2019 IL App (2d) 160941-U
No. 2-16-0941
Order filed July 15, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JUSTINA S. KEMOKAI, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 14-CF-3110 Honorable George D. Strickland, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Jorgensen and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Although the trial court erred in admitting the State's summary exhibits that labeled certain transactions as "fraudulent" or "unauthorized," defendant forfeited the issue and the evidence was not closely balanced under the plain error doctrine; the evidence was sufficient that the theft exceeded $100,000 in value; and the trial court did not rely on an improper aggravating factor at sentencing. Therefore, we affirmed defendant's conviction and sentence for Class 1 felony theft, but we remanded so defendant may file a motion raising alleged errors in the imposition or calculation of fines, fees, assessments, costs, and *per diem* credit pursuant to Illinois Supreme Court Rule 472 (eff. May 17, 2019).

¶ 2 Defendant, Justina S. Kemokai, appeals her conviction and sentence for theft over $100,000 but less than $500,000 (720 ILCS 5/16-1(a)(1)(A), (b)(6) (West 2014)). On appeal,

she contends (1) the trial court erred in admitting certain exhibits prepared by an expert because they contained his opinion as to whether certain transactions were "fraudulent" or "unauthorized"; (2) the State failed to prove beyond a reasonable doubt that the value of the stolen property exceeded $100,000 in value; (3) the circuit court relied on an improper aggravating factor at sentencing; and (4) she should receive a $5-per-day credit to offset the various fines imposed against her. For the following reasons, we affirm defendant's conviction and sentence and remand the cause.

¶ 3 I. BACKGROUND

¶ 4 On December 10, 2015, a grand jury indicted defendant on three counts of financial exploitation of an elderly person (720 ILCS 5/17-56(a) (West 2014)), three counts of financial exploitation of a person with a disability (*id.*), two counts of theft over $100,000 but less than $500,000 (720 ILCS 5/16-1(a)(1)(A), (a)(2)(A) (West 2014)), one count of use of counterfeited, forged, expired, revoked, or unissued credit or debit card (720 ILCS 5/17-36 (West 2014)), and one count of forgery (720 ILCS 5/17-3(a)(1) (West 2014)). The victims in each count were Eugene and Ruth Stern, an elderly couple who suffered from dementia and Alzheimer's, respectively, and for whom defendant worked as their live-in caregiver. The offenses concerned the alleged unauthorized use of the Sterns' credit cards and ATM card during the nearly 3-year period that defendant cared for the Sterns, as well as a series of 12 "duplicate" paychecks issued to defendant. The Sterns' other live-in caregiver, Laticia Lewis, was charged as a co-defendant with various similar financial crimes against the Sterns, but the circuit court granted defendant's motion to sever her trial from that of co-defendant Lewis. According to the presentence investigation report (PSI), Lewis eventually pleaded guilty to Class 3 felony theft, received a

sentence of 282 days in jail and 30 months' probation, and was ordered to pay over $60,000 in restitution.

¶ 5 The circuit court conducted a jury trial over four days in August and September 2016. Janet Siegel, one of the Sterns' daughters, testified as follows. Her parents, Eugene and Ruth Stern, were born in 1925 and 1930, respectively, and they married in 1952. She had one brother, Robert Stern, and one sister, Deborah Schatzman. Around 2008 or 2009, her mother's mental health began to deteriorate, in that she became forgetful and would repeat questions several times. Her mother's short-term and long-term memory eventually became non-existent, and she was eventually diagnosed with Alzheimer's. By 2011, her mother was "completely unable to function." Her father took care of her mother initially, but his health, too, eventually declined.

¶ 6 Siegel and her siblings contacted All Help Health Services (All Help) in September 2011 to find a caregiver for their parents. Defendant began working as the Sterns' live-in caregiver shortly thereafter. Defendant was the primary caregiver for her parents, but there were also intermittent caregivers who served as substitutes. Defendant had her own bedroom in the Sterns' home. In April 2012, another caregiver, Laticia Lewis, also began caring for her parents. Over a typical 14-day period, defendant would care for her parents for eight days and Lewis would care for her parents for six days. On days Lewis was working, she stayed in the same bedroom as defendant, who was not working.

¶ 7 Eugene had paid the household bills during most of her parents' marriage, but defendant and Lewis began to help him with paying the bills by the end of 2013, as his mental health continued to decline and he was "less clear." At this time, Siegel sporadically inquired as to whether her parents' bills were being paid. Either defendant or Lewis would sit with her father

while he paid the bills, and they would tell him what the bill was for and what needed to be paid, and her father would write a check for payment thereof.

¶ 8 Siegel and her sister began to look more closely at their parents' finances in 2014, when their father seemed to become feebler and more confused. When they went through some of their parents' bills, she discovered that their home equity loan had a balance of $85,000. The next day, they went to a branch of Bank of America, where their parents' accounts were held, and met with a bank manager for several hours. She learned that her parents' home equity loan was outstanding because it was linked to their checking account as overdraft protection. While they were there, they reviewed their parents' checking account statements. Siegel noticed that there were numerous checks written to defendant and, considering the length of time she had cared for her parents, it appeared that more checks were written to defendant than there should have been. Several checks were written to the caregivers a few days after the previous paychecks were written, and the checks were for the same amount of money as the prior checks. She also became concerned about "what was an extreme number and amount of money taken out in ATM withdrawals." To her knowledge, her father never paid bills with cash, only checks, and he had never given her any cash. She did not find any ATM receipts in her parents' house, and defendant never said anything to her about making ATM withdrawals for her father. She did not try to determine where the money that was withdrawn had gone, but she could not imagine her parents using that amount of money. She also looked at the charges that were made on her parents' credit cards, and she saw charges that did not seem like they were purchases that her parents would have made.

¶ 9 She fired defendant and Lewis four days later, and then went with her siblings to the police. Sometime later, when she cleaned out the bedroom that defendant and Lewis stayed in,

she found her mother's driver's license, blank checks for her parents' checking account, a checkbook register, and a payment receipt for her parents' home equity loan.

¶ 10 While the police investigation was underway, Siegel met with detective Steven Neuman of the Highland Park police department several times. Together, they went through her parents' various financial statements, including those related to their checking account and credit cards. They also went through credit card receipts and still images captured from store and ATM security cameras. With Neuman, she identified items in the receipts that her parents would not have purchased, such as high heeled shoes, numerous articles of lingerie, perfume, skinny jeans, children's clothing and footwear, 11 pairs of women's footwear, and pre-paid cell phone minutes. During her testimony, she identified several such purchases on itemized spreadsheets Neuman prepared that were admitted into evidence. She also identified numerous credit card receipts that were signed "Ruth," but they were not her mother's signature, and she identified defendant in surveillance videos from various stores, ATMs, and banks.

¶ 11 The recorded deposition of Eugene Stern, who passed away prior to trial, was admitted into evidence and played for the jury. He testified that he was 88 years old and lived with Ruth in Highland Park. He no longer could drive a car, and he used a wheelchair to move around inside his home. He executed a financial power of attorney in 2011, but he could not recall who he named as his agent. He testified that defendant and Lewis worked for him and his wife as caregivers between 2011 and 2014, but he could not recall how they came to use their services. They helped them by doing things around the house, going to the dry cleaners, and going grocery shopping for them. Defendant would grocery shop for them approximately two times per week, and she would purchase the items he instructed her to. He did not accompany her to the store.

