2021 IL App (2d) 180368-U
No. 2-18-0368
Order filed February 4, 2021

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. LEMAR H. MOORE, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 01-CF-2150 Honorable Mark L. Levitt, Judge, Presiding.

JUSTICE BRENNAN delivered the judgment of the court.
Justices McLaren and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The postconviction trial court's ruling, following a third-stage evidentiary hearing on defendant's successive postconviction petition, that defendant failed to establish that he was entitled to a new trial based upon a claim of actual innocence was not manifestly erroneous. Thus, we affirmed the trial court's denial of postconviction relief.

¶ 2 Defendant, Lemar H. Moore, appeals from the trial court's denial of his amended supplemental successive postconviction petition following a third-stage evidentiary hearing on his claim of newly discovered evidence of actual innocence. For the reasons set forth below, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Following a jury trial, defendant was found guilty of first-degree murder (see 720 ILCS 5/9-1(a)(1) (West 2000)) and sentenced to 50 years' imprisonment for the shooting death of Johnny Legaretta. We detailed the facts and procedural history of this case at length in our opinion on direct appeal (see *People v. Moore*, 343 Ill. App. 3d 331 (2003)), and in our Rule 23 Order affirming the dismissal of defendant's first postconviction petition (see *People v. Moore*, No. 2-07-0698 (July 15, 2009) (unpublished order under Supreme Court Rule 23)). We recount the information necessary to place into context defendant's arguments in this appeal.

¶ 5 A. Trial

¶ 6 The evidence at trial established that the victim died from three gunshots fired at close range from defendant's gun. This occurred on July 2, 2001, during a fistfight between the victim and defendant after defendant accused the victim of stealing a gold chain from Venus Anderson—defendant's mother and the victim's former legal guardian with whom defendant and the victim had lived.

¶ 7 Stacey Pitts, the victim's friend, witnessed the event. She testified that as she and the victim were walking down McAlister Street toward Belvidere Road in Waukegan, a blue car approached, and the passenger yelled, "Where is my mother's chain?" The victim responded, "[G]o home and look for it." The car pulled into the parking lot of a nearby grocery store. The driver went inside the store, and the passenger, identified as defendant, ran toward Pitts and the victim while repeatedly inquiring as to the location of the gold chain. The victim attempted to walk past defendant, and defendant punched him in the face twice. The victim handed a notebook he was holding to Pitts, who told the victim not to fight defendant. The victim responded, "No it's fun, it's fun."

¶ 8 Pitts testified that as the victim walked back toward defendant, defendant punched him a third time. The victim struck defendant at least four times. Pitts testified that she saw a handgun tucked in the right side of defendant's waistband. Defendant showed the gun to the victim, and the victim asked whether defendant was threatening him. However, as defendant and the victim argued, Pitts turned her head momentarily just as she heard a loud gunshot. Pitts turned back and saw that the victim and defendant were still arguing and fighting. The two men got closer to one another, and Pitts heard a second gunshot. Pitts recalled that defendant held the gun and that the victim never attempted to seize it. The victim leaned against the fence behind him, gasped for air, and lay on his back. Defendant ran to the blue car; the car sped away. Pitts ran to the grocery store and spoke to the police on the telephone. Pitts identified the driver as Ronald Harris.

¶ 9 George Callison testified that he and his wife, Shirley Callison, were driving along Belvidere Road and saw two men in a fistfight on the sidewalk. The victim was swinging his arms out from his sides and was not making contact. George saw defendant, who was "literally up against" the victim, strike the victim with a left-hand uppercut. The victim fell against a fence, slid to his knees, and bled from his chest. George did not hear gunshots and thought the victim had been stabbed. Then, as defendant ran across the street, their car almost hit defendant. Shirley testified that she saw defendant run across the street, in the direction of their car, holding something in his waistband. She could see a bulge but could not make out what it was.

¶ 10 The only other eyewitness testimony at trial was from the owner of the grocery store, Juan Marban. Marban testified that he was repairing a light in the store's entrance at the time of the altercation. A blue car pulled up; a man identified as defendant exited the car and walked toward two people across the street. The driver entered the store, stood behind Marban, and stared outside. Marban testified that "everything happened at once." He heard two gunshots and saw defendant

holding a gun and covering his face. The man standing behind Marban said, "Jesus," exited the store, and drove away with defendant. Marban called 911 and handed the phone to Pitts who had entered the store. Marban testified that he did not see defendant and the victim punching each other. He believed that the two men were standing four feet apart when the shots were fired, but Marban acknowledged that he told a police officer that he asked the man in the store what had happened.

