2018 IL App (3d) 160023-U

Order filed December 11, 2018

Modified upon denial of rehearing January 9, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 9th Judicial Circuit, Fulton County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-16-0023 Circuit Nos. 15-CF-79 and 15-CF-80
CHADWICK N. BARNER,	)	Honorable Raymond A. Cavanaugh,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justice Lytton concurred in the judgment.
Presiding Justice Schmidt concurred in part and dissented in part.

ORDER

¶ 1 *Held*: (1) Evidence presented at trial was sufficient to prove defendant guilty beyond a reasonable doubt of attempted first degree murder but insufficient with respect to the offenses of aggravated battery and aggravated fleeing or attempting to elude a peace officer; (2) the evidence regarding defendant's commission of attempted murder was not closely balanced; (3) the circuit court erred by failing to conduct a preliminary *Krankel* inquiry into defendant's *pro se* posttrial claims of ineffective assistance of counsel; and (4) the circuit court did not err by considering serious harm or threat of harm in aggravation when imposing the sentence for the offense of attempted murder.

¶ 2 Following a jury trial, defendant, Chadwick N. Barner, was found guilty of attempted first degree murder, aggravated battery, and aggravated fleeing or attempting to elude a peace officer. He raises numerous arguments on appeal pertaining to the insufficiency of the State's evidence with respect to all three of his convictions. Defendant's conviction for attempted first degree murder is affirmed. Defendant's convictions for aggravated battery and aggravated fleeing or attempting to elude a peace officer are reversed. We remand the matter to the trial court for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 The State charged defendant with aggravated fleeing or attempting to elude a peace officer (625 ILCS 5/11-204.1(a)(1) (West 2014)). The charging instrument alleged defendant failed to obey a visual or audible signal to stop his vehicle, and in the course of his attempt to elude drove in excess of 21 miles per hour over the speed limit. In a separate information, the State also charged defendant with attempted first degree murder (720 ILCS 5/8-4(a), 9-1 (West 2014)) and aggravated battery (*id.* § 12-3.05(d)(4)(i)). With respect to the attempted first degree murder charge, the State alleged defendant held Lieutenant Doug Lafary's head under water with the intent to kill him. Regarding the aggravated battery charge, the State alleged defendant made contact of an insulting or provoking nature with Lafary in that he "rolled his body on top of Lt. Doug Lafary's body after the two had fallen into a lake."

¶ 5 A jury trial on all charges commenced on October 20, 2015. During *voir dire*, the circuit court admonished the jury pool of the four principles of law contemplated by Illinois Supreme Court Rule 431(b) (eff. July 1, 2012). After addressing the jury pool collectively, the court divided the potential jurors into groups of four, and delivered the same admonishments. To each

panel of four prospective jurors, the court asked if they had "any quarrel with" any of the legal principles in question.

¶ 6 The State's first witness at trial was Terry Parks, chief of the Canton Park District Police Department. Parks testified that shortly after 2 p.m. on May 12, 2015, he observed a newer model black vehicle driving approximately 85 miles per hour on Route 9, where the speed limit was 50 miles per hour. Parks saw what he described as a "good side view of [the driver's] face." Parks observed the driver was a white male wearing a black shirt or a black coat. Parks pursued the vehicle with his lights and siren activated.

¶ 7 Parks followed the vehicle to the parking lot of Davis Sand and Gravel. As Parks entered the parking lot, he observed the front end of the black vehicle sticking out from behind a building at another end of the lot. Parks testified the black vehicle pulled out and sped past him, coming within two feet of his squad car. The black vehicle's tires squealed as it pulled back onto Route 9. Parks attempted to pursue the vehicle again, estimating that it was traveling between 80 and 85 miles per hour at that point. Parks terminated the pursuit when the black vehicle entered a residential area.

¶ 8 Deputy Daniel Daly of the Fulton County Sheriff's Department testified that he received the dispatch that a park district officer was in pursuit of a vehicle. He informed Lafary and Brad Ward of the call and they each left the station in separate vehicles. Daly eventually observed a black vehicle stopped in the southbound lane on Taylor Road. A white male wearing a black leather jacket, blue jeans, and a red t-shirt was standing by the open door of the vehicle. Daly identified defendant as the male standing by the vehicle.

¶ 9 Daly testified defendant indicated that "his car had just quit running." Daly observed that the vehicle "smelled extremely hot." He also observed that defendant was very nervous. Lafary

performed a pat-down search on defendant and asked him to remove his jacket. Parks later appeared on the scene where defendant's vehicle had stopped. Parks recognized the vehicle as the one he had been pursuing. He also recognized the black jacket, which was laying on the hood of the vehicle, as the one worn by the driver. Out of concern that defendant's vehicle could catch fire, Daly asked defendant to step over to Daly's truck. Daly noticed a bulge in the front pocket of defendant's pants. Defendant informed Daly it was cash. Daly asked defendant to empty his pockets and put the contents on the hood of the truck. Daly testified: "As I turned to pat the hood of my truck, [defendant] advised, 'Fuck this', and I turned to see him run past me, running southbound in the ditch."

¶ 10 Daly and Lafary pursued defendant on foot. Defendant ran into a wooded area, then jumped into a lake[1] and swam away. Daly, Lafary, and other officers set up a perimeter and began searching the area for defendant. Approximately one hour into the search, an officer spotted defendant and relayed his location to other officers. Lafary drove to the location where defendant had been seen, picking up Sheriff Jeff Standard along the way.

