2013 IL App (2d) 120442-U
No. 2-12-0442
Order filed December 26, 2013

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. CHRISTOPHER STOLLER, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 08-CF-1041 Honorable Daniel B. Shanes, Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices Birkett and Spence concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant failed to establish that aspects of trial counsel's performance were either deficient or prejudicial. Accordingly, defendant is not entitled to a new trial based on ineffective assistance of counsel and the judgment of the trial court would be affirmed.

¶ 2 Following a jury trial in the circuit court of Lake County, defendant, Christopher Stoller, was found guilty of theft of property exceeding $100,000 in value (720 ILCS 5/16-1(a)(1)(A), (b)(6) (West 2008)) and sentenced to eight years' imprisonment. On appeal, defendant argues that, for

various reasons, he was denied the effective assistance of counsel and is therefore entitled to a new trial. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On October 21, 2009, the State charged the 62-year old defendant by indictment with one count of theft, alleging he intended to permanently deprive his daughter, Janine Mazzocco, of property having a total value in excess of $100,000. See 720 ILCS 5/16-1(a)(1)(A), (b)(6) (West 2008). At the time of his arrest, defendant was living in Scottsdale, Arizona. Prior to residing in Arizona, defendant lived in Illinois, where he started a real-estate holding company by the name of Willow Industries, Inc. (Willow). Willow owned a 13-lot subdivision in Barrington, Illinois, known as the Damien subdivision.

¶ 5 In 2008, Willow sold the Damien subdivision to a corporate buyer for $1.8 million. Two of defendant's sons, Max and David Stoller, subsequently sued defendant in civil court, claiming an ownership interest in some of the proceeds of the sale. The sale proceeds were placed in a trust account, with attorney Donald Morrison serving as trustee. At some point during the civil proceedings, the judge ordered a disbursement of some of the sale proceeds to three non-parties, including Mazzocco, who lived in Lake in the Hills, Illinois. Defendant came into possession of the disbursement check sent to Mazzocco and deposited it into a bank account in Willow's name. The back of the check deposited by defendant bore two endorsements, one from "Jeanine Mazzocco" and the other from defendant. The State's theory of the case was that defendant had forged Mazzocco's signature on the check, intending to permanently deprive her of the money to which she was entitled pursuant to the civil court's disbursement order.

¶ 6 A. Pre-Trial

¶ 7 On March 19, 2010, at defendant's arraignment, the State filed a discovery motion requesting handwriting exemplars from defendant. According to the State, the exemplars would prove that defendant falsely endorsed Mazzocco's name on the check. A hearing on the State's motion was scheduled for May 4, 2010. At the May 4 hearing, Robert Ritacca, defendant's attorney, indicated that the defense would "agree that [defendant] signed the endorsement on the check," explaining that defendant "is going to state that he signed the check and placed the check into the bank." The court asked the parties to reduce the exact stipulation to writing.

¶ 8 On May 17, 2010, Ritacca addressed the stipulation mentioned on May 4, stating, "we were going to agree to the stipulation in terms of the handwriting." Ritacca explained that the State would "prepare a stipulated agreement indicating that [defendant] signed his daughter's check as an endorser on a check that was deposited in an Arizona bank," and that "hopefully" he could sign the stipulation that day.

¶ 9 On June 3, Ritacca filed a speedy trial demand. At a hearing on July 6, 2010, the State said, "Judge, there is a stipulation that I provided to Mr. Ritacca that hasn't been executed yet that would need to be before we can answer ready for trial." Ritacca responded, "We will sign the stipulation saying that–indicating that [defendant] deposited a check in the Arizona Bank." Also at the hearing on July 6, the State notified the court that defendant's brother, Leo Stoller, had filed a motion in probate court alleging that defendant was incompetent, and that Leo was seeking to be appointed guardian of defendant's affairs. Ritacca indicated he was not concerned about defendant's fitness. The court reviewed the file from the probate court and questioned defendant. At Ritacca's request, the court then continued the case for a Rule 402 conference.

¶ 10 On the next court date, July 9, 2010, Ritacca indicated it would be in defendant's best interest to have a fitness examination. On July 26, 2010, Dr. Karen Chantry filed the results of her examination of defendant, in which she concluded that defendant was unfit to stand trial. On August 6, 2010, Ritacca argued that defendant was fit. However, based on Dr. Chantry's report, its observations of defendant, and recent changed in defendant's demeanor, the court found a *bona fide* doubt of defendant's fitness. On August 17, 2010, the parties stipulated to the contents of Dr. Chantry's report, and the court found that defendant was unfit to stand trial. On February 9, 2011, following a hearing, the court found that defendant was restored to fitness.

¶ 11 On April 4, 2011, the court accepted defendant's signed jury waiver and the parties proceeded to a bench trial on stipulated evidence. During the State's opening argument, the prosecutor asserted that the parties had stipulated that defendant had signed both his name and Mazzocco's name on the disbursement check payable to Mazzocco. Ritacca objected, arguing that defendant had only signed his own name on the check. The court continued the case to give the State an opportunity to review the transcripts regarding the stipulation.

¶ 12 On April 6, 2011, after the parties reviewed transcripts of prior proceedings, Ritacca asserted that it had always been his position that defendant endorsed only his own name on the check. The State responded that it had given Ritacca a written stipulation more than 10 months earlier, stating that defendant had signed both his and Mazzocco's names on the check. The State observed that after Ritacca received the written stipulation, he told the court he would sign it. Because the parties could not agree on a stipulation, the court ordered defendant to comply with the State's request for handwriting exemplars.

¶ 13 On May 5, 2011, the State argued that defendant did not comply with the request for exemplars. The State asserted that defendant filled out the exemplar packet with "squiggly lines." Ritacca argued that the "squiggly lines" were defendant's handwriting, noting that defendant was on psychotropic drugs. The court gave Ritacca the option of having defendant re-submit handwriting exemplars, or allowing the trier of fact to consider defendant's failure to comply with the exemplars as consciousness of guilt. Ritacca voiced a preference for the latter option. He then indicated that defendant had only waived his right to a jury because he expected to be proceeding at a bench trial on stipulated evidence. Defendant now wanted a jury trial. On May 10, 2011, the court allowed defendant to reinstate his right to a trial by jury.