¶ 11 Subsequent to his arrest, defendant agreed to assist the police in locating the gun used in the shooting. The gun was recovered from the bottom of a ravine located next to where the getaway car was parked. Testimony regarding the autopsy established that the victim suffered three gunshot wounds that formed a triangle near the upper center part of his chest—any of which could have killed the victim. The trajectory of each bullet would have been consistent with the victim reaching with his right hand and leaning forward when he was shot. A forensic scientist testified that that the victim was shot at close range, once from approximately one foot away and twice from farther away. The closest shot could have been fired from six inches away. A trigger-pull test disclosed that the gun was "relatively difficult to fire." Namely, a single-action shot, where the firearm is cocked manually before firing, required 4.5 pounds of force; a double-action shot, where the firearm is not cocked, required at least 16 pounds. However, the combined force of pulling the gun barrel in one direction and pulling the trigger in the opposite direction could make it easier to discharge the weapon.

¶ 12 The trial court declined defendant's proposed jury instructions on (1) second-degree murder based on the provocation of mutual combat and (2) self-defense. Nonetheless, the jury was instructed on second-degree murder based on an unreasonable belief in the need for self-defense, as the State did not object to this instruction. The jury found defendant guilty of first-degree

murder, and defendant was sentenced to 50 years' imprisonment. The trial court denied defendant's posttrial motions.

¶ 13 B. Direct Appeal

¶ 14 On direct appeal, defendant challenged, *inter alia*, the trial court's rulings on his proposed jury instructions. *Moore*, 343 Ill. App. 3d at 338-41. We held that the trial court did not abuse its discretion in declining to instruct the jury on second-degree murder based on the provocation of mutual combat because the totality of the evidence indicated that defendant was the aggressor, used excessive force under the circumstances, and fought with the victim on unequal terms. *Id.* at 339-40. Defendant instigated the incident by confronting the victim and accusing him of theft. *Id.* at 340. Although the victim fought back with his fists, defendant escalated the situation by brandishing a gun and firing three shots into the victim's chest. *Id.* There was no evidence that the victim attempted to grab the gun when he saw it in defendant's waistband, defendant was three inches taller and 20 to 30 pounds heavier than the victim, and there was no evidence that the victim was armed or had a violent history. *Id.* Pitts's testimony indicated that the victim willingly entered the fistfight; however, nothing suggested that the victim would have done so if he had known that defendant would draw a gun. *Id.*

¶ 15 We also held that the trial court did not abuse its discretion in declining to instruct the jury on self-defense because there was no evidence that defendant acted under an objectively reasonable belief that the threat the victim presented required the use of a gun. *Id.* at 341. Nothing in the record suggested that the victim was armed or would have used deadly force during the altercation, and no one testified that the victim attempted to seize the gun. *Id.*

¶ 16 Moreover, we pointed out that defendant was the aggressor because he instigated and escalated the conflict. *Id.* And, in addition to the lack of an objective belief in the need to use the

gun, there was no evidence that defendant actually and subjectively believed that the victim was armed or would have used deadly force during the altercation. *Id.* Thus, regarding the instruction for second-degree murder based on an unreasonable belief in the need for self-defense that the jury *did* receive, we noted, "[b]ecause a finding of even an unreasonable use of self-defense still require[d] evidence that the defendant was not the aggressor and subjectively and actually believed that the force applied was necessary [citation], the dearth of evidence on these elements suggest[ed] that the trial court would not have abused its discretion if it had declined to instruct the jury on second-degree murder." *Id.* Accordingly, we affirmed defendant's conviction and sentence. *Id.* at 348.

¶ 17 C. Initial Postconviction Proceedings

¶ 18 In 2006, defendant filed a *pro se* postconviction petition, alleging that trial counsel was ineffective for (1) failing to adopt defendant's *pro se* motion to suppress his postarrest statements, (2) failing to present available exculpatory evidence to support his theory of self-defense and second-degree murder based on the provocation of mutual combat, and (3) deceiving defendant into not testifying by telling him that Pitts's testimony provided sufficient evidence to obtain the proposed jury instructions. Defendant submitted supporting affidavits detailing his confession and the advice not to testify. The trial court found that defendant raised a gist of a constitutional violation and appointed postconviction counsel.

¶ 19 Counsel filed an amended postconviction petition, alleging that trial counsel was ineffective for (1) failing to address the *pro se* motion to suppress, (2) failing to present available exculpatory evidence to support the theory of second-degree murder, and (3) advising defendant not to testify. The amended petition also alleged ineffective assistance of appellate counsel for failing to raise the issues on direct appeal. According to the amended petition, trial counsel told

the jury in his opening statement that there would be evidence that defendant and the victim engaged in a struggle over control of the gun after both parties reached for the gun and also told the jury that Harris would testify that he asked defendant to hold his gun earlier that day because Harris was on probation. At the hearing on the State's motion to dismiss the amended postconviction petition, postconviction counsel advised that Harris was available at the time of trial but that she had been unsuccessful in attempting to locate and obtain an affidavit from Harris in support of postconviction relief.[1] The trial court granted the State's motion to dismiss, finding no substantial showing of a constitutional violation.

