2012 IL App (1st) 102500-U

FIRST DIVISION
NOVEMBER 13, 2012
MODIFIED UPON DENIAL OF REHEARING DECEMBER 21, 2012

1-10-2500

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07 CR 02601
	)	
MICHAEL SELVIE,	)	Honorable
	)	Joseph Claps,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justice Delort[1] concurred in the judgment.
Justice Rochford dissented.

ORDER

¶ 1 *Held:* Case remanded with directions to conduct an evidentiary hearing to determine whether a witness was truly unavailable at the time of trial.

¶ 2 After a bench trial, defendant Michael Selvie was convicted of first-degree murder and sentenced to 55 years in the Illinois Department of Corrections. The murder victim, William Posey (Posey), was acting as the bodyguard of Chicago Bears player Terry Johnson (Johnson) when Posey was struck by a single gunshot while at a bar in Chicago.

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[1]Justice Karnezis participated in the original Rule 23 order filed on November 13, 2012, prior to the expiration of his assignment to the Illinois Appellate Court.

¶ 3 On this direct appeal, the defendant raises two issues: (1) whether the trial court abused its discretion by denying the defendant's motion for a new trial when it was supported by the affidavit of a previously unavailable witness, Michael Lumpkin (Lumpkin); and (2) whether the State failed to prove the defendant guilty of first-degree murder beyond a reasonable doubt. The affidavit in support of the defendant's motion for a new trial was provided by Lumpkin, an eyewitness to the murder who would testify that he was a bouncer at the bar, that he was physically holding the victim and the defendant apart at the moment when the fatal gunshot was fired, and that Lumpkin did not observe a gun in the defendant's hand at that moment or at any other time that night.

¶ 4 For the reasons that follow, we find that the trial court abused its discretion when it denied the defendant's motion for a new trial without the benefit of an evidentiary hearing in light of the sworn affidavit of a previously unavailable witness, in support of that motion. Since we remand this case on the first issue, we do not reach the defendant's second claim.

¶ 5 BACKGROUND

¶ 6 In this case, the defendant Michael Selvie was convicted of the murder of Posey, who died as the result of a single fatal gunshot received while at the Ice Bar on North Clark Street in Chicago shortly after 1:15 a.m. on December 16, 2006.

¶ 7 The defendant was indicted for first-degree murder, for being an armed habitual criminal, and for unlawful use of weapon by a felon. All charges stemmed from the shooting death of Posey on December 16, 2006. The defendant waived his right to a jury and was tried by the trial court.

¶ 8 Since we are asked in this appeal to assess whether Lumpkin's affidavit evidence was material or merely cumulative, we provide a detailed account of the evidence at trial.

¶ 9 The State presented a total of 12 witnesses. These witnesses included five event witnesses who were present at the Ice Bar where the shooting took place on the night in question: (1) Mia Waites, who arrived with Johnson; (2) Antoine Hunt, the only person who testified that he observed the defendant shoot the victim; (3) Keturah Mayhorn, another bar patron; (4) Johnson, the victim's employer; and (5) Joe Randone, a photographer employed by the Ice Bar. The remaining witnesses were: (6) Dr. Scott Denton, who performed the autopsy on the victim; (7) Ellen Chapman, an expert in gunshot residue testing; (8) Mary Wong, an additional gunshot residue expert; (9) & (10) Police Officers Maurice Henderson and Thomas Pierce, who collected evidence at the murder scene; and (11) & (12) Detectives John and Daniel Gillespie, who interviewed witnesses and conducted the investigation.

¶ 10 Mia Waites (Waites) testified to the events immediately prior to the shooting. However, Waites did not observe who fired the shot because her back was momentarily turned. Waites later identified photographs of a shirt found on the floor of the Ice Bar as that worn by the defendant. Waites also identified the defendant as the person who had been fighting with the victim.

¶ 11 Waites testified that she knew both Johnson, who was a Chicago Bears football player, and the victim, who was Johnson's bodyguard. Before heading to the Ice Bar, Waites, Johnson, and the victim had been at Gibson's Restaurant on Rush Street in Chicago. Waites testified that the three of them entered the Ice Bar without being searched by the security staff. Once inside, Waites was dancing with Johnson when the defendant bumped into Johnson on more than one occasion and eventually, Johnson and the defendant "exchanged words." Waites described the defendant as wearing a collared, buttoned-up shirt with orange-colored stripes. After words were exchanged, a

fist fight between the victim and the defendant ensued. Waites retreated to stand out of the way.

¶ 12 Waites testified that, during the course of the fight, two security guards intervened, but then the victim and the defendant resumed the fight. Waites was standing 10 to 12 feet away, and one or two minutes had elapsed into the second part of the fight when she heard a single gunshot. Waites testified that she did not observe who fired the shot because her back was momentarily turned. After the shot, Waites observed the victim on the floor moaning that he was hit. Two women then approached the victim to provide assistance. Waites testified that she did not observe a gun on the floor prior to leaving the bar.

¶ 13 Waites testified that she and Johnson left the Ice Bar together in the limousine in which they had arrived and that they drove to Northwestern Memorial Hospital where the victim had been taken. Upon arriving at Northwestern Memorial Hospital, the police informed Waites and Johnson that the victim had died. Johnson and Waites then traveled to Bourbonnais, Illinois, to speak with Chicago Bears coach, Lovie Smith (Coach Smith), about what had happened that evening.

¶ 14 Waites testified that, a few days later, she met with Chicago police detectives, where she identified photographs of the defendant as the person who had been fighting with the victim. Waites also identified photographs of the shirt worn by the defendant on the night in question.

¶ 15 Waites testified that the next day she received a telephone call from police officers and agreed to meet with them at the Gurnee library, where she was interviewed. Waites testified that, later, she viewed a lineup, where she identified the defendant as the man who had fought with the victim. Waites testified that she spoke with an assistant State's Attorney and provided a signed statement about what had happened and later, on January 5, 2007, she testified before a grand jury.

¶ 16 On cross-examination, Waites admitted that she never observed the defendant, or anyone else, with a handgun that evening. Waites also admitted that she told the police that she never went into the bar, and was in the limousine at the time of the shooting. Waites explained that she told this falsehood because she was only 20 years old at the time, and was nervous about being in trouble.

¶ 17 By all accounts, the bar was crowded at the time of the shooting. Antoine Hunt (Hunt) was the only person to testify that he observed the defendant shoot the victim.

¶ 18 Hunt testified that he was a "quality control technician" for Chrysler Corporation in December of 2006.[2] During the early morning of December 16, 2006, he and two friends traveled from DeKalb, Illinois, where he lived, to the Ice Bar in Chicago, drinking a couple of shots of "Remy" on the way. The men arrived at the Ice Bar at about 1 a.m. Hunt insisted that he was not "under the influence" upon arrival at the bar.

¶ 19 Hunt testified that he was not searched before entering the bar, but did pay a $30 cover charge. Hunt estimated that there were 150 to 200 people in the bar that night, of which about 25 to 50 were in the VIP section.

¶ 20 Hunt checked his coat, ordered a drink and went straight to the dance floor. While dancing, Hunt witnessed the defendant and the victim arguing and fighting in the VIP section. Hunt said the fight lasted several minutes and covered the length of the bar. Hunt testified that he was about "7 to 10 feet, if that" from the fight. Hunt testified that he was "2 to 5 feet from [the defendant], when the security guys broke [the fight] up." Hunt testified that nothing obstructed his view, and that the

[2]The parties later stipulated that, in fact, Hunt worked for a temporary employment agency where he was temporarily assigned to a job making car seats for Chrysler.

defendant was wearing a striped shirt, which he identified in a photograph at trial.

¶ 21 Hunt testified that the victim had the upper hand during the fight until the two "bouncers broke it up." The defendant appeared embarrassed because the fight happened in front of women. After the fight broke up, the defendant pulled out a black nine millimeter handgun from the waistband of his pants, held it straight out and turned sideways, and fired one shot, striking the victim "one time in the shoulder." Hunt testified that the victim was two or three feet from the defendant, "very close,"[3] when the shot was fired.

¶ 22 Hunt testified that the defendant took off his striped shirt and dropped it on the floor while still holding the gun. Hunt witnessed the victim lying on the floor with blood coming from his shoulder. Hunt testified that the defendant then dropped the gun, but Hunt was unsure where the gun went because it was chaotic and people were stampeding to exit the bar.

