2016 IL App (1st) 143254-U
No. 1-14-3254

THIRD DIVISION
December 28, 2016

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 13 CR 9645 (01)
	)	
DANIEL DOBOS,	)	
	)	The Honorable
Defendant-Appellant.	)	Thaddeus L. Wilson,
	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's conviction for being an organizer of a continuing financial crimes enterprise affirmed where: the evidence was sufficient to uphold his conviction; the circuit court did not abuse its discretion in admitting other crimes evidence or in admitting a prior consistent statement of one of his accomplices; and he was not denied his constitutional right to effective assistance of trial counsel.

¶ 2 Following a bench trial, defendant Daniel Dobos was convicted of being an organizer of a continuing financial crimes enterprise,[1] a type of financial institution fraud, and was sentenced

[1] Defendant was specifically found guilty of being an "organizer of a continuing financial crimes enterprise," a type of financial institution fraud set forth in section 17-10.6 (i) of the Criminal Code of 2012 (Code) (720 ILCS 5/17-

to 9 years' imprisonment. Defendant appeals his conviction and the sentence imposed thereon, arguing: (1) the State failed to prove his guilt beyond a reasonable doubt; (2) the circuit court erred in admitting other crimes evidence; (3) the circuit court erred in admitting a prior consistent statement of an alleged accomplice; and (4) he was denied his constitutional right to effective assistance of trial counsel. For the reasons set forth herein, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 In March 2013, the accounts of multiple Chase Bank customers, including Lane Ketelsen, Serif Licina, and Mike Mitzner, were unlawfully accessed and funds withdrawn absent the account holders' knowledge or consent. Defendant and three other men, Lorant Szintea, Ferencz Menyhart and Attila Szasz,[2] members of a credit/debit card "skimming" operation, were all arrested in connection with those events. Defendant, in pertinent part, was charged with multiple financial crimes including simple theft (720 ILCS 5/16-1(a)(1)(A) (West 2012)), identity theft (720 ILCS 5/16-30(a)(1) (West 2012)) and being the organizer of a continuing financial crimes enterprise (720 ILCS 5/17-10.6(i) (West 2012)). Defendant waived his right to a jury trial, and instead, elected to proceed by way of a bench trial.

¶ 5 Trial

¶ 6 At trial, Kevin Lackey, a fraud investigator with Chase Bank, testified that in March 2013, he managed a team of ten people who were employed to investigate financial fraud,

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10.6(i) (West 2012)). Defendant uses the term "organizer of a financial crimes enterprise" to discuss the offense, whereas the State refers to the crime as "organizer of financial institution fraud." For the sake of clarity, this court will employ the specific language used in section 17-10.6(i) of the Code, "organizer of a continuing financial crimes enterprise," throughout this disposition in reference to the offense.

[2] Szintea, Menyhart, and Szaz are not parties to this appeal.

specifically skimming, at Chase Bank Automated Teller Machines (ATMs) located throughout the United States. Lackey explained that "skimming" is the act of placing disguised "electronic devices onto ATM terminals or other points of compromise for [credit or debit] card information." The electronic devices record card information when used by a customer including the account number and the Personal Identification Number (PIN). "That information is stored in[] the device that's placed on the terminal, then that's taken to an off-site location and uploaded to a laptop or some computer and then it's downloaded onto other magnetic stripe cards, so it in effect becomes a clone of the customer card that was originally used. And then [the offenders] basically use those cards as the customer would [and] go back to the ATMs and just take out whatever the—either what the daily withdrawal limit would allow or the balance of the account."

¶ 7 Lackey testified that a skimming investigation generally commences when a customer files a fraud claim. Once a claim is filed, analysts examine the claim and other pending claims to determine whether the customers' cards were used at a particular bank branch on the same date. If so, a member of his team will go to the branch and ascertain whether there are skimming devices on the branch's ATM. During the investigation, Lackey and his analysts work with law enforcement personnel in the particular city in which the skimming investigation is taking place.

¶ 8 Lackey confirmed that an investigation into the skimming operation in which defendant was involved commenced in March 2013. During that investigation Lackey worked with members of the Secret Service task force and the Financial Crimes task force in Chicago, including Detective Cynthia Serafini. They placed "fairly typical close-circuit surveillance cameras" in and around several Chase Bank branches. Cameras were also installed "either inside and/or outside the ATM terminals." Lackey confirmed that Lorant Szintea, Ferencz Menyhart,

and Attila Szasz, members of defendant's skimming crew, all appeared on surveillance video during the course of Lackey's skimming investigation in March and April 2013. They were seen installing and removing equipment and accessing and withdrawing money from Chase Bank accounts. Lackey was able to confirm that the accounts the men accessed were the same accounts that were the subject of fraud claims filed by Chase Bank account holders. He specifically confirmed that accounts held by Lane Ketelsen, Serif Licina, and Mike Mitzner were compromised during the course of the skimming operation "attributed to [defendant's] crew." Ultimately, a "little over 80" account holders filed claims due to fraudulent activity that was related to this skimming operation. In addition, approximately $52,000 was unlawfully accessed during the skimming operation.

