State of New York
Court of Appeals

OPINION

No. 108
The People &c.,
Respondent,
v.
Clinton Britt,
Appellant.

Jenny C. Wu, for appellant.
Sheila L. Bautista, for respondent.

FAHEY, J.:

We hold that there was legally sufficient evidence of defendant's "intent to defraud, deceive or injure another," within the meaning of Penal Law § 170.30. In addition to the undisputed direct evidence of defendant's knowing possession of counterfeit bills, there

was sufficient circumstantial evidence from which the jury could infer the separate mens rea of intent to defraud.

I.

A police officer observed defendant Clinton Britt standing on West 42nd Street in Manhattan, in front of a "haunted house" attraction known as "Times Scare," drinking out of a container covered by a brown paper bag. As the uniformed officer approached, defendant looked in his direction and then "ran upstairs" into "Times Scare." The officer pursued defendant, stopped him, and observed that the container was an open can of an alcoholic beverage.

Defendant was unable to provide a form of identification that included his home address and date of birth. Consequently, the officer could not issue a summons, and defendant was handcuffed and searched incident to arrest. During that search, the arresting officer found cash, in two separate wads or bundles, in a pocket of defendant's jacket. In one of defendant's pants pockets, the officer found a small Ziploc bag containing what appeared to be crack cocaine.[1] Defendant then became agitated and made a hopping movement, after which the officer found two more Ziploc bags at defendant's feet.[2]

At the station house, the arresting officer counted the cash, finding a wad of loose bills, totaling $148, and 17 folded bills, totaling $300. The latter bundle of bills – four $10 bills and thirteen $20 bills – was secured by a rubber band. The officer suspected, based

[1] The substance tested positive for cocaine at the NYPD laboratory.
[2] The substance in one of these bags was tested and found to be the controlled substance methylone.

on the visual and tactile appearance of the folded bills, that they were counterfeit. As the officer was taking defendant to the holding area, defendant said to him, "I want to talk to a detective, and I will give up who I got the currency from, the counterfeit bills from, if you make the drug charges go away."

The police department contacted the United States Secret Service and a Secret Service Agent identified the 17 bills as counterfeit currency. Defendant was charged by indictment with 17 counts of criminal possession of a forged instrument in the first degree (Penal Law § 170.30) and 2 counts of criminal possession of a controlled substance in the seventh degree (Penal Law § 220.03).

Defendant moved to suppress the property seized from him and his statements, as fruits of illegal police action. At the suppression hearing, the arresting officer testified that a paper bag is a common method of concealing an open container of alcohol. The officer also testified about the "drinking motion" he had seen defendant make with the container concealed in the brown bag and defendant's flight into "Times Scare." Defendant argued that his actions had not provided the officer with reasonable suspicion justifying his detention. Supreme Court denied defendant's motion.

During defendant's trial, the jury heard testimony from, among others, the arresting officer and the Secret Service agent who had identified the bills as counterfeit. The People did not move to qualify the Secret Service agent as an expert witness, but defendant raised no objection at this time to the agent's qualifications or the fact that the agent had not been formally qualified to testify.

The prosecutor asked the Secret Service agent: "in counterfeit interaction, in your experience, what do you see when people are passing [counterfeit currency]?" The agent responded: "A lot of the times . . . they will have their genuine currency in one pocket and . . . they have the counterfeit currency separated in a separate pocket." At this point, defense counsel twice interjected with the single word "Objection" but did not specify the nature of the objection. On cross-examination, the Secret Service agent testified that he had never made any "low-level street arrests."

At the close of the prosecution's case and again prior to submission of the case to the jury, defendant moved for a trial order to dismiss all counts related to the charges of criminal possession of a forged instrument, on the ground that there was legally insufficient evidence of his "intent to defraud" (Penal Law § 170.30). Defendant cited our decision in People v Bailey (13 NY3d 67 [2009]). Supreme Court denied the motion.

In its jury charge, Supreme Court instructed the jury that the Secret Service agent had given "opinions on technical matters." The court then gave the jury a charge based on the Criminal Jury Instructions (see CJI2d[NY] Expert Witness), as follows:

> "Ordinarily, a witness is limited to testifying about facts and is not permitted to give an opinion. Where, however, scientific, medical, technical or specialized knowledge will help the jury understand the evidence or to determine facts in issue, a witness with expertise in a specialized field may render opinion about such matters.
> "You should evaluate the testimony of any such witness just as you would the testimony of any other witness. You may accept or reject such testimony in whole or in part just as you may with respect to the testimony of any other witness. In deciding whether to accept such testimony, you should consider the following[:] [t]he quality and believability of the witness; the fact and circumstances upon which the witness's opinion was based; the reasons given for the witness's opinion; and whether the witness's opinion is consistent or inconsistent with other evidence in the case."

During a conference concerning the jury instructions, defense counsel placed on the record an exception to this part of the charge. Defense counsel stated that the agent "was never sworn in as an expert witness" and had not been "qualified as an expert" and added that this was "part of the reason why I objected to his talking about his knowledge as to how people keep money in one pocket or the other." Counsel did not further explain the specific nature of the prior objection to that testimony or move to strike the testimony.

