



called Third Ward Club. Multiple witnesses identified defendant as the shooter. Patricia Skinner, close friends with defendant and in the beginning stages of a relationship with him, testified she saw defendant shoot Williams. At the time, Skinner believed she was 10 to 15 feet from defendant. Kirchell Butcher, defendant's cousin and Williams's girlfriend, testified she saw defendant pull a gun from his waist and shoot Williams. Thomas Ahlers testified he saw defendant shoot toward McDonald. When defendant turned in the direction toward Ahlers, Ahlers saw defendant still had the gun. Ahlers jumped behind a vehicle and heard another shot. Jackie Samuels, defendant's cousin, did not hear gunshots due to "loud music" in the parking lot but testified after she saw McDonald fall to the ground, she turned and saw defendant's arm extended. Clyde Butcher, defendant's cousin, testified he saw defendant walking toward the club with a gun. He watched defendant reach over to his left side and pull out his arm to the right. Clyde heard a shot. Clyde testified defendant turned and shot again toward the van, in the direction McDonald was running. Marion Carr, defendant's cousin, testified he did not see defendant shoot anyone. His testimony was impeached, however, with a videotape of Carr demonstrating to an informant and fellow gang members how defendant shot the victims. One witness, Jerry Palmer, testified someone known as "Fat Cat," not defendant, shot Williams and McDonald. His testimony was impeached with a detective's testimony. The detective testified Palmer told him he did not know who fired the gun but assumed defendant did.

¶ 5 At trial testimony established the gun used to shoot the victims was not recovered. A bullet was recovered from McDonald. A firearms examiner testified the recovered bullet had markings "indicative of Remington ammunition." It was "a .38 special or a 357 Magnum caliber fired bullet." The firearms examiner determined at least five different manufacturers produced

firearms that could have fired the bullet.

¶ 6 Defendant pursued a direct appeal, arguing a prior inconsistent out-of-court statement was improperly admitted. This court affirmed defendant's conviction. *People v. Carlos*, 275 Ill. App. 3d 80, 81, 655 N.E.2d 1182, 1182 (1995).

¶ 7 In September 2007, defendant filed a *pro se* petition under the Post-Conviction Hearing Act (725 ILCS 5/122-1 through 122-8 (West 2008)). In his petition and the later amended petition, defendant asserted a claim of actual innocence. In support, defendant relied on affidavits from two witnesses, Tylon Rodgers and Darrin Thornton, who averred they were unavailable at the time of trial to testify and would testify defendant did not shoot the victims. Neither identified another individual as the shooter. *People v. Carlos*, 2013 IL App (4th) 110389-U, ¶¶ 36, 37. An evidentiary hearing was held on defendant's postconviction petition. *Id.* at ¶ 39. At the hearing, Rodgers testified; counsel informed the court Thornton would not testify as he had died. *Id.* at ¶¶ 39, 45. The trial court concluded the defendant was unable to prove by a preponderance of the evidence his claim of actual innocence and denied defendant's petition. *Id.* at ¶ 52. The court emphasized the testimony of Rodgers and Thornton would not have been enough to undermine the testimony of "several eyewitnesses" who identified defendant as the shooter. *Id.* On appeal, this court affirmed the trial court's judgment. *Id.* at ¶ 73. A more detailed summary of the trial evidence appears in our decision. See *Id.* at ¶¶ 6-34

¶ 8 In September 2011, while his appeal from the denial of his postconviction petition was still pending, defendant moved, pursuant to section 116-3 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/116-3 (West 2010)) for Integrated Ballistics Identification System (IBIS) testing of the bullet recovered from McDonald. According to defendant's motion, in this

process, the ballistic information from the recovered bullet would be entered into the National Integrated Ballistic Information Network (NIBIN) to compare against other NIBIN crimes to ascertain whether a match might occur which would potentially link the same weapon used to shoot McDonald to other crimes. Defendant argued the information could potentially identify "Fat Cat" as someone who used the weapon in other crimes and thus would "substantially advance" his claim "Fat Cat" killed McDonald and Williams.

¶ 9 The State moved to dismiss defendant's section 116-3 motion. In January 2012, the trial court granted the State's motion. The court, relying on our decision in *People v. Snow*, 2012 IL App (4th) 110415, 824 N.E.2d 1139, reasoned defendant's argument IBIS testing would result in a match to other shootings was "wholly speculative."

