No. 2—08—0944
Order Filed June 6, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kendall County.
Plaintiff-Appellee,	)	
v.	)	No. 07--CF--386
TRAVARES O. MITCHELL,	)	Honorable Thomas E. Mueller,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Hudson concurred in the judgment.

ORDER

Held: There was no plain error in the trial court's failure to comply fully with Supreme Court Rule 431(b) (eff. May 1, 2007) in questioning prospective jurors.

Defense counsel's failure to object to allegedly improper comments by the State in rebuttal argument was neither plain error nor ineffective assistance of counsel.

The evidence was sufficient to convict defendant of aggravated battery of a government officer.

As defendant's age and criminal history made him eligible for Class X sentencing, the trial court did not err in imposing the three-year term of mandatory supervised release (MSR) for a Class X felony rather than the lesser MSR term for the offense for which he was convicted.

INTRODUCTION

This case returns to us on remand from our supreme court. In July 2008, a jury convicted defendant, Travares Mitchell, of aggravated battery of a government officer (720 ILCS 5/12—3, 12—4(b)(18) (West 2006)). On appeal, defendant raised several contentions, among them that the trial court committed reversible error by failing to question prospective jurors in conformity with Supreme Court Rule 431(b) (eff. May 1, 2007). In an unpublished order, we held that the trial court's failure to comply with Rule 431(b) was, without more, plain error because it affected a substantial right of defendant. *People v. Mitchell*, No. 2—08—0944 (May 7, 2010) (unpublished order under Supreme Court Rule 23). Since the admonishment issue was dispositive, we did not address defendant's remaining contentions. On March 4, 2011, the supreme court entered a supervisory order directing us to vacate our judgment and reconsider the admonishment issue in light of *People v. Thompson*, 238 Ill. 2d 598 (2010), to determine if a different result is warranted. *People v. Mitchell*, 239 Ill. 2d 575 (2011). After reconsidering the admonishment issue, and addressing the remaining issues defendant raises, we affirm his conviction.

BACKGROUND

The State indicted defendant on two counts of aggravated battery. Both counts alleged that defendant committed a battery upon Kendall County Sheriff's Deputy Caleb Waltmire by kicking him while aware that he was a government officer engaged in the performance of his official duties (720 ILCS 5/12—4(b)(18) (West 2006)). Count I charged that defendant knowingly made contact of an insulting or provoking nature with Waltmire (720 ILCS 5/12—3(a)(2) (West 2006)). Count

II charged that defendant knowingly caused bodily harm to Waltmire (720 ILCS 5/12—3(a)(1) (West 2006)).

Defendant was tried before a jury in July 2008. The jury convicted defendant of count I but acquitted him on count II. Defendant filed a posttrial motion, which the trial court denied.

At sentencing, the trial court determined that, though aggravated battery as charged in count I is a Class 2 offense (730 ILCS 12—4(e)(2) (West 2006)), defendant had to be sentenced as a Class X offender given his age and criminal history (720 ILCS 5/5—5—3(c)(8) (West 2006)). Accordingly, the court imposed the three-year term of mandatory supervised release (MSR) applicable to Class X felonies rather than the two-year term applicable to Class 2 felonies. 730 ILCS 5/5—8—1(d)(1), (d)(2) (West 2006).

Defendant filed a timely appeal, arguing (1) the trial court's questions to prospective jurors were insufficient under Rule 431(b) and so reversal is required; (2) the State made improper comments during closing argument; (3) the evidence was insufficient to support a conviction on count I; and (4) the court imposed an improper term of MSR. We find all four contentions unavailing. We address them in turn.

ANALYSIS

I. Rule 431(b)

Supreme Court Rule 431(b) states:

> "The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is

> not required to offer any evidence on his or her own behalf; and (4) that the defendant's failure to testify cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's failure to testify when the defendant objects.
>
> The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section." Ill. S. Ct. R. 431(b) (eff. May 1, 2007).

The four principles enumerated in the rule are often referred to as the *Zehr* principles, as they originated with the supreme court's decision in *People v. Zehr*, 103 Ill. 2d 472 (1984). In what follows, we refer to the principles according to their enumeration in the rule.

