

No. 1-11-2079

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 C2 20381
	)	
CHISLEY HAYNES,	)	Honorable
	)	Timothy J. Chambers,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE HOWSE delivered the judgment of the court.  
Justices Palmer and Taylor concurred in the judgment.

**ORDER**

¶ 1 *Held:* There was sufficient evidence that defendant committed retail theft. As to felony retail theft, the court could reasonably conclude that only the stolen items were included in the store receipt showing value. Trial counsel did not render ineffective assistance by not (1) seeking to preserve and introduce video that the store did not submit to the police, (2) challenging the admission of photographs or a store receipt of stolen and purchased merchandise, or (3) further impeaching a store employee with the security video. Trial court did not deprive defendant of a fair hearing on her post-trial motion by not viewing the entire security video before the hearing.

¶ 2 Following a bench trial, defendant Chisley Haynes was convicted of felony retail theft and sentenced to two years' probation with 90 days in jail. On appeal, she contends that there was insufficient evidence to convict her, and also contends that the State failed to prove the value of the allegedly stolen merchandise as required to raise retail theft to a felony. She also contends that trial counsel rendered ineffective assistance by failing to (1) object to the admission of certain records (2) preserve and present security video regarding the key question of where defendant was stopped by store personnel, and (3) present more of the store security video to support defendant's account of events. Lastly, she contends that, upon remand, this case should be assigned to a different judge because the trial court deprived her of a fair trial by not viewing more of the security video in support of her post-trial claim of ineffective assistance.

¶ 3 **FACTS**

¶ 4 Defendant was charged with retail theft for, on or about May 9, 2010, allegedly taking merchandise – "jewelry, sunglasses, and clothing" with a retail value over \$150 – from a Kohl's store with the intent to permanently deprive Kohl's of possession, use, or benefit thereof.

¶ 5 Just before trial, the State informed the court that, though the retail theft statute had been amended since defendant was charged, raising the threshold for felony retail theft from \$150 to \$300, the State would not be amending the charge "since the amount we're going to be alleging here is well over \$300."

¶ 6 At trial, Christy Repsis testified that she had worked in loss prevention for Kohl's department stores for 11 years and was the loss prevention supervisor for the Kohl's store in question on the day in question. At about 1 p.m. that day, she noticed defendant in the jewelry department because she was "selecting multiple items of jewelry \*\*\* very quickly with no regards to the price," placing the items in her shopping cart. Defendant was alone, and Repsis had not seen defendant before that day. After about 25 minutes in the jewelry department,

defendant went to the men's department and Repsis followed her there. Over a period of about 20 minutes, defendant placed several men's shirts in her shopping cart. Defendant then went to the juniors' department, where she met with a man. (The man was in court, and defendant interjected that he was her husband.) In the juniors' department, defendant placed several items of clothing and five pairs of sunglasses into her cart; Repsis considered the latter to be unusual.

¶ 7 As defendant approached a fitting room, Repsis checked it beforehand and saw that there was no merchandise, tags, or hangers therein. After defendant entered a fitting-room stall, alone and carrying the aforementioned merchandise and a large Kohl's bag, Repsis went into the neighboring stall. She could hear defendant ripping tags from merchandise and see Kohl's price tags falling to the floor in defendant's stall. She was familiar with the sound of tags being ripped from merchandise from her experience in loss prevention. Defendant then left the stall, and was not visibly carrying any of the merchandise she had brought into the fitting room. She still had the large Kohl's bag, which she placed in her shopping cart. Repsis checked the stall that defendant had been using, and saw tags on the floor.

