

NOTICE

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2014 IL App (4th) 130276-U

NO. 4-13-0276

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

December 30, 2014

Carla Bender

4th District Appellate

Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Adams County
BRYAN D. HILL,)	No. 12CF252
Defendant-Appellant.)	
)	Honorable
)	Robert K. Adrian,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.

Justices Harris and Appleton concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed the trial court's judgment, finding (1) the State's evidence proved defendant guilty beyond a reasonable doubt and (2) defendant did not receive ineffective assistance of counsel.

¶ 2 In February 2013, a jury found defendant, Bryan D. Hill, guilty of three counts of unlawful delivery of cannabis and one count of unlawful delivery of a controlled substance. In April 2013, the trial court sentenced him to prison.

¶ 3 On appeal, defendant argues (1) the State's evidence failed to prove him guilty beyond a reasonable doubt and (2) he received ineffective assistance of counsel. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In May 2012, a grand jury indicted defendant on three counts of unlawful delivery of cannabis and one count of unlawful delivery of a controlled substance. Count I alleged defendant committed the offense of unlawful delivery of cannabis (720 ILCS 550/5(d) (West

2010)) on August 30, 2010, when he knowingly and unlawfully delivered to another more than 30 grams, but less than 500 grams, of cannabis within 1,000 feet of a school or church. Count II alleged defendant committed the offense of unlawful delivery of a controlled substance (720 ILCS 570/401(d) (West 2010)) on September 1, 2010, when he knowingly delivered to another less than one gram of a substance containing cocaine. Count III alleged defendant committed the offense of unlawful delivery of cannabis (720 ILCS 550/5(b) (West 2010)) on September 1, 2010, when he knowingly and unlawfully delivered to another more than 2.5 grams, but not more than 10 grams, of a substance containing cannabis. Count IV alleged defendant committed the offense of unlawful delivery of cannabis (720 ILCS 550/5(d) (West 2010)) on September 7, 2010, when he knowingly and unlawfully delivered to another more than 30 grams, but not more than 500 grams, of a substance containing cannabis. Defendant pleaded not guilty.

¶ 6 In February 2013, defendant's jury trial commenced. Quincy police officer James Brown testified Terry Newman was the focus of an investigation for selling cannabis and prescription drugs in early 2010. Brown approached Newman and asked if he would be interested in cooperating with law enforcement "for consideration of his charges." Newman agreed to cooperate. Because of his cooperation, Newman ultimately was not charged for his offenses and received compensation for his work.

¶ 7 Newman told Brown he could purchase cannabis from defendant. On August 30, 2010, Brown prepared Newman for a drug buy with defendant. Because Newman did not have a valid driver's license, Newman's girlfriend, Kellie Willing, agreed to assist the task force by driving him to the drug transactions. Brown stated searches were conducted of both subjects and the vehicle. He also provided prerecorded United States currency to Newman for use in the purchase of the cannabis as well as a covert video-recording device. He stated most of the drug

buys utilized hidden video but not audio recording, as the latter involved a "somewhat time-consuming process" in receiving court authorization. Brown stated a review of the video of the transaction between Newman and defendant showed a transfer of money for a plastic bag of cannabis. After the transaction, Brown met with Newman and retrieved two plastic Baggies of suspected cannabis. Brown stated the transaction occurred within 1,000 feet of Quincy University.

¶ 8 Brown stated he engaged the services of Newman again on September 1, 2010. The proposed transaction was for a quarter pound of cannabis but ended up being "an ounce of higher grade cannabis," referred to as "kush." There was also an offer to buy a half gram of cocaine. Brown provided Newman with \$160. Both Newman and Willing were searched prior to the transaction, as was the vehicle. Later, Brown met with Newman, who provided him with a plastic Baggie of cannabis and a small Baggie of suspected cocaine. A review of the hidden camera video showed Newman getting into defendant's car and engaging in a drug transaction with him.

¶ 9 On September 7, 2010, Brown provided Newman with \$350 to purchase two ounces of cannabis and one gram of cocaine. Brown stated both Newman and Willing were searched. Brown followed the informants for a time but did not observe the alleged transaction. After the transaction took place, Newman met Brown and provided him with cannabis and \$150. Brown stated the video-recording device did not work during this transaction.

