2011 IL App (2d) 091138-U
No. 2—09—1138
Order filed August 4, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of De Kalb County.
Plaintiff-Appellee,	)	
v.	)	No. 06—CF—310
ALEXANDER E. RYAN,	)	Honorable Robbin J. Stuckert,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.
Justice McLaren concurred in the judgment.
Justice Bowman dissented.

ORDER

Held: (1) The State proved defendant guilty beyond a reasonable doubt of deceptive practices, as it corroborated the statutory inference of knowledge and intent with evidence of a series of bad checks and the closure of defendant's account (of which he would have received notice according to the bank's business practice) before he wrote the bad check at issue; (2) defendant showed no reversible error in the trial court's admission of evidence relating to his subsequent acts, as any error either was harmless or did not rise to the level of reversible plain error (and, for the same reasons, counsel was not ineffective for failing to object to the evidence).

¶ 1 Following a jury trial, defendant, Alexander E. Ryan, was found guilty of deceptive practices (720 ILCS 5/17—1(B)(d) (West 2006)) and sentenced to three years' imprisonment. On appeal he

argues (1) that he was not proved guilty beyond a reasonable doubt; and (2) that the court erred in admitting evidence of subsequent acts as proof of his intent to defraud. For the reasons that follow, we affirm.

¶ 2 I. BACKGROUND

¶ 3 On July 6, 2006, defendant was charged with one count of deceptive practices (720 ILCS 5/17—1(B)(d) (West 2006)). The complaint alleged that on or about February 22, 2006, defendant, with the intent to defraud The UPS Store, knowingly delivered a check drawn on the De Kalb County Credit Union for $176.10 in exchange for shipping services, knowing the check would not be paid.

¶ 4 At trial, Randy Pollner testified that, in February 2006, he owned The UPS Store (the store) located in De Kalb. On February 22, 2006, at about 2:30 p.m., defendant came to the store to ship a salt spreader. A shipping order, which was filled out by defendant, was admitted into evidence as State's Exhibit No. 3. The shipping order listed the sender as "Ryan's Lawn Care & Snow" and the sender's address as "P.O. Box 347, De Kalb, Illinois." It was signed by "Alexander Ryan." Defendant shipped the salt spreader "cash on delivery" (COD). Pollner explained that, when a customer ships an item COD, the customer requires the delivery person to collect certain funds from the recipient on delivery. These funds may include the cost of the shipping as well as the cost of the item being shipped. The delivery person may not leave the item unless the designated funds are collected. Thereafter, the delivery person returns the funds to Pollner, who in turn contacts the customer and gives the customer the funds. The customer must pay the actual cost of shipping at the time of shipping.

¶ 5 According to Pollner, the cost to ship the salt spreader was $138.12. Defendant paid the cost of shipping with a check. Pollner identified State's Exhibit No. 7 as a copy of the check that he had received from defendant. The check, which was number 1027, was made out to the store for $176.10 (which included an additional charge for packaging). The check was dated February 22, 2006, and signed by defendant. Within two days of receiving the check, Pollner deposited it into his bank account.

¶ 6 Pollner testified that, within two weeks of shipping the salt spreader, he received the COD funds that had been collected by the delivery person assigned to defendant's shipment. On March 9, 2006, defendant returned to the store and picked up COD funds of $326.10. State's Exhibit No. 4, a COD statement, was admitted into evidence, showing that defendant received $326.10 from the store. The statement was signed by defendant.

¶ 7 Pollner further testified that, on March 9 or 10, 2006 (after having already given defendant the COD funds), he received a notice from his bank indicating that defendant's check had been returned unpaid, because the account that it was drawn on had been closed. Thereafter, Pollner contacted the De Kalb County sheriff's department. Pollner was shown a photographic lineup and asked to identify defendant. Pollner was able to "narrow[] it down to one of two." Defendant never returned to the store to pay Pollner.

