2015 IL App (2d) 130832-U
No. 2-13-0832
Order filed May 26, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MICHAEL J. REYES, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Kane County. No. 07-CF-1821 Honorable Susan Clancy Boles, Judge, Presiding.

PRESIDING JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Jorgensen and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The evidence was sufficient to support the defendant's convictions of first degree murder, and the trial court did not err in denying his motion to dismiss the indictment on the basis of pre-indictment delay.

¶ 2 On February 1, 2013, a jury found the defendant, Michael Reyes, guilty of six counts of first degree murder (720 ILCS 5/9-1(a)(1), (2) & (3) (West 1992)) relating to the 1993 deaths of Jesus and Francisco Montoya. He appeals, arguing that the State did not prove his guilt beyond a reasonable doubt and that the delay in charging him with the murders substantially prejudiced his ability to present his defense, violating his due process rights. We affirm.

¶ 3 I. BACKGROUND

¶ 4 The following facts, which are arranged in roughly chronological order, are drawn from the testimony and other evidence presented at trial.

¶ 5 At about 2:20 p.m. on March 9, 1993, the Aurora police responded to a telephone report of a white conversion van parked on the street near 16 South Spencer. Looking inside, they found two men dead in the back of the van. There was a bullet hole in the windshield. The van belonged to the Montoya family, and the men were Jesus and Francisco Montoya, two brothers. The men, one of whom was sitting behind the driver's seat and the other of whom was sitting behind the front passenger seat, had bullet wounds to their heads. Four shell casings were found inside the van. The police later determined that all of the recovered casings were .45 caliber and had been fired by the same gun.

¶ 6 A fingerprint lifted from the van matched someone named Aaron Jones. However, a police officer testified that he was unable to establish any connection between Jones and the shootings. Several items found inside the van, including an LA Raiders hat, two beer cans, and a Dairy Queen cup, were tested for DNA. The DNA results from the beer cans excluded the defendant, and the other items yielded too little DNA to produce results. A pager was found in Jesus's pocket. The phone numbers on it included his girlfriend, his mother, an upstairs neighbor whose phone he sometimes used, a person named Alex Mishos, a camera store, and an armed forces recruiter. An Aurora police detective testified that he believed that, at the time, pagers could store only seven phone numbers; the numbers for any pages placed after that were not retained.

¶ 7 Forensic autopsies of the victims produced the following information. Francisco had been shot twice in the head, one bullet entering just below his right eye and the other on the top right side of his skull. Pass-through wounds to his right hand indicated that Francisco had been holding his hand up to his face as he was shot. Jesus had also been shot twice in the head, once

below his lip and once in the left portion of his head; both bullets were found inside his skull. In addition, he had been shot through the left shoulder. Neither victim was shot between his eyes, or in his throat or neck. Both men had died as a result of being shot.

¶ 8 Francisco's girlfriend testified that she spent the evening of March 8, 1993, with Francisco. Someone picked him up from her apartment shortly before 10 p.m. On March 9, Jesus's girlfriend identified the bodies of the brothers. She testified that in 1993 the brothers were involved in selling cocaine for their family, who obtained it from an uncle in Texas.

¶ 9 Dennis Sorbel testified that, in 1993, he and the defendant were both employees at BRK Electronics, a manufacturing plant in Aurora. On March 10, 1993, they ate lunch together at a Pizza Hut near work. Sorbel had known the defendant for two or three months at that point, primarily through the defendant's aunt, who also worked at BRK. Over lunch, the defendant told Sorbel that he had murdered two brothers as part of a "ripoff" involving $60,000 worth of drugs. The defendant said he had arranged a drug sale with the brothers in their van. The defendant brought his friend Abraham, a gang member from Chicago, to the meeting. The defendant used a .45 caliber gun to shoot the brother who was seated across from him in the face and the side of the head. He then shot the other brother, who was next to him and who had curled into a fetal position after he shot the first brother, twice in the head and in the neck. The defendant took the brothers' cocaine. He told Sorbel that his mother and girlfriend would say he was with them at the time of the shooting.

