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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Kane County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 10-CF-2840
)	
PASSION P. THOMAS,)	Honorable
)	Allen Anderson,
Defendant-Appellant.)	Judge, Presiding.

ORDER

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Zenoff and Jorgensen concurred in the judgment.

¶ 1 *Held:* The evidence adduced at trial was sufficient to convict defendant of the charges. Because we further determined that defendant was not denied the effective assistance of trial counsel, we affirmed.

¶ 2 Defendant, Passion P. Thomas, appeals her convictions of three counts of forgery (720 ILCS 5/17-3(a)(2) (West 2010)), two counts of retail theft (720 ILCS 5/16A-3(a) (West 2010)), and two counts of theft by deception (720 ILCS 5/16-1(a)(2)(A) (West 2010)). She contends that (1) the evidence adduced at trial was insufficient to prove her guilt beyond a reasonable doubt and (2), in

the alternative, she was denied the effective assistance of counsel. For the reasons that follow, we affirm.

¶ 3 On March 9, 2011, defendant was charged by indictment with three counts of forgery, two counts of retail theft, and two counts of theft. All offenses were alleged to have occurred at the Huntley Outlet Center. According to the indictment, on October 31, 2010, defendant used counterfeit \$100 bills to pay for merchandise at three different stores; this resulted in retail theft charges. Moreover, defendant was charged with theft for her alleged actions of taking valid United States currency that she was given as change when making the fraudulent purchases.

¶ 4 On May 23, 2013, defendant's jury trial commenced. Julie Krumwiede testified that, on October 31, 2010, she worked as an assistant manager at the "Toys R Us Express" store at the Huntley Outlet Mall. Krumwiede testified that, on October 31, 2010, she was working the store register when an African-American woman paid \$15 for a doll using what appeared to be a \$100 bill. The customer left the store with the doll and the change she was given. Krumwiede testified that she did not suspect that the bill was counterfeit. She testified that the lady who tendered the \$100 bill wore a black and gray sweatshirt with a hood and sunglasses. When asked if she could identify the alleged suspect in the courtroom, Krumwiede responded, "I'm sorry, I'm not sure, I can't remember."

¶ 5 On cross-examination, Krumwiede admitted that, on October 31, 2010, she informed police that the shopper was over 5'7" and was wearing a red and gray striped sweatshirt with the hood up. On November 10, 2011, Krumwiede was asked to sign a "Photo Lineup/Spread Acknowledgment" form. She signed the form and proceeded to select defendant's photograph from a lineup. She stated

that she had selected the photo because, “that’s the person that looked like the one who gave me the \$100 bill.”

¶ 6 Felicia Ramos testified that, on October 31, 2010, she worked as a clerk at Lane Bryant, a women’s clothing store located at the Huntley Mall. She testified that, on October 31, 2010, an African-American woman paid for \$30 worth of merchandise using a \$100 bill. Ramos described the woman “as black, darker skinned,” wearing something that made her look taller, possibly heels, and a white jacket or white vest with her hair pulled in a high ponytail. Ramos testified that the woman left the store with the items she purchased (a bracelet and shirt) and approximately \$70 in cash given to her as change for her purchase.

¶ 7 Ramos testified that she was shown a photographic line up and selected defendant “because she looks the closest to the person that I saw that day.” In court, she identified defendant as “the person who handed me the \$100 bill.”

¶ 8 Sherry Kerkstra testified that, on October 31, 2010, she worked as a clerk at the BCBG Max Azira store at the Huntley Mall. She testified that an African-American woman gave her a \$100 bill for a pair of \$20 jeans. Upon examining the bill and testing it with a special marker, Kerkstra became suspicious. Kerkstra testified that she told the woman that the bill appeared suspicious. She asked the woman if she had another way to pay. In response, according to Kerkstra, the woman offered payment in another form and told Kerkstra that if the bill was not real, she did not want it and that Kerkstra was free to provide it to authorities. Kerkstra testified that, while this transpired, she noticed a mall security guard talking with another BCBG clerk near the entrance of the store.