¶ 8 Jody Mernack, a manager at the De Kalb County Credit Union, testified that she handled all account records. Mernack met defendant on January 19, 2006, the day he opened his checking and savings accounts. State's Exhibit No. 6 was identified by Mernack as copies of defendant's bank statements from January through December 2006. The records showed that defendant opened his savings account with a $5 deposit and his checking account with a $25 deposit. On January 27,

2006, defendant deposited $500 into his checking account. On February 1, 2006, defendant's checking account balance was $525. On February 2, 2006, defendant withdrew $200. On February 6, 2006, two checks cleared his account, and he made $700 deposit, which resulted in an end-of-day balance of $925.16.

¶ 9 The records show that from February 7 through February 9, 2006, 11 "Internet Withdrawals" totaling $867.80 were made from defendant's checking account. In addition, a check for $4.55 cleared his account. On February 9, 2006, defendant had a balance of $52.91. That day, two checks (one for $79.15 and one for $139.74) were returned for insufficient funds. The account was charged $40 in fees, leaving defendant with a balance on February 9, 2006, of $12.91. On February 10, 2006, five Internet withdrawals totaling $800 were posted to defendant's account but not paid because, on that day, the bank closed defendant's account. On February 10, 2006, a third check was returned unpaid. On February 13 and 14, 2006, two additional Internet withdrawals were posted to defendant's account but not paid. On February 17 and 21, 2006, two more checks (one on each date) were returned because the account was closed.

¶ 10 According to Mernack, the credit union sends computer-generated notices to a customer when his account has been overdrawn and when the account is closed. Pursuant to its regular business practices, the credit union sends notice of an account closure on the same day that the account is closed. Defendant's account was closed on February 10, 2006; therefore, notice would have been mailed on February 10, 2006. Defendant would not have received notice of Internet withdrawals until he received his monthly statement. Defendant's February statement would have been mailed at the beginning of March. Defendant's statements, notices, and returned checks would have been sent to his address on file: "P.O. Box 347, De Kalb, Illinois."

¶ 11 Mernack identified State's Exhibit No. 7 as a copy of a check drawn on defendant's account. The check, which was number 1027, was dated February 22, 2006, and made payable to the store for $176.10. She recognized the signature as being similar to defendant's signature. The credit union did not honor the check because it had already reported defendant's account as closed.

¶ 12 According to Mernack, defendant's checking account balance on March 31, 2006, was negative $145.74. The start balance on December 1, 2006, was negative $145.74. On December 31, 2006, the account had a zero balance because the credit union charged off the account as a loss.

¶ 13 Kelli Sullivan, a detective with the City of De Kalb police department, testified that she showed Pollner a photographic lineup and that, although he narrowed the suspects down to two individuals, he could not positively identify defendant as the person who wrote the check.

¶ 14 The parties stipulated that defendant was at the store in De Kalb on February 22, 2006, at approximately 2:30 p.m.

¶ 15 The jury found defendant guilty of deceptive practices (720 ILCS 5/17—1(B)(d) (West 2006)), and the trial court sentenced him to three years' imprisonment. Following the denial of his motion for reconsideration, defendant timely appealed.

¶ 16 II. ANALYSIS

¶ 17 Defendant first argues that he was not proved guilty beyond a reasonable doubt, because the State failed to present sufficient corroborating evidence that defendant knew the check would not be paid and that he had the intent to defraud. He further argues that the court erred in allowing into evidence Mernack's testimony concerning defendant's account status for the months after he had written the check and that the admission of Pollner's testimony concerning defendant's failure to return to the store to pay Pollner amounts to reversible plain error.

¶ 18 A reviewing court 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. Collins*, 106 Ill. 2d 237, 261 (1985). On a challenge to the sufficiency of the evidence, " 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The trier of fact is responsible for resolving conflicts in the testimony, weighing the evidence, and determining what inferences to draw, and a reviewing court ordinarily will not substitute its judgment on these matters for that of the trier of fact. *People v. Cooper*, 194 Ill. 2d 419, 431 (2000).

¶ 19 "To carry its burden in a prosecution for deceptive practices, the State must prove beyond a reasonable doubt that: (1) the defendant made, drew, issued or delivered a check, draft or order for payment; (2) the defendant obtained money or property in return; (3) the defendant knew at the time he or she tendered the check that there were insufficient funds in the account to pay the check or draft; and (4) the defendant acted with the intent to defraud." *People v. Butcher*, 257 Ill. App. 3d 1051, 1054-55 (1994).

