2017 IL App (1st) 152867-U

SIXTH DIVISION
MAY 12, 2017

No. 1-15-2867

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 88 CR 8605
	)	
MICHAEL HARPER,	)	Honorable
	)	Kenneth J. Wadas,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Rochard and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's denial of the defendant's successive postconviction petition following a third-stage evidentiary hearing is affirmed where (1) the evidence presented was not so conclusive that it would probably change the result on retrial, and (2) the trial court did not abuse its discretion when it barred the testimony of the defendant's expert on police coercion and interrogation tactics.

¶ 2 The defendant, Michael Harper, appeals from the dismissal of his petition for postconviction relief following an evidentiary hearing under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2002)). On appeal, he argues that the trial court (1) erred in denying him postconviction relief because he presented sufficient evidence to support his

claim of actual innocence; and (2) abused its discretion in excluding expert testimony regarding false confessions and police interrogation tactics. For the reasons that follow, we affirm.

¶ 3 The defendant and his co-defendant, Arthur Brown, were each charged with committing several offenses including arson and first-degree murder in connection with a fire that occurred at 5 a.m. on May 28, 1988, at a building located on the 400 block of East 63rd Street in Chicago. Pismai Panichkarn and Kiert Phophariat died of smoke inhalation as a result of the fire. In April 1990, following simultaneous but severed jury trials, the defendant and Brown were each found guilty of two counts of first-degree murder and one count of arson.[1] The defendant was sentenced to natural life imprisonment for murder and a concurrent 30-year prison term for arson. On direct appeal, this court reversed the defendant's conviction and remanded for a new trial, holding that the cumulative impact of trial errors denied him a fair trial. See *People v. Brown*, 253 Ill. App. 3d 165, 183 (1993). In that same opinion, we affirmed Brown's conviction and sentence. *Id.*

¶ 4 At the defendant's second jury trial, which commenced on July 20, 1994, the parties agreed, by way of stipulation, to the introduction of a transcript of Cecil Hingston's and Sid Malone's testimony from the first trial. According to the transcript of Hingston's testimony, which was read to the jury, Hingston had testified that, around 5 a.m. on May 28, 1988, he was working at a gas station on Marquette Road when two men in a white Ford truck purchased gas in a red and yellow gasoline can. Hingston recalled that one of the men "fumbled around" and spilled gas on the ground, while the other man remained in the truck, urging the other man to

[1] Brown was sentenced to natural life imprisonment for murder and a concurrent seven-year prison term for arson. Another codefendant, Geronia Ford, was convicted of arson and sentenced to seven years' imprisonment. A third codefendant, Albert Harper, Jr., was acquitted following a bench trial in June 1991.

hurry. Hingston also stated that the man who spilled the gas had a rag, but asked for additional paper towels, which Hingston provided. After paying for the gas, both men left in the white truck.

¶ 5 According to the transcript of Sid Malone's testimony, Malone testified that, at approximately 5 a.m. on May 28, 1988, he was walking across 63rd Street when he noticed a white van, with license plate number GAS 403, driving "a little too fast," causing him to "back up" and "get out of the way." Malone testified that the van parked in front of a video store and Chinese restaurant at the 400 block of 63rd Street. He observed two individuals, one of whom carried a gasoline can, exit the van and walk toward the video store, which was still open. He also saw two or three other individuals standing outside of the video store. A few minutes later, Malone noticed smoke emanating from the video store. Malone identified People's exhibit number 3 as a photograph of the white van with license plate number GAS 403.

¶ 6 Chicago police officer David Brown testified that he was on patrol with his partner, Officer Hester Scott, when he observed smoke coming from a video store. Officer Brown stated that he exited his vehicle and began knocking on storefront windows of the video store to see if anyone was in the store. At this time, the defendant approached him and asked whether the "Chinese or Oriental people" got out. Officer Brown instructed the defendant to stand across the street for his safety and to talk to Officer Scott. The defendant later identified himself to Officer Brown as the owner of the video store and agreed to accompany him to the police station to assist in the investigation.

¶ 7 Officer Scott testified that, after calling the fire department, she was approached by a bystander, Sid Malone. Malone told her that he saw two men exit a white van with license plate number GAS 403 and that one of the men carried a gasoline can into the video store. Officer

Scott testified that, as she was talking to Malone, Malone pointed to a van driving down 63rd Street and said: "There it goes now; there goes the van now." Officer Scott testified that she got a glimpse of the vehicle and then radioed to other officers in the area to stop the van.

