2019 IL App (4th) 180290-U

NO. 4-18-0290

FILED
June 19, 2019
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
DONTRELL L. NETTER,	)	No. 16CF1063
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justice Turner concurred in the judgment.
Justice Knecht dissented.

ORDER

¶ 1 *Held*: (1) The State presented sufficient evidence to establish defendant's guilt beyond a reasonable doubt.

(2) Comments by the trial court, characterizing a witness's testimony, did not amount to reversible error.

(3) The trial court did not abuse its discretion by admitting a "highly prejudicial" photograph into evidence.

(4) Defendant waived his claim of error that the trial court erred in admitting certain photographs into evidence because the photographs did not accurately depict the scene of the alleged offenses.

(5) Defendant failed to establish that his defense attorney provided him with ineffective assistance of counsel.

¶ 2 Following a jury trial, defendant was convicted of aggravated criminal sexual as-

sault (720 ILCS 5/11-1.30(a)(5) (West 2014)) of a person over 60 years of age and sentenced to 30 years in prison. He appeals, arguing (1) the State's evidence was insufficient to establish his guilt, (2) the trial court improperly commented on and misstated key witness testimony, (3) the court improperly admitted into evidence and published a highly prejudicial photograph to the jury, (4) the court erred in admitting into evidence and publishing to the jury photographs that did not accurately depict the scene of the alleged offenses, and (5) his defense counsel was ineffective. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In July 2016, the State charged defendant with two counts of attempt (aggravated criminal sexual assault) (720 ILCS 5/8-4(a), 11-1.30(a)(5) (West 2014)) (counts I and II) and one count of conspiracy (*Id.* § 8-2(a)) (count III). In November 2016, it additionally charged defendant with two counts of aggravated criminal sexual assault (*Id.* § 11-1.30(a)(4)) (counts IV and V). The charges were based on allegations that in July 2015, defendant went to Bickford Assisted Living Center (Bickford) in Champaign, Illinois; met with Channing Butler, a Bickford employee; and engaged in sexual conduct with a Bickford resident. According to the State's theory of the case, Butler contacted and communicated with individuals online with the purpose of having those individuals meet him at Bickford to engage in sexual activity with either Butler or a resident of the facility. The State alleged that while at Bickford, defendant entered the room of the victim, H.C., a person 60 years of age or older; exposed his penis; and attempted to commit, or committed, an act of sexual penetration with H.C. by making contact with his penis and H.C.'s mouth. The State further alleged that the act was attempted or committed either by the use of force or when defendant knew that H.C. was unable to understand the nature of the act or was

unable to give knowing consent.

¶ 5 At defendant's December 2017 trial, Laurie Dey testified that H.C. was her maternal aunt. H.C. was born on February 3, 1925, and was 90 years old when she passed away on July 23, 2015. During the last year of her life, H.C. resided in the "memory care unit" of Bickford in room number 601. While living at Bickford, H.C. was confined to a wheelchair. Dey testified she visited H.C. at Bickford six days a week and noticed a decline in H.C.'s memory and mental abilities.

¶ 6 Tim Clark testified he worked as a director for Bickford from December 2014 to October 2016. He described Bickford as having two "areas"—an assisted living area with 36 apartments and a memory care area with 18 apartments. Each Bickford resident had his or her own apartment. Bickford employees consisted of a housekeeper, activity person, a cook, some administrative staff, the director, and an assistant director. It additionally employed registered nurses (RNs) and certified nursing assistants (CNAs), who provided direct care for the facility's residents.

¶ 7 Clark testified he was familiar with Butler, who worked for Bickford as a CNA. Clark was Butler's direct supervisor. During the summer of 2015, Butler typically worked the daytime shift at Bickford from 7:30 a.m. to 3 p.m. At times, Butler also volunteered to work the night shift in the memory care unit from 11 p.m. to 7 a.m. Clark testified the night shift in the memory care unit was "very quiet" because most of the residents were asleep. Staffing during that shift consisted of two CNAs, one for each area of the facility, and a nurse, who worked almost exclusively "up front" in the assisted living area. Clark described the memory care area as being "separated" from the other areas of the facility.

¶ 8 On direct examination, Clark was shown a series of photographs that he testified accurately depicted Bickford as it appeared in July 2015. Specifically, he stated the photographs showed (1) the facility's "front sign" and entrance; (2) the main entrance, leading to the facility's assisted living area; (3) the separate outside entrance for the memory care area; (4) "an internal shot" of the entrance for the memory care area; (5) a hallway leading to the memory care area; and (6) two photographs of apartment number 601. The State moved to admit the photographs into evidence. Upon inquiry by the trial court, defense counsel asserted he had no objection "subject to some cross-examination." The trial court granted the State's motion and admitted the photographs into evidence. The photographs were also published to the jury.

¶ 9 Clark testified that to enter Bickford's grounds, one had to pass the sign for the building that was depicted in one of the photographs. At nighttime, the sign was illuminated. Further, Clark stated that the facility had a parking lot. Parking spaces near the entrance included handicapped spaces that were identified by signs and markings on the ground. Additionally, the outside entrance to the memory care area, which was a side entrance to the building, had a security door that was always locked and required a code to enter. The memory care entrance had a separate parking lot that also had spaces designated for handicapped-accessible parking. On cross-examination, Clark testified that the photographs of Bickford's exterior, which were taken during daylight hours, did not represent what the area looked like at midnight or 3 a.m.

¶ 10 Amanda O'Brien testified she was the RN coordinator at Bickford. In the course of her employment, O'Brien had daily or semi-daily interactions with H.C. and became familiar with H.C., her medications, and her behaviors. She stated H.C. had memory issues, did not walk, used a wheelchair to get around, was not very social, and spent a lot of time in her apartment. In

July 2015, H.C. was physically handicapped. At that time, H.C. was also "quite bad" mentally, and O'Brien did not believe that H.C. was aware of what was happening around her.

¶ 11 Andre Davis testified he was a detective with the City of Champaign police department. He was involved in the investigation that led to the charges against defendant. Davis testified he received a report in August 2015 that caused him to conduct interviews with Butler on December 9, 2015, and January 19, 2016. During the December 2015 interview, Butler brought up defendant's name. As a result, Davis obtained a booking photograph of defendant. He stated he concealed identifying information on the photograph and showed it to Butler. According to Davis, Butler identified defendant as the person pictured in the photograph.

¶ 12 Davis testified that as part of his investigation, he interviewed defendant on December 15, 2015. During that interview, defendant denied ever having been to " 'Bickford Assisted Living nursing home' " or any nursing home in Champaign County. Davis testified he explained to defendant "that the person who had brought all this to light was using Facebook as a method of communication, trying to get people to come out to the nursing home." In response, defendant stated he was never "recruited over Facebook to come out to the nursing home"; however, he acknowledged that he was contacted through Facebook by someone with the profile name "Cherokee." Defendant reported that "Cherokee" offered to pay $300 if "Cherokee" could perform oral sex on defendant. Defendant asserted he declined the offer because it "was too good to be true." According to Davis, defendant did not describe any other form of social media contact that might have led him to Bickford or any other pseudonyms used to proposition him.

