2017 IL App (1st) 150672-U

No. 1-15-0672

Third Division
September 27, 2017

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IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 CR 21937
	)	
THACKER BUFORD,	)	Honorable
Defendant-Appellant.	)	Michael B. McHale,
	)	Judge, presiding.
	)	

PRESIDING JUSTICE COBBS delivered the judgment of the court.
Justices Fitzgerald Smith and Howse concurred in the judgment.

O R D E R

¶ 1 *Held*: Defense counsel did not labor under an actual conflict of interest. Defendant failed to demonstrate that he received ineffective assistance of counsel. Defendant was not precluded from presenting a complete defense. Although the Counterfeit Trademark Act created an unconstitutional mandatory presumption as applied to defendant, its application was harmless beyond a reasonable doubt.

¶ 2 Following a jury trial in the circuit court of Cook County, defendant, Buford Thacker, was found guilty of violating the Counterfeit Trademark Act (765 ILCS 1040/2 (West 2012)) and unlawful use of a weapon by a felon (720 ILCS 5/24-1.1(A) (West 2012)). Defendant was sentenced to 10 years' imprisonment.

¶ 3 On appeal, defendant contends that he should receive a new trial because: (1) his trial counsel labored under a conflict of interest by representing both defendant and a potential defense witness; (2) he received ineffective assistance of counsel; and (3) he was denied his right to present a complete defense. Defendant also contends (4) that his conviction under the Counterfeit Trademark Act should be reversed because the statute is unconstitutional as applied to him. We affirm.

¶ 4 BACKGROUND

¶ 5 Defendant was indicted on one count of violating the Counterfeit Trademark Act, in that he possessed, with the intent to sell, counterfeit merchandise; and one count of unlawful use of a weapon by a felon, based on his possession of a 12 gauge shotgun.[1] Defendant was tried before a jury on both counts. The trial adduced the following pertinent facts.

¶ 6 The Special Operations Unit of the Cook County Sheriff's Police investigates, *inter alia*, trademark and copyright infringement. Unit Commander Michael Anton, Investigator Lisette Rivera, and Investigator Conrad Edgett, a SWAT team member, testified regarding their investigation and arrest of defendant, and defendant's confession. On October 8, 2013, Commander Anton assigned Investigator Rivera and her partner to investigate a business selling items at 1813 West 71st Street in Chicago. That day, Rivera and her partner drove by that address, which she described as a single family brick home. Outside of the residence, Rivera observed a black SUV displaying items for sale and a sign saying "Pick 'Yo Style

[1] Prior to trial, the State entered a *nolle prosequi* on count 3, which charged defendant with unlawful use of a weapon by a felon based on possession of 12 gauge shotgun shells.

Fashions."[2] Thereafter, Rivera learned who resided at that address, and the unit obtained a search warrant.

¶ 7 On October 21, 2013, at approximately 5:30 p.m., the unit executed the search warrant. Edgett and his SWAT team were assigned to assist in the entry, and they were sometimes referred to as the entry team. Both Anton and Edgett observed the above-described black SUV with its advertisement. Edgett and the entry team knocked on the front door and announced their office. An adult woman answered the door, Edgett explained the purpose of the visit, and the woman allowed them to enter. The entry team encountered an additional woman and a child, and cleared the residence for the safety of the officers and the occupants. Edgett went into the kitchen, where he observed defendant with another entry team member. Defendant was taken into custody, handcuffed, and placed in the back of a squad car.

¶ 8 Anton parked his car on 71st Street, and waited one or two minutes for the entry team to enter and clear the residence. As he approached, Anton saw a camera installed above the entryway. He walked into the residence's living room and saw a flat screen television that displayed the outside of the residence. Anton saw defendant in the kitchen and placed in the squad car.

¶ 9 Anton and his officers began searching the premises. Anton testified that the living room and dining room "were set up almost like a store," containing purses, boots, shoes, and various other items. While they searched the second floor, Anton observed a floor vent. Based on his previous work experience, he opened the vent, shined a flashlight down the vent, and discovered a pistol-gripped shotgun approximately 20 to 25 feet down in the vent.

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[2] After a foundation was laid, several photographs of the SUV were admitted into evidence. The sign read in full: "Pick 'Yo Style Fashions: Highest Quality Replica Purses, Etc." Attached to the rear window above this sign was another which read: "Yes We're Open."

