2013 IL App (2d) 120387-U
No. 2-12-0387
Order filed November 7, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 10-CF-0225
CRAIG GUTOWSKY,	)	Honorable Daniel P. Guerin,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices McLaren and Spence concurred in the judgment.

ORDER

¶ 1 *Held:* Because defendant did not suffer prejudice from inaccurate grand jury testimony, dismissal of the indictment was not necessary. Further, the State produced sufficient evidence to find defendant guilty beyond a reasonable doubt of theft by deception. Thus, we affirmed.

¶ 2 Following a bench trial, defendant, Craig Gutowsky, was convicted of theft by deception of more than $10,000, but less than $100,000, in violation of section 16-1(a)(2) of the Criminal Code of 1961 (the Criminal Code) (720 ILCS 5/16-1(a)(2) (West 2010)). The trial court sentenced defendant to one year of periodic imprisonment with work release, 4 years of probation, and $91,000 in restitution. Defendant appeals his conviction, contending that (1) the trial court improperly denied

his motion to dismiss the indictment; and (2) the State failed to prove his guilt beyond a reasonable doubt. We affirm.

¶ 3 I. Background

¶ 4 The record reflects that defendant began investing money with Kevin Carney, who is currently incarcerated after being convicted of operating a Ponzi scheme. Carney claimed to potential investors that he had a computer program that could beat the stock market and promised investors a 20 % monthly return on investment. Christine Hart and Don Swanson, acquaintances of defendant, introduced defendant to Carney; told defendant that Carney would invest only for family and friends; and advised defendant that he could not bring other investors into the investment or he would be cut out. Carney told defendant that he could withdraw money at anytime and that money left in his account after one month would roll over to the next month. Defendant invested with Carney, and Carney gave defendant money whenever defendant requested.

¶ 5 Thereafter, defendant brought his friends, Eli Shereshovech III and Paul Nikolaou, into the investment with Carney. Paul also brought his father, Chris Nikolaou, to defendant to invest money. Defendant told Shereshovech and the Nikolaous that he would account for their investments through his account with Carney. Defendant ultimately invested $90,000 with Carney and withdrew $165,000 from Carney. When authorities discovered Carney's scheme, defendant's account balance totaled $246,913.80. Defendant had also created a company named CMG for the purpose of investing money with Carney.

¶ 6 A grand jury returned an indictment charging defendant with theft by deception. During the grand jury proceedings, Gregory Baiocchi, an investigator with the Illinois Attorney General's office, testified. Baiocchi testified that 465 people had invested money with Carney and that 330 investors lost money. Baiocchi testified that, as part of his investigation, he interviewed Shereshovech and

the Nikolaous, and testified that defendant had "perpetrated his own fraud scheme" upon those individuals. Baiocchi testified that defendant had discussed with Shereshovech and the Nikolaous that they could make an investment through defendant into another investment program and that they would get a 10% monthly return on that investment. The following colloquy occurred:

> "MR. SNOW [Assistant Attorney General]: And from your investigation, you're aware that [defendant] never invested money from [Shereshovech and the Nikolaous] with [Carney]?
>
> A. Yes.
>
> Q. So then [defendant] would be aware that he was not getting any kind of return for [Carney] to pay [defendant's] investors.
>
> A. Correct."

Baiocchi testified that defendant had promised them that the investment program had a proven record of performance and that it was a financially sound investment. Baiocchi testified that defendant was not registered with the Illinois Secretary of State. Baiocchi testified that Shereshovech wrote defendant checks on three separate occasions and also made cash deposits for defendant to invest with Carney. The following colloquy occurred:

> "Q: [Defendant] [e]xplained to [Shereshovech and the Nikolaous] but without telling them the truth of the fact there was no investment, they were not realizing any gain, and that, in some instances, [defendant] used the money for personal purposes?
>
> A. Yes."

Baiocchi testified that defendant had received over $100,000 from Shereshovech and the Nikolaous and that defendant never returned any money to them.

