2017 IL App (2d) 150127-U
No. 2-15-0127
Order filed August 9, 2017

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Boone County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 12-CF-223
	)	
DERRICK L. LEWERS,	)	Honorable
	)	Robin C. Tobin III,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Burke and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant was proven guilty beyond a reasonable doubt; the State established a sufficient chain of custody for the narcotics evidence; defense counsel was not ineffective; the trial court did not abuse its discretion in overruling two of defense counsel's objections; and the State did not make improper remarks during closing argument. However, we agreed with defendant that he was entitled to additional monetary credit against fines for time spent in presentence custody. Therefore, we affirmed as modified.

¶ 2 Following a jury trial, defendant, Derrick L. Lewers, was convicted of two counts unlawful delivery of a controlled substance within 1,000 feet of a senior citizen housing complex (720 ILCS 570/407(b)(1) (West 2012)) and sentenced to 12 years' imprisonment. In this *pro se*

appeal, defendant argues that: (1) he was not proven guilty beyond a reasonable doubt; (2) the trial court erred in admitting two exhibits without a sufficient chain of custody; (3) defense counsel was ineffective for errors relating to evidence of defendant's prior bad acts; (4) the trial court erred by overruling defense counsel's objections to certain testimony; (5) the prosecutor made improper comments during closing argument; and (6) the judgment should be modified to reflect additional per diem credit against fines for time he spent in presentence custody. We disagree with defendant's first five arguments but agree with his last argument. We therefore affirm as modified.

¶ 3 I. BACKGROUND

¶ 4 On November 30, 2012, defendant was charged with two counts of unlawful delivery of a controlled substance within 1,000 feet of a senior citizen housing complex (720 ILCS 570/407(b)(1) (West 2012)) and two counts of unlawful delivery of a controlled substance (720 ILCS 570/401(c)(2) (West 2012)).

¶ 5 On February 27, 2014, defendant filed several motions *in limine*, including one in which he sought to prohibit the State from introducing evidence of his three prior convictions of unlawful possession of a controlled substance. The trial court ruled that if defendant testified, the State could use evidence of his 2005 conviction for impeachment purposes.

¶ 6 Witness testimony began on October 7, 2014. Tina Follis testified as follows. She was 28 years old and lived in Belvidere, Illinois. On July 19, 2012, she met with Detectives Leon Berry and Shane Woody of the Belvidere police department regarding information that she had about defendant, whom she had known for about six years and called "D." Follis signed a police confidential source contract. The detectives told Follis to ask defendant for $200 worth of cocaine. The next day, on July 20, 2012, she again met with the detectives. A detective

searched the car she had driven, and Officer Julie Gruber searched Follis by patting her down. Follis contacted defendant, and he said that he had to drop his kids off before meeting her. Detective Berry gave her $200, and she drove her own car to her house. She waited in her car until defendant called and said that he was close. Defendant pulled up in an SUV, and Follis entered the passenger side. She put the $200 in the cup holder, but defendant said that he had only "one." He gave her a clear plastic baggie with a powdery substance. Follis said that she would "just get the other eight-ball some other time," and she took back $100. Follis exited the car, and she waited for defendant to pull away before going back to Detective Berry's car. She put the remaining $100 and the baggie into a brown paper bag that Detective Berry had in his car. Follis returned to the police station and was again searched by Officer Grubar.

¶ 7 Follis met with the police again on August 2, 2012. Officer Gruber patted her down. At Detective Berry's direction, Follis contacted defendant to buy $100 of cocaine. Defendant called and said that he was about 15 minutes away. Follis entered Detective Berry's car, and he drove her home. He gave her a recording device and $120 dollars; the extra $20 was for defendant's "gas money." Follis exited the car and stood in her driveway. Defendant pulled up in the same SUV. Follis entered his vehicle and gave him the $120, and he handed her a baggie with a white powdery substance. Follis exited the SUV, and defendant drove away. Follis then got back into Detective Berry's car and gave him the baggie and the recorder. She rode with him to the station, where Officer Gruber again searched her.

¶ 8 Follis identified a disk as containing recordings of her phone calls to defendant and their conversation in his SUV from that day.[1] In the recorded call from August 2, 2012, a male voice says, "Hello, what's up?" Follis asks, "Are you for real coming because I'm going to stand

[1] The recordings were played for the jury during Detective Berry's testimony.

outside so that my daughter doesn't, like, know nothing [*sic*]." The male voice says that he is on his way out there, and Follis replies, "Thanks, babe."

¶ 9 In the recording from the SUV, Follis can be heard saying that she did not "want [her] daughter to see" and that her daughter "better not see nothing [*sic*]." Follis can also be heard counting by two's to 10 and saying "and 20 for gas." She also says, "Thank you for that" and "Be careful." In response to an unclear question from the driver, Follis says that she will probably be "sitting in the house, doing nothing, get ahold of me or something."

¶ 10 Follis testified that prior to July 20, 2012, she was being investigated for residential burglary and prostitution. Based on her cooperation in this case, she was not charged with those offenses. The police also gave her cash (a total of $200) and provided her with cell phone minutes. Follis admitted to struggling with drug use, but she denied being high on drugs at the time of the transactions in question. Still, she admitted that she was using cocaine "throughout the time of these transactions," even though the confidential source contract required her to refrain from illegal activity. She had sexual relations with defendant on a regular basis during the time that she had known him.

¶ 11 Detective Berry offered testimony consistent with that of Follis regarding their interactions on July 19 and 20, 2012. He additionally testified as follows. Follis told him that she had a sexual relationship with defendant and that he was her cocaine supplier. On July 20, 2012, at about 1 p.m., Detective Berry and Officer Gruber followed Follis as she drove her car to her house, keeping a "constant visual" on her vehicle. When she arrived home, he and three other officers got into surveillance positions. Shortly before 3 p.m., Follis called him, and she then exited her car and walked to the rear of her vehicle. Detective Berry observed a green Ford Expedition go by, driven by a black male. The SUV pulled up to the house, and Detective Berry

noted the license plate, later determining that it was registered to defendant. Follis entered the SUV and exited about one minute later. After the SUV left, Detective Berry drove over to Follis and picked her up. He opened up a brown paper bag, and she placed a clear baggie with a white powdery substance in the bag. She also returned $100. He drove Follis back to the police station. There, he opened the baggie and saw three small baggies containing a white substance inside. Detective Berry weighed the baggies and field-tested the substance. He then put them in an evidence bag, which he sealed and marked with his initials and the date. He placed the bag in the evidence locker at the police department. Detective Berry identified the bag in court as People's exhibit 1. After that transaction, he obtained a court order to use an eavesdropping device to record calls and conversations between Follis and defendant.