In *Thompson*, the supreme court noted that Rule 431(b) "requires trial courts to address each of the enumerated principles." *Thompson*, 238 Ill. 2d at 607. The rule

> "mandates a specific question and response process. The trial court must ask each potential juror whether he or she understands and accepts each of the principles in the rule. The questioning may be performed either individually or in a group, but the rule requires an opportunity for a response from each prospective juror on their understanding and acceptance of those principles." *Id.*

Defendant acknowledges that he raised no Rule 431(b) issue in the court below. See *People v. Barrow*, 133 Ill. 2d 226, 260 (1989) ("in general both an objection at trial and a written post-trial motion raising the issue are required to preserve that issue for review"). Defendant asks us to review the Rule 431(b) issue under the plain error rule, which "bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved claims of error in specific circumstances." *Thompson*, 238 Ill. 2d at 613. We apply the plain-error doctrine when

> "(1) a clear or obvious error occured and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *Thompson*, 238 Ill. 2d at 613 (quoting *People v. Piatrowski*, 225 Ill. 2d 551, 656 (2007)).

See also Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999) ("Any error, defect, irregularity, or variation which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court").

Defendant argues both prongs of plain error.

A. Whether there was Error

Without error, of course, there is no "plain" error, so we first determine whether there was error at all in the trial court's application of Rule 431(b). See *People v. Hudson*, 228 Ill. 2d 181, 191 (2008).

There indeed was error. Here the court was obligated to question prospective jurors with regard to all four principles since defendant did not testify at trial and there is no indication in the record that he objected to inquiries regarding principle (4) (concerning a defendant's right not to testify). The court began the process of jury selection by addressing all prospective jurors. With respect to each of the principles in Rule 431(b), the trial court informed the prospective jurors of that principle and asked whether the jurors understood it. The court also asked the jurors whether they would have any "difficulty" convicting the defendant if the State proved its case beyond a reasonable doubt or any "difficulty" acquitting him if the State failed to carry its burden. This inquiry was, we

believe, functionally a direct question whether the jurors accepted principle (2). The court, however, made no other relevant inquiries. The court did not, that is, ask the jurors whether they accepted principles (1), (3), and (4).

The jury was then selected from three panels of four prospective jurors each. During the selection process, the court did not ask or admonish the jurors any further with respect to Rule 431(b). Although Rule 431(b) speaks specifically of the trial court's duty, this court has implied that the *voir dire* questions of counsel may help satisfy Rule 431(b). See *People v. Schaefer*, 398 Ill. App. 3d 963, 967 (2010) ("Neither the court nor counsel asked any prospective juror whether he or she understood and accepted the third and fourth principles"). Compare *People v. Graham*, 393 Ill. App. 3d 268, 275 (1st Dist. 2009) ("the State may not rely on the prosecutor's or defense counsel's questions to satisfy the requirements of Rule 431(b)"), *vacated*, 239 Ill. 2d 565 (2011). We need not decide whether to expressly hold as much here, for even the combined queries of counsel and the court in this case did not comply with Rule 431(b). During *voir dire*, defense counsel and the assistant State's Attorneys asked all three panels if they were willing to convict defendant if the State proved his guilt beyond a reasonable doubt and acquit him if the State did not meet its burden. Arguably, these queries, like the trial court's preliminary questions, fulfilled Rule 431(b) as to principle (2). The assistant State's Attorneys also asked the third panel whether, since the State had not yet produced any evidence, they believed defendant was "technically *** not guilty." Though this query essentially fulfilled Rule 431(b) as to principle (1) and perhaps even principle (3), it was put to only 4 of the 12 jurors ultimately selected as jurors.

We conclude that Rule 431(b)'s dictates were not met here. The trial court properly addressed only one of the *Zehr* principles (principle (2)) in its initial remarks. Counsel made

additional inquiries of the individual venire panels. However, of the prospective jurors who were ultimately selected to serve, only 4 of the 12 were queried about additional *Zehr* principles (principle (1) and possibly principle (3)). Thus, a majority of those selected to serve on the jury were properly informed and queried about just one of the *Zehr* principles.

Having determined there was error, we now examine whether there was plain error.

