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2012 IL App (3d) 100483-U

Order filed January 18, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
	)	Will County, Illinois
Plaintiff-Appellee,	)	
	)	
v.	)	Appeal No. 3-10-0483
	)	Circuit No. 09-CF-1609
ISMAEL REYES,	)	
	)	Honorable Amy Bertani-Tomczak,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE SCHMIDT delivered the judgment of the court.
Justices Holdridge and Lytton concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's decision not to grant defendant a new trial pursuant to defendant's motion for a new trial and claim for 2-1401 relief was not error. The new evidence was not likely to change the outcome of a second trial since the State presented evidence of the defendant's confession, and the new evidence was cumulative to evidence presented at trial.

¶ 2 The State charged defendant, Ismael Reyes, with aggravated criminal sexual abuse, and a

jury found him guilty. Following the trial, he moved for a new trial based on newly discovered evidence. Prior to sentencing, he sought a new trial pursuant to 735 ILCS 5/2-1401 (West 2010). The basis for the 2-1401 motion was the same newly discovered evidence presented in the original motion for a new trial. The trial court denied relief on both grounds. Following a sentencing hearing the trial court sentenced defendant to 36 months probation and six months in jail, and granted him credit for the more than six months already served. Defendant appeals the trial court's failure to grant a new trial under his motion for a new trial and his 2-1401 claim. For the reasons that follow, we affirm.

¶ 3 FACTS

¶ 4 The State alleged that defendant, while he was 21, committed an act of sexual conduct with L.S., who was 13. L.S.'s mother testified that she was concerned about L.S.'s relationship with defendant. She admitted that she never saw any inappropriate contact between defendant and L.S.

¶ 5 L.S. testified that on or about April 20, 2009, she was alone with defendant in her home. She and defendant kissed, and while both were fully clothed, defendant touched her breast and private parts between her legs. She went on to explain that sometime later her mother took her to the Child Advocacy Center (Center) for an interview. She did not want to go; her mother made her. L.S. testified that during the interview, she lied to the investigator by claiming she and defendant only held hands, kissed and hugged, and that defendant did not touch her inappropriately. L.S. testified she lied during the interview to protect defendant.

¶ 6 L.S. went on to testify that several weeks later she was interviewed by Detective Kenneth Simpson, whom she told truthfully, that defendant had touched her inappropriately. On a subsequent date, L.S. was again interviewed at the Center. This time she told the investigator truthfully that defendant had touched her breast and vagina. At trial, L.S. testified that her testimony that defendant touched her breasts and in between her legs was true.

¶ 7 L.S. also testified that her mother had told her to say that something had happened between her and defendant, and L.S. did not want to disappoint her mother. She also stated that her mother had been angry about her relationship with defendant.

¶ 8 Detective Jaime Marquez testified that he is fluent in Spanish and English; Spanish was his first language. Marquez admitted that he has no formalized training in translating from Spanish to English or vice versa. He can read Spanish, but said that if he were presented with defendant's written statement, he would not be able to read it verbatim. Marquez conducted the interview with defendant in Spanish due to defendant's inability to communicate in English.

¶ 9 Marquez interviewed defendant at the Bolingbrook police department. During the interview, defendant told Marquez: he knew L.S., had been to her apartment, had kissed and touched her when they were alone, and specifically admitted that he touched L.S.'s breasts and vagina. Defendant stated that at the time, he was 21, and he knew that L.S. was 13 or 14. Defendant made a written statement following the interview. The written statement was not entered into evidence.

¶ 10 At the close of the State's case, defendant moved for a directed verdict, which was

denied. Defendant presented no evidence. While the jury was deliberating, defense counsel informed the court that Heather Larga, a friend of L.S., told him that L.S. had called Larga the previous night and told her that "when she [L.S.] was on the stand her mother forced her to testify the way she did and she was going to get an ass-whooping if she didn't." Defense counsel further stated he did not know what to do with this information. He intended to obtain a written statement from Larga, and was going to attempt to speak with L.S. Sometime later the jury returned a guilty verdict.

¶ 11 The following day, defendant filed a motion for judgment notwithstanding the verdict and for a new trial based on newly discovered evidence. Attached to the motion were affidavits from Larga and L.S. Larga's affidavit indicated that L.S. told her that she had to say the defendant touched her or else her mother was going to "whoop her ass." The affidavit also indicated that L.S. lied while testifying due to her mother's influence. L.S.'s affidavit stated that she lied during her testimony at trial. She claimed that defendant never made any type of contact with her genitalia, buttocks or breasts. L.S. felt compelled to lie due to threats made by her mother. At the conclusion of a hearing on the motion, the trial court denied the motion.

¶ 12 Defendant later amended the motion to include a claim for relief under section 2-1401. The court heard argument on the 2-1401 claim. The court took the issue under advisement so it could consider the parties arguments, and ultimately denied the claim.

