

SIXTH DIVISION
May 27, 2016

No. 1-14-2939

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 12 CR 13884
)	
MOHAMMED HUSSAIN,)	Honorable
)	Lawrence E. Flood,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hoffman and Hall concurred in the judgment.

O R D E R

¶ 1 *Held:* We affirmed the judgment of the circuit court where defendant's indictment was not void as duplicative and the evidence was sufficient to convict him of the charge of counterfeit trademarks beyond a reasonable doubt.

¶ 2 Following a bench trial, defendant Mohammed Hussain was convicted of counterfeit trademarks and was sentenced to one year of probation with fines and fees. On appeal, defendant argues that the indictment was void as duplicative and that the evidence was insufficient to convict him beyond a reasonable doubt as he did not know the goods at issue were counterfeit at the time he intended to sell them. We affirm.

¶ 3 Defendant was charged by indictment with two counts of counterfeit trademarks in violation of section 2 of the Counterfeit Trademark Act (Act) (765 ILCS 1040/2 (West 2012)). Count I alleged that, on July 10, 2012, defendant committed the offense of counterfeit trademarks in that defendant "kept or had in his possession with the intent that the same should be sold, or disposed of or any goods or merchandise to which any counterfeit mark or imitation trademarks were attached or affixed or in which any counterfeit mark or imitation trademarks were printed, painted, stamped or impressed to wit: merchandise bearing counterfeit trademarks including True Religion, Polo, Nike, Timberland, and Gucci of which he was not the rightful owner of such trademarks and he knowingly sold, offered for sale or held for sale more than 100 but fewer than 500 counterfeit items." (Capitalization omitted.) Count II alleged that, on July 10, 2012, defendant committed the offense of counterfeit trademarks "in that he kept or had in his possession with the intent that the same should be sold, or disposed of or any goods or merchandise to which any counterfeit mark or imitation trademarks were attached or affixed or in which any counterfeit mark or imitation trademarks were printed, painted, stamped or impressed to wit: merchandise bearing counterfeit trademarks including True Religion, Polo, Nike, Timberland, and Gucci of which he was not the rightful owner of such trademarks and he knowingly sold, offered for sale or held for sale counterfeit items having a retail value in the aggregate of more than \$300 but less than \$10,000." (Capitalization omitted.) Defendant made no pretrial motion to dismiss the indictment.

¶ 4 On May 8, 2014, the State nol prossed count II and the case proceeded to a bench trial on count I.

¶ 5 Investigator Lissette Rivera testified that, on the morning of July 10, 2012, she was working with a special operations unit of the Cook County Sheriff's Police Department (Department) executing a search warrant at the Fresh Line store located at 11150 S. Michigan Avenue in Chicago (store) with six or seven other investigators from the Department. Kevin Read, a private investigator who specializes in counterfeit merchandise, later arrived at the store to assist the investigators. The investigators recovered 116 pairs of shoes bearing a Nike® (Nike) trademark, 90 pairs of jeans with the True Religion® (True Religion) trademark, and two shirts with the trademark Polo® by Ralph Lauren (Polo). The store contained other merchandise bearing logos of Polo, Timberland® (Timberland), Gucci® (Gucci), and various sports league merchandise. During the search of the store, business documents bearing defendant's name, including a business license, were found. After the merchandise was recovered, Mr. Read determined whether the seized merchandise was counterfeit.

¶ 6 At trial, Investigator Rivera identified two shirts bearing the Polo trademark, two pairs of shoes bearing the Nike trademark, and two pairs of jeans bearing the True Religion trademark as having been recovered from the store pursuant to the search warrant. These items were later admitted into evidence.

¶ 7 Only a clerk was present when the investigators first arrived at the store. Around noon, defendant appeared and identified himself as the owner. Defendant was placed into custody and transported to the Department's headquarters in Maywood. Investigator Rivera informed defendant of his *Miranda* rights before interviewing him. Investigator Rivera was present during the entire interview and had no problem understanding defendant. Mr. Read and Investigator Helen Sjaaj were also present.

