No. 2—09—0436
Order filed March 24, 2011

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 06—CF—955
GERALD GOLD,	)	Honorable Daniel B. Shanes,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Justices McLaren and Birkett concurred in the judgment.

ORDER

Held: The trial court properly admitted State expert's testimony regarding retrograde extrapolation; sufficient evidence existed that defendant proximately caused the death of the victim; and defendant's proposed modification to a jury instruction was properly denied.

In this case, defendant, Gerald Gold, was charged with various offenses after his vehicle struck a 40-year-old man, Thad Martens, who was walking his bicycle at night. Following a jury trial, defendant was convicted of two counts of aggravated driving under the influence (DUI) (resulting in bodily harm/death) (625 ILCS 5/11—501(d)(1)(C), (F) (West 2004)), and two counts of failure to report an accident involving personal injury/death (625 ILCS 5/11—401(b) (West

2004)). The trial court sentenced defendant to seven years' imprisonment. On appeal, defendant argues that the trial court erred by allowing a State expert witness to testify about his blood alcohol content (BAC) at the time of the accident using the retrograde extrapolation theory; that the State failed to prove beyond a reasonable doubt that the accident was the proximate cause of Martens' death; and that the trial court erred by refusing to modify a jury instruction to fit defendant's theory of the case. We affirm.

I. BACKGROUND

A. State's Witnesses

The following evidence was adduced at defendant's January 2009 trial. On August 14, 2004, at approximately 10:30 p.m., a paramedic saw a man later identified as Martens walking his bicycle northbound past the Deerfield Fire Department on Waukegan Road. Several hours later, around 1:40 a.m., defendant, an attorney, and his wife, Gabriela Gold, appeared at the Deerfield Police Station to report that defendant had struck someone with his minivan while driving northbound on Waukegan Road. Around 1:50 a.m., police followed defendant and his wife to the scene of the accident, which was a couple of miles from the fire department and near the Deerfield high school. At that location, it was dark; the speed limit was 45 m.p.h.; there were four lanes; and there was no sidewalk, only a guardrail with two feet of gutter. The paramedic responding to the scene realized that it was the same man he had seen earlier, Martens, who had been struck; his body was found in the grass about 20 feet from the guardrail.

Christina Larson worked the midnight shift as a 911 dispatcher at the Deerfield Police Department. When defendant spoke through the opening in the glass, Larson detected a "strong odor" of alcohol. Larson relayed this observation to another officer, Officer Rick Bernas. Larson

advised Deerfield Police Commander Marie Gawne that a couple in the lobby was very upset at having found a body near the Deerfield high school.

At the scene, Officer Bernas testified that defendant looked down at Martens and said that " 'he has been out here for about an hour.' " Once paramedics arrived, defendant and his wife returned to the police station. At the station, Officer Bernas noticed shards of glass on defendant, and he questioned defendant as to what had occurred.

Defendant advised Officer Bernas that he was driving his minivan to Wendy's around 11 p.m. or midnight when he struck something. He got out to see what had happened and saw a bicycle on the roadway. Defendant picked up the bicycle, put it on the other side of the guardrail, and then went home to get Gabriela's car to drive to Wendy's. Defendant did not see anything as he drove to Wendy's, so he went home and ate his food. Defendant further relayed that after he got home, his wife questioned him about the damage to the minivan, which included a broken side window, a broken front windshield, a broken side mirror, some damage to the turn signal, and a scrape mark on the right front bumper. Defendant told his wife that he had hit a bicycle, and they decided to return to the scene to figure out what had happened. After discovering Martens' body, they went home before coming to the station, and defendant took some anti-anxiety medication.

At trial, Gabriela offered a similar version of events. On August 14, she played Monopoly with her children until 11 p.m. or midnight, which was when she realized that defendant had left the house. When she discovered that defendant was not home, she noticed that defendant's minivan had suffered damage, and that he had taken her car. Defendant returned with food from Wendy's around 12:15 or 12:20 a.m., and she asked him what had happened to his minivan. Defendant replied that he had hit a bicycle, and she asked how a bicycle could cause so much damage. About 20 or 30

minutes later, she and defendant drove to the spot where he said he had hit the bicycle, although it was dark and they had trouble finding it. Eventually, Gabriela spotted glass on the road and they exited the car. Using a flashlight, they found the bicycle. They were looking for what had caused the damage, such as a post or something sticking out, when Gabriela saw a shoe. She then saw Martens' body. At this point, they were not thinking rationally; they were in shock and hysterical. Gabriela thought they should go to the police but defendant wanted to go home and get the damaged minivan to take to the police. Gabriela did not recall telling an officer that after they went home, they had a discussion lasting a few minutes about what to do. She also did not recall telling an officer that defendant went upstairs to take some medication for anxiety. Fifteen to twenty minutes elapsed from the time they found the body to the time they drove to the police station. Gabriela admitted that they should have gone directly to the police station. It was around 1:45 a.m. when defendant drove his minivan to the station, and she followed in her car.

