2016 IL App (5th) 140031-U

NO. 5-14-0031

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Randolph County.
	)	
v.	)	No. 13-CF-109
	)	
CLIFTON L. BARDO,	)	Honorable
	)	Richard A. Brown,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Chapman and Cates concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's finding that defendant's convictions for unlawful delivery of a controlled substance occurred within 1,000 feet of a church is reversed where the State did not prove beyond a reasonable doubt that the building in question operated as a church on the dates of the offenses. Accordingly, defendant's enhanced convictions are reduced and this cause is remanded for resentencing. The State concedes the drug assessment fee imposed for defendant's conviction of the lesser class offense must be vacated. The drug assessment fee imposed for defendant's conviction of the higher class offense is vacated and remanded for imposition of the fee on the reduced conviction. As to defendant's other claims, the trial court did not abuse its discretion in denying defendant a continuance to obtain substitute counsel on the day of trial, defendant waived his claim that the State failed to establish a sufficient chain of custody, defendant was not denied the right to effective assistance of counsel where counsel's conduct was a product of sound trial strategy, and defendant's escort into the courtroom by a bailiff

through the jail entrance did not constitute a *Boose* violation where defendant was not physically restrained in any way during trial.

¶ 2 BACKGROUND

¶ 3 The charges in this appeal stem from a 2012 investigation involving two separate controlled drug buys. Officer Ralph Jones, a patrolman for the Sparta Police Department assigned to the Drug Task Force, conducted an undercover narcotics investigation beginning September 11, 2012, along with Sparta Police Department Officers Jeremy Kempfer, Steve Laramore, and David Bierman.

¶ 4 Jodie Tanner worked as a confidential informant with the Sparta Police Department during this investigation, and was instructed to make two separate narcotics purchases from defendant, who had been named a suspect. The first operation of the investigation was conducted on September 12, 2012. The second operation was conducted on October 1, 2012. In both operations, the Sparta officers placed a recording device on Tanner and provided Tanner money to purchase suspected narcotics from defendant. The officers testified that the residences where the two operations were executed were less than 1,000 feet from an alleged church, New Hope Baptist Church (New Hope).

¶ 5 The first operation took place at 323 West Park Street in Sparta, where the officers witnessed Tanner enter and exit a residence. After leaving the residence, Tanner drove to a predetermined location where she gave three small bags to Officer Laramore, who then handed the bags to Officer Jones. Jones field tested the substance in the bags for the presence of cocaine, weighed the bags, placed them in an evidence bag, and transported

the evidence to the Sparta Police Department where he locked the evidence in an evidence locker. Officer Kempfer testified that he personally measured a distance of 575 feet between the residence and New Hope.

¶ 6 The second operation took place at 260 North Lewis Street in Sparta, where officers witnessed Tanner enter a residence. Tanner and defendant later exited the residence, and Tanner left in her vehicle. Officers Bierman and Laramore followed Tanner until Officer Jones "gained sight of her." Tanner then met Jones at a predetermined location. Jones testified he field tested, weighed, and sealed suspected cocaine that Tanner had bought from defendant, and placed the suspected cocaine into evidence. Jones further testified that he personally measured a distance of 648 feet between the residence and New Hope.

¶ 7 Following the investigation, defendant was charged by information with one count of unlawful delivery of 1-15 grams of a controlled substance within 1,000 feet of a place of worship, a Class X felony. 720 ILCS 570/407(b)(1) (West 2012). Defendant was arrested and posted bond. Defense counsel then entered his appearance as the attorney of record for defendant, and the matter was set for a preliminary hearing. Thereafter, an amended information was filed charging defendant with an additional count of unlawful delivery of less than one gram of a controlled substance within 1,000 feet of a place of worship, a Class 1 felony. 720 ILCS 570/407(b)(2) (West 2012).

¶ 8 Prior to trial, on September 5, 2013, defense counsel filed a motion to disclose identity of informant. A hearing on this motion was held on September 27, 2013, where defense counsel argued he needed the identity of the Sparta Police Department's

confidential informant to prepare a proper defense. The trial court ordered that all witnesses be disclosed that day, indicating this would give defense counsel "three good weeks to finish [his] discovery." The matter was set for trial on October 21, 2013.

¶ 9 On the morning of trial, defense counsel approached the bench with a motion to withdraw as attorney of record, citing a breakdown in communication with defendant and defendant's desire to obtain substitute counsel to represent him at trial. The trial court denied the motion, and the trial proceeded.

¶ 10 After the State rested, defense counsel filed a motion for a directed verdict, arguing the State failed to prove that New Hope was a place of worship on the dates of the offenses. Defense counsel also moved for a directed verdict on the second count, arguing defendant was not identified on the surveillance video of the second operation. In response, the State asserted the jury could infer that defendant committed the offenses as charged, and further argued there was evidence that New Hope was a place of worship on the dates in question. The court denied defense counsel's motion.

¶ 11 Following the jury trial, defendant was found guilty of unlawful delivery of 1-15 grams of a controlled substance within 1,000 feet of a place of worship, a Class X felony, and unlawful delivery of less than one gram of a controlled substance within 1,000 feet of a place of worship, a Class 1 felony. 720 ILCS 570/407(b)(1), (2) (West 2012). Defendant subsequently filed a motion for judgment notwithstanding the verdict, or, alternatively, for a new trial, which the trial court denied. Defendant was sentenced to 24 years' incarceration with respect to each count to run concurrently. Defendant then filed a motion to reconsider his sentence, which the trial court also denied. This appeal

followed. Defendant alleges seven separate errors in his appeal, which we will consider in the order they appear in defendant's brief.