¶ 10 On cross-examination, Brown stated a search of a female informant is usually conducted by a female officer, if one is available. Brown stated he or an assisting officer conducted the search of Willing. He also stated Newman assisted in the search by pulling her bra away from her body to make sure she was not concealing contraband. Brown testified he did

not use a canine unit to help in searching the vehicle for contraband.

¶ 11 Kellie Willing testified Newman is the father of her son. She stated she agreed to provide transportation to Newman during the drug transactions. She stated neither she nor Newman hid drugs on their persons or in the vehicle during their time as confidential sources. She also stated she was searched prior to and after the transactions, as was the vehicle.

¶ 12 Illinois State Police Master Sergeant Robert Short testified he participated in the investigation on September 7, 2010, and met with Newman and Willing. Short noted he had warned Newman as to the repercussions of having any drugs in his possession. Short stated he did not find anything in his searches of the vehicle or of Newman. After the transaction, Brown recovered cannabis and currency from Newman. Short again searched Newman and the vehicle. He also observed Newman searching Willing, including pulling on her bra. Given the cannabis recovered on September 7, 2010, Short stated an object of that size would have been easily discovered during his searches.

¶ 13 Terry Newman testified he was serving a 10-year sentence for residential burglary. He had felony convictions for retail theft, obstructing justice, aggravated battery, and aggravated driving under the influence. In 2010, Newman was approached by Officer Brown following a delivery of cannabis and prescription pills and questioned about the possibility of becoming a confidential informant. In return for his cooperation, Newman hoped he would not be charged for the two felony offenses.

¶ 14 Prior to the transactions, Newman stated he and the vehicle were searched. He also participated in the search of Willing, by grabbing her bra to "jiggle it a couple times" to make sure there was no hidden contraband. During the first transaction, Newman carried a key-chain camera in his hand. He initially sought to buy two ounces of cannabis for \$120 per ounce.

Newman entered defendant's vehicle and purchased cannabis. Newman later provided the cannabis to Officer Brown, who searched him and the vehicle. Brown then gave him and Willing \$60 each for their work.

¶ 15 Newman stated the second transaction took place in a vehicle in defendant's backyard. He purchased a half ounce of cannabis and a half gram of cocaine. After the transaction was complete, Newman gave the substances and remaining cash to Officer Brown, who searched him and the vehicle.

¶ 16 Newman stated the third transaction took place in front of defendant's house. Newman purchased cannabis from defendant for \$150. Newman then turned over the marijuana and money to Officer Brown.

¶ 17 Defendant testified Newman contacted him on August 30, 2010, and stated he had some cannabis to sell. Defendant stated they met, and defendant purchased a half ounce of cannabis. Defendant stated they met again on September 1, 2010, and he purchased cannabis from Newman. Defendant remembered meeting Newman on September 7, 2010, but he did not get any cannabis from him on that day. Defendant testified he never sold any illegal substances to Newman.

¶ 18 Following closing arguments, the jury found defendant guilty on all four counts. In April 2013, defendant filed a posttrial motion, arguing the State's evidence failed to prove him guilty beyond a reasonable doubt. The trial court denied the motion. Thereafter, the court sentenced defendant to 12 years on count I, 10 years on count II, 5 years on count IV, and 364 days on count III. The court ordered all four sentences to run concurrent with one another. The court also imposed various fines and fees. This appeal followed.

¶ 19 II. ANALYSIS

¶ 20

A. Drug Convictions and Police Informants

¶ 21

Defendant argues his convictions on counts II and IV must be reversed because those convictions were based on the testimony of a confidential informant and drug user who assisted the police to make money and to avoid being charged with two drug offenses. We disagree.

