2019 IL App (1st) 153030-U

SIXTH DIVISION
March 1, 2019

No. 1-15-3030

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. BERNABE DIAZ, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Cook County. Nos. 10 CR 14989, 10 CR 14990 Honorable Vincent Gaughan, Judge Presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 ***Held:*** We affirm defendant's convictions and sentences over his multiple contentions of error and his claim that his sentences are unconstituional.

¶ 2 This is the second direct appeal arising from the trial of defendant Bernabe Diaz for the sexual assaults of two minor sisters. A jury found defendant guilty of one count of predatory criminal sexual assault of D.S., and two counts of predatory criminal sexual assault and one count of criminal sexual assault of her sister C.S. The circuit court sentenced defendant to 28 years' imprisonment for the predatory criminal sexual assault of D.S. and to life imprisonment on one count of predatory criminal sexual assault of C.S. However, the court did not enter

judgment on the two remaining convictions. On the first direct appeal, we upheld the convictions and sentences for the two sentenced counts, and remanded the case for sentencing on the other two convictions. *People v. Diaz*, 2014 IL App (1st) 113613-U, ¶ 72 (unpublished order under Supreme Court Rule 23). On remand, the circuit court sentenced defendant to an additional four years' imprisonment for the criminal sexual assault of C.S. and an additional life sentence for the remaining predatory criminal sexual assault conviction. Defendant now appeals the convictions and sentences on those counts.[1] We affirm.

¶ 3 BACKGROUND

¶ 4 This court discussed the factual background of the underlying case at length in the order on defendant's first direct appeal. *Diaz*, 2014 IL App (1st) 113613-U. Here, we provide only the specific facts most relevant to the current appeal.

¶ 5 Defendant was arrested and indicted for numerous counts of sexual assault against D.S. and C.S., the minor daughters of his then-girlfriend. The counts related to D.S. were brought in case number 10 CR 14989 and those related to C.S. were brought in case number 10 CR 14990. The State moved to join the two cases. Over defendant's objection, the circuit court granted the motion and the two cases were tried together.

¶ 6 At trial, C.S. testified that she was 14 years old and that she was born in March, 1997. She lived with her brother Juan, her sister D.S., and her mother in an apartment on Melvina Street in Chicago, Illinois. The family moved to Melvina Street when C.S. was between 12 and 13 years old. Before that, they all lived with defendant at various addresses on Mobile Street. C.S. testified that defendant first started touching her inappropriately when she was between five and six years old. She testified that defendant "touch[ed] his private part to [her] private part"

[1] Defendant raises arguments as to every count. However, as discussed below, we only reach those issues related to the remanded counts.

over 20 times while they lived on Mobile Street. She also testified that defendant touched her "butt" with his "private part" more than 20 times while they lived on Melvina Street.

¶ 7 C.S. testified that on the morning of August 2, 2010, defendant took her to his bedroom, turned off the light and closed the door. He pulled down her underpants and pushed her face-first onto the bed. She testified that he then touched her "butt" with his "private part." She told him to stop and tried to push him away. Her brother Juan then came into the room and told her to leave while he engaged in an altercation with defendant.

¶ 8 Juan testified that when he walked into defendant's room that morning, he saw defendant with his undershorts around his knees. He also saw defendant's erect penis touching his sister's bare behind. He struggled with defendant to keep him from leaving and made a phone call to a friend to come help him. When his friend arrived, Juan told him to guard the girls and to call the police. Juan testified that he was 15 or 16 years old when the family moved from Mobile Street to Melvina Street, and that he was four years older than C.S.

¶ 9 Aside from testimony from the siblings, the State also presented evidence from medical practitioners and forensic scientists. That evidence showed that a male DNA profile was identified from a semen stain on C.S.'s underpants and from a swab of her anus. One of the forensic scientists testified that the male DNA profile matched that of defendant, to reasonable degree of scientific certainty.

