2019 IL App (1st) 160503-U
No. 1-16-0503
Opinion filed February 14, 2019

FOURTH DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. BERNARD WILLIAMS, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Cook County. No. 96 CR 25384 (01) The Honorable Joseph M. Claps, Judge, presiding.

JUSTICE GORDON delivered the judgment of the court.
Presiding Justice McBride and Justice Reyes concurred in the judgment.

ORDER

¶ 1 *Held*: Reversed and remanded for a new trial, based on the actual innocence claim of a 17-year-old defendant sentenced to 60 years in connection with a shooting; where the intended victim testified that he knew defendant and defendant was not the shooter; where the sole witness to identify defendant at

trial recanted; where no physical evidence connected defendant to the murder and when he was not arrested at the scene; where the detective who claims that defendant confessed made no contemporaneous notes; and where the trial court may have committed manifest error by employing the wrong legal standard at the evidentiary hearing and by relying on a fact, namely, that an exonerating witness had previously identified defendant, which is not in the record before us, as well as other facts not supported by the record.

¶ 2 Defendant Bernard Williams, 17 years old, was convicted, after a bench trial, of first degree murder and aggravated battery with a firearm, in connection with a shooting on August 23, 1996, and was sentenced to a total of 60 years with the Illinois Department of Corrections (IDOC). At sentencing, and in the decades after, he has consistently asserted his innocence.

¶ 3 Defendant claims that he is actually innocent and that the trial court erred by dismissing his petition for postconviction relief at the third stage. Twice before, the trial court has dismissed this same petition and, twice before, this court has reversed on appeal.

¶ 4 At the second stage of this same postconviction proceeding, defendant supported his actual innocence claim with affidavits from: (1) Eric Smith, who was both the intended target of the shooting according to the State and an eyewitness who did not testify at trial; and (2) Noel Zupancic, an investigator with the Public Defender's Office, who interviewed Martinoe Powell, the only eyewitness at trial to identify defendant as one of the shooters. Smith averred

that defendant was not one of the shooters, and Powell recanted his trial testimony.

¶ 5 Although this court on appeal discounted Zupancic's affidavit since it contained only hearsay,[1] we found that "[t]he newly discovered evidence presented in Smith's affidavit directly contradicts Nash's testimony." *Williams*, 2012 IL App (1st) 103350-U, ¶ 114. We explained that "there is no physical evidence, and the case is based on the sole identification of a *** recanting witness and a confession that defendant refused to provide the ASA, and the intended victim is now coming forward to say that defendant was not the attacker." *Williams*, 2012 IL App (1st) 103350-U, ¶ 114.

¶ 6 At the subsequent third-stage evidentiary hearing, both Smith and Powell testified, as well as additional witnesses. Smith, the intended victim, testified in exact agreement with his prior affidavit which this court had already found would probably change the result on retrial—that he was present at the shooting, that he knew defendant, that he observed the shooters, and that defendant was *not* one of the shooters. In addition, instead of the prior hearsay affidavit from the investigator's interview with Powell, Powell testified in person, recanting his prior trial testimony and also testifying that defendant was *not* one of the shooters.

[1] *People v. Williams*, 2012 IL App (1st) 103350-U, ¶ 103.

¶ 7 For the following reasons, we reverse and remand for a new trial.

¶ 8 BACKGROUND

¶ 9 I. Pretrial Proceedings

¶ 10 On October 26, 1998, defendant chose to have a bench trial and waived his right to a jury. In addition, the prosecutor indicated that he intended to file a motion *in limine* to permit the testimony of a gang crime specialist from the Chicago police department. The prosecutor stated that the intended victim of the crime was "Puff," whose "real name is Eric Smith"; that the State's theory of the case was that Smith was the leader of a gang named "Dog Pound"; and that the shooters were members of a rival gang, called the "Traveling Vice Lords." After hearing arguments, the trial court stated that the State could renew its motion *in limine* after its presentation of evidence, if it supported its contention that gang rivalry was the motive for the shooting.

¶ 11 II. Evidence at Trial

¶ 12 In opening statements, defense counsel questioned the identification evidence against defendant, and the State claimed that this was an act of gang violence. The prosecutor stated that the intended victim was "Puff," or Eric Smith, that the shooters were members of the Traveling Vice Lords, and that Smith was the leader of a renegade group of Traveling Vice Lords. First, we

will provide a short summary of the evidence. Then, we will provide a more detailed discussion of the evidence presented by each side.

¶ 13 In sum, the evidence at trial revealed that, at 4:45 p.m., on August 23, 1996, Gary Thomas was shot and killed as he stood on the sidewalk in front of Wash's Lounge, a tavern in the West Garfield Park neighborhood of Chicago.[2] Three bystanders were also hit by random shots, but they were unable to identify the shooters. At the time of the shooting, Thomas was standing in front of the tavern with fellow gang members Eric Smith and Smith's friend, Martinoe Powell.[3]

¶ 14 At trial, Powell testified that he observed two men approaching who wore black-hooded sweatshirts and who Smith told him were from a rival gang. Powell testified that, when the two men were 20 feet away, the two men pulled out handguns from underneath their sweatshirts and fired at them. At trial, Powell identified defendant as one of the two shooters.[4] Powell, who was in prison on an unrelated offense, was the only eyewitness at trial to implicate

[2] Wash's Lounge is also referred to by witnesses as Wash's Place and Wash's Tavern. In the interest of consistency, we refer to it as Wash's Lounge.

[3] Martinoe Powell was previously identified as Marvin Nash in our prior appellate opinion. However, he testified at the third-stage evidentiary hearing that Martinoe Powell is his real name, so we will use his real name throughout this opinion.

[4] Codefendant Deangelo Johnson was tried separately, received a jury trial, and was found guilty. *People v. Johnson*, 2011 IL App (1st) 092817, ¶ 1.

defendant in the shooting, and he admitted that he had never observed the shooters before. At trial, no gun was recovered and no physical evidence linked defendant to the shooting.

¶ 15 Chicago police detective Kriston Kato testified that he and his partner were assigned to investigate the murder and that they located Smith approximately a week after the shooting and interviewed him. They then sought to arrest defendant. However, Kato did not testify at trial about the substance of his conversation with Smith. Kato testified that he also met with Powell, who identified defendant from a photo array as one of the shooters.

¶ 16 Smith, the intended victim, did not testify at trial. At trial, Detective Kato testified that he had been unable to locate Smith since September 2, 1996, although Kato had looked for him repeatedly.

¶ 17 A. State's Case

¶ 18 The State's first witness was Rita Thomas, the wife of the deceased, who identified her husband's body.

¶ 19 The State’s second witness was Lucinda Birmingham, one of the three bystanders who was hit by a random shot. Birmingham testified that, on August 23, 1996, at approximately 4:30 p.m., she left a store on West Madison and headed home, walking down Madison and toward Keeler. While walking down the street, she was also scratching off some lottery tickets. She stopped

and hugged a friend named Charles Mitchell. After she walked away from him, she heard "some noises" and "maybe shots." Then she realized that she had been shot in the leg, and she "just fell over in the vacant lot" next to Wash's Lounge. Birmingham testified that "[p]eople were running over" her and, in particular two "young men maybe ran over the top of [her]." Describing the two young men, Birmingham testified: "One seemed to be dressed in black. One of the young men looked to have his hair braided up in some type of French braids." The men appeared to be 18 or 19 years old.

¶ 20 On cross-examination, Birmingham clarified that the man dressed in black was wearing a black t-shirt and black jogging pants, and that the two men were not wearing either hooded shirts or baseball caps. She explained that, by French braids, she meant "braids that are rolled up coming down singularly one at a time." She observed that one of them had muscular arms.

¶ 21 The State's third witness was Crystal Pope, who was also one of the three bystanders hit by a random shot. At the time, Pope was a sophomore in high school. Pope testified that at approximately 4:45 p.m. on August 23, 1996, she was walking with her cousin, Charles Pope, on Kostner heading toward Madison. After she stepped off the curb to cross Madison, her cousin noticed that her left arm was bleeding and he told her that she had been shot. At first, she did not feel anything, but then she fell. Her cousin pulled her back onto the

sidewalk, and she lay on the sidewalk, going in and out of consciousness. The bullet passed through her left arm and entered her body, near the lower part of her spine, where it is still located.

