2014 IL App (1st) 120525-U

SIXTH DIVISION
May 16, 2014

No. 1-12-0525

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MARIO GUIZAR, Defendant-Appellant.	)	Appeal from the Circuit Court of Cook County No. 10 CR 11316 Honorable Thaddeus L. Wilson, Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Rochford and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court of Cook County is reversed and remanded for retrial. Defendant was found guilty beyond a reasonable doubt, but defense counsel was ineffective for failing to request the accomplice witness jury instruction.

¶ 2 Following a jury trial in the circuit court of Cook County, defendant Mario Guizar was convicted of delivery of a controlled substance of more than 15 but less than 100 grams of cocaine. The trial court sentenced defendant to nine years' imprisonment and three years of

mandatory supervised release. On appeal, defendant contends: (1) his counsel was ineffective for failing to request an accomplice witness jury instruction; (2) he was not proven guilty beyond a reasonable doubt; (3) he is entitled to an evidentiary hearing because a jury note indicated the jurors believed defendant could have received an unfair trial; and (4) his sentence was excessive. For the reasons which follow, we reverse the judgment of the trial court and remand for a new trial.

¶ 3 BACKGROUND

¶ 4 On June 3, 2010, defendant and another individual, Gabriel Sandoval (Sandoval) were arrested during an undercover police operation to purchase narcotics. Defendant was charged by indictment with two counts pursuant to section 401(a)(2)(A) of the Criminal Code of 1961 (Code) (720 ILCS 570/401(a)(2)(A) (West 2010)). Count 1 alleged that defendant delivered more than 15 but less than 100 grams of cocaine, a controlled substance. Count 2 alleged that defendant possessed with intent to deliver more than 15 but less than 100 grams of cocaine, a controlled substance.

¶ 5 Three Chicago police officers and Sandoval (the accomplice witness), testified at trial on behalf of the State regarding the events leading up to and including the arrest of defendant on June 3, 2010. A forensic scientist also testified that the substance recovered by the officers was in fact cocaine. Defendant, who is Spanish-speaking, was assisted by a Spanish-English interpreter throughout the proceedings.

¶ 6 *Officer Amador's Testimony*

¶ 7 Officer Angel Amador (Amador) testified that on June 3, 2010, he was conducting an undercover narcotics investigation to purchase cocaine from Sandoval. While undercover, Amador had purchased cocaine from Sandoval on two prior occasions; May 20 and May 25,

2010. During both transactions, Amador telephoned Sandoval in the morning inquiring about obtaining specific amounts of cocaine and Sandoval instructed Amador to meet him in the area of Belmont and Karlov in Chicago to purchase the narcotics. Both of these transactions occurred at around 11:00 a.m. Each time Amador arrived before Sandoval and waited inside his unmarked police vehicle. Sandoval arrived thereafter in a green Chevy Lumina. When executing both transactions Amador entered Sandoval's vehicle and exchanged prerecorded "1505" funds for cocaine.[1] On May 20 and May 25, 2010, Amador purchased a quarter of an ounce of cocaine for $240 and half ounce of cocaine for $480, respectively.

¶ 8 Amador further testified that on June 3, 2010, like the previous transactions, he telephoned Sandoval in the morning to purchase cocaine. This time, however, Amador requested three ounces of cocaine, a "substantially bigger amount of cocaine" than he previously requested which cost $2,700. Again, Sandoval instructed Amador to meet him at the intersection of Belmont and Karlov. When Sandoval arrived at the location, Amador was already there. Sandoval informed Amador that "he had already put in the order for three ounces of cocaine" and that "we have to drive over to the area of Lavergne and Schubert to go get him [*sic*] because that is where his buddy lived." Amador then followed Sandoval to the location in his unmarked police vehicle. Amador radioed the other officers involved in the operation and informed them that the location for the narcotics transaction had changed.

¶ 9 Once Amador and Sandoval arrived at Lavergne and Schubert, Sandoval parked his vehicle and gestured to Amador to park in front of him. Amador complied. Amador then communicated his location to the other officers by radio.

[1] Amador testified that prerecorded "1505" funds are "money that is withdrawn from our unit for the sole purpose of conducting an undercover narcotic purchases [*sic*] in which the serial numbers of the various denominations are recorded on a separate sheet and then inventoried."

¶ 10 Amador testified that while he waited in his vehicle, he observed defendant enter Sandoval's vehicle and sit in the front passenger seat. Sandoval and defendant then engaged in a brief conversation. Sandoval then exited his vehicle, walked over to Amador's vehicle, and sat next to Amador in the front passenger seat. Sandoval handed Amador a green colored rag, which covered a large ziplock plastic bag. Inside the ziplock plastic bag were three additional clear, knotted plastic bags, each containing a white powdered substance that Amador suspected was cocaine. Amador handed Sandoval $2,700 in prerecorded "1505" funds and asked "if that was his [Sandoval's] buddy in the car." Amador testified that Sandoval responded, "Yes, and that he was waiting for his money." Amador further testified that, "I learned from Mr. Sandoval that his buddy, referring to Mr. Guizar, told Mr. Sandoval to relate to me that any time that I needed more cocaine or I was using the street terminology more onions [ounces of cocaine] to give Mr. Sandoval a call and that Mr. Sandoval in turn would get a hold of Mr. Guizar." Sandoval then exited Amador's vehicle and returned to his own vehicle where defendant remained waiting.

¶ 11 Amador drove away and informed the other officers via radio that the narcotics transaction was complete. A few minutes later, Amador returned to the scene of the transaction and made positive identifications of Sandoval and defendant.

¶ 12 On cross-examination, Amador testified that it was not until June 3, 2010, that he learned Sandoval was obtaining the narcotics from another individual. Amador stated it was possible that the narcotics were already in Sandoval's vehicle when he first arrived at Belmont and Karlov. In addition, Amador testified that on June 3, 2010, he never observed defendant with the narcotics or the prerecorded "1505" funds.

¶ 13 *Officer Hayes' Testimony*

¶ 14 Chicago police officer Donte Hayes (Hayes) testified that on May 25 and June 3, 2010,

he was conducting surveillance as part of an undercover operation to purchase narcotics. On May 25, 2010, after Amador completed the narcotics transaction with Sandoval, Hayes followed Sandoval to the intersection of Leclair and Schubert where he observed Sandoval park his vehicle. Hayes then observed defendant walking west on Leclair in the direction of Sandoval's vehicle. Hayes drove away without observing what occurred after defendant approached Sandoval's vehicle. Hayes' observation of defendant on May 25, 2010, was not memorialized in a police report.

