

No. 1-12-1748

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IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Cook County
Plaintiff-Appellee,)	
)	
v.)	No. 03 CR 24690
)	
TRIANDUS TABB,)	
)	Honorable
Defendant-Appellant.)	Mary M. Brosnahan,
)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Palmer concurred in the judgment.

ORDER

¶ 1 HELD: (1) Where the evidence presented at defendant's third-stage evidentiary hearing was not so conclusive that it would probably change the result on retrial, the trial court did not commit manifest error in denying defendant postconviction relief; (2) Where the trial court said it was familiar with testimony regarding the reliability of eyewitness identifications and allowed defendant to argue generally about eyewitness identification in closing argument, the trial court did not abuse its discretion when it barred the testimony of defendant's expert on eyewitness identifications; and (3) Where the State investigators provided defendant with reports that included the substance of their notes from witness interviews, the trial court did not abuse its discretion when it refused to impose sanctions on the State.

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¶ 2 Defendant Triandus Tabb appeals from the dismissal of his petition for postconviction relief after an evidentiary hearing under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 et seq. (West 2002)). On appeal, defendant contends that: (1) the trial court erred in denying him postconviction relief because defendant presented evidence sufficient to support his claim of actual innocence and warrant a new trial; (2) the trial court erred in excluding the expert testimony on the reliability of eyewitness testimony defendant sought to present; and (3) the trial court erred by failing to impose discovery sanctions on the State when the State admitted to destroying investigators' interview notes. We affirm.

¶ 3 After a jury trial, defendant was convicted of attempted first degree murder, aggravated battery with a firearm, and the attempted aggravated vehicular highjacking of Salvador Gomez. The facts of the trial and defendant's conviction are discussed fully in *People v. Tabb*, 374 Ill. App. 3d 680 (2007). We will discuss the evidence presented at the jury trial only to the extent necessary for consideration of the issues on appeal.

¶ 4 Salvador Gomez, the victim, testified that at approximately 1:20 p.m. on September 6, 2003, while driving in his black sport utility vehicle (SUV), he stopped at a red light at 51st Street and Ashland Avenue in Chicago, Illinois. Gomez had his window rolled down and, while he was stopped, he was approached by a man who pointed a gun at Gomez's left temple. The man told Gomez to "get out of the f**** truck, mother f*****" three times. Gomez said he did not get out of the truck but just kept looking at the man's face. After the third time the man yelled, Gomez tried to pull the gun down, away from his head, and the attacker shot Gomez three times. After he was shot, Gomez drove away and did not see where the shooter went. Gomez

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described the shooter as a tall, black man who was "kind of skinny" and wearing "[w]hite clothes, jersey with a shirt and some bandana on the head." Gomez was about an arm's length away from the shooter during the encounter and said he looked at the gun and at the shooter's face. On October 25, 2003, Gomez viewed two separate in-person lineups at the police station. Gomez did not recognize anyone in the first lineup. In the second lineup, he identified defendant as the shooter. Gomez testified that he was sure defendant was the shooter and identified defendant as the shooter in open court. The police did not tell Gomez who to identify in the lineup.

¶ 5 Norman Brown testified that in September 2003 he lived at the Daniel Nellum Group Home (group home) at 1458 West 51st Street. Isaac Pittard and defendant also lived in the group home. Brown and defendant were both members of the Blackstone street gang. On September 6, 2003, Brown, Pittard, and defendant left the group home together and walked to a store on Ashland to buy cigarettes. Brown then saw defendant approach a black truck. Defendant "up'd out a chrome pistol and opened fire" three or four times, and then ran. Brown and Pittard ran back to the group home and did not see defendant again that day. Brown testified that no one had threatened him or promised him anything in exchange for his testimony. Brown was arrested in connection with the shooting on October 25, 2003, and initially told the police he did not know anything about the shooting. On cross-examination, Brown admitted that the day before trial he told defense counsel he did not know whether defendant had committed the crime, but later said he did not remember saying he did not know whether defendant had committed the crime. Brown also said that the day he was arrested, the police told him he would go to jail unless he gave them information.

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¶ 6 Valerie Panozzo, an attorney for the Cook County public defender's office, testified that two days previously, she was present for a conversation with Brown, in which Brown said he heard shots on September 6, 2003, but did not see the shooter. Brown also told Panozzo that he did not see defendant with a gun.

¶ 7 Eyvonne Ford testified that in September 2003 she lived across the street from the group home. She knew defendant, Brown, and Pittard because they were friends with her son and had spent time at her home. In the early afternoon of September 6, 2003, Ford was walking toward 51st and Ashland when defendant, Pittard, and Brown came running toward her. Defendant told Ford he had shot a "Scipe," which Ford understood to mean defendant had shot a member of the Satan Disciple street gang. Defendant then pointed in the direction of a black vehicle. In court, Ford identified a photograph of Gomez's SUV as the vehicle she had seen. Defendant told Ford he still had the gun on him, but she did not see one. Ford did not believe defendant at first, because she knew defendant to be a liar. However, after seeing defendant, Ford spoke with her sister. Ford's sister had seen a man who had been shot lying on the ground near 51st and Paulina Avenue. Ford contacted the police and told them she had information about the shooting.

¶ 8 Detective William Svilar testified that he was assigned to investigate the shooting and, after speaking with Ford, he compiled a photo array of seven photographs. On October 25, 2003, Svilar arrested Brown and Pittard. At approximately 1:15 p.m., Gomez viewed a lineup of six people, including Brown and Pittard, but did not identify anyone in the lineup. Shortly after, Officer Milot Cadichon, another eyewitness to the shooting, viewed the same lineup. He identified Brown and Pittard as being present at the scene of the shooting, but did not identify

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anyone as the shooter. Svilar informed Brown and Pittard separately that a witness had put them at the scene of the shooting. Svilar arrested defendant later that night. Gomez returned to the police station and identified defendant as the shooter from a five-person lineup.

