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2012 IL App (4th) 100768-U

Filed 1/25/12

NO. 4-10-0768

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Livingston County
ALAN E. HALE,)	No. 09CF322
Defendant-Appellant.)	
)	Honorable
)	Jennifer H. Bauknecht,
)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices McCullough and Cook concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court, by properly exercising its discretion as trier of fact, determined the credibility of witnesses, how much weight to afford their respective testimony, resolved conflicts in the evidence, drew reasonable inferences from that evidence, and found the State's version more persuasive than defendant's. The court's decision was supported by the record.
- ¶ 2 The trial court erred in assessing a public-defender fee without conducting a hearing on defendant's ability to pay.
- ¶ 3 Defendant, Alan E. Hale, appeals from his convictions after a bench trial on three drug-related offenses. He was sentenced to three concurrent prison terms, the maximum of which was five years. In this direct appeal, he claims his convictions must be reversed because the State's primary witness against him was not credible. He also claims the trial court erred in assessing a public defender's fee without conducting a hearing on his ability to pay. We affirm defendant's convictions, vacate the public-defender fee, and remand for an ability-to-pay hearing as specified

herein.

¶ 4

I. BACKGROUND

¶ 5 In December 2009, the State charged defendant with (1) one count of unlawful delivery of a look-alike substance (720 ILCS 570/404(b) (West 2008)) for knowingly distributing to a confidential source a pill represented to be morphine on January 30, 2009 (count I); (2) one count of unlawful delivery of a controlled substance (720 ILCS 570/401(c)(1.5) (West 2008)) for knowingly distributing to a confidential source more than 1 gram, but less than 15 grams, of fentanyl on February 17, 2009 (count II); and (3) one count of unlawful delivery of a controlled substance, (720 ILCS 570/401(d) (West 2008)) a substance containing morphine on February 17, 2009 (count III).

¶ 6

On April 5, 2010, defendant's bench trial began. The State's first witness was Jeffrey Flowers. He testified he had recently been arrested on a drug charge and, in relation to that arrest, he met Pontiac police officer Mike Willis. He agreed to assist Willis as a confidential source in future controlled purchases. The prosecutor asked Flowers why he agreed to do so. Flowers responded: "Just a little bit of everything. The [reason] with [defendant] was that he had ultimately called the cops on me; and that had upset me considering he knew everything and then to kind of benefit myself, too, I guess." He said he was not "specifically promised anything" from Willis, but he agreed to "make buys from [defendant]," Flowers' brother-in-law at the time.

¶ 7

Referring to January 30, 2009, Flowers testified he telephoned defendant "to make sure he was home and everything and see what he had." Flowers asked defendant if he "had a couple of fentanyl patches." According to Flowers, defendant indicated he did and told him to "'stop down and [they] could talk.'" Flowers met Willis that afternoon in the park to discuss the potential

transaction. Willis searched Flowers and his vehicle then gave him \$35. Flowers said he intended to buy MS contin (morphine) from defendant. When asked how MS contin came up, Flowers said he had "just asked [defendant] for pain killers, and that's what was acknowledged." Flowers said he did not know what MS contin looked like.

¶ 8 When Flowers arrived at defendant's residence, one of the children opened the door. Flowers went inside and found defendant. They entered the bedroom together where Flowers saw his sister laying on the bed. He said she walked out of the room when they entered. Defendant handed Flowers eight or nine white round pills with numbers or letters on them. Flowers agreed to purchase them and placed the pills in the cellophane wrapper taken from his pack of cigarettes and into his pocket. Flowers said defendant had these pills from his recent back surgery. Flowers left the residence to meet Willis.

¶ 9 Some time after this transaction, Willis contacted Flowers and advised that the pills were not MS contin. Flowers contacted defendant and asked why he had not given him MS contin. According to Flowers, defendant said his wife did not want him to because "of [Flowers] being her little brother." Defendant admitted he had given him "somas" instead.