¶ 10 The jury found defendant guilty two counts of predatory criminal sexual assault as to C.S., with one count being based on contact between his penis and C.S.'s vagina and the other based on contact between defendant's penis and C.S.'s anus. The jury also found defendant guilty of criminal sexual assault of C.S. Finally, the jury found defendant guilty of the predatory criminal sexual assault of D.S. The court denied defendant's motion for a new trial, and

sentenced defendant to a term of 28 years' imprisonment on his conviction for predatory criminal sexual assault in D.S.'s case and to a consecutive sentence of life imprisonment on his conviction for predatory criminal sexual assault premised upon contact with C.S.'s anus. The court specifically did not enter judgment on counts 4 and 13 of C.S.'s case (10 CR 14990). Count 4 was for predatory criminal sexual assault in that defendant made contact between his penis and C.S.'s vagina when she was under 13 years of age. Count 13 was for criminal sexual assault premised upon contact with C.S.'s anus on August 2, 2010.

¶ 11 On the first direct appeal, we affirmed the convictions and sentences on which the circuit court entered judgment. *Diaz*, 2014 IL App (1st) 113613-U, ¶ 72. However, we remanded for sentencing on counts 4 and 13 of case number 10 CR 14990. On remand, defendant argued that, given the previous life sentence, additional sentencing would be "repetitive." The circuit court expressed concern about the constitutionality—and logic—of sentencing defendant to a second life sentence, but ultimately entered sentences of four years' imprisonment on count 13 and life imprisonment for the remaining predatory criminal sexual assault conviction, count 4.

¶ 12 This appeal followed.

¶ 13 ANALYSIS

¶ 14 This case comes before us in an extremely unusual procedural posture. As described above, this is the second direct appeal from the same trial. In this appeal, defendant was initially represented by the Office of the State Appellate Defender. Citing the preclusive effect of this court's 2014 order, that office concluded that a second appeal in this case would be without arguable merit, and filed a motion to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967). Defendant's counsel from the first appeal (who was also defendant's trial counsel) filed a response to that motion and moved to substitute himself as counsel, which we granted. We

granted the State Appellate Defender leave to withdraw and allowed defendant an extension of time to file a brief. Rather than raise any new issues, however, defendant's brief in this appeal simply repeats—in many places verbatim—the exact same arguments raised and rejected in the first appeal.

¶ 15 Defendant contends that (1) the circuit court erred in granting the State's motion for joinder; (2) the State failed to prove his guilt beyond a reasonable doubt;[2] (3) the trial court erred in denying defendant's motions for a directed verdict and for a new trial; (4) the State violated *Brady v. Maryland*, 373 U.S. 83 (1963) and the defendant's right to confront the witnesses against him when it did not call a certain witness at trial; (5) the jury verdicts were incompatible with the given instructions; (6) defendant's sentences of life imprisonment, and the statute requiring them, are unconstitional. These contentions are virtually identical to those raised in defendant's first direct appeal. See *Diaz*, 2014 IL App (1st) 113613-U, ¶ 2.

¶ 16 Before we can reach the merits of any of defendant's arguments, we must determine the effect of the first appeal. Defendant contends that the first appeal should not have been entertained at all because there was no final judgment as to each and every count. As a result, he argues, the case was not complete and ready for appeal until now. He asks that we now entertain all of his contentions of error as to all four convictions. The State argues that this appeal only regards the counts that we remanded for sentencing. We agree with the State.

