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2013 IL App (4th) 120332-U

NO. 4-12-0332

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED  
November 1, 2013  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
CHARLES A. WATSON,	)	No. 10CF1955
Defendant-Appellant.	)	
	)	Honorable
	)	Harry E. Clem,
	)	Judge Presiding.

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

**ORDER**

¶ 1 *Held:* We grant the office of the State Appellate Defender's motion to withdraw as appellate counsel pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). The appellate court held (1) defendant's ineffective assistance of counsel claim failed because (a) defendant did not show he was prejudiced by trial counsel's pretrial contact, (b) the trial court's finding the video evidence was not altered was not against the manifest weight of the evidence, (c) counsel's decision to not impeach the victim and not object to the State's closing argument were reasonable exercises of his professional judgment; and (2) defendant's sentence was not excessive.

¶ 2 This appeal comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal because any request for review would be frivolous and without merit. We agree and affirm.

¶ 3 I. BACKGROUND

¶ 4 On November 22, 2010, the State charged defendant, Charles A. Watson, with armed robbery, a Class X felony (720 ILCS 5/18-2(a)(2), (b) (West 2010)), and aggravated

robbery, a Class 1 felony (720 ILCS 5/18-5(a), (b) (West 2010)). The information alleged the offenses occurred at the corner of Green and Sixth Streets in Champaign, Illinois, on November 21, 2010.

¶ 5 A. The Pretrial *Krankel* Hearings

¶ 6 On December 21, 2010, the trial court held a hearing pursuant to *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984), to hear defendant's complaints against his trial counsel, Anthony Ortega. Defendant described his concerns as follows: "I asked my counselor to pick up some tapes that would prove my innocence a few days after I was arrested. And he come to see me two, three weeks later and he hadn't picked the tapes up, you know. And I got a little bit, you know, uncomfortable with the fact that, you know, these tapes will prove my innocence." Defendant added "the crime [is] supposed to have been committed on Sixth and Green [Streets]. And I know it's a bank there, it's a[n] Arab store there, it's Oodles [*sic*] and Noodles and I know it's cameras there[.]" Ortega informed the trial court he spoke with defendant by phone two days after he was arrested and "[b]ased on that conversation, [he] didn't think any tapes were relevant." A week prior to the hearing, he and defendant had a discussion about potential videos. Counsel felt "getting the tape wouldn't help us." He had not made a discovery request for any such recordings. The court asked defendant if defendant wanted Ortega to continue as trial counsel. Defendant replied "he can continue as bein' my lawyer." The court continued Ortega's representation.

¶ 7 On February 22, 2011, the trial court held a second hearing pursuant to *Krankel* to hear defendant's complaints about Ortega. The following occurred:

"THE COURT: That's you, sir. You have some concerns

about your lawyer's representation, sir?

[DEFENDANT]: Yes, I do.

THE COURT: What?

[DEFENDANT]: Everything. He's going against my wishes and telling lies, and you know, and—I've been here ninety days. I don't know nothing, no more about what I'm here for than the first day I was arrested. He's not doing anything to—to help me, you know, just do this here.

\* \* \*

THE COURT: All right. Have you given your attorney—and I don't want to know the information, I just want you to answer my question—have you given the attorney the names of anyone who you believe may be a possible witness in this case?

[DEFENDANT]: No, I haven't

THE COURT: Are there any such people?

[DEFENDANT]: Yes, it is.

\* \* \*

THE COURT: And what you're telling me is that you have not given your attorney the very basic information that an attorney would need to represent you effectively. Is that correct?

[DEFENDANT]: Yes, sir."

Ortega stated he (1) spoke to defendant by telephone on November 24, 2010; (2) met with him in

jail on December 17, 2010; (3) "spoke with him on the phone one other time"; and (4) "sent two letters" to defendant (these letters are attached to defendant's July 16, 2013, filing with this court). He informed the court the State just received a video recording and he hoped to show it to defendant "sometime this week."

