2019 IL App (1st) 160327-U

No. 1-16-0327

May 20, 2019

First Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 99 CR 15711
	)	
RONALD SMITH,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge presiding.

JUSTICE WALKER delivered the judgment of the court.
Justice Pucinski and Justice Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err in denying defendant leave to file a successive postconviction petition where defendant did not state a colorable claim of actual innocence.

¶ 2 Following a 2001 jury trial, defendant Ronald Smith was found guilty of first degree murder (720 ILCS 5/9-1(a)(1) (West 1998)) and sentenced to 35 years in prison. In 2015, defendant filed a *pro se* motion for leave to file a successive postconviction petition alleging actual innocence based on newly discovered evidence that (1) Darrell Harris, a newly discovered

eyewitness, observed defendant standing down the street from the victim at the time of the murder, and (2) defendant's signed written statement was a product of police coercion. On appeal, defendant argues that the circuit court erred because he presented a colorable claim of actual innocence based on Harris's affidavit. Additionally, defendant now styles his claim of police coercion as evidence that would undermine the strength of the State's trial evidence, thereby increasing the probability that Harris's affidavit would change the result on retrial. We affirm.

¶ 3 BACKGROUND

¶ 4 We recount the background of the case only to the extent necessary to resolve the issues on appeal. Prior to trial, defendant filed a motion to suppress evidence of his oral and written statements to police. In particular, defendant argued that he only signed a written statement because the police told him that he could go home if he did so. Defendant further contended that he was not informed of his *Miranda* rights prior to interrogation and that he was unable to understand his *Miranda* rights "due to [his] physical, physiological, mental, education, and/or psychological state, capacity, and condition."

¶ 5 At a pretrial hearing on the motion, Chicago police detective David Wright testified that he was present when defendant signed the handwritten statement on June 14, 1999. Wright stated that defendant had been advised of his *Miranda* rights before an earlier interview that day and prior to defendant signing the written statement, Assistant State's Attorney John O'Grady also advised him of his *Miranda* rights. Wright had no difficulty communicating with defendant, and defendant did not indicate that he was unable to understand his rights on either occasion. Wright did not hear anyone tell defendant that he could go home if he signed a confession.

¶ 6 O'Grady also testified that he advised defendant of the *Miranda* rights, which defendant stated he understood, and that he had no difficulty communicating with defendant. O'Grady denied hearing anyone tell defendant he could go home if he signed a confession.

¶ 7 Defendant testified that he turned himself in at a police station upon hearing that Detectives Wright and James Sanchez were looking for him. At the police station, defendant met with Sanchez after waiting about five minutes. Sanchez took defendant to an interview room, locked the door, and left without providing *Miranda* warning to him. Wright came in about 30 minutes later and told defendant that the police "wanted [him] as a witness and [he] would be out of there in no less than four or five hours." Wright proceeded to interview defendant for about 30 minutes without reading him the *Miranda* rights. Approximately "thirty minutes to an hour" after the interview, Sanchez came in to "check on" defendant and asked him "if [he] needed a cigarette or something." O'Grady arrived "a couple of hours after" Sanchez and conducted two separate interviews with defendant. During the first conversation, which lasted "[n]o longer than twenty minutes," O'Grady did not advise defendant of the *Miranda* rights. Defendant asked O'Grady when he would be able to leave, and O'Grady replied "don't worry about it, we'll get you out of here as quick as we can." Defendant offered to write down "exactly what happened," but O'Grady rejected the offer because he wanted all the witness statements to "coincide together."

¶ 8 Defendant next spoke with O'Grady "[a]bout an hour or two" later while Sanchez and Wright were present. None of the individuals Mirandized defendant. O'Grady presented defendant with a piece of paper and explained again that all of the witnesses in the case were required to sign a statement and that "they had to all coincide." Defendant testified that he signed

the written statement in multiple places "[b]ecause I thought I was a witness." He did not read the statement before signing it because O'Grady was "covering it up." Defendant asked if he could read the statement, but O'Grady refused.

