2014 IL App (1st) 113613-U

FIFTH DIVISION
June 13, 2014

No. 1-11-3613



IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court |
| Plaintiff-Appellee, | ) | of Cook County |
| | ) | |
| v. | ) | No. 10 CR 14989 |
| | ) | 10 CR 14990 |
| | ) | |
| BERNABE DIAZ, | ) | Honorable |
| | ) | Vincent Gaughan, |
| Defendant-Appellant. | ) | Judge Presiding. |

JUSTICE PALMER delivered the judgment of the court.
Presiding Justice Gordon and Justice McBride concurred in the judgment.

**ORDER**

¶1 ***Held***: Defendant forfeited his contention that the trial court erred by joining two cases for trial. The State proved defendant's guilt beyond a reasonable doubt. The State did not violate *Brady v. Maryland*, 373 U.S. 83 (1963) or defendant's right to confront the witnesses against him. Defendant's sentence of life imprisonment, and the statute requiring it, are not unconstitutional.

¶2 Following a jury trial, defendant Bernabe Diaz was found guilty of two counts of predatory criminal sexual assault relating to two victims, aggravated criminal sexual assault and criminal sexual assault. Defendant was sentenced to 28 years' imprisonment on one count of

predatory criminal sexual assault and to life imprisonment on the other count of predatory criminal sexual assault. On appeal, defendant contends that: (1) the trial court erred by granting the State's motion for joinder; (2) the jury's verdicts were against the manifest weight of the evidence; (3) the trial court erred by denying defendant's motion for a directed verdict and his motion for a new trial; (4) the State violated *Brady v. Maryland*, 373 U.S. 83 (1963) and defendant's right to confront the witnesses against him when it did not call a certain witness at trial; (5) defendant's sentence of life imprisonment, and the statute requiring it, are unconstitutional. For the reasons that follow, we affirm defendant's convictions and sentences and remand the matter to the trial court with instructions.

¶3 Defendant was arrested and indicted for, among other things, predatory criminal sexual assault of "Delores" in case number 10 CR 14989 and predatory criminal sexual assault of Delores' sister, "Carmen," in case number 10 CR 14990. The State ultimately proceeded to trial on one count of predatory criminal sexual assault of Delores and one count of predatory criminal sexual assault and two counts of criminal sexual assault of Carmen. On October 7, 2010, the State filed a motion to admit other crimes evidence from Delores' case in the then-elected case of Carmen. While the other crimes motion was pending, the State filed a motion to join the related cases. Over defendant's objection, the trial court granted the State's motion and the two cases were tried together.[1]

¶4 Carmen testified that she was 14 years old and in ninth grade and that she was born on March 24, 1997. Carmen lived with her brother Juan, her sister Delores and her mother in an apartment on Melvina Street in Chicago, Illinois. Carmen testified that when she was between five and six years old and living with her family on Mobile Street in Chicago when she first remembered "something happening" between her and defendant. Specifically, Carmen

[1] Defendant did not include a transcript of the hearing on this motion in the record on appeal.

remembered that defendant used his hands to touch her "front part" that she used to "pee" over and under her clothing and touched her "butt" with his hands over her clothing. Defendant also used his "private part," the part he used to "go pee," to touch Carmen's "front part" that she used to "pee" both over and under her clothing. This occurred more than 20 times while Carmen lived on Mobile Street. When Carmen and the family subsequently moved to Melvina Street, defendant again used his "front private part" to touch Carmen's "front private part" under his clothes and under her clothes. This occurred more than 20 times while Carmen lived on Melvina Street. While living on Melvina, defendant also touched Carmen's "boobs" with his hands both over and under her clothing and he touched Carmen's "butt" with his hands and his "private part" both over and under her clothing. This happened more than 20 times while Carmen lived on Melvina. When defendant touched Carmen's butt with his "front private part" while on Melvina, his front private part did not touch the part of Carmen's butt that she used to go to the restroom.

¶5 Carmen also testified that when she was approximately 12 years old and living on Mobile Street, she saw defendant "touching" her sister Delores and "doing it with her" or "having sexual contact" with her in the bedroom. At least once or twice, Carmen saw defendant's "private part" touching Delores' "front private part." Carmen said that she saw defendant's private part "many times" when she lived on Mobile. When defendant touched Carmen while she was living on Mobile and Melvina Streets, she saw something "wet" and "white" that she called "sperm" come out of defendant's private part.

¶6 Carmen testified that at approximately 11 a.m. on August 2, 2010, she was in the living room of her house on Melvina. Carmen's mother was at the store and Carmen was home with her brother, sister and defendant. Defendant took Carmen to the bedroom he shared with her mother and turned the light off and closed the door. Defendant pulled down his pants and pulled

down his underwear "halfway." He pulled down Carmen's underwear and pushed her towards the bed. Carmen fell face first onto the bed and defendant grabbed Carmen's hands and "started moving" with his "private part" touching Carmen's butt. His "private part" did not make contact with the part of Carmen 's butt that she used to go to the bathroom. Carmen told defendant to stop but he kept moving and she tried to push defendant but she could not get away from him. Juan then came into the room and turned the lights on. He told Carmen to leave the room and then started "cussing" at defendant. Carmen left the room and went to the bathroom. She had her pants on at this point. Chicago police officers came to Carmen's house later that day and she, her mother and sister went with the officers to the hospital. Carmen spoke to a doctor and a nurse and told them what defendant did to her. The doctor examined Carmen and kept her clothes. Carmen had never before told anyone what defendant had been doing because she was scared of him.

