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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 of
Respondent-Appellee,	)	Cook County, Illinois.
	)	
	)	
	)	No. 01 CR 23332
v.	)	
	)	
RODNEY CLEMONS,	)	Honorable
	)	James Michael Obbish,
Petitioner-Appellant.	)	Judge Presiding.

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JUSTICE JOSEPH GORDON delivered the judgment of the court.

Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

**ORDER**

*Held:* In post-conviction proceedings, defendant forfeited his claim of ineffective assistance of appellate counsel where he failed to raise such a claim in his initial post-conviction petition.

Defendant Rodney Clemons was convicted of first degree murder, and his conviction was affirmed on direct appeal. Defendant's subsequent post-conviction petition was summarily dismissed, and he now appeals from the denial of his motion for leave to file a successive petition for relief under the Post-Conviction Hearing Act, 725 ILCS 5/122-1 et. seq. (West 2010).

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Defendant contends that the circuit court erred in denying his motion because he presented a non-frivolous claim of ineffective assistance of appellate counsel based on that counsel's failure to argue on direct appeal that the circuit court erred in refusing to admit evidence that the victim may have worked as a prostitute. For the reasons that follow, we affirm the judgment of the circuit court.

### BACKGROUND

The record shows that defendant was charged with first degree murder for the fatal shooting of Doris Smith. At the close of defendant's trial, the jury found him guilty, and the trial court sentenced him to 20 years' imprisonment in the Illinois Department of Corrections on the murder conviction and an additional consecutive term of 25 years' imprisonment for personally discharging a firearm during the commission of the murder.

The record shows that during defendant's trial, the State presented the identification testimony of Derric Clemmons<sup>1</sup>, Marie Jackson, Natalie Jones and Lionel Powe. Each of those witnesses testified that on the night of the murder, they observed a man shoot Doris on the corner of 81<sup>st</sup> Street and Houston, and later picked defendant out of a line-up as Doris' shooter. Each of those witnesses testified that on August 26, 2001, at or about 2:00 am, they heard gunshots and saw Doris running out of a alley as defendant chased her. Derric testified that he heard more gunshots before he went outside and saw Doris lying face down in a pool of blood. Marie Jackson, Natalie Jones and Lionel Powe each testified that they saw defendant pull out a gun and

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<sup>1</sup>Nothing in the record appears to indicate any familial relationship between defendant and Derric Clemmons.

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shoot Doris.

Also introduced at defendant's trial was the testimony of Doris Smith's daughter, Natasha Smith, who stated that defendant and her mother had been in an abusive off-and-on relationship, which her mother had tried to break off. Natasha further testified that at or about 1:25 to 1:30 am on the night of the murder, defendant came to her house looking for Doris. According to Natasha, defendant became enraged when she told him that her mother was not home, and as he left, defendant stated that "somebody is going to die tonight."

In addition, the State presented the testimony of Dr. Michel Humilier, a Cook County deputy medical examiner and expert in forensic pathology. Dr. Humilier testified that he reviewed the internal autopsy performed on Doris, which indicated that Doris had been shot in two different places: her front hip and her upper back just beneath her head. According to Dr. Humilier, Doris' gunshot wounds were consistent with her ducking and turning her back to the person firing the gun.

Further, Detective Aaron Chatman testified that at approximately 2:00 am on the night in question, he was assigned to investigate the shooting at 81<sup>st</sup> Street and Houston. According to the detective, when he arrived at the scene, the victim had already been taken away, and at that time, he examined the evidence, "conducted a canvass of the area" and interviewed Derric and Marie. While at the scene, Detective Chatman found a "legal document" inside the victim's purse which contained that victim's name, Doris Smith, and defendant's name, Rodney Clemons.

At pre-trial hearings, the parties acknowledged that the legal document found in Doris' purse was an order of protection against defendant. At one of those hearings, the State

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acknowledged that the order of protection had been granted ex parte, and that no evidence indicated that defendant had notice of that order.