¶ 22 The State's fourth witness was Chicago police officer Patrick Conroy, who testified that, at approximately 4:45 p.m. on August 23, 1996, he observed a man lying in the middle of Madison who had been shot and whom he later learned was Gary Thomas. After the shooting, a large crowd gathered in the area. The officer attempted to talk to the victim, but he could not respond. The officer observed numerous shell casings on the sidewalk.

¶ 23 On cross-examination, Officer Conroy testified that, while on the scene, he spoke with Lucinda Birmingham, who provided the following description of the offenders: two black men; approximately 18 or 19 years old; both wearing black t-shirts and dark or black jogging pants; both with guns; and one with braids. The description provided by Birmingham was the only description that the police had on August 23, 1996, of the offenders.

¶ 24 The State's fifth witness was Martinoe Powell, the only event witness at trial to implicate defendant in the shooting. Powell testified that, in May 1998, he pled guilty to a felony narcotics charge, in exchange for which he was sentenced to four years with IDOC. Powell also received probation for a burglary charge in 1985. On August 23, 1996, Powell drove with his 10-year-

old son from Rockford, Illinois, where he was living and working, toward Wash's Lounge on Madison, between Keeler and Kildare. At approximately 4:45 p.m., he observed three of his friends standing in front of Wash's Lounge, and he and his son joined them. The three friends were: Eric Smith, who is called "Puff"; Irving Young who is called "Pokey"; and another man who was called "Buster." Powell later learned that Buster's real name was Gary Thomas. Powell testified that Smith was the leader of a gang called "Dog Pound."

¶ 25 Powell testified that Smith looked towards Keeler and then exclaimed: "Man, look, here come those m*** f*** n***s; man, m*** f*** travelers." Powell understood Smith to be referring to a gang called the "Traveling Vice Lords." When Powell looked towards Keeler, he observed two men walking towards them, who were dressed in black hooded sweatshirts and black leather gloves. Powell testified that "in the neighborhood if somebody fixin' to do something to somebody, that's the dress." The two men were approximately 19 to 21 years old. In the courtroom, Powell identified defendant and codefendant as the two men he had observed.

¶ 26 Powell testified that, when he first observed the two men, they were approximately 20 feet away. The two men reached under their shirts and near their waists; and they both pulled out guns and aimed their guns toward Powell's group. Then they started shooting. At first, Powell started to run, but

then he turned and observed that his son was in shock and still standing there, so he ran back to his son. When he ran back toward his son, the two men were still firing. Puff ran down the street toward Kildare; and Pokey ran inside Wash's Lounge. Buster said he was hit, and then he stumbled and fell.

¶ 27 Powell testified that he grabbed his son and tried to carry him toward a back alley near Wash's Lounge. Powell was running from Madison to the alley, which ran east and west, as Madison does. The alley is between Keeler and Kildare. As he entered the alley, he made a right turn towards Kildare. At that moment, he observed the two shooters in the alley running toward Keeler. Powell and the shooters were running in opposite directions in the alley. After Powell reached Kildare, he went to Madison Street where his motor vehicle was located and placed his son in his van and drove down the street, where he observed Buster laying in the street. Powell went to locate Buster's wife and drove her to the hospital.

¶ 28 Powell testified that, on September 2, 1996, the police showed him a group of five photographs and he recognized two of them as the shooters.[5] On September 11, 1996, Powell viewed a lineup and recognized defendant and codefendant Johnson as the shooters.

[5] Detective Kato later testified that Powell picked out only one photograph, and that the one photograph was a photograph of defendant.

¶ 29 On cross-examination, Powell did not remember telling the detectives on September 11, 1996, that he was a member of the Dog Pound gang, and he denied being a member of that gang. He testified that he had a teardrop tattoo under his right eye, and that it was "for all the brothers that was killed." He acknowledged that gangs use this symbol too. Powell admitted that he sold drugs, but denied selling drugs on the corner where the crime occurred.

¶ 30 On cross-examination, Powell admitted that, although he was present when the police arrived at the scene, he did not tell them at that time what he had observed. However, when he was at the hospital with Buster's wife, he met with the police again and then informed them that he had observed the shooters. He told the police that Puff knew they were Traveling Vice Lords, and that Puff probably knew who they were because they were trying to kill him. Powell testified that he had never observed the shooters before the day of the offense.

¶ 31 Powell testified that he told the police at the hospital that the shooters wore black hooded sweatshirts and that the hoods came down when they started running. When the shooting started, he observed a woman scratching lottery tickets who was then shot. Birmingham had testified that she had been scratching off lottery tickets before she was shot. Powell testified that one of the shooters had braids in his hair and, in court, he identified the one with braids as codefendant Johnson. Birmingham had testified that one of the two young men,

who had run "over the top of" her, had braids. Powell testified that the shooters' sweatshirts covered their arms, which contradicted, in part, the testimony of Birmingham, who had testified that she observed that one of the two men had muscular arms.

¶ 32 Powell denied telling the police that one shooter was between 5'5" and 5'8", and the other shooter was between 5'6" and 5'9". He claimed to have told the police that the shooters were 5'7" and 6'5".

¶ 33 The State's sixth witness was Detective Kriston Kato, with the Chicago police department, who testified that, on September 2, 1996, he and his partner, Detective Sam Cerone, located a witness that they had been looking for, namely, Eric Smith. After interviewing Smith, they looked for defendant. On the evening of September 2, 1996, Detective Kato, with Detectives Cerone and Patricia Warner, met with Martinoe Powell. The detectives showed Powell five Polaroid photographs, and Powell picked out one photograph, which was the one of defendant. Detective Kato testified that Powell picked out only one photograph, which contradicted Powell's trial testimony that he had picked out two photographs.

¶ 34 Kato testified that, on September 11, 1996, at a little after midnight, he and other officers located defendant driving a vehicle on Kilbourn, and defendant was arrested, almost three weeks after the shooting. The vehicle

contained two passengers who identified themselves as Donald Ware and Shawn Harris. In court, Kato identified "Donald Ware" as codefendant Johnson. All three occupants of the vehicle were transported back to the police station, where they were interviewed by Kato and his partner Cerone. First, they interviewed defendant whom, Kato testified, identified the other two men as his alibi. Then they interviewed Shawn Harris and, after his interview, codefendant Johnson became a suspect. The detectives then interviewed codefendant Johnson, whose statement was not admitted in evidence against defendant.

¶ 35 Kato testified that, after his interview of Johnson, he intended to conduct a lineup. Kato left his offices to look for witnesses Smith and Powell, but he could not locate either one. At 5 a.m., Kato returned to the station and informed the three men that he was unable to locate the two witnesses and that he was then leaving. At 4:30 in the afternoon of September 11, 1996, Kato returned to the station, and went to look again for Smith and Powell. Kato was able to locate Powell, but not Smith, and Powell was brought back to the station to view a lineup.

¶ 36 Kato testified that, at 6 p.m., Kato conducted a five-person lineup. Out of the five people, three were suspects: defendant; codefendant; and Shawn Harris, the third and remaining occupant of defendant's vehicle. Only two people in the lineup were described by Kato as "fillers." Kato testified that, after the lineup,

Kato had a conversation with defendant in which Kato confronted defendant with the fact that defendant had been identified in the lineup. After speaking with defendant, Kato then spoke again with codefendant Johnson.

¶ 37 Kato testified that he again left his offices to look for Smith but he could not find him. Kato testified that he was unable to locate Smith after September 2, 1996.

¶ 38 The State's seventh witness was Charles Mitchell, whom Lucinda Birmingham had testified that she had hugged immediately prior to the shooting. Like Birmingham, Mitchell was also a bystander hit by a random bullet. Mitchell testified that he was 40 years old, and that in April 1997 he had pled guilty to a felony narcotics charge, for which he received two years of probation. Mitchell testified that he was currently in jail, due to a violation of that probation. On August 23, 1996, at approximately 4:45 p.m., he was in a vacant lot on Madison Street drinking a beer. At that time, he observed a friend whom he knew then only as "Buster," but whom he now knows to be Gary Thomas. Then Lucinda Birmingham walked into the vacant lot, gave him a hug and walked off. Buster had left before Birmingham entered. Then Mitchell heard a lot of shooting, and he looked down at his left pants leg and observed that it had a hole in it, with some blood, and he realized that he had been shot. Then he ran home, and his mother told him to go back out, so he would be

taken to the hospital. Then he returned to Madison Street and waited for an ambulance. After 30 minutes, an ambulance transported him to a hospital, where his wound was cleaned, he learned that the bullet had gone through his leg, and he was then released.

