2020 IL App (5th) 170387-U

NO. 5-17-0387

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Hamilton County.
	)	
v.	)	No. 05-CF-31
	)	
MICHAEL P. FARLEY,	)	Honorable
	)	David K. Frankland,*
Defendant-Appellant.	)	Judge, presiding.

JUSTICE BOIE delivered the judgment of the court.
Justices Moore and Overstreet concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the trial court's denial of defendant's postconviction petition where defendant failed to demonstrate ineffective assistance of trial counsel and where there was sufficient corroborative evidence for a rational trier of fact to have found beyond a reasonable doubt the *corpus delicti* of charge I.

¶ 2 Defendant, Michael P. Farley, was found guilty of three counts of predatory criminal sexual assault of a child in violation of section 12-14.1(a)(1) of the Criminal Code of 1961 (720 ILCS 5/12-14.1(a)(1) (West 2004)) on November 24, 2008. On March 16, 2009,

*Both parties' briefs state that the proceedings were before the Honorable Melissa A. Morgan; however, our review of the record indicates that the Honorable Judge Frankland presided over defendant's trial, sentencing, and postconviction proceedings.

defendant was sentenced to 60 years' confinement within the Illinois Department of Corrections. Defendant appealed and this court affirmed. *People v. Farley*, 2012 IL App (5th) 090229-U. On January 2, 2013, defendant filed a *pro se* postconviction petition for relief (petition). The trial court conducted an evidentiary hearing on August 1, 2016, and on August 11, 2016, issued a written order denying defendant's petition. Defendant now appeals the denial of his petition presenting three issues for this court's review. First, defendant argues that the trial court's denial of his petition following an evidentiary hearing was manifestly erroneous. Second, defendant argues that the State failed to prove the *corpus delicti* of the predatory criminal sexual assault charged in count I. Third, defendant argues that the trial court erred in failing to conduct a *Krankel*[1]-type inquiry into defendant's *pro se* claim of unreasonable assistance of postconviction counsel. For the following reasons, we affirm the judgment of the trial court denying defendant's petition.

¶ 3 I. BACKGROUND

¶ 4 On July 22, 2005, defendant was charged by information with two counts of predatory criminal sexual assault of a child in violation of section 12-14.1(a)(1) of the Criminal Code of 1961. 720 ILCS 5/12-14.1(a)(1) (West 2004). Count I alleged that defendant, during the period of January 1, 2004, to May 30, 2004, committed an act of sexual penetration with R.Y.,[2] who was under 13 years of age when the act was committed,

[1]*People v. Krankel*, 102 Ill. 2d 181 (1984), and its progeny mandate a preliminary inquiry into the factual basis for a defendant's *pro se* claim that trial counsel provided ineffective assistance of counsel. Commonly referred to as a *Krankel* hearing.

[2]The full names of the minors involved in this matter were provided in the record of the postconviction proceedings since they were no longer minors at that time. However, given the nature of the charges and that they were minors at the time of the alleged offenses, we will address them by initials only in this decision.

in that defendant allowed R.Y.'s mouth to come into contact with his penis as R.Y. performed fellatio upon him. Count II alleged that defendant, on or about June 1, 2004, committed an act of sexual penetration with R.Y., who was under 13 years of age when the act was committed, in that defendant allowed R.Y.'s mouth to come into contact with his penis as R.Y. performed fellatio upon him. Defendant was R.Y.'s stepfather at the time of the charged incidents.

¶ 5 On June 20, 2007, the State filed another information charging defendant with three additional counts of predatory criminal sexual assault of a child in violation of sections 12-14.1(a)(1) and 12-16(c)(1)(i) of the Criminal Code of 1961. 720 ILCS 5/12-14.1(a)(1), 12-16(c)(1)(i) (West 2004). The identified victim in counts III, IV, and V was M.Y., also a stepdaughter of defendant, and these charges were dismissed by the State prior to trial.

¶ 6 Finally, a sixth count of predatory criminal sexual assault of a child in violation of section 12-14.1(a)(1) of the Criminal Code of 1961 was charged by information on November 17, 2008. 720 ILCS 5/12-14.1(a)(1) (West 2004). Count VI alleged that, on or about June 25, 2004, defendant committed an act of sexual penetration with R.Y., who was under 13 years of age when the act was committed, in that defendant spread R.Y.'s legs apart and allowed his tongue to come in contact with R.Y.'s vagina.

¶ 7 Counts I, II, and VI proceeded to a bench trial on November 24, 2008. As summarized in our previous decision on defendant's direct appeal (*Farley*, 2012 IL App (5th) 090229-U, ¶¶ 13-15), R.Y. testified at trial as follows:

> "R.Y. testified that she was 13 years old and that, in 2004, she was 8 years old. R.Y. testified that on her birthday, June 1, 2004, she and the defendant were in

a field behind their house working on a car he was fixing up to sell. She was tired and hot and went to sit under a tree to cool off. After a short while, the defendant approached R.Y., pulled his penis out, placed his hands on the back of R.Y.'s head, and forced her to suck on his penis. R.Y. testified that she struggled, but the defendant would not let go so she bit his penis. He released her, and she ran home and went into her bedroom. After some time, the defendant came into her bedroom and told her not to tell anybody. At the time of the incident no other adults were home.

R.Y. testified that on June 25, 2005, she was in the garage with the defendant helping him work on a vehicle. When she finished helping him she wanted to go outside to play. Before she went outside, the defendant grabbed her hand. She unsuccessfully tried to pull away. He pulled down her pants and underwear to her ankles. R.Y. stated that the defendant then set her on the vehicle, spread her legs apart, and blew on and licked the inside of her vagina. She then shoved him away and went outside. The defendant told R.Y. not to tell anybody.