The record further shows that defense counsel attempted to admit into evidence the audiotape of Derric's 911 phone call, which he made on the night in question. Defense counsel sought to admit a portion of the audiotape in which Derric gave defendant's description to the operator, which according to defense counsel, did not exactly match defendant. More notably however, defense counsel sought to admit the portion of the audiotape where Derric stated that the person who was being shot was a prostitute. Defense counsel stated that he wanted the jury to hear that portion of Derric's 911 call to support its theory that the victim was shot by a "john" during a misunderstanding. In addition, defense counsel stated to the court that he could call witnesses who would testify that the victim was engaged in prostitution to support her drug habit. After the trial court ascertained from Derric that he was, in fact, the caller on the audiotape, it allowed defense counsel to ask Derric about the description of the shooter which he gave in his phone call, but not his statement that the victim of the shooting was a prostitute. In doing so, the trial court found that Derric's description of the victim as a prostitute was speculative and improper.

Additionally, defense counsel attempted to introduce testimony from Victor Latiker that on more than one occasion he had given money to the victim in exchange for sexual favors, and that on other occasions, he observed the victim, while at crack houses, take money from other men and go "upstairs" with them for about five minutes. Defense counsel told the trial court that such testimony lends credence that Derric was not speculating when he described the victim as a

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prostitute in his 911 call, and therefore, that portion of the audiotape should be admitted into evidence. The court, nevertheless, still did not allow the audiotape of Derric's 911 call to be admitted into evidence, noting that, irrespective of Latiker's testimony, Derric did not testify to seeing a sex act by the victim, money exchanging hands, or anything of the sort which would give him an opportunity to speculate that she was a prostitute.

After defendant's conviction, this court affirmed that judgment on direct appeal, over defendant's claims that the trial court erred when it failed to conduct an inquiry into his alleged *pro se* posttrial claim that trial counsel rendered ineffective assistance. *People v. Clemons*, No. 1-05-3290 (2008) (unpublished opinion under Supreme Court Rule 23). On October 20, 2008, defendant filed a *pro se* post-conviction petition alleging, *inter alia*, that the trial court erred in excluding from the evidence the 911 audiotape of an eyewitness, and that he received ineffective assistance from both trial and appellate counsel. Specifically, defendant alleged, in a section titled "911 tape phone call," that the trial court committed reversible error in not admitting the 911 audiotape of Derric Clemmons, in which he states that a "prostitute" was being shot at an alley, and that the "appellate review did not raise any issue that was preserved for review by defendant." Defendant claimed that the court erred in stating that the witness' statement characterizing the victim was a prostitute was speculative because defendant offered testimony from a man named Victor Latiker, who would lay the foundation for that statement.

In addition, defendant alleged in a separate section titled "trial counsel's ineffective assistance," that his trial counsel was ineffective in failing to investigate and interview certain witnesses, consult with defendant regarding trial strategy, discuss police reports with defendant,

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take defendant's phone calls, contest defendant's arrest and statement, and object to certain trial testimony. Defendant further alleged, in another separate section titled "ineffective assistance of appellate counsel" that he received ineffective assistance of appellate counsel who failed to raise trial counsel's ineffectiveness, argue that defendant was not proven guilty beyond a reasonable doubt, and raise additional claims which defendant suggested through his correspondence.

Attached to defendant's *pro se* petition were numerous pieces of correspondence between defendant and his appellate attorney, in which defendant asks his attorney to raise the following issues: (1) the testimony of the forensic medical examiner is inconsistent with the testimony of eyewitnesses who testified at trial; (2) the State violated the ruling on a motion in limine by referring to an order of protection entered against defendant; (3) admission of hearsay testimony by the victim's daughter, Natasha Smith; (4) defendant's testimony was "ignored;" (5) four of the trial witnesses committed perjury; and (6) ineffective assistance of trial counsel. Additionally, defendant asked his appellate attorney to explain to him what an "appeal bond" is. Notably, nowhere in the attached correspondence did defendant refer to the trial court's exclusion of evidence that the victim, Smith, may have worked as a prostitute.

