2016 IL App (1st) 143564-U

FIFTH DIVISION
December 30, 2016

No. 1-14-3564

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DUEL THOMAS, Defendant-Appellant.	)	Appeal from the Circuit Court of Cook County No. 99 CR 10375-02 Honorable Jorge Luis Alonso, Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Gordon and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's second-stage dismissal of defendant's successive postconviction petition is affirmed where (1) defendant's culpable negligence caused a delay of almost six years in filing his claim of ineffective assistance of counsel, (2) defendant was not prejudiced by trial counsel's failure to request a limiting jury instruction specific to gang-related evidence and failure to argue in his motion for a new trial that the circuit court erred in allowing gang evidence, (3) defendant was not prejudiced by appellate counsel's failure to allege trial counsel's ineffectiveness and failure to question the circuit court's denial of his motion to quash arrest and suppress evidence, and (4) defendant's newly discovered evidence was insufficient to support his claim of actual innocence.

¶ 2 Defendant Duel Thomas appeals the second-stage dismissal of his *pro se* and supplemental petitions (collectively the petitions)[1] for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). On appeal, defendant argues the circuit court erred in dismissing his petitions without a third-stage evidentiary hearing because (1) the delay in filing his petitions was not due to his culpable negligence, (2) he also advanced a claim of actual innocence, (3) trial counsel was ineffective in failing to request a limiting jury instruction specific to gang-related evidence and failing to raise in his motion for new trial that it was error to allow gang testimony, (4) appellate counsel was ineffective for failing to argue the circuit court erred in denying his motion to quash arrest and suppress evidence and failing to argue ineffective assistance of trial counsel, and (5) he presented newly discovered evidence that would probably change the result on retrial. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 As defendant's postconviction claim is one of actual innocence, it is necessary to set out the trial evidence in some detail. The evidence at trial established that on March 26, 1999, the victim Quinton Kirkwood had been playing dice in the apartment of Glendy Roberts (Roberts) located near 16th Street and Homan Avenue in Chicago. During the course of the game, the victim had won several thousands of dollars while James Williams (Williams) had lost money. The following day, on March 27, 1999, the victim's body was found in a rear basement stairwell at Christiana Avenue in Chicago. He had been shot to death.

¶ 5 On March 28, 1999, Jeff Henderson (Henderson) was arrested in connection with the murder. The following day, Henderson provided a written statement to an assistant State's Attorney (ASA), implicating defendant in the crimes.

[1] This case is on appeal from the dismissal of both the *pro se* petition and the supplemental petition for postconviction relief. Accordingly, we will address the dismissal of both petitions.

¶ 6 On April 30, 1999, defendant and his codefendants Henderson, Antonio Thomas (Antonio),[2] Linord Thames (Thames), and Williams were charged by indictment with first degree murder, aggravated kidnapping, kidnapping, and attempt armed robbery for the shooting death of the victim. Henderson was tried before a jury prior to defendant's trial. Following his trial, Henderson was acquitted.

¶ 7 At defendant's trial, however, Henderson recanted his testimony at his trial (Henderson's original testimony) and implicated himself in the crimes instead. Thereafter, Henderson's original testimony and statement to the ASA were introduced into evidence. As Henderson was the only eyewitness to the crimes, it is necessary to set out his trial testimony in detail.

¶ 8 A. Henderson's Testimony at His Trial

¶ 9 At his trial, Henderson testified that on the night of March 26, 1999, he was attending a birthday party for Antonio at the apartment of Frederick Laws's (Laws) uncle located at 16th Street and Homan Avenue.[3] During the party, Henderson heard Thames convey to defendant that Williams had lost money in a dice game and had sent Thames to get his money back. Henderson heard them speak about a couple of "stacks" and explained that a stack meant one thousand dollars. Defendant and Thames then called Antonio to the side. Thereafter, the three men left the apartment. Henderson left after seven to ten minutes.

¶ 10 Henderson found defendant, Antonio, and several other people at the corner of 16th Street and Homan Avenue. Defendant instructed Henderson to retrieve Antonio's vehicle and park near Roberts's building where the dice game was taking place. Henderson parked the vehicle as instructed. He then observed defendant and Antonio walk out of Roberts's building with the victim. Antonio was holding the victim at gunpoint. Antonio pushed the victim into the

[2] Antonio is defendant's brother.
[3] The apartment of Laws's uncle and Roberts's apartment are located on the same intersection.

trunk of his vehicle and closed the trunk. He then entered the vehicle through the driver's side, circled the block a couple of times, and returned. Defendant then entered the vehicle and instructed Henderson to do the same. Antonio then drove Henderson and defendant to an alley nearby. Defendant instructed Henderson to pick up some money from the victim's relatives. Defendant then grabbed the victim from the trunk and led him down a cemented stairwell.

¶ 11 Defendant and Antonio demanded money from the victim while holding him at gunpoint. The victim used Antonio's cellular phone to call his relatives and ask for money. Henderson then proceeded to the victim's relatives' house which was nearby but they refused to give him any money. Henderson returned to the alley and informed defendant and Antonio he had failed to obtain the money. The victim asked to call his relatives again. When no one answered the call, defendant shot the victim several times with an automatic weapon. Then Antonio shot the victim multiple times.[4] Defendant fled on foot. Antonio ordered Henderson to drive him a few blocks and instructed him to keep quiet about the incident.

¶ 12 The next day, Antonio and Maurice Thomas (Maurice),[5] came to Henderson's house. Antonio ordered Henderson to keep his "mouth closed" because defendant knew where he lived.

¶ 13 Following Henderson's trial, defendant, Antonio, and Thames were tried concurrently before separate juries.

¶ 14 B. Pretrial Proceedings

¶ 15 1. Defendant's Motion to Quash Arrest and Suppress Evidence

¶ 16 Prior to defendant's trial, defendant filed a motion to quash arrest and suppress evidence. In his motion, defendant asserted the arresting officers did not have probable cause to arrest him based on his conduct before the arrest. In this vein, defendant requested the circuit court to

[4] Henderson did not testify as to whether defendant and Antonio used different weapons.
[5] Maurice is also defendant's brother.

suppress (1) any physical evidence discovered as a result of the arrest and detention, (2) any statements, utterances, reports of gestures and responses by defendant during the detention following the arrest, (3) any in-court or out-of-court identification of defendant, (4) testimony of witnesses who viewed defendant during the detention following the arrest, as well as witnesses discovered as a result of the arrest, (5) photographs, fingerprints, and other information that resulted from the processing of defendant following the arrest, and the fruits thereof, and (6) all other knowledge and the fruits thereof, witnesses, statements, or gestural information and physical evidence which were the product of the arrest. Thereafter, the circuit court conducted an evidentiary hearing on defendant's motion.

¶ 17 a. Testimony of Defendant

¶ 18 At the suppression hearing, defendant testified that on March 28, 1999, he was standing near 16th Street and Homan Avenue when three police officers approached him. The officers "grabbed" his arm and indicated they "wanted to talk" with him at the police station. Defendant conveyed he did not wish to go to the police station. The police officers, however, handcuffed him and drove him to the police station. Defendant testified he "felt I was under arrest." At the police station, defendant was placed in a "small room" and the door to the room was locked.