¶ 12 I. Abuse of Discretion

¶ 13 Defendant first alleges the trial court abused its discretion in denying defense counsel's motion to withdraw as attorney of record on the day of trial, as defendant was deprived of his sixth amendment right to be represented by counsel of his choice.

¶ 14 The constitutional right to counsel includes the right to counsel of one's own choosing. *People v. Basler*, 304 Ill. App. 3d 230, 232, 710 N.E.2d 431, 433 (1999). In deciding whether to grant a continuance to substitute counsel, the trial court must balance the defendant's fundamental right to counsel of her choice against the interests of the State, the court, and the witnesses in the efficient disposition of cases without unreasonable delay. *Basler*, 304 Ill. App. 3d at 232, 710 N.E.2d at 433.

¶ 15 The right to counsel cannot be used as a weapon to frustrate the administration of justice or otherwise impede the effective prosecution of a crime. *Basler*, 304 Ill. App. 3d at 232, 710 N.E.2d at 433. The balancing of interests requires a review of the defendant's diligence and an inquiry into the reasons for the request to determine whether the defendant is being truthful or is merely attempting to delay the case. *Basler*, 304 Ill. App. 3d at 232, 710 N.E.2d at 433.

¶ 16 The determination of whether to grant a continuance for substitution of counsel is a matter left to the trial court's discretion, and will not be overturned absent an abuse of that discretion. *People v. Segoviano*, 189 Ill. 2d 228, 245, 725 N.E.2d 1275, 1283 (2000). An abuse of discretion will only be found where the trial court's ruling is arbitrary,

fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court. *People v. Hall*, 195 Ill. 2d 1, 20, 743 N.E.2d 126, 138 (2000). Whether the denial of a motion for a continuance violates a defendant's substantive right turns upon the particular facts of each case. *Basler*, 304 Ill. App. 3d at 232, 710 N.E.2d at 433. "A court does not abuse its discretion in denying a continuance where new counsel is not identified or does not stand ready to make an unconditional entry of appearance." *Basler*, 304 Ill. App. 3d at 232, 710 N.E.2d at 433.

¶ 17 Here, on the morning trial was set to begin, defense counsel approached the bench with a motion to withdraw as attorney of record. Defense counsel indicated there was a "breakdown in the communication" with defendant, and communicated defendant's desire to obtain substitute counsel with "a bit more experience." Defendant informed the judge that he was made "aware as of last week" that defense counsel had never previously handled a jury trial.

¶ 18 After inquiring defendant about his desire to obtain new counsel, the court denied the motion. Specifically, the court explained:

> "Well, from what I've been told, gentlemen, I certainly wholeheartedly believe in a person's right to counsel of their choice. Not only do I believe it, but it's our Constitutional law that I must follow. However, I don't think it's fair, nor will I permit my court proceedings to be delayed when at the last minute when I've got 37 jurors that we paid to come here today, trial is ready, witnesses are here, to say, Oh, I've decided I don't like my attorney and I want time–I want to delay the trial so I can go hire a new attorney. This Court won't allow that ***. You had ample

time to bring your issue with your attorney before the Court, and we just–I simply will not allow it to be done at 9 o'clock on the day that the jury trial is to begin at nine o'clock. For that reason, I'm going to deny your motion."

¶ 19 After careful review, we cannot say the trial court abused its discretion in denying defense counsel's motion to withdraw as attorney of record on the morning trial was set to begin. As we previously stated, the granting of a continuance rests within the discretion of the trial judge. Factors to be considered in the exercise of that discretion include whether defendant has shown diligence, the failure of defendant to articulate an acceptable reason for desiring new counsel, and the representation by current counsel for a lengthy period of time prior to the request for new counsel. *People v. Childress*, 276 Ill. App. 3d 402, 414, 657 N.E.2d 1180, 1188 (1995).

¶ 20 Here, defense counsel's oral motion to substitute counsel was made on the morning of trial. While defense counsel informed the trial judge he was prepared to file the motion, he conceded he had not "filed it yet." Moreover, defense counsel did not notify the court that defendant had been searching for new counsel until the morning of trial despite knowing this information one week prior to trial. As it was the morning of trial, witnesses and jurors were present, and trial was ready to commence. We find the trial court did not abuse its discretion in denying the motion to withdraw as attorney of record.

¶ 21 In support of his argument, defendant cites to *People v. Washington*, 195 Ill. App. 3d 520, 552 N.E.2d 1067 (1990), which held the trial court's denial of the defendant's

request for a continuance to allow his privately retained counsel to appear constituted reversible error. We find *Washington* distinguishable from the instant case.

¶ 22 In reaching its decision, the *Washington* court determined the "trial court failed to conduct any inquiry into the stated reason for the request for the continuance when it summarily denied the request." *Washington*, 195 Ill. App. 3d at 525, 552 N.E.2d at 1070. Further, the court noted "there is no indication in the record that defendant's request for a relatively brief continuance of seven days was being used merely as a delaying tactic," and any such suspicion would be tenuous in light of the short date requested. *Washington*, 195 Ill. App. 3d at 525, 552 N.E.2d at 1070.

