2015 IL App (5th) 120571-U

NO. 5-12-0571

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Crawford County.
	)	
v.	)	No. 07-CF-126
	)	
JEROD W. ROBINSON,	)	Honorable
	)	Kimbara Harrell,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Justices Welch and Schwarm concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant was not "in custody" for purposes of *Miranda* when police questioned him at the scene of an accident. The defendant's waiver of his *Miranda* rights at the jailhouse was valid where the evidence refuted his claim that he suffered a head injury that impaired his ability to make a knowing, intelligent, and voluntary waiver. State met its burden of showing witnesses who were residents of foreign nations were unavailable such that use of their videotaped evidence depositions at trial did not run afoul of the defendant's right to confront and cross-examine witnesses. Defendant was not entitled to an evidentiary hearing on juror misconduct where the only evidence to support his claim was an investigator's statement that one juror told him another juror said something about driving to the scene of the accident. Court's consideration of a factor inherent in the offense as a factor in aggravation required remand for sentencing without consideration of that factor.

¶ 2 The defendant, Jerod W. Robinson, appeals his conviction and 10-year sentence for aggravated driving under the influence (DUI). The charges stemmed from a motor vehicle crash that killed two foreign exchange students. After the jury returned a guilty verdict, the attorney who represented the defendant at trial retired from the practice of law. The defendant subsequently retained new counsel, who filed a motion for a new trial on his behalf along with a motion to reconsider sentence. The State moved to strike the defendant's motion for a new trial on the ground that it was not timely filed. The court granted the State's motion to strike and denied the defendant's motion to reconsider sentence. On appeal, the defendant argues that (1) the court abused its discretion in striking his motion for a new trial and, therefore, the issues raised in the stricken motion should not be deemed forfeited on appeal; (2) the defendant's statements to police at the accident scene should have been excluded because the defendant was subjected to custodial interrogation without first being given *Miranda* warnings; (3) his statements at the police station should have been suppressed because his waiver of his *Miranda* rights was not knowing and voluntary; (4) the court erred by allowing the State to introduce the videotaped evidence depositions of two witnesses without demonstrating that the witnesses were unavailable to testify live; (5) the court erred in refusing to allow the defendant to present evidence of juror misconduct; and (6) the court impermissibly considered a factor inherent in the offense as an aggravating factor in sentencing the defendant. We affirm the defendant's conviction, vacate his sentence, and remand the cause to allow the trial court to resentence the defendant without considering the improper factor.

¶ 3 The charges at issue in this appeal stem from a tragic motor vehicle accident. On September 17, 2007, the defendant attended a party in rural Crawford County. In the early morning hours of September 18, Linda Gerhold left the party with four friends, including the two decedents, Marcin Piwowarski and Jacqueline Schuering. The defendant left the party a few minutes later. Shortly after leaving, Gerhold stopped her vehicle to allow Piwowarski to get out of the vehicle to vomit. Because Piwowarski was seated in the middle of the back seat, Schuering also got out of the vehicle so that he could exit. Gerhold parked in the roadway, towards the right side. She acknowledged that she did not turn on the flashers. While Piwowarski and Schuering were outside of Gerhold's vehicle, the defendant drove through a dip in the road towards them. According to the defendant, he did not see Gerhold's vehicle until two seconds before the collision because of the dip in the road, and he did not see Piwowarski and Schuering standing in the roadway at all. He swerved to the right in an effort to avoid hitting Gerhold's vehicle, but he struck Piwowarski and Schuering and collided with the right rear of Gerhold's vehicle. Jacqueline Schuering died at the scene. Marcin Piwowarski later died of his injuries at the hospital.

¶ 4 The first officer to arrive at the scene was Crawford County Sheriff's Deputy Troy Love. Deputy Love found the defendant sitting next to the body of Jacqueline Schuering, crying. According to Deputy Love's trial testimony, the defendant told him that "he'd screwed up. He'd been at a party and he was drunk and he hit 'em." Trooper Richard Morris arrived on the scene shortly after 3 a.m. He observed that the defendant's eyes were glassy and his breath smelled of alcohol. He asked the defendant how much he had

to drink, to which the defendant responded, "Quite a bit." Trooper Morris administered field sobriety tests to the defendant. Although he passed one test, he failed two others. The trooper then administered a portable breathalyzer test, which indicated that the defendant had a blood-alcohol content (BAC) over the legal limit. Trooper Morris informed the defendant that he was under arrest for DUI, handcuffed him, and placed him in his squad car. The defendant fell asleep during the drive to the Crawford County jail.

¶ 5 At the Crawford County jail, the defendant fell asleep in his cell. After a 20-minute observation period, Trooper Morris and Officer Jeremy Langley attempted to wake the defendant. It took them seven minutes to rouse him from sleep. After that, the defendant submitted to an additional breath test and a urine test. Trooper Morris then read the defendant his *Miranda* rights. The defendant waived those rights and admitted to Trooper Morris that he drank 15 beers between 6 and 10 the previous night at the party. He also provided a brief written statement. In it, he admitted that he initially saw Gerhold's vehicle when he pulled out of the driveway of the home where the party was being held. However, he stated, he then lost sight of the vehicle as he drove through a dip in the road. When he saw the vehicle, he swerved to the right in an attempt to avoid hitting it, but he was not able to avoid the crash. Later that morning, the defendant's father posted bond, and the defendant was released. The defendant was charged with DUI, aggravated DUI, and failure to reduce speed to avoid an accident.

