2017 IL App (2d) 150744-U
No. 2-15-0744
Order filed March 31, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiff-Appellee,	)	
v.	)	No. 06-CF-4324
PETER GAKUBA,	)	Honorable John R. Truitt,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE HUDSON delivered the judgment of the court.
Justices Hutchinson and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Evidence that police learned defendant's name and birth date through routine booking process was properly admitted as it was ascertained independently from any illegally obtained evidence; (2) trial court did not err in granting State's motion to obtain a new buccal swab of defendant pursuant to Illinois Supreme Court Rule 413 after initial buccal swab was suppressed; (3) defendant's challenge to the sufficiency of the evidence was not persuasive; (4) trial court did not err in denying defendant's request to proceed *pro se* made less than a month before trial was scheduled to begin where defendant had engaged in a pattern of delay tactics; (5) trial court did not err in denying defendant's motions to disqualify the assistant State's Attorney from the case; (6) the denial of defendant's motions to substitute judges for cause were proper; and (7) trial court did not abuse its discretion in either sentencing defendant to a term of four years' imprisonment on each of his three convictions or ordering the sentences to run consecutively.

¶ 2 Following a jury trial in the circuit court of Winnebago County, defendant, Peter Gakuba, was convicted of three counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(d) (West 2006)). The trial court sentenced defendant to four years' imprisonment on each count with the sentences to run consecutively. Defendant appeals *pro se*, alleging that a variety of errors occurred during his trial and at sentencing. For the reasons set forth below, we affirm.

¶ 3 I. BACKGROUND

¶ 4 On November 4, 2006, J.S. and K.S. reported to the Rockton police department that M.S., their 14-year-old son, was missing. After M.S. was located, he was interviewed by the Rockton police. M.S. initially told the officers that he spent the night alone. He later conceded that he had spent the night at a hotel in Rockford with a man named "Phil" whom he had met online. M.S. denied having any sexual contact with Phil. The Rockton police department contacted the Illinois State Police to assist in the investigation.

¶ 5 After being briefed about the situation, Sergeant Charles O'Brien and Detective Daniel Balsley of the Illinois State Police spoke to M.S. and prepared reports of the encounter. M.S. told the officers that during his contact online, Phil described himself as an 18-year-old self-employed businessman who was going to be in the Rockford area on business. At approximately 4 p.m. on November 3, 2006, M.S. called Phil to give him directions to M.S.'s neighborhood. M.S. then left his home with his mother's cell phone and $30 in cash. Phil picked up M.S. around the corner from his home in a silver sedan. M.S. told the officers that Phil did not appear to be 18 years old and he did not resemble a photograph posted online. Phil took M.S. to several stores in Rockford to look at video games and to a room at the Marriott Courtyard hotel. M.S. drew a diagram of the room's location. Phil then took M.S. to a Hollywood Video store, where they rented five movies, and to a restaurant for food.

¶ 6 M.S. told O'Brien and Balsley that upon returning to the hotel, he and Phil watched a movie on Phil's laptop. After the movie, Phil began masturbating and then undressed both himself and M.S. Phil then "touched" M.S. and had M.S. perform oral sex on him. Phil ejaculated in M.S.'s mouth. Phil then had anal intercourse with M.S. M.S. reported that Phil also performed oral sex on him. M.S. reported that the incident lasted about 30 minutes. M.S. stated that he and Phil slept in the same bed together, clothed, and that Phil never threatened him. The next morning, Phil took M.S. to Denny's for breakfast. While at Denny's, Phil received a phone call from the Rockton police department asking him about M.S. being a runaway.[1] Phil then dropped off M.S. at a bowling alley in South Beloit.

¶ 7 After concluding the interview with M.S., O'Brien and Balsley advised J.S. and K.S. that M.S. would have to be taken to a hospital to have a sexual assault kit administered. O'Brien then went to the Marriott Courtyard hotel in Rockford, where he spoke with the evening desk clerk, Tanea Tennin. Upon talking with Tennin, O'Brien was able to determine that the room described by M.S. was room 101. Tennin checked the registration entries and reported that room 101 had been booked through Travelocity by a Peter Gakuba on November 3, 2006, with a check-out date of November 5, 2006. O'Brien went to the area where room 101 is located and noted that it was adjacent to an exit door. O'Brien observed a silver, four-door Ford Taurus in the first parking stall outside the exit door. O'Brien conducted a license check of the vehicle and learned that it was registered to PV Holding Corporation in Chicago.

¶ 8 O'Brien then spoke by telephone to Merlin Peacey, a manger for a Hollywood Video store in Loves Park. Peacey told O'Brien that an individual named Peter Gakuba had rented six

[1] The manner in which the police obtained defendant's telephone number was explained at defendant's trial, as set forth below.

movies from the store on November 3, 2006. Peacey noted that Gakuba's account was registered to an address in Maryland. Thereafter, O'Brien returned to the hotel where he, Master Sergeant Easton, and the assistant manager of the hotel went to room 101. The assistant manager knocked on the door, identified himself, and asked the occupant to come to the door. The occupant, who was later determined to be defendant, asked what he wanted. The assistant manager replied that he needed to talk to him. Defendant did not answer the door, so O'Brien knocked on the door, identified himself as a police officer, and asked defendant to open the door. Defendant did not respond, so O'Brien used a hotel master key to open the door. Upon entering the room, O'Brien and Easton identified themselves as police officers. Defendant was standing next to a desk. There was a laptop computer nearby that was in the process of shutting down. The officers informed defendant that they were conducting an investigation which required him to come to their office. Defendant asked if he was under arrest. O'Brien told defendant that he was not, but that he "had no option to decline." Prior to leaving, defendant asked if "this was something he needed an attorney for." O'Brien responded that that decision was up to defendant. Defendant was placed in a squad car and transported by another trooper to the Illinois State Police facility in Rockford. The only personal item taken from the room was defendant's New York driver's license.

¶ 9 Upon arriving at the police facility, defendant was placed in an interview room. At 7:55 p.m. on November 4, 2006, O'Brien, in the presence of Easton, read defendant his constitutional rights from the Illinois State Police constitutional rights and waiver form. Defendant indicated that he understood his rights. Defendant placed his initials next to each right and signed the waiver form. Defendant did not ask for an attorney. Defendant initially denied that anyone spent the previous night in his hotel room. He later acknowledged that he had met M.S. online

and that M.S. had spent the night in the hotel room. Defendant stated that he met with M.S. to obtain drugs. Defendant explained that he meets many people online and makes contact with them when he travels to obtain marijuana and crystal methamphetamine. However, defendant later stated that if he was involved in drugs he would not be able to be in his line of work (a hedge fund investor). When asked if he had any sexual contact with M.S., defendant replied either "no" or "no comment." Defendant was asked if "no comment" meant "yes" since he had used the phrase several times during the interview. Defendant responded by stating, "if I say yes," and then picking up the waiver form and pointing to the second warning, "anything you say can be used against you in court and other proceedings." The interview concluded at 8:55 p.m. Defendant was subsequently charged by criminal complaint with two counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(d) (West 2006)). Defendant's bond was set at $250,000. Defendant posted bond and was released from custody. The bond was subject to various conditions, although defendant was allowed to reside outside of Illinois.

¶ 10 Meanwhile, in the early morning hours of November 5, 2006, O'Brien filed complaints for a search warrant of room 101 at the Marriott Courtyard hotel in Rockford and of the Ford Taurus located in the hotel's parking lot. In the affidavits filed in support of the search warrants, O'Brien asserted that M.S. stated that it was "Peter 'Phil' Gakuba" who assaulted him in Room 101 of the Marriott Courtyard hotel in Rockford on November 4, 2006. As part of the search warrant for the hotel room, O'Brien also requested permission to search and seize the laptop computer observed in the hotel room. Shortly before 2:00 a.m. on November 5, 2006, the circuit court of Winnebago County granted permission to execute the search warrants. On November 6, 2006, O'Brien filed a complaint for a seizure warrant requesting that a blood or buccal sample be taken from defendant. In the affidavit filed in support of the seizure warrant, O'Brien also stated

that M.S. reported that "Peter 'Phil' Gakuba" assaulted him in room 101 of the Marriott Courtyard hotel in Rockford on November 3, 2006. At 11:20 a.m. on November 6, 2006, the circuit court of Winnebago County granted permission to seize blood and a buccal swab sample from defendant. The seizure warrant was executed the same day, with a buccal swab collection from defendant's mouth area.

¶ 11 On December 20, 2006, defendant was charged by indictment with three counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(d) (West 2006)). Each count alleged that on or about November 3, 2006, defendant "committed an act of sexual penetration with [M.S.] (D.O.B. 1-25-92), who was at least 13 years of age but under 17 years of age when the act was committed *** and that the defendant was at least 5 years older than [M.S.]" However, the act of sexual penetration described in each count differed. Count I alleged that defendant "knowingly placed his penis in the mouth of [M.S.]," count II alleged that defendant "knowingly placed his penis in the anus of [M.S.]," and count III alleged that defendant "knowingly placed his mouth on the penis of [M.S.]" Defendant initially retained attorney Debra Schafer to represent him. Assistant State's Attorney Kate Kurtz was assigned to prosecute the case. The case was eventually placed on the docket of Judge John Truitt.

¶ 12 Defendant's trial did not commence until April 27, 2015, almost nine years after he was taken into custody. During the intervening time, Schafer filed several pretrial motions. She moved to suppress statements defendant made to police in his hotel room and later at the police station. In support of the motion, Schafer argued, among other things, that the officers who interrogated defendant failed to provide him *Miranda* warnings, that the officers disregarded defendant's request to remain silent, and that defendant's statements were not voluntary. The court denied the motion. Schafer also filed: (1) a motion to quash defendant's arrest and

suppress physical evidence seized from defendant's hotel room on November 4, 2006; (2) a motion to quash the search warrant and suppress physical evidence seized from defendant's rental car (the Ford Taurus); and (3) a motion to quash the search warrant and suppress evidence seized from defendant's hotel room. Finding that there was probable cause to believe that a crime had been committed, the trial court denied the motion to quash defendant's arrest and suppress physical evidence. The court also denied defendant's motion to quash the search warrant and suppress physical evidence taken from the hotel room. However, the court granted the motion to quash the search warrant and suppress physical evidence taken from the rental car on the basis that the search warrant failed to describe the items to be seized.

¶ 13 After several continuances, the trial was scheduled to begin on September 20, 2010. On that date, however, Schafer moved to continue the matter. The request for a continuance was premised on defendant's representation that he conducted an investigation and had discovered information that allegedly showed that M.S. was posting personal ads on Craigslist and other sites seeking an older male companion. Schafer indicated that she did not think the individual posting the ads was M.S. However, defendant insisted that the individual who posted the ads "had a story which was too similar to the alleged victim not to be him." Defense counsel requested the continuance to allow defendant to issue a subpoena for the material at issue. The State objected to the continuance. The State argued that the evidence did not appear to be related to M.S., but that regardless, information relating to M.S.'s purported actions years after the offenses were committed lacked relevance and that any sexual history would be barred by the Rape Shield Act (725 ILCS 5/115-7 (West 2010)). The court denied the motion to continue, finding the information was not relevant and that, in any event, it would not be admissible. At

that point, defendant produced a *pro se* motion entitled "Motion for Continuance & Motion for Substitution of Counsel by Reason of Ineffective Counsel."

¶ 14 In his motion, defendant argued, *inter alia*, that Schafer had failed to conduct discovery, refused to conduct independent forensic testing of the hard drive of defendant's computer and M.S.'s computer, and failed to adequately prepare for trial. Defendant also referenced the availability of an affirmative defense and suggested that certain witnesses should have been subpoenaed for trial. Upon questioning from the trial court, however, defendant could neither identify a specific affirmative defense nor suggest what the purported witnesses would testify to. Moreover, Schafer opined that the witnesses defendant referenced would not be helpful. Schafer also indicated that she considered a search of the computer drives a "fishing expedition." According to Schafer, defendant wanted things his way or not at all. In response to defendant's allegations, Schafer moved to withdraw from the case.

