

NOTICE  
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2013 IL App (4th) 110389-U  
NO. 4-11-0389  
IN THE APPELLATE COURT  
OF ILLINOIS  
FOURTH DISTRICT

FILED  
January 25, 2013  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
MICHAEL SHEA CARLOS,	)	No. 92CF1062
Defendant-Appellant.	)	
	)	Honorable
	)	Paul G. Lawrence,
	)	Judge Presiding.

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JUSTICE KNECHT delivered the judgment of the court.  
Presiding Justice Steigmann and Justice Appleton concurred in the judgment.

**ORDER**

- ¶ 1     Held: The trial court did not err in concluding, after an evidentiary hearing under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-8 (West 2008)), defendant did not establish actual innocence by a preponderance of the evidence.
- ¶ 2     In January 2011, the trial court held a third-stage evidentiary hearing under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-8 (West 2008)) on the *pro se* petition filed by defendant, Michael Shea Carlos. Appointed counsel filed an amended petition claiming defendant was innocent of the two murders for which he was convicted in 1993. After an evidentiary hearing, the court concluded defendant had not established actual innocence by a preponderance of the evidence and denied defendant's postconviction petition.
- ¶ 3     Defendant appeals, arguing the trial court erroneously (1) determined his newly discovered evidence would not probably change the result of his case on retrial, and (2) consid-

ered evidence presented by the State that was not presented at trial. We affirm.

¶ 4

## I. BACKGROUND

¶ 5 On December 21, 1992, the State charged defendant with the December 19, 1992, murders of Terry Williams and Jerome McDonald (720 ILCS 5/9-1 (West 1992)). Defendant was tried by jury.

¶ 6 At trial, Patricia Skinner, McDonald's ex-girlfriend, testified in December 1992, she and defendant were also close friends who were "beginning to have a relationship." On December 19, 1992, Skinner was in her apartment with defendant and several others, including Jacalyn "Jackie" Samuels, Ricky Samuels, and Sandra Johnson. At some point, McDonald and his girlfriend Shelly Pilant stopped by Skinner's apartment. Defendant went outside with McDonald and Ricky. When defendant returned to the apartment, defendant "was kind of upset with [Skinner] because of something that [McDonald] had told him." Later in the evening, Skinner drove defendant to a friend's house. Defendant told Skinner not to go to Third Ward Club (Club) later that night.

¶ 7 Skinner testified she decided to go to the Club anyway. Skinner paged defendant to tell him she was going to the Club with Johnson and Jackie, who wanted to speak to Pilant. Defendant responded to the page, saying he would also go to the Club. Once there, Skinner, Jackie, and Johnson entered the building. They found Pilant and McDonald in the rear of the building near a pool table. Jackie and Pilant began yelling at each other. McDonald picked up a pool cue and stepped between Pilant and Jackie. Jackie also grabbed a cue. A bartender told them to leave. At that point, "[m]ore or less[,] the whole bar came outside."

¶ 8 Skinner testified they stood in the parking lot with "a lot of people." Williams and

his girlfriend, Kirchell Butcher drove up in McDonald's car. Jackie told Kirchell she was going to break the car's windows. Williams entered the Club and exited with McDonald. McDonald and Jackie began shouting at each other. Williams began "voicing his opinion[,] too." At some point, defendant, who was in the parking lot, started arguing with McDonald and Williams.

When asked the subject of the argument, Skinner testified to the following: "Something about [McDonald] leave [defendant's] cousin alone, and then [Williams] said something in [McDonald's] defense, defendant, [McDonald] and they had words." Skinner then saw "a gun come up."

She was standing next to Williams. Defendant, 10 to 15 feet away, was holding the gun.

Skinner told him to put down the gun, but defendant fired and Williams fell. Skinner went to the ground with Williams. When on the ground, Skinner saw McDonald already lying on the ground. Skinner did not know how many shots she heard. Everyone "started running," and Skinner left in her car.