¶ 13 ANALYSIS

¶ 14 Defendant argues that the trial court's decisions not to grant a new trial pursuant to his

motion for a new trial and 2-1401 claim were wrong. He also cursorily raises the possibility that defendant's trial counsel provided ineffective assistance. We address the first two issues below. However, defendant has waived any consideration that his trial counsel provided ineffective assistance since he failed to argue that point to this court. Illinois Supreme Court Rule 341(h)(7) requires briefs to include "argument, which shall contain the contentions of the appellant and the reasons therefore, with citation of the authorities and the pages of the record relied on." (eff. July 1, 2008). Rule 341 also states, "points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing." *Id.* Since defendant did not in any way cite to authority or develop his argument that trial counsel was ineffective, he has forfeited this argument on appeal. *People v. Manoharan*, 394 Ill. App. 3d 762, 772 (2009).

¶ 15 I. Motion for New Trial

¶ 16 Defendant argues that the trial court erred in refusing to grant a new trial due to the discovery of new evidence: the affidavits indicating that L.S. lied at trial. We review a trial court's decision whether or not to grant a new trial due to newly discovered evidence for an abuse of discretion. *People v. Gabriel*, 398 Ill. App. 3d 332, 350, 2010. Defendant asserts our review should be *de novo*; the authority he cited in support of that proposition did not address the standard of review proper in this case.

¶ 17 A trial court should grant a new trial due to newly discovered evidence when: (1) the evidence "has been discovered since trial;" (2) the evidence "is of such a character that it could not have been discovered prior to the trial by the exercise of due diligence;" (3) the evidence "is

material to the issue and not merely cumulative;" and (4) the evidence "is of such a conclusive character that it will probably change the result on retrial." *Id.* at 350.

¶ 18 We need only address the last requirement in this case. The evidence presented by defendant is not of such a conclusive character that it would probably change the result on retrial. The State presented evidence that defendant confessed to touching L.S. inappropriately. This alone is enough to make evidence that L.S. lied at trial unlikely to change the result of the trial. In addition, there was evidence at trial that L.S. had told investigators both that defendant had touched her inappropriately and that he had not. There was also evidence presented at trial that L.S.'s mother wanted her to say that something happened between L.S. and defendant. Given defendant's confession to touching L.S.'s breasts and vagina, the newly discovered evidence presented by defendant would not probably change the result on retrial. The trial court did not abuse its discretion in refusing to grant a new trial.

¶ 19 II. Section 2-1401 Relief

¶ 20 Defendant's last contention is that the trial court erred in not granting a new trial pursuant to section 2-1401 of the Civil Practice Law. 735 ILCS 5/2-1401 (West 2010). In a criminal case, section 2-1401 allows the trial court "to correct errors of fact occurring in the State's case, which, if known at the time judgment was entered, would have prevented the judgment's rendition." *McDonald*, 405 Ill. App. 3d 131, 137 (2010). The basis upon which defendant seeks relief under section 2-1401 is the same as in his motion for a new trial: the affidavits of L.S and Larga.

¶ 21 Where as here, the trial court held a hearing on the 2-1401 motion, we will reverse the trial court only if we find its determination was against the manifest weight of the evidence. *People v. Burrows*, 172 Ill. 2d 169, 180, (1996); *McDonald*, 405 Ill. App. 3d at 137. Defendant, relying on *People v. Vincent*, 226 Ill. 2d 1 (2007), argues that the proper standard of review is *de novo*. *Vincent*, however, holds that when a court enters a judgment on the pleadings or a dismissal of a section 2-1401 claim, the proper standard of review is *de novo*. *Vincent*, 226 Ill. 2d at 18. In this case, the trial court held a hearing on the 2-1401 claim, therefore, our review is to see if the trial court's decision is against the manifest weight of the evidence.

¶ 22 In order to succeed under section 2-1401, defendant was required to provide proof, "by a preponderance of evidence, of a defense or claim that would have precluded entry of the judgment in the original action and diligence in both discovering the defense or claim and presenting the petition." *Vincent*, 226 Ill. 2d at 7-8. The trial court denied 2-1401 relief on the basis that evidence was presented at trial that L.S. had both claimed defendant touched her inappropriately, and at other times claimed that he did not touch her inappropriately, along with evidence that defendant confessed to touching L.S.'s breasts and vagina. The trial court believed that an additional piece of evidence that L.S. had changed her story from time to time would not have changed the outcome of a second trial.

¶ 23 The trial court's determination that the new evidence presented by defendant would not have precluded his conviction had it been known at trial is not against the manifest weight of the evidence. This evidence is at best cumulative to the evidence the jury had before it. The

evidence simply would not have precluded entry of a guilty verdict had it been presented at trial.

¶ 24 CONCLUSION

¶ 25 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 26 Affirmed.