Illinois Official Reports

Appellate Court

People v. Heineman, 2021 IL App (2d) 190689

Appellate Court Caption	THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RYAN J. HEINEMAN, Defendant-Appellant.
District & No.	Second District No. 2-19-0689
Filed	September 30, 2021
Decision Under Review	Appeal from the Circuit Court of McHenry County, No. 16-CF-629; the Hon. Sharon L. Prather, Judge, presiding.
Judgment	Affirmed in part and vacated in part. Cause remanded.
Counsel on Appeal	James E. Chadd, Thomas A. Lilien, and Fletcher P. Hamill, of State Appellate Defender's Office, of Elgin, for appellant. Patrick D. Kenneally, State's Attorney, of Woodstock (Patrick Delfino, Edward R. Psenicka, and Leslie Martin, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.

Panel JUSTICE BIRKETT delivered the judgment of the court, with opinion.
Justice Hudson concurred in the judgment and opinion.
Justice Brennan dissented, with opinion.

OPINION

¶ 1 Following a jury trial, defendant, Ryan J. Heineman, was found guilty of two counts of aggravated driving under the influence of alcohol (aggravated DUI) (625 ILCS 5/11-501(a)(1), (a)(2), (d)(1)(f) (West 2016)), following a single-vehicle crash that resulted in the death of Tanya McDonough, defendant's longtime friend. The trial court sentenced defendant to six years' imprisonment. Defendant appeals, arguing that (1) the State failed to prove that his blood alcohol concentration was at or above 0.08 grams per 100 milliliters of blood because it relied on lay testimony from Officer Mark Fisher, an investigating police officer, concerning the conversion factor in section 1286.40 of Title 20 of the Illinois Administrative Code (Administrative Code) (20 Ill. Adm. Code 1286.40 (2015)) to convert the results of defendant's blood serum alcohol concentration test into its whole blood equivalent, (2) the trial court erred in denying his posttrial motion to substitute counsel, and (3) the trial court improperly considered McDonough's death as an aggravating factor at sentencing because the death is a factor inherent in the offense. We conclude that, although the trial court did not abuse its discretion in allowing Fisher to testify as to his training and experience regarding the conversion factor in section 1286.40 of Title 20 of the Illinois Administrative Code (section 1286.40 conversion factor) to convert the results of defendant's blood serum alcohol concentration test into its whole blood equivalent, the trial court abused its discretion in denying defendant's motion to substitute counsel for posttrial proceedings where the record did not support its finding that the motion was merely a delaying tactic. Therefore, we affirm defendant's conviction but vacate his sentence and remand for new posttrial proceedings.

¶ 2 I. BACKGROUND

¶ 3 On August 11, 2016, defendant was indicted on two counts of aggravated DUI (625 ILCS 5/11-501(a)(1), (a)(2), (d)(1)(f) (West 2016)) following a single-vehicle accident that caused the death of his passenger, McDonough. Specifically, count I alleged that on June 26, 2016, defendant knowingly drove a motor vehicle while the alcohol concentration in his blood was 0.08 or more, in violation of section 11-501(a)(1) of the Illinois Vehicle Code (Code), which was the proximate cause of McDonough's death, in violation of section 11-501(d)(1)(F). Count II made the same allegations, except that it alleged that defendant was under the influence of alcohol in violation of section 11-501(a)(2) and that said violation was the proximate cause of McDonough's death, in violation of section 11-501(d)(1)(F).

¶ 4 The Trial

¶ 5 A jury trial was held over the course of three days. The evidence established the following. On the evening of June 25, 2016, and into the early morning of June 26, 2016, defendant and McDonough, who were neighbors and longtime friends, hosted a birthday party for McDonough at both of their houses. There were "at least 20, if not more" people at the party,

and all of the adults were drinking alcohol, including defendant and McDonough. Also at the party were McDonough's fiancé, Thomas Rice; McDonough's aunt, Michelle Moberg; and several of McDonough's friends, including Lynette Courtney and Theresa Valez. The partygoers frequently went back and forth between the residences.

¶ 6 Several witnesses testified that they observed defendant drinking "Jack [Daniel's whiskey] and Cokes" from a large plastic cup, as well as Jell-O shots, throughout the evening. Moberg, who had worked as a bartender, testified that she saw defendant pour himself and drink a 50/50 mixture of whiskey and Coke into a "big tumbler" that she estimated was three times larger than the average size that such a drink would be served at a bar. Moberg, who would see people drunk on a daily basis at her job, opined at trial that defendant was drunk that night, as did Courtney, Rice, and Valez. When Moberg first met defendant, he was "pretty quiet" and "not outspoken," but at the party, he was "[v]ery bouncy. Very alert. Just more talkative than he normally would be."

¶ 7 At around 1 a.m. on June 26, McDonough got into an argument with Rice, and she left the party on foot. Moberg began to chase after her, but she was tired and sore because she had spent the day packing and moving. At Moberg's request, her 16-year-old son, Justin, and his friend, Zachary, agreed to follow McDonough. Neither Justin nor Zachary drank alcohol at the party because they were underage.

¶ 8 Justin and Zachary found McDonough lying in a ditch by the side of State Park Road, and they helped her up. Defendant then arrived in his Jeep and pulled into the ditch, running over two "decent size[d] trees" in the process. Justin told defendant that he and McDonough should not be driving because they had both been drinking. McDonough got into the passenger seat of defendant's vehicle, and they drove back to defendant's house. Justin and Zachary did not get into defendant's vehicle because Justin knew that defendant had been drinking.

¶ 9 Justin and Zachary then walked back to McDonough's house. Justin testified that, as they approached the house, he saw defendant and McDonough leave in the Jeep again, with defendant driving and McDonough in the front passenger seat. On cross-examination, Justin could not recall stating in his video-recorded statement the day after the incident that, by the time Justin and Zachary arrived back at the party, defendant and McDonough had already left and he did not see defendant's Jeep pull away from the house. He stated at trial that, if he did make such a statement, "it was a mistake because [he] did see them leave."

¶ 10 The State's evidence established that, in the hours after defendant and McDonough left the party, Rice and Moberg both called defendant's cell phone several times. Rice's first attempt to call defendant occurred at 2:39 a.m., and Moberg's first attempt occurred at 2:45 a.m. Defendant answered neither call.

¶ 11 At 2:53 a.m., defendant returned Moberg's call, and the conversation lasted 24 minutes. Moberg testified that, during this call, defendant told her that he had been in an accident and that he was upside down in his car and trapped behind the steering wheel in his seatbelt. He also stated that he heard a woman screaming but did not know who it was because no one was in the car with him. Moberg recognized the screaming woman as McDonough, and she said to defendant, "Ryan, that's my niece. It's Tanya." She asked defendant where they were, and she heard defendant tell McDonough that he was on the phone with Moberg. McDonough then started screaming Moberg's first name, and she screamed "Sean." Moberg testified that McDonough called her "Aunty Shell" and stated that "Shell and Sean sounded alike." Moberg asked defendant where they were, but defendant replied that he did not know. Moberg told

defendant to get out of the car and go to the road so that she could find them. Moberg then drove around the area with Justin and Zachary, searching for the wreckage. At another point, Moberg and Rice "jumped on the four-wheeler" and spent "about an hour just going up and down [Route 12] trying to find them."

¶ 12 The State's exhibits showed that Moberg called defendant's phone seven more times between 3:18 a.m. and 5:20 a.m. The 3:18 a.m. call lasted nine minutes, and the 5:20 a.m. call lasted four minutes. Moberg testified that, during one of the conversations, Justin took her phone and put defendant on speaker phone. Justin told defendant to turn on his GPS tracking on his phone and stated that they would call the police to ask them to determine defendant's location. Defendant said "okay" but then stated that the only thing he could see on his phone was pornography. At that point, Moberg wondered if the phone call was a joke, and she was unsure whether there had really been an accident. Moberg called the police and ceased her search between 3 a.m. and 4 a.m. because they searched everywhere they could think of. Moberg testified that she had no doubt that defendant was driving the Jeep when it crashed because McDonough did not know how to drive. "She is afraid to. She would have never made it around the corner from the house." Several of McDonough's friends, including Courtney and Valez, testified that McDonough never drove, although Valez recalled a single occasion 11 or 12 years earlier when McDonough drove a car into town. Several witnesses also testified that McDonough did not have a driver's license but instead had only a state ID.

¶ 13 The State's exhibits also showed that Rice called defendant's cell phone eight times between 2:39 a.m. and 6:53 a.m. Rice testified that he called defendant because he wanted to determine where defendant and McDonough were and whether they were hurt. He tried to reach McDonough by calling her cell phone, but she did not answer. A call at 3:28 a.m. between Rice and defendant lasted for 19 minutes. During the call, defendant "said something about being in a ditch," but he kept "joking around like nothing was happening." Rice told defendant to turn on the GPS tracking on his phone, and defendant commented that he could look at pornography on his phone. Rice testified that defendant continued to joke around "like nothing was wrong." Rice warned defendant that he would call the police if he "wouldn't actually be serious." The State's exhibits established that Rice called 911 at 4:49 a.m. Rice opined that defendant sounded drunk.

¶ 14 Libertyville firefighter paramedic Steve Holtz was driving to work on the morning of June 26, 2016. After coming around a bend in the road along Route 12, Holtz saw defendant standing on the side of the road, holding a piece of debris, and staring off into the woods. Holtz wondered whether there was an accident because it "seemed weird that [defendant] was just standing there." As Holtz slowed down, he did not see a car wreck. He proceeded approximately 20 to 30 yards further down the road, and he observed a body lying in the ditch about two to three feet from the shoulder of the road. Holtz turned around and parked in an area between the body and defendant. He asked defendant what happened, but defendant replied that he did not know. Holtz asked if the woman lying in the ditch was okay, and defendant replied that he did not know. Holtz called 911 and checked the woman's pulse, but she did not have one. He also observed that the woman's lips were blue, she had significant injuries to her legs, and her skin was very pale and cool to the touch. Holtz told the 911 dispatcher that he believed the woman was dead. Holtz again asked defendant what happened, as well as how long they had been out there. Defendant again stated that he did not know. In response to further questions, defendant told Holtz that he had come from a party but he did

not know why they were out by the roadside. Defendant told Holtz that they should not have left the party. Once Holtz noticed a car "almost directly behind [them] up in a tree," he assumed they came from the car, and he asked defendant if anyone else was inside the vehicle. Defendant replied that he did not know. Holtz described defendant as confused and disoriented, but he did not detect an odor of alcohol during their conversation and did not observe any problems with defendant's speech.

¶ 15 Patrol Sergeant Jason Hintz of the Spring Grove Police Department was the first officer to respond to the scene. He was dispatched to the area at approximately 6 a.m. Defendant told Hintz that he did not know what happened or how he got to that area. Defendant stated that he woke up in the ditch next to McDonough. Defendant also stated that he did not know who was driving and that no one should have been driving. Hintz did not see defendant's vehicle when he initially arrived on the scene, but after taking a closer look, he was able to see the front end of the vehicle, which was "just barely protruding out from the heavy brush," about 30 feet away. Paramedics arrived and treated defendant in the ambulance. Hintz asked defendant if he had received any phone calls. Defendant stated that he did not remember making any phone calls, and he voluntarily handed Hintz his cell phone. Hintz later obtained a search warrant for defendant's cell phone, but he was unable to access it because neither passcode that defendant provided him unlocked the phone. Hintz did not detect an odor of alcohol coming from defendant, and defendant did not slur his speech in the brief conversation he had with him.

¶ 16 Firefighter paramedic Lawrence VanHoorelbek arrived at the scene at 6:20 a.m. He observed defendant sitting near the ditch and McDonough lying beside him. VanHoorelbek asked defendant what had happened, but defendant stated that he could not recall. Defendant was reluctant to get into the ambulance because he did not want to leave McDonough. Defendant was eventually treated and transported to the hospital. VanHoorelbek observed that defendant had abrasions to his forehead, knees, and lower legs, as well as contusions on his left shoulder and right hip. Based on his experience as a firefighter paramedic, VanHoorelbek opined that contusions such as those were consistent with wearing a driver's side seatbelt at the time of a vehicle crash. VanHoorelbek's partner, firefighter paramedic Nicole McDevitt, attended to McDonough. McDevitt did not see the vehicle at first, but it was later pointed out to her, and she observed that it was "up on a berm probably about 15 feet away from" McDonough. McDevitt checked McDonough for cardiac activity and for any signs of life, but she had neither. McDonough was "cold," which McDevitt testified meant that she had "no circulation or profusion [*sic*] for quite some time."