¶ 12 Detective Berry also testified consistently with Follis regarding his role in the events of August 2, 2012. Specifically, he met with her at about 4 p.m. and asked her to call defendant for $100 of cocaine. He then drove her to her house in an unmarked car and gave her $120. She exited the car and sat on the home's outside stairs. At about 4:30 p.m., the same Ford Expedition arrived, again driven by a black male. After Detective Berry was advised by another officer that Follis had entered and exited the SUV, Detective Berry drove closer and saw the SUV leaving. He pulled onto the property, and Follis entered his vehicle. Detective Berry opened a paper bag, and Follis put a clear baggie with a white substance in it, as well as the recording device he had given her. Detective Berry drove Follis back to the police station, and he again weighed and tested the substance before processing the baggie into evidence. Detective Berry identified the evidence bag in court as People's exhibit 2. Detective Berry also identified the recordings from Follis's phone and the wire she wore in defendant's car, and he testified that they contained the voices of Follis and defendant.

¶ 13 On November 8, 2012, Detective Berry went to defendant's house and told him that he was under arrest for selling cocaine in Belvidere. After being advised of his *Miranda* rights, defendant said that it must be a case of mistaken identity because he did not go to Belvidere. Defendant then changed his story and said that his in-laws lived in Belvidere, so he sometimes went there with his kids. Detective Berry told defendant that he had twice observed him selling cocaine in Belvidere. Defendant said that he was cheating on his wife with three different women who lived in Belvidere. Detective Berry transported defendant to the police station, where defendant signed a written waiver of his *Miranda* rights. Defendant said that he was confused, and he repeated that it must be a case of mistaken identity. He said that the only time he went to Belvidere was to see three different women, and he denied selling drugs to anyone in Belvidere. Defendant said that he had gone to prison for selling cocaine and had not sold any since getting out of prison.

¶ 14 Officer Gruber testified regarding her searches of Follis on July 20, 2012, and August 2, 2012, as well as her participation in the operations. She agreed that she did not conduct a body cavity search of Follis.

¶ 15 Sergeant Shane Woody testified that he searched Follis's car before the drug buy on July 20, 2012. He also described his role in the police activity that day.

¶ 16 Detective Daniel Smaha testified as follows. On August 2, 2012, he participated in the surveillance at Follis's home. He parked his unmarked car in a place where he could see the house and driveway. He watched Follis walk to the driveway and remain there until a green Ford Expedition arrived. Detective Smaha did not see her manipulate her clothing in any way. She entered the SUV, exited within two minutes, and then stayed in the driveway until the SUV

left. Follis then walked across the street, and Detective Berry said that she was in his field of vision.

¶ 17 Detective Smaha further testified that his duties included being the custodian of evidence in the police department. On August 2, 2012, he obtained People's exhibit 1 from the Belvidere evidence room at the police department and transported it to the State Police crime lab. He later picked up the exhibit from the lab and transported it back to the police department. Detective Smaha did the same for People's exhibit 2. Both evidence bags were sealed when he transported them.

¶ 18 Martin Skelcy testified that he was employed by the Illinois State Police as a forensic scientist. He received People's exhibits 1 and 2 in a sealed condition, and he identified them in court based on the markings he subsequently made on the bags, including the laboratory case number, the laboratory exhibit number, his initials, and the date. The gross weight of exhibit 1 was 2.3 grams. The weight of the powders inside two of the three bags in exhibit 1 was 1.4 grams, and the weight of the powder in exhibit 2 was 1.6 grams. The powders all contained cocaine. Skelcy did not test the third bag within exhibit 1 because the first two bags already weighed one gram, and the weight of the third bag would not have brought the total weight to the next threshold weight (for charging purposes).

¶ 19 Sergeant Patrick Gardner testified that he was present with Detective Berry during defendant's arrest. He testified that defendant said that he never sold cocaine to anyone in Belvidere. Sergeant Gardner testified that after signing a written *Miranda* warning at the police station, defendant again denied selling drugs in Belvidere. Defendant "did not deny selling drugs in other locations but did not confirm it as well."

¶ 20 Detective Chris Washburn testified that cocaine is generally packed for sale in clear plastic sandwich bags. He searched defendant after his arrest and found a clear plastic sandwich bag, among other things, in his pocket.

¶ 21 Trudy Snell testified that she was Follis's mother and lived with her. Snell testified that on August 1, 2014, at about 3 a.m., she woke up to the sounds of dogs barking and someone banging. She went downstairs and saw defendant banging on a big picture window. Defendant spoke through the window, asking if he could come in and talk to Follis. Snell refused and told him to leave. Snell agreed that defendant had been over to the house a number of times before and had a relationship with Follis.

¶ 22 After the State rested its case, defendant moved for a directed verdict, which the trial court denied. Defendant then testified as follows. He had known Follis since about 2008. They were "basically friends with benefits" and had a sexual relationship. He never provided her with drugs, though sometimes he would give her money at her request. He went to her house over one hundred times in 2012, sometimes just to arrange liaisons. He did not specifically recall going there on July 20, 2012; he could not say whether he went there or not. In the early morning hours of August 1, 2012, Follis called defendant and said that she wanted to meet up with him. They went to a couple of bars in Rockford and had sex in the car. Follis then asked for $100 and said that she could pay him back the next day. She promised to give him an extra $20. Defendant gave her the money, and he drove to her residence the next day to get repaid. Follis gave him the money, and he asked what she was going to be doing later on because he wanted to "hook up." He had never delivered cocaine to anyone in Belvidere and did not have drugs with him that day.

¶ 23 When the police later came to arrest him, defendant was confused about their questions about Belvidere because he had not been there in a while. He normally went there just to see his in-laws. He was not sure about the time period the police were referring to, so he said that he had been to Belvidere to see an ex-girlfriend. Defendant had been to prison for possession of cocaine, not for selling drugs, and he had successfully completed his parole. He denied ever using cocaine. When the police arrested him, he had a plastic bag in his pocket because he had been eating some gummy worms left over from one of his kid's lunch bags.

¶ 24 On October 10, 2014, the jury found defendant guilty of all four counts. Defendant filed a motion for a new trial on November 10, 2014, which the trial court denied on December 8, 2014. The trial court further found that the convictions of unlawful delivery of a controlled substance merged into the convictions of unlawful delivery of a controlled substance within 1,000 feet of a senior citizen housing complex. The trial court sentenced defendant to concurrent terms of 12 years' imprisonment.

