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2018 IL App (4th) 160436-U

NO. 4-16-0436

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
September 11, 2018
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. CHRISTOPHER J. WAGNER, Defendant-Appellant.	Appeal from the Circuit Court of Adams County No. 16CF10 Honorable Alan D. Tucker, Judge Presiding.

JUSTICE CAVANAGH delivered the judgment of the court.
Justices Steigmann and DeArmond concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Trial counsel did not render ineffective assistance by failing to move to suppress defendant's written statement.

(2) It was not error for the State's witnesses to narrate the events depicted on the surveillance videos when those witnesses did not provide opinion or identification testimony.

(3) The State proved defendant guilty beyond a reasonable doubt of criminal damage to property.

(4) The record is insufficient to determine whether trial counsel was ineffective for failing to object to the trial court's imposition of a Class-X sentence based upon an out-of-state burglary conviction before determining whether it constituted a qualifying offense.

¶ 2 Following a jury trial, defendant, Christopher J. Wagner, was found guilty of two counts of burglary, one count of unlawful possession of a stolen vehicle, and one count of criminal damage to property. The trial court sentenced him to three 20-year terms and one 3-year

term in prison, all to be served concurrently. Defendant appeals, arguing (1) his trial counsel was ineffective when she failed to file a motion to suppress his written statement; (2) plain error occurred when several witnesses violated the silent-witness theory; (3) the State failed to prove defendant guilty of criminal damage to property beyond a reasonable doubt; and (4) the trial court erred in sentencing defendant as a Class X offender. After our review of the record, we affirm defendant's convictions and sentences.

¶ 3 I. BACKGROUND

¶ 4 On January 5, 2016, the State filed an information against defendant alleging he committed a burglary at the Wilco gas station. See 720 ILCS 5/19-1(a) (West 2014). After further investigation, on January 15, 2016, the State amended the information to a four-count complaint against defendant. The amended information alleged he committed the following offenses: (1) burglary (720 ILCS 5/19-1(a) (West 2014)) when he knowingly and without authority entered the Wilco gas station with the intent to commit a theft therein on January 2, 2016 (count I); (2) burglary (720 ILCS 5/19-1(a) (West 2014)) when he knowingly and without authority entered Starcrest Cleaners with the intent to commit a theft therein on January 1, 2016 (count II); (3) unlawful possession of a stolen vehicle (625 ILCS 5/4-103(a)(1) (West 2014)) for possessing a vehicle he knew to be stolen on January 1, 2016 (count III); and (4) criminal damage to property (720 ILCS 5/21-1(a)(1) (West 2014)) for knowingly damaging an automated teller machine (ATM) on January 1, 2016 (count IV).

¶ 5 Defendant's jury trial began on April 19, 2016, with the testimony of Roderick Clow, who testified he had parked his gold 2002 Ford Explorer Sport Trac pickup truck in the parking lot of Instant Replay sports bar in Quincy at approximately 6:30 p.m. on January 1, 2016. He left his truck in the parking lot for his wife and son to drive home. He left it unlocked

with the keys in the console. Clow said his wife called the police around 9:30 p.m. when she could not find the truck in the lot. At approximately 3 a.m. on January 2, 2016, police called Clow to inform him they recovered his truck in the Hy-Vee grocery store parking lot. It had damage to the lower rear panels, including scrapes and a transfer of red paint.

¶ 6 Jacob Griffith, who performs security monitoring for Titan Wheel, testified he reviewed surveillance video at the request of Quincy police for the evening of January 1, 2016. After his review, Griffith said he noticed that at approximately 7:15 p.m. an individual is seen walking through the parking lot of nearby Instant Replay checking the doors on various vehicles. From the video, Griffith is unable to identify the person's face, as it appears he or she is wearing a dark jacket with the hood pulled up. The person, who apparently found a door unlocked, got into a vehicle and drove away. The surveillance video was published to the jury.

¶ 7 Dan Brink, the facilities manager for First Bank and Trust, testified that on January 2, 2016 he received a complaint that the ATM on the campus of John Wood Community College was inoperable. He directed an employee to investigate. The employee discovered the ATM had been damaged with a noticeable dent in the front. The posts, which hold a canopy over the ATM, were scratched. Brink was able to retrieve surveillance video from the ATM which showed a truck backing into the machine. Once the truck hit the ATM, power was lost, as the wires were damaged. No money was missing; the vault had not been opened. The video recorded from the ATM was published to the jury.

¶ 8 Luke Humke, a Quincy police officer, testified that on January 2, 2016, he responded to the dispatch regarding the ATM. When he arrived, Humke observed (1) tire marks in the grass; (2) a square damage mark on the front of the ATM made from what he thought was most likely a hitch; and (3) the maroon paint on the poles on each side of the ATM had been

scraped off. In Humke's opinion, it appeared someone had backed into the ATM intentionally. Because Humke recalled that Clow's truck had been stolen the night before, he asked Clow if he could observe the damage to his truck. Humke found both sides of the truck had maroon paint transfer to the rear quarter panels and damage to the hitch receiver. In Humke's opinion, the paint on the ATM posts and the paint transfer on the truck were the same color.

