NO. 5-09-0483

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Hardin County.
	)	
v.	)	No. 07-CF-24
	)	
CHARLES H. CONKLE,	)	Honorable
	)	Don A. Foster,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Presiding Justice Chapman and Justice Stewart concurred in the judgment.

RULE 23 ORDER

Held: (1) The trial court did not abuse its discretion regarding the motion for a continuance, (2) the ruling on suppression is supported by the record, (3) the court's conduct during the testimony of Alva Busch was not prejudicial, (4) the court properly ruled on Busch's expertise, (5) the evidence supports the conviction, and (6) the court properly conducted the sentencing hearing.

Defendant, Charles H. Conkle, was charged with aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2006)), in the circuit court of Hardin County. After a jury trial, defendant was convicted and sentenced to 15 years' imprisonment. On appeal, defendant raises numerous issues: (1) whether the circuit court abused its discretion by not granting a continuance, (2) whether defendant's statement to police should have been suppressed, (3) whether the court's comments during the testimony of Alva Busch were prejudicial, (4) whether the court erred in ruling on the expertise of Busch, (5) whether the evidence was sufficient to support the conviction, and (6) whether the sentence was an abuse of discretion. We affirm.

I. FACTS

On the evening of April 21, 2007, defendant shot his wife of 29 years, Regina Conkle, in the neck. Defendant was charged with aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2006)) and attempted first-degree murder (720 ILCS 5/8-4(a), (c)(1)(D) (West 2006)).

The testimony of Regina sets a backdrop for discussing the issues raised on appeal. Regina described a progression of events for April 21, 2007. Starting around noon, Regina and defendant hosted a four-wheeler rodeo at their home in the country. Barbeque and beer were consumed by the participants. Both Regina and defendant imbibed throughout the day.

As the day ended and the participants were leaving, the couple began to argue. Both took four-wheelers back to the family house. Defendant cursed at Regina while she was on the porch, and she stated she was leaving. Regina then went into the house and into the couple's bedroom to get some clothes. Defendant followed and retrieved a pistol from under the marital bed.

Defendant does not contest the general progression of events up to the retrieval of the pistol. Instead, defendant contends that the shooting was accidental. On appeal, defendant also raises issues regarding evidentiary and procedural rulings.

Defendant contests Regina's description of the shooting as intentional. Regina gave the following account:

> "Q. [Attorney for the State:] All right. When he pulled out the pistol[,] what did you do?
>
> A. I turned around and–and–and asked him: [']Please, [defendant], you don't want to do this.['] And then I walked towards him and that's when I bent beside the bed on my knees and started begging him not to do this.
>
> Q. Did he say anything to you?

A. If he did, I don't remember.

Q. He didn't–

A. I was scared.

Q. Did he tell you you weren't leaving?

A. Yes.

Q. Okay, so you're on your knees. Where's the gun?

A. In [defendant's] hand.

Q. And what's he doing with it?

A. Pointing it at me.

Q. So you got on your knees. Did you put your hands up or anything?

A. Yes. I put my right hand up like this and was begging him not to–not to do this and then I don't know how long it was but it don't seem like it was very long I was begging him and crying and I just went like this and that's when I heard the gunshot.

Q. You made the movement there with your arm. Was it just your arm that you moved?

A. No. My head and all moved.

Q. You kind of turned away from the pistol?

A. Uh-huh.

Q. Did he shoot you?

A. Yes.

Q. Where did the bullet strike you?

A. Striked me here at the neck. It come out here in the back."

After being shot, Regina went into the bathroom, grabbed a towel, and put it around her neck. She was then transported to the hospital via an ambulance that defendant apparently called.

On cross-examination, Regina testified that in her statement to police two days after the incident she stated that defendant hugged her and said that he was sorry and that he did not mean to do it. Regina testified that she had iced down a couple of 30-packs of beer for the event and that during the course of the day she drank 13 or 14 cans. Defendant had also been drinking, and she told police that he was more drunk than her. Regina described defendant as "very intoxicated."