¶ 9 Officer Milot Cadichon testified that at approximately 1:20 p.m. on September 6, 2003, he was off-duty and driving along 51st Street. He stopped at a red light at the intersection of 51st and Ashland and saw a black man approach a black SUV that was stopped at the same traffic light across Ashland. The man pulled out a silver revolver and stuck the gun in the face of the SUV driver. While dialing 9-1-1, Cadichon saw the driver struggling with the attacker. The attacker pulled back and Cadichon heard shots. After three or four shots were fired, the shooter got into the backseat of a car and fled. Cadichon said he was about 100 feet from the attack. He described the attacker as wearing a black and white striped jersey and having braids. When he viewed a photo array that included photos of defendant, Brown, and Pittard later that day, Cadichon identified Pittard as the shooter and Brown as the driver of the getaway car. When explaining why he originally identified Pittard as the shooter, Cadichon said "when I viewed the picture that evening, looking at it, *** it looks like braids, and the person I saw with the gun had braids. So, it might have been closer to the person that I saw at the time." Pittard was the only person in the photo array that had braids in his hair. On October 25, 2003, Cadichon viewed an in-person lineup from which he "tentatively" identified Brown and Pittard as people he believed had been at the scene, though he was not sure. He was unable to positively identify the shooter. On cross-examination, Cadichon admitted that his view of the shooting was interrupted by the traffic passing on Ashland. Cadichon never had a full-face view of the shooter. Looking at

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defendant in open court, Cadichon could neither say defendant was or was not the shooter.

¶ 10 Brian Gary, a child care worker at the group home, testified that his job was to "monitor the youths" and he recorded whether a boy had left or returned to the group home in a log book. Gary worked during the day on September 6, 2003, and testified that according to the log book, Brown left the group home at 12:30 p.m. and Pittard left at 12:45 p.m. At 1 p.m. defendant was the only boy present in the group home and at 1:45 p.m. defendant left the group home.

¶ 11 The jury found defendant guilty of attempted first degree murder, aggravated battery with a firearm, and attempted aggravated vehicular hijacking. The court merged the attempted murder and aggravated battery charges, sentencing defendant to a 12-year prison term for those charges and a consecutive term of 4 years for the vehicular hijacking charge. Defendant's motion to reconsider sentence was denied and defendant appealed his convictions and sentence. On appeal, this court vacated defendant's conviction for aggravated battery with a firearm and affirmed the trial court's decision in all other respects. *Tabb*, 374 Ill. App. 3d 680 (Neville, J., dissenting).

¶ 12 On June 25, 2008, defendant filed a verified petition for postconviction relief arguing actual innocence and ineffective assistance of counsel. The State filed a motion to dismiss the petition on November 26, 2008. Defendant then filed a motion for limited discovery and for leave to file an amended postconviction petition. The trial court denied the motion for discovery but granted defendant leave to file an amended petition.

¶ 13 On March 25, 2009, defendant filed his amended postconviction petition, arguing that: (1) newly discovered evidence showed he was actually innocent of the crimes for which he was convicted; and (2) he was denied the effective assistance of counsel. In support of his petition,

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defendant attached affidavits from, in pertinent part, Betty Stuckey, David Carr, Walid Ghnaim, Isaac Pittard, and Cynthia Estes.

¶ 14 In her affidavit, Betty Stuckey averred that at about 1 p.m. on September 6, 2003, she drove with her son, David Carr, to the currency exchange near 51st and Ashland to cash a check. As she was leaving the currency exchange, she noticed a black truck stopped at the intersection, and then saw a car pull up into the alley. A man exited the car, approached the truck, and told the driver to get out of the truck. The driver did not leave the truck and "[a]fter a few moments" the man shot at the driver of the truck. When the light changed, the truck drove away. The shooter then jumped back into the car in the alley, and that car drove away. Stuckey described the shooter as being about 160 pounds, 5'6" tall, and wearing a white t-shirt and blue jeans. She averred that she "got a good look at the face of the shooter" and that defendant was not the shooter. She did not stay to speak with police because she was afraid to get involved.

¶ 15 David Carr averred that while at the currency exchange with his mother at approximately 1 p.m., he saw an SUV stopped at the traffic light at 51st and Ashland. He then saw a Pontiac vehicle with at least two people inside pull over. Two men exited the Pontiac and ran up to the SUV. One man was about 5'10" or 5'11", thin, with short hair and a caramel complexion. The other was shorter, thin, with an afro and a darker caramel complexion. The taller male exchanged words with the driver of the SUV, then pulled out a blue or silver revolver and fired three times. The two men returned to the Pontiac and drove away, and the SUV driver drove away. In 2005, Carr was in the lockup at the court house when he heard defendant talking about the shooting and Carr realized it was the shooting he had witnessed. Carr stated that defendant

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was not the shooter and was not at the scene at the time of the incident.

¶ 16 Walid Ghnaim averred that on September 6, 2003, he was standing outside his place of employment, J & J Fish & Chicken, located at 51st and Ashland. At around 1:20 p.m., he saw a truck stop at a red light at the intersection. A silver or grey car with at least two black men inside pulled into a nearby alley. A tall, thin, black man exited the silver car and approached the driver of the truck while holding a gun. He had an "unobstructed and clear view" of the man's face. The man pointed the gun at the driver's face, screamed at the driver, opened the "truck door," then shot into the truck three or four times. The shooter then returned to the car in the alley and the car drove away. Ghnaim was interviewed by police 15 to 20 minutes after the shooting, at which time he gave a brief description of the shooter. Ghnaim was unable to identify the shooter in a photo array.

¶ 17 Pittard averred that at approximately 1:20 p.m. on September 6, 2003, while he and Brown were walking home from purchasing cigarettes at a store on Ashland, Pittard heard three or four shots fired. Pittard did not see the shooting, did not see defendant shoot the victim, and did not see defendant with a gun. Defendant was not with Pittard and Brown when the shooting occurred and Pittard did not run to Ford after the shooting. After Pittard was arrested for the shooting, the police told Pittard that Brown had said defendant was the shooter. Pittard lied and told the police that defendant was the shooter because he was afraid that if he did not agree with Brown's story, he would be blamed for the shooting. Pittard also averred that both Ford and Brown dealt drugs in the neighborhood in 2003.

¶ 18 Cynthia Estes averred that on November 14, 2008, Brown told her and an attorney that he

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heard shots fired but did not see the shooting. Defendant was not with Brown and Pittard when they heard the shooting and Brown was "100% certain that [defendant] did not commit this shooting." Brown said he lied to the police because he was scared of being charged. Brown refused to sign an affidavit attesting to the facts relayed to Estes.