¶ 7 On March 8, 2011, defendant filed a motion to dismiss the indictment with prejudice. Defendant argued that Baiocchi's testimony that defendant never invested money with Carney and that defendant never gave money back to Shereshovech or the Nikolaous was misleading. According to defendant, there would not have been probable cause to indict if the grand jury had been properly advised that defendant had invested with Carney and that defendant had returned some money to his alleged victims. On May 3, 2011, the trial court denied defendant's motion.

¶ 8 A bench trial commenced on November 21, 2011. William Harmening, chief special agent with the Illinois Securities Department, testified first on the State's behalf. Harmening testified that he received information that Carney was taking money from investors to reinvest in a pool investment and promised a 20% monthly return, which compounded would return in excess of 700% annualized. Harmening testified that Carney was operating a Ponzi scheme and that any investor who received less than his or her principal investment back was considered a victim; out of 460 investors, 321 were victims. Harmening testified regarding defendant's account with Carney, which was account number 159. Harmening testified that defendant wrote a check for $4,000 and made a $4,500 cash deposit with Carney on September 1, 2007, and wrote Carney an additional $20,000 check on November 1, 2007. Harmening testified that, on September 2, 2008, Carney made a check payable to CMG Consulting for $10,000. Harmening testified that defendant had deposited $83,900 with Carney and received $165,000 in withdrawals from Carney.

¶ 9 The State next called John D'Andgelis, an accountant who had performed accounting services to defendant. D'Andgelis testified that defendant was the principal of CMG Consulting. D'Andgelis helped defendant set up a company called Nick's Game Room by looking for retail space and applying for a loan through the Small Business Association.

¶ 10 Shereshovech testified next on the State's behalf. Shereshovech testified that he had known defendant since high school. Shereshovech testified that he was a mortgage broker and that defendant had approached him about refinancing his mortgage. During that process, defendant told Shereshovech that he had a new source of income from being a broker and that he was retiring from being a truck driver. Defendant told Shereshovech that he had an investment that guaranteed a 10% return. Shereshovech testified that he had asked defendant if he could make that type of investment. Defendant originally said "no" because it would have angered the other investors, who defendant described as "millionaires." Shereshovech testified that he had several more conversations with defendant, and defendant eventually agreed to let him in on the investment. Shereshovech testified that he gave defendant a check for $8,000 and that he expected that defendant would deposit that check into a "fund," which defendant had described to him as "a private equity fund that took a substantial amount of money to get the type of return." Shereshovech testified that he wrote defendant three checks totaling $34,000 and also gave defendant cash to invest. Shereshovech testified that his investments with defendant totaled approximately $87,000. Shereshovech testified that, in 2008, defendant had invited him on a golf trip to California and Nevada. During a flight, defendant handed him approximately $3,400 in cash, which would have been approximately 10% of what Shereshovech had originally invested. Shereshovech testified that he believed that payment was a return payment on his investment.

¶ 11 During cross-examination, Shereshovech admitted that he collected unemployment compensation during the time he was investing with defendant. Shereshovech denied that, in August 2008, defendant had given him $7,000 in cash at the Union Grove Speedway. Shereshovech purchased a truck from defendant that was valued at approximately $10,000 to $12,000.

¶ 12 Shereshovech's father, Eli Shereshovech, Jr. (Eli), testified on the State's behalf. Eli testified that the checks Shereshovech wrote to defendant were from his checking account. Eli did not recognize the signatures on the checks written by Shereshovech and his son did not have permission to write checks from Eli's account.

¶ 13 Chris Nikolaou testified next on the State's behalf. Chris testified that he lived in Addison and had worked in the fast food industry as an operator and owner for the past 40 years. Chris testified that he had a home equity line of credit through Chase Bank. Using that line of credit, Chris wrote checks for $10,000, $30,000, and $50,000 to invest with defendant. Chris testified that he intended to invest approximately $100,000 with defendant. Chris testified that defendant told him that the return on his investment would be 10% per month. Chris testified that defendant "assure[d] me that the money is not going to be lost." Chris testified that he never received a return on his investment from defendant. Chris testified that he and Paul subsequently met with defendant. Defendant had promised them an additional 6% return, on top of a 6% return they expected to receive from the State, "[s]o we wouldn't call the police." Chris testified that he never received a 6% return. During cross-examination, Chris acknowledged that defendant "felt bad about this whole thing." Chris further acknowledged that defendant never told him to take the additional 6% return in exchange for not calling the police, but that was Chris's understanding.

