2017 IL App (1st) 102500-UB

SIXTH DIVISION
FEBRUARY 3, 2017

No. 1-10-2500

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07 CR 02601
	)	
MICHAEL SELVIE,	)	Honorable
	)	Joseph Claps,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Rochford and Delort[1] concurred in the judgment.

ORDER

¶ 1 *Held*: Following evidentiary hearing to determine whether a witness was unavailable at the time of trial, we conclude that the trial court did not abuse its discretion in denying the defendant's motion for new trial. Separately, we conclude that the evidence presented at trial was sufficient to convict the defendant of first-degree murder.

After a bench trial, defendant Michael Selvie was convicted of first-degree murder in the shooting death of William Posey at a bar in Chicago. In this appeal, the defendant raises two issues: (1) whether the trial court abused its discretion by denying the defendant's motion for a

[1] Justice Karnezis participated in the original Rule 23 order filed on November 13, 2012, prior to the expiration of his assignment to the Illinois Appellate Court. Justice Delort replaces him on the panel. See Ill. S. Ct., M.R. 1062 (eff. Dec. 3, 2012).

new trial, based upon an affidavit of a witness who was purportedly unavailable to the defense at the time of trial; and (2) whether the State failed to prove the defendant guilty of first-degree murder beyond a reasonable doubt. The defendant's motion for a new trial focused on Michael Lumpkin, an eyewitness who claimed that he did not observe a gun in the defendant's hand at the time of the shooting. According to the defendant, Lumpkin was not available to testify at the time of the defendant's trial, based upon Lumpkin's counsel's assertion that Lumpkin would invoke his Fifth Amendment rights and refuse to testify. In a prior order in this appeal, we concluded that the trial court should not have ruled on the motion for new trial without conducting an evidentiary hearing regarding the availability of Lumpkin to testify at the time of the defendant's trial, and we remanded for the court to conduct such a hearing. *People v. Selvie*, 2012 IL App (1st) 102500-U (Nov. 13, 2012; modified upon denial of rehearing, Dec. 21, 2012). As that hearing has now been completed, we now affirm the circuit court with respect to both the denial of the motion for new trial and the first-degree murder conviction.

¶ 2 BACKGROUND

¶ 3 The facts surrounding the shooting and the evidence submitted at trial were thoroughly discussed in our prior Rule 23 order. *Id.* Thus, a more limited version of those facts is recounted here.

¶ 4 The victim in this case, Posey, died as the result of a single fatal gunshot received while at the Ice Bar in Chicago shortly after 1:15 a.m. on December 16, 2006. The defendant was indicted for first-degree murder, for being an armed habitual criminal, and for unlawful use of a weapon by a felon. The defendant waived his right to a jury and was tried by the trial court.

¶ 5 The State's evidence included five event witnesses who were present at the Ice Bar at the time of the shooting: (1) Mia Waites; (2) Antoine Hunt, the only person who testified that he

observed the defendant shoot Posey; (3) Keturah Mayhorn, another bar patron; (4) Terry Johnson, a Chicago Bears football player, for whom Posey was working as a bodyguard on the night of the shooting; and (5) Joe Randone, a photographer employed by the Ice Bar. The remaining witnesses included the physician who performed the autopsy on Posey; two experts in gunshot residue evidence, two police officers who collected evidence at the murder scene; and two detectives who interviewed witnesses and conducted the investigation.

¶ 6 Waites testified that the defendant had been fighting with the victim shortly before the shooting. However, Waites did not observe who fired the shot. Waites later identified photographs of a shirt found on the floor of the Ice Bar as that worn by the defendant. Waites testified that in a police lineup a few days after the shooting, she identified the defendant as the man who had fought with the victim. On cross-examination, Waites admitted that she never observed the defendant, or anyone else, with a handgun that evening.

¶ 7 Hunt testified that in the early morning of December 16, 2006, he and two friends traveled to the Ice Bar in Chicago, drinking a couple of shots of "Remy" on the way. The men arrived at the Ice Bar at about 1 a.m.

¶ 8 Hunt observed a fight between Posey and the defendant, and testified that Posey had the upper hand until two "bouncers broke it up." According to Hunt, the defendant then pulled out a black nine millimeter handgun and fired one shot, striking the victim. Hunt testified that the victim was two or three feet from the defendant, "very close," when the shot was fired.