¶ 22

"When reviewing a challenge to the sufficiency of the evidence in a criminal case, the relevant inquiry is whether, when 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.'" *People v. Ngo*, 388 Ill. App. 3d 1048, 1052, 904 N.E.2d 98, 102 (2008) (quoting *People v. Singleton*, 367 Ill. App. 3d 182, 187, 854 N.E.2d 326, 331 (2006)). The trier of fact has the responsibility to determine the credibility of witnesses and the weight given to their testimony, to resolve conflicts in the evidence, and to draw reasonable inferences from the evidence. *People v. Jackson*, 232 Ill. 2d 246, 281, 903 N.E.2d 388, 406 (2009). "[A] reviewing court 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. Rowell*, 229 Ill. 2d 82, 98, 890 N.E.2d 487, 496-97 (2008).

¶ 23

The "testimony by an informant who himself abuses unlawful substances and who participates in an undercover operation to minimize punishment for his own illegal activity should be closely scrutinized." *People v. Anders*, 228 Ill. App. 3d 456, 464, 592 N.E.2d 652, 657 (1992). However, an informant's pending criminal charges and motive of gaining leniency bear upon his credibility, but do not "render his testimony unworthy of belief." *People v. Pittman*, 100 Ill. App. 3d 838, 841-42, 427 N.E.2d 276, 279 (1981); see also *People v. Pittman*, 93 Ill. 2d 169, 174-75, 442 N.E.2d 836, 838-39 (1982). Our supreme court has held that "where a witness

has hopes of reward from the prosecution, his testimony should not be accepted unless it carries within it an 'absolute conviction of its truth.' " *People v. Ash*, 102 Ill. 2d 485, 493, 468 N.E.2d 1153, 1156 (1984) (quoting *People v. Williams*, 65 Ill. 2d 258, 267, 357 N.E.2d 525, 530 (1976)).

¶ 24 In the case *sub judice*, Officer Brown testified to the procedures utilized before, during, and after a controlled drug buy with a confidential informant. He stated Newman and Willing were searched prior to each controlled buy. Their vehicle was also searched. Brown provided Newman with prerecorded currency to make the drug transactions. After meeting with defendant, Newman returned to Brown and delivered contraband. Newman and Willing were then searched.

¶ 25 Master Sergeant Short testified he assisted in the drug buy on September 7, 2010. He searched Newman as well as Willing's vehicle. Newman assisted in the search of Willing's bra to ensure she was not hiding contraband. Short indicated he was very thorough in his searches and he felt comfortable neither Newman, Willing, nor their vehicle contained contraband.

¶ 26 The testimony of Newman and Willing was substantially similar to that of the officers. Both confirmed they were searched before and after each transaction with defendant. Their car was also searched. Both denied possessing any drugs of their own during this time and confirmed the drugs obtained by Newman were purchased from defendant.

¶ 27 The State's evidence was more than sufficient to allow the jury to conclude defendant delivered the drugs to Newman on the dates alleged. The officers stated the informants and the vehicle were searched prior to Newman meeting with defendant and no contraband was found. After meeting with defendant, Newman and Willing returned to Officer

Brown with cannabis or cocaine. A rational jury could find the officers' testimony corroborated the informants' version of the transactions with defendant and thereby conclude the cannabis and cocaine in Newman's possession upon his return could only have come from defendant.

¶ 28 Defendant argues Newman lacked credibility as an informant and witness because he was a drug dealer hoping to avoid criminal charges. Defendant also argues the evidence failed to ensure Newman's testimony was credible because there was no audio recordings of the transactions, the officers did not use a canine to sniff Willing's car prior to the buys, a female officer was not used to thoroughly search Willing, and the acts alleged in counts II and IV were not video recorded. Defendant claims these issues created a reasonable doubt as to his guilt.

¶ 29 Our supreme court has noted "it is well settled that the 'credibility of a government informant, as with any other witness, is a question for the jury.' " *People v. Evans*, 209 Ill. 2d 194, 213, 808 N.E.2d 939, 949 (2004) (quoting *People v. Manning*, 182 Ill. 2d 193, 210, 695 N.E.2d 423, 431 (1998)). " "The established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury." *Evans*, 209 Ill. 2d at 213, 808 N.E.2d at 950 (quoting *Hoffa v. United States*, 385 U.S. 293, 311 (1966)).

