2015 IL App (2d) 141128-U
No. 2-14-1128
Order filed January 6, 2016

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. CARLY ROUSSO, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 12-CF-2699 Honorable James K. Booras, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Burke and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: Pursuant to the one-act, one-crime rule, defendant's cumulative sentence for aggravated DUI (death) and her surplus reckless homicide sentence were vacated (counts II and IV); defendant's conviction and 4-year sentence for aggravated DUI (death) was affirmed (count I), notwithstanding defendant's contention that it was the less serious offense; defendant's 4-year sentence for aggravated DUI (death) was also not an abuse of discretion.

¶ 2 This is a tragic case for many reasons. The facts are not in dispute. On September 3, 2012, a weekday afternoon, defendant, Carly A. Rousso, was driving her parents' car in downtown Highland Park. While driving, defendant inhaled, or "huffed," from a spray can of multi-purpose duster; it contained the propellant difluoroethane, or DFE. As she was driving,

defendant passed out behind the wheel; her car crossed into the opposite lanes and she veered off the road and onto the sidewalk. At the time, Modesta Santos-Sacramento was walking with her four children on the sidewalk. Defendant's car struck Modesta and her children. Modesta was injured; her 5-year old daughter, Jaclyn, had been killed.

¶ 3 Defendant was found guilty and sentenced for two counts of aggravated driving under the influence (aggravated DUI) and reckless homicide. On appeal, she challenges her convictions and her sentence. We affirm in part and vacate in part.

¶ 4 I. BACKGROUND

¶ 5 Between the original and amended indictments, defendant was charged with six offenses. For the death of Jaclyn, the State charged defendant with four offenses: two counts of aggravated DUI, causing death (aggravated DUI (death)) (625 ILCS 5/11-501(a)(3), (d)(1)(F) (West 2012); 625 ILCS 5/11-501(a)(6), (d)(1)(F) (West 2012))), and two counts of reckless homicide (720 ILCS 5/9-3(a) (West 2012)). For the injuries to Modesta, the State charged defendant with two counts of aggravated DUI, causing great bodily harm (625 ILCS 5/11-501(a)(3), (d)(1)(C) (West 2012); 625 ILCS 5/11-501(a)(6), (d)(1)(C) (West 2012)).

¶ 6 Prior to trial, defendant pled guilty to one of the reckless homicide counts and the State nol-prossed the remaining reckless homicide charge. On the four aggravated DUI counts, defendant opted for a bench trial, which adduced the following evidence.

¶ 7 On September 3, 2012, defendant, who had recently completed a 17-month stay in a residential treatment facility for drug addiction, drove her parents' two-door black Lexus from their home in Highland Park to a pharmacy in Deerfield. There, she purchased two cans of a compressed air cleaner—"Blast Away"—which contained DFE. Having inhaled that substance before, defendant knew that it had the potential to render her unconscious. She "huffed" the

spray and began to drive toward her parents' home.

¶ 8 As defendant drove east on Central Avenue in downtown Highland Park, she passed out. Her vehicle crossed the westbound lanes of Central Avenue, left the roadway, and struck Jaclyn, Modesta, and Jaclyn's two brothers. The car then struck a wall, backed up and struck Jaclyn again, hit another wall, went forward, and struck Jaclyn a third time. The incident was captured on surveillance video. As noted, Jaclyn was killed, and Modesta suffered serious injuries.

¶ 9 Sergeant Rodney Carbajal of the Highland Park police department responded to the scene. He saw defendant standing next to another police vehicle. When he asked if she was okay, she responded, through tears, "I did this, I caused this." When Carbajal tried to reassure defendant that everything would be okay, defendant said, "[N]o; I am a recovering drug addict and I relapsed today." When Carbajal asked defendant what she was on, she stated, "I was huffing, I was huffing in the car." Later, Carbajal saw defendant sitting near a police car; she was swaying forward and slipping in and out of consciousness.

¶ 10 Defendant told Officer Richard Williamson of the Highland Park police department that she had been huffing. When he asked her what, she pointed to a white, plastic shopping bag on the front seat of her car and said that she had just bought it. The bag contained two cans of Blast Away and a receipt that showed that they had been purchased shortly before the accident.

¶ 11 Defendant was transported to a local hospital. When Detective Sean Gallagher of the Highland Park police department interviewed her at the hospital, defendant identified a photograph of one of the two cans as one that she had used to huff.