¶7 On cross-examination, Carmen explained that her family lived on Mulligan Street when defendant first moved in with them, that the family moved to Mobile when she was little and that the family moved to Melvina when Carmen was between 12 and 13 years old. Carmen agreed that she never spoke to her sister after she saw defendant with Delores and that she never spoke to Juan about it until August 2, 2010. Carmen also never spoke to Juan or her mother about what defendant had done to her prior to August 2. Carmen had not spoken to her mother about what happened on August 2 because "she wouldn't listen." Carmen and her sister had not spoken about what happened on August 2 because Carmen "did not feel comfortable talking about [i]t." Carmen agreed that she did nothing after seeing defendant with her sister. Carmen acknowledged that she had a "normal" relationship with defendant when he first moved in with Carmen's family. Defendant also had a "normal" relationship at that time with Juan, Delores and

Carmen's mother. However, defendant later had an "awful" relationship with Juan as they began fighting.

¶8 Emergency room doctor Reena Patel testified as an expert in emergency room medicine. Doctor Patel examined Carmen and Delores when they were brought to the hospital on August 2. Carmen was taken to a room and Doctor Patel and a nurse began by obtaining an oral history of what brought Carmen to the emergency room. Carmen told the doctor that defendant "was on top of her and he put his thing inside her vagina, and while that was going on her brother walked in, and her brother and her stepfather had an argument, and the police were called." Carmen told the doctor that she meant "penis" when she said defendant's "thing." Carmen also told the doctor that this type of assault had been going on for approximately two years. Doctor Patel further testified that Carmen also told her that defendant hit her at times. The doctor then conducted a full physical examination of Carmen. The doctor took specimens during the examination, including vaginal and anal swabs, which she gave to the nurse. The doctor saw the nurse put those specimens in an envelope and seal it. Doctor Patel did not observe any trauma to Carmen's genital areas, but testified that it was still possible that vaginal or anal penetration had occurred without a physical manifestation. She explained that there could be incomplete or "chronic" penetration and that there was also increased blow flow and thus increased healing capacity. During the examination, the doctor noted that Carmen was "quiet, at times tearful" and "only answered questions to what we asked."

¶9 Doctor Patel also examined Delores that day. The doctor took a history from Delores, who related that her brother had found defendant on top of her sister Carmen. Delores told the doctor that defendant had also assaulted her since she was approximately five years old. Delores said she was not sexually assaulted on August 2, but that she had been three days earlier.

Delores told the doctor that "defendant "puts his penis inside her vagina and has ejaculated on her at times." Doctor Patel conduced a physical examination of Delores. The doctor did not observe any signs of physical trauma as she obtained vaginal and oral swabs. The doctor gave each specimen to the nurse, who placed the samples in an envelope. The doctor reiterated that the lack of physical trauma did not preclude past instances of sexual abuse. On cross-examination, Doctor Patel testified that other than the oral history given to her, she did not observe anything during her examination of Carmen or Delores that indicated either was subject to "chronic" assaults.

¶10 Nurse Meghan Wolthusen testified that she assisted Doctor Patel in treating Delores and Carmen on August 2. Wolthusen spoke to each girl in a separate room and obtained their oral histories. Later, she again spoke to both girls separately along with Doctor Patel. After the girls were interviewed, Wolthusen gathered evidence for the sexual assault collection kits under Doctor Patel's direction. This included clothing, hair, vaginal and anal specimens and swabs. She put this material into the collection kit, sealed the kit and then turned it over to Chicago Police evidence technician Caldwell.

¶11 Chicago police evidence technician Sheila Caldwell testified that she picked up the two sealed criminal sexual assault kits that were collected from Carmen and Delores. Caldwell obtained those kits from nurse Wolthusen at the hospital at approximately 10:30 p.m. on August 2. Caldwell inventoried the evidence and secured it in the forensic services unit.

¶12 Delores testified that she was 16 years old and entering tenth grade and that she was born on May 18, 1995. She currently lived with her sister, brother and mother. Until August 2, defendant had lived with the family for approximately 10 years. Delores was approximately five or six years old when defendant first came to live with the family on Mulligan Street. The

family moved from there to Mobile Street and then to Melvina Street. Delores testified that when she was about five or six years old when something "unusual" happened with defendant. She explained that she was in the bedroom she shared with her sister Carmen when they heard someone come into the room. Defendant "came in and grabbed one of us, and that's when it started."

¶13 Delores further testified that she next remembered something happening with defendant when she was approximately 12 years old and the family was living on Mobile Street. Specifically, defendant put his penis into her vagina when they were in Delores' mother's bedroom. This happened approximately 10 times while the family lived on Mobile Street and it felt "nasty." Defendant did not put his penis anywhere else on or in her body and she did not see anything come out of his penis. Delores was approximately 15 years old when the family moved to Melvina Street. Delores also saw defendant touch her sister's vagina and "boobs" under her clothes with his hands more than 10 times at both the Mobile and Melvina addresses. She never saw defendant touch her sister with any other part of his body.

¶14 Delores testified that on August 2, 2010, she was at home with her sister, brother and defendant while her mother was at the store. Defendant was in his room and Delores heard her brother Juan try to hit defendant and call the police. The police later came to the house and Delores and her sister were taken to the hospital, where they spoke to a nurse and a doctor about what happened that day. Delores told the nurse and doctor what defendant had done to her in the past. She did not tell anyone what had happened to her before then because she was scared that defendant might do something to her and her sister. She finally told someone on August 2 because she "wanted [defendant] to go to jail for what he did."

¶15 On cross-examination, Delores testified that she moved out of the house on Mulligan

when she was ten years old. Her family lived at three different houses on Mobile Street. Delores lived at the first house for approximately two years, when she was seven or eight years old, then moved to a second house when she was eight years old, where they lived about a year, and finally she lived at another house on Mobile Street for approximately one or two years. Delores was 15 years old when the family moved to Melvina in 2010. Defendant's mother lived with them in 2010, and Delores had a good relationship with her. Between 2008 and 2009, she had a "bad" relationship with defendant because she "didn't like the way that he talked to me" and she told him that. She described Carmen's relationship with defendant during that time in the same manner. Delores saw defendant hit Carmen with a cable once in 2008 or 2009.