The jury found defendant guilty of all the counts of first-degree criminal possession of a forged instrument and one count of seventh-degree criminal possession of a controlled substance. Defendant was sentenced, as a second felony offender, to concurrent prison terms of three to six years on the forged instrument counts and time served for possession of a controlled substance.

On appeal, defendant raised challenges to legal sufficiency, the Secret Service agent's testimony, and the legality of the initial detention. The Appellate Division affirmed (160 AD3d 428 [1st Dept 2018]). The court held that the jury could reasonably have inferred from the evidence that defendant knowingly possessed counterfeit money with fraudulent intent; that defendant's challenge to the agent's testimony was unpreserved; and that the arresting officer had reasonable suspicion, justifying the stop.

A Judge of this Court granted defendant leave to appeal (31 NY3d 1145 [2018]). We now affirm.

II.

An individual is guilty of criminal possession of a forged instrument in the first degree under Penal Law § 170.30 "when, with knowledge that it is forged and with intent to defraud, deceive or injure another, he utters or possesses any forged instrument of a kind specified in section 170.15." The language of the statute contemplates a complex mens rea that "requires both knowing possession and intent. [The intent element] does not, however, require use or attempted use as an element of the crime . . . Nor does [it] require that the contemplated use be imminent" (People v Rodriguez, 17 NY3d 486, 490 [2011]). "Because intent is an invisible operation of the mind, direct evidence is rarely available (in the absence of an admission) and is unnecessary where there is legally sufficient circumstantial evidence of intent," in the form of the defendant's conduct and the circumstances surrounding the alleged crime (Rodriguez, 17 NY3d at 489 [internal quotation marks, square brackets, and citations omitted] [emphasis added]; see also People v Bracey, 41 NY2d 296, 301 [1977]).

Defendant contends that the evidence before the jury was not legally sufficient to prove that he had "intent to defraud . . . another" by means of the counterfeit bills (Penal Law § 170.30). Defendant does not dispute that there was sufficient evidence that he knew that the currency was forged. He cites People v Bailey (13 NY3d 67) for the proposition that intent to defraud cannot be inferred from knowing possession alone, and he maintains that the evidence in his case does not demonstrate intent.

In Bailey, the defendant caught the attention of police officers who were on the lookout for pickpockets in a commercial district in Manhattan. The officers saw defendant

Bailey trying to take handbags from customers in several fast food restaurants, and arrested him. Three counterfeit $10 bills were recovered from Bailey's pocket. Overhearing the officers discuss the counterfeit appearance of the bills, Bailey "reportedly said, '[y]ou got me for the counterfeit money, but I didn't have my hand near the purse' " (Bailey, 13 NY3d at 69). Following a jury trial, Bailey was convicted of criminal possession of a forged instrument in the first degree. Bailey moved to set aside the verdict on that count, arguing that the evidence was not sufficient to prove that he had the mens rea of "intent to defraud, deceive or injure another" (Penal Law § 170.30). Although Bailey did not dispute that he knew the bills were counterfeit, he insisted that this was insufficient to prove intent.

This Court dismissed the criminal possession of a forged instrument count.

> "[K]nowledge alone is not sufficient to hold defendant criminally liable for possessing a forged instrument. Knowledge and intent are two separate elements that must each be proven beyond a reasonable doubt by the People. Simply put, drawing the inference of defendant's intent from his knowledge that the bills were counterfeit improperly shifts the burden of proof with respect to intent from the People to the defendant. Stated another way, by ruling that the evidence was sufficient to sustain defendant's conviction of possession of a forged instrument, the lower courts have effectively stripped the element of intent from the statute and criminalized knowing possession." (Bailey, 13 NY3d at 71-72.)

Bailey stands for the proposition that intent to use counterfeit bills to defraud, deceive, or injure cannot rationally be inferred from knowing possession of counterfeit bills on its own. As we subsequently explained, "intent cannot be presumed from knowing possession alone unless there is a statute establishing such a presumption" (Rodriguez, 17 NY3d at 489, citing Bailey, 13 NY3d at 72), and there is no such statutory presumption

with respect to criminal possession of a forged instrument in the first degree (see id. at 490 n 4).

Bailey is distinguishable from this appeal. Bailey was found with only $30 in counterfeit bills on his person, whereas defendant had $300. It could hardly be inadvertent that defendant had so large a sum of counterfeit bills. Most significantly, defendant's counterfeit currency was physically separated from the genuine bills on his person, and the jury heard testimony from the Secret Service agent that individuals who pass counterfeit currency will separate their counterfeit currency from their genuine bills. In Bailey, the evidence of Bailey's admission to the police that the bills were counterfeit demonstrated only knowing possession, and there was no independent evidence of intent to pass the counterfeit bills. That single piece of evidence of knowing possession was not enough in itself to show the separate mens rea of intent. Here, by contrast, there were "several factors" (id. at 489) from which the jury could infer not only knowing possession of the counterfeit bills, but also intent to use the bills to defraud.