¶ 17 Officer Jack Zumwalt of the McHenry Police Department interviewed defendant in the emergency room at approximately 8 a.m. on the morning of the crash. Zumwalt read defendant his *Miranda* rights (see *Miranda v. Arizona*, 384 U.S. 436 (1966)), and defendant acknowledged those rights and signed a written waiver. Defendant stated that the last thing he could remember before the crash was being at a large bonfire at the party. The next thing defendant could remember was waking up in a ditch next to the road. He could not recall how he got there, and he could not recall anything from the time of the bonfire until he awoke in the ditch.

¶ 18 Zumwalt described defendant's speech as "thick-tongued." Defendant's speech was "not slurred necessarily, but cotton mouth of sorts." Defendant's eyes were "glassy and bloodshot." Defendant told Zumwalt that he had "about three to four glasses of Jack and Coke" but he kept spilling them and thus did not consume the full amount of alcohol in the cups. Defendant stated

that he also had some Jell-O shots. Defendant told Zumwalt that, the night of the party, he hid his car keys so that no one would drive his Jeep, and he said that no one but him was allowed to drive his Jeep because it ran on a special type of fuel. On cross-examination, Zumwalt acknowledged that he wrote in his report that defendant had allowed others to drive his Jeep in the past, but he said defendant specified that McDonough had not driven it. Defendant allowed Zumwalt to photograph his injuries, which included abrasions to his face, shoulders, and waist.

¶ 19 The State produced other evidence at the trial concerning the crash scene. Photographs admitted into evidence showed tire marks and furrows leading from the eastbound lane of Route 12, across the westbound lane, through some gravel on the side of the road, through a grassy ditch, and into a stand of trees where defendant's Jeep was found. Jeep parts and other debris were scattered along the path leading into the trees. Included in the debris were the Jeep's rear axle, the Jeep's luggage rack, and two empty "airplane bottles" of vodka. The Jeep was among the trees, about 30 feet from the roadway. The Jeep was severely damaged, with the passenger's side far more damaged than the driver's side—the front passenger's seat was folded in on itself, and foliage was poking up through the passenger's side window. The airbags had deployed, the driver's seatbelt was secured in its buckle, but the passenger seatbelt was not. DNA consistent with that of defendant was recovered from both the driver's and the passenger's airbags, as well as from the driver's seatbelt. The DNA samples obtained at the scene were inconsistent with McDonough's DNA.

¶ 20 Forensic pathologist Mark Witeck testified as an expert in forensic pathology. He performed an autopsy on McDonough, which revealed fractures to the base of her skull, right shoulder, right thigh, right femur bone, left tibia, left fibula, and pelvis and multiple rib fractures on both sides. McDonough also had bleeding in and around her brain, in her chest cavity and in her abdominal cavity, with lacerations to her liver and urinary bladder. Witeck noted that McDonough had abrasions, bruises, and lacerations on the outside of her body, including her head, torso, and extremities. McDonough's blood alcohol concentration at the time of her death was 0.137%. Witeck opined that, to a reasonable degree of medical certainty, McDonough's death was caused by multiple injuries sustained in a motor vehicle crash. He further opined that it was possible, but highly unlikely, that someone with those injuries would have been able to either walk or crawl, and he stressed that McDonough had, in addition to fractures to her pelvis and legs, injuries to her skull and brain.

¶ 21 Emergency room physician Archana Reddy testified that she treated defendant on the morning of June 26, 2016. Reddy ordered a blood test because defendant "appeared intoxicated." Defendant's blood was drawn at 7:24 a.m. The results of the test showed that defendant's blood serum alcohol concentration was 155 milligrams per deciliter, which was an "elevated level, a high level." Based on Reddy's training and experience, defendant's blood serum alcohol concentration demonstrated that defendant was intoxicated. On cross-examination, Reddy testified that there was no "conversion done to whole blood," but she clarified that "we always order serum," as opposed to a whole blood alcohol test. She was not familiar with the "difference between serum alcohol and whole blood alcohol."

¶ 22 Emergency room nurse Kathleen Bolanowski testified that she treated defendant in the emergency room. She observed bruises on the right side of defendant's face, an abrasion on his left shoulder, and bruising on his right hip and both knees. She described the bruising on defendant's shoulder and hip as a "seat belt mark." Bolanowski drew defendant's blood, on

Reddy's order, within 15 minutes of when he arrived in the emergency room. The lab results showed that defendant's blood serum alcohol concentration was 155 milligrams per deciliter of serum. Bolanowski testified that anything "greater than 80 milligrams per deciliter [was considered] intoxicated." She explained that "when a person is greater than 80 [milligrams per deciliter], we can say that possibly their behavior, their mental status *** [or] anything out of the ordinary *** is related to alcohol," as opposed to a head injury or a neurological problem. She further testified that she could smell alcohol on defendant's breath. Still, defendant's speech was clear, and he was alert and cooperative.

¶ 23 Fisher, who was one of the officers who investigated defendant's case, testified that he was a police officer for the City of McHenry and had worked in that capacity for over 19 years. He testified that he was familiar with section 1286.40 of Title 20 of the Administrative Code and that he had received training on it "throughout the years." He described this section of the Administrative Code as providing a mathematical formula for converting a blood serum or blood plasma alcohol concentration into a whole blood equivalent.

¶ 24 When the State asked Fisher to provide the formula, defense counsel objected on the basis that Fisher was not an expert in the field of toxicology. Outside the presence of the jury, the State argued that, based on *People v. Stipp*, 349 Ill. App. 3d 955 (2004), expert witness testimony was unnecessary to establish the conversion factor between blood serum alcohol concentration and whole blood alcohol concentration because it was codified in section 1286.40. The State further argued that, because "it's a mathematical equation[,] [a]nybody with a calculator could do it." The State also noted that the results of defendant's blood serum test were entered into evidence without objection. Conversely, defense counsel argued that *Stipp* was distinguishable because, there, the parties agreed to apply the conversion factor, unlike here. Defense counsel further argued that he could not meaningfully cross-examine Fisher because "he's not going to know anything about what could possibly affect or impact that conversion. He is just going to say a mathematical equation, [but] I can't cross-examine the equation." Counsel also pointed to *People v. Love*, 2013 IL App (3d) 120113, and argued that a cautionary jury instruction was needed to inform the jury that it need not accept the conversion factor as a conclusive fact. Expressly relying on *Stipp*, the trial court overruled defense counsel's objection, and it stated that it would revisit the jury instruction issue later.

¶ 25 After the jury returned to the courtroom, Fisher testified that he learned of defendant's blood serum alcohol concentration test results during the course of the investigation, and that to apply the conversion formula to those results, "[y]ou would divide the blood serum level, which in this case is .155, by 1.18 to get a [whole blood alcohol concentration of] [.]131." Fisher agreed that defendant's converted whole blood alcohol concentration level exceeded the legal limit for driving under the influence of alcohol in Illinois.

¶ 26 Defendant called no witnesses in his case-in-chief. Instead, he sought only to admit a number of exhibits, including the video-recorded interview of Justin by a detective, which defense counsel argued contained "some impeachment material." After hearing argument outside the presence of the jury, the trial court allowed defendant to play for the jury the portion of Justin's recorded interview that the State conceded was "different than what he said on the stand," namely, when he testified that he observed defendant's Jeep pull out of the driveway and exit the subdivision just prior to the fatal collision, with defendant driving and McDonough in the passenger seat. Without objection, the trial court also admitted exhibits documenting defendant's injuries, including medical records and photographs, as well as photographs of the

vehicle wreckage.

¶ 27 Jury Instructions and Verdict

¶ 28 During the jury instructions conference, defense counsel tendered a nonpattern jury instruction modeled after Illinois Pattern Jury Instructions, Criminal, No. 23.30A (4th ed. 2000) (hereinafter IPI Criminal 4th) but that, based on *Love*, cautioned the jury that it was not required to accept the section 1286.40 conversion factor. The State objected to the instruction, pointing out that it did not ask the trial court to take judicial notice of the section 1286.40 conversion, as was the case in *Love*, but that, rather, evidence of the conversion factor was introduced through Fisher's testimony, which was subject to cross-examination.

¶ 29 The trial court refused defense counsel's jury instruction.[1] In so ruling, it reasoned that *Love* was distinguishable because, there, the court took judicial notice of the Administrative Code such that, under Illinois Rule of Evidence 201(g) (eff. Jan. 1, 2011), the court was required to inform the jury that it was not required to accept the section 1286.40 conversion factor as a judicially noticed conclusive fact. Conversely, here, the court stressed that it did not take judicial notice of section 1286.40 but that instead, the State presented the conversion factor through Fisher, who testified that he was a police officer, that he was familiar with section 1286.40, and that he had received training on it. The court reasoned that a limiting instruction was unnecessary because the jury was free to accept or reject Fisher's testimony, just as it could for any witness. Additionally, relying on *Stipp*, the court agreed with the State that it did not need to present the conversion factor through an expert witness because the conversion factor is a mathematical equation that the jury could "apply *** themselves without having an expert witness to explain it."

¶ 30 During closing arguments, the State argued separately that the evidence proved all of the elements of both counts of aggravated DUI. It noted that the elements were identical for both counts, save for one proposition. Regarding count I, the State noted that it was required to prove that the alcohol concentration in defendant's blood was 0.08 or more. In support, the State argued that the evidence established that defendant's blood was tested some four hours after the crash and the results demonstrated that defendant's "BAC is still a .131. *** Therefore, you know at the time of the accident[,] he's way over a .08." With respect to count II, the State noted that it was required to prove that defendant was under the influence of alcohol. In support, the State recounted several pieces of evidence, including, as relevant here, that the converted whole blood alcohol concentration test showed that defendant's blood alcohol concentration was 0.131, which, again, was obtained some four hours after the crash.

¶ 31 On February 25, 2019, the jury found defendant guilty on both counts of aggravated DUI. The trial court scheduled a sentencing hearing for April 5, 2019. The State also requested that defendant's bond be revoked, but the trial court denied the request. Instead, it ordered that defendant be put on a home monitor electronic bracelet and surrender his passport.

¶ 32 Motions to Withdraw and for Leave to Enter

¶ 33 On March 22, 2019, defendant's attorney since December 2016, Martin LaScola, filed a motion to withdraw and attorney Raymond Wigell filed a motion for leave to enter his

[1]Defendant makes no argument on appeal that the trial court erred in refusing this jury instruction.

appearance as defendant's counsel (collectively, motion to substitute counsel). That same day, Wigell also filed a motion for a new trial, arguing that defendant was not proven guilty of either charge beyond a reasonable doubt and that defendant's rights under the state and federal constitutions were violated. Wigell asked the trial court to set aside the guilty findings, grant defendant a new trial as to either or both convictions, allow counsel time to obtain and review the record, and allow him to file a supplemental motion for a new trial after the materials could be reviewed.

¶ 34 At a hearing on March 29, 2019, the trial court asked defendant why he wished to have new counsel, noting that LaScola had represented defendant for "an extended period of time, and [had] done a very good job." Defendant responded that Wigell was "more versed in the post-trial motions." The court disagreed with that opinion and stated that LaScola had tried the case, knew what all the facts were, and was therefore "in a much better position to file a post-trial motion." When asked, defendant denied "having problems" with LaScola, and he reiterated that the reason he wished to have new counsel was "just the experience with post-trial motions."

¶ 35 The court denied the motion to substitute counsel, stating that it viewed the motion as a delay tactic. The court stressed that a sentencing hearing was scheduled for the following week, that the case had pended for three years, and that the case had been continued over 20 times on defendant's motions. The trial court explained:

> "I understand that you are entitled to an attorney of your choice, but at this point in the proceedings, whether the court allows that or not is within the court's discretion. Based upon the status of the case, the length of time that it's been pending, [and] the length of the time that Mr. LaScola has represented you, I'm not going to grant your motion just because you think somebody else may be better versed in post-trial motions, which is not true because [Wigell] has not been in the case at all. Motion is denied."