¶ 17 "The final judgment in a criminal case is the sentence." *People v. Becker*, 414 Ill. 291, 295 (1953). Without the entry of a sentence, we cannot entertain an appeal from a finding of guilt. *People ex rel. Filkin v. Flessner*, 48 Ill. 2d 54, 56 (1971). However, where the defendant is

[2] As was the case in the first appeal, defendant argues that "[t]he jury verdicts of [g]uilty were against the manifest weight of the evidence." See *Diaz*, 2014 IL App (1st) 113613-U, ¶ 43. As we explained in the 2014 order, defendant's argument is essentially that the evidence was insufficient to support his convictions. *Id.*, ¶ 44.

convicted on multiple counts, but the trial court does not enter judgment on every count, we may properly entertain an appeal as to the sentenced convictions. *People v. Lilly*, 56 Ill. 2d 493, 496 (1974). Therefore, we properly entertained the first appeal with respect to the convictions for which the circuit court sentenced defendant initially. Because we have already disposed of all of the issues related to those counts, this appeal is necessarily limited to the previously incomplete two convictions that we remanded for sentencing: counts 4 and 13 of case number 10 CR 14990.

¶ 18 Having identified which convictions are at issue, we must next determine which arguments, if any, are barred by the law of the case doctrine. "The law of the case doctrine generally bars relitigation of an issue previously decided in the same case. [Citation.] Thus, the determination of a question of law by an appellate court in the first appeal may be binding on the court in a second appeal." *People v. Sutton*, 233 Ill. 2d 89, 100 (2009). The two exceptions to the law of the case doctrine are: "(1) if a higher reviewing court makes a contrary ruling on the same issue after the lower court's decision, or (2) if a reviewing court determines that its prior decision was palpably erroneous." *Diocese of Quincy v. Episcopal Church*, 2016 IL App (4th) 150193, ¶ 28. "The fact that a court might reach a different conclusion if it had to consider the issue anew does not mean that the court's prior decision was palpably erroneous." *Radwill v. Manor Care of Westmont, IL, LLC*, 2013 IL App (2d) 120957, ¶ 12.

¶ 19 Defendant has not filed a reply brief, but in his opening brief he anticipated that the State would make a preclusion argument. He contends that we should not follow *People v. Blair*, 215 Ill. 2d 427 (2005) in precluding his arguments. He rightly points out that *Blair* deals with *res judicata* in the context of a postconviction petition, not a second direct appeal from the same trial. See *id.* 450 (holding that a postconviction petition may be dismissed on *res judicata* grounds). While defendant is correct that *res judicata* should not bar his previously litigated

claims within the same case, he fails to recognize that the proper preclusion doctrine at issue here is law of the case. Most of defendant's arguments in this appeal were fully litigated and disposed of in the first appeal, and are therefore binding on this court. In particular, the State contends that defendant's claimed errors with respect to joinder, discovery, and the jury verdicts are all barred. We address those issues in turn.

¶ 20 As to defendant's argument that the court erred in granting the State's motion for joinder of the two criminal cases, we held in the first appeal that defendant had forfeited that issue because he did not raise it in his posttrial motion and did not ask this court to review the issue for plain error. *Diaz*, 2014 IL App (1st) 113613-U, ¶ 42. This issue, having been raised and resolved in the first appeal is barred by the law of the case doctrine. And even if it were not barred, it would still be forfeited because defendant did not raise it on remand and still does not seek plain error review.

¶ 21 We held in the first appeal that defendant's discovery arguments were without merit. We found that there was no *Brady* violation because the name of the evidence technician who collected defendant's DNA swabs was listed in the State's answer to discovery and therefore was not "undisclosed" evidence. *Diaz*, 2014 IL App (1st) 113613-U, ¶ 54. We also held that the record did not support defendant's contention that the State failed to disclose that the evidence technician would be unavailable for trial. *Id.* Finally, we held that defendant was not denied the right to confront the witnesses against him because the constitution does not require that the State call every witness that it names in discovery. *Id.* (quoting *People v. Sanchez*, 115 Ill.2d 238, 266-67 (1986)). Because these issues were fully litigated and disposed of on the first appeal, they are also barred by the law of the case doctrine.