Viewing the evidence in the light most favorable to the prosecution, as we must (see People v Danielson, 9 NY3d 342, 349 [2007]; Jackson v Virginia, 443 US 307, 319 [1979]), a rational jury could have found beyond a reasonable doubt that defendant intended to pass the counterfeit bills in his possession and thereby defraud others. Here, considering the quantity of the counterfeit bills found on defendant's person while he was in a commercial district of Manhattan popular with tourists, his admission that the bills were counterfeit, and the fact that he separated them from genuine bills by means of a band, the evidence was legally sufficient to establish beyond a reasonable doubt that defendant

intended to pass the bills. In particular, the jury could have rationally inferred that defendant kept the counterfeit bills separate from genuine currency "so that he could quickly and easily produce one or the other, as needed" (Rodriguez, 17 NY3d at 490), depending on whether he was in a situation where counterfeit bills were likely to be detected. The Secret Service agent testified that people who pass counterfeit bills will physically separate them from genuine currency by using separate pockets, and the jury was given a charge permitting it to treat the agent's statements as expert testimony. It was rational for the jury to infer defendant's intent to pass the counterfeit money from the segregation of the counterfeit bills, here achieved by a rubber band, along with the other circumstantial evidence we have summarized.

III.

Next, defendant challenges the admission of the Secret Service agent's testimony that individuals who pass counterfeit bills separate their genuine currency from their counterfeit currency. He maintains that the agent had no expertise with regard to street-level arrests and that his testimony invaded the jury's province. We agree with the Appellate Division that defendant's objections to the testimony are unpreserved. Beyond that, these objections would go to the weight, not the sufficiency, of the evidence.

During the agent's testimony, defense counsel issued only one-word objections, without any elaboration. "The word 'objection' alone was insufficient to preserve the issue for our review" (People v Tevaha, 84 NY2d 879, 881 [1994]), because it did not specify the basis for the general objection. Subsequently, in the discussion of the jury charge, defense counsel contended that the agent had not been qualified as an expert witness, and

added that this was "part of the reason why" he had objected to the agent's testimony about separation of counterfeit from genuine currency in a different pocket. Notably, defendant did not move to strike the agent's testimony. Defense counsel's remarks targeted portions of the jury instruction and did not function to specify the basis of the earlier general objection at a time when the trial court could still "effectively chang[e]" its prior ruling allowing the testimony (CPL 470.05 [2]).

IV.

In addition, defendant maintains that the arresting officer lacked reasonable suspicion to justify the original stop. We disagree.

The parties agree that the police intrusion at issue here, namely forcibly stopping and detaining defendant, occurred at the third level of the "graduated four-level test for evaluating street encounters initiated by the police" (People v Moore, 6 NY3d 496, 498 [2006]) set forth by this Court in People v De Bour (40 NY2d 210 [1976]). That level requires "a reasonable suspicion that [the defendant] has committed, is committing or is about to commit a felony or misdemeanor" (id. at 223). It is well established that "[w]hether the circumstances of a particular case rise to the level of reasonable suspicion presents a mixed question of law and fact" (People v Brown, 25 NY3d 973, 975 [2015]), and review by this Court is therefore "limited to whether there is evidence in the record supporting the lower courts' determinations" (People v McIntosh, 96 NY2d 521, 524 [2001]). Here, the arresting officer observed defendant drinking from a container hidden in a paper bag, which the officer testified is a common method of concealing an open container of alcohol, and defendant fled when he saw the officer approach. The

combination of these factors constitutes record support for the conclusion that the officer had reasonable suspicion that defendant had committed, or was committing, a crime (see generally People v Holmes, 81 NY2d 1056, 1058 [1993]).[3]

Accordingly, the order of the Appellate Division should be affirmed.

[3] We do not reach the unpreserved issue discussed in the dissent of whether a police officer's observation of an apparent open container violation could, on its own, justify a third-level intrusion.

People v Clinton Britt

No. 108

WILSON, J. (dissenting):

The majority lauds the hot pursuit and forcible detention of Clinton Britt, a man drinking a Lime-A-Rita™ wrapped in a brown paper bag in Times Square shortly before midnight, and his subsequent conviction for intending to spend counterfeit money absent

any indication that he attempted or planned to use it, simply because it was found rubber-banded separately from his real money when he was searched upon arrest. Both are mistakes.

The first – let's chase and physically detain people drinking from unseen containers in brown paper bags – is perhaps understandable because of the tremendous difficulty inherent in the (mis-)application of our De Bour test in many real-world situations. The sad consequence of that mistake is a regression from the legislative and prosecutorial progress eschewing policing based on stereotypes, returning us to the world of broken windows – where police pursue quality of life violations that disproportionately affect the poor (not merely those committing the infractions, but their families, neighbors and communities).

The second – let's equate the separation of real from counterfeit money with the intent to defraud – is inexplicable. It overturns our clear holding in People v Bailey (13 NY3d 67 [2009]), by contravening the most fundamental proposition of evidence: a fact is not evidence unless it makes the disputed issue more likely to be true than it otherwise would be. Put simply, if you knew you had counterfeit money on your person and did not want to use it, you would keep it separate from your real money. That Mr. Britt kept his real and fake money separate says nothing about his intent to use it to defraud, deceive or injure anyone, which is a statutory requirement under Penal Law § 170.30.

I.

