2020 IL App (2d) 180414-U
No. 2-18-0414
Order filed March 9, 2020

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. KEVIN W. WHEAT, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Stephenson County. No. 13-CF-270 Honorable Michael P. Bald, Judge, Presiding.

JUSTICE BRIDGES delivered the judgment of the court.
Justices Schostok and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not manifestly err in denying defendant's claim of ineffective assistance of trial counsel, as the evidence refuted defendant's claim that counsel had falsely promised to call certain witnesses at trial and fraudulently induced him to reject a guilty plea offer.

¶ 2 After a jury trial, defendant, Kevin W. Wheat, was convicted of unlawful possession of cocaine with the intent to deliver (720 ILCS 570/401(a)(2)(A) (West 2012)) and sentenced to 22 years' imprisonment. On appeal, he contended that the trial court erred in denying his motion to suppress the search warrant for his residence and that his trial counsel had been ineffective for failing to call certain witnesses and for misleading him into rejecting a plea offer. We upheld the

search warrant but remanded for a hearing in accordance with *People v. Krankel*, 102 Ill. 2d 181 (1984), on whether his trial attorney misled him into rejecting a plea offer. *People v. Wheat*, 2017 IL App (2d) 141057-U.

¶ 3 On remand, the court held an evidentiary hearing and ruled against defendant. He appeals, reasserting his claim of ineffectiveness of counsel. We affirm.

¶ 4 I. BACKGROUND

¶ 5 The full factual background can be found in our order in defendant's first appeal. Here, we note the following. On November 22, 2013, police searched defendant's house and person. Defendant was arrested. Approximately $2000 in cash was found on his person. On November 27, 2013, the trial court held a preliminary hearing and found probable cause for the charge. Defendant immediately requested a Rule 402 conference (see Ill. S. Ct R. 402(d) (eff. July 1, 2012)) for discussing a possible guilty-plea agreement. The conference was inconclusive. On January 6, 2014, defendant moved to suppress evidence that had been recovered from his house, though not cash that had been taken from his person. After a hearing, the court denied the motion.

¶ 6 Discovery proceeded. On August 14, 2014, defendant's attorney, Anthony Peska, filed a document listing Steve Enck and Kyle Dailey as possible witnesses. The next day, Peska filed a notice that he had a subpoena for defendant's financial statements from the State Bank in Freeport. Peska stated that he might introduce statements and might call Terrie Keys, a bank employee, to testify.

¶ 7 On August 27, 2014, the State filed a list of witnesses that included several law-enforcement officers and experts. It also listed Becky Hiester, Keys, and two parole officers, Lynn Perry and Andrew Munoz, because defendant had been on mandatory supervised release (MSR) before his arrest. On August 29, 2014, defendant filed several motions *in limine*, including one to

bar testimony from Perry and Munoz and to exclude any testimony relating to MSR, "monitoring the Defendant, the Defendant being registered to live at a particular address, the Defendant being registered to work for a particular employer, or what travel permissions the Defendant was permitted [*sic*]" and "where the Defendant worked while on [MSR]."

¶ 8 On September 17, 2014, the court heard the various motions. Peska argued that the testimony of Perry and Munoz, who had been responsible for monitoring defendant, would be irrelevant and unduly prejudicial. The prosecutor, Carl Larson, responded that the State could describe them as State employees "who [kept] track of employment[,] which could easily be employment officers." He said that he had told Peska specifically what he anticipated Perry and Munoz would say. He argued that their testimony was relevant because Becky Hiester, who was also on the State's witness list, would testify that defendant had never worked for Hiester Construction. Larson acknowledged that he had disclosed Perry and Munoz "in the last couple of weeks," because he had only recently discovered bank records that suggested that defendant performed lawn care sporadically but did not appear to have any regular employment. Larson contacted a parole officer and learned that defendant had registered himself as employed by Hiester Construction. However, the company told Larson that defendant did not work there.

