

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2012 IL App (4th) 110420-U
NO. 4-11-0420
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

FILED
November 2, 2012
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
DONALD E. BEARD,)	No. 02CF1394
Defendant-Appellant.)	
)	Honorable
)	Elizabeth A. Robb,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Pope and Cook concurred in the judgment.

ORDER

- ¶ 1 *Held:* Trial court did not err in dismissing defendant's postconviction petition.
- ¶ 2 After a May 2003 jury trial defendant was convicted of one count of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(2) (West 2002) and later sentenced to a 20-year prison term. His conviction was affirmed on direct appeal. *People v. Beard*, 356 Ill. App. 3d 236, 825 N.E.2d 353 (2005).
- ¶ 3 Defendant now appeals from the dismissal of his postconviction petition arguing the trial court erred in not holding an evidentiary hearing on two issues: (1) his claim of ineffective assistance of counsel because counsel did not allow defendant to make the decision whether to have the jury instructed on the lesser included offense of battery; and (2) his claim there was newly discovered evidence the victim-complainant, his wife Heather Beard, admitted

committing perjury at trial. We affirm.

¶ 4

I. BACKGROUND

¶ 5 The facts of the case may be found in our earlier decision. In brief, defendant held, Heather Beard, his estranged wife for several days, sexually assaulted her, and caused her bodily harm.

¶ 6 Defendant's initial *pro se* postconviction petition was dismissed, but this court reversed and remanded for further proceedings. *People v. Beard*, No. 4-05-0732 (Feb. 27, 2007) (unpublished order under Supreme Court Rule 23). Appointed counsel withdrew and new counsel filed an amended postconviction petition making the claims noted above. The State filed a motion to dismiss the amended petition.

¶ 7 In his amended petition, defendant claimed he received ineffective assistance of counsel because trial counsel failed to propose a jury instruction on battery or domestic battery. The trial court concluded this issue was forfeited because it could have been raised on direct appeal, and the failure to request the instruction was part of trial strategy.

¶ 8 The trial court concluded defendant's claim of recantation and perjury based on statements of Juan Villareal and Jafaria Newton should be dismissed based on *res judicata*. The statements of those two jail inmates were considered on direct appeal in conjunction with the denial of a motion for new trial. Villareal and Newton's statements were vague assertions Heather testified as she did so she could "get her children back." On appeal from the conviction, these statements were found to be potential impeachment at best, if they actually occurred, and insufficient to grant a new trial.

¶ 9 Defendant also claimed Heather recanted her trial testimony as demonstrated by

an affidavit from one John Stemmons, which stated Heather admitted lying during the trial. The trial court ruled Stemmons' affidavit was sufficient to allow defendant to proceed to an evidentiary hearing. At that hearing, the two assistant States' Attorneys involved in defendant's criminal trial and termination proceedings as to Heather's children testified. Both testified they made no promises to, arrangements for, or representations to Heather, that she surrendered parental rights to three children *before* the criminal trial and she did not appear and contest the termination of her parental rights to her fourth child.

¶ 10 Heather testified consistently, denying there had been any agreement or promises to secure her testimony against defendant. She denied recanting her testimony to Stemmons, and told Stemmons she had been physically and sexually abused by defendant for three days and did not discuss her testimony with Stemmons. Stemmons did not testify. The trial court found the allegation of recantation to Stemmons was not supported by the evidence.

¶ 11 Defendant's amended postconviction petition was dismissed.

¶ 12 II. ANALYSIS

¶ 13 In his amended postconviction petition, defendant claims he had a personal right to seek a lesser included offense instruction, counsel was ineffective for failing to request the instruction, and the court erred in not requiring an evidentiary hearing on this claim. Without regard to the weight of evidence against defendant and the lack of merit to this claim, we need not even consider his argument. This issue could have been raised on direct appeal, but was not. The issue is forfeited. *People v. Harris*, 206 Ill. 2d 1, 12-13, 794 N.E.2d 314, 323 (2002).

¶ 14 Contrary to defendant's statement of the issue in his brief, the trial court conducted an evidentiary hearing on the alleged recantation, and the consideration of that issue included the

question of whether Heather lied at trial, whether she was pressured to testify as she did because of representations by the State and whether she made any statements to Stemmons contradictory to her trial testimony.

¶ 15 Counsel attempts to argue the evidentiary hearing was somehow limited to the issue of whether Heather had an understanding with the State to testify against defendant so she could gain an advantage in regaining or not losing her parental rights. This argument has no merit.

¶ 16 The evidence presented at the evidentiary hearing covered both the question of an arrangement or understanding with the State and Heather's unequivocal denial of recanting her testimony to Stemmons in response to a question by defense counsel. No testimony refuted her denial. The trial court believed Heather. The court found the allegation of recantation in Stemmon's affidavit was not supported by the evidence.

¶ 17 The defense asserts the trial court did not rule on Stemmons' recantation and that Stemmons' statement was newly discovered evidence of actual innocence. The record belies those assertions.

¶ 18 III. CONCLUSION

¶ 19 We affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 20 Affirmed.