¶ 6 On April 2, 2008, the State filed a motion to take videotaped evidence depositions of two occurrence witnesses–Linda Gerhold and Sarala Bechter. The two young women were exchange students from Germany and Switzerland, respectively, and the State

anticipated that both would be leaving the United States to return to their home countries before the matter came for trial. At hearings in the matter, the State presented the testimony of Pamela Swanson-Madden, the program director for Illinois Eastern Community College, where Gerhold and Bechter were studying. Swanson-Madden testified that Bechter's exchange program included nine months of school and up to two months of additional time in which she could travel, while Gerhold's exchange program included one semester of school, six months of work, and an option to travel for three weeks before returning home. Both women had already booked their tickets home. Bechter's flight was July 9, and Gerhold's was July 26. Swanson-Madden further testified that Gerhold's J-1 student visa could not be extended. She testified that although Bechter held a different type of visa which allowed her to apply for an extension, Bechter could not change her travel plans without incurring significant additional expenses.

¶ 7 The defendant argued that this evidence did not establish that Bechter and Gerhold were unavailable to testify at trial. He emphasized that the trial date had not been set. He argued that, as such, it was impossible to demonstrate that either witness would be unavailable for a particular trial setting. He also argued that the State had not demonstrated that Bechter and Gerhold were unwilling or unable to travel to the United States later to testify at trial. The court disagreed and set a time for the depositions to take place.

¶ 8 The defendant subsequently filed a motion to exclude the videotaped depositions and a motion to suppress the statements he made to officers at the scene of the accident and in the Crawford County jail. At a motion hearing, the parties reiterated the

arguments they made at the hearing on the State's motion to take the depositions. Ruling from the bench, the court denied the motion to exclude the depositions.

¶ 9 At a hearing on the motion to suppress, the defendant's mother, Debra Medsker, testified on his behalf. She testified that on the morning after the accident, she noticed that the defendant had a bruise on his elbow and a bump on the right side of his head, just behind his temple. She stated that the defendant complained of having a headache for two to three days following the accident and "a little bit of double vision, just on and off." She recognized the double vision as being a sign of a concussion because her sons played sports "and that's the first thing you learn is concussions and their symptoms and when to take 'em" for medical treatment. Medsker testified that she did not take the defendant for medical treatment, however, because she "knew it wasn't life threatening." She stated that she would have taken him for treatment had these symptoms persisted. Medsker further testified that the defendant was "a little dazed," but he was able to talk to her and understand the questions she asked him.

¶ 10 The defendant testified at the suppression hearing that he did not remember the impact; he remembered waking up in his truck after the collision. He testified that he noticed a bruise on his elbow and a "goose egg" on the right side of his head. In addition, he testified that he had a headache and double vision. He also stated that he felt "dazed and shocked at everything that had happened." He acknowledged that he did not request medical treatment, either at the accident scene or later at the county jail.

¶ 11 The defendant further testified that approximately five or six officers were at the scene of the accident, although he was not certain of the precise number. He testified that

officers told him to wait by the car and one officer stood near him watching him. Another officer took his wallet and driver's license. He stated that he did not feel free to leave. Trooper Morris questioned the defendant, administered field sobriety tests and a breathalyzer test, and arrested the defendant for DUI. The defendant asserted that he did not remember anything that happened at the Crawford County jail.

¶ 12 Trooper Morris testified at the suppression hearing for the State. He testified that when he arrived at the accident scene, he was advised by another officer that the defendant had refused treatment from ambulance personnel. Trooper Morris next testified to what took place at the Crawford County jail. He acknowledged that it took seven minutes to rouse the defendant from sleep in order to administer additional tests and question him further. Once the defendant was awakened, Trooper Morris administered another breath test to him and requested that he provide a urine sample. He then read the defendant the *Miranda* warnings. The defendant waived his rights and gave a statement. Trooper Morris testified that the defendant seemed to understand his questions. He further testified that he did not observe any injury to the defendant, and the defendant did not complain to him of any injuries.

¶ 13 The court entered a written order setting forth its findings. The court first addressed the defendant's arguments concerning his statements at the scene of the accident. The court noted that courts have generally found that investigative questioning at the scene of a motor vehicle accident does not amount to custodial interrogation for purposes of *Miranda*. As such, the court concluded, warnings were not required and the defendant's statements to police were admissible. The court next addressed the

defendant's arguments regarding the waiver of his *Miranda* rights at the Crawford County jail. The court noted that the booking video showed the defendant walking into the jail unassisted. The video also showed the defendant walking from his cell to the booking room and back unassisted and standing to talk to Trooper Morris for 10 minutes in the booking room. The court noted that the defendant was a high school graduate with some college education. The court expressly found that there was no evidence of police coercion and no evidence that the defendant suffered injuries that impeded his ability to understand the waiver of his *Miranda* rights. The court therefore denied the motion to suppress.

