2017 IL App (4th) 160749-U

NO. 4-16-0749

FILED
December 5, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Champaign County
BAHA'EDDIN Q. AL MOMANI,	)	No. 10CF21
Defendant-Appellee.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: (1) The trial court's use of first-stage language, "frivolous or patently without merit," upon granting a second-stage dismissal under the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-8 (West 2008)) does not alone necessitate reversal of the trial court's order.

(2) Defendant failed to make a substantial showing of actual innocence, as the evidence in one affidavit was not newly discovered and the evidence in the other was not of sufficiently conclusive character it probably would change the outcome on retrial.

(3) Defendant forfeited his argument he made a substantial showing police officers violated his right against self-incrimination.

(4) Defendant failed to make a substantial showing he was denied the effective assistance of trial counsel.

(5) Defendant failed to make a substantial showing he was denied his right to be present at trial, when the record shows defendant understood English, was admonished he could be tried *in absentia*, and was informed of the trial date.

(6) Defendant failed to make a substantial showing he was denied due process.

¶ 2 In January 2011, defendant, Baha'Eddin Q. Al Momani, was tried *in absentia* by jury and found guilty of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(4) (West 2008)) and kidnapping (720 ILCS 5/10-1(a)(1) (West 2008)). Defendant was sentenced *in absentia* to consecutive terms of 25 years' imprisonment for aggravated criminal sexual assault and 7 years for kidnapping.

¶ 3 After defendant was captured and imprisoned for his convictions, he filed *pro se* and supplemental postconviction petitions. In his petitions, defendant alleged several denials of constitutional rights and a claim of actual innocence. At the second stage of postconviction proceedings, the State moved to dismiss defendant's petitions. The trial court granted the State's motion upon finding the claims "frivolous, patently without merit, and outrageous." Defendant appeals the dismissal. We affirm.

¶ 4 I. BACKGROUND

¶ 5 On January 6, 2010, the State charged defendant with criminal sexual assault (720 ILCS 5/12-13(a)(2) (West 2008)) for an alleged act occurring on or near November 1, 2009. Defendant entered a plea of not guilty. At his arraignment, which followed the entry of his plea, the trial court advised defendant if he failed to appear for trial, the trial could proceed in his absence. Defense counsel then informed the court defendant was "present with an Arabic language interpreter." Later that same month, the grand jury returned an indictment for criminal sexual assault. On January 26, 2010, defendant, appearing with an interpreter, pleaded not guilty.

¶ 6 In October 2010, the State added charges of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(4) (West 2008)), alleging the assault occurred during the commission of

another felony (kidnapping), and kidnapping (720 ILCS 5/10-1(a)(1) (West 2008)).

¶ 7 Trial was set for January 10, 2011. On that date, defendant did not appear. Defense counsel asked the trial court to permit him to withdraw as counsel, asserting defendant's failure to communicate with him "for the last several weeks" impaired his ability to defend him. Defense counsel stated the main defense was H.E. consented and, without defendant, defense counsel lacked the ability to present the defense to the jury. The court denied his motion. Defense counsel informed the court he spoke to defendant by telephone before trial, making defendant aware of the trial date. The court noted defendant was admonished regarding a trial *in absentia*.

¶ 8 Trial proceeded later that day. The State's first witness was H.E. H.E. testified she was 19 years old on October 31, 2009. That night, H.E., accompanied by Kayla Peterson and Shannon Hall, went to Joe's Brewery, a college bar to celebrate Halloween. H.E. was dressed as Kim Kardashian, wearing a Python dress, gray boots, pantyhose, two bras, earrings, and a black wig. Before leaving for Joe's Brewery, H.E. drank a white Russian, containing vodka, at Peterson's residence. H.E. drank a glass of wine at "Mike's" apartment, before heading to Joe's Brewery around 11 p.m. At Joe's Brewery, H.E. consumed a beverage containing cranberry juice and vodka, as well as a shot of alcohol. H.E. was intoxicated. H.E. did not recall leaving Joe's Brewery with anyone.

¶ 9 According to H.E., she awoke in the rear of defendant's van parked inside a storage unit around 6:30 a.m. on November 1. H.E. was lying on her back, and defendant was naked and on top of her. H.E.'s underwear was around her ankles. H.E. was wearing only a brassiere. H.E. had not seen the van before.

¶ 10 H.E. testified she asked defendant where her clothes were. Defendant told her they were in the front seat of the van. H.E. put on her clothes. She was unable to exit the van because the door would not open. H.E. asked defendant to let her out. Defendant responded by telling her to calm down. Defendant lit a cigarette. After he finished the cigarette, defendant exited the van and opened the door to the storage unit. H.E. exited the van and storage unit to urinate. H.E. returned to the van because she was scared and did not know where she was.

¶ 11 H.E. averred defendant drove her to her apartment building around 7 a.m. Upon leaving defendant's van, H.E. ran to her apartment. She noticed she did not have her phone. Inside the apartment, H.E. showered and called her father, using the phone of one of her roommates. H.E. was embarrassed and confused. She did not have a hangover. H.E. went to Walmart to buy a phone, but decided against it. H.E. then went to Peterson's apartment. There, she told Peterson and Hall what occurred. Peterson drove H.E. to the hospital, where medical personnel examined her and obtained samples. Later, Investigator Sean Cook arrived at her apartment and collected clothing. H.E. identified the earrings found in defendant's van as her own. H.E. identified a photograph of the storage unit she was in. The nurse who examined H.E. informed her she had been sexually penetrated. H.E. did not consent to sexual contact with defendant.

¶ 12 On cross-examination, H.E. testified she drank the white Russian at Peterson's place around 10 p.m. From Mike's apartment, H.E. and her friends Peterson and Hall walked about five blocks to Joe's Brewery. They arrived around 11 p.m. The bar was crowded. H.E. had, on previous occasions, consumed four or five alcoholic beverages. H.E. "sometimes" was able to handle her drinks, admitting she told police she had consumed up to five hard liquor drinks and

was "able to handle that amount." However, she also had passed out from drinking before. H.E. maintained control of her drinks during the course of the evening. H.E. testified she did not remember anything until she woke with defendant on top of her. Defendant did not attempt to force himself on H.E. or threaten her. He did not have weapons.

¶ 13 On further cross-examination, H.E. testified when she left the storage facility, she urinated next to a fence line adjacent to a residential area. From that place, she could not see defendant's storage unit. H.E. did not go to the residential area, but returned to the van. H.E. looked for her phone in the van, but did not find it. The police returned it to her days later.