¶ 8 Firefighter Kevin Brannigan testified that, when he arrived at the video store, smoke was pouring out and the front door was locked with burglar bars. When he cut open the lock and broke the glass door behind the burglar bars, an explosion knocked him back several feet. Brannigan attributed the explosion to a back-draft, which he explained occurs when a fire is deprived of oxygen. After the fire was extinguished, Brannigan saw that burglar bars had been pried off the video store's back door and also noticed that the video store smelled of gasoline. According to Brannigan, he entered the adjoining restaurant and discovered two deceased victims, later identified as Panichkarn and Phophariat, with their noses and mouths covered with soot.

¶ 9 Detective Joseph Campbell, an expert in the causes and origins of fires, testified that the fire's point of origin was the rear of the video store and that an accelerant, gasoline, had been used to intentionally start the fire. Detective Campbell also stated that he executed a search warrant on a white Ford Bronco with license plate GAS 403 and recovered several videotapes inside the truck. He also testified that, based upon information from an occupant of the building, he recovered a two-gallon gasoline can outside of the building near an alley. During his testimony, Detective Campbell identified a photograph he took of the gasoline can. The photograph shows a red and yellow gasoline can on the ground with a white rag wrapped around the handle.

¶ 10 Detective David Kutz testified that he interviewed the defendant at the police station. He explained that the defendant was not a suspect at that time and was not handcuffed or restrained

in any way. During the interview, the defendant told Detective Kutz that he owned a Ford van with license plate number GAS 403 and was the only person with keys to the van. Detective Kutz stated that, at this point, he advised the defendant of his *Miranda* rights. The defendant answered additional questions and admitted that he intended to burn the building because selling videotapes was not profitable and he wanted to collect insurance proceeds.

¶ 11 Assistant State's Attorney (ASA) Joel Whitehouse testified that, in May 1988, he took a court-reported statement from the defendant. The statement, which was published to the jury, stated that the video store was owned by his mother, Roberta Holmes. The statement went on to state that he drove to the video store at 3 a.m. on May 28, 1988, where he met Brown and informed him that he wanted to burn the videotapes because the business was not profitable and he wanted to collect the insurance proceeds. The defendant's uncle, Albert Harper, and his cousin, Geronia Ford, were also present. Brown agreed to assist the defendant in exchange for some X-rated videotapes, which he put in the Ford Bronco. The defendant then instructed Ford to get some gasoline, after which Ford left with Harper while the defendant and Brown remained at the video store. According to the statement, Brown then bent the burglar bars at the back of the store to make it appear like someone broke into the store. He and Brown then discussed placing a mattress from the video store against the videotapes so it "would flame quicker." He stated that two "Oriental persons" had a restaurant near his video store, that they spent nights in the restaurant from time to time, and that he knew their truck was in the neighborhood on the night of the fire. In his statement, the defendant stated that he had been treated fairly by the police and by ASA Whitehouse.

¶ 12 Marshall Levin, the landlord of the building in which the video store was located, testified that he leased retail space to the defendant. He stated that, at the time of the fire, he had

liability insurance on the building but did not have fire insurance because the premium was too high. Levin was not aware if the defendant had insurance on the video store and did not know if he received any insurance proceeds as a result of the fire. According to Levin, the defendant was "more or less" current on his rent, and if any rent was owed, it was only for one month.

¶ 13 Assistant Medical Examiner Nancy Jones testified that Panichkarn and Phophariat died from carbon monoxide poisoning due to smoke inhalation and that soot deposits were found on their nostrils and brains.

¶ 14 The defense presented a stipulation that license plate number GAS 403 was registered with the Secretary of State in the name of Geronia Hopper.

¶ 15 Following the jury's deliberations, the defendant was again found guilty of arson and two counts of first-degree murder. He was sentenced to natural life imprisonment without parole on his murder convictions and to a concurrent seven-year term on his arson conviction. His conviction and sentence were affirmed on direct appeal. See *People v. Harper*, 279 Ill. App. 3d 801 (1996).

¶ 16 In March 1997, the defendant, through counsel, filed a petition for postconviction relief, alleging that he was actually innocent of the crimes based upon the confession of "James Dell." No affidavits or supporting documentation were attached to the petition. While the initial postconviction petition was pending in the trial court, the defendant filed a *pro se* successive petition for postconviction relief, in which he alleged that another witness, Willie Freeman, would prove his actual innocence. He also alleged ineffective assistance of counsel, due process violations, and improper remarks by the prosecutor during closing argument. In separate orders, the trial court summarily dismissed the defendant's post-conviction petitions and this court affirmed. See *People v. Harper*, No. 1-97-3735 (1998) (unpublished order under Supreme Court

Rule 23); *People v. Harper*, No. 1-97-3023 (1999) (unpublished order under Supreme Court Rule 23).