¶ 20 We affirmed the dismissal of the petition on grounds that even if defendant's claims were true, none of them amounted to ineffective assistance or prejudicial error. *Moore*, No. 2-07-0698.[2] Initially, we pointed out that, contrary to defendant's allegations, trial counsel never told the jury that Harris or any other witness would testify that the victim reached for the gun or that the gun fired while the two men were fighting over control of it. *Id.* at 9. Regarding Harris, trial counsel told the jury only that Harris would testify as to how and why defendant came into possession of the gun—testimony that "would not have materially helped defendant's case." *Id.* at 9-10. We pointed out that such testimony would not have been exculpatory because it could not have refuted what the evidence showed to be defendant's mental state during his encounter with the victim. *Id.*

[1] The supplemental record defendant filed in this appeal contains a signed two-page affidavit from postconviction counsel regarding her unsuccessful attempts to locate Harris. However, the original record contained only the first page of this affidavit.

[2] The ineffective assistance claims pertaining to the *pro se* motion to suppress were not raised on appeal from the dismissal of the postconviction petition.

at 10. We also stated that not offering Harris's testimony was likely a strategic decision, given the testimony that defendant was carrying the gun before the fight ensued. *Id.*

¶ 21 Moreover, we reasoned, even if trial counsel had introduced testimony from defendant or Harris that the victim reached for and struggled with defendant over the gun, it would not have changed or mitigated the evidence that defendant both instigated and elevated the conflict. *Id.* at 11. Accordingly, as there was no reasonable probability that the outcome of the trial would have been different had defendant testified, we likewise held that the purported erroneous advice not to testify would not have prejudiced defendant. *Id.* at 12. In light of our holding, we also concluded that defendant's ineffective assistance of appellate counsel claim would not have succeeded. *Id.* at 14.

¶ 22 D. Successive Postconviction Proceedings

¶ 23 The successive postconviction proceedings at the heart of this appeal were initiated approximately four years later in 2013. We turn to those proceedings.

¶ 24 1. Successive Postconviction Petitions

¶ 25 In April 2013, defendant filed a *pro se* "Petition for Post-Conviction Relief Motion for leave to file successive Post-Conviction Petition Relief." He alleged misconduct by the Waukegan detectives who procured his postarrest statements and systematic misconduct by the Waukegan police in procuring statements from arrestees. Defendant also maintained that trial counsel was ineffective for failing to pursue a motion to suppress his statements. Defendant subsequently filed a "Motion to Correct," separately seeking leave to file the successive petition. Meanwhile, however, the case had been assigned for a determination of whether to grant leave to file the successive postconviction petition. Nevertheless, the record reflects that there was never an order

entered on the preliminary issue of whether to grant defendant leave to file a successive postconviction petition.

¶ 26 In September 2013, defendant filed a "Motion for Status," and in October 2013, he wrote a letter to the circuit clerk's office inquiring as to the status of his petition. After receiving no response, in December 2013, defendant filed a motion requesting that his case proceed to the second stage of postconviction proceedings. The record reflects that defendant's case was docketed and called for status but repeatedly continued.

¶ 27 On April 30, 2014, defendant filed a motion for leave to supplement his *pro se* successive postconviction petition with a supporting affidavit from Harris. Defendant alleged that he received Harris's affidavit on March 21, 2014. Harris attested that he had witnessed the victim reach for defendant's gun during the fight and saw them struggle over control of the gun. Harris further attested that his postarrest statement to the police that he had not witnessed the shooting was a lie and coerced by police brutality.

¶ 28 Approximately one year later, on March 6, 2015, the trial court appointed counsel to represent defendant. On August 12, 2016, counsel filed a supplemental successive postconviction, asserting that defendant was denied the effective assistance of trial counsel due to counsel's failure to move to suppress defendant's statements and exclude the gun and counsel's failure to call Harris to testify. The supplemental successive postconviction petition further asserted that appointed counsel in the initial postconviction proceedings failed to make reasonable efforts to locate Harris.

