No. 2—07—0359
Order filed June 3 2011



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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the Circuit Court of Kane County. |
| Plaintiff-Appellee, | ) | |
| v. | ) | No. 03--CF--1845 |
| CHARLES E. CLENDENIN, | ) | Honorable Patricia Piper Golden, |
| Defendant-Appellant. | ) | Judge, Presiding. |

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JUSTICE BIRKETT delivered the judgment of the court/
Presiding Justice Jorgensen and Justice Hudson concurred in the judgment.

**ORDER**

*Held*: The trial court did not err in rejecting defendant's posttrial claims that a new trial was warranted because the State committed a discovery violation and trial counsel was ineffective for acquiescing in the violation.

The trial court did not err in rejecting defendant's posttrial claim that trial counsel was ineffective for misinforming defendant as to the length of time he would have to register as a sex offender if convicted of possession of child pornography.

The evidence was sufficient to prove defendant guilty of possession of child pornography.

## I. BACKGROUND

Following a stipulated bench trial, defendant, Charles E. Clendenin, was convicted of unlawful possession of child pornography (720 ILCS 5/11--20.1(a)(6) (West 2002)). He appealed to this court, arguing that the trial court erred in denying (1) his motion to quash arrest and suppress evidence; and (2) his posttrial motion alleging ineffective assistance of counsel and a discovery violation by the State, and claiming that the stipulated evidence was insufficient to support his conviction. We affirmed the denial of defendant's motion to quash and suppress. *People v. Clendenin*, 395 Ill. App. 3d 412, 435-36 (2009). Regarding the ineffectiveness claim, we held that one of the grounds supported relief, namely, that the stipulated bench trial was constitutionally defective in that defense counsel failed to insure that defendant was informed of the specific content of the stipulation before he assented to the stipulation in open court. *Id.* at 447. As this holding was dispositive of the appeal, we did not consider the remaining grounds of ineffectiveness raised in defendant's posttrial motion. We also did not consider whether the State committed a discovery violation or whether the stipulation was sufficient to support defendant's conviction. *Id.* at 464.

The supreme court granted the State's leave to appeal. *People v. Clendenin*, 234 Ill. 2d 530 (2009). The court agreed that the trial court properly denied defendant's motion to quash and suppress. *People v. Clendenin*, 238 Ill. 2d 302, 331 (2010). The court reversed, however, our holding that defense counsel was ineffective for failing to insure that defendant was informed of the specific content of the stipulation. *Id.* at 326-27. The court remanded for us to decide defendant's remaining claims of ineffectiveness, his claim that the State committed a discovery violation, and his claim that the stipulation was insufficient to establish his guilt. *Id.* at 331. We now affirm on all remaining issues.

We recapitulate the facts necessary to decide these remaining issues. On September 5, 2003, defendant was charged with unlawful possession of child pornography. The complaint alleged that defendant knowingly possessed a video clip with the file name R@YColdReelkiddymo.mpg, which depicted a female child, whom defendant knew or reasonably should have known was under the age of 18 years, actually or by simulation engaged in the act of sexual penetration.

On September 19, 2003, defendant's trial counsel[1] filed a motion for discovery. In October 2003, counsel filed a motion to quash defendant's arrest and suppress evidence. Defendant sought suppression of a compact disc that was taken from his house by a friend, Ellen Bailey, who then turned the disc over to the police. The disc contained, it is undisputed, video clips of child pornography. In February 2004, the trial court denied the motion to quash and suppress.

The January 23, 2004, hearing on the motion to quash and suppress revealed the background of the child pornography charge against defendant. Bailey testified that, in August 2003, she was defendant's friend and neighbor. That month, defendant went on vacation and asked Bailey to check on his residence. During one of her visits, Bailey noticed a zipper case of compact discs on a shelf behind defendant's computer. She took the case home, where she viewed the contents of one of the discs. The files on the disc had "very disturbing" titles such as " 'mother f—s 8-year-old' " and "something about toddler daycare." Bailey viewed one of the files, which depicted what appeared to be a "grown man having sex with a 13-year-old." Bailey kept the disc, believing it to contain child pornography. She returned the remainder of the discs and the zipper case to defendant's residence. Later, Bailey turned over the disc to the police, who agreed that it contained child

[1] Defendant was represented by a different attorney during posttrial proceedings.

pornography. On September 3, 2003, St. Charles Police Detective Andrew Lamela arrested defendant and took him to the police station.