¶ 11 Standard testified he entered the passenger seat of Lafary's vehicle. As Lafary drove through a field, Standard observed "an individual running along scrub brush-type of area of the pond." Lafary yelled, "Stop, police" through his open window. Standard testified that upon seeing himself and Lafary, defendant "backed into the scrub-brush area and kind of squatted down."

¶ 12 Standard testified that Lafary slammed on the breaks, exited the vehicle, and attempted to tackle defendant. Standard noted defendant was crouched down with his back to the pond. According to Standard, after the tackle, both defendant and Lafary "ended up in the water."

[1]A number of the State's witnesses used the terms "lake" and "pond" interchangeably to refer to the same body of water.

Standard described the events in detail, testifying: "[A]s [Lafary] tried to tackle *** [defendant], [Lafary] appeared to go over the top of him; and his body would have canted to his right-hand side. So, he would have been on his right shoulder into the pond with his feet slightly elevated off the bank." Standard testified defendant also landed in the water.

¶ 13 As Standard alighted from Lafary's vehicle, he heard Lafary shout, "This fucker is trying to drown me." Immediately after, Lafary's head went under the water. Standard observed defendant applying pressure to Lafary's body, and "the pressure was holding [Lafary] under water." Standard testified that Lafary remained on his right side with his feet slightly elevated. Lafary was "struggling to get up from underneath the water." Standard waded knee-deep into the water and used an armbar to remove defendant from atop Lafary. Standard estimated that approximately 15 seconds elapsed from the time Lafary alighted from the vehicle to the time Standard pulled defendant off Lafary.

¶ 14 Lafary's testimony regarding the initial traffic stop of defendant accorded with that provided by Daly. After asking defendant to remove his jacket, Lafary looked into the black vehicle. He saw no contraband, but did see a package of meat on the front seat. During this visual inspection, Lafary heard "a commotion" behind him. He turned and saw defendant running from Daly. Lafary engaged in a foot pursuit. The pursuit ended when defendant jumped into a lake. Lafary saw defendant emerge at the other end of the lake and run into a wooded area.

¶ 15 Lafary assisted in establishing a perimeter around the area. He eventually received information that defendant had been seen in a field to the southeast of the lake. Lafary proceeded to that location, picking up Standard along the way. Lafary eventually spotted defendant "laying [*sic*] on the ground in some tall grass."

¶ 16 Lafary testified that as he brought his vehicle to a stop, defendant stood and began to turn. Lafary alighted from the vehicle and gave chase, tackling defendant from behind. Lafary testified that the momentum from the tackle carried both defendant and himself into the lake.

¶ 17 Lafary testified that he landed in the lake "canted to the right." He could tell that defendant "landed somewhere to my left. I could feel him to my left kind of on my left shoulder." He could feel the bottom of the lake on his right shoulder. Lafary attempted to roll to his right. Lafary testified: "As I rolled onto my right side, [defendant] rolled with me. He came cross-wise with my body. His upper torso was on my upper torso." On cross-examination, Lafary described what happened in the water as follows: "I could feel him touching me on my, on my left side. I felt his presence there as I rolled to my, onto my right side and he rolled with me. Then he was—then I knew for sure he was on top of me."

¶ 18 Lafary continued: "I was trying to push him away. With every force that I pushed up, he was pushing back down; and he got his hands around mine and pushed on the side of my head and began pushing down with force and was pushing me into the water." Lafary testified he would occasionally get a breath, but defendant would push his head back under the water. In one of those instances, Lafary yelled to Standard: "This fucker is trying to drown me." Defendant pushed his head under the water after Lafary yelled. Lafary recalled that Standard eventually pulled defendant off him. He estimated that 20 to 30 seconds elapsed between the time he first made contact with defendant to when Standard pulled defendant off him.

¶ 19 Chris Ford of the Fulton County Sheriff's Department arrived on the scene after the altercation. When he arrived, Lafary was still standing in the water. Ford testified that Lafary's hair and uniform were wet. Lafary, within earshot of defendant, told Ford defendant had tried to drown him. Defendant, according to Ford, responded by stating: "You attacked me, and I didn't

know who you were." Tim Harper, also of the Fulton County Sheriff's Department, testified defendant was also wet when Harper transported him after being taken into custody.[2]

¶ 20 The State introduced a series of photographs of Lafary taken by Ford. Both Ford and Lafary testified that the photographs were taken within minutes of the altercation between Lafary and defendant. In the photographs, the right half of Lafary's brown uniform shirt is wet, with some wetness onto the left half toward the bottom of his shirt. The photographs show some dark marks on the upper portions of Lafary's pants, as well as bruising and abrasions on each side of Lafary's face. Lafary's hair appears to be wet in the pictures.

¶ 21 Defendant denied being the driver of the black vehicle seen speeding on Route 9. He testified he was in the area searching for places to fish. He purchased some steaks in Farmington before proceeding through Canton. He stopped on Taylor Road so that he could put the steaks in a cooler he kept in the trunk of the vehicle. He was outside of his vehicle when he noticed multiple squad cars approaching his location. Defendant testified that Lafary approached him using an angry tone of voice and vulgarity. Lafary told defendant "You are a suspect of attempted murder and reckless driving." Later, while defendant was standing by Daly, Lafary searched defendant's vehicle and removed a black jacket from the backseat. Defendant denied wearing the black jacket that day.

¶ 22 Defendant testified that he fled after Lafary removed the jacket from the vehicle. After running into a ditch and through some woods, defendant dove into a pond. After emerging from the pond, defendant removed his shirt and hid in the woods for approximately 35 to 40 minutes.