¶ 14 Peterson testified she was with H.E. on October 31, 2009. H.E. arrived at her apartment around 7 or 8 p.m. She, H.E., and Hall dressed as the Kardashians. Before leaving her apartment, she and her friends consumed one or two white Russians, containing kahlua, vodka, and milk. Peterson believed they left her apartment by 9:30 p.m. They went to Mike's apartment, had a glass of wine, and then left with a group by 10:30 p.m. to walk to Joe's Brewery. Once the group arrived at Joe's Brewery, they had a drink together. After that time, Peterson recalled only seeing H.E. one other time, around 12:45 a.m. At 12:45 a.m., Peterson talked to H.E., who "was still coherent." Peterson left Joe's Brewery between 1:15 and 1:30 a.m. on November 1. Peterson did not see H.E. again until she arrived at Peterson's apartment on November 1. Peterson drove H.E. to the hospital.

¶ 15 On cross-examination, Peterson testified to seeing H.E. drink only one white Russian at her apartment. When they left Peterson's apartment, H.E. was fine. She and H.E. "weren't buzzing or drunk." At Mike's apartment, Peterson said H.E. had one glass of wine. Upon arriving at the bar, around 11 p.m., H.E. had a cranberry-vodka drink. Peterson agreed

H.E. seemed fine. Around 12:45 a.m., H.E. called Peterson's cell. H.E. was not ready to leave. She was with her brother. Peterson did not see a drink in H.E.'s hand at that time. H.E. appeared fine and coherent. Peterson did not notice any problems.

¶ 16 Don Maxey, an Urbana police detective, testified he participated in defendant's arrest. Knowing defendant requested counsel, Detective Maxey asked no questions but listened as defendant asked questions and volunteered information. Defendant asked Detective Maxey the reason for his arrest. Detective Maxey replied defendant had been arrested for criminal sexual assault. Defendant asked if that meant the lab reports were back. Detective Maxey did not respond. Defendant used the time after his arrest to plead his innocence. Defendant commented he and "that girl were drinking" and he did not "do anything to that girl."

¶ 17 Sean Cook, an investigator with the Urbana police department, testified he met with H.E. on the afternoon of November 1, 2009. After learning defendant owned the storage unit, Investigator Cook found defendant at defendant's residence around 2:30 or 3:30 p.m. on November 2. Investigator Cook, accompanied by Detective Maxey and another officer, approached defendant, explaining to him his name came up as a person of interest in an investigation. Defendant was hesitant to speak with them, stating he probably had a little too much to drink. His girlfriend was inside the residence. Investigator Cooke reported defendant was not sure why the police wanted to talk to him.

¶ 18 Investigator Cook testified he explained to defendant they wanted to know his whereabouts on the night before. Defendant, asserting he had a bad memory, stated he did not know where he was. When asked if anyone could confirm his location for the evening because they wanted to know if he was involved in an accident or in the illegal activity, defendant denied

being in an accident and referred to a "drunk girl" who was with him that evening. Defendant reported meeting a drunk girl outside Joe's Brewery. Defendant referred to the girl as "very drunk," and stated she "was stumbling around" and once physically ran into the van. Defendant offered the girl a ride. At first, the girl declined, but eventually she entered the van. Defendant asked if she wanted a ride. According to defendant, the girl wanted to stay with him. Defendant explained the girl did not know what she wanted to do as she was too drunk. Defendant indicated he wanted to help her get sober. He did not take her to his residence because he had a male roommate. Defendant decided to take her to his storage garage where he would not be seen with the "drunk girl." Defendant stated he stayed up all night watching over her, attempting to sober her up. He stated he did not touch her and did not have sex with her. Defendant denied any physical activity with her.

¶ 19 According to Investigator Cook, the officers asked why defendant did not just call the police, defendant stated in Jordan the people take care of each other. The officers believed his response odd because they learned defendant had been in the United States for six years. When asked if he had been drinking on Halloween night, defendant denied being intoxicated, stating he "only had a couple beers."

¶ 20 Investigator Cook testified he informed defendant they would obtain a search warrant of the van and seize the van. Inside the van, the officers located H.E.'s earrings. They found protein stains on the carpet in the back of defendant's van. The officers took the carpet for testing. When Investigator returned the van to defendant on November 9, 2009, defendant asked if they found anything. The officers explained to defendant they took the carpet to have it processed for DNA. At that point, defendant stated he was drunk and did not remember what he

did on Halloween. After Investigator Cook pointed out the inconsistencies in defendant's statements, defendant said he did not believe he had sex with the girl. Defendant stated he was drunk, watched over her, and remembered waking up in the front seat of the van.

¶ 21 On cross-examination, Investigator Cook stated he did not tape his conversation with defendant. Defendant was groggy during the interview. He asked that the officers interview him away from the female in his residence, and they did. Defendant reported being "a little drunk," and Investigator Cook observed defendant had bloodshot eyes and a slight odor of alcohol on his breath. Defendant cooperated with the officers' request for a swab of his mouth. Defendant did not object to the officers' searching his van.

¶ 22 Testimony from a medical professional and a forensic scientist established protein taken from H.E.'s underwear matched defendant's DNA. The match for defendant was 1 in 56 trillion.

¶ 23 Christine Meeker, a registered nurse, testified she was a trauma nurse specialist and a sexual-assault nurse examiner. Nurse Meeker examined H.E. on November 1, 2009. She collected swabs for a sexual-assault kit. Upon physically examining H.E., Nurse Meeker observed bruising on H.E.'s neck area. This bruising appeared to be a hickey. Nurse Meeker observed a laceration to an area of the vaginal vault, which is consistent with blunt-force trauma.

¶ 24 On cross-examination, Nurse Meeker testified she did not test H.E. for drugs or alcohol. H.E. did not appear to be impaired by alcohol. Nurse Meeker examined H.E. "head to toe," and found no other indications of trauma. Nurse Meeker observed no tenderness in the vaginal area. The laceration on the vaginal vault could occur during consensual sexual activity.

¶ 25 Richard Voss testified. We note six pages of Voss's testimony do not appear in

the record, which includes parts of his direct testimony and cross-examination. According to Voss, on November 1, 2009, he received a call from an officer regarding a telephone found by John Dust at Joe's Brewery. The officer was going to return the telephone and wanted to know Voss's recollection of the night. Voss was with Dust when the telephone was found. It was on a bar. They found it around 1 a.m. During the investigation, Voss learned what the alleged victim looked like. He recalled seeing someone matching that description at the bar. Voss testified the female wore a purple dress, had dark hair, and wore boots. No one was with her at that time.