¶ 19 b. Testimony of Detective Dominic Rizzi

¶ 20 Chicago police detective Dominic Rizzi (Detective Rizzi) testified that on March 28, 1999, he learned from other police officers that the victim had been gambling and he was provided a list of names of individuals who had also participated in the gambling. Before leaving the police station, he spoke with defendant's brother Maurice and Marcus Williams who had witnessed the gambling.[6] Later that evening, Detective Rizzi and his partner, Chicago police

[6] Based on our review of the record, Detective Rizzi did not testify to the content of these conversations.

detective James Smith (Detective Smith), located defendant at 16th Street and Homan Avenue. Detective Rizzi asked defendant to accompany them to the police station for questioning regarding the victim's murder. Defendant agreed. During this time, defendant was not handcuffed. The two detectives did not place their hands on defendant in a forceful manner nor have their weapons drawn. When they arrived at the police station, defendant was placed in an interview room. Defendant denied any knowledge of the victim's murder.

¶ 21 Thereafter, Detective Rizzi interviewed Maurice who stated that on March 26, 1999, he was at a dice game located at 16th Street and Homan Avenue. Maurice heard Williams and Thames discuss that the victim had won $9,000 in another dice game at an apartment upstairs and that he would be an "easy lick," meaning an easy robbery. Defendant was also present during this conversation. Maurice heard Antonio instruct Henderson to "go get the car." Thereafter, Antonio went to find the victim and placed him in the trunk of the vehicle. Maurice observed Antonio drive around the block and pick up defendant and Henderson. The three men drove off with the victim in the trunk of the vehicle.

¶ 22 Later that night, Detective Rizzi interviewed Henderson. Henderson stated that on March 26, 1999, he heard Thames say the victim had won $7,000 in a dice game and that he would be an "easy lick," meaning "easy to rob." Thereafter, Antonio went to find the victim, placed him in the trunk of a vehicle, and drove around the block. Then Henderson and defendant also got into the vehicle and the three men drove into an alley on a block between Christiana Avenue and Homan Avenue. Henderson further stated that defendant and Antonio asked him to "pick up some money" at a house on Homan Avenue but he was unable to obtain the money at the house. After Henderson informed Antonio he had failed to obtain the money, Antonio became "irate" and "started yelling" at the victim. Then defendant shot the victim and Antonio also shot the

victim. Following this conversation, defendant was formally placed under arrest.

¶ 23 On cross-examination, Detective Rizzi acknowledged defendant had been placed in a locked interview room before he was formally placed under arrest.

¶ 24 d. Trial Court's Determination of the Motion to Quash Arrest and Suppress Evidence

¶ 25 After hearing the testimonies presented, the circuit court found Detective Rizzi to be a credible witness and denied defendant's motion to quash his arrest and suppress evidence.

¶ 26 2. State's Motion to Introduce the Testimony of Jeff Henderson

¶ 27 Prior to trial, the State filed a Motion to Introduce the Testimony of Jeff Henderson. Thereafter, the circuit court conducted a hearing to determine which parts of Henderson's testimony at his trial could be introduced at defendant's trial. In the course of that hearing, the circuit court stated that all references to gangs and Henderson's compulsion defense, *i.e.*, that defendant and Antonio forced him to participate in the crimes, would be excluded.

¶ 28 C. Trial Proceedings

¶ 29 The matter proceeded to a jury trial where the State presented the testimony of the following twelve witnesses.

¶ 30 1. Testimony of Glendy Roberts

¶ 31 Roberts testified that on March 26, 1999, he resided on a second floor apartment located at 16th Street and Homan Avenue. Later that evening, he returned to his apartment and observed twelve to fifteen people in his kitchen shooting dice, including Thames, Williams, and the victim. Thereafter, the victim left the apartment. Thames and Williams left after the victim.

¶ 32 2. Testimony of Henderson

¶ 33 Henderson testified that on the night of March 26, 1999, he was attending Antonio's birthday party at Laws's uncle's apartment located at 16th Street and Homan Avenue. Thames

and Laws were also at the party. Henderson further stated his testimony at his own trial was false and he did not, in fact, recall seeing defendant on the night of the murder.

¶ 34 The State then introduced Henderson's testimony which he provided at his own trial and impeached his statement that his original testimony was untrue. Defendant did not object. Henderson, however, continued to testify that he knew defendant "just from around the neighborhood, that's all." While he admitted to testifying he was with defendant on the night of the murder in his original testimony, he claimed "the whole transcript you're reading is [a] lie."

¶ 35 After a discussion with the parties outside the presence of the jury, the trial court determined that Henderson's written statement to ASA Luke Sheridan (ASA Sheridan) could be admitted under section 115-10.1 of the Code (725 ILCS 5/115-10.1 (West 1998)), which allows a prior inconsistent statement that would otherwise be excluded as hearsay to be admitted as substantive evidence. Henderson, however, testified the statement was "made up" by the ASA. He also claimed that while he did sign each page of the statement, he had not read it before signing it. In addition, Henderson denied making most of the statements in the statement to the ASA.

¶ 36 Henderson further testified that on the night of the murder, Thames approached him and said, "I got a lick for you." Thereafter, Henderson alone forced the victim at gunpoint to enter the trunk of a vehicle and attempted to rob him. After he failed to obtain money from the victim's relatives, he shot the victim in the alley where the victim's body was discovered. He stated that he fired a .38-caliber weapon with one hand and a .45-caliber weapon with his other hand.

¶ 37 The State proceeded to ask defendant if he sold drugs for anyone. Henderson testified he did not sell drugs for anyone but himself. At this point, the State asked for a sidebar. During the

sidebar, outside the presence of the jury, the State asked to revisit the issue of gang-related evidence. After discussing the issue with the parties, the circuit court decided to allow the introduction of gang-related evidence. Over defendant's objection, the circuit court provided the following instructions to the jury as to gang-related evidence:

> "[Y]ou are going to be hearing evidence and testimony that is being admitted for a limited purpose, and the testimony involves the mention of gang membership. There is no evidence or inference or argument that this homicide in any way was gang related. So it is being offered for the limited purpose only of evaluation of the credibility of this witness as well as the consideration of any arguments concerning his motivation. So for that limited purpose only it will be admissible. It will not be considered by you for any other purposes in deciding the case."

¶ 38 After questioning resumed, Henderson stated he was never a member of the Black Souls street gang, of which defendant was the chief. He did admit, however, that he had testified at his own trial that he was a Black Souls gang member and that the "number one law" of the Black Souls gang was "to never disown one of your brothers" and "to always look up to your older brothers and never disobey the mob, never go against the grain."

¶ 39 During questioning, ASA Virginia Bigane (ASA Bigane) also asked Henderson if he had conveyed to anyone that he had committed the crimes. Henderson responded he had confessed to ASA Bigane in private but he could not recall the exact date. On the day he confessed, he had been transported from the Pinckneyville Correctional Center by two correctional officers for a court hearing. Although the officers were nearby, they were not present when he confessed.

