

Nos. 1-10-1537 & 1-10-2400, Consolidated

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, |) Appeal from |
| |) the Circuit Court |
| Plaintiff-Appellee, |) of Cook County |
| |) |
| v. |) No. 96 CR 24554 |
| |) |
| MARTICE HANIBLE, |) Honorable |
| |) Joseph G. Kazmierski Jr., |
| Defendant-Appellant. |) Judge Presiding. |

JUSTICE PALMER delivered the judgment of the court.

Justice Lampkin concurred in the judgment.

Justice R. Gordon dissented.

ORDER

- ¶ 1 **Held:** The dismissal of defendant's postconviction petition after an evidentiary hearing is affirmed over defendant's contentions that: (1) the trial court erred in denying his claim of actual innocence; and (2) he made a substantial showing that he was deprived of the effective assistance of trial and appellate counsel.
- ¶ 2 Defendant Martice Hanible appeals from the third-stage dismissal of his petition for relief

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under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2000). Defendant contends that the trial court erred in denying his claim of actual innocence at the third stage of proceedings because there is a reasonable probability that the recantation testimony of the State's primary eyewitness would change the result on retrial. Defendant also contends that he made a substantial showing that he was deprived of the effective assistance of trial and appellate counsel. We affirm.

¶ 3

BACKGROUND

¶ 4 This case arises from the June 13, 1996, shooting death of Nathaniel Reginald Howard (Reggie). In connection with the shooting, defendant was charged with first degree murder, attempted first degree murder and aggravated discharge of a firearm. After a 1998 jury trial, defendant was found guilty of the charged offenses and sentenced to consecutive terms of 60 years' imprisonment for first degree murder and 20 years' imprisonment for attempted first degree murder.

¶ 5 This court affirmed defendant's convictions on direct appeal over his challenge to the sufficiency of the evidence and contentions of prosecutorial misconduct. *People v. Hanible*, No. 1-98-4662 (March 8, 2001) (unpublished order under Supreme Court Rule 23). We, however, ordered that defendant's sentences be served concurrently. *Hanible*, No. 1-98-4662 at 15. The facts underlying defendant's convictions are set out in detail in that order. We revisit them here to the extent necessary to understand the issue raised on appeal.

¶ 6 At trial, Brian Keyes testified that on the night of the shooting, he was with Reggie, sitting in front of Reggie's home at 5464 West Walton Street in Chicago. As the pair sat talking, Brian

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heard voices coming from somewhere to his right. Brian looked up and, by the light of a street lamp, saw three black men in their early twenties approaching him and Reggie. Brian said that as the three men got closer, he was able to see their faces. When the men were about seven feet from Brian and Reggie, they stopped. At this time, Brian had a clear view of the men's faces and said defendant was the man standing in the middle of the group. Brian said defendant was wearing dark pants and a white shirt. He also said defendant had "nappy" hair that was unevenly cut. Brian identified defendant in open court.

¶ 7 The men asked Brian and Reggie if they had any marijuana for sale. Reggie answered that they did not. Brian saw that two of the men were pointing guns at him and Reggie as one of the men asked where they could find some marijuana for sale. Brian stood up, told Reggie to run and began to run himself. As he ran, Brian heard laughter and then gunshots. Brian turned around and saw two of the men, including defendant, shooting. He also saw Reggie lying on the sidewalk. Because shots were still being fired in his direction, Brian continued to run.

¶ 8 Shortly after the shooting, Brian was stopped by police, who escorted him back to 5464 West Walton. There, Brian gave the police a description of the three men. Brian said the men were black and of average height and weight. He said defendant was about 5 feet 11 inches tall and weighed around 135 pounds. He also described defendant's haircut to police.

¶ 9 Two weeks after the shooting, Brian viewed a series of photographs presented to him by detectives and identified defendant and another man as the shooters. The other man was Michael Collins, who later pled guilty to the murder. On September 21, 1996, Brian viewed a lineup and identified defendant as one of the shooters. Brian testified that he had never seen defendant prior

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to the night of the shooting.

¶ 10 Brian acknowledged that he was twice-convicted of drug-related offenses and that he had spent time in prison. At the time of trial, Brian was facing charges on two other drug-related offenses. He also acknowledged that he is a member of the Four Corner Hustlers street gang. Brian further acknowledged that he had consumed between four to six beers and smoked marijuana during the day of the shooting. He denied that he had either consumed beer or smoked marijuana during the night of the shooting. Brian said he was free from the effects of either substance at the time of the shooting.

¶ 11 Detective Joseph Mohan testified that he was assigned to investigate the shooting in question and went to the scene of the crime. There, Mohan spoke with Brian who gave him a general description of the shooters. Mohan said that Brian was upset but did not appear to be under the influence of drugs or alcohol. After learning that the shooting was gang-related, Mohan showed Brian a group of photographs of members of the Black P. Stones street gang. The Black P. Stones were a rival gang of the Four Corner Hustlers. Brian identified defendant and another man as the shooters. After Brian did so, an arrest warrant was issued for defendant. Defendant was arrested in Milwaukee, Wisconsin, and transported to Area 5 police headquarters. On September 21, 1996, Brian identified defendant from a lineup as one of the shooters.

¶ 12 After the State's case-in-chief, the parties entered into three stipulations. First, the parties stipulated that police officers recovered .45- and .380-caliber shell casings from the crime scene, that there were no fingerprints and that the murder weapon was never found. Second, the parties stipulated that Brian made a positive identification of defendant from a photo array as one of the

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shooters and asked to see defendant in person. Finally, the parties stipulated that if called as a witness, Detective Curley would testify that Brian identified defendant from a lineup as one of the shooters.

