrial

¶ 5 After officers conducted a traffic stop of defendant on September 19, 2009, a grand jury returned a multiple-count indictment alleging aggravated DUI.[1] One count was predicated on defendant DUI and having at least two prior violations of the same statute (625 ILCS 5/11-501(a)(2), 11-501(d)(1)(A), 11-501(d)(2)(B) (West Supp. 2009)). A second count was predicated on defendant driving while having an alcohol concentration of .08 or more and having at least two prior violations of the same statute (625 ILCS 5/11-501(a)(1), 11-501(d)(1)(A), 11-501(d)(2)(B) (West Supp. 2009)).

¶ 6 On October 27, 2010, the State filed a supplemental disclosure indicating that it may call David Henebry, the Technical Administrator of the Alcohol and Substance Abuse Testing Section for the Illinois State Police, as a witness at trial. Over the next several months, the State was granted a total of three continuances based on either the unavailability of material witnesses or the assistant State's Attorney for the scheduled trial dates.

¶ 7 On August 8, 2011, defendant disclosed the identity of two potential expert witnesses, Dr. Ronald Henson and Mary McMurray. According to defendant, these experts would rebut any State evidence attempting to establish an alcohol concentration on defendant's breath; they would rely

[1]It appears from the sentencing order that counts II and III were nolle prossed.

upon the State's documents and their own training expertise; they would possibly employ retrograde extrapolation; and they would describe the proper methods for breath alcohol testing, including any uncertainties in the process itself.

¶ 8 On September 13, 2011, the State faxed to defense counsel a supplemental disclosure of Henebry as an expert witness. The State advised defendant that Henebry would testify in its case-in-chief or in rebuttal on the topics of: (1) breath alcohol testing; (2) field sobriety testing; (3) breath machine maintenance, calibration, operation; or (4) any topic related to the mechanical or scientific operation of the breath machine used to test defendant. The remainder of topics Henebry would testify to mirrored the topics set forth in defendant's disclosure.

¶ 9 The parties appeared in court on September 20, 2011, the date trial was scheduled to commence. Defense counsel advised the court that he was not in his office the prior week, from Wednesday through Friday (September 14-16, 2011). When he returned on Monday, September 19, 2011, he received an expert disclosure from the State with some "cryptic opinions" or "areas" the expert would touch upon. The State responded that its disclosure tracked the language used by the defense in its disclosure. Defense counsel pointed out that the case was two years old and characterized the State's expert disclosure as a "late disclosure." Defense counsel argued that he was unable to prepare for Henebry as an expert witness, and the State had not offered "any opinions" or the "ultimate opinion" as to what Henebry would say. Defense counsel wanted to know if Henebry was going to pinpoint defendant's blood alcohol content (BAC) at the time of driving. Noting that the case had already been set for trial three times, the trial court stated that it was "not going to continue it."

¶ 10 Defense counsel then asked to bar Henebry as a witness. The State replied that Henebry would not use retrograde extrapolation to pinpoint defendant's BAC but would testify "solely in rebuttal for the purposes of any issues that may come up with the actual sufficiency of the way the officer conducted the official breath test and anything that might come up with the machine given that he's a breath alcohol technician." Defense counsel asked whether Henebry was going to offer an opinion, and the court interjected that Henebry was going to testify in rebuttal based on whatever the defense raised in its case-in-chief. The court asked defense counsel how the State would know the substance of Henebry's testimony if it did not know what the defense witnesses were going to say. When defense counsel reiterated that he had not had time to prepare, the court said that defense counsel would have time to speak with Henebry before he testified.

¶ 11 Next, the court heard argument on the State's motion *in limine* to bar defendant's experts from testifying. The State noted that the evidence would show that defendant's BAC, which registered .10, was obtained 90 minutes after his arrest. Based on the particular facts in defendant's case, the State asked the court to bar defendant from having his experts employ retrograde extrapolation to work backwards and make a prediction as to defendant's BAC at the time of driving/arrest. The State argued that the evidence showed defendant's BAC at a certain point in time; any expert testimony as to defendant's BAC beyond that was simply a guess.

¶ 12 The court asked whether defendant's experts were going to venture an opinion on defendant's BAC at a specific point in time, and defense counsel replied "maybe." The court said that that might be a problem, and defense counsel elaborated that his experts were going to say that a BAC number 90 minutes after defendant's arrest, "even if you accept that as the gospel truth[,] would make the range of possibilities below or above the [.08] limit at the time of driving." Defense counsel

continued, "there's doubt because the science doesn't prove to a reasonable degree of certainty when you blow .10 [ninety] minutes later you had to be .08 at the time of driving. They're going to explain that. And they're going to say accepting that number and the range, this guy could [be] .04, this guy could be .14" at the time of driving.

¶ 13 The court denied the State's motion to bar the expert testimony of the defense. However, the defense experts would not be allowed to give an opinion as to defendant's "exact BAC at a point of driving." On the flip side, the State's expert could not employ retrograde extrapolation to pinpoint defendant's BAC at the time of driving either. The State agreed that it was not calling Henebry for that purpose.

¶ 14 B. Trial

¶ 15 Sergeant Charles Yanz testified first on behalf of the State. Sergeant Yanz had worked for the Wheaton police department for 27 years. He was on patrol in an unmarked squad car on September 19, 2009. At about 12:30 a.m., Sergeant Yanz saw defendant driving ahead of him on Naperville Road in the left lane. Three times, defendant made lane changes without using his turn signal. Sergeant Yanz activated his lights, and defendant came to a stop one block later. When Sergeant Yanz approached defendant, his button-down shirt was "completely wide open," and his belt buckle was unbuckled and "flipped wide open to both sides." Sergeant Yanz also noticed a strong odor of alcohol emanating through the open window of the car. Defendant denied drinking that evening and said he had just drunk some mouthwash prior to being stopped. Defendant showed the officer a bottle of mouthwash that he removed from the side compartment of his door.

