No. 2—10—0537
Order filed April 15, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	No. 09—TR—150511
and	)	
JAMES JARZYNA,	)	Honorable Robert A. Miller,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

Held: State trooper's testimony by itself was sufficient to convict the defendant of speeding in a construction zone.

Following a bench trial, the defendant, James Jarzyna, was convicted of speeding in a construction zone (625 ILCS 5/11—605.1 (West 2008)) and fined $675. On appeal, the defendant argues that (1) he was not convicted beyond a reasonable doubt and (2) the trial court erred in allowing testimony regarding a photograph that was never admitted into evidence. We affirm.

On August 25, 2009, the defendant was charged by criminal complaint with speeding in a construction zone (625 ILCS 5/11—605.1 (West 2008)). On February 14, 2010, the trial court

conducted a bench trial. According to the bystander's report, a state trooper (who was not identified by name) testified that on August 25, 2009, he was in a police van at Interstate 88. A system of radars detected a vehicle traveling 66 mph in a 45 mph construction zone. A picture was taken of the driver of the vehicle and it appeared on a computer screen. From that picture, the state trooper identified the defendant as the driver of the vehicle. A small, color copy of that picture was produced at trial. A larger picture, similar to the size that the state trooper viewed in the police van, was not available for trial. The state trooper further testified that at the time the car was tracked speeding, construction workers were present and construction work was ongoing.

The defendant testified that he was not driving a vehicle on Interstate 88 on the day in question. He asserted that the photograph of the driver in the vehicle did not depict him, and that the quality of the picture was so poor that it could not prove the identity of any person that was driving the car. The defendant also stated that he wanted to see the larger computer image of the person driving the car that the state trooper referenced.

At the close of the trial, the trial court found the defendant guilty of speeding in a construction zone and fined him $675. The trial court explained that it found the state trooper's testimony credible and the defendant's testimony not credible. The trial court also found that the State's exhibit depicting the driver of the vehicle supported the State's witness identification of the defendant as the driver. On May 19, 2010, following a hearing, the trial court denied the defendant's motion to reconsider. The trial court explained that it found the defendant's credibility to be an issue because although the defendant testified that either his wife or one of his children could have been driving the vehicle at the time at issue, he could not identify any of them from the State's photograph produced at trial. Following the trial court's ruling, the defendant filed a timely notice of appeal.

The defendant's first contention on appeal is that the State failed to prove him guilty beyond a reasonable doubt. Specifically, the defendant argues that the only evidence at trial as to the identity of the driver of the vehicle at issue was a photograph. Because that photograph was of extremely poor quality, the defendant insists that it was insufficient to serve as the basis for his conviction.

It is not the province of this court to retry the defendant. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). The relevant question is " 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *Id*, quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The sufficiency of the evidence and the relative weight and credibility to be given the testimony of the witnesses are considerations within the exclusive jurisdiction of the fact finder. *People v. Smeathers*, 297 Ill. App. 3d 711, 717 (1998). The evaluation of the testimony and the resolution of any conflicts or inconsistencies which may appear are also wholly within the province of the finder of fact. *People v. Isunza*, 396 Ill. App. 3d 127, 130 (2009).

While acknowledging the law set forth above, the defendant argues that this court should nonetheless apply a *de novo* standard of review "because it is undisputed that the only evidence of identity at trial was a photograph, which is available to the reviewing court." We disagree with the defendant's characterization of the evidence. At the hearing, both the defendant and the state trooper testified. Not only was the trial court in a better position to consider the demeanor of the defendant and the state trooper, the trial court had the opportunity to view the defendant and determine for itself whether the defendant bore a resemblance to that of the driver who been photographed speeding through the construction zone. Thus, as the trial court's ability to observe the witnesses was an important part of the trial, and since that is not something this court can do on review, a *de novo*

standard of review would be inappropriate. We therefore will apply the *Collins* standard of review on appeal.

Turning to the merits of the defendant's first contention, we believe that there was sufficient evidence to establish that the defendant drove his vehicle through a construction zone at an excessive speed. The state trooper testified that after radars detected a driver speeding through a construction zone, a picture of that driver appeared on his computer screen. From that picture, the state trooper identified the defendant as the driver. Although the defendant insisted that he was not driving the vehicle, the trial court was not obligated to place greater weight on the defendant's testimony than that of the State Trooper. See *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006) (the trial judge is in the best position to determine the credibility of the witnesses and resolve conflicts in the testimony).

Moreover, we find without merit the defendant's insistence that the trial court held against him his failure to identify the driver. The defendant argues that his failure to provide proof of his innocence cannot be construed to satisfy the State's burden of proof. The record does not support the defendant's contention. Rather, the record reveals that the trial court discounted the defendant's credibility after he claimed that his wife or two children could have been driving the vehicle, but then was unable to identify the driver in the photograph as being that of either his wife or children. The trial court's determination that the defendant was not credible is not tantamount to determining that the respondent had to prove his own innocence. See *People v. Williams*, 209 Ill. App. 3d 709, 721 (1991) (when a defendant elects to testify and offer an explanation, he is bound to tell a reasonable story or be judged by its improbabilities).