¶ 12 He kept his ATM card and his credit cards in his wallet, which he stored in his desk drawer in his home. Initially, he testified that he did "not directly" give either defendant or Lewis permission to use his ATM card to withdraw cash, and he did not think that defendant ever told him that she was going to take his ATM card to withdraw cash. However, he later agreed that he had given defendant his ATM card so that she could withdraw cash to purchase groceries and household items, and that defendant had given him cash from ATM withdrawals for his use. He did not remember giving defendant permission during the years she worked for him to withdraw $73,000 from his checking account with his ATM card. He also testified regarding his credit cards. He could not recall whether he had given defendant permission to use his Carson's credit card but, if he did, it probably would have been so that she could purchase clothing for him. He did not give her permission to purchase clothing for herself. He did, however, give her permission to purchase items, such as purses, for herself. He did not give defendant permission to use his credit cards to pay her electricity bill or Comcast bill, and he did not give her permission to use his credit cards for personal use of approximately $33,000 worth of purchases. He also did not give defendant permission to use his credit cards at Nordstrom Rack, Marshalls, or Walgreens for her personal use. His caregivers would give him receipts for the things they purchased, and he "probably" kept the receipts but he did not know where. He did not know how many occasions he asked defendant to shop for him, but it was frequent enough to be "noticeable." Regarding paychecks he issued to his caregivers, he testified that he wrote checks to defendant and Lewis when they told him one was due. He paid defendant once per week by check in an amount that was agreed upon. He could not recall instances when he gave defendant more than one paycheck per week.

¶ 13 During 2013 and 2014, he may have made mortgage payments for his son, Robert, but he could not "say yes or no" to whether he had never paid Robert's mortgage. He also gave cash and checks in different amounts to Robert during that time. Robert asked him for money "maybe twice a month," and he would give Robert money from his back pocket. In the past, "probably Robert" drove him to the ATM, as had defendant and Lewis.

¶ 14 Dr. Leslie Marie Guidotti-Breting was qualified by the trial court as an expert in both dementia and Alzheimer's. She testified that she was a board certified clinical neuropsychologist, and her role was to examine cognitive and emotional functioning in her patients. Eugene was referred to her for evaluation by his neurologist in July 2013. His daughter and son accompanied him for his first one-hour interview, and she gave him various standardized cognitive tests without his children present for about two to three hours. Eugene was able to communicate with her for the most part, but he sometimes had confusion and she would have to rephrase the question because it was clear that he did not understand what she had asked. Eugene did not believe he had any problems with his memory or performing day-to-day activities, but a common component of dementia includes having a lack of insight into one's own difficulties. His children were much more concerned than Eugene was because, over the prior six months, they noticed a significant change in their father's functioning with basic tasks, as well as confusion with events and times and increased agitation. Based on her evaluation of Eugene, she diagnosed him as having dementia due to his "significant moderate to severe cognitive impairment."

¶ 15 Howard Snow testified as follows. He was the owner of All Help, which was a licensed home services placement agency. All Help identifies caregivers using a registry and places them with a family. The caregivers are independent contractors, and their clients are typically elderly.

The caregivers assist clients with daily activities, such as meal preparation, dressing, and bathing. When All Help identifies a potential new caregiver, the individual must complete an application, a skill checklist, and an authorization form to perform a background check. The caregiver is also interviewed over the phone and in person. A caregiver is free to decline to go to a particular household. In situations where a live-in caregiver is requested, a team of two caregivers is typically used because a live-in caregiver needs some days off. All Help provides a back office billing function for both the clients and caregivers. All Help sends bi-weekly invoices to its clients based on the days the caregiver worked and the daily rate. The client is to write a check in the caregiver's name and mail it to All Help's office. All Help maintains a ledger for every caregiver that includes the dates they worked, the client they cared for, the rate the client pays, and the agency fee. Once a payment is recorded on the ledger, All Help notifies the caregiver that their check is available for pick up. The caregiver is responsible for forwarding a percentage of the check to All Help for its fee. They "basically bill [the caregiver] in arrears" and notify the caregiver how much they owe All Help. Caregivers "cannot take the check and just go home." Snow also testified that caregivers are instructed to not accept client fees directly from the client, nor should they accept gifts, money, or personal items.

¶ 16 Robert Stern testified as follows. He lived about a mile or two from his parents' home. Between 2011 and 2014, he regularly visited them more than once per week. A couple of years before 2011, he lost a high paying job and was unemployed for over one year. After he exhausted his retirement account, he asked his father for financial help. When he asked for help, his father would write him a check. His father never gave him cash. In any given month, his father would give him between $500 and $5,000. He was unsure of the total amount his father gave him, but it was "substantial.

¶ 17 Sometime in 2013 or 2014, his father wrote him a check for $5,000, but the check bounced. He drove his father to the bank so that his father could free up additional funds using a line of credit his father had taken out. He was not involved with the transaction, and his father spoke directly with the banker. Other than this time, he never drove his father to the bank.

¶ 18 Detective Steven Neuman of the Highland Park police department was called by the State as an expert witness. Over defendant's objection, he was qualified as an expert in the investigation of financial crimes and analysis. He testified that he was assigned to investigate possible financial crimes against the Sterns. After examining the case report and its attachments, including financial statements and bank records, he contacted Siegel, who was the complainant and the Sterns' power of attorney. He went through the financial documents and the bank records, and he met with Snow, who provided him with various records. Neuman "went through and * * * tried to break down which caregiver was working on which day." He also met with the Sterns at their home around May 22, 2014. Siegel introduced him to Ruth but, within a few minutes, she did not know who he was. Eugene was friendly, but he appeared much frailer than Ruth.

¶ 19 As part of his investigation, he obtained records relating to the Sterns from various financial institutions, including their checking account statements and credit card statements from American Express and Visa. He also received payment records from Comcast for defendant's Comcast account, and he determined that the Sterns' Visa and American Express credit cards were used to pay defendant's Comcast bill several times. Similarly, he obtained payment records from defendant's electric utility account at Commonwealth Edison (ComEd). It demonstrated that the Sterns' Visa credit card was used to pay several of her electricity bills. As

part of his analysis, he matched payments such as those made to ComEd to the billing statements from the Sterns' credit card, and he incorporated that analysis into the spreadsheets he prepared.

