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SIXTH DIVISION  
December 13, 2013

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 09 CR 20893
	)	
KENNY LESLIE,	)	Honorable
	)	Jorge Luis Alonso,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE LAMPKIN delivered the judgment of the court.  
Justices Hall and Reyes concurred in the judgment.

**ORDER**

¶ 1 *HELD:* (1) Defendant received effective assistance of counsel; (2) defendant's right to confront the witnesses against him was not denied when the trial court limited his cross-examination of police officers about defendant's civil lawsuit against the arresting officers; (3) the jury was not improperly exposed to other crimes evidence where the uncharged offense of aggravated assault to a police officer was admissible to explain the circumstances of and the basis for defendant's arrest; and (4) the State's closing argument was proper.

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¶ 2 After a jury trial, defendant Kenny Leslie was convicted of aggravated battery to a police officer and sentenced to 20 years in prison.

¶ 3 On appeal, defendant contends that: (1) he was deprived of effective assistance of counsel where counsel failed to request jury instructions on the lesser-included offenses of felony resisting a peace officer and misdemeanor reckless conduct; (2) the trial court violated defendant's right to confront the witnesses against him by limiting his cross-examination of two police officers about defendant's civil lawsuit against the arresting officers; (3) reversible error occurred when the jury was exposed to other crimes evidence and not given any limiting instruction that would have prevented them from using the uncharged offense of aggravated assault to a police officer as propensity evidence to convict defendant; and (4) the State improperly argued in rebuttal closing argument that an acquittal would empower defendant to commit future offenses and made a medical inference unsupported by trial evidence to undermine defendant's testimony.

¶ 4 For the reasons that follow, we affirm defendant's conviction and sentence.

¶ 5 I. BACKGROUND

¶ 6 On the evening of November 3, 2009, the police had stopped a car that was involved in two "hit and run" incidents and arrested the female driver. Defendant, who was in the front passenger seat, refused to exit the car. Ultimately, defendant was arrested and charged with two counts of aggravated battery to a peace officer. One count alleged that defendant caused bodily harm by biting and striking Chicago police officer Fernando Rodriguez, and the other count alleged that, by the same conduct, defendant made physical contact of an insulting or provoking

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nature to Officer Rodriguez. After a jury trial, defendant was convicted of one count of aggravated battery to a peace officer and sentenced as a Class X offender to 20 years in prison.

¶ 7 Eight witnesses testified for the State: four police officers, one police sergeant, and three paramedics. The State presented evidence at trial that Chicago police officers Susan Lascola and Sofia Gonzalez were at the scene of an automobile accident on the south side of Chicago at around 5:30 p.m. on the date of the incident. The driver who remained at the scene told the police that her car was struck by a female driver in a grey Ford Taurus, who fled the scene. While the police were filling out paperwork, a car drove past their squad car followed by a second car whose driver was frantically beeping the horn. That driver stopped and told the officers that she was following the same Ford Taurus, which had just struck her car and took off. The officers pursued the Taurus and eventually stopped it in the center turning lane at the intersection of 79th Street and Cottage Grove Avenue. Officer Lascola observed the female driver and defendant moving around near the center console area and suspected that they might be trying to hide contraband or retrieve a weapon.

¶ 8 The driver, Jessica, initially refused to cooperate but eventually exited the car. She was arrested for fleeing the scene of two accidents and for driving under the influence of alcohol. An open beer was found in the car's console. Eventually, several more police officers arrived at the scene. Due to the nature of the charges, police policy required that the car be towed and impounded. Defendant, however, was still in the front passenger seat and refused to exit the car. He said he was a quadriplegic, but the officers had observed him moving his arms. Officer Lascola told defendant he was not under arrest but he had to exit the car because it had to be

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towed and impounded. She asked him where his wheelchair was and where he lived so other officers could retrieve the wheelchair and take him where he needed to go. Defendant refused to say how he got into the car and where he lived. He did not have any walking cane with him. He said he was not hurt, and Officer Lascola told him that other officers had arrived and could help him out of the car.

¶ 9 When Officer Lascola reached around defendant to unfasten his seatbelt and pat him down for weapons, defendant reached toward the console with his left arm. Officer Lascola pulled him back and put her hand on his chest to hold him while she reached for his seatbelt. Meanwhile, defendant pushed his chest forward, moved his arms around, and said that he was not going to let them take him out of the car. At that point, Officers Rodriguez and Marco Proano stepped forward to assist in getting defendant out of the car. Defendant yelled that he was not getting out of the car and his back hurt. Accordingly, the police called the fire department. When Officer Rodriguez asked defendant to step out of the car, defendant said, "[Expletive omitted] you both, Mexicans. I'm going to get my gun and kill you when I get out." After that statement, the officers refrained from arresting defendant for aggravated assault to a police officer because they were waiting for the fire department to arrive and assess defendant for any injuries.

¶ 10 A fire engine and an ambulance arrived at about 6:18 p.m., and defendant refused to let anyone touch him. He refused treatment from the firemen and the two paramedics and declined to sign a refusal of service form. He told a paramedic that he was neither injured nor in pain. Then, defendant exited the car on his own without assistance, stood up and took about four steps

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from the car. At that point, Officer Rodriguez handcuffed defendant, who was taken into custody for aggravated assault to a police officer based on his threat to get a gun and kill the officers.

¶ 11 Officer Rodriguez testified that when the fire engine and ambulance arrived at the scene, he took a few steps back to give the firemen and paramedics room. After defendant refused medical attention, he exited the car, stood up, and took a couple of steps. Officer Rodriguez, who was about five or six feet away from defendant, was unsure if the paramedics had assisted defendant in any way. Defendant had a "bit of a limp, but nothing out of the ordinary." When Officer Rodriguez handcuffed defendant, no force was required to affect the arrest. While Officer Proano spoke with other people at the scene, Officer Rodriguez walked defendant to a squad car. Defendant, who was still screaming, sat in the back seat but positioned his legs outside the squad car to prevent Officer Rodriguez from closing the door. Defendant defied Officer Rodriguez's orders to put his feet in the car, so Officer Rodriguez picked up defendant's legs, moved them into the car and tried to close the door. Defendant, however, slid onto his back, lay lengthwise across the backseat, and kicked. When Officer Rodriguez tried to close the door, defendant kicked him two to three times in the jaw. Eventually, Officer Rodriguez was able to close the car door.