¶ 19 The trial court granted the State's motion to dismiss defendant's amended petition and denied defendant's motion to reconsider.

¶ 20 On appeal, this court remanded defendant's cause for third-stage proceedings, finding that defendant presented allegations of actual innocence sufficient to warrant an evidentiary hearing. *People v. Tabb*, No. 1-09-2904 (2011) (unpublished order under Supreme Court Rule 23).

¶ 21 On May 26, 2011, defendant filed a motion for limited postconviction discovery and requested, in pertinent part, "[a]ny written notes relating to, or recordings of, interviews of witnesses named in Defendant's Amended Post-Conviction Petition." The State responded with investigative reports relating to witness interviews that had been completed by their investigators. Prior to the evidentiary hearing, on October 25, 2011, defendant informed the court that although he had requested copies of the investigators' notes from their interviews, the rough notes had been destroyed. Defendant requested sanctions, asking the court to either preclude the State from calling their investigators "which would [b]e the most extreme sanction" or require the State's investigators to recreate their notes and submit to interviews with defense counsel.

¶ 22 The State argued they had complied with the motion for discovery and were not required to tender the notes. In addition, the State claimed that the investigators' notes were incorporated into the tendered reports and explained that it was typical practice for the investigators to destroy

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their notes once their reports were completed. The State argued that sanctions were inappropriate under the circumstances because defendant had "received the reports, which contain everything that we learned and that's [sic] complies [with] the discovery request." In response, defense counsel pointed out that some of the investigator reports were not completed until after defendant had submitted his discovery requests to the State.

¶ 23 The court did not impose sanctions, stating:

"I understand the issues as explained by the parties. I'm not going to order [the investigators] to sit for an interview. They are like any other witness. They can talk to you if they want. They can refuse to talk to you. The testimony is such that it's their policy to create the reports based on the notes and then destroy the notes, it's certainly subject to cross-examination. There is nothing before me at this juncture to show that there was information not contained in the reports as a result of the interview. Certainly you can cross-examine on this issue."

The court also instructed the State to ask their investigators to refrain from destroying notes taken during future interviews.

¶ 24 On August 11, 2011, the State filed a motion to strike, seeking to bar the testimony of a witness defendant intended to call as an expert in eyewitness identification, Dr. Shari Berkowitz. In his response to the State's motion, defendant attached Berkowitz's 11-page report, in which she conducted a review of the case materials to "assess the eyewitness memory factors that were

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present in the case and to offer opinions regarding the relevance of scientific research in the area of eyewitness memory to the facts of the case itself." After summarizing her findings as to the identifications of Salvador Gomez, Officer Cadichon, Walid Ghnaim, David Carr, and Betty Stuckey, Berkowitz concluded that Gomez's identification of defendant "may be unreliable" and that there was a "substantial probability" that Gomez misidentified defendant as the shooter.

¶ 25 After hearing arguments on the motion and having previously noted that it was "very familiar" with the case law and "all the recent cases" about eyewitness identification testimony, the trial court barred the testimony of Berkowitz. In doing so, the court noted that it was not ruling on the admissibility of Berkowitz's testimony if defendant were granted a new trial.

¶ 26 At the evidentiary hearing, beginning on November 29, 2011, Betty Stuckey testified that at about 1:20 p.m. on September 6, 2003, she drove to the currency exchange to cash her payroll check, accompanied by her son, David Carr, her stepson, Magnum, and Magnum's girlfriend, Catherine. While Stuckey was in the currency exchange parking lot at 51st and Ashland, she saw a black truck stopped at a red light, then saw a car turn into an alley. A boy got out of the car and approached the truck with a gun. The boy demanded the driver's keys, but when the driver refused, the boy "put the gun through the window and shot several times." The truck drove away and the shooter turned and ran toward Stuckey, ran into the alley, and got into the car which then drove away. Stuckey explained she did not wait for the police after the shooting because she was afraid to get involved. She described the shooter as having light brown skin, weighing 150 to 160 pounds, and wearing blue jeans and a white t-shirt. She was "positive" that defendant was not the shooter because she looked the shooter "dead in his face." At the time of the hearing,

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Stuckey's son, David Carr, was deceased.

¶ 27 On cross-examination, Stuckey acknowledged that on June 19, 2008, she spoke with the defense and gave an affidavit. She told the defense that on September 6, 2003, she had gone to the currency exchange with Carr and then, after the shooting, she drove to a bus stop where she picked up two kids she knew, Anthony and Mookie. When Stuckey met with State investigators on July 22, 2011, she told them that she drove to the currency exchange with Carr, Magnum, Catherine, and Catherine's two children. Stuckey also told the State investigators that she never made it into the currency exchange because it was closed when the shooting started. However, at the hearing Stuckey testified that the currency exchange was open and she had cashed her check. In addition, during her meeting with the State investigators, Stuckey went over her 2008 affidavit with the investigators and was given the opportunity to make changes. Stuckey's original affidavit had said that: she went into the currency exchange to cash her check; she saw a car with two people in it pull into an alley; she saw the shooter exit the car; the shooter ran back into the alley and got into the car, which then drove away. During her meeting with the State investigators, however, Stuckey changed her affidavit to say that: she did not go into the currency exchange due to the shooting; she did not see a car pull into an alley; she did not see where the shooter came from; after the shooting, the shooter ran into the alley. Stuckey admitted she lied to the State investigators when she said she did not see a car pull up in the alley and when she said Catherine's children were in the car the day of the shooting. Stuckey further testified that although Carr met defendant in 2005, she did not meet with the defense investigators until 2008.

¶ 28 On redirect examination, Stuckey explained that she lied to the State investigators

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because the day she met with the State investigators her son Darnell had told her not to get involved because the shooting was gang-related. However, she chose to testify and had told the truth at the hearing because she knew it was the right thing to do.

¶ 29 The parties stipulated to the chain of custody and authentication of a payroll check issued to Stuckey on September 5, 2003, and cashed by her on September 6, 2003.