¶16 Delores further testified on cross-examination that she did not recall whether she was 11, 12 or 13 years old when defendant sexually abused her. She was in Burbank school from kindergarten to eigth grade, including when she was 12 years old, but Delores did not recall what year she was in at Burbank when defendant sexually abused her. Delores never spoke to her sister, mother or brother about the sexual abuse that defendant committed. She agreed that after what happened on August 2, her brother said he wanted defendant to stay in jail.

¶17 On redirect examination, Delores testified that defendant put his penis in her vagina more than 10 times at each of the four addresses at which the family lived. She also testified that she wanted defendant to go to jail "to pay for his crime and all the things that he did to us." On recross-examination, Delores testified that she remembered acts that defendant committed upon her when she was 14 and 15 years old. However, she did not know how old she was when the acts were committed upon her prior to age 14 or 15.

¶18 Chicago police detective Tannia Faranchini testified that she investigated cases involving children who were sexually abused by family members. Detective Faranchini was assigned to

assist another detective in investigating Carmen and Delores' case because she and defendant spoke Spanish and the other detective did not. The detectives went to speak with defendant at the police station on August 3, 2010. Defendant was taken to an interview room and read his *Miranda* rights in Spanish. Defendant agreed to speak to the detectives and also agreed to give a buccal swab. After defendant signed a form consenting to the buccal swab, the detectives called evidence technician Mendoza to the police station to administer the buccal kit. Mendoza came to the police station with the kit and used Detective Faranchini as an interpreter to explain to defendant how the buccal swab would be collected. Mendoza swabbed the inside of defendant's cheeks, took defendant's fingerprints and then sealed the buccal kit and showed Detective Faranchini that the kit was sealed. Detective Faranchini testified that the kit was inventoried by Mendoza and the detective identified People's Exhibit 7 as defendant's buccal swab kit. The detective testified that the evidence was in the same or substantially the same condition as when it was sealed by Mendoza.

¶19 Illinois State Police Forensic Scientist Debra Kot testified as an expert in forensic technology. Kot tested Delores' vaginal and anal swabs and found no semen or saliva on either swab. Kot also received a buccal standard from defendant. She opened the kit and preserved the two buccal swabs from defendant's cheeks for DNA analysis. Kot did not perform any DNA testing on the swabs. Kot tested Carmen's kit and identified semen on the anal swab but found no semen on the vaginal swab. She preserved the sample that contained semen for DNA analyisis. Kot identified semen on Carmen's underwear, which she preserved.

¶20 Delores and Carmen’s brother Juan testified that defendant moved in with his family in 2000 when Juan was seven years old and the family lived on Mulligan Street. The family moved to 2146 Mobile Street when Juan was between eight and nine years old and they lived there for

three years. The family moved to 2165 Mobile Street when Juan was between 10 and 11 years old and then moved to 2228 Mobile Street when Juan was 13 or 14 years old. Finally, the family moved to their current address on Melvina when Juan was 15 to 16 years old. Their current apartment had two and a half bedrooms. Juan lived in the half bedroom, his mother and defendant lived in another room and Juan's sisters shared the other bedroom.

¶21 Juan testified that on August 2, 2010, he was lying on his bed pretending to be asleep so that nobody would bother him. Juan's sisters, his mother and defendant came home and Juan's mother left for the store shortly thereafter. Through the curtain to his room, Juan saw defendant walk into his room and then walk out wearing just boxer shorts. Defendant peeked inside Juan's room but Juan was still pretending to be asleep. Juan saw Carmen walk toward her bedroom and defendant follow her. Defendant tried to close Carmen's door but a rug blocked the way and then defendant pointed toward his own bedroom. Carmen walked into defendant's bedroom and defendant followed her and closed the door.

¶22 Juan became suspicious because he could not see any light or hear any voices coming from defendant's bedroom. Juan got up and walked to defendant's bedroom, opened the door and turned on the light. Juan saw defendant on top of Carmen, who was face down on the bed. He could see Carmen's naked butt because her pants were pulled down. Defendant's boxer shorts were pulled down to his knees and Juan could see defendant's erect penis touching Carmen's "bare naked butt." Juan pushed defendant off of Carmen and told her to leave the room. Juan pushed defendant a couple of times and got his sister out of the room. Juan went to his bedroom, grabbed his cell phone and called a friend who lived close by to come to the house immediately. In the meantime, defendant grabbed a towel and some clothes and locked himself inside the bathroom and turned on the shower. When Juan's friend arrived, Juan told him to

guard the sisters and to call the police. Defendant came out of the bathroom and Juan followed defendant to his bedroom. Defendant grabbed some clothes and tried to leave. Juan struggled with defendant to stop him from leaving. Juan's mother arrived home during the struggle and told Juan to "let him go," so Juan pushed defendant inside the house and closed the door. The police arrived and Juan directed them to defendant.

¶23 On cross-examination, Juan testified that he did not get along with defendant in 2010 because defendant argued with Juan's mother and hit her. Juan agreed that he also argued with defendant about Juan being out too late with his friends. Juan's arguments with defendant started about two years before trial. Juan acknowledged that he smoked marijuana.

¶24 Ryan Paulsen, a forensic scientist with the Illinois State Police, testified as an expert in forensic biology and DNA analysis. Paulsen analyzed defendant's buccal swab and developed a DNA profile for defendant. He also received a blood standard taken from Carmen and developed her DNA profile. Paulsen was able to extract a DNA profile from Carmen's anal swab that contained semen. Paulsen opined that there were two contributors to the DNA in the anal swab. In addition to Carmen's DNA, defendant could not be excluded as a contributor to the male DNA profile identified in the mixed sperm fraction from the anal swab. Paulsen explained that when he associates a particular DNA profile to a person, he then calculates a frequency which estimates how rare that profile is in the general population. Paulsen testified that approximately 1 in 24 million black, 1 in 18 million white or 1 in 5.2 million Hispanic unrelated individuals could not be excluded from having contributed to that DNA profile. Paulsen opined that to a reasonable degree of scientific certainty, the DNA profile obtained from the anal swab and was consistent with having come from defendant.

