No. 2—09—0874
Order filed June 28, 2011

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 08—CF—89
RAYMOND V. SCOTT,	)	Honorable John J. Kinsella,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Justice McLaren specially concurred in the judgment.
Justice Burke dissented.

ORDER

Held: This court had jurisdiction over the appeal. The trial court did not err in overruling defendant's objection to an officer's testimony that defendant's girlfriend, who did not testify at trial, had implicated him. The State was not required to present the testimony of the alleged victims of credit card fraud in order to submit into evidence bank documents indicating that unauthorized charges had been reported on the accounts, and the State also provided a sufficient foundation for the documents to be admissible. The evidence was sufficient to prove defendant guilty of identity theft beyond a reasonable doubt. Defendant's argument that he would not have been subject to extended term sentences if he were properly sentenced as a class 2 offender under the identity theft statute was without merit. However, the trial court erred in ordering defendant to submit DNA samples and pay the corresponding fee, because defendant had previously submitted such samples as a result of a prior felony.

Following a bench trial, defendant, Raymond V. Scott, was convicted of five counts of identity theft (720 ILCS 5/16G—15(a)(1), (a)(4) (West 2006)). The trial court found that two of the counts merged, and it sentenced defendant to concurrent terms of nine years' imprisonment on the remaining counts. On appeal, defendant argues that he was denied his right to confront and cross-examine witnesses when the trial court allowed into evidence: the statement of an alleged co-conspirator implicating him; bank documents without sufficient foundation; and hearsay statements of alleged victims. Defendant further argues that: he was not proven guilty beyond a reasonable doubt; his class 3 extended term sentence must be modified to a sentence within the class 2 range; and the sentencing order for DNA testing must be vacated because he already submitted to such testing as a condition of a prior sentence. We affirm in part and vacate in part.

I. BACKGROUND

On February 14, 2008, defendant was indicted on five counts of identity theft. Count I alleged that on October 14, 2007, he knowingly used personal identifying information of Susan Schoenborn, being her debit card number, to obtain merchandise from Thorntons, knowing that the personal identifying information was stolen or produced without lawful authority. Count II was identical except that it alleged that defendant used Schoenborn's debit card number to fraudulently obtain goods from Thorntons valued at over $300 but not more than $2,000. The next two counts alleged that on November 7, 2007, defendant knowingly possessed credit card numbers of Rohit Singh (count III) and Stephen Miller (count IV), knowing that the personal identifying information was stolen or produced without lawful authority. Count V alleged that on October 25, 2007, defendant used Jacqueline Alfonso's credit card number to obtain merchandise from Thorntons, knowing that the personal information was stolen or produced without lawful authority.

Defendant waived his right to a jury trial, and a bench trial took place on February 18 and March 20, 2009. Sijo Job, a personal banker and custodian of accounts records at JP Morgan Chase Bank in Wheaton, described the process for obtaining a debit card from the bank, how transactions are recorded, and the bank procedures for when a customer reports an inaccuracy in an account statement. Job testified that no one is allowed to put information from the magnetic strip of a Chase card onto another bank card or gift card. Job identified a joint Chase bank account statement for Christopher Kearns and Susan Schoenborn. The account was linked to a particular debit card number ending in 2020, in Schoenborn's name. The statement listed a transaction dated October 14, 2007, from the Marriott Hotel in Hoffman Estates. Job had never spoken to Schoenborn or Kearns, did not set up their account, could not verify that they received the cards, and did not know how credit card terminals work or how information gets from the terminal to the bank and then to a statement. However, he did verify the existence of the accounts and debits cards before testifying. It is possible for the embossed number on the front of the card to be different from the number on the magnetic strip, if someone altered the magnetic information.

Susan Kearns, formerly Susan Schoenborn, testified that she and her now-husband had a Chase Bank account in October 2007. She identified her debit card number, which ended in 2020. She did not know defendant and did not give him or anyone else permission to use her debit card at Thorntons gas station in Naperville on October 14, 2007. She also did not know someone named Gaja Starks and did not give her permission to use her debit card on October 14. Kearns spent her wedding night at the Marriott Hotel in Hoffman Estates on October 12, 2007, and she paid using her debit card. She and her husband went to Las Vegas the following day, and she had the card with her there; the card was never stolen. They returned on October 18. Kearns identified her bank statement

showing purchases at Thorntons gas stations in Naperville and Aurora on October 14, 2007. The bank initially notified Kearns of unusual activity, but she assumed it was her Las Vegas purchases. When she returned home, she checked her statement on-line and saw unauthorized purchases. She called the bank, but it had already put a stop on her account.

Linda Hatch, branch manager and custodian of account records for U.S. Bank, testified how a credit card account is opened with her bank, how transactions are recorded, and how customers report errors. Cardholders are not permitted to place information from the magnetic strip of a U.S. Bank Visa onto a non-U.S. Bank credit card or gift card. Hatch testified that credit card statements and affidavits of forgery or unauthorized use are prepared and used in the regular course of business. Hatch identified an exhibit as credit card information for a specific account number ending in 5824, which belonged to Rohit Singh. His mailing address was in Georgia. The account was closed in October 2007. Hatch identified a document as showing that Singh reported fraudulent transactions on his account. Hatch also identified a credit card statement for Singh reflecting a credit card transaction on October 16, 2007, at the Marriott in Hoffman Estates. The exhibits were prepared in the ordinary course of business reasonably close in time to the happening of the transactions. By ordinary course of business, Hatch meant that the documents were produced whenever the company deemed it necessary for credit card fraud, rather than being generated automatically like a monthly checking account statement. Hatch admitted that she had never talked to Singh, and it was not her job to look into whether the disputed transactions were truly fraudulent. She did not generate the documents she discussed in court. A person using a credit card would not necessarily know the information on the card's magnetic strip.

Christine Kulagowski testified that she was employed with American Express Security, and part of her duties included being a custodian of account records. Kulagowski described how: an American Express account is opened; transactions are recorded; statements are generated; and unauthorized transactions are reported. Account holders are not authorized to put information from the card's magnetic strip onto another card. Kulagowski identified an application and account statement in the name of Jacqueline Alfonso, with an address in Texas. The specific account number, which ended in 1006, was detailed. The statement reflected a transaction at the Marriott in Hoffman Estates with an arrival date on October 23, 2007, and a departure date of October 24, 2007. The statement also showed two transactions at Thorntons in Naperville on October 25, 2007, at 2:42. a.m. and 2:46 a.m., each for $317. The Thorntons transactions were reported as fraudulent. Kulagowski had never talked to Alfonso and did not conduct an investigation into her fraud report.

David Aumiller, a vice president of investigative services and a manager at Bank of America, described how credit card accounts are opened, how transactions occur and are processed, and how customers report inaccuracies. He testified that account holders are not permitted to put information from the magnetic strip of a Bank of America card onto another card. Bank of America used computer equipment to store credit card applications, account statements, and affidavits of forgery, and they were permanent business records of the bank. Aumiller identified a bank record for a University of Georgia student account in the name of Stephen Miller, ending in number 2930. The mailing address was in North Carolina. Aumiller identified an "affidavit" of fraud prepared by Miller stating that there was a transaction on September 12, 2007, that he did not authorize. An affidavit of fraud is not sworn to or notarized. Miller was issued a new card in October 2007. Aumiller did not see Miller sign the affidavit or compare the signature with other bank documents.

However, Aumiller had a document showing that the operator spoke to Miller and verified that he was the authorized signer on the account. Aumiller testified that on merchant receipts, only the last four digits of the account number appear, and some receipts will include the customer's name while others will not.

Sade Vesay testified that she worked at Thorntons gas station in Naperville in 2007. On October 14, 2007, at about 10:20 a.m., defendant purchased gift cards in $100 increments with an American Express credit card in three separate transactions. Vesay swiped defendant's card and watched him sign the receipts. For the second and third transactions, she matched the name on the credit card with his driver's license. Vesay identified three receipts in court. She did not compare the credit card number on the receipt with the number on defendant's card. Defendant's demeanor during the purchases was "[v]ery friendly," and he gave "[t]oo much information *** as to why he was purchasing the gift cards." Vesay identified defendant in a police photo line up on November 20, 2007, and in open court by his appearance; she could not remember his name.