Lamela testified that defendant agreed to give a statement while at the station on September 3. Defendant first gave a nonrecorded oral statement, which Lamela summarized in a police report. Defendant later gave a second statement, which Lamela recorded on audiotape. After he took the statements, Lamela asked defendant for permission to search his home, and defendant gave his consent. While searching defendant's home with fellow officers, Lamela seized a case containing several discs.

On September 23, 2004, the parties appeared before the trial court for a bench trial based on stipulated evidence. The court took the stipulation under advisement. Later, at a status hearing, the court announced that it could not accept the stipulation because it did not identify the source of the evidence upon which it was based:

> "This comes on for status on the stipulation and evidence which I received on September 23rd. On that date I received a two-page stipulation which was given to me along with People's Exhibit[s] 1 and 2. People's Exhibits 1 and 2 are described in the stipulation as photographs of the video clip referred to in the complaint for preliminary hearing. In the complaint for the preliminary hearing it refers to 'video clip with a file name of R@YGOLDREELKIDDYMO. MPG.' People's Exhibit[s] 1 and 2 do not have any file name on them. People's Exhibits 1 and 2 appear to portray a female child whom the defendant knew, or reasonably should have known, was under the age of 18 years which showed the female child actually or by simulation engaged in the act of sexual penetration.
>
> I have some questions which are not readily apparent from the stipulation and from

the evidence. They are: What is a video clip? Where did the video clip come from? Did it come from a disk? Did it come from the disk that Ellen Bailey delivered to the West Chicago Police Department?"

The court set the matter for status on February 17, apparently to allow the parties time to refashion the stipulation if they desired. On February 17, trial counsel informed the court that an item of discovery had just become available from the State the previous day and that the parties needed additional time to rework the stipulation. The court continued the matter.

On March 16, 2005, trial counsel announced to the court that the parties had agreed on a "new stipulation." This stipulation was not read into the record nor was its content described in any way on the record. The record on appeal contains the stipulation, and this is the entirety of it:

"STIPULATION

NOW COME the parties to this cause and hereby stipulate to the availability of the following evidence for purposes of proceeding with a bench trial of the charge of unlawful possession of child pornography alleged in the Complaint for Preliminary Hearing.

The parties agree that the witnesses called at the hearing on the defense Motion to Quash Arrest and Suppress Evidence held on January 23, 2004[,] would provide the same testimony that was presented on that date, including the introduction of the same exhibits. The State moves for admission of photographs of the video clip referred to in the Complaint for Preliminary Hearing, marked People's Exhibits # 1 & 2. The photographs portray a portion of one of the video clips contained on the computer disk taken from [defendant's] apartment by Ellen Bailey on August 29, 2003[,] and delivered to the West Chicago Police by Ellen Bailey on September 1, 2003. [Defendant] objects to the introduction into evidence

of People's Exhibits # 1 & 2 on the same grounds presented at the hearing on the defense Motion to Quash Arrest and Suppress Evidence and the subsequent Motion to Reconsider. [Defendant] requests the Court to reconsider and reverse its previous rulings concerning the admissibility of this evidence.

If called as a witness, [Lamela] would testify that he interviewed [defendant] on September 3, 2003[,] following his arrest in this case. After waiving his Miranda rights, [defendant] stated that he logs on to the internet to a website from which he downloads music and pornography. He typed in key words for the pornography in the search engine and then downloads all the files to his hard drive. Later, he transfers the files to a disk and then views them. He does not know what he downloads until the file has been viewed. He admitted to possessing six disks containing pornography in his apartment. When asked if he knew how many video clips of child pornography were contained on the disks, he stated, 'Not very many.' He last downloaded pornography from the website on the preceding weekend. He stated that he did not have time to transfer those files to a disk and did not know what files were downloaded. [Defendant] identified the disk provided to the West Chicago Police Department by Ellen Bailey as belonging to him. [Defendant] denied manufacturing or distributing the child pornography video clips. The police seized seventy-seven (77) compact disks from [defendant's] residence, of which five (5) contained pornography, including adult pornography. The remainder of the disks contained music and information from [defendant's] employment.