R.Y. testified that the defendant 'made [her] touch his private parts' and 'suck his feet.' She said that sucking on his feet caused red marks around her lips. Her mother asked why she had such chapped lips and R.Y. told her. R.Y. stated that she did not tell her mother about any other incidents involving the defendant."

¶ 8 R.Y. also testified at defendant's trial, in relevant part, as follows:

"Q. And did you know a [name]?

A. Yes.

Q. Who was he?

A. My uncle.

Q. And he's dead now, isn't he?

A. Yes.

Q. Committed suicide.

* * *

Q. You do remember him, don't you?

A. Yes.

Q. Did you accuse him of molesting you?

A. Yes.

Q. And how about Bobbi Butler?

A. No.

* * *

Q. How about Talon[3] Torrance? Do you know him?

A. Yes.

Q. Did you accuse him of molesting you?

A. No.

Q. And how about your grandfather, Dwayne? Did you accuse him of molesting you?

A. You mean Mervin [G.]?

[3]The trial transcript incorrectly states "Talon." Mr. Torrance's correct first name is later identified in the record as "Allen."

* * *

Q. Yes, Mervin, that's right, that's right. Did you accuse him of molesting you?

A. No."

¶ 9 The trial court also heard the testimony of seven other witnesses,[4] including testimony related to the confession defendant gave to law enforcement. According to Brenda Burton, a sergeant in investigations with the Illinois State Police, defendant had described to her three incidents of sexual misconduct with R.Y. The first incident defendant described was in a field where defendant stated that R.Y. "put his penis in her mouth and sucked on it until he ejaculated." The second incident defendant described to Brenda Burton was:

"[Defendant] and [R.Y.] were in the garage, that [R.Y.] had, in fact, sat on the bucket and urinated in it. He said when she had finished, he lifted her up onto the engine block of the car they were working on and spread her legs and her vagina and blew on it to dry it off because he didn't have any toilet paper."

¶ 10 The third incident defendant described to Brenda Burton was that:

"[R.Y.] was sitting with [defendant] in a chair on his lap *** she began kissing down his chest *** and when [R.Y.]'s mouth got to his lower abdomen, she was still rubbing his penis and then put his penis in her mouth."

[4]A complete summary of the testimony at trial was provided in *People v. Farley*, 2012 IL App (5th) 090229-U, and only such testimony necessary for our analysis of the present issues is set forth in this decision.

Brenda Burton further testified that she had also interviewed R.Y. She noted that R.Y. talked to her about the incidents in the field and the garage, and although R.Y. did not tell her about the incident in the chair, R.Y. had "started telling me about a time when he—they French kissed." Brenda Burton also testified that R.Y. had described being taken onto a couch in the middle of the night and defendant "humping" her. According to Brenda Burton, R.Y. had also used the term "having sex with" in describing the incident on the couch.

¶ 11 Jeff McElroy, an investigator for the Department of Children and Family Services, testified that during his interview with R.Y. that he conducted shortly after the allegations were made, R.Y. informed him of the incident in the garage. When Mr. McElroy asked R.Y. if defendant had made her do anything to him, he testified that R.Y. stated that defendant "would have her put her mouth on his penis" and "made her kiss his pee-pee."

¶ 12 Upon completion of the bench trial, defendant was found guilty of counts I, II, and VI of predatory criminal sexual assault of a child in violation of section 12-14.1(a)(1) of the Criminal Code of 1961. 720 ILCS 5/12-14.1(a)(1) (West 2004).

¶ 13 Defendant filed a motion for posttrial relief on December 24, 2008, and an amended motion for posttrial relief on March 13, 2009. The amended motion for posttrial relief stated, *inter alia*, that the State failed to prove every element of each offense. Specifically, in the memorandum of law which accompanied defendant's amended motion for posttrial relief, defendant argued that the *corpus delicti* of predatory criminal sexual assault, as alleged in count II, was never established.

¶ 14 The trial court conducted a hearing and denied defendant's amended posttrial motion on March 16, 2009. On the same day, the trial court sentenced defendant to 20 years' confinement within the Illinois Department of Corrections, on each count, with the sentences to run consecutively, for a total of 60 years' confinement. On March 27, 2009, defendant filed a motion to reconsider the trial court's denial of his amended posttrial motion. The trial court denied defendant's motion to reconsider on May 13, 2009. Defendant then appealed his conviction and this court affirmed the judgment of the trial court on January 9, 2012. *Farley*, 2012 IL App (5th) 090229-U. The *corpus delicti* issue was not raised within defendant's direct appeal. *Id.*

¶ 15 On January 2, 2013, defendant filed a *pro se* petition for postconviction relief pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 (West 2012)). Defendant's *pro se* petition set forth the following summarized claims:

> Claim I: Ineffective assistance of trial counsel for failing to perform an investigation of known witnesses who could have impeached the State's main witness concerning prior false accusations of sexual abuse.
>
> Claim II: Ineffective assistance of trial counsel for failure to know the law as it pertained to uncorroborated confessions and, since the victim did not testify to the allegations contained in count I, the statements made by the victim to police or social services were "testimonial" in nature and, therefore, inadmissible.
>
> Claim III: Ineffective assistance of trial counsel for failing to object to several witnesses who improperly testified to the truthful character of the victim. Defendant noted that this issue was addressed by this court within his direct appeal and found

to be harmless error; however, defendant argues the harmless error finding was incorrect, or in the alternative, was now supported by additional evidence outside of the record on appeal.

