2017 IL App (2d) 151250-U
No. 2-15-1250
Order filed February 7, 2017

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. 14-CF-1906
STEVEN E. HABAY,	)	Honorable Daniel B. Shanes,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's convictions of child pornography were affirmed. The trial court properly denied both defendant's motion to quash arrest and suppress evidence and his motion to suppress statements. The court properly refused to assess discovery sanctions against the State. The court did not abuse its discretion in sentencing defendant.

¶ 2 Following a bench trial with stipulated evidence, defendant, Steven Habay, was convicted of seven counts of possessing child pornography (720 ILCS 5/11-20.1(a)(6) (West 2014)). On appeal, he argues that the court erred in denying both his motion to quash arrest and suppress evidence and his motion to suppress statements. He further contends that discovery sanctions

against the State were warranted where the police failed to record his interview and preserve the recording. He finally challenges his sentence as excessive. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 (A) Defendant's Online Posts and the Discovery of Child Pornography

¶ 5 Defendant, 40 years of age, was a long-term substitute Spanish teacher at Highland Park High School. On May 28, 2014, his employment was terminated after he made disparaging remarks in class about students. Over the next two days, he posted and edited comments on a website called wikispaces.com, which is a privately maintained blog that can be used by teachers to communicate with their students. On the "homework page" of his blog, defendant wrote the following about two particular 14 year-old students, whom we will call "S" and "T":

> "EXTRA CREDIT TRANSLATIONS:
>
> PAST TENSE
>
> There once was a gorilla named [T]. [T] was rude, loud and disrespectful. Instead of going to church, [T] should have moved to the zoo on the South Side. [T] liked to cry, roll her head and wonder where her daddy was.
>
> PRESENT TENSE
>
> [S] is a dirty snake. She is rude and disrespectful and has no friends. [S] is a dishonest cheat. She is more stupid than [T] the gorilla. [S] likes to blame others for her mistakes and cry to her mommy.
>
> FUTURE TENSE
>
> [T] the gorilla will someday even double-cross her friend the snake. [S] the snake will be ripped apart and die slowly. The gorilla will realize that she has devoted her life

> to a folly and blame her mommy. The gorilla will return to Nigeria and live as a humble servant."

In this post, defendant used only "S's" and "T's" full first names, not their last names. Defendant edited this post multiple times, so slightly different versions of it appeared on the blog at different times. For example, defendant added to the "present tense" section that "[m]ost people would like to stomp on the snake" and "I hope that [T] chops the snake into two, and then a hunter gets the mean gorilla."

¶ 6 In another post, defendant wrote:

> "Have to love it when a teacher is blamed for students cheating and incessantly talking. Some administrators are afraid of upsetting parents that are, lets [*sic*] just say a bit dark. Some teachers have better things to do than to attempt to teach animals and spoiled, entitled little cheaters, especially in a broken school, sorry, broken district. [T] should be put down like a rabid dog in the streets. The truth hurts."

Defendant did not use "T's" full name in this post, but referred to her by her first and last initials.

¶ 7 "S" and "T," along with their parents, saw defendant's posts and contacted the police. Detective Philip DeLaurentis of the Highland Park police department worked with the host of the website to identify the internet protocol (IP) address used to make the postings. DeLaurentis was later able to determine that the IP address was associated with a Comcast landline account. At 1:35 p.m. on May 30, 2014, DeLaurentis received confirmation from Comcast that this IP address was linked to defendant's residence.

¶ 8 The police consulted with the State's Attorney's office to consider an arrest plan and specific charges against defendant. In the afternoon of May 30, 2014, defendant was apprehended as he was doing yard work outside of his residence, which he shared with his

parents, William and Helen Habay. Defendant was charged by criminal complaint with cyberstalking (720 ILCS 5/12-7.5(a)(1) (West 2014)) and harassment through electronic communications (720 ILCS 5/26.5-3(a)(2) (West 2014)).

¶ 9 Almost immediately after defendant was taken into custody, Detective Sean Gallagher of the Highland Park police department spoke with defendant's parents inside the family home. At Gallagher's request, defendant's mother retrieved defendant's laptop computer from his bedroom in the basement and gave it to the detective. Gallagher brought the computer to the police station, where defendant was being interrogated by DeLaurentis in the presence of Detective Bill Evans. Defendant then signed a consent form authorizing a search of his computer. The computer was later taken to the Cyber Crimes Division of the Lake County State's Attorney's Office for analysis, but it was not actually searched for more than a month.

¶ 10 Meanwhile, on June 25, 2014, defendant was charged by indictment with four counts of cyberstalking (720 ILCS 5/12-7.5(a-5)(1), (2) (West 2014)) and two counts of harassment through electronic communications (720 ILCS 5/26.5-3(a)(5) (West 2014)). The specific threatening statements identified in the indictment were that "[T] should be put down like a rabid dog in the streets" and that "[S] the snake will be ripped apart and die slowly."

¶ 11 On July 14, 2014, Dean Kharasch of the Cyber Crimes Division used a forensic tool called EnCase to search defendant's computer. Kharasch removed the hard drive and viewed the entire file structure of the device. In the process of doing so, he discovered two folders containing images of naked children. After discussing his findings with his supervisor, Kharasch obtained a warrant to search the computer for child pornography. Following a full forensic analysis of the computer, defendant was charged by indictment with seven counts of child pornography, with the victims being under the age of 13.

¶ 12 (B) Defendant's Pretrial Motions

¶ 13 Defendant filed a motion to quash arrest and suppress evidence. He argued that the police lacked probable cause to arrest him on May 30, 2014, because he did not make any direct threats toward specific people in his online posts. Additionally, according to defendant, "words posted on an internet blog are not the same as words sent directly to an email address." Defendant proposed that the police should have spoken with him about the allegations and obtained a warrant before arresting him. Moreover, defendant argued, the police illegally entered his home without a warrant while he was already in police custody. Defendant also maintained that his mother did not have the authority to enter his bedroom and give the computer to the police. Finally, defendant alleged that he consented to a search of his computer only for the limited purpose of verifying his IP address.

¶ 14 Defendant also filed a motion to suppress statements. In that motion, he asserted that he was not advised of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), until the May 30, 2014, police interview had concluded.

¶ 15 The matter proceeded to an evidentiary hearing on defendant's motions. During the pendency of the hearing, defendant filed a motion for discovery sanctions, complaining that DeLaurentis failed to preserve the recording of the May 30, 2014, interview. Defendant reiterated in this motion that he had provided only a limited consent to search his computer and that he was not read his *Miranda* rights until the end of the interview. He suggested that the recording of the interview may have been evidence that was favorable to the defense. Accordingly, defendant concluded, due process and fundamental fairness dictated that DeLaurentis should not be allowed to testify as to what was shown on the taped interview.

¶ 16 The court heard testimony from six witnesses at the hearing: DeLaurentis, Gallagher,

Kharasch, defendant's father, defendant's mother, and defendant. There were three significant issues on which the evidence was conflicting: the circumstances under which Gallagher obtained the computer from defendant's residence, the scope of defendant's consent to search the computer, and whether defendant was given *Miranda* warnings before he was interviewed.