¶ 8 Following the interview, defendant agreed to give a written statement. Defendant asked Investigator Rivera to prepare the statement "because he didn't write very well in English." After preparing the statement based on the interview, she reviewed it with defendant. The word "Gucci" was deleted from the statement and defendant and Investigator Rivera then signed the statement and initialed the deletion. Defendant's written statement was admitted into evidence and provided:

"I, Mohammed Hussain, voluntarily give the following statement and have not been promised anything in return for the statement. I am the owner of Fresh Line store located at 11150 South Michigan Avenue, Chicago, Illinois. I am solely responsible for the purchase of merchandise for the store. I am aware that some of the items in my store are counterfeit with various trademark names of Polo, True Religion, Nike; and Timberland. I am also taking responsibility for the counterfeit items at the View Store which is owned by my wife. Inus Vohra is my clerk and only sells the items on my behalf. This statement was written by Investigator L. Rivera because Hussain does not write well in English."

Investigator Rivera did not tell defendant that he could go home nor make promises to defendant if he signed it.

¶ 9 On cross-examination, Investigator Rivera testified that, during the interview, defendant was friendly and cooperative. She did not ask defendant if he understood the words "responsibility," "counterfeit," or "merchandise." Mr. Read did not contribute to the statement she prepared for defendant except for the fact that "Gucci" was deleted from the statement because Mr. Read told Investigator Rivera that Gucci did not wish to participate in any criminal case.

¶ 10 Investigator Rivera could not recall asking defendant about the source of the counterfeit merchandise. She admitted that if such information was obtained, it would be included in her report. The parties stipulated that this information was not in the reports.

¶ 11 On redirect, Investigator Rivera testified that, when she reviewed the statement with defendant, he did not say that he did not understand the words "responsibility," "counterfeit" or "merchandise," or anything else in the statement. On recross, she admitted that sometimes interviewees for whom English is not their first language are embarrassed to admit that they do not understand a question.

¶ 12 Kevin Read, a licensed private investigator and vice president of Edward R. Kirby & Associates, Inc. (Kirby) testified that Kirby investigates wholesale and retail sales of counterfeit or trademark-infringing merchandise. Mr. Read has been trained by trademark-holding corporations to recognize counterfeit merchandise and assists in business brand protection. He, in turn, has trained law enforcement officials as to brand protection. Mr. Read has conducted over 1,000 investigations, examined thousands of counterfeit items, and testified in seven cases as an expert in the identification of counterfeit goods.

¶ 13 On cross-examination, as to his expertise, Mr. Read testified that he had been trained in brand protection by True Religion and Polo in 2008 and by Nike in 2012 and, annually, the companies provided him with information as to any changes to their brands. During his training, he was shown how to identify authentic and counterfeit merchandise. After his examination, defense counsel said he had no objection to the court's acceptance of Mr. Read as an expert.

¶ 14 Mr. Read continued his direct testimony. Mr. Read was present at the store during the execution of the search warrant. The State showed Mr. Read the two pairs of jeans bearing the

True Religion brand which were admitted into evidence. On the day of the search, Mr. Read had examined those jeans at the store and found them to be counterfeit based on the quality of the denim and a security label. Thereafter, he examined a total of 90 pairs of jeans with the True Religion trademark and found them all to be counterfeit. Mr. Read was also shown two shirts bearing the Polo brand which were admitted into evidence. Mr. Read had examined the shirts during the execution of the warrant and found them to be counterfeit based on the embroidery of the Polo horse logo and the tag. Overall, Mr. Read examined 71 purported Polo items at the store and found them all to be counterfeit. Finally, the State showed him two pairs of Nike shoes which were admitted into evidence. Mr. Read had examined the shoes at the store and found them to be counterfeit based on the quality of the shoeboxes, the tags on the shoes, the fact that the glue affixing the soles had bled into the leather, and the shoe liner had not been glued into the shoe. Overall, Mr. Read examined 116 pairs of the purported Nike shoes and found them all to be counterfeit.

