2011 IL App (2d) 100313-U
No. 2-10-0313
Order filed February 10, 20112

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-CM-1900
LATOYA T. GORDON,	)	Honorable Helen S. Rozenberg,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Bowman and Zenoff concurred in the judgment.

ORDER

Held: The evidence was sufficient to prove defendant's guilt of retail theft (720 ILCS 5/16A-3(b) (West 2008)) beyond a reasonable doubt; defendant's counsel was not ineffective; and the restitution order was corrected to conform to the amount proved at trial.

¶ 1 Defendant, Latoya T. Gordon, appeals her conviction of retail theft (720 ILCS 5/16A-3(b) (West 2008)) based on her switching price tags on merchandise in the T.J. Maxx store in the Gurnee Mills shopping center. Defendant challenges the sufficiency of the evidence to convict her, the effectiveness of her defense counsel for failing to object to the admission into evidence of a receipt

and the store's loss prevention officer's testimony about the value of various items, and defendant argues that the imposition of restitution was not authorized because all of the merchandise she had when she was stopped was immediately returned to the store. We affirm as modified.

¶ 2 On April Fool's Day, 2009, defendant was charged with retail theft. On May 4, 2009, a superseding information was filed alleging that defendant took clothing having a total value of less than $150, intending to deprive the T.J. Maxx store of the use or benefit of its merchandise without paying the full value of the clothing. On February 17, 2010, a jury trial in this matter commenced.

¶ 3 Chad Smits, an officer with the Gurnee police department, testified that, on April 1, 2009, he was on duty at the Gurnee Mills mall, and he received a call from the T.J. Maxx store requesting police assistance with a possible theft. Smits waited outside of the T.J. Maxx store with Yannis Reglis, the store's loss prevention officer. When defendant and Mozena Davis exited the store, Reglis and Smits approached them and then took them to the store's loss prevention office, located in the back area of the store. Smits testified that he did not observe either defendant or Davis at any time while they had been shopping in the store, only as they exited.

¶ 4 Smits testified that, in the loss prevention office, he observed Reglis examining the merchandise that defendant and Davis had purchased. Reglis gave the items with the price tags to the store manager, but Smits acknowledged that he did not see what the manager did with the items. Smits testified that, after the store completed it investigation, he arrested both defendant and Davis.

¶ 5 Reglis testified that he worked as the loss prevention officer for the T.J. Maxx store in the Gurnee Mills mall. Reglis briefly explained the store's inventory system. He testified that, when merchandise arrives at the store, it already has a tag attached to it that shows the item's price and its stock keeping unit (SKU) number. The computer is able to read the SKU number and determine the

item's price. When T.J. Maxx marks down the price of an item, a red clearance sticker is placed on the original price tag. Reglis testified that the clearance stickers are supposed to be specially designed to make it difficult, if not impossible, to switch them between price tags. The clearance stickers have stickier adhesive to provide stronger adhesion to the tag, and they have incised hatch marks which are supposed to make the clearance stickers tear if someone tried to peel it off. Reglis testified that he was not aware of any times that someone was able to remove a clearance sticker from a tag without tearing the clearance sticker.

¶ 6 Reglis testified that the store had 12 different cameras that covered between 80% and 90% of the shopping area of the store. The cameras provided video feeds to the monitors located in the loss prevention office at the back of the store. The parties stipulated to the admission of April 1, 2009, recordings taken from the video cameras. Reglis testified that, on that day, he began to watch Davis, who was shopping with defendant, because Davis kept looking up at the cameras. As Reglis was watching, he observed Davis peel off and transfer the red clearance stickers, apparently from clearance items to non-clearance items. Reglis testified that he did not see defendant peel off any clearance stickers.[1] Reglis continued to observe defendant and Davis, and watched them pay for their items at the cash register. After they had paid, Reglis stopped them outside of the store and took them back into the loss prevention office. In the loss prevention office, Reglis placed the items defendant and Davis had purchased into the same pile. Reglis testified that he did not see if his manager took the items to do a price check.