¶ 23 Hunt testified that while he was making his exit from the Ice Bar, he kept watching the defendant to avoid being shot himself. Hunt testified that the defendant ran out of the bar. Hunt did not talk to the police immediately after the shooting, because he "didn't want to get involved" and figured that others would tell the police what happened. Hunt also testified that he believed the victim's injuries to be minor because he had been shot in the arm.

¶ 24 Hunt testified that, the next day, having heard that the victim died, Hunt contacted the police. On December 22, 2006, the police came to his house, where he identified the defendant's photograph and told the police that the defendant was the one who shot the victim. Hunt testified that on

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[3]The assistant medical examiner testified that the victim's clothing did not reveal evidence of close-range firing and that the muzzle of the gun was more than 2 feet away.

December 27, 2006, he viewed a line-up at the Area Three police station and identified the defendant as the shooter. After being asked if he had any difficulty identifying the defendant, Hunt testified that he "picked him out right away."

¶ 25 On cross-examination, Hunt denied that he was a gang member, but agreed that he had worked with DeKalb and Chicago police officers as an informant. He had previously provided information to Detective Whalen of the Chicago Police Department in regard to the Four Corner Hustler Street gang, because he had grown up in that area and was familiar with its members.

¶ 26 Keturah Mayhorn (Mayhorn) testified that she was texting when the fight occurred. However, she was able to testify about the atmosphere in the bar following the shooting and the condition of the victim, whom she approached to provide aid.

¶ 27 Mayhorn and her friend Charissa Hurt (Charissa) arrived at the Ice Bar around midnight. They were not searched by the security staff before entering the bar. Once inside, Mayhorn ordered a drink. Mayhorn and Charissa placed themselves on a platform between the velvet rope of the VIP section and the DJ booth.

¶ 28 Mayhorn testified that, shortly after 1:15 or 1:20 a.m., a fight broke out, starting inside the VIP section, where approximately 15 people were present. Mayhorn "did not focus on the fight" because she was texting, but witnessed one of the bouncers trying to break up the fight.

¶ 29 Mayhorn then heard one shot and the crowd began to run past her to her right. Mayhorn testified that she could smell the gunpowder as the crowd tried to flee the bar. Mayhorn moved closer to the wall, to avoid being trampled. Then the lights came on and she observed the victim lying on the floor at the bottom of the platform.

¶ 30 Mayhorn testified that she and Charissa knelt next to the victim. Mayhorn did not observe any blood on his body and thought he had not actually been shot. The victim said he had been shot, and Mayhorn called 911 from her mobile telephone. Mayhorn remained until the police and an ambulance arrived. Mayhorn testified that, by the time the police had arrived, the victim's breathing was labored and slow, but he was still alive. Paramedics arrived and took the victim away. Mayhorn never observed a gun on the floor by the victim's feet. At trial, Mayhorn identified the striped shirt left at the bar as possibly belonging to one of those involved in the fight.

¶ 31 On cross-examination, Mayhorn testified that she did not observe the two people in the fight. Mayhorn described several people, more than five, as "a group" throwing punches. Additionally, when asked about the shirts being worn, Mayhorn testified "it was light when I was looking at the victim, but it was dark during the fight."

¶ 32 Johnson, a Chicago Bears football player, testified to the events leading up to the fight and his memory of the individual who bumped him. Johnson, the victim Posey , and Waites arrived at the Ice Bar together after they had dinner at Gibson's in Chicago around 1:10 to 1:15 a.m. on December 16, 2006. After arriving, they were escorted to the VIP section of the bar. Johnson estimated there were 30 to 40 people in that section. Johnson said that neither he nor the victim had a weapon. Johnson testified that the lighting was typical nightclub setting, "[d]im with *** the little red or green strobe lights [*sic*] little deals going around."

¶ 33 Johnson testified that he and Waites began to dance and a man bumped him "very aggressively" approximately five times. When it happened, Johnson testified that he identified himself to the man who bumped him and stated that he did not want any trouble. The two shook

hands and separated. Johnson testified that the man again bumped into him "unusually hard" once again and Johnson again identified himself and stated that he did not want any problems. Johnson testified that the victim then came over, asked what was happening, and Johnson told him that the man was bumping him but it was "no big deal." Following Johnson's answer, Johnson testified that he observed the victim turn to sit down.

¶ 34 Johnson testified that, after he turned away, he heard arguing and escalating voices. Johnson then observed the victim fighting with the man who had bumped him. Johnson testified that he was about four feet away trying to keep his distance from the fight and not be involved.

¶ 35 Johnson testified that bar security briefly separated the two men who were fighting. Johnson asked the victim what he was doing and asked him to stop fighting. After Johnson questioned the victim, the victim and the other man broke free from the bouncers and began fighting again. Johnson testified that he personally tried to break it up again but then decided to get out of the way when the crowd began pushing. Johnson moved away from the fight and walked towards the rear of the bar, when he heard a gunshot. Johnson did not observe the shooting, but dove behind a couch. Johnson then observed the victim lying on the floor while two women checked his pulse. Johnson did not observe a gun or blood on the floor.

¶ 36 Johnson testified that he spoke to the police on December 20, 2006, and was shown photographs. However, he did not make an identification and also made none at the lineup conducted on December 27, 2006. Johnson testified that the collared and plaid shirt which he was shown was "similar" to the shirt worn by the man who bumped him on the dance floor.

¶ 37 On cross-examination, Johnson testified that he was placed on misdemeanor probation on

December 16, 2006. He testified that he could not remember what the person who bumped him was wearing nor did he know the identity of that person. Johnson testified that he was within a couple feet of the fight when it started and he could not tell "who was winning." Johnson testified that both men wound up rolling around on the floor, and the bouncers came over and broke up the fight. However, the men started fighting again, so Johnson retreated towards the windows of the bar. Johnson further testified that, when he was questioned by the police at Northwestern Memorial Hospital, he told them he did not know what happened. Johnson told Sergeant Voight[4] that he was informed by the Ice Bar management that it would be better to leave due to potential danger and that he heard about the shooting while in his vehicle. Johnson also testified that he never told investigating Detective Hunt[5] that he had turned his back to the fight and that is when the gunshot occurred. Finally, Johnson testified that he never observed the presence of a handgun at the victim's feet. Johnson testified that he lied to the police regarding his involvement and knowledge of the incident because he "was concerned with Tank Johnson and Tank Johnson's career." Johnson testified that he and Waites then traveled to Bourbonnais, at Coach Smith's instruction, in order to tell him what had happened that evening at the Ice Bar. Johnson testified that the dance floor was dimly lit. He recalled that the man who bumped him was about six feet tall and weighed around 200 to 220 pounds; and that he was stocky, had a gap in his teeth, and wore a small goatee. Notwithstanding his earlier contradictory testimony at trial, Johnson identified a shirt as the shirt the

[4] The first name of Sergeant Voight was not in the appellate record.

[5] The first name of Detective Hunt was not in the appellate record. Also, Detective Hunt is not to be confused with State witness Antoine Hunt, whose testimony is set forth above.

defendant wore the night of the shooting. Johnson also stated that a photograph depicting the defendant with gapped teeth resembled the man who was fighting with the victim.

¶ 38 Joseph Randone (Randone) testified that he was hired as a photographer by the Ice Bar for the evening in question, and that he provided about 70 pictures of bar patrons. He testified that he did not observe the shooting, but he heard the gunshot and then observed people stampeding toward the exit away from the VIP area. Afterward, Randone spoke with the police and turned over the memory cards from his digital camera to the police. The party photographs were printed by the police and used as part of their investigation.

¶ 39 Detective John Gillespie later testified that he showed some of the party photographs to Hunt, but that Hunt did not identify anyone as being involved in the incident.

¶ 40 Dr. Scott Denton (Dr. Denton), an assistant medical examiner in the Cook County Medical Examiner's Office, testified about the autopsy that he performed on the victim and that the wound was *not* the result of a close-range firing. He testified that the victim suffered a gunshot wound to the left shoulder region, and that the bullet went through the armpit, the victim's side, the sixth rib, and eventually lodged on the right side of the spine. Dr. Denton testified that neither an examination of the victim's clothing nor his person revealed evidence of close-range firing; thus, the muzzle of the gun "was greater than 18 to 24 inches away from the surface of his clothing." The victim died of the gunshot wound. He testified that the victim's arm was likely raised at the time he was shot.

