SECOND DIVISION
January 10, 2017

No. 1-14-2575

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 CR 8057
	)	
FREDERICK MINES,	)	Honorable
	)	Charles P. Burns,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE HYMAN delivered the judgment of the court.
Justice Pierce concurred in the judgment.
Justice Mason specially concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's conviction for robbery is affirmed where defendant forfeited review of the issue raised on appeal because he failed to object to the admission of his Verizon Wireless records into evidence on the basis of inadequate foundation and the evidence was not closely balanced to warrant plain error review.

¶ 2 Following a bench trial, defendant Frederick Mines was convicted of robbery and sentenced to six years' imprisonment. On appeal, Mines contends that he was denied his right to

a fair trial because the trial court erred in admitting and relying on hearsay evidence, specifically, subscriber information and call data from Verizon Wireless for which the State failed to lay an adequate foundation. We affirm. Mines was required to raise an objection at trial and specify the objection in a written posttrial motion; he failed to do either. And, contrary to Mines's argument, the evidence was not closely balanced such that Mines was prejudiced by the error so as to justify plain error review.

¶ 3 Background

¶ 4 Mines was arrested on April 9, 2013, and later charged by information with armed robbery and aggravated unlawful restraint. On the date of trial, without objection from defense counsel, the State amended the armed robbery charge to aggravated robbery. Because Mines does not challenge the sufficiency of the evidence to sustain his conviction we recount the facts to the extent necessary to resolve the issue raised on appeal. We note that, shortly after the trial began, Mines elected to represent himself, and, after being admonished by the court, proceeded *pro se*.

¶ 5 At trial, Mehdi Djeddaoui testified that on February 7, 2013, he was employed as a manager for a Pizza Hut restaurant at 3451 West Devon Avenue. About 8:30 p.m., Djeddaoui received a telephone order for a pizza delivery to 6239 North Claremont Avenue. The order was placed by an individual who identified himself as "Duke" and the telephone number for the order was (773) 951-8928. Djeddaoui stated that the individual called the Pizza Hut twice: once to ask that the delivery driver have change for a $100 bill; and again to confirm the order. Djeddaoui tendered the order to the delivery driver, Camille Youssef.

¶ 6 Youseff testified that he arrived at 6239 Claremont about 9 p.m. As he opened the front door to the building, Mines grabbed him, pushed him into the corner of the vestibule and told

him to drop his wallet and the pizzas. After Youseff did so, Mines pushed him out of the building. Youseff then called Djeddaoui, who called the police. When the police arrived, Youseff provided them with a description of the robber. The next day, Youseff met with the police and identified Mines as the robber from a photo array.

¶ 7 Chicago police officer Richard Piek testified that he compiled the photo array and retrieved Mines's photo from the Chicago Police Department I-Clear database after a search of the database for the nickname "Duke." Officer Piek also testified that, after searching the database, he learned that Mines had "Duke" tattooed on the upper portion of his left arm. On April 9, 2013, Youseff viewed a lineup and identified Mines as the robber. Youseff also identified Mines in open court. He testified that Mines had "something in his hand," but that he was not sure whether it was a gun because it was too dark in the vestibule to see it.

¶ 8 Joe Wong testified that he owned the building at 6239 North Claremont and that the basement apartment was rented by Henrietta Mines. Wong stated that Henrietta moved out of the apartment in January 2013, and that he saw the defendant, her brother, at the apartment after she moved out. Wong stated that Mines did not have permission to stay in the apartment.

¶ 9 Dan Markus, a Verizon analyst, testified that he responds to small claim cases and appears as a custodian of records when necessary. As a custodian of records, he is familiar with subscriber information records kept in the ordinary course of business. Markus explained that subscriber information includes a name, address, contact phone number, e-mail address, account number, wireless telephone number, date of activation, and, if applicable, date of account deactivation. Markus identified State Exhibit 3 as a police request to produce records pertaining to the telephone number associated with the pizza delivery. The request was made to the keeper of records with Verizon's "law enforcement team" in New Jersey. Markus stated that the request

"c[a]me through the law enforcement channels of Verizon" and that the law enforcement team ran "an analysis or a check with respect to [the] phone number." The analysis revealed that subscriber information was available.

¶ 10 Markus identified State Exhibit 3(A), which listed the wireless number for which the records were requested, and the first and last name of the subscriber, "Frederick Mine." Markus also identified State Exhibit 3(B) as a record of the subscriber's address information. The primary address for the account was listed as 1723 West Balmoral Avenue, Chicago. Markus further identified State Exhibit 3(C) as listing other contacts associated with the account. He stated that because there was "no available day phone *** the system or a salesperson entered in all nines[.]" State Exhibit 3(E) reflected that the account was established on June 12, 2012, and that, before the date of the robbery, it had not been deactivated. State Exhibit 3(F), a call detail kept in the ordinary course of Verizon's business, showed that two phone calls were made from the number to the Pizza Hut. Markus testified that State Exhibit 3(G) showed that the two calls occurred on February 7, 2013, at 8:44 p.m. and 8:46 p.m.

