

2012 Ill. App. (2d) 100969-U
No. 2-10-0969
Order filed February 16, 2012

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Lake County.
Plaintiff-Appellee,)	
)	
v.)	No. 09-CF-3276
)	
DAVID THOMAS,)	Honorable
)	John T. Phillips,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Zenoff concurred in the judgment.

ORDER

Held: The State provided an adequate foundation for a video recording to be admitted into evidence; the State proved its case beyond a reasonable doubt; the trial court did not abuse its discretion in sentencing defendant to a longer term than it initially had after defendant withdrew a guilty plea; defendant's due process rights were not violated by the fact that the video recording contained certain gaps; and defendant received the effective assistance of counsel.

¶ 1 Defendant, David Thomas, appeals a judgment of the circuit court of Lake County convicting him of retail theft (720 ILCS 5/16A-3(a) (West 2008)). The trial court imposed an extended sentence of six-years' imprisonment. Defendant now appeals, raising five issues. First, he contends

that a video recording was admitted into evidence without a proper foundation. Second, he argues that the State failed to prove him guilty. Third, he complains that the trial court imposed a greater sentence than the one it had imposed pursuant to a guilty plea, which defendant later withdrew. Fourth, he asserts that his due process rights were violated because the State lost certain evidence. Fifth, he claims he did not receive the effective assistance of counsel. For the reasons that follow, we affirm.

¶ 6

I. BACKGROUND

¶ 7 Defendant initially pleaded guilty to one count of retail theft. The plea was partially negotiated in that the State agreed to a five-year sentencing cap. The trial court stated it would abide by this agreement. It imposed a sentence of 4-1/2 years. Defendant filed a motion to withdraw his plea, alleging ineffective assistance of counsel. The trial court granted the motion, and the case proceeded to a bench trial. Defendant was charged with two counts of retail theft and one count of burglary. The following evidence was adduced.

¶ 8 The sole witness to testify was Michael London, who was called by the State. London testified that he is employed by Sears Holdings as a loss prevention manager. He works at a K-Mart in Zion. There is a camera system in the store as well as a tagging system that causes some merchandise to set off an alarm if it is taken out the front door. A security guard is usually at the front door.

¶ 9 London testified that he was working during the evening of August 16, 2009. He was working on paperwork in his office, where he was also able to view monitors linked to the cameras in the store. He observed defendant in the health and beauty department. Initially, he “didn’t think anything of it,” however, defendant left the department and returned five minutes later. This drew

London's attention, and he zoomed the camera in on defendant. Defendant had a shopping cart with a small garbage can in it. A backpack was inside the garbage can. He approached some deodorant and unzipped the backpack. London stated that defendant began "putting merchandise in the backpack without regard to the price, size, [or] color." Defendant first took "multiple bars of Degree deodorant." Next, London testified, defendant went to the pharmacy counter and placed some Nicorette gum in the backpack.

¶ 10 Defendant then zipped up the backpack and headed towards the front of the store. He still had the shopping cart at this time. London called the police. Defendant went to the comforter section of the store. He took the backpack out of the cart at this time and exited the store without paying for any of the items in the backpack. The police stopped defendant on the sidewalk in front of the store. Before he approached the police, defendant set the backpack down behind a pole. Defendant was handcuffed and placed in the back of a squad car. Defendant stated that he took the deodorant because his car was out of gas.

¶ 11 The State then sought to have a video recording generated by the camera system at London's store admitted into evidence. Defendant objected, and the State questioned London about the recording in an attempt to lay a foundation for its admission. The trial court ruled that the State was successful in doing so. It then viewed the recording. As the recording played, London described the events it memorialized. The recording starts when defendant is in the health and beauty department for the second time. London explained that the first time defendant was in that department was not on the tape. London acknowledged that the recording stops before the point at which defendant left the store. This is because that area of the store is covered by a different camera.

¶ 12 London further testified that the police recovered the backpack. London went through it and

found the deodorant and gum that he had seen defendant place in the backpack. He inventoried the items and determined they were worth \$564.91. London added that defendant made no purchases inside the store.