During his questioning of defendant at the police station, Officer Bernas noticed that defendant had candy in his mouth, and he asked him to take it out. Defendant denied that he had been drinking. After Officer Bernas asked defendant if he would be willing to take a "test,"[1] defendant said he felt ill and began pacing back and forth in the hallway. Defendant was asked if he needed an ambulance, which he declined, saying he needed a drink of water. Approximately 15 minutes elapsed as defendant drank from the drinking fountain and paced. Defendant was then given the "test," after which he admitted to drinking two or three beers around 5 or 6 p.m. as he watched the White Sox game. Officer Bernas also administered two field sobriety tests: the one-legged test

[1]The "test" referred to a portable Breathalyzer test, evidence of which was not admissible to the jury.

and the walk and turn test. Defendant failed both tests. When Officer Bernas asked defendant if he suffered from any physical defects, defendant responded that he suffered from arthritis. According to Officer Bernas's alcohol influence report, defendant's breath had a moderate odor of alcohol at 3 a.m. At 3:19 a.m., defendant was asked to submit to a Breathalyzer. Defendant refused and was subsequently taken to the hospital for a mandatory blood draw, which occurred at 5:03 a.m. Officer Bernas arrested defendant for DUI. Defendant's residence was searched later that morning, which revealed packaging from Wendy's and two beer cans.

1. Retrograde Extrapolation Theory

State expert Mark Milford testified as follows. His credentials included a Bachelor's of Science in biology; a Master's of Science in criminal justice with a concentration in forensic science; 20 years' employment at the Northeastern Illinois Regional Crime Laboratory; specialized training in the detection of alcohol; and certification in toxicology and blood analysis. Milford, who had been previously qualified to testify in the areas of toxicology and drug chemistry, was accepted as an expert in both fields without objection.

Milford's testing of defendant's 5 a.m. blood draw from the hospital showed a BAC of .056. He then testified regarding the theory of retrograde extrapolation, which is where a blood test taken hours after the incident is used to determine the BAC at the time of the incident. Milford's training in this area was with the Illinois State Police. Milford explained that he had to make some assumptions before he performed the analysis, such as that the individual was "in relatively good health"; that the blood alcohol level had peaked and was on the way down; that no additional alcohol had been consumed from the time of the accident; and that the individual's metabolism was at a normal rate, meaning that the ability to break down the ethyl alcohol was within a range of .01 grams

per deciliter to .02 grams per deciliter. Milford explained that because individuals metabolized alcohol at different rates, the standard procedure was to calculate a range. The procedure involved taking the number of hours between the accident and the blood draw, multiplying it by .01 (the low range), and then adding that to the BAC at the time it was collected. If the individual had a higher metabolism rate, the number of hours would be multiplied by .02 (the higher range), before adding that to the BAC at the time it was collected. When asked if retrograde extrapolation was science or math, Milford answered "a little bit of both."

At this point, defense counsel objected on the basis that Milford was not qualified to offer testimony regarding retrograde extrapolation. Defense counsel argued that retrograde extrapolation was a separate field from toxicology or drug chemistry. The trial court disagreed, reasoning that retrograde extrapolation came between the two spheres of toxicology and drug chemistry.

Using the retrograde extrapolation theory, Milford testified that he used the 5 a.m. .056 BAC to calculate defendant's BAC 4½ hours earlier, at 12:35 a.m. When asked if he was able to make this calculation based on his training and education in forensic science, Milford replied as follows:

> "Yes, I did that. I mean this calculation I was first exposed to in my - you mentioned my training, current approaches in forensic toxicology and that was in Paduca, Kentucky in 1993. That's where I was first exposed to this calculation where we had a consortium of forensic toxicologists not only from Illinois but from other states and then once against I saw it in the Illinois State Police Training guidelines.
>
> I've implemented in to our training toxicology manual and that's what I would train in [*sic*] incoming toxicologists, and part of our accreditation procedures we have to show competency in our training manuals and during our last accreditation process which was in

November of 2007 I had the expert in my field overlook my training manual and it passed their criteria so it has been scrutinized by other people in the forensic community."

Over objection, Milford opined that defendant's BAC at 12:35 a.m. was "in the range from .100 grams per deciliter to .144 grams per deciliter." On cross-examination, Milford was asked if "any reasonably astute, well-organized school child who understands math can perform the same calculation," to which Milford replied that it was a "rather simple calculation." On redirect, Milford explained that retrograde extrapolation required knowing "the circumstances" and "average metabolism rate of alcohol."