¶ 9 Lorant Szintea testified[3] that he arrived in Chicago from Romania in March 2013 along with codefendants Menyhart and Szasz. Upon their arrival, they stayed at a hotel located in the vicinity of Peterson and Lincoln Avenues and began searching for employment opportunities. They also began frequenting a nearby Romanian bar, which is where they first met defendant. Szintea testified that defendant approached them at the bar and offered to help them find work. After they met with defendant "about three, four more times" at the bar, defendant then took them to a storage unit located several miles away to explain the type of work that they would be performing. At the storage unit, defendant showed them boxes of equipment "to be [installed] on the ATMs and cameras." Defendant explained the job as follows: "one was supposed to put the device[s] [on the ATMs], one was supposed to look out for the area, to watch the area, and one was supposed to take off the devices." Defendant then assigned the tasks to the three men. Szintea was responsible for placing the equipment onto the ATM machines and Menyhart was

[3] Szintea testified through a Romanian interpreter at trial.

responsible for removing the equipment. Szasz, in turn, was the lookout. Defendant explained that they were going to be targeting ATMs associated with Chase Bank.

¶ 10 Szintea testified that after defendant showed them the equipment, he offered to find them a place to live in the same apartment building in which he resided, located at 4427 North Seeley Avenue. When defendant took them to the building, he instructed them not to mention his name; rather, they were to tell the landlord that they had simply observed a sign advertising available units. After the three men moved into the building, defendant transported the equipment from the storage unit to their fourth-floor apartment. Defendant explained that he was on probation and could not be seen with the equipment in his own apartment. Defendant then drove the men to a local bank to show them how to install the skimming equipment onto the ATM machines. After receiving instructions, Szintea testified that he installed equipment onto "about ten" different ATM machines located throughout the City of Chicago. Defendant was never present for the installation or removal of the equipment; however, he observed the men from a nearby location. In addition, Szintea testified that he and the other men were able to communicate with defendant using cellular phones he had purchased for them. Szintea explained that he would use the phone to talk to defendant if he was having trouble installing the equipment. He would then remove the battery of his phone before returning to the apartment in accordance with defendant's instructions.

¶ 11 Szintea testified that the skimming equipment that he placed onto the ATM machines recorded information when debit card holders used the machines to access their accounts. Based on the information that the skimming devices recorded, defendant would create cloned cards in Szintea's fourth-floor apartment. Szintea, Menyhart and Szasz would then use the cards to "take out money" from the ATM machines. After the men withdrew funds from the compromised

accounts, they turned the money over to defendant, who would then give them a portion of the proceeds.

¶ 12 Szintea acknowledged that he had not received permission from Serif Licina, Lane Ketelson, or Mike Mitzner to access their accounts or use their account information. He admitted that he pled guilty to identity theft in connection with the crimes he committed with defendant and received a sentence of probation. Szintea further admitted that he knew that the skimming operation that defendant organized was illegal when he agreed to participate in the scheme. He also acknowledged that he was "angry" at defendant because he "went to jail for the first time in [his] life because of [defendant's scheme]."

¶ 13 Szintea confirmed, however, that he was not promised anything or threatened with any negative consequences in exchange for his trial testimony. He testified that the information he provided during the trial was the same information he provided to police when he was initially questioned about the skimming operation. His prior statement had been made before he was actually charged with any crime in connection with defendant's skimming operation. Szintea specifically denied that his testimony was required as a condition of his probation. He further denied that he was the invidual who was actually in charge of the skimming operation and that he was simply shifting the blame onto defendant, who he knew had been previously been convicted of a similar offense.

¶ 14 Lane Ketelsen testified that he held an account with Chase Bank in 2013. He recalled that on April 3, 2013, he attempted to withdraw some money from his account, but that it "came back as an invalid transaction." He tried again, but had the same result. At that point, Ketelsen sought out assistance from a bank teller, who was able to look into his account. The teller

informed him that $500 had been removed from his account earlier that morning. The bank teller then discovered that $500 had been removed from Ketelsen's account during each of the three preceding days, beginning on March 31, 2013. Altogether, $2,000 had been withdrawn from his account. Ketelsen confirmed that he had not withdrawn those funds and testified that he was the only authorized user named on his bank account. Ketelsen denied that he had given anybody permission to access his account or provided anyone with his PIN number. He had never met defendant, Szintea, Szasz, or Menyhart. Ketelsen testified that he ultimately recouped the stolen funds from Chase Bank.