¶ 29 On March 21, 2017, counsel filed an amended supplemental successive postconviction petition, incorporating the previously raised allegations and adding a claim of newly discovered evidence of actual innocence based upon an affidavit from Marshall Johnson that was notarized on January 19, 2017, according to the affidavit. On the day of the murder, July 2, 2001, Johnson

was 10 years and 9 months old. Johnson attested that on this date, when his aunt's boyfriend, Lamar Johnson (whom he referred to as "Uncle Chop"), was driving him to a recreation center in Waukegan off of Belvidere Road near McAlister Street, he witnessed the fight between defendant and the victim. He knew defendant because defendant's younger brother was his friend, and he knew the victim because the victim had lived with defendant's mother. Johnson attested that, during the course of the fight, he saw the victim reach for something in defendant's waistband and then saw the two men struggling over a gun and heard two gunshots. Johnson's uncle tried to follow the getaway car but was blocked by a car containing "an older white couple." Johnson further attested that his uncle instructed him not to say anything about what he had witnessed due to concern about Johnson's youth and well-being.

¶ 30 In further support of the petition, counsel submitted as exhibits the statements that the Callisons gave to the police after the shooting in which they referred to a car behind them and described the individuals in the front seat as two black males. George described the individuals as being in their late teens or early twenties; Shirley described them as "younger looking *** boys." Counsel also submitted a police report summarizing a July 26, 2001, interview with Johnson's uncle and the uncle's handwritten statement in which Johnson's uncle recounted that he had driven past the scene and witnessed an argument where a man grabbed and shot the victim. Counsel asserted that the uncle's statement was never tendered to the defense and amounted to a *Brady* violation.

¶ 31 The State filed a motion to dismiss the amended supplemental successive postconviction petition. The trial court denied the motion to dismiss; the State answered the petition; and the case proceeded to an evidentiary hearing.

¶ 32 2. Evidentiary Hearing

¶ 33 The evidentiary hearing commenced on March 9, 2018. The defense called three witnesses: Harris, Johnson, and defendant.

¶ 34 Harris testified that he and defendant are cousins. At the time of his testimony, Harris was incarcerated for aggravated domestic battery. On the day of the murder, Harris was 19 years old. He and defendant were driving around that day but not looking for the victim. Defendant had a gun because Harris asked him to hold it for him. Defendant and Harris saw the victim twice that day. The second time they saw the victim, defendant exited the car and said, "Let me go holler at him." At that time, Harris exited the car and went into a grocery store.

¶ 35 While Harris was in the back of the store by the coolers, the store owner told Harris that his friend was fighting outside. Harris testified that he did not see the beginning of the fight. However, he saw defendant "lift up his shirt," the victim "go for" the gun in defendant's waistband, and a 10 to 15-second struggle over the gun before the victim was shot. According to Harris, the victim "kept on hitting" defendant until he was shot again and then "just fell." Harris acknowledged his postarrest statements to the police in which he had maintained that he did not witness the shooting. Harris also acknowledged that he pled guilty to concealing or aiding a fugitive and received a 30-month sentence in exchange for his agreement to testify against defendant. However, the state never called him as a witness.

¶ 36 Johnson testified next at the evidentiary hearing. He grew up in Waukegan and, as a boy, was friends with defendant's younger brother, and their mothers were friends. Johnson was almost 11 years old on the day of the murder and described himself as a "medium size, heavy set" child. At the time of his testimony, Johnson was incarcerated for first-degree murder. Johnson had been incarcerated at Menard Correctional Center (Menard) from 2011 until early February 2017 (when he was transferred to another facility). In December 2016, he was moved from Menard's west

house to its east house. While on the gallery in the east house, he heard someone calling for an "Omar" from Waukegan. He did not know anyone named "Omar" but was interested in knowing who in Menard was from Waukegan.

¶ 37 Johnson testified that shortly thereafter, in early January 2017, Johnson was in the prison yard and recognized defendant, whom he knew as "Lee J." Johnson said, "You Venus's son." Defendant said, "ya, ya." Johnson reminded defendant that he used to play at defendant's house with defendant's younger brother. He and defendant conversed about the reason for defendant's incarceration. Defendant said that he had been convicted of killing his brother. Johnson asked "who," and defendant said "Johnny." Johnson responded, "What? No—how much time they give you?" Johnson testified that he expressed shock upon learning the length of defendant's sentence and told defendant that he was there with his uncle when the events took place.

¶ 38 Johnson testified as to what he witnessed on July 2, 2001—the day of the murder. He and his uncle were driving down McAlister Street in Waukegan toward the recreation center when Johnson saw two men fighting. Johnson immediately recognized defendant. Johnson did not know the victim but had seen him at defendant's mother's house. Johnson saw the victim punch defendant and then saw both men swinging wildly at each other. He saw the victim "go for Lee J's waist," at which point Johnson saw the gun as the victim pulled the gun from defendant's waist. Defendant grabbed the victim's hand, and the two of them struggled over the gun. Johnson heard two gunshots, and then "everything came to a stop." The victim froze with the gun in his hand, dropped the gun, and fell to the ground. Johnson acknowledged that he did not know what happened before he and his uncle arrived at the scene.

