2024 IL App (1st) 191502-U

No. 1-19-1502

Order filed March 19, 2024

Second Division



IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 05 CR 17358 |
| | ) | |
| STEPHEN McCOY, | ) | Honorable |
| | ) | Charles P. Burns, |
| Defendant-Appellant. | ) | Judge, presiding. |

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Howse and Justice Ellis concurred in the judgment.

**ORDER**

¶ 1 *Held*: The circuit court's order denying defendant's motion for leave to file a successive postconviction petition is affirmed where the new evidence presented in support of his claim of actual innocence is not of such conclusive character that it would likely alter the outcome on retrial.

¶ 2 Defendant Stephen McCoy appeals the circuit court's denial of his motion for leave to file a successive postconviction petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2018)) following his 2008 convictions for attempted first-degree murder and

aggravated battery with a firearm. In his petition, defendant raised several grounds for relief, but appeals the dismissal of his petition only as to his claim of actual innocence. For the following reasons, we affirm.

¶ 3 Defendant was charged by indictment with, in relevant part, two counts of attempted first-degree murder under sections 8-4 and 9-1(a)(1) of the Criminal Code of 1961 (Code) (720 ILCS 5/8-4, 9-1(a)(1) (West 2004)) and two counts of aggravated battery with a firearm under then-existing section 12-4.2(a)(1) of the Code (720 ILCS 5/12-4.2(a)(1) (West 2004)) (repealed by Pub. Act 96-1551, art. 1, § 10 (eff. July 1, 2011)), for shooting Ernest Anderson and Curtis Chatman.[1]

¶ 4 In 2007, a jury found defendant guilty of the attempted murder of Anderson, not guilty of the attempted murder of Chatman, and guilty of aggravated battery of both victims. In 2008, the trial court sentenced defendant to consecutive terms of 15 years for the attempted murder of Anderson (merging the aggravated battery count) and 10 years for the aggravated battery of Chatman. We affirmed on direct appeal over defendant's contention that the trial court failed to conduct a proper *voir dire* of the jury and improperly coerced the verdict by informing the jury of the potential for sequestration. *People v. McCoy*, 405 Ill. App. 3d 269 (2010). Because defendant raises a claim of actual innocence, we recount the evidence presented against him.

¶ 5 At trial, Anderson testified he had worked in security for the City of Chicago for about eight years. He knew defendant "[f]rom the neighborhood" and identified him in court. Anderson and defendant's cousin Dominique McCoy each had a child with the same woman. Anderson acknowledged that his relationship with defendant's family was "[n]ot good." In 2005, defendant

[1] Former section 12-4.2(a)(1) of the Criminal Code of 1961 (720 ILCS 5/12-4.2(a)(1) (West 2004)), defining the offense of aggravated battery with a firearm, was incorporated into section 12-3.05, aggravated battery (720 ILCS 5/12-3.05 (West 2012)).

and his family lived three houses south of and across the railroad tracks from Anderson's house on the 12000 block of South LaSalle Street.

¶ 6 On the evening of July 8, 2005, Anderson and his cousin Chatman were outside their cousin Julian's house, on the corner of the block where Anderson lived. A "guy" called Jonathan approached, stared at them, and walked toward a group of people across the tracks. Then another man called Anderson by his nickname, Francis. As the man approached, Anderson recognized him as defendant. Defendant drew a firearm from his waistband, and Anderson and Chatman ran. Defendant fired, and Chatman fell to the ground. Anderson was shot while running to his truck, which was parked across the street. He retrieved his duty firearm from inside the vehicle, proceeded to the corner, and "returned fire" at defendant, who was still firing. After defendant ran into his house, Anderson checked on Chatman and went into his own house and called 911.

¶ 7 The police arrived and, after speaking with Anderson, went to defendant's house. Anderson was transported by ambulance to the hospital, where he was treated for a gunshot wound to the back of his shoulder. After being released that same night, he went home, retrieved his duty firearm from his vehicle, and gave it to the police. He then went to the police station, where he viewed a lineup and identified defendant as the shooter.

