2018 IL App (2d) 170227-U
No. 2-17-0227
Order filed May 2, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. PATRICK PURSLEY, Defendant-Appellee.	))))))))))	Appeal from the Circuit Court of Winnebago County. No. 93-CF-1174 Honorable Joseph G. McGraw, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices McLaren and Hutchinson concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's findings following a third-stage evidentiary hearing on defendant's postconviction petition were not manifestly erroneous. Therefore, we affirmed its order granting defendant a new trial.

¶ 2 Defendant, Patrick Pursley, sought postconviction relief from his 1994 first-degree murder conviction based on new ballistics testing from 2011 and his experts' subsequent review. He argued, in pertinent part, that the ballistics evidence and his experts' testimony were newly discovered, material, and noncumulative evidence that would likely change the result on retrial, because the evidence showed that the firearm recovered by police in connection with his murder

conviction was not the murder weapon. Following a third-stage evidentiary hearing, the circuit court granted defendant a new trial. For the reasons set forth herein, we affirm.

¶ 3 I. BACKGROUND

¶ 4 A. Defendant's Conviction and Direct Appeal

¶ 5 Defendant's postconviction petition concerns his first-degree murder conviction for the fatal shooting of Andrew Ascher[1] on April 2, 1993. We affirmed his conviction on direct appeal (*People v. Pursley* (*Pursley I*), 284 Ill. App. 3d 597 (1996)), and we restate the relevant facts adduced from defendant's trial primarily by reference to our prior opinion. Around 10 p.m. on April 2, 1993, Ascher and his girlfriend, Becky George, were parked outside George's brother's apartment in Rockford, Illinois. *Id.* at 600. A man approached the driver's door, opened it, pointed a gun at Ascher, and said " 'This is a stickup, hand me your money.' " *Id.* While George was looking for money in her purse, she heard two "pops," and Ascher slumped in his seat. The man ran, and she called the police. *Id.* She told the police that the man was wearing dark clothing and a blue ski mask with a hood over the mask. She also saw black skin around the eyes. *Id.* The police did not find any suspects in the area but did recover a spent bullet in the car and another bullet from Ascher's shoulder. *Id.*

¶ 6 On June 10, 1993, Marvin Windham called Crimestoppers to report that defendant had told him that he killed Ascher. The police set up surveillance of the apartment that defendant shared with his girlfriend, Samantha Crabtree. The police saw defendant and Crabtree enter a vehicle, and they followed it in an unmarked van. At one point, the vehicle stopped, and defendant jumped out and ran. The police did not catch defendant, but Crabtree agreed to go

[1] As noted in our 2011 opinion, the proper spelling of the victim's name is "Ascher" as opposed to "Asher." *People v. Pursley*, 407 Ill. App. 3d 526, 527 n.1 (2011).

with them to the police station. *Id.* at 601. On the way back to the station, the police stopped at Crabtree's apartment and searched it pursuant to a valid search warrant. *Id.* They recovered evidence that included a nine millimeter Taurus model firearm (the Taurus or Taurus handgun).

¶ 7 Crabtree told the police that defendant told her that if she said anything to the police, he would kill her. She made statements outlining events that occurred before, during, and after Ascher's murder, including that she and defendant had been driving around that night looking for a house for defendant to rob; that he was wearing black boots, black jeans, a black hooded sweatshirt, and a navy blue ski mask; and that defendant asked her to pull over after they passed some apartments. He got out of the car and walked toward the apartments, and after a few minutes, she heard gunshots. Defendant returned to the car and told her to drive. He was carrying a nine millimeter handgun in his hand. She was nervous driving home, and defendant threatened several times to kill her. *Id.*

¶ 8 At defendant's trial, the State's ballistics expert, Daniel Gunnell,[2] testified that the nine millimeter Taurus handgun found at Crabtree's apartment was the same weapon used to shoot Ascher. *Id.* at 602. Gunnell opined that he could exclude all other firearms based on his forensic analysis, and that the visible marks on the bullets acted like a "fingerprint" for the gun.

¶ 9 Windham testified that in April 1993, he had visited defendant. Defendant had showed him a newspaper clipping about Ascher's murder and described how he robbed and killed Ascher. On cross-examination, Windham stated that he received $2,650 in exchange for his information. He also stated that he waited two months to report what he had learned because defendant had not threatened him personally until June 1993. At the time of trial, Windham had

[2] We did not specifically identify the State's expert in our 1996 opinion, but we provide it here. Likewise, we did not identify the defense's ballistics expert, Mark Boese.

two criminal charges pending against him. *Id.*

¶ 10 Crabtree testified at trial, and we noted that her testimony "contradicted her June 10, 1993, statement and her testimony before the grand jury." *Id.* She testified that her prior statements had been coerced and that she and defendant did not leave her apartment on April 2, 1993.

¶ 11 Several witnesses testified as to defendant's whereabouts on April 2, including defendant's son, Anthony, and Anthony's mother and grandmother. *Id.* They testified to the effect that defendant was in Rockford on April 2 and that he did not leave his house that evening. On cross-examination, they admitted that they previously had told the police that they were unsure of his whereabouts on April 2 or had previously reported different timelines for some events.

¶ 12 Defendant presented his own ballistics expert, Mark Boese, who testified that he was unable to make a conclusive identification that the bullets from the scene were fired by the Taurus handgun. *Id.* at 603.