Anton attempted to retrieve the shotgun with a clothes hangar and hooks, but it was too deep to reach.

¶ 10 Anton approached defendant, who was sitting in a police car on 71st Street. Anton explained who he and Investigator Edgett were. Edgett read defendant his Miranda rights. Although defendant did not sign a written Miranda waiver at that time, defendant agreed to have a conversation with Anton and Edgett. Defendant admitted that the weapon belonged to him, and that he placed it in the vent when he saw the police coming. Defendant informed Anton how to retrieve the gun with a hook tied to a rope located in a bedroom. Anton returned to the residence and attempted to retrieve the weapon as instructed for approximately 1½ hours without success. Officers eventually opened the wall to recover the weapon, which was loaded with seven shells. The weapon was placed inside an evidence box. Anton explained that the weapon was not tested for fingerprints because defendant admitted that the shotgun was his and had told Anton how to retrieve it.

¶ 11 Investigator Rivera waited in the alley until the entry team informed her that it was safe to enter the residence. Upon entering the front door, Rivera observed two women, a child, and defendant in the living room. Also, Rivera observed several shelves and racks containing boots, shoes, and handbags bearing various trademarks such as UGGS, Louis Vuitton, Coach, Tory Burch, and Michael Kors. There was also a glass case containing jewelry bearing various trademarks, which also displayed signs indicating which credit cards the business accepted. In a closet of the first room she searched, Rivera discovered receipts and order forms. In the back porch, which was enclosed, Rivera discovered numerous boxes containing boots, handbags, and wallets bearing the trademarks of UGGS, Louis Vuitton,

Tory Burch, and Michael Kors. On the second floor, Rivera discovered handbags bearing Louis Vuitton and Michael Kors trademarks.

¶ 12 Kevin Read, a licensed private detective, testified as an expert in brand protection and identifying counterfeit merchandise. He investigated individuals and manufacturers regarding counterfeit merchandise. He had received training from brand managers at Michael Kors, Decker-UGG, Louis Vuitton, Tory Burch, and Coach, and was an authorized agent for all of those brands. On October 21, 2013, officers with the Cook County Sheriff's Police Department contacted Read. He went to the residence and met with the officers executing the search warrant. He was allowed inside the residence to inspect items that officers suspected to be counterfeit. Upon inspection, Read determined that all of the items found in the various rooms were counterfeit. After Read's inspection, the counterfeit items were inventoried as evidence. Rivera testified that the counterfeit merchandise recovered from the residence totaled: 194 Michael Kors items, 37 UGG items, 81 Louis Vuitton items, 137 Coach items, and 194 Tory Burch items. Upon cross-examination, Rivera clarified that possession of the items themselves were not illegal unless someone affixes an unauthorized trademark.

¶ 13 Rivera transported defendant to the Cook County Sheriff's Police Department in Maywood, and took him to an interview room. Also present were Rivera's partner and Read. Rivera read defendant his Miranda rights from a preprinted form, which defendant, Rivera, and her partner signed. Rivera asked defendant if he understood his rights. Defendant answered that he did and agreed to speak with her. Their conversation lasted approximately 30 minutes. Rivera asked defendant if he was willing to provide a written statement, and defendant responded in the affirmative. Rivera asked whether defendant wanted to write the statement himself, or Rivera could write the statement for him. Defendant chose the latter.

¶ 14 Defendant's statement was as follows:

¶ 15 "I [defendant] give this statement voluntarily. I have not been promised anything in return for this statement. I currently live at 1813 71st Street Chicago. I live there with my girlfriend Belinda Jackson. I have been selling counterfeit merchandise for over 6 years. I started selling out of my vehicle until I convinced Belinda to get the business license in her name although the license was previously in my name. I buy North Face and Jordans items from a Chinese website and have them shipped to my house. Two of the shipments were intercepted by customs. I buy Uggs, Michael Kors and Timberlands from 'Mike' at Fashion Star located at 87th and Harlem. Also buy tags from Mike. I understand that the merchandise I sell is counterfeit and take full responsibility. My street name is 'Cash.' *** I purchased the shotgun found inside the vent in house from a 'crackhead' named Nate. I bought the gun for 150.00 in an alley. The ammunition found with the weapon was the only ammo I have that I purchased with the gun. I threw the gun in the vent today when I observed the police on my monitor approach my residence. I hid the weapon because of my criminal background. This statement was written on my behalf by [Investigator Rivera] and I reviewed the statement."