¶ 15 Hayes further testified that on June 3, 2010, he conducted surveillance from the location of 5017-5019 West Schubert. After receiving a radio communication that the narcotics transaction was relocated to Lavergne and Schubert, Hayes observed Sandoval's vehicle drive past him followed seconds later by Amador's vehicle. Both vehicles, however, parked outside of his view. Three to five minutes later, Hayes observed defendant walking from 5042 West Schubert towards Sandoval and Amador's vehicles. Hayes recognized defendant as the same individual he observed with Sandoval on May 25, 2010. Defendant proceeded to walk directly in front of Hayes' vehicle and Hayes observed a bulge on defendant's right side near his waistband. The bulge was the size of a baseball or tennis ball and was underneath defendant's shirt. Hayes immediately radioed the other officers to alert them of the bulge, as he believed the bulge "could have been a weapon."

¶ 16 On cross-examination, Hayes testified that the narcotics operation was conducted to arrest a specific drug dealer, Sandoval. No other individual was identified as being the focus of the narcotics operation. Hayes further testified that he did not report observing defendant on May 25, 2010, because "[a]t the time I didn't think that it was important" and that he followed Sandoval that day on a "hunch."

¶ 17 *Officer Rivera's Testimony*

¶ 18 Officer Jorge Rivera (Rivera) testified that on June 3, 2010, he was part of the undercover narcotics operation as an enforcement officer. An enforcement officer is "an individual who is in plainclothes, but wearing an outer vest carrier, an exposed weapon, a badge, police identifiers, and operating in an unmarked police vehicle with emergency lights and equipment." Rivera did not observe the narcotics transaction, but was stationed nearby in a "secreted location." Rivera, however, was a party to all of the radio communications exchanged between the officers. After the narcotics transaction was complete, Sandoval began to drive southbound on Lavergne. Rivera then intercepted Sandoval's vehicle. Rivera exited his vehicle, announced his office, and ordered Sandoval and defendant to raise their hands. Sandoval complied with the command, but defendant did not. As Rivera approached Sandoval's vehicle he observed that defendant's hands were not visible and his arms were moving below his waist. Finally, after numerous commands, defendant raised his hands.

¶ 19 Rivera detained Sandoval and defendant and performed a pat-down search. Rivera did not discover a bulge in defendant's waistband; however, he did recover two cellular telephones and a wallet containing $102 in cash. Rivera also conducted a pat-down search of Sandoval. He recovered a wallet containing $3,167, of that amount $2,700 were the prerecorded "1505" funds.

¶ 20 In addition, a search of Sandoval's vehicle was conducted. A clear plastic bag containing a white powdered substance, which Rivera suspected was cocaine, was recovered from underneath the passenger seat. All of the cocaine recovered from the undercover narcotics operation was placed in an inventory bag, heat sealed, given a unique inventory number, and then forwarded to the Illinois State Police Crime Lab for further analysis.

¶ 21 On cross-examination, Rivera testified he had his weapon drawn in a "low ready

position" when he ordered defendant and Sandoval to raise their hands.

¶ 22 *Sandoval's Testimony*

¶ 23 Gabriel Sandoval testified on behalf of the State to the following facts with the assistance of a Spanish-English interpreter. Sandoval initially testified that he was charged with delivery of a controlled substance to an undercover officer for the three transactions of May 20, May 25, and June 3, 2010, to which he could have been sentenced to between six and 30 years imprisonment and fined up to $500,000. Sandoval stated he pleaded guilty to selling cocaine on all three occasions after coming to an agreement with the State. In exchange for his truthful testimony in this case, the State reduced Sandoval's charges and recommended that he receive two years of probation and a fine of $1,500, along with 10 days of manual labor.[2] Sandoval further testified that he understood that if he did not tell the truth he would "go to jail."

¶ 24 Sandoval then testified to the following facts regarding the narcotics transactions of May 20, May 25, and June 3, 2010. He first met defendant approximately 15 days prior to May 20, 2010, at Herbalife, "a club where they sell tea to drink." Defendant initiated a conversation with Sandoval. Defendant informed Sandoval that he could provide Sandoval with cocaine to sell. On May 20, 2010, Amador telephoned Sandoval to purchase $140 worth of cocaine. Sandoval testified that he met Amador "through another person." Sandoval was not in possession of any cocaine at the time. Sandoval telephoned defendant who told him to come over to obtain the cocaine. Sandoval drove his green Chevy Lumina to the intersection of Diversey and Lavergne where defendant handed him a bundle of cocaine. Sandoval then drove to the intersection of

[2] Two pages of Sandoval's testimony regarding whether a conviction based on the plea agreement was entered was not contained in the record on appeal. We observe, however, that in closing arguments defense counsel states Sandoval is a convicted felon. In addition, the trial court issued instructions to the jury regarding when a witness has been previously convicted of a crime. None of the other witnesses testified to having a prior conviction.

Belmont and Karlov where he met Amador and exchanged the cocaine for money. Thereafter, Sandoval drove to Lavergne and handed defendant all of the money obtained from the transaction. Sandoval did not retain any of the proceeds because "when we were at Herbalife he talked and he told me that he was out of work and so I did it for him to help him out."

¶ 25 Sandoval further testified that on May 25, 2010, Amador telephoned him to purchase $480 worth of cocaine. Sandoval did not have any cocaine in his possession at that time, so he drove to meet defendant to obtain some. Thereafter, Sandoval drove to the area of Belmont and Karlov to meet Amador where the cocaine was exchanged for $480. Once the transaction was concluded, Sandoval met defendant and gave him the $480.

¶ 26 Sandoval testified that on June 3, 2010, Amador telephoned him requesting $2,700 worth of cocaine. Once again, he did not have any cocaine when Amador called. Sandoval met with Amador at Belmont and Karlov and informed Amador he did not have the cocaine, but asked Amador to follow him to Lavergne. Once at Lavergne, Sandoval parked his vehicle and gestured for Amador to park in front of him. Defendant entered Sandoval's vehicle on the passenger side and handed him a bag of cocaine. Sandoval exited his vehicle, entered Amador's vehicle, and exchanged the bag of cocaine for $2,700. Amador said to Sandoval that if he needed more cocaine he would call him. In response, Sandoval said that Amador could call him and he would call defendant. Sandoval exited Amador's vehicle and walked over to his own vehicle where defendant was still waiting in the passenger seat. After Sandoval sat down inside his vehicle, the police arrived and ordered him to raise his hands. Sandoval did not have time to give defendant the $2,700.