[2]Barry Blackwell and Brad Ward, each of the Fulton County Sheriff's Department, testified that when they arrived on the scene of the altercation, Lafary was wet and standing in the water and defendant was wet as well.

He eventually decided that he should go back and turn himself in. He began walking back to his vehicle.

¶ 23 As defendant was walking, a vehicle approached him at a high rate of speed. He testified that Lafary emerged from the driver's side of the vehicle, took two steps, and lunged at him. Defendant turned away just before contact was made. He testified that they fell to the ground, with Lafary landing partially on top of him. Defendant testified that they were approximately two feet from the water at that point. Lafary told defendant: "Try to run now, mother fucker, and I'll put a bullet in your head." Defendant testified he did not struggle or resist.

¶ 24 Defendant testified that he never entered the water when Lafary tackled him. After he was in custody, he heard Lafary and other officers "laughing and joking." Defendant testified that Lafary said "I think he tried to kill me" to other officers "in a joking voice."

¶ 25 Larry Knotts was an inmate in the Fulton County jail. He testified that Lafary and another Fulton County deputy transported him to and from court in Peoria on September 10, 2015. Knotts, who had become aware of defendant's case while in jail, asked Lafary why Standard did not shoot defendant if he was trying to drown him. Knotts testified: "He told me that when they come around the corner, that he was in the passenger side of the vehicle, Lafary was. He dove out of the vehicle through the brush to apprehend [defendant]." Knotts testified that Lafary told him that he and defendant landed on the ground after the tackle.

¶ 26 The State called two witnesses in rebuttal. Lafary testified that he recalled his conversation with Knotts. He denied telling Knotts that he was in the passenger seat of the vehicle that approached defendant. He told Knotts he thought defendant was going to drown him and he was afraid he was going to have to shoot defendant.

¶ 27 Michael Harmon testified that he towed the black vehicle from Taylor Road at the request of the police. While the police did not have a key to the vehicle, Harmon was able to tow it because "[i]t had been left in gear." Had the vehicle been placed in park, Harmon would have had to drag the vehicle or use a dolly system. He did not have to do either. Harmon testified that the vehicle emitted "a hot mechanical smell." He testified that the vehicle showed signs of overheating.

¶ 28 The jury found defendant guilty on all counts. At his sentencing hearing, defendant commented that the first time he met defense counsel he requested that counsel move for a change of venue, because Lafary was the jail administrator in Fulton County and because Lafary's wife worked in the State's Attorney's office. Defendant called counsel "one of the most worthless attorneys this side of the Pentagon." Later, defendant commented that "this attorney has not worked for me at all, at all."

¶ 29 Following defendant's statement, the State listed for the court the factors in aggravation. The State argued: "The first one listed is perhaps the most important one here. The conduct threatened serious harm. The defendant was charged and found guilty of the offense of attempted first degree murder of a police officer. Clearly, Factor Number 1 applies."

¶ 30 In imposing the sentence, the court began by stating: "I'm finding the following factors in aggravation exist: Number 1, that your conduct caused or threatened serious harm[.]"[3] The court sentenced defendant to 40 years' imprisonment for attempted first degree murder, 14 years' imprisonment for aggravated battery, and 6 years' imprisonment for aggravated fleeing or attempting to elude a peace officer, with all sentences running concurrently.

[3]The court also read through the mitigating factors, finding only the third statutory factor was applicable. The court then commented: "So, after looking at all the factors in aggravation, the only one that I find in your favor is Factor Number 3." In context, it is abundantly clear that the court misspoke in saying "aggravation" rather than "mitigation."

¶ 31 II. ANALYSIS

¶ 32 Defendant raises multiple arguments on appeal. Primarily, defendant argues that the State's evidence was insufficient to sustain his convictions for attempted first degree murder, aggravated battery, and aggravated fleeing and attempting to elude a peace officer. Alternatively, defendant argues that the circuit court committed plain error by failing to properly admonish the jury venire regarding the *Zehr* principles as required by Illinois Supreme Court Rule 431(b). Defendant also contends that the circuit court failed to conduct a proper *Krankel* inquiry and improperly considered an aggravating factor inherent in attempted first degree murder when imposing sentence.

¶ 33 A. Sufficiency of the Evidence

¶ 34 When a challenge is made to the sufficiency of the evidence at trial, we review to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Baskerville*, 2012 IL 111056, ¶ 31; *People v. Collins*, 106 Ill. 2d 237, 261 (1985). In making this determination, we review the evidence in the light most favorable to the prosecution. *Baskerville*, 2012 IL 111056, ¶ 31.

¶ 35 It is not the purpose of a reviewing court to retry a defendant. *People v. Milka*, 211 Ill. 2d 150, 178 (2004). Instead, great deference is given to the trier of fact. See, *e.g.*, *People v. Saxon*, 374 Ill. App. 3d 409, 416-17 (2007). All reasonable inferences from the record in favor of the prosecution will be allowed. *People v. Bush*, 214 Ill. 2d 318, 326 (2005). " 'Where evidence is presented and such evidence is capable of producing conflicting inferences, it is best left to the trier of fact for proper resolution.' " *Saxon*, 374 Ill. App. 3d at 416 (quoting *People v. McDonald*, 168 Ill. 2d 420, 447 (1995)). The trier of fact is not required to accept or otherwise seek out any explanations of the evidence that are consistent with a defendant's innocence; nor is the trier of

fact required to disregard any inferences that do flow from the evidence. *McDonald*, 168 Ill. 2d at 447; see also *Saxon*, 374 Ill. App. 3d at 416-17.