¶ 16 Defendant initialled corrections in the transcribed statement. However, he refused to sign it.

¶ 17 Additionally, representatives from Decker-UGG, Tory Burch, Louis Vuitton, Michael Kors, and Coach each testified how his or her respective company protects its global brand, prevents counterfeit activities, and how counterfeit merchandise hurts its business. Each representative identified a certified copy of his or her respective company's trademark filed with the United States Patent and Trade Organization. Further, each representative testified that defendant, or "Pick 'Yo Style Fashions," had never been authorized to possess, use, or sell items affixed with the respective trademarks.

¶ 18 The State introduced into evidence a certified copy of defendant's driving abstract, listing his name and 1813 West 71st Street as his address. A certified record search disclosed no City of Chicago business license issued to "Pick 'Yo Style Fashions" at that address. Further, the parties stipulated that defendant had a prior felony conviction. The State rested. The trial court denied defendant's motion for a directed finding.

¶ 19 Defendant did not present evidence and, after receiving admonishments from the court, elected not to testify. The defense case was that the State failed to prove defendant guilty of the charged offenses beyond a reasonable doubt. In closing argument, trial counsel attacked the credibility of the State's witnesses and described purported discrepancies in their testimony.

¶ 20 The jury found defendant guilty as charged. Defendant retained new counsel, who filed a supplemental motion for a new trial. The trial court denied the motion and proceeded to sentencing. At the close of the sentencing hearing, the court sentenced defendant to a concurrent ten-year prison term on each conviction.

¶ 21 Defendant timely appeals. Additional pertinent facts will be discussed in the context of the issues raised on appeal.

¶ 22 ANALYSIS

¶ 23 Defendant raises several issues in which he contends that he was deprived of his constitutional right to effective assistance of counsel at trial. The sixth and fourteenth amendments to the United States Constitution guarantee the right to effective assistance of counsel. U.S. Const., amends. VI, XIV; *Cuyler v. Sullivan*, 446 U.S. 335, 343-44 (1980).

¶ 24 I. Conflict of Interest

¶ 25 Defendant contends that he is entitled to a new trial because his trial counsel labored under a conflict of interest by representing both defendant and a potential defense witness. A criminal defendant's sixth amendment right to effective assistance of counsel includes the right to conflict-free representation. *People v. Morales*, 209 Ill. 2d 340, 345 (2004). Such representation means assistance by an attorney whose loyalty to his or her client is not diluted by conflicting interests or inconsistent obligations. *People v. Mahaffey*, 165 Ill. 2d 445, 456 (1995); *People v. Spreitzer*, 123 Ill. 2d 1, 13-14 (1988). Further, there are two categories of conflict of interest: *per se* and actual. *People v. Hernandez*, 231 Ill. 2d 134, 142-44 (2008); *Morales*, 209 Ill. 2d at 345, 348-49. A *per se* conflict of interest exists where certain facts about a defense attorney's status engender, by themselves, a disabling conflict. Unless a defendant waives his or her right to conflict-free representation, a *per se* conflict of interest is grounds for automatic reversal. *Hernandez*, 231 Ill. 2d at 142-43; *Morales*, 209 Ill. 2d at 345-46. Defendant does not contend that a *per se* conflict of interest existed in this case. Absent a *per se* conflict, further analysis "depends on when the issue was raised before the trial court." *People v. Clark*, 374 Ill. App. 3d 50, 62 (2007).

¶ 26 In the case at bar, defendant argues that: (A) the trial court erred when, after it was informed of trial counsel's potential conflict, the court failed to conduct an adequate inquiry; and (B) trial counsel labored under an actual conflict of interest.

¶ 27 A. *Adequate Inquiry*

¶ 28 Prior to jury selection, the trial court asked: "Does the Defense have any additional witnesses that you would like me to call?" Trial co-counsel initially answered in the negative, but then responded: "Oh, your Honor, if we could add Belinda Jackson to that list," to which the court responded in the affirmative. Later in their conversation, the prosecutor informed

the court as follows: "Belinda Jackson has a—she was arrested in this matter as well, charged with a misdemeanor. That case is currently pending, Judge, and if I understand, [trial counsel] represents her as well, so for Counsel to call her in this case, Judge, I think may be a potential issue." The court asked: "Does she have a Fifth Amendment Right if she wants to?" The prosecutor responded in the affirmative. The court observed: "It does sound like a potential conflict." Trial co-counsel responded: "Yes your Honor, so we may not be calling her." The court concluded: "So I will not—well, I'm not sure if I should read her name to the jury or not. I guess until we have it resolved, I will read it, but I understand your point [prosecutor], that may not come to pass." Trial began the next day, and there was no mention of this potential conflict. Jackson was not called as a witness.