¶ 26 During cross-examination, Voss testified he interacted with the female at the bar around 1 a.m. Her head was down on the bar. She said she was fine. Later, Voss observed the same female on the dance floor. She was being held up by a male. Voss thought they were dating and together. He did not intervene, inform the bartender, or call security or the police. Voss did not see them leaving. Voss did not know either individual that night or during his testimony. On redirect examination, Voss stated he told the police officer the male seemed to "be dancing on her." The two were real close and he was supporting her. The male appeared to be helping her stand. The female did not appear to be moving to the music.

¶ 27 Robert Comer testified he went to Joe's Brewery with Voss and John Dust on Halloween 2009. Comer recalled seeing a female at the bar. She seemed to be falling asleep, and she appeared incoherent. Voss approached her to ask if she was okay. She stated she was fine. The female was wearing a dress and some boots. Dust found this female's cell phone. Later, Comer observed the female again. A male was holding her up. She appeared to be dead weight.

¶ 28 On cross-examination, Comer stated he did not identify either the male or the female in the case. He was not present when the cell phone was found by Dust and returned to

this female. He did not know whether the female is the same one. Comer stated the female could have been wearing a costume, but it "looked like a regular dress." Comer did not call the police or security. He did not see the two leave the bar.

¶ 29 Defense counsel called no witnesses.

¶ 30 The jury found defendant guilty of aggravated criminal sexual assault and kidnapping. Defendant failed to appear at the March 2011 sentencing hearing. The trial court sentenced him to consecutive terms of 25 years' imprisonment for aggravated criminal sexual assault and 7 years for kidnapping.

¶ 31 In February 2014, defendant filed a *pro se* postconviction petition, asserting actual innocence and multiple violations of his constitutional rights. On May 30, 2014, private counsel filed a supplementary petition. Regarding the alleged deprivations of his constitutional rights, defendant alleges (1) he was improperly denied the right against self-incrimination, as police officers pointed a gun at his head and tortured him, forcing him to make incriminatory statements; (2) he was denied the effective assistance of counsel in failing to investigate witnesses and evidence, by deficiently questioning witnesses and arguing before the jury, by failing to request a continuance when defendant failed to show for trial, in failing to move to suppress defendant's statements to the police, and in failing to request the judge's rationale in multiple rulings; (3) he was denied his right to be present at trial; and (4) he was denied due process when the trial court improperly answered a jury question, failed to admonish the jury to ignore the State's improper remarks, and failed to direct the verdict.

¶ 32 Attached to the petitions are affidavits by Clemon Adkinson and Ronald J. Wilkerson. Adkinson, an inmate in Menard Correctional Center, averred the following in his

initial affidavit:

> "2) On the night of Halloween in November of 2009, while passing by the Glover Street Warehouse in Urbana, Illinois, I noticed a female friend of mine, named [H.E.] sitting in the passenger seat of a van, laughing with and kissing on a man who appeared to be Arabian[.] 3) I spoke with [H.E.] and she introduced the Arab to me as her new boyfriend and asked me to give them some privacy for an intimate moment[.] 4) [H.E.] was not drunk or raped and I agree to come to court to repeat this statement, which I did not do before because I did not know the Arab was charged with rape."

¶ 33 In his second affidavit, Adkinson corrected the time period of his observations of H.E. with defendant as over October 31, 2009, to November 1, 2009. Adkinson averred he had known H.E. for approximately one year and had seen her sober, intoxicated, and "even completely drunk." Adkinson stated H.E. was not drunk when he saw her at the warehouse, laughing with and kissing defendant. Adkinson observed H.E. and defendant, as they moved furniture around the storage unit. Adkinson remembered defendant when he saw him in prison.

¶ 34 Wilkerson averred in his affidavit he observed police officers put a black gun to an Arab's head. Wilkerson had seen the same "dude" the night before at Joe's Brewery "with this pretty white chick." The female was dancing "all over him" in "a very sexual way." Wilkerson watched as the female helped the "Mexican/Arab looking dude" into a van as he "looked really drunk" around 2 a.m. on November 2, 2009.

¶ 35 On February 10, 2015, the State moved to dismiss defendant's petition. The State argued defendant's petitions were insufficient as a matter of law, barred by *res judicata*, and untimely.

¶ 36 Two days later, the trial court granted the State's motion. The court held the following:

> "The State's Motion as to the actual innocence phase of the Defendant's Petition is well-taken. Attached to the Defendant's Petition are two affidavits from Clemon Adkinson and Ronald Wilkerson. Mr. Adkinson was sentenced by the Court in Champaign County Cause 11-CF-355 to 30 years in the Department of Corrections for the offense of Aggravated Battery with a Firearm. Ronald Wilkerson was sentenced by this Court in Champaign County Cause 12-CF-798 to 120 years in the Department of Corrections for Armed Robbery. Both are housed at the Menard Correctional Center. The Defendant is housed at the Menard Correctional Center!!
>
> The Defendant's Post Conviction Petition was not brought within the time required by law. The State's Motion on this issue is well taken.
>
> The Defendant's Petition is frivolous, patently without merit and is ordered dismissed."

¶ 37 On appeal from this dismissal, this court reversed and remanded the matter to the

trial court. *People v. Al Momani*, 2016 IL App (4th) 150192-U, ¶ 1. We found the trial court improperly granted the State's motion to dismiss without providing defendant notice and an opportunity to be heard on the State's motion. *Id.* We noted the State conceded the postconviction petition was timely, and defendant, because he did not file a direct appeal, did not forfeit claims he could have raised during that appeal. *Id.* ¶ 13.

¶ 38 On remand, the trial court entered the following order: "The Court reaffirms its order filed February 12, 2015. The defendant's petition is frivolous, patently without merit, and outrageous. It is ordered dismissed."

¶ 39 This appeal followed.

¶ 40 II. ANALYSIS

¶ 41 A. The Stages of the Post-Conviction Act

¶ 42 In enacting the Post-Conviction Hearing Act, the legislature created a three-stage process by which a petitioner may assert claims that, during the proceedings that led to his or her conviction, a substantial denial of his or her constitutional rights occurred. See 725 ILCS 5/122-1 to 122-8 (West 2008)). At the first stage of proceedings, a petition is filed. *People v. Andrews*, 403 Ill. App. 3d 654, 658-59, 936 N.E.2d 648, 653 (2010). The petition must contain "affidavits, records, or other evidence supporting its allegations" or state the reason such evidence is not attached (725 ILCS 5/122-2 (West 2008)) to show the allegations in the petition "are capable of objective or independent corroboration." *People v. Hodges*, 234 Ill. 2d 1, 10, 912 N.E.2d 1204, 1208 (2009). During the first stage, the trial court examines the petition to determine whether the claims are frivolous or patently without merit. *Andrews*, 403 Ill. App. 3d at 658-59, 936 N.E.2d at 653. Claims found frivolous or patently without merit shall be dismissed. 725 ILCS 5/122-

2.1(a)(2) (West 2008).