¶ 8 On cross-examination, Anderson testified that when he first saw defendant's firearm, defendant was standing "by the first rail" on the south side of the tracks. Anderson's duty firearm was in an unlocked compartment in his truck, which was also unlocked. Anderson acknowledged that, before the incident, defendant's sister Cameesha McCoy had testified against Anderson at his

jury trial for the 1997 murder of Marlon Nelson, who was shot in the area.[2] On redirect examination, Anderson testified he had been found not guilty. On recross, Anderson testified that his duty firearm was a .40 caliber Smith & Wesson.

¶ 9 Chatman testified that at about 8 p.m. on July 8, 2005, he was with his cousin Anderson outside the house of another cousin, Julian, north of the railroad tracks. A "suspicious gentleman" approached from the south side of the tracks, stared, and walked to a group of people on the south side of LaSalle. Another man, wearing a white T-shirt and dark blue shorts, then approached from the direction of the crowd, stood on the south side of the tracks, addressed Anderson as Francis, and drew a firearm. Chatman did not know the man, but identified him in court as defendant. Chatman and Anderson turned to run, but Chatman was shot in the back of the neck, fell, and lost consciousness. At the hospital, a physician informed Chatman that his hearing was diminished as a result of the incident. The next day, Chatman was released from the hospital and went to the police station, where he identified defendant in a lineup as the shooter.

¶ 10 On cross-examination, Chatman testified that defendant never crossed the tracks. The police questioned Chatman while he was hospitalized and "out of it," and it was not until he went to the police station that he told the police that another man had approached him and Anderson before defendant did so.

¶ 11 Eddie Williams testified he resided on the southwest corner of 121st Street and LaSalle. While exiting his garage on the evening of July 8, 2005, he saw a young man in a white shirt on the south side of the tracks firing a handgun across the tracks toward the north side. After two shots

[2] Because defendant and Cameesha McCoy share a last name, we refer to Cameesha McCoy by her first name.

were fired, a "guy" on the sidewalk at the corner north of the tracks fell. Williams ran to the back of his porch. Williams's neighbor, Emma Davis, was walking her dog near the shooter; Williams "hollered at [Davis] to stop her." The shooter headed south past Williams's house. Two or three minutes after the initial shots were fired, Williams heard additional shots fired toward the south side of the tracks by a second shooter, who was on the north side, near the corner. Williams could not see the second shooter, who was behind a tree.

¶ 12 On cross-examination, Williams testified the initial shooter had his back to Williams; he was "crouched" as he ran southbound on LaSalle with his right hand over his left shoulder. Williams did not see his face.

¶ 13 Chicago police officer Alfred Powe testified that he and his partner responded to the shooting. At the scene, Chatman was lying on the ground and appeared to have been shot in the head; Anderson was walking but had a shoulder injury. After Anderson told the police defendant was the shooter, Powe and other officers went to a nearby house, spoke with defendant's mother and sister, and took defendant into custody.

¶ 14 Chicago police sergeant Richard Kelly testified that he and his partner, Johnny Tate, were homicide detectives who investigated the shooting. On arriving at the 120th block of LaSalle on the evening of July 8, 2005, they identified blood on the sidewalk, .40-caliber shell casings across the street from that location, and, further south, 9-millimeter shell casings on the railroad embankment. They went to the hospital and spoke with Anderson, who had been treated for a shoulder gunshot wound and released. Anderson told the detectives that defendant was the shooter. The detectives accompanied Anderson back to the scene, where he retrieved his firearm from a compartment behind the driver's seat of his parked vehicle. Kelly and Tate then accompanied

Anderson to police headquarters, where he identified defendant as the shooter in a lineup. The day after the shooting, July 9, 2005, Williams, Davis, and Chatman each viewed a lineup; Chatman identified defendant as the shooter.

¶ 15 On cross-examination, Kelly testified that the 9-millimeter shells were all found about 8 to 25 feet from the south side of the tracks. It was about 2 a.m. on July 9, 2005, when he and Tate returned to the scene with Anderson following his release from the hospital. Anderson said his vehicle had been moved. In a closed compartment inside the vehicle, Kelly saw a firearm, which was recovered by an evidence technician.

¶ 16 On redirect, Kelly testified that the 9-millimeter shells recovered from the south side of the tracks were "a little more spread out" than the .40-caliber casings recovered from across the tracks in front of a corner residence. He was unsure where Anderson said his vehicle had originally been parked.

