

2015 WL 10768523 (N.Y.A.D. 1 Dept.) (Appellate Brief)
Supreme Court, Appellate Division, First Department, New York.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v.
Andrique BARON, Defendant-Appellant.

No. 16181.
2015.

To be argued by John T. Hughes

Brief for Respondent

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***1 BRIEF FOR RESPONDENT**

INTRODUCTION

Defendant Andrique Baron appeals from a judgment of the Supreme Court, New York County (Thomas Farber, J.), rendered July 31, 2009, convicting him, after a jury trial, of one count of Computer Trespass ([Penal Law § 156.10](#)), seven counts of Commercial Bribe Receiving in the First Degree ([Penal Law § 180.08](#)), four counts of Computer Tampering in the Third Degree ([Penal Law § 156.25\[1\]](#)), fourteen counts of Falsifying Business Records in the First Degree ([Penal Law § 175.10](#)), three counts of Criminal Possession of a Forged Instrument in the Second Degree ([Penal Law § 170.25](#)), five counts of violating Educational Law 224(2), and one count of Attempted Falsification of Business Records in the First Degree ([Penal Law § 175.10](#)). Defendant was sentenced to an aggregate term of 2 2/3 to 8 years in prison. He has completed that sentence.

***2** While serving as the Director of Admissions for Touro College, in New York County, defendant repeatedly created fake transcripts and other credentials for individuals who had never attended the school, usually in exchange for money. To do so, he exploited a “bug” in the college’s computer system, of which other Touro officials were then unaware. Defendant dealt with many of his “customers” through a middleman, at least initially. Often, after the initial contacts, defendant spoke to or met with the “customers” personally. Many of defendant’s customers used the fake transcripts defendant provided to apply for professional licenses, and several worked as teachers for New York City.

Eventually, other Touro officials became aware that the school’s student records were being improperly altered. The college initiated an investigation, which exposed defendant’s extensive wrongdoing and led to his arrest.

Once the wrongdoing became public, Touro suffered enormous damage to its reputation and finances. Many students transferred out of Touro, enrollment dropped significantly, and Touro was forced to hire additional employees to manually verify the thousands of student records that had been submitted to professional licensing entities, such as the New York State Department of Education.

By New York County Indictment 3221/2007, filed July 16, 2007, defendant was charged with one count of computer trespass, seven counts of third-degree computer tampering, three counts of first-degree commercial bribe receiving, and ten counts of falsifying business records in the first degree. These charges related to both ***3** defendant’s unauthorized use of Touro computer system and the sale of fake Touro credentials to seven of the scheme’s “customers.” By New York County Indictment 4743/2008, filed October 3, 2008, defendant was additionally charged with three counts of second-degree criminal possession of a forged instrument, four counts of first-degree commercial bribe receiving, ten counts of falsifying business records in the first degree, eight violations of [Education Law 224\(2\)](#), and one count of attempted falsification of business records. One of the falsification of business records charges superseded count 28 in the earlier indictment. Otherwise, the new charges related to seven additional “customers” to whom defendant provided fake Touro transcripts and other credentials. The two indictments were consolidated for trial, and on May 18, 2009, defendant’s trial commenced before the Honorable Thomas Farber and a jury. On June 9, 2009, defendant was convicted of all the counts submitted to them, 35 in total.¹

On July 31, 2009, defendant was sentenced to 1 1/3 to 4 years on each count of computer trespass, third-degree computer tampering, first-degree commercial bribe receiving, and first-degree falsification of business records. Defendant was sentenced to 1 year for each count of second-degree criminal possession of a forged instrument, attempted falsification of business records

in the first degree, and each Education Law *4 violation. The concurrent sentences under each indictment were imposed consecutively to one another, yielding an aggregate sentence of 2 2/3 to 8 years in prison.

On appeal, defendant argues that the trial evidence was legally insufficient as to some counts, and that the jury's verdict on the disputed charges was against the weight of the evidence. Defendant further claims that the People elicited improper hearsay testimony and uncharged crimes evidence. In addition, defendant maintains that his trial counsel provided ineffective assistance of counsel and that the Computer Trespass charge was duplicitous.

THE EVIDENCE AT TRIAL²

The People's Case

A “bug” in the computer system of Touro College, where defendant is a Director of Admissions, gives defendant full access to the registrar's live student records.

Defendant was a Director of Admissions for Touro College (hereafter, “Touro”), which offers a variety of undergraduate and graduate degrees (IRA TYSZLER: 71-72, 74, 83; MARK SHOR: 901-02). At the relevant time, undergraduate students paid \$5,000 a semester; a master's degree cost \$13,500 or more; and tuition at Touro Law School was approximately \$14,000 per semester *5 (ENERIKA KOHAVI: 645-47). Touro had about 18,000 students (Tyszler: 71). Defendant's office was on Touro's Manhattan campus, located at 207 West 23rd Street, in New York County (Tyszler: 72, 81-82). In addition to his responsibilities as a Director of Admissions, defendant served as the data manager for the admissions office (Tyszler: 84). Defendant was considered a computer expert by his colleagues, who knew him as “Andre” (Tyszler: 74, 88; Shor: 902).

In the late 1990s, Touro revamped its computer system (Shor: 906-07). In particular, Touro upgraded its “student information system,” a software package that the various parts of the school used to maintain their records (Shor: 904-07). Defendant served as the representative of the admissions department for the implementation of the upgrades, and he was “very, very deeply involved” in the process (Shor: 907).

Touro's student information system had separate “modules” for different offices, such as financial aid, the registrar, and admissions (Shor: 907). The system was designed so that each department's employees, while able to view the records of other departments, would be able to make changes only to their own office's records (see Shor: 929). Thus, when he was logged in under his normal username, “AndreB,” defendant could not make changes to the records of the registrar's office, which was responsible for “recording and gathering grades,” “protecting the records of the college,” awarding degrees, and providing transcripts to students (Tyszler: 75-77; Shor: 909, 919, 929).

*6 Touro's student information system also had a feature called a “test system” (Shor: 910), which was “completely separate” from the main student information system (hereafter, “the main system”), with a “different set of data” (Shor: 930-31). The test system allowed Touro officials to try out new features without making any changes to the live student records (Shor 910; VLADIMIR ROZIN: 447-48). Defendant was one of only four people who had access to the test system (Shor: 910-11). The four special usernames for the test system all started with the letters “PLY” and concluded with letters representing the user's department; thus the username for the test system's admissions module was “PLYAD” (Shor: 930-31). Each username had its own password (Shor: 932). From the test system's admissions module, a user was supposed to be able to navigate only to the other modules within the test system (Shor: 954-59). Unbeknownst to Touro, however, a bug in the test system allowed a user to cross over to the main system and access live student records (Shor: 954).

Because of the bug, a user who navigated from the test system's admissions module to the registrar module would actually enter the registrar module for the main system (Shor: 954-59). And when a user accessed the main system's registrar module in this way, he could make changes to the live student records contained within (Shor: 954-59). By exploiting the bug, therefore,

defendant would be able to log in using the “PLYAD” username and then access and makes changes to the registrar's records, even though he was not authorized to do so, because he did not work in that department (Tyszler: 116-18; Rozin: 450; Shor: 954-58).

***7 A middleman, Vladimir Diaquoi, arranges to provide fake Touro transcripts to Nadine Desinor, Florence Constant, Renee Rene, and Ghislene Julmice.**

In 2003, NADINE DESINOR was working as a teacher in Queens County (Desinor: 788). She wanted to obtain a permanent teaching certification from New York's Board of Education, but was having trouble passing the required exams (Desinor: 788-89). Although Desinor had never attended Touro College (Rozin: 462), one of her friends said she knew someone who could “give [her] a transcript” (Desinor: 790). Desinor obtained the phone number for Vladimir Diaquoi,³ and when she called him, Diaquoi told her that he “[had] a friend working at Touro College who [could] give [Desinor] the transcript” (Desinor: 791).

Diaquoi met Desinor at her house and said that she would have to pay \$3000 for the transcript (Desinor: 792). Desinor agreed, and Diaquoi later returned with two Touro College transcripts in Desinor's name: one official, and the other unofficial (Desinor: 794). The transcripts indicated that Desinor had earned a graduate degree in education (Desinor: 793; Kohavi: 645-47; People's Exhibit 552). Desinor complained to Diaquoi that the transcript did not include her middle initial (Desinor: 794). Diaquoi told her to “write ... down exactly what is missing” so he could “give it to his friend to fix it” (Desinor: 794). On the unofficial transcript, Desinor wrote, “make sure he writes ‘Nadine M. Desinor’” (Desinor: 795-96; People's Exhibit 552). After *8 Desinor gave him back the document, Diaquoi brought her another copy of the transcript that listed her name correctly (Desinor: 796).

In 2006, Desinor wanted another copy of the fake transcript to submit to the Department of Education for a substitute teacher license (Desinor: 797-98). After Touro told her that she was “not in the system” (Desinor: 799),⁴ Desinor called Diaquoi and then paid him \$1500 for another copy of the fake transcript (Desinor: 801). Desinor submitted both fake Touro transcripts to the Department of Education (PETER IANIELLO: 664-66).

In 2003 or 2004, Diaquoi also sold a fake Touro College transcript to FLORENCE CONSTANT, a friend of Desinor's (Constant: 700-08; Desinor: 804-05). Diaquoi told Constant, who had never completed a class at the college, that he “knew somebody” at Touro who could provide a transcript falsely stating that she had obtained a master's degree in education (Constant: 699-700, 705-08, 711; Rozin: 464-66). Constant gave Diaquoi a piece of paper with her name, social security number, and address, and later, Diaquoi brought her a draft Touro transcript for her to inspect for errors (Constant: 703). Constant ultimately paid Diaquoi a total of \$1500 (Constant: 702-04). Constant worked as a teacher for New York City, and submitted a fake Touro transcript to the Department of Education in 2004 (Ianiello: 667-68).

***9** Also, in 2004, Renee Rene and Ghislene Julmice - two other friends of Desinor's - purchased or obtained fake Touro transcripts from Diaquoi (Desinor: 805-07). Neither Rene nor Julmice ever attended Touro (Rozin: 466-67). In 2005, Rene, who also worked as a teacher for New York City, submitted a fake Touro transcript to the Department of Education (Ianiello: 668-70).

Defendant and Michael Cherner sell fake transcripts and other documents to Levan Vartanov, Jennifer Vartanov and Karina Shilimov.

In 2004, LEVAN VARTANOV (hereafter, “Levan”) and his wife, Jennifer Vartanov (hereafter, “Jennifer”), unsuccessfully applied to Touro Law School (Levan: 604). Subsequently, Levan's parents introduced him to Michael Cherner (Levan: 605-06), who was the director of Touro's academic computer centers and worked in the college's office in Brooklyn (Tyszler: 89). Cherner told Levan that he could help the couple get into Touro Law School if they each paid \$10,000 (Levan: 606). Levan agreed and

gave Cherner half of the money up front (Levan: 607-08, 615-16). After receiving the money, Cherner said that Levan had “to go see his partner” (Levan: 608).

Cherner scheduled an appointment for Levan to meet defendant, and in April, 2005, Levan went to defendant's office in Manhattan (Levan: 609-10). Levan met with defendant for almost an hour (Levan: 613). Defendant told Levan that he'd “make sure” both Levan and Jennifer got into Touro Law (Levan: 613). Ultimately, however, *10 the law school did not admit the couple, and Cherner gave Levan his money back (Levan: 616-17).