¶ 9 Brendan Bailey testified that, on October 31, 2010, he was employed as a mall security guard. He testified that, on that day, he received multiple reports of fake \$100 bills being passed in the

mall. He testified that, before he entered BCBG, he received a call that an employee at Designer Fragrance had received a counterfeit \$100 bill. The Designer Fragrance store employee informed Bailey that the perpetrator was a tall black woman wearing a red and white sweater. Bailey noticed a woman matching that description as he neared the store. He followed the woman, who walked in the opposite direction to the parking lot, where he watched her enter a “Suburban” with two other individuals; the vehicle then proceeded to drive away. Bailey then returned to BCBG, spoke with defendant and Kerkstra, and was given permission by defendant to show the \$100 bill to police.

¶ 10 Bailey approached a police officer with the counterfeit bill. He noticed that defendant had exited the store. Bailey testified that he and the police officer walked around until they located defendant seated by herself outside a Reebok store, smoking a cigarette. Bailey did not recall whether defendant carried any shopping bags other than the bag from BCBG. He testified that defendant wore a black jacket with fur around the hood. He could not recall her hairstyle. Bailey positively identified defendant in the courtroom.

¶ 11 Huntley police officer Sean Halik testified that, on October 31, 2010, he went to the mall in response to a security guard’s complaint that counterfeit \$100 bills were being passed. Halik testified that the original dispatch mentioned two offenders, one man and an African-American woman wearing red-striped clothing. He testified that his investigation led to a third offender, defendant.

¶ 12 Halik testified that after meeting with Bailey in front of the BCBG, he located defendant sitting outside the Reebok store. He testified that he could not recall what defendant was wearing but did recall that she wore “really high heels.” Halik spoke with defendant and defendant explained that the store thought her \$100 bill was fake. Defendant told Halik that she had told the store clerk

to keep the bill because she did not want it if it was fake. Halik testified that defendant told him that she obtained the bill from one of her sister's friends in exchange for styling hair. Halik could not recall whether defendant was carrying any bags other than the BCBG bag. Halik asked defendant if anyone accompanied her to the mall that day and defendant responded that she came to the mall with her sister, Sholanda Thomas and her sister's friend, James. Halik asked defendant to call her sister but defendant was unable to reach her.

¶ 13 Secret Service Agent Adam Dull testified as an expert in the identification of counterfeit currency. He stated his opinion that the passed \$100 bills, People's Exhibit nos. 1, 2, and 3, were counterfeit. Dull explained two common methods used in passing counterfeit currency. One of the methods he described involved a situation where a person takes a high-value counterfeit bill into a store, tenders it for an inexpensive item, and receives change for the bill in genuine currency. Dull testified that People's Exhibit nos. 1, 2, and 3 were identical. People's Exhibit nos. 1, 2, and 3 were admitted into evidence and the jury was allowed to observe each bill. Each bill contained identical serial numbers: People's Exhibit nos. 1, 2, and 3 each contained the number "CG5064625A" in the lower right corner and "CG50654625A GF" in the top left corner.

¶ 14 Detective Joseph Willard testified that he administered a photo lineup to both Ramos and Krumwiede. He testified that the lineup consisted of six photos, one of which was defendant's Minnesota State identification card photo. He testified that defendant's picture was smaller than the other photos in the lineup. However, Willard explained that, when presenting the photo lineup to the witnesses, he used a manila envelope with windows cut out to make the photographs appear uniform in size. He testified that the lineup did not include heights of the individuals.

¶ 15 Willard testified that he administered a state-mandated "Photo Lineup/Spread

Acknowledgment” sheet to both Ramos and Krumwiede. Willard explained that the acknowledgment states that the suspect might not be in the photo spread, that the witness is under no obligation to make an identification, and that the witness should not assume that the person administering the lineup knows which photo is that of the suspect. According to Willard, once the witness reads the form, he or she is required to acknowledge that he or she has read and understood each of the admonishments by initialing each of them and providing his or her signature. Willard testified that both Ramos and Krumwiede initialed and signed the form. Both witnesses selected defendant’s photo from the lineup.