¶ 10 Sorbel phoned a friend in Colorado, Eric Patsch, and told him about his conversation with the defendant. Sorbel told Patsch that he had checked out the defendant's story by reading about the shootings in the newspaper. Also, word was out on the street that the defendant had done the shootings. (At trial, Sorbel testified inconsistently about when he first read about the shootings, saying it was three or four days after they happened.) Patsch urged Sorbel to call the police, but

Sorbel did not do so. At some point, Patsch himself called the police and reported the conversation between the defendant and Sorbel. Patsch arranged with the police to speak with Sorbel again and secretly record the phone calls. On March 21, 1993, in a recorded phone call, Patsch asked Sorbel to recount detailed information from the defendant about the shootings, saying that he needed the information for a school project. Sorbel provided details, saying that all of the information could be found in the newspaper. When pressed to provide information that the defendant had related that had not been in the paper, Sorbel at first said that he could not recall any such information, but later said that one of the victims had been shot in the forehead, between the eyes. The police obtained the recordings of Patsch's phone calls with Sorbel.

¶ 11 Near the end of March 1993, Sorbel was stopped by the Aurora police for a traffic offense. He was taken to the station, where the police asked him about his conversation with the defendant. The police told him that, if he did not tell them what he knew, he could be charged with obstruction of justice, which was a felony. However, if he cooperated, he would not be charged with anything. Sorbel had never been in trouble with the police before and was nervous. After speaking with police, Sorbel made a written statement regarding his conversation with the defendant.

¶ 12 Sorbel's was the only statement that implicated the defendant in March 1993. The defendant's home was searched on March 10, 1993, and the following day he voluntarily spoke to police. The defendant told the police that, on the night of March 8, 1993, he had paged the Montoya brothers three or four times to come over to his house and get high, but they never showed up. He was not charged with the murders at that point in time.

¶ 13 The police file on the murders contained a record that, on March 24, 1993, a confidential informant told a police investigator named Wayne Biles that two men from Chicago, Victor Cortez and Hector Montanez, had committed the murders. The informant also stated that

"Michael" set up the meeting between these two men and the Montoya brothers, and "Michael" was seen in the front passenger seat with the brothers at about 11 p.m. on March 8, 1993. The informant did not know "Michael's" last name. The informant said that Cortez and Montanez lived near 22nd and Kedzie in Chicago.

¶ 14 The next developments in the case appear to have come about a decade later. At trial, former FBI agent Paul Bock testified that he worked on an investigation into drug trafficking by members of the Latin Kings street gang in Aurora in late 2001. A large number of gang members were arrested and charged, and many offered to cooperate with the government's efforts to prosecute other gang members in exchange for cash, relocation, or favorable plea agreements in their own cases. Among other efforts, the FBI worked with the county sheriff and county prosecutor to reexamine unsolved murders, including the murders of the Montoya brothers.

¶ 15 Jose Oliva was arrested in 2002 and charged with conspiracy to distribute cocaine, felony possession of a firearm, and possession of cocaine with intent to distribute. He agreed to cooperate with the government, and in May 2003, he entered a negotiated plea agreement in federal court to the conspiracy count. The remaining charges were dismissed. Although the sentence for conspiracy would have been between 10 years and life in prison, under the plea agreement he served less than eight years. At the time of trial, he was still on parole, and he acknowledged that the plea agreement could be vacated at any time if he stopped cooperating with the government. He provided information about several Latin Kings, including the defendant.

¶ 16 Oliva testified that in the spring of 1993, the defendant asked him for a gun. Oliva gave him a .45 caliber handgun. After that, "supposedly some murders happened." About three

weeks later, Oliva asked the defendant to return the gun, but the defendant said he could not do so because he had gotten rid of it. Oliva did not ask why.

¶ 17 Juan Acevedo was arrested on several federal charges in 2003, for which he faced a sentence of 30 years to life in prison. Like Oliva, he agreed to cooperate with the government and entered a negotiated plea agreement, pursuant to which he pled guilty to a single count of conspiracy to distribute illegal drugs. Sentenced to four years in prison, he actually served only 34 months. At trial, he acknowledged that, if he did not testify for the government, the plea deal could be voided and he could be prosecuted on all of the original charges. Acevedo testified that he had been a Latin King in Aurora from 1988 through 2004 or 2005. In October 2002, he had a conversation with the defendant at an apartment in Aurora; Abraham Estremera was also present. When someone brought up the Montoya brothers' murders, the defendant said that he and Estremera had committed them. Acevedo testified that, upon hearing the defendant implicate him, Estremera looked shocked. However, the defense later presented records showing that Estremera had been in prison (serving a life sentence) beginning in July 2002, and thus Estremera could not have been present in October 2002 when Acevedo said that he met with the defendant and Estremera.