¶ 13 Davis further testified that he monitored telephone calls defendant made while he was an inmate at the Champaign County jail. The State's evidence showed two calls of interest

were identified from those recordings—a call that occurred on March 16, 2017, and a call that occurred on March 19, 2017. Recordings of those two calls were played for the jury. During the calls, defendant spoke to his grandmother. He acknowledged communicating on Facebook and through text message with Butler but asserted that he thought Butler was a woman. He further acknowledged that he went to the "nursing home" at approximately 2 a.m. on an unspecified date. However, defendant asserted it was dark and the nursing home looked like a house. Defendant stated that Butler was "at the door" and "no one [else] was there." Defendant asked where the girl was and what was going on, and Butler stated he wanted defendant to do things with an "old lady." Defendant asserted he immediately left.

¶ 14 On cross-examination, Davis testified that he never showed defendant a photograph of Bickford. He stated that the alleged offenses took place at night or in the early morning hours while it was dark. Davis also testified that defendant gave him permission to access his phone, which defendant stated was at his grandmother's house. However, defendant's grandmother reported that she did not have defendant's phone and the phone was never located.

¶ 15 Davis further testified that Butler acknowledged using the "handles" of "Cherokee" and "Taylor Banks Banks," both of whom he represented to be women, when contacting individuals online. According to Davis, Butler was found to have at least four or five Facebook accounts that he had set up and then deleted. During his interview with Davis, Butler also identified two other individuals that he had contacted online.

¶ 16 The State presented evidence that the police obtained and examined Butler's cell phone. Police detective Patrick Simons testified as an expert in the field of digital forensic examination. He stated he examined Butler's cell phone and discovered an image relevant to the un-

derlying investigation that was generated with, and kept on, that device. Specifically, the camera on Butler's cell phone was used to capture the image Simons discovered, and the image was maintained on Butler's phone. Simons determined that the image was created on July 12, 2015, at 3:31 a.m. He identified People's exhibits B-1 and B-2 as containing the photograph he discovered on Butler's phone and a negative of that image, respectively.

¶ 17 On cross-examination, Simons testified that he did not "come across anything that showed a connection between" Butler and defendant. Further, he agreed that the name "Cherokee" was involved in the underlying investigation and that he provided information to Davis regarding an exchange between Butler, using one of his pseudonyms, and an individual named Trent Warren. Simons agreed that he provided transcripts of the communications he found during his investigation to Davis for Davis's review. On redirect, Simons stated that his examination of Butler's phone also indicated that programs and data had been deleted from the phone prior to the time it was obtained by the police.

¶ 18 Butler testified that he was currently imprisoned in the Illinois Department of Corrections (DOC). Prior to his imprisonment, he worked at Bickford as a CNA. Butler acknowledged working at Bickford during the summer of 2015 and that he occasionally volunteered for overnight shifts in the memory care unit. Butler made an in-court identification of defendant and testified that he saw defendant at Bickford in July 2015. Butler testified he created a "fake [Facebook] page," pretending to be a female, and told defendant that they could meet "for sex or something like that." As a result of that interaction, defendant met Butler at Bickford on an occasion in July 2015. Butler testified defendant arrived at Bickford after midnight while Butler was the only person working in the memory care unit. Butler then stated that the following

occurred:

> "[Defendant] found out it was me, and then I told him, [']I have somebody that you could do something with[’], and I showed him the lady, and he basically just, you know, turned it down or whatnot. And then that was basically it."

¶ 19 Butler testified that during the summer of 2015 he invited multiple men to Bickford during the overnight hours. Occasionally he took pictures with his cell phone of the things that happened while the men were there. The State then showed Butler the photograph contained in People's Exhibit B-1. Butler testified he recognized the picture and agreed it was one that he had taken. The following colloquy then occurred:

> "Q. And Mr. Butler, *** who's the female depicted in this picture?
>
> A. That's [H.C.]
>
> Q. And is there somebody's hand around [H.C.'s] face in that picture?
>
> A. Yes.
>
> Q. Whose hand is that?
>
> A. Mine.
>
> Q. Okay. And is there a portion of another person's body in the face [*sic*] in front of [H.C.]?
>
> A. Yes.
>
> Q. Whose—and just for the—well, I'll say, and that's a male penis, correct?
>
> A. Yes.
>
> Q. Whose penis is that?

A. I can't say.

Q. What do you mean when you use the term, you can't say?

A. I mean, it was a long time ago, so I'm really not [100%] sure who I can say that is, but I know that he did come up there. I don't know if that's him a [100%], but yes, that is a picture of a penis.

Q. Well at the time you took this picture you were present in the room correct?

A. Yes.

* * *

Q. At the time you took this picture [H.C.] was present in the room; is that right?

A. Yes.

Q. At the time you took this picture who else was in the room?

A. Dontrell.

* * *

Q. And by that do you mean Dontrell Netter, the defendant here?

A. Yeah, yes."

¶ 20 The State moved to publish People's exhibit B-1 to the jury and defendant's counsel, Michael McClellan, objected:

"MR. MCCLELLAN: Object, your Honor.

THE COURT: The objection's overruled, it may be published.

MR. MCCLELLAN: Your Honor, there is no identification of that photo-

graph.

THE COURT: He said it was him.

MR. MCCLELLAN: Pardon?

THE COURT: He identified [defendant] as the person in the photograph.

MR. MCCLELLAN: I didn't hear it that way your Honor. I'm having trouble hearing, but I thought the question was—

THE COURT: Mr. McClellan, the objection is—

MR. MCCLELLAN: —was who else was in the room.

THE COURT: The objection is overruled."

The trial court allowed both the photograph and the negative of the same image, People's exhibit B-2, to be shown to the jury.

¶ 21 Butler further testified that leading up to the events at issue he had multiple different Facebook profiles. Two of the names he used in his profiles were "Cherokee" and "Taylor Banks Banks." Originally, he met defendant through Facebook. Butler stated he told defendant over instant messaging that he knew a lady who was over 60 that defendant could have sex with. Butler denied that he had any sexual relationship with defendant. However, he testified that he invited defendant to Bickford to "have sex" with him. Butler stated that if defendant did not want to have sex with him, "then there was a lady that was over 60 who he could have sex with."

¶ 22 Butler denied that defendant received or tried to receive oral sex from H.C. in Room 601. He testified defendant did not "put his penis into her mouth and start moving it back and forth" and that defendant did not ejaculate. Butler further denied that he and defendant were "on and off sexually." He estimated that defendant was in the room with him and H.C. for

"[m]aybe [10] minutes."

¶ 23 Butler acknowledged that he was investigated by the police, arrested, and charged with several crimes. In July 2016, he pleaded guilty to three felony counts of solicitation of aggravated criminal sexual assault. Butler recalled being interviewed by Davis in December 2015 and that their interview was recorded.