¶ 36 1. Attempted First Degree Murder

¶ 37 A person commits attempted first degree murder when, with the specific intent to commit first degree murder, he "does any act that constitutes a substantial step toward the commission of that offense." 720 ILCS 5/8-4(a) (West 2014). First degree murder is committed, *inter alia*, where a person intentionally kills an individual without lawful justification. *Id.* § 9-1(a)(1). In this case, the State had to prove, beyond a reasonable doubt, that defendant performed an act constituting a substantial step toward killing Lafary with the specific intent of doing so. See *People v. Williams*, 165 Ill. 2d 51, 64 (1995).

¶ 38 The element of intent is rarely susceptible of direct proof, and often must be proven through circumstantial evidence. *People v. Williams*, 295 Ill. App. 3d 663, 665 (1998). In the context of attempted murder, our supreme court has noted that the requisite intent may be demonstrated "by surrounding circumstances [citation], including the character of the assault and the nature and seriousness of the injury [citation]." *Williams*, 165 Ill. 2d at 64. The court continued:

> "Since every sane man is presumed to intend all the natural and probable consequences flowing from his own deliberate act, it follows that if one wilfully does an act, the direct and natural tendency of which is to destroy another's life, the natural and irresistible conclusion, in the absence of qualifying facts, is that the destruction of such other person's life was intended." *Id.* (quoting *People v. Koshiol*, 45 Ill. 2d 573, 578 (1970), quoting *People v. Coolidge*, 26 Ill. 2d 533, 537 (1963)).

In the present case, defendant does not argue the State failed to prove that he took a substantial step toward the commission of first degree murder. He contends only that "the evidence failed to show that [defendant] had an intent to kill Lafary." We disagree.

¶ 39 Lafary testified that defendant was on top of him, forcefully pushing his head under the water. Lafary struggled, but each time he was able to bring his head out of the water, defendant pushed Lafary's head back down under the water. Standard, too, observed that defendant was applying pressure to Lafary that was keeping Lafary's head under water in spite of resistance from Lafary. Lafary was able to shout during the altercation that defendant was attempting to drown him.

¶ 40 Although defendant claims he did not intend to kill Lafary, when viewing all reasonable inferences from the circumstantial evidence in a light that is favorable to the prosecution, the jury could have rationally reached the opposite conclusion. The circumstantial evidence demonstrated defendant held Lafary's head under water despite Lafary's attempts to resist the force used by defendant. The jury could have easily concluded this conduct was not accidental but was an intentional act with obvious natural and deadly consequences from the submersion of a person's head under water. The jury is not required to abandon common sense. Reasonable jurors would know death by drowning is a natural, if not the most likely, consequence from holding a person's head under the surface of a pond of water against the person's will, in spite of that person's extreme resistance to this maneuver. Here, defendant did not voluntarily release Lafary at any point in time in order to allow Lafary to catch his breath. Another person came to Lafary's aid by pulling defendant off Lafary, who was fighting for his life. Viewing the State's evidence in the light most favorable to the State, the State's evidence established defendant willfully and forcefully held Lafary's head under water while Lafary resisted defendant's actions in order to

preserve his life. Accordingly, it would be reasonable for the jury in the present case to conclude defendant intended to hold Lafary's head under water until Lafary was rendered lifeless and unable to leave the pond to continue his pursuit of defendant. We defer to the determination of the trier of fact and affirm defendant's conviction for attempted first degree murder.

¶ 41 In reaching this conclusion, we reject defendant's contention that the evidence "indicates that [defendant] was trying to put enough distance between him and Lafary so that he could escape." Initially, defendant's argument strains credulity. It defies logic to conclude that forcefully holding Lafary under water, as Lafary struggled, could put any distance between defendant and Lafary. More importantly, even where the evidence may produce conflicting reasonable inferences, the trier of fact is in the best position to resolve that conflict. *Saxon*, 374 Ill. App. 3d at 416.

¶ 42 We also reject defendant's argument that the brief nature of the encounter rebuts an inference of intent to kill. Defendant stresses that the encounter was no more than 30 seconds, that Lafary's head was not "under water for any significant amount of time," and that Lafary did not inhale any water or lose consciousness. The brevity of the submersion of Lafary's head resulted from the efforts of his rescuer. Defendant did not voluntarily abandon these efforts after just a few moments. As stated above, it is reasonable for a trier of fact to conclude that a person being chased by police, who forcefully holds the pursuing officer's head below water as the officer struggles greatly, intends to drown the officer who was attempting to apprehend and place defendant in custody.

¶ 43 2. Aggravated Battery

¶ 44 In order to sustain a conviction for aggravated battery in the present case, the State is obligated to prove beyond a reasonable doubt that defendant knowingly "makes physical contact

of an insulting or provoking nature" with Lafary. 720 ILCS 5/12-3(a)(2), 12-3.05(d)(i) (West 2014). A person acts knowingly as to the result of his conduct when he "is consciously aware that that result is practically certain to be caused by his conduct." *Id.* § 4-5(b). Per the charging instrument then, the State needed to prove that defendant was practically certain that "roll[ing] his body on top of Lt. Doug Lafary's body" would cause contact of an insulting and provoking nature and that such contact actually was of such a nature.

¶ 45 Whether contact is of an insulting or provoking nature is often to be inferred by the trier of fact. *People v. Nichols*, 2012 IL App (4th) 110519, ¶ 43. Such an inference may be derived from the circumstances surrounding the contact or the reaction of the victim at the time. *People v. DeRosario*, 397 Ill. App. 3d 332, 334-35 (2009); *People v. Wrencher*, 2011 IL App (4th) 080619, ¶ 55.