¶ 10 This appeal followed.

¶ 11 II. ANALYSIS

¶ 12 Section 116-3(a)(1) of the Code (725 ILCS 5/116-3(a)(1) (West 2010)) provides a defendant may move for IBIS testing on evidence secured for the trial that resulted in his conviction but was not subjected to IBIS testing at trial. To present a *prima facie* case for IBIS testing, the defendant must show "identity was the issue in the trial which resulted in his \*\*\* conviction; and \*\*\* the evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect." 725 ILCS 5/116-3(b) (West 2010). The trial court should permit the requested testing upon determining "the result of the testing has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence even though the results may not completely exonerate the defendant" and "the testing requested

employs a scientific method generally accepted within the relevant scientific community." 725 ILCS 5/116-3(c) (West 2010). Evidence is "materially relevant" to a defendant's claim of actual innocence if it tends "to significantly advance his claim of actual innocence." *People v. Johnson*, 205 Ill. 2d 381, 395, 793 N.E.2d 591, 600 (2002) (quoting *People v. Savory*, 197 Ill. 2d 203, 213, 756 N.E.2d 804, 810-11 (2001)). To be materially relevant, it need not by itself exonerate the defendant. *Johnson*, 205 Ill. 2d at 395, 793 N.E.2d at 600. A "materially relevant" determination requires an examination of the trial evidence, as well as the evidence the defendant wants to test. *Id.* at 396, 793 N.E.2d at 601. On appeal of a trial court's ruling with no evidentiary hearing on a motion for testing under section 116-3, our review is *de novo*. *Snow*, 2012 IL App (4th) 110415, ¶ 63, 964 N.E.2d 1139.

¶ 13 Defendant argues he has met the requirements of section 116-3 and his motion should have been granted. Defendant emphasizes identity of the shooter was at issue in his trial, IBIS testing did not occur during his trial because it did not yet exist, and the chain of custody was sufficient to establish the bullet had not been substituted or altered. See 725 ILCS 5/116-3(b) (West 2010). Defendant contends evidence found as a result of IBIS testing would be materially relevant because it would significantly advance his claim someone else shot McDonald and Williams.

¶ 14 The State agrees identity is an issue, IBIS testing did not occur at trial, and the chain of custody was sufficient. The State argues IBIS testing does not have "the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence." 725 ILCS 5/116-3(c) (West 2010). The State contends the evidence would not be materially relevant because the evidence acquired from IBIS testing would not "signifi-

cantly advance" his claim. See *Johnson*, 205 Ill. 2d at 395, 793 N.E.2d at 600 (quoting *Savory*, 197 Ill. 2d at 213, 756 N.E.2d at 810-11). The State emphasizes the strength of its case against defendant and argues any results would not "significantly advance" defendant's claim of innocence.

¶ 15 We agree with the State. Through IBIS testing, defendant hopes to find evidence the gun used to kill McDonald and Williams was used in other crimes and those crimes would somehow be linked to an individual known as "Fat Cat." The existence of such crimes—committed either before or after the killings—would not significantly advance defendant's claim he did not use that same gun on that particular night. The State's case identifying defendant was strong. It includes testimony of multiple witnesses who saw the shootings and a videotaped demonstration by a witness as to how defendant killed the victims. These individuals knew defendant before the shooting. One was in the beginning stages of a romantic relationship with defendant; four were defendant's cousins. Even though, as defendant argues, the parking lot was crowded, these facts mitigate any potential link of the gun to other crimes—even if such crimes were committed by "Fat Cat."

¶ 16 Defendant's remaining arguments to the contrary are also unconvincing. For example, defendant contends, given the discrepancies in the testimony of the witnesses to the shootings and the motives of several witnesses to lie, a jury could potentially find Palmer's testimony regarding "Fat Cat" believable if a jury heard the gun had been used in other crimes by "Fat Cat." We disagree. Palmer's testimony was not only contradicted by the testimony and statements of the six individuals who knew defendant, but also by his own statement to the police he assumed defendant was the shooter. No one knows who "Fat Cat" is. Since the weapon was

never recovered, it is possible it could have been used in crimes after the murders by anyone.

Given the evidence against defendant, the fact someone resembling "Fat Cat" used the gun either before or after the murders would not significantly advance his actual-innocence claim.

¶ 17

### III. CONCLUSION

¶ 18

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

¶ 19

Affirmed.