¶ 9 Kirchell testified she was McDonald's sister, Williams's girlfriend, and defendant's cousin. On December 19, 1992, Kirchell and Williams went to the Club in McDonald's car to pick up McDonald and Pilant. After Williams parked the car, he exited the vehicle. At that point, Jackie, Kirchell's cousin, "got in his face saying something." Jackie kicked the car, and Williams walked toward the Club. Kirchell remained in the car, listening to music. She saw defendant, Marion Carr, and Skinner walking toward Skinner's car. As Williams continued walking toward the Club, defendant "got up in [Williams's] face and he started arguing about something." Kirchell saw Williams point his finger at defendant. Kirchell started rolling down her window to hear what the argument was about. Kirchell saw defendant turn to his side, pull a black gun from his waist, and point the gun at Williams. Kirchell started to exit the car. She

heard a shot and saw defendant shoot Williams. Kirchell ran to Williams while the others fled. McDonald was also on the ground, but Kirchell did not see him get shot.

¶ 10 The only individuals Kirchell saw in the parking lot at that time were Williams, Skinner, Jackie, defendant, Johnson, Carr, and McDonald. Kirchell initially told police she saw defendant shoot McDonald. Kirchell, however, did not see defendant shoot McDonald, but she did see him shoot Williams. Kirchell gave different estimates regarding how far she was from defendant and Williams. At one point, Kirchell testified she did not really know how far the group was from her. At another point, when asked if the group was "further than 30 feet, 20 to 30 feet away or closer than 20 to 30 feet away," Kirchell stated "a little closer." Later, Kirchell testified the group was within five or ten feet of where she was sitting and then she agreed they were 10 or 15 feet away.

¶ 11 Thomas Ahlers, who was incarcerated in the McLean County Jail at the time of his testimony, testified he went to the Club on December 19, 1992. While in the parking lot, two individuals he knew arrived. Ahlers went to talk to them. He went inside the Club once to get a drink. Not many people were there when Ahlers first arrived, but others later arrived.

¶ 12 According to Ahlers, McDonald drove to the Club in his mother's van. He sat in the van until Clint Fullilove and a woman arrived. All three talked in the parking lot. Later, Williams arrived. Williams briefly spoke to Ahlers and then entered the Club. Williams and McDonald exited the Club together. Ahlers saw McDonald argue with Jackie, who was with defendant. Defendant walked away. Jackie said she would fight McDonald by herself. At that point, defendant returned with a gun in his hand. Defendant shot toward McDonald. Ahlers saw who he "assumed" was McDonald fall. Defendant then turned toward Ahlers. Defendant had the

gun in his hand. Ahlers jumped behind a van and heard another shot. He turned and saw someone grab his chest. Ahlers looked around the other side of the van and saw defendant walking away. Ahlers jumped into a car and left with two others.

¶ 13 Ahlers testified he did not contact the police. Ahlers had two counts of delivery and possession of a controlled substance with intent to deliver pending against him at the time of his testimony. He pleaded guilty to possession with intent to deliver. He understood he could be sentenced to a prison term of up to 15 years, but without the deal he faced up to 22 years in prison. The State also agreed to seek only a five-year prison term for Ahlers. The other charge would be dismissed if defendant testified truthfully. Ahlers felt "kind of uncomfortable" testifying against defendant, because they were "hooked up in the same organization."

¶ 14 Jackie, a cousin to defendant and McDonald, testified her 19-year-old son Ricky and defendant were "good friends." According to Jackie, she had been at Skinner's apartment on December 19, 1992. While there, McDonald and Pilant stopped by the apartment. McDonald and Pilant stayed outside; Jackie did not go outside while they were there. At some point in the evening, Jackie, Ricky, defendant, Skinner, and Johnson left the apartment and, in Skinner's car, drove Ricky home and dropped off defendant on Davis Street. Johnson informed Jackie that Pilant "had said some stuff about" Jackie's son. Jackie became upset. She decided to go to the Club to talk to Pilant. On the way, Jackie and Skinner picked up defendant.

¶ 15 Jackie testified she, Skinner, and defendant entered the club. While inside Skinner and Jackie talked to Pilant and asked her why "she told them lies and everything." Jackie yelled at Pilant. While Jackie was yelling at Pilant, McDonald stepped between them to stop the "fussing." The bartender at the Club told them to go outside. Johnson, Skinner, and

Jackie went outside. "[A] lot of people" were in the parking lot.