¶ 12 Defendant arrived at the police station around 7 p.m. At about 10:50 p.m., Officers Rodriguez and Proano took defendant to the lockup area and removed his handcuffs so he could be fingerprinted and photographed. Defendant, however, refused to cooperate. Consequently, Officers Rodriguez and Proano took defendant to a holding cell, where he was required, for

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safety reasons, to remove his shoelaces. Defendant, who was sitting on a bench with his feet on the floor, refused to remove his shoelaces.

¶ 13 Officer Rodriguez testified that he reached toward defendant's feet to take off his shoelaces, but defendant turned and placed his feet on top of the bench. Officer Rodriguez testified that he reached for defendant's feet again, but defendant lunged forward, bit down on Officer Rodriguez's right wrist, and locked on. Officer Rodriguez tried to push defendant off him and used open hand strikes and pressure on pressure points to get defendant to unlock his jaw. With the assistance of Officer Proano, Officer Rodriguez pried defendant off him, removed defendant's shoelaces, and closed the door of the holding cell. Officer Rodriguez was taken to the hospital and treated for the bite injury. The State published to the jury photographs of the injuries to Officer Rodriguez's jaw and wrist.

¶ 14 On cross-examination, Officer Rodriguez acknowledged that he had previously submitted, under oath, written answers to a questionnaire by an investigator for the Independent Police Review Authority (IPRA). In that signed written statement, Officer Rodriguez stated that "[he] opened the passenger door, assisted [defendant] out of the vehicle and re-located [defendant] to [Officer Rodriguez's] vehicle for transport." At the trial, Officer Rodriguez testified that he was not holding defendant's shoulder when he tried to remove defendant's shoelaces; however, during a preliminary hearing in November 2009, Officer Rodriguez testified that when defendant became combative, Officer Rodriguez tried to hold defendant down by his shoulders to remove his shoelaces.

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¶ 15 Officer Proano's testimony was generally consistent with Officer Rodriguez's testimony. Officer Proano was talking with other people at the scene and thus did not see defendant kick Officer Rodriguez in the jaw. Furthermore, when Officers Proano and Rodriguez were in the holding cell with defendant, Officer Rodriguez managed to remove one of defendant's shoelaces and had begun to remove the second shoelace when defendant grabbed Officer Rodriguez's arm, bit down on his wrist, and locked on. Officer Rodriguez had not made any sort of aggressive physical contact with defendant. When the officers left the holding cell, defendant kept laughing and said that he was going to sue them. On cross-examination, Officer Proano acknowledged that his police report stated that defendant bit Officer Rodriguez's hand while they were taking defendant to a lockup cell; the report did not contain any details concerning defendant's shoelaces and his sitting on a bench. Furthermore, defendant did file a civil lawsuit against Officers Proano and Rodriguez and the Chicago police superintendent for damages.

¶ 16 An intake paramedic at the Cook County jail testified that he performed defendant's medical evaluation upon his arrival at the jail. Defendant denied any recent trauma and did not say that he had been assaulted by a police officer.

¶ 17 Defendant testified that he was 46 years old and had been shot several times in 1990, which resulted in paralysis. After surgery and physical therapy, he regained the use of his legs but suffered pain in his back and required the use of a leg brace to walk. On the day of the incident, his back had "popped" and he was in pain. He was a passenger in the Taurus Jessica was driving, and they were going to a convenience store. After the police stopped the car and ordered Jessica out of the car, defendant remained in the passenger seat. He told the female

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officer that he had injured his back, his right leg was paralyzed from the knee down, he was unable to get out of the car, and did not have his cane. The police did not offer to drive him home, and Officer Rodriguez angrily ordered him out of the car.

¶ 18 Defendant testified that he asked for help getting out of the car, but Officers Rodriguez and Proano grabbed him, threw him face-first onto the ground, jumped on him, placed their knees into his back, and then handcuffed him. Then the officers pulled him up, slammed him against their squad car, shoved him into the car and closed the door. Defendant admitted that he used profanity but denied threatening to shoot the officers and denied kicking Officer Rodriguez or flailing his legs at him. At the police station, the officers grabbed him out of the car and took him to the intake area, where he sat, handcuffed, for a couple of hours. When defendant complained that he had done nothing wrong, the officers slammed him onto the floor. The officers also repeatedly refused defendant's requests to go to the hospital. After arguing with the officers, defendant was sitting on a stool when Officer Rodriguez approached him from behind and placed him in a choke hold for 30 to 40 seconds. Defendant testified that he could not breathe, so he bit Officer Rodriguez on the wrist to force him to release the choke hold.

¶ 19 Defendant denied any recollection of the Taurus striking two other cars before being stopped by police; denied seeing any fire trucks, ambulances or paramedics at the scene; denied getting out of the Taurus on his own; denied refusing to be fingerprinted or photographed; and denied being told to remove his shoelaces. He was taken to the hospital the next day and treated for asthma and back pain. He acknowledged that he never told anyone at the hospital that he had been choked. He admitted that he had a 2000 conviction for driving under the influence.

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¶ 20 The jury found defendant guilty of aggravated battery to a peace officer based on bodily harm. The jury acquitted defendant of the charge premised on insulting or provoking contact. The trial court sentenced defendant as a Class X offender to 20 years in prison. Defendant timely appealed.