¶ 29 Defendant now argues that once the trial court "was informed" of trial counsel's potential conflict of interest, the court should have investigated the matter further, admonished defendant, or obtained defendant's waiver of the potential conflict. We disagree.

¶ 30 When defense counsel brings a potential conflict of interest to the attention of the trial court at an early stage, a duty devolves upon the trial court to either appoint different counsel, or determine whether the potential conflict is too remote to justify doing so. See *Holloway v. Arkansas*, 435 U.S. 475, 484 (1978); *People v. Kitchen*, 159 Ill. 2d 1, 29 (1994); *Spreitzer*, 123 Ill. 2d at 18. Under the *Holloway* rule, if the trial court does not take these steps, then a potential or possible conflict of interest could deprive the defendant of the guaranteed assistance of counsel. *Spreitzer*, 123 Ill. 2d at 18. Reversal of a conviction does not require a showing that the attorney's actual performance was in any way affected by the alleged potential conflict, or a showing of specific prejudice. *Id*; *Kitchen*, 159 Ill. 2d at 29; *Clark*, 374 Ill. App. 3d at 62.

¶ 31 However, in *Morales*, our supreme court expressly confirmed that the *Holloway* rule "applies only where a trial court fails to respond appropriately to *defense counsel's* objection to a representation. (Emphasis added.) *Morales*, 209 Ill. 2d at 348; see *People v. White*, 2011 IL App (1st) 092852, ¶ 102 ("the Illinois Supreme Court in *Morales* plainly rejected application of the *Holloway* rule where the prosecutor, not defense counsel, informed the court about a possible conflict in the early stages of a case"); *Clark*, 374 Ill. App. 3d at 63-64 (same).

¶ 32 In the case at bar, neither defendant nor defense counsel suggested to the trial court that a potential conflict of interest existed. Therefore, the trial court was not obligated to conduct an inquiry.

¶ 33 B. *Actual Conflict of Interest*

¶ 34 Defendant next argues that his trial counsel labored under an actual conflict of interest by representing both defendant and Belinda Jackson. Defendant asserts that representing both of them caused his trial counsel "to abandon the plausible defense of presenting Jackson as an alternative offender, thereby violating [defendant's] right to conflict-free representation."

¶ 35 If defense counsel does not apprise the trial court of the potential conflict, then "a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." *Sullivan*, 446 U.S. at 350. "What this means is that the defendant must point to some specific defect in his counsel's strategy, tactics, or decision making attributable to the conflict." *Spreitzer*, 123 Ill. 2d at 18. To establish that an actual conflict of interest adversely affected counsel's performance, a defendant must: (1) demonstrate that some plausible alternative defense strategy or tactic might have been pursued, a defense that possessed sufficient substance to be a viable alternative; and (2) establish that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties

or interests. *People v. Nelson*, 2017 IL 120198, ¶ 37 (quoting *United States v. Fahey*, 769 F.2d 829, 836 (1st Cir. 1985)). Further, mere speculations or conclusions are not sufficient to establish that an actual conflict of interest affected counsel's performance. *Morales*, 209 Ill. 2d at 349.

¶ 36 In the present case, defendant asserts that his trial counsel's representation of both defendant and Jackson meant that trial counsel could not present defendant's "best defense, which involved casting blame on Jackson as an alternative offender." Defendant explains: "While they may not have technically been co-defendants, she was at the very least a co-participant in the alleged criminal activities, and, most importantly could have been presented as a potential sole offender for the same crimes that [defendant] was charged with and ultimately convicted of." We disagree.

¶ 37 Defendant fails to explain how blaming Jackson would have been exculpatory to him. In his confession to the charged crimes, defendant stated that Jackson was his girlfriend, and that they lived at 1813 West 71st Street. On the same day that defendant confessed to his crimes as charged, Jackson made an inculpatory statement to Investigator Rivera and her partner. Jackson stated in relevant part: "I share the business with my boyfriend Buford Thacker who helps me sell the merchandise. I was not aware there was a shotgun in the house until it was found by the police. I have an FOID [Firearm Owners' Identification] card but have never used it to purchase anything."