¶ 40 Henderson also claimed he did not know the extent of his immunity from further prosecution after his acquittal. On the State's rebuttal, ASA Arthur Hill (ASA Hill) testified he

had offered Henderson blanket immunity from prosecution for "any real or perceived perjury from any prior testimony as well as any involvement regarding the murder of the victim in this case." When asked if the immunity had been explained to him, Henderson had answered, "yes."

¶ 41 3. Testimonies of Correctional Officers Darron Arnett and Craig Wilkey

¶ 42 Correctional Officers Darron Arnett and Craig Wilkey testified they transported Henderson from the Pinckneyville Correctional Center to the court on August 2, 2001. On that day, Henderson was never outside the presence of at least one of the officers and they did not hear Henderson confess to murder.

¶ 43 4. Testimony of ASA Maria Kuriakos

¶ 44 ASA Maria Kuriakos (ASA Kuriakos) testified she was assigned to the victim's murder case on the day the Pinckneyville officers brought Henderson to court. ASA Kuriakos spoke with Henderson briefly and informed him there would be no hearing that day. She did not hear Henderson confess to the victim's murder. Later that day, she spoke with ASA Bigane and learned ASA Bigane did not have contact with Henderson that day. On the next court date, the two Pinckneyville officers were not present.

¶ 45 5. Testimony of ASA Sheridan

¶ 46 ASA Sheridan testified that on March 29, 1999, he handwrote Henderson's statement regarding the crimes. Henderson read the first paragraph aloud and then ASA Sheridan read the rest of the statement aloud. ASA Sheridan also made corrections as requested by Henderson, which Henderson initialed. The written statement was admitted into evidence as a prior inconsistent statement under section 115-10.1 of the Code (725 ILCS 5/115-10.1 (West 1998)). The statement was essentially the same as Henderson's original testimony, implicating defendant

in the shooting and kidnapping of the victim.[7] ASA Sheridan stated Henderson never admitted to committing the crimes.

¶ 47 6. Testimony of Frederick Laws

¶ 48 Laws testified that on March 25, 1999, he spoke with Williams who informed him he had lost a lot of money to the victim in a dice game. The next day, on March 26, 1999, Laws attended Antonio's birthday party at his uncle's apartment. At the party, he heard Thames inform defendant and Antonio that the victim had won approximately eight or nine thousand dollars and that Williams wanted someone to rob him. Antonio said, "let's go." Then defendant, Antonio, and Thames left the apartment and Henderson also left five minutes later. Laws admitted he had been convicted of controlled substance violations in 1989 and 1992.

¶ 49 7. Testimonies of Ernestine Reed and Shakela Kirkwood

¶ 50 The victim's aunt Ernestine Reed (Reed) and his cousin Shakela Kirkwood (Shakela) testified that on the night of the murder, the victim called their home and said he was sending someone to pick up some money. Reed and Shakela both identified Henderson in a lineup as the individual who came to their house and asked for the money.

¶ 51 8. Testimonies of Detectives Thomas McGreal and Patrick Foley

¶ 52 Chicago police detectives Thomas McGreal (Detective McGreal) and Patrick Foley (Detective Foley) testified they found seven cartridge casings and four fired bullets around the victim's body while investigating the crime scene. Detective Foley testified he identified two of the bullets as .45 caliber bullets and one as a .380 or 9 mm caliber bullet. He explained that based in his experience, this meant two firearms were used in the incident.

[7] Unlike the trial testimony, the statement does not mention that Williams wanted someone to rob the victim. The statement only indicates that Thames informed defendant and Antonio that the victim had won approximately $9,000 in another dice game and was a good target for a robbery. We note that this difference does not affect the outcome of this matter on appeal.

¶ 53 9. Testimony of Detective Dominick Rizzi

¶ 54 Detective Rizzi was examined as to his expertise in firearms. He testified that based on his expertise, it would be difficult for someone to fire two weapons at once using both hands as Henderson claimed to have done. The firearms were not designed for left-hand use and the strong recoil or kickback would cause the shooter to lose control of the firearms.

¶ 55 10. The Verdict

¶ 56 Defendant offered no evidence at trial. Thereafter, the trial court again instructed the jury that "[a]ny evidence that was received for a limited purpose should not be considered by you for any other purpose." On October 24, 2001, after hearing closing arguments and considering the evidence, the jury convicted defendant of first degree murder, aggravated kidnapping, and attempt armed robbery. Defendant was sentenced to serve 60 years for first degree murder (720 ILCS 5/9-1(a)(1) (West 1998)) and 30 years for aggravated kidnapping (720 ILCS 5/10-2(a)(1) (West 1998)) in the Illinois Department of Corrections, the sentences to run concurrently.[8]

¶ 57 D. Direct Appeal

¶ 58 Following his conviction, defendant appealed, arguing (1) the State failed to prove him guilty of murder, aggravated kidnapping, and attempt armed robbery beyond a reasonable doubt because the case depended entirely on the "incredible" testimony of Henderson, (2) the trial court erred in allowing the State to introduce Henderson's signed statement as substantive evidence, (3) the trial court erred in allowing the State to introduce evidence of defendant's gang membership, and (4) the State made improper closing arguments. This court affirmed the trial court's judgment. *People v. Thomas*, 354 Ill. App. 3d 868 (2004). On May 25, 2005,

[8] Following their respective trials, Antonio was convicted of aggravated kidnapping and Thames was convicted of first degree murder and aggravated kidnapping. Antonio was sentenced to serve an extended term of 60 years at the Illinois Department of Corrections based on his prior attempt murder conviction. Thames was sentenced to serve concurrently 28 years for first degree murder and 15 years for aggravated kidnapping in the Illinois Department of Corrections.

defendant's petition for leave to appeal was denied by the Illinois Supreme Court.

¶ 59 E. Postconviction Proceedings

¶ 60 1. Defendant's *Pro se* Postconviction Petition

¶ 61 On August 18, 2010, defendant filed his *pro se* postconviction petition for relief. Defendant alleged ineffective assistance of counsel including (1) his trial counsel's failure to ask prospective jurors about gang bias and failure to interview and subpoena Maurice and Thames and (2) his appellate counsel's failure to raise the issue of trial counsel's ineffectiveness and failure to challenge the trial court's denial of his motion to quash arrest. Defendant also alleged actual innocence. Attached to his petition was Maurice's affidavit dated December 20, 2008 (Maurice's first affidavit) in which he averred he had informed the police, "I knew nothing of a murder" but the officers threatened to charge him with other cases if he did not say "what they wanted me to say." Maurice stated he implicated defendant in the murder because he was afraid he could also be charged with murder. This affidavit, however, was not notarized. Thereafter, the trial court appointed the Cook County Public Defender's Office to represent defendant.

¶ 62 2. Defendant's Supplemental Postconviction Petition

¶ 63 On March 28, 2013, defendant filed his supplemental postconviction petition alleging ineffective assistance of counsel and actual innocence.