¶ 8 B. Defendant's March 2011 Jury Trial

¶ 9 1. *The Victim's Testimony*

¶ 10 The victim, a 21-year-old female nursing student, testified she was walking down Sixth Street in Champaign, toward the Illini Union on the campus of the University of Illinois at approximately 10 a.m. on November 21, 2010. As she stood at the corner of Sixth and Green, in front of the Noodles & Company restaurant, a man (who was never identified) approached her by crossing over Sixth Street and said "he and his brother are looking for some food and they need money." She described him as "African-American, middle-aged, and gray coat, little bit [of] gray hair and medium build." He was wearing a black shirt, sweatshirt, and black pants. Another man, defendant, approached her from behind. She described defendant as wearing a "red shirt and black pants" and a navy sweatshirt. The unidentified man held in his right hand what appeared to the victim to be a gun beneath a brown fur hat. The victim could only see the barrel of the gun underneath the hat. She removed her backpack to get her wallet out. She handed the unidentified man her wallet "but he said [']I don't want a wallet, I just want your money, I don't want your credit cards.['] " She knew she had a \$20 bill in her wallet. She could not remember exactly what she gave the man but knew it was around \$40. The two men left together.

¶ 11 Champaign police took the victim to three different "showups." At the third, she identified defendant. She knew he was one of the robbers because "I could tell [by] the hat and

the clothes and everything[.]" In court, she was not able to positively identify defendant as one of the men who robbed her.

¶ 12 During cross-examination, the following exchange occurred between defense counsel and the victim:

"Q. Now, later you identified someone to the police who you said was the first person; is that correct?

A. Yes.

Q. Would it be correct to say that your identification of that person was primarily based on the fact that he had that hat?

A. Yeah. My eyesight is really bad, too, and we were kind of far. And he was wearing most of the clothing and everything as it was I saw, well, an hour ago who just pointed something at me, and the hat particularly because that was the main thing."

¶ 13 On re-cross-examination, the following exchange occurred between defense counsel and the victim:

"Q. Is it still your belief that the person you identified as taking part in the robbery was the person who you handed the money over to?

A. Yes."

¶ 14 *2. The Video Recordings*

¶ 15 Heidi Ponder, the fraud manager at Busey Bank, testified two automatic teller machines (ATM) containing video cameras are at the branch location at Sixth and Green Streets

in Champaign. One ATM faces Green Street and the other is on the corner. Both cameras were operating and properly recording on November 21, 2010. She is the only person responsible for making recordings from the surveillance system. She burned the video to a compact disc for police. The compact disc's content cannot be altered once it is burned. She testified she did not alter, delete, or add anything to the video recording when she made a copy for the police.

¶ 16 The State introduced 18 still photographs from the ATM recordings. The photographs are not time-stamped. The photographs from the Green Street ATM show two individuals crossing over Sixth Street. Defendant is wearing a brown fur hat, a dark jacket, and a hooded sweatshirt with an orange hood. He hands the second man, who is wearing tan pants and a dark shirt or jacket, the fur hat. The photographs from the corner ATM show the man holding the fur hat crossing over Sixth Street, and the robbery in progress.

¶ 17 When the State attempted to play the ATM recordings, the record reflects a recess was taken to resolve technical difficulties. The State informed the trial court "I am using a copy which does work but I can keep that together with the actual exhibit so the Court will have both." (The record on appeal contains two discs labeled as containing the ATM videos: a compact disc and a digital video disc.) The State played the video from the Green Street ATM. The assistant State's Attorney informed the court she started the video at 9:55:52 a.m. and stopped it at 10:05:36 a.m. The State then played the video from the corner ATM, which showed the robbery. The assistant State's Attorney informed the court she started the video at 10:05:30 a.m. and stopped it at 10:06:58 a.m.