¶ 14 Paul testified that he had known defendant for more than 10 years. While meeting for lunch during the spring of 2008, defendant told Paul that he was in an investment earning a 10% monthly return. Paul withdrew $5,000 from his retirement account and sold his motorcycle to defendant for $5,000 and gave that money to defendant to invest. Paul testified that he went with defendant to Indianapolis during the summer of 2008. To pay for the trip, and at defendant's suggestion, Paul withdrew $1,000 from his investment account with defendant. Defendant also loaned him an

additional $500. Paul testified that he brought Chris into the investment, and Chris gave defendant $36,000 to invest in August 2008. Paul testified that Chris gave defendant an additional $45,000 to invest in September 2008. Paul testified that, other than the $1,000 he had received for the trip to Indianapolis, neither he nor his father received any return on their investments with defendant.

¶ 15 Paul testified that he spoke with defendant during the winter of 2009, after Carney's assets had been seized. Paul told defendant that Harmening had contacted him. Defendant told Paul to tell Harmening that the expected return was 20%; however, defendant had never mentioned a 20% return to Paul before that conversation. Paul testified that defendant later apologized and that he never intended for Paul to lose money. Paul testified that defendant offered to match the six cents per dollar that Paul and Chris expected to receive from the State. Paul testified that defendant never informed him that defendant was not licensed to sell securities or that defendant was offering him a chance to purchase an investment defendant had already made.

¶ 16 David Head testified that he invested money with Carney. Head testified that he saw defendant at several social events in early 2008, including at defendant's house and at a country club to which Head belonged. Head testified that he observed defendant in possession of many items, including a Mercedes, a Rolex watch, and a motorcycle. Head testified that he and defendant had played golf at Blackhawk Country Club in St. Charles. After the round of golf, defendant told Head that he needed to "pick up some money"; defendant left, and returned about an hour later. At a card game later that evening, defendant retrieved a brown bag and dropped approximately $50,000 in cash on the table. The State rested after Head's testimony. Thereafter, the trial court denied defendant's motion for a directed finding.

¶ 17 Tim Adams, a magician from Naperville, testified on defendant's behalf. Adams testified that he invested nearly $65,000 with Carney and that he received nearly $18,000 in return on his investment. Adams believed that Carney was providing a legitimate investment opportunity.

¶ 18 Brian Rowe testified that he had known defendant for approximately 13 years. Rowe testified that he was at the Union Grove Speedway with defendant and Shereshovech in the summer of 2008. Rowe testified that, while in defendant's trailer, he noticed an envelope and that "there was a good deal of money scattered out there." The back of the envelope had "Eli" written on it and had a designation of $7,000. Rowe testified that, later on, defendant handed a white envelope to Shereshovech, which Rowe believed was the same envelope that he had seen earlier.

¶ 19 Defendant next called Paul Kosielniak. Kosielniak testified that he had invested with Carney, who told Kosielniak that his investment was a "[100%] guarantee." Kosielniak testified that he had invested $20,000 with Carney and that he expected a 20% return. Kosielniak testified that he also introduced his mother to Carney, and she subsequently invested $50,000 with him.

¶ 20 Defendant testified on his own behalf. Defendant testified that he has a wife and two children, ages 11 and 7. Defendant testified that the highest level of education that he received was a high school diploma. Defendant had worked at USF Holland as a truck driver for approximately 11 years. Defendant testified that, while out to dinner with Swanson and Hart in 2007, Swanson had shown defendant blue prints for a 12,000 square foot house that Swanson was building. When defendant inquired how Swanson, who worked with defendant as a truck driver, could afford to build that type of house, Swanson replied that he would be "a millionaire in two years." Defendant also noticed that Swanson had purchased a new Ford truck valued at approximately $60,000. At a subsequent dinner, Hart told defendant that she was involved with an investment program that was making her a lot of money and asked defendant if he would like to get involved. Swanson told

defendant that he also was making a lot of money by investing with Carney and that Carney had already made millions in the stock market.

