STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 12, 2011
v	No. 292521 Macomb Circuit Court
CAROL ANN WALKER, Defendant-Appellant.	LC No. 2008-004969-FH

Before: GLEICHER, P.J., and SAWYER and MARKEY, JJ.

PER CURIAM.

A jury convicted defendant Carol Ann Walker of possessing fewer than five counterfeit coins, MCL 750.261, and three counts of uttering and publishing counterfeit bills, MCL 750.253. The trial court sentenced Walker to concurrent terms of one to 10 years' imprisonment for possessing counterfeit coins and one to five years' imprisonment for the uttering and publishing convictions. Walker appeals as of right. We affirm Walker's convictions and sentences for uttering and publishing counterfeit bills, reverse her conviction of possessing counterfeit coins and remand for correction of the judgment of sentence.

On September 2, 2008, Walker and codefendant Selena Shelton embarked on a shopping expedition in Chesterfield Township. They first visited Dick's Sporting Goods, where Walker paid for merchandise with three $100 bills. The duo then went to T. J. Maxx, where Walker again used three $100 bills to pay for items she and Shelton had selected. At the next stop, Bed Bath and Beyond, Walker handed cashier Michelle Swider three $100 bills as payment for cookware. Swider examined the bills and perceived that they "felt rough in texture" and "were visibly wrong." The bills passed muster when Swider applied a counterfeit-detection pen. Nevertheless, Swider contacted Nicole Gauthier, a store manager, to express concern about the bills' authenticity. Gauthier determined that one of the bills contained a security thread denoting a value of $5 rather than $100, and she refused to accept them. According to Swider, Walker asked to have the bills returned to her "so that she could take them back to the bank." After Swider handed back the bills to Walker, she observed Walker and Shelton driving away from the store in "a dark red Range Rover." A Bed Bath and Beyond representative then called the Chesterfield Township police department and reported the event.

Meanwhile, Walker and Shelton continued shopping. They bought goods at several nearby stores, including Kmart, Lowe's, Target, Home Depot and Petco. At each location,

Walker offered multiple $100 bills as payment for the items the pair presented for payment. None of the cashiers at the other stores harbored suspicions about the validity of the bills, despite that several examined them with a counterfeit-detection pen. Security camera video footage later obtained from some of the stores revealed that Walker, not Shelton, paid for the merchandise.

Within about 30 minutes of the events at Bed Bath and Beyond, Chesterfield Township Officer Chris Delor arrived at the store, interviewed Gauthier and Swider and viewed a surveillance tape depicting the attempted cookware purchase. Delor located Walker and Shelton leaving a Michael's store less than a mile away and called for backup. Through the Range Rover's window, Delor noticed abundant "merchandise, bags and boxes and things in the truck[.]"

Delor and Officer Duane Van Acker questioned Walker and Shelton in a parking lot outside Michael's. Walker produced two $100 bills from a hip bag, both of which proved to be counterfeit. Walker advised Delor that Shelton had used a credit card to pay for the pair's Home Depot acquisitions. However, Shelton told Delor that Walker had bought the Home Depot items with cash, and Shelton directed the officers to a receipt in the Range Rover. Van Acker found six store receipts in Shelton's purse, along with $409 in cash, later determined to be genuine, in the Range Rover. On the basis of information contained in the receipts, the police collected the $100 bills that Walker had presented at each shopping destination. Many of the bills shared the same serial number and all bore the watermark and security thread inserted into $5 bills. Walker does not dispute the counterfeit nature of the $100 bills she tendered in Chesterfield Township.

In February 2009 and March 2009, Walker and Shelton stood trial jointly. The prosecutor introduced evidence detailing the purchases made with the counterfeit money. Chesterfield Township Detective Scott Blackwell and United States Secret Service Agent Jay Donaldson testified concerning custodial statements made by both defendants. During the interviews, Shelton disclosed that someone nicknamed "Tweeny" "fronted" her and Walker the counterfeit $100 bills for "50 cents on the dollar." Walker maintained that her boyfriend, Derrick Walls, had given her $2500 in $100 bills in a Comerica Bank envelope and instructed her to "go shopping and take care of yourself." At trial, Walker testified that until her arrest, she had no idea that the bills were counterfeit and denied telling Swider that she had obtained the money from a bank. In response to the prosecutor's cross-examination inquiries, Walker could not supply any information about Walls apart from his name. The jury convicted both defendants as charged.