¶ 21

## II. ANALYSIS

¶ 22

### A. Ineffective Assistance of Counsel

¶ 23 Defendant claims he was denied the right of effective assistance of counsel because counsel failed to request jury instructions on the lesser-included offenses of felony resisting a peace officer and misdemeanor reckless conduct.

¶ 24 In order to obtain relief on his claims of ineffective assistance of counsel, defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).

Specifically, defendant must show not only that his lawyer's performance fell below an objective standard of reasonableness, but also that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687-89; *People v. Albanese*, 104 Ill. 2d 504, 525-27 (1984). The competence of counsel is assessed in light of counsel's total performance (*People v. Ayala*, 142 Ill. App. 3d 93, 99-100 (1986)), and there is a strong presumption that the conduct of counsel falls within the wide range of reasonable professional assistance (*Strickland*, 466 U.S. at 689). The prejudice prong of the *Strickland* test may be satisfied if defendant can show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. *People v. Evans*, 209 Ill. 2d 194, 220 (2004). The failure to satisfy either *Strickland* prong will preclude a

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finding of ineffective assistance of counsel. *People v. Johnson*, 368 Ill. App. 3d 1146, 1161 (2006).

¶ 25

#### 1. Felony Resisting Arrest

¶ 26 First, defendant argues that his trial counsel was ineffective for insisting on a misdemeanor resisting a peace officer instruction when the trial court offered to instruct the jury on the felony version of the offense, which was a Class 4 felony. See 720 ILCS 5/31-1(a), (a-7) (West 2010). The felony resisting instruction would have provided the jury with a less serious alternative to the charged offense of aggravated battery to a police officer and not exposed defendant, given his criminal history, to an enhanced sentencing range of 6 to 30 years under the Class X offender provision. See 730 ILCS 5/5-4.5-95(b) (West 2010). Defendant complains that counsel's unreasonable decision prevented the jury from convicting defendant of a probational Class 4 felony with a sentencing range of 1 to 3 years. See 720 ILCS 5/31-1(a-7) (West 2010) (felony resisting a peace officer); 730 ILCS 5/5-4.5-45 (West 2010) (sentencing for a Class 4 felony). Defendant contends there was a reasonable probability that the jury would have convicted him of resisting a peace officer because the State's evidence showed that he was resisting the police and the jury could have concluded that his kicking and biting were part of his overall effort to thwart and resist the officers. Defendant argues the trial court failed to ask whether he concurred in counsel's decision to forego altogether a lesser-included offense instruction.

¶ 27 Counsel's trial strategy enjoys a presumption of soundness. *People v. Pecoraro*, 175 Ill. 2d 294, 319 (1997). "Neither mistakes in strategy nor the fact that another attorney with the

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benefit of hindsight would have handled the case differently indicates the trial lawyer was incompetent." *People v. Negron*, 297 Ill. App. 3d 519, 538 (1998). Even though the decision whether to submit a lesser-included offense instruction is uniquely one of trial strategy, it ultimately belongs to the defendant. *People v. Brocksmith*, 162 Ill. 2d 224, 229 (1994) (because the decision of what plea to enter ultimately belongs to the defendant and that decision is analogous to the decision to tender a lesser-included offense instruction, both decisions should be treated the same).

¶ 28 To ensure that the defendant's right to submit a lesser-included offense instruction is safeguarded, "when a lesser-included offense instruction is tendered, \*\*\* the trial court should conduct an inquiry of defense counsel, in defendant's presence, to determine whether counsel has advised defendant of the potential penalties associated with the lesser-included offense, and the court should thereafter ask defendant whether he agrees with the tender." *People v. Medina*, 221 Ill. 2d 394, 409 (2006). This procedure strikes the appropriate balance of inquiry and confirmation without overreaching by the trial court or undue intervention in the attorney-client relationship. *Id.* (generalized admonishments by the trial court concerning lesser-included offense instructions run the risk of improperly intruding on the attorney-client relationship and interfering with the defense strategy counsel has pursued). If no lesser-included instruction is tendered, then no inquiry by the trial court is required because "it may be assumed that the decision not to tender was defendant's, after due consultation with counsel." *Id.* at 410.

¶ 29 According to the record, defense counsel requested, in defendant's presence, the lesser-included offense of resisting a peace officer. The trial court then conducted an inquiry of

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defendant, who affirmed that he: had a chance to talk to his lawyers about the lesser-included offense issue; was asking for a lesser-included offense instruction to be given to the jury; had time to think about whether it was a good idea or not; understood the potential disadvantages of that strategic decision; understood that it was his personal decision to make; and was not being forced to request the lesser-included offense of resisting.

¶ 30 Thereafter, defense counsel and the State argued whether the lesser-included resisting instruction should be either the misdemeanor or Class 4 felony version. The defense argued that the misdemeanor version was appropriate because the jury could choose to disbelieve that defendant bit and kicked the officer, and choose to believe that defendant refused to exit the car after he threatened the officers and then "stiffened up" so that two officers had to handcuff him. The State responded that the jury should receive the felony version because Officer Rodriguez suffered bodily harm during the incident. Upon questioning by the trial court, defense counsel confirmed that the defense did not want the resisting instruction if the court determined that the Class 4 felony version, and not the misdemeanor version, was appropriate. The trial court then determined that it would not be consistent with the evidence to give the misdemeanor version of the instruction.

¶ 31 We do not agree with defendant's assertion that defense counsel, rather than defendant, made the ultimate decision not to tender the felony resisting instruction. After being admonished by the trial court, defendant confirmed that he had spoken to counsel about the lesser-included offense issue, understood the potential disadvantages of this strategy, and wanted to request a lesser-included instruction. Then, the parties argued, in defendant's presence, the merits of

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whether the misdemeanor or felony version of the instruction was appropriate. When the trial court ruled in favor of the State, defense counsel, in defendant's presence, expressly rejected the felony instruction, and defendant raised no objection to or questions concerning counsel's statement. Defendant's contrary argument notwithstanding, it would have been improper under the circumstances in this case for the trial court to interject itself into this strategic decision between defendant and his counsel by continuing to ask defendant if he concurred with counsel's decision to forego altogether a lesser-included offense instruction. See *Medina*, 221 Ill. 2d at 410 ("it may be assumed that the decision not to tender was defendant's, after due consultation with counsel").