¶ 39 The State's eighth witness was Dr. Barry Lifschultz, a forensic pathologist with the Cook County Medical Examiner's Office, who testified that he performed the autopsy on the body of Gary Thomas on August 24, 1996, and concluded that Thomas died as a result of a gunshot wound.

¶ 40 The State's ninth witness was Thomas Reynolds, a forensic investigator with the Chicago police department, who testified that he and his partner were assigned on August 23, 1996, to process the crime scene, where they took photographs and recovered 9-millimeter cartridge casings and two fired bullets.

¶ 41 The State's tenth witness was Brian Mayland, a forensic firearms examiner specializing in firearms identification and employed by the Illinois State Police, who examined the cartridge casings and fired bullets recovered in this case. Specifically, he received as exhibits: two fired bullets; and five 9-millimeter cartridge casings. After his examination, he determined that four 9-millimeter cartridge casings were all fired from the same gun, but that one 9-millimeter casing was fired from a different gun. He could not opine whether the recovered bullets came from the casings that were recovered

¶ 42 The State then re-called Detective Kato, who testified that he and Detective Cerone spoke with defendant, who Kato identified in court, at approximately 1 a.m. on the morning of September 11, 1996, at the police station. Kato testified that he introduced himself and informed defendant of his rights. Defendant told Kato that he wished to speak with Kato and Cerone. Defendant told Kato that "he had no knowledge of the shooting, and no knowledge of any of the names [Kato] gave him and he stated that he was with Donald Ware, [and] Deshawn Harris at the Brickyard Mall at the time." Defendant also specifically told Kato that he did not know Puff or anyone from the Dog Pound gang. Kato's conversation with defendant lasted approximately 20 minutes.

¶ 43 After the conversation, and after the detectives returned to the station that afternoon, a lineup was held where Powell positively identified defendant. At approximately 6:30 p.m., Kato and Cerone again spoke with defendant. Kato re-advised defendant of his *Miranda* rights and defendant acknowledged he understood them and wished to speak with the detectives. Kato informed defendant that he had been identified as one of the shooters. After Kato confronted defendant with the lineup identification, defendant "still denied it but he stated that he did in fact know Puff and he was having problems with him. Puff had shot at him on several occasions. And that also, that he believed

that Donald Ware may be involved in the shooting because of *** Donald Ware's gang affiliation and that [defendant] lied about being with Donald Ware and Shawn Harris at the time, stated he was with a girlfriend at the time of the shooting." Defendant informed Kato that "Donald Ware" was a member of the "Traveling Vice Lords" and that at the time, the "Traveling Vice Lords" were "at war" with the "Dog Pound" over territory.

¶ 44 Kato and Cerone returned to the station at approximately 8 p.m. the same night, after having left to search for Smith, when Kato was informed that defendant wanted to speak with him again. Kato went to the interview room with Detective Patricia Warner, where Kato again informed defendant of his rights. At that time, defendant told Kato "that Puff had shot at him on three different occasions, and that he heard on the street that Puff and the Dog Pound were going to rob him at his house and that after *** Puff and the Dog Pound robbed him, he was going to burn his house down. And at that time he said he was going to not take that any more." Defendant then told Kato:

> "that he then obtained a nine-millimeter handgun and he drove around looking for Puff or any of the Dog Pound members. And that on Madison in front of a liquor store, he observed several of the Dog Pound people and he pulled his car over, on foot approached them and as he got approximately 30 feet from them, he started shooting at them. He said he

shot at Puff and another Dog Pound member named Elroy. He shot at them, everybody ran. He then ran to his car and left the scene."

Kato asked defendant who else was involved and defendant stated that "he would rather not say because that person was in another gang." Defendant also told Kato that he threw the gun away on his way home.

¶ 45 After leaving the interview room, Kato informed felony review, and assistant State's attorneys (ASAs) Sue Ziegler and Bill Dorner arrived at the police station, where they were apprised of the investigation to that point. At approximately 10 p.m., Kato and the ASAs entered the interview room where defendant was located. Defendant informed them that he had already spoken with Kato about the incident and that he wanted an attorney present if he was speaking with the ASAs. The conversation was terminated at that point.

¶ 46 On cross-examination, Kato admitted that his conversations with defendant were not recorded and that he did not have any handwritten notes concerning them. Detective Kato prepared a supplementary report about defendant's confession on September 12, 1996, only after questioning codefendant Johnson.[6]

[6] In the order being appealed from, namely, the trial court's order denying defendant's petition after the third-stage evidentiary hearing, the trial court found: "The statements Detectives testified that petitioner made were not memorialized in

¶ 47 In both of his briefs to this court, defendant observes that multiple allegations of coercing confessions have been lodged against Detective Kato, who has been the subject of numerous newspaper articles, as well as opinions by this court and the supreme court. *E.g.*, *People v. Olivera*, 164 Ill. 2d 382, 388 (1995) ("Detective Johnson's account of the conversation with defendant following the lineup differed dramatically from that of Detective Kato"); *Olivera*, 164 Ill. 2d at 392 ("the answer of Detective Kato was one that the detective should have known would be reasonably likely to elicit an incriminating response"); *Olivera*, 164 Ill. 2d at 397 (reversing the conviction); *People v. House*, 2015 IL App (1st) 110580, ¶¶ 47-59 (discussing the various OPS[7] complaints and other appellate court opinions concerning Detective Kato), *vacated on other grounds*, No. 122134 (Nov. 28, 2018) (supervisory order to reconsider proportionate penalties clause issue); *People v. McDaniel*, 326 Ill. App. 3d 771, 781 (2001) (finding that "Detective Kato was not truthful"); *McDaniel*, 326 Ill. App. 3d at 786 (finding that "the defendant's confession was involuntary and, therefore, should have been suppressed"); *People v. Wallace*, 299 Ill. App. 3d 9, 12-13, 19 (1998) (reversing defendant's

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any written statement." People v. Willians, No. 96 CR 2538401, slip op. at 4 (Cir. Ct. Cook Co. Jan. 26, 2016).

[7] OPS is the Office of Professional Standards, which is the office within the Chicago Police Department that investigates police misconduct. *E.g. House*, 2015 IL App (1st) 110580, ¶¶ 1, 8.

conviction based on an illegal arrest by Detective Kato and others). While defendant does not claim abuse by Detective Kato, he does claim that he did not confess as Detective Kato claims. In addition, the reference by defendant in his briefs was never placed in evidence before the trial court at the evidentiary hearing or argued as a basis for relief and our supreme court rules preclude parties from supplementing the record with matters that were not presented to the trial court. As a result, we will not consider them here.

¶ 48 The State's eleventh witness was Bill Dorner, one of the two ASAs who spoke with defendant at approximately 10 p.m. on September 11, 1996. Dorner testified that, upon entering the interview room with Ziegler and Kato, the ASAs introduced themselves to defendant, told him who they were and why they were there, and read him his *Miranda* rights. Defendant told Dorner that "he had already talked to the detective and told him his participation and that he didn't want to talk to [Dorner] until he had an attorney present." The ASAs then terminated the interview and left the room.

¶ 49 After Dorner's testimony, the State rested its case.

¶ 50 B. Defense Case

¶ 51 Defendant took the stand in his own defense. Defendant's testimony was limited. He denied that he told Kato that he attempted to shoot Smith. Instead, he testified that he told Kato only that he knew his *Miranda* rights and had an

attorney. Although defendant informed them that he had an attorney, no detective or ASA gave defendant the use of a telephone to contact his attorney.