¶ 18 Carlos Olivares also agreed to cooperate with the prosecution of former Latin Kings. Olivares ultimately received $40,000 from the government as relocation assistance. He provided the following testimony at trial.

¶ 19 Olivares had been one of the leaders of the Latin Kings in the 1990s and had been second in command ("cacique"). He estimated that he made about $200,000 per year supplying gang members with drugs and guns. In 1993, he was arrested on federal charges and was imprisoned until 1998. Later that year, he was arrested on state charges and he remained in prison on those charges until 2004. He began cooperating with the government in 2003.

¶ 20 Olivares told the government that he knew the defendant, who had been a fellow Latin King. He also knew the Montoya brothers, who (like him) sold cocaine. They did not sell for a gang, but for an uncle in Texas. Olivares said that, on the morning of March 9, 1993, he received a phone call from his cousin, Fernando Roman, who told him that the Montoya brothers had been shot. Olivares went to Roman's house. At some point after that, he left Roman's house and went to the east side of Aurora. During the afternoon, he and some other gang members were at the corner of Spring and State, near a convenience store, watching the police activity near the shooting scene, which was about five blocks away.

¶ 21 Olivares saw the defendant there. According to Olivares, the defendant smiled as he came up to Olivares, and Olivares asked him, "Why did you tell my cousin anything? That's going to come back to haunt you." Olivares then asked the defendant what happened, and the defendant said he had killed the Montoya brothers. The defendant said, "You should have seen the rush. I shot him once. He started shaking, and I shot him again." The defendant described calling the Montoya brothers to set up a deal. The defendant said that Estremera was with him and was supposed to shoot the other brother, but Estremera froze and couldn't do it, so the defendant turned and shot the other brother. The defendant said he used a .45 caliber gun. Then he took nine ounces (a quarter kilo) of cocaine from the brothers. As he and Estremera ran from the van, Estremera vomited. The defendant later divided the cocaine with Estremera, even though he felt Estremera was a coward. The defendant asked Olivares, who was a larger distributor than the defendant, if Olivares could sell the cocaine for him. He asked Olivares to come by his house to see the cocaine. Olivares did so, about three days later. The defendant showed Olivares a package with about four and a half ounces of cocaine. Olivares testified that he knew how much cocaine it was because "I sell drugs." Olivares declined to sell the cocaine for the defendant but recommended some possible buyers.

¶ 22 Carlos Escalante was another former Latin King from Aurora. He was arrested in 2000 on state charges, and after that gang members believed that he had cooperated with the police and turned against him. He was arrested again in 2005 on federal charges and decided to cooperate with the government. Although he was classified as a level six career offender, the highest level under the federal sentencing guidelines, he was able to negotiate a plea agreement to a single count of conspiracy to distribute cocaine and a 90-month sentence. (He was also ordered to forfeit over $4 million.)

¶ 23 Escalante testified that he was in state prison in March 1993 when the Montoya brothers were killed. He learned of their deaths from his sister. He was released from prison later in 1993. Sometime after that (he did not know where or when), Escalante had a conversation with the defendant. The defendant told him that he had killed the Montoya brothers. The defendant said that he paged the Montoyas and arranged to buy cocaine from them. He met with them inside a van. Estremera was also there. The defendant was sitting in the front passenger seat. After the drug deal was done, he showed the brothers a gun. He then pointed the gun toward the driver's side of the van and shot one of the brothers in the neck or throat. That brother reached to grab his wound and the defendant shot him again, killing him. He then shot the other brother, who was curled up on the floor in the back of the van, pleading with the defendant not to shoot him.