¶ 32 The record establishes that defendant agreed with counsel's request to instruct the jury on the misdemeanor version of the resisting offense only. Consequently, defendant cannot contend on appeal that counsel was ineffective for rejecting the trial court's offer to instruct the jury on the felony version of the resisting offense. *People v. Carter*, 208 Ill. 2d 309, 319 (2003) ("Under the doctrine of invited error, an accused may not request to proceed in one manner and then later contend on appeal that the course of action was in error."); *People v. Villarreal*, 198 Ill. 2d 209, 227 (2001) ("to allow defendant to object, on appeal, to the very verdict forms he *requested* at trial would offend all notions of fair play" (emphasis in original)).

¶ 33 However, assuming, *arguendo*, that the record could be interpreted in the manner urged by defendant on appeal, we nonetheless find that he was not denied effective assistance of counsel. Trial strategy is virtually unchallengeable and will generally not support an ineffective assistance of counsel claim. *People v. Palmer*, 162 Ill. 2d 465, 476 (1994). Counsel's decision to

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advance an "all-or-nothing defense" has been recognized as a valid trial strategy (*People v. Barnard*, 104 Ill. 2d 218, 231-32 (1984)) and is generally not unreasonable unless that strategy is based upon counsel's misapprehension of the law (*People v. Lemke*, 349 Ill. App. 3d 391, 399-402 (2004)). In this case, counsel adopted a valid trial strategy when he argued to the jury that defendant was grabbed from the car by the officers and thrown to the ground, that he did not resist arrest and did not kick Officer Rodriguez from inside the squad car, that he did not refuse to be fingerprinted or photographed or refuse to remove his shoelaces, and that he was acting in self-defense when he bit Officer Rodriguez's wrist to release the choke hold. The mere fact that this strategy proved unsuccessful does not mean counsel performed unreasonably and rendered ineffective assistance. *People v. Milton*, 354 Ill. App. 3d 283, 290 (2004). Defendant has not met his burden under the deficient performance prong of the *Strickland* test.

¶ 34 2. Misdemeanor Reckless Conduct

¶ 35 Next, defendant argues trial counsel was ineffective for failing to request an instruction on the lesser-included offense of misdemeanor reckless conduct (720 ILCS 5/12-5(a)(1) (West 2010)), because a conviction of that offense would not have exposed defendant to a lengthy term of imprisonment. Defendant argues a reckless conduct instruction was warranted because the evidence concerning kicking the door of the squad car and biting Officer Rodriguez was sufficient to create an issue of fact as to whether defendant acted knowingly or recklessly.

¶ 36 The State argues that an instruction on the lesser-included offense of reckless conduct was not warranted because the evidence showed that defendant's conduct was not mere recklessness, but only intentional or knowing, and accordingly, trial counsel was not ineffective

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for failing to request such an instruction.

¶ 37 To determine whether an offense is properly considered a lesser-included offense and whether a defendant is entitled to a lesser-included offense instruction, courts employ a two-tiered charging instrument approach. *People v. Phillips*, 383 Ill. App. 3d 521, 540 (2008). In order to identify whether an offense is a lesser-included offense of a charged offense, the court must determine that the factual description of the charged offense in the indictment contains a broad foundation or main outline of the lesser offense. *Id.* However, even when a lesser-included offense has been identified in the charged offense, the defendant must still meet an independent prerequisite in order to have the jury instructed on the lesser-included offense. *Id.* Specifically, the court must examine the evidence adduced at trial to determine whether the evidence rationally supports a conviction for the lesser-included offense. *Id.* A "defendant is entitled to a lesser-included offense instruction only if the evidence at trial is such that a jury could rationally find him guilty of the lesser offense, yet acquit him of the greater." *Medina*, 221 Ill. 2d at 405.

¶ 38 Although reckless conduct may be a lesser-included offense of aggravated battery to a peace officer, we conclude, after reviewing the charging instrument in this case and the evidence adduced at trial, that under the facts of this case defendant's conduct was not reckless and, thus, he was not entitled to a lesser-included reckless conduct instruction.

¶ 39 In order to prove defendant guilty of aggravated battery to a peace officer, the State had to establish that defendant (1) intentionally or knowingly, without legal justification, caused bodily harm or made physical contact of an insulting or provoking nature to the victim; and (2) knew the

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victim was a peace officer engaged in his official duties. *People v. Phillips*, 392 Ill. App. 3d 243, 257-58 (2009). A person is considered to act intentionally "to accomplish a result or engage in conduct \*\*\* when his conscious objective or purpose is to accomplish that result or engage in that conduct." 720 ILCS 5/4-4 (West 2010); *People v. Renteria*, 232 Ill. App. 3d 409, 416 (1992). "A defendant's intent may be implied from the character of the act." *People v. Howery*, 178 Ill. 2d 1, 43 (1997). A person acts knowingly with respect to his conduct when he "is consciously aware that that result is practically certain to be caused by his conduct." 720 ILCS 5/4-5(b) (West 2010). Knowledge also encompasses conduct that is performed willfully. *Id.*

¶ 40 In contrast, a "person commits reckless conduct when he or she, by any means lawful or unlawful, recklessly performs an act or acts that \*\*\* cause bodily harm to or endanger the safety of another person." 720 ILCS 5/12-5(a)(1) (West 2010). "A person is reckless or acts recklessly when that person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow \*\*\*." 720 ILCS 5/4-6 (West 2010). Recklessness is a "less culpable mental state" than knowledge, and evidence of recklessness is insufficient to prove that a person acted knowingly." *People v. Fornear*, 176 Ill. 2d 523, 531 (1997) (quoting *People v. Spears*, 112 Ill. 2d 396, 408 (1986)).