¶ 23 In contrast, the trial court here conducted a thorough inquiry into defense counsel's stated reasons for his motion to withdraw as attorney of record. The court asked defense counsel if he had any evidence or statements to make in support of his motion and asked defense counsel when he first learned of defendant's desire to obtain new counsel. Only after considering defense counsel and defendant's statements did the court deny the motion. Further, unlike the seven-day request in *Washington*, defendant's proposed substitute counsel requested more than two months for a new trial date.

¶ 24 Defendant next cites to *People v. Childress*, 276 Ill. App. 3d 402, 657 N.E.2d 1180 (1995). *Childress* found the trial court violated the defendant's right to counsel of his choice by denying a request for a continuance where private counsel sought to file an appearance on the defendant's behalf on the day scheduled for trial. Unlike *Childress*, defendant's proposed substitute counsel in the instant case did not file an appearance on defendant's behalf on the morning of trial. The proposed substitute counsel specifically

indicated he was unwilling to enter his appearance on behalf of defendant, and was unable to proceed in the matter for two months.

¶ 25 Defendant finally cites to *People v. Myles*, 49 Ill. App. 3d 325, 364 N.E.2d 323 (1977). We again distinguish this case from the case at bar. *Myles* held it was an abuse of discretion for the trial court to deny a continuance and compel the defendant to go to trial on a murder charge with an inexperienced associate attorney who worked under a more experienced attorney retained by the defendant. The experienced attorney had informed the clerk of the court the previous day that he would be arriving at court late due to a conflicting court appearance.

¶ 26 Unlike *Myles* where the request for a continuance was merely a few hours, the request in the instant case was more than two months. Further, defendant failed to seek substitute counsel who stood ready to make an unconditional entry of appearance on defendant's behalf. In light of the foregoing, we reject defendant's argument.

¶ 27 II. Place of Worship

¶ 28 The Illinois Controlled Substances Act (Act) enhances the sentence available for a drug offense if the offense occurs within 1,000 feet of certain locations, including schools, public parks, or any "real property comprising any church, synagogue, or other building *** or place used primarily for religious worship." 720 ILCS 570/407(b) (West 2012). This enhancing provision is only applicable if the State can prove beyond a reasonable doubt that the enhancing location was used for that primary purpose on the date of the offense. *People v. Sims*, 2014 IL App (4th) 130568, ¶ 106, 9 N.E.3d 621. Defendant argues the State failed to meet this burden because it offered no evidence

whatsoever regarding the use of New Hope on the dates of the offenses–September 12, 2012 and October 1, 2012. We agree.

¶ 29 We review claims of insufficient evidence to determine " '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.) *People v. Ortiz*, 2012 IL App (2d) 101261, ¶ 9, 971 N.E.2d 1159 (quoting *People v. Collins*, 106 Ill. 2d 237, 261, 478 N.E.2d 267, 277 (1985)). A conviction will not be set aside unless the evidence is so unsatisfactory or improbable that it creates reasonable doubt of the defendant's guilt. *Ortiz*, 2012 IL App (2d) 101261, ¶ 9, 971 N.E.2d 1159. It is not the function of the reviewing court to retry the defendant. *Ortiz*, 2012 IL App (2d) 101261, ¶ 9, 971 N.E.2d 1159. Rather, the trier of fact must assess the credibility of the witnesses and the weight of their testimony, resolve conflicts in the evidence, and draw reasonable inferences from that evidence; this court will not substitute its judgment for that of the trier of fact on these matters. *Ortiz*, 2012 IL App (2d) 101261, ¶ 9, 971 N.E.2d 1159.

¶ 30 In making his argument, defendant cites to *People v. Ortiz*, 2012 IL App (2d) 101261, 971 N.E.2d 1159, which also involved a defendant charged with unlawful delivery of a controlled substance within 1,000 feet of a church. In *Ortiz*, the investigating officer testified that he measured the distance between the drug transaction in question and a building known as Emmanuel Baptist Church to be 705 feet. *Ortiz*, 2012 IL App (2d) 101261, ¶ 5, 971 N.E.2d 1159. However, the officer did not offer testimony regarding the date on which he measured the distance. Further, although the

State produced photographs of Emmanuel Baptist Church into evidence, it offered no testimony concerning when the photographs were taken or whether the photographs accurately represented the building as it appeared on the date of the offense. *Ortiz*, 2012 IL App (2d) 101261, ¶ 11, 971 N.E.2d 1159.

¶ 31 In finding this evidence insufficient, the court stressed that the issue before it was not simply whether the evidence established beyond a reasonable doubt that the building was used primarily for religious worship. Rather, the court emphasized the "issue is whether the evidence established beyond a reasonable doubt that the building was such a building *on the date of the offense*." (Emphasis in original.) *Ortiz*, 2012 IL App (2d) 101261, ¶ 11, 971 N.E.2d 1159. Without such evidence, the court found there was no way of knowing whether Emmanuel Baptist Church existed on the date of the offense. *Ortiz*, 2012 IL App (2d) 101261, ¶ 11, 971 N.E.2d 1159.