¶ 20 One such spreadsheet depicted various purchases made at the Wal-Mart in Vernon Hills using the Sterns' American Express and Visa credit cards while defendant was working. It was admitted over defendant's objection as Exhibit 60. Neuman testified that he prepared the one-page spreadsheet using the Sterns' credit card statements, Wal-Mart receipts, Siegel's identification of defendant on still images he obtained from Wal-Mart's security cameras, and the caregiver schedule from All Help, all of which were admitted into evidence. The spreadsheet bore the phrase "Vernon Hills (IL) Wal-Mart Unauthorized Credit Card Charges," and it contained several columns of information, including the date, amount charged, credit card used, whether there was video evidence and, if so, the caregiver identified on video, the caregiver assigned to work that day, and a "notes" column. In total, the spreadsheet listed 20 transactions, all of which occurred on days defendant worked from December 2013 to May 2014. The charges totaled $3,447.89, and this figure appeared in red ink at the bottom of the spreadsheet. The spreadsheet reflected that there was video evidence from four transactions, and Siegel identified defendant alone in all four. In all, Neuman prepared 11 spreadsheets that summarized his analysis of the underlying evidence and financial data in this case, and he testified to his method for preparing each one and identified the documents he relied on, all of which were in evidence.

¶ 21 Neuman also testified as to his interview of defendant after her arrest. Defendant told him that Eugene would, on occasion, give her his ATM card and instruct her to withdraw funds for household expenses and for reimbursement of her out-of-pocket expenses. She would give Eugene the cash from the withdrawn cash and the receipt from the ATM. She also stated that

Eugene spent a lot of money and that he was very generous with her. Defendant also stated that she would take the Sterns shopping at stores such as Carson's and Macy's and that, while they were shopping, Eugene would offer to purchase items for her, such as clothing and shoes. She stated that Eugene's health eventually declined to the point that he did not wish to leave the house anymore, and that she would go shopping without the Sterns. Eugene would give her a list of items to purchase, such as groceries, clothing, and general household items. She also stated that he instructed her to sign the name "Ruth" for any credit card transactions she made for them, and that he would allow her to use his credit card to pay some of her bills, such as for her cell phone and home electricity. Neuman also questioned defendant about what appeared to be 12 duplicate paychecks she was given by the Sterns that were not listed on the ledger maintained by All Help. She told him that, two or three days after receiving a paycheck, Eugene would write her another paycheck as an advance payment for the next paycheck. Neuman replied to her that the explanation did not make sense because she still received her next paycheck. He testified that defendant "kind of shut down on [him] at that point," and she could not explain the discrepancies in the records.

¶ 22 A jury found defendant guilty on all counts. At sentencing on October 21, 2016, the circuit court merged the convictions into one count of theft over $100,000 but less than $500,000 (720 ILCS 5/16-1(a)(1)(A), (b)(6) (West 2014)) and sentenced defendant to six years' imprisonment. It also ordered her to pay $39,504.69 in restitution. Defendant filed a motion to reconsider her sentence and a motion to vacate the judgment notwithstanding the verdict, both of which the circuit court denied. Defendant timely appealed.[1]

[1] The State filed a motion to cite additional authority on June 21, 2019, which we granted at oral argument on June 26, 2019, without objection from defendant.

¶ 23 II. ANALYSIS

¶ 24 On appeal, defendant contends that (1) the trial court erred in admitting certain exhibits prepared by Neuman because they contained his opinion as to whether the charges and checks were "fraudulent" or "unauthorized"; (2) the State failed to prove beyond a reasonable doubt that the value of the stolen property exceeded $100,000; (3) the circuit court relied on an improper aggravating factor at sentencing; and (4) she should receive a $5-per-day credit to offset the various fines imposed against her.

¶ 25 We begin by addressing defendant's primary argument on appeal, which is that the trial court erred in admitting into evidence four exhibits prepared by Neuman, namely: Exhibits 50, 51, 60, and 64. Except for Exhibit 51, all of the challenged exhibits were spreadsheets that summarized Neuman's analysis of several hundred pages of credit card statements, checking account statements, receipts, canceled checks, and ledgers maintained by All Help, as well as video evidence obtained from various stores and ATMs. Here, defendant stresses that Exhibit 50 included a spreadsheet column that was labeled "Unauthorized Pay/Duplicate Pay; Not reported to All Help Health Services." Similarly, Exhibit 51, which consisted of 12 photocopied checks that the State argued were duplicate paychecks written to defendant by Eugene, was titled "Unauthorized Pay Checks Issued to: Justina Kemokai," and the words "[u]nauthorized/duplicate pay" were handwritten beneath each photocopied check. Finally, she notes that Exhibit 60 was titled "Vernon Hills (IL) Wal-Mart Unauthorized Credit Card Charges," and Exhibit 64 was titled "Fraud Claim for Card Number ***" and one of the columns was labeled "Fraudulent Charge" and was printed with red ink.

¶ 26 Defendant acknowledges that some kind of summary exhibit would have been appropriate, but she argues that these particular exhibits went beyond merely summarizing the

evidence because they labeled certain paychecks and credit card charges as either "unauthorized" (Exhibits 50, 51, and 60) or "fraudulent" (Exhibit 64), despite the trial court's ruling that Neuman should not opine whether the Sterns were the victims of fraud. Defendant contends that these labels bore on the ultimate issue in the case, disguised Neuman's opinion as evidentiary fact, and invaded the province of the jury. Defendant analogizes her case to *People v. Nwadiei*, 207 Ill. App. 3d 869 (1990), wherein the appellate court ruled that the trial court erred in allowing, over the defendant's specific objection, the State's summary exhibits that included data columns that were labeled "false" and "fraudulent."

¶ 27 The State initially responds that defendant has forfeited review of whether the headings and labels included on these exhibits were improper because, although she objected to the spreadsheets in the court below, she objected on grounds other than those she now raises on appeal. As to the merits of defendant's claim, the State argues that the mere label or caption included on these exhibits would have been harmless because all of the underlying documents that were used to compile the spreadsheet exhibits were admitted into evidence and available for the jury to review.

¶ 28 We agree with the State that defendant has forfeited review of this issue. In order to preserve a claim of error on appeal, a defendant must both object at trial and raise the error in a written posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988).

¶ 29 Our review of the record and the report of proceedings confirm that defendant did not object at any point to the headings or labels in the proceedings below that she now argues on appeal were improper. "A specific objection [forfeits] all other[,] unspecified grounds." *People v. Cuadrado*, 214 Ill. 2d 79, 89 (2005). Prior to trial and defendant's request for severance, the State filed a motion *in limine* pursuant to Illinois Rules of Evidence 1006 and 104(a) seeking to

allow it to introduce at trial the spreadsheets prepared by Neuman. According to the motion, the spreadsheets summarized Neuman's analysis of hundreds of pages of credit card statements, bank statements, receipts, canceled checks, and the like, and they would "allow the jury a convenient way of examining the relevant evidence." The motion also indicated that all of the spreadsheets and underlying documents were previously tendered to defendant during discovery. In opposition, defendant filed a "Motion to Exclude Expert Testimony and the Admission of the Excel Spreadsheet into Evidence." Therein, she asserted that the State prepared a spreadsheet that depicted "the date, the amount of money withdrawn, and the defendant that the prosecution *believes* withdrew the money on that specific day."[2] (Emphasis in original.) Citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), she argued that the State failed to lay an adequate foundation for Neuman's testimony because the spreadsheet did not qualify as sufficient facts or data upon which he could testify as an expert. She also argued that the spreadsheet was hearsay that did not fall within the business records exception. She made no objection to any heading or label contained on the spreadsheet.

