

13-3666

To Be Argued By:
FELICE M. DUFFY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 13-3666

UNITED STATES OF AMERICA,
Appellee,

-vs-

SHAUN WHITEHEAD,
Defendant-Appellant,

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

DEIRDRE M. DALY
United States Attorney
District of Connecticut

FELICE M. DUFFY
Assistant United States Attorney
EDWARD CHANG
Assistant United States Attorney (of counsel)

Table of Contents

Table of Authorities	iii
Statement of Jurisdiction	vi
Statement of Issue Presented for Review	vii
Preliminary Statement	1
Statement of the Case	3
A. The Target stores	3
B. The Walmart store	13
C. The defendant's arrest	15
D. Expert testimony about counterfeiting activity	17
Summary of Argument	18
Argument	19
I. The evidence at trial was sufficient to support the jury's verdict	19
A. Relevant facts	19
B. Governing law and standard of review	19
1. Elements of the offense	19

2. Sufficiency of the evidence	20
C. Discussion.....	22
Conclusion.....	28

Table of Authorities

Pursuant to “Blue Book” rule 10.7, the Government’s citation of cases does not include “certiorari denied” dispositions that are more than two years old.

Cases

<i>United States v. Al-Sadawi</i> , 432 F.3d 419 (2d Cir. 2005)	20
<i>United States v. Asbury</i> , 586 F.2d 973 (2d Cir. 1978)	19, 22, 24
<i>United States v. Cuti</i> , 720 F.3d 453 (2d Cir. 2013)	21
<i>United States v. Florez</i> , 447 F.3d 145 (2d Cir. 2006)	21
<i>United States v. Guida</i> , 792 F.2d 1087 (11th Cir. 1986)	25
<i>United States v. Hassan</i> , 578 F.3d 108 (2d Cir. 2008)	21
<i>United States v. Heras</i> , 609 F.3d 101 (2d Cir. 2010)	21
<i>United States v. Idriss</i> , 436 F.3d 946 (8th Cir. 2006)	20

<i>United States v. Jackson</i> , 335 F.3d 170 (2d Cir. 2003)	21
<i>United States v. Lacey</i> , 459 F.2d 86 (2d Cir. 1972)	19, 20
<i>United States v. Leftenant</i> , 341 F.3d 338 (4th Cir. 2003)	20
<i>United States v. Mariani</i> , 725 F.2d 862 (2d Cir. 1984)	21
<i>United States v. Mousli</i> , 511 F.3d 7 (1st Cir. 2007)	19, 20
<i>United States v. Olson</i> , 697 F.2d 273 (8th Cir. 1983)	24
<i>United States v. Payton</i> , 159 F.3d 49 (2d Cir. 1998)	21
<i>United States v. Petrone</i> , 185 F.2d 334(2d Cir. 1951) (per curiam)	24
<i>United States v. Tran</i> , 519 F.3d 98 (2d Cir. 2008)	21
<i>United States v. Wethington</i> , 141 F.3d 284 (6th Cir. 1998)	20

Statutes

18 U.S.C. § 472	3, 19
18 U.S.C. § 3231	vi
28 U.S.C. § 1291	vi

Rules

Fed. R. App. P. 4.....	vi
------------------------	----

Statement of Jurisdiction

The United States District Court for the District of Connecticut (Alfred V. Covello, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on September 9, 2013. *See* Appendix (“A”) at 9. On August 26, 2013, the defendant filed a timely notice of appeal pursuant to Rule 4(b) of the Federal Rules of Appellate Procedure. *See* A9, A677. This Court has appellate jurisdiction pursuant to 28 U.S.C. §1291.

**Statement of Issue
Presented for Review**

Was there sufficient evidence that the defendant passed counterfeit bills knowingly and with intent to defraud, where (1) on five different occasions, he purchased a total of ten iPads and other items using 98 one-hundred dollar bills, all of which were counterfeit; (2) he returned all of the iPads to different stores within a day or two after purchasing them; (3) the bills looked funny, smelled funny, and felt funny; and (4) he demonstrated consciousness of guilt, including, for example, by stating to the police when arrested that the case was “rock solid”?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 13-3666

UNITED STATES OF AMERICA,

Appellee,

-vs-

SHAUN WHITEHEAD,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Shaun Whitehead was convicted after trial of five counts of passing counterfeit one-hundred dollar bills in five different stores in Connecticut. On each occasion, Whitehead purchased two iPads; on four occasions, he also purchased Bose headphones. Whitehead always paid for the iPads separately, obtaining a different receipt for each iPad, and each iPad was returned for genuine currency at a different store in New York or New Jersey within a day or two.