¶ 64 a. Affidavits in Support of Ineffective Assistance of Counsel

¶ 65 In his supplemental petition, defendant asserted his trial counsel was ineffective in his failures to (1) request a limiting instruction regarding gang-related evidence and (2) allege, in his motion for new trial, that the trial court erred in allowing gang-related evidence. Defendant argued his appellate counsel was also ineffective in his failures to (1) allege trial counsel's ineffectiveness and (2) raise the issue of the trial court's denial of his motion to quash arrest.

¶ 66 In support of his claims, defendant attached two new affidavits to his petitions from (1) himself and (2) Michael Jones (Jones). Defendant averred he filed his *pro se* postconviction petition as soon as he learned that Maurice and Thames were never interviewed or subpoenaed by trial counsel. Defendant also stated this led him to question his trial counsel's inaction with respect to other legal issues "concerning jurors and gang violence."

¶ 67 Jones, defendant's fellow inmate, attested he had an "achievement award" that "demonstrate[ed] proficiency in Uniform Law Clerk Training II" from a college. Jones also stated he had advised defendant not to file his postconviction petition "until he obtained affidavits" because his petitions could be denied.

¶ 68 a. Affidavits in Support of Actual Innocence

¶ 69 Additionally, defendant contended there were witnesses that could testify he was not present at the crime scene to support his claim of actual innocence. In support of his claims, defendant attached seven new affidavits to his petitions from Maurice (Maurice's second affidavit), Laws, Antonio, Thames, Henderson, and Prior. Laws provided two affidavits. Maurice's second affidavit was notarized in 2010, Laws's affidavits were each notarized in 2010 and 2013, Antonio's affidavit was notarized in 2006, Thames's affidavit was notarized in 2008, Henderson's affidavit was notarized in 2006, and Prior's affidavit was notarized in 2011.

¶ 70 In Maurice's second affidavit dated January 23, 2013, he averred he "knew [defendant] had nothing to do with the incident" at the time when he gave his statement to the police but he had implicated defendant in the crimes because the police had threatened him.

¶ 71 In Laws's affidavit dated September 22, 2010 (Laws's first affidavit), he averred (1) he never heard Thames inform defendant and Antonio that Williams had lost money to the victim and wanted defendant and Antonio to rob the victim and (2) he "never heard [Antonio] say lets

go to [defendant and Thames] after hearing about this alleged sweet lick or easy money." Laws also claimed his original testimony was "manufactured by the [ASA]" who had threatened to charge him with perjury if he did not "say what they wanted me to say."

¶ 72 In Laws's affidavit dated March 8, 2013 (Laws's second affidavit), he claimed that "at the time of the incident" he and defendant arrived at Antonio's birthday party at the same time, stayed together, and left at the same time. Laws stated that accordingly, defendant could not have committed the crimes.

¶ 73 Antonio attested to the following. He did not speak with Thames at Laws's uncle's apartment about anything and he did not leave the apartment with Thames. Thereafter, he went to another apartment and heard Williams ask Henderson to "get his money back for him without hurting the victim." He knows that Thames "had nothing to do" with the crimes.

¶ 74 Thames attested he did not ask defendant to rob the victim nor inform defendant that Williams wanted someone to rob the victim. He also stated he did not witness defendant rob, kidnap, or murder anyone and that defendant did not follow him to anyone's apartment.

¶ 75 In Henderson's affidavit, he stated his testimony at his own trial was "not the truth." He also claimed his attorney had advised him to implicate defendant to the crimes in order to "win [his] case," and had further assured him the ASA would not use his testimony against defendant.

¶ 76 Prior averred that on the night of March 26, 1999, he was 10 years old. That night, he was walking toward the corner of 16th and Homan Avenue, when he observed a man holding a firearm to another man's head, whom he later learned was the victim. The man holding the firearm forced the victim into the trunk of a vehicle at gunpoint. Then the man closed the trunk and looked in Prior's direction. Prior recognized the man was Henderson and ran to his house nearby. One or two days later, Prior was walking past the back door of a two-flat building, when

he observed the victim's body lying on the ground. That same day, Prior identified Henderson as the man he had observed forcing the victim into the trunk of a vehicle at gunpoint. Defendant was also in the lineup but Prior did not identify him because he had not seen defendant when the victim was forced into the trunk. Thereafter, Prior moved to Mississippi. In 2007 or 2008, he was visiting in Chicago when Henderson approached him and indicated he had tried to "take the rap, but they let me go anyway."

¶ 77 Thereafter, the State filed a motion to dismiss all of defendant's *pro se* and supplemental petitions. After the matter was briefed and argued, the circuit court dismissed defendant's petitions, finding the petitions were not timely filed and rejecting defendant's argument that the delay in filing was not due to his culpable negligence. The circuit court expressly noted, "on this issue of the [time] limitations, I am not fact-finding." Additionally, the circuit court found defendant had not advanced a proper claim of actual innocence. This appeal followed.

¶ 78 ANALYSIS

¶ 79 On appeal, defendant argues the circuit court erred in dismissing his petitions without an evidentiary hearing because (1) the delay in filing his petitions was not due to his culpable negligence and he advanced a claim of actual innocence in the same petitions, (2) trial counsel was ineffective in failing to request a limiting jury instruction specific to gang-related evidence and failing to raise in his motion for new trial that it was error to allow gang testimony, (3) appellate counsel was ineffective for failing to argue the trial court erred in denying his motion to quash arrest and failing to argue ineffective assistance of trial counsel, and (4) he presented newly discovered evidence that would probably change the result on retrial.

¶ 80 A. Standard of Review

¶ 81 We begin by noting the familiar principles regarding postconviction proceedings. The

Act (725 ILCS 5/122-1 *et seq*. (West 2010)) provides criminal defendants a remedy to redress substantial violations of their federal or state constitutional rights in their original trial or sentencing hearing. *People v. Allen*, 2015 IL 113135, ¶ 20. A postconviction action is not a substitute for or an addendum to a direct appeal, but is a collateral attack on a prior conviction and sentence. *People v. Tate*, 2012 IL 112214, ¶ 8. "The purpose of the proceeding is to allow inquiry into constitutional issues relating to the conviction or sentence that were not, and could not have been, determined on direct appeal." *People v. Barrow*, 195 Ill. 2d 506, 519 (2001). Accordingly, *res judicata* bars consideration of issues that were presented and decided on direct appeal, and issues that could have been raised on direct appeal but were not presented are considered forfeited. *People v. Simpson*, 204 Ill. 2d 536, 551, 560 (2001).

¶ 82 The Act creates a three-stage procedure of postconviction relief in noncapital cases. *Allen*, 2015 IL 113135, ¶ 21. At the first stage, the defendant need only present the "gist" of a constitutional claim. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). Since most petitions at this stage are drafted by *pro se* defendants, the threshold for survival is low. *Id.* If the circuit court independently determines that the petition is either "frivolous or is patently without merit" it dismisses the petition. 725 ILCS 5/122-2.1(a)(2) (West 2010); *Hodges*, 234 Ill. 2d at 11. If a petition is not summarily dismissed by the circuit court, the petition advances to the second stage. *Hodges*, 234 Ill. 2d at 10.