¶ 9 Hunt testified that he contacted the police the day after the shooting. On December 22, 2006, the police came to his house, where he identified the defendant’s photograph and told the police that the defendant was the one who shot the victim. On December 27, 2006, he identified the defendant as the shooter in a police line-up.

¶ 10 Mayhorn testified that, shortly after 1:15 or 1:20 a.m., a fight broke out in the VIP section of the Ice Bar. Mayhorn "did not focus on the fight" but witnessed one of the bouncers trying to break up the fight. Mayhorn heard one shot, and saw the crowd fleeing the bar. Then the lights came on and she observed the victim lying on the floor.

¶ 11 Johnson testified that he, Posey (his bodyguard), and Waites arrived at the Ice Bar around 1:10 to 1:15 a.m. on December 16, 2006. After arriving, they were escorted to the VIP section of the bar. Johnson said that neither he nor the victim had a weapon. Johnson testified that the lighting was dim.

¶ 12 Johnson testified that he and Waites began to dance and a man bumped him "very aggressively" approximately five times. Johnson testified that he identified himself to the man who bumped him and stated that he did not want any trouble. The two men shook hands and separated. Johnson testified that the man again bumped into him. Posey then came over; Johnson told Posey that the man was bumping him but it was "no big deal." Johnson testified that Posey turned to sit down.

¶ 13 Johnson later heard arguing and saw Posey fighting with the man who had bumped him. Johnson testified that bar security attempted to separate the two men but they broke free and resumed fighting. Johnson testified that he personally tried to break it up but then decided to get out of the way. Johnson walked towards the rear of the bar, when he heard a gunshot. Johnson did not observe the shooting and did not see a gun.

¶ 14 Johnson testified that the man who bumped him was about six feet tall and 200 to 220 pounds. Johnson was later shown photographs by police on December 20, 2006 and viewed a police lineup on December 27, 2006 but did not make any identification. However, at trial Johnson identified a shirt as similar to that worn by the man who bumped him. Johnson also

stated that a photograph depicting the defendant resembled the man who was fighting with Posey.

¶ 15 Dr. Scott Denton of the Cook County Medical Examiner's Office, who performed an autopsy on Posey, concluded that he died of a single gunshot wound. Dr. Denton testified that the body and clothing did *not* show signs of a close-range firing.

¶ 16 Ellen Chapman, a forensic scientist and an expert in gunshot residue analysis for the Illinois State Police, testified that there was gunshot residue on the cuffs of the defendant's shirt. On cross-examination, Chapman testified that gunshot residue can inadvertently be transferred from hands that have residue on them. Chapman was not asked to test any other part of the shirt other than the cuffs. Mary Wong, a trace chemistry analyst with the Illinois State Police, testified that she identified six particles of gunshot residue on the left cuff, and one particle on the right cuff of the shirt.

¶ 17 Officer Maurice Henderson testified that, on the night of the shooting, he recovered one nine-millimeter cartridge case from the VIP section of the bar, but that no gun was recovered from the scene. Officer Thomas Pierce testified, that, on the night of the shooting, he gathered a number of other objects, including a shirt, from the scene. The shirt was inventoried and sent to the Illinois State Police crime lab for testing.

¶ 18 Detective Daniel Gillespie testified that on December 22, 2006, he showed Hunt a photographic array and Hunt immediately identified the defendant as the person who had shot Posey. Detective Gillespie was also present on December 26, 2006, when Waites identified the defendant in a lineup as the person she observed fighting Posey.

¶ 19 The parties stipulated to the testimony of several fingerprint, ballistics, biology, and DNA experts. In sum, the stipulations established that: (1) the bullet that killed the victim could have

been paired with the nine-millimeter casing recovered from the scene; (2) the defendant's fingerprints were not found on any items recovered at the scene; (3) the defendant's DNA was found in bloodstains on the shirt recovered at the scene; and (4) the defendant could not be excluded as a source of DNA for material collected from Posey's fingernail clippings.

¶ 20 The defendant's case included the testimony of Jason Louis Antoine, who was the manager of the Ice Bar at the time of the shooting. The most significant parts of Antoine's testimony were that: (1) he was looking at the defendant at the time of the shooting and he did not observe a gun in the defendant's hands at the time; and (2) that the defendant was not wearing his shirt at the time of the shooting.

¶ 21 Antoine testified that, while Johnson was dancing, the defendant bumped into Johnson a few times and Johnson told him to stop. Antoine testified that Posey later tackled the defendant from behind and a fight ensued. Antoine testified that bouncers, including Lumpkin, attempted to separate Posey and the defendant. During the struggle, the defendant's shirt was pulled off over his head.