¶ 15 The court denied defendant's motion, finding that the allegations contained therein lacked merit. The court also opined that defendant's motion was brought as a delay tactic. The court stated that defendant "sandbagged" the court and his attorney by waiting to file his motion until the court denied his attorney's motion to continue. Nevertheless, the court granted Schafer's motion to withdraw.

¶ 16 Thereafter, defendant retained new counsel, Beau Brindley and Michael Thompson. On January 11, 2011, they filed a document entitled "Consolidated Motions to Supress [*sic*] Statements and Evidence Pursuant to Previously Uncited Authority." In the motion, defendant's attorneys argued that: (1) the law enforcement officers' initial entry into defendant's hotel room on November 4, 2006, constituted an illegal and unreasonable entry in violation of his fourth amendment rights; (2) any inculpatory statements made by defendant on November 4, 2006,

were a direct result of the illegal entry into his hotel room and must be suppressed; and (3) evidence obtained pursuant to the search and seizure warrants, including the contents of defendant's hotel room, his computer, and the buccal swab, must be suppressed pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), because the affidavits in support of the warrants contained false statements and material omissions. Over the State's objection, the court allowed the motion to the extent it raised new grounds not litigated in any of defendant's prior motions.

¶ 17 Initially, the trial court denied defendant's request for a *Franks* hearing. In its ruling, the court acknowledged that the affidavits in support of the search warrants incorrectly indicate that M.S. used defendant's name. However, the court stated that "any false, misleading statements referring to Peter Gakuba are cleared up by the interview of [defendant]." At a subsequent hearing, however, the court granted defendant's motion to suppress statements. In making its ruling, the trial court stated that there was probable cause to arrest defendant based on information provided by M.S. as well as the investigation which corroborated much of M.S.'s statement to police. Indeed, the court found that the police engaged in "good police work" in attempting to corroborate the information provided by M.S. Nevertheless, the court rejected the reasons stated by O'Brien at the hearing for entering the hotel room (exigent circumstances, risk of flight, and destruction of evidence) and granted the motion to suppress statements, finding that the police should have obtained a warrant prior to entering defendant's hotel room.

¶ 18 Following the court's ruling, defense counsel asked the court to reconsider its ruling on the motion to quash the warrants. Defense counsel noted that the court denied defendant's request for a *Franks* hearing because, even if the allegedly false statements in O'Brien's affidavits in support of the search warrants were omitted, the warrant was salvaged by defendant's statements to police. Defense counsel asserted that because the court ruled that

defendant's statements were illegally obtained and cannot be used, there was "nothing left" to identify the name of the person or the room number to be searched. The court found that defendant's statements could no longer be considered in support of the affidavit to secure the search warrants. Moreover, the court found that the affidavit contained "material misrepresentations" when it stated that M.S. identified defendant as "Peter Gakuba" and he provided the room number at the hotel. The court therefore reconsidered and quashed the search and seizure warrants.

¶ 19 Thereafter, the State moved to obtain a new buccal sample since the prior swab was suppressed as a result of the court's ruling. The State argued that it had a lab report that suggested there was genetic material on swabs from M.S.'s rape kit that showed a mixture of two males, and, based on M.S.'s statements, the corroboration of those statements, and the lab report, there was probable cause to obtain a buccal sample pursuant to Illinois Supreme Court Rule 413 (eff. Jan. 1, 1982). The court agreed, and on September 29, 2011, entered an order compelling defendant to submit to a buccal sample pursuant to Rule 413.

¶ 20 Defense counsel also sought leave to file a motion to suppress evidence under the Video Privacy Protection Act (Video Privacy Act), 18 U.S.C. § 2710 (2006). That legislation prohibits video rental providers from disclosing "personally identifiable information" concerning any consumer to a law enforcement agency without a valid court order, subpoena, or warrant. Defense counsel contended that "personally identifiable information" regarding defendant was obtained by the police from Hollywood Video in violation of the Video Privacy Act. The court remarked that it had "never heard of such a bizarre thing," but granted defendant leave to file the motion. Ultimately, the trial court granted defendant's motion and suppressed certain information received from Hollywood Video.

¶ 21 Meanwhile, on April 26, 2013, approximately 2½ weeks before trial was set to begin, defendant filed two *pro se* motions: (1) a motion to modify a protective order and (2) a motion to "substitute" his attorneys for "ineffectiveness" and to impose sanctions against them. On April 30, 2013, Brindley and Thompson moved to withdraw, alleging an actual conflict of interest making it impossible for them to ethically represent defendant. The court reluctantly granted the motion to withdraw. The court declined to address defendant's allegation of ineffectiveness, but opined that Brindley and Thompson had done "an outstanding job in arguing and presenting pretrial motions to the Court."

¶ 22 Defendant informed the court that he intended to represent himself, and the court admonished defendant about proceeding *pro se*. Defendant then filed several motions, including: (1) a motion to compel discovery; (2) a motion to compel the State for "Certificate of Compliance with Mandatory Replevin;" (3) a motion to dismiss the indictment based on alleged prosecutorial misconduct; (4) a motion to disqualify the Winnebago County State's Attorney's office and assistant State's Attorney Kurtz; (5) a motion to introduce the "accuser's other criminal sex offenses;" and (6) a motion to suppress biographical evidence, including defendant's social security number, date of birth, fingerprints, and DNA profile. The court set a status of June 5, 2013, to allow the State to reply to defendant's motions. On June 5, 2013, defendant filed several more motions, including: (1) multiple motions to compel discovery; (2) a motion to suppress "primary and derivative evidence;" (3) an addendum to his motion to compel the State for "Certificate of Compliance with Mandatory Replevin;" (4) a motion for a show cause order to hold assistant State's Attorney Kurtz in direct criminal contempt for suborning perjury; and (5) a motion to dismiss the indictment based on alleged prosecutorial misconduct.

¶ 23 At a hearing on July 19, 2013, immediately after the trial court denied several of defendant's motions, defendant filed a motion to substitute Judge Truitt for cause. On July 22, 2013, defendant filed an amended motion to substitute Judge Truitt for cause, adding complaints about Judge Truitt's rulings on July 19, 2013. Defendant subsequently withdrew the amended motion to substitute Judge Truitt for cause, and trial was set for February 24, 2014. Thereafter, defendant again filed a variety of motions, including a "second amended motion" to substitute Judge Truitt for cause. Following an evidentiary hearing, Judge Joseph McGraw denied defendant's "second amended motion" to substitute Judge Truitt for cause. In January and February 2014, defendant filed several more *pro se* motions, including a motion to continue trial. Over the State's objection, the trial court granted defendant's motion to continue trial, but set an "absolute cutoff date" of February 28, 2014, for filing any pretrial motions.

¶ 24 At a status hearing on March 5, 2014, defendant requested leave to file more than 15 additional motions. The trial court denied defendant's request. Defendant then filed a notice of appeal to this court. On May 5, 2014, this court dismissed defendant's appeal for lack of a final order. Thereafter, defendant filed various documents in the trial court, including a motion to recuse judge. Judge Truitt declined to recuse, so defendant filed another motion to substitute him for cause. Judge McGraw denied the motion to substitute Judge Truitt for cause after a hearing. As Judge McGraw began to announce his ruling, defendant interrupted and moved to substitute Judge McGraw for cause. That motion was denied. Thereafter, defendant continued to file additional motions in the trial court. He also filed an interlocutory appeal to this court, which was denied. On October 24, 2014, Judge Truitt set a trial date of April 27, 2015.

¶ 25 On November 25, 2014, defendant filed a motion for court-appointed counsel. At a hearing on December 9, 2014, the trial court acknowledged that defendant had the right to court-

appointed counsel. The court asked defendant why he was requesting counsel after representing himself for more than a year and a half. Defendant cited difficulties he was having with the discovery process, including issuing subpoenas. The trial court then admonished defendant that if it were to appoint the public defender to represent defendant, it would not be simply for the limited purpose of assisting defendant with ministerial duties, but rather that counsel would be representing defendant. The court also admonished defendant that it he appoints a public defender and, as trial approaches, defendant indicates that he has a problem with counsel, that if the court determined the allegations were not meritorious, counsel would proceed to trial for defendant. The court stated, however, that if it found defendant's allegations meritorious, he could proceed *pro se*. The court also stated that it would not continue the matter any further. Defendant indicated he understood. The court then appointed the public defender's office to represent defendant.

¶ 26 On January 6, 2015, the trial court held a conference with assistant Public Defender Shauna Gustafson and a representative from the State's Attorney's office to assist Gustafson in familiarizing herself with the filings in the case and to make sure she would be prepared for trial. On March 4, 2015, Gustafson filed a motion to disqualify assistant State's Attorney Kurtz from prosecuting the case. That motion was denied.

¶ 27 On March 31, 2015, defendant filed *pro se* a "Motion to Substitute Court-Appointed Counsel—Ineffective Representation." Defendant alleged, in part, that Gustafson was ineffective because she had only four to five months to prepare for trial. Defendant also claimed that because Gustafson had adopted one of his prior motions, she was required to adopt all of his previously filed motions. The court denied defendant's motion to substitute counsel. Defendant

informed the court that if it would not allow him to substitute counsel, he would proceed *pro se*. In response, the court stated:

> "I anticipated that very thing, and that's denied, as well, Mr. Gakuba, for—on the basis that on December 9 you stood before the court, indicated to the effect that you had no idea how to issue a subpoena, cause to be [*sic*] a subpoena to be served. You asked for assistance.
>
> I know exactly where this thing would go if you were allowed to again return to being *pro se*. You'd appear most likely before the court on April 23, indicate that you either haven't had time or still aren't quite sure how to have subpoenas served, necessitating another delay on a nine year old case. Eight and a half years. I'm sorry. Only eight and a half years."

The court also noted that this was the third time "on the eve of trial or certainly within a month of trial" that defendant wanted to discharge his attorney. The court found that defendant's actions were precipitated by a desire to delay the trial.

¶ 28 As noted above, defendant's trial began on April 27, 2015. M.S. testified that he was born on January 25, 1992. In 2006, M.S. was a 14-year-old freshman at a Catholic high school. M.S. testified that he had a difficult relationship with his parents because they were "very traditional" Catholics and he is homosexual. In October 2006, M.S. met an individual online who identified himself as an 18-year old male named "Phil." M.S. identified People's exhibit 6 as a picture from Phil's MySpace page. M.S. "chatted" online with Phil and believed they were having a romantic relationship. During their conversations, M.S. and Phil discussed Phil buying M.S. a phone and a laptop. They also discussed buying a car and a house in the town where M.S. lived so that they could see each other.

¶ 29 M.S. testified that Phil asked him for proof that he was actually 14 years old. To that end, M.S. called Phil both from a pay phone at school and from his mother's cell phone so that defendant could hear his voice. Additionally, M.S. faxed Phil a copy of his school identification card. Phil told M.S. that he received the fax.

¶ 30 M.S. and Phil eventually agreed to meet. To that end, on November 3, 2006, Phil drove a rental car to the street where M.S. resided. Upon approaching the vehicle, M.S. noted that the driver did not appear to be Phil's stated age, but he got into the car anyway. In court, M.S. identified defendant as the driver of the car. Defendant then drove to Rockford where he and M.S. went to several stores, including Best Buy, Walmart, and Hollywood Video. Defendant bought several video games for M.S's portable video game device. M.S. identified People's Exhibits 9 and 10 as pictures of himself and defendant entering and exiting a Walmart store on November 3, 2006. After going to an Italian restaurant and Dairy Queen for food, defendant and M.S. went to defendant's room at the Marriott Courtyard hotel in Rockford.