¶ 16           Upon going outside, Williams and Kirchell pulled up. Jackie kicked the car they were driving. She told Williams to tell Pilant "to come out because [they] wanted to talk to her." Williams entered the Club. Jackie then saw Williams and McDonald exit the Club. Jackie met McDonald "in the middle of the parking lot." Jackie informed McDonald about what she had heard Shelly had said. Jackie did not believe she was arguing. She believed "it was calm." Defendant stepped between McDonald and Jackie and told McDonald "to back up off from Jackie." McDonald and Jackie continued talking. Defendant and Skinner walked away. They were behind Jackie. Jackie testified to the following: "Then all of a sudden I just heard Kirchell crying and I looked down and seen [*sic*] [Williams] on the ground[,] and[,] all I know[, McDon-ald], then [McDonald] walked away and got to the building[,] and I just seen [*sic*] him fall." She turned and either saw defendant with his arm out and Skinner hit defendant's arm or heard Skinner say "she had hit his arm."

¶ 17           According to Jackie, Williams was about five feet away from her. Jackie did not hear gunshots and did not recall telling a police officer she heard shots, stating there was "loud music out in that parking lot." Jackie acknowledged the statement she gave to the police indicates she heard a shot and saw defendant's arm pointed at McDonald. Jackie did not see a gun on defendant and did not see anyone shoot the victims. Jackie testified if defendant had a gun she would not have been able to see it.

¶ 18           Clyde Butcher testified he was McDonald's stepbrother, Kirchell's brother, and defendant's cousin. On December 19, 1992, he, McDonald, Pilant, and another male went to the Club in his stepmother's van. While there, Clyde played a game of pool and then went back to

the van to drink beer with someone named David Harris. As the two sat in the van drinking beer, Clyde saw Jackie and Skinner walking toward the Club. He saw McDonald exit the Club and go to the middle of the parking lot where Jackie and Skinner stopped him to talk. Clyde heard McDonald curse and then walk away. Clyde next saw defendant walking toward the Club. Clyde did not see anyone else around him. Defendant, standing near the van, started shooting. Clyde initially testified he did not see the gun but later testified he saw a gun, but could not describe it. He saw defendant's hand reach over to his left side and pull his arm out to the right. Clyde testified it looked like defendant was shooting at Jackie. He could not see Williams standing there. After defendant pointed his arm, Clyde heard a gunshot. After that first shot, Clyde saw McDonald try to get away. McDonald was running toward the van. Defendant then turned toward the van and shot. Clyde heard a total of five gunshots.

¶ 19 Clyde testified a lot of people were in the parking lot that evening. During the evening, Clyde saw Kirchell, Pilant, Jackie, and Skinner in the parking lot, but he did not see Ahlers or Carr.

¶ 20 Shelly Pilant testified, in December 1992, she was McDonald's girlfriend. Pilant remained inside the Club after the argument with Skinner, Jackie, and Johnson. McDonald told her to wait by the telephone. Pilant remained there until Kirchell entered the Club screaming. As Pilant exited the Club, she saw defendant get into a car that drove away.

¶ 21 Clinton Fullilove testified, on December 19, 1992, he went to the Club around 4 or 5 p.m. He stayed in the parking lot with Ahlers and a woman. Fullilove entered the Club "[a] couple of times and got a beer." Fullilove would then return to his car. He testified "[m]ostly everybody was inside."

¶ 22 According to Fullilove, while sitting in his car, he saw two men get shot. Fullilove's car was approximately five or six feet from the shooter. He heard three shots. Fullilove did not know the men who were shot. When asked if he could describe the shooter, Fullilove answered as follows: "I don't know. Light[-]skinned guy, not dark, but light. I didn't see him that good." When asked if he saw the shooter in the courtroom, Fullilove responded, "I am not sure, you know."

¶ 23 Carr, defendant's and McDonald's cousin, testified he went to the Club late in the evening on December 19, 1992. Carr did not enter the Club and stayed in the parking lot. Upon arriving, Carr spoke briefly with defendant. Defendant then entered the Club. Carr sat in a vehicle and consumed alcohol with Tylon Rodgers and a woman. He saw Jackie and Skinner in the parking lot. Carr saw Jackie and McDonald "tussling" and arguing in the parking lot. No one was hitting the other. Carr then heard a shot. Carr ran to his car and left. Carr denied seeing anyone shoot anyone. He denied seeing anyone with a gun.

¶ 24 The State then impeached Carr's testimony by asking Carr about statements he made to "Spanky" Ledbetter, a paid police informant, who taped the conversation with Carr. Carr testified he met with Ledbetter and Kenny Thomas in the late afternoon of December 20, 1992. According to Carr, he told Ledbetter defendant told him "he was going to go take care of business with" McDonald, but Carr told defendant "[defendant] wasn't going to shoot [his] cousin." Carr also told Ledbetter he saw defendant shoot Williams and McDonald.