¶ 41 Ellen Chapman (Chapman), a forensic scientist and an expert in gunshot residue analysis (GSR analysis) in the Trace Evidence Unit of the Illinois State Police, testified that there was gunshot residue on the defendant's shirt. The parties stipulated that Chapman was qualified as a

gunshot residue expert.

¶ 42 Chapman testified that, on December 19, 2006, she took samples from the bottom part of the sleeves and cuffs of the defendant's shirt. Chapman sampled the cuff area because it would have been closest in proximity to a discharged firearm and would be the most likely place to find gunshot residue. Chapman also took a room air sample. Chapman admitted that gunshot residue can be transferred to other objects and that clothing should be collected as soon as possible to preserve a particular sample. Chapman testified that, if gunshot residue does not land on a person or clothing, then it will fall to the floor. Chapman testified that gunshot residue becomes dispersed at greater distances. She testified that gunshot residue does not disintegrate; so if left undisturbed, it can remain on an item for a long time.

¶ 43 On cross-examination, Chapman testified that gunshot residue can inadvertently be transferred from hands that have residue on them. Chapman testified that obtaining and preserving the evidence quickly was important. Chapman testified that gunshot residue can travel, depending on the firearm, depending on the circumstances, *** back and sides, three to four feet *** [T]owards the muzzle end, which is target (sic), it might even travel further." Chapman was not asked to test any other part of the shirt other than the cuffs. When questioned, Chapman testified that, if the shirt had been on the ground when a gun was fired, there could have been residue on the collar or back of the shirt and Chapman did not know if there was gunshot residue on any part of the shirt other than the cuffs.

¶ 44 Mary Wong (Wong), a trace chemistry analyst with the Illinois State Police Forensic Sciences Division, followed up Chapman's work and testified to the GSR results in this case. The parties

stipulated that Wong was "an expert in the testing of gunshot residue."

¶ 45 Wong testified that, when a firearm is discharged, particulate matter is released in the form of a gas which travels backward toward the shooter and downward onto the hand holding the gun. The substance is comprised of three elements, the presence of which indicates gunshot residue to the exclusion of any other source. Wong identified six particles of gunshot residue on the left cuff, and one particle on the right cuff of the shirt that the defendant wore on the night of the shooting.

¶ 46 Wong testified that, in regard to the left cuff, it "was either in the vicinity of a discharged firearm or came in contact with a primer gunshot residue related item." Wong testified that no other part of the defendant's shirt was examined for gunshot residue other than the cuffs, but explained that the Illinois State Police Crime Lab has never tested full shirts without a specific request. Wong testified that long-sleeved shirts are automatically tested only at the cuffs, and if the cuffs are negative for the presence of gunshot residue, the rest of the shirt will not be tested.

¶ 47 On cross-examination, Wong testified that the particles that come out of a weapon, when fired, can travel three to five feet. Wong testified that if the shirt had been on the ground when gunshot residue particles fell, it is possible but "not probable" that the shirt could pick up those particles while on the floor. Gunshot residue does not "drop straight down into one position." In order for the shirt to pick up a concentration of gunshot residue, she testified it would have to fall with the cuffs down onto the precise locations of the dissipated particles. Wong testified that no one asked her to test any area other than the cuffs. She also testified that she was not saying that someone who wore the shirt fired a gun.

¶ 48 Officer Maurice Henderson (Officer Henderson) testified that he was assigned to collect

evidence at the Ice Bar at North Clark Street on the night of the shooting. When he arrived at 3:05 a.m., the VIP section of the bar had already been cordoned off from other areas of the bar. Officer Henderson recovered and identified a nine-millimeter cartridge case in front of the "little stage area." Three items of clothing on the stage were also recovered. Other items of glassware and a doo-rag were also recovered and inventoried.

¶ 49 On cross-examination, Officer Henderson testified that no detective instructed him to take and inventory the shirt, which was later identified as the one worn by the defendant. At the time, Officer Henderson did not have information about what the shooter was wearing. No gun was recovered.

¶ 50 Officer Thomas Pierce (Officer Pierce) arrived at the Ice Bar at 11:42 p.m. on December 16, 2006. Officer Pierce testified that he was met by Detective John Gillespie who gave him instructions on what evidence to collect. Officer Pierce testified that he photographed the evidence while wearing clean gloves and placed all recovered evidence into proper evidence bags. Officer Pierce collected a Hennessey bottle, a shirt adjacent to a large bar, another bottle, and some jewelry. Officer Pierce testified that he later inventoried the shirt and sent it to the Illinois State Police crime laboratory for testing.

¶ 51 Detective John Gillespie[6] (Detective J. Gillespie) testified that he and his partner, Officer Tim Thompson (Officer Thompson), were assigned to follow up the investigation of the shooting at the Ice Bar. Detective J. Gillespie spoke to a number of witnesses, including Jason Antoine, the bar's

[6]Two of the investigating detectives share the same last name: John Gillespie and Daniel Gillespie.

manager, and two of the bouncers, Kevin Jones and Mike Hopkins. Detective J. Gillespie testified that he observed a shirt on the floor, and an evidence technician was called to inventory the shirt. He testified that, on December 19, 2006, officers were looking for the defendant. On December 20, 2006, a photographic array was shown to Waites, who identified the defendant as having had a confrontation with the victim. Detective J. Gillespie testified that the defendant arrived at the police station at 5:00 p.m. on December 26, 2006.

¶ 52 On cross-examination, Detective J. Gillespie noted that at about 2:00 p.m. on December 16, 2006, he showed some of the party photographs to Hunt, who did not identify anybody as being involved in the incident. On December 17, 2006, Detective J. Gillespie went to the Ice Bar to retrieve the shirt. He spoke to Michael Lumpkin, the bouncer at the Ice Bar who did not testify at trial but submitted an affidavit posited in support of the defendant's posttrial motion.

¶ 53 Detective Daniel Gillespie (Detective D. Gillespie) testified about his general involvement with the case. Detective D. Gillespie testified that an investigative alert for the defendant was issued after Waites identified the defendant as the person who had fought with the victim. The defendant was located and brought to the police station at 5:00 p.m. on December 16, 2006. Detective D. Gillespie testified that he and other detectives spoke with Johnson; Johnson's driver; Waites; and Coach Smith.

¶ 54 Detective D. Gillespie learned on December 19, 2006 that a fingerprint found on a Hennessey bottle from the Ice Bar belonged to a Bobby Selvie, the defendant's brother. On December 22, 2006, Detective D. Gillespie went to DeKalb, Illinois, and showed Hunt a photographic array. Hunt immediately identified the defendant as the person who had fought with the victim, pulled out a gun,

and shot the victim. Detective D. Gillespie was present on December 26, 2006, when Waites identified the defendant in a lineup as the person she observed fighting with the victim. Detective D. Gillespie testified that, on the same day, Hunt also identified the defendant as the shooter.

¶ 55 The parties stipulated to the testimony of several fingerprint, ballistics, biology, and DNA experts. First, the parties stipulated that if Jon Flaskamp was called to testify he would testify that he was employed by the Illinois State Police as an expert in firearms analysis and that the cartridge case found at the scene could have at one time held the bullet recovered from the victim. Second, the parties stipulated that if Anne Stevenson was called to testify, she would testify that she was employed by the Illinois State Police as a fingerprint analyst and that a latent print found on a Hennessey bottle recovered by Officer Pierce at the Ice Bar matched the fingerprint of Bobby Selvie. Third, it was stipulated that if Tiffany Kimple was called to testify, she would testify that she was employed by the Illinois State Police as a fingerprint analyst and that no latent impressions were on the cartridge case recovered at the scene. Fourth, the parties stipulated that the nine millimeter fired cartridge casing recovered at the bar could have held the bullet that was recovered from the victim's spine. Fifth, the parties stipulated that the defendant's fingerprints were not found on 17 glass tumblers, a wine glass, and a bottle of Miller's Genuine Draft recovered at the Ice Bar. Sixth, the parties stipulated that the defendant's fingerprints were also not found on other glass tumblers, bottles, tongs, napkins, a white metal chain, or a pair of sunglasses.