¶ 24 Butler testified that during the interview, he described what he had done at Bickford with various persons and residents. The State confronted Butler with statements he made in response to Davis's questions. Butler acknowledged that certain exchanges occurred, testifying "yes" or "I believe so" when the prosecutor asked about a particular exchange. Specifically, Butler acknowledged reporting to Davis that he and defendant were "on and off sexually." He also agreed that he stated as follows regarding defendant's visit to Bickford: " 'And then he came in, we did our thing for a little bit, and then he tried to receive oral sex from an another [*sic*] lady that was there.' " Butler also admitted that he told Davis that defendant had oral sex with the victim. The following colloquy also occurred between Butler and the State:

> "Q. Also, Mr. Butler, isn't it true that on December 9th, 2015, in your recorded interview with *** Davis you had the following exchange?
>
> Detective Davis, 'So Dontrell ended up, you say he put her on her side?' You say, 'And he just put it in there and started moving back and forth.'
>
> Detective Davis says, 'All right.' And you say, 'In there, where did he—'
>
> You say, 'Put it in his—in her mouth.'
>
> He says, Detective Davis says, 'In her mouth, okay, but she was

awake?'

You say, 'Mm-hmm' in the affirmative.

Detective Davis says, 'Okay, and did she, did she say anything?' You did not give an audible response.

Detective Davis says, 'Okay, did he ejaculate?'

You say, 'Yeah, I believe so.' Isn't it true that you had that exchange with Detective Davis during your recorded interview?

A. Yes, but I don't know if that was for him. I don't recall saying that to him about him.

Q. I'm sorry, sir. What was your answer?

A. I don't recall telling [Davis] that about him, about [defendant].

Q. So you say you don't recall having that particular exchange?

A. I remember having it, but I don't know if I was talking about [defendant]."

Ultimately, the State played two portions of Butler's video and audio recorded interview with Davis for the jury. In the two clips, Davis asked Butler questions referencing defendant's first name and Butler provided information indicating defendant had a sexual encounter with Butler and then put his penis in H.C.'s mouth and "started moving back and forth." Butler also indicated that defendant ejaculated and remained in the room with H.C. for approximately 10 minutes.

¶ 25 Finally, on direct examination, the State asked Butler whether it was his "testimony *** that the penis depicted in People's Exhibit B-1 is the penis belonging to the defendant." Butler responded, "Yeah, I believe so, yes."

¶ 26 On cross-examination, Butler testified that he had contact with a number of men about engaging in sexual activity at Bickford and that he used a variety of identities, including those of women, to engage in that contact. Butler stated that he approached defendant with the identity of a woman and suggested that defendant could have sex with Butler or "one of the residents." He testified, however, that he did not tell defendant "that this was a nursing home." Further, he asserted that he had never met defendant before contacting him on Facebook. According to Butler, his statements to Davis that he and defendant had a sexual relationship and a sexual encounter at Bickford were untrue.

¶ 27 Butler also testified that an individual named Trent Warren was one of the people he had contact with on Facebook. He and Warren exchanged naked pictures and Butler invited Warren to Bickford. Butler stated that the information he provided to Davis was about Warren and other people, as well as defendant. He agreed that he was "[p]ossibly" confused about "who did what to who." Regarding the photograph in People's exhibit B-1, Butler testified he did not recall "if that's exactly [defendant] or not"; however, he did remember taking a picture of defendant. Butler further remembered talking with defense counsel prior to trial. He agreed that he signed a written statement asserting that he could not be certain that the photo in People's exhibit B-1 was of defendant and that when defendant saw H.C., he ended the encounter and, "shortly" thereafter, left the facility. Finally, Butler again denied that defendant had "sex of any kind" with "a woman in that room."

¶ 28 On redirect, Butler stated that Warren and an individual named Dean Goble were other people he invited to Bickford. Both Warren and Goble were light-skinned, Caucasian men, and neither man was at Bickford at the same time as defendant. Butler also testified that the ex-

posed penis in People's exhibit B-1 appeared to belong to "a dark or medium-complected African-American person." (The record identifies defendant as African-American.) Additionally, Butler testified that the written statement he signed was written by defendant's attorney and not him.

¶ 29 Defendant testified on his own behalf. He acknowledged having felony convictions for unlawful possession of a weapon, burglary, and resisting arrest and that he served time in prison. Defendant asserted he pleaded guilty in each of his previous cases and denied that those cases involved "anything of the nature" of his pending charges.

¶ 30 Regarding the charges at issue, defendant testified he first received a friend request through Facebook from an individual named "Taylor Banks Banks." He "assumed at the time [that Taylor] was a white woman." Now he knew that "Taylor" was actually Butler. Defendant testified that he and "Taylor" flirted with one another and had contact through text messaging. He stated he was also contacted by someone named "Cherokee" but that contact occurred around 2011.

¶ 31 In July 2015, "Taylor" communicated to defendant that he "could either have sex with Taylor, or a woman of the age of like 50." Defendant testified he received directions on where to meet with either "Taylor" or "a woman of 50 years old." He followed the directions and when he got to the approximate location of where to meet "Taylor" he was told to make a left at a gas station. Defendant testified he was looking for a house and saw some "subdivision homes." He texted "Taylor" that he was "in the neighborhood[,]" but "Taylor" responded that he was not in the correct location and directed him back to the gas station. Defendant parked his car and began walking. He stated he noticed a parking lot with a single car but was still unsure where he

was supposed to be. He texted "Taylor" to come get him. Next, "[a] man came out of [a] door and waved [him] in."

¶ 32 Defendant's counsel showed defendant a daytime photograph of Bickford that was purportedly taken from Bickford's website. Defendant identified Bickford as "the place" but asserted he did not recognize Bickford on the night of the alleged offenses. Defendant stated the daytime photograph did not depict the way Bickford looked at night. On defense counsel's motion, the photograph was admitted into evidence. It was also shown to the jury.

¶ 33 Defendant further testified that he did not know the man who waved at him and had never seen the man before. When he approached the man, defendant asked "where's the girl" and "where's Taylor." The man told defendant to come inside first and then admitted that he was the person defendant had been communicating with. Defendant stated he was "upset" and "felt tricked" but "held on to some hope that maybe there was still the woman there" because he was "in that kind of mood to have sex." He asked where "[t]he other woman" was. The man then led defendant down a hall and explained he had "a woman in this room" that was "old" and that he wanted defendant "to go have sex with her." The man opened a door and defendant observed a woman sitting in a chair close to a bed. When he saw the woman, defendant felt angry and told the man that he "must be fucking crazy." He stated he was "not going to do it" and he left. Defendant testified the man had to "press in some numbers" near the exit door before he could leave the building.

¶ 34 Defendant denied that he ever got close to the woman or that he went inside her room. After he left, his immediate reaction was to call the police, but he decided against it because he was on parole at the time. Defendant testified he did not think that he had committed a

crime, so he decided to "just leave and put it behind [him]." He also did not recognize that the man had committed a crime, stating, "He just suggested that I do something, and I said no."

¶ 35 In December 2015, defendant was interviewed by Davis. At that time, defendant did not realize that the place he had been in July 2015 was a "nursing home" or an "extended-care facility called Bickford." On the night of the incident, he "perceive[d] [Bickford] to be a home." He stated he had "second thoughts" when he saw Bickford's doors.