¶ 30 Here, the matters raised by defendant on appeal dealing with Newman's potential bias were fully laid out for the jury, and it was the jury's responsibility to judge the credibility of the witnesses. Moreover, the lack of video and audio recordings of the transactions in question was also before the jury, and it was the duty of the jurors to resolve conflicts in the evidence and draw reasonable inferences from that evidence. Considering the evidence in the light most favorable to the prosecution, a rational jury could have found the essential elements of charged offenses beyond a reasonable doubt.

¶ 31

B. Assistance of Counsel

¶ 32 Defendant argues his convictions must be reversed because defense counsel failed to ask the jury be instructed to view the testimony of paid informants with caution. We disagree.

¶ 33 A defendant's claim of ineffective assistance of counsel is analyzed under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Cathey*, 2012 IL 111746, ¶ 23, 965 N.E.2d 1109. To prevail on such a claim, "a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *People v. Petrenko*, 237 Ill. 2d 490, 496, 931 N.E.2d 1198, 1203 (2010). To establish deficient performance, the defendant must show his attorney's performance fell below an objective standard of reasonableness. *Evans*, 209 Ill. 2d at 219-20, 808 N.E.2d at 953 (citing *Strickland*, 466 U.S. at 687). Prejudice is established when a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Evans*, 209 Ill. 2d at 219-20, 808 N.E.2d at 953 (citing *Strickland*, 466 U.S. at 694). A defendant must satisfy both prongs of the *Strickland* standard, and the failure to satisfy either prong precludes a finding of ineffective assistance of counsel. *People v. Clendenin*, 238 Ill. 2d 302, 317-18, 939 N.E.2d 310, 319 (2010).

¶ 34 Defendant argues counsel should have requested an instruction informing the jury that the testimony of paid informants should be viewed with caution and his failure to do so undermined confidence in the verdict. "The purpose of jury instructions is to provide the jury with the correct legal principles applicable to the evidence, so that the jury may reach a correct conclusion according to the law and the evidence." *People v. Bannister*, 232 Ill. 2d 52, 81, 902 N.E.2d 571, 589 (2008).

"Illinois courts give preference to applicable pattern jury

instructions over nonpattern instructions. [Citation.] Indeed, Supreme Court Rule 451(a) informs that whenever the Illinois Pattern Jury Instructions, Criminal, contain an instruction applicable in a criminal case and the court determines that the jury should be instructed on the subject, the applicable pattern jury instruction 'shall be used' unless it does not accurately state the law. [Citation.] Nevertheless, if the pattern jury instructions do not contain an instruction on a subject on which the trial court determines that the jury should be instructed, the court may tender a nonpattern instruction to the jury as long as it is simple, brief, impartial, and free from argument." *People v. Buck*, 361 Ill. App. 3d 923, 942, 838 N.E.2d 187, 203 (2005).

See also *People v. Sims*, 265 Ill. App. 3d 352, 362, 638 N.E.2d 223, 230-31 (1994) (stating jury "instructions may be modified or supplemented when the facts of a particular case make them inadequate").

¶ 35 In Illinois, the Illinois Pattern Jury Instructions, Criminal, do not include an instruction dealing specifically with paid-informant witnesses. As both defendant and the State point out, several federal courts have found the use of paid informants raises credibility concerns, requiring the need for an informant instruction "when the informant's testimony is uncorroborated by other evidence." *United States v. Luck*, 611 F.3d 183, 187 (4th Cir. 2010); see also *United States v. Bosch*, 914 F.2d 1239, 1247 (9th Cir. 1990); *United States v. Hill*, 627 F.2d 1052, 1054-55 (10th Cir. 1980); *United States v. Garcia*, 528 F.2d 580, 587-88 (5th Cir. 1976); *United States v. Griffin*, 382 F.2d 823, 828 (6th Cir. 1967). The Fourth Circuit stated "[t]hese

courts have explained that an informant instruction is necessary because a general witness credibility instruction is not sufficiently cautionary for informants because of special concerns about the incentive that they have to fabricate information for their own benefit." *Luck*, 611 F.3d at 187.