2. Martens' Medical Condition

The record showed that before the accident, Martens was able to walk, talk, and feed himself, and he lived with his mother in Wisconsin. Martens was unable to drive and would ride his bicycle on long trips, sometimes staying overnight or longer. Martens kept in touch with his mother by calling her, and the last time she spoke to him was on August 11, 2004. Martens told her that he was heading home but wanted to visit his brother in Chicago.

When paramedics arrived at the scene of the accident, Martens was unconscious and unresponsive. He had vomited, his blood pressure was low, his body temperature was cool, his teeth were clenched shut, his breathing was very labored, he was pale, and there was a lot of swelling around his right eye. Martens was transported to Highland Park Hospital and then transferred by Flight for Life to Lutheran General Hospital, where Dr. Daniel Resnick treated him.

Dr. Resnick testified that Martens was unconscious, had a Glasgow coma scale of five, was mildly hypotensive and cold, had a chest tube in one side to release air or blood, and was intubated so that he could breathe. Multiple CT scans indicated that Martens had a head injury of "multiple

hemorrhagic foci," meaning "multiple small hemorrhages within the substance of his brain." Martens remained at the hospital for 30 days and showed some improvement, such as the fracture in his pelvis being fixated, his lung contusion being resolved, and his receiving a tracheotomy. When he left the hospital, Martens could not walk, speak, or sit up, and could not go to the bathroom or feed himself on his own. Dr. Resnick opined that Martens' prognosis for a functional recovery was "close to zero." He also stated that a delay in receiving treatment for a head injury would affect Martens' outcome.

Dr. Resnick was questioned about whether Martens also suffered from a brain tumor at the time of the accident. According to Dr. Resnick, there was no evidence of a brain tumor when he treated Martens, only a space where a brain tumor had been resected. Also, the neurosurgeon at Lutheran General involved in Martens' care was not concerned about a recurrent brain tumor. In treating Martens, Dr. Resnick would have known if at the time, Martens was under treatment for a brain tumor. To the best of his knowledge, Martens was not under such treatment at the time of the accident.

Dr. Resnick was informed that Martens died a few months later, in February 2005. When asked if his death was caused by being struck by a vehicle, Dr. Resnick replied that the "end result of his death was a result of essentially his irreparable head injury and his inability to get up and move around and function, which left him at risk for - this is what head-injured patients who don't recover, about 80 percent of them end up dying from some infectious complication." Dr. Resnick went on to say that this "is what - the head-injured patient in an extended care facility, 80 percent of them die from some infections complication, so I would say yes, his sepsis-related death was caused by his head injury."

From Lutheran General Hospital, Martens was transferred to a rehabilitation facility in Wisconsin, Lakeview Hospital, where he stayed for three months. Martens was still in a coma and unable to sit up or talk on his own. In addition, he had a breathing tube, a feeding tube, and an indwelling catheter. Martens' treating physician, Dr. James Howard Cohn, described his pace of recovery as slow and expected his continued recovery to be slow. At the time of his discharge, Martens was alert, breathing on his own, had a good temperature, and had good blood pressure. However, Martens was "essentially dependent for feeding, for toileting, for bathing, for dressing"; he still had tubes attached to his body. Dr. Cohn's assessment was that if given the opportunity, Martens would continue to make slow but gradual gains. Nevertheless, Martens was at a significantly high risk for infections based on the severity of his injuries. Dr. Cohn was aware that Martens had suffered a brain tumor, which rendered him unable to work, drive, and caused seizures. He was also aware that part of the tumor had been removed, but not all of it.

Martens, who still needed nursing home care after leaving Lakeview Hospital, was moved to a nursing home in Wisconsin. While in the nursing home, Martens was taken to the emergency room twice, where he eventually died. Dr. Ronda Ditter treated Martens in the hospital the day before he died, February 3, 2005. Martens had come in due to a 104 degree fever. He was hypoxic, meaning he was having trouble maintaining his own airway, and his blood pressure had dropped. Defendant had an indwelling catheter and a feeding tube, and he was unable to speak or sit up by himself. Dr. Ditter explained that because a human body is not designed to have artificial tubing, indwelling tubes frequently become infected with resistant bacteria. Martens' records indicated that he was a known carrier of many resistant bacteria, and that he had been sick for some time after becoming a quadriplegic. Antibiotics were administered but Martens' condition worsened, and he

was placed on a breathing machine. The next day, February 4, Martens became more and more hypertensive. Recognizing that every possible life-saving measure had been taken, Martens' mother decided to cease resuscitative efforts, and he died within minutes. In Dr. Ditter's opinion, the cause of death was sepsis, along with a urinary tract infection and probable pneumonia. A secondary cause of death was quadriplegia.