¶ 16 Within five minutes of the stop, Officer Chris Harpling arrived on the scene. Officer Harpling, who had worked for the Wheaton police department for 10 years, testified that Sergeant

Yanz advised him that defendant was speeding and had changed lanes without using his turn signal. Sergeant Yanz indicated that defendant was possibly intoxicated.

¶ 17 Defendant exited the car and walked to the sidewalk so that Officer Harpling could administer field sobriety tests. At first, defendant denied drinking and said he had just used mouthwash. However, Officer Harpling could smell a strong odor of alcohol coming from defendant's breath, and the odor was consistent with an alcoholic beverage and not mouthwash. Defendant's eyes were red and glassy, and he had trouble maintaining his balance. He also repeatedly put his hands in his pockets, which the officer asked him not to do. After being questioned several times, defendant eventually admitted drinking one glass of wine with dinner earlier in the evening.

¶ 18 The first field sobriety test that Officer Harpling administered was the walk-and-turn test. There were eight possible clues of intoxication for that test, and the exhibition of two or more clues indicated a failing score. Defendant exhibited five clues and thus failed that test. The next test was the one-leg-stand test. The one-leg-stand test had four possible clues of intoxication, and the exhibition of two clues indicated a failing score. Defendant exhibited three clues on the one-leg-stand test, another failing score. On a non-standardized test, defendant was able to recite the alphabet from letter D to letter U. Throughout the tests, defendant said he wanted to go home and had made a mistake.

¶ 19 Overall, Officer Harpling opined that defendant was driving under the influence. His opinion was based on his physical observations of defendant, defendant's performance on the tests, and the fact that defendant admitted that he had been drinking. Defendant was taken to the police station.

¶ 20 Officer Harpling was certified to administer Breathalyzer tests. The machine that he used for defendant's test was tested for accuracy by the Illinois State Police. The Wheaton police department breath analysis instrument log (log) indicated that the machine was certified accurate three days prior to defendant's Breathalyzer test. When asked who certified the machine, Officer Harpling said that he could not make out the signature. At this point, the State's expert Henebry, who had remained in the courtroom,[2] assisted the State by saying aloud the name on the log, causing defense counsel to approach the bench. The court advised Henebry, "Sir, don't do that," and the State continued its questioning of Officer Harpling. Officer Harpling identified an affidavit of Timothy Miller of the Illinois State Police Breath Analysis Instruments, who averred that he certified the machine accurate on September 16, 2009.

¶ 21 In administering the Breathalyzer test, Officer Harpling conducted a 20-minute observation period to allow any residual alcohol in defendant's mouth to dissipate and to make sure that no foreign substance was placed in defendant's mouth that could alter the test results. Just prior to administering the test, defendant belched, so Officer Harpling conducted an additional 20-minute observation period prior to testing him. Also prior to testing defendant, the machine performed a self-check to ensure that there was no alcohol inside the machine and that it was functioning properly. Officer Harpling knew that the machine performed a self-check because he heard the audible noises, such as clicks, that emanate from the machine during a self-check. The machine passed the self-check, as indicated on the readout. Officer Harpling removed a sterile mouthpiece from a sealed package and attached it to a tube so that defendant could blow into the machine. Defendant blew into the machine until it clicked, which meant that an adequate breath sample was

[2]The parties agreed that their experts would remain in the courtroom during the trial.

collected. Otherwise, the machine would have indicated insufficient breath. There was a readout of defendant's air sample on the machine and also a printout, which both indicated a BAC of .10. Officer Harpling recorded defendant's BAC in the log.

¶ 22 At this time, the State asked the court for a moment, and defense counsel objected based on the State "talking to witnesses during the trial." The court advised the State that it should not be conferring with its expert. In a sidebar conference, the State argued that it could speak with its expert because he was going to be commenting on testimony, but the court clarified that the only purpose of having the expert remain in court was to listen to the testimony.

¶ 23 On cross-examination, Officer Harpling testified that he did not recall telling defendant to stop breathing so heavily because it could interfere with the Breathalyzer test. Officer Harpling admitted that in the room where the Breathalyzer was administered, there was a sink with a waterless hand sanitizer that smelled of rubbing alcohol. After defendant belched, Officer Harpling cancelled the first Breathalyzer test, but he did not recall using the hand sanitizer prior to the second Breathalyzer test. Officer Harpling denied touching the mouthpiece that attached to the machine; he did not remove the plastic covering on the mouthpiece until he placed it on the machine.

¶ 24 At this time, the State asked to qualify its expert Henebry outside the presence of the jury, and it asked for the "same thing" for the defense experts. When defense counsel commented that the State had not yet provided him with Henebry's opinions, the court said that defense counsel was going to find out Henebry's opinions "right now."

¶ 25 David Henebry testified that he had been employed by the Illinois State Police as a breath analysis operator instructor and breath alcohol technician for the past 13 years. Prior to that, he worked for the Illinois State Department of Public Health as a technician, calibrating and repairing

breath instruments. He was qualified as a technician and instructor on the type of Breathalyzer machine used in the instant case.

¶ 26 As far as Henebry's opinions, the court noted that it wanted defense counsel to have this information "ahead of time." The State countered that it expected the same from defense counsel's experts. According to the State, it "intentionally" tracked defense counsel's language in defendant's disclosure in its own disclosure. The court commented that the State would have the same opportunity in that defense counsel would also *voir dire* his expert outside of the presence of the jury.

¶ 27 The State resumed its questioning of Henebry. Henebry reviewed the police reports and listened to the testimony of Officer Harpling, who had administered the Breathalyzer test. In his opinion, Officer Harpling's decision to terminate the first Breathalyzer test based on defendant's burping "went way above and beyond his responsibility." The training did not require him to terminate the test on this basis, and there was no evidence showing that burping would invalidate a test. Henebry reviewed the log and opined that the accuracy check for the machine was within the tolerance required by law.