¶ 9 The trial court denied defendant's motion to suppress. In so ruling, the court found that the State had proven by a preponderance of the evidence that defendant was advised of his *Miranda* rights, and he was not told that he could go home if he signed a confession.

¶ 10 The case proceeded to a jury trial, where Deborah Dean testified that at about 3:15 p.m. on June 10, 1999, she and her fiancé, Arnett Williams, walked from their apartment to the corner of Walnut Street and St. Louis Avenue. There, they encountered three men—defendant, Tony "Four-Tone" McGruder, and Albert "BD" Johnson—whom they knew from previous drug transactions. Williams owed drug debts to all three men, and repaid all but $5 of what he owed to McGruder. Dean and Williams returned to the corner of Walnut and St. Louis around 8 p.m. and purchased crack cocaine from the three men. They went back to the corner again around 1:30 a.m. and attempted to purchase more crack cocaine on credit. When they arrived, defendant, McGruder, and Johnson were playing dice and drinking bottles of beer. As Williams was talking to Johnson, McGruder "jumped into the conversation" and yelled at Williams about the $5 he owed. Defendant also yelled at Williams, claiming that he owed him money as well. McGruder and Williams exchanged punches before Williams pulled out a box cutter and "grazed" McGruder. McGruder screamed "this bitch, he scratched me. I'm going to kill this mother f***." Williams ran away as McGruder and defendant threw beer bottles at him. When Williams slipped and fell, McGruder hit him in the head with a bottle. Then, defendant and McGruder kicked Williams as he lay on the ground.

¶ 11 Dean and Williams fled to their apartment. Upon discovering that Dean lost her keys, Williams retraced his steps in search of them while Dean waited in front of the apartment. Dean next saw Williams as defendant and McGruder were chasing him toward the apartment. When Williams fell to the ground, McGruder punched his lower body and defendant kicked and punched his upper body and head. Johnson tried to pull McGruder off Williams, but was unsuccessful. Johnson walked away toward Fulton Street. Dean saw McGruder "jab" Williams three times, although she did not actually see a weapon. Defendant and McGruder then fled.

¶ 12 Johnson's testimony was virtually identical to Dean's. In addition, Johnson testified that he heard McGruder say, "[H]e cut me. I'm going to kill this mother f***" after the first encounter with Williams. Johnson was standing on the corner of St. Louis and Walnut when Williams returned about five minutes later. Defendant and McGruder grabbed beer bottles out of a trash can, and McGruder said, "He cut me, I'm fitting to kill him." Defendant and McGruder chased Williams, both throwing beer bottles at him as he ran. Johnson watched the chase from near the alley between Fulton and Walnut. When Williams slipped and fell, defendant kicked and punched his "face and chest" while McGruder kicked and punched his lower body. Johnson ran over, grabbed McGruder's arm, and told him to "chill out," but McGruder pushed him away. As defendant continued to beat Williams, McGruder pulled out a pocket knife and stabbed Williams two or three times. Johnson fled, and was later apprehended by the police. He was taken to a police station, where he identified a photograph of McGruder. Johnson acknowledged at trial that he was on probation for two previous convictions for delivery of a controlled substance, and that he had a different possession of a controlled substance case pending in the circuit court.

However, he testified that the State had not made any threats or promises in exchange for his testimony.

¶ 13 Sanchez testified that he and Wright interviewed defendant at the police station on June 13, 1999. Before questioning defendant, Sanchez read him the *Miranda* rights. After reading each right, Sanchez asked defendant if he understood, and defendant responded affirmatively. Sanchez and defendant then had a "20 to 30 minute" conversation during which defendant admitted to punching, kicking, and throwing beer bottles at Williams after they argued about Williams's drug debt. Defendant, Johnson, and McGruder then went back to their dice game, during which McGruder told defendant that "if Mr. Williams came back and he was able to catch him he was going to kill him." When Williams returned, defendant and McGruder chased him and threw beer bottles at him. Williams fell to the ground and defendant kicked and punched his upper body. McGruder pulled a knife and stabbed Williams. Defendant then fled.

