ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	)	Case No. 2008-2490
	)	
Plaintiff-Appellant,	)	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-Appellee.	)	

REPLY BRIEF OF APPELLANT STATE OF OHIO

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ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW NO. I

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.

In her answer to the State's first proposition of law, Appellee asserts that the Eleventh District Court of Appeals properly reversed and vacated her conviction on sufficiency grounds. Ms. Troisi disagrees with the State's classification of the decision of the Court of Appeals as one based on a procedural deficiency. But the State maintains that the real issue in *Troisi* was the improper admission of evidence.

In its opinion, the Court of Appeals discounted the testimony of Mr. Richissin, the State's expert witness, stating that it "completely lacks evidentiary support" because "it was introduced without a proper foundation and/or qualification." *State v. Troisi*, 179 Ohio App.3d 326, 2008-Ohio-6062, 901 N.E.2d 856, at ¶¶ 36, 40. The Court of Appeals further found 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).

But 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 v. United States (1978), 437 U.S. 1, 15, 98 S.Ct. 2141 (emphasis added). In *Troisi*, the Eleventh District Court of Appeals reversed the defendant's conviction based on what it termed "insufficiency" when the real issue was the improper admission of evidence. Simply put, 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 framed its analysis as one of sufficiency, the incorrect receipt of evidence is a procedural deficiency and does not equate to evidentiary insufficiency. If the State presents evidence that is later found to be inadmissible, it does not mean that the evidence was not presented; the evidence does not cease to exist as part of the record for a sufficiency analysis. Instead, both admissible and inadmissible evidence must be examined.

The *Troisi* dissent recognized this distinction and pointed out the majority's error: "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.

Moreover, Appellee avers that the State's expert witness had no knowledge of the marks as they existed on the federal registry. (Appellee's Br. 3). This is simply not the case. While Mr. Richissin testified on cross-examination that he never personally viewed the trademarks from the principal register of any specific items he testified about, his knowledge of the trademarks was extensive. Indeed, at the time Mr. Richissin testified for the State, he was not only in the intellectual property unit of the Cleveland Police Department, but the regional director of PICA, the Professional Investigation Consulting Agency. (T.p. 181). Through PICA, Mr. Richissin investigated intellectual property crimes. (T.p. 182). The company has offices all over the world. (T.p. 183).

Mr. Richissin explained that each individual trademark, e.g., Louis Vuitton, Coach, Prada, etc., provides its own training to PICA. (T.d. 183). Investigators such as Mr. Richissin are continually updated through seminar and training manuals on the tags, labels, changes in models and product lines, etc. Id. Mr. Richissin said that he had been to approximately 30 training sessions and was so knowledgeable that he actually consulted with the trademarks prior to changes being made in their products. (T.p. 184). He also stated that he personally worked with approximately 40 different trademarks, including Prada, Coach, Dior, Fendi, Louis Vuitton, Dooney and Bourke, Tiffany, Burberry, Kate Spade, Liz Claiborne, Chanel, and Versace, the trademarks involved in this case. (T.p. 185-186). Each of these companies provided specific training to Mr. Richissin regarding their respective marks. (T.p. 186). Thus, for Appellee to insinuate that Mr. Richissin was unaware of how the marks looked on the federal registry is inaccurate.

Appellee also contends that her confession is "virtually, if not completely, immaterial to the statutory inquiry." (Appellee's Br. 7). The State disagrees. Jurors are permitted to

draw reasonable inferences from the evidence presented at trial. Based on the discussion in the second proposition of law, the jury should have been permitted to listen to any relevant evidence that was not prohibited by the rules of evidence and draw from this evidence reasonable inferences. This is exactly what the jury did at trial. It heard evidence from the State's expert witness as well as Appellee's statements to police and found that the State proved the crime with which she was accused.

Finally, Appellee asserts that the jury "was never given the required standard with which to draw a comparison * * * ." (Appellee's Br. 8, fn.2). Appellee points out that Mr. Richissin provided his own definition of "counterfeit." Id. But there is no dispute that the jury was properly instructed as to the law to apply in this case. The fact that Mr. Richissin provided a basic definition of the term to allow the jury to follow his testimony is irrelevant to the issue in question in this proposition of law: whether a conviction can be vacated by a court of appeals after it finds that there has been a procedural deficiency in the trial. Moreover, Appellee had the opportunity to cross-examine Mr. Richissin on his definition and to argue in closing arguments that his definition did not match that provided by the trial court.