¶ 28 Next, the State asked Henebry the effect on the test if the operator washed his hands with a sanitizer containing rubbing alcohol, placed the mouthpiece on the machine, and then removed the plastic around the mouthpiece. Henebry testified that the machine would draw an "air blank" to determine the existence of any residual alcohol near the mouthpiece. The air blank had to reach a result of zero before the test could begin; otherwise, the test would end with the message "ambient fail." If the machine detected mouth alcohol in the subject, it would terminate the test. The presence of mouth alcohol on defendant was "very unlikely" given that there was a completed test in this case.

¶ 29 Again, defense counsel requested a continuance so that he could fully prepare and possibly impeach Henebry's "unqualified" opinions. The State reiterated that its disclosure of Henebry was not late, and that it was not the State's fault that defense counsel went out of town. The court said to proceed and "see where we go."

¶ 30 On cross-examination, defense counsel asked Henebry the date the State first communicated with him regarding his possible testimony. Henebry replied that he had been aware of defendant's case for at least one year or more but was not subpoenaed until August 11, 2011.

¶ 31 Because the State planned to call Henebry as a rebuttal witness, it rested. Defendant moved for a directed finding, which the court denied.

¶ 32 Susan Dietrich testified first on behalf of the defense. Dietrich had known defendant for 14 years; he was a good friend. On the date of the incident, Dietrich had dinner with defendant at a restaurant. She estimated that defendant had two glasses of red wine. After dinner, they left between 11 and 11:30 p.m., each driving separately. Dietrich followed defendant to his brother's house to help feed his birds, and defendant drove safely. They stayed less than 30 minutes. Defendant and Dietrich left at the same time, around 12 or 12:15 a.m., and she drove home. Defendant was not, in Dietrich's opinion, under the influence of alcohol. His balance and speech were fine.

¶ 33 Next, defense expert Henson was questioned outside the presence of the jury. According to defense counsel, Henson would testify that "one cannot determine to a reasonable degree of certainty based on the facts of the case, including the breath test and variations thereof, including the human body and the machine itself, that the defendant was at or above .08 grams of alcohol." The State then asked for clarification regarding whether Henson would be allowed to opine whether defendant's BAC at the time of driving would have been higher or lower than the BAC test result

90 minutes later. The court responded that it did not think Henson could render such an opinion because he did not know "the number." Defense counsel then stated that Henson was "going to give an opinion that one would not be able to determine to a reasonable degree of scientific certainty that the person was at or above .08 at the time of driving based on the factors that [were] unanswered or not or [came] into play in this. He [was] here to simply reduce the value of their evidence, not to provide affirmative numbers, period."

¶ 34 In the presence of the jury, Henson testified regarding his career history and academic credentials, which included serving as a police officer. Henson's CV was introduced into evidence and he was qualified as an expert on the areas of standardized field sobriety testing, breath alcohol testing as well as its principles and limitations, and the effects of alcohol on the human body, including elimination and absorption. With respect to defendant, Henson reviewed police reports of the incident, the breath alcohol test ticket printout, handwritten logs, certifications associated with the accuracy check inspections, and a videotape of the breath testing.

¶ 35 Henson explained the Breathalyzer machine used in this case. Once the machine conducted its internal checks and an ambient air check for contamination, the officer would insert a mouth piece on the machine. Then, the machine would prompt that it was ready to accept a breath sample. The individual would then be instructed to take a breath and blow steadily into the machine; a minimum flow rate and amount of volume of breath was required. The breath sample was then analyzed and a ticket was printed.

¶ 36 In conducting the test, the Breathalyzer operator should tell an individual to take a deep breath and blow steadily through. In this case, Officer Harpling repeatedly told defendant to blow harder. Henson testified that the videotape showed defendant "taking exaggerated breaths in and

exhaling several times," and Officer Harpling saying " 'this does not help you. Just breathe normally.' " In addition, Henson testified that the officer's use of a hand sanitizer prior to the second breath test would invalidate the testing process if the hand sanitizer contained alcohol, because the machine could not distinguish between the various forms of alcohol. Officer Harpling touched the breath hose near the portion where he inserted the mouth piece, meaning that the alcohol on his hands could have been introduced into the breach machine. This was an improper methodology in performing the breath test. Henson testified that mouthwash could also contain a type of alcohol, and the machine did not have the ability to differentiate between the alcohol in mouthwash and the alcohol in beverages.

¶ 37 Regarding the field sobriety tests, Henson disagreed that they were pass/fail tests and cited to a passage in the instructor's manual. He also testified regarding the general principles of alcohol absorption and elimination. The range of absorption of alcohol was between 30 minutes and three hours. The range of elimination was between .01 and .02 per hour. Defense counsel asked Henson if based upon a BAC of .10 at 2:09 a.m., was it a scientific certainty that a person driving a vehicle at 12:26 a.m. would be at or above .08 based solely on the information available in defendant's case. Henson replied that food and alcohol consumption, as well as the delay in testing, played a part in making the assessment. In light of defendant's performance on the field sobriety tests and defendant's driving, defense counsel asked Henson, "Do you have an opinion based upon a reasonable degree of certainty as to whether or not the defendant was under the influence of alcohol to a degree of .08 or more at the time of driving, based on the information that you've been offered?" The State objected and asked that the question be stricken, and the court sustained the objection. Defense counsel then asked if "one can come to a scientific certainty that the defendant was at or

above .08 or more based upon the information that you have received in this case," to which Henson replied no. Henson explained that defendant's driving behaviors did not match the "top twenty questions associated with intoxicated motorists that's published by the National Highway Traffic Safety Administration." Henson further explained that the field tests were not perfect; there were margins of error. For those reasons, according to Henson, one of three individuals would be misclassified as intoxicated.