¶ 83 At the second stage of postconviction proceedings, counsel may be appointed to an indigent defendant (725 ILCS 5/122-4 (West 2010)) and the State is allowed to file a motion to dismiss or an answer to the petition (725 ILCS 5/122-5 (West 2010)). *Id.* at 10-11. At this stage, the circuit court must determine whether the petition and any accompanying documentation make a substantial showing of a violation of constitutional rights to warrant a third-stage

evidentiary hearing. *People v. English*, 403 Ill. App. 3d 121, 129 (2010). The petitioner, however, is not entitled to an evidentiary hearing as a matter of right. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). Rather, in order to mandate an evidentiary hearing, allegations in the petition must be supported by the record or by its accompanying affidavits. *Id*. Nonfactual and nonspecific claims that merely amount to conclusions are insufficient to require an evidentiary hearing under the Act. *Id*. Further, at this stage of the proceedings, the circuit court takes all well-pleaded facts that are not positively rebutted by the trial record as true. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). If the circuit court determines the petitioner made a substantial showing of a constitutional violation at the second stage, a third-stage evidentiary hearing must follow. 725 ILCS 5/122-6 (West 2010); see also *English*, 403 Ill. App. 3d at 129.

¶ 84 At a third-stage evidentiary hearing, the circuit court serves as a fact finder and accordingly, determines the credibility of witnesses, decides the weight to be given testimony and evidence, and resolves any evidentiary conflicts. *People v. Domagala*, 2013 IL 113688, ¶ 34. It is at this stage that the circuit court must determine whether the evidence introduced demonstrates that the petitioner is entitled to relief under the Act. *Id*.

¶ 85 Here, defendant's postconviction petition advanced to the second stage and was dismissed. We review a circuit court's dismissal of a postconviction petition without a third-stage evidentiary hearing under a *de novo* standard of review. *Pendleton*, 223 Ill. 2d at 473. Under *de novo* review, we perform the same analysis that a trial judge would perform. *People v. Tyler*, 2015 IL App (1st) 123470, ¶ 151. Having set forth our standard of review, we now turn to the substantive issues raised on appeal.

¶ 86 B. Ineffective Assistance Claims

¶ 87 Defendant claims the delay in his filing was not due to his culpable negligence because

he relied on the advice of Jones, a fellow inmate who received a certificate for completing "law clerk training" at a college. According to Jones's affidavit, he advised defendant not to file the petition until he had "obtained the affidavits" because he believed that without the affidavits, defendant's petition would have been denied. Defendant further claims his filing was not untimely because he advanced a claim of actual innocence to which a time limitation for commencing postconviction proceedings under the Act does not apply. Additionally, defendant maintains he exercised due diligence in filing his petitions because they were filed as soon as he learned Maurice and Thames were never interviewed or subpoenaed by his trial counsel and he formed the belief he was denied effective assistance of counsel.

¶ 88 In response, the State contends defendant cannot "bootstrap" an untimely constitutional claim onto his actual innocence claim. The State further claims Jones's affidavit fails to demonstrate he specifically advised defendant to refrain from filing his petitions by the statutory time constraint provided by the Act. 725 ILCS 5/122-1(c) (West 2010). The State also points out Thames and Maurice were known witnesses at the time of trial but defendant has failed to establish why he was unable to learn they were never interviewed or subpoenaed by his trial counsel before the filing deadline had passed. *Id.* The State argues that accordingly, defendant has failed to establish he was not culpably negligent in filing an untimely postconviction petition.

¶ 89 Here, we must first resolve the threshold issue of whether these petitions should be dismissed on untimeliness grounds pursuant to the Act. 725 ILCS 5/122-1(c) (West 2010). The Act requires a petitioner to file his petition within the time limitation specified in section 122-1(c) of the Act, unless defendant alleges facts demonstrating the delay was not due to his culpable negligence. *Id.*; *People v. Cruz*, 2013 IL 113399, ¶ 19. Under the Act, culpable negligence "contemplates something greater than ordinary negligence and is akin to

recklessness." *People v. Boclair*, 202 Ill. 2d 89, 108 (2002). Our courts have previously noted that a lack of culpable negligence is very difficult to establish. *People v. Turner*, 337 Ill. App. 3d 80, 86 (2003). Further, although a circuit court's findings of fact regarding whether a petition's untimeliness was due to culpable negligence will not be reversed unless manifestly erroneous, our review is *de novo* where, as here, the circuit court made no findings of fact regarding the timeliness issue. *People v. Gerow*, 388 Ill. App. 3d 524, 527 (2009).

¶ 90 Here, when defendant filed his *pro se* petition on August 18, 2010, the Act provided that a postconviction petition had to be filed within six months after the denial of a petition for leave to appeal or three years from the date of defendant's conviction, whichever is sooner. 725 ILCS 5/122-1(c) (West 2010). Considering that the jury found defendant guilty on October 24, 2001, and his petition for leave to appeal to the Illinois Supreme Court was denied on May 25, 2005, defendant's petition for postconviction relief was due on or before October 2004. Defendant's petition, however, was not filed until August 18, 2010, which was almost six years beyond the due date. See 725 ILCS 5/122-1(c) (West 2010). In this regard, defendant concedes that his petition is untimely but argues the delay was not due to his culpable negligence.

¶ 91 In the case at bar, we find *People v. Lander*, 215 Ill. 2d 577 (2005), to be instructive. In *Lander*, the defendant alleged he was not culpably negligent for the untimely filing of his postconviction petition because he had relied on the erroneous advice of a prison law clerk, jailhouse lawyers, and a law librarian. *Id.* at 586. There, our supreme court rejected defendant's argument because he did not allege these individuals had any particular training providing them with specialized knowledge in postconviction matters nor present sufficient facts to establish his reliance on these individuals was reasonable. *Id.* at 588. The *Lander* court also determined the case was distinguishable from *People v. Rissley*, 206 Ill. 2d 403 (2003), where the defendant had

reasonably relied on the advice of his appellate counsel, "a person who had obvious expertise in legal matters and, in particular, criminal appeals." *Id.* at 587-88. Further, the *Lander* court noted that the obligation of knowing the filing deadline for a postconviction petition remains solely with the defendant and that the defendant's reliance on such individuals demonstrated an indifference to the consequences likely to follow. *Id.* at 588-89.

¶ 92 Similarly, while defendant alleges he lacks culpable negligence because he relied on Jones's advice to delay his filing, there are no allegations as to what, if any, expertise Jones possessed in postconviction matters. See *id.* at 586. Therefore, like the defendant in *Lander*, defendant here has failed to establish that his reliance on Jones was reasonable. See *id.* at 588; see also *People v. Williams*, 394 Ill. App. 3d 236, 245 (2009) (defendant's reliance on an inmate law clerk in the preparation of his postconviction petition was not reasonable where the defendant did not allege that the inmate law clerk possessed any expertise in postconviction matters). Moreover, although Jones indicates in his affidavit that he advised defendant to not file his petitions until he had obtained the affidavits, Jones did not specifically state that he advised defendant to refrain from filing his petitions by the filing deadline provided in the Act. Accordingly, we conclude defendant's claim that he relied on Jones's advice is insufficient to establish that the delay in filing was not due to his culpable negligence. See *id.* at 589; see also *People v. Hampton*, 349 Ill. App. 3d 824, 829 (2004) (a defendant's unfamiliarity with the time requirements for filing a postconviction petition does not demonstrate a lack of culpable negligence).