¶ 36 Following the trial court's ruling, Wigell asked for leave to file an appearance as co-counsel, which the trial court allowed. Wigell requested additional time to have "an opportunity to coordinate with Mr. LaScola and read the entire court record," but the trial court denied the request, stating "It's not going to happen, counsel. This is a delay tactic." The court further explained that:

> "Mr. La[S]cola remains as counsel in this case. He tried the case. He's very familiar with all the facts and circumstances surrounding the trial. He's very familiar and quite capable of alleging any errors that he believes occurred during the course of the trial in a post-trial motion."

Wigell noted "one open area, with certainly complete respect for Mr. LaScola, is ineffective assistance of counsel." The trial court interjected that it saw nothing to suggest that LaScola had been ineffective, and it stressed that defendant had stated that he wanted new counsel only because he thought Wigell was better versed in posttrial motions and had denied having any problems with LaScola. The trial court did, however, grant defendant two additional weeks to file an amended motion for a new trial, which the court acknowledged was not enough time for Wigell to get the transcripts and review the record. The trial court rescheduled defendant's sentencing hearing for April 26, 2019. The State renewed its motion to revoke defendant's bond, which the trial court granted "in light of the fact that the sentencing hearing is now being

delayed."

¶ 37 Posttrial Proceedings and Sentencing Hearing

¶ 38 On April 18, 2019, Wigell filed a supplemental motion for a new trial, without the benefit of transcripts. At the hearing on April 26, 2019, the State, citing a potential "scenario where the appellate court in a year and half sends this back here for another sentencing hearing because counsel doesn't have the transcripts," stated that it had no objection to holding the hearing on the posttrial motion and sentencing in June 2019, specifically because Wigell stated that his office spoke with the court reporter and learned that the transcripts would be available in two to four weeks. The court granted defendant an additional 30 days, but it stated that it would not grant further extensions. The court explained:

> "There was very good reason why the court denied your request on the last occasion, counsel. I reviewed the record in the case. The case is very old. It's been pending since '16. If I allowed you to file an appearance in this case and allowed Mr. LaScola to withdraw, [Wigell] would be the fourth attorney in the case. The case has been continued 25 times on defense motion. Mr. LaScola has represented defendant since December of '16. He's represented him through all pretrial motions. He's represented him on a motion to suppress. I've never heard one complaint from [defendant] regarding Mr. LaScola's performance in this case. I don't want it delayed any further than a month."

The trial court rescheduled the hearing for defendant's motion for a new trial and for sentencing to June 12, 2019.

¶ 39 Wigell ultimately filed three supplemental motions for a new trial, and each motion incorporated the claims raised in the prior motions, as well as raised its own distinct claims. In part, the supplemental motions alleged that the trial court erred by (1) allowing Fisher to testify as a lay witness concerning the section 1286.40 conversion factor when it should have been introduced through an expert, (2) refusing LaScola's jury instruction that the jury could disbelieve Fisher's testimony concerning said conversion factor, and (3) denying defendant's motion to substitute counsel. The motions also alleged that LaScola rendered ineffective assistance of counsel in several respects. Specifically, Wigell asserted that LaScola was ineffective by not calling an expert witness (1) to counter Fisher's lay testimony regarding the relationship between blood serum alcohol concentration and whole blood alcohol concentration, (2) to "discuss the metabolism and absorption of alcohol into the bloodstream" and who could have testified as to deficiencies in the testing, and (3) to testify as to the DNA that was recovered from the crash. Wigell also alleged other examples of LaScola's alleged ineffectiveness, including his failure to object to several witnesses' testimony that McDonough never drove, failing to ask the witnesses who testified concerning seatbelt injuries whether a backseat driver's side seatbelt could cause the same injuries as would a driver's seatbelt, and failing to subpoena the hospital concerning its procedures for evaluating blood serum alcohol concentrations. Wigell signed the supplemental motions, but LaScola did not.

¶ 40 On June 12, 2019, the trial court held a hearing on defendant's motion for a new trial and for sentencing. LaScola and Wigell both appeared as co-counsel. Wigell provided a brief argument touching on several claims, but then he moved on to the allegation that LaScola provided ineffective assistance of counsel. He stated that LaScola

> "sitting to my right, did a very good job. But like all of us, there were some faults there. I think he could have done more. And some of the things he could have done, I do believe, meet the level of a *Strickland* standard that if he had done them or if he had not done them, it could have affected the result. Specifically, regarding the certain expert witnesses and certain concepts connected with the DNA evidence."

¶ 41 In response, the State noted that many of the issues raised in the motion for a new trial arose at trial, and it stood on its earlier statements and arguments regarding the same. The State then addressed the ineffective assistance of counsel claim, and it commented that "any notion that Mr. LaScola was ineffective, the [P]eople find that to be preposterous." The State further asserted that LaScola's presentation of the evidence was admirable and that "he was a very worthy opponent."

¶ 42 The trial court denied defendant's motion for a new trial. It stated that "defendant is not entitled to a perfect trial. He's entitled to a fair one. He had a fair one." Addressing the claim of ineffective assistance of counsel, the court stated that it agreed with the State that it did not see any indication that LaScola was ineffective and that, indeed, he did "an outstanding job," and "all that he could." It continued, stating that LaScola was "not responsible for the result."

¶ 43 The matter then proceeded to the sentencing hearing. The presentence investigation report (PSI) showed that defendant was 36 years old at the time of sentencing. His adult criminal record consisted of two misdemeanors in 2002 and more than one dozen petty traffic offenses. The PSI showed that defendant was married from 2008 to 2015 and he and his ex-wife shared custody of their teenage daughter. He was employed from 2001 through the date of the sentencing hearing, most recently as a system analyst/programmer for General Kinematics in Crystal Lake, where he had received high marks in all aspects of his work. Indeed, his employer continued to consult with him on work-related business even while he was incarcerated. The State's evidence in aggravation consisted of victim impact statements from McDonough's mother, daughter, and aunt, detailing the devastating impact her death had on their lives. In mitigation, defendant's daughter testified that defendant played an important role in her life and she feared that they would lose their special bond. Defendant made a statement in allocution, wherein he stated that he was "really sorry for the pain the incident caused," and he said that he was McDonough's best friend and that she was at his house "all the time." Regarding the night of the crash, he stated that he did not "recall much, but every couple of days, [defendant has] a nightmare" that always "ends with Tanya." Defendant said that the crash is "something [he] will have to live with forever" and that he did not "think it's fair that [he] was the only person to walk away [from the crash]."

¶ 44 The State requested that the trial court sentence defendant to prison. Wigell argued that defendant's background presented the "extraordinary circumstances" that warranted a sentence of probation as contemplated by section 11-501(d)(2)(G) of the Code (625 ILCS 5/11-501(d)(2)(G) (West 2018)). In the alternative, Wigell requested the minimum sentence of three years imprisonment, while acknowledging that the sentencing range provided for up to a 14-year sentence.

¶ 45 The trial court merged both counts and sentenced defendant on count I to six years' imprisonment. In so sentencing, the trial court stated that it had considered the facts and evidence presented at trial, the PSI, the arguments of counsel, the victim impact statements, and all of the statutory factors in aggravation and mitigation. In mitigation, it noted that defendant had very little criminal history and no prior felony convictions. Nevertheless, the

court found that there were no extraordinary circumstances to justify a sentence of probation, and it stated that probation would deprecate the seriousness of the offense. Further, it stated that, because "there's life lost, *** there's a price to pay when that life is lost by an illegal act." In imposing the sentence, the court stated that defendant was not a "bad guy" but instead was "a good guy that made a very, very bad decision to get behind the wheel of a car and drive when he was intoxicated. Not only is that decision bad, that decision is illegal; and that bad, illegal decision ended up in the death of the young lady."

¶ 46 On July 2, 2019, defendant filed a motion to reconsider the sentence, wherein he reiterated his argument that extraordinary circumstances were present such that a sentence of probation was appropriate, or, in the alternative, he requested a sentence of less than six years. Defendant stressed, among other things, his strong friendship with McDonough and the sincere remorse he expressed at the sentencing hearing. On August 6, 2019, the trial court[2] denied defendant's motion.

¶ 47 Defendant timely appealed.

¶ 48 II. ANALYSIS

¶ 49 Defendant raises three issues on appeal. First, he argues that the trial court abused its discretion in allowing the State to introduce evidence of the section 1286.40 conversion factor through Fisher's testimony, such that the State failed to prove that his whole blood alcohol concentration was 0.08 or higher, as required to obtain a conviction on count I. Second, he argues that the trial court erred in denying his posttrial motion to substitute counsel and, instead, allowing his preferred counsel, Wigell, to represent defendant only jointly with his trial counsel, LaScola. Third, defendant argues that the court erred by considering McDonough's death in aggravation because it is a factor inherent in the offenses of which he was convicted.

¶ 50 Propriety of Fisher's Testimony

¶ 51 Defendant argues on appeal that the trial court erred in admitting Fisher's testimony concerning the section 1286.40 conversion factor to prove that defendant's whole blood alcohol concentration was at or above 0.08. Defendant acknowledges that the conversion factor may come in at trial via live witness testimony, but he maintains that the witness must be an expert in the field of toxicology. He argues that "Fisher had no expertise, knowledge, or authority to tell the jury what factor to use" and he lacked knowledge of "how to convert serum blood alcohol concentration into [a] whole blood alcohol concentration."

¶ 52 The pertinent section of the Administrative Code is titled "Conversion of Blood Serum or Blood Plasma Alcohol Concentration to a Whole Blood Equivalent." 20 Ill. Adm. Code 1286.40 (2015). It provides that "[t]he blood serum or blood plasma alcohol concentration result will be divided by 1.18 to obtain a whole blood equivalent." *Id.* This issue involves the trial court's ruling on an evidentiary matter, namely the admission of Fisher's testimony.

[2]We note that Judge Sharon L. Prather did not preside over the hearing on defendant's motion to reconsider the sentence, as Judge Prather had by then retired from the bench. Instead, Judge Michael E. Coppedge presided over the hearing. Before entering his ruling, Judge Coppedge stated that he had copiously reviewed the trial transcript, as well as the information that was before Judge Prather when she imposed defendant's six-year sentence.

Accordingly, we will reverse that ruling only if the trial court abused its discretion. See *Gunn v. Sobucki*, 352 Ill. App. 3d 785, 789 (2004). "Evidentiary rulings are within the trial court's discretion and will not be reversed absent a clear abuse of discretion." *People v. Olsen*, 388 Ill. App. 3d 704, 709 (2009). An abuse of discretion will be found only if the trial court's decision is arbitrary, fanciful, or unreasonable or where no reasonable person would take the view adopted by the trial court. *People v. Menssen*, 263 Ill. App. 3d 946, 952 (1994). The parties agree on appeal that this issue should be reviewed for an abuse of discretion.

¶ 53 The crux of defendant's argument appears to be that the State is limited to two methods to establish a conversion factor between blood serum alcohol concentration and whole blood alcohol concentration. Pointing to *People v. Thoman*, 329 Ill. App. 3d 1216 (2002), defendant asserts that the State may either (1) present expert witness testimony as to the appropriate conversion factor (see, *e.g.*, *People v. Rushton*, 254 Ill. App. 3d 156, 161-62 (1993); *People v. Ethridge*, 243 Ill. App. 3d 446, 458-59 (1993)) or (2) ask the trial court to take judicial notice of section 1286.40 of Title 20 of the Administrative Code, which provides a conversion factor of 1.18 (see, *e.g.*, *People v. Cruz*, 2019 IL App (1st) 170886, ¶ 42; *Love*, 2013 IL App (3d) 120113, ¶ 25; *Olsen*, 388 Ill. App. 3d at 717; *Stipp*, 349 Ill. App. 3d at 958).

¶ 54 At this juncture, it is helpful to distinguish blood serum from whole blood, as well as explain how those differences impact the State's burden of proving that a defendant's blood alcohol concentration was 0.08 or higher. Blood alcohol concentration can be measured in either whole blood or blood serum. Blood serum is a constituent part of whole blood, in that blood serum is what remains after red and white blood cells and other particulate matter have been removed from a blood sample. *People v. Green*, 294 Ill. App. 3d 139, 145 (1997) (citing Stedman's Medical Dictionary 1278 (24th ed. 1984)). The absence of red and white blood cells and other particulate matter increases the relative percentage of water within blood serum, which, in turn, results in higher blood alcohol concentration levels in blood serum as compared to whole blood. *Id.* at 145. This is so because alcohol has an affinity for water. *Id.* A blood serum alcohol reading will always be higher than the whole blood alcohol reading. *Id.* (citing Carol A. Roehrenbeck & Raymond W. Russell, *Blood Is Thicker Than Water*, 8 Crim. Just. 14, 15 (1993)).