¶ 22 As to defendant's claims of error regarding the jury verdicts and instructions, we found on the first appeal that those claims were conclusory and lacked any legal analysis or citation to legal authority or the record on appeal. *Diaz*, 2014 IL App (1st) 113613-U, ¶ 58. Defendant forfeited those arguments in the first appeal, and they are now barred by the law of the case doctrine. We note that the corresponding portion defendant's brief in this appeal is just as conclusory and unsupported, so even if these issues were not barred by the law of the case doctrine, they would still be forfeited. See Ill. S.Ct. R. 341(h)(7) (eff. Nov. 1, 2017).

¶ 23 Having disposed of all issues that were properly the subject of the first appeal, we now turn to defendant's remaining claims of error. As discussed above, those arguments apply only to the remanded counts. Defendant argues that the State failed to prove his guilt beyond a reasonable doubt; the trial court erred in denying defendant's motions for a directed verdict and for a new trial; and defendant's second sentence of life imprisonment, and the statute requiring it, is unconstitutional.

¶ 24 When reviewing the sufficiency of the evidence, the relevant inquiry is 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. Collins*, 106 Ill. 2d 237, 261 (1985) (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). Only when the evidence is "so unsatisfactory, improbable or implausible" that it raises a reasonable doubt as to defendant's guilt, is reversal justified. *People v. Slim*, 127 Ill. 2d 302, 307 (1989).

¶ 25 The charge of predatory criminal sexual assault required the State to prove that defendant committed an act of sexual penetration when he was 17 years of age or older on a victim who was less than 13 years old when the act was committed. 720 ILCS 5/11-1.40 (West 2010).

"Sexual penetration" is defined in relevant part as "any contact, however slight, between the sex organ or anus of one person by an object, the sex organ, mouth or anus of another person." 720 ILCS 5/11-0.1 (West 2010).

¶ 26 "[I]t is often difficult in the prosecution of child sexual abuse cases to pin down the times, dates, and places of sexual assaults, particularly when the defendant has engaged in a number of acts over a prolonged period of time." *People v. Bishop*, 218 Ill. 2d 232, 247 (2006). Consequently, "[t]he date of the offense is not an essential factor in child sex offense cases." *People v. Guerrero*, 356 Ill. App. 3d 22, 27 (2005). "As long as the crime occurred within the statute of limitations and prior to the return of the charging instrument, the State need only provide the defendant with the best information it has as to when the offenses occurred." *Id.*

¶ 27 Defendant's sufficiency of the evidence arguments are practically identical to those raised on the first appeal. Defendant argues that the State failed to prove that he performed any act of penetration on C.S. before March 24, 2010, her thirteenth birthday. He claims that C.S.'s testimony about events before that date "was vague as to dates, time periods, years and specific locations." Consequently, he argues, the State did not prove his guilt beyond a reasonable doubt. However, the trial evidence was more than sufficient to sustain a guilty verdict on count 4.

¶ 28 As we noted on the first appeal:

> "[C.S.] testified that when she was between five and six years old, defendant used his 'private part' to touch her 'front part.' [C.S.] also testified that defendant touched his front private part to her front private part more than 20 times while the family lived at the addresses on Mobile Street. [C.S.] further testified that defendant touched her 'butt' with his private part more than 20 times when the family lived on Melvina. Defendant corroborated [C.S.] when he

> testified that the family moved to Melvina from the last address on Mobile Street (2228) in October of 2009. In October of 2009, [C.S.] would have been 12 years old. Juan testified that he lived at the 2228 Mobile Street address until he was 15 or 16 years old, which is also consistent with [C.S.] being 11 or 12 years old when the family moved to the Melvina address. Again, [C.S.'s] lack of specificity as to the exact date on which instances of sexual penetration took place is not fatal and does not establish that the State failed to prove defendant's guilt beyond a reasonable doubt. Based upon the testimony set forth above, a rational trier of fact could have found that defendant committed acts of sexual penetration on both girls before they turned 13 years old. Accordingly, defendant was proven guilty beyond a reasonable doubt." *Diaz*, 2014 IL App (1st) 113613-U, ¶ 42.