¶ 27 Sandoval testified he was detained by the officers and cocaine was later discovered inside his vehicle. Sandoval further testified he did not have any cocaine inside his vehicle on June 3,

2010, and he did not observe defendant with any cocaine other than the cocaine he gave to Amador. Sandoval denied telephoning defendant to ask him to go to lunch on June 3, 2010. Sandoval further testified he did not have an agreement with defendant to be paid for selling cocaine.

¶ 28 On cross-examination, Sandoval testified that he did not have an arrangement with defendant to be paid for selling drugs. Sandoval also testified that on June 3, 2010, he did not observe defendant placing any drugs under the seat of his car because when he took the cocaine from defendant he was not looking at him. Sandoval further testified that when he left his vehicle to give the cocaine to Amador on June 3, 2010, he did not observe what defendant was doing in the vehicle. Sandoval stated the cocaine found in his vehicle must belong to defendant.

¶ 29 Sandoval further testified on cross-examination that he pleaded guilty to the charges and that it was in his best interest to testify so he could get probation and not have to go to jail. Sandoval stated he did not initially inform the officers of defendant's involvement with him in the narcotics transaction. Sandoval further testified that on May 20, 2010, he did not count the money Amador gave him in exchange for the cocaine, he just handed the money directly to defendant. Defendant did not ask about the other hundred dollars and Sandoval did not keep it for himself. Sandoval also testified that he did not know how much cocaine was worth. In addition, Sandoval testified, "The situation is at no time did I sell drugs. I just wanted to help him, and I'm not going to put the blame on me for helping him." He further stated that he testified in defendant's case "to help myself."

¶ 30 On re-direct, Sandoval testified he was not lying to get probation, that he was not forced to testify, and that the Assistant State's Attorneys instructed him to only tell the truth.

¶ 31 *The Forensic Scientist's Testimony*

¶ 32 Forensic scientist Martin Palomo (Palomo) of the Illinois State Police Forensic Science Center testified that the contents of one of the three plastic bags recovered on June 3, 2010, and weighing 28.011 grams, was tested and found to be cocaine. Palomo also testified that he only tested one bag of cocaine because the weight of its contents was more than 15 grams but less than 100 grams. Palomo further testified that the weight of the contents of all three plastic bags was 83.9 grams. In addition, Palomo testified that the substance found beneath the passenger seat of Sandoval's vehicle was 15.005 grams of cocaine.

¶ 33 The State rested its case and defendant moved for a directed finding, which was denied by the trial court. Defendant was the defense's sole witness.

¶ 34 *Defendant's Testimony*

¶ 35 Defendant testified to the following facts with the aid of a Spanish-English interpreter. As of June 3, 2010, he had known Sandoval for a "month and a half" and believed them to be friends. On June 3, 2010, Sandoval telephoned him just past 11:00 a.m. to ask him to go to lunch. Sandoval met him "about a block away" from where he resided at 5042 West Schubert, because Sandoval did not know defendant's exact address and the road was a one way street. Once defendant entered Sandoval's vehicle, Sandoval said to him "wait for me. I got to call my friend. He's waiting for me." Defendant waited for Sandoval inside the vehicle and observed Sandoval walk a half a block in front of the vehicle. Defendant testified he could not view what Sandoval was doing once he exited the vehicle.

¶ 36 About five minutes later, Sandoval returned to the vehicle and drove out of the parking space. Soon thereafter, two men dressed in civilian clothes approached the vehicle from the front with handguns pointed in defendant's direction. Defendant was scared and felt his body get cold. He did not know they were police officers. Defendant raised one hand and with the other

opened the vehicle door. Defendant was detained in handcuffs and patted down. The police officers recovered his wallet that contained "$180 more or less" in cash and two cellular phones. Defendant denied that the narcotics found in Sandoval's vehicle belonged to him.

¶ 37 Defendant further testified that he did not provide narcotics to Sandoval on May 20 or May 25, 2010, and that he did not receive any money from these narcotics transactions. Defendant denied being involved in the sale of illegal narcotics.

¶ 38 On cross-examination, Defendant testified that he met Sandoval through a friend "at the job" and that the two exchanged phone numbers. Sandoval would telephone him, but their conversations were brief. Defendant admitted that Sandoval was not a friend, but an acquaintance and that Sandoval had never been to his residence. In addition, the two had never "gone out to eat" before June 3, 2010.

¶ 39 The defense rested its case. Outside the presence of the jury, the trial court considered which jury instructions would be provided. Defense counsel did not object to any of the instructions ultimately tendered to the jury. Additionally, defense counsel did not request that the accomplice witness instruction be tendered to the jury.

¶ 40 Following closing arguments, jury deliberation commenced. During deliberations the trial court received a note from the jury which indicated that a juror who was bilingual in Spanish believed many of the words and phrases used during trial, particularly those involving legal terminology, were not always accurately understood by the witnesses. The jury note indicated the jurors wondered whether defendant received a fair trial. Defense counsel moved for a mistrial. The trial court heard arguments and denied defendant's motion for a mistrial. After discussion with counsels for both sides and in response to the jury's note, the trial court instructed the jury to apply the law to the facts and evidence presented in the matter and reserve

questions of law for the trial court to determine.

¶ 41 The jury found defendant guilty of delivery of a controlled substance and the trial court denied defendant's motion for a new trial. After considering all factors in aggravation and mitigation, the trial court sentenced defendant to nine years' imprisonment in the Illinois Department of Corrections with three years of mandatory supervised release. The trial court denied defendant's motion to reconsider sentence. This appeal timely followed.