¶ 13 Defendant pursued a theory of mistaken identity at trial. Robert Stallworth, a security guard, testified that on the night of the shooting, he was in the bedroom of his third-floor apartment, watching television. Stallworth's bedroom window overlooks Walton Street. At about 11:30 p.m., Stallworth heard gunshots and looked out of his window. He saw two men on the corner of Walton and Pine Avenue, standing under a street lamp and shooting. Stallworth could not see at whom the men were shooting. Stallworth said he saw the profiles of the shooters and, as the shooters turned to run, he saw their faces. He described the shooters as two black men, one about 5 feet 8 inches tall and the other about 5 feet 11 inches. The taller of the two had a lighter complexion and was wearing a light colored shirt with stripes. The shorter man was wearing a dark colored shirt with a red collar. Stallworth said he was positive that defendant was not one of the shooters.

¶ 14 After the shooters fled, Stallworth ran outside and saw Reggie, whom he had known for several years, lying in a pool of blood. Stallworth ran to Reggie's house and told his parents of the shooting. When police arrived, Stallworth gave them a description of the shooters.

¶ 15 On cross-examination, Stallworth acknowledged that the window through which he made his observations was dirty and that the shooters were half a block away. He also acknowledged that the shooters ran with their heads down. Stallworth further acknowledged that he told police he saw only two shooters and that he mistook Brian for Brian's brother "Pee-Wee." Stallworth

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admitted that at the time of the shooting, he believed Reggie had murdered a woman Stallworth dated. After the shooting, Stallworth learned that the woman was still alive. Stallworth viewed a lineup on June 21, 1996, in which defendant participated, but said he did not remember seeing defendant in that lineup because he was not looking for defendant.

¶ 16 In rebuttal, William Marley, an investigator for the State's Attorney's Office, testified that Stallworth told him that Stallworth had told an investigating detective that all Stallworth could see were silhouettes and that he could not identify anyone. Stallworth told the investigator that when he later thought about the shooting, he was able to remember what the shooters looked like.

¶ 17 The parties also stipulated that if Detective Rabbit were called, he would testify that he spoke with Stallworth after the June 21, 1996, lineup, and that Rabbit was unable to recall and his report did not reflect whether Stallworth told him that the shooters were not in the lineup.

¶ 18 During closing argument, the State argued that Brian's testimony was credible and sufficient to convict defendant of Reggie's murder. In doing so, the State noted that defendant fled to Milwaukee because he was "running from the prosecution for his involvement in this murder[.]" The State also noted:

"Now, if he's innocent, why didn't he let the police know where he was, that he wanted to leave town? There is nothing stopping him. Why not let the police know I'm going to be up in a different state, in a different city, but he doesn't do that, and the reason is because he knows he's guilty."

¶ 19 In rebuttal, defendant argued that the evidence was insufficient to find him guilty of the murder where the only evidence against him was the uncorroborated testimony of a rival gang

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member, who admitted to consuming alcohol and marijuana on the day of the shooting.

¶ 20 Following closing arguments, defendant was found guilty of the charged offenses.

¶ 21 On December 6, 2001, defendant filed a *pro se* petition for relief under the Act. On April 13, 2004, defendant filed a petition for postjudgment relief under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2002)). The trial court recharacterized defendant's section 2-1401 petition as a supplement to his postconviction petition. Defendant attached to this latter petition an affidavit from Brian. In the affidavit, Brian averred that he "had doubt as to [defendant] being one of the men that [Brian] testified to seeing on June 13, 1996, whom took part in the shooting of [his] friend [Reggie]." Brian also averred that he was "almost for sure that [defendant] is not one of the three men there on June 13, 1996, that [he] s[aw] commit the crime[.]" Defendant also submitted an affidavit from his former attorney Ken Del Vallee, who averred that he had advised defendant to leave town after defendant told him that police had been "making it unpleasant" for him. Del Vallee was not defendant's trial attorney. Finally, defendant attached an affidavit from Michael Collins. In the affidavit, Collins recanted portions of his plea agreement that implicated defendant in the shooting.

¶ 22 On October 12, 2006, postconviction counsel filed a supplemental postconviction petition, arguing that: (1) defendant was actually innocent of Reggie's murder because Brian's affidavit undermined the only evidence connecting defendant to the shooting; (2) defendant was denied a fair trial because the jury instructions misstated the law regarding eyewitness identification; (3) trial counsel was ineffective for failing to present Del Valle as a witness to testify about defendant's alleged flight from Chicago; and (4) trial counsel was ineffective for entering into a

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damaging and factually incorrect stipulation regarding the statements Stallworth made to Detective Rabbit after the June 21, 1996, lineup.

¶ 23 The State filed a motion to dismiss defendant's petition on April 10, 2008. Postconviction counsel filed a response to the State's motion. On November 20, 2008, the trial court denied the State's motion to dismiss defendant's actual innocence claim but granted the motion as to all other claims. The court held an evidentiary hearing on defendant's actual innocence claim on December 10, 2009.

¶ 24 At the hearing, Brian testified that he did not get a good look at the three men who approached him and Reggie on the night of the shooting. Brian said that after the men asked him if he had any marijuana, they began shooting immediately and he started to run. He said that he only saw the men for a few seconds and that he was intoxicated at the time. Brian told police at the scene that he was unable to make an identification of the shooters because he was not one hundred percent sure who they were. Brian testified that he had the impression that police already knew who the shooters were when they showed him photographs of the possible shooters. He acknowledged that he was unable to name or describe the officers who gave him that impression. Brian said that he identified defendant from the photographs because he was "going off the police word." He said he had come forward with this later information because he had started going to church and wanted "to make things right." Brian acknowledged that he did not lie when he identified defendant at trial.

¶ 25 On cross-examination, Brian testified that he executed his affidavit while incarcerated at the county jail. He said that he did not discuss the matter with anyone and that he was "not sure"

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whether he spoke with the public defender about the contents of his affidavit. Brian said he could not recall whether he had executed one or two affidavits and in what year he signed the affidavit. Brian acknowledged that after the shooting he had given a handwritten statement to Assistant State's Attorney Karen O'Malley, identifying defendant as one of the shooters. He also acknowledged that he identified defendant from a lineup as one of the shooters. Brian further acknowledged that in open court at trial he identified defendant as one of the shooters.