The introduction of the testimony of Detective Lamela would be subject to [defendant's] objection on the same grounds presented in the defense Motion to Quash Arrest

> and Suppress Evidence and the subsequent Motion to Reconsider. [Defendant] requests the Court to reconsider and reverse its previous rulings concerning the admissibility of this evidence. [Defendant] objects to all evidence seized by the St. Charles Police Department from [defendant's] residence and to the statements made by [defendant] to the police because the evidence constitutes the illegal fruit of the unlawful search and seizure of the computer disk delivered to the police by Ellen Bailey.
>
> [Defendant] does not stipulate to the sufficiency of the evidence to convict him of the offense charged."

The court took the matter under advisement and, on April 27, 2005, issued its decision finding defendant guilty of possession of child pornography.

Following trial, defendant retained new counsel. In August 2005, defendant filed a posttrial motion alleging several claims. (We recite only the claims that remain outstanding after the supreme court's decision.) First, defendant argued that the State breached its discovery duties by failing to tender the audiotape of his September 2003 interview with Lamela until March 2005, approximately 18 months after the defense's initial discovery request. Defendant noted that, though the State did provide, as part of its initial discovery disclosures, a transcript of the interview (police transcript), the transcript was materially inaccurate, as defendant discovered only after obtaining and playing the audiotape. For comparison, defendant attached to his motion both the police transcript, which had been prepared by Shari Lotito, a secretary at the St. Charles police department, and a transcript that defendant arranged from a certified court reporter in Ohio (certified transcript).

Second, defendant claimed that trial counsel provided ineffective assistance by acquiescing in the State's late disclosure of the audiotape and by failing to challenge the State's case on the basis of the inaccuracies in the transcript.[2]

Third, defendant argued that the stipulation was insufficient to support a conviction of possession of child pornography.

The trial court held an evidentiary hearing on the ineffectiveness claim. Several witnesses testified including Lamela, defendant, and defendant's father, Charles Clendenin. Clendenin is a retired attorney whom defendant consulted throughout the case, primarily after his conviction.

Defendant testified that, when he reviewed the police transcript tendered as part of the State's initial discovery disclosures, he noticed that the transcript ascribed to him words and phrases he did not remember saying in his statements to police. Defendant asked trial counsel "many times" to obtain the audiotape of the interview from the State so that he and counsel could assess the accuracy of the police transcript. Trial counsel, however, did not obtain the audiotape until shortly before the presentation of the second stipulation on March 16, 2005—18 months after defendant's initial

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[2] Defendant did not allege in his motion, but did assert at the hearing, that there was also a discrepancy between both transcripts and the stipulation as to defendant's statements to Lamela.

Defendant further alleged in his posttrial motion that trial court made infrequent contact with him during the case. This allegation, however, did not constitute a separate ineffectiveness claim but was made in connection with the claim that counsel was ineffective in the handling of the stipulation. That claim of ineffectiveness was rejected by our supreme court. See *Clendenin*, 238 Ill. 2d at 326-27.

discovery requests in September 2003. Defendant first listened to the audiotape on March 17, 2005, and it confirmed his suspicion that the police transcript was inaccurate in material respects.

Defendant also testified that trial counsel erroneously advised him that, if he were convicted, he would have to register as a sex offender for a period of 10 years. Actually, a conviction of possession of child pornography qualifies one as a "sexual predator" (730 ILCS 150/2(E)(1) (West 2002)), who must register as a sex offender for life (730 ILCS 150/7 (West 2002)).[3]

Clendenin testified that he received the audiotape from trial counsel in the mail on March 17, 2005, the day after the stipulation was submitted to the trial court. The tape was indecipherable; the speakers sounded like "the Chipmunks." Clendenin took the tape to an audio professional who was able to make an intelligible copy for him. Clendenin then took the intelligible copy to a certified court reporter for transcription (certified transcript). Clendenin found a discrepancy between the police transcript and the certified transcript. The police transcript contained the following exchange:

"Lamela: O.K. and approximately to your knowledge how much of the images on the disks contain child pornography? Which would be anyone under the age of seventeen engaging in active sexual penetration.

[Defendant]: Should be very few.

Lamela: Very few? O.K.

[Defendant]: Because normally they everything [*sic*] is labeled with twenty different keywords and. [*sic*]

Lamela: O.K.

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[2]This specific instance of ineffectiveness was not alleged in defendant's posttrial motion, and the trial court did not specifically rule on it.

[Defendant]: And um *several times they threw it in there*." (Emphasis added.)