¶ 17 Chicago police officer Allen Grzyb, an evidence technician, testified he recovered blood on the sidewalk and shell casings from the scene. From the rear passenger compartment of a vehicle, he collected a firearm. On cross-examination, Grzyb testified that the 9-millimeter shell casings were all found on the south side of the tracks. On redirect, he testified that all were found within a 6-foot circumference.

¶ 18 The State introduced stipulations that Anderson had a "through and through" right shoulder gunshot wound, with wounds at the back upper right and front upper right shoulder, and that

Chatman had a "through and through" gunshot wound to the back of the head, resulting in a mastoid bone fracture and a hearing deficiency.[3] The State rested.

¶ 19 Defendant's sister Cameesha testified that on August 20, 1997, she was standing on the porch of her house when she heard gunshots and saw Anderson shoot Nelson, who was unarmed. She told defendant that evening and later testified at Anderson's trial. On cross-examination, Cameesha testified that Anderson was found not guilty of Nelson's murder.

¶ 20 Leton James testified that he had known defendant for 20 years and considered him his "best friend, sort of like a brother." He arrived at defendant's house just before the shooting on the evening of July 8, 2005, and saw defendant "on the railing at the end of the corner." A few people were on the street. Defendant looked over his shoulder to speak to two men at the corner on the north side of the tracks, hesitated, turned, and proceeded toward the tracks. One of the pair lifted his shirt, revealing a gun "sticking out of the left side of his pockets."

¶ 21 James testified, "I saw him pull the gun out and then I saw [defendant] pull his gun out from his right side of his pocket." Defendant fired a shot; one of the pair of men fell and the other "stumbl[ed] to the other side of the corner." Observing the events from behind a vehicle parked on the street, James then saw defendant "[t]urn around and run shooting" from the railroad embankment, aiming his right hand over his left shoulder "with his head turned" and without looking back, and then run down the sidewalk to his house. The man who had fled fired about 10 shots from the corner on the north side of the tracks and then ran "from north from the corner to the west side of the street" before entering a residence.

[3] The stipulation did not specify whether Anderson's front shoulder wound or back shoulder wound was the exit wound.

¶ 22 On cross-examination, James testified he did not know Anderson or Chatman. Before defendant fired, the other man with a firearm displayed it by lifting his shirt; "the handle of the gun was sticking out his left pocket." Defendant fired "after the other guy went for his gun." When defendant fired the first shot, he was "slightly" facing the two men but turning his body away. James did not call the police.

¶ 23 Defendant testified that on the evening of July 8, 2005, he returned from work and armed himself with a handgun, "[b]ecause of the neighborhood and the violence," before going outside to sit on the railroad railing and smoke a cigarette. Someone behind him, from the north side of the tracks, repeatedly called his name. Seeing two men, defendant rose and walked toward them, but stopped near the tracks. One of the men said "[W]hat's up," and defendant recognized him as Anderson, whom he knew but had not seen in about seven years. Defendant replied "[W]hat's up," to which Anderson responded "[T]his [i]s up." Defendant testified:

> "[Anderson] pulled out like I seen't [*sic*] a black handle hanging out his pocket, so I got real paranoid like I didn't know what to do because it was like a spur of the moment type of thing, you know. So I had pulled up my gun and I had shot and I was running at the same time."

¶ 24 Anderson drew his firearm from his left pocket, but "it was like a struggle," allowing defendant "to get [his] shot off and run at the same time." Defendant then retreated southbound from the embankment, running in a "straight diagonal" toward the curb while firing five to seven shots "backwards like" with his right hand reaching around his left arm and looking away from the direction he was firing. As he ran down the east sidewalk toward his house, defendant heard "[r]eturn fire."

¶ 25 Defendant fired the first shot "[b]ecause [Anderson] pulled a gun out," and continued to fire while running because he "didn't know whether Anderson was going to hit [him] or not." Defendant did not see what happened to Anderson's companion. Defendant was arrested at home about 40 minutes later.