Here are the pertinent facts, taken in the light most favorable to the People. At 11:15 p.m. on Sunday, March 9, 2014, Police Officer Ryan Lathrop, driving his three-wheeled police scooter, saw Clinton Britt on the sidewalk in front of Times Scare, a now-defunct haunted house attraction in Times Square. Mr. Britt was drinking from a can or bottle wrapped inside a brown paper bag. Officer Lathrop made a U-turn, intending to approach Mr. Britt. Mr. Britt noticed Officer Lathrop's U-turn and ran up the couple of stairs into Times Scare. Officer Lathrop followed Mr. Britt inside, pursued him down a hallway, and stopped him by grabbing his arm. It was then that Officer Lathrop was able to see the rim of the beverage inside the brown paper bag, which said "Lime-A-Rita." Officer Lathrop walked Mr. Britt outside, initially planning to issue him a summons for the open-container violation. Because Mr. Britt had only an identification card issued by the City College of New York, which did not show his birthdate or address, Officer Lathrop arrested him. In a search incident to that arrest, Officer Lathrop found in Mr. Britt's pockets a small pink plastic bag of what he thought was crack cocaine and some money.

Later, when Officer Lathrop vouchered Mr. Britt's possessions at the precinct, he noticed that some of the currency was folded with a rubber band wrapped around it while the rest of it was loose. Officer Lathrop pulled the rubber band off the folded currency and could tell immediately that it was poor-quality counterfeit money: it felt smooth, did not have watermarks or security strips on it, and had blurry images. In total, Mr. Britt had 17 counterfeit $10 and $20 bills, totaling $300. Mr. Britt also had $148 in genuine money.

Mr. Britt told Officer Lathrop: "I want to talk to a detective, and I will give up who I got the currency from, the counterfeit bills from, if you make the drug charges go away."

Mr. Britt was charged with 17 counts of criminal possession of a forged instrument in the first degree (Penal Law § 170.30) and two counts of criminal possession of a controlled substance in the seventh degree (Penal Law § 220.30). In Supreme Court, Mr. Britt moved to suppress the counterfeit bills and his statement to the police as the result of unlawful police conduct. In particular, Mr. Britt argued that leaving the sidewalk to go inside Times Scare did not elevate the officer's right to approach to a right to forcibly detain him. Supreme Court denied Mr. Britt's suppression motion. At the conclusion of the People's evidence against him, Mr. Britt moved to dismiss the criminal possession of a forged instrument counts, arguing that the People had not proved Mr. Britt's intent to defraud. Mr. Britt renewed this motion at the end of trial, supplying the People and the court with People v Bailey (13 NY3d 67 [2009]). Although the court agreed the argument was "a very good one," it denied Mr. Britt's motion "at th[at] time." The jury returned a verdict of guilt as to 17 counts of criminal possession of a forged instrument in the first degree and one count of criminal possession of a controlled substance in the seventh degree. The court sentenced Mr. Britt to three to six years in prison on the forgery counts, and time served on the controlled substance count.

On appeal, Mr. Britt challenged his convictions, arguing: (1) his arrest was unlawful, and therefore his statements and evidence obtained from searching him should be suppressed and the indictment dismissed; (2) he lacked the intent required for first-

degree possession of a forged instrument, and therefore a new trial should be ordered on the forged instrument counts; and (3) Secret Service Agent Helm was improperly permitted to testify as an expert on how persons intending to pass counterfeit money keep that money on their person.

The Appellate Division held the trial court had "properly denied defendant's suppression motion" on the ground that the act of drinking from a brown paper bag, coupled with Mr. Britt's flight, "created at least reasonable suspicion" (People v Britt, 160 AD3d 428, 429-430 [1st Dept 2018]). It also held that the evidence supported both "inferences that defendant knowingly possessed counterfeit money and did so with the requisite fraudulent intent" (id.). The Appellate Division concluded that the jury could have inferred defendant knew the money was counterfeit and intended to spend it from the quantity, denomination, and amount of counterfeit money, and from the fact that it was bundled separately from the genuine money, reasoning that the combination of factors, "and the exercise of common sense," could lead to the conclusion that Mr. Britt "had no reason to carry these counterfeit bills except to spend them" (id.).

I will discuss the forged instrument issues first and the legality of the search last.

II.

The majority acknowledges, as it must, that "[k]nowledge and intent are two separate elements that must each be proven beyond a reasonable doubt by the People. Simply put, drawing the inference of defendant's intent from his knowledge that the bills were counterfeit improperly shifts the burden of proof . . . [by] stripp[ing] the element of

intent from the statute and criminaliz[ing] knowing possession" (majority op at 7, quoting People v Bailey). Yet the majority does just what Bailey commands must not be done, holding Mr. Britt liable for mere knowing possession.

Mr. Britt's case is much like Mr. Bailey's in several ways. To begin, as in this case, Mr. Bailey possessed the counterfeit money in a commercial shopping district – in fact, just a few blocks from where Mr. Britt was arrested. As here, police observed Mr. Bailey allegedly committing a crime unrelated to counterfeit bill possession. There, police officers watched Mr. Bailey enter and exit fast food restaurants, attempting to pickpocket several people; upon Mr. Bailey's arrest, the police recovered three counterfeit $10 bills from his wallet (Bailey, 13 NY3d at 71-72). Like Mr. Britt, Mr. Bailey admitted his knowing possession of counterfeit money, telling the police: "You got me for the counterfeit money, but I didn't have my hand near that purse" (id.). Nothing in the record of either case suggested that Mr. Britt or Mr. Bailey had attempted to use, was using, or had plans to use the counterfeit money.