I

Walker first challenges the trial court's refusal to substantively address the issues raised a motion for a new trial. On January 8, 2010, Walker's counsel attempted to file by fax in the Macomb Circuit Court a motion for a new trial under MCR 6.431. The court rejected Walker's faxed motion because it was not accompanied by a recently increased fax-filing fee. After the court notified Walker's counsel that it had not accepted the filing, defense counsel filed the motion by regular mail.

While the new trial motion remained pending in the trial court, Walker filed in this Court a motion to remand to the trial court for development of a factual record. At a March 1, 2010

motion hearing, the trial court took under advisement whether defense counsel had timely filed the motion for a new trial, adding, "[I]f I agree it was timely, then I'll move onto the substantive issues." On March 16, 2010, this Court granted Walker's motion to remand and ordered the trial court to decide the motion for a new trial within 28 days. *People v Walker*, unpublished order of the Court of Appeals, entered March 16, 2010 (Docket No. 292521). The Court's order specifically instructed the trial court to render "a decision on defendant-appellant's motion for new trial filed January 21, 2010." Subsequently, the trial court acknowledged receipt of this Court's order, but again found the motion untimely and declined to consider its merits.

"It is the duty of the trial court, on remand, to comply strictly with the mandate of the appellate court according to its true intent and meaning." *People v Blue*, 178 Mich App 537, 539; 444 NW2d 226 (1989). Pursuant to MCR 7.216(B):

> When any nonjurisdictional act is required to be done within a designated time, the Court of Appeals may permit it to be done after expiration of the period on motion showing that there was good cause for delay or that it was not due to the culpable negligence of the party or attorney.

Furthermore, MCR 7.216(A)(7) authorizes this Court to "enter any judgment or order or grant further or different relief as the case may require." For example:

> Our Supreme Court has forbidden this Court to grant leave to appeal on an application filed after the twelve-month cutoff, as MCR 7.205(F)(3) provides that leave on such an application "may not be granted" . . . . Nevertheless, *this Court has the authority to "enter any judgment or order or grant further or different relief as the case may require*." MCR 7.216(A)(7). This Court, on occasion, has treated improperly filed claims of appeal as applications for leave to appeal and proceeded to consider the substantive issue presented on appeal. [*People v Harlan*, 258 Mich App 137, 143-144; 669 NW2d 872 (2003) (emphasis added).]

The trial court erred by either deliberately ignoring or fundamentally misapprehending the meaning of this Court's remand instructions. The Court's clearly worded order should have presented no interpretive difficulties, and we discern no reasonable basis for the trial court's failure to comply with the mandate set forth in the order. However, in the interest of "the just, speedy, and economical determination" of this action, MCR 1.105, we elect to decide the issues in Walker's new trial motion in lieu of again remanding the matter to the trial court.

II

Walker asserts in her motion for a new trial that the jury's verdict contravened the great weight of the evidence, which she claims showed that she did not know that the money was counterfeit until her arrest, most of the cashiers lacked any suspicion that Walker had paid with counterfeit bills, and sophisticated techniques were necessary to determine whether the bills were genuine. "The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003). "A verdict may be vacated only when it does not find reasonable support in

the evidence, but is more likely to be attributed to causes outside the record such as passion, prejudice, sympathy, or some extraneous influence." *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993) (internal quotation omitted). "'Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial.'" *Musser*, 259 Mich App at 219, quoting *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998).

The statute penalizing the uttering and publishing of counterfeit notes, MCL 750.253, states as follows:

> Any person who shall utter or pass, or tender in payment as true, any such false, altered, forged or counterfeit note, certificate or bill of credit for any debt of this state, or any of its political subdivisions or municipalities, any bank bill or promissory note, payable to the bearer thereof, or to the order of any person, issued as aforesaid, knowing the same to be false, altered, forged or counterfeit, with intent to injure or defraud as aforesaid, shall be guilty of a felony, punishable by imprisonment of not more than 5 years or by fine of not more than 2,500 dollars.