¶ 22 Antoine testified that Lumpkin was holding each man while he was on his knees and the men were on the ground. Lumpkin held Posey with his right hand and the defendant in his left. Antoine was watching the fight when he "heard a popping sound." However, he did not observe anyone holding a gun when the shot was fired. Antoine stated that he had agreed to testify before the grand jury only after he was told that the defendant had confessed to the crime.

¶ 23 On cross-examination, Antoine testified that the shirt recovered from the floor appeared to be the same one that he observed the defendant wearing. Antoine also testified that he was also attacked from behind by the defendant's brother, Bobby Selvie, but declined to press charges against him. Antoine testified that, despite his training as a Marine Corps marksman and his

familiarity with firearms, he did not recognize the "pop" sound as a gunshot but believed it was only a champagne bottle breaking. Antoine testified that he was looking at the defendant when he heard the sound. However, he admitted that he had not told the police or the grand jury that the defendant did not have a gun in his hands at the time of the shooting. Antoine also acknowledged that he and the defendant had been named as defendants in a lawsuit stemming from Posey's death.

¶ 24 The defendant elected not to testify.

¶ 25 In rebuttal, the State called former assistant State's Attorney Peter Garbis, who had interviewed and presented Antoine to the grand jury. Garbis confirmed that Antoine never said that he was looking at the defendant's hands and did not observe a gun when he heard the "pop." The State then recalled Detective John Gillespie[2], who stated that Antoine admitted that the defendant was "a regular customer" at the bar and that he considered the defendant a "friend." Detective Gillespie also testified that Antoine never said that he was looking at the defendant's hands and did not observe a gun at the time of the gunshot. Detective Jeffrey King similarly testified that at the scene shortly after the shooting, Antoine did not say that he was looking at the defendant's hands when the gun discharged.

¶ 26 On February 19, 2010, the trial court found the defendant guilty. The trial court noted that Hunt was the only State witness who testified to seeing the defendant fire a gun, and that Antoine testified that he did not observe a handgun in the defendant's hand. However, after discussing many aspects of their testimony, including potential bias and personal interest, the trial court found that Hunt's testimony was more credible. In addition, the court also cited the

[2] Two of the investigating detectives in this case share the same last name: Daniel and John Gillespie.

evidence of gunshot residue on the cuffs of the defendant's shirt. The trial court found that this evidence established beyond a reasonable doubt that the defendant was guilty of all charges.

¶ 27 On May 12, 2010, the defendant filed a motion for a new trial or, alternatively, for a reduced conviction to second-degree murder. On May 19, 2010, a hearing on the defendant's motion for a new trial was held. Among other arguments, the defendant requested a new trial because Lumpkin, one of the bouncers on the night of the shooting, could have exculpated him if he testified at trial. Notably, the defendant did not claim that he was unaware of the existence of Lumpkin's potential testimony at the time of trial. Rather, the defendant claimed that Lumpkin had been an "unavailable witness" because Lumpkin's counsel had informed the defendant's trial counsel that Lumpkin would invoke the Fifth Amendment and refuse to testify if called as a witness.

¶ 28 In support of his motion for new trial, the defendant filed a sworn affidavit signed by Lumpkin and dated June 2, 2008 – over one year before the defendant's 2009 bench trial. The sworn affidavit detailed Lumpkin's observations that he heard a gunshot while he was holding Posey and the defendant apart. In that affidavit, Lumpkin swore that he never observed a gun in the defendant's hand when the shot was fired.

¶ 29 The defendant asserted that, at the time of his bench trial, Lumpkin was: "unavailable to the defense because his counsel *** had informed defense trial counsel that his client would invoke the Fifth Amendment if called to testify" as Lumpkin had a pending unrelated felony weapons charge. The defendant asserted that Lumpkin would have corroborated Antoine's testimony that the defendant was *not* holding a gun at the time of the shooting. The trial court asked a clarifying question as to the defendant's motion for new trial, as follows:

> "THE COURT: [Defense Attorney], I have a question about part of your motion for new trial regarding the unavailable witness ***. The question I have is, your motion for a new trial claims that Mr. Lumpkin was unavailable because you were informed by his attorney that if called to testify, he would invoke a 5th amendment privilege based on some pending case that he allegedly had at the time. Wouldn't the determination of whether or not Mr. Lumpkin was entitled to invoke his 5th amendment privilege as to the facts and circumstances involving the charges against [the defendant] be a determination from me, not the attorney for Mr. Lumpkin? Wouldn't that be the way it works?
>
> [DEFENSE COUNSEL]: Judge, I believe that that may have been a determination ultimately that may have been made by you. But the scenario that we were operating under back then was that we had been informed by his counsel, ***, that unless we could reasonably guarantee him that the facts and circumstances of his pending case would not be gone into by either party, that he would be advising his client to assert his 5th amendment privilege. *** [I]t's improper for me to call a witness to the stand if I have knowledge or information that he intends on asserting his 5th amendment privilege."