¶ 14 On May 11, 2011, the court held a hearing on a defense motion to bar the testimony of Morrison, who previously represented both defendant as an individual and Willow. At the hearing, the State argued that it expected Morrison's testimony at trial to be consistent with his grand jury testimony. Morrison would testify that he filed an agreed motion for disbursement, received an e-mail with Mazzocco's purported address, sent a letter and check to Mazzocco pursuant to the court's order, subsequently discovered that the check did not arrive, and conducted an investigation. During this time, Morrison was only representing Willow and acting as a trustee of the proceeds of the sale of the Damien subdivision. He had withdrawn as counsel for defendant and would not testify to statements made by defendant when he represented him.

¶ 15 The State noted that Morrison had refused to answer two questions at the grand jury hearing, after invoking the attorney-client privilege. The State requested an *in camera* inspection of the privileged answers to determine if they fell within the crime-fraud exception. The court barred the State from introducing statements made by defendant to Morrison in its case-in-chief, finding that

defendant was in the control group at Willow, and that Morrison therefore owed defendant a duty of confidentiality for the time he represented Willow in addition to when he represented defendant individually. The crime-fraud exception was inapplicable. Morrison would be permitted to testify about the chronology of events leading to the civil court's order to disburse proceeds to Mazzocco. The court warned Ritacca that he could waive defendant's attorney-client privilege at any time, even implicitly, by asserting a defense that put the privileged communications at issue.

¶ 16 B. Trial

¶ 17 On May 17, 2011, following jury selection, defendant's trial commenced. During his opening statement, Ritacca asserted that defendant was a real-estate developer who bought the Damien subdivision, which sat undeveloped for 25 years. At some time, defendant put the property in a trust, designating his children as the beneficiaries. Defendant's children did nothing to develop the property, but eventually received portions of their interest in the lots. Defendant found a corporate buyer for the lots in 2006, and his children, including Mazzocco, quitclaimed their interests in the lots back to Willow to facilitate the sale of the property. Because Mazzocco had relinquished her interest in the property, she was not entitled to any of the proceeds of the sale. Further, defendant never authorized a disbursement to Mazzocco. The disbursement order was a mistake because the trustee of the proceeds had no authority or permission to transfer any of the proceeds from the trust account. Ritacca additionally posited that defendant had no intent to "steal" from his children.

¶ 18 The State's first witness was Morrison. Morrison explained that he represented defendant and Willow in a civil suit initiated by defendant's sons, Max and David. The suit arose when a corporate buyer offered to purchase the Damien subdivision from Willow for $1.8 million, and Max and David sought to block the sale, asserting an ownership interest in the property. Morrison

testified that $1.8 million was a good price for the property, and would benefit any potential owner. After negotiations, the parties agreed to allow the sale to go forward and to place the proceeds of the sale into an interest-bearing trust account while they disputed ownership. Morrison deposited the money into an account at First Midwest Bank in Waukegan, Illinois. The account was entitled "Willow, Industries." The civil court judge subsequently appointed Morrison as trustee of the account and issued an order prohibiting withdrawal of funds from the account absent court authorization.

¶ 19 In February 2008, Morrison was only representing Willow. A different attorney represented defendant. Morrison and defendant's new attorney researched the history of title to the Damien subdivision and concluded that three non-parties, including Mazzocco, were entitled to part of the proceeds under the Uniform Gift to Minors Act. Morrison drafted a motion, which was subsequently joined by defendant's attorney and counsel for Max and David. The agreed motion asked the court to order the disbursement of some of the proceeds to the three non-parties. The State sought to admit a copy of the agreed motion, and Ritacca objected, arguing that he had never seen the agreed motion, that the motion was incomplete, and that defendant did not agree to the disbursement.

¶ 20 The State identified the page number of the motion in the discovery documents it had tendered to counsel over a year ago, and argued that the agreed motion was relevant to rebut Ritacca's argument that defendant did not agree to the disbursement, and that there was no basis for the disbursement order. The court addressed the attorneys as follows:

> "Let me tell both parties one thing. What we're not doing in this case is trying a civil case. That's going to be tried in civil court.
>
> * * *

> It's the existence of the civil judge court's order that's relevant, not the correctness of it. I am not the appellate court for that judge. That order can be tested on appeal and not collaterally addressed in this courtroom, because that's exactly what it is, a collateral issue, so it's relevant in this case.
>
> Now, the defense can raise issues germane to this case and it does so at its peril because it opens the door making other things that might not otherwise be relevant admissible * * * and the correctness of the [disbursement] order * * * is not an issue for this jury or for me for that matter."

The court found that the agreed motion would not go to the jury because it merely explained the basis for the disbursement order.

¶ 21 After the sidebar, Morrison testified that, on February 14, 2008, the civil court issued an agreed order instructing Morrison to disburse monies to the non-parties, including $105,026.30 to Mazzocco. Leo, defendant's brother, then asked Morrison to give him the checks for Mazzocco and the other non-parties, so he could deliver them. Morrison refused to tender the checks to Leo and asked for the addresses of the non-parties. Later that day, Morrison received an e-mail listing addresses for Mazzocco and the other two non-parties.

¶ 22 On February 15, 2008, Morrison mailed a letter to Mazzocco at the address set forth in the e-mail. Morrison's letter notified Mazzocco of the disbursement order and sought a verification of her address. After Morrison received a signed return letter from Mazzocco confirming her address, he instructed his bookkeeper to transfer Mazzocco's portion of the proceeds from the account at First Midwest Bank into his client trust account. Morrison then executed a check to Mazzocco from the client trust account in the amount of $105,026.30 and mailed it to her on February 20, 2008.