¶ 9 Doug Frese, general manager of Starcrest Cleaners, testified he was notified at 6:30 a.m. on January 2, 2016, that the glass front door of the business had been shattered. When he arrived, the police were on the scene. Inside, the cash register drawers had been moved around, and the handset for the telephone was on the floor. Nothing had been taken from the business. Frese gave the police the security camera footage, which was also published for the jury. The footage showed the suspect throwing a piece of concrete through the glass door at approximately 11:30 p.m. on January 1, 2016. The suspect entered the business, jumped over the counter, checked the cash registers, and threw the handset of the telephone on the floor. The suspect was wearing a hooded jacket, blue jeans, and gloves.

¶ 10 Christopher Mueller, a Quincy police officer, responded to Starcrest Cleaners at approximately 6:15 a.m. on January 2, 2016. After retrieving the security footage and speaking with Frese, Mueller went to Wilco gas station because he knew they had also reported a burglary that evening. Mueller said he was not able to gather much information there. He went to Hy-Vee where Clow's truck had been recovered. Mueller watched surveillance footage of Hy-Vee's parking lot and saw a suspect exit Clow's truck wearing what appeared to be the same jacket, jeans, and gloves as the suspect in the Starcrest Cleaners footage.

¶ 11 Shawn Wilson, the store manager at Wilco, testified he received a telephone call at approximately 1:30 a.m. on January 2, 2016, from his father informing him of a break-in.

Wilson said a piece of concrete had been thrown through the door and items had been strewn all over the counter. A cash-register drawer, which contained approximately $160, was missing. Surveillance footage showed a truck driving up in front of the station. The suspect threw a piece of concrete through the door. Another camera angle from inside the store showed the suspect leaning over the counter and pushing the cash register to the floor. The suspect pulled the drawer out. A third camera angle showed the break-in from above. As Wilson was driving home after cleaning up the store at approximately 3 a.m., he spotted the truck that the suspect had been driving in the surveillance video parked in the Hy-Vee parking lot. On cross-examination, Wilson said he believed the truck was gray or silver.

¶ 12 Kevin Kasparie, an Adams County sheriff's deputy, responded to the burglary at Wilco at approximately 1:30 a.m. He said when he arrived, he observed that the glass entry door had been shattered, apparently by a large landscaping brick that was lying "in the middle of the business." Kasparie took a photo of a partial footprint he found "next to the back counter exit." Kasparie said he went to Hy-Vee and viewed the parking lot surveillance footage. On the video, he saw the suspect exit Clow's truck, walk to the passenger side, remove something from the passenger side, and place it in a silver Ford sport utility vehicle (SUV). The suspect drove away in the silver SUV. Kasparie viewed earlier surveillance footage and found the silver SUV had entered the Hy-Vee parking lot at approximately 7:30 p.m. on January 1, 2016. He was able to observe the SUV's license plate number with the exception of the last digit. A fellow deputy began running the partial plate number and found the SUV was registered to defendant.

¶ 13 Kasparie testified that on January 4, 2016, he and another officer went to defendant's residence and saw defendant in the SUV. Defendant agreed to accompany the officers to the police station. According to Kasparie, defendant was wearing what appeared to be

the same clothing and shoes as the suspect in the surveillance footage from Starcrest Cleaners, Wilco, and Hy-Vee. A photo of defendant in the interview room was published to the jury along with three still images taken from the Starcrest Cleaners surveillance video for the purpose of demonstrating the arguable comparison of the suspect's clothes and shoes to that of defendant's. The images from the surveillance footage showed a light discoloration on the right sleeve of the suspect's jacket. According to the photo from the interview room, the jacket defendant was wearing had a light-colored stain near the right elbow. Defendant denied any involvement in the burglaries. Officers obtained a search warrant for his residence and vehicle, which were both executed on January 4, 2016, after defendant's interview. Kasparie said defendant's landlord reported receiving $50 from defendant one to two days earlier. The deputy who searched defendant's vehicle found a pair of brown jersey gloves in the pocket of the driver's side door panel.

¶ 14 Gabriel Vanderbohl, a detective with the Quincy police department, investigated the Starcrest Cleaners burglary, the damage to the ATM, and the stolen vehicle. He said he had also viewed the surveillance video from the Wilco burglary and concluded that it appeared all of the crimes were committed by the same suspect. On January 6, 2016, Vanderbohl met with defendant, who was in custody on charges related to the Wilco burglary. Vanderbohl advised defendant he "wasn't going to be able to talk to him about the case that he was in jail for at that time," but he could ask questions about the other crimes since defendant "did not have any representation, meaning a lawyer, for those three cases." When Vanderbohl advised defendant he was on video at the various places, he invoked his right to counsel. However, when Vanderbohl advised he would return shortly with three citations for those crimes, defendant agreed to give a

statement. Defendant prepared a handwritten statement, which Vanderbohl read aloud to the jury. It provided as follows:

> " 'I drove to Hy-Vee on Broadway, parked my car, walked through the parking lot and crossed over Broadway to meet my friend in the parking lot'—well, it says 'in the parking, Kmart parking lot. I got in her car and we sat there and smoked meth, and then we drove around and smoked meth. At some point I remember being in a motel in a hot tub and getting sick. I do not remember the events of the night beyond that. I do not remember the day or time I parked my car there at Hy-Vee.' "

¶ 15 The State rested. Defendant moved for a directed verdict, which the trial court denied.