In Spring 2006, Cherner contacted Levan and said that he would be able to provide “transcripts and recommendation letters from Touro Law School,” which would help Levan and his wife apply to other law schools as transfer students (Levan: 617-18). Cherner said that the cost would be 525,000 a person (Levan: 618). Levan agreed, but balked at paying the entire \$50,000 up front (Levan: 618-19). Cherner told him, “[T]his involves more work. It's more expensive. It's a lot more people involved. It's me and my associate” (Levan: 619). Eventually, Cherner agreed to take half the money up front, with the remaining \$25,000 due when Levan and Jennifer were accepted into law school (Levan: 619).

A few weeks later, in the Summer of 2006, Cherner gave Levan the fake Touro Law transcripts (Levan: 620; People's Exhibits 9, 10). He also provided the fake letters of recommendation, which bore the signature of BARBARA MEHRMAN, an assistant dean of career services at Touro Law (Levan: 621, 623; People's Exhibit 11), who, in reality, never drafted or signed any letters of recommendation for either Levan or Jennifer Vartanov (Mehrman: 542-46). Using the fake transcripts as well as the fake letters of recommendation, Levan and Jennifer applied and were accepted to New York Law School as second-year law students (Levan: 623; WILLIAM PEREZ: 136-37).

*11 In June 2005, KARINA SHILIMOV contacted Cherner for help getting into Touro's undergraduate physician assistant program; she had heard from family and friends who attended Touro that Cherner could help her get admitted to the program, even though her grades were poor (Shilimov: 370-71). Cherner quoted Shilimov a price of “6 or 7 thousand dollars” (Shilimov: 372), but Shilimov had yet to pay Cherner when her application was rejected (Shilimov: 374).

A year later, in the summer of 2006, Shilimov contacted Cherner again (Shilimov: 375). This time, Cherner told Shilimov that, for \$10,000, “he would be able to backdate grades and enter them in the system as if [Shilimov] had taken classes over the course of a year at Touro College” (Shilimov: 375-76). Cherner told Shilimov that his partner “Andre” was going to put the fake grades into the system (Shilimov: 378-79).

Shilimov gave Cherner the \$10,000 in cash, and with Cherner's help applied to the physician assistant program, which began in January 2007 (Shilimov: 376-77, 381, 390-91). Sometime in the fall of 2006, Cherner showed Shilimov on his computer a fake student record for her in Touro's system (Cherner: 377-78). When time went by without Touro even having acknowledged receipt of her application, Shilimov repeatedly contacted Cherner (Shilimov: 379-81). One day, defendant called Shilimov, introduced himself by name, and told her that he was “the one working with Mr. Cherner” (Shilimov: 380-81).

*12 Despite defendant and Cherner's repeated assurances, in January 2007, Shilimov still had not received word from Touro about the application (Shilimov: 381). Shilimov went to see defendant in his office, and defendant reassured her that she would be admitted (Shilimov: 381, 384, 386). But Shilimov was never admitted to Touro's physician assistant program (Shilimov: 386-87).

Afterward, defendant told Shilimov he would “help [her] get into a different program” by providing her with a fake transcript (Shilimov: 386-87). Defendant told Shilimov that he “would give it to [her] for the price that [she] had already paid because of the hassle [she] went through” (Shilimov: 387). Later, Shilimov went back to defendant's office, and defendant gave her several fake Touro transcripts (Shilimov: 387-89). The transcripts were in sealed envelopes, but defendant showed Shilimov a copy of an unsealed transcript (Shilimov: 389). This unsealed copy listed the pedigree information Shilimov had provided to Cherner,

classes she had never taken, and grades she had never earned (Shilimov: 388, 392, 401). Defendant also mentioned to Shilimov that an “investigation” into her had begun (Shilimov: 386, 394).

***13 Defendant obtains a fake transcript for Jacques Gracia, who then acts as a middleman for fake transcripts that defendant provides to Jacqueline Gracia, Phillippe Marc and Isma Marcelin.**

JACQUES GRACIA⁵ met defendant in early 2005 at a Touro College open house (Gracia: 1016). Gracia wanted to become a physical therapist, and was interested in taking courses at Touro (Gracia: 1017). Gracia asked defendant if he could help him “get into the program” (Gracia: 1018-19). The two subsequently met inside a car, where defendant told Gracia that there was “another way that he could help” (Gracia: 1019-20). Defendant said that, for \$3,000, he could give Gracia a fake Touro transcript listing all the courses Gracia needed to become a physical therapist (Gracia: 1020-21). When Gracia demurred that he could not afford it, defendant agreed to give Gracia the fake transcript for free, provided Gracia referred other potential customers (Gracia: 1021-22). Defendant promised Gracia a cut of whatever payments he received through those referrals (Gracia: 1022).

Gracia wrote down his personal information, including his date of birth and his social security number, and gave it to defendant (Gracia: 1024; People's Exhibit 625). He also gave defendant copies of his transcripts from other schools he had attended (Gracia: 1025-26; People's Exhibit 626). A few weeks later, defendant gave Gracia a fake Touro transcript (Gracia: 1028-29). All of the classes that Gracia needed to become a physical therapist were on the transcript (Gracia: 1029-30). Defendant then *14 helped Gracia submit the fake transcript to the New York State Department of Education, with an application to become a physical therapist (Gracia: 1030-32).

Subsequently, Gracia's wife Jacqueline gave Gracia \$3,000 for a fake transcript that she hoped would allow her to become an occupational therapist (Gracia: 1035-36). Gracia gave the \$3,000 to defendant along with Jacqueline's personal information (Gracia: 1035-37). Defendant used that personal information to create a fake transcript for Jacqueline (Gracia: 1036-37; People's Exhibit 652).

In the fall of 2006, PHILLIPE MARC, who wanted a degree in information technology, asked Gracia to help him obtain a transcript from Touro (Gracia: 1060-61; Marc: 556-58). Marc gave Gracia his personal information, which Gracia passed along to defendant (Gracia: 1061; Marc: 558). A few weeks later, defendant gave Gracia a fake transcript with Marc's information, and Gracia gave the transcript to Marc (Gracia: 1061-62; Marc: 558-59; People's Exhibit 39-A).

Later that fall, Marc referred ISMA MARCELIN to Gracia; Marcelin wanted a fake transcript so he could become a teacher (Gracia: 1066; Marc: 565-66; Marcelin: 676-77). Marcelin wrote down his personal information on a piece of paper and gave it to Gracia, who gave it to defendant (Gracia: 1067-68; Marcelin: 678-81; People's Exhibit 24). Defendant provided Gracia with the completed transcript, which Gracia then passed along to Marcelin (Gracia: 1068; Marcelin: 682).

*15 Marc paid Gracia approximately \$6,000 for both Marc and Marcelin's transcripts (Gracia: 1063-69). Gracia kept \$2,000, and the rest went to defendant (Gracia: 1068-69).

Defendant provides a fake transcript to Nadgeda Jean-Baptiste, whom he was dating, and promises to obtain a transcript for Eltines Despinosse.

Gracia also referred NADGEDA JEAN-BAPTISTE to defendant for a fake transcript (Gracia: 1072; Jean-Baptiste: 725). Jean-Baptiste had mentioned to Gracia that she was interested in going to school, and Gracia told her he knew someone who could help her (Jean-Baptiste: 725-26). After Jean-Baptiste and defendant met, they dated for a short time (Jean-Baptiste: 726-28). Jean-Baptiste did not know that defendant was married (Jean-Baptiste: 769-70). Instead of money, defendant asked Jean-Baptiste for an “intimate friendship” in exchange for the transcript (Jean-Baptiste: 769). Jean-Baptiste provided defendant with all of her personal information, and defendant brought her several copies of fake Touro transcripts (Jean-Baptiste: 729-33; People's

Exhibit 42A). Jean-Baptiste also prepared a letter of recommendation for herself, signed it with Gracia's name, and gave it to defendant (Jean-Baptiste: 733-34; People's Exhibit 42D). Using the transcripts and the letter of recommendation, defendant helped Jean-Baptiste apply to Long Island University (Jean-Baptiste: 735).

Sometime between 2004 and 2006, defendant met ELTINES DESPINOSSE at a party (Despinosse: 836). They dated for about a year and a half, and remained *16 friends after the relationship ended (Despinosse: 837, 839). Despinosse knew defendant was married (Despinosse: 838). A few months after they had stopped dating, Despinosse told defendant that she wanted to go back to school for nursing, but that some of the grades she had previously earned were too old to count (Despinosse: 839-41, 850). Despinosse had heard from a friend that defendant could provide her with a fake transcript (Despinosse: 839-40). Defendant told Despinosse that he would “ask somebody to do him a favor,” and he told Despinosse to “let him know” when she was ready to go ahead with the transaction (Despinosse: 842). Meanwhile, Despinosse gave defendant her personal information on a piece of paper (Despinosse: 842).

About a year later, Despinosse told defendant that she was ready to go back to school, and that she needed a transcript (Despinosse: 843). Defendant said “okay” (Despinosse: 843). He asked Despinosse to give him an unofficial transcript, after which Despinosse gave defendant an old unofficial transcript from Long Island University (Despinosse: 843-45; People's Exhibit 561).

Touro notices certain irregularities in its student records and launches an investigation, which leads to defendant.

In June 2005, MURIEL TENETY, the registrar for Touro's School of Health Science, checked the computer system for a student named Michael McCrain, who had not picked up his diploma, and found no record in his name (Tenety: 5/8). She discovered that McCrain's student ID number had been assigned to someone named *17 “Jacques Gracia” (Tenety: 578-81). Tenety changed the name on the record back to McCrain, but a few months later, she found that someone had gone back into the system and again removed McCrain's name, replacing it with “Jacqueline Gracia,” and still later, “Jacques Gracia” (Tenety: 582-83). Tenety told her supervisor about the discrepancy (Tenety: 583-84).

In August 2006, PAULA KUTCH, the registrar of Touro's law school, noticed that Levan and Jennifer Vartanov were listed as having been admitted to the law school, even though they had actually been rejected (Kutch: 159-61). Kutch left a message for defendant “to see if there was some reason” for the discrepancy, but defendant never returned her call (Kutch: 166-68).

Later that fall, Mark Shor, Touro's Chief Technology Officer, learned that a student who had applied to Touro - Karina Shilimov - did not have the proper credentials (Shor: 898, 937-38). Both Shilimov's transcript and the registrar's electronic files indicated that she had taken a number of courses at Touro, but an investigation revealed that she had never attended the school (Rozin: 453-61). Shor accessed Touro's student information system and discovered that the username “PLYAD” had been used to create fake records in Shilimov's name (Shor: 937-39).

*18 On January 8, 2007, Shor activated a feature in Touro's computer system that recorded the IP addresses⁶ of any computers that made changes in the student information system (Shor: 940). The recorded addresses showed that, between January 8, 2007, and March 20, 2007, the username PLYAD was used 235 different times to access or change records in Touro's student information system (Shor: 941).

Only three computers used the “PLYAD” username to access or change student records: defendant's work computer, defendant's home computer, and Michael Cherner's computer (Shor: 959-962). Of those 235 instances, defendant's work computer was used 81 times, and his home computer was used 133 times (Shor: 960-62). Defendant's home and work computers were used to alter or create records for multiple individuals, including Karina Shilimov, Irene Zalivanskiy, Boris Yakubov, and Lasheen Tingling; the latter was a Touro employee who worked on the same floor as defendant (Shor: 970-75; Rozin: 490-91; Tyszler: 81, 92).