¶ 30 Nelly Gomez, wife of Salvador Gomez, testified that at about 11 p.m. on October 25, 2003, she accompanied Salvador to the police station to view a lineup. They arrived at the police station and Officer Cepeda led them to a room where he told Nelly to wait. Cepeda then immediately escorted Salvador to view the lineup. While Nelly was waiting and sitting at a desk, about two desks down she noticed a couple of files stacked up on top of each other and on top of the stack was a black and white photograph of a man, whom she identified in open court as defendant. When Nelly saw the picture, she said she got very angry. When Salvador returned, he told Nelly he had identified the shooter in the lineup. Nelly asked to see a picture of the shooter. Cepeda looked around and then picked up the photo of defendant Nelly had seen earlier. Nelly told Salvador and Cepeda that she had gotten a sick feeling while looking at defendant's picture. Nelly then testified that just before Salvador was to testify at defendant's trial, Ford approached Salvador and Nelly and told them defendant had confessed to her. Nelly testified that Salvador told Ford he would never forget the colors in the handle of the gun. Ford said she knew what gun had been used and that the gun had a colorful handle. Ford also told Salvador she had seen him lying on the ground on the day of the shooting. On May 9, 2011, Nelly had a conversation with the defense team, but she denied telling defense counsel that Salvador also

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spent time in the room with defendant's picture prior to lineup. Nelly also denied telling the defense that, after Salvador viewed the lineup, she told Salvador he chose the right person or that a police officer told Salvador he had chosen the right person. After the May 2011 phone call with the defense, Nelly spoke with State investigators, who specifically asked Salvador if he had seen the picture of defendant on top of the file stack prior to his viewing the lineup. Salvador and Nelly told the State investigators that Salvador had not seen the picture prior to the lineup.

¶ 31 Cynthia Estes, a private investigator, testified that she had participated in a phone call with Nelly Gomez and two other defense team members. Nelly told them that, prior to viewing the lineup, Nelly and Salvador were waiting in a room where there was a file with defendant's picture on top. Both she and Salvador looked at the picture. Nelly then said that after the lineup, Salvador told her he had identified the person whose picture was on the file. Nelly told Salvador that she thought he was right because she had a sick feeling in her stomach when she saw the picture. An officer then told Nelly and Salvador that Salvador had identified the correct suspect.

¶ 32 Estes also met with Stuckey at the scene of the shooting. "It was a difficult interview" because Stuckey was scared. Stuckey was confused by the questions asked and reluctant to take part in the case, but she talked to the defense because "she wanted to do the right thing."

¶ 33 The parties then stipulated that if defendant were granted a new trial, defense counsel Cathryn Crawford would be called to testify that on January 27, 2005, she was told by a bailiff that her client wanted to speak with her. She went to the lockup where she saw defendant and David Carr standing together "in an excited state." Carr told Crawford that he heard defendant complaining about his conviction and Carr said Carr had been at the scene of the shooting with

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his mother. Crawford conducted an interview with Carr and the contents of Carr's affidavit are consistent with what he told her in lockup. "Most important he saw the shooter and it was not [defendant]."

¶ 34 The parties also stipulated that if Walid Ghnaim were called as a witness, he would testify that at approximately 1:20 p.m. on September 6, 2003, he was standing outside of J & J Fish facing 51st Street when he saw an SUV stop at a red light. Ghnaim saw at least two black men in an older model Buick parked in an alley off of Ashland. One black man exited the back seat of the Buick and approached the SUV, carrying a silver handgun. He walked up to the driver's window and demanded the driver get out of the car. When the driver refused, the black man stepped back and shot into the truck three or four times. The shooter got into the back seat of the Buick, which then drove down the alley. However, Ghnaim "would not have been able to identify the shooter near the time of the shooting and would not be able to identify him now."

¶ 35 The State called Isaac Pittard, who testified that sometime in the afternoon of on September 6, 2003, Pittard, Brown, and defendant left the group home to go to a nearby store. Pittard could not recall if defendant had a gun. While Pittard was talking to a girl, defendant said "watch this" and ran "off in his own separate direction" toward Ashland. Then Pittard heard shots coming from the direction in which defendant had run. Pittard never saw a gun in defendant's hand and did not see defendant shoot anyone. Pittard admitted that he lied to Detective Svilar on October 25, 2003, when he said he knew defendant had a gun on September 6. Pittard also told Svilar that Pittard saw defendant pull a gun out of defendant's pants. Pittard did identify a photograph of defendant as the person who shot the victim on September 6. Pittard

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told Assistant State's Attorney (ASA) Grace Hong the same things he told Detective Svilar. At approximately 2:37 a.m., Hong wrote down Pittard's statement. Pittard told Hong that defendant showed Pittard a gun and when they were on the street defendant had the gun in his pants. He saw defendant approach the driver's side of a truck and pull the gun out of his pants. Pittard heard two or three gunshots. Pittard told Hong he was telling the truth, reviewed his statement, and made corrections.

¶ 36 On cross-examination, Pittard said his statement was not true and that he signed the statement because he was 15 years old and did not know better. He had been told he was picked out of lineup and he told the detectives what they wanted to hear because he thought he might be charged. Pittard testified that everything in his 2008 affidavit was true.

¶ 37 The parties stipulated that Pittard had two prior felony convictions, one for receiving stolen property and another for carrying a concealed weapon.

¶ 38 Thomas McGreal, an investigator for the State's Attorney's Office, testified that at about 10 a.m. on July 22, 2011, he and his partner, Joanne Ryan, went to Provident Hospital to interview Betty Stuckey. She asked them to come back later and they returned at 2:30 p.m. Stuckey agreed to be interviewed in the investigators' vehicle. They did not force Stuckey to speak with them and she was free to leave when she wanted. They started by simply asking Stuckey what happened the day of the shooting and listening to her narrative. Ryan then showed Stuckey the affidavit Stuckey had completed on June 19, 2008. Ryan went through the affidavit line by line and Stuckey made changes. Stuckey told them the shooter was wearing a possibly brown-colored hat, a striped light brown shirt, and brown pants although her affidavit originally

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said the shooter was wearing a white t-shirt and jeans. She changed the affidavit to reflect that she was unsure of what the shooter was wearing. The investigators showed Stuckey a photo of defendant and Stuckey "immediately said that looks like the young man that was doing the shooting." When asked to explain why she thought he was the shooter, Stuckey then said the person in the photograph was not the shooter.