¶ 16 Defendant testified that he and his five-year-old daughter rented a room in a house on 46th Street in Quincy. He was employed at Knapheide Manufacturing Company through a temporary agency. Defendant said, on January 1, 2016, he took his daughter to her grandmother's house and then began drinking alcohol. He said he always kept the keys to his SUV in the center console, using the door keypad to enter. He said "a number of people" know the keypad combination because he allowed others to borrow his vehicle and trailer. He said his jacket and shoes were always in his vehicle because he wore them only for work. However, he admitted he was wearing the jacket and shoes when the officers arrived at his house on January 4, 2016, because he had prepared his trailer for a tree-removal job.

¶ 17 On cross-examination, defendant testified his handwritten statement was completely untrue. He said it was not him on any of the surveillance footage, but he admitted it "definitely looked like [his] jacket" in the Starcrest Cleaners footage and his shoes looked

"similar" to the suspect's shoes in the Wilco footage. He said, after he took his daughter to her grandmother's house, he went to Hy-Vee, bought vodka, and went to the cemetery where his parents and sister were buried. Defendant said Vanderbohl coached him on what to write in his statement. He said he "was scared and confused at the time." Defendant rested.

¶ 18 The State recalled Vanderbohl in rebuttal, who testified that defendant had told him that the last time someone borrowed his vehicle was "Christmastime 2015." Vanderbohl did not recall defendant mentioning he had a problem with alcohol. Rather, he recalled defendant stating that alcohol and methamphetamine "was not a good mixture." Vanderbohl denied coaching defendant or telling him what to write. He said defendant understood the nature of the interview and did not appear confused.

¶ 19 The jury found defendant guilty of all four charged offenses. The trial court sentenced defendant to concurrent 20-year prison terms on counts I, II, and III, and a concurrent 3-year term on count IV. This appeal followed.

¶ 20 II. ANALYSIS

¶ 21 Defendant filed this direct appeal, raising four contentions of error. First, he claims his trial counsel rendered ineffective assistance when she failed to file a motion to suppress the written statement he made in violation of his right to counsel. Second, he claims plain error occurred when several witnesses were allowed to narrate the contents of the surveillance footage when they had no personal knowledge of the events depicted. Third, he argues the State failed to prove him guilty of count IV, the criminal-damage-to-property offense, when there was insufficient evidence identifying him as the driver of Clow's vehicle at the time the ATM was damaged. Finally, defendant contends the trial court erred in sentencing him as a Class X offender. For the reasons that follow, we affirm.

¶ 22 A. Ineffective Assistance of Counsel

¶ 23 On January 4, 2016, Deputy Kasparie went to defendant's residence to speak with him about the crime spree that had occurred during the overnight hours beginning on January 1, 2016. After interviewing defendant and executing search warrants, Kasparie arrested defendant. On January 5, 2016, the State charged defendant with the Wilco burglary only. The same day, the trial court appointed the public defender to represent defendant with regard to that charge. The next day, on January 6, 2016, Quincy police detective Vanderbohl interviewed defendant in jail regarding the Starcrest Cleaners burglary, the stolen vehicle complaint, and the damage to the ATM. Defendant's appointed counsel was not present, as Vanderbohl explained: "[Defendant] did not have any representation, meaning a lawyer, for those three cases." Defendant claims his counsel should have moved to suppress the written statement obtained after defendant was questioned by police in her absence. Defendant claims he was prejudiced by counsel's inaction, especially since his case was based entirely on circumstantial evidence.

¶ 24 A claim of ineffective assistance of counsel is analyzed under the familiar two-prong standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Henderson*, 2013 IL 114040, ¶ 11. To prevail on such a claim, "a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *People v. Petrenko*, 237 Ill. 2d 490, 496 (2010). To establish deficient performance, the defendant must show his attorney's performance fell below an objective standard of reasonableness. *People v. Evans*, 209 Ill. 2d 194, 219 (2004) (citing *Strickland*, 466 U.S. at 687). In doing so, the defendant must overcome a "strong presumption" that counsel's conduct was the result of sound trial strategy, not incompetence. *People v. Pecoraro*, 175 Ill. 2d 294, 319-20 (1997). "[T]he decision whether to file a motion to suppress is generally 'a matter of trial strategy, which is entitled to

great deference.' " *People v. Bew*, 228 Ill. 2d 122, 128 (2008) (quoting *People v. White*, 221 Ill. 2d 1, 21 (2006)).

¶ 25 To establish prejudice resulting from counsel's failure to file a motion to suppress, a defendant must show a reasonable probability that: (1) the motion would have been granted and (2) the outcome of the trial would have been different had the evidence been suppressed. *People v. Patterson*, 217 Ill. 2d 407, 438 (2005) (citing *People v. Orange*, 168 Ill. 2d 138, 153 (1995)). "A defendant must satisfy both prongs of the *Strickland* test and a failure to satisfy any one of the prongs precludes a finding of ineffectiveness." *People v. Simpson*, 2015 IL 116512, ¶ 35. "However, if the ineffective-assistance claim can be disposed of on the ground that the defendant did not suffer prejudice, a court need not decide whether counsel's performance was constitutionally deficient." *People v. Evans*, 186 Ill. 2d 83, 94 (1999).