Therefore, this Court should find that vacatur was not an appropriate remedy in this case.

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 her answer to the State's second proposition of law, Appellee contends that the State misinterprets the decision of Eleventh District Court of Appeals. She avers that the Court of Appeals did not dictate an evidentiary requirement for the State but simply critiqued the State's production of evidence in the instant case.

Appellee suggests that "[w]hether [the State] initially realized it or not, and regardless of how thoroughly it was considered, in the trial of the case below the State of Ohio simply embarked on an ill-conceived trial strategy." (Appellee's Br. 27-28). But despite Appellee's harsh criticism of the State's case, evidence was presented in a logical and organized manner in the best method that the State believed was available to it. The State was never put on notice that there was any problem with its production of evidence. Indeed, the defense made objections to the testimony of the expert witness, but the objections were overruled by the trial court. Because the State was unaware of any problems with its evidence production, the State was not given the opportunity to remedy any alleged evidentiary problems in its case and present evidence in a different manner. It is the province of any party in a lawsuit to present any relevant admissible evidence the party deems fit, and it is up to the jury to decide whether the party has met its burden of proof. In this case, the jury convicted Appellee, and it is not the job the Court of Appeals to take away that conviction without allowing the State the opportunity to retry her because the trial court accepted the State's evidence that is now objectionable.

Appellee's contentions lose sight of the big picture; an appellate court cannot be permitted to choose the trial strategy used by the State. Instead of analyzing this case to determine whether the trial court abused its discretion by admitting certain evidence, the Eleventh District Court of Appeals attacked the State's method of evidence production. Whether or not the Court of Appeals, or Appellee for that matter, insists that presenting certified copies of registered marks is the best method of evidence production, it is still only one of many methods available to the State, and neither Appellee nor the appellate court should be able to dictate which option the State must use.

Appellee argues that the State's expert's testimony usurped the jury's function. (Appellee's Br. 10). But this is not the case. Mr. Richissin gave a brief definition of "counterfeit" to allow the jury to follow his testimony. During direct examination, Mr. Richissin testified that trademark counterfeiting is "[c]opying the registered trademark of a property owner." (T.p. 188). He was not testifying to the legal definition of the term as Appellee suggests but was merely giving a general explanation to allow the jury to follow his testimony. In this case, Mr. Richissin did not usurp the trial court's function of instructing the jury. The jury was provided the legal definition of "counterfeit mark" by the trial court in the jury instructions at the close of Appellee's case:

> Counterfeit mark means a spurious trademark that satisfies both of the following: One, 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 orservices to which or in connection with which the spurious trademark 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. Two, it's [sic] use is likely to cause confusion or mistake or to deceive other persons. Spurious means false, falsified, not genuine, deceitful or forged. Trademark means any word, name, symbol, devise or combination of any word, name, symbol or devise that is adopted and used by a person

> to identify and distinguish the goods of that person, including a unique product, from the goods of other persons, and to indicate the source of the goods, even if that source is unknown.

(T.p. 308-309). The jury was then able to apply the facts from trial to the law as provided by the trial court. Thus, Appellee's contention that Mr. Richissin usurped the jury's function is incorrect.

Next, Appellee provides an example using Tiffany jewelry. She suggests that Mr. Richissin's testimony was useful to establish the element of "spuriousness" but was used to usurp the jury's fact-finding function. (Appellee's Br. 10-11). Mr. Richissin testified to features of the jewelry that indicate that it is not authentic. Appellee suggests that while the expert's testimony established spuriousness, it does not indicate whether the mark was identical or substantially indistinguishable from a mark on the federal registry.

Appellee's assertion is wrong for two reasons. First, she too narrowly interprets the definition of counterfeit mark. The broad point of R.C. 2913.34 is to prohibit a wide range of counterfeit 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 (8th ed., 2004).

Appellee, and 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, one loses 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.

For example, the statute is designed to prohibit the sale of purses that are designed to resemble Kate Spade bags with a counterfeit mark attached, but the statute is also designed to prohibit the sale of goods that do not resemble actual Kate Spade products but contain a counterfeit mark. The statute is designed to punish both "good" counterfeiters who create products that very closely resemble authentic products and "bad" counterfeiters whose goods can easily be distinguished from the real thing. Thus, the statute's reach is much broader than what Appellee tries to limit it to.