By contrast, the certified transcript contained the following exchange:

"Q. Okay and approximately to your knowledge, how much of the images on the disks contain child pornography? Which would be anyone under the age of seventeen engaging in active sexual penetration?

A. Should be very few.

Q. Very few? Okay.

A. Because normally they—everything is labeled with twenty different keywords and—

Q. Okay. Have you—

A. ---*sometimes they throw it in there*." (Emphasis added.)

Clendenin considered "significant" the contrast between the phrases "several times they threw it in there" and "sometimes they throw it in there."

Clendenin also found a discrepancy between the March 2005 stipulation and both transcripts with regard to defendant's response to Lamela's question as to how many images of child pornography defendant knew were contained on his discs. Both transcripts represented defendant answering, "Should be very few," but the stipulation represented defendant answering, "Not very many."

Detective Lamela testified that, after he completed the tape-recorded interview with defendant on September 3, 2003, he gave the tape to Lotito, an administrative assistant with the St. Charles police department. Lamela received the police transcript from Lotito on September 19, 2003. Lamela did not listen to the entire audiotape, but to his knowledge the police transcript was

accurate. Lamela was asked whether, in any of the interviews on September 3, 2003, he asked how many video clips of child pornography defendant possessed and defendant answered, "Not very many." Lamela clarified that this particular exchange occurred not in the audiotaped interview but in the prior, unrecorded, interview. Lamela's report of the unrecorded interview states in relevant part:

> "I asked [defendant] how many compact disks he had in his apartment with pornography on it [*sic*]. [Defendant] stated that he has approximately 6 including the disk that I had possession of. I asked [defendant] if he knew how many video clips of child pornography he had on the disks and he stated, '*Not very many*.' " (Emphasis in original.)

After describing this interview, Lamela writes that he "obtained a taped statement from [defendant]," and that this statement would be transcribed later. Lamela's report was included in discovery disclosures to defendant and was admitted into evidence at the ineffectiveness hearing. Lamela also testified that the evidence log for the audiotape showed a notation, "listened by [trial counsel]," with a date of March 15, 2005.

Lotito testified that she routinely transcribed taped statements as a courtesy to the police officers. Lotito was neither a certified court reporter nor had she taken any courses in transcription. Lotito acknowledged that it was possible that the transcription she made of defendant's taped statement contained errors.

Trial counsel testified that, after the motion to quash and suppress was denied in February 2004, he discussed with defendant how to proceed. One of the options counsel mentioned to defendant was a stipulated bench trial. Counsel explained that procedure to defendant as follows:

> "I explained to him that the primary purpose of a stipulated bench trial would be to

preserve the Fourth Amendment issue that we had lost at the hearing on the motion to suppress.

That the parties would agree as to certain basic facts that would be presented if there were live testimony at a trial. That he should anticipate being found guilty at the conclusion of the stipulated bench trial.

And again, the primary purpose of it would be to then take an appeal to the appellate court on the legal issue we had presented to Judge Golden, *** trying to get her ruling overturned.

And if that succeeded, then the case would come back here with virtually all the evidence in the case suppressed, and the prosecution then being unable to prove him guilty of the charge."

Counsel also explained to defendant that a stipulation "include[s] certain facts pertaining to the case that would have been presented by live testimony before the Judge in court, [and] that this [is] a substitute for [the testimony]." Defendant had no questions of counsel regarding the "mechanics" of a stipulated bench trial, and from what counsel could tell, defendant understood the procedure. Counsel testified that he and defendant discussed the stipulation option over several months. "From time to time [defendant] would express some hesitation about it," but eventually he agreed to a stipulated bench trial.

Counsel explained how he decided on the content of the stipulation:

"I decided to include in the stipulation as minimal a factual basis for the State as I thought [the State] would be willing to accept. In other words, I did not include the entirety of the statement [defendant] gave to the police.

> Instead, I selected certain portions from it to include in the stipulation. And I omitted a number of details that I thought would be harmful to his defense, but still enough that [the State] would accept the contents of the stipulation and present it to the Judge.
>
> I also included some facts that I thought left the door open to argument, that the evidence was not sufficient to convict [defendant] of the charge."