Claim IV: Ineffective assistance of trial counsel for failure to file a pretrial motion to suppress defendant's statements to law enforcement or to object to the use of the statements during trial.

Claim V: Ineffective assistance of appellate counsel for failure to raise claims II and IV, above, in defendant's direct appeal. (Defendant noted that claims I and III were supported by facts outside the record and therefore did not fall under a claim of ineffective assistance of appellate counsel.)

Claim VI: That the cumulative effect of claims I-V rendered defendant's trial fundamentally unfair and denied him due process.[5]

¶ 16 Attached to defendant's *pro se* petition was approximately 31 pages of trial transcript; a copy of a sex offender evaluation completed by a Hamilton County probation officer on February 5, 2009; two affidavits executed by defendant's mother, Barbara Farley, on November 7, 2012, and December 7, 2012; an affidavit executed by defendant on December 27, 2012; an affidavit executed by M.Y. on December 13, 2012; an affidavit executed by Gaila Garrison on December 10, 2012; an affidavit executed by Judy Butler

[5]Claim VI provides no specific allegations, but a general assertion that all of the prior specific claims combined for an unfair trial and denied him due process. This court will address, if necessary, whether defendant received an unfair trial or was denied due process within its analysis of the specific issues.

on November 8, 2012; Capital Investigation interview notes[6] of Judy Butler dated February 2, 2007; an affidavit executed by Bob Butler on October 22, 2012; an affidavit executed by Duane Y. on August 3, 2012; Capital Investigation interview notes of Duane Y. dated August 4, 2008; and defendant's discovery answer filed on February 25, 2008.

¶ 17 On June 3, 2013, the trial court appointed postconviction counsel to represent defendant, and on March 28, 2014, postconviction counsel filed a Supreme Court Rule 651(c) (eff. Feb. 6, 2013) certificate. The State filed a motion to dismiss defendant's petition on January 8, 2014. On June 13, 2014, the trial court issued a written order and denied the State's motion to dismiss. Thereafter, on June 30, 2014, the State filed a response to defendant's petition.

¶ 18 Postconviction counsel filed a motion to withdraw as counsel on July 9, 2014, citing irreconcilable differences with defendant. On August 6, 2014, defendant filed a supplemental appearance and a consent for counsel to withdraw. The same day, the trial court granted postconviction counsel's motion to withdraw.

¶ 19 Defendant was appointed new postconviction counsel who filed a Rule 651(c) certificate and a supplement to defendant's *pro se* petition on June 3, 2016. The supplement to defendant's *pro se* petition incorporated defendant's *pro se* petition and further alleged (1) ineffective assistance of trial counsel for failing to object to several witnesses'

[6]The Capital Investigation interview notes state that the documents constitute attorney work product and are confidential and private. We note, however, that when a party voluntarily testifies about privileged communications with counsel, or voluntarily injects into the case either a factual or legal issue which requires examination of confidential communications, it is deemed a waiver of the attorney-client privilege. *Selby v. O'Dea*, 2020 IL App (1st) 181951, ¶¶ 176-79. As such, any documents and/or communications with counsel, submitted in support of this appeal, are deemed an express waiver by defendant of the attorney-client privilege.

testimonies and (2) that defendant was denied due process by remaining leg shackled during the bench trial.

¶ 20 On August 1, 2016, the trial court conducted an evidentiary hearing on defendant's petition. At the beginning of the hearing, the State offered a proffer asserting that the reason defendant's feet remained shackled during his trial was due to the sheriff's concerns that the courthouse only had a part-time bailiff present in the courtroom for security and no officer stationed on the first floor of the courthouse. The State noted that defendant's hands were unrestricted, so he was able to cooperate with his defense counsel throughout the trial, but that defendant's legs had remained shackled to ensure that he could not flee from the courtroom or the courthouse.

¶ 21 Four witnesses were called during the evidentiary hearing. Their testimonies are summarized as follows:

¶ 22 M.Y.

¶ 23 M.Y. testified that she is the older sister of R.Y. and that she was 23 years old. M.Y. identified the affidavit attached to defendant's petition that she executed on December 13, 2012. M.Y. stated that she had executed the affidavit at the request of defendant's mother, Barbara Farley, and went on to state that the information in the affidavit, "[a] lot of it is true and most of it is not true." M.Y. testified that she had accused defendant of molesting her when she was younger, but that defendant had never touched her.

¶ 24 Although M.Y. admitted that her allegations against defendant were false, she testified that she believed R.Y.'s allegations about defendant were true. M.Y. testified that R.Y. had never admitted to her that the allegations were false. According to M.Y., R.Y.

had accused their uncle of rape and at one time, R.Y. had admitted that she lied about the rape, but did so "because she was under a lot of stress because a lot of people were trying to tell her to, but she was honestly telling the truth." M.Y. testified that the statement in her affidavit, "that [defendant] was innocent of the charges against [R.Y.]," was false. M.Y. stated that defendant was innocent of the charges that he had molested her, but M.Y. believed that defendant was not innocent of the charges related to R.Y. M.Y. testified that defendant's mother had told her what to write in the affidavit and further told her that if she complied, M.Y. would be allowed to see her half-sister who resided with defendant's mother. M.Y. stated that after she executed the affidavit, to date, she had not been permitted to see her half-sister. Finally, M.Y. admitted that she had made an accusation of abuse against her father, but she was not aware of R.Y. ever having made any accusations against their father.