Defendant did not have permission to create or alter the affected student records, nor was there any legitimate reason for him to do so (Tyszler: 116-18; Rozin: 450; Shor: 971-72).

In addition, on the evening of January 8, 2007, defendant's home computer accessed the registrar's live student records using the login "PLYAD" and performed a "mass recalculation" of over 350,000 student records (Shor: 965-66). Touro's *19 student information system kept a record of the date, time, and username associated only with the most recent change to a student's records (Shor: 963-65). Thus, the "mass recalculation" process overwrote the data pertaining to any prior changes to the applicable records (Shor: 965-67).

Touro notifies the police, who search defendant's home and office and find a trove of fake transcripts and other documents linking him to the crimes.

In February 2007, Touro told the police about the unauthorized changes to its student records, and Detective JEANNIE FINUCANE was assigned to the case (Finucane: 259-60). Detective Finucane obtained a search warrant, and on March 8, 2007, she and a field team conducted a "sneak and peek" search of defendant's work office (Finucane: 261-62). The police copied all of the data from defendant's computer onto a hard drive and Xeroxed a number of documents they found in the office (Finucane: 262-66). One of the documents was a printout of Karina Shilimov's fake student record (Finucane: 268-70; People's Exhibit 20).

On March 20, 2007, Detective Finucane met with defendant at his office for about an hour (Finucane: 274-75). During the meeting, defendant's cell phone was out on a desk and repeatedly rang (Finucane: 275). Each time it rang, Finucane noticed that the screen read, "Michael Cherner" (Finucane: 275). Detective Finucane arrested and searched defendant, who was carrying \$637 in cash and several pieces of paper (Finucane: 276). One of these pieces of paper had the name "Despinosse Eltines," with a date of birth, address, and social security number (Finucane: 280; People's *20 Exhibit 26). Another listed the name "Isma Marcelin" alongside a similar set of personal information (Finucane: 276-79; People's Exhibit 24).

Subsequently, Detective Finucane obtained another search warrant and conducted a full search of defendant's office (Finucane: 280). After quickly gathering what appeared to be the most important documents, Detective Finucane and her team proceeded to defendant's home, in Elmont, New York, which they also searched pursuant to a warrant (Finucane: 281; RICHARD MCNAMARA: 1112). Defendant's wife PATRICIA GOUIN was at home, along with their children (Finucane: 283). Inside defendant's home, the police found several computers, data storage devices, and "many, many documents" (Finucane: 287; McNamara: 1112-13). Defendant and his wife were the only individuals who used the computers inside the house (Gouin: 882-83). Gouin only used the computers for "shopping, entertainment," and other personal matters; she never used them for work, and she never used them to access any Touro records (Gouin: 880-84).

Among the documents discovered inside defendant's home was the fake unofficial transcript that Nadine Desinor had given back to Vladimir Diaquoi in 2003 bearing Desinor's handwritten note, "make sure he writes Nadine M. Desinor" (Finucane: 311-12; Desinor: 795-96; People's Exhibit 552). The police also found a printout of a Touro student information report for Desinor dated September 27, 2006, which was the same year that Desinor purchased a second transcript from Diaquoi (Finucane: 312-13; Desinor: 797-801; People's Exhibit 552B). Fake *21 transcripts were also found for Ghislene Julmice and Florence Constant, along with a handwritten note listing Renee Rene's name, social security number, date of birth, address, and a slate of courses (Finucane: 323, 325-27; Rozin: 464-68; People's Exhibits 628, 635, 636).

So, too, defendant's home yielded a fake unofficial transcript for Gracia's wife Jacqueline, and a handwritten note listing Gracia's name, social security number, address, date of birth, and phone number (Finucane: 301, 321-22; People's Exhibit 625, 652). The police also found drafts of fake letters of recommendation for Levan and Jennifer Vartanov (Finucane: 317-21; People's Exhibit 604, 605, 607, 618), along with a handwritten note reading "Karina 4 official transcripts" (Finucane: 307-08, People's Exhibit 516).

Other documents discovered were a fake unofficial transcript for Nadgeda Jean-Baptiste; a piece of paper listing Eltines Despinosse's name, address, social security number, date of birth, and the phrase "3-copies"; apparently genuine transcripts for Despinosse from LaGuardia Community College and Long Island University; and a printout of a fake student record for Irene Zalivanskiy (Finucane: 308-11; McNamara: 1122-23; Rozin: 498; People's Exhibits 515, 535, 558, 560, 561). Defendant also had a significant quantity of blank Touro transcripts and diploma paper inside his home, as well as blank certifications of professional education for teachers, registered physician assistants, physical therapists, and occupational therapists (Finucane: 298-300, 314). Because he worked in admissions, and not the *22 registrar's office, defendant had no legitimate reason to have blank transcript paper or blank diploma paper (Tysler: 107-8; Rozin: 445). Moreover, no Touro employee had permission to take blank transcript paper or blank diploma paper out of the office (Tyszler: 107; Rozin: 445).

Detective ROBERT DIBATTISTA performed a forensic analysis on defendant's computers and storage devices (DiBattista: 1134-36, 1142-43). DiBattista discovered e-mails that defendant sent from his work e-mail address to his personal e-mail account with subject names referencing Jennifer and Levan Vartanov; attached to each e-mail was a Microsoft Word file of a fake letter of recommendation (DiBattista: 1151-58; People's Exhibit 80). The author of the Microsoft Word files was listed as "Andre B" (DiBattista: 1160-63).

During his search of defendant's computers and storage devices, DiBattista also found Microsoft Word files of fake letters of recommendation for Irene Zalivanskiy (DiBattista: 1182-86; People's Exhibits 54C, 82).

Investigators discover incriminating information in defendant's bank and phone records, and defendant is fired.

An investigation of defendant's bank records revealed that, between September 13, 2006, and March 13, 2007, a total of \$113,614.90 was deposited into defendant's bank account, 579,500 of which was made up of cash deposits (SARAH SCHOKNECHT: 1224; People's Exhibit 69, 72). Defendant's annual salary was *23 \$65,000, and Touro paid defendant twice a month, in checks of about \$1,800 (ROSIE KAHAN: 179; Schoknecht: 1225, 1229).

Defendant's phone records also indicated that, from the fall of 2006 through March or April of 2007, defendant had numerous phone conversations with Vladimir Diaquoi (55 calls), Jacques Gracia (223 calls and 18 text messages), Karina Shilimov (15 calls), Eltines Despinosse (39 calls and 14 text messages), and a number registered to Margarita Cherner, Michael Cherner's wife (205 phone calls and 1 text message) (Schoknecht: 1216-1220; McNamara: 1123).

Shortly after his arrest, defendant was suspended from his position as a Director of Admissions, and on July 18, 2007, he was formally terminated (Kahan: 180).

Touro works to mitigate the damage caused by defendant and his cohorts.

Once the investigation became public, Touro went through a "very, very difficult period" (Tyszler: 112). Students, parents, licensing agencies, and numerous governmental entities - including the city, state, and national departments of education - "were concerned about the accuracy of [Touro's] records" (Tyszler: 112). There was widespread concern that many individuals with credentials from Touro had not actually earned their degrees (Tyszler: 112). As a result, New York State stopped processing licenses for Touro students, until Touro agreed to certain conditions (Rozin: 503). One of these conditions was that the school would review around 4,000 transcripts that Touro students had submitted to the state to apply for professional *24 licenses (Rozin: 502-04). This process entailed finding the original paperwork from a course - signed by the faculty member - and matching it by hand to every student record, to verify that the student had actually taken the class and earned the grade (Tyszler: 112; Rozin: 504-05). The review process took "a huge toll" on Touro's staff. Touro also hired additional employees just to review Touro's records, which cost the college about \$25,000 (Tyszler: 112-13; Rozin: 505-06). Separately, the United States Department of Education conducted a formal audit of Touro, which took "tens of [Touro] employees" about two weeks to complete (Rozin: 506-07).

Enrollment dropped significantly in wake of the investigation (ENERIKA KOHAVI: 649). One Touro official estimated that between 2,000 and 3,000 students-10 to 15 percent of Touro's student body - dropped out or transferred to another school as a result of the scandal, which was a "public relations nightmare" (Kohavi: 649-51; Tyszler: 113).

The Defense Case

OBED FIGUEROA, MARIBEL RODRIGUEZ, and JOSUE CHOUTE, three of defendant's colleagues at Touro, were not aware of defendant ever offering a transcript to anyone (Figueroa: 1265; Rodriguez: 1287; Choute: 1336, 42-43). Figueroa and Choute remembered training sessions at Touro where the test system was used; however, these training's were only inside the admissions module (Figueroa: 1273-75, *25 78, 83; Choute: 1346), and Choute was "not trained in a system that was in place before 2007, for test purposes only" (Choute: 1348).

Defendant never offered transcripts to either FRANTZ BARON or PATRICK BARON, his brothers (Frantz: 1305; Patrick: 1325-27). Defendant had an honest reputation in his community (Frantz: 1305-06; Patrick: 1331). Defendant had a side business doing taxes; he mostly did family members' taxes for free, but he also had paying clients, who would pay him about \$100 each (Frantz: 1311-12, 1320-21).

POINT I DEFENDANT'S GUILT OF WIDESPREAD FRAUD WAS PROVEN BY AMPLE CREDIBLE EVIDENCE (Answering Defendant's Brief, pages 44-45, 49-62).

The jury convicted defendant of 35 different counts related to his long-running scheme to provide numerous individuals with fake transcripts and other credentials from his employer Touro College. The particular crimes of which defendant was convicted were computer trespass (one count), first-degree commercial bribe receiving (seven counts), third-degree computer tampering (four counts), first-degree falsification of business records (fourteen counts), second-degree criminal possession of a forged instrument (three counts), violating Educational Law 224(2) (five counts), and attempted falsification of business records in the first degree (one count).

On appeal, defendant challenges the proof with respect to 11 of the 35 counts of which he was convicted. Defendant argues that all seven of his convictions for *26 first-degree commercial bribe receiving, all three convictions for second-degree criminal possession of a forged instrument, and the one conviction for attempted falsification of business records in the first degree were not supported by legally sufficient evidence or were against the weight of the evidence (Defense Brief: 44-45, 60-62). Defendant does not challenge the weight or sufficiency of the evidence with respect to his convictions for computer trespass, third-degree computer tampering, first-degree falsification of business records, or his violations of [Education Law 224\(2\)](#).