Counsel then testified to his efforts at obtaining the audiotape of defendant's statement to Lamela. On September 19, 2003, counsel filed a general discovery request. During the next four months, the State provided discovery to counsel, including the police transcript of defendant's taped statement to Lamela. Clendenin had "some questions" about the accuracy of the police transcript. On September 2, 2004, trial counsel wrote the prosecutor on the case requesting that the State provide, prior to the trial date of September 23, 2004, the audiotape of defendant's statement. Counsel did not receive the audiotape by that date. (Regardless, counsel tendered the stipulation, which the trial court later determined it could not accept.) Counsel made an appointment to listen to the tape on March 16, 2005. (Actually, according to the police log, counsel listened to the tape on March 15, 2005, the day before the stipulated bench trial.) Later, he received a copy of the tape and mailed it to Clendenin. Counsel admitted that, in the 18 months between his initial discovery request and his appointment to listen to the tape, he never filed a motion to compel production of the tape. Counsel testified that, when he finally listened to the tape and compared it to the police transcript, he found "minor" discrepancies that "appeared *** not to have any impact on the thrust of the comments [defendant] made to the police." If counsel had found significant disparities, he might have reconsidered whether a stipulated bench trial was appropriate.

Following the testimony, the trial court issued a written decision denying defendant's posttrial motion. First, the court found that "[t]here was no discovery violation" regarding the audiotape of Detective Lamela's interview with defendant. The court found that the delay in disclosure of the audiotape "did not affect [d]efendant's representation in light of what [trial counsel] knew from all of the disclosure and from conversations with [d]efendant." The court further found that the discrepancy between the phrase "several times they threw it in there" (the police transcript) and "sometimes they throw it in there" (the certified transcript) "was not dispositive on the element of Defendant's knowledge in light of other disclosures in the case," including defendant's response, "Not very many," to Detective Lamela's question of how many video clips of child pornography defendant knew were contained in the discs in his possession.

Second, the court found, without elaboration, that the stipulation contained proof beyond a reasonable doubt that defendant possessed child pornography.

## II. ANALYSIS

### A. Discovery/Ineffective Assistance Issues Regarding the Audiotape and Police Transcript

Since defendant's claim of a discovery violation dovetails with his claim of ineffective assistance of counsel, we address them together.

Defendant argues that the State violated its discovery duties by failing to tender the audiotape of defendant's interview with Detective Lamela until 18 months after the defense's discovery request. Supreme Court Rule 412(a)(ii) (eff. March 1, 2001) provides that "the State shall, upon written motion of defense counsel, disclose to defense counsel the following material and information within its possession or control: *** (ii) any written or recorded statements and the substance of any oral statements made by the accused ***." Relatedly, defendant claims that trial

counsel was ineffective for acquiescing in the untimely disclosure and by failing to challenge the State's case on the basis of both (a) the inaccuracy in the police transcript, and (b) Lamela's failure to audiotape his initial interview with defendant in which he stated that his discs contained "Not very many" video clips of child pornography.

We do not decide if the State violated its discovery duty with respect to the audiotape, because even if this was so, there was no prejudice to defendant. Several factors are relevant to whether a discovery violation prejudiced the defendant and warranted a new trial, including the closeness of the evidence, the strength of the undisclosed evidence, and the likelihood that prior notice would have helped the defense discredit the evidence. *People v. Cisewski*, 118 Ill. 2d 163, 172 (1987). The defendant bears the burden of proving prejudice. *Id.* The decision whether to grant a new trial as a sanction for a discovery violation is within the discretion of the trial court. *People v. Harper*, 392 Ill. App. 3d 809, 822 (2009).

To establish ineffective assistance of trial counsel, a defendant must meet the familiar two-part standard of *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Albanese*, 104 Ill. 2d 504, 525-27 (1984). A defendant must first demonstrate that his counsel's performance was deficient in that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687; *People v. Wiley*, 205 Ill. 2d 212, 230 (2001). In so doing, a defendant must overcome the strong presumption that the challenged action or inaction of counsel was the product of sound trial strategy and not of incompetence. *People v. Barrow*, 133 Ill. 2d 226, 247 (1989). Secondly, a defendant must demonstrate that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694; *Wiley*, 205 Ill. 2d

at 230. Because a defendant must satisfy both prongs of this test, the failure to establish either prong is fatal to the claim. *Strickland*, 466 U.S. at 697; see *People v. Bannister*, 232 Ill. 2d 52, 80 (2008). We review *de novo* defendant's claim of ineffectiveness as there are no relevant disputed facts. *People v. Wilson*, 392 Ill. App.3d 189, 197 (2009).