On cross-examination, Dr. Ditter admitted that no autopsy was performed. Dr. Ditter was aware that Martens suffered from a brain tumor. Although the tumor had been resected six years earlier, it was a terminal condition, meaning that Martens would eventually die from it. Dr. Ditter did not treat Martens for his tumor and did not know how long he was expected to live with that condition. Dr. Ditter clarified that the brain tumor did not cause the sepsis. Rather, the sepsis was the result of resistant bacterial infections caused by indwelling foreign bodies/tubes.

B. Defense Witnesses

The defense tendered Ronald Henson as an expert in the fields of blood alcohol testing, specimen collection, retrograde extrapolation, and field sobriety testing. Henson reviewed Milford's retrograde extrapolation calculation, and he opined that there was not enough information available in this case to perform that analysis. According to Henson, retrograde extrapolation required consideration of the impact of trauma, the individual's "body weight, consumption, times frames of consumption, total consumption, *** the alcohol, food sources, [and] body temperature." Henson further testified that Milford did not account for the medication taken by defendant before the blood draw.

On cross-examination, Henson admitted that he was not a toxicologist and that there was not enough information regarding defendant's medication for him to perform retrograde extrapolation

in this case; factoring in the medication was beyond his expertise. Despite not being qualified to conduct retrograde extrapolation in this case, Henson could still opine whether Milford performed the analysis correctly.

Defendant testified that on August 14, 2004, he watched a White Sox game on television at home that ended around 8:30 or 9 p.m. He drank two 16-oz. cans of beer during the game. After that, he went to the grocery store, returning home around 10:30 p.m. At 11:10 or 11:20 p.m., defendant drove to Wendy's to get something to eat while Gabriela played Monopoly in the kitchen with their daughter. As he drove north on Waukegan Road, "all of a sudden there was just glass coming from the passenger side window;" defendant had no idea what had happened. Defendant stopped his car, got out, and saw a bicycle by the guardrail. Defendant looked around but could not see anything because it was dark. He decided to drive home and get Gabriela's car. Driving the same route, he stopped again at the scene of the accident but still could not see or hear anything. Defendant proceeded to Wendy's for a cheeseburger and fries. When questioned about what time the accident occurred, defendant "could only guess at the exact time," which he thought ranged between 11:20 and 11:40 p.m.

Defendant returned home from Wendy's and sat down to eat. Gabriela then questioned him about the damage to the minivan, and about 10 to 15 minutes later, defendant finished his meal and they drove back to the scene. They brought a flashlight but had some trouble locating the bicycle. Finally, they found it, and Gabriela shined her flashlight in the area and discovered a shoe. It was then that they saw Martens' body. Defendant said that they needed to go home, get the minivan, and drive to the police station. They were hysterical, and defendant took some anti-anxiety medication

when they got home before going to the police. About 15 to 17 minutes elapsed from the time he realized that he had hit Martens to the time he reported it to the police.

C. Jury Instruction Conference & Renewed Objection to Milford's Testimony

At the jury instruction conference, defense counsel requested that the jury instructions regarding aggravated leaving the scene of an accident involving death or personal injury be modified to state that "the clock starts" when the defendant knows a person is involved as opposed to one hour from the accident. Otherwise, defense counsel argued, it could be a "strict liability" situation where the jury concluded that the accident happened more than one hour before defendant went to the police station. The trial court denied defense counsel's request. Because the jury instructions required that defendant know that he was involved in an accident involving a person, the court concluded that the instructions accurately stated the law. The court noted that the parties were free to argue reasonable inferences from the evidence and how the law applied to it.

Following the jury instruction conference, defense counsel renewed his motion to strike Milford's testimony regarding retrograde extrapolation. The trial court denied defense counsel's request.

D. Posttrial Matters

The jury acquitted defendant of reckless homicide and found him guilty of two counts of aggravated DUI (based on great bodily harm and death), and two counts of failing to report an accident involving personal injury or death.

Defendant moved for a new trial, arguing that: (1) he was not proven guilty of the offenses beyond a reasonable doubt; (2) the trial court erred by not modifying the jury instruction to read that he was required to report the accident within one hour of knowing that a person was involved in the

accident; and (3) by allowing Milford to testify regarding "retrograde extrapolation without the proper foundational evidence required to prove his expertise." Following the parties' oral arguments, the trial court denied defendant's posttrial motion.

Noting that the two aggravated DUI convictions merged into one offense, as did the two convictions of failure to report an accident, the trial court sentenced defendant to seven years' imprisonment for failing to report an accident, and 36 months' of "intensive probation" for the aggravated DUI.