¶ 26 This case can be decided on the prejudice prong. In order for a defendant to establish that he was prejudiced by counsel's failure to file a motion to suppress, he must show a reasonable probability that the motion would have been granted and that the outcome of the trial would have been different if the evidence at issue had been suppressed. *Henderson*, 2013 IL 114040, ¶ 15. An attorney's decision not to file a motion to suppress will not be grounds to find incompetent representation when the motion would have been futile. *Patterson*, 217 Ill. 2d at 438.

¶ 27 Here, the success of a motion to suppress defendant's statement is dependent on whether Vanderbohl violated defendant's sixth amendment right to counsel. Defendant claims he made the statement in his appointed counsel's absence. He claims Vanderbohl "interrogated [him] outside the presence of counsel about other closely related offenses, alleged to be part of

the same crime spree, fully aware that [he] was represented by counsel and in violation of [his] sixth amendment rights."

¶ 28 When an individual is taken into custody and interrogated, certain procedural safeguards are necessary to protect that individual's constitutional right against self-incrimination. *Miranda v. Arizona*, 384 U.S. 436 (1966). Not all statements given by a defendant after he "has been taken into custody are to be considered the product of interrogation." *Rhode Island v. Innis*, 446 U.S. 291, 299 (1980). Any statement which is volunteered is not necessarily barred by the fifth amendment and can be admitted at trial. *Miranda*, 384 U.S. at 478.

¶ 29 The *Miranda* Court noted that "[t]he fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated." *Miranda*, 384 U.S. at 478. Interrogation occurs through express police questioning or "any words or actions on the part of the police *** that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Innis*, 446 U.S. at 301. See *People v. Wilson*, 164 Ill. 2d 436, 450 (1994). The Court further held that when an accused invokes this right to counsel, "the interrogation must cease until an attorney is present." *Miranda*, 384 U.S. at 474. When the defendant invokes his right to counsel, the accused is presumed to be unable to proceed without counsel's advice. *People v. Peck*, 2017 IL App (4th) 160410, ¶ 30. However, further interrogation may occur *only if* the accused initiates " 'further communication, exchanges, or conversations with the police.' " *Id.* at 31 (quoting *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981)).

¶ 30 Our supreme court has stated that " 'the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police

(other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.' " *People v. Hunt*, 2012 IL 111089, ¶ 30 (quoting *Innis*, 446 U.S. at 300-01).

¶ 31 Here, Vanderbohl testified he was questioning defendant about the three uncharged crimes. (The interview was not video or audio recorded.) Defendant initially agreed to speak with the detective. Vanderbohl said he told defendant that defendant could be seen on video surveillance at Hy-Vee and Starcrest Cleaners. Vanderbohl said defendant requested an attorney "at some point during that dialogue." Vanderbohl testified:

> "At that point I stopped questioning him and then I told him that I was going to have to retrieve three citations that I was going to write to him. He wanted to know what those were going to be for, so I advised him as part of the booking process what he was going to be arrested for. He stated that he wanted to talk more. I told him that I couldn't without—if he wanted an attorney, and he stated that he wanted to talk without one."

¶ 32 Based upon this testimony, it does not appear that Vanderbohl improperly continued the interrogation after defendant invoked his right to counsel. Vanderbohl merely announced he was going to retrieve citations. He did not ask defendant any questions or use any words that would be "reasonably likely to elicit an incriminating response." *Hunt*, 2012 IL 111089, ¶ 30. In fact, it was defendant who reinitiated a dialogue by asking about the nature of the citations. Vanderbohl reminded defendant he had requested an attorney, which precluded Vanderbohl from engaging in any further conversation with defendant. At that point, defendant waived his right to counsel and gave Vanderbohl a written statement.

¶ 33 Assuming the trial court would have been presented with these facts at a hearing on a motion to suppress, we cannot say there existed a reasonable probability that the motion would have been successful. It does not appear that Vanderbohl obtained defendant's statement in violation of his right to counsel. Vanderbohl's statement that he needed to retrieve three citations did not constitute further interrogation or a statement that was reasonably likely to elicit an incriminating response from defendant. Rather, it was defendant who reinitiated the conversation with Vanderbohl.

¶ 34 Accordingly, we find defendant is unable to demonstrate that a reasonable probability exists that a motion to suppress would have been granted. Consequently, defendant is unable to demonstrate that he was prejudiced by counsel's failure to request suppression, as a motion to suppress would have been futile (*Patterson*, 217 Ill. 2d at 438), and defendant's claim of ineffective assistance of counsel must fail. See *People v. Edwards*, 195 Ill. 2d 142, 163 (2001) (failure to satisfy either prong of the *Strickland* test defeats a claim of ineffective assistance).

¶ 35 B. Silent-Witness Theory

¶ 36 Defendant next argues plain error occurred when six State witnesses violated the silent-witness theory by narrating the events depicted on the surveillance videos played for the jury when those witnesses had no personal knowledge of the events. Assuming *arguendo* we find no plain error, defendant claims trial counsel rendered ineffective assistance for failing to object to the witnesses's narration.

¶ 37 Because the issue is whether the witnesses's testimony constitutes admissible evidence as a matter of law, rather than whether the trial court erred in admitting the evidence, our standard of review is *de novo*. *People v. Sykes*, 2012 IL App (4th) 111110, ¶ 30. Defendant concedes he failed to preserve this issue for appeal by failing to raise it during the trial court

proceedings. He contends that, because the evidence was so closely balanced, the clear and obvious error was enough to tip the scales of justice against him. We disagree that any error occurred.