¶ 25 Defendant filed a motion to reconsider the sentences on December 26, 2014, which the trial court denied on January 12, 2015. Defendant timely appealed and has filed a *pro se* brief.

¶ 26 II. ANALYSIS

¶ 27 A. Sufficiency of the Evidence

¶ 28 Defendant first argues that there was insufficient evidence to prove him guilty beyond a reasonable doubt. When examining the sufficiency of the evidence, we must 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. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *People v. Collins*, 106 Ill. 2d 237, 261 (1985). The trier of fact has the responsibility to assess witnesses' credibility, weigh their testimony, resolve

inconsistencies and conflicts in the evidence, and draw reasonable inferences from the evidence. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). We will not set aside a criminal conviction unless the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of the defendant's guilt. *People v. Lloyd*, 2013 IL 113510, ¶ 42.

¶ 29 Defendant was convicted of two counts of unlawful delivery of a controlled substance within 1,000 feet of a senior citizen housing complex. Section 401(c)(2) of the Illinois Controlled Substances Act (Act) (720 ILCS 570/401(c)(2) (West 2012)) makes it a crime to deliver 1 gram or more but less than 15 grams of a substance containing cocaine. Section 407(b)(1) of the Act (720 ILCS 570/407(b)(1) (West 2012)) provides for an enhanced penalty when the crime takes place within 1,000 feet of a senior citizen housing complex. Defendant does not challenge the evidence that Follis's house was within 1,000 feet of a senior citizen housing complex, nor does he directly challenge evidence regarding the drugs' weight or that the substance contained cocaine. He instead argues that there was insufficient evidence that he possessed and delivered the drugs.

¶ 30 Defendant argues that Follis, the primary witness against him, was not credible because she worked with police only to avoid prosecution for her own crimes and because she received cash and a cell phone in return for her assistance. Defendant argues that she also admitted using drugs during the time that she helped the police, despite signing an agreement not to engage in any illegal activity. Defendant further maintains that Follis's accusations against him lacked corroboration. Specifically, for the July 20, 2012, drug buy, the State did not introduce any phone records to show that Follis called him, and no one else listened in on any calls. According to defendant, without support of Follis's alleged arrangement to purchase narcotics, the State failed to prove his knowledge or intent to deliver a controlled substance.

¶ 31 Defendant additionally contends that although there were several officers conducting surveillance on July 20, 2012, none of them could identify him as the driver or saw an exchange of cash or drugs. Regarding the August 2, 2012, incident, defendant recognizes that he admitted that he was present, but he argues that the officers again did not see an exchange of drugs take place. Defendant points out that although Follis had a hidden recording device, the recording provides no indication that she received drugs for the $120. Defendant also notes the police did not immediately arrest him, nor did they recover any of the pre-recorded money from him.

¶ 32 Defendant argues that in addition to the officers failing to corroborate Follis's testimony, they contradicted each other's testimony in many respects. Specifically, Detective Berry testified that on July 20, 2012, he opened a brown paper bag, and Follis placed the baggie in that bag. Officer Gruber testified that Detective Berry handed her a paper bag, and after Officer Gruber opened it, Follis put the baggie and cash in the paper bag. For the August 2, 2012, incident, Detective Berry testified that while Follis was waiting in her car, she moved from the driver's seat to the passenger's seat from time-to-time. Another officer testified that he did not see her change positions within the vehicle, but rather that she stood outside her vehicle for a very long time. Officers further differed in their descriptions of whether Follis sat on her porch or the driveway, and in what she was wearing that day. According to defendant, these discrepancies show that Follis was not under constant surveillance. One officer also described defendant's vehicle as approaching from a different direction than other officers.

¶ 33 Defendant argues that it is possible that Follis planted the evidence of drugs. He contends that Follis never declared that she did not have any drugs on her before the transactions and that the intensity of Officer Gruber's pat-down searches of Follis were "questionable." Defendant notes that Follis admitted to purchasing and using drugs during the time of the

controlled buys and knowing where the transactions were to take place. Defendant argues that, therefore, Follis could have hidden drugs on her person or somewhere else. Defendant argues that his testimony refuted Follis's and was consistent with the audio recordings.

¶ 34 Defendant analogizes this case to *People v. Bazemore*, 25 Ill. 2d 74 (1962), and *People v. Jackson*, 103 Ill. App. 2d 123 (1968). In *Bazemore*, 25 Ill. 2d at 78, the supreme court held that where the informant was an addict and provided uncorroborated testimony that the defendant sold him drugs, there was insufficient evidence to sustain the defendant's conviction. The court stated that "the informer was at liberty to name almost any person he wished to select as the guilty one." *Id.* at 77. In *Jackson*, 103 Ill. App. 2d at 127-28, the appellate court similarly held that the evidence was insufficient to prove the defendant guilty beyond a reasonable doubt of the unlawful sale of narcotic drugs. In addition to finding the informant's credibility questionable, the court stated that his accusation lacked corroboration, in that: a policeman could not identify the defendant as the person he saw with the informant; the defendant was not arrested at the time of the sale or shortly after; the defendant was not found with any pre-recorded money in his possession; and there was no evidence that the defendant was in the area when the sale took place. *Id.* at 127. The court stated that the informant could have named any person of a similar size and form as the person seen by the officer. *Id.*

¶ 35 Last, defendant argues that there was a lack of evidence showing a connection between him and the drugs, as Follis never identified the contents of People's exhibits 1 and 2 as the material he gave her. Defendant maintains that Follis and Skelcy also gave conflicting descriptions of the substances, in that Follis described receiving a bag of a substance but Skelcy identified exhibit 1 as three small bags.

¶ 36 We begin by discussing how courts review the testimony of informant-addicts. The testimony of an informant-addict should be scrutinized with caution, but it may be sufficient to sustain a conviction if it is credible under the surrounding circumstances, such as being corroborated by police officers. *People v. Hines*, 30 Ill. 2d 152, 157 (1964). It is not necessary for the police to see the exchange of money for narcotics between the informer and the defendant if the circumstances lend credence to the informer's testimony. *People v. Lopez*, 187 Ill. App. 3d 999, 1005 (1989). It is also not necessary for the money in the exchange to be recovered or for the defendant to be arrested immediately after the transaction. *Id.* Further, the thoroughness of a police search of the informant before the narcotics purchase does not create reasonable doubt on its own, but rather may affect the weight given to the informant's testimony. *Id.*

¶ 37 We conclude that there was sufficient evidence corroborating Follis's testimony such that defendant was proven guilty beyond a reasonable doubt. Although defendant points to a lack of evidence supporting Follis's testimony that he agreed to bring her drugs, such support was not necessary given the evidence that defendant showed up and delivered drugs to her. To the extent that defendant challenges the evidence that he was the driver present at the arranged drug buys on July 20 and August 2, 2012, at trial defendant admitted being present on the latter date. As for July 20, 2012, defendant did not admit or deny that he was present that day, saying that he had gone to Follis's house over 100 times in 2012. Moreover, Follis's testimony that defendant was the driver was corroborated by evidence that the SUV that showed up was registered to defendant, it was the same car he was admittedly driving on August 2, 2012, and officers saw a black male driving the vehicle. In this manner, this case is readily distinguishable from *Bazemore* and *Jackson*, as there the police surveillance was so lacking that the informants could

have named a multitude of people as the drug supplier. See *Bazemore*, 25 Ill. 2d at 77; *Jackson*, 103 Ill. App. 2d at 127. Here, in contrast, all of the evidence of identity pointed to defendant.