¶ 14 O'Grady testified that, on the night of June 13, 1999, he traveled to the police station to interview defendant. With Wright present, O'Grady explained to defendant that he was a prosecutor, and informed him of the *Miranda* rights. Defendant stated that he understood each right, and told O'Grady about his involvement in Williams's murder. O'Grady then had Wright leave the room so that he could talk to defendant alone. O'Grady asked defendant how the police had treated him. Defendant replied that they were treating him "fine," and had given him bathroom breaks, cigarettes, and soda. They did not threaten him or make him any promises.

¶ 15 O'Grady talked to defendant again "[a] few hours later" while Wright was present. O'Grady told defendant that he wanted to memorialize his earlier statement, and explained the options for doing so. In particular, O'Grady offered to hand write a summary of defendant's

earlier statement, allow defendant to make any changes, and then choose whether he wanted to sign it. Alternatively, O'Grady offered to bring in a court reporter to transcribe defendant's words verbatim, from which he could make revisions. Lastly, O'Grady stated that "the third option would be that we would just leave it as the oral statement he had already given me." Defendant replied that he wanted to do the handwritten option. O'Grady obtained a blank statement form with preprinted *Miranda* warnings at the top. Defendant read part of the *Miranda* warnings out loud to prove that he could read. O'Grady then wrote a "summary" of defendant's earlier statement while defendant was "reminding [him] or prompting [him]" about what to write. Defendant and O'Grady reviewed the written statement line by line, and defendant made several revisions. Defendant, O'Grady, and Wright initialed by the revisions and signed each page of the statement.

¶ 16 O'Grady read the statement to the jury. Before the handwritten portion, the preprinted *Miranda* rights section read:

> "I understand I have the right to remain silent and that anything I say can be used against me in a court of law. I understand that I have the right to talk to a lawyer and have him present with me during questioning. And if I cannot afford to hire a lawyer, one will be appointed by the court to represent me before any questioning. Understanding these rights, I wish to give a statement. Ronald Smith.
>
> After being advised and stating that he understood his constitutional rights, and after being advised and stating that he understood that John O'Grady is an assistant state's attorney, a prosecutor, a lawyer, and not his lawyer, [defendant] states that he wants to give his statement, which is in summary and not in word-for-word form."

¶ 17 The handwritten portion stated that defendant, McGruder, and Johnson were playing dice when Dean and Williams approached them and asked to purchase crack cocaine on credit. Williams became upset when he was denied, and McGruder and defendant argued with him. McGruder and Williams "started swinging fists at each other," and Williams pulled out a box cutter and cut McGruder. Williams fled, and defendant and McGruder chased him with beer bottles in hand. They threw the bottles at Williams, caught up to him, and kicked him as he lay on the ground. Williams got up and ran away, and the others went back to their dice game.

¶ 18 After Williams left, McGruder stated that "he was going to kill [Williams] if he was able to catch [him]." Williams returned, and defendant and McGruder grabbed more beer bottles and chased him. When Williams slipped and fell, defendant and McGruder kicked him in the head and threw bottles at him. McGruder then pulled out a knife and stabbed Williams. Defendant fled.

¶ 19 The statement concluded:

> "[Defendant] states that he has been treated find [*sic*] by the police and Assistant State's Attorney O'Grady. [Defendant] states he has only been here since the early evening and he has been allowed to use the bathroom whenever he wanted. [Defendant] states he has had cigarettes to smoke and pop to drink. [Defendant] states he is free from the effects of drugs and alcohol and he is giving this statement totally free and voluntarily.
>
> [Defendant] states nobody has made any threats or promises to him in order for him to give this statement. [Defendant] states he was told about the different ways his statement could be given. [Defendant] was told th[at] he could give his statement in

> handwritten form or in a court reported form, or he could leave it as an oral statement only. [Defendant] states he has chosen to make a handwritten statement.
>
> [Defendant] states he has read this whole statement and he showed that he can read English by reading the first typewritten paragraph of this statement out loud. [Defendant] states he has been allowed to make any changes or corrections to this statement that he wanted to."