¶ 13 The jury found defendant guilty of first degree murder, and the court sentenced defendant to life without parole. *Id.*

¶ 14 We affirmed defendant's conviction on direct appeal. *Id.* at 611. We explained that the jury chose to believe the State's evidence and that defendant's witnesses did not raise a substantial doubt of guilt sufficient to reverse the conviction. *Id.* at 609. In particular, the jury could have believed that Crabtree previously told the truth and lied at trial, and the defense witnesses placing defendant's location on April 2 had given different accounts to the police prior to trial. *Id.* at 609-10. In addition, it was "immaterial that the defense's ballistics expert contradicted the State's expert," as it was the jury's duty to resolve contradictory expert

testimony. *Id.* at 610.

¶ 15 B. Prior Postconviction Petitions and First Motion for Ballistics Testing

¶ 16 In July 1997, defendant filed a postconviction petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 1996)), and the circuit court dismissed the petition as frivolous and without merit. We affirmed. *People v. Pursley* (*Pursley II*), 341 Ill. App. 3d 230, 232 (2003) (citing *People v. Pursley*, No. 2-97-0984 (1999) (unpublished order under Supreme Court Rule 23)). In March 1999, defendant filed a second postconviction petition, which was also dismissed, and we again affirmed. *Id.* (citing *People v. Pursley*, No. 2-00-0551 (2001) (unpublished order under Supreme Court Rule 23)).

¶ 17 Having exhausted all other forms of remedy, defendant filed a *pro se* motion in the circuit court for forensic testing pursuant to section 116-3 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5-116-3 (West 2000)). *Id.* at 233. He argued that the Taurus handgun, as well as cartridge casings and bullets recovered from the crime scene, were subject to testing under the Integrated Ballistics Identification System (IBIS), as authorized by section 116-3.

¶ 18 The police had recovered two cartridge casings (the recovered cartridge casings or recovered casings) outside the vehicle where Ascher had been shot. *Id.* at 232. They also had recovered two bullets (the recovered bullets), one from the vehicle's dashboard and one from Ascher's shoulder. *Id.* These casings and bullets were the evidence used at defendant's trial to link the Taurus to Ascher's shooting.

¶ 19 The circuit court dismissed defendant's motion, finding, in part, that section 116-3 did not apply to ballistics testing. On appeal, we affirmed, explaining that under the statute's plain language, section 116-3 did not apply to IBIS testing. *Id.* at 235.

¶ 20 C. Second Motion for Postconviction Ballistics Testing

¶ 21 In 2007, the Illinois legislature amended section 116-3 of the Code to specifically include IBIS testing, and defendant filed a new *pro se* motion for ballistics testing under section 116-3 on April 6, 2008. *People v. Pursley* (*Pursley III*), 407 Ill. App. 3d 526, 528 (2011). Defendant was later represented by *pro bono* counsel, who filed an amended motion. The court denied the motion in July 2009. *Id.*

¶ 22 In its order, the circuit court indicated that defendant sought IBIS testing, that section 116-3 authorized such testing, and that such testing was not available at trial. However, the parties disputed whether IBIS testing would produce probative results. *Id.* The court explained that even if IBIS testing were performed, any potential match would still require hands-on comparison and testing by a ballistics expert, distinguishing IBIS testing from DNA testing. *Id.* It concluded that IBIS testing would not provide a reasonable likelihood of more probative results. *Id.*

¶ 23 We reversed on appeal. *Id.* at 539. We explained that, at defendant's trial, the IBIS database was not in existence and the bullets and casings were not subject to an IBIS search. Furthermore, the parties did not dispute that the requirements of section 116-3(b) were met (identity and chain of custody), leaving the court with only the requirements of section 116-3(c). *Id.* at 531.

¶ 24 Section 116-3(c) required that: (1) testing had the scientific potential to produce new, noncumulative evidence that is materially relevant, though not necessarily exonerating, to defendant's claim of actual innocence; and (2) the testing employed a generally accepted scientific method. *Id.* The parties did not dispute the second factor but did dispute whether the testing had the potential to produce new, noncumulative evidence materially relevant to defendant's claim of innocence.

¶ 25 We concluded that IBIS testing had the potential to produce new, noncumlative evidence that would satisfy section 116-3(c). *Id.* at 533. We began with a primer on IBIS. Agencies that partnered with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), such as local law enforcement, would use IBIS to compare digital images of markings recovered from a crime scene against earlier entries in the IBIS system in a matter of hours. *Id.* The IBIS system could produce matches between firearms, and a "high-confidence" match would lead a firearm examiner to confirm the match. This system allowed law enforcement to link separate crime scene investigations where previously there was no known connection. *Id.*

¶ 26 Whether IBIS testing was materially relevant to a claim of actual innocence depended on the other evidence adduced at trial. *Id.* at 535. We turned to the evidence from defendant's trial, summarizing it as follows. Gunnell testified for the State, beginning with his method for examining the recovered evidence. He first observed the number of lands, grooves, and twists in the bullets, and he compared the two bullets to each other using a comparison microscope, finding them similar in class characteristics. *Id.* at 536. He did the same for the recovered casings. Then, he test fired two shots from the Taurus handgun, and he compared the test-fired evidence to the recovered evidence. He opined that the recovered bullets and casings came from the same Taurus handgun, to the exclusion of all other firearms, relying on the microscopic striations and the impressions created by the firing mechanism of the Taurus. *Id.* He explained that the marks on a gun were similar to a fingerprint, and although the striations did not need to be a perfect match, that was because there was no such thing as a homogeneous piece of metal. *Id.* On cross-examination, Gunnell admitted that he did not perform a firing pin comparison test and that he did not photograph his observations. *Id.*