In response, the State disputed whether Lumpkin's counsel had told the defendant's counsel that Lumpkin was going to invoke the Fifth Amendment. The State further argued that "it is [the

court's] determination, not defense lawyer's determination, to see whether or not a witness is truly unavailable."

¶ 30 On May 28, 2010, the trial court denied the defendant's motion for new trial. The trial court reiterated its finding that Hunt was more credible than Antoine. The trial court found that Antoine "clearly knew who [the defendant] was, [but] chose initially to avoid making that identification" and that "[W]hen you toss up [Hunt] and [Antoine] in the determination of the credibility, it's frankly no contest." On July 16, 2010, the trial court sentenced the defendant to 55 years in the Illinois Department of Corrections on the charge of first-degree murder.

¶ 31 On August 10, 2010, the defendant filed a timely notice of appeal. On appeal, the defendant asserted that (1) the trial court abused its discretion by denying his motion for new trial based on the affidavit of Lumpkin, and (2) that the State failed to prove the defendant's guilt of first-degree murder beyond a reasonable doubt.

¶ 32 In a prior Rule 23 order, we concluded that, for purposes of reviewing the denial of defendant's motion for new trial, the record was insufficient to determine whether Lumpkin was unavailable at the time of the defendant's trial. *People v. Selvie*, 2012 IL App (1st) 102500-U, ¶ 93. Thus, we remanded the case to the trial court to conduct an evidentiary hearing on that issue and to decide the motion for new trial after that evidentiary hearing. *Id.* ¶ 95. In light of that determination, our order did not reach the defendant's separate contention as to the sufficiency of the evidence to support his conviction. We retained jurisdiction of this appeal, pending completion of the evidentiary hearing. We specified that "if the trial court ultimately denies the defendant's motion for a new trial on remand, the case shall return to this court for determination of both the remaining issue regarding sufficiency of the evidence *** and the trial court's findings, decision and orders after remand." *Id.*

¶ 33 Upon remand, the trial court conducted a hearing at which it heard the testimony of witnesses including Lumpkin, the defendant's trial counsel, and Lumpkin's former attorney.

¶ 34 Lumpkin testified at the evidentiary hearing on March 5, 2015. Lumpkin acknowledged that at the time of defendant's trial in October and November 2009, he had a pending, unrelated felony weapons charge. His legal counsel with respect to that charge was Todd Pugh. Lumpkin acknowledged that he had been subpoenaed with respect to the defendant's trial. He stated that he had in fact come to the court building, but did not enter the courtroom because he was not called as a witness.

¶ 35 Lumpkin recalled that his counsel, Pugh, had advised him to "tell them exactly what you need to tell them. Tell them the truth." He specifically denied that Pugh advised him not to testify at the defendant's trial due to his pending weapons charge, and denied that anyone had advised him not to testify in the defendant's trial. Rather, he recalled Pugh told him: "Whatever they ask me, whoever the person was, tell them the truth." Lumpkin further testified that, if he had been called to testify at the defendant's trial, he would have done so.

¶ 36 Lumpkin was separately questioned at the evidentiary hearing regarding the events surrounding the shooting. He recalled he was working as a security guard at the Ice Bar when he observed an altercation between the defendant and Posey. He recalled that he grabbed Posey with his left hand and the defendant with his right hand, trying to separate the two men. He recalled that there were "drinks flying around," and he was "half blind" when "a gunshot came from my right side" extremely close to his face. He stated that he never saw a gun in the defendant's hands.

¶ 37 On cross-examination, he also agreed that shortly before the gunshot, a drink was either thrown or knocked into his face and he "had alcohol in my eyes." He acknowledged that he had

signed the June 2, 2008 affidavit that was later submitted in support of the defendant's motion for new trial. However, Lumpkin did not recall who had typed it, or who had presented it to him.