Notably, it is hardly surprising that defendant does not challenge 24 of the counts of which he was convicted, including the 14 counts of falsifying business records in the first degree and the four counts of third-degree computer tampering, because overwhelming evidence established defendant's guilt of those crimes. The People presented testimony from eight different individuals who received fake Touro credentials and from one of the scheme's middlemen. Further, phone records linked defendant to all of the middlemen. The People also presented extensive documentary evidence, found in defendant's home and on his work and home computers, including copies of fake Touro transcripts, student records, or letters of recommendation for Karina Shilimov, Nadine Desinor, Ghislene Julmice, Florence Constant, Levan and Jennifer Vartanov, Nadgeda Jean-Baptiste, and Irene Zalivanskiy (Finucane: 268-70, 308-27; McNamara: 1121-23; People's Exhibits 20, 515, 535, 552, 552, 604, 605, 607, 618, 635, 636). Other documents, including some found on defendant's person when *27 he was arrested, listed the name, date of birth, address, and social security number of Renee Rene, Isma Marcelin, and Jacques Gracia (Finucane: 276-79, 321-23; People's Exhibits 24, 625, 628), all of whom received fake Touro credentials from either defendant or a middleman (Desinor: 804-07; Gracia: 1028-30, 1066-68; Marcelin: 682). So, too, Jacques Gracia testified that he received a fake transcript from defendant and acted as a middleman for fake transcripts for Philippe Marc and Isma Marcelin (Gracia: 1028-30, 1060-69). And electronic evidence obtained when Touro tracked the IP addresses of the computers accessing its computer system showed that defendant used his computers to change student records for Karina Shilimov, Irene Zalivansky, and Lasheen Tingling (Shor:

970-75). Thus, testimonial, electronic, and documentary evidence linked defendant to all the different individuals specified in the respective counts.

In addition, the evidence powerfully established the aggravating element for the falsifying business records and computer tampering counts - namely, that defendant acted with the intent to commit another crime (Penal Law § 175.10) or to commit or further the commission of a felony (Penal Law § 156.25). In particular, the evidence showed that the relevant individuals obtained the fake credentials to submit them to governmental licensing authorities, and in certain instances actually submitted them (Ianiello: 664-70; Gracia: 1030-32; Marcelin: 683-84). Offering a False Instrument for Filing in the Second Degree is a misdemeanor, see Penal Law § 175.30, while submitting such documents to the state or another public office, such as government *28 licensing authorities, with the intent to defraud constitutes the felony of Offering a False Instrument for Filing in the First Degree. See Penal Law § 175.35.

So, too, the proof that defendant committed the crime of computer trespass was rock solid. During the relevant period, from January 8, 2007, to March 31, 2007, Touro was tracking the IP addresses that were accessing its system. The resulting electronic evidence showed that defendant's computers made hundreds of improper alterations to Touro's student records and that defendant performed a "mass recalculation" of student records from his home computer to try to hide his wrongdoing (Shor: 963-67).

Simply put, a mountain of evidence established defendant's guilt of the counts that even he fails to dispute on this appeal. A discussion of the disputed counts follows.

A. The relevant legal standards

The applicable legal standards are well-settled. "A verdict is legally sufficient if there is any valid line of reasoning and permissible inferences that could lead a rational person to conclude that every element of the charged crime has been proven beyond a reasonable doubt." *People v. Delamota*, 18 N.Y.3d 107, 113 (2011); see also *People v. Gordon*, 23 N.Y.3d 643, 649 (2014); *People v. Danielson*, 9 N.Y.3d 342, 349 (2007); *People v. Bleakley*, 69 N.Y.2d 490, 495 (1987). This Court must view the proof "in the light most favorable to the prosecution" and afford the People "all reasonable evidentiary inferences." *Delamota*, 18 N.Y.3d at 113; see also *Danielson*, 9 N.Y.3d at 349; *People v. *29 Cintron*, 95 N.Y.2d 329, 332 (2000). In other words, in a sufficiency review, this Court must "marshal competent facts most favorable to the People and determine whether, as a matter of law, a jury could logically conclude that the People sustained its burden of proof." *Danielson*, 9 N.Y.3d at 349.

Only in rare instances will a legally sufficient verdict be against the weight of the evidence. In cases in which a different verdict "would not have been unreasonable," this Court must "weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony" to determine whether the trier of fact has given the evidence the weight it should be accorded. *Bleakley*, 69 N.Y.2d at 495; see also *People v. Kancharla*, 23 N.Y.3d 294, 303-04 (2014); *Danielson*, 9 N.Y.3d at 348. Since an appellate court reviews only a cold record, even in evaluating the weight of the evidence it must accord "[g]reat deference... to the fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor." *People v. Mateo*, 2 N.Y.3d 383, 410 (2004); see also *Bleakley*, 69 N.Y.2d at 495.

B. Defendant's legal sufficiency claims are unpreserved.

A sufficiency claim does not state a question of law for appellate review unless the defendant raised the specific contention before the trial court. *People v. Gray*, 86 N.Y.2d 10, 18-19 (1995). Here, the arguments that defendant now advances to challenge the legal sufficiency of his convictions are articulated for the first time on this appeal.

*30 At the close of the People's case, while defendant made a motion to dismiss (T: 1234), he articulated two specific arguments that he does not now repeat. Below, defendant argued that the People did not establish (1) the intent element for the counts charging him with possession of the forged letters of recommendation (T: 1238), and (2) that he received a bribe from Levan or Jennifer Vartanov as required for the relevant counts of commercial bribe receiving (T: 1239-40).

Defendant now raises entirely different arguments with respect to the legal sufficiency of the proof of his guilt: Defendant challenges all his convictions of commercial bribe receiving on the ground that there was insufficient proof that “each act of bribe receiving caused the requisite amount of economic harm to Touro College” (Defense Brief: 50). Defendant additionally challenges two of the commercial bribe receiving counts related to Nadine Desinor on the ground that there was insufficient evidence that he accepted “any benefit” from her and that the “People failed to establish an agreement” between him and Vladimir Diaquoi, the relevant middleman (Defense Brief: 50). Defendant also claims that the relevant letters of recommendation did not qualify as “forged instruments” for the possession of a forged instrument counts (Defense Brief: 52-56), and that the proof did not establish the “attempted” element of the one count of attempted falsification of business records in first degree (Defense Brief: 56-60). Because defendant did not present any of those contentions to the trial court, his legal sufficiency claims are unpreserved.

***31** C. The evidence established the seven counts of commercial bribe receiving.

In addition to being unpreserved, defendant's challenges to the bribe receiving convictions lack substantive merit. To prove defendant's guilt of Commercial Bribe Receiving in the First Degree, the People had to prove that defendant was an employee of Touro; that he solicited, accepted, or agreed to accept a benefit upon an agreement or understanding that such benefit would influence his conduct in relation to Touro's affairs, without Touro's consent; that the value of the benefit exceeded \$1,000; and that this conduct caused economic harm to Touro in an amount exceeding \$250 (see [Penal Law § 180.08](#); T: 1522-24). The evidence established all of those elements.

Undisputedly, defendant was an employee of Touro. Undisputedly also, defendant, together with the relevant middleman, solicited and accepted financial benefits exceeding \$1,000 from individuals specified in five of the seven counts of commercial bribe receiving: Levan and Jennifer Vartanov (two counts), Karina Shilimov (one count), Isma Marcelin (one count) and Phillippe Marc (one count). In particular, defendant acted in concert with Michael Cherner to accept at least \$25,000 for Levan and Jennifer Vartanov's fake credentials (Levan: 619-20) and \$10,000 for Karina Shilimov's forged student record (Shilimov: 376). Further, defendant worked with Jacques Gracia to accept approximately \$6,000 for Isma Marcelin and Phillippe Marc's transcripts (Gracia: 1064, 1068-69). Contrary to defendant's claim, the ***32** evidence established the other elements of the commercial bribe receiving convictions as well.

1. The evidence established the element of economic harm.

As hereafter discussed, the evidence also established the element that defendant's employer sustained economic harm exceeding \$250. As stated in *People v. Wolf*, “the felony commercial bribery legislation requires proof of concrete economic loss suffered by the bribe receiver's employer, which would not have been incurred in the absence of the corrupt arrangement.” [98 N.Y.2d 105, 110 \(2002\)](#). Consistent with *Wolf*, the trial court instructed the jury that “[e]conomic harm to the [e]mployer means actual economic loss suffered by the employer which would not have been incurred in the absence of the corrupt agreement” (T: 1523) (internal quotation marks omitted). Here, the trial evidence established that defendant's corrupt scheme, of which each individual crime of commercial bribe receiving was a part, caused tens of thousands if not hundreds of thousands of dollars of concrete economic harm to Touro.

More particularly, the school had to spend \$25,000 on additional employees to comply with the state's directive to review the authenticity of 4,000 student records (Tysler: 113; Rozin: 505-06). Additionally, in the aftermath of the scandal, enrollment at Touro dropped by approximately 10 to 15 percent; Touro officials reasonably attributed this drop to defendant's corrupt scheme, given that such a decrease in enrollment was unprecedented, relative to past years (Kohavi: 649-51). The drop in ***33** enrollment caused Touro concrete economic harm in the form of lost tuition payments of thousands and even tens of thousands of dollars per student. The lost payments quickly would have added up to tens or hundreds of thousands of dollars.

Contrary to defendant's contentions (Defense Brief: 51-52), *People v. Wolf* does not support his argument that the proof of economic harm in this case was legally insufficient. The main holding of *Wolf* was that, under the first-degree commercial bribery statute, the mere payment of a kickback did not itself establish "economic harm" to the victim organization. See 98 N.Y.2d at 110. In so holding, the Court rejected the view that a jury could find that the cost to the employer was "necessarily inflated" by the amount of the kickback. *Id.* at 110. Unlike *Wolf*, this case did not involve the payment of kickbacks, and the People did not rely on the bribes defendant received to establish the "economic harm" to Touro. Instead, as discussed above, the People presented evidence that, because of defendant's scheme, Touro suffered concrete, out-of-pocket, economic loss of tens of thousands if not hundreds of thousands of dollars. That proof did not constitute the sort of "solely intangible, esoteric, or theoretical harms" that *Wolf* legally insufficient. *Id.* at 111.

Nor does *Wolf* support defendant's complaint that "the People did not quantify the loss attributable to each individual act of bribe receiving (Defense Brief: 52). Defendant asserts that "cumulative loss" is legally insufficient proof of economic harm under *Wolf*. But the deficiency in proof of economic harm addressed in *Wolf* related to the inability to quantify any economic harm. *Wolf* did not say that concrete, *34 quantifiable economic harm could not be apportioned among different causative acts. And indeed, no policy rationale would support such a restriction, which would allow a defendant to escape criminal responsibility because he caused his employer concrete economic loss by multiple acts rather than by a single act.

Here, even if no single act of bribe receiving by itself was responsible for the total economic loss, the large amount of economic harm Touro suffered was fairly apportioned among the many individual acts of criminal wrongdoing of which defendant was convicted. Under any such proportional allocation, the loss for a particular instance of commercial bribe receiving easily would have exceeded the relatively low \$250 threshold.

Thus, the proof properly established the "economic harm" element of the bribe receiving counts.

2. The evidence established that defendant accepted a benefit from Nadine Desinor.

Next, contrary to defendant's claim, the evidence established that defendant accepted a benefit from Nadine Desinor. The evidence showed that, in two separate transactions, Desinor bought two fake Touro transcripts from Vladimir Diaquoi and defendant. In 2003, Desinor paid Diaquoi \$3,000 for the first fake Touro transcript (Desinor: 792-96). In 2006, Desinor paid Diaquoi another \$1,500 for a second copy of the transcript (Desinor: 797-801). Defendant asserts that "Desinor testified that she never spoke to [him] or paid him a bribe" (Defense Brief: 50). But, because the *35 evidence showed that defendant was Diaquoi's accomplice in the bribe receiving crime, the benefit of more than \$1,000 for each transaction was jointly possessed by Diaquoi and defendant. See *People v. Rivera*, 84 N.Y.2d 766, 771 (1995) ("The key to understanding accessory liability is that whether one is the actual perpetrator of the offense or an accomplice is, with respect to criminal liability for the offense, irrelevant") (internal quotation marks and citation omitted); see also *People v. King*, 116 A.D.3d 424, 425 (1st Dept. 2014) (defendant properly convicted of possession of forged driver's license recovered from co-defendant, where forged document was an instrumentality of a joint criminal enterprise).