Michael Masbaum, who also worked at Thorntons in Naperville, testified that defendant came to the station on October 25, 2007, at about 2:41 a.m. Defendant was driving a white Cadillac. Defendant bought three $100 gift cards using a credit card, and Masbaum watched him sign the receipt, which he identified in court. Defendant then bought more gift cards in the same manner in a second transaction. Masbaum identified a security video showing defendant making the purchases. The Cadillac returned to the store one hour later and a black woman came in. The credit card she presented was declined, and Masbaum later learned from his company that it was the same credit card defendant had used. Masbaum identified the woman, Gaja Starks, in a photo line-up on November 20, 2007.

David Caudill, Thorntons' senior director of information technology, testified that part of his duties was being a custodian of credit card transaction records at Thorntons. Once a credit card is swiped at a Thorntons store, the information automatically goes to Fifth/Third Bank for approval or denial. One approved, a code is issued, and the transaction information is logged onto Thorntons database. Caudill identified the three receipts from Thorntons from October 14, 2007. Thorntons records showed the full account number, which ended in 2020, for all three transactions. Caudill also listed the full account number for the October 25, 2007, transactions at Thorntons; it ended in 1006. The name information from the magnetic strip is not always printed on a receipt. If a card were reported stolen, a denial code would appear for the transaction. If the magnetic strip of an existing credit card was reencoded with a stolen number, the strip was run through a credit card processing machine, and the transaction was approved, the last four digits of the new reencoded number would show up on the receipt.

State Police Trooper Amanda Griffin testified that she pulled over a silver Cadillac on November 7, 2007, for various traffic violations. Defendant was alone in the vehicle. She arrested him for driving on a suspended license. An inventory search of the Cadillac revealed 31 gift cards in $50 and $100 increments in the glove box area and center console; a laptop and what appeared to be a card swiper in the backseat; and some electronic devices such as iPods, still in their original wrappings, in the trunk. Griffin identified two Visa gift cards and one MasterCard gift card as being found in the car; she acknowledged that her report specifically listed only American Express gift cards. When she asked defendant where he got all of the gift cards, he said that he was related to Byron Scott of the Lakers and had received them as gifts.

A certified title history of the Cadillac was entered into evidence. It showed that the Cadillac was registered to defendant.

Illinois State Police Sergeant Amy Pelletier testified that on November 8, 2007, she received a voicemail from defendant asking if he could pick up his belongings from the Cadillac. Pelletier and Trooper Reineke took defendant to his car, and Pelletier inventoried the items defendant removed from the vehicle. The items included a computer and computer case, which neither of the officers opened, and 31 gift cards. Pelletier told defendant that she would have to photocopy the gift cards before he could take them, and defendant said that he did not want them back. Pelletier later turned the gift cards over to Special Agent Andriakos. Pelletier agreed that the items she documented did not include a credit card scanner.

Illinois State Police Trooper Ronald Reineke testified that when defendant was removing items from the car, defendant opened a computer case slightly and said that it was a laptop computer. Defendant did not completely open the case in Reineke's presence. Defendant never removed and showed him any credit card scanning device.

Special Agent James Andriakos of the State Police's financial crimes task force testified that he was investigating defendant for identity theft. Andriakos obtained the gift cards defendant left with the police. He ran the cards through a card reader and compared the numbers on the magnetic strip to those embossed on the front of the cards. Andriakos listed the full numbers from the face of various gift cards and from their magnetic strips. A Visa gift card had an embossed number ending in 6827, but the number from the magnetic strip ended in 2930. A MasterCard gift card had an embossed number ending in 9725 but a number ending in 5824 on the magnetic strip. Another Visa gift card had an embossed number ending in 6515 but a number ending in 5824 on the magnetic

strip. Andriakos testified that a credit card skimming or scanning device typically looks like one would see at the store. It is usually black, about 2½ or 3 inches wide by 1½ inches wide, and has an opening down the middle with an arrow indicating in which direction to swipe the card.

Investigator Harry Russman of the Hoffman Estates Police Department testified that he "became aware of" defendant and Starks in October and November 2007. During that time, Russman met with Starks at the Marriott Hotel in Hoffman Estates, where she was working. On November 12, 2007, he went to Stark's residence in Elgin. Russman and his partner saw defendant drive up to the residence in a black Infiniti, and they arrested him for driving on a suspended license and possession of cannabis. An inventory search of the car revealed a black computer bag (with no computer) and a box with what looked like "a credit card scanner or skimmer" inside. There were also "miscellaneous" gift cards and credit cards inside the computer bag. Russman obtained a search warrant to search the scanner but did not find anything on it. On November 14, 2007, Starks consented to a search of her residence. Inside, Russman found a November 7, 2007, Illinois State Police tow inventory sheet and a cell phone bill with defendant's name.

Naperville Police Department Detective Donald Bisch testified as follows. He interviewed defendant on November 13, 2007. Defendant waived his *Miranda* rights and agreed to speak with Bisch. Bisch said that he was investigating some incidents at a Thorntons gas station in Naperville where reencoded stolen credit card numbers were used to purchase gift cards. Bisch told defendant that based on the preliminary investigation, he believed that defendant was involved. Defendant did not deny involvement. He said that just because he might be seen on a video at the store, it did not mean that he had done anything wrong. He also said that if he had been at that station or purchased a gift card, it did not mean that he had done anything wrong.

Bisch testified that he "explained to [defendant] that [he] believed he was connected with the case and involved in the case because Gaja Starks had been arrested and it implicated him --." Defense counsel objected. The prosecutor stated, "This is what he is indicating to the defendant," and the trial court overruled the objection. Bisch testified that he told defendant that one of the reasons he believed defendant was involved was because defendant's girlfriend was involved. The trial court overruled defense counsel's objection to the reference to Starks being defendant's girlfriend; the trial court stated that the fact that Bisch said that to defendant in the course of accusing him of the crime was a different issue from whether it was true. Bisch testified that defendant did not deny that Starks was his girlfriend. Defendant said, " [Starks] was arrested for that so you should be looking at her. She's involved in this so all the stuff is probably hers."

Bisch testified that he again told defendant the reasons he believed he was involved, and defendant again replied that if he was in the store or purchased gift cards, it did not necessarily mean that he did anything wrong. Bisch testified that "again [he] told [defendant] that Gaja Starks, his girlfriend, had been involved in similar activity and had implicated him." Bisch told defendant that he was in the process of obtaining a video and was confident that defendant would be on it. Defendant repeated that if he were there, it did not mean he had not anything wrong. Bisch asked if defendant wanted to make a statement, and defendant said that he would take his chances on whether he would get charged.

Bisch further testified that a Thorntons employee provided him with a license plate number, which Bisch found was registered to defendant. Bisch arrested defendant on January 28, 2008, at his Riverside apartment. While Bisch was in the apartment, the phone rang, and Bisch answered it. The female caller identified herself as Gaja Starks.

The trial court found defendant guilty of all counts. It stated that in viewing the evidence, it was convinced that defendant was engaged in a conspiracy with Starks in October and November 2007 to obtain credit card information at least in part through Starks' employment connections at the Marriott Hotel. Further, defendant was seen purchasing gift cards at Thorntons with fraudulent credit cards containing account numbers of other people. The trial court stated that it believed beyond a reasonable doubt that defendant knew that he was in possession of stolen credit card numbers and used them knowing that they were fraudulently obtained.

Defendant filed a posttrial motion on April 20, 2009, arguing that he was not proven guilty beyond a reasonable doubt and that the trial court erred in admitting bank records without any foundation. On June 11, 2009, defendant filed a motion to be sentenced as a class 2 offender. On July 9, 2009, the trial court denied defendant's motion to be sentenced as a class 2 offender, stating that it could not increase the class of the offense charged. It also denied defendant's posttrial motion and sentenced defendant. The trial court subsequently denied defendant's motion to reconsider his sentence, and this appeal followed.

II. ANALYSIS

A. Motion

We begin by considering the State's motion to dismiss the appeal for lack of jurisdiction; the motion was ordered taken with the case. Defendant was sentenced on July 9, 2009, and his "amended" motion to reconsider the sentence[1] is file-stamped August 13, 2009. The motion to

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[1]Although the motion is labeled as an "amended" motion to reconsider sentence, there is no prior motion to reconsider sentence in the record.

reconsider the sentence was denied on August 19, 2009, and defendant filed his original notice of appeal on August 24, 2009. The State notes that Rule 606 requires that a notice of appeal be filed within 30 days following the entry of the final judgment appeal from, or 30 days after an order disposing of a timely motion directed against the judgment. Ill. S. Ct. R. 606 (eff. Mar. 20, 2009). The State points out that defendant's notice of appeal was not filed within 30 days of the imposition of his sentence, and it further argues that defendant's motion to reconsider sentence was untimely and therefore did not extend the time for filing a notice of appeal. As such, according to the State, this court is without jurisdiction to entertain the appeal.