Also attached to defendant's post-conviction petition was the transcript of the court proceedings in which defense counsel attempted to introduce Latiker's testimony with respect to Doris' alleged acts of prostitution. That transcript reflects the previously mentioned exchange, in which defense counsel stated that Latiker would testify that he had given the victim money in exchange for sex on more than one occasion, and had observed the victim take money from men and disappear with them while at crack houses.

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In addition, it appears that defendant attached to one of the filed copies of his post-conviction petition the affidavits of Andre Smith, who appears to have no relation to the victim, and Natasha Smith. In Natasha Smith's affidavit, she stated, in relevant part, that she was recanting her prior testimony, and that the statements that she made to a detective on the night of the murder was "changed" by that detective. She further stated that on the night of the murder, she told Detective Chatman that defendant was at her residence earlier that night and that what defendant actually said to her was that there was a lot of shooting outside and somebody was going to die. According to Natasha, defendant was concerned about the whereabouts of her mother. Natasha's affidavit further stated, however, that Detective Chatman "changed" her statement to say that defendant was enraged when she saw him, that he stormed out of the building and that he said that he was going to kill someone. However, Natasha does not explain in her affidavit whether Detective Chatman changed her statement in his written report, his testimony regarding her statement, or in any other medium. In addition, Natasha stated in her affidavit that she later changed her original statement at trial in order to secure a conviction because she was "confused." Further, Natasha averred that Detective Chatman did not write down in his reports the description that she gave of defendant's clothing and facial hair.

In Andre Smith's affidavit, he stated that he was with defendant until after 2:00 am on the night of the murder, which, according to the evidence presented at trial, took place at about 1:54 am. According to Andre, he drove defendant to his girlfriend Priscilla King's house shortly after 1:00 am that night. He further stated that after a few minutes at King's house, he and defendant went to meet with someone named "Jamaca" on Exchange Street, then walked to the victim's

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house. According to Andre, he waited for defendant outside of the victim's building while defendant went inside for a few minutes, and then both men returned to King's house. In addition, Andre averred that he and defendant talked for some time in front of King's house until just after 2:00, at which time defendant went inside to go to bed.

On December 12, 2008, the circuit court dismissed defendant's post-conviction petition as frivolous and patently without merit. In doing so, the circuit court found that defendant's claims that he received ineffective assistance of both trial and appellate counsel are without merit. The circuit court further held that defendant's claim that the trial court erred in not admitting the 911 audiotapes of eyewitness Derric Clemmons does not provide a basis upon which relief can be granted, in part because "[e]videntiary rulings are not properly reviewed by the trial court in a post-conviction petition."

Defendant then filed, *pro se*, a document titled "motion for reconsideration of post-conviction." In that motion, defendant alleged that the circuit court should reconsider its dismissal of his post-conviction petition because the affidavits of Natasha Smith and Andre Smith are newly discovered evidence, and he was therefore entitled to an evidentiary hearing. Attached to that motion were copies of the affidavits of Natasha Smith and Andre Smith, which were previously attached to defendant's *pro se* post-conviction petition.

On January 30, 2009, the circuit court, treating defendant's motion to reconsider as a motion for leave to file a successive petition for post-conviction relief, denied the motion. In doing so, the court found that defendant had failed to demonstrate any prejudice inured from his failure to assert his claims in his initial post-conviction petition. The court noted that in his initial

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petition, defendant did not mention Natasha Smith, and referred to Andre Smith only as a witness that trial counsel did not interview. In addition, the court noted that had these claims been presented in defendant's initial petition, there is little probability that defendant would have prevailed. We note that while the circuit court stated in its written order that defendant failed to attach the affidavits of Andre Smith and Natasha Smith to his first post-conviction petition, the record before us contains two copies of defendant's post-conviction petition and that the affidavits are only attached to one of those copies. However, this inconsistency does not affect the outcome of this appeal.