¶ 15 To the best of Mr. Read's knowledge from his experience and training, defendant was not authorized by Polo, Nike, or True Religion to sell their merchandise. Polo, Nike, and True Religion do not authorize the sale of counterfeit merchandise.

¶ 16 On cross-examination, Mr. Read stated that defendant's store did contain authentic brand merchandise. Mr. Read, however, did not recall seeing any authentic Nike Air Force One or Air Jordan shoes, nor Polo or True Religion merchandise. While Mr. Read was accompanied to the store by someone from Kirby, he personally examined the seized items and determined that the items were counterfeit. Mr. Read could not recall if he reviewed any of the store's shipping documents, and he did not learn the source of the seized items.

¶ 17 In the past, defendant was asked by Kirby to purchase particular goods from various stores and deliver them to Kirby. Defendant was not involved in determining whether those goods were counterfeit. Mr. Read was not aware of defendant having received any training in counterfeit recognition. Mr. Read did not recall whether defendant asked for words to be defined or explained during his interview.

¶ 18 The State offered into evidence without objection certified copies from the Patent and Trademark Office of Trademarks for True Religion and Nike.

¶ 19 Defendant's motion for a directed finding was denied.

¶ 20 Defendant testified that he has been a clothing retailer for 22 years and owns the store. He acknowledged that "it is not proper to sell fake or counterfeit items." He then testified that he did not know the meaning of the word "counterfeit," but understood that he was charged with selling "fake" goods. He defined "fake" as "not real." Defendant has known Mr. Read for about 15 years and about Kirby for almost 20 years. Kirby would give him money to purchase specified goods from other stores, such as sports jerseys, shoes, and "Polo" items. Defendant has had no training in recognizing counterfeit goods.

¶ 21 The investigators seized business records and about 400 items from the store which contained about 40,000 items. Defendant had purchased the seized items from various jobbers. Jobbers sell goods "cheap" for cash. He has been buying goods from jobbers for 20 years and does not know where the goods are manufactured. When asked what the jobbers sell, defendant replied "a lot of merchandise from different companies, overstock, irregular merchandise, leftovers, outsizes" and returns; "product that is not sold through regular channels." The jobbers would send him photographs of merchandise by email. Defendant then ordered the merchandise

by email or phone if "we like" it. The purchased items are then shipped to the store. He answered "no" when asked whether he had any knowledge that the seized items were "counterfeit."

¶ 22 At Department headquarters, defendant signed a document stating, in part, that he waived his rights because an unspecified person defendant referred to as "he" told him: "you wanna go home, sign these papers." Defendant did not write nor dictate the statement, he merely signed it.

¶ 23 On cross-examination, defendant reasserted that he did not know the meaning of the word "counterfeit," nor had he heard the word prior to trial. He first testified that, when he bought goods on behalf of Mr. Read's firm, he always purchased from jobbers, but he later testified that he went into retail stores to make the purchases.

¶ 24 Defendant applied to become an authorized retailer of Dickey's brand merchandise, but he did not apply to be an authorized retailer of Nike or True Religion merchandise. About 15 or 16 years ago, he applied and had an account with Polo. He did not "find it unusual" that he bought Nike merchandise from a jobber. Defendant did not ask the jobbers whether or not they "work for Nike." In July 2012, he did not purchase items directly from Polo, Nike, or True Religion but from jobbers. Defendant paid a jobber \$24 for jeans with the True Religion trademark and sold them for \$60. The True Religion jeans which were seized had price tags of \$319. Defendant did not consider the purchase price to be unusual because the jeans were "probably" irregular. He has purchased other goods from jobbers for \$10 with price tags of \$100.

¶ 25 Defendant insisted that he was not informed of his *Miranda* rights before he was offered the statement to sign. He was not interviewed, nor did he make an oral statement to the investigator. The statement had been prepared, and he did not read it before signing. However,

various details in the statement—that defendant was the store's sole purchaser of goods, that his wife owned a store named the View, and that a clerk named "Enish Warwa," sold goods on defendant's behalf—were correct. Also correct was the initialed deletion of Gucci, as defendant has never sold Gucci merchandise.