Defendant notes that the proof of service states that his trial counsel mailed the amended motion to reconsider sentence on July 30, 2009. Defendant argues that his motion was therefore timely under Supreme Court Rule 12(b)(3) (Ill. S. Ct. R. 12(b)(3) (eff. Nov. 15, 1992)). Defendant alternatively argues that the trial court was revested with jurisdiction.

Supreme Court Rule 373 (Ill. S. Ct. R. 373 (eff. Feb. 1, 1994)), which applies to civil appeals on its face, also applies to criminal appeals by virtue of Supreme Court Rule 612(s) (Ill. S. Ct. R. 612(s) (eff. Sept. 1, 2006)). See *People v. Lugo*, 391 Ill. App. 3d 995, 997 (2009). Rule 373 provides in relevant part:

> "Unless received after the due date, the time of filing records, briefs or other papers required to be filed within a specified time will be the date on which they are actually received by the clerk of the reviewing court. If received after the due date, the time of mailing shall be deemed the time of filing. Proof of mailing shall be as provided in Rule 12(b)(3). This rule also applies to the notice of appeal filed in the trial court." Ill. S. Ct. R. 373 (eff. Feb. 1, 1994).

Rule 12(b)(3) states that service is proved "in case of service by mail, by certificate of the attorney, or affidavit of a person other than the attorney, who deposited the paper in the mail, stating the time and place of mailing, the complete address which appeared on the envelope, and the fact that proper postage was prepaid." Ill. S. Ct. R. 12(b)(3) (eff. Nov. 15, 1992).

Here, defendant's sentence was imposed on July 9, 2009, so under Rule 606 his postsentencing motion was due by August 10, 2009. Defendant's postsentencing motion is file-stamped August 13, 2009, after the due date, so pursuant to Rule 373 the date of mailing will be used to compute the time of filing. Defense counsel's notice of filing, which is included in the record, is addressed to "Assistant State's Attorney Ken Taturalus [*sic*]." It states, "PLEASE TAKE NOTICE, that on the 30th day of July, 2009, I will cause to be filed with the Clerk of the Court, 505 North County Farm Road, Wheaton, Illinois, this Notice of Filing and AMENDED Motion to Reconsider Sentence." The typewritten date of July 30, 2009, is over-written in ink with the date August 13, 2009. The proof of service portion of the document states that the attorney mailed the notice and postsentencing motion on July 30, 2009, "to the attached named party by MAIL with proper postage prepaid" from a Chicago address.

Defendant relies on the proof of service date to argue that he mailed the notice of filing on July 30, 2009. Under Supreme Court Rule 12(c) (Ill. S. Ct. R. 12(c) (eff. Nov. 15, 1992)), service by mail is complete four days after mailing. Thus, under defendant's scenario, service was complete on August 3, 2009, making defendant's postsentencing motion timely filed. It is undisputed that defendant thereafter filed his notice of appeal within 30 days of the denial of that motion, which would mean that we have jurisdiction over his appeal.

However, there is a wrinkle in this situation in that the notice of filing is addressed to the assistant state's attorney, and the proof of service states that the notice and motion to reconsider were mailed to the "attached named party." In *Secura Insurance Co. v. Illinois Farmers Insurance Co.*, 232 Ill. 2d 209, 216 (2009), our supreme court held that a notice of filing sent to opposing counsel referring to a notice of appeal, along with a certificate of service showing that the notice of filing was mailed to opposing counsel on a particular date, was not sufficient proof that the notice of appeal was mailed by the due date. It further stated, "There is nothing in the certification *or in the body of the notice of filing* that attests to the mailing of the notice of appeal to the clerk on June 16, 2006." (Emphasis added.) *Id.* at 216-17; see also *Knapp v. Bulun*, 392 Ill. App. 3d 1018, 1027 (2009) (proofs of service attached to unstamped motions reflected that they were mailed to opposing counsel but did not indicate that they were also mailed to the court clerk, so the proofs of service were insufficient to establish that the party mailed the motions to the court for filing). Thus, a notice of filing sent just to the other party is not sufficient to show that a document was mailed to the court on the day referenced in the proof of service.

Still, we believe that this case is distinguishable because unlike *Secura* and *Knapp*, the notice of filing document that defendant relies on is file-stamped, showing that it was actually filed with the court. The question is when it was mailed, and the proof of service indicates a mailing date of July 30, 2009. Further, unlike *Secura*, where there was nothing in the body of the notice of filing indicating that it was sent to the clerk on a particular date, this notice of filing states that the attorney "would cause to be filed with the Clerk of the Court, 505 North County Farm Road, Wheaton," the motion to reconsider sentence on July 30, 2009. Although this is overwritten in ink to the filing date, it is not clear who made this change or why. It was presumably not defense counsel, as he

stated below that the motion was mailed July 30, 2009, and if the court received the document by mail on August 13, 2009, it would have to have been mailed sometime before that date. Given that the notice of filing was filed with the clerk, indicates in the body that it would be filed with the clerk on July 30, 2009, and includes a proof of service by mail date of July 30, 2009, we believe that it sufficiently demonstrates that defendant mailed his motion to reconsider by July 30, 2009, giving us jurisdiction over the appeal. Accordingly, we deny the State's motion to dismiss. Based on our resolution of this issue, we do not address defendant's alternative argument that even if his motion to reconsider his sentence was untimely, the trial court was revested with jurisdiction because the State did not object to the trial court's consideration of defendant's postsentencing motion.

B. Coconspirator Statement

Turning to the merits, defendant first argues that Gaja Starks' arrest statement implicating him was improperly admitted during Bisch's testimony and was hearsay not subject to confrontation or cross-examination. Defendant points to Bisch's testimony that: (1) Bisch "explained to [defendant] that [he] believed he was connected with the case and involved in the case because Gaja Starks had been arrested and *it implicated him*"; and (2) later "again [he] told [defendant] that Gaja Starks, his girlfriend, had been involved in similar activity and *had implicated him*." (Emphases added.) Defendant argues that the prosecutor magnified the error when he stated in closing argument that "defendant certainly worked in conjunction with [Starks] to obtain these stolen credit card numbers." Defendant maintains that because the trier of fact repeatedly heard that a non-testifying, alleged codefendant had implicated him in the offenses, we should reverse his convictions and remand the cause for a new trial.

In general, the admission of evidence is within the trial court's discretion, and its evidentiary rulings will not be reversed absent an abuse of discretion. *People v. Becker*, 239 Ill. 2d 215, 234 (2010). Whether a hearsay statement is admissible under an exception to the hearsay rule is similarly reviewed for an abuse of discretion. See *People v. Caffey*, 205 Ill. 2d 52, 89-94 (2001). However, a trial court's determination of whether a particular statement constitutes hearsay in the first place presents a question of law that is reviewed *de novo* where, as here, the determination does not involve factual findings or weighing witness credibility. *People v. Crowe*, 327 Ill. App. 3d 930, 936 (2002). But *cf. People v. McNeal*, 405 Ill. App. 3d 647, 666 (2010) (trial court has the discretion to determine whether statements are hearsay). Further, whether a defendant's sixth amendment right to confront witnesses was violated is a question a law that we review *de novo*. *People v. Williams*, 238 Ill. 2d 125, 141 (2010).

The State argues that defendant forfeited his challenge to the alleged coconspirator statements by failing to object to the second statement at trial and raise the issue of either statement in a posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (to preserve an issue for review, the defendant must object at trial and raise the issue in a written posttrial motion). However, defendant asks that we review the issue for plain error. The plain error doctrine allows a reviewing court to consider an unpreserved error where either (1) a clear error occurs and the evidence is closely balanced, or (2) a clear error occurs that 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, 564-65 (2007). In applying the plain error test, the first step is to determine whether error occurred at all. See *Piatkowski*, 225 Ill. 2d at 565.