¶ 27 Boese, the defense's ballistics expert, also tested the Taurus handgun. He compared his

test-fired casings to the State's test-fired casings, and he found their impressions identical. *Id.* He photographed his impression slides. He determined that three or four striations from the recovered casings were similar to his test casings, but that the striation positions with respect to one another were dissimilar. He also testified that the firing pin impressions on the casings were dissimilar. Based on these differences, Boese opined that the crime scene bullets were probably fired from a Taurus handgun but not the specific Taurus handgun recovered from Crabtree's apartment. He could neither conclude that the Taurus fired the recovered shots nor exclude it; there were insufficient similarities to make a determination. *Id.*

¶ 28 The defense argued the ballistics evidence at length in an attempt to discredit Gunnell. On the other hand, the State "equally argued its evidence," discussing the testimony of various witnesses in addition to ballistics testimony. *Id.* at 538. We stated that there was "no doubt the State relied upon the ballistics evidence," but "[t]o say that the State completely relied on Gunnell's testimony would be to misinterpret the entirety of the evidence." *Id.*

¶ 29 Nevertheless, we could not disregard that much of the State's remaining evidence was circumstantial. *Id.* at 539. We concluded that new ballistics evidence could potentially advance defendant's claims. We specifically noted that any hands-on comparison by ballistics experts following further ballistics testing would involve additional evidence and possibly test evidence of another weapon from the IBIS system. Therefore, hands-on expert analysis following IBIS testing would not be the same analysis as already performed in this case. *Id.*

¶ 30 Finally, we rejected the State's argument that defendant's motion was a mere "fishing expedition," explaining that the legislature specifically chose to allow IBIS testing. *Id.* We concluded that defendant met the requirements of his section 116-3 motion for postconviction IBIS testing, and therefore we reversed and remanded for further proceedings. *Id.*

¶ 31 On remand, the circuit court entered an agreed order on March 13, 2011. Therein, the parties agreed that ISP would conduct IBIS testing on the recovered bullets and casings as well as the State and defense test-fired bullets and casings. The testing would be performed to assess whether the test-fired bullets and casings were fired from the same weapon as the recovered bullets and casings. The forensic laboratory was to determine "any conclusive findings; any findings probative of a non-match among the material; and any findings regarding the degree of confidence of any matching characteristics." After ISP finished its testing process, it was to send the Taurus and items tested to defendant's identified ballistics examiner.

¶ 32 D. 2014 Postconviction Petition

¶ 33 On September 26, 2014, defendant filed a "Successive Post-Conviction Petition Demonstrating Actual Innocence." The petition stated that defendant had received the ISP examiner's forensic laboratory report in December 2011, which included IBIS analysis. The petition alleged that both the recovered bullets and casings and the test-fired bullets and casings were entered into the IBIS system and that the IBIS system had failed to reveal a digital match between the test firings and the recovered evidence. Further, two ISP examiners had reached an "inconclusive" determination of whether the recovered bullets were fired by the Taurus.

¶ 34 Defendant's petition asserted four counts for postconviction relief. Count I argued that the report and conclusions of John Murdock, defendant's retained ballistics expert, were new, noncumulative, and material evidence that were likely to change the result on retrial. In particular, defendant argued that after reviewing the evidence in the case, Murdock concluded that the recovered cartridge casings were not fired from the Taurus handgun and that the evidence did not support that the recovered bullets were fired from the Taurus handgun. Count II argued that new ISP laboratory reports—the digital IBIS analysis and the ISP examiners'

conclusions that the recovered bullets were not conclusively fired from the Taurus—were new, noncumulative, and material evidence that were likely to change the result on retrial. Defendant argued that taken together, the State's new reports showed that the bullets recovered from the crime scene could not be identified as having been fired by the Taurus handgun, directly contradicting Gunnell's testimony at trial, and IBIS digital analysis failed to link the Taurus handgun to the recovered bullets and casings. Count III argued that another man had committed Ascher's murder, and count IV argued that Gunnell's testimony at trial violated defendant's due process rights.

¶ 35 The State moved to dismiss the petition on January 4, 2016. The court denied the motion on April 19, 2016, and it set the petition for an evidentiary hearing.

¶ 36 E. Third-Stage Evidentiary Hearing

¶ 37 A third-stage evidentiary hearing commenced on December 12, 2016, and took place over three consecutive days. At the beginning of the hearing, the parties stipulated to the admission of various records, reports, and exhibits relied upon by the expert witnesses at the hearing. The stipulated exhibits included the Taurus handgun, the recovered casings and bullets, Gunnell's 1993 test-fired casings and bullets, and McLain's 2011 test-fired casings and bullets.

¶ 38 Defendant's first witness was John Murdock, who testified as follows. He had been a firearm and toolmark examiner for 50 years, explaining that the job entailed evaluating physical evidence collected from a crime scene, including guns and bullets. He had worked for ATF for 15 years, performing firearm and toolmark examinations. He retired from ATF in 2008, formed his own forensic consulting company, and he was currently contracting full-time with the Contra Costa County Sheriff Coroner's Office in Martinez, California, as a firearm and toolmark examiner. Over his career, he had performed over 1,000 firearm and toolmark identifications,

and he had been qualified as an expert witness of firearm and toolmark identification in state and federal court approximately 100 times. The court recognized Murdock as an expert in firearm and toolmark identification.

