

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	)	Case No. 2008-2490
	)	
Plaintiff-Appellee,	)	On Appeal from the
	)	Lake County Court of Appeals,
v.	)	Eleventh Appellate District
	)	
JUANITA M. TROISI	)	
	)	Court of Appeals Case No. 2008-L-060
Defendant-Appellant.	)	

**MERIT BRIEF OF APPELLANT STATE OF OHIO**

CHARLES E. COULSON (0008667)  
PROSECUTING ATTORNEY  
LAKE COUNTY, OHIO

Teri R. Daniel (0082157) (COUNSEL OF RECORD)  
ASSISTANT PROSECUTING ATTORNEY  
Administration Building  
105 Main Street, P.O. Box 490  
Painesville Ohio 44077  
(440) 350-2683 Fax (440) 350-2585

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COUNSEL FOR APPELLANT, STATE OF OHIO

Dominic J. Vitantonio (0052058)  
Argie, D'Amico & Vitantonio  
6449 Wilson Mills Road  
Mayfield Village, Ohio 44143-3402  
(440) 449-3333

COUNSEL FOR APPELLEE, JUANITA M. TROISI

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## STATEMENT OF THE CASE AND FACTS

The City of Kirtland Police Department received information that a "purse party" was going to occur in their city on February 3, 2007, at the Kirtland Grange Hall. (T.p. 91). Timothy Richissin, the regional director of the Professional Investigation Consulting Agency (PICA), assisted the Kirtland Police Department in their investigation. Accompanied by a female, he went to the Kirtland Grange Hall to make a purchase and to check the authenticity of the merchandise being sold. (T.p. 98). Mr. Richissin bought a counterfeit Louis Vuitton handbag for \$50 and informed the police department that all of the merchandise displayed was counterfeit. (T.p. 98-100). Approximately 75-100 customers were present at the Kirtland Grange when officers arrived and were instructed to place the handbags back on the tables and leave the premises. *Id.* Officers approached Defendant-Appellee Juanita M. Troisi, who made a written statement to police after being informed of her *Miranda* rights, admitting that she was selling fake merchandise. (T.p. 103, 106).

Officers began the tedious task of sorting and inventorying the counterfeit merchandise. (T.p. 112). Ultimately, the brands involved included Gucci, Louis Vuitton, Prada, Kate Spade, Coach, Chanel, Dior, Tiffany, Fendi, Burberry, Dooney & Bourke, Versace, and Dolce & Gabana. (T.p. 122). Officers recovered 1123 purses, 235 wallets, 456 items of jewelry, 66 scarves, 14 belts, 3 shirts, and 6 travel bags for a total of more than 1900 pieces of counterfeit merchandise. (T.p. 124).

Subsequently, Troisi was indicted on the following counts: Count 1, Criminal Simulation, a felony of the third degree, in violation of R.C. 2913.32(A)(4); Count 2, Trademark Counterfeiting, a felony of the third degree, in violation of R.C. 2913.34(A)(4); Count 3, Trademark Counterfeiting, a felony of the third degree, in violation of R.C.

2913.34(A)(5); and Count 4, Possessing Criminal Tools, a felony of the fifth degree, in violation of R.C. 2923.24. (T.d. 1).

The case proceeded to jury trial in March of 2008. (T.d. 64). Mr. Richissin testified as the State's expert witness. Over a defense objection, he testified as to his expert opinion of the authenticity of the confiscated merchandise. The trial court dismissed Counts 1 and 3 of the indictment at the State's request. Troisi was convicted by a jury of one count of Trademark Counterfeiting, a felony of the third degree, in violation of R.C. 2913.34(A)(4) and one count of Possessing Criminal Tools, a felony of the fifth degree, in violation of R.C. 2923.24. (T.d. 64, 67). She was sentenced to serve a stated prison term of three years on each count, to be served concurrently, for a total of three years in prison. Id.

The defendant appealed her conviction, raising five assignments of error, including whether the defendant's conviction was based on insufficient evidence and whether the testimony of the State's expert witness was improper opinion testimony. In *State v. Troisi*, 11<sup>th</sup> Dist. No. 2008-L-060, 2008-Ohio-6062, the Eleventh District Court of Appeals reversed and vacated the defendant's conviction, holding that the testimony of the State's expert was improper and that the defendant's conviction was based on insufficient evidence.

## ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

### PROPOSITION OF LAW NO. 1

WHEN A DEFENDANT'S CONVICTION HAS BEEN SET ASIDE DUE TO AN ERROR IN THE PROCEEDINGS LEADING TO CONVICTION, SUCH AS THE WRONGFUL ADMISSION OF EVIDENCE, DOUBLE JEOPARDY DOES NOT BAR RETRIAL OF THE DEFENDANT, AND VACATUR IS AN INAPPROPRIATE REMEDY.

It is a longstanding, fundamental principle in American jurisprudence that double jeopardy bars retrial of a defendant after a conviction is reversed based on insufficient evidence. See, e.g., *Burks v. United States* (1978), 437 U.S. 1, 98 S.Ct. 2141. At first glance, it seems that the Eleventh District Court of Appeals did just that in *State v. Troisi*—vacated a defendant's conviction after finding that the State presented insufficient evidence. A closer review of the case, however, reveals that the defendant's conviction was not reversed based on the sufficiency of the evidence but on a procedural deficiency<sup>1</sup> in the trial itself, and vacatur was not a proper remedy to be applied by the Court of Appeals.

**A. An important distinction is drawn between reversals based on insufficient evidence and those based on procedural deficiencies; retrial based on the latter is not barred by double jeopardy.**

In reviewing whether evidence was sufficient to support a criminal conviction, an appellate court's function "is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, 273, 574 N.E.2d

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<sup>1</sup>The State does not concede that the admission of Mr. Richissin's testimony was error (see Proposition of Law 2) but will refer to it as such for ease of discussion in this proposition of law.

492. "The relevant inquiry does not involve how the appellate court might interpret the evidence." *Id.* Rather, the question is, after viewing the evidence in a light most favorable to the prosecution, whether the jury could have found the essential elements of the crime proven beyond a reasonable doubt. *Id.* An appellate court's reversal for insufficient evidence is essentially a determination that the State's case against a defendant was so lacking that the trial court should not have allowed the case to go to the jury. *Lockhart v. Nelson* (1988), 488 U.S. 33, 39, 109 S.Ct. 285, citing *Burks* at 16-17.

While the Double Jeopardy Clause promotes the fundamental interest of protecting defendants from successive prosecutions, there is also a fundamental interest in allowing the retrial of defendants: the sound administration of justice. *United States v. Tateo* (1964), 377 U.S. 463, 466, 84 S.Ct. 1587. And a well-established exception to the Double Jeopardy Clause arises when a defendant's conviction is set aside because of an error in the proceedings leading to conviction. See, e.g., *United States v. Ball* (1896), 163 U.S. 662, 16 S.Ct. 1192.

In *Lockhart v. Nelson*, the Supreme Court of the United States held that "where the evidence offered by the State and admitted by the trial court—whether erroneously or not—would have been sufficient to sustain a guilty verdict, the Double Jeopardy Clause does not preclude retrial." *Id.* at 35. In so holding, the Court drew a very important distinction between reversals based on the insufficiency of the evidence and those based on procedural deficiencies: "While the former is in effect a finding 'that the government has failed to prove its case' against the defendant, the latter 'implies nothing with respect to the guilt or innocence of the defendant,' but is simply 'a determination that [he] has been

convicted through a judicial *process* which is defective in some fundamental respect.' " Id. at 40, quoting *Burks* at 15 (emphasis in original). Therefore, retrial is permissible after a reversal for a procedural deficiency, and vacatur was not the correct remedy in *Troisi*.

Recently, in *State v. Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593, 903 N.E.2d 284, this Court adopted the holding of *Lockhart*: "When evidence admitted at trial is sufficient to support a conviction, but on appeal, some of that evidence is determined to have been improperly admitted, the Double Jeopardy Clauses of the United States and Ohio Constitutions will not bar retrial." *Brewer* at syllabus. This Court explained that holding to the contrary would hinder the State's efforts to seek justice:

"If the evidence offered by the State is received after challenge and is legally sufficient to establish the guilt of the accused, the State is not obligated to go further and adduce additional evidence that would be, for example, cumulative. Were it otherwise, the State, to be secure, would have to assume every ruling by the trial court on the evidence to be erroneous and marshal and offer every bit of relevant and competent evidence. The practical consequences of this would adversely affect the administration of justice, if for no other reason, by the time which would be required for preparation and trial of every case."