¶ 14 The matter proceeded to trial in August 2011. On the second day of trial, however, the court granted the defendant's motion for a mistrial. Before the matter came for a second trial, the defendant renewed his motion to disallow the videotaped depositions. The court denied this motion, and the matter proceeded to trial again in March 2012. Evidence presented by the State included the videotaped evidence depositions of Linda Gerhold and Sarala Bechter, the defendant's statements at the accident scene and in the Crawford County jail, the results of the defendant's breathalyzer tests, and the testimony of an accident reconstruction specialist. In addition to describing the collision, Gerhold and Bechter testified that the defendant played drinking games at the party and became noticeably intoxicated. The accident reconstructionist opined that ordinary reaction time under the circumstances was 1.6 seconds. He further testified that there was no evidence the defendant applied the brakes and that there was more room for the defendant to avoid Gerhold's vehicle by swerving to the left, rather than the right. He

concluded that the primary cause of the collision was the defendant's failure to reduce his speed and the defendant's intoxication was a secondary cause.

¶ 15 The defendant testified in his own defense, stating that he saw Gerhold's vehicle, but then lost sight of it when he drove through a dip in the road. He testified that when he saw the vehicle again, he did not have enough time to react. Pursuant to the State's motion, the jurors were taken to view the scene of the accident. The State requested the site view because prosecutors were concerned that photographs of the scene might have misled jurors as to the distance between the dip in the road and the site of the crash. On March 20, 2012, the jury returned guilty verdicts on the charges of aggravated DUI and failure to reduce speed to avoid an accident.

¶ 16 The court held a sentencing hearing in May 2012. The court first considered statutory factors in aggravation, and found three to be present. First, the court found that the defendant's conduct caused serious harm to others because two people died. See 730 ILCS 5/5-5-3.2(a)(1) (West 2006). Second, the court found that the defendant had a prior history of delinquency or criminal behavior. See 730 ILCS 5/5-5-3.2(a)(3) (West 2006). The court pointed to a 2004 charge of possession or consumption of alcohol by a minor, a Class A misdemeanor for which the defendant received and successfully completed 60 days of court supervision. Third, the court found a prison sentence necessary to deter others from committing the same offense. 730 ILCS 5/5-5-3.2(a)(7) (West 2006).

¶ 17 Next, the court considered factors in mitigation. The court found two such factors: (1) the defendant was going to compensate the victims (730 ILCS 5/5-5-3.1(a)(6) (West 2006)); and (2) the defendant led a law-abiding life for a substantial period of time, as

there were three years between his prior charge and the current offense (730 ILCS 5/5-5-3.2(a)(7) (West 2006)). The court sentenced the defendant to 10 years in prison for aggravated DUI, imposed fines for both charges, and ordered the defendant to pay restitution. The court entered a judgment of conviction including these sentences on June 8, 2012.

¶ 18 On July 3, 2012, the defendant, through newly retained counsel, filed a motion to reconsider sentence and a motion for a new trial. In his motion to reconsider sentence, the defendant argued that the court erred in (1) failing to consider certain mitigating factors, (2) considering the defendant's prior history as both an aggravating and mitigating factor, and (3) considering the fact that the defendant's conduct caused serious harm to others as an aggravating factor even though it is a factor inherent in the offense of aggravated DUI. He also raised issues related to the restitution ordered. In his motion for a new trial, the defendant argued, as he does in this appeal, that the court erred in admitting his statements to police and admitting the videotaped evidence depositions of Linda Gerhold and Sarala Bechter. He also alleged that at least one juror made an unauthorized visit to the scene of the accident.

¶ 19 Both motions came for a hearing on November 20, 2012. Defense counsel indicated that he hired an investigator to talk to all of the jurors because he had "heard rumors" that jurors made an unauthorized visit to the crash site. Before he could put the investigator on the stand, however, the State orally moved to strike the defendant's motion for a new trial, arguing that it was filed untimely 105 days after the verdicts were rendered. See 725 ILCS 5/116-1(b) (West 2012) (providing that a "motion for a new trial

shall be filed" within 30 days after the jury returns a verdict (emphasis added)). In response, the defendant argued that (1) the State forfeited its timeliness argument by not raising it at any time during the 4½ months the motion was pending; and (2) case law holds that the statutory 30-day limit begins to run when a judgment is entered on the verdict. The court asked the State's attorney if the State intended to file a written motion, and the prosecutor indicated that she would do so. The court initially granted the State's motion to strike. However, the defendant requested that the court reserve ruling until the State filed a written motion and both parties submitted arguments in the matter. The court agreed, and moved on to consider the defendant's motion to reconsider sentence.

¶ 20 The defendant argued that the fact that the defendant's conduct caused serious harm to others was inherent in the offense and, as such, should not have been considered as a factor in aggravation. He also argued that the court's consideration of the defendant's limited prior history as both a factor in aggravation and a factor in mitigation was inconsistent. He pointed out that the defendant's only prior charge–underage possession or consumption of alcohol–is ordinarily treated as being akin to a traffic ticket rather than criminal activity because it is "so inconsequential." The State argued that the court could properly consider as a factor in aggravation the fact that the defendant's conduct caused serious harm to Linda Gerhold and the surviving passengers in her vehicle even though it could not consider the deaths of Jacqueline Schuering and Marcin Piwowarski.