¶ 38 There was also sufficient evidence to prove beyond a reasonable doubt that defendant delivered drugs to Follis. Officer Gruber described the procedure she used to search Follis's person before and after the controlled buys, and Sergeant Woody described his search of Follis's car before the drug buy on July 20, 2012. During both incidents, there was testimony that the police kept Follis in sight at all times and that she turned over a baggie of a white powdery substance immediately after defendant left. Thus, there was ample evidence that Follis obtained the drugs from defendant. Although the State was not required to prove that Follis exchanged money for the drugs,[2] such evidence further supported that the crime took place. Defendant admittedly accepted money from Follis on August 2, 2012. On July 20, 2012, immediately after meeting with defendant, Follis had only $100 of the $200 the police had given her.

¶ 39 As for defendant's argument that Follis was required to identify People's exhibits 1 and 2 as the baggies that she obtained from defendant, defendant cites no authority to support this position. The evidence showed that Follis was searched before the controlled buys, she immediately turned the contraband over to Detective Berry after defendant left, Follis described the drugs in court, and Detective Berry identified the exhibits in court. Also, there is no conflict in the evidence from Follis identifying the first purchase as one bag and Skelcy identifying exhibit 1 as three small bags, as Detective Berry testified that the baggie that Follis gave to him

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[2] Section 102(h) of the Act (720 ILCS 570/102(h) (West 2012)) defines "deliver" and "delivery" as "the actual, constructive or attempted transfer of possession of a controlled substance *with or without consideration*, whether or not there is an agency relationship." (Emphasis added.)

after the July 20, 2012, purchase had three small baggies inside of it. We address the chain of custody of the exhibits in defendant's second argument on appeal.

¶ 40 Although defendant points to inconsistencies in the testimony regarding exactly where Follis was sitting or standing while she was waiting, what she was wearing, and from which direction defendant's vehicle approached, these conflicts involve tangential issues and did not affect the crime's essential elements. Further, that Follis may have found a way to hide drugs on her person or nearby was a theory brought out by the defense that the jury could consider, but it did not render the evidence of defendant's guilt, when viewed in the light most favorable to the State, so improbable, unsatisfactory, or inconclusive as to create a reasonable doubt. Accordingly, there was sufficient evidence to prove defendant guilty beyond a reasonable doubt of unlawful delivery of a controlled substance within 1,000 feet of a senior citizen housing complex.

¶ 41 B. Chain of Custody

¶ 42 Defendant next argues that the State failed to establish a sufficient chain of custody for People's exhibits 1 and 2. Defendant acknowledges that he did not object to the admission of this evidence at trial, thereby forfeiting the argument (see *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (to preserve an issue for review, the defendant must object at trial and raise the issue in a written posttrial motion)), but he argues that the admission of the evidence constitutes plain error. The plain error doctrine allows a reviewing court to consider an unpreserved error where either (1) a clear error occurs and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, or (2) a clear error occurs that is so serious that it affected the trial's fairness and challenged the integrity of the judicial process. *People v. Sebby*, 2017 IL 119445, ¶ 48. In applying the plain error test, the first step is to

determine whether a clear and obvious error occurred. *Id.* ¶ 49. The State argues that defendant has forfeited his plain error argument because he does not discuss whether the evidence was closely balanced. We disagree, as defendant argues that the case was closely balanced because the State's case depended on the testimony of an addict-informer, and he developed this argument in conjunction with his challenge to the sufficiency of the evidence. Therefore, he has not forfeited his reliance on the plain error doctrine.

¶ 43 Defendant argues that as the first link in the chain of custody, Follis had to identify or sufficiently describe what she recovered, but the State never elicited such testimony from her. Defendant also argues that the description of what Follis received and what Berry took out of the paper bag and sent to the lab does not match, creating a fatal gap in the chain of custody. Defendant points out that for the July 20, 2012, transaction, Follis said that defendant gave her an "eight-ball" in the form of a white powdery substance in a clear plastic baggie. She put the baggie in a brown paper bag in Detective Berry's car. Defendant argues that neither bag was sealed, initialed, or dated with any identifying marks by Follis, Detective Berry, or Officer Gruber in the car. Defendant maintains that there was also no testimony of how Follis gave the paper bag to Detective Berry.

¶ 44 Defendant points out that Detective Berry testified that when he opened the paper bag at the police station, he found a plastic bag with three small baggies inside. Defendant notes that Detective Berry did not mention finding any money in the paper bag, even though Follis and Officer Gruber testified that Follis also put the remaining $100 in that bag. Defendant argues that another discrepancy lending credence to a mix-up is that Follis paid $100 for the drugs in both of the controlled buys, but Skelcy testified that the gross weight of exhibit 1 was 2.3 grams whereas the weight of the powder in exhibit 2 was 1.6 grams. Defendant argues that it is

inconsistent that, in the course of two weeks, Follis would pay the same price to the same person and give the same description of the substance, but the quantity received would change so drastically. Defendant argues that Detective Berry should have testified to the gross weight of the baggies to compare with the weights testified to by Skelcy.

¶ 45 For the August 2, 2012, transaction, defendant argues that no officer saw what, if anything, was handed to Follis. Defendant argues that although Follis said that she met back with Detective Berry seconds after defendant left, the audio recording shows that it was nearly 10 minutes. Defendant contends that, like the previous transaction, Follis gave only a generic description of a clear baggie with a white powdery substance, which she put in a brown bag. Defendant argues that Follis did not initial or date the bag, it was not sealed the last time she saw it, and she did not identify the exhibit in court. Defendant notes that Skelcy testified that exhibit 2 was a baggie with a small knotted bag inside of it, which defendant maintains should have been apparent to Follis.