¶ 39 In order to examine the physical evidence in the case, Murdock used two different types of microscopes. He used a stereo binocular microscope for observing "all the small marks in the little nooks and crannies of cartridge cases and fired bullets." He also used a firearm comparison microscope, which could take high-quality digital images, and such microscopes cost $50,000 to $80,000 dollars. The comparison microscope he used could go up to 120 times magnification, or 120 power. These microscopes were "very handy to look at very small marks." He explained that comparison microscopes from the early 1990s ranged from only 20 to 40 power—sometimes a little higher—and there was no digital photography available.

¶ 40 Murdock provided some background on the science of toolmark and firearm examination.[3] He explained that when a firearm is fired, certain toolmarks are left behind, both on the bullet and the cartridge casing. He went through an exhibit showing different types of marks, explaining how they were made and where they would appear, including breech face marks, firing pin impressions, magazine marks, extractor marks, and ejector marks.

¶ 41 He then turned to how an identification using different marks was made. First, in determining whether a test-fired item matched a questioned item, he looked for class characteristics, which were "features that are designed into a product by a manufacturer." For example, manufacturers could include different amounts of grooves in a gun barrel and can use different angles for the grooves. A firearm identification could not be made solely on the basis

[3] Other experts at the hearing also provided similar background information on firearm identification.

of class characteristics, although an elimination could.

¶ 42 The next step after considering class characteristics was to look for individual characteristics, independent of any subclass markings. Subclass markings were also derived from the manufacture of the firearm or other tool, and they appeared in a repetitive way as a result of the machining processes used to manufacture the item. Subclass marks alone could not be the basis for an identification. On the other hand, individual characteristics were those marks that would not be expected to appear on similar firearms. An examiner would look for reproducible marks from the firearm in question, and they would rely on knowledge and experience to evaluate the degree of agreement or disagreement among marks. Identifications were made to a "practical certainty."

¶ 43 Murdock opined as to his conclusions in this case. He first addressed the bullets. He was unable to conclude that the two recovered bullets were fired from the same gun barrel. He used his firearm comparison microscope to examine those bullets. He did conclude that Gunnell's test-fired bullets from 1993 and McLain's test-fired bullets from 2011 were fired from the same gun. He reviewed images of those bullets and explained the similar impressions he observed.

¶ 44 He next compared the recovered bullets to the test-fired bullets, and he concluded that there was no significant agreement between them. He did not create any "photomicrographs" of his comparisons because "there was really nothing to illustrate. There was no significant agreement at all." He compared the test-fired bullets to the recovered bullets using the firearm comparison microscope at up to 60 power.

¶ 45 He also examined the cartridge casings. He first concluded that the two recovered casings were fired from the same gun. The breech face markings on those casings were "very reproducible," and it helped that there were two casings. That allowed him to establish a

benchmark for what markings to expect if another bullet is fired from the same gun. He began his examination at 6 power, proceeding to 15 power, then 40 power, and eventually 120 power. He proceeded to a greatly increased magnification power because when he saw the casings at 40 power, he began "to discern some small marks near the bottom. I wanted to see what they looked like with a closer view." At 120 power, he was able to conclude that the same firearm was responsible for the striation marks on the casings, that is, the two recovered casings were fired from the same gun. When asked if he could make this identification at 40 power, Murdock responded "no way I could—that you could make this kind of a comparison and conclusion at that magnification."

¶ 46 Murdock also concluded that the 1993 and 2011 test-fired casings were all fired from the same gun. He examined the test-fired casings at varying magnifications, looking at various marks. Murdock found that all the test-fired casings exhibited similar breech face marks. He also examined the firing pin impression on the 2011 test-fired casings and noted "faint concentric marks near the outer edge of the two firing pin impressions." In his opinion, "whatever firing pin struck this *** you would have corresponding faint impressions near the outer edge *** of the firing pin tip." He further examined the ejector marks and extractor marks. In particular, he examined extractor marks on the 2011 test casings at up to 80 power. He concluded that the extractor marks on the 2011 casings were created by the same gun. Finally, Murdock examined the magazine lip marks from the 1993 test fire casings. He examined two different lip marks, one at up to 80 power and the other at up to 120 power. He concluded that the magazine lip marks on the 1993 test casings were created by the same magazine lip, emphasizing the matching striae between marks.

¶ 47 Murdock then compared the test-fired casings to the recovered casings. He concluded

that the test-fired casings were fired from a different gun than the recovered casings. He first found "sufficient dissimilarities to indicate that [the cartridge casings] were not struck by the same breech face." He also concluded that the recovered and test-fired casings were struck by different firing pins. He noted that the concentric, circular marks on the test fired cartridges were a subclass characteristic that could be used for exclusion but not identification. The test-fired casings had coarse marks and a concentric, circular mark in the middle of the firing pin impression, whereas the recovered casings had only faint circular marks near the periphery of the firing pint impression. These comparisons were made at up to 30 power.

¶ 48 He continued to compare other marks between the test-fired and recovered casings, because after coming to the opposite conclusion of the ISP examiners based on the breech face and firing pin marks, he thought it reasonable to move on to other markings to see if those agreed or disagreed. He specifically noted that there were firing pin aperture marks on all four of the test casings, likely caused by an apparent defect in the firing pin aperture, which did not appear in a similar fashion on the recovered cartridges. He also concluded that the test-fired and recovered casings were struck by different ejectors based on the ejector marks.