¶ 31 In the hotel room, M.S. and defendant ate and watched movies on defendant's laptop computer. When the movie was over, defendant told M.S. that they were "gonna have fun." Defendant took off his clothes and then took off M.S.'s clothes. Defendant began to kiss M.S. on the lips and "around [his] whole body," including M.S.'s anus and penis. Defendant also placed M.S.'s penis in his mouth. Defendant then pushed M.S's head toward defendant's penis. Defendant told M.S. to perform oral sex on him and that defendant would reciprocate on M.S. M.S. performed oral sex on defendant, and defendant ejaculated on M.S.'s mouth. Defendant then inserted his penis in M.S.'s anus after applying some "lube." Defendant did not use a condom. M.S. went to bed after defendant finished.

¶ 32 The next morning, defendant received a phone call from M.S.'s parent's house, which defendant did not answer. Defendant and M.S. then went to a Denny's restaurant, where defendant also received a call from the police asking if he knew M.S. and knew where M.S. was. M.S. noted that he had called defendant's number from his mother's cell phone a day earlier. Defendant and M.S. developed a plan for M.S. to say that he had just been walking around the night before. When they left Denny's, defendant dropped off M.S. at a bowling alley in South Beloit. He then called his father to pick him up.

¶ 33 After M.S.'s father took him home, the police came and took M.S. to the Rockton police station. M.S. testified that he did not change his clothes or take a shower between the time that he got home and the time the police arrived. M.S. acknowledged that, initially, he was not truthful with the police about where he had been because he was embarrassed and did not want anyone, especially his parents, to know what had happened. After M.S. told the police what had happened, he was taken to Rockford Memorial Hospital where a rape kit was administered. The rape kit involved swabbing M.S.'s mouth and his anus. M.S. testified that his clothes were also taken.

¶ 34 M.S. testified that he spoke to the police about the incident on a couple of occasions. On November 4, 2006, he gave the police information about the hotel room and drew a diagram of its location in the hotel building. On November 6, 2006, the police came to M.S.'s house and presented him with a photo array. From the array, M.S. identified defendant as the person who had sex with him.

¶ 35 On cross-examination, M.S. testified that he was having troubles at home. M.S. explained that his relationship with his parents was difficult because they believe that homosexuality is a sin. According to M.S., his parents grounded him for being gay. M.S. stated

that he was not allowed to leave the house without his parents' permission. M.S. admitted that during online chats with "Phil," he alleged that his parents had beaten him, although that was not true.

¶ 36 J.S., M.S.'s father, testified that M.S. was born on January 25, 1992, and that M.S. was 14 years old in November 2006. On the evening of November 3, 2006, J.S. went to a laundromat. When he returned, his wife's cell phone was missing and M.S. was not at home. J.S.'s attempts to locate M.S. were unsuccessful. At about 2:30 a.m. on November 4, 2006, J.S. contacted the police to report M.S. as a runaway. J.S.'s daughter recalled that M.S. had recently used the fax machine. J.S. was able to recover the last phone number that a fax was sent to. J.S. then contacted his wife's cell phone carrier to obtain a list of calls made from and received on his wife's cell phone. J.S. learned that one of the numbers was the same as the one shown on the fax machine. J.S. called the number, but no one answered. J.S. gave the number to the police. A few hours later, M.S. called J.S. and asked to be picked up at the Viking Bowling Alley in South Beloit. On cross-examination, J.S. testified that he loved M.S., but acknowledged that the fact that he was gay caused some familial conflict.

¶ 37 O'Brien testified that he met with M.S. in November 2006 and ascertained that he was 14 years old. M.S. described what had happened and indicated both verbally and by drawing a diagram the location of the hotel and room where he was taken. O'Brien then went to the hotel, which he determined was the Marriott Courtyard in Rockford. O'Brien testified that as a result of his investigation into the matter, "Peter Gakuba" was arrested. At that point, the State asked O'Brien whether, in processing the paperwork for defendant's arrest, he learned of defendant's birth date. Over defense counsel's objection, O'Brien answered in the affirmative. Kurtz then asked O'Brien for defendant's date of birth. Before O'Brien responded, defense counsel

requested a sidebar. During the sidebar, the parties discussed whether the police had obtained defendant's date of birth independently from the suppressed evidence. After a short recess, during which the court allowed Kurtz and O'Brien to speak, O'Brien testified that he asked defendant his date of birth during the "booking process that began with this defendant at 9:20 on November 4, 2006," and that defendant stated that he was born on November 21, 1969. Defense counsel did not cross-examine O'Brien.

¶ 38 Dr. Robert Escarza testified that he is a staff physician in the emergency room at Rockford Memorial Hospital. On November 4, 2006, Dr. Escarza, using swabs, took oral and rectal samples from M.S. for the sexual assault kit. After taking the samples, Dr. Escarza gave the swabs to the nurse assisting him. On cross-examination, Dr. Escarza testified that he also physically examined M.S. and noted no trauma to the rectum. On redirect, Dr. Escarza noted that rectum is "designed to expand."

¶ 39 Balsley testified that on November 4, 2006, he was assigned to investigate allegations of sexual abuse involving M.S. In furtherance of this assignment, Balsley traveled to Rockford Memorial Hospital where the nurse assisting Dr. Escarza gave him a sexual assault evidence collection kit. Balsley testified that the kit was in a sealed condition when he retrieved it. At the hospital, Balsley also collected clothing and a portable video game device from M.S. Balsley further testified that on November 6, 2006, he went to M.S.'s home to collect some video game cartridges and to review a photo array with M.S. After reviewing the photo array, M.S. identified the individual in People's Exhibit 17C as the perpetrator. Balsley testified that the individual depicted in People's Exhibit 17C is defendant.

¶ 40 Charles Davidson testified that in September 2011, he was a special agent for the Illinois State Police. On September 29, 2011, Davidson took a buccal sample from defendant by

swabbing the inside of his cheek. Davidson then placed the swab in a buccal swab kit and sealed it.

¶ 41 Blake Aper, a forensic scientist with the Illinois State Police Crime Lab in Rockford, was qualified as an expert to testify in the areas of biology and DNA analysis. Aper conducted testing on the rectal swabs taken from M.S. against known standards taken from both M.S. and defendant. Aper testified that, based on a reasonable degree of scientific certainty, he found (1) a mixture of DNA of two people on one of the anal swabs that was consistent with that of defendant and M.S. and (2) sperm with a "clean, single source male DNA profile" that matched defendant. Aper testified that the DNA profile from the sperm testing would only be found in 1 in 79 quintillion white unrelated individuals, 1 in 550 quintillion black unrelated individuals, and 1 in 1 sextillion Hispanic unrelated individuals.

¶ 42 Following Aper's testimony, the State rested. Defense counsel then made an oral motion for a directed verdict, arguing that the State's evidence had not shown beyond a reasonable doubt that defendant was guilty of the charged offenses. The trial court denied the motion. The defense called Officer Ronald Dippel of the Rockton police department. Dippel testified that at approximately 2:43 a.m. on November 4, 2006, he received a report of a missing juvenile. Dippel went to the juvenile's home and spoke to J.S., M.S.'s father. J.S. told Dippel that M.S. was on medication for a psychiatric problem, but his behavior was getting progressively worse. J.S. recounted that M.S. became upset after being picked up from school on November 3. M.S. left the house and returned at least a dozen times. J.S. indicated that it was typical for M.S. to leave the house for several hours at a time when he was upset. However, J.S. told Dippel that he had not seen M.S. since the afternoon of November 3. Following Dippel's testimony, the defense rested. Defendant's motion for a directed verdict at the close of the evidence was

denied. After closing arguments, the jury began deliberations. The jury found defendant guilty of all three counts charged.

¶ 43 Thereafter, defendant filed a motion for a new trial, raising a variety of issues. On June 29, 2015, the trial court denied the motion. The matter immediately proceeded to a sentencing hearing. Ultimately, the court sentenced defendant to a separate term of four years' imprisonment on each count with the sentences to run consecutively. The court credited defendant with 64 days time served. Defendant was also ordered to register as a sex offender for life, undergo medical testing for sexually transmitted diseases, and pay a sex-offender registration fine of $500 and court costs. On July 1, 2015, defendant filed a motion for reconsideration of sentence, which the trial court subsequently denied. Defendant then initiated the present appeal.

¶ 44 II. ANALYSIS

¶ 45 On appeal, defendant, who represents himself, presents a variety of issues for review. We address each issue in the order raised in defendant's brief. At the outset, we note that many of the arguments defendant raises consist of a multitude of sub-issues with string cites to a variety of cases. However, defendant does not develop these arguments or present a reasoned basis for finding that error was committed. Moreover, defendant does not always indicate why the cases he cites are relevant to his arguments. This makes it difficult to understand and address defendant's arguments. Accordingly, to the extent that we do not address an argument raised in defendant's brief, we consider it forfeited for failure to comply with Illinois Supreme Court Rule 341(h)(7) (eff. Jan. 1, 2016), which requires the appellant's brief to include argument which contains "the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." See *Ramos v. Kewanee Hospital*, 2013 IL App (3d)

120001, ¶ 37 (noting that the failure to properly develop an argument and support it with citation to relevant authority results in forfeiture).

¶ 46 A. Identity Evidence

¶ 47 Defendant first argues that the trial court erred in allowing O'Brien to testify regarding his name and birth date. According to defendant, this information was obtained in violation of federal law, specifically the Video Privacy Act (VPPA), 18 U.S.C. § 2710 (2006), which limits discovery of details regarding video rentals, and corroborated by the illegal seizure of his driver's license at the hotel room. Defendant asserts that his birth date constituted a "key essential fact element of this crime" and that without proof of his age, his convictions were based on "illegally obtained identity evidence" and must be overturned "outright." The State responds defendant's identity and his biographical information were obtained independently of any acts that were found to have been illegal by the trial court. The State alternatively asserts that this evidence would have been "inevitably discovered" in light of the trial court's finding that there was probable cause to arrest defendant.

¶ 48 As a general rule, evidence must be excluded as the "fruit of the poisonous tree" if it has been obtained through the exploitation of illegal police conduct. *People v. Durgan*, 281 Ill. App. 3d 863, 867 (1996). Two exceptions to this exclusionary rule are the "independent source doctrine" and the "inevitable discovery" doctrine. See *Nix v. Williams*, 467 U.S. 431, 443-44 (1984). "The independent source doctrine allows admission of evidence that has been discovered by means wholly independent of the constitutional violation." *Nix*, 467 U.S. at 443; see also *People v. Edwards*, 144 Ill. 2d 108, 143-44 (1991). Under the inevitable discovery doctrine, "[i]f the prosecution can establish by a preponderance of the evidence that the

information ultimately or inevitably would have been discovered by lawful means *** the evidence should be received." *Nix*, 467 U.S. at 444.

¶ 49 In this case, the record shows that although the trial court found probable cause to arrest defendant, it granted several pretrial motions filed by defendant. Among these motions were a motion to quash the search warrant and suppress the evidence taken from defendant's hotel room, a motion to suppress statements defendant made to the police during defendant's interview immediately after defendant was taken into custody, and a motion to suppress personally identifiable information pursuant to the Video Privacy Act. Defendant claims that the police would not have discovered his name and birth date absent their illegal conduct. We disagree and conclude that defendant's name and age were derived from sources independent of any illegal police conduct.

¶ 50 At the hearing on defendant's motion to suppress statements, O'Brien testified that, as part of his investigation into M.S.'s allegations, he was able to determine that "Phil" was staying in room 101 of the Marriott Courtyard hotel. The desk clerk at the hotel advised O'Brien that the room was registered to "Peter Gakuba." This occurred prior to O'Brien contacting the video store, entering defendant's hotel room, or interviewing him at the police station. Thus, defendant's name was discovered wholly independently of any constitutional violation.