¶ 26 On redirect examination, defendant was asked to define "responsibility." He replied that if someone gave him a job to do, he would be responsible for the job if he agreed to do it. Until the execution of the search warrant, nobody had told defendant that any of the goods he sold were counterfeit. Defendant signed the statement because he trusted Mr. Read and the investigators.

¶ 27 The parties stipulated that defendant owns no trademarks, nor has he applied for any trademarks.

¶ 28 The trial court found defendant guilty stating that the State "has proved the elements *** for this particular offense."

¶ 29 In his posttrial motion, defendant challenged the sufficiency of the evidence but raised no objection as to the indictment. After denying the motion, the court proceeded to a sentencing hearing. Defendant was sentenced to one year of probation with fines and fees. The court then admonished defendant as to his appeal rights and finished by stating: "just so we're clear, I found [defendant] guilty on both [count I and II]. This 12 month sentence is concurrent," but also said: "Counts [I and II are merged]." Only one order of probation and one order of fines and fees were entered. Defendant did not file a motion to vacate or reconsider the sentence. This appeal followed.

¶ 30 On appeal, defendant argues that the indictment is void as duplicative as it alleged disparate acts in the disjunctive in the same count and the evidence was not sufficient to prove his guilt beyond a reasonable doubt. Defendant has forfeited any challenge to the trial court's statement at the end of the sentencing hearing that it had found him guilty on both counts and that it had entered a concurrent sentence on count II or merged the two counts despite the State having nolle prossed count II as he failed to object below or raise an argument on appeal as to this issue. Acknowledging the trial court's action, defendant in his initial brief has said that his arguments on appeal would apply to either count.

¶ 31 As to the indictment, defendant argues that the indictment is duplicative because it includes the disjunctive phrases "kept" or "had", "sold" or "disposed of," "goods" or "merchandise," "attached" or "affixed," and "printed, painted, stamped or impressed."

¶ 32 " 'Where a defendant challenges the sufficiency of an indictment or information for the first time on appeal, a reviewing court need only determine whether the charging instrument apprised the defendant of the precise offense charged with enough specificity to prepare his or her defense and allow pleading a resulting conviction as a bar to future prosecution arising out of the same conduct.' " *People v. Phillips*, 215 Ill. 2d 554, 562 (2005) (quoting *People v. Maggette*, 195 Ill. 2d 336, 347-48 (2001)). The issue on appeal is whether, in light of the facts on the record as well as the indictment itself, the indictment was so imprecise as to prejudice the defendant's ability to prepare a defense. *Id.*

¶ 33 Our supreme court has held that a defendant is prejudiced by a charging instrument that alleges disparate acts in a single count because " '[t]he use of the disjunctive [or] under these circumstances causes uncertainty and conjecture as to which of the alternative acts the accused is

charged with committing." ' ' " *Id.* at 564 (citing *People v. Eagle Books, Inc.*, 151 Ill. 2d 235, 245 (1992) (quoting *People v. Heard*, 47 Ill.2d 501, 505 (1970))).

¶ 34 However, there is not a prejudicial use of the disjunctive "or" when the instrument charges a single act in disjunctive language. Our supreme court in *Phillips* found:

"Defendant certainly should have understood he was charged with possessing pornographic pictures of children. The disjunctive language in each count simply gave the State flexibility as to the physical form of the pictures. That flexibility did not leave defendant uncertain about which of several disparate acts he stood accused of committing, because the record makes clear that on the date of his arrest he possessed all of the pictures the police seized from him. Thus, in this case there was only one act of possession, not three disparate and alternative acts. The disjunctive language in the indictment did not prejudice defendant." *Id.*