¶ 23 Several weeks later, Morrison received a telephone call from Mazzocco. Mazzocco informed Morrison that one of her brothers had told her about the court-ordered disbursement. Mazzocco informed Morrison that she had not received any check from his office. Morrison conducted an investigation. After obtaining and examining a copy of the cashed check from the bank, Morrison compared the signature on the back of the check with the signature on the confirmation letter that had been returned to him. On the check, the signature read "Jeannine Mazzocco." In the letter, the signature read "Janine Stoller." After his investigation, Morrison determined that Mazzocco did not sign those documents.

¶ 24 On cross-examination, Ritacca asked Morrison if he spoke to defendant about disbursing the proceeds. Morrison responded in the affirmative. The court called a sidebar and reminded Ritacca that, while he had barred the State from eliciting evidence from Morrison about conversations he had with defendant, counsel could vitiate the court's pre-trial ruling by asking questions that would result in a waiver of the attorney-client privilege. Shortly after the sidebar, Ritacca asked Morrison, "Who did you talk to in Willow concerning your disbursement?" Morrison replied, "Do you really want to know the answer to that question?" Ritacca repeated the question and Morrison answered, "I talked to your client Christopher Stoller and Leo Stoller."

¶ 25 Ritacca later asked Morrison if he had spoken to Stephanie Stoller, Willow's purported president, before the court issued the disbursement order. Morrison testified that he spoke to Stephanie only after the order. Before the court issued the disbursement order, Morrison had spoken to "the person that told me he had power of attorney over Stephanie Stoller about that disbursement."

¶ 26 Morrison further reiterated that he sent notifications of the disbursements to the addresses he received in the e-mail. Morrison did not know who sent the e-mail, but it was electronically

signed by Stephanie Stoller, defendant, and Willow. The e-mail came from an account in the name of "L. Lee." Morrison assumed the e-mail was sent by defendant or Leo.

¶ 27 According to Morrison, the $105,000 figure was computed by looking at the Uniform Gift to Minors Act, which indicated Mazzocco was entitled to proceeds from the sale regardless of whether she quiclaimed her interest in the property, since she was gifted as a minor. Morrison, defendant's attorney, and counsel for Max and David agreed that the disbursement figures were correct. Ritacca asked if it were true that Morrison had no basis to write Mazzocco a check, and Morrison responded that he acted via his client's authorization to file the agreed disbursement motion and pursuant to a court order directing him to disburse the proceeds. Morrison testified that defendant was involved in discussions regarding the disbursement, claiming that defendant was in his office, in Illinois, when the parties agreed to the disbursement motion. On re-direct examination, Morrison testified that he withdrew as counsel for Willow after completing his investigation.

¶ 28 Janine Mazzocco testified that she had not seen or spoken with defendant, her father, in about two and a half years. Prior to that, Mazzocco had an "up and down" relationship with defendant. Mazzocco was aware of the Damien subdivision since she was a child, but she did not know much about it. Mazzocco testified she thought her and her siblings' names were on the property, but was unsure if defendant's name was on the property. Mazzocco had no dealings with Willow and did not know who was in charge of Willow.

¶ 29 Mazzocco testified that she received a telephone call from defendant around February 14, 2008, in which defendant told her that her mother, who had committed suicide in 2007, was giving her a gift from heaven. Defendant explained that he had received $10,000 and was going to help out Mazzocco. Within a month, Mazzocco received a check for $4,000. The check was sent by

defendant to Mazzocco's address in Lake in the Hills, Illinois. The following weekend, Mazzocco received a call from one of her brothers, who told her that the court had ordered a $105,000 disbursement in her name. Mazzocco discussed the issue with her husband and retained an attorney. She did not call defendant to ask about the money.

¶ 30 Mazzocco testified that she never received the disbursement check sent by Morrison. Mazzocco stated that she had never lived in River Grove, Illinois, where Morrison sent the check. Mazzocco noted that her first name was spelled incorrectly in the e-mail to Morrison. In the e-mail, Mazzocco's first name was spelled "Jeanine." However, Mazzocco spells her first name "Janine." Mazzocco's first name was also misspelled as "Jeanine" in the endorsement of the disbursement check. Mazzocco related that she has never signed her name, "Jeanine." Mazzocco further testified that she had never seen the letter from Morrison seeking to confirm her address. Mazzocco explained that in the letter, Morrison asked the recipient to sign the bottom of the letter and return it to him, and the recipient signed Mazzocco's name as "Janine Stoller."

¶ 31 On cross-examination, Mazzocco testified that she did not know where defendant was living prior to his incarceration. Defendant led Mazzocco to believe that he was living in Illinois, but Mazzocco received a telephone call from her niece, who revealed that defendant was living in Arizona. Mazzocco did not know if defendant had ever lived in River Grove, Illinois, but she knew defendant lived with Leo at one time.

¶ 32 Mazzocco admitted that defendant had helped her with her financial problems in the past. According to Mazzocco, however, defendant had not always been good to her. Mazzocco stopped talking to defendant because he threatened her after her mother committed suicide.

¶ 33 In an attempt to impeach Mazzocco with her testimony before the grand jury, Ritacca asked Mazzocco if she told the grand jury that she never received any money from defendant. The court called a sidebar and told counsel to lay a proper foundation for his impeachment. After the sidebar, Ritacca did not pursue this line of questioning. Mazzocco then testified that she never signed a promissory note relating to money defendant had given her. Ritacca confronted Mazzocco with defense exhibit one, a document entitled "Promissory Note of Janine M. Mazzocco." Mazzocco admitted that the signature on the document looked like hers, but she denied signing the document. According to Mazzocco, defendant would often cut-and-paste her signature from one document onto others. On re-direct examination, Mazzocco testified that sometime prior to that day, she reviewed the promissory note and swore on an affidavit in front of a notary that she did not sign the note.