¶25 Paulsen also analyzed the semen stain from Carmen's underwear. He identified a female

DNA profile that matched Carmen's DNA profile. Paulsen also obtained a male DNA profile from the semen stain on Carmen's underwear and compared it to defendant's DNA profile. Paulsen opined that male DNA profile from the sample matched defendant's DNA profile. Paulsen also opined that the DNA profile from this sample would be expected to occur in 1 in 4.6 quadrillion blacks, 1 in 4.5 quadrillion whites and 1 in 900,000 Hispanic unrelated individuals. Paulsen opined that to a reasonable degree of scientific certainty, the DNA profile obtained from Carmen's underwear was consistent with having come from defendant. On cross-examination, Paulsen explained that the DNA profile from the underwear was complete but that the anal swab was only a partial profile and that this explained that statistical differences for the samples. Paulsen also testified that a proper chain of custody was maintained over the samples that he received.

¶26 Outside the presence of the jury, the defense raised the issue of a lack of foundation for admitting defendant's buccal swabs into evidence. The State argued that a proper foundation had been laid because, although the sample had been taken by Mendoza, she was indefinitely unavailable and the State instead used Detective Faranchini because she was present when the swabs were taken. The court found no chain of custody issue because of Detective Faranchini's testimony and because there was no evidence of tampering or contamination. The court allowed defendant's biologic sample to the admitted into evidence.

¶27 Defendant moved for a directed verdict. Defendant argued that the count of predatory criminal sexual assault of a child had not been proven regarding Delores because she did not provide credible testimony that the sexual assault occurred prior to her thirteenth birthday on May 18, 2008. The court noted that the statute recognized that children's memories could be blurry and that this was an issue of fact for the jury. Defendant then raised the same argument

regarding Carmen. The trial court denied the motion.

¶28 Defendant presented the testimony of Delores and Carmen's mother, Jovita. Jovita described defendant's relationship with Carmen and Delores as "well" and "fine" and testified that "everything was fine" since 2001. Neither Carmen nor Delores ever told her about having any problems with defendant. Her children did not want her to be with defendant, but this was only because he was younger than her. Carmen and Delores never complained that defendant sexually abused them and Jovita never observed anything that suggested the girls were afraid of defendant. Jovita only had "small arguments" with defendant and he never hit her. Defendant argued with Juan since he was 13 years old and defendant disciplined Juan for being out too late. Jovita asked Carmen and Delores to talk to her about the accusations against defendant but they refused to talk about it and got upset. Juan also would not talk about the case and instead said "everything is fine."

¶29 Jovita further testified that she was out with the girls on the morning of August 2 and then returned home so she could make breakfast. However, defendant told her to go to the store so she left the apartment. When Jovita returned home between 15 and 30 minutes later, Juan was grabbing and hitting defendant. Jovita asked Juan what was happening, and Juan responded that she should ask defendant. Jovita asked defendant, who said he did not know and that Juan was acting that way because he did not like defendant. Defendant was wearing different clothes than when Jovita left for the store and she explained that defendant was going to take a shower when she left because she and defendant were going to go to the store. Defendant had already gone into the bathroom and shut the door when Jovita left for the store. When she returned, Carmen and Delores were outside in the yard. Jovita testified that since August 2, she had asked the girls what happened and "if it did happen" but the girls would not answer.

¶30 Luisa Lara, defendant's sister, testified that she lived with defendant and the family on 2228 Mobile Street for three months in 2008 and another three months in 2009. Luisa never observed any problems between the family members and described Carmen and Delores as normal. Juan tried to provoke fights with defendant but defendant did not respond.

¶31 Carmen Lara, defendant's mother, testified that she lived with defendant, Jovita and the family for two and a half years until mid-2009. During that time, defendant a treated Carmen and Delores like his own children and the girls seemed comfortable around him. Juan did not get along with defendant because defendant disciplined him and on several occasions Juan said he was going to kill defendant.

¶32 Perla Delacruz testified that she knew defendant because she lived with defendant's mother from 2009 to 2010. She saw defendant and Jovita every day during that time and observed that "they lived well" and the family was "fine."

¶33 Defendant testified on his own behalf that from 2000 to 2003, he lived at 2230 Mulligan Street with his brother, two friends, Jovita and her children. During that period, he treated the girls, who were then two and a half and four and a half years old, like his sisters and had a good relationship with Juan. During that period, defendant never undressed the girls or otherwise touched them sexually. Carmen was five years old when they moved out of the Mulligan Street residence. Defendant, Jovita and the children then moved to 2146 Mobile Street and lived there for three years with defendant's brother Angel and Angel's friend. Defendant treated the girls the same during those years and never touched them sexually. Defendant treated the girls in the same manner when the family lived at 2165 Mobile Street and the girls were never uncomfortable around him. Defendant and Jovita became engaged in 2006, after which Juan began to ignore defendant. Defendant never hit Juan but he was upset that Juan would stay out

late. The girls acted the same to defendant during this time. The entire family lived at 2228 Mobile Street from mid-2007 to October of 2009. Defendant did not sexually abuse the girls during this time and he continued to have arguments with Juan. In November of 2009, defendant moved with Jovita and the children to the apartment on Melvina. Defendant testified that he had a good relationship with Carmen and Delores and he never sexually abused them while the family lived on Melvina.