Regina testified that the couple did not keep loaded weapons around the house because they had young grandchildren who regularly visited. Regina testified that the last firing of the weapon before the incident was when she had shot at some groundhogs in the yard about two to three weeks earlier. After using the pistol, Regina put it between the mattress and the box spring. She admitted she did not unload the pistol after using it.

On redirect, Regina testified that after the house had been broken into in 2006, defendant had kept the pistol loaded and underneath the bed.

The jury found defendant guilty of aggravated battery, but not attempted murder. The trial court entered a judgment on the verdict and sentenced defendant to 15 years in custody.

Defendant appeals.

II. ANALYSIS

A. Continuance

Defendant contends that the trial court abused its discretion by not granting a requested continuance to obtain an expert. On October 20, 2008, one week before the trial began, defendant filed a motion to continue in order to obtain the presence of John Clayton, a firearms expert. Defendant alleged that he had not previously been able to obtain the services of a firearms expert due to a lack of funds and that Clayton had informed him that he would be unavailable the trial week of October 27, 2008. Defendant alleged as follows:

"5. That Mr. John C. Clayton is essential to the defense of the Defendant in

that he is a firearms expert trained in the pressure points and firing capabilities of firearms. His testimony is essential to present evidence to the jury of the firing capabilities of the firearm in question in this case."

Defendant argues that the refusal of the motion prejudicially impaired the preparation of his case. Defendant stresses that his sole defense at the trial was that the shooting was an accident and that the expert witness was essential to this defense. See *People v. Johnson*, 11 Ill. App. 3d 395, 401, 296 N.E.2d 763, 767 (1973).

Defendant's assertion of prejudice is problematic on several levels, starting with the grounds for a continuance. The motion for a continuance did not allege reasons for Clayton's unavailability, nor was any affidavit attached to the motion. See 725 ILCS 5/114-4(a) (West 2008); *People v. McClain*, 343 Ill. App. 3d 1122, 1131, 799 N.E.2d 322, 330 (2003).

Defendant's diligence in presenting Clayton is undermined by the record. Defendant had previously been granted two motions to continue, from settings of August 13, 2007, and January 14, 2008. In addition, the State had been granted a continuance from the August 11, 2008, trial date based on defendant's recent filing of a motion to suppress.

Defendant asserts that the trial court ruled without thoughtful consideration of the circumstances. Defendant alleges that he had been unable to obtain Clayton earlier because of limited financial circumstances. Defendant does not, however, point to any portion of the record previous to the week of trial where he advised the trial court of his intent to retain Clayton. The record indicates that this was not an instance where the trial court mechanically denied a continuance in order to clear a docket, nor is there any indication that the end of the terms of office for the judge or the prosecutor controlled the decision. *Cf. People v. Wilson*, 120 Ill. App. 3d 950, 960, 458 N.E.2d 1081, 1088 (1983) (the ruling was influenced by a planned vacation).

In any event, the record demonstrates no prejudice to defendant. Defendant declined

to offer proof of Clayton's opinion. In the absence of an offer of proof, the record is devoid of any suggestion of the materiality of the proposed expert's testimony. See *People v. Moore*, 397 Ill. App. 3d 555, 561, 922 N.E.2d 435, 441 (2009). The ruling fell within the sound discretion of the trial court.

B. Alva Busch

Defendant next contends that the trial court's treatment of Alva Busch prejudiced his defense. He contends that he was prejudiced both by statements the court made in front of the jury and by the court's refusal to recognize the full extent of Busch's expertise. This invites a lengthy examination of both the direct examination of Busch and his cross-examination.

First, defendant contends that the trial court judge overstepped his bounds by appearing hostile towards Busch during the course of the trial. The consideration of this issue was not limited to the portions of the record referenced in the briefs of the parties on appeal. The entirety of the record of Busch's testimony was reviewed with utmost scrutiny by this court. The record does not support defendant's contention.

The transcript of the direct examination of Busch reveals little input from the trial court. Within the first three pages of the transcript, the following colloquy occurred:

"Q. [Attorney for defendant:] And are you currently a member of any associations at this time?

A. Quite a few.

Q. All right.

THE COURT: Can you hear him?

[Juror:] Barely.

[Juror:] Barely.

THE COURT: Could you please speak up so the jury can hear you?