¶ 25 Carr testified he lied to Ledbetter. Carr explained he "thought [he] knew it because [he] heard everything from the streets and trying [*sic*] to bring it to the meeting." He lied to Ledbetter "mainly to get the floor at the meeting." He agreed he made the statements to

Ledbetter as an attempt to prevent the meeting from getting confusing.

¶ 26 The trial court allowed the State to show the videotape of Carr's discussion with Ledbetter. We summarized the videotape of this discussion when resolving defendant's direct appeal as follows:

"The videotape shows Carr talking with Ledbetter in the basement of a house. Carr describes the shooting in detail. Carr explains McDonald was in an argument with a girl named Jackie. Apparently, defendant decided to forcefully intervene. Carr tried to dissuade defendant from using a gun by telling him a gun was not necessary. He also told defendant not to shoot their cousin. However, defendant said he had some business to take care of and shot McDonald. Defendant then turned and shot Williams. Throughout his narration, Carr consistently used the first person singular. At no point did he say the events he was describing were told to him by someone else. At one point, he even disputes a description of the event given to Ledbetter by another eyewitness, telling Ledbetter his version was correct because he was there and he saw the shooting happen." *People v. Carlos*, 275 Ill. App. 3d 80, 82, 655 N.E.2d 1182, 1183 (1995).

¶ 27 Sandra Garza testified she was at Barbara Price's apartment in the early morning hours of December 20, 1992. Rodney Harris, Garza's boyfriend in December 1992, was also present. At some point, Garza and Harris left the apartment but returned after 3 a.m. At that

time, defendant and Paul Childs were there. The police arrived at Price's apartment and, in searching the apartment, entered a bedroom. The police escorted Childs, Harris, and defendant from that bedroom.

¶ 28 A number of police officers testified on the State's behalf. According to this testimony, officers found defendant hiding under a bed. After officers transported defendant to the Bloomington Police Department, detectives interviewed defendant around 7 a.m. on December 20, 1992. When detectives entered the interview room, they found defendant sleeping. The detectives read defendant his *Miranda* warning. Defendant stated he understood his rights and talked to them. After the detectives explained to defendant a shooting had occurred, two people had been killed, and several witnesses had identified defendant as the shooter, defendant "just smiled." Defendant told the police he was not at the Club on December 19, 1992. One officer testified defendant did not provide his whereabouts, while another testified defendant stated "he was in an apartment with a girl," but refused to provide further details. Defendant "stated a couple of times he wasn't afraid he was going to have to do any time for it." Defendant was surprised he was not released.

¶ 29 The defense called Jerry Palmer to testify. Palmer testified, on the night of December 19, 1992, he was in the parking lot of the Club. Palmer was in the cab of a truck having sex with a woman who was not his wife. Palmer watched defendant and three women exit the club and begin talking to two men. At some point, defendant turned away from the discussion. Palmer "heard a pop." He looked up and saw a man nicknamed "Fat Cat," holding a gun. Palmer then "heard two more pops," and then told the women he was with, "let's get the hell out of here."

¶ 30 According to Palmer, "Fat Cat" was not defendant. "Fat Cat" was approximately five feet six or five feet seven inches tall. He was 19 or 20 years old. Palmer did not tell police what he saw because it would upset his wife.

¶ 31 The State impeached Palmer's testimony by calling a detective to testify. That detective testified Palmer told him he did not see the circumstances leading up to the shooting and he did not know who fired the gun. Palmer told the detective he assumed defendant fired the gun, but he also said twice he might be wrong.

¶ 32 Defendant testified on his own behalf. According to defendant, when he entered the Club on December 19, 1992, he saw the argument at the pool table. Defendant had been inside 15 seconds before the women were thrown out of the Club. Defendant left the Club, too. He walked to Carr's vehicle in the parking lot. At some point, Williams pulled into the parking lot. Jackie began kicking the vehicle Williams had been driving. Williams exited the car and jogged into the club. He exited the Club with McDonald. Jackie approached them, arguing. Defendant walked up to the group and told them "they was [*sic*] family and shouldn't be arguing." Williams then told defendant he "didn't have nothing to do with" it and to "leave it alone." As a crowd gathered, defendant began walking away toward Carr's vehicle.