Defendant cites *Crawford v. Washington*, 541 U.S. 36, 68 (2004), where the Supreme Court held that a defendant's right to confront witnesses under the sixth amendment prohibits the admission of testimonial out-of-court statements unless the declarant is unavailable to testify, and the defendant had a prior opportunity to cross-examine him or her. Defendant also cites *Bruton v. United States*, 391 U.S. 123, 136-37 (1968), where the Supreme Court held that a defendant's sixth amendment right to confrontation was violated when, during a joint trial, the trial court allowed into evidence the nontestifying co-defendant's statement implicating the defendant, despite the issuance of a limiting instruction. Later, in *Lee v. Illinois*, 476 U.S. 530, 541 (1986), the Supreme Court stated that the confrontation clause is "threatened" when the State seeks to use an accomplice's confession against the defendant without the ability to cross-examine the accomplice. See also *Lilly v. Virginia*, 527 U.S. 116, 134 (1999) (accomplices' confessions inculpating a defendant are not within a firmly rooted exception to the hearsay rule). "Illinois courts responded to *Bruton* by finding that testimony by witnesses recounting the inculpatory substance of conversations with non-testifying persons (often, but not always, co-defendants) could be reversible error." *People v. Sample*, 326 Ill. App. 3d 914, 920 (2001). Still, an officer may testify regarding his investigatory procedures without violating the hearsay rule, including testifying about the existence of conversations, even if the logical inference is that the officer took subsequent steps as a result of the conversation's substance. *People v. Jones*, 153 Ill. 2d 155, 159-60 (1992); see *People v. Rush*, 401 Ill. App. 3d 1, 15-16 (2010) (not improper hearsay for officer to testify that after speaking to another officer and two of the victim's relatives, he went to the crime scene with a description of the offender that was detailed at trial).

Defendant likens this case to *Sample*, *People v. Armstead*, 322 Ill. App. 3d 1 (2001), and *People v. Jura*, 352 Ill. App. 3d 1080 (2004). In *Sample*, the appellate court held that repeated strong inferences that the defendant's codefendants had implicated him, combined with the use of those statements to build a substantive link in the State's case, breached "the boundaries set for the investigative process hearsay exception." *Sample*, 326 Ill. App. 3d at 924. In *Armstead*, the court held that questioning revealing the substance of the conversation between a nontestifying witness and an officer that implicated the defendant as the shooter was improper. *Armstead*, 322 Ill. App. 3d at 12-13. In *Jura*, the court found that hearsay of a dispatch call describing the suspect went beyond explaining the investigative steps by the police because the information was repeated by more than one witness; the witnesses testified to the substance of the dispatch; and the State relied on the substance of the statements in opening and closing arguments to prove that the defendant matched the hearsay description of the man with a gun. *Jura*, 352 Ill. App. 3d at 1087-88. The court held that the hearsay was inadmissible because it was used as substantive evidence to prove the defendant guilty. *Id.* at 1089.

The State argues that there was no testimony that Starks made inculpatory statements regarding defendant. The State argues that in the first disputed statement, Detective Bisch's testimony that he told defendant that "Starks had been arrested and *it* implicated him" (emphasis added), Bisch was communicating that the fact that Starks had been arrested, combined with her presumed relationship with defendant, suggested that he too might be involved in the crime. We agree with this interpretation, as Bisch did not say that Starks had implicated defendant but rather that "it," being the fact of her arrest, implicated him. Accordingly, this statement does not qualify as hearsay or involve the confrontation clause.

The State argues that the same reasoning applies to the second statement, Bisch's testimony that he told defendant "that Gaja Starks, his girlfriend, had been involved in similar activity and *had* implicated him." (Emphasis added.) The State admits that it could be inferred from this testimony, if considered in isolation, that Bisch was referring to a statement by Starks. However, according to the State, because Bisch never mentioned the content of a statement by Starks and had earlier referenced "it," *i.e.* Stark's criminal involvement, as implicating defendant, the second testimony is better taken to refer to the circumstances rather than to any statement by Starks. We disagree, as the most reasonable inference from the second statement is that Starks had said something implicating defendant.

The State alternatively argues that to the extent that Bisch's testimony referred to a statement by Starks, it was not offered to prove the truth of the matter asserted, that defendant was involved with Starks in identity theft. The State argues that contrary to defendant's analysis of the State submitting the statement under the hearsay exception for explaining the course of a police investigation, the State actually presented the testimony for the nonhearsay purpose of showing defendant's reaction to the implication that he was involved in the offenses.

We agree with the State's argument. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted, meaning that testimony about a statement not offered for this purpose is not hearsay. *People v. Banks*, 237 Ill. 2d 154, 179 (2010). Thus, a statement offered to show its effect on the listener rather than for the truth of the matter asserted is not hearsay. *People v. Robinson*, 391 Ill. App. 3d 822, 834-35 (2009) (not hearsay for officer to tell the defendant that he had reason to believe that the defendant was transporting drugs; statement was offered to show its effect on the defendant, as evidence of consciousness of guilt). For example, in *People v. Hanson*,

238 Ill. 2d 74, 102 (2010), our supreme court held that it was not hearsay for an officer to testify that he told the defendant that the defendant's sister thought he "did this [the crime]," because the testimony was not offered to prove that the defendant was guilty or that his sister thought he was guilty, but rather to provide context for the police investigation and show the defendant's state of mind based on his response to the questioning. Here, after defense counsel objected to the first statement, the prosecutor stated, "This is what he [Bisch] indicated to the defendant." Thus, the State clearly revealed that it was not seeking to introduce the testimony for the truth of the matter asserted. When the defense then objected to testimony that Bisch referred to Starks as defendant's girlfriend during the interview, the trial court responded by saying that the fact that Bisch said that to defendant while accusing him of the crime was a different issue from whether it was true. As such, the trial court also recognized that Bisch's testimony regarding what he said to defendant during the interview was not being offered for the truth of underlying matters asserted. The State subsequently elicited testimony about defendant's response to the allegations, including that he did not deny that Starks was his girlfriend or directly deny committing any crimes, thereby providing circumstantial evidence of consciousness of guilt.

This case is readily distinguishable from *Sample* and *Jura* because in those cases, the State repeatedly elicited and emphasized testimony that strongly implied that a codefendant had implicated the defendant, including in opening and closing arguments. Here, in contrast, we have determined that only one of the two complained-of statements could refer to Starks herself implicating defendant, and the State did not repeat or emphasize that testimony. Also, unlike *Armstead*, Detective Bisch did not reveal the substance of the nontestifying witness's statement. *Cf. People v. Moman*, 201 Ill. App. 3d 293, 303-04 (1990) (no error in allowing officer to testify that codefendant

made statements implicating the defendant, because the remark was isolated, the testimony did not reveal corroborating details or the content of the confession, and the statement was not offered for its truth). Further, in *Sample* and *Jura* the testimony was found improper because it was offered as substantive evidence of the defendant's guilt (see *Rush*, 401 Ill. App. 3d at 15-16 (distinguishing *Sample* and *Jura* on this basis)), whereas here the testimony was used only as a means to show defendant's reaction. Compare *People v. Simms*, 143 Ill. 2d 154, 173-74 (1991) (the defendant's right to confront witnesses not violated when officer testified at capital sentencing hearing that he told the defendant that the defendant's brother said that the defendant had admitted stabbing the victim; the testimony was offered not for the truth of what the brother said but to explain why the officer continued to question the defendant), with *People v. Johnson*, 116 Ill. 2d 13, 27-28 (1987) (police officer's testimony that codefendants had named the defendant as the shooter was inadmissible hearsay because it was used as substantive evidence of the defendant's guilt).

Defendant counters that the State's whole theory, as argued in closing, was that he was working with Starks in obtaining stolen credit card numbers, and that the only evidence of this theory was the improper testimony from Bisch. This argument is devoid of merit, as the State did not refer to any custodial statement by Starks in argument and there was ample, other evidence of defendant's relationship with Starks, including that: Starks was seen at Thorntons exiting the same Cadillac that defendant had arrived in an hour earlier, and she tried to use a credit card that was later determined to have the same account number as the card defendant had used that day; defendant was arrested while driving up to Starks' residence; the police found a cell phone bill and tow sheet with defendant's name on them inside Stark's home; when Bisch arrested defendant, a caller to

defendant's residence identified herself as Starks; and defendant did not deny that Starks was his girlfriend in response to Bisch referring to Starks as such.

In sum, the first disputed statement by Bisch was not hearsay on its face, and the second statement was not hearsay because it was not offered for the truth of the matter asserted. Further, the cases defendant relies on are inapposite because they involve statements that were repeatedly elicited in testimony and emphasized, in contrast to the brief reference here, and were offered as substantive evidence of the defendant's guilt. Because the statements in this case were admissible nonhearsay, they do not implicate the confrontation clause (see *Crawford*, 541 U.S. at 60 n.9), and defendant's challenge of the statements fails.

