2016 IL App (2d) 140124-U
No. 2-14-0124
Order filed July 21, 2016

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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 Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 08-CF-1861
GRANT GAMBAIANI,	)	Honorable Daniel P. Guerin,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court, with opinion.
Justices Zenoff and Spence concurred in the judgment and opinion.

ORDER

¶ 1 *Held*: Defendant's convictions for child pornography (possession) are reversed, since the trial court abused its discretion when it refused to instruct the jury concerning voluntariness; defendant's convictions for predatory criminal sexual assault and child pornography (manufacture) are affirmed, despite defendant's claims of error.

¶ 2 This case comes before us a second time following a retrial. In 2008, then-10-year-old D.G. reported to his parents, and later to investigators, that he had been involved in a months' long sexual relationship with his 24-year-old cousin, defendant Grant Giambaiani. Defendant often babysat for D.G. (his apartment was near D.G.'s parent's home) and would spend time

with D.G. on family trips. In July 2008, defendant was arrested and police officers, armed with a search warrant, seized his cellular phone and desktop computer from his apartment. Defendant later gave a statement to the police and was charged by indictment with four counts of predatory criminal sexual assault of a child (PCSA) (three of the counts involved oral sex; one count was based on sexual penetration of the victim's anus), one count of aggravated criminal sexual abuse of a minor, and one count of manufacturing child pornography. All of the charged sex acts occurred in the victim's bedroom in Illinois, between March 2008 and June 2008. The child pornography (manufacturing) count arose as a result of a lewd photograph of D.G. taken by defendant with his cell phone.

¶ 3 After his arrest, defendant was admitted to bail and posted bond. At no time did defendant file a speedy-trial demand. In July 2009, before a hearing on one of defendant's motions to suppress, the State represented to the court that it had offered defendant a plea agreement, which defendant had rejected, and that new and additional charges would be filed concerning the child pornography images found in the "thumb cache" (a term we'll discuss below) on defendant's desktop computer. In September 2009, fourteen months after the initial charges, the State charged defendant by information with 18 counts of child pornography (possession) based on the images found on his desktop computer. (Three of the counts were for aggravated possession based on the estimated age of the children depicted (under 13), but for convenience we refer to all 18 counts as a single group.)

¶ 4 While the suppression motions were still being litigated, in January 2010, the State filed a motion *in limine* to admit at trial evidence of prior sex acts between defendant and victim under 725 ILCS 5/115-7.3 (West 2012), which provides for the admission of uncharged "other crimes" to show a defendant's propensity to commit certain charged sex offenses. According to the

State's motion, some of the other-crimes sex acts between defendant and the victim allegedly occurred during a family trip to Florida, during a trip to Ohio, in the victim's bedroom, and in defendant's apartment. The State's motion additionally sought to introduce the child pornography found on defendant's desktop computer as other-crimes evidence.

¶ 5 Prior to trial, defendant moved to sever the 18 child pornography (possession) counts for trial. After an evidentiary hearing, the trial court denied defendant's motion explaining that the original six offenses and 18 additional offenses were related. That is, that defendant had "groomed" the victim by showing him child pornography and by suggesting that they act out what they saw together. The trial court further noted that even if the additional child pornography counts had been severed for trial, evidence related to offenses would be admissible under 725 ILCS 5/115-7.3.

¶ 6 At defendant's first trial, a jury found him guilty of all of the charges and the trial court sentenced defendant to an aggregate 43-year term of imprisonment. On appeal, however, we reversed defendant's convictions and sentences finding that the State had violated the rule set forth in *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose material and potentially exculpatory evidence, and remanded the case for a new trial. *People v. Giambaiani*, 2012 IL App (2d) 101246-U, ¶¶ 35-36. In addition, since the issue was likely to crop up on retrial, we also addressed defendant's contention that the 18 additional child pornography charges should not have been permissively joined at trial. We disagreed with defendant, explaining that the trial court did not abuse its discretion in joining the charges for trial because "similar *** evidence linked the offenses." *Id.* ¶ 44.

¶ 7 On remand, defendant was represented by a new attorney who filed a motion seeking leave to "personally inspect and photograph" the victim's bedroom and the adjacent areas in his

family's residence. The trial court denied the motion, but ordered the police to take new photographs of the victim's bedroom and encouraged counsel to speak with the police about the photographs counsel felt he needed. Counsel spoke with the police and the police took new pictures. At a subsequent hearing, counsel renewed his request to inspect the victim's residence, stating that the new photos were also insufficient and emphasizing that "where *** things are located" in the victim's family's house was "an intricate part of the [defendant's trial] defense." The trial court denied the renewed request.