¶ 30 During the hearing, defendant largely stood on her motion. She noted that Neuman was not privy to the underlying transactions and argued that the spreadsheets were based on hearsay and reflected only "what [Neuman] believes had occurred." She also argued that Neuman had no basis or expertise to opine that the Sterns were the victims of fraud because he did not conduct a "full investigation to do those spreadsheets" and that said determination was an ultimate fact for the jury to determine. Defendant did not object to or even reference the words "fraudulent" or

[2] Based on this description of the spreadsheet, we infer that it was the spreadsheet that was admitted as Exhibit 54. This exhibit listed every ATM withdrawal from the Sterns' checking account from the date defendant was hired through her termination.

"unauthorized" in any of the headings or labels included in the spreadsheets during the hearing. The circuit court granted the State's motion *in limine*, noting that as long as the State laid a proper foundation, the spreadsheets were admissible.

¶ 31 During Neuman's trial testimony, although defense counsel objected to the admission of Exhibit 60, which was the first spreadsheet introduced by the State, he did not object to the inclusion of the word "unauthorized" on the spreadsheet. Instead, he objected to the exhibit because it was "a document that has red writing on [it]," and because it included dollar amounts and names. Defense counsel also stated "I don't know if we can connect the names *** with the charges." He further argued that "we never agreed to" the spreadsheets containing "numbers and the names," and that, according to the spreadsheet, "it looks like [defendant] *** used those charges with that amount of money." Counsel also stated that the spreadsheet was Neuman's work product and "not the work of Bank of America." The circuit court overruled the objection and admitted the exhibit into evidence, stating:

> "[I]t would be nonsensical and incapable of being understood if that information was not on there. *** A spreadsheet is summing up what is already in evidence. That's what I ruled on. So names can be in there, locations can be in there, account numbers can be in there, dollar amounts can be in there. That's what a spreadsheet is. *** The investigator can pull those materials as long as they are reliable or in evidence together and sum up what they mean to the investigation. Then, if you disagree with what he sums up, then you are going to point out specific parts."

Defense counsel renewed the objection that he made to Exhibit 60 after the State moved to admit the three other exhibits that defendant now argues on appeal were in error, which the circuit court overruled.

¶ 32 In her posttrial motion to vacate judgment notwithstanding the verdict and for a new trial, defendant argued, *inter alia*, that the circuit court erred in admitting "a spreadsheet indicating which defendant committed ATM withdrawals. The spreadsheet described the time, place, amount, and which defendant." There, defendant reiterated her foundation and hearsay arguments concerning the exhibit, and argued that the spreadsheet "does not simply document an occurrence," but instead amounted to "a conclusion distinctively associated with the original entrant." The court denied the motion, noting that Neuman merely collated the data, all of which was contained in the financial records and All Help records admitted at trial.

¶ 33 As noted, at no point did defendant object to any of the headings or labels included on the State's exhibits in the trial court that she now argues on appeal were improper. Indeed, defendant concedes this point in her reply brief, wherein she acknowledged that "the improper labels mentioned in [her] opening brief were not specifically referenced in the court below." However, in order to preserve this issue for review, it was incumbent upon her to do so—especially in light of her assertion concerning the ease with which any problem regarding the headings and labels could have been averted. Of note, defendant states in her opening brief that "[t]his problem could easily have been avoided if [Exhibit 50] had been labeled "Checks Not Reported to All Help." Regarding Exhibit 60, defendant states that "the word 'unauthorized' simply could have been removed." Finally, concerning Exhibit 64, she asserts that "the words 'Fraud Claim' in the title could simply have been omitted." The underlying purpose of the forfeiture rule is to ensure that the trial court is given the opportunity to correct any errors before they are raised on appeal. *People v. Anderson*, 407 Ill. App. 3d 662, 667 (2011). The circuit court here had no such opportunity.

¶ 34 We observe that defendant effectively limits her argument on appeal to contesting the headings and labels themselves—not the underlying data. Save for a single credit card transaction included in Exhibit 64, she does not argue that any of the charges listed in the spreadsheets were inaccurate or that the State failed to establish the basis for the inclusion of any particular transaction thereon. Indeed, defendant describes the spreadsheets in her opening brief as "summarizing the evidence in this case," and she appears to comment approvingly on two spreadsheets that were prepared similarly by Neuman but which she does not challenge on appeal. Specifically, she states that they "did not contain such a label and they were completely comprehensible." While we are cognizant that an issue raised on appeal need not be identical to the objection raised at trial in order to be preserved (See *People v. Hyland*, 2012 IL App (1st) 110966, ¶ 27), we view defendant's argument on appeal as distinct from those raised in the trial court.

¶ 35 Defendant's forfeiture is compounded by the fact that she challenged different exhibits in her posttrial motion as compared to on appeal. As the State points out, defendant's posttrial motion challenged just one spreadsheet exhibit. In the motion, she did not identify the spreadsheet by the exhibit number used at trial, but she described it as "a spreadsheet indicating which defendant committed [the] ATM withdrawals." She also noted that the spreadsheet included columns depicting the "time, place, amount [of money withdrawn], and which defendant." We observe, however, that none of the spreadsheets defendant argues contained improper labels or headings concern ATM transactions. Instead, the subject matter of the spreadsheets complained of in this portion of her brief is limited to alleged duplicate paychecks, credit card purchases at the Wal-Mart in Vernon Hills, and American Express credit card charges made with various merchants. In her reply brief, defendant portrays her posttrial motion as

contesting all of the spreadsheets, but our review of her posttrial motion confirms that she raised no issue concerning any of the spreadsheets she argues on appeal were admitted in error. In short, because defendant raised no issue in her posttrial motion regarding any of the exhibits that she now challenges on appeal, she has forfeited review of the issue for this additional reason.

¶ 36 Notwithstanding defendant's failure to preserve the issue, she asserts that the issue can be reviewed for plain error. The plain error doctrine is a narrow, limited exception to the general rule of procedural default. *People v. Hillier*, 237 Ill. 2d 539, 545. Although defendant did not advocate for plain-error review in her opening brief, she correctly points out that plain error may be raised for the first time in a reply brief. *People v. Ramsey*, 239 Ill. 2d 342, 412 (2010). Here, defendant advocated for plain-error review in response to the State's forfeiture argument.

¶ 37 Under the plain error doctrine, a reviewing court may consider an unpreserved error when a clear or obvious error occurred and (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against defendant, regardless of the seriousness of the error, or (2) the error is so serious that it affected the fairness of the trial and challenged the integrity of the judicial process. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). The defendant bears the burden of persuasion in showing both that a clear or obvious error exists and that one of the prongs is satisfied. *People v. Marcos*, 2013 IL App (1st) 11040, ¶ 58. Here, defendant seeks review under the first prong, asserting that the evidence was closely balanced.