¶ 36 Defendant further testified that when making calls from the jail, he was aware that his conversations were monitored and recorded. He asserted that what he told his grandmother on the phone was what actually happened. Defendant also described the clothing he was wearing on the night of the incident and testified his grandparents provided all of his clothes. Defendant denied that the photograph in People's exhibit B-1 was of him or that he was wearing the clothing depicted in that photograph on the night he was at Bickford.

¶ 37 On cross-examination, defendant explained that his online contact with "Cherokee" occurred in 2011 and was "of a sexual nature." He testified "Cherokee" offered to pay $300 to perform oral sex on him and to "have sex." Defendant asserted he declined those offers. He further testified that when looking to meet "Taylor" on the night of the incident, he drove passed the location where he ultimately found Butler. He agreed that there was a sign in front of the building but maintained that he did not see it. Defendant acknowledged passing some handicapped parking spots to get to the door to the building. He testified he observed "a big set of security doors" but did not leave because his interest was piqued. Defendant stated that the woman Butler showed him was elderly, and he agreed that on the inside, the building he entered did not look like a house. According to defendant, he asked Butler his "relation" to the building and But-

ler replied that "he worked there."

¶ 38 Defendant also acknowledged that when he was interviewed by Davis, he reported that he had never been to Bickford or any other nursing home in Champaign County. He agreed that as part of that conversation, Davis talked about possible communications defendant had with a person named "Cherokee" and a person known as "Taylor Banks Banks." Nevertheless, defendant did not tell Davis about the July 2015 incident, asserting he did not like the police.

¶ 39 Defendant's grandmother, Glenda Netter, testified she was defendant's adoptive mother and that defendant had lived with her since birth. Netter and her husband provided all of defendant's clothing. She testified that the clothing depicted in the photograph in People's exhibit B-1 was "not something that [defendant] would wear" and "not something [she] bought."

¶ 40 Ultimately, the jury found defendant guilty of each charged offense. In January 2018, defendant filed a posttrial motion for a judgment notwithstanding the verdict or a new trial. The same month, the trial court conducted a hearing and denied the motion. The matter proceeded with sentencing and the court sentenced defendant to 30 years in prison in connection with count IV, aggravated criminal sexual assault.

¶ 41 In February 2018, defendant filed a motion to reconsider his sentence. In April 2018, the trial court denied defendant's motion.

¶ 42 This appeal followed.

¶ 43 II. ANALYSIS

¶ 44 A. Sufficiency of the Evidence

¶ 45 On appeal, defendant first challenges the sufficiency of the evidence against him.

He asserts that Butler was a "wholly unreliable" witness and the State failed to prove him guilty of the charged offenses because its case hinged on Butler's prior out-of-court statements to the police. Defendant points out that Butler's prior statements were inconsistent with both a written statement he signed after speaking with defendant's counsel and Butler's actual trial testimony. He also argues that Butler's trial testimony contained internal inconsistencies, which further established Butler's lack of reliability. Ultimately, defendant maintains that no reasonable trier of fact could have found Butler credible.

¶ 46 When presented with a challenge to the sufficiency of the evidence, a reviewing court must determine whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the required elements of the charged offense beyond a reasonable doubt. *People v. Gray*, 2017 IL 120958, ¶ 35, 91 N.E.3d 876. "It is not the role of the reviewing court to retry the defendant." *Id.* Rather, it is the trier of fact's responsibility "to resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from the facts." *Id.* On review, "[a] criminal conviction will not be reversed for insufficient evidence unless the evidence is so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of the defendant's guilt." *Id.*

¶ 47 Here, defendant was convicted and sentenced on count IV, aggravated criminal sexual assault, and all other offenses were found to merge into that offense. A person commits aggravated criminal sexual assault as charged in this case if he or she commits the offense of criminal sexual assault and the victim is 60 years of age or older. 720 ILCS 5/11-1.30(a)(5) (West 2014). A person commits criminal sexual assault if he or she commits an act of sexual penetration and (as charged in count IV) "knows that the victim is unable to understand the na-

ture of the act or is unable to give knowing consent[.]" *Id.* § 11-1.20(a)(2).

¶ 48 There is no dispute that defendant went to Bickford sometime in July 2015. The State presented evidence that the victim was 90 years old and resided at Bickford. The evidence also showed that both the victim's memory and mental health were in decline such that she did not appear to know what was happening around her. Finally, under section 115-10.1 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10.1(a) (West 2016)), the State was permitted to introduce Butler's prior statements to the police that defendant committed an act of sexual penetration with the victim by placing his penis in the victim's mouth. On appeal, defendant does not challenge the admission of Butler's prior statements under section 115-10.1. Instead, he argues that the prior inconsistent statements were insufficient to sustain his convictions. We disagree.

¶ 49 Pursuant to section 115-10.1 of the Code, a witness's prior inconsistent statements may be admitted as substantive evidence. *Id.* A statement properly admitted under section 115-10.1 may, alone, be sufficient evidence to sustain a defendant's conviction. *People v. Curtis*, 296 Ill. App. 3d 991, 996-97, 696 N.E.2d 372, 376-77 (1998). This court has held that "no 'suspect categories' of properly admitted evidence exist" and one standard of appellate review applies to all evidence, including substantive evidence of prior inconsistent statements. *Id.* at 999. Further, "[o]nce a jury or trial court has chosen to return a guilty verdict based upon a prior inconsistent statement, a reviewing court not only is under no obligation to determine whether the declarant's testimony was 'substantially corroborated' or 'clear and convincing,' but it may *not* engage in any such analysis." (Emphasis in original.) *Id.*

¶ 50 In this case, it was the jury's responsibility to determine the credibility of witness-

es and the weight to be given to their testimony. The trier of fact "is in a better position to assess witness credibility because it may observe the witnesses' demeanor and consider any conflicts or inconsistencies in their testimony." *Id.* Here, the jury had the opportunity to observe Butler when he testified at trial and viewed portions of his recorded interview with Davis. A rational jury could have found Butler was being truthful during his interview with Davis and untruthful when he later signed the statement written by defense counsel and testified at trial.

¶ 51 On appeal, defendant argues that Butler was an unreliable witness because his trial testimony was internally inconsistent. We agree that Butler contradicted himself while testifying at trial but reject defendant's assertion that such inconsistencies necessarily render Butler's statements to the police unworthy of belief. At trial, Butler testified that defendant did not engage in any sexual activities with the victim and that defendant left Bickford shortly after Butler showed him H.C. However, Butler also testified, consistent with his statement to Davis, that defendant was in the room with H.C. for approximately 10 minutes. Further, Butler testified that he remembered taking a photograph of defendant and asserted both that defendant was in the room when the photograph contained in People's exhibit B-1 was taken and that the penis shown in that photograph belonged to defendant. These statements were inconsistent with the portions of Butler's testimony that indicated defendant was at Bickford only briefly or that defendant had only very limited contact with the victim. Even Butler's assertion that he did not know, or could not be 100% certain, whether the photograph at issue depicted defendant tends to call into question his exculpatory trial testimony. A rational jury could have concluded that such contradictions or internal inconsistencies in Butler's trial testimony supported the version of events Butler initially reported to the police and warranted a finding that Butler was not credible when he testi-

fied at trial and recanted his previous inculpatory statements.

