2021 IL App (1st) 180546-U

No. 1-18-0546

Order filed March 25, 2021

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit
	)	Court of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 03 CR 274
	)	
JULIUS TRIPLETT,	)	Honorable
	)	Nicholas Ford,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Reyes and Martin concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in dismissing defendant's postconviction petition without an evidentiary hearing where, accepting as true defendant's allegations and supporting affidavits, his petition made a substantial showing of ineffective assistance of trial counsel and actual innocence.

¶ 2 At a bench trial in 2004, defendant Julius Triplett was convicted of first degree murder for the shooting death of Michael Pierre Haywood. The State's case rested on the custodial statements and grand jury testimony of Germain Johnson and Keith Wilson implicating Triplett as the shooter.

When they recanted their out-of-court statements at trial, the State introduced them as substantive evidence under section 115-10.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10.1 (West 2004)). No other evidence connected Triplett to the shooting.

¶ 3 After we affirmed his conviction on direct appeal, Triplett filed a *pro se* petition for post-conviction relief. As later amended by appointed counsel, the petition alleged that Triplett's trial counsel was ineffective for failing to interview and call Triplett's sister, Maisha Hall, as an alibi witness and asserted a claim of actual innocence based on newly discovered evidence. In support of his claims, Triplett submitted affidavits from Hall and a fellow inmate named Robert Robinson. Hall attested that Triplett was home with her when the shooting allegedly occurred, and Robinson attested that at the same time he was with Johnson at a different location. On the State's motion, the trial court dismissed the petition without an evidentiary hearing.

¶ 4 On appeal, Triplett contends that his petition and supporting affidavits made a substantial showing of ineffective assistance of counsel and actual innocence. He asks us to reverse the trial court's order dismissing his petition and remand for an evidentiary hearing on his claims. For the following reasons, we agree that Triplett is entitled to an evidentiary hearing on his claims and thus reverse the trial court's judgment.[1]

¶ 5 I. BACKGROUND

¶ 6 On the morning of November 5, 2002, Haywood's body was discovered in a vacant lot at the corner of West Lexington Street and South Washtenaw Avenue in Chicago. The State's theory was that, on the prior evening, Haywood was standing in front of an apartment building two lots

[1] In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order.

west of the vacant lot when Triplett, who had driven to the area with Johnson and Wilson, got out of his car, walked toward Haywood, and shot him to death as he tried to climb over a fence into the vacant lot.

¶ 7 Alicia Andrews and Victoria Washington, along with several other family members, lived in the two-flat apartment building at 2708 West Lexington Street, two lots west of the vacant lot. An adjoining, abandoned building sat between their building and the vacant lot. The front yard of the abandoned building was separated from the vacant lot by a metal fence. At trial, Andrews and Washington testified that they heard multiple gunshots outside their apartment on November 4, 2002, between 8:30 and 9 p.m. After the shooting ended, Andrews, Washington, and other family members went outside. Washington testified that they did so immediately; Andrews said that they waited 30 minutes. Andrews testified that she walked up to the fence separating the front yard of the abandoned building from the vacant lot and looked into but did not enter the vacant lot. Washington testified that she and other family members looked through the vacant lot, including the area near the fence. Both women testified that they saw nothing unusual, although Andrews testified that it was dark at the time and both testified that not all the streetlights in the area were working. Both testified that it was common to hear gunshots in their neighborhood.

¶ 8 Around 11:30 p.m., Haywood's friend, Jerome Cooper, informed Haywood's mother, Edna Gandia, that there had been a shooting and asked her if Haywood made it home. Gandia testified that she and Cooper searched for Haywood for two hours but did not find him. Gandia said they drove by the vacant lot at Lexington and Washtenaw several times but did not get out of the car. She too testified that there was not much lighting in the area at the time.

¶ 9 Around 9:00 the next morning, when Washington and her brother left for school, they saw Haywood's body in the vacant lot and called the police. Detective Terrence O'Connor, who arrived a short time later, testified that Haywood's body was about 10 feet north of the sidewalk and one or two feet from the fence in the vacant lot, which he described as strewn with debris. Detective O'Connor testified that some grass in the vacant lot was knee-length but that none of the overgrown grass was in the area immediately next to where Haywood's body was found. The detective stated that if a person were standing in front of the abandoned building and looking directly at the location where the body was found, the overgrown grass would not obstruct their view. But he also opined that a person could miss the body if they were just passing by.