#### ANALYSIS

On appeal, defendant does not challenge the circuit court's denial of his "motion for reconsideration," and contends only that the circuit court erred in dismissing his initial post-conviction petition as frivolous and patently without merit. He contends that his claim that his appellate counsel was ineffective for failing to argue on direct appeal that the trial court erred in excluding evidence that the victim worked as a prostitute had an arguable basis in both law and fact, as required to survive summary dismissal. According to defendant, the circuit court erred in dismissing his petition with respect to his claim regarding Derric's 911 phone call because it characterized it as a challenge to an evidentiary ruling, which does not present a constitutional claim as required for relief under the Act. See e.g. *People v. Cox*, 34 Ill. 2d 66, 68 (1966); *People v. Vitale*, 3 Ill. 2d 99, 106 (1954). Consequently, defendant argues that the circuit court failed to recognize that defendant raised that claim in the framework of ineffective assistance of appellate counsel, for failure to raise that evidentiary challenge on direct appeal, where that issue

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could have been reviewed. Thus, defendant maintains that we should reverse the dismissal of his petition and remand his cause for further post-conviction proceedings.

The purpose of the Illinois Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2008)), under which the instant petition is brought, is to allow courts to resolve contentions regarding constitutional violations at trial that have not been, and could not have been, previously adjudicated. *People v. Evans*, 186 Ill. 2d 83, 89 (1999). Proceedings brought under the Act are commenced by filing a petition in the court in which the conviction occurred, supported by affidavit. 725 ILCS 5/122-1(b) (West 2008). Defendant is also required to set forth the manner in which his rights were violated, supported by affidavit, records or other evidence. 725 ILCS 5/122-2 (West 2008).

At the first stage of proceedings, defendant must present the gist of a constitutional claim to survive dismissal. At that stage, the circuit court independently reviews the petition within 90 days of its filing and must summarily dismiss the petition if it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2008). A petition will be found frivolous and patently without merit when defendant fails to articulate the gist of a constitutional claim, such that the allegations in the petition, taken as true and liberally construed, have no basis in law or in fact. *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). Conversely, if defendant does, in fact, present the gist of a constitutional claim, it advances to the next stage, where the circuit court will conduct an evidentiary hearing on its allegations. *People v. Edwards*, 197 Ill. 2d 239, 245-56 (2001). To meet that requirement and survive dismissal, defendant needs only present a modest amount of detail and does not need to make legal arguments or cite to legal authority. *People v. Gaultney*,

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174 Ill. 2d 410, 418 (1996).

In this case, the circuit court dismissed defendant's petition at the first stage of proceedings, and the issue before us is whether he articulated in his pro se petition the gist of a constitutional claim so as to survive first-stage dismissal. See *Edwards*, 197 Ill. 2d at 244. At this stage of proceedings, since defendant has not been yet afforded an evidentiary hearing, we are to take all well-pled allegations in the petition as true and liberally construe them in favor of defendant. See *People v. Coleman*, 183 Ill. 2d 366, 380-81 (1998) (discussing the standard of review for dismissal hearings under section 122-2.1). The question of whether the circuit court erred in summarily dismissing a post-conviction petition is reviewed *de novo*. *Coleman*, 183 Ill. 2d at 388-89.

Defendant contends that he raised, in his post-conviction petition, a claim of ineffective assistance of appellate counsel for failing to argue on direct appeal that the trial court erred by not admitting evidence that the victim was working as a prostitute on the night when she was shot. He maintains that the evidence that he sought to admit at trial substantiated defendant's allegation that the victim worked as a prostitute, which was a significant component of his theory of defense, which was that defendant was misidentified as the shooter, who was in fact, one of the victim's "clients." According to defendant, the trial court erred in excluding the evidence on the basis that it was speculative, because defendant's proposed evidence included Latiker's testimony that he had paid the victim for sex on more than one occasion, and that he had observed the victim receive money from men and disappear with them for a period of time. Defendant argues that appellate counsel was ineffective for not challenging the trial court's refusal to admit the

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audiotape of Derric's 911 call and Latiker's testimony regarding Doris' alleged prostitution because that exclusion was an error. Accordingly, defendant maintains that his post-conviction claim asserting such ineffectiveness had an arguable basis of law and fact.