¶ 18 Amara Godwin, a manager at the Colonial Pantry store on Fourth and Green Streets, testified she is responsible for making recordings from the cameras inside the store. The



¶ 22

#### 4. *The State's Closing Argument*

¶ 23

Before arguments, the trial court admonished the jury "final arguments are not evidence. If one of the attorneys inadvertently misstates the evidence, you should disregard the statement by the attorney and decide the case ultimately on your collective best recollection of the evidence as you actually heard it during the trial."

¶ 24

During closing argument, the State was summarizing the photographs from the corner ATM which depicted the robbery. The assistant State's Attorney stated: "They're standing all three right there (indicating) together. She takes her backpack off to get her wallet out that was in her backpack, hands it over to the man with the gun and then the men leave together towards Fourth Street where they're seen six to seven minutes later on the Colonial Pantry video."

¶ 25

#### 5. *The Jury Verdict & Sentencing*

¶ 26

The jury found defendant guilty of aggravated robbery and not guilty of armed robbery.

¶ 27

In April 2011, the trial court found defendant was eligible for Class X felony sentencing pursuant to section 5-4.5-95(b) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-4.5-95(b) (West 2010)) (providing for Class X felony sentencing where defendant has previously been convicted of two Class 2 or greater felonies) and committed this crime while on mandatory supervised release (MSR) for another felony offense (730 ILCS 5/5-5-3.2(a)(12) (West 2010)). The court sentenced defendant to 15 years' imprisonment.

¶ 28

On November 14, 2012, we affirmed defendant's sentence. *People v. Watson*, 2012 IL App (4th) 110424-U.

¶ 29

C. The Postconviction Petition Proceedings

¶ 30

In August 2011, defendant filed a *pro se* petition for postconviction relief. The trial court appointed counsel. In December 2011, counsel filed an amended postconviction petition. It alleged (1) trial counsel was ineffective for (a) not having sufficient contact with defendant prior to trial, (b) conducting an insufficient pretrial investigation, (c) failing to impeach the victim with an inconsistent statement, and (d) failing to object when the State misstated facts during closing argument; and (2) the 15-year prison sentence was excessive. In December 2011, the State filed a motion to dismiss. In March 2012, the trial court denied the State's motion.

¶ 31

In April 2012, the trial court held an evidentiary hearing. Officer Leibach testified he assisted in the robbery investigation and conducted three "showups" with the victim. She identified defendant at the third showup. The victim initially identified defendant as the individual who had the gun during the robbery. When defendant was arrested, Leibach collected a brown fur hat, a black hooded coat, and black overalls. He did not collect a red coat.

¶ 32

Defendant testified he met with Ortega, in person, twice while awaiting trial. He testified Ortega did not show him discovery or police reports. Ortega showed him a video with defendant and another male where defendant passes a hat to the other person. Defendant testified he requested counsel to investigate the existence of "videotapes." (He did not explain what videos he meant.) He stated he believed there was an issue with the fact the original ATM recording was not used at trial and a copy was used at trial. He denied being on Sixth and Green Streets and committing the crime. To explain his image in the video, he testified "someone put me there on the video." He questioned how someone would get his image and "put it on a copy of a tape."

¶ 33 Ortega testified he met with defendant in person "[a] handful of times," in jail "one or two times," "called him a few times," and "met with him in court a few times." He explained to defendant the discovery and "probably just read him the reports." He went over the physical evidence collected during the investigation, which included the hat and clothing. When Ortega first met with defendant, defendant said he was with another male on Sixth and Green and "the other guy got money from a woman" and defendant "didn't say anything to the woman." Then, "the next time I talked to him and at the time of trial, he was still insistent that he was not there at Sixth and Green." He testified he and defendant disagreed about the videos. Ortega testified defendant "was adamant that if I would subpoena a video at the Colonial Pantry, it would show him there. And that was supposedly at the exact time the robbery was occurring. And that he wanted me to subpoena that video. And I told him I wasn't going to subpoena that video, that I thought it was more likely it would hurt him in the case. But he went and contacted the police and told them about the video, and they subpoenaed it." Ortega testified nothing suggested the recordings had been altered.