¶ 25 Bobbijo Butler

¶ 26 Bobbijo testified that he knew defendant because his mother was a good friend of defendant's parents. Bobbijo stated that, several years ago, he allowed defendant's wife and her five children to stay with him for a period of time. Bobbijo admitted that, "I get a little bit nervous when I get on the stand like this. [The State's Attorney] usually gives me about 90 days in the county jail[.]" When asked whether he was aware of any accusations made by M.Y. or R.Y. that he had sexually assaulted them, Bobbijo testified "I was just told by [wife of uncle accused of rape] that they said that. I wasn't sure. There was never no paper work. Nobody ever said. Nothing ever—***—came of that." Bobbijo denied ever having sexual contact with M.Y. or R.Y. Bobbijo also testified that he was not aware of

any instance where defendant's wife attempted to manipulate R.Y. to get her to testify or to accuse defendant of molesting her.

¶ 27 Bobbijo identified the affidavit that he executed on October 22, 2012. Bobbijo testified that it was a correct statement within the affidavit that "[M.Y.] told him that everything she and [R.Y.] said was not true. She said she just wanted everyone to quite [*sic*] asking about it and [R.Y.] was lying." Bobbijo further stated, however, that R.Y. had never admitted to him that she had falsely accused defendant. Finally, Bobbijo testified that he did not know, and had never spoken with, defendant's trial attorney.

¶ 28 Duane Y.

¶ 29 Duane testified that he is the father of M.Y. and R.Y. Duane stated that, when R.Y. was 15 or 16 years old, she had made false allegations that he had sexually molested her. Duane testified that he never had any kind of sexual contact with R.Y. Duane further testified that, on one occasion, R.Y. admitted to him that she had lied about defendant sexually assaulting her. According to Duane, R.Y. told him that the accusations were false when R.Y. had moved in with him when she was 11 or 12 years old. Duane testified that he informed R.Y.'s counselor that R.Y. had stated to him that her accusations against defendant were false. Duane testified that he did not know, and had never spoken with, defendant's trial counsel, but that he did speak with a private investigator concerning defendant's trial. Duane also testified that he was never aware of any instance where R.Y.'s mother encouraged R.Y. to make up false stories against defendant. Finally, Duane testified that he had prepared and executed the affidavit at the request of defendant's mother.

¶ 30 R.Y.

¶ 31 R.Y. testified that she was the stepdaughter of defendant and that she had previously testified as a witness at defendant's trial. R.Y. stated that, at some point after the trial, she and her family had lived with Bobbijo Butler and his wife. R.Y. testified that Bobbijo never had any inappropriate contact with her and that she did not recall ever making any accusation against Bobbijo. After moving out of Bobbijo's residence, R.Y. and her family lived with Allen Torrance for less than a year. R.Y. testified that, after they had moved out, she told her mom that Allen had attempted to French kiss her. R.Y. stated she would have been 12 or 13 years old at the time. Concerning her father, R.Y. admitted that when she was 16 years old, she had made a false accusation against him because she was tired of living with him and wanted to leave. R.Y. stated that she felt bad about it and informed the Department of Children and Family Services that the allegation was false. R.Y. also admitted that she had made an accusation of sexual abuse against her uncle, but that he had committed suicide prior to the police arresting him. R.Y. testified that the accusations against her uncle were true. R.Y. denied telling anyone, including her father, that her accusations against defendant were false. R.Y. confirmed that her testimony at defendant's trial was fair and accurate.

¶ 32 A subpoenaed witness, Allen Torrance, did not appear for the hearing. The parties, however, stipulated "[t]hat if Mr. Torrance was allowed to testify, that he would say there had been a possible allegation made [by R.Y.] against him." Upon completion of closing arguments, the trial court took the matter under advisement.

¶ 33 On August 11, 2016, the trial court issued a written order denying defendant's petition. The written order noted that defendant had put forth six claims of ineffective assistance of counsel within his petition. Five of the claims were directed towards defendant's trial counsel with the sixth claim being directed towards defendant's appellate counsel. The trial court also noted that defendant raised a "shackling" issue in his supplement to the petition. The trial court's written order stated that:

> "[T]he Appellate Court answered defendant's claims. As the Appellate Court noted, 'a defendant must contemporaneously object and raise the issue in a posttrial motion.' (Par. 38). Defendant did not do this and therefore any errors are waived. More importantly, while there may have been some failure on trial counsel's part to object to certain questions, 'the defendant failed to show that, but for counsel's deficient performance, the result of the trial would have been different, and thus he failed to show that he received ineffective assistance of counsel.' [Citation.]
>
> *** R.Y.'s testimony is consistent with her prior statements and testimony. While she admitted that years later she made an allegation against her father, the allegation was quickly recanted. Unlike defendant, Duane [Y.] denied the allegations and never confessed to any inappropriate conduct with his daughter. Defendant admits he did confess to the police investing the allegations. (See Petition filed January 2, 2013, pp. 6 & 7). Subsequently, he had tried to repudiate the confession. His confession substantiated and corroborated the statements of the young 9 year old, R.Y."

¶ 34 The trial court's written order went on to address the testimony of Bobbijo Butler[7] stating that he had no firsthand knowledge of R.Y. accusing him of any misconduct and also noted that the stipulation concerning Allen Torrence apparently centered on R.Y. informing her mother that he had kissed her on the mouth. Concerning Duane Y.'s testimony, the trial court's written order noted that he testified that years later, R.Y. made one statement that her allegations against defendant were not true, but that R.Y. had testified she did not make that statement to her father.