¶ 10 Dr. Joseph Cogan, the medical examiner, identified eight through-and-through gunshot wounds to Haywood's body and concluded that Haywood died of multiple gunshot wounds. Dr. Cogan testified that three shots entered the front of Haywood's torso and traveled from the right side to the left, striking his heart, lungs, and other internal organs. The shot that struck Haywood's heart entered at an upward angle, while the other two shots to his torso entered either horizontally or at a slightly downward angle. Two shots entered Haywood's right and left thighs and exited his right and left buttocks, respectively, traveling upward. Two more shots went through Haywood's upper right leg. Although the autopsy indicated that these shots followed a downward trajectory, Dr. Cogan opined that the shots could have entered Haywood's body at an upward angle if his right leg was raised toward his torso while trying to climb a fence. The final shot that Dr. Cogan identified traveled through Haywood's right elbow. Dr. Cogan opined that Haywood was unlikely to have survived more than 30 minutes after the gunshot wound to his chest and that his body had not been moved after he died.

¶ 11 Two weeks after the shooting, Johnson and Wilson were questioned at the police station by a detective and a prosecutor. Both men made (and signed) statements that were memorialized in writing by Assistant State's Attorney (ASA) Jennifer Walker. Johnson stated that he got into a car with Wilson and Triplett on November 4, 2002, around 8 or 8:30 p.m., and began to drive around. Johnson drove to the home of a girl he knew, where the men stopped for a short period of time before continuing to drive around. Triplett then told Johnson to drive to "Pookie Slim's block" on Lexington Street between Washtenaw and California Avenues. When they arrived, Triplett told Johnson to pull over. Triplett got out of the car, telling Johnson and Wilson that he was going to talk to "Big Baby." Triplett walked over to Big Baby, while Pookie Slim came to the car and talked to Wilson. About five minutes later, Triplett returned to the car and the men drove away.

¶ 12 At Triplett's direction, Johnson dropped Triplett off near his home, drove around for a short period, and returned to pick Triplett up. The men stopped briefly at the home of the girl they had visited earlier and then continued to drive around. Triplett instructed Johnson to drive back to Pookie Slim's location. At Triplett's direction, Johnson pulled over at Lexington and Washtenaw. Triplett got out of the car, saying he needed to talk to Big Baby. As he did so, Triplett put the hood of his sweatshirt over his head. Johnson saw Haywood knocking on someone's door. Then, all of a sudden, Johnson heard a loud gunshot. Johnson and Wilson ducked down in the car, and Johnson heard several more gunshots. After the gunshots stopped, Triplett got back in the car, and Johnson drove away. As they drove, Johnson saw the handle of a gun sticking out of the front pocket of Triplett's hoodie. Eventually, Johnson and Wilson got out of the car, and Triplett drove away. Two weeks later, Johnson spoke with Triplett on the phone. Triplett told Johnson that Wilson was "bogus for tricking on" him, and Johnson told Triplett that he was "bogus for shooting" Haywood.

¶ 13 Wilson likewise stated that he, Johnson, and Triplett were riding in Triplett's car around 8 or 8:30 p.m. on November 4, 2002. Johnson drove to Pookie Slim's location on Lexington, where Wilson saw several people, including Pookie Slim, Big Baby, and Haywood. Triplett rolled down his window and called out to Haywood, saying he wanted to talk to him. When Haywood ignored Triplett, Triplett walked over to Big Baby and talked to him instead. Pookie Slim then came to the car and talked to Wilson. Triplett was frowning when he returned to the car about five minutes later. Johnson drove away and, at Triplett's direction, let Triplett out by his home. When Triplett returned to the car, Johnson drove away again.

¶ 14 Triplett then told Johnson to drive back to Pookie Slim's location. Once there, Triplett put his hood on and got out of the car, saying he was going to talk to Big Baby. When Haywood, who was standing on a porch at that location, saw Triplett, he jumped to the porch next door, trying to get away. He then began climbing the fence near the vacant lot. When Haywood was at the top of the fence, Wilson saw Triplett pull a gun from the front pocket of his hoodie and fire it. Wilson then saw Haywood fall. Wilson ducked down in the car and heard several more gunshots. After the gunshots ceased, Triplett got back in the car, and Johnson drove off. Wilson and Johnson got out of the car a short time later, and Triplett drove away. Several days later, Wilson saw Triplett carrying the same gun he had used to shoot Haywood. Triplett told Wilson he had "f***ed up" and "shouldn't have done dude like that."