*Brewer* at ¶19, quoting *State v. Wood* (Mo. 1980), 596 S.W.2d 394, 398-399. The State must be able to rely on the evidentiary rulings of the trial court, which mandates that a reviewing court consider all of the evidence presented at trial in a sufficiency analysis.

**B. The Eleventh District Court of Appeals failed to distinguish between reversal for procedural deficiency and reversal for evidentiary insufficiency and erred by vacating Troisi's conviction.**

In *Troisi*, the Eleventh District Court of Appeals failed to act in accordance with the distinction between insufficient evidence and procedural deficiency. The Court of Appeals held that the State's expert witness, Timothy Richissin, improperly testified that the goods

in question were counterfeit. The appellate court wholly discounted Mr. Richissin's testimony, stating that it "completely lacks evidentiary support" because "it was introduced without a proper foundation and/or qualification." *Troisi* at ¶¶ 36, 40. After essentially ignoring the value of the expert's testimony, the Court of Appeals stated that "aside from Mr. Richissin's assurances that the goods were counterfeit (as defined by Richissin himself) the record is devoid of *any evidence* from which the jury could conclude that the items seized bore a trademark 'identical with or substantially indistinguishable from a mark that is registered on the principal register in the United States patent and trademark office \* \* \*' as required by R.C. 2913.34(F)(1)(a)(i)." *Id.* at ¶32 (emphasis in original).

The United States Supreme Court specifically held that the incorrect receipt of evidence amounts to a procedural deficiency:

[R]eversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g. *incorrect receipt or rejection of evidence*, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished.

*Burks* at 15 (emphasis added). In *Troisi*, the Eleventh District Court of Appeals reversed the defendant's conviction based on what it termed "sufficiency" when the real issue was the improper admission of evidence. The defense objected to Mr. Richissin's testimony, the objection was overruled by the trial court, and the witness testified that it was his opinion that the goods were counterfeit. While the Court of Appeals may have couched its analysis as one of sufficiency, the incorrect receipt of evidence is a procedural deficiency and does not equate to evidentiary insufficiency.

The analysis of the *Troisi* dissent is correct: "I believe the state's evidence in this case, an expert opinion regarding the identity of the actual trademarks combined with the defendant's confession, was sufficient." *Troisi* at ¶61 (Cannon, J., dissenting). The dissenting judge determined that the remedy applied by the court was incorrect; he acknowledged that in conducting a sufficiency analysis, the court of appeals is required to look at the actual evidence admitted at trial, both admissible and inadmissible. *Id.* at ¶¶73-74. The analysis in the dissent should be adopted by this Court: the vacatur of the defendant's conviction was not the appropriate remedy.

Contrary to longstanding precedent from the United States Supreme Court and to this Court's holding in *Brewer*, the Eleventh District Court of Appeals vacated *Troisi*'s conviction based on a procedural deficiency that the State was not given the chance to remedy. "[R]etrial grants the state 'one full and fair opportunity' to present its evidence to the jury free from error." *Brewer* at ¶19. Through the holding in *Troisi*, the State was denied its one full and fair opportunity to present its evidence to the jury in the prosecution of this defendant. Vacatur was not the proper remedy, and the decision of the Eleventh District Court of Appeals should be reversed.

#### **PROPOSITION OF LAW NO. II**

R.C. 2913.34 DOES NOT SPECIFY THE MEANS BY WHICH THE STATE MUST ESTABLISH THAT THE MARKS WERE IDENTICAL OR SUBSTANTIALLY INDISTINGUISHABLE, THUS, THE STATE IS NOT REQUIRED IN ALL CASES TO INTRODUCE CERTIFIED COPIES OF THE TRADEMARKS IN QUESTION.

In *Troisi*, the Eleventh District Court of Appeals held that the expert's testimony as to the authenticity of the merchandise usurped the function of the jury because the State

failed to introduce “evidence of the marks as they appear on the principal registry.” *Troisi* at ¶39. However, this court-imposed requirement has no foundation in the law. In dissent, Judge Cannon stated that “there are a variety of ways for the state to meet its burden of demonstrating that the marks used on the products were identical or substantially indistinguishable from the registered marks.” *Id.* at ¶61. The judge agreed that one way is to introduce certified copies of the trademarks, however, he also expressed his belief that the State’s evidence in this case, an expert opinion regarding the identity of the marks combined with the defendant’s confession, was a proper method of proof. *Id.*

**A. The Eleventh District Court of Appeals’s narrow reading of the definition of “counterfeit mark” overlooks the requirement that the mark be “spurious”.**

The defendant was convicted of a violation of R.C. 2913.34(A)(4), which specifies that no person shall sell, offer for sale, or otherwise dispose of goods with the knowledge that a counterfeit mark is attached to, affixed to, or otherwise used in connection with the goods. “Counterfeit mark” is defined in R.C. 2913.34(F)(1)(a) as a spurious mark that satisfies two conditions. First, the mark must be “identical or substantially indistinguishable from a mark that is registered on the principal register in the United States patent and trademark office for the same goods or services as the goods or services to which or in connection with which the spurious trademark is attached, affixed, or otherwise used.” R.C. 2913.34(F)(1)(a)(i). Second, the use of the mark is likely to cause confusion or mistake or deceive other persons. R.C. 2913.34(F)(1)(a)(ii). The term “spurious” is not defined in the statute but is defined by Black’s Law Dictionary as a mark “[d]eceptively suggesting an erroneous origin” or “fake”. Black’s Law Dictionary (8<sup>th</sup> ed., 2004).

The Eleventh District Court of Appeals read the definition of counterfeit mark very narrowly to focus only on the first condition—that the mark be identical or substantially indistinguishable from one on the principal registry. But in so doing, the Court of Appeals lost sight of the “spurious” aspect of the definition. Indeed, the first condition is only one aspect of a much broader definition. Essentially, the purpose of the first prong is to identify the victim of the crime. The legislative history of the federal version of the statute indicates that “a mark need not be absolutely identical to a genuine mark in order to be considered counterfeit. Such an interpretation would allow counterfeiters to escape liability by modifying the registered trademarks by their honest competitors in trivial ways.” *United States v. Guerra* (2002), 293 F.3d 1279, 1288.

Thus, the definition of counterfeit mark must be read in a broader context to take the spurious nature of the mark into consideration. This is precisely the reason why experts are crucial in the prosecution of trademark counterfeiters: lay jurors do not have the requisite ability to decipher the origin of a product by simply comparing a genuine mark with a counterfeit one. Contrary to the assertions of the Eleventh District Court of Appeals, a simple comparison of a mark on a good such as a handbag and a certified copy of a mark from the principal registry will not allow the jury to make a determination as to the authenticity of a mark.

In the instant case, the State enlisted the expertise of Mr. Timothy Richissin to assist the jury in reaching its ultimate decision. In qualifying Mr. Richissin, the State elicited information on his extensive training in the area of intellectual property and his experience as a certified law enforcement officer. Mr. Richissin testified that he was a sergeant with the Cleveland Police Department and had approximately 26 years of law enforcement

experience. (T.p. 179). As a Cleveland Police Officer, he participated in investigations dealing with intellectual property such as counterfeit trademarks. (T.p. 181). Additionally, at the time of the instant offense, Mr. Richissin was the regional director of PICA, a private investigatory agency that is often employed by victim trademarks. (T.p. 181-182).

Mr. Richissin testified that each trademark creates its own enforcement manual and training programs, and PICA investigators are continually updated on changes in models and lines of products. (T.p. 183). Since 2002, when he first became involved in the field of intellectual property, he attended approximately 30 training sessions and consults with the trademarks prior to them establishing new guidelines for their intellectual property. (T.p. 184). Mr. Richissin's extensive training and experience surely qualify him as an expert in the area of counterfeit trademarks.

Mr. Richissin testified about indicators that led him to opine that the handbags were counterfeit. For example, in testifying about the counterfeit Louis Vuitton bag that he purchased, Mr. Richissin stated that the LV trademarks were in the wrong position on the bag and that the bag had plastic over the handles, two red flags that the bag was not authentic. Additionally, he testified that the odor of the bag indicated that the material was not the same as that of an authentic bag. (T.p. 201-202). Ultimately, Mr. Richissin opined that the bag was counterfeit based on his analysis. (T.p. 202).

Mr. Richissin's testimony was helpful to the jury because the jury did not have the requisite knowledge and training to undergo this type of analysis as lay persons. By their very definition, the counterfeit marks would be nearly identical to actual marks, and without further information, the jury would be unable to make a determination as to the spurious nature of a mark as required by the definition of counterfeit mark. A simple comparison of

the marks of the seized goods to those on the principal registry would not have allowed the jury to assess whether the marks were counterfeit. This was accomplished through expert testimony.