¶ 26 The State presented the testimony of four witnesses. Assistant State's Attorney Thomas Reick, one of the trial prosecutors in this case, testified that he interviewed Brian before trial. Brian never told Reick that he could not identify the shooters or that he was not 100% sure who they were. Brian also never told Reick that he was intoxicated at the time of the shooting or that police had suggested to him who to identify.

¶ 27 Detective Richard Maher testified that he and Detective Curley conducted the September 21, 1996, lineup at which Brian identified defendant. Maher said Brian never indicated that he was uncertain in his identification of defendant. Brian also never told the detectives that he had been intoxicated on the night of the shooting.

¶ 28 Assistant State's Attorney Thomas Kougias testified that he presented Brian to the grand jury on September 25, 1996, at which time Brian made a photo identification of defendant under oath. Brian never told Kougias that he was uncertain about his ability to identify defendant or that he was intoxicated on the night of the shooting. Brian also never said that police had suggested to him which photograph to choose. Kougias said he and Brian reviewed the handwritten statement Brian gave to O'Malley and that Brian never indicated he had been intoxicated on the night of the

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shooting or that police had suggested to him which photograph to choose.

¶ 29 Investigator Brannigan testified that he had interviewed Collins at the Illinois River Penitentiary on June 19, 2008. Collins told Brannigan that the affidavit he submitted was a lie and that he had signed it to help defendant, who was Collins' friend.

¶ 30 In denying defendant's petition, the trial court noted that at trial the jury, as the trier of fact, made certain credibility determinations. The court pointed out that the jury heard testimony about Brian's drinking and marijuana use, but that it also heard Brian testify that he was positive defendant was one of the shooters. The court noted that Brian's testimony at the evidentiary hearing "could best be described as critical and unsure as a whole." The court afforded "no weight" to Collins' affidavit given Brannigan's testimony that Collins acknowledged that the affidavit was a lie.

¶ 31 Defendant filed a notice of appeal on May 13, 2010 (No. 1-10-1537), from the court's order. Although the court had recharacterized defendant's section 2-1401 petition as a supplement to his postconviction petition, defendant filed a motion to reconsider his section 2-1401 petition. The court denied the motion on July 7, 2010. Defendant filed a notice of appeal (No. 1-10-2400) from that denial on July 27, 2010. We granted defendant's motion to consolidate the appeals.

¶ 32 On appeal, defendant argues that the trial court erred in denying his actual innocence claim at the third stage of proceedings because there is a reasonable probability that Brian's recantation testimony would change the result on retrial. Defendant also claims that the court erred in granting the State's motion to dismiss his other claims because he made a substantial showing that he was deprived of his right to the effective assistance of trial and appellate counsel.

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¶ 33

ANALYSIS

¶ 34 The Act (725 ILCS 5/122-1 *et seq.* (West 2000)) provides "a remedy for defendants who have suffered a substantial violation of their constitutional rights at trial." *People v. Edwards*, 197 Ill. 2d 239, 243-44 (2001). Under the Act, a postconviction proceeding in noncapital cases contains three stages. *People v. Pendleton*, 223 Ill. 2d 458, 471-72 (2006). At the first stage, the trial court has 90 days to review a defendant's petition and may summarily dismiss the petition if the court finds it frivolous and patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2000); *Pendleton*, 223 Ill. 2d at 472. If the trial court does not dismiss the petition within that 90-day period, the court must docket it for further consideration. 725 ILCS 5/122-2.1(b) (West 2000); *Pendleton*, 223 Ill. 2d at 472.

¶ 35 At the second stage of postconviction proceedings, counsel may be appointed for the defendant, if the defendant is indigent. 725 ILCS 5/122-4 (West 2000); *Pendleton*, 223 Ill. 2d at 472. After postconviction counsel has made any necessary amendments to the defendant's petition, the State may move to dismiss it. 725 ILCS 5/122-5 (West 2000); *Pendleton*, 223 Ill. 2d at 472. If the State moves to dismiss, the trial court may hold a hearing on the State's motion. *Pendleton*, 223 Ill. 2d at 473. At the hearing, the trial court is foreclosed from engaging in any fact finding and all well-pled facts that are not positively rebutted by the trial record are to be taken as true. *Pendleton*, 223 Ill. 2d at 473. At the second stage, the defendant bears the burden of making a substantial showing of a constitutional violation. *Pendleton*, 223 Ill. 2d at 473.

¶ 36 Here, the trial court dismissed all but defendant's actual innocence claim at the second stage of proceedings. The dismissal of a postconviction petition without an evidentiary hearing is

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reviewed *de novo*. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007).

¶ 37 If the State's motion to dismiss is denied, the State must answer the defendant's petition and the proceeding then advances to the third stage, an evidentiary hearing where the defendant may present evidence in support of his petition. 725 ILCS 5/122-6 (West 2000); *Pendleton*, 223 Ill. 2d at 472-73. Here, defendant's actual innocence claim advanced to a third-stage evidentiary hearing. Because fact finding and credibility determinations were involved at the hearing, we will not reverse the trial court's decision unless it is manifestly erroneous. *Pendleton*, 223 Ill. 2d at 473.

¶ 38 On appeal, we first consider defendant's argument that the trial court erred in denying his claim of actual innocence. To establish a claim of actual innocence, a defendant must present evidence that is newly discovered, material and non-cumulative and "of such conclusive character that it would probably change the result on retrial." *People v. Morgan*, 212 Ill. 2d 148, 154 (2004). Defendant argues that the trial court's ruling was manifestly erroneous where there is a reasonable probability that Brian's recantation of his trial testimony would likely change the result upon retrial because it was the only evidence tying defendant to the murder.