"The crime of uttering and publishing consists of offering or passing a forged instrument as genuine, knowing the same to be false, with an intent to injure or defraud." *People v Peace*, 48 Mich App 79, 86; 210 NW2d 116 (1973) (citation omitted). Alternatively stated, "[t]he elements of uttering and publishing are: (1) knowledge on the part of the defendant that the instrument was false; (2) an intent to defraud; and (3) presentation of the forged instrument for payment." *People v Shively*, 230 Mich App 626, 631; 584 NW2d 740 (1998). A jury may infer an actor's intent from the facts and circumstances, and minimal circumstantial evidence suffices to show a defendant's state of mind. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

Walker's great weight of the evidence argument ignores substantial evidence and reasonable inferences proving her awareness that the bills were counterfeit. Swider recounted at trial that when she informed Walker of the bills' lack of authenticity, Walker declared that she intended to return the bills to her bank. However, Officer Delor testified that a short while later that same afternoon, Walker told him that she had received the bills from her boyfriend. Additionally, Walker persisted in presenting multiple $100 bills at several other stores, even after learning from Swider of their counterfeit nature. Walker's inconsistent statements regarding the bills' provenance, combined with her continued use of the challenged currency, undercut Walker's credibility, and a jury could view Walker's dissembling as circumstantial evidence of her guilt. See *United States v Zafiro*, 945 F2d 881, 888 (CA 7, 1991) ("The government cannot force a defendant to take the stand, of course, but if he does and denies the charges and the jury thinks he's a liar, this becomes evidence of guilt to add to the other evidence."), aff'd 506 US 534; 113 S Ct 933; 122 L Ed 2d 317 (1993). Consequently, we cannot conclude that the evidence preponderated so heavily against the jury's verdict that it would be a miscarriage of justice to allow the verdict to stand.

III

Walker also raises several claims of prosecutorial misconduct, specifically that the prosecutor improperly (1) sought Walker's comment on Officer Delor's and Detective Blackwell's credibility, (2) shifted the burden of proof by denigrating Walker's failure to

corroborate her testimony, (3) vouched for the credibility of prosecution witnesses, and (4) invoked the prestige of his office to bolster Detective Blackwell's testimony. This Court reviews claims of prosecutorial misconduct according to the following standards:

> Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. [*People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), criticized on other grounds in *Crawford v Washington*, 541 US 36, 64; 124 S Ct 1354; 158 L Ed 2d 177 (2004).]

We consider unpreserved claims of prosecutorial misconduct only to ascertain whether any plain error affected the defendant's substantial rights. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

A

Walker complains that the prosecutor improperly solicited her opinions concerning the credibility of two police witnesses, Officer Delor and Detective Blackwell. During cross-examination of Walker, the following relevant colloquy ensued:

> *Q*: Do you remember telling Officer Delor you didn't know why they rejected your money?
>
> *A*: No.
>
> *Q*: Did you tell him that?
>
> *A*: No.
>
> *Q*: Was he lying when he said that?
>
> *A*: No. I can't call him a liar. I didn't say it.
>
> *Q*: Derrick Walls, who is Derrick Walls again?
>
> * * *
>
> *Q.* How many times over the course of a year do you think you went to his house?
>
> *A.* About three.
>
> *Q.* Three times in a year?

A. Yeah.

Q. How many times in the course of the year did he come to your house?

A. Almost every other day.

Q. And in this year, even though you had been there at least three times, you never were able to learn of his address or even neighborhood or cross roads or any type of information you could give to the police?

A. Yes, I know where—I know—I don't know his address, but I know where he lived.

Q. You told Detective Blackwell all you knew was he lived on the west side of Detroit?

A. I told him he lived on the west side of Detroit, and I told him the street.

Q. You told him the street?

A. Yes, I did.

Q. He asked you the address and [you] told him the street?

A. I didn't know the address. I told him I did not know the address. I know the house but I don't know the address.

Q. So when Detective Blackwell said you could not provide any identifying information he's lying?

A. No, I'm not saying he's lying.

Defense counsel objected on the ground that the prosecutor had posed an "argumentative" question. After a bench conference, the prosecutor's cross-examination proceeded as follows:

Q. Ms. Walker, you recall discussing this case with Scott Blackwell, is that correct?

A. Yes, I do.

Q. According to you, you told him where Derrick Walls lived, at least the street?

A. Yes.

Q. You were more specific than west side of Detroit?

A. Yes.

Q. Were you able to give a phone number?

A. I told him it was in my cell phone.

Q. You told him it was in your cell phone?

A. Yes.

Q. You didn't tell Detective Blackwell that you had no idea what his phone number was?

A. No. I told him I don't—I can't remember it off the top of my head, but it is in my cell phone.

Q. Did you ever provide that number to Detective Blackwell?

A. No, I didn't.

"It is not proper for a prosecutor to ask a defendant to comment on the credibility of prosecution witnesses since a defendant's opinion on such a matter is not probative and credibility determinations are to be made by the trier of fact." *People v Knapp*, 244 Mich App 361, 384; 624 NW2d 227 (2001) (internal quotation omitted). We agree with Walker that the prosecutor committed misconduct by asking whether Officer Delor and Detective Blackwell had lied. Although the prosecutor plainly posed improper questions, we decline to hold that these two brief queries denied Walker a fair trial, especially given the substantial, properly admitted evidence of her guilt.