¶ 15 Shortly after making their statements, Johnson and Wilson testified before a grand jury. In their testimony, Johnson and Wilson described a version of events substantially similar to what they had recounted in their statements. One notable exception was that Wilson testified he saw Haywood get shot and fall while on the second porch rather than when climbing the fence.

¶ 16 At trial, Johnson and Wilson recanted their prior statements and grand jury testimony.[2] Johnson testified that Wilson and Triplett approached him in a car on November 4, 2002, between 5 and 6 p.m. He got into the car and began to drive. After stopping at the home of a girl he knew, Johnson drove to the 2700 block of West Lexington, where he saw Big Baby and Pookie Slim. Triplett got out to talk to Big Baby while Johnson and Wilson remained in the car. After five minutes, Triplett returned to the car, and Johnson drove away. Johnson then drove to Triplett's house, where Triplett got out. After Johnson circled the block, Triplett got back in the car with some food. They then continued to drive around.

¶ 17 Johnson testified that, between 8:30 and 9 p.m., they returned to the 2700 block of West Lexington to buy marijuana. When they arrived, Johnson saw Big Baby and Haywood. Haywood was on a porch, going into a house. Big Baby called out to them, and Triplett got out of the car to see what he wanted. Johnson testified that Triplett was wearing a jacket but did not have anything on his head. Johnson testified that, after Triplett got back in the car, he heard multiple gunshots. He then drove away. Johnson denied seeing Triplett with a gun after Triplett got back in the car. Two weeks later, Johnson spoke with Triplett by phone, but Johnson denied that Triplett said anything about Wilson.

¶ 18 Johnson acknowledged speaking with ASA Walker and a detective at the police station on November 18, 2002. He acknowledged that ASA Walker wrote out his statement and read it to him, and that he then signed it. After reviewing the written statement, however, Johnson claimed to recognize only parts of it. He denied telling ASA Walker that Triplett was wearing a hood on

[2] At the time of trial, Johnson was incarcerated on weapon- and drug-related convictions and facing a pending drug-conspiracy charge.

his head when he got out of the car at Lexington and Washtenaw; that Triplett was outside the car when the shots were fired; and that he saw the handle of a gun sticking out of the front pocket of Triplett's hoodie as they drove away. Johnson also denied telling ASA Walker that, in a phone call after the shooting, Triplett told him that Wilson was "bogus for tricking on" him, and that he told Triplett that he was "bogus for shooting" Haywood.

¶ 19 Johnson also acknowledged testifying before the grand jury. He claimed, however, that he could not recall whether he agreed to tell the truth during his grand jury testimony because he had been drinking before arriving at the police station the prior evening. (He did not deny telling ASA Walker that he was not under the influence of drugs or alcohol, but he claimed that he thought he was "supposed" to say that.) Johnson said he could not recall testifying that Triplett put his hood up when he got out of the car; that Triplett got back in the car after the gunshots stopped; and that he saw a gun in the front pocket of Triplett's hoodie after Triplett got back in the car. Johnson also said he could not recall testifying about his phone call with Triplett two weeks after the shooting.

¶ 20 Wilson testified that he was at home at 9 p.m. on November 4, 2002. He testified that, earlier that evening, he had been riding around in a car with Johnson and Triplett. At some point, they drove to the area of Lexington and Washtenaw, where Wilson saw Big Baby, Pookie Slim, and Haywood, as well as other people he did not know. Wilson testified that no one got out of the car. Instead, while seated in the car, Wilson spoke with Pookie Slim and Triplett spoke with Big Baby. After a minute or two, they drove away. They then went to Johnson's girlfriend's house and talked to her for a while. After that, Wilson testified, he was dropped off at home. He denied going back to Lexington and Washtenaw a second time that evening.

¶ 21 Wilson acknowledged that he spoke with ASA Walker and a detective at the police station in the early hours of November 19, 2002. He admitted that he read and signed the written statement that ASA Walker prepared during their conversation, but he denied making many of the statements that ASA Walker attributed to him. He denied stating that Triplett called out to Haywood and that Haywood ignored him; that Triplett got out of the car, talked to Big Baby, and returned to the car frowning; and that Triplett then told Johnson to drive to Triplett's home. He denied stating that he, Johnson, and Triplett returned to Lexington and Washtenaw a second time and that Triplett put his hood over his head and got out of the car. He denied stating that Haywood jumped from one porch to the other and tried to climb the fence into the vacant lot to get away from Triplett; that Triplett pulled a gun from the pocket of his hoodie and fired at Haywood as he was at the top of the fence; and that Haywood then fell. He denied stating that he ducked down in the car and heard several more gunshots and that Triplett then returned to the car after the shooting stopped. He also denied stating that he saw Triplett carrying the same gun a few days later and that Triplett told him he had "f***ed up" and "shouldn't have done dude like that."