¶ 13 During cross-examination, London testified that his office is in the rear of the store and that it takes him approximately 17 seconds to get to the front of the store. There was no recording from the camera covering the front of the store because the video technician that copied the footage from the store's system to the compact disc presented at trial "made an error and did not record that video." London explained that a technician made the recording from the camera system; however, he neglected to include footage from the camera covering the front door. London did not realize this until the footage was no longer on the camera system.

¶ 14 London testified that at the time he observed defendant, he was working alone. He was watching six monitors and doing paperwork, though he could not recall what sort of paperwork. London also could not recall if there was a guard at the front door at the time; however, he stated that a guard's responsibilities do not include stopping shoplifters. London could not recall the color of the garbage can in which defendant placed the backpack.

¶ 15 When London exited the store, he saw defendant on the front sidewalk. Defendant had the backpack. The police were "near the end of the building positioned so you couldn't see them." London was "no more than ten, 15 feet" away from defendant. An officer approached and handcuffed defendant. Defendant was placed in a squad car, and a second officer arrived. At one point, one of the officers opened the back door of the squad car, and London overheard defendant say that he took the merchandise because his car was out of gas. London acknowledged that he prepared a written report about the incident and that the report made no mention of defendant making

such a statement. On redirect examination, London explained that while he would note in a report that he did an interview with a shoplifter, in this case, he did not actually interview defendant.

¶ 16 After London's testimony concluded, the State rested. Defendant made, and the trial court denied, a motion for a directed finding. Defendant then declined to present any evidence, and the parties presented closing arguments.

¶ 17 The trial court first noted that it could not conclude beyond a reasonable doubt that defendant entered the store with the intent to commit a theft. Therefore, it found him not guilty of burglary. It also found defendant not guilty of one count of retail theft (the trial court did not set forth its reasoning with respect to this count). However, it found him guilty of one count of retail theft, which was enhanced to a class 3 felony due to a prior conviction. See 720 ILCS 5/16A-3(a) (West 2008). The trial court subsequently sentenced defendant to six-years' imprisonment. He now appeals.

¶ 18 **II. ANALYSIS**

¶ 19 Defendant raises five issues before this court. First, he argues that the trial court erred in permitting a video recording to be admitted into evidence without a proper foundation. Second, he contends that he was not proven guilty beyond a reasonable doubt. Third, he asserts that the trial court abused its discretion when it imposed a greater sentence following a trial after it permitted defendant to withdraw a guilty plea. Fourth, he claims that his due process rights were violated because the State lost certain evidence. Fifth, he argues his attorney's representation of him constituted the ineffective assistance of counsel. We will address these issue in the order that defendant raises them.

¶ 20 **A. The Video Recording**

¶ 21 Defendant first argues that the trial court erred in allowing the admission of a video recording without a proper foundation. We review this issue using the abuse-of-discretion standard. *People ex rel Sherman v. Cryns*, 203 Ill. 2d 264, 284 (2003) (“The admission of a videotape into evidence is within the sound discretion of the circuit court and will not be disturbed absent an abuse of discretion.”). Therefore, we will disturb such a ruling only if no reasonable person could agree with the position taken by the trial court. *People v. Becker*, 239 Ill. 2d 215, 234 (2010).

¶ 22 Generally speaking, there are two ways the proponent of a video recording can lay a foundation for its admission. Traditionally, a recording may be admitted where a witness can testify that it constitutes a fair and accurate representation of some object or event. *People v. Smith*, 321 Ill. App. 3d 669, 675 (2001). Alternatively, a foundation may be established under a “silent witness” theory, where evidence is set forth that the process that produced the photograph or videotape was reliable. *People v. Taylor*, 2011 IL 110067, ¶39. The traditional method is at issue in this case.

¶ 23 Here, London testified that the video recording “truly and accurately reflect[ed] the happening at the Zion store.” Furthermore, he testified that he observed no additions, deletions, or anything different than what he had observed. We note that London also testified briefly as to how the tape was made and to the chain of custody; however, such considerations are relevant to the “silent witness” method of establishing a foundation rather than the traditional one. The trial court found that London’s testimony provided an adequate foundation. Subsequently, London explained that he first observed defendant prior to the point at which the tape commences.