¶ 29 Our reasoning in the first appeal is equally applicable here. C.S. testified about sexual abuse starting from the time she was five or six years old. She testified that it occurred repeatedly throughout the time that the family lived on Mobile Street. The testimony of C.S., Juan, and defendant himself all corroborated the fact that C.S. was under the age of 13 during that period. A rational trier of fact could have found that defendant committed acts of sexual penetration on C.S. before she was 13 years old. Accordingly, defendant was proven guilty of count 4 beyond a reasonable doubt.

¶ 30 Defendant makes no specific argument as to reasonable doubt on count 13, which relates to the events of August 2, 2010. That issue is therefore forfeited. See Ill. S.Ct. R. 341(h)(7) (eff. Nov. 1, 2017). We note, however, that the evidence on that count was overwhelming. Both C.S. and Juan described in detail the events of that morning. The jury also heard the testimony of forensic scientists concluding that defendant's semen was found in C.S.'s anus and on her

underpants. In light of this evidence, even if the issue were not forfeited, we would conclude that a rational fact finder could have found defendant guilty of count 13 beyond a reasonable doubt.

¶ 31 The next issue is whether the circuit court erred in denying defendant's motions for a directed verdict and a new trial. As was the case on the first appeal, defendant's arguments are simply reiterations of his other contentions. See *Diaz*, 2014 IL App (1st) 113613-U, ¶ 57. He merely repeats his claims that the State failed to prove beyond a reasonable doubt that he committed acts of sexual penetration on C.S. while she was under the age of 13, and that he was deprived of his right to cross-examine the evidence technician who took his buccal swabs. See *Id.* Because we have already considered and rejected those arguments, we need not consider them again.

¶ 32 Finally defendant contends that his second life sentence and the statute mandating it violate the Eighth Amendment to the United States Constitution and the proportionate penalties clause of the Illinois Constitution. Once again, these arguments are virtually identical to those raised in the first appeal. And once again, they fail. Defendant's second life sentence, like his first, was entered pursuant to the Criminal Code of 1961 (Code) (720 ILCS 5/12-14.1(b)(1.2) (West 2008) (renumbered 720 ILCS 5/11-1.40(b)(1.2) (eff. July 1, 2011))). That statute requires a sentence of life imprisonment for any "person convicted of predatory criminal sexual assault of a child committed against 2 or more persons". *Id.*

¶ 33 In our 2014 order, we explained that in *People v. Huddleston*, 212 Ill.2d 107 (2004) our supreme court already considered whether section 12-14.1(b)(1.2) of the Code comports with the proportionate penalties clause of the Illinois Constitution. See *Diaz*, 2014 IL App (1st) 113613-U, ¶ 62. We also discussed at length *People v. Oates*, 2013 IL App (5th) 110556, in which the

defendant made very similar arguments to those made in this case. *Diaz*, 2014 IL App (1st) 113613-U, ¶ 63-65.

¶ 34 In this appeal, defendant does not even acknowledge *Huddleston* or *Oates*, let alone make any effort to distinguish those cases. Defendant merely repeats, with superficial edits, the exact same arguments that we have already held to be unavailing. Because defendant offers no reason why we should depart from the sound reasoning of our order on the first appeal, we will not do so.

¶ 35 Defendant's final contention is that sentencing an individual with no criminal history to life imprisonment violates the prohibition against cruel and unusual punishment under the Eight Amendment to the United States Constitution. The Eighth Amendment of the Constitution of the United States provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., amend. VIII.

¶ 36 This argument was also considered and rejected by this court in the first appeal, again relying on *Huddleston* and *Oates*. *Diaz*, 2014 IL App (1st) 113613-U, ¶ 67-68. Once again, defendant does not cite to those cases or make any effort to distinguish them. With no argument to persuade us otherwise, we see no reason to depart from the sound reasoning of our order on the first appeal.

¶ 37 CONCLUSION

¶ 38 Accordingly, we affirm defendant's convictions and sentences.

¶ 39 Affirmed.