

THIRD DIVISION
August 3, 2011

2011 IL App (1st) 093507-U
No. 1-09-3507

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court
Plaintiff-Appellee,)	of Cook County
)	
v.)	08 CR 8758
)	
DALE ROBINSON,)	Honorable
)	Thomas M. Davy,
Defendant-Appellant.)	Judge Presiding.

JUSTICE STEELE delivered the judgment of the court.
Justices Neville and Murphy concurred in the judgment.

O R D E R

HELD: We reverse and remand the trial court's judgment where the surveillance video was improperly admitted after improper foundation at defendant's probation revocation hearing.

¶1 Defendant Dale Robinson appeals from a circuit court order revoking his probation and sentencing him to an eight-year term of imprisonment. Robinson argues that the court erred in admitting and considering a surveillance DVD¹ without proper foundation during a probation

¹The terms "DVD" and "video" are used variously in the record. The trial court viewed the surveillance footage from a DVD. For purposes of clarity, we will refer to the surveillance

1-09-3507

revocation hearing. We reverse and remand.

¶2

BACKGROUND

¶3 On July 10, 2008, Robinson was sentenced to two years' probation with a TASC² mandate for retail theft at a Walgreens drugstore. Robinson was then apprehended by CVS store security guards for alleged retail theft of a bottle of alcohol on October 24, 2008. At the probation revocation hearing, the arresting officer, Jerry Martinez, testified that he received a call around 12:30 p.m. to go to the CVS store located 8025 South Ashland Avenue in Chicago. At that time, the officer spoke with Thomas Kentrell, the store's security guard, who called because he was holding an offender for a retail theft. Officer Martinez and his partner, Officer Tulley, arrested defendant and read him his *Miranda* rights. Kentrell provided Officer Martinez with a surveillance DVD. Officer Martinez was present as the recording was removed from the camera and DVD recorder. Officer Martinez made no identifying marks on the recording. The recording was placed in a sealed envelope and inventoried. Months later, Officer Martinez gave it to an assistant State's Attorney in the courtroom. Officer Martinez never viewed the DVD.

¶4 Over defense counsel's objection, Officer Martinez testified Kentrell told him Robinson

recording as a DVD.

²TASC stands for Treatment Alternatives for Safe Communities. Probation with a TASC mandate provides treatment as an alternative to prison for nonviolent offenders with substance abuse or dependence disorders. In the program, case managers develop individualized service plans that include linkages to community-based substance abuse treatment, medical/mental health services, vocational/educational programs, and other needed social services.

1-09-3507

walked past the last point of sale without paying for a bottle of whiskey. At the store, Kentrell gave Officer Martinez a receipt for the value of the bottle of whiskey. The State offered to play the store surveillance DVD. Defense counsel objected, based on a lack of foundation for the DVD. The objection was overruled, and the DVD was played several times at various rates of speed.

¶5 Robinson testified on his own behalf that he intended to pay for the bottle of whiskey. He explained that he entered the store with \$28 in his pocket before heading to the liquor section, where he took a bottle of whiskey from the shelf. The bottle did not have a price tag on it and defendant could not recall whether the price was listed on the shelf. Robinson claimed the store had sales tags up and down the aisle. As a result, he thought the price of the bottle had been marked down. He claimed he saw sales fliers at the front of the store when he first entered. As he walked around the store, he noticed Kentrell coming out of the office towards him. A woman then said, “stop him; he walked past my cash register.” Robinson said Kentrell then took him to an office in the rear of the store. In the office, he was told the manager thought he was going to steal the bottle of whiskey. The court found defendant violated his probation and sentenced him to eight years of incarceration, with one year of mandatory supervised release, not granting time served for probation.

¶6

DISCUSSION

¶7 Robinson asserts the trial court’s finding that he committed retail theft must be vacated, because the evidence primarily relied upon was a store surveillance recording for which the State failed to establish adequate foundation.

¶8 In *Gagnon v. Scarpelli*, 411 U.S. 778, 785 (1973), the United States Supreme Court mandated procedural safeguards to insure the probationer of his due process rights and interest, as well as insuring “that his liberty is not unjustifiably taken away and the [interest of the] State to make certain that it is neither unnecessarily interrupting a successful effort at rehabilitation nor imprudently prejudicing the safety of the community.” Hearings are required by statute to determine the alleged probation violation. 730 ILCS 5/5-6-4(b) (West 2008). At these proceedings, “[t]he State has the burden of going forward with the evidence and proving the violation by the preponderance of the evidence. The evidence shall be presented in open court, with the right of confrontation, cross-examination and representation by counsel.” 730 ILCS 5/5-6-4(c) (West 2008).