B. Whether the Error Affected the Fairness and Integrity of the Proceeding

In our previous disposition, we held that the failure to comply with Rule 431(b) was alone enough to warrant reversal. See *Mitchell*, 2—08—944, slip op. at 8. In *Thompson*, however, the supreme court declined to hold "that compliance with [Rule 431(b)] is *** indispensable to a fair trial." *Thompson*, 238 Ill. 2d at 614. Thus, a reviewing court "cannot presume the jury was biased simply because the trial court erred in conducting the Rule 431(b) questioning." *Id.* The defendant bears the burden of establishing that the Rule 431(b) violation resulted in a biased jury. *Id.* at 614-15.

We see nothing in the record to suggest that the jury was biased. In assessing the harm done from incomplete Rule 431(b) queries, we may consider additional instructions the court gave the jury. See *People v. Chester*, No. 4—08—0841, slip op. at 12 (Ill. App. April 11, 2011) (instruction embodying *Zehr* principles following closing arguments ameliorated any potential negative effect from trial court's failure to comply with Rule 431(b)); *People v. Rogers*, slip op. at 9 (Ill. App. March 8, 2011) (same). Before the parties' opening arguments, the trial court gave this instruction:

"Under the law, the defendant is presumed to be innocent of the charges against him. This presumption remains with him throughout every stage of the trial and during your

deliberations and is not overcome unless from all of the evidence in this case you are convinced beyond a reasonable doubt that the defendant is guilty.

The State has the burden of proving the guilt of the defendant beyond a reasonable doubt and the burden remains with the State. The defendant is not required to prove his innocence, nor is he required to present evidence on his own behalf. He may rely on the presumption of innocence."

The court gave essentially the same instruction again after closing arguments and before deliberations began. Also at that time, the court admonished the jury that they were not to draw any inferences from defendant's decision not to testify. These instructions, which essentially embodied the *Zehr* principles, would have counteracted any potential unfairness stemming from the failure to comply with Rule 431(b). See *Chester*, slip op. at 12; *Rogers*, slip op. at 9. Moreover, the jury acquitted defendant on one of the two counts. This would have been unlikely had the jury been biased. See *Rogers*, slip op. at 9.

The error, we conclude, did not affect the fairness of the trial or challenge the integrity of the judicial process.

C. Whether the Evidence was Closely Balanced

We also disagree with defendant that the evidence was closely balanced.

The following evidence was adduced at trial. The State's first witness was Theos Manikas, who testified that, on November 9, 2006, he was working the front desk at the Route 30 Motel. Around noon, defendant came to the front desk and asked to rent a room. Defendant paid cash and filled out a registration card. Defendant went to his room, which was across the parking lot from the motel office. Manikas testified that defendant was acting normally at this time.

Manikas testified that, later that afternoon, defendant returned to the office. Unlike before, defendant was acting "strange" and "odd." Defendant complained that there were people in his room and asked Manikas why he had let them in. From his vantage point at the front desk, Manikas had been able to see the door of defendant's room that afternoon. Manikas had not seen anyone enter defendant's room after he checked in. Defendant's was the only room in the motel that was occupied that afternoon, and Manikas saw no one else on the motel property. Nonetheless, defendant "rattled on" to Manikas about the people in defendant's room. As defendant was becoming "more and more agitated," Manikas stated that he was going to call 911. When Manikas dialed the phone, defendant immediately left the premises. Manikas saw defendant walk on Route 30 toward Route 34. Defendant still had his room key with him.

Manikas testified that, when the police arrived at the motel, he asked them to inform defendant that he was no longer welcome on the property. The police retrieved the room key from defendant for Manikas. When Manikas' shift ended around 4 p.m., he went on Route 30 and saw defendant standing with the police near a squad car.

Kendall County Sheriff's Deputy Caleb Waltmire testified that, on November 9, 2006, at 4:15 p.m., he was dispatched to the Route 30 Motel to investigate a reported disturbance. At the motel, Waltmire spoke with Manikas, who reported that defendant had come to the motel office "irate," claiming that Manikas was letting people in defendant's room without his permission. Afterward, defendant walked west on Route 30. Defendant still had the room key and Manikas wanted it back.