¶ 39 After reviewing the evidence presented, we cannot say that the court's ruling was manifestly erroneous. Here, Brian's testimony at the evidentiary hearing was not of such conclusive character that it would probably change the result on retrial. Brian testified that he was unsure of his identification of defendant, not that defendant was not one of the shooters. When asked about his earlier positive identifications of defendant at trial, Brian acknowledged that he had not lied when he identified defendant in open court. As noted by the trial court, Brian's

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testimony "could best be described as critical and unsure as a whole." Contrary to defendant's argument, Brian's testimony at the evidentiary hearing was not a recantation of his trial testimony; rather, it was at most impeaching of his trial testimony. This court has held that evidence that merely impeaches a witness is not of such a conclusive character as to justify postconviction relief. See *People v. Barnslater*, 373 Ill. App. 3d 512, 523 (2007).

¶ 40 Even were we to characterize Brian's testimony at the evidentiary hearing as recanting his trial testimony, we note that recantations are deemed "highly unreliable" and a court will not grant a new trial on that basis except in "extraordinary circumstances." *People v. McDonald*, 403 Ill. App. 3d 131, 137 (2010); *People v. Steidl*, 177 Ill. 2d 239, 260 (1997). This case does not present those extraordinary circumstances. See *People v. Jones*, 2012 IL App (1st) 093180 (the defendant was not entitled to postconviction relief because the eyewitness's recantation of her positive identification of the defendant as gunman did not rise to the level of a due process violation where the witness testified at the postconviction hearing that she was no longer sure that the defendant was one of the gunmen).

¶ 41 In reaching this conclusion, we find *People v. Ortiz*, 235 Ill. 2d 319 (2009), cited by defendant in support of his argument, distinguishable. Here, unlike *Ortiz*, defendant did not present the affidavit and testimony of a newly identified eyewitness, who at the evidentiary hearing said he saw the shooting and that the defendant was not one of the shooters. See *Ortiz*, 235 Ill. 2d at 326.

¶ 42 The dissent takes issue with our treatment of *Ortiz*. Contrary to the dissent's contention, we do not hold that *Ortiz* does not apply to newly discovered evidence but only to newly

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identified witnesses. We have made no such general declaration. We simply note that the cases are factually and materially dissimilar.

¶ 43 In *Ortiz*, Sigfredo Hernandez did not testify at the defendant's trial. Over 11 years after the offense, his affidavit was attached to the defendant's third *pro se* postconviction petition. At an evidentiary hearing Hernandez revealed that he was present at the time of the shooting in question and that he saw two persons who were not the defendant on bicycles, chasing the victim on Sheridan Road. They got off their bicycles, approached the victim and fired shots at him. Hernandez further related that he did not see defendant in the park that night. He did not report his story to police because he was scared of being killed by his fellow gang members. He moved to Wisconsin at the end of 1992 or the beginning of 1993. He saw the defendant's mother in Chicago in 2003 and told her that he knew defendant was not guilty. A few months later, he wrote out his affidavit with a friend's help in order to " 'get it off his chest.' " *Ortiz*, 235 Ill. 2d at 326.

¶ 44 At the third stage these cases are factually specific. We distinguish *Ortiz* in that *Ortiz* involved a newly discovered witness that came forward with evidence that totally exonerated the defendant. That is not the case here. The case at bar did not involve a newly discovered witness who came forward to exonerate the defendant. This case involves a key eyewitness who testified and was extensively cross-examined at the original trial and identified defendant in open court as a shooter. Additionally, he testified that shortly after the shooting, he identified defendant in a photo array and later in a lineup. He even testified that he confirmed his identification of defendant in a conversation in the Cook County jail with his attorney. He has now since recanted

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his testimony. As noted above, recantations are deemed "highly unreliable" and recantation evidence is disfavored in the law. As a result, the facts of this case are simply not comparable nor as strong as in *Ortiz*.

¶ 45 Defendant next argues that he made a substantial showing that he was deprived of the effective assistance of trial counsel because counsel: (1) agreed to a jury instruction that misstated the law regarding identification testimony; (2) failed to present attorney Del Vallee as a witness; and (3) entered into a factually incorrect stipulation regarding the statements Stallworth made to Detective Rabbit after the June 21, 1996, lineup. Defendant also claims that his appellate counsel was ineffective for failing to contest the allegedly misleading jury instruction on direct appeal.

¶ 46 To establish a claim of ineffective assistance of trial counsel a defendant must show: (1) that his counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) that this deficient performance prejudiced the defendant such that, but for counsel's error, he would have been acquitted. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). A defendant's failure to show either deficient performance or prejudice will defeat his claim. *Strickland*, 466 U.S. at 696-97.

¶ 47 Here, defendant cannot show that either trial or appellate counsel was deficient for not challenging the jury instruction regarding identification testimony. At defendant's 1998 trial, the jury was given Illinois Pattern Jury Instruction No. 3.15 (Illinois Pattern Jury Instructions, Criminal, No. 3.15 (3rd ed. 1992) (Circumstances of Identification) (hereinafter, IPI Criminal 3rd No. 3.15)). The instruction provides:

"When you weigh the identification testimony of a witness, you should

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consider all the facts and circumstances in evidence, including, but not limited to, the following:

The opportunity the witness had to view the offender at the time of the offense;

or

The witness's degree of attention at the time of the offense;

or

The witness's earlier description of the offender;

or

The level of certainty shown by the witness when confronting the defendant;

or

The length of the time between the offense and the identification confrontation."

(Emphasis added.) IPI Criminal 3rd No. 3.15. Defense counsel did not object to the instruction and appellate counsel did not raise the issue on direct appeal. Defendant's appeal was decided in March 2001.