¶ 9 Larson argued that this evidence was relevant because defendant was planning to put on evidence that the cash found on his person had a "legitimate source." The State, of course, planned to argue that the cash indicated drug dealing. Thus, Becky Hiester's testimony would be relevant to refuting defendant's argument that all or a portion of the cash was payment from her firm. Perry and Munoz could shed light on the issues of intent to deliver and identity, *i.e.*, whether defendant was the person who had knowingly possessed the cocaine.

¶ 10 Peska responded that, if the State's only purpose was to prove that defendant had been unemployed at the time, it need not call two parole officers to do so. Moreover, if a parole officer testified for the State, it would be difficult to cross-examine him or her without disclosing defendant's criminal history. The court took the motion under advisement.

¶ 11 The hearing turned to other matters. Peska told the court that he had submitted a witness list and had also talked to Larson about Dailey. He said that he probably would not call Dailey. But with the addition of Perry, Munoz, and Becky Hiester to the State's witness list, Peska "just wanted to announce that [he] probably" would subpoena Kyle Hiester, the foreman of Hiester Construction. Peska acknowledged that the court had still not decided whether to allow Perry, Munoz, and Becky Hiester to testify. He told the court, "Now, if the Court's ruling *** comes back to a point where I don't need that foreman, then I won't necessarily call that foreman." Larson did not object to subpoenaing for Kyle Hiester, and the court held that that would be proper.

¶ 12 On September 17, 2014, Peska filed a notice that he might call Kyle Hiester Construction. On September 22, he filed a notice that he might call Mary Shianna, an employee of State Bank. On September 24, the State filed a notice that it might call Eric Field, one of defendant's purported customers. That day, the State also filed a notice of disclosure that attached one page of a supplemental law-enforcement report of an interview with Field.

¶ 13 On September 25, 2014, the State moved *in limine* to admit Field's testimony. The motion alleged that, according to defendant's bank records, he cashed three checks from Field between September 17 and 24, 2013; all three stated that they were for " 'lawn care.' " However, Field told the police that he actually wrote the checks for cocaine. The State argued that the evidence was relevant to prove defendant had known the cocaine was there and had intended to distribute it.

¶ 14 On September 25, 2014, Larson told the court that he did not want the motion heard that day, because he had not yet interviewed Field. He asked that the motion be heard on the morning of trial, September 29. Peska objected, and Larson acquiesced in the court's choice of the next day. Larson wanted to add some names to his witness list, and the court told him to submit a comprehensive list the next day.

¶ 15 The next day, September 26, 2014, the State submitted the list. Among the names were Enck, Shianna, Perry, Munoz, Becky Hiester, Kyle Hiester, and Field. That day, the parties reargued defendant's motion *in limine* to bar the parole officers' testimony. The court postponed a ruling until when (and if) the State put on its rebuttal. The parties turned to the State's motion *in limine* as to Field. Larson expressed doubt that he would call Field. He withdrew the motion.

¶ 16 On September 29, 2014, defendant's jury trial began. The State presented evidence that the search of defendant's house had revealed a scale and two plastic bags containing cocaine in a hole cut into the drywall in a closet. The police also found numerous sandwich bags, an alleged "drug ledger," and a surveillance camera over the back door to the house.

¶ 17 Shortly after the State rested, the judge asked Peska whether he was ready to present his case. Peska related that he had previously disclosed Enck and Dailey as his principal witnesses and had later added bank employees. However, he continued, he had since decided not to call Dailey; he would check to see whether Enck had shown up from Iowa as he had promised, but he did not plan to call him either. After defendant told the court that he did not want to testify, Peska exited to make copies of a motion to exclude defendant's prior convictions.