¶ 52 As set forth in *Curtis*, the mere fact that Butler's trial testimony contradicted his prior statements to the police does not render Butler, or his earlier statements to police, "wholly unreliable" as asserted by defendant. In this instance, the State presented evidence supporting each element of the charged offenses. When viewed in a light most favorable to the State, the evidence was sufficient to prove defendant's guilt beyond a reasonable doubt.

¶ 53 B. Improper Comments by the Trial Court

¶ 54 Defendant next argues that the trial court erred by commenting on and misstating Butler's testimony regarding who was depicted in the photograph in People's exhibit B-1. Specifically, he contends the court erroneously stated that Butler identified the photograph as showing defendant's penis when Butler had only testified that defendant was in the room when the photograph was taken. According to defendant, the court's misstatement of Butler's testimony improperly influenced both Butler and the jury and requires remand for a new trial.

¶ 55 On appeal, defendant acknowledges that he failed to preserve this issue for appellate review. See *People v. McLaurin*, 235 Ill. 2d 478, 485, 922 N.E.2d 344, 349 (2009) (stating that a defendant forfeits a claim of error for review by failing to both object to the error at trial and raise the error in a posttrial motion before the trial court). Nevertheless, he maintains that the forfeiture rule should be relaxed under the *Sprinkle* doctrine (*People v. Sprinkle*, 27 Ill. 2d 398, 189 N.E.2d 295 (1963)) because he challenges the trial court's conduct. Defendant also argues that second-prong plain error occurred because the court's error was "so fundamental that consideration of it is necessary to protect and preserve the integrity and reputation of the judicial process."

¶ 56 In *Sprinkle*, the supreme court held that application of the forfeiture rule should be "less rigid" where the conduct of the trial judge is at issue. *Id*. at 401. In *People v. Thompson*, 238 Ill. 2d 598, 939 N.E.2d 403 (2010), the supreme court stated that "under the *Sprinkle* doctrine, the forfeiture rule may be relaxed when a trial judge oversteps his or her authority in the presence of the jury or when counsel has been effectively prevented from objecting because it would have fallen on deaf ears." (Internal quotation marks omitted.) *Id.* at 612. However, the court also held as follows:

> "The failure to preserve an error will be excused under the *Sprinkle* doctrine only in extraordinary circumstances, *** such as when a judge makes inappropriate remarks to a jury or relies on social commentary instead of evidence in imposing a death sentence. [Citations.] We have stressed the importance of applying the forfeiture rule uniformly except in compelling situations because failure to raise a claim properly denies the trial court an opportunity to correct an error or grant a new trial, thus wasting time and judicial resources." *Id.*

¶ 57 Here, defendant has failed to show that compelling or extraordinary circumstances warrant a relaxation of the forfeiture rule. Defendant alleges a single instance of improper commentary by the trial court. Although the offending comments were made in the presence of the jury, they occurred while the trial court was ruling on McClellan's objection to the State's motion to publish the photograph in People's exhibit B-1 and were not directed to the jury. See *People v. Lopez*, 2012 IL App (1st) 101395, ¶ 60, 974 N.E.2d 291 ("[T]he trial court's comments during its evidentiary rulings and closing argument, even if unnecessary or incorrect, were not extraordinary circumstances to justify excusing the forfeiture by defense counsel."). Further, we

note defendant did not raise any challenge to the comments at issue in his posttrial motion, which would have given the trial court a further opportunity to address the issue and determine whether a new trial was warranted. See *People v. Minter*, 2015 IL App (1st) 120958, ¶ 137, 37 N.E.3d 238 (noting the defendant failed to raise his challenge to the trial court's comments in his posttrial motion and declining to apply *Sprinkle*). Accordingly, we decline to apply the *Sprinkle* doctrine and find defendant has forfeited this issue for review.

¶ 58 As stated, defendant also argues that his forfeiture may be excused under the second prong of the plain-error doctrine. The plain-error doctrine may be applied to bypass normal forfeiture principles and allow a reviewing court to consider unpreserved claims of error. *Thompson*, 238 Ill. 2d at 613. The plain-error doctrine applies when a "clear or obvious error occurred" and either (1) "the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error" or (2) the "error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." (Internal quotation marks omitted.) *Id.* "In plain-error review, the burden of persuasion rests with the defendant." *Id.* Additionally, "[t]he first step of plain-error review is determining whether any error occurred." *Id.*

¶ 59 "A trial court has the duty to refrain from conveying improper impressions to the jury." *People v. Patterson*, 192 Ill. 2d 93, 138, 735 N.E.2d 616, 641 (2000). It is improper for the court "to suggest through comments or questions an opinion regarding the facts of the case or the credibility of witnesses [citation]." *People v. Falaster*, 173 Ill. 2d 220, 231-32, 670 N.E.2d 624, 630 (1996). "However, for a trial judge's comments to constitute reversible error, defendant must demonstrate that the comments constituted a material factor in the conviction or were such that

an effect on the jury verdict was the probable result." *People v. Brown*, 172 Ill. 2d 1, 38-39, 665 N.E.2d 1290, 1307 (1996).

¶ 60 Here, at trial, Butler identified the photograph in People's exhibit B-1 as a picture he took. He testified that the photo depicted the victim, his hand around the victim's face, and a man's penis in front of the victim's face. Initially, Butler stated that defendant came to Bickford but that he was not 100% sure whose penis was in the photograph. On further questioning, Butler indicated defendant was in the room when the photograph was taken. The State then moved to publish the photograph to the jury and defense counsel objected. Thereafter, the following colloquy occurred:

> "THE COURT: The objection's overruled, it may be published.
>
> MR. MCCLELLAN: Your Honor, there is no identification of that photograph.
>
> THE COURT: He said it was him.
>
> MR. MCCLELLAN: Pardon?
>
> THE COURT: He identified [defendant] as the person in the photograph.
>
> MR. MCCLELLAN: I didn't hear it that way, your Honor. I'm having trouble hearing, but I thought the question was—
>
> THE COURT: Mr. McClellan, the objection is—
>
> MR. MCCLELLAN: —was who else was in the room.
>
> THE COURT: The objection is overruled."

¶ 61 We agree that the trial court misstated Butler's testimony when ruling on McClellan's objection. Specifically, although Butler testified defendant was in the room when the pho-

tograph was taken, at the time the court's comments were made, Butler had not yet explicitly testified that the photograph depicted defendant's penis. Nevertheless, we find defendant has failed to establish that the court's comments constituted a material factor in his conviction or were such that an effect on the jury verdict was the probable result.