A. Yes, sir."

In the ensuing pages of the transcript, the presence of the trial court is largely absent, with the court asking questions about the measurement of a scar and sustaining a couple of objections.

Defendant points to commentary from the court more than halfway through the direct testimony about Busch's expertise. Defense counsel asked Busch about his observations of the bullet wound:

> Q. [Attorney for defendant:] And in your work through your actual experience, not just sitting in a classroom but through your actual experience over 24 years in viewing hundreds of bullet wounds, are you able to identify markings around a bullet wound, as to what they are?
>
> A. Yes. I've testified prior in trials, as far as trajectory angles and wound patterns. I've worked with pathologists each time on these shootings. I see the abrasion rings. It's textbook-type stuff. It's in a lot of textbooks. It's constantly taught. The abrasion ring is a scientific thing that occurs. Any pathologist that's ever had any training in bullet wounds, you got two kinds of pathology. You've got a clinical, and you've got a forensic. You ask any forensic pathologist, which I stood over many an autopsy, observed the abrasion ring and then the trajectory angle rod was placed through the wound, and it verified the abrasion ring was consistent with the entry angle as the bullet passed through the body."

Defense counsel then moved to have Busch admitted as an expert in crime scene investigation. The State announced that it had no objection to Busch testifying as a crime scene investigator, but it objected to any admission of Busch as a pathologist. The court ruled as follows:

> THE COURT: I will not determine the witness with what's been offered to be

an expert in the areas that [attorney for State] has objected to, pathology. If he wants to testify from his experience, what he observed, he may."

Defendant points to an unsolicited comment by the court that began on the following page of the transcript:

"Q. [Attorney for defendant:] And, in fact, have you reviewed textbooks and looked at textbooks that show exactly that type of abrasion next to a wound?

A. Yes. I've talked with the author of that particular text.

Q. Mr. Warner U. Spitz of the Medicolegal Investigation of Death?

A. Yes. He's a pathologist, and his son is also a pathologist. And I work cases with his son.

Q. And based on all your experience through all of these–

THE COURT: That's nice, but that's not really relevant, you know. You may inquire further.

[Attorney for the State:] Yes, your Honor."

Defendant contends that the court improperly limited the recognition of Busch as an expert. This argument is without merit. Busch was recognized as an expert in crime scene investigation. The State objected to Busch testifying as a pathologist. The trial court had a duty to address this objection. At the trial, defendant did not respond to this objection. Indeed, Busch suggested that he was not a pathologist but that he had "worked with pathologists each time on these shootings." Defendant also did not object to comments by the prosecutor during closing argument that compared Busch to a crime scene investigator who testified for the State. The record gives no indication that the trial court's ruling was in error.

Furthermore, defendant did not offer on the record any testimony that Busch was unable to present. Busch testified to his experience in examining angles and trajectories of

bullets in shootings and rendered his opinions.

Defendant asserts that the trial court's statements regarding Busch's expertise, and particularly the unsolicited comment regarding the textbook, implied to the jury that the judge thought Busch's qualifications were irrelevant. The record does not support defendant's argument. First, the trial court's rulings were proper under the law. It is irrelevant that Busch personally knew the particular pathologist who wrote a textbook. Moreover, the court's comments were warranted by the context of the testimony. In arguing that the comment regarding the textbook displayed prejudice, defendant emphasizes that the ruling of the court was unsolicited. This ignores the context of the comment. The court's comment, a ruling that it was irrelevant whether Busch personally knew certain pathologists, came shortly after the court had ruled that Busch was not qualified to render an opinion as a pathologist.

The majority of the input of the trial court was during cross-examination. The first comment in this regard is illustrative of the dispute on appeal:

> "Q. [Attorney for the State:] I would really just like to know if you know how many clients you've had where you said they were not guilty. And if you don't know, that's fine.
>
> A. Well, to be fair to you, Counselor, I think I would have to qualify my response.
>
> [Attorney for defendant:] I'm gonna object, your Honor. He's asking him to say whether or not he believes someone's not guilty.
>
> THE COURT: That's not a difficult question. You can answer that question."

On the page following this input, the court sustained defendant's objection that a question was argumentative, and on the following page, the prosecutor withdrew a question after a similar objection.