¶ 33 Defendant further testified, as he was walking away, he heard shots. Defendant did not see where the shots were coming from. After the shots were fired, everyone "was scattering." Defendant ran to the exit of the parking lot. People drove past him. Defendant walked to Barbara Price's apartment. The police found defendant hiding under a bed in Price's apartment. Defendant hid under the bed because Rodney Harris, who was also in Price's apartment, said he would fight with the police if they entered the room.

¶ 34 According to defendant, he learned about the murders while at the police station. Defendant was shocked. He did not recall whether he smiled when the detectives told him about the killings.

¶ 35 The jury found defendant guilty of both murders. The trial court sentenced defendant to natural life in prison. This court affirmed defendant's conviction in September 1995. *Carlos*, 275 Ill. App. 3d at 81, 655 N.E.2d at 1182.

¶ 36 In September 2007, defendant filed his *pro se* postconviction petition. In December 2007, the trial court ordered second-stage proceedings and appointed counsel to represent defendant. In June 2009, appointed counsel filed an amended petition, asserting a claim of actual innocence based upon newly discovered evidence. According to the allegations, an individual, Tylon Rogers, witnessed the shooting and would testify he did not see defendant with a gun in his hands. In an "affidavit" not notarized, Rogers asserted he was at the Club on December 19, 1992. According to his statement, Rogers was in the parking lot and saw a confrontation involving McDonald, Jackie, and Skinner. Rogers saw a crowd gathering around the confrontation. In this crowd, he saw defendant, who appeared to be trying to stop the dispute. Williams made his way through the crowd and joined in the arguing. Rogers heard at least four gunshots. He saw people scatter. Rogers saw defendant "on the outside edge of the crowd" and defendant "did not have a gun in his hand" and "was not one of those in the crowd doing the shooting." At the time of defendant's trial, Rogers was on bond for a drug case. Rogers had moved to Missouri and did not intend to return. Rogers also "did not trust the police department enough to come forward at that time."

¶ 37 In August 2009, appointed counsel added a notarized affidavit from Darrin

Thornton. Thornton averred he was at the Club when the shootings took place. Thornton observed the argument between Jackie and McDonald. Thornton averred defendant was standing next to Jackie. He heard gunshots and ducked. Thornton "had a clear view of" defendant, who did not have a gun in his hands. Defendant ran as everyone else did. According to Thornton, he knew defendant through defendant's brother. Thornton averred he did not talk to the police due to his "lack of maturity" as well as "drug activity" he was involved in.

¶ 38 The State moved to dismiss defendant's amended postconviction petition. In March 2010, the trial court denied the State's motion and ordered an evidentiary hearing.

¶ 39 In January 2011, the evidentiary hearing commenced. Rodgers was called to testify. According to Rodgers, he and defendant were cousins. On the night of the shootings, Rodgers was sitting in the Club parking lot in the front passenger seat of a car. Three others, including Carr, were also in the vehicle. While there, Rodgers saw an argument in the parking lot between McDonald, Williams, Pilant, and Jackie. Defendant was standing with them, but he was not arguing with the others. As Rodgers was about to open a bottle, he heard a pop. A woman in the car with him screamed. Rodgers exited the car and saw, "after the popping," a "spark of fire."

¶ 40 Rodgers testified he did not see defendant with a gun. Rodgers did not see defendant fire a gun. Despite seeing the "spark," Rodgers did not see who fired the gun. Rodgers heard four gunshots. After the first, Rodgers saw defendant run.

¶ 41 According to Rodgers, he left the scene before the police arrived. He did not contact the police at that time because he had a criminal case pending against him and a problem with one of the detectives with the Bloomington police department. During defendant's trial,

Rodgers was facing unrelated felony charges and he "went back and forth from Missouri to Illinois" because "they could have come to [him] with questions about everything, and they could have tried to involve me in it, you know, because Detective [Larry] Shepherd had it bad for [him]" and he did not trust the police.

¶ 42 Rodgers had known defendant since 1986. They were fellow gang members at the time of the shootings. Rodgers acknowledged he went to prison in November 1993 for calculated criminal drug conspiracy and defendant was a co-conspirator in that offense.

¶ 43 Rodgers testified he was uncertain who helped him prepare the affidavit. Rodgers had "relayed messages" to defendant and talked with Toby Carlos, defendant's brother and Rodgers's cousin, about "what to put in the affidavit." He received the typed affidavit in the mail from Toby. He signed it, but not in front of a notary.