¶ 24 On cross-examination, Escalante admitted that, while he was still in prison in 1993, his sister told him over the phone that the defendant was in the front passenger seat and shot one of the brothers, who was the driver; then the defendant turned and shot the second brother.

¶ 25 In June 2007, the defendant was charged with the murders of the Montoya brothers.

¶ 26 In 2007, Michael Rodriguez was in jail facing murder charges of his own, as a result of testimony obtained from former Latin Kings about a different unsolved murder. Rodriguez had

been active in the Latin Kings from 1990 to 1999. Rodriguez faced a prison term of 20 to 60 years on the murder charge. However, by cooperating with the government and testifying against the defendant and other former Latin Kings, he was able to negotiate a plea agreement under which he pled guilty to conspiracy to commit first degree murder and a prison term of 90 months, on which he could receive day-for-day credit and thus serve only 45 months. He had served his entire sentence for that conviction by the time he testified at the defendant's trial. As a further incentive, at the time of trial he had a pending felony charge in Kane County and did not know what might happen with that charge. However, the State had agreed to reduce his bond to an amount he was able to post.

¶ 27 Rodriguez testified that, while he was in jail in 2007, he shared a cell with the defendant. At some point during that period, the defendant volunteered that he had killed the Montoya brothers. The defendant described how he had paged the brothers for a drug deal and driven around Aurora with them, supposedly waiting for a buyer to call but actually so that the defendant could look for a place to commit the murders. Estremera was with them. The defendant first shot one brother, who was in the driver's seat; then he shot the other brother, who was a passenger. Estremera vomited. The defendant split the quarter-kilo of cocaine they took from the brothers with Estremera. The defendant mentioned being surprised that the police did not find his number on the Montoya brothers' pager after the shooting.

¶ 28 Further jail-house testimony came from Craig Renzelman. Renzelman was convicted of criminal sexual abuse and was sent to the Stateville Correctional Center in July 2008, where he shared a cell with the defendant for 10 days. Renzelman did not know any Latin Kings before this. He told the defendant that he had been convicted of a marijuana-related crime.

¶ 29 Renzelman said that the defendant spoke about the Montoya brothers' shooting "mostly every day" during the time that they shared a cell. The defendant had a big stack of papers about

his case by his bunk, including police reports, which he would read aloud from. According to Renzelman, the defendant volunteered that he had been charged with the murders of the Montoya brothers. The defendant recounted how he and someone named Abraham met the Montoyas inside a red van, purportedly to buy drugs but actually to rob them. The defendant shot them repeatedly in the head, although one of the brothers held up a hand in defense. Abraham "froze up," so the defendant shot both brothers himself. The defendant said his sister had written to Abraham (who was already serving a life sentence), suggesting that he assume responsibility for killing the Montoya brothers as well.

¶ 30 After 10 days, Renzelman was transferred to a different correctional center, where he told a prison official about the defendant's statements about the Montoyas' murders. Renzelman initially testified that he reported the defendant's statements because it "was the right thing to do." However, on cross-examination, he admitted that he spoke up because he was hoping that doing so might persuade officials to help him with his case: his three-year sentence was the longest possible sentence for his offense.

¶ 31 In 2008, the defendant moved to compel, *inter alia*, identification of the confidential informant who in March 1993 told police investigator Biles that the Montoya brothers had been shot by Victor Cortez and Hector Montanez, accompanied by someone named "Michael." The trial court granted the motion and ruled that the State must disclose the informant. At a later court date, however, the State advised the court that Biles could no longer remember the identity of the informant, and no further information was available.

¶ 32 The final witness to implicate the defendant in the killings of the Montoya brothers was Gino Montoya, the victims' younger brother. In March 1993, Gino was 15 years old and lived with his brothers and the rest of his family in Montgomery. The brothers were all home on the evening of March 8. Gino was expecting to accompany his brothers to a drug deal. He saw

Jesus put a quarter kilo of cocaine in his jacket pocket. Jesus got a call on his pager, and went upstairs to borrow a neighbors' phone to return the call. (At the time, the family had no phone.) When he came back, the three brothers prepared to go meet with the defendant "and some other individuals unknown to us." Francisco wanted to bring a gun, but Jesus told him not to. The brothers did not want their parents to know they were leaving, so they climbed out a window and pushed the family's van down the street before starting it. One of Gino's brothers sent him back to the apartment to get his jacket, and when Gino returned, the van was gone. That was the last time he had seen his brothers alive.