Defendant points to several other comments during cross-examination that he claims were prejudicial, for example:

"Q. [Attorney for the State:] My question is: If the direction of fire is this way, the bullet should be contained in this room[?]

A. Okay.

Q. So you will–you will give me that one?

A. I don't know what to say. You know–

Q. Yes or no would be nice.

THE COURT: That's a simple question that you can answer.

A. Your Honor, if he's–

THE COURT: And answer the question.

A. If he's shooting to the south, the bullet should be towards the south somewhere."

Defendant also points to the following:

"Q. [Attorney for the State:] That's–that's it. Good answer. If I understand you correctly, based upon all these things that you testified, you are saying that in your opinion–and you showed everybody where you thought they were standing relative to one another, what position the little girl that you had up here bent at the waist, all of that. In your opinion, that's how this occurred.

[Attorney for defendant:] Gonna object, your Honor. It's a mischaracterization of the testimony. Witness clearly said that is one possible way it could have happened, not that it's the only way. He's already testified to that.

[Attorney for the State:] Your Honor, my question was, actually, is that what your opinion is?

THE COURT: Is it?

A. I'm sorry. Could you repeat the question?

THE COURT: Can you hear the state's attorney asking questions? Can you hear him?

A. Yes, I can.

THE COURT: Okay. Listen to him.

A. Okay."

The State's cross-examination ended with the following:

"Q. [Attorney for the State:] Okay. So the bullet wasn't in the bed, but let me just ask you this one point. If a person is standing here and shoots a person right there and it passes through her neck, it's not likely to hit the bed, is it, if the bed's here?

A. Given the position she said she was–

Q. Would it likely hit the bed under that scenario?

A. Yes.

Q. Shooting that direction is gonna hit the bed.

A. The person that gets shot is over here. If he shoots over here–

Q. Now, you don't understand.

A. –the person isn't getting shot.

Q. You don't understand. I'm saying if I'm standing here and we have a person standing here–

A. Okay.

Q. –and I've got a gun and I shoot that person and it goes through their neck, is it likely under that scenario the bullet likely would be found in that bed?

[Attorney for defendant:] I'm gonna object, your Honor. I guess[–]is the State trying to ask a hypothetical of something completely different than the facts and the circumstances–

THE COURT: I don't think so. Answer the question.

A. You're saying that the person standing directly in front of the other person.

Q. I'm saying one guy is standing here, one person's standing here, only this one's down on their knees and he's pointing the gun just like that. Now, can you see that in relation to the bed?

A. Yes.

Q. Is that bullet likely to hit the bed?

A. No.

Q. We got there.

[Attorney for defendant:] Gonna object, your Honor. That's argumentative.

THE COURT: Disregard that.

[Attorney for the State:] I think that's all I have, your Honor."

The record does not demonstrate any prejudice from the court's comments during cross-examination. Initially, it must be noted that defendant is not contending that the trial court made any improper rulings during the cross-examination of Busch. Most of the statements pointed to by defendant were in the course of the court ruling on objections, a duty the court fulfilled.

A judge has a responsibility to remain impartial and not display prejudice. Reversible error occurs when a defendant shows that a judge has made prejudicial statements and that he has been harmed by the remarks. *People v. Wells*, 106 Ill. App. 3d 1077, 1086, 436 N.E.2d 688, 695 (1982). In this case, the court did not unnecessarily interject itself into the proceedings. See *People v. Marino*, 414 Ill. 445, 446, 111 N.E.2d 534, 535 (1953); *People v. Brown*, 200 Ill. App. 3d 566, 577, 558 N.E.2d 309, 315 (1990) (the judge conducted his own cross-examination of a witness, including questions about the witness's tax records). The record does not indicate that the judge was partial or displayed prejudice.