¶ 17 (1) The Seizure of Defendant's Computer

¶ 18 Defendant was arrested within moments of the police arriving at his home on May 30, 2014, and he was immediately taken to the police station. Gallagher testified that, because this was an internet-based investigation, it would be helpful if he could get defendant's computer. According to Gallagher, there was no pressure on him to get the computer. However, he acknowledged that one of his primary reasons for being at the Habay home was to get it. Gallagher also wanted to talk to defendant's parents about defendant's mental health.

¶ 19 There was conflicting testimony as to whether Gallagher asked defendant's parents to allow him to enter the residence or they instead invited him inside. Nevertheless, it is undisputed that the parents voluntarily allowed Gallagher into their home and that they spoke with him for about 10 to 15 minutes in the living room. Gallagher testified that he learned during this conversation that defendant's father did not use computers much, that defendant's mother did so very sparingly, and that defendant had his own laptop.

¶ 20 It is undisputed that Gallagher asked the parents for defendant's computer, telling them that he would take it to the police station to find out whether defendant would consent to a search. Defendant's parents testified that his mother initially responded that she felt she should not give Gallagher the computer, and that Gallagher replied that he would get a search warrant if they would not give it to him. Both parents felt threatened by Gallagher's remarks, even though he did not raise his voice. Gallagher, on the other hand, did not recall defendant's mother

expressing reservations about giving him the computer. He also did not think that he would have said that he would get a search warrant, as he did not believe he could have obtained one at that point. Later in his testimony, Gallagher flatly denied telling defendant's parents that he would return with a search warrant.

¶ 21 The evidence was also conflicting as to whether Gallagher told defendant's parents that he wanted the computer to verify defendant's IP address. Gallagher testified that he did not place any limits on what would be done with the computer or what would be searched. The parents, on the other hand, remembered Gallagher mentioning that he wanted the computer to confirm defendant's IP address. Nevertheless, it is undisputed that defendant's mother left the living room and retrieved the computer from defendant's bedroom in the basement. According to the mother, the computer was half under defendant's bed. When she returned, Gallagher asked for the power cord, and she went back to defendant's bedroom to get that for him. Gallagher then took the computer to the police station, which was within 10 minutes of the Habay home.

¶ 22 Most of the evidence regarding the layout of the home and defendant's parents' access to the computer at issue came from defendant and his parents. Their testimony established that this was a split-level home with four bedrooms upstairs and a basement converted for defendant to use as a bedroom. The washer and dryer were also in the basement. The door leading to the basement had a lock on it. If it was locked from the downstairs, it could be accessed from the upstairs with a key. Defendant testified that this door was locked 90% of the time when he was not home. Defendant's mother had an extra key to the basement in her jewelry box that she could use if the door was locked. Defendant's parents did not go into the basement apart from the mother going into the laundry area once per week. The parents did not use defendant's

computer and did not know his password. Defendant testified that his sister gave him the computer as a gift and that no one else had ever used it.

¶ 23 (2) The Scope of Defendant's Consent to Search the Computer

¶ 24 Another disputed issue at the hearing was whether defendant limited his consent to search the computer to merely confirming his IP address. Defendant testified that DeLaurentis told him the following, verbatim, during the May 30, 2014, interview:

> " 'Your mother gave us your computer. We don't really need it since we have copies of all the blogs that you posted. And we know the IP address that they came from. All we're going do [*sic*] with your computer is confirm the IP address.' "

According to defendant, DeLaurentis told him to sign the consent-to-search form or he would get a warrant to search the computer. Defendant further testified that DeLaurentis said the police could figure out his password if he did not provide it. It was under these circumstances, defendant insisted, and with the belief that the interview was being recorded, that he signed the consent-to-search form.

¶ 25 DeLaurentis disputed defendant's version of events, maintaining that he did not mention that he wanted to verify the IP address. DeLaurentis further denied telling defendant that he would get a warrant or that he could figure out how to access the computer.

¶ 26 The consent-to-search form that defendant signed at 5:07 p.m. on May 30, 2014, is included in the record. In that form, defendant authorized DeLaurentis and Gallagher to search his computer without specific limitations on the scope of the search. The model of the computer at issue was handwritten on the form along with defendant's password.

¶ 27 (3) The Timing of *Miranda* Warnings

¶ 28 One final disputed issue was whether defendant was informed of his *Miranda* rights before he was interviewed by DeLaurentis on May 30, 2014. DeLaurentis testified that he gave defendant *Miranda* warnings before asking any questions about the blog posts. Defendant, in contrast, testified that DeLaurentis first interrogated him about the blog posts for 15-20 minutes, asking the same questions until defendant said that he was done talking. According to defendant, DeLaurentis then left the room for 10 minutes and spoke with somebody from the State's Attorney's office. Only after returning, defendant recalled, did DeLaurentis give him *Miranda* warnings. Defendant testified that DeLaurentis did not ask him any further questions about the blog, but instead left the room again. Upon returning 5 to 10 minutes later, DeLaurentis discussed consenting to a search of the computer to confirm the IP address.

¶ 29 The record contains the *Miranda* form that DeLaurentis reviewed with defendant. The form was executed on May 30, 2014, at 4:20 p.m. Defendant initialed the form next to each of the specified *Miranda* rights, but he refused to sign at the bottom of the form.

¶ 30 As noted above, defendant argued in his motion for discovery sanctions that the recording of his interview, had it been preserved, would have confirmed his testimony regarding both the scope of his consent and the timing of the *Miranda* warnings. DeLaurentis was questioned at the hearing about the recording capabilities in the particular room where defendant was interviewed. He testified that the recording system is different now than it was in May 2014. However, it was not clear from DeLaurentis' testimony whether (1) defendant's interview was automatically recorded and DeLaurentis failed to preserve that evidence before it was recorded over or (2) defendant's interview was never recorded. There appears to be no dispute that, if there ever was a recording of the interview, such recording was erased prior to defendant making any specific discovery request for it.

¶ 31 (C) The Court's Rulings on the Pretrial Motions

¶ 32 The court denied defendant's motion to quash arrest and suppress evidence, denied the motion to suppress statements, and declined to impose discovery sanctions. The court found that the police had probable cause to arrest defendant on May 30, 2014. The court explained that the question of whether the evidence presented could support convictions of cyberstalking and harassment through electronic communications was different from whether there was probable cause for the arrest. To that end, the court noted, although wikispaces.com was "open to a broad class of people," the only ones who would have any interest in the blog were the students, faculty, and teachers. Additionally, while there was "an interesting question and an open question" as to whether defendant made direct threats so as to support convictions on the cyberstalking/harassment charges, the posts were "evocative," "[i]n bad taste," and "offensive." The court also deemed it significant that the police knew that defendant had a teacher-student relationship with the people who read the blog. The court thus concluded that the postings were "more than sufficient to support the police having probable cause to investigate whether these crimes were committed."

¶ 33 Addressing the seizure of defendant's computer from the Habay home, the court found that defendant's parents had the authority "to physically give the computer to the police" but not to give them access to the computer files. The court reasoned that the parents "had access to the whole house," even though they did not use the computer. Moreover, the evidence did not show that defendant walled himself or his computer off from his parents. Instead, according to the court, the parents had common access to the basement area. The computer was just like any other object that the parents could have picked up and taken, such as a remote control, a cell phone, or a cup of coffee.