¶ 49 After examining two extractor marks on the recovered casings at up to 120 power, he determined that they were not created by the same extractor as the marks on the test-fired casings. In particular, the marks on the test-fired casings consisted of a series of coarse and fine lines observable at a higher magnification, whereas the recovered casings showed marks that were more uniform—they weren't the same series of coarse and fine lines. He explained that he knew that the extractor marks on the test-fired cartridges were created by the extractor on the Taurus handgun, and therefore the marks on the recovered cartridges must have been created by an extractor on another gun. Finally, he examined the magazine lip marks between the 1993 test-

fired casings and the recovered casings at up to 80 power. He concluded the marks came from different magazine lips.

¶ 50 After presenting his conclusions, Murdock testified that it was customary in many laboratories to go through a verification process, where a primary examiner turns over the evidence to another experienced examiner to see if that person agrees with the primary's conclusions, in order to prevent errors in reporting. His work in this case was verified by Chris Coleman.

¶ 51 Chris Coleman testified next for the defense as follows. He was a contract firearms examiner who was currently contracting with the Washington, D.C., Regional Crime Laboratory in their Firearms Examination Unit. He had been a firearm and toolmark examiner for 21 years. He had testified as an expert witness in the area of firearm and toolmark examination around 169 times, and he had testified for the defense in about 10 percent of those instances. The court accepted him as an expert in firearm identification.

¶ 52 Coleman defined verification as a "quality assurance process," allowing a "second set of eyes or a second examiner with experience" to review a firearm or toolmark examination. Murdock had asked him to verify some work at his lab, without telling him what the evidence was related to, who had retained him, or what Murdock's conclusions about the evidence were. Coleman examined the two sets of test-fired casings, the recovered casings, the test-fired bullets, and the recovered bullets.

¶ 53 He began by examining the cartridge casings, first determining that all the test-fired casings appeared to be fired from the same gun. He also determined that the two recovered casings appeared to be fired from the same gun. Then, he compared the test-fired casings to the recovered casings. At lower magnification, he thought there were "some similarities there" and

that his examination would not take long. As he increased the magnification, however, he noticed that "things weren't in the right orientation; they weren't the same size or shape; they weren't in the same locations."

¶ 54 He then examined the bullets. The test-fired bullets "lined up" as from the same gun easily. They had good markings. The recovered bullets were more difficult, and he did not see much agreement between the two recovered bullets. Coleman told Murdock that he did not believe the recovered casings were fired from the same gun as the test fires, and that is when Murdock told him that was his conclusion, too.

¶ 55 This initial examination took Coleman about three hours. He later went through a systematic comparison of the evidence with Murdock's notes and comparisons for about 18 hours. He came to the same conclusions as Murdock, including the general conclusion that all the test-fired cartridge casings were fired from the Taurus, and that the recovered casings were not fired from the Taurus. Like Murdock, Coleman examined breech face marks, firing pin impressions, ejector marks, extractor marks, aperture bulge, and magazine lip marks, and he compared those marks between the test-fired casings and the recovered casings. His comparisons used magnification of up to 120 power. As to the bullets, Coleman described the recovered bullets as damaged, and he was not able to find any significant agreement between the recovered bullets. They had similar class characteristics, but he could not gather anything more. He also found no significant agreement between the test-fired bullets and the recovered bullets.

¶ 56 The State called three witnesses, beginning with Daniel Gunnell. Gunnell, who had testified in defendant's original trial, was currently employed as the Assistant Laboratory Director at the Joliet Forensics Science Laboratory with the ISP. He testified as follows as an expert in firearm and toolmark identification and analysis.

¶ 57 Gunnell recounted his 1993 examination of the evidence in defendant's case. He had examined both the test-fired cartridge casings and bullets from the Taurus using a comparison microscope. In 1993, the magnification traditionally used was "between 10 and 20 power." At the time, ISP protocol did not require that he take photographs of his examinations, and a proper identification was made by viewing evidence under a microscope, not by examining a photograph. His conclusions were verified by another ISP examiner.

¶ 58 Gunnell's next involvement with the physical evidence in this case was in 2012. He reexamined the casings and bullets again after another ISP examiner, Beth Patty, had examined them. She had reached the same conclusion as he did in 1993 on the recovered casings—that they were fired by the Taurus—but she reached an "inconclusive" determination on whether the recovered bullets were fired from the Taurus. Upon reexamination, he concurred with Patty's conclusions. He was not sure why he looked at the bullets in 1993 differently than in 2012, but he offered that the bullets may have been altered by handling or darkened by chemical reactions as they age. He did not believe his inconclusive determination on the recovered bullets in 2012 was inconsistent with his 1993 identification.

¶ 59 Gunnell addressed Murdock's examination and conclusions. He found Murdock's work to be within accepted standards and his documentation "very thorough." He was not sure, however, how Murdock reached an elimination conclusion on the bullets. He explained that an elimination required either a difference in class characteristics or an "overwhelming difference in individual characteristics," but here, there was agreement in class characteristics and some agreement of individual characteristics between the test-fired and recovered bullets. He did not believe the evidence supported an elimination conclusion. Likewise, he believed that the language in Murdock's notes and documentation related to the casings supported an

"inconclusive" conclusion, not an elimination.

¶ 60 Gunnell also explained that extractor marks, ejector marks, and magazine lip marks could be created without firing a gun. He did not believe those marks contributed to an elimination conclusion in this case.

¶ 61 On cross-examination, Gunnell confirmed that in 1993, he did not have the benefit of a comparison microscope that could go up to 120 power. At the time, ISP examiners typically used 20 power, and there was no high-resolution digital photography available. The maximum total power available was about 60 power, but they "seldom" used that. In his 1993 examination, he had noted variable firing pin impressions between the test-fired and recovered casings, but he "did not put a lot of consideration towards the identification on that." As to the degradation of the bullets, he admitted that he had not cited any scientific literature to support their degradation, and he did not identify any specific place where the bullets degraded.