¶ 8 After a second jury trial, defendant was found guilty on all charges save for one count of predatory criminal sexual assault (one of the oral sex counts). Defendant filed a posttrial motion, which the trial court denied. The trial court then sentenced defendant to an aggregate 34-year term of imprisonment; 28 years for the sex offenses plus a six-year term for the manufacture of child pornography. The trial court also sentenced defendant to 18 five-year terms on each of the child pornography possession counts to run concurrent to his six-year sentence for manufacturing. Defendant appeals and raises several issues. Ultimately, we find the majority of defendant's arguments are unpersuasive, save for his improper jury-instruction claim.

¶ 9 Defendant's first contention is that his trial attorney was ineffective for failing to file a speedy trial demand pursuant to the speedy trial statute, 725 ILCS 5/103-5(b) (West 2012). According to defendant, had his attorney filed a speedy trial demand, the State would not have been able to file the 18 additional child pornography charges in September 2009 based on the compulsory joinder statute, which requires the State to "prosecute all known offenses within the jurisdiction of a single court in a single criminal case 'if they are based on *the same act*.' 720 ILCS 5/3-3(b) (West 2008)." (Emphasis added.) *People v. Hunter*, 2013 IL 114100, ¶ 10.

¶ 10 There are a number of assumptions in defendant's argument—*e.g.*, that the State would not have been able to bring the possession charges within the applicable 160-day period following his demand, or that the possession offenses were "known" by the State within that period—but we need not consider them because the charges in this case were not based on the same act. As our supreme court has said, "[j]oinder is required where the defendant is engaged 'in only one continuous and uninterrupted act.' " *Hunter*, 2013 IL 114100, ¶ 18 (quoting *People v. Quigley*, 183 Ill. 2d 1, 11 (1998)). In other words, joinder is required in cases where an offender "simultaneously possesses" an additional item of contraband (*e.g.*, *Hunter*, 2013 IL 114100, ¶ 19; *People v. Dismuke*, 2013 IL App (2d) 120925, ¶ 14; *People v. Hiatt*, 229 Ill. App. 3d 1094, 1097 (1992)), or where the new and additional charges are essentially just a recharacterization of the initial charges (*e.g.*, *People v. Williams*, 204 Ill. 2d 191, 201 (2003); *Quigley*, 183 Ill. 2d at 10; *People v. McGee*, 2015 IL App (1st) 130367, ¶ 43). Conversely, joinder is *not* required where the offenses are based on separate and distinct criminal acts, despite their interrelationship. See, *e.g.*, *People v. Gooden*, 189 Ill. 2d 209, 219-20 (2000) (home invasion with a firearm and criminal sexual assault (same victim)); *People v. Mueller*, 109 Ill. 2d 378, 384 (1985) (murder and concealment of homicidal death (same victim)); *People v. Albanese*, 104 Ill. 2d 504, 528-33 (1984) (separate murders). Thus, joinder boils down to an issue of classification, *i.e.*, whether the offenses are classified as a single act or as several acts.

¶ 11 Here, the 18 additional child pornography (possession) charges were not based the same act as the initially charged offenses. Defendant's alleged possession of child pornography on his computer was a separate act from the acts that comprised the first set of charged offenses—*i.e.*, sexual penetration, sexual conduct, and the manufacture of child pornography (of a separate image). Therefore, since compulsory joinder did not apply to the 18 additional possession counts,

they likely would not have been dismissed on speedy trial grounds and defendant's counsel was therefore not ineffective for not filing a demand. *People v. Staten*, 159 Ill. 2d 419, 432 (1994).

¶ 12 Defendant next claims that no rational jury could have found him guilty of one count of predatory criminal sexual assault (penis to anus). If he is correct, we would be required to reverse this conviction. *People v. Collins*, 106 Ill. 2d 237, 261 (1985) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

¶ 13 With respect to the challenged conviction, defendant concedes the element of age, *i.e.*, that he was over 17 and that the victim was younger than 13 at the time of the alleged offense. 720 ILCS 5/11-1.40(a) (West 2012). However, defendant disputes whether there was sufficient evidence of "sexual penetration" between his penis and D.G.'s anus. Relevant here, the jury was instructed that "sexual penetration" is defined as "any contact, however slight between the sex organ *** of one person [and the] anus of another person ***." Illinois Pattern Jury Instructions, Criminal, No. 11.65E (4th ed. 2000) (hereinafter IPI Criminal 4th, No. ____); 720 ILCS 5/11-0.1 (West 2012). Defendant initially argues that there was no medical evidence to prove sexual penetration of D.G.'s anus, but medical evidence is not required since the definition of sexual penetration includes even slight sexual contact which may not result in medically detectable evidence. *People v. Le*, 346 Ill. App. 3d 41, 50 (2004). Thus, a victim's testimony alone may be sufficient evidence to persuade a reasonable jury of the defendant's guilt of a sex offense. See, *e.g.*, *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009); *People v. Hillier*, 392 Ill. App. 3d 66, 69 (2009), *aff'd*, 237 Ill. 2d 539 (2010).