[1]The State acknowledged, during closing argument, that the portion of the video shown did not show defendant switch any price tags.

¶ 7 Reglis testified that the State's group exhibit No. 3 contained the items that defendant had in her possession when he stopped her outside of the store. The State's exhibit No. 2 was a copy of two receipts, one showing what defendant paid and the other showing what defendant's items actually sold for. The State's exhibit No. 1 was the original receipt. Reglis testified that the manager totaled the price of the items, amounting to $108.53, while defendant actually paid $63.43 for the items.

¶ 8 From exhibit No. 1, Reglis used the SKU numbers to identify the specific pieces of clothing in group exhibit No. 3. Reglis also compared the price tags on the actual items to the value shown on the exhibit No. 1 receipt. Specifically, Reglis testified that the clearance tag on the shirt that was the State's exhibit No. 3A scanned as "career wear," but this was incorrect; the shirt was properly classified as "urban wear." One of the items, the State's exhibit No. 3C was correctly tagged; similarly, Reglis testified that he could not tell if the tags on the State's exhibit No. 3F had been switched. Reglis also testified that the clearance tags on the items appeared to be intact and not ripped or shredded.

¶ 9 The jury deliberated and returned a guilty verdict. On February 25, 2010, defendant was sentenced to a 2-year term of conditional discharge, a 30-day term of imprisonment in the county jail, and an additional 30-day term of imprisonment that was stayed pending defendant's successful completion of the terms of her conditional discharge, completion of the rehabilitation course, "Cognitive Thinking for a Change," payment to T.J. Maxx of $113.94 in restitution, and no contact with the Gurnee Mills shopping center. Regarding the restitution component of the sentence, the State informed the trial court defendant had been refunded the money she paid for the merchandise she had taken on April 1, 2009, and the nearly $114 represented the actual price of the merchandise

at issue on April 1, 2009, which was not in any condition to be sold again by T.J. Maxx. On March 15, 2010, defendant filed a motion for judgment notwithstanding the verdict, or, alternatively, for a new trial. Following a March 25, 2010, hearing, the motion was denied, and defendant timely filed a notice of appeal on that same day.

¶ 10 Defendant's initial contention on appeal is a challenge to the sufficiency of the evidence. When reviewing a defendant's challenge to the sufficiency of the evidence, the relevant question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *People v. Day*, 2011 IL App. (2d) 091358, ¶ 26. We will not reverse the fact finder's determination unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt as to the defendant's guilt. *Day*, 2011 IL App. (2d) 091358, ¶ 26. The State must prove the offense of retail theft by changing the price by demonstrating that defendant knowingly altered or changed the price tag of merchandise and attempted to purchase that merchandise at less that its full retail value with the intention of depriving the merchant of the full retail value of the merchandise. 720 ILCS 5/16A-3(b) (West 2008).

¶ 11 The evidence showed that defendant and Davis, who were talking together and using the same shopping cart, went from the clearance section to a section of the store with regularly priced items, drawing the attention of Reglis, the store's loss prevention officer. Reglis observed them peel off clearance stickers and affix the stickers to different items, which were then placed into their common shopping cart. Reglis double-checked and made sure that they were taking items from a clothing rack containing items priced at $12.99, with very few clearance stickers. By contrast, even

though the items defendant purchased came from the $12.99 rack with few clearance items, nearly everything defendant tried to purchase had a clearance sticker.

¶ 12 When Reglis stopped defendant, her items did not match the information on the clearance stickers. For example, one of defendant's items was a black shirt that should have been priced at $12.99. The shirt, however, had a clearance sticker on the tag with a price of $7.00. Further, the information on the clearance sticker indicated it was in the career wear category, while the item was properly classified in the full size category. Reglis also testified that a green shirt by Rockwater that belonged in the urban wear category did not scan in that category.

¶ 13 Additionally, the items defendant tried to purchase totaled about $63 at the register. After defendant had been stopped and the items were investigated, they should have totaled $108 if they had been properly marked. Based on this evidence, we conclude that any rational finder of fact could have found defendant guilty of the offense as charged beyond a reasonable doubt.