¶ 43 When a petition survives the first stage, either by a court finding its claims not frivolous or patently without merit or by the court's failure to make a first-stage ruling within 90 days of the petition's filing (see 725 ILCS 5/122-2.1(a), (b) (West 2008)), it advances to the second stage where counsel may be appointed and an amended petition may be filed. *Andrews*, 403 Ill. App. 3d at 659, 936 N.E.2d at 653. At this stage, the State may answer the petition or move to dismiss it. 725 ILCS 5/122-5 (West 2008). If the State answers the petition or the trial court denies the State's motion to dismiss, the proceeding advances to the third stage, in which the defendant may present evidence to support his claim. *Andrews*, 403 Ill. App. 3d at 659, 936 N.E.2d at 653; 725 ILCS 5/122-5 (West 2008). In this case, the State moved to dismiss defendant's postconviction petitions, and the trial court granted that motion.

¶ 44 At the second-stage of postconviction proceedings, the trial court's task is to determine whether the allegations in the petition sufficiently demonstrate a constitutional infirmity necessitating relief. *People v. Snow*, 2012 IL App (4th) 110415, ¶ 15, 964 N.E.2d 1139. The defendant has the burden of making a substantial showing a constitutional violation occurred. *People v. Pendleton*, 223 Ill. 2d 458, 473, 861 N.E.2d 999, 1008 (2006). "To accomplish this, the allegations in the petition must be supported by the record in the case or by its accompanying affidavits." *People v. Coleman*, 183 Ill. 2d 366, 381, 701 N.E.2d 1063, 1072 (1998). The trial court, when considering a motion to dismiss, must take as true all well-pleaded facts not positively rebutted by the record. *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008. The Postconviction Act does not intend claims based on matters outside the record be adjudicated on the pleadings, and, at the second stage, the trial court may not engage in fact finding. *Snow*, 2012

IL App (4th) 110415, ¶ 15, 964 N.E.2d 1139. A petition may be dismissed at the second stage only when the petition's allegations, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation. *Id.* Our review of a second-stage dismissal is *de novo*. *Id.*

¶ 45 B. A Second-Stage Dismissal with First-Stage Language

¶ 46 Defendant first argues we must reverse because the trial court improperly reviewed his case at the second-stage of postconviction proceedings using the standard applicable to first-stage review. Defendant emphasizes the court dismissed his case at the second stage upon finding the allegations in his petition frivolous and patently without merit. In support of his contention reversal is mandated, defendant relies on the holding in *People v. Lara*, 317 Ill. App. 3d 905, 908, 741 N.E.2d 679, 682 (2000).

¶ 47 In contrast, the State emphasizes well-settled law this court has the authority to affirm on any basis in the record. The State urges this court to address the merits of defendant's arguments and affirm.

¶ 48 We agree with the State and find the trial court's use of "frivolous or patently without merit" language upon entering a second-stage dismissal does not alone necessitate reversal. As we held in *Snow*, 2012 IL App (4th) 110415, ¶ 17, 964 N.E.2d 1139, "the use of an improper standard in analyzing a postconviction petition at the second stage does not itself serve as a basis for reversal[.]" We may affirm a second-stage dismissal on any grounds supported by the record, regardless of the reasoning of the trial court. *Id.*

¶ 49 Defendant's cited case, *Lara*, does not support defendant's position. At best, *Lara* supports the conclusion a trial court may not use the first-stage procedure to *summarily dismiss* a

petition at the second stage of proceedings. *See Lara*, 317 Ill. App. 3d at 907-08, 741 N.E.2d at 681-82. This appeal does not involve a petition that was summarily dismissed. Defendant was represented by counsel. The State filed a motion to dismiss. Defendant, on remand, had the opportunity to respond. The trial court granted the State's motion. This process is consistent with *Lara*. See *id.* at 908, 741 N.E.2d at 682.

¶ 50 C. Actual Innocence

¶ 51 Defendant next contends the trial court erroneously dismissed his claim of actual innocence. The State disagrees.

¶ 52 At the second stage of postconviction proceedings, the relevant question in an "actual innocence" inquiry is whether the petitioner made a substantial showing of actual innocence warranting an evidentiary hearing. *People v. Flowers*, 2015 IL App (1st) 113259, ¶ 33, 24 N.E.3d 1240. Evidence supporting an actual-innocence claim must be newly discovered, material, and not merely cumulative, as well as "of sufficiently conclusive character that it would probably change the result of a retrial." *Id.* (quoting *People v. Edwards*, 2012 IL 111711, ¶ 32, 969 N.E.2d 829). "Conclusive" means the newly discovered evidence, when considered with the trial evidence, would probably lead to a different result. *People v. Coleman*, 2013 IL 113307, ¶ 96, 996 N.E.2d 617.

¶ 53 Moreover, to be newly discovered, evidence must have been " 'unavailable at trial and could not have been discovered sooner through due diligence.' " *Snow*, 2012 IL App (4th) 110415, ¶ 21, 964 N.E.2d 1139 (quoting *People v. Harris*, 206 Ill. 2d 293, 301, 794 N.E.2d 181, 187 (2002)). The petitioner bears the burden of establishing he exercised due diligence. *Id.* "Evidence is also not newly discovered when the evidence 'presents facts already known to a

defendant at or prior to trial, though the source of these facts may have been unknown, unavailable, or uncooperative.' " *Id.* (quoting *People v. Collier*, 387 Ill. App. 3d 630, 637, 900 N.E.2d 396, 403 (2008)).

¶ 54 Defendant relies on affidavits from two affiants as newly discovered evidence of his actual innocence: Clemon Adkinson and Wilkerson.

¶ 55 1. *Affidavits of Clemon Adkinson*

¶ 56 The facts alleged in Adkinson's affidavits, taken as true, are not newly discovered. Defendant asserts he acted with due diligence as he could not have found Adkinson until after his imprisonment. However, the facts in Adkinson's affidavit show that defendant was introduced to Adkinson on the night in question. No statement by Adkinson establishes defendant, who Adkinson observed moving furniture, was incoherent at this time. Given these facts, defendant has not shown he acted with due diligence in locating Adkinson, whom he met before trial. *Collier*, 387 Ill. App. 3d at 637, 900 N.E.2d at 403 (observing when evidence "presents facts already known to a defendant at or prior to trial, though the source of these facts may have been unknown, unavailable, or uncooperative[,]" it is not newly discovered).