¶ 10 On February 17, 2009, Flowers made another connection with defendant with Willis' knowledge. Defendant told Flowers he had a fentanyl patch for him. Flowers met Willis at the same park. Willis conducted the required search then gave Flowers \$20. Flowers drove to defendant's residence. One of the children answered the door again and Flowers stepped inside. The entire family was in the living room. Flowers followed defendant to the bedroom where defendant demonstrated how to apply the patch. Flowers placed it in his pocket and gave defendant \$20. Defendant handed Flowers a small purple pill defendant said was "the actual MS contin." He told

him to "take it," meaning swallow it at that time, but Flowers told him he would wait until later. Flowers placed the purple pill in his pocket as well and left the residence to rejoin Willis.

¶ 11 On cross-examination, Flowers agreed that he "undertook this enterprise because [he] wanted to get back at [defendant] and [he] also wanted to help [himself]." He acknowledged his multiple theft convictions in 2002; his burglary and theft convictions in 2003; and his deceptive-practices conviction in 2008. Flowers testified he was not certain "exactly what [] charge" he was currently facing, but believed it was a felony. He admitted he was hoping to benefit in his case by agreeing to participate in the transactions with defendant.

¶ 12 Flowers further testified he had also purchased drugs on February 25, 2009. He went to defendant's residence with the intent to purchase the drugs. Defendant had just left but, Flowers' sister was there. He said she did not give him the drugs. Flowers went into the bedroom and got the drugs that had been "left for [him] to pick up" and he left the money there. The following exchange occurred:

"Q. You don't like [defendant], do you? You were mad at him on this occasion because of the fact you think he turned you in for drugs. Right?

A. I'm not necessarily mad at him. At the point in time, I was.

Q. And even though he was going through the divorce or not getting along with your sister, you're saying he was willing to sell drugs to you?

A. Yeah. I don't get along with my sister.

[Defense counsel accused Flowers of stealing multiple items from defendant's home, while Flowers denied it.]

Q. You'd never taken anything, and you were just on the best of terms with him. Is that right?

A. I'm not saying we were on the best of terms, but I never stole from the man.

Q. Why did he not like you even before all this started?

A. Me and Alan—My parents split up. I moved in with my sister. Alan tried to be my dad, and I wasn't having it.

Q. You never got along with him, and he never got along with you. Right?

A. Well, as far as I know we did. I mean, I lived with the guy for seven years.

Q. And on this occasion, you were so upset you thought, hey, I can kill two birds with one stone, help you with your own case and your drugs and your past felony history and get back at Alan Hale and set him up. Right?

A. It wasn't a revenge thing if that's what you are getting at."

¶ 13 On redirect examination, Flowers testified he was surprised when defendant was not at home on the third transaction because they had spoken earlier and he was expected to be there. His sister told Flowers defendant had just left with his mother. She telephoned defendant while Flowers was present in reference to this transaction. After Flowers' testimony, the trial was

adjourned.

¶ 14 On May 7, 2010, the trial continued. Officer Willis testified next for the State. He said he met Flowers initially when "we" purchased cannabis from him and, as a result, Flowers was arrested. Soon after his arrest, he "contacted [them] wanting to work." Willis said he promised Flowers "[o]nly that his level of cooperation would be made known to the State's Attorney." No specific deals were made. Prior to January 30, 2009, Willis had worked with Flowers only once in a controlled transaction with another seller. Flowers telephoned Willis on January 30, 2009, and advised him of the potential controlled purchase with defendant. Willis testified consistently with Flowers' prior testimony regarding the circumstances of this transaction, as well as the later two. Each time, Willis followed Flowers and watched him enter defendant's residence. In the first two transactions, he traveled back to the park to wait while Inspector Nolan maintained surveillance on Flowers in a separate vehicle. Nolan was not involved in the third transaction, as Willis utilized a recording device attached to Flowers.

¶ 15 On cross-examination, Willis testified he was not aware that defendant and Flowers had "difficulties." Counsel asked Willis if knowing about these "difficulties" would have affected his opinion about Flowers' truthfulness or Flowers' role as a confidential source. Willis said he is "always concerned with the confidential source's truth."