¶ 14 Defendant maintains that the evidence was insufficient to support her conviction. Defendant first contends that the State failed to prove that she intended to pay less than the full retail value for the clothes. Defendant contends that there was no proof that she switched any price tags; she was neither captured on video switching the tags nor was she observed by Reglis performing any illegal actions. We disagree.

¶ 15 Reglis clearly testified that he observed "them" peeling off the clearance stickers and affixing them to other merchandise. Reglis also testified that, for reasons that he could not explain, he did not see defendant peeling the stickers on the video that he was shown. Thus, we have a witness's definite testimony that he observed both defendant and Davis engage in switching the clearance stickers. While it appears to be true that, on the video, defendant does not appear to be switching

stickers, this is not conclusive proof that she did not, especially in light of Reglis's testimony. Thus, at worst, the video evidence shown to the jury is inconclusive. We hold that Reglis's testimony is sufficient to establish that defendant was engaged in switching the clearance stickers. See *People v. Little*, 322 Ill. App. 3d 607, 618 (2001) (testimony of a single credible witness who observed the action is sufficient to support a finding of guilt beyond a reasonable doubt).

¶ 16 Defendant next points out that she was not charged as Davis's accomplice, and that Davis's actions in the store did not demonstrate defendant's guilt. Defendant further argues that her mere presence at the scene near Davis cannot serve to prove her guilty of retail theft. We disagree.

¶ 17 In the first place, it appears on the video that defendant and Davis are shopping together. The video shows that they are moving through the store together, they appear to speak to one another, and they are putting items in the same shopping cart. Further, they check out together. The video shows, then, that defendant and Davis are acting together during their visit to the T.J. Maxx. In addition, Davis is clearly seen on the video switching the tags. She is in close proximity to defendant when she does this, she does not appear to try to hide her actions from defendant, and defendant appears to be able to see what Davis is doing.

¶ 18 Second, the video shows that defendant and Davis are sharing a shopping cart. Davis is seen switching tags and placing items in the cart. Defendant apparently bought the items that Davis had switched the prices on, because when she was stopped, she had paid only $63 for items that cost at least $108. Based on these facts, the State demonstrated that defendant was far more than "merely present" during Davis's criminal activities; indeed, the State demonstrated that defendant actively participated in the endeavor, attempting to purchase items on which Davis had altered the price by switching clearance stickers. (In addition, Reglis testified that he saw "them" switch the clearance

stickers, suggesting that he had observed defendant, as well as Davis, switch stickers from clearance items to other items.) We reject defendant's contention.

¶ 19 Next, defendant argues that there is no evidence that the items were properly marked in the first place. Defendant argues that it is possible that the items had been incorrectly marked by the T.J. Maxx employees before she came into the store, and Reglis did not testify that she was responsible for changing the prices on any of the items. We disagree.

¶ 20 Leaving aside the fact that Reglis testified he observed them (defendant and Davis) peel off the stickers from clearance items and affix the stickers to other items from a non-clearance area of the store, defendant is essentially arguing that it was simply coincidence that she chose a number of items that happened to have been incorrectly marked by the store's employees. To support this contention, defendant cites to *People v. Kostatinovich*, 98 Ill. App. 3d 611 (1981). In that case, a group of four women entered a store and "cornered" the workers and asked them questions about various products for around 5 or 10 minutes. *Kostatinovich*, 98 Ill. App. 3d at 612. After that time, the defendant said something in a foreign language at the front of the store and the witnesses observed seven women leave the store. *Kostatinovich*, 98 Ill. App. 3d at 612. No witness testified that he or she had seen the defendant near the back of the store; one witness did not even see the defendant until she was leaving the store. *Kostatinovich*, 98 Ill. App. 3d at 612-13. In addition, a witness testified that, in addition to the group of about seven women, there were five or six other customers in the store at that time. *Kostatinovich*, 98 Ill. App. 3d at 613. The owners then discovered that cash, checks, and a coin collection were missing from the back of the store. *Kostatinovich*, 98 Ill. App. 3d at 612-13. On appeal, the appellate court reversed the defendant's conviction, holding that, because no witness actually observed the defendant to be in or near any of