¶ 34 Ortega explained he did not impeach the victim on her descriptions of the suspects because "the video kind of spoke for itself and the clothing that [defendant] was arrested wearing, kind of spoke for itself." It was obvious from the victim's testimony she was focused on the fur hat when she identified the suspect who pointed the gun. Ortega admitted he did not object to the State's statement during closing argument the victim handed her wallet to the man with the gun rather than handing her money out of her wallet to the man with the gun.

¶ 35 On cross-examination, Ortega testified he contacted two stores near the robbery location to determine if they had video recordings. They did not. To his knowledge, the video

from Busey Bank was the only video available.

¶ 36 The trial court acknowledged it held two *Krankel* hearings prior to trial and defendant's complaints about the video recordings were discussed at those hearings. It found defendant had not indicated (1) how the videos were altered, (2) what additional witnesses would have testified to, (3) where additional video evidence would have come from, (4) what it would have revealed, or (5) it would have caused a different result. The court found there was no indication or evidence the ATM video recordings were altered to superimpose defendant's image. The court concluded it was a matter of trial strategy as to how much counsel should have cross-examined the victim about her identification. The court stated trial counsel "could have conducted a [television] style or movie style slashing cross-examination of the victim, but to establish what? The misidentification was already established. \*\*\* [Harsh examination of an] innocent victim of a terrifying crime, would have been considered ["]piling on["] by the jurors and perhaps been considered unfavorably by them." As to the State's closing argument, the court found this was a strategic decision and any error was cured by the jury instruction final arguments are not evidence.

¶ 37 This appeal followed.

¶ 38 On April 30, 2013, OSAD moved to withdraw as appellate counsel, including in its motion a brief in conformity with the requirements of *Pennsylvania v. Finley*, 481 U.S. 551 (1987). The record shows service of the motion on defendant. On its own motion, this court granted defendant leave to file additional points and authorities by May 31, 2013. Defendant did so and the State filed a brief in support of OSAD's motion. After examining the record and executing our duties in accordance with *Finley*, we grant OSAD's motion and affirm the trial

court's judgment.

¶ 39

## II. ANALYSIS

¶ 40

### A. Standard of Review

¶ 41

The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2012)) provides a method for criminal defendants to assert their convictions were the result of a substantial denial of their constitutional rights. *People v. Hodges*, 234 Ill. 2d 1, 9, 912 N.E.2d 1204, 1208 (2009). The Act allows for postconviction relief through a three-stage procedure. *Id.* at 10, 912 N.E.2d at 1208. At the first stage, the trial court must, within 90 days of the petition's filing, independently review the postconviction petition and determine whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2012). If the trial court does not dismiss the postconviction petition as frivolous or patently without merit, then the petition advances to the second stage. Counsel is appointed to represent the defendant, if necessary (725 ILCS 5/122-4 (West 2012)), and the State is allowed to file responsive pleadings (725 ILCS 5/122-5 (West 2012)). At this stage, the circuit court must determine whether the petition and any accompanying documentation make a "substantial showing of a constitutional violation." *People v. Domagala*, 2013 IL 113688, ¶ 33, 987 N.E.2d 767 (quoting *People v. Edwards*, 197 Ill. 2d 239, 246, 757 N.E.2d 442, 446 (2001)). If a substantial showing of a constitutional violation is set forth, then the petition advances to the third stage, where the trial court conducts an evidentiary hearing. 725 ILCS 5/122-6 (West 2012). "When a petition is advanced to a third-stage, evidentiary hearing, where fact-finding and credibility determinations are involved, we will not reverse a circuit court's decision unless it is manifestly erroneous." *People v. Pendleton*, 223 Ill. 2d 458, 473, 861 N.E.2d 999, 1008 (2006).