Whitehead does not deny that he was the individual who purchased the iPads, and he does not deny that counterfeit bills were used for each of the purchases. Whitehead argues, however, that there was insufficient evidence for a jury to find that he knew the bills were counterfeit and that he had the requisite intent to defraud. Whitehead's argument is meritless.

The jury heard that Whitehead used a total of 98 one-hundred dollar bills in the five stores; every single one of the bills used by Whitehead was counterfeit. The jury heard testimony that the bills looked funny, smelled funny, and felt funny, and the jury was able to examine the bills, which were admitted into evidence.

Furthermore, the jury heard testimony from a Secret Service agent that one way to launder counterfeit money was to purchase an expensive item using counterfeit money and then to obtain genuine money by returning the item at another store. That is exactly what Whitehead did. The jury heard no other reason for why Whitehead would have repeatedly purchased and returned the iPads, and indeed, the jury heard no explanation for how Whitehead could legitimately have possessed nearly \$10,000 in counterfeit currency.

Finally, the jury heard compelling evidence of Whitehead's consciousness of guilt, including his statement to police officers that the case was "rock solid." In short, there was overwhelming

evidence on which the jury could have concluded that Whitehead had the requisite knowledge and intent to defraud.

The judgment below should be affirmed.

Statement of the Case

On August 9, 2012, appellant Shaun Whitehead was charged with five counts of passing counterfeit notes, in violation of Title 18, United States Code, Section 472. *See* A3. On April 10, 2013, Whitehead was convicted by a jury on all counts. *See* A7.

On August 14, 2013, the district court (Alfred V. Covello, J.) sentenced Whitehead to 42 months' imprisonment, followed by five years of supervised release. *See* A9. Judgment entered on September 9, 2012, and Whitehead filed a timely notice of appeal on August 26, 2012. *See id.*

Whitehead has completed the service of his sentence.

A. The Target stores

Between January 26, 2011 and February 18, 2011, Whitehead used counterfeit one-hundred dollar bills to purchase iPads and Bose headphones from four different Target stores in Connecticut. In each case, Whitehead purchased two iPads and two Bose headphones, and shortly after each purchase, the iPads were returned for

genuine currency at Target stores in New York and New Jersey.

Target's policy on counterfeit currency

Target stores employ managers, known as Asset Protection Specialists (APS), who are responsible for preventing and detecting theft. *See* A38, A40, A150-51, A178, A315-16, A333. Target cashiers are expected to notify an APS manager if a transaction is made using suspicious bills or is otherwise suspect, *see* A154, A316, but it is Target's practice and policy for cashiers to accept all bills offered to make purchases, *see* A42, A69-70, A135, A227, A316, A339-41.

Target stores share information about criminal activity through "Alerts." *See* A43-44. The Alerts contain information about the criminal activity, including photographs of the suspects if available. *See* A44, A336-338.

In or about January 2011, an Alert was issued concerning counterfeiting activity involving the defendant, who was identified as "Terrence Campbell" ("Alert 7244"). *See* A337-38; Government Exhibit ("Ex.") 31. The Alert included a photograph of the defendant and information about his vehicle—a blue, four-door sedan with Iowa license plate number D4042. *See id.* Jason White, the Target investigator assigned to the case, instructed asset protection personnel that "if they saw the individual picture[d] in 7244 to go ahead and allow the transaction to be com-

pleted, and to gather as much intelligence through the video, and also secure the counterfeit currency after the transaction was completed.” A341.

Count One—the store in Windsor, Connecticut

On January 26, 2011, an individual later identified as Whitehead entered the Target store in Windsor, Connecticut. *See* A45-48. Whitehead was wearing a purple shirt and a sweater vest. *See* A47, A96. He went to the electronics department and asked to purchase two iPads and two Bose headphones. *See* A78-79. Whitehead purchased the two Bose headphones using four one-hundred dollar bills. *See* A61-63, A89, A104; Ex. 6. He then purchased each iPad in separate transactions, using eight one-hundred dollar bills to pay for each. *See* A63, A65-66, A83; Ex. 7, 8.