¶ 42 ANALYSIS

¶ 43 A. Ineffective Assistance of Counsel

¶ 44 Defendant first contends that he received ineffective assistance of counsel because defense counsel failed to request Illinois Pattern Jury Instruction, Criminal, No. 3.17 (IPI 3.17) (4th ed. 2000), the accomplice witness instruction. An accused is entitled to capable legal representation at trial. *People v. Wiley*, 165 Ill. 2d 259, 284 (1995). To establish a claim of ineffective assistance of counsel, a defendant must prove both (1) deficient performance by counsel and (2) prejudice to defendant. *People v. Smith*, 195 Ill. 2d 179, 187-88 (2000) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). To satisfy the first prong of the *Strickland* test, a defendant must show that his counsel's performance fell below an objective standard of reasonableness, as measured by prevailing norms. *Smith*, 195 Ill. 2d at 188. "To establish deficient performance, the defendant must overcome the strong presumption that counsel's action or inaction was the result of sound trial strategy." *People v. Perry*, 224 Ill. 3d 312, 341-42 (2007). To satisfy the second prong, prejudice is demonstrated if there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. *People v. Albanese*, 104 Ill. 2d 504, 525 (1984); *People v. Echols*, 382 Ill. App. 3d 309, 318 (2008). A probability rises to the level of a "reasonable probability" when it is

"sufficient to undermine confidence in the outcome" of the proceeding. *People v. Peeples*, 205 Ill. 2d 480, 513 (2002) (citing *Strickland*, 466 U.S. at 694). Counsel's deficient performance must have rendered either the outcome unreliable; or the proceeding fundamentally unfair. *Id.*

¶ 45 Defendant argues that defense counsel failed to request the accomplice witness instruction, which states:

> "When a witness says he was involved in the commission of a crime with the defendant, the testimony of that witness is subject to suspicion and should be considered by you with caution. It should be carefully examined in light of the other evidence in the case." Illinois Pattern Jury Instruction, Criminal, No. 3.17 (IPI 3.17) (4th ed. 2000).

Defendant asserts that as a result of defense counsel's unreasonable failure to request the accomplice witness jury instruction he suffered prejudice because it forced the jury to choose between defendant and Sandoval's version of events without legal guidance.

¶ 46 The State asserts that defense counsel's assistance was not ineffective because: (1) the record is not sufficient to evaluate defense counsel's performance and, thus, is better evaluated in a postconviction hearing; and (2) if the record is adequately developed to address this issue, defense counsel's performance was objectively reasonable based on the entire record and defendant has not demonstrated any prejudice because the jury was provided with Illinois Pattern Jury Instruction 1.02 (Illinois Pattern Jury Instruction, Criminal, No. 1.02 (4th ed. 2000)), which directed the jury to evaluate Sandoval's credibility in light of his bias and self-interest in testifying. We first turn to address the State's contention that defendant's ineffective assistance of counsel argument is inappropriate for review on direct appeal.

¶ 47 1. Direct or Collateral Review

¶ 48 The State asserts the record is not sufficiently developed to evaluate counsel's

reresentation, as the record is silent regarding whether defense counsel had a strategic motive for omitting the accomplice witness instruction.

¶ 49 The State relies on the cases of *Massaro v. United States*, 538 U.S. 500, 505-506 (2003), and *People v. Bew*, 228 Ill. 2d 122, 134-35 (2008), for the proposition that an ineffective assistance of counsel claim is "preferably brought, in the first instance, before a trial court, particularly within a collateral review proceeding." We disagree with the State that these cases provide a basis to reject outright defendant's ineffectiveness claim. *Massaro* and *Bew* do not impose a complete bar against ineffective assistance claims on direct appeal. In fact, the Supreme Court expressly rejected that contention in *Massaro* stating:

> "We do not go this far. We do not hold that ineffective-assistance claims must be reserved for collateral review. There may be cases in which trial counsel's ineffectiveness is so apparent from the record that appellate counsel will consider it advisable to raise the issue on direct appeal. There may be instances, too, when obvious deficiencies in representation will be addressed by an appellate court *sua sponte*." *Massaro*, 538 U.S. at 508-09.

Similarly, in *Bew*, our supreme court held that where the record was insufficient to address any of the defendant's alternative grounds for suppression of evidence, the defendant's ineffective assistance claim would be rejected. *Bew*, 228 Ill. 2d at 135. We note that both *Bew* and *Massaro* addressed the defendants' claims for ineffective assistance of counsel "based on defense counsel[]s['] failure to file a suppression motion." *People v. Henderson*, 2013 IL 114040, ¶ 22. The State, however, cites no authority where a court has found a record insufficient to support a determination of ineffective assistance of counsel for defense counsel's failure to request a jury instruction, including the accomplice witness instruction.

¶ 50 We, on the other hand, find the record sufficient to determine whether defense counsel's assistance was ineffective. First, Sandoval testified he was charged with and pleaded guilty to the same charges that were brought against defendant. The record definitively establishes that Sandoval was an accomplice to the crime. Accordingly, defendant was entitled to the accomplice witness instruction. See *People v. Lewis*, 240 Ill. App. 3d 463, 466-67 (1992) (setting forth that "[t]he test for determining whether a witness is an accomplice for the purposes of the accomplice witness instruction is whether the witness could have been indicted for the offense in question either as a principal or under a theory of accountability."). Second, a review of relevant case law reveals that strategic reasons for not requesting the accomplice witness jury instruction have "typically eluded the courts." *People v. Davis*, 353 Ill. App. 3d 790, 795 (2004). Third, the committee notes for IPI Criminal 4th No. 3.17 follows *People v. Rivera*, 166 Ill. 2d 279, 292-293 (1995), wherein our supreme court recommended giving the accomplice witness instruction any time an accomplice testifies regardless of whether the testimony is presented by the State or by the defense. As the State has cited no relevant authority and the record establishes that defendant was entitled to the instruction, we now turn to address the merits of defendant's ineffective assistance of counsel claim.

¶ 51 2. Counsel's Performance

¶ 52 "The court will look at the totality of the circumstances in determining whether defense counsel's performance was deficient for failing to tender the accomplice-witness [*sic*] instruction." *People v. Campbell*, 275 Ill. App. 3d 993, 998 (1995). "[T]he purpose of the accomplice witness instruction is to warn the jury that there may be a strong motivation for a witness to provide false testimony for the State in return for immunity or some other form of lenient treatment." *Davis*, 353 Ill. App. 3d at 798. Generally, the accomplice witness instruction

should be given if the totality of the evidence and the reasonable inferences there from establish probable cause to believe that the witness participated in the crime, either as a principal or under a theory of accountability. *People v. Henderson*, 142 Ill. 2d 258, 315 (1990). If this test is satisfied, the defendant is entitled to an accomplice instruction even if the witness denies involvement in the crime. *Lewis*, 240 Ill. App. 3d at 466-67.