¶ 20 Dr. Eupil Choi, a deputy chief medical examiner, testified that Williams's death was a homicide caused by multiple stab wounds. Williams also had abrasions on his head and upper body that Choi found were "consistent with someone who has been kicked and punched."

¶ 21 At closing, the State argued that defendant was accountable for the murder because he "willfully joined in" when McGruder attacked Williams. In response, defense counsel acknowledged that defendant chased, kicked, and threw beer bottles at Williams, but argued that defendant did not share McGruder's intent to kill and did not know that he was carrying a knife.

¶ 22 The jury found defendant guilty of first degree murder. The court denied defendant's motion for new trial, which argued, *inter alia*, that it erred in denying defendant's pretrial motion to suppress. After a hearing, the court sentenced defendant to 35 years in prison.

¶ 23 On direct appeal, defendant argued that the trial court erred by failing to adequately explain the reasons for its sentencing decision, and abused its discretion in imposing an excessive sentence. *People v. Smith*, No. 1-01-1969 (2002) (unpublished order under Illinois Supreme Court Rule 23). We affirmed. *Id.*

¶ 24 In April 2003, defendant filed an initial *pro se* postconviction petition, alleging that he was denied effective assistance of counsel, that he was tried for an offense never presented to the

grand jury, and that the State failed to prove him guilty beyond a reasonable doubt. The circuit court summarily dismissed the petition, and we denied defendant leave to file a late appeal (*People v. Smith*, No. 1-03-2900 (2003) (dispositional order)).

¶ 25 Defendant filed a successive postconviction petition in March 2004, asserting, *inter alia*, actual innocence. The claim was based on an affidavit from Dean in which she acknowledged that defendant "had something to do with the frist [*sic*] part of the fright [*sic*]," but averred that he was "[n]ot invol[ved] with the actual killing of Arnett Williams" and "was not the one who cut him." Defendant also attached his own affidavit in which he averred that, on retrial, Dean would "recant" her original testimony and "add more detail" to the events described in her affidavit. In April 2004, defendant filed a motion to amend his successive petition, which the circuit court denied. On appeal, we found that the circuit court had neglected to rule on the successive petition itself, and consequently remanded for second-stage postconviction proceedings because more than 90 days had passed since its filing. *People v. Smith*, No. 1-04-1774 (2006) (unpublished order under Illinois Supreme Court Rule 23). On remand, the circuit court granted the State's motion to dismiss. We affirmed the dismissal, and our supreme court denied defendant's *pro se* petition for leave to appeal.

¶ 26 In May 2008, defendant filed another *pro se* motion for leave to file a successive postconviction petition in which he alleged actual innocence based on a different affidavit from Dean. In this affidavit, Dean averred that defendant was involved in the "first part of the fight" wherein he and McGruder "hit and kicked" Williams. Dean and Williams ran home, but upon realizing that they had lost their keys, Williams returned to the scene of the fight and reengaged with McGruder. During this "second part of the fight," McGruder stabbed Williams. Defendant

was not beating Williams, but was "down the street walking toward us to see what had happened" because Dean was screaming. McGruder fled on foot, and defendant followed without realizing what McGruder had done. The circuit court denied leave to file the successive petition on the grounds that Dean's new affidavit was unlikely to change the result on retrial. We affirmed, finding that the affidavit was neither newly discovered nor sufficiently exonerating in light of the "overwhelming evidence of Defendant's accountability adduced at trial." *People v. Smith*, No. 1-08-2948 (2010) (unpublished order under Illinois Supreme Court Rule 23).

¶ 27 In April 2010, defendant filed a petition for writ of *habeas corpus* in federal court, raising, *inter alia*, actual innocence based on Dean's second affidavit. *U.S. ex rel. Smith v. Rednour*, No. 10 C 2767, 2010 WL 4363380 (N.D. Ill. Oct. 26, 2010), at *6. The federal district court dismissed the petition with prejudice. *Id.*, at *7.