¶ 18 Defendant then told the judge that Peska had told him earlier that he would call the witnesses that defendant had wanted, including Enck and Dailey, but that he had failed to subpoena them and now indicated that he would not call them. Peska returned, stated that he had looked for

Enck but had not found him. He presented his motion to exclude prior convictions, which was granted in part and denied it in part. Defendant stated that he still did not want to testify, but he had believed that his witnesses were going to testify and if Peska planned not to call them, he should have told him before trial. Although he did not believe that the State's evidence proved that the drugs had been his, he believed that the jury would convict him unless he put on evidence, because juries usually make defendants prove their innocence. He said that the witnesses should have been subpoenaed and ready to testify.

¶ 19 Peska responded as follows. He had subpoenaed Kyle Hiester and Mary Shianna; neither had shown up. Peska had decided early on not to call Dailey and had discussed his decision with defendant. Enck lived in Iowa but had assured Peska that he would appear for trial; however, he had decided not to call Enck even if he was present. Peska noted that the court and the State were aware that "trial strategy changes sometimes mid-trial" and that he was "entitled" in his discretion not to put on witnesses that he had previously listed. In sum, he would put on no evidence.

¶ 20 In his closing argument, Peska told the jury that the State had presented the events out of sequence to obscure the gaps in its evidence. He posited innocent explanations for the sandwich bags, surveillance camera, and alleged drug ledger. Moreover, he noted, the only cocaine found had been concealed in a hole cut in the drywall of a closet; defendant had moved in recently and might not have known about concealed drugs that a prior resident might have left there.

¶ 21 The jury found defendant guilty. At sentencing, defendant stated in allocution that Peska had initially told him that he would present the witnesses he wanted, then revealed otherwise only after the State rested. Defendant's former roommate (not identified by name but apparently Enck) could have explained incriminating evidence in the residence, and the bank statements could have explained the cash found on defendant. The court sentenced defendant to 22 years' imprisonment.

¶ 22 On appeal, we rejected defendant's contention that a remand was required so that the court could hear his claim that Peska had neglected his case by refusing to call Dailey, Kyle Hiester, Enck, and Shianna and thereby misled him into declining a plea offer. We noted Peska's statement at the pretrial hearing that he would probably not call Dailey and that, in the trial court, defendant had not mentioned Kyle Hiester as a witness whom Peska should have called. Therefore, the claim on appeal of unfair surprise would be limited to Peska's decision not to call Enck and Shianna. *Wheat*, 2017 IL App (2d) 141057-U, ¶ 55. We concluded that defendant had not explained "even in general terms" (*id.* ¶ 57) how Enck's testimony could have rebutted the State's evidence of possession or how Shianna and the bank records could have provided an innocent explanation for the cash found on defendant's person (*id.* ¶ 59).

¶ 23 We further rejected defendant's argument that Peska had misled him into declining a plea offer. We noted that the record did not establish whether that the State made a plea offer. *Id.* ¶ 61. We remanded the cause "for the trial court to inquire into the factual basis for defendant's claim that [Peska's] misleading advice induced him into rejecting a plea offer (or offers), to his prejudice." *Id.* ¶ 62. No other claim of ineffectiveness was to be considered. *Id.*

¶ 24 On remand, the trial court appointed new counsel for defendant and held an evidentiary hearing limited to the issue specified in our order. Defendant and Peska testified.

¶ 25 Defendant testified on direct examination as follows. Before trial, he met with Peska only on court dates and never at the jail. At the preliminary hearing, after the Rule 402 conference, defendant told Peska that he would accept a plea to a Class 1 felony in return for an eight-year sentence but that the State's offer was not reasonable. Ten months later, right before the trial was to begin, Peska told defendant that the State had offered a plea to a Class 1 felony, with an 11-year sentence, but that he could go back and get a deal with a "single digit" sentence. Defendant

testified further, "I said all my witnesses are going to be there, right? And he said yeah. And I said why would I take a deal? And that was it."