¶ 20 Under the deceptive practices statute:

> "Failure to have sufficient funds or credit with the depository when the check or other order is issued or delivered, or when such check or other order is presented for payment and dishonored on each of 2 occasions at least 7 days apart, is *prima facie* evidence that the offender *knows that it will not be paid by the depository, and that he has the intent to defraud.*" (Emphasis added.) 720 ILCS 5/17—1(B)(d) (West 2006).

The State may not rely entirely on the statutory inference of intent; rather, the inference is permissible only where there exists evidence to corroborate the inference. *Butcher*, 257 Ill. App. 3d at 1055; *People v. Shepard*, 193 Ill. App. 3d 910, 914 (1990).

¶ 21 We first note that, because defendant's checking account did not have sufficient funds when the check was written to the store, the State made a statutory *prima facie* showing that defendant knew the check would not be paid and that he acted with the intent to defraud. See 720 ILCS 5/17—1(B)(d) (West 2006). Defendant concedes as much in his reply brief; nevertheless, defendant argues that the State failed to put forth the requisite corroborating evidence.

¶ 22 According to defendant, the State failed to present any direct evidence of defendant's knowledge concerning the status of his account. Defendant makes much of the fact that he shared his account jointly with his wife. He maintains that there was no evidence presented concerning who made the Internet withdrawals from his account and whether defendant was aware that they were made. According to defendant, by taking the Internet transactions out of the equation (*i.e.*, if he was unaware that they were made), he would have had no reason to believe that the check he wrote to the store would be returned unpaid, because his starting balance of $925.16 less the amounts of only the checks that he had written left enough money in the account to cover the check to the store. Defendant's argument must fail. Regardless of whether defendant was aware of the Internet transactions when he wrote the check, the testimony presented gave rise to an inference that he had notice of (1) the five bounced checks and (2) the fact that the account had been closed on February 10; thus he was well aware of the status of his account.

¶ 23 Defendant's bank records and Mernack's testimony sufficiently corroborated the *prima facie* showing of knowledge and intent. We find *Shepard* and *People v. Lundblade*, 95 Ill. App. 3d 474

(1981), instructive. In *Shepard*, the defendant was charged with writing three bad checks (from two different banks) to various Kroger stores in November 1987. *Shepard*, 193 Ill. App. 3d at 912. The defendant's checking account records for October, November, and December 1987 were admitted into evidence. *Id.* The records from one bank established that the defendant began writing bad checks around November 2, that seven checks overdrew the account in November, and that four checks were bounced in December. *Id.* The records from the second bank showed that, by the end of November, five overdrawn checks were outstanding and that, by the end of December, another overdrawn check was outstanding. *Id.* at 912-13. The defendant testified that he believed the checks would clear but that a check for an insurance settlement he received had not cleared. *Id.* at 913. On appeal, the defendant argued that there was insufficient evidence that he knew the checks would not be paid and that he intended to defraud the Krogers. *Id.* at 914. The Fourth District found that there were sufficient facts to corroborate the statutory inference, in part because the bank statements showed that the checks in question "[were] not isolated bad checks but part of a series of numerous bad checks passed during that time." *Id.* at 915.

¶ 24 In *Lundblade*, the defendant was charged with writing a bad check to a Goldblatt's store. *Lundblade*, 95 Ill. App. 3d at 475. The defendant testified that the bank had a practice of covering his checks for him. *Id.* at 476. However, there was also testimony from bank employees that the defendant had been warned two months prior to writing the check at issue that they would not longer cover his overdrafts. *Id.* at 477. On appeal, the defendant argued that the State failed to prove his intent to defraud. *Id.* In affirming, the court noted that the defendant's account had been overdrawn for a month and a half prior to his writing the check at issue. *Id.* at 478. The court also noted that "the defendant clearly knew he had insufficient funds at the time he issued the check and there was

substantial proof which negated his claim that he expected to get credit from the bank ***. Moreover, defendant's account had been overdrawn for approximately a month and a half prior to making the check with no deposit to his checking account in that time." *Id.*

¶ 25 Here, defendant's bank statements established that defendant had issued several other bad checks prior to writing the check at issue and that his account was closed when he wrote the check. As in *Shephard* and *Lundblade*, these facts are highly probative of defendant's knowledge of the status of his accounts and intent to defraud the store.