¶ 38 Both defendant and Jackson implicated defendant in the counterfeit trademark charge. Thus, defendant's alternative defense strategy of blaming Jackson would not have been viable. Also, blaming Jackson for possession of the shotgun would not have been a viable

alternative defense strategy because defendant confessed that he bought the weapon and hid it. We hold that defendant has not demonstrated an actual conflict of interest.

¶ 39 II. Deficient Representation

¶ 40 Defendant next claims that he was denied effective assistance of counsel based also on deficient representation. Defendant initially argues that the appropriate standard for assessing trial counsel's conduct is provided by *United States v. Cronic*, 466 U.S. 648 (1984), and *People v. Hattery*, 109 Ill. 2d 449 (1985). Unlike the familiar two-part test from *Strickland v. Washington*, 466 U.S. 668 (1984), which requires a defendant to establish both a deficiency in counsel's performance and prejudice resulting therefrom, *Cronic* requires a court to presume that counsel's error, if established, was prejudicial. The presumption is properly invoked when, for example, "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, [which constitutes] a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Cronic*, 466 U.S. at 659. Our supreme court applied the *Cronic* standard in *Hattery*, in which defense counsel conceded his client's guilt to murder in opening statement, did not introduce any evidence at trial, and did not make a closing argument to the jury.

¶ 41 At trial, defendant's trial counsel presented the defense that defendant was an "entrepreneur" selling *replicas*, which differed from counterfeit items. Defendant's trial counsel pursued this theory in his cross-examination of a witness and in closing argument. Defendant now characterizes this defense theory as non-viable because the merchandise bore counterfeit trademarks, and as a concession of guilt because defendant possessed and sold the merchandise.

¶ 42 We conclude that *Strickland*, rather than *Cronic* and *Hattery*, provides the appropriate standard for assessing the performance of defendant's trial counsel. Here, trial counsel's performance did not constitute a total failure of legal representation. Rather, trial counsel's conduct demonstrated an attempt to present a defense, albeit unsuccessfully, and to subject the State's case against defendant to adversarial testing. Defendant's trial counsel aggressively cross-examined the State's witnesses, and forcefully argued that the jury should find defendant not guilty. See, *e.g.*, *People v. Williams*, 192 Ill. 2d 548, 565-67 (2000); *People v. Shatner*, 174 Ill. 2d 133, 143-46 (1996); *People v. Bloomingburg*, 346 Ill. App. 3d 308, 316-18 (2004). We conclude that *Strickland*, applies to the instant case.

¶ 43 As earlier noted, the test is composed or two prongs: deficiency and prejudice. *Strickland*, 466 U.S. at 694. First, the defendant must prove that counsel's performance fell below an objective standard of competence under prevailing professional norms. To establish deficiency, the defendant must overcome the strong presumption that the challenged action or inaction might have been the product of sound trial strategy. Second, the defendant must establish prejudice. The defendant must prove that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. The prejudice prong of *Strickland* entails more than an "outcome-determinative" test. The defendant must show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. *People v. Evans*, 186 Ill. 2d 83, 93 (1999) (and cases cited therein). Further, a defendant must satisfy both prongs of the *Strickland* test. However, if the ineffective-assistance claim can be disposed of on the ground that the

defendant did not suffer prejudice, a court need not decide whether counsel's performance was constitutionally deficient. *Id*. at 94 (and cases cited therein).

¶ 44 Defendant argues that his trial counsel's "entrepreneur-selling-replicas" defense theory fails the *Strickland* test. We disagree. Initially, we conclude that the evidence of defendant's guilt, including his highly corroborated confession, was overwhelming. We observe that defendant's refusal to sign his confession did not render it unreliable, and thus inadmissible, because the State laid a proper foundation for its admission. See *People v. Berryman*, 13 Ill. 2d 229, 231 (1958); *People v. McNeil*, 99 Ill. App. 2d 273, 279 (1968). This ultimately concludes our analysis of the second prong of *Strickland*, but also informs our view of *Strickland*'s first prong. "A weak or insufficient defense does not indicate ineffectiveness of counsel in a case where a defendant has no defense." *People v. Ganus*, 148 Ill. 2d 466, 474 (1992).