After the cashier rang up the first iPad, he became suspicious and contacted the manager on duty, Mike Grasso. *See* A84-85. Grasso approached the cashier, who informed him that Whitehead had “just paid me \$2,000 worth of money with hundreds.” A85-86. Grasso thought the customer’s behavior was unusual because “he didn’t seem very excited,” whereas typically, “when . . . people are purchasing a lot of electronics, they’re happy, . . . they want to talk about it.” A95-96. “[H]e was spending almost over—almost \$2,000 and he wasn’t very happy,

just kind of like wanted to get his stuff and go.” A96.

After Whitehead left the register, Grasso examined the money. *See* A101. Grasso observed that the money “didn’t look quite right. The watermark was off on it. You could tell, like, the ink was kind of blurred, in the left, or in the upper part of the bills. So it just didn’t look right to me” A101-02.

As Whitehead was leaving the store, APS Domingo Merced stepped into the aisle in front of him. *See* A48. According to Merced, Whitehead “came out and he stopped, he looked at me, and he was like holy crap, he sees me. He had like a deer in the headlights eyes look that wow, I’m caught, and he just kept walking really quickly. When he hit the exit door, he bolted running.” *Id.* Merced returned to his office and watched the video from an external camera, which showed Whitehead running from the store. *See* A49; Ex. 4.

Merced retrieved the one-hundred dollar bills paid by Whitehead. *See* A50, A87. He noticed that “they smelled like machine oil, really strong machine oil smell.” A50. He also noticed that “the hundred dollar stamp” and “the United States of America” were raised, “as if the press pushed them too hard.” A51. Merced also observed that the first four digits of the serial numbers of the bills were “the exact same on

most of them” and that the last four digits “were pretty consecutive for the most part.” *Id.*

The following day, both iPads were returned, in separate transactions, to a Target store in Hackensack, New Jersey. *See* A109-12, A348-59. In each transaction, the store refunded \$773.79 in genuine currency. *See id.* There was no information about whether the Bose headphones were returned, because the Bose headphones did not have serial numbers tracked by Target. *See* A352-53.

The exhibits admitted at trial included the twenty one-hundred dollar bills passed by Whitehead, *see* A102; Ex. 20, the photographs and videos from the Target store in Windsor, *see* A57-61, A109-112; Ex. 1, 3, 5, 18, 19, and the receipts from the purchases and the returns, *see* A61-66; Ex. 6-11. The exhibits also included the purple shirt and sweater vest that Whitehead wore when purchasing the iPads and Bose headphones as identified by Grasso and Merced, *see* A47-48, A57, A96; Ex. 87, which Whitehead was wearing on the day he was arrested, *see* A469.

Count Two—the store in Waterford, Connecticut

On February 8, 2011, an individual later identified as Whitehead entered the Target store in Waterford, Connecticut. *See* A125-26. Whitehead was wearing a purple shirt and a sweater vest. *See* A131. He went to the electronics department and asked to purchase two iPads and

two Bose headphones. *See* A126. According to the cashier, Whitehead “just pointed at the iPad case and said I want these two iPads on here, and he pointed at the most expensive one that we had in the case” *Id.*

The cashier testified that the situation was “very suspicious” because Whitehead had “an aura around him that was strange, the way he came in demanding for the iPad, didn’t ask for help, he just said this is what I want.” A126-27. After retrieving the two iPads and the two Bose headphones, the cashier contacted the asset protection team about his suspicions and asked them to focus the store’s cameras on Whitehead. *See* A128-29.

Again, Whitehead paid for the items in three separate transactions, using four one-hundred dollar bills to pay for the two Bose headphones and eight one-hundred dollar bills to pay for each iPad. *See* A138-44; Ex 23, 24, 25.

The cashier described Whitehead as “very shaky and nervous . . . especially when he started counting his money.” A133. When asked to describe the one-hundred dollar bills, the cashier testified that “they felt moist and they were very sticky.” A134. “[U]sually I count, you know, handle a lot of money when I worked at Target, and the bills generally don’t stick to each other like Velcro.” *Id.* The cashier also testified: “I knew when I first handled the money that it wasn’t real.” A135.

The following day, both iPads were returned to different Target stores, one in Hackensack, New Jersey, *see* A163-64, A355-56; Ex. 24, 28, and one in Brooklyn, New York, *see* A159-62, A356-57; Ex. 25, 29. In each case, Target refunded \$773.79 in genuine currency. *Id.*

The exhibits admitted at trial included the twenty one-hundred dollar bills passed by Whitehead, *see* A158; Ex. 30, the videos from the Target store in Waterford, *see* A129; Ex. 21, 22, and the receipts for the purchases and the returns, Ex. 23, 24, 25, 27, 28, 29. The cashier from the Waterford store also identified the purple shirt and sweater vest that Whitehead wore when purchasing the iPads and Bose headphones, *see* A132; Ex. 87, which Whitehead was wearing on the day he was arrested.