¶ 38 The plain-error doctrine provides a limited and narrow exception to the general rule of forfeiture. *People v. Walker*, 232 Ill. 2d 113, 124 (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 the defendant's trial and the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Taylor*, 2011 IL 110067, ¶ 30. As a matter of convention, reviewing courts typically undertake plain-error analysis by first determining whether error occurred at all. *People v. Sargent*, 239 Ill. 2d 166, 189 (2010). "If error is found, the court then proceeds to consider whether either of the [aforementioned] two prongs of the plain-error doctrine have been satisfied." *Id.* at 189-90. However, when a record clearly shows that plain error did not occur, we can reject that contention without further analysis. *People v. Bowens*, 407 Ill. App. 3d 1094, 1108 (2011). We first address whether any error occurred at all.

> "Under the silent[-]witness theory, a surveillance video may be admissible as substantive evidence in the absence of authentication by an eyewitness with personal knowledge of the content if there is adequate proof of the reliability of the process that produced the recording. [Citation.] Under this theory, it is not necessary for a witness to testify to the accuracy of the images depicted in the video so long as the accuracy of the process used to produce the evidence is established with an accurate foundation. [Citation.] This is so because the

evidence is ' "received as a so-called silent witness or as a witness which 'speaks for itself.' " ' [Citation.]" *People v. Mister*, 2016 IL App (4th) 130180-B, ¶ 46 (quoting *Taylor*, 2011 IL 110067, ¶¶ 32, 35) (quoting Jordan S. Gruber, *Foundation for Contemporaneous Videotape Evidence*, in 16 Am. Jur. Proof of Facts 3d 493, § 5, at 508 (1992)).

¶ 39 Where no witness has personal knowledge as to the events a particular recording or photograph depicts, the parties may still introduce those photographs and video recordings as substantive evidence so long as the proper foundation is laid. *Taylor*, 2011 IL 110067, ¶ 32. This evidence is admitted under the silent-witness theory, as the contents speak for themselves. *Id.* Defendant does not contest the admissibility of the video recordings. Instead, he claims, six of the State's witnesses violated the silent-witness theory by narrating the events depicted on the surveillance videos without personal knowledge of those events.

¶ 40 A lay witness may only testify to events of which he or she has personal knowledge. Ill. R. Evid. 602 (eff. Jan. 1, 2011). Such testimony must be "(a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Ill. R. Evid. 701 (eff. Jan. 1, 2011). Further, Illinois Rule of Evidence 704 (eff. Jan.1, 2011) provides, "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." See also *People v. Brown*, 2017 IL App (1st) 142197, ¶ 58.

¶ 41 Our supreme court has stated, "[Rule 704(a) (Ill. R. Evid. 704(a) (eff. Jan. 1, 2011))] excludes opinion testimony of a lay witness 'wherever inferences and conclusions can be

drawn by the jury as well as by the witness ***.' " (Emphasis omitted.) *Freeding-Skokie Roll-Off Service, Inc. v. Hamilton*, 108 Ill. 2d 217, 221 (1985); see also *Sykes*, 2012 IL App (4th) 111110, ¶ 36. In *Sykes*, this court held the witness was "in no better position, based on the video admitted into evidence and published to the jury, to determine" the ultimate issue of the case, *i.e.* whether the defendant removed money from the cash register. *Id.* at ¶ 43 (a loss-prevention officer testified he reviewed surveillance footage which depicted defendant committing a theft). *Id.* at 44.

¶ 42 Defendant relies on cases from Indiana and Kentucky to support his claim that "a witness is not allowed to narrate the events depicted on the video if []he has no personal knowledge of the events []he is describing." See *Groves v. State of Indiana*, 456 N.E.2d 720, 723 (Ind. 1983); *Childers v. Commonwealth of Kentucky*, 332 S.W.3d 64, 74 (Ky. 2010). Defendant cites no Illinois authority that sets forth this *per se* rule.

¶ 43 Defendant also relies on our supreme court's opinion in *Freeding-Skokie Roll-Off Service*, a civil case involving the recovery of damages from a car accident. In that case, the supreme court addressed the admissibility of lay opinion testimony, not a witness's narration of events on a surveillance video. The supreme court noted that a lay witness *can* describe the details of a car accident but *cannot* opine as to which driver was negligent in causing the accident. *Id.* at 222. The court held the admission of opinion testimony of lay witnesses as to whether the collision could have been avoided was reversible error. *Id.* at 223. We find that case wholly inapplicable to the facts before us.

¶ 44 In this case, the six witnesses, about whom defendant complains, did not testify for the purpose of (1) identifying defendant as the person seen on the various surveillance videos or (2) stating any opinions or conclusions. That is, these witnesses were not called upon to offer

opinions on whether they believed it was defendant in the videos. Although the witnesses were not present at the various locations, their testimony included narrating portions of the recordings. Their perceptions did not need to be based on the live events at the locations because they were not providing eyewitness accounts. Rather, their testimony was relevant to the events depicted in the recordings. Consequently, in order to comply with the requirement of Rule 602 regarding a witness's personal knowledge of the events, the witnesses needed to have viewed only the recording. This testimony laid an evidentiary foundation for admission of the surveillance recording. See *Brown*, 2017 IL App (1st) 142197, ¶ 62 (citing *People v. Thompson*, 2016 IL 118667, ¶¶ 8, 61 (law enforcement officer's testimony describing the actions of "the subject" in the surveillance recording did not identify the defendant as the individual depicted in the recording and thus was not lay opinion identification testimony).