¶ 21 Defendant testified that he eventually met with Carney at Carney's home in Elk Grove Village. Carney told defendant that he had designed web technology that gave him three seconds notice of information prior to that information reaching other investors. Defendant testified that he decided to invest with Carney and that Carney told him that he would run his investment for only five years and only for family and friends. Carney told defendant that he would make a 20% monthly return on his investment and that defendant would not be allowed to bring other investors into the investment. Carney told defendant that defendant could take his money out at any time.

¶ 22 Defendant first invested $8,500 with Carney on September 1, 2007. Defendant continued to invest with Carney and on December 1, 2007, gave him an additional $28,000; that amount included $17,000 that defendant had obtained from Shereshovech. Defendant testified that he believed his account with Carney totaled $103,468.58 by January 2, 2008 and that he was "trying to sell every asset I had, everything I could to get money in with [Carney]." Defendant testified that he quit his job with USF Holland in September 2008 because he wanted to start his own business. Defendant testified that, while investing with Carney, he purchased a Mercedes with a $1,000 down payment and had a $52,000 outstanding balance; a motorcycle; a trailer; and rented an industrial building to store the trailer.

¶ 23 Defendant testified that he and Shereshovech had been friends since high school. Defendant testified that in late 2007, he told Shereshovech about his investments with Carney and offered Shereshovech a chance to invest with Carney through defendant's account. Defendant testified that he never told Shereshovech that he was a trader or that he sold securities and that Shereshovech knew that defendant was a truck driver. Defendant testified that Shereshovech first gave him money

to invest with Carney in November 2007 and that Shereshovech gave him money to invest "roughly four different times." Defendant testified that he paid Shereshovech "anytime he requested it" and that he paid Shereshovech approximately $64,000 while defendant was investing Shereshovech's money. Defendant testified that he transferred a Chevy Silverado to Shereshovech, who agreed to pay defendant out of his monthly profits; defendant denied that Shereshovech wrote him a check for the truck. Defendant admitted that he gave Shereshovech $7,000 in cash at the Union Grove Speedway in October 2008. Defendant testified that he would either deposit money that Shereshovech gave him into his personal bank account and that he accounted for Shereshovech's money in his account with Carney; or he would directly deposit Shereshovech's money with Carney. Defendant testified that he never intended to keep the money that Shereshovech gave him for himself.

¶ 24 Defendant testified that Paul had been his friend for 10 to 15 years. Defendant testified that Paul had told him that he had been having financial problems. Defendant explained to Paul that he had an investment opportunity and wanted to help Paul. Defendant testified that Paul gave him $5,000 in April or May 2008 and that Paul's money would be accounted for in defendant's account with Carney. Defendant testified that, on May 31, 2008, his earnings statement from Carney reflected $34,051.46. Defendant withdrew $28,000 and used the approximately $6,000 difference to bring Paul in to the investment through defendant's earnings. In June 2008, defendant left in excess of $5,000 in his account with Carney to cover a bike that Paul had given defendant to invest. Defendant testified that, in August 2008, Paul agreed to use $1,000 in earnings to take a weekend trip to Indianapolis.

¶ 25 Defendant testified that Paul asked him if he could give defendant money to invest on behalf of Chris. Defendant testified that he met with Paul and Chris in August 2008 and explained to Chris

that if he wanted to be part of the investment, Chris's money would have to be under defendant's account and that $100,000 was the most defendant could invest on Paul and Chris's behalf. Defendant testified that Paul and Chris wanted to give him either $100,000 or $80,000 all at once, but defendant refused to take it.