¶ 42 B. Defendant's Ineffective Assistance of Counsel Claims

¶ 43 1. The *Strickland* Standard

¶ 44 Ineffective assistance of counsel claims are reviewed under the two-pronged standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To establish ineffective assistance of counsel, a defendant must demonstrate (1) "his defense counsel's performance was deficient in that 'counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment' "; and (2) "but for defense counsel's deficient performance, the result of the proceeding would have been different." *People v. Coleman*, 183 Ill. 2d 366, 397, 701 N.E.2d 1063, 1079 (1998) (quoting *Strickland*, 466 U.S. at 687, 694.). To satisfy the first prong, "a defendant must overcome the strong presumption that the challenged action or inaction of counsel was the product of sound trial strategy and not of incompetence." *Id.* A court "may resolve ineffectiveness claims under the two-part *Strickland* test by reaching only the prejudice component, for lack of prejudice renders irrelevant the issue of counsel's performance." *Id.* at 397-98, 701 N.E.2d at 1079.

¶ 45 We note defendant's arguments often blur between arguing ineffective assistance of counsel and the evidence does not support his conviction. This court's role is not to reconsider the evidence and we reject any suggestion we should independently evaluate the evidence. See *People v. Washington*, 2012 IL 110283, ¶ 60, 962 N.E.2d 902 ("It is the jury's function to weigh the evidence, assess the credibility of the witnesses, resolve conflicts in the evidence, and draw reasonable inferences therefrom.").

¶ 46 2. *Counsel's Pretrial Contact With Defendant*

¶ 47 Defendant asserts trial counsel did not have sufficient pretrial contact with him

and he did not have enough information about his case to make a fully informed decision about how to proceed. Defendant does not indicate what additional information could have been provided or how additional contact would have been outcome-determinative. See *People v. Johnson*, 372 Ill. App. 3d 772, 777, 867 N.E.2d 49, 53 (2007). At the evidentiary hearing, trial counsel testified he met with defendant in person at the county jail and in court, talked to him by telephone, and reviewed discovery material and the videos with defendant. We note at the February 2011 *Krankel* hearing, defendant informed the trial court *he* was not providing counsel with "the very basic information that an attorney would need to represent" him effectively. Defendant has not made a substantial showing of prejudice as a result of defense counsel's pretrial contact.

¶ 48 *3. Counsel's Investigation of the Videos*

¶ 49 Defendant appears to contend trial counsel was ineffective for not (1) subpoenaing the Colonial Pantry video recording, (2) investigating whether the Busey Bank ATM video was altered to insert his image into the video, and (3) objecting when the State used a "handmade" video recording at his trial which was not as effective as the original and did not indicate the time or date of the recording. Defendant is unclear what he means by "handmade" video and whether this refers to the physical copy used by the State, or his allegation the video was fabricated. Regardless, defendant's contentions are unpersuasive.

¶ 50 Defendant's disagreement with trial counsel about the Colonial Pantry video recording was examined at the February 2011 *Krankel* hearing. At both the *Krankel* hearing and the postconviction hearing, counsel testified he believed the video did not benefit defendant's defense. Defendant contacted Colonial Pantry and the store turned the recording over to

Champaign police. At trial, the State presented this video to show defendant—who was wearing the fur hat—was just two blocks from the scene of the robbery approximately 10 minutes after it occurred. Defendant does not indicate how the Colonial Pantry video assists his defense, counsel's strategic decision to not procure this video was unreasonable, or how he was prejudiced by counsel's decision. See *Strickland*, 466 U.S. at 691 ("counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary" and "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments"). We reject his claim trial counsel was ineffective for not subpoenaing the Colonial Pantry video recording.