¶ 16 After the State rested, the defense recalled mall security guard Bailey as its first witness. Bailey testified that a Designer Fragrance employee told him that a tall African-American woman wearing a striped sweater had used a counterfeit \$100 bill at the store. Bailey recounted how he followed a woman fitting that description to the parking lot and saw her depart in a “Suburban.” He testified that the woman’s long hair was pulled into a ponytail. Bailey testified that, on November 21, 2010, he identified defendant’s photo in a photo lineup. He testified that he was not shown a lineup that included a photo of the woman who wore the red-striped garment.

¶ 17 The defense recalled Officer Halik. He testified that defendant told him that if the \$100 bill was fake, she did not want it, and the police could keep it.

¶ 18 Defendant testified on her own behalf. She testified that, in October of 2010, she resided in Minnesota. On October 31, 2010, she was returning to Minneapolis with her cousin. They stopped at the mall to use the bathroom. Defendant testified that she was 5' 2" tall and was wearing a dark blue, almost black, coat with a fur collar on the day of the incident.

¶ 19 Defendant testified that her cousin went into a Guess store to shop and defendant went to the

food court to get something to eat. Defendant testified that, while waiting in line at Great Steak, she witnessed another customer attempting to pay for her food with a \$100 bill. However, according to defendant, the store could not make change for so large a bill. Defendant volunteered to give the woman \$100 in smaller currency. The woman accepted the offer and gave defendant the \$100 bill. Defendant testified that the woman was tall, wore her hair in a long ponytail, and was dressed in a black-hooded sweater.

¶ 20 Defendant testified that she was unfamiliar with the Mall and, upon attempting to reach the Reebok store, ended up at the BCBG store instead. Defendant testified that she went inside the store, found some \$20 pants on a clearance rack, and attempted to pay for them with the \$100 she had just received. She testified that the store clerk told her that the bill was fake and asked defendant if she had another way to pay. The defendant paid for the pants using other money she had in her wallet. Defendant testified that a security guard approached her and asked if he could take the bill and show it to police officers who were outside the store. Defendant replied, “if it is, yes, it is not real, no purpose for me having it.”

¶ 21 Defendant testified that, after the incident, she left BCBG and headed for the Reebok store. She testified that she was approached by two police officers and a security guard. The officers showed her the \$100 bill. Defendant explained that she did not know it was counterfeit. According to defendant, the officers asked her if she was employed. She responded that she was a student who made money on the side by doing hair. She gave police her identification card and they wrote down her address.

¶ 22 When asked why she did not tell the police where she obtained the \$100 bill, defendant explained stating:

“ ‘Cause at that time, and moment, I was like, it all happened so quickly. How did you get it for change, I wasn’t even really thinking about it like that until when I got here for the second trial date, and then they read the police report, and I remembered the lady.”

Defendant denied having been in the Lane Bryant store or the Toys ‘R Us store.

¶ 23 The jury instructions tendered by the parties and given by the trial court did not include Illinois Pattern Jury Instructions, Criminal, No. 3.15 (4th ed. 2000) (IPI Criminal 4th No. 3.15), “Circumstances of Identification.” However, the jury was advised that:

“ you are the judges of 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, and interest, bias, or prejudice he may have, and the reasonableness of his testimony considered in the light of all the evidence in the case.”

¶ 24 The jury found defendant guilty of three counts of forgery, based upon passing counterfeit currency, two counts of retail theft based upon defendant’s purchase of merchandise, and two counts of theft based upon passing counterfeit \$100 bills and receiving real currency in return. The trial court denied defendant’s motion for a new trial. On August 11, 2011, defendant was sentenced to 24 months’ probation. She timely appeals.

¶ 25 Defendant first contends that the State failed to prove her guilty beyond a reasonable doubt of the retail thefts, thefts, and forgeries that occurred at Lane Bryant and Toys ‘R Us. We determine that the evidence was sufficient to convict defendant of the charges.

¶ 26 When an appellate court reviews the sufficiency of the evidence, 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. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *People v. Cooper*, 194 Ill. 2d 419, 430-31 (2000). All reasonable inferences from the evidence must be allowed in favor of the State. *People v. Gonzalez*, 239 Ill. 2d 471, 478 (2011).

