

Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2006)) in which he alleged his appellate attorney rendered ineffective assistance of counsel for failing to raise all the issues before the appellate court that were preserved by trial counsel in his posttrial motion. In the petition, defendant alleged his appellate defender failed to raise the following four issues preserved by his trial counsel in his posttrial motion: (1) an audiotape of the alleged drug buy was admitted into evidence without being properly authenticated, (2) the audiotape was allowed into the jury room and unduly emphasized only a portion of the evidence, (3) no restrictions were placed upon the playing of the audiotape and it was allowed to be played several times and unduly emphasized only a portion of the evidence, and (4) defendant was not proven guilty beyond a reasonable doubt because (a) the confidential source was not believable, (b) the audiotape was not clear, and (c) the police did not determine if the confidential source possessed the contraband prior to the alleged transaction. The State filed a motion to dismiss. The trial court denied the State's motion, and the cause ultimately proceeded to a third stage hearing during which the trial court heard arguments by counsel.

¶ 5 On February 10, 2009, the trial court dismissed the petition in a seven-page written order. Defendant now appeals from that order. In this appeal, defendant contends the trial court erred when it denied his postconviction petition after an evidentiary hearing and raises only one of the claims set forth in his postconviction petition. Defendant asserts his appellate counsel rendered ineffective assistance of counsel when he failed to raise the issue that defendant was not proven guilty beyond a reasonable doubt because the confidential source was not credible, the audiotape of the controlled buy was not clear, and the police did not take adequate precautions to determine if the confidential source possessed the contraband prior to the alleged transaction. Defendant does not raise the three other issues raised before the trial court, thereby waiving the other three claims raised in his postconviction petition pursuant to Supreme Court Rule 341(h)(7), which states that "[p]oints

not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing." Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008).

¶ 6

ANALYSIS

¶ 7 The parties agree that the standard of review is *de novo* because the trial court only heard arguments of counsel and no new evidence was presented at the third stage evidentiary hearing. See *People v. Pendleton*, 223 Ill. 2d 458, 473, 861 N.E.2d 999, 1008 (2006). Claims of ineffective assistance of counsel are resolved under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). The *Strickland* test also applies to claims of ineffective assistance of appellate counsel. *People v. Rogers*, 197 Ill. 2d 216, 223, 756 N.E.2d 831, 835 (2001). Under *Strickland*, a defendant must demonstrate that counsel's performance was deficient and that such deficient performance substantially prejudiced defendant. *Strickland*, 466 U.S. at 687. To demonstrate performance deficiency, a defendant must establish that counsel's performance fell below an objective standard of reasonableness. *People v. Edwards*, 195 Ill. 2d 142, 163, 745 N.E.2d 1212, 1223 (2001). To demonstrate sufficient prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

¶ 8 A defendant who claims appellate counsel was ineffective for failing to raise an issue on appeal must allege facts demonstrating such failure was objectively unreasonable and that counsel's decision prejudiced the defendant. *Rogers*, 197 Ill. 2d at 223, 756 N.E.2d at 835. A defendant does not suffer prejudice from appellate counsel's failure to raise a nonmeritorious claim on appeal. *People v. Simms*, 192 Ill. 2d 348, 362, 736 N.E.2d 1092, 1107 (2000). Appellate counsel's choices concerning which issues to pursue are entitled to substantial deference. *Rogers*, 197 Ill. 2d at 223, 756 N.E.2d at 835.

¶ 9 Defendant maintains that his appellate counsel was ineffective for failing to raise the issue of whether he was proven guilty beyond a reasonable doubt. When a reviewing court considers a challenge to a criminal conviction based upon the sufficiency of evidence, it is not our function to retry the defendant. *People v. Hall*, 194 Ill. 2d 305, 329-30, 743 N.E.2d 521, 536 (2000). Instead, our inquiry is limited to "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in original.) *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). It is the responsibility of the trier of fact to "fairly *** resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319. The reviewing court must carefully examine the evidence while bearing in mind that it was the fact finder who heard and saw the witnesses. *People v. Cunningham*, 212 Ill. 2d 274, 280, 818 N.E.2d 304, 308 (2004). Only where the evidence is so improbable or unsatisfactory as to create reasonable doubt of the defendant's guilt will a conviction be set aside. *Hall*, 194 Ill. 2d at 330, 743 N.E.2d at 536.