¶ 8 Defendant then went to the children's department, where she put several items of children's clothing into her cart over a 20-minute period. She went to the shoe department and put a pair of shoes in her cart. She then went to another fitting room. Repsis "had an associate clean out the fitting room before she entered." From outside the fitting room, Repsis could see defendant's legs. She heard defendant ripping clothing tags from merchandise and saw her place the merchandise from the cart into the Kohl's bag, leaving the tags and hangers on the floor. When defendant exited the fitting room, Repsis went in. There was no merchandise in the room, and Repsis picked up the tags. Defendant in the meantime went back to the juniors' department, with the Kohl's bag in her cart, where she again met her husband. In the juniors' department, defendant selected some clothing items and two pairs of sunglasses, then went to the fitting room

she had first visited. Repsis first confirmed that the room had no merchandise, tags, or hangers. From outside the fitting room, Repsis could hear defendant ripping tags from merchandise and heard the Kohl's bag and a purse being opened. When defendant left the fitting room, she was not visibly carrying the merchandise she had brought in; she left two items behind in the room along with the torn tags.

¶ 9 Defendant and her husband then went to a checkout stand near the store's exit to the outdoors, where she purchased three items with cash. As she did so, her husband stood nearby with the cart holding the Kohl's bag. Defendant rejoined her husband and they went to the store's other exit, onto the mall; she had the bag in the cart when they exited the store. Though she passed sensor posts as she exited, the sensor alarm did not sound. Repsis and Gideon, a Kohl's loss prevention officer at the time (but not at the time of trial), approached defendant outside the store and asked her to return to the store; she did so. Repsis found that the large Kohl's bag contained 96 items of merchandise that defendant had not paid for. Repsis photographed the 96 items and, along with a store manager, scanned the items and thereby prepared a cash-register receipt for the items. Repsis testified that the photographs "accurately depict the items [she] recovered from the defendant," and defense counsel did not object to the introduction of the photographs. The receipt for the items totaled \$1,434.55, as Repsis recalled, and defense counsel did not object to its introduction into evidence. Repsis and other store employees reattached the tags to the merchandise, which was returned to the display racks.

¶ 10 On cross-examination, Repsis testified that she did not photograph the detached tags nor did she submit them to the police as evidence. She did not recall testifying at a preliminary hearing that she found "nothing" in the fitting rooms used by defendant because defendant had taken the tags with her. The State stipulated that Repsis had so testified. The store has a security video system, and Repsis knew that a Kohl's loss prevention officer had prepared a disc of video

from the day in question and provided the disc to the police. However, the disc did not include defendant exiting the store as it "was not burned;" that is, copied to the disc. There were two security cameras facing the store's mall exit. Repsis had last viewed the disc about a year before trial; that is, around the time of the incident. When portions of the video were played in court, Repsis admitted that defendant purchased more than three items; rather, she appeared to purchase "at least nine or ten items." Also, defendant was in the store for about five minutes after making her purchase, as she went from the checkout near the outdoor exit to the mall exit. Repsis reiterated that defendant was outside the store when she stopped her. However, when asked to place a mark on a photograph of the mall exit, Repsis placed a mark outside the sensor posts but inside the store as indicated by the different floor tiles for the store and the mall. Repsis maintained that this was still outside the store because a person is "passing all last points of sale" by going beyond the sensor posts. Repsis found "jewelry, socks [and] sunglasses" in defendant's purse, but her report of the incident stated that merchandise was found in the Kohl's bag in the shopping cart.

¶ 11 On redirect examination, Repsis testified that defendant could be seen on the video purchasing "a couple of dresses" and socks, but not jewelry, sunglasses, or shoes. Repsis recovered 96 items from defendant as she exited the store. While portions of the disc were shown on cross-examination, the entire disc is over three hours long. Gideon had been monitoring the video system that day, so that when he came to help Repsis stop defendant, nobody was watching the video system at the time defendant was stopped.

¶ 12 The Kohl's receipt entered into evidence is dated May 9, 2010, and is in two pieces, one listing items totaling \$200.15 before tax and another listing items totaling \$1,231.40 before tax. (Thus, \$1,431.55 of merchandise is listed on the combined receipt.) However, someone wrote on the top of one of the receipts "2,298.44 total." Though the receipt is marked "this is not a

customer receipt," it includes phrases consistent with a customer receipt including sales tax computations, "YouSave" indications of sales or discounts for each item, and "buy/get 50% off" indications for several items.

¶ 13 Defendant unsuccessfully moved for a directed finding.