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 Appellee and 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.

Second, while not demonstrated in the snippet of testimony provided by Appellee, Mr. Richissin did testify that the counterfeit mark was identical or substantially indistinguishable from a mark on the federal registry. After examining and testifying about different pieces of merchandise from each trademark in question, the following exchange took place:

The State:	Now, were the trademarks that you inspected on these pieces of merchandise–were they either identical or substantially indistinguishable from the genuine trademark?
Richissin:	Yes, they were.
Defense counsel:	Objection.
The Court:	Overruled.

(T.p. 226). This exchange is important for many reasons. It shows that there was sufficient evidence presented at trial despite the appellate court's decision to ignore such evidence. It also shows that the State was unaware of a potential procedural deficiency in the trial–possibly incorrect receipt of evidence. Finally, it goes to show, contrary to Appellee's misleading assertions, that Mr. Richissin did testify that the marks on the counterfeit goods were identical or substantially similar with those on the principal registry.

Appellee contends that the Eleventh District Court of Appeals did not dictate a requirement that certified copies be introduced but submits that using the certified copies is the "easiest, most effective and most sensible way" to introduce evidence in a trademark counterfeiting case. (Appellee's Br. 15). Yet while there was no express mandate to the

State in the appellate court's decision, the language and the rejection of other methods essentially limits the State to the "certified copy" method. Second, there are many methods of evidence production available to the State (see State's Merit Brief), and as discussed above, the State presented the evidence in the method it viewed most useful and understandable to the jury in this case.

In her brief, Appellee suggests that the State did not use certified copies because the production of such certified marks creates a "hardship and/or difficult task, or that it represents a significant and/or undue burden." (Appellee's Br. 16). This is simply not the case. When the State recognized that there are hundreds, if not thousands, of individual marks for each trademark, the State was not suggesting a hardship for the State but was concerned about jury confusion. With so many different, yet similar marks, the jury's function of comparing these marks with a counterfeit mark becomes a difficult and monumental task. If the use of certified copies of marks creates a hardship or burden, it is not on the State, but the jury.

Appellee ponders "what the proof requirement of "spuriousness" has to do with the utility (or not) of the "certified copy" method of satisfying the identical-with-or-substantially-indistinguishable-from prong of the definition of "counterfeit mark." (Appellee's Br. 17). Appellee then posits that "it is simply being pointed out that the State would prefer a single method of proof that would allow it to satisfy both of these aspects of the definition of "counterfeit mark." Id. Appellee coins this the "dual-purpose approach." Id. But Appellee's rhetorical question demonstrates a understanding of the State's argument and the statutory definition of "counterfeit mark." Indeed, as discussed above and in the State's merit brief, the prongs of the definition of "counterfeit mark" must be read together to have

any applicable meaning in the law. Appellee too narrowly reads the definition to limit the statute's application to cases.

Appellee also questions the State's use of federal trademark counterfeiting cases. Because the federal statute is so similar to the Ohio trademark counterfeiting statute and because this is a case of first impression in Ohio, federal cases are useful to shed light on the issues in the instant case. Furthermore, the State discussed the federal cases to show that even when certified copies of trademarks were not presented as evidence, the jury was permitted to draw inferences from the evidence that was presented on the element of identical or substantially indistinguishable. And contrary to Appellee's reading of *United States v. Xu*, No. H-07-362, slip op. (S.D. Tex. Dec. 4, 2008), the jury did not have a certified copy of a registered mark to draw a comparison; instead, they viewed an ® symbol and were permitted to draw an inference that the product was registered on the principal registry. Similarly, in the instant case, the State should not be required to produce a certified copy of a registered mark in every case; the jury should also be permitted to draw reasonable inferences from the evidence presented.

CONCLUSION

For these reasons, the State requests, and 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,

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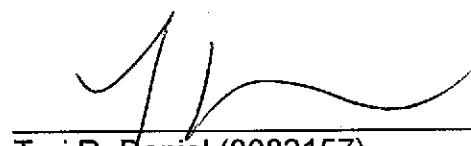
PROOF OF SERVICE

A copy of the foregoing Reply Brief of Appellee, State of Ohio, was sent by regular U.S. Mail, postage prepaid, to counsel for the appellee, Dominic J. Vitantonio, Esquire, 6449 Wilson Mills Road, Mayfield Village, OH 44143-3402, on this 16th day of July, 2009.



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