¶ 45 The six witnesses described the actions and movements of the subject in the parking lots and in or around the businesses. Because some of the footage was difficult to see due to clarity issues, and because it was sometimes difficult to pinpoint the subject's movements, particularly in the parking lot videos, the witnesses's accounts may have helped the jury focus on the suspect's actions. These witnesses did not purport to know defendant personally so as to aid in his identification as the suspect. Their testimony consisted of fact-based summary reviews of the events depicted in the surveillance footage.

¶ 46 For example, Griffith, the security monitor for Titan Wheel, described the placement of the various security cameras, the views seen from those cameras, and the footage captured on the night in question. He testified he was not able to identify the person in the video.

¶ 47 Brink, the facilities manager for First Bank and Trust, described the location of the ATM, the recording system within the ATM, the damage sustained to the ATM, and his

observation of a truck backing into the ATM on the recorded video. He provided no identifying information for the truck or the suspect driving the truck.

¶ 48 Frese, the general manager of Starcrest Cleaners, described the damage to the front door, the location and number of security cameras in place, and his observation of the security footage. He testified he was not able to see the person's face, but he described what the suspect was wearing—a "Carhartt-type coat with a hood, with gloves."

¶ 49 Officer Mueller responded to Starcrest Cleaners for a reported burglary. On the witness stand, he described the damage to the front door and the interior, the procedure he used to record the surveillance footage on his digital camera from the store's computer monitor, and his review of the security footage. He testified as follows: "Basically, what I observed was a male subject who was wearing like a tan Carhartt—it appeared to be a tan Carhartt-like jacket. It had like an emblem on the jacket. Just from my experience, I believe it was like a Carhartt emblem, and blue jeans, and he also looked like he had gloves on and a hood pulled up over his head." Mueller interpreted various still images taken from the surveillance video. He further testified he went to Hy-Vee and observed their surveillance video. He said the subject was wearing the same clothes as the subject from the Starcrest Cleaners burglary. Mueller did not identify defendant as the person in the video.

¶ 50 Wilson, the manager at Wilco, described the damage to the front door and interior, the fact that a cash register was missing, the number and placement of cameras, and his observation of the security footage. He described the truck, which he could see "perfectly." He also testified he spotted the truck in the Hy-Vee parking lot. Wilson identified defendant in court as a former employee, but he did not identify defendant as the suspect in the surveillance footage.

¶ 51 Finally, Kasparie testified about the details of his investigation. He described the damage at Wilco, his observation of the video surveillance, and the process he used to record the footage from the computer monitor. He testified he went to Hy-Vee and viewed the surveillance footage there. Describing the footage, Kasparie said the "individual exited the tan truck, went to the passenger side of the tan truck, grabbed something out of the passenger seat and then put it into the passenger side of the silver Ford SUV. He then walks around the silver Ford SUV, gets in the driver's seat and leaves." Kasparie also viewed footage from earlier in the evening when the suspect parked the vehicle in the Hy-Vee parking lot. He said he was not able to see "any identifying features about the individual that was driving the car[.]" Kasparie did not identify defendant as the person he saw on the video.

¶ 52 Because these witnesses did not provide opinion testimony or testimony in any way identifying the suspect in the footage as defendant, the case law pertaining to the admissibility of identification testimony of a lay witness is not applicable here. See generally *Thompson*, 2016 IL 118667 (addressing the admissibility of lay opinion identification testimony). That is, we are not faced with the issue of the admissibility of opinion identification testimony of lay witnesses. Instead, these witnesses testified only as to what they observed on the surveillance videos. They provided facts only and in no way invaded the province of the jury by reaching conclusions, drawing inferences, stating opinions, or making identifications. The jury remained free, without improper influence, to determine the ultimate issue in the case after weighing the evidence, assessing the witnesses's credibility, resolving conflicts in the evidence, and drawing reasonable inferences therefrom. See *People v. Washington*, 2012 IL 110283, ¶ 60. We conclude that defendant has not established any error, much less plain error.

¶ 53 Further, defendant has failed to establish any resulting prejudice that would advance any meaningful argument that his counsel was ineffective for failing to object to this testimony. As stated above, these witnesses did not provide testimony that would suggest the identification of defendant as the suspect in the surveillance videos. In fact, if anything, their testimony *aided* defendant's theory of the case by acknowledging they could not see any identifying features of the suspect's face. Some witnesses even admitted it was impossible to know whether the suspect was male or female. For these reasons, we conclude defendant is unable to demonstrate prejudice.

¶ 54 C. Sufficiency of the Evidence

¶ 55 Defendant next contends the State failed to produce sufficient evidence to establish critical elements of the offense of criminal damage to property. In particular, he claims the State's circumstantial evidence failed to prove beyond a reasonable doubt he was driving Clow's vehicle at 10 p.m. when the damage to the ATM occurred. As a result, he claims, his conviction on count IV must be reversed.