¶ 34 Nevertheless, the court found that the parents' access to the computer was immaterial if defendant validly consented to the search of his computer, because the police "could have gone and got it" anyway. To that end, the court determined that defendant, who was a "highly educated and intelligent individual," signed a general consent to search the computer. The court stated that the documentary evidence (presumably, the signed consent form) "speaks volumes" about the scope of the consent. Nor did the court find "any impropriety insofar as *Miranda*."

¶ 35 Addressing the alleged discovery violation, the court noted that this was not a case where the State destroyed evidence after receiving a discovery request. Moreover, the court determined that it was unclear whether there was ever a recording of defendant's interview in the first place. The court indicated that, even if the recording existed at some point but was not preserved, the court's ruling would be the same. The court explained that it was not appropriate to bar testimony regarding the interaction between defendant and the police. However, the court added, the defense should be allowed to introduce evidence at trial about the officers' opportunities to record the interview.

¶ 36 (D) Trial and Sentencing

¶ 37 The court denied defendant's motion for reconsideration of the rulings on the pretrial motions. The State then non-suited the charges of cyberstalking and harassment through electronic communications. Following a very brief bench trial with stipulated evidence, the court found defendant guilty of all seven counts of child pornography. The court denied defendant's motion for a new trial.

¶ 38 DeLaurentis testified in aggravation at the sentencing hearing, detailing the various comments that defendant made on the blog about "S" and "T." The State also presented written statements from "S" and "T" as well as recordings of various phone calls that defendant made to

his family members while he was incarcerated in the Lake County jail prior to trial. In those phone calls, defendant disparaged the police, the attorneys involved in the case, and the media. The only mitigating evidence that defendant presented was a letter from his father, which is not included in the record on appeal. In his statement in allocution, defendant criticized the police for lying and thanked his parents for their support.

¶ 39 In sentencing defendant, the court considered defendant's lack of prior convictions, that he had a postgraduate education, that he had helped other inmates with their studies, and that his family had dealt with tragedy (defendant's brother had recently died in a shooting that involved police). According to the court, defendant had talents and gifts, but he also had a temper and problems with impulsivity. The court explained that possession of child pornography is "particularly harmful because the child's actions are reduced to a recording which could haunt the child in future years." Moreover, defendant was in a position of trust as a teacher, and part of the inappropriateness of his conduct was that he had violated that trust. On counts I through VI, the court sentenced defendant to concurrent terms of 30 months of probation with 18 months of periodic imprisonment as a condition of probation. Defendant was also ordered to complete 150 hours of public service and to contribute $2,500 to the children's advocacy center. The sentences on counts I through VI were to run consecutive to a term of 49 months' imprisonment in the Illinois Department of Corrections (D.O.C.) on count VII. Following the denial of his postsentencing motion, defendant filed a timely notice of appeal.

¶ 40 II. ANALYSIS

¶ 41 Defendant argues that the court erred in denying both his motion to quash arrest and suppress evidence and his motion to suppress statements. He also contends that DeLaurentis'

failure to either record the police interview or preserve that recording justified discovery sanctions against the State. Finally, he challenges his sentence as excessive.

¶ 42 (A) Motion to Quash Arrest and Suppress Evidence

¶ 43 Defendant advances four overarching reasons why the court erred in denying his motion to quash arrest and suppress evidence: (1) the police lacked probable cause to arrest him on May 30, 2014; (2) the police should have obtained a warrant to search his computer rather than procuring the computer from his mother, who lacked actual or apparent authority to give it to them; (3) his consent to search the computer was involuntary; and (4) the search of the computer exceeded the scope of his consent.

¶ 44 In reviewing the trial court's rulings on defendant's motions to suppress, we will not disturb the court's findings of fact unless they are against the manifest weight of the evidence. *People v. Jarvis*, 2016 IL App (2d) 141231, ¶ 17. "This deferential standard of review is grounded in the reality that the circuit court is in a superior position to determine and weigh the credibility of the witnesses, observe the witnesses' demeanor, and resolve conflicts in their testimony." *People v. Jones*, 215 Ill. 2d 261, 268 (2005). Nevertheless, "a reviewing court remains free to undertake its own assessment of the facts in relation to the issues presented and may draw its own conclusions when deciding what relief should be granted." *Jones*, 215 Ill. 2d at 268. Therefore, the ultimate question of whether suppression is warranted under the circumstances is a legal issue, which we review *de novo*. *Jarvis*, 2016 IL App (2d) 141231, ¶ 17.

¶ 45 (1) Probable Cause to Arrest Defendant

¶ 46 Defendant first argues that the police lacked probable cause to arrest him on May 30, 2014. Although he acknowledges that his statements online were "in poor taste and should not have been posted," he emphasizes that he did not use his students' full first and last names or

send the messages directly to them. Defendant submits that his speech was constitutionally protected, that he did not make any direct threats, and that "[n]o reasonable person could believe such posts were threats of immediate or future harm." According to defendant, the police should have responded to the posts by either speaking with him to ascertain his intent or seeking an arrest warrant. Instead, he argues, they "acted in haste" with the "planned goal to go to [his] home without a warrant, arrest [him], and seize his personal computer."

¶ 47 A defendant is protected from unreasonable searches and seizures under both the United States and Illinois Constitutions. U.S. Const., amend. IV; Ill. Const. 1970, art. I, § 6. These constitutional provisions are violated when a person is arrested without probable cause. *People v. Lee*, 214 Ill. 2d 476, 484 (2005). "Probable cause to arrest exists when the facts known to the officer at the time of the arrest are sufficient to lead a reasonably cautious person to believe that the arrestee has committed a crime." *People v. Love*, 199 Ill. 2d 269, 279 (2002). Courts look to the totality of the circumstances to determine whether there was probable cause at the time of the arrest. *Love*, 199 Ill. 2d at 279.

¶ 48 Defendant was originally charged by criminal complaint with violating subsection (a)(1) of the cyberstalking statute, which provides that "[a] person commits cyberstalking when he or she engages in a course of conduct using electronic communication directed at a specific person, and he or she knows or should know that would cause a reasonable person to *** fear for his or her safety or the safety of a third person." 720 ILCS 5/12-7.5(a)(1) (West 2014).[1] There is no dispute that defendant engaged in a "course of conduct" and that he used an "electronic

[1] The First District recently held that this subsection of the cyberstalking statute was facially unconstitutional, and the matter is currently pending before the supreme court. *People v. Relerford*, 2016 IL App (1st) 132531, ¶ 33.

communication," as those terms are defined in the statute. See 720 ILCS 5/12-7.5(c)(1) (West 2014) ("course of conduct" includes two or more communications to or about a person); 720 ILCS 5/12-7.5(c)(2) (West 2014) ("electronic communication" includes a transmission through a computer). However, defendant contends that his comments were not directed at specific people and would not have caused reasonable people to fear for their safety. The statute defines "reasonable person" as "a person in the victim's circumstances, with the victim's knowledge of the defendant and the defendant's prior acts." 720 ILCS 5/12-7.5(c)(6) (West 2014).