¶ 39 Johnson saw defendant run to a car that Johnson's uncle identified as being driven by "Pig," which was Harris's nickname. Johnson did not see whether defendant picked up anything before

running to the car. Johnson testified that he did not see who had the gun while defendant and the victim were struggling over it. However, he maintained that he saw the victim with the gun in his hand, holding it low, after defendant ran to the getaway car. Johnson's uncle then circled around the block but was not able to follow the getaway car because a car in front of them, with a couple inside he described as white, blocked their path. Johnson's uncle told him not to tell anyone what he had seen. The parties stipulated that Johnson's uncle died in 2016.

¶ 40 Johnson testified that he was coming forward now because he felt that it was the right thing to do and that he wrote the affidavit for defendant of his own volition. He denied that defendant told him the content of police reports, that Johnson's uncle had spoken to the police, or that there was a white couple in the car at the scene. Johnson testified that prior to seeing defendant at the Menard prison yard, he had not had any contact with defendant. Despite seeing defendant two more times at Menard, they did not talk about the case. Johnson also testified that he had not spoken to anyone, including the police, investigators, or defense counsel, about the events of July 2, 2001.

¶ 41 Defendant's own testimony at the evidentiary hearing largely involved his claims of police misconduct in procuring his postarrest statements and ineffective assistance of trial counsel for failure to pursue suppression of the statements. Regarding Johnson's account, defendant testified that he was unaware that Johnson had witnessed the events until he spoke with Johnson at Menard. Defendant also testified that in October 2016, he submitted a Freedom of Information Act request for the police reports from his case because his postconviction counsel told him that she was prohibited from providing the reports to him. Defendant received the police reports sometime in mid to late January 2017. The police reports included the statements taken from the Callisons and Johnson's uncle.

¶ 42 The State called as a rebuttal witness at the evidentiary hearing defendant's trial counsel, Christopher Lombardo. Lombardo testified that he had no independent recollection of each specific item of discovery he received in defendant's case but was aware that defendant had made several oral and written statements to detectives. He and his co-counsel had declined to adopt defendant's *pro se* suppression motion. His recollection was that the content of some of defendant's statements demonstrated that defendant had not acted with an intent to take a life and that he thought he could have used the statements to argue self-defense or a lesser offense. However, the statements were never admitted at trial.

¶ 43 Following arguments at the close of the evidentiary hearing, the case was continued for ruling.

¶ 44 3. Trial Court's Ruling

¶ 45 On May 10, 2018, the trial court denied defendant's amended supplemental successive postconviction petition. The trial court stated that it had considered the entire file, the common law record, all pleadings, all arguments and materials in support of and in opposition to postconviction relief, and all evidence adduced during the evidentiary hearing. The trial court recounted the "essential facts" underlying the case. Namely, there was an altercation between defendant and the victim in which defendant was the "initial aggressor having punched [the victim] in the face two times as [the victim] attempted to leave a confrontation." The trial court found nothing to undermine defendant's contention that the victim reengaged and that both men engaged in a fist fight. However, the trial court noted: "[I]n my view what occurred next is clear and unequivocal. It was Mr. Moore that pulled a gun. A witness at the scene testified at the trial [in] this case and all of the evidence I have seen support[s] the conclusion that the gun was discharged several times with Mr. Moore running away."

¶ 46 The trial court rejected the ineffective assistance of counsel claims as conclusory and found that defendant received "completely effective assistance of counsel." Indeed, the trial court noted, after hearing defendant's testimony and evaluating his credibility, it was "quite certain that [defendant] would not have succeeded" in suppressing his statements or the gun. The trial court also found that the failure to call Harris as a witness was "of very little import" as his testimony added nothing to the analysis of whether defendant was entitled to a self-defense instruction. Rather, having heard Harris testify and evaluating the "incredibility" of his testimony, the trial court determined that it was an exercise in sound trial strategy for defense counsel not to call Harris as a witness.

¶ 47 The trial court also rejected defendant's claim that Johnson's testimony constituted newly discovered evidence of actual innocence. Noting that it had "looked at and evaluated the testimony" of Johnson and "considering all of the information," the trial court found that Johnson's testimony "simply is not true." His testimony and the "underlying way in which the witness was allegedly 'discovered' I find [to] have been totally incredible." Thus, "[e]ven assuming that the witness were to testify, the analysis would not change." The trial court further stated: "[H]aving heard all of the evidence that was proffered, I would certainly say that I think it's fair to say that the account that was given here by [Johnson] was farcical and in my view, fabricated in its entirety." The trial court did not "believe anything that he had to say here and in this courtroom." Moreover, the trial court reasoned that there was "nothing about it that would have in any way altered the analysis" in ruling on defendant's proposed jury instructions at trial, and "[t]here [was] nothing in anything that he said that in my view would have changed any of the calculus."