¶ 26 Defendant testified that, before trial, he and Peska had met several times before court dates and talked about witnesses. Defendant had also sent Peska letters advising him about potential witnesses. Also, Dailey had visited defendant in jail and told him that Peska had said that he did not want Dailey to testify, because there would be "retaliation by the State." Defendant relayed this to Peska, and they talked about other potential defense witnesses: "They were all going to testify. That was my whole point of turning down the plea." Peska did not tell defendant how he would secure their presence, but defendant had assumed that Peska had subpoenaed them. The availability of the witnesses was crucial to defendant's decision to go to trial; he had had two trials before and he "would never go to trial without a defense. The jury assumes you guilty anyways."

¶ 27 Defendant testified that, during the recess, he told Peska that the State's case was "nothing" and that Peska just had to present his witnesses. Peska told him that his witnesses "weren't there." Defendant became angry and asked Peska what he was talking about. Peska told him that his witnesses were not going to be there and that he had not subpoenaed them. This was the first time he had told defendant that he would not call any witnesses. Had defendant known that Peska would not call witnesses, he would have taken the State's offer.

¶ 28 Defendant testified on cross-examination as follows. At the outset of the case, he believed that the State had "no evidence" against him, but he felt that a jury would convict him anyway, because the process is "pretty well stacked against you." On the morning of trial, he turned down an offer from the State. He did not ask for probation, and it was never offered.

¶ 29 Asked whether Peska should have known in advance what the State's witnesses would have said, defendant testified, "Yes *** on a simple case like this." Asked what his witnesses'

testimony would have been; he responded, "I don't believe I really have to get into that." Asked "What if the witnesses were no good for your case?," defendant responded, "That's not what we're here for today. But *** that's for your speculation."

¶ 30 Defendant testified that, immediately before trial, Peska told him, "They are offering you 11 at a Class 1. I'll go right back and get you the single digits that you wanted." Defendant asked Peska whether his witnesses would be there; Peska said yes; defendant said, "[T]hen why would we take it?"

¶ 31 On examination by the court, defendant testified as follows. After the Rule 402 conference, he received an offer that he rejected because the sentence was much too high. The only other offer was made right before trial. Peska told him that the State had offered 11 years' imprisonment but he could get the single-digit sentence that defendant had wanted originally. Defendant did not suggest a counteroffer. After Peska reassured him that his witnesses would be there, defendant said that he did not want to plead guilty.

¶ 32 Peska testified on direct examination as follows. Before trial, he spoke with defendant at the courthouse, and defendant made him aware of the witnesses that he wanted him to obtain. At the preliminary hearing, defendant was eager to resolve the case and requested the Rule 402 conference. At the conference, Larson offered a deal much higher than what defendant would accept. To Peska's recollection, Larson's offer included a 15-year sentence, but defendant wanted a 7-year sentence. Peska recalled that, on the day of trial, Larson made an offer that included an 11-year sentence. Larson asked Peska to make a counteroffer. Peska spoke to defendant and asked him for a counteroffer. Peska testified, "[Defendant] said [']tell him I would take 6[']. And then he chuckled and said [‘] no, tell him I'll take probation.[’] And then he said[‘]I probably wouldn't

even take that.[’] ” Peska found defendant’s statements “bizarre,” but he told Larson that defendant would take probation. Larson scoffed and departed.

¶ 33 Peska testified that, initially, defendant had “kind of wanted to call” several people, and he and defendant then narrowed the list. These included, at some point, Dailey, Enck, Shianna, and Kyle Hiester. By the time the State had finished its case, Peska had changed his mind about calling any witnesses, but the decision was not entirely based on the State’s evidence. Very early on in the case, Peska had decided not to call Dailey. Also, although subpoenaed, Kyle Hiester was not a high priority because he could have done little but “rebut some things.” Peska had spoken to defendant about Shianna, and he had subpoenaed defendant’s bank records. Peska also spoke to Enck, who lived in Iowa but had told Peska several times that he had no trouble coming to court for defendant’s case.