¶9 The State is correct in its contention that Robinson failed to raise the issue about whether the store surveillance recording was admitted without adequate foundation in a written motion.

¶10 The State cites *People v. Enoch*, 122 Ill. 2d 176, 186-87 (1988), in arguing that an issue must be preserved for appeal by both a timely objection and a written motion. The State further argues failing to do so results in forfeiture of the issue on appeal. *People v. Ward*, 154 Ill. 2d 272, 293 (1992). In this case, the State argues Robinson forfeited this issue by failing to file a posttrial motion. Robinson concedes he did not file a posttrial motion, but argues the issue should be reviewed under the plain error doctrine.

¶11 Robinson is correct that plain error need not be raised in an opening brief and may be asserted after the State argues forfeiture. *People v. Williams*, 193 Ill. 2d 306, 348 (2000).

“[T]he plain-error doctrine allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurs and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurs and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.” *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (citing *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005)). Robinson carries the burden of persuasion under both prongs of the plain-error test. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009). We must first determine if an error occurred. *People v. Walker*, 392 Ill. App. 3d 277, 294 (2009) (citing *Piatkowski*, 225 Ill. 2d at 56). Here, Robinson argues the trial court erroneously admitted the surveillance DVD, because the State did not offer foundation evidence from anyone who could testify that the recording “truly and accurately reflects” what it purports to show.

¶12 “Illinois law has traditionally restricted DVDs and other visual recordings use as demonstrative evidence, that is, use as illustrations of witnesses’ testimony.” *People v. Flores*, 406 Ill. App. 3d 566, 572 (2010). A DVD recording may be introduced as demonstrative evidence if it is properly authenticated and relevant to a particular issue in the case. *People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 283 (2003). To establish authenticity, a foundation must be laid by someone having personal knowledge of the filmed object. *Id.* The foundation may be established through testimony of a competent witness who has sufficient knowledge to testify that the DVD accurately represents what it purports to show. *Id.* at 284.

¶13 Here, no one with personal knowledge of the events depicted in the DVD testified that the

DVD truly and accurately reflected what it purported to show. The State did not present a witness who testified that the DVD showed Robinson walking past the cash registers to the door with a bottle of whiskey in his hand based on personal knowledge acquired by seeing the event occur. Officer Martinez testified that he arrived after the events depicted on the recording took place, and as such, cannot testify that the events on the DVD accurately represent what they purport to show. Robinson himself testified that he did not walk past all of the cash registers and that the scope of the image captured by the camera does not show three registers, which he alleges were between himself and the door. It is clear the DVD was not admissible here as demonstrative evidence. See *Flores*, 406 Ill. App. 3d at 573.

¶14 Problems arise where DVDs are used independent of testimony, which amounts to treating DVDs as substantive evidence. *Flores*, 406 Ill. App. 3d at 572. “Illinois law recognizes a distinction between demonstrative and other evidence, variously described as ‘real,’ ‘probative,’ or ‘substantive.’ ” *Flores*, 406 Ill. App. 3d at 573. “Demonstrative evidence has no probative value in itself. It serves, rather, as a visual aid to the jury in comprehending the verbal testimony of a witness.” *Flores*, 406 Ill. App. 3d at 573 (citing *Cisarik v. Palos Community Hospital*, 144 Ill. 2d 339, 341 (1991)). The court in *Flores* noted:

“Because the foundation for admission of visual recordings as demonstrative evidence is inadequate to ensure their reliability as substantive evidence, it is necessary to articulate a foundation for their admission as substantive evidence. When we say ‘visual recording,’ we mean either analog or digital still photographs, motion pictures, or videos.” *Flores*, 406 Ill. App. 3d at 572-73.

1-09-3507

¶15 The Second District of this court adopted a theory for a proper foundation in cases where there is no witness who is available to testify that a visual recording is a true and accurate depiction of what it purports to depict. See *People v. Taylor*, 398 Ill. App. 3d 74, 86 (2010) (following the Third District's adoption of the "silent witness" theory as a means for authenticating visual recordings under similar circumstances in *People v. Vaden*, 336 Ill. App. 3d 893, 898 (2003)). The *Flores* court discussed the seminal case, *United States v. Taylor*, 530 F.2d 639 (5th Cir. 1976), regarding admission of visual recordings as substantive evidence under the "silent witness" theory. *Taylor* concerned admission of photographs taken by an automatic still camera in a bank. The security system caused the camera to start taking photographs only after a masked robber locked the employees in the vault, so that no witnesses were available to testify that the photographs were accurate. The prosecution presented testimony "as to the manner in which the film was installed in the camera, how the camera was activated, and the fact that it was properly developed and contact prints made from it" from government witnesses who were not present during the robbery. *Id.* at 641-42. *Taylor* held that "such testimony furnished sufficient authentication for the admission of the contact prints into evidence." *Id.* at 642. The Illinois Supreme Court has not yet ruled on the "silent witness" theory. However, even if we adopted and applied the "silent witness theory," there was still insufficient foundation established for use of the DVD here as substantive evidence, for there was no testimony as to the manner in which the film was installed in the camera, how the camera was activated, or how, if any, prints were made.