Count Three—the store in Lisbon, Connecticut

On February 8, 2011, APS John Spivey reviewed Alert 7244. A180-81. That evening, Spivey noticed an individual enter the store who matched the description in the alert. *See* A181. Spivey testified, “[P]retty much couldn’t believe my eyes what I was seeing. The subject looked exactly like the subject on the alert, wearing the same exact clothes, same everything.” *Id.* Spivey returned to his office and zoomed in on the individual, later identified as Whitehead. *See* A182. Spivey testified that Whitehead was wearing a purple shirt and a sweater vest, *see id.*, and he

identified the purple shirt and sweater vest that Whitehead was wearing when Whitehead was arrested, *see* A182-83; Ex. 87.

Some time later, Spivey went to the parking lot to look for Whitehead's car, which had been described in the alert. *See* A187. Spivey found the car, based on the description and the Iowa license plate number D4042 provided in the alert. *See id.* Spivey did not observe anybody in the car. *See* A191.

In the meantime, Whitehead went to the electronics department and asked to purchase two iPads and two Bose headphones. *See* A228-30. Again, Whitehead paid for the items in three separate transactions, using four one-hundred dollar bills to pay for the two Bose headsets and eight one-hundred dollar bills to pay for each iPad. *See* A202-04.

The cashier testified that the bills had "a certain feel and texture and scent to it that wasn't just normal Once I looked at it, I just felt that it wasn't real." A231-32. The cashier testified that Whitehead "was trying to hurry up the process. He stated that . . . he had his kids in the car, he wanted us to hurry up." A242.

After the transactions were completed, Spivey watched on video as Whitehead left the store. *See* A190-91. Whitehead began "to jog, run," towards his car, and he "left the scene at a high rate of speed." *Id.* Spivey then secured the hun-

dred-dollar bills passed by Whitehead. *See* A191. Spivey examined the bills and observed that the serial numbers were close to one another, that they had “an odd smell, kind of sweet, and the lettering was slightly raised,” and that “they were a little tacky.” A192-93.

The following day, both iPads were returned to different Target stores, one in Hackensack, New Jersey, *see* A207-08, A357-58; and one in Jersey City, New Jersey, *see* A208-09, A358-59. In each case, Target refunded \$773.79 in genuine currency. *See id.*

The exhibits admitted at trial included the twenty one-hundred dollar bills passed by Whitehead, *see* A195; Ex. 67, the photographs and videos from the Target store in Lisbon, *see* A196-201; Ex. 32, 37, 42, 43, and the receipts from the purchases and returns, *see* A207-09, A357-359; Ex. 38, 39, 40, 44, 45.

Count Four—the store in South Windsor, Conn.

On February 18, 2011, an individual later identified as Whitehead entered the Target store in South Windsor, Connecticut. *See* A296-297. Whitehead was wearing a purple shirt and a sweater vest. *See* A299. He went to the electronics department and asked to purchase two iPads and two Bose headphones. *See* A296-97.

Again, Whitehead paid for the items in three separate transactions, using four one-hundred

dollar bills to pay for the two Bose headphones and eight one-hundred dollar bills to pay for each iPad. *See* A275-78, A299; Ex. 69, 70, 71.

After Whitehead left, a cashier who had observed the transactions examined the bills. *See* A304-05. The cashier, who had “very limited” training, observed that the bills “looked fake, but they were really, really good.” A305; *see also id.* (describing texture of bills as “a little bit off” and “a little bit more rigid, they didn’t feel quite right”).

The bills were secured by APS Robert Casar. *See* A319-20. Casar “noticed the texture to the bills,” which “appeared as if there were some type of film” on them. A320. Although the bills looked “very, very good,” Casar was “suspicious” of them. *Id.*

Two days later, both iPads were returned to a Target store in Valley Stream, New York. *See* A323-328, A362-64; Ex. 70, 71, 73. For each iPad, Target refunded \$773.79 in genuine currency. *See id.*

The exhibits admitted at trial included the twenty one-hundred dollar bills passed by Whitehead, *see* A329, A306; Ex. 74, the videos from the Target store in South Windsor, *see* A306; Ex. 68, and the receipts from the purchases and the returns, *see* A274, A323-328, A362-64; Ex. 69-73. The cashier also identified the purple shirt and sweater vest that Whitehead wore

when purchasing the iPads and Bose headphones. *See* A299-300; Ex. 87.