¶ 33 Gino first told the police what he knew in September 2012. He testified that his mother was afraid of retaliation after Jesus and Francisco were killed and so she made him promise that he would not tell the police anything that had happened on the night of the shooting. He kept his promise until after she died in February 2012. However, Gino also conceded that his mother had arranged for him to talk with police on March 10, 1993. He did not tell the police what he knew about the shooting at that point. He also vaguely recalled that he spoke again to police in 2007, telling them that his brothers had gone to sell cocaine to someone on the night they were killed. At the time of trial, Gino was serving a 23-year prison term in Wisconsin for a drug-related offense.

¶ 34 The defendant's trial took place between January 28 and February 1, 2013. The jury found the defendant guilty of three counts of first degree murder (720 ILCS 5/9-1(a)(1), (2) & (3) (West 1992)) as to each brother, for a total of six convictions. The defendant filed a posttrial motion in which he argued, among other things, that pre-indictment delay deprived him of the ability to adequately prepare his defense, thereby violating his right to due process. On July 2, 2013, the trial court denied this motion and sentenced the defendant to natural life in prison, to run consecutively to other sentences the defendant was serving. Upon the defendant's motion to

reconsider the sentence, the trial court re-sentenced the defendant so that his life sentence ran concurrently with his other sentences. The defendant filed a timely notice of appeal.

¶ 35 II. ANALYSIS

¶ 36 On appeal, the defendant raises two arguments. First, he argues that the evidence was insufficient to support his conviction because the State's witnesses were so untrustworthy. Second, he argues that his due process rights were violated by the lengthy pre-indictment delay in this case. We take each argument in turn.

¶ 37 A. Sufficiency of the Evidence

¶ 38 In his first argument, the defendant argues that the evidence was insufficient to prove beyond a reasonable doubt that he murdered the Montoya brothers. He points out that there was no physical or eyewitness evidence connecting him with the crime. Rather, the sole evidence against him was the testimony of numerous witnesses that the defendant admitted committing the murders.

¶ 39 As to the State's witnesses Oliva, Acevedo, Olivares, Escalante, and Rodriguez, the defendant asserts that the reliability of their testimony was fatally compromised by their motivation to incriminate him, as all of them were cooperating with the government in order to secure substantial benefits for themselves, including monetary payments and greatly reduced sentences for their own crimes. He points out that none of them came forward until years later, when they faced substantial prison time on multiple charges. Further, several of them either lied in their testimony or got key details wrong in a manner that supports the conclusion that they were repeating street rumors rather than the defendant's own words. For instance, Acevedo testified that Estremera was present when the defendant told people in October 2002 that he and Estremera committed the murders, specifically noting that Estremera looked shocked when the defendant made these statements. However, federal records showed that Estremera was in prison

in October 2002, so he could not have been present as Acevedo said. Another person in whom the defendant supposedly confided was Escalante, who could not remember when or where the relevant conversation actually occurred. Further, Escalante testified that the defendant said one of the Montoya brothers was shot while in the driver's seat of the van, but this account conflicted with the positions of the bodies at the crime scene. Rodriguez's account of the defendant's statements to him contained this same error. Escalante later admitted that his sister told him this story while he was in prison, based on what she had heard on the street, and the defendant argues that the testimony of Escalante and Rodriguez (and perhaps the other gang witnesses) was based wholly on such street rumors, not on any confession by him.[1]

¶ 40 As to Sorbel and Renzelman, he argues that their testimony that the defendant spontaneously admitted the murders to them was inherently unbelievable, and both of them had other sources for the information they supposedly heard from him—Sorbel admitted reading about the shooting in the newspaper, and Renzelman had access to the defendant's stack of papers in the cell. When Patsch asked Sorbel to provide some detail about the crime that was not in the newspapers, Sorbel first said he could not do so and then provided a detail that was