¶ 22 Wilson also acknowledged testifying before the grand jury. However, when the prosecutor read large portions of the grand jury transcript to him verbatim, Wilson denied giving the answers attributed to him. In addition to denying the portions of his grand jury testimony that were similar to his earlier statement, Wilson denied testifying that he saw Haywood get shot by Triplett and fall down on the second porch as he was trying to get away from Triplett.

¶ 23 The State called ASA Walker to perfect its impeachment of Johnson and Wilson. And the parties stipulated to the admission of the grand jury transcripts for impeachment purposes. In

addition, Johnson's and Wilson's prior inconsistent statements to ASA Walker and the grand jury were admitted as substantive evidence under section 115-10.1.

¶ 24 The trial court found Triplett guilty of first degree murder and sentenced him to 40 years in prison. We affirmed Triplett's conviction on direct appeal, rejecting his challenges to the sufficiency of the evidence and the admission of Johnson's and Wilson's out-of-court statements as substantive evidence. See *People v. Triplett*, No. 1-04-1387, 927 N.E.2d 892 (2006) (Table) (unpublished order under Illinois Supreme Court Rule 23).

¶ 25 In 2007, Triplett filed a *pro se* petition for postconviction relief. He alleged that his trial counsel was ineffective for failing to investigate and call his sister, Hall, and her friend, Jennifer Darnell, as alibi witnesses. As support for this claim, Triplett submitted an affidavit from Hall attesting that she was at home on November 4, 2002, working as a hair stylist. Hall stated that, around 8:00 that evening, while she was with a client, Triplett came home, spoke to her briefly, and went to his room, where he remained until Hall finished her work a little after 10 p.m. In his own affidavit, Triplett stated that Darnell had signed and sent him an affidavit (which he had not yet received) asserting that she was at Hall's home on November 4, 2002, and remembered that Triplett was also present from 8 to 11 p.m. Triplett alleged that he informed trial counsel that Hall and Darnell could testify to his whereabouts at the time the shooting was alleged to have occurred but that counsel never contacted the witnesses or investigated his potential alibi. In a supporting memorandum, Triplett alleged that trial counsel told him that a factfinder would not believe alibi testimony from his sister and her friend.

¶ 26 Triplett also alleged that trial counsel was ineffective for failing to investigate and call Wilson's cousin, Jameka Allen, to testify that Wilson was at home with her on November 4, 2002,

between 8 p.m. and midnight. In a supporting affidavit, Triplett attested that Allen had mailed him an affidavit to support this claim but he had not yet received it.

¶ 27 Finally, Triplett submitted an affidavit from Robinson, a fellow inmate with whom he had become acquainted and discussed the details of his case. In the affidavit, Robinson attested that, between 7:30 and 11 p.m. on November 4, 2002, he was playing dice with Johnson and about 20 other people at Trumbull Avenue and Iowa Street. Robinson stated that he remembered that evening because he won $200 in the dice game and learned of Haywood's death the next day.

¶ 28 The trial court appointed counsel to represent Triplett. After numerous continuances spanning almost nine years, appointed counsel filed an amended petition, reasserting Triplett's claims that his trial counsel was ineffective for failing to investigate and call Hall as an alibi witness and that Robinson's affidavit constituted newly discovered evidence of actual innocence.[3] Appointed counsel supported the amended petition with updated affidavits from Triplett, Hall, and Robinson. Triplett attested that, on November 4, 2002, he came home around 8 p.m., said hello to his sister, and then rested in his room until sometime after 10 p.m. He stated that he told his trial counsel to contact Hall about testifying as an alibi witness but counsel never did so.

¶ 29 Hall attested that she was styling hair at her home on November 4, 2002. She stated that, around 8 p.m., Triplett walked in the kitchen door, stopped to chat, and then went to his room, where he stayed until Hall finished her hairstyling work around 10 p.m. Hall stated that she was not interviewed about the matter until 2015, when an investigator working for Triplett's appointed postconviction attorney contacted her.

[3] The amended petition omitted Triplett's claims that trial counsel was ineffective for failing to investigate and call Darnell and Allen.

¶ 30 Robinson attested that, on November 4, 2002, he was playing dice with Johnson on Iowa and Trumbull from either 6 or 7 p.m. until 10 p.m. In this affidavit, Robinson stated that he remembered that evening because his girlfriend had called him at 10:00 that evening to let him know she was going into labor.