¶ 39 On cross-examination, McGreal stated that Stuckey did not say she did not want to get involved, did not say she did not want to answer any questions, and was "very open about answering" the investigators' question. She was not confused, but she did contradict her previous affidavit while she was giving her narrative explanation of what had occurred on September 6. McGreal admitted to destroying the notes he took during the interview with Stuckey "[a]s policy with the Cook County State's Attorney's Office."

¶ 40 Sergeant William Svilar substantially restated his trial testimony. He also testified that when he initially spoke with Pittard at about noon on October 25, 2003, at the police station, Pittard denied any involvement in the shooting. Svilar spoke with Pittard a second time after Pittard was identified as being present at the scene of the shooting in the lineup, at about 1 p.m. In the second conversation, Pittard said he was present with Brown and defendant, and that defendant had approached the victim's truck, ordered the victim out of the truck, and then fired shots into the truck, striking the victim. Subsequently, Svilar contacted ASA Hong who then spoke with Pittard and reduced the conversation to a handwritten statement. Svilar was present when Pittard gave the statement, made and initialed corrections, and when Pittard signed his statement. Svilar never threatened or coerced Pittard into identifying defendant as the shooter

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and never told Pittard he would be charged in the case if Pittard did not identify defendant.

¶ 41 The parties then stipulated that, if called, ASA Grace Hong would testify that she spoke with Pittard at about 2:37 a.m. on October 26, 2003, and reduced their conversation to a handwritten statement. Hong witnessed Pittard sign and initial the statement and would testify that the statement represents a true and accurate summary of Pittard's statement to her. Pittard reviewed the statement and made any necessary corrections he wished to make.

¶ 42 For impeachment purposes, the parties also stipulated to David Carr's prior convictions for aggravated battery and heinous battery.

¶ 43 In February 2012, defendant called Officer Cadichon as a rebuttal witness, whose testimony was substantially similar to his trial testimony. He testified that he had a "pretty clear" view of the shooter's face and described him as a skinny, young, black male between 5'9" and 5'10" tall, wearing short braids. Pursuant to a subpoena, Cadichon had printed out color mug shots of defendant, Brown, and Pittard. Defendant showed Cadichon the photographs of defendant, Brown, and Pittard. Cadichon identified Pittard as the shooter. He said he did not "believe" defendant was the shooter and did not "think" defendant was the person he saw. Cadichon also said of defendant, "[t]hat's not the person that I saw that day."

¶ 44 On cross-examination, Cadichon admitted that at the 2004 trial, he stated he could not identify defendant as the shooter and could not say defendant was not the shooter. However, the day of the hearing, he did not think defendant was the shooter from his memory. Cadichon admitted that in 2004 his recollection of events was fresher in his mind than the day of the hearing. Cadichon identified Pittard as the shooter from the photo array because Pittard was the

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only person pictured wearing braids, not because he recognized the face. Cadichon never had a full frontal view of the shooter so he had "doubts" and ultimately concluded, again, that he could not say that defendant was not the shooter.

¶ 45 During closing arguments, the court allowed defendant to argue generally about "social scientific research" in regard to eyewitness identification over the State's objection, saying "I did indicate that I was not going to allow in the testimony of the expert identification witness, but I am familiar in general with the concept. You can proceed along these lines generally."

¶ 46 On May 17, 2012, the trial court denied defendant postconviction relief in a written order.

¶ 47 On appeal, defendant first contends that the trial court erred in denying him a new trial because he successfully presented newly discovered evidence that was material and not merely cumulative and which was of such conclusive character that it would probably change the result on retrial.

¶ 48 The Act provides a three-stage process through which a defendant may challenge his conviction or sentence for violations of a constitutional right that could not have been addressed on direct appeal. *People v. Chatman*, 357 Ill. App. 3d 695, 698 (2005). At an evidentiary hearing, the trial court is the fact finder and therefore must determine witness credibility, determine the weight to be given to witness testimony, and resolve any evidentiary conflicts. *People v. Dopson*, 2011 IL App (4th) 100014, ¶ 19. A new trial will be warranted if the surrounding circumstances and facts, including the new evidence, require closer scrutiny to determine defendant's guilt or innocence. *People v. Gonzalez*, 407 Ill. App. 3d 1026, 1033 (2011). When the trial court denies a defendant postconviction relief after a third-stage

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evidentiary hearing where the court considered the new evidence and weighed the credibility of witnesses, the court's determination will be reversed only if it was manifestly erroneous. *People v. Morgan*, 212 Ill. 2d 148, 162 (2004). Manifest error is error that is clearly evident, plain, and indisputable. *People v. Taylor*, 237 Ill. 2d 356, 373 (2010).

¶ 49 As an initial matter, defendant contends that the trial court erroneously applied the wrong standard in denying his petition. In its order, the trial court noted that actual innocence means "total vindication or exoneration," citing *People v. Savory*, 309 Ill. App. 3d 408, 414-415 (1999), *aff'd*, 197 Ill. 2d 203 (2001). Defendant maintains that this definition of actual innocence is inconsistent with the supreme court's holding in *People v. Ortiz*, 235 Ill. 2d 319 (2009). In *Ortiz*, the supreme court held that an actual innocence claim must be based on evidence that is newly discovered, material, not merely cumulative, and " 'of such conclusive character that it would probably change the result on retrial.' " *Ortiz*, 235 Ill. 2d at 333-34 (quoting *Morgan*, 212 Ill. 2d at 154).

¶ 50 Although in its order the trial court stated that actual innocence meant total vindication or exoneration, throughout the rest of the order, the trial court consistently analyzed the hearing testimony under the *Ortiz* standard. The trial court considered whether the evidence was newly discovered, material, non-cumulative, and so conclusive that it would probably change the result on retrial. The trial court is presumed to know and follow the law absent an affirmative showing in the record to the contrary. *People v. Wigman*, 2012 IL App (2d) 100736, ¶ 41(citing *In re N.B.*, 191 Ill. 2d 338, 345 (2000)). Here, the record shows that the trial court used the appropriate standard in considering defendant's petition, and we find no affirmative showing to the contrary.