¶ 26 Moreover, the State notes the presence of additional evidence in this case, specifically Mernack's testimony concerning the credit union's practice of sending out notice of bounced checks and closed accounts. We agree that, from this testimony, the jury could reasonably infer that defendant was sent notice. We reject defendant's argument that the fact that the bank usually gives notice does not give rise to an inference that it did so here. Relying on *Wilkey v. Illinois Racing Board*, 65 Ill. App. 3d 534 (1978), defendant maintains that the State's failure to submit copies of the notices sent to defendant gives rise to a presumption that either notice was not sent or, if it was, it was sent after defendant wrote the check at issue. However, unlike in *Wilkey,* which involved the failure of the racing board to test samples that would have decisively established the absence of an illegal drug (*id.* at 539), here there is no evidence suggesting that the State possessed paper copies of the notices sent to defendant but failed to present them. Indeed, the credit union may not have kept copies of the computer-generated notices sent to defendant. In any event, Mernack's testimony established that the credit union's usual practice is to send computer-generated notices to account holders when checks are returned unpaid and when accounts are closed. Mernack testified that notice concerning defendant's account closure would have been sent on February 10, 2006. The

address used by the credit union for defendant was the same address that defendant provided to Pollner when he shipped the salt spreader. Defendant would have this court believe that, notwithstanding the fact that the bank usually sends out notice, it failed to do so here; indeed, not on just one occasion but on several. We decline that invitation.

¶ 27 Defendant next argues that it was error for the court to allow into evidence testimony from Mernack that defendant never deposited money into his account after writing the check to Pollner and testimony from Pollner that defendant never returned to the store to pay him. We note that, although defendant did object to Mernack's testimony, he did not object to Pollner's. Relying on *People v. Bormet*, 142 Ill. App. 3d 422 (1986), defendant argues that this evidence cannot be used to show defendant's intent when the check was issued. As noted, to convict a defendant of deceptive practices, the State must prove that the defendant had the specific intent to defraud when he tendered the check. *Id.* at 426. The intent must be present when the check is issued; "[d]efendant's subsequent actions, therefore, cannot be used as corroborating evidence of his intent to defraud when the check was delivered." *Id.* at 427. In *Bormet*, the court held that a subsequent refusal to pay was insufficient corroborating evidence of the defendant's intent to defraud when he issued the check. *Id.* at 425; see also *People v. Cundiff*, 16 Ill. App. 3d 267, 272 (1973) ("The crime is complete, if it has been committed at all, when the making, delivery, or uttering of the check takes place and it is immaterial whether payment or restitution is subsequently made."). Relying on *Butcher*, the State maintains that the evidence was proper. There the court noted that evidence showing that, while the defendant's check to the seller was outstanding, she deposited money into other bank accounts "could be reasonably interpreted by the [fact finder] as intent to defraud." *Butcher*, 257 Ill. App. 3d at 1056.

¶ 28 We need not determine whether the admission of the complained-of testimony was error, because even assuming *arguendo* that it was, it was not reversible error. First, as to Mernack's testimony, any alleged error was harmless. Under the harmless-error analysis, the test is whether, it is clear beyond a reasonable doubt that, absent the error, a rational jury would have found the defendant guilty. *People v. Thurow*, 203 Ill. 2d 352, 368-69 (2003). Given that defendant's bank records established that defendant's account had been closed in February 2006, the testimony that defendant's balance did not change over the ensuing months is hardly surprising. Thus, absent any alleged error, a rational jury certainly would have found defendant guilty.