¶ 38 Questioned separately by the court, Lumpkin again stated that he was down on the floor trying to separate Posey and the defendant when a drink was thrown or knocked into his face; he held on to the men although he was "semi blind." He stated that he did not let go of the men until the gunshot came from his right side.

¶ 39 On June 2, 2015, the hearing continued with testimony from Richard Beuke, who was the defendant's lead counsel at trial. Beuke testified that attorney Michael Clancy had also assisted him in the case. Beuke testified that, sometime before the defendant's trial, he and Clancy learned that Lumpkin was represented by attorney Todd Pugh.

¶ 40 Beuke and Clancy subsequently interviewed Lumpkin at Pugh's offices. At that time, Beuke told Lumpkin that he and Clancy wanted Lumpkin to speak with their investigator, John Burn. According to Beuke, Burn later spoke separately with Lumpkin, and Burn prepared the affidavit that was eventually signed by Lumpkin and dated June 2, 2008.

¶ 41 Beuke recalled having one or two separate conversations with Pugh regarding the availability of Lumpkin as a trial witness, in light of Lumpkin's separate pending weapons charge. Beuke acknowledged that Lumpkin's separate case arose sometime after the June 2008 affidavit. According to Beuke: "Mr. Pugh wanted some assurance from us that we would not go into *** his pending case. And we told him that we could not give him that assurance, nor could I give him the assurance that the prosecutors might [not] go into it also." Beuke recalled that Pugh responded that, without such assurance, that he "would be advising his client to take the 5th." Beuke testified he believed it was not appropriate to call Lumpkin as a defense witness because "unless we could guarantee Mr. Pugh that we would not go into that pending case ***,

that his client was going to take the 5th based on his advice." Beuke acknowledged that he never brought the issue to the attention of the trial court.

¶ 42 Clancy also testified at the evidentiary hearing that he assisted Beuke in preparing for the defendant's trial. He recalled that Pugh introduced Lumpkin to Beuke and Clancy, and that Lumpkin was later interviewed by Beuke's investigator.

¶ 43 Clancy recalled learning that Lumpkin had been arrested for a separate weapons charge, arising from his work as a bouncer at another club. Clancy stated that Pugh "informed me that because Mr. Lumpkin had a pending gun case that was somewhat similar to the circumstances of our case *** he would be exercising his Fifth Amendment privilege and not testify in our case." Clancy testified that "Mr. Pugh was clear that Mr. Lumpkin would be taking five" due to his pending gun charge. However, Clancy did not recall if he had told Pugh that he or Beuke planned to ask Lumpkin questions about Lumpkin's pending case. Clancy testified that he and Beuke did not call Lumpkin "Because he was going to take five." However, he acknowledged that he never told Pugh that the question of Lumpkin's Fifth Amendment privilege would be raised before the trial court.

¶ 44 Following Clancy's testimony, Pugh also testified at the evidentiary hearing that he represented Lumpkin in connection with charges for aggravated unlawful use of a weapon from an arrest in January 2009. Pugh denied that he had met Lumpkin before that date. He recalled meeting with Lumpkin, Beuke and Clancy sometime after Lumpkin's arrest, and that Beuke and Clancy interviewed Lumpkin with respect to the defendant’s case. The subject of Fifth Amendment privilege was not raised during that initial meeting.

¶ 45 Pugh recalled that Lumpkin subsequently was subpoenaed, both by the defendant's lawyers and by the State, to appear as a potential trial witness. Pugh recalled speaking to an

Assistant State's Attorney, as well as Clancy, about Lumpkin, and that he told both attorneys that he "would advise [Lumpkin] to not answer any questions regarding his pending charge."

¶ 46 Pugh recalled that the State' attorney told him the State had no intention of going into the subject of Lumpkin's separate gun case, and he believed he was told something similar by Clancy. Shortly before the defendant's trial, Pugh testified he asked Clancy and Beuke to let him know if Lumpkin would be called to testify so that he could "come up and make a record in front of the judge" and seek a ruling with respect to Lumpkin's Fifth Amendment rights.

¶ 47 Asked whether he told Clancy that Lumpkin was going to "take five," Pugh testified "I said only if the Court were going to allow either party to cross-examine him on his pending charge. That would have been the only statement that I would have made to that effect of asserting his Fifth Amendment privilege." Pugh specifically denied telling Clancy that "in no uncertain terms without any qualifications" Lumpkin was going to assert his Fifth Amendment privilege. Pugh did not recall any conversations with Beuke on the topic.