In that regard, the only reasonable inference from the evidence was that defendant and Diaquoi acted as a team, with a common culpable mental state, to benefit financially from providing Desinor with the fake transcripts. Defendant's assertion that "the People failed to establish an agreement between Diaquoi and" him (Defense Brief: 50) ignores the reality of the joint enterprise shown by the evidence. In particular, Desinor testified that Diaquoi told her he had a "friend" at Touro who could provide her with a fake transcript (Desinor: 791). The trial evidence proved beyond any reasonable doubt that defendant was this "friend."

Indeed, a fake unofficial transcript in Desinor's name with Desinor's handwritten notation, "make sure he writes 'Nadine M. Desinor's," was found in defendant's home; that documentary evidence corresponded with Desinor's testimony that, at Diaquoi's request, she wrote that notation on the first fake transcript and gave *36 it back to Diaquoi (Desinor: 795-96; Finucane: 311-12; People's Exhibit 552). In addition, when the police searched defendant's home, they found a printout of Desinor's second fake student record dated September 27, 2006 (Finucane: 312-13; Rozin: 438-49; People's Exhibit 552B). And phone records showed

that defendant and Diaquoi spoke on the phone on September 19, 2006, and October 13, 2006 (T: 875; People's Exhibit 48) - shortly before, and shortly after, the date on Desinor's second fake student record. The only plausible explanation for the presence of the noted documents in defendant's home, together with the noted phone records, was that defendant worked with Diaquoi to sell fake Touro transcripts to Desinor.

Put another way, the only reasonable conclusion from the evidence was that defendant intended for Diaquoi to take the bribes from Desinor so that they both could benefit financially from defendant creating fake student records for her. This conclusion was buttressed by Jacques Gracia's testimony, which showed that defendant indeed split the proceeds of transactions with the middleman who referred him "customers" for fake Touro records (Gracia: 1060-69). The only transcripts that defendant provided to individuals who did not pay for them were given in exchange for an "intimate friendship" (Jean-Baptiste: 769) or the promise of additional referrals (Gracia: 1022). Indeed, defendant's bank records confirmed that defendant personally benefitted from the wrongdoing he committed with the assistance of different middlemen. Between September 13, 2006 and March 13, 2007, defendant made deposits into his bank account totaling \$113,614.90, including \$79,500 in cash *37 (Schoknecht: 1224; People's Exhibit 72), even though his annual salary was only \$65,000 (Kahan: 179). Defendant's side business in tax preparation could not possibly have generated that large amount of extra cash (see Frantz: 1311-12, 1320-21), which instead plainly reflected payments for false Touro records and other documents.

In short, the jury had every reason to conclude that defendant and Diaquoi acted in concert to accept Desinor's bribes, and defendant was accordingly criminally liable for those bribes, each of which exceeded the \$1,000 threshold.

D. If this Court reaches the merits of defendant's unpreseed claim, this Court's precedent supports his contention that letters of recommendation were not "forged instruments" within the meaning of Penal Law § 170.10.

Defendant was convicted of three counts of second-degree criminal possession of a forged instrument for possessing forged letters of recommendation for Leva Vartanov, Jennifer Vartanov, and Nadgeda Jean-Baptiste. As discussed above defendant did not argue below, as he now does on appeal, that letters of recommendation do not qualify as "forged instruments" for the purposes of the applicable statute. Accordingly, defendant's appellate claim is unpreserved.

On the merits, *People v. Sengupta* decided that a forged reference letter does not constitute a "forged instrument of a kind specified in Penal Law § 170.10." 121 A.D.3d 575, 575 (1st Dept. 2014). As a result, in *Sengupta*, this Court reduced that defendant's convictions to criminal possession of a forged instrument in the third degree. *Id.* at 575. Thus, if this Court chooses to reach defendant's claim in the interests of justice, the People concede that, pursuant to *Sengupta*, defendant's three *38 convictions for second-degree criminal possession of a forged instrument should be reduced to third-degree criminal possession of a forged instrument. *Id.* at 575.⁷

E. The proof established defendant's guilt of attempted falsification of business records in the first degree.

Defendant also was convicted of attempted falsification of business records in the first degree for agreeing to provide a fake Touro transcript for Eltines Despinosse. On appeal, defendant claims that there was legally insufficient evidence that he engaged in conduct constituting an attempt (Defense Brief: 56-60), and that alternatively this conviction was against the weight of the evidence (Defense Brief: 60-62). As discussed above, defendant did not make this sufficiency argument in his mid-trial motion to dismiss, rendering it unpreserved. In addition, the jury reasonably concluded that defendant took sufficient action to constitute an attempt.

A person is guilty of an attempt when, "with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime." Penal Law § 110.00. The law does not punish evil thoughts alone, and something more than criminal intent or mere preparation is required. See *People v. Naradzay*, 11 N.Y.3d 460, 466 (2008); *People v. Mahboubian*, 74 N.Y.2d 174, 189 (1989); *People v. Bracey*, 41 N.Y.2d 296, 300 (1977). To be guilty of an attempt the defendant must have come "very

*39 near” or “dangerously near” to committing the completed crime. See *People v McGee*, 20 N.Y.3d 513, 519 (2013); *People v Clyde*, 18 N.Y.3d 145, 155 (2011); *Naradzay*, 11 N.Y.3d at 466-67.

Notably, the “dangerously near” standard does not require that the defendant have taken the final step towards the completion of the offense. *Naradzy*, 11 N.Y.3d at 466; *Bracey*, 41 N.Y.2d at 300. It is enough that the defendant “carried the project forward within dangerous proximity to the criminal end to be attained.” *Bracey*, 41 N.Y.2d at 300 (quotations and citation omitted); *People v Midgette*, 115 A.D.3d 603, 604 (1st Dept 2014). Thus, when a defendant’s acts are “potentially and immediately dangerous,” and place it within his power to commit the crime unless interrupted or frustrated, he has gone sufficiently beyond “mere preparation” to constitute an attempt. *Mahboubian*, 74 N.Y.2d at 191; see *People v Sobieskoda*, 235 N.Y. 411, 419 (1923).

Here, the record showed, not just that defendant agreed to provide a fake transcript to Despinosse, but also that defendant had gathered all the information he needed to do so and was poised to use that information to create the fake transcript, until the police investigation caught up with him. The crime proceeded beyond the point where Despinosse gave defendant her personal information, including her social security number, address, and date of birth, on a slip of paper (Despinosse: 842-43). Inside defendant’s home, the police found another piece of paper in someone else’s handwriting that again listed Despinosse’s personal information, and additionally *40 included the phrase “3-copies” - an apparent reference to the number of transcripts that defendant was supposed to make for Despinosse (Finucane: 310-11; Despinosse: 845-46; People’s Exhibit 558). So, too, the police found Despinosse’s transcript from Long Island University, which Despinosse remembered having given defendant (Finucane: 311; Despinosse: 843-45; People’s Exhibit 561). And when the police searched defendant following his arrest, he was carrying another piece of paper in his wallet listing all of Despinosse’s personal information (Finucane: 276-80; People’s Exhibit 26). At the same time, defendant possessed the blank forms and had the computer access he needed to create the fake documents. Together, that evidence permitted the jury to find that defendant’s acts went sufficiently beyond “mere preparation” to constitute an attempt.

Indeed, the inference from the evidence is that the only reason defendant did not actually provide the fake documents he had promised Despinosse was that he became aware of the police investigation and then was arrested. While defendant argues that he stopped responding to Despinosse’s text messages (Defense Brief: 58), he omits the fact that Despinosse’s last text messages were sent on March 10 and March 16, 2007, days before defendant’s arrest on March 20, 2007 (Despinosse: 848-850, 863), and well after defendant had learned about Touro’s investigation into his scheme (see Shilimov: 392-397). As the People noted at trial, defendant did not “get a chance to actually make for Despinosse because he was arrested in [March of 2007]” (T: 53; see also T: 1468). Thus, defendant did not abandon or *41 “en[on]c[e] (Defense Brief: 60) his agreement to provide Despinosse with the fake transcripts. The investigation into his misconduct simply caught up with him before he could get around to the final act of creating the transcripts - conduct that came “dangerously close” to the completed crime and that rendered defendant guilty of the attempted falsification of business records charge.

In sum, all of defendant’s legal sufficiency arguments are unpreserved. On the merits, except for defendant’s convictions for criminal possession of a forged instrument in the second degree, defendant’s guilt of all the counts he disputes on appeal was proven by ample, credible evidence.

POINT II THE COURT PROPERLY ADMITTED STATEMENTS MADE BY DEFENDANT’S CO-CONSPIRATORS (Answering Defendant’s Brief, pages 19-23, 38-48).

Of the eight witnesses for whom defendant falsified Touro credentials, six testified that they initiated the wrongdoing through a middleman. One of those middlemen, Jacques Gracia, testified at trial; the other two, Vladimir Diaquoi and Michael Cherner, did not. On appeal, defendant claims that certain testimony by the relevant customers as to what Diaquoi and Cherner told them was inadmissible hearsay that violated his rights under the state Confrontation Clause.

*42 Defendant mainly complains about Florence Constant and Nadine Desinor’s testimony that Diaquoi stated that he was working with a partner at Touro (Defense Brief: 21-23). Neither Constant nor Desinor said that Diaquoi identified the “partner”

by name (Constant: 711, 717-18; Desinor: 791). Karina Shilimov and Levan Vartanov provided similar testimony that Cherner told them he was working with a partner; Shilimov testified that Cherner told her his partner's name was "Andre," and both customers testified that Cherner later referred them to defendant to complete the relevant fraudulent transactions (Shimov: 378-89; Levan: 608-613).

Defendant challenges this testimony on essentially two bases: First for the first time on appeal, defendant argues that this testimony violated his rights under the New York State Confrontation Clause because the People did not show that Cherner and Diaquoi were unavailable (Defense Brief: 38-44). Additionally, defendant claims that, as a matter of state evidentiary law, the People did not establish a prima facie case of conspiracy between him and Diaquoi (Defense Brief: 22). Defendant's complaints are partially unpreserved and wholly without merit.

A. Defendant's claims under the New York Confrontation Clause are unpreserved.

As defendant implicitly acknowledges (see Defense Brief: 42), at trial, he never made a constitutional objection to any of the testimony that he complains about on appeal (see T: 378-81, 609, 708-12, 791-96). Because defendant never argued at trial that his rights under the state Confrontation Clause were violated, this new-found ^{*43} claim is not properly before this Court. See *People v. Liner*, 9 N.Y.3d 856, 856-57 (2007); *People v. Wilson*, 101 A.D.3d 469, 470 (1st Dept. 2012).