**B. The Eleventh District Court of Appeals impeded prosecutorial discretion and the fair administration of justice when it dictated the type of evidence that the State must produce in trademark counterfeiting cases.**

From the language of R.C. 2913.34, the majority in *Troisi* dictated a requirement for the State to introduce certified copies of the marks from the principal registry. But absent an express statutory requirement or a prohibition in the rules of evidence, the State can present any competent evidence at its disposal for each of the elements of an offense. The State charges offenses based on its ability to present competent evidence, including the testimony of an expert.

The narrow reading of the definition of counterfeit mark by the Court of Appeals in *Troisi* hinders the State's ability to prosecute R.C. 2913.34 cases. Essentially, the Court of Appeals is requiring the State to prove its case through only one of the many methods available. In the instant case, there were basically four methods available to the State to prove that the marks were counterfeit.

First, as was required by the Court of Appeals, the State could have presented certified copies of the marks from the principal registry of the United States patent and trademark office. A search of the federal registry may reveal hundreds, if not thousands, of individual marks for one trademark. Additionally, a certified copy of the mark may not provide the jury with the necessary information as to whether the mark is spurious.

Next, the State can provide authentic pieces of merchandise for a direct comparison by the jury. In this case, over 1900 pieces of merchandise were seized from the defendant; it would be nearly impossible for the State to allow a direct jury comparison of each piece of counterfeit merchandise with its authentic counterpart. Besides being cost-prohibitive, many of the non-authentic items do not have a genuine counterpart to allow a direct comparison. This may, however, be a viable option in some trademark counterfeiting cases, and the State must be able to choose the best method of evidence presentation based on the particulars of the case.

Another option for the State is eliciting expert testimony from either an investigator or the owner of the mark. Based on the specific facts of the instant case, this was the best method available. The sheer volume of evidence required the testimony of an expert. Selecting a sample of the counterfeit merchandise was not an option because the jury would lose sight of the magnitude of the crime. Expert testimony allowed the jury to fully appreciate the scope of the defendant's conduct without having to engage in a direct comparison of over 1900 pieces of merchandise. Plus, the expertise of the witness allowed the jury to draw its own conclusion as to the spurious nature of the goods.

The defendant, however, argued that the testimony of the expert witness usurped the function of the jury because Mr. Richissin testified to his opinion of the authenticity of the goods. But this is an antiquated view of the rules of evidence; indeed, Evid.R. 704 provides that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact." The defendant's assertion also overlooks the fact that an expert witness's testimony is subject to cross examination and is weighed by the jury in making its decision. The

purpose of an expert witness is to testify to matters beyond the knowledge or experience possessed by lay jurors. Evid.R. 702. Mr. Richissin's testimony was based on specialized information, and he was qualified as an expert. *Id.* The State complied with all of the applicable rules of evidence in offering the expert testimony, and Mr. Richissin's testimony was allowed over numerous defense objections. The expert testimony in this case was proper in all regards and should be permitted as a method of proof in a trademark counterfeiting case.

Finally, the State should be able to introduce evidence of a defendant's confession in trademark counterfeiting cases. In this case, the defendant made both oral and written statements to law enforcement acknowledging that she was aware that the merchandise was counterfeit and that she intended to sell it to the public. In fact, this was part of the defendant's defense at trial: everyone knew the goods were fake. The nature of the goods was not a contested issue at trial. The Eleventh District Court of Appeals essentially ignored the defendant's confessions in its analysis and found that the State had fallen short because it failed to produce certified copies of the marks from the principal registry.

Generally, the State has numerous options available as methods of producing evidence at trial. But through its decision in *Troisi*, the Eleventh District Court of Appeals removed the State's discretion and seriously hindered the pursuit of justice in Ohio as to trademark counterfeiting cases. The Court of Appeals cannot be permitted to impose a judicially-determined evidentiary method of establishing these violations based on the facts of one case that it examined in hindsight. R.C. 2913.34 cases can involve a wide array of facts and circumstances that require differing methods of evidence production. Without

an express statutory requirement or a prohibition in the rules of evidence, the State should be permitted to produce any evidence at its disposal.

**C. Federal case law indicates that the Eleventh District Court of Appeals did not properly interpret the trademark counterfeiting statute.**

An interpretation of R.C. 2913.34 has never been undertaken by this Court, and to date, the Eleventh District Court of Appeals is the only appellate court in Ohio to analyze this statute. But much can be inferred from federal case law. Indeed, R.C. 2913.34 is analogous to Section 2320, Title 18, of the United States Code.<sup>2</sup> Federal cases

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<sup>2</sup>18 U.S.C. 2320 provides, in pertinent part:

(a)(1) Offense. In general. – Whoever; [sic] intentionally traffics or attempts to traffic in goods or services and knowingly uses a counterfeit mark on or in connection with such goods or services, or intentionally traffics or attempts to traffic in labels, patches, stickers, wrappers, badges, emblems, medallions, charms, boxes, containers, cans, cases, hangtags, documentation, or packaging of any type or nature, knowing that a counterfeit mark has been applied thereto, the use of which is likely to cause confusion, to cause mistake, or to deceive, shall, if an individual, be fined not more than \$2,000,000 or imprisoned not more than 10 years, or both \* \* \*  
\* \* \*

(e)(1)(A) For the purpose of this section the term “counterfeit mark” means a spurious mark –

(i) that is used in connection with trafficking in any goods, services, labels, patches, stickers, wrappers, badges, emblems, medallions, charms, boxes, containers, cans, cases, hangtags, documentation, or packaging of any type or nature;

(ii) that is identical with, or substantially indistinguishable from, a mark registered on the principal register in the United States Patent and Trademark Office and in use, whether or not the defendant knew such mark was so registered;

(iii) that is applied to or used in connection with the goods or services for which the mark is registered with the United States Patent and Trademark Office, or is applied to or consists of a label, patch, sticker, wrapper, badge, emblem, medallion, charm, box, container, can, case, hangtag, documentation, or packaging of any type or nature that is designed, marketed, or otherwise intended to be used on or in connection with the goods or services for which the mark is registered in the United States

demonstrate that the Court of Appeals did not properly interpret the element that the counterfeit mark be identical or substantially indistinguishable from a mark in the U.S. registry; indeed, the Court of Appeals too narrowly defined the proof required to meet this element.

In *United States v. Guerra*, 293 F.3d 1279, the defendant claimed that the jury was not presented evidence that would enable it to determine whether the labels on counterfeit cigars were identical or substantially indistinguishable from registered trademarks. Specifically, the appellant argued that the government was required to produce genuine cigars or labels to allow a direct comparison, representatives from the trademarks, or investigators who were also cigar experts. *Id.* at 1288. In rejecting the appellant's argument, the Eleventh Circuit Court of Appeals stated:

The statute does not specify the means by which the Government may establish that the marks were "identical or substantially indistinguishable." There is no support for the proposition that in all cases, the trier of fact must determine indistinguishability based on the marks as affixed to actual goods. Nor is there a requirement that the actual trademark owner testify in a criminal trial, or that the agent who conducted the investigation and seizure of the counterfeit merchandise be qualified as an expert in the particular type of product.

*Id.* Just as the federal statute does not provide the means by which the government may prove its case, R.C. 2913.34 lacks the same type of language. Thus, the State may prove its case through nearly any available means, and the Eleventh District Court of Appeals should have accepted Mr. Richissin's testimony on this element.

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Patent and Trademark Office; and  
(iv) the use of which is likely to cause confusion, to cause mistake, or to deceive[.]

Similarly, in three federal cases where defendants' convictions were affirmed, the government did not introduce certificates of registration to prove that the marks in question were identical or substantially indistinguishable from marks on the federal registry. First, in *United States v. Park* (2006), 164 Fed. Appx. 584, 585, the defendant operated a gift shop that sold counterfeit merchandise. In order to prove that the Louis Vuitton and Chanel merchandise was counterfeit, the government introduced a complaint from a civil action that occurred eight months prior to the criminal case. *Id.* The complaint indicated that trademark holders had registered and used the marks in question. *Id.* Additionally, the defendant's civil counsel, as well as a government special agent, each testified that the seized goods contained marks that were identical to marks registered on the principal registry. *Id.*

Likewise, in *United States v. DeFreitas* (2000), 92 F.Supp.2d 272, 278, the government did not introduce the certified copies of marks on the principal registry. Instead, it presented both genuine and counterfeit items into evidence. *Id.* The case involved the sale of three types of counterfeit Beanie Babies; this small number allowed the government to produce authentic goods without much hardship. The testimony of the CEO of the victim company, as well as a company catalogue, were also presented to the jury. *Id.* The court concluded that the evidence was sufficient for the jury to conclude that the marks were registered. *Id.*

Finally, in *United States v. Xu*, No. H-07-362, slip op. (S.D. Tex. Dec. 4, 2008), the defendant was indicted for selling counterfeit prescription drugs. The defendant filed a motion for a judgment of acquittal, which was granted in part and denied in part. The defendant's motion was denied with respect to one count where the government presented

the testimony of an employee of the victim company. The employee testified that the symbol next to the product name was the registered trademark symbol, and from this information, the court found that the jury could make a reasonable inference. But with regard to the remaining counts relating to other drugs, the court granted the defendant's motion because the government failed to elicit any testimony or evidence regarding the registration of a mark. This was certainly not the case in *Troisi*—the State elicited testimony from an expert witness who gave his opinion that the marks in question were identical or substantially indistinguishable from marks on the federal registry.