¶ 55 The term "alcohol concentration" is defined in section 11-501.2(a)(5) of the Code as "either grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath." 625 ILCS 5/11-501.2(a)(5) (West 2016). It is well established that, although the term "blood" is not defined in the Code, that term refers to "whole blood," as opposed to "blood serum." *Thoman*, 329 Ill. App. 3d at 1218. "[W]hole blood is the standard unit required by the Code." *Id.* (citing *Green*, 294 Ill. App. 3d at 144-45).

¶ 56 There are two recognized methods that the State may use to prove a defendant's whole blood alcohol concentration level. The State may present evidence of (1) a whole blood alcohol concentration test result or (2) a blood serum alcohol concentration test result converted into whole blood equivalents. *Id.*; *Green*, 294 Ill. App. 3d at 147; see also *Stipp*, 349 Ill. App. 3d at 958 (holding that the term "blood" in section 11-501.4, which pertains to the admissibility of blood test results of persons receiving medical treatment in the emergency room, means "(1) whole blood alcohol concentration test results; and (2) blood serum alcohol concentration test results where evidence is presented that converts the results into whole blood equivalents").

¶ 57 The results of a blood *serum* analysis are admissible at trial. *Menssen*, 263 Ill. App. 3d at 953. Nevertheless, because the Code refers only to whole blood, in order to prove a defendant guilty under section 11-501(a)(1), the State is required to prove beyond a reasonable doubt that the defendant's whole blood alcohol concentration was 0.08 grams of alcohol per 100 milliliters of blood or more. See *Thoman*, 329 Ill. App. 3d at 1218. It is undisputed that defendant's whole blood alcohol concentration was not tested. Dr. Reddy testified that "we always order serum," and that there was no "conversion done to whole blood" at the hospital. As such, count I hinges on whether the State properly presented evidence of defendant's blood serum alcohol concentration test results converted into whole blood equivalents and, if so, whether said conversion resulted in a whole blood alcohol concentration of 0.08 or more. See *id.* at 1219-20 (reversing the defendant's conviction where the State presented no evidence of the conversion factor). In the absence of a method to convert the results, a jury has no way of knowing whether a given blood serum alcohol concentration equates to a whole blood alcohol concentration that exceeds the legal limit. "[E]vidence of a blood serum alcohol concentration is generally useful only if there is evidence of a conversion factor to a whole blood alcohol concentration." *Olsen*, 388 Ill. App. 3d at 715.

¶ 58 The precise conversion factor between blood serum and whole blood can vary based on the individual and the circumstances in which the blood sample is obtained and tested. Roehrenbeck, *supra*, at 15; see also *Green*, 294 Ill. App. 3d at 146 n.2 (observing that conversion factors vary because alcohol concentration ratios between blood serum and whole blood vary among individuals). Indeed, the exact conversion factor may even fluctuate within a short period of time. Roehrenbeck, *supra*, at 15. Defendant concedes in his brief that the generally accepted range of alcohol concentration in blood serum is 12% to 20% higher than in whole blood, which results in a conversion factor of 1.12 to 1.20. See *Menssen*, 263 Ill. App. 3d at 953. "Because a blood serum alcohol concentration test result can predictably be anywhere from 12% to 20% higher than a whole blood alcohol concentration test result [citation], blood serum concentration test results are converted by dividing by a corresponding factor between 1.12 to 1.20." *Thoman*, 329 Ill. App. 3d at 1218-19; see also *Green*, 294 Ill. App. 3d at 146 n.2 (noting that the parties used a conversion factor of 1.16 because it was the average of the range).

¶ 59 In *Thoman*, the State introduced evidence that the defendant's blood *serum* alcohol concentration was 0.306, but it did not present any evidence of the defendant's *whole* blood alcohol concentration or how blood serum alcohol concentration relates to whole blood alcohol concentrations. *Thoman*, 329 Ill. App. 3d at 1218. The appellate court noted that section 11-501(a)(1) of the Code required the State to prove that the defendant's whole blood alcohol concentration was 0.08 or more and that it could accomplish that task "only by presenting evidence of an actual whole blood alcohol concentration test result or from blood serum alcohol concentration test results converted into whole blood equivalents. *Id.* at 1219 (citing *Green*, 294 Ill. App. 3d at 147). The court reversed the defendant's conviction of driving with a blood alcohol concentration of 0.08 or more, reasoning that the State failed to present either type of evidence because it presented evidence of defendant's blood serum alcohol

concentration without any evidence of how that result converted into whole blood equivalents.[3] *Id.* at 1219-20.

¶ 60 Defendant points to the *Thoman* court's statement that "[t]he State could have proved the whole blood alcohol concentration through expert testimony regarding the conversion factor or through asking the trial court to take judicial notice of, and instruct the jury on, the appropriate conversion factor" (*id.* at 1220), such as the section 1286.40 conversion factor, and he argues that the State is limited to these two methods. Defendant's reading of *Thoman* is far too narrow. Put simply, judicial notice or expert testimony *may* be used to introduce this evidence, but neither *Thoman* nor any other case cited by defendant provides that these are the only permissible avenues. Rather, *Thoman* makes clear that, in the absence of "an actual whole blood alcohol concentration test result," the only means available to the State to prove that the defendant's whole blood alcohol concentration was 0.08 or more is to "present[ ] evidence *** from blood serum alcohol concentration test results converted into whole blood equivalents." *Id.* at 1219. As defendant's own brief recognizes, *Thoman* establishes that evidence of a given blood serum alcohol concentration is meaningless unless the State provides the jury with a method of converting the blood serum alcohol concentration into a whole blood alcohol concentration.

¶ 61 In the instant matter, the State equipped the jury with evidence of an acceptable method of conversion via Fisher's testimony. Further, admitting this testimony was not an abuse of discretion, because the testimony was predicated on his training and familiarity with section 1286.40 of Title 20 of the Administrative Code, which has the force of law. Specifically, Fisher testified that he was one of the investigators assigned to the case, that he learned of defendant's blood serum alcohol concentration during the course of the investigation, and that he had received training on the conversion factor in the regulation over the course of his career as a police officer. He was able to correctly apply the conversion factor to defendant's measured blood serum alcohol concentration in accordance with his training: "You would divide the blood serum level, which in this case is .155, by 1.18 to get a [.]131," which Fisher testified exceeded the legal limit for driving under the influence of alcohol. Both numerical figures that were needed to perform this simple calculation, namely defendant's blood serum alcohol concentration and the appropriate conversion factor in accordance with Fisher's training, were facts within Fisher's personal knowledge.

¶ 62 Defendant argues that Fisher's testimony was improper because the conversion factor is based on scientific knowledge. While it is undeniable that the conversion factor was derived using a scientific process, it does not follow that Fisher was incompetent, as defendant asserts, to offer testimony on the resulting fixed value for the conversion factor. Section 11-501.2(a) of the Code generally governs the admissibility of the results of chemical or other test results in prosecutions for driving under the influence of alcohol (DUI). 625 ILCS 5/11-501.2(a) (West 2016). By way of section 11-501.2(a)(1), the legislature expressly authorized the Department of State Police, as an executive branch State agency, to promulgate standards and "approve satisfactory techniques or methods" for the chemical analysis of blood and to prescribe regulations as necessary to implement section 11-501.2 of the Code. *Id.* § 11-501.2(a)(1). Section 1286.40 of Title 20 of the Administrative Code, which provides the 1.18

[3]During the trial in *Thoman*, the State nol-prossed the charge of driving while under the influence of alcohol in violation of section 11-501(a)(2) of the Code. *Thoman*, 329 Ill. App. 3d at 1218.

conversion factor[4] here at issue, is a valid exercise of the Department of State Police's authority to implement statutory law as delegated to it by the legislature. *Olsen*, 388 Ill. App. 3d at 715. We stated in *Olsen* that "the [section 1286.40] conversion factor is merely a means by which the Department of State Police is seeking to effectuate the law regarding the chemical analysis of blood" and that the precise conversion factor is a detail that the legislature need not establish in delegating its authority to the Department of State Police to execute the law. *Id.* The Administrative Code has the force and effect of law, and its rules and regulations are presumed valid. *Medcat Leasing Co. v. Whitley*, 253 Ill. App. 3d 801, 803 (1993). It is well established that the legislature has the power to prescribe new and alter existing rules of evidence or to prescribe methods of proof. *People v. Rolfingsmeyer*, 101 Ill. 2d 137, 140 (1984). The legislature has done so, here, albeit by delegating to the Department of State Police the authority to implement the provision of the Code regarding chemical and other tests, including the authority to provide a fixed conversion factor to convert blood serum alcohol concentration into whole blood equivalents. Indeed, the Department of State Police, as the administrative agency authorized to promulgate section 1286.40, " 'essentially amounts to a tool in the hands of the legislature.' " *Olsen*, 388 Ill. App. 3d 714 (quoting *Chicagoland Chamber of Commerce v. Pappas*, 378 Ill. App. 3d 334, 350 (2007)).

¶ 63 Although Fisher perhaps[5] lacked knowledge of the scientific and medical principles involved in accounting for the differences in alcohol concentration between blood serum and whole blood, it was unnecessary for him to be an expert in the underlying science in order to testify as to the conversion factor because he had received training on the section 1286.40 conversion factor. See *People v. Abdallah*, 82 Ill. App. 2d 312, 217 (1967) (holding that the operator of a radar instrument does not have to be an expert in the science underlying the radar device, and it is sufficient that the operator is familiar with the device and its operation, such that the evidence presents a question of weight and credibility for the jury); *People v. Donohoo*, 54 Ill. App. 3d 375 (1977) (holding that the State is not required to introduce expert testimony on the scientific accuracy of a speed gun). In essence, Fisher's testimony concerned his compliance with the applicable administrative rules and regulations lawfully promulgated by the Department of State Police, and such testimony is commonplace in DUI prosecutions. See, *e.g.*, *People v. Hall*, 2011 IL App (2d) 100262; *People v. Ebert*, 401 Ill. App. 3d 958 (2010); *People v. Fonner*, 385 Ill. App. 3d 531 (2008). Because Fisher's testimony demonstrated that he complied with section 11-501.2(a) and the regulations promulgated thereunder, specifically section 1286.40 of Title 20 of the Administrative Code, he was qualified to testify as to the conversion factor on which he had received training, the rudimentary calculation that stems from the conversion factor, and the result of said calculation in defendant's particular case.

¶ 64 We also reject defendant's argument that Fisher's testimony concerning his training on the section 1286.40 conversion factor was hearsay.[6] Illinois Rule of Evidence 801(c) (eff. Oct. 15,

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[4]This court has previously stated that "the 1.18 conversion factor *** is generally accepted in the relevant scientific community." *People v. Cortez*, 361 Ill. App. 3d 456, 468 (2005).

[5]We note that defendant asserts that Fisher was unable to identify the drafters of the regulation or explain how the conversion factor was determined. However, he cites no portion of the transcript in support of the assertion, and our review of the transcript reveals that defense counsel asked him no such questions during cross-examination.

[6]Defendant objected to Fisher's testimony regarding the conversion factor on the basis that he was not an expert, and defendant conceded at oral argument that he did not expressly raise a hearsay

2015) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801 defines the term "statement" as "an oral or written assertion *** or nonverbal conduct of a person, if it is intended by the person as an assertion," and it defines "declarant" as "a person who makes a statement." Ill. R. Evid. 801(a), (b) (eff. Oct. 15, 2015). It is axiomatic that information in a statute or administrative regulation is not hearsay because neither the legislature nor an executive branch state agency authorized to implement the statute is a "person" or "declarant" within the meaning of Illinois Rule of Evidence 802 (eff. Jan 1, 2011), which provides that hearsay is inadmissible at trial except as provided by the Illinois Rules of Evidence, the Illinois Supreme Court rules, or statutory law as contemplated in Illinois Rule of Evidence 101 (eff. Jan. 1, 2011) (providing that "[a] statutory rule of evidence is effective unless in conflict with a rule or decision of the Illinois Supreme Court").