C. Bank Documents

Defendant next argues that for counts III through V, the State improperly presented its case through hearsay testimony from bank and credit card employees who did not know the individuals alleged in the indictments, and from hearsay documents generated by the institutions for the purpose of establishing fraud on an account. Defendant maintains that this use of hearsay testimony violated his right to confront and cross-examine the alleged victims. Defendant also argues that bank records were admitted without a proper foundation.

The State points out that although defendant raised the issue of improper foundation in his posttrial motion, he did not raise the hearsay/confrontation issue in his posttrial motion, thereby forfeiting that issue for review. However, defendant claims plain error, which as mentioned, first requires us to determine whether error occurred. See *Piatkowski*, 225 Ill. 2d at 565. As with other evidentiary rulings, whether business records are admissible is within the trial court's sound discretion. *People v. Universal Public Transportation, Inc.*, 401 Ill. App. 3d 179, 197 (2010).

Further, as mentioned, whether a statement qualifies as hearsay is reviewed *de novo* where no factual findings or determinations of witness credibility are involved. *Crowe*, 327 Ill. App. 3d at 936.

The foundation necessary for the admission of business records is prescribed in section 155—5(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/115—5(a) (2008)). That section states in relevant part:

> "Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in [the] regular course of any business, and if it was in the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.
>
> All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility." 725 ILCS 5/115—5(a) (West 2008).

Section 155—5 also generally excludes records made "during an investigation of an alleged offense or during any investigation relating to pending or anticipated litigation." 725 ILCS 5/115—5(c)(2) (West 2008). Computer *stored* data is admissible under the business records exception to the hearsay rule if the computing equipment is recognized as standard, the data is entered in the regular course of business reasonably close in time to the happening of the recorded event, and the testimony establishes that the information sources, method, and time of preparation indicate its trustworthiness. *People v. Houston*, 288 Ill. App. 3d 90, 98 (1997). However, computer *generated* records, where the information is not entered by a human declarant, is subject to a lesser standard. The moving

party must simply show that the recording device was accurate and operating properly when the evidence was generated. *Id.*

Defendant cites *People v. Davis*, 322 Ill. App. 3d 762 (2001). In *Davis*, the defendant was charged with retail theft of property worth over $10,000. *Davis*, 322 Ill. App. 3d at 763. To prove the value of the stolen rings, the State elicited testimony from the salesperson that a document listing only three catalogue numbers showed their value. *Id.* at 764. The salesperson did not testify about the process of creating the records or that the store made such records in the regular course of business; she testified only that she would retrieve such records in the regular course of business. *Id.* at 766. The appellate court held that the trial court erred in admitting the record because the trial court lacked any basis for assessing the record's trustworthiness, in that the prosecution did not offer any evidence about the sources of information used or the process of creating the record. *Id.* See also *Apa v. National Bank of Commerce*, 374 Ill. App. 3d 1082, 1088 (2007) (bank statements improperly admitted where witness did not testify about the circumstances of their creation but testified only that he retained such records in the regular course of his own charter bus business).

Defendant argues that the testimony of Linda Hatch from U.S. Bank was erroneously admitted on multiple levels. He argues as follows. A document showing that the account was closed because of a lost or stolen card, or forgery, was not kept in the regular course of business because Hatch testified that such a document is prepared only when the "back office" requests it. This is presumably because of allegations of fraud or unauthorized use, which also means that it was prepared in anticipation of litigation. Hatch could not testify who requested or generated the document and therefore could not offer satisfactory evidence of its reliability or accuracy. Although Hatch had never met Singh, the alleged victim, and did not testify that she verified his signature

against any other bank document, she testified that a report of unauthorized use was purportedly signed by him. Defendant argues that the documents and Hatch's testimony were hearsay because they were offered to prove that fraudulent transactions occurred on an account purportedly belonging to Singh, and that the foundational requirements that would allow the documents to be admitted as business records were not met.

The State argues that there was no hearsay or confrontation error because the bank records were not introduced or considered for the truth of the matter asserted by the victims, but rather were used to lay a foundation for and show the course of each bank's actions. We agree. In response to defendant's objection that the signed document of unauthorized use showed that the customer reported fraud on the account, the trial court stated that it was overruling the objection because rather than proving that there were fraudulent transactions on Singh's account, the document just showed that the bank had a record it relied on in its ordinary course of business to document a report of fraud, and based on the report, the bank credited funds back to the account. Thus, contrary to defendant's argument, the document was not offered to prove that fraud had actually occurred on Singh's account.

Regarding the foundation for documents admitted pursuant to Hatch's testimony, Hatch testified that a document showing that the account was closed because of a lost or stolen card was information printed off the "system" in the ordinary course of business whenever the company determined that it was necessary for credit card fraud. Even if, *arguendo*, such action could be said to have been done in anticipation of litigation, the retrieval of records in anticipation of litigation does not disqualify records as business records, and Hatch's testimony shows that the document was a compilation of information already in the computer system rather than new information generated

solely for trial. *Cf. In re V. T. III*, 306 Ill. App. 3d 817, 821 (1999) (juvenile incident report was not made in anticipation of litigation because it was a standard form used to document the health and safety of the minor and did not call into question the motivation, recall, or soundness of the report's conclusions). Although Hatch did not know who requested or generated the document, she was not required to, as "[a]nyone familiar with the business and its procedures may testify about how the business record was prepared." *Id.* at 820; see also 725 ILCS 5/115—5(a) (West 2008) (circumstances of the making of business record, including lack of personal knowledge by the entrant or maker, may affect its weight but not its admissibility). Unlike *Davis* and *Apa*, Hatch testified that she was a custodian of records; explained how accounts were opened, transactions were recorded, and customers reported fraud; and testified that the documents were made in the ordinary course of business reasonably close in time to the happening of the transactions. Accordingly, the trial court acted within its discretion in determining that a proper foundation was laid for the documents and admitting them into evidence.

Turning to Christine Kulagowski from American Express Security, defendant argues that she never testified who, how, or why documents she identified as "screen shots" were prepared or how the information was generated. Defendant also argues that it can be inferred from her testimony that her job is to provide documents of unauthorized activity on an account to law enforcement in anticipation of pending litigation. Defendant maintains that Kulagowski's testimony was hearsay and was insufficient to establish the exception to the business records rule that would have allowed the documents to be admitted.

Defendant's argument is without merit. Kulagowski's testimony was not hearsay because the trial court stated that it was accepting the information as business records rather than proof that

the underlying events occurred. As for foundation for the "screen shots" group exhibit, Kulagowski testified that the first page showed account numbers, the second page showed when cards were sent out, the third and fourth pages showed transactions on the account, and the fifth page showed charges that were reported as fraud. Thus, Kulagowski clearly explained the nature of the information, and she also testified that the records were maintained in the ordinary course of business and prepared reasonably close in time to the transactions depicted in the document. Although Kulagowski did not testify who prepared the documents, she was not required to do so. *In re V. T. III*, 306 Ill. App. 3d at 821. Kulagowski's testimony shows that the records were made in the ordinary course of business reasonably close in time to the transactions depicted on them, meaning that the documents would not qualify as being made in anticipation of litigation, and also leading to the conclusion that the trial court did not abuse its discretion in admitting them into evidence.

Last, defendant argues that the testimony of David Aumiller from Bank of America suffered from similar infirmities. Defendant argues that the affidavit Aumiller identified as having been signed by the victim, Miller, was clearly a document prepared in anticipation of litigation and therefore inadmissible under section 115—1(c). Defendant argues that because Aumiller did not see Miller sign the affidavit or attempt to verify the signature, the testimony was hearsay. Defendant maintains that the testimony also violated *Crawford* because he did not have the opportunity to confront Miller.

We conclude that Aumiller's testimony about Miller was not hearsay because, as with the other witnesses, the trial court did not consider it for the truth of the underlying matters asserted by nontestifying victims. That is, the trial court stated that the document showed that the business had a record that a particular customer filed a report of fraud with the bank, making the report

admissible, but it did not ultimately prove fraud. As testimony and documentary references to Miller were not hearsay, they do not implicate *Crawford*. See *Crawford*, 541 U.S. at 60 n.9. The document itself would not qualify as being prepared in anticipation of litigation because Aumiller testified that it was prepared in the ordinary course of business, and it was received by Bank of America over one month before the charged offense took place. As the State points out, the company could have determined that the discrepancy was due to customer, store, or system error, and just because litigation is theoretically possible due to a report of fraud does not mean it is anticipated. *Cf. People v. Russell*, 385 Ill. App. 3d 468, 474 (2008) (admission of state trooper's affidavits and log book entries showing certification of breath testing machine and recording the defendant's breath sample were admissible as business records because it was the regular course for the police to make such records at the time of the events in question).