¶ 29 As to Pollner's testimony concerning defendant's failure to pay him, defendant concedes that this alleged error was forfeited. *People v. Bennett*, 281 Ill. App. 3d 814, 823 (1996). He invites us to conduct plain-error review. Our supreme court has explained the plain-error rule as follows:

> "[T]he plain-error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence. In the first instance, the defendant must prove 'prejudicial error.' That is, the defendant must show both that there was plain error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him. The State, of course, can respond by arguing that the evidence was not closely balanced, but rather strongly weighted against the defendant. In the second instance, the defendant must prove there was plain error and that the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. [Citation.] Prejudice to the defendant is presumed because of the importance of the right involved, '*regardless* of the

strength of the evidence.' (Emphasis in original.) [Citation.]" *People v. Herron*, 215 Ill. 2d 167, 186–87 (2005).

¶ 30 Defendant cannot establish plain error under the first prong because the evidence is not closely balanced. The State presented far more than sufficient evidence, in the form of the bank records and Mernack's testimony, to corroborate its *prima facie* case.

¶ 31 As to the second prong, defendant has failed to present a persuasive argument that the alleged error " 'was so serious that it affected the fairness of defendant's trial and challenged the integrity of the judicial process.' " *Id.* at 187. The case he relies upon is clearly distinguishable. See *People v. Hope*, 116 Ill. 2d 265 (1986). The issue in *Hope*, a death penalty case, was whether the trial court erred in allowing the State to introduce evidence concerning the family of the deceased at the guilt phase of the defendant's trial. The supreme court did not conduct plain-error review. The court found that the evidence was highly prejudicial and reversed and remanded for a new trial. *Hope* in no way supports defendant's argument that the admission of Pollner's testimony rises to the level of reversible plain error. We thus reject defendant's argument as unsupported. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008).

¶ 32 Lastly, defendant argues that, if we decline to find reversible plain error, we should find that his counsel was ineffective for failing to object to Pollner's testimony. A claim of ineffective assistance of counsel requires a defendant to establish that (1) his attorney's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). Defendant has failed to establish that, but for counsel's alleged error, the result of the proceeding would have been different. Given the abundant

evidence of defendant's guilt, we cannot say that there is a reasonable probability that, but for counsel's failure to object to Pollner's testimony, the result of the proceeding would have been different.

¶ 33 In sum, taking into consideration the *prima facie* evidence of defendant's knowledge that his check would not be paid and his intent to defraud, along with the corroborating evidence of defendant's numerous bounced checks, the overdrawn account, the subsequent closure of the account (almost two weeks prior to his issuance of the check at issue), and the credit union's practice of sending notices of the above, we find that defendant was proved guilty beyond a reasonable doubt of deceptive practices. We further hold that defendant has shown no reversible error in the admission of evidence.

¶ 34 III. CONCLUSION

¶ 35 For the reasons stated, we affirm the judgment of the circuit court of De Kalb County.

¶ 36 Affirmed.

¶ 37 JUSTICE BOWMAN, dissenting.

¶ 38 I respectfully disagree with the majority's conclusion that the State presented sufficient evidence to find defendant guilty of deceptive practices. In my view, the State failed to present sufficient corroborating evidence that defendant knew the check he wrote to the store would not be paid, and that he had the intent to defraud.

¶ 39 As the majority correctly states, the State must prove the following elements, beyond a reasonable doubt, to establish deceptive practices: (1) the defendant made, drew, issued or delivered a check, draft, or order for payment; (2) the defendant obtained money or property in return; (3) the defendant knew at the time he or she tendered the check that there were insufficient funds in the

account to pay the check or draft; and (4) the defendant acted with the intent to defraud. *People v. Butcher*, 257 Ill. App. 3d 1051, 1054-55 (1994). Deceptive practices is a specific intent crime, meaning that the defendant had the specific intent to defraud at the time he or she tendered the dishonored check. *Id.* at 1055.

¶ 40 Though I believe that the State failed to present sufficient corroborating evidence as to the last two elements of knowledge and intent, I acknowledge that because defendant's checking account did not have sufficient funds when the check was written to the store, the State made a *prima facie* showing as to those two elements. See 720 ILCS 5/17—1(B)(d) (West 2006) ("Failure to have sufficient funds or credit with the depository when the check or other order is issued or delivered, or when such check or other order is presented for payment and dishonored on each of 2 occasions at least 7 days apart, is *prima facie* evidence that the offender knows that it will not be paid by the depository, and that he has the intent to defraud").