¶ 35 Based on the above, the trial court found that defendant had not met the burden of proof that a substantial showing of constitutional violation existed and denied defendant's petition. On September 1, 2016, defendant filed a *pro se* motion for reconsideration of the denial of his petition. In his motion for reconsideration, defendant argued, *inter alia*, that postconviction counsel rendered unreasonable assistance of counsel by failing to raise several issues that defendant claimed were relevant to his postconviction petition. On August 23, 2017, the trial court heard arguments and denied defendant's motion for reconsideration.

¶ 36 Defendant appeals the denial of his postconviction petition arguing that the trial court's denial of his petition was manifestly erroneous. Defendant also argues that the State failed to prove the *corpus delicti* of predatory criminal sexual assault charged in count I, and that the trial court erred in failing to conduct an inquiry into defendant's *pro se* claim of unreasonable assistance of postconviction counsel. We address these issues as follows.

[7]The trial court's written order identifies Bobbijo Butler as "Bobbi [Y.]."

¶ 37 II. ANALYSIS

¶ 38 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2016)) provides a remedy to a criminal defendant whose federal or state constitutional rights were substantially violated in his original trial or sentencing hearing. *People v. Pitsonbarger*, 205 Ill. 2d 444, 455 (2002). A postconviction proceeding is not an appeal from an underlying judgment, but rather a collateral attack on the judgment. *People v. Ortiz*, 235 Ill. 2d 319, 328 (2009). As a collateral proceeding, a postconviction proceeding allows inquiry only into constitutional issues that were not, and could not have been, adjudicated in an appeal of the underlying judgment. *Id.*

¶ 39 The Act sets forth a three-stage process for postconviction proceedings in noncapital cases. *People v. Little*, 2012 IL App (5th) 100547, ¶ 12. At the first stage, the trial court independently assesses a defendant's petition and may summarily dismiss the petition if the court determines that it is frivolous or patently without merit. *Id*. If not dismissed at the first stage, the petition advances to the second stage where counsel may be appointed and the State may move to dismiss the petition. *Id*. At the second stage, the trial court must determine whether the petition contains sufficient allegations of a constitutional violation, and if a substantial showing is made, the petition proceeds to the third stage for an evidentiary hearing. *Id*.

¶ 40 In this matter, defendant's petition proceeded to the third stage and an evidentiary hearing was conducted. A defendant has the burden of proving a substantial constitutional violation at the third stage. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). The trial court "may receive evidentiary proof via affidavits, depositions, testimony, or other evidence,

and may order the petitioner brought before the court" at the third stage evidentiary hearing. *People v. Gerow*, 388 Ill. App. 3d 524, 527 (2009). The evidentiary hearing allows the parties to "develop matters not contained in the trial record and, thus, not before the appellate court." *People v. Lester*, 261 Ill. App. 3d 1075, 1078 (1994).

¶ 41 The trial court serves as the finder of fact at the evidentiary hearing and, as such, it is the trial court's function to determine witness credibility, decide the weight to be given to the evidence, and resolve evidentiary conflicts. *People v. Brown*, 2020 IL App (1st) 190828, ¶ 43. When a petition is advanced to the third stage and an evidentiary hearing has been conducted involving fact-finding and credibility determinations, we will not reverse a trial court's decision unless it is manifestly erroneous. *Pendleton*, 223 Ill. 2d at 473. A trial court's ruling is manifestly erroneous if it contains an error that is clearly evident, plain, and indisputable. *People v. Hughes*, 329 Ill. App. 3d 322, 325 (2002).

¶ 42 Before addressing whether the trial court's denial of defendant's petition was manifestly erroneous, we must attend to the trial court's finding that defendant waived any errors because he failed to contemporaneously object and raise the issues in a posttrial motion. The trial court made a general finding that "any errors" were waived without providing a specific determination concerning each of defendant's claims.

¶ 43 Defendant states that the ineffective assistance of counsel claims addressed within his appeal were not waived since they were dependent on matters outside of the record and, as such, could not have been raised in a posttrial motion or on direct appeal. Defendant also argues that *corpus delicti* issue is not waivable. The State offers no arguments concerning waiver.

¶ 44 The trial court was correct that issues not raised in a posttrial motion are forfeited for review on appeal. *People v. Nielson*, 187 Ill. 2d 271, 296 (1999). Additionally, issues that could have been raised and considered on direct appeal, but were not, are deemed procedurally defaulted. *People v. Veach*, 2017 IL 120649, ¶ 47. In Illinois, issues that must be raised in a direct appeal include a constitutional claim alleging ineffective assistance of counsel. *Id*. If not raised in the direct appeal, a defendant risks the claim being deemed procedurally defaulted. *Id*. "Procedural default does not, however, preclude a defendant from raising an issue on collateral review that depended upon facts not found in the record." *Id.* Further, there are exceptions to the operation of waiver. One such exception is that the absence of proof of the *corpus delicti* may not be waived. *People v. Davis*, 173 Ill. App. 3d 300, 303 (1988).

¶ 45 The trial court improperly determined that defendant's *corpus delicti* claim was subject to waiver since the absence of proof of the *corpus delicti* may not be waived. *Id*. Further, concerning defendant's claim of ineffective assistance of trial counsel for the alleged failure to investigate and impeach R.Y. concerning prior false accusations, we find that the additional facts not found in the record, provided in the documentation attached to the petition, were sufficient to avoid waiver. Defendant only addresses the operation of waiver on these two claims[8] within this appeal. Defendant has not addressed the trial court's ruling of waiver concerning the remainder of his claims, such as the shackling issue or his claim of ineffective assistance of trial counsel for failure to file a pretrial motion to

[8]Defendant's third issue on appeal, regarding unreasonable assistance of postconviction counsel, was raised in his motion to reconsider and was not subject to the trial court's waiver finding on his petition.

suppress. Illinois Supreme Court Rule 341(h)(7) requires that all arguments must contain the contentions of the appellant, the reasons therefor, and the citation of authorities. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). Any points not argued by an appellant in an opening brief are forfeited. *People v. Towns*, 182 Ill. 2d 491, 502-03 (1998). As such, any and all issues not raised by defendant in this appeal, including any arguments that other claims were not subject to the trial court's finding of waiver, are deemed waived.