the places from which the owners' items were taken, and because other customers were also in the store at the same time, the State had failed to prove beyond a reasonable doubt the defendant's guilt. *Kostatinovich,* 98 Ill. App. 3d at 614. Defendant analogizes this case with *Kostatinovich,* arguing that because the jury was not shown any video recording of defendant changing the tags, and because the store's own employees may have been the ones to have incorrectly placed the clearance tags on non-clearance items, the State failed to sustain its burden of proving her guilty beyond a reasonable doubt.

¶ 21 *Kostatinovich,* however, is distinguishable. While the defendant's actions in that case were suspicious, there was no evidence linking the defendant with the stolen items. Here, by contrast, not only were defendant's actions in this case suspicious, but she was found with the items that had their price tags tampered with. Thus, there is the additional circumstance tying defendant in this case to the items in question. In addition, because it appears on the video that Davis did not try to conceal her actions of peeling off clearance stickers and affixing them to non-clearance items, the reasonable inference arises that Davis was peeling the clearance sticker for both herself and defendant. This inference is further strengthened by the fact that all of the items were placed in the same shopping cart and the two women were shopping together throughout the store. We conclude, then, that the key lack in *Kostatinovich,* namely, a connection between the defendant and the items that were stolen, is not duplicated in this case. Here, defendant and Davis placed tampered items into the shopping cart from which defendant bought her merchandise, and that merchandise had the price tags altered to reflect that the items were on clearance when they were not supposed to be.

¶ 22 We further note that, while defendant is correct that no witness testified about whether the items were properly marked in the first place, her claim that the store's employees had incorrectly

marked the items that she just happened to buy is no more than conjecture. While the claim might be able to explain why the items she bought were improperly marked, there is no actual evidence to support the claim. Instead, the evidence showed that Davis altered the price tags of the items placed in defendant and Davis's shopping cart. Because there is actual evidence of Davis switching the clearance tags onto the items that defendant purchased, it undercuts defendant's unsupported claim that the items were already incorrectly marked. Accordingly, we reject defendant's contention on this point.

¶ 23 Defendant also repeatedly argues that the fact that the clearance stickers were not ripped means that they were not switched from clearance items to non-clearance items. Defendant bases this argument on Reglis's testimony that the clearance stickers used stronger or stickier adhesive and that they were incised with hatch marks to make them more likely to rip when someone tried to peel them off. According to defendant, this testimony coupled with the fact that none of the stickers on the items she bought were ripped leads to the conclusion that the stickers were not changed. While defendant's logic is not obviously unsound, her contention nevertheless cannot be sustained. We note that the video clearly shows Davis removing the clearance stickers from the tags and transferring them onto the tags of the items that were then placed into the shopping cart. While this evidence does not invalidate Reglis's testimony about the clearance stickers, it is clear that Davis did not appear to have any trouble transferring the clearance stickers between the tags. For whatever reason, it appears manifestly clear that the safety measures incorporated into the clearance stickers did not function as anticipated in this case. Further, the jury was informed of all of the evidence, including the safety measures used by the clearance stickers to help reveal signs of tampering. It heard and saw all of the evidence and we will not disturb its determination on this point. *People v.*

Williams, 193 Ill. 2d 306, 338 (2000) (it is the jury's province to determine the credibility of witnesses, to weigh their testimony, to resolve conflicts in the evidence, and to draw reasonable inferences from the evidence).

¶ 24 Defendant also contends that the State did not prove the full actual value of the items. According to defendant, Reglis's testimony was insufficient to establish the value of the items because Reglis did not see the receipt being generated that showed the value of the items and he did not generate the receipt himself. In addition, because Reglis did not see the creation of the receipt, he did not see which items the manager rang up, so he could not be sure that the manager rang up the correct items. We disagree.