¶ 62 As argued by the State, "the clear import" of Butler's testimony, as set forth above, was that the penis in the photograph belonged to defendant. Although Butler initially asserted he was uncertain on the identity of the third person depicted in the photograph, he never testified that it was not defendant in the photograph. Additionally, prior to the court's comments, Butler clearly identified defendant as being in the room when the picture was taken along with himself and the victim. In fact, when the prosecutor asked Butler "who else was in the room"—aside from Butler and the victim—Butler responded with only defendant's name. As the photograph depicted only three people and Butler identified only three people in the room, the most logical inference from his testimony was that it was defendant's penis that was depicted in People's exhibit B-1.

¶ 63 Further, the evidence presented at trial otherwise fails to reflect that anyone else alleged to be involved with Butler was present at Bickford at the same time as defendant. At trial, neither Butler nor defendant suggested that another person was present at Bickford when defendant went there to meet Butler. The evidence demonstrated that Butler identified two other individuals who he communicated with that visited Bickford. He asserted that both individuals were Caucasian, unlike the person depicted in the photograph, and neither was present at Bickford at the same time as defendant. Also, prior to Butler's testimony, the State played recordings of defendant's telephone conversations with his grandmother in which defendant emphatically

asserted that no one was present with him at Bickford aside from Butler and the victim.

¶ 64 Additionally, we note that it has been held that a trial judge's alleged misstatement of trial testimony when making an evidentiary ruling was "cured" by an "instruction directing the jury that they are not to construe any of the judge's rulings or remarks as an opinion on the facts." *People v. Brown*, 388 Ill. App. 3d 104, 111, 904 N.E.2d 139, 146 (2009). Again, the trial court's comments in this case were not directed to the jury but instead were made in the course of ruling on an objection. The jury had the opportunity to hear the actual questions posed by the State and Butler's responses, as well as McClellan's suggestion that the court misheard the testimony. Notably, the jury also ultimately received the following instruction from the court: "Neither by these instructions, nor by any ruling or remark which I have made do I mean to indicate any opinion as to the facts, or as to what your verdict should be." Given these circumstances, we find that the trial court's comments likely did not affect the jury nor were they a material factor in defendant's conviction.

¶ 65 We also note that, ultimately, Butler affirmatively identified the penis in the photograph as belonging to defendant. Defendant points out that Butler's identification of defendant occurred only after the trial court's improper comments, suggesting that Butler must have also been improperly influenced by the court. However, given that Butler's testimony implicitly established the photograph as depicting defendant prior to the court's comments, we disagree that the record establishes that he was influenced by the court's remarks. Accordingly, Butler's ultimate explicit identification of defendant in the photograph further supports a finding that the jury was not influenced by the court's comments so much as the actual testimony and evidence presented in the case.

¶ 66 Here, defendant has failed to establish reversible error. Consequently, he has also failed to establish plain error. See *People v. Smith*, 2016 IL 119659, ¶ 39, 76 N.E.3d 1251 ("[A]bsent reversible error, there can be no plain error.").

¶ 67 C. Admission of the Photographs in People's Exhibits B-1 and B-2

¶ 68 On appeal, defendant next argues the trial court abused its discretion by admitting the photographs in People's exhibits B-1 and B-2 into evidence and publishing them to the jury. He contends that the State failed to lay the necessary foundation for the photographs and that the photographs were only relevant if Butler could have testified that they depicted defendant's penis. Additionally, he argues that the photographs were "highly prejudicial," outweighing any benefit they had as material and probative evidence.

¶ 69 "Photographs, like any evidence, may be admitted into evidence when authenticated and relevant either to illustrate or corroborate the testimony of a witness, or to act as probative or real evidence of what the photograph depicts." *People v. Smith*, 152 Ill. 2d 229, 263, 604 N.E.2d 858, 872 (1992). "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Illinois Rule of Evidence 901(a) (eff. Jan. 1, 2011). "Evidence can be authenticated by direct or circumstantial evidence." *People v. Harper*, 2017 IL App (4th) 150045, ¶ 57, 80 N.E.3d 856.

¶ 70 Additionally, "[i]f photographs are relevant to prove facts at issue, they are admissible and may be shown to the jury unless the prejudicial nature of the photographs outweighs their probative value." *People v. Chapman*, 194 Ill. 2d 186, 219, 743 N.E.2d 48, 69 (2000). "The decision whether to admit photographs into evidence is committed to the discretion

of the trial judge, whose determination will be upheld unless it is an abuse of discretion." *People v. Kidd*, 175 Ill. 2d 1, 37, 675 N.E.2d 910, 927 (1996). "An abuse of discretion occurs where the trial court's decision is arbitrary, fanciful or unreasonable [citation] or where no reasonable person would agree with the position adopted by the trial court [citations]." *People v. Becker*, 239 Ill. 2d 215, 234, 940 N.E.2d 1131, 1142 (2010).

¶ 71 The State, as the proponent of the photograph in People's exhibit B-1 (and the negative of that photograph contained in People's exhibit B-2), claimed that it depicted defendant engaging in sexual conduct with the victim at the time of the alleged offense. As discussed above, Butler's testimony provided sufficient support for concluding that the photograph showed what the State claimed. Butler testified he took the photograph, that it depicted his hand holding the victim's face, and that it showed the penis of a third person. Although Butler initially proclaimed that he could not definitively say whose penis was shown in the photograph, he then identified defendant as also being in the room when the picture was taken. Defendant suggests on appeal, that the photograph could have depicted another person that Butler had contact with online and invited to Bickford; however, as discussed, there was no indication from either Butler or defendant that any other individual involved with Butler was present at Bickford at the same time as defendant. Again, evidence presented prior to the admission of the photograph showed that defendant denied that any other person aside from Butler was present when he visited Bickford in July 2015.

¶ 72 The photograph (and its negative) was also probative of the issue of whether defendant engaged in sexual conduct with the victim. At trial, defendant asserted he declined engaging in any such activity with H.C. and, directly thereafter, left Bickford. The photograph con-

tradicts defendant's version of the incident and supports Butler's statements to Davis regarding defendant's actions while at Bickford. Ultimately, the photograph was highly relevant, and its probative value outweighed its prejudicial effect. The trial court did not abuse its discretion in admitting the photograph in People's exhibit B-1, or its negative in People's exhibit B-2, or by publishing the photograph to the jury.

¶ 73 D. Admission and Publication of Daytime Photographs

¶ 74 On appeal, defendant also challenges the admission and publication to the jury of daytime photographs of Bickford. He contends that there was no dispute at trial that he entered Bickford at night when it was dark and that "daytime photos could not accurately and fairly depict the appearance of the building and how lighting would have changed [its] appearance." Defendant acknowledges that he failed to preserve this issue for appellate review because he did not object to the photographs at trial and only raised the issue in his posttrial motion. However, he asks this court to excuse his failure and reach the merits of his claim under the plain-error doctrine.