[1] The defendant also argues that Olivares's account of meeting with him was mistaken or false, in that it suggested that the meeting took place about 10 a.m. on March 9, 1993, while the police were investigating the crime scene, but the police were not called to the scene until after 2 p.m. Our perusal of the record shows that, in fact, Olivares testified that he received the phone call from Roman about 10 a.m. (after which he went over to Roman's house and then traveled to the area near the crime scene), not that he conversed with the defendant at that time. In his testimony, Olivares agreed that his conversation with the defendant took place in the afternoon on March 9, 1993.

inconsistent with the physical evidence (that one brother was shot in the forehead between the eyes). The defendant notes that, although the police received the statement from Sorbel in March 1993, he was not charged that time, and he argues that this showed Sorbel was not credible. Further, Renzelman admitted that he told prison officials about the defendant's supposed confession with the hope that it would lead to personal benefit in his own circumstances. Finally, Gino Montoya's testimony did not establish that the defendant committed any crime, but only that Gino believed that his brothers planned to meet up with the defendant that night. The defendant points out that he told police from the beginning that he had invited the Montoya brothers to his home to get high that night.

¶ 41 In evaluating the sufficiency of the evidence, it is not the province of this court to retry the defendant. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). The relevant question is " 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *Id*. (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The weight to be given to the witnesses' testimony, the determination of their credibility, and the reasonable inferences to be drawn from the evidence are all matters within the jurisdiction of the trier of fact. *People v. Smith*, 185 Ill. 2d 532, 542 (1999); *Collins*, 106 Ill. 2d at 261-62. Likewise, the resolution of any conflicts or inconsistencies in the evidence is also within the province of the fact finder. *Collins*, 106 Ill. 2d at 261-62. We will set aside a criminal conviction only "where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt." *Smith*, 185 Ill. 2d at 542.

¶ 42 Any interest on the part of a witness that may color his testimony is unquestionably relevant in assessing his credibility. *People v. Balayants*, 343 Ill. App. 3d 602, 605 (2003) ("A witness may be impeached by evidence that the witness has pending charges or is in State

custody at the time of trial, as it tends to show that the testimony may be influenced by bias, interest, or motive to lie." (citing *People v. Triplett*, 108 Ill. 2d 463, 481-82 (1985))). Here, the evidence of various witnesses' motivation to testify favorably to the State was substantial. However, all of this evidence was presented to the jury, which also heard the defense attorney's arguments that these witnesses should not be believed. Thus, the jury was well prepared to determine the credibility of these witnesses and the weight that should be given to their testimony. See *id*. ("A jury is entitled to the details of the theory of defense so it can make an informed judgment, and *** the right to cross-examine is satisfied when counsel is permitted to 'expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness.' " (quoting *Davis v. Alaska*, 415 U.S. 308, 318 (1974))). Moreover, not all of the State's witnesses had a clear motive to testify favorably to the State; for instance, Sorbel had no such motive. The testimony of a single credible witness is sufficient to sustain the defendant's convictions. See *People v. Slim*, 127 Ill. 2d 302, 307 (1989).

¶ 43 Further, although certain details of the testimony by the State's witnesses appeared to be incorrect or even false, other details were consistent with the physical evidence or supported the State's position that the information about which the witnesses testified came from the defendant himself. Oliva testified that he gave the defendant a small .45 caliber gun one or two weeks before the murders. Gino testified that his brothers took a quarter kilo of cocaine with them when they left the house to do a drug deal. Olivares testified that the defendant told him that he used a .45 caliber gun to shoot the Montoya brothers, and that he and Estremera had taken a quarter kilo (nine ounces) of cocaine from the van after the shooting and had split it. When Olivares later viewed the defendant's half share of the stolen cocaine, it was four and a half ounces. Although Escalante's report regarding the position of the first victim (in the driver's

seat) did not match the crime scene, the autopsy of Francisco Montoya supported Escalante's testimony that the defendant reporting shooting one of the brothers while his hand was raised to his neck or face. Rodriguez's account of the defendant's statements to him included the amount of the cocaine and the fact that the police apparently had not found the defendant's phone number on the victims' pager.

¶ 44 Viewing all of the evidence in the light most favorable to the State, even taking into account the generally low credibility of the State's witnesses who testified to secure a personal gain, we do not find the evidence "so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt." *Smith*, 185 Ill. 2d at 542.