¶ 51 Defendant's contentions about the Busey Bank ATM video recordings are without merit. At trial, the State had technical difficulties playing the Busey Bank ATM video recordings. The State initially attempted to play the recordings, which were written to a compact disc, but actually played the recordings written on a digital video disc. The State informed the court of the time it played the two ATM videos (we note the full recordings are approximately 2 1/2 hours). At the evidentiary hearing, trial counsel testified there was nothing to suggest the video had been altered in any way. Defendant provided no evidence how the recordings could have been altered, what—other than his appearance in the video—suggested it had been altered or fabricated, who altered the video, how the content of the two discs are different, or how the time provided by the State was incorrect. Defendant only offered his bare assertion his image was inserted into the video or a "handmade" video was made. Defendant relies on supposition rather than evidence in asserting the State's use of a digital video disc containing the ATM videos was objectionable. See Ill. R. Evid. 1003 (eff. Jan. 1, 2011) (admissibility of duplicates). In

short, defendant has provided no evidence to indicate the ATM videos were altered, fabricated, tampered with, or the recording on the compact disc was in any way different from the recording on the digital video disc. The trial court's findings the ATM videos were not altered are not against the manifest weight of the evidence.

¶ 52 *4. Counsel's Impeachment of the Victim*

¶ 53 Defendant asserts trial counsel did not properly impeach the victim with statements she initially made to Officer Leibach, namely, (1) her improper identification of defendant as the individual who was holding the gun and fur hat during the robbery, and (2) her description of the money contained in the police report.

¶ 54 In determining whether trial counsel's cross-examination of a witness constituted ineffective assistance of counsel, our supreme court has stated, "Generally, the decision whether or not to cross-examine or impeach a witness is a matter of trial strategy which will not support a claim of ineffective assistance of counsel. [Citation.] The manner in which to cross-examine a particular witness involves the exercise of professional judgment which is entitled to substantial deference from a reviewing court. Defendant can only prevail on an ineffectiveness claim by showing that counsel's approach to cross-examination was objectively unreasonable." *People v. Pecoraro*, 175 Ill. 2d 294, 326-27, 677 N.E.2d 875, 891 (1997).

¶ 55 During her testimony, the victim could not positively identify defendant as one of the men who robbed her. During cross-examination, the victim admitted she initially identified defendant as the individual brandishing the gun and to whom she handed the money, and her identification was influenced by the fact defendant was wearing the same fur hat as used in the robbery. As the trial court pointed out, counsel could have berated the victim with her

misidentification of defendant but the misidentification had been established—by defense counsel. During her testimony, the victim described one of the robbers as wearing a "red shirt" and could only remember she handed over a \$20 bill and approximately \$40 in cash. Defendant contends she told Officer Leibach one of the suspects was wearing a "red coat" and she handed over one \$20 bill, two \$10 bills, and an unknown amount of \$5 bills. During the postconviction hearing, counsel explained he believed nothing would be accomplished by impeaching the victim with her statements. Again, counsel could have berated the victim on these slight differences, but it was counsel's exercise of his professional judgment in determining such a line of questioning would be imprudent. Defendant has failed to make a substantial showing of prejudice as a result of counsel's choice to limit his questioning of the victim's identification of defendant and her statements contained in the police report.

¶ 56 *5. Counsel's Failure To Object During Closing Argument*

¶ 57 Defendant asserts trial counsel was ineffective for failing to object to the State's closing argument. Defendant contends counsel should have objected to the State's characterization the victim handed over her wallet, rather than cash.

¶ 58 At trial, the victim testified she first handed her wallet over, but it was rejected, as the man with the gun only wanted cash. She then removed the cash and handed the cash over. The State made the complained-of comment while summarizing the still photographs taken from the ATM recordings. See *People v. Glasper*, 234 Ill. 2d 173, 204, 917 N.E.2d 401, 419 (2009) (The State "has wide latitude in making a closing argument and is permitted to comment on the evidence and any fair, reasonable inferences it yields."). When viewed in context and in light of the victim's testimony, the State's statement the victim handed her wallet over to the man with the

gun is merely a summarization of the evidence. See *Id.*, 917 N.E.2d at 420 ("A closing argument must be viewed in its entirety, and the challenged remarks must be viewed in their context."). The trial court admonished the jury the parties' arguments were not to be considered evidence and they should rely on the evidence as presented during the trial. See Illinois Pattern Jury Instructions, Criminal, No. 1.03 (4th ed. 2000). Considering the nature of closing argument, the jury instruction, and the minor omission for summarization purposes, we disagree with defendant's contention this statement was improper or objectionable. Regardless, defendant does not offer how he was prejudiced by defense counsel's decision not to object, or how the outcome would have been different.