¶ 14 Here, there was sufficient evidence of actual contact between defendant's penis and the victim's anus. At defendant's trial, D.G. testified that one day in his bedroom in June 2008, defendant had D.G. sit on his penis which, according to D.G., initially went "*almost* into [his]

butt hole" and "once it hit, it really hurt[.]" Defendant emphasizes D.G.'s use of the word "almost" and argues that what D.G. meant by "hit" was ambiguous. Generally, evidence that the defendant's sex organ only touched an area near the complainant's anus is insufficient to establish sexual penetration (*People v. Atherton*, 406 Ill. App. 3d 598, 609 (2010); *People v. Oliver,* 38 Ill. App. 3d 166, 170 (1976)), but D.G.'s testimony did not end there. In his very next answer, D.G. explained that defendant's penis "hurt [his] butt hole"; that it made contact with his anus for "[t]en, fifteen seconds" before they had to stop because "it hurt." D.G. testified that his anus hurt and that he had a rash on his anus for the following week. One week later, when defendant asked D.G. to "try" anal sex again with him, D.G. said no citing his rash and that "it really hurt." Based on this testimony alone, a reasonable jury could find defendant guilty of predatory criminal sexual assault (penis-to-anus) beyond a reasonable doubt.

¶ 15 Our conclusion is not diminished by the fact, as defendant points out, that D.G. was impeached with his testimony from the first trial that defendant's penis "went in the crack" but did not make contact with his anus. As the State notes, D.G. was several years younger at the time of defendant's first trial and may not have understood the question; although that suggestion is somewhat tempered by the fact that D.G. manifested little difficulty when speaking to an investigator years before defendant's first trial. In any event, the resolution of this inconsistency in D.G.'s testimony was for the jury to determine, not us. The jury's verdict represents their resolution of that issue and we cannot say that it was unreasonable. *Id.*; see also *Siguenza-Brito*, 235 Ill. 2d at 228 ("[i]t remains the firm holding of this court that the testimony of a single witness, if positive and credible, is sufficient to convict, even [when] it is contradicted"). We note too that D.G.'s testimony concerning sexual penetration was corroborated by defendant's own statement to the police. In fact, a number of critical details were the same. According to the

investigator, when asked about anal penetration, defendant replied that "it only happened one time" when they were in D.G.'s bedroom; that D.G. sat on his penis and that his "penis penetrated [D.G.]'s anus for 10 to 15 seconds"; however, "it was very uncomfortable for both of them, so they stopped." Thus, whether D.G.'s testimony is considered alone or alongside the evidence of defendant's statement, the evidence was sufficient to sustain defendant's conviction.

¶ 16 Defendant next contends that the trial court denied him his constitutional right to a public trial when it closed the courtroom during D.G.'s testimony. 725 ILCS 5/115-11 (West 2012) provides that in certain sex-offense cases, while the victim is testifying, the court may exclude "all persons, who, in the opinion of the court, do not have a direct interest in the case, except the media." The State notes that when it asked the trial court to close the courtroom for the victim's testimony pursuant to 725 ILCS 5/115-11, defense counsel agreed to the closure, stating "Well, we'd ask that John [(defendant's father)] remain", which the court allowed. We agree with the State that counsel's statement acquiescing to the courtroom's closure, waived the issue for review. This is distinct from the ordinary forfeiture of a claim. A forfeiture is basically an oversight in preserving a claim (see *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) ("*Both* a trial objection *and* a written post-trial motion raising the issue are required for alleged errors that could have been raised during trial") (emphasis in original)), which we can overlook to review the underlying claim for plain error; but waiver is a deliberate decision to abandon a right, and that we cannot overlook. *United States v. Olano*, 507 U.S. 725, 732-34 (1993); *People v. Townsell,* 209 Ill. 2d 543, 548 (2004); *In re Detention of Swope,* 213 Ill. 2d 210, 217 (2004).

¶ 17 Even if we could consider this issue, there is simply no merit to defendant's contention that he was denied his sixth amendment right to a public trial. In *People v. Falaster,* 173 Ill. 2d 220, 228 (1996), our supreme court held that the closure of a courtroom is constitutional so long

as it complies with 725 ILCS 5/115-11 (West 2012). This is so because, unlike a complete mandatory closure, which indiscriminately excludes the general public and so is unconstitutional (*e.g.*, *Waller v. Georgia*, 467 U.S. 39 (1984), *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982)), 725 ILCS 5/115-11 (West 2012) is limited in scope; it applies only to the victim's testimony in sex-offense cases, and does not exclude the media and those directly interested in the case. *Falaster*, 173 Ill. 2d at 228 (citing *People v. Holveck*, 141 Ill. 2d 84, 103-04 (1990)). Here, the trial court complied with 725 ILCS 5/115-11 (West 2012)—at least nominally, as we explain below—and defendant has not shown that anyone was excluded erroneously. Accordingly, none of the evils of a closed trial were implicated in this case. *Falaster*, 173 Ill. 2d at 228.