¶ 26 Defendant testified that his account balance with Carney was $239,913.80 on October 1, 2008. Defendant testified that he first learned that Carney's accounts had been frozen after receiving a phone call from Swanson while defendant was in California. Defendant believed that his account with Carney had in excess of $240,000 at that time. Defendant spoke with Carney, and Carney advised that his accounts had been temporarily frozen, but defendant believed that he would get his money back. When defendant realized that Carney's investments were not legitimate, he offered to reimburse the Nikolaous six cents on the dollar and the ten percent that he had earned from them. Defendant testified that he felt "bad" about what happened and that he never intended to steal the Nikolaous's money. Defendant testified that he wanted to open Play N' Trade stores and have Paul and Shereshovech each manage a store. Defendant traveled to California to attend a franchise seminar and had invested $50,000 in starting his business. Defendant denied throwing $50,000 in cash on a table during a poker game with Head, although he acknowledged bringing about $40,000 with him to the poker game. Defendant testified that he could not recall where he got the $40,000. Defendant testified that he sold his Mercedes, the motorcycles, and the trailer. Defendant rested after testifying.

¶ 27 The State called Edward Margolis in rebuttal. Margolis testified that he represented defendant in a federal bankruptcy proceeding involving Carney. Margolis testified that the bankruptcy trustee filed an adversary complaint against defendant seeking to collect money from him to redistribute to Carney's other victims.

¶ 28 Hart testified next during rebuttal. Hart testified that, in 2007, she and Swanson told defendant that they met an investor and defendant could earn a 20% return if he was interested. Hart told defendant that the investor would invest only for family and friends and would allow only a certain number of people to invest. Hart testified that she never told defendant that, if he brought other investors in, Carney would remove him from the investment or that Carney would exclude people from the investment. During cross-examination, Hart acknowledged that she brought more than five other people into Carney's investment.

¶ 29 The trial court found defendant guilty of theft by deception of an amount over $10,000. The trial court concluded that Carney ran a Ponzi scheme and that his promised 20% return per month was fictitious. Defendant began to invest with Carney, but there was no evidence that defendant knew that Carney was operating a fraudulent fund. The trial court concluded that the transaction between defendant and Shereshovech was "unprofessional, sloppy, at times naive." However, because the trial court questioned Shereshovech's credibility, it was unable to conclude beyond a reasonable doubt that defendant intended to permanently deprive Shereshovech of his money. Regarding the Nikolaous, the trial court concluded that, unlike with Shereshovech's money, defendant never attempted to keep track of their money with a ledger or an accounting. The trial court found Chris to be an "extremely believable, straightforward witness" and noted Head's testimony regarding defendant dropping a large sum of money on a table during a poker game. The trial court concluded that defendant's testimony that he brought $40,000 to a poker game without remembering where he got that money to be "unbelievable"; defendant's demeanor at that point "was different and it struck [the trial court] as an attempt to cover up or evade what was going with the [Nikolaous's] money"; and that defendant's handling of the Nikolaous's money was more than mere recklessness. The trial court concluded that defendant's behavior was "strong circumstantial

evidence" that defendant was taking the Nikolaous's money and spending it "like on poker games." The trial court emphasized that defendant never returned Paul's motorcyle, even after Carney's assets had been frozen, and that went to defendant's intent to deprive Paul of his investment. The trial court further noted that defendant offered the Nikolaous 6% above what the State was going to return on Carney's Ponzi scheme; defendant told Paul to lie to investigators by informing them that the return on the investment would be 20% as opposed to 10%; and defendant only returned approximately $1,000 to Paul. The trial court concluded that defendant committed theft on the payments from the Nikolaous to defendant "[a]nd at the very least, the $5,000 from Paul." Defendant timely appealed.

¶ 30 II. Discussion

¶ 31 A. Grand Jury

¶ 32 Defendant first contends that the indictment charging him with theft by deception was based on misleading and false evidence, and therefore, the trial court erred by denying his motion to dismiss the indictment. Defendant notes that Baiocchi inaccurately testified that defendant never invested money with Carney or paid money back to Shereshovech or the Nikolaous. Defendant argues that he suffered prejudice from Baiocchi's inaccurate testimony because the grand jury would not have returned an indictment had the State provided truthful, accurate, and complete information about the alleged illegal conduct.