¶ 49 Defendant was also originally charged with violating subsection (a)(2) of the harassment through electronic communications statute, which criminalizes "[i]nterrupting, with the intent to harass, the telephone service or the electronic communication service of any person." 720 ILCS 5/26.5-3(a)(2) (West 2014). It appears that the citation to subsection (a)(2) in the criminal complaint was a scrivener's error, because the officer alleged that defendant "knowingly communicated derogatory statements to (2) juvenile victims about race and communicated threats of bodily harm using his home computer and the open website wikispaces.com." These allegations more squarely implicated subsection (a)(5) of the statute, which was the provision that was cited in the indictment. That provision states that "[a] person commits harassment through electronic communications when he or she uses electronic communication for any of the following purposes: *** Threatening injury to the person or to the property of the person to whom an electronic communication is directed or to any of his or her family or household members." 720 ILCS 5/26.5-3(a)(5) (West 2014). Once again, defendant's arguments center on whether he threatened injury to the people to whom his communications were directed.

¶ 50 In the indictment, defendant was further charged with violating subsections (a-5)(1) and (2) of the cyberstalking statute, which provide:

> "A person commits cyberstalking when he or she, knowingly and without lawful justification, creates and maintains an Internet website or webpage which is accessible to one or more third parties for a period of at least 24 hours, and which contains statements harassing another person and:
>
> (1) which communicates a threat of immediate or future bodily harm, sexual assault, confinement, or restraint, where the threat is directed towards that person or a family member of that person, or
>
> (2) which places that person or a family member of that person in reasonable apprehension of immediate or future bodily harm, sexual assault, confinement, or restraint." 720 ILCS 5/12-7.5(a-5)(1), (2) (West 2014).

There is no dispute that defendant's postings were accessible to third parties for a period in excess of 24 hours. Additionally, "harass" means "to engage in a knowing and willful course of conduct directed at a specific person that alarms, torments, or terrorizes that person." 720 ILCS 5/12-7.5(c)(4) (West 2014). Accordingly, the issue is whether defendant directed his comments toward particular people and either communicated threats of immediate or future bodily harm toward them or placed them in reasonable apprehension of such harm.

¶ 51 We hold that there was probable cause to arrest defendant on May 30, 2014. The police knew that defendant's employment as a long-term substitute high school teacher had been terminated on May 28 after he made disparaging statements toward students in class. The police also knew that, over the next two days, defendant posted and edited comments on a website that was used for purposes of communicating with his students. Although defendant emphasizes that he did not use the full first and last names of "S" and "T" in his posts, there could have been no confusion in the readers' minds as to whom defendant was referring when he used the girls' first

names or their initials. Both girls were students in his class. The police thus could have reasonably inferred that the comments were directed toward "S" and "T" and that defendant knew that these students would view the posts. "S" and "T" indeed saw defendant's comments shortly after they were posted.

¶ 52 We are also mindful that "S" and "T" were 14 years old at the time, and defendant was their 40-year-old teacher. Defendant's comments were arguably directly threatening. For example, defendant called "S" a snake and then asserted that "[S] the snake will be ripped apart and die slowly." Irrespective of whether defendant was implying that *he* would rip apart the snake or, instead, that "T"—"S's" "gorilla" friend—would do so, the comment could be construed as a direct threat. He also wrote that "[m]ost people would like to stomp on the snake" and that he hoped that "[T] chops the snake into two, and then a hunter gets the mean gorilla." Defendant further posted that "[T] should be put down like a rabid dog in the streets." DeLaurentis explained that the parents of "S" and "T" were very scared by defendant's posts and believed that defendant was going to come to their homes. Under the totality of the circumstances, the police were justified in believing that defendant's posts were directly threatening and that the elements of cyberstalking and harassment through electronic communications were satisfied.

¶ 53 Defendant insists that his speech was constitutionally protected, citing cases that distinguish protected speech from "true threats." See, *e.g.*, *People v. Diomedes*, 2014 IL App (2d) 121080, ¶ 30 (True threats " 'encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.' " (quoting *Virginia v. Black*, 538 U.S. 343, 359-60 (2003))). We agree with the trial court that the question of whether there was probable cause to

arrest defendant is fundamentally different from whether the State could have proved beyond a reasonable doubt that he made "true threats" so as to sustain convictions for the charged offenses. See *People v. Wear*, 229 Ill. 2d 545, 564 (2008) (" 'The standard for determining whether probable cause is present is probability of criminal activity, rather than proof beyond a reasonable doubt.' " (quoting *People v. Garvin*, 219 Ill. 2d 104, 115 (2006))). Police must act reasonably in light of the circumstances presented; we do not demand that they be constitutional scholars. See *Love*, 199 Ill. 2d at 279 (" 'In dealing with probable cause, *** we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' " (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949))). "Indeed, probable cause does not even demand a showing that the belief that the suspect has committed a crime be more likely true than false." *Wear*, 229 Ill. 2d at 564. We thus have no occasion to consider whether defendant's statements could have justified convictions of cyberstalking and harassment through electronic communications. We hold only that, presented with the circumstances described above, the police acted reasonably in believing that defendant had committed those offenses. Accordingly, there was probable cause for the arrest.

¶ 54 (2) The Constitutionality of the Manner in Which the Police Obtained Defendant's Computer from his Home

¶ 55 Defendant next argues that he had a "reasonable expectation of privacy in his bedroom and its contents" and that his mother lacked actual or apparent authority to consent to a search of his bedroom and the seizure of his computer. He maintains that there was no evidence that he gave his mother "joint access to or control over his bedroom or his personal effects contained therein." He also proposes that Detective Gallagher knew that the computer belonged to him

alone. According to defendant, Gallagher was thus obligated to inquire further as to the mother's authority to give him the computer. Moreover, defendant argues, even if his mother had the authority to consent to a search for the computer, the seizure of the computer was invalid pursuant to the reasoning of *People v. Blair*, 321 Ill. App. 3d 373 (2001). Finally, defendant contends that "[t]he absence of a search warrant where the authorities had opportunity to obtain one is fatal."

¶ 56 We reiterate that defendant was originally arrested on May 30, 2014, on charges pertaining to threats that he made online, and the investigation at that point was focused on those charges. The undisputed evidence showed that defendant's parents voluntarily allowed Gallagher into their home while defendant was under arrest and en route to the police station. Gallagher then had a brief conversation with the parents in the living room. During that conversation, Gallagher learned that defendant had his own laptop computer. Gallagher asked the parents to give him the computer so that he could take it to the police station to see whether defendant would consent to a search. Defendant's mother retrieved the computer from defendant's bedroom in the basement while Gallagher waited in the living room. Gallagher then took the computer to the police station, where defendant consented to a search. When the computer was searched more than a month later, authorities discovered seven still images of child pornography.

¶ 57 The fourth amendment to the United States Constitution generally prohibits officers from entering a person's home to search for specific objects without a warrant. *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990). A well-settled exception is where the search proceeds pursuant to consent. *People v. Lyons*, 2013 IL App (2d) 120392, ¶ 22. Such consent may come either from the defendant or from "a third party who possessed common authority over or other sufficient

relationship to the premises or effects sought to be inspected." *United States v. Matlock*, 415 U.S. 164, 171 (1974). "Common authority rests 'on mutual use of the property by persons generally having joint access or control for most purposes' such that each assumes the risk that the other may permit the common area to be searched." *People v. Burton*, 409 Ill. App. 3d 321, 328 (2011) (quoting *Matlock*, 415 U.S. at 171 n. 7).