¶ 15 Serif Licina testified that he was also an account holder at Chase Bank in 2013. He testified that sometime in March 2013, he checked his account balance online and noticed that money was missing from his account. His bank records showed that $500 had recently been removed from his account on three separate occasions. Licina went to his local bank branch the following day to inquire about the withdrawals and the missing funds. When he arrived at the bank and spoke to the bank teller, he learned that another $500 had been withdrawn from his account that morning. Licina testified that he and his wife were the only authorized users named on his bank account. Neither he nor his wife had made the four withdrawals that totaled $2,000. He did not provide anybody with permission to access his bank account and make those withdrawals. Licina confirmed that he did not know defendant, Szintea, Szasz, or Menyhart and specifically denied that he had given any of the men permission to access his account on March 29, 2013.

¶ 16 The parties stipulated to the testimony of Mike Mitzner. Pursuant to the stipulation, Mitzner would testify that he had an account with Chase Bank in 2013, and that he was the only authorized user of that account. Mitzner would further testify that he never provided anyone

with his account information or his PIN number and that he had never met defendant, Szintea, Szasz, or Meynhart. Finally, Mitzner would testify that in 2013, he discovered that fraudulent monetary withdrawals had been made from his account, that he reported those transactions to the bank, and that the bank reimbursed him with the amount of money unlawfully stolen from his account.

¶ 17 Cynthia Serafini, a detective in the Chicago Police Department's Financial Crimes Unit, testified that she regularly oversees investigations pertaining to identity theft, skimming, credit card fraud, and account takeovers. She provided evidence pertaining to defendant's prior 2012 conviction for identity theft. Detective Serafini explained that she was notified about a skimming investigation that was being conducted at various Chase Bank branches located in the city and surrounding suburbs sometime in January 2012. Defendant and another individual were ultimately taken into custody in connection with that investigation on April 7, 2012. At approximately 10:20 p.m., that evening, Detective Serafini interviewed defendant at the Aurora Police Department. After being advised of and waiving his *Miranda* rights, defendant provided a detailed statement in which he admitted to installing electronic skimming devices at Chase Bank ATMs in Aurora and Downers Grove. Defendant further admitted that he was part of an organized group and that installed, recovered, and decoded electronic skimming devices in order to ascertain other people's account information from their debit cards. Defendant admitted that his role in the group was to install the skimming equipment onto ATM machines. Another member of the group removed the equipment from the ATMs, and yet another individual decoded the information recorded by the skimming equipment and created cloned debit/credit cards. Defendant explained that once the cloned cards were created, another member of the group would use the cards to withdraw money from different ATMs without the account holders'

knowledge or permission. The money would then be split among the members of the group. Defendant stated that the skimming operation had been ongoing for at least four months and that the individuals who were involved in the skimming operation were from Romania. He admitted that the addresses found on a piece of paper in his vehicle were Chase Bank locations within the zone to which he was assigned to install electronic skimming devices.

¶ 18 Detective Serafini testified that after defendant provided his detailed confession, he ultimately pled guilty to the offense of identity theft and received probation.

¶ 19 After presenting the aforementioned testimony, the State rested its case and defense counsel made a "motion for a finding of not guilty." After hearing arguments from the parties, the circuit court denied the motion. Defendant elected not to testify and defense counsel called no witnesses. The State then delivered its closing argument. Defense counsel, in turn, elected to waive his closing argument. Thereafter, the circuit court, after consulting with its notes, found defendant guilty of being an organizer of a continuing financial crimes enterprise.[4] The court's verdict was based primarily on Szintea's detailed testimony regarding defendant's role in organizing the illegal skimming operation. The court noted that Szintea's testimony established that defendant recruited his accomplices, provided them with skimming equipment, educated them how to install and use the equipment, assigned the men specific roles in the operation, and created cloned debit/credit cards.

¶ 20 The cause then proceeded to a sentencing hearing where the court, after hearing arguments in aggravation and mitigation, elected to sentence defendant to 9 years' imprisonment. Defendant's posttrial motion was denied and this appeal followed.

[4] We note that defendant was found guilty of all of the other offenses of which he was charged, including identity theft, theft, financial institution fraud and conspiracy to commit financial institution fraud. The counts merged and defendant was subsequently convicted of being an organizer of a continuing financial crimes enterprise.

¶ 21 ANALYSIS

¶ 22 Sufficiency of the Evidence

¶ 23 Defendant first argues that the State failed to prove him guilty of being an organizer of a continuing financial crimes enterprise beyond a reasonable doubt. He acknowledges that the State "presented evidence that the co-defendants attached skimming devices and withdrew money from Chase ATMs in Chicago," but emphasizes that "there was no evidence to connect the alleged co-conspirators to the specific thefts alleged in the indictment."

¶ 24 The State responds that defendant was proven guilty of being an organizer of a continuing financial crimes enterprise beyond a reasonable doubt.