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¶ 51 The evidence at defendant's original trial was overwhelming. Salvador Gomez positively identified defendant as the shooter in an in-person lineup and in open court during trial. He said that defendant was an arm's length from him during the attack, that he looked at the gun and into defendant's face, and that he was sure defendant was the shooter. Salvador also testified that the police did not tell him who to identify during the lineup. Norman Brown testified that he and Pittard were with defendant when defendant shot someone in a black truck. Brown also said that he was not threatened or promised anything in exchange for his testimony. Eyvonne Ford testified that on the day of the shooting, in the early afternoon, defendant ran up to her while she was walking toward 51st and Ashland, and told her he had shot a "Scipe," then pointed to a black SUV. Ford said she knew defendant previously and also identified a photograph of Salvador's black SUV as the SUV defendant pointed at on the day of the shooting. Officer Cadichon testified that he viewed the attack from about 100 feet away across Ashland while traffic was passing. He originally identified Pittard as the shooter from a photo array, but when he viewed the in-person lineup, Cadichon could only identify Pittard as having been present. Cadichon also placed Brown at the scene. At trial, Cadichon testified he could not say whether defendant was or was not the shooter.

¶ 52 The new evidence defendant presented in support of his actual innocence claim included the testimony of Betty Stuckey, the affidavit of David Carr, the testimony of Nelly Gomez, and the testimony of Walid Ghnaim. Stuckey testified that after the shooter fired his gun, he ran toward Stuckey on his way back to the car in the alley. Stuckey maintained that she looked the shooter "dead in his face" and was "positive" that defendant was not the shooter. However, the

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trial court found that Stuckey was not credible as a witness, a determination within the court's purview in an evidentiary hearing. *Dopson*, 2011 IL App (4th) 100014, ¶ 19. As the trial court pointed out, Stuckey's testimony was impeached by the State. At the hearing, Stuckey openly admitted that she lied to the State investigators about what she saw the day of the shooting. Stuckey told the State investigators that she never made it into the currency exchange and she changed her 2008 affidavit to say the same, although Stuckey had originally averred that she did cash her check in the currency exchange. Stuckey also told the State investigators that she did not see a car with two people in it pull into the alley and did not see where the shooter came from. She changed her 2008 affidavit accordingly from her original statements that she saw the car pull into the alley and saw the shooter exit the car. Stuckey said she lied to the State investigators because she did not want to get involved in the case. However, Stuckey provided the defense with an affidavit in 2008, voluntarily spoke with the State investigators in 2011, and admittedly told the State investigators a different version of facts than she told the defense. In addition, Stuckey did not come forward until 2008, almost five years after the shooting occurred. Defendant argues that even though Stuckey's hearing testimony was impeached, "there was no wavering from the core of her testimony: she saw the shooter's face and the shooter was not [defendant]." However, Stuckey's general lack of credibility as a witness reasonably calls into question the credibility of her statement that defendant was not the shooter.

¶ 53 As to the affidavit of David Carr, we agree with the trial court that it would not be admissible at a new trial because it is hearsay. See *People v. Sims*, 143 Ill. 2d 154, 173 (1991) (hearsay is an out-of-court statement that has been offered to prove the truth of the matter

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asserted). The general rule is that hearsay is inadmissible at trial (*People v. Wilson*, 2012 IL App (1st) 101038, ¶ 38), and Carr's affidavit does not fall under any exceptions to the hearsay rule.

Section 115-10.4 of the Code of Criminal Procedure allows the admission of prior testimony of a deceased witness if it was made "under oath at a trial, hearing, or other proceeding" and had "been subject to cross-examination by the adverse party." 725 ILCS 5/115-10.4(d) (West 2006)¹. Carr did not make his statement under oath at a trial, hearing, or other proceeding and was never subject to cross-examination, so his affidavit would not be admissible under the section 115-10.4 exception to the hearsay rule.

¶ 54 In addition, Carr's affidavit does not fall under the excited utterance exception to the hearsay rule. Ill. R. Evid. 803(2) (eff. Jan. 1, 2011). A hearsay statement will be admitted under the "excited utterance" exception to the hearsay rule if there was an occurrence so startling it produced a spontaneous and unreflecting statement, there was no time for the declarant to fabricate his statement, and the statement related to the circumstances of the occurrence. *People v. Williams*, 193 Ill. 2d 306, 352 (2000). We do not believe that Carr hearing defendant talk about the circumstances of his conviction while in the lockup qualifies as "an occurrence so startling it produced a spontaneous and unreflecting statement." More than a year lapsed between the occurrence of the shooting and the time Carr met defendant in the lockup and it is unclear how much time lapsed between the time when Carr and defendant met and when Carr made his statements to Crawford, giving Carr time to fabricate his statements. Defendant has not

¹ The requirement that the statement must have "been subject to cross-examination by the adverse party" was added to the statute effective June 17, 2005. See Pub. Act 94-53, § 5 (eff. June 17, 2005).

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offered any case law or reasoning to support his argument beyond a conclusory statement that Carr's affidavit would fall under the hearsay exception. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) (the argument section of appellant's brief "shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and pages of the record relied on.") Therefore, we find Carr's testimony would be inadmissible and would have no effect on the outcome of a new trial.

¶ 55 Nelly Gomez testified that she accompanied Salvador to the police station to view an in-person lineup. She maintained throughout her testimony that Salvador did not see a picture of defendant before viewing the lineup. Nelly denied telling the defense that Salvador spent time in the room with defendant's picture prior to the lineup or that she or Cepeda told defendant he chose the right person after he identified defendant in the lineup. Nelly also testified that Ford had approached her and Salvador and told Salvador that defendant had confessed to Ford. Nelly's testimony was impeached by Estes, who testified that Nelly told the defense that Salvador waited in the room with defendant's photograph before going in to view the lineup, and after the lineup an officer told Salvador that he had identified the correct suspect.

¶ 56 Defendant argues that the combination of Nelly telling Salvador that defendant's picture gave her a sick feeling, Ford telling Salvador that defendant had confessed to Ford, and Salvador telling Ford he would never forget what the gun looked like undermines Salvador's identification. However, at most, Nelly's testimony would serve only to impeach Salvador's identification. As the trial court noted, evidence which merely impeaches the testimony of another witness will not generally be of such a conclusive character as to justify a new trial.

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People v. Barnslater, 373 Ill. App. 3d 512, 523 (2007) (citing *People v. Chew*, 160 Ill. App. 3d 1082, 1086 (1987)).