¶ 46 While defendant has not raised a one act-one crime argument on appeal, those principles are nevertheless relevant to our analysis. That doctrine, in short, holds that a defendant may not suffer multiple convictions "carved from the same physical act." *People v. Bouchee*, 2011 IL App (2d) 090542, ¶ 6 (quoting *People v. King*, 66 Ill. 2d 551, 566 (1977)). The State adhered to this principle when, in the instrument charging defendant with aggravated battery, it alleged only that defendant "rolled his body on top of Lt. Doug Lafary's body." Defendant's physical act of pushing Lafary's head under water, already supporting a conviction for attempted first degree murder, may not also support a conviction for aggravated battery.

¶ 47 The evidence regarding defendant's purported commission of aggravated battery amounted to two passages from Lafary's testimony. First, on direct examination, Lafary testified: "As I rolled onto my right side, [defendant] rolled with me. [Defendant] came cross-wise with my body. [Defendant's] upper torso was on my upper torso." Then, on cross-examination, Lafary

testified: "I could feel him touching me on my, on my left side. I felt his presence there as I rolled to my, onto my right side and he rolled with me. Then he was—then I knew for sure he was on top of me." Standard, the only other witness who observed the altercation between defendant and Lafary, did not testify regarding defendant's roll, only mentioning that both men landed in the water. Further, none of the photographs introduced at trial were probative of whether defendant rolled onto Lafary, let alone whether he did so willfully.[4]

¶ 48 The evidence in this case, even when viewed in the light most favorable to the State, indicates the initial contact when defendant rolled over the officer was caused by the forcefulness of the officer's attempt to tackle defendant. Punching, kicking, slapping, or spitting on another person are actions that may easily be construed as insulting or provoking contact. See *Nichols*, 2012 IL App (4th) 110519, ¶ 43 (Finding, of liquids flung at correctional officers: "[J]uries are nevertheless generally permitted to infer the insulting or provoking nature of those obviously repulsive contacts.").

¶ 49 We are not persuaded by the State's arguments pertaining to the aggravated battery charge. For instance, the State claims that the aggravated battery conviction is supported by the fact that "defendant kept pushing Lt. Lafary down into the water every time Lt. Lafary tried to push defendant away from him." Later, the State asserts: "Lt. Lafary testified to the cuts, abrasions, and bruises he received from the struggle with defendant. This is physical evidence of defendant's battery of Lt. Lafary."

¶ 50 Pushing Lafary's head under water is the physical act supporting the attempted murder conviction. We agree that holding the officer's head below water constituted evidence of intent

[4]The wording of Lafary's testimony raises doubts as to whether defendant intentionally rolled himself onto Lafary, or whether defendant merely ended up atop Lafary as the result of Lafary's own movement. This question, however, does not cast doubt upon the conclusion that defendant, once on top of Lafary, plainly acted intentionally in forcing Lafary's head under water.

to cause death. However, we cannot agree with the State's suggestion that rolling over a portion of Lafary's body, while both men simultaneously resisted each other's actions, rose to the level of insulting or provoking contact by defendant. Moreover, this record lacks any State's evidence showing Lafary's injuries were sustained when defendant rolled onto him rather than while the officer's head was submerged. After carefully reviewing this record, we conclude the State did not introduce evidence from which a reasonable jury could find defendant guilty of aggravated battery beyond a reasonable doubt. Consequently, we reverse defendant's conviction for aggravated battery.

¶ 51 3. Aggravated Fleeing or Attempting to Elude

¶ 52 As charged in the present case, the offense of aggravated fleeing or attempting to elude a peace officer is committed when a driver fails or refuses to obey a signal by a peace officer directing the driver to bring his vehicle to a stop and in doing so drives at a rate of speed at least 21 miles per hour over the posted speed limit. 625 ILCS 5/11-204(a), 204.1(a)(1) (West 2014). The relevant section of the Illinois Vehicle Code also holds that "the officer giving such signal shall be in police uniform." *Id.* § 11-204(a).

¶ 53 Defendant contends that no evidence was adduced at trial regarding Parks's attire at the time he signaled for defendant to stop his vehicle, and that his conviction for aggravated fleeing or attempting to elude a peace officer must be reversed for insufficient evidence. The State confesses error, conceding that no evidence was presented on the police uniform element. The State agrees that defendant's conviction must be reversed.

¶ 54 That the officer who gives the signal for a driver to stop his vehicle shall be in a police uniform and is an essential element of the offense of fleeing or attempting to elude a peace officer. *Id.*; see also *People v. Murdock*, 321 Ill. App. 3d 175, 177 (2001). In turn, it is also an

essential element of the aggravated form of the same offense. In *Murdock*, the court rejected the State's argument that other factors—such as the activation of emergency lights and sirens on a squad car—obviate the requirement that the State introduce evidence regarding the officer's attire. *Murdock*, 321 Ill. App. 3d at 177. In reversing the defendant's conviction, the court commented: "We are not free to rewrite the language of the legislature, which speaks for itself." *Id*.

¶ 55 The same result must be reached here. The State produced no evidence regarding Parks's attire, and thus failed to prove each element of the charged offense beyond a reasonable doubt. Accordingly, we accept the State's confession of error and vacate defendant's conviction and sentence for aggravated fleeing or attempting to elude a peace officer.