The defendant's second contention on appeal is that the trial court erred in considering the state trooper's testimony that a larger version of the picture admitted at trial more clearly depicted

the defendant as the driver of the vehicle. The defendant argues that the trial court improperly admitted the smaller picture because it violated the best evidence rule as well as his right of confrontation. Although the defendant did not raise an objection to the state trooper's reference to a larger version of the picture at trial, he argues that this court should nonetheless consider his contention pursuant to the plain error doctrine.

Evidentiary rulings are within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion. *People v. Dunmore*, 389 Ill. App. 3d 1095, 1105 (2009). Issues not raised at trial via a timely objection are forfeited for review on appeal. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). However, plain errors or defects affecting substantial rights may be noticed by an appellate court although they were not brought to the attention of the trial court. *People v. Howell*, 358 Ill. App. 3d 512, 519-20 (2005); Supreme Court Rule 615(a) (eff. January 1, 1967). This court will find plain error only where (1) the evidence was closely balanced or (2) the error so prejudiced the defendant's case that it resulted in an unfair trial. *People v. Johnson*, 208 Ill. 2d 53, 64 (2003). Absent any error, there cannot be plain error. *People v. Brant*, 394 Ill. App. 3d 663, 677 (2009).

The trial court did not err in considering the picture of the driver that was admitted into evidence. There is no indication that the picture admitted into evidence was different than the picture the state trooper originally viewed on his computer, other than the original picture was larger. The color picture introduced into evidence was approximately 3½ inches by 2½ inches, large enough to show the driver's face and also large enough for the trial court to consider whether the picture bore a resemblance to the defendant who appeared at trial. Even if we were to construe the smaller picture introduced into evidence as somehow being inconsistent with the larger picture that the state trooper originally viewed, it would be a minor inconsistency that would not effect the admissibility

of that evidence. See *Hahn v. Union Pacific R. Co.*, 352 Ill. App. 3d 922, 934 (2004) (minor inconsistencies in documentary evidence are matters that affect only the weight of the evidence, not its admissibility).

In so ruling, we find unpersuasive the defendant's argument that the trial court's admission of the photograph violated the best evidence rule. The best evidence rule states a preference for the production of the original documentary evidence when the contents of the documentary evidence are sought to be proved. *People v. Tharpe-Williams*, 286 Ill. App. 3d 605, 610 (1997). There is no general rule that a party must produce the best evidence that the nature of the case permits. *Id.* The best evidence rule does not apply where a party seeks to prove a fact that has an existence independent of the documentary evidence, even though the fact might have been reduced to, or is evidenced by, the documentary evidence. *Id.* For instance, an individual who observes a crime occur on a video monitor may testify to it even if that incident was simultaneously recorded on videotape. *Id.*

In *Tharpe-Williams*, the defendant was convicted of retail theft after two Wal-Mart loss prevention agents testified that they had viewed her on a video monitor taking items that she had not purchased. On appeal, the defendant argued that the agents' testimony violated the best evidence rule because the videotape of the incident was not submitted into evidence. This court found that the respondent forfeited the issue because she had not raised it in timely fashion. *Id.* at 608-09. Further, we found that the agent's testimony was properly admitted because it sought to prove a fact that was independent of the videotape of the incident, *i.e.*, that they observed the defendant place unpaid items in her bag as well as accept a bag with unpaid items. *Id.* at 610. We additionally found that it was irrelevant that the agents only observed the incident because it was telecast by a video camera. *Id.* We explained that because the agents observed the incident on the video monitor at the

same time it occurred, they could testify to facts based on their personal observations. *Id.* at 610-11. We reasoned that the situation was no different than if the agents had been 100 yards away from the defendant at the time of the incident but they needed a telescope to observe what was happening. *Id.* at 611.

Here, the state trooper testified that, based on personal observations, he observed the defendant speed through a construction zone. His testimony was competent evidence and sufficient to convict the defendant, independent of any photograph identifying the defendant as the driver of the vehicle. Thus, the best evidence rule does not apply to this case. See *id.*

Finally, we reject the defendant's argument that the State's failure to introduce the larger photograph violated his rights under *Crawford v. Washington*, 541 U.S 36 (2004) and *Melendez-Diaz v. Massachusetts*, 557 U.S. ___, 129 S. Ct. 2527 (2009). Relying on *Melendez-Diaz,* the defendant asserts that documents have been given treatment similar to actual testimony by courts facing confrontation issues. The defendant insists that it was fundamentally unfair that he was not able to "scrutinize the only piece of evidence allegedly capable of positively identifying him as the driver."

In *Crawford*, the Supreme Court held "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is *** the one the Constitution actually prescribes: confrontation." *Crawford*, 541 U.S. at 68-69. In *Melendez-Diaz*, the defendant was charged with distributing and trafficking cocaine. Rather than offer live testimony to prove that the substance was cocaine, the prosecution submitted three certificates of analysis showing the results of the forensic analysis performed on the seized substances. *Melendez-Diaz*, 557 U.S. at ___, 129 S. Ct. at 2531. On review, the Supreme Court found that the certificates were functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination. *Id.*, 557 U.S. at ___, 129 S. Ct. at 2532. Therefore, the trial court erred in admitting those certificates

because "[t]he Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits[.]" *Id.*, 557 U.S. at ___, 129 S. Ct. at 2542.

Here, the State did not seek to prove its case through affidavits but rather through the live testimony of the state trooper. As such, the defendant's rights were not violated under either *Crawford* or *Melendez-Diaz*.

For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed.

Affirmed.