SECOND DIVISION
MILLER, P. J.,
RICKMAN and REESE, JJ.

October 4, 2019

NOT TO BE OFFICIALLY REPORTED

In the Court of Appeals of Georgia

A19A0782. LAWTON v. THE STATE.

MILLER, Presiding Judge.

Ronnie Larenza Lawton appeals from the trial court's denial of his motion for new trial and the judgment of conviction after a Douglas County jury found him guilty of three counts of identity fraud, three counts of forgery in the fourth degree, and possession of a firearm by a convicted felon. Lawton argues that (1) his trial counsel was ineffective for failing to impeach a testifying officer at the hearing on his motion to suppress; (2) the trial court erred in denying his motion for a directed verdict on Counts 2 and 9 of the indictment; (3) the introduction of hearsay testimony violated his Confrontation Clause rights and his trial counsel was ineffective for failing to object to this testimony; (4) the use of a demonstrative aid prejudiced him; and (5) the trial court was improperly influenced during sentencing by the

prosecution's proffer of hearsay testimony. We reverse the convictions for Counts 2 and 9 of the indictment and vacate the sentences entered thereon because the evidence was insufficient, but we otherwise affirm.

Viewed in the light most favorable to the jury's verdict,[1] the evidence at trial showed that in January 2016, an officer with the Douglasville police department was on patrol and observed a red SUV traveling "well below" the flow of traffic. Several tractor-trailors were backed up behind the SUV and had to pass on the right-hand lane, which posed a safety issue. The officer also testified that the driver failed to maintain his lane. When he stopped and approached the vehicle, which Lawton was driving, the officer noticed a strong odor of marijuana coming from the vehicle. The officer advised Lawton that he would issue him a warning and had Lawton sit in the front right seat of his patrol car. While verifying the status of Lawton's driver's license, the officer asked Lawton where he was headed. Lawton told him that he was going to Philadelphia, Mississippi to gamble and that he would be gone for a few days. Lawton's passenger, however, told the officer that he and Lawton were headed to Temple, Georgia, and they planned to return that day. The officer asked Lawton for permission to search the vehicle and its contents, and after Lawton declined to

[1] *Jackson v. Virginia*, 443 U. S. 307 (99 SCt 2781, 61 LE2d 560) (1979).

give consent, the officer requested a K-9 officer. The K-9 officer gave a "positive alert," indicating the presence of the odor of narcotics in the vehicle.[2]

Upon searching the vehicle, the officer found a black ledger in the center console, which contained numerous names, addresses, license numbers, and social security numbers. In the trunk, the officer found additional ledgers with more names, social security numbers, and addresses, 13 cards in Lawton's name, numerous prepaid debit cards, counterfeit money, laptops, a printer, blank check stock, a "square reader" or card reader, a precision knife kit, a "perforated edge tool," a driver's license and social security card issued in the names of persons who were not in the vehicle, a manual for printing cards, a code printer used for etching numbers onto cards, a $45,000 check issued to a person named Robin Lowe, checks issued to a person named Joshua Coleman, and a small bag with a gun.

A grand jury indicted Lawton for six counts of identity fraud (OCGA § 16-9-121), three counts of forgery in the fourth degree (OCGA § 16-9-1 (e)), and one count of possession of a firearm by a convicted felon (OCGA § 16-11-131 (b)). The trial court granted a directed verdict on three of the identity fraud counts, the jury convicted Lawton on the remaining seven counts of the indictment, and the trial court

[2] The officer later located marijuana in the passenger's pocket.

sentenced Lawton to a total of 25 years' imprisonment. Lawton filed a motion for new trial which the trial court denied after a hearing. This appeal followed.

1. First, Lawton argues that his trial counsel was constitutionally ineffective because at the hearing on the motion to suppress the seized items, counsel did not seek to impeach the testifying officer with either the officer's own report or dash camera video of the traffic stop.[3] In Lawton's view, trial counsel should have impeached the officer because he testified that Lawton drove over the marked lines for the left-hand fast lane and right-hand slow lane, but the report did not mention the vehicle crossing the right-hand lane marker. Lawton also argues that the dash camera video showed that he only traveled over a lane marker when he was pulling over on the side of the road after the stop. We conclude that trial counsel did not provide ineffective assistance.

> In order to evaluate [Lawton's] claim of ineffective assistance of counsel, we apply the two-pronged test established in *Strickland v. Washington*,[4] which requires [Lawton] to show that [his] trial counsel's performance was deficient and that the deficient performance so prejudiced [him] that there is a reasonable likelihood that, but for

---

[3] Lawton had a different attorney during the trial.