¶ 26 On cross-examination, defendant testified that at the time of the incident he did not know Chatman, and knew that Anderson had been found not guilty of Nelson's murder. At the time of the incident, defendant was wearing a white T-shirt and dark or denim shorts. He had acquired the firearm "[o]ff the streets" about six months before. Defendant denied that Anderson had "his gun hanging out his pocket." He explained that although Anderson's firearm was in his pocket, defendant did not see the firearm until Anderson lifted his shirt because Anderson "had it concealed under his shirt." Defendant testified that he was facing and pointing his gun at Chatman and Anderson when he fired the initial shot, but also that he was turning away from them. Defendant's back was to Chatman and Anderson when they were hit. Defendant confirmed he was "able to also shoot [Anderson] in the back." When defendant returned home, he was scared and hid his firearm under his bed. He surrendered to the police when they arrived. The defense rested.

¶ 27 In closing arguments, the State argued that defendant had not acted in self-defense. The defense argued that defendant had shot at Anderson in self-defense as a result of Anderson's actions and that Chapman was inadvertently shot.

¶ 28 The jury requested the "legal definition of intent to kill" and, upon counsel's agreement, received the transcripts of the testimony of defendant, Chatman, and Anderson.[4] After deliberating

[4] In response to the jury's question, the trial court, with counsel's agreement, instructed the jury, "You have received the collective instructions in this case. Please continue to deliberate."

for over seven hours, the jury found defendant guilty of the attempted murder of Anderson and of aggravated battery of both victims.

¶ 29 The court denied defendant's motion for a new trial. Defendant filed a supplemental motion to reconsider, which was also denied.

¶ 30 Regarding the counts concerning Anderson, the court merged the aggravated battery count into the attempted murder count. Finding both victims suffered great bodily harm, the court sentenced defendant to 15 years for the attempted murder of Anderson and 10 years for the aggravated battery of Chatman, to be served consecutively.

¶ 31 We affirmed defendant's convictions on direct appeal. *McCoy,* 405 Ill. App. 3d 269.

¶ 32 On May 12, 2011, defendant filed his initial *pro se* petition for relief under the Act, alleging ineffective assistance of trial counsel on the basis that counsel, *inter alia,* stipulated to the victims' injuries and failed to retain an expert witness to determine how Anderson had been injured. On October 23, 2012, the circuit court, on the State's motion, dismissed the petition at the second stage of proceedings. On appeal, this court affirmed the dismissal upon granting appointed appellate counsel's motion to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and *Anders v. California*, 386 U.S. 738 (1967). *People v. McCoy,* 2014 IL App (1st) 123279-U (summary order).

¶ 33 While that appeal was pending, defendant, on April 19, 2013, filed a motion for leave to file a successive petition for relief under the Act, alleging he had not received reasonable representation by postconviction counsel. The circuit court denied the motion.

¶ 34 On April 16, 2019, defendant filed a second *pro se* motion for leave to file a successive petition, the subject of the instant appeal. He argued, in relevant part, that he is actually innocent of the offenses.

¶ 35 In support of his actual innocence claim, defendant appended to his proposed successive petition the undated, notarized affidavit of Alfred Davis, who averred he witnessed the incident giving rise to defendant's convictions.[5] In his affidavit, Alfred stated he moved to 120th Street and Wentworth Avenue around 1994. While incarcerated in 2018, he conversed with another inmate, Kemari Griffin, about the West Pullman neighborhood. Because defendant was from the area, Griffin brought him to Alfred's cell.[6] In speaking with defendant, Alfred learned they both knew a person called Russell who "stayed on" 122nd Street and Wentworth Avenue. Alfred told defendant about events that occurred one day in July 2005 after he went to Russell's house and no one answered the door.

¶ 36 Alfred averred that when he approached 120th and Wentworth and "walked a long [*sic*] the northside of the tracks," he saw two men walking "toward the corner" and smelled marijuana "in the air." He "saw the light skinned guy with a handgun protruding from his pocket" and heard him say, " '[T]here go that n***' " and " 'b*** a*** n***.' " Alfred, believing the man was speaking to him and mistaking him for someone else, "started to run." However, then "the dark skinned guy asked the lighter skinned guy who he was talking about and the lighter skinned guy pointed to a guy sitting on the railing, now known to [Alfred] as [defendant]."