¶ 58 Because the Constitution requires police to be "reasonable" in their actions rather than always "correct" (*Rodriguez*, 497 U.S. at 185), courts have recognized that "[c]ommon authority may be either actual or apparent" (*Burton*, 409 Ill. App. 3d at 328). "Actual authority" means " '[a]uthority that a principal intentionally confers on an agent, including the authority that the agent reasonably believes he or she has as a result of the agent's dealings with the principal.' " *People v. Miller*, 346 Ill. App. 3d 972, 985-86 (2004) (quoting Black's Law Dictionary 127 (7th ed. 1999)). In contrast :

> "[U]nder the 'apparent authority' doctrine, a warrantless search does not violate the fourth amendment where the police receive consent from a third party whom the police *reasonably believe* possesses common authority, but who, in fact, does not. [Citation.] The reasonableness standard is objective: would the facts available to the officer cause a reasonable person to believe that the consenting party had authority over the premises? If so, the search is valid. [Citation.] If not, however, an officer may not blindly accept a person's consent to search, and a warrantless search without further inquiry is unlawful." (Emphasis in original.) *Burton*, 409 Ill. App. 3d at 328-29.

It is the State's burden to show that the third party's consent was valid. *Lyons*, 2013 IL App (2d) 120392, ¶ 22.

¶ 59 We note that the State contends, as a threshold matter, that "defendant's mother acted independently and [that] the seizure of defendant's computer was without the requisite degree of police involvement necessary to invoke the protections of the fourth amendment." See *People v. Heflin*, 71 Ill. 2d 525, 539 (1978) ("The constitutional proscription against unreasonable searches and seizures does not apply to searches or seizures conducted by private individuals."). We will assume for purposes of our analysis that there was sufficient police involvement to implicate the fourth amendment where Gallagher specifically requested the computer from defendant's parents, and the mother responded to that request by entering defendant's bedroom, retrieving the computer, and giving it to the detective. Additionally, we need not resolve the dispute between the parties as to whether defendant's mother had the actual authority to retrieve the computer from defendant's bedroom and then give it to Gallagher. We hold that she had the apparent authority to do so.

¶ 60 Defendant resided with his parents, who voluntarily allowed Gallagher into their home. Gallagher had no information that defendant's mother lacked authority to venture into any specific areas of her home. Nor did he know where defendant stored the computer. Indeed, as far as Gallagher knew, the computer could have been on the kitchen table that the whole family shared. When Gallagher asked defendant's parents for the computer, he therefore had no reason to anticipate where in the home defendant's mother might go. Gallagher then remained in the living room with defendant's father while the mother retrieved the computer. Accordingly, when she returned momentarily with the computer in her hands, Gallagher still had no reason to suspect that she had entered defendant's bedroom, and he had no reason to question whether she had permission to go into that room.

¶ 61 In arguing that his mother lacked apparent authority to enter his bedroom and give the computer to Gallagher, defendant emphasizes that Gallagher knew that the computer belonged to him, not his parents. He proposes that Gallagher thus should have inquired further as to the mother's authority. However, there was no need to make further inquiry, as the police never had any intention of searching the computer unless and until they procured consent from defendant to do so. That distinguishes this case from *Miller*, which defendant cites. In that case, the police relied on the consent of a third party to open and search the defendant's zipped duffel bag. *Miller*, 346 Ill. App. 3d at 986-87. In contrast, the undisputed testimony here was that Gallagher informed defendant's parents (truthfully) that he would take the computer to the police station to see whether defendant would consent to a search. Accordingly, to the extent that a laptop computer could be considered a "closed container" analogous to a duffel bag (see *People v. Blair*, 321 Ill. App. 3d 373, 381 (2001) (Homer, J., specially concurring)), this was not a situation where the police relied on the consent of a third party to search that container.

¶ 62 Defendant cites *Blair* in support of his contention that even if his mother was authorized to search his bedroom for the computer, she lacked the authority to consent to the seizure of the computer, *i.e.*, removing it from the home. In *Blair*, the defendant was arrested for disorderly conduct after he videotaped children at a zoo. *Blair*, 321 Ill. App. 3d at 375. Later that day, while the defendant was in custody, the police went to his home, where they were greeted by his father. *Blair*, 321 Ill. App. 3d at 375. The father gave the officers permission to look at the defendant's belongings. *Blair*, 321 Ill. App. 3d at 375. In the basement, the officers found a computer, which the father told them belonged to the defendant. *Blair*, 321 Ill. App. 3d at 376. The officers looked at the "bookmarks" in the defendant's internet search history and noticed "numerous references to teenagers," which led them to believe that there was child pornography

on the computer. *Blair*, 321 Ill. App. 3d at 376. Purportedly with the father's consent, the officers then seized the computer. *Blair*, 321 Ill. App. 3d at 376. Following a more thorough search of the computer, the police located 16 files of child pornography. *Blair*, 321 Ill. App. 3d at 376. The trial court denied the defendant's motion to suppress evidence, finding that the father validly consented to a search of the home's common areas and that such consent "extended to permission to activate his son's computer and inspect its contents." *Blair*, 321 Ill. App. 3d at 376.

¶ 63 The appellate court reversed, holding first that, even if the father validly consented to a search of the defendant's computer, "the subsequent search failed to provide the police with probable cause to seize it." *Blair*, 321 Ill. App. 3d at 377. The court explained that the officers' knowledge that the defendant had been arrested for disorderly conduct, along with their discovery of references to "teenagers" on his computer, did not give rise to probable cause to believe that there was child pornography on the computer. *Blair*, 321 Ill. App. 3d at 377. Absent such probable cause, the seizure of the computer was valid only if the father had the authority to consent to it. *Blair*, 321 Ill. App. 3d at 378. Although the trial court's finding that the defendant's father consented to the seizure was not against the manifest weight of the evidence, the question remained as to whether the father had the authority to do so. *Blair*, 321 Ill. App. 3d at 378.

¶ 64 The court noted that the issue of whether a third party's common authority over the premises gives him the power to consent to a *seizure* rather than a *search* of a defendant's property had "received scant judicial attention." *Blair*, 321 Ill. App. 3d at 378. The reason for such dearth of authority, the court suggested, was that "third-party consent is often superfluous where the incriminating character of an item is apparent, allowing it to be seized pursuant to the

plain view doctrine without consent or a warrant." *Blair*, 321 Ill. App. 3d at 378. After examining the rationale justifying third-party-consent-searches, the court explained that such rationale "does not provide a sufficient basis for a third party's consent to the seizure of another's personal effects." *Blair*, 321 Ill. App. 3d at 379. Accordingly, the court held:

> "[T]he consent of a third party is ineffective to permit the government to seize property in which the third party has no actual or apparent ownership interest. Rather, a seizure is lawful only when the owner of the property consents to the seizure, there is a valid warrant for its seizure, or police are lawfully present and there is probable cause to believe the property is contraband, stolen property, or evidence of a crime." *Blair*, 321 Ill. App. 3d at 380.