¶ 17 In July 2001, the defendant filed a *pro se* motion to vacate, arguing that, pursuant to *Apprendi v. New Jersey*, 530 U.S. 466 (2000), his sentence was both unconstitutional and void. The trial court dismissed the motion to vacate, which was affirmed on appeal by this court. See *People v. Harper*, No. 1-01-3468 (2002) (unpublished order under Supreme Court Rule 23).

¶ 18 On January 24, 2003, the defendant filed the instant successive postconviction petition, claiming actual innocence. Defense counsel, who was appointed to represent the defendant in advancing his postconviction petition, filed an amended petition asserting actual innocence based upon newly discovered evidence, namely: (1) James Bell's confession to the crime for which the defendant was convicted, and (2) Hingston's recantation of his trial testimony. In support of his successive petition, the defendant attached an affidavit from Bell, dated May 29, 2009, as well as a transcript of Bell's testimony at Brown's postconviction proceedings.[2] In his affidavit, Bell attested that he did not know the defendant; that he believed Brown owned the video store; that Brown owed him over $1,500 in drug money; and that he set fire to the video store in retaliation for Brown's failure to pay the drug debt. Transcripts of Brown's postconviction proceedings reveal that Bell testified that: he was responsible for setting the fire; he bent the burglar bars on the rear gate of the video store and kicked in the back door; he spread gasoline on a mattress inside the video store; he exited through the back door of the store; and he "dumped" the gasoline can and left in his car. Bell further testified that he did not come forward with this

[2] The record reveals that Brown filed a successive postconviction petition and was granted a new trial based upon the testimony of James Bell who stated that he committed the arson. See *People v. Brown*, No. 1-03-2735 (2005) (unpublished order under Supreme Court Rule 23).

information sooner because of the lingering effects of drugs and his fear of receiving the death penalty. He also stated that he had accepted Christianity while serving a sentence in prison on an unrelated matter and that, as a result of his faith, he no longer feared prosecution for the crimes.

¶ 19 The defendant also attached an affidavit by Hingston, the gas station attendant, dated December 3, 2002. Hingston attested that his trial testimony was a lie and he never sold gasoline to anyone in a truck or a van on the morning of the arson. He stated that he told the police officers of this fact, but they informed him about two individuals who confessed to purchasing gasoline from him on that morning. Hingston asserted that the officers threatened him with a fine and a negative report to his boss if he did not identify the individuals they wanted him to identify as having purchased gas. Hingston averred that he cooperated with the officers' request to identify certain individuals from a physical lineup. His affidavit, however, does not state who he identified in the lineup.

¶ 20 Finally, the defendant attached his own affidavit, dated July 23, 2009. In his affidavit, the defendant attested that he confessed to setting the fire because the detectives threatened to charge his mother, who co-owned the video store, with murder. He also stated that he did not know Bell prior to the fire and that, in 1997, while incarcerated at Statesville Correctional Center, he heard a "rumor" about "James Dell" who was also at Statesville Correctional Center, but he never personally talked with him. The defendant asserted that he did not set fire to the video store and never asked anyone to buy gasoline to start a fire. Lastly, the defendant stated that neither he nor his mother collected any insurance money as a result of the fire.

¶ 21 On July 1, 2010, more than seven years after the defendant filed the instant postconviction petition, the trial court granted the State's motion to dismiss the petition. On appeal, this court reversed the trial court's judgment and remanded the matter with instructions to

conduct third-stage proceedings, finding that the defendant made a substantial showing of actual innocence such that he was entitled to an evidentiary hearing. See *People v. Harper*, 2013 IL App (1st) 102181.

¶ 22 On remand, the State filed a motion *in limine* to bar the defendant from calling James Trainum, the defendant's proposed expert in the field of police interrogation tactics and false confessions, as a witness at the evidentiary hearing. The State asserted that Trainum does not qualify as an expert and his proposed testimony would not aid the court in determining whether the defendant met his burden of showing actual innocence.