B

During the prosecutor's closing argument, he asserted that Walker's inability or unwillingness to offer information about Walls suggested her guilt. Walker cites as improper prosecutorial burden shifting the following italicized remarks:

> *Why would Ms. Walker lie about where the money came from? Who is Derrick Walls? Why isn't he here? Why hasn't he ever been presented to anyone? Why couldn't she provide any information?* Unfortunately, we couldn't address it today, but if you remember Detective Blackwell's original testimony I asked him specifically did she give anything, any type of identification? Nothing other than he lived on the west side of Detroit. No street. Now she said she gave a street. No address, no phone number, no nothing. She wants us to believe she told Detective Blackwell I can get you this guy. I can get you the guy passing this bad money, just let me see my cell phone. He's going to say no? He doesn't want to get the criminal? He doesn't want to get the guy passing counterfeit money creating these bad bills? Of course he does. It doesn't make sense because it is not true. [Emphasis added.]

"[T]he prosecution may not use a defendant's failure to present evidence as substantive evidence of guilt" in a manner that shifts to the defense the burden of proof. *People v Reid*, 233 Mich App 457, 477; 592 NW2d 767 (1999). But

> where a defendant testifies at trial or advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant. Although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof. [*People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995).]

The defendant in *Fields* admitted to police at the time of his arrest that he had shot his wife. *Id*. at 97. At the defendant's trial, however, he testified that Joanne Walker, his former lover, had "pulled out a pistol and fired several quick shots before [he] could wrest the gun from her." *Id*. at 98-99. The prosecutor extensively cross-examined the defendant regarding Walker's whereabouts and whether he had offered assistance in locating her. *Id*. at 99-101 n 5. In closing argument, the prosecutor characterized Walker as "a construction, a figment of the mind[.]" *Id*. at 101 n 6. On appeal, the defendant contended that the prosecutor's questions and argument had improperly shifted to him the burden of proving his innocence. *Id.* at 104. The Supreme Court rejected this claim, emphasizing that "[a]rguments regarding the weight and credibility of the witnesses and evidence presented by defendant do not shift the burden to the defendant to prove his innocence, but rather question the reliability of the testimony and evidence presented." *Id.* at 107. In holding that no burden shifting had occurred, the Supreme Court explained that "where a defendant testifies at trial or advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant." *Id*. at 115. Because the prosecutor's rhetorical questions about Walls in this case impugned Walker's credibility, but did not shift to the defense the burden of proof, we detect no misconduct in the prosecutor's challenged remarks.

C

Walker also criticizes as prosecutorial misconduct the following passage from the prosecutor's rebuttal argument referencing Shelton's defense:

> With respect to Ms. Shelton, it reminds me of a saying in law school, the red hearing [sic] was thrown out, but we had another saying. If the facts are on your side, you argue the facts. If the law is on your side, you argue the law. If you don't have either, you just argue.
>
> So when the defense comes up with, well, there was magical construction at the police department. Detective Blackwell must be lying. He probably had a gun in the Defendant's mouth, you know, he had her write a confession out in blood. That's what he's insinuating, right? That Detective Blackwell got up here and lied under oath. He's willing to stake himself, his career, his representation

> [sic] to this Court, to each of you, to me. His life he's going to stake for these two defendants. You've got to come [up] with more than that.

Walker contends that these comments improperly vouched for Detective Blackwell's credibility and inappropriately emphasized the prestige of the police department. "[T]he prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Nor may the prosecutor "attempt to place the prestige of his office, or that of the police, behind a contention that the defendant is guilty, but he may argue that the evidence shows that the defendant is guilty." *People v Cowell*, 44 Mich App 623, 628; 205 NW2d 600 (1973).