¶ 34 Timothy Zens, a fraud investigator for M&I Bank, testified that defendant was the only person authorized to conduct transactions for an account Willow had at M&I Bank. Zens identified several withdrawal and deposit documents, which showed that defendant opened an account in Willow's name on February 27, 2008, with a deposit of $169,416.89. Bank records show that the deposit consisted of two checks, one to Mazzocco for $105,026.30 and one to Mark Stoller for $64,390.59.[1] Zens also identified three cashier's checks dated March 10, 2008. Zens noted that the remitter of all three checks was Willow. One check was payable to "Jeanine Mazzocco" in the amount of $64,390.59, one check was payable to Mark Stoller in the amount of $105,026.30, and the third check was payable to Willow in the amount of $105.50. Zens noted that the phrase "Not used for purposes intended" was written in the endorsement area of all three checks. According to

[1]Mark Stoller was another non-party who received funds pursuant to the civil court's disbursement order.

Zens this terminology is placed on the back of a check to void the document. Zens identified a fourth cashier's check also dated March 10, 2008. Zens noted that the remitter of the fourth check was Willow and that the check was made payable to Willow in the amount of $169,522.39. Zens noted the final withdrawal of $169,522.39 (the original deposit plus interest) was subsequently deposited into an account in Willow's name at Goldwater Bank, and that Willow's account at M&I Bank was closed on March 18, 2008, with a zero balance.

¶ 35 Louis Archbold testified that he was a special investigator with the Lake County State's Attorney's office, and that he conducted an investigation of defendant. During his investigation, Archbold reviewed documents from Goldwater Bank. He identified a signature card used to open an account for Willow, which contained only defendant's signature. He also identified an account statement, indicating that defendant opened the Willow account at Goldwater Bank on March 12, 2008, by depositing a cashier's check from M&I Bank. The check, in the amount of $169,522.39, was remitted by Willow and payable to Willow. The statement also showed that on March 17, 2008, there was a "transfer to open checking" for $20,000, and on March 24, 2008, there was a "transfer to checking" for $10,000. Archbold identified a cash withdrawal slip, showing that on March 13, 2008, defendant withdrew $8,000.

¶ 36 Archbold then identified a series of checks from Goldwater Bank. The first was a cashier's check payable from Willow to James and Williams Jewelers for $4,200. Another cashier's check was from Willow payable to M&R Moda in Pelle Firenza, Inc., for $3,000. A third check for $4,000 was issued March 12, 2008, and was payable to Mazzocco. Defendant signed the check to Mazzocco. Another check dated March 12 was payable to defendant from Willow for $5,000. Defendant signed that check as well. Another check signed by defendant was payable to defendant

from Willow in the amount of $200. Another document showed that on March 18, defendant withdrew $9,900 from Willow's account. By the end of April 2008, Willow's account at Goldwater Bank had a zero balance.

¶ 37 During the course of his testimony, Archbold identified a series of six separate cashier's checks dated April 8, 2008, issued from Willow's account at Goldwater Bank, payable to defendant. Each of the checks was for $9,500. Archbold testified that in his experience as an investigator, the series of $9,500 checks suggested a practice called "structuring." Ritacca objected, arguing that the State had not disclosed that Archbold would be testifying as an expert. The court sustained Ritacca's objection.

¶ 38 William Biang, an investigator with the Lake County State's Attorney's office, identified a court order that was given to him by the prosecutor, which instructed defendant to comply with the State's request for handwriting exemplars. Biang called Ritacca two times to set up an appointment to obtain the exemplars, but Ritacca failed to return his calls. On May 2, 2011, Biang met with defendant in the investigation division of the sheriff's office to obtain the exemplars. Biang watched defendant fill out the standard packet for handwriting exemplars. Biang did not send the exemplars to be analyzed by an expert because he determined they had no evidentiary value.

¶ 39 On cross-examination, Biang testified that defendant was in jail at the time he attempted to obtain the exemplars. Biang agreed that he could have called Ritacca's office on the day he met with defendant, but he did not. Ritacca asked Biang if the exemplars he received from defendant consisted of "scribbling," and Biang concurred with Ritacca's description. Biang acknowledged that he did not know if defendant was feeling well at the time the exemplars were executed. Following

Biang's testimony, the State rested. Defendant moved for a directed verdict. The trial court denied the motion.

¶ 40 Defendant then testified on his own behalf. Defendant related that he moved to Scottsdale, Arizona in 2007, after his wife committed suicide. Defendant denied returning to Illinois until he was arrested in this case and he denied ever living in Park Ridge, Illinois.[2] Defendant testified that he married in the seventies and bought a house in Deerfield, Illinois. Defendant operated a sporting goods company and eventually formed Willow, a real-estate company incorporated in Delaware. According to defendant, lawyers "put [Willow] together for the purposes of investing in real estate for the sale of the Damien subdivision."

¶ 41 Defendant testified that he was not present when Willow sold the Damien subdivision. Two of defendant's sons, Max and David, subsequently initiated a lawsuit against defendant. Defendant denied knowing anything about the disbursement to Mazzocco because he was in Arizona. Defendant testified that he would have objected to the agreed motion and disbursement order if he had known about them. Defendant denied sending an e-mail to Morrison listing the addresses to which the disbursement checks should be sent. According to defendant, the e-mail indicates it originated from someone named "L. Lee." Defendant also denied either receiving a letter from Morrison that was sent to Park Ridge or signing Mazzocco's name on a letter and returning it to Morrison. Defendant asserted that he did not intend to deprive Mazzocco of any lawful interest she had in the sale proceeds.

[2] In referring to the location where Morrison sent the check for Mazzocco, Ritacca referred to the address being in Park Ridge, River Forest, or Mt. Prospect, Illinois.

¶ 42 Defendant testified that he received by Federal Express a check payable to Mazzocco for $105,026.30. Defendant denied signing Mazzocco's name on the back of the check, stating that the check had already been endorsed with Mazzocco's signature when he received it. Defendant endorsed his own name on the check and deposited it in Willow's account at M&I Bank. Defendant explained that he deposited the check into Willow's account because "it's Willow Industries' money." Defendant added that he was part of Willow. Defendant further testified that after depositing the check, he told Mazzocco that he had money for her. Defendant testified that he sent Mazzocco a Bank of America cashier's check for $5,000. He also sent Mazzocco a second check for $4,000. Defendant additionally wrote Mazzocco a check for $63,000, but cancelled it after talking to her. Defendant testified that he transferred the funds from M&I Bank to Goldwater Bank because M&I became "nervous" after receiving a call from Morrison.