¶ 23 The defendant opposed the State's motion, arguing that Trainum is a qualified expert and that his testimony would assist the court because a critical issue in the case is whether the defendant's confession was false in light of the interrogation tactics and alleged coercion used by the detectives and ASA Whitehouse. The defendant asserted that Trainum "carefully reviewed the confessions, testimony, and other evidence from the defendant's case and has identified numerous inconsistencies, investigative flaws, and improper police interrogation tactics that were used that undermine the reliability the [the defendant's] confession." Noting that the State primarily relied upon the defendant's confession in convicting him, the defendant maintained that he should be permitted to introduce Trainum's expert testimony to explain why his confession is unreliable.

¶ 24 The trial court granted the State's motion to bar Trainum from testifying as an expert witness at the evidentiary hearing. In so ruling, the court found that Trainum is not a qualified expert, but rather a retired detective who has "taken a false confession in his own career and has set himself up as part of [an] *** industry to giving his opinions on false confessions ***." In addition, the trial court determined that Trainum's testimony would not be relevant to the issue of

actual innocence and that his proposed testimony was not "beyond the common knowledge of ordinary citizens" and, thus, would not aid the trier of fact.

¶ 25 The matter then proceeded to a third-stage evidentiary hearing. Hingston died during the pendency of the defendant's postconviction petition and did not testify at the evidentiary hearing. At that hearing, Bell testified that he was serving a natural life sentence in Statesville Correctional Center for armed robbery and had been so incarcerated for 20 years. Bell claimed that, in 1988, he supported himself by selling cocaine and heroin and that Brown was one of his customers. Bell explained that he sold cocaine to Brown a "[c]ouple times a week" and that Brown eventually accrued a $3,000 drug debt. When Bell confronted Brown about the debt, Brown claimed that his video store business was having difficulty, but he promised to pay Bell as soon as "he start[ed] making money." After waiting for Brown to pay his debt, Bell eventually "got tired" and set the video store on fire.

¶ 26 Specifically, Bell testified that he drove his brown Audi 5000 to the video store sometime between 2 and 4 a.m. and parked his vehicle in the back of the store. He retrieved a gasoline can that was in his vehicle, walked down the alley, and approached the video store's back door. Bell recalled that the store had "cheap" burglar bars that did not "go all the way down to the ground" and that he was able to slide under the bars. He also stated that there was "nothing sophisticated" about the rear door, which "popped" open after he pushed "real hard." He retrieved the gasoline can, which he had set down on the ground, entered the store and began searching for money near the cash register. After unsuccessfully searching for money, Bell testified that he "sprinkled" gas around several rows of videotapes and a mattress near the rear of the store. He ignited the gas with a lighter, exited the store through the rear door, slid under the burglar bars, "dumped" the gasoline can behind the store, and "got out of there."

¶ 27 Bell explained that he waited 10 or 15 years after the crime to confess because it took time for the effects of drugs to dissipate and for his "common sense" to return. He stated that he first talked about his culpability in a prison Bible study group, which made him feel "relieved." Bell stated that he never told anyone outside of prison what happened; he never read any transcripts from the defendant's or Brown's trials; and he knows nothing about those cases. He denied that anyone offered him anything in exchange for his testimony, and he denied testifying in postconviction cases outside of the instant case and Brown's case.

¶ 28 Bell acknowledged he had been convicted of numerous counts of armed robbery and that he was currently serving two natural life sentences in the same prison as Brown. He admitted that he was never convicted of any drug crimes. He also acknowledged his signature on the affidavit in which he confessed to the arson, and that the affidavit had been prepared by investigators working for Brown.

¶ 29 The defendant testified that he and his mother were co-owners of Magic Video store and that Brown worked at the store as a handyman. The defendant stated that, at 12:30 a.m. on May 28, 1988, he met Brown at the store and assigned him to install shelves. The defendant's cousin and uncle, Ford and Harper, were also present. Around 1 a.m., the defendant, Ford, and Harper left the store while Brown continued working. Harper went to the corner store and started drinking with his friends, while the defendant drove Ford to his grandmother's house where they went to sleep. The defendant testified that his grandmother woke him up because his pager kept going off. After returning the page, the defendant learned that his store was on fire. He explained that he walked to the store, approached a police officer at the scene and informed him that Brown was inside the store. The defendant complied with the officer's request that he step away from the building, and he also agreed to go to the police station to assist in the

investigation. The defendant acknowledged that he signed a court-reported statement that was drafted by Detectives Kutz and Fine, along with ASA Whitehouse, but asserted that he was not asked any questions by the investigators before signing the statement.

¶ 30 In addition, the defendant testified that neither he nor his mother had insurance on the store or the videotapes; nor did they collect any insurance money as a result of the fire. Regarding Bell, the defendant testified that he first became aware of him in 2004 or 2005 when he was in Tamms Correctional Center. He did not know Bell in 1988, never saw him in the neighborhood, never talked to him, and never offered him anything in exchange for his testimony in this case. The defendant denied setting fire to the video store on May 28, 1988.