[4] *Strickland v. Washington*, 466 U. S. 668, 687 (III) (104 SCt 2052, 80 LE2d 674) (1984).

> counsel's errors, the outcome of the trial would have been different. In addition, there is a strong presumption that trial counsel's conduct falls within the broad range of reasonable professional conduct, and a criminal defendant must overcome this presumption.

(Citations and punctuation omitted.) *Roberts v. State*, 344 Ga. App. 324, 334 (4) (810 SE2d 169) (2018). "Tactical decisions receive even greater deference, only forming the basis of an ineffective assistance claim if a decision is so patently unreasonable that no competent attorney would have chosen it." (Citation and punctuation omitted.) *Newby v. State*, 338 Ga. App. 588, 592 (3) (791 SE2d 92) (2016). "Decisions about what questions to ask on cross-examination are quintessential trial strategy and will rarely constitute ineffective assistance of counsel. In particular, whether to impeach prosecution witnesses and how to do so are tactical decisions." (Citation omitted and punctuation.) *Mallery v. State*, 342 Ga. App. 742, 746 (b) (805 SE2d 257) (2017). "Unless clearly erroneous, this Court will uphold a trial court's factual determinations with respect to claims of ineffective assistance of counsel; however, a trial court's legal conclusions in this regard are reviewed de novo." (Citation and punctuation omitted.) *Roberts*, supra, 344 Ga. App. at 334 (4).

At the hearing on the motion for new trial, Lawton's trial counsel testified that he purposely did not impeach the officer with the dash camera video regarding the

failure to maintain lane violation. First, he explained that although Lawton appeared to be driving straight on the video, "it's subjective," and that "the minute . . . the officer was going to say that [Lawton] failed to maintain his lane . . . it was going to be problematic." Trial counsel also testified to his understanding that the officer observed the lane violation before the camera was activated. He added, "having done plenty of this, I'm well aware that normally the videos come on when the lights come on. Sometimes there's a delay, so I'm well aware of that." According to his testimony, trial counsel was focusing on impeaching the officer with regard to the officer's estimation of Lawton's speed. Trial counsel explained that the minimum speed limit was 40 miles per hour, that Lawton had not been driving in the fast lane, and that Lawton had been driving approximately 60 or 65 miles per hour. Thus, trial counsel believed that the stronger argument centered on Lawton's speed, and he wanted to maintain the trial court's attention on the allegation that Lawton was driving too slowly. As to the officer's report of the traffic stop, trial counsel testified that the issue of whether Lawton had drifted to the left or right was a minute detail which he did not believe "was going to be enough to carry the day."

It is clear that trial counsel made strategic decisions not to impeach the officer with either his traffic report or the dash camera video of the traffic stop, and these

decisions were not so patently unreasonable that no attorney would have chosen them. Therefore, Lawton has also failed to show that his trial counsel performed outside the broad range of professional conduct. See *Dinkins v. State*, 300 Ga. 713, 717 (4) (b) (797 SE2d 858) (2017) (failure to impeach did not fall outside the broad range of professional conduct). Accordingly, Lawton does not demonstrate ineffective assistance on this basis, and the trial court properly denied the motion for new trial on these grounds.

2. Next, Lawton argues that the evidence was insufficient to support the jury's verdict as to Counts 2 and 9 of the indictment, which alleged identity fraud and forgery in the fourth degree, respectively, and that the trial court erred in denying his motion for directed verdict as to these counts. After a careful review of the evidence, we agree that there was insufficient evidence to sustain a guilty verdict as to Counts 2 and 9 of the indictment.

> On appeal from a criminal conviction, we view the evidence in the light most favorable to support the jury's verdict, and the defendant no longer enjoys a presumption of innocence; moreover, this Court determines evidence sufficiency and does not weigh the evidence or determine witness credibility. Resolving evidentiary conflicts and inconsistencies, and assessing witness credibility, are the province of the factfinder, not this Court. As long as there is some evidence, even though contradicted,

> to support each necessary element of the state's case, this Court will uphold the jury's verdict.

(Citation omitted.) *McKenzie v. State*, 300 Ga. App. 469, 469 (1) (685 SE2d 333) (2009).

(a) Count 2 - Identity Fraud

Lawton argues that as to Count 2 of the indictment, the evidence was insufficient partly because there was no testimony from the issuer of the debit card underlying this count, or from the victim named in this count, and it is unclear whether the name or account number belonged to a real person. We agree that the evidence was insufficient.