¶ 41 Here, the evidence clearly established that defendant intentionally kicked and bit Officer Rodriguez, and those acts cannot seriously be construed as merely reckless. Specifically, after defendant, who was agitated and defiant, was placed in the squad car, he deliberately slid down onto his back and pumped his legs to kick at Officer Rodriguez, who stood between defendant and the door. While Officer Rodriguez tried to close the door between defendant's leg pumps,

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defendant struck him two or three times in the jaw. Then, at the police station, defendant, who was still agitated and defiant, refused to remove his shoelaces, and deliberately repositioned himself on the bench and then lunged at Officer Rodriguez to bite him on the wrist. Defendant locked his jaw onto the officer's wrist for a period of time and only released his bite when the officers struck him. Photographs of Officer Rodriguez's injuries were published to the jury. Although defendant denied kicking Officer Rodriguez, defendant invoked the right of self-defense and testified that he intentionally bit Officer Rodriguez to release his alleged choke hold. Defendant's testimony did not suggest that any of his actions were unintentional, accidental or merely reckless. Our review of the evidence establishes that defendant was not entitled to a jury instruction on reckless conduct, and, thus, counsel was not ineffective for failing to request one.

¶ 42

#### B. Right to Confront Witnesses

¶ 43 Defendant argues the trial court violated his right to confront the witnesses against him by restricting his cross-examination of Officers Rodriguez and Proano regarding defendant's pending civil lawsuit against them. Defendant argues the trial court's ruling prevented him from attacking the Officers' credibility by questioning them on a matter that would have shown their bias, interest or motive to testify falsely. First, defendant contends the complete restriction of any questions to Officer Rodriguez about the pending lawsuit deprived the jury of the opportunity to evaluate the tone, manner, and body language of Officer Rodriguez, who was the State's most critical witness where he was the bite victim and the only witness who testified that defendant kicked him from inside the squad car. Second, defendant contends that, although he was able to question Officer Proano to some extent about the pending lawsuit, the trial court

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improperly prevented the defense from asking whether defendant's lawsuit sought damages as a result of an injury he sustained, as opposed to seeking merely an unworthy "payday" from the incident.

¶ 44 According to the record, the trial court sustained the State's objection to defense counsel's question to Officer Rodriguez about whether he was currently being sued. The trial court explained that the issue of defendant's lawsuit against the police officers was a proper subject for either the State or defense to pursue during any testimony by defendant because it was relevant to the issue of defendant's motive to testify falsely; however, it was not "fair game" to question the officers about the lawsuit because it would be unfair for defendant to sue them in civil court and then suggest that the civil lawsuit gave them a motive to lie in the criminal case.

¶ 45 Later, Officer Proano testified on direct examination that defendant was laughing in the lockup and said that he would sue the officers. Thereafter, the defense was allowed to elicit Officer Proano's testimony that defendant was suing him about what happened on the evening of defendant's arrest. Then the State elicited Officer Proano's testimony that defendant was suing him, Officer Rodriguez and the police superintendent for money or a "payday." On further re-cross, Officer Proano testified that he received the lawsuit a couple of weeks ago, he did not know any details because he had not spoken to anybody about it, and the question of any injuries sustained by defendant during the incident was pending further investigation. When defense counsel asked if defendant's civil complaint sued the officers for money damages as a result of an injury defendant claimed he received as a result of the incident, the trial court sustained the State's objection.

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¶ 46 First, we reject defendant's second contention that the trial court improperly limited Officer Proano's cross-examination. The record is clear that the trial court properly sustained the State's objection to defense counsel's question of Officer Proano because it was repetitive and he had already answered that he did not know any details concerning the damages or injuries alleged in defendant's lawsuit. Accordingly, our analysis of this issue is limited to the trial court's preclusion of lawsuit questions to Officer Rodriguez.

¶ 47 The confrontation clause of the sixth amendment of the United States Constitution (U.S. Const., amend. VI) guarantees a defendant the right to cross-examine a witness against him for the purpose of showing the witness's bias, interest or motive to testify falsely. *Davis v. Alaska*, 415 U.S. 308 (1974). The exposure of a witness's motivation is an important function of the constitutionally protected right of cross-examination. *Greene v. McElroy*, 360 U.S. 474 (1959). However, a trial judge may impose limits on a defense counsel's inquiry into the potential bias of a prosecution witness without offending defendant's sixth amendment right. *People v. Harris*, 123 Ill. 2d 113, 144 (1988). A trial judge retains wide latitude to impose reasonable limits based on concerns about harassment, prejudice, confusion of the issues, the witness's safety, or interrogation that is repetitive or of little relevance. *Id.* The "Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985).

¶ 48 The limitation of cross-examination rests within the sound discretion of the trial court and will not be reversed unless there has been a clear abuse of discretion. *People v. Green*, 339 Ill.

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App. 3d 443, 455 (2003). An abuse of discretion occurs only where the court's decision is arbitrary or fanciful, or where no reasonable person would adopt the court's view. *People v. Dunmore*, 389 Ill. App. 3d 1095, 1105 (2009). While a defendant should be allowed the widest latitude possible on cross-examination to establish bias or a motive to testify falsely, the evidence of bias or motive must not be remote or uncertain and it must give rise to an inference that the witness has something to gain or lose by his testimony. *Green*, 339 Ill. App. 3d at 455.