¶ 18 That said, we have some concerns with *how* the courtroom closure was handled in this case. After D.G. took the stand but before he was sworn in, the lead prosecutor stated, "I forgot to clear the courtroom, but I think there's only one gentleman besides the lady." The court then asked the lead prosecutor to speak with "the lady" and determine whether she was "with the press." The "gentleman" was the trial court judge's law clerk, and the lead prosecutor said, "I'll tell him to leave." "Yeah. All right," the court responded. The trial court noted that defendant's father was also in the courtroom pursuant to its prior ruling. After a short break, the lead prosecutor explained that "the lady" was a student. The trial court stated that she "left," but the record does not indicate whether she was asked to leave or left of her own accord. The court then asked the lead prosecutor to tell "the deputies *** not to let anybody in[.]" From the transcript, it is not clear whether only some, all, or none of this conversation occurred in front of the jury.

¶ 19 This was not the ideal way to handle the courtroom's closure. As we have recently said, ordering bailiffs to completely bar the public from entering a courtroom during testimony, even

testimony under 725 ILCS 5/115-11 (West 2012), is highly objectionable. See *People v. Burman*, 2013 IL App (2d) 110807, ¶ 57. "Closing a public hearing like a trial should not be done lightly, and the proper course would have been to direct the bailiff to signal if anyone attempted to enter and then determine on a case-by-case basis whether the person should be permitted to enter." *Id*. We must clarify what we said in *Burman* as to who must make this determination. Recall that 725 ILCS 5/115-11 (West 2012), provides that the court may exclude those who "*in the opinion of the court*, do not have a direct interest in the case, except the media." (Emphasis added.) Thus, during testimony subject to 725 ILCS 5/115-11 (West 2012), while a bailiff may determine whether a person is a credentialed member of the media, it is for the trial court judge to determine whether a would-be spectator is directly interested in the case and may sit in the gallery or not. See, *e.g.*, *People v. Revelo*, 286 Ill. App. 3d 258, 265 (1996). Had the trial court followed this procedure and handled these matters personally, it would have been unnecessary to effectively deputize the lead prosecutor to question the spectators and to instruct the bailiffs. Although defendant does not raise the issue, we are compelled to note that a prosecutor is a natural authority figure before a jury (*People v. Blue*, 189 Ill. 2d 99, 137 (2000)); thus, to allow the prosecutor to be responsible for courtroom order "would cloak the state's attorney with the authority to be judge as well as prosecutor" (*People v. Grimm*, 74 Ill. App. 3d 514, 517 (1979) (Stouder, J., dissenting)), and in another case that could easily be a bridge too far.

¶ 20 Defendant's next contention concerns the testimony of Dr. Thomas Rizzo, a child psychologist. In June 2008, D.G. made an outcry statement to his parents, reporting defendant's sexual abuse. Because defendant was their nephew, D.G.'s parents took him to see Rizzo. Rizzo met with D.G., but only briefly; after D.G. made several disclosures, Rizzo, a mandated reporter (325 ILCS 5/4 (West 2012)), stopped the session and contacted the authorities. On

cross-examination, the first question Rizzo was asked was whether "from time to time" "children make up stories" or "fantasize" about sexual abuse. This same question was asked two additional times. Each time Rizzo generally replied that he was aware of the possibility and that, while he had not seen any examples in his own practice, "in the literature there are examples." On redirect, Rizzo testified that he was trained to focus on several factors including the consistency of the child's statement and the child's demeanor relative to his or her expected level of sexual maturity. Those answers lead to the following exchange:

> "Q. [Assistant State's Attorney:] Was there anything about [D.G.'s] story that was inconsistent with what your training was or what he was saying to you?
>
> A. [Rizzo:] No.
>
> Q. How about his demeanor?
>
> A. That was consistent with a kid telling the truth."

There was no objection. The State then tendered Rizzo and the defense declined to re-cross him.

¶ 21 Defendant now contends that Rizzo's testimony—that D.G.'s demeanor "was consistent with a kid telling the truth"—was improper in that it vouched for D.G.'s credibility. As the State notes, defendant did not object to Rizzo's testimony at trial and so the issue has been forfeited. *Enoch*, 122 Ill. 2d at 186. Accordingly, the issue may be reviewed only for plain error. *Townsell*, 209 Ill. 2d at 548.