¶ 38 We agree with defendant that the labeling of certain checks and transactions in the complained-of exhibits as "fraudulent" or "unauthorized" constituted clear error. Illinois Rule of Evidence 1006 provides for the admission of summary exhibits. It states that "[t]he contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or

duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court." Ill. R. Evid. 1006 (eff. Jan. 1, 2011). Such summaries are admissible because they simplify and clarify what the underlying documents "would show if the jurors took the time and had the ability to chart the details." *F.L. Waltz, Inc. v. Hobart Corp.*, 224 Ill. App. 3d 727, 732 (1992).

¶ 39 Here, none of the underlying financial records, photographic evidence, or caregiver records from All Help designated any transactions or paychecks as either "fraudulent" or "unauthorized" and, as such, the labels on the summary exhibits attributed meaning to the evidence that the records themselves did not. Instead, these labels reflected Neuman's conclusions based on his analysis of the evidence in conjunction with those transactions Siegel identified that her parents would not have made—despite the court's ruling prohibiting Neuman from opining that the Sterns were the victims of fraud. While the State necessarily had to convey to the jury the significance that it placed on these checks and transactions, it should have used less suggestive means. See *People v. Wiesneske*, 234 Ill. App. 3d 29, 44 (1992) (commenting that "care must be taken to omit argumentative and conclusional matter in [the preparation of a summary under Rule 1006] lest a jury be misled"); see also *People v. Nwadiei*, 207 Ill. App. 3d 869, 879-80 (1990) (reversing conviction based on multiple errors amounting to "calculated and extensive" prosecutorial misconduct, including labeling certain Medicaid claims as "false" and "fraudulent").

¶ 40 Having determined that the "fraudulent" and "unauthorized" headings were improper, we now consider whether reversal is warranted pursuant to the plain error doctrine. To reverse under the closely balanced prong of the plain error doctrine, defendant must show that the evidence "was so closely balanced that the error alone severely threatened to tip the scales of

justice." *People v. Sebby*, 2017 IL 119445, ¶ 51. "In determining whether the evidence adduced at trial was close, a reviewing court must evaluate the totality of the evidence and conduct a qualitative, commonsense assessment of it within the context of the case." *Id.* ¶ 52. "A reviewing court's inquiry involves an assessment of the evidence on the elements of the charged offense or offenses, along with any evidence regarding the witnesses' credibility." *Id*. The consideration of whether the evidence is closely balanced differs from a reasonable doubt argument based on the sufficiency of the evidence. *Id*. ¶ 60. The evaluation deals not with the sufficiency of close evidence, but with the closeness of sufficient evidence. *Id*.

¶ 41 A person commits theft when he or she "knowingly [o]btains or exerts unauthorized control over property of the owner" and "[i]ntends to deprive the owner permanently of the use or benefit of the property." 720 ILCS 5/16-1(a)(1)(A) (West 2014). Where a defendant is charged with theft of property exceeding a specified value, the value of the property involved is an element of the offense to be resolved by the trier of fact as either exceeding or not exceeding the specified value. *Id*. § 16-1(c). Theft of property exceeding $100,000 and not exceeding $500,000 in value is a Class 1 felony. *Id*. § 16-1(b)(6). As charged, in order to prove defendant guilty of Class 1 theft, the jury had to find that defendant (1) knowingly obtained or exerted unauthorized control over the property of the Sterns, being United States currency; (2) intended to deprive the Sterns permanently of their use or benefit of the property; and (3) the property exceeded $100,000 but not $500,000 in value. *Id*. § 16-1(a)(1)(A), (b)(6).

¶ 42 Here, the evidence was not closely balanced. The jury heard Siegel's testimony concerning purchases that her elderly parents, who suffered from dementia and Alzheimer's, would not have made, such as high heeled shoes, lingerie, perfume, skinny jeans, 11 pairs of women's footwear, and pre-paid cell phone minutes. During her several meetings with Detective

Neuman, she identified these items, and others, with the aid of various credit card receipts, transaction logs, and security footage. Said transactions were included in the spreadsheets prepared by Neuman. Siegel also discovered that numerous paychecks were written to defendant just a few days after a previous paycheck was written, and the checks were written for the same amount. Further, she testified that she discovered that her parents' home equity loan had a balance of $85,000 because it was linked to their checking account as overdraft protection, and there were an extreme number of ATM withdrawals from the account. She could "not imagine" her parents spending that amount of money.

¶ 43 Although Siegel's testimony did not cover every single transaction listed on the challenged spreadsheets, Neuman testified and was cross-examined regarding his process for assessing the paychecks issued to defendant and the multitude of credit card purchases and ATM withdrawals that were made while defendant was working and had access to the Sterns' credit cards and ATM card. Neuman identified with specificity the records and evidence he used to compile each spreadsheet, including those exhibits defendant complains of on appeal. For example, he testified that he compiled Exhibit 50 by comparing the All Help paycheck logs and billing statements to the Sterns' checking account records. Neuman noted that 12 paychecks totaling $18,230 were not recorded by All Help, and that these checks were close both in time and amount to the checks that were recorded by All Help. He also compared the service dates and the check numbers that were reported to All Help, and noted that defendant was already paid for the days that these 12 paychecks purportedly covered. Defendant concedes that these checks were not reported to All Help. Neuman similarly identified the records and evidence he relied on to compile the spreadsheets depicting the more than $39,000 in credit card purchases Siegel identified that her parents would not have needed or authorized, as well as the nearly $73,000

that was withdrawn from the Sterns' checking account using their ATM card on the days defendant worked. All of the financial statements (consisting of several thousand pages), records from All Help, and the images obtained from the video surveillance were admitted into evidence at trial before the spreadsheets were introduced.

¶ 44 The jury also viewed the videotaped deposition of Eugene, who testified that he did not give defendant permission to use his credit cards to pay her electricity and cable bills, nor did he allow her to use his credit cards to purchase clothing for herself at Nordstrom Rack, Marshalls, or Carsons, although he did allow her to buy items, such as purses, for herself. Eugene likewise did not give her permission to use his credit cards for her personal use of $33,000 worth of purchases. Although he testified that he gave his ATM card to defendant to purchase groceries and other household items, he also testified that he did "not directly" give her permission to use his ATM card, that she never told him she was taking his ATM card, and that he did not remember giving her permission to withdraw $73,000. Although Eugene testified that he gave Robert checks and cash "maybe twice a month," Robert testified that his father only gave him checks, and that he never gave him cash.

¶ 45 In short, we conclude that the evidence was not so closely balanced such that the mere inclusion of the improper labels in the four challenged exhibits threatened to tip the scales of justice against defendant. At oral argument, defense counsel agreed that the error would have been avoided if the word "alleged" preceded the word "fraudulent" in Exhibit 64. Regarding Exhibit 60, titled "Vernon Hills (IL) Wal-Mart Unauthorized Credit Card Charges," counsel stated that there would have been no error if the word "unauthorized" was not included on the spreadsheet. He also noted that the other spreadsheets Neuman prepared summarizing the credit card transactions did not contain the word "unauthorized," yet there was "no suggestion that they

were incomplete or that the jury was unable to understand them." Put simply, there is no indication that the jury was unduly influenced by or gave more weight to the challenged exhibits than those that did not contain the improper labels and which defendant suggests were appropriate. Despite the use of the labels, it would have been obvious to the jury that these spreadsheets summarized Neuman's review of the underlying evidence in conjunction with those transactions identified by Siegel that her parents would not have made, as well as the still images from the numerous security videos wherein Siegel identified defendant. Because the evidence against defendant was not closely balanced, she cannot obtain relief under the plain error doctrine.