Even if, *arguendo*, the report of fraud should have been excluded as being made in anticipation of litigation, error in its admission was harmless beyond a reasonable doubt. See *People v. Stechly*, 225 Ill. 2d 246, 304 (2007) (an error is harmless if it appears beyond a reasonable doubt that the error did not contribute to the verdict). Defendant was charged in count IV with knowingly possessing the credit card number of Stephen Miller on November 7, 2007, knowing that the personal identifying information was stolen or produced without lawful authority. Aumiller testified regarding account statements that showed that a credit card number ending in 2930 was assigned to the name of Stephen Miller, and Aumiller identified an account statement dated October 2007 showing that the balance from that account was transferred to a new account number assigned to Miller. Aumiller also testified that individuals are not permitted to put information from the magnetic strip of a Bank of America card onto another card. However, the same 2930 account

number was found on the magnetic strip of a Visa gift card that had a different embossed number on front and was in defendant's car on November 7. Thus, Miller's documented fraud report was not necessary to show that defendant possessed a card with personal identifying information that was produced without lawful authority, nor would it impact the element of knowledge. Accordingly, any error in admitting the report of fraud was harmless.

D. Sufficiency of the Evidence

Defendant next argues that he was not proven guilty beyond a reasonable doubt. The standard of review for a claim of insufficiency of the evidence is the same for both bench trials and jury trials. *People v. Leach*, 405 Ill. App. 3d 297, 311 (2010). The standard 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. Collins*, 106 Ill. 2d 237, 261 (1985). The trier of fact has the responsibility to assess witnesses' credibility, weigh their testimony, resolve inconsistencies and conflicts in the evidence, and draw reasonable inferences from the evidence. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). We will not set aside a criminal conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 225 (2009).

For count I, the State was required to prove that on about October 14, 2007, defendant knowingly used the personal identifying information of Susan Schoenborn, being her debit card number, to obtain merchandise from Thorntons, knowing that the personal identification information was stolen or produced without lawful authority. See 720 ILCS 5/16G—15(a)(4) (West 2006). Count II was identical except that it alleged that defendant used Schoenborn's debit card number to

fraudulently obtain goods from Thorntons worth over $300 but no more than $2,000. See 720 ILCS 5/16G—15(a)(1) (West 2006). Count V was also the same as count I except that it pertained to October 25, 2007, and alleged that the identifying information was a credit card number that belonged to Jacqueline Alfonso. For count III, the State was required to prove that on about November 7, 2007, defendant knowingly possessed personal identifying information of Rohit Singh, being Singh's credit card number, knowing that the number was stolen or produced without lawful authority. See 720 ILCS 5/16G—15(a)(4) (West 2006). Count IV was the same as count III except that it alleged that Stephen Miller was the victim.

For the purposes of his sufficiency of the evidence argument, defendant does not dispute beyond his already-discussed arguments that the prosecution established that he possessed cards whose magnetic strips contained identifying information of the aforementioned individuals on the dates in question. Rather, defendant argues that the prosecution failed to establish that he had the requisite knowledge that the information on the magnetic strips was not his own, because there was insufficient evidence to link him to "skimming" information from existing credit cards.

Defendant argues that the State tried to establish knowledge by having Trooper Griffin testify that when defendant was stopped on November 7, he had "what looked like a card swiper" in the trunk. Defendant notes that Troopers Pelletier and Reineke did not observe defendant removing such a device when he came to collect his belongings the following day, nor is it listed on the inventory sheet. Defendant also argues that although Detective Russman saw "what looked like" a skimmer or scanner in the back seat of the car that defendant drove to Starks' home on November 12, Russman also testified that the scanner was searched pursuant to a warrant but nothing was on it. Defendant maintains that the State's failure to offer the scanner into evidence suggest that none of

the officers saw such a device or its use at trial was irrelevant. Defendant argues that there also would have been a wholly innocent explanation for its presence, such as that he was selling goods at flea markets and used the scanner to process sales, especially in light of Trooper Griffin's testimony that there were electronic devices in original wrappers in defendant's trunk on November 7.

Defendant further argues that there was no connection between the alleged card reader and Starks, around whom the prosecution based its theory. Defendant argues that Detective Russman's testimony showed only that defendant may have known Starks, and Detective Bisch's testimony reflected only that he knew that she had been arrested for credit card fraud. Defendant argues that if he knew Starks and had any type of relationship with her, it would not have been unusual for her to have ridden in his car and perhaps left behind some of her personal items, or for her to have access to his personal effects. Defendant argues that his mere association with someone suspected of committing an offense is insufficient to establish his knowledge that Starks, by virtue of her access to credit cards used at the Marriott, was transferring personal information to a credit card he had in his own name or to gift cards he had in his car, which she also rode in.

Defendant argues that evidence of his association with Starks was not enough to establish his knowledge of what was encoded on the magnetic strip of gift and credit cards, especially when considering Caudill's testimony that the embossed name does not always print on a receipt, and the only way to know that a magnetic strip had been reencoded would be to compare the credit card with the last four digits appearing on the receipt. Defendant argues that with no evidence that he scanned credit cards to obtain the personal information of another, and with no admissible and reliable

evidence linking him with Starks' alleged criminal enterprise, the prosecution failed to establish the requisite knowledge to prove him guilty of the charged offenses.

We conclude that there was sufficient evidence for a rational trier of fact to determine, beyond a reasonable doubt, that defendant knew that credit and gift cards in his possession were reencoded with credit or debit card numbers that were stolen or produced without lawful authority. A mental state is rarely proven by direct evidence and instead is usually inferred from surrounding circumstances. People v. Lissade, 403 Ill. App. 3d 609, 613 (2010). Thus, by its nature, knowledge is typically proven by circumstantial evidence rather than direct proof (In re Keith C., 378 Ill. App. 3d 252, 260 (2007)), though it must still be proven beyond a reasonable doubt (Lissade, 403 Ill. App. 3d at 613). The State presented evidence through Investigator Russman that Starks worked at the Marriott in Hoffman Estates. Schoenborn testified that she stayed in that hotel the night of October 12, 2007, and she later saw that her bank statement reflected unauthorized purchases at Thorntons gas stations in Naperville and Aurora on October 14, 2007. Kulagowski testified that records showed that an account in Alfonso's name had a transaction recorded at the same hotel for the night of October 23, and records indicated that Alfonso reported two transactions at Thorntons in Naperville on October 25, 2007, as fraudulent. Hatch testified that an account in Singh's name showed a transaction at the Hoffman Estates Marriott on October 16, 2007, and records indicated that Singh subsequently reported fraudulent transactions on his account. Thus, there was evidence that individuals were reporting fraudulent transactions shortly after staying at the Marriott where Starks worked.

Contrary to defendant's argument that the State showed only that he may have known Starks, the State's evidence indicated a much stronger relationship between defendant and Starks than just

being mere acquaintances. As previously detailed, Starks was seen at Thorntons exiting the same Cadillac that defendant had arrived in an hour earlier, and she tried to use a credit card that was later determined to have the same account number as the card defendant had used that day; defendant was arrested while driving up to Starks' residence; the police found a cell phone bill and tow sheet with defendant's name on them inside Starks' home; when Bisch arrested defendant, a caller to defendant's residence identified herself as Starks; and defendant did not deny that Starks was his girlfriend in response to Bisch referring to Starks as such.

The evidence further showed that defendant had two gift cards in his car when he was stopped on November 7 that had the personal identifying information of Singh and Miller on their magnetic strips. Although defendant argues that Starks could have left some of her personal possessions in the car, there was direct evidence that defendant claimed ownership of the gift cards. Trooper Griffin testified that defendant said he got the gift cards as gifts from Byron Scott of the Lakers, and Sergeant Pelletier testified that defendant told her she could keep the gift cards.