B. None of the challenged statements were testimonial; thus, the Confrontation Clause is not implicated.

In any event, defendant's new-found claim is meritless. Of course, the confrontation clauses of the United States and New York constitutions require that a defendant be allowed to confront the witnesses against him. *U.S. Const.* 6th, 14th Amendments.; *N.Y. Const.*, art. I, § 6. As explained in *Crawford v. Washington*, 541 U.S. 36, 51 (2004), a defendant's confrontation rights may bar the admission only of "testimonial statements of a witness" who does not appear at trial. See *People v. Nieves-Andino*, 9 N.Y.3d 12, 15 (2007). Although the Court declined to delineate the outer limits of such testimonial evidence, it spoke generally of a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford*, 541 U.S. at 51; see also *People v. Encarnacion*, 87 A.D.3d 81, 89 (1st Dept. 2011). And in subsequent cases, the Court explained that whether out-of-court statements were testimonial turned on whether the declarant's "primary purpose" in making the statement was to establish facts potentially relevant to criminal prosecution. *Davis v. Washington*, 547 U.S. 813, 823 (2006); see *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2714 n.6; *Michigan v. Bryant*, 562 U.S. 344, 360-62 (2011); *Melendez Massachusetts*, 557 U.S. 305, 310-11 (2009).

^{*44} New York courts have followed *Crawford* in interpreting the New York State Constitution. In particular, the state confrontation clause, just as its federal counterpart, only bars the admission of "testimonial" statements. *People v. Basagoitia*, 55 A.D.3d 619, 620 (2nd Dept. 2008); see also *People v. Bradley*, 8 N.Y.3d 124, 126 (2006); *People v. DiTommaso*, 127 A.D.3d 11, 20 (1st Dept. 2015).

Judged by those standards, defendant's unpreserved claims must fail. The out-of-court statements by Diaquoi and Cherner to which defendant points (Defense Brief: 42-44) were nontestimonial. To begin, Diaquoi did not even refer to defendant by name. Accordingly, as the trial court said, these statements were "minimally prejudicial" (T: 710) and did not directly implicate defendant at all. See *People v. Garcia*, 25 N.Y.3d 77, 88 (2015). Moreover, the statements were not "procured with a primary purpose of creating an out-of-court substitute for trial testimony." *People v. Pealer*, 20 N.Y.3d 447, 453 (2013) (quoting *Michigan v. Bryant*, 562 U.S. 344 [2011]). Indeed, not one of these statements was made to a law enforcement official, let alone in contemplation of a future judicial proceeding. Instead, they were all statements made to other actors in furtherance of the conspiracy to effect the wrongdoing. Statements in furtherance of a conspiracy are uniformly recognized as a classic hearsay exception that falls outside the ambit of the Confrontation Clause, because they are nontestimonial. *Crawford*, 541 U.S. at 56 (noting that "by their nature," "statements [made] in furtherance of a conspiracy" are nontestimonial); see also *United States v. Shyne*, 617 F.3d 103, 108 (2d. Cir. 2010).

*45 Thus, defendant's arguments concerning Diaquoi and Cherner's unavailability (Defense Brief: 41-42) are completely beside the point. Regardless of whether defendant's co-conspirators were "available," the challenged statements were still nontestimonial. And while defendant argues at length that New York's Confrontation Clause provides greater protection than the federal version (Defense Brief: 40), this, too, is irrelevant in the end, because both the federal and state confrontation clauses apply only to testimonial statements. *Basagoitia*, 55 A.D.3d at 620. In short, defendant's constitutional claim not only is entirely unpreserved, but also fails on the merits because all of the relevant statements were in furtherance of the conspiracy and nontestimonial.

C. The evidence established the requisite prima facie case of conspiracy.

As a matter of state evidentiary law, the well-established hearsay exception was applicable because the People established the requisite prima facie case of conspiracy. Notably, defendant does not expressly contest the existence of such a prima facie case with respect to Michael Cherner. Indeed, Shilimov's testimony that defendant told her he was "the one working with Mr. Cherner" (Shilimov: 380-81), together with the fake documents in Shilimov's name found in defendant's home, more than sufficiently established a prima facie case of conspiracy between defendant and Cherner. Further, defendant's claim with respect to Diaquoi is unpreserved, because after Constant's testimony relating to Diaquoi's statements to her was provisionally admitted (T: 708-711), defendant never renewed that objection or objected to Desinor's similar *46 testimony (T 790-801). That failure constituted an acknowledgement by defendant that the requisite prima facie conspiracy had been established. In any event, on the merits, the court properly admitted the testimony referencing Diaquoi's statements.

Although the hearsay rule bars the admission of extrajudicial statements to prove the matter asserted, a number of exceptions exist for statements with a high indicia of reliability. See *People v. Brensic*, 70 N.Y.2d 9, 14 (1987). A "declaration by a coconspirator during the course and in furtherance of the conspiracy is admissible against another coconspirator as an exception to the hearsay rule." *People v. Caban*, 5 N.Y.3d 143, 148 (2005), quoting *People v. Bac Tran*, 80 N.Y.2d 170, 179 (1992). "The theory underlying the coconspirator's exception is that all participants in a conspiracy are deemed responsible for each of the acts and declarations of the others." *Caban*, 5 N.Y.3d at 148. "[S]uch declarations may be admitted only when a prima facie case of conspiracy has been established." *Id.* However, "testimony establishing the prima facie case need not precede testimony about the hearsay statements." *Id.* at 151. Thus, "a coconspirator's statements are admissible as long as the People independently establish a conspiracy by the close of their case." *Id.*

Here, contrary to defendant's contention, a significant amount of evidence linked defendant and Diaquoi to each other, and to the larger conspiracy, so as to establish the requisite prima facie case. Most notably, documentary evidence linking defendant to the creation of fake transcripts for both Constant and Desinor was found in defendant's home. In particular, when the police searched defendant's house, *47 they found the incorrect transcript that Desinor had given back to Diaquoi with her handwritten note, "Make sure he writes Nadine M. Desinor" (Desinor: 795-96; Finucane: 312; People's Exhibit 552). Similarly, the police found a fake transcript with Constant's name, address, and social security number (Finucane: 325-26; Constant: 711-12; People's Exhibit 635). So, too, inside defendant's home, the police found a fake transcript in the name of one of the friends Desinor testified she referred to Diaquoi, Ghislene Julmice, as well as a handwritten note listing the name, social security number, date of birth, address, and a list of classes of the other friend Desinor referred, Renee Rene (Desinor: 805-07; Finucane: 323, 326-27; People's Exhibits 628, 636).

As discussed above, in Point I, Section D, the only plausible explanation for how Constant, Desinor, and Julmice's fake transcripts ended up in defendant's home is that defendant was part of the conspiracy in which Diaquoi was involved to create and sell fake transcripts from Touro College. Again, the documents found in defendant's home by themselves were more than sufficient to establish a prima facie case of conspiracy between defendant and Diaquoi. In addition, defendant's phone records linked him to the conspiracy with Diaquoi. The two men made dozens of phone calls to each other in 2006 and 2007 (Schoknecht: 1219). Two of these calls - on September 19, 2006, and October 13, 2006-were placed around the time that defendant created fake credentials for Desinor, which Diaquoi then gave to her (see Finucane: 312-13; Rozin: 438-49; Desinor: 797-801; T: 875;

People's Exhibits 48, *48 552B). Together, the documentary evidence and the phone records strongly established a prima facie case of conspiracy that made it proper for the court to allow testimony about Diaquoi's statements pursuant to the hearsay exception for statements of a co-conspirator.

Moreover, the trial court recognized that statements of the scheme's middlemen regarding the price of the transcripts were "actually part of the crime itself" (T: 22-23). As the People argued (T: 23-24), such verbal acts are part of the res gestae of the crime, and do not constitute hearsay. See *People v. Ayala*, 273 A.D.2d 40,40 (1st Dept. 2000).

In sum, the trial court properly admitted various statements of defendant's co-conspirators, none of which implicated the Confrontation Clause. Defendant's contrary claim is largely unpreserved and enely without merit.⁸

***49 POINT III THE COURT PROPERLY ADMITTED EVIDENCE OF
VARIOUS UNCHARGED TRANSACTIONS THAT WERE ASSOCIATED
WITH DEFENDANT'S SCHEME (Answering Defendant's Brief, pages 23-38).**

On appeal, defendant argues that the court improperly admitted evidence of several uncharged crimes related to defendant's scheme. Specifically, defendant claims that the trial court should not have admitted evidence "of an allegedly forged student record for Jacqueline Gracia" and of "allegedly forged letters of recommendation" for Irene Zalivanskiy, who was named in three charged counts that involved different forms of fraud (Defense Brief: 23-32). Defendant further argues that the trial court erroneously admitted "evidence of an uncharged crime relating to the allegedly falsified student records of Boris Yakubov" (Defense Brief: 32-34). Defendant's claims with respect to Zalivanskiy and Yakubov are unpreserved. In addition, all are meritless.

A. The governing legal standards.

Of course, the prosecution is not permitted to introduce evidence of prior bad acts or uncharged crimes solely to demonstrate a defendant's criminal propensity. See *People v. Dorm*, 12 N.Y.3d 16, 19 (2009); *Alvino*, 71 N.Y.2d at 241 (1987); *People v. Molineux*, 168 N.Y. 264, 293 (1901). However, evidence of uncharged crimes is admissible when probative of some fact in issue other than a defendant's criminal propensity, and its probative value outweighs the risk of undue prejudice. See *People v. *50 Leeson*, 12 N.Y.3d 823, 827 (2009); *Alvino*, 71 N.Y.2d at 242; *People v. Valis*, 43 N.Y.2d 364, 368 (1977). The decision whether to admit uncharged crime evidence lies within the sound discretion of the trial court. See *Alvino*, 71 N.Y.2d at 242, 247.

One theory under which uncharged crimes evidence may be admitted is to show "a common scheme or plan." *People v. Fiore*, 34 N.Y.2d 81, 84 (1974). That theory applies when there is "such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." *Id.* at 84-85 (internal quotation marks omitted). Uncharged crime evidence may also be admissible when it tends to establish the "absence of mistake or accident." See *People v. Cass*, 18 N.Y.3d 553, 560 (2012).

B. The court properly admitted evidence related to Jacqueline Gracia's fake transcript.

1. The relevant record.

In their pretrial Molineux application, the People sought to admit evidence related to a fake Touro student record for Jacqueline Gracia (hereafter, "Jacqueline"), the wife of Jacques Gracia, one of the middlemen in the scheme (J: 100-03). Jacqueline's student record was found in defendant's home, attached to the genuine student record of an actual Touro student named Betsy Thariath (J: 100-01; People's Exhibits 652, 653). Jacqueline's fake record and Betsy Thariath's genuine record listed the same student ID number (J: 100-03; T: 197; People's Exhibits 652, 653).

*51 The People argued that this evidence was relevant to several material issues in the case. First, the prosecutor argued that it showed how defendant created the fake transcripts and fake student records: Defendant “would go into an existing record of a real student, delete their name,” replace it with the customer's name, print the transcripts, and “at some point later, change it back to the real student” (J: 101-03; T: 203). Second, the People noted that this evidence would help complete Jacques Gracia's narrative and explain the sequence of events (J: 102). Finally, the People argued that the evidence related to Jacqueline's fake transcript was relevant to defendant's intent and rebutted the anticipated defense that defendant stumbled upon the fake student records by accident (J: 105-06; T: 197-98). Defense counsel argued that this evidence was “repetitive,” and that the People could have charged defendant for the fraud related to Jacqueline (J: 104). The court ruled that the evidence was admissible to “explain” defendant's “modus operandi” and show how “the particular scheme was accomplished” (T: 201-03). It gave the jury a corresponding limiting instruction that the evidence could not properly be used as proof of defendant's criminal propensity, but instead had been admitted only to explain “defendant's modus operandi” (T: 1495-96).