¶ 25 Due process requires proof beyond a reasonable doubt to convict a criminal defendant. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). In reviewing a challenge to the sufficiency of the evidence, it is not a reviewing court's role to retry the defendant; rather, we must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found each of the essential elements of the crime beyond a reasonable doubt. *People v. Ward*, 215 Ill. 2d 317, 322 (2005); *People v. Hayashi*, 386 Ill. App. 3d 113, 122 (2008). The trier of fact is responsible for evaluating the credibility of the witnesses, drawing reasonable inferences from the evidence, and resolving any inconsistencies in the evidence (*People v. Bannister*, 378 Ill. App. 3d 19, 39 (2007)), and a reviewing court should not substitute its judgment for that of the trier of fact (*People v. Sutherland*, 223 Ill. 2d 187, 242 (2006)). Ultimately, a reviewing court will not reverse a defendant's conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to his guilt. *People v. Carodine*, 374 Ill. App. 3d 16, 24 (2007).

¶ 26 Section 17-10.6(i) of the Criminal Code of 2012 sets forth the offense of being an organizer of a continuing financial crimes enterprise. 720 ILCS 5/17-10.6(i) (West 2012). In order to sustain a conviction for that offense, the State must establish that the defendant agreed with one or more persons to commit 3 or more felony offenses involving a financial institution within an 18-month period and that the defendant "occupie[d] a position of organizer, supervisor, or financier or other position of management" with respect to the other participants in the conspiracy. 720 ILCS 5/17-10.6(i)(1)(A)(iii), (2) (West 2012). In this case, the predicate felony offenses that formed the basis for defendant's conviction for being an organizer of a continuing financial crimes enterprise were thefts from the accounts of Lane Ketelsen, Serif Licina, and Mike Mitzner as well as thefts from "over 80" other Chase Bank accounts between March 27, 2013, to April 14, 2013. 720 ILCS 5/16-1 (b) (West 2008) (theft of over $500 constitutes a felony).

¶ 27 In this case, Lorant Szintea provided detailed testimony about defendant's role in recruiting him, Menyhart, and Szasz to take part in an organized skimming operation in March 2013 that targeted ATMs associated with Chase Bank. He testified that defendant procured the skimming equipment, trained the men how to use the equipment and assigned each man specific roles in the operation. Szintea was responsible for installing the equipment, Menyhart was responsible for removing the equipment, and Szasz was assigned to be the "lookout." Szintea further testified that defendant was the individual who created the cloned cards, which he and the others used to unlawfully access the accounts of Chase Bank customers and withdraw funds. He specifically acknowledged that he not received permission from Lane Ketelsen, Serif Licina or Mike Mitzner to access their accounts.

¶ 28 Defendant's sufficiency of the evidence claim does involve any challenge to Szintea's credibility or his account of the skimming operation and defendant's role therein; rather, it is simply premised on his claim that the State failed to prove that he or the other members of the skimming operation "committed thefts from the accounts of Lane Ketelsen, Serif Licina, or Mike Mitzner or any of the money taken from the 80 unrelated Chase accounts alleged in the indictment." We find defendant's argument unavailing. We acknowledge that Szintea did not detail the specific ATM locations targeted by the group or the specific dates on which they used the ATM machines to access and withdraw funds from compromised accounts. He simply testified that the skimming operation commenced in March 2013. However, contrary to defendant's assertion, the additional evidence presented by the State established the requisite link. Ketelsen and Licina both testified that a total of $2,000 had been withdrawn from their accounts without their permission over the course of several days in March and April 2013. Both men filed fraud claims. Based on relevant exhibits, it appears that Ketelsen filed a claim on April 3, 2013, for $2,000 and that Licina filed his corresponding claim for $2,000 on April 2, 2013. In addition, Mitzner's stipulated testimony established that funds were also unlawfully withdrawn from his account. An exhibit shows that his fraud claim was filed on April 6, 2013, for $1,200.

¶ 29 Although defendant suggests that someone other than he or his accomplices could have stolen the money from Ketelsen, Licina and Mitzner, Kevin Lackey, a Chase Bank fraud investigator, specifically identified defendant and his accomplices as the individuals who were responsible for the thefts from their accounts. During the course of Lackey's investigation, which commenced in March 2013 and continued through April 2013, he viewed surveillance footage in which he observed the three members of defendant's crew installing and removing

skimming equipment and accessing and withdrawing funds from Chase accounts that matched accounts subject to fraud claims. He was then able to compile a spread sheet of the specific accounts that were compromised by this specific skimming operation. The accounts of Ketelsen, Licina and Mitzner were three of the accounts that were unlawfully accessed by defendant and his accomplices. Although the surveillance footage is not part of the record and was not introduced at trial, still images of defendant's crew members accessing Chase Bank ATMs and the spread sheet and other documentary evidence on which Lackey relied upon during his trial testimony, is included in the record. Defendant's sufficiency of the evidence claim—that neither he nor his accomplices committed the specific thefts from the accounts of Ketelsen, Licina and Mitzner—essentially requires this court to question Lackey's credibility and reject all logical inferences arising from his testimony. This court will not do so. See *Sutherland*, 223 Ill. 2d at 242 (recognizing that the trier of fact is responsible for evaluating the credibility of witnesses and drawing reasonable inferences from their testimony, and that a reviewing court may not substitute its judgment for that of the trier of fact). Rather, viewing the totality of the evidence in the light most favorable to the prosecution, including the testimony provided by Szintea and Lackey, the surveillance images, the spread sheet and other documentary evidence, we conclude a reasonable trier of fact could have found defendant guilty of being the organizer of a financial crimes enterprise beyond a reasonable doubt.