¶ 22 Defendant's forfeiture is not a stand-alone reviewability problem however; it also affects our review of the merits of his claim. That is, because defendant did not object to now-challenged testimony, he deprived the State of an opportunity to cure the alleged defect at trial. In effect then, defendant's argument is that the trial court erred in failing to strike Rizzo's answer about D.G.'s demeanor *sua sponte*. Even if we were to say that the evidence in this case was closely balanced and review this issue for plain error, we would find no plain error. Whether

it is the prosecution or the defense, the general rule is that "*counsel* should not ask one witness to comment on the veracity of the testimony of another witness." (Emphasis added.) *United States v. Sullivan*, 85 F.3d 743, 750 (1st Cir. 1996). Here, defense counsel's questions to Rizzo on cross-examination thrice insinuated that D.G. was lying because children often "make up stories" or have "fantasize" sexual abuse. This was little different than the famous (and famously improper) question "Did you think the witness was lying?" See *id.* Considerably more foundation was required to make that line of questioning proper, yet it was the defense's first question of Rizzo on cross. Accordingly, once *the defense* broached the subject of D.G.'s veracity, it opened the door for the State to challenge the insinuation. See, *e.g.*, *People v. Denson*, 2013 IL App (2d) 110652, ¶ 29, *aff'd*, 2014 IL 116231; *People v. Bakr*, 373 Ill. App. 3d 981, 989 (2007); *People v. Longstreet*, 2 Ill. App. 3d 556, 559 (1971). To that end, we note that the State's final question on redirect was limited and concerned Rizzo's evaluation of D.G.'s "demeanor"; despite Rizzo's answer, the State's question did not call for his opinion on D.G.'s ability to tell the truth.

¶ 23 We determine that Rizzo's testimony simply was not plain error because, given the evidence, there is no reasonable probability that the outcome of defendant's trial would have been different had Rizzo's final answer been stricken. See *People v. Sparkman*, 68 Ill. App. 3d 865, 871 (1979) (no plain error where trial court did not *sua sponte* strike officer's testimony after State's question elicited officer's opinion on credibility of a key defense witness).

¶ 24 Next, defendant contends that the trial court abused its discretion when it denied defendant's counsel's renewed request to "personally inspect" the victim's bedroom. Although the issue was preserved in defendant's posttrial motion, we find it has no merit. The trial court made a thorough record when it weighed the probity of counsel's inspection against the victim's

family's right to privacy. The court further considered that nearly 5 years had elapsed between the timeframe of the alleged offenses and the time of counsel's request. So, the trial court crafted a compromise and ordered the police to take additional photographs of the victim's bedroom and house, as well as to collaborate with defendant's counsel. Although counsel deemed those photographs insufficient and renewed his request, at trial, the defense introduced 11 large, glossy 15" x 23" photographs of the victim's bedroom and the surrounding area in the home. Those exhibits provided more than enough perspective concerning the interior geography of the victim's bedroom and the adjacent interior spaces (although they were taken roughly 5 years after the offenses were committed). In light of these facts, we cannot say the trial court abused its discretion when it denied counsel's request to inspect the victim's bedroom. See, *e.g.*, *People v. Poole*, 123 Ill. App. 3d 375 (1984) (finding the trial court did not abuse its discretion when it refused to grant defense counsel access to the bedroom of the complaining witness (a ten-year-old girl) for the purpose of taking photographs at night (so as to reproduce the lighting conditions of the alleged assault)).

¶ 25 Next, defendant contends that the trial court erred when it allowed D.G.'s mother to remain in the gallery after she testified and during the testimony of several other witnesses. Defendant also did not preserve this issue in his posttrial motion, but this was not error let alone plain error. *People v. Hillier*, 237 Ill. 2d 539, 549 (2010). No statute or rule requires the exclusion of witnesses when not testifying; it is a courtroom-management matter entirely within the trial court's discretion. *People v. Adams*, 41 Ill. 2d 98, 101 (1968); *People v. Chennault*, 24 Ill. 2d 185, 187 (1962); *In re H.S.H.*, 322 Ill. App. 3d 892, 896 (2001). Critically, defendant does not allege any prejudice resulted to him from D.G.'s mother's continued presence in the courtroom, likely because he would have to concede that his father's continued presence was

reciprocally prejudicial to the State. Nevertheless, we determine that defendant's failure to allege prejudice is dispositive. See *U.S. ex rel. Darcy v. Handy*, 351 U.S. 454, 462 (1956) (" 'it is not asking too much that the burden of showing [the] essential unfairness [from a person's continued presence in the courtroom] be sustained *** not as a matter of speculation but as a demonstrable reality.' *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 281 (1942)").

¶ 26 That brings us to the final issue in this case—the jury instructions concerning the child pornography (possession) charges. At defendant's second trial, Detective Daniel Ragusa of the Naperville police department testified that he found the child pornography images on the hard drive of defendant's desktop computer. Ragusa recovered the images as "thumbnails" from the computer's "thumb cache." Generally, thumbnails, Ragusa explained, are reduced-size images that are used to represent a larger image or a video file in the operating system's explorer view. Thumbnails are created automatically by the computer's operating system (in this case, Windows Vista), and the "thumb cache" is where those thumbnail images are stored. This process decreases load times when large icons are viewed. See also *Wikipedia*, "Windows Thumbnail Cache," https://en.wikipedia.org/wiki/Windows_thumbnail_cache. Ragusa testified that in order for a thumbnail image to be cached, the original image would have to be "introduced to the computer in some fashion"—either (1) from an external source such as a cell phone or a USB drive, or (2) downloaded from the internet—and then "viewed through Windows Explorer." Ragusa did not find the original full-size images on defendant's computer, or other images in defendant's temporary internet files, which are stored in the browser cache. The only images Ragusa found were thumbnail files in the thumb cache.