¶ 48 In November 2001, this court held that an identical instruction, with the inclusion of the word "or" between the enumerated factors, was plain error because a jury could have concluded that eyewitness testimony was reliable if only one of the five factors was present. *People v. Gonzalez*, 326 Ill. App. 3d 629 (2001). The law, however, requires that the jury consider each of

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these factors. *Gonzalez*, 326 Ill. App. 3d at 640-41. Our supreme court agreed with *Gonzalez* that giving the instruction with the "ors" is plain error. *People v. Herron*, 215 Ill. 2d 167, 191 (2005); see also *People v. Piatkowski*, 225 Ill. 2d 551, 556 (2007) (substituting "or" for "and" when giving the instruction is "clear and obvious error"). In reaching this decision, the *Herron* court noted that in 2003, the instruction was modified, removing the "or." *Herron*, 215 Ill. 2d at 191 (2005).

¶ 49 Defendant now argues that his trial and appellate counsel were ineffective for not raising this issue. Defendant claims that, as in *Gonzalez*, his counsel should have challenged the erroneous jury instruction because the law was well-established, even before *Gonzalez* and *Herron* were decided, that the reliability of identification evidence must be determined by considering all five factors.

¶ 50 We considered and rejected this same argument in *People v. Chatman*, 357 Ill. App. 3d 695 (2005). In *Chatman*, the defendant filed a postconviction petition, asserting that trial and appellate counsel had been ineffective for failing to challenge the same "or" instruction.

Chatman, 357 Ill. App. 3d at 699. We found that the defendant was not entitled to the benefit of the *Gonzalez* decision because it was reached six years after the defendant's appeal was decided and Illinois courts generally do not apply new rules retroactively to cases on collateral review.

Chatman, 357 Ill. App. 3d at 700. We explained that counsel's failure to invoke a ruling that had not yet occurred could not be deemed objectively unreasonable or result in prejudice to the defendant because:

"to require counsel to premissise future appellate court holdings would render 'effective assistance' an impossible standard to meet and would, we believe, render

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nearly all Illinois attorneys incompetent. We will not ascribe incompetence to defendant's counsel based on a ruling issued well after their service to defendant ended."

Chatman, 357 Ill. App. 3d at 700.

¶ 51 Here, we see no reason to depart from the reasoning in *Chatman*. As mentioned, defendant's trial and appeal were decided before *Gonzalez* was decided and before IPI Criminal 3rd No. 3.15 was modified. Accordingly, defendant has failed to show that trial counsel's performance fell below an objective standard of reasonableness to satisfy the first prong of the *Strickland* test.

¶ 52 We are likewise unpersuaded by defendant's related argument that his appellate counsel was ineffective for failing to raise this issue on appeal. In support of this argument, defendant relies on *People v. Leason*, 352 Ill. App. 3d 450 (2004). In *Leason*, this court held that a defendant must raise an issue, "even when the law is against him, to preserve it for review." *Leason*, 352 Ill. App. 3d at 454. This holding is not tantamount to a requirement that a defendant's appellate counsel must raise on appeal issues that have yet to be decided and are without legal precedent. It is well-settled that appellate counsel is not required to raise every conceivable issue on appeal but should winnow out weaker arguments and focus on one central issue if possible. *People v. Tenner*, 175 Ill. 2d 372, 387 (1997) (citing *Jones v. Barnes*, 463 U.S. 745, 751-53 (1983)).

¶ 53 Defendant next contends that his trial counsel was ineffective for failing to call attorney Del Vallee as a witness. Defendant argues that Del Vallee's testimony would have refuted the

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State's anticipated argument that defendant fled the jurisdiction and traveled to Wisconsin to avoid prosecution. Defendant maintains that counsel's failure to present Del Vallee's testimony constituted performance below an objective standard of reasonableness and resulted in prejudice.

¶ 54 However, counsel's decision "of what witnesses to call and what evidence to present are generally unassailable matters of trial strategy that cannot form the basis of a claim of ineffective assistance of counsel." *People v. Ward*, 371 Ill. App. 3d 382, 433 (2007). This is so because it is virtually impossible for a reviewing court to assess with any certainty the potential effect of one trial tactic versus another.

¶ 55 Notwithstanding that defendant's argument does not form the basis of an ineffectiveness claim, he has failed to overcome the presumption that counsel's decision not to call Del Vallee as a witness was proper. There is a "strong presumption" that trial counsel rendered adequate assistance and made all significant decisions in the exercise of his reasonable professional judgment. *People v. Flores*, 128 Ill. 2d 66, 81 (1989); *Strickland*, 469 U.S. 689-90. This is especially so where, as here, counsel fails to call a witness after interviewing him. *People v. Moleterno*, 254 Ill. App. 3d 615, 622 (1993) (a reviewing court presumes trial strategy and will not disturb counsel's decision not to call a witness after interviewing the witness).

¶ 56 The record shows that trial counsel was aware of Del Vallee and interviewed him before trial. During argument on the State's motion *in limine* to introduce evidence of defendant's gang affiliation to prove motive, the parties discussed Del Vallee's proposed testimony. The assistant State's Attorney said that trial counsel informed him that Del Vallee had advised defendant to leave Chicago during the course of the investigation. The assistant State's Attorney also expressed

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concern about a possible breach of the attorney-client privilege if Del Vallee were to testify. In response, counsel suggested possible reasons why he might call Del Vallee as a witness, but said he had no intention of asking Del Vallee to testify about the advice he had given to defendant. Counsel also informed the court that at the time police were investigating Reggie's murder, defendant had a drug case pending against him. Ultimately, counsel chose not to call Del Vallee as a witness. Under these circumstances, we refuse to second-guess or find unreasonable counsel's decision. See *Moleterno*, 254 Ill. App. 3d at 622. As a result, we do not find counsel ineffective on this basis.