¶ 25 Reglis testified that he was trained to run the cash registers and computers used by T.J. Maxx as a part of his duties as loss prevention officer. In addition, he was aware of the system that the store used to classify and control its merchandise. He was aware of the broad categories to which the items belonged and testified that, with the clearance stickers, the items were improperly categorized. For example the shirt that was marked on clearance was shown as belonging to the career wear category when it should have been in the urban wear category. Thus, based on Reglis's knowledge of the systems used by T.J. Maxx, his testimony adequately established the value of the merchandise.

¶ 26 Regarding the argument that Reglis did not observe the creation of the receipts, and could not have been sure that the correct items were rung up, his testimony established his knowledge of the systems used by the store. In addition, he observed Davis and defendant shopping and observed the items placed into the shopping cart. In addition, he watched them check out, so he was able to see which items each woman purchased. There was no evidence that Davis's purchases were being

mistakenly attributed to defendant (or vice versa). Thus, because Reglis knew which items were purchased by defendant, he could tell if the receipt would have been in error. Accordingly, we reject defendant's argument on this point.

¶ 27 Defendant highlights Reglis's testimony in which he apparently concedes that defendant did not purchase the items comprising the State's exhibit No. 3F, a pair of shoes. The State notes that Reglis expressly testified that all of the items in State's group exhibit No. 3 were purchased by defendant. We agree with the State that, from the tenor of the questioning it is likely that Reglis misspoke in testifying that the shoes were not in defendant's possession; the questioning concerned whether the prices of items had been changed and Reglis likely meant that the price of the shoes could not be shown to have been incorrect.

¶ 28 Defendant contends that it is improbable that Reglis would have been able to read the SKU numbers and to know the SKU number for each piece of clothing. While this is true, Reglis testified that T.J. Maxx categorized its clothing. It is not unreasonable to believe that, as loss prevention officer, Reglis knew what items belonged in each clothing category. This explains his ability to identify the merchandise at issue as belonging to a particular category. Further, the jury heard all of the evidence and it was within the jury's province to assign the credibility and weight to be accorded to the evidence. *Williams*, 193 Ill. 2d at 338.

¶ 29 Defendant argues that, even if Reglis knew the SKU numbers for individual items of clothing, there was no evidence to show that the SKU numbers did not change when an item was marked down. Defendant reasons that, because the clearance sticker has a bar code, a new bar code is being placed on the item when it is marked down, and that the new bar code may also correspond to a new SKU number. Defendant argues that, because Reglis would not know what the SKU

number of the marked-down item is, he could not give the value of the item, both pre- and post-mark-down.

¶ 30 In support of Reglis's incompetency to testify about the value of the items, defendant cites to *People v. Mikolajewski*, 272 Ill. App. 3d 311 (1995). In that case, the defendant was convicted of felony retail theft, meaning that he had taken items with a value greater than $150. At trial, a store security guard testified about the value of the items based on having seen the price tags on the stolen items. *Mikolajewski*, 272 Ill. App. 3d at 313. The court held that the guard's testimony was inadmissible hearsay and noted that the guard had no personal knowledge or understanding of how or why the items were priced at a particular value. *Mikolajewski*, 272 Ill. App. 3d at 317. The court also noted that, had the items been available, the price tags would have been self-authenticating and would have established the value of the items. *Mikolajewski*, 272 Ill. App. 3d at 317. Defendant argues that *Mikolajewski* stands for the proposition that, where the person testifying as to value has no idea about how or why the value was established, that testimony is insufficient to establish the value for the purpose of establishing the seriousness of the crime. While this may be a plausible reading of *Mikolajewski*, it misses the more important point. *Mikolajewski* held that the State failed to prove the value of the items because it offered incompetent testimony of that value, noting that, had the items and their price tags been available as evidence, the State would have properly established the value. *Mikolajewski*, 272 Ill. App. 3d at 317. Here, while Reglis's testimony may have been hearsay, the actual items and their price tags were available in court and had been admitted into evidence. Thus, the State presented sufficient evidence (being the original price tags) of the value of the items, along with sufficient evidence of what defendant paid for the items. Accordingly, *Mikolajewski* supports the conclusion that the State presented sufficient evidence of value, and

whether Reglis's testimony about the value was hearsay, it was of no moment because the evidence of value was properly admitted, so Reglis's hearsay testimony was harmless beyond a reasonable doubt. Accordingly, we reject defendant's argument on this point.