¶ 16 The State presented the trial court with a stipulation relating to Inspector Nolan's testimony, to wit: "[H]e was also present and observed the portions, he surveilled the two transactions during the times that [Officer] Willis did not actually have actual observance of that; and again, he observed the confidential source neither obtain anything or drop off anything." The State rested.

¶ 17 Defendant testified on his own behalf. He said he and his wife separated in December 2009. They married in January 1997, so he had known Flowers for 14 years. Flowers lived with them "on and off" for approximately seven years, ending in 2008. Defendant said he "had basically just put [his] foot down and had had enough." According to defendant, Flowers had illegal drugs in the house, so defendant called the police. From that point, defendant "wouldn't have any *** relationship with him, anything to do with him."

¶ 18 Defendant testified that on January 30, 2009, Flowers visited their home. Defendant denied there was any transaction or interaction between him and Flowers. Defendant said he and his wife were in the bedroom when Flowers arrived. Flowers came into the bedroom and then Flowers and his wife went into another room while defendant remained in the bedroom. On February 17, 2009, Flowers visited again. Defendant denied any transaction occurred during this visit as well. Defendant admitted he had been prescribed MS contin and the fentanyl patch. He recalled that sometime in February 2009, he telephoned his wife, while he was out-of-state on work-related travel, asking her to dispose of the patches due to the potential danger to children. Defendant admitted he had given two of his prescription Vicodin pills to Flowers' brother, Chris, one weekend because Chris was unable to renew his prescription until Monday and he was out of pills. At the close of defendant's testimony, the trial was adjourned.

¶ 19 On June 21, 2010, the trial resumed. Defendant rested and the State recalled Willis in rebuttal. Willis testified that, during his interview with defendant in May 2009, defendant told him he had personally thrown away his fentanyl patches in the garbage, recalling that he had put them in the bottom of the garbage so his children would not get them. He did not state that he had asked his wife to dispose of them.

¶ 20 After considering the arguments of counsel, the trial court announced its ruling, finding the State had proved defendant guilty beyond a reasonable doubt. Specifically, the court stated:

"First of all, I agree with [the prosecutor] that I found Mr. Flowers to be a very credible witness; and I understand that he may have, well, first of all, he has a record. And as [the prosecutor] has pointed out, that's what you're going to get when you are dealing with confidential sources. That's just the bottom line.

But, you know, there's a way to tell if people are being honest and up front with you; and simply because Mr. Flowers has a record or doesn't particularly care for the defendant, whatever it is, that alone to me is not enough to make me think, okay, all of his testimony is not credible. I look at other things. Body language, how the evidence or the testimony comes out and what other facts there are to support what not only the confidential source is saying but what the defendant is saying.

And here, it's very clear that what the defendant is arguing doesn't really add up based not only on the defendant's own statements but based upon everything else that came out during the trial; and my feeling was that Mr. Flowers was a credible witness. Not only did Mr. Flowers testify credibly to the two buys that took place, *** but his testimony[,] coupled with the defendant's testimony

and particularly[,] the defendant's argument[,] do[es]n't make sense.

I mean, it doesn't make sense that the defendant would, if I believe the defendant's story and that is that it was always Mrs. Hale doing the selling, number one, as [the prosecutor] pointed out, you either lied on the stand which I suspect is the case or you lied to Mr. Willis the night that he interviewed you. But boy, that stuck out like a sore thumb in the court's mind."

The court continued to refer to specific examples of defendant's testimony which caused her to question his credibility. The court continued:

"[A]nd again, I can't stress enough that I did find him [referring to Flowers] to be a credible source, or a credible witness. He was not, you know, he didn't seem to be making things up. He was not uncomfortable when he was discussing matters that, you know, he probably didn't want to talk about, specifically about his sister. But the drugs were your drugs. They were in your house. They were in your dresser drawer, and you were there.

So I just find that Mr. Flowers was credible. The defendant was not credible. And based upon that, I believe the State has met its burden of proof so I do find the defendant guilty on counts I, II, and III."