Defendant timely appealed.

II. ANALYSIS

A. Retrograde Extrapolation

Defendant's first argument on appeal is that Milford was not qualified to offer an expert opinion regarding retrograde extrapolation because it is a separate field than toxicology or drug chemistry.

At the outset, the parties dispute the standard of review. While acknowledging that the abuse-of-discretion standard is the appropriate standard of review for the admission of expert testimony, defendant argues that the trial court "expressly invoked" *Frye* (see *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)) while discussing the admission of Milford's testimony. We disagree. The trial court's reference to *Frye* in this case recognized that defendant's challenge to Milford's testimony was *not* based on *Frye* but rather was based on whether Milford was qualified to offer an opinion regarding retrograde extrapolation. Whereas a *Frye* analysis is subject to *de novo* review, the decision as to whether an expert scientific witness is qualified to testify in a subject area is in the sound discretion of the trial court. *People v. Nelson*, 235 Ill. 2d 386, 430-31 (2009); *In re*

Commitment of Simons, 213 Ill. 2d 523, 530-31 (2004). Thus, we review the court's decision that Milford was qualified to render an opinion regarding retrograde extrapolation for an abuse of discretion.

Based on Milford's qualifications, we cannot say that the trial court abused its discretion in determining that he was qualified to testify as to defendant's BAC at the time of the accident. Without objection, Milford was qualified to testify in the areas of toxicology and drug chemistry, and the court determined that retrograde extrapolation fell between those two fields of expertise. Milford possessed a biology degree and a master's degree in criminal justice with a concentration in forensic science. He was first exposed to the theory of retrograde extrapolation in 1993. In his 20 years' employment at the Northeastern Illinois Regional Crime Laboratory, he had implemented retrograde analysis into his training toxicology manual, which had been "scrutinized" and "passed" as recently as 2007 pursuant to the applicable accreditation procedures. Based on these credentials, the trial court properly concluded that Milford had the requisite scientific background and education to understand and apply the principles regarding retrograde extrapolation.

Defendant's next challenge to Milford's testimony concerns the procedure itself. According to defendant, Milford's analysis omitted "impacting" variances including defendant's age (58), his arthritis, his overweight condition, his food consumption of a cheeseburger and fries, his ingestion of generic anti-anxiety medication, and the trauma associated with the accident. Milford explained that he had to make certain assumptions before performing the analysis, such as that the individual was in relatively good health; that the blood alcohol level had peaked and was on the way down; and that no additional alcohol had been consumed from the time of the accident. In addition, Milford explained that because individuals metabolized alcohol at different rates, that the standard procedure

was to calculate a range (.01 to .02). Using defendant's 5 a.m. BAC of .056, Milford calculated that defendant's BAC at 12:35 a.m. fell somewhere in the range of .100 to .144.

Defendant's argument lacks merit for two reasons. First, Milford testified on redirect that retrograde extrapolation required knowing "the circumstances" involved. Here, Milford's "assumptions" that defendant challenges were supported by the evidence. Aside from telling Officer Bernas that he had arthritis, there was no evidence that defendant was not in relatively good health. Also, defendant testified that he consumed two beers before the accident and no alcohol afterwards, meaning that his blood alcohol level had peaked and was on the way down. Milford further testified that he used a high to low range for calculating the rate at which defendant was able to metabolize alcohol.

Second, defendant's argument goes to the weight and not the admissibility of Milford's opinion. The factual basis for an expert's opinion generally does not affect his standing as an expert, and it is the jury which determines the weight of the opinion. *Petraski v. Thedos*, 382 Ill. App. 3d 22, 31 (2008). While opinions based on sheer speculation should be stricken as irrelevant, testimony based on expert analysis of the known physical facts is admissible. *Id.* at 31. In *Petraski*, the plaintiff challenged the expert's BAC opinion using retrograde extrapolation. The court determined that any questions about the facts upon which the expert based his opinion would go to the weight of the opinion, to be challenged on cross-examination. *Id.* at 32. Moreover, the expert's assumption that the driver's BAC level was in the elimination phase when her blood was drawn 1½ hours after the accident was not unwarranted. *Id.* at 31-32; see also *People v. Johnigk*, 111 Ill. App. 3d 941, 943 (1982) (in estimating the BAC at a time earlier than the sample was drawn, additional facts relating to the number of drinks consumed by defendant would go to the weight of the opinion and not to its

admissibility). In this case, defendant did not challenge the facts forming Milford's opinion on cross-examination. Instead, defendant elected to use his own expert, Henson, who testified that Milford did not have enough information in this case to perform a retrograde extrapolation analysis. According to Henson, Milford did not account for the medication taken by defendant prior to the blood draw. Moreover, Henson testified that retrograde extrapolation required consideration of trauma experienced from the accident; the individual's weight; the amount and time frame of alcohol consumption; food ingested; and body temperature. As the trial court reasoned, it was up to the jury in this case to determine how much weight to give Milford's opinion in light of Henson's testimony.