¶ 27 Ragusa also noted that defendant had "torrent software" on his computer. Ragusa explained that torrent programs, such as BitTorrent, eMule, and uTorrent, are peer-to-peer

file-sharing programs that are used to download music, images, and videos. Ragusa testified that it is "extremely common" to see such programs on computers associated with child pornography, but he gave no explanation as to why that association was stronger than any other type of downloading activity.

¶ 28 The jury was later instructed on the definition of "possession"—that it may be actual or constructive—and on the issues and elements of child pornography (possession). Illinois Pattern Jury Instructions, Criminal, Nos. 4.16, 9.29, 9.30 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. __). Defendant claims that the trial court erred however when it refused to instruct the jurors using his three proposed, non-pattern instructions.

¶ 29 The first and second proposed instructions purported to rely on the First District's decision in *People v. Josephitis*, 394 Ill. App. 3d 293 (2009)—a decision that this court subsequently adopted in *People v. Gumila*, 2012 IL App (2d) 110761. Taken together, these cases, along with *People v. Scolaro*, 391 Ill. App. 3d 671 (2009), recognize the common-sense proposition that unique from other types of contraband possession, such as guns or drugs, files may unintentionally "pop up" on a person's computer, or be uploaded onto a person's computer, and thereafter be automatically "cached" or etched into the computer's digital memory without the user being any the wiser. Thus, this court and others have said that the possession of cached child-pornography files alone is insufficient; that in order to show *knowing* possession of child pornography, the ultimate question is whether the defendant reached out for and controlled the images at issue. *Josephitis* is one such example.

¶ 30 At the instructions conference, based on his reading of *Josephitis*, defendant proposed to instruct the jury both that (1) "mere[ly] viewing" child pornography was insufficient to constitute " 'possession' " and that (2) the mere "presence of child pornography in [defendant's

computer's] cache" was also insufficient to constitute possession. With respect to the first proposed instruction, what the court said in *Josephitis* was that the "mere viewing" of child pornography *might* not constitute possession "under certain factual scenarios, for example a patron [accidentally] attending a theater showing a film containing child pornography ***." *Josephitis*, 394 Ill. App. 3d at 301. To instruct the jury on the insufficiency of "mere viewing" as a blanket legal proposition and without any additional context, as defendant proposed to do here, would have been incomplete, misleading, and highly argumentative. The same is true of defendant's second proposed instruction. The court in *Josephitis* stated that the mere presence of child pornography on a person's computer is insufficient *standing alone*; that there must be additional evidence of "both the intent and capability to control the [images]" such as circumstantial evidence showing that the defendant knew that the images were stored in his browser cache, or evidence of the defendant's internet search history thus showing that he intentionally sought out the images in the first place. *Id.* at 299. The core concept in that statement—that constructive possession requires "both the power and the intention to exercise control" over an object—was adequately communicated to the jury in IPI Criminal 4th No. 4.16, which is the instruction defining possession. Accordingly, there was no need to issue defendant's misleading and argumentative proposed non-pattern instructions. *People v. Gacy*, 103 Ill. 2d 1, 90 (1984); *People v. Gardner*, 282 Ill. App. 3d 209, 219 (1996); *People v. Walters*, 211 Ill. App. 3d 102, 105 (1991); see also *People v. Valentin*, 135 Ill. App. 3d 22, 31 (1985) (holding that trial court properly refused defendant's proposed instruction "that mere presence in the vicinity of the heroin or mere knowledge of the physical location, however, does not constitute possession under the statute").

¶ 31 We cannot however reach the same conclusion concerning defendant's third proposed instruction. The offense of child pornography (possession) has two components. The first is that the offender's possession of any lewd image, video, or depiction involving children must be "with knowledge of the nature or content thereof[.]" 720 ILCS 5/11-20.1(a)(6)(West 2012). 720 ILCS 5/11-20.1(b)(5) (West 2012), sets forth the second component as follows:

> "The charge of child pornography does not apply to a person who does not voluntarily possess a film, videotape, or visual reproduction or depiction by a computer in which child pornography is depicted. Possession is voluntary if the defendant knowingly procures or receives a film, videotape, or visual reproduction or depiction for a sufficient time to be able to terminate his or her possession."

Neither the issues nor the elements instruction for the offense of child pornography (possession) discusses the voluntariness component set forth in 720 ILCS 5/11-20.1(b)(5). See IPI Criminal 4th, No. 9.29, 9.30.

¶ 32 At the jury instruction conference, defendant tendered a non-pattern instruction that recited the language in 720 ILCS 5/11-20.1(b)(5) verbatim. Defendant's counsel pointed out that Ragusa had testified the thumbnails recovered from defendant's computer were cached automatically but the original images were not found, which raised the question as to whether defendant had knowingly *and voluntarily* possessed the original images specifically. Counsel asserted that under 720 ILCS 5/11-20.1(b)(5), involuntariness was a defense to the charge, and that the jury should be instructed on it because Ragusa's testimony had raised the issue.