[5] Because Emma Davis, an eyewitness at trial, and Alfred Davis share a surname, we refer to Alfred Davis by his first name.

[6] Kemari Griffin's surname is also spelled "Griffen" in the record. We adopt the spelling that appears in Griffin's affidavit.

¶ 37 As Alfred "crossed the street on 120th and LaSalle St[reet] to get away from trouble," he passed defendant, who was "on the railing" with his back to the pair of men. After one of the men, who were now behind Alfred, "call[ed] out a name," defendant got up and began walking toward the tracks. The lighter-skinned man "showed [defendant] a handgun hanging out of his pocket and said, '[W]hat up now n***.' " Alfred saw defendant's face; defendant "was really scared and then he puled [*sic*] up a gun first and started shooting and running for his life." Alfred stated that he is willing to testify to the content of his affidavit and would have provided an affidavit sooner had he known defendant's identity and location.

¶ 38 Defendant also appended his own affidavit, averring that he met Alfred while incarcerated and had previously been unaware of any eyewitnesses who did not testify at trial. Defendant also appended an affidavit by Griffin, who averred that while imprisoned in 2018 he encountered Alfred, a fellow inmate, and brought defendant, another inmate, to Alfred's cell and introduced them.

¶ 39 Defendant argued in his motion for leave to file a successive petition under the Act that this new evidence supports his claim of actual innocence by contradicting the trial testimony of Anderson and Chatman and showing that Anderson was the initial aggressor, thus establishing that defendant acted in self-defense.

¶ 40 In a written order denying defendant's motion for leave, the circuit court found that Alfred's proposed testimony would be nonmaterial, cumulative, and "not so conclusive that it would change the result on retrial." Defendant appeals.

¶ 41 On appeal, defendant contends that he set forth a colorable claim of actual innocence and that the circuit court therefore erred in denying his motion.

¶ 42 The Act provides a three-stage procedure for a criminal defendant to attack a conviction or sentence by asserting that it resulted from a "substantial denial" of his or her constitutional rights. 725 ILCS 5/122-1 *et seq.* (West 2018); *People v. Tate*, 2012 IL 112214, ¶ 8. The Act contemplates the filing of only one postconviction petition; thus, a defendant must obtain leave of court before filing a successive petition. 725 ILCS 5/122-1(f) (West 2018); *People v. Robinson*, 2020 IL 123849, ¶ 43. For leave to be granted, the defendant must either establish "cause and prejudice" for his or her failure to assert the postconviction claim in an earlier proceeding, or, pertinent here, set forth a "colorable claim of actual innocence." *People v. Edwards*, 2012 IL 111711, ¶¶ 22-23.

¶ 43 To set forth a colorable claim of actual innocence, a defendant must support the proposed successive petition with documentation containing evidence that is newly discovered, material and noncumulative, and of such conclusive character that it would probably change the result on retrial. *Robinson*, 2020 IL 123849, ¶ 47.

¶ 44 Evidence is "newly discovered" if it was discovered after the trial and the defendant could not have discovered it earlier through the exercise of due diligence. *Id.* Evidence is "material" if it is relevant and probative of the defendant's innocence, and "noncumulative" if it adds to, and does not merely repeat, information presented at trial. *Id.* Evidence is of sufficiently "conclusive character" if, when considered along with the trial evidence, it would probably lead to a different result. *Id.* To be likely to alter the result on retrial—that is, to be sufficiently conclusive to establish a colorable claim of actual innocence—the new evidence need not be entirely dispositive of the question of the defendant's innocence. *Id.* ¶ 48.

¶ 45 The standard for setting forth a colorable claim of actual innocence is higher than that required in order for a petition to survive summary dismissal at the first stage of proceedings under

the Act—where the defendant need only set forth the "gist" of a constitutional claim—but lower than the "substantial showing" required at the second stage. *Id.* ¶ 58. A motion for leave to file a successive petition "should be granted where the petitioner's supporting documentation raises the probability that it is more likely than not that no reasonable juror would have convicted the petitioner in light of the new evidence." *Id.* ¶ 44. Until third-stage proceedings, the court must take all well-pled allegations in the petition and supporting affidavits as true unless positively rebutted by the trial record, and refrain from making factual findings or credibility determinations. *Id.* ¶ 45.