¶ 46 A. Whether Denial Was Manifestly Erroneous

¶ 47 We now proceed to the trial court's findings beyond waiver and to the merits of whether the trial court's denial of defendant's petition was manifestly erroneous. Defendant argues that the evidence at the evidentiary hearing established that defendant's trial counsel was ineffective for failing to investigate and present witnesses at trial to show that the victim had made prior false claims of sexual abuse against several individuals and failed to impeach the victim's veracity and credibility. Defendant states that his trial counsel was aware of these witnesses and the false allegations before trial, yet failed to contact them or call them as witnesses. Defendant argues that there is a reasonable probability that he would have been acquitted if these witnesses had been presented to show that the victim had lied on the stand, had a history of making false claims of sexual abuse, and had a bias against defendant. As such, defendant argues that the evidence presented at the evidentiary hearing established that defendant received ineffective assistance of trial counsel rendering the trial court's ruling manifestly erroneous.

¶ 48 We note that the State argues that the *Strickland v. Washington*, 466 U.S. 668 (1984), analysis put forth by defendant has no bearing on the manifestly erroneous standard

applicable to this appeal. The State is incorrect. In order to determine whether the trial court's ruling was manifestly erroneous, we must determine whether defendant established a claim of ineffective assistance of his trial counsel at the third stage evidentiary hearing (see *People v. Hughes*, 329 Ill. App. 3d 322, 325 (2002); *People v. Lacy*, 407 Ill. App. 3d 442, 456 (2011)), and we review ineffective assistance of counsel claims under the two-prong standard set forth in *Strickland*. *People v. Evans*, 186 Ill. 2d 83, 93 (1999).

¶ 49 Under the first prong of the *Strickland* analysis, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness so as to deny him the right to counsel guaranteed under the sixth amendment. *Strickland*, 466 U.S. at 687-88. There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and the court must give deference to counsel's performance within the context of trial and without the benefit of hindsight. *Id*. at 689.

¶ 50 It is also well settled that the strategic choices made by defense counsel, including the decision whether to present a particular witness, is within the realm of strategic choices that are generally not subject to attack on the grounds of ineffectiveness of counsel. *People v. Tate*, 305 Ill. App. 3d 607, 612 (1999) (citing *People v. Flores*, 128 Ill. 2d 66, 85-86 (1989)).

¶ 51 In addition to showing that counsel's performance fell below an objective standard of reasonableness, a defendant must establish that the deficient performance resulted in prejudice under the second prong of *Strickland*. *Strickland*, 466 U.S. at 687. Proof of prejudice requires an affirmative showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694. Further, "[t]he assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision." *Id*. at 695. An insufficient showing on either prong will defeat the constitutional claim. *Id*. at 687.

¶ 52 In this matter, defendant has failed to establish that his trial counsel's performance fell below an objective standard of reasonableness. Although defendant claims that his trial counsel failed to investigate the alleged false allegations, the investigation notes attached to the petition demonstrate that an investigation was conducted. Upon the completion of the investigation, it then became a matter of strategic choices for defense counsel on whether to present a particular witness.

¶ 53 R.Y. testified at trial that she never made any false accusations against her uncle, Bobbijo Butler, Allen Torrence, or her grandfather. As the trial court noted, Bobbijo Butler had no personal knowledge of any accusation made against him by R.Y. As such, he could have only offered inadmissible hearsay evidence at trial. The only information provided concerning Allen Torrence was that R.Y. told her mother that he had attempted to French kiss her. Whether that constituted a false allegation of sexual assault would have been a strategic choice made by defense counsel in his decision on whether to present him as a witness. Concerning R.Y.'s grandfather, the only information presented by defendant is an affidavit executed almost four years after defendant's trial and does not even state what type of misconduct, sexual or otherwise, R.Y. allegedly accused her grandfather of performing. The affidavit is not executed by R.Y.'s grandfather, but

another individual who states that "she knows [R.Y.] has accused her grandfather." R.Y.'s uncle was deceased at the time of the trial and there is no evidence that R.Y.'s allegations against her uncle were false.

¶ 54 At the evidentiary hearing, R.Y. did acknowledge that she had falsely accused her father of sexual misconduct. Defendant's reply brief states:

> "Therefore, there was an abundance of evidence available to trial counsel that would have showed R.Y.'s pattern of accusations of sexual abuse against other persons, including her admitted false claim against Duane [Y.], that could have damaged R.Y.'s credibility and undermined her claim against [defendant]."

¶ 55 This court is unpersuaded, and finds it outside the realm of possibility, that the false allegations made by R.Y. against her father in approximately 2012 was available to defendant's trial counsel in 2008. As stated above, the court must give deference to counsel's performance within the context of trial and without the benefit of hindsight. *Strickland*, 466 U.S. at 687-88. At the time of trial, the investigation notes of the interview with Duane Y. indicated that, "[Duane Y.] was not aware of any previously unfounded reports the girls had alleged against the defendant and he was not aware of promises of gifts or candy to either girl to make such allegations."