Again, assuming *arguendo* that there was a discovery violation, the trial court did not abuse its discretion in refusing to order a new trial, because defendant has not demonstrated prejudice. Though there was delay in the disclosure of the audiotape, trial counsel was able to hear the tape on March 15, 2005, the day before the stipulated bench trial, and discern the discrepancy between the audiotape and the police transcript. Defendant argues that the late disclosure of the audiotape "impaired [his] ability to investigate the circumstances of any statements he made." Defendant does not, however, explain how further investigation might have revealed more about "the circumstances" of his statements to Lamela. Somewhat inconsistently with his claim that he would have wanted more time to investigate, defendant flatly states that, if the State had made a timely disclosure of the audiotape, he "would *never* have stipulated to a bench trial concerning a crime that he did not commit" (emphasis added). Both of theses assertions assume that defendant's choice to undergo a stipulated bench trial was somehow influenced by the particular phrasing of "several times they threw it in there." This assumption has no support in the testimony at the ineffectiveness hearing. Notably, the phrase "several times they threw it in there" does not appear in the stipulation, so it is not apparent why defendant would have wanted to withdraw or perhaps refashion the stipulation based on the revelation that what defendant said to Lamela was in fact "sometimes they throw it in there."

As for defendant's response, "Not very many," to Lamela, we note that this phrase was absent not only from the audiotape but from the police transcript that the defense received earlier as part of the State's initial discovery disclosures. The reason for its absence was suggested in Lamela's report, which was also included in the initial disclosures. After relating a conversation in which defendant said, "Not very many," Lamela stated that he "obtained a taped statement from [defendant]," to be transcribed at a later date. Evidently, then, Lamela took two separate statements from defendant. The defense should have recognized the possibility that the phrase, "Not very many," might not have been repeated verbatim in the second, audiotaped statement that the police transcript purported to report. The defense should not have been surprised, then, to learn that, in fact, the phrase "Not very many" did not appear in the audiotape but that defendant answered "Should be very few" to a similar question from Lamela. Moreover, defendant does not claim that there is any semantic difference between "Not very many" and "Should be very few." Thus, defendant has not established that he was prejudiced on this point by the late release of the audiotape.

For similar reasons, we hold that trial counsel was not ineffective for failing to arrange an earlier release of the audiotape. Given that counsel did review the audiotape before the stipulated trial, was able to discern the discrepancy between the audiotape and the police transcript, and was able to reach a conclusion about the importance of the discrepancy, there was no reasonable probability that the outcome of the proceeding would have been different had counsel obtained the audiotape earlier. Moreover, defendant has not established prejudice with respect to the absence of the answer, "Not very many," from the audiotape, as it should not have been a surprise to defendant that this phrase was absent from the audiotape, and defendant does not claim there is any difference

in meaning between "Not very many" and "Should be very few," the answer that appears in the audiotape and the police transcript.

Moreover, counsel acted within the range of reasonable representation in deciding not to recommend against a stipulated bench trial despite the inaccuracy in the police transcript and the omission of defendant's statement, "Not very many," from the audiotape. Defendant argues that there is a crucial difference between the phrase "several times they threw it in there," appearing in the police transcript, and defendant's actual phrase, "sometimes they throw it in there." The former, defendant claims, "imputes actual knowledge by [d]efendant that the disk contained child pornography," whereas the latter "does not impute actual knowledge but rather suggests the [d]efendant's general opinion or information he received from others."

We emphasize that the criterion we apply is not how defendant would have wanted trial counsel to act upon learning of the discrepancies or what we would have done in trial counsel's place. The benchmark is whether counsel's conduct fell within a wide range of reasonable professional assistance. *People v. Ingram*, 382 Ill. App. 3d 997, 1006 (2008). "Evaluation of counsel's conduct cannot extend into areas involving the exercise of judgment, discretion or trial tactics even where the reviewing court would have acted differently." *People v. Mitchell*, 105 Ill. 2d 1, 12 (1984).