¶ 32 Defendant also cites to *People v. Cadena*, 2013 IL App (2d) 120285, 994 N.E.2d 219, which involved a defendant who was convicted of unlawful deliveries and unlawful possession of a controlled substance within 1,000 feet of a church. On appeal, the defendant challenged the sufficiency of the evidence regarding whether his offenses were committed within 1,000 feet of a church. *Cadena*, 2013 IL App (2d) 120285, ¶ 9, 994 N.E.2d 219. Specifically, the defendant argued the "State did not present sufficient evidence to allow the finder of fact to conclude that the Evangelical Covenant Church was an active church on the dates of the offenses." *Cadena*, 2013 IL App (2d) 120285, ¶ 10, 994 N.E.2d 19.

¶ 33 The court agreed with the defendant, finding the testimony identifying the building known as Evangelical Covenant Church was insufficient to prove that it was operating as a church on the dates of the offenses. In reaching its conclusion, the court noted that the only testimony indicating the church was being used as such on the dates of the offenses was the investigating officer's affirmative response to the leading question, "[I]s that a church that is an active church?" *Cadena*, 2013 IL App (2d) 120285, ¶ 16, 994 N.E.2d 219. The court determined this question was stated in the present tense and without temporal context, such that there was no way to determine whether the officer's answer referred to the dates of the offenses or the time of trial.

¶ 34 The court rejected the State's argument that the officer's experience on the police force was sufficient for the jury to infer he was familiar with the church and its activities, as the officer offered no demonstration or explanation of how he was familiar with the enhancing location. The court indicated the State "could have easily established" the church was active on the dates of the offenses "by eliciting testimony from someone affiliated with the church." (Internal quotation marks omitted.) *Cadena*, 2013 IL App (2d) 120285, ¶ 18, 994 N.E.2d 219. As the court further noted, "because the State failed to present evidence from anyone demonstrating personal knowledge as to whether the church was operating as such on the dates of the offenses, *no* rational trier of fact could have found the enhancement beyond a reasonable doubt." (Emphasis in original.) *Cadena*, 2013 IL App (2d) 120285, ¶ 18, 994 N.E.2d 219.

¶ 35 In the case at bar, Officers Kempfer and Jones testified regarding the distance between New Hope and the two residences where the undercover narcotic operations

were conducted. Kempfer testified he personally measured the distance between New Hope and the residence of the first operation to be 575 feet, while Jones testified he personally measured the distance between New Hope and the residence of the second operation to be 648 feet.

¶ 36 The State concedes there was no testimony concerning what date the officers' measurements were taken. The State also concedes there was no testimony elicited from a church member that the building was used primarily as a church on the dates of the offenses. While the State indicates Officers Kempfer and Jones had been employed by the City of Sparta for over 10 years and would presumably be familiar with New Hope as a place of worship, there was simply no testimony elicited from either officer regarding the dates of their measurements. For these reasons, we find the State has failed to prove beyond a reasonable doubt that New Hope was a place of worship on the dates of the offenses. Accordingly, pursuant to Illinois Supreme Court Rule 366(a) (eff. Feb. 1, 1994), we reduce defendant's convictions to unlawful delivery of controlled substances and remand for resentencing.

¶ 37 The State calls our attention to *People v. Foster*, 354 Ill. App. 3d 564, 821 N.E.2d 733 (2004), which found that because the structure in question was by name a "church," "a rational trier of fact could have inferred New Hope Church was a church used primarily for religious worship based on its name." *Foster*, 354 Ill. App. 3d at 568, 821 N.E.2d at 737. After careful consideration, we find the State's argument is misplaced. The *Foster* court was not asked to resolve the question of whether the building at issue was a church on the date of the offense. For this reason, we reject the State's argument.

¶ 38 III. Chain of Custody

¶ 39 Defendant next argues the State failed to establish a sufficient chain of custody for the State's exhibit 3 used at trial, which was the suspected cocaine obtained from the second operation. Given the incomplete set of facts and testimony regarding the State's exhibit, defendant alleges the evidence presented was insufficient to prove him guilty beyond a reasonable doubt. For the reasons that follow, we find defendant has forfeited this claim.

¶ 40 It is well settled that to avoid procedural default, defendant must make a contemporaneous objection and raise the issue in a posttrial motion. *People v. Davis*, 205 Ill. 2d 349, 361, 793 N.E.2d 552, 560 (2002). Where a defendant fails to satisfy either prong of this test, his challenge is considered waived on appeal. *People v. Woods*, 214 Ill. 2d 455, 470, 828 N.E.2d 247, 257 (2005). This rule is especially appropriate when a defendant argues that the State failed to lay the proper technical foundation for the admission of evidence, and a defendant's lack of a timely and specific objection deprives the State of the opportunity to remedy any deficiency in the foundational proof at the trial level. *Woods*, 214 Ill. 2d at 470, 828 N.E.2d at 257.

¶ 41 In contrast, a defendant's challenge to the sufficiency of evidence is not subject to the waiver rule and may be raised for the first time on direct appeal. *Woods*, 214 Ill. 2d at 470, 828 N.E.2d at 257. The relevant inquiry of a defendant's challenge to the sufficiency of evidence "is 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." *Woods*, 214 Ill. 2d at 470, 828 N.E.2d

at 257. A defendant's conviction must be reversed if a court determines "the evidence is insufficient to establish the defendant's guilt beyond a reasonable doubt." *Woods*, 214 Ill. 2d at 470, 828 N.E.2d at 257. When the State has failed to prove its case, the only proper remedy is a judgment of acquittal, and remand of the cause for a new trial is not an option. *Woods*, 214 Ill. 2d at 470-71, 828 N.E.2d at 257.