¶ 33 The State objected, and argued as follows:

> "[Assistant State's Attorney]: *** I believe for any instruction to be given, there has to be at least some or slight evidence of—to support it, and this is, this statute [720 ILCS 5/11-20.1(b)(5)] is for those unfortunate people who have computers where some friend—or not friend—e-mails them something that's child pornography, and they delete it right away; or someone, somehow sends them a virus; and as soon as they become aware, they take steps to delete it so that you cannot say that they voluntarily possessed it.
>
> In this case, first of all, we have no evidence of any of that. We have the

> defendant's statements. We have it on his computer. We have the expert testimony. There's been no evidence at all of anything like that by the defense.
>
> The evidence is that it was saved on his computer and downloaded to his computer, by the defendant, by his own admission, and by the fact he showed Dominic these things in his room."

Afterwards, the trial court declined to issue the instruction. We determine that the trial court abused its discretion when it failed to do so.

¶ 34 Unlike knowledge or intent, "voluntariness" is not a mental state; it is a legal conclusion that is a component of every offense. 720 ILCS 5/4-1 (West 2012). But generally, voluntariness is only at issue when an unconscious act, such as automatism or involuntary physical movement (*People v. Grant*, 71 Ill. 2d 551, 558 (1978)), *or* when an automated process is implicated. See, *e.g.*, *People v. Martino*, 2012 IL App (2d) 101244, ¶ 15 (finding defendant not criminally responsible for involuntarily causing injury to a police officer while defendant was being tased). As Professor LaFave has pointed out, involuntariness "is a defense of the failure of proof variety." Wayne LaFave, 1 SUBSTANTIVE CRIMINAL LAW § 9.1 (2d ed. 2003-date).

¶ 35 Professor LaFave also notes that voluntariness takes on a particular dimension in possession cases:

> "For legal purposes other than criminal law—*e.g.*, the law of finders[-keepers]—one may possess something without knowing of its existence, but possession in a criminal statute is usually construed to mean *conscious possession*. So construed, knowingly receiving an item or retention after awareness of control over it could be considered a sufficient act or omission to serve as the proper basis for a crime. *This knowledge or awareness, however, concerns only the physical object and not its specific quality or properties*; one may be said to be in possession of narcotics even when he believes that the substance is not a narcotic, although this belief might well bar conviction because the required mental state is lacking." (Footnotes omitted.) LaFave, 1 SUBSTANTIVE CRIMINAL LAW § 6.1(e).

For this reason, Illinois law holds that for all possession offenses, not just child pornography (possession), possession is a voluntary act if and only if the contraband was "knowingly

procured or received" or the offender "was aware of his control thereof for a sufficient time to have been able to terminate his possession." 720 ILCS 5/4-2 (West 2012)

¶ 36 As *Josephitis*, *Scolaro*, and *Gumila* make clear, the risks of involuntary possession are particularly high when computers, and specifically automated computer functions such as caching, are involved. The legislature was keenly sensitive to the issue: Why else would it use specifically the language in 720 ILCS 5/4-2 applicable to all possession offenses in 720 ILCS 5/11-20.1(b)(5) if it were not concerned with a computer's ability to automatically sweep up child-pornography evidence?

¶ 37 Consequently, we reject the State's arguments that an instruction under 720 ILCS 5/11-20.1(b)(5) is only available "[to] those unfortunate people who have computers where some[one] e-mails them something that's child pornography, and they delete it right away;" or that the instruction could only be given if there had been "evidence at all of anything like that by the defense." Those arguments stand the instruction issue on its head. The defendant is entitled to jury instructions that fully and fairly set forth the applicable law concerning his theory of the case. *People v. Mohr*, 228 Ill. 2d 53, 65 (2008); *People v. Davis*, 213 Ill. 2d 459, 478 (2004); *People v. Jones*, 175 Ill. 2d 126, 132 (1997); *People v. Everette*, 141 Ill. 2d 147, 156 (1990); *People v. Lockett*, 82 Ill. 2d 546, 553 (1980). The only question was whether there was slight evidence—even *very* slight evidence—to support defendant's claim of involuntariness, regardless of which party introduced that evidence, and regardless of whether evidence is contradicted by defendant himself. *Id.* In other words, the State's evidence was not a hurdle the defendant had to clear in order to have the jury instructed on involuntariness. And it was not the province of the trial court to weigh the evidence and determine the issue of defendant's voluntariness during the instructions conference. The trial court's duty was simply to determine

whether slight evidence had been presented on the issue of voluntariness, and to instruct the jury accordingly. See *Lockett*, 82 Ill. 2d at 553.