2. Argument

The evidence related to Jacqueline Gracia's transcript was properly admitted for purposes other than to show defendant's criminal propensity. In particular, the evidence showed how defendant carried out his common scheme or plan to use his *52 position at Touro to commit fraud. As the trial court stated, this evidence helped link “certain things that might otherwise not be so clear to the jury and would help explain the scheme of the plan” (J: 110).

More particularly, this evidence demonstrated how defendant created the fake student records that were central to the scheme. Defendant would take a real student record, with a unique student ID number, and replace the real student's name with the name of his customer. This explained to the jury why many of the fake student records found in defendant's home or office listed a student ID number that belonged to a real Touro student (Rozin: 462-68). For example, a fake transcript for Nadine Desinor was found in defendant's home with the student ID number “249931” (Rozin: 462-63; People's Exhibit 634). This student ID number actually belonged to Efstathia Paulakos, a real Touro student (Rozin: 463-64; Paulakos: 777-82). Thus, this evidence demonstrated an important common feature of the charged crimes that showed that they were all part of one scheme.

This evidence also rebutted the defense argument that defendant simply stumbled upon the fake documents or was trying to fix the system (T: 69, 194). What defendant did to create the fake records in Jacqueline's name betrayed a calculated scheme to use existing Touro student records to create fraudulent ones.

Thus, the evidence related to Jacqueline's fake record was not admitted solely to demonstrate defendant's criminal propensity, and the trial court was well within its *53 discretion to admit it. Moreover, the court gave the jury a careful limiting instruction (T: 1495-96) that prevented any unfair prejudice.

C. Contrary to defendant's unpreserved claim, the court properly admitted the letters of recommendation for Irene Zalivanskiy that were found on defendant's computer.

1. The relevant record.

The People charged defendant with several crimes for creating fake student records for Irene Zalivanskiy (see T: 1552-53, 1569-72). The People requested permission under Molineux to admit fake letters of recommendation for Zalivanskiy that were found on defendant's computer (T: 204). These letters of recommendation were offered to prove defendant's intent: namely, that defendant meant to “create an admissions file” of fake credentials for Zalivanskiy that she could submit to another school (T: 204). The People argued further that the proposed evidence would counter the defense argument that defendant was simply accessing Zalivanskiy's records as part of his efforts to “fix” the glitch in the test system (see T: 204).

2. Argument.

Defendant never objected to the admission of the forged letters of recommendation in Irene Zalivanskiy's name as improper uncharged crime evidence (T: 204-14, DiBattista: 1176; People's Exhibit 82). Counsel only expressed concern that he had not been provided with the name of a foundation witness from Mercy College for these letters (T: 204-209). Consequently, as defendant implicitly *54 acknowledges (see Defense Brief: 31), his present claim that the letters were improper uncharged crimes evidence is unpreserved.

In any event, the trial court properly admitted evidence of the fake letters of recommendation. Notably, the case law recognizes that uncharged crimes evidence may be especially useful for showing intent in crimes involving forgery and other fraudulent conduct. See *People v. Knox*, 126 A.D.2d 748, 748 (2nd Dept. 1987). Consistent with that case law, defendant's possession of the fake letters of recommendation for Zalivanskiy was highly probative with respect to his intent - and to the absence of mistake - when he accessed and altered Zalivanskiy's student records in Touro's computer system (Shor: 973).

D. Contrary to defendant's unpreserved claim, the trial court properly admitted evidence that defendant altered Boris Yakubov's records as direct evidence of the computer tampering charge.

1. The relevant record.

At trial, the People presented evidence that, when defendant accessed Touro's computer network without authorization, he altered the student records of Boris Yakubov (Finucane: 309-10; Rozin: 489-91, Shor: 972; People's Exhibits 70F, 518). During summation, when the prosecutor was discussing this evidence, the trial court asked counsel to approach and inquired as to the relevance of this evidence (T: 1445). The prosecutor stated that, while he would not object to "an instruction," this evidence was being offered as "direct evidence of computer trespass" (T: 1445). Defendant never objected to the admission of this evidence or to the prosecutor *55 comments during summation, nor did he ever request a limiting instruction (see Finucane: 309-10; Rozin: 489-91, Shor: 972; T: 1444-45).

2. Argument.

Defendant's claim that the trial court improperly admitted evidence that he made alterations to the student records of Boris Yakubov (Defense Brief: 32-34) is unpreserved and meritless. Again, defendant never objected to the admission of this evidence. While the court subsequently raised the issue of the relevance of the evidence, defendant notably did not dispute the People's theory. Accordingly, defendant failed to alert the trial court to the complaint about this evidence that he advances on appeal.

In any event, as the prosecutor explained during the sidebar discussion, the pertinent evidence was offered as proof of the crime of computer trespass (T: 1444-45). One element of that crime was that defendant accessed the Touro computer network during the period between January 8, 2007 and March 31, 2007. The evidence that the "PLYAD" username accessed Yakubov's student record from defendant's home computer at around 11:00 pm on February 11, 2007 (Shor: 972; People's Exhibit 70F) showed that defendant was in position to more broadly access the computer network during the relevant period.

***56 E. Any error in admitting the challenged evidence would have been harmless.**

In any event, the disputed uncharged crimes evidence could not have affected the verdict. As previously stated, an overwhelming amount of documentary evidence was found in defendant's home linking him to the scheme's "customers." Further, many of defendant's "customers" testified that they received fake credentials directly from defendant. And one of the middlemen with whom defendant worked - Jacques Gracia - told the jury about multiple charged transactions where defendant sold fake Touro credentials. So, too, because the IP addresses using the system were being monitored at the time, electronic evidence

established that, between January 8, 2007, and March 31, 2007, defendant repeatedly accessed Touro's computer network and made improper changes to student records.

Moreover, given the sheer scope of defendant's fraudulent scheme, it could hardly have come as a surprise to the jury that defendant additionally prepared fake records for two "customers" (Jacqueline and Yakubov) who were not named in the charged crimes. Meanwhile, Zalivanskiy was named in three separate counts of wrongdoing in the first indictment. In that context, evidence that defendant also falsified letters of recommendation for Zalivanskiy hardly could have been inflammatory or unduly prejudicial.

Thus, any error would have been harmless. See *People v. Crimmins*, 36 N.Y.2d 230, 241-42 (1975).

*57 In sum, the trial court properly admitted evidence of several other uncharged transactions related to defendant's far-flung criminal scheme.

POINT IV DEFENDANT RECEIVED EFFECTIVE REPRESENTATION (Answering Defendant's Brief, pages 67-80).

As Justice Farber stated when he denied defendant's motion to vacate his conviction pursuant to CPL 440.10, "[t]he evidence against defendant was overwhelming, and proved defendant's guilt beyond a shadow of a doubt" (Farber, J., Decision on CPL 440.10 Motion, March 8, 2011, at 5-6) (hereafter, "Decision"). Nevertheless, defendant seeks to blame his trial counsel, not himself, for the jury's verdict and seeks reversal on the ground that his trial counsel was ineffective. Defendant's attack on his trial counsel fails to provide a legitimate ground for relief.

At the outset, to the extent defendant now repeats criticisms of his trial counsel previously advanced in his CPL 440.10 motion, it should be noted that this Court denied defendant's application under CPL 460.15 to appeal from the denial of the CPL 440.10 motion (Andrias, J., Certificate Denying Leave, M-2253, dated Sept. 28, 2011) (hereafter, "Certificate Denying Leave"). This direct appeal is not a proper forum to relitigate the 440.10 motion.

*58 In addition, to the extent defendant now raises new criticisms of his trial counsel, not raised in his prior 440.10 motion, the record is inadequate for review. In that regard, defendant did not argue in his CPL 440.10 motion, as he does on this appeal, that his attorney was ineffective for including insufficient detail in his omnibus motion (see Defense Brief: 71-72). Instead, defendant claimed in his prior motion that the omnibus motion was never filed (Defendant's CPL 440.10 Motion, dated November 6 2010 at ¶ 55).

An ineffective assistance of counsel claim ordinarily should be raised in the first instance by a 440.10 motion because such a motion provides an opportunity to expand the record and for counsel to explain his conduct. See, e.g., *People v. Rivera*, 71 N.Y.2d 705, 709 (1988); *People v. Squire*, 115 A.D.3d 454, 456 (1st Dept. 2014). Because defendant's trial attorney had no opportunity to explain his conduct with respect to the purported errors defendant raises for the first time on appeal, this court should reject those claims out of hand. See *People v. Stultz* 2 N.Y.3d 277, 284 (2004) ([a]n appellate court cannot fault the attorney until after the nonrecord proof has been aired"); *People v. Love*, 57 N.Y.2d 998, 1000 (1982).⁹

In any event, the existing record belies defendant's ineffective assistance of counsel claim. Defendant has completely failed to satisfy his "well-settled, high *59 burden of demonstrating that he was deprived of a fair trial by less than meaningful representation." *People v. Hobot*, 84 N.Y.2d 1021, 1022 (1995). To meet that burden, a defendant must demonstrate that "his attorney's performance was so deficient and his actions so unreasonable that they fell outside the scope of professional competence." *People v. Alexander*, 162 A.D.2d 164, 164 (1st Dept. 1990); see *Strickland v. Washington*, 466 U.S. 668, 690 (1984). Moreover, the reviewing court begins with the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland v. Washington*, 466 U.S. 668 at 689.

Under the federal constitutional analysis, a defendant must also show that there is a “reasonable probability” that, but for the attorney’s errors, “the result of the proceeding would have been different.” *Strickland v. Washington*, 466 U.S. at 694. Under New York’s state constitutional analysis, a defendant need not “fully satisfy the prejudice test of *Strickland*’s by proving the reasonable probability of a different outcome absent the errors. *People v. Caban*, 5 N.Y.3d 143, 155 (2005) (internal citation and quotation marks omitted). Instead of examining the record for self-standing “prejudice,” a New York court must determine “whether the attorney’s conduct constituted ‘egregious and prejudicial’ error such at defendant did not receive a fair trial.” *People v. Benevento*, 91 N.Y.2d 708, 713-14 (1998). At the same time, the Court of Appeals has termed a *Strickland*-type showing of prejudice a “significant element under the New York analysis, *People v. Caban*, 5 N.Y.3d at 155-56, so much so that it *60 “would, indeed, be skeptical of an ineffective assistance of counsel claim absent any showing of prejudice.” *People v. Stultz* 2 N.Y.3d 277,283-84 (2004).

Here, the existing record shows that trial counsel’s overall representation of defendant was more than competent. Counsel delivered a forceful opening statement, which argued that Touro sought to blame defendant for its own security lapses and questioned the credibility of the prosecution witnesses who had admitted to criminal conduct and made favorable plea agreements (T: 65-69). Thereafter, counsel was attentive during the testimony of the People’s witnesses, raising objections (see, e.g., T: 79, 92, 228, 501-02, 707-711, 789-90) and conducting vigorous cross-examinations. Counsel successfully precluded evidence of a hacker’s manual the police found on defendant’s home computer, arguing that it was irrelevant and prejudicial (T: 1051-52). At the end of the People’s case, counsel moved to dismiss, making arguments for why individual counts were not established (T: 1234, 1238-40). Thereafter, counsel presented a defense case (T: 1262-1365). In summation, counsel tried to cast doubt on the credibility of the People’s witnesses by, among other things, revisiting the theme from his opening that many of the witnesses had crafted their accounts to obtain favorable plea agreements (T: 1388; 1404-05A).