¶ 57 2. *Affidavit of Wilkerson*

¶ 58 Wilkinson averred he observed a "Mexican/Arab looking dude at Joe's" dancing "with this pretty white chick," who was giving him a lap dance. Wilkinson further testified he observed the same female helping the male, who "looked really drunk" into a white van around 2 a.m. on November 2, 2009.

¶ 59 This evidence is not "of such conclusive character that it would probably change the result on retrial." *Edwards*, 2012 IL 111711, ¶ 32, 969 N.E.2d 829. The incident occurred on

November 1, 2009, not on November 2, 2009, as averred by Wilkinson. Notwithstanding the error in the date, the conclusiveness of the testimony is further weakened by Wilkinson's failure to identify either defendant or H.E. When considering the allegations in Wilkinson's affidavit with the trial evidence, as this court may do (see *Coleman*, 2013 IL 113307, ¶ 96, 996 N.E.2d 617), we find Wilkinson's vague testimony would not probably change the outcome at a retrial.

¶ 60 D. Right Against Self-Incrimination

¶ 61 In his original postconviction petition, defendant asserts he was denied his constitutional right against self-incrimination when police officers tortured him and forced him to confess to sexual contact and kidnapping. On appeal, however, defendant makes no argument regarding this alleged denial. Any claim defendant made a substantial showing of the denial of his constitutional right against self-incrimination is forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) ("Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.").

¶ 62 On appeal, however, defendant has asserted an argument related to police misconduct and the failure to provide *Miranda* warnings (see *Miranda v. Arizona*, 384 U.S. 436 (1966)) in the context of his ineffective-assistance-of-counsel claim. That argument is addressed below.

¶ 63 E. Right to the Effective Assistance of Counsel

¶ 64 When asserting an ineffectiveness claim, the petitioner, at the second stage of postconviction proceedings, must make a substantial showing counsel provided ineffective assistance. See *People v. Tate*, 2012 IL 112214, ¶ 19, 980 N.E.2d 1100. To do so, the petitioner must prove (1) counsel's performance was objectively unreasonable, and (2) absent counsel's

error, a reasonable probability exists the outcome of his trial would have been different. See *People v. Young*, 341 Ill. App. 3d 379, 383, 792 N.E.2d 468, 472 (2003). The latter part of this test is also referred to as the prejudice component of the ineffectiveness claim. See *Coleman*, 183 Ill. 2d at 397, 701 N.E.2d at 1079 (stated courts "may resolve ineffectiveness claims under the two-part *Strickland* test by reaching on the prejudice component").

¶ 65 1. *Forfeiture*

¶ 66 Defendant asserts the State, before the trial court, conceded a number of these arguments were properly pleaded. Citing *People v. Turner*, 2012 IL App (2d) 100819, ¶ 44, 972 N.E.2d 1205, defendant argues his claims should advance to a third-stage evidentiary hearing due to the State's procedural default.

¶ 67 In the trial court, the State filed three motions to dismiss defendant's postconviction petitions. In the first motion to dismiss, the State argued defendant failed to state a claim. In the text of this motion, the State wrote the following:

> "Defendant alleges his trial counsel was ineffective for failing to establish certain facts through cross-examination of the witnesses presented, and for failing to emphasize these facts in argument. Though the State does not concede the remaining allegations of ineffective assistance of trial counsel have legal or factual merit, *they are adequately pleaded*. However, for the reasons set forth in the Second and Third motions to dismiss should still be dismissed." (Emphasis added.)

¶ 68 In the second and third motions, the State asserted forfeiture and untimeliness

arguments. When this court remanded to allow defendant to respond to the State's arguments for dismissal, this court accepted the State's concession and found the claims in the postconviction petitions were neither forfeited nor untimely (*Al Momani*, 2016 IL App (4th) 150192-U, ¶ 13), thereby rendering the second and third motions to dismiss moot. Only the claims in the first motion to dismiss remain, meaning the State conceded the viability of multiple claims of ineffective assistance of counsel.

¶ 69 The forfeiture rule, however, "is an admonition to the parties and does not affect this court's jurisdiction." *Ballinger v. City of Danville*, 2012 IL App (4th) 110637, ¶ 13, 966 N.E.2d 594. Notwithstanding the State's forfeiture, this court may affirm a postconviction dismissal on any ground appearing in the record. See *Snow*, 2012 IL App (4th) 110415, ¶ 17, 964 N.E.2d 1139 (observing this court may affirm the dismissal of a postconviction petition on any ground of record). Because defendant's arguments may be resolved on the pleadings and record alone, using the standards for the second-stage review of postconviction petitions, we will consider whether defendant made a substantial showing of the denial of a constitutional right on the otherwise forfeited grounds.

¶ 70 2. *Failure To Investigate*

¶ 71 Defendant first contends counsel was ineffective in that he failed to investigate witnesses identified in police reports and failed to locate witnesses defendant specified.

¶ 72 The record reveals defendant has not made a substantial showing he was prejudiced by counsel's alleged failure to investigate. Defendant has not provided any documentation showing had counsel investigated he would have found a witness or witnesses who would have provided testimony favorable to him. This fact is fatal to defendant's failure-to-

investigate claim. A defendant asserting trial counsel was ineffective for failing to investigate witnesses must support his allegation with an affidavit from the witnesses not investigated or subsequently called. *People v. Enis*, 194 Ill. 2d 361, 380, 743 N.E.2d 1, 13 (2000). Absent such affidavit, a court of review cannot determine whether the witness not investigated would have provided information favorable to the defendant, making further review unnecessary. *Id.* Nor has defendant cited anything in the record that would establish prejudice. Without such a showing, defendant cannot prevail on this claim. See *People v. Little*, 335 Ill. App. 3d 1046, 1052, 782 N.E.2d 957, 963 (2003) (noting an ineffective-assistance-of-counsel claim may be resolved on a determination defendant cannot prove one of the grounds).

¶ 73 We note, contrary to defendant's assertion otherwise, defendant's lone case on the matter does not relieve him of the long-standing requirement of making a substantial showing of prejudice. See *People v. Perez*, 148 Ill. 2d 168, 592 N.E.2d 984 (1992). The *Perez* appeal followed an evidentiary hearing. *Id.* at 170-71, 592 N.E.2d 985-86. The opinion resolving the appeal does not indicate documentation supporting a finding of prejudice was not attached to the petition or was otherwise excused. Any such holding would be in direct contravention of *Enis*, which requires affidavits for claims of failure to investigate witnesses. See *Enis*, 194 Ill. 2d at 380, 743 N.E.2d at 13.