¶ 44 The State showed a video to Rodgers. The video contained a conversation recorded on December 20, 1992, among 23 members of the Gangster Disciples in Ledbetter's Bloomington residence. The individuals in the video were defendant's co-conspirators in the aforementioned calculated-criminal-drug-conspiracy offense. Carr also appears in the video. When asked about the videotaped conversation Rodgers had with Carr, Rodgers denied defendant was in the car with him that evening, despite having said in the video defendant was in the car with him. Rodgers also denied that he was referring to defendant when he referenced the shooting on the video: "boom, boom, boom, and break."

¶ 45 Thornton, who signed the other affidavit attached to defendant's postconviction petition, did not testify. Appointed counsel stated he had died. The trial court allowed the affidavit to be entered into evidence.

¶ 46 The State called Leslie Young to testify. Young testified, on December 19, 1992, she was home with her boyfriend, Paul Childs, and Spanky Ledbetter. Spanky had taken Childs Christmas shopping. Later, while Young and Childs were wrapping Christmas presents, defendant entered her apartment. He appeared upset and looked as if he had been crying. Defendant stated two people had been shot. Defendant handed Young "a bunch of little packages of something and a towel." Something heavy was inside the towel but Young did not look inside the towel. She believed it was a gun.

¶ 47 At this point in Young's testimony, defense counsel objected. Defense counsel argued, "I'm going to object to this. I believe she said she didn't look. She didn't know it was a gun. Also, I believe it's beyond the scope of the [postconviction] petition." The State responded the petition argued "actual innocence" and Young's testimony went "directly to whether or not there's an actual innocence in this" case. The trial court overruled defense counsel's objection.

¶ 48 Young testified she assumed it was a gun by the way it felt in her hand and because it was heavy. Defendant changed into a different sweatshirt. Defendant commonly changed clothes at Young's apartment. Young put the sweatshirt defendant had removed into a closet with the towel. When she awoke the next morning, Young read about the shootings in the newspaper. She asked Quinton Winston to remove the items from her residence.

¶ 49 Young testified she was not questioned about this in 1992. When asked "[w]ho[m] did you tell, and when did you tell, and why did you tell," Young testified "Sherry Campbell, a little rat snitch that I thought was my friend—I was discussing it with her, did not know she was recording me at the time." In that recording, Young told Campbell she had the gun in her hand and she had gotten it from defendant. Later, Young also told an officer she

trusted the same thing. Young was not happy to be testifying under a subpoena at the evidentiary hearing: "They did not question me back in '92. I feel I should not be here now." Young did not tell the police earlier because she "wasn't exactly sure it was a gun \*\*\* [u]ntil Sherry Campbell told me she sold them a gun."

¶ 50 The State also called Sheryl Jordan to testify. According to Jordan, she received a subpoena to testify the night before. Jordan could not recall "everything," just "bits and pieces." After the State asked her to read a police report she signed on December 21, 1992, Jordan testified she did not recall making a statement to the police that Rodgers told her defendant shot Williams and McDonald. The court allowed the State to enter the report into evidence.

¶ 51 At the end of the hearing, the trial court summarized the evidence. The court observed Rodgers was defendant's cousin and stated defendant did not have a gun at the Club. The court noted the State attempted to impeach Rodgers's testimony by relying on the statements of the videotape. The court did not agree it could conclude from Rodgers's statement on the tape that Rodgers identified defendant as the individual who fired the weapon, but found his statement on the video somewhat inconsistent with his testimony he did not see who shot the victims. The court further observed Jordan's testimony showed Rodgers either witnessed defendant shoot the victims or heard that fact.

¶ 52 The court then found defendant had not met his burden of proving actual innocence by a preponderance of the evidence or the new evidence would probably change the result on retrial:

"And so even if counsel was able to call these witnesses,  
the Court doesn't think that it would have made any difference in

the outcome of the original trial. As the Court indicated, at the original trial, there were several eye witnesses, including Patricia Skinner, [Jackie] Samuels, Kirchell Butcher, Clyde Butcher, and Marion Carr, who was shown on the videotape in great detail, showing all of his fellow gang members how exactly the defendant shot Jerome McDonald and, and Terry Williams. There was also the testimony of Thomas Ehlers, another eye witness. There was the testimony of [a police officer] indicating that the defendant was hiding under a bed after the shooting that night, and when he was taken into custody, he was confronted about the, the murders, and the defendant simply smiled and then indicated that he didn't want to continue talking with, with the police. So, in, in summary, the defendant has not been able to prove by a preponderance of the evidence the actual innocence allegation. He's not been able to show that this new evidence would be such a conclusive character as to probably change the result on, on retrial."