¶ 46 Defendant further argues that although Detective Smaha testified that he delivered exhibit 1 to the lab on August 2, 2012, he did not testify when he delivered exhibit 2 or when he picked up either exhibit. Defendant asserts that the record additionally lacks evidence as to where the exhibits were stored in the lab before and after Skelcy tested them. Defendant argues that the record is also devoid of any use of an inventory number by any of the custodians, and although there was an inventory date, there was nothing to distinguish the evidence bags from any other pieces of evidence that may have been inventoried that day. Defendant argues that, therefore, the police failed to protect the evidence against accidental substitutions.

¶ 47 In admitting narcotics into evidence, the State is required to establish a chain of custody because such evidence is often not readily identifiable or may be susceptible to tampering,

contamination, or exchange. *People v. Woods*, 214 Ill. 2d 455, 467 (2005). The State has the burden to make a *prima facie* showing of a chain of custody that is sufficiently complete such that it is improbable that the evidence was subject to tampering or accidental substitution. *Id.* at 467-68. To do so, the State must show that the police took reasonable protective measures to ensure that the substance obtained from the defendant was the same substance that the forensic chemist tested. *Id.* The State is not required to have every person in the chain testify or exclude every possibility of tampering or contamination. *Id.* at 467. If the State meets its burden, the burden then shifts to the defendant to produce evidence of actual tampering, alteration, or substitution. *Id.* at 468. If the defendant makes such a showing, the burden shifts back to the State to rebut the defendant's claim. *Id.* If the defendant fails to make such a showing, deficiencies in the custody chain go to the weight of the evidence, rather than its admissibility. *Id.* at 467.

¶ 48 We have already concluded that the fact that no one saw defendant hand the drugs to Follis did not create a reasonable doubt of defendant's guilt given the searches of Follis and her car and the constant surveillance. The question here is the chain of custody of the drugs from Follis to the lab technician. We conclude that the State met its burden of making a *prima facie* showing of a sufficient chain of custody by showing that it took reasonable protective measures to ensure that the substances obtained from Follis were the same substances tested at the crime lab. The evidence showed that, on both occasions after defendant drove away, Follis put the baggie of drugs in a brown bag in Detective Berry's car. He drove to the police station and examined and tested the drugs. He put them in sealed evidence bags with his initials and date, and he placed them in an evidence locker. Detective Smaha testified to transporting the bags, in a sealed condition, to and from the crime lab. Skelcy testified to receiving the bags in a sealed

condition, and he described their contents and the test results. He also testified about the markings he made. Skelcy and Detectives Berry and Smaha identified the exhibits in open court.

¶ 49 Regarding defendant's arguments about the July 20, 2012, drug buy, Follis described what she received from defendant as a clear plastic baggy with a powdery substance. Detective Berry also described it as a clear baggie with a white powdery substance. Detective Berry testified that when he opened the baggie at the police station, he saw that it had three small baggies within it, so there is no significant discrepancy between Follis's description of the drugs and that of Detective Berry and Skelcy. Also, there was no requirement that Follis describe exactly how she handed Detective Berry the brown bag. According to the evidence presented by the State, Follis entered Detective Berry's car immediately after defendant left, and she put the drugs into a paper bag in the car. Though the brown bag was not sealed or labeled, it was not necessary for the police to do so at that time, as it remained within Detective Berry's care, custody, and control. *Cf. People v. Alsup*, 241 Ill. 2d 266, 278 (2011) (State made *prima facie* case of sufficient chain of custody where, among other things, the officer retrieved the suspected drugs from the scene and transported them on his person back to the police station). That Detective Berry did not mention money being in the bag also does not undermine the chain of custody, as he did say that Follis returned $100, and the questioning focused on the location of the drugs. That the suspected drugs had a slightly higher gross weight than the drugs purchased for the same price a few weeks later is also not significant, as defendant is comparing gross and net weights and, even then, the weight difference had no bearing on chain of custody.

¶ 50 As for the August 20, 2012, drug buy, the recording entered into evidence shows that it was about three minutes from when Follis exited defendant's car to when Detective Berry stated that it was the end of the recording, as opposed to the 10 minutes that defendant asserts.

Regardless, as stated, there was evidence that Follis was under constant surveillance. Follis described receiving a baggie with a white powdery substance from defendant, and that it apparently was a bag within a bag is not a significant distinction.

¶ 51 Similarly, that Smaha did not testify as to the dates that he transported the evidence bags from the police station to the crime lab does not defeat the State's *prima facie* showing of a sufficient chain of custody, as it is not even necessary to have every person in the chain testify. *Wood*, 214 Ill. 2d at 467. Also, an inventory or identifying number is not required as a matter of law, as it is just one way of showing that reasonable protective measures were taken. *People v. Anderson*, 2013 IL App (2d) 111183, ¶ 46. Here, reasonable protective measures were shown by having each person in the chain of custody testify and describe the precautions taken in their handling of the evidence.

¶ 52 In sum, the State met its burden of making a *prima facie* showing of a sufficient chain of custody, and defendant has failed to rebut the presumption by showing that actual tampering, alteration, or substitution took place. Accordingly, defendant has failed to show error regarding this issue, much less plain error. See also *Woods*, 214 Ill. 2d at 471-42 (a plain error challenge to the chain of custody may be brought only "in those rare instances where a complete breakdown in the chain of custody occurs," such as where the inventory numbers or description of the items do not match).

¶ 53 C. Ineffective Assistance of Counsel

¶ 54 Defendant's third argument on appeal is that his trial counsel was ineffective for errors relating to evidence of defendant's prior bad acts. For a claim of ineffective assistance of counsel, a defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Hodges*, 234 Ill. 2d 1, 17 (2009). As to trial counsel, the defendant

must first establish that, despite the strong presumption that counsel acted competently and that the challenged action was the product of sound trial strategy, counsel's representation fell below an objective standard of reasonableness under prevailing professional norms such that he or she was not functioning as the counsel guaranteed by the sixth amendment. *People v. Manning*, 227 Ill. 2d 403, 416 (2008). Second, the defendant must establish prejudice by showing a reasonable probability that the proceeding would have resulted differently absent counsel's errors. *People v. Valdez*, 2016 IL 119860, ¶ 14. A failure to establish either prong of the *Strickland* test precludes a finding of ineffectiveness. *People v. Cherry*, 2016 IL 118728, ¶ 24.