¶ 12 While at the hospital, defendant provided blood and urine samples. Jennifer Bash, a forensic toxicologist for the Illinois State Police, analyzed the blood and the contents of the cans of compressed air; both contained DFE. According to Bash, DFE is a volatile compound,

consisting of two fluorine atoms and a carbon base. She described the general effects of ingesting DFE as including lethargy, loss of coordination, prostration, dizziness, hallucinations, and sedation. It also produces "intoxication." Bash concluded that defendant's described behavior was consistent with someone who had ingested DFE.

¶ 13 Bash prepared a written report in which she compared DFE with another volatile compound, trichloroethane (TCE). The two are similar in that they both have a carbon base, but TCE has three chlorine atoms, whereas DFE has two fluorine atoms. Both fluorine and chlorine are halogens. Ingestion of TCE and DFE will produce similar effects. According to Bash, DFE is also similar to other volatile compounds listed in the Use of Intoxicating Compounds Act (720 ILCS 690/1 *et seq.* (West 2012)), such as acetone, methyl ethyl ketone, and toluene.

¶ 14 On cross-examination, Bash admitted that DFE is not an alkaloid. Nor is it a ketone (such as acetone, methyl ethyl ketone, and methyl isobutyl ketone), an acetate (such as ethyl acetate, and methyl cellosolve acetate), an aromatic (such as toluene), or an alcohol (such as isopropanol). On redirect examination, Bash acknowledged that DFE is a different substance than those listed in the Intoxicating Compounds Act.

¶ 15 The trial court found defendant guilty of all four counts of aggravated DUI. Before sentencing, defendant filed a posttrial motion to dismiss the aggravated DUI charges, in which she contended that the Intoxicating Compounds Act was unconstitutional. She also filed a separate posttrial motion, in which she contended that, as a matter of statutory construction, DFE is not a named compound or covered by the catchall language of the Intoxicating Compounds Act and, hence, does not trigger liability under either section 11-501(a)(3) or section 11-501(a)(6) of the Illinois Vehicle Code, which is the basis for defendant's aggravated DUI charges. Defendant asked that all four of her aggravated DUI convictions be vacated. The trial

court denied both of defendant's motions.

¶ 16 At sentencing, the State submitted in aggravation the victim impact statements of Modesta and her husband, Tomas. They described the pain their family endured as a result of Modesta's injuries and Jaclyn's death.

¶ 17 In mitigation, Heather Keith, a licensed counselor, testified regarding her treatment of defendant. She first met defendant in September 2012. In the two years that she treated defendant, she came to know defendant's family well. Because of concerns about defendant being a suicide risk, defendant was hospitalized on November 30, 2012, while she was out on bond.

¶ 18 Before the accident, defendant had been diagnosed with post-traumatic-stress disorder (PTSD), major depression, anxiety, and polysubstance dependence. According to Keith, defendant's PTSD was related to multiple events in her life. Those events included being adopted, being bullied and ridiculed at school, being raped at age 14, and being attacked by a pit bull, for which she received approximately 400 stitches to her face. Because of these events, defendant was called a slut and a monster at school. Starting at age 14, defendant had over 11 people in her life die. Keith explained that defendant's history of trauma had caused her to "numb herself with drugs."

¶ 19 According to Keith, there has been a "huge change" in defendant following the accident. Defendant told Keith that she now lives her life for Jaclyn. In Keith's opinion, Jaclyn's death had given defendant purpose and a motivation to give to others. Defendant progressed from a patient needing extensive treatment to a volunteer who works with others to help them heal. Keith added that some patients in the intensive outpatient program have said that defendant saved their lives. She explained that defendant's comments and her openness about her own problems has given

other patients hope.

¶ 20 Keith described defendant as a caring, compassionate young woman. According to Keith, defendant needs to continue to see a therapist to "fight her demons." In Keith's opinion, an extended period of incarceration will destroy defendant's progress and healing because she will decline rapidly without support.

¶ 21 On cross-examination, Keith admitted that defendant was discharged from the program because she had been discovered abusing inhalants and alcohol while free on bond in this case. Defendant was then hospitalized and transferred to Timberline Knolls, a residential program.