¶ 45 Defendant also argues that trial counsel was constitutionally deficient by failing to call Belinda Jackson to testify. However, "[t]he decision to call particular witnesses is a matter of trial strategy and thus will not ordinarily support an ineffective-assistance-of-counsel claim." *People v. Patterson*, 217 Ill. 2d 407, 442 (2005); see *People v. Jones*, 323 Ill. App. 3d 451, 457 (2001) (and cases cited therein). As we earlier discussed, any testimony elicited from Jackson would only have further implicated defendant. Defendant has failed to demonstrate ineffective assistance of counsel based on deficient representation.

¶ 46 III. Presentation of Complete Defense

¶ 47 Defendant next claims that the trial court denied him the constitutional right to present a complete defense. In his opening statement, defendant's trial counsel told the jury that Belinda Jackson sold counterfeit merchandise to an undercover police officer on three

separate occasions prior to defendant's arrest. On the State's objection, the following colloquy took place at sidebar:

¶ 48 "THE COURT: Why are you going into that, [defense counsel]?

[Defense Counsel]: Because that's what they gave the three dates the lady went in to get the search warrant.

THE COURT: The charges doesn't deal with anybody buying anything.

[Defense Counsel]: Yes.

THE COURT: You are attacking the validity of the search warrant.

[Defense Counsel]: No. If I say bought it from another person, then that takes off what they are charging him [defendant].

THE COURT: Unless you are planning on introducing that evidence with [the undercover officer], the State isn't ***.

[Prosecutor]: Correct.

THE COURT: So stay away from them. I am going to instruct [the jury] to disregard. This is a search. They go in and execute a search. There is no motion of acknowledging validity of the search. He is not introducing the evidence. So sustained."

¶ 49 Defendant argues that this evidence was relevant, "as it could have been the cornerstone of a defense strategy to present Jackson as an alternative offender to [defendant]." However, according to defendant, the trial court would not allow defense counsel "to argue this evidence in opening statements, and apparently because of this ruling, counsel did not attempt to introduce this evidence in any other way during the trial. Therefore, [defendant] was denied his constitutional right to present a complete defense and should be granted a new trial."

¶ 50 Initially, defendant correctly concedes that this contention was not properly preserved for appellate review. This issue was not included in defendant's posttrial motion. Therefore, it is procedurally forfeited. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Seeking our review, defendant invokes the plain-error doctrine, which provides a narrow and limited exception to the general and normal rule of procedural default. *People v. Bannister*, 232 Ill. 2d 52, 65 (2008); *People v. Harris*, 182 Ill. 2d 114, 136 (1998). A reviewing court will consider unpreserved error when a clear and obvious error occurs and (1) the evidence is closely balanced; or (2) the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007); *People v. Hall*, 194 Ill. 2d 305, 335 (2000). In addressing defendant's plain-error contention, it is appropriate to determine whether error occurred at all. *Bannister*, 232 Ill. 2d at 65.

¶ 51 A criminal defendant is constitutionally guaranteed a meaningful opportunity to present a complete defense. *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006); see *People v. Burgess*, 2015 IL App (1st) 130657, ¶ 133 (quoting *People v. Ramirez*, 2012 IL App (1st) 093504, ¶ 43). However, the Constitution permits a trial court to exclude evidence that is only marginally relevant, unduly prejudicial, confusing, or misleading. *Holmes*, 547 U.S. at 326-27. Thus, "it is within the discretion of the trial court to exclude such evidence, without infringing on the accused's constitutional right to present a defense, when the relevancy of the evidence is so speculative as to impart little probative value." *People v. Reese*, 121 Ill. App. 3d 977, 988 (1984); see *People v. Brewer*, 2013 IL App (1st) 072821, ¶ 51 (same). Further, the scope and latitude of opening statements are within the trial court's discretion. *Burgess*, 2015 IL App (1st) 130657, ¶ 153.

¶ 52 In the case at bar, evidence of Jackson's prior sales to an undercover officer had no bearing on defendant's charged offense of possession with intent to sell counterfeit merchandise. Further, the trial court never prevented defendant's trial counsel from introducing evidence of another offender. Defendant's argument that the trial court's ruling "apparently" precluded counsel from attempting to pursue this theory at trial is mere speculation. Having found no error, there can be no plain error. See, *e.g.*, *Bannister*, 232 Ill. 2d at 71. Defendant's procedural default of this issue is not excused.