¶ 38 Here, there was slight evidence suggesting that defendant's possession of the cached images was unknowing and involuntary because it was the result of an automated computer function. In fact, the State's argument, both at the instruction conference and on appeal, misstates the critical evidence on this point. At the instruction conference, for example, the prosecutor stated the evidence showed the child pornography "was saved on [defendant's] computer and downloaded to his computer, by the defendant." In its appellate brief, the State again asserts that "the evidence presented was that the images would not have been in the thumb cache unless they were both opened and *saved*." (Emphasis in original.) But that was not a fair characterization of the State's evidence, which came primarily from the testimony of detective Ragusa. On redirect, for example, Ragusa was again asked about the automatic caching of thumbnails on defendant's computer:

> "Q. How did, in your opinion, how did the images that you saw on the defendant's computer get into the thumb cache, in your opinion? What would that user have had to have done?
>
> [***]
>
> A. With the presence of a file[-]sharing program on there that you can download child pornography with by searching for it, they would have been downloaded to the machine in a way and then once they are downloaded, they would have been downloaded to the machine in a way and then once they are downloaded, they are opened and viewed through Windows Explorer, which would cache them to the [thumb cache] folder.
>
> Q. So one is downloading off the internet, right?
>
> A. Yes.
>
> Q. What is another way?

> A. Sticking a thumb drive into the computer, attaching an external hard drive or any other source of media to the computer and viewing them through Windows Explorer.
>
> Q. Like a DVD?
>
> A. Yes.
>
> Q. Like a CD?
>
> A. Yes."

Thus, Ragusa testified there were *two* possible scenarios that accounted for how the images ended up in defendant's thumb cache and *neither* scenario necessarily involved *retaining* the image after it was initially opened or viewed. Thus, as defense counsel argued at the instructions conference, Ragusa's failure to recover the *original* images from defendant's computer provided slight evidence that defendant *did* terminate his possession of the original images despite the lingering presence of the thumbnails recovered in the thumb cache. That was defendant's defense, and because there was slight evidence to support it, he was entitled to have the jury instructed on it.

¶ 39 The State argues that this jury-instruction error was harmless and that the result of defendant's trial on the child pornography (possession) charges would have been the same either way, but we disagree with the State. There was to be sure evidence of other child pornography in this case, which may show defendant's propensity to possess child pornography generally (see 725 ILCS 5/115-7.3); however that evidence was not specific to the 18 images defendant was found guilty of possessing. More importantly, here the jury was never instructed on, and thus was never called upon to decide, the critical issue of whether defendant voluntarily possessed the images that were automatically cached by his computer. The error takes on particular significance given that throughout defendant's trial the State repeatedly shifted its emphasis as to

whether defendant was charged with possessing the thumbnails, the original images, or both. Moreover, we observe that the State introduced no additional evidence, such as search terms, download logs, or other digital history, to show that defendant knowingly and voluntarily possessed the images at issue. See, *e.g.*, *State v. Kirby*, 156 Conn. App. 607, 615 (2015) (finding possession where defendant altered an image in the thumb cache). *State v. Schuller*, 287 Neb. 500, 509, 843 N.W.2d 626, 633 (2014) (search history; download history); *United States v. Buchanan*, 485 F.3d 274, 277 (5th Cir. 2007) (download logs); *In re Welfare of J.E.M.*, 2012 WL 1380400, at *6-7 (Minn. Ct. App. Apr. 23, 2012) (unpublished order) (download logs; contemporaneous internet search queries).

¶ 40 Accordingly, we reverse defendant's convictions for child pornography (possession). As there was sufficient evidence supporting those convictions, we determine that double jeopardy would not preclude a retrial. See *People v. Lerma*, 2016 IL 118496, ¶ 35.

¶ 41 We close with a brief observation. It may well be that "[b]orrowing [analog] concepts from drugs and weapons [possession] cases" (*Gumila*, 2012 IL App (2d) 110761, ¶ 41) is analytically ill suited to the crime of child pornography (possession), especially in what is an increasingly digital world. Other jurisdictions have responded to this imprecision by criminalizing the act of accessing or viewing child pornography, which does not require an offender to "possess" it. See, *e.g.*, 18 U.S.C. § 2252A(a)(5)(B); Alaska Stat. Ann. § 11.61.127 (West 2012); Va. Code Ann. § 18.2-374.1 (West 2012). Whether a change in the law is in order is not for us to say; rather, we simply apply the law as written. See *In re C.C.*, 2011 IL 111795, ¶ 41 ("We apply the statutes of this state as written, and do not carve out exceptions that do not appear in the statute simply because we do not like how the statute applies in a given case").

¶ 42 The judgment of the circuit court of Du Page County is affirmed with respect to defendant's convictions for PCSA and child pornography (manufacturing). The judgment is reversed in part with respect to defendant's child pornography (possession) convictions and this cause is remanded to the trial court for a new trial on those charges.

¶ 43 Affirmed in part; reversed in part, and remanded.