¶ 74 Defendant's other arguments regarding alleged failures to investigate, such as seeking testing of a cigarette butt from the van, fingernail scrapings, fingerprints, and H.E.'s blood and requesting the security videotape earlier, fail for the same reason. Defendant has provided no evidence to make a substantial showing defendant was prejudiced by these alleged failures. Without evidence, any conclusion the evidence would have created doubt as to

defendant's guilt is purely speculative. The trial court did not err in dismissing these claims. See *People v. McCoy*, 2014 IL App (2d) 100424-B, ¶ 18, 19 N.E.3d 628 (holding "no prejudice to defendant could have existed unless exculpatory evidence did exist").

¶ 75 The same rationale applies to defendant's argument trial counsel was ineffective for failing to present testimony to "test the victim's resistance," such as the failure to ask the trial court to appoint an expert. Defendant improperly failed to attach an affidavits by an expert who would have testified in a manner that could have led to a finding of prejudice. *Enis*, 194 Ill. 2d at 380, 743 N.E.2d at 13 (holding a postconviction claim of ineffective-assistance-of-counsel based on the failure to investigate or call witnesses necessitates supporting affidavits as to what the witness would have testified).

¶ 76 Defendant's cited case, *People v. Popoca*, 245 Ill. App. 3d 948, 952, 615 N.E.2d 778, 781-82 (1993), an appeal following an evidentiary hearing, does not support the conclusion a postconviction petitioner need not provide documentary evidence supporting his claims.

¶ 77 3. *Failure To Seek a Continuance*

¶ 78 Defendant asserts trial counsel provided ineffective assistance by not seeking a continuance when he failed to show for trial. Defendant, however, provides no case law or other authority establishing the legal considerations for claims of ineffective assistance of counsel based on the failure to seek a continuance. Particularly troubling is the lack of any effort to explain how defendant suffered prejudice when counsel, who asked the trial court to permit him to withdraw from the case when defendant failed to show for trial, failed to ask specifically for a continuance. Defendant has forfeited this claim by not providing argument or authority in support. See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016); see also *Crull v. Sriratana*, 388 Ill. App.

3d 1036, 1045, 904 N.E.2d 1183, 1190-91 (2009) ("A contention that is supported by some argument but no authority does not meet the requirements of Rule 341 and is considered forfeited.").

¶ 79 4. *Failure To Object, Cross-Examine, Argue*

¶ 80 Defendant asserts his trial counsel was ineffective for failing to establish for the jury through objections, cross-examination, or argument the following: (1) testimony H.E. did not remove her clothes or consent to sexual contact or being in the storage unit when H.E. testified she did not remember anything; (2) Voss's and Comer's testimony the cell phone was returned to the same girl they noticed in the bar even though they were not present when the phone was returned; (3) testimony H.E. "was frightened when she awoke with a strange man on top of her but he was not threatening or had a weapon and she gave him her address so he could drive her home"; (4) Investigator Cook's testimony officers recovered a pack of cigarettes near the storage unit but the same did not appear on the evidence list; and (5) Nurse Meeker testified she took a neck swab from H.E., but no such swab was included in a written report or on the evidence receipt. Defendant further contends trial counsel should have emphasized the absence of evidence showing H.E. "was incoherently intoxicated" because the evidence established H.E. (1) was coherent at 12:45 a.m.; (2) was not hungover upon waking 4 to 5 hours later; (3) had no injuries consistent with someone having been moved about; (4) did not feel there had been an assault until after taking a shower, calling her father, and shopping for a new cell phone.

¶ 81 In general, the decision whether to cross-examine or impeach a witness is a matter of trial strategy that will not support an ineffective-assistance-of-counsel claim. *People v. Pecoraro*, 175 Ill. 2d 294, 327, 677 N.E.2d 875, 891 (1997). The means by which counsel cross-

examines "a particular witness involves the exercise of professional judgment which is entitled to substantial deference from a reviewing court." *Id.* at 326-27, 677 N.E.2d at 891. Trial strategy generally encompasses decisions as to what matters to object to and the timing of the objections (*Id.* at 327, 677 N.E.2d at 891) as well as to decisions as to the content of closing argument (*People v. Shamlodhiya*, 2013 IL App (2d) 120065, ¶ 15, 986 N.E.2d 204). A defendant may prevail only by showing counsel's approach to these matters was objectively unreasonable. See *Pecoraro*, 175 Ill. 2d at 326, 677 N.E.2d at 891. As with other ineffectiveness claims, a defendant must also establish prejudice. *Coleman*, 183 Ill. 2d at 397-98, 701 N.E.2d at 1079 (stating "lack of prejudice renders irrelevant the issue of counsel's performance").

¶ 82 Regarding defense counsel's alleged failures during testimony and argument, defendant cannot show either component of the ineffectiveness claims. While defense counsel may not have emphasized the alleged inconsistency in H.E.'s assertion she did not remove her clothes or consent to sexual contact and her assertion she did not remember the events, it was not objectively unreasonable for defense counsel not to highlight the alleged inconsistency. The State would have clarified H.E.'s statements on redirect testimony or in rebuttal argument, demonstrating H.E. did not knowingly recall removing her clothes. Any such approach would have allowed H.E. to testify again she did not consent. In addition, there is no prejudice, as defense counsel elicited testimony questioning H.E.'s level of intoxication to undermine H.E.'s averments she lacked the ability to consent and argued extensively for reasonable doubt on this ground.

¶ 83 As to Voss's and Comer's testimony, while defense counsel did not emphasize the two were not present when the phone was returned during closing argument, he elicited

testimony showing the same and other testimony weakening the value of their testimony. Voss testified he did not talk to either defendant or H.E. and would not know either one of them at the time of his testimony. Voss further testified the woman appeared fine at 1 a.m. During argument, defense counsel argued Comer and Voss saw someone sitting in the bar not in costume, while H.E. was dressed as Kim Kardashian and the fact the two did not identify either H.E. or defendant by photograph or lineup.

¶ 84 We also find no error in defense counsel's failure to contradict H.E.'s testimony she was frightened when she awoke with her own testimony that indicated otherwise, such as the man was not threatening and did not have a weapon and the fact she gave the man her address. H.E.'s version of the events is frightening. To argue otherwise would have had no effect on the jury.

¶ 85 As to the facts regarding Investigator Cook and Nurse Meeker, the alleged facts or discrepancies alleged by defendant are so inconsequential the omission of said facts was not objectively unreasonable or prejudicial. The discrepancies between the written evidentiary list or report, even if intentional, would not have undermined either individual's testimony sufficient to call doubt on the veracity of their statements during trial.