B. The Walmart store

At Walmart, cashiers were trained to use several techniques to detect counterfeit currency. *See* A408. The techniques included: (1) the use of special markers, *see* A370, A412; (2) examining the watermark, *see* A408; (3) examining the serial numbers, *see id.*; and (4) using a machine that detected counterfeit bills, *see* A370, A408-09, A412.

Count Five—the store in Naugatuck, Connecticut

On February 25, 2011, an individual later identified as Whitehead entered the Walmart in Naugatuck, Connecticut. *See* A371-72. Whitehead was wearing a purple shirt and a sweater vest. *See* A410. He went to the electronics department and asked to purchase two iPads. *See* A372-73. Whitehead asked to pay for the iPads in two separate transactions, *see* A374, and he handed the cashier nine one-hundred dollar bills for the first iPad, *see* A375-76, A410.

The cashier tested the bills in a machine, which rejected the bills. *See* A375-76. The cashier testified that it was “not unusual” for the machine to reject a bill, but that it was “very unusual to have consistently each bill” rejected. *Id.* The cashier examined the bills and observed that the watermark of Benjamin Franklin

“looked kind of cartoonish.” A376. The cashier then went to a different department, where he tested the bills again. *See* A379-80. When the bills were rejected again, he contacted a manager. *See* A380. When Whitehead asked for the money to be returned, the cashier refused. *See* A382.

At that point, Christopher Lokis, a customer service manager, intervened. *See id.* Lokis ran the bills through the machine, which rejected them yet again. *See* A411. Lokis checked the serial numbers on the bills to make sure that there were no duplicates, and he tested the bills using a marker. *See* A412. When the bills passed, he instructed the cashier to proceed with the transaction. *See id.*

The cashier completed the transaction for the first iPad, *see* A385-86; Ex. 76, and he then accepted nine one-hundred dollar bills from Whitehead for the second iPad, *see* A388-89; Ex. 77. After Whitehead left, the store manager took custody of the bills. *See* A391.

The following day, both iPads were returned to different Walmart stores, one in Riverdale, New Jersey, *see* A413-16, A429-432, A437-39; Ex. 76, 79, and one in Boonton, New Jersey, *see* A416-17, A443; Ex. 77, 80. In each case, Walmart refunded \$887.03 in genuine currency. *See id.*

Surveillance cameras in the Riverdale store captured Whitehead entering the store, return-

ing one of the iPads, and exiting the store. *See* A430-32, A434, A439-43; Ex. 81, 82, 83.

The exhibits admitted at trial included the eighteen one-hundred dollar bills passed by Whitehead, *see* A377; Ex. 104, the photographs and videos from the Naugatuck store and the Riverdale store, *see* A371, A430-32, A434, A439-43; Ex. 75; 81, 82, 83, and the receipts from the purchases and returns, *see* A386, A388-89, A413-16, A429-432, A437-39, A443; Ex. 76, 77, 79, 80. Lokis also identified the purple shirt and sweater vest that Whitehead wore when purchasing the iPads. *See* A410-11; Ex 87.

C. The defendant's arrest

On March 9, 2011, Whitehead was arrested in North Attleboro, Massachusetts, while driving with a suspended license in a vehicle with stolen plates. *See* A455-56. Whitehead was driving a blue Chevrolet with Iowa license plate number D4042. *See* A481-82; Ex. 90. He was wearing the purple shirt and sweater vest that was repeatedly identified by the Target and Walmart employees who testified at trial. *See* A484; Ex. 87.

Although Whitehead was unemployed, *see* A488, he had approximately four thousand dollars in his pocket, *see* A458. Whitehead was taken to the police station and processed. *See* A459.

At the police station, Whitehead attempted to hide “crumpled up” Target receipts in his shoes.

A462-64. Whitehead was then asked to stand for a pat down, at which point he made a fist with his right hand. *See* A464-65. Whitehead refused to open his fist; when the officers eventually pried his hand open, more crumpled up Target receipts dropped to the floor. *See* A465-66. Whitehead was then asked to remove his jeans. *See* A466. As he did so, more Target receipts fell out of his jeans. *See* A466-67. Whitehead also had additional receipts concealed in his underwear, *see* A467-68, and he attempted a second time to conceal additional receipts in his fist, *see* A468-69.