Why is Mr. Britt serving three to six years in prison when Mr. Bailey walked free? To distinguish Bailey, the majority relies on two grounds that do not bear a whit on Mr. Britt's intent to defraud. First, the majority notes that "Bailey was found with only $30 in counterfeit bills on his person, whereas [Mr. Britt] had $300." The amount of counterfeit money, however, does not bear at all on one's intent to defraud, deceive or injure. For the purposes of Penal Law § 170.30, a $30 fraud and a $300 fraud are indistinguishable. If I walk around with $300 in real money in my wallet, and my teenage daughter walks around with $30 in her purse, what basis would there be to conclude that I am more likely than she

to spend some of the money? (Indeed, if you knew us, there's a good chance that by the end of the day she'd have spent $30, still have $30, and I'd have $270.)

The same is true with counterfeit money. That Mr. Britt possessed $300 and Mr. Bailey $30 does not suggest that Mr. Britt had any greater intent to "defraud, deceive or injure" than did Mr. Bailey. At most, it might suggest that if both of them had an intent to defraud, Mr. Britt's fraud might have been for a greater amount, but the amount of the fraud is irrelevant under the statute.[1] In its creation of the criminal possession statute, the legislature made no distinction as to the amount of counterfeit money one must possess, either in total or as to the number of bills. Nor did it create a presumption of intent based on the nominal value or number of bills in one's possession. We know, however, from the legislature's structure of the forgery statutes, that it creates volume-based presumptions when it believes such are warranted. Penal Law § 170.27, for example, creates a presumption of intent from possessing two or more forged debit or credit cards. The legislature has made similar volume-based gradations in numerous other statutes, including Penal Law § 158.00(2)(a), which creates a presumption of intent when a person possesses five or more public benefits cards in names other than his or her own; and Penal Law § 235.10(2), which creates a presumption of intent where a person possesses six or more

[1] The majority contends that Mr. Britt's possession of $300 in counterfeit money "could hardly be inadvertent" (majority op at 8). That is true. Like Mr. Bailey, Mr. Britt admitted his knowing possession of the counterfeit money. The intent required by Penal Law § 170.30, however, is not the intent to possess counterfeit money, but the intent to use it to defraud. Mr. Britt's concession that his possession was not inadvertent satisfies the statute's knowledge requirement, but not its intent-to-defraud requirement. That is the core of Bailey's holding.

obscene articles (see Bailey, 13 NY3d at 72). But, as we pointedly noted in Bailey, "there is no statutory presumption regarding counterfeit bills" (id.). The legislature could readily have created that same presumption of intent based on the nominal value of counterfeit currency or the number of bills possessed if it wished to do so. It did not.

Those legislative decisions were important to us in Bailey (id.). Now they are not. The majority's $270 distinction derives from neither a citable source nor a logical proposition. Moreover, by differentiating between the total amount of counterfeit money one carries, the majority invites a bumpy ride down a slippery slope.[2] Now, it appears, intent lies somewhere between $30 and $300, or three and 17. Will four bills be enough to show intent when three was not? Will $75 be enough when $30 was not? Inevitably, inconsistent results will abound until we hit the rock bottom of $30, or perhaps zero.

Second, and "[m]ost significantly," according to the majority, Mr. Britt's "counterfeit currency was physically separated from the genuine bills on his person, and the jury heard testimony from the Secret Service agent that individuals who pass counterfeit currency will separate their counterfeit currency from their genuine bills" (majority op at 8). Here is the complete extent of Agent Helm's testimony on the above point:

> "Q. And in counterfeit interaction, in your experience, what do you see when people are passing them?

[2] The Appellate Division departments have had no trouble interpreting Bailey: mere knowing possession is not enough to prove intent, but an attempt to use the bills is. In People v Batson (103 AD3d 910 [2d Dept 2013]), the Second Department held that the defendant's knowing possession of 43 counterfeit bills did not establish his intent to defraud. In People v Brousseau (149 AD3d 1275 [3d Dept 2017]) and People v Bickley (99 AD3d 1113 [3d Dept 2012]), the Third Department upheld convictions where the defendants had attempted to use the counterfeit money to make a purchase.

A. Generally they pass. A lot of the times they have bills of larger denomination paper or something smaller; and then they will have their genuine currency in one pocket and counterfeit currency. Then they have the counterfeit currency separated in a separate pocket."

Both Mr. Britt's separation of his fake from real money and Agent Helm's testimony suffer from the same problem: they have zero probative value as to intent, and therefore are not relevant evidence on which any trier of fact could rely – even putting aside the proof-beyond-a-reasonable-doubt standard. Evidence is relevant if it has any tendency to make more or less likely the truth of the proposition for which it is offered (David P. Leonard, The New Wigmore: The Principle of Limited Admissibility § 1.4 [3d ed 2019]) – in other words, if "it makes determination of the action more probable or less probable than it would be without the evidence" (People v Scarola, 71 NY2d 769, 777 [1988]). To determine whether evidence has probative value, one simply asks: "Does learning of this evidence make it either more or less likely that the disputed fact is true?" (McCormick on Evidence § 185 [7th ed 2013]). The Guide to New York Evidence states that relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the proceeding more probable or less probable than it would be without the evidence" (Guide to NY Evid rule 4.01, Relevant Evidence).

