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IN THE
COURT OF APPEALS OF INDIANA

MICHAEL COX,	)	
	)	
Appellant- Defendant,	)	
	)	
vs.	)	No. 79A02-0903-CR-255
	)	
STATE OF INDIANA,	)	
	)	
Appellee- Plaintiff,	)	

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable Bruce Graham, Judge Pro Tempore
Cause No. 79C01-0610-FA-18

September 9, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Following a bench trial and a remand by this court, Michael Cox appeals his convictions for child molesting and attempted child molesting, both Class A felonies. On appeal, Cox raises one issue, which we restate as whether his convictions violate the prohibition against double jeopardy as guaranteed by Article I, Section 14, of the Indiana Constitution. Concluding the law of the case doctrine bars Cox's double jeopardy challenge, we affirm.

Facts and Procedural History

The facts leading to Cox's convictions are described as "heinous" in a previous appellate decision, Cox v. State, 2008 WL 2953736, at *1 (Ind. Ct. App., Aug. 4, 2008) ("Cox I"), but we wish to elaborate briefly to provide some context. On September 29, 2006, Cox was babysitting five-year-old Li.L., four-year-old Lo.L., and two-year-old M.L., at the children's home in Tippecanoe County. When the children's mother returned home that afternoon, Lo.L. told her that Cox had touched him inappropriately. Several days later during a police interview, Cox stated that while he and Lo.L. were in the bathroom, he let Lo.L. touch his penis to help him masturbate and that he ejaculated in his hand and had Lo.L. taste his semen. Cox also stated that shortly after this incident, he touched Lo.L.'s penis while the two were on a couch in the living room. Cox stated the two then returned to the bathroom, where he put his penis between Lo.L.'s buttocks. Lo.L. also participated in a police interview, and his descriptions of these incidents were similar to Cox's, though less detailed; he stated that Cox touched the inside of his

buttocks with a finger, that he pulled on Cox's penis, and that Cox made him "drink the white stuff." State's Exhibit 2, at 11.

On October 4, 2006, the State charged Cox with Count I, Class A felony child molesting; Count II, Class A felony attempted child molesting; and Count III, Class C felony child molesting. Counts I and II were charged under subsection (a) of the child molesting statute, while Count III was charged under subsection (b). See Ind. Code § 35-42-4-3(a) and (b). Following a bench trial on October 2, 2007, during which the police interviews of Lo.L. and Cox were admitted into evidence, the trial court entered a judgment of conviction on Count III as charged, but entered judgments of conviction on Counts I and II as Class C felonies. On appeal, a panel of this court reasoned that because Class C felony child molesting under subsection (b) is not a lesser included offense of Class A felony child molesting under subsection (a), Cox was twice "convicted of one crime while having been charged with another." Cox, 2008 WL 2953736, at *2. Accordingly, the panel concluded that "[t]he judgments as Class C felonies on counts I and II are void" and remanded "for a finding and judgment of acquittal or conviction on counts I and II, Child Molesting and Attempted Child Molesting, as Class A felonies." Id. at *3. On remand, the trial court found Cox guilty on both counts and entered judgments of conviction as Class A felonies. Cox now appeals.

Discussion and Decision

Cox argues the trial court's entry of judgments of conviction as Class A felonies on Counts I and II violates the prohibition against double jeopardy as guaranteed by

Article I, Section 14, of the Indiana Constitution.[1] Section 14 prohibits, among other things, retrial of a defendant for an offense after he has been acquitted of that offense. See Richardson v. State, 717 N.E.2d 32, 37 n.3 (Ind. 1999) (citing State v. Davis, 4 Blackf. 345 (Ind. 1837)). Cox contends he was acquitted of the Class A felonies because, as he succinctly puts it, "[w]hen the trial court said 'guilty' on the class C felonies it said 'not guilty' on the class A felonies." Appellant's Brief at 13.

Although he does not mention it in his brief, this contention by Cox implicates the doctrine of implied acquittal. That doctrine – initially a creature of common law, but since codified, see Ind. Code § 35-41-4-3 – states that a finding of guilt on a lesser included offense implies that the trier of fact found the defendant not guilty of the greater offense, see Haddix v. State, 827 N.E.2d 1160, 1165 (Ind. Ct. App. 2005), trans. denied. And an implied finding of not guilty on the greater offense means the defendant was acquitted of that offense, which in turn bars reconsideration of the greater offense in light of the prohibition against double jeopardy. See id.

The State counters that Cox's argument is foreclosed by the law of the case doctrine. Our supreme court has described the doctrine as "a discretionary tool by which appellate courts decline to revisit legal issues already determined on appeal in the same case and on substantially the same facts." Cutter v. State, 725 N.E.2d 401, 405 (Ind.

[1] Cox also claims in passing these convictions violate the Indiana Constitution's guarantee that "[j]ustice shall be administered . . . speedily, and without delay." Ind. Const. Art. I, § 12. Alleged violations of this constitutional provision are typically analyzed under Indiana Criminal Rule 4(C), see, e.g., State v. Penwell, 875 N.E.2d 365, 367 (Ind. Ct. App. 2007), trans. denied, which "expressly requires that a defendant be discharged if not brought to trial within certain prescribed time limits," Clark v. State, 659 N.E.2d 548, 551 (Ind. 1995). Cox, however, does not cite Criminal Rule 4(C), let alone attempt to explain the relevant time limits in this case. Accordingly, we conclude Cox has waived this claim for failure to provide citation to authority or otherwise provide cogent argument. See Ind. Appellate Rule 46(A)(8)(a); Gonzalez v. State, 908 N.E.2d 313, 319 n.5 (Ind. Ct. App. 2009), trans. pending.