¶ 93 Defendant further argues that the delay in his filing was justified because he filed the petitions as soon as he learned that his trial counsel never interviewed or subpoenaed Maurice and Thames. Defendant, however, fails to provide any specific dates when he learned this or

demonstrate that he made diligent attempts to uncover this information. Moreover, defendant alleges no facts to establish why he did not discover that Maurice and Thames were never interviewed or subpoenaed by his trial counsel before the filing deadline. Further, defendant does not explain why he could not have filed his petitions earlier when these witnesses were known at the time of trial. Accordingly, we find defendant has failed to establish that he was not culpably negligent for the untimely filing of his petitions. *People v. Gunartt*, 327 Ill. App. 3d 550, 552-553 (defendant failed to establish the delay in filing his postconviction petition was not due to his culpable negligence where he alleged no facts to adequately demonstrate why he did not discover his attorney's failure to investigate and introduce the allegedly new evidence); see also *People v. Davis,* 351 Ill. App. 3d 215, 218 (2004) (three-year period for filing petition for postconviction relief after date of conviction is not postponed until time that claim is known or should have been known; legislature could have, but did not, provide for such rule in the Act).

¶ 94 In addition, defendant maintains that another reason why his claim of ineffective assistance of counsel was not untimely is because he advanced a claim of actual innocence which can be filed at any time. Here, we find *People v. Flowers*, 2015 IL App (1st) 113259, to be instructive on this issue. As in this case, the defendant in *Flowers* filed an untimely postconviction petition in which he advanced a claim of ineffective assistance and a claim of actual innocence. *Id.* ¶ 1. While the *Flowers* court considered defendant's claim of actual innocence, the court nonetheless determined that the defendant was culpably negligent in the untimely filing of his claim and held the circuit court properly dismissed the defendant's claim of ineffective assistance. *Id.* ¶¶ 38, 51. Accordingly, we proceed as this court did in *Flowers* and find the circuit court properly dismissed defendant's claim of ineffective assistance. *Id.*

¶ 95 C. Ineffective Assistance of Counsel

¶ 96 Further, assuming *arguendo* that defendant's claim of ineffective assistance was timely, defendant's claim still lacks merit. It is well settled that at the second stage of postconviction proceedings, claims of ineffective assistance of counsel are reviewed under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Domagala,* 2013 IL 113688, ¶ 36. Under *Strickland,* defense counsel is ineffective only if defendant demonstrates (1) his counsel's performance fell below an "objective standard of reasonableness" or (2) counsel's error prejudiced the defendant. *Strickland*, 466 U.S. at 687-8, 694.

¶ 97 Under the first prong, defendant must overcome the strong presumption that his counsel's conduct falls within the wide range of reasonable professional assistance and " 'might be considered sound trial strategy.' " *Strickland*, 466 U.S. at 689 ("there are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way"). To establish prejudice under the second prong, defendant must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id*. The prejudice prong entails more than an "outcome-determinative test" and "[t]he defendant must show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair." *People v. Richardson*, 189 Ill. 2d 401, 411 (2000). The failure to establish either prong precludes a finding of ineffective assistance of counsel. *People v. Patterson*, 192 Ill. 2d 93, 107 (2000).

¶ 98 Similarly, claims of ineffective assistance of appellate counsel are reviewed under the standard set forth in *Strickland*. *People v. English*, 2013 IL 112890, ¶ 33. Appellate counsel is

not obligated to raise every possible issue on appeal but expected to exercise his own professional judgment in selecting issues he reasonably determines are meritorious. *Id.* ¶ 33-34. Thus, if an underlying issue is without merit, defendant suffers no prejudice from counsel's failure to raise it on appeal. *People v. Easley*, 192 Ill. 2d 307, 329 (2000).

¶ 99 1. Jury Instruction

¶ 100 Defendant asserts his trial counsel was ineffective because he failed to (1) request a "limiting jury instruction specific to gang-related evidence" and (2) argue in his motion for a new trial that the trial court erred in allowing gang evidence. According to defendant, his trial was fundamentally unfair because the jury not only heard that Henderson was a member of the Black Souls street gang but that defendant was a "gang chief" and the "number one law" of the gang was "to always look up to your older brothers and to never disobey the mob, never go against the grain." Defendant further maintains his appellate counsel was ineffective for failing to allege his trial counsel's ineffectiveness on direct appeal.

¶ 101 The State responds defendant's claim lacks merit because the trial court instructed the jury that "[a]ny evidence that was received for a limited purpose should not be considered by you for any other purpose." The State further argues trial counsel's decision to refrain from requesting a specific instruction was strategic because a specific instruction would have highlighted the gang evidence in front of the jury. In addition, the State contends defendant's claim that his appellate counsel was ineffective is also without merit because (1) the gang-related evidence was properly admitted, (2) defendant was not prejudiced by the gang-related evidence, and (3) the trial court provided a limiting instruction on the gang-related evidence.

¶ 102 Generally, evidence of gang affiliation need not necessarily be excluded if it is otherwise relevant and admissible. *People v. Gonzalez*, 142 Ill. 2d 481, 489 (1991). Evidence is relevant if

it makes the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. *Id.* at 487-88. Moreover, a showing of bias or motive to testify falsely is an accepted method of impeachment. *People v. Bull*, 185 Ill. 2d 179, 206 (1998). Proof of bias is almost always relevant as the jury is entitled to assess all evidence that would bear on the truthfulness of a witness's testimony. *United States v. Abel*, 469 U.S. 45, 52 (1984). In some cases, evidence of gang affiliation is probative of bias to warrant its admission for a credibility determination. *People v. Blue*, 205 Ill. 2d 1, 15, 18 (2001) (citing *Abel*, 469 U.S. at 52). Evidence demonstrating the common membership of a witness and a party in an organization is probative of bias. *Id.* at 15 (citing *Abel*, 469 U.S. at 52).

¶ 103 In this case, it was only after Henderson testified he did not sell drugs for anyone other than himself that the State asked to revisit the issue of gang-related evidence. As Henderson had effectively denied his membership with the Black Souls street gang, evidence of Henderson's gang membership was relevant and admissible to impeach him. *People v. Murray*, 254 Ill. App. 3d 538, 554 (1993) ("evidence of defendant's gang membership was relevant and admissible to impeach defendant after he denied his gang affiliation"). Moreover, evidence that defendant was Henderson's superior in a gang where the "number one law" was to "always look up to your older brothers and never disobey the mob" was also relevant and admissible because it explained why Henderson recanted his earlier statements and implicated himself in the crimes instead. Additionally, Henderson's credibility and motivation in recanting his original testimony was a central issue in this case, as he was the only eyewitness who implicated defendant to the murder and no physical evidence linked defendant to the crimes. Therefore, the evidence was relevant because it tended to make it more probable that Henderson was falsely testifying at defendant's trial than it would have been without the evidence. *People v. Thomas*, 354 Ill. App. 3d 868, 885

(2004).