¶ 42 Our supreme court has rejected the notion that a challenge to the State's chain of custody is a question of the sufficiency of the evidence:

> "A chain of custody is used to lay a proper foundation for the admission of evidence. Accordingly, a defendant's assertion that the State has presented a deficient chain of custody for evidence is a claim that the State has failed to lay an adequate foundation for that evidence. [Citation.] Thus, a challenge to the chain of custody is an evidentiary issue that is generally subject to waiver on review if not preserved by defendant's making a specific objection at trial and including this specific claim in his or her posttrial motion." *Woods*, 214 Ill. 2d at 471, 828 N.E.2d at 257.

However, our supreme court has acknowledged that under limited circumstances a challenge to the chain of custody may be properly raised for the first time on appeal if the alleged error rises to the level of plain error. *Woods*, 214 Ill. 2d at 471, 828 N.E.2d at 257.

¶ 43 The plain error doctrine serves as a narrow and limited exception to the general rule of procedural default. *People v. Bannister*, 232 Ill. 2d 52, 65, 902 N.E.2d 571, 580 (2008). We will review unpreserved error when a clear and obvious error occurs and: (1)

the evidence is closely balanced; or (2) that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *Bannister*, 232 Ill. 2d at 65, 902 N.E.2d at 580. The defendant bears the burden under both prongs of the plain error doctrine. *People v. Hillier*, 237 Ill. 2d 539, 545, 931 N.E.2d 1184, 1187 (2010). "If the defendant fails to meet his burden, the procedural default will be honored." *Hillier*, 237 Ill. 2d at 545, 902 N.E.2d at 1188.

¶ 44 After careful review, we find defendant has failed to meet his burden of establishing plain error. Clearly, a defendant who fails to argue for plain error review cannot meet his burden of persuasion. *Hillier*, 237 Ill. 2d at 545, 902 N.E.2d at 1188. "[W]hen a defendant fails to present an argument on how either of the two prongs of the plain-error doctrine is satisfied, he forfeits plain-error review." *Hillier*, 237 Ill. 2d at 545-46, 902 N.E.2d at 1188. Here, defendant failed to object to the admissions of any exhibits admitted at trial, failed to object to the qualifications of the State's expert witness, and failed to raise the chain of custody issue in his motion for judgment notwithstanding the verdict, or alternatively, for a new trial. Further, defendant did not argue for plain error review. Accordingly, defendant has forfeited this issue and we need not address the merits of defendant's argument.

¶ 45 Defendant cites to *People v. Cowans*, 336 Ill. App. 3d 173, 782 N.E.2d 779 (2002), in support of his proposition that he is not required to preserve his chain of custody claim if the State fails to show reasonable protective measures were taken due to gaps in the chain of custody. We find *Cowans* unpersuasive.

¶ 46 We initially note that the defendant in *Cowans* was permitted to raise a challenge to the State's chain of custody on appeal. There is nothing which indicates the defendant preserved his claim. As the court explained, "[a] challenge to the sufficiency of the evidence is not subject to the waiver rule and may be raised for the first time on direct appeal." *Cowans*, 336 Ill. App. 3d at 176, 782 N.E.2d at 782.

¶ 47 Since *Cowans* was decided, however, our supreme court has rejected the notion that a challenge to the State's chain of custody is a question of the sufficiency of the evidence. Defendant's argument overlooks the clear ruling in *Woods* that a challenge to the chain of custody is a claim that the State has failed to lay an adequate foundation for the evidence. *People v. Alsup*, 241 Ill. 2d 266, 275, 948 N.E.2d 24, 29 (2011). Therefore, as we outline above, a challenge to the chain of custody is subject to waiver on review if not preserved. The record indicates defendant did not object to the admission of the evidence and did not raise the issue in his posttrial motion. Accordingly, we reject defendant's argument.

¶ 48 Finally, defendant attempts to distinguish the State's reference to our supreme court's decision in *People v. Alsup*, 241 Ill. 2d 266, 948 N.E.2d 24 (2011), which found the defendant waived his appellate argument challenging the chain of custody of drugs, from the case at bar. As defendant points out, unlike the instant case, a stipulation regarding chain of custody was reached in *Alsup* between the State and the defendant. However, defendant offers no explanation as to why this element supports his position that he has not forfeited his chain of custody argument. Importantly, the *Alsup* court "acknowledged that under limited circumstances defendant may raise a challenge to the

chain of custody for the first time on appeal if the alleged error rises to the level of plain error." *Alsup*, 241 Ill. 2d at 277, 948 N.E.2d at 30. As we previously indicated, defendant did not argue for plain error review. Accordingly, we reject defendant's argument and proceed to our next issue.

¶ 49 IV. Ineffective Assistance of Counsel

¶ 50 Defendant next alleges he was denied the right to effective assistance of counsel because defense counsel told the jury during his closing argument that defendant was present in the surveillance videos used at trial. Therefore, defendant contends his convictions should be reversed and this cause remanded for a new trial.

¶ 51 In order to succeed on a claim of ineffective assistance of counsel, petitioner must satisfy the two-pronged *Strickland* test adopted by our supreme court: (1) petitioner must allege facts which demonstrate that counsel's representation fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984); *People v. Albanese*, 104 Ill. 2d 504, 526, 473 N.E.2d 1246, 1255 (1984).