¶ 31 The State moved to dismiss Triplett's petition without an evidentiary hearing. On October 30, 2017, after hearing oral argument, the trial court granted the State's motion and dismissed Triplett's petition, concluding that the affidavits of Hall and Robinson did not support claims of ineffective assistance of counsel or actual innocence. On March 30, 2018, we allowed Triplett to file a late notice of appeal.

¶ 32 II. ANALYSIS

¶ 33 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2018)) "provides a method by which persons under criminal sentence in this state can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both." *People v. Tate*, 2012 IL 112214, ¶ 8. A petition filed under the Act is adjudicated in three stages. *Id.* ¶ 9. At the first stage, the circuit court independently examines a petition without input from the State. *People v. Johnson*, 2018 IL 122227, ¶ 14. If the court finds the petition is frivolous or patently without merit, the petition is summarily dismissed. *People v. Allen*, 2015 IL 113135, ¶ 21. If the petition is not summarily dismissed after first-stage review, the court dockets the petition for second-stage consideration. *Id.*

¶ 34 At the second stage, the court may appoint counsel to represent an indigent defendant and appointed counsel may file an amended petition. *People v. Lesley*, 2018 IL 122100, ¶ 32. The State may then move to dismiss the petition or answer it. *People v. Cotto*, 2016 IL 119006, ¶ 27. If the

State files a motion to dismiss, the trial court must then determine "whether the petition and any accompanying documentation make a substantial showing of a constitutional violation." *People v. Bailey*, 2017 IL 121450, ¶ 18. If the court finds that the petition makes the requisite showing, it must advance the petition to third-stage review, where the court conducts an evidentiary hearing. *Id.* If the court finds the petition does not make a substantial showing of a constitutional violation, it will be dismissed at the second stage. *Id.*

¶ 35 During second-stage review, the court examines only "the legal sufficiency of the petition," without "engag[ing] in any fact-finding or credibility determinations." (Internal quotation marks omitted.) *People v. Domagala*, 2013 IL 113688, ¶ 35. In other words, the court asks "whether the allegations in the petition, liberally construed in favor of the petitioner and taken as true, are sufficient to invoke relief under the Act." *People v. Sanders*, 2016 IL 118123, ¶ 31. Despite this liberal pleading standard, the trial court need not accept as true "facts [that] are positively rebutted by the trial record." *People v. Brown*, 2020 IL App (1st) 170980, ¶ 41. But if the petition's well-pleaded allegations, if proven true, would entitle the petitioner to relief, the petition must advance to a third-stage evidentiary hearing, where the veracity of the petition's allegations can be tested. *Domagala*, 2013 IL 113688, ¶ 35. We review the second-stage dismissal of a postconviction petition *de novo*. *People v. Dupree*, 2018 IL 122307, ¶ 29.

¶ 36 A. Ineffective Assistance of Counsel

¶ 37 Triplett's first contention is that the trial court erred in dismissing his petition without an evidentiary hearing because his amended petition and its supporting affidavits made a substantial showing that his trial counsel was ineffective for failing to investigate and call Hall as an alibi witness. At the outset, the State argues that Triplett forfeited this claim by failing to raise it on

direct appeal. But the failure to raise a claim on direct appeal results in a postconviction forfeiture only where the claim "could have been raised" on direct appeal. *Tate*, 2012 IL 112214, ¶ 8. An ineffective assistance claim, moreover, must be raised on direct appeal only if it is "apparent on the record." *People v. Veach*, 2017 IL 120649, ¶ 46. Triplett's claim that trial counsel was ineffective for failing to investigate and present Hall as an alibi witness is not apparent from the trial record and could not have been raised on direct appeal. The claim is thus properly presented on postconviction review, so we turn to the merits.

¶ 38 Ineffective assistance of counsel claims are judged under a familiar two-part standard. To prevail on such a claim, a defendant must show that his counsel's performance was deficient and that he was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Cherry*, 2016 IL 118728, ¶ 24. To demonstrate deficient performance, the defendant "must show that counsel's performance fell below an objective standard of reasonableness." *Dupree*, 2018 IL 122307, ¶ 44. When reviewing counsel's performance, we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and that counsel's "challenged action[s] might be considered sound trial strategy." (Internal quotation marks omitted.) *Strickland*, 466 U.S. at 689. To establish prejudice, the defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Dupree*, 2018 IL 122307, ¶ 44. When an ineffective assistance claim is considered at the second stage of postconviction review, the petition need only make a substantial showing of deficiency and prejudice to survive dismissal and proceed to an evidentiary hearing. See *Domagala*, 2013 IL 113688, ¶¶ 42, 47.

