

basis presented in support of the plea agreement was that: (1) the victim, who was the defendant's 12-year-old stepdaughter, would testify that the defendant sexually assaulted her at the family's home; (2) the defendant confessed to police that he had sex with the victim in exchange for purchasing for her some roller blades she wanted; (3) a friend of the victim gave a written statement to police wherein the friend claimed the victim had told the friend about the assault; (4) the victim's mother gave a statement to police wherein the mother claimed the victim had told the mother about the assault; (5) the victim claimed that sheets taken from her bed contained ejaculate from the defendant; (6) the victim hid the sheets in her closet, then turned them over to police, who sent them to a crime lab; and (7) the crime lab confirmed the presence of semen on the sheets, but that no testing to confirm the identity of the donor of the semen had been done, and, pursuant to the plea agreement, none would be done. Prior to the presentation of the factual basis, counsel for the defendant acknowledged that the DNA evidence from the sheets did not identify the defendant as the donor of the semen, and stated that "[p]ending the additional charges," the defendant was nevertheless willing to accept the plea agreement.

¶ 5 On October 28, 2010, the defendant filed a petition for postconviction relief. On May 19, 2011, he filed *pro se* an amended postconviction petition. Counsel was appointed for the defendant, and an evidentiary hearing was held on the amended petition on January 12, 2012. At the conclusion of the hearing, the judge stated that he did not find the defendant to be a credible witness and that "there was no substantial denial of any constitutional right shown." He noted as well that a sufficient factual basis for the plea agreement existed, even "excluding the DNA evidence." With regard to the DNA evidence, he added that the fact that the DNA testing showed that the semen on the sheet did not come from the defendant "was not dispositive evidence *** one way or the other as it related to the actual innocence claim" raised in the amended petition, and that no DNA testing linked the victim to the sheet

either, leaving the judge to conclude that because the semen was found on "an external object," it "could've been put there in any situation, of the individual's sleeping there, being there innocently[,] or other people involved." He noted that the defendant had always denied that the semen on the sheet was his, and thus was not prejudiced in any way when it was determined that the semen was not his. The judge denied the defendant's petition, and this timely appeal followed.

¶ 6

ANALYSIS

¶ 7 When a trial court issues a ruling on a postconviction petition following an evidentiary hearing, that ruling "will not be disturbed unless it is manifestly erroneous." *People v. Coleman*, 206 Ill. 2d 261, 277 (2002). Manifest error is error that is "clearly evident, plain, and indisputable." *Id.* (quoting *People v. Ruiz*, 177 Ill. 2d 368, 384-85 (1997)). On appeal in the case at bar, the defendant contends that the trial court's denial of his postconviction petition was manifestly erroneous because, according to the defendant, he has been exonerated by DNA evidence. We note as an initial matter that after the defendant filed his opening brief in this case, the State filed a motion to strike the appendix to that brief, claiming that the "false confession" materials contained therein had not been presented to, or argued before, the trial court, and were not the sort of materials of which this court should take judicial notice. We ordered the State's motion to be taken with the case, and hereby deny it. That said, we do not find the "false confession" materials to be either relevant or persuasive. The defendant contends we should consider the materials, and thus find that in this case there was a "false confession," because the defendant has been "exonerated by the power of objective scientific evidence" which therefore calls into question the validity of his confession. The defendant's exoneration argument hinges upon his premise that "the facts asserted by the State which would make [the defendant] guilty of the offense cannot be true," because the State claimed that it had in its possession the sheet upon which the defendant

ejaculated when he assaulted the victim, and yet DNA testing proved that the ejaculate on the sheet did not come from the defendant, but instead came from the victim's stepbrother, who sometimes stayed at the residence in question. Therefore, according to the defendant's theory of the case, the victim "was wrong when she identified" the defendant as the person who assaulted her.

¶ 8 There are a number of problems with the defendant's theory. First, it is simply not accurate, as a factual matter, to claim, as the defendant does, that the absence of the defendant's ejaculate on the sheets submitted for testing means that "the facts asserted by the State which would make [the defendant] guilty of the offense cannot be true." Contrary to the defendant's assertion, the State, in the factual basis it presented to the trial court, never claimed that the sheets contained the defendant's ejaculate; instead, as detailed above, the State represented that the victim claimed that sheets taken from her bed contained ejaculate from the defendant, that the victim had turned the sheets over to police, who had sent them to a crime lab, and that although the crime lab had confirmed the presence of semen on the sheets, no testing to confirm the identity of the donor of the semen had been done, and, pursuant to the plea agreement, none would be done. Accordingly, with regard to the ejaculate on the sheets, the State's factual basis clearly and unequivocally stated that the claim of the victim had not been verified by scientific testing, and was only that: an unsubstantiated claim, not a fact upon which the plea agreement was based.