¶ 43 Defendant testified that he withdrew money from the Goldwater account to pay Mark Stoller and to pay legal fees. Defendant also wrote six checks for $9,500 to use as down payments on real-estate purchases. Defendant explained that he bought the properties at auctions that required the use of certified checks for $9,500. Defendant testified that the checks also went toward work he had to do to prepare the properties for sale.

¶ 44 Ritacca attempted to introduce a Bank of America cashier's check allegedly issued to Mazzocco. The State objected, asserting that the document was not disclosed in discovery. The court asked Ritacca whether the check was ever tendered to the State. Ritacca respondent, "I don't know. Don't know, can't tell you." The court barred Ritacca from using the cashier's check. Defendant then testified regarding the handwriting exemplar. Defendant explained that he "scribbled" on the handwriting exemplar packet because the investigator refused to call his attorney.

Defendant later reiterated that he did not intend to deprive Mazzocco of any lawful interest in the money.

¶ 45 On cross-examination, defendant maintained that he did not agree to the disbursement order. Defendant admitted being in Morrison's office with his attorney and Morrison, but testified that neither his attorney nor Morrison notified him of the agreement. According to defendant, Morrison was not his attorney at the time, so Morrison had no duty to communicate with defendant about the order. Defendant also explained that because his attorney did not draft the order, he had no obligation to disclose the agreement to defendant. Defendant acknowledged that the e-mail sent to Morrison with the addresses of the disbursement recipients lists his name at the bottom. Defendant also acknowledged that he did not try to contact Mazzocco when he received the check for $105,000 with her endorsement on it. Defendant did not question why he was receiving the check because he "knew" that it was "improperly made [to Mazzocco]" and the check "should have been made out to Willow Industries." Following defendant's testimony, the defense rested.

¶ 46 The State called investigator Archbold as a rebuttal witness. Archbold testified that the six checks defendant wrote for under $10,000 evidenced "structuring." Archbold explained that by keeping the amount payable under $10,000, defendant did not have to file a cash transaction report with the bank, which would have subjected his transactions to heightened scrutiny. Following Archbold's testimony, the defense moved for a directed verdict. The trial court denied the motion.

¶ 47 In closing, Ritacca argued that Mazzocco was not entitled to the money and that defendant had no intent to permanently deprive her of the money. According to Ritacca, defendant had no interest in the money. The money belongs to Willow. Ritacca further asserted that after the proceeds of the sale were deposited into a trust account, the owner of the money was Morrison. Thus, after

Morrison received a call from Mazzocco and subsequently found someone else deposited the check, he should have cancelled the first check and written Mazzocco another check. Following deliberations, the jury found defendant guilty.

¶ 48 C. Posttrial Motions and Sentencing

¶ 49 Ritacca filed a posttrial motion to vacate the judgment notwithstanding the verdict and for a new trial. Subsequently, defendant hired a new attorney to represent him in the posttrial proceedings and Ritacca withdrew. Defendant's new attorney adopted the arguments in Ritacca's posttrial motion, and filed his own motion for a new trial or, in the alternative, arrest of judgment. A hearing on defendant's motions were held on September 19, 2011. Following arguments by the parties, the court denied defendant's motions.

¶ 50 Immediately following the court's decision on the posttrial motions, the sentencing hearing commenced. During his statement in allocution, defendant claimed that Ritacca was "drunk all the time." Defendant elaborated, explaining that during his fitness hearing, Ritacca "came in drunk." Defendant claimed that Ritacca "had a cup with alcohol in it," and that he was "mumbling" and "totally incoherent." According to defendant, another judge arrested Ritacca and put him in lockup. On several other occasions, Ritacca would arrive in court smelling like alcohol. The court stated that it never observed Ritacca under the influence of anything and that defendant appeared to be communicating effectively with Ritacca during trial. After considering arguments from the parties, the court sentenced defendant to serve eight years in prison. The court also ordered full restitution to Mazzocco. Defendant thereafter filed a motion to reconsider sentence. After the trial court ruled on the motion to reconsider, defendant filed a notice of appeal.

¶ 51 II. ANALYSIS

¶ 52 On appeal, defendant argues that, for various reasons, he was denied the effective assistance of trial counsel and is therefore entitled to a new trial. The sixth amendment to the United States Constitution guarantees a criminal defendant the effective assistance of counsel. U.S. Const., amend. VI; see *People v. Simms*, 192 Ill. 2d 348, 402 (2000) (citing *People v. Hattery*, 109 Ill. 2d 449, 360-61 (1985)). The purpose of this guarantee is to ensure that a criminal defendant receives a fair trial. *People v. Davis*, 353 Ill. App. 3d 790, 794 (2004). "Effective assistance of counsel means competent, not perfect, representation." *People v. Rodriguez*, 364 Ill. App. 3d 304, 312 (2006). We review claims of ineffective assistance of counsel in light of all of the circumstances of the case (*People v. Cunningham*, 191 Ill. App. 3d 332, 337 (1989)) and in accordance with the analysis developed by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1994), and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984). The *Strickland* analysis consists of two components. First, a defendant alleging that he was deprived of the effective assistance of counsel must demonstrate that counsel's performance was deficient, *i.e.*, it fell below an objective standard of reasonableness. *People v. Fillyaw*, 409 Ill. App. 3d 302, 311 (2011); *Rodriguez*, 364 Ill. App. 3d at 312. Second, a defendant must establish a reasonable probability that he was prejudiced. *Fillyaw*, 409 Ill. App. 3d at 312; *Rodriguez*, 364 Ill. App. 3d at 312.