¶ 65 Our conclusion that judicial notice and expert witness testimony are not the sole methods the State may use to establish the conversion factor finds support in *Stipp*, 349 Ill. App. 3d 955. There, the defendant was charged with two DUI offenses after he was involved in a single-vehicle collision. *Id.* at 957. The defendant's blood was drawn in the hospital as part of the hospital's standard procedure, and his blood serum alcohol level was tested. Relying on section 1286.40 of Title 20 of the Administrative Code, the State took the view that it was unnecessary for an expert to testify as to the conversion factor from blood serum alcohol concentration to whole blood alcohol concentration. *Id.* Based on what the *Stipp* court called "the appropriate conversion factor of 1.18," the parties agreed that the defendant's whole blood alcohol level was 0.24 and that the jury would be given that number. *Id.*

¶ 66 At trial, a laboratory technician testified that the defendant's blood serum test results "translated to a blood serum alcohol level of 0.284 grams of alcohol per 100 milliliters of blood," that blood serum contains a higher alcohol concentration than whole blood, and that "the conversion factor from blood serum to whole blood alcohol concentration was 1.18." *Id.* The defendant was convicted on both counts. *Id.* On appeal, the defendant asserted that the blood test results were inadmissible because the test was conducted on his blood serum rather than his whole blood. *Id.* In affirming, the appellate court noted that nothing in section 11-501.4, which makes admissible blood tests performed for the purpose of determining the concentration of alcohol in the blood of an individual receiving medical treatment in an emergency room, prohibited the use of blood serum test results in lieu of a whole blood alcohol concentration test. *Id.* at 958. It further noted that several cases held that blood serum test

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objection. To preserve an issue for review, a defendant must object at trial and present the issue in a written posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). The State has not asked us to find the argument forfeited, but even if it had, we would find the issue preserved. An issue raised on appeal does not have to be identical to the objection raised at trial, and we will not find the claim forfeited when the trial court had the opportunity to review the same essential claim. *People v. Mohr*, 228 Ill. 2d 53, 65 (2008). After defendant objected, he argued that "if [Fisher] testifies to the conversion factor," "[h]e is just going to say a mathematical equation, and I can't cross-examine the equation." In his posttrial motion, defendant similarly argued that he was unable to meaningfully cross-examine Fisher regarding the conversion factor. It has been said that "the fundamental reason for excluding hearsay is the lack of an opportunity to cross-examine the declarant." *People v. Bryant*, 391 Ill. App. 3d 1072, 1090 (2009). Defendant's argument before the trial court is sufficiently similar to the issue he raises on appeal, such that the trial court had the opportunity to review the same essential claim.

results converted into whole blood equivalents are admissible under sections 11-501 and 11.501.2. The *Stipp* court concluded that the term "blood" under section 11-501.4 allows for "the admission of: (1) whole blood alcohol concentration test results; and (2) blood serum alcohol concentration test results where evidence is presented that converts the results into whole blood equivalents." *Id.* In apparent reliance on the laboratory technician's testimony, the court held that the trial court properly admitted the blood test results because "the State presented evidence concerning the conversion of blood serum alcohol results to whole blood equivalents." *Id.*

¶ 67 It is noteworthy that, in *Stipp*, evidence establishing the conversion factor was admitted without the trial court taking judicial notice of section 1286.40 of Title 20 of the Administrative Code and without the admission of expert witness testimony on the subject. Instead, the State presented evidence of the conversion factor by way of the lab technician's testimony. Nothing in *Stipp* suggests that this witness was received by the trial court as an expert, and defendant concedes in his reply brief that the lab technician in *Stipp* was a lay witness. The testimony of the lab technician in *Stipp* regarding the conversion factor was strikingly similar to Fisher's testimony in this case. Again, the lab technician testified that a serum result of 284 translated to a blood serum alcohol level of 0.284 grams of alcohol per 100 milliliters of blood, that blood serum contains a higher concentration of alcohol than whole blood, and that the conversion factor from blood serum to whole blood is 1.18. Here, Fisher testified that he investigated defendant's case, learned the results of defendant's blood serum analysis during the investigation, and had received training on, and was familiar with, the section 1286.40 conversion factor, and he said that one needed only to "divide the blood serum level, which in this case is .155, by 1.18 to get a [.]131." The *Stipp* court held that the lab technician's testimony sufficed for State-presented evidence concerning the conversion of blood serum alcohol concentration test results to whole blood equivalents, such that the results of the defendant's blood serum alcohol concentration were admissible. *Id.* We conclude similarly, here. Although defendant is correct that *Stipp* involved whether the results of the defendant's blood serum alcohol concentration test were admissible in the first place, *Stipp* nevertheless provides guidance in the instant matter because it undercuts defendant's argument that the State can establish the conversion factor only through judicial notice or expert testimony. It is of no consequence that, in *Stipp*, the parties agreed to provide the jury with defendant's converted whole blood alcohol level, which was "[b]ased on the appropriate conversion factor of 1.18," because the admission of Fisher's testimony was proper in light of his training and familiarity with the section 1286.40 conversion factor, which, again, has the force of law and is presumed valid.

¶ 68 We also note that, in his statement of facts, defendant maintains that the trial court "gave the jury IPI Criminal 4th No 23.30A, which told [it] that if [it] found the defendant's whole blood alcohol concentration to be greater than .08 g/dl, [it was] to presume that he was under the influence of alcohol." Such was not the case. The trial court gave the jury IPI Criminal 4th No. 23.30, without objection, which informed the jury that it "never [is] required to make this presumption, and that the presumption should not be considered during their "deliberations on the offense of driving with an alcohol concentration of 0.08 or more." The trial court also gave IPI Criminal 4th No. 23.30A, without objection, which defines the term "alcohol concentration." We caution counsel that facts shall be "stated accurately." Ill. S. Ct. R. 341(h)(6) (eff. Oct. 1, 2020).

¶ 69 In his brief, defendant argues that, "other than the legislative authority to create a discretionary presumption ***, the Section's unidentified drafters had no more apparent qualifications to speak on toxicology than has any random lay person." Defendant then argues that, "if the judge does not choose to take judicial notice of the Section, then the Section provides no competent evidence of the appropriate conversion factor." He continues, asserting that the trial court "even refused a tendered jury instruction on the grounds that she had not taken judicial notice of the Section." The record does not contain a copy of the purported instruction quoting the language from Illinois Rule of Evidence 2.01(g) (eff. Jan. 1, 2011), which provides that, where the court takes judicial notice of any adjudicative fact, the jury is to be informed that "it may, but is not required to, accept as conclusive any fact judicially noticed."

¶ 70 The suggestion that the drafters of administrative regulations were not qualified to "speak on toxicology" is specious. As noted, the Administrative Code has the force and effect of law, and its rules and regulations are presumed valid. *Medcat*, 253 Ill. App. 3d at 803. Yet, the dissent appears to accept the argument that it was unfair to allow Fisher to testify as opposed to the court taking judicial notice so that the cautionary instruction in Rule 2.01(g) would have been given. "Consistent with the adversary theory and avoidance of embarrassment to the court, a party is not entitled to complain of failure to take judicial notice unless she has requested it and brought appropriate materials to the attention of the court." Michael H. Graham, Graham's Handbook of Illinois Evidence § 201.4, at 115-16 (2021 ed.). A party may request the court to take judicial notice at any stage of the proceedings. Ill. R. Evid. 201(f) (eff. Jan. 1, 2011). Defendant never requested the trial court to take judicial notice and is therefore foreclosed from complaining that the jury did not receive the instruction he claims he was entitled to under Rule 2.01(g).

¶ 71 Although it is not necessary to our resolution on this issue, we would be remiss if we did not point out that, even on appeal, defendant offers no suggestion of any conversion factor that would convert his measured blood serum alcohol concentration of .155 into a whole blood alcohol concentration below 0.08. The court in *Thoman* observed that "a blood serum alcohol concentration test result can predictably be anywhere from 12% to 20% higher than a whole blood alcohol test result [citation], [such that] blood serum concentration test results are converted by dividing by a corresponding factor between 1.12 to 1.20." *Thoman*, 329 Ill. App. 3d at 1218-19. Whether the highest or lowest conversion rate is used to convert defendant's blood serum alcohol concentration into a whole blood equivalent, the results are all well above 0.08—ranging from 0.129 to 0.138.

¶ 72 Defendant notes parenthetically that, in *People v. Luth*, 335 Ill. App. 3d 175, 177 (2002), an expert for the defense opined that the blood serum alcohol concentration measurement could range from 3% to 60% higher than the whole blood equivalent, thus resulting in a conversion factor of 1.03 to 1.6. There, the defendant's treating physician testified that a 60% difference between blood serum and whole blood would be impossible. *Id.* Utilizing even the most inordinately favorable conversion factor mentioned only in passing in defendant's brief—1.6—defendant's whole blood alcohol concentration would measure 0.097, which would *still* exceed 0.08. See *Menssen*, 263 Ill. App. 3d at 953 ("[a] simple mathematical calculation would show that translating the serum-alcohol results to blood-alcohol level still places defendant in a state of intoxication"); see also *Petraski v. Thedos*, 382 Ill. App. 3d 22, 29-30 (2008) ("[E]ven

using a 1.25 conversion factor, [the driver's] blood-alcohol concentration would have been more than .08.").

¶ 73 The dissent disagrees with our analysis, arguing that it "runs afoul" of the Illinois Rules of Evidence. *Infra* ¶ 113. The dissent does not appreciate the dichotomy between "fact" and "opinion" testimony. Opinion testimony concerns what a witness " 'thinks, believes, or infers in regard to facts in dispute, as distinguished from his personal knowledge of the facts themselves.' " (Internal quotation marks omitted.) *Prairie v. Snow Valley Health Resources, Inc.*, 324 Ill. App. 3d 568, 577 (2001) (quoting *Mittelman v. Witous*, 135 Ill. 2d 220, 243 (1989)). Fisher knew the section 1286.40 conversion factor as a result of his training and experience as a police officer, and he learned of defendant's blood serum alcohol concentration test result during the course of the investigation. He was not asked to render any opinion that would require expert testimony, such as retrograde extrapolation. See *People v. Barham*, 337 Ill. App. 3d 1121, 1135 (2003).

¶ 74 In *People v. Cruz*, 2019 IL App (1st) 170886, ¶ 8, the trial court took judicial notice of section 1286.40 over the defendant's objection. The defendant argued that "the State should be required to have an expert witness testify to the calculation because it was 'not something that the average individual knows and could calculate properly.' " *Id.* During closing argument, the prosecutor explained to the jury that if it accepted "the judicially noticed conversion formula, they would divide the blood serum concentration by 1.18 to arrive at defendant's whole BAC of 0.16." *Id.* ¶ 24. On appeal, the defendant did not challenge the trial court's decision to take judicial notice of the formula but, instead, argued that the "State was required to 'establish the converted number' either through expert testimony or through a stipulation between the parties." *Id.* ¶ 42. The appellate court rejected this argument, noting that " '[e]xpert testimony is proper when the subject matter of the inquiry is such that only a person with skill or experience in that area is capable of forming a judgment.' " *Id.* (quoting *People v. Leahy*, 168 Ill. App. 3d 643, 649 (1988)). The court stated that "all that was required was to divide two given numbers. This is a matter of basic arithmetic and did not necessitate the use of expert testimony." *Id.*

¶ 75 The dissent argues that, "[b]ecause Fisher was not qualified to render expert testimony as to the conversion of serum to whole blood, his testimony in this regard runs afoul of Rule 701 and was thus incompetent and inadmissible." *Infra* ¶ 113. At the same time, the dissent does not question the authority of a trial court to take judicial notice of section 1286.40 of Title 20 of the Administrative Code. "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Ill. R. Evid. 201(b) (eff. Jan. 1, 2011). "The purpose of judicial notice is to dispense with the normal method of producing evidence." *In re Estate of McDonald*, 2021 IL App (2d) 191113, ¶ 92. There is no fact that is susceptible to judicial notice that cannot be introduced through some other means. Fisher's testimony regarding his training and experience with section 1286.40 of Title 20 of the Administrative Code was based on facts, not lay opinion. " 'All relevant evidence is admissible, except as otherwise provided by law.' " *People v. Dabbs*, 239 Ill. 2d 277, 289 (2010) (quoting Ill. R. Evid. 402 (eff. Jan. 1, 2011)). The method of introducing relevant evidence is up to the parties, except in very rare circumstances. See *People v. Walker*, 211 Ill. 2d 317, 338 (2004) (when a defendant offers to stipulate to his prior felony status, a trial court abuses its discretion when it admits the defendant's criminal

record of conviction). If the dissent were correct in concluding that establishing the conversion factor requires expert testimony, a trial court would never be allowed to take judicial notice of section 1286.40 of Title 20 of the Administrative Code because a judicially noticed fact must be "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Ill. R. Evid. 201(b) (eff. Jan. 1, 2011). Contrary to the dissent's position, Fisher's testimony did not stray into areas that required any scientific, technical, or other specialized knowledge. Fisher would have crossed that line, however, if he had suggested that the use of the 1.18 conversion factor in this particular instance was appropriate not just because it was specified in the Administrative Code, but also because it was the appropriate factor given defendant's body chemistry and the circumstances in which his blood sample was obtained and tested. Fisher offered no such testimony, however, but merely testified that he followed the regulation in accordance with his training. Moreover, in this case, like in *Cruz*, defendant wanted the opportunity to cross-examine an expert on the underlying science but did not present evidence or argument that the conversion factor was inappropriate under the facts of the case.