¶ 52 Under the *Strickland* test, a reasonable probability is a probability sufficient to undermine confidence in the outcome, namely, that counsel's deficient performance caused the result of the trial to be unreliable or the proceeding fundamentally unfair. *People v. Enis*, 194 Ill. 2d 361, 376, 743 N.E.2d 1, 11 (2000). There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the petitioner must overcome the presumption that, under the

circumstances, the challenged action is sound trial strategy. *Strickland*, 466 U.S. at 689. The failure to satisfy either the deficiency prong or the prejudice prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *Enis*, 194 Ill. 2d at 377, 743 N.E.2d at 11.

¶ 53 A key issue in the instant case was whether defendant could be placed at the scene of the alleged offenses during the two operations conducted on September 12, 2012, and October 1, 2012. Several of the officers who worked on the investigation testified at trial.

¶ 54 Officer Kempfer testified he was familiar with defendant and positively identified him in court. Kempfer further testified he witnessed defendant meet Tanner at the front door of the residence where the first controlled drug buy occurred. Kempfer testified he then observed Tanner and defendant enter the residence, and later exit the residence together.

¶ 55 Officer Laramore, who conducted surveillance with Kempfer, testified he observed defendant and Tanner exit the residence where the first controlled drug buy occurred. Defendant asserts Laramore testified he did not see anyone meet Tanner at the residence during the first operation. However, while Laramore stated he did not "recall seeing anyone" meet Tanner at the residence, he specifically testified he observed Tanner and defendant exit the residence together. Further, Laramore identified defendant in court:

> "Q. [Attorney for State]: Okay. So you did see [defendant] come out of that residence whenever [Tanner] came out?
>
> A. Yes, sir.

Q. Are you familiar with [defendant]?

A. Yes, sir.

Q. Do you see him here today?

A. Yes, sir. He's sitting at the defense table."

¶ 56 Officer Laramore further testified that he observed Tanner and defendant enter the residence where the second controlled drug buy occurred, and positively identified defendant as the individual he observed wearing a red sweatshirt on the date of the second operation.

¶ 57 Officer Bierman testified he was an undercover patrolman during the second controlled buy, and observed Tanner and defendant enter a residence. Bierman identified defendant in court as the same individual he observed during the second operation, and indicated defendant was wearing a red sweatshirt.

¶ 58 Tanner also testified at trial. Tanner indicated she was assigned a name, Jamie Williamson, to conceal her identity, and identified defendant in court as the individual who sold her cocaine and crack cocaine on the date of the first operation, September 12, 2012. Tanner further identified defendant as the individual who sold her cocaine on the date of the second operation, October 1, 2012. Tanner testified that defendant was wearing a red sweater and pants when he sold her cocaine on October 1, 2012, and indicated she had consented to wear an overhear device during both operations.

¶ 59 The State played the audio and video footage captured on the overhear device in court from both operations, and Tanner testified regarding the events depicted on the video. Regarding the first operation, Tanner testified defendant was "bagging up drugs"

on the video. Tanner further testified she performed oral sex on defendant, which was also captured on the video. Tanner positively identified defendant as the individual weighing the drugs on the video, and testified the video accurately and truthfully depicted the events which took place on the date of the first operation. Concerning the second operation, Tanner identified defendant as the individual who handed her drugs in exchange for cash as captured by the surveillance video. The videos capturing the drug transactions were admitted into evidence.

¶ 60 The admissions by defense counsel that defendant was present in the surveillance videos which defendant alleges amount to ineffective assistance of counsel occurred as follows. The first admission defendant points out occurred when defense counsel attacked Tanner's credibility during his closing argument. Counsel asserted Tanner was not a credible witness because she indicated she performed oral sex on defendant during the first operation because she was scared. As counsel stated to the jury:

> "[Tanner] told [counsel for the State], well, I performed oral sex on [defendant] because I was scared. Once again, what did you see? What did you not see? What did you hear? What did you not hear? You guys watched the video I watched yesterday. Did he force her to do that? Did he do anything more than ask her to perform oral sex on him? No. Then what do we find out later? That wasn't the first time she did it. So I'm supposed to believe she was scared one time, but she's maybe done it other times?"

¶ 61 The second admission defendant points out occurred later in defense counsel's closing argument when he stated to the jury:

"My client's back's turned in the second video. There's someone in a red shirt. [Tanner] talks to other people in that house during that second video. The cops said they didn't see anyone come in or out. Does that mean someone else with a red shirt wasn't in that house? Is it a coincidence? Is it super convenient if there's two people with red shirts there? Yeah, it is, but, I'm sorry, sometimes people wear the same color shirts. It's possible. It's possible. The State's going to tell you it's not possible, but it's possible."

¶ 62 After careful review, we fail to see how defense counsel's disclosure to the jury that defendant was present in the surveillance videos amounts to ineffective assistance of counsel. As the State points out, multiple eyewitnesses observed defendant enter and exit the two residences where the controlled buys occurred. These witnesses were acquainted with defendant and positively identified defendant in court as the individual they observed at the scenes of the controlled buys. Moreover, the jury themselves watched the surveillance videos that depicted defendant selling drugs.

¶ 63 Instead of arguing defendant was not present in the surveillance videos, defense counsel argued and reiterated throughout his closing argument that defendant was not seen selling drugs on the surveillance videos. We fail to see how counsel's focus was not a product of sound trial strategy. As counsel stated to the jury:

"I watched the same video you guys watched yesterday, watched it a bunch of times. Tell me where you saw drugs in that–either of those videos. I don't believe you did. You've seen drugs in court that [counsel for the State] says came from my client, but as he said, did they have to come from my client? I don't think so."