Defendant's final attack on Milford's expert testimony regarding retrograde extrapolation is based on *People v. Barham*, 337 Ill. App. 3d 1121 (2003), where the reviewing court reversed the defendant's convictions for reckless homicide. Despite defendant's contention that *Barham* is controlling here, it is distinguishable in several critical ways. First, the "expert" in that case, Cathy Anderson, lacked the credentials that Milford possessed. Although she was qualified to test blood samples for the presence of alcohol, there was no evidence that Anderson was qualified by education, training, or experience to explain retrograde extrapolation or to render any opinion regarding the rate of elimination of alcohol from the human system. *Barham*, 337 Ill. App. 3d 1133-34. Second, Anderson testified only that she was aware that the average rate of elimination (.010 to .020) was published in literature; she did not render an opinion of the defendant's BAC at the time of the accident. *Id.* at 1133-34. Third, the trial court recognized and admitted in open court that Anderson's testimony about the rate of elimination lacked foundation and would not have been admissible had it a been a jury trial (it was a bench trial). *Id.* at 1135. However, the trial court, relying on Anderson's inadmissible testimony, performed its own calculation of the defendant's

BAC at the time of the accident. *Id.* at 1135. As a result, the trial court improperly assumed the role of expert witness; it made a calculation which it was unqualified to make; and it deprived the defendant of the opportunity to test or rebut the evidence. *Id.* at 1135. Accordingly, the reviewing court refused to consider Anderson's testimony or the court's conclusion in evaluating the sufficiency of the evidence regarding proof of the defendant's intoxication. *Id.* at 1135.

None of the problems that *Barham* addressed are present here. As discussed, Milford was qualified to render an opinion on the theory of retrograde extrapolation; he explained how he arrived at defendant's BAC at the time of the accident; and defendant was allowed to challenge his testimony, which he did through his own expert, Henson. For all of these reasons, we are not persuaded by defendant's challenges to Milford's expert testimony regarding retrograde extrapolation.

As a final matter, the State argues that defendant has forfeited on appeal any argument that the "alcohol" swab used at the hospital to draw his blood somehow tainted the blood sample. The State points out that defendant has forfeited this issue by not raising it in his posttrial motion and by failing to seek review under the plain error doctrine. While this was a hotly debated issue at trial, we note that defendant makes brief mention of it on appeal. In any event, we agree with the State that the issue is forfeited, at the very least for failing to clearly define the issue and cite pertinent authority. See *People v. Banks*, 378 Ill. App. 3d 856, 872 (2007) (this court is entitled to have the issues clearly defined and to be cited pertinent authority; arguments that do not satisfy the requirements of Supreme Court Rule 341 do not merit consideration on appeal); Ill. S. Ct. R. 341(h)(7) (eff. Sept. 1, 2006).

B. Proximate Cause

Defendant's second argument on appeal is that the State failed to prove beyond a reasonable doubt that Martens' death was "causally connected" with being struck by defendant's vehicle. In analyzing this issue, we consider whether, viewing the evidence in the light most favorable to the State, any reasonable trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *People v. Amigon*, 239 Ill. 2d 71, 77 (2010). Therefore, we must affirm defendant's convictions unless no reasonable jury could have found that the State had proven the element of proximate cause beyond a reasonable doubt. *Id.* at 77.

The focus of the proximate cause theory of liability is whether the defendant's actions set in motion a chain of events which were or should have been within defendant's contemplation that ultimately caused the death of the decedent. *People v. Sims*, 374 Ill. App. 3d 231, 250 (2007). The State need not prove that defendant's acts constituted the sole and immediate cause of death, but rather must show that defendant's acts were a contributing cause of death, such that death did not result from a source unconnected with or independent of those acts. *Id. at* 250. A defendant's criminal acts are the proximate cause of a person's death if they contribute to that person's death and the death is not caused by an intervening event unrelated to the defendant's acts. *People v. Jones*, 376 Ill. App. 3d 372, 388 (2007).

In support of his position, defendant argues that: Martens' "disease was terminal;" Dr. Cohn testified that he expected Martens to have "continued recovery for a number of months - if not years," when he was discharged from the Lakeview Hospital; and no autopsy existed showing the cause of death. As we discuss, the evidence in this case supports the jury's conclusion that the State proved proximate cause beyond a reasonable doubt.