¶ 86 Turning to defendant's remaining arguments regarding defense counsel's failure to emphasize evidence contradicting H.E.'s contention she was "incoherently intoxicated," we find defense counsel elicited testimony on these matters and argued the evidence created reasonable doubt. For example, defense counsel cross-examined H.E. and Peterson to establish H.E. was underage and had someone of legal age obtain drinks for her, H.E. consumed only 4 or 5 alcoholic beverages between 7 or 8 p.m. and 1 a.m., and Peterson observed a "coherent" H.E.

around 12:45 a.m. with no drink in her hand. Defense counsel further elicited testimony showing H.E. did not call the police immediately upon awakening. Defense counsel cross-examined medical personnel to show the injuries sustained by H.E. were consistent with consensual sex.

¶ 87 Defense counsel also highlighted the testimony regarding H.E.'s level of intoxication during closing argument. Arguing the evidence did not "even come[] close to illustrating [H.E.] was at a level of intoxication that she was unable to consent," counsel emphasized H.E.'s testimony she had only four drinks, over a period beginning between 7 and 8 p.m. on October 31 until 1 a.m. on November 1. Counsel pointed to Peterson's testimony H.E. appeared coherent around 12:45 a.m. and had no drinks in her hand. Counsel emphasized H.E.'s testimony she had on a prior occasions had 4 to 5 drinks and the fact H.E. did not have a hangover the morning of November 1. Counsel emphasized H.E. did not call the police until after calling her father and shopping at Walmart. Counsel argued the medical testimony indicated there were no injuries, no trauma, no tenderness, no bruising, and one vaginal tear that could occur during consensual activity.

¶ 88 Defense counsel's factual allegations, taken as true, in consideration with the record, fail to establish a substantial denial of his constitutional right to the effective assistance of counsel in defense counsel's examination of witnesses and closing argument.

¶ 89 5. *Failure To File a Motion to Suppress*

¶ 90 Defendant asserts his trial counsel was ineffective in failing to file a motion to suppress based on defendant's allegations the police officers violated his constitutional rights pursuant to *Miranda*, 384 U.S. 436. In his affidavit, defendant asserts the arresting officers subjected him to physical and psychological torture by using racial slurs and pointing a gun at his

head and forcing him to lie and state, "The white girl was so drunk when I had sex with her and that I met her in the street, and the girl was unable to walk, she hit the van front and back, and opened the door seeking a place to stay safe until she [was] sober and I offered for her a ride but she refused." Defendant supports these assertions with Wilkinson's affidavit, which alleges Wilkinson observed the police place a gun to defendant's head.

¶ 91 Defendant has not made a substantial showing he was denied the effective assistance of counsel due to counsel's failure to file a motion to suppress the above statements. Defendant identifies no testimony in the record where his confessions were introduced at trial. The only statements made to police officers at trial were his denials he had sex with H.E., his admission H.E. was drunk, and his subsequent statement he, too, was drunk and could not remember the events of the evening. Defendant's alleged "confession" to sexual contact was not admitted at trial. Defendant's alleged confession H.E. refused his offer for a ride was not admitted. As to defendant's statements showing H.E. was "drunk," those statements repeated evidence already introduced to the jury. Defendant cannot prove he suffered prejudice in the absence of a motion to suppress and cannot prevail on his ineffectiveness claim.

¶ 92 6. *Failure To Request the Judge's Rationale*

¶ 93 Defendant asserts his trial counsel provided ineffective assistance by failing to "request the judge[']s personal test methods to determine [H.E.'s] level of intoxication and voluntary waiver of *Miranda* warnings[,] and defendant[']s degree of comprehending English." We fail to see how these failures equate to the ineffective assistance of counsel. As we found above, the suppression of evidence based on *Miranda* would have had no effect on the outcome of the trial. As shown below, the record establishes defendant understood English. Any attempt

by defense counsel to seek the judge's "test methods" would have had no effect and therefore was not prejudicial.

¶ 94 As to the personal test method to determine H.E.'s level of intoxication, as shown below, we find defendant forfeited any argument the trial court erroneously granted a directed verdict by not providing supporting authority. If defendant's allegation pertains to that finding, it is forfeited. In any other context, the allegation regarding the judge's personal test method is irrelevant. The question of whether to believe H.E.'s testimony she was so intoxicated she could not have consented to either sexual contact or confinement was a question for the jury, not the judge.

¶ 95 F. Defendant's Right To Be Present at Trial

¶ 96 Defendant asserts he made a substantial showing his right to be present at trial was violated when his trial proceeded *in absentia*. Defendant asserts, under section 113-4(e) of the Code of Criminal Procedure of 1963 (Criminal Procedure Code) (725 ILCS 5/113-4(e) (West 2008)), the State was required to give admonishments at the entry of the plea. Defendant contends no such admonishment was given, as no interpreter was made available to translate the admonishment for him. In addition, defendant contends no admonishment was made when the original charge was superseded by grand jury indictment and the admonishment was not repeated. Defendant further contends he was unaware of the court date.

¶ 97 The State disagrees. The State argues the record plainly shows defendant understood English, an admonishment was made, and defendant knew the trial date.

¶ 98 Criminal defendants have the constitutional right to be present during all stages of trial and to confront all witnesses against them. *People v. Smith*, 188 Ill. 2d 335, 340, 721 N.E.2d

553, 557 (1999) (citing U.S. Const., amend. VI). Because of this right, courts reluctantly allow trials to proceed in a defendant's absence. *Id.* A defendant gives up his right to be present when he voluntarily absents himself from trial. *Id.* This court will not reverse a trial court's decision to try a defendant *in absentia* absent an abuse of discretion. See *People v. Flores*, 104 Ill. 2d 40, 50, 470 N.E.2d 307, 311 (1984).

¶ 99 Section 115-4.1(e) of the Criminal Procedure Code mandates trial courts grant a new trial when defendant can establish his failure to appear was without his fault and due to circumstances beyond his control. 725 ILCS 5/115-4.1(e) (West 2008). The State, to establish a *prima facie* case of willful absence must prove defendant (1) was advised of the trial date; (2) was advised his failure to appear could result in a trial in his absence; and (3) failed to appear for trial when the case was called. *Smith*, 188 Ill. 2d at 343, 721 N.E.2d at 558.