¶ 56 Seventh, the parties stipulated that if Ryan Paulsen[7] was called to testify, he would testify that

[7] Two stipulated witnesses share the last name of Paulsen.

he was employed by the Illinois State Police as a forensic biologist and that there was blood on the multi-colored long sleeve shirt. Eighth, the parties stipulated that if Andrea Paulsen was called to testify, she would testify that she was employed by the Illinois State Police as a forensic DNA analyst and that the DNA profile of bloodstains found on the shirt matched the defendant and did not match the victim. Cellular material found on this shirt had a mixture of DNA profiles consistent with having originated with two people. A major male DNA profile from the mixture matched the defendant but not the victim. Analysis of blood from a white shirt matched the victim but not the defendant. The analysis of fingernail clippings from the victim revealed a mixture of DNA, such that the defendant was a possible donor to the second DNA profile. The random possibility of this was calculated to be approximately one in ten million black males.

¶ 57 In sum, the stipulations established that: (1) the bullet that killed the victim could have been paired with the casing recovered from the scene; (2) the defendant's fingerprints were not found on any items recovered at the scene; (3) the defendant's DNA was only found on his own shirt (in ten bloodstains and on the collar); and (4) the defendant could not be excluded as a DNA donor for the material collected from the victim's fingernail clippings.

¶ 58 The State introduced certified copies of two of the defendant's prior convictions for narcotics dealing in order to prove a necessary element for the charges of unlawful use of a weapon by a felon and for being an armed habitual criminal. The State then moved into evidence all of its exhibits without objection and rested its case.

¶ 59 The defendant's motion for directed verdict was denied. The defendant argued that the evidence was insufficient because it was a "single witness" identification case and that the witness,

Hunt, was not credible because: (1) Hunt was a police informant; (2) Hunt identified the defendant six days after the shooting; and (3) Hunt's testimony contradicted the State's other event witnesses inasmuch as he described only a single fight. The defendant also urged the trial court to discount the gunshot residue evidence because only the cuffs of the defendant's shirt were tested and the shirt remained on the floor for two days before the police recovered it.

¶ 60 The State countered that the evidence was strong because Hunt testified that he watched the entire fight and then observed the defendant pull out a gun and shoot the victim. The State also noted that physical evidence, including gunshot residue on the cuffs of the defendant's shirt and his DNA on the multi-colored long sleeve shirt were corroborative. The State also argued that the witnesses' differing vantage points explained inconsistencies in the testimony. The State further argued that the defendant had a motive to shoot the victim because he was losing the fight.

¶ 61 The defense presented its own case. The defense read a stipulation between the parties that, from June 7, 2006, through November 26, 2006, Hunt worked for a temporary employment agency, Job One U.S.A., and was assigned to work at Johnson Controls in Sycamore, Illinois, making car seats for Chrysler Corporation. The parties stipulated that Sandra Boch, a human resources assistant at Job One U.S.A., would testify to this fact to be used as impeachment because Hunt had testified that he worked as a "quality control technician *** [f]or Chrysler."

¶ 62 Defense then called Jason Louis Antoine (Antoine) who was the manager of the Ice Bar at the time of the shooting. The most significant parts of Antoine's testimony were that: (1) he was looking at the defendant at the time of the shooting and he did not observe a gun in the defendant's hands at the time; and (2) that the defendant was not wearing his shirt at the time of the shooting.

¶ 63 Antoine testified that he served seven years in the Marine Corps and, upon his discharge, he had achieved the rank of sergeant. Antoine received training as a primary marksmanship instructor and instructed marines in the use of certain weapons. Antoine began working at the Ice Bar in October, 2002, starting as a doorman and eventually being promoted to general manager. Antoine was working in that capacity at the Ice Bar on December 15 and December 16, 2006.

¶ 64 Antoine testified that in terms of security, there were two men at the front door to check patrons' identification and inspect handbags. In December of 2006, the bar employed a total of five bouncers, with three bouncers working upstairs within the bar. Antoine said all male patrons were searched, unless he personally excused them, and women had their handbags checked before they could enter the bar. Antoine testified that no patrons were allowed to have their coats on while they were inside the bar. On the evening of December 15, 2006, Antoine was monitoring different parts of the bar, including the entrance. Antoine testified that at about 1:00 a.m. on December 16, 2006, he was standing "out front of the bar" when he observed a limousine pull up and Johnson, plus one male and one female, exited the limousine. Antoine testified that he recognized Johnson as a Chicago Bear football player, who had been to the Ice Bar two or three times before. Antoine escorted Johnson and his two friends, who were not searched, upstairs to the VIP area. Antoine testified that fifteen "or so" persons were within the VIP area when Johnson arrived. Antoine testified that there were two other groups in the VIP section, and Antoine asked one of them to move to accommodate Johnson's group.

¶ 65 Antoine testified that, while Johnson was dancing in the VIP section, the defendant bumped into Johnson a few times and Johnson told him to stop. The two then shook hands and the defendant

walked away. Antoine testified that the victim then "leapt past Johnson and jumped on top of the defendant from the rear." The defendant was wearing a plaid, buttoned-down shirt with a white t-shirt underneath. The defendant's back was to the victim when this occurred. The victim "tackled" the defendant to the floor and Antoine himself fell with them. A fight ensued, including other patrons. The two men, namely the victim and the defendant, "were actually being separated" as one bouncer pulled the victim toward the entry door, and the defendant was pulled toward the VIP area by another bouncer, Lumpkin, who was also known as "Big Mike." Antoine testified that, while being held, the defendant's shirt was pulled off over his head, and he had on only his white undershirt. The victim then broke free from the bouncer's grip and began fighting with the defendant again. A second scuffle ensued, and the security staff became involved again to separate the men. Antoine testified that the scuffle covered different parts of the bar.

¶ 66 Antoine testified that Lumpkin was actually holding each man while he was on his knees and the men were on the ground. Lumpkin had the victim in his right hand and the defendant in his left. Antoine was about eight to ten feet away, watching the men fight, when he "heard a popping sound." Antoine testified that he did not observe a gun in the defendant's hands, or the victim's hands, or in anybody's hands. Antoine testified that he turned around, "because, like I said, I thought it was a bottle behind me being thrown, so all the patrons just began to scatter." Antoine testified that he began to escort patrons out the emergency exit and called 911. Antoine testified that he did not go over to where the victim was lying on the floor, but said that he observed three or four people stomp on and kick the victim as he lay on the floor. The defendant was not among them.

¶ 67 Antoine testified that, after he called 911, Chicago fire department paramedics arrived and

began to treat the victim. Antoine testified that he spoke to the police that night, and that he cooperated with police and prosecutors. Over the next few weeks, he was contacted by the police and the State's Attorney's Office and eventually appeared before a grand jury in January 2007. At the grand jury, Antoine was unable to testify where the other bouncers were at the time of the fight. But at trial, Antoine testified that they were assisting in pulling apart the two men. Antoine said he agreed to testify before the grand jury only after he was told that the defendant had confessed to the crime.

¶ 68 On cross-examination, Antoine testified that, although he believed that it was an important fact, he never told the police or the grand jury that the defendant did not have a gun in his hands at the time of the shooting. Specifically, he testified that, "when the shot was fired, I did not see [the defendant] holding a firearm." Antoine testified that, when he was shown a photographic array by the police on December 23, 2006, at 1:55 p.m. at his house, he did not identify anyone as the shooter. Antoine agreed that his memory of the shooting was better shortly after the shooting than it was three years later at the time of trial.

¶ 69 Antoine also testified that the Ice Bar had a video surveillance system. The hard drive for this system was kept on another floor. Both Antoine and Maria Amato, the owner of the Ice Bar, had access to the computer where it was stored. When the police arrived, Antoine took them to review the video recording and personally tried to retrieve the surveillance video without success. When asked about the fight itself, Antoine stated, "the combat seemed pretty mutual." Antoine testified that during the incident, the defendant, whose photograph he identified in court, attacked him from behind and Antoine filed a complaint against him. Antoine later told the police on December 26,

2006, that he did not wish to press charges against the defendant.