¶ 55 Defendant notes that during its direct examination of Detective Berry, the State introduced evidence that defendant denied selling drugs in Belvidere, but not specifically in other places. Defendant argues that, rather than objecting, defense counsel elicited damaging and prejudicial testimony on cross-examination. The exchange in question transpired as follows. Defense counsel elicited testimony that Detective Berry had the capability of recording the conversation with defendant but did not record it. Counsel asked Detective Berry whether he remembered the discussion word-for-word, and Detective Berry responded that he remembered the general context in which defendant said various words. Defense counsel questioned whether defendant said multiple times that he did not sell cocaine to anybody in Belvidere, and Detective Berry answered in the affirmative. Defense counsel then asked, "He also said that he has been to prison and he didn't do anything with cocaine since then; right?" Detective Berry replied that defendant said that he went to prison for selling cocaine and that he had not sold cocaine since then. Defense counsel then asked whether defendant denied selling drugs in two different ways, being not selling any in Belvidere and not selling anything since prison. Detective Berry answered in the affirmative.

¶ 56 Defendant argues that Detective Berry's answer as to why defendant went to prison was inaccurate, and counsel compounded the error by referring to it as a fact. Defendant maintains that instead of introducing the bad act of going to prison to oppose another bad act of selling drugs outside of Belvidere, counsel should have avoided the whole line of questioning by simply objecting on direct examination. Defendant argues that the trial court would have sustained the objection because the testimony inferred bad acts. Defendant notes that counsel objected to similar testimony from Detective Gardner. Defendant argues that counsel also should have objected to Detective Berry repeatedly referring to him as Follis's cocaine supplier.[3] Defendant argues that this characterization gave the jury the impression that he and Follis had been engaged in a long-term dealer-buyer relationship, which would constitute additional prior bad acts.

¶ 57 Defendant argues that this case is similar to *People v. Phillips*, 227 Ill. App. 3d 581 (1992). There, defense counsel elicited hearsay testimony of the defendant's connection to the current robbery and a prior, unrelated robbery. *Id.* at 581, 583-85. The appellate court found that counsel's actions constituted ineffective assistance, and it reversed and remanded for a new trial. *Id.* Defendant argues that his case presents an even more compelling case for reversal because the trial court had previously limited the admissibility of his prior convictions.

¶ 58 We conclude that defendant has failed to show that defense counsel provided ineffective assistance, in that defendant has failed to overcome the presumption that counsel's actions were the product of sound trial strategy. See *Manning*, 227 Ill. 2d at 416. In this manner, this case is readily distinguishable from *Phillips*. It was reasonable for counsel not to object to Detective Berry's testimony that defendant was Follis's drug supplier, as it was the defense theory that

[3] Defense counsel did not object to this characterization during Detective Berry's direct examination but did so on his re-direct examination.

Follis falsely set defendant up in order to evade prosecution from her own criminal actions and to obtain money and other benefits from the police. See *People v. Doyle*, 328 Ill. App. 3d 1, 14 (2002) (defense counsel was not ineffective for not objecting to gang evidence and hearsay because that evidence was part of the defense theory and therefore part of trial strategy).

¶ 59 Similarly, defendant has failed to show that counsel acted objectively unreasonably in not objecting to Detective Berry's testimony that defendant denied selling drugs in Belvidere. That denial was consistent with defendant's testimony that he never delivered cocaine to anyone in Belvidere. The State also elicited testimony from Detective Berry that defendant did not specifically deny selling drugs in other places, but defense counsel then used that testimony to question Detective Berry's credibility. Specifically, he elicited testimony from Detective Berry that: he could have used a recording device but did not; he purported to remember the discussion with defendant in detail; and defendant actually denied selling any cocaine since leaving prison. The last admission by Detective Berry contradicted his prior testimony that defendant did not deny selling drugs outside of Belvidere. Moreover, although Detective Berry referred to defendant as going to prison for selling drugs, defense counsel questioned defendant about this issue, and defendant clarified that he actually went to prison for possessing cocaine. This distinction also served to raise questions about Detective Berry's credibility and his recollection of his conversation with defendant.

¶ 60 We recognize that the trial court had ruled that evidence of defendant's 2005 conviction of unlawful possession of a controlled substance would be admissible for impeachment purposes only if defendant testified, whereas counsel's actions allowed this evidence in during the State's case-in-chief. However, the evidence would otherwise have come in when defendant testified.[4]

[4] During discussions about the scope of Follis's cross-examination, defense counsel

Defense counsel's use of a defendant's prior convictions can be a matter of trial strategy, such as removing the potential impeachment value of the evidence from the State. *People v. Williams*, 317 Ill. App. 3d 945, 950 (2000); see also *People v. Sergeant*, 326 Ill. App. 3d 974 (2002) (it was "sound trial strategy for defense counsel to choose to front the [defendant's] convictions"). That is the situation here. Defendant has therefore failed to show that defense counsel's actions were objectively unreasonable, which alone precludes a finding of ineffective assistance of counsel. See *Cherry*, 2016 IL 118728, ¶ 24.

¶ 61 Even otherwise, defendant has also failed to establish prejudice by showing a reasonable probability that the proceeding would have resulted differently without counsel's alleged errors. See *Valdez*, 2016 IL 119860, ¶ 14. The testimony that Follis came to the police with information about defendant and was then told to ask him to deliver cocaine already indicated that Follis told the police that defendant was her drug supplier. Regarding evidence of defendant's prior conviction, defendant took the stand and testified as to this fact, and he further denied transporting drugs of any kind "into Belvidere" or delivering cocaine "to anybody at any time in Belvidere," thereby again referring specifically to Belvidere. Defendant also denied possessing cocaine at any point since being released from prison. Therefore, even if defense counsel had not engaged in the complained-of actions, the jury would still have otherwise been largely informed of the allegedly damaging testimony, and there is not a reasonable probability that the trial would have resulted differently.

¶ 62 D. Evidentiary Rulings

¶ 63 Defendant next argues that the trial court erred in overruling two of defense counsel's objections. A trial court's evidentiary rulings are discretionary and will not be overturned unless

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informed the court that defendant planned to testify, showing that it was not an undecided issue.

the trial court abused its discretion. *People v. Irwin*, 2017 IL App (1st) 150054, ¶ 27. An abuse of discretion occurs where the trial court's ruling is arbitrary, fanciful, or unreasonable. *Id.* A trial court may choose to exercise its discretion and exclude relevant evidence if the danger of unfair prejudice substantially outweighs the evidence's probative value. *Id.* Additionally, an evidentiary error will be deemed harmless where there is no reasonable probability the jury would have acquitted the defendant without the error. *People v. Shaw*, 2016 IL App (4th) 150444, ¶ 66.