¶ 41 It is important to remember that this *prima facie* language in the statute does not create either a conclusive or a rebuttable presumption as to these elements. *People v. Bormet*, 142 Ill. App. 3d 422, 427 (1986). Instead, it creates a permissible inference of guilt *if* it is supported by corroborating evidence. *Id.* at 426. In other words, as the majority recognizes, the State may not rely entirely on the statutory inference of knowledge and intent but must bolster that *prima facie* showing with some corroborating evidence. *Butcher*, 257 Ill. App. 3d at 1055; see also *People v. Shepard*, 193 Ill. App. 3d 910, 914 (1990) (these are permissible inferences which may be drawn *only* when there exists evidence to corroborate the inference). It is precisely the State's failure to provide the requisite corroborating evidence, in my opinion, that leads me to the conclusion that the State failed to prove the elements of knowledge and intent beyond a reasonable doubt.

¶ 42 The bank records in this case showed that defendant opened a checking account at a credit union on January 19, 2006. Defendant shared this checking account jointly with his wife. Following some deposits and withdrawals, the balance on February 6 was $925.16. From February 7 through February 9, 11 Internet withdrawals totaling $867.80 were made from the checking account. On February 9, two checks were returned for insufficient funds. On February 10, five more Internet withdrawals totaling $800 were posted to the account. These Internet withdrawals were not paid because the bank closed the account that same day. Also on February 10, a third check was returned unpaid. Then, on February 13 and 14, two additional Internet withdrawals were posted to the account but not paid. Finally, on February 17 and 21, two more checks were returned because the account had been closed. The next day, February 22, gave rise to the instant charge, when defendant wrote a check to a store for $176.10.

¶ 43 Although these bank records show that a series of bad checks were passed during the time frame at issue, defendant points out that there was no evidence presented at trial regarding who made the Internet withdrawals, or whether defendant was aware that they were made. By removing the Internet withdrawals from the equation, defendant argues that he would have had no reason to know that the check he wrote to the store would be returned unpaid, because he would have had sufficient funds on that date to cover the check. The majority resolves defendant's argument by stating that "[r]egardless of whether defendant was aware of the Internet transactions when he wrote the check, the testimony presented gave rise to an inference that he had notice of (1) the five bounced checks and (2) the fact that the account had been closed on February 10," which was 12 days before he wrote the check at issue here. Slip op. at 7. I agree with the majority that such an inference would

constitute the type of corroborating evidence sufficient to establish's guilt. However, I respectfully submit that the State's evidence fell short of allowing this inference.

¶ 44 The pivotal testimony in this regard stemmed from Jody Mernack, a manager at the credit union, who testified that she handled all account records. Mernack identified copies of defendants' bank statements, the substance of which I summarized above. She then went on to testify that the credit union sends notices to a customer when his account has been overdrawn and when the account is closed. Pursuant to its regular business practices, the credit union sends notice of an account closure on the same day that the account is closed. Given that defendant's account was closed on February 10, 2006, Mernack testified that notice would have been mailed to him that day. Despite the State's failure to introduce evidence of these notices that were purportedly sent to defendant, the majority concludes that the bank records and Mernack's *testimony* sufficiently corroborated the *prima facie* showing of knowledge and intent. I disagree.

¶ 45 Mernack's testimony regarding the credit union's practice of sending notice to account holders was speculative at best and did not allow for an inference that defendant received notice of his bounced checks and account closure prior to writing the February 22 check. Her testimony established only that the credit union's *usual* practice was to send computer-generated notices to account holders when a check was returned unpaid and when an account was closed. While the majority reasons that the jury could reasonably infer that defendant was sent notice, this requires the court to base one inference upon another. In other words, it requires the court to infer that notice was actually sent and then infer that notice was received. As defendant points out, though, "[a] reasonable inference within the purview of the law must have a chain of factual evidentiary antecedents. If an alleged inference does not have a chain of factual evidentiary antecedents, then

