

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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KA 16-01187

PRESENT: SMITH, J.P., PERADOTTO, WINSLOW, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

SAMANTHA DIXON, DEFENDANT-APPELLANT.

HAYDEN DADD, CONFLICT DEFENDER, GENESEO (BRADLEY E. KEEM OF COUNSEL),
FOR DEFENDANT-APPELLANT.

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (JOSHUA J. TONRA OF
COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Robert B. Wiggins, J.), rendered April 12, 2016. The judgment convicted defendant, upon a nonjury verdict, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting her, upon a nonjury verdict, of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]), arising from her sale of heroin to a confidential informant. Defendant's contention that the evidence is legally insufficient to support the conviction because the testimony of the People's witnesses was incredible as a matter of law is not preserved for our review (see *People v Wilcher*, 158 AD3d 1267, 1267-1268 [4th Dept 2018], *lv denied* 31 NY3d 1089 [2018]; *People v Gaston*, 100 AD3d 1463, 1464 [4th Dept 2012]; see generally *People v Gray*, 86 NY2d 10, 19 [1995]). In any event, that contention lacks merit. In presenting their case, the People offered the testimony of the confidential informant to establish the elements of the crimes charged, including defendant's knowing possession, intent to sell, and sale of a controlled substance. The confidential informant's testimony "was not incredible as a matter of law inasmuch as it was not impossible of belief, i.e., it was not manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*Wilcher*, 158 AD3d at 1268 [internal quotation marks omitted]; see *People v Harris*, 56 AD3d 1267, 1268 [4th Dept 2008], *lv denied* 11 NY3d 925 [2009]). The confidential informant's criminal history and receipt of a benefit in exchange for her willingness to work with the police did not render her testimony

incredible as a matter of law (see *People v Hodge*, 147 AD3d 1502, 1503 [4th Dept 2017], *lv denied* 29 NY3d 1032 [2017]; *People v Carr*, 99 AD3d 1173, 1174 [4th Dept 2012], *lv denied* 20 NY3d 1010 [2013]). Those facts were placed before County Court, and we see no basis to disturb the court's credibility determination (see *Carr*, 99 AD3d at 1174). Furthermore, viewing the evidence in the light most favorable to the People (see *People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to support defendant's conviction with respect to each count (see *People v Bleakley*, 69 NY2d 490, 495 [1987]; *People v Bausano*, 122 AD3d 1341, 1342 [4th Dept 2014], *lv denied* 25 NY3d 1069 [2015]). Neither the absence of a recording of the transaction nor defendant's challenges to the credibility of the police witnesses precluded the court from finding, based on the testimony of the confidential informant and the forensic chemist who confirmed that the tested substance contained heroin, that defendant knowingly and unlawfully possessed heroin with intent to sell and did sell the drug to the informant (see Penal Law §§ 220.16 [1]; 220.39 [1]; *People v Nichol*, 121 AD3d 1174, 1177 [3d Dept 2014], *lv denied* 25 NY3d 1205 [2015]).

Viewing the evidence in light of the elements of the crimes in this nonjury trial (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (see generally *Bleakley*, 69 NY2d at 495 [1987]; *People v Stephenson*, 104 AD3d 1277, 1278 [4th Dept 2013], *lv denied* 21 NY3d 1020 [2013], *reconsideration denied* 23 NY3d 1025 [2014]).