¶ 51 Similarly, the record establishes that defendant's date of birth was discovered by independent means during the routine booking process. In this regard, the record shows that defendant's interview with police concluded at 8:55 p.m. At defendant's trial, assistant State's Attorney Kurtz asked O'Brien on direct examination whether, "as part of [his] job processing the paperwork for the arrest," O'Brien learned defendant's date of birth. Over defense counsel's objection, O'Brien answered in the affirmative. Kurtz then asked O'Brien for defendant's date

of birth. Before O'Brien responded, defense counsel requested a sidebar. During the sidebar, the parties discussed whether the police had obtained defendant's date of birth independently from the suppressed evidence. Kurtz represented that O'Brien asked defendant for his date of birth and defendant orally told him. Gustafson responded that O'Brien's police report did not reflect this. The court instructed Kurtz to talk to O'Brien about how he obtained the information. After a short break, Kurtz told the court that O'Brien learned defendant's date of birth independently. The court noted that the fact O'Brien did not specify in his report that he independently obtained defendant's date of birth as part of the booking process could be examined on cross-examination. When O'Brien retook the witness stand, Kurtz asked him whether, "as part of the Illinois State Police arrest and booking process that began with this defendant at 9:20 on November 4, 2006," he asked defendant his date of birth. O'Brien responded in the affirmative. Kurtz then asked O'Brien for defendant's date of birth. He responded that it was November 21, 1969. Defense counsel did not cross-examine O'Brien. Thus, the evidence reflects that defendant's date of birth was obtained after the police interview of defendant concluded at 8:55 p.m. Indeed, we note that routine booking questions, such as the accused's date of birth and age, fall within an exception to *Miranda* which exempts those questions seeking data to complete booking or pretrial services. See *Pennsylvania v. Muniz*, 496 U.S. 582, 601 (1990).

¶ 52 Defendant claims, however, that the trial court erred by improperly "assum[ing]" that the police learned his identity information from a routine-booking question-and-answer session. We disagree. As noted above, O'Brien expressly testified that he learned defendant's date of birth during the booking process when he asked defendant for this information.

¶ 53 Defendant also claims that the trial court erred in allowing Kurtz and O'Brien to discuss O'Brien's testimony with him "mid-examination." In support of this claim, defendant directs us to *People v. Pendleton*, 75 Ill. App. 3d 580 (1979). In that case, the trial court called a weekend recess while the complainant was on the witness stand and still subject to cross-examination. During the recess, the prosecutor conferred with the complainant regarding her testimony. When the complainant testified after the recess, she was better able to identify the men who raped her. The trial court declared a mistrial. On retrial, the defendants were convicted. The appellate court reversed the defendants' convictions. The court held that the retrial of the defendants violated double jeopardy principles because the prosecutor's conduct, which prompted the mistrial declaration, constituted "overreaching." *Pendleton*, 75 Ill. App. 3d at 594-97.

¶ 54 The *Pendleton* court noted that "overreaching" is defined as prosecutorial or judicial misconduct which is: (1) specifically designed to provoke a mistrial in order to secure a second, and perhaps more favorable, opportunity to convict the accused or (2) motivated by bad faith or undertaken to harass or prejudice the accused. *Pendleton*, 75 Ill. App. 3d at 593. In concluding that the prosecutor's conduct constituted "overreaching," the appellate court found that the prosecutor attempted to conceal from the trial court the scope of the conference between her and the complainant. *Pendleton*, 75 Ill. App. 3d at 595-96. The court also noted that at the time of the weekend recess, "the prosecution's case was going badly." *Pendleton*, 75 Ill. App. 3d at 595. The court recounted that the prosecutor "was acutely aware that, based upon Friday's testimony, the State may have failed to prove a *prima facie* case against a number of the defendants because of the complainant's complete and often times disastrous inability to identify her alleged attackers." *Pendleton*, 75 Ill. App. 3d at 595. Yet, when trial reconvened the next week, "the complainant positively, conclusively and unhesitatingly identified the defendants as the men who

had allegedly raped her." *Pendleton*, 75 Ill. App. 3d at 595. The appellate court found that the prosecutor's misconduct "was motiviated by bad faith" in that it resulted from "a fear that (based upon the testimony elicited from the complainant on Friday) the trial judge was likely to acquit a number of the defendants." *Pendleton*, 75 Ill. App. 3d at 596.

¶ 55 *Pendleton* is easily distinguishable from the facts of this case. Significantly, assistant State's Attorney Kurtz did not conceal her discussion with O'Brien and there is no evidence that O'Brien's testimony was influenced or changed as a result of the discussion between O'Brien and Kurtz. In addition, the record does not support a conclusion that Kurtz was trying to provoke a mistrial because her case had been going badly. Indeed, the *Pendleton* court acknowledged that an attorney may consult with a witness regarding his testimony even after the witness is placed on the stand as long as a legitimate need arises for such a discussion. *Pendleton*, 75 Ill. App. 3d at 594. The *Pendleton* court noted, for instance, that the attorney may require additional information made relevant by the days' testimony or may find it necessary to inquire along lines not fully explored earlier. *Pendleton*, 75 Ill. App. 3d at 594-95. Nevertheless, the *Pendleton* court cautioned that since such discussions "pose a tantalizing potential for misconduct," they should be strictly scrutinized. *Pendleton*, 75 Ill. App. 3d at 595.

¶ 56 In this case, Kurtz's consultation with O'Brien occurred with the permission of the trial court for the purpose of obtaining "additional information made relevant by the days' testimony," *i.e.*, when and how he learned of defendant's birth date. Moreover, although defense counsel voiced concern over the consultation, indicating that there was no evidence in O'Brien's report that he asked defendant his birth date after the interview of defendant was complete, she made no attempt to pursue this line of questioning in cross-examination. Indeed, she opted not to cross-examine O'Brien at all. See *People v. Struck*, 29 Ill. 2d 310, 313-15 (1963) (finding that it

was not error to allow State to talk to witness during recess in direct examination where defense counsel given opportunity to cross-examination).

¶ 57 Defendant claims that Kurtz and the trial court "suborn[ed] perjury of a state police witness [O'Brien] who committed perjury as to the illegal obtainment of [defendant's] birthdate." As defendant notes, in *Napue v. Illinois*, 360 U.S. 264 (1959), the Supreme Court held that the Fourteenth Amendment due process clause bars prosecutors from knowingly presenting false testimony and obligates them to correct such testimony when it occurs. However, defendant presents no evidence to support his claim that this is what occurred here. Defendant also asserts that O'Brien was "an untrustworthy and unreliable witness guilty of two *Franks* violations" and a "known perjurer." Presumably, defendant is referring to the fact that the trial court quashed the search and seizure warrants which were executed based on defendant's claim that the affidavits filed by O'Brien in support of the warrant contained false statements and material omissions. However, contrary to defendant's suggestion, the trial court never labeled O'Brien as a perjurer. In this regard, although the court described the execution of the affidavit as "sloppy," it rejected the notion that it was executed with intent to mislead the issuing magistrate.

¶ 58 In short, we find that the trial court properly admitted evidence of defendant's name and birth date as they were obtained independently from any of the evidence found by the trial court to be illegally obtained by the police.

¶ 59 B. Buccal Sample

¶ 60 Defendant next argues that the trial court erred in granting the State's motion to take a buccal sample of defendant pursuant to Illinois Supreme Court Rule 413 (eff. July 1, 1982). Defendant suggests that the buccal sample should have been excluded under the doctrines of

estoppel and *res judicata* because (1) the trial court quashed a seizure warrant for and suppressed an earlier buccal sample and (2) the seizure warrant was "functionally" a Rule 413 motion. The State responds that the trial court properly granted the State's request for a buccal sample pursuant to Rule 413 because there was probable cause to obtain the sample.

¶ 61 On November 6, 2006, O'Brien obtained a seizure warrant for a blood or buccal sample from defendant. The seizure warrant was executed the same day, with a buccal sample collected from defendant's mouth area. Defendant successfully moved to suppress evidence obtained pursuant to the seizure warrant on the basis that the affidavit filed in support of the warrant contained false statements and material omissions.

¶ 62 Thereafter, the State moved to obtain a new buccal sample pursuant to Illinois Supreme Court Rule 413(a)(vii) (eff. July 1, 1982). Rule 413(a)(vii) provides that, notwithstanding the initiation of judicial proceedings and subject to constitutional limitations, a judicial officer may require the accused to permit the taking of samples of his blood, hair, and other materials of his body which involve no unreasonable intrusion thereof. Attached to the State's motion were the lab reports from the Illinois State Police with respect to a rectal swab taken from M.S. In the motion, the State noted that the rectal swab taken from M.S. was interpreted as containing a mixture of DNA profiles from two people. One of the DNA profiles matched the DNA profile of M.S. The State asserted that a buccal standard from defendant was necessary for comparison with the other DNA profile on the rectal swab. Defendant objected to the State's request. Defendant maintained that because the initial buccal sample was suppressed, allowing the State to invoke Rule 413 to obtain a new one "would undermine any deterrent affect [*sic*] that the Fourth Amendment exclusionary rule could hope to have" and "render search warrants for DNA completely unnecessary in literally all cases." Following a hearing on September 29, 2011, at

which the parties argued their respective positions, the trial court granted the State's motion, noting that "there is a different basis for the State's request, that being the evidence collection kit submitted by M.S." A new buccal sample was taken from defendant the same day.

¶ 63 In support of his claim that the trial court abused its discretion in granting the State's motion to take a new buccal sample pursuant to Rule 413, defendant directs us to *People v. Turner*, 367 Ill. App. 3d 490 (2006). In that case, the State obtained a search warrant one week prior to the defendant's trial seeking to photograph the defendant's penis to corroborate the victim's testimony regarding whether the defendant was circumcised. The search warrant was not issued by the judge presiding over the case. Less than an hour after the warrant issued, defense counsel appeared before the issuing judge, asserting that he had no notice of the State's application for a search warrant and objecting to the photography session. Although the issuing judge quashed the warrant, two sets of photos had already been taken.

¶ 64 Subsequently, defense counsel moved for sanctions before the presiding judge. Among other things, defense counsel argued that the episode violated the defendant's constitutional right to counsel and Illinois Supreme Court Rule 413, which requires that defense counsel be given notice and the chance to be present when such evidence is taken. The presiding judge determined that the supreme court rules of discovery had been violated. As a result, she sanctioned the State by barring any evidence obtained during the photography session. Nevertheless, the presiding judge stated that she would allow individuals who were not involved in the photography session to testify at trial regarding the defendant's circumcision. After its motion for reconsideration was denied, the State requested permission to conduct another photography session or, alternatively, a medical examination of the defendant regarding his circumcision. The presiding judge denied the State's request, explaining that because she had

sanctioned the State for failing to comply with discovery rules, it was "not appropriate to undue [*sic*] what was done by asking permission to now do properly what was done improperly."

¶ 65 On appeal, the State argued that the trial court erred in suppressing the photographs for failure to follow Rule 413. We disagreed. Initially, we found that the State clearly violated Rule 413(b) by failing to provide defense counsel with timely notice of and the opportunity to be present at the photography session. *Turner*, 367 Ill. App. 3d at 497-98. Even so, the State maintained that the sanction imposed by the trial court—exclusion of any evidence obtained during the photography session or testimony from those individuals involved—was too harsh. We acknowledged that the sanction of excluding evidence is appropriate in only the most extreme circumstances and is disfavored "because it does not contribute to the goal of truth-seeking." *Turner*, 367 Ill. App. 3d at 499. Nevertheless, we concluded that the sanction imposed in this case was appropriate given evidence that: (1) the State had obtained the warrant from a judge not presiding over the case; (2) no notice was given to defense counsel or the presiding judge; (3) the judge who issued the warrant was not advised that the case was pending for trial before another judge; and (4) the defendant had objected but was told that his attorney "was being made aware" of the photography session, thereby suggesting that defense counsel had approved. *Turner*, 367 Ill. App. 3d at 500-01. We also found that the photos were "inherently intrusive, degrading, and humiliating" and that the State was not unduly impaired by the sanction because the presiding judge indicated that she would allow the State to present testimony or a stipulation regarding whether the defendant was circumcised. *Turner*, 367 Ill. App. 3d at 500.