¶ 31 On cross-examination, the defendant acknowledged that he drove a white Ford Bronco with license plate GAS 403, which was registered to his uncle. He also conceded that two boxes of pornographic videotapes were inside his vehicle. He explained, however, that he was going to trade the videotapes with Ed's Video on 79th and Western.

¶ 32 After the defense rested, the Stated called ASA Whitehouse as a witness. ASA Whitehouse testified that he worked in the felony review unit in the Cook County State's Attorney's Office and that he assisted in investigating the fire that occurred during the early morning hours of May 28, 1988, at the Magic Video store. He explained that there were four suspects and the police were looking for a white van or truck with license plate number GAS 403. After the vehicle was located, ASA Whitehouse obtained a search warrant and accompanied the detectives as they performed a search during which two boxes and a plastic bag containing pornographic videotapes were recovered.

¶ 33 ASA Whitehouse testified that he returned to the Area One police station that same morning and learned that the defendant and Ford were already in custody. A third suspect,

Brown, arrived at the police station later in the evening while the fourth suspect, Harper, came to the police station a few days later with an attorney. ASA Whitehouse testified that the defendant, Ford, and Brown each confessed to playing a role in the arson. He also stated that it took several hours to take their statements because he had to wait for a court reporter. According to ASA Whitehouse, he obtained "court-reported" confessions from the defendant and Ford, while Brown gave a handwritten confession because he did not want to wait for the court reporter. ASA Whitehouse testified that all three confessions were given "quickly" and, although the stories were not exact, they "dovetailed and fit" together within the sequence of events. He stated that he has "no doubt" that the statements he obtained were accurate. He also denied that anyone was mistreated or otherwise coerced into giving their confession.

¶ 34 Following closing arguments, the trial court denied the defendant's postconviction petition. The court explained that it found ASA Whitehouse credible and his testimony compelling as to the lack of any coercion employed upon the defendant. It also observed that "[t]his might be one of the fastest confessions in the history of double murders in Chicago" and there was "not enough time to employ any coercion." The court concluded that the defendant gave a "free and voluntary" and truthful admission about his role in this case. The trial court found Hingston's recantation in his affidavit not credible and inherently unreliable. Regarding Bell, the court found his testimony "totally unbelievable" and stated that he has "zero credibility." The court noted that he is serving two terms of natural life imprisonment and is not at risk of obtaining a longer prison sentence or the death penalty for confessing to the arson. Thus, the court stated that "Bell doesn't factor into this case at all." The trial court denied the defendant's postconviction petition and this appeal followed.

¶ 35 On appeal, the defendant contends that he presented newly discovered evidence that was material and not merely cumulative and which was of such a conclusive character that it would probably change the result of his case on retrial, and argues therefore, that the trial court erred in denying his postconviction petition. We disagree.

¶ 36 A postconviction proceeding is not an appeal of the underlying judgment; rather, it is a collateral proceeding where the defendant may challenge a conviction or sentence for violations of his constitutional rights. *People v. Tate*, 2012 IL 112214, ¶ 8. Thus, any issues that were raised and decided on direct appeal are barred by the doctrine of *res judicata*. *Id.* Similarly, issues that could have been presented on direct appeal, but were not, are forfeited. *Id.* The purpose of a postconviction proceeding is to permit inquiry into constitutional issues involved in the original conviction and sentence that were not, and could not have been, adjudicated previously on direct appeal. *People v. Harris*, 206 Ill. 2d 1, 12 (2002).

¶ 37 A postconviction petition brought under the Act (725 ILCS 5/122-1 *et seq.* (West 2002)) is adjudicated in three stages. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). At the first stage, the trial court independently reviews the petition within 90 days of its filing and summarily dismisses the petition if it finds it to be "frivolous or *** patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2002). If the trial court does not dismiss the postconviction petition at the first stage, it advances to the second stage, where counsel is appointed to represent the defendant and the State is allowed to file a responsive pleading. *Edwards*, 197 Ill. 2d at 245-46. A petition will be dismissed at this stage if it fails to make a substantial showing of a constitutional violation. *Id*. at 246. Finally, if such a showing is made, the petition advances to the third stage, where the trial court conducts an evidentiary hearing on its allegations. *Id*.