Mr. Britt's separation of his counterfeit money from his real money has absolutely no probative value as to his intent to use it to defraud, deceive or injure anyone. Ask yourself this: suppose you know you are carrying both real and counterfeit money, and you want to make sure you do not spend the counterfeit money. Would you intermingle it with your real money, or keep it separate? Obviously, you would keep it separate, just as Mr.

Britt did. Mr. Bailey – whose conviction under Penal Law § 170.30 we reversed for lack of evidence of intent – carried his counterfeit money in his wallet, which at least arguably might have supported an inference that he intended to use it. Yet the majority concludes that Mr. Britt's secure isolation of his counterfeit money away from his real money is evidence of his intent to use it to defraud. If anything, Mr. Britt's separation of his counterfeit money makes it somewhat less probable that he intended to use it; it certainly has no tendency to prove his intent to do so. As a consequence, it is not relevant evidence (and surely not sufficient to sustain proof of intent beyond a reasonable doubt). Of course, when evidence is in conflict and the jury sides with the People, on appeal we must accept all inferences a rational trier of fact could have made from the evidence. But when evidence has no probative value, it is not evidence, and no inferences can be made from it. If the trial record also included evidence that on the day of Mr. Britt's offenses, Barbie® turned 55, would we accept an inference of intent to defraud based on that evidence?

Agent Helm's testimony is likewise not probative evidence. He testified only that persons who pass counterfeit bills "a lot of times" separate them from their real bills. But his testimony does not say that people knowingly carrying counterfeit money who do not wish to spend it carry their bills any differently. Without that comparison, his observation has no probabilistic value. Suppose Officer Lathrop had testified that Mr. Britt was wearing pants, and Agent Helm testified that people who pass counterfeit money "a lot of the time" wear pants. Agent Helm's testimony would lack probative value, unless he also testified that people who carry counterfeit bills without the intent to defraud are less likely to wear pants.

Finally, the majority's reliance on People v Rodriguez – a case involving forged IDs, not counterfeit currency – is misplaced. There, the Court found several factors, "taken together," provided a legally sufficient basis from which to infer that the defendant had the requisite intent (17 NY3d 486, 489 [2011]). Those factors included: (1) "the defendant had a motive to assume a false identity because he was aware that the police were searching for him"; (2) "the fact that three of the four documents found in defendant's possession bear his photograph provides a sound basis for the inference that defendant actively participated in manufacturing the false identification documents"; (3) defendant "posed for the photographs for the purpose of making the documents"; (4) "defendant was observed, upon arrest, wearing a tan corduroy suit jacket which appears to be the same suit jacket he is seen wearing in the loose photographs found in his possession"; and (5) "defendant carried the false documents separately from his true identification" (id. at 489-90).

Nothing in Rodriguez suggests that the last factor, separation of the fake from real IDs, would have been sufficient to establish intent to defraud. In addition, the second, third and fourth factors go powerfully to Mr. Rodriguez's intent because they allowed "the jury to infer that defendant was recently involved in the production of the false documents and that he retained the intent to defraud at the time of his arrest" (id. [emphasis added]). Here, in sharp contrast, there is no suggestion that Mr. Britt had anything to do with the manufacture of the counterfeit money.

Furthermore, Mr. Rodriguez's separation of his fake from real IDs is different from the separation of fake and real money in a way quite important to intent. Someone who intended to use fake currency might well choose to mix it into some real currency and

present the bundle in the hope that the mixture would be more likely to pass scrutiny. But, where, as in Rodriguez, one carries around fake IDs with a fake name and a real ID with a real name, one would never mix the two and present them as a bundle. Doing so would immediately reveal – not conceal – illegality. People possessing several real IDs, though, might well keep them together. So, where the separation of fake from real IDs might have some probabilistic tendency to show intent to use the fake ID, separation of fake from real money does not. The majority's reliance on Rodriguez is further misplaced for that reason.

In derogating Bailey, the majority collapses the knowledge and intent elements of the criminal possession statute. That conflicts with Bailey's strong admonition that intent to defraud may not be inferred from knowing possession or from an assumption that people walking around shopping districts with counterfeit money intend to use it to defraud. *Stare decisis* is supposed to count for something. The rule from Bailey has proved workable and effective. More importantly, in Bailey we correctly interpreted a straightforward statute in which the legislature required both knowledge and intent to be proved beyond a reasonable doubt. Indeed, the legislature required proof of intent to defraud, deceive or injury with regard to every degree of criminal possession of a forged instrument: there is no forgery-related crime for the knowing possession of counterfeit money. Trivializing the intent requirement to allow its proof to turn on a $270 difference and the careful sequestration of counterfeit money does not comport with the statute's language or our binding caselaw.

III.