¶ 56 B. *Zehr* Principles

¶ 57 In *People v. Zehr*, 103 Ill. 2d 472, 477 (1984), our supreme court held that a circuit court must determine whether potential jurors understand and accept certain fundamental principles of criminal law prior to their selection to a jury. That decision would later be codified in Illinois Supreme Court Rule 431(b) (eff. July 1, 2012). The rule provides:

> "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 if a defendant does not testify it cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's decision not 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." *Id*.

¶ 58 Defendant contends that the circuit court erred by asking potential jurors whether they had "any quarrel with" the listed principles, rather than asking if they understood and accepted them. Because defendant did not preserve this issue below, he requests that this court address it and review the matter for plain error. Specifically, he argues that the error is reversible because the evidence at trial was closely balanced.

¶ 59 The first step in a plain-error analysis is to determine whether a clear or obvious error occurred. *People v. Eppinger*, 2013 IL 114121, ¶ 19. In *People v. Wilmington*, 2013 IL 112938, ¶ 28, our supreme court addressed a scenario in which the circuit court only asked potential jurors whether they had any disagreement with the *Zehr* principles. The *Wilmington* court held: "While it may be arguable that the court's asking for disagreement, and getting none, is equivalent to juror *acceptance* of the principles, the trial court's failure to ask jurors if they *understood* the four Rule 431(b) principles is error in and of itself." (Emphases in original.) *Id*. ¶ 32.

¶ 60 In the present case, the circuit court failed to use the specific language required by Rule 431(b). Asking the members of the venire whether anyone quarreled with the *Zehr* principles does not produce a response that is probative of whether each potential juror understands those principles. The State does not dispute this point, effectively conceding that the circuit court committed clear and obvious error.

¶ 61 Having found error, we turn to the issue of whether the court's error caused this defendant to suffer prejudice. It is well established that a defendant may demonstrate actual prejudice by showing "that the evidence was so closely balanced that the error alone severely

threatened to tip the scales of justice against him." *People v. Herron*, 215 Ill. 2d 167, 187 (2005). Under the second prong, if a defendant shows that the error in question was a structural error, then prejudice to the defendant will be presumed. *Id*.; *Eppinger*, 2013 IL 114121, ¶ 19. Here, defendant argues only that the evidence was closely balanced and does not complain about structural error.

¶ 62 When evaluating prejudice and the purported closely balanced nature of the State's evidence, we focus solely on the State's evidence pertaining to defendant's attempted first degree murder charge because defendant's other convictions have been set aside by this court. In *People v. Naylor*, 229 Ill. 2d 584, 606-09 (2008), our supreme court held that a case that is nothing more than a credibility contest must be considered as a closely balanced case upon review. We construe the holding in *Naylor* as being applicable to a very narrow category of criminal cases. Namely, where the finder of fact must decide guilt or innocence basely *solely* on sworn, testimonial evidence presented to the jury. In *Naylor*, the trier of fact did not receive any additional evidence to contradict or corroborate either version of events as described during the testimony before the trier of fact. Our supreme court recently reaffirmed this point of law in *People v. Sebby*, 2017 IL 119445, ¶ 63, concluding that a case must be deemed "closely balanced" where the outcome of the case turned on the testimony of a witness where the State did not introduce other evidence corroborating the State's witnesses' version of the events.

¶ 63 In this case, the jury received consistent testimony from Lafary, Standard, and several other officers that were eyewitnesses that day. Standard's eyewitness account indicated Standard saw Lafary and defendant land in the water after Lafary tackled defendant. According to Standard's testimony, Standard witnessed defendant applying pressure while forcing Lafary to stay under water. Lafary testified to the same events that Standard's eyewitness account

addressed. While Lafary could not see defendant's actions, Lafary vividly described his attempts to draw a breath as defendant pushed Lafary's head under the water. In addition, numerous other officers corroborated that both Lafary and defendant were wet after defendant was taken into custody.

¶ 64 In contrast, defendant testified that he never entered the water. Defendant's testimony was ostensibly supported by the testimony of Knotts, an inmate who testified that Lafary, the victim, told Knotts that neither Lafary nor defendant entered the water on the day in question. Of course, the testimony from defendant and Knotts would make the officers' version of the events impossible, and the trier of fact was presented with directly conflicting versions of the events in question.

¶ 65 However, unlike the situations in *Naylor* and *Sebby*, in this case the jury received photographs showing that Lafary's face and uniform were wet. The same photographs depicted a water pattern on Lafary's uniform that corroborated the officers' testimony about the events. Further, the State's photographs that the jury had to consider also documented fresh scratches and marks on Lafary's face. Defendant suggests that the photographs the trier of fact received in this case do not qualify as credible extrinsic evidence because "the only evidence as to the timing of those pictures came from the testimony of the officers." He concludes: "[T]here is no extrinsic evidence to corroborate the officers' testimony that [the photographs] were taken immediately following the incident."

¶ 66 The logic defendant urges this court to adopt could apply to any imaginable piece of documentary evidence. For example, unrefuted DNA evidence, drug tests, fingerprints, and tool marks, would not eliminate the case from being a credibility contest. Carrying defendant's logic to an extreme, where the State introduces the video, recorded by a security camera, catching

defendant in the act of committing a crime, the evidence would remain closely balanced because a jury must first decide whether the person who set up the camera or retrieved the images were persons of integrity and had credibility. If we accept defendant's argument, nearly every criminal case with compelling extrinsic evidence would be reduced to a "credibility contest," and thus closely balanced. Such a result is not required by existing case law and we will not create such precedent in this appeal.