The court cautioned that its holding was limited to situations where (1) "there is no other applicable exception to the warrant requirement"; (2) there is actually a seizure, such as by removing property from a residence; and (3) "the party giving consent has no actual or apparent ownership interest in the property to be seized." *Blair*, 321 Ill. App. 3d at 381.

¶ 65 *Blair* is distinguishable, because the defendant in that case was under arrest for a crime that had no connection to the computer that the police seized. Critical to the result in *Blair* was that, prior to the time the police seized the computer, there was no probable cause to believe that it contained evidence of criminal activity. To that end, the *Blair* court recognized that a seizure is justified where the police are lawfully present and there is probable cause to believe that the property is evidence of a crime. *Blair*, 321 Ill. App. 3d at 380. Defendant in the present case was under arrest for cyberstalking and harassment through electronic communications, and the criminal complaint that had been signed earlier that day alleged that he used his "home computer" to commit those crimes. Additionally, Gallagher was lawfully in the Habay home

with the consent of defendant's parents. Thus, unlike in *Blair*, Gallagher had probable cause to seize the computer. We again emphasize that the police never had any intention of actually searching that computer without defendant's personal consent.

¶ 66 Defendant maintains that "[t]he absence of a search warrant where the authorities had opportunity to obtain one is fatal." He argues that any delay occasioned by procuring a warrant would not have impeded the investigation here, as defendant was already in custody. He further contends that "[t]here were no exigent circumstances or emergency which could provide an excuse for the police officer's failure to secure a warrant to invade the security of the Habay home."

¶ 67 As explained above, defendant's parents voluntarily allowed Gallagher into their home. Accordingly, this situation is distinguishable from the cases cited by defendant where the police entered private residences without either consent or a warrant. Additionally, we have already addressed the issue of defendant's mother's authority to enter defendant's bedroom and give the computer to Gallagher. Because she provided valid third-party consent, there is no reason to consider whether exigent circumstances might have provided a separate justification for the police conduct.

¶ 68 For the foregoing reasons, we hold that the manner in which the police obtained defendant's computer from his home did not violate the fourth amendment.

¶ 69 (3) Voluntariness of Defendant's Consent to Search the Computer

¶ 70 Defendant next argues that the trial court erred in finding that he voluntarily consented to a search of his computer. He proposes that his consent was involuntary under the totality of the circumstances. According to defendant, those circumstances included: being "illegally arrested"; being handcuffed to a bar in an interview room, interrogated, and making incriminating

statements regarding the blog posts before receiving *Miranda* warnings; being told that he had been charged with cyberstalking and harassment through electronic communications and that the police already possessed his computer; being told that the police would get a search warrant if he did not consent to a search of the computer; and never being verbally informed that he had the right to refuse consent.

¶ 71 One exception to the requirement to procure a warrant before conducting a search is if the search proceeds pursuant to consent that is voluntarily given. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 222 (1973). Consent is involuntary if it is "coerced, by explicit or implicit means, by implied threat or covert force." *Schneckloth*, 412 U.S. at 228. "[T]he question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *Schneckloth*, 412 U.S. at 227. "[W]e must review the voluntariness of the consent in light of traditional notions of fairness and society's needs for effective police investigations." *People v. Prinzing*, 389 Ill. App. 3d 923, 932 (2009).

¶ 72 Defendant testified that DeLaurentis was nice to him and did not yell during the interview at the police station. Nevertheless, defendant now mentions his "illegal arrest" as a reason for the consent being involuntary. However, we have already held that there was probable cause for his arrest on charges of cyberstalking and harassment through electronic communications. Defendant also mentions delayed *Miranda* warnings as another indication that his consent was involuntary. Although the testimony was disputed as to the precise timing of the *Miranda* warnings, even defendant acknowledged that he was read his rights before he signed the consent-to-search form. Defendant suggests that another hallmark of coercion was that one of his hands was handcuffed to a bar when he signed the consent form. But that was consistent with police

protocol, and there was no evidence that defendant felt coerced by virtue of being handcuffed or that this contributed to him signing the consent form. Importantly, a defendant's consent to search is not rendered involuntary simply because he was lawfully in custody at the time. *People v. Shinohara*, 375 Ill. App. 3d 85, 97 (2007).

¶ 73 Case law indicates that it is *per se* coercive for the police to procure a defendant's consent by representing that "they could definitively obtain a warrant." *People v. Kratovil*, 351 Ill. App. 3d 1023, 1031 (2004). Although defendant testified that DeLaurentis said he would get a warrant to search the computer if defendant did not provide his consent, DeLaurentis denied saying that. Faced with this conflicting testimony, it was the trial court's duty to determine the credibility of the witnesses (*People v. Taggart*, 233 Ill. App. 3d 530, 551 (1992)), and the court apparently believed the officer's testimony. Furthermore, while defendant emphasizes the absence of any oral warning that he could withhold consent, the form that he signed explicitly informed him of that right. The form also provided: "I further state that no promises, threats, force, or physical or mental coercion of any kind whatsoever have been used against me to got [*sic*] me to consent to the search described above or to sign this form." Even if defendant did not thoroughly read the one-page form he signed, a person's knowledge that he may decline to give consent is merely one factor to be considered. *Schneckloth*, 412 U.S. at 227. Moreover, the authorities did not actually search the computer for more than a month after defendant provided the consent, and defendant never took any measures during that time to revoke his consent. Under the totality of the circumstances, defendant's consent to search his computer was not "coerced, by explicit or implicit means, by implied threat or covert force." *Schneckloth*, 412 U.S. at 228.

¶ 74 (4) Scope of Defendant's Consent to Search the Computer

¶ 75 Defendant also argues that, even if he voluntarily consented to a search of his computer, "the forensic search for images contained in the folders on his computer's hard drive exceeded the scope of his consent." According to defendant, DeLaurentis limited the scope of the intended search by, in defendant's words, specifically requesting "to search defendant's computer for his IP address, and arguably blog-post messages and log ins." Additionally, defendant notes, he and DeLaurentis had only discussed the investigation of cyberstalking and harassment through electronic communications. Defendant proposes that, under such circumstances, a reasonable person would have understood that the consent was limited to verifying the IP address and blog posts. Defendant further complains that "Kharasch admittedly did not conduct a forensic search for that type of evidence, rather immediately began searching folders on the computer's hard drive for images and web sites visited by defendant." Only after obtaining a warrant, defendant asserts, did Kharasch "conduct a separate examination in which he obtained evidence of defendant's blog posts." Finally, defendant emphasizes that the written consent form that he signed stated that he authorized DeLaurentis and Gallagher, not Kharasch, to search the computer.

¶ 76 Where a defendant's consent is the basis for a warrantless search, the police "have no more authority than they have been given by the voluntary consent of the defendant." *People v. Berry*, 314 Ill. App. 3d 1, 12 (2000). "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness-what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno*, 500 U.S. 248, 251 (1991). "The scope of a search is generally defined by its expressed object." *Jimeno*, 500 U.S. at 251. Although a suspect is free to limit the scope of a search, "if his consent would reasonably be understood to extend to a particular container, the

Fourth Amendment provides no grounds for requiring a more explicit authorization." *Jimeno*, 500 U.S. at 252. The State bears the burden of proving that the police acted within the scope of the consent given. *People v. Dawn*, 2013 IL App (2d) 120025, ¶ 30.