¶ 49 We do not find an abuse of discretion by the trial court in this case. The record establishes that the trial testimony of Officers Rodriguez and Proano concerning defendant's conduct was generally consistent with their documentation of his conduct in the police reports or statements to a supervisor. Moreover, those reports were made and defendant was charged with aggravated battery of a police officer long before defendant filed his civil lawsuit. *Cf. People v. Fultz*, 2012 IL App (2d) 101101, ¶¶ 59-60 (trial court abused its discretion where it limited cross-examination of a police officer regarding the timing of the aggravated battery charge where a citizen's complaint about the police action was filed before the police sought authorization from the State's Attorney's office for the aggravated battery charge); *People v. Averhart*, 311 Ill. App. 3d 492, 498-99 (1999) (where the defendant alleged the police officer framed him in December 1995 in retribution for a prior brutality complaint the defendant had filed against the officer concerning a prior arrest in January 1995, the trial court erred in precluding cross-examination concerning the prior brutality complaint because it was critical for the jury to have a full understanding of the relationship between the officer and the defendant in order to properly weigh their respective credibility). In the instant case, there was no evidence of any prior history

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between the arresting officers and defendant, and Officer Proano testified that he was served with defendant's lawsuit only a couple of weeks prior to his trial testimony. In addition, the precluded cross-examination did not involve an IPRA investigation but, rather, concerned a civil lawsuit defendant had served on the officers shortly before the criminal trial commenced. See *People v. Wilson*, 2012 IL App (1st) 092910, ¶ 32 (where the defense theory was that a police officer shot an unarmed defendant, planted a gun near him and then mishandled the gun to justify the lack of the defendant's fingerprints, the trial court abused its discretion by precluding evidence of IPRA investigations related to the instant case). Accordingly, we cannot say that no reasonable person would adopt the trial court's view that the evidence of any bias from defendant's lawsuit was too remote or uncertain and did not give rise to an inference that the officers had something to gain or lose by their testimony.

¶ 50 Nevertheless, assuming, *arguendo*, that the trial court's limitation of Officer Rodriguez's cross-examination was an abuse of discretion, the error was harmless. A criminal defendant is constitutionally entitled to a fair trial, not a perfect one. *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). Thus, not all constitutional errors require reversal of a judgment of conviction. *Id.* The State has the burden to prove beyond a reasonable doubt that the constitutional error did not contribute to the verdict obtained. *People v. Patterson*, 217 Ill. 2d 407, 428 (2005). There are three different approaches to measuring harmless error: "(1) focusing on the error to determine whether it might have contributed to the conviction, (2) examining the other evidence in the case to see if overwhelming evidence supports the conviction, and (3) determining whether the improperly admitted [or excluded] evidence is merely cumulative or duplicates properly admitted

evidence." *Id.* Factors to consider in determining whether an error is harmless include: (1) the importance of the witness's testimony in the prosecution's case, (2) whether the testimony was cumulative, (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, (4) the extent of cross-examination otherwise permitted, and (5) the overall strength of the prosecution's case. *Van Arsdall*, 475 U.S. at 684.

¶ 51 In reviewing this claim of error to defendant's right to cross-examine a witness, "we are not required to isolate the particular limitation on cross-examination to determine whether reversible error has occurred. [Citation.] Rather, the question in each case must finally be whether defendant's inability to make the inquiry created a substantial danger of prejudice by depriving him of the ability to test the truth of the witness's direct testimony. [Citation.] We look to the record in its entirety and the alternative means open to the defendant to impeach the witness. [Citation.] Thus, if a review of the entire record reveals that the fact-finder has been made aware of adequate factors concerning relevant areas of impeachment of a witness, no constitutional question arises merely because the defendant had been prohibited on cross-examination from pursuing other areas of inquiry. [Citation.]" *People v. Klepper*, 234 Ill. 2d 337, 355-56 (2009).

¶ 52 Here, the State met its burden of establishing that the alleged error did not contribute to the jury's verdict. Because Officer Proano's testimony on direct examination opened the door to the civil lawsuit evidence, the jury was made aware of defendant's recent lawsuit against the arresting officers and the Chicago police superintendent for monetary damages arising from

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defendant's arrest in the instant case. Officer Proano testified that the investigation was continuing concerning the issue of whether defendant had sustained any injuries as a result of his arrest. Consequently, the jury was aware of the possibility of potential bias concerning Officers Rodriguez and Proano based on the lawsuit. In addition, defendant was fully permitted to cross-examine both officers about the circumstances of the arrest and detention, and otherwise fully tested Officer Rodriguez's credibility, even questioning him concerning his police reports and written statements to the IPRA. Consequently, the trial court's limitation did not create a "substantial danger of prejudice by depriving [the defendant] of the ability to test the truth of the witness' direct testimony." *Harris*, 123 Ill. 2d at 145.

¶ 53 Moreover, the evidence against defendant was overwhelming. The arresting officers' testimony concerning defendant's defiant behavior at the scene and the circumstances of his arrest was corroborated by other police officers at the scene and two paramedics. Although no one else saw defendant kick Officer Rodriguez in the jaw, he timely reported it to his supervisor at the scene, filled out the requisite report concerning the injury, and photographed the injury. In addition, another police officer and a sergeant corroborated certain portions of the arresting officers' testimony concerning defendant's conduct in the lockup. In contrast, defendant's testimony was neither credible nor corroborated. After his arrest, he was treated only for asthma and back pain, and the paramedic at the jail testified that during defendant's medical intake, he did not complain of any recent injury or trauma.

¶ 54 Thus, the evidence supporting defendant's conviction was overwhelming and any error in precluding the cross-examination of Officer Rodriguez concerning defendant's lawsuit was

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harmless.

¶ 55

### C. Other Crimes Evidence

¶ 56 Defendant argues that, during the trial, the jury was exposed to other crimes evidence, *i.e.*, the uncharged misdemeanor offense of aggravated assault to a police officer, where defendant was arrested for threatening to get his gun and kill Officers Rodriguez and Proano.