¶ 21 In ruling from the bench, the trial judge stated that she had presided over the defendant's trial for five years and was "very familiar with the facts" as well as every motion filed in the case. The court denied the motion to reconsider sentence.

¶ 22 On November 27, 2012, the State filed a written motion to strike the defendant's posttrial motion. On November 29, the defendant filed a "motion to reconsider the State's motion to strike and for other relief." In it, he requested that the court (1) vacate its previous order granting the State's motion to strike; (2) deny the State's written motion to strike; and (3) hold a hearing on the defendant's motion for a new trial and allow the defendant to call witnesses and present evidence.

¶ 23 On December 11, 2012, the court held a hearing on these motions. The defendant presented as an offer of proof the testimony of his attorney's investigator, Alan Profancik. Profancik testified that four of the jurors refused to discuss the case with him. Five jurors told him that they did not recall any problems during deliberations, three of whom specifically told him that they did not recall any other jurors saying that they had driven to the scene of the accident on their own. One juror told Profancik that three of the jurors had some difficulty reaching a decision. The juror also told Profancik that he found the authorized visit to the site of the accident strange because he felt that the police, prosecutor, and trial judge were being "secretive." The juror provided no additional detail. Profancik testified that another juror told him that a female juror mentioned that she researched the accident location on Google Earth, but provided no additional details. Profancik testified that he asked the final juror twice whether he heard anything about any of the other jurors returning to the accident scene. The first time he asked, the juror said no. The second time, he told Profancik that a male juror mentioned driving back to the scene. He gave no other details.

¶ 24 After Profancik testified, the defendant asked the court to subpoena the male jurors to determine which, if any, had visited the crash site. The court told him it would deny that request until it ruled on the motions. The following week, the court entered a written order denying the defendant's motion for a new trial, granting the State's motion to strike, and denying the defendant's request to subpoena jurors. This appeal followed.

¶ 25 The defendant first contends that the court abused its discretion in granting the State's motion to strike his motion for a new trial. He acknowledges that the motion was not filed timely. A motion for a new trial must be filed within 30 days after the jury renders a verdict. 725 ILCS 5/116-1(b) (West 2012). As the defendant points out, however, this requirement is not jurisdictional. Here, the defendant's timely postsentencing motion was pending; as such, the court had jurisdiction to consider his motion for a new trial. See *People v. Gilmore*, 356 Ill. App. 3d 1023, 1036 (2005). The defendant argues that the court abused its discretion in declining to do so because his attorney retired and abandoned her representation of him without formally withdrawing. He contends that under these circumstances, his attorney's failure to file the motion on time should not be attributed to the defendant and he has shown cause to excuse the procedural default. See *Maples v. Thomas*, ___ U.S. ___, ___, 132 S. Ct. 912, 922-24 (2012). Alternatively, he contends that counsel's failure to file a timely motion for a new trial constituted ineffective assistance of counsel.

¶ 26 Before considering these arguments, it is important to note that the defendant does not ask that this court remand the matter to the trial court to allow that court to consider his motion for a new trial on the merits; he asks only that this court excuse the procedural

default that results from the striking of his motion for a new trial. See *People v. Cosby*, 231 Ill. 2d 262, 271-72 (2008) (explaining that in order to preserve an issue for appeal, a defendant must object at trial and raise the issue in a posttrial motion). In other words, he asks us to consider his arguments without subjecting them to plain error analysis. This narrows the question before us. The first step in plain error analysis is determining whether there was error at all. *Cosby*, 231 Ill. 2d at 273. Because we find no error in the issues raised by the defendant related to his trial, the result is the same whether the defendant's arguments are subject to plain error review or not. As such, we need not resolve this issue.

¶ 27 We turn now to the merits of the defendant's contentions. His first two arguments concern the propriety of the court's ruling on his motion to suppress his statements. In reviewing the trial court's ruling, we determine whether the court's factual findings are against the manifest weight of the evidence. However, we review *de novo* the court's ultimate decision to grant or deny the motion to suppress. *People v. Luedemann*, 222 Ill. 2d 530, 542 (2006).

¶ 28 The defendant first argues that the court erred in refusing to suppress his statements to police at the scene of the accident. There is no dispute that none of the officers at the accident scene read the defendant his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). At issue is whether they were required to do so.

¶ 29 Before police may question a suspect who is in custody, they are required to advise the suspect that he has the right to remain silent and the right to have counsel present during questioning and that anything he says may be used as evidence against

him at trial. *Berkemer v. McCarty*, 468 U.S. 420, 429 (1984) (quoting *Miranda*, 384 U.S. at 444). This requirement applies not only in the context of a formal arrest, but in situations where the suspect has been " 'deprived of his freedom of action in any significant way.' " *Berkemer*, 468 U.S. at 428 (quoting *Miranda*, 384 U.S. at 444).