¶ 38 At a third-stage evidentiary hearing, the burden is on the defendant to make a substantial showing of a deprivation of constitutional rights. *People v. Beaman*, 229 Ill. 2d 56, 71 (2008); *People v. Coleman*, 206 Ill. 2d 261, 277 (2002). The trial court, serving as the finder of fact, must determine witness credibility, weigh the testimony and evidence, and resolve any evidentiary conflicts. *People v. Domagala*, 2013 IL 113688, ¶ 34. We will not reverse the trial court's decision unless it is manifestly erroneous. *Coleman*, 206 Ill. 2d at 277. Manifest error means error that is "clearly evident, plain, and indisputable." *Id.*

¶ 39 As an initial matter, the defendant asserts that the trial court applied the wrong standard in denying his petition. In its oral ruling, the trial court stated that the defendant "did the double murder. I don't have a doubt in my mind. And the defense evidence and petition is insufficient to generate a new trial." The defendant maintains that this heightened standard is inconsistent with the supreme court's holding in *People v. Coleman*, 2013 IL 113307. In *Coleman*, the supreme court reaffirmed its holding in *People v. Washington*, 171 Ill. 2d 475 (1996), which announced the standard for evaluating postconviction claims of actual innocence. In particular, the court held that an actual innocence claim must be based on evidence that is newly discovered, material, not merely cumulative, and "of such a conclusive character that it would probably change the result on retrial." *Coleman*, 2013 IL 113307, ¶ 84 (quoting *Washington*, 171 Ill. 2d at 489).

¶ 40 In this case, while it is true that the trial court stated that it had no doubt that the defendant committed the offenses for which he was convicted, throughout the remainder of its ruling, the court analyzed the testimony and evidence under the *Washington* standard. The court considered whether the evidence was newly discovered, material, noncumulative, and so conclusive that it would probably change the result on retrial. We also note that the trial court is

presumed to know and follow the law absent an affirmative showing in the record to the contrary. *In re N.B.*, 191 Ill. 2d 338, 345 (2000). Here, the language in the trial court's ruling, viewed as a whole, leads us to conclude that it applied the appropriate standard in considering the defendant's actual innocence claim.

¶ 41 Turning to the merits, the parties dispute whether Bell's confession and Hingston's recantation affidavit qualify as newly discovered and material evidence of the defendant's innocence that would likely change the result on retrial. For purposes of this appeal, we assume, without deciding, that Bell's confession and Hingston's recantation are newly discovered and material evidence. We instead focus our analysis on the third requirement—namely, whether the evidence is of such a conclusive character that it would probably change the result on retrial.

¶ 42 Newly discovered evidence is considered to be of a conclusive nature if it raises the probability that, in light of the new evidence, it is more likely than not that no reasonable juror would have convicted the defendant. *People v. Edwards*, 2012 IL 111711, ¶ 40. In determining whether the evidence is so conclusive as to probably change the result on retrial, the court must engage in a balancing test of the evidence before it. *Coleman*, 2013 IL 113307, ¶ 97. This balancing process "is a comprehensive approach and involves credibility determinations that are uniquely appropriate for trial judges to make." *Id.*

¶ 43 In this case, regarding Hingston's affidavit, the trial court considered the statements contained therein and determined that his recantation is inherently unreliable and not credible. See *People v. Morgan*, 212 Ill. 2d 148, 155 (2004) (a witness's recantation of his or her prior trial testimony is generally regarded as inherently unreliable). As a consequence, the court concluded that Hingston's recantation was not of such a conclusive character that it would probably change the result on retrial. Based upon our examination of the record, we cannot conclude that the trial

court erred in finding that Hingston's trial testimony was more credible than the statements contained in his affidavit recanting his trial testimony. Hingston, who was not even an eyewitness to the arson, gave two different versions of events. Ultimately, it was up to the trial court as the trier of fact and the judge of witness credibility to determine which of the following versions to believe.

¶ 44 At trial, in April 1990, Hingston's testimony established that two men in a white truck purchased gas in a red and yellow gasoline can around 5 a.m. on May 28, 1988. He recalled that one of the men "fumbled around," spilled gas on the ground, and asked for paper towels, which Hingston gave to the man. Hingston also testified that the other man remained in the truck and urged the man who purchased gas to hurry. Hingston's testimony in this regard was corroborated by other evidence presented at trial. For example, Sid Malone similarly testified that he observed two men exit a white truck and walk toward the video store, with one of the men carrying a can of gasoline. Hingston's description of the gasoline can as red and yellow and his testimony that the man had a towel was corroborated by photographs taken at the scene of the fire, depicting a red and yellow gasoline can with a white towel wrapped around the handle, lying on the ground behind the video store. Hingston's trial testimony was also consistent with the defendant's court-reported statement to ASA Whitehouse that Ford and Harper used his white truck to purchase gasoline.