¶ 45 B. Pre-Indictment Delay

¶ 46 The defendant's second argument on appeal is that the 14-year delay between the murders and his indictment for those murders substantially prejudiced his ability to present and prove his defense, depriving him of due process. Before trial, the defendant moved to dismiss the indictment on the basis of this delay. The trial court denied the motion, finding that the defendant had not shown actual and substantial prejudice arising from the delay. The defendant contends that this finding was erroneous.

¶ 47 The due process clause of the fourteenth amendment protects accused persons from oppressive and unreasonable pre-indictment delays. *People v. Carini*, 357 Ill. App. 3d 103, 112 (2005) (citing *United States v. Marion*, 404 U.S. 307, 325-26 (1971)). As explained by our supreme court, courts facing a claim of prejudicial pre-indictment delay must apply a two-step approach. First, the defendant must show actual and substantial prejudice. *People v. Lawson*, 67 Ill. 2d 449, 459 (1977). The possibility of prejudice is not enough. *Id.* Once the defendant shows actual prejudice, the burden shifts to the State to show the reasonableness of the delay. *Id.* After the State has met the requirements of the second step, the trial court "must make a

determination [of whether the delay violated due process,] based upon a balancing of the interests of the defendant and the public." *Id.*

¶ 48 In this case, the trial court held that the defendant had not met his burden as to the first step. The defendant argues that the trial court erred in this determination and asks us to find that he has met his burden, and to remand the case so that the trial court may proceed to the second step and, if necessary, the balancing test. Claims involving the violation of constitutional rights such as due process are reviewed *de novo* (*Carini*, 357 Ill. App. 3d at 113), and we apply this standard in reviewing the trial court's findings regarding substantial prejudice.

¶ 49 The defendant lists two ways in which he was prejudiced by the pre-indictment delay in charging. First, he was unable to obtain March 1993 time records from his employer, BRK Electronics, because those records had been destroyed. (An investigator from the state's attorney's office testified that she was told by BRK that employment records were destroyed after seven years.) The defendant asserts that those time records would have shown that he was at work during the daytime hours of March 9, 1993, refuting Olivares's testimony that he spoke with the defendant near the crime scene that afternoon. He argues that the jury could have used this information to discredit Olivares's testimony, and that this could have led the jury to discount the testimony of all of the former Latin Kings. Second, the defendant argues that the delay removed any chance to locate the confidential informant who reported that two other men, Victor Cortez and Hector Montanez, actually shot the Montoya brothers, because investigator Biles could no longer recall the identity of the informant. The defendant argues that he thus was unable to produce evidence that someone else committed the murders (suggesting that all of the testimony about the defendant's supposed confessions was false), substantially prejudicing his case.

¶ 50 As to the employment records, we agree with the trial court that these records had limited evidentiary value. The defendant argues that the records would have shown that Olivares lied when he testified that he spoke with the defendant on the afternoon of March 9, 1993, while the police were at the scene of the shooting, and thus shown that all of Olivares's testimony was a lie. However, the employment records would have shown only the hours during which the defendant was at work that day. They would not have eliminated the possibility that Olivares's conversation with the defendant occurred after the defendant got off work, when the police may still have been investigating the crime scene. Olivares did not give a specific time when the conversation occurred. Thus, at most the records would have negated only one aspect of Olivares's testimony about the conversation—the time of occurrence—and they might not have achieved even that. They would not have negated any other fact about which Olivares testified, including the specific details of the crime, such as the amount of cocaine stolen and the caliber of the gun used in the shooting. The defendant's further argument that the impeachment provided by the records might also have discredited the other witnesses who were former Latin Kings before the jury is simply speculation.