¶34 Defendant further testified that on August 2, 2010, he went to take a bath after Jovita went to the store. After defendant came out of the bathroom, Juan attacked him. Defendant was fully dressed at the time, but he had changed clothes after bathing. Juan grabbed defendant and asked him what he had against Juan. One of Juan's friends arrived with what looked like a knife and Juan told his friend to stab defendant if he tried to get away. During this time, Carmen was watching television in the living room and Delores was making a sandwich in the kitchen. Carmen did not appear in distress. Delores told Juan to leave defendant alone. Juan threatened to kill defendant and throw him out the window, after which the girls became scared. Defendant testified that he did not do or say anything to Carmen while Jovita was at the store.

¶35 On cross-examination, defendant testified that he was not Delores or Carmen's biological father. Jovita would take defendant's side whenever he had an argument with Juan. At the police station, Detective Faranchini told defendant of the accusations that Carmen made against him. Defendant told the detective that the girls were mad at him because he wanted their mother to repay a loan. However, defendant testified that the girls were not actually mad at him.

¶36 On redirect, defendant testified that he did not tell Detective Faranchini that the girls were mad at him. Defendant was never alone with the girls in the ten years that he lived with them. On August 2, 2010, Juan was still upset at defendant over a previous argument as to

whether Jovita took better care of Juan or defendant. Juan also made threats to defendant on previous occasions.

¶37 Defendant then rested his case. In rebuttal, the State called Detective Faranchini, who testified that defendant told her that the girls were mad at him about having asked his mother to repay a loan. Defendant never mentioned anyone having a knife to the detective. The State also recalled Juan, who testified that defendant was alone with him and his sisters in the apartment on prior occasions. Juan also testified that Luisa never lived with the family and that he did not know Perla Delacruz. Juan's friend Daniel came to the apartment on August 2 and he did not have a knife. Finally, Daniel Salgado testified that he came to the apartment after Juan called him and that defendant and Juan were struggling when Daniel arrived. Daniel did not have a knife in his hand but, instead, was holding a pen.

¶38 At the close of evidence, defendant moved for a mistrial on the ground that his right to confront the witnesses against him was violated when the State did not call Mendoza to testify after the defense had rejected the State's offer to stipulate to Mendoza's testimony. The State explained that it had learned from a sergeant that Mendoza was on indefinite medical leave on the same day that it disclosed that information to the defense. The State also argued that it was not required to call every witness listed on its witness list. The trial court told the State that the case had been on call for a year, the State could not simply say it just found out about the Mondoza and that it was the State's fault for not finding out about Mendoza earlier. The court found, however, that at most defendant's argument went to the chain of custody, that defendant "cross-examine[d] on that" and that there "was evidence about identifying the swabs." The court denied defendant's motion.

¶39 The jury found defendant guilty of the predatory criminal sexual assault of Delores and

aggravated criminal sexual assault of Delores. The jury also found defendant guilty of both counts of predatory criminal sexual assault as to Carmen, with one count being based on contact between defendant's penis and Carmen's vagina and the other based on contact between defendant's penis and Carmen's anus, as well as criminal sexual assault. The trial court denied defendant's motion for a new trial. Defendant was sentenced to a term of 28 years' imprisonment on his conviction for predatory criminal sexual assault in Delores's case and to a consecutive sentence of life imprisonment on his conviction for predatory criminal sexual assault in Carmen's case. In Delores's case, no judgment or sentence was entered on defendant's other convictions for predatory criminal sexual assault or sexual assault. This appeal followed.

¶40 Defendant first contends that joining the two cases for trial was error because it indicated that defendant had a propensity to commit violence and thus tended to "overpersuade" the jury that defendant deserved criminal punishment.

¶41 The State initially responds that defendant has forfeited this contention because he did not include the issue in his posttrial motion and because defendant does not ask that we review the issue for plain error. Defendant did not file a reply brief in this case and therefore has not responded to the State's forfeiture argument. We agree with the State.

¶42 In order to preserve an issue for appeal, defendant must raise an objection at trial *and* include the objection in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Defendant did not raise the joinder issue in his posttrial motion and does not ask us to review the issue for plain error. Accordingly, we find the issue forfeited. See *People v. Thompson*, 2013 IL App (1st) 113105, ¶ 123 (finding that the defendant had forfeited his claim of sentencing error where the defendant did not raise this issue in his motion to reconsider his sentence and did not ask the appellate court to review the claim for plain error).

¶43 Defendant next contends that the jury verdicts finding him guilty of predatory criminal sexual assault were against the manifest weight of the evidence.

¶44 Although defendant claims that the verdicts were against the manifest weight of the evidence, defendant is ultimately challenging the sufficiency of the evidence to support his conviction. When a defendant makes such a challenge, the reviewing court must determine whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004). The trier of fact is responsible for assessing the credibility of the witnesses, weighing the testimony, and drawing reasonable inferences from the evidence. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001). A criminal conviction will not be set aside on appeal unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to the defendant's guilt. *People v. Cox*, 195 Ill. 2d 378, 387 (2001).

¶45 The charges 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).

¶46 Defendant challenges his convictions for predatory criminal sexual assault on the sole basis that Delores did not identify with specificity that she was sexually penetrated prior to turning 13 years old and that Carmen's testimony was similarly "vague as to dates" and therefore insufficient to establish that she too was sexually penetrated by defendant prior to age 13. Defendant's argument is without merit.

¶47 Our supreme court has recognized that "it 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). For this reason, "[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*.