Waltmire drove after defendant and stopped to speak with him. Defendant acted "very erratically." He confirmed that he had been at the Route 30 Motel, and claimed that he was upset with the manager because people were coming into his motel room. During this conversation,

Deputy Pearson, also of Kendall County, arrived. He and Waltmire asked defendant to identify who had come into his room. Defendant replied that he didn't know who the people were but that they were now following him. Defendant became "very irate" when Waltmire asked him for identification. Defendant eventually provided his name but continued to "yell" about people following him. Defendant "[a]t times" would "brush" at his body with his hands and "yell at somebody to stop touching him," even though "it was very clear there was nobody standing next to him." Defendant would also "yell in the direction where nobody was standing like he was yelling at somebody." Waltmire observed that defendant was wearing a sweatshirt and sweat pants. It was a "cool" day with temperature in the mid-40s, but defendant was "sweating profusely," with "a great deal of sweat over his brow, off to the sides, down by his neck."

Waltmire testified that defendant handed the room key to Pearson, who then left to return the key to the Route 30 Motel. Defendant then said he "was done talking" to Waltmire and walked west on Route 30. Waltmire let defendant walk away because there was no basis to further detain him. Because, however, defendant's behavior was "erratic" and perhaps could cause harm to himself or others, Waltmire sat in his squad car and watched defendant as he walked away. Three times defendant looked back "directly at" Waltmire's squad car. Twice, when there was no traffic, defendant crossed Route 30. The third time defendant crossed Route 30, he "jumped directly" into the way of oncoming traffic and forced several cars to break suddenly. Waltmire immediately approached in his squad car and ordered defendant to step off the roadway. Defendant claimed he was attempting "to lose the people who were following him." Waltmire announced that he was placing defendant under arrest. Waltmire brought defendant to the squad car and asked him to turn around with his back to Waltmire. Waltmire placed defendant's arms behind his back and

handcuffed both wrists. Waltmire then proceeded to double-lock the handcuffs, first locking the left wrist. As he double-locked the right wrist, defendant, still with his back to Waltmire, "lowered" his right shoulder "so as to stabilize himself and gain momentum" and then kicked backward with his right foot, striking Waltmire in the right ankle. The kick was "strong" and Waltmire felt pain for 15 minutes afterward. Waltmire did not, however, miss work because of the kick.

Waltmire testified that he then told defendant to get into the squad car. Defendant did not immediately comply. When Waltmire repeated the order, defendant remarked that he "[couldn't] do it" and that Waltmire was "making a mistake." Waltmire then gave defendant a "slight push" into the car, and defendant complied. Once seated in the squad car, defendant became "even more erratic" and began "screaming" that people were grabbing him from underneath the back seat. Defendant also pulled his feet away from the floor of the car. No one else was in the squad car.

Waltmire testified that defendant perspired during the entire encounter. Once inside the squad car, defendant sweated "even more so than before" although Waltmire had the air conditioning on "full blast." It appeared to Waltmire that defendant was able to differentiate between Waltmire and the people defendant claimed were following him. Defendant never accused Waltmire or Pearson of following him.

Deputy Pearson testified that he also was dispatched to the Route 30 Motel on the afternoon of November 9, 2006. Pearson learned that Waltmire had already been at the motel and left. Pearson spoke briefly with Manikas and left to join Waltmire where he had stopped defendant. Pearson and Waltmire attempted to get information from defendant, but it was difficult. Defendant was "erratic and irrational." He claimed people were following him and grabbing him. There was no one at the scene, however, other than Pearson and Waltmire. Defendant "couldn't *** offer any

information as to who was following him." Defendant was calm at first but became increasingly agitated as Pearson and Waltmire repeated their requests for information. Defendant was "sweating profusely" even though the temperature was, in Pearson's estimation, between 40 and 50 degrees. Defendant's pupils were also "a bit" dilated.

Pearson testified that, at his request, defendant handed him the room key. Pearson then returned to Motel 30. After returning the key to Manikas, Pearson heard over the radio that Waltmire was taking defendant into custody. Pearson returned to the scene and saw that defendant was in the squad car. Waltmire and Pearson heard defendant "screaming and yelling" from inside the car. They opened the car door, and defendant stated that "people were reaching from underneath the seat grabbing at him." Defendant continued to claim there were people in the car even after Pearson and Waltmire assured him there were not. Based on defendant's condition, Pearson and Waltmire summoned an ambulance, and defendant was hospitalized.