The State responds that defendant's claim in his post-conviction petition in regard to the admission of testimony and audiotapes was only an evidentiary challenge, which is not a constitutional claim for which relief can be granted in a post-conviction proceeding. See *Cox*, 34 Ill. 2d at 68; *Vitale*, 3 Ill. 2d at 106. The State maintains that defendant's challenge of the trial court's refusal to admit that evidence was not raised in the framework of ineffective assistance of appellate counsel, which, unlike a challenge to an evidentiary ruling, may be a claim of a constitutional violation properly raised in a post-conviction petition. Accordingly, the State argues that defendant's present claim that his appellate counsel was ineffective for not challenging the exclusion of that evidence on direct appeal was not raised in defendant's post-conviction petition, and is now forfeited.

Although allegations made in a pro se post-conviction petition are to be liberally construed (*Hodges*, 234 Ill. 2d at 20), the Act provides that "[a]ny claims of a substantial denial of constitutional rights not raised in an original or amended petition is waived." 725 ILCS 5/122-3 (West 2009). In fact, since this court does not have the powers enjoyed by our supreme court, we cannot reach post-conviction claims that were not raised in the initial petition. *People v. Jones*, 213 Ill. 2d 498, 507 (2004).

In *Jones*, 213 Ill. 2d at 499, defendant pleaded guilty to attempted first degree murder in exchange for a prison term of 20 years. He later filed a *pro se* post-conviction petition, which

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was dismissed as frivolous and patently without merit, and this court affirmed. *People v. Jones*, 341 Ill. App. 3d 103, 107-08 (2003). The supreme court granted defendant leave to appeal, and noted that the case presented the issue of whether defendant could raise for the first time on appeal the issue of improper admonishments, where he had failed to raise it in his post-conviction petition. *Jones*, 213 Ill. 2d 506-07. The court held that, as provided by section 122-3 of the Act, the appellate court is not free to excuse, in the context of post-conviction proceedings, the forfeiture of a claim caused by defendant's failure to include issues in his post-conviction petition. *Jones*, 213 Ill. 2d at 508.

In fact, the court noted that this conclusion is not changed by the fact that *pro se* litigants are often unable to draft post-conviction petitions which meet the requirements to survive dismissal at the first stage. *Jones*, 213 Ill. 2d at 504. The supreme court noted that

"Stated bluntly, the typical *pro se* litigant will draft an inartful pleading which does not survive scrutiny under the "frivolity/patently without merit" standard of section 122-2.1, and it is only during the appellate process, when the discerning eyes of an attorney are reviewing the record, that the more complex errors that a nonattorney cannot glean are discovered. The appellate attorney, not wishing to be remiss of his or her duty, then adds the newly discovered error to the appeal despite the fact that the claim was never considered by the trial court in the course of its ruling. The thought process behind the attorney's actions is clear - the attorney is zealously guarding the client's rights and is attempting to conserve judicial resources by raising the claim expeditiously at the first chance available.

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These goals are laudable, but they nonetheless conflict with the nature of the appellate review and the scriptures of the Act." *Jones*, 213 Ill. 2d at 504-05; accord *People v. Jolly*, 374 Ill. App. 3d 499, 505 (2007) (finding that defendant's claim of ineffectiveness of his postplea counsel had been forfeited where " 'even a liberal reading' of defendant's post-conviction petition reveal[ed] no claim of ineffectiveness by [postplea counsel]."