C. Suppression

In the hours after the incident, defendant gave a statement to police. Defendant contends that this statement should have been suppressed because he was grossly intoxicated at the time. If a defendant is interrogated without counsel, the State has a heavy burden to demonstrate that the defendant knowingly and intelligently waived his right to counsel and his privilege against self-incrimination. *People v. Roy*, 49 Ill. 2d 113, 115, 273 N.E.2d 363, 365 (1971); *People v. Sleboda*, 166 Ill. App. 3d 42, 51, 519 N.E.2d 512, 518 (1988). A statement should be suppressed if a defendant is so grossly intoxicated that he no longer has the capacity to waive his rights. *People v. Garcia*, 165 Ill. 2d 409, 421, 651 N.E.2d 100, 106 (1995). As was stated in *Sleboda*:

> "In *People v. Roy* (1971), 49 Ill. 2d 113, our supreme court held that a defendant had not understandingly waived his *Miranda* rights due to the fact that he was intoxicated. However, evidence of intoxication by itself will not render a waiver involuntary. (*People v. Moon* (1976), 38 Ill. App. 3d 854, 860.) Rather, the evidence must plainly show that a defendant is so grossly intoxicated that he no longer has the capacity to knowingly waive his rights. (38 Ill. App. 3d at 860.) Where the evidence is not clear, the fact that a defendant was intoxicated does not make his statement inadmissible. (38 Ill. App. 3d at 860.) With regard to whether a defendant was so intoxicated as to make his statements involuntary, the decision of a trial court will not be reversed unless it is against the manifest weight of the evidence. *In re Shutters* (1977), 56 Ill. App. 3d 184, 188." *Sleboda*, 166 Ill. App. 3d at 51, 519 N.E.2d at 518.

Defendant had undoubtedly consumed alcohol prior to his confession. Defendant alleged in his motion to suppress that "he advised the officers in his taped interview that he was still intoxicated from the day before where he had consumed two 30-packs of beer with his wife," as noted in the transcript of his interview with the police. Defendant also alleged

in his motion that a breath test revealed a blood alcohol of 0.101 approximately one hour after he was given the *Miranda* warning (*Miranda v. Arizona*, 384 U.S. 436 (1966)), and at the hearing on the motion, he pointed out that the test was administered approximately four hours after his arrival at the police station. Furthermore, Regina testified that defendant had been drinking beer on the date of the incident and described him as very intoxicated.

Nonetheless, the record supports the finding that the waiver was given knowingly and voluntarily. Intoxication, by itself, does not render a statement inadmissible. *People v. Santiago*, 222 Ill. App. 3d 255, 266, 582 N.E.2d 1304, 1312 (1991). The test is not the same as for driving a vehicle. See, *e.g.*, *Sleboda*, 166 Ill. App. 3d at 49, 519 N.E.2d at 517 (the statement was admissible when the breath test revealed a blood-alcohol content of 0.22). The test is whether defendant was so grossly intoxicated that it undermined the voluntary and knowing nature of his statement. *Garcia*, 165 Ill. 2d at 421, 651 N.E.2d at 106.

The evidence presented at the hearing on the motion to suppress supported the admission of the statement. The State presented testimony from three officers, each of whom testified that defendant was able to keep his balance, did not slur his speech, and otherwise seemed to understand the questions and respond coherently. The trial court was able to observe and consider the testimony of the officers in light of the audio recording of defendant's statement. See *Santiago*, 222 Ill. App. 3d at 266, 582 N.E.2d at 1312 (the admission of a statement was upheld despite conflicting testimony by officers regarding whether the defendant was grossly intoxicated). Furthermore, the trial court was able to review both defendant in person and the audio recording of the interview. See *Garcia*, 165 Ill. 2d at 423, 651 N.E.2d at 107 (the trial court observed that the defendant was slow of speech both in person and in an audio recording).

The evidence presented by the State at the hearing is similar to that in *Sleboda*, where the court stated as follows:

"In the instant case, we find that the decision of the trial court was not against the manifest weight of the evidence. While there can be no doubt that defendant was intoxicated, the evidence was sufficient to show that his waiver was knowingly made. There was evidence that showed defendant was able to stand and walk unassisted, was responsive to questions, was able to follow directions, did not have slurred speech, showed concern for both his sister and father, and showed an awareness of the accident.

The instant case is thus distinguishable from *Roy* where the defendant kept saying 'What?' in response to a reading of his rights, was swaying, and was very confused. (*Roy*, 49 Ill. 2d at 114-15.) Moreover, unlike the instant case, the defendant in *Roy* never said that he understood the warnings. 49 Ill. 2d at 115." *Sleboda*, 166 Ill. App. 3d at 51-52, 519 N.E.2d at 518.