¶ 56 Defendant relies on the evidence presented at trial to argue that he could not have been the person who stole Clow's vehicle. He claims the Hy-Vee surveillance video purportedly shows him parking his own vehicle at 7:30 p.m., while the Titan Wheel surveillance video shows someone stealing Clow's vehicle at 7:15 p.m. Because these two videos, when taken together, do not support the State's theory that defendant stole Clow's vehicle after parking his own at Hy-Vee, his conviction for criminal damage to property cannot stand. He claims there is no evidence demonstrating that it was him that stole Clow's vehicle or that he was driving that vehicle at the time it damaged the ATM.

¶ 57 A reviewing court will not set aside a criminal conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). On a challenge to the sufficiency of the evidence, " '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)). This standard applies regardless of whether the evidence is direct or circumstantial, and circumstantial evidence meeting this standard is sufficient to sustain a criminal conviction. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009). The trier of fact is responsible for resolving conflicts in the testimony, weighing the evidence, and determining what inferences to draw, and a reviewing court ordinarily will not substitute its judgment on these matters for that of the trier of fact. *People v. Cooper*, 194 Ill. 2d 419, 431 (2000). " '[I]n weighing evidence, the trier of fact is not required to disregard inferences which flow normally from the evidence before it, nor need it search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt.' " *People v. Hardman*, 2017 IL 121453, ¶ 37 (quoting *Jackson*, 232 Ill. 2d at 281).

¶ 58 Betsy Terwelp, a manager at Hy-Vee, testified at trial that she reviewed with Kasparie the video surveillance of the parking lot and copied the relevant portions onto a disc. The prosecutor asked Terwelp whether the videos contained a timestamp. She indicated they did, and that the timestamp was correct or, at least, within two minutes of accuracy. Terwelp did not provide testimony about what exact time appeared on the videos given to Kasparie. The video published to the jury did not contain a timestamp.

¶ 59 Kasparie testified he requested Terwelp to "go back in time to see exactly what time [defendant's vehicle] actually entered the parking lot of Hy-Vee." After doing so, he discovered, according to his testimony, that the vehicle entered "[a]round 7:30 p.m. on January 1st."

¶ 60 Defendant claims this evidence "casts doubt on the State's entire case" and, if the exact timing of the events is not accurate, "there is no reason to trust [the State's] assessment of the time when the other videos were recorded." We disagree.

¶ 61 The jury heard evidence that, at 7:15 p.m., Clow's vehicle was stolen from Instant Replay's parking lot. Kasparie's testimony that defendant's vehicle entered Hy-Vee's parking lot "around 7:30 p.m." does not necessarily destroy the State's timeline. The jury could have merely assumed Kasparie's recollection was imprecise, given he testified only to an estimate or approximate time. This 15-minute disparity was not likely fatal but interpreted only as a best guess.

¶ 62 Otherwise, based on the totality of the evidence, a reasonable jury could have found, after resolving conflicts in the testimony, weighing the evidence presented, and determining what inferences to draw from that evidence, that the State sufficiently proved defendant guilty beyond a reasonable doubt of all charged offenses, including criminal damage to property. Accordingly, we find, after viewing the evidence in the light most favorable to the prosecution, the jury's verdict here was consistent with that of any rational trier of fact.

¶ 63 D. Sentence

¶ 64 Finally, defendant claims the trial court erred in sentencing him as a Class X offender when it failed to consider whether his Maryland burglary conviction contained the same

elements as an Illinois Class 2 or greater felony as required by section 5-4.5-95(b) of the Illinois Code of Corrections (Code) (730 ILCS 5/5-4.5-95(b) (West 2014)).

¶ 65 The applicable section of the Code provides as follows:

> "When a defendant, over the age of 21 years, is convicted of a Class 1 or Class 2 felony, after having twice been convicted in any state or federal court of an offense that contains the same elements as an offense now (the date the Class 1 or Class 2 felony was committed) classified in Illinois as a Class 2 or greater Class felony and those charges are separately brought and tried and arise out of different series of acts, that defendant shall be sentenced as a Class X offender." 730 ILCS 5/5-4.5-95(b) (West 2014).

¶ 66 Citing the First District's opinion in *People v. Washington*, 195 Ill. App. 3d 520, 529 (1990), defendant contends his sentence should be vacated and the cause remanded for a new sentencing hearing because the State failed to demonstrate the necessary elements of defendant's Maryland burglary conviction. However, *Washington* was decided prior to our supreme court's decision in *Williams*, which provides guidance on the requirements for the imposition of Class X sentencing provisions based upon section 5-4.5-95(b) of the Code (730 ILCS 5/5-4.5-95(b) (West 2014)). See *People v. Williams*, 149 Ill. 2d 467 (1992).

¶ 67 In *Williams*, the court held that the presentence report is generally a reliable source for a defendant's criminal history (*Id.* at 491), and that requiring the State to do more to prove prior convictions for purposes of the statute, which is now codified at section 5-4.5-95(b) of the Code (730 ILCS 5/5-4.5-95(b) (West 2014)), such as providing certified copies of conviction, would be a "useless requirement and a needless waste of time" (*Williams*, 149 Ill. 2d at 493). The supreme court held that the criminal history in the presentence report was all that

was necessary to establish the defendant's eligibility for an enhanced sentence. *Williams*, 149 Ill. 2d at 491. That is, the State need not present certified records of the defendant's prior convictions for purposes of showing Class X eligibility. Presentence reports are adequate. *Williams*, 149 Ill. 2d at 493.