As Justice Farber recognized in his decision denying defendant’s *CPL 440.10* motion, defendant’s trial attorney faced an uphill battle. Nevertheless, counsel defended his client with zeal, professionalism, and skill. Simply put, the jury found *61 defendant guilty because a vast amount of evidence proved his guilt, not because of any alleged shortcomings in counsel’s representation.

Defendant’s particular complaints with respect to trial counsel are unavailing. Defendant excoriates his trial counsel for not including enough detail in his omnibus motion with respect to the motion to suppress physical evidence (Defense Brief: 71-72). Defendant also complains that his attorney “failed to challenge the adequacy of the warrants” pursuant to which the police recovered a trove of physical evidence from his home (Defense Brief: 72). Notably, however, defendant does not identify a single fact or argument that his attorney omitted that might have supported a legal challenge to the search warrants.

In that regard, “[a] presumption of validity attaches to a search warrant.” *People v. Gramson*, 50 A.D.3d 294, 295 (1st Dept. 2008) (citing *People v. Castillo*, 80 N.Y.2d 578, 585 [1992]). Further, the standard for issuing a warrant to seize and search property is “reasonable cause” to believe that the property, inter alia, “[h]as been used, or is possessed for the purpose of being used, to commit or conceal” a crime. *CPL 690.10*. Significantly, the trial evidence showed that, before the police searched defendant’s home, Touro had conducted an investigation which had revealed concrete evidence that defendant was using his home and office computers to commit crimes. That investigation unmistakably established “reasonable cause” to issue search warrants for defendant’s home and office computers, as well as for the surrounding areas. Notwithstanding that he may have been sloppy in cutting and pasting from other *62 motion papers (see Defense Brief: 73), defendant’s trial attorney cannot fairly be faulted for failing to advance a challenge to the search warrants that plainly would have had no sound factual or legal basis and would have been unsuccessful. See *Stul* 2N.Y.3dat287.

Nor was counsel remotely ineffective for failing to object to “inadmissible hearsay” (Defense Brief: 75). For the reasons discussed in Point II, above, the statements to which defendant claims his attorney should have objected (Defense Brief: 75-76) were admissible under the co-conspirator exception to the hearsay rule.

Similarly, trial counsel was not derelict in failing to object to uncharged crimes evidence (Defense Brief: 77). Defendant's attorney did make some objections to that evidence (see 104, 106-07; T: 192-97). More fundamentally, for the reasons discussed in Point III, the disputed uncharged crimes evidence was admissible and ultimately could not have affected the outcome.

As for defendant's remaining criticisms of trial counsel (Defense Brief: 72-73, 78-80), they too fail to support his ineffective assistance of counsel claim. Effective representation did not require that counsel object to the testimony from a Touro official that defendant had been "terminated" (Kahan: 180). That testimony related an undisputed fact that could hardly have come as a surprise to the jury, given the nature of the charges. Contrary to defendant's assertions (Defense Brief: 78-79), that employment action did not predetermine whether defendant was culpable for the charged crimes. The course of the trial, including the parties' closing arguments and *63 the court's instructions, plainly conveyed that criminal culpability was an issue for the jury to decide. For similar reasons, defendant was not deprived of the effective assistance of counsel by the admission of his Touro personnel file, for which the court gave a limiting instruction (T: 178).

Finally, defense counsel was not ineffective for failing to make the losing argument that the indictment did not constitute a "true bill." As Justice Farber noted in his decision denying defendant's [CPL 440.10](#) motion, "[a] properly signed, stamped and dated indictment is contained in each court file. The copies that were provided to the defendant had the name of the foreperson blacked out to protect that individual's privacy" (Thomas Farber, J., Decision Denying Defendant's [CPL 440.10](#) Motion, dated January 18, 2011, at 3). That routine protective measure did not affect the validity of the indictment.

In sum, to the extent that defendant's ineffective assistance of counsel claim even is reviewable, defendant's trial counsel plainly represented defendant zealously and effectively. Defendant has not shown that counsel was incompetent or denied him a fair trial by not making the meritless arguments defendant presses on appeal.

***64 POINT V DEFENDANT WAS PROPERLY CHARGED WITH
COMPUTER TRESPASS (Answering Defendant's Brief, pages 62-67).**

On appeal, defendant complains that, while he was charged "with only one count" of computer trespass, the People "introduced evidence of multiple acts" of unauthorized access to Touro's student records (Defense Brief: 62-63). He further claims that "this duplicitous charging allowed the jury to convict [him] of one count of Computer Trespass based on any of the alleged instances of unauthorized access, without twelve jurors agreeing on any specific act" (Defense Brief: 63). Defendant's claim is unpreserved for review and entirely meritless.

As an initial matter, defendant never argued before the trial court that the computer trespass charge was duplicitous. Thus, as defendant implicitly acknowledges (see Defense Brief: 66), his claim is wholly unpreserved. Only recently, in [People v. Allen](#), 24 N.Y.3d 441, 444 (2014), the Court of Appeals reaffirmed that duplicity claims are subject to normal preservation requirements. Earlier, the Court of Appeals cogently explained why an appellate court should not consider any claim of duplicity that was not raised below:

To allow an unpreserved claim of duplicitousness to be raised on appeal would open the door to abuse. Defendants accused of multiple offenses may not much care how many counts they face, or may prefer to face one count (and thus one conviction) rather than several. Under the rule defendants here seek, it would be possible for them to make that choice at trial by letting a duplicitous indictment *65 stand without objection, and make the opposite choice on appeal; they might thus obtain a new trial on the basis of an error they consciously decided not to challenge because they thought it insignificant, or welcomed it.

[People v. Becoats](#), 17 N.Y.3d 643, 651 (2011). Accordingly, this Court should not entertain defendant's unpreserved duplicity claim.

Nor should this Court reach defendant's unpreserved claim in the interest of justice. The computer trespass charge applied to a narrow window of time, from January 8, 2007, to March 20, 2007. Defendant's use of Touro's computer system during that specified period was a continuing crime that was properly charged as a single count of computer trespass.

The governing law is readily summarized. “Each count of an indictment may charge one offense only.” CPL 200.30(1). A count that charges more than one offense is impermissibly “duplicious.” *People v. Alonzo*, 16 N.Y.3d 267, 269 (2011). The prohibition against duplicity promotes “fair notice of the nature of the charges” and enables the defendant to invoke the double jeopardy bar against subsequent prosecution for the same offense. *People v. Keindl*, 68 N.Y.2d 410, 416 (1986). In addition, the prohibition protects “the reliability of the unanimous verdict” as based on the same conduct. *Id.* at 418. Notably, where “a crime by its nature as defined in the Penal Law may be committed either by one act or by multiple acts and can be characterized as a continuing offense over time, the indictment may charge the *66 continuing offense in a single count.” *People v. First Meridian Planning Corp.*, 86 N.Y.2d 608, 615-16 (1995).

With respect to the charge at issue, a “person is guilty of computer trespass when he or she knowingly uses... or accesses computer network without authorization,” and when “he or she does so with an intent to commit or attempt to commit or further the commission of any felony” (Penal Law 5 156.10; T: 1509-10). Notably, “‘access’ means to instruct, communicate with, store data in, retrieve from, or otherwise make use of any resources of a computer, physically, directly or by electronic means” (Penal Law § 156.00). The “storage” of data connotes keeping the data in a location for an extended period of time. Moreover, a defendant could “store” files in an unauthorized location and frequently make changes to those files. Similarly, “instruct[ing]” or “communicat[ing]” with a computer need not entail a one-time event, and instead fits readily with repetitive conduct. Thus, the crime of computer trespass may be covered by a continuing course of conduct occurring over an extended period of time.

Indeed, New York courts have previously approved of the use of a continuing crime theory in cases involving fraudulent conduct. *See People v. Rosich*, 170 A.D.2d 703, 703-04 (2nd Dept. 1991) (“It is well established that grand larceny may be charged as a series of single larcenies governed by a common fraudulent scheme or plan even though the successive takings extended over a long period of time.”); accord *People v. Perry*, 114 A.D.3d 1282, 1283 (4th Dept. 2014). The same logic applies to this *67 case, where defendant was engaged in a long-term fraudulent scheme that relied upon his continual, unauthorized access to a computer network.

More particularly, the trial evidence showed that, from January 8, 2007, to March 20, 2007, when Touro was tracking the IP addresses of the computers making changes to student records, defendant was constantly altering registrar data without authorization, making hundreds of changes and storing newly-created fake student records on Touro's computer network (Shor: 940-62; Rozin: 454-455, 508-09). Notably, a common fraudulent scheme united the individual instances of unlawful access. As a result, the individual instances of wrongdoing properly were viewed as part of defendant's commission of the continuing crime of computer trespass.

In addition, contrary to defendant's argument (Defense Brief: 63), the evidence at trial simply could not have supported a finding that defendant made only some of the unauthorized changes to student records revealed by the investigation. Because the proof was so similar for each change that defendant made during the relevant period, any doubt the jury would have had as to the proof of any individual instance would have applied to the other instances as well. Simply put, the jury would not have convicted defendant of computer trespass without unanimously determining that defendant used the computer fraudulently throughout the period to make the changes shown by the evidence.

In sum, defendant's new-found claim of dupliciousness is unpreserved and without merit.

*68 CONCLUSION

The judgment of conviction should be affirmed.

Footnotes

- 1 Before trial, the People dismissed three of the computer tampering charges, six counts of first-degree falsification of business records, and two of the charged violations of [Education Law 224\(2\)](#) (J: 11). During deliberations, the People consented to dismissal of one of the Education Law violations as a result of a charging error (T: 1609-10).
- 2 Parenthetical references preceded by a last name are to that witness' trial testimony. References to "T" are to non-testimonial portions of the trial proceeding. "J" refers to the jury-selection phase, and "S" refers to sentencing.
- 3 Diaquoi's nickname was "Jimmy" (McNamara: 1114-15).
- 4 In 2004, Desinor had been able to obtain another copy of the transcript directly from Touro, which she had then submitted to the state (Desinor: 800-01).
- 5 Gracia's nickname was "Harry" (Gracia: 1066).
- 6 As Shor explained, an IP address is a "unique identifier for every computer on the internet" (Shor: 937).
- 7 Cognizant that there might be an issue about the status of the letters of recommendation, Justice Farber sentenced defendant to only 1 year in prison for each criminal possession of a forged instrument count, to run concurrently with the first level of sentences of 1 1/3 to 4 years in prison for the other felony counts (S: 17-19). Accordingly, defendant's aggregate sentence will remain unaffected.
- 8 As for defendant's claim that the court improperly admitted a statement of Desinor's friend "Betty" (Defense Brief: 22), this argument is entirely meritless. Desinor briefly mentioned that a friend named Betty told her that Diaquoi could get her a transcript (Desino 789-90). This statement was not offered for the truth of the matter asserted, but rather to explain how Desinor met Diaquoi.
- 9 As it happens, even defendant's papers in support of his 440.10 motion did not include an affidavit from trial counsel.

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