¶ 52 On cross-examination, defendant denied being a member of the Traveling Vice Lords. Defendant also denied knowing an individual named Puff or Smith, denied being angry with him, and denied that the Dog Pound gang shot at defendant's house on three occasions. Defendant testified that each time the two male detectives, Detectives Kato and Cerone, attempted to speak with him after he was arrested, he refused to speak with them and told them he wanted his attorney present. Defendant explained that "Mr. Engerman," who was his trial counsel, "had been his lawyer before," and defendant kept repeating: "I want[ ] my lawyer present." When asked if a woman detective also came into the interview room, defendant testified that only the two male detectives spoke with him.

¶ 53 After defendant's testimony, the defense rested.

¶ 54 On rebuttal, the State did not call Detective Cerone who defendant admitted meeting with, and instead called only Detective Patricia Sawczenko, formerly known as Patricia Warner. Detective Sawczenko testified that defendant requested to speak with Kato at approximately 8 p.m. on September 12, 1996, and stated that "he wanted to tell them the truth now." When

Detectives Kato and Cerone returned to the police station approximately 10 minutes later, Sawczenko informed them of what defendant had told her.

¶ 55 Detective Sawczenko accompanied Kato into the interview room and spoke with defendant. Kato read defendant his rights, and defendant responded that he understood each right. Defendant then told Sawczenko and Kato that "Puff and the Dog Pound had shot at him on three different occasions prior to this incident. *** He then said that he had heard from people on the street that Puff was going to come over to his house and rob him and then burn his house down." Defendant then told Sawczenko and Kato "that he went to a friend's house and obtained a nine-millimeter handgun and went out looking for Puff and members of the Dog Pound." Defendant did not state who accompanied him at that point.

¶ 56 Sawczenko testified that defendant then stated that he drove around in his vehicle until he located Puff and other members of the gang "standing in front of a lounge on *** West Madison."[8] Defendant "then said that he parked his car, he got out of the car and he approached on foot and he was about 30 feet away from the people and he pulled out his gun and started firing in their direction." Defendant told them that, after he finished shooting, he ran back to

[8] Sawczenko's testimony that defendant stated that the gang was "standing in front of a lounge on *** West Madison" does not support Kato's testimony that defendant stated the gang was on Madison in front of the liquor store. *Supra* ¶ 44.

his vehicle, dropped his gun in an alley, and drove away. Defendant stated that "he thought he had shot Puff but then he had heard later that he didn't hit Puff, he hit somebody else accidentally and killed him." Sawczenko testified that defendant did not wish to tell them who else was involved "because he was a member of another gang."

¶ 57 On cross-examination, Sawczenko admitted that she had not taken any notes at the time of the conversation with defendant and that the only way it was memorialized was through a supplemental report later prepared by Kato.[9]

¶ 58 After closing arguments, the trial court found defendant guilty of first degree murder and three counts of aggravated battery with a firearm. As part of its findings, the trial court found that "[a]ll the evidence points to the fact that there was an intent to get Puff," or Eric Smith. At the sentencing, defendant stated: "I'm still pleading innocent." After considering factors in mitigation and aggravation, the trial court sentenced defendant to 50 years for the first degree murder and three 10-year terms for the three aggravated batteries, with all sentences to be served consecutively for a total of 80 years.

[9] Detective Kato testified that he prepared the supplementary report on September 12, 1996.

¶ 59 III. Direct Appeal

¶ 60 On direct appeal, this court remanded the case to the trial court to determine whether two of the three convictions for aggravated battery included severe bodily harm. *People v. Williams*, 335 Ill. App. 3d 596, 597 (2002). On remand, the trial court found that two of the convictions did not cause severe bodily harm and ordered those two convictions to be served concurrently. Defendant is currently serving a 50-year term for first degree murder, one consecutive 10-year term for one of the aggravated battery convictions, and two concurrent 10-year terms on two of the aggravated battery convictions.

¶ 61 IV. Procedural History of Postconviction Proceedings

¶ 62 On December 5, 2001, defendant filed a *pro se* petition for postconviction relief. After the petition advanced to the second stage and counsel was appointed, counsel filed a supplemental petition that included an actual innocence claim. The actual innocence claim was supported by two affidavits: (1) an affidavit from Eric Smith, the target of the shooting, who did not testify at trial; and (2) an affidavit from Noel Zupancic, an investigator with the Office of the Public Defender, who interviewed Martinoe Powell, the only identification eyewitness to testify at trial. At argument on defendant's postconviction petition, both the State and defense counsel informed the trial

court that they were unable to locate Smith for trial. Specifically, the prosecutor conceded that "the People could not find him."

¶ 63 The State filed a motion to dismiss, and the trial court granted it, finding that the *pro se* postconviction petition was untimely filed. During the argument on the State's motion, the ASA acknowledged "[t]he fact that the People could not find [Smith]." The Assistant Public Defender explained that, "in the neighborhood, [defendant's] brother saw Eric Smith, a/k/a, Puff and asked him about this case. And that is when he contacted me." On appeal, this court found that defendant's *pro se* postconviction petition was timely filed and that counsel's supplemental petition was timely filed as a supplement to the first petition. We therefore remanded the case to the trial court to consider defendant's actual innocence claim. *People v. Williams*, No. 1-07-3102 (Mar. 12, 2010) (unpublished order under Supreme Court Rule 23).

¶ 64 On remand, the trial court considered defendant's actual innocence claim and dismissed defendant's postconviction petition a second time, again without a third-stage evidentiary hearing. With respect to Smith's affidavit, the trial court found that, although Smith's statements were newly discovered and unavailable at trial, they were not of such a conclusive character that they would probably change the result. *People v. Williams*, 2012 IL App (1st) 103350-U, ¶ 89. Specifically, the trial court found Smith's affidavit

inconclusive due to Smith's alleged prior identification of defendant to the police as one of the shooters. With respect to Zupancic's affidavit which contained Powell's statements to Zupancic, the trial court found the affidavit insufficient in light of the general rule against hearsay affidavits. *Williams*, 2012 IL App (1st) 103350-U, ¶ 103.

¶ 65 On appeal, this court reversed and remanded for a third-stage evidentiary hearing. While we agreed that Zupancic's hearsay affidavit, by itself, was insufficient (*Williams*, 2012 IL App (1st) 103350-U, ¶ 103), we observed:

> "there were only two eyewitnesses who observed the shooter: [Powell] and Smith. None of the victims who testified at trial were able to identify the shooter. [Powell] testified that defendant was the shooter, and his testimony was crucial to the trial court's finding of guilt beyond a reasonable doubt. The newly discovered evidence presented in Smith's affidavit directly contradicts [Powell's] testimony. In his affidavit, Smith stated that he was present at the shooting, that he knew the defendant, that he observed the shooter, and that defendant was not the shooter." *Williams*, 2012 IL App (1st) 103350-U, ¶ 114.

¶ 66 As a result, this court found that a third-stage evidentiary hearing was required "where there is no physical evidence, and the case is based on the sole identification of a possibly recanting witness and a confession that defendant

refused to provide the ASA, and the intended victim is now coming forward to say that defendant was not the attacker." *Williams*, 2012 IL App (1st) 103350-U, ¶ 115.

¶ 67 V. Third-Stage Evidentiary Hearing

¶ 68 A. Testimony

¶ 69 At the third-stage evidentiary hearing held on remand, Eric Smith, the intended victim, testified that, in the afternoon of August 23, 1996, he was standing on the sidewalk in front of Wash's Lounge with a group of nine people that included: "Buster" (the murder victim); Martinoe Powell; "Pokey"; and Powell's seven-year-old son. Smith was bouncing a ball back and forth with Powell's son; and Powell was standing immediately to Smith's right and talking with Pokey, when two men approached and started shooting. When the shooting began, Smith ran to Personnel Liquor, located four or five stores down Madison Street from Wash's Lounge.

¶ 70 Smith testified that he had observed both of the shooters before, but did not know their names. They were "little bitty boys," shorter, and with a darker skin tone than Smith himself. Smith testified that he was 5'6" or 5'7" in height and that the shooters were shorter than he was and no older than "about 16." Both wore black clothing.