¶ 35 This court has held that a charging instrument is erroneously duplicative when two or more distinct offenses are joined in the same count, but not where the instrument alleges a single offense in more than one way, nor alleges different acts contributing to the ultimate charged offense. *People v. Iniguez*, 361 Ill. App. 3d 807, 817 (2005) (for first degree murder, allegation that a defendant acted "intentionally or knowingly," and another count alleging that he knew that his action "created a strong probability of death or great bodily harm," not duplicative). See also *People v. Johnson*, 376 Ill. App. 3d 175, 181 (2007) (allegation that a defendant solicited a child or someone believed to be a child was not prejudicially disjunctive); *People v. Brown*, 259 Ill. App. 3d 579, 580 (1994) (allegation that a defendant "knowingly possessed on or about his person or on his own land or in his own abode or fixed place of business a weapon" not

prejudicially disjunctive); *People v. King*, 253 Ill. App. 3d 705, 708 (1993) (allegation that a burglary defendant "without authority knowingly enter[ed] or remain[ed] within" was not prejudicially disjunctive).

¶ 36 Here, defendant does not support his argument with, nor are we aware of, any published case which holds that the governing statute, section 2 of the Act (765 ILCS 1040/2 (West 2012)), establishes multiple distinct offenses. Thus, the indictment here could not have alleged distinct offenses in the same count.

¶ 37 As to the argument that the indictment alleged prejudicial disjunctives which linked multiple disparate acts, we find otherwise. The allegations that defendant "kept or had in his possession" "goods or merchandise" to which "counterfeit mark or imitation trademarks were attached or affixed or in which any counterfeit mark or imitation trademarks were printed, painted, stamped or impressed" describe single acts or objects of action: keeping and having something are synonymous; as are goods and merchandise; attaching, affixing, printing, painting, stamping, and impressing—all are not disparate, but methods of marking merchandise with a trademark. The allegation that defendant "knowingly sold, offered for sale, or held for sale" describes acts that are not synonymous, but so does the "entering or remaining within" found proper in *King*. We see no reason not to follow *King*, because neither the aforesaid phrase here, nor in *King*, creates the uncertainty our supreme court condemned in *Phillips*. See also *Brown*, 259 Ill. App. 3d at 580 (distinguishing erroneous use of disjunctive to link disparate acts from proper use to link terms "so intimately related as to provide the defendant with specific notice of the charge").

¶ 38 Finally, the allegation that defendant had "the intent that the same should be sold, or disposed of," is a single mental state of intending to convey away. The indictment is not erroneous because it duly apprised defendant that he was accused of the offense of counterfeit trademarks in that he allegedly possessed on a specified date merchandise (that is, goods intended to be sold) knowingly marked with specified counterfeit trademarks.

¶ 39 Defendant also argues that there was insufficient evidence to convict him of counterfeit trademarks beyond a reasonable doubt. Specifically, defendant argues that the State failed to prove that he knowingly possessed counterfeit merchandise with the intent to sell.

¶ 40 Section 2 of the Act provides in relevant part:

"Whoever *** knowingly sells or disposes of or keeps or has in his or her possession, with intent that the same shall be sold or disposed of, any goods, wares, merchandise, or other product of labor or service, to which any such counterfeit or imitation is attached or affixed, or on which any such counterfeit or imitation is printed, painted, stamped or impressed, or knowingly sells or disposes of any goods, wares, merchandise or other product of labor contained in any box, case, can, or package to which or on which any such counterfeit or imitation is attached, affixed, printed, painted, stamped or impressed, or keeps or has in his possession with intent that the same shall be sold or disposed of, any goods, wares, merchandise or other product of labor in any box, case, can or package to which or on which any such counterfeit, or imitation is attached, affixed, printed, painted, stamped or impressed or knowingly sells a service using a counterfeit service mark, shall be guilty of a Class A misdemeanor for each offense, or in the case of a

counterfeit item shall be punished as provided in Section 8." 765 ILCS 1040/2 (West 2012).