¶ 24 Defendant contends that the trial court’s ruling was error. Defendant first states that the recording was “admittedly not accurate.” He then points to several statements London made about how the recording was made, such as who copied it from the store’s camera system to the compact

disc that was presented to the trial court. Again, such things concern the “silent witness” method, and they are not relevant to assessing whether the State established a foundation under the traditional method. Defendant also points out that though there were six cameras in the store, the recording only contains material from two of them. He notes that London testified he observed defendant five minutes before the recording begins. Defendant then reasons that the recording was incomplete and that, therefore, London could not testify that it accurately depicted what he observed. He concludes, “The fact that four of the six cameras that were operating at the time of [the] incident are not depicted on the CD, as well as the gaps in the footage that was [*sic*] admitted, raises an issue of the integrity of the recording as well as the capability of the system which produced the recording.”

¶ 25 We find defendant’s argument unpersuasive. Defendant seems to be advancing the proposition that where a camera does not record every single thing a person does, what it does record is somehow suspect. Initially, we note he cites no authority holding thusly, and it is a dubious proposition at that. We fail to see how the fact that the recording did not show the first time defendant was in the health and beauty department would preclude the trial court from accepting London’s testimony that it did accurately depict the events when defendant returned to that department and took the merchandise. London observed these events, and he also observed that portion of the recording. As such, he could testify that that portion of the tape accurately represented the events he observed. At the very least, keeping in mind the standard of review, a reasonable person certainly could conclude that the recording was accurate based on this testimony, regardless of whether some other events were not included on it. The same can be said of any gap in the recording. Put differently, what is important is what is depicted in the recording rather than what is not.

¶ 26 Indeed, case law confirms this. In *Taylor*, 2011 IL 110067, ¶39, our supreme court, while considering the admissibility of a videotape, cited the following secondary sources of authority with approval. The first states:

“The mere fact that certain portions of the recorded conversation are less audible than others does not ordinarily require exclusion of what the jurors personally heard from listening to the tape, and the fact that portions of a recorded conversation or statement are inaudible or incomplete does not bar the use of the film as evidence, unless the unintelligible portions are so substantial as to render the film as a whole untrustworthy, or unless the audible portions are without evidentiary value.” Carl T. Drechsler, *Admissibility of Videotape Film in Evidence in Criminal Trial*, 60 A.L.R. 3d 333, § 2(a) (1974).

The second notes:

“Complete exclusion may be proper if the videotape will not be of sufficient clarity to be useful to the jury, [citation] or if the imperfections are material enough, or render the entire videotape of such dubious probative value that it will likely not aid the jury's understanding. [Citation.] That is, if ‘any demonstrable distortion...so substantially affect[s] our perception of the relevant aspects of the depiction, as to create a probative risk that outgains its probative value in the case,’ then the entire videotape can be excluded. [Citation.] However, technical difficulties resulting in poor, inadequate, distorted, or incomplete visibility or audibility do not require automatic exclusion if the difficulties can be remedied or if the remaining portions of the videotape have sufficient probative value. [Citation.]” Jordan S. Gruber, *Foundation for Contemporaneous Videotape Evidence*, in 16 Am. Jur. Proof of Facts 3d 493, § 27 (1992).

In this case, a reasonable person could conclude that what appeared on the video recording had probative value in this case. Accordingly, that the recording did not memorialize all of defendant's actions provides no basis to exclude it. In short, we cannot conclude that the trial court abused its discretion in admitting the recording.

¶ 27 B. Proof of Guilt Beyond a Reasonable Doubt

¶ 28 Defendant next contends he was not proven guilty beyond a reasonable doubt. When presented with a challenge to the sufficiency of the evidence, a reviewing court, drawing all reasonable inferences in favor of the State, must determine whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *People v. Hill*, 276 Ill. App. 3d 683, 690 (1995). It is not our function to retry a defendant and substitute our judgment for that of the trier of fact. *People v. Eyler*, 133 Ill. 2d 173, 191 (1989). Questions regarding the weight to which evidence is entitled, the credibility of witnesses, and what inference to draw from the evidence are primarily for the trier of fact. *People v. Tye*, 141 Ill. 2d 1, 13 (1990). “If, however, after such consideration the court is of the opinion that the evidence is insufficient to establish the defendant's guilt beyond a reasonable doubt, it must reverse the conviction.” *People v. Scott*, 367 Ill. App. 3d 283, 285 (2006). With these principles in mind, we now turn to defendant's argument.