¶ 70 On cross-examination, Antoine further admitted that celebrities and women were not searched before they entered the Ice Bar. Furthermore, some patrons did not have to produce identification to enter. Antoine testified that the shirt recovered from the floor appeared to be the same one that he observed the defendant wearing on the night of the shooting. Antoine also testified that he was also attacked from behind by the defendant's brother, Bobby Selvie, but Antoine later also declined to press charges against him. Antoine testified that, despite his training as a Marine Corps marksman and his familiarity with firearms, he did not recognize the "pop" sound that occurred during the fight as a gunshot. Instead, he believed it was only a champagne bottle breaking. Antoine testified that he was "looking at the defendant when [he] heard the 'pop,' " and that he was also "looking at Big Mike." Antoine also testified that he looked at the defendant immediately after hearing the "pop."

¶ 71 Antoine testified that, shortly before trial, he refused to speak to prosecutors. Finally, Antoine testified that he and the defendant, as well as two promoters, were named as defendants in a lawsuit stemming from the victim's shooting death.

¶ 72 The defendant did not testify in his own behalf and the defense rested.

¶ 73 In rebuttal, the State first called former assistant State's Attorney Peter Garbis (Garbis) who had interviewed and presented Antoine to the grand jury. Garbis confirmed that Antoine never said that he was looking at the defendant's hands and did not observe a gun when he heard the "pop." The State then recalled Detective J. Gillespie who confirmed that Antoine admitted that the defendant was "a regular customer" at the bar and that Antoine considered the defendant a "friend."

Detective J. Gillespie also testified that Antoine told him that "he knew for a fact that *** the victim[] did not have a gun, because he was looking at [the victim's] hands[.]" Detective J. Gillespie also testified that Antoine never said that when the shot went off he was looking at the defendant's hands and did not observe a gun.

¶ 74 Detective Jeffrey King (Detective King) , one of the first detectives on the scene, testified that immediately after the shooting, Antoine did not say that he was looking at the defendant's hands and did not observe a gun when the gun discharged. Antoine also never mentioned the name "Michael Selvie" during their conversation.

¶ 75 On February 19, 2010, the trial court found the defendant guilty on all counts. The trial court made certain findings in regard to the evidence adduced at trial. The trial court found that Hunt was the only State witness who testified to observing the defendant produce a gun and fire it. Antoine's testimony for the defense was summarized by the trial court as confirming the occurrence of the fight, "three separate scrimmages," and Antoine's description of hearing "what he described as a champagne bottle breaking." Although Antoine testified that he did not observe a handgun in the defendant's or the victim's hand, the trial court noted that, in comparing Hunt and Antoine's testimony, the court must look at many things, including bias, personal interest, and the manner in which they testified, as well as any significant impeachment. The court then compared Antoine's description of the noise he heard against the testimony of all the other witnesses and their observations, including Mayhorn and Charissa who not only heard the shot, but could smell the burning gun powder. The trial court found it unlikely that Antoine, a Marine of seven years who was responsible for marksmanship training and who would have heard hundreds if not thousands of

weapons fired, would compare the sound of the gun shot to a "pop and maybe a bottle breaking."

¶ 76 The trial court noted that, although Antoine was in charge of security, no one testified that they had been searched in any manner. The trial court noted that Antoine is being "sued for whatever role he may have played," and found that Antoine "clearly had some relationship, maybe a business relationship, maybe something more with the individual responsible for booking the party that defendant was attending at the Ice Bar." The trial court noted that Antoine had "some kind of relationship with Bobby Selvie, who attacked him from behind and then stopped when they came face-to-face." Furthermore, Bobby Selvie was the same person against whom Antoine declined to press charges. The court noted that Antoine did not identify the defendant in a photographic array, and had indicated in his testimony that he really did not want to become involved with the investigation or to testify. The trial court found that Antoine was one of two people responsible for a surveillance camera and a tape that only he and the owner of the bar had access to, but yet he testified that there was no tape of that night or the following early morning.

¶ 77 The trial court also discussed Antoine's inconsistent testimony, noting that sometimes Antoine said the defendant did not have a gun and sometimes he said that he did not observe a gun. The trial court observed that, on cross-examination, although Antoine did not want to become involved, he felt much better about testifying after he claimed that he was told that the defendant confessed to the shooting. Ultimately, the trial court found Antoine's testimony not credible.

¶ 78 In evaluating the credibility of the State's witness Hunt, the trial court considered the "cooperation from other witnesses, at least about his presence in the bar because he does not make an announcement until the next day to anyone about what he observed, and he gave reasons for that."

Therefore, the trial court found Hunt's testimony more credible than Antoine's testimony.

¶ 79 The trial court observed that "there's no evidence that Hunt would have had any hope that anything would be on [the defendant's] shirt when he picked [the defendant] out as the person he saw shoot the [victim]."

¶ 80 The trial court also stated that, since there was only a single gunshot, it would produce minimal residue for the GSR results. The trial court acknowledged that Antoine was the only witness to testify that the shirt came off the defendant before the shot was fired. But the trial court also noted that, "even if that was true that the shirt was off [the defendant] when the shot was fired, the one shot, the shooter would have had to [have] been standing over the shirt and over the cuffs. It's just not believable, not at all."

¶ 81 The trial court found that this evidence established beyond a reasonable doubt that the defendant was guilty of all charges.

¶ 82 On May 12, 2010, the defendant filed a motion for a new trial or, alternatively, for a reduced conviction to second-degree murder (motion for a new trial). On May 19, 2010, a hearing on the defendant's motion for a new trial was held. The defendant urged the trial court to reconsider its determination that Antoine was not credible, and to reassess Hunt's credibility. The defendant also argued that the lighting conditions in the bar at the time of the shooting were poor and the atmosphere chaotic. The defendant argued that the gunshot residue evidence was weak and there was no other physical evidence or other corroboration linking him to the shooting. Alternatively, the defendant asked the trial court to reduce his conviction to second-degree murder on the theory that the victim was the aggressor and they engaged in mutual combat, and that defendant had an

unreasonable belief in the need for self-defense.

¶ 83 The defendant also requested a new trial because Lumpkin, one of the bouncers, could have exculpated him. However, at the time of trial, Lumpkin was an "unavailable witness." In support of this argument, the defendant filed a sworn affidavit signed by Lumpkin. The sworn affidavit detailed Lumpkin's observations that he heard a gunshot while he was holding the victim and the defendant apart. He swore that he never observed a gun in the defendant's hand when the shot was fired.

¶ 84 The defendant asserted in his motion for new trial that Lumpkin was:

> "unavailable to the defense because his counsel, *** , had informed defense trial counsel that his client would invoke the Fifth Amendment if called to testify, based on the fact Mr. Lumpkin had a pending felony of unlawful use of weapon charge at the time of [the defendant's] trial."

The defendant's attorney asserted that Lumpkin would have corroborated Antoine's testimony and requested a new trial on this basis. The trial court asked a clarifying question as to the defendant's motion for new trial, as follows:

> "THE COURT: [Defense Attorney], I have a question about part of your motion for new trial regarding the unavailable witness, Mr. Michael Lumpkin, for which you have attached an affidavit.
>
> The question I have is, your motion for a new trial claims that Mr. Lumpkin was unavailable because you were informed by his

attorney that if called to testify, he would invoke a 5th amendment privilege based on some pending case that he allegedly had at the time. Wouldn't the determination of whether or not Mr. Lumpkin was entitled to invoke his 5th amendment privilege as to the facts and circumstances involving the charges against [the defendant] be a determination from me, not the attorney for Mr. Lumpkin? Wouldn't that be the way it works?

[DEFENSE COUNSEL]: Judge, I believe that that may have been a determination ultimately that may have been made by you. But the scenario that we were operating under back then was that we had been informed by his counsel, ***, that unless we could reasonably guarantee him that the facts and circumstances of his pending case would not be gone into by either party, that he would be advising his client to assert his 5th amendment privilege. *** [I]t's improper for me to call a witness to the stand if I have knowledge or information that he intends on asserting his 5th amendment privilege."