¶ 27 A reviewing court will not substitute its judgment for that of the trier of fact on issues of the weight of the evidence or the credibility of the witnesses. *People v. Rojas*, 359 Ill. App. 3d 392, 398 (2005). This same standard of review applies regardless of whether the evidence is direct or circumstantial and regardless of whether the defendant receives a bench or jury trial. *Cooper*, 194 Ill. 2d at 431.

¶ 28 Where the record leaves a reasonable doubt, a reviewing court must reverse the judgment. *People v. Smith*, 185 Ill. 2d 532, 542 (1999). “[A] court of review has a duty to carefully review the evidence and to reverse the conviction of the defendant when the evidence is so unsatisfactory as to raise a serious doubt as to the defendant’s guilt.” *People v. Estes*, 127 Ill. App. 3d 642, 651 (1984). However, the trier of fact determines the witnesses’ credibility, weighs the evidence, draws inferences, and resolves any conflicts in the evidence. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001).

¶ 29 Here, defendant argues that the totality of the evidence established that a woman other than defendant used counterfeit currency at Lane Bryant and Toys ‘R Us, and therefore, the convictions based on the transactions that occurred at those stores must be reversed. The State responds that, based on the totality of the circumstances, including the multiple eyewitness identifications, defendant’s inconsistent explanations, and her unusual demeanor when confronted with the counterfeit bill, defendant’s guilt was proved beyond a reasonable doubt.

¶ 30 In the current matter, we determine that the credibility the jury assigned to the identifying

witnesses is not defeated by discrepancies in their testimony regarding the perpetrator's height and attire. Defendant essentially argues that this is a case of mistaken identity. Defendant suggests that the real perpetrator wore a red-striped garment and was observed leaving the mall in a van before police confronted defendant outside the Reebok store. Thus, defendant asserts that the store clerks' testimony, regarding the identity of the perpetrator, was not credible. However, a reviewing court will not reverse a conviction simply because the evidence is contrary or because a defendant claims that a witness is not credible. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). "A trier of fact is not required to accept any possible explanation compatible with the defendant's innocence and elevate it to the status of reasonable doubt." *Id.* "Contradictory testimony of a witness does not *** destroy [credibility] and it remains for the trier of fact to decide when, if at all [s]he testified truthfully." *Sparling v. Peabody Coal Co.*, 59 Ill. 2d 491, 498-99 (1974). It is for the finders of fact to determine how testimonial flaws affect the credibility of the witness as a whole. *People v. Cunningham*, 212 Ill. 2d 274, 283 (2004). Here, the jury weighed the evidence and determined that despite inconsistencies in the testimony of the various witnesses, the store clerks were credible.

¶ 31 The State points to *People v. Danis*, 129 Ill. App. 3d 664 (1984), as instructive of this point. In *Danis*, the defendant had only three fingers on each hand. Both identifying witnesses testified that they were sure that defendant had one normal hand and one deformed hand. The appellate court held that the two witnesses' failure to notice that both hands were deformed was "not so dubious that any serious doubt of his guilt" existed. *Id.* at 669. The court reasoned that witnesses positively identified the defendant and that this alone was sufficiently persuasive to establish identification of the perpetrator beyond a reasonable doubt. *Id.* at 668. The court determined that the jury may have concluded that the witnesses' failure to observe the deformity on the other hand did not, by itself,

destroy the credibility of their identification of the defendant. *Id.*

¶ 32 In the present matter, the jury may have determined that the failure of the store clerks to properly identify defendant's attire was not fatal to their credibility in identifying defendant as the perpetrator. The same conclusion can be made for the witnesses' failure to accurately determine defendant's height. Where there is a discrepancy between the complaining witness's estimate of a defendant's height and the defendant's actual height, it is for the trier of fact to evaluate the weight to be given to the discrepancies. *People v. Nichols*, 32 Ill. App. 3d 265, 268 (1975).