¶ 38 Next, defense counsel asked, "And this has nothing to do with the Breathalyzer result. Based on your experience as an officer, your training as a field sobriety instructor and the evidence that you received in this case, do you have an opinion whether or not the defendant was under the influence of alcohol at the time he was operating the motor vehicle?" Again, the State objected, and the court sustained the objection. Defense counsel requested a sidebar conference and argued that every person, including a lay person, had the ability to opine whether someone was under the influence. The court stated, "I understand that, but I'm not going to allow that." When defense counsel asked the court its basis for sustaining the objection, the court stated that "[n]ow you're asking just looking at the field test, [Henson] doesn't think so." Defense counsel argued that Henson was allowed to give his opinion, but the court again stated that "[h]e's not going to give it."

¶ 39 The subject of Henson's opinion then resurfaced after a brief recess. Outside the presence of the jury, defense counsel gave an offer of proof as to Henson's opinion. Henson would have opined that defendant was not under the influence of alcohol at the time of driving based on defendant's driving and his performance on the field sobriety tests, "and the Breathalyzer tests not impacting his opinion." The court asked how this would differ from anyone watching a video of someone performing field sobriety tests and then giving an opinion. Defense counsel replied that

Henson did more than simply watch a video of field tests, "so it would be different in that respect." Defense counsel went on to say that "if it was sufficient for a person to offer an opinion, even a layperson can. How is it that what he - why can't - he's a layperson." The court explained that to extend that logic, anyone sitting in the courtroom could watch such a video and then opine whether the individual was intoxicated. Defense counsel argued that Henson was a "little different than that," but the court maintained its ruling.

¶ 40 After the defense rested, the State called Henebry as a rebuttal witness. As an instructor and technician for the Illinois State Police Breath Alcohol Program, he was responsible for the repair, calibration, and maintenance of Breathalyzer machines and was licensed to teach breath analysis operating training. Henebry explained that the infrared portion of the machine was able to detect mouth alcohol. Before a test was performed, the machine would ensure that the infrared detector was active; otherwise, the test could not go forward. A completed breath test indicated that the infrared detector was active. Henebry saw no error messages in conjunction with defendant's breath test, meaning the test was successful.

¶ 41 Henebry further testified that if an individual blew very hard and uninterrupted into the machine, it would not affect the breath sample. If an individual blew in a hard but interrupted manner, such as a number of quick breaths, a warning message would appear on the machine. Blowing too slightly would result in the machine indicating insufficient breath. Henebry was not aware of any maximum pressure of blowing into the machine that would skew the results of the test. Henebry was not trained to know whether taking a "whole bunch of deep breaths" prior to blowing into the machine would affect the result. Henebry disagreed with Henson that blowing harder into the machine could falsely elevate the results. Individuals could not change the alcohol content of

their breath; they simply filled up the sample chamber more quickly. Henebry observed the video of defendant taking the breath test. Because he had never seen someone breathe in such a manner prior to the test, Henebry could not conclude if it would affect the test. Likewise, Henebry could not offer an opinion as to the effects of a hand sanitizer on the test without knowing the nature of the sanitizer.

¶ 42 On cross-examination, Henebry admitted that he had formed an opinion that the breath test was conducted properly before watching the video, which he watched for the first time that day. As defense counsel wrapped up his cross-examination, he asked the court for "a second," and apparently communicated with his expert Henson. The trial court advised defense counsel that "this is the same thing you asked not to be done."

¶ 43 At this time, defense counsel asked for a sidebar conference and advised the court that Henson told him that he saw Henebry whisper something to the jury from the stand. The court ordered a recess and questioned Henebry, who said he smiled at the jury but did not recall communicating with any of them. Defense counsel called two witnesses, who testified otherwise. Defendant's brother, David Illescas, testified that during a sidebar conference with the attorneys, he saw Henebry's mouth moving and some sort of conversation or something said to the jury. David had no idea what was said. The next witness, Henson, testified that he saw Henebry smile at the jurors, then mouth something. The second female juror mouthed something in response, and they were both smiling as it transpired. Defense counsel moved for a mistrial, which the trial court denied. The court then questioned the particular juror, who stated that Henebry said they were going to be there late; that was all. The juror looked away because she figured she was not allowed to respond.

¶ 44 Following the jury instruction conference, the parties discussed which exhibits should go back with the jury. Defense counsel asked for Henson's CV and addendum to go back. The State had no exhibits it wanted the jury to see, and it objected to any CVs going back on the basis that they were not appropriate or helpful to the jury. The court agreed that no exhibits needed to go back unless the jury asked to see something. Defense counsel responded that he would be "nice about it." He said that this was "what [he] feared if [he] tried to shortcut Dr. Henson's qualifications, that the eight thousand things that he could also have talked about would not get back there." Defense counsel then renewed his motion for a directed finding, which the trial court denied.

¶ 45 The jury found defendant guilty of both counts. The sentencing order reflects that the driving while having an alcohol concentration of .08 or more count merged with the DUI count. Because it was his third DUI violation, defendant was sentenced to two months' periodic imprisonment and two years' probation. Defendant moved for a new trial, and the trial court denied this motion. Defendant timely appealed.

¶ 46 II. ANALYSIS

¶ 47 A. Statement of Facts

¶ 48 As an initial matter, the State argues in its brief that defendant's statement of facts is improper. According to the State, it is rife with argument, makes inferences not directly supported by the record, and contains inaccuracies. Illinois Supreme Court Rule 341 (eff. July 1, 2008), provides that the statement of facts shall contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment. Though defendant disputes any impropriety, we agree with the State that portions of defendant's statement of facts are argumentative. Therefore, we disregard those offensive portions. See *Pekins Insurance Co. v.*

Precision Dose, Inc., 2012 IL App (2d) 110195, ¶ 24 (where the defendant's statement of facts paraphrased the record inaccurately, the reviewing court simply disregarded the offensive portions).