¶ 10 In the instant case, the evidence at trial was sufficient to prove defendant guilty beyond a reasonable doubt of unlawful delivery of less than five grams of a substance containing methamphetamine. The evidence showed that a confidential informant telephoned defendant from the office of the chief of police of the Carmi police department and set up a purchase of methamphetamine from defendant. The confidential source was fitted with a recording device which not only recorded conversations but also allowed law enforcement officers to hear what was transpiring contemporaneously. The confidential source was patted down and his clothing was checked prior to the drug buy to ensure that he was not carrying any drugs. A law enforcement official gave the confidential source \$25 with which to purchase the methamphetamine from defendant.

¶ 11 Law enforcement officials followed the confidential source to defendant's house. When the source arrived at defendant's house, a conversation ensued, which was recorded and played for the jury. On the tape, the confidential source can be heard asking defendant whether he "got that shit." As pointed out in our order deciding the direct appeal, the term "shit" is frequently used as a reference to various types of illegal drugs. The tape reveals defendant was hesitant to engage in a drug transaction at his home because his father was going to be coming home. Defendant told the confidential source he did not have any "dope" on him, but he would go to a convenience store and get some. The two then biked together to the convenience store. Defendant went into the store alone and when he came out, the two men entered a lean-to shed attached to the store so that the confidential source could allegedly urinate. While in the shed, the confidential source asked defendant, "You got it?" Defendant responded, "It's right here in my hand." The confidential source testified that defendant then handed him the bag of methamphetamine in exchange for the \$25 he was given by law enforcement. The confidential source then biked back to the police department, leaving defendant in front of the convenience store.

¶ 12 Defendant testified on his own behalf that he was not engaged in a drug deal, but rather the confidential source gave him \$25 to pay for a debt and defendant was going to later deliver some dishes to the confidential source. Defendant's sisters testified that six days prior to the alleged drug buy, the confidential source told them that he had been approached by authorities to "set up" defendant, and the source was afraid not to cooperate for fear of being subjected to reincarceration. The sisters claimed that they did not tell defendant about this alleged conversation because they were "intimidated" by the confidential source.

¶ 13 While defendant claims the confidential source was not believable, the record shows that defendant had extreme credibility issues of his own due to a prior conviction for unlawful manufacture of methamphetamine for which he had been sentenced to 10 years'

imprisonment and prior convictions and prison sentences for attempted home invasion and aggravated battery. Defendant also claims the audiotape was not clear, but enough could be heard that it was sufficiently incriminating. Finally, the record shows the police made sure that the confidential source did not possess the contraband prior to leaving the police station. The record further shows that defendant's testimony set forth his theory that he was framed by the confidential source.

¶ 14 We agree with the trial court that this case basically boiled down to a credibility issue, which the jury resolved in favor of the confidential source. After viewing all the evidence in the light most favorable to the State, the jury could have found the essential elements of the crime beyond a reasonable doubt. It was the jury's responsibility to consider the evidence presented at trial, and we are not to substitute our judgment for the jury's finding. The State presented sufficient evidence to prove defendant guilty of unlawful delivery of a controlled substance beyond a reasonable doubt; therefore, appellate counsel was not ineffective for failing to raise this nonmeritorious issue on direct appeal. Accordingly, defendant's claim of ineffective assistance of appellate counsel fails.

¶ 15 For the foregoing reasons, the judgment of the circuit court of White County is hereby affirmed.

¶ 16 Affirmed.