¶ 34 The State asked Peska whether, given how the State’s case had proceeded, any of the possible witnesses would have helped or hurt defendant. Peska responded that “some of them” could have helped but that calling them would have enabled the State to call rebuttal witnesses who would have “obliterated any chance of any argument we had.” For instance, evidence of the sources of defendant’s cash could have been countered by evidence that the names “Kyle D.” and “Kyle H.” on the drug ledger referred to Dailey and Kyle Hiester. Also, defendant and Enck had told Peska that they intended to put the cash toward buying a boat. However, “probably *** right around when the State rested their case,” Larson had told Peska that if he put on any evidence about the money, Larson would call rebuttal witnesses, including Becky Hiester, Eric Field, and a parole officer. In particular, Field had told the police that his checks to defendant were for drugs. The parole officer would have testified that defendant had “never had a job anywhere,” and Becky Hiester would have testified that he never worked for Hiester Construction. Thus, Kyle Hiester’s

testimony would not have helped on the issue of defendant's employment; Shianna's testimony about his bank deposits would not have helped him; and Enck's testimony, even if helpful, would have triggered unfavorable evidence on rebuttal.

¶ 35 Peska testified that having defense witnesses testify about the cash that defendant had possessed would have produced "extremely damning" consequences; this was a drug prosecution and the rebuttal evidence would have brought out that defendant had no legitimate source of income and was getting all his money from drug sales. During the recess, Peska had not thought it wise to explain his decision in detail, because "it was still an open matter."

¶ 36 Peska testified that he decided late not to call Shianna but had expected Enck to be available, as he had kept him apprised of the court dates and had never heard that he would not appear. Therefore, during the recess, he checked to see whether Enck was there. But even had Enck been there, Peska probably would not have called him, given the likely consequences in rebuttal.

¶ 37 Peska did not believe that he had duped or misled defendant in relation to the witnesses and any plea agreement. He had planned on calling Shianna and Enck and had expected Enck to be there; only after realizing the danger of calling them did he decide not to do so.

¶ 38 Peska testified on cross-examination as follows. When defendant provided him with the names of the potential witnesses (other than Shianna), he and Peska went over what their testimony would likely be and where they could be located. Other than Kyle Hiester, he spoke with them and believed that he knew what they would say. Asked whether he had had these informative conversations "maybe weeks or even months before the actual trial," Peska testified, "Time frames are difficult ***. I would have to refer to notes and things of that nature. But to say that I learned about what they were going to testify to in advance of trial is fair."

¶ 39 Peska testified that, in the day or two preceding the trial, he had some discussions with defendant. As best he could recall, he told defendant that he had subpoenaed Shianna, and Enck had told both Peska and defendant that he would show up for trial.

¶ 40 Peska testified that, before trial, defendant had said that he felt that the witnesses he wanted to testify were important "to explain an innocent source of the currency." Peska "understood his concern," but he did not think that the witnesses would necessarily strengthen or weaken the case. But he acknowledged that "[defendant] was very persistent that he wanted those people to testify to explain that money away."

¶ 41 Peska testified that the witness list that he prepared before trial would have included the four people whom defendant wanted him to call. After the State rested, he had expected Enck and Kyle Hiester to appear, although the latter was not a high priority. Ultimately, Peska decided not to call any witnesses, but he told defendant of his decision only after the State had rested.

¶ 42 Peska testified on redirect examination as follows. He explained that Kyle Hiester was not a high-priority witness because defendant had anticipated that he would testify that he had offered defendant a job, but Peska had learned that Larson would then have Becky Hiester testify that Kyle had no authority to offer defendant a job and that defendant had never been offered a job. Peska had expected Enck to appear and testify.

¶ 43 On examination by the court, Peska testified as follows. There were two occasions on which plea agreements were discussed. The first was the Rule 402 conference, and the second was on the morning of trial. Peska recalled that at the Rule 402 conference, Larson had wanted defendant to serve "somewhere in the neighborhood of 15 years" in prison and defendant had offered to plead guilty in return for a 7-year sentence. Whatever the exact numbers, Larson and defendant had been "a long ways off." On the morning of trial, Larson made the offer with an 11-

year sentence; Peska told defendant and asked him whether he wanted to make a counteroffer. Defendant responded that he would accept six years in prison, then said probation, then said that he probably would not even take that. Peska told Larson defendant's response. Larson saw it as comical and the plea negotiation ended.