¶ 57 Finally, defendant has failed to show that trial counsel was ineffective for allegedly entering into a factually incorrect stipulation. Defendant claims that Stallworth testified that neither of the shooters he saw commit the murder was present in the lineup he viewed on June 21, 1996, yet counsel stipulated that Detective Rabbit would testify that Stallworth never told Rabbit that the shooters were not in the lineup. Defendant claims that this stipulation was factually inaccurate where Rabbit knew Stallworth did not identify anyone from the lineup. Defendant maintains that it was unreasonable for counsel to enter into this stipulation because it served to impeach Stallworth and resulted in prejudice.

¶ 58 As with counsel's decision not to call Del Vallee as a witness, counsel's decision to enter into a stipulation is a matter of trial strategy that is virtually unchallengeable and benefits from a strong presumption that it was proper. See *People v. Salcedo*, 2011 IL App (1st) 083148, ¶ 50; *People v. Smith*, 326 Ill. App. 3d 831, 851 (2001) (the use of a stipulation does not demonstrate ineffective assistance of counsel). Even were we to assume that counsel's decision to enter into

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the stipulation was unreasonable, defendant is unable to show prejudice.

¶ 59 Contrary to defendant's argument, counsel did not stipulate that "Detective Rabbit would testify that Robert Stallworth never told [Rabbit] that the shooters were not in the lineup." Rather, counsel stipulated that Rabbit would testify that "he does not recall and his report does not reflect that Robert Stallworth ever told him" that the shooters were not in the lineup. Stallworth's failure to tell Detective Rabbit that the shooters were not in the lineup and the fact that Stallworth did not identify anyone from the lineup are two different matters. The failure to make a lineup identification is not the same thing as a positive statement by a witness that the perpetrators were not in the lineup. This aside, the record shows that defendant was positively identified by Brian on three separate occasions: from a photo array, a lineup and in court. Unlike Stallworth, Brian saw defendant from a distance of seven feet and had an unobstructed view of defendant's face. Stallworth testified that he was positive defendant was not one of the shooters. Given the jury's verdict, it is clear they found Brian's identification of defendant credible. In light of this evidence, we cannot say that but for the stipulation in question, defendant would have been acquitted. This is especially so where the parties agreed that defendant participated in the June 21, 1996, lineup and that Stallworth did not identify him.

¶ 60 CONCLUSION

¶ 61 For the reasons stated, we affirm the dismissal of defendant's postconviction petition after an evidentiary hearing.

¶ 62 Affirmed.

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¶ 63 JUSTICE R. GORDON, dissenting:

¶ 64 I find that there is a reasonable probability that the loss of the State's only identification evidence would change the result at trial. Therefore I must dissent.

¶ 65 In the case at bar, defendant was accused of being one of a pair of shooters who killed the deceased. At trial, the only issue was identification. However, there was no physical evidence linking defendant to the shooting, and defendant was not arrested at the scene of the crime.

¶ 66 The only evidence tying defendant to the shooting was the testimony of one man, Brian Keyes, who was admittedly a rival gang member with drug charges pending at the time of trial. Brian testified that he was sitting next to the deceased when the shooting started.

¶ 67 By contrast, the only other eyewitness, Robert Stallworth, testified that defendant was definitely not one of the shooters. Stallworth was a neighbor who testified that he observed the shooting through his second-story window. After the shooting, Stallworth walked over to the deceased's home to notify his parents about the shooting.

¶ 68 Defendant asserted his innocence in a verified *pro se* postconviction petition which advanced to the third stage. At the third-stage evidentiary hearing, Brian testified and admitted that he was too intoxicated to identify the shooters whom he observed for only a few seconds before he turned and started running. Brian testified that he had started going to church and that he reached out to contact the State's Attorney in order to right his own former wrong.

¶ 69 Brian had no apparent motive to lie. At the time of the shooting, he was a rival gang member and one of the intended victims. Prior to the filing of the *pro se* petition, defendant did not contact Brian; instead Brian contacted the State. He was also not in prison at the time of the

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hearing.

¶ 70 For the reasons explained below, I find that our supreme court's decision in *People v. Ortiz*, 235 Ill. 2d 319 (2009), is controlling, and that the facts here are as compelling as *Ortiz* for granting a new trial.

BACKGROUND

¶ 71 Brian testified at defendant's trial that at 11:30 p.m. on June 13, 1996, a group of three men approached a street corner where he was sitting with his friend, Nathaniel Howard, and asked whether they had any "weed." After they replied no, Brian noticed that one of the men was pointing a .45 caliber gun at him and Brian ran. Although he had observed a gun pointing directly at him, Brian testified that, when he reached the street, he stopped and turned around. Brian testified that he observed two people shooting, that he observed his friend fall to the ground and that then he resumed running. Brian testified that, a few days after the shooting, he met with Detective Curley and he selected two photographs; however, Brian did not state the number of photographs he was shown. (Later, at the postconviction evidentiary hearing, Brian explained that he was shown only three photographs, and that the police removed one.)

¶ 72 When Brian testified at trial, half the questions asked by the prosecutor during his direct examination were simple yes-or-no questions, to which Brian answered only a simple yes or no. Of the 207 questions asked on direct, 106 were yes-or-no questions with yes-or-no answers. That does not include either-or questions or other one-word answers. The fact that the direct was abnormal for its paucity of "W" questions (what, when, where and how) is a fact that would be lost to a jury. During closing argument, the State conceded that Brian, who had just been led

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through his yes-or-no answers, was "the only person who can identify these shooters." The prosecutor also admitted: "I think you could see that [Brian] had a little trouble expressing himself, and that he was confused as to some things." The "confus[ion]" occurred on cross-examination where, without the yes-or-no questions of the prosecutor, Brian became confused as to which of the three men had a gun and exactly what they looked like. However, the State vouched for him during its closing, assuring the jurors that he had no motive to lie, and the jury returned a conviction. The State gave this assurance, although Brian had pending drug charges and belonged to a rival gang.