¶ 48 Detective John Gillespie was also called at the evidentiary hearing. He recalled that, in interviews with Lumpkin on December 18 and 27, 2006, Lumpkin did not tell him that he never saw the defendant with a gun on the night of the shooting. He also agreed that Lumpkin had told him "he got a drink thrown in his face" just before hearing the shot.

¶ 49 The court heard arguments on August 25, 2015. In its argument the State noted that, during the opening statements on behalf of the defendant at trial, Beuke had specially told the court that Lumpkin would testify regarding the events before the shooting. The State argued that this demonstrated that Lumpkin was not viewed as an unavailable witness by the defense. The State further argued that, if the defense had wished to call Lumpkin, it was the defendant's counsel's obligation to bring any Fifth Amendment issue to the court's attention.

¶ 50 On October 2, 2015, the court denied the defendant's motion for new trial. First, the court rejected the defendant's argument that Lumpkin's testimony had been unavailable. The court "faile[d] to see the relevance" of the testimony regarding discussions between Pugh and the defendant's counsel as to whether Lumpkin would invoke the Fifth Amendment. The court noted that the "proper procedure" if the defense wished to call Lumpkin was to litigate the issue "outside the presence of the jury to determine whether or not he had a [F]ifth [A]mendment privilege."

¶ 51 The court also emphasized that Lumpkin "testified that he was at trial [and] ready to testify. He never said anybody talked to him about invoking the [F]ifth [A]mendment. He never said he wanted to invoke the [F]ifth [A]mendment." Moreover, the court noted that even if Pugh had advised him to invoke the Fifth Amendment, "he doesn’t have to follow that advice" and could still testify. Thus, the court found there was "no question" that Lumpkin "was, in fact, available to testify."

¶ 52 The court went on to find that, even if Lumpkin was considered unavailable, Lumpkin's testimony regarding the shooting "would not change my verdict at all." The court indicated it did not assign much weight to Lumpkin's testimony that he did not see the defendant with a gun, "given the timing of all the events and the firing [of] the shot when he wasn't looking at anything because his eyes were closed." The court noted "there is a world of difference between a witness saying I was looking at a man's hands" at the time of the gunshot and this case, since Lumpkin indicated he could not see clearly because "[s]omeone threw a drink in his face."

¶ 53 Following the conclusion of the evidentiary hearing and the denial of the motion for new trial, the parties supplemented the appellate record with relevant materials, including the

transcripts from the evidentiary hearing. The parties also submitted supplemental briefing related to the trial court's conclusions at the evidentiary hearing.

¶ 54 ANALYSIS

¶ 55 We note that we have jurisdiction, as we retained jurisdiction over this appeal in our prior Rule 23 order which remanded the case for the evidentiary hearing. With the evidentiary hearing completed, we are now prepared to review the denial of the defendant's motion for a new trial, premised on Lumpkin's testimony as alleged "newly discovered evidence."

¶ 56 "In Illinois, newly discovered evidence warrants a new trial when: (1) it has been discovered since the trial; (2) it is of such a character that it could not have been discovered prior to the trial by the exercise of due diligence, (3) it is material to the issue but not merely cumulative; and (4) it is of such a conclusive character that it will probably change the result on retrial. Motions for new trial on grounds of newly discovered evidence are not looked upon favorably by the courts and should be subject to the closest scrutiny." (Internal quotation marks omitted.) *People v. Salgado*, 366 Ill. App. 3d 596, 605 (2006). "[T]he denial of a motion for a new trial based on newly discovered evidence will not be disturbed on appeal absent an abuse of discretion." *Id.* For the following reasons, we decline to find that the trial court abused its discretion in denying the motion for new trial.

¶ 57 The circumstances of this motion are unique, insofar as it is not disputed that the defendant knew of Lumpkin's potential eyewitness testimony *before* the trial (as evidenced by the affidavit dated June 2008). Rather, the crux of the defendant's argument is that Lumpkin's testimony must be considered "newly discovered" because he was unavailable to testify at trial, based on Pugh's alleged assertions to defendant’s attorneys that Lumpkin would invoke the Fifth Amendment if called to testify. Thus, in conjunction with the motion for new trial, it was

defendant's burden to demonstrate that Lumpkin was unavailable as a trial witness at the time of defendant's trial, due to his planned invocation of the Fifth Amendment.

