IN THE SUPREME COURT OF THE STATE OF DELAWARE

JESUS CINTRON, Defendant-Below, Appellant, v. STATE OF DELAWARE, Plaintiff-Below, Appellee.	No. 135, 1999 Court Below: Superior Court of the State of Delaware in and for Kent County in Cr. A. Nos. IN97-08-0331 through 0340. Def. ID. No. 9707003458

Submitted: January 14, 2000
Decided: February 4, 2000

Before **WALSH, HOLLAND and HARTNETT,** Justices.

O R D E R

This 4th day of February 2000, upon consideration of the appellant's brief filed pursuant to Supreme Court Rule 26(c) ("Rule 26(c)"), his attorney's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) In July 1998, the appellant, Jesus Cintron, was tried by a jury in the Superior Court on five counts of Second Degree Unlawful Sexual Contact; two counts of Attempted Second Degree Unlawful Sexual Contact; and one

count each of Continuous Sexual Abuse of a Child, Third Degree Unlawful Sexual Penetration, and Offensive Touching. At the conclusion of the State's case-in-chief, the Superior Court considered and denied Cintron's motion for judgment of acquittal. Prior to sentencing, the Court considered and denied Cintron's motion for a new trial. Cintron was convicted as charged and was sentenced to a total of five years at Level V incarceration followed by one year at a Level IV Halfway House, two years at Level III probation and one year at Level II probation. This is Cintron's direct appeal.

(2) Cintron's defense counsel has filed a brief and a motion to withdraw pursuant to Rule 26(c). The standard and scope of review applicable to the consideration of a motion to withdraw and an accompanying brief under Rule 26(c) is twofold: (a) the Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for claims that could arguably support the appeal; and (b) the Court must conduct its own review of the record and determine whether the appeal is so totally devoid of at least arguably appealable issues that it can be decided without an adversary presentation.[1]

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[1] *Penson v. Ohio*, 488 U.S. 75, 83 (1988); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 442 (1988); *Anders v. California*, 386 U.S. 738, 744 (1967).

(3) Cintron's defense counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. By letter, counsel informed Cintron of the provisions of Rule 26(c) and provided Cintron with a copy of the motion to withdraw, the accompanying brief, and the complete trial transcript. Cintron also was informed of his right to supplement his counsel's presentation. Cintron submitted points to his counsel. The State has responded to the position taken by Cintron's counsel as well as to the points raised by Cintron and has moved to affirm the conviction.

(4) In a two-page submission, Cintron raises the following claims: (i) multiplicitous charges within the indictment; (ii) weight and sufficiency of the evidence; (iii) "hearsay and confrontation rights"; (iv) "*Brady* violation"; (v) prosecutorial misconduct; and (vi) ineffective assistance of counsel.

(5) The victim in this case was Cintron's niece, who was 13 years old at the time of trial in July 1998. At trial, the victim testified that Cintron had sexual contact with her on numerous occasions, beginning in the summer of 1996 and ending approximately one year later. As related in detail by the victim, the sexual contact included incidents of fondling, attempted fondling,

and at least one incident of vaginal/digital penetration. The victim testified that the sexual contact occurred at least 15 times over the course of the year and occurred in various locations in Delaware, including her home, Cintron's residence, and Cintron's place of employment where the victim's mother also worked. The victim eventually told her parents of the sexual contact which led ultimately to Cintron's arrest and prosecution. At trial, Cintron denied the victim's claims, leaving the jury with a determination of credibility.

(6) In his first claim on appeal, Cintron alleges that the indictment was multiplicitous. Multiplicity is the charging of a single offense in more than one count of an indictment.[2] "The division of a single offense into multiple counts of an indictment violates the double jeopardy provisions of the Constitutions of the State of Delaware and of the United States."[3]

(7) Cintron did not raise a multiplicity claim in the Superior Court. As a result, his claim must be reviewed under a plain error standard.[4] Under the plain error standard of review, "the error complained of must be so clearly

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[2] *Feddiman v. State*, Del. Supr., 558 A.2d 278, 288 (1989).