¶ 14 Defendant testified that she was shopping for several hours in the Kohl's store on the day in question. While she placed several items in her cart, she did not have a Kohl's bag with her as she shopped, and she never put any merchandise in her purse. While in the fitting rooms two times, she did not take any tags off of merchandise. She had not left the store when Repsis stopped her, she walked through the store after making her purchases because she was not finished shopping, and she did not intend to leave the store with the unpurchased merchandise. When Repsis stopped defendant "really close to the cash register," she "kept everything," including the purchased items. Defendant denied that she took jewelry or was ever shopping in the jewelry department. However, when shown photographs taken by Repsis that included jewelry items, defendant admitted that she did not "know if I have all of [the jewelry]. I have some." Defendant tried on several pair of sunglasses but took only two or three, which was consistent with the photographs.

¶ 15 Following closing arguments, the court found defendant guilty. The court found Repsis to be credible and that defendant was "past the last point of purchase" and "past the sensor towers" when she was stopped. The court noted that "there's no reason for [the store] to keep the clothes or the tags" and that Repsis was not the person who prepared the video for the police.

¶ 16 In her post-trial motion as amended, defendant challenged the sufficiency of the evidence in general, and also the sufficiency of the evidence of merchandise value for purposes of proving felony retail theft. Defendant claimed that counsel was ineffective for not (1) seeking to preserve, and then introduce at trial, the entire security video to corroborate defendant's account

that she was detained while still in the store, (2) cross-examining Repsis using the video to impeach her testimony that defendant was shopping quickly without regard to price, that defendant shopped in the jewelry department when she did not, that Repsis entered a fitting room ahead of defendant, (3) cross-examining Repsis regarding her testimony that defendant passed the sensor posts with items still bearing sensor tags without triggering an alarm, (4) objecting to the introduction of photographs depicting the allegedly stolen merchandise, and (5) objecting to introduction of the inventory list of allegedly stolen items.

¶ 17 At the motion hearing, the court stated that "[w]e were unable to open the video" and thus had not viewed the full video but "the testimony I heard was clear and conclusive." Following arguments, the court denied the motion, noting that retail theft cases were prosecuted to convictions before video existed so that the "fact that a video does not show every specific act does not rise to the level of reasonable doubt in and of itself." The court reiterated its finding that Repsis was credible. As to the receipt, it was a "standard register tape" that "has significant inventory purpose for Kohl's" and was "not simply \*\*\* prepared in matters of litigation, but it also does reflect what is and is not on the shelves at any given time in the store." As to value of the merchandise, "it was clearly well over \$150, regardless of how many are alleged to have been paid for and how many were not, some 96 items."

¶ 18 The court sentenced defendant to two years of probation with 90 days in jail, and this appeal timely followed.

¶ 19

## ANALYSIS

¶ 20

### I. Sufficiency of the evidence

¶ 21 On appeal, defendant first contends that there was insufficient evidence to convict her of felony retail theft. Regarding the elevation of retail theft to a felony, she contends that the State

failed to prove the value of the allegedly stolen goods where Repsis failed to deduct the value of the merchandise defendant purchased from the value of all merchandise recovered by Repsis.

¶ 22 A person commits retail theft when she knowingly "[t]akes possession of, carries away, transfers or causes to be carried away or transferred, any merchandise displayed, held, stored or offered for sale in a retail mercantile establishment with the intention of retaining such merchandise or with the intention of depriving the merchant permanently of the possession, use or benefit of such merchandise without paying the full retail value of such merchandise." 720 ILCS 5/16A-3(a) (West 2010). A trier of fact may infer that a person possessed merchandise with said intent when she conceals unpurchased merchandise among her belongings – with merchandise deemed concealed when "although there may be some notice of its presence, [it] is not visible through ordinary observation" – and "removes that merchandise beyond the last known station for receiving payments for that merchandise in that retail mercantile establishment." 720 ILCS 5/16A-2.1, -4 (West 2010).