¶ 49 B. Notice of Appeal

¶ 50 The State next points out that defendant's notice of appeal references only the DUI conviction and makes no reference to the judgment of driving with an alcohol concentration of .08 or more. The State further points out that the transcript of the sentencing hearing was not included in the record on appeal, meaning that it is impossible to determine upon which judgment the sentence was entered. Therefore, even if this court were to grant defendant the relief he seeks, the State concludes that his judgment for driving while having an alcohol concentration of .08 or more would remain undisturbed.

¶ 51 "The purpose of a notice of appeal is to inform the prevailing party that the other party seeks review of the trial court's decision." *People v. Lewis*, 234 Ill. 2d 32, 37 (2009). While a notice of appeal is jurisdictional, it is widely accepted that such a notice is to be construed liberally. *People v. Smith*, 228 Ill. 2d 95, 104 (2008). The notice is sufficient to confer jurisdiction if, considered as a whole and liberally construed, it fairly and adequately identifies the complained-of judgment. *Lewis*, 234 Ill. 2d at 37. When the deficiency in the notice of appeal is one of form, rather than substance, and the appellee is not prejudiced, the failure to comply strictly with the form of notice is not fatal. *Smith*, 228 Ill. 2d at 105.

¶ 52 As defendant points out, the record reflects that the driving while having an alcohol concentration of .08 or more judgment merged with the DUI judgment. Though the State may have missed this notation in the sentencing order, it is clear that defendant was sentenced on the DUI judgment. Accordingly, defendant referenced the DUI conviction in his notice of appeal. The State

cites no case law for the proposition that the notice of appeal must reflect both judgments if they merged into one conviction. Furthermore, defendant challenged both judgments in his posttrial motion, and he appeals the denial of that motion in his notice of appeal as well. The State claims no prejudice by the lack of reference to the driving while having an alcohol concentration of .08 or more judgment in the notice of appeal. Thus, we determine that the notice fairly and accurately advised the State of the nature of the appeal and conferred jurisdiction as to both judgments.

¶ 53 C. Expert Testimony

¶ 54 Turning to the merits, defendant first argues that the trial court erred by preventing Henson from rendering an opinion that defendant was not under the influence of alcohol at the time of driving.

¶ 55 Trial courts are given broad discretion when determining the admissibility of expert testimony. *People v. Cardamone*, 381 Ill. App. 3d 462, 500 (2008). Expert testimony is admissible if the individual is qualified as an expert by knowledge, skill, experience, training, or education, and the testimony will aid the trier of fact in understanding the evidence. *In re Juan M.*, 2012 IL App. (1st) 113096, ¶ 53. An expert witness may provide an opinion on the ultimate issue in a case. *Cardamone*, 381 Ill. App. 3d at 500. The test is whether the opinion will assist the trier of fact to understand the evidence or to determine a fact in issue. *Id.* When considering the reliability of the expert testimony, the court should balance its probative value against its prejudicial effect. *People v. Enis*, 139 Ill. 2d 264, 290 (1990). In exercising its discretion, the trial court should also carefully consider the necessity and relevance of the expert testimony in light of the facts of the case. *Id.*

¶ 56 In his reply brief, defendant argues that the trial court barred Henson "from telling the jury that there was insufficient information to prove to a reasonable degree of scientific certainty that the

defendant's BAC was at or above .08 at the time of driving, or that in his opinion the defendant was not under the influence of alcohol."

¶ 57 Regarding the first half of defendant's assertion, we disagree that the trial court barred Henson from testifying that there was insufficient information to prove to a reasonable degree of scientific certainty that defendant's BAC was at or above .08 at the time of driving. Contrary to defendant's assertion, Henson was allowed to do just that. At trial, defense counsel specifically asked Henson if "one can come to a scientific certainty that the defendant was at or above .08 or more based upon the information that you have received in this case," to which Henson replied no. What Henson was *not* allowed to answer was defense counsel's question prior to the above question, which was whether Henson had "an opinion based upon a reasonable degree of certainty as to whether or not the defendant was under the influence of alcohol to a degree of .08 or more at the time of driving, based on the information that [he had] been offered?" The court agreed to strike that question based on the State's objection, which was proper. Indeed, defendant admits in his reply brief that there is a difference between offering an opinion that a person was "not" .08 at a certain time, and offering an opinion that the evidence "fails to prove" that a person was at or above .08. Defendant concedes that while defense counsel stated that his expert would not offer the former, he made clear that his expert would be offering the latter. Given that Henson was allowed to testify to the latter, which is that one could not come to a scientific certainty that defendant was at or above .08 at the time of driving based on the information provided, defendant's argument is easily rejected.

¶ 58 Regarding the second half of defendant's argument, he is correct that Henson was barred from testifying that defendant was not driving under the influence. In particular, defense counsel asked Henson, "And this has nothing to do with the Breathalyzer result. Based on your experience

as an officer, your training as a field sobriety instructor and the evidence that you received in this case, do you have an opinion whether or not the defendant was under the influence of alcohol at the time he was operating the motor vehicle?" The State's objection to this question was sustained. Afterwards, defendant made an offer of proof that Henson would have opined that defendant was not driving under the influence based on his driving and on his performance of the field sobriety tests. Defense counsel argued that if a lay person could offer an opinion, so could Henson, who was also a lay person.