¶ 46 We review *de novo* a circuit court's denial of a motion for leave to file a successive postconviction petition alleging a claim of actual innocence. *Id.* ¶ 40. This court "may affirm on any basis supported by the record if the judgment is correct." *People v. Anderson*, 401 Ill. App. 3d 134, 138 (2010).

¶ 47 In this court, defendant argues that he presented a colorable claim of actual innocence where the evidence supporting his claim is newly discovered, material, noncumulative, and conclusive.

¶ 48 In response, the State does not dispute that the evidence is newly discovered, but maintains that it is not material, noncumulative, or of sufficiently conclusive character that it would, when considered along with the trial evidence, probably lead to a different result on retrial. Because we agree with the State on the latter point, we need not determine whether the evidence presented in support of defendant's claim is material and noncumulative. *People v. Sanders*, 2016 IL 118123, ¶ 47.

¶ 49 The most important requirement for an actual innocence claim is that the evidence is of such a conclusive character that, considered with the trial evidence, it would likely alter the result

on retrial. *Robinson*, 2020 IL 123849, ¶ 47. In this regard, "[p]robability, rather than certainty, is the key." *Id.* ¶ 48. Indeed, "the conclusive-character element requires only that the petitioner present evidence that places the trial evidence in a different light and undermines the court's confidence in the judgment of guilt." *Id.* ¶ 56 (citing *People v. Coleman*, 2013 IL 111307, ¶ 97).

¶ 50 For purposes of establishing the conclusiveness of new evidence at the leave-to-file stage of successive proceedings, the court's proper focus is "not *** on whether the new evidence is inconsistent with the evidence presented at trial." *Id.* ¶ 60. Rather, "the court considers only whether the new evidence, if believed and not positively rebutted by the record, could lead to acquittal on retrial" (*id.*), or, stated differently, is "of such a conclusive character that, when considered along with the trial evidence, would probably lead to a different result" (*id.* ¶ 83).

¶ 51 After carefully reviewing the record, we cannot say that Alfred's proposed testimony, considered along with the trial evidence, "could lead to acquittal on retrial" (*id.* ¶ 60) or "would probably lead to a different result" (*id.* ¶ 83). In his affidavit, Alfred describes a lesser threat of harm, and hence a weaker case for self-defense, than that presented at trial by the testimonies of James and defendant.

¶ 52 James testified that defendant fired after Anderson "went for" his handgun. Specifically, James explained, "I saw him pull the gun out and then I saw [defendant] pull his gun out from his right side of his pocket." Defendant testified that he drew and fired the initial shot because Anderson "pulled a gun out." Defendant expressly denied that Anderson's handgun was "hanging out his pocket," explaining that instead Anderson "had" his handgun "concealed" under his shirt until he raised his shirt to display the handgun to defendant. According to defendant, as Anderson "struggle[d]" to remove the gun from his pocket, defendant fired the initial shot.

¶ 53 However, Alfred avers defendant drew and fired his handgun after Anderson merely "showed" a handgun that was both "protruding from his pocket" and already visible to Alfred before Anderson called out to defendant.[7] Thus, Alfred describes a lesser threat of imminent harm than that which the jury found insufficient to return a verdict of not guilty on any count.

¶ 54 Further, Alfred's proposed testimony describes only part of the altercation. He does not describe the shooting of either victim, a second shooter, or any observations after defendant "started shooting and running for his life." See *People v. Garcia*, 2022 IL App (1st) 210040, ¶ 36 (affirming summary dismissal of a petition alleging actual innocence; eyewitness's affidavit was not sufficiently conclusive where, *inter alia*, it described only a portion, and neither the beginning nor the end, of the altercation). Alfred's proposed testimony also leaves undisputed the evidence, presented by the State at trial, that Chatman and Anderson were shot in the *back*, consistent with both victims' accounts that they fled when defendant drew his firearm.