As applicable here, "[a] person commits the offense of identity fraud when he or she willfully and fraudulently . . . [w]ithout authorization or consent, uses or possesses with intent to fraudulently use identifying information concerning a *person*." (Emphasis supplied.) OCGA § 16-9-121 (a) (1). Under OCGA § 16-1-3 (12), "'[p]erson' means an individual," and this Court has previously explained that "[i]n its common meaning, an 'individual' is an *actual* human being." (Emphasis supplied.) *Martinez v. State*, 325 Ga. App. 267, 273 (2) (750 SE2d 504) (2013). Further, "we

have repeatedly held that criminal statutes must be strictly construed against the State." (Citation and punctuation omitted.) Id. at 274 n.34 (2).

Count 2 of the indictment alleged that Lawton, "without authorization, did willfully and fraudulently possess with intent to fraudulently use a Ready debit card ending in 0524, identifying information of Sean Thompkins. . . ." Although there was extensive testimony regarding how a debit card can be altered for fraudulent use, there was no evidence whatsoever regarding whether Sean Thompkins is an actual human being, so as to render him a victim of identity fraud under OCGA § 16-9-121 (a) (1). The record does not show that the officer retrieved any document belonging to a Sean Thompkins, no person by this name testified at trial, no witness testified to this person's existence, and there was no evidence that the number embossed on the card was attached to the account of any real person. Also, the investigator testified that when someone purchases a prepaid debit card such as a Ready card, there is no name embossed on it. Thus, there was no evidence that the card had been issued to a person named Sean Thompkins before Lawton possessed it. And while there may exist an actual person named Sean Thompkins, "the State bears the burden of proving every essential element of an offense." (Citation and punctuation omitted.) *Rodriguez v. State*, 343 Ga. App. 526, 527 (806 SE2d 916) (2017). Tellingly, OCGA § 16-9-121

(a) (4) explicates the manner in which a defendant can commit identity fraud by creating, using or possessing fictitious identifying information concerning a *fictitious person*. It is clear, however, that Lawton was not indicted under OCGA § 16-9-121 (a) (4). Count 2 of the indictment does not track the language of this subsection at all.[5] See *Villedrouin v. State*, 246 Ga. App. 774, 777 (1) (542 SE2d 160) (2000) ("If the indictment sets out the offense as done in a particular way, the proof must show it, or there will be a variance.") (citation omitted). We therefore conclude that there was insufficient evidence for the jury to convict on Count 2 of the indictment, and we reverse the conviction and vacate the sentence on this count.

(b) Count 9 - Forgery in the Fourth Degree

As to Count 9 of the indictment, Lawton urges us to reverse this conviction because there was no evidence that the listed payor on the check did not authorize the making of the check. Again, we agree that the evidence was insufficient.

"To warrant a conviction on circumstantial evidence, the proved facts shall not only be consistent with the hypothesis of guilt, but shall exclude every other

[5] We also note that the jury was not instructed on subsection OCGA § 16-9-121 (a) (4). Rather, the trial court's instruction on identity fraud solely tracked the language of OCGA § 16-9-121 (a) (1), which addresses identifying information concerning a "person," and the trial court enunciated various forms of identifying information that can belong to an "individual."

reasonable hypothesis save that of the guilt of the accused." (Citation omitted.) *Russu v. State*, 321 Ga. App. 695, 698 (1) (742 SE2d 511) (2013). A person commits the offense of forgery in the fourth degree "when with the intent to defraud he or she knowingly . . . [m]akes, alters, possesses, utters, or delivers any check written in the amount of less than $1,500.00 . . . in such manner that the check as made or altered purports to have been made by . . . authority of one who did not give such authority." OCGA § 16-9-1 (e). Count 9 of the indictment alleged that Lawton, "with intent to defraud, did knowingly possess a JP Morgan Chase Bank check #9031290 written in an amount less than $1,500, to wit: $453.09, in such a manner that the check purports to have been made with the authority of Savannah Restaurants, Corp., who did not give such authority. . . ."

We are cognizant, as the State argues, that in addition to the check at issue, check stock, forged checks, and check cutting equipment were seized from Lawton's vehicle. The trial court also noted irregularities on the face of the check. But there was no evidence from any representative of this supposed entity, Savannah Restaurants, Corp., whether testimonial or otherwise, that Savannah Restaurants, Corp. did not authorize the making of *the specific check* underlying Count 9. In fact, the State did not present to the jury even an iota of evidence regarding this supposed

entity, Savannah Restaurants, Corp., or its relation to either the check or to Lawton. The State bears the "burden with respect to each crime charged." *Minor v. State*, 264 Ga. 195, 196 (2) (442 SE2d 754) (1994). And the jury must "not only . . . look to the crimes *individually*, but . . . also look to the elements of each crime to determine whether the State has met its burden." (Emphasis supplied.) Id.