¶ 30 Other Crimes Evidence

¶ 31 Defendant next contends that the circuit court erred in admitting his 2012 identity theft conviction." He argues that his previous offense "was not sufficiently unique to demonstrate *modus operandi*, not sufficiently connected to the current case to be part of a common plan or design, and not sufficiently probative of the undisputed issue of intent" to warrant its admission.

¶ 32 The State initially responds that defendant failed to properly preserve this issue for appellate review. On the merits, the State argues that "the trial court properly admitted evidence of defendant's 2012 identity theft conviction to show *modus operandi*, common scheme plan, and intent."

¶ 33 As a threshold matter, defendant concedes that he failed to properly preserve this issue for appellate review because trial counsel did not include this purported error in defendant's posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (recognizing that to properly preserve an issue for appeal, a defendant must object to the purported error at trial and specify the error in a posttrial motion and that his failure to satisfy both requirements results in forfeiture of appellate review of his claim). In an effort to avoid forfeiture, however, defendant invokes the plain error doctrine, which provides a limited exception to the forfeiture rule and allows for review of forfeited issues on appeal if the evidence is closely balanced or the error is of such a serious magnitude that it affected the integrity of the judicial process and deprived the defendant of his right to a fair trial. Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967); *People v. Belknap*, 2014 IL 117094, ¶ 48; *People v. Sargent*, 239 Ill. 2d 166, 189 (2010); *People v. Piatkowski*, 225 Ill. 2d 551, 564-65 (2007). The first step in any plain error analysis is to determine whether any error actually occurred. *Piatkowski*, 225 Ill. 2d at 565; *People v. Rinehart*, 2012 IL 111719, ¶ 15. If an error is discovered, the defendant then bears the burden of persuasion to show that the error prejudiced him. *Sargent*, 239 Ill. 2d at 189-90. Keeping this standard in mind, we turn now to evaluate the merit of defendant's claim.

¶ 34 As a general rule, evidence of other crimes or prior bad acts, that is, evidence of crimes or acts for which a defendant is not on trial, is inadmissible if its purpose is merely to show the defendant's propensity to commit criminal acts. Ill. R. Evid. 404(b) (eff. Jan. 1, 2011); *People v.*

Heard, 187 Ill. 2d 36, 58 (1999). Other crimes evidence, however, may be admitted if it is relevant for a purpose other than to establish the defendant's bad character or his propensity to commit the charged offense. Ill. R. Evid. 404(b) (eff. Jan. 1, 2011); *People v. Pikes*, 2013 IL 115171, ¶ 11; *People v. Evans*, 373 Ill. App. 3d 948, 958 (2007). Accordingly, other crimes evidence may be admitted to show *modus operandi*, intent, motive, identity, or the absence of mistake. *Pikes*, 2013 IL 115171, ¶ 11; *People v. Hensely*, 2014 IL App (1st) 120802, ¶ 50. *Modus operandi* "refers to a pattern of criminal behavior which is so distinct that separate crimes or wrongful conduct are recognized as being the work of the same person." *People v. Tipton*, 207 Ill. App. 3d 688, 694 (1990). " 'This inference arises when both crimes share peculiar and distinctive features not shared by most offenses of the same type and which, therefore, earmark the offenses as one person's handiwork.' " *People v. Jackson*, 331 Ill. App. 3d 279, 286 (2002) (quoting *People v. Berry*, 244 Ill. App. 3d 14, 21 (1991)). Ultimately, "[*m*]*odus operandi* acts as circumstantial evidence of identity on the theory that crimes committed in a similar manner indicate that they were committed by the same offender." *People v. Littleton*, 2014 IL App (1st) 121950, ¶ 44. Although the degree of similarity required to introduce other crimes evidence under the *modus operandi* exception is higher than for other exceptions, some dissimilarities between offenses will always exist. *People v. Clark*, 2015 IL App (1st) 131678, ¶ 53. On review, the circuit court's ruling concerning the admissibility of other crimes evidence will not be disturbed absent an abuse of discretion. *People v. Donoho*, 204 Ill. 2d 159, 182 (2003); *People v. Moss*, 205 Ill. 2d 139, 156 (2001). An abuse of discretion pertaining to an evidentiary ruling " ' will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court.' " *People v. Thompson*, 2013 IL App (1st) 113105, ¶ 100 (quoting *People v. Caffey*, 205 Ill. 2d 52, 89 (2001)).