Our review of the record reflects that in advancing the above-quoted rebuttal argument, the prosecutor defended Detective Blackwell's credibility in response to an attack that Shelton's counsel made on Blackwell in his closing argument:

> Now, of course, we don't know exactly what happened. You weren't there. I wasn't there. Unfortunately, through some miracle or some technical difficulties, even though the station videotapes and audiotapes all of the interviews, all of these interrogations since I think it was '97 . . . '99, a long time, right. The reason they do that is because they know, hey, video doesn't lie. Oops. Our video system is not working. Okay. Building was being remodeled. They can't go anywhere else to do this interview interrogation, this questioning? You can't pull out a tape recorder? He says, well, we don't have the budget for it. Come on. Even if it is 1982 cassette recorder that is huge and it takes a cassette tape and you press play or record on it. No. You know why they didn't need to? Because he's going to question them. First of all, he knows they are lying or he thinks they are lying, and he knows what happens, he's already made his conclusion, guilty.
>
> Clearly what you're telling me, Ms. Shelton, is clearly a lie because it is not matching up with what happened here. Not making any sense to me. Guilty. Until you tell me something different guilty.
>
> Well, we can draw our own conclusions but I do find that interesting that nothing was recorded so we just have to assume that this happened. And, you're right, people don't confess to things that don't happen normally, although studies have shown that occasionally there is [sic] people that do confess.

Because "the prosecutor's comment was a fair response to an issue raised by the defense," we find no prosecutorial misconduct. *Fields*, 450 Mich at 110.

IV

Walker next avers that her counsel rendered ineffective assistance by failing to raise objections when (1) Agent Donaldson testified concerning "schemes employed by other counterfeiters," (2) the prosecutor advised the jury that Walls was not present, and (3) the prosecutor "vouched for the [o]fficers and [p]laced the [p]restige of the [o]ffice behind the [w]itnesses." As Walker did not develop a testimonial record regarding the ineffective assistance

of counsel claims, we limit our review to any mistakes apparent on the existing record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). Whether a defendant has received the effective assistance of counsel comprises a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review for clear error a trial court's findings of fact, if any, regarding the conduct of defense counsel, while we consider de novo questions of constitutional law. *Id*.

"'[T]he right to counsel is the right to the effective assistance of counsel.'" *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984), quoting *McMann v Richardson*, 397 US 759, 777 n 14; 90 S Ct 1441; 25 L Ed 2d 763 (1970). In *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the United States Supreme Court held that a convicted defendant's claim of ineffective assistance of counsel includes two components: "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." To establish the first component, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). With respect to the prejudice aspect of the test for ineffective assistance, the defendant must demonstrate a reasonable probability that but for counsel's errors, the result of the proceedings would have differed. *Id*. at 663-664. The defendant must overcome the strong presumptions that his "counsel's conduct falls within the wide range of professional assistance," and that his counsel's actions represented sound trial strategy. *Strickland*, 466 US at 689. A defense counsel possesses "wide discretion in matters of trial strategy." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). This Court may not "substitute our judgment for that of counsel on matters of trial strategy, nor will we use the benefit of hindsight when assessing counsel's competence." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009) (internal quotation omitted).

A

Walker maintains that her trial counsel should have objected to the following testimony by Agent Donaldson:

> *Q.* What is the practice of cashing out when it comes to goods?
>
> *A.* Well, someone will purchase an item with counterfeit currency and then they will return it for genuine cash.
>
> * * *
>
> *Q.* Prior to sitting in on that interview [with Shelton], had you spoken with Detective Blackwell as to the background of the investigation; what they believe[d] to be the process in which the money was passed and the goods obtained?
>
> *A.* Yes, sir.
>
> *Q.* When you spoke to Ms. Shelton *what was your opinion* as to the manner in which she was conducting herself?

A. Making purchases of not necessarily of any dollar amount—of merchandise and then returning that at a later time for cash.

Q. Did you have *any opinion* as to whether the Defendant was not only making purchases with counterfeit bills but also cashing out?

A. Yes.

Q. What was your opinion?

A. That she was attempting to pass counterfeit currency.

Q. In your opinion, was she[] also quote/unquote cashing out?

A. Yes. [Emphasis added.]

The trial court recognized Agent Donaldson as an expert "in the authenticity of federal notes," without objection by Walker's counsel. Although the prosecutor's questions about cashing out arguably exceeded the scope of Agent Donaldson's recognized expertise, defense counsel's failure to object to this line of questioning did not equate to ineffective assistance of counsel. In light of Agent Donaldson's significant experience investigating counterfeiting crime, he was qualified to answer the prosecutor's inquiries relating to the purposes for which Walker and Shelton used the counterfeit money. Because the trial court properly admitted this evidence pursuant to MRE 702 and MRE 703, defense counsel need not have lodged a groundless objection to this portion of Agent Donaldson's trial testimony. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

B

Walker predicates her remaining ineffective assistance contentions on defense counsel's failure to object to the prosecutor's closing argument concerning Walls and his rebuttal argument referencing the custodial interviews conducted by Detective Blackwell. Because neither argument qualified as improper, Walker's claims that her counsel should have objected to the prosecutor's arguments lacks merit. And neglecting to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel. *Snider,* 239 Mich App at 425.