The federal version of the statute analogous to R.C. 2913.34 is interpreted in a broader fashion than the Eleventh District Court of Appeals allowed in this case. Because R.C. 2913.34 does not specify the means by which the State must establish that the marks were identical or substantially indistinguishable, the State should not be required to introduce certified copies of the marks in question in all cases.

### **CONCLUSION**

It is sometimes said that trademark counterfeiting is a victimless crime and that fake handbags should be legal because only the big name company is being hurt. There are, however, many victims and far-reaching implications of this illegal conduct. Once a counterfeit product leaves the booth, even with the knowledge of its lack of authenticity, confusion occurs in the market. Trademark counterfeiting laws protect not only the brand and the direct purchaser but any potential purchaser down the line. More importantly, these laws protect the public at large. "To the extent the mark is unprotected, the owner's interest in producing quality goods is undercut to the detriment of the public generally. Any construction of the [statute] that allows persons to traffic legally in counterfeit trademarks

also risks fostering the proliferation of 'substandard and sometimes dangerous' goods." *State v. Marchiani* (2001), 765 A.2d 765. The Eleventh District Court of Appeals's decision in *Troisi*, however, did just that—the Court's overly narrow interpretation of the statute hinders the State's ability to prosecute trademark counterfeiting cases and ultimately leaves marks unprotected in Ohio.

The decision of the Eleventh District Court of Appeals should be reversed for two reasons. First, as discussed in the first proposition of law, the court of appeals failed to take all of the evidence presented at trial into consideration in its sufficiency analysis. Because of this decision, the State is no longer able to retry a defendant after a reversal for a procedural deficiency; the court of appeals has essentially equated a reversal for improperly admitted evidence with a reversal based on evidentiary insufficiency, a notion that has been consistently rejected by the United States Supreme Court.

Second, as discussed in the second proposition of law, by demanding an unreasonable level and manner of proof for a conviction for a violation of R.C. 2913.34, the Court of Appeals has severely hindered the State's ability to prosecute criminals for trademark counterfeiting in Ohio. This case is one of first impression as no court in Ohio has addressed the basic elements of the crime of trademark counterfeiting. But several federal courts of appeals have considered this very issue, and the Eleventh District Court of Appeals's decision in *Troisi* conflicts with these federal cases.

For these reasons, justice requires that this Honorable Court reverse the decision of the Eleventh District Court of Appeals and reinstate the defendant's conviction in this case. In the alternative, if this Court does not find merit in the State's second proposition of law, the State requests this Honorable Court reverse the decision of the Eleventh District

Court of Appeals and remand the case to the trial court to allow the State to retry the defendant in accordance with the holding of this Court.

Respectfully submitted,

By: Charles E. Coulson, Prosecuting Attorney

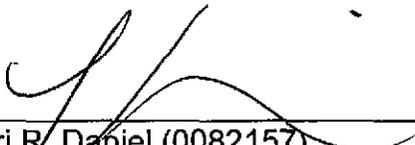
By:   
Teri R. Daniel (0082157)  
Assistant Prosecuting Attorney  
Counsel of Record

COUNSEL FOR APPELLANT  
STATE OF OHIO  
Administration Building  
105 Main Street  
P.O. Box 490  
Painesville, Ohio 44077

(440) 350-2683 Fax (440) 350-2585

**PROOF OF SERVICE**

A copy of the foregoing Memorandum in Support of Jurisdiction of Appellant, State of Ohio, was sent by regular U.S. Mail, postage prepaid, to counsel for the appellee, Dominic J. Vitantonio, Esquire, Argie, D'Amico & Vitantonio, 6449 Wilson Mills Road, Mayfield Village, OH 44143-3402, on this 29<sup>th</sup> day of May, 2009.

  
\_\_\_\_\_  
Teri R. Daniel (0082157)  
Assistant Prosecuting Attorney

TRD/klb

## **APPENDIX**

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, )  
 )  
 Plaintiff-Appellant, )  
 )  
 v. )  
 )  
 JUANITA M. TROISI, )  
 )  
 Defendant-Appellee. )

Case No. **08-2490**

On Appeal from the  
Lake County Court of Appeals,  
Eleventh Appellate District

Court of Appeals Case No. 2008-L-060

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**NOTICE OF APPEAL OF APPELLANT STATE OF OHIO**

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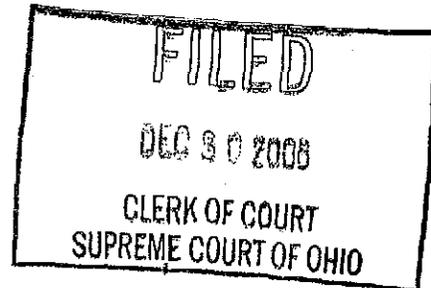
CHARLES E. COULSON (0008667)  
PROSECUTING ATTORNEY  
LAKE COUNTY, OHIO

Teri R. Daniel (0082157) (COUNSEL OF RECORD)  
ASSISTANT PROSECUTING ATTORNEY  
Administration Building  
105 Main Street, P.O. Box 490  
Painesville Ohio 44077  
(440) 350-2683 Fax (440) 350-2585  
tdaniel@lakecountyohio.gov

COUNSEL FOR APPELLANT, STATE OF OHIO

Dominic J. Vitantonio, Esquire  
6449 Wilson Mills Road  
Mayfield Village, OH 44143-3402  
(440) 449-3333

COUNSEL FOR APPELLEE, JUANITA M. TROISI



Notice of Appeal of Appellant State of Ohio

Appellant State of Ohio, gives notice of appeal to the Supreme Court of Ohio from the opinion judgment entry of the Lake County Court of Appeals, Eleventh Appellate District, entered in *State v. Troisi*, Court of Appeals Case No. 2008-L-060 on November 18, 2008.

This case is a Claimed Appeal of Right, pursuant to S.Ct. R. II, Section 1(A)(2) as it involves a substantial constitutional question, and/or this case is a Discretionary Appeal, pursuant to S.Ct. R. II, Section 1(A)(3) as it involves a felony and raises issues of public or great general interest.

Respectfully submitted,

By: Charles E. Coulson (0008667)  
Lake County Prosecuting Attorney

By:   
Teri R. Daniel (0082157)  
Assistant Prosecuting Attorney  
Counsel of Record

COUNSEL FOR APPELLANT  
STATE OF OHIO

Administration Building  
105 Main Street  
P.O. Box 490  
Painesville, Ohio 44077  
(440) 350-2683 Fax (440) 350-2585

PROOF OF SERVICE

A copy of the foregoing Notice of Appeal was sent by regular U.S. Mail, postage prepaid, to counsel for the appellee, Mr. Dominic J. Vitantonio, Esquire, 6449 Wilson Mills Road, Mayfield Village, OH 44143-3402, and, pursuant to S.Ct.R. XIV, Section 2, the Ohio Public Defender, Mr. David Bodiker, 8 East Long Street, 11th Floor, Columbus, Ohio 43215, on this 29<sup>th</sup> day of December, 2008.



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Teri R. Daniel (0082157)  
Assistant Prosecuting Attorney

TRD/klb

THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
LAKE COUNTY, OHIO

STATE OF OHIO,

OPINION

Plaintiff-Appellee

FILED  
COURT OF APPEALS  
NOV 18 2008  
LYNNE L. MAZEIKA  
CLERK OF COURT  
LAKE COUNTY, OHIO

CASE NO. 2008-L-060

- vs -

JUANITA M. TROISI,

Defendant-Appellant.

Criminal Appeal from the Court of Common Pleas, Case No. 07 CR 000647.

Judgment: Reversed and vacated.