¶ 29 Defendant first asserts that London—the State's sole witness—was not credible. He bases this assertion on two considerations. First, defendant points out that the video recording contains several gaps. Second, he notes that London testified that he observed defendant placing deodorant and Nicorette gum into the backpack, but “it is impossible to see what defendant is putting into the backpack” on the recording. Regarding defendant's first point, that there are gaps means simply that the recording does not corroborate London's testimony on certain points. Defendant sets forth no

authority for the proposition that London's testimony had to be corroborated to sustain a conviction. Indeed, the law is precisely the opposite. See *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009) ("It remains the firm holding of this court that the testimony of a single witness, if positive and credible, is sufficient to convict, even though it is contradicted by the defendant."). As for not being able to see what defendant was placing in the backpack on the recording, we note that London was familiar with the store. For example, London testified that the shelf defendant was looking at in the recording was "where the Degree antiperspirant is kept in the store." He also testified that defendant "took the shopping cart towards the pharmacy counter where we keep the Nicorette gum." Therefore, even if the items were not sufficiently distinct in the recording to be identified by someone unfamiliar with the store, a reasonable inference remains that London was able to identify them due to their location and knew what it was that defendant was concealing in the backpack. As noted previously, all reasonable inference must be drawn in favor of the State at this point in the proceedings. *People v. Wheeler*, 226 Ill. 2d 92, 117 (2007). Moreover, even disregarding this inference, a court of review will not disturb a conviction simply because some contradictory evidence exists in the record. *People v. Berland*, 74 Ill. 2d 286, 306 (1978). After all, even if the items defendant stole could not be seen on the recording, defendant was apprehended outside the store in possession of them. Defendant points to other minor inconsistencies in London's testimony; however, none of them leave us with a reasonable doubt as to his guilt.

¶ 30 Defendant raises two additional points. He argues that the fact that portions of the recording are missing leads to an inference that they would have been damaging to the State's case. We note that drawing such an inference from the absence of evidence is permissive rather than mandatory. See *People v. Danielly*, 274 Ill. App. 3d 358, 367-68 (1995). Given that London explained that the

gaps in the recording were due to a technician's inadvertence, we do not see how the State's case could have been meaningfully damaged. Further, it is unclear what the tapes *could have* shown that would have been favorable to defendant, unless they show defendant paying for the merchandise with which he was apprehended outside of the store. That, however, is simply not plausible. When defendant observed the police outside the store, he concealed the backpack behind a pole. If he had paid for the merchandise, it is inconceivable why he would have engaged in such furtive behavior. Finally, we note that drawing an inference from missing evidence is appropriate where the evidence was solely within one party's ability to produce. *Danielly*, 274 Ill. App. 3d at 368 ("We do not believe the instruction tendered by the defendant was appropriate to the facts of this case for the simple reason that the complainant's underwear at the time of trial was not 'peculiarly within the [State's] power to produce.' This evidence had been destroyed 18 months earlier by the complainant and the tendered instruction has the potential to be confusing."). In this case, there is no indication that the State was ever in possession of a recording showing defendant leaving the store or covering other gaps in the recording that was actually placed into evidence.

¶ 31 Defendant similarly complains that the State did not call either of the police officers or the store security guard to corroborate London's testimony. Again, London's testimony did not require corroboration to support defendant's conviction. *Siguenza-Brito*, 235 Ill. 2d at 228. Nevertheless, it is true that Illinois case law does recognize the propriety of drawing such an inference under certain circumstances. See *People v. Smith*, 3 Ill. App. 3d 64, 67 (1971). However, it is also true that "[t]he State is not obligated to call every witness" and it "may accept the risk of unexplained absence of a witness so long as the offense is otherwise proved." *People v. Gonzales*, 125 Ill. App. 2d 225, 235 (1970). Defendant was, of course, free to comment on the fact that the State did not call

these witnesses. *Gonzales*, 125 Ill. App. 2d at 235. As such, whether to draw the inference defendant here argues for was a matter for the trial court and any concomitant effect on the weight to which London's testimony was entitled was also for that court. Finally, and most fundamentally, if defendant believed these witnesses would have testified favorably to him, he could have called them as well. See *People v. Lasley*, 158 Ill. App. 3d 614, 633 (1987).