¶ 71 Smith identified defendant in the courtroom and testified that defendant was not one of the two shooters. Smith did not observe defendant on Madison Street near Wash's Lounge during the afternoon of the shooting. Although Smith did not know defendant by name in 1996, Smith had observed defendant at the candy store of defendant's "father or granddaddy," which was close to where defendant resided. Smith believed defendant was "two, three years younger" than himself.[10] In 1996, defendant was "about the same size *** or a little bit taller" than Smith. Smith had previously spoken to defendant to say: "what's up Shorty." Smith had no disagreements with defendant.

¶ 72 Smith testified that he did not speak to the police about the shooting for "awhile, awhile, awhile, awhile" after the August 23, 1996, shooting. Smith's first encounter with the police concerning the shooting occurred on September 3, 1996, after Smith was arrested for driving without a license.[11] Smith was handcuffed and transported in a police vehicle to a police station where officers showed him six photos. Smith could not recall how the photos were displayed but remembered that there was a "circle over one of the guys in the picture." Smith recognized defendant as the person in the "circle." Smith said nothing

[10] Eric Smith testified that his birthday was September 3, 1968, which would make him 27 years old on the day of the shooting.

[11] Detective Kato testified at trial that this arrest and Kato's subsequent questioning of Smith occurred on September 2, 1996.

about defendant or the shooting and was released after 5 to 10 minutes. Before the questioning, Smith did not know that defendant had been charged for the shooting.

¶ 73 Smith testified that he was not subpoenaed to testify at defendant's trial and that he spoke to the police about the shooting on only one other occasion. A year or a year and a half after the shooting, in 1997 or 1998, while at court on one of his own cases, Smith was pulled to the side by Detective Cronin and brought to the State's Attorney's office. Cronin asked Smith questions about the 1996 shooting. When Cronin showed Smith "one big picture," Smith neither identified defendant as the shooter, nor denied that defendant was the shooter. Instead, Smith told Detective Cronin: "I don't want nothing to do with this." The conversation lasted only five minutes, and Smith did not hear from the police again about the shooting.

¶ 74 Smith testified that he did not inform the police that defendant was not one of the shooters, because "where I come from, I don't do it like that *** the little reputation that I had when I was out there, I would have took care of it myself." He did not want to be involved with the case.

¶ 75 On cross-examination, Smith testified that he was not the leader of the Dog Pound gang in 1996. The "Dog Pound" were a "bunch of little boys." At the time of the shooting, Smith was a member of a gang called the Insane Vice

Lords. Smith did not know whether the shooters on August 23, 1996, were members of the "Traveling Vice Lords" gang.

¶ 76 Smith testified that, while he generally would not talk to the police back in 1996, he did speak to them when they stopped him for a traffic violation in September 1996. Smith denied that he described the shooters in September 1996, as two black males of medium build between 17 to 20 years old wearing black hoodies, with one between the height of 5'6" and 5'8", and one between 5'7" and 5'9". Smith knew defendant and defendant's family a little at the time of the shooting and knew where he could find them, but he did not know about the charges against defendant until he was questioned at the police station.

¶ 77 Smith testified he was not friends with "Buster," the murder victim, and did not know if "Buster" was in a gang. Smith was friends with Powell, but they were not in the same gang. Smith did not know Charles Mitchell or Crystal Pope and was not aware of any women out on the sidewalk with him. Smith did not know how many people were shot. While "a lot" of shots were fired, he could not recall how many.

¶ 78 Smith testified that, in 2005, he was approached by a public defender about giving a deposition or signing an affidavit about the shooting. Smith signed the affidavit in the presence of the public defender and the woman who Smith was living with at the time. To the best of Smith's recollection,

everything in the affidavit was true and accurate. In 2014, he signed another affidavit in the Public Defender's Office downtown in the presence of two other people.

¶ 79 Smith testified that he did not know if he had two felony convictions and thought he probably had more than two. One of his convictions was under the name, Derrick Carter. In addition to Derrick Carter, Smith has used other names. Smith probably heard about defendant's conviction a year or two after it happened, but Smith did not seek out defendant's attorney to provide his recollection of the shooting.

¶ 80 On redirect, Smith testified that, since he "wasn't around," he did not learn of defendant's arrest until he observed the photos at the police station. Smith did not recall when he learned defendant was being prosecuted and was "not really" aware of the case. He learned defendant was found guilty about a year or two after the verdict. Smith used to "always say [defendant] wasn't the one" who did the shooting, but Smith "wasn't made for" going to the police. When approached by the public defender in 2005, he "really had to think about it first," but decided to talk to the public defender because defendant "wasn't the one."

¶ 81 At the evidentiary hearing, the next witness was Martinoe Powell, who recanted his prior trial testimony, testifying that he was present at the shooting,

but that he did not observe the men approach with firearms or who was shooting. Powell testified that, after the shooting, he drove the victim's wife to the hospital where he was questioned by the police. After speaking with them at the hospital, the police "kept sweating him" on the streets. Later, the police took Powell to the police station, where they showed him a photo of defendant and told Powell "that's him right there." The police instructed Powell to go along with their identification of defendant as the shooter, and Powell "went along with the police." Powell could not recall the names of the officers, but said he was told this by "several police" who were not the same officers he had spoken with at the hospital. Powell picked defendant out of a lineup, and defendant was the only person Powell selected. Powell went along with the police, because he thought he "was doing the right thing," but "[t]hey were dirty cops." Powell was doing "dirty stuff on the street," and the cops observed him every day and "had the ups" on him.

¶ 82 Powell testified that he lied when he testified at defendant's trial that defendant was one of the shooters, and that he lied because the State's Attorney's Office was paying him. Powell testified that he spoke to prosecutors about "four or five times" between the shooting and his own imprisonment which preceded defendant's trial. Before Powell left each meeting, he was given a piece of paper by a prosecutor and told to "stick to the plan and be

careful and all that stuff" or "stick to the story, be careful and see you later and all that stuff." When Powell presented the paper in a little room downstairs by the newspaper stand, he received an envelope containing cash. The amount of cash varied, "about $30, $40, $27, $50," based on whether Powell had informed them that he needed bus fare, food or gas. He used this money for drugs, food, clothing, gas, and transportation.

¶ 83 Powell testified that he decided to speak on defendant's behalf, because Powell went to prison for a criminal sexual assault he did not commit. It was like "getting a whipping from God from all of the bad stuff." Although at first Powell was not going to cooperate, he decided that he "just can't let nobody sit in there like that."

¶ 84 The next witness was defendant's former trial counsel, William Engerman, who testified that he was currently an assistant State's attorney. Engerman testified that, although the defense received discovery from the State before defendant's trial, to the best of his recollection, the defense did not receive information about payments made to witnesses. If Engerman had known at defendant's trial that Powell had received payments from the prosecution, Engerman would have cross-examined Powell about those payments, even if the payments were for sums less than $10. Engerman did not retain defendant's

file when he left the private law firm, and he does not know what happened to the file.

¶ 85 The fourth and final witness was Lori Smith,[12] who had been the director of the Victim/Witness Unit at the Cook County State's Attorney's Office since 2010. Although she had no direct knowledge of defendant's case, she was aware of past policies of the Victims/Witness Unit.

¶ 86 Ms. Smith testified that the files in the Victim/Witness Unit were organized by the name of the defendant. At the request of defense counsel and the State, Ms. Smith had searched for defendant's file within the Victim/Witness files but could not find it. This was not surprising, since the majority of the Victim/Witness Unit's files were destroyed after being damaged in a fire before Smith became director. Shortly after she became director, the remaining files were destroyed by flooding after officers of the Sheriff's Department K-9 Unit left hoses running after providing water for their dogs.

¶ 87 Ms. Smith testified that it was highly unlikely for an assistant State's attorney to give a witness cash for bus fare or food without the involvement of the Victim/Witness Unit. Ms. Smith testified that if a witness received money for food, it would be a "modest amount of money in cash between $4 and $7."

[12] So as not to confuse this witness with Eric Smith, we will refer to this brief witness as Ms. Smith.

A witness could also receive money for gas or bus fare, if he or she produced a receipt, which was required for reimbursement.