¶ 56 Duane Y. testified at the evidentiary hearing that R.Y., when she was 11 or 12 years old, told him that the allegations against defendant were false, but he also testified that he did not inform anyone of this information except R.Y.'s counselor. There was no testimony that this information was available to defendant's defense counsel. Further, the trial court serves as the finder of fact at the evidentiary hearing and, as such, it is the trial court's

function to determine witness credibility. *Brown*, 2020 IL App (1st) 190828, ¶ 43. R.Y. testified that she never told her father, or anyone, that the allegations against defendant were false. The trial court's written order noted the testimony of R.Y. and Duane Y. and found that "R.Y.'s testimony [was] consistent with her prior statements and testimony." A reviewing court may not substitute its judgment for that of the trier of fact on questions involving the credibility of the witnesses (*People v. Grano*, 286 Ill. App. 3d 278, 289 (1996)), and this court will not do so here.

¶ 57 In this matter, defendant has failed to demonstrate that his trial counsel did not investigate the potential false accusations. The investigation notes attached to defendant's petition clearly indicate that an investigation was conducted. Defendant has further failed to demonstrate that R.Y.'s allegations concerning her uncle, Bobbijo Butler, Allen Torrence, or grandfather were false or disproven, wherein their testimony would have been available to impeach R.Y.'s testimony at trial. R.Y.'s uncle was deceased at the time of trial, and concerning Bobbijo Butler and R.Y.'s grandfather, defendant has failed to even demonstrate that R.Y. made any, let alone false, allegations against these individuals. The only proven false allegation made by R.Y. was against her father in approximately 2012, and we cannot hold trial counsel accountable for an event that occurred years after the completion of trial.

¶ 58 As such, defendant has failed to overcome the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. Because we have determined that defendant has an insufficient showing on the first prong of *Strickland*, we need not to address the second prong of prejudice.

¶ 59 Based on the above, we find that the judgment of the trial court concerning defendant's claims of ineffective assistance of trial counsel contains no error that is clearly evident, plain, or indisputable. Therefore, the trial court's ruling was not manifestly erroneous.

¶ 60 B. *Corpus Delicti* of Predatory Criminal Sexual Assault

¶ 61 We first note that this issue was raised in defendant's amended motion for posttrial relief. Defendant stated in his amended motion for posttrial relief that "[i]n the case at bar, the corpus delicti of Predatory Criminal Sexual Assault, as alleged in Count II, was never established." The trial court denied defendant's amended motion for posttrial relief.[9] Defendant now raises the identical argument with regard to count I. Defendant argues that the State failed to prove the *corpus delicti* of predatory criminal sexual assault as alleged in count I. According to defendant, the State alleged in counts I and II that defendant forced R.Y.'s mouth to come into contact with his penis, but the evidence at trial established only a single incident where R.Y.'s mouth came in contact with defendant's penis. As such, defendant argues that the State failed to meet its burden of proving the *corpus delicti* of the conduct alleged in count I and that defendant's conviction on count I should be vacated. We disagree.

¶ 62 "The *corpus delicti* of an offense is simply the commission of a crime." *People v. Lara*, 2012 IL 112370, ¶ 17. In order to obtain a valid conviction, the State must prove beyond a reasonable doubt the *corpus delicti* along with the identity of the person who

[9]The judgment of the trial court denying defendant's amended posttrial motion for relief is not at issue in this appeal.

committed the offense. *Id*. "In general, the *corpus delicti* cannot be proven by a defendant's admission, confession, or out-of-court statement alone. When a defendant's confession is part of the *corpus delicti* proof, the State must also provide independent corroborating evidence." *Id.* "The primary purpose of the *corpus delicti* rule is to ensure the confession is not rendered unreliable due to either improper coercion of the defendant or the presence of some psychological factor." *Id*. ¶ 47. The independent evidence need only tend to show the commission of the crime, and it need not be so strong that it alone proves the commission of the offense beyond a reasonable doubt. *Id*. ¶ 18. The corroboration evidence is sufficient to satisfy the *corpus delicti* rule if the evidence, or reasonable inferences based on it, tends to support the commission of a crime that is at least closely related to the charged offense. *Id*. ¶ 45. Further, "the trier of fact alone is entrusted with the duties of examining the evidence and subsequently determining whether the State has met its burden of proving the elements of the charged offense beyond a reasonable doubt. *** Inherent in those responsibilities is the need to consider a variety of evidence, some conflicting or unclear, addressing the *corpus delicti*, the identity of the offender, or both." *Id*. ¶ 46. We review the challenge of a criminal conviction for insufficient evidence by considering all of the evidence in the light most favorable to the prosecution, to determine whether any rational trier of fact could have found beyond a reasonable doubt the essential elements of the crime. *People v. Brown*, 2013 IL 114196, ¶ 48.

¶ 63 Defendant cites to *People v. Sargent*, 239 Ill. 2d 166 (2010), wherein the Illinois Supreme Court reversed the conviction in a similar type of case because "the corroboration rule requires that there be independent evidence tending to show that defendant committed

each of the offenses for which he was convicted." *Id*. at 185. Although *Sargent* remains valid case law, in *Lara*, 2012 IL 112370, our supreme court went on to clarify its holding in *Sargent*:

> "The court's statement [in *Sargent*] that corroboration must 'relate to the specific events on which the prosecution is predicated' was addressed not to just any two separate criminal charges but particularly to criminal charges alleging distinctly different types of acts. The court did not countenance the use of evidence establishing the defendant's digital penetration of M.G. to prove the fondling allegation as well precisely because the latter constituted an entirely different type of assault affecting a different part of the victim's body. ***
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> ***
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> Notably, however, *Sargent* recognized that in some instances one type of criminal activity could be 'so closely related' to another type that 'corroboration of one may suffice to corroborate the other.' [Citation.] Thus, *Sargent* suggests that the same corroborating evidence may suffice to support a defendant's confession to multiple offenses when the offenses possess some distinctive elements. Due to the fact-intensive nature of the inquiry, however, the question of whether certain independent evidence is sufficient to establish specific charged offenses must be decided on a case-by-case basis. Our acknowledgment in *Sargent* that not all elements of each offense must be expressly corroborated in all criminal cases seriously undermines defendant's arguments here. Contrary to defendant's claim,

Sargent may be properly read to support the general rule that corroboration is not compulsory for each element of every alleged offense." *Id*. ¶¶ 24, 26.