After Officer Lathrop spotted Mr. Britt in Times Square drinking something concealed in a brown paper bag, Mr. Britt quickly entered Times Scare, hoping to avoid Officer Lathrop. On the undisputed facts, Officer Lathrop forcibly detained Mr. Britt when he caught up with him inside Times Scare and grabbed him by the arm – a level-three "forcible stop and detention" under People v De Bour (40 NY2d 210 [1976]). In De Bour, we established a four-tiered framework for evaluating police-civilian encounters. Unlike the federal approach, which focuses on probable cause, the four-tiered De Bour system has three levels below probable cause, each of which permits a different level of police conduct (see People v Gates, 31 NY3d 1028, 1030 [2018] [Garcia, J., dissenting]). For ease of reference, here is how De Bour's four levels operate:

Level	Factual Basis	Allowable Police Conduct
1	The facts provide the police with an "objective, credible reason, not necessarily indicative of criminality"	Inquiry
2	The facts provide the police with "a founded suspicion that criminality is afoot"	Stop and inquiry short of a forcible detention
3	The facts provide the police with "a reasonable suspicion that a particular person has committed, is committing or is about to commit a felony or misdemeanor"	Forcible stop and detention, but not arrest
4	The facts provide the police with probable cause for an arrest	Arrest

(De Bour, 40 NY2d at 223).

The parties agree that, when Officer Lathrop pursued Mr. Britt into Times Scare and grabbed his arm, he conducted a forcible stop and detention, which is a level three intrusion under De Bour. As the majority states, to justify that forcible stop and detention, Officer Lathrop must have had "'a reasonable suspicion that [Mr. Britt] has committed, is committing or is about to commit a felony or misdemeanor'" (majority op at 10, quoting De Bour [40 NY2d at 223]). The majority concludes Officer Lathrop satisfied De Bour's requirement for a level-three forcible stop. Mr. Britt disagrees. He is correct.

De Bour allows the forcible stop and detention of suspects when the officer has a reasonable suspicion that the person has or is about to commit a "felony or misdemeanor" (emphasis added). That portion of De Bour is also codified in CPL 140.50(1), which permits a forcible stop when the officer "reasonably suspects that such person is committing, has committed or is about to commit either (a) a felony or (b) a misdemeanor defined in penal law" (emphasis added). "Level three authorizes an officer to forcibly stop and detain an individual, and requires a reasonable suspicion that the particular individual was involved in a felony or misdemeanor" (People v Moore, 6 NY3d 496, 498-499 [2006]). We have repeatedly emphasized that temporary detentions are authorized "only for felonies and misdemeanors, not violations" (In re Victor M., 9 NY3d 84, 88 [2007]).

Drinking a Lime-A-Rita™ in Times Square is not a felony or misdemeanor. Nothing in the Penal Law prohibits it. Instead, it is a violation of New York City Administrative Code § 10-125, punishable by a fine of not more than $25 or imprisonment of not more than one day. Here, Officer Lathrop observed actions by Mr. Britt that he

believed constituted an open container violation, not a misdemeanor or felony. Neither De Bour nor CPL 140.50(1) permitted a forcible stop and detention of Mr. Britt. De Bour, therefore, provides no justification for such a stop under these facts. Consequently, the subsequent arrest of Mr. Britt was unlawful, and all evidence seized and the statement he made should have been suppressed (see e.g. People v McIntosh, 96 NY2d 521, 527 [2001]).

De Bour explicitly mandates that the reasonableness of a police officer's intrusion hinges on "the gravity of the crime involved" (De Bour, 40 NY2d at 219). Thus, whatever De Bour's other shortcomings might be (see People v Gates, 31 NY3d 1028, 1029, 1030 [2018] [Garcia, J., dissenting]; People v Perez, 31 NY3d 964, 966, 972 n 3 [2018] [Rivera, J., dissenting]), it made an important distinction when, based on our State constitution, it limited level-three forcible stops to felonies and misdemeanors, which distinction the legislature had previously adopted as a statutory guarantee in CPL 140.50. It makes perfect sense that, when balancing the right to be left alone and avoid intrusive police conduct (People v Holmes, 81 NY2d 1056, 1058 [1993], citing People v May, 81 NY2d 725, 727-728 [1992]; see also People v Moore, 6 NY3d 496 [2006]; People v Howard, 50 NY2d 583 [1980]) against the need to protect innocent persons from crime, both our court and the legislature concluded that greater police intrusion is justified if Mr. Britt is observed with a possible bomb instead of a possible beer.

Under De Bour and the Criminal Procedure Law, when an officer observes someone drinking from a container concealed in a paper bag, the officer is justified in a level-two inquiry to gain "explanatory information" upon a "founded suspicion that criminal activity

is afoot" (id. at 223). Officer Lathrop could have followed Mr. Britt, could have asked him to see what was in the bag, could have waited for Mr. Britt to discard it (see People v Bothwell, 261 AD2d 232 [1st Dept 1999]), or could have attempted – without forcibly detaining Mr. Britt – to peer into the bag to determine its contents (see People v Francis, 17 Misc 3d 870, 873 [Sup Ct, Bronx County 2007] [where defendant was drinking from bottle wrapped in brown paper, police officer had a right to approach defendant, who poured out some of its contents to demonstrate it was orange juice and not alcohol]; People v Canty, 55 AD3d 330 [1st Dept 2008] [where police officer saw the beer bottle, an officer could pursue and arrest the defendant]). But, as regards offenses that are not felonies or misdemeanors, De Bour level three does not exist. Absent probable cause to arrest Mr. Britt – which the People do not contend Officer Lathrop had when he grabbed Mr. Britt's arm – no forcible stop is permitted.

IV.