¶ 62 Russell McLain testified next as follows. He was now retired after working for ISP for about 30 years, and he testified as an expert in firearm and toolmark identification. In 2011, he was assigned to input the evidence from defendant's case into the IBIS database. He performed the 2011 test fires on the Taurus, and he ran the IBIS search on the-test fired casings and bullets.

¶ 63 McLain also performed his own comparison of the recovered bullets and casings against his 2011 test-fired bullets and casings. He concluded that the two recovered casings and one of the recovered bullets were fired from the Taurus. He admitted that ISP policy was typically against reexamination of such evidence.

¶ 64 On cross-examination, McLain confirmed that he did not perform any thorough examination of the evidence that would constitute a reexamination. He also confirmed that the IBIS system did not match the recovered cartridge casings to the test-fired casings. Further, the

IBIS report did not match the recovered bullets to the test-fired bullets. Finally, McLain did not "spend any or much time comparing the firing pin marks," and he did not compare ejector marks, extractor marks, or magazine lip marks.

¶ 65 The State's final witness was Beth Patty, and she testified as follows. She was employed with ISP as an assistant laboratory director of the DNA indexing laboratory in Springfield, and she had previously worked in the field of firearm identification, including as a quality review coordinator. The court recognized her as an expert in firearm and toolmark identification.

¶ 66 In 2012, she received the physical evidence in his case, which included the recovered bullets and casings and the 1993 and 2011 test-fired bullets and casings. She also personally test fired the Taurus eight times, and she concluded that her test-fired casings were fired by the same gun as the 1993 and 2011 test-fired casings. She then used a comparison microscope to compare each of her test-fired casings to the recovered casings.

¶ 67 Patty concluded that the recovered casings were fired by the Taurus handgun. Because she had made an identification based on breech face marks, she "would not turn to looking for extractor, ejector and magazine lip marks." Those marks could have been created when the bullet was chambered in another weapon but not fired. Those marks were "something to consider," but they were not the primary focus in a firearm identification.

¶ 68 She performed a similar examination and comparison of the bullets. Her conclusion was "inconclusive"—she could neither identify nor eliminate the Taurus as having fired the recovered bullets. She explained that there was insufficient detail on the bullets, which was a matter of professional opinion. She further explained that an elimination conclusion is typically based on class characteristics, and while ISP policies allowed for an elimination based on individual characteristics, that would require an overwhelming difference in individual

characteristics. Her examination and conclusion were verified by another ISP examiner.

¶ 69 The comparison microscope Patty used to examine the evidence went up to 40 power, and she believed that level of magnification was sufficient to reach her conclusions. She disagreed with Murdock's elimination conclusion with respect to the casings. His description of the breech face markings looked to her like "the wording of an inconclusive" determination.

¶ 70 On cross-examination, Patty confirmed that she did not compare ejector marks, extractor marks, or magazine lip marks in reaching her conclusion that the recovered cartridge cases came from the Taurus. Rather, her conclusion was based on breech face marks and firing pin impressions. She agreed, upon review of the firing pin impressions, that there were both some similarities and some differences between the recovered casings and test-fired casings.

¶ 71 On rebuttal, Murdock testified as follows. He agreed with the general proposition that ejector, extractor, and magazine lip marks could be created without firing a weapon, but he disagreed that those marks lacked value in this case. Sometimes those marks were "of profound value." He explained that the casings used in the test firings were marked NR for non-reloadable, and that they were actually fired from the Taurus. He could safely assume their marks were from firing. One of the recovered casings had marks in similar positions and relations to the test-fired casings, and was marked non-reloadable. He compared all the marks on that casing.

¶ 72 F. Circuit Court Findings and Order Granting a New Trial

¶ 73 At a February 15, 2017, hearing, the court made its initial findings. The court first found that Murdock's and Coleman's testimony at the hearing was newly discovered evidence. Further, it found that Murdock's and Coleman's testimony was not merely cumulative of Boese's; their testimony was "more extensive than Mr. Boese's trial testimony, qualitatively,

quantitatively, and reached additional conclusions beyond those reached by Mr. Boese." The court also found that defendant's due process claim was not waived.

¶ 74 The court held another hearing on March 3, 2017. First, defendant withdrew count III, stating that he would like to rest on the strength of the remaining counts. The court then rendered its remaining findings. On count I, the court found that, in addition to being new, noncumulative evidence, Murdock's and Coleman's testimony would likely change the result at retrial. On count II, the court found that the ISP reports were newly discovered, material, and noncumulative, and that the evidence would likely change the result at retrial. The court specified that its findings were as to the new ballistics evidence and did not have "anything to do with the IBIS testing. I'm talking about the ballistic testing conducted by the Illinois State Police." On count IV, the court found that Gunnell's testimony at the original trial was not a due process violation, and it therefore denied relief on that count.

¶ 75 The circuit court also entered a written order to this effect on March 3, 2017, and it awarded defendant a new trial.

¶ 76 The State timely appealed.

¶ 77 II. ANALYSIS

¶ 78 The State argues that the circuit court erred in granting defendant's postconviction petition and awarding him a new trial following a third-stage evidentiary hearing, because the relevant evidence introduced at the hearing was not newly discovered and was cumulative of the evidence presented at trial. Therefore, it argues that the court's decision was manifestly erroneous.