*Charles E. Coulson*, Lake County Prosecutor and *Teri R. Daniel*, Assistant Prosecutor,  
105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

*Dominic J. Vitantonio*, 6449 Wilson Mills Road, Cleveland, OH 44143 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Juanita M. Troisi, appeals from the judgment on conviction entered by the Lake County Court of Common Pleas, after trial by jury, on one count of trademark counterfeiting, a felony of the third degree, and one count of possession of criminal tools, a felony of the fifth degree. For the reasons set forth below, this court reverses and vacates appellant's convictions.

{¶2} On February 3, 2007, appellant hosted a "purse party" at a building known as the Kirtland Grange in Kirtland, Ohio. At this event, appellant offered for sale various items, such as purses, wallets, and jewelry. After receiving her invitation, Dina Halatek, one of the invitee's, contacted the Kirtland Police Department about the event because she had been recently informed the sale of items at such parties was "very criminal." Sergeant Jamie Tavano of the Kirtland Police Department initiated an investigation of the matter. During his investigation, Sgt. Tavano contacted Tim Richissin, a sergeant with the Cleveland Police Department. Tavano sought Richissin's assistance because of his background as a well-known investigator of intellectual property crimes. In addition to being a police officer, Mr. Richissin was employed as a regional director of the Professional Investigating Consulting Agency (PICA). According to Mr. Richissin, PICA is a private company specializing in the investigation of intellectual property crimes such as trademark counterfeiting. With the assistance of Mr. Richissin, the investigation culminated in a raid of the premises on the day of the event. After the raid, appellant was arrested and police seized over 1,700 purportedly counterfeit items along with appellant's vehicle and a sum of cash from sales.

{¶3} Appellant was subsequently indicted on one count of criminal simulation, in violation of R.C. 2913.32(A)(4), a felony of the third degree; two counts of trademark counterfeiting, in violation of R.C. 2913.34(A)(4) and (5), felonies of the third degree; and one count of possessing criminal tools, in violation of R.C. 2923.24, a felony of the fifth degree. Three forfeiture specifications were attached to each count relating to the property seized, to wit: the vehicle used to transport the property, the money seized from sales, and the purportedly counterfeit property itself. Prior to the commencement

of trial, the trial court dismissed the criminal simulation count and one count of trademark counterfeiting. At the close of the state's case, appellant moved for acquittal which the trial court overruled. The jury subsequently returned verdicts of guilty on the remaining charges of trademark counterfeiting and possessing criminal tools. Appellant was sentenced to three years imprisonment for the trademark counterfeiting conviction and one year for the possessing criminal tools conviction. The sentences were ordered to be served concurrently for a total of three years imprisonment. Appellant now appeals.

{¶4} As they are each significantly related, we shall address appellant's first, second, and fourth assignments of error together. Under these assigned errors, appellant posits the following:

{¶5} "[1.] The trial court erred by permitting Richissin to testify concerning his 'expert' opinion that the items were 'counterfeit,' 'fake,' 'not original,[" and/or 'not authentic[.]'

{¶6} "[2.] The trial court erred by denying appellant's [Criminal] Rule 29 motion[.]

{¶7} "[4.] The verdict is not sustained by sufficient evidence."

{¶8} We first point out that appellant's second and fourth assignments of error assert the same legal theory. Defense counsel's Crim.R. 29 motion acted to challenge the sufficiency of the state's evidence. Thus, these two separate assignments of error contest the very same issue; namely, whether the state presented adequate evidence at trial to meet its burden of proof on each element of the crimes charged. It is from this point we shall begin our analysis.

{¶9} An appellate court reviewing whether the evidence was sufficient to support a criminal conviction examines the evidence admitted at trial and determines whether such evidence, if believed, would convince the mind of the average juror of the defendant's guilt beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 273. A reviewing court may not reweigh or reinterpret the evidence; rather, the proper inquiry is, after viewing the evidence most favorably to the prosecution, whether the jury could have found the essential elements of the crime proven beyond a reasonable doubt. *Id.*

{¶10} R.C. 2913.34, the statute governing the crime of "trademark counterfeiting" provides, in relevant part:

{¶11} "(A) No person shall knowingly do any of the following:

{¶12} \*\*\*\*

{¶13} "(4) Sell, offer for sale, or otherwise dispose of goods with the knowledge that a counterfeit mark is attached to, affixed to, or otherwise used in connection with the goods;

{¶14} \*\*\*\*

{¶15} "(F) As used in this section:

{¶16} "(1)(a) \*\*\* 'counterfeit mark' means a spurious trademark or a spurious service mark that satisfies both of the following:

{¶17} "(i) It is identical with or substantially indistinguishable from a mark that is registered on the principle register in the United States patent and trademark office for the same goods or services as the goods or services to which or in connection with

which the spurious trademark or spurious service mark is attached, affixed, or otherwise used \*\*\*.

{¶18} "(ii) Its use is likely to cause confusion or mistake or to deceive other persons."

{¶19} With the statutory definition in mind, the state was required to prove appellant:

{¶20} (1) Knowingly;

{¶21} (2) sold, offered for sale, or otherwise disposed of goods in her possession;

{¶22} (3) knowing that a spurious trademark was affixed to or otherwise used in connection with the goods; and

{¶23} (4) the spurious trademark:

{¶24} (a) is identical with or substantially indistinguishable from a mark that is registered on the principal register in the United States patent and trademark office for the particular purse, jewelry or item,

{¶25} *and*

{¶26} (b) is likely to cause confusion or mistake or to deceive other persons.

{¶27} Although appellant does not concede the state met its burden on elements (1)-(3), she does not take specific issue with the state's proof on these elements. Rather, appellant's challenge is directed at the manner in which the state attempted to prove element (4)(a). Appellant alleges that the testimony of Tim Richissin, the state's intellectual property counterfeiting expert, by itself, was inadequate to prove the subject

goods bore a "spurious" or "counterfeit" mark as defined by statute. We agree with appellant's argument.

{¶28} At trial, Mr. Richissin testified as an intellectual property crime expert for the state. He testified he was a sergeant with the Cleveland Police Department who principally investigates crimes involving intellectual property. Mr. Richissin testified he first became involved in investigating intellectual property crimes in 2002 and has attended "maybe thirty training sessions" since that time. Mr. Richissin is a regional director for PICA, a private investigation firm retained by international fashion designers for the purpose of investigating trademark counterfeiting. Mr. Richissin testified PICA investigates allegations of trademark counterfeiting (as well as other illicit activities related to intellectual property) and, once it completes an investigation, it submits its findings to law enforcement for purposes of prosecution. According to Mr. Richissin, PICA clients include Gucci, Prada, Coach, Dior, Fendi, Louis Vuitton, Dooney and Bourke, Tiffany, Kate Spade, Liz Claiborne, Chanel, and Versace. Each of these companies provides PICA investigators training regarding how to identify inauthentic items or "knock-offs" bearing their respective trademark.

{¶29} Over defense objection, Mr. Richissin defined "trademark counterfeiting" as "[c]opying the registered trademark of a property owner." He further testified, again over objection, he is "one of the more knowledgeable people in Northeast Ohio about trademark counterfeiting." According to Mr. Richissin, he is able to personally distinguish counterfeit goods from authentic goods due to his training and experience in this area.

{¶30} During direct examination, Mr. Richissin was provided certain examples of goods seized from appellant and asked to identify whether the items were, in his estimation, counterfeit. He was also asked to explain how he arrived at his conclusions. After inspecting what was purported to be a Coach bag, a Prada purse, a Louis Vuitton purse, a Chanel purse, a Gucci purse, a Burberry purse, a Fendi purse, a Kate Spade purse, and a piece of Tiffany jewelry, Mr. Richissin concluded each, over strenuous objections by defense counsel, were knock-offs and therefore counterfeit. At the conclusion of direct examination, Mr. Richissin testified, again over objection, that the trademarks on the merchandise he inspected were "identical or substantially indistinguishable from the genuine trademark."

{¶31} During the defense's case-in-chief, defense counsel called Mr. Richissin as a witness. During defense counsel's direct examination of Mr. Richissin, the witness testified he had never obtained a record from the United States patent and trademark office. He further testified he had never personally viewed the trademarks from the principal register of any items he testified were counterfeit. After the conclusion of Mr. Richissin's testimony, defense counsel rested.

{¶32} The state neither submitted certified copies of the authentic trademarks of the companies whose marks were at issue nor any other evidence of the actual trademarks registered in the principal register of the United States patent and trademark office. In essence, aside from Mr. Richissin's assurances that the goods were counterfeit (as defined by Richissin himself) the record is devoid of *any evidence* from which the jury could conclude that the items seized bore a trademark "identical with or substantially indistinguishable from a mark that is registered on the principal register in

the United States patent and trademark office \*\*\*" as required by R.C. 2913.34(F)(1)(a)(i). R.C. 2913.34 specifically requires the state to prove, beyond a reasonable doubt, that a "counterfeit mark" was attached or affixed to the goods in question. The definition of "counterfeit mark" is precisely defined in the statute and requires proof that the mark be "identical with or substantially indistinguishable from" the marks registered with the United States patent and trademark office. Without evidence that the goods bore a counterfeit mark as defined in the law, there can be no violation of the trademark counterfeiting statute.

