

¶ 4 On June 14, 2012, the State charged defendant by information with retail theft (subsequent offense) (720 ILCS 5/16-25(a)(1), (f)(1) (West 2012)), a Class 4 felony, under a theory of accountability for the theft of a bottle of vodka from Schnucks, a retail merchant.

¶ 5 On November 14, 2012, defendant's jury trial commenced. Aaron Miller, a customer service manager for Schnucks, testified first for the State. On June 14, 2012, Miller was in his office at the Schnucks store when a liquor vendor informed him of a possible theft in progress. The vendor indentified two individuals he suspected of shoplifting standing at a store register. Miller noticed "a bulge sticking out of the back of one of their coats. It was a big bulge, very noticeable." According to Miller, the bulge "was probably a foot [long] and it was in the shape of what could have been a bottle." Miller continued, "it was in an awkward position so it was just out of the side of his back, couldn't see a book bag or anything like that, it was just a bulge in the shape of his [*sic*] bottle coming out of his back. So it was kind of obvious." Miller watched the two individuals as they made a purchase and walked toward the exit. As they approached the exit, Miller stopped them, announced he was store security and "wanted to talk to them about what was in their coat, see what is was." Miller identified defendant as one of the individuals he stopped. According to Miller, defendant told him "he was not with the other person that had the item." Miller testified both individuals left at the same time and he followed them outside and took a picture of the license plate of the car defendant got into, the driver of which Miller was familiar with. The other individual, Demetrios Steel, did not leave in this vehicle.

¶ 6 Miller testified he returned to the store and reviewed the security-video footage. Based on the footage, he determined a bottle had been taken from the "vodka section" of the aisle and called the police to report the theft. Miller went to the liquor aisle where the vodka was kept

and determined—based on the store's practice of keeping "all the liquor *** pulled towards the front and easy for customers to shop"—a bottle of New Amsterdam vodka, valued at \$11.99, was missing from the shelf.

¶ 7 During Miller's testimony, the security video, admitted as People's exhibit No. 1, was published to the jury over defendant's objection. Defendant objected to the video's authenticity and chain of custody. A copy of the digital video disc (DVD) is contained in the record on appeal. The video depicts two individuals, identified by Miller as defendant and Steel, enter the store together and proceed down one of the liquor aisles. At the end of the aisle, they appear to have a brief discussion (the video does not contain audio). Defendant then walks a short distance down the aisle and removes what appears to be a bottle from one of the shelves. He is seen walking toward the camera with the bottle in his hand, rejoining Steel in an adjacent aisle. Defendant is then seen with a black bag in his hand and the bottle is no longer visible. In the video, the two individuals separate and walk down different aisles. A bulge is visible from beneath Steel's jacket. The next time Steel appears in the video, he is exiting the store followed by Miller and another individual. A short time later, defendant is seen leaving the store.

¶ 8 During playback of the security video for the jury, the State intermittently paused it so Miller could "explain to the jury what we are seeing." During pauses in the video, and after Miller had identified defendant on the video, the following colloquy occurred:

"Q. What entrance are they walking in?

A. The east entrance of the store.

Q. Is that the same entrance that they exited?

A. Yes.

Q. Mr. Miller, did you see defendant take something off the shelf in that video?

A. Yes.

Q. Do you know what is located on that part of the shelf where he took something?

A. Yes.

Q. What is that?

A. It's our vodka section.

Q. And how big is your vodka section?

A. Probably four feet.

Q. Is it all contained in that one aisle?

A. Yes.

Q. Did you also see the other gentleman take something off the shelf?

A. Not in that section, no. It looked like they got beer in this bottom section.

Q. Okay. The beer and vodka are in two separate sections?

A. Yes.

Q. At this point in the video, what are you doing?

A. I was in my office and then they alerted me and I came out and watched them go through the register."

Miller also identified himself and the vendor in the video. He further identified Steel, the individual with the "bottle sticking out," walking out the entrance directly in front of him.

¶ 9 On cross-examination, Miller agreed he did not personally observe the two individuals prior to being informed of the possible theft and exiting his office. He testified he subsequently observed Steel and saw the bulge underneath his coat, and he observed defendant pay for an item before leaving the store. Miller stated, "they were walking out together and when I stopped them and talked to them on the front end of the store they were together and they were together at the register."