Pearson testified that he has training in discerning whether people are "under the influence of compounds." Based on defendant's profuse sweating in cold conditions, his pupil dilation, and his hallucinations, Pearson believed that defendant was "under the influence of some type of narcotic of some sort."[1] Pearson acknowledged the"possibility" that hallucinations may also be experienced by a person with a mental illness.

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[1] Earlier, Pearson alluded to his "training of observing who may be under the influence of drugs or alcohol." The defense objected, and the court struck Pearson's remark. The defense did not, however, object to Pearson's later testimony that, based on his training, he believed defendant was under the influence of a narcotic.

In arguing that the evidence was closely balanced, defendant does not dispute either that Deputy Waltmkire was a government officer engaged in his official duties (see 720 ILCS 5/12—4(b)(18) (West 2006)) or that kicking is physical contact of an insulting or provoking nature (see 720 ILCS 5/12—13(a)(2) (West 2006)). Defendant focuses instead on the *mens rea* for the crime of battery. A person is guilty of battery if he "intentionally *or* knowingly without legal justification and by any means *** makes contact of an insulting or provoking nature with an individual." (Emphasis added.) 720 ILCS 5/12—3(a)(2) (West 2006). Count I charged only that defendant made "knowing" contact with Waltmire. A person acts knowingly or with knowledge of (1) the "nature or attendant circumstances of his conduct, described by the statute defining the offense, when he is consciously aware that his conduct is of such a nature or that such circumstances exist," or (2) "the result of his conduct, described by the statute defining the offense, when he is consciously aware that such result is practically certain to be caused by his conduct." 720 ILCS 5/4—5 (West 2006). By contrast, "[a] person intends, or acts intentionally or with intent, to accomplish a result or engage in conduct described in the statute defining the offense, when his conscious objective or purpose is to accomplish that result or engage in that conduct." 720 ILCS 5/4—4 (West 2006).

Defendant claims that, given the evidence that he was hallucinating, it was a close question whether it was Waltmire he knowingly kicked or, instead, some hallucinated person. Defendant states that it is "quite likely that his kick was merely an attempt to shake off the people he thought were grabbing at this legs, or that Waltmire happened to brush up against [defendant's] leg and [he] mistook [Waltmire] for one of his hallucinations."

We disagree that defendant's guilt was a close question. First, defendant's claim that he did not knowingly strike Waltmire is weakened by the fact, though he had been complaining that people were following and even physically touching him, Waltmire and Pearson did not witness defendant actually attempt to strike his tormentors until Waltmire began to handcuff him. If defendant felt all along that he was being physically harassed, one would have expected him to strike sooner. As it happened, defendant did not lash out until Waltmire touched him.

Second, defendant had to have known that it was Waltmire, not another, who was handcuffing him. Waltmire told defendant he was under arrest and asked him to turn around with his back to Waltmire. Defendant should have anticipated at this point that Waltmire was going to handcuff him. While Waltmire was in the process of handcuffing, defendant kicked him. There is no evidence to suggest that, when defendant kicked his leg back, he was unaware that Waltmire was still immediately behind him and, hence, that his foot was "practically certain" (720 ILCS 5/4—5(b) (West 2006)) to strike Waltmire. Defendant was not, we stress, charged with intentionally striking Waltmire. Defendant could have *knowingly* kicked Waltmire even if another being, real or imagined, was the intended target of the kick. See *People v. Bracey*, 345 Ill. App. 3d 314, 323-24 (2003), *rev'd on other grounds*, 213 Ill. 2d 265 (2004) (even though the defendant, in throwing fruit juice from his cell at a fellow inmate passing by with a corrections officer, may have intended to hit only the inmate, the defendant was practically certain that the officer, who was between the cell and the inmate, would be hit as well). There was no indication before the kicking incident that defendant was unable to distinguish Waltmire and Pearson from defendant's supposed hallucinations or was otherwise incapable of discerning their spatial location. Defendant was able to converse with the officers, hand them objects, and obey their directions.

We conclude that, because the evidence was not closely balanced, defendant did not satisfy this prong of plain error.

II. State's Closing Argument

Defendant argues that the State made improper remarks during its rebuttal closing argument. Defendant neither objected contemporaneously to the remarks nor alleged them as error in a posttrial motion. He asks us to review his claims under the plain-error doctrine. There was no plain error, we hold, because there was no error at all. See *Hudson*, 228 Ill. 2d at 191.