¶ 53 Here, the record demonstrates that Sandoval was an accomplice and the parties do not argue otherwise. Accordingly, defendant was entitled to the accomplice witness instruction. See *Campbell*, 275 Ill. App. 3d at 997. Despite being entitled to it, the record fails to disclose any reason why defense counsel chose not to request the accomplice witness instruction. As previously discussed, strategic reasons for not requesting the accomplice witness instruction "typically have eluded the courts." *Davis*, 353 Ill. App. 3d at 795. Based on the record provided, we cannot find any strategic reason for defense counsel not to have requested the accomplice witness instruction. See *Love*, 285 Ill. App. 3d at 792 ("Even if we were to speculate on defense counsel's reasons for not asking for 3.17, we can't think of one. He should have asked.").

¶ 54 The failure of defense counsel to tender an accomplice witness instruction, however, does not necessarily constitute ineffective assistance of counsel. *People v. McCallister*, 193 Ill. 2d 63, 90-91 (2000) (stating that even if trial counsel's performance was deficient, counsel was not ineffective because defendant failed to establish a reasonable probability that the result of trial would have been different had the instruction been given). Counsel is ineffective where there is a reasonable probability that the result of the trial would have been different had the instruction been given. *Id.* Accordingly, we turn to address whether defendant was prejudiced by defense counsel's deficient performance.

¶ 55 3. Prejudice

¶ 56 The State contends that the accomplice witness instruction was not necessary and, thus, defendant was not prejudiced, because the jury was provided with the general credibility instruction. The instruction informed the jury to evaluate a witness' believability in light of "his ability and opportunity to observe, [his age,] his memory, his manner while testifying, any interest, bias, or prejudice he may have, and the reasonableness of his testimony considered in the light of all the evidence in the case." Illinois Pattern Jury Instruction, Criminal, No. 1.02 (4th ed. 2000). The State further asserts that the jury also received Illinois Pattern Jury Instruction 3.12, which states: "Evidence that a witness has been convicted of an offense may be considered by you only as it may affect the believability of the witness." Illinois Pattern Jury Instruction, Criminal, No. 3.12 (4th ed. 2000). Additionally, the State maintains that defense counsel informed the jury of Sandoval's bias and self-interest through his rigorous cross-examination of Sandoval as well as through his closing arguments. The State concludes these jury instructions and defense counsel's arguments fully informed the jury of Sandoval's self-interest and, therefore, the failure to request the accomplice witness instruction did not prejudice defendant.

¶ 57 In *McCallister* our supreme court laid out the framework for evaluating whether a defense counsel's failure to request the accomplice witness instruction constituted ineffective assistance of counsel. *McCallister*, 193 Ill. 2d at 91. In that case, the defendant was convicted of three counts of first degree murder. *Id.* at 67. An eyewitness, who the defendant asserted was an accomplice witness, testified in great detail about the events leading up to and following the murders, stating the defendant had murdered the victims, shooting each one of them more than once. *Id.* at 68-73. The physical evidence and several other witnesses corroborated the eyewitness' testimony. *Id.* at 67-68. The defendant, however, testified he shot the first two victims in self defense and that the eyewitness had shot the third victim before shooting the first two victims again. *Id.* at 78-83.

¶ 58 Based on the evidence presented, our supreme court determined that defendant failed to prove that his counsel's failure to tender the accomplice witness instruction caused prejudice. *Id.* at 90-91. The framework the court utilized consisted of the consideration of: (1) the inherent weaknesses in the defendant's own testimony; (2) the strength of the evidence offered against the defendant apart from the accomplice witness' testimony; and (3) the instructions actually received by the jury. *Id.* at 91. The court painstakingly evaluated the trial testimony and concluded that the most critical portions of the defendant's testimony were uncorroborated, impeached, or inconsistent with physical evidence. *Id.* at 91-95. For example, the defendant testified that one of the victims said he was going to " 'shoot [defendant's] a**,' " however, in a prior written statement the defendant did not mention this threat. *Id.* at 91. The defendant also testified that one of the victims was attempting to pull "something" out of his pants that was presumably a weapon. *Id.* at 92. The kitchen knife that was discovered underneath the victim's body, however, was too large to be carried in one's pants, suggesting the defendant found the knife after the murders occurred and placed it under the victim's body. *Id.*

¶ 59 The court then examined the testimony of the other witnesses and concluded that an accomplice witness instruction would not have diminished the weight of this testimony because it was "consistent in all important respects" and corroborated the testimony of the accomplice witness. *Id.* at 95-96. Lastly, the court noted that the jury received the general pattern instruction on witness credibility, which tells jurors that " '[i]n considering the testimony of any witness, [they] may take into account * * * any interest, bias, or prejudice he may have.' " *Id.* at 96. The court acknowledged that:

> "the general instruction on witness credibility may not, *by itself*, be enough to cure an errant omission of an accomplice witness instruction. Otherwise, the accomplice witness

> instruction would be rendered essentially meaningless, since the general instruction on witness credibility is given in most criminal cases. In this case, however, we believe that the fact that the jury was told to consider, in general, the bias, interest or prejudice of the witnesses may be considered as one factor, *among others*, which establishes that defendant was not prejudiced by his trial counsel's failure to tender the accomplice witness instruction." (Emphasis in original.) *Id.* at 96-97.

After examining each of these considerations, based on the facts presented in the matter, the court found the facts were "not so closely balanced that we can say our 'confidence in the outcome' [Citation.] has been undermined by trial counsel's failure to request the accomplice witness instruction." *Id.* at 98.

¶ 60 Defendant relies on *Campbell*, to support his position that he was prejudiced by defense counsel's ineffective assistance. *Campbell*, 275 Ill. App. 3d at 998-99. Although *Campbell* was decided prior to our supreme court's decision in *McCallister*, the *Campbell* court evaluated the issue according to the principals set forth in *McCallister*. Accordingly, we find *Campbell* to be persuasive authority.

¶ 61 In *Campbell*, we considered whether defense counsel's failure to provide the accomplice witness jury instruction constituted ineffective assistance of counsel. *Id.* at 995. There, the defendant was convicted of burglary and criminal damage to property after testimony adduced at trial from two accomplice witnesses implicated the defendant. *Id.* at 994-95. The two accomplice witnesses testified that the defendant had entered the church and sprayed the interior of the church with a fire extinguisher. *Id.* The two witnesses, however, denied doing any damage to the church themselves. *Id.* In addition, the accomplice witnesses admitted that their testimony was offered in exchange for leniency from the State for the same incident in which the

defendant was charged. *Id.* The defendant testified that he did not enter the church and that the two accomplice witnesses were the ones who sprayed the church with the fire extinguisher. *Id.* at 995. A third nonaccomplice witness testified he observed defendant running through a field away from the church on the day of the crime. *Id.* at 994.