The State then responded, as follows:

"[PROSECUTOR]: Mr. Lumpkin was under defense subpoena on November 24, 2009, in the middle of our trial. *** And as far as [Lumpkin's attorney] telling defense counsel something,

> [Lumpkin's attorney] did not tell [the defendant's attorney] that his client was going to take [the fifth].
>
> We were never going to ask or never cross-examine Mr. Lumpkin regarding any pending case he had in this building, and it is your determination, not defense lawyer's determination, to see whether or not a witness is truly unavailable."

¶ 85 On May 28, 2010, the trial court denied the defendant's motion for new trial. The trial court reiterated that Hunt was more credible than Antoine. Even though Hunt waited a day after the shooting to talk with the police, Hunt explained he waited because he was unaware of the seriousness of the victim's injury, and when he learned that he had died, Hunt told the police what he knew. The trial court contrasted Hunt's reasoning with Antoine, whom the court repeated was not credible. The trial court found that Antoine "clearly knew who Mr. Selvie was, [but] chose initially to avoid making that identification *** [W]hen you toss up [Hunt] and [Antoine] in the determination of the credibility, it's frankly no contest."

¶ 86 The trial court also rejected the defendant's request to reduce his conviction to second-degree murder. After reciting the law regarding provocation, mutual combat, and self-defense, the trial court found that "[i]n this case there is no question from the witnesses that these two individuals were separated. There is absolutely no evidence that the deceased in this matter was armed. The only person [who] was armed was [the defendant]."

¶ 87 On July 16, 2010, after hearing factors in aggravation and mitigation, the trial court sentenced the defendant. The court vacated the previously entered guilty verdict of armed habitual criminal.

720 ILCS 5/24-1.7(a) (West 2010). The two counts of unlawful use of a weapon by a felon were merged with the first-degree murder conviction. 720 ILCS 5/24-1.1(a) (West 2010). The trial court sentenced the defendant to 55 years in the Illinois Department of Corrections. The trial court concluded as follows:

> "THE COURT: I heard the evidence. I made the decision. I tell you to your face, Mr. Selvie, I am convinced beyond a reasonable doubt that you are the person responsible for shooting and killing [the victim]. If I did not believe the evidence demonstrated ***, my verdict would have been different. It wasn't."

On August 10, 2010, the defendant filed a timely notice of appeal.

¶ 88 ANALYSIS

¶ 89 In this direct appeal, the defendant raises two issues: (1) whether the trial court abused its discretion by denying the defendant's motion for a new trial when that motion was based on the affidavit of a previously unavailable witness; and (2) whether the State failed to prove the defendant's guilt of first-degree murder beyond a reasonable doubt. We find the order in which the defendant articulates the issues in his brief to be of little consequence. Accordingly, we address the issues in a manner that embraces judicial economy and does not elevate procedural form over substance.

¶ 90 We address the first issue, and find that for the reasons stated below, we must remand the case to the trial court for an evidentiary hearing before the trial court rules on the defendant's motion for a new trial. Since we remand the case on the first issue because we believe that the truth-seeking

tools and effort in the trial court are important to the administration of justice as the dissent correctly points out, we do not reach the defendant's second issue.

¶ 91 In Illinois "the denial of a motion for a new trial based on newly discovered evidence will not be disturbed on appeal absent an abuse of discretion." *People v. Gabriel*, 398 Ill. App. 3d 332, 350 appeal denied, 236 Ill. 2d 562 (2010); *People v. Molstad*, 101 Ill. 2d 128 (1984); *People v. Salgado*, 366 Ill. App. 3d 596 (2006). Furthermore, "[m]otions for new trial on grounds of newly discovered evidence are not looked upon favorably by the courts and should be subject to the closest scrutiny." *People v. Ortiz*, 385 Ill. App. 3d 1, 10 (2008) affirmed, 235 Ill. 2d 319 (2009) (quoting People *v. Williams*, 295 Ill. App. 3d 456, 462 (1998)).

¶ 92 In *Ortiz*, our supreme court set forth factors that must be met to reverse the denial of a motion for new trial based upon newly discovered evidence:

> "Substantively, the evidence in support of the claim must be [(1)] newly discovered; [(2)] material and not merely cumulative; and [(3)] 'of such conclusive character that it would probably change the result on retrial.' " *People v. Ortiz*, 235 Ill. 2d 319 (2009) (citing *People v. Morgan,* 212 Ill. 2d 149, 154 (2004)).

¶ 93 In this case, Lumpkin's sworn affidavit in support of the defendant's motion for a new trial related to his observations at the time of the shooting. Although the defendant obviously knew of Lumpkin at the time of trial, there is a serious question as to whether the defendant knew the substance of what Lumpkin's sworn testimony would be since the defendant asserts that Lumpkin was unavailable. Defense counsel asserts in good faith that he believed that he was acting properly

in accordance with established law when he refrained from calling Lumpkin as a witness after being advised by Lumpkin's counsel that Lumpkin would invoke his fifth amendment right against self-incrimination. As the dissent acknowledges, it is improper for a party to call a witness whom he has reason to believe will invoke his fifth amendment privilege. *People v. Human*, 331 Ill. App. 3d 809, 819 (2002). We reject the assertion that defendant has forfeited this issue since waiver or forfeiture is a limitation on the parties, not the court. See *People v. Demitro*, 406 Ill. App. 3d 954, 959 (2010). Rather, our focus is on fundamental fairness and seeking the truth. However, we cannot say based on the record before us whether Lumpkin was unavailable at the time of trial. *People v. Parker*, 2012 IL App (1st) 101809. This is precisely why an evidentiary hearing is warranted. As the trial court pointed out, the question of whether a witness can invoke his privilege against self-incrimination is to be decided by the trial court. *People v. Edgeston*, 157 Ill. 2d 201, 220 (1993). Although the trial court in this case correctly acknowledged that it is the court's prerogative and responsibility to determine whether a witness is unavailable within the meaning of the law, that did not occur. A trial court's discretion is not to be rubber stamped by a court of review. Rather, we must determine whether the trial court exalted form over substance and whether the trial court applied the appropriate truth-seeking methods. Lumpkin's testimony was never presented at trial because defense counsel claimed that he had been advised by counsel for Lumpkin that he would invoke his fifth amendment right if called to testify. Defense counsel asserts that he believed in good faith that it would have been improper for him to call a witness whom he *knows* will invoke his fifth amendment privilege. The facts of this case are unique. If we proceed on the assumption that the truth-seeking process in the trial court is crucial to fundamental fairness and the administration of

justice, then we cannot cloak legitimate issues in a procedural dressing in order to avoid ruling on the issue or to reach a particular result. The affidavit provided by Lumpkin in support of the defendant's motion for a new trial raises interesting factual questions. The assertions are such that the trial judge needed to make a threshold determination as to whether Lumpkin was truly unavailable at the time of trial. The substance of Lumpkin's testimony if he was an unavailable witness then becomes important regarding whether it was cumulative or non-cumulative. However, we do not reach that issue prior to the determination of Lumpkins' availability. The record discloses that the trial court did not discuss the availability of Lumpkin nor the sufficiency of his affidavit with any specificity before ruling on the defendant's motion for a new trial. The conflict between the prosecutor and defense counsel as to what Lumpkin's counsel told defense counsel regarding his intention to invoke his fifth amendment right is not evidence, but it does suggest lack of clarity around an important question. The trial court should ascertain the accuracy of what was said given the importance of the issue. Thus, we are unable to say from the record, what, if any, consideration the trial court gave to the affidavit and witness availability in ruling on the motion for a new trial since the court never mentioned either factors when issuing his ruling, after taking the matter under advisement.

¶ 94 We do not opine on what the trial court is likely to find upon conducting a hearing regarding the availability of Lumpkin at the time of trial. However, in light of the unique facts of this case, and assuming that the underpinning of our system of justice is a search for the truth, we believe that the procedural step of conducting an evidentiary hearing will provide important factual information to the trial judge regarding Lumpkin's availability. See generally *People v. Stechy*, 225 Ill. 2d 246, 345

(2007) (J. Thomas dissenting) (suggesting that the court remand the matter for an evidentiary hearing to inquire, *inter alia*, whether a witness was unavailable due to defendant's wrongdoing).