¶ 73 Years after the trial, Brian handwrote two affidavits which he had notarized. In his first affidavit, dated September 29, 2003, Brian wrote: "At this time my consci[ence] is bothering me as to sending an innocent man possibly to the penitentiary. *** My doubt is to the point that I'm almost for sure that Martice Hanible is not one of the three men there on June 13th 1996 that I seen commit the crime on me and my friend."

¶ 74 In his second affidavit, which was signed on January 22, 2004, Brian wrote that, two days after the shooting, the police showed him three photographs and asked him if he could identify the shooter. When he could not, they removed one of the photographs and directed him to look at just the remaining two. The police told him "that they already knew that both of the men in the photos were involved in the shooting." They also told him that one of the men in the photographs was named Martice Hanible. Brian stated that: "when the police said that one of Hanible's friends had already said he was involved, I said that Hanible must have been involved."

¶ 75 In his affidavit, Brian stated that he was later brought to view a lineup. When he had not

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identified anyone after 20 minutes, "a police officer said 'Look at number 2.' " The police then showed him a photograph of defendant, and Brian stated: "I realized it was the picture they had shown me before. I said, 'Number 2 then.' " In his affidavit, Brian stated that he "want[ed] to speak now" because "my conscience is bothering me."

¶ 76 (Although the date on the second affidavit appears to be January 22, 2003, the record contains an affidavit from the notary public before whom he appeared on that day and she swore that Brian actually signed this affidavit on January 22, 2004.)

¶ 77 At the third-stage evidentiary hearing, Brian testified that, while he was in the county jail, he "started going to church and [he] gave [his] life over to Christ." While Brian was "asking him for like guidance," Brian began feeling "uneasy" about his prior testimony in this case, and he felt the need in his "heart and soul to make things right." Leaving his prior testimony intact "was just wearing down on [him]." So he went to the law library and obtained the form for the affidavit. Then he "[w]rote the affidavit in my room" and brought it back to the law library "to get it notarized there." Then he mailed the affidavit to the State's Attorney's office. Prior to writing out the affidavit, he had not spoken with the public defender or with anyone else. He never spoke about the affidavit with defendant's family or with any gang members. However, after he mailed the affidavit, "[s]ome people" came to see him and he believed that they were from the State's Attorney's office. Brian made clear that he was the one who initiated contact and that he initiated contact by sending his affidavit.

¶ 78 At the hearing, Brian testified about what happened before, during and after the shooting. All through the day of the shooting, he was drinking and smoking marijuana. Immediately prior

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to the shooting, he was sitting on the corner of Walton and Pine Streets with his good friend, Nathaniel Reginald Howard, whom Brian called "Big Red." (At the trial, the nickname was transcribed as "Big Reg," and at the hearing, it was transcribed as "Big Red.") The two had known each other a long time. The corner where they were sitting was in front of Big Red's house and on the same block as Brian's house. During the summer of 1996, when the shooting occurred, Brian was 17 or 18, and Big Red was a few years older.

¶ 79 Brian testified that, while they were sitting on the corner, they were smoking marijuana. Brian testified that he was intoxicated as a result of the alcohol and the marijuana. Then three men approached them and asked whether Brian and Big Red were selling weed. Brian had never seen these three men before. After Brian replied that they were not selling marijuana, the three men pulled out guns and started shooting. The men stood in front of him for "maybe" two minutes before they started shooting. However, Brian did not "see" them at first. He testified that: "When I seen them they were already up on me. And all I seen was a gun." Then he "jumped up and immediately ran." As a result, he looked at them for only "[a] few seconds." Brian testified that he knew the men were shooting at him as he ran because he could hear "the little whistle" of the bullets "coming pass."

¶ 80 Brian testified that he wanted the men, who had actually shot at him and who had shot Big Red, to be held accountable for what they did.

¶ 81 Brian testified that, while he was still running, the police pulled him over and placed him in a police vehicle and transported him back "to the block." Brian testified that "at first they thought I was the one that did the shooting." However after "everybody came out" and "[t]hey

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knew me from the block," then the police asked if Brian knew who did the shooting. Brian testified: "I told them no. They asked could I identify. I told them no. And then that night they let me go."

¶ 82 Brian testified that, a few days later, the police came and placed him in a police vehicle and transported him to a police station, where a police detective showed him two photographs. Brian told the police that he was unable to identify anyone from the two photographs. Brian testified that, although he told them that he "couldn't identify nobody on the picture[s]," the police were "persistent." They showed him a statement by someone named Ernest, whom Brian knew as Pork Chop. In the statement, Ernest was "saying he testified against Martice." On cross, Brian clarified that he was not shown "a statement by Ernest," but rather "Ernest's statement [as written] by the police"; and that he knew Ernest from the neighborhood.

¶ 83 Brian testified that the police were "gesturing" toward defendant's photograph. Brian testified: "I was never one hundred percent sure. But I am going off like what the police is doing. And that's why I picked his picture out." Brian explained: "I figured like, you know, they show me the statement that he made, his friend made or whoever it was. And I felt like man, I want to do the right thing. And that's how I end up picking his picture" from the two photographs shown. Brian testified: "I went off the word of the police saying that this is what happened, and this person is the one who did it."

¶ 84 Brian testified that he did not know defendant prior to the shooting and that the first time he heard about defendant was "[a]fter they came and got me, the police." He testified that the first time he became aware of defendant as a person was "[a]t the police station." The very first time

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that Brian saw defendant in any fashion was when the police showed him a photograph of defendant

¶ 85 Brian testified that he did not stand by his trial testimony and that he did not know who killed Big Red and who shot at him. Explaining why he could not identify the shooters, Brian testified: "First of all because it's dark." Second, "when people [are] shooting at you, you're not trying to really see who is shooting. You're trying to get out of the way of the bullet." Third, "the weed, [and the] alcohol had something to do with it."