¶ 57 Considering both the trial evidence and the evidence presented at the evidentiary hearing, we do not believe defendant has presented evidence that is so conclusive it would probably change the result on retrial. Defendant has essentially presented Stuckey, who was not credible as a witness, and Cadichon, who originally testified he could not say whether defendant was or was not the shooter, then eight years later said defendant was not the shooter, just before he again said he could not say that defendant was not the shooter. Ghnaim was unable to identify anyone as the shooter. In contrast, the State presented Salvador's identification, which has never changed even if it has been impeached, Brown who said he saw defendant commit the crime, and Ford who said defendant confessed to her. Defendant argues that the testimony of Stuckey, Cadichon, and Ghnaim that the shooter fled in a getaway car "eviscerates the testimony of Ford," and Brown and Pittard. However, at most the testimony about the getaway car impeaches rather than eviscerates the testimony of Ford, Brown, and Pittard. As we have stated before, evidence which merely impeaches the testimony of another witness will not generally be of such a conclusive character as to justify a new trial. *Barnslater*, 373 Ill. App. 3d at 523 (citing *Chew*, 160 Ill. App. 3d at 1086).

¶ 58 While we also acknowledge that Pittard recanted his identification of defendant as the shooter and there was testimony through Estes's affidavit that Brown recanted his identification, recantation testimony is considered to be "highly unreliable." *People v. McDonald*, 405 Ill. App. 3d 131, 137 (2010). Further, the evidence of Brown's recantation is the affidavit of Estes, which

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is inadmissible hearsay and cannot be considered. In light of Brown's refusal to give an affidavit or sign any acknowledgment of his recantation, it is unlikely Brown would testify to this recantation at a new trial. However, even if we were to accept the recantation of both Brown and Pittard, both said that they did not witness the shooting and defendant was not with them at the time they heard it. When a witness statement affirms that the witness does not have any personal knowledge of the crime, that statement cannot support a claim of actual innocence. *People v. Gillespie*, 407 Ill. App. 3d 113, 135 (2010). Under these circumstances, we cannot say the trial court committed a clearly evident, plain, or indisputable error in denying defendant's request for a new trial. Therefore, the court's decision was not manifestly erroneous.

¶ 59 Defendant next contends that the trial court erred when it excluded the testimony of Dr. Berkowitz as an expert on eyewitness identification.

¶ 60 The trial court has wide discretion in limiting the type of evidence that will be admitted in a postconviction evidentiary hearing. *Morgan*, 212 Ill. 2d at 162. A trial court's decision to exclude eyewitness identification expert testimony is reviewed for an abuse of discretion. *People v. Enis*, 139 Ill. 2d 264, 289 (1990); *People v. Aguilar*, 396 Ill. App. 3d 43, 51 (2009). An abuse of discretion will be found where the trial court's decision is arbitrary, fanciful, or unreasonable, or where no reasonable person would agree with the decision. *People v. Starks*, 2012 IL App (2d) 110273, ¶ 20 (citing *People v. Baez*, 241 Ill. 2d 44, 106 (2011)).

¶ 61 Generally, a witness will be permitted to testify as an expert "if his experience and qualifications afford him knowledge which is not common to lay persons and where such testimony will aid the trier of fact in reaching its conclusion." *Enis*, 139 Ill. 2d at 288. " 'A

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threshold requirement for the admission of expert testimony is that the proffered testimony be of assistance to the court or jury.' " *People v. Hall*, 157 Ill. 2d 324, 339-40 (1993) (quoting *People v. Mack*, 128 Ill. 2d 231, 250 (1989)). In Illinois, the trend has been to exclude expert testimony on eyewitness identification because it invades the province of the trier of fact. *People v. McGhee*, 2012 IL App (1st) 093404, ¶ 54; see also *Tabb*, 374 Ill. App. 3d at 692 (acknowledging that "whether eyewitness testimony is trustworthy is within the common knowledge and experience of average juror"). In *Enis*, our supreme court cautioned against the overuse of expert testimony, stating:

"The determination of a lawsuit should not depend upon which side can present the most or the most convincing expert witnesses. We are concerned with the reliability of eyewitness expert testimony [citations], whether and to what degree it can aid the jury, and if it is necessary in light of defendant's ability to cross-examine eyewitnesses. An expert's opinion concerning the unreliability of eyewitness testimony is based on statistical averages. The eyewitness in a particular case may well not fit within the spectrum of these averages. It would be inappropriate for a jury to conclude, based on expert testimony, that all eyewitness testimony is unreliable." *Id.* at 289-90.

The *Enis* court concluded that when considering whether to admit expert testimony, the trial court should consider the relevance and necessity of the expert testimony in light of the facts of

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the case before it. *Id.* at 290.

¶ 62 In the present case, the record shows that the trial court read defendant's response to the State's motion to strike, which included Berkowitz's 11-page report explaining her findings. The trial court stated that it was "very familiar with" the case law on expert eyewitness identification testimony and had heard "a lot of expert witness identification testimony at trial on other cases in my courtroom." After hearing argument from both parties, the trial court concluded that the expert testimony would "not be appropriate" for the hearing and cited an Illinois case in support of its conclusion. Although the record of proceedings shows the cited case transcribed as "*People v. Jerome Allen*, 377 Ill. App. 3950," we believe the trial court was referring to *People v. Jerome Thomas*, 377 Ill. App. 3d 950 (2007), based on its recitation of the case facts and analysis, and because "377 Ill. App. 3950" is not an actual citation. The trial court observed that in upholding the lower court's decision to deny admission of eyewitness identification expert testimony, the *Thomas* court specifically noted that the case was being considered by an "experienced trial judge" rather than a jury. See *Thomas*, 377 Ill. App. 3d at 361. In barring the testimony, the trial court here noted that it was not determining whether Berkowitz's testimony would be admissible if defendant were granted a new trial. Finally, the trial court permitted defendant to generally argue about "social scientific research" in regard to eyewitness identifications during closing argument, over the State's objection. The record shows the trial court carefully considered whether Berkowitz's testimony would aid it in reaching a conclusion and, after considering relevant case law, determined it would not. Under these circumstances, we find no abuse of discretion.