¶ 32 In sum, defendant has identified several inconsistencies in the State's evidence, however resolving such conflicts are for the trier of fact. The same is true of matters of credibility. Moreover, defendant's complaints that London's testimony was not corroborated in various ways is not a valid attack on the sufficiency of the evidence. *Siguenza-Brito*, 235 Ill. 2d at 228("[T]he testimony of a single witness, if positive and credible, is sufficient to convict."). After considering defendant's arguments, we are not "of the opinion that the evidence is insufficient to establish the defendant's guilt beyond a reasonable doubt." *Scott*, 367 Ill. App. 3d at 285.

¶ 33 C. Defendant's Sentence

¶ 34 Defendant next asserts that the trial court erred in imposing an extended sentence of six-years' imprisonment after it permitted him to withdraw his guilty plea. Defendant had been sentenced to four years and six months following his plea. Defendant first cites *North Carolina v. Pearce*, 395 U.S. 711, 726, 23 L. Ed. 2d 656, 670, 89 S. Ct. 2072, 2081 (1969), where the Supreme Court held:

"Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due

process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.

In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.” (Footnote omitted.)

However, in *Alabama v. Smith*, 490 U.S. 794, 801-02, 104 L. Ed. 2d 865, 873-74, 109 S. Ct. 2201, 2205-06 (1989), the Supreme Court held that *Pearce* does not apply in cases where the first sentence was imposed pursuant to a guilty plea. Therefore, *Pearce* is of no assistance to defendant here.

¶ 35 Defendant also relies on section 5-5-4 of the Unified Code of Corrections (730 ILCS 5/5-5-4 (West 2008)). That section states, in pertinent part:

“Where a conviction or sentence has been *set aside on direct review or on collateral attack*, the court shall not impose a new sentence for the same offense or for a different offense based on the same conduct which is more severe than the prior sentence less the portion of the prior sentence previously satisfied unless the more severe sentence is based upon conduct on the part of the defendant occurring after the original sentencing.” (Emphasis added.) 730 ILCS 5/5-5-4 (West 2008).

It is axiomatic that the plain language of a statute must be given effect where it is clear and unambiguous. *People v. Christopherson*, 231 Ill. 2d 449, 455-56 (2008). The plain meaning of the

language emphasized above defeats defendant's argument. Quite simply, his conviction was not "set aside on direct review or collateral attack." 730 ILCS 5/5-5-4 (West 2008). Indeed, in *People v. Miller*, 286 Ill. App. 3d 297, 302 (1997), this court held, "Since in this case the defendant's guilty plea was vacated by the trial court, his conviction was not overturned by a higher court as required in order for section 5-5-4 to apply." In short, section 5-5-4 is not applicable here.

¶ 36

D. Loss of Evidence

¶ 37 Defendant next contends that "the loss or destruction of visual evidence constituted a denial of defendant's right to due process." Defendant notes that the destruction of or the failure to preserve potentially useful evidence constitutes a due process violation where a defendant shows bad faith by the State. See *People v. Voltaire*, 406 Ill. App. 3d 179, 184 (2010). To succeed in this argument, defendant must show that the loss of the evidence was the result of bad faith by the State. See *People v. Hall*, 235 Ill. App. 3d 418, 427 (1992) ("The test, therefore, is whether the defendant can show bad faith on the part of law enforcement officials."). This is because the actions by private parties do not implicate due process. See *Colorado v. Connelly*, 479 U.S. 157, 166, 93 L. Ed. 2d 473, 483, 107 S. Ct. 515, 521 (1986); see also *State v. Roberts*, 841 A. 2d 175, 179 (2003) (finding no due process violation where evidence was destroyed because "[u]nlike instances in which the arresting officers have lost or destroyed evidence in their possession, this vehicle was under the care of a private entity when its putative evidence was lost."). As the purported loss of evidence was the result of an action by a private party, defendant cannot make a showing of bad faith on the part of the State.