The receipts found on Whitehead's person included return receipts for high-end electronic goods, including iPads and Bose headphones, purchased that day from different Target stores in Massachusetts. *See* A498-505, A513-21; Ex. 93.

The police officers also recovered a Florida driver's license in the name of "Terrell Campbell" but with Whitehead's picture. A470-71; Ex 91. Whitehead claimed that he used the license to gain entrance to clubs when he was under 21, *see* A471, but the date on the license indicated that it had been issued after Whitehead had turned 21, *see* A471-73.

At one point, Whitehead was asked if he was willing to talk. *See* A496. Whitehead responded that he had "nothing to say" and that he was "screwed." *Id.* Whitehead also said, "I got noth-

ing to say to you, the case is rock solid.” *Id.* Whitehead appeared “dejected, like he gave up and was just sitting there, like defeated.” A497.

The exhibits admitted at trial included the receipts found on Whitehead and the fake Florida driver’s license. *See* A470-71, A498-505, A513-21; Ex. 91, 93.

D. Expert testimony about counterfeiting activity

United States Secret Service Special Agent (SA) Timothy Conway provided expert testimony about how counterfeit money is produced and how it can be recognized. *See* A552-61.

SA Conway also testified about the different methods used to turn counterfeit money into genuine money. *See* A562. According to SA Conway, counterfeit money can be sold, or it can be used to purchase an inexpensive item in order to obtain genuine money in change. *See id.* A third method is to buy an expensive item with the counterfeit money “and then return it to another store” in order to get genuine money back. *Id.*

SA Conway testified that the ninety-eight bills passed by Whitehead were “very good quality, sophisticated quality,” counterfeit bills. A565; *see also* A573-78.

Summary of Argument

A defendant challenging the sufficiency of the evidence after a jury's guilty verdict bears a "heavy burden" and must show that no reasonable jury would have convicted him. *See* Point I.B., *infra*. In this case, there was overwhelming evidence that Whitehead knew that he was using counterfeit bills and that he had the requisite intent to defraud, including the funny look, smell, and feel of the bills; the quantity of counterfeit bills involved; the otherwise inexplicable pattern of his purchases and returns; and the evidence of his consciousness of guilt. *See* Point I.C., *infra*. Accordingly, the judgment below should be affirmed.

Argument

I. The evidence at trial was sufficient to support the jury's verdict

A. Relevant facts

The facts pertinent to consideration of this issue are set forth in the Statement of the Case above.

B. Governing law and standard of review

1. Elements of the offense

A conviction under Title 18, United States Code, Section 472 requires proof of three elements: (1) that the bill passed or possessed was counterfeit; (2) that the defendant knew the bill was counterfeit and intended to use the bill to defraud; and (3) that the defendant passed or possessed the false bill. *See United States v. Mousli*, 511 F.3d 7, 14 (1st Cir. 2007); *United States v. Asbury*, 586 F.2d 973, 977-78 (2d Cir. 1978). Only the second element is at issue on this appeal.

Proof of knowledge and fraudulent intent does “not have to be established by direct evidence but [may] be inferred from the surrounding facts and circumstances.” *Id.*; *see also United States v. Lacey*, 459 F.2d 86, 90 (2d Cir. 1972) (“[A] finding of knowledge that is largely inferential is not impermissible.”). The mere act of passing a counterfeit bill “may easily be probative of the intent to defraud,” although a jury

may not convict an “innocent bystander” who passed a counterfeit bill without knowledge of its lack of authenticity. *Mousli*, 511 F.3d at 15; see also *United States v. Wethington*, 141 F.3d 284, 287 (6th Cir. 1998) (“To prove intent to defraud, the government may present evidence that the defendant passed or attempted to pass a false bill.”)

In particular, a jury may properly infer the requisite knowledge and intent to defraud from evidence of a defendant’s consciousness of guilt. See *United States v. Idriss*, 436 F.3d 946, 950 (8th Cir. 2006) (rejecting challenge to sufficiency of the evidence based on defendant’s furtive behavior); *United States v. Leftenant*, 341 F.3d 338, 347 (4th Cir. 2003) (rejecting challenge to sufficiency of the evidence based on defendant’s guilty demeanor and implausible explanation); *Lacey*, 459 F.2d at 90 (rejecting challenge to sufficiency of the evidence based on defendant’s inconsistent statements); see also *United States v. Al-Sadawi*, 432 F.3d 419, 424 (2d Cir. 2005) (“It is well-settled that flight can, in some circumstances, evidence consciousness of guilt.”).