¶ 31 Defendant also argues that no proper foundation was laid to show that the clearance tags did not change the category of the item. Defendant further contends that there was no evidence that the clearance stickers correctly identified the items to which they were affixed. We further note that these arguments reprise defendant's earlier argument that there is nothing to show that the store employees did not mistakenly tag the items in the first place. Reglis testified about the store's method of categorizing the clothes it sold. Further there is no evidence to suggest that any of the items that defendant purchased were incorrectly tagged. Last, it seems implausible that the placing of a clearance sticker would change the categorization of the item as the clearance sticker only decreases the price, while the item remains the same. Accordingly, we reject defendant's arguments on these final points.

¶ 32 We hold that, when properly considered, the evidence was sufficient beyond a reasonable doubt to prove defendant's guilt. Defendant was seen shopping with Davis, Davis was observed to peel off clearance stickers and affix the stickers to the items taken from non-clearance racks and place them into the common shopping cart. Defendant was observed attempting to purchase the items comprising the State's group exhibit No. 3 and was stopped while in possession of those items. We conclude that any rational trier of fact could have concluded beyond a reasonable doubt that defendant was guilty of the offense of retail theft by changing the price tags.

¶ 33 Defendant next argues that her counsel was ineffective for failing to object to the admission of the State's exhibit No. 1, the receipt created by the manager showing the actual prices of the

items[2], and for failing to object to Reglis's testimony about the receipts and prices, because he lacked personal knowledge. A claim of ineffective assistance of counsel involves the familiar analysis first set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under the *Strickland* standard, in order to demonstrate that his or her counsel was ineffective, a defendant must show (1) that the attorney's performance fell below an objective standard of reasonableness, and (2) that, but for the attorney's deficient performance, there is a reasonable probability that the outcome of the trial would have been different. *People v. Watson*, 2012 IL App (2d) 091328, ¶ 23. In order to prevail on his or her ineffective-assistance claim, the defendant must fulfill both elements of the *Strickland* test (*Watson*, 2012 IL App (2d) 091328, ¶ 23), and the court may resolve the claim on one element without reaching the other element (*People v. Cunningham*, 2012 IL App (3d) 100013, ¶ 31). With these principles in mind, we consider defendant's specific arguments.

¶ 34 Defendant first argues that the State's exhibit No. 1 was inadmissible because it was not a business record because it was created in the course of an investigation. Even if we were to accept this contention, it fails because the record shows that the price tags for the merchandise were in evidence, and price tags qualify as an exception to the rule against hearsay and as a self-authenticating record. 720 ILCS 5/16A-2.2 (West 2008); *Mikolajewski*, 272 Ill. App. 3d at 317; *People v. Ferraro*, 79 Ill. App. 3d 465, 471-72 (1979). Because the actual price tags are in evidence, the State's exhibits are no more than summaries of that evidence. The actual price tags showed both what the items were originally valued at, as well as what defendant's attempted mark-down was, by

[2]Actually, it appears that the State's exhibit No. 1 is defendant's original receipt and exhibit No. 2 is the receipt created by the manager that combined defendant's original receipt with the actual values of defendant's merchandise.

affixing the clearance sticker to the price tag. Thus, the information of which defendant' complains was already in the record when the actual items were admitted into evidence. Because this evidence was properly admitted, the manager's summary comparing the actual paid amount to the properly charged amount was only duplicative and could not have caused prejudice to defendant. Because there can be no prejudice to defendant, defendant cannot maintain her ineffective-assistance claim.