¶ 44 Peska testified that there was no mention of a plea offer after the State had rested. At that point, Larson indicated that "his rebuttal was going to be swift and extreme if [Peska] put on evidence." Peska's decision not to put on any evidence was "based on what [he] knew that rebuttal was going to be based on who was on [Larson's] initial list of witnesses and how things had progressed leading up to that."

¶ 45 In rebuttal, defendant testified on direct examination that, immediately before trial, Peska assured him that his witnesses would be there. Asked whether this assurance was why he would not accept a plea agreement, defendant testified, "When he came to me with the plea, I asked him if my witnesses would be there. And that was the whole thing. I said why would I take a plea? If my witnesses are going to testify, why would I take a plea?" Peska told defendant that, except for Dailey, all the witnesses would be there. Peska had told him two weeks before the trial that he would not call Dailey. Peska did not explain to him at any point before the State rested that he might not call the other potential witnesses.

¶ 46 On examination by the court, defendant testified that, shortly before trial, Peska relayed an offer that included an 11-year sentence. Peska told him that he could go back and get an agreement to a single-digit sentence. Defendant could not remember whether he had made a counteroffer. It was possible that he had responded as Peska testified that he had.

¶ 47 The trial court ruled against defendant. Its written order stated as follows. The sole question before the court was whether Peska gave defendant misleading advice that induced him

to reject a plea offer, to his prejudice. After summarizing the testimony, the court wrote, "It is the opinion of the Court that the defendant had an unrealistic view of the value of his case" and noted that there had been two discussions of plea offers. In the first, on the day of the preliminary hearing and the Rule 402 conference, the State made an offer; the defendant indicated that he wanted a much shorter sentence or probation; and the State declined the counteroffer. In the second, on the morning of the trial, the State made an offer that, apparently, included an 11-year sentence; defendant rejected it.

¶ 48 The court concluded, "At times, people reject plea agreements to their own peril. This certainly seems to be the case here." Defendant had not been misled or duped by Peska. "As the case wound down, [Peska] made a calculated decision on trial strategy in which he felt that the benefit of calling the witnesses was outweighed by the consequence[s] of calling them." Thus, rather than showing that Peska had misled defendant into rejecting a favorable plea bargain, "the record show[ed] that *** defendant rejected plea offers and that [Peska] utilized trial strategy that was apparently unsuccessful." The court denied defendant relief.

¶ 49 Defendant filed a timely notice of appeal.

¶ 50 II. ANALYSIS

¶ 51 On appeal, defendant contends that the trial court should have found that Peska rendered ineffective assistance by misleading him into rejecting a guilty-plea offer that would have given him a much shorter sentence than what he received. Under *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984), defendant was required to prove that (1) his trial counsel's performance was objectively unreasonable; and (2) it is reasonably probable that, but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland* extends to plea negotiations and a defendant's decision on whether to accept or reject a plea offer. *Lafler v.*

Cooper, 566 U.S. 156, 162-63 (2012); *People v. Hale*, 2013 Il 113140, ¶ 16. In this context, a defendant must prove by more than his own self-serving subjective testimony that his rejection of a plea offer was based on counsel's erroneous advice and that there is a reasonable probability that, absent counsel's errors, he would have accepted the offer, the offer would have been presented to and accepted by the court, and the defendant's conviction or sentence (or both) would have been less severe than what was actually imposed. *Missouri v. Frye*, 566 U.S. 134, 147 (2012); *Lafler*, 566 U.S. at 164-65; *Hale*, 2013 Il 113140, ¶¶ 18-19.

