No. 2—09—0422
Order filed February 1, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of McHenry County.
Plaintiff-Appellee,	)	
v.	)	No. 06—CF—576
EULALIO HARO,	)	Honorable Joseph P. Condon,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Hutchinson and Schostok concurred in the judgment.

ORDER

Held: The trial court properly admitted expert testimony concerning retrograde extrapolation of defendant's blood alcohol level at the time of the collision. Defendant's objections to the testimony, which were not properly raised in the trial court, went to the weight to be given to the testimony, not to the foundation of the testimony.

Defendant, Eulalio Haro, appeals from his convictions of aggravated driving under the influence (625 ILCS 5/11-501(a)(2), (d)(1)(F) (West 2004)) and failure to report an accident involving personal injury or death (625 ILCS 5/11-401(b), (d) (West 2004). We affirm.

At about 3:55 in the afternoon on June 24, 2006, Dean Knospe was killed when a maroon car hit him head-on while he drove his motorcycle on Route 14 in Woodstock. Defendant was arrested the following afternoon and charged with a single count each of aggravated driving under the influence, failure to report an accident involving personal injury or death, and reckless homicide (720 ILCS 5/9-3(a) (West 2004). A jury returned guilty verdicts on all three counts. The trial court denied defendant's motion for a new trial and sentenced defendant to consecutive terms of 14 years in prison for aggravated driving under the influence and 6 years for failure to report an accident involving personal injury or death.[1] This appeal followed.

I. FACTS

Dean Knospe died from multiple injuries suffered on June 24, 2006, when the motorcycle on which he was riding on Route 14 was struck head-on by a car that was driving into oncoming traffic.

Cynthia Miller testified that, at about 3:55 pm on June 24, 2006, she was driving westbound on Route 14 when she saw a maroon car coming up behind her, going about 60 miles per hour. The car passed her and attempted several times to pass the car ahead of her. The car eventually veered into oncoming traffic and hit a motorcycle. The maroon car only slowed as it moved into the right-hand lane; it never stopped. The maroon car then sped away. Miller described the driver of the car as a Hispanic man probably in his early twenties.

Dave Hinz testified that he was driving west on Route 14 on June 24 when he saw a "red-maroon Cavalier" straddling both westbound lanes and traveling about 15 miles per hour in a 35

[1]No sentence was imposed for reckless homicide, as it merged with the conviction of aggravated driving under the influence.

mile-per-hour stretch of road. After Hinz honked his horn, the Cavalier swerved right, "went flying back into on-coming lanes and kind of zigzagged back and forth, almost hit a - - rear ended another car." When they reached an intersection with a red light, the Cavalier was in the far right lane, while Hinz was in the left turn lane. Hinz stated that there was only one person, the driver, in the Cavalier, and he "appeared to be hunched over and sleeping, leaning sideways."

Kimberly Wirtz testified that, as she drove west on Route 14, she was passed by a "reddish sports car" going 15 to 20 miles per hour more than the posted 40 miles-per-hour speed limit. The driver was a male Hispanic. After it passed her, the car was "still driving quite erratically" as it passed the minivan in front of it. Eventually, after trying to pass another vehicle, the car "veered heavily to the right and then veered to the left" into oncoming traffic and hit a motorcycle. She did not see what the car did after it hit the motorcycle.

Aimee Cassell testified that she was a passenger in a minivan driving behind a motorcycle headed eastbound on Route 14 on June 24. A westbound car came into their lane and hit the motorcycle head-on. Initially, she could not see what happened to the motorcycle driver; however, as the car went back into its own lane and continued westbound, she could see the body being dragged under the car, which slowed down but never came to a complete stop. Once the body came out from under the car, the car "took off."

Officer James O'Doherty of the Woodstock police department testified that, on June 25, 2006, he was in the parking lot of an apartment complex at 2091 Stonelake Road looking for a vehicle that fit the description of the car that had left the scene of the collision the day before. He saw a car with front end damage and paint transfer that fit the description and matched up with some evidence left at the scene. O'Doherty called other officers and determined, with the help of an

assistant complex manager, who frequently drove the car and in what unit he lived. O'Doherty went to the back of the building, behind the unit, while other officers knocked at the front door. O'Doherty saw a man, whom he identified as defendant, run out onto the balcony "as if they [*sic*] were going to jump off." Defendant saw him and ran back inside. The balcony was approximately seven feet off the ground. Eventually, O'Doherty spoke with defendant inside the apartment. After talking about how close he was to his nephew, defendant "became somewhat remorseful" and told O'Doherty that "he thought he had hit something on the way back from Crystal Lake and wanted to tell us the truth."

Officer Louis Vasquez of the Woodstock police department testified that he spoke to defendant at 2091 Stonelake Road on June 25, 2006. Defendant told him that he had not been involved in an accident and that he had loaned his car to a friend whose name he did not know. If his friend had been involved in an accident, he did not know anything about it. Vasquez again spoke to defendant later that day, after defendant had made a statement to another officer. Defendant told Vasquez that he had been driving back from Crystal Lake when "his glass suddenly started to break. And he didn't know what happened. So he kept on driving."