¶ 35 The same result obtains with defendant's contention about Reglis's testimony the receipt. Defendant argues that, because Reglis did not create the receipt, he lacked the necessary personal knowledge to testify about it. Again, even if this is true, it does not diminish the fact that the price tags were properly in evidence. Reglis's testimony was, at most, cumulative to the properly admitted evidence, and, even if it were stricken, the properly admitted evidence of value would remain. Thus, there can be no prejudice attaching to Reglis's testimony as that same information was properly admitted in the form of the price tags affixed to the items defendant purchased. Because this evidence was properly admitted, Reglis's testimony was only duplicative and could not have caused prejudice to defendant. Because there was no prejudice to defendant arising from Reglis's testimony, she cannot maintain her ineffective-assistance claim.

¶ 36 Defendant raises a number of arguments in support of her contentions. None of the arguments, however, deal with the effect of the properly admitted price tags on the complained-of issues. As a result, we need not consider those arguments further.

¶ 37 Defendant finally contends that the restitution order must be vacated because defendant was required to pay an amount that was more than T.J. Maxx's losses as the items were immediately returned to the store when she was stopped. Defendant argues that, because the items were confiscated from her and returned to the store, any damage to the items that prevented them from

being marketable should not be attributed to her, but should be the store's fault. This is especially true, according to defendant, where Reglis can be observed tossing the items onto the floor. Defendant alternatively contends that, because the testimony established the value of the clothes to be $108.53, and the restitution order required defendant to pay to T.J. Maxx $113.94, the restitution order must vacated and the cause remanded so that the restitution amount could be properly recalculated. Defendant also argues that Reglis testified that the shoes were not in defendant's possession when she was stopped, so the value of the items was likely less than the $108.53. We disagree.

¶ 38 Section 5-5-6(b) of the Uniform Code of Corrections (Code) (730 ILCS 5/5-5-6(b) (West 2010)) authorizes restitution and limits it to actual out-of-pocket expenses, losses, damages, and injuries suffered by the victim. We will not reverse the trial court's restitution order absent an abuse of discretion. *People v. Clausell*, 385 Ill. App. 3d 1079, 1080 (2008).

¶ 39 Regarding restitution, the parties do not provide transcripts of the hearing at which it was imposed. Instead, the parties have provided an agreed statement of facts, which provides, pertinently:

¶ 40 "The State supported the requested restitution amount by informing the Court that Defendant had been refunded any money she paid T.J. Maxx on the date of offense, and that the total requested represented the sale price of the merchandise at issue in this case, which was not in a condition to be resold."

¶ 41 Defendant argues that the fact that the clothes were not in a condition to be resold was due to Reglis's mishandling of them. The agreed statement, however, only provides that the clothes were not in a condition to be resold, it does not provide the reasons why the clothes were not in a

condition to be resold. We note that the clothes were apparently taken and held for evidence from the date of the offense through the trial. This fact, not attributable to T.J. Maxx, provides a reason why the clothes could not be sold, namely, they were not physically present in the store to be sold. As a result, we do not accept defendant's contention, and we cannot accept that it was the store's handling of the clothes the prevented their resale. Instead, we determine that it was not the store's actions that prevented the resale of the clothes, so it was appropriate for the trial court to order restitution based on the value of the clothes established at trial.

¶ 42 Defendant also contends that the she did not have the shoes, according to Reglis's testimony. We have already determined that Reglis's testimony clearly established that defendant was stopped with all of the items in the State's group exhibit No. 3, including the shoes. *Supra*, ¶ 27. Reglis's testimony referred to the fact that he could not determine if the price for the shoes had been marked down by the store or as a result of switching a clearance sticker. Thus, we reject this contention.

¶ 43 As to the discrepancy between the restitution amount ordered and the value of the items proved at trial, we hold that the trial court's order must be modified to conform to the evidence at trial. Defendant argues that the excessive amount ordered is plain error and the State does not dispute the use of a plain error analysis. We accept the concession and, pursuant to Illinois Supreme Court Rule 366 (eff. Feb. 1, 1994), modify the restitution amount to be $108.53, the amount proved at trial.

¶ 44 For the foregoing reasons, we affirm as modified the judgment of the circuit court of Lake County.

¶ 45 Affirmed as modified.