¶ 35 In this case, prior to trial, the State filed a motion seeking to admit evidence pertaining to defendant's prior 2012 conviction for identity theft. He pled guilty to that offense after providing a detailed statement to law enforcement officers in which he admitted to working with a small group of individuals to obtain Chase Bank account holders' debit card information by installing electronic skimming equipment onto ATMs. The information was then used to create duplicate cards, which in turn, were used to unlawfully remove money from the card holders' accounts. In support of its motion, the State argued that "[t]he similarities between the two cases, the Defendant's previous case and the instant case, are striking and nearly identical. Based on [the] similarities, the probative value of allowing other crimes evidence for purposes of showing the Defendant's identity, intent, modus operandi and absence of mistake or an innocent state of mind outweighs any prejudice and should be admitted as allowed by law."

¶ 36 After hearing the arguments of the parties, the circuit court granted the State's motion and ruled that details pertaining to defendant's 2012 identity theft conviction were admissible. In doing so, the court emphasized that it generally "loath[ed]" admitting other crimes evidence because such evidence can be "very dangerous and can invite convictions in [a] pending case simply because of wrongdoing in some other case." Nonetheless, the court found that admission of other crimes evidence in this case was warranted given the notable similarities between the circumstances relating to defendant's prior offense and the offenses for which defendant was on trial. Upon review, we find no abuse of discretion.

¶ 37 Although defendant suggests that the two crimes only share general similarities characteristic of most skimming offenses, we agree with the circuit court that the two skimming operations in which defendant was involved shared a number of notable and distinctive similarities. Both operations involved a group of Romanian immigrants who targeted Chase

Bank ATMs located throughout the Chicagoland area. In both instances, the different individuals who comprised the group were delegated specific tasks. One individual would install the skimming equipment onto the ATM machines while another individual was the lookout. A different member of both groups was assigned to remove the equipment and provide it to another individual, who was entrusted with using the information to create cloned debit/credit cards. Finally, the members of the group would then use those cards to withdraw funds from the compromised Chase Bank accounts. Ultimately, we find that the two skimming operations were sufficiently similar to warrant the admission of defendant's 2012 identity theft conviction into evidence under the *modus operandi* exception. Therefore, we reject defendant's argument that the circuit court erred and abused its discretion in admitting the other crimes evidence. In doing so, we specifically reject defendant's argument that the circuit court failed to properly balance the probative value of the evidence against its prejudicial effect prior to ruling that it was admissible. It is evident from the record that the circuit court carefully considered the arguments of the parties, the potential pitfalls of other crimes evidence, and the probative value of defendant's 2012 identity theft conviction prior to granting the State's motion to admit the other crimes evidence.

¶ 38 Ultimately, "[h]aving found no error, there can be no plain error." *Bannister*, 232 Ill. 2d at 79. Moreover, having found no error, defendant's alternative argument that defense counsel was ineffective for failing to include this issue in defendant's posttrial motion is likewise unavailing. *Id*. (citing *People v. Hall*, 194 Ill. 2d 305, 354 (2000), and *People v. Alvine*, 173 Ill. 2d 273, 297 (1996)).

¶ 39 Admission of Szintea's Prior Consistent Statement

¶ 40 Defendant next argues that the circuit court erred when it permitted the State to elicit a prior consistent statement made by Lorant Szintea. He argues that Szintea's statement was "made after his motive to shift blame to [defendant] arose and *** contained details that were not part of Szintea's trial testimony."

¶ 41 The State responds that the circuit court did not abuse its discretion in admitting Szintea's prior consistent statement. Specifically, the State argues that the statement was properly admitted to rebut defense counsel's suggestion that Szintea's trial testimony was a recent fabrication and that he had a motive to testify falsely.

¶ 42 As a threshold matter, defendant concedes that is issue was also not properly preserved for appellate review and again invokes the plain error doctrine to avoid forfeiture. Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). As discussed previously, the first step in plain error review is to determine whether any error occurred. *Bannister*, 232 Ill. 2d at 65; *Rinehart*, 2012 IL 111719, ¶ 15.