¶ 53 To establish that counsel's performance was not objectively reasonable, a defendant must overcome the strong presumption that the challenged action or inaction was the product of sound trial strategy and not incompetence. *People v. Coleman*, 183 Ill. 2d 366, 397 (1998). A defendant must show that " 'counsel made errors so serious that counsel was not functioning as "counsel" guaranteed the defendant by the Sixth Amendment.' " *Fillyaw*, 409 Ill. App. 3d at 312 (quoting

Strickland, 466 U.S. at 687). General, conclusory allegations of ineffectiveness are insufficient to establish the first prong of the *Strickland* test. *People v. Williams*, 139 Ill. 2d 1, 17 (1990). Therefore, the defendant must identify with specificity " 'the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment.' " *Williams*, 139 Ill. 2d at 17 (quoting *Strickland*, 466 U.S. at 688).

¶ 54 As noted earlier, however, even if trial counsel did not provide assistance that was objectively reasonable, a defendant must still show a reasonable probability that counsel's shortcomings resulted in prejudice. *Rodriguez*, 364 Ill. App. 3d at 312. A reasonable probability is one that would undermine confidence in the outcome of the trial. *Rodriguez*, 364 Ill. App. 3d at 312. Mere conjecture and speculation are insufficient to undermine confidence in the outcome. *Williams*, 139 Ill. 2d at 12 (holding that speculative allegations and conclusory statements are insufficient to support a claim of ineffective assistance of counsel); *Rodriguez*, 364 Ill. App. 3d at 312 (same). Because a defendant's failure to establish either component of the *Strickland* analysis will defeat an ineffectiveness claim, a reviewing court need not address both prongs of the inquiry if the defendant makes an insufficient showing as to one prong. *Strickland*, 466 U.S. at 697; *People v. Gonzalez*, 339 Ill. App. 3d 914, 922 (2003).

¶ 55 In support of his claim that he is entitled to a new trial as a result of ineffective assistance of counsel, defendant raises four separate allegations. First, defendant claims that Ritacca elicited otherwise inadmissible testimony from Morrison that directly contradicted the defense theory that defendant did not agree to the disbursement order. Second, defendant contends that Ritacca failed to impeach Mazzocco with available evidence, even though her credibility was at issue. Third, defendant alleges that Ritacca failed to tender critical evidence in discovery, resulting in an inability

to defend against an essential element of the offense charged. Finally, defendant asserts that in order to prevail under Ritacca's chosen theory of defense, the jury would have had to overturn the civil court's disbursement order, an act that the jury lacked authority to do. In response to defendant's arguments, the State simply argues that defendant is not entitled to a new trial because he failed to establish that the outcome of his trial would have been different absent trial counsel's alleged errors.

¶ 56 A. CROSS-EXAMINATION OF MORRISON

¶ 57 Defendant first argues that Ritacca was ineffective because he elicited otherwise inadmissible testimony from Morrison that directly contradicted the defense theory that defendant did not agree to the disbursement order. Specifically, defendant notes that Ritacca successfully obtained a pretrial ruling, based on the attorney-client privilege, to bar the State from eliciting statements made by defendant to Morrison. Ritacca then told the jury during his opening statement that defendant did not agree to the disbursement order and that the disbursement order was based on misinformation. Yet, during his cross-examination of Morrison, Ritacca elicited testimony that defendant agreed to the disbursement order. Defendant argues that Ritacca's decision to elicit this testimony rendered his performance objectively unreasonable because it not only put privileged communications at issue, it allowed the jury to consider credible evidence that defendant had, in fact, agreed to the disbursement order. Moreover, defendant maintains that he was prejudiced by Ritacca's performance. According to defendant, absent the testimony elicited by Ritacca during his cross-examination of Morrison, there would have been no direct evidence that he (defendant) knew about the civil court's disbursement order and that Mazzocco was the rightful owner of the check issued by Morrison. In turn, defendant claims that the remaining evidence would have been insufficient

to establish beyond a reasonable doubt that he knowingly obtained unauthorized control over property belonging to Mazzocco, one of the elements of the offense charged.

¶ 58 Assuming *arguendo*, that the above allegations establish that Ritacca was deficient, we fail to see how defendant was prejudiced by the alleged error. Defendant was charged with theft of property exceeding $100,000 in value. 720 ILCS 5/16-1(a)(1)(A), (b)(6) (West 2008). Therefore, the State had to prove beyond a reasonable doubt the following four elements: (1) that Mazzocco was the owner of the property in question; (2) that defendant knowingly obtained unauthorized control over that property; (3) that defendant intended to permanently deprive Mazzocco of the use or benefit of the property; and (4) that the value of the property exceeds $100,000. 720 ILCS 5/16-1(a)(1)(A), (b)(6), (c) (West 2008); *People v. Max*, 2012 IL App (3d) 110385, ¶ 69; *People v. Day*, 2011 IL App (2d) 091358, ¶ 27.

¶ 59 Contrary to defendant's claim, the lack of direct evidence regarding whether he knowingly obtained unauthorized control over property belonging to Mazzocco is not fatal because the requisite mental state may be proven indirectly by inference or deduction made by the trier of fact based upon the facts and circumstances of the case. *People v. Cameron*, 2012 IL App (3d) 110020, ¶ 32; see also *People v. Hernandez*, 2012 IL App (1st) 092841, ¶ 118 (recognizing that, because of its very nature, knowledge is often proven by circumstantial evidence rather than by direct proof). Here, even absent the testimony elicited by Ritacca during his cross-examination of Morrison, the jury was presented with evidence from which they could reasonably conclude that the funds in question belonged to Mazzocco and that defendant knowingly obtained control over Mazzocco's property without her consent.

¶ 60 For instance, the jury could have reasonably concluded that the funds in question belonged to Mazzocco based on testimony about the civil court's disbursement order, which authorized the disbursement of a portion of the proceeds of the sale of the Damien subdivision to three non-parties, including Mazzocco. Significantly, there was evidence, aside from Morrison's testimony on cross-examination, that defendant would have known about the disbursement order. Morrison testified on direct examination by the State that defendant's attorney agreed to the disbursement order. Although defendant claimed that his attorney never told him about the disbursement order, the jury could have reasonably inferred that if defendant's attorney agreed to the disbursement order, the attorney would have notified defendant about it. Morrison also testified on direct examination that after he requested addresses for the recipients of the disbursements, he received an e-mail with Mazzocco's purported address. The e-mail was electronically signed by defendant. From this testimony, the jury also could have reasonably inferred that defendant was aware that the court had ordered a disbursement to Mazzocco.