¶ 59 Later, in his amended motion for a new trial, defendant argued that the court erred when it refused to allow Henson to render an opinion that defendant was not driving under the influence even though Henson had reviewed all of the same evidence that had been reviewed by Henebry, plus more. In rejecting this claim, the trial court stated:

> "Based on his review of the evidence, Henson was allowed to testify that you cannot establish 0.8 [*sic*] at the time of driving based on a breath test given some time later. [Henson] was allowed to testify that defendant's driving pattern does not support intoxication, and the field tests have a margin of error. While it is true that every person can give their opinion of whether a person is intoxicated or not, this is based on that person's personal observation of the person, and is not based on a person reading the reports. That would be the same as having any lay person come in and read a report and say yeah, based on that[,] my knowledge of intoxication, the person was or wasn't under the influence."

¶ 60 On appeal, defendant argues that the trial court erred by not allowing Henson to opine, as an expert, whether defendant was driving under the influence. Defendant argues that experts are allowed to base opinions on facts about which they lack personal or firsthand knowledge. Also,

defendant argues that Henson's opinion would have aided the jury in understanding the evidence and determining whether defendant was intoxicated because it was based on knowledge outside the bounds of the average juror.

¶ 61 While we agree with defendant that experts may testify to opinions, including those that are not based on firsthand knowledge or observation (see *Verbance v. Altman*, 324 Ill. App. 3d 494, 503 (2001)), the problem with defendant's argument is that he has changed his theory on appeal. As reflected above, defendant argued to the trial court and in his motion for a new trial that Henson's opinion that he was not driving under the influence was admissible under a lay person's theory. See *People v. Bowman*, 357 Ill. App. 3d 290, 299-300 (2005) (a lay person may express an opinion on the question of intoxication *if the opinion is based on his or her personal observation* of and experience with intoxication). Though defendant faults the trial court for not comprehending the legal and qualitative differences between Henson and any mere lay person in providing an opinion as to whether defendant was driving under the influence, the trial court's decision barring Henson's opinion derived from the theory under which defendant sought to admit Henson's opinion, *i.e.*, as a lay person. Because Henson did not observe defendant on the night of the incident, the trial court barred Henson from opining that defendant was not driving under the influence in his capacity as a layperson, which was not an abuse of discretion.

¶ 62 Because defendant advances a different argument on appeal than the one presented to the trial court, his argument is forfeited. See *People v. Nesbitt*, 405 Ill. App. 3d 823, 834 (2010). Nevertheless, we may affirm on any basis in the record (*People v. Johnson*, 237 Ill. 2d 81, 89 (2010)), and forfeiture aside, we are not persuaded by defendant's argument.

¶ 63 The trial court possesses considerable leeway in deciding how to go about determining whether a particular expert's testimony is reliable. *Verbance*, 324 Ill. App. 3d at 503. Because the rules of evidence grant expert witnesses testimonial latitude unavailable to other witnesses on the assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline, the trial court acts as a gatekeeper in excluding testimony that does not bear an adequate foundation of reliability. *Id*. at 502-03. Experts tie observations to conclusions through the use of general truths derived from specialized experience, and the expert's testimony will often rest upon an experience that is foreign to the jury. *Id*. The trial court must make certain that an expert employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. *Id.*

¶ 64 In barring Henson's opinion that defendant was not driving under the influence, the trial court emphasized that Henson's opinion would have been based on his reading of police reports. While defendant argues that Henson's opinion would have been based on more than the reading of police reports, defense counsel's question to Henson about whether defendant was driving under the influence was based on Henson's experience as a police officer and his training as a field sobriety instructor, not the Breathalyzer result. But even with this background, the simple fact remains that Henson's opinion would have been based on the police reports of the incident, which the trial court rejected as a sufficient basis for his opinion. As the trial court pointed out in its denial of defendant's amended motion for a new trial, Henson was allowed to testify that defendant's driving pattern did not support intoxication and that the field sobriety tests had a margin of error. Beyond poking holes in the State's case, however, the court did not find the police reports sufficient to allow Henson to render an ultimate opinion as to whether defendant was driving under the influence. See *People v.*

Patel, 366 Ill. App. 3d 255, 272 (2006) (regardless of how skilled or experienced an expert is, the expert may not offer a judgment or opinion based on conjecture).

¶ 65 We further note that intoxication is a condition that lay persons understand and on which they may offer an opinion. Therefore, it was also reasonable for the trial court to determine that Henson's opinion would not have aided the jury. See *Kunz v. Little Co. of Mary Hospital and Health Care Centers*, 373 Ill. App. 3d 615, 624 (2007) (generally, expert testimony is not admitted when the subject matter is not beyond the knowledge and experience of the average juror). Finally, the fact that there were three eyewitness in this case may have also been a factor in the court's decision to bar Henson's opinion. *Cf. People v. Reding*, 191 Ill. App. 3d 424, 438 (1989) (due to the lack of reliable eyewitness testimony on the speed of the defendant's vehicle and the point of impact, it was appropriate to allow expert testimony on these matters). For any and all of these reasons, the trial court did not abuse its discretion in barring Henson from testifying that defendant was not driving under the influence. See *Heinz by Heinz v. McHenry County*, 122 Ill. App. 3d 895, 898-99 (1984) (in determining whether the trial court abused its discretion, the reviewing court noted that it could affirm on any basis appearing in the record).

¶ 66 D. Henson's CV

¶ 67 Defendant next argues that Henson's CV and addendum should have been given to the jury during deliberations. While conceding that he was afforded an opportunity to qualify Henson as an expert before the jury, defendant argues that his direct examination of Henson was extremely limited at the court's insistence on "not wasting any more time." Characterizing this as a case where two, diametrically opposed, views were offered by the State and defense experts, defendant argues that it was paramount for the jury to be able to determine the origin of Henson's views in order to judge

the validity of his opinion. Defendant claims that while the jury did not need to understand the scientific processes behind the subject matters testified to by the experts, access to Henson's qualifications and credentials would have given the jury the tools to compare the credibility of the competing experts' testimony.