Detective Jeff Parsons of the Woodstock police department testified that he went to 2091 Stonelake Road in Woodstock on June 25, 2006 to investigate a possible suspect vehicle that had been involved in the June 24 collision. He saw a "reddish colored Chevy Z24" with several cans of beer inside. The car had damage on the front and side. Parsons noticed what appeared to be blood and human flesh under the car. He had the car towed to another location, where he recovered hair and what he believed to be blood and flesh from the bottom of the car.

Parsons spoke to defendant at the police department sometime that afternoon. Defendant stated that the Chevy Z24 was his. Defendant said that he had been at a friend's garage in Crystal Lake on June 24 and had consumed one beer while his car was being fixed. When asked if he had been involved in the collision, defendant initially denied it; he then changed his answer to "he hit me; he came into my lane." When Parsons suggested that defendant hit a motorcycle, defendant said that he thought that he did. Defendant did not stop after the accident because he did not have a driver's license. He also made no effort to report the collision because his cousin, with whom he lived, "locks up the phone."

Parsons asked defendant if he had anything to drink "between the time of the motor vehicle accident and the time of the conversation" that they were having, and defendant stated that he had not. Parsons then administered a Breathalyzer test at 1:58 pm on June 25; the result was 0.025. Parsons again asked defendant if had anything to drink between the collision and their conversation; defendant again replied no. Parsons then took defendant to Memorial hospital, where defendant provided blood and urine samples, which were sent to the Illinois State Police crime lab for analysis.

On cross-examination, Parsons stated that there were five beer cans in defendant's car, but he did not think that all five were unopened. He did not recall smelling alcohol on defendant's breath on June 25. Defendant told him that he "wasn't drunk, honestly" before the accident and that the beer found in his car was purchased after the collision. Parsons admitted that he had asked defendant if he had had anything to drink "since last night," and defendant had told him no.

Dr. Daniel Brown, a forensic toxicologist, testified that he received a copy of the Woodstock police department report regarding the collision, which included information about the time of the collision and the times that samples of defendant's breath and blood were obtained. He also received

a report from the Illinois State Police laboratory report with results of testing done on defendant's blood. Brown relied on these reports in forming his opinion about defendant's intoxication at the time of the collision. Brown testified that, according to the reports, the Breathalyzer test conducted at 1:58 pm on June 25 revealed a level of "0.025 grams per deciliter for 210 liters of breath." The test of defendant's blood, conducted less than an hour later, revealed a reading of 0.006 per deciliter. Normal metabolic processes would have accounted for the decrease in the readings.

Brown then explained the process of retrograde extrapolation, used to "predict what the blood alcohol concentration at some prior time was." Alcohol is metabolized by a human body at a "relatively constant rate"; an "average" human metabolizes alcohol at a rate of 0.015 grams per deciliter of blood per hour. As an example, after 20 hours, one should metabolize .30 grams per deciliter "within a relatively reasonable range." If one has a human subject "in a pretty good state of health" with normal liver function, and knows the times of the occurrence and the analytical work, one can predict within a reasonable degree of scientific certainty the alcohol concentration at some prior time.

Brown stated that, in this case, he relied on the breath and blood results as well as the police report that stated that defendant "had not consumed any alcohol after the incident at four p.m. on June the 24th." The lack of additional alcohol consumption was "a very important piece of information." When Brown was asked if he had formed an opinion as to defendant's blood alcohol level at the time of the accident, defense counsel objected, stating "He has testified that there's a possibility that there's a range. And if he's going to narrow it to one particular numerical result, I would object to that." The trial court overruled the objection. Brown then testified that the "average metabolic processes" would indicate an "exceedingly high" blood alcohol of "approximately .35"

and that there would be "a range associated with that." The level of impairment one would expect to find in a person at that level varied; a "naive drinker," such as a college freshman, "may be nearly dead." A "heavy social drinker" would be exceedingly intoxicated but "probably functional to a certain extent." An alcoholic who "chronically abuses large amounts of alcohol" might be functional "to the point where they can manage to start their car and drive down the road."

On cross-examination, Brown stated that it was still possible to calculate a blood alcohol level via retrograde extrapolation if the subject consumed alcohol after a collision but before the test, so long as the amount of alcohol consumed during that period is known. In this case, he made his calculation on the assumption, obtained from the police report, that there was no alcohol consumed after the collision. Certain factors, such as food consumption and type of alcoholic beverage consumed, would have little or no impact on the extrapolation. Based on height and weight, defendant would have had to consume at least 14 alcoholic beverages to have a blood alcohol level of 0.356. When asked if he would be able to perform retrograde extrapolation if defendant had "several" alcoholic beverages after the collision, Brown stated that it would be "nice" to have the exact number of drinks to come up with as close an estimate as possible. Humans achieve about .02 grams per deciliter blood alcohol per drink. If defendant had consumed three drinks after the collision, Brown would subtract .06 from his calculation of .35 to arrive at a new result of .29.

Defendant rested without presenting any evidence.

II. ANALYSIS

Defendant first contends that the trial court erred in allowing the State to present the testimony of expert witness Dr. Daniel Brown. According to defendant, Brown's calculation of

defendant's blood alcohol content lacked a factual foundation because there was no evidence to support his assumption that defendant did not consume any alcohol after the collision.