¶ 66 The facts in *Turner* are clearly distinguishable from those in the present case. First, unlike *Turner*, the seizure warrant in this case was not quashed as a result of a discovery sanction. Instead, the trial court agreed with defendant's claim that the affidavit filed in support

of the warrant contained false statements and material omissions. As noted previously, however, that the trial court rejected the notion that the affidavit was executed with intent to mislead. Rather, the court described the execution of the affidavit as "sloppy." Moreover, the State properly requested leave to obtain a new buccal sample in accordance with Rule 413. The State filed a written motion which it presented to the judge presiding over defendant's case. Attached to the State's written motion were the lab reports from the Illinois State Police with respect to a rectal swab taken from M.S. In its motion the State alleged probable cause to obtain the buccal sample, explaining that the rectal swab taken from M.S. was interpreted as containing a mixture of DNA profiles from two people. One of the DNA profiles matched the DNA profile of M.S. The State asserted that a buccal standard from defendant was necessary for comparison with the other DNA profile on the rectal swab. See *People v. Treece*, 159 Ill. App. 3d 397, 406-09 (1987) (holding that an order requiring an accused to submit, pursuant to Rule 413, to the taking of blood, hair, and other materials of the body is appropriate where probable cause is shown to justify such an order); *People v. Jones*, 30 Ill. App. 3d 562, 564 (1975) (same). Finally, we note that defense counsel was given notice of the State's request, provided the opportunity to file a written response and present oral argument, and was allowed to be present when the buccal sample was collected. Thus, we find no error.

¶ 67 Defendant nevertheless complains that when presenting the motion for a buccal sample pursuant to Rule 413, the State did not expressly indicate that a DNA analysis of the suppressed buccal sample demonstrated that he contributed to one of the two DNA profiles taken from the rectal swab. According to defendant, assistant State's Attorney Kurtz's failure to reference this was intentional and constituted a "second iteration" of the false affidavit tendered in support of the request for a seizure warrant for the first buccal sample. We disagree. We find that Kurtz

was simply supporting her request for a new buccal sample without referencing the known, but now excluded, result involving the suppressed buccal sample. Defendant points to no evidence that Kurtz harbored a nefarious motive or attempted to deceive the trial court. Moreover, the record clearly demonstrates that everyone was aware of the facts and circumstances surrounding the request.

¶ 68 Finally, defendant directs us to *People v. Lawlor*, 291 Ill. App. 3d 97 (1997), for the proposition that the doctrine of judicial estoppel barred the State from requesting a buccal sample pursuant to Rule 413 after the initial buccal sample was suppressed. *Lawlor* is not on point. In that case, the State obtained a "seizure order" for the defendant's gun pursuant to Rule 413. The seizure order was subsequently quashed because the discovery rules for criminal cases apply only after an indictment or information is filed, and, at the time the order was issued, there were no criminal charges pending against the defendant. On appeal, this court concluded that the State was estopped from arguing that the "seizure order" was a "search warrant" because it had taken inconsistent positions. *Lawlor*, 291 Ill. App. 3d at 103. The State initially obtained a "seizure order" pursuant to Rule 413 and received the benefit of that position by securing the seizure of the defendant's gun. *Lawlor*, 291 Ill. App. 3d at 103. However, when the defendant raised a challenge, the State asserted that the seizure order was really a search warrant. *Lawlor*, 291 Ill. App. 3d at 103. Here, in contrast, the initially filed seizure warrant was not converted into a discovery motion pursuant to Rule 413. Rather, after defendant's motion to quash the initial buccal sample was granted, the State filed a separate Rule 413 motion, defendant was given time to respond, and the trial court heard argument on the motion. Thus, *Lawlor* does not support defendant's argument that the doctrine of judicial estoppel barred the State from requesting a buccal sample pursuant to Rule 413 after the initial buccal sample was suppressed.

¶ 69 For the foregoing reasons, we therefore reject defendant's claim that the trial court erred in granting the State's request to collect a new buccal sample pursuant to Rule 413.

¶ 70 C. Sufficiency of the Evidence

¶ 71 Defendant next contends that "cumulative evidentiary errors by the trial court" resulted in him being "wrongfully convicted with legally insufficient evidence," "false/fabricated evidence," and "manifestly insufficient evidence." We interpret this argument to constitute a challenge to the sufficiency of the evidence.[2] In suggesting that the evidence is insufficient to establish his guilt, defendant contends that: (1) M.S. and M.S.'s father falsely testified that defendant knew who the victim was as well as the victim's age; (2) M.S. falsely testified that he communicated with defendant over the internet; (3) the physical evidence does not corroborate M.S.'s testimony because no DNA was found on the oral swabs, hotel bedding or clothing of the victim and there was no signs of physical trauma to the victim's rectum; and (4) M.S.'s testimony was generally unbelievable. The State responds that the evidence against defendant was not only sufficient to establish defendant's guilt beyond a reasonable doubt, it was overwhelming.

¶ 72 When faced with a challenge to the sufficiency of the evidence, it is not the function of the reviewing court to retry the defendant. *People v. Smith*, 185 Ill. 2d 532, 541 (1999). Rather, the relevant inquiry is whether the evidence, construed in the light most favorable to the State, would allow any rational trier of fact to find beyond a reasonable doubt the essential elements of the crime charged. *People v. Wheeler*, 226 Ill. 2d 92, 114 (2007). This means that we must draw

[2] We say "interpret" because the issue is duplicative and convoluted as defendant references multiple other issues, including re-argument of his first two issues and foreshadowing his fourth argument. To the extent that we discuss these issues elsewhere, we do not address them again in this section.

all reasonable inferences from the record in favor of the State. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011). The testimony of a single witness is sufficient to convict if the testimony is positive and credible, even if the testimony is contradicted by the accused. *People v. Bailey*, 311 Ill. App. 3d 265, 269 (2000). Moreover, it is the function of the trier of fact to assess the credibility of the witnesses and the weight of their testimony, resolve conflicts in the evidence, and draw reasonable inferences from that evidence, and this court will not substitute its judgment for that of the trier of fact on these matters. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001). Discrepancies, omissions and bias go to the weight of the testimony to be evaluated by the trier of fact. *People v. Mendoza*, 62 Ill. App. 3d 609, 616-17 (1978). "Minor inconsistencies in testimony do not, by themselves, create a reasonable doubt." *People v. Cunningham*, 309 Ill. App. 3d 824, 827 (1999). We will not reverse a conviction unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt as to the defendant's guilt. *People v. Billups*, 384 Ill. App. 3d 844, 846 (2008).

¶ 73 To prove the offense of aggravated criminal sexual abuse as charged in this case, the State was required to establish beyond a reasonable doubt that (1) the accused committed an act of sexual penetration with the victim; (2) the victim was at least 13 years of age but under 17 years of age; and (3) the accused was at least 5 years older than the victim. 720 ILCS 5/12-16(d) (West 2006); *Bailey*, 311 Ill. App. 3d at 269. For purposes of the statute, the term "sexual penetration" means "any contact, however slight, between the sex organ or anus of one person by an object, the sex organ, mouth or anus of another person, or any intrusion, however slight, of any part of the body of one person or of any animal or object into the sex organ or anus of another person, including but not limited to cunnilingus, fellatio or anal penetration." 720 ILCS

5/12-12(f) (West 2006). Evidence of emission of semen is not required to prove sexual penetration. 720 ILCS 5/12-12(f) (West 2006).

¶ 74 In this case, each of the three counts charged in the indictment alleged that on or about November 3, 2006, defendant "committed an act of sexual penetration with [M.S.] (D.O.B. 1-25-92), who was at least 13 years of age but under 17 years of age when the act was committed *** and that the defendant was at least 5 years older than [M.S.]" The act of sexual penetration described in each count differed, with count I alleging that defendant "knowingly placed his penis in the mouth of [M.S.]," count II alleging that defendant "knowingly placed his penis in the anus of [M.S.]," and count III alleging that defendant "knowingly placed his mouth on the penis of [M.S.]" Considering the evidence in the record in the light most favorable to the State, we conclude that the evidence was sufficient to support defendant's convictions.

¶ 75 At trial, both M.S. and his father testified that M.S. was born on January 25, 1992, and that in November 2006, M.S. was 14-year-old high school freshman. M.S. testified that in October 2006, he met an individual online who identified himself as an 18-year-old male named "Phil." Phil asked M.S. for proof that he was actually 14 years old. To this end, M.S. called Phil from a pay telephone at school and from his mother's cell phone so that he could hear M.S.'s voice. M.S. also faxed Phil a copy of his high-school identification card. Phil informed M.S. that he received the fax. Phil and M.S. agreed to meet in November 2006. On November 3, 2006, a male subject drove to a pre-arranged location to pick up M.S. Upon approaching the vehicle, M.S. noted that the driver did not appear to be Phil's stated age. Nevertheless, M.S. got into the car. In court, M.S. identified defendant as the driver of the car.

¶ 76 M.S. testified that defendant drove him around Rockford, stopping at several locations, including a Walmart, a video store, and a restaurant. M.S. identified pictures of himself and

defendant entering and exiting a Walmart store on November 3, 2006. Defendant then took M.S. to a room at the Marriott Courtyard hotel in Rockford. M.S. testified that after he and defendant ate and watched movies on defendant's laptop, defendant placed M.S.'s penis in his mouth. At defendant's request, M.S. performed oral sex on defendant and defendant ejaculated on M.S.'s mouth. Defendant then inserted his penis in M.S.'s anus after applying some "lube."

¶ 77 M.S.'s allegations were corroborated by investigators with the Illinois State Police. To that end, O'Brien testified that when he met with M.S. in November 2006, he ascertained that M.S. was 14 years old. M.S. described what had happened and indicated both verbally and by drawing a diagram the location of the hotel and room where defendant had taken him. O'Brien then went to the hotel, which he determined was the Marriott Courtyard in Rockford. As a result of O'Brien's investigation into the matter, defendant was arrested. O'Brien testified that defendant's date of birth was obtained during the booking process and that defendant had indicated that he was born on November 21, 1969.

¶ 78 After reporting the incident to police, M.S. was taken to a hospital, where a rape kit was administered and rectal swabs were taken. The rectal swabs taken from M.S. were compared with known standards taken from both M.S. and defendant. That testing revealed (1) a mixture of DNA of two people on one of the anal swabs that was consistent with that of defendant and M.S. and (2) sperm with a "clean, single source male DNA profile that matched defendant. Aper, the forensic scientist who conducted the testing, testified that the DNA profile from the sperm would only be found in 1 in 79 quintillion white unrelated individuals, 1 in 550 quintillion black unrelated individuals, and 1 in 1 sextillion Hispanic unrelated individuals.

¶ 79 Thus, the foregoing evidence establishes that M.S. was born on January 25, 1992, making him at least 13 years of age but under 17 years of age in November 2006. The evidence further

establishes that defendant was born on November 21, 1969, making him at least 5 years older than M.S. Moreover, a rational trier of fact could have reasonably concluded that the contact described by M.S. constituted "sexual penetration" as that term is defined by statute. In this case, M.S. testified that defendant placed M.S.'s penis in his mouth. M.S. further testified that defendant placed his penis in M.S.'s mouth and in M.S.'s anus. This conduct clearly falls within the statutory definition of "sexual penetration." Accordingly, based on this evidence, we cannot say that no rational trier of fact could have found defendant guilty of the charges alleged in the indictment.

¶ 80 Nevertheless, as noted above, defendant challenges various aspects of the evidence presented at trial. For instance, defendant claims that M.S.'s testimony was generally unbelievable. Defendant also claims that M.S. and his father falsely testified that defendant knew who M.S. was as well as M.S.'s age and that M.S. falsely testified that he communicated with defendant over the internet. These challenges, however, go to the credibility of the witnesses, the weight to be afforded their testimony, and the inferences to be drawn therefrom. As noted above, such decisions fall within the province of the trier of fact. *Ortiz*, 196 Ill. 2d at 259. Here, the jury clearly found the testimony of M.S. and his father credible. Based on our review of the record, we cannot say that the claims raised by defendant require us to call the jury's assessment into question. We note, for instance, that M.S. testified that he met an individual online who identified himself as an 18-year-old male named "Phil." M.S. communicated with Phil online. Phil asked M.S. for proof of his age, so M.S. spoke to Phil by telephone and also faxed Phil a copy of his school identification card. M.S. testified that Phil told him that he received the fax. M.S. later arranged to meet Phil. Upon approaching Phil's vehicle at a pre-arranged location, M.S. noted that the driver did not appear to be Phil's stated

age. M.S. identified defendant as the driver of the car. Other than unsupported theories, defendant points to no evidence disputing this testimony. Accordingly, we cannot say that the evidence was so unreasonable or improbable so as to create a reasonable doubt as to defendant's guilt.