¶ 86 Brian thus abandoned the inherently incredible testimony, which he had given at trial, that, after noticing a gun pointing directly at him, he had stopped to turn around and watch the gunmen shooting his friend.

¶ 87 Brian testified that he was taken to the police station for a total of three times. The first time, he viewed the two photographs. The second time he was taken there, he met with an ASA. It was the same police officer, who had transported him to the police station to view the photographs, who returned and brought him back again to the station to meet with the ASA. Brian provided a statement to the ASA "[b]ecause that's what the police – See if you're not – In the police station, it's a whole different thing. The police – It's not the same. Yeah, I said that because that's what they were leading on to, you know." Then, Brian was transported yet a third time to the station by the same police officer to view a lineup. Brian observed: "It was the same police officer that came and got me every time."

¶ 88 On cross, Brian was asked whether the officer took him into custody. Brian replied no, but they had a warrant for his arrest. On redirect, when Brian asked if he went willingly to the police

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station, he stated: "They came and got me. I didn't have no choice but to come because they came and got me and put me in the police car."

¶ 89 Brian testified, prior to his grand jury testimony, that: "I told [the ASA] I wasn't one hundred percent sure like I've been telling them. He told me I couldn't say that. I have to say I'm one hundred percent sure."

¶ 90 On cross-examination, Brian tried to explain that he did not feel that he had lied at trial when he stated that defendant was one of the shooters, because he had been told that by the police. However, the prosecutor cut off his answer:

"ASSISTANT STATE'S ATTORNEY [ASA]: Did you lie when you had previously testified that he was one of the shooters?"

BRIAN: No.

ASA: No, you didn't lie.

BRIAN: No, I was told ---

ASA: That's all. No you did not lie."

On cross, when the ASA asked, "[y]ou identified Martice Hanible as one of the shooters, right?"

Brian replied: "The police identified him for me."

¶ 91 Although only Detective Curley observed Brian identify defendant at the photographic identification and at the lineup, the State chose not to call him as a witness at the evidentiary hearing. None of the witnesses called by the State were present during Brian's identification either through photographs or at the lineup. Thus, the State's evidence left Brian's description of his identifications, as well as the police's actions in telling Brian whom to pick, undisputed.

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¶ 92 The State did call Detective Mahr who did assist in conducting the lineup. However, he testified that he did not observe Brian identify defendant at the lineup and that he was not present for the photographic identification.

¶ 93 At the end of the third-stage hearing, the trial court denied defendant's postconviction petition. The trial court described Brian's testimony in one sentence and found it "critical and unsure." However, the court did not find that Brian was lying or that his testimony was not credible. The court did not evaluate Brian's testimony against the State's other evidence, and it did not discuss what the evidence at a retrial would look like. The court did not rule as to whether there was a reasonable probability that the result would be different at a retrial. Instead, the trial court ruled only that defendant's conviction was "not the result of a substantial deprivation of a Constitutional Right" which is not the issue on an actual-innocence petition. No written order was entered. Since the trial court failed to make a specific ruling on defendant's actual innocence claim, it is unclear whether the trial court's ruling, or lack of a ruling, is entitled to deference.

ANALYSIS

¶ 94 I find the facts here as compelling as *Ortiz*, in which our supreme court ordered a reversal.

¶ 95 The majority finds, in essence, that *Ortiz* does not apply because it finds that *Ortiz* does not apply to newly discovered evidence but applies only to newly identified witnesses. *Supra* ¶ 44. First, the *Ortiz* decision itself speaks repeatedly of newly discovered evidence. *E.g. Ortiz*, 235 Ill. 2d at 334. Second, the Illinois Supreme Court already rejected this same argument when it held that the affidavit of a codefendant qualified as newly discovered evidence for purposes of *Ortiz*. *People v. Edwards*, 2012 IL 111711, ¶ 38 (citing *People v. Molstad*, 101 Ill. 2d 128, 135

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(1984). See also *People v. Parker*, 2012 IL App (1st) 101809, ¶ 84.

¶ 96 In *Ortiz*, as here, there is no physical evidence linking the defendant to the shooting. *Ortiz*, 235 Ill. 2d at 337. In *Ortiz*, as here, the State is now left without a single eyewitness who can identify the defendant at trial as the shooter. *Ortiz*, 235 Ill. 2d at 337. In *Ortiz*, there was one eyewitness who could positively testify that the defendant was *not* the shooter. *Ortiz*, 235 Ill. 2d at 337. By contrast, in our case, there are two: Brian and Stallworth, the only two known eyewitnesses to the shooting.

¶ 97 In addition, there are other facts which make the case at bar even stronger and possibly more compelling than the facts in *Ortiz*. First, Brian's trial testimony – that after the shooters pointed a gun directly at him at point-blank range, he turned around to watch the shooting of his friend – goes against common sense. By contrast, his testimony at the evidentiary hearing, that he just kept running, comports with our shared human experience. Second, the yes-and-no answers of his direct examination and his confusion without them support his testimony now that he was always confused about who the shooters were and that he was simply relying on the word of the State. Third, at both the evidentiary hearing and the trial, he testified that he selected two photographs; however, at the evidentiary hearing, he clarified that there were only two photographs to choose from. Fourth, the State failed to call at the evidentiary hearing the one witness who could have completely discredited Brian's testimony about the police's suggestive behavior at his identifications, namely, Detective Curley. Without his testimony, Brian's testimony went entirely unrefuted. Fifth, since the trial court failed to make a specific ruling on defendant's actual innocence claim, it is unclear what deference the trial court's ruling, or lack of a

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ruling, is entitled to.

¶ 98 For the foregoing reasons, I find that *Ortiz* governs our decision, and I find that the facts here are certainly as compelling as the facts that required reversal in *Ortiz*. Thus, I would reverse and grant defendant a new trial.