¶ 64 In addition to arguing defendant was not detected selling drugs on the surveillance videos, defense counsel also focused his closing argument on attacking the credibility of Tanner as the State's confidential informant. Again, we find counsel's focus was a product of sound trial strategy. Counsel informed the jury that Tanner and defendant engaged in a past relationship with one another, and questioned Tanner's motive behind working as a confidential informant in the two operations:

> "What did we also find out? They used to be in a relationship together. That's also interesting, I think. That's their star witness, an ex-girlfriend who's getting paid to say he sold her something. Now, if that's not reason, bias, and motivation to at the least be inaccurate, tell me what isn't. An ex-lover who's getting paid to set someone up."

¶ 65 Further, we find defendant's argument that counsel made a clear admission of defendant's presence on the surveillance video of the second operation is misguided. As it pertains to counsel's statement that his "client's back's turned in the second video," counsel was clearly trying to communicate to the jury the possibility that the individual who sold drugs to Tanner could be someone other than defendant. This is evidenced by counsel's later statement that "sometimes people wear the same color shirts." Accordingly, we reject this argument.

¶ 66 For these reasons, we conclude defense counsel's closing argument was a product of sound trial strategy. Accordingly, we reject defendant's argument.

¶ 67 V. Cross-Examination

¶ 68 Defendant further alleges his counsel provided ineffective assistance due to counsel's deficient cross-examination of the State's witnesses regarding chain of custody and surveillance.

¶ 69 Generally, an attorney's decisions about whether and how to cross-examine or impeach a witness is a matter of trial strategy which will not by itself support a claim of ineffective assistance of counsel under *Strickland*. *People v. Pecoraro*, 175 Ill. 2d 294, 326, 677 N.E.2d 875, 891 (1997). The manner in which to cross-examine a particular witness involves the exercise of professional judgment which is entitled to substantial deference from a reviewing court. *Pecoraro*, 175 Ill. 2d at 326-27, 677 N.E.2d at 891. A defendant can only prevail on a claim of ineffective assistance of counsel by showing counsel's approach to cross-examination was unreasonable. *Pecoraro*, 175 Ill. 2d at 327, 677 N.E.2d at 891.

¶ 70 In alleging ineffective assistance of counsel, defendant must satisfy the two-pronged *Strickland* test we lay out above. That is, defendant (1) must allege facts which demonstrate counsel's representation fell below an objective standard of reasonableness, and (2) show there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Strickland*, 466 U.S. at 687, 694. We again reiterate that the failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *Enis*, 194 Ill. 2d at 377, 743 N.E.2d at 11.

¶ 71 Defendant indicates there are discrepancies in the testimony of the State's witnesses concerning the chain of custody of the State's evidence from the first operation

and the State's surveillance during both of the alleged offenses. Regarding the chain of custody issue, Officer Jones testified at a preliminary hearing that he personally placed evidence recovered from the first operation in the evidence vault at the Sparta Police Department. Jones then testified he took the evidence to the Illinois State Police Crime Lab in Carbondale where he had it analyzed. However, at trial, Jones testified that to the best of his knowledge, Chief Ashley transported the evidence from the police department to the crime lab in Carbondale.

¶ 72 While we note there is a discrepancy in testimony regarding who transported evidence from the police department to the crime lab, defendant has presented nothing to affirmatively indicate any tampering, alteration, or substitution of the evidence. "Unless defendant provides actual evidence of tampering or substitution, the State need only establish the stated probability and any deficiencies go to weight and not admissibility of the evidence." *People v. Shiflet*, 125 Ill. App. 3d 161, 178, 465 N.E.2d 942, 954 (1984). Because the defense has offered no actual evidence of tampering, we do not find counsel's failure to impeach Jones' testimony on cross-examination fell below an objective standard of reasonableness.

¶ 73 Defendant further indicates there are discrepancies in the officers' testimonies regarding the surveillance of the two operations. Officers Kempfer and Laramore testified regarding the surveillance of the first operation. In observing the operation, Kempfer testified he and Laramore parked their vehicle a block south on West College Street, while Laramore testified he and Kempfer parked at the "end of Park Street near the intersection of Oak Street." Kempfer testified he observed defendant meet Tanner at

the front door of the residence when Tanner arrived, while Laramore testified he "did not recall seeing anyone" meet Tanner "at that time."

¶ 74 After Tanner left the residence in her vehicle, Officer Kempfer testified he and Laramore "paralleled [Tanner] to the highway," let her pass them, then followed her to the predetermined location. Officer Laramore testified they remained stationary at the end of Park Street near the intersection of Oak Street until Tanner reached the intersection of Broadway Street, at which time Officer Jones "picked her up" and continued following her. Laramore stated they trailed behind Jones back to the predetermined location.

¶ 75 Officers Laramore and Bierman testified regarding their surveillance of the second operation. Laramore testified that he and Bierman parked their vehicle on Lewis Street to observe the operation, and remained stationary upon seeing Tanner exit the residence where the alleged offense occurred. Laramore testified that Tanner left in her vehicle, and Officer Jones followed her from the area to a predetermined location. Likewise, Bierman testified that he and Laramore parked their vehicle on Lewis Street to observe the operation. Bierman testified that upon seeing Tanner exit the residence, he followed her until "Jones gained sight of her." Bierman further testified that after leaving the residence, Tanner met Officer Jones at the predetermined location.