¶ 45 Nonetheless, in an affidavit dated December 3, 2002, Hingston recanted his trial testimony. In his affidavit, Hingston reaffirmed that he was working as a gas station attendant on May 28, 1988, but this time he claimed that he did not sell gas to anyone driving a truck or van. Hingston averred that the police pressured him into identifying "the individuals they wanted

[him] to identify." He stated that he "cooperated with the police and did whatever they told [him] to [do], because *** [he] would be in trouble if [he] didn't."

¶ 46 We note, however, that Hingston never identified the two men who purchased gas from him in the early morning hours of May 28, 1988. Although Hingston attests that he went to the police station and identified the two men in a physical lineup, this evidence was never presented at the defendant's trial and was never considered by the trier of fact. Accordingly, Hingston's affidavit is not a "recantation" of any identification testimony presented at trial.

¶ 47 Moreover, to the extent the defendant argues that Hingston's affidavit buttresses his claim that his confession was the product of police coercion, the trial court specifically found that ASA Whitehouse's testimony that there was no coercion to be credible and compelling. It, therefore, concluded that there is no credible evidence that the defendant was coerced into giving a false confession. Credibility determinations of this kind were for the trial court to make, and we have no basis in the record before us to second-guess its judgment. See *Coleman*, 2013 IL 113307, ¶ 97.

¶ 48 In sum, given the role of the trial court as trier of fact and based upon the evidence presented at the evidentiary hearing, we cannot say that the court's determination that Hingston's recantation is unreliable and not credible is manifestly erroneous. Based upon our examination of the record, we believe that the trial court, as the trier of fact, could have reasonably determined that Hingston's trial testimony that two men in a white truck purchased gas in a red and yellow gasoline can was truthful and that the subsequent statements in his affidavit recanting his trial testimony were not truthful. See *People v. Brooks*, 187 Ill. 2d 91, 133 (1999).

¶ 49 We reach a similar conclusion with respect to Bell's testimony. At the evidentiary hearing, Bell testified that he parked his brown Audi behind the video store sometime between 2

and 4 a.m., retrieved a red and yellow gas can from his vehicle, and broke into the video store by sliding under the burglar bars and pushing the door open. Once inside, he "sprinkled" gas on the videotapes and a mattress, ignited the gas, exited the store through the rear door, slid under the burglar bars, "dumped" the gasoline can behind the store, and "got out of there." Bell explained that he acted alone in setting the fire and he committed the crime because he believed Brown owned the store and he wanted to retaliate against him for failing to pay his $3,000 drug debt. At the conclusion of the evidentiary hearing, the trial court observed that Bell is serving natural life in prison and is not at risk of obtaining a longer sentence or the death penalty. The court concluded that his testimony was "totally unbelievable," has "zero credibility," and "doesn't factor into this case at all."

¶ 50 In challenging the trial court's credibility determination, the defendant asserts that Bell's testimony is consistent with a number of pieces of physical evidence, including: the timing of the fire; the use of gasoline as an accelerant to start the fire; the presence of a mattress in the rear of the store; evidence that the burglar bars covering the rear door were bent; and evidence that a red and yellow gasoline can was recovered behind the building. The defendant also asserts that Bell's testimony is credible because he had a motive to set the fire while the defendant did not. The defendant's arguments, however, are nothing more than a request for this court to reweigh the evidence and make a credibility determination—something we cannot do. See *Coleman*, 2013 IL 113307, ¶ 97 ("credibility determinations *** are uniquely appropriate for trial judges to make"). In any case, while it is true that Bell's version of events fits within the evidence presented at the defendant's trial, we note that the evidence presented at trial is also consistent with the defendant's court-reported confession. As a result, this evidence does not demonstrate that Bell's testimony was any more credible than the defendant's court-reported confession. See

People v. Pintos, 133 Ill. 2d 286, 291 (1989) (the State need not disprove every reasonable hypothesis of innocence). Moreover, contrary to the defendant's assertion, the evidence presented at trial established that he, in fact, had a motive to start the fire. In his confession, the defendant admitted he wanted to start the fire because his video store was not profitable and he believed he could collect insurance money for the resulting damage to the store. The fact the State presented no evidence that the video store was insured is of no consequence.