¶ 95 We hold that an evidentiary hearing to determine whether Lumpkin was truly unavailable at the time of trial will provide the trial court with more complete information upon which to base its ruling. Accordingly, we vacate the trial court's denial of the defendant's motion for a new trial, remand the case to the trial court with directions to conduct an evidentiary hearing to determine whether Lumpkin was unavailable at the time of trial. If it is determined that Lumpkin was unavailable at the time of trial, the trial court will then determine whether Lumpkin's proffered testimony was "newly discovered evidence" as the defendant claims. The trial court may then determine whether the evidence was cumulative or non-cumulative and its likely consequent impact, if any, on the outcome of the trial. While remanding the case to the trial court, we retain jurisdiction. Therefore, if the trial court ultimately denies the defendant's motion for a new trial on remand, the case shall return to this court for determination of both the remaining issue regarding sufficiency of the evidence to establish the defendant's guilt beyond a reasonable doubt, and the trial court's findings, decision and orders after remand. We direct the parties to provide a status report to this court, within 60 days of this modified order, regarding this case on remand. We further direct the appellant to transmit to the clerk of this court, within 30 days of the trial court's decision, a report of the proceedings on remand, and any other court records and orders after remand relevant to the evidentiary hearing. The defendant may also file a supplemental brief (limited to 5 pages) addressing the issue of the trial court's ruling upon remand, within 14 days of the filing of the report of the proceedings of the evidentiary hearing. The State may also file a supplemental response brief

(limited to 5 pages) addressing the issue of the trial court's ruling upon remand, within 14 days of the filing of the defendant's supplemental brief. See *People v. Makiel*, 263 Ill. App. 3d 54, 72-74 (1994); *People v. Jones*, 177 Ill. App. 3d 663, 669 (1988).

¶ 96 Vacated and remanded with instructions.

¶ 97 JUSTICE ROCHFORD, dissenting.

¶ 98 I respectfully dissent.

¶ 99 Defendant, on appeal, raises two issues. The first issue is whether his guilt was proven beyond a reasonable doubt. The second issue is whether the testimony of Michael Lumpkin provides a basis for the granting of a new trial. The majority did not address the first issue, concluding instead that this case should be remanded for an evidentiary hearing as to the second issue. However, if we were to conclude that the evidence did not support the finding of defendant's guilt, there would be no need for us to consider whether a new trial was required based on the testimony of Mr. Lumpkin and no need for the trial court to conduct an evidentiary hearing as to this question. If we were to determine that the finding of guilt was supported by the evidence, this decision, which would be based on a review of the trial evidence, would necessarily guide our consideration as to whether a new trial should be granted based on Mr. Lumpkin's testimony, and whether the trial court abused its discretion by failing to hold an evidentiary hearing as to the request for a new trial. See *People v. Molstad*, 101 Ill. 2d 128, 134 (1984) (testimony found to support guilt beyond a reasonable doubt should be balanced against newly discovered evidence in determining whether there should be a new trial); *People v. Gonzalez*, 407 Ill. App. 3d 1026, 1034(2011) ("a new trial is warranted if all of the facts and surrounding circumstances, including the new evidence, warrant closer scrutiny to

determine the guilt or innocence of the defendant"). Therefore, I respectfully suggest that defendant's first issue on appeal required our initial consideration.

¶ 100 As set forth in the majority opinion, a new trial should be granted here if the testimony of Mr. Lumpkin had been discovered since the trial; could not have been discovered prior to trial by the exercise of due diligence; is material to the issue and not merely cumulative; and is of such a conclusive character, that it probably would change the result on retrial. See *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009). Defendant bears the burden of proof on each of these factors. *People v. Hallom*, 265 Ill. App. 3d 896, 906 (1994).

¶ 101 Both the decision to grant a new trial and the decision whether to hold an evidentiary hearing on any aspect of a motion for new trial are within the discretion of the trial court. *People v. Salgado*, 366 Ill. App. 3d 596, 606 (2006); *People v. Gibson*, 304 Ill. App. 3d 923, 930 (1999).

¶ 102 In seeking a new trial below, defendant in his posttrial motion contended Michael Lumpkin "was unavailable to the defense," and that his testimony was material and "corroborated the fact Mr. Selvie did not have a gun and was not the person who shot Mr. Posey." As to the unavailability of Mr. Lumpkin at the time of trial, defendant in his posttrial motion argued:

> "Mr. Lumpkin was unavailable to the defense because his counsel...had informed defense trial counsel that his client would invoke the Fifth Amendment if called to testify, based on the fact Mr. Lumpkin had a pending felony unlawful use of a weapon charge at the time of Mr. Selvie's trial. Mr. Lumpkin was unavailable as a witness for the defense and as the State chose not to call him to

> support its case, the Court was left without this highly relevant evidence."

The posttrial motion did not include evidentiary support for and did not substantiate defendant's contentions relating to Mr. Lumpkin's possible assertions of the fifth amendment. Defendant, in his posttrial motion, did not seek an evidentiary hearing on his request for a new trial.

¶ 103 Defendant did submit to the trial court a statement of Mr. Lumpkin that was titled an "affidavit." This statement was dated June 2, 2008. Defendant's bench trial began on October 26, 2009–over 15 months after the statement was made. The typed statement has the signature of Michael Lumpkin, without notarization, but is said to have been made pursuant to "Section 1-109 of the Illinois Code of Civil Procedure." Defendant, in his posttrial motion, did not present any factual background as to the circumstances surrounding the making of the statement.

¶ 104 Mr. Lumpkin's statement provides as follows:

> "On December 15, 2006, I was working security, along with five or six other men, at Ice Bar, 738 N. Clark Street, Chicago, Illinois. ***
>
> I observed Tank Johnson enter the bar with his bodyguard and go right to the V.I.P. section, which was roped off from the rest of the bar. There were between forty and sixty people inside the V.I.P. section at this time. *** I was standing outside of the V.I.P. section when Tank Johnson and his bodyguard entered it. ***
>
> At some point, while I was standing outside of the V.I.P.

section, I [] observed some body language that indicated to me that Tank Johnson's bodyguard, whom I later learned to be Willie Posey, and another man, whom I later learned to be Michael Selvie, were arguing with each other ***.

I walked into the V.I.P. section *** to see what was going on. A shoving match ensued between Willie Posey and Michael Selvie, but I don't remember who pushed whom.

A crowd kind of convened around Willie Posey and Michael Selvie when this shoving match started, and I tried to grab guys off one another. Michael Selvie's people were trying to pull his guys off, and ~~Willie Posey's people were doing the same with his guys.~~ *I was trying to pull Willie Posey away from Michael Selvie and his people. (MEL) JEB*

I got down on one knee, squatting over Willie Posey and Michael Selvie on the floor, trying to separate them. I grabbed Willie Posey with my left hand and Michael Selvie with my right hand. Two guys jumped on my back, trying to pull me back. I separated Willie Posey and Michael Selvie, and my partner, Little Mike, pulled the two guys off my back. As I held Willie Posey with my left hand and Michael Selvie with my right, Little Mike pulled me back, trying to help me up.

> I maintained my grip on Willie Posey and Michael Selvie, as Little Mike was pulling me up. I was hunching up, coming up, still holding Willie Posey with my left hand and Michael Selvie with my right, being pulled back by Little Mike, when I heard a shot coming from my right. The sound of this gunshot indicated to me that it was not fired from a large caliber gun. I did not see where this shot came from, but I never saw a gun in Michael Selvie's hand when the shot was fired or, for that matter, at any time that night.
>
> After the shot rang out, I let go of Willie Posey and Michael Selvie and backed up to get out of the way. I saw Willie Posey lying on the floor and I became disoriented, as everyone started running out of the bar." (Strikethrough and handwritten underlining in original.) (Italicized language is handwritten in original.)[8]

¶ 105 Mr. Lumpkin, in this statement, did not discuss a pending criminal charge, did not state that he would assert his fifth amendment rights if called as a witness, and did not assert that he was otherwise unavailable as a witness at the time of defendant's trial. Because the statement was made in advance of the trial, it does not state that Mr. Lumpkin would be fully available now and willing to testify should a retrial be granted.

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[8]The statement has handwritten underlining and changes, with the initials "MEL" and "JEB" by the changes. In his motion for a new trial, defendant explained that the changes were made and initialed by Mr. Lumpkin and the underlining was done by defendant's trial counsel.