¶ 41 Section 8 of the Act provides that "[a] person who knowingly sells, offers for sale, holds for sale, or uses 100 or more but fewer than 500 counterfeit items or counterfeit items having a retail value in the aggregate of more than \$300 but less than \$10,000 is guilty of a Class 3 felony." 765 ILCS 1040/8(b) (West 2012). " 'An admission by a defendant is not required for the trier of fact to conclude that a defendant had knowledge of something.' " *People v. Smith*, 2015 IL App (4th) 131020, ¶ 44 (quoting *People v. Jasoni*, 2012 IL App (2d) 110217, ¶ 20). "Such evidence 'may be established by evidence of the acts, statements, or conduct of the defendant, as well as the surrounding circumstances.' " *Id.* (quoting *People v. Jaynes*, 2014 IL App (5th) 120048, ¶ 46).

¶ 42 Based upon a claim of insufficiency of the evidence, on review we must determine whether, taking the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *In re Q.P.*, 2015 IL 118569, ¶ 24. It is the responsibility of the trier of fact to resolve conflicts and weigh and draw reasonable inferences from the testimony and other evidence. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 59. "The trier of fact is best equipped to judge the credibility of witnesses, and due consideration must be given to the fact that it was the trial court that saw and heard the witnesses." *Id.* "This court will not retry a defendant when considering a sufficiency of the evidence challenge." *Id.* The trier of fact need not be satisfied beyond a reasonable doubt as to each link in the chain of circumstances. Instead, it is sufficient if all the evidence taken together satisfies the trier of fact beyond a reasonable doubt of the defendant's guilt. *Id.* ¶ 60. The trier of

fact is not required to disregard inferences that flow normally from the evidence, nor to seek all possible explanations consistent with innocence and elevate them to reasonable doubt, nor to find a witness was not credible merely because the defendant says so. *Id.* A conviction will be reversed only where the evidence is so unreasonable, improbable, or unsatisfactory that a reasonable doubt of the defendant's guilt remains. *Id.*

¶ 43 Here, it is undisputed that defendant possessed merchandise with the intent to sell. He is a clothing retailer and, through his clerk, was selling clothing on July 10, 2012. Defendant does not dispute that the seized merchandise was counterfeit and does not challenge the sufficiency of the evidence as to the number or value of the counterfeit goods. The issue before us is the sufficiency of the evidence that defendant knew the merchandise was counterfeit at the time that he intended to sell it.

¶ 44 In his statement, defendant admitted to knowing that some of the store's merchandise was counterfeit. Defendant testified that he signed the statement without reading it and without understanding the terms used therein, such as "counterfeit," having been told that he would go home if he signed the statement. Investigator Rivera however testified that the statement was based on defendant's interview after being given his Miranda warnings and that defendant reviewed the statement before signing it. She further testified that defendant was not told that he could go home if he signed the statement. The trial court found defendant's testimony was not credible and this conclusion was not unreasonable.

¶ 45 Defendant argues that the statement is ambiguous as it does not specify when he developed the knowledge that the merchandise was counterfeit. However, we are not required to

elevate to reasonable doubt the possibility that defendant gave a statement merely to admit that he now, after his arrest and strictly in hindsight, knows the merchandise he sold was counterfeit.

¶ 46 Defendant argues that he could not have known the merchandise was counterfeit because Mr. Read applied expert training and experience in determining which items were counterfeit. While the investigators relied upon Mr. Read's expertise in determining which goods to seize, it is eminently reasonable to conclude that defendant, a clothing merchant of 22 years' experience would develop sufficient knowledge as to the authenticity of trademark clothing and shoes even if he was not trained in recognizing counterfeits. Defendant admitted that he was not an authorized retailer for Nike and True Religion merchandise and did not purchase the Polo goods on any existing account. His only source for the seized goods was "jobbers" and those purchases were made pursuant to questionable practices. He received the goods at significantly reduced prices and with full knowledge that the purchase prices were well below retail prices. It is reasonable to infer from the deep discount, and the manner in which he purchased the purportedly branded merchandise he was aware that the merchandise was counterfeit or fake and not simply returns or rejected merchandise.

¶ 47 In sum, we do not find it unreasonable, improbable, or unsatisfactory that the trial court should find defendant's requisite knowledge based on the evidence.

¶ 48 Accordingly, the judgment of the circuit court is affirmed.

¶ 49 Affirmed.