2000). The rule promotes "finality and judicial economy," id., and extends to issues that were wrongly decided by the appellate tribunal, Shoulders v. State, 578 N.E.2d 693, 697 n.1 (Ind. Ct. App. 1991), trans. denied. Being discretionary, the rule need not be followed in all instances, though our supreme court has cautioned that an appellate court "should be loathe to [revisit prior decisions] in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous and would work manifest injustice."[2] Hopkins v. State, 782 N.E.2d 988, 990 (Ind. 2003) (citation omitted). The question therefore becomes whether the law of the case doctrine applies to Cox's argument and, if so, whether its application should be disregarded under the clear error and manifest injustice standard.

The Cox I panel reasoned that with respect to Counts I and II, Cox was "convicted of one crime while having been charged with another." 2008 WL 2953736, at *2. We gather from this statement that the panel in Cox I took the view not only that the trial court did not convict Cox of a lesser included offense – indeed, as the panel noted, Class C felony child molesting under subsection (b) of the child molesting statute is not a lesser included offense of Class A felony child molesting under subsection (a), see Ind. Code § 35-42-4-3(a) and (b); Brooks v. State, 526 N.E.2d 1171, 1172 (Ind. 1988)[3] – but,

[2] Instances where appellate courts have declined to apply the law of the case doctrine include where a change in the law renders the first appellate decision obsolete, see State v. Huffman, 643 N.E.2d 899, 901-02 (Ind. 1994); State v. Lewis, 543 N.E.2d 1116, 1118-19 (Ind. 1989), and where a co-defendant obtains relief in a separate appellate proceeding and the defendant does not, and the two appellate proceedings involve the same issue and substantially similar facts, see Turner v. State, 751 N.E.2d 726, 729, 734 (Ind. Ct. App. 2001).

[3] The dissent believes the trial court "got it right the first time," which we take to mean the dissent believes the trial court properly found Cox guilty of the Class C felonies at the 2007 bench trial. We do not disagree with the dissent that the trial court is in the best position to weigh the evidence and make the ultimate determination, or that the trial court is presumed to know and apply the law. See slip op. at 8. However, as was made clear in Cox I and as we reiterate herein, the Class C felonies of which the trial court found Cox guilty are not lesser included offenses of the Class A felonies the State charged; the trial court has no authority to amend the charges on its own motion and

critically, that it had not passed judgment on whether Cox was guilty of Counts I and II as charged (i.e., as Class A felonies). This interpretation explains why the Cox I panel chose to remand "for a finding and judgment of acquittal or conviction on counts I and II, Child Molesting and Attempted Child Molesting, as Class A felonies." 2008 WL 2953736, at *3. And because the Cox I panel's decision to remand means it necessarily rejected any inference that Cox had been acquitted of Counts I and II, it follows that the law of the case doctrine applies to Cox's argument.

The law of the case doctrine may be disregarded where the previous appellate decision meets the clear error and manifest injustice standard, Hopkins, 782 N.E.2d at 990, but such an approach is not warranted in this case.[4] The panel reasoned that remand was appropriate because the trial court had not passed judgment on Counts I and II as charged. To rise to the level of clear error, then, we think it is incumbent on Cox to demonstrate the trial court definitively ruled on Counts I and II as Class A felonies. Cf. Brooks, 526 N.E.2d at 1172 (reversing defendant's conviction where trial court granted judgment on the evidence with respect to a molestation charge, but then sua sponte amended the charge for submission to the jury as a lesser included offense). However, nothing in the record indicates the trial court made such a ruling (indeed, to return to Cox's principal argument, he merely claims the trial court's ruling on the Class A felonies is implicit), which means the Cox I panel's reasoning does not rise to the level of

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the State specifically declined to move to amend the charges to conform to the evidence. 2008 WL 2953736 at *2. In this case, the trial court did not correctly apply the law, and we fail to see how we could have let the Class C felony convictions stand in Cox I, as the dissent would suggest would have been appropriate. Moreover, we are unsure how the dissent would have us proceed at this juncture to reach the conclusion it advocates.

[4] We note as an aside that Cox does not appear to argue that this case meets the clear error and manifest injustice standard, arguing instead that the Cox I panel's reasoning "is inaccurate." Appellant's Br. at 11.

clear error. Accordingly, we conclude that disregarding the law of the case doctrine is not warranted.

Conclusion

The law of the case doctrine bars Cox's argument that his Class A felony convictions violate the prohibition against double jeopardy as guaranteed by Article I, Section 14, of the Indiana Constitution.

Affirmed.

BAILEY, J., concurs.

DARDEN, J., dissents with opinion.

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	)	
Appellee-Plaintiff.	)	

DARDEN, Judge, dissenting

I respectfully dissent, because I believe that the trial court, in exercising its sound judgment and responsibilities, got it right the first time.

Despite disagreeing with the result reached by the majority, I must note that Cox's actions are deplorable, and that I have no sympathy for him. My dissent is premised in my belief that the trial court is in the best position to weigh the evidence presented and to make the ultimate determination as to what that evidence established. It is presumed that the trial judges know the law and how to apply it. In my opinion, the ambiguity of our previous order on remand left the trial court feeling compelled to enter convictions for class A felonies.