¶ 68 The decision whether to allow the jury to take exhibits into the jury room is left to the sound discretion of the trial court. *People v. White*, 2011 IL App (1st) 092852, ¶ 59. We will not reverse that decision unless there is an abuse of discretion that prejudices the defendant. *Id*. We reject defendant's argument for several reasons.

¶ 69 First, defendant's argument that the trial court essentially rushed his direct examination of Henson based on not wasting time is not supported by the record. Defendant cites to no page of the transcript for this claim, and the trial court's comments about not wasting time applied not to just defendant but to the State as well. See *In re Jonathan C.B.*, 2011 IL 107750, ¶253 (control of the courtroom is vested in the trial judge).

¶ 70 Second, though defendant argues that Henson's CV was critical to an understanding of Henson's views, the record reveals that defendant agreed to merely "highlight" Henson's qualifications for the jury. After the *voir dire* of Henson, the court recognized that defendant would want to cover some of Henson's credentials. However, the court stated that "we're not going through another *voir dire*." Defense counsel responded that he would simply admit into evidence Henson's CV so that Henson would not have to read every item on it. Defense counsel had "no problem with just highlighting" Henson's credentials, even though the State immediately advised the court that it would not be taking that approach with its rebuttal expert, Henebry.

¶ 71 Third, when the State objected to Henson's CV going back with the jury, defendant did not protest the issue. Instead, defense counsel stated that he would be "nice about it," even though "this" was what he feared if he tried to "shortcut" Henson's qualifications and leave out the "eight thousand things" that would not get back to the jury. Again, it was defendant's decision to "highlight" Henson's credentials, although the record shows that defense counsel questioned Henson extensively regarding his academic and career background. In fact, Henson's credentials accounted for nearly 20 pages of almost 100 pages of Henson's testimony.

¶ 72 Finally, defense counsel cross-examined the State's expert, Henebry, as to his academic and career background, emphasizing the limitations of his areas of expertise. Defense counsel also challenged Henebry's opinion that the breath test was conducted properly on the basis that his opinion was formed prior to watching the video of defendant's breath test. Because defense counsel was able to examine Henson extensively regarding his expertise and cross-examine Henebry extensively regarding his lack of expertise, the trial court did not abuse its discretion in refusing to allow Henson's CV to go to the jury room. See *Johnson v. Hoover Water Well Service, Inc.*, 108 Ill. App. 3d 994, 1010 (1982) (the trial court did not abuse its discretion by refusing to let the CV of the defense expert go to the jury room after it had been admitted into evidence; the expert was extensively questioned on his professional career by defense counsel, and this testimony revealed he was highly educated and knowledgeable).

¶ 73 E. Failure to Grant a Continuance

¶ 74 Defendant next argues that he was denied a fair trial when the trial court refused to grant him a continuance "in light of the State's untimely and thoroughly insufficient" expert disclosure. While defendant does not treat the State's expert, Henebry, as a rebuttal witness in his brief, the State's

response points out that different rules apply to rebuttal witnesses, and the State challenges defendant's argument on this basis. As a result, defendant adjusts his argument slightly in his reply brief. According to defendant, the State: (1) had already been granted three continuances by the trial court; (2) did not fax its disclosure of Henebry as an expert witness until a few days prior to trial when defense counsel was out of town; (3) deliberately kept its disclosure of Henebry's anticipated testimony vague; (4) waited until mid-trial, after all of its witnesses had testified, to announce that it would call Henebry in rebuttal; and (5) violated a discovery rule.

¶ 75 The grant or denial of a continuance motion is within the sound discretion of the trial court, and its ruling will not be disturbed unless that decision amounts to an abuse of discretion. *People v. Abernathy*, 399 Ill. App. 3d 420, 441 (2010).

¶ 76 In analyzing defendant's argument, we summarize the sequence of events and correct some misstatements by defendant. On October 27, 2010, the State filed a supplemental disclosure indicating that it may call Henebry as a witness at trial. The State was then granted a total of three continuances based on the unavailability of witnesses or the prosecutor. On August 8, 2011, defense counsel disclosed the identity of Henson as an expert. On September 13, 2011, one full week before trial was scheduled, the State faxed to defense counsel a supplemental disclosure of Henebry as an expert, advising that Henebry would testify in its case-in-chief or in rebuttal. The topics to which Henebry would testify mirrored the language in defendant's expert disclosure.

¶ 77 When the parties appeared in court for trial on September 20, 2011, defense counsel objected to the State's September 13 disclosure of Henebry on the basis that he had been out of town from September 14 to September 16. As a result, defense counsel did not receive the State's disclosure until September 19, the day before trial. Though defense counsel argued that he was unable to

prepare for Henebry as an expert witness, the court refused to continue the case. Defense counsel then asked to bar Henebry as a witness. It was at this point, not mid-trial, as defendant asserts, that the State announced its decision to call Henebry "solely in rebuttal." According to the State, Henebry would address any issues that arose during the defense's case-in-chief regarding the officer's administration of the breath test or the Breathalyzer machine itself. At this point, defense counsel asked whether Henebry was going to offer an opinion, and the court interjected that it would be impossible for the State to know the substance of Henebry's testimony based on it not knowing how the defense witnesses would testify. The court indicated that defense counsel would be allowed to speak with Henebry before he testified.

¶ 78 In his reply brief, defendant claims that even if the law pertaining to rebuttal witnesses applies, the State violated Illinois Supreme Court Rule 412(a)(vi) (eff. Mar. 1, 2001), which states:

> "If the State has obtained from the defendant, pursuant to Rule 413(d), information regarding defenses the defendant intends to make, it shall provide to defendant not less than 7 days before the date set for the hearing or trial, or at such other time as the court may direct, the names and addresses of witnesses the State intends to call in rebuttal, together with the information required to be disclosed in connection with other witnesses the State intends to call in rebuttal, together with the information required to be disclosed in connection with other witnesses by subdivisions (i), (iii), and (vi), above, and a specific statement as to the substance of the testimony such witnesses will give at the trial of the cause."