¶ 81 Defendant also claims that the physical evidence does not corroborate M.S.'s testimony because none of his DNA was found on the oral swabs taken from M.S., the hotel bedding, or M.S.'s clothing. Likewise, defendant notes that there was no sign of physical trauma to M.S.'s rectum. Initially, we note that corroboration with physical evidence is not necessary to prove a sexual offense. *People v. Schott*, 145 Ill. 2d 188, 202 (1981); see also *People v. Parker*, 2016 IL App (1st) 141597, ¶ 30 ("*Schott* makes clear that the State need not demonstrate the physical evidence substantially corroborates a complainant's testimony."); *Bailey*, 311 Ill. App. 3d at 269. Therefore, pursuant to *Schott*, the State was not required to present physical evidence to corroborate M.S.'s testimony. Nevertheless, we note that the State did present such evidence. Significantly, as noted above, the rectal swabs taken from M.S. were compared with known standards taken from both M.S. and defendant. That testing revealed (1) a mixture of DNA of two people on one of the anal swabs that was consistent with that of defendant and M.S. and (2) sperm with a "clean, single source male DNA profile" that matched defendant. As noted above, Aper, the forensic scientist who conducted the testing, testified that the DNA profile from the sperm would only be found in 1 in 79 quintillion white unrelated individuals, 1 in 550 quintillion black unrelated individuals, and 1 in 1 sextillion Hispanic unrelated individuals. Likewise, we note that there is no need to corroborate a victim's testimony regarding a sexual offense with medical evidence or proof of physical injury even if there is a question regarding consent or force. *People v. Bowen*, 241 Ill. App. 3d 608, 620 (1993). Thus, in this case, where consent is

not at issue, the lack of testimony regarding physical trauma to M.S.'s rectum does not require a contrary result.

¶ 82 Prior to concluding, we note that defendant also claims that when he sought to introduce impeachment evidence of M.S.'s "internet activities and publications of a salacious and vulgar nature on websites and internet chats," the trial court disallowed the evidence on relevancy grounds. According to defendant, M.S. "had a preoccupation with sexual activity" and he should have been allowed a meaningful opportunity to impeach M.S. "on motive, interest, and bias based upon M.S.'s prolific internet activities." Defendant claims that he was prejudiced by the exclusion of this evidence. We review evidentiary rulings for an abuse of discretion. *People v. Acevedo*, 2017 IL App (3d) 150750, ¶ 13. An abuse of discretion occurs when the trial court's ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the court. *People v. Whitfield*, 2017 IL App (2d) 140878, ¶ 106.

¶ 83 The evidence at issue appears to consist of internet postings and was the subject of a hearing in September 2010, when Schafer, at defendant's behest, sought a trial continuance. Defendant claimed that the postings, which appeared in 2009 and 2010, related to M.S. At the hearing on the motion, the trial court found that even if the postings related to the victim, which it noted both Schafer (defense counsel at the time) and Kurtz doubted, it lacked relevance to the issues at trial. While representing himself, defendant filed a "Motion to Introduce Accuser's Other Criminal Sex Offenses," seeking to introduce some of the same evidence. The trial court also denied the motion. After reviewing the record, we cannot say that the trial court's decision to exclude this evidence constituted an abuse of discretion.

¶ 84 Evidence is relevant if it has a tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without

the evidence. *People v. Abernathty*, 402 Ill. App. 3d 736, 749 (2010). Here, even accepting as true defendant's claim that the internet postings were made by M.S., we note that M.S. acknowledged that he willfully accompanied defendant to the hotel and had a sexual encounter with him. In light of this evidence, we fail to see how the admission of internet postings related to M.S.'s internet activities three to four years later had a tendency to make the existence of any fact that is of consequence to the determination of the action less probable than it would be without the evidence. Thus, consent and the victim's conduct before and after the offenses were not relevant to the issues in the case. Indeed, as noted above, the State was only required to prove the ages of M.S. and defendant and whether the acts of penetration alleged occurred. 720 ILCS 5/12-16(d) (West 2006); *Bailey*, 311 Ill. App. at 269. Thus, even if the complained-of evidence was improperly excluded, we fail to see how defendant was prejudiced by its exclusion.

¶ 85 D. Request to Proceed *Pro Se*

¶ 86 Defendant next argues that his right to self-representation pursuant to the sixth amendment (U.S. Const., amend. VI) was thwarted when the trial court denied his request to proceed *pro se* three to six weeks prior to trial. We disagree.

¶ 87 The sixth amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence." U.S. Const., amend. VI. "The Supreme Court has held that the right to retained counsel of choice is included in the sixth amendment right to counsel." *People v. Baez*, 241 Ill. 2d 44, 104-05 (2011) (citing *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147-48 (2006) and *Wheat v. United States*, 486 U.S. 153, 159 (1988)). The right to retain counsel of one's choice includes a criminal defendant's decision to represent himself. *Faretta v. California*, 422 U.S. 806, 833-36 (1975). The right to self-representation, however, is not absolute, and "[a]

defendant who abuses the sixth amendment in an attempt to delay trial and the effective administration of justice may forfeit his right to counsel of choice." *People v. Howard*, 376 Ill. App. 3d 322, 335 (2007); see also *People v. Rohlfs*, 368 Ill. App. 3d 540, 545 (2006) (providing that the right to self representation may be forfeited if the defendant engaged in serious and obstructionist misconduct); *People v. Antoine*, 335 Ill. App. 3d 562, 580 (2002) (noting that "[t]he exercise of the right to choice of counsel may be denied if it will unduly interfere with the administration of justice"); *People v. Childress*, 276 Ill. App. 3d 402, 413 (1995) (holding that a defendant will lose his right to counsel of choice if he attempts to "thwart justice, delay or embarrass the effective administration of justice"). We review a trial court's decision regarding a self-representation request for an abuse of discretion. *People v. Hunt*, 2016 IL App (1st) 132979, ¶ 16.

¶ 88 Based upon our review of the record, we conclude that the trial court did not abuse its discretion in denying defendant's request to proceed *pro se*. The trial court found that defendant's request was merely interposed as a delay tactic. The record supports this finding. As the trial court noted, at the time defendant requested to proceed *pro se* in March 2015, his case had been pending for approximately 8½ years. During that time, defendant was out on bond. Defendant was initially represented by attorney Schafer. On the day of trial, however, defendant sought to have Schafer removed. Defendant then retained attorneys Brindley and Thompson to represent him. Again, shortly before trial was set to begin, defendant requested the removal of his attorneys. Defendant then informed the court that he intended to proceed *pro se*. During the course of his self representation, defendant, by our count, filed more than 50 motions, many of them duplicative of filings previously tendered to the court by either defendant himself or his former attorneys. In addition, on at least two occasions, defendant sought relief in this

court seeking to challenge the trial court's rulings prematurely. On November 25, 2014, after almost 19 months of self representation, defendant requested the appointment of counsel. The trial court granted defendant's request and appointed the public defender's office to represent defendant. On March 31, 2015, less than a month before the scheduled trial date of April 27, 2015, defendant again requested the substitution of counsel. When that request was denied, defendant insisted on representing himself. The trial court denied the request, explaining that it was merely the latest in a series of tactics precipitated by a desire to delay the commencement of defendant's trial. Given the history of this case, we cannot say that the trial court's conclusion is arbitrary, fanciful, or unreasonable, or that no reasonable person would take the view adopted by the court. Accordingly, we reject defendant's claim that the trial court abused its discretion in denying his motion to represent himself less than a month prior to the scheduled trial date.

¶ 89 E. Motion to Disqualify Assistant State's Attorney

¶ 90 Next, defendant argues that the trial court erred in (1) denying his motions and the motions of his attorneys to disqualify Assistant State's Attorney Kurtz; (2) allowing Kurtz to serve as a "Special ASA" pursuant to section 4-2003 of the Counties Code (55 ILCS 5/4-2003 (West 2012)); and (3) denying his motion for appointment of a special prosecutor other than Kurtz.

¶ 91 Defendant first claims that the trial court erred in denying his motions and the motions of his attorneys to disqualify Assistant State's Attorney Kurtz (Kurtz). A trial court's decision whether to grant a motion to disqualify will not be disturbed on appeal absent an abuse of discretion. *Marshall v. County of Cook*, 2016 IL App (1st) 142864, ¶ 22. As noted above, an abuse of discretion occurs when the trial court's ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the court. *Whitfield*, 2017 IL App

(2d) 140878, ¶ 106. After reviewing the record, we cannot say that the trial court abused its discretion in denying defendant's motions to disqualify Kurtz.

¶ 92 Defendant filed multiple motions to disqualify Kurtz, both when he was represented by counsel and during the time he was representing himself. These motions raised various theories as to why Kurtz should be disqualified as the prosecutor on the case. For instance, defendant alleged that Kurtz may have made false statements to and intimidated a witness in this case. Defendant also alleged that Kurtz committed "official misconduct" and "suborned perjury" by seeking to revoke his bond "on a false and fabricated pretrial bond violation." In addition, defendant contended that Kurtz had "a real and ongoing personal interest in the adjudication of this case" because she was among the defendants named in a 36-count civil rights complaint he filed in federal court. The trial court rejected all of defendant's claims.

¶ 93 On appeal, defendant again asserts that Kurtz should have been disqualified for a myriad of reasons. Defendant's "argument" in this regard, however, consists merely of a rambling, and, at times, unclear recitation of his interpretation of the facts interspersed with conclusory allegations and references to case law. For instance, defendant suggests that Kurtz should have been disqualified from prosecuting this matter because she "supervised" various aspects of the case, including "the crime investigation by state police," "the warrantless entry, illegal search and seizure of [defendant] and his personal property," and "the residential burglary of [defendant's]" room at a hotel (the Alpine Inn) where defendant was staying. Defendant further asserts that Kurtz should have been disqualified because she "suborned perjury," she was a "key material witness" in this matter, and she is a named party in a federal lawsuit filed by defendant. However, conspicuously absent from defendant's argument is an explanation why these allegations rendered Kurtz disqualified to prosecute defendant's case. Indeed, defendant's

allegations are not supported by any coherent argument or citation to any *relevant* authority. As such, we find that defendant's claim that the trial court erred in denying his motions to disqualify Kurtz has been forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) (requiring appellant's brief to contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on); see also *People v. Olsson*, 2016 IL App (2d) 150874, ¶ 22 (holding that the defendant forfeited contentions by failing to cite authority and set forth a developed argument).

¶ 94 Defendant also claims that the trial court erred in allowing Kurtz to serve as a "Special ASA" pursuant to section 4-2003 of the Counties Code (55 ILCS 5/4-2003 (West 2012)). The record shows that Kurtz was assigned to defendant's case from the date it first entered the court system in November 2006. In September 2014, Kurtz left the office of the Winnebago County State's Attorney and took a position as an assistant State's Attorney in Macon County Illinois. At that time, assistant State's Attorney James Brun informed the court that the State needed time to determine who would replace Kurtz and that it was "looking at the necessity of a special prosecutor outside of the office." At a hearing on October 9, 2014, Brun told the court that the State was "working out the final details on appointing Miss Kate Kurtz as a special prosecutor." Brun updated the court at a later hearing, stating that the State did not believe "there's a necessity for a motion or order appointing Kate Kurtz as a Special Prosecutor" because "there is no conflict in this matter."