We set the context for the errors defendant claims. At the close of the evidence, the State made an oral motion *in limine*, which the State claimed was prompted by certain of the defense's *voir dire* questions and by its opening statement. During *voir dire*, defense counsel asked prospective jurors whether they believed that a person should be held accountable for kicking another even if the kicking was caused by an "illness." In the defense's opening statement, counsel said in part:

> "I'm a dreamer at night. When I sleep I have very vivid, wild dreams. And there are days when I've had a dream that something very real happened to me. I have to ask, I had a conversation with somebody or I saw an incident, and I have to ask was this real or was I dreaming it. Well, this is what [defendant] was going through on November 9th of 2006. He didn't know what was real and what was a figure of his imagination.
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> ***
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> Now, you will hear testimony from the deputies, from the State's own witnesses, that [defendant] was complaining that people were grabbing at his legs and maybe he did kick back, that's for you to decide what happened, not what [the State] tells you happened. You

get to decide that. And what you also have to decide is whether or not that that was conscious, whether or not he knew that he had kicked the deputy."

Discussions on the State's motion in *in limine* proceeded as follows:

"MR. GORUP [assistant State's Attorney]: Listening to [defense counsel's] *** opening statement, judge, I'm worried that she may be trying to argue—I don't think she would because she can't be arguing involuntary intoxication in this case. Obviously, case law and statute says [*sic*] you can't. Furthermore, the defendant hasn't testified and nor has a doctor testified. So I don't think that she can testify as to his mental state at the time either. So I think a lot of those questions she was asking the jury do you think there is a reason and maybe he was mentally ill. I don't think that's proper argument at this point because there has been no evidence to it. I don't want to basically object while counsel is up there.

MS. EMERSON: [defense attorney]: There will be no argument regarding voluntary intoxication or the mental illness. Well, I'm going to argue that the officers testified that he was hallucinating, that he believed that people were following him."

The court ruled as follows:

"I think if counsel limits the argument to that which the officers have testified they observed, the behavior, you can argue that, the jurors can draw their own conclusions from that behavior without getting into any comments on mental illness or drug use, involuntary intoxication."

In its closing argument, the State argued in part:

[W]e are all responsible for our own actions. So, if a person such as the defendant did, walks out at say 4:40 [p.m.] during nearly rush hour traffic, walks into the roadway, steps in front of a moving vehicle that has to stop suddenly and serve [*sic*] to avoid striking him, he is

responsible for his own actions. If a person then, after being placed into custody by a police officer, reaches back with his leg and kicks that officer in the leg, they're responsible for their actions."

The State did not mention whether defendant was mentally ill or under the influence of a controlled substance when he kicked Deputy Waltmire

In the defense's closing argument, counsel stated:

"What is real and what is imagined? It's for maybe us easy to determine. But on that day for [defendant], it wasn't so clear cut. For [defendant] what was real was that somebody was following him ***.

Now, [the State] just explained to you some of the instructions the judge will give you and he makes it sound very simple, right? Did he kick him, did he not kick him, did he know he was a peace officer, did he not. But he glossed over pretty much the most important part. Did he knowingly do it. Did he know what he was doing. And as the testimony from all three of the State's witnesses, they testified [*sic*] erratic behavior, his hallucinations, he didn't know what was real, what was not real. To him these people were real. ***

* * *

[Defendant] was emphatic that these people were following him. For him that was real. That was his reality. Just because Deputy Waltmire, Deputy Pearson[,] didn't see those people, couldn't tell who those people were, doesn't mean they weren't real.

* * *

What was [defendant] consciously aware of? He was consciously aware that somebody was following him. He was consciously aware of the fact that he had to get away

from them. He was not consciously aware that Deputy Waltmire was behind him putting him in cuffs. All he was concerned with at that time was getting these people away from him."

In rebuttal, the State argued in part:

"[Defendant] [w]alks away, then he causes a disturbance there at Route 30 rush hour, cars are about to hit him, so they place him under arrest. *Then what's he do? He kicks an officer because you're making a mistake. If you kick an officer because you think he is making a mistake—ladies and gentlemen, you're not going to get an instruction that says that you can kick a police officer because you're making a mistake—they're making a mistake.* You're also not going to get an instruction that says that due to any other circumstances such as what Deputy Pearson testified he thought, the defendant should be let off the hook, not going to get an instruction that says because the defendant was voluntarily intoxicated he is not guilty.