¶ 55 We therefore find that Alfred's proposed testimony is not sufficently conclusive of actual innocence for purposes of the leave-to-file stage. We emphasize that we do not base this conclusion on fact or credibility determinations, but on our discernment that Alfred's testimony does not place the trial evidence in a different light or undermine our confidence in the jury's verdicts. See *Robinson*, 2020 IL 123849, ¶ 56 (citing *Coleman*, 2013 IL 111307, ¶ 97).

¶ 56 Defendant nevertheless argues that Alfred's proposed testimony is conclusive because it would "enhance [defendant]'s and James' credibility, undermine Anderson's and Chatman's, and

[7] This court makes no finding on whether the mere display of a weapon by Anderson would be sufficient to establish any element of self-defense or imperfect self-defense.

provide substantial confirmation of [defendant]'s lawful self-defense," especially where Alfred, unlike defense eyewitness James, did not know defendant at the time of the events at issue.

¶ 57 However, as mentioned, for purposes of establishing conclusiveness at the leave-to-file stage, the court's proper focus is not on whether the new evidence is inconsistent with the evidence presented at trial. Rather, it is on whether the new evidence, if believed and not positively rebutted by the record, could lead to acquittal on retrial (*Robinson*, 2020 IL 123849, ¶ 60), or is "of such a conclusive character that, when considered along with the trial evidence, [it] would probably lead to a different result" (*id.* ¶ 83). Here, this standard is unmet.

¶ 58 Alfred's affidavit supports the self-defense claim to the extent that it corroborates defendant's account that Anderson spoke aggressively to him and "showed" him his firearm before defendant drew and fired at Anderson and Chatman. However, Alfred's version makes no mention of Anderson making a move for his firearm. Given this omission, the fact that Alfred was, unlike James, a stranger to defendant at the time of the incident does not render Alfred's testimony sufficiently conclusive where, as mentioned, the jury rejected a more compelling claim of self-defense.

¶ 59 We are likewise unpersuaded by defendant's argument that the new evidence is sufficiently conclusive because the jury deliberated for over seven hours and sent questions to the judge.

¶ 60 We decline to speculate that the duration of deliberations makes it any more likely that, on retrial, the new evidence would tip the balance in defendant's favor. See *People v. Nugen*, 399 Ill. App. 3d 575, 584 (2010) ("We reject the general premise a lengthy deliberation necessarily means the evidence is closely balanced."). Nor will this court speculate as to the reasoning for the jury's questions or requests for transcripts during deliberations. See *People v. Spears*, 112 Ill. 2d 396,

409 (1986) (supreme court will not "attempt to metaphysically divine a jury's collective intent from a single question that may well have only embodied the curiosity or concern of a single juror"); *People v. Peoples*, 2015 IL App (1st) 121717, ¶ 106 ("We may not guess as to why a jury did what it did, no matter how obvious it may seem to us.").

¶ 61 Further, we find inapposite the cases on which defendant relies in arguing the new evidence is conclusive. See *People v. Molstad*, 101 Ill. 2d 128, 132-35 (1984) (trial court abused its discretion in denying motion for a new trial; affiants were five codefendants who averred the defendant was not at the scene); *People v. Woods*, 2020 IL App (1st) 163031, ¶ 49 (reversing denial of leave to file successive petition under the Act; affiant attested he was the unidentified man, described by trial witnesses, whose sudden emergence from an alley pointing a firearm prompted the defendant to shoot); *People v. Willingham*, 2020 IL App (1st) 162250, ¶ 35 (reversing second-stage dismissal of postconviction petition; affiant averred he "was right there—in the car with" a gang member who was armed and who "shot at [the defendant] before [the defendant] fired his gun").

¶ 62 Unlike the affiants in those cases, Alfred is neither a codefendant nor a direct participant in the events giving rise to defendant's convictions. See *Woods*, 2020 IL App (1st) 163031, ¶ 49. Indeed, defendant, in his brief, characterizes Alfred as "an uninvolved *** passerby." Alfred's proposed testimony also offers comparatively limited evidence of actual innocence. In sum, the evidence is not comparable in character or potency to the proposed testimony of the affiants in those cases.

¶ 63 Because defendant has failed to establish all four criteria for a claim of actual innocence, we conclude that the circuit court did not err in denying defendant's motion for leave to file a successive postconviction petition.

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

¶ 65 Affirmed.