¶ 58 Having reviewed the transcript of the evidentiary hearing conducted on remand pursuant to our prior Rule 23 order, we have no difficulty agreeing with the trial court's assessment that Lumpkin's testimony was available to the defendant at the time of his trial. In other words, the testimony disclosed at the evidentiary hearing did not demonstrate that Lumpkin was unavailable to testify. Thus, we do not find that the court abused its discretion in denying the motion for new trial.

¶ 59 The evidentiary hearing revealed a significant discrepancy between the testimony of the defendant's trial counsel, Beuke and Clancy, and that of Lumpkin's attorney, Pugh, concerning Lumpkin's supposed intent to invoke his Fifth Amendment right. The defendant's trial counsel testified that it was their belief based on conversations with Pugh, that Lumpkin planned to invoke the Fifth Amendment and refuse to give *any testimony whatsoever* in the trial, because defendant's counsel could not assure Pugh that they would not ask Lumpkin about his pending gun charge. Pugh, on the other hand, indicated that he told the defendant's counsel that he would advise Lumpkin to invoke his Fifth Amendment right *only* to the extent that he was asked questions about the pending, unrelated charge. Pugh denied that he would have advised Lumpkin not to testify about any aspect of the defendant's case.

¶ 60 The defendant's supplemental brief argues that since no assurance was given by defense counsel to Pugh that they would not question Lumpkin about his pending case, "as far as defense counsel knew at trial, since the defense reserved the option of questioning Lumpkin regarding his pending gun case, Lumpkin would 'take the Fifth' if called as a witness." Thus, the defendant asserts that Lumpkin was unavailable to serve as a trial witness.

¶ 61 There are multiple problems with the defendant's position. First, as a credibility matter, at the evidentiary hearing the trial court could certainly have found Pugh's testimony more credible than that of the defendant's counsel. The trial court, as finder of fact at the hearing, could believe Pugh's testimony that he merely indicated he would advise Lumpkin to invoke the Fifth Amendment *only with respect to the unrelated pending gun charge*, and that he had not indicated to the defendant's counsel that Lumpkin would refuse to testify altogether.

¶ 62 Moreover, even assuming the truth of the defendant's trial counsel's testimony at the evidentiary hearing, they testified that they considered Lumpkin unavailable only because *they decided* to reserve the option of questioning Lumpkin regarding his pending gun case and declined to assure Pugh that they would not examine his client, Lumpkin, on that topic. In other words, the defendant appears to concede that Lumpkin could have been called to testify had his counsel elected not to ask about Lumpkin's separate case, but that they concluded that they could not "assure" Lumpkin's counsel that they would not delve into that line of questioning. If that were the case – and if Lumpkin's testimony were as crucial to the defense as is asserted in this appeal—it is extremely puzzling that the defendant's trial counsel would consider him "unavailable" and not even attempt to call him. Further, at no time did they raise the potential Fifth Amendment issue before the trial court.

¶ 63 The defendant's supplemental brief does not cite any case holding that a witness may be deemed unavailable based solely on representations by the witness' counsel that the witness will invoke the Fifth Amendment and refuse to testify. However, the defendant cites to our decision in *People v. Human*, 331 Ill. App. 3d 809, 819 (2002) for the proposition that "it is improper for a party to call a witness whom it has reason to believe will invoke his [F]ifth [A]mendment privilege." The defendant's reliance on *Human* is unavailing, when considering the full relevant

statement from *Human*: "This court has repeatedly held that it is improper for a party to call a witness whom it has reason to believe will invoke his [F]ifth [A]mendment privilege before the jury; *therefore, a trial judge does not err when he precludes calling such a witness.* [Citations.]" (Emphasis added.) *Id.* As noted by the State's supplemental brief, *Human* and the other cases it cited for this proposition concerned instances where the potential Fifth Amendment issue *was* in fact brought to the trial court's attention for a ruling.

¶ 64 Moreover, as emphasized by the trial court, regardless of whatever discussions may have occurred between the attorneys, Lumpkin himself testified that he would have testified as a witness at the defendant's trial if called to do so. The defendant's supplemental brief does not dispute this, but argues—without any case support—that "whether Mr. Lumpkin was at court prepared to testify *** is not relevant to the determination of this cause in the unusual circumstances of this case." We disagree. In order to show that Lumpkin was unavailable, the defendant's burden in the context of this motion was to show that Lumpkin would have invoked his Fifth Amendment privilege and refused to provide the testimony that the defendant claims exculpates him. As the trial court noted, even had Pugh advised him not to testify about the shooting, there was absolutely no indication from Lumpkin that he was planning to take that advice and decline to testify. To the contrary, Lumpkin unequivocally stated that he was ready and willing to testify, but was never called to do so.