¶ 33 A grand jury determines whether probable cause exists that an individual has committed a crime. *People v. DiVincenzo*, 183 Ill. 2d 239, 254 (1998). The State's Attorney's office serves as an advisor to the grand jury, informing it of proposed charges and pertinent law. *Id.* While a defendant generally may not challenge an indictment returned by a legally constituted grand jury, a defendant may challenge an indictment procured through prosecutorial misconduct. *People v.*

LeGore, 2013 IL App (2d) 111038, ¶ 23. To warrant dismissal of an indictment, prosecutorial misconduct must constitute a deprivation of due process or a miscarriage of justice, and a defendant's due process rights "may be violated if the prosecutor deliberately or intentionally misleads the grand jury, uses known perjured or false testimony, or presents other deceptive or inaccurate evidence." *DiVincenzo*, 183 Ill. 2d at 257. Thus, to permit the dismissal of an indictment, the denial of due process must be "unequivocally clear," and the prejudice must be "actual and substantial." *People v. Oliver*, 368 Ill. App. 3d 690, 694-95 (2006). Prosecutorial misconduct is "actually and substantially prejudicial" only if, without it, the grand jury would not have returned an indictment. *Id.* at 696-97. Where, as here, the facts about what transpired at the grand jury proceeding are undisputed, we apply a *de novo* standard of review. *LeGore*, 2013 IL App (2d) 111038, ¶ 23.

¶ 34 In *People v. Holmes*, 397 Ill. App. 3d 737 (2010), the defendant argued that he was denied the effective assistance of counsel because his trial counsel did not seek dismissal of a grand jury indictment, which according to him, the State procured through false testimony from a police officer. *Id.* at 741-42. In rejecting the defendant's assertion that he was denied the effective assistance of counsel, the court in *Holmes* noted that many of the discrepancies in the officer's testimony were "relatively minor details that could not have affected the grand jury's deliberations or determination of probable cause." *Id.* at 742. Specifically, the court noted that the officer testified before the grand jury that the arresting officer was on foot patrol when that officer first saw the defendant, the defendant tripped, and the defendant "threw a bunch of 'baggies' to the ground." *Id.* However, the arresting officer testified at trial that he was in his patrol car when he witnessed the defendant begin to run; and the defendant reached into his pockets, removed "shiny objects," which the defendant threw as he fell to the ground. *Id.* The court in *Holmes* concluded that these discrepancies "were

immaterial and not prejudicial," and noted that false grand jury testimony did not warrant dismissing the indictment where a truthful answer would not have substantially influenced the grand jury's decision. *Id.* at 743 (citing *People v. Mattis*, 367 Ill. App. 3d 432, 437 (2006)). The court in *Holmes* further noted that "[t]he most significant discrepancy" was the officer's testimony before the grand jury that the cocaine that the defendant possessed weighed approximately 4.7 grams, while the parties agreed at trial that the cocaine weighed approximately 2.7 grams. *Holmes*, 397 Ill. App. 3d at 743. The reviewing court concluded that while this discrepancy "arguably made [the] defendant's conduct seem more serious to the grand jury, the difference in weight did not affect the degree of the offense with which the defendant was charged and of which he was ultimately convicted." *Id.*

¶ 35 We find the reasoning in *Holmes* instructive to this case. Here, we recognize that Baiocchi's testimony that defendant never invested Shereshovech's or the Nikolaous's money with Carney and that defendant never returned money back to them arguably made his conduct seem more serious to the grand jury. However, as the State notes, while defendant did return nominal amounts, he never returned the principle investment given to him by Shereshovech or the Nikolaous, which totaled more than $100,000; and defendant did not pay Chris any return on his principle investment of more than $81,000. Baiocchi's testimony that defendant never returned nominal amounts to Shereshovech or to Paul, where Shereshovech and the Nikolaous gave defendant in excess of $100,000 to invest, did not affect the crime with which defendant was charged or ultimately convicted. See *id.*

¶ 36 Similarly, Baiocchi's testimony that defendant never deposited Shereshovech's money into his Carney account does not compel us to dismiss the grand jury's indictment. Although defendant deposited $10,000 that Shereshovech gave him into his account with Carney, Shereshovech testified that he gave defendant nearly $87,000. The record does not reflect that defendant ever deposited the remaining $77,000 that Shereshovech gave him into Carney's account. Thus, we believe that this

discrepancy was immaterial and not prejudicial. See *Mattis*, 367 Ill. App. 3d at 437 (concluding that a "relatively small" discrepancy did not materially prejudice the defendant).