¶ 33 Moreover, although defendant asserts that the photo lineup identifications were flawed because the height of the individuals in the lineup was unknown and because defendant's photo stood out as it was the only photo reproduced from a state identification card, we note that differences in appearance of individuals in photo lineups also go to the weight of the identification testimony. *People v. Denton*, 329 Ill. App. 3d 246, 250 (2002). Because a jury must draw reasonable inferences from the facts presented to arrive at its ultimate verdict, we determine that it was reasonable for the jury to disregard the inconsistencies in witness testimony. See *Cunningham*, 212 Ill. 2d at 280. Thus, in this case, we are not at liberty to substitute our judgment for that of the triers of fact. See *Rojas*, 359 Ill. App. 3d 392, 398 (2005).

¶ 34 Furthermore, we note that the jury heard inconsistencies in testimony regarding defendant's story as well, and the jurors were free to assign weight to her credibility as a witness based upon those inconsistencies. Here, defendant told Halik and Bailey that she obtained the counterfeit bill from her sister's friends in exchange for styling hair. At trial, she testified that she received the counterfeit bill from a customer in line at Great Steak. Defendant also told Halik and Bailey that her sister and her sister's friend accompanied her to the mall that day. At trial, she testified that she was

with her cousin at the mall on the day of the incident. It was up to the triers of fact to determine the credibility of the testifying parties. See *Ortiz*, 196 Ill. 2d at 259. The jury verdict reflects that it was defendant's testimony, not that of the store clerks, that lacked credibility. When viewing the evidence in the light most favorable to the State, we determine that a rational trier of fact could have reached the conclusion that defendant was guilty of the alleged conduct beyond a reasonable doubt. *Jackson*, 443 U.S. at 319.

¶ 35 Defendant's second contention on appeal is that her trial counsel was ineffective for failing to tender IPI Criminal 4th No. 3.15. IPI Criminal 4th No. 3.15 provides:

“When you weigh the identification testimony of a witness, you should consider all the facts and circumstances in evidence, including, but not limited to, the following:

[1] The opportunity the witness had to view the offender at the time of the offense.

[2] The witness's degree of attention at the time of the offense.

[3] The witness's earlier description of the offender.

[4] The level of certainty shown by the witness when confronting the defendant.

[5] The length of time between the offense and the identification confrontation.” IPI Criminal, No. 3.15 (4th ed. 2011).

The State responds that the decision not to tender the instruction was sound trial strategy or, in the alternative, the absence of such an instruction was not prejudicial as there is no reasonable probability that, absent defense counsel's actions, the outcome of defendant's trial would have been different. We determine that defendant's trial counsel was not ineffective.

¶ 36 Whether a defense attorney has provided effective assistance is a mixed question of fact and law. *Strickland v. Washington*, 466 U.S. 668, 698 (1984). Although a reviewing court must defer

to the trial court's findings of fact, it is free to make an independent determination of the ultimate legal issue. *People v. Crane*, 195 Ill. 2d 42, 51 (2001). Here, the facts surrounding counsel's representation of defendant are reviewable from the record. Thus, whether counsel's acts or omissions constituted ineffective assistance of counsel is a question of law in this case and is therefore subject to *de novo* review. *People v. Daniels*, 187 Ill.2d 301, 307 (1999).

¶ 37 To show ineffective assistance of counsel, a defendant must demonstrate that his or her attorney's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *Strickland*, 466 U.S. at 687. The primary duties of a defense attorney are to advocate for the defendant's cause and to use his or her skill and knowledge so as to render the trial a reliable adversarial testing process. *People v. Jackson*, 318 Ill. App. 3d 321, 326 (2000), citing *Strickland*, 466 U.S. at 688. To establish that counsel's representation was deficient, the defendant must overcome the strong presumption that the challenged action or inaction might have been the product of sound trial strategy. *People v. Simms*, 192 Ill. 2d 348, 361 (2000). This presumption is overcome where no reasonably effective criminal defense attorney confronting the circumstances of the defendant's trial would engage in similar conduct. *People v. Fletcher*, 335 Ill. App. 3d 447, 453 (2002).