¶ 88 B. Trial Court's Ruling

¶ 89 At the third-stage evidentiary hearing,[13] the trial court considered two issues. First the trial court considered defendant's claim that the State's non-disclosure of payments to Martinoe Powell made prior to or during the trial violated defendant's right to due process as recognized in *Brady v. Maryland*, 373 U.S. 83 (1963). The trial court found that Powell's testimony lacked credibility in the absence of corroborating evidence and, therefore, defendant had failed to present sufficient evidence to meet his burden of showing a substantial violation of his constitutional right to due process.

¶ 90 Second, the trial court considered defendant's claim of actual innocence based on the newly discovered testimony of Eric Smith. A defendant is entitled to a new trial when evidence is newly discovered; material and not merely cumulative; and of such a conclusive character that it would probably change the result on retrial. *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009). The trial court found that Smith's account of the shooting was newly discovered, since it had been discovered since the trial and was not discoverable by defendant earlier

[13] Prior to ruling, the trial court heard oral argument, including remarks by the ASA that "at the time of trial *** [i]n the record, it indicates that they can't locate [Smith]."

through due diligence. The trial court also found that Smith's testimony was material, because it provided an account of the shooting in which defendant was not the shooter.

¶ 91 However, considering both the (1) testimony of Eric Smith and (2) Martinoe Powell's recantation of his prior testimony, the trial court found that defendant failed to meet the " 'conclusive character' " prong of the test. *Ortiz*, 235 Ill. 2d at 336 (quoting *People v. Harris*, 206 Ill. 2d 293, 301 (2002)). The trial court found Smith's and Powell's testimony was not credible, and this lack of credibility meant their testimony would probably not change the result on retrial.

¶ 92 The trial court dismissed the postconviction petition on January 26, 2016, and defendant filed a timely notice of appeal on January 26, 2016. This appeal followed.

¶ 93 ANALYSIS

¶ 94 On appeal, defendant claims that the trial court erred by not granting his postconviction petition for a new trial after a third-stage evidentiary hearing. Defendant claims that he is actually innocent based on newly discovered evidence. On appeal, the State argues that, "[p]reviously, this Court found Smith's affidavit was newly discovered" and "material and not cumulative," and "[t]herefore, the trial court only had to determine whether Smith's testimony

was of such [a] conclusive nature that it would probably change the result on retrial." For the following reasons, we reverse and remand for a new trial.

¶ 95 I. Stages of a Postconviction Proceeding

¶ 96 The Post-Conviction Hearing Act (725 ILCS 5/122-1 (West 2000)) provides that a defendant may challenge his or her conviction or sentence for violations of federal or state constitutional rights. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006) (citing *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005)). To be entitled to postconviction relief, a defendant bears the burden of showing that he or she suffered a substantial deprivation of his or her federal or state constitutional rights. 725 ILCS 5/122-1(a) (West 2000); *Pendleton*, 223 Ill. 2d at 471 (citing *Whitfield*, 217 Ill. 2d at 183); *People v. Evans*, 186 Ill. 2d 83, 89 (1999); *People v. Lacy*, 407 Ill. App. 3d 442, 455 (2010).

¶ 97 In noncapital cases, the Act provides for three stages. *Pendleton*, 223 Ill. 2d at 471-72. At the first stage, the trial court has 90 days to review a petition and may summarily dismiss it, if the trial court finds that the petition is frivolous and patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2000); *Pendleton*, 223 Ill. 2d at 472. If the trial court does not dismiss the petition within that 90-day period, the trial court must docket it for further consideration. 725 ILCS 5/122-2.1(b) (West 2000); *Pendleton*, 223 Ill. 2d at

472. In the case at bar, defendant's petition was docketed and proceeded to the second stage.

¶ 98 At the second stage, the trial court may appoint counsel if defendant is indigent. *Hobson*, 386 Ill. App. 3d at 230- 31. After defense counsel has made any necessary amendments to the petition, the State may move to dismiss it. *Pendleton*, 223 Ill. 2d at 472 (discussing 725 ILCS 5/122-5 (West 2000)). See also *Perkins*, 229 Ill. 2d at 43. If the State moves to dismiss, the trial court may hold a dismissal hearing, which is still part of the second stage. *People v. Coleman*, 183 Ill. 2d 366, 380-81 (1998).

¶ 99 At the end of the second stage, if the trial court denies the State's motion to dismiss, or if the State chooses not to file a motion to dismiss, then the State must answer the petition. 725 ILCS 5/122-5 (West 2000); *Pendleton*, 223 Ill. 2d at 472. Unless the trial court allows further pleadings (725 ILCS 5/122-5 (West 2000)), the petition then advances to the third stage, which is an evidentiary hearing. 725 ILCS 5/122-6 (West 2000); *Pendleton*, 223 Ill. 2d at 472-73. In the case at bar, the trial court originally dismissed defendant's petition at the second stage, but then the appellate court reversed the judgment of the trial court and remanded the case for a third-stage evidentiary hearing.

¶ 100 A third-stage evidentiary hearing is held only when the allegations of the postconviction petition make a substantial showing that a defendant's

constitutional rights have been violated and those allegations are supported by affidavits, records, or other evidence. *Waldrop*, 353 Ill. App. 3d at 249. The affidavits that accompany a postconviction petition must identify with reasonable certainty the sources, character, and availability of the alleged evidence supporting a defendant's allegations. *People v. Waldrop*, 353 Ill. App. 3d 244, 249 (2004). In the case at bar, this court found that defendant made a substantial showing of actual innocence and that he adequately supported his claims with documentary evidence. *Williams*, 2012 IL App (1st) 103350-U, ¶ 115.

¶ 101 At a third-stage evidentiary hearing, the trial court "may receive proof by affidavits, depositions, oral testimony, or other evidence," and "may order the [defendant] brought before the court for the hearing." 725 ILCS 5/122-6 (West 2000). In the case at bar, the trial court heard witness testimony.

¶ 102 II. Standard of Review

¶ 103 At a third-stage evidentiary hearing, the defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006) (citing *People v. Coleman*, 206 Ill.2d 261, 277 (2002)).

¶ 104 When a petition is advanced to a third-stage evidentiary hearing, and fact-finding and credibility determinations are involved, we will not reverse a

circuit court's decision unless it is manifestly erroneous. *People v. Beaman*, 229 Ill. 2d 56, 72 (2008) (citing *People v. Childress*, 191 Ill. 2d 168, 174 (2000)).

¶ 105 However, if no fact-finding or credibility determinations were necessary at the third stage, *i.e.*, no new evidence was presented and the issues presented were all pure questions of law, we apply a *de novo* standard of review—unless the judge who presided over the postconviction proceedings had some special expertise or familiarity with defendant's trial or sentencing and that familiarity had some bearing on the disposition of the postconviction petition. *Beaman*, 229 Ill. 2d at 72; *Pendleton*, 223 Ill. 2d at 473 (citing *People v. Caballero*, 206 Ill. 2d 65, 87–88 (2002)). In the case at bar, the trial judge who denied defendant's postconviction petition was not the same trial judge who presided over defendant's bench trial.

¶ 106 Since testimony was presented at the evidentiary hearing and the trial court made credibility determinations, we employ a manifest-error standard with respect to these determinations. *Beaman*, 229 Ill. 2d at 72. A finding is against the manifest weight of the evidence when the opposite conclusion is clearly evident or if the finding itself is unreasonable, arbitrary, or not based on the evidence presented. *People v. Peterson*, 2017 IL 120331, ¶ 39.

¶ 107 "[T]he manifest weight standard is not a rubber stamp. It does not require mindless acceptance in the reviewing court." *People v. Anderson*, 303

Ill. App. 3d 1050, 1057 (1999). See also *People v. Jacobs*, 2016 IL App (1st) 133881, ¶ 77 (a "deferential standard of review *** is not a rubber stamp"); *People v. Hernandez*, 312 Ill. App. 3d 1032, 1036 (2000) ("deference does not require a mindless rubber-stamp on every bench trial guilty verdict we address"). We must not "abdicate our responsibility to examine factual findings." *Anderson*, 303 Ill. App. 3d at 1057.

¶ 108 III. Actual Innocence Claim

¶ 109 The wrongful conviction of an innocent person violates due process under the Illinois Constitution of 1970 (Ill. Const. 1970, art. I, § 2), and thus, a defendant can raise in a postconviction proceeding a claim of actual innocence based on newly discovered evidence. *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009); *People v. Washington*, 171 Ill. 2d 475, 489 (1996).