¶ 23 When presented with a challenge to the sufficiency of the evidence, this court must determine whether, after taking 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. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011). On review, we do not retry the defendant and we accept all reasonable inferences from the record in favor of the State. *Id.* The trier of fact need not be satisfied beyond a reasonable doubt as to each link in the chain of circumstances; instead, it is sufficient if all the evidence taken together satisfies the trier of fact beyond a reasonable doubt of the defendant's guilt. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 60. Similarly, the trier of fact is not required to disregard inferences that flow normally from the evidence nor to seek all possible explanations consistent with innocence and elevate them to reasonable doubt.

*Id.* A conviction will be reversed only where the evidence is so unreasonable, improbable, or unsatisfactory that a reasonable doubt of the defendant's guilt remains. *Beauchamp*, at 8.

¶ 24

A. Retail theft in general

¶ 25 Here, looking at the evidence in the light most favorable to the State as we must, we find sufficient evidence that defendant committed retail theft. It is undisputed that defendant picked up multiple items of merchandise, purchased some items at a cash register near the outdoor exit, and then passed through the store in the direction of the mall exit while carrying other unpurchased items. The issue is whether defendant was stopped by Repsis past the last point of purchase and the sensor posts, so that she had an opportunity to pay for the unpurchased merchandise but did not, or instead she was stopped within the store before she had such an opportunity. Stated another way, the case hinges upon the credibility of Repsis and defendant.

¶ 26 Defendant demurs, contending that the absence from the disc of video from the mall exit or of defendant's stop is sufficient for reversal, citing *People v. Phuong*, 287 Ill. App. 3d 988 (1997). In *Phuong*, this court reversed a retail theft conviction and stated in part that the store:

"had a videotape of the entire incident but that it had been misplaced prior to trial. It seems to us that if the State could have presented a videotape that showed defendant committing the offense, it certainly would have done so. That it failed to do so indicates that the tape contained no incriminating evidence."

*Phuong*, at 997.

However, this court also found that:

"testimony that defendant told her that her friend passed her the merchandise does little to incriminate defendant since the State

failed to show that defendant was even aware that [the friend] had stolen the skirt. In fact, [the friend] testified that she and defendant had not planned together to steal anything from the store, nor did she tell defendant that she was going to steal anything. Absent some showing by the State that defendant knowingly took the skirt and intended to keep it without paying for it, defendant cannot be found to have committed retail theft. That defendant merely ended up with the skirt in her possession will not suffice." *Id.*

Similarly, we found that it was "possible that if the tags had been removed from the skirt prior to the time that [the friend] 'passed' it to defendant, defendant would have no reason to know, or even suspect, that the merchandise had not been paid for." *Id.* In sum, our reversal in *Phuong* was not founded primarily on the absence of once-available video evidence.

¶ 27 More broadly, we do not read *Phuong* to state a general rule that we must make an exculpatory inference from the absence of video evidence when video had been available to some degree or at some point. Notably, this court has not cited *Phuong* for such a proposition, or anything like it, in any published opinion. In the instant case, a reasonable finder of fact could believe Repsis's testimony that she did not prepare the video disc for the police, and it is not unreasonable to infer that it was not Repsis's doing that the disc did not depict the mall exit or defendant's stop.

¶ 28 We cannot conclude that no reasonable finder of fact could favor Repsis's account over defendant's as the trial court did. While there were discrepancies in Repsis's testimony, there were also discrepancies in defendant's testimony, the most telling being that she first professed to have taken no jewelry – indeed, that she had not shopped in the jewelry department – but then, once confronted with photographic evidence to the contrary, admitted that she took some jewelry.

Lastly, we do not find it fatal to the State's case that the sensor alarm did not sound; no machine or system, even properly maintained, operates completely without failure.

¶ 29 B. Felony retail theft

¶ 30 Retail theft is a felony where the merchandise stolen has a "full retail value" exceeding \$300 and a misdemeanor otherwise, so that "the value of the property involved is an element of the offense to be resolved by the trier of fact as either exceeding or not exceeding \$300." 720 ILCS 5/16A-10 (West 2010). For purposes of retail theft, "full retail value" is "the merchant's stated or advertised price of the merchandise." 720 ILCS 5/16A-2.2 (West 2010).