The court denied defendant's petition.

¶ 53 In February 2011, defendant filed a *pro se* motion to reconsider. In his motion, defendant raised ineffective-assistance-of-counsel claims. Defendant argued his counsel failed, in part, to adequately investigate Young. In March 2011, counsel filed a motion to reconsider, arguing Jordan's out-of-court statements should not have been considered. At the April 2011 hearing on defendant's motion to reconsider, the trial court concluded defendant failed to meet

his burden before the State called Young and Jordan to testify:

"The burden is on [defendant] and the court talked about that in its ruling where the defendant is required to present evidence that is so conclusive and would probably change the result on retrial and at the conclusion of the defendant's evidence, it's clear that the limited amount of evidence that was presented by the defendant certainly didn't come close to being so conclusive as it would probably change the result on retrial. All of the allegations of ineffective assistance of counsel then related to all of the evidence which the State presented which essentially at that point in time was really just, I suppose, icing on the cake. It really—the State probably didn't even have to present that. I don't recall that a motion for directed verdict was made, but it was clear that at the end of the defendant's case that there had not been enough evidence presented to meet that high burden of proof."

¶ 54 This appeal followed.

¶ 55 II. ANALYSIS

¶ 56 A. Postconviction Proceedings

¶ 57 The Act provides a three-stage process by which a defendant in noncapital cases may obtain postconviction review of his claims a substantial denial of his constitutional rights resulted in his conviction. *People v. Dopson*, 2011 IL App (4th) 100014, ¶ 17, 958 N.E.2d 367, 372. At the first stage, the trial court examines the petition to ascertain whether it is frivolous or

patently without merit. *People v. Andrews*, 403 Ill. App. 3d 654, 658, 936 N.E.2d 648, 652 (2010). The court shall dismiss any petition deemed frivolous and patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2008). When a petition survives stage one, it advances to stage two, which allows for the appointment of counsel. *Andrews*, 403 Ill. App. 3d at 658, 936 N.E.2d at 653. At this stage, the State may answer the petition or file a motion to dismiss. 725 ILCS 5/122-5 (West 2008). If the State answers the petition or the court denies the State's motion to dismiss, the proceeding advances to the third stage. At this state, a defendant may present evidence to support his claim (*Andrews*, 403 Ill. App. 3d at 658-59, 936 N.E.2d at 653; 725 ILCS 5/122-5 (West 2008)) and he bears the burden of making a substantial showing of a constitutional violation (*People v. Pendleton*, 223 Ill. 2d 458, 473, 861 N.E.2d 999, 1008 (2006)).

¶ 58 This appeal follows the trial court's denial of defendant's postconviction petition after a third-stage evidentiary hearing. This court will not overturn a trial court's decision following an evidentiary hearing unless that decision is manifestly erroneous. *People v. Coleman*, 206 Ill. 2d 261, 277, 794 N.E.2d 275, 286 (2002). Manifest error is "error that is 'clearly evident, plain, and indisputable.'" *Coleman*, 206 Ill. 2d at 277, 794 N.E.2d at 286 (quoting *People v. Ruiz*, 177 Ill. 2d 368, 384-85, 686 N.E.2d 574, 582 (1997)).

¶ 59 The time within which a petition under the Act must be filed is limited. At the time defendant was sentenced, section 122-1(c) required a defendant whose sentence was other than death to initiate proceedings under the Act within six months after the denial of a petition for leave to appeal to the Illinois Supreme Court was denied or within six months of the date for filing such petition if none was filed unless that defendant alleged facts showing the delay was not due to his or her culpable negligence. 725 ILCS 5/122-1 (West 1992). The General

Assembly later amended section 122-1(c), providing the limitation "does not apply to a petition advancing a claim of actual innocence." See 725 ILCS 5/122-1(c) (West 2004).