Here, defendant's *pro se* post-conviction petition contains a section titled "911-tape-phone-call" which specifically states that "[t]he single issue before this court is whether the trial court committed reversible error when it denied the defendant the opportunity to play the audiotape recorded statement before the court." Although defendant's petition stated in that section that "the appellate review did not raise any issue that was preserved for review by [d]efendant \*\*\*, " it makes no mention of appellate counsel's role in the proceeding, or suggest that she was ineffective for not raising that issue on direct appeal. Additionally, although defendant's *pro se* petition also includes a section titled "ineffective assistance of appellate counsel," it is clear that it is a separate claim from the section titled "911-tape-phone-call." In fact, nowhere in defendant's ineffective assistance of appellate counsel claim is there any mention of that attorney's failure to raise the issue of whether the trial court properly excluded the audiotape of Derric's 911 call or any part of Latiker's testimony. While defendant claimed in his *pro se* petition that his appellate counsel was ineffective for not raising the issues which he asked her to raise on direct appeal, his references to those issues in his petition make no mention of the trial court's ruling in excluding the Derric's 911 call or Latiker's testimony regarding Doris'

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alleged prostitution.<sup>2</sup> Moreover, none of the attached correspondence between defendant and his appellate counsel, in which he listed the issues that he wanted his counsel to raise, makes any reference to the trial court's refusal to admit such evidence of the victim's alleged prostitution.

Although defendant contends in his reply brief that he did, in fact, raise the claim that his appellate counsel was ineffective for not challenging the trial court's evidentiary ruling by claiming in his petition that "the appellate review did not raise any issue that was preserved for review by [d]efendant \*\*\*, " such a contention lacks merit. As previously noted, that remark makes no mention of appellate counsel's role, or any alleged shortcomings, in those proceedings. A court considering a post-conviction petition is not required to infer allegations that were not made. *People v. Mackins*, 222 Ill. App. 3d 1063, 1067 (1991). In *Mackins*, 222 Ill. App. 3d at 1066, defendant filed a petition for relief from judgment pursuant to section 2-1401 of the Illinois Code of Civil Procedure, in which he contended that the police officers who testified at his trial committed perjury, and pointed to inconsistencies in their testimony. On appeal from the trial court's dismissal of that petition, defendant argued, *inter alia*, that his petition should have been considered pursuant to the Act because it " 'unequivocally raised the inference' " that his trial attorney was ineffective for not impeaching the police officers based on the inconsistencies in their testimony. *Mackins*, 222 Ill. App. 3d at 1067. In affirming the trial court's dismissal, the court

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<sup>2</sup>As previously discussed, those issues are: failure to argue that defendant was not proven guilty beyond a reasonable doubt, and raise additional claims which defendant suggested through his correspondence. Such claims included: (1) inconsistency between the testimony of the forensic medical examiner and the eyewitnesses'; (2) the State's alleged violation of a ruling in limine by referring to an order of protection; (3) admission of hearsay testimony by Natasha Smith; (4) defendant's testimony was "ignored;" (5) trial witnesses' alleged perjury; and (6) ineffective assistance of trial counsel.

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found that even if that petition had been brought under the Act, it would have been properly dismissed because it nowhere alleged ineffective assistance of counsel and it was "obvious" that the trial court was not required to " 'infer' " an allegation that was not made.

As previously noted, it is clear from the petition's language that "the single issue" in that section is whether the trial court erred in excluding that evidence. The conclusion that defendant's claim that the trial court erred in excluding evidence of the victim's alleged prostitution was not framed in terms of ineffective assistance of counsel is further supported by the fact that defendant made a separate claim of ineffective assistance of appellate counsel which did not refer to counsel's failure to raise that issue on direct appeal. Thus, even a liberal reading of defendant's post-conviction petition does not reveal a claim that his appellate counsel was ineffective for failing to raise the issue of whether the trial court properly excluded the audiotape of Derric's 911 call, or any other evidence that the victim engaged in acts of prostitution. Accordingly, we conclude that defendant has forfeited the claim that his appellate counsel was ineffective for failing to challenge the trial court's exclusion of evidence referring to the victim's alleged acts of prostitution. *Jolly*, 374 Ill. App. 3d at 505.

Therefore, for the foregoing reasons, the circuit court's dismissal of defendant's post-conviction petition is affirmed.

Affirmed.

FITZGERALD SMITH, P.J., and HOWSE, J., concur.