¶ 31 Here, Repsis testified that she recovered "96 pieces of merchandise that [defendant] did not pay for that she had selected earlier," which Repsis and the store manager scanned. Repsis testified that "the receipt for the merchandise she had selected and concealed" consisted of 96 items totaling, "I think," \$1434.55. Repsis differentiated from those 96 items "the merchandise that she paid for." On the other hand, Repsis also testified that there were three purchased items, before later admitting that defendant purchased "at least nine or ten items," and defendant testified that Repsis kept the items she had purchased. However, that Repsis kept the purchased items, and was uncertain how many purchased items there were, does not necessarily imply that she commingled the purchased and unpurchased items before photographing or scanning them. Absent clearer evidence either way, and taking this evidence in the light most favorable to the State as we must, a finder of fact could reasonably conclude that only stolen items were scanned to produce the receipt showing \$1,431.55 in full retail value.

¶ 32 II. Ineffective assistance of trial counsel

¶ 33 Defendant contends that trial counsel provided ineffective assistance by failing to (1) seek to preserve, and then introduce at trial, the entire video including when and where defendant was

stopped, (2) object to the admission of the photographs and receipt, and (3) present more of the video disc to impeach Repsis and support defendant's account of events.

¶ 34 On a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced him; in other words, that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a reasonable probability that the outcome of the proceedings would have been different but for counsel's errors. *People v. Cathey*, 2012 IL 111746, ¶ 23. When a defendant raises an ineffective-assistance claim on direct appeal, this court may decline to adjudicate the claim if it involves matters beyond the record on direct appeal. *People v. Wright*, 2012 IL App (1st) 073106, ¶ 107.

¶ 35 A. Absence from the disc of video of defendant's stop or the mall exit

¶ 36 Supreme Court Rule 412(c) requires the State to "disclose to defense counsel any material or information *within its possession or control* which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce his punishment therefor." Ill. S. Ct. R. 412(c) (eff. Mar. 1, 2001)(emphasis added). Rule 412(f) similarly provides that the "State should ensure that a flow of information is maintained between the various investigative personnel and its office sufficient to place within its possession or control all material and information relevant to the accused and the offense charged." Under these rules, the State must disclose evidence known to the police, even if not known to the prosecutor, because prosecutors have a duty to learn of favorable evidence known to other government actors, including the police. *People v. Berman*, 229 Ill. 2d 56, 73 (2008).

¶ 37 However, our supreme court has found that the State had no duty in a criminal case to obtain and disclose evidence – nurse's notes – in the possession of a government-owned hospital. *People v. House*, 141 Ill. 2d 323, 387 (1990).

¶ 38 "Although the State's Attorney's office apparently represents Cook County Hospital in civil litigation, since this is not a civil case, we do not believe possession and control of this information must be imputed to the State's Attorney's office. The State's Attorney's office does not represent Cook County Hospital in this case and the personnel of the hospital are not the State's Attorney's 'investigative personnel' within the meaning of our Rule 412(f)." *Id.*

¶ 39 Here, we find no ineffective assistance arising from the fact that the video disc did not include Repsis stopping defendant. What little evidence exists on this record regarding this issue is that the disc Kohl's tendered to the police – in essence, to the State – did not include video of the stop. Thus, while defendant argues that trial counsel could have sought disclosure of the video in question, and then sought discovery sanctions up to and including dismissal of the case, the State cannot produce, nor can it be sanctioned for not producing, that which it did not have and was not obliged to obtain. Just as the State "does not represent Cook County Hospital in this case and the personnel of the hospital are not the State's Attorney's 'investigative personnel' within the meaning of our Rule 412(f)" (*House*, at 387), Kohl's is not a party to this case and its loss prevention personnel are not police officers or State investigators.