¶ 46 Defendant next argues that the $72,780 that was withdrawn from the Sterns' checking account with their ATM card on days that she worked should not have been included in the total amount of property taken. Defendant notes that she was convicted of theft exceeding $100,000, which is a Class 1 felony, based on the "cumulative total of duplicate paychecks, unauthorized credit card transactions, and ATM withdrawals." According to defendant, because "[t]he duplicate paychecks totaled $18,230" and the "unauthorized credit card transactions totaled $39,265.23," the State "needed the ATM withdrawals in order for the total value to exceed $100,000." We note that the sum of the duplicate paychecks and unauthorized credit card transactions, which defendant does not contest in this portion of her brief, is $57,495.23. Accordingly, this total falls short of the "exceeding $100,000" statutory threshold necessary for a Class 1 felony by $42,504.78.

¶ 47 In support of her argument that the ATM withdrawals should not have been included in the total, she points out that there was no video evidence for the vast majority of the ATM withdrawals, and she highlights Eugene's testimony that he allowed her to use his ATM card to

withdraw cash for groceries and household items and that he gave checks and cash to Robert when he experienced financial difficulties. Defendant contends that Eugene's testimony establishes that "some of these ATM withdrawals were authorized," yet the State did not present evidence to differentiate between those withdrawals that were authorized and those that were not. "At best, the State's evidence suggested that [defendant] might have kept some of the money withdrawn from the ATM." Defendant does not challenge the sufficiency of the evidence to support her conviction for theft, but rather, she challenges only the sufficiency of the evidence to support her conviction for theft of property exceeding $100,000 and not exceeding $500,000. 720 ILCS 5/16-1(a)(1)(A), (b)(6) (West 2014). Again, where a defendant is charged with theft of property exceeding a specified value, the value of the property involved is an element of the offense to be resolved by the trier of fact as either exceeding or not exceeding the specified value. *Id.* § 16-1(c). Defendant requests that we reduce her conviction to theft of property exceeding $10,000 and not exceeding $100,000, which is a Class 2 felony (*Id.* §§ 16-1(a)(1)(A), (b)(5)), and that we remand the matter for re-sentencing.

¶ 48 When challenging the sufficiency of the evidence, the 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. Wheeler*, 226 Ill. 2d 92, 117 (2007). This standard of review applies regardless of whether the evidence is direct or circumstantial and regardless of whether the defendant received a bench or a jury trial. *Wheeler*, 226 Ill. 2d at 114. Under this standard, a reviewing court must consider all of the evidence, not just the evidence that is convenient to the State's theory of the case. *Id.* at 117. This mandate, however, does not necessitate a point-by-

point discussion of every piece of evidence as well as every possible inference that could be drawn therefrom. *Id.* at 117-18.

¶ 49 It is not our function to retry defendant, and we will not substitute our judgment for that of the trier of fact on questions regarding the weight to be given to a witness's testimony, the credibility of the witnesses, the resolution of inconsistencies and conflicts in the evidence, and the reasonable inferences to be drawn from the testimony. *People v. Gaciarz*, 2017 IL App (2d) 161102, ¶ 43. A guilty verdict may be supported not only by the evidence itself, but also by any reasonable inferences that may be drawn from the evidence. *People v. Hsiu Yan Chai*, 2014 IL App (2d) 121234, ¶ 34. We will not reverse a conviction unless the evidence is " 'so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt.' " *Id.* (quoting *People v. Collins*, 106 Ill. 2d 237, 261 (1985)).

¶ 50 After viewing the evidence in the light most favorable to the State, we conclude that the evidence was sufficient to establish that the value of the stolen property exceeded $100,000 in value. The trial court admitted Exhibit 56, which defendant does not contest on appeal. This exhibit listed all of the ATM withdrawals from the Sterns' checking account in the approximately 8 months prior to defendant working for them as their live-in caregiver. The underlying bank statements were also entered into evidence. During this period, which spanned from February 15 to October 9, 2011, just $380 was withdrawn from the Sterns' checking account using their ATM card. Specifically, $60 was withdrawn in single transactions in March, May, June, and July 2011, and $140 was withdrawn between 3 transactions in April—two for $60 and one for $20. In August and September 2011, there were no withdrawals. As asserted by the State, this ATM activity represented the Sterns' cash spending "baseline" prior to defendant working for them.

¶ 51 The jury also considered Exhibit 55, which was a spreadsheet that listed certain ATM withdrawals from the Sterns' checking account during the course of defendant's employment. The data was filtered to exclude all of the ATM withdrawals that were made on days defendant did not work. The bank statements underlying these transactions were also entered into evidence. During the roughly 2½ years that defendant worked as their live-in caregiver, the Sterns' ATM card was used to withdraw $72,780 on days defendant worked. Our review of this exhibit and the underlying bank statements has yielded the following observations.

¶ 52 During the initial months of defendant's employment, the ATM activity relative to the Sterns' checking account remained largely consistent with their "baseline" spending that preceded defendant's employment. In the nearly 6-month period from October 10, 2011 (defendant's first day working for the Sterns), through March 2012, a total of $640 was withdrawn between 7 ATM transactions. Each individual withdrawal was made on different days and was temporally separated from the other withdrawals by 2 to 7 weeks. Sixty dollars was withdrawn in the majority of these transactions, although $260 was withdrawn in a single transaction in January 2012—the only withdrawal made that month.

¶ 53 The following 12-month period, from April 2012 through March 2013, marked an increase in both the frequency of ATM withdrawals and the amount withdrawn in each transaction. Two hundred dollars was, by far, the most common amount withdrawn during this period. Of the 23 individual ATM withdrawals this period, $200 was withdrawn in all but three instances; two withdrawals were for $60, and one was for $100. In total, $4,220 was withdrawn using the Sterns' ATM card during this period.

¶ 54 From April 2013 through April 2014, the frequency of $200 ATM withdrawals increased precipitously on days defendant worked, and some months saw this amount withdrawn several

dozen times. In total, the Sterns' ATM card was used during this period to withdraw $66,920. The largest monthly sums were withdrawn in August 2013, December 2013, and January 2014, when $9,200 was withdrawn between 52 individual ATM transactions (40 at $200, 12 at $100), $15,400 was withdrawn in 78 ATM transactions (76 at $200, two at $100), and $10,200 was withdrawn between 46 ATM transactions (43 at $200, and one at $400, $500, and $700), respectively. For the days there was ATM activity, $200 was often withdrawn five times in a single day, and some individual days saw this amount withdrawn 10 or even 15 times between various ATMs near the Sterns' home. Two hundred dollars was the chosen withdrawal amount in 304 out of the 341 ATM withdrawals this period, representing $60,800 out of the $66,920 withdrawn this period. One hundred dollars was withdrawn 29 times, representing the second most common withdrawal amount. Although not nearly as common, various other amounts were also withdrawn during this period, namely: $700 (once), $500 (three times), $400 (once), $300 (twice), and $20 (once).