¶ 67 Significantly, defendant does not challenge the accuracy of the photographic image on review. Instead, defendant claims the image that was accurately captured by the photographer was staged. Consequently, it is uncontested that the jury received one piece of extrinsic evidence that corroborated the testimony of the State's witnesses and made defendant's testimony less likely to be true. Since this jury received extrinsic evidence, while not a case involving overwhelming evidence of guilt, we conclude the circumstances in the case at bar did not fit the category of closely balanced that the court found existed in *Sebby*.

¶ 68 We conclude that the evidence was not closely balanced because the jury received non-testimonial, extrinsic evidence that arguably corroborated the testimony of the State's witnesses. Therefore, we do not find plain error.

¶ 69 C. *Krankel*

¶ 70 The proper procedure to be followed where a defendant makes *pro se* posttrial claims of ineffective assistance of counsel is set forth in *People v. Krankel*, 102 Ill. 2d 181 (1984), and its progeny. Those cases make clear that the circuit court should conduct a preliminary inquiry into defendant's claims—often by way of addressing defendant and counsel—and, if there is an indication of possible neglect of the case on counsel's part, the court should appoint new counsel to fully pursue defendant's claims. *People v. Nitz*, 143 Ill. 2d 82, 134-35 (1991). Even if the

circuit court deems a defendant's claims meritless, it must make some inquiry and provide the defendant an " 'opportunity to specify and support his complaints.' " *People v. Moore*, 207 Ill. 2d 68, 80 (2003) (quoting *People v. Robinson*, 157 Ill. 2d 68, 86 (1993)).

¶ 71 In the present case, the circuit court did not conduct a preliminary inquiry as contemplated by *Krankel*, and the State does not argue otherwise. Instead, the State contends that defendant did not make a claim of ineffective assistance of counsel such that a preliminary inquiry would be mandated.

¶ 72 In *People v. Ayres*, 2017 IL 120071, our supreme court considered what level of detail was necessary to trigger the mandatory *Krankel* inquiry. *Id.* ¶ 18. The *Ayres* court held that a "clear claim" of ineffectiveness may be made orally or in writing and "need not be supported by facts or specific examples." *Id.* ¶ 19. The *Ayres* court adhered to its previous position in *Moore*, 207 Ill. 2d at 79, where it held " ' "a *pro se* defendant is not required to do any more than bring his or her claim to the trial court's attention." ' " *Ayres*, 2017 IL 120071, ¶ 11 (quoting *People v. Taylor*, 237 Ill. 2d 68, 76 (2010), quoting *Moore*, 207 Ill. 2d at 79). In *Taylor*, 237 Ill. 2d at 76, the court held that a claim must at least "expressly complain[ ] about counsel's performance." In recently rejecting an argument that a *Krankel* inquiry was required, the Fourth District distilled the supreme court's directives on the subject:

> "[F]or a defendant to make a 'clear claim' of ineffective assistance of counsel, the defendant must at least mention his attorney. The trial court was in a position to review defendant's letter within the context of the circumstances surrounding the plea and sentencing. Here, defendant did not request the appointment of new counsel, or reference his counsel in any way, which might have directed the court's attention to some perceived deficiency in trial counsel's representation. [Citation.] As defendant's

letter falls short of a 'clear claim asserting ineffective assistance of counsel,' [citation] he is not entitled to a *Krankel* inquiry." *People v. Thomas*, 2017 IL App (4th) 150815, ¶ 31 (quoting *Ayres*, 2017 IL 120071, ¶ 18).

¶ 73 Defendant in the present case made a clear claim of ineffective assistance of counsel. He expressly and explicitly complained of counsel's performance. Defendant's comments that counsel was "one of the most worthless attorneys this side of the Pentagon" and that counsel "has not worked for me at all, at all" are not ambiguous. Moreover, defendant provided a specified complaint—that counsel failed to move for a change in venue—which goes beyond what is required to trigger a *Krankel* inquiry. See *Ayres*, 2017 IL 120071, ¶ 19. Accordingly we remand the matter so that the circuit court may conduct the proper inquiry into defendant's claims.

¶ 74 D. Sentencing

¶ 75 Finally, defendant argues that the circuit court erred when it considered as a factor in aggravation that his conduct caused or threatened serious harm. He maintains that the threat of serious harm is implicit in the offense of attempted murder, and that the circuit court therefore applied an improper double enhancement. Defendant concedes that he failed to preserve the issue, but argues that the error constitutes a second-prong plain error.[5]

¶ 76 A factor implicit in the offense for which a defendant is found guilty may not be considered as a factor in aggravation. *People v. Phelps*, 211 Ill. 2d 1, 11 (2004). "Stated differently, a single factor cannot be used both as an element of an offense and as a basis for imposing 'a harsher sentence than might otherwise have been imposed.' [Citation.] Such dual use of a single factor is often referred to as a 'double enhancement.' " *Id*. at 11-12 (quoting

[5]Defendant also argues on appeal that the circuit court erred in imposing extended-term sentences for aggravated fleeing or attempting to elude a peace officer and aggravated battery. However, as this court has reversed each of those convictions, we need not address that argument.

People v. Gonzalez, 151 Ill. 2d 79, 83-85 (1992)). The prohibition on double enhancements stems from the presumption that the legislature necessarily contemplated the factors inherent in an offense in setting the sentencing range for that offense. *Id.* at 12.