¶ 48 The trial court concluded:

> "It's not surprising to me that witnesses tried to alter their testimony to comport

with the facts as they know them to be. It's not surprising to me that they try to craft stories that will give them a result they hope to achieve.

What is surprising to me is that given the amount of time they had to concoct the stories, how poorly of a job they actually wound up doing. It is for all these reasons that I have concluded, and in fairness to all that having duly considered all of the matters that were appropriately raised by the defendant taking into consideration all the requests for relief in his amended supplemental postconviction I find there is nothing in the record to merit the relief sought. His petition for supplemental postconviction relief is, therefore, and shall be denied."

¶ 49 The trial court entered a written order denying defendant postconviction relief for the reasons stated on the record. Defendant timely appealed.

¶ 50 II. ANALYSIS

¶ 51 On appeal, defendant challenges the trial court's finding that he failed to establish that he was entitled to a new trial based on his actual innocence claim. Specifically, he challenges the trial court's findings regarding the lack of credibility and conclusiveness of Johnson's testimony. Defendant does not raise an argument with respect to any of the other claims raised during the course of the successive postconviction proceedings and does not challenge the trial court's findings with respect to the other testimony presented at the evidentiary hearing.

¶ 52 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)) provides a means by which a criminal defendant may assert a claim for a substantial denial of his or her constitutional rights at trial. *People v. Pendleton*, 223 Ill. 2d 458, 471-72 (2006). The Act sets forth a three-stage process for the adjudication of postconviction petitions. *Id.* Petitions that are not summarily dismissed at first-stage proceedings advance to the second stage where the trial court

may appoint counsel who then has the opportunity to "shape the petitioner's claims into the appropriate legal form." *People v. Turner*, 187 Ill. 2d 406, 417 (1999). If the State is unsuccessful in moving to dismiss the petition at the second stage, then the cause advances to a third-stage evidentiary hearing. *Pendleton*, 223 Ill. 2d 458, 472. At the third-stage evidentiary hearing, the defendant must show by a preponderance of the evidence a substantial violation of a constitutional right. *People v. Coleman*, 2013 IL 113307, ¶ 92. The trial court, as the finder of fact at the hearing, makes credibility determinations and weighs the evidence. *People v. Reed*, 2020 IL 124940, ¶ 51. Accordingly, we review a trial court's ruling following a third-stage evidentiary hearing for manifest error. *Id.* Manifest error is an error that is "clearly evident, plain, and indisputable." (Internal quotation marks and citations omitted.) *Id.* "Thus, a decision is manifestly erroneous when the opposite conclusion is clearly evident." *Coleman*, 2013 IL 113307, ¶ 98.

¶ 53 Preliminarily, although not addressed by the parties, we point out that the Act contemplates only one postconviction proceeding. *People v. Robinson*, 2020 IL 123849, ¶ 42 (citing *People v. Edwards*, 2012 IL 111711, ¶ 22). Thus, a defendant must obtain leave of court to file a successive postconviction petition. *Id.* ¶ 43 (citing *Edwards*, 2012 IL 111711, ¶ 24). The bar against successive postconviction proceedings will be relaxed where a defendant asserts a fundamental miscarriage of justice based on actual innocence or establishes cause and prejudice for failure to assert the claim earlier. *Id.* ¶ 42 (citing *Edwards*, 2012 IL 111711, ¶¶ 22-23).

¶ 54 Here, the record demonstrates that the trial court never explicitly ruled on whether to grant defendant leave to file a successive postconviction petition (or whether to grant defendant's motion for leave to supplement the successive petition). Nevertheless, the State never objected, and the lack of an affirmative ruling on leave to file did not preclude the trial court's ultimate consideration of the successive postconviction petition. *Cf. People v. Tidwell*, 236 Ill. 2d 150, 161 (2010)

(recognizing that the trial court has the authority to consider a successive postconviction petition even in the absence of a separate motion seeking leave to file it). Accordingly, the ruling for our review is the trial court's denial of the amended supplemental successive postconviction petition following the third-stage evidentiary hearing. The trial court found in relevant part that defendant failed to establish that he was entitled to a new trial based on his claim of newly discovered evidence of actual innocence presented by Johnson. We review that determination for manifest error. See *Reed*, 2020 IL 124940, ¶ 51.