Defendant also does not dispute that he used cards with Schoenborn and Alfonso's account information on the magnetic strips when he made purchases at Thorntons on October 14 and 25, 2007. These dates were within two days of when records showed that the women stayed at the Marriott in Hoffman Estates. The nature of the purchases provided circumstantial evidence of defendant's knowledge, as on October 14, defendant bought a total of $800 worth of gift cards in three separate, sequential transactions, and on October 25, he bought a total of $600 worth of gift cards in two sequential transactions. The trier of fact could thereby infer that defendant was charging smaller amounts at a time in order to avoid the transactions being immediately rejected or flagged by the bank. Defendant argues that it is not unusual for people to make credit card purchases in

increments when the card may be nearing its limits, but it is up to the trier of fact to draw reasonable inferences from the evidence and resolve conflicts. Further, Thorntons' employee Vesay testified that defendant was providing "too much" information as to why he was purchasing the gift cards, which could create the inference that defendant wanted to preempt any suspicion regarding his purchases. Moreover, there was additional evidence implicating defendant, in that Trooper Griffin pulled defendant's car over on November 7 and saw what looked like a card swiper inside as well as electronic devices in their original wrappings in the trunk. Although Pelletier and Reineke did not see the swiper the following day when they were inventorying the items defendant removed, they also did not look inside defendant's computer case, and any conflict in the testimony was for the trier of fact to resolve. Investigator Russman also found a card swiper in the car defendant was driving just days later on November 12. Defendant's explanation that he may have possessed a card swiper as a means to sell electronic devices at a flea market amounts to merely a hypothesis of innocence that the trier of fact was not required to accept and elevate to the status of reasonable doubt. See *People v. Evans*, 209 Ill. 2d 194, 212 (2004). The same goes for defendant's argument that Starks could have left her swiper in the car he was driving on two occasions. Also, the trier of fact did not consider possession of the swiper in isolation, as it was combined with defendant's use of the altered credit card and possession of the altered gift cards. Defendant's argument that Starks could have been transferring personal information to a credit card defendant had in his own name or to gift cards he had in his car is not persuasive, as there seemingly would be no benefit to Starks to do so. At best, it constitutes another hypothesis of innocence that the trier of fact was not required to accept.

Furthermore, when confronted by Detective Bisch about the crimes, defendant did not directly deny involvement in the crimes or even confirm or deny any facts, but rather repeatedly stated that even if he had been at the gas station and bought gift cards, it did not necessarily mean he had done anything wrong. Defendant also stated that rather than make a statement, he would take his chances on whether or not he would get charged. Defendant's behavior thus provided some circumstantial evidence of consciousness of guilt. In sum, viewing the evidence in the light most favorable to the State, a rational trier of fact could have determined beyond a reasonable doubt that defendant knowingly used credit cards and possessed gift cards that were reencoded with credit and debit card numbers that were stolen or produced without lawful authority.

E. Class of Offenses

Defendant next argues that the trial court erred in denying his posttrial motion to be sentenced to non-extended class 2 felonies under the identity theft statute rather than to the class 3 felonies as charged, which made him eligible for extended term sentences due to his prior class 3 convictions. The trial court denied the motion on the basis that it could not increase the classification of offenses when the prosecution had opted to charge them as class 3 felonies.

Defendant notes that four of the identity theft counts against him fell under section 5/16G—15(a)(4) of the Criminal Code of 1961 (720 ILCS 5/16G—15(a)(4) (West 2006)). For these charges (excluding a merged charge), defendant was sentenced under section 15(d)(2) of the statute, which provides that a "person convicted of any offense enumerated in paragraphs (2) through (7) of subsection (a) is guilty of a Class 3 felony." 720 ILCS 5/16G—15(d)(2) (West 2006). The sentencing range for the class 3 felonies is two to five years (see 730 ILCS 5/5—8—1(a)(6) (West

2006)), but defendant received extended terms under section 5—5—3.2(b)(1) of the Unified Code of Corrections. That section provides that the court may impose an extended term sentence:

> "[w]hen a defendant is convicted of any felony, after having been previously convicted
>
> in Illinois or any jurisdiction of the same or similar class felony or greater class felony, *when such conviction has occurred within 10 years after the previous conviction, excluding time spent in custody*, and such charges are separately brought and tried and arise out of different series of acts." (Emphasis added.) 730 ILCS 5/5—5—3.2(b)(1) (West 2006).

Defendant had prior class 3 felonies within 10 years of the instant convictions, making this section directly applicable.

Defendant notes that the charges against him involved four distinct victims and incidents within a two-month period. Defendant argues that he therefore should have been automatically sentenced under section 15(d)(4) of the identity theft statute, which states:

> "A person who, within a 12 month period, is found in violation of any offense enumerated in paragraphs (2) through (7) of subsection (a) with respect to the identifiers of, or other information relating to, 3 or more separate individuals, at the same time or consecutively, is guilty of a Class 2 felony." 720 ILCS 5/16G—15(d)(4) (West 2006).

For class 2 felonies, defendant would have been subject to sentences between three and seven years (see 730 ILCS 5/5–8–1(a)(5) (West 2006)), but defendant argues that he would not have been subject to extended terms, making his maximum sentence for each charge seven years as compared to the nine years that the trial court imposed.

Defendant apparently believes that he would not have been eligible for extended terms if he had been sentenced for class 2 felonies because section 5–5–3.2(b)(1) states that the prior felony must be the "same or similar class felony or greater class felony" and be within 10 years of the current conviction. 730 ILCS 5/5–5–3.2(b)(1) (West 2006). For purposes of determining the 10-year period in section 5–5–3.2(b)(1), the date of the conviction is the date the sentencing order was entered. *People v. Robinson*, 89 Ill. 2d 469, 477 (1982) . Defendant's most recent conviction of a class 2 felony was on December 8, 1992, about 16½ years before the July 2009 convictions at issue in this case. However, section 5–5–3.2(b)(1) excludes time spent in custody in computing the 10-year period, which has been interpreted to mean any time spent in the custody of State or Federal authorities. *People v. Smith*, 199 Ill. App. 3d 839, 857 (1990). Defendant's presentence report shows that he received the following sentences of jail or imprisonment: 7 days in March 1993; 20 days in October 1993; 3 years in October 1994; 4 years in June 1994; 2 years in May 1994; 32 days in June 1994; 70 days in May 1996; 102 days in June 1996; 4 years in August 2000; 3 years in December 2000; 14 days in March 2007; 54 days in March 2008; and 30 days in December 2008. The record also reflects that defendant was in custody for the majority of 2008 and up until the time of sentencing in July 2009. Further, periods of parole are also considered time spent "in custody." *Id.* Even considering that defendant may have been released early from sentences of imprisonment based on good time credit, the sentences would still mean that he was in custody for a total of well over 6½ years, meaning that his class 2 felony would be computed as occurring within 10 years under section 5/5–5–3.2(b)(1). As such, he would have still been eligible for extended terms if he had been convicted of class 2 felonies, and his attempt to shorten his sentences by obtaining a higher class felony fails.

F. DNA Fee

As part of sentencing, the trial court ordered that defendant submit DNA samples and pay a $200 DNA fee pursuant to sections 5—4—3(a) and 5—4—3(j) of the Unified Code of Corrections (730 ILCS 5/5—4—3(a),(j) (West 2008)). Defendant's last argument is that the order for DNA samples must be vacated because the record shows that as a condition of a prior sentence, he already submitted DNA samples. Thus, argues defendant, the trial court's order was statutorily unauthorized and therefore void. Defendant did not object to the order in the trial court, but a challenge to an allegedly void order is not subject to forfeiture. *People v. Rigsby*, 405 Ill. App. 3d 916, 920 (2010).

Section 5—4—3(a) states that "[a]ny person *** convicted or found guilty of any offense classified as a felony under Illinois law *** shall, regardless of the sentence or disposition imposed, be required to submit specimens of blood, saliva, or tissue to the Illinois Department of State Police in accordance with the provisions of this Section." 730 ILCS 5/5—4—3(a) (West 2008). Correspondingly, section 5—4—3(j) states that "[a]ny person required by subsection (a) to submit specimens of blood, saliva, or tissue to the Illinois Department of State Police for analysis and categorization into genetic marker grouping, in addition to any other disposition, penalty, or fine imposed, shall pay an analysis fee of $200. 730 ILCS 5/5—4—3(j) (West 2008).