¶ 53 Defendant alternatively asserts that he was denied the effective assistance of counsel when his trial counsel failed to preserve this issue for review. As previously discussed, a defendant must establish both deficient performance and prejudice, and the failure to establish either is fatal to the claim. *Strickland*, 466 U.S. at 687-88.

¶ 54 In the case at bar, we can dispose of defendant's assertion of ineffective assistance of counsel on the "prejudice" prong alone. We earlier found no error in the trial court's ruling. Thus, the trial court would have rightfully overruled any defense objection thereto. Consequently, whether or not defense counsel preserved this issue for review, the result would have been the same. Thus, defendant was not prejudiced in terms of *Strickland*. See *e.g.*, *People v. Ceja*, 204 Ill. 2d 332, 358 (2003); *People v. Kuntu*, 196 Ill. 2d 105, 129-30 (2001).

¶ 55 IV. As-Applied Constitutionality of Counterfeit Trademark Act

¶ 56 Defendant lastly claims that section 8(h) of the Counterfeit Trademark Act is unconstitutional as applied to him because it creates a mandatory irrebuttable presumption that the possessor of a certain number of counterfeit goods knows they are counterfeit and intends to sell or distribute those items. (765 ILCS 1040/8(h) (West 2012). Defendant further

argues that the jury instruction based on this provision was unconstitutional as well. The State expressly concedes that the statute is unconstitutional in this regard as applied to defendant. We agree.

¶ 57 Although the State is constitutionally required to prove every element of a crime beyond a reasonable doubt, the State may rely on certain presumptions and inferences to prove its case. Presumptions may be permissive or mandatory. While a permissive presumption allows the fact finder to infer the existence of the ultimate or presumed fact upon proof of the predicate fact, a mandatory presumption requires the fact finder to accept the presumption. *People v. Jordan*, 218 Ill. 2d 255, 265 (2006). Mandatory presumptions may be further categorized as irrebuttable (conclusive) or rebuttable. Mandatory irrebuttable presumptions are unconstitutional because they conflict with a criminal defendant's presumption of innocence. Under Illinois law, all mandatory presumptions are now considered unconstitutional. *Id.* at 265-66.

¶ 58 In the present case, section 8(h) of the Act provides: "A person having possession, custody, or control of more than 25 counterfeit items or counterfeit marks *shall be presumed* not to be simply in possession of such, but to possess said items with intent to offer for sale, to sell, or to distribute." (Emphasis added.) (765 ILCS 1040/8(h) (West 2012). This section contains a mandatory irrebuttable presumption and, therefore, is unconstitutional as applied to defendant.

¶ 59 However, the State responds that application of this unconstitutional presumption to defendant constitutes harmless error. A constitutional error is harmless if it appears beyond a reasonable doubt that the error did not contribute to the verdict. To determine whether application of an unlawful presumption is harmless error, the reviewing court must: (1)

determine what evidence the fact finder actually considered in reaching the verdict; and (2) weigh the probative force of the evidence actually considered by the fact finder against the probative force of the presumption standing alone. The issue is whether the fact finder based its verdict on evidence that establishes the presumed fact beyond a reasonable doubt, independently of the presumption. *People v. Woodrum*, 223 Ill. 2d 286, 315 (2006).

¶ 60 This test is easily and obviously met here. Absent the unconstitutional presumption that defendant's possession of over 25 counterfeit items meant that he intended to sell them, the evidence at trial overwhelmingly established that defendant intended to sell the counterfeit items. "Criminal intent is a state of mind that is usually inferred from the surrounding circumstances." *Id.*, at 316. In the present case, defendant lived at 1813 West 71st Street. The SUV parked in front of the house displayed signs that advertised the business. Inside, the dwelling was set up as a store, displaying the counterfeit merchandise. Defendant confessed. As we earlier concluded, the combination of defendant's confession and corroborating evidence of guilt was overwhelming. We conclude that the jury's guilty verdict would have been the same absent the presumption. Accordingly, we hold that the application of the unconstitutional presumption as applied to defendant was harmless beyond a reasonable doubt.

¶ 61 CONCLUSION

¶ 62 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed. Pursuant to *People v. Nicholls*, 71 Ill. 2d 166 (1978), we grant the State's request and assess defendant $100 as costs for this appeal.

¶ 63 Affirmed.