¶ 55 To establish a claim of actual innocence, the evidence must be: (1) newly discovered; (2) material and not merely cumulative; and (3) of such conclusive character that it would probably change the result on retrial. *Robinson*, 2020 IL 123849, ¶ 47 (citing *People v. Edwards*, 2012 IL 111711, ¶ 32). The State does not dispute that Johnson's testimony was newly discovered, material, and not merely cumulative. Rather, the arguments on appeal center around the trial court's finding that defendant failed to establish that Johnson's testimony was of such conclusive character that it would probably change the result on retrial.

¶ 56 The conclusive character of the new evidence "refers to evidence that, when considered along with the trial evidence, would probably lead to a different result" and is "the most important element of an actual innocence claim." *Id.* The ultimate question is whether the newly discovered evidence "places the trial evidence in a different light and undermines the court's confidence in the judgment of guilt." *Id.* ¶ 48. In short, "[p]robability, rather than certainty, is the key in considering whether the fact finder would reach a different result after considering the prior evidence along with the new evidence." *Id.*

¶ 57 The trial court found Johnson's testimony "farcical" and "fabricated in its entirety" and consequently not of such conclusive character that it would probably change the result on retrial.

Defendant challenges these credibility determinations. He contends that the State did not disprove Johnson's assertions regarding his familiarity and relationship with defendant's family or that he was driving with his uncle at the time of the murder. In fact, the Callisons stated that they saw a car behind them and described the occupants of the car as two black males, with George's description of the occupants as late teens or early twenties and Shirley's description of them as two "younger looking *** boys." Although not quite 11 years old at the time, Johnson described himself as a "medium size, heavy set" child. Defendant further contends that Johnson's testimony was corroborated by the physical evidence at trial—that the victim was shot at close range while possibly reaching with his right hand and leaning forward.

¶ 58 However, it was the function of the trial court, as the finder of fact at the evidentiary hearing, to make credibility determinations and decide the weight to be given the evidence. See *Reed*, 2020 IL 124940, ¶ 51. Absent manifest error, we defer to the trial court's credibility determinations at the hearing. *People v. Hotwagner*, 2015 IL App (5th) 130525, ¶ 31. This deference is " 'grounded in the reality that the circuit court is in a superior position to determine and weigh the credibility of the witnesses, observe the witnesses' demeanor, and resolve conflicts in their testimony.' " *People v. English*, 406 Ill. App. 3d 943, 953-54 (2010) (quoting *People v. Pitman*, 211 Ill. 2d 502, 512 (2004)).

¶ 59 Our review of the record demonstrates no basis upon which to second-guess the trial court's credibility determinations. Johnson came forward 16 years after the murder and only after talking to defendant in Menard, where they were both imprisoned. Johnson testified that it was only after defendant informed him of his first-degree murder conviction that Johnson mentioned that he had in fact witnessed the July 2, 2001, events. Despite the revelation, according to Johnson, he and defendant never discussed the case again notwithstanding additional encounters at Menard. Under

these circumstances, it was not unreasonable for the trial court to question Johnson's veracity. See *Reed*, 2020 IL 124940, ¶ 54 ("We cannot say it was unreasonable for the court to question the truthfulness of [the witness], where he came forward only after being imprisoned and discussing the case with defendant."). As the State argues, Johnson's maintenance of such a secret was implausible; Johnson's claim to have never heard that defendant—his friend's brother and son of his mother's friend—was convicted of first-degree murder based on the events he witnessed was incredulous; and Johnson's description of his meeting with defendant at Menard in early 2017, soon after his uncle's death and defendant's receipt of the police reports, was "far too convenient."

¶ 60 Moreover, Johnson testified that the victim was in possession of the gun after the shooting and dropped it when he fell to the ground. However, it was undisputed that defendant had the gun after the shooting. Indeed, defendant assisted the police in recovering the gun used in the shooting from the bottom of a ravine. The trial court, having heard Johnson's testimony, was in the best position to weigh his credibility. Defendant presents no persuasive basis upon which to conclude that the trial court's credibility findings were manifestly erroneous.

¶ 61 Defendant nevertheless argues that Johnson's testimony places the State's evidence in a new light and undermines confidence in the result at trial, citing *Coleman*, 2013 IL 113307, and *People v. Galvan*, 2019 IL App (1st) 170150. In *Coleman*, the supreme court reversed the denial of the defendant's postconviction petition on grounds that new and material eyewitness testimony presented at the evidentiary hearing was conclusive enough that it would probably change the result on retrial. 2013 IL 113307, ¶ 113. The court reasoned that, despite credibility issues, the witnesses' version of events contradicted the testimony of the State's witnesses at trial on the ultimate issue of who was involved in the offenses. *Id.* In *Galvan*, the appellate court reversed the denial of postconviction relief where the trial court's disbelief of witness testimony at the

evidentiary hearing regarding abusive interrogation tactics was not relevant to whether the detective's credibility could be impeached with the testimony at a new suppression hearing. 2019 IL App (1st) 170150, ¶ 74.