¶ 64 We note that during arguments on defendant's amended motion for posttrial relief, defendant's counsel argued:

> "[D]ealing with Count I, the—as he referred to as the field incident, both through the victim's testimony and through closed-circuit TV and Investigator Brenda Burton and Rick White, that the factual scenario of when and where it took place and how it came about is roughly the same. *** With that incident, through the testimony of the defendant, through the investigators, and also the victim stating that there was fellatio performed, that's more than ample evidence for beyond a reasonable doubt."

¶ 65 Defendant now argues that the "field incident" was charged in count II and argues that this court should vacate his conviction on count I. In this matter, the trial court acknowledged that much of the testimony was presented under an exception to the hearsay rule because the victim was under the age of 13 years old. The trial court found that, "although the testimony was not exact on every detail, on the core issues, the testimony was consistent." The trial court did not make any specific finding connecting the testimony to specific counts. As such, it is difficult to determine whether the "field incident" was charged in count I or in count II. However, we need not answer that question to determine whether there was sufficient corroborating evidence to support defendant's confession to two occasions of causing his penis to come into contact with R.Y.'s mouth.

¶ 66 R.Y.'s testimony at trial concerning the incident in the garage and the "field incident" were exceedingly similar to the incidents that defendant confessed to Brenda Burton. Defendant also described an incident in the living room where R.Y. French kissed him and then performed fellatio. Although R.Y. could not recall any other specific incidents of fellatio at trial, R.Y. testified that in other incidents, her younger brother would sometimes be taking a nap. Brenda Burton testified that in her interview with R.Y., R.Y. had "started telling me about a time when he—they French kissed." Brenda Burton also testified that R.Y. had described being taken onto a couch in the middle of the night and defendant "humping" her. Jeff McElroy, the investigator for the Department of Children and Family Services, testified that R.Y. had informed him that defendant would make her "kiss his pee-pee" and put her mouth on his penis.

¶ 67 R.Y.'s testimony concerning the two specific incidents tends to indicate that defendant's confession was not unreliable due to either improper coercion of the defendant or the presence of some psychological factor since defendant recited many of the same details relating to the two incidents. Although R.Y.'s testimony at trial was unclear regarding any additional occurrences of performing fellatio on defendant, the testimony of Brenda Burton corroborated that R.Y. had described to her French kissing defendant and an incident of sexual assault which occurred in the living room. As stated above, corroboration is not compulsory for each element of every alleged offense, and many of the same details relating to the living room incident tend to indicate that defendant's confession was not unreliable.

¶ 68 It was the trial court's responsibility to consider the variety of evidence in this matter addressing the *corpus delicti*. The trial court determined that the corroborating evidence supported defendant's confession and was sufficient to establish the specific charged offenses. We also find that R.Y.'s testimony, along with the testimony of the witnesses who had interviewed R.Y., considered in the light most favorable to the prosecution, was sufficient for the trial court to determine that the State had provided corroborative evidence to defendant's confession concerning charge I. We further find that a rational trier of fact could have found beyond a reasonable doubt the essential elements of the crime that defendant committed the offense charged in count I for which he was convicted.

¶ 69 Because we have now addressed this issue on appeal, the defendant's claim that his appellate counsel rendered ineffective assistance of counsel for failure to raise this issue on direct appeal is moot.

¶ 70 C. Claim of Unreasonable Assistance of Postconviction Counsel

¶ 71 In his opening brief, defendant raised the issue of whether the trial court erred in failing to conduct a *Krankel*-type hearing to investigate defendant's *pro se* claims of unreasonable assistance of postconviction counsel. Defendant cited to *People v. Custer*, 2018 IL App (3d) 160202, in support of his argument. The appellate court in *Custer* found that a *Krankel*-type procedure should apply to claims of unreasonable assistance of postconviction counsel at the third stage of postconviction proceedings. *Id.* ¶ 25. However, as noted by the State and acknowledged by defendant in his reply brief, the Illinois Supreme Court recently reversed the appellate court's judgment in *Custer* and declined to extend the

posttrial procedures created in *Krankel* to allegations of unreasonable assistance of postconviction counsel. *People v. Custer*, 2019 IL 123339, ¶ 46.

¶ 72 Therefore, defendant's argument that the trial court erred in failing to conduct a *Krankel*-type hearing to investigate defendant's *pro se* claims of unreasonable assistance of postconviction counsel is nullified by the recent Illinois Supreme Court ruling in *Custer*. In compliance with *Custer*, we find that the trial court did not err in failing to conduct a *Krankel*-type hearing to investigate defendant's *pro se* claims of unreasonable assistance of postconviction counsel.

¶ 73 III. CONCLUSION

¶ 74 For the foregoing reasons, we affirm the judgement of the trial court denying defendant's postconviction petition.

¶ 75 Affirmed.