¶ 104 Moreover, the trial court did in fact provide the jury with limiting instructions that were specific to the evidence. The record reveals that the trial court instructed the jury to consider defendant's alleged gang membership only for the purpose of evaluating Henderson's credibility as a witness and his motivation in changing his testimony. The record also establishes that the trial court further emphasized to the jury that there was no evidence the murder was gang related and that defendant's alleged gang membership could not be considered for any other purpose, and instructed them again before deliberations.

¶ 105 Under these circumstances, we conclude defendant was not prejudiced by his trial counsel's performance because he cannot establish that, but for counsel's performance, the result would have been different. *Richardson*, 189 Ill. 2d at 411. Thus, it follows that defendant has also failed to demonstrate that appellate counsel was ineffective. *Easley*, 192 Ill. 2d at 329.

¶ 106 2. Motion to Quash Arrest and Suppress Evidence

¶ 107 Defendant next maintains his appellate counsel was ineffective for failing to question the trial court's denial of his motion to quash arrest and suppress evidence. According to defendant, he was effectively arrested when the police escorted him to the police station for questioning. Defendant argues the police lacked sufficient probable cause to place him under arrest at that time because they "only had information that [defendant] was at or involved in a dice game, not that he was involved in the murder [of the victim]."

¶ 108 In response, the State contends the trial court did not err in denying defendant's motion because defendant voluntarily accompanied the officers to the police station and was formally arrested after Henderson implicated him to the crimes.

¶ 109 Having reviewed the record, we conclude defendant cannot demonstrate he suffered

prejudice because the outcome of the trial would not have been different had defendant's motion been granted. Our review of the record reveals that none of the evidence defendant sought to suppress existed. First, no physical evidence was discovered as a result of defendant's arrest which linked defendant to the murder. Second, there were no statements, utterances, reports of gestures or responses by defendant following his arrest. Third, while Henderson, Maurice, and Laws were the only witnesses who provided evidence linking defendant to the murder, none of these witnesses were discovered as a result of defendant's arrest: the police had already questioned Maurice before they proceeded to locate defendant; and Henderson and Laws were identified as witnesses through independent investigations by the police. Fourth, no photographs, fingerprints or other information that was the product of processing defendant were admitted as evidence against him. Rather, it is clear that the jury's guilty finding was primarily based on Henderson's prior statements to ASA Sheridan and Henderson's original testimony at his own trial in which he implicated defendant in the murder.

¶ 110 Under these circumstances, it cannot reasonably be said that the outcome of defendant's trial would have been different had his motion to quash arrest been granted. As the outcome would not have been different, we reject defendant's argument that his appellate counsel was ineffective for failing to raise this issue on direct appeal. *Richardson*, 189 Ill. 2d at 411.

¶ 111 C. Actual Innocence

¶ 112 Defendant claims, in the alternative, this matter should advance to a third-stage evidentiary hearing because the eight affidavits provided by Maurice, Laws, Antonio, Thames, Henderson, and Prior present newly discovered evidence that would change the result on retrial. Defendant further argues that he exercised due diligence in presenting his claim of actual innocence because his *pro se* postconviction petition was filed soon after he learned there were

witnesses who "knew [he was] innocent of the crimes" and were willing to support his petition.

¶ 113 In response, the State contends defendant was not diligent in presenting his claim of actual innocence because the eight affidavits were notarized years before they were filed with defendant's petitions. The State also argues the trial court properly rejected defendant's claim of actual innocence because the eight affidavits fail to satisfy the requirements of an actual innocence claim. Further, the State claims Maurice's first affidavit did not satisfy the pleading requirements of section 122-2 of the Act because it was not notarized. 725 ILCS 5/122-2 (West 2010). Additionally, the State maintains defendant intertwined his claim of actual innocence and ineffective assistance claim by relying on Maurice's first affidavit to support both claims.

¶ 114 The due process clause of the Illinois Constitution provides postconviction petitioners with "the right to assert a freestanding claim of actual innocence based on newly discovered evidence." *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009). To succeed on a claim of actual innocence, a defendant must present evidence that is (1) newly discovered, (2) material and noncumulative, and (3) of such conclusive character that it would probably change the result on retrial. *People v. Coleman*, 2013 IL 113307, ¶ 96. Newly discovered evidence means the evidence must not have been available at defendant's trial and defendant must not have been able to discover it sooner through due diligence. *Id.* To qualify as material, the evidence must be relevant and probative of the petitioner's innocence. *Id.* Noncumulative means "the evidence adds to what the jury heard." *Id*. (citing *People v. Molstad*, 101 Ill. 2d 128, 135 (1984)). Conclusive means the evidence, when considered with the evidence presented at trial, would probably lead to a different result. *Id.* As our supreme court has recently held, "[w]e must be able to find that petitioner's new evidence is so conclusive that it is more likely than not that no reasonable juror would find him guilty beyond a reasonable doubt." *People v. Sanders*, 2016 IL

118123, ¶ 47. Moreover, in considering a claim of actual innocence the court does not question the strength of the State's case, nor question whether a defendant has been proved guilty beyond a reasonable doubt. *People v. Collier*, 387 Ill. App. 3d 630, 636 (2008) (" 'actual innocence' is not within the rubric of whether a defendant has been proved guilty beyond a reasonable doubt"); see also *People v. Adams*, 2013 IL App (1st) 111081, ¶ 36 ("[e]vidence of actual innocence must support total vindication or exoneration, not merely present a reasonable doubt").

¶ 115 Applying these principles, we initially find that defendant has failed to exercise due diligence in filing seven of the eight affidavits that were attached to support his actual innocence claim because the affidavits were notarized years prior to defendant filing his petitions. The affidavits were notarized and filed as follows:

- Maurice's first affidavit - notarized 2008, filed 2010
- Maurice's second affidavit - notarized 2010, filed 2013
- Laws's first affidavit - notarized 2010, filed 2013
- Laws's second affidavit - notarized 2013, filed 2013 (diligently filed)
- Antonio's affidavit - notarized 2006, filed 2013
- Thames's affidavit - notarized 2008, filed 2013
- Henderson's affidavit - notarized 2006, filed 2013
- Prior's affidavit - notarized 2011, filed 2013

Defendant, however, fails to adequately explain the delay except to state generally that he was not culpably negligent because he relied on the advice of Jones. We have previously found this argument to be unpersuasive. Thus, as the affidavits could have been presented to the court sooner through the exercise of due diligence, we find that they are not newly discovered. *People v. Edwards*, 2012 IL 111711, ¶ 37.