¶ 62 On appeal, the defendant contended he was entitled to the accomplice witness instruction. *Id.* at 995. In response, the State asserted that the instruction was unnecessary because (1) the accomplice witnesses' testimony was not uncorroborated, (2) the jury received Illinois Pattern Jury Instruction, Criminal, No. 1.02 (2d ed. 1981) on witness credibility, and (3) the State and defense counsel focused on the credibility of the accomplice witnesses in closing argument and discussed the deals entered into by the accomplice witnesses. *Id.* at 996. After evaluating the testimony of the accomplice witnesses and the strength of the evidence against the defendant, we concluded defense counsel was ineffective for failing to request the accomplice witness instruction. *Id.* at 998. We determined, "[h]ad the accomplice-witness [*sic*] instruction been given, the jury would have been compelled to examine the testimony of Morphis and Nordhouse [the accomplice witnesses] in that light, which would have militated in favor of giving serious consideration to defendant's explanation of the event." *Id.* at 999.

¶ 63 Applying the principles of *McCallister* to the case at bar, it is apparent that defendant was prejudiced by defense counsel's failure to request the accomplice witness jury instruction. In making this determination, we first consider the inherent weakness in the defendant's own testimony. *McCallister*, 193 Ill. 2d at 91. Unlike the defendant in *McCallister*, defendant's testimony here was not impeached by any prior inconsistent statements and he had no prior convictions.

¶ 64 Indeed, much of defendant's testimony was corroborated by the general facts established

at trial. For example, defendant testified that as of June 3, 2010, he had known Sandoval for at least one month. Sandoval did not know defendant's address, but did know defendant lived on Schubert near Lavergne. On June 3, 2010, Sandoval parked a half a block away from defendant's residence to pick defendant up. Defendant entered Sandoval's vehicle and sat in the passenger seat. The two spoke to one another, then Sandoval exited the vehicle. Sandoval returned to the vehicle and the two drove away. Thereafter, they were intercepted by police officers who detained and searched defendant. The officers did not find any narcotics or prerecorded "1505" funds on defendant's person. This testimony was consistent with the testimony of the other witnesses.

¶ 65 Moreover, key portions of defendant's testimony were expressly corroborated by multiple witnesses. Specifically, defendant's testimony that he did not possess narcotics when he was arrested was corroborated by Rivera, who stated he did not find narcotics during a pat-down search of defendant and was further corroborated by the testimony of Sandoval, who testified he did not see defendant place anything under the seat of his vehicle. Additionally, defendant's testimony that he did not receive money for the narcotics transactions on June 3, 2010, was corroborated by the testimony of Rivera, who stated the only cash recovered from defendant after the search on June 3, 2010, was $102 of unmarked funds and by Sandoval's testimony that he did not give defendant any of the funds on that date. Based on the record, we cannot say that defendant's testimony was " 'replete with objectively discernible weaknesses, including prior inconsistent statements, critical facts that were uncorroborated, and assertions that were at odds with the physical evidence.' " *Davis*, 353 Ill. App. 3d at 797 (quoting *McCallister*, 193 Ill. 2d at 98).

¶ 66 We next consider the strength of the evidence offered against the defendant apart from

the accomplice witness' testimony. *McCallister*, 193 Ill. 2d at 91. The record discloses that without the testimony of Sandoval the evidence against defendant was unsubstantial. Amador testified that on June 3, 2010, he observed defendant enter Sandoval's vehicle and engage in a brief conversation. Sandoval then entered Amador's vehicle and handed him the cocaine in exchange for $2,700. Amador testified Sandoval informed him that defendant was "his buddy" and that defendant was "waiting for his money." Amador further testified that, "I learned from Mr. Sandoval that his buddy, referring to Mr. Guizar, told Mr. Sandoval to relate to me that any time that I needed more cocaine or I was using the street terminology more onions to give Mr. Sandoval a call and that Mr. Sandoval in turn would get a hold of Mr. Guizar." Amador, however, also testified that it was possible that Sandoval already had the cocaine in his vehicle when he initially met him at Belmont and Karlov.

¶ 67 Hayes' testimony reveals that it was Sandoval who was the focus of the undercover operation, not defendant. Hayes observed Sandoval meet defendant after the May 25, 2010, narcotics transaction. Hayes, however, did not stay to observe what happened after the two men greeted each other. Instead, Hayes continued to drive past them. In addition, Hayes testified that he concluded this occurrence was not important enough to include in a police report. Hayes further testified that he observed a bulge near defendant's waist band. Hayes, however, stated that he believed it could have been a weapon.

¶ 68 Rivera testified that defendant did not initially raise his hands when ordered to do so and that defendant's arms were moving. Rivera, however, admitted that defendant's arms were outside of his view and, therefore, he could not observe what defendant's hands were doing. In addition, Rivera testified he did not discover any items in defendant's waist band, but did recover two cellular telephones and a wallet containing $102. Rivera found no cocaine or prerecorded

"1505" funds during his search of defendant. Because the evidence presented against defendant, apart from the accomplice testimony, was weak, if given, the accomplice witness instruction would have had an effect on the jury's assessment of Sandoval's testimony. See, *cf. McCallister*, 193 Ill. 2d at 95 (finding the testimony against the defendant was not weak, and, therefore, the accomplice witness' testimony had no effect on the jury's assessment of the witnesses).

¶ 69 Lastly, we consider the instructions actually received by the jury. See *id.* at 91. We first acknowledge that "[t]he general instruction on witness credibility may not, *by itself*, be enough to cure an errant omission of an accomplice witness instruction." (Emphasis in original.) *Id.* at 96. Additionally, it has been long held that "the credibility of such [an accomplice] witness[] is not to be passed upon the same as that of other witnesses." *People v. Zaransky*, 362 Ill. 76, 79 (1935). Accordingly, the jury must be appropriately instructed "as to the tainted character of their [the accomplice witness'] testimony." *Id.* A general credibility instruction is not a substitute for the accomplice witness instruction. *Id.* In fact, "this instruction goes far beyond the instruction relating to the credibility of witnesses in general." *People v. Wheeler*, 401 Ill. App. 3d 304, 314 (2010).