2. Sufficiency of the evidence

An appellant challenging the sufficiency of the evidence “faces a heavy burden, because [the Court] must review the evidence in the light most favorable to the government, drawing all reasonable inferences in its favor.” *United States*

v. Tran, 519 F.3d 98, 105 (2d Cir. 2008). “Reversal is warranted only if no rational factfinder could have found the crimes charged proved beyond a reasonable doubt.” *Id.* “The ultimate question is not whether [the Court] believe[s] the evidence adduced at trial established defendant’s guilt beyond a reasonable doubt, but whether *any rational trier of fact could so find.*” *United States v. Payton*, 159 F.3d 49, 56 (2d Cir. 1998).

The standard is “exceedingly deferential” to the jury’s role as the fact finder. *United States v. Hassan*, 578 F.3d 108, 126 (2d Cir. 2008). The Court “may not usurp the role of the jury by substituting its own determination of the weight of the evidence and the reasonable inferences to be drawn for that of the jury.” *United States v. Heras*, 609 F.3d 101, 105 (2d Cir. 2010). The evidence is to be viewed not in isolation, but as a whole. *See United States v. Mariani*, 725 F.2d 862, 865 (2d Cir. 1984). Indeed, “the jury’s verdict may rest entirely on circumstantial evidence.” *United States v. Jackson*, 335 F.3d 170, 180 (2d Cir. 2003).

The Court reviews *de novo* claims of insufficient evidence, applying the same stringent standard as the district court. *See United States v. Cuti*, 720 F.3d 453, 462 (2d Cir. 2013); *United States v. Florez*, 447 F.3d 145, 154 (2d Cir. 2006).

C. Discussion

Whitehead does not deny that counterfeit bills were used to purchase the iPads and Bose headphones, and he does not deny that he was the individual who did so. Instead, his sole argument on appeal is that he did not know the bills were counterfeit and that, accordingly, he did not possess the requisite intent to defraud. *See* Appellant’s Brief (“Br.”) at 16. Whitehead’s argument is meritless, because there was extensive circumstantial evidence from which a reasonable jury could have inferred that Whitehead knew the bills were counterfeit.

The appearance of the counterfeit currency

All of the bills passed by Whitehead were admitted into evidence and available for the jury to examine. On that basis alone, the members of the jury could reasonably have concluded, based on their own common knowledge and daily experience with U.S. currency, that Whitehead knew the bills were counterfeit. *See Asbury*, 586 F.2d at 978 (rejecting challenge to sufficiency of the evidence where, *inter alia*, “jurors examined the bills and could conclude that their counterfeit nature must have been readily apparent . . .”).

The jury also heard considerable testimony from store employees who immediately recognized the suspicious nature of the bills. *See, e.g.*, A135 (“I knew when I first handled the money that it wasn’t real.”); A231-32 (“Once I looked at

it, I just felt that it wasn't real."); A304-05 (concluding that bills "looked fake" despite having "very limited" training in recognizing counterfeits). The jury heard that the bills looked funny, *see, e.g.*, A376 (describing "cartoonish" depiction of Benjamin Franklin); smelled funny, *see, e.g.*, A50 (describing "strong machine oil smell"); and felt funny, *see, e.g.*, A134 (describing bills as "very sticky"). The jury could reasonably have relied on that testimony as well to conclude that Whitehead knew the bills were counterfeit.

Whitehead argues that several witnesses testified concerning "the high quality of the counterfeit bills." Br. at 22-23. However, Whitehead's argument takes the testimony of those witnesses out of context. In fact, those witnesses essentially testified that the bills were suspicious *despite* being of high quality. *See* A305 ("They looked fake, but they were really, really good."); A320 (noticing that bills had "some type of film" and were "suspicious" but otherwise "looked very, very good"); A579 (testifying that the time to recognize bills as counterfeit was "not long"). The jury was likewise entitled to conclude that Whitehead knew the bills were counterfeit, even if the bills were "high quality" counterfeits.

The quantity of counterfeit currency

The jury was also entitled to conclude that Whitehead had the requisite knowledge and intent to defraud based on the quantity of the

counterfeit currency. *See Asbury*, 586 F.2d at 978 (rejecting challenge to sufficiency of the evidence because, *inter alia*, jury was entitled to conclude that possession of thirty-seven counterfeit bills was not innocent).