To illustrate, in *Adams v. State*, 217 Ga. App. 706 (459 SE2d 182) (1995), the defendant was indicted for numerous counts of forgery of a check,[6] partly on the basis that several checks were drawn without authority. Id. As part of his job at a check printing company, the defendant was tasked with destroying checks that were not suitable for shipping to customers. Id. Instead, the checks underlying the indictment had been deposited in the defendant's bank accounts, and some matching deposit slips had been found in the defendant's home. Id. As to some of the forgery counts — for which we found sufficient evidence existed — "officials from the companies that were the victims of the forgeries testified that the checks deposited in [the defendant's] bank account were not signed by anyone at their firm authorized to sign checks and that their company did not do business with [the defendant] or his

[6] Since the 2012 amendment of OCGA § 16-9-1, forgery of a check has been classified as forgery in either the third or fourth degree. See OCGA § 16-9-1 (d) and (e).

businesses." Id. As to other checks, however, "affidavits executed by officials at the other companies that were also the victims of the forgeries were the only evidence on the issue of authority to sign the checks." Id. After determining that these affidavits were inadmissible, we held that "[b]ecause no other evidence was introduced on Counts 3, 4, 5, and 6 proving the essential element of the crime of forgery that the checks *were drawn without authority*, the trial court erred by denying [the defendant's] motion for a directed verdict on these counts." (Emphasis supplied.) Id. at 707 (3).

Similarly, the record before us contains no evidence regarding the existence of Savannah Restaurants, Corp. or whether the check was unauthorized. Compare *Sapp v. State*, 271 Ga. 446, 447 (1) (520 SE2d 462) (1999) (checks were made without authority where the victim wrote the checks in the defendant's name while being held at gunpoint after being beaten by the defendant); *McClure v. State*, 234 Ga. App. 304 (506 SE2d 667) (1998) (evidence sufficient to show the check was drawn without authority where victim's purse was snatched as she left a restaurant and her checkbook was in the purse); *Mitchell v. State*, 208 Ga. App. 473 (430 SE2d 852) (1993) (evidence sufficient where victim had stopped payment on the account and she denied knowing the defendant); *McBride v. State*, 202 Ga. App. 556, 556-557 (415

SE2d 13) (1992) (evidence sufficient where there were irregularities on the face of the check and a representative of the named payor testified that the defendant was not employed by the company and was not authorized to use the company's checking account). Thus, we conclude that the evidence was insufficient to sustain a guilty verdict on Count 9 of the indictment, and we reverse the conviction and vacate the sentence on this count.[7]

3. Next, Lawton argues that he is entitled to a new trial because the introduction of hearsay testimony violated his Confrontation Clause rights and because a demonstrative aid prejudiced him. This argument does not warrant reversal because Lawton does not satisfy all prongs of the plain error test.

Because Lawton did not make this objection at trial, we review this claim for plain error. *Varner v. State*, __ Ga. __,__ (2) (b) (__ SE2d__) WL 4144840 (S19A0951, decided September 3, 2019) (applying plain error review to the defendant's Confrontation Clause and hearsay arguments). "To show plain error, [Lawton] must point to an error that was not affirmatively waived, the error must have been clear and not open to reasonable dispute, the error must have affected his

[7] Because we are reversing the convictions on Counts 2 and 9, we do not address Lawton's argument that the convictions were supported only by inadmissible hearsay.

substantial rights, and the error must have seriously affected the fairness, integrity or public reputation of judicial proceedings." *Harris v. State*, 340 Ga. App. 865, 873-874 (3) (798 SE2d 498) (2017). "The third component of this test requires the appellant to make an affirmative showing that the error probably did affect the outcome below." (Citation and punctuation omitted.) *Lupoe v. State*, 300 Ga. 233, 243 (4) (794 SE2d 67) (2016). "Satisfying all four prongs of this standard is difficult, as it should be." (Citation and punctuation omitted.) Id.