V

Walker further disputes that the jury properly convicted her of violating MCL 750.261, which criminalizes possession of less than five "counterfeit coins" as that term is described in MCL 750.260. "Criminal defendants do not need to take any special steps to preserve a challenge to the sufficiency of the evidence." *People v Cain*, 238 Mich App 95, 116-117; 605 NW2d 28 (1999). But if a "defendant's argument is not a true sufficiency claim, rather it chiefly entails an issue of statutory construction that was not argued below," the appellate court should consider the issue for plain error affecting the defendant's substantial rights. *People v Hill*, 257 Mich App 126, 144; 667 NW2d 78 (2003). Walker did not preserve her argument in the trial court. Nevertheless, "[s]tatutory construction concerns an issue of law that this Court considers

de novo," *id.*, and "this Court may consider an unpreserved issue if the question is one of law and all the facts necessary for its resolution have been presented or where necessary for a proper determination of the case." *People v Giovannini*, 271 Mich App 409, 414-415; 722 NW2d 237 (2006) (internal quotation omitted).

When considering whether the statutory offense elements exist in a particular case, we bear in mind the statutory interpretation principles summarized in *People v Cassadime*, 258 Mich App 395, 398; 671 NW2d 559 (2003):

> To discern the Legislature's intent, this Court must first look to the specific language of the statute. Further, this Court must presume that every word, phrase, and clause in the statute has meaning and must avoid any construction that would render any part of the statute surplusage or nugatory. Every word or phrase in the statute is accorded its plain and ordinary meaning. [Internal quotation omitted.]

The statute under which the jury convicted Walker, MCL 750.261, provides:

> Any person who shall have in his possession *any number of pieces less than 5, of the counterfeit coin mentioned in the next preceding section*, knowing the same to be counterfeit, with intent to utter and pass the same as true, and any person who shall utter, pass, or tender in payment as true, any such counterfeit coin, knowing the same to be false and counterfeit, shall be guilty of a felony, punishable by imprisonment in the state prison *not more than 10 years, or by a fine of not more than 5,000 dollars.* [Emphasis added.]

The "next preceding section" to which MCL 750.261 refers, MCL 750.260, states:

> Any person who shall counterfeit any gold or silver coin, current by law or usage within this state, and every person who shall have in his possession, at the same time, *5 or more pieces of false money or coin, counterfeited in the similitude of any gold or silver coin current as aforesaid*, knowing the same to be false and counterfeit, and with intent to utter or pass the same as true, shall be guilty of a felony, punishable by imprisonment in the state prison for life, or for any term of years. [Emphasis added.]

The plain language of MCL 750.260 penalizes the possession of counterfeit money resembling "any gold or silver coin." Because the $100 bills passed by Walker fell outside the purview of "any gold or silver coin" potentially punishable under MCL 750.260 or MCL 750.261, we vacate Walker's conviction under MCL 750.261 and remand for correction of her judgment of sentence. See *People v Underwood*, 278 Mich App 334, 337; 750 NW2d 612 (2008) ("Resentencing is an appropriate remedy where a defendant's sentence is based on an inaccurate calculation of the sentencing guidelines range and, therefore, does not conform to the law.").

VI

Walker finally urges this Court to remand the case to a different judge for resentencing, in light of the trial court's dismissive attitude toward Walker's motion for a new trial.[1]

> In determining whether resentencing should occur before a different judge, this Court applies the following test:
>
> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. [*People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997) (internal quotation omitted).]

As Walker observes, the trial court has exhibited some difficulty adhering to the specifics of Court of Appeals orders. However, our review of the record has uncovered no basis for any suggestion why the trial court could not resentence Walker in conformity with this opinion and the applicable law, and in a manner that preserves the appearance of fairness and justice.

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ David H. Sawyer
/s/ Jane E. Markey

[1] On remand, Walker may elect to forego resentencing, given that we have vacated the conviction that carried a 10-year maximum term.