¶16 In this case, the trial judge noted:

1-09-3507

“As to the DVD itself, the testimony of Officer Martinez was that that was produced from the recording camera. He got the CD from the DVD recorder; that he inventoried it in a sealed condition, he took that out of inventory in a sealed condition, and tendered that to the State and the DVD does show the Defendant on it, so I think that there is sufficient foundation to admit that just as someone would not be able to explain how a photograph was created, but can describe what it truly and accurately reflects what’s in the photograph.”

¶17 At trial, Martinez testified he only received the DVD from Kentrell. He did not testify about how it was recorded:

“Q. [Prosecutor:] Officer Martinez, the videotape – you already testified that you took a video surveillance tape from the CVS, is that correct?

A. [Martinez:] That’s correct.

Q. And inventoried that item, is that correct?

A. That’s correct.

Q. And today we viewed this item, is that correct?

A. That is correct.

Q. And does that appear to be or is that the same item that you received from Mr. Kentrell from CVS and in fact inventoried?

A. Yes, it is.”

¶18 The court further noted that “[t]he testimony of Officer Martinez was that***[h]e was given the DVD which he saw produced from the machine in the room.” There must be

testimony as to the method used to record the DVD as well as chain of custody. *Vaden*, 336 Ill. App. 3d at 898; see also *Taylor*, 530 F.2d at 642. Therefore, the court here was incomplete in its reiteration of the requirements for an adequate foundation of the DVD surveillance DVD. Without testimony about the manner in which the film was installed in the camera, how the camera was activated, or how, if any, prints were made, there is no proper foundation to admit the DVD as substantive evidence.

¶19 Therefore, with neither sufficient demonstrative nor substantive foundation, we find there was error.

¶20 Robinson argues the evidence is so closely balanced that the error alone threatened to tip the scales of justice against him. Robinson argues the admission of the surveillance DVD was extremely prejudicial, given the fact the judge viewed it several times and, by his comments, demonstrated that he considered the recording as the State's most compelling evidence of Robinson's guilt.

¶21 The record contains no testimony from any witnesses explaining what the surveillance DVD purports to show. The trial judge relied upon the DVD almost exclusively, without a proper foundation, to identify defendant as having violated his probation. The court also relied upon the testimony of Officer Martinez, who was not there at the time of the alleged crime and arrived to find Robinson in the manager's office. The officer could not and did not testify about how the DVD was recorded. The DVD itself does not show the full store, including three cash registers purportedly closer to the door, which the defendant did not pass. The State provided no witnesses who testified about who was in the store at the time of the incident. The trial judge

1-09-3507

noted the DVD was important and used substantively: “I also viewed the DVD several times to have it slowed down and to identify the person in my own mind as the Defendant.***Even disregarding the testimony of the hearsay testimony of Mr. Kentrell which I will since *the DVD basically can speak for itself*. ***Here, the Defendant is being charged with a violation of his probation where the burden is preponderance of the evidence.” (Emphasis added.) Because the trial court erroneously admitted the DVD without a proper foundation and used the DVD as substantive evidence, we find the error was clear, obvious and threatened to tip the scales of justice against Robinson. Although we find plain error, the error is not based on the sufficiency of the evidence. “When the issue is one that concerns the sufficiency of the evidence, we are required to reverse outright, whereas the erroneous admission of evidence is a procedural error, which allows us to remand for a new trial.” *People v. Moore*, 335 Ill. App. 3d 616, 623 (2002) (citing *People v. Olivera*, 164 Ill. 2d 382, 393 (1995)).

¶22 Given our disposition of this issue, we need not reach the issue as to whether the trial court’s denial of credit for time Robinson served warrants a new sentencing hearing.

¶23 CONCLUSION

¶24 In sum, the circuit court committed plain error in admitting and relying on the store’s DVD without proper foundation. Thus, the order of the circuit court of Cook County revoking Robinson’s probation and sentencing him to eight years of incarceration is reversed. This case is remanded for further proceedings consistent with this order.

¶25 Reversed and remanded.