¶ 43 As set forth above, the admission of evidence falls within the sound discretion of the trial court, and as such, its rulings will not be disturbed on appeal absent an abuse of discretion. *Caffey*, 205 Ill. 2d at 89; *People v. Hatchett*, 397 Ill. App. 3d 495, 506 (2009); *People v. Mullen*, 313 Ill. App. 3d 718, 730 (2000). As a general rule, the admissibility of prior consistent statements for the purpose of corroborating trial testimony or bolstering a witness is precluded. *People v. Cuadrado*, 214 Ill. 2d 79, 90 (2005); *People v. Heard*, 187 Ill. 2d 36, 70 (1999); *People v. McWhite*, 399 Ill. App. 3d 637, 641 (2010). This rule exists because it is likely that a trier of fact will unfairly enhance a witness's credibility simply because his or her statement has been repeated. *People v. Wiggins*, 2015 IL App (1st) 133033, ¶ 41; *McWhite*, 399 Ill. App. 3d at 641; *People v. Johnson*, 385 Ill. App. 3d 585, 608 (2008). The general rule precluding the admission

of prior consistent statements however, is not absolute. *People v. Richardson*, 348 Ill. App. 3d 796, 802 (2004); *Mullen*, 313 Ill. App. 3d at 730. Prior consistent statements may be admissible to rebut a charge that the witness is motivated to testify falsely or to rebut a charge that the testimony is a recent fabrication. *Richardson*, 348 Ill. App. 3d at 802; *Mullen*, 313 Ill. App. 3d at 730. To be admissible, however, the prior consistent statement must have been uttered before a motive to fabricate arose. *Cuadrado*, 214 Ill. 2d at 90; *Heard*, 187 Ill. 2d at 70; *Wiggins*, 2015 IL App (1st) 133033, ¶ 39. Even where admissible under these limited circumstances, prior consistent statements may not be considered substantive evidence. *McWhite*, 399 Ill. App. 3d at 641; *Mullen*, 313 Ill. App. 3d at 730. Rather, they are simply admissible to show that the witness told the same story before the time of the alleged fabrication. *Mullen*, 313 Ill. App. 3d at 730.

¶ 44 In this case, during defense counsel's cross-examination of Szintea, counsel made several inquiries as to whether Szintea was given any incentives in exchange for his trial testimony, or alternatively, whether he was threatened with any consequences if he did not testify. Counsel specifically asked for details about the Rule 402 conference that preceded Szintea's guilty plea. When the State objected on relevance grounds, defense counsel explained: "I'm trying to find out what's motivating this guy to testify today." Defense counsel was then permitted to proceed with his line of inquiry. Thereafter, on redirect examination, the State asked Szintea to confirm that his trial testimony was true and that he had provided the same account to police when he was first questioned about the skimming operation. When defense counsel objected to the introduction of Szintea's prior consistent statement, the circuit court overruled the objection, reasoning that the prior statement was relevant and admissible because defense counsel was "claiming now that [Szintea's trial testimony] was a recent fabrication." Szintea then testified that he had previously informed police that defendant organized the skimming operation and

recruited him, Meynhart and Szasz to take part in the scheme. He also told the officers that defendant provided the men with electronic skimming equipment and taught them how to install and remove the equipment. Szintea testified that he also informed the investigating officers that defendant provided the men with cloned cards and directed them to specific ATM locations to remove money from the compromised Chase Bank accounts. The proceeds were then provided to defendant. Szintea explained that he provided this account to investigating officers before he was actually charged with any crimes in connection with the skimming operation.

¶ 45 Upon review, we cannot agree that the circuit court abused its discretion in admitting Szintea's prior consistent statement. The statement was, as the circuit court properly found, admissible to rebut defense counsel's suggestion that Szintea's trial testimony was a recent fabrication and that he had a motive to testify falsely. In so finding, we are unpersuaded by defendant's argument that Szintea possessed a motive to fabricate at the time he provided his statement to police. Szintea had admitted to his role in the skimming offense when informed the police that defendant was the organizer of the skimming scheme. That is, Szintea did not implicate defendant in an effort to divert suspicion away from himself and avoid criminal charges; rather, he freely admitted to illegally installing skimming devices onto Chase Bank ATM machines. *Cf. Wiggins*, 2015 IL App 133033, ¶ 40 (finding that the circuit court erred in admitting a witness's prior consistent statement implicating the defendant in a shooting where the statement was made after the police had taken the witness into the police station and informed him that another person had identified him as the shooter because the witness had a motive to fabricate a story blaming the defendant for the shooting to avoid being charged with the crime himself). Accordingly, because Szintea's prior consistent statement was made absent motive to fabricate, it was properly admissible to rebut defense counsel's suggestion that he was

motivated to testify falsely and had recently fabricated his testimony. *Cuadrado*, 214 Ill. 2d at 90; *Heard*, 187 Ill. 2d at 70. Therefore, the circuit court did not err or abuse its discretion in admitting the prior consistent statement. The fact that Szintea's prior consistent contained several additional innocuous details that were absent from his trial testimony, including the specific location of one of the storage units, does not alter our conclusion. Given the lack of error, defendant's reliance on the plain error doctrine to avoid forfeiture is unavailing. See *People v. Hansen*, 238 Ill. 2d 74, 115 (2010) ("Finding no error, our plain-error analysis ends here").

¶ 46 Ineffective Assistance of Trial Counsel

¶ 47 Finally, defendant argues that he was denied his constitutional right to effective assistance of trial counsel when his attorney "did not make a closing argument following the State's closing argument."