¶ 30 Many cases have focused on the question of whether a reasonable person in the suspect's position, innocent of any crime, would feel free to leave. See, *e.g.*, *People v. Braggs*, 209 Ill. 2d 492, 506 (2003); *People v. Jordan*, 2011 IL App (4th) 100629, ¶ 17. The United States Supreme Court has made clear, however, that this question begins, rather than ends, the analysis. *Howes v. Fields*, ___ U.S. ___, ___, 132 S. Ct. 1181, 1189 (2012); see also *Jordan*, 2011 IL App (4th) 100629, ¶ 20. As the Court explained, a second, equally important question is "whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Howes*, ___ U.S. at ___, 132 S. Ct. at 1189-90. Relevant factors include (1) the time and place of the questioning; (2) the number of police officers present; (3) the presence or absence of any friends or family of the suspect; (4) any indicia of formal arrest, such as physical restraint or a show of weapons or force; (5) the length, mood, and manner of the interrogation; and (6) whether the defendant is aware that he is the focus of the investigation. *Jordan*, 2011 IL App (4th) 100629, ¶ 18.

¶ 31 Generally, on-the-scene investigation of a traffic accident does not amount to custodial interrogation, and *Miranda* warnings are, therefore, not required. *Berkemer*, 468 U.S. at 440; *People v. Nunes*, 143 Ill. App. 3d 1072, 1075 (1986) (citing *People v. Parks*, 48 Ill. 2d 232, 237 (1971)). This is so despite the fact that "few motorists would

feel free *** to leave the scene *** without being told they might do so." *Berkemer*, 468 U.S. at 436. However, an encounter that begins as a routine traffic stop or on-the-scene accident investigation can be transformed into a custodial interrogation if officers subject a suspect to treatment that effectively renders him "in custody" for purposes of *Miranda*. *Jordan*, 2011 IL App (4th) 100629, ¶ 20 (quoting *Berkemer*, 468 U.S. at 440).

¶ 32 The Fourth District's decision in *Jordan* is illustrative of how this elevation can occur. There, a passenger was separated from her companion and locked in the back of a squad car for 23 minutes. *Jordan*, 2011 IL App (4th) 100629, ¶ 22. One of the officers at the scene told her that he intended to keep her there long enough to send for drug-sniffing dogs. As the Fourth District explained, the "defendant could have reasonably concluded that her initial insistence of innocence was not satisfactory and she would not be allowed to leave until she confessed." *Jordan*, 2011 IL App (4th) 100629, ¶ 22. The danger of this type of pressure was one of the prime concerns underlying the *Miranda* decision. *Jordan*, 2011 IL App (4th) 100629, ¶ 22 (quoting *Miranda*, 384 U.S. at 468). As we will explain, we do not find that danger to present in the circumstances of this case.

¶ 33 Here, there were multiple officers at what one officer described as a "chaotic" accident scene involving serious injuries to multiple individuals. For obvious reasons, the on-the-scene investigation of the accident was not as brief as a routine traffic stop. See *Berkemer*, 468 U.S. at 437-38 (explaining that the brevity of a typical traffic stop mitigates the danger of compulsion to confess). In addition, the defendant was aware that

he was the focus of the officers' investigation–although, as the State points out, he only became the focus of the investigation after telling Deputy Love that he struck the victims.

¶ 34 However, unlike what occurred in *Jordan*, there were no indicia of formal arrest until Trooper Morris arrested the defendant for DUI. No officers used force or drew weapons, and the defendant was not handcuffed or placed in a squad car. See *Jordan*, 2011 IL App (4th) 100629, ¶ 23 (noting that an officer's act of locking the defendant in the back of a squad car–where prisoners who have been formally arrested sit–contributed to the coercive environment that is the hallmark of custodial interrogation). In addition, the fact that questioning took place in the open, at the side of the road, helped mitigate against coercive pressures to confess. See *Berkemer*, 468 U.S. at 438 (explaining that "[t]his exposure to public view both reduces the ability of an unscrupulous policeman to use illegitimate means to elicit self-incriminating statements and diminishes the motorist's fear" that this might happen). Significantly, all three of the officers who questioned the defendant one at a time asked few questions of him in a conversational and noncoercive manner.

¶ 35 Viewing these circumstances in their totality, we find that the instant case stands in stark contrast to *Jordan* in that it simply did not present the same type of coercion normally associated with station house questioning or formal arrest. We conclude that the trial court correctly determined that the defendant was not "in custody" for purposes of *Miranda*.

¶ 36 The defendant next contends that the court erred in refusing to suppress the statements he made at the Crawford County jail. He argues that he was incapable of

making a knowing, intelligent, and voluntary waiver of his *Miranda* rights due to a combination of "extreme intoxication," symptoms of a head injury, lack of sleep, and shock over the fact that he had just been involved in a motor vehicle accident that killed two of his friends. The defendant does not contend that Trooper Morris engaged in coercive techniques. He contends only that he "was in no condition to make a voluntary, intelligent, and knowing waiver" and, as such, police should have waited a few hours before questioning him to allow him to get some sleep and sober up. We find no merit to these contentions.