¶ 76 Illinois Rule of Evidence 101 (eff. Jan. 1, 2011) provides that "[a] statutory rule of evidence is in effect unless in conflict with a rule or a decision of the Illinois Supreme Court." Again, administrative rules have the force and effect of law and, like statutes, are presumed valid. Title 20, section 1286.40, of the Administrative Code, titled, "Conversion of a Blood Serum or Blood Plasma Alcohol Concentration to a Whole Blood Equivalent," is not in conflict with any rule or decision of the Illinois Supreme Court. The dissent contends that section 1286.40 is somehow unique because it "dispenses with the need for expert testimony absent judicial notice or an agreement by the parties." Hospital blood test results are produced by science but are admissible as business records because "[t]he legislature obviously concluded that if these blood-alcohol test results are sufficiently trustworthy and reliable for the emergency room physician to use and consider when deciding what treatment is appropriate, then those results are sufficiently trustworthy and reliable to be received into evidence at a later trial." *Rushton*, 254 Ill. App. 3d at 167-68 (quoting *People v. Hoke*, 213 Ill. App. 3d 263, 270 (1991)). As we have stated, the formula for converting a blood serum result to a whole blood equivalent is codified in section 1286.40 of Title 20 of the Administrative Code and, unlike testimony concerning retrograde extrapolation or the effects of medication, etc., applying the section 1286.40 conversion factor is basic math. It is also a step in the investigation of suspected DUI crashes resulting in injuries requiring medical treatment. The conversion formula allows prosecutors to make timely charging decisions.

¶ 77 Regardless of whether the State chose to establish the conversion factor through Fisher's testimony or by requesting the trial court to take judicial notice of the regulation, defendant would not have been able to "cross-examine the equation." The dissent argues that, by having Fisher testify, "the State avoided the trial court's gatekeeping function as well as the instruction that the jury 'may, but is not required to, accept as conclusive any fact judicially noticed.' " *Infra* ¶ 107 (quoting Ill. R. Evid. 201(g) (eff. Jan. 1, 2011)). The trial court relied on *Stipp* in concluding that the State was not required to call "an expert to testify as to the conversion rate." The dissent does not cite any flaw in the trial court's reasoning. Neither the State nor defendant asked the trial court to take judicial notice. The trial court explained that "judicial notice probably in fact does carry greater weight with the jury than ordinary testimony" and concluded that the limiting instruction from Rule 201(g) was unnecessary. The trial court

explained that "the jury is free to accept or reject" Fisher's testimony just as it is with any other witness. Contrary to the dissent's suggestion that the State's approach "avoided the trial court's gatekeeping function" (*infra* ¶ 107), the record is clear that the trial court listened to the arguments of the parties and concluded that the precedent cited by the State supported the State's argument that expert testimony was not required to establish the conversion factor.

¶ 78 Denial of Defendant's Motion to Substitute Counsel

¶ 79 Defendant next argues that the trial court erred in denying defendant's motion to substitute counsel for the posttrial proceedings, wherein he requested that the trial court allow LaScola to withdraw and Wigell to appear as his new counsel. Defendant asserts that the ruling denying his motion curtailed his right to be represented by counsel of his choosing and that the resulting co-representation arrangement caused Wigell to labor under an actual conflict of interest because he raised claims of ineffective assistance against co-counsel LaScola but failed to adequately present those claims in the trial court or preserve them for appellate review. Defendant suggests that LaScola's presence in the courtroom as co-counsel compromised Wigell's ability to articulate the ineffectiveness claims at the hearing on the posttrial motion. Defendant prays that we reverse the trial court's order denying the motion to substitute counsel and that we remand the case for new posttrial proceedings.

¶ 80 The State responds that the trial court appropriately denied the motion to substitute counsel because the court found that the motion was filed simply to prolong the proceedings. In support, the State largely reiterates the trial court's express reasoning for that conclusion, namely that defendant had already sought "twenty-five continuances," that Wigell would have been defendant's fourth attorney in the case, and that defendant did not voice any complaint about LaScola's performance when the court inquired whether he was "having problems" with LaScola. Further, the State asserts that the denial of LaScola's request to withdraw did not cause Wigell to labor under an actual conflict of interest, notwithstanding Wigell's claim that co-counsel LaScola provided ineffective assistance of counsel throughout the proceedings.

¶ 81 A defendant in a criminal matter has a constitutional right to the assistance of counsel under the sixth amendment to the United States Constitution as made applicable to the states via the fourteenth amendment. U.S. Const., amends. VI, XIV; Ill. Const 1970, art. I, § 8. That right includes the right to counsel of the defendant's choice (*People v. Friedman*, 79 Ill. 2d 341, 349 (1980)), and it has been regarded as the root meaning of the constitutional guarantee in the sixth amendment (*People v. Tucker*, 382 Ill. App. 3d 916, 919 (2008) (citing *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 147-48 (2006))). The right to counsel under the sixth amendment also includes the right to be free from unwanted counsel. See *Faretta v. California*, 422 U.S. 806 (1975) (holding that the right to counsel includes the right to self-representation and a criminal defendant may refuse state-provided counsel if the choice is made intelligently and voluntarily).

¶ 82 Still, courts recognize that "the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Wheat v. United States*, 486 U.S. 153, 159 (1988). The right to substitute counsel is not absolute, and the trial court may deny a defendant's request to substitute counsel if the " 'substitution of counsel would unduly prejudice the other party or interfere with the administration of justice.' " *Sullivan v. Eichmann*, 213 Ill. 2d 82, 91 (2004) (quoting *Filko v. Filko*, 127 Ill. App. 2d 10, 17 (1970)). The right to counsel of one's

choosing "may not be employed as a weapon to indefinitely thwart the administration of justice, or to otherwise embarrass the effective prosecution of crime." *People v. Solomon*, 24 Ill. 2d 586, 590 (1962). It is well settled that a defendant's right to counsel of choice must be measured against the trial court's interest in trying the case with diligence and the orderly process of judicial administration. *People v. Brisco*, 2012 IL App (1st) 101612, ¶ 41; *People v. Curry*, 2013 IL App (4th) 120724, ¶ 48. In balancing these interests, " 'the court must inquire into the actual request to determine whether it is being used merely as a delaying tactic.' " *Tucker*, 382 Ill. App. 3d at 920 (quoting *People v. Burrell*, 228 Ill. App. 3d 133, 142 (1992)). When evaluating whether defendant's request is merely a delaying tactic, the trial court should consider various factors, such as whether the defendant articulates an acceptable reason for desiring new counsel, whether the defendant has continuously been in custody, whether he has informed the trial court of his efforts to obtain counsel, whether he has cooperated with current counsel, and the length of time the defendant has been represented by his current counsel. *People v. Ramsey*, 2018 IL App (2d) 151071, ¶ 24.

¶ 83 We review for an abuse of discretion the trial court's decision on a motion to substitute counsel. *People v. Segoviano*, 189 Ill. 2d 228, 245 (2000). A trial court does not abuse its discretion in denying a motion to substitute counsel in the absence of ready and willing substitute counsel. *Ramsey*, 2018 IL App (2d) 151071, ¶ 25. If new counsel is specifically identified and is ready, willing, and able to enter an unconditional appearance, the trial court should grant the motion. *Id.* However, if any of those requirements are lacking, the denial of a motion to substitute counsel is not an abuse of discretion. *Id.*

¶ 84 We agree with defendant that the trial court abused its discretion in denying his motion to substitute counsel because the record does not support the trial court's stated reasons for concluding that the motion was merely a delaying tactic or was otherwise calculated to thwart the administration of justice. At the outset, we note that the timing of defendant's motion suggests that it was not filed merely to delay the proceedings. Defendant utilized LaScola as his counsel during nearly all of the substantive pretrial proceedings through the completion of the trial. Defendant moved to substitute counsel less than one month after the trial concluded, and the motion predated the first scheduled posttrial hearing as well as the filing of any posttrial motion by defendant. This timeline demonstrates that defendant filed the motion to substitute at his earliest opportunity following the trial and before any posttrial proceedings commenced, which supports his assertion that he retained Wigell because he felt that Wigell had more skill and experience than LaScola in the posttrial realm. *Cf. People v. Staple*, 402 Ill. App. 3d 1098, 1103 (2010) (no abuse of discretion in denying motion to substitute counsel where defendant is unable to articulate an acceptable reason for desiring new counsel, defendant already has an experienced criminal lawyer, and the request is made the same day as trial). Although the trial court disagreed with defendant's opinion that his posttrial interests would be better served by Wigell than LaScola, again because the trial court believed that LaScola had represented him for an extended period, had done "a very good job," was familiar with the facts, and would be "in a much better position to file a posttrial motion," there can be no doubt that the right to select defendant's privately retained counsel belonged to *defendant*, not the trial court. See *Tucker*, 382 Ill. App. 3d at 919 (noting that the right to the assistance of counsel of one's choice has been regarded as the root meaning of the sixth amendment). Notwithstanding the trial court's disagreement with defendant, he articulated an acceptable reason for wishing to

substitute Wigell for LaScola, which is a pertinent factor in evaluating whether the trial court should have allowed the motion. See *id.* at 920.

¶ 85 The trial court's determination that defendant's true aim was to delay the proceedings is further refuted by the circumstances surrounding the parties' first posttrial appearances in court. At the first court date following the trial, defendant appeared in court with both LaScola and Wigell. In other words, defendant specifically identified the private counsel he wished to represent him for the posttrial proceedings and procured Wigell's presence at the first posttrial court date. See *id.* (whether the defendant has informed the trial court of his efforts to obtain counsel is a relevant factor for the court to consider). As stressed by defendant, no posttrial motion had been filed at that point other than a "generic placeholder" motion for a new trial that Wigell filed contemporaneously with the motion to substitute counsel. A supplemental motion would likely have been required regardless of the court's ruling on the motion to substitute counsel, and the only delay that would have resulted had the court granted the motion was the estimated two-to-four weeks it would have taken the court reporter to prepare the transcripts. See *Brisco*, 2012 IL App (1st) 101612, ¶ 45 ("merely because defendant's chosen counsel requires a continuance to become prepared, it does not follow that counsel is not willing and able to make an entry into the case"). We agree with defendant, and the State offers no argument to the contrary, that Wigell was ready, willing, and able to appear as defendant's counsel as LaScola's replacement. See *Ramsey*, 2018 IL App (2d) 151071, ¶ 25 (noting that, "if new counsel is specifically identified and stands ready, willing, and able to enter an unconditional appearance, the motion [to substitute counsel] should be allowed"). Further, it is of no consequence that defendant denied "having problems" with LaScola because defendant's right to counsel of his choice did not depend on the inadequacy of LaScola's representation. See *Tucker*, 382 Ill. App. 3d at 919 (stating that "[t]he right [to counsel of one's choice] does not depend on whether defendant received a fair trial or was prejudiced by the representation he received").