¶ 60 Defendant's 2007 *pro se* postconviction petition was filed well outside of the time period specified in section 122-1. See 725 ILCS 122-1 (West 1992); 725 ILCS 5/122-1(c) (West 2004). In his petition, however, defendant asserted a claim of actual innocence. To support a claim of actual innocence, 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." (Internal quotation marks omitted.) *People v. Ortiz*, 235 Ill. 2d 319, 333, 919 N.E.2d 941, 950 (2009).

¶ 61 B. Actual Innocence

¶ 62 Defendant first argues the trial court committed manifest error in concluding the "newly discovered" testimony of Rodgers would not likely change the result of defendant's case on retrial. In support, defendant contends Rodgers' testimony meets the newly-discovered-evidence requirements. Defendant maintains Rodgers' testimony would likely convince the jury of his innocence on retrial because (1) the State offered no significant forensic or circumstantial evidence tying defendant to the shootings, (2) the witnesses for the State who implicated defendant as the shooter "were of doubtful reliability," and (3) Rodgers would testify defendant did not shoot McDonald and Williams.

¶ 63 The State argues the trial court did not commit manifest error in finding defendant had not established actual innocence. The State maintains defendant was aware of what Rodgers' testimony would have been at the time of trial but did not attempt to subpoena him or otherwise call him to testify. The State further maintains, given the number of individuals who identified

defendant as the shooter, the court did not err in finding Rodgers' testimony was not of such conclusive character it would probably change the result on retrial.

¶ 64 As stated above, to support a claim of actual innocence, the evidence 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." (Internal quotation marks omitted.) *Ortiz*, 235 Ill. 2d at 333, 919 N.E.2d at 950. All three elements must be satisfied to support an actual-innocence claim.

¶ 65 In this case, the trial court did not decide whether Rodgers' testimony was "newly discovered," but resolved the issue based upon the element of whether the testimony was of such conclusive character it would probably change the outcome on retrial. We begin by considering the propriety of that decision.

¶ 66 In concluding defendant had not established the evidence was of such a conclusive character as to probably change the result on retrial, the trial court emphasized multiple witnesses, including Skinner, who was in the beginning stages of a romantic relationship with defendant, identified defendant as the shooter. The court noted the videotape showed Carr demonstrating to fellow gang members how defendant shot McDonald and Williams. The court emphasized the police found defendant hiding under a bed the night of the shootings and, when confronted about the shootings, defendant simply smiled and indicated he did not want to speak with the police. We further note the trial court reached its decision after observing Rodgers testify.

¶ 67 We find the trial court's decision is not manifestly erroneous. While discrepancies exist in the testimony, and the witnesses provided varied descriptions of what occurred, multiple

witnesses who knew defendant and were standing in clear view of him at the time of the shootings identified defendant as the shooter. The court was aware of the testimony and the discrepancies. The court viewed Rodgers as he testified, judged his credibility, and determined Rodgers' testimony not of such conclusive character as to probably change the outcome on retrial. Given the evidence and testimony against defendant, the court's decision is not manifestly erroneous. *Coleman*, 206 Ill. 2d at 277, 794 N.E.2d at 286 (quoting *Ruiz*, 177 Ill. 2d at 384-85, 686 N.E.2d at 582).

¶ 68 C. Young's Testimony

¶ 69 Defendant further argues the trial court erroneously considered Young's testimony in denying his postconviction petition. Defendant argues Young's testimony was not related to the claims made in his postconviction petition and maintains "[t]he State cannot simply short-circuit subsequent proceedings by offering additional evidence that it claims would render a retrial futile, where that evidence was never presented to the original jury." Defendant also emphasizes Young's testimony and contends he would not have been crying had he shot Williams and McDonald.

¶ 70 We need not decide whether the State can properly submit evidence not presented at trial during an evidentiary hearing under the Act, because the record establishes the trial court did not consider Young's testimony in reaching its decision. At the conclusion of the evidentiary hearing, when the court explained its reasons for denying defendant's actual-innocence claim, the court did not mention or reference Young's testimony. In addition, at the hearing on the motion to reconsider, the court explicitly rejected the argument Young's testimony had any bearing on its decision. The court concluded defendant did not meet his burden of proof regarding actual

evidence at the evidentiary hearing and the State's evidence was, therefore, unnecessary. Nothing in the record contradicts this holding. We find no error.

¶ 71

### III. CONCLUSION

¶ 72 We affirm the trial court's judgment. We grant the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 73 Affirmed.