When paramedics arrived on the scene, Martens was unconscious and unresponsive; his blood pressure was low; his body temperature was cool; and his breathing was very labored. Martens was rushed to the hospital where several CT scans revealed multiple small hemorrhages in his brain. His treating physician, Dr. Resnick, testified that when Martens left the hospital 30 days later, he could not walk, speak, sit up, go to the bathroom, or feed himself on his own. Describing Martens' prognosis for a functional recovery as "close to zero," Dr. Resnick opined that the cause of Martens' death a few months later was his "irreparable head injury" which left him at risk for "some infectious complication." According to Dr. Resnick, Martens' "sepsis-related death was caused by his head injury." From the hospital, Martens was transferred to a rehabilitation center for three months. Dr. Cohn testified that though Martens made some progress, he was still dependent for feeding, bathing, going to the bathroom, and he still had tubes connected to his body. The severity of Martens' injuries, according to Dr. Cohn, placed him at a significantly high risk for infections. After Martens left the hospital, he still needed nursing home care. While in the nursing home, Martens developed a fever and went to the emergency room where Dr. Ronda Ditter treated him. Dr. Ditter testified that because a human body is not designed to have artificial tubing or indwelling tubes, these foreign bodies frequently become infected with resistant bacteria, and that Martens' records indicated that he was a known carrier of many resistant bacteria. While admitting that no autopsy was performed, Dr. Ditter stated that the cause of death was sepsis.

Defendant is correct that Martens' suffered a terminal condition involving a brain tumor. Although all three of Martens' treating physicians were aware that his brain tumor had been at least partially resected, none of them linked this condition to his death whatsoever. As our supreme court has stated, this is a case where defendant takes the victim as he finds him. See *People v. Brack*, 117

Ill. 2d 170, 178 (1987). Dr. Resnick testified that the neurosurgeon on his team was not concerned about a recurrent tumor, and that he did not believe that Martens was undergoing any treatment related to the tumor at the time of the accident. In a similar vein, Dr. Ditter testified that the brain tumor did not cause the sepsis that led to Martens' immediate death; rather, the sepsis was the result of resistant bacterial infections caused by Martens' indwelling tubes. It was up to the jury to decide the cause of death. See *Sims*, 374 Ill. App. 3d at 251. After hearing the evidence, the jury reasonably concluded that the accident, and not Martens' terminal condition, was the proximate cause of Martens' death.

Defendant's argument that Dr. Cohn expected Martens to recover is equally unpersuasive. Dr. Cohn qualified this statement by noting that Martens was at a significantly high risk for infections, meaning that *if* he did not fall victim to infection, his continued recovery would be slow. Sadly, Martens did succumb to infection in this case. Moreover, our supreme court recently rejected such an argument in *Amigon*. In *Amigon*, the victim died five years after he suffered gunshot wounds. Though the immediate cause of death was pneumonia, the physician in *Amigon* testified that the victim had "developed and succumbed to pneumonia because his paralyzing gunshot injury severely damaged his fourth cervical vertebra." *Amigon,* 239 Ill. 2d at 81. In other words, the victim ended up dying from "community bacteria" that a normal person his age would usually survive. *Id.* at 82. In reaching its decision, the court rejected the defendant's argument that the victim was returning to health in the time period between the injury and eventual death. The court reasoned that the existence of a time interval between the defendant's act and death does not preclude a causal link; this is true even where, during this interval, there has been an apparent recovery from the injuries inflicted. *Amigon*, 239 Ill. 2d at 79.

Also, we note that defendant phrases this issue in his brief as whether the "aggravated personal [injury]/death proximate cause jury instructions were tantamount to guilty-directed verdicts." However, as the State points out, defendant fails to expand on this argument, which results in forfeiture. See *Banks*, 378 Ill. App. 3d at 872 (arguments that do not satisfy the requirements of Supreme Court Rule 341 do not merit consideration on appeal).

C. Jury Instruction

Defendant's third argument on appeal is that the trial court erred by refusing to modify Illinois Pattern Jury Instructions, Criminal, Nos. 23.07 and 23.08 (4th ed. Supp. 2004) (hereinafter, IPI Criminal 4th Nos. 23.07, 23.08 (Supp. 2004)) to fit his theory of the case. These instructions pertain to the definition and issues of aggravated leaving the scene of an accident involving death or personal injury. Defendant argues that modified instructions were warranted to fit the unusual facts here, which was at what point the one-hour clock to report the accident commenced running.

The State's response is two-fold: first, that defendant forfeited this argument by failing to present his proposed non-IPI jury instruction in writing, and second, that the court properly denied his request for modification because the instruction accurately stated the law. We agree with the State's second rationale.