¶ 11 On cross-examination, Markus testified that the records were pulled by Verizon's law enforcement team. He stated that the records are accurate because they are recorded at the instance that an activity takes place on Verizon's towers and switches. He also stated that these records are used by Verizon for billing purposes.

¶ 12 Chicago Police Officer Kirk Rutkowski testified that he arrested Mines on August 26, 2009, and participated in Mines's "booking" process. During the process, Mines reported his address as 1723 West Balmoral.

¶ 13 Mines did not present evidence in his defense.

¶ 14 Following closing arguments, the court found Mines guilty of the lesser-included offense of robbery. In announcing its decision, the court stated that Youseff was a "very credible" witness, who did not have an interest or bias in this matter and whose identification of Mines was "unequivocal." The court also stated that Youseff's testimony was "clear, convincing, and proof beyond a reasonable doubt." The court then recounted the circumstantial evidence presented against Mines. The court pointed out Mines's sister had resided at 6239 North Claremont, the scene of the robbery, and that the owner of the building had seen Mines there. The court also pointed out that the Verizon call records indicated that two calls were made to the Pizza Hut at 3451 West Devon on the date and time of the robbery from a telephone number registered to "Frederick Mine." The records also showed that the address listed for the account was the same address Mines reported to an officer during a prior arrest. The court further pointed out that the individual who called the Pizza Hut used the name Duke and that Mines had "Duke," his nickname, tattooed on his arm.

¶ 15 Analysis

¶ 16 On appeal, Mines challenges the admission of State Exhibit 3, Verizon's cellular telephone records, on the basis that the State failed to establish a proper foundation. Mines argues that these records served as "critical evidence" against him and their introduction without a proper foundation deprived him of a fair trial. In setting forth this argument, Mines acknowledges that he has forfeited review of this issue because he failed to object to the State's introduction of the records into evidence (see *People v. Enoch*, 122 Ill. 2d 176, 186 (1988)), but argues that we should review the issue under the first prong of the plain error doctrine.

¶ 17 The plain error rule is a narrow and limited exception to the general rule of forfeiture. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008). Under the plain error doctrine, a reviewing court

will review an unpreserved error when a clear and obvious error occurs and: (1) the evidence is closely balanced; or (2) the alleged error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *People v. Bannister*, 232 Ill. 2d 52, 65 (2008). The first step in the plain error analysis is determining whether an error occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). We find that no error occurred.

¶ 18 The admission of evidence is within the sound discretion of the trial court. *People v. Becker*, 239 Ill. 2d 215, 234 (2010). This court will not reverse the trial court absent an abuse of that discretion. *Id.* We will find an abuse of discretion only where the trial court's decision is arbitrary, fanciful or unreasonable, and where no reasonable person would agree with the position adopted by the trial court. *Id.*

¶ 19 Mines elected to proceed *pro se* at trial. A *pro se* litigant must comply with the rules of procedure required of attorneys; a court will not apply a more lenient standard to *pro se* litigants regarding the rules of evidence and decorum. *People v. Fowler*, 222 Ill. App. 3d 157, 165 (1991). The trial court admonished Mines of this standard when he elected to represent himself. To preserve the alleged foundation error, Mines was required to raise an objection at trial and specify the objection in a written posttrial motion. See *Enoch*, 122 Ill. 2d at 187-88. Mines failed to do either.

¶ 20 Had Mines raised a foundation objection to the Verizon records, it may have been proper for the State to elicit further testimony from the Verizon analyst regarding the technical aspects of the input, storage, and generation of the records. See *People v. Houston*, 288 Ill. App. 3d 90, 99 (1997). But, Mines did not do so, and we decline to find plain error on the part of the trial court for admitting the records into evidence. *Id.* Moreover, the alleged failure of the State to lay a proper foundation for the records does not amount to a violation of Mines's substantial rights

such that plain error review would be appropriate. *People v. Bynum*, 257 Ill. App. 3d 502, 515 (1994).

¶ 21 That said, even were we to conclude that Mines did not waive this issue and address the merits, the result would remain the same. The Verizon records were entered into evidence under the business record exception to the hearsay rule. Telephone records and supporting documentation are hearsay, but admissible under the business record exception. See *People v. Reed*, 108 Ill. App. 3d 984, 989-90 (1982). Illinois Rule of Evidence 803(6) provides, in relevant part, that "records of regularly conducted activity" are not considered inadmissible hearsay if the records constitute:

> "A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or date compilation, all as shown by the testimony of the custodian or other qualified witness, *** unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness[.]" Ill. R. Evid. 803(6) (eff. Jan, 1, 2011).

¶ 22 The party, in this case the State, seeking the admission of a document into evidence under the business record exception must lay an adequate foundation by showing that the record was: (i) a memorandum or record of an act, transaction, occurrence, or event; (ii) made in the regular course of business; and (iii) made at the time of the act or within a reasonable time thereafter. *People v. Morrow*, 256 Ill. App. 3d 392, 397 (1993); see also 725 ILCS 5/115-5(a) (West 2014).