¶ 95 On March 4, 2015, defendant, then represented by Gustafson, filed a motion to disqualify Kurtz as the prosecutor in his case. In the motion, Gustafson noted that Kurtz is no longer employed by the office of the Winnebago County State's Attorney and that Kurtz "is not so employed as to act as a 'special prosecutor' in any other way." Gustafson noted that defendant,

on many occasions, both through prior counsel and *pro se*, has, for various reasons, objected to Kurtz remaining the prosecuting attorney in this matter. Gustafson renewed those objections, noting that Kurtz remains a named party to a lawsuit brought by defendant in federal court.

¶ 96 On March 9, 2015, Joseph Bruscato, the Winnebago County State's Attorney, executed a document appointing Kurtz as a special assistant State's Attorney "for the sole purpose of assisting the Office of the Winnebago County State's Attorney with the prosecution of" defendant's case. Kurtz accepted the appointment and took an oath, which was notarized, to faithfully discharge the duties of the office. Kurtz continued to be compensated by the Macon County State's Attorney's office during the prosecution of the matter. However, the Winnebago County State's Attorney's office provided Kurtz a *per diem* of $36 "to reimburse any out of pocket expenses during the trial."

¶ 97 A hearing on defendant's motion to disqualify was held on March 26, 2015. At that hearing, defendant stood on his motion. The State responded that the Winnebago County State's Attorney had the authority to appoint Kurtz to prosecute the case pursuant to section 4-2003 of the Counties Code (55 ILCS 5/4-2003 (West 2012)), which provides that it is the sole discretion of the elected State's Attorney to contract and appoint his assistants. The State further argued that it is a matter of judicial economy for Kurtz to prosecute the case since she has been involved with it since it first came into the court system. The court denied the motion to disqualify. The court also found that it "makes sense" to allow Kurtz to prosecute the case since given the age of the case and Kurtz's involvement in it.

¶ 98 Defendant now suggests that Section 4-2003 of the Counties Code (55 ILCS 5/4-2003 (West 2012)) did not provide a basis for the appointment of Kurtz as a special assistant State's Attorney in this case. That provision states as follows:

> "Except as provided in Section 4-2001, where assistant State's Attorneys are required in any county, the number of such assistants shall be determined by the county board, and the salaries of such assistants shall be fixed by the State's Attorney subject to budgetary limitations established by the county board and paid out of the county treasury in quarterly annual installments, on the order of the county board on the treasurer of said county. *Such assistant State's Attorneys are to be named by the State's Attorney of the county, and when so appointed shall take the oath of office in the same manner as State's Attorneys and shall be under the supervision of the State's Attorney*." (Emphasis added.) 55 ILCS 5/4-2003 (West 2012).

Accordingly, pursuant to the plain language of section 4-2003, it is within the discretion of the State's Attorney of each county to appoint his or her assistants. 55 ILCS 5/4-2003 (West 2012); 1973 Ill. Atty. Gen. Op. S-567 (March 28). That is what occurred in this case. Bruscato appointed Kurtz, and she took the required oath of office. Indeed, defendant cites no contrary authority. Instead, he directs us to *People v. Woodall*, 333 Ill. App. 3d 1146, 1153-57 (2002), for the proposition that the position of special assistant State's Attorneys is "unknown to our laws." However, defendant's citation to *Woodall* is misplaced as that case involved the appointment of an appellate prosecutor, not the appointment of an assistant State's Attorney from another county.

¶ 99 Lastly, defendant asserts that the trial court erred in denying his motion to appoint a special prosecutor other than Kurtz. Defendant filed the motion on October 16, 2014, when he was representing himself. In the motion, defendant again reiterated the fact that he had filed several actions against Kurtz. The court denied the motion as moot because the State indicated that it would be appointing Kurtz pursuant to the State's Attorney's authority under section 4-

2003 of the Counties Code (55 ILCS 5/4-2003 (West 2012)). Although defendant's brief is not entirely clear on this point, he seems to suggest that Kurtz should not have served as the special assistant State's Attorney because of the same reasons he sought her disqualification. As noted above, however, the trial court did not find any of these reasons persuasive, and defendant did not develop a cogent, supported argument in his brief to support a finding that the trial court's ruling was in error. As a result, we also reject defendant's claim that the trial court erred in denying defendant's motion to appoint a special prosecutor other than Kurtz.

¶ 100 F. Substitution of Judge

¶ 101 Next, defendant argues that the Judge McGraw abused his discretion in denying (1) defendant's motions to substitute Judge Truitt for cause and (2) defendant's motion to substitute Judge McGraw for cause. Defendant claims that as a result of Judge McGraw's rulings, he was tried and convicted "before a biased trial judge acting as an advocate." Defendant's claims lack merit.

¶ 102 Section 114-5(d) of the Code of Criminal Procedure of 1963 (725 ILCS 5/114-5(d) (West 2012)) allows a criminal defendant to "move at any time for substitution of judge for cause, supported by affidavit." Section 114-5(d) further provides:

> "Upon the filing of such motion a hearing shall be conducted as soon as possible after its filing by a judge not named in the motion; provided, however, that the judge named in the motion need not testify, but may submit an affidavit if the judge wishes. If the motion is allowed, the case shall be assigned to a judge not named in the motion. If the motion is denied the case shall be assigned back to the judge named in the motion." 725 ILCS 5/114-5(d) (West 2012).

To prevail on a motion to substitute judge for cause, the defendant must show facts and circumstances indicating that the trial judge is prejudiced against him. *People ex rel. Baricevic v. Wharton*, 136 Ill. 2d 423, 439 (1990). In this regard, the defendant must establish actual prejudice, not merely the possibility of prejudice. *People v. Patterson*, 192 Ill. 2d 93, 131 (2000). Prejudice is defined as " 'animosity, hostility, ill will, or distrust towards this defendant.' " *Patterson*, 192 Ill. 2d at 131 (quoting *People v. Vance*, 76 Ill. 2d 171, 181 (1979)). On review, we will not disturb the trial court's finding on a motion for substitution of judge unless that finding is against the manifest weight of the evidence. *People v. Mercado*, 244 Ill. App. 3d 1040, 1047 (1993). A finding is against the manifest weight of the evidence if it is clearly erroneous or the record supports an opposite conclusion. *People v. Haywood*, 2016 IL App (1st) 133201, ¶ 29.

¶ 103 With this framework in mind, we turn to the substitution motions filed in this case. Judge Truitt presided over defendant's case. On July 19, 2013, defendant filed a *pro se* "Motion and Affidavit for Substitution of Judge for Cause." In his motion, defendant alleged that "the bias and prejudice, evidence from the undisputed and uncontroverted history in this case, revealing plainly erroneous rulings and an abuse of discretion by [Judge Truitt], compels that a substitute judge be assigned to any future proceedings." At a hearing that same day, Judge Truitt scheduled the matter before Judge McGraw for hearing. Subsequently, defendant filed an amended motion to substitute and Judge Truitt filed an affidavit in response to defendant's amended motion. However, at an August 6, 2013, hearing before Judge McGraw, defendant withdrew the amended motion.

¶ 104 On December 3, 2013, defendant filed a document labeled "Second Amended Motion and Certified Statement for Substitution of Judge for Cause."[3] In the motion, defendant asserted that, for various reasons, Judge Truitt is biased and prejudiced against him. A hearing on defendant's motion was held before Judge McGraw over two dates in February 2014. Judge McGraw found that much of what defendant detailed in his motion involved legal rulings with which defendant disagreed. Judge McGraw further noted that two of defendant's former attorneys testified at the hearing and opined that Judge Truitt did not express a personal animus or prejudice towards defendant. Concluding that defendant had not demonstrated actual prejudice on the part of Judge Truitt, Judge McGraw denied defendant's second amended motion.

¶ 105 On June 5, 2014, defendant filed a document entitled "2nd Motion to Substitute Judge Truitt for Cause and Memorandum of Law" (June 5, 2014, substitution motion). On July 21, 2014, Judge Truitt filed an affidavit in response to the motion. A hearing on the motion was held before Judge McGraw. Shortly after Judge McGraw began to explain his ruling, defendant interrupted and announced that he was filing a motion to substitute Judge McGraw for cause. Ultimately, Judge McGraw found that defendant's motion to substitute Judge Truitt was "bereft of any evidence of actual prejudice or some sort of animus or some sort of justification why [the motion] should be granted." Judge McGraw noted that defendant's claims of prejudice were premised on the fact that Judge Truitt made certain rulings against him. However, Judge McGraw stated that adverse rulings are not evidence of actual prejudice. Accordingly, Judge

[3] Defendant filed another "Second Amended Motion and Certified Statement for Substitution of Judge for Cause" on February 4, 2014. That motion appears substantially identical to the motion filed on December 3, 2013.

McGraw denied the motion to substitute Judge Truitt for cause. Judge McGraw also found defendant's attempt to file a motion against him "unavailing," opining that it was an attempt to forestall the court from issuing a ruling on defendant's motion to substitute Judge Truitt for cause.

¶ 106 As noted above, defendant argues on appeal that Judge McGraw's rulings on the motions to substitute Judge Truitt were erroneous. Based upon our review of the record, we disagree. Defendant failed to offer any facts to support a claim that Judge Truitt harbored animus, hostility, ill will, or distrust towards him. Representative of the types of claims defendant advanced in his motions to substitute Judge Truitt for cause are the following. Defendant alleged that by responding "Uh-huh" while listening to argument and representations made by assistant State's Attorney Kurtz at a December 8, 2008, hearing on his motion to suppress statements, Judge Truitt was somehow affirming the "brazen lawlessness of the state police" and "condon[ing] unlawful behavior." In fact, Judge Truitt was merely acknowledging that he was listening to the State's argument. Thus, this did not establish actual prejudice by Judge Truitt towards defendant. Defendant also alleged that Judge Truitt "lashe[d] out" at him while he was testifying at a January 13, 2009, hearing on his motion to suppress statements. Again, we disagree. Our review of the record establishes that Judge Truitt was merely admonishing defendant to listen to the questions posed by the State and answer them. No actual prejudice was established.

¶ 107 Defendant further alleged that Judge Truitt's finding in a pretrial motion that defendant's testimony was incredible somehow demonstrates actual prejudice. In fact, it is the duty of the trial court to assess the credibility of the witnesses. See *People v. Taggart*, 233 Ill. App. 3d 530, 551 (1992). As such, this does not establish actual prejudice to defendant. Defendant also

complained that Judge Truitt improperly denied a motion he filed on the eve of trial alleging ineffective assistance of counsel against Schafer. Judge Truitt found the motion lacked merit and was brought for purposes of delay. However, after hearing defendant's contentions, Shafer moved to withdraw, citing a breakdown between her and defendant. Judge Truitt granted Schafer's motion. Thus, the relief defendant requested—to replace his attorney—was ultimately granted, and defendant failed to show actual prejudice. Most of defendant's remaining allegations concern adverse rulings made by Judge Truitt regarding defendant's pretrial motions. We note, however, "a judge's previous ruling adverse to [a] defendant does not alone disqualify that judge or require him to recuse himself from further proceedings." *Antoine*, 335 Ill. App. 3d at 572 (citing *People v. Moore*, 199 Ill. App. 3d 747, 768 (1990)). In this case, defendant has not shown that the mere fact that Judge Truitt made rulings adverse to his position demonstrated actual prejudice. For these reasons, we reject defendant's claim that his motions to substitute Judge Truitt for cause were improperly denied. Quite simply, defendant has failed to demonstrate that Judge McGraw's rulings on the motions were clearly erroneous or that the record supports an opposite conclusion.