¶ 37 As previously discussed, the court expressly rejected the defendant's claim that he suffered a head injury. On appeal, this finding of historical fact is subject to manifest-weight-of-the-evidence review. See *Luedemann*, 222 Ill. 2d at 542. We believe the evidence supports the court's findings. Although the defendant's mother testified that she observed what she believed to be symptoms of a concussion, she admitted that she had no medical training and did not believe the defendant needed medical attention. In addition, the undisputed evidence showed that the defendant did not seek medical attention for any injuries. Moreover, the court had the opportunity to view the booking tape and observe the defendant's demeanor at the jail. The court noted that, although it took several minutes for officers to rouse the defendant from sleep, once he was awake, he did not appear to be impaired by any injury. These findings were not against the manifest weight of the evidence. We find no error in the court's ultimate conclusion that the defendant's waiver of his rights was voluntary, knowing, and intelligent.

¶ 38 The defendant next argues that the court erred in admitting the videotaped evidence depositions of Linda Gerhold and Sarala Bechter. He contends that this violated his right to confront and cross-examine the witnesses against him. We disagree.

¶ 39 Illinois Supreme Court Rule 414 (eff. Oct. 1, 1971) governs the use of videotaped depositions in criminal trials. The rule provides that a court may order the taking of an evidence deposition if the court finds that there is a "substantial probability" that the witness will be unavailable to testify at trial and the witness's testimony is relevant. Ill. S. Ct. R. 414(a) (eff. Oct. 1, 1971). The court may only order the taking of an evidence deposition upon the written motion of a party and notice to both parties. Ill. S. Ct. R. 414(a) (eff. Oct. 1, 1971). Once the requirements of Rule 414 are satisfied, the decision to allow the use of a videotaped deposition at trial is a matter within the trial court's discretion. *People v. Tokich*, 314 Ill. App. 3d 1070, 1073 (2000).

¶ 40 Although the trial court has this discretion, live testimony before a jury is preferred, and "any exception must be narrowly drawn." *People v. Johnson*, 118 Ill. 2d 501, 508 (1987). This is because the use of evidence depositions in a criminal trial impinges on the defendant's constitutional right to confront and cross-examine the witnesses against him. The United States Supreme Court has held that this right "includes both the opportunity to cross-examine [the witness] and the occasion for the jury to weigh the demeanor of the witness." *Mancusi v. Stubbs*, 408 U.S. 204, 211 (1972) (quoting *Barber v. Page*, 390 U.S. 719, 725 (1968)). The purpose of Rule 414 is to strike a balance between this right and the need to preserve all relevant evidence. *Johnson*, 118 Ill. 2d 508.

¶ 41 At issue in this case is whether the State made the requisite showing that the two witnesses were unavailable. In *People v. Johnson*, cited by the defendant, the Illinois Supreme Court considered what the definition of "unavailable" should be for purposes of striking a balance between the need to preserve evidence and the defendant's confrontation rights. The court discussed the definition of "unavailable" found in Federal Rule of Evidence 804, which governs the admission of hearsay evidence where the declarant is unavailable to testify as a witness. *Johnson*, 118 Ill. 2d at 508-09. That rule provides that a declarant is unavailable if the statement is subject to privilege or if the witness persistently refuses to testify in spite of a court order to do so, is unable to remember the events about which he is meant to testify, or is unavailable due to death or illness. *Johnson*, 118 Ill. 2d at 509 (quoting Fed. R. Evid. 804(a)). The *Johnson* court observed that these reasons for unavailability "are substantial and therefore legally cognizable." *Johnson*, 118 Ill. 2d at 509. Although the court "embrace[d] the general principles" embodied in the Rule 804, it declined to adopt the list "as an exhaustive definition of 'unavailable' under Illinois law." *Johnson*, 118 Ill. 2d at 509.

¶ 42 Here, both witnesses were permanent residents and citizens of foreign nations. This fact means that the State had no power to compel them to attend the defendant's trial to testify live. See *Mancusi*, 408 U.S. at 212. It also means that they could not voluntarily return to the United States to testify live without incurring substantial travel expenses. Thus, the reason for their unavailability is "substantial" and thus legally sufficient under the reasoning of *Johnson*. Moreover, in *Mancusi*, the United States Supreme Court explicitly held that the fact that a witness was a permanent resident of

Sweden was sufficient to show that he was unavailable to testify. *Mancusi*, 408 U.S. at 211-13.

¶ 43 The defendant argues, however, that the court abused its discretion in admitting the depositions because the State did not renew its motion to allow the depositions in the second trial and made no showing that either witness was unable or unwilling to return to testify live at the defendant's second trial. We are not persuaded. As just discussed, the fact that both witnesses were permanent residents of foreign nations was sufficient to support a finding that they were unavailable; the State was not required to prove anything else.

¶ 44 We note that the defendant's second trial took place nearly four years after the court initially ruled that the depositions could be used at trial. Presumably, this is the reason the defendant complains that the State did not renew its request to use the depositions prior to the second trial. Implicit in this argument is a contention that the State was required to prove that the witnesses *remained* unavailable. It is worth noting that the defendant acknowledges that the circumstances underlying the court's initial decision to allow use of the depositions were unlikely to have changed. He states in his brief, "It appears that the witnesses were probably in Europe during the second trial." In any case, the court revisited the issue at a hearing on the defendant's motion to disallow use of the videotaped depositions in his second trial. The record contains neither a transcript nor bystander's report of that hearing, so we have no way to know what evidence was before the court relating to the continued unavailability of the witnesses. It was the defendant's burden, as appellant, to provide this court with a record that is

sufficiently complete to support his claims of error. We thus resolve any doubts left by gaps in the record in favor of the State as appellee. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). As such, we must presume that the evidence showed that the witnesses remained unavailable. We find no error or abuse of discretion in the court's decision to allow the State to present the videos of the depositions.