[3] *Id.*

[4] *Wainwright v. State*, Del. Supr., 504 A.2d 1096, 1100 (1986).

prejudicial to substantial rights as to jeopardize the very fairness and integrity of the trial."[5]

(8) There is no evidence of plain error in the indictment. Based upon the facts of this case as they were developed at trial, each of the charges alleged in the indictment represented a separate instance of prohibited conduct, with the exception of the charge of Continuous Sexual Abuse of a Child which punishes three or more acts of sexual conduct with a child under the age of 14 over a period of time.[6] The offenses as charged in the indictment were not multiplicitous.

(9) Next, Cintron contends, as he did in his motion for judgment of acquittal, that there was insufficient evidence to convict him of the charges. In reviewing a trial judge's denial of a motion for judgment of acquittal, the Court must, after viewing the evidence in a light most favorable to the State, determine whether any rational trier of fact could have found that the elements of the crime were proven beyond a reasonable doubt.[7]

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[5] *Dutton v. State*, Del. Supr., 452 A.2d 127, 146 (1982).

[6] 11 *Del. C.* § 778

[7] *Davis v. State*, Del. Supr., 706 A.2d 523, 525 (1998).

(10) The record reflects that Cintron's motion for judgment of acquittal was properly denied. Under Delaware law, the jury is the sole trier of fact, responsible for determining witness credibility and resolving conflict in the testimony.[8] The testimony of the victim alone is sufficient to sustain a conviction.[9] It is entirely within the discretion of the jury to accept one witness' testimony and reject the conflicting testimony of the same witness or that of other witnesses.[10] After giving careful consideration to the record, we are satisfied that there was sufficient evidence for any rational trier of fact to have found the essential elements of each of the crimes beyond a reasonable doubt.

(11) Cintron alleges, generally, violations of his "hearsay and confrontation rights." Cintron fails, however, to direct this Court to any specific references in the record to support his claim, and our review of the record does not reveal any hearsay and/or confrontation clause violations. Cintron's claim is without merit.

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[8] *Tyre v. State*, Del. Supr., 412 A.2d 326, 330 (1980).

[9] *See Styler v. State*, Del. Supr., 417 A.2d 948, 950 (1980).

[10] *Pryor v. State*, Del. Supr., 453 A.2d 98, 100 (1982).

(12) Cintron alleges, generally, a "*Brady* violation"[11] and prosecutorial misconduct. A *Brady* violation occurs when the prosecutor fails to disclose favorable evidence that is material to either the guilt or punishment of the defendant.[12] The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.[13]

(13) Again, Cintron does not direct this Court to any specific references in the record to support either of these claims. The record reflects that, at trial, during cross-examination, a police detective alluded to a previously undisclosed tape recording of the detective's interview with the victim's mother. When Cintron's counsel objected, claiming that the tape recording was discoverable and should have been disclosed by the prosecution, the Superior Court directed the prosecutor to provide the tape recording to defense counsel, who elected to listen to the tape that evening after the close of the proceedings for the day.

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[11] *Brady v. Maryland*, 373 U.S. 83 (1963).

[12] *Id.*

[13] *U.S. v. Bagley*, 473 U.S. 667, 682 (1985).

(14) Cintron has not alleged, nor does the record reveal, that an earlier disclosure of the taped interview would have resulted in a different outcome at trial. The Superior Court acted well within its discretion in resolving this discovery matter.

(15) Finally, Cintron alleges ineffective assistance of counsel. This Court will not consider on direct appeal any claim of ineffective assistance of counsel that was not raised below.[14] Accordingly, we will not consider Cintron's claims of ineffective assistance of counsel for the first time in this direct appeal.

(16) We are satisfied that defense counsel made a conscientious effort to examine the record and correctly concluded that Cintron could not raise a meritorious claim on appeal. Having independently reviewed the record, we find that Cintron's appeal is wholly without merit and devoid of any arguably appealable issue. Our finding that the appeal is without merit renders defense counsel's motion to withdraw moot.

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[14] *Wing v. State*, Del. Supr., 690 A.2d 921, 923 (1996).

NOW, THEREFORE, IT IS ORDERED, pursuant to Supreme Court Rule 26(c), that the judgment of the Superior Court be, and the same hereby is, AFFIRMED.

BY THE COURT:

Randy J. Holland
Justice