¶ 108 Defendant also claims that he made a timely and meritorious motion to substitute Judge McGraw prior to his ruling on the June 5, 2014, substitution motion. Again, we disagree. A criminal defendant "may move at any time for substitution of judge for cause, supported by affidavit." 725 ILCS 5/114-5(d) (West 2014). A motion for substitution of judge for cause must be filed at the earliest practical moment and prior to the judge ruling on a substantive issue in the case. *People v. Jones*, 197 Ill. 2d 346, 356 (2001); *People v. Algee*, 228 Ill. App. 3d 401, 406 (1992). A contrary holding would allow a defendant to "shop" for a judge more favorably disposed to the defendant. *Algee*, 228 Ill. App. 3d at 406. Generally, upon the filing of the

motion, "a hearing shall be conducted as soon as possible after its filing by a judge not named in the motion." 725 ILCS 5/114-5(d) (West 2014). Nevertheless, a party's right to have a petition for substitution heard by another judge is not automatic. *In re Estate of Wilson,* 238 Ill. 2d 519, 553 (2010) (discussing section 114-5(d) of the Code of Criminal Procedure of 1963 and its civil counterpart). Thus, a judge may deny a motion without referring it to another judge if the motion is not timely filed, fails to include an affidavit, or alleges bias not stemming from an extrajudicial source. See *Wilson*, 238 Ill. 2d at 553-54; see also *Petalino v. Williams*, 2016 IL App (1st) 151861, ¶ 35. In this case, defendant's motion was not timely filed. In particular, the record establishes that defendant did not seek to file the motion until after Judge McGraw began to pronounce his ruling on defendant's June 5, 2014, substitution motion. See *Algee*, 228 Ill. App. 3d at 406-07 (holding that motion to substitute judge for cause was properly denied where the defendant's motion was not filed until after the defendant pleaded guilty and was sentenced); see also *Curtis v. Lofy*, 394 Ill. App. 3d 170, 176 (2009) (noting that a motion for substitution of judge may be denied where the movant had the opportunity to form an opinion as to the judge's reactions to his or her claims). Moreover, defendant's motion is not supported by affidavit. See *Wilson*, 238 Ill. 2d at 553-54; see also *Petalino v. Williams*, 2016 IL App (1st) 151861, ¶ 37; *People v. Brim*, 241 Ill. App. 3d 245, 248-49 (noting that section 114-5(d) of the Code of Criminal Procedure of 1963 requires a motion for substitution of judge for cause to be verified by affidavit). Because defendant's motion to substitute Judge McGraw for cause was neither timely filed nor supported by affidavit, we conclude that the motion was properly denied without referring it to another judge for decision.

¶ 109 G. Sentence

¶ 110 In his final contention of error, defendant challenges the sentences imposed by the trial court on two principal grounds. First, defendant argues that the trial court should have imposed probation rather than a term of incarceration. Alternatively, defendant argues that his sentences should have been ordered to run concurrently instead of consecutively. We disagree with both propositions.

¶ 111 The trial court is vested with broad discretion in imposing an appropriate sentence. *People v. Jones*, 168 Ill. 2d 367, 373-74 (1995). As such, a sentence which falls within the statutory range will not be disturbed on review absent an abuse of discretion. *People v. Patterson*, 217 Ill. 2d 407, 448 (2005). A sentence should reflect both the seriousness of the offense and the objective of restoring the defendant to useful citizenship. Ill. Const. 1970, art. I, § 11; *People v. McWilliams*, 2015 IL App (1st) 130913, ¶ 27. In light of these objectives, "[t]he trial court is charged with fashioning a sentence based upon the particular circumstances of the individual case, including the nature of the offense and the character of the defendant." *People v. Fern*, 189 Ill. 2d at 48, 55 (1999). The trial court's decision in sentencing is entitled to great deference and weight. *People v. Latona*, 184 Ill. 2d 260, 272 (1998). The trial court is afforded such deference because the trial court, having observed the defendant and the proceedings, it in a superior position to determine the appropriate sentence, considering the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). The sentencing judge is to consider "all matters reflecting upon the defendant's personality, propensities, purposes, tendencies, and indeed every aspect of his life relevant to the sentencing proceeding." *People v. Barrow*, 133 Ill. 2d 226, 281 (1989). A trial court abuses its sentencing discretion when the penalty imposed is greatly at variance with

the spirit and purpose of the law or manifestly disproportionate to the nature of the offense. *People v. Watt*, 2013 IL App (2d) 120183, ¶ 49.

¶ 112 In this case, we find no abuse of discretion by the trial court in sentencing defendant to a term of imprisonment. At defendant's sentencing hearing, the State acknowledged that defendant was eligible for a sentence of probation or a term of imprisonment. The State argued for a prison term whereas defense counsel requested probation. In pronouncing defendant's sentence, the trial court stated that it had considered, *inter alia*, the evidence received at trial, the presentence report, a sex offender evaluation of defendant, character reference letters filed on defendant's behalf, the arguments of the parties, and the applicable statutory factors in aggravation and mitigation. The court noted that as part of defendant's sex-offender evaluation, he was administered a Static 99R. That test placed defendant at a low-to-moderate risk of re-offending. However, after considering other factors, including defendant's clinical interview, social history, and psychological assessment, the doctor performing the evaluation found that defendant's risk of re-offending increased to the moderate level. The court also found the facts of the case disturbing. It noted that defendant "held himself out to be an 18 year old young man *** and prayed on a vulnerable, confused 14 year old boy, who at the time was struggling with his sexuality, and according to his testimony, just trying to find acceptance from someone."

¶ 113 The court discussed the statutory factors and noted that there were "a number of factors in mitigation that apply," with the principal one being defendant's lack of prior delinquency or criminal activity. The court acknowledged that defendant had complied with his pretrial release for an extended period of time. However, the court rejected the notion that defendant's conduct was the result of circumstances unlikely to recur or that his character and attitude indicated that he is unlikely to commit another crime. In this regard, the trial court noted that, throughout the

proceedings, defendant "has depicted the police and the prosecutor as corrupt" and judges as ignorant of or unwilling to follow the law. Defendant also portrayed his lawyers as incompetent or corrupt and the victim as "a conniving little sex addict who lured him in." The court allowed that the offenses of which defendant was convicted are probationable. However, the court opined that a sentence of probation would deprecate the seriousness of the offenses and would be inconsistent with the ends of justice. As a result, the court sentenced defendant to four years' imprisonment on each of his three convictions.

¶ 114 As the foregoing indicates, the trial court considered the appropriate factors in aggravation and mitigation. The court rejected a sentence of probation, finding that such a sentence would deprecate the seriousness of defendant's conduct and would be inconsistent with the ends of justice. Moreover, the sentences ultimately imposed by the trial court fall within the statutory sentencing range for the offenses of which defendant was convicted. In fact, the sentences fall much closer to the minimum of three years' imprisonment than the maximum of seven years' imprisonment. See 720 ILCS 5/12-16(d), (g) (West 2006) (now codified as 730 ILCS 5/11-1.60 (West 2016)); 730 ILCS 5/5-8-1(a)(5) (West 2006) (now codified as 730 ILCS 5/5-4.5-35 (West 2016)).

¶ 115 Defendant nevertheless claims that the sentence imposed by the trial court ignores evidence that he was compliant with all terms of his pre-trial bond for 8½ years and his potential for rehabilitation. We disagree. As noted above, the court expressly addressed these factors, but determined that a sentence other than imprisonment would deprecate the seriousness of the offenses and would be inconsistent with the ends of justice. Essentially, defendant would have us reweigh the factors already considered by the trial court. However, the trial court is in a better condition to fashion an appropriate sentence, and we will not substitute our judgment by

reweighing the factors. Accordingly, we find that the trial court did not abuse its discretion in sentencing defendant to a term of imprisonment instead of probation.

¶ 116 We now turn to defendant's alternative claim that the trial court erred in imposing consecutive sentences. Section 5-8-4(b) of the Unified Code of Corrections (730 ILCS 5/5-8-4(b) (West 2006)) provides that, except in cases where consecutive sentences are mandated, concurrent sentences must be imposed, unless, considering the nature and circumstances of the offense and the history and character of the defendant, consecutive sentences "are required to protect the public from further criminal conduct by the defendant." 730 ILCS 5/5-8-4(b) (West 2006). If the trial court imposes consecutive sentences to protect the public, it must set forth in the record the bases for such sentences. 730 ILCS 5/5-8-4(b) (West 2006). Although consecutive sentences are to be imposed sparingly, the trial court has wide discretion in determining whether to impose a consecutive sentence, and a reviewing court should not interfere with that decision unless there has been an abuse of that discretion. *People v. Buckner*, 2013 IL App (2d) 130083, ¶ 36.

¶ 117 Based upon our review of the record, we find no abuse of discretion by the trial court in ordering defendant's sentences to run consecutively. In exercising its discretion to impose consecutive sentences, the trial court considered the character of defendant. The court explained that although defendant was "not required to admit guilt or wrongdoing," he has, "from the beginning portrayed himself as the victim, never once recognizing there's anything unreasonable about his behavior." Moreover, the court found that defendant placed the blame for his situation on everyone else, including M.S. Accordingly, the court found that consecutive sentences were necessary to protect the public from further criminal conduct by defendant. Based on the explanation set forth by the trial court and given its broad discretion in sentencing matters, we

cannot say that the trial court abused its discretion in sentencing defendant to consecutive terms of four years' imprisonment on each count.

¶ 118 Defendant claims that the trial court engaged in advocacy by urging the State to argue for consecutive sentences. The record shows that the State was aware that consecutive sentences were a discretionary matter for the court to decide. In its opening argument at sentencing, the State remarked, "[t]his is not a mandatory consecutive sentence, therefore, it is by Statute then concurrent, *unless the Court were to find any additional factor*." (Emphasis added.) The court later sought clarification of the State's position on consecutive sentences, remarking to the assistant State's Attorney, "I didn't hear any argument that the Court consider discretionary consecutive. It's clearly not mandatory consecutive, but you are not arguing discretionary consecutive even though I know it's discretionary with the Court?" The State responded that it believed that consecutive sentences were appropriate to protect the public from further criminal conduct by defendant. Defendant argues that it was improper for the court to ask the State about the availability of consecutive sentences. We disagree. The court merely sought clarification regarding the State's position on the matter, and defendant cites no legal authority that prohibits the court from doing so. See *Gakuba v. Kurtz*, 2015 IL App (2d) 140252, ¶ 19 (finding that the defendant forfeited argument unsupported by any cogent analysis or citation to relevant authority). Defendant also complains that the trial court found that he was a danger to the public on the basis that he denied guilt. Defendant, however, mischaracterizes the trial court's remarks. The trial court never stated that defendant's denial of guilt required the imposition of consecutive sentences. To the contrary, the court acknowledged that defendant was not required to admit guilt or wrongdoing. Rather, the court found that consecutive sentences were required to protect the public from further criminal conduct by defendant because defendant continually portrayed

himself as the victim, he placed the blame for his actions on everyone else, including the victim, and defendant failed to recognize the unreasonable nature of his conduct. Defendant complains that it was improper for the trial court to "critici[ze] that [defendant] sees himself as the victim." However, defendant cites no cogent argument or legal authority for this position.

¶ 119 Finally, we note that defendant advances several other reasons why, in his opinion, the trial court's sentence was improper. Unfortunately for defendant, these remaining arguments have been forfeited for failure to include any cogent analysis or citation to relevant authority. See *Gakuba*, 2015 IL App (2d) 140252, ¶ 19. For instance, defendant argues that prior to the sentencing hearing, the State sought to introduce "entirely irrelevant evidence" from an Itasca, Illinois police officer regarding his contact with two 18-year-old men. Defendant filed a motion *in limine* to bar this evidence, and the trial court granted defendant's motion. Defendant nevertheless complains that in ruling on the motion, the trial court "entertained the notion that [defendant] may have mistaken adult men for 'boys.' " We disagree.[4] However, even if we were to accept defendant's interpretation, he never explains how this impacted his sentence. Thus, he has forfeited this argument. Defendant also references "a record of 'plea negotiations'." Again, however, he never explains how this impacted his sentencing hearing, thereby resulting in forfeiture of this claim.

¶ 120 III. CONCLUSION

¶ 121 For the reasons set forth above, we affirm the judgment of the circuit court of Winnebago County. As part of our judgment, we grant the State's request that defendant be assessed $50 as

[4] In fact, the court granted defendant's motion on the ground that the evidence the State sought to introduce was irrelevant *because* the individuals in question were 18 and they never pursued charges against defendant for any sex crime.

costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 122 Affirmed.