¶ 10 Bloomington police officer Fred Martin testified next for the State. On June 14, 2012, he was dispatched to Schnucks "for a retail theft report." Upon his arrival, Miller gave him four color printouts from the security video and a description of the persons involved in the theft. Miller also provided him with the name of the driver of the vehicle defendant left in. Martin later located defendant and Steel walking down the street. Martin first spoke with Steel. He then spoke with defendant. Martin asked defendant whether he "took a bottle of vodka off the shelf?" Defendant admitted he had. Martin then asked, "did you hand it to [Steel] and did he put it under his coat?" Defendant again admitted he had. According to Martin, defendant also told him "he had bought some beer and he didn't know that [Steel] was going to Steel [*sic*] that alcohol." Defendant further stated, " 'this is bullshit over an eleven dollar bottle of booze.' "

¶ 11 Defendant did not present any evidence. During its closing argument, the State played a portion of the security video for the jury again. During deliberations, the jury again viewed the security video. The jury found defendant guilty of retail theft. On January 3, 2013, defendant filed a motion for a new trial, asserting (1) the State failed to prove him guilty beyond a reasonable doubt; (2) the trial court erred when it denied his motion for a directed verdict; (3) the jury ignored or gave too little consideration to evidence showing his limited contact with the stolen merchandise; and (4) the court erred in denying defense counsel's objections. Defendant's

posttrial motion failed to specify the objections he claimed should have been sustained. On January 30, 2013, the trial court denied defendant's motion for a new trial. That same day, the trial court sentenced defendant to 30 months' conditional discharge and 14 days in the McLean County jail, and it imposed mandatory fines.

¶ 12 This appeal followed.

¶ 13 II. ANALYSIS

¶ 14 On appeal, defendant asserts in the alternative (1) reversible error occurred where Miller's testimony violated the silent-witness theory; or (2) he received ineffective assistance of trial counsel where counsel failed to address the silent-witness issue in a posttrial motion.

¶ 15 A. Forfeiture

¶ 16 Generally, to preserve an issue for review, a party must object at trial and raise the issue in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1129 (1988). Here, defendant concedes he failed to preserve the silent-witness-theory issue for review because he neither objected to Miller's testimony at trial nor raised the issue in a posttrial motion. Nonetheless, he asserts we can review the issue for plain error.

¶ 17 B. Plain Error

¶ 18 1. *Standard of Review*

¶ 19 Illinois Supreme Court Rule 615(a) (eff. Jan. 1, 1967) provides, "Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." "The plain-error doctrine is a limited and narrow exception to the general rule of procedural default." *People v. Walker*, 232 Ill. 2d 113, 124, 902 N.E.2d 691, 697 (2009). "Under the plain-error doctrine, this court will review forfeited challenges when (1)

a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) a clear or obvious error occurred, and the error is so serious that it affected the fairness of defendant's trial and the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Taylor*, 2011 IL 110067, ¶ 30, 956 N.E.2d 431. Under either prong of the plain-error analysis, the defendant bears the burden of persuasion. *People v. Lewis*, 234 Ill. 2d 32, 43, 912 N.E.2d 1220, 1227 (2009). Prior to determining whether plain error occurred, however, we first determine whether error occurred at all. *People v. Sargent*, 239 Ill. 2d 166, 189-90, 940 N.E.2d 1045, 1059 (2010). If clear or obvious error did not occur, no plain-error analysis is necessary. *Walker*, 232 Ill. 2d at 124, 902 N.E.2d at 697.

¶ 20

2. *Silent-Witness Theory*

¶ 21 In this case, defendant does not take issue with the introduction of the security video as substantive evidence, but rather, he challenges as inappropriate Miller's testimony regarding contents of the video of which, he claims, Miller had no personal knowledge.

¶ 22 Under the silent-witness theory, photographs and videotapes may be introduced as substantive evidence, without the need for a witness to testify regarding the accuracy of the images depicted in the video, so long as a proper foundation is laid. *Taylor*, 2011 IL 110067, ¶ 32, 956 N.E.2d 431. "[T]he evidence is 'received as a so-called silent witness or as a witness which ' "speaks for itself." ' " *Id.* (quoting Jordan S. Gruber, *Foundation for Contemporaneous Videotape Evidence*, 16 Am. Jur. Proof of Facts 3d 493, § 5, at 508 (1992)). The State contends no error occurred because, except for Miller's testimony that the video depicted defendant removing something from a shelf, the remainder of his testimony with respect to the video was based on his personal observations of the location and the events.