We first note that defendant failed to raise this specific objection at the time that the testimony was given and also failed to raise it in his motion for a new trial. Both at trial and in his motion for a new trial, defendant objected to Brown testifying to a specific numerical result of defendant's blood alcohol level. Both an objection at trial and inclusion in a post-trial motion is necessary to preserve an issue for appeal. See *People v. Whirl*, 351 Ill. App. 3d 464, 466 (2004). Defendant acknowledges these deficiencies but argues that this court should review this issue as plain error. The plain error doctrine is an exception to the doctrine of forfeiture and permits the consideration of errors affecting substantial rights. *People v. McCormick*, 328 Ill. App. 3d 378, 381 (2002). This is a limited exception that will preserve an issue for review where the evidence is closely balanced or the error is of such magnitude that the defendant was denied a fair trial. *McCormick*, 328 Ill. App. 3d at 381. This court's first step in a plain error analysis is to determine whether a clear or obvious error occurred. See *People v. Ramsey*, No. 105942, 2010 WL 3911466, at *54 (Ill. Oct. 7, 2010) (Subject to revision or withdrawal.)

Defendant argues that Brown was allowed to give the jury his opinion on the ultimate issue of the case - whether defendant was driving under the influence of alcohol at the time of the collision - without a factual basis. Decisions concerning whether to admit expert testimony are left to the discretion of the trial court, and we review such rulings using the abuse of discretion standard. *People v. Adams*, 404 Ill. App. 3d 405, ___ (2010). However, the admission of expert testimony requires the proponent to lay an adequate foundation establishing that the information upon which the expert bases his opinion is reliable. *People v. Safford*, 392 Ill. App. 3d 212, 221 (2009). The

trial court must determine whether the foundational requirements have been met, and that is a question of law. *Safford*, 392 Ill. App. 3d at 221.

According to defendant, Brown based his calculation of a blood alcohol level on an incorrect factual basis. Brown testified that he based his calculation on the breath and blood lab results and the police report that stated that defendant "had not consumed any alcohol after the incident at four p.m. on June the 24th." The lack of additional alcohol consumption was "a very important piece of information." Defendant points out that, on cross-examination, Detective Parsons admitted that he asked defendant if he had had anything to drink "since last night," not whether he had had anything to drink after the collision. Defendant argues that, in light of this factual inconsistency, Brown's testimony lacked a factual basis, and the admission of this testimony was an error of great magnitude because expert testimony can "overpersuade in favor of the party introducing it." See *People v. Perry*, 147 Ill. App. 3d 272, 276 (1986). We disagree, and find that there was no error, let alone plain error, in the admission of Brown's testimony.

Brown's testimony did not lack a factual basis. Brown testified about the calculation used in retrograde extrapolation, the factors that he considered, and that his calculation was based on the information contained in the police report concerning defendant's lack of additional alcohol consumption after the collision. It was not based on speculation or conjecture such that it should have been stricken as irrelevant. See *Petraski v. Thedos*, 382 Ill. App. 3d 22, 31 (2008). Instead, it was an opinion based on known facts and assumptions, and it was admissible; it was for the jury to determine the weight to be given to the opinion. *Petraski*, 382 Ill. App. 3d at 31.

Defendant argues that the record "offers no reason to suppose" that he did not consume alcohol after the accident, as he was only asked if he had consumed alcohol "since last night."

However, this goes to the weight that the testimony, not to the foundation of the testimony. Only if there were uncontradicted evidence that defendant *had* consumed some certain amount of alcohol after the collision would the foundation of Brown's expert testimony be affected, as then the opinion would not conform to established facts. However, there is no evidence to suppose that defendant *did* consume alcohol after the collision. At most, Parsons testified that defendant told him that he had purchased the cans of beer found in his car after the collision, and some of the five cans were opened. Defendant had the opportunity to affirmatively establish that he had consumed some number of drinks after the collision. He did not do so. The only evidence regarding defendant's actual alcohol consumption on the day of the collision was defendant's statement to Parsons that he had had one beer before the accident.

In addition, Brown also testified on cross-examination that his calculations could take into account alcohol consumed in between the collision and the breath test. Brown testified that, based on .02 grams per deciliter blood alcohol per drink, if defendant had consumed three drinks after the collision, Brown would subtract .06 from his calculation of .35 to arrive at a new result of 0.29. However, there was no evidence presented that defendant consumed any alcohol after the collision. Brown's opinion was based on uncontradicted known facts and assumptions that provided an adequate foundation for his opinion. There was no error in the admission of Brown's testimony, let alone plain error.

Defendant next contends that his counsel was ineffective because he failed to object to the lack of foundation for Brown's opinion or to raise the issue in the posttrial motion. However, as we have already concluded, Brown's opinion was supported by an adequate foundation such that the

trial court did not err in admitting Brown's testimony. As there was no error, there can be no ineffective assistance of counsel.

III. CONCLUSION

For these reasons, the judgment of the circuit court of McHenry County is affirmed.

Affirmed.