¶ 75 In this instance, we find that plain-error review is not available to defendant because he affirmatively acquiesced to the admission of the daytime photographs of Bickford. "Generally, a defendant may not complain of error which he invited or in which he acquiesced." *People v. Milligan*, 327 Ill. App. 3d 264, 269, 764 N.E.2d 555, 559 (2002). Additionally, plain-error review applies only "to cases involving procedural default, not affirmative acquiescence." *People v. McGuire*, 2017 IL App (4th) 150695, ¶ 29, 92 N.E.3d 494. "When defense counsel affirmatively acquiesces to actions taken by the trial court, any potential claim of error on appeal is waived, and a defendant's only available challenge is to claim he received ineffective assistance

of counsel." *Id.*

¶ 76 Here, after the State moved to admit the daytime photographs of Bickford, the trial court asked McClellan if there was "any objection to the photographs being admitted." McClellan responded "[n]o" and indicated that he would address them on cross-examination. Further, not only did defendant waive any objection to the State's daytime photographs of Bickford, he also submitted a daytime photograph of that facility when presenting his case. Defendant's photograph was similarly admitted into evidence and shown to the jury. Accordingly, we find defendant has affirmatively acquiesced to the admission of the daytime photographs and a plain-error analysis may not be applied. (We note defendant does claim ineffective assistance of counsel as to this issue, which we address below in conjunction with his other ineffective-assistance claims.)

¶ 77 E. Ineffective Assistance of Counsel

¶ 78 Finally, on appeal, defendant argues that McClellan provided him with ineffective assistance of counsel. Specifically, he argues that McClellan's performance was deficient because he improperly focused on collateral matters, could not hear, could not make cogent objections, could not effectively question witnesses, and could not follow along with the State's evidence.

¶ 79 Ineffective-assistance-of-counsel claims are judged under the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Peterson*, 2017 IL 120331, ¶ 79, 106 N.E.3d 944. To prevail on such a claim, "a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness and a reasonable probability exists that, but for counsel's errors, the result of the proceeding

would have been different." *Id.* "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding." (Internal quotation marks omitted.) *Id.* Additionally, a finding of ineffective assistance of counsel is precluded by the defendant's failure to establish either *Strickland* prong. *Id.*

¶ 80 1. *Improper Focus on Collateral Matters*

¶ 81 Defendant first argues McClellan rendered ineffective assistance because he improperly focused on collateral matters during defendant's trial rather than relevant issues in the case. To support his contention, defendant notes McClellan objected when the State inquired into Dey's age. He also points out that when Dey was tendered for cross-examination, McClellan made statements indicating that he was familiar with the witness. Specifically, the following colloquy occurred:

> "BY MR. MCCLELLAN:
>
> Q. One of the things this [*sic*] threw me, I was thrown a long time ago when I convinced myself it wasn't you.
>
> MR. BANACH [(ASSISTANT STATE'S ATTORNEY)]: Objection, not a question.
>
> Q. But—
>
> THE COURT: Get on to it, Mr. McClellan.
>
> Q. —I thought that when he called you to the stand he used the name Gates. Did you hear anything like? That.
>
> THE COURT: That was not the name, Mr. McClellan, please ask a question.

MR. MCCLELLAN: So—strike that. I don't have any questions, your Honor."

Ultimately, McClellan explained to the court that he knew members of Dey's family and stated that he "feared that [his] discomfort *** may have influenced the jury."

¶ 82 Additionally, defendant points out that during Butler's testimony, McClellan interrupted the State's direct examination, asserting that he had a "collateral" thought that involved Butler's counsel and asking to approach the bench. The trial court denied that request. Later, outside the presence of the jury, McClellan clarified his earlier interruption, stating he was trying to call the court's attention to the fact that Butler's counsel had previously indicated a desire to be present during Butler's testimony. The court responded that it did not "believe there's a Fifth Amendment right involved at this point."

¶ 83 First, the record does not support a finding that McClellan improperly failed to focus on issues relevant to defendant's case. Although he, at times, addressed or remarked on collateral matters, he nevertheless presented relevant arguments, cross-examined witnesses on relevant matters, and addressed critical issues in the case. Further, we agree with the State that defendant has failed to establish prejudice resulted from the three specific instances of alleged "improper focus" presented on appeal. Accordingly, we do not find that McClellan's assistance was ineffective on this asserted basis.

¶ 84 2. *Inability to Hear*

¶ 85 Defendant next argues McClellan was ineffective due to deficiencies in his ability to hear. Initially, although the record shows there were times when McClellan expressed an inability to hear what occurred during the trial, it also shows he communicated his hearing problems

to the trial court and the court assisted in resolving those issues. We find neither deficient performance by McClellan nor prejudice to the defendant from these occurrences.

¶ 86 Further, as argued by the State, defendant only argues that prejudice occurred in one instance relative to McClellan's hearing. Specifically, he asserted that McClellan's hearing difficulties had an impact on the trial court's misstatement of Butler's testimony as it related to the photographs in People's exhibits B-1 and B-2, resulting in their improper admission and Butler's ultimate testimony that defendant was pictured in the photos. The record, however, does not show that McClellan misheard or failed to hear Butler's testimony regarding the photographs. In fact, McClellan objected to the photographs on the basis that there was "no identification" and, after the court incorrectly stated that Butler had identified defendant, McClellan asserted to the court that he "didn't hear it that way" and that he thought the question was "who else was in the room."

¶ 87 Moreover, as previously discussed, the photographs at issue were not improperly admitted. Accordingly, we also reject defendant's ineffective-assistance-of-counsel claim on this asserted basis.

¶ 88 3. *Failure to Make Cogent Objections*

¶ 89 Defendant further argues that McClellan was ineffective because "[t]hroughout the trial [he] struggled to make cogent and timely objections." Specifically, he notes McClellan (1) objected to Dey's testimony regarding the victim's mental faculties "based on lack of expertise and foundation," (2) failed to object to daytime photographs of Bickford, and (3) objected to the admission of Butler's prior inconsistent statements on the basis that they were not appropriate impeachment. Again, defendant only argued prejudice with respect to the issue of the daytime

photographs. See Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1, 2017) ("Points not argued [in an appellant's brief] are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."). As a result, we confine our analysis to that issue.

¶ 90 First, we disagree with defendant's assertion that McClellan's lack of objection to the daytime photographs "could never be considered trial strategy." Generally, "[t]rial strategy includes decisions such as what matters to object to and when to object." *People v. Bates*, 2018 IL App (4th) 160255, ¶ 47, 112 N.E.3d 657. As defendant points out, a critical part of his testimony was that he mistook Bickford for a "home" on the night of the alleged offense. Without any photographs, the jury would have been left with defendant's bare assertion and evidence that otherwise indicated Bickford was an assisted living facility with two "units," several employees, the ability to house in excess of 50 residents, a parking lot, and security doors. The photographs at issue, which reflect that Bickford's exterior had somewhat of a house-like appearance, provided context for defendant's assertions. (Notably, no nighttime photographs were submitted at trial and it is speculative as to whether such photographs would have helped or hindered the defense.) Given the verbal descriptions of Bickford, defense counsel could have reasonably concluded that defendant would be worse off with no photographic support for his claim and that the admission of the daytime photographs with the explanation that they did not accurately reflect the way the facility looked at night would prove more helpful to his case.