¶ 61 In addition to the above testimony, there was evidence from which the jury could reasonably conclude that defendant knowingly exercised unauthorized control over property belonging to Mazzocco. Morrison testified on direct examination that he drafted a check to Mazzocco for $105,026.30 on February 20, 2008, and sent it to the address listed for her in the e-mail he received. Although the check was cashed, Mazzocco never received it. Morrison compared the signature for Mazzocco on the back of the cashed check to the signature on the letter that had been returned to him and discovered that they did no match. Based on his investigation, Morrison concluded that Mazzocco did not sign either document. Mazzocco confirmed that her first name was spelled incorrectly in the endorsement on the back of the check Morrison sent. The evidence also

established that shortly after Morrison mailed the check to Mazzocco, defendant opened an account at M&I Bank and made a deposit of $169,416.89. Bank records admitted into evidence establish that the deposit consisted of the $105,026.30 check issued by Morrison to Mazzocco and a check for $64,390.59 issued by Morrison to Mark Stoller, another non-party. Defendant was the only signatory on Willow's M&I account. Defendant later caused several cashier's checks to be issued to various parties, including Mazzocco, only to subsequently void them, withdraw all funds from M&I Bank, and deposit the money into an account opened in Willow's name at Goldwater Bank. Defendant was the only signatory for Willow's account at Goldwater Bank. The funds deposited in the Goldwater Bank account were then systematically withdrawn by defendant so that by the end of April, the Goldwater Bank account had a zero balance.

¶ 62 In addition, there was evidence of defendant's consciousness of guilt. Defendant testified that he transferred the money from M&I Bank to Goldwater Bank after Morrison contacted M&I Bank, and, in defendant's words, the bank became "nervous." In addition, defendant's lack of cooperation in completing the handwriting exemplars was evidence of his consciousness of guilt. In short, the outcome of the State's case did not rest entirely on Ritacca's cross-examination of Morrison. Quite simply, the evidence against defendant, including evidence of his consciousness of guilt, was overwhelming. Accordingly, we conclude that defendant has not satisfied *Strickland*'s prejudice prong. We therefore reject this claim of ineffective assistance of counsel.

¶ 63 B. IMPEACHMENT OF MAZZOCCO

¶ 64 Defendant next argues that Ritacca was ineffective because he failed to impeach Mazzocco with available evidence, even though her credibility was at issue. In support of this claim, defendant asserts the following. Before the grand jury, Mazzocco testified that she did not receive any money

from defendant since February 14, 2008. At trial, however, Mazzocco testified that defendant sent her a $4,000 check about a month after the civil court issued the disbursement order. On cross-examination, Ritacca started to impeach Mazzocco, asking her whether she told the grand jury that she "never received any monies from * * * [her] dad." At that point, the court called a sidebar to remind Ritacca to lay a foundation for the impeachment. After the sidebar, Ritacca failed to complete his impeachment of Mazzocco. Defendant asserts that because of Ritacca's failure to complete his impeachment, the jury never learned of Mazzocco's prior inconsistent testimony. According to defendant, Ritacca's failure to impeach Mazzocco was "exceedingly prejudicial" because Ritacca argued that the State failed to prove that defendant intended to permanently deprive Mazzocco of $100,000 or more. Defendant notes that he testified that he sent Mazzocco about $9,000 after the court's disbursement order while Mazzocco testified that defendant sent her only $4,000. Thus, he reasons, the jury was faced with a credibility determination regarding whether he intended to permanently deprive Mazzocco of property exceeding $100,000 in value. Defendant contends that absent any impeachment of Mazzocco, the jury had no reason to find his testimony more credible than Mazzocco's.

¶ 65 We reject defendant's claim that Ritacca's performance was deficient because he failed to complete his impeachment of Mazzocco. As a general matter, the decision whether to impeach a witness is a matter of trial strategy and will not support a claim of ineffective assistance of counsel. *People v. Pecoraro*, 175 Ill. 2d 294, 326 (1997); but see *People v. Salgado*, 263 Ill. App. 3d 238, 246-47 (1994) ("[T]he complete failure to impeach the sole eyewitness when significant impeachment is available is not trial strategy and, thus, may support an ineffective assistance claim."). Defendant insists that Mazzocco's grand jury testimony conflicted with her trial testimony.

We disagree. In her testimony before the grand jury, Mazzocco denied endorsing the check sent by Morrison. She was then asked whether she "received any of the monies from *that check*." (Emphasis added.) Mazzocco responded in the negative. This testimony was not inconsistent with Mazzocco's trial testimony. At trial, Mazzocco testified that defendant contacted her, told her he had received $10,000 from an unspecified source, and indicated that he wanted to help her out. About a month later, Mazzocco received a check for $4,000. Thus, Mazzocco never testified at trial that she received any money *from the check sent by Morrison*. Because Mazzocco's trial testimony was not inconsistent with her grand jury testimony, it would have been futile for Ritacca to impeach her on this point. Accordingly, we conclude that Ritacca's failure to complete the impeachment of Mazzocco did not render his performance deficient under the first prong of *Strickland*.

¶ 66 C. FAILURE TO TENDER EVIDENCE

¶ 67 Defendant next argues that Ritacca was ineffective for failing to tender critical evidence in discovery, resulting in an inability to defend against an essential element of the offense charged. In support of this claim, defendant notes that at trial Mazzocco and defendant agreed that defendant had sent Mazzocco a check for $4,000. However, defendant additionally testified that he sent Mazzocco a cashier's check from Bank of America for $5,000, which Mazzocco denied. Defendant asserts that the issuance of checks from defendant to Mazzocco worth about $9,000 would have disproved the State's theory that defendant intended to permanently deprive Mazzocco of over $100,000. Defendant complains that because of Ritacca's failure to comply with discovery rules, he was unable to present available evidence in support of his claim that he sent Mazzocco a check for $5,000. He further claims that had Ritacca introduced the $5,000 check into evidence, it would have gone toward showing that Mazzocco was not credible.