Counsel testified at the ineffectiveness hearing that the inaccuracy in the police transcript was "minor" and "appeared *** not to have any impact on the thrust of the comments [defendant] made to the police." Counsel noted that, if he had found a more significant departure between the audiotape and the police transcript, he might have reconsidered whether the stipulation was the proper course. We think the phrases "several times they threw it in there" and "sometimes they

throw it in there" are not so distinct in meaning that counsel could not reasonably have decided to proceed with the stipulation, which, as it happened, contained neither version of the threw/throw comment to Lamela.

As for the omission of defendant's answer, "Not very many," from the audiotape, defendant, as we noted, does not claim any semantic difference between this statement and the statement, "Should be very few," appearing in the audiotape and police transcript. Defendant suggests that trial counsel should have opted for a full-blown trial at which Lamela could be impeached for his "reporting errors." Defendant claims that, "[i]n one area of his report, Lamela indicates the words ["Not very many"] were spoken, but at that juncture in his investigation, the audio taping suddenly stopped." From our review, Lamela's report makes no such indication. Defendant does not further elaborate on what he considers Lamela's "reporting errors," and we seriously doubt that defendant could have damaged Lamela's credibility. First, it is not as if Lamela claimed for the first time at the ineffectiveness hearing that defendant said, "Not very many." That statement was recorded in Lamela's written report disclosed to defendant early in the discovery process. Lamela's decision to follow the first exchange with a second, audiotaped exchange is not in itself nefarious. As for the inaccuracy in the police transcript, defendant does not suggest how that could have been Lamela's fault.

We conclude that the trial court did not err in refusing to order a new trial.

B. Ineffective Assistance - Sex Registration

Defendant also argues that trial counsel was ineffective for advising him that he would be required to register as a sex offender for a term of only 10 years if he were convicted. In fact, defendant's conviction means that he is deemed a "sexual predator" (730 ILCS 150/2(E)(1) (West

2002)), and defendant is required to register as a sex offender for life (730 ILCS 150/7 (West 2002)). Defendant argues that counsel's mistake in advising him of the collateral consequence of sex offender registration represents ineffective assistance of counsel because he would not have agreed to the stipulated bench trial had he been correctly advised. In support of his point, defendant cites to *People v. Correa*, 108 Ill. 2d 541 (1985), and *People v. Manning*, 371 Ill. App. 3d 457 (2007). *Correa* and *Manning*, however, are inapposite as they both deal with erroneous advice about collateral consequences of guilty pleas. Here, as the supreme court held (see *Clendenin*, 238 Ill. 2d at 322-23), defendant's stipulated bench trial was not a guilty plea because it preserved a defense (the search and seizure issue) and it did not concede that the evidence presented in the stipulation was sufficient to convict. Defendant cites to no authority that giving erroneous advice concerning collateral sentencing consequences is *per se* ineffective representation. Accordingly, we reject defendant's contention.

C. Sufficiency of the Evidence

Last, defendant challenges the sufficiency of the evidence. When the sufficiency of the evidence is contested, the reviewing court must consider whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Phillips*, 215 Ill. 2d 554, 569-70 (2005). This standard of review applies in all criminal cases, regardless of the nature of the evidence. *Id.* at 570.

Defendant was convicted under section 11—20.1(a)(6) of the Criminal Code of 1961 (Code) (720 ILCS 5/11—20.1(a)(6) (West 2002)), which provides that a person commits the offense of possession of child pornography when "with knowledge of the nature or content thereof, [he]

possesses any film, videotape, photograph or other similar visual reproduction or depiction by computer of any child *** whom the person knows or reasonably should know to be under the age of 18 *** engaged in" certain sexual or lewd activity.

In finding defendant guilty, the trial court said

"I have considered the issues that must be proved beyond a reasonable doubt by the [P]eople. They are that the defendant, with the knowledge of the nature of the CD clips, possessed a depiction by computer of a child when the defendant knew or reasonably should have known that child to be under 18 and so to this, as far as his knowledge of this, that is shown by the statement he gave to Officer Lamela from the stipulation and also the defendant said at that time that he had certain disks in his apartment with pornography on them. And when asked if knew how many video clips of child pornography were on those disks, he stated quote, not very many. The defendant's statement is born [*sic*] out by the evidence in the stipulation which says that 77 disks were taken from the apartment and that only five contained pornography and those—and one of them was the disk that was taken by Ellen Bailey and given to the police

The knowledge of the nature of what was on that disk is also shown by some of the titles that Ellen Bailey testified to at the hearing which I have already[,] I believe[,] placed on the record.