¶ 37 B. Sufficiency of the Evidence

¶ 38 Defendant next contends that the State failed to prove him guilty of theft by deception beyond a reasonable doubt. Defendant argues that he should not have been found guilty because he failed to keep track of the Nikolaous's money in the same way that he kept track of Shereshovech's money. According to defendant, "[t]hat he was irresponsible in how he accounted for the money he received from Shereshovech and the Nikolaous does not make him guilty of stealing their money by deception."

¶ 39 When reviewing a challenge to the sufficiency of the evidence in a criminal proceeding, 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.) *Jackson v. Virginia,* 443 U.S. 307, 318-19 (1979). Reviewing courts apply this standard of review regardless of whether the evidence is direct or circumstantial, or whether the defendant received a bench or a jury trial. *People v. Norris*, 399 Ill. App. 3d 525, 531 (2010). Further, circumstantial evidence meeting this standard is sufficient to sustain a criminal conviction. *Id.* In applying this standard of review, a reviewing court is not permitted to substitute its judgment for that of the fact finder on questions involving the weight of the evidence or the credibility of the witnesses. *People v. Sutherland*, 155 Ill. 2d 1, 17 (1992). Accordingly, when considering a sufficiency of the evidence challenge, we will not retry the defendant and will not reverse a conviction " 'unless the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of [the] defendant's guilt.' " *People v. Hires*, 396 Ill. App. 3d 315, 318 (2009) (quoting *People v. Collins*, 214 Ill. 2d 206, 217 (2005)).

¶ 40 A defendant commits theft by deception when he " 'knowingly *** obtains by deception control over property of the owner' " and " '[i]ntends to deprive the owner permanently of the use or benefit of the property.' " *People v. Kotlarz*, 193 Ill. 2d 272, 299 (2000) (quoting 720 ILCS 5/16-1(a)(2)(A) (West 1992)). To convict a defendant of theft by deception, the State must prove (1) the victim was induced to part with money; (2) the transfer of money was based on the deception; (3) defendant intended to permanently deprive the victim of the money; and (4) defendant acted with the specific intent to defraud the victim. *Kotlarz*, 193 Ill. 2d at 299. "A trier of fact may infer intent to defraud from the facts and circumstances surrounding the transaction." *People v. McManus*, 197 Ill. App. 3d 1085, 1096 (1990).

¶ 41 In this case, a rational trier of fact could have concluded that defendant intended to defraud the Nikolaous. As the trial court noted, defendant did not attempt to keep track of the Nikolaous's money after assuring them that their money would be invested with Carney. At the same time, defendant purchased various items, including a Mercedes, motorcycles, and a trailer; and also admitted to bringing $40,000 in cash to a poker game while not being able to recall how that money came into his possession. Further, according to Paul's testimony, defendant told him to advise Harmening that Paul's expected return would be 20% even though defendant had told Paul that the expected return would be 10%. That defendant asked Paul to misrepresent to Harmening the promised rate of return "implies that defendant knew his actions were not entirely above board." See *People v. Moran*, 260 Ill. App. 3d 154, 161 (1994). Finally, the trial court, as the trier of fact, found defendant's testimony regarding the $40,000 that defendant brought to the poker game to be "unbelievable." We are not permitted to substitute our judgment for that of the fact finder with respect to the credibility of witnesses. See *Sutherland*, 155 Ill. 2d at 17.

¶ 42 In sum, defendant asks us to reweigh the evidence and speculate as to other possible conclusions that the evidence could have supported. However, we conclude that a rational trier of fact could have found that the State produced sufficient evidence that defendant intended to deprive the Nikolaous of their money. See *McManus*, 197 Ill. App. 3d at 1098-99.

¶ 43 III. Conclusion

¶ 44 For the foregoing reasons, we affirm the judgment of the circuit court of Du Page County.

¶ 45 Affirmed.