¶ 77 Once again, we begin our plain error analysis by considering whether the circuit court committed a clear or obvious error. As a threshold matter, we must determine whether causing or threatening serious harm (730 ILCS 5/5-5-3.2(a)(1) (West 2014)) is implicit in the offense of attempted murder. Our supreme court's decision in *People v. Saldivar*, 113 Ill. 2d 256 (1986), in which it considered the same aggravating factor in the context of actual murder, is instructive. The *Saldivar* court determined that while the end result of every murder—a person's death—could not be considered in aggravation, a sentencing court was free "to consider the force employed and the physical manner in which the victim's death was brought about." *Id.* at 271.

¶ 78 The reasoning set forth in *Saldivar* applies with even greater force to the offense of *attempted* murder. See *People v. Killings*, 150 Ill. App. 3d 900, 910 (1986). Attempted murder, after all, contemplates innumerable possible results short of actual death. For example, consider the would-be murderer who shoots and misses his victim, versus the one who hits, paralyzing the victim for life. Each case is an attempted murder, but a great disparity exists in the degree of harm suffered by each victim. Thus, a sentencing court may consider the degree of harm done in addition to the physical manner in which that harm was done. As the *Saldivar* court noted: "[T]he commission of any offense, regardless of whether the offense itself deals with harm, can have varying degrees of harm or threatened harm. The legislature clearly and unequivocally intended that this varying quantum of harm may constitute an aggravating factor." *Saldivar*, 113 Ill. 2d at 269.

¶ 79 The circuit court in this case could properly consider the degree of serious harm inflicted by defendant without doubly enhancing his sentence. While the harm suffered by Lafary could have been far worse, it was nevertheless a serious harm even if it did not qualify as extremely serious harm that caused disfigurement or a permanent physical disability.

¶ 80 Finally, as a matter of housekeeping, we must address a motion taken with the case. As part of his sufficiency of the evidence argument, defendant explains the physiology of drowning, including the assertion that loss of consciousness occurs after being under water between 3 and 10 minutes. In support of this point, defendant cites to and quotes from a book entitled "Forensic Pathology, 2nd Edition." V. DiMaio & D. DiMaio, *Forensic Pathology* at 399-400 (2d ed. 2001). As an appendix to his reply brief, as a matter of courtesy to the court, defendant attached only the scanned pages from that book necessary to support defendant's argument. The State, in turn, has moved to strike that appendix, arguing the scanned pages were not part of the record and were not presented to the trial court. It is well established that a party may not rely on resources outside the record to support its position on appeal. *Keener v. City of Herrin*, 235 Ill.2d 338, 346 (2009). Defendant has inadvertently violated this general premise. Under these circumstances, a court of review may strike the brief or disregard the material. *Allstate Insurance Company v. Kovar,* 363 Ill. App. 3d 493, 499 (2006). We have elected to simply ignore the extraneous materials contained in the appendix. Consequently, we deny the State's motion.

¶ 81 In conclusion, we affirm defendant's conviction and sentence for attempted first degree murder and reverse defendant's convictions for aggravated fleeing or attempting to elude a peace officer and aggravated battery due to the insufficiency of the State's evidence. We remand the matter so the circuit court may conduct a preliminary inquiry into defendant's *pro se* posttrial claims of ineffective assistance of counsel with respect to the attempted murder conviction alone.

¶ 82 III. CONCLUSION

¶ 83 The judgment of the circuit court of Fulton County is affirmed in part, reversed in part, and remanded with instructions.

¶ 84 Affirmed in part and reversed in part.
¶ 85 Remanded with directions.

¶ 86 PRESIDING JUSTICE SCHMIDT, concurring in part and dissenting in part:

¶ 87 I concur with the majority except as to the finding the State presented insufficient evidence to sustain defendant's conviction for aggravated battery. The question on review is whether *any* rational trier of fact could have found the elements of aggravated battery proved beyond a reasonable doubt. *Collins*, 106 Ill. 2d at 261. The majority searches out alternative explanations to find defendant did not act knowingly when he put the weight of his body onto Officer Lafary so as to pin him to the ground. It claims the evidence presented at trial shows defendant rolled on top of Lafary as a result of being tackled; that the two men were "resist[ing] each other's action." *Supra* ¶ 50. Defendant had no right to resist Lafary's attempts to arrest him. Any contact made with Lafray in defendant's resisting of the officer constituted an aggravated battery. Resisting arrest always "provokes" more force by the arresting officer.

¶ 88 We, as the reviewing court, will not substitute our judgment for that of the trier of fact. *People v. Young*, 128 Ill. 2d 1, 51 (1989). To say the evidence did not support the conclusion defendant knowingly made an insulting or provoking contact is absurd. Defendant was in the middle of his third flight from law enforcement. Once he knew he was spotted, defendant attempted to flee again. Lafary tackled defendant to stop him; the two fell to the ground. Lafray testified he "canted to the right" when he landed in the water. He said he could feel defendant's presence to his left. Lafary brought his arms below him to push himself off the bottom of the lake. It was then he "rolled to [his] right side" and "[defendant] rolled with [him]." This

testimony indicates to the reader, and apparently to the jury, that Lafray and defendant landed in the water side-by-side, ending the force of the tackle. In an attempt to get up, Lafray tried to roll over and sit up. Defendant, also no longer in motion from the tackle, rolled in the same direction to leverage his body weight over Lafary to facilitate his attempts to drown the officer.

¶ 89 The State can also establish knowledge with circumstantial evidence. *People v. Laubscher*, 183 Ill. 2d 330, 335 (1998). The jury was entitled to take defendant's act of holding Lafary's head under water as evidence that defendant knowingly pinned the officer to the ground. The totality of the evidence, when viewed in the light most favorable to the State, supports defendant's conviction for aggravated battery. Accordingly, I would affirm defendant's conviction.