Whitehead passed ninety-eight counterfeit, one-hundred dollar bills—with not a single genuine bill mixed in. Absent any other explanation for how Whitehead could have innocently obtained nearly \$10,000 in counterfeit currency, the jury was entitled to infer his guilty knowledge and intent to defraud. *See United States v. Petrone*, 185 F.2d 334, 335-336 (2d Cir. 1951) (*per curiam*) (holding that inference of guilty knowledge was appropriate and “no other conclusion was possible” where defendant offered no explanation for possessing \$5100 in counterfeit bills); *see also United States v. Olson*, 697 F.2d 273, 275 (8th Cir. 1983) (“[A] critical inquiry bearing on the issue of guilty knowledge is whether the accused person has passed more than one counterfeit obligation.”).

The obvious laundering of counterfeit currency

The jury was also entitled to conclude that Whitehead was obviously engaged in a concerted effort to launder counterfeit money. SA Conway testified that one way of turning counterfeit money into genuine money was to use the counterfeit money to purchase an expensive item, and then to return the item at a different store

for genuine money. *See* A562. This is precisely what Whitehead did, over and over again.

Indeed, one would be hard pressed to come up with any plausible reason for Whitehead to have repeatedly purchased iPads from stores in Connecticut, and then to have promptly returned them to stores in New York and New Jersey, other than for the purpose of laundering counterfeit money. Based on the pattern of transactions that Whitehead engaged in while using the counterfeit money, the jury was entitled to infer his guilty knowledge and intent to defraud. *See United States v. Guida*, 792 F.2d 1087, 1095 (11th Cir. 1986) (“[I]t has been held that guilty knowledge may be inferred from the rapid and repetitious passing of counterfeit notes . . .”).

Whitehead’s consciousness of guilt

Finally, the jury was entitled to rely on the evidence of Whitehead’s consciousness of guilt in concluding that Whitehead possessed the requisite knowledge and intent to defraud. The evidence of Whitehead’s consciousness of guilt merits particular weight on this appeal, because the members of the jury had the opportunity to review and evaluate the video recordings of Whitehead’s flight and nervousness for themselves.

In particular, the jury had the opportunity to review video recordings of Whitehead’s flight from the Target store in Windsor, Connecticut,

see Ex. 4; A48 (“When he hit the exit door, he bolted running.”), and the Target store in Lisbon, Connecticut, see Ex. 37; A190 (“As soon as he hit the main exit he moved very quickly to his vehicle and left the scene at a high rate of speed.”). The jury also reviewed a video recording of Whitehead’s nervous demeanor in the Target store in Waterford, Connecticut. See Ex. 21; A133 (describing Whitehead as “very shaky and nervous”).

The jury also heard that Whitehead lied at the Target store in Lisbon about the reason why he was in a hurry, falsely claiming that his kids were in the car. See A242, A191.

Finally, the jury heard testimony about Whitehead’s peculiar behavior after he was arrested, when he tried to hide Target receipts in his shoes, in his fists, and in his clothing. See, e.g., A463-69. Whitehead told police that “[t]he case is rock solid,” A496, presumably in reference to the copious Target receipts that were being discovered on his person around that time.

Taken as a whole, Whitehead’s conduct provided compelling evidence of knowledge, *i.e.*, that he knew his transactions at the Target stores were fraudulent. Whitehead acted guilty, demonstrating consciousness of guilt, because he knew he was guilty.

Although Whitehead argues that he was not always nervous, and that being in a hurry is not

necessarily evidence of guilt, *see* Br. at 21-22, Whitehead provides no explanation for why he lied about having “his kids in the car.” Whitehead also offers no explanation for his peculiar behavior after being arrested.

Finally, Whitehead’s argument that he did not flee when his money was detected as counterfeit by the machine in the Walmart store is unavailing, as the jury could reasonably have concluded that Whitehead was simply trying to brazen his way through a bad situation and to avoid losing the money he paid to purchase the counterfeit bills. At bottom, Whitehead’s arguments merely go to the weight of the evidence, which was ultimately for the jury to decide; his arguments provide no basis for overturning the jury’s considered verdict.

Conclusion

For the forgoing reasons, the judgment of the district court should be affirmed.

Dated: June 3, 2014

Respectfully submitted,

DEIRDRE M. DALY
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

A handwritten signature in black ink, reading "Felice M. Duffy". The signature is written in a cursive, flowing style with a large, prominent "F" and a long, sweeping tail on the "y".

FELICE M. DUFFY
ASSISTANT U.S. ATTORNEY

Edward Chang
Assistant United States Attorney (of counsel)