¶ 76 After careful review, we do not find that counsel's failure to impeach the above testimony regarding surveillance of the two operations amounted to ineffective assistance. "It is the function of the trier of fact to assess the credibility of the witnesses, to determine the appropriate weight of the testimony, and to resolve conflicts or

inconsistencies in the evidence." *People v. Evans* 209 Ill. 2d 194, 211, 808 N.E.2d 939, 949 (2004). Reversal is not warranted merely because the defendant alleges a witness was not credible or that the jury assigned too much weight to a particular piece of evidence. *Evans*, 209 Ill. 2d at 211-12, 808 N.E.2d at 949.

¶ 77 Here, although the jury was presented with conflicting testimony, it is the jury's function to resolve conflicts in the evidence, which it did, against defendant. We do not find that the inconsistencies in the testimony of the instant case, such as where the officers parked their vehicle to observe an operation and which officer followed Tanner after she left the residence where the operation occurred, undermine confidence in the jury's verdict. It is the function of the jury to take these inconsistencies into consideration in reaching their decision. For these reasons, we conclude defense counsel's failure to impeach certain testimony based on inconsequential discrepancies did not fall below an objective standard of reasonableness. Accordingly, we reject defendant's argument.

¶ 78 VI. Right to a Fair Trial

¶ 79 Defendant alleges he was denied due process of law and the right to a fair trial by impartial jurors because the jurors witnessed defendant being escorted into the courtroom by a bailiff through the jail entrance.

¶ 80 In support of his argument, defendant relies on our supreme court's decision in *People v. Boose*, 66 Ill. 2d 261, 362 N.E.2d 303 (1977). In *Boose*, the defendant argued the trial court abused its discretion in denying his attorney's request to remove his shackles in the presence of the jury at his competency hearing, as the shackles caused the jury to be "irrevocably prejudiced" against the defendant. *Boose*, 66 Ill. 2d at 265, 362

N.E.2d at 304. Our supreme court affirmed the decision of the appellate court, finding the trial court abused its discretion in denying the defense counsel's request to remove the defendant's shackles.

¶ 81 After careful review, we do not find that defendant's escort into the courtroom by a bailiff through the jail entrance amounts to a *Boose* violation. The *Boose* standard is designed to address whether a defendant should be shackled during criminal proceedings. Generally, shackling is to be avoided because it (1) compromises the accused's presumption of innocence; (2) restricts the accused's ability to assist his counsel during trial; and (3) offends the dignity of the judicial process. *In re A.H.*, 359 Ill. App. 3d 173, 181, 833 N.E.2d 915, 922 (2005).

¶ 82 Here, defendant concedes he was not in shackles in the presence of the jury. There is no evidence from the record that defendant was physically restrained in any way during trial. The mere escorting of defendant by a bailiff through the jail entrance past the door of the jury room does not amount to a *Boose* violation. Accordingly, we reject defendant's argument.

¶ 83 VII. Drug Assessment Fee

¶ 84 As we previously indicated, defendant was convicted of count I, unlawful delivery of a controlled substance within 1,000 feet of a place of worship, a Class X felony, for which defendant received a sentence of 24 years in the Department of Corrections. The court imposed a drug assessment fee of $3,000 for the count I conviction. Regarding count II, defendant was convicted of unlawful delivery of a controlled substance within 1,000 feet of a place of worship, a Class 1 felony, for which defendant received a

concurrent sentence of 24 years in the Department of Corrections. The court imposed a drug assessment fee of $2,000 for the count II conviction.

¶ 85 Relying on the Act and the Third District's finding in *People v. Jackson*, 375 Ill. App. 3d 796, 874 N.E.2d 592 (2007), which cites to the Act, defendant argues, and the State agrees, the drug assessment fee imposed for the Class 1 felony conviction must be vacated. The Act provides:

> "The court shall not impose more than one assessment per complaint, indictment or information. If the person is convicted of more than one offense in a complaint, indictment or information, the assessment shall be based on the highest class offense for which the person is convicted." 720 ILCS 570/411.2(g) (West 2010).

¶ 86 Here, the court imposed a drug assessment fee of $3,000 for defendant's count I conviction and $2,000 for defendant's count II conviction. Pursuant to the above clause in the Act, the $2,000 assessment fee for the lesser class offense for which defendant has been convicted must be vacated. Further, because the $3,000 drug assessment fee for the higher class offense was imposed based upon the judgment that defendant was guilty of unlawful delivery of a controlled substance within 1,000 feet of a place of worship, we vacate that assessment fee and remand for imposition of the fee on the reduced conviction.

¶ 87 CONCLUSION

¶ 88 For the foregoing reasons, we reverse defendant's convictions of unlawful delivery of a controlled substance within 1,000 feet of a place of worship (720 ILCS 570/407(b)(1), (2) (West 2012)), affirm defendant's convictions of unlawful delivery of a

controlled substance, and remand for resentencing. The drug assessment fee imposed for the Class X felony conviction is vacated and remanded for imposition of the fee on the reduced conviction (720 ILCS 570/407(b)(1) (West 2012)). The drug assessment fee imposed for the lesser Class 1 felony conviction is vacated (720 ILCS 570/407(b)(2) (West 2012)).

¶ 89 Affirmed in part and reversed in part; cause remanded.