

No. 1-11-3093

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 1390
	)	
MAYNARD HENDERSON,	)	Honorable
	)	Michael Brown,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE HYMAN delivered the judgment of the court.  
Justices Sterba and Pierce concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court did not err in admitting a store receipt of the stolen merchandise as evidence of value where defendant did not object to its admission, and the failure of defendant's counsel to object does not amount to ineffective assistance of counsel where the State could have laid a proper foundation for the evidence had the objection been made.

¶ 2 Following a bench trial, defendant Maynard Henderson was convicted of felony retail theft and sentenced to five years' imprisonment. On appeal, he contends that the trial court erred in admitting, without proper foundation, a receipt as evidence of the value of the goods stolen for

purposes of elevating retail theft to a felony. Relatedly, he contends that trial counsel was ineffective for not making a foundational objection to the receipt's admission.

¶ 3 Defendant was charged with retail theft for allegedly taking, on December 24, 2010, Christmas eve, merchandise – "medication and soap" with a retail value over \$150 – from a Walgreens store with the intent to permanently deprive Walgreens of their possession, use, or benefit.

¶ 4 At trial, the manager of a particular Walgreens store, Carl Washington, testified that he was working that afternoon when he saw defendant and another man near the store's main entrance and exit. Defendant's shopping cart had a gift bag, two "extra large" packs of toilet paper, Clarinex, and Mucinex. Washington saw defendant "attempt to take something off the shelf" and put it in a bag in the shopping cart that he was pushing. When Washington looked at defendant and his companion, the companion left the store. A short time later, defendant went towards the exit still pushing the cart, without first going to a cash register to pay for the merchandise. When defendant "got close enough to the exit where [Washington] could figure that he had no intention of paying for the items," Washington stopped him. Washington asked defendant to accompany him to his office. Defendant did so. Another Walgreens employee brought defendant's shopping cart to the office. There, defendant was detained by a store security guard and "the items were rung up on the register to determine the value of the items," which Washington recalled being \$1,188.92.

¶ 5 Washington saw that a bag in the cart contained a bottle of dishwashing detergent, a box of ibuprofen, "several" boxes of Mucinex, "a total of 21 and 24 boxes of Claritin." Each item had a Walgreens security tag on it. Defendant did not produce a receipt for the merchandise. Washington testified that People's Exhibit 1 and 2 were photographs that accurately depicted the items from defendant's cart, while Exhibit 3 was a register receipt for the items.

¶ 6 On cross-examination, Washington admitted that the receipt totaled \$1,182.92. But, while Washington testified to seeing two packages of toilet paper in the cart, neither the receipt nor the photographs included toilet paper. Washington admitted that defendant was still in the store when he stopped him, so that the theft alarm did not sound, and that defendant did not attempt to leave the store quickly or hastily as had his companion. Washington also admitted that he did not see defendant or his companion take any Claritin or Mucinex from the shelves, though they were in the cart when defendant was stopped. The store has a security video system, and Washington provided the police with a disc of video from the entrance area of the store on that day without first viewing the video himself.

¶ 7 Anthony Greenwood, security guard for the Walgreens store, testified that he saw defendant and another man enter and go towards the back of the store. Defendant was thus out of Greenwood's sight until about five minutes later, when Greenwood went to the washroom. On his way, he passed defendant and his companion, and defendant did not have any merchandise at this point. While Greenwood was in the washroom, Washington paged him on the public-address system. Greenwood went to Washington's office, where he saw Washington, defendant, and a large Hallmark gift bag "full of Mucinex and Claritin" as well as ibuprofen, a bottle of dishwashing liquid, and "some tissue." Greenwood emptied the bag onto a sink and took two photographs of the contents of the bag. He also took a photograph of defendant, People's Exhibit 4, which he testified accurately depicted defendant. On cross-examination, Greenwood testified that he did not see defendant remove any Claritin or Mucinex from the shelves, and that the items removed from the bag included toilet paper.

¶ 8 All four exhibits were admitted into evidence without objection. Defendant unsuccessfully moved for a directed finding.

¶ 9 Following closing arguments, the court found defendant guilty. The court found that the testimony of Washington and Greenwood was "clear and convincing" and that defendant "was in control of the cart and the items inside the cart and went past the last set of registers." The court also found that the "items that were listed in the receipt were not your typical shopping fare for Christmas Eve," which corroborated "a shoplifting kind of case." Regarding value for felony purposes, the court stated that Walgreens personnel did not have to know the exact value of the merchandise but "I do find the value of the items exceeded \$150."

¶ 10 In his general post-trial motion, defendant challenged the sufficiency of the evidence only. Following arguments in aggravation and mitigation, the court sentenced him to five years' imprisonment. Defendant's post-sentencing motion was denied, and this appeal timely followed.

¶ 11 On appeal, defendant contends that without a proper foundation for its admission, the trial court erred when it admitted into evidence for purposes of elevating retail theft to a felony, the receipt regarding the value of the goods stolen. He also contends that trial counsel was ineffective for not making a foundational objection to the admission of the receipt.