¶ 70 In the present case, the jury was provided with the general credibility instruction as well as Illinois Pattern Jury Instruction 3.12, which states, "Evidence that a witness has been convicted of an offense may be considered by you only as it may affect the believability of the witness." Illinois Pattern Jury Instruction, Criminal, No. 3.12 (4th ed. 2000). These two instructions are not equivalent to the accomplice witness instruction, which clearly imparts to the jury to view the accomplice witness' testimony with great suspicion and caution. See Illinois Pattern Jury Instruction, Criminal, No. 3.17 (4th ed. 2000).

¶ 71 We also acknowledge that unlike the accomplice witness in *McCallister*, Sandoval

testified in exchange for leniency from the State. The *McCallister* court specifically noted that testifying in exchange for leniency, as was done in *Campbell*, was a distinguishing factor. *McCallister*, 193 Ill. 2d at 98. Based on the record before us, we conclude that the totality of the circumstances warranted the submission of an accomplice witness instruction to the jury and that defendant was prejudiced by its omission. Accordingly, defense counsel's performance was deficient for failing to tender the accomplice witness instruction. See *Campbell*, 275 Ill. App. 3d at 998.

¶ 72 The State relies on the cases of *Lewis* and *Davis* to support its contention that defendant was not prejudiced by counsel's failure to tender the accomplice witness instruction where the general credibility instruction was provided to the jury. *Lewis*, 240 Ill. App. 3d at 467; *Davis*, 353 Ill. App. 3d at 798. The State further contends that defense counsel's failure to tender the accomplice witness instruction did not result in prejudice to defendant because defense counsel fully informed the jury of Sandoval's role in the crime, his past criminal convictions, and his lack of credibility, relying on *Love* (285 Ill. App. 3d at 792-93). We note that *Lewis* and *Love* were issued prior to our supreme court's decision in *McCallister*. To the extent they are inconsistent with *McCallister* we do not consider them as persuasive authority.

¶ 73 In *Lewis*, although defendant was entitled to the accomplice witness instruction, we determined that "this error, alone, would not require reversal" because the jury received the general credibility instruction. *Lewis*, 240 Ill. App. 3d at 467. We did, however, ultimately reverse the defendant's convictions and remand for a new trial because of the cumulative effect of defense counsel's many other deficiencies that prejudiced the defendant. *Id.* at 470. The court did not consider the inherent weaknesses in the defendant's own testimony or the strength of the evidence apart from the accomplice witness' testimony. See *McCallister*, 193 Ill. 2d at 91. In

addition, the facts of *Lewis* did not require the court to consider the importance of providing the accomplice witness instruction where the accomplice witness is testifying pursuant to a plea agreement with the State. Accordingly, *Lewis* is inconsistent with *McCallister* and inapposite to the case at bar.

¶ 74 In *Davis*, we concluded that defense counsel's failure to request the accomplice witness instruction did not prejudice the defendant because the trial testimony of the defendant was uncorroborated, contrary to other unbiased testimony, and impeached by his prior inconsistent statements and prior conviction. *Davis*, 353 Ill. App. 3d at 798. As previously stated, the testimony of defendant here was corroborated and was not impeached. In addition, defendant here did not have any prior convictions, unlike the defendant in *Davis*. Accordingly, the facts of *Davis* are inapposite from the facts of the present case.

¶ 75 In *Love*, we concluded that although defense counsel had no strategic reason not to request the accomplice witness instruction, defense counsel was not ineffective as the jury was informed about the accomplice witness' prior convictions and "unsavory occupation," and the defense counsel attacked the accomplice witness' credibility. *Love*, 285 Ill. App. 3d at 792. The *Love* decision, however, did not take into consideration the inherent weaknesses in the defendant's own testimony nor the strength of the evidence offered against the defendant apart from the accomplice witness' testimony. See *McCallister*, 193 Ill. 2d at 91. Accordingly, *Love* is not persuasive authority as it fails to evaluate the issue under the guidelines set forth by our supreme court in *McCallister*.

¶ 76 We conclude that defendant was entitled to the accomplice witness instruction. Had the accomplice witness instruction been given, the jury would have been compelled to examine Sandoval's testimony with close scrutiny. See *Campbell*, 275 Ill. App. 3d at 999. Due to the fact

that the State's case relied heavily on the testimony of Sandoval, we find that this deficient performance so prejudiced the defense as to deny the defendant a fair trial. *Strickland*, 466 U.S. at 687. We conclude that had the instruction been given, there is at least a reasonable probability that the result would have been different. See *Wheeler*, 401 Ill. App. 3d at 314.

¶ 77 B. Reasonable Doubt

¶ 78 We next address defendant's argument that the State failed to prove him guilty beyond a reasonable doubt. Defendant contends the State failed to prove him guilty of delivery of a controlled substance beyond a reasonable doubt for two reasons: (1) the State presented insufficient evidence of his guilt; and (2) the State presented incredible testimony. Both of these contentions revolve around the accomplice witness testimony of Sandoval. Defendant asserts that this testimony was the State's strongest evidence, but that it is inherently suspicious because Sandoval received a deal from the State in exchange for his testimony and because Sandoval knew that by shifting the blame to defendant he would not be going to prison. We first turn to consider whether the State presented insufficient evidence of defendant's guilt.

¶ 79 When reviewing the sufficiency of the evidence in a criminal case, we must determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *People v. Smith*, 185 Ill. 2d 532, 541 (1999). We will not reverse a criminal conviction unless the evidence is so unreasonable, improbable or unsatisfactory as to create a reasonable doubt of the defendant's guilt. *People v. Ortiz*, 2012 IL App (2d) 101261, ¶ 9. A reviewing court does not retry the defendant or substitute its judgment for that of the trier of fact with regard to the credibility of witnesses or the weight to be given to each witness' testimony. *People v. Jackson*, 232 Ill. 2d 246, 280-81 (2009); *People v. Boykin*,

2013 IL App (1st) 112696, ¶ 6. Rather, we "carefully examine the evidence while bearing in mind that the trier of fact is in the best position to judge the credibility of witnesses, and due consideration must be given to the fact that the fact finder saw and heard the witnesses." *People v. Herman*, 407 Ill. App. 3d 688, 704 (2011); see *People v. Rivas*, 302 Ill. App. 3d 421, 430 (1998).

¶ 80 It is well established that the testimony of an accomplice must be cautiously scrutinized on appeal. *People v. Ash*, 102 Ill. 2d 485, 493 (1984). "We recognize that the testimony of an accomplice witness has inherent weaknesses and should be accepted only with caution and suspicion. Nevertheless, the testimony of an accomplice witness, whether corroborated or uncorroborated, is sufficient to sustain a criminal conviction if it convinces the jury of the defendant's guilt beyond a reasonable doubt." *People v. Tenney*, 205 Ill. 2d 411, 429 (2002). Accordingly, we now turn to address defendant's contention.