¶ 28 In October 2008, July 2010, August 2011, and May 2012, defendant filed petitions for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)). On each occasion, the circuit court denied relief and we affirmed after granting appellate counsel's motion to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). *People v. Smith*, 2014 IL App (1st) 122557-U*; People v. Smith*, 2012 IL App (1st) 113264-U; *People v. Smith*, 2012 IL App (1st) 102843-U; *People v. Smith*, No. 09-0107 (2008) (unpublished order under Illinois Supreme Court Rule 23).

¶ 29 In January 2012 and October 2013, defendant filed two additional motions for leave to file successive postconviction petitions, both of which the circuit court denied. We affirmed the denial of the January 2012 motion after appellate counsel moved to withdraw (*People v. Smith*,

2015 IL App (1st) 132576-U), and the record does not show that defendant appealed the denial of the October 2013 motion.

¶ 30 Defendant filed another *pro se* section 2-1401 petition in March 2015, claiming actual innocence based on our supreme court's then-recent ruling in *People v. Fernandez*, 2014 IL 115527. The circuit court dismissed, finding that "Fernandez does nothing to exonerate [defendant] of criminal liability," because here "evidence presented [showed] that [defendant] kicked the victim with the co-defendant which led to his stabbing." The record does not show that defendant appealed.

¶ 31 On July 20, 2015, defendant filed the instant motion for leave to file a successive postconviction petition, alleging that he was actually innocent because (1) Wright and O'Grady coerced him into signing a written confession, and (2) Harris's attached affidavit established that defendant was not beating Williams when McGruder stabbed him. In the affidavit, Harris, a fellow inmate at Western Illinois Correctional Center, averred that he was walking toward the corner of St. Louis and Walnut on the night of the murder when he heard glass breaking. He looked toward Fulton and saw defendant standing by the alley between Fulton and Walnut. Harris also saw a man being chased down St. Louis and Fulton by two other men, whom Harris did not recognize. The man being chased fell down, and his pursuers began punching and kicking him. Harris noticed some money and dice on the ground, so he bent down to pick up the money. As he bent down, he heard a man scream. When Harris looked up, defendant was running away. One of the attackers was still kicking the man on the ground, and the other was stabbing him with a "shiny object." Harris ran away before anyone could see him. He explained that he did not come forward sooner because he was scared, had stolen the money, and did not

realize that an innocent man had been convicted of the murder before running into defendant in prison.

¶ 32 The circuit court denied defendant leave to file a successive postconviction petition, stating that his claim of police coercion was procedurally barred and not supported by the record. The court also found that defendant's claim of actual innocence failed because Harris's affidavit, which placed defendant at the murder scene, did not exonerate him. We allowed defendant's late notice of appeal.

¶ 33 ANALYSIS

¶ 34 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)) provides a statutory mechanism for a criminal defendant to obtain relief if his conviction was a product of a substantial denial of his constitutional rights. In Illinois, freestanding claims of actual innocence are cognizable as a matter of due process. *People v. Washington*, 171 Ill. 2d 475, 489 (1996). When a defendant's postconviction petition states a claim of actual innocence, it must be supported by newly discovered evidence that is material, noncumulative, and so conclusive that it would probably change the result on retrial. *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009). The conclusiveness of the evidence is the most important factor. *People v. Edwards*, 2012 IL 111711, ¶ 40. The inquiry is not whether the new evidence casts reasonable doubt on defendant's guilt, but whether it is akin to a "total vindication or exoneration." *People v. Shaw*, 2018 IL App (1st) 152994, ¶ 53. Because such evidence is usually unavailable, claims of actual innocence are rarely successful. *Schlup v. Delo*, 513 U.S. 298, 324 (1995).