¶ 91 Further, we agree with the State that there is no reasonable probability that the result of the proceedings would have been different had McClellan objected to the daytime photographs or if they had been excluded altogether. First, defendant neglects to mention that he also submitted a daytime photograph of Bickford into evidence, which was shown to the jury. On re-

view, he does not challenge his counsel's presentation of that photograph. Thus, even if the State's photos were not admitted, the jury would have still been presented with a daytime photograph of Bickford from which to judge defendant's credibility.

¶ 92 Additionally, "[i]t is settled that the fact that conditions had changed at the time the photographs were taken does not necessarily render them inadmissible, so long as the jury is not misled." (Internal quotation marks omitted.) *People v. Peeples*, 155 Ill. 2d 422, 474, 616 N.E.2d 294, 318 (1993). Here, Clark identified the photographs at issue and testified they accurately depicted Bickford as it appeared in July 2015. It was clear from the evidence presented, as well as the photographs themselves, that the photographs did not depict Bickford's appearance at night. Ultimately, the jury was not misled and the mere fact that the photographs were daytime photos rather than nighttime photos would not have necessarily rendered them inadmissible. Accordingly, we also find defendant suffered no prejudice.

¶ 93 4. *Failure to Effectively Question Witnesses*

¶ 94 Defendant also argues that McClellan was ineffective in the manner in which he questioned witnesses. As to this claim, defendant first notes that on cross-examination of Butler, McClellan elicited testimony that Butler signed a written statement asserting that defendant did not engage in any sexual activity with H.C. and that he left Bickford shortly after seeing her. He notes that on redirect examination by the State, Butler testified that although he signed the statement, it was written by defense counsel. McClellan then interjected, acknowledging that he "actually put those crooked letters on the paper."

¶ 95 In his brief, defendant fails to present a sufficient argument as to how McClellan's performance was deficient or how he suffered prejudice. We note that he cites case authority for

the proposition that a defendant can show ineffective assistance by establishing that his counsel's approach to cross-examination was objectively unreasonable (*People v. Pecoraro*, 175 Ill. 2d 294, 326-27, 677 N.E.2d 875, 891 (1997)); however, he has failed to elaborate on why McClellan's cross-examination of Butler was unreasonable for eliciting testimony from Butler regarding the written statement Butler signed. Due to the lack of a reasoned argument in his appellant's brief, defendant has forfeited this particular claim. See Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1, 2017) ("Points not argued [in an appellant's brief] are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.").

¶ 96 Forfeiture aside, in his reply brief, defendant asserts that McClellan's performance was deficient because he wrote the statement signed by Butler, calling into question the statement's reliability. Even assuming McClellan's performance was objectively unreasonable on this basis, we find defendant has not, and cannot, establish prejudice. The written statement contained essentially the same version of the facts as set forth in Butler's trial testimony. However, Butler's trial testimony contained internal inconsistencies that reflected negatively on his credibility at trial and suggested that his earlier statements to the police were truthful. Accordingly, whether there had been no written statement introduced at trial or whether Butler had written the same statement himself, we cannot conclude that the result of the trial would have been different.

¶ 97 Defendant further contends that McClellan was ineffective when cross-examining Simons. Simons testified for the State as an expert in the field of digital forensic examination. Defendant notes that during McClellan's cross-examination of Simons, the following colloquy occurred:

"Q. Are you available to teach people how to use their [S]martphones?

THE COURT: Mr. McClellan, is that a question?

MR. MCCLELLAN: I'm hesitant to ask some of these things, because frankly, I am the least electric—electronic-capable person in the world."

Defendant argues McClellan's statements show he failed to understand and ask important questions in a case that involved electronic communications. He further asserts that there is a reasonable probability that a more vigorous cross-examination of Simons would have supported defendant's explanation of the underlying events.

¶ 98 Here, the record indicates McClellan's comments were facetious and that he did cross-examine Simons regarding his examination of Butler's phone. In particular, McClellan elicited testimony from Simons that his examination of the phone did not yield "anything that showed a connection" between Butler and defendant. Simons also identified the names "Cherokee" and "Taylor Banks Banks" as being significant to the investigation. On appeal, defendant has failed to identify specific questions that McClellan should have asked Simons or prejudice from such a failure. Accordingly, we find defense counsel was not ineffective on this basis.

¶ 99 5. *Failure to Follow Along With the State's Evidence*

¶ 100 Finally, on appeal, defendant argues McClellan was ineffective because he could not follow along with the State's evidence. With respect to this issue, defendant contends as follows:

"The trial court, throughout the trial, appeared to admonish, dismiss[,] and try to assist defense counsel in representing [defendant]. Defense counsel's comments and actions throughout the trial were not only odd, they show that he was not able

to effectively represent [defendant.] This ineffectiveness deprived [defendant] of his Sixth Amendment [r]ight to effective counsel."

¶ 101 Here, defendant's argument as to this particular issue is not entirely clear and he cites no portion of the record or any legal authority to support his claim. He appears to rely on each of the points previously raised to argue that McClellan's errors, when considered cumulatively, denied him his right to effective representation. For the reasons already expressed, we find that defendant has not established that he received ineffective assistance as to any of those claims. Also, our review of the record does not support defendant's characterization of McClellan's performance. Rather, it shows McClellan presented appropriate arguments to the jury that were relevant to the issues in the case, appropriately cross-examined the State's witnesses, and presented relevant evidence on defendant's behalf. Defendant has failed to establish that his counsel's performance was ineffective.

¶ 102 III. CONCLUSION

¶ 103 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we grant the State's request that defendant be assessed $75 as costs for this appeal.

¶ 104 Affirmed.

¶ 105 JUSTICE KNECHT, dissenting:

¶ 106 I respectfully dissent. I will only mention the oddity of using daytime photographs of Bickford when defendant asserted the assisted living center looked like a home after midnight on a dark, summer night. Further, defense counsel seemed to lack focus throughout the trial.

¶ 107 The telling issue is the photograph of someone's penis. Butler was a witness of many opinions and was willing to change them to suit the question or situation. Butler contacted individuals other than defendant to engage in sexual activities with him or a resident of Bickford during the summer of 2015. The identification of the penis in the photograph was a key element of the State's case.

¶ 108 The trial court interjected itself into the proceedings when defense counsel objected to the photograph's admission into evidence. The court misstated the evidence when overruling counsel's objection, stating, "He said it was him[,]" and then stating, "[Butler] identified [defendant] as the person in the photograph." That was not true, and highly prejudicial. Any juror would believe the issue of identification had been decided by the judge.

¶ 109 Butler had already said, "I can't say" when asked, "Whose penis is that?" He said, "I mean it was a long time ago, so I am not really [100%] sure who I can say that is ***." Butler was not consistent in his testimony. He denied defendant engaged in a sex act with a Bickford resident. Then he admitted he told a police officer someone had engaged in a sex act with a resident but stated, "I don't know if I was talking about [defendant]." There were other statements from Butler on both sides of this key question.

¶ 110 Any uncertainty the jury might have had about Butler's testimony was erased when the judge solved it for them by gratuitously saying, "He identified [defendant] as the per-

son in the photograph." It was the equivalent of the judge testifying when he misstated the evidence. It was a prejudicial error that undermines any confidence in the verdict.