¶ 64 Defendant maintains that the trial court should have sustained defense counsel's objection to Sergeant Gardner's testimony that defendant did not deny selling drugs in other places. Sergeant Gardner testified that he was present when defendant told Detective Berry that he never sold cocaine to anyone in Belvidere. Sergeant Gardner testified that after they transported defendant to the police station, defendant signed a written *Miranda* waiver. Sergeant Gardner testified that he then began questioning defendant about selling cocaine in Belvidere, and defendant "again vehemently denied selling drugs in Belvidere." At this point, defense counsel asked to approach the bench. He stated that he was objecting because the State was trying to elicit testimony that defendant did not deny selling drugs in other locations, which was an improper "attempt to refer to other bad acts." The trial court stated, "We went into that yesterday [through Detective Berry's testimony]. It's in, they can't unring the bell." The State then asked Sergeant Gardner whether defendant denied selling drugs in other locations. He replied that defendant "did not deny selling drugs in other locations but did not confirm it as well."

¶ 65 Defendant points out that evidence of other crimes is not admissible if it is relevant to establish a defendant's propensity to commit crime. See *People v. Pikes*, 2013 IL 115171, ¶13;

see also Ill. R. Evid. 404(b) (eff. Jan. 1, 2011). When such evidence is offered to establish any material question, the trial court must weigh the evidence's relevance against its prejudicial effect. *Pikes*, 2013 IL 115171, ¶13. Defendant argues that the State used this evidence only to show his propensity to commit a crime, as it was not material or relevant to the case at hand. Defendant contends that the trial court did not apply any probative value versus prejudicial effect weighing test, but rather just ruled that the bell had been rung. Defendant argues that counsel was not seeking to unring any bells but rather to keep the State from repeatedly referencing prejudicial prior bad acts.

¶ 66 We conclude that the trial court did not abuse its discretion in overruling defense counsel's objective to Sergeant Gardner's testimony, as it was largely cumulative of Detective Berry's testimony on this subject. As discussed, defense counsel did not object to Detective Berry's testimony, and we have determined that counsel did not render ineffective assistance for this decision. We recognize that cumulative other-crimes evidence can over-persuade the jury to convict the defendant because he is a bad person, rather than based on evidence of the charged crime. *People v. Heller*, 2017 IL App (4th) 140658, ¶ 54. However, such danger is present when the other-crimes evidence becomes a focal point of the trial or a mini-trial within the trial. *Id.* ¶ 57. This did not occur here, as the State did not focus on the uncharged crimes.

¶ 67 Defendant argues that the trial court also abused its discretion when it overruled defense counsel's objection to Detective Berry's testimony on re-cross examination that Follis told him that defendant was her cocaine supplier. The trial court overruled the objection, saying that defense counsel had "opened the door." Defendant argues that the testimony was inadmissible hearsay and implied other prior bad acts.

¶ 68 We conclude that the trial court acted within its discretion in overruling the objection, as Detective Berry had previously referred to defendant in this manner during his direct examination, without objection.[5] Moreover, defense counsel had questioned Detective Berry about whether he knew that Follis and defendant had a relationship, which, as the trial court stated, opened the door to the State asking questions about the type of relationship between them. See *People v. Harris*, 231 Ill. 2d 582, 588 (2008) (a defendant can open the door to the admission of evidence that would otherwise be inadmissible).

¶ 69 E. Closing Argument

¶ 70 Defendant's fifth argument on appeal is that he is entitled to a new trial because the State made unfairly prejudicial remarks during closing argument. A prosecutor has wide latitude in making a closing argument and may comment on the evidence and any fair, reasonable inferences arising from the evidence. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). A prosecutor may also comment on witnesses' credibility and respond to statements by defense counsel that invite a response. *People v. Burman*, 2013 IL App (2d) 110807, ¶ 25. However, a prosecutor may not argue facts or assumptions that are not contained in the record. *Glasper*, 234 Ill. 2d at 204. We view the challenged remarks in the context of the entire closing argument. *Id.* Improper remarks will warrant a reversal only if they result in substantial prejudice to the defendant. *Burman*, 2013 IL App (2d) 110807, ¶ 25. Where a prosecutor makes numerous improper remarks, we may consider their cumulative impact. *People v. Clark*, 335 Ill. App. 3d 758, 764 (2002). Our supreme court has applied both a *de novo* (*People v. Wheeler*, 226 Ill. 2d

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[5] We have already concluded that defense counsel was not ineffective for not objecting to the testimony. See *supra* ¶ 58.

92, 121 (2007)) and abuse of discretion standard of review (*People v. Blue*, 189 Ill. 2d 99, 128 (2000)) for the trial court's rulings on closing argument.[6]

¶ 71 Defendant recognizes that defense counsel did not object to all of the alleged improper statements or mention all of them in the motion for a new trial, thus forfeiting them for review. See *Enoch*, 122 Ill. 2d at 186. However, defendant asks that we review the forfeited statements for plain error. As stated, in applying the plain error test, we must first determine whether an error occurred. *Sebby*, 2017 IL 119445, ¶ 48.

¶ 72 Defendant notes that the State began its closing argument by playing the audio recording from the SUV on August 2, 2012. The prosecutor stated that Follis said that she did not want her kids to see, which meant that she wanted to keep the cocaine transaction a secret as opposed to returning money that she had borrowed from defendant. Defendant argues that for the prosecutor to make such a statement constitutes hearsay. According to defendant, the remark was a comment on Follis's state of mind and amounted to matters not in evidence and opinion testimony. Defendant argues that the statement is not a reasonable inference because it was unlikely that the police would conduct a controlled buy in the presence of children, and even otherwise, Follis knew of the police presence and had no need to keep anything secret.

¶ 73 Defendant's argument is without merit, as the prosecutor's closing argument was simply argument, and it did not constitute testimony or hearsay. The audio recording was admitted into evidence, and the prosecutor could properly comment on the evidence. It was a reasonable

[6] We do not attempt to resolve this conflict because, as we later discuss, we would reach the same result under either standard for the remarks for which defense counsel raised objections. See *People v. James*, 2017 IL App (1st) 143036, ¶ 45.

inference that Follis did not want her kids to see an illegal narcotics purchase, and it further countered defendant's testimony that Follis was simply repaying him for a loan.

¶ 74 Defendant next takes issue for the following portion of the prosecutor's argument:

> "You are going to have to ask yourselves does that sound like someone paying money back or does it sound like a drug deal. I submit to you that is exactly the way drug deals take place, there is traffic, people don't want to be seen, it goes quickly. When you buy, here is the cash, here's the drugs, see you later."