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¶ 63 Finally, defendant contends that the trial court erred by failing to impose discovery sanctions on the State for the State investigators' admitted destruction of their rough notes from witness interviews. Specifically, defendant argues that the State should have been sanctioned for the destruction of the notes from the Betty Stuckey and Nelly Gomez interviews. Defendant further claims that the typed summary reports of the interviews the State provided were insufficient to comply with his discovery request for "any written notes relating to *** interviews of witnesses named in Defendant's Amended Post-Conviction Petition."

¶ 64 The trial court has "considerable discretion" in imposing sanctions for a violation of discovery. *People v. Voltaire*, 406 Ill. App. 3d 179, 183 (2010) (citing *People v. Patel*, 366 Ill. App. 3d 255, 272-73 (2006)). A court's decision to impose sanctions is reviewed under an abuse of discretion standard. *People v. Kladis*, 403 Ill. App. 3d 99, 105 (2010), *aff'd*, 2011 IL 110920. An abuse of discretion will be found when the defendant was prejudiced by the discovery violation and the trial court failed to eliminate the prejudice. *People v. Taylor*, 409 Ill. App. 3d 881, 908 (2011).

¶ 65 A violation of a discovery request may be analyzed as either a due process violation or under Illinois Supreme Court Rule 415(g)(I) (eff. Oct. 1, 1971). *Kladis*, 403 Ill. App. 3d at 105. Where evidence is potentially useful, but not material and exculpatory, the failure to preserve the evidence will violate due process only if the defendant shows the State acted in bad faith. *Id.*

¶ 66 Here, we find no due process violation as a result of the investigators' destruction of their written notes. It is undisputed that the State provided defendant with summary reports of its investigators' interviews with Betty Stuckey and Nelly Gomez. Defendant nonetheless argues,

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“the contemporaneous notes would have provided a more accurate account of what occurred throughout the entirety of these interviews.” However, defendant has provided no evidence that the destroyed notes contained material exculpatory evidence. In fact, defendant has not suggested that the destroyed notes were material or exculpatory at all. Defendant only cites the general principle that the State violates due process when it destroys material exculpatory evidence. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008).

¶ 67 Defendant has also failed to show the State acted in bad faith. The investigators destroyed their handwritten notes pursuant to "typical practice" after they had memorialized the contents of their notes in summary reports. Although defendant requested any written notes relating to witness interviews, the State provided defendant with the summary reports, which contained the substance of the handwritten notes. There is no evidence that the State destroyed the notes as a result of defendant's discovery request and therefore no evidence of bad faith from the State. In support of his argument that the State acted in bad faith, defendant cites only to a case from the Ninth Circuit. See *United States v. Harris*, 543 F.2d 1247, 1248 (1976) (finding that the "routine disposal of potentially producible materials" by the FBI was impermissible and usurped the role of the court to determine what evidence must be produced to a criminal defendant). Although they may be considered as persuasive authority, lower federal court decisions are not binding on this court. *People v. Johnson*, 408 Ill. App. 3d 107, 118 (2010).

¶ 68 We also find the State did not commit a discovery violation pursuant to Rule 415. Rule 415(g)(I) provides:

"If at any time during the course of the proceedings it is

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brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, exclude such evidence, or enter such other order as it deems just under the circumstances." Ill. Sup. Ct. R. 415(g)(I) (eff. Oct. 1, 1971).

¶ 69 Here, the court noted that the State had provided defendant with the substance of the State investigators' interviews in the summary reports. The court also observed that defendant would have an opportunity to cross-examine the investigators on the issue of the destruction of their handwritten notes. Under these circumstances, we find no discovery violation was committed by the State.

¶ 70 However, even assuming the State did violate discovery when the investigators destroyed their handwritten notes, we find the trial court did not abuse its discretion in not sanctioning the State. The record shows that the State provided defendant with summary reports from its investigators' interviews. Although defendant speculates that the reports did not contain all the information that was contained in the handwritten notes, defendant has offered no evidence to support this conclusion. Furthermore, the purpose of discovery is not to provide evidence for the defendant's defense, but is rather to "prevent the production of surprise evidence or testimony which would serve to prejudice defendant's case." *People v. Howard*, 121 Ill. App. 3d 938, 948 (1984). Defendant in the present case was provided with the summary reports and had the

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opportunity to cross-examine one of the investigators, McGreal, and the witnesses about the State investigator interviews. Therefore, defendant was not prejudiced by the lack of sanctions.

¶ 71 In addition, we find the cases upon which defendant relies to be distinguishable. See *People v. Szabo*, 94 Ill. 2d 327 (1983); *Kladis*, 403 Ill. App. 3d 99. In *Szabo*, the defendant argued that he was entitled to the summaries of oral statements made by the State's principal witness, who was also defendant's alleged accomplice, made to an ASA. *Szabo*, 94 Ill. 2d at 342-43. The ASA had conducted 20 interviews with the State's star witness, totaling approximately 30 hours, and had destroyed the written notes after creating an eight-page outline. *Id.* at 343. On appeal, the court concluded that the eight-page outline was not the same as "contemporaneous memoranda of some 30 hours of interviews" with the State's principal witness. *Id.* at 346. In contrast, the State here destroyed notes from interviews with, specifically, two witnesses, neither of which were principle witnesses to the State's case. At most, the hearing testimony of Nelly Gomez and Stuckey could impeach the testimony of other State witnesses. Thus, we find no instruction from *Szabo*.

¶ 72 In *Kladis*, the defendant made a discovery request for all videotapes pertaining to her arrest. *Kladis*, 403 Ill. App. 3d at 101. The State agreed to provide the defendant with a videotape of her arrest that was recorded on an in-car camera, however the tape was inadvertently destroyed before the defendant received a copy. *Id.* at 101-02. The trial court found a discovery violation and sanctioned the State by barring any testimony as to the contents of the videotape. *Id.* at 103. The trial court was concerned because there had been three recent incidents where various police departments had either intentionally or inadvertently destroyed videotapes

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requested in criminal prosecutions. *Id.* at 108. On appeal, the trial court's decision was affirmed. *Id.* at 120-21. While in *Kladis* the State did not provide the defendant with anything that contained the substance of the videotape in another form, here defendant was provided with summary reports, which contained the substance of the rough notes. Therefore, we find *Kladis* to be inapplicable to the present case.

¶ 73 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 74 Affirmed.