The question of whether defendant was grossly intoxicated is one of fact. The trial court was in a better position to evaluate this claim. The ruling was not against the manifest weight of the evidence.

D. Sufficiency Of The Record

Defendant contends that the evidence presented at the trial was insufficient to support his conviction. Defendant asserts that the State failed to present evidence that he knowingly or intentionally harmed Regina as required for the offense of aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2008)).

Contrary to defendant's assertion, the record contains direct and circumstantial evidence that defendant knew the pistol was loaded and that he triggered the pistol intentionally. Regina testified that the couple did not keep loaded weapons in the house, but she also testified that defendant kept the pistol loaded and underneath the bed after the house had been broken into in 2006. The State also presented expert testimony that considerable

pressure was needed to fire the trigger. The jury was also presented with the circumstances of the incident. The shooting occurred in the midst of a domestic dispute in which Regina was preparing to leave and was then threatened by defendant. See *People v. Moore*, 358 Ill. App. 3d 683, 687, 832 N.E.2d 431, 436 (2005). A rational trier of fact could reasonably find that defendant intentionally harmed Regina.

E. Sentencing

As a final issue, defendant contends that the trial court failed to consider mitigating factors when rendering its decision. The section of the Unified Code of Corrections governing sentencing hearings mandates that a court "shall *** consider evidence and information offered" in mitigation. 730 ILCS 5/5-4-1(a)(4) (West 2008). In imposing a sentence for a violent crime, "the trial judge shall specify on the record the particular evidence, information, factors in mitigation and aggravation[,] or other reasons that led to his sentencing determination." 730 ILCS 5/5-4-1(c) (West 2008).

Contrary to defendant's assertion, the plain language of the statute does not call for the court to list in its decision every factor for mitigation that was presented. Instead, the court is required to state the particular evidence and factors "that led to his sentencing determination." 730 ILCS 5/5-4-1(c) (West 2008). No recitation of the proceedings is necessary. *People v. Adamcyk*, 259 Ill. App. 3d 670, 680, 631 N.E.2d 407, 414 (1994). The long-held standard is as follows:

> "Where relevant mitigating evidence is before the court, it is presumed that the court considered it absent some indication in the record to the contrary other than the sentence itself." *People v. Dominguez*, 255 Ill. App. 3d 995, 1004, 626 N.E.2d 775, 783 (1994).

Indeed, the precedent relied on by defendant reaffirms this standard. *People v. Storms*, 254 Ill. App. 3d 139, 143, 626 N.E.2d 324, 328 (1993). *Storms* pronounced the following:

"In setting a sentence, the court must consider information offered in mitigation (Ill. Rev. Stat. 1989, ch. 38, par. 1005-4-1(a)(4) (now codified, as amended, at 730 ILCS 5/5-4-1(a)(4) (West 1992))), which includes the fact that 'the defendant's criminal conduct neither caused nor threatened serious physical harm to another.' (Ill. Rev. Stat. 1989, ch. 38, par. 1005-5-3.1(a)(1) (now 730 ILCS 5/5-5-3.1(a)(1) (West 1992)).) Absent any contrary indication, it is presumed that the trial court considered evidence presented in mitigation. *People v. McDonald* (1992), 227 Ill. App. 3d 92, 100." *Storms*, 254 Ill. App. 3d at 143, 626 N.E.2d at 328.

The record contains no indication contrary to the presumption that the trial court considered mitigating factors. The sentence was in the middle of the statutory range and does not appear to be disproportionate to the nature of the offense. Moreover, the trial court did discuss the mitigating factors at the sentencing hearing. At the conclusion of the defense arguments, the court engaged in a colloquy with defense counsel about which factors under the sentencing statute were applicable, particularly the likelihood of recurrence. Furthermore, in issuing the sentence, the court made a factual finding on defendant's statement in allocution, calling it self-serving.

III. CONCLUSION

Accordingly, the judgment of the circuit court is hereby affirmed.

Affirmed.