Defendant contends the trial court abused its discretion and defense counsel rendered ineffective assistance by failing to instruct the jury in accordance with Illinois Pattern Jury Instructions, Criminal, No. 3.14 (4th ed. 2000), which would instructed the jury not to use the uncharged offense as propensity evidence to convict defendant. Defendant asserts that without the limiting instruction, jurors unfamiliar with compartmentalized legal reasoning would naturally think that defendant's threat to shoot and kill the officers and his subsequent arrest for aggravated assault made it more likely that he committed aggravated battery by kicking and biting Officer Rodriguez. Jurors in deliberations also could have used the aggravated assault to buttress the officers' testimony and reject defendant's denial that he kicked Officer Rodriguez and bit him in self-defense.

¶ 57 Defendant acknowledges that defense counsel did not object to the trial court's alleged failure to give the jury the appropriate instruction. Nevertheless, defendant urges this court to review this issue under both prongs of the plain error doctrine. Alternatively, defendant argues his counsel's failure to object constituted ineffective assistance of counsel.

¶ 58 A court may consider a forfeited issue as plain error. The plain error doctrine allows errors not previously challenged to be considered on appeal if either: (1) the evidence is closely

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balanced and the jury's guilty verdict may have resulted from the error; or (2) the error was so fundamental and of such magnitude that the defendant was denied a fair trial and the error must be remedied to preserve the integrity of the judicial process. *People v. Hudson*, 228 Ill. 2d 181, 191 (2008); *People v. Herron*, 215 Ill. 2d 167, 177 (2005). "In plain error review, the burden of persuasion rests with the defendant." *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). The first step of plain error analysis is deciding whether any error has occurred (*Id.*), and we conclude that no error occurred here.

¶ 59 "The consequential steps in the investigation of a crime and the events leading up to an arrest are relevant when necessary and important to a full explanation of the State's case to the trier of fact." *People v. Hayes*, 139 Ill. 2d 89, 130 (1990), *overruled on other grounds*, *People v. Tisdell*, 201 Ill. 2d 210, 217-19 (2002). In criminal cases, an arresting or investigating officer should be allowed some explanation of his presence and conduct so that he is not put in the false position of seeming just to have happened upon the scene. *People v. Cameron*, 189 Ill. App. 3d 998, 1004 (1989).

¶ 60 The decision whether to admit other crimes evidence is within the sound discretion of the trial court. *People v. Lieberman*, 107 Ill. App. 3d 949, 955 (1982). The evidence is inadmissible to show that the defendant had a propensity to engage in criminal activity; however, it may be admitted when relevant for other purposes. *People v. Baptist*, 76 Ill. 2d 19, 27 (1979). Other-crimes evidence has been held admissible if relevant to demonstrate knowledge, intent, motive, plan, or identification (*People v. Lindgren*, 79 Ill. 2d 129, 137 (1980)), or if it is relevant to the police investigation of the offense at issue and the investigatory procedures involved an integral

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part of the narrative of the arrest (*People v. Scott*, 108 Ill. App. 3d 607, 613 (1982)). Reference to another crime during such narrative is admissible if it explains the circumstances surrounding a defendant's arrest. *People v. Morthole*, 51 Ill. App. 3d 919, 932 (1977), *overruled on other grounds*, *People v. Lewis*, 75 Ill. App. 3d 560 (1979).

¶ 61 In this case, no error occurred when the jury was informed that defendant was arrested after he exited the car based on his threat to shoot and kill the officers. The basis for defendant's arrest was inextricably intertwined with the charged offenses. Testimony concerning his threat was necessary for the jury to understand the officers' cautious conduct at the scene and why they needed to search defendant, who claimed to be paralyzed, for weapons while they waited for the paramedics to arrive to assist defendant in getting out of the car. Without evidence that defendant threatened the officers and was arrested for aggravated assault, the jury would wonder why the officers handcuffed him, placed him into the squad car, and took him to the police station to be fingerprinted and photographed.

¶ 62 Furthermore, "where the trial court properly admitted evidence of other criminal acts that occurred at the same time and place and that were related to the criminal action for which the defendant was being tried, no limiting instruction is required." *People v. Figueroa*, 341 Ill. App. 3d 665, 672 (2003). "This is particularly the case where the acts complained of as evidence of other crimes arose from the very same transaction or set of circumstances as the primary criminal act." *Id.* Notably, defendant himself took the stand and gave detailed testimony concerning his version of his conduct leading up to the arrest. We conclude that the evidence concerning defendant's arrest was only used to explain the officers' conduct and the circumstances leading to

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defendant's arrest, and, thus, no limiting instruction was necessary in this case.

¶ 63 Accordingly, defendant's alternative argument that his counsel was ineffective for failing to request a limiting instruction likewise fails. *People v. Lawton*, 212 Ill. 2d 285, 304 (2004) (counsel need not make futile motions to be deemed effective); *People v. Jackson*, 391 Ill. App. 3d 11, 34-35 (2009) (because no limiting instruction was necessary concerning the complained-of evidence, defendant could not show that counsel was ineffective for failing to seek a limiting instruction).

¶ 64 D. Closing Argument

¶ 65 Defendant contends he was denied his right to a fair trial based on the prosecutor's erroneous and prejudicial comments during closing argument. Specifically, defendant alleges that the prosecutor (1) contended that an acquittal would empower defendant to commit future offenses; and (2) relied on a medical inference that was unsupported by any trial evidence to undermine a critical portion of defendant's testimony. Defendant argues the cumulative impact of the prosecution's acts of misconduct denied him a fair trial.

¶ 66 A prosecutor is allowed wide latitude during closing arguments. *People v. Nieves*, 193 Ill. 2d 513, 532-33 (2000). A prosecutor may comment on the evidence presented at trial, as well as any fair, reasonable inferences therefrom, even if such inferences reflect negatively on the defendant. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005). Remarks made during closing arguments must be examined in the context of those made by both the defense and the prosecution, and must always be based upon the evidence presented or reasonable inferences drawn therefrom. *People v. Coleman*, 201 Ill. App. 3d 803, 807 (1990). The character and scope

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of closing arguments are left largely to the discretion of the trial court, and we will not disturb its decision absent an abuse of discretion. *People v. Aleman*, 313 Ill. App. 3d 51, 66-67 (2000). We will reverse a conviction on the ground of improper argument only if the challenged comments constituted a material factor in the conviction, without which the jury might have reached a different verdict. *Id.* at 67. However, where a defendant has forfeited review of many of the prosecutor's statements made during closing argument, the court reviews *de novo* the legal issue of whether the prosecutor's improper statements were so egregious that they warrant a new trial. *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007).