¶ 86 The State's reliance on *People v. Gornick*, 107 Ill. App. 3d 505 (1982), is misplaced. There, the trial court appointed two public defenders, Winiecki and Stanton, who represented the defendant during a hearing. *Id.* at 508. Eight days later, the defendant sought their removal from the case, in part, because they were "frauds," and he requested the appointment of a Chicago Bar Association (CBA) attorney. The trial court appointed another public defender and denied the request for a CBA attorney. *Id.* Less than two months later, the defendant retained a private attorney, but by the following year, that attorney was granted leave to withdraw, and the trial court appointed another public defender. *Id.* at 509. Five months later, that public defender withdrew following the defendant's renewed motion for a CBA attorney. The defendant asserted that he "went through five" public defenders, and he found none of them to be satisfactory. The court again declined to appoint a CBA attorney, and it reappointed Winiecki to the case unless and until the defendant retained private counsel. *Id.* At a subsequent court date, the defendant asserted that his public defenders had conspired against him. Winiecki, citing a potential conflict, was later allowed to withdraw, and the defendant again renewed his request for a CBA attorney. *Id.* This time, the trial court granted the request and appointed a CBA attorney, Schwartz. At the next court date, however, the defendant accused Schwartz of lying and stated that he did not "accept" him. *Id.* The court informed the defendant that it would not appoint any additional attorneys and that he would have to represent himself if Schwartz withdrew. *Id.* The defendant then filed a *pro se* motion to substitute judges and

appoint new counsel, and he requested that Schwartz be charged with perjury and fraud. In federal court, the defendant filed a petition for leave to file a section 1983 suit (42 U.S.C. § 1983 (1970)) against Schwartz and the trial judge, alleging, among other claims, corruption, conspiracy, official misconduct, obstruction of justice, and perjury. *Gornick*, 107 Ill. App. 3d at 509. The petition was denied by the United States District Court for the Northern District of Illinois, and the Seventh Circuit and the United States Supreme Court both refused the case. *Id.* at 510.

¶ 87 On appeal, the appellate court rejected the defendant's claim that he was denied a fair trial "when he was represented *** by an attorney he did not want, had accused of incompetency, perjury and fraud, and against whom defendant had filed a 1983 suit, which he maintained established a *per se* conflict of interest which required Schwartz to withdraw." *Id.* In so ruling, the court stated that the trial court could have reasonably concluded that the purpose for the substitution request was to delay the proceedings and hamper the orderly process of justice. *Id.* The court stressed that, prior to Schwartz's representation, the defendant had been represented by four different public defenders, all of whom defendant stated were unsatisfactory, and one private attorney. It also stated that the trial was repeatedly delayed by the various substitutions of counsel, and it highlighted that the trial court granted his request for the appointment of a CBA attorney, in part, because the defendant believed that the public defender's office was conspiring against him. Even after obtaining a CBA attorney, however, the defendant also found that attorney to be a fraud and a liar. *Id.* at 510-11.

¶ 88 The instant matter is readily distinguishable from *Gornick*. In its brief, the State lists every attorney that ever appeared with defendant during the course of the proceedings and argues that, like *Gornick*, this case "involves a game of musical chairs among multiple attorneys." The record simply does not support the State's assertion. Instead, it demonstrates that two private attorneys represented defendant jointly from the inception of the case until December 7, 2016, and that LaScola represented defendant from December 7, 2016, through the end of trial in late February 2019. The State points out that another attorney represented defendant on December 7, 2016, but we note that this attorney was from the same law firm as LaScola and stepped up on a single occasion in LaScola's stead and did not file an appearance. The record does not show a "game of musical chairs among multiple attorneys" but instead reflects a single substitution early in the case that caused no disruption to the proceedings because no substantive motions were filed prior to LaScola's representation and the substitution occurred when the State was awaiting compliance with several subpoenas. Indeed, the trial court's observation that LaScola represented defendant "for an extended period of time," which included "all [the] pretrial motions" through the completion of the trial, underscores the conclusion that defendant had no history of attempting to delay any of the proceedings by seeking to substitute his counsel. There is no indication that defendant refused to cooperate with every attorney he had, as was the case in *Gornick*, or otherwise accused any attorney of being unsatisfactory or engaging in conspiracy, fraud, perjury, and the like. Moreover, unlike in *Gornick*, nothing suggests that any substitution of counsel, whether the substitution that allowed LaScola to represent defendant or the proposed substitution of Wigell for LaScola that the court denied, was calculated to "frustrate the administration of justice" or "otherwise embarrass the effective prosecution of crimes." See *id.* at 510.

¶ 89 The State also emphasizes the trial court's statement that "[t]he case ha[d] been continued twenty-five times on defense motion" in support of its argument that the court's decision to

deny the motion to substitute was proper. In his opening brief, defendant asserts that the trial court's statement was inaccurate because there were 21 pretrial continuances, nearly all of which were routine, and all of which were entered by agreement. The State does not respond to defendant's argument regarding the accuracy of the court's statement but instead reiterates the court's finding that the motion to substitute counsel was a delay tactic, based upon the number of continuances and the number of attorneys who previously represented defendant. We have reviewed the record and agree with defendant that most of the continuances were prompted by the parties' ongoing efforts to obtain discovery, such as a DNA analysis from a police laboratory, medical records, cell phone data, and transcripts from an administrative hearing before the Illinois Secretary of State. Some of the longest continuances were prompted by the trial judge being unavailable on scheduled dates, such as a 56-day continuance of the hearing on defendant's motion to suppress and an 84-day continuance of the trial—both of which were entered by the agreement of the parties. Put simply, nothing in the record suggests that defendant had a history of purposefully delaying the proceedings in this case.

¶ 90 The trial court's comments, coupled with the lack of support in the record for its findings that defendant's goal was to delay the proceedings, suggest that the trial court denied defendant's motion to substitute because it was unwilling to allow Wigell enough time to obtain the transcripts from the court reporter. On this point, *Brisco* is instructive. There, one month after the defendant was found guilty, and at the first sentencing hearing on June 2, new counsel requested leave to enter an appearance for the purpose of posttrial motions. *Brisco*, 2012 IL App (1st) 101612, ¶ 9. Counsel requested time to supplement the pending motion for a new trial and to review the transcript. *Id.* After a scheduling conference, the trial court noted that the trial judge was retiring effective July 1 and the new counsel was scheduled to have surgery on June 21. *Id.* After initially denying the motion, the court stated that it would allow counsel to substitute into the case, but only if he could file his supplemental motion and be ready by June 15. In offering counsel this opportunity, the court noted that it would be impossible to obtain the transcript in that short time, and counsel withdrew his appearance. *Id.* ¶ 39.

¶ 91 The appellate court concluded that the trial court's allowance of just a two-week continuance was tantamount to denying counsel's motion to substitute because it recognized the impossibility of obtaining the transcript by then. *Id.* ¶ 40. The court went on to hold that the trial court abused its discretion in denying the motion (*id.* ¶ 48), reasoning that the mere fact that counsel required time to file a supplemental motion for a new trial was an insufficient reason to deny the defendant his right to counsel of his choice, particularly where the trial court did not inquire as to the length of time counsel would need. *Id.* ¶¶ 45-47. It also noted that, although the judge was nearing retirement, the State cited no case "recognizing a trial court's interest in being available to rule on posttrial motions as greater than defendant's right to counsel of his choice." *Id.* ¶ 42. The court was also persuaded by the fact that defendant moved to substitute counsel at the first court date following the trial and the trial court had yet to request briefing or hear argument on any posttrial motions. *Id.* ¶ 44. Although counsel requested time to become prepared, the *Brisco* court noted that this fact, alone, is not a sufficient basis to deny a motion to substitute. *Id.* ¶ 47.

¶ 92 Here, like in *Brisco*, the trial court denied the motion to substitute counsel because it did not want to allow Wigell time to obtain transcripts from the court reporter and prepare a supplemental motion for a new trial, notwithstanding that defendant moved to substitute

counsel before posttrial matters had commenced and he identified and brought said counsel with him to court at his first opportunity following the trial. Moreover, the trial judge in the instant matter was nearing retirement, as was the judge in *Brisco*. While we are cognizant that, in *Brisco*, the trial court noted that there was no finding that the defendant's motion "was dilatory or lacking in good faith" (*id.* ¶ 42), unlike in the instant matter, *Brisco* nevertheless provides guidance because the court's finding here that defendant's motion to substitute counsel was being used merely as a delaying tactic is unsupported by the record, as discussed above.

¶ 93 In the absence of support in the record for the trial court's finding that defendant's motion to substitute counsel was a delaying tactic and in light of the repeated recognition that a defendant's right to counsel under the sixth amendment includes the right to counsel of choice, we determine that the trial court abused its discretion in denying the motion. Therefore, we vacate defendant's sentence and remand for new posttrial proceedings including, if necessary, sentencing. As such, we need not evaluate defendant's related claim that the trial court's ruling forced Wigell to labor under an actual conflict of interest when he brought claims of ineffective assistance of counsel against co-counsel LaScola or his argument that the trial court improperly considered a factor inherent in the offense when fashioning the sentence.

¶ 94 III. CONCLUSION

¶ 95 For the reasons stated, we affirm the judgment of the circuit court of McHenry County but vacate defendant's sentence and remand for new posttrial proceedings.

¶ 96 Affirmed in part and vacated in part.

¶ 97 Cause remanded.

¶ 98 JUSTICE BRENNAN, dissenting:

¶ 99 I respectfully dissent from the majority's holding that a lay witness may testify to the conversion factor for converting blood serum alcohol concentration test results to whole blood alcohol concentration equivalents simply because the Administrative Code provides the formula.

¶ 100 As the majority acknowledges, according to the relevant scientific community, the precise conversion factor between blood serum and whole blood can vary based on the individual and the circumstances in which the blood sample is obtained and tested. Roehrenbeck, *supra*, at 15; *Green*, 294 Ill. App. 3d at 146 n.2 (conversion factors vary because alcohol concentration ratios between blood serum and whole blood vary among individuals). Indeed, the exact conversion factor may even fluctuate within a short period of time. Roehrenbeck, *supra*, at 15. Illinois courts have generally noted that "a blood serum alcohol concentration test result can predictably be anywhere from 12% to 20% higher than a whole blood alcohol concentration test result [citation], [so] blood serum concentration test results are converted by dividing by a corresponding factor between 1.12 to 1.20." *Thoman*, 329 Ill. App. 3d at 1218-19; see also *Green*, 294 Ill. App. 3d at 146 n.2 (noting that the parties used a conversion factor of 1.16 because it was the average of the range); but see *Petraski v. Thedos*, 382 Ill. App. 3d 22, 29 (2008) (expert testified that "factors from 1.09 to 1.22 are generally accepted in the scientific community"). Simply put, "case law in this area suggests that there is no single mathematical

formula for converting a blood plasma or blood serum alcohol reading into a whole blood alcohol reading. Courts have recognized that there is a range of valid conversion ratios, depending on various aspects of blood chemistry." *Watson v. State*, No. A-10758, 2013 WL 6576723, at *9 (Alaska Ct. App. Dec. 11, 2013) (unpublished memorandum opinion).

¶ 101 Notwithstanding the scientific community's consensus that the conversion factor for converting serum to whole blood concentrations can vary within a range of numbers, the Department of State Police secured an amendment to the Administrative Code titled, "Conversion of a Blood Serum or Blood Plasma Alcohol Concentration to a Whole Blood Equivalent," which provides: "The blood serum or blood plasma alcohol concentration result will be divided by 1.18 to obtain a whole blood equivalent." 20 Ill. Adm. Code 1286.40 (2015). Parenthetically, the only other state my research has disclosed that has administratively or legislatively settled upon a specific conversion number is West Virginia, which *chose a different* conversion factor for its conversion formula. See W. Va. Code St. R. § 64-10-8 (2021) ("The quantity of alcohol found in serum shall be divided by a *factor of 1.16* to determine the quantity of alcohol in the blood ***." (Emphasis added.)).