¶ 35 The Act generally disfavors the filing of successive postconviction petitions. *Edwards*, 2012 IL 111711, ¶ 29; see also 725 ILCS 5/122-1(f) (West 2014). When a defendant requests

leave to file a successive postconviction petition that alleges actual innocence, he must meet a higher standard than is required of initial petitions at the first stage. *Edwards*, 2012 IL 111711, ¶¶ 22, 24. To obtain leave of court, a successive allegation of actual innocence must present a "colorable claim," of the defendant's innocence, meaning that " 'it is more likely than not that no reasonable juror would have convicted [the defendant] in the light of the new evidence.' " *Id.* ¶ 24 (quoting *Schlup*, 513 U.S. at 327). In addition, the doctrines of *res judicata*, collateral estoppel, and law of the case apply in successive postconviction proceedings to prevent a defendant from "taking two bites out of the same appellate apple" (*People v. Partee*, 125 Ill. 2d 24, 37 (1988)), and to avoid "piecemeal post-conviction litigation" (*People v. Tenner*, 206 Ill. 2d 381, 398 (2002); see also 725 ILCS 5/122-3 (West 2014) (constitutional claims not raised in the initial postconviction petition are waived in subsequent proceedings)). "The denial of a defendant's motion for leave to file a successive postconviction petition is reviewed *de novo*." *People v. Bailey*, 2017 IL 121450, ¶ 13.

¶ 36 On appeal, defendant first argues the circuit court erred in denying him leave to file a successive petition because he stated a colorable claim of innocence based on Harris's affidavit. However, it is clear that Harris's allegations are insufficient to exonerate defendant. As noted, defendant's new evidence must do more than merely raise reasonable doubts of his guilt. See *Shaw*, 2018 IL App (1st) 152994, ¶ 53; *People v. Collier*, 387 Ill. App. 3d 630, 636 (2008). Essentially, Harris averred only that defendant was not beating Williams when McGruder delivered the fatal wounds. Although defendant contends that this destroys his accountability for the murder, it only creates conflicting testimony with, among other things, defendant's own signed confession. As such, it is not the kind of conclusive evidence necessary to state an actual

innocence claim. See *People v. Sanders*, 2016 IL 118123, ¶ 52 (finding that a trial witness's recantation was not conclusive where it "merely add[ed] to conflicting evidence" and contradicted the testimony of other witnesses).

¶ 37 Defendant's present claim of actual innocence is substantively identical to his previously denied claims based on Dean's affidavits. There, as here, defendant offered as newly discovered evidence affidavits averring that he was not beating Williams while McGruder stabbed him. We affirmed the circuit court's denials of leave to file successive petitions based on Dean's affidavits. In doing so, we rejected the argument that "Dean's second affidavit, placing Defendant down the street at the time of the victim's stabbing, outweighs the overwhelming evidence of Defendant's accountability adduced at trial." *People v. Smith*, No. 1-08-2948 (2010) (unpublished order under Supreme Court Rule 23). Specifically, we noted that defendant was convicted under a theory of accountability, and in any event, Dean's affidavit was contradicted by defendant's signed confession, as well as testimony from Sanchez and O'Grady. *Id.* Although the "new" evidence of defendant's location during the murder now comes from Harris, rather than Dean, it is essentially the same claim, and does nothing to alter the logic of our prior decisions.

¶ 38 In the analogous case of *People v. Jones*, 2017 IL App (1st) 123371, the defendant was convicted of first degree murder after he and two co-offenders shot and killed a man they saw exiting a rival gang member's house. *Jones*, 2017 IL App (1st) 123371, ¶ 6. The evidence at the defendant's trial included his statements to police and a videotaped confession admitting his involvement in the murder. *Id.* ¶ 11. The defendant's initial postconviction petition claimed actual innocence based on an affidavit from Melvin Jones, one of the co-offenders, averring that

Melvin was solely responsible for the murder and had threatened defendant to falsely confess. *Id.* ¶ 25. After reviewing the "many contradictions" between the record and Melvin's allegations, we affirmed the circuit court's summary dismissal. *Id.* ¶ 29.

¶ 39 The defendant then filed a motion for leave to file a successive postconviction petition, this time alleging actual innocence based on police coercion and an affidavit from Telvin Shaw, a previously undiscovered eyewitness whom the defendant met in prison. *Id.* ¶¶ 31-32. Shaw averred that, unbeknownst to anyone else, he was walking down the street near the murder scene and saw that Melvin was the lone shooter. *Id.* ¶ 32.