¶ 22 Nicole Gehbauer, a licensed counselor with a masters degree in art therapy, treated defendant for two years, beginning in September 2012. She agreed that defendant suffered from PTSD. According to Gehbauer, defendant's more recent artwork displayed a "level of remorse that she was unable to articulate earlier in her treatment." It also showed a "more valid vision of how she truly sees herself and the guilt, shame and some of the deeper feelings she felt." Gehbauer described defendant as a kind person, who is motivated to make her life, and others' lives, better. She has changed the lives of other patients, who have become volunteers just so that they could continue listening to defendant. Gehbauer has heard several patients say that, without defendant, they might not be alive. Although defendant still battles with her life experiences, she feels that she can make a difference and be an example to others of how to recover from trauma.

¶ 23 Pastor Emma Lozano met defendant when defendant spoke to a youth group. In doing so, defendant displayed sincere remorse and responsibility. Lozano described the audience of both youth and adults as having given defendant their rapt attention. Defendant's message had "reached those young people." According to Lozano, defendant "changed people's lives that day." Pastor Lozano added that, if defendant were given probation, she would continue to help

others in the community.

¶ 24 Defendant's father, David Rousso, testified that defendant is a loving, kind, considerate person who made a terrible mistake. He stated that she had a difficult time fitting in in elementary and middle school. She was extensively bullied, including on social media; someone even created a "Carly Rousso hate page." After defendant was sexually assaulted while she was in middle school, someone painted "Carly Rousso is a slut" on an underpass at her school.

¶ 25 When defendant was 14, she was mauled by a pit bull and received approximately 450 stitches, mostly to her face. Her father described it as "absolutely horrible." Students at school taunted her and called her "Frankenstein." She would rarely walk in public, and, when she did, she would wear a scarf or her hair to hide her face. She suffered physical and emotional pain and had nightmares regarding the incident.

¶ 26 When the taunting at school became intolerable, her parents sent her to a high school in Deerfield. According to her father, it was not any better there. Defendant began to "self-medicate" with drugs that she obtained from her high school classmates. To help defendant, her parents enrolled her in a residential treatment facility called Discovery Ranch. She was there for 17 months, made great progress, and obtained her GED. She had been home about three weeks before the accident. Her father described her as being a "loving girl that carries with her a heavy burden." She has had a positive impact on those around her and has matured tremendously the past two years. Rousso stated that defendant is committed to do whatever she can to make up for causing Jaclyn's death.

¶ 27 In allocution, defendant stated that she was "so sorry for what happened on September 3, 2012" and that she wished that she had died instead of Jaclyn. She stated that she would not "let [Jaclyn] die in vain" and that she wants to prevent that type of situation from happening to

others.

¶ 28 The trial court, before pronouncing sentence, noted that there were "several counts of aggravated DUI." The court stated that "they all merge and there will be one count [of aggravated DUI] and the reckless homicide is a separate and distinct offense." In pronouncing sentence, the trial court recognized that there was an issue as to whether there were extraordinary circumstances present that would require probation. In considering that issue, the court commented that the defense had submitted "tons of mitigation." The court added that, this accident was the result of bad choices, and in considering the circumstances of the case, it could "state one thing, that the defendant is still alive. It's the victim that's not here. And it is due to the defendant's activities that [Jaclyn] is not with us today." The court added that "[i]n spite of all her adversities *** [and] all her bad childhood, *** the defendant is still alive. And she caused the death of an individual, a five-year-old child." The trial court found that all of defendant's negative experiences in life and all of defendant's efforts following the accident did not constitute extraordinary circumstances requiring a sentence of probation (see 625 ILCS 5/11-501(d)(2)(G) (West 2012)); instead the court found that a prison sentence was appropriate.

¶ 29 The court stated that it was "considering all of the mitigation that was presented." In that regard, the court noted that "[h]alf of the City of Highland Park" appeared to have written letters supporting defendant. The court stated that there was hope for defendant to "save other people from drugs" and that there was a "light at the end of the tunnel." The court noted, however, the need to punish defendant, the need to protect the public, and the need to deter others from engaging in similar conduct. The court stated that it would impose a sentence of 4 years' imprisonment on a *single* "aggravated DUI conviction"—it did not specify which one—and 5 years' imprisonment on the reckless homicide conviction, to run concurrently. The court advised

defendant that she must serve at least 85% of her aggravated DUI sentence, followed by two years of mandatory supervised release (MSR), while defendant was eligible to serve 50% of her reckless homicide sentence, which has only one year of MSR.