¶ 79 The State begins its argument by emphasizing that not all markings on cartridge casings result from the firing of a weapon. So-called action marks or non-fired marks can result from

loading, unloading, and cycling the firearm, and such marks may include extractor, ejector, and magazine marks. On the other hand, impressed marks, such as breech face marks and firing pin impression marks, are created only when the gun is fired.

¶ 80 The State continues that its experts disagreed with Murdock's consideration of the actions marks—here, the extractor, ejector, and magazine lip marks. The State argues that such action marks could have been created without the weapon being fired. It also contends that Murdock found agreement in class characteristics and some agreement in individual characteristics between the crime scene evidence and test fired evidence. Further, the State's experts disagreed with Murdock that the differences between the recovered evidence and test-fired evidence were sufficient to support excluding the Taurus as the murder weapon.

¶ 81 In addition, the State argues that Murdock's and Coleman's conclusions were not based on new technology—specifically, their use of high-powered magnification up to 120 power and high-resolution digital microphotographs. It argues that Murdock did not testify to taking a single high-resolution microphotograph comparing the impressed marks between the crime scene evidence and test evidence. Rather, the majority of photographs in evidence comparing impressed marks were taken at 40 power or less. The State contends that it was incumbent upon Murdock to take high-resolution photographs of the impressed marks if the goal of the defense was to demonstrate that new technology could "lead to anything other than merely a second examination of the same evidence available at defendant's trial."

¶ 82 Finally, the State acknowledges that we may not simply substitute our opinion for that of the circuit court, but it asserts that if "the non-fired marks are subtracted from the equation," then the only difference between the evidence at the evidentiary hearing and defendant's trial was the ultimate conclusion of the experts. In sum, both Murdock's and Coleman's examinations of the

breech face marks and firing pin impressions were conducted at the same magnifications available at defendant's trial, and therefore the court's order was manifestly erroneous because it was not based on new evidence and was cumulative to the evidence adduced at trial.

¶ 83 Defendant responds as follows. First, he argues that the State has only challenged the circuit court's ruling on count I (Murdock's and Coleman's testimony) and has thus forfeited a challenge to the court's ruling on count II (the ISP reports). In the alternative, he argues that the court's ruling on count II was not manifestly erroneous, because the new ISP reports undermined Gunnell's trial testimony, as the ISP experts could not identify the recovered bullets as having been fired by the Taurus. Defendant argues that count II was an adequate basis for a new trial, and that we should affirm on this basis alone.

¶ 84 Moreover, defendant argues that we should affirm the circuit court's ruling on count I. He argues that the court rightly found that Murdock's and Coleman's opinions were newly discovered evidence, stressing that Murdock and Coleman used up to 120 power to examine the cartridge casings and up to 60 power to examine the bullets. Murdock also documented his work with 78 high-resolution digital photomicrographs, which he could not have done with the technology available in 1993.

¶ 85 In defense of Murdock's consideration of the ejector, extractor, and magazine lip marks, defendant argues that Murdock explained that all the test-fired casings were non-reloadable rounds actually fired by the Taurus in laboratory conditions, and therefore those marks were attributable to the Taurus. Importantly, if the murder weapon was the Taurus, then the extractor marks, ejector marks, and magazine lip marks should have been found on the recovered casings, as those also would have been fired from the Taurus.

¶ 86 Next, defendant argues that the circuit court properly concluded that Murdock's and Coleman's opinions were material and noncumulative. They both reached an elimination conclusion, which was different than Boese's inconclusive determination at trial. In addition, their opinions were aided by modern equipment unavailable to Boese at the time of trial, and Boese did not testify that he compared the ejector, extractor, or magazine lip marks on the test-fired casings to the recovered casings.

¶ 87 Finally, defendant contends that the circuit court correctly found that Murdock's and Coleman's opinions were likely to change the result on retrial. Their opinions excluded the Taurus as the shooting weapon, which was significant testimony that went to a critical issue at trial—identity—and directly contradicted Gunnell's testimony at trial. Moreover, defendant argues that the State is essentially asking us to inappropriately reweigh the evidence from the evidentiary hearing.

¶ 88 We first note, with respect to forfeiture, that the State's argument was not specifically limited to one count. Its arguments are reasonably read to assert not only that Murdock's and Coleman's testimony was not new and cumulative but also that the State's experts' testimonies support reversal on appeal—in particular, that they identified the recovered cartridge casings as having been fired by the Taurus. Therefore, we reach the merits of the State's argument.

¶ 89 We agree with defendant that the circuit court's findings on counts I and II were not manifestly erroneous. When a postconviction petition advances to a third-stage evidentiary hearing, where fact-finding and credibility determinations were involved, we will not reverse the circuit court's decision unless it is manifestly erroneous. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). A decision is manifestly erroneous if the error is " 'clearly evident, plain, and indisputable,' " that is, the opposite conclusion is clearly evident. *People v. Coleman*, 2013 IL

113307, ¶ 98 (quoting *People v. Morgan*, 212 Ill. 2d 148, 155 (2004)). The trial court serves as the finder of fact at an evidentiary hearing (*People v. Chatman*, 357 Ill. App. 3d 695, 704 (2005)), and we give deference to the trial court because it was in the best position to observe the conduct and demeanor of the parties and witness (*People v. Deleon*, 227 Ill. 2d 322, 332 (2008)). We may not substitute our judgment on issues of witness credibility, the weight to be given to the evidence, or the inferences to be drawn. *Id.* Because the circuit court made both factual findings and credibility determinations at the evidentiary hearing, we will only reverse if its decision was manifestly erroneous.