¶ 40 We affirmed the circuit court's denial of leave to file a successive petition, finding that Shaw's affidavit was not sufficiently exonerating. *Id.* ¶ 65. We noted that defendant's prior postconviction petition had already raised the argument that Melvin was the sole offender, which we rejected in light of the overwhelming evidence to the contrary. *Id.* ¶ 49.

¶ 41 Here, as in *Jones*, Harris did not allege that defendant was not present during the offense and did not purport to have seen the events that transpired prior to the murder. Instead, his affidavit merely repeated Dean's claim that McGruder was the lone assailant at the time he delivered the fatal blow. As noted, this claim is overwhelmingly rebutted by the record, and even if true, does not definitively negate defendant's accountability. See *Edwards*, 2012 IL 111711, ¶ 39 (affidavit averring that the defendant, who was convicted of murder under an accountability theory, did not take part in the offense was not exonerating where it "critically d[id] not assert that [the defendant] was not *present* when the shooting took place" (emphasis in original)); *People v. Williams*, 2016 IL App (1st) 133459, ¶¶ 56-57 (affidavit did not exonerate defendant, who was convicted of murder under a theory of accountability, where it acknowledged that he

was present at the scene but merely offered an account of the victim's death that was contrary to the trial evidence). Harris's affidavit is therefore unlikely to change the result on retrial, and defendant has not stated a colorable claim of actual innocence.

¶ 42 Defendant nevertheless argues on appeal that Harris's affidavit would likely alter the result on retrial because the evidence of his guilt was not overwhelming. In making this argument, he seeks to undermine the evidence against him, *i.e.*, Dean's testimony, Johnson's testimony, and his own oral and written statements. However, this argument is misplaced because, as noted, "[a] claim of actual innocence is not a challenge to whether the defendant was proved guilty beyond a reasonable doubt, but rather an assertion of total vindication or exoneration." *Shaw*, 2018 IL App (1st) 152994, ¶ 53. For reasons we have explained, Harris's affidavit did not rise to the level of exoneration.

¶ 43 Moreover, defendant's attacks on the trial evidence are themselves unavailing. Although we must consider the cumulative effect of the newly discovered evidence to determine whether a retrial would likely produce a different result (*Ortiz*, 235 Ill. 2d at 336-37), the evidence against defendant remains overwhelming. Dean's testimony, even assuming that she would partially recant in accordance with her affidavits, would still establish that defendant and McGruder beat Williams minutes before the murder and after McGruder threatened to kill Williams. As we have previously found, Dean's partial recantation does little to absolve defendant of accountability for McGruder's actions. Dean's testimony regarding the first encounter is corroborated by Johnson, who also testified that defendant was involved in the second beating after McGruder reiterated his plan to kill Williams. The record shows that trial counsel fully explored Johnson's credibility

at trial, including potential bias toward the prosecution, and the jury convicted defendant nonetheless.

¶ 44 Defendant's claim of police coercion is similarly unpersuasive. In the present motion for leave to file a successive petition, defendant styled his claim as one of actual innocence. In support, defendant relied solely on his own assertion that Sanchez and O'Grady "coerced" him into signing a confession without reading it by telling him that he could go home if he did so. On appeal, he argues that this coercion weakens the strength of his written statement. However, as defendant acknowledges on appeal, his contention is not new. Defendant advanced the same argument in the trial court at a pretrial suppression hearing in 2000. The trial court denied defendant's motion to suppress, as well as his motion for a new trial based in part on the same assertion. Defendant did not raise the issue on direct appeal or in any of the numerous postconviction proceedings detailed above. We note that defendant only claims coercion with respect to his written statement. He does not challenge his earlier oral statements to law enforcement, which were substantively identical to his written statement.

¶ 45 CONCLUSION

¶ 46 Defendant failed to present a colorable claim of actual innocence. Harris's affidavit does not raise the probability that a reasonable jury would not convict defendant in light of the overwhelming evidence of his guilt. Thus, the circuit court did not err in denying defendant leave to file a successive postconviction petition.

¶ 47 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 48 Affirmed.