¶ 30 The court's written sentencing order, however, shows that it entered a 4-year sentence on *each* of the aggravated DUI (death) convictions (counts I and II), in addition to the 5-year sentence for the reckless homicide conviction (count IV), all to be served concurrently. In other words, the sentencing judgment reflects that the court imposed on defendant *three* sentences for Jaclyn's death and no sentence for the injuries to Modesta. Defendant filed a postsentencing motion, which the trial court denied. Afterward, defendant filed a timely notice of appeal.

¶ 31 II. ARGUMENT

¶ 32 Defendant presents several contentions on appeal challenging her convictions and her sentence. We address them in turn, but before doing so, we note that after oral argument we asked to parties to submit additional briefing on the application of the one-act, one-crime rule in this case. The parties have done so. (More precisely, the State filed a "confession of error," but because the State raised a new argument based upon its concession, we have elected to treat its "confession" as a supplemental brief.)

¶ 33 Under the one-act, one-crime rule, multiple sentences for a single act are improper. *People v. Artis*, 232 Ill. 2d 156, 161-63 (2009) (citing *People v. King*, 66 Ill. 2d 551 (1977)). As we see it, there are three one-act, one-crime issues in this case. The first is that the trial court, despite its statement that all of the aggravated DUI sentences would merge, imposed two sentences on defendant for aggravated DUI (death). The second is that the trial court imposed a sentence for reckless homicide in addition to defendant's sentences for aggravated DUI (death). And, the third is that due to the trial court's merger, defendant received no sentence for

aggravated DUI in connection with Modesta's injuries. We address the third issue first because it may be easily disposed of. It is an exception to the one-act, one crime rule if a single act causes harm to more than one victim. *People v. Shum*, 117 Ill. 2d 317, 363 (1987); *People v. Thomas*, 67 Ill. 2d 388, 390 (1977); *cf. People v. Bennett*, 331 Ill. App. 3d 198, 203 (5th Dist. 2002). Thus, it would have been proper for the State to ask, or for the trial court to impose, a sentence upon defendant for both Jaclyn's death and Modesta's injuries. The State, however, has forfeited this issue by failing to raise it. See, *e.g.*, *People v. Betance-Lopez*, 2015 IL App (2d) 130521, ¶ 52 (holding State forfeited improper-merger issue). We address the first two one-act, one-crime issues below in the course of addressing defendant's contentions.

¶ 34 Defendant's first contention is that her aggravated DUI "charge" and "sentence" should be vacated because DFE is not one of the prohibited compounds listed in the Intoxicating Compounds Act. In support of this contention, she cites to "625 ILCS 5/11-501(a)(3)(6)" and states that with respect to aggravated DUI, "[t]he charge contained in the indictment must fail because [DFE] is not an enumerated intoxicating compound as listed in the Intoxicating Compounds Act." This issue presents a question of statutory construction, which we consider *de novo*. *People v. Martin*, 2011 IL 109102, ¶ 20. Having done so, we reject defendant's argument.

¶ 35 Note that defendant references a section "11-501(a)(3)(6)" of the Vehicle Code. Note also that defendant refers to her aggravated DUI "charge" and "sentence" in the singular, and not in plural. The problem is that there is no section "11-501(a)(3)(6)" of the Vehicle Code, and as we alluded to earlier, the trial court imposed two sentences for aggravated DUI in Jaclyn's death, not one. The first sentence for aggravated DUI, under count I, was based on a violation of no section 11-501(a)(3), while the second sentence for aggravated DUI (death), under count II, was based on a violation of section 11-501(a)(6). These *separate* subsections of section 11-501 read

in pertinent part as follows:

> "§ 11-501. Driving while under the influence of alcohol, other drug or drugs, intoxicating compound or compounds or any combination thereof.
>
> (a) A person shall not drive or be in actual physical control of any vehicle within this State while:
>
> * * *
>
> (3) under the influence of any intoxicating compound or combination of intoxicating compounds to a degree that renders the person incapable of driving safely; *** or
>
> * * *
>
> (6) there is any amount of a drug, substance, or compound in the person's breath, blood, or urine resulting from the unlawful use or consumption of *** an intoxicating compound listed in the Use of Intoxicating Compounds Act[.]" 625 ILCS 5/11-501(a)(3), (a)(6) (West 2012).

An ordinary violation of subsection (a) is a Class A misdemeanor. See 625 ILCS 5/11-501(c) (West 2012). But where, as here, a violation of subsection (a) is a proximate cause of another's death, the offense is enhanced to aggravated DUI (death) (625 ILCS 5/11-501(d)(1)(F) (West 2012)), an extended-term Class 2 felony punishable by not less than 3 and not more than 14 years imprisonment (625 ILCS 5/11-501(d)(2)(G) (West 2012)).