¶ 9 Nor, as a factual matter, does the absence of the defendant's ejaculate on the sheets mean that he did not sexually assault the victim in the manner she described. In his first interview with police, the defendant stated that he did all the laundry in the residence and that the residence was often so messy that he could not tell which laundry was clean and which dirty. Police reports submitted by the defendant in support of his amended postconviction petition indicate that: (1) the victim stated that the first sexual assault of her by the defendant,

which is the assault involving the sheets, occurred between approximately January 21, 2008, and February 5, 2008, when her mother was incarcerated in the county jail; and (2) the sheets were not turned over to police until May 2008, when the assault to which the defendant pled guilty, and the other alleged assaults, were reported. Thus, as the trial judge surmised, the semen found on the sheets "could've been put there in any situation, of the individual's sleeping there, being there innocently[,] or other people involved." Indeed, any number of scenarios could explain the absence of the defendant's semen on the sheets, and the presence of the semen of someone else who sometimes resided in the often messy, chaotic residence, especially when it is considered that the defendant did all the laundry in the residence, and that several months passed between the time of the assault and the time the sheets were given to police. Accordingly, as a factual matter, the absence of the defendant's ejaculate on the sheets does not, by any stretch of the imagination, exonerate him of the crime to which he pled guilty, and his due process argument, premised on innocence by exoneration, fails.

¶ 10 Moreover, once the defendant's exoneration theory has been rejected, there is nothing left to support the notion that the defendant's confession was a false one. The defendant points to nothing about the factual circumstances surrounding his confession that would invalidate that confession, and cites no case law from which one could conclude that the confession was anything but free, willing, and voluntary. Accordingly, the defendant has waived consideration of any argument that his confession was not voluntary. See Ill. S. Ct. R. 341(h)(7) (eff. Mar. 16, 2007) (argument must contain the contentions of the appellant, the reasons therefor, and the citation of authorities; points not argued in an opening brief are forfeited and shall not be raised in the reply brief, in oral argument, or in a petition for a rehearing).

¶ 11 Waiver notwithstanding, we have thoroughly reviewed the DVD recordings of the defendant's two interviews with investigators. It is patently clear from those recordings that

the defendant was operating freely and voluntarily at all times during the interviews. In the first interview, which lasted approximately three hours and was conducted on May 21, 2008, the defendant is relaxed, and presents himself as intelligent and articulate; he interacts with the participants on a first-name basis; when he indicates that he needs to use the restroom, the officers instantly respond and point him to the restroom down the hallway, not even bothering to go with him to ensure he returns; finally, at one point during the interview, both officers leave the room for approximately 10 minutes, during which time the defendant is left alone with an employee of the Department of Children and Family Services (DCFS), who pointedly tells the defendant that she has no police authority as they fill out DCFS paperwork together. When the first interview concludes, the defendant tells officers to call him if a warrant is issued, and that he will turn himself in. In the second interview, which lasted approximately one hour and was conducted on June 16, 2008, the tone is again cordial, with the participants again interacting on a first-name basis and with the defendant stating that he has "full knowledge" of what he is doing in the interview. Put simply, any claim that the defendant's confession was anything but voluntary would be utterly without merit.

¶ 12 In his briefs on appeal, the defendant raises a second issue for this court to consider: whether his sentence is void because there was no presentence investigation (PSI) and, the defendant claims, no proper finding on the record of the defendant's full criminal history. At oral argument, however, counsel for the defendant stated that he wished to withdraw from this court's consideration that issue, and to move forward only on the issue discussed above. Having examined the second issue and the relevant case law surrounding it, we agree with counsel for the defendant that the issue is without merit, and that the defendant could not prevail on that issue under any set of circumstances. Accordingly, we allow the defendant to withdraw the issue, and we shall consider it no further.

¶ 13

CONCLUSION

¶ 14 For the foregoing reasons, we affirm the denial of the defendant's amended postconviction petition.

¶ 15 Affirmed.