¶ 40 Moreover, despite defendant's contention to the contrary, it is far from "undisputed" that "the Kohl's camera would have captured the area where Repsis claims" to have stopped defendant, or that "someone, whether it was Repsis or someone else, made the decision not to burn that portion of the video onto the disc." While defendant admits that it is unclear "whether the video still exists, or whether it was destroyed," she does not entertain the possibility that it never existed. On this record, it is mere speculation that Kohl's or any of its employees either intentionally or unintentionally destroyed, or failed to include on the disc, the stop or mall-exit

video, or even that such video existed. Repsis's testimony that the stop video was not "burned" to the disc does not necessarily imply that there was such video to be burned. Similarly, that there were cameras pointed at the mall exit does not necessarily imply that useable video resulted at the relevant time, especially since nobody was operating the video system at that time. Indeed, the video disc shows that Kohl's personnel moved video cameras in an effort to actively track defendant and her husband through the store as events occurred, rather than solely editing together video from passive cameras after the fact, which supports an inference that the absence of video of the key event resulted from the absence of a video operator at that time. Overall, even if we were to somehow confuse Kohl's with the police or the State, we would be unable to evaluate the instant ineffective assistance claim on this record.

¶ 41

B. Admission of the photographs

¶ 42 Section 115-9(a) of the Code of Criminal Procedure, 725 ILCS 5/115-9(a)(West 2010), governs the use of photographs as evidence in retail theft cases, and provides that a photograph of the allegedly stolen property shall be admitted into evidence "in place of the property and to the same extent as the property itself" if it:

"(1) will serve the purpose of demonstrating the nature of the property; and

(2) is otherwise admissible into evidence under all other rules of law governing the admissibility of photographs into evidence. The fact that it is impractical to introduce into evidence the actual property for any reason, including its size, weight, or unavailability, need not be established for the court to find a photograph of that property to be competent evidence." 725 ILCS 5/115-9(a)(West 2010).

A photograph or other visual recording may be authenticated by the testimony of a person who saw the things, scene, or occurrence depicted in the photograph and avers that the photograph is an accurate depiction thereof. *People v. Dennis*, 2011 IL App (5th) 090346, ¶ 22.

¶ 43 We find no ineffective assistance from the lack of an objection to introduction of the photographs because we find they were admissible. Repsis recovered the merchandise and photographed it herself, and she testified that the photographs accurately depicted the items she recovered. We acknowledge defendant's argument that the photographs do not distinguish between items defendant paid for and those she did not pay for. However, because the same issue would exist had the State introduced the merchandise itself rather than photographs thereof, we conclude that this argument goes to the weight to give the photographs rather than whether a proper foundation was laid for their admission as evidence of the allegedly stolen merchandise.

¶ 44 C. Admission of the receipt

¶ 45 This contention of ineffective assistance is based on the assertion that a timely objection to the receipt's introduction would certainly have resulted in its exclusion. Defendant cites *People v. Mikolajewski*, 272 Ill. App. 3d 311 (1995), to support this contention. However, in *Mikolajewski*, the sole evidence of the stolen merchandise's retail value was the testimony of a security guard based on a price tag she had seen on the merchandise. The tag was not introduced into evidence, nor was it visible in the photograph of the merchandise entered into evidence. *Mikolajewski*, 272 Ill. App. 3d at 317. The court noted that "the price tag stickers on the [merchandise] would have been admissible evidence of value" because such tags are self-authenticating. *Mikolajewski*, 272 Ill. App. 3d at 317. This court thus found the admission of the guard's testimony to be erroneous because "[t]he jury was being asked to accept [the guard's] hearsay testimony at face value," not because a price tag could not be competent evidence of merchandise's retail price. *Mikolajewski*, 272 Ill. App. 3d at 318. Because the receipt itself was

introduced here, rather than merely Repsis's recollection of it, this case is clearly distinguishable from *Mikolajewski*.