¶ 116 Moreover, as explained herein, none of the eight affidavits support defendant's claim of actual innocence. In examining the affidavits, we first turn to Maurices's first and second affidavits, Laws's first affidavit, and the affidavits provided Antonio, and Thames. Regarding Maurice's first affidavit, we reject the State's argument that defendant intertwined his claim of actual innocence and ineffective assistance claim by relying on Maurice's first affidavit to support both claims. *People v. Hobley*, 182 Ill. 2d 404, 443-44 (1998) (a free-standing claim of innocence means that the newly discovered evidence being relied upon is not being used to supplement an assertion of a constitutional violation with respect to the trial). Our review of the record reveals that the statements in Maurice's first affidavit have no bearing on trial counsel's and appellate counsel's alleged failure to address gang-related evidence, which is the focus of defendant's claim of ineffective assistance. The State also argues that Maurice's first affidavit should not be considered because it did not satisfy the pleading requirements of section 122-2 of the Act as it was not notarized. 725 ILCS 5/122-2 (West 2010). Regardless, we need not decide this issue because the facts contained in all of these five affidavits, including Maurice's first affidavit, are not of such a conclusive character that it would probably change the result on retrial. *Coleman*, 2013 IL 113307, ¶ 9*6.*

¶ 117 Specifically, none of the four witnesses attest that defendant committed the crimes in their affidavits. In Maurice's first affidavit, Maurice averred that when he was questioned by the police officers, he informed them, "I knew nothing of a murder." In his second affidavit, Maurice (1) attested he "knew [defendant] had nothing to do with the incident" at the time when he gave his statement to the police, and (2) made a vague and conclusory claim that he implicated defendant because the police threatened to "blame me for the crime[s]." Further, in Antonio's affidavit, defendant is not mentioned even in passing. Instead, Antonio averred (1) he

did not speak with Thames about anything at Laws's uncle's apartment and did not leave the apartment with Thames, (2) he went to another apartment to speak with Williams and heard Williams ask Henderson to "get his money back for him without hurting the victim," and (3) Thames "had nothing to do" with the crimes. Moreover, in Laws's first affidavit, Laws recants his trial testimony and attests that (1) he never heard Thames inform defendant and Antonio that Williams had lost money to the victim and wanted defendant and Antonio to rob the victim, and (2) he never heard Antonio say "let's go" to defendant and Thames, after they heard about the "sweet lick" or "easy money." Laws also makes a vague and conclusory claim that his trial testimony was "manufactured by the [ASA] who was prosecuting the murder of [the victim]" who threatened to charge him with perjury if he did not "say what they wanted me to say." Additionally, in Thames's affidavit, he averred that on the night of the crimes, (1) he did not ask defendant to rob the victim nor inform defendant that Williams wanted someone to rob the victim, (2) defendant did not follow Thames to anyone's apartment, and (3) Thames did not witness defendant rob, kidnap, or murder anyone.

¶ 118 As mentioned before, none of the allegations contained in these five affidavits go to defendant's actual innocence. At best, the five affidavits would impeach Laws's and Maurice's credibility as witnesses, as the affidavits would merely conflict with the evidence they presented at trial that defendant had heard Williams wanted someone to rob the victim. The five affidavits, however, would not arguably exonerate nor substantively contradict Henderson's original testimony that defendant committed the crimes. As previously noted, an affidavit that merely impeaches or contradicts trial testimony is not sufficiently conclusive to justify a claim for actual innocence. *Collier,* 387 Ill. App. 3d at 637; see also *Ortiz,* 235 Ill. 2d 319, 335 (2009) (impeachment of a prosecution witness is not a sufficient basis for granting a new trial). We thus

find that these five affidavits are not of such conclusive character that they would probably change the result on retrial. *Adams,* 2013 IL App 1st 111081, ¶ 36.

¶ 119 We further find that although defendant filed Laws's second affidavit within the year it was notarized, it does not qualify as newly discovered evidence as explained herein. In his second affidavit, Laws averred defendant could not have committed the crimes because Laws and defendant arrived at Antonio's birthday party at the same time, stayed together, and left the party at the same time. Our supreme court has previously determined, " 'it is illogical for defendant to claim that this evidence of his alibi is new, where he obviously knew of his alibi at the time of trial [and] on appeal.' " *Edwards,* 2012 IL 111711, ¶ 34 (quoting and affirming *People v. Edwards,* 403 Ill. App. 3d 1101 (2010) (unpublished order under Supreme Court Rule 23)); see also *People v. Harris*, 206 Ill. 2d 293, 301 (2002) (affidavits of alibi witnesses were not newly discovered evidence where defendant would have known his own alibi at the time of trial). Further, defendant obviously knew of Laws who testified at his trial but fails to explain why this alibi testimony was unavailable at that time. As the alibi evidence could have been discovered sooner through the exercise of due diligence, we find that the evidence was not newly discovered. *Edwards,* 2012 IL 111711, ¶ 37.

¶ 120 In examining Henderson's affidavit, we find the statement that his original testimony at his own trial was "not the truth" is merely cumulative, as it does not add to his recantation presented at trial. See *Ortiz*, 235 Ill. 2d at 335 (evidence is cumulative when it does not add to trial evidence). Further, while Henderson also asserts in his affidavit that his trial counsel had advised him to implicate defendant in the crimes in order to "win [his] case," and assured him the ASA would not use his testimony against defendant, this allegation is not probative of defendant's innocence and thus is not material evidence. *Coleman*, 2013 IL 113307, ¶ 96.

Accordingly, Henderson's affidavit does not support defendant's claim of actual innocence. *Id.*

¶ 121 Defendant also relies on Prior's affidavit in which he averred that on the night of the murder, he observed Henderson forcing the victim into the trunk of a vehicle at gunpoint. We again find *Flowers*, 2015 IL App (1st) 113259, to be instructive. There, the defendant claimed actual innocence based on affidavits from a witness, Dujuan McCray (McCray). *Id.* ¶ 20. Our court in *Flowers* determined that McCray's affidavits were neither material nor conclusive because a close reading of the affidavits indicated McCray did not, in fact, witness the shooting. *Id.* ¶ 34. Specifically, McCray did not attest that he observed the shooter, nor allege defendant was not one of the shooters. *Id.* Instead, he indicated he had observed two men with weapons *after* the shooting and that neither of them was defendant. *Id.* Our court in *Flowers* further determined McCray's affidavits did not support a claim of actual innocence where, at best, the affidavits established McCray was not at the scene of the shooting and had no personal knowledge about the shooting itself. *Id.* ¶ 37.

¶ 122 Similarly, a close reading of Prior's affidavit reveals that Prior did not, in fact, witness the shooting. Like McCray in *Flowers*, Prior did not attest that he observed the shooter. At best, his affidavit demonstrates Henderson had a firearm and forced the victim into the trunk of a vehicle. We cannot infer from this affidavit that defendant was not the shooter. Moreover, Prior was not at the scene of the shooting and he had no personal knowledge of the crimes. We thus find that Prior's affidavit is not probative of defendant's innocence and would not change the result on retrial to support a claim of actual innocence. *Id.* ¶ 35. Accordingly, we conclude that defendant has failed to meet his burden of making a substantial showing of a claim of actual innocence. *Coleman*, 2013 IL 113307, ¶ 96.

¶ 123 CONCLUSION

¶ 124 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 125 Affirmed.