The function of jury instructions is to provide the jury with accurate legal principles to apply to the evidence so it can reach a correct conclusion. *People v. Pierce*, 226 Ill. 2d 470, 475 (2007). Jury instructions should not be misleading or confusing, and their correctness depends not on whether defense counsel can imagine a problematic meaning, but whether ordinary persons acting as jurors would fail to understand them. *People v. Bannister*, 232 Ill. 2d 52, 81 (2008). "If IPI

instructions contain an applicable instruction on a subject about which the trial court determines the jury should be instructed, the trial court *must* use that instruction, unless the court determines that the instruction does not accurately state the law." (Emphasis added.) *Id.* at 81. In other words, where a pattern instruction does not accurately state the law, Supreme Court Rule 451(a) (Ill. S. Ct. R. 451(a) (eff. July 1, 2006)) allows the trial court to modify it. *Id.* at 81. The decision whether to give a nonpattern instruction is within the trial court's discretion. *Id* at 81.

During the jury instruction conference, defense counsel specifically requested the court to modify the fourth proposition of the following IPI jury instruction:

> "To sustain the charge of aggravated leaving the scene of an accident involving death or personal injury, the State must prove the following propositions:
>
> *First Proposition:* That the defendant was the driver of a vehicle involved in a motor vehicle accident: and
>
> *Second Proposition:* That the motor vehicle accident resulted in a death or personal injury; and
>
> *Third Proposition:* That the defendant knew an accident had occurred: and
>
> *Fourth Proposition:* That the defendant knew that the accident involved another person; and
>
> *Fifth Proposition:* That the defendant *** failed to stop as close to the scene of the accident as possible without obstructing traffic more than necessary and forthwith return to the scene of the accident and remain at the scene of the accident until the defendant had performed the duty to give information and render aid; and

Sixth Proposition: That the defendant failed to report the accident within one hour at a nearby police station or sheriff's office, giving the place of the accident, the date, the approximate time, the defendant's name and address, the registration number of the vehicle driven, and the names of all other occupants of that vehicle." IPI Criminal 4th No. 23.08 (Supp. 2004).

Defense counsel wanted the fourth proposition to indicate that "the clock starts" running when the defendant knows a person is involved as opposed to one hour from the time of the accident. In making this argument, defense counsel advised the court that he did not have a problem with the State arguing that defendant knew from the very beginning that he had hit someone. Rather, defense counsel did not want the State arguing that defendant had only one hour from the time of the accident to report it, which would be a misstatement of the law. The court agreed that the State would not be allowed to misstate the law, but then commented that defense counsel's concern was addressed in the fourth proposition, which spoke for itself.

We agree with the trial court that the above IPI instruction does not misstate the law as to failure to report an accident involving personal injury or death. In *People v. Digirolamo*, 179 Ill. 2d 24 (1997), our supreme court confirmed that this offense requires that "the defendant had *knowledge* of an accident *involving a person.*" (Emphasis added.) *Id.* at 40. As the trial court recognized, proposition four accomplishes just that. The propositions, written in the conjunctive, require the jury to find that defendant was the driver of a vehicle involved in an accident; that the accident resulted in personal injury or death; that defendant knew an accident had occurred; that defendant *knew* that the accident *involved another person*; that defendant failed to remain at the scene until he had performed the duty to give information and render aid; and that defendant failed to report the

accident within one hour. The IPI instruction thus requires the jury to find that defendant had knowledge that another person was involved before it finds that he failed to report the accident within one hour. As written, the instruction alleviates the very confusion that defendant sought to avoid.

Furthermore, the parties' closing arguments with respect to that jury instruction were proper. In denying defense counsel's motion to modify the instruction, the court reiterated that the parties were free to argue reasonable inferences from the evidence and how the law applied to it. To this end, the State was allowed to argue that based on the shattered glass and the damage to his vehicle, defendant knew immediately that he had hit someone. However, the State was *not* allowed to argue that defendant had one hour to report the accident regardless of whether he knew that he had hit someone. Conversely, defense counsel argued that defendant did not realize that he had hit Martens until he returned to the scene of the accident with his wife. It was up to the jury to determine the time line regarding at what point defendant knew that he had hit someone and whether he reported the accident within one hour. For these reasons, we find no abuse of discretion on the issue of jury instructions.

To the extent that defendant argues that the State made improper remarks during closing argument about defendant being an attorney, this issue is forfeited. Defendant never objected to the comments and never raised the issue in his posttrial motion; therefore, it will not be considered on appeal. See *People v. Singleton*, 367 Ill. App. 3d 182, 190-91 (2006) (the defendant failed to preserve his argument that the State exceeded appropriate bounds during closing argument for review on appeal where he failed to object at trial or raise the issue in a posttrial motion).

III. CONCLUSION

For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed.

Affirmed.