¶ 36 In considering defense counsel's performance in this case, we first note the Supreme Court Committee on Jury Instructions in Criminal Cases "disapproves of instructions which comment on particular types of evidence, *e.g.*, flight." Illinois Pattern Jury Instructions, Criminal 4th No. 3.00 (4th ed. 2009) (hereinafter IPI Criminal 4th No. 3.00). The Committee has indicated its agreement with cases holding as follows:

" 'Courts are under a general obligation to avoid giving instructions which unduly emphasize one part of the evidence in a case, and are not required to give an instruction that would provide the jury with no more guidance than that available to them by application of common sense.' *People v. McClellan*, 62 Ill. App. 3d 590, 595, 378 N.E.2d 1221 (1st Dist. 1978)." IPI Criminal 4th No. 3.00.

The Committee has specifically stated its recommendation that instructions not be given on the subjects of flight (No. 3.03), motive (No. 3.04), and weighing police testimony (No. 3.19).

¶ 37 Second, as stated, our supreme court has held " 'the credibility of a government informant, as with any other witness, is a question for the jury.' " *Evans*, 209 Ill. 2d at 213, 808 N.E.2d at 949 (quoting *Manning*, 182 Ill. 2d at 210, 695 N.E.2d at 431). IPI Criminal 4th No. 1.02, stating the jury is the sole judge of the believability of witnesses, provides as follows:

"Only you are the judges of the believability of the witnesses and of the weight to be given to the testimony of each of

them. In considering the testimony of any witness, you may take into account 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."

This jury instruction, which was given in this case, provides the necessary admonition to the jury to carefully consider each witness and any interest, bias, or prejudice he may have.

¶ 38 Here, defendant failed to establish his counsel's performance was objectively unreasonable. There is no IPI criminal instruction concerning informant bias and Illinois law neither encourages nor requires it. Just as the trial court would not abuse its discretion by refusing to give a non-IPI instruction if the issue is covered by other instructions (*Buck*, 361 Ill. App. 3d at 942-43, 838 N.E.2d at 203), defense counsel is not ineffective for failing to submit a non-IPI instruction covered by other instructions. Specifically, counsel is not ineffective in failing to tender non-IPI instructions on an informant's credibility. See *People v. O'Brien*, 74 Ill. App. 3d 256, 260, 392 N.E.2d 967, 970 (1979) (finding no reversible error where the trial court refused to give a non-IPI instruction tendered by defense counsel). As the jury was properly instructed on witness bias in accordance with IPI Criminal 4th No. 1.02, counsel's performance was not deficient.

¶ 39 Even if an informant instruction was required in this case, defendant failed to establish prejudice. The jury was provided with ample evidence of Newman's potential bias and self-interest. Further, defense counsel pointed out Newman's alleged deficiencies during closing argument. For example, counsel noted Newman has "some credibility issues, all right." He also noted Newman had been in prison and was helping the police "to get out of some more felonies."

Noting "Terry Newman's credibility problems," counsel mentioned Newman worked as a confidential source against seven different people, indicating he "was really determined to stay out of jail." Counsel also pointed out Newman received payment for the drug deals, which was "a source of income" for him. Counsel reminded the jury as follows:

"So we've got a lot of issues with Terry Newman. He's got [a] long criminal history. He's picked up on a delivery of cannabis. He's picked up on selling prescription hydrocodone pills, controlled substance. You know, I just don't think he's credible enough without a camera backing him up every single time."

¶ 40 In this case, the jury, as trier of fact, had the responsibility to determine the credibility of the witnesses and the weight to be given to their testimony. The jury heard evidence of Newman's potential bias, and defense counsel argued Newman should not be believed because of that bias. However, despite that evidence and argument, the jury was not required to believe defendant's testimony over that of Newman's, which was partially corroborated by videotape evidence and supported by the testimony of police officers. As defendant failed to establish either prong of the *Strickland* standard, his claim of ineffective assistance of counsel is without merit.

¶ 41 III. CONCLUSION

¶ 42 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 43 Affirmed.