¶ 38 The sole evidence in the record regarding what defendant characterizes as a loss of evidence appears in the testimony of London. He stated that the technician who made the tape from the

camera system neglected to include footage from the camera covering the front door. Defendant identifies nothing that establishes that the State played any role whatsoever in this process. Rather, defendant points to the following in an attempt to show that the State acted in bad faith: (1) the State never informed defendant of the missing footage prior to trial; (2) the State had ample opportunity to and in fact did review the tape numerous times; (3) the State argued during opening statements that the recording showed defendant leaving the store; and (4) that the State did not inform defendant that London had not accurately recorded what he had observed. We see no nexus between these purported indications of bad faith and the loss of portions of the recordings. None of these actions resulted in the gaps in the recording.

¶ 39 Further, some of these things tend to negate an inference of bad faith on the State's part. If the State was aware of the missing footage, why did it claim that the recording showed defendant leaving the store during opening argument? It would have served no purpose for the State to attempt to conceal the gaps after the trial commenced (indeed, we are unsure whether it would have served a purpose before this point, since defendant had been tendered a copy of the recording at least six months before the trial). Moreover, that the State did not inform defendant of the gaps in the recording or of London's purported failure to accurately record what he observed is consistent with the State not knowing that the gaps existed. Finally, since the State tendered a copy of the recording, which contained the gaps, it is not truly the case that the State did not inform defendant of the gaps, as they were apparent in the recording.

¶ 40 Defendant has not established that the State was involved in the failure of the technician to include all footage from the various cameras in the store, much less than that the State acted in bad faith. Even assuming, *arguendo*, the State's actions identified by defendant constituted bad faith,

there is no nexus between them and the fact that the recording does not include all of London's observations. As such, we reject defendant's argument on this issue.

¶ 41 E. Ineffective Assistance of Counsel

¶ 42 Defendant's final argument is that his trial attorney was ineffective. When a defendant alleges the ineffective assistance of counsel, the standards set forth in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984), govern. *People v. Albanese*, 104 Ill. 2d 504, 526, 527 (1984). To prevail on such a claim, a defendant must demonstrate that his counsel's performance "fell below an objective standard of reasonableness" (*Strickland*, 466 U.S. at 688, 80 L. Ed.2d at 693, 104 S. Ct. at 2064) and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (*Strickland*, 466 U.S. at 694, 80 L. Ed.2d at 698, 104 S. Ct. at 2068). The first prong is assessed relative to prevailing professional norms. *People v. Spann*, 332 Ill. App. 3d 425, 430 (2002). A strong presumption exists that counsel's performance "falls within the wide range of reasonable professional assistance." *People v. Miller*, 346 Ill. App. 3d 972, 982 (2004). Decisions involving judgment, strategy, or trial tactics cannot support an ineffectiveness claim. *People v. Lindsey*, 324 Ill. App. 3d 193, 197 (2001). To satisfy the prejudice prong, a defendant need only demonstrate a reasonable probability that, but for counsel's errors, the outcome of the proceeding would have been different. *People v. Colon*, 225 Ill. 2d 125, 135 (2007). A "reasonable probability" is one sufficient to undermine confidence in the outcome of the proceeding. *People v. Evans*, 209 Ill. 2d 194, 220 (2004). A defendant must satisfy both prongs of this test, and a court of review may address them in any order. *People v. Lacy*, 407 Ill. App. 3d 442, 457 (2011).

¶ 43 Defendant first argues that trial counsel was ineffective because she failed to challenge the

admissibility of the video recording based on Supreme Court Rule 412(a)(I) (eff. March 1, 2001). This rule requires, *inter alia*, that, upon written motion, the State disclose to defendant “the names and last known addresses of persons whom the State intends to call as witnesses, together with their relevant written or recorded statements, memoranda containing substantially verbatim reports of their oral statements, and a list of memoranda reporting or summarizing their oral statements.”¹ Defendant notes that, unlike a due process claim, it is not necessary to show bad faith to succeed on a discovery violation. *People v. Koutsakis*, 255 Ill. App. 3d 306, 312 (1993).