You heard Deputy Pearson, he said he went through the training, he said the defendant was sweating profusely, his eyes were dilated. He said he thought he was on something. Does that let the defendant off the hook? That's what defense counsel wants you to believe. So ask yourselves that. You want somebody that an officer thinks is on something running around kicking people, especially police officers in this day and age? No." (Emphasis added.)

Defendant contends that the emphasized comments in the last full paragraph of this quotation violated the court's ruling on the State's motion *in limine*. We disagree. The State's stated concern in presenting its motion *in limine* was that the defense would, despite the absence of instructions on intoxication or mental illness, argue that defendant was not responsible for his actions because of an underlying impairment. The defense responded to the motion *in limine* by confirming that it would present "no argument regarding voluntary intoxication or *** mental illness," but would

argue only that, due to defendant's hallucinations, he could not have knowingly kicked Waltmire. Viewing the court's ruling in this context, we cannot read it as barring the State from remarking, consistent with the trial court's restriction, that the jury could not consider defendant's mental illness or intoxication as a defense to the charges. Such was, in fact, the substance of the remarks of which defendant complains. The State's initial closing argument stressed personal responsibility and submitted that defendant was guilty because he voluntarily kicked Waltmire. In fact, so single-minded was the State's argument that defense counsel criticized its simplicity and proposed that defendant's hallucinations complicated the question of guilt. The defense did not mention whether defendant was intoxicated or mentally ill, but it was appropriate for the State, in rebuttal, to anticipate any inclination by the jury to acquit defendant based simply on their perception that he had an underlying impairment. To this end, the State first noted that the jury would not be given an instruction on "mistake" or voluntary intoxication. The State then mentioned Pearson's testimony and stressed that defendant should not be "let *** off the hook" because he was "on something."[2] The State's next comment, the focus of defendant's complaint, restated this point. In asking whether it was desirable to allow someone to roam free who was "on something" and was "kicking people," the State essentially argued that, even if defendant was "on something," he should not be allowed to commit battery.

Defendant argues that "[d]rug use is a highly prejudicial topic, and by introducing the topic during closing arguments, the State inflamed the passions of the jury regarding the evils of drug use."

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[2] Defendant does not, we note, argue that the State made a misrepresentation by claiming the defense's position was that defendant should be "let off the hook" because he was, as Pearson testified, under the influence of some substance

Defendant misconceives the substance of the State's argument. The thrust of the State's rebuttal argument was that defendant was guilty because he kicked Waltmire, not that he was guilty because he was on drugs. The State mentioned Pearson's testimony only to stress its ultimate irrelevance to the question of guilt. Contrary to the defendant's claim, it was not during closing arguments that drug use was first mentioned. Pearson mentioned it (and defendant does not challenge on appeal the admission of his testimony). The State simply placed Pearson's testimony in its proper legal contezt.

Defendant further argues that the prosecutor injected his personal opinion into the argument by stating: "So ask yourselves that. You want somebody that an officer thinks is on something running around kicking people, especially police officers in this day and age? No." We see no expression of a personal opinion in these remarks. Perhaps defendant has inadvertently mis-described his complaint, for the instances of prosecutorial overreaching he cites for comparison did not involve personal opinions by prosecutors but, rather, their exaggerations of the consequences of an acquittal. See *People v. Estes*, 127 Ill. App. 3d 642, 650 (1984) ("the prosecutor's suggestion that a finding that the defendant had acted legally in self-defense was equivalent to morally condoning the act"); *People v. Slaughter*, 84 Ill. App. 3d 88, 97 (1980) (" 'And if you don't come back with a verdict of guilty in this case, there will be no way that another jury hearing a case like this could find a guy guilty' "). The prosecutor here neither attempted to characterize the morality of an acquittal nor claimed that an acquittal would have far-reaching legal consequences. Instead, the prosecutor argued for a conviction based on the particular circumstances of the case, *i.e.*, defendant's kicking a police officer. Accordingly, we find no error in the State's remarks.