¶ 79 At the outset, we note that defendant does not explain how this rule was violated, considering the fact that the State did fax its disclosure indicating that Henebry would be called as an expert either in its case-in-chief *or in rebuttal*, seven days prior to the hearing. In terms of the substance

of Henebry's anticipated testimony, the State mirrored the topics stated in defendant's disclosure. Regardless, the State's technical compliance with this discovery rule is not the dispositive issue, because defendant is not arguing that Henebry should not have been allowed to testify. Rather, the crux of defendant's argument is that he was entitled to a continuance. However, as we explain, the trial court did not err by refusing to grant defendant a continuance to prepare for Henebry's expert testimony.

¶ 80 In arguing for a continuance, defense counsel claimed that the State's disclosure was "late" based on his absence from his own office, but the trial court was not persuaded. Regarding defense counsel's argument that the State failed to disclose Henebry's opinions, the State pointed out that the substance of its disclosure mirrored defendant's disclosure. Most important, defendant mistakenly argues that the State waited until mid-trial to announce its decision to call Henebry as a rebuttal witness, when it reality, it did so on the day of trial. See *People v. Hood*, 213 Ill. 2d 244, 259 (2004) (the State's duty to disclose a rebuttal witness arises when the State has formed the intent to call such witness; because rebuttal testimony is intended to explain, contradict, or disprove the defendant's evidence, the State generally cannot know the need for rebuttal until after the defense testimony is heard). According to the State, Henebry would rebut whatever issues arose in defendant's case-in-chief regarding the breath test or the Breathalyzer machine itself. As the trial court noted, the substance of Henebry's testimony beyond that would depend on how the defense witnesses testified. The trial court then allowed defense counsel to question Henebry outside the presence of the jury. Therefore, the court's decision to deny defendant's motion for a continuance was not an abuse of discretion.

¶ 81 F. Misconduct of State and Henebry

¶ 82 Defendant next argues that the State's misconduct disadvantaged his ability to prepare a defense. The errors alleged by defendant include: (1) Henebry's supplying the name of the person who certified the Breathalyzer as accurate during Officer Harpling's testimony; (2) the State's improper communication with Henebry after completing its direct examination of Officer Harpling; and (3) Henebry's improper communication with the jury.

¶ 83 Defendant's first two claims are forfeited for failing to cite authority. With respect to arguments, Illinois Supreme Court Rule 341 (eff. July 1, 2008), states what briefs must contain: "Argument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." An issue that is merely listed or included in a vague allegation of error is not "argued" and will not satisfy the requirements of this rule. *Vancura v. Katris*, 238 Ill. 2d 352, 370 (2010). Furthermore, an argument that is developed beyond mere list or vague allegation may be insufficient if it does not include citations to authority. *Id*. Because defendant's first two claims contain no citation to authority, they are forfeited.

¶ 84 With respect to defendant's third claim, he argues that Henebry "violated the court's rules" when he began conversing with "two jurors" while the parties were engaged in a sidebar. Without citation to the record, defendant argues that when Henson notified defense counsel about Henebry's improper communication, the court "yelled" at defense counsel and Henson about the fact that they were communicating. Defendant also argues that the court neglected to poll all of the jurors to determine whether Henebry's communication impacted their ability to be fair and impartial. In support of his position, defendant cites *People v. Burns*, 304 Ill. App. 3d 352, 370 (2010), for the proposition that any communication with a juror during trial about a matter pending before the jury is deemed presumptively prejudicial to a defendant's right to a fair trial. Although this presumption

of prejudice is not conclusive, the burden rests upon the State to establish that such contact with the jurors was harmless to the defendant. *Id*.

¶ 85 In this case, the trial court ordered a recess upon learning that Henson had advised defense counsel that he saw Henebry whisper something to the jury from the stand. The court questioned Henebry, who said he smiled at the jury but did not recall communicating with any of them. Defense counsel then called two witnesses, defendant's brother, David, and Henson, regarding what they saw. Both witnesses saw Henebry mouth something to the jury, although they did not know what. Henson also saw one juror mouth something in response. The court questioned that juror, not two jurors, as defendant asserts, regarding what Henebry said. According to that juror, Henebry said they were going to be there late; that was all. The juror said that she looked away because she figured she was not allowed to respond. Though defendant moved for a mistrial, which the trial court denied, he did not ask the trial court to poll the remainder of the jury. Therefore, that argument is forfeited. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (in order to preserve an issue for review, both a trial objection and a written posttrial motion raising the issue are required).

¶ 86 Because the communication was not about a matter pending before the jury, the trial court was satisfied that defendant suffered no prejudice. As *Burns* goes on to state, a reversal or a new trial will not be ordered because of a conversation between a juror and a third person that is of a harmless character and unrelated to the case. *Burns*, 304 Ill. App. 3d at 6. The trial court has substantial discretion in determining whether an improper contact with a juror has caused prejudice to the defendant, and a verdict will not be set aside where it is obvious that no prejudice resulted from a communication to the jury. *Id*. Accordingly, we reject defendant's claim of misconduct.

¶ 87 G. Cumulative Error

¶ 88 Defendant's final argument is that the errors he alleged, taken individually or collectively, denied him a fair trial and prevented the jury from fairly weighing the evidence and testimony. However, in rejecting every individual claim of error, cumulative-error analysis is not necessary. See *People v. Perry*, 224 Ill. 2d 312, 356 (2007).

¶ 89 III. CONCLUSION

¶ 90 For the reasons stated, the judgment of the circuit court of Du Page County is affirmed.

¶ 91 Affirmed.