¶ 55 While defendant correctly points out that there were no video recordings for the majority of the individual ATM withdrawals, there was nevertheless sufficient evidence for the jury to infer that defendant was responsible for the withdrawals that were made on the days she worked and thus had access to the Sterns' ATM card. As such, we reject defendant's assertion that the jury attributed to her the ATM withdrawals that were made on the days she worked "absent any evidence." The jury heard the testimony of Detective Neuman, who explained that video evidence was not available for most of the transactions due to the age of the transactions and the finite period of time that the bank retained ATM video recordings. He testified that the oldest video he could retrieve was from January 29, 2014, when defendant, as identified by Siegel, was recorded making three $200 withdrawals within a span of three minutes. Defendant had ample

opportunity to cross-examine Detective Neuman regarding these transactions. Although defendant stresses that she was identified on video withdrawing "only $3,100" in total, we observe that this sum was the result of 16 individual ATM withdrawals—many of which were made within minutes of each other, and $200 was withdrawn in all but one of these instances. The other withdrawal was for $100. Moreover, image stills from these ATM security videos were entered into evidence and show defendant making the withdrawals.

¶ 56 A guilty verdict may be supported not only by the evidence itself, but from any reasonable inferences that may be drawn from the evidence. "[I]n weighing the evidence, the trier of fact is not required to disregard inferences which flow normally from evidence before it [citation], nor need it search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt [citation]." *People v. Campbell*, 146 Ill. 2d 363, 380 (1992). Here, in light of the commonalities between defendant's videoed use of the Sterns' ATM card and the transactions for which there was no video evidence due to the passage of time, the circumstantial evidence was sufficient for the jury to infer that defendant was responsible for the overwhelming majority, if not all of the ATM withdrawals on the days she worked and had access to the Sterns' ATM card. See *People v. Walker*, 2016 IL App (2d) 140566, ¶¶ 10-11 (where the defendant challenged one of four drug transactions with an undercover officer because it was arranged solely through text messages, the circumstantial evidence was sufficient to infer that the defendant sent the messages based on his consistent use of the phone number for voice communications with the officer in other transactions).

¶ 57 Defendant attempts to refute certain transactions by highlighting that some withdrawals were made on "transition days," when both she and Lewis worked at different times on the same day. She suggests that Lewis could have been responsible for those withdrawals. Our review of

the evidence confirms, however, that the vast majority of the withdrawals that were made on the days that both Lewis and defendant worked were in $200 increments, with several such withdrawals made each day, within minutes of each other. The pattern of these transactions mirrors those where defendant was identified on video making the withdrawals, as well as those that were made on the days when defendant was the Sterns' only caregiver. We also note that, in every transaction where Lewis was identified on video withdrawing funds with the Sterns' ATM card, most withdrawals ranged in amount from $500 to $800 and were taken out in a single transaction per day. Lewis was not recorded making any withdrawals of $200. As such, it was reasonable for the jury to attribute these withdrawals to defendant. In any event, the sum of withdrawals made on "transition days" was $17,080, and the total value of the property stolen would have exceeded $100,000 even if these transactions were excluded. Indeed, the statutory threshold would have been exceeded even if the jury chose to disregard every ATM transaction except for the 241 withdrawals of $200 that occurred on "non-transition days" (*i.e.* when defendant was the Sterns' sole caregiver) between April 2013 and April 2014.

¶ 58 There was also little evidence that anyone other than defendant used the Sterns' ATM card on the days only defendant worked. Eugene testified that he could no longer drive and that he kept his ATM card in his wallet inside of a desk drawer. Accordingly, he would have required assistance to get to an ATM in order to make a withdrawal, and he testified that defendant, Lewis, and "probably Robert, [his] son," had driven him to the ATM. Although Eugene testified that he gave cash and checks to Robert when he was experiencing financial difficulties, Robert testified that his father never gave him any cash and that he drove his father to the bank only one time—when his father met with a banker in either 2013 or 2014 to utilize a line of credit in order to make good on a check that had bounced. Robert testified that his father

"was kind of surprised that there wasn't any money [in his account] that would cover the check." Copies of the checks Eugene gave his son were admitted into evidence and were considered by the jury. The credibility of witness testimony is for the jury to determine. *People v. Smith*, 185 Ill. 2d 532, 541. Here, the jury was free to accord more weight to Robert's testimony than that of Eugene, who suffered from dementia with moderate to severe cognitive impairment and was 88 years old at the time of his deposition.

¶ 59 Further, we note that Eugene's testimony was inconsistent regarding whether he allowed defendant to use his ATM card. As defendant points out, he testified that he gave his ATM card to defendant to withdraw cash for grocery shopping and other purchases. However, he also testified that he did "not directly" give defendant permission to use his ATM card, that defendant had never told him that she was going to take his ATM card, and that he did not remember giving defendant permission to withdraw $73,000 from his checking account.

¶ 60 Even if some of the cash from the nearly 375 ATM withdrawals that were made on days defendant worked for the Sterns was used to purchase groceries or household items at their direction, it was reasonable for the jury to nevertheless infer that the total theft exceeded $100,000 in light of the massive disparity of ATM use prior to and during defendant's employment. When a defendant attempts to explain incriminating circumstances, the defendant must produce a reasonable account or be judged by its improbabilities and inconsistencies. *People v. Brozan*, 163 Ill. App. 3d 73, 79 (1987). Put simply, the evidence provided a reasonable basis for the jury to conclude that even if Eugene authorized defendant to use his ATM card for certain purchases, defendant stole more than $42,504.78 using said ATM card, such that the total value of the theft exceeded $100,000 when combined with the duplicate paychecks and

unauthorized credit card transactions. The jury was also given the opportunity to convict defendant of lesser included offenses, but it declined to do so.

¶ 61 Defendant next contends that the circuit court improperly considered at sentencing an aggravating factor for which there was no evidentiary support. Defendant points out that, at sentencing, the court commented on defendant's prior misdemeanor theft charge for which she received one year of supervision, and she contends that the court focused particularly on her failure to disclose this case to either All Help or the Sterns. Defendant highlights the court's following comments:

> "I saw nothing in the personnel records from the caregiver nor did I hear any testimony that [defendant] ever disclosed to anyone, the caregivers or the Sterns, that she had just gotten off supervision for theft literally weeks before starting at the Sterns.'
>
> She was arrested, and this is, I agree, contrary to her testimony at the motion to suppress. She was arrested in May of 2011 *** right before she began working at the Sterns, pleaded guilty to theft and was given a year of supervision which was eventually terminated, and I understand that that is not a conviction of record but supervisions can be considered as conduct.
>
> And in the context of this case, I have to wonder about the lack of being forthcoming with the agency and/or the Sterns would have caused a different result. Would they have hired somebody to come into their home who [*sic*] had just gotten off of supervision for stealing from somebody? I think the answer is pretty obvious that they would not have done that. And it does show a prior act of misconduct and prior contact with the court system."