{¶33} Although Mr. Richissin testified the items he inspected, each of which were affixed with a recognizable trademark emblem of some kind, were inauthentic based upon multiple factors, it is merely from these observations that he was able to conclude the items represented instances of "trademark counterfeiting." Given the statute, the supportive testimony for his conclusions is basically insufficient to meet the statutory definition of the crime of trademark counterfeiting set forth under R.C. 2913.34.

{¶34} In particular, Mr. Richissin's definition of "trademark counterfeiting" (i.e., "copying the registered trademark of a property owner") is overly broad and does not embrace the precise legal definition of "trademark counterfeiting." Moreover, it appears the state, perhaps inadvertently, blurred the foregoing distinction by repeatedly asking Mr. Richissin, in light of *his* conception of trademark counterfeiting, whether a given item is "authentic or counterfeit." Such questions illustrate that the state was attempting to meet its burden by using an informal or colloquial understanding of "trademark counterfeiting" as opposed to the specific statutory definition.

{¶35} We recognize that Evid.R. 704 permits an expert to provide testimony by way of opinion or inference that embraces the ultimate issue for the jury. However, simply because Mr. Richissin could so testify does not imply his testimony, by itself, was adequate to meet the state's burden. To the contrary, Mr. Richissin's testimony was premised upon an essentially subjective or, at best, a non-legal definition of the phrase "trademark counterfeiting." We acknowledge that Mr. Richissin did, on direct examination, draw the blank conclusion that the items he inspected were "either identical or substantially indistinguishable from the genuine trademark." However, Mr. Richissin later testified he had never seen the genuine trademarks as they appear on the principal register in the United States patent and trademark office. Because he had never viewed the genuine trademarks and the state failed to submit some evidence of the same, Mr. Richissin's initial conclusion completely lacks evidentiary support.

{¶36} Because there was no evidence presented that would allow the jury to conclude the goods bore a counterfeit mark that was identical with or substantially indistinguishable from a registered trademark, the jury was allowed to render a verdict based only upon Mr. Richissin's non-legal conception of this ultimate issue. Irrespective of the propriety of the jury instructions, the jury heard no evidence regarding the first prong of the definition of a "counterfeit mark." Hence, under these circumstances, Mr. Richissin's testimony was both misleading and legally insufficient to prove the ultimate issue which his testimony embraced.

{¶37} Our review of the body of Ohio law in this area reveals that no court has addressed the basic elements of the crime of "trademark counterfeiting." Accordingly, our construction and analysis of this issue is a matter of first impression. In our view,

the statutory elements of the crime of "trademark counterfeiting" are unambiguously set forth under R.C. 2913.34. The statute *requires* the state to prove the trademark affixed to the purported knock-off merchandise is identical with or substantially indistinguishable from that which is properly registered with the United States trademark and patent office. This is a specific, express element of the crime for which appellant was prosecuted. However, as outlined above, the state failed to offer any substantive evidence to prove this element of the crime. We therefore hold this "gap" in the evidentiary chain necessitates a reversal of appellant's conviction for "trademark counterfeiting."

{¶38} While the foregoing analysis is dispositive of the instant case, we shall still address appellant's first assignment of error because it contemplates an issue that is capable of repetition yet evading review. Under her first assignment of error, appellant asserts the trial court erred in allowing Mr. Richissin's testimony because it invaded the province of the jury effectively denying her due process of law. Appellant contends that Mr. Richissin usurped the function of the jury when, without any evidence that the goods at issue possessed marks that are "identical with or substantially indistinguishable from" the mark on the principal registry of the United States patent and trademark office, he testified as an expert that the goods at issue were "counterfeit," "fake," "not original," and/or "not authentic." We agree.

{¶39} As discussed above, Mr. Richissin was allowed to testify that "trademark counterfeiting" means "[c]opying the registered trademark of a property owner." Although this definition may be sufficient in Mr. Richissin's business of intellectual property crime investigation, the statutory definition differs significantly from this open-

ended conception. However, in light of this definition, Mr. Richissin was permitted to testify, over defense counsel's objection, that the items at issue were counterfeit without any substantive evidence that the marks on the items were counterfeit pursuant to R.C. 2913.34(F)(1)(a)(1). Because the state introduced no evidence of the marks as they appear on the principal registry, the jury was unable to measure Mr. Richissin's testimony against the proper statutory definition set forth under R.C. 2913.34(F)(1)(a)(i). By allowing him to draw his conclusion without introducing evidence of the marks as they exist on the principal registry, the issue of whether the marks were counterfeit was taken from the jury. Therefore, Mr. Richissin's testimony, which carried with it an air of authority beyond that of general lay testimony, acted to usurp the jury's role.

{¶40} In light of this analysis, an ancillary, yet crucial point deserves clarification. Although the manner in which the state chose to prove its case is legally problematic, Mr. Richissin's testimony was not necessarily improper. Rather, it is this court's position that, given the course of *these* proceedings, Mr. Richissin's testimony was improper because it was introduced without a proper foundation and/or qualification.

{¶41} To explain, it is patent that Mr. Richissin's definition of "trademark counterfeiting" differed significantly from the statutory elements requiring proof of "trademark counterfeiting" under Ohio law. As these definitions differed, the testimony could have been properly introduced had the state laid a foundation to establish this distinction. Introducing this distinction to the jury may have benefitted the state because, in doing so, it may have triggered the introduction of evidence relating to the actual trademarks of the goods at issue as they appear in the principal registry of the United States patent and trademark office. In so doing, the jury would have had the

opportunity to weigh Mr. Richissin's conclusions against the actual trademark emblems and determine, for itself, whether the marks were counterfeit pursuant to the statute. However, without laying this foundation, the jury was not only confused as to the proper standard, it was misled into believing Mr. Richissin's testimony sufficed to establish the marks at issue were counterfeit. This ultimate conclusion was a factual issue to be determined by the jury based upon evidence before it. As emphasized throughout our analysis, such defects in the state's strategy and proof are fatal and, as a result, the matter must be reversed.

{¶42} Finally, although appellant does not expressly challenge her conviction for possession of criminal tools in her brief, upholding the verdict due to such an omission would be plain error. Pursuant to Crim.R. 52 (B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." A defendant's substantial rights are affected when the error at issue has an impact on the outcome of the trial. *State v. Stanley*, 11th Dist. No. 2007-P-0104, 2008-Ohio-3258, at ¶29.

{¶43} Here, appellant's indictment alleged she possessed criminal tools, namely, "totes/vehicles, with the purpose to use it criminally." The indictment further specified: "The circumstances indicate that the substance, device, instrument or article involved was intended for use in the commission of a felony, to-wit: \*\*\* Trademark Counterfeiting."

{¶44} The specification charging appellant with possessing criminal tools "intended for use in the commission of a felony," raised the offense from a first-degree misdemeanor to a felony of the fifth degree. See R.C. 2923.24(C). As appellant was

charged with a felony specification for possession of criminal tools, the specification became an additional element of the offense which the state was required to prove beyond a reasonable doubt. *State v. Davis*, 6th Dist. No. WD-07-031, 2008-Ohio-3574, at ¶15; see, also, *State v. Brown* (1993), 85 Ohio App.3d 716, 723.

{¶45} A review of the evidence demonstrates the state failed to prove appellant possessed the "tools" at issue with the purpose of committing the felony of trademark counterfeiting. "Purposely" is defined in R.C. 2901.22(A) as follows:

{¶46} "A person acts purposely when it is [her] specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature."

{¶47} The Supreme Court of Ohio has stated that "'purpose' is the highest of the culpable mental states, placing on the prosecution the heaviest possible burden in establishing *mens rea*. By including this scienter requirement [in the statute governing the crime of possessing criminal tools], the General Assembly has required both control of the article and the specific intention to use the article to commit a crime." (Emphasis sic.) *State v. McDonald* (1987), 31 Ohio St.3d 47, 49.