¶ 45 The defendant next argues that the court abused its discretion in refusing to give him an opportunity to present evidence of juror misconduct. We note that there is some confusion over whether the court made a substantive ruling in this regard. The defendant initially alleged that a new trial was warranted due to juror misconduct in his motion for a new trial, which the court struck as untimely. However, at the hearing on the State's motion to strike, the defendant requested that the court subpoena the male jurors to attempt to determine whether any of them drove to the crash scene as alleged by one of the jurors. The court expressly denied this request as a distinct ruling apart from its rulings on pending motions. Thus, we may review the court's decision to deny this request on the merits.

¶ 46 As a general matter, the testimony of jurors is not admissible to impeach the verdict. *People v. Hobley*, 182 Ill. 2d 404, 457 (1998). Thus, neither the affidavit nor testimony of a juror is admissible to show the "motive, method or process by which the jury reached its verdict." *People v. Holmes*, 69 Ill. 2d 507, 511 (1978). This rule, however, does not apply to juror affidavits or testimony offered to prove that there were "improper extraneous influences on the jury." *Hobley*, 182 Ill. 2d at 457-58. A jury verdict will not be set aside unless the extraneous matter creates " 'such a probability that

prejudice will result' " that the verdict must be " 'deemed inherently lacking in due process.' " *Holmes*, 69 Ill. 2d at 514 (quoting *Estes v. Texas*, 381 U.S. 532, 542-43 (1965)). This probability of prejudice can be demonstrated by showing that the extraneous information related directly to a crucial issue in the case and that it may have improperly influenced the jury's verdict. *Stallings v. Black & Decker (U.S.), Inc*., 342 Ill. App. 3d 676, 680-81 (2003); *Wade v. City of Chicago Heights*, 295 Ill. App. 3d 873, 888 (1998). In addition, a party seeking an evidentiary hearing on juror misconduct must offer "specific, detailed, and nonconjectural evidence" to support his claim of misconduct. *People v. Towns*, 157 Ill. 2d 90, 102 (1993); *People v. Willmer*, 396 Ill. App. 3d 175, 182 (2009). We do not believe the defendant has met that burden here.

¶ 47 The defendant did not provide the court with affidavits from any of the jurors. The only evidence he provided was the testimony of defense counsel's investigator. As discussed earlier, the majority of the jurors who were willing to speak with Profancik told him that they did not recall any problems arising during deliberations, and some specifically stated that they did not recall other jurors driving to the accident scene subsequent to the authorized visit they made as a group. One juror indicated that a male juror drove to the scene after prompting from Profancik. This is not the type of detailed, specific evidence the *Towns* court had in mind. See *Towns*, 157 Ill. 2d at 102; see also *Willmer*, 396 Ill. App. 3d at 178-83 (finding a juror's affidavit sufficient to meet the *Towns* standard where the juror alleged that he looked up an applicable statute online and discussed it with other jurors).

¶ 48 Moreover, it is not clear what type of extraneous information the juror possibly could have learned by driving to the crash site. For one thing, jurors had already visited the site in a court-sanctioned site view. As such, they had already seen the layout of the road. The defendant argues, however, that a juror may have driven to the site at night and gained information that could not be gathered from the court-ordered daytime viewing–presumably, he means information about the extent to which visibility was reduced by darkness. We are not persuaded.

¶ 49 Conditions at an accident site *can* constitute extraneous information with sufficient potential for prejudice to warrant reversal. See, *e.g.*, *Wade*, 295 Ill. App. 3d at 887-88. Here, visibility was at issue because the defendant contended that he could not have avoided the collision. However, jurors in this case had already viewed the site, and the salient facts related to visibility at night were not in dispute. Gerhold acknowledged that she did not turn on her flashing hazard lights and her break lights were not illuminated. Testimony of officers investigating the crash confirmed the defendant's evidence that there were no street lights in the vicinity and Gerhold's vehicle was not otherwise illuminated. Jurors were already aware of the dip in the road from their daytime visit to the site. The defendant testified that he saw the vehicle stopped in the road two seconds before the crash and could not have done anything to avoid the accident. The State did not dispute the defendant's testimony that he saw Gerhold's vehicle two seconds before impact. Instead, prosecutors countered with the opinion of the accident reconstruction specialist that normal reaction time was 1.6 seconds, thereby giving the defendant time to avoid the accident in spite of the limited visibility. Prosecutors also highlighted the

defendant's admission that he actually saw Gerhold's vehicle before he drove through the dip in the road and the evidence that he did not even attempt to brake. Thus, the defendant did not provide the court with any evidence that the juror may have obtained extraneous information that could have impacted the verdict.