¶ 77 The evidence regarding the scope of the authorized search was disputed. Defendant's parents testified that Gallagher mentioned at their home that the police wanted to confirm defendant's IP address; Gallagher denied saying that. Additionally, defendant testified that DeLaurentis told him at the police station that " '[a]ll we're going to do with your computer is confirm the IP address.' " DeLaurentis denied saying that. It was the trial court's duty to assess the credibility of the witnesses in light of this conflicting testimony. *Taggart*, 233 Ill. App. 3d at 551. The trial court apparently resolved these conflicts in favor of the officers.

¶ 78 Moreover, a reviewing court must give due weight to the inferences drawn by the finder of fact. *Wear*, 229 Ill. 2d at 561. The trial court found that the consent form that defendant signed "speaks volumes" about the scope of the consent. That form did not reflect any specific limitations on the scope of the search of the computer. Indeed, by all objective measures, it was a general consent to search the computer. That distinguishes this case from *Prinzing*, for example, where the police officer at issue, "by his own words, limited the scope of the intended computer search." *Prinzing*, 389 Ill. App. 3d at 936.

¶ 79 Kharasch, the investigator who searched the computer, was not informed of any limitations on defendant's consent, although DeLaurentis provided some search terms for guidance. Defendant criticizes Kharasch for immediately reviewing the folders on the computer rather than searching specifically for blog posts. However, there is no evidence in the record to support defendant's assumption that a search regarding his blog posts would not have required an examination of the computer's folders. Moreover, Kharasch explained that the process of

searching a computer with EnCase involved reviewing the folder structure and the contents of the folders before moving to internet history. Kharasch thus did not act arbitrarily in beginning his search by focusing on defendant's folders. We also note that Kharasch did not have the opportunity to view defendant's internet history during his initial search of the computer, because he stopped searching the computer and obtained a warrant once he identified folders with images of naked children.

¶ 80 Defendant observes that the written consent form that he signed indicated that he gave his consent to Gallagher and DeLaurentis of the Highland Park police department, not Kharasch of the Cyber Crimes Division of the Lake County State's Attorney's Office. Citing only *People v. Vasquez*, 388 Ill. App. 3d 532 (2009), defendant asserts *inter alia* that "[b]ecause [his] consent had been explicitly limited to Detectives DeLaurentis and Gallagher, any search deviating from the expressed limitations exceeded the scope of the consent." Aside from the fact that *Vasquez* did not involve any similar purported limitation on the identity of the parties who were authorized to conduct a search, defendant has forfeited this argument by failing to raise it below. In the trial court, defendant alleged and testified that his consent was limited to allowing the confirmation of the computer's IP address. According to defendant, Kharasch improperly exceeded the scope of the consent by failing to limit the search to that particular task. The trial court resolved that issue against defendant. Significantly, however, defendant did not allege or testify that he placed any limitation on the specific individuals who could perform the search. The State thus had no reason or opportunity to present evidence pertaining to whether Kharasch, as opposed to DeLaurentis or Gallagher, was authorized to search the computer. Nor did the trial court make specific findings of fact on that point. Under these circumstances, we decline to

consider defendant's argument, which is entirely distinct from what he argued in the trial court. See *People v. Hughes*, 2015 IL 117242, ¶ 50.

¶ 81 For all of these reasons, the search of defendant's computer did not exceed the scope of the consent.

¶ 82 (5) Summary

¶ 83 To summarize, there was probable cause to arrest defendant on May 30, 2014, on charges of cyberstalking and harassment through electronic communications. Additionally, the manner in which the police obtained defendant's computer from his home did not violate the fourth amendment. Once the computer was at the police station, defendant voluntarily provided his general consent to search the computer. The subsequent search of the computer that produced evidence of child pornography was within the scope of that consent. Accordingly, the trial court properly denied defendant's motion to quash arrest and suppress evidence.

¶ 84 (B) Motion to Suppress Statements

¶ 85 Defendant further argues that the court erred in denying his motion to suppress statements, because the police deliberately waited to read him his *Miranda* rights until after he was interrogated and had made incriminating statements about the blog posts. He contends that this purported "question first, warn later" tactic was improper under *Missouri v. Seibert*, 542 U.S. 600 (2004), and rendered his consent to search the computer involuntary.

¶ 86 As the State correctly notes, defendant did not identify any specific statements that he wanted suppressed. Moreover, the evidence was conflicting as to the timing of the *Miranda* warnings. DeLaurentis testified that he gave defendant *Miranda* warnings before asking him questions, and the trial court apparently found that testimony to be more credible than defendant's testimony. It is the function of the trial court to assess credibility when the evidence

is disputed. *Taggart*, 233 Ill. App. 3d at 551. Accordingly, the trial court properly denied defendant's motion to suppress statements.

¶ 87 In his reply brief, defendant cites pages 464-465 of the report of proceedings to support his contention that "[e]ven DeLaurentis admitted that he read defendant the *Miranda* warnings 'way at the end of the interview.' " Although defendant accurately cites the record, this point deserves further attention. When DeLaurentis testified in the State's case in chief, he was clear that he gave defendant *Miranda* warnings before interviewing him. DeLaurentis subsequently testified as a rebuttal witness and was again clear on this point when questioned by the State:

> "Q. And now, when you and Detective Evans interviewed the defendant, Steven Habay, what's the first thing you did when you went into the interview room?
>
> A. In the interview room Detective Evans and I at the time we spoke to him, didn't ask him any questions, just gave him a picture as to why he was in custody because he asked a of couple times [*sic*]. Then I read him his Miranda warnings and we interviewed him."

DeLaurentis added that he spoke with defendant for 15 minutes before stepping out of the room, and then he returned to ask about the consent to search the computer. On cross-examination, the following colloquy occurred between defense counsel and DeLaurentis:

> "Q. All right. When you stepped out of the room, if you recall, did you call Felony Review?
>
> A. I don't recall specifically ***. I probably did. I have had many conversations with Felony Review in and out of this investigation especially that day.
>
> Q. It's your testimony when you came back from the phone call, when you stepped out and you came back in, the Miranda form was already signed, right?

A. Correct.

Q. And it's now your testimony that you gave him the Miranda way at the end of the interview; correct."

A. Correct.

Q. Where it's signed the time is signed, and you put the time in the Miranda form?

A. I did." (Emphasis added).

On re-direct examination, the State clarified with DeLaurentis that he gave defendant *Miranda* warnings *before* interrogating him:

"Q. Just to be clear, a moment ago you testified that you stepped out of the interview room.

A. I did.

Q. So first you Mirandized the defendant?

A. Yes.

Q. And then you had a conversation with him?

A. Yes.

Q. Then you stepped out?

A. Correct.

Q. So that's the order that things took place?

A. Yes."

It is possible that DeLaurentis was confused by defense counsel's question on cross-examination or that he did not listen to the question carefully. However, any confusion in the record was resolved on re-direct examination. DeLaurentis unambiguously testified multiple times that he

gave defendant *Miranda* warnings before interrogating him, and the trial court reasonably found that testimony to be credible.