{¶48} Because there was insufficient evidence of the crime of "trademark counterfeiting," there is likewise insufficient evidence to support appellant's conviction on the possessing criminal tools charge. Because the state failed to submit evidence that the marks were counterfeit as defined by statute, it necessarily follows it could not prove appellant knowingly sold goods affixed with counterfeit marks, i.e., it could not prove she engaged in "trademark counterfeiting." Without evidence appellant

committed or was aware she was committing the principal crime, one cannot reasonably infer appellant acted with the specific intent to commit the principal crime. Put differently, without evidence that the marks at issue were "identical to or substantially indistinguishable" from the actual trademarks, it is not possible to conclude, beyond a reasonable doubt, that appellant acted with criminal purpose, i.e., the specific intent to commit the felony of trademark counterfeiting, in using the "tools" at issue. One cannot infer a criminal purpose without sufficient evidence that the defendant had the specific intent to commit an actual crime prohibited by the Ohio Revised Code. Although appellant used the "tools" to transport the suspect goods, there is insufficient evidence to support the conclusion she did so with the specific intent to engage in trademark counterfeiting in violation of R.C. 2913.34. Appellant's conviction for possessing criminal tools was plain error and is accordingly reversed and vacated.

{¶49} Appellant's first, second, and fourth assignments of error have merit...

{¶50} Appellant's third and fifth assignments of error provide:

{¶51} "[3.] The verdict is against the manifest weight of the evidence.

{¶52} "[5.] The statute is void for vagueness and the trial court erred in overruling appellant's motion for a new trial on this basis."<sup>1</sup>

{¶53} As our analysis above is dispositive of the matter, appellant's third and fifth assigned errors are moot.

---

1. Moreover, it is well-settled that a court will not pass upon the constitutionality of a legislative enactment unless or until it becomes necessary to do so in order to dispose of the case before it. See, e.g., *American Cancer Society v. Dayton* (1953), 160 Ohio St. 114, 121. As our substantive analysis of appellants first, second, and fourth assigned errors disposed of the case, addressing the constitutionality of the statute is clearly unnecessary.

{¶54} For the reasons discussed herein, appellant's convictions for trademark counterfeiting and possession of criminal tools are reversed and the judgment of conviction entered by the Lake County Court of Common Pleas is hereby vacated.

COLLEEN MARY O'TOOLE, J., concurs,

TIMOTHY P. CANNON, J., dissents with Dissenting Opinion.

---

TIMOTHY P. CANNON, J., dissenting.

{¶55} I respectfully dissent from the majority's opinion.

{¶56} First, I believe, as an expert witness for the state, Sergeant Richissin was permitted to testify as to the identity of the companies' trademarks. He testified that he was trained by representatives from Gucci, Prada, Coach, Dior, Louis Vuitton, Fendi, Dooney and Bourke, Tiffany, Burberry, Liz Claiborne, Kate Spade, Chanel, and Versace. Also, he testified that he was familiar with the trademarks of each of these companies and that those trademarks are registered in the United States Patent and Trademark Office.

{¶57} Further, I believe the state submitted sufficient evidence to sustain Troisi's convictions.

{¶58} Courts have held "that 'the purpose of trademark law is not to guarantee genuine trademarks but to guarantee that every item sold under a trademark is the genuine trademarked product, not a substitute.'" *United States v. Petrosian* (C.A.9,

1996), 126 F.3d 1232, 1234, fn. 2, quoting *Gen. Elec. Co. v. Spelcher* (C.A.7, 1989), 877 F.2d 531, 534.

{¶59} There is a federal statute analogous to R.C. 2913.34. See Section 2320, Title 18, U.S.Code. This statute also defines a "counterfeit mark" as a "spurious mark \*\*\* that is identical with, or substantially indistinguishable from, a mark registered on the principal register in the United States Patent and Trademark Office." Section 2320(e)(1), Title 18, U.S.Code. Regarding this statute, the Eleventh Circuit Court of Appeals has held:

{¶60} "The statute does not specify the means by which the Government may establish that the marks were 'identical or substantially indistinguishable.' There is no support for the proposition that in all cases, the trier of fact must determine indistinguishability based on the marks as affixed to the actual goods. Nor is there a requirement that the actual trademark owner testify in a criminal trial, or that the agent who conducted the investigation and seizure of the counterfeit merchandise be qualified as an expert in the particular type of product. In this case, the jury had been shown registered designs of the trademarks for each cigar, as well as various cigar labels or bands produced by authorized licensees. The jury therefore had a valid basis for comparison in determining whether the designs were 'identical or substantially identical [sic].'" *United States v. Guerra* (C.A.11, 2002), 293 F.3d 1279, 1288.

{¶61} Thus, in any given case, there are a variety of ways for the state to meet its burden of demonstrating that the marks used on the products were identical or substantially indistinguishable from registered marks. I agree that one of the ways to do this is to actually introduce certified copies of the trademarks in question. This would be

the paramount evidence to prove the state's case. However, another way to meet the state's burden would be to introduce authentic products and have a representative from the company identify the items as authentic, thus providing the jury with a comparison of the two marks. Finally, I believe the state's evidence in this case, an expert opinion regarding the identity of the actual trademarks combined with the defendant's confession, was sufficient.

{¶62} In the case sub judice, Sergeant Richissin testified that, based on his education, training, and experience, he is able to identify trademarks. He identified certain marks on the counterfeit purses as being purported trademarks from certain companies, such as Louis Vuitton. He also testified that certain marks, such as the one appearing on a purported Coach bag, were "registered on the principal register in the United States Patent and Trademark Office." Moreover, Sergeant Richissin testified that the marks on the merchandise seized from Troisi "were either identical or substantially indistinguishable from the genuine trademark[s]."

{¶63} In addition to Sergeant Richissin's expert testimony, the state presented evidence that Troisi *admitted* the merchandise was counterfeit. Troisi gave a written statement to the police, which was admitted at trial. In her statement, Troisi states that she "had copy bags," that she knew "it was error to sell them," and that she was "willing to give [the officers] the names of [her] suppliers in New York." In addition, the officer taking her statement asked: "Q. Did you know the merchandise you were selling (and brought) to 10350 Chillicothe Rd. was counterfeit designer merchandise?" Troisi responded in her own handwriting: "A. Yes[.] I knew that the purses and wallets were not authentic."

{¶64} Also, Sergeant Richissin executed a controlled buy from Troisi. He testified that he had the following conversation with her:

{¶65} "Q. Was there any discussion prior to your purchase?

{¶66} "A. We tried to get [Troisi] down on the price. We asked her if we could purchase the purse for forty dollars, rather than fifty dollars."

{¶67} "Q. And did she have a response for you?

{¶68} "A. She said to me, Do you know [how] much it would cost to buy that purse if it was real."

{¶69} In her written statement, Troisi admitted that the merchandise was counterfeit. In addition, during the controlled buy, she directly informed Sergeant Richissin that the merchandise was not real.

{¶70} Through the testimony of Sergeant Richissin and Troisi's confession, the state presented evidence that, when viewed in totality and in a light most favorable to the state, was sufficient for a trier-of-fact to conclude that Troisi committed the offense of trademark counterfeiting.

{¶71} The judgment of the trial court should be affirmed.

{¶72} Finally, I disagree with the remedy imposed by the majority.

{¶73} When conducting a sufficiency of the evidence analysis, this court is to look at the actual evidence admitted at trial, both admissible and inadmissible. See *State v. Jeffries*, 11th Dist. No. 2005-L-057, 2007-Ohio-3366, at ¶100, citing *Lockhart v. Nelson* (1988), 488 U.S. 33, 34. (*State v. Jeffries* overruled on other grounds in *State v. Jeffries*, 119 Ohio St.3d 265, 2008-Ohio-3865.) In her brief, Troisi asserts "without the testimony of Richissin on this issue, the verdict is not supported by sufficient evidence."

(Emphasis added.) As such, Troisi apparently concedes that *with Sergeant Richissin's testimony* the state presented sufficient evidence to support her convictions.

{¶74} If the majority concludes that Sergeant Richissin's testimony should not have been admitted because a proper foundation was not provided, then what occurred in this matter is an error in the admission of evidence. As such, the proper remedy is to reverse Troisi's convictions and remand the matter for a new trial. See, e.g., *State v. Papalevich* (Nov. 13, 2001), 10th Dist. No. 01AP-264, 2001 Ohio App. LEXIS 5063, at \*26. However, the "inadmissible" evidence should still be considered when conducting a sufficiency of the evidence analysis. *State v. Jeffries*, supra, at ¶100. This is because, had the trial court sustained Troisi's objections to Sergeant Richissin's testimony, the state would have had the opportunity to submit other evidence to demonstrate that the marks used on the products in this case were identical or substantially indistinguishable from registered marks.