A financial fraud investigator with the Douglas County Sheriff's Office testified at trial, using a spreadsheet in which he had entered the identities found in Lawton's car. In advancing his hearsay argument, Lawton refers to two exchanges between the prosecutor and the investigator, concerning the information retrieved from his vehicle. While referring to the spreadsheet, the prosecutor asked the investigator, "[w]hat is the significance of the red and the green?" The investigator responded, "[o]n the red ones, of course, I tried to contact those individuals. Some of them I was able to get in contact with to determine that they did not give Mr. Lawton access to their personal information." Later in the trial, the following exchange occurred:

> STATE: As part of your investigation, were you able to determine if the defendant had any lawful reason to have these identities?
>
> WITNESS: I was not able to find any reason with any of the people that I talked to that said that they had given him permission to have their personal identity information.

Lawton argues that the Confrontation Clause does not permit an investigator to relay his conversations with potential trial witnesses who do not testify. Even assuming that the investigator's testimony included some impermissible hearsay, however, Lawton fails to show that this testimony or the use of demonstrative aid probably affected the outcome at trial.

With the exception of Counts 2 and 9 which we reverse in this opinion, there was direct testimony on each of the identity fraud and forgery charges on which the jury convicted Lawton. Specifically, Count 1 was premised on Lawton's possession of a certain bank account number. The part-owner of the business that owned the corresponding bank account testified that he had sent a $45,000 check from the account to a Robin Lowe, Lowe never received the check, someone attempted to cash it, and he neither knew Lawton nor gave Lawton permission to possess the bank

account information. This same $45,000 check was discovered in Lawton's car. Count 4 of the indictment was premised on Lawton's possession of a social security number, and the victim testified that he did not know Lawton before this case arose, nor had he given Lawton permission to have his social security number. Counts 7 and 8 were premised on two checks purportedly issued by Select Staffing, and the assistant treasurer for Select Staffing's parent company testified at trial. She explained that the address and account number on the checks were incorrect, the apparent signature of the chief financial officer was not the same as that on the checks that are ordinarily issued, and the two checks made out to Joshua Coleman were never issued. Because Lawton does not show that the claimed error probably affected the outcome of his trial, he cannot satisfy all the prongs of the plain error test, and this argument fails.

4. Lawton claims that his trial counsel was constitutionally ineffective because she failed to object to the inadmissible hearsay that resulted from the investigator's testimony. Again, we disagree.

The Supreme Court of Georgia "has equated the prejudice step of the plain error standard with the prejudice prong for an ineffective assistance of counsel claim." *Hampton v. State*, 302 Ga. 166, 168-169 (2) (805 SE2d 902) (2017). Thus,

"for the same reasons that we concluded that appellant could not carry his burden to show prejudice on plain error review[,] . . . we conclude that he cannot carry his burden to show prejudice on this ineffectiveness claim." Id. at 172 (4) (b).

5. Lastly, Lawton argues that the sentencing court was improperly influenced by the prosecutor's proffer of hearsay to show that he had committed a very similar prior offense. This argument finds no support in the record.

At sentencing, the State introduced into evidence various exhibits pertaining to Lawton's previous convictions, including convictions for identity fraud and forgery in Fulton County in 2014, a robbery conviction in 1989, and a 2015 conviction in Lamar County for being in possession of a cell phone while being an inmate at a jail. During its argument on sentencing, the State discussed facts underlying the 2015 conviction in Lamar County. The record, however, does not support Lawton's contention that the trial court was "improperly influenced by the prosecution's proffer of hearsay." On the contrary, the trial court stated on the record:

> It's a horrible, horrible, thing to go through as a victim. And then after hearing the case and the jury returned its verdict, now to hear *these documents* that have been presented to me that this isn't even the first time, that you've done this before, to hear that you've been convicted of this before. . . .

While these statements show that the trial court possibly considered the admitted documentary evidence related to Lawton's convictions, there is no indication from the record that the trial court was wrongfully influenced by hearsay. "Absent a strong showing to the contrary, Georgia law presumes that the trial judge, when sitting without a jury, separates the legal evidence from facts not properly in evidence in reaching his or her decision." (Citation and punctuation omitted.) *Taylor v. State*, 282 Ga. App. 469, 472 (3) (c) (638 SE2d 869) (2006). There has been no showing that the trial court improperly considered hearsay during sentencing, and this argument is therefore unpersuasive.

In sum, the evidence was insufficient to sustain convictions on Counts 2 and 9 of the indictment, and we reverse those convictions and vacate the sentences entered thereon, but we otherwise affirm Lawton's convictions and sentence.

Judgment affirmed in part, reversed in part, and vacated in part. Rickman and Reese, JJ., concur.