¶48 In this case, there was sufficient evidence upon which a rational trier of fact could have found that both girls were sexually penetrated by defendant prior to the age of 13. Both Delores and Carmen testified that the defendant began abusing them when they were five or six years old and that the abuse continued until August 2, 2010. Delores testified that she was sexually penetrated at all three addresses on Mobile Street at which the family lived between 2001 and 2008, when she was between 6 and 12 years old. Delores also specifically testified that defendant put his penis inside her vagina when she was 12 years old and that it felt "nasty." It is true that Delores testified on cross-examination that she could not be specific as to dates or her age as to the acts of sexual abuse committed upon her prior to age 14. However, such specificity in dates is not required under the statute and, regarding her testimony that she could not be specific about her age, the jury was also free to accept as little or as much of her testimony as it saw fit. See *People v. Logan*, 352 Ill.App.3d 73, 80–81 (2004) ("it is for the trier of fact to resolve any inconsistencies in the testimony, and the trier of fact is free to accept or reject as much or as little as it pleases of a witness' testimony."

¶49 Similarly, Carmen testified that when she was between five and six years old, defendant

used his "private part" to touch her "front part." Carmen 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. Carmen further testified that defendant touched her "butt" with his private part more than 20 times when the family lived on Melvina. Defendant corroborated Carmen 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, Carmen 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 Carmen being 11 or 12 years old when the family moved to the Melvina address. Again, Carmen'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.

¶50 Defendant next contends that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963) and denied him his right to confront the witnesses against him when the State "concealed the absence of" and did not call as a witness the evidence technician who culled and preserved defendant’s buccal swab.

¶51 Defendant essentially raised this issue in two contexts during trial. He first raised the issue in context of a lack of foundation for admitting his buccal swabs into evidence and subsequently raised the issue in context of his right to confront witnesses against him. The trial court found that, at most, defendant's arguments went to a chain of custody issue and that defendant had been allowed to cross-examine of that issue and therefore found no merit to

defendant's claims.

¶52 Initially, defendant is incorrect when he claims that the alleged violation relates to Chicago police evidence technician Caldwell. Caldwell was listed in the State's discovery answer and testified at trial that she picked up the evidence collection kits from the hospital on August 2 and inventoried and secured the kits in the forensic services unit. Instead, it appears that defendant's claim is related to evidence technician Mendoza, who collected the buccal swabs from defendant and who was listed by the State as a witness but was not called to testify at trial. We find no merit to defendant's claim.

¶53 A defendant is guaranteed the right to confront the witnesses against him by the confrontation clauses of both the United States and Illinois Constitutions. U.S. Const., amends. VI, XIV; Ill. Const.1970, art. I, § 8. Additionally, pursuant to *Brady*, the State has an affirmative duty to disclose any evidence that is favorable to the accused and material to either guilt or punishment. *People v. Harris*, 206 Ill. 2d 293, 311 (2002). In order to successfully show a Brady violation, the defendant must make a showing that: (1) the evidence was suppressed by the State either willfully or inadvertently; (2) the undisclosed evidence is favorable to the accused because it is either exculpatory or impeaching; and (3) the accused was prejudiced because the evidence is material to guilt or punishment. *People v. Jarrett*, 399 Ill.App.3d 715, 727–28 (2010).

¶54 In this case, there was no violation of *Brady* or defendant's right to confront the witnesses against him. With respect to defendant's *Brady* claim, Mendoza was listed in the State's answer to discovery. Therefore, her existence and her role in the case cannot be considered "undisclosed" evidence. Moreover, the record does not support defendant's contention that the State failed to disclose that Mendoza would be unavailable. In court, the State informed the trial

court that although Mendoza was on its witness list, it had learned from a police sergeant that Mendoza was on indefinite medical leave. The State further represented that it related this information to defense counsel as soon as the State had learned of it. The record also shows that the State introduced the taking of the buccal swab through Detective Faranchini, who was present and acted as a translator during the collection of the evidence. We agree with the trial court's assessment that defendant's argument does not implicate the Confrontation Clause but, instead, at most goes to the issue of whether the State maintained a sufficiently complete chain of custody over the evidence. We also agree with the trial court's assessment that defendant was afforded the opportunity to cross-examine Detective Faranchini, as well as the other witness, as to the steps taken to maintain a sufficiently complete chain of custody. Although defendant does not advance any specific argument on appeal that a sufficiently complete chain of custody was not maintained over his buccal swabs, we note that Detective Faranchini testified regarding the steps that she observed Mendoza take to maintain a proper chain of custody over the buccal swabs. We also note that our supreme court has made the following observations regarding the State's burden of establishing a sufficiently complete chain of custody:

> "[A] sufficiently complete chain of custody does not require that every person in the chain testify, nor must the State exclude every possibility of tampering or contamination. [*People v. Woods*, 214 Ill. 2d 455, 467 (2005)]. It is not erroneous to admit evidence even where the chain of custody has a missing link if there was testimony which sufficiently described the condition of the evidence when delivered which matched the description of the evidence when examined. *Id*. at 467–68. At this point, deficiencies in the chain of custody go to the weight, not admissibility, of the evidence. *Id*. at 467." *People v. Alsup*, 241 Ill. 2d 266, 275 (2011).

However, we need not consider whether the State met its burden of establishing a sufficiently complete chain of custody given that defendant advances no argument that such a chain of custody was not maintained.

¶55 Finally, the Confrontation Clause does not require that every witness listed be ultimately called by the State. See *Melendez-Diaz v. Massachusetts*, 5547 U.S. 305, 311 (2009) ("it is not the case, that anyone whose testimony may be relevant in establishing a chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case"). As our supreme court has observed:

> "[T]here is no requirement that every witness listed must be called by the State. If there were, trials would be unduly protracted, and testimony would often be needlessly cumulative. The decision regarding which witnesses will actually be called is, and must be, a matter of trial strategy, subject to the up-to-the-minute assessments of counsel. Here, the prosecution apparently decided that [the witnesses'] testimony would add little to their case and made the decision not to use it. Moreover, if [the witnesses'] testimony was considered essential by the defendant, he, of course, was free to subpoena [that witness] and to call him as a witness. Having failed to do so, the defendant is in no position to claim prejudice." *People v. Sanchez*, 115 Ill. 2d 238, 266-67 (1986).