¶ 46 We disagree with defendant's assertion that, had an objection been made to the receipt, the State could not have laid a proper foundation for the receipt as a business record. *See* 725 ILCS 5/115-5 (West 2010). Where a store clerk printed a computer-generated list of prices for stolen merchandise to establish its retail value, this court held that such a retrieval of records, though clearly in anticipation of litigation, did not disqualify the receipt as a business record since the requisite foundation pertains to the time when the business made the record, not when the record was retrieved. *People v. Davis*, 322 Ill. App. 3d 762, 766 (2001). The requisite foundation for introducing business records is that (1) the record was made as a memorandum or record of the act, transaction, occurrence, or event, (2) it was made in the regular course of business, and (3) it was the regular course of such business to make such a record at the time of the transaction or within a reasonable time thereafter. 725 ILCS 5/115-5 (West 2010); *Davis*, at 766. Here, the act or transaction in question was not the scanning of the merchandise, which was merely the retrieval of records, but Kohl's establishment of a retail price for each item of merchandise, which was indisputably done in the regular course of Kohl's business as a retailer. Repsis scanned items and witnessed the scanning of the other items, and the content of the receipt, including discounts and sales, confirms that the cash register then retrieved and computed the same merchandise and price data in the same manner as when Kohl's actually sells such merchandise.

¶ 47 D. Failure to use more of the video to impeach Repsis

¶ 48 Finally, having viewed the entire video disc, we find no ineffective assistance from counsel's failure to use more of the disc to impeach Repsis as defendant now contends.

¶ 49 As to Repsis's characterization that defendant was shopping quickly without regard to price, it was undisputed at trial that defendant spent hours shopping, including 20 minutes or more in each of several departments. Thus, the court had ample evidence other than the video contradicting this characterization. Moreover, Repsis made that assertion specifically regarding defendant's shopping in the jewelry department, not all of her shopping, and the disc begins after defendant was in the jewelry department by Repsis's account so that the video does not either corroborate or refute her testimony on this point.

¶ 50 As to the contention that the video does not depict defendant in the jewelry department as Repsis testified, the disc begins with defendant approaching and then shopping in the children's department, accompanied by her husband. This is consistent with Repsis's account of events, but well after defendant had been in the jewelry department. Thus, the absence of video of defendant in the jewelry department neither corroborates nor refutes Repsis's testimony that she was there.

¶ 51 Due to the nearly-opaque nature of the shopping cart, which consisted of a large black cloth bag hanging in a wheeled frame, the draping of merchandise on the shopping cart through most of defendant's shopping, and the placement of her purse during checkout, it is not possible to see a Kohl's bag in the cart before defendant made her purchases nor to rule out the presence of such a bag. Notably, by Repsis's account, the bag was removed from the cart during the period depicted on the disc only when defendant and the cart were in a fitting room. However, there is no video from within the fitting rooms to either corroborate or impeach this testimony. In sum, there is an insufficient basis for defendant's contention that there was no Kohl's bag in her cart before checkout.

¶ 52 Defendant argues that Repsis testified that, on the first fitting room visit, she went in to clean it out, while the video shows her entering after defendant. However, the first fitting room visit depicted on the video – the one defendant cites in her brief in support of this alleged

impeachment – is the visit after defendant shopped in the children's department and selected a pair of shoes. Since Repsis testified that she had an associate clean the room on that occasion rather than herself, and indeed the video depicts a woman ducking into and out of the fitting room as defendant enters, there is no impeachment on this point.

¶ 53 Lastly, while defendant asserts that the video never shows Repsis carrying "any significant amount of tags," there was no testimony regarding where Repsis held or put the tags as she followed defendant through the store, and the video shows her wearing a baggy sweatshirt.

¶ 54 We conclude that, because the disc does not establish the points of impeachment now alleged by defendant, counsel did not act unreasonably by not using the disc to raise them, nor was the outcome of the trial likely to be different had counsel used the disc as suggested.

¶ 55 III. Trial court not viewing the entire disc for post-trial motion

¶ 56 Defendant's final contention is that the trial court deprived her of a proper hearing on the ineffective-assistance claims in her post-trial motion by not viewing the entire video disc in advance of the hearing, so that a different judge should hear her case on remand. However, because we are not remanding, the question of who would hear this case on remand is moot. Moreover, for the same reasons that greater use of the video would not have changed the outcome of the trial, we conclude that viewing the entire disc was unlikely to change the outcome of the post-trial motion and thus that the court did not deprive her of a fair hearing.

¶ 57 Accordingly, the judgment of the circuit court is affirmed.

¶ 58 Affirmed.