Defendant argues that none of the police officers testified as to how drug deals take place, so the prosecutor was giving testimony as to matters not in evidence. Defendant argues that the State was attempting to "give credibility to an audio recording" which contained no evidence of a drug transaction.

¶ 75 We conclude that the prosecutor's statement was not improper. As stated, the prosecutor's remarks during closing argument were argument, not testimony or evidence. Further, the specific statements here were fair argument to counter the defense theory that a drug deal could not have taken place because the recorded conversation between defendant and Follis in the SUV was very short and did not mention drugs. Further, a prosecutor may make appeals to the jurors to apply their common sense (*People v. Runge*, 234 Ill. 2d 68, 146 (2009)), which is essentially what the prosecutor did here.

¶ 76 Defendant argues that the prosecutor also improperly suggested in rebuttal that defendant's testimony about why he had a sandwich bag in his pocket was fabricated. The prosecutor stated that defendant's explanation was "preposterous" and "unbelievable," as defendant wanted the jury "to believe that his kids ate all the nutritious food and somehow left the best part of the lunch." Defendant maintains that trying to link the sandwich bag in his

pocket when he was arrested to the transactions that took place several months before was extremely weak evidence, and suggesting that he was lying was a desperate attempt to foster the State's theory.

¶ 77 We find no error in the prosecutor's remarks, as it was commentary on defendant's explanation for the presence of the sandwich bag in his pocket when he was arrested. Further, as stated, a prosecutor may comment on a witness's credibility (*Burman*, 2013 IL App (2d) 110807, ¶ 25), so it was not error for him to refer to defendant's testimony on this subject as "preposterous" and "unbelievable," especially since it was limited to a small portion of defendant's testimony. See also *People v. Smith*, 2014 IL App (1st) 103436, ¶ 72 (prosecutor's comments suggesting that the defendant was fabricating his testimony was not erroneous because the prosecutor make the remark in the context of argument about evidence contradicting the defendant's testimony). Further, defense counsel also argued about the sandwich bag during closing argument, allowing the prosecutor to counter his assertions. See *Burman*, 2013 IL App (2d) 110807, ¶ 25.

¶ 78 As we have found no error in the unpreserved alleged errors raised by defendant, there can be no plain error. See *People v. Alexander*, 2017 IL App (1st) 142170, ¶ 46.

¶ 79 Last, defendant argues that the prosecutor improperly told the jury, over objection, that defendant's visit to Follis's home during the early hours of August 1, 2014, showed a consciousness of guilt because the trial date was set for August 8, 2014. Defendant argues that there was no evidence to support this claim, but rather Snell testified that defendant had been to her home numerous times before and had a relationship with Follis. Defendant argues that the prosecutor also improperly used the August 2014 incident to suggest, over objection, that Follis missed court dates because she was intimated by him. Defendant points out that Follis testified

that she did not show up to two court dates in February and June 2014 because she was "torn" and did not "want to get [defendant] in trouble."

¶ 80 Applying either the *de novo* or abuse of discretion standard (see *supra* ¶ 70 n.6), we conclude that the trial court did not err in overruling defense counsel's objection to the challenged remarks. Defendant's appearance at Follis's home on August 8, 2014, was unusual in that she was the primarily witness against him; it was shortly before the trial began; he showed up at 3 a.m.; and he banged on a picture window until Snell came down and told him to leave. Accordingly, it was a reasonable inference from the evidence that defendant wanted to talk to Follis about the case, which could indicate a consciousness of guilt. *Cf. People v. Clark*, 335 Ill. App. 3d 758, 767 (2002) (the prosecutor stated a legitimate argument that defendant changed his appearance before trial by growing a beard, and it was relevant because it arguably indicated a consciousness of guilt). The prosecutor's remark that Follis may have been "a little bit hesitant to go to court" due to defendant's "behavior" was not also in error. Defense counsel argued that Follis was "torn" and missed court dates because she had framed defendant, and the prosecutor could respond to this theory in the broad manner in which he did. See *Burman*, 2013 IL App (2d) 110807, ¶ 25.

¶ 81 F. Monetary Credit

¶ 82 Finally, defendant argues that although the trial court awarded him a $10 credit towards fines for the two days spent in county jail between the time of arrest and the day bond was posted, it erred by not also giving him $5-per-day credit for each of the sixty days he spent in custody after the guilty finding on October 10, 2014, and until the sentencing date of December 8, 2014. He argues that he is therefore entitled to an additional $300 credit towards his $3,000 fine and $3,000 drug assessment. The State concedes this issue.

¶ 83 Section 110-14 of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14 (West 2014)) provides for a $5-per-day credit for any person who is incarcerated on a bailable offense and spends time in presentence custody, and against whom a fine is levied. The credit applies from the time the defendant is in pretrial custody up to the time of sentencing. *People v. Rivera*, 378 Ill. App. 3d 896, 899 (2008). In calculating a defendant's presentence credit, we do not include the day of sentencing. *People v. Alvarez*, 2012 IL App (1st) 092119, ¶ 71. The $5-per-day credit is applicable to fines, including drug assessment fees. *People v. James*, 391 Ill. App. 3d 1045, 1054 (2009). The question of whether a defendant is entitled to such credit cannot be waived and may be raised for the first time on appeal. *People v. Burney*, 2011 IL App (4th) 100343¶ 94. We review this issue *de novo* as it involves the application of a statute to undisputed facts. *People v. Richards*, 394 Ill. App. 3d 706, 709 (2009).

¶ 84 We agree with the parties that defendant is entitled to additional monetary credit for the time he spent in custody prior to being sentenced. However, the parties' calculation of 60 days includes the day of sentencing, which is contrary to current case law. See *Alvarez*, 2012 IL App (1st) 092119, ¶ 71. Accordingly, we modify the mittimus to reflect an additional 59 days of presentence monetary credit. Added to the two days of credit defendant already received, he is entitled to a sum of 61 days' credit totaling $305 towards his fees. We amend the mittimus to reflect this change. See *Alvarez*, 2012 IL App (1st) 092119, ¶ 72 (the appellate court has the authority to correct the mittimus without remanding the case back to the trial court).

¶ 85 III. CONCLUSION

¶ 86 For the reasons stated, we affirm the judgment of the Boone County circuit court but modify the mittimus to reflect a total of 61 days of presentence monetary credit. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal.

ILCS 5/4-2002(a) (West 2016); *People v. Nicholls,* 71 Ill. 2d 166, 179 (1978); see also *People v. Williams*, 235 Ill. 2d 286, 297 (2009) (fee applies even where the defendant is partially successful on appeal).

¶ 87 Affirmed as modified.