¶56 Here too, the State was not required to call Mendoza as a witness simply because she was listed on its pretrial discovery answers. The State notified defendant when it learned of Mendoza's indefinite unavailability and, in Mendoza's place, the State presented the testimony of Detective Faranchini regarding the taking of defendant's buccal swabs. Defendant was given the opportunity to and did in fact cross-examine the detective about the chain of custody over the buccal swabs. If the defense nevertheless believed that Mendoza's testimony was critical to its

case, it was free to subpoena Mendoza or ask for a continuance when it learned of Mendoza's unavailability. Notably, defendant makes no showing that any of Mendoza's testimony would have been favorable to the defense. For these reasons, we find no violation of *Brady* or the Confrontation Clause and that defendant was not prejudiced when the State did not call Mendoza as a witness at trial.

¶57 Defendant's next contention is that the trial court erred in denying defendant's motion for a directed verdict and motion for a new trial. However, defendant's arguments are simply reiterations of his previous arguments that the State failed to prove beyond a reasonable doubt that Carmen and Delores were sexually penetrated by defendant prior to the age of 13 years old and that defendant was deprived of his right to cross-examine the evidence technician who took his buccal swabs. We have already considered and rejected these arguments and we need not consider them again.

¶58 Defendant next contends that the verdicts were "at odds with the jury instructions" and therefore indicated “confusion” of the jury. However, this conclusory assertion is unsupported by any legal analysis or citation to legal authority or the record on appeal. Supreme Court Rule 341(h)(7) requires appellate briefs to contain “[a]rgument, 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.” Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008). A conclusory assertion, without supporting legal analysis or citation to the record or relevant authority, is insufficient to satisfy rule 341(h)(7). *People v. Haissig*, 2012 IL App (2d) 110726, ¶ 17. We find that defendant’s conclusory allegation is insufficient to satisfy rule 341(h)(7) and is therefore waived.

¶59 Defendant next contends that the statute under which he was sentenced violates the proportionate penalties clause of the Illinois Constitution. Defendant claims that the statute's

mandatory imposition of a life sentence is “cruel, degrading and wholly disproportionate to the offense."

¶60 The Illinois Constitution requires penalties to be proportionate to the crime. Article I of the Illinois Constitution provides that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11.

¶61 Defendant was sentenced to a term of life imprisonment 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))), which provides:

> "A person convicted of predatory criminal sexual assault of a child committed against 2 or more persons regardless of whether the offenses occurred as the result of the same act or of several related or unrelated acts shall be sentenced to a term of natural life imprisonment."

¶62 Our supreme court has already considered whether section 12–14.1(b)(1.2) of the Code comports with the proportionate penalties clause of the Illinois Constitution. See *People v. Huddleston*, 212 Ill. 2d 107 (2004). The defendant in *Huddleston* was convicted of three counts of predatory criminal sexual assault and given the mandatory life sentence pursuant to the same statute under which defendant was sentenced in this case. The defendant claimed that the sentencing provision was cruel, degrading and so wholly disproportionate to the offense that it shocked the moral sense of the community. In reviewing this claim, our supreme court noted that the United States Supreme Court has “ 'sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights’ ” and has “proclaimed the ‘prevention of sexual exploitation

and abuse of children *** a government objective of surpassing importance.' " *Id*. at 132 (quoting *New York v. Ferber*, 458 U.S. 747, 757 (1982)). The court further noted that it had previously observed that "the welfare and protection of minors has always been considered one of the State's most fundamental interests." *Huddleston*, 212 Ill. 2d at 133 (quoting *American Federation of State, County & Municipal Employees v. Department of Central Management Services,* 173 Ill. 2d 299, 311 (1982)). The court reasoned that section 12–14.1(b)(1.2) of the Code was "obviously intended to protect this vulnerable segment of our society from sexual predation by deterring would-be offenders and ensuring that those who commit sexual acts with multiple victims will not have the opportunity to reoffend." *Huddleson*, 212 Ill. 2d at 134. Further, the purpose of the statute was to "protect victims from, and punish perpetrators for, sexually harmful and offensive conduct." *Id*. at 147 (quoting *People v. Sanchez*, 344 Ill. App. 3d 74, 82 (2003)). The court ultimately concluded that the statute's mandatory life sentence was not unconstitutional as applied to the defendant and that it was therefore constitutional on its face. *Id*. at 130 (finding the statute constitutional as applied to defendant and noting that "so long as there exists a situation in which a statute could be validly applied, a facial challenge must fail").

¶63 The appellate court has relied upon the holding and reasoning in *Huddleston* to reject a defendant's claim that his sentence of life imprisonment under section 12–14.1(b)(1.2) of the Code was cruel, degrading and wholly disproportionate to the offense committed. See *People v. Oates*, 2013 IL App (5th) 110556, ¶¶ 47-62 (where the defendant was convicted of sexually abusing two children and given a mandatory life sentence, the court relied upon the holding and reasoning in *Huddleston* and rejected the defendant's proportionate penalties challenge to the sentencing provision).

¶64 Defendant attempts to distinguish *Huddleston* on the ground that the defendant in that

case had a prior conviction for public indecency. However, *Huddleston* was considering the same statute under which defendant in this case was convicted, and that statute does not require a prior conviction. Moreover, the defendant's prior conviction in *Huddleston* was not a basis for the court's analysis of the constitutionality of the statute. Further, this argument was recently rejected in *Oates*, where the defendant attempted to distinguish *Huddleston* on the same basis as does defendant in this case. In response to this argument, the court observed:

> "The discussion of a prior sexual offense and possession of pornographic materials in Huddleston was in the context of a broader discussion of the propensity of sex offenders to repeat. Moreover, *Huddleston* pointed to this activity to express incredulity regarding the defendant's expert, whose recommendation it found perverted the purpose of risk assessment." *Id*. at ¶ 51.