¶ 67 First, defendant argues that the prosecutor improperly implied that defendant would commit future crimes if the jury failed to convict him. Defendant states that this type of argument improperly urges jurors to convict based on an emotional appeal to unwarranted fears that an acquittal will make the jurors responsible for the defendant's future crimes. Defendant argues that the impact of the prosecutor's improper and highly prejudicial remarks was amplified before the jury by the trial court's failure to sustain the defense's multiple objections.

¶ 68 According to the record, the defense argued in closing argument that the officers exercised their "power and control" over defendant and lied about the entire encounter. In response, the prosecutor argued that the arresting officers' testimony was corroborated by other officers and three civilians whereas defendant's testimony about a police conspiracy or frame-up was not credible, was uncorroborated, and was inconsistent with statements he made both at the time of the incident and in his initial complaint to an investigator. The prosecutor argued that when defendant testified, he lied because he would say or do anything to avoid a conviction. The

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prosecutor argued that defendant refused to take responsibility for the incident and has been avoiding responsibility from the "get-go," but the jury could hold him responsible for the actions and choices he made. Over defendant's objections, the prosecutor argued:

"[Defendant] won't hold himself responsible, but you all can. If you want to let him go, then let him go. But know this, you let him go, you give him a recipe for getting off on cases like this scot-free. You give him a road map on how to do it. You give him a recipe on how to avoid responsibility. But if you want him to learn, if you want to hold him responsible, then you go back into that jury room and you sign the verdict forms that he is guilty of aggravated battery  
\*\*\*."

¶ 69 Although defendant made contemporaneous trial objections, which were overruled, his posttrial motion asserted merely that the prosecutor "made prejudicial, inflammatory and erroneous statements in closing argument." Defendant did not set forth any specific complained-of remarks. This court has consistently held that the use of such "boilerplate" language in a posttrial motion that the prosecutor's remarks in closing argument were "prejudicial, inflammatory, and erroneous statements designed to arouse the passions and prejudices of the jury" without setting forth the specific complained-of remarks is too general and not sufficiently specific to preserve an alleged error for review. *People v. Harris*, 187 Ill. App. 3d 832, 841 (1989). Therefore, the question of whether the prosecutor improperly implied that defendant would commit future offenses if acquitted has been waived on review. Additionally, the plain error exception does not apply because the evidence was not closely balanced nor was the

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perceived error of such magnitude that the defendant was denied a fair trial.

¶ 70 However, assuming, *arguendo*, that the argument has not been waived, the prosecutor's statement was not improper. "Even if [a] statement did imply that defendant would commit future crimes, that fact does not in itself make the remark impermissible." *People v. Raymond*, 404 Ill. App. 3d 1028, 1062 (2010); see also *People v. Harris*, 129 Ill. 2d 123, 159 (1989) (finding it was permissible for the State to argue that the defendant was a ticking time bomb). The context of the prosecutor's remarks lessened any impropriety because she did not dwell on any sort of future criminal activity and her remarks were not egregious. See *People v. Jackson*, 391 Ill. App. 3d 11, 40 (2009) (it is not improper for the prosecutor to point to "the jury's ability to effect specific and general deterrence based on the defendant's culpability").

¶ 71 Finally, defendant argues the prosecutor improperly challenged defendant's testimony by speculating, without any basis on competent evidence admitted at trial, that defendant would have passed out in 10 seconds if Officer Rodriguez had actually choked him for 30 to 40 seconds. Defendant argues the prosecutor essentially testified as an expert medical witness to impeach defendant's testimony because it is not a matter of common knowledge how long an individual being choked will remain conscious. Defendant acknowledges that he did not timely object to the prosecutor's unsupported medical testimony but nevertheless asks this court to consider this issue under both prongs of the plain error doctrine.

¶ 72 According to the record, the defense argued that defendant's testimony that Officer Rodriguez choked him was credible because the location of the bite mark on Officer Rodriguez's hand was consistent with defendant's version of the incident. In response, the prosecutor argued

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that defendant's testimony that Officer Rodriguez choked him for 30 to 40 seconds was incredible because other police officers were present at the police station and another person was in custody. The prosecutor asked the jurors, based on their common sense and life experiences, whether defendant's claim was believable. The prosecutor argued:

"Ladies and gentlemen, if he was choked that hard he is not going to last ten seconds before he is out cold. He said he couldn't breathe. He said it was tight and that's why he had to bite the officer. 30 to 40 seconds. That is a lie. He wasn't choked. And I submit to you if he was choked he wouldn't have lasted more than eight to ten seconds before he was out cold."

¶ 73 We conclude that no error occurred because the prosecutor's remarks were proper. Defendant's credibility was a proper subject for closing argument, and "a prosecutor is permitted to discuss subjects of general knowledge, common experience, or common sense in closing argument." *People v. Beard*, 356 Ill. App. 3d 236, 242 (2005) (the jury could use its every day experience in judging the apparent strength of an individual to determine whether the witness was physically capable of inflicting the victim's injuries, and no expert testimony was needed to make that assessment). Assuming, *arguendo*, that the complained-of remarks were improper, the plain error exception does not apply because the evidence was not closely balanced nor was the perceived error of such magnitude that defendant was denied a fair trial.

¶ 74

### III. CONCLUSION

¶ 75 For the foregoing reasons, we affirm defendant's conviction of aggravated battery of a police officer and his sentence.

¶ 76 Affirmed.

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