¶ 36 To apply defendant's argument—whether DFE is specifically listed in the Intoxicating Compounds Act—to both convictions would unavoidably conflate section 11-501(a)(3) and section 11-501(a)(6). This we shall not do as it is our duty to apply the statute as written. See *Martin*, 2011 IL 109102, ¶ 21. Pursuant to the plain language of the Vehicle Code, defendant could be found guilty and sentenced for a violation of section 11-501(a)(3) for driving under the influence of "*any* intoxicating compound *** to a degree that render[ed] [her] incapable of driving safely" (emphasis added) (625 ILCS 5/11-501(a)(3) (West 2012)), without *any* reference to the Intoxicating Compounds Act. Defendant does not argue that DFE is not "intoxicating" in

the general sense of the word, or that at the time of the accident she was intoxicated, but not to a degree that she was "incapable of driving safely"; her only argument is that DFE is not "listed" as a prohibited compound in the Intoxicating Compounds Act, which is *not* an element of DUI based on section 11-501(a)(3). By any reasonable definition, DFE is plainly an "intoxicating compound" as that term is used in section 501(a)(3); that is, it was used in this case to "to excite or stupefy *** to the point where physical and mental control [wa]s markedly diminished." INTOXICATE, *Merriam-Webster Online Dictionary* (2015). Therefore, the trial court could properly sentence defendant under count I for aggravated DUI (death) based on a violation of section 11-501(a)(3) regardless of DFE's status under the Intoxicating Compounds Act.

¶ 37 That said, we need not consider defendant's argument concerning section 11-501(a)(6), DFE, and the Intoxicating Compounds Act because no matter how we resolve that issue, we cannot uphold defendant's additional concurrent sentence for aggravated DUI (death) for the same victim under the one-act, one-crime rule. See *Artis*, 232 Ill. 2d at 161-63. Accordingly, we vacate defendant's sentence for aggravated DUI under count II, a sentence that is also in tension with the trial court's oral pronouncement that it would merge the convictions and impose a single aggravated DUI sentence. See *People v. Walker*, 386 Ill. App. 3d 1025, 1027 (2008) (when the oral pronouncement of a trial court conflicts with its written order, the oral pronouncement controls). We note that although defendant failed to preserve this issue in her postsentencing motion, or to directly raise it on appeal, we have a duty to resolve it ourselves as surplus convictions bear on the integrity of the judicial process. See *Artis*, 232 Ill. 2d at 165-68.

¶ 38 Next, we address the application of the one-act, one-crime rule on defendant's remaining aggravated DUI sentence and her reckless homicide sentence. Those sentences (like defendant's cumulative aggravated DUI sentences) are based on the same act and one must be vacated. In the

supplemental briefs, defendant asks that we vacate her 4-year aggravated DUI sentence (which at a mandatory 85% would likely be longer than her 5-year reckless homicide sentence with day-for-day credit). The State (in its "confession of error") asks that we vacate the reckless homicide sentence instead. We agree with the State.

¶ 39 Under *Artis*, we will vacate the sentence for "the less serious offense" because a "sentence should be imposed on the more serious offense ***." *Id.* at 170. In determining which offense is the "more serious" we compare the respective sentencing ranges prescribed by the legislature, as "common sense dictates that the General Assembly would mandate greater punishment for offenses it deems more serious." *Id*. As noted, the offense of aggravated DUI (death) is an extended-term Class 2 felony (625 ILCS 5/11-501(a)(3), (d)(1)(F), (d)(2)(G) (West 2012)), of which 85% of the sentence must be served (730 ILCS 5/3-6-3(a)(2.3) (West 2012)), which is then followed by a 2-year term of MSR (730 ILCS 5/5-4.5-35(l) (West 2012)). Reckless homicide on the other hand is a Class 3 felony (720 ILCS 5/9-3(a), (d)(2) (West 2012)), subject to day-for-day credit (730 ILCS 5/3-6-3(a)(2.1) (West 2012)), with a 1-year MSR term (730 ILCS 5/5-4.5-40(l) (West 2012)). Since aggravated DUI (death) is the more serious offense, we vacate defendant's sentence for reckless homicide. *Artis*, 232 Ill. 2d at 170; accord *People v. Stutzman*, 2015 IL App (4th) 130889, ¶ 39 (reckless homicide is the less serious than aggravated DUI (death)). Although the vacatur of defendant's concurrent reckless homicide sentence is unlikely to have any effect on the amount of time she will serve, we again have a duty to ensure that she not receive additional sentences for a single offense. See *Artis*, 232 Ill. 2d at 165-68.