¶ 110 In *Ortiz*, our supreme court held that, to assert a claim of actual innocence based on newly discovered evidence, a defendant must show that the evidence was (1) newly discovered; (2) material and not merely cumulative; and (3) of such a conclusive character that it would probably change the result on retrial. *Ortiz*, 235 Ill. 2d at 333; *People v. Orange*, 195 Ill. 2d 437, 450-51 (2001) (citing *People v. Molstad*, 101 Ill. 2d 128, 134 (1984)). In its appellate brief, the State acknowledges that, since this court previously determined that Smith's affidavit was newly discovered, and material and not cumulative, "the

trial court only had to determine whether Smith's testimony was of such conclusive nature that it would probably change the result on retrial."

¶ 111 At a third-stage evidentiary hearing, the question is not whether the State's evidence is *sufficient* to convict beyond a reasonable doubt, but whether it is *probable* that a jury "considering all the evidence, both old and new together," would still convict. *People v. Coleman*, 2013 IL 113307, ¶ 97. As our supreme court has explained, at a third-stage evidentiary hearing:

> "the trial court should not redecide the defendant's guilt in deciding whether to grant relief. See *People v. Molstad*, 101 Ill. 2d 128, 136 (1984) ('this does not mean that [the defendant] is innocent, merely that all of the facts and surrounding circumstances *** should be scrutinized to determine [his] guilt or innocence'). Indeed, the sufficiency of the State's evidence to convict beyond a reasonable doubt is not the determination that the trial court must make. If it were, the remedy would be an acquittal, not a new trial. See *People v. Washington*, 171 Ill. 2d 475, 497 (1996) (McMorrow, J., specially concurring) ('where a reviewing court determines that no rational trier of fact could find the defendant guilty beyond a reasonable doubt, the proper remedy is not a new trial but an acquittal')." *Coleman*, 2013 IL 113307, ¶ 97.

Our supreme court summed it up by stating: "Probability, not certainty, is the key as the trial court in effect predicts what another jury would likely do, considering all the evidence, both new and old, together." *Coleman*, 2013 IL 113307, ¶ 97.

¶ 112 IV. First Two *Ortiz* Factors

¶ 113 At the evidentiary hearing, the trial court found that Smith's testimony was both (1) newly discovered and (2) material and not cumulative. For the following reasons, we conclude that these findings were not against the manifest weight of the evidence.

¶ 114 First, the trial court stated that it found Smith's testimony to be "newly discovered," because the statements made by Smith in his affidavit and testimony were "clearly discovered since the trial took place" and "could not have been discovered by defendant earlier." *Williams*, 96 CR 2538401, slip op. at 14. Reaching this same finding, this court previously observed that "[t]he record contains representation by the State and the police that they were aware that Smith was a witness, that they were out looking for him, and that they could not find him." *Williams*, 2012 IL App (1st) 103350-U, ¶ 91. For example, Detective Kato testified at trial that he searched for Smith, but could not find him after on September 2, 1996.

¶ 115 With respect to this same issue in this same case, this court found: "Nowhere do our cases require a party to engage in an act of futility; and the State fails to explain why it thinks defendant would do a better job [of finding Smith] than the police. At the oral argument before us, the prosecutor admitted that 'it is clear that [Smith] evaded police to avoid testifying.' *** If, as the State claims, Smith succeeded in evading the police to avoid testifying, it is difficult to understand how an arrested defendant could have found him." *Williams*, 2012 IL App (1st) 103350-U, ¶¶ 92-93. See also *Williams*, 2012 IL App (1st) 103350-U, ¶ 96 (discussing *Molstad*, 101 Ill. 2d at 132 (a defendant does not have to engage in due diligence when it appears futile)).

¶ 116 Second, the trial court also found that Smith's testimony was material and not cumulative of the evidence at trial. "Evidence is considered cumulative when it adds nothing to what was already before" the factfinder. *Ortiz*, 235 Ill. 2d at 335. As this court previously observed, this finding is well-supported by the record. *Williams*, 2012 IL App (1st) 103350-U, ¶ 109. Both Smith and Powell's testimony "concern the ultimate issue of whether defendant was the shooter." *Williams*, 2012 IL App (1st) 103350-U, ¶ 109. There was "no testimony" at trial "that defendant may not have been the shooter." *Williams*, 2012 IL App (1st) 103350-U, ¶ 109. The only eyewitness at trial who identified defendant as the shooter was Powell, and he testified at the evidentiary hearing

that his trial testimony was false. "There was no physical evidence presented at trial to implicate defendant"; and he was not arrested at or near the crime scene. See *Williams*, 2012 IL App (1st) 103350-U, ¶ 109. Thus, the trial court's finding that the testimony at the evidentiary hearing constituted material and not cumulative evidence was not against the manifest weight of the evidence.

¶ 117 V. Third *Ortiz* Factor

¶ 118 The trial court found that Smith's testimony, supported by Powell's recantation, was not of a sufficiently conclusive character that it would likely change the result on retrial. See *Ortiz*, 235 Ill. 2d at 333-34. The primary question on this appeal is whether this finding is against the manifest weight of the evidence.

¶ 119 A. Legal Standard

¶ 120 First, we observe that the trial court may have applied the wrong legal standard which, if that was the case, would justify a remand, at the very least, for further postconviction proceedings. In its written order, the trial court stated that, at the third-stage evidentiary hearing, defendant "bears the burden of proof to show *beyond a preponderance* of the evidence" that he was wrongfully convicted. (Emphasis added.) *Williams*, No. 96 CR 2538401, slip op. at 19. The trial court provided this standard without a legal cite to support this finding. However, defendant's appellate briefs never argue this issue and we will not

consider it in our decision-making process. In addition, even though the judge's written order says defendant's burden was "beyond a preponderance," maybe the judge simply misspoke as he never used the term again. This court is not clear as to what "beyond a preponderance" means. However, the standard "beyond" the preponderance standard is typically considered as "clear and convincing," and our supreme court explicitly rejected that as the appropriate standard for postconviction proceedings in *People v. Coleman*, 2013 IL 113307, ¶ 93. See *In re D.T.*, 212 Ill. 2d 347, 362 (2004) ("The clear and convincing standard requires proof greater than a preponderance, but not quite approaching the criminal standard of beyond a reasonable doubt.").

¶ 121 In *Coleman*, as in our case, the supreme court considered an appeal after a third-stage evidentiary hearing. *Coleman*, 2013 IL 113307, ¶ 1. In *Coleman*, "the State's proposed standard" was to "impose a 'clear and convincing burden of proof" on a defendant asserting an actual innocence claim. *Coleman*, 2013 IL 113307, ¶ 92. Our supreme court explicitly rejected this proposed " 'clear and convincing' " standard as "inappropriate." *Coleman*, 2013 IL 113307, ¶ 92. However, this appears to be the standard that the trial court applied in the case at bar when it found that defendant must demonstrate proof "beyond" the preponderance standard.

¶ 122 In *Coleman*, our supreme court set forth the appropriate standard for a trial court to apply at a third-stage evidentiary hearing. The trial court must consider whether the evidence at the evidentiary hearing "places the evidence presented at trial in a different light and undercuts the court's confidence in the factual correctness of the guilty verdict." *Coleman*, 2013 IL 113307, ¶ 97. "[T]he trial court should not redecide the defendant's guilt in deciding whether to grant relief." *Coleman*, 2013 IL 113307, ¶ 97. "[T]he sufficiency of the State's evidence to convict beyond a reasonable doubt is not the determination that the trial court must make. If it were, the remedy would be an acquittal, not a new trial." *Coleman*, 2013 IL 113307, ¶ 97.

¶ 123 "Probability, not certainty, is the key as the trial court in effect predicts what another jury would likely do, considering all the evidence, both new and old together." *Coleman*, 2013 IL 113307, ¶ 97.

¶ 124 B. Manifest Weight

¶ 125 As we observed above, a finding is against the manifest weight of the evidence when the opposite conclusion is clearly evident or if the finding itself is unreasonable, arbitrary, or not based on the evidence presented. *Peterson*, 2017 IL 120331, ¶ 39; *People v. Deleon*, 227 Ill. 2d 322, 332 (2008).