¶ 81 Defendant was convicted of delivery of a controlled substance pursuant to section 401 of the Code (720 ILCS 570/401 (West 2010)), which provides in pertinent part that "it is unlawful for any person knowingly to manufacture or deliver, or possess with intent to manufacture or deliver, a controlled substance other than methamphetamine, a counterfeit substance, or a controlled substance analog." *Id.* The Code defines "delivery" to mean "the actual, constructive or attempted transfer of possession of a controlled substance, with or without consideration, whether or not there is an agency relationship." 720 ILCS 570/102(h) (West 2010).

¶ 82 The trial testimony, taken in the light most favorable to the State, established the following facts. Officers Amador, Hayes, and Rivera, were involved in an undercover narcotics investigation near the intersection of Belmont and Karlov in Chicago. On June 3, 2010, the investigation was relocated to Schubert and Lavergne after Sandoval informed Amador that he

did not have the three ounces of cocaine Amador requested with him and that is "where his buddy lived" from whom he would obtain the cocaine. After driving over to and parking near Schubert and Lavergne, defendant entered Sandoval's vehicle. Both Amador and Hayes observed defendant walking toward Sandoval's vehicle with a bulge under his shirt and near his waistband. Defendant handed Sandoval a bag containing three ounces of cocaine. Defendant then waited in the vehicle while Sandoval went to give the cocaine to Amador. While in Amador's vehicle, Sandoval gave him the three ounces of cocaine in exchange for $2,700 in prerecorded "1505" funds. Sandoval then returned to his vehicle and drove away. Rivera intercepted Sandoval's vehicle and ordered defendant and Sandoval to raise their hands. Sandoval complied, but defendant did not. Rivera observed defendant moving his arms, but did not know what defendant was doing with his hands. Ultimately, defendant raised his hands, exited the vehicle, and was detained. The $2,700 in prerecorded "1505" funds was found in Sandoval's wallet and cocaine was found underneath the passenger seat of Sandoval's vehicle. No drugs or prerecorded funds were found on defendant's person.

¶ 83 In this case, Sandoval's testimony, along with the other evidence presented at trial, was sufficient to sustain defendant's conviction. Sandoval testified that before meeting Amador for the first two narcotics transactions he met with defendant to obtain the cocaine. Sandoval also testified that after completing the first two transactions he met defendant to give him the money he obtained from Amador. This testimony was partially corroborated by the testimony of Officer Hayes, who stated he observed Sandoval with defendant directly after the second narcotics transaction was concluded on May 25, 2010. See *Ash*, 102 Ill. 2d at 493 (the uncorroborated testimony of an accomplice can be a sufficient ground on which the trier of fact may base a conviction). Sandoval's testimony that defendant was the supplier of the cocaine was further

corroborated by Officer Amador's testimony, wherein Amador stated that Sandoval informed him on June 3, 2010, that he had to obtain the three ounces of cocaine from his "buddy" (referring to defendant) and that defendant "wants his money." Sandoval further testified that defendant handed him the cocaine that he ultimately handed to Amador on June 3, 2010. In addition, Sandoval's testimony that defendant handed him the narcotics in "a bag" was corroborated by Amador's testimony, wherein he stated that the cocaine Sandoval handed him was in "a Ziplock [*sic*] bag." Viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of delivery of a controlled substance beyond a reasonable doubt. See *Boykin*, 2013 IL App (1st) 112696, ¶ 17.

¶ 84 Defendant next asserts that much of Sandoval's testimony was "incredible" for two reasons: (1) Sandoval testified that he began selling cocaine for defendant within three days of meeting him; and (2) Sandoval testified that he sold the cocaine without taking any compensation to help defendant who was not his friend.

¶ 85 As the State correctly points out, the trial testimony indicates Sandoval met defendant in the beginning of May 2010 and that Sandoval first sold cocaine to Amador on May 20, 2010. Accordingly, defendant's first contention is incorrect, as the evidence demonstrates that Sandoval did not begin selling cocaine three days after meeting defendant.

¶ 86 Regarding defendant's second contention, that Sandoval's testimony was incredible because he stated he sold cocaine without compensation to help defendant, we conclude this testimony does not create reasonable doubt of defendant's guilt. As previously acknowledged, an accomplice witness' testimony need not be corroborated for the jury to find it credible. See *Tenney*, 205 Ill. 2d at 429. Here, however, much of Sandoval's testimony was corroborated. In addition, the jury was well aware and fully informed of Sandoval's involvement in the narcotics

transaction and his plea agreement with the State. Given this information, it was for the trier of fact to determine the credibility of the witnesses and the weight to be afforded their testimony. See *Boykin*, 2013 IL App (1st) 112696, ¶ 6. "While it is true that testimony of a witness who is an accomplice is to be viewed with suspicion and is to be viewed by the jury with caution, it is also clear that such evidence, if it is enough to convince the jury beyond a reasonable doubt, is sufficient to sustain a conviction." *People v. Williams,* 70 Ill. App. 3d 489, 493 (1979). Here, the jury found the evidence was sufficient to sustain defendant's conviction for delivery of a controlled substance and this finding is not so unreasonable, improbable or unsatisfactory as to create a reasonable doubt of defendant's guilt. See *Ortiz*, 2012 IL App (2d) 101261, ¶ 9. "By this finding, however, we reach no conclusion as to defendant's guilt that would be binding on retrial." *People v. Naylor*, 229 Ill. 2d 584, 610-611 (2008).

¶ 87 Although we reverse defendant's conviction on ineffectiveness of counsel as to the accomplice witness instruction, we have found that the evidence was sufficient to prove defendant guilty beyond a reasonable doubt. Thus, a retrial will not violate defendant's right to be free from double jeopardy. *People v. McKown*, 236 Ill. 2d 278, 311 (2010); *People v. Jiles*, 364 Ill. App. 3d 320, 330-331 (2006). As the foregoing is dispositive of this case, and we decline to address defendant's alternative arguments. See *Naylor*, 229 Ill. 2d at 610-611.

¶ 88 CONCLUSION

¶ 89 For the reasons stated above, the judgment of the circuit court of Cook County is reversed and the cause is remanded for a new trial.

¶ 90 Reversed and remanded.