¶ 21 Defendant filed a posttrial motion, claiming the State failed to prove him guilty

beyond a reasonable doubt on the same basis as that presented in this appeal. The trial court denied defendant's motion. The court sentenced defendant to concurrent terms of four years on the conviction involving the look-alike-substance (count I), and five years each on the remaining two counts, involving fentanyl (count II) and morphine (count III). The court also assessed several fees, fines, and costs including a \$400 assessment for the public defender. The court denied defendant's motion to reconsider his sentence. This appeal followed.

¶ 22

II. ANALYSIS

¶ 23 Defendant contends that his convictions must be reversed because Flowers was not a credible witness. He claims that because (1) Flowers was facing a felony drug charge and had a "criminal past," (2) Flowers admitted he became a confidential source primarily to "get back at" defendant for evicting him from his home and for calling the police on him, and (3) Flowers' testimony was "entirely uncorroborated," his testimony should not have been believed and therefore, the State failed to prove defendant guilty beyond a reasonable doubt.

¶ 24 When a defendant challenges the sufficiency of the evidence supporting his conviction, as in this case, by contesting a witness's credibility, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). "It is the trier of fact's responsibility to determine the witnesses' credibility and the weight given to their testimony, to resolve conflicts in the evidence, and to draw reasonable inferences from the evidence; we will not substitute our judgment for that of the trier of fact on these matters." *People v. Brooks*, 187 Ill. 2d 91, 132 (1999). Reversal is justified only where the evidence is "so unsatisfactory, improbable or implausible" that it raises a reasonable doubt as to the

defendant's guilt. *People v. Slim*, 127 Ill. 2d 302, 307 (1989).

¶ 25 The trial court heard both Flowers' testimony and defendant's testimony. Since neither version of events was so implausible or improbable as to call its veracity into question, the decision of which version to believe rested with the court. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001). After hearing both stories, viewing the witnesses while testifying, and being made aware by defense counsel of the alleged deficiencies in Flower's testimony, the court nevertheless chose to believe Flowers over defendant. This was its prerogative in its role as the trier of fact. *People v. Moser*, 356 Ill. App. 3d 900, 911 (2005). Because the trier of fact is in a superior position to assess the credibility of witnesses, we will not disturb that determination. *People v. Wittenmyer*, 151 Ill. 2d 175, 191-92 (1992) (the trial judge, as the fact finder, was unequivocal that he believed the testimony of the State's witnesses and rejected the testimony of defense witnesses; it was in his province to do so).

¶ 26 Given the deferential rules of appellate review, we will not reassess the witnesses' credibility, and we therefore acquiesce in the trial court's finding with regard to defendant's sale of drugs to Flowers. We cannot say that the court's findings are so unreasonable, improbable, or unsatisfactory as to create a reasonable doubt of defendant's guilt. See *People v. Wells*, 241 Ill. App. 3d 141, 147 (1993) (trier of fact—a jury in that case, was faced with credibility question and chose to believe certain testimony over the defendant's theory, a decision that was within its province and will not easily be disturbed). We affirm defendant's convictions.

¶ 27 Defendant next claims the trial court erred in assessing a \$400 fee as reimbursement to the county for the services of the public defender without conducting an ability-to-pay hearing as required by section 113-3.1(a) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/113-

3.1(a) (West 2008)). The State concedes the error and we accept the State's concession. We thereby vacate the \$400 public-defender assessment and remand for a hearing in accordance with the statute and the notice requirements as set forth in *People v. Johnson*, 297 Ill. App. 3d 163, 164-65 (1998) ("Thus, the statutorily required hearing need only (1) provide the defendant with notice that the trial court is considering imposing a payment order, pursuant to section 113-3.1 of the Code, and (2) give the defendant an opportunity to present evidence regarding his ability to pay and other relevant circumstances, and otherwise to be heard regarding whether the court should impose such an order.").

¶ 28

III. CONCLUSION

¶ 29 For the foregoing reasons, we affirm the trial court's judgment convicting defendant guilty of all three counts for which he was charged. We vacate the portion of the sentencing judgment that assesses a \$400 public-defender fee and remand for further proceedings consistent with this court's decision set forth above. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal. *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978); *People v. Williams*, 235 Ill. 2d 286, 297 (2009).

¶ 30

Affirmed in part and vacated in part; cause remanded with directions.