¶ 65 As the defendant failed to show at the evidentiary hearing that Lumpkin even planned to *assert* the Fifth Amendment right with respect to any questioning, he has not established that Lumpkin's testimony was unavailable. As a result, Lumpkin's testimony cannot be considered *newly discovered* evidence, so as to support the defendant's motion for new trial. In turn, we hold that the trial court did not abuse its discretion in denying the motion for new trial premised

upon Lumpkin's allegedly exculpatory testimony. Having determined that Lumpkin was not unavailable, we need not separately discuss whether the substance of his testimony would have changed the trial court's finding.

¶ 66 Having affirmed the denial of the defendant's motion for a new trial, we turn to the remaining contention from the defendant's direct appeal: that the evidence did not support the finding of guilt. Our standard of review on a challenge to the sufficiency of the State's evidence is well settled. "When reviewing the sufficiency of the evidence, it is necessary to determine whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citations.] It is not the function of the reviewing court to retry the defendant or substitute its judgment for that of the trier of fact. [Citation.] Rather, the trier of fact assesses the credibility of the witnesses, determines the appropriate weight of the testimony, and resolves conflicts or inconsistencies in the evidence. [Citation.] A criminal conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. [Citation.]" *People v. Gabriel*, 398 Ill. App. 3d 332, 341 (2010). A reviewing court will not substitute its judgment for that of the trier of fact. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006).

¶ 67 In his appellate briefing, the defendant asserts that the trial court's finding was a result of "guess work and speculation" and "unwarranted, unjustified assessment of the credibility of the witnesses." Specially, the defendant argues that it was "unreasonable" for the court to credit Antoine Hunt's eyewitness testimony identifying him as the shooter. The defendant cites various "character, observation and credibility issues" related to Hunt, including his use of alcohol on the night of the shooting, the "poor lighting conditions and chaos of events" in the crowded bar, and

his failure to speak to police on the night of the shooting. The defendant also asserts that Hunt's description of the shooting was "directly contrary to the physical evidence in the case." In particular, he claims that if Posey had been shot by the defendant at close range as described by Hunt, there should have been corresponding physical evidence on Posey's body or clothing.

¶ 68 The defendant also argues that the court erred in failing to credit the testimony of Jason Antoine, who testified that he did not see a gun in the defendant's hands. Citing Antoine's occupation as a student and his experience as a Marine, the defendant argues that Antoine was "a far more credible individual" than Hunt. He contends that the decision not to credit Antoine was based on "speculation and guess work" and that it was "grossly unreasonable" to credit Hunt and not Antoine.

¶ 69 The defendant further argues that the State's case lacked "meaningful, relevant corroboration of Mr. Hunt that would justify a finding of guilt." The defendant acknowledges the blood evidence found on the defendant's shirt but argues this merely "corroborated the fact the defendant was in a physical altercation with" Posey. The defendant also acknowledges the testimony that there was gun residue on the shirt but argues that this physical evidence "constituted but a whisp of corroboration" of Hunt's testimony and "not the kind of meaningful, relevant corroboration that would result in a guilty finding in this cause." Further, he points to the lack of any fingerprints implicating the defendant, and the fact that a gun was not recovered from the scene.

¶ 70 We find the defendant's arguments unpersuasive. It is axiomatic that it is the role of the trier of fact (in this case the trial court), and not the role of our court to reweigh the evidence or substitute our credibility determinations for those made by the trier of fact. Yet, the defendant urges that we do exactly that in arguing that the trial court should have credited Antoine but not

credited Hunt. We will not engage in such second-guessing of the trial court's factual determinations.

¶ 71 Further, the argument that the physical evidence was not sufficiently "meaningful" to corroborate Hunt, is unavailing, as it is well settled that "[i]dentification by a single witness is sufficient to support a conviction if the defendant is viewed under circumstances permitting a positive identification." *Gabriel*, 398 Ill. App. 3d at 341. In any event, the trial court could certainly find that the DNA evidence and gunshot residue found on the shirt discovered at the scene–which eyewitnesses stated matched that worn by the defendant—corroborated Hunt's account that the defendant shot Posey. In short, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could certainly find that the defendant shot and killed Posey. Accordingly, we affirm the defendant's conviction of first-degree murder.

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

¶ 73 Affirmed.