¶ 23 As pointed out by the parties, the Verizon records implicate the distinction between computer-stored records and computer-generated records in terms of foundational requirements. See *In re Marriage of DeLarco*, 313 Ill. App. 3d 107, 114 (2000). Computer-stored records constitute statements placed into the computer by an out-of-court declarant and, thus, cannot be tested by cross-examination. *Id.* Therefore, computer-stored data is inadmissible absent an exception to the hearsay rule. *Id.* Under the business exception to the hearsay rule, they are admissible if: (i) the electronic computing equipment is recognized as standard; (ii) the input is entered in the regular course of business reasonable close in time to the event recorded; and (iii) the foundation testimony shows that the source of information, method and time of preparation indicate its trustworthiness and justify its admission. *Id.* at 114-15. Computer-generated records, on the other hand, are generally admissible as representing the tangible results of a computer's internal operations. *Id.* at 114. As such, all that need be shown to admit computer-generated records into evidence is that the recording device was accurate and operating properly when the evidence was generated. *Id.*

¶ 24 Mines contends that the Verizon records represent both computer-stored and computer-generated records. Specifically, Mines argues that the subscriber information, *e.g.* name, address, contact phone number, date of activation, etc., for his cellular telephone account constitutes computer-stored records, while the call data associated with his account is computer-generated. Mines maintains that the State failed to lay an adequate foundation for any of the records.

¶ 25 But, given the record before us, we are unable to unequivocally say that the subscriber information constitutes a computer-stored record. Although Markus testified that an activation of a prepaid account may have required a "salesperson," he also stated that certain data may have

been entered by "the system." Under these circumstances, we are unable to determine whether the subscriber information constitutes a computer-stored or computer-generated record.

¶ 26 As for the call data, showing incoming and outgoing calls associated with Mines's account, we agree with Mines and the State that it is computer-generated data. On cross-examination, Markus testified that the records are accurate because "they are recorded at the instance that [an] activity takes place on [Verizon's] towers and switches." See *Houston*, 288 Ill. App. 3d at 98-9 (telephone billing records generated instantaneously by computer when calls were placed from defendant's accounts constituted computer-generated data). Nevertheless, under either standard, the State failed to lay a sufficient foundation for the records.

¶ 27 Markus's testimony comprised identifying the State's exhibit and recounting the information presented in it. Markus provided virtually no testimony regarding the computing equipment used, the procedures used for the input of the data, or the accuracy of the computing devices. While we are mindful that "there can be no question that computer science has created many devices, the reliability of which can scarcely be questioned[,]" there still exists a requirement to prove the accuracy and proper operation of the particular device under consideration. *People v. Holowko*, 109 Ill. 2d 187, 192 (1985). As mentioned, there was no testimony regarding the accuracy or operation of the devices. Although Markus did state on cross-examination that the records are accurate because "they are recorded at the instance that [an] activity takes place on [Verizon's] towers and switches," this testimony, without more, establishes the records as only being computer-generated. Accordingly, if Mines had objected and the State had been unable to cure the defect, it would have been error for the court to admit the records into evidence.

¶ 28 Even so, contrary to Mines's argument, the evidence was not closely balanced such that Mines was prejudiced by the error so as to justify plain error review. In finding Mines guilty of robbery, the trial court relied on direct evidence of Mines's guilt and then, after finding this evidence sufficient to convict, merely recounted the myriad of circumstantial evidence, including the Verizon records, presented against him. In announcing its decision, the trial court first stated that Youseff, the eyewitness, was "very credible," his identification of Mines as the robber was "unequivocal," and his testimony was "clear and convincing, and proof beyond a reasonable doubt." It is well-settled that "the testimony of a single witness, if it is positive and the witness credible, is sufficient to convict." See *People v. Smith*, 185 Ill. 2d 532, 541 (1999) and cases cited there. The trial court then pointed out the overwhelming amount of circumstantial evidence, aside from the Verizon records, presented against Mines. Specifically, that Mines's sister had resided at 6239 North Claremont, the scene of the robbery, and that the owner of the building had seen Mines in the building. The trial court further noted that the individual who called the Pizza Hut identified himself as “Duke” and Mines had "Duke," his nickname, tattooed on his arm. A commonsense assessment of this evidence shows it was not closely balanced and thus plain error review is not warranted to excuse Mines's forfeiture of the issue. See *People v. Belknap*, 2014 IL 117094, ¶¶ 48-51.

¶ 29 Affirmed.

¶ 30 JUSTICE MASON, specially concurring:

¶ 31 I concur in the result in this case. I write specially because, having found that neither prong of plain error applies in this case, *i.e.*, the evidence was not closely balanced and the admission of the evidence, without objection, did not render Mines’ trial fundamentally unfair, plain error review is, as the majority concludes, “unwarranted.” Having properly concluded that

plain error review is unwarranted, it is unnecessary to address the merits of the forfeited issue. I, therefore, do not join in the analysis beginning at ¶ 21 of the order.