¶ 40 Parenthetically we note that defendant's reliance on *People v. Lush*, 372 Ill. App. 3d 629 (2007), and *People v. Latto*, 304 Ill. App. 3d 791 (1999), for the proposition that we should vacate defendant's sentence for aggravated DUI (death) is misplaced. In *Lush*, the appellate court

determined that the offense of aggravated DUI based on two or more prior DUI violations—note: *not* aggravated DUI (death)—was the lesser-included offense of reckless homicide. *Id*. at 635. Defendant errs in relying on *Lush* because not all aggravated DUI offenses are the same; the offense may be committed in myriad ways, all of them labeled "DUI" or "aggravated DUI." See *Martin*, 2011 IL 109102, ¶ 26 ("In Illinois, a driver may commit [an underlying] DUI in six ways"). *Latto* on the other hand relied on *People v. Green*, 294 Ill. App. 3d 139 (1997), and in both cases the appellate court simply concluded, without any analysis, that aggravated DUI (death) was the lesser included or less serious offense of reckless homicide—first in *Green*, and then in *Latto*, purporting to follow *Green*. We decline to follow either *Latto* or *Green* because, in our view, neither decision's analysis passes muster under *Artis*. Instead, we adhere to the analysis we have set forth above and vacate defendant's reckless homicide sentence. Because we have vacated defendant's sentence for reckless homicide, we need not address her argument that her 5-year sentence for that offense was excessive.

¶ 41 Defendant next contends her 4-year aggravated DUI sentence was excessive. Defendant also makes the related argument that the trial court improperly considered the victim's death, a factor inherent in the offense, in aggravation. We reject both arguments.

¶ 42 We address first defendant's improper-factor argument. A fact that is implicit in the offense cannot be used both as an element of the offense and as a factor in aggravation, *i.e.*, to impose a harsher sentence than might otherwise have been imposed. *People v. Morrow*, 2014 IL App (2d) 130718, ¶ 13. This prohibition against "double enhancement" is based on the notion that, in designating the applicable range of punishment for an offense, the legislature necessarily considered the factors inherent in the offense. *Id*. Whether a trial court relied on an improper sentencing factor requires us to consider the entire record, not just a few comments, and presents

a question of law, which we review *de novo*. *Id*. ¶ 14.

¶ 43 In this case, although the trial court, in pronouncing sentence, mentioned Jaclyn's death, and "the death of another person" is an inherent factor in the offense (see 625 ILCS 5/11-501(d)(1)(F) (West 2012)), the court did not specifically state that it was relying on that fact in aggravation. Instead, the trial court's reference to Jaclyn's death was in the context of commenting on the nature and circumstances of defendant's conduct " 'which, along with other factors in aggravation and mitigation, determine[d] the exact length of [her] sentence.' " *Id*. ¶ 18 (quoting *People v. Thomas*, 171 Ill.2d 207 (1996)). The comment also referred to the fact that defendant is lucky to be alive. The reference, therefore, was not improper. The trial court is not required to refrain from any mention of sentencing factors which constitute elements of an offense, and a mere reference to the existence of such a factor is not reversible error. *People v. Jones*, 299 Ill. App. 3d 739, 746 (1998). The record (by which we mean the transcript of the sentencing hearing, to the exclusion of the written judgment) shows that the trial court carefully considered the evidence both in aggravation and in mitigation. Therefore, in viewing the record, we cannot say that the court erred in mentioning Jaclyn's death during sentencing.

¶ 44 With respect to defendant's excessive-sentence argument, the trial court is in the best position to determine a criminal defendant's sentence and has considerable discretion in doing so. See *People v. Stacey*, 193 Ill. 2d 203, 210 (2000). We review defendant's sentence for an abuse of that discretion. *Id*. A sentence within the permissible statutory range is presumptively proper and will not be deemed an abuse of discretion unless it is "greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *Id*.