Defendant argues that the statute's plain language contemplates a single collection of a person's DNA for the database, and common sense supports this interpretation because a person's DNA does not change. Until very recently, there had been a split in authority regarding whether a trial court has the authority to order a defendant to submit a DNA sample and pay the $200 analysis fee if the defendant's DNA was already on file as a result of a prior felony conviction. Some courts reasoned that the statute's obvious purpose was to collect a DNA profile from a convicted defendant

to store in a database, and once a defendant submitted a DNA sample, additional samples would serve no purpose and therefore were not authorized. *People v. Willis*, 402 Ill. App. 3d 47, 61 (2010), *vacated on other grounds*, 239 Ill. 2d 587; *People v. Evangelista*, 393 Ill. App. 3d 395, 399 (2009); see also *People v. Unander*, 404 Ill. App. 3d 884, 888, 891 (4th Dist. 2010) (vacating fee on the basis that the court ordered the defendant to submit a DNA specimen and pay the fee only if he had not already done so). The court in *Rigsby* also reached the same result, stating that the statute's silence on whether repeat offenders have to provide additional DNA samples and pay the corresponding fee rendered the statute ambiguous, allowing the court to look beyond the statute's language to resolve the ambiguity. *Rigsby*, 405 Ill. App. 3d 917-18. The *Rigsby* court stated the implementing regulation for section 5—4—3 that designates which facility or agency is responsible for collecting the DNA samples is based on the statutory presumption that the offender has not previously had a sample taken. *Id.* at 918, citing 20 Ill. Adm. Code §§1285(c)(1) through (c)(6), amended at 31 Ill. Reg. 9249, 9254-55, eff. June 12, 2007 (generally stating that "[i]f the qualifying offender has not previously had a sample taken" and is serving time in the particular facility or is transferred there, that facility or agency is designated to collect the DNA sample).

Other courts reasoned that the statute's plain language did not excuse a defendant from the DNA collection requirement based on a prior sample, and a contrary interpretation could theoretically result in no sample in the database, such as a twice-convicted felon having his initial sample expunged due to a reversal of or pardon from the first offense's conviction based on a finding of actual innocence. *People v. Anthony*, No. 1—09—1528, slip op. at 6 (1st Dist. Ill. App. March 31, 2011); *People v. Fountain*, No. 1—08—3459 , slip. op. at __ (1st Dist. Ill. App. February 25, 2011); *People v. Adair*, 406 Ill. App. 3d 133, 143-44 (2010) (DNA fee may be used for costs beyond

analysis and categorization, such as the cost of purchasing and maintaining equipment); *People v. Williams*, 405 Ill. App. 3d 958, 965 (2010); *People v. Bomar*, 405 Ill. App. 3d 139, 150 (3rd Dist. 2010); *People v. Hubbard*, 404 Ill. App. 3d 100, 103 (2010); *People v. Grayer*, 403 Ill. App. 3d 797, 801 (2010) (there is a purpose for additional DNA samples in that there could be a need or desire for fresh samples and an ability to subject the new samples to new methods of collection, analysis, and categorization; *People v. Marshall*, 402 Ill. App. 3d 1080, 1083 (2010), *overruled*, No. 110765 (May 19, 2011).

Our supreme court just brought closure to this issue in *Marshall*, No. 110765. The supreme court agreed with *Rigsby* that the statute's silence on the question of whether a trial court may order successive DNA samples rendered the statute ambiguous, allowing the court to look at extrinsic aids of construction. Slip op. at 10. The court sated that in cases of ambiguity, it was required to give substantial weight and deference to the interpretation of the statute given by the agency charged with the statute's administration and enforcement. *Id.* It agreed with *Rigsby* that the regulation implementing section 5—4—3 show an intent to require just one specimen of DNA to be taken to create a profile for the DNA database. Slip op. at 9. The supreme court also reasoned that there would be no "loophole" where a twice-convicted felon whose DNA was expunged would be left without a DNA sample on file, because the statute requires that any person incarcerated after August 22, 2002, submit a DNA sample prior to release (730 ILCS 5/5—4—3(a) (West 2008)), and the statute also gives the trial court the discretion to require a defendant to submit a DNA sample in situations not otherwise covered by the statue. 730 ILCS 5/5—4—3(a-5) (West 2008); slip op. at 13. Finally, the supreme court rejected the notion that the desire to have fresh samples justifies

multiple DNA samples. The supreme court stated that there is no practical need for multiple samples,

citing *Rigsby* for the proposition that DNA samples can remain viable for thousands of years if they are maintained under appropriate conditions. Slip op. at 14.

Therefore, pursuant to our supreme court's decision in *Marshall*, we agree with defendant that we must vacate the trial court's order requiring him to submit additional DNA samples and pay the $200 DNA analysis fee.

III. CONCLUSION

We vacate the order requiring defendant to submit DNA samples and pay the analysis fee. We affirm the judgment of the Du Page County circuit court in all other respects.

Affirmed in part and vacated in part.

JUSTICE McLAREN, specially concurring.

I specially concur because I believe the simplest and best analysis regarding this court's jurisdiction to entertain this appeal is through the application of the revestment doctrine. I believe the State actively participated without objection in the presentation of the motion attacking the judgment and the subsequent denial by the court on the merits of the motion. See *People v. Kaeding*, 98 Ill.2d 237, 241 (1983) ("In order for the rule to apply, the parties must actively participate without objection in proceedings which are inconsistent with the merits of the prior judgment. *** [U]nlike the situation in *Sears v. Sears*, 85 Ill.2d 253 (1981), where this court recently refused to apply the revestment doctrine because the merits of the previously entered judgment were not opposed in the subsequent proceedings").

JUSTICE BURKE, dissenting.

I respectfully dissent as I believe that this court does not have jurisdiction to entertain the appeal.

Defendant's postsentencing motion was due by August 10, 2009, but it was not filed with the clerk of the court until August 13, 2009. Defendant argues that, since the proof of service for the motion shows that it was mailed on July 30, 2009, it was filed timely pursuant to Supreme Court Rule 12(b)(3). Ill. S. Ct. R. 12(b)(3) (eff. November 15, 1992). The problem with defendant's argument is that the proof of service indicates that it was sent to the "attached named party," and the attached named party was the assistant State's Attorney.

This exact situation was addressed by our supreme court in *Secura Insurance Co. v. Illinois Farmers Insurance Co.*, 232 Ill. 2d 209, 216 (2009), where the court held that notice of filing sent only to opposing counsel is not adequate proof that the paper was filed timely with the clerk.

The majority opinion points to the body of the notice, which states that the defense attorney will cause the motion to be filed with the clerk on July 30. That date is hand-written over with the date August 13. The majority speculates that, since the clerk received the motion on August 13, it would have been mailed at some time before that date, presumably on July 30. It is equally plausible that the defense attorney mailed the motion to opposing counsel on July 30, and then hand delivered it to the clerk on August 13. It is just this type of conjecture that Rule 12(b)(3) was put in place to avoid.

The body of the motion relied upon by the majority to establish mailing to the clerk on July 30 does not satisfy Rule 12(b)(3). The Rule requires that the attorney certify the time and place that he or she deposited the paper in the mail or delivered it to a third-party commercial carrier. The body of the motion simply states that the attorney will cause the motion to be filed with the clerk. There

is nothing in the attorney's certification or in the body of the notice that attests to the mailing of the motion to the clerk on July 30. See *Secura*, at 216-17.

The special concurrence suggests that we have jurisdiction over this case through the doctrine of revestment. Revestment applies when the parties actively participate without objection in further proceedings that are inconsistent with the merits of the prior judgment. *People v. Kaeding*, 98 Ill. 2d 237, 241 (1983).

In the present case, while the State did not object to the untimeliness of the motion, it did not actively participate in proceedings on the motion. The State never filed a written response, and when the trial court took up the motion in open court, it never sought the State's input and the State did not comment upon it in any way.

The State argues that a close reading of the supreme court's revestment cases shows that revestment only applies when the State actively participates in proceedings in a manner that is inconsistent with the merits of the prior judgment, and arguing against modifying or setting aside a judgment is not inconsistent with the merits of that judgment. See, *e.g.*, *People v. Minniti*, 373 Ill. App. 3d 55 (2007) (Kapala, J., dissenting).

We need not address this particular point because revestment requires active participation and not merely consent. *People v. Montiel*, 365 Ill. App. 3d 601, 605 (2006). Here, while the State may have consented to the untimely motion being heard by failing to object, it clearly did not actively participate in the proceedings on the motion.

Therefore, I would grant the State's motion to dismiss the appeal for lack of jurisdiction.