As to him possessing a depiction by a computer of a child, this part of the element, Ellen Bailey took the disk from his home and with others and then returned the others to the home and gave one to the police. And the defendant has identified pursuant to the stipulation as far as his statement that disk as being his."

The trial court then noted that, based on her review, State's Exhibits 1 and 2, attached to the stipulation contained child pornography.

Defendant makes several arguments on the issue of sufficiency. First, he argues that the State failed to establish that he voluntarily possessed any child pornography. Section 11—20.1(b)(5) of the Code (720 ILCS 5/11—20.1(b)(5) (West 2002)) states that "[t]he charge of child pornography does not apply to a person who does not voluntarily possess a film, videotape, or visual reproduction or depiction by computer in which child pornography is depicted." Section 11—20.1(b)(5) further states that "[p]ossession 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." 720 ILCS 5/11—20.1(b)(5) (West 2002). Defendant argues that, because the stipulation showed that it was his custom to search for and download pornographic files and then transfer them to disc before viewing them, and because he told Lamela that he last downloaded pornography three days before his interview with Lamela but did not have time to transfer the files to a disc and did not know what files were downloaded, he could not have knowingly and voluntarily possessed child pornography. Defendant reasons that, because he did not have time to transfer to disc the files that he downloaded, he could not have made a decision to terminate his possession, and, therefore, he did not voluntarily and knowingly possess child pornography.

This argument fails. If we credit defendant's sequence of (1) downloading to hard drive, (2) transferring to disc, and (3) reviewing the files, then perhaps defendant may have had a colorable argument that he did not voluntarily possess child pornography that was not yet transferred from his hard drive. The *res* of the alleged crime, however, was a file that was already transferred from hard drive to disc, namely, the disc Bailey later took from defendant's residence. Defendant, we stress,

does not specifically argue that he had not reviewed the contents of the disc that Bailey took from his residence. Defendant's argument is only that he did not have time to complete his usual sequence of download-copy-review for the results of his most recent search for pornography. Accordingly, defendant's contention that he did not have time to determine whether to terminate his possession does not address the disc Bailey took from his residence, and is unavailing.

Next, defendant notes that the trial court appeared to confuse the disc taken by Bailey with one of the 77 discs seized by police, 5 of which contained pornography. Defendant claims, therefore, that it is unclear whether the trial court based its finding of guilt on People's Exhibits 1 and 2 (the photographs from the video clip on the disc that Bailey took), or on those five other discs containing pornography. Defendant concludes that, as those five discs "contained only adult pornography," the trial court may have based its verdict on an improper basis. We disagree. First, the stipulation states that the five discs contained adult pornography but not that they contained *only* adult pornography. Second, the only pornographic materials that the trial court specifically referenced in its decision were State's Exhibits 1 and 2, the photographs taken from video clip on the disc that Bailey took from defendant's residence. There is no doubt, therefore, that the trial court based its decision on defendant's possession of child, not adult, pornography—namely, the pornographic material attached the stipulation.

Defendant's final argument is that it is unclear that, when defendant said that "not very many" video clips of child pornography were contained on his discs, he was speaking of the specific disc Bailey took from his residence. In reviewing a conviction, the State is accorded the benefit of all reasonable inferences from the evidence. *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). Defendant's stipulated testimony was that he downloads material to his hard drive and "later ***

transfers the files to a disk and *then* views them" (emphasis added). Defendant added that he "does not know what he downloads until the file has been viewed." Although these remarks do not foreclose the possibility of some measure of delay between defendant's transferring the files to a disc and his viewing them, there is evidence to suggest that defendant was aware of the contents of the discs he had created up to the time of his interview. The stipulation refers to a total of six discs containing pornography: one taken by Bailey and given to the police, and five later seized by the police. Consistent with this, defendant admitted possessing six discs containing pornography. That defendant had knowledge of the contents of the discs was confirmed by his remark that not "not very many" video clips of child pornography were on the discs. The trial court, therefore, could reasonably infer that defendant was aware of the content of all discs in his possession, including the disc that was the subject of the stipulation.

Defendant does not challenge the proof of any other elements of the crime. Accordingly, we hold that the evidence was sufficient to prove defendant guilty beyond a reasonable doubt of possession of child pornography.

## III. CONCLUSION

For the foregoing reasons, we affirm the judgment of the circuit court of Kane County.

Affirmed.