¶ 51 The defendant relies on *People v. Molstad*, 101 Ill. 2d 128, 135-36 (1984), and *People v. Ortiz*, 235 Ill. 2d 319, 325-26 (2009), in support of his argument that he is entitled to a new trial based upon the newly discovered evidence. We believe that *Molstad* and *Ortiz* are distinguishable from the instant case because the trial court in those cases did not assess the credibility of the testimony provided by the witnesses. Nor did the State in *Molstad* and *Ortiz* discredit the newly discovered evidence. Here, however, the trial court considered the credibility of Bell and the statements contained in Hingston's affidavit and determined that a new trial based upon the newly discovered evidence was not warranted.

¶ 52 Ultimately, the defendant's postconviction petition turned on the credibility of Bell's confession and Hingston's recantation. Here, as in every case of this kind, it was for the trial court to assess the credibility of the testimony after having observed the demeanor of the witnesses. See *Morgan*, 212 Ill. 2d at 165. The trial court properly considered the record, listened to all of the testimony, and watched how the witnesses reacted when questioned and cross-examined. Under these circumstances, we cannot say that the trial court committed a clearly evident, plain, or indisputable error in finding that Bell's testimony and Hingston's recantation affidavit were not credible and, therefore, not of such a conclusive character that the

result on retrial would be different. Accordingly, the trial court's denial of the defendant's postconviction petition was not manifestly erroneous.

¶ 53 Finally, the defendant contends that the trial court abused its discretion in granting the State's motion *in limine* to preclude James Trainum, an expert in police interrogation tactics and false confessions, from testifying at the evidentiary hearing.

¶ 54 The trial court has wide discretion in limiting the type of evidence that will be admitted in a postconviction evidentiary hearing. *Id*. at 162. A trial court's decision to exclude expert testimony is reviewed for an abuse of discretion. *People v. Enis*, 139 Ill. 2d 264, 289 (1990). An abuse of discretion will be found where the trial court's decision is arbitrary, fanciful, or unreasonable, or where no reasonable person would agree with the decision. *People v. Baez*, 241 Ill. 2d 44, 106 (2011).

¶ 55 As noted above, issues that were raised and decided on direct appeal are barred from consideration in a postconviction proceeding by the doctrine of *res judicata*. *Tate*, 2012 IL 112214, ¶ 8. As the State correctly notes, this court addressed the voluntariness of the defendant's confession on direct appeal and held that the trial court did not err in finding the defendant's confession voluntary. See *Brown*, 253 Ill. App. 3d at 182-83 ("There is absolutely no evidence that [the] defendant was physically or mentally coerced into giving the statement."). Consequently, the defendant's claim that his confession was the result of coercion is barred by *res judicata*. See *People v. Patterson*, 192 Ill. 2d 93, 139 (2000).

¶ 56 The defendant argues, however, that in our previous opinion reversing the second-stage dismissal of his post-conviction petition, we rejected the State's argument that he was precluded from raising a claim of police coercion where he has come forth with newly discovered evidence. *Harper*, 2013 IL App (1st) 102181, ¶ 52. He argues, therefore, that he should have been

permitted to introduce Trainum's expert opinion in support of his police-coercion claims. We disagree.

¶ 57 Our supreme court has stated that the doctrine of *res judicata* can be relaxed where a defendant comes forth with newly discovered evidence. See *Patterson*, 192 Ill. 2d at 139. Newly discovered evidence is evidence that was unavailable at trial and could not have been discovered sooner through due diligence. *People v. Harris*, 206 Ill. 2d 293, 301 (2002). Here, unlike Hingston's recantation and Bell's confession, the expert testimony of Trainum does not qualify as newly discovered evidence. Rather, Trainum's opinion regarding the reliability of the defendant's confession is based upon his review of the defendant's court-reported confession, police reports, and the testimony presented at the defendant's first and second trials. Since the evidence presented at both trials established the same set of facts, Trainum's opinions are based on facts that were known to the defendant prior to the second trial. See *People v. Jones*, 399 Ill. App. 3d 341, 364 (2010) ("evidence is not newly discovered when it presents facts already known to a defendant at or prior to trial"). In other words, since Trainum's opinions do not rest on any evidence that was not available to the defendant at or prior to the second trial, his expert opinion does not qualify as newly discovered evidence, and the defendant cannot assert an exception to *res judicata*. *Patterson*, 192 Ill. 2d at 140. As a consequence, we find no abuse of discretion in the trial court's decision to bar Trainum's testimony at the third-stage evidentiary hearing on the defendant's petition for postconviction relief.

¶ 58 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 59 Affirmed.