¶ 38 In the current matter, defendant failed to show that her trial counsel's conduct was not trial strategy. "Defense counsel's choice of jury instruction is considered a tactical decision, within the discretion of defense counsel." *People v. Mims*, 403 Ill. App. 3d 884, 890 (2010). The State asserts that tendering the instruction may have potentially undermined the defense theory that the woman wearing the red-striped garment was the actual culprit. Although, this argument is weak and the

State, in its brief, fails to fully develop or explain the argument, defendant's argument on the issue is no better. Here, defendant's argument simply asserts that "No effective trial strategy would include the failure to tender an instruction on the primary factor relating to the jury's determination *** of whether the defendant was properly identified as the offender." The record is silent regarding the reasons behind defense counsel's failure to tender the instruction and cases cited by both parties are easily distinguishable.

¶ 39 For example, in *People v. Lowry*, 354 Ill. App. 3d 760, 764 (2004), the court held that defendant's failure to tender a jury instruction regarding the definition of "knowingly" constituted ineffective assistance of counsel. In that case, after the jury trial, during deliberations, the jury sent a question to the trial judge asking for clarification on the meaning of "knowingly." *Id.* The question for the jury was whether the alleged perpetrator fired a gun knowingly or accidentally. *Id.* This is not similar to the case here. In the present matter, the jury was given ample instructions on the criteria by which they should make their decision. No juror questioned the trial judge or in any way indicated that he or she failed to understand the instructions at the time the instructions were given or at any time before they rendered a decision. Thus, the case is distinguishable.

¶ 40 However, because it is defendant's burden to overcome the strong presumption that the challenged action or inaction might have been the product of sound trial strategy, we hold that the first *Strickland* prong is not satisfied in the present matter. See *Simms*, 192 Ill. 2d at 361.

¶ 41 Although both *Strickland* prongs must be satisfied to show ineffective assistance of counsel, because this case may be instructive to the legal community, we address defendant's argument that the second *Strickland* prong applies. We determine that the second *Strickland* prong is not satisfied. Defendant argues that had her trial counsel tendered the proper jury instructions, the outcome of her

trial would have been different. Specifically, defendant asserts that the evidence in this case was closely balanced and thus, any error affecting the jury's assessment of the reliability of the identification testimony could have tipped the scales. The State responds that, even if the instruction was tendered, defendant would not have been acquitted on any of the charges. We agree with the State.

¶ 42 The jury in this case heard testimony that both identifying witnesses initialed and signed an acknowledgment form mitigating the potential shortfalls of witness identification before each witness identified defendant as the alleged perpetrator. Each witness corroborated the testimony of the others. Defendant admitted that she attempted to pass a fake \$100 bill on the same day, and at the same mall, where there were reports that counterfeit \$100 bills were being passed. The modus operandi of defendant's admitted conduct and the conduct of the suspect were similar. The counterfeit bill recovered from defendant had serial numbers identical to other counterfeit bills passed that day. Although defendant testified that she recalled receiving the counterfeit bill from a woman in line at Great Steak after her memory was jogged by a police report, the jury heard testimony that defendant affirmatively stated to police that she was given the counterfeit bill in exchange for styling the hair of her sister's friend. The jury also heard testimony tending to show that defendant offered multiple stories regarding who accompanied her to the mall that day. Furthermore, the jury was informed that they were "the judges of 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." Based on the forgoing, it is

unlikely that, but for defense counsel's failure to tender IPI Criminal 4th No. 3.15, the result of the trial would have been different. See *Strickland*, 466 U.S. at 687. Thus, we determine that defendant did not receive ineffective assistance of counsel.

¶ 43 Although, we find no prejudice in this case and we determine that the errors here fall short of requiring reversal, we note that the better way to have approached this case was for the IPI Criminal 4th No. 3.15 instruction to have been offered. Whether offered by defendant's trial attorney, the prosecutor, or the trial court, such an instruction would have ensured that our judicial system maintains its integrity.

¶ 44 For the forgoing reasons, we affirm the judgment of the Circuit Court of Kane County.

¶ 45 Affirmed.