¶ 62 At the outset, we note that the parties disagree on which standard of review applies to this issue. Defendant advocates for *de novo* review, asserting that the question of whether a defendant's sentence was based on an improper sentencing factor is a question of law. The State contends that defendant's argument is more akin to an argument that the circuit court gave the factor improper weight, and notes that defense counsel commented that he "disagree[d] with the amount of weight the court put on [the supervision]" during the hearing on defendant's motion to reconsider sentence. As for the applicable standard of review, we agree with defendant. The crux of her argument is that the trial court relied on an improper aggravating factor at sentencing. Although the imposition of a sentence is normally within the trial court's discretion, "the question of whether a court relied on an improper factor in imposing a sentence ultimately presents a question of law to be reviewed *de novo*." *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 8. Still, where a defendant claims that the trial court considered an improper factor in imposing his or her sentence, "there is a rebuttable presumption that the sentence was proper," and the defendant bears the burden of affirmatively demonstrating an error. *People v. Burnette*, 325 Ill. App. 3d 792, 809 (2001). There is a strong presumption that the trial court based its sentencing decision on proper legal reasoning, and the reviewing court must consider the record as a whole, rather than focusing on a few words or statements made by the trial court. *People v. Canizalez-Cardena*, 2012 IL App (4th) 110720, ¶ 22.

¶ 63 Defendant argues that there was no evidence that she failed to disclose her prior case, and she contends that the evidence suggested the opposite because All Help performed a background check on her while she was still on supervision.[3] She requests that her sentence be reduced from 6 years to 5 or, in the alternative, that we remand the matter to the trial court for resentencing.

[3] We observe that defendant argues only that there was no evidence that she did not

¶ 64 The State responds that the court did not increase defendant's sentence based on her lack of candor, noting the court's explanation in its ruling denying defendant's motion to reconsider sentence that it did not inappropriately consider her prior theft case.[4] We agree with the State.

¶ 65 In her motion to reconsider sentence, defendant argued, *inter alia*, that "[the] court sentenced the defendant relying on a sentence of supervision that was not a conviction for [t]heft." During the hearing on said motion, defense counsel argued that he "disagree[d] with the amount of weight that the Court put on" defendant's arrest and supervision "prior to her being employed by the Sterns." Defense counsel stressed that the case resulted in court supervision, which was neither a conviction nor a felony.

¶ 66 In addressing this specific argument, the court responded as follows:

> "[R]egarding [defendant's] total sentence, I didn't place undue weight on the prior theft conviction [*sic*]. What I brought out was that this was conduct, and the courts have repeatedly held that even a supervision on a theft is conduct. It's not a conviction. I recognized that back then; I recognize it now. However, it was very close in time to the fact that she began working there. The fact that she had been under the supervision of a

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disclose her prior court supervision; she makes no argument that she was not required to disclose it. Thus, we assume for purposes of our review that defendant was required to disclose it.

[4] As factors in aggravation, the trial court also noted that defendant showed no remorse, that the sentence was necessary to deter others from committing similar offenses, and that probation would deprecate the seriousness of the offense. It also considered the nature of the crime, such that it was not a one-time theft of $100,000, but rather, it was hundreds of smaller thefts over a period of several years. The court commented that "very few days passed where [defendant] didn't do something to steal money from the Sterns."

court within 30 days or so prior to beginning to steal from this family is a valid factor for the court to consider, and that's exactly how I considered it."

¶ 67 Based on the trial court's explanation of defendant's sentence, which it duly reconsidered based upon her motion, it is clear that the court ultimately relied not on defendant's lack of candor regarding her prior court supervision, but on her recidivism. As relied on by the trial court, the PSI revealed that defendant was arrested for theft in Cook County on May 9, 2011, and that she was sentenced to one year of court supervision after she pled guilty on June 3, 2011. Defendant apparently completed her term of supervision, as the case was dismissed on September 27, 2011. Defendant did not challenge the accuracy of this information. Indeed, we have held that a previous disposition of supervision may be helpful to a trial judge in determining an appropriate sentence. *People v. Talach*, 114 Ill. App. 3d 813, 827 (1983). Because the completion of defendant's court supervision for theft was in close temporal proximity to her first acts of theft from the Sterns, we agree with the State that this was a valid factor for the trial court to consider at sentencing.

¶ 68 In any event, we note that defendant conceded that she did not disclose her court supervision to All Help or the Sterns, and this concession effectively served as a substitute for such evidence. During the hearing on her motion to reconsider sentence, defense counsel stated "it's not her fault that it was never disclosed," and he stressed that, during her background check, "other agencies and other security officials had an opportunity to take a look at it, and they never found it." He went on to state that, "[i]f it was up to her, I guarantee you that she would have come forward and said: 'Listen, I've been charged with a misdemeanor theft and I finished my supervision.' Because that's in her character." In light of the above, we determine that the trial court did not consider an improper aggravating factor in imposing defendant's sentence.

¶ 69 As a final matter, defendant contends that certain monetary assessments imposed against her should be offset by the $5-per-day credit for her presentence custody because they are "fines." See 725 ILCS 5/110-14(a) (West 2016) ("[a]ny person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of $5 for each day so incarcerated upon application of the defendant"). She notes that, at sentencing, the court found that she was entitled to receive credit for 52 days in custody, for a total of $260, yet she was not given any credit against her fines in the trial court. Defendant acknowledges that she did not apply for the credit in the trial court, but she contends that she may seek it for the first time on appeal based on *People v. Woodward*, 175, Ill. 2d 435, 457 (1997). The State agrees that credit is warranted for some of the assessments, but not others.

¶ 70 On February 26, 2019, after the parties submitted their briefs, our supreme court adopted Illinois Supreme Court Rule 472, which provides that the circuit court retains jurisdiction to correct certain sentencing errors, including, as relevant here, errors in "the imposition or calculation of fines, fees, assessments or costs" and "the application of *per diem* credit against fines." Ill. S. Ct. R. 472(a)(1), (2) (eff. Mar. 1, 2019). Under Rule 472, "[n]o appeal may be taken by a party from a judgment of conviction on the ground of any sentencing error specified above unless such alleged error has first been raised in the circuit court." Ill. S. Ct. R. 472(c) (eff. Mar. 1, 2019). Rule 472 was subsequently amended on May 17, 2019, to provide that "[i]n all criminal cases pending on appeal as of March 1, 2019, or appeals filed thereafter in which a party has attempted to raise sentencing errors covered by this rule for the first time on appeal, the reviewing court shall remand to the circuit court to allow the party to file a motion pursuant to this rule." Ill. S. Ct. R. 472(e) (eff. May 17, 2019). This appeal was pending as of March 1, 2019, and defendant concedes that she did not first raise this alleged error in the circuit court. As

such, pursuant to Rule 472, we remand to allow defendant to file a motion raising the alleged error in the circuit court.

¶ 71 III. CONCLUSION

¶ 72 For the reasons stated, we affirm defendant's conviction for theft and her sentence and we remand so that she may file a motion raising alleged errors in the imposition or calculation of fines, fees, assessments, costs, and *per diem* credit.

¶ 73 Affirmed and remanded.