¶ 106 During the hearing on the posttrial motion, a discussion took place which is set forth above in the majority opinion. In that discussion, the trial court remarked that the extent of any fifth amendment privilege was for the court, and not for Mr. Lumpkin's attorney, to determine. Defense counsel explained that he believed it would have been improper to call Mr. Lumpkin as a witness knowing that he would assert a fifth amendment privilege. In response, the State challenged the contention that Mr. Lumpkin's attorney had raised the fifth amendment and stated that, in any event, Mr. Lumpkin would not have been cross-examined as to a pending charge. The trial court, after taking the matter under advisement, ultimately denied the posttrial motion.

¶ 107 In a criminal case a witness may, "under the aegis of the fifth amendment, refuse to answer questions which might incriminate him, but only when he has reasonable cause to believe he might subject himself to prosecution if he answers." *People v. Edgeston*, 157 Ill. 2d 201, 220 (1993). However, "[n]either an unreasonable fear of self-incrimination nor mere reluctance to testify is a ground for claiming the privilege, it is the circuit court which determines if, under the particular facts, there is a real danger of incrimination." *Id.* The fifth amendment privilege may be denied to a witness where, "considering all the circumstances, *** the answer sought cannot possibly have a tendency to incriminate." *Id.* at 221.

¶ 108 Generally, "it is improper for a party to call a witness whom it has reason to believe will invoke his fifth amendment privilege before the jury." *People v. Human*, 331 Ill. App. 3d 809, 819 (2002). However, a trial court may determine the extent and applicability of the fifth amendment rights of a witness prior to the witness being called. See, *e.g.*, *Edgeston*, 157 Ill. 2d at 221-22; *People v. Rosenthal*, 394 Ill. App. 3d 499, 513 (2009).

¶ 109 The central case as to a claim of newly discovered evidence based on a witness's fifth amendment rights to avoid incriminating testimony is *People v. Molstad*, 101 Ill. 2d 128 (1984). In *Molstad*, defendant sought a new trial based on the affidavits of four convicted codefendants and one acquitted codefendant which stated that defendant was not present at the scene of the crime. *Id*. at 132. The affidavits were prepared after defendant's trial, but before sentencing. *Id*. at 134. The supreme court addressed the issue of whether this evidence was newly discovered and said:

> "[T]he State has not disputed the fact that the affidavits were not prepared until after the guilty verdict and before the sentencing hearing. Thus, at the time of trial, the only testimonial evidence that Molstad could offer to counter Albritton's was his testimony that he was not present at the scene of the attack. Molstad's codefendants did not present their testimony concerning Molstad's whereabouts at trial because such testimony would have incriminated them. The testimony of Molstad's codefendants clearly qualifies as newly discovered evidence." *Id*. at 134-35.

See also *People v. Edwards*, 2012 IL 111711, ¶ 34. Here, Mr. Lumpkin's statement was made and was known to defendant well in advance of trial. Defendant also was aware of Mr. Lumpkin's possible assertion of his fifth amendment rights during the trial. Thus, defendant had an opportunity to obtain a decision from the trial court as to the reasonableness of any fifth amendment assertion and to seek to limit any cross-examination of the State as to a pending charge prior to calling Mr. Lumpkin as a witness. Unlike in *Molstad*, where the new testimony was that of codefendants, Mr.

Lumpkin may have had a pending unrelated charge, but it is not at all clear that his testimony as to what took place on the night of Mr. Posey's murder would be incriminating.

¶ 110 At the hearing on the posttrial motion, the trial court noted that it would have been for the court and not for the witness's attorney to determine whether Mr. Lumpkin's assertion of fifth amendment rights was proper. The trial court's comment elucidates the lack of sufficient support for defendant's claim that the fifth amendment made Mr. Lumpkin completely unavailable as a witness. The trial court's statement was not a recognition on its part that an evidentiary hearing, as to the motion for new trial, would be necessary. The trial court's point was that defendant, although intending to call Mr. Lumpkin as a witness, did not seek a determination from the trial court as to the applicability of the fifth amendment to Mr. Lumpkin's testimony at the time of trial.

¶ 111 Defendant's position on appeal is, again, that Mr. Lumpkin was unavailable as a witness because his counsel had been told by Mr. Lumpkin's counsel he would invoke his fifth amendment rights because of a pending felony unlawful use of a weapon case. Defendant has not argued before this court that the trial court abused its discretion in failing to conduct an evidentiary hearing.

¶ 112 Defendant, in his appellant's brief, presented no argument and cited to no legal authority for his conclusion that Mr. Lumpkin must be considered as having been unavailable at defendant's bench trial because there was a possibility that he would assert his fifth amendment rights based on an unrelated charge. Defendant has waived review of the issue. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008); *In re Marriage of Auriemma*, 271 Ill. App. 3d 68, 72 (1994) (" '[a] reviewing court is entitled to have the issues on appeal clearly defined with pertinent authority cited and a cohesive legal argument presented. The appellate court is not a depository in which the appellant may dump

the burden of argument and research.' " (quoting *Thrall Car Manufacturing Co. v. Lindquist*, 145 Ill. App. 3d 712, 719 (1986))). The State, in its appellee's brief, argued that Mr. Lumpkin should not be considered as "unavailable" where there had been no showing that Mr. Lumpkin had a reasonable basis for asserting his fifth amendment rights. Defendant in his reply brief fails to discuss, in any way, his argument that a new trial is warranted based on Mr. Lumpkin's testimony and, thus, does not refute or object to the State's arguments. As discussed, the issue is waived. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008). The trial court did not abuse its discretion in failing to hold an evidentiary hearing on defendant's claim that Mr. Lumpkin was unavailable.

¶ 113 Defendant did not argue below and does not argue on appeal that Mr. Lumpkin's testimony was discovered since trial. The State, in its appellee's brief, presents a legal argument with citations to law and the record that Mr. Lumpkin's testimony was not newly discovered where: Mr. Lumpkin was identified as a witness during discovery; his statement was made prior to the trial; defendant had knowledge of the statement; and defense counsel mentioned in opening statement that Mr. Lumpkin may be called to testify. Defendant failed to respond to the State's arguments in his reply brief. The issue is waived. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008).

¶ 114 A review of the record shows that defendant's trial counsel in opening statement did, in fact, state that he believed Mr. Lumpkin would be called as a witness. Defense counsel stated that Mr. Lumpkin was working as a bouncer at the Ice Bar on the night of the murder, and also described Mr. Lumpkin's expected testimony. Trial counsel's description of Mr. Lumpkin's testimony in opening statement was consistent with and substantially the same as what is set forth in the statement attached to the posttrial motion.

¶ 115 The record also shows that the State listed Michael Lumpkin as a potential witness at trial and listed him as someone who "made written and/or grand jury statements." The State moved, prior to trial, seeking an order compelling production for inspection of certain statements including "statements made to the defense by Michael Lumpkin."

¶ 116 The record shows defendant was aware that Mr. Lumpkin was working at the Ice Bar that night and was a witness to the incident and that defendant had knowledge of the nature of his testimony at the time of trial. "It is well established that evidence is not 'newly discovered' when it presents facts already known to a defendant at or prior to trial, even if the source of these facts may have been unknown, *unavailable*, or uncooperative." (Emphasis added.) *People v. Jarrett*, 399 Ill. App. 3d 715, 723 (2010). The failure to hold an evidentiary hearing, as to whether Mr. Lumpkin's testimony was "newly discovered," was not an abuse of discretion under these circumstances.

¶ 117 Finally, to warrant a new trial, Mr. Lumpkin's proposed testimony cannot be merely cumulative of the trial evidence. *Ortiz*, 235 Ill. 2d at 334. The majority suggests that an evidentiary hearing should be conducted on this factor without having analyzed the evidence that was presented at trial. Moreover, defendant's request for a new trial was based on Mr. Lumpkin's purported testimony as set forth in his statement. The trial court, as the trier of fact, was in a position to evaluate Mr. Lumpkin's purported testimony and determine whether it was merely cumulative, or was of such a character, that the outcome of the trial would have been different without holding an evidentiary hearing as to the posttrial motion.

¶ 118 For these reasons, I respectfully dissent from the finding that the trial court abused its discretion by failing to conduct an evidentiary hearing on the issue of whether Mr. Lumpkin's

testimony provided a basis for granting a new trial.