¶ 44 Defendant, nevertheless, encounters a problem similar to the one he had with his last argument. There is nothing in the record to suggest that the State was ever in possession of a copy of the recording that showed all of defendant’s actions inside the store. Indeed, the record indicates otherwise. As noted, a technician failed to include all footage from the various cameras in the store when he transferred the recording from the camera system to a compact disc. The State tendered to defendant a copy of the compact disc that it possessed. Rule 412 requires only that the State “disclose to defense counsel *** material and information within its possession or control.” Thus, opposing the admission of the recording on this basis would have been futile. The failure to take a futile action cannot form the basis of a claim of ineffectiveness. *People v. Haynie*, 347 Ill. App. 3d 650, 654 (2004).

¶ 45 Defendant next contends that trial counsel was ineffective in that she did not call any witnesses to impeach London. Generally, whether to call a witness constitutes a matter of trial strategy. *People v. Ramey*, 152 Ill. 2d 41, 54 (1992). In certain circumstances, however, the failure

¹Since the video recording is not a memorialization of a statement, it would have made more sense for defendant to rely on subsection (a)(v) of Rule 412 (eff March 1, 2001).

may be sufficiently egregious that it may support an ineffectiveness claim. To this end, defendant cites *People v. Garza*, 180 Ill. App. 3d 263 (1989). In that case, the reviewing court found counsel ineffective, in part, due to counsel's failure to call three witnesses. *Garza*, 180 Ill. App. 3d at 269. Notably, the court considered the substance of the witnesses' testimony in coming to its decision. *Garza*, 180 Ill. App. 3d at 266, 267 (The defendant argued counsel was ineffective, *inter alia* "in failing to get Andrea Zeman's testimony into evidence; in not calling defendant's sister to corroborate his alibi defense; and in not calling either Chuck Groves or Tony Mroczka, who would have testified that defendant was not responsible for the motorcycle incident and that he turned himself in only to cover for another gang member." Zeman was to testify "that Donna had told her that she and Nuckols were shot from a car as they walked down the street.").

¶ 46 In this case, the only testimony specifically identified by defendant is that Officer Vaughan testified before the grand jury that London stated that he had apprehended defendant while London testified that it was the police that had apprehended him. It is clear from Vaughan's testimony that he was not present during defendant's apprehension and that, in his words, he "review[ed] the reports and [became] familiar with the facts in the case." London's testimony confirms that Vaughan was not present when defendant was apprehended. We have also reviewed the report of Officer Hucker, who, according to Vaughan, "initially investigated" the case. The report states that another officer radioed to Hucker that he had defendant in custody. Thus, Hucker's report was consistent with London's testimony. The impeachment value of the statement of Vaughan upon which defendant relies—particularly given that Vaughan was not an occurrence witness—would have been minimal. We perceive no reasonable probability that the result of the proceedings would have been different had defense counsel called Vaughan to testify. In other words, this argument fails on the prejudice

prong of the ineffectiveness inquiry.

¶ 47 Finally, defendant claims that trial counsel should have moved to suppress his statement that he took the merchandise because his car was out of gas. He asserts that a *Miranda* violation occurred. As this statement was made while defendant was in the back of a police car, he was obviously in custody. However, a *Miranda* violation can occur only where a defendant is subject to custodial interrogation. *People v. Peo*, 391 Ill. App. 3d 815, 818 (2009). Defendant points to nothing that would indicate that he was subject to interrogation at the time he made the statement. We note that Hucker’s report states that at the time defendant made the statement at issue, he “had not been read his Miranda Rights and was not asked any questions regarding the theft.” Since interrogation is an essential element of a *Miranda* violation, a motion to suppress would have necessarily failed. Again, the failure to file a futile motion does not constitute the ineffective assistance of counsel. *Haynie*, 347 Ill. App. 3d at 654.

¶ 48 To conclude, neither a motion to suppress based on *Miranda* nor a challenge to the recording based on a discovery violation could have succeeded. Furthermore, there is no reasonable probability that the testimony defendant faults his attorney for not presenting would have changed the outcome of the trial. Accordingly, we reject defendant’s argument that he received the ineffective assistance of counsel.

¶ 49

III. CONCLUSION

¶ 50 In light of the foregoing, the judgment of the Circuit Court of Lake County is affirmed.

¶ 51 Affirmed.