¶ 90 Here, defendant's postconviction claim was based on newly discovered evidence. The due process clause of the Illinois Constitution affords postconviction petitioners the right to assert a claim of actual innocence based on newly discovered evidence, and the newly discovered evidence to support such a claim must be material, noncumulative, and likely to change the result on retrial. *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009). Newly discovered evidence is evidence that was not available at the defendant's original trial and could not have been discovered sooner through due diligence (*People v. Morgan*, 212 Ill. 2d 148, 154 (2004)), and evidence is cumulative when it "adds nothing to what was already before the jury" (*Ortiz*, 235 Ill. 2d at 335). In determining whether evidence is likely to change the result on retrial, we do not determine whether defendant is innocent; we determine only whether, under all the facts and circumstances of defendant's conviction, further scrutiny of guilt or innocence is warranted in light of the new evidence. See *id.* at 337 (citing *Molstad*, 101 Ill. 2d 128 , 136 (1984).

¶ 91 First, the court's finding that defendant presented newly discovered evidence was not manifestly erroneous. The State does not directly dispute that high-magnification microscopes were new technology that was unavailable at defendant's trial. The State argues, however, that

Murdock and Coleman did not actually utilize this new technology in reaching their conclusions, entreating us to subtract evidence of the ejector, extractor, and magazine lip marks from the evidentiary equation.

¶ 92 We reject this argument. It was for the circuit court to weigh the evidence and assess credibility of witnesses, and Murdock testified that the ejector, extractor, and magazine lip marks were relevant to his examination—he thought it was reasonable to examine other toolmarks after reaching a different conclusion than the State's examiners based on the impressed marks. While Murdock admitted that these additional marks could be created without firing the weapon, he explained that the test-fires were performed in a laboratory using non-reloadable casings and were actually fired by the Taurus. It was reasonable to expect that the markings on the test-fired casings would match the markings on the recovered casings, if the Taurus was the weapon that shot Ascher. He testified that the markings did not match, and this bolstered his conclusion that the Taurus was not the gun used to shoot Ascher. Murdock thus examined the ejector, extractor, and magazine lip marks utilizing technology unavailable at the time of defendant's trial, as he specifically used up to 120 power to examine the magazine lip marks and 80 power to examine the extractor marks.

¶ 93 Moreover, Murdock used high-powered magnifications to examine some of the impressed marks as well. He testified that he used up to 120 power to ascertain that the two recovered casings were from the same gun based on the breech face marks, and he testified that he would not have been able to make that identification at 40 power. He also made other comparisons between test-fired casings at up to 80 power. All of Murdock's conclusions were verified by Coleman, who likewise utilized high-powered magnifications in his examinations.

¶ 94 We further reject the State's argument that Murdock was required to take high-resolution microphotographs of his comparisons of impressed marks. He provided testimony to the court of his examinations utilizing new technology, and any absence of accompanying documentation goes to the weight of evidence and witness credibility, which were issues for the circuit court to resolve.

¶ 95 Second, the court's finding that defendant's newly discovered evidence was material and noncumulative was not manifestly erroneous. Murdock and Coleman concluded that the Taurus was not the gun used in Ascher's shooting. No expert at trial reached this conclusion, which would undoubtedly be noncumulative and material to identification of the shooter. As we noted in our 2011 opinion, ballistics evidence was important to the State's case at defendant's trial, and much of the State's remaining evidence was circumstantial. *Pursley III*, 407 Ill. App. 3d at 538-39. At trial, Boese was unable to exclude or confirm whether the Taurus was the gun used to shoot Ascher, and he did not testify to examining extractor, ejector, or magazine lip marks. He also did not have access to high-magnification microscopes that the experts used in preparation for the evidentiary hearing.

¶ 96 Finally, the court's finding that the newly discovered evidence likely would have changed the result on retrial was not manifestly erroneous. The court heard Murdock and Coleman testify that they could eliminate the Taurus as the weapon used in the shooting; considered their conclusions in light of the State's experts' testimony; and weighed the witnesses' credibility. We will not reweigh the evidence or reassess witness credibility, and we have already established in our prior opinion that the ballistics evidence was important to the State's case at trial (*id.*). Favorable expert testimony eliminating the Taurus as the murder weapon is the type of new evidence that warrants reconsideration of guilt or innocence under the

totality of these circumstances. See *Coleman*, 2013 IL 113307, ¶ 97 (if evidence is new, material, and noncumulative, then the trial court must consider whether the evidence "places the evidence presented at trial in a new light and undercuts the court's confidence in the factual correctness of the guilty verdict").

¶ 97 Accordingly, the circuit court did not err in granting defendant a new trial based on count I. While our affirmance of count I is sufficient to affirm the court's award of a new trial, we also note that the ISP reports, which were created after defendant's trial and were the basis for count II, contained at least one salutary conclusion for defendant—an inconclusive identification of the recovered bullets that contradicted Gunnell's testimony at trial that the bullets were fired from the Taurus. This inconclusive identification by the State was new in that it did not exist at defendant's trial and could not have existed prior to his successful request for IBIS testing; was material and noncumulative, in that the State was effectively walking back its prior, material conclusion that the recovered bullets were fired by the Taurus; and may have changed the result on retrial, in light of the importance of ballistics identification evidence. Accordingly, the circuit court's findings on count II were also not manifestly erroneous.

¶ 98 III. CONCLUSION

¶ 99 The circuit court's findings following defendant's third-stage evidentiary hearing were not manifestly erroneous, and we therefore affirm the Winnebago County circuit court's order granting defendant a new trial.

¶ 100 Affirmed.