¶ 45 As noted, for the offense of aggravated DUI (death), defendant faced a potential sentence of between 3 and 14 years' imprisonment. See 625 ILCS 5/11-501(a)(3), (d)(1)(F), (d)(2)(G)

(West 2012). Defendant's 4-year sentence is well within that range and is thus presumptively proper. As to the relationship between the sentence and the nature of the offense, we note again that the record reflects the trial court carefully considered the evidence presented at sentencing. Given the considerable harm that occurs when a death is caused by an intoxicated driver, we find that defendant's near-minimum-term sentence is not at odds with the spirit of the law or disproportionate to the nature of the offense.

¶ 46 Defendant's final argument is the trial court improperly failed to find that "extraordinary circumstances" existed such that she should have received probation instead of a 4-year sentence for aggravated DUI. Section 11-501(d)(2)(G) of the Vehicle Code, provides that, unless the court determines that "extraordinary circumstances" exist that "require probation," a 3-to-14-year prison sentence "shall" be imposed. 625 ILCS 5/11-501(d)(2)(G) (West 2012). Accordingly, defendant asks that *we* (1) find the trial court erred and (2) sentence her to probation. This we cannot do.

¶ 47 When a party asks for relief, we must ask whether we have the power to grant it. Here, we do not. Although neither party mentions it, under Illinois Supreme Court Rule 615(b)(4), we have the power to "reduce the punishment imposed by the trial court" (Ill. S. Ct. R. 615(b)(4) (eff. Jan. 1, 1969)). But that power, granted to us by the supreme court, is not unlimited. Our supreme court has twice stated that we categorically do *not* have the power to reduce a prison sentence down to a sentence of probation. See *People v. Bolyard*, 61 Ill. 2d 583, 588 (1975) ("Rule 615 does not grant a reviewing court the authority to reduce a sentence of imprisonment to a sentence of probation."); *People ex rel. Ward v. Moran*, 54 Ill. 2d 552, 556 (1973) ("Supreme Court Rule 615 [citation] was not intended to grant a court of review the authority to reduce a penitentiary sentence to probation."); accord. *Stutzman*, 2015 IL App (4th) 130889, ¶

40; *People v. Bruer*, 335 Ill. App. 3d 422, 428 (2002)).

¶ 48 But even if we did have such power, we would be disinclined to use it in this case. We may alter a sentence under Rule 615 if and only if we find that the trial court has abused its discretion (*People v. Alexander*, 239 Ill. 2d 205, 212 (2010)), which we have already determined did not happen. As we have repeatedly noted, the record shows that trial court judge considered a number of factors at sentencing; his imposition of a sentence above the minimum and his comments at sentencing indicate a firm belief that a probation sentence for defendant was wholly unwarranted, much less "require[d]." See *People v. Rennie*, 2014 IL App (3d) 130014, ¶ 30 (the plain language of section 11-501(d)(2)(G) creates the presumption that a defendant *shall* serve a prison sentence unless extraordinary circumstances "require probation"). Without disregarding the abuse-of-discretion standard and the plain language of the statute, we simply cannot substitute our judgment for that of the trial court. See *Alexander*, 239 Ill. 2d at 213.

¶ 49 We hasten to add that we are not indifferent to defendant's argument that she has suffered greatly in life. But that suffering does not make the circumstances before us extraordinary to the degree that probation was required. See *People v. Vasquez*, 2012 IL App (2d) 101132, ¶ 70 (distinguishing between mitigation and "extraordinary circumstances"). The fact remains that defendant drove while intoxicated through downtown Highland Park on a weekday afternoon. She could have done any number of things differently, including calling someone to pick her up. Instead, the result of her decisions is that a child has died and the child's mother was seriously injured. We believe that Justice Jorgensen's thoughtful comments in *Vasquez* (albeit with some adaptation) bear repeating, for here, too:

> "This court *** is not unaffected by the many tragic elements before us. However, while this case has to some degree impacted each person it has touched, the fact remains that the *** deceased victim[ ] [the injured victim,] and their famil[y] have paid the greatest price. As the trial court noted at sentencing, there are *many* alternative

> decisions that could have been made on the [day] of the accident but, sadly, were not. The trial court's [sentencing] decision is simply not an abuse of discretion and must be affirmed." (Emphasis in original.) *Id*. ¶ 72.

¶ 50 III. CONCLUSION

¶ 51 For these reasons, we vacate one of defendant's sentences for aggravated DUI (death) (count II) and her sentence for reckless homicide (count IV). Otherwise, the judgment of the circuit court of Lake County is affirmed.

¶ 52 Affirmed in part and vacated in part.