¶ 59                    6. *Defendant's Claim About Detective Morris's Testimony*

¶ 60                    In his July 16, 2013, filing with this court, defendant asserts trial and appellate counsel were ineffective for "not objecting to the use of perjured testimony from Officer Rob Morris where he testified that the two men walked into an all[e]y." At trial, the State questioned Detective Morris if it was possible for defendant to avoid walking in front of the ATM cameras to return to the corner of Green and Sixth Streets. Morris testified there is an alley near the Busey Bank and it would have been possible for defendant to use the alley to avoid being seen by the ATM cameras. Defendant provides no explanation how this testimony is perjury. Further, defendant did not raise this issue before the trial court in his postconviction petition. We decline to consider defendant's claim for the first time on appeal. See *Lazenby v. Mark's Construction Inc.*, 236 Ill. 2d 83, 92, 923 N.E.2d 735, 741 (2010) (issues not raised before the trial court are forfeited).

¶ 61                    C. *Defendant's Sentencing Claim*

¶ 62 Defendant summarily contends his sentence violates the proportionate penalty and due process clauses of the United States and Illinois constitutions "by being cruel and unusual" and being "plainly excessive." Defendant does not articulate how his sentence violates the proportionate penalty clause of the Illinois constitution (see *People v. Sharpe*, 216 Ill. 2d 481, 521-23, 839 N.E.2d 492, 517-18 (2005) (summarizing acceptable proportionate penalties clause challenges)), or how his sentence violates the due process clause of either the United States or Illinois constitutions. It is not the burden of this court to bear defendant's arguments for him. See *People v. Snow*, 2012 IL App (4th) 110415, ¶ 32, 964 N.E.2d 1139.

¶ 63 In defendant's previous appeal, this court was called upon to determine whether the trial court properly imposed a 15-year prison sentence. *Watson*, 2012 IL App (4th) 110424-U, ¶¶ 8-20. This court concluded defendant was eligible for enhanced Class X felony sentencing pursuant to section 5-4.5-95(b) of the Unified Code because of his 1981 and 1991 convictions and the trial court properly sentenced him to a sentence within the Class X sentencing range. *Id.* ¶19. Defendant previously argued he received an improper sentence in his direct appeal and we need not reconsider his sentence in a postconviction petition. See *People v. Blair*, 215 Ill. 2d 427, 443, 831 N.E.2d 604, 615 (2005) ("The doctrine of *res judicata* bars consideration of issues that were previously raised and decided on direct appeal.").

¶ 64 D. Defendant's *Brady* Violation Claim

¶ 65 In his July 16, 2013, filing with this court, defendant contends he was denied due process "where the prosecution suppressed evidence by not allowing the original (exhibit 1) [(ATM recording)] and police report in petitioner's trial" in violation of *Brady v. Maryland*, 373 U.S. 83, 87 (1963). "A *Brady* claim requires a showing that: (1) the undisclosed evidence is

favorable to the accused because it is either exculpatory or impeaching; (2) the evidence was suppressed by the State either wilfully or inadvertently; and (3) the accused was prejudiced because the evidence is material to guilt or punishment." *People v. Beaman*, 229 Ill. 2d 56, 73-74, 890 N.E.2d 500, 510 (2008). Defendant did not raise this issue before the trial court in his postconviction petition and the trial court did not hear evidence on this *Brady* claim. We decline to consider this argument presented for the first time on appeal. See *Lazenby*, 236 Ill. 2d at 92, 923 N.E.2d at 741 (issues not raised before the trial court are forfeited).

¶ 66

### III. CONCLUSION

¶ 67 We grant OSAD's motion to withdraw as appellate counsel and 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. 55 ILCS 5/4-2002(a) (West 2012).

¶ 68 Affirmed.