within the purview of the law it is not a reasonable inference but is instead mere speculation." *People v. Davis*, 278 Ill. App. 3d 532, 540 (1996). In this case, the inference that defendant received notice is not supported by a factual evidentiary antecedent; namely, that notice was mailed. Had the State provided evidence that the credit union's usual mailing practice was followed, then it would be possible to infer that defendant received notice of the bounced checks and account closure prior to writing the check at issue, which would be sufficient to corroborate the statutory inference. But without such evidence, Marnack's testimony as to the usual mailing practice alone was insufficient to corroborate the *prima facie* showing of defendant's knowledge and intent. See *First National Bank of Antioch v. Guerra Construction Co.*, 153 Ill. App. 3d 662, 667 (1987) (evidence of general office practice regarding mailing is insufficient unless accompanied by evidence that the practice was followed in the particular instance in question).

¶ 46 I note that the two cases relied upon by the State, which also involved the issuance of bad checks, contained significantly more corroborating evidence. In *Shepard*, for example, the court upheld the conviction based on the defendant issuing a series of bad checks, *plus* his statement to police that he was robbing Peter to pay Paul, *plus* his "highly suspect" testimony at trial that he was waiting on the proceeds of two insurance checks. *Shepard*, 193 Ill. App. 3d at 915. Then, in *People v. Lundblade*, 95 Ill. App. 3d 474, 477 (1981), the defendant admitted that he did not have sufficient funds when he wrote the check, but he raised the defense that the bank had a history of covering checks when he lacked sufficient funds. The corroborating evidence consisted of a bank employee testifying that the defendant had been warned approximately two months prior to writing the bad check that his overdraft checking account practice must cease. *Id.* at 477. Based on this testimony, the court concluded that there was substantial proof negating the defendant's claim that he expected

to get credit form the bank when he wrote the check. *Id.* at 478. Moreover, in a case with similar facts, *People v. Mitchell*, 50 Ill. App. 3d 120, 122 (1977), the defendant argued that there was no evidence that she knew that there were insufficient funds in her account to cover the check. The court in *Mitchell* rejected that argument because, unlike the case at bar, the evidence showed that prior to the date of the check in question, the bank sent defendant six overdraft notices covering checks in excess of $600. *Id.* at 121-22. Not only was the defendant sent notice by her bank that her account reflected a negative balance, the defendant herself admitted at trial that she knew that there were insufficient funds to cover the check. *Id.* at 122.

¶ 47 As a final matter, the other two pieces of evidence that the State used to corroborate the *prima facie* case were improperly used to show defendant's intent. In particular, testimony from Mernack that defendant never deposited money into his account after writing the check, and testimony from the store owner that defendant never returned to the store to pay him, should not have been considered by the jury as proof as defendant's intent. The majority acknowledges that the intent to defraud must be present at the moment a check is issued, drawn, made, or delivered; therefore, the requisite intent cannot be inferred from defendant's *subsequent* acts. *Bormet*, 142 Ill. App. 3d at 426. In other words, it is immaterial whether payment or restitution is subsequently made. *Id.* Even so, the majority determines that any error regarding Mernack's testimony was harmless, and it fails to find plain error with respect to the store owner's testimony.[1] According to the majority, defendant cannot establish prejudice under the plain-error doctrine because the State "presented far more than sufficient evidence, in the form of the bank records and Mernack's testimony, to

[1]Defendant concedes that he failed to object to the store owner's testimony, and he asks this court to conduct plain-error review.

corroborate its *prima facie* case." I have already explained why Mernack's testimony was not sufficient to allow the inference that defendant received notice of his bounced checks and closed account before writing the February 22 check. Again, had the State introduced evidence that such notice was sent to defendant, I would be inclined to agree that the State presented sufficient evidence to corroborate its *prima facie* case, despite the State's improper use of defendant's subsequent acts to prove intent. But since the State did not present such evidence, the error is compounded when the majority uses the faulty inference to reject defendant's plain error argument.

¶ 48 Excluding the inference relied upon by the majority that defendant received notice, and excluding the improper evidence of defendant's subsequent acts, all that remains in terms of corroborating evidence is the bank records. And the bank records, standing alone, are insufficient corroborating evidence of defendant's guilt. Accordingly, I would reverse defendant's conviction of deceptive practices.