Stepping away, for a moment, from whether the separation of fake from real currency has probabilistic value and the niceties of De Bour and the Criminal Procedure Law, we should consider the larger context at play here. Mr. Britt has four felony convictions and a score of misdemeanor convictions, mostly for controlled substance offenses and mostly more than a decade old. More recently, he has been employed by City College. Despite a work-related injury to his back, he has helped numerous people in his community, several of whom wrote him letters of support. In one letter, a doctor from New Jersey informed the court that Mr. Britt took care of the doctor's 92-year-old cousin, who

had dementia and was unable to walk or feed herself. Mr. Britt "groomed her, fed her and accompanied her everywhere, on neighborhood walks, to the beauty salon and to her doctor's appointments." According to the doctor, Mr. Britt could not have dedicated himself "more to another person," and gave his cousin "dignity and more love than any of her relatives . . . did." The doctor went so far as to offer to testify as to Mr. Britt's character, despite the fact that he had not been asked to at trial. A North Carolina "elderly couple" also wrote in to describe Mr. Britt as a "wonderful friend," who had "greatly helped and assisted" them on their travels to New York. They described him as an "honest person, a caring person, and a very helpful and considerate person." An 88-year-old gentleman wrote in to describe Mr. Britt as a "steadying presence" both physically and emotionally, helping him visit his sons' homes, and calling Mr. Britt a "true friend." Mr. Britt's mother also wrote into the court. She noted that after being released from prison in 2005, Mr. Britt had been employed for eight years and had "shown considerable changes since his release." Mr. Britt's mother informed the court that, although Mr. Britt suffered from cancer himself, he had moved in with his elderly parents, who are both in their eighties, in order to take care of them.

The People requested that Mr. Britt be sentenced to 7 ½ to 15 years in prison – the maximum allowed by law. The court, instead, sentenced him to the minimum: three to six years, because "he actually did not use the money for anything or pass the money. So there was no harm caused. It's not a violent act." Even with the minimum sentence, he is losing three to six years of his life, the elderly people in his community whom he has been helping

will be without his assistance, and taxpayers will spend somewhere between $210,000 to $1,000,000 for his imprisonment.[3] None of that would have happened had he been affluent, drinking rosé with a chilled lobster picnic splayed out on Central Park's Great Lawn on a sunny summer afternoon.

Our state legislature and local governments, specifically in recognition of the differential impact on the poor and people of color, have taken steps to decriminalize certain offenses as a way to reduce the catastrophe visited on those communities by overcriminalization of relatively minor offenses (see 2019 NY Senate-Assembly Bill S6579, A8420 [signed by the Governor, July 29, 2019] [reducing the penalty for unlawful possession of marijuana to "avoid the disparate racial and ethnic impact seen in current marijuana enforcement"]; New York City Council, Criminal Justice Reform Act [passed June 13, 2016], https://council.nyc.gov/legislation/criminal-justice-reform/ [accessed Dec. 12, 2019]). Prosecutors have similarly begun to focus their resources away from low-level violations or infractions (see e.g. District Attorney Vance . . . Announce[s] New Structural Changes to Criminal Summonses Issued in Manhattan, Mar. 1, 2016, https://www.manhattanda.org/district-attorney-vance-commissioner-bratton-mayor-de-blasio-announce-new-structural-c/ [accessed Dec. 12, 2019] [announcing the Manhattan

[3] Vera Institute, Prison Spending in 2015, https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends-prison-spending; Marc Santora, City's Annual Cost Per Inmate is $168,000, Study Finds, NY Times, Aug. 23, 2013, https://www.nytimes.com/2013/08/24/nyregion/citys-annual-cost-per-inmate-is-nearly-168000-study-says.html.

District Attorney's Office "will no longer prosecute most violations or infractions . . . such as littering, public consumption of alcohol, or taking up two seats on the subway"]; Albany County DA David Soares Announces Policy Change in Marijuana Prosecutions, Nov. 15, 2018, http://www.albanycountyda.com/Media/News/18-11-15/Albany_County_DA_David_Soares_Announces_Policy_Change_in_Marijuana_Prosecutions.aspx [accessed Dec. 12, 2019]). Abundant scholarly literature supports those decisions (see e.g. Charlie Gerstein & J.J. Prescott, Process Costs and Police Discretion, 128 Harv L Rev F 268 [Apr. 10, 2015]; see generally Issa Kohler-Hausmann, Misdemeanor Land: Criminal Courts and Social Control in an Age of Broken Windows Policing [2018]; William J. Stuntz, The Collapse of American Criminal Justice [2011]). The majority today charts the opposite direction, abrogating our clear holding in Bailey to uphold Mr. Britt's conviction for intending to defraud by use of counterfeit money, and ignoring the vital distinction in De Bour and the Criminal Procedure Law clearly establishing the illegality of Mr. Britt's arrest. As of today, it appears the law approves the forcible detention of people drinking from containers wrapped in paper bags and their imprisonment for years if they possess $300 of counterfeit money. Raise your hand if you think that is a good allocation of police resources and a wise expenditure of taxpayer dollars.

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Order affirmed. Opinion by Judge Fahey. Chief Judge DiFiore and Judges Stein, Garcia and Feinman concur. Judge Wilson dissents in an opinion in which Judge Rivera concurs.

Decided December 19, 2019