¶ 126 1. The Trial Court's Findings

¶ 127 In its brief to this court, the State's primary argument on this issue is:

> "The trial court found Smith incredible for good reason. The reality about Smith is that he was defendant's initial accuser. *** So, although Smith was portrayed as an 'innocence witness,' the reality is that he was defendant's initial accuser. The trial court noted this finding, 'Smith's explanation for declining to participate in the Chicago Police Department's investigation does not add up when considering the nature of these proceedings.' "

¶ 128 During argument after the evidentiary hearing, the ASA made the following factual claim: that Smith had identified defendant "in a photo array" prior to trial. Similarly, in its brief to this court, the State argues: "Smith confirmed to investigators that he had recognized the shooters as Traveling Vice Lords and admitted that he had recognized one of the shooters as a Traveling Vice Lord named 'Bernard'." Following this statement are a number of cites to the record.

¶ 129 However, all the cites are either to arguments by counsel or to an earlier trial court order. Not one cite is to testimony or documentary evidence.

¶ 130 During argument at the second stage, an ASA claimed that, attached to defendant's petition, were police investigation notes indicating that Smith stated to the police that defendant was one of the shooters. However, there are no such notes attached to the petition in the record before us—not to the original

pro se petition filed December 5, 2001, not to the addendum, filed September 11, 2014, and not to the supplemental petition, filed December 12, 2006. The record before us is devoid of either testimony or documentary evidence to support this factual claim.

¶ 131 If, as the State's argues on appeal, this was the basis for the trial court's finding that "Smith's explanation *** does not add up," then this finding is not based on the evidence presented. *Peterson*, 2017 IL 120331, ¶ 39; *Deleon*, 227 Ill. 2d 322, 332 (2008). The only testimony about Smith's statements to the police is Smith's own testimony at the evidentiary hearing, in which he denied saying anything to the police about defendant.

¶ 132 The trial court also found that: "Smith's inability to explain why he all of a sudden has come forward with exonerating testimony casts doubt upon the truth of his assertions that petitioner was the shooter." However, the record contradicts the trial court's finding that Smith's decision to testify was "sudden." Smith has cooperated with the Public Defender's Office on this case for more than a decade, swearing in his first affidavit in 2005 and testifying in 2016.

¶ 133 The trial court also found Smith's testimony to have inconsistencies primarily with respect to the exact dates and details in the sequence of events after the shooting. However, by the time of the 2016 evidentiary hearing, it had been two decades since the 1996 shooting. The State argues on appeal that

these inconsistencies are an attempt by Smith to convince the trial court that he was not defendant's initial accuser. However, as we have already discussed, there is no testimonial or documentary evidence of that in the record.

¶ 134 Regarding the sequence of events of the shooting itself, Smith's testimony at the evidentiary hearing is consistent with the testimony at trial. Powell testified at trial that, before the shooters approached, he was talking about "when he used to hang with Pokey," while Smith played with Powell's son. Similarly, Smith testified that Powell was talking with Pokey, while Smith and Powell's son played with a ball. Powell testified at trial that, as the shooting began, Smith ran in the direction of Personnel Liquors. Similarly, Smith testified at the evidentiary hearing that he took shelter in Personnel Liquors.

¶ 135 The trial court found Smith's description of the shooters unreliable because of Smith's incorrect estimate of defendant's age. At the evidentiary hearing, Smith identified defendant in the courtroom and then, shortly after identifying him in person, Smith was asked to estimate defendant's age. Smith testified that he believed that defendant was "two, three years younger" than Smith.[14] Actually, on the day of the shooting, Smith was 27 years old and

[14] As for the shooters, Smith testified that they were "little bitty boys," who were shorter than Smith. Smith described the shooters as less than 5'6" or 5'7" in

defendant was 17 years old. Since Smith estimated that defendant was "two, three years younger," Smith's estimate of defendant's age was approximately seven years off. What this shows is that, while looking at defendant in the courtroom, Smith misestimated defendant's age. He could not have any intent to mislead, because he knew that the court would know exactly how old defendant was.[15] In addition, Smith testified that he had observed the shooters before and knew defendant from the neighborhood, and that defendant was not one of the shooters. Even if Smith's description of the shooters' approximate age was unreliable, that still does not undercut Smith's knowledge of who these people were.

¶ 136 The trial court found incredible that an active gang member, such as Smith was in 1996, would not want to cooperate in a police investigation. The trial court observed that, while Smith might have been reluctant to identify a shooter, he should have been willing to tell them that defendant was *not* the shooter. The trial court does not explain how this would involve him any less in the police investigation.

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height and no older than "about 16." By contrast, Smith testified that, in 1996, defendant was "about the same size *** or a little bit taller" than Smith.

[15] Smith could not have had an intent to deceive the court, where the factfinder at the evidentiary hearing was the court, and where Smith had been arrested before and knew that one of first facts established in processing was a defendant's date of birth.

¶ 137 2. Considering All the Evidence

¶ 138 As we observed above, at a third-stage evidentiary hearing, the question is not whether the State's evidence is *sufficient* to convict beyond a reasonable doubt, but whether it is *probable* that a jury "considering all the evidence, both old and new together," would still convict. *People v. Coleman*, 2013 IL 113307, ¶ 97. In light of all the evidence, both the old and the new together, it is not probable that a jury would still convict.

¶ 139 As this court previously found in its prior opinion on this same issue, "there is no physical evidence, and the case is based on the sole identification of a possibly recanting witness and a confession that defendant refused to provide the ASA, and the intended victim is now coming forward to say that defendant was not his attacker." *Williams*, 2012 IL App (1st) 103350-U, ¶ 115. In addition, now the sole eyewitness at trial is not "possibly recanting"; he did, in fact, recant. The evidence of Smith's testimony and the recantation of Powell supporting this theory is of such a conclusive character that it could probably change the result in a new trial. See also *supra* ¶ 47.

¶ 140 In addition, the two detectives' trial testimony differed concerning what defendant stated. Detective Kato testified that defendant told them that defendant first located Smith and his group in front of the liquor store and that is where defendant approached them and started shooting, whereas Detective

Sawczenko testified that defendant told them that he first located Smith and his group in front of the lounge and that is where defendant approached them and started shooting. At the evidentiary hearing, Smith testified that the liquor store was four or five stores away from the lounge. Smith testified that he was in front of the lounge when the shooters approached, which is consistent with Powell's trial testimony. When the two detectives themselves cannot agree on the exact content of defendant's oral statements,[16] it increases the probability that a jury will not be convinced, in light of the new evidence.

¶ 141 In this case, the evidence at trial was weak, based upon the testimony of a single eyewitness, who is a convicted felon, and who was in the penitentiary at the time of his trial testimony, and who now recants his testimony, concerning a shooting under circumstances not conducive to a good identification, with an alleged oral statement heard by a police officer who did not memorialize it at the time, did not videotape it and had no handwritten notes of it, and which defendant has always denied he made. There was no physical evidence connecting defendant to this crime, and multiple other witnesses could not identify defendant because of the fleeting time frame. Here, a new eyewitness

[16] If the minor inconsistencies in Smith's testimony 20 years later are significant, then so are the detectives' inconsistencies only two years after the events in question. It would be a double standard to consider significant the post-event timeline inconsistencies in Smith's testimony made two decades later, while ignoring the detectives' inconsistencies made only two years after the events in question.

has effectively testified that he knows defendant and that defendant was not one of the offenders who opened fire with a gun on that day at the location in question. The old and new eyewitness evidence does place the evidence at trial in a different light and undermines the court's confidence in the factual correctness of the original guilty finding. As a result, we find that there is a reasonable probability that the result would be different on retrial.

¶ 142 Since the evidence presented at the evidentiary hearing "places the evidence presented at trial in a different light and undercuts the court's confidence in the factual correctness of the guilty verdict" (*Coleman*, 2013 IL 113307, ¶ 97), a new trial is required.

¶ 143 CONCLUSION

¶ 144 For all the foregoing reasons, we find that the trial court's finding was against the manifest weight of the evidence and remand for a new trial.

¶ 145 Reversed and remanded.