¶ 12 A person commits retail theft when he knowingly "[t]akes possession of, carries away, transfers or causes to be carried away or transferred, any merchandise displayed, held, stored or offered for sale in a retail mercantile establishment with the intention of retaining such merchandise or with the intention of depriving the merchant permanently of the possession, use or benefit of such merchandise without paying the full retail value of such merchandise." 720 ILCS 5/16A-3(a) (West 2010). Retail theft is a felony where the merchandise stolen has a "full retail value" exceeding \$150 and a misdemeanor otherwise, so that "the value of the property involved is an element of the offense to be resolved by the trier of fact as either exceeding or not exceeding \$150." 720 ILCS 5/16A-10 (West 2008). "Full retail value" is defined as "the merchant's stated or advertised price of the merchandise." 720 ILCS 5/16A-2.2 (West 2010).

¶ 13 The State argues, defendant concedes, and we agree, that defendant did not preserve this claim of error in the trial court and thus it must rise to the level of plain error to survive forfeiture. *People v. Rinehart*, 2012 IL 111719, ¶ 15. The rule that an unpreserved error is forfeited "is particularly appropriate when a defendant argues that the State failed to lay the proper technical foundation for the admission of evidence, and a defendant's lack of a timely and specific objection deprives the State of the opportunity to correct any deficiency in the foundational proof at the trial level." *People v. Johnson*, 406 Ill. App. 3d 114, 117-18 (2010), quoting *People v. Woods*, 214 Ill. 2d 455, 470 (2005).

¶ 14 Plain error exists when a clear or obvious error occurred and either (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, or (2) that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). The defendant bears the burden of persuasion in a plain error review. *Id.*, at 613. The first step in plain error analysis is determining whether there was an error. *Rinehart*, ¶ 15.

¶ 15 Defendant argues in particular that the admission of the receipt constitutes serious error under the second prong of plain error. But, our supreme court has repeatedly held that serious error under the second prong of plain error is the same as structural error, which exists in only a limited class of cases such as a complete denial of counsel, trial by a biased judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, denial of a public trial, or a defective reasonable doubt instruction. *Thompson*, at 609, 613-14. "In *Glasper*, this court equated the second prong of plain-error review with structural error, asserting that automatic reversal is only required where an error is deemed structural, *i.e.*, a systemic error which serves to erode the integrity of the judicial process and undermine the fairness of the defendant's trial." (Internal quotation marks removed.) *Thompson*, at 613-14, quoting *People v.*

*Glasper*, 234 Ill. 2d 173, 197–98 (2009), quoting *People v. Herron*, 215 Ill. 2d 167, 186 (2005).

Admission of the receipt here is not one of the above-listed errors. Even applying the broader definition that an error is structural if it necessarily renders a criminal trial fundamentally unfair or an unreliable means of determining guilt or innocence (*Thompson*, at 609), we conclude for the reasons stated below that the admission of the receipt here was neither fundamentally unfair nor rendered the trial unreliable.

¶ 16 First, defendant deprived the State of the opportunity to lay a foundation for the receipt by not making a foundational objection to its introduction or admission. Absent an objection on which to rule, we will not hold that the trial court erred by failing to *sua sponte* bar the receipt from admission.

¶ 17 Defendant did not specifically object at trial and raise the specific issue again in a post trial motion to preserve any alleged error for review. *People v. Woods*, 214 Ill. 2d 455, 470 (2005). A timely objection would have given the State an opportunity to correct any deficiencies regarding the receipt's foundation. This "rule is particularly appropriate when a defendant argues that the State failed to lay the proper technical foundation for the admission of evidence, and a defendant's lack of a timely and specific objection deprives the State of the opportunity to correct any deficiency in the foundational proof at the trial level." *Id.*

¶ 18 As to whether trial counsel rendered ineffective assistance to defendant by not so objecting, we find that he did not. On a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced defendant; in other words, that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a reasonable probability that the outcome of the proceedings would have been different but for counsel's errors. *People v. Cathey*, 2012 IL

111746, ¶ 23. In short, counsel is not required to make every possible objection, only those with a reasonable prospect of success.

¶ 19 As to the State's foundational obligation, defendant notes the usual foundation for business records: (i) the record was made as a memorandum or record of the act, transaction, occurrence, or event, (ii) it was made in the regular course of business, and (iii) it was the regular course of the business to make a record at the time of the transaction or within a reasonable time afterwards. 725 ILCS 5/115-5 (West 2010); *People v. Davis*, 322 Ill. App. 3d 762, 766 (2001). Defendant argues that additional authentication is required for the receipt as it resulted from records stored on a computer; that is, evidence that: (i) standard equipment was used, (ii) the computer at issue generates accurate records when used appropriately, (iii) the computer was used appropriately, and (iv) the sources of the information, the method of recording used, and the time of preparation indicate that the record is trustworthy and should be admitted into evidence. *People v. Johnson*, 376 Ill. App. 3d 175, 180 (2007).

¶ 20 We agree that the receipt could be authenticated in this manner, but do not see that as an insurmountable burden for the State. A document printed in anticipation of litigation, showing the prices set by a merchant for its merchandise, is not thereby disqualified as a business record because the requisite foundation pertains to the time when the business made the record rather than when the record was retrieved. *Davis*, at 766. Because a foundational objection was unlikely to have been successful, and that the foundation necessary to overcome the objection could have likely been laid, we cannot find counsel acted unreasonably by not raising it or that defendant was prejudiced by its absence.

¶ 21 Accordingly, the judgment of the circuit court is affirmed.

¶ 22 Affirmed.