STATE OF OHIO  
COUNTY OF LAKE

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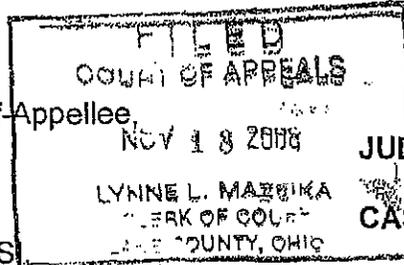
IN THE COURT OF APPEALS  
ELEVENTH DISTRICT

STATE OF OHIO,

Plaintiff-Appellee,

- VS -

JUANITA M. TROIS,



JUDGMENT ENTRY

CASE NO. 2008-L-060

Defendant-Appellant.

For the reasons stated in the opinion of this court, it is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is reversed. Judgment is vacated.

Costs assessed against appellee.

  
JUDGE CYNTHIA WESTCOTT RICE

COLLEEN MARY O'TOOLE, J., concurs,

TIMOTHY P. CANNON, J., dissents with dissenting opinion.

## Ohio Constitution, Section 10, Article I

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

## United States Constitution, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## R.C. 2913.34

(A) No person shall knowingly do any of the following:

1. (1) Attach, affix, or otherwise use a counterfeit mark in connection with the manufacture of goods or services, whether or not the goods or services are intended for sale or resale;

(2) Possess, sell, or offer for sale tools, machines, instruments, materials, articles, or other items of personal property with the knowledge that they are designed for the production or reproduction of counterfeit marks;

(3) Purchase or otherwise acquire goods, and keep or otherwise have the goods in the person's possession, with the knowledge that a counterfeit mark is attached to, affixed to, or otherwise used in connection with the goods and with the intent to sell or otherwise dispose of the goods;

(4) Sell, offer for sale, or otherwise dispose of goods with the knowledge that a counterfeit mark is attached to, affixed to, or otherwise used in connection with the goods;

(5) Sell, offer for sale, or otherwise provide services with the knowledge that a counterfeit mark is used in connection with that sale, offer for sale, or other provision of the services.

(B)(1) Whoever violates this section is guilty of trademark counterfeiting.

(2) Except as otherwise provided in this division, a violation of division (A)(1) of this section is a felony of the fifth degree. Except as otherwise provided in this division, if the cumulative sales price of the goods or services to which or in connection with which the counterfeit mark is attached, affixed, or otherwise used in the offense is five thousand dollars or more but less than one hundred thousand dollars or if the number of units of goods to which or in connection with which the counterfeit mark is attached, affixed, or otherwise used in the offense is more than one hundred units but less than one thousand units, a violation of division (A)(1) of this section is a felony of the fourth degree. If the cumulative sales price of the goods or services to which or in connection with which the counterfeit mark is attached, affixed, or otherwise used in the offense is one hundred thousand dollars or more or if the number of units of goods to which or in connection with which the counterfeit mark is attached, affixed, or otherwise used in the offense is one thousand units or more, a violation of division (A)(1) of this section is a felony of the third degree.

(3) Except as otherwise provided in this division, a violation of division (A)(2) of this section is a misdemeanor of the first degree. If the circumstances of the violation indicate that the tools, machines, instruments, materials, articles, or other items of personal property involved in the violation were intended for use in the commission of a felony, a violation of division (A)(2) of this section is a felony of the fifth degree.

(4) Except as otherwise provided in this division, a violation of division (A)(3), (4), or (5) of this section is a misdemeanor of the first degree. Except as otherwise provided in this

division, if the cumulative sales price of the goods or services to which or in connection with which the counterfeit mark is attached, affixed, or otherwise used in the offense is five hundred dollars or more but less than five thousand dollars, a violation of division (A)(3), (4), or (5) of this section is a felony of the fifth degree. Except as otherwise provided in this division, if the cumulative sales price of the goods or services to which or in connection with which the counterfeit mark is attached, affixed, or otherwise used in the offense is five thousand dollars or more but less than one hundred thousand dollars or if the number of units of goods to which or in connection with which the counterfeit mark is attached, affixed, or otherwise used in the offense is more than one hundred units but less than one thousand units, a violation of division (A)(3), (4), or (5) of this section is a felony of the fourth degree. If the cumulative sales price of the goods or services to which or in connection with which the counterfeit mark is attached, affixed, or otherwise used in the offense is one hundred thousand dollars or more or if the number of units of goods to which or in connection with which the counterfeit mark is attached, affixed, or otherwise used in the offense is one thousand units or more, a violation of division (A)(3), (4), or (5) of this section is a felony of the third degree.

(C) A defendant may assert as an affirmative defense to a charge of a violation of this section defenses, affirmative defenses, and limitations on remedies that would be available in a civil, criminal, or administrative action or proceeding under the "Lanham Act," 60 Stat. 427-443 (1946), 15 U.S.C. 1051-1127, as amended, "The Trademark Counterfeiting Act of 1984," 98 Stat. 2178, 18 U.S.C. 2320, as amended, Chapter 1329. or another section of the Revised Code, or common law.

(D)(1) Law enforcement officers may seize pursuant to Criminal Rule 41 or Chapter 2933. or 2981. of the Revised Code either of the following:

(a) Goods to which or in connection with which a person attached, affixed, otherwise used, or intended to attach, affix, or otherwise use a counterfeit mark in violation of this section;

(b) Tools, machines, instruments, materials, articles, vehicles, or other items of personal property that are possessed, sold, offered for sale, or used in a violation of this section or in an attempt to commit or complicity in the commission of a violation of this section.

(2) Notwithstanding any contrary provision of Chapter 2981. of the Revised Code, if a person is convicted of or pleads guilty to a violation of this section, an attempt to violate this section, or complicity in a violation of this section, the court involved shall declare that the goods described in division (D)(1)(a) of this section and the personal property described in division (D)(1)(b) of this section are contraband and are forfeited. Prior to the court's entry of judgment under Criminal Rule 32, the owner of a registered trademark or service mark that is the subject of the counterfeit mark may recommend a manner in which the forfeited goods and forfeited personal property should be disposed of. If that owner makes a timely recommendation of a manner of disposition, the court is not bound by the recommendation. If that owner makes a timely recommendation of a manner of disposition, the court may include in its entry of judgment an order that requires appropriate persons to dispose of the forfeited goods and forfeited personal property in the recommended

manner. If that owner fails to make a timely recommendation of a manner of disposition or if that owner makes a timely recommendation of the manner of disposition but the court determines to not follow the recommendation, the court shall include in its entry of judgment an order that requires the law enforcement agency that employs the law enforcement officer who seized the forfeited goods or the forfeited personal property to destroy them or cause their destruction.

(E) This section does not affect the rights of an owner of a trademark or a service mark, or the enforcement in a civil action or in administrative proceedings of the rights of an owner of a trademark or a service mark, under the "Lanham Act," 60 Stat. 427-443 (1946), 15 U.S.C. 1051-1127, as amended, "The Trademark Counterfeiting Act of 1984," 92 Stat. 2178, 18 U.S.C. 2320, as amended, Chapter 1329. or another section of the Revised Code, or common law.

(F) As used in this section:

(1)(a) Except as provided in division (F)(1)(b) of this section, "counterfeit mark" means a spurious trademark or a spurious service mark that satisfies both of the following:

(i) It is identical with or substantially indistinguishable from a mark that is registered on the principal register in the United States patent and trademark office for the same goods or services as the goods or services to which or in connection with which the spurious trademark or spurious service mark is attached, affixed, or otherwise used or from a mark that is registered with the secretary of state pursuant to sections 1329.54 to 1329.67 of the Revised Code for the same goods or services as the goods or services to which or in connection with which the spurious trademark or spurious service mark is attached, affixed, or otherwise used, and the owner of the registration uses the registered mark, whether or not the offender knows that the mark is registered in a manner described in division (F)(1)(a)(i) of this section.

(ii) Its use is likely to cause confusion or mistake or to deceive other persons.

(b) "Counterfeit mark" does not include a mark or other designation that is attached to, affixed to, or otherwise used in connection with goods or services if the holder of the right to use the mark or other designation authorizes the manufacturer, producer, or vendor of those goods or services to attach, affix, or otherwise use the mark or other designation in connection with those goods or services at the time of their manufacture, production, or sale.

(2) "Cumulative sales price" means the product of the lowest single unit sales price charged or sought to be charged by an offender for goods to which or in connection with which a counterfeit mark is attached, affixed, or otherwise used or of the lowest single service transaction price charged or sought to be charged by an offender for services in connection with which a counterfeit mark is used, multiplied by the total number of those goods or services, whether or not units of goods are sold or are in an offender's possession, custody, or control.

(3) "Registered trademark or service mark" means a trademark or service mark that is registered in a manner described in division (F)(1) of this section.

(4) "Trademark" and "service mark" have the same meanings as in section 1329.54 of the Revised Code.