¶ 51 As to the identity of the confidential informant who told the Aurora police that the murders were committed by two other men, the defendant has not shown that the lack of this information violated due process by depriving him of the opportunity for a fair trial. When the identity of a confidential informant is at issue, courts apply a slightly different test than the *Lawson* two-step test. Our supreme court outlined this test in *People v. Holmes*, 135 Ill. 2d 198 (1990). Under *Holmes*, courts apply a three-step process. First, a defendant must establish that the informant's testimony would be material to his defense. *Id*. at 212. This standard is not a high one; it is met when the defendant shows that "the informant's testimony is 'relevant and helpful to the accused's defense.' " *People v. Abston*, 263 Ill. App. 3d 665, 674 (1994) (quoting

Roviaro v. United States, 353 U.S. 53, 62 (1957)). Once the defendant has done this, the State must produce the informant or, if that is impossible, it must show that it "exerted a good-faith effort to make the witness available." *Holmes*, 135 Ill. 2d at 212. If the State can show this, the burden shifts back to the defendant to "affirmatively demonstrate that the informant's testimony 'would tend to be exculpatory or would create a reasonable doubt as to the reliability of the prosecution's case either through direct examination or impeachment.' " *Id*. at 213 (quoting *State v. Jenkins*, 360 N.E.2d 1288, 1290 (N.Y. 1977)). This is a higher burden on the defendant than that imposed by the first step; indeed, our supreme court commented in *Holmes* that, at least as of the date of that decision, the court did not know of any case in which a defendant had successfully met the third step. *Id*. at 214. (However, in *Holmes*, the supreme court went on to find that burden met where the informant was the sole witness to the supposed drug sale that formed the basis for count II of the indictment in that case.)

¶ 52 In this case, the trial court found that the defendant had established the relevancy and materiality of the informant's identity, and thus it ordered the State to produce that information. Subsequently, an Aurora police officer testified that he spoke with investigator Biles regarding the informant's identity, but Biles could not remember the informant's name and had no notes containing that information. The trial court found that the State had met its burden under the second step of the *Holmes* test to show that it made a good faith effort to produce the informant's identity. The trial court then went on to say that the circumstances did not present a violation of the defendant's due process rights.

¶ 53 On appeal, the defendant argues that the trial court erred in determining that the State established a good faith effort to produce the information because, even if the State acted reasonably in 2008 when the informant's identity was requested, it did not act reasonably or in good faith in 1993, when Biles failed to record the informant's identity despite the clearly

material substance of the informant's report. However, the defendant cites no legal support for his argument that the State's duty to conduct a good-faith effort to locate an informant extends back in time to encompass the earlier failure of the police to record the informant's identity, and we are not aware of any such legal support. Accordingly, we reject his argument that the State did not make a good faith effort to produce the informant's identity.

¶ 54 We therefore turn to the question of whether the defendant met his burden under the third prong of the *Holmes* test by showing that the informant's testimony " 'would tend to be exculpatory or would create a reasonable doubt as to the reliability of the prosecution's case either through direct examination or impeachment.' " *Id.* at 213 (quoting *State v. Jenkins*, 360 N.E.2d 1288, 1290 (N.Y. 1977)). Here, it is not clear that the informant's testimony would be exculpatory, inasmuch as the informant reported that someone named "Michael" was with the two Chicago men at the time of the shooting. Moreover, "[t]he purpose of requiring the prosecution to disclose the names of government informants whose testimony might be material and helpful to a defendant's defense is to allow the defendant the opportunity to call the informants as witnesses, or at least to interview them in preparation for trial." *Holmes*, 135 Ill. 2d at 206. Here, however, there is no indication in the informant's statement that he was an eyewitness to the shooting, and it cannot be assumed that this is the case. Without personal knowledge of the shooting, the informant could not testify. And, as the statement does not indicate the informant's source for the information, we cannot presume that he could have provided any leads (beyond those already contained in the statement) had the defendant been able to interview him.

¶ 55 In sum, the record does not provide any support for an assumption that the informant could provide eyewitness testimony as suggested by the defendant, and the informant's ability to supply any further leads is speculative at best. Thus, we cannot conclude that the missing

testimony would create a reasonable doubt regarding the defendant's culpability for the murders. See *Lawson*, 67 Ill. 2d at 459 (the mere possibility of prejudice is not sufficient to show that pre-indictment delay violated a defendant's due process rights). The trial court did not err in denying the defendant's motion to dismiss the indictment based on the pre-indictment delay in this case.

¶ 56 III. CONCLUSION

¶ 57 For the foregoing reasons, the judgment of the circuit court of Kane County is affirmed.

¶ 58 Affirmed.