The court in *Oates* concluded that nothing in the case before it undermined the observation in *Huddleston* that mandating a life sentence for the crimes committed by the defendant was the legislature's measured response to the "'propensity of sex offenders to repeat.'" *Id*. (quoting *Huddleston*, 212 Ill. 2d at 138).

¶65 We reach the same result in this case. Defendant does not clearly articulate whether his challenge to the statute is facial or as it applies to him. Regardless, our supreme court has already held that the statute is not unconstitutional on its face and we find nothing in the facts of this case that would render the reasoning and holding in *Huddleston* inapplicable to defendant's sentence. Defendant was convicted of the predatory criminal sexual assault of two sisters who were less than 13 years old when defendant sexually assaulted them. Following the reasoning and holding in *Huddleston*, we find that defendant's sentence of life imprisonment does not violate the proportionate penalties clause of the Illinois Constitution.

¶66 Defendant next contends that the imposition of life imprisonment as to persons with no criminal history 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

¶67 This argument was considered and rejected by the court in *Oates*. The defendant in *Oates* claimed that his sentence was cruel and unusual under the Eight Amendment to the United States Constitution. *Oates*, 2013 IL App (5th) 110556, at ¶ 53. In rejecting that claim, the court looked to *Huddleston*, in which the United States Supreme court identified Illinois as not being alone in imposing a mandatory life sentence for the first predatory criminal sexual assault conviction where there are two or more children. *Id*. at ¶58-59 (citing *Huddleston*, 212 Ill. 2d at 140. The court noted that *Huddleston* pointed in particular to the scheme in Louisiana and that the United States Supreme Court had since reviewed Louisiana's statutory scheme and left its mandatory life sentence for sex offenders "intact." *Oates*, 2013 IL App (5th) 110556, at ¶59 (citing *Huddleston*, 212 Ill. 2d at 140) (citing *Kennedy v. Louisiana*, 554 U.S. 407 (2008). The court ultimately concluded that "an examination of the [defendant's] sentence reveals it to be neither cruel nor unusual" and found that when a defendant was convicted of sexual abuse of two children, the "penological goals more fully examined in Huddleston justify defendant's sentence." *Oates*, 2013 IL App (5th) 110556, at ¶62.

¶68 We find the reasoning in *Oates* persuasive and we reach the same result in this case. We similarly conclude that defendant's sentence, based upon his convictions for the predatory criminal sexual assault of two children under 13 years old, is neither cruel nor unusual within the meaning of the Eighth Amendment.

¶69 Finally, the State contends that we should remand this matter so that the trial court can enter a judgment of conviction and sentence on Counts 4 and 13 in Carmen's case (10CR4990). In Carmen's case, defendant was found guilty of predatory criminal sexual assault based on contact between defendant's penis and Carmen's anus (Count 2), predatory criminal sexual assault based on contact between defendant's penis and Carmen's vagina (Count 4). Both of these counts alleged that the acts of sexual penetration took place between March 24, 2002, and March 23, 2010, prior to Carmen reaching the age of 13 years old. Defendant was also found guilty in Carmen's case of criminal sexual assault based upon contact between defendant 's penis and Carmen's anus on August 2, 2010 (Count 13). The trial court entered judgment and imposed a life sentence only on Count 2 and the State asserts that each of act of sexual penetration was a distinct crime and that therefore judgment and a consecutive sentence should have been entered on Counts 4 and 13. As noted, defendant did not file a reply brief in this case and therefore he has not responded to the State's argument.

¶70 It is clear from the record that the trial court intentionally did not enter judgment or impose sentence on Counts 4 and 13. The half-sheet specifically states "Sentencing on (Count 2) no judgment on Counts 4 & 13" and the mittimus for Carmen's case stated "No judgment on Counts 4, 13." It is unclear from the record why the trial court did not enter judgment on these counts. Based upon the record we do have, the issue was not raised in the trial court and no explanation has been provided to this court by the parties. Compounding the problem is the fact that the parties have not included in the record on appeal the transcript for the sentencing hearing in Carmen's case, where a life sentence was entered on Count 2 but no judgment was entered on Counts 4 and 13.

¶71 Nevertheless, it appears that the State is correct that each count alleged a specific and

distinct act of sexual penetration and that therefore judgment and sentence should have been entered on those counts. We note that the trial court's decision to not enter judgments and sentences on Counts 4 and 13 may have been based upon our supreme court's prior holding that section 5-8-4(a) of the Unified Code of Corrections (Code) (720 ILCS 5/5-8-4(a) (West 2008) does not allow for consecutive life sentences and based upon subsequent appellate court decisions interpreting *Palmer*. See *People v. Palmer*, 218 Ill. 2d 148 (2006) (holding, in part, that the imposition of consecutive natural life sentences is impermissible both under section 5-8-4(a) of the Code and under "natural law"); *see also People v. Ramey*, 393 Ill. App. 3d 661, 670 (2009) (holding that *Palmer* prohibits the imposition of any sentence consecutive to a natural-life term). We note, however, that our supreme court has since overruled that portion of its decision in *Palmer*. See *People v. Petrenko*, 237 Ill. 2d 490 (2010); see also 730 ILCS 5/5-8-4 (West 2008) ("The court shall impose consecutive sentences" where a defendant is convicted of, among other things, criminal sexual assault and predatory criminal sexual assault).

¶72 Therefore, we remand this matter to the trial court for the entry of a judgment and sentence on defendant's convictions for predatory criminal sexual assault (Count 4) and criminal sexual assault (Count 13) in Carmen's case (10CR4990) or for clarification as the why no judgment and sentence should be entered on those counts.

¶73 For the reasons stated, we affirm defendant's convictions and sentences and we remand this matter to the trial court with instructions.

¶74 Affirmed; remanded with instructions.