¶ 48 The State responds that "defense counsel was not ineffective because deciding to waive closing argument was a reasonable trial strategy and defendant suffered no prejudice f[ro]m that decision."

¶ 49 It is well-established that every criminal defendant has a constitutional right to receive effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I § 8; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S. Ct. 2052, 2063, 80 L. Ed. 2d 674, 691-92 (1984). The right to effective assistance of counsel entails "reasonable, not perfect, representation." *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 79. To prevail on a claim of ineffective assistance of trial counsel, the defendant must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984) and establish that: (1) counsel's performance fell below an objective standard of reasonableness, and (2)

counsel's deficient performance prejudiced defendant. *People v. Albanese*, 104 Ill. 2d 504, 525 (1984); *People v. Baines*, 399 Ill. App. 3d 881, 887 (2010). With respect to the first prong, the defendant must overcome the "strong presumption" that counsel's action or inaction was the result of sound trial strategy. *People v. Jackson*, 205 Ill. 2d 257, 259 (2001); *People v. Shelton*, 401 Ill. App. 3d 564, 584 (2010). " 'In recognition of the variety of factors that go into any determination of trial strategy, * * * claims of ineffective assistance of counsel must be judged on a circumstance-specific basis, viewed not in hindsight, but from the time of counsel's conduct, and with great deference accorded counsel's decisions on review.' " *Wilborn*, 2011 IL App (1st) 092802, ¶ 79 (quoting *People v. Fuller*, 205 Ill. 2d 308, 330-31 (2002)); see also *People v. Mitchell*, 105 Ill. 2d 1, 15 (1984) ("The issue of incompetency of counsel is always to be determined by the totality of counsel's conduct.") To satisfy the second prong, the defendant must establish that but for counsel's unprofessional errors, there is a reasonable probability that the trial court proceeding would have been different. *People v. Peeples*, 205 Ill. 2d 480, 513 (2002). A defendant must satisfy both the performance and prejudice prongs of the *Strickland* test to prevail on an ineffective assistance of counsel claim. *Evans*, 209 Ill. 2d at 220; *People v. McCarter*, 385 Ill. App. 3d 919, 935 (2008).

¶ 50 As a threshold matter, we observe that the decision to waive opening or closing argument is one that has been long been considered a matter a trial strategy that is generally immune from ineffective assistance of counsel claims. *People v. Conley*, 118 Ill. App. 3d 122, 127-28 (1983). This is particularly true in the context of a bench trial. *Id*. (citing *People v. Talasch*, 20 Ill. App. 3d 794 (1974)); *Cf. People v. Wilson*, 392 Ill. App. 3d 189, 200 (2009) ("It would be a rare case in which choosing not to make a closing argument in a *jury* trial would be sound trial strategy" (emphasis added)). In this case, at the conclusion of the State's case-in-chief, defense counsel

"mov[ed] for a finding of not guilty." In support of the oral motion, defense counsel argued that the State failed to satisfy its burden of proving defendant guilty of being an organizer of a continuing financial crimes enterprise beyond a reasonable doubt. Counsel emphasized that defendant was not captured on surveillance video actively taking part in the skimming operation and that no skimming equipment or other physical evidence was found when officers executed a search warrant at his apartment. Instead, the State's case was based primarily on the testimony of Szintea. Defense counsel also argued that defendant's prior conviction was irrelevant and "d[id not] shine any light on whether or not" he organized a second skimming ring. Ultimately, however, after considering defense counsel's argument, the circuit court denied defendant's motion, reasoning: "we have a crime and we have a person who admitted his role in a crime testify that [defendant] was part of the group, testified what [defendant's] role was, as part of that group." Immediately after the circuit court's denial of defendant's motion, the State delivered its closing argument.[5] Defense counsel then waived his closing statement, electing not to repeat the arguments he had just made minutes ago in support of defendant's motion for a finding of not guilty.

¶ 51 Under these circumstances, we conclude that trial counsel's decision to forgo closing argument may properly be construed as reasonable trial strategy, which will not support an ineffective assistance of counsel claim. See generally *Conley*, 118 Ill. App. 3d at 127-28. Moreover, even if the decision could be deemed unreasonable, defendant's ineffective assistance of counsel claim nonetheless necessarily fails because he has not shown that he was prejudiced by the lack of closing argument given the evidence against him, including the testimony of his coconspirator Szintea, whom the circuit court found to be a compelling witness.

[5] The State's closing argument immediately preceded the circuit court's denial of defendant's motion for a not guilty finding because defendant elected not to testify and defense counsel presented no evidence. We note that defendant does not take issue with defense counsel's decision not to call any witnesses or present evidence.

¶ 52 CONCLUSION

¶ 53 The judgment of the circuit court is affirmed.

¶ 54 Affirmed.