¶ 68 Although the fact that the defendant has made restitution is no defense to the charge of theft, it is relevant in determining the absence of the requisite felonious intent. *People v. Campbell*, 28 Ill. App. 3d 480, 490 (1975). Nevertheless, even if Ritacca's failure to introduce the check was objectively unreasonable under the first prong of *Strickland*, defendant has failed to show prejudice as a result of Ritacca's omission. As defendant readily concedes, he testified that he sent Mazzocco a check for $5,000 in addition to a check for $4,000. Thus, he presented substantially the same evidence during his testimony. See *Campbell*, 28 Ill. App. 3d at 490-91 (holding that exclusion of evidence that the defendant had returned stolen funds to the victim was not prejudicial where the defendant presented substantially the same evidence during his testimony). Moreover, it is unlikely that the jury would have credited the evidence that defendant sent Mazzocco a second check for $5,000, and therefore did not intend to permanently deprive Mazzocco of property valued in excess of $100,000. Mazzocco testified that she only received $4,000. In addition, there was evidence that defendant had other cashier's checks drawn only to subsequently void them. Accordingly, we fail to see how the outcome of the trial would have been different had the alleged check been admitted into evidence.

¶ 69 In a related contention, defendant faults Ritacca for failing to request a verdict for class 2 theft, given his testimony that he returned $9,000 to Mazzocco after the court's disbursement order. Compare 720 ILCS 5/16-1(b)(6) (West 2008) and 730 ILCS 5/5-8-1(a)(4) (West 2008) (now codified as amended at 730 ILCS 5/5-4.5-30(a) (West 2012)) (classifying theft of property exceeding $100,000 and not exceeding $500,000 in value as a class 1 felony subject to a term of imprisonment of between 4 and 15 years) with 720 ILCS 5/16(b)(5) (West 2008) and 730 ILCS 5/5-8-1(a)(5) (West 2008) (now codified as amended at 730 ILCS 5/5-4.5-35(a) (West 2012)) (classifying theft of

property exceeding $10,000 and not exceeding $100,000 in value as a class 2 felony subject to a term of imprisonment of between three and seven years). As we previously noted, however, strategic decisions cannot form the basis for an ineffective assistance of counsel claim. *Coleman*, 183 Ill. 2d at 397; see also *People v. Walton*, 378 Ill. App. 3d 580, 589 (2007) (recognizing that counsel's trial strategy is virtually unchallengeable and will generally not support an ineffective assistance of counsel claim). Here, defendant has not established that Ritacca's failure to request a verdict for class 2 theft was objectively unreasonable under the first prong of the *Strickland* test. In this regard, we note that an "all or nothing defense" has been recognized as a valid trial strategy. See *Walton*, 378 Ill. App. 3d at 589. An "all or nothing defense" occurs when a defendant seeks either an outright acquittal or a conviction of the charged offense and not a conviction of a lesser-included offense. *People v. Benford*, 349 Ill. App. 3d 721, 729 (2004). Ritacca could have reasonably believed that the evidence regarding the first three elements of the offense was stronger than the evidence regarding the value of the property at issue. In turn, Ritacca could have reasoned that rather than guarantee defendant at least a class 2 felony conviction, he would give defendant a realistic chance at acquittal. The mere fact that an "all or nothing" strategy proved unsuccessful does not mean that counsel performed unreasonably and rendered ineffective assistance. *Walton*, 378 Ill. App. 3d at 589. As a result, we find that Ritacca's failure to request a verdict for class 2 felony theft was a matter of trial strategy and therefore it does not support an ineffective assistance of counsel claim.

¶ 70 D. DEFENSE THEORY

¶ 71 Finally, defendant argues that Ritacca was ineffective because to prevail under Ritacca's chosen theory of defense, *i.e.*, that defendant did not agree to the disbursement order, the jury would have had to overturn the disbursement order. Defendant maintains, however, that the jury had no

authority to overturn the civil court's disbursement order. Therefore, defendant insists, Ritacca's entire theory of defense was invalid. Even if we were to find that Ritacca was deficient for presenting this theory, we would reject defendant's claim of ineffective assistance of counsel because we do not believe that this alleged error affected the outcome of the trial.

¶ 72 Contrary to defendant's position, Ritacca's defense did not rely entirely on a strategy that defendant did not know about the civil court's disbursement order. Ritacca's defense was multi-faceted. For instance, during his opening statement, Ritacca asserted that the evidence would show not only that Mazzocco "is not the owner" of the disputed funds, but that defendant had "no intent" to deprive anyone of his or her rightful property. In addition, Ritacca attempted to show that the value of the property did not exceed $100,000, by eliciting testimony from defendant that he returned $9,000 to Mazzocco. Further, during closing argument, Ritacca stated, "I also told you in opening that Janine Mazzocco doesn't own the money. She is not the owner of the money. I also told you that he had no intent to take the money." Ritacca also argued to the jury during closing that defendant "endorsed the check [to Mazzocco] legally, properly, put it in the bank. He never exerted unauthorized control." Moreover, as recounted earlier, the evidence against defendant was overwhelming. The civil court's disbursement order directed Morrison to issue $105,026.30 to Mazzocco from the proceeds of the sale of the Damien subdivision. Mazzocco never received the funds. Bank records establish that the check issued to Mazzocco by Morrison was deposited into an account opened by defendant in Willow's name at M&I Bank in Arizona. Defendant later transferred the funds to Goldwater Bank after Morrison contacted M&I Bank and the bank became "nervous." Thereafter, defendant systematically withdrew the funds on deposit at Goldwater Bank.

Thus, defendant has failed to establish that the outcome of his trial would have been different absent trial counsel's alleged error.

¶ 73 III. CONCLUSION

¶ 74 For the reasons set forth above, we affirm the judgment of the circuit court of Lake County.

¶ 75 Affirmed.