¶ 68 This was so, the court held, because defendant "never once claimed at sentencing that [his] criminal record did not make [him] eligible for a sentence under the Class X provision." *Williams*, 149 Ill. 2d at 493. "Any claimed deficiency or inaccuracy within a presentence report must first be brought to the attention of the sentencing court, and a failure to do so results in waiver of the issue on review. [Citations.] Every defendant in the cases before us neglected to notify the sentencing court that he believed the presentence report was deficient because the report failed to include the dates upon which the felonies were committed." *Williams*, 149 Ill. 2d at 493 (counsel not only failed to object, but conceded his client was eligible for a Class X sentence). Indeed, this court has previously held that a defendant's eligibility to be sentenced as a Class X offender "may be presented in any manner that the sentencing court, in its discretion, finds to be reliable and trustworthy." *People v. Shelton*, 208 Ill. App. 3d 1094, 1105 (1991) (it is not the State's burden to prove the defendant's eligibility).

¶ 69 On this record, we must assume all parties and the trial court were satisfied with the information provided pertaining to defendant's eligibility as a Class X offender pursuant to section 5-4.5-95(b) of the Code (730 ILCS 5/5-4.5-95(b) (West 2014)). See *People v. Tye*, 141 Ill. 2d 1, 25 (1990) (it is assumed the judge considered only competent evidence in making a finding and that assumption will be overcome only if the record affirmatively demonstrates the contrary). The presentence report was presented to and reviewed by the court, and both parties were given the opportunity to question and challenge its contents. No one addressed the

eligibility qualifications of defendant's Maryland burglary conviction. It is the defendant's burden to challenge any evidence presented to the court at sentencing if he believes such evidence is inaccurate, defective, or inapplicable. See *People v. Brown*, 229 Ill. 2d 374, 389 (2008) (addressing the habitual criminal sentencing provisions, the court found the defendant will be eligible for the enhanced sentence upon the State's presentation of qualifying evidence unless he produces evidence to the contrary).

¶ 70 Here, defendant's attorney did not object to Class X eligibility at the sentencing hearing. Was it because she had checked the Maryland statute and concluded that indeed defendant's burglary conviction qualified, or was it because she failed to do so? Regardless, the trial court considered all of the information presented, including defendant's Maryland burglary conviction, and determined, without objection, defendant was eligible for Class X sentencing. As an aside, we note this issue could have easily been resolved (that is, if counsel had, in fact, confirmed the Maryland burglary was a qualifying offense) by ensuring that a complete and accurate record was made regarding defendant's eligibility. It would have required nothing more than having either party or the trial court reiterate that a burglary in Maryland was the same or similar class felony as in Illinois based upon the sentencing range and elements of the offense.

¶ 71 To address defendant's claim of counsel's substandard performance, we note that an ineffective-assistance-of-counsel claim is analyzed under the two-prong *Strickland* standard. *Strickland*, 466 U.S. at 687; *Evans*, 186 Ill. 2d at 93. For a successful ineffective-assistance-of-counsel claim, a defendant must demonstrate (1) defense counsel's performance fell below an objective standard of reasonableness and (2) the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. To satisfy the deficiency prong of *Strickland*, the defendant must demonstrate counsel made errors so serious and counsel's performance was so deficient that

counsel was not functioning as "counsel" guaranteed by the sixth amendment (U.S. Const., amend. VI). *Evans*, 186 Ill. 2d at 93. Further, the defendant must overcome the strong presumption the challenged action or inaction could have been the product of sound trial strategy. *Id* . To satisfy the prejudice prong, the defendant must prove a reasonable probability exists that, but for counsel's unprofessional errors, the proceeding's result would have been different. *Id*.

¶ 72 As stated on this record, we are unable to discern the reasons, if any, counsel failed to object to or inquire about the Maryland burglary conviction. Further, the record is devoid of any facts that suggest the Maryland burglary conviction is a qualifying offense for the purposes of imposing a Class X sentence. In order to determine whether an out-of-state conviction is a "same or similar class felony" as required by the Code, trial courts should consider both the sentencing range and the elements of the out-of-state offense before imposing an extended-term sentence. *People v. Bailey*, 2015 IL App (3d) 130287, ¶ 15. Because the record is inadequate for resolving defendant's claim of ineffective assistance of counsel, we decline to consider it on direct appeal. See *People v. Veach*, 2017 IL 120649, ¶ 46 ("[I]neffective assistance of counsel claims may sometimes be better suited to collateral proceedings but only when the record is incomplete or inadequate for resolving the claim.")

¶ 73 We therefore conclude "the record is incomplete or inadequate for resolving the claim" at this time. See *Veach*, 2017 IL 120649, ¶ 46. Rather, we would be in a better position to review the matter following postconviction proceedings, where defendant can develop a complete record for our review.

¶ 74 III. CONCLUSION

¶ 75 For the reasons stated, we affirm defendant's conviction and sentence. As part of our judgment, we award the State its $75 statutory assessment against defendant as costs of this appeal.

¶ 76 Affirmed.