¶ 102 In *Olsen*, we considered various arguments in opposition to section 1286.40's conversion factor of "1.18." In doing so, we acknowledged, as we had in *Thoman*, that "blood serum alcohol concentration test results are often 12% to 20% higher than whole blood alcohol concentration test results, so blood serum alcohol can be divided by a corresponding factor between 1.12 and 1.20 to be converted to whole blood alcohol concentrations." *Olsen*, 388 Ill. App. 3d at 712-13 (citing *Thoman*, 329 Ill. App. 3d at 1218-19). We first found that the Department of State Police had the authority to pass section 1286.40 and adopt a conversion factor as part of its authority to "develop 'standards' and 'approve satisfactory techniques and methods' for the chemical analysis of blood and to 'prescribe regulations as necessary to implement [section 11-501.2(a)(1)]' " of the Code. *Id.* at 715 (quoting 625 ILCS 5/11-501.2(a)(1) (West 2006)). We next considered the defendant's argument that, given the previously referenced conversion range, section 1286.40's conversion factor of 1.18 amounted to an unconstitutional mandatory presumption in providing that "[t]he blood serum or blood plasma alcohol concentration result *will be* divided by 1.18 to obtain a whole blood equivalent." (Emphasis added.) 20 Ill. Adm. Code 1286.40 (2015); see also *People v. Woodrum*, 223 Ill. 2d 289, 309 (2006) (mandatory presumptions, whether rebuttable or irrebuttable, are unconstitutional). We interpreted the mandatory language in section 1286.40 as discretionary and held that, "while a trial court may take judicial notice of section 1286.40, the application of the 1.18 conversion factor is not a mandatory presumption, but rather a permissive presumption that the trial court need not accept." *Olsen*, 388 Ill. App. 3d at 717. Finally, and significant to the majority's holding here today, the *Olsen* majority disagreed with the specially concurring justice's contention that section 1286.40's conversion factor could constitute "both a presumption *and independent evidence* that the 1.18 conversion factor is valid." (Emphasis added.) *Id.* at 718.

¶ 103 It is perhaps noteworthy that the defendant in *Olsen* did not specifically challenge the Department of State Police's selection of "1.18" as the conversion factor, notwithstanding that this number is but one point on the scientific community's accepted range of conversion factors. Indeed, such an argument would not have been possible in *Olsen*, as no defense expert was called at trial and the record did not otherwise support a challenge to the actual formula

prescribed in section 1286.40. Further, I would note that, while the First, Third,[7] and Fifth Districts of our Appellate Court have implicitly acknowledged the propriety of trial courts taking judicial notice of section 1286.40's conversion factor, they have done so while recognizing that the factor was not directly challenged in those cases. See, *e.g.*, *Cruz*, 2019 IL App (1st) 170886, ¶ 42 (approving the propriety of the State doing the conversion math for the jury at closing, but noting that the defendant did not challenge the court's taking judicial notice of section 1286.40); *People v. Love*, 2013 IL App (3d) 120113, ¶ 25 (commenting favorably on *Thoman*'s *dicta* that courts may take judicial notice of section 1286.40's conversion factor, though noting that the defendant did not challenge the "applicable conversion factor" or whether "the conversion factor of 1.18 represents an adjudicative fact amenable to judicial notice"); *Thoman*, 329 Ill. App. 3d at 1219 (Fifth District *dicta* suggesting the State could have established the whole blood conversion factor by asking the court to take judicial notice of section 1286.40).

¶ 104 Accepting for the moment that a trial court may take judicial notice of section 1286.40's conversion factor of 1.18, this case presents a different question, *i.e.*, whether the State can instead introduce the formula through a nonexpert witness who has "familiarity" with section 1286.40's conversion factor. Distilled to its essentials, the majority opinion concludes that Fisher properly provided the section 1286.40 conversion factor to the jury "because the testimony was predicated on his training and familiarity with section 1286.40 of Title 20 of the Administrative Code, *which has the force of law*." (Emphasis added.) *Supra* ¶ 61. In further support, the majority refers to Illinois Rule of Evidence 201(b)(2), which provides, " 'A judicially noted fact must be one not subject to reasonable dispute in that it is *** (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.' " *Supra* ¶ 75 (quoting Ill. R. Evid. 201(b) (eff. Jan. 1, 2011)). From here, the majority concludes that Fisher's testimony was appropriate because "[t]here is no fact that is susceptible to judicial notice that cannot be introduced through some other means." *Supra* ¶ 75.

¶ 105 My concern with the majority's analysis rests in part with the reality that section 1286.40's codification of the 1.18 conversion factor is an incomplete picture of the scientific community's understanding that blood serum alcohol concentration test results are often 12% to 20% higher than whole blood alcohol concentration test results, so blood serum alcohol concentrations can be divided by a corresponding factor between 1.12 and 1.20 to be converted to whole blood alcohol concentrations. *Thoman*, 329 Ill. App. 3d at 1218-19. Thus, it can hardly be said that the conversion factor settled on in section 1286.40 is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Ill. R. Evid. 201(b)(2) (eff. Jan. 1, 2011). In fact, our case law, and that of other states, is replete with examples of expert evidence in disagreement with section 1286.40's use of a single factor.

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[7]I do not agree with the majority's reliance on the Third District's *Stipp* case for the proposition that a nonexpert witness may testify to the section 1286.40 conversion factor. *Stipp*, 349 Ill. App. 3d 955. The parties in *Stipp* stipulated to the 1.18 conversion factor, which was then introduced for administrative ease through a nonexpert crime lab witness. On appeal, the defendant challenged the use of a serum blood concentration to satisfy the elements for finding the defendant guilty of a *per se* DUI. *Id.* at 957-58. The holding in no way supports the use of nonexpert testimony to introduce the section 1286.40 conversion factor.

¶ 106 In *Olsen*, we noted that a trial court may, but is not required to, take judicial notice of section 1286.40's conversion factor. *Olsen*, 388 Ill. App. 3d at 717. With this in mind, one might ask why a trial court in a given case might decline to take judicial notice of section 1286.40. Mathematically speaking, the higher the conversion factor is on the range, the lower the value of the whole blood alcohol equivalent. Understanding this, it necessarily follows that in certain circumstances the application of section 1286.40's 1.18 conversion factor would result in a whole blood equivalent that exceeds ".08," but a conversion factor on the higher end of the scientifically accepted range (1.19-1.20) would not. Thus, the closer the application of section 1286.40's 1.18 conversion factor comes to a 0.08 whole blood alcohol concentration, the more likely it becomes that a trial court might exercise its discretion not to take judicial notice of section 1286.40. In this way, the court acts as a gatekeeper to exclude potentially misleading or incomplete evidence. Moreover, in those instances where a trial court agrees to take judicial notice of section 1286.40, it must necessarily instruct the jury " 'that it may, but is not required to, accept as conclusive any fact judicially noticed.' " *Love*, 2013 IL App (3d) 120113, ¶¶ 25-26 (quoting Ill. R. Evid. 201(g) (eff. Jan. 1, 2011)).

¶ 107 By simply having Fisher testify to section 1286.40's codification of scientific evidence, however, the State avoided the trial court's gatekeeping function as well as the instruction that the jury "may, but is not required to, accept as conclusive any fact judicially noticed." Ill. R. Evid. 201(g) (eff. Jan. 1, 2011). While I agree with the majority that defendant's blood serum alcohol concentration would have converted to a whole blood alcohol concentration in excess of 0.08 at even the highest point of the scientific community's accepted range, this is of no consequence if section 1286.40's conversion factor was not properly admitted into evidence. See *Thoman*, 329 Ill. App. 3d at 1220 (rejecting State's "harmless error" argument that, "even if the highest conversion factor of 1.20 were applied to defendant's blood serum alcohol concentration test result, his whole blood alcohol concentration would still be over 0.08" because "[t]he State has the burden of proving defendant guilty beyond a reasonable doubt").

¶ 108 Unlike the majority, I would analyze Fisher's testimony as opinion testimony. Illinois Rules of Evidence 701 and 702 govern the admissibility of opinion evidence. Illinois Rule of Evidence 701 (eff. Jan. 1, 2011) concerns the opinion testimony of lay witnesses and provides:

> "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) *rationally based on the perception of the witness*, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) *not based on scientific, technical, or other specialized knowledge* within the scope of Rule 702." (Emphases added.)

Illinois Rule of Evidence 702 (eff. Jan. 1, 2011) concerns the opinion testimony of experts and provides:

> "*If scientific, technical, or other specialized knowledge* will assist the trier of fact to understand the evidence or to determine a fact in issue, *a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto* in the form of an opinion or otherwise. Where an expert witness testifies to an opinion based on a new or novel scientific methodology or principle, the proponent of the opinion has the burden of showing the methodology or scientific principle on which the opinion is based is sufficiently established to have gained general acceptance in the particular field in which it belongs." (Emphases added.)

¶ 109 Fisher provided lay opinion testimony when he provided the jury with the factor to convert the blood serum alcohol concentration test result to a whole blood alcohol concentration equivalent. This was allowed over defendant's objection that Fisher was not an expert and thus was unqualified to so testify. In upholding the trial court's decision to allow the testimony, the majority sidesteps the evidentiary limitations placed upon such testimony by Rule 701. Rule 701 limits such opinions or inferences to matters that are "rationally based on the perception of the witness." Ill. R. Evid. 701(a) (eff. Jan. 1, 2011). This is typically understood to mean observations gleaned from the witness's senses as to some relevant matter. See Michael H. Graham, Cleary and Graham's Handbook of Illinois Evidence § 602.1, at 418-20 (10th ed. 2010). Lay witnesses can testify based on a rational perception of what they observed if it is helpful for the determination of a fact in issue. Ill. R. Evid. 701(a), (b) (eff. Jan. 1, 2011); *People v. Donegan*, 2012 IL App (1st) 102325, ¶ 42. Lay witnesses cannot testify to an opinion based on scientific, technical, or other specialized knowledge. Ill. R. Evid. 701(c) (eff. Jan. 1. 2011); *Donegan*, 2012 IL App (1st) 102325, ¶ 42.

¶ 110 Where a lay witness offers an opinion, it must be based on personal observations and the recollection of concrete facts, not on specialized knowledge. *People v. Novak*, 163 Ill. 2d 93, 103 (1994). Here, however, Fisher perceived nothing in the course of investigating defendant that related to the conversion factor. Rather, Fisher relied upon his training and knowledge of the Administrative Code in opining as to the conversion factor. Stated otherwise, Fisher relied upon "scientific, technical, or other specialized knowledge within the scope of Rule 702," which Rule 701 prohibits. Ill. R. Evid. 701(c) (eff. Jan. 1, 2011).

¶ 111 Where, as here, the witness relies upon scientific, technical, or other specialized knowledge within the scope of Rule 702, such testimony is proper only if the witness is otherwise qualified as an expert under Rule 702. Fisher's lay opinion testimony was improper under Illinois Rule of Evidence 701, and he was not properly qualified as an expert witness. See Ill. R. Evid. 702 (eff. Jan. 1, 2011). His testimony as to the conversion factor was outside of the bounds of Fisher's personal observations and recollection of the situation. He provided testimony beyond the common knowledge and experience of a layperson and instead offered an opinion based on specialized knowledge.

¶ 112 To avoid the application of Illinois Rules of Evidence 701 and 702 to Fisher's testimony, the majority analogizes to radar and lidar cases, which, in summary, held that it was unnecessary for the testifying officers to be experts in doppler science in order to testify to the defendants' driving speeds. What the majority ignores, however, is the role that accuracy checks played in rendering expert testimony unnecessary. Because the accuracy of the devices was assured by accuracy checks using tuning forks, it was unnecessary for the testifying officer to understand doppler science that was otherwise accepted in the scientific community. See *Abdallah*, 82 Ill. App. 2d at 316 (radar device—"where, on the other hand, there is reasonable and sufficient proof of the accuracy of the radar instrument (tuning fork), the reading taken therefrom may of itself be sufficient for a conviction"); *Donohoo*, 54 Ill. App. 3d at 378 (speed gun—accuracy of speed gun tested by use of "tuning fork"). Here, needless to say, we lack any tuning fork to assure the accuracy of Fisher's opinion as to the appropriate conversion factor.

¶ 113 Simply put, I disagree that section 1286.40 has talismanically changed the process for converting blood serum alcohol concentration from scientific evidence into evidence upon which any lay person may opine. Indeed, my research has failed to disclose another circumstance where scientific evidence has been codified to dispense with the need for expert

testimony. The purpose of Rule 701(c)'s prohibition of lay witness testimony as to scientific, technical, or other specialized knowledge is "to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." Fed. R. Evid. 701, Advisory Committee Note (amended 2000). Because Fisher was not qualified to render expert testimony as to the conversion of serum to whole blood concentrations, his testimony in this regard runs afoul of Rule 701 and was thus incompetent and inadmissible. Absent the improperly admitted serum-to-whole-blood conversion testimony, there was no evidence as to defendant's whole blood alcohol concentration, requiring reversal of defendant's conviction on count I and remand for a new trial. See *People v. Olivera*, 164 Ill. 2d 382, 393 ("[f]or purposes of double jeopardy all evidence submitted at the original jury trial may be considered when determining the sufficiency of the evidence").

¶ 114 For the reasons expressed above, I respectfully dissent.