¶ 52 Defendant argues that the record refutes the court's finding that Peska originally planned to call the witnesses that defendant wanted, only to change course after the State rested. Defendant maintains that Peska knew at least a few days before trial what the State's rebuttal evidence would be were he to put on any defense witnesses. Therefore, he maintains, the court could not reasonably find that it was only after the State rested that Peska decided not to put on any evidence. Defendant concludes that, when Peska told him of the plea offer and defendant asked whether his witnesses would testify, Peska misled him by assuring him that they would. Defendant also contends that the evidence at the hearing proved that he elected to spurn the plea offer and go to trial solely because Peska assured him that he would call witnesses.

¶ 53 In sum, defendant argues that Peska rendered ineffective assistance, because (1) his failure to communicate his actual trial strategy to defendant was objectively unreasonable (see *People v. Mendez*, 336 Ill. App. 3d 935, 939 (2003) (rendering reasonable professional assistance includes aiding a defendant in making an informed choice as to whether or not to plead guilty)) and (2) as a result, defendant forwent a favorable plea and a lighter sentence than what he actually received.

¶ 54 "If a trial court has reached a determination on the merits of a defendant's ineffective assistance of counsel claim, we will reverse only if the trial court's action was manifestly

erroneous." *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 25. " 'Manifest error' is error that is clearly plain, evident, and indisputable." *Id.* For the following reasons, defendant has not met this standard.

¶ 55 First, we clarify one matter. Defendant argues that Peska deceived him by refusing to call Dailey, Kyle Hiester, Enck, and Shianna. However, even under defendant's construction of Peska's conduct, Peska did not deceive defendant on the morning of trial as to whether he would call Dailey or Kyle Hiester.

¶ 56 At the September 17, 2014, hearing, Peska clearly informed the court and defendant that he probably would not call Dailey. See *Wheat*, 2017 IL App (2d) 141057-U, ¶ 55. In the trial court, defendant did not specifically mention Kyle Hiester as a potential witness whom Peska should have called. See id. Thus, as we held, defendant "could not claim unfair surprise as to these two potential witnesses." *Id.* We recognize that we made the quoted statement in the context of defendant's claim that Peska was ineffective for failing to call certain witnesses, which is distinct from his claim that Peska was ineffective for misleading him into declining the second plea offer. However, both inquiries turn on whether Peska committed ineffective assistance in assuring defendant on the morning of trial that Enck and Shianna were available and would testify for defendant. For the following reasons, we conclude that the answer is no.

¶ 57 The trial court found that before trial Peska assured defendant in good faith that his witnesses would testify and that he did not change his mind until after the State rested. This finding is dispositive of the performance prong of the *Strickland* test.

¶ 58 The evidence, including defendant's testimony, did not directly contradict the court's finding. The court did not manifestly err in accepting Peska's explanation of his actions.

¶ 59 As Peska and the trial court noted, it is not particularly unusual for defense attorneys to change their strategy as a trial unfolds. True, even before trial, Peska had some sense of the dangers of calling witnesses who could be rebutted to defendant's disadvantage. Nonetheless, his calculation of the risks and benefits of calling witnesses legitimately could have changed after he heard the State's evidence. He might have decided that the State's case was not airtight and that the sounder course was to argue reasonable doubt, based on the ambiguity of the evidence as the State had presented it.

¶ 60 To conclude that Peska deliberately misled defendant before trial would require us to determine that he intended to induce defendant to reject a plea bargain with a sentence of no more than 11 years even though he knew that defendant preferred that result to going to trial without witnesses. The record does not support defendant's implicit assertion that Peska had decided to sabotage his client.

¶ 61 Because the court did not manifestly err in holding that defendant's claim did not satisfy *Strickland*'s performance prong, we need not consider whether he satisfied the prejudice prong.

¶ 62 III. CONCLUSION

¶ 63 The judgment of the circuit court of Stephenson County is affirmed.

¶ 64 Affirmed.