¶ 62 *Coleman* and *Galvan* are inapposite. Defendant does not argue that Johnson's testimony contradicts trial testimony or provides a source of witness impeachment. Rather, he argues that the newly discovered evidence of Johnson's testimony bears directly on his theory at trial—that the victim was shot only after reaching for the gun in defendant's waistband and struggling over it. Thus, defendant contends, a new jury should be allowed to consider Johnson's testimony "to properly determine whether [he] is guilty of murder, was acting in self-defense, or was guilty only of the lesser offense of second degree murder/unreasonable self-defense."

¶ 63 The trial court, however, found that Johnson's testimony would not have altered the ruling on defendant's proposed jury instruction. Defendant challenges this finding as manifestly erroneous and maintains that Johnson's testimony would have entitled him to jury instructions on self-defense or second-degree murder based on an unreasonable belief in the need for self-defense.

¶ 64 Initially, we point out that the jury *did* receive an instruction for second-degree murder based on an unreasonable belief in the need for self-defense. As we noted on direct appeal, "[a]lthough the evidence suggests that defendant was not entitled to the instruction, the court's use of the instruction benefitted defendant because it allowed the possibility of a conviction of a lesser offense." *Moore*, 343 Ill. App. 3d at 341.

¶ 65 Moreover, we step back to reiterate the only issue raised on appeal here—defendant's challenge to the trial court's finding that he failed to establish that he was entitled to a new trial based on his claim of newly discovered evidence of actual innocence. The only proposed jury instruction germane to this issue is the self-defense instruction. That is because newly discovered

evidence supporting an acquittal based on self-defense could amount to actual innocence. *People v. Wingate*, 2015 IL App (5th) 130189, ¶ 35. But newly discovered evidence that would merely reduce the defendant's liability from first-degree murder to second-degree murder does not establish actual innocence. *People v. Moore*, 2018 IL App (3d) 160271, ¶ 21; *Wingate*, 2015 IL App (5th) 130189, ¶¶ 31-34. Defendant's argument improperly conflates these concepts. We parse the argument and turn to defendant's discussion of the self-defense instruction.

¶ 66 A person acts in self-defense when (1) unlawful force was threatened against him, (2) he was not the aggressor, (3) the danger of harm was imminent, (4) the use of force was necessary, (5) he actually and subjectively believed a danger existed that required use of the force applied, and (6) his beliefs were objectively reasonable. *People v. Gray*, 2017 IL 120958, ¶ 50. If the State negates any one element, the self-defense claim necessarily fails. *Id.* Defendant argues that even if he were the initial aggressor, Johnson's testimony regarding the victim reaching for defendant's gun and the ensuing struggle would have provided an evidentiary basis to instruct the jury on an initial aggressor's use of force. See Illinois Pattern Jury Instructions, Criminal, No. 24-25.09 (approved July 18, 2014) ("Initial Aggressor's Use of Force") ("A person who initially provokes the use of force against himself is justified in the use of force only if the force used against him is so great that he reasonably believes he is in imminent danger of death or great bodily harm, and he has exhausted every reasonable means to escape the danger other than the use of force which is likely to cause death or great bodily harm to the other person.").

¶ 67 Defendant, however, does not articulate the evidentiary basis that would have entitled him to a self-defense instruction in the first instance, and his argument finds no support in the record. See *People v. Crue*, 47 Ill. App. 3d 771, 773 (1977) ("If there is an evidentiary basis for the instructions, it is proper to give both the self-defense and the use of force by an aggressor

instructions, so that the jury may decide between the conflicting evidence and apply the correct law."). Moreover, as discussed, the trial court found Johnson's testimony not credible and consequently not of such conclusive character that it would probably change the result on retrial.

¶ 68 Accordingly, defendant presents no persuasive basis upon which to hold that the trial court's findings regarding the credibility and conclusiveness of Johnson's testimony were manifestly erroneous, and our review of the record demonstrates no such basis. In sum, the trial court's conclusion that Johnson's testimony was not of such conclusive character that it would probably change the result on retrial does not amount to clearly evident, plain, and indisputable error. See *Reed*, 2020 IL 124940, ¶ 51. Thus, we affirm the trial court's denial of postconviction relief.

¶ 69 III. CONCLUSION

¶ 70 For the reasons stated, we affirm the judgment of the circuit court of Lake County.

¶ 71 Affirmed.