Defendant also argues that there was no basis in the evidence for the State's comment that defendant kicked Waltmire because he believed Waltmire was making a "mistake" in arresting him. Defendant says:

> "There was absolutely no evidence whatsoever that the kick was actually in response to [defendant's] being handcuffed and placed under arrest. And what evidence does exist suggests that it was *not* related, because [defendant] complacently allowed both wrists to be handcuffed and one to be double-locked prior to the kick [citation], and he complied with Waltmire's demand to get in the car after just a 'slight push' toward the car. [Citation.]." (Emphasis added.)

The effect of the State's comment, defendant argues, was to ascribe "a motivation for [defendant's] actions that was simply not otherwise present in the State's evidence." The State's comment had a particularly harmful effect, defendant claims, because the defense's theory was that defendant did not know it was Waltmire he was kicking as opposed to one of the hallucinated persons.

A prosecutor has wide latitude in making a closing argument and is permitted to comment on the evidence and on any fair, reasonable inferences it yields. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). Prosecutors may not, however, argue assumptions or facts not contained in the record. *Id.*

It was reasonable for the State to remark that defendant struck Deputy Waltmire out of protest over the arrest. Defendant showed resentment toward the police intervention both before and after he kicked. Beforehand, he became "very irate" while the police questioned him, while afterward he verbally protested the arrest and hesitated to get into the squad car. The State was well within its bounds in inferring that defendant's resentment and anger at the police overflowed into physical action at one point during the arrest. That action occurred, not unexpectedly, when the encounter elevated to a physical restraint on defendant's freedom. Defendant considers it significant that he did not continue his physical resistance once both hand restrains were fully secured, but it may well be that defendant believed at that point that further resistance was futile.

For the foregoing reasons, we find no error in the State's comments. Consequently, we find no plain error.

Defendant alternatively argues that it was ineffective assistance for defense counsel not to object to the State's comments. To establish ineffective assistance of trial counsel, a defendant must meet the familiar two-part standard of *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Albanese*, 104 Ill. 2d 504, 525-27 (1984). The defendant must first demonstrate that his counsel's performance was deficient in that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687; *People v. Wiley*, 205 Ill. 2d 212, 230 (2001). In so doing, the defendant must overcome the strong presumption that the challenged action or inaction of counsel was the product of sound trial strategy and not of incompetence. *People v. Barrow*, 133 Ill. 2d 226, 247 (1989). Secondly, the defendant must demonstrate that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694; *Wiley*, 205 Ill. 2d at 230. Because the defendant must satisfy both prongs of this test, the failure to establish either prong is fatal to the claim. *Strickland*, 466 U.S. at 697; see *People v. Bannister*, 232 Ill. 2d 52, 80 (2008).

Counsel may not be deemed ineffective for failing to lodge an objection that would have been overruled for lack of merit. *People v. Bean*, 137 Ill. 2d 65, 132 (1990); *In re Detention of Allen*, 331 Ill. App. 3d 996, 1005 (2002). We have determined that the State's comments were not improper. Since any objection would have had no merit, counsel was not ineffective for failing to make it.

III. Sufficiency of the Evidence

Defendant argues that the evidence was insufficient to establish that he committed aggravated battery.

We review the evidence in the light most favorable to the State and consider whether *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). We will not retry the defendant. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). We will not reverse a conviction unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. *Collins*, 106 Ill. 2d at 261.

On this point, defendant essentially restates what he argued in attempting to establish plain error on the ground that the evidence at trial was closely balanced. The only element of aggravated battery defendant disputes is that his kicking of Deputy Waltmire was knowing. For the reasons stated in Part I(C) of this analysis, we hold that the evidence was sufficient to convict defendant. In short, the State established that defendant was aware that Deputy Waltmire was standing behind him when he drew back his leg and kicked. This evidence showed that defendant's contact with Waltmire was knowing.

IV. Defendant's MSR Term

Defendant's final claim on appeal is that the trial court should have imposed the two-year MSR term applicable to Class 2 felonies rather than the three-year term applicable to Class X felonies. In *People v. McKinney*, 399 Ill. App. 3d 77, 83 (2010), *appeal denied*, 237 Ill. 2d 578 (2010), this district addressed and rejected the same argument of statutory construction that defendant puts forth here. We see no reason to depart from *McKinney*.

For the foregoing reasons, we affirm the judgment of the circuit court of Kendall County.

Affirmed.