¶ 23 The sum and substance of defendant's silent-witness argument, as set forth in his brief, is that "Miller invaded the province of the jury when he provided his interpretation that Mr. Wilson took the bottle of vodka from the store shelf. *** After all, it is unclear in the surveillance DVD whether the bottle Mr. Wilson took from the alcohol aisle of Schnucks was, in fact, vodka." A review of Miller's testimony regarding this portion of the video leads us to conclude that, contrary to defendant's assertion, no error occurred.

¶ 24 Specifically, Miller testified in part as follows:

" Q. Mr. Miller, did you see defendant take something off the shelf in that video?

A. Yes.

Q. Do you know what is located on that part of the shelf where he took something?

A. Yes.

Q. What is that?

A. It's our vodka section."

Miller did not testify the video depicts defendant removing a bottle of vodka from the shelf. Instead, he agreed the video depicts defendant taking "something" off the shelf. The prosecutor then asked Miller if he knew what was located on that shelf, to which Miller responded, "It's our vodka section." Defendant does not argue Miller's testimony that the area where defendant took the bottle was the store's vodka section lacked foundation. We find Miller's testimony did not improperly invade the province of the jury and conclude no error occurred.

¶ 25 Our decision is in accord with *People v. Starks*, 119 Ill. App. 3d 21, 25, 456 N.E.2d 262, 265 (1983). In *Starks*, after reviewing a video of a prison riot, several correctional

officers testified for the purpose of identifying the defendants—who were in the background of the video, making identification difficult—involved in the riot. *Id.* at 26, 456 N.E.2d at 266.

The officers were able to identify the defendants based on their familiarity with the defendants' mannerisms and their body movements. *Id.* We found the officers' testimony "was rationally based upon the witnesses' personal knowledge of the defendants before the occurrence and their perception of what they saw on the videotape. It was an aid to the jury in resolving the issue of identification and did not invade the province of the jury." *Id.* Similarly, in this case, Miller's testimony defendant removed "something" from the "vodka section," which he later determined to be a bottle of New Amsterdam vodka valued at \$11.99, was based on his personal knowledge of the arrangement of the store, and thus, it was properly considered by the jury.

¶ 26 Even if we found error occurred during Miller's testimony—which we do not—in the context of the proceedings here it would not amount to plain error.

¶ 27 Contrary to defendant's assertion, the evidence in this case was not so closely balanced that Miller's testimony threatened to tip the scales of justice against defendant. The video shows defendant removing what appears to be a bottle from a shelf, and then later walking down an aisle carrying a black bag with the bottle no longer visible. The video then depicts defendant handing the bag to Steel, who puts the bag, then his jacket, over his shoulder. Miller testified he personally observed defendant and Steel at the cash register, where defendant purchased an item that was not the bottle he removed from the shelf. Miller noticed Steel had "a bulge sticking out of the back of [his coat]. It was *** in the shape of what could have been a bottle." Miller testified after watching the video he went to the vodka aisle and noticed an \$11.99 bottle of New Amsterdam vodka appeared to be missing from the shelf. Additionally, when questioned by Officer Martin, defendant admitted taking a bottle of vodka off the shelf and

handing it to Steel, who concealed it under his coat. Defendant also told Martin, "this is bullshit over an eleven dollar bottle of booze." Here, even absent Miller's testimony that defendant removed "something" from the "vodka section," the jury had sufficient evidence to find defendant guilty of retail theft under an accountability theory.

¶ 28 C. Ineffective Assistance of Counsel

¶ 29 In the alternative, defendant asserts his trial counsel was ineffective for failing to address Miller's improper testimony regarding the surveillance video in a posttrial motion. Because we find no error occurred regarding Miller's testimony that defendant removed "something" from the "vodka section" of the aisle, counsel was not ineffective for failing to address the issue in a posttrial motion.

¶ 30 III. CONCLUSION

¶ 31 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2012).

¶ 32 Affirmed.