¶ 50 In addition, while the defendant argues on appeal that a juror "may have" visited the crash site after dark, he presented no evidence to suggest that this was the case. His conjecture that it was possible is not enough to entitle him to an evidentiary hearing on juror misconduct. We find that the court properly denied the defendant's request to subpoena jurors.

¶ 51 Finally, the defendant argues that the court erred by considering serious harm to others–a factor inherent in the offense of aggravated DUI–as an aggravating factor when sentencing him. The State concedes that consideration of this factor was improper. See *People v. Conover*, 84 Ill. 2d 400, 404-05 (1981); *People v. Maxwell*, 167 Ill. App. 3d 849, 852 (1988). The State contends, however, that remand for consideration of the sentence is not necessary under the facts of this case because (1) the fact that the sentence was at the lower end of the permissible range indicates that the court placed little to no weight on the factor, and (2) the trial court had the opportunity to consider this same argument in ruling on the defendant's motion to reconsider sentence. We agree with the defendant that remand is necessary.

¶ 52 It is improper for a sentencing court to consider a factor that is inherent in the offense as a factor in aggravation because we presume that the legislature took the factor into account in determining an appropriate sentencing range for the offense. *Conover*, 84

Ill. 2d at 405. Serious harm to others is an element of the offense of aggravated DUI. 625 ILCS 5/11-501(d)(1)(C) (West 2006). Aggravated DUI involving the deaths of two or more people elevates what would otherwise be a Class A misdemeanor (625 ILCS 5/11-501(b-2) (West 2006)) to a felony with a prescribed sentencing range of 6 to 28 years (625 ILCS 5/11-501(d)(2) (West 2006)).

¶ 53 The State concedes that the court improperly considered the deaths of Jacqueline Schuering and Marcin Piwowarski as a factor in aggravation. However, as the State correctly points out, remand for a new sentencing hearing is not always required when the sentencing court considers an improper factor. Remand is unnecessary where it is clear from the record that the improper factor was given so little weight that we can assume it did not lead to a harsher sentence than would have been imposed had the court not considered it. See *People v. Bourke*, 96 Ill. 2d 327, 333 (1983); *Maxwell*, 167 Ill. App. 3d at 851-52. Relevant factors that guide our determination include (1) any comments made by the sentencing court either emphasizing or minimizing the improper factor, and (2) the extent to which the sentence imposed was less than the maximum sentence for the crime charged. *People v. Dowding*, 388 Ill. App. 3d 936, 945 (2009). Applying these factors to the facts at hand, we find that remand is necessary.

¶ 54 Here, the court explicitly stated that it considered the deaths of Jacqueline Schuering and Marcin Piwowarski as a factor in aggravation. The court did not make any comments that either emphasized or minimized any of the factors it considered. As the State points out, the 10-year sentence imposed was near the lower end of the sentencing range, a factor that can weigh in favor of a finding that the improper consideration was

accorded little weight. However, this fact alone is not dispositive. See, *e.g.*, *Maxwell*, 167 Ill. App. 3d at 853-54. We emphasize, moreover, that remand is necessary unless it is *clear* from the record that consideration of the improper factor did not impact the defendant's sentence. We do not believe we can say that on the record before us.

¶ 55 The court considered only three factors in aggravation, one of which was the defendant's prior history of criminal conduct. As the defendant points out, the court also considered the fact that the defendant did not have a significant prior criminal history and/or the fact that he led a law-abiding life since committing that offense as a factor in mitigation. It is unlikely that the court gave a great deal of weight to a single misdemeanor charge as a factor in aggravation, and whatever weight it did place on this factor was offset to some extent by the corresponding finding of a factor in mitigation. Considering the defendant's sentence was four years above the minimum, the court likely gave little weight to all of the aggravating factors it considered, and there is no indication it considered any factor to be the most important aggravating factor. For these reasons, it is impossible to determine whether, absent consideration of the improper factor, the court would have sentenced the defendant to 6 or 8 years instead of 10.

¶ 56 We also find no merit to the State's argument that remand is unnecessary due to the fact that the court had the opportunity to clarify and, if necessary, correct its ruling at the hearing on the defendant's motion to reconsider sentence. In denying that motion, the court stated only that it was familiar with the facts of the case and with all pleadings filed throughout the proceedings. In short, the court did not clarify the basis for its sentence when it had the opportunity to do so. As such, remand is necessary.

¶ 57 We reiterate that 10 years is toward the lower end of the prescribed sentence range for aggravated DUI. Thus, if the court chooses to impose the same sentence on remand, it would not necessarily be invalid. However, it is impossible to discern on this record whether the improper factor played a role in determining that sentence. Thus, we remand to allow the court to either clarify the role that factor played in the sentence imposed or reconsider the defendant's sentence without consideration of the serious harm to others.

¶ 58 For the foregoing reasons, we affirm the defendant's convictions, and we affirm the court's orders striking the defendant's motion for a new trial and denying his request to subpoena jurors about the alleged unauthorized site view. However, we vacate his sentence and remand the matter to the trial court for further proceedings consistent with this decision.

¶ 59 Convictions affirmed; sentence vacated; cause remanded with directions.