¶ 100 1. *Defendant's Ability To Understand English*

¶ 101 In asserting his claim he was improperly tried *in absentia*, defendant makes repeated claims he was unable to understand English and was improperly denied an interpreter during proceedings. Defendant emphasizes the attorney representing him at his arraignment requested and used an interpreter. The State disputes this claim by pointing to the record. We agree with the State.

¶ 102 The record affirmatively establishes defendant understood and spoke English. At trial, H.E. testified regarding their verbal interaction on the morning of November 1. The police officers testified regarding statements defendant made and their conversations with him. Investigator Cook agreed defendant had an accent, but, he stated there was only "one time that I recall not understanding him." Defense counsel mentioned having telephone conversations with

defendant. Moreover, at a hearing on July 12, 2010, the trial court interacted with defendant in a manner that further demonstrates defendant understood English:

> "THE COURT: *** Mr. Al Momani, do you know where your lawyer is?
>
> MR. AL MOMANI: I called him this morning. He's coming from Chicago. He told me he's on 57. He's on his way.
>
> THE COURT: All right. Well we'll—we'll hold this for a while and give him an opportunity to be here. Have a seat, sir.
>
> ***
>
> [DEFENSE COUNSEL]: *** I'm requesting leave to withdraw. ***
>
> THE COURT: All right. What I'm going to do is – Where is – Mr. Al Momani, do you have the funds to hire another lawyer?
>
> MR. AL MOMANI: I'm working on it. Like my family is trying collecting money to find a—but I talked to a couple of them actually so."

¶ 103 Having found defendant understood English, we reject defendant's arguments he was not properly admonished or informed of the trial date due to his inability to understand statements made by or before the trial court.

¶ 104 2. *The Admonishment for Trial In Absentia*

¶ 105 Section 113-4(e) of the Criminal Procedure Code states "[i]f a defendant pleads not guilty, the court shall advise him at that time or at any later court date on which he is present

that if he escapes from custody or is released on bond and fails to appear in court when required by the court that his failure to appear would constitute a waiver of his right to confront the witnesses against him and trial could proceed in his absence." 725 ILCS 5/113-4(e) (West 2008). After defendant entered his plea of not guilty, the record shows defendant was admonished pursuant to section 113-4(e).

¶ 106 Defendant asserts, however, after the grand jury returned the indictment and he pleaded not guilty on January 26, 2010, the admonishments were not repeated. Defendant thus contends the State did not comply with section 113-4(e). Defendant, however, has not cited any authority or developed any argument the admonishments made earlier that same month were rendered ineffective following the grand jury indictment on the same charge. The argument is forfeited. See *Crull*, 388 Ill. App. 3d at 1045, 904 N.E.2d at 1190-91 ("A contention that is supported by some argument but no authority does not meet the requirements of Rule 341 and is considered forfeited.").

¶ 107 3. *Defendant's Knowledge of the Trial Date*

¶ 108 Defendant argues the record fails to show he was aware of his court date. Defendant points to places in the record he contends raises a question of his presence before the trial court when the trial date was set. Defendant further contends defense counsel, when asserting defendant knew of the trial date, made equivocal statements.

¶ 109 On more than one occasion, defense counsel asserted for the record defendant knew the court date. Defendant points to no fact of record, including no averment by affidavit, to refute defense counsel's statement. Defendant has not met his burden of making a substantial showing he was unconstitutionally denied his right to be present at trial.

¶ 110 G. Right to Due Process of Law

¶ 111 1. *Jury Question*

¶ 112 Defendant argues the trial court improperly answered a jury question, denying his right to due process. Defendant points to the following jury question and answer: "We would like clarification on the phrase 'against your will' in the kidnapping charge. If we agree she was incoherently drunk and the Defendant knew she was incoherently drunk, does that mean he held her against her will?" Defense counsel suggested the jury follow the instructions given. After some discussion, the trial court sent the following response: "It is for you to determine, based on the evidence, whether her condition rendered her incapable of consenting to the confinement."

¶ 113 Defendant acknowledges the answer is correct, but he maintains there was no evidence the victim was incoherently drunk and the court's answer "did nothing to focus the jury on whether there was evidence that she was unable to consent." Defendant, however, provides no citations to support the argument the trial court, in providing a correct response, committed reversible error. By citing no authority in support of this argument, defendant has forfeited it. Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) (mandating an argument "shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities"); see also *Vancura v. Katris*, 238 Ill. 2d 352, 370, 939 N.E.2d 328, 340 (2010) ("An issue that is merely listed or included in a vague allegation of error is not 'argued' and will not satisfy the requirements of the rule.").

¶ *114* 2. *Prosecutor's Remarks During Rebuttal Argument*

¶ 115 At trial, during rebuttal argument, the following discourse occurred:

"[PROSECUTOR]: *** Something happened with [H.E.]

after she left Joe's Brewery and it happened at the hands of this Defendant, whether he gave her something—

[DEFENSE COUNSEL]: Objection, Judge.

THE COURT: I'll sustain the objection."

The State continued, without objection: "Whatever he did with her we don't know. But he did it to the point where she wasn't able to give knowing consent. And he did it to the point where she wakes up in a storage unit and doesn't even know what's happened to her."

¶ 116 Defendant argues he was denied due process by this remark, as the trial court did not admonish the jury to disregard it. In making his argument, defendant cites one case to support his claim the trial court's failure to admonish the jury resulted in reversible error: *People v. Terry*, 99 Ill. 2d 508, 517, 460 N.E.2d 746, 750 (1984). *Terry*, however, does not hold reversal is required when an admonishment, one that was not requested, is not made to cure an alleged improper remark. At best, *Terry* supports the proposition an admonishment may cure improper remarks during closing argument. See *id.* (finding "the admonishment here was sufficient to correct any alleged error"). Defendant has not supported his argument with relevant authority. We find it forfeited. See *People v. Ward*, 215 Ill. 2d 317, 332, 830 N.E.2d 556, 564 (2005) (observing argument unsupported by relevant authority does not comply with supreme court rules).

¶ 117 3. *The Trial Court's Failure To Direct the Verdict*

¶ 118 Defendant contends the trial court improperly failed to grant his motion for a directed verdict. Defendant contends the trial court improperly concluded the victim "was unconscious when the only evidence offered was an inability to recall."

¶ 119 Defendant has not developed this argument with citation to authority, only citing one case to support the contention a "motion to dismiss admits all facts not actually contradicted by the record." See *Pendleton*, 223 Ill. 2d 458, 861 N.E.2d 999 (2006). Defendant does not develop an argument showing the trial court's conclusion was incorrect. He has forfeited this claim. See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) ("Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.").

¶ 120 III. CONCLUSION

¶ 121 We affirm. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2016).

¶ 122 Affirmed.