¶ 88 (C) Motion for Discovery Sanctions

¶ 89 Defendant next argues that the court erred by failing to assess discovery sanctions against the State where DeLaurentis decided either not to record defendant's May 30, 2014, police interview or not to preserve that recording. According to defendant, the reason that he did not write any limitations on the consent-to-search form was because he believed that the recording would show that his consent was limited. Defendant suggests that the recording "would have been the best evidence of the timing of the *Miranda* warnings and the limited scope of defendant's consent and would have corroborated defendant's testimony." He argues that the failure to record the interview or preserve the recording amounted to bad faith on the part of the police so as to constitute a due process violation justifying dismissal of the charges. He further contends that sanctions, including barring the State from introducing testimony at trial regarding matters reflected on the recording, were warranted under Illinois Supreme Court Rule 415 (eff. Oct. 1, 1971).

¶ 90 "[A] discovery violation can be analyzed under either the due process clauses of [the] United States (U.S. Const., amend. V., XIV) and State Constitutions (Ill. Const. 1970, ar. 1, § 2) or under Illinois Supreme Court Rule 415(g)(i) (eff. Oct. 1, 1971)." *People v. Moore*, 2016 IL App (1st) 133814, ¶ 23. The Supreme Court has held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988). Where a defendant asserts a due process violation for failing to preserve evidence, our review is *de novo*. *Moore*, 2016 IL App (1st) 133814, ¶ 23.

¶ 91 In contrast to the threshold that a defendant must meet to demonstrate a constitutional violation, a defendant is not required to show bad faith when moving for discovery sanctions under Illinois Supreme Court Rule 415(g)(i). *Moore*, 2016 IL App (1st) 133814, ¶ 35. Instead, the defendant must show only that " 'a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto.' " *Moore*, 2016 IL App (1st) 133814, ¶ 35 (quoting Ill. S. Ct. R. 415(g)(i)). We review a trial court's decision to deny sanctions pursuant to the discovery rules for an abuse of discretion, which occurs only when the court's ruling is " 'fanciful, arbitrary, or unreasonable to the degree that no reasonable person would agree with it.' " *Moore*, 2016 IL App (1st) 133814, ¶ 35 (quoting *People v. Kladis*, 2011 IL 110920, ¶ 23).

¶ 92 The constitutional dimension of defendant's discovery challenge lacks merit, because there was nothing approaching bad faith in the present case. There was no statutory requirement for DeLaurentis to record the interview. Even assuming that the interview was recorded and that DeLaurentis failed to take measures to preserve the recording, it does not appear to be disputed that the tape was recorded over before defendant made any specific request for it in discovery. Nor is there any indication that DeLaurentis acted contrary to either department protocol or his personal practices by failing to preserve the recording. Under these circumstances, there was no constitutional violation.

¶ 93 Defendant does not identify any specific discovery rule or order that the State violated. He cites *Kladis*, 2011 IL 110920, in support of his contention that the State should have been barred from introducing testimony about matters that would have been shown on the video recording. However, unlike in the present case, in *Kladis*, the defendant made an explicit discovery request for the evidence at issue 25 days before it was destroyed. *Kladis*, 2011 IL 110920, ¶ 38. Defendant has failed to demonstrate any discovery violation, so the trial court did

not abuse its discretion in refusing to sanction the State pursuant to Supreme Court Rule 415(g)(i).

¶ 94 (D) Sentence

¶ 95 Finally, defendant argues that his sentence was excessive. He contends that the court failed to consider or give sufficient weight to the following mitigating facts: he had no prior criminal record; he was at a low risk to re-offend; his character and attitude made it unlikely that he would commit another crime; he took responsibility for his actions; he was willing to comply with sex-offender treatment; he was likely to comply with the conditions of probation; and he was traumatized by his brother's recent death. He notes that he had impulse issues, shyness, a lack of self-esteem, trouble dealing with relationships, and major depression and anxiety. He further emphasizes that he assisted fellow inmates with obtaining their GEDs and that his parents were willing to continue supporting him. Defendant maintains that a sentence of imprisonment was inappropriate under the circumstances and that he should have instead received straight probation.

¶ 96 "A reviewing court gives substantial deference to the trial court's sentencing decision because the trial judge, having observed the defendant and the proceedings, is in a much better position to consider factors such as the defendant's credibility, demeanor, moral character, mentality, environment, habits, and age." *People v. Snyder*, 2011 IL 111382, ¶ 36. We will not disturb the sentence that the trial court imposed absent an abuse of discretion. *Snyder*, 2011 IL 111382, ¶ 36. "An abuse of discretion occurs if the trial court imposes a sentence that is greatly at variance with the spirit and purpose of the law, or is manifestly disproportionate to the crime." *People v. Watt*, 2013 IL App (2d) 120183, ¶ 49. We must presume that the trial court considered all relevant sentencing factors, and a court is not obligated to assign a specific value to each

factor. *People v. Wilson*, 2016 IL App (1st) 141063, ¶ 11. It is not our role to substitute the trial court's judgment with our own, even if we might have weighed the applicable factors differently. *Wilson*, 2016 IL App (1st) 141063, ¶ 11.

¶ 97 Defendant was convicted of seven counts of possessing child pornography in violation of 720 ILCS 5/11-20.1(a)(6) (West 2014). Because the children depicted in the photographs were under the age of 13, each offense was a Class 2 felony (720 ILCS 5/11-20.1(c-5) (West 2014)), punishable by a maximum term of imprisonment of seven years (730 ILCS 5/5-4.5-35(a) (West 2014)), and with any terms of imprisonment in the D.O.C. to be served consecutively (730 ILCS 5/5-8-4(d)(2.5) (West 2014)). The trial court sentenced defendant to 49 months' imprisonment on count VII. On each of counts I through VI, defendant was sentenced to 30 months' probation with 18 months of periodic imprisonment as a condition of probation. The sentences on counts I through VI were concurrent to one another, but consecutive to the sentence on count VII.

¶ 98 We find no abuse of discretion. The trial court specifically considered that defendant had no prior convictions, that he had a postgraduate education, that he had helped other inmates with their studies, and that his family struggled with tragedy. However, the court also noted that defendant had a temper and problems with impulsivity. Those findings are amply supported by the record. The court also found it significant that possession of child pornography is harmful to the victims, because "the child's actions are reduced to a recording which could haunt the child in future years." That is certainly a fair observation, and this court has said that "[t]he seriousness of the offense is the most important sentencing factor." *Watt*, 2013 IL App (2d) 120183, ¶ 50. Nor does the record support defendant's contention that he would be particularly likely to comply with a term of probation. To the contrary, the trial court revoked defendant's bond prior to trial amidst the State's allegations that he failed to comply with the conditions of

the bond. Additionally, there were conflicting assessments regarding defendant's risk for reoffending. Under the circumstances, defendant's sentence was neither greatly at variance with the spirit and purpose of the law nor manifestly disproportionate to the crimes.

¶ 99 III. CONCLUSION

¶ 100 For the reasons stated, we affirm the judgment of the circuit court of Lake County. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4–2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 101 Affirmed.