¶ 39 We conclude that the allegations in Triplett's petition and supporting affidavits, taken as true, make a substantial showing that Triplett's trial counsel was ineffective for failing to investigate and call Hall as an alibi witness. As for deficient performance, Hall's affidavit attests that Triplett was home with her from 8 to 10 p.m. on November 4, 2002—around the time that Haywood was shot. Triplett alleges that he asked trial counsel to contact Hall to testify as an alibi witness but that counsel failed to do so. Hall similarly attests that she was not interviewed about the case until well after Triplett's trial concluded, when an investigator working for Triplett's postconviction attorney contacted her.

¶ 40 The State asserts that trial counsel's decision not to call Hall as an alibi witness was based on the reasonable strategic consideration that alibi testimony from a defendant's relative is unlikely to carry much weight and that presenting unreliable alibi testimony may do more harm than good. In fact, Triplett himself recounted in his petition that trial counsel explained to him that a factfinder was unlikely to believe alibi testimony from his sister. But that type of strategic decision "may be made only after there has been a thorough investigation of [the] law and facts relevant to plausible options." (Internal quotation marks omitted.) *People v. Upshaw*, 2017 IL App (1st) 151405, ¶ 39. Here, nothing in the record rebuts Hall's allegation, which we must accept as true at this stage of the proceedings, that trial counsel never contacted her about her potential testimony.

¶ 41 "An attorney who fails to conduct [a] reasonable investigation, fails to interview witnesses, and fails to subpoena witnesses cannot be found to have made decisions based on valid trial strategy." *People v. Makiel*, 358 Ill. App. 3d 102, 107 (2005). Instead, the "failure to interview witnesses may indicate actual incompetence, particularly when the witnesses are known to trial counsel and their testimony may be exonerating." (Internal quotation marks and citations omitted.)

Upshaw, 2017 IL App (1st) 151405, ¶ 39. Taking the allegations in Triplett's petition and Hall's affidavit as true, as we again note we must do at this stage of the proceedings, we find that Triplett has made a substantial showing that trial counsel was deficient in failing to interview Hall before deciding not to call her as an alibi witness at trial.[4]

¶ 42 Triplett has also made a substantial showing of prejudice to warrant an evidentiary hearing. While the evidence at trial was sufficient to sustain his conviction, it was far from overwhelming. The State's case rested entirely on the out-of-court statements and grand jury testimony of Johnson and Wilson, which those men later recanted at trial. The State presented no other evidence linking Triplett to Haywood's death. And some circumstantial evidence tended (at least somewhat) to undermine the version of events that Johnson and Wilson recounted in their out-of-court statements and grand jury testimony. For instance, while Johnson and Wilson claimed that Triplett shot Haywood near the vacant lot around 8:30 or 9 p.m., Haywood's body was not discovered in that location until the next morning, even though several neighbors searched the area shortly after hearing gunshots around 8:30 or 9 p.m. the prior evening. In addition, Wilson gave conflicting pretrial accounts of the location where Triplett shot Haywood. In his statement to ASA Walker, Wilson claimed to have seen Triplett pull a gun from his pocket and fire at Haywood as Haywood was climbing the fence near the vacant lot. Before the grand jury, however, Wilson testified that Haywood was on a porch when he was shot. In both accounts, Wilson suggested that Haywood was trying to escape from Triplett when he was shot, even though Dr. Cogan testified that many of the bullets that struck Haywood entered the front of his body. Due to the closeness of the

[4] Whether Triplett's and Hall's allegations *are* true, of course, is a question to be decided by the trial court following an evidentiary hearing. All we decide here is that Triplett has stated a legally sufficient claim for postconviction relief and that he is thus entitled to an evidentiary hearing to test the veracity of the allegations in his petition and supporting affidavits.

evidence, there is a reasonable probability that alibi testimony from Hall, if credible, would have changed the result at trial.

¶ 43 The State argues that trial counsel's failure to present alibi testimony from Hall did not prejudice Triplett because Hall's proposed testimony "fails to disturb" Johnson's and Wilson's inculpatory accounts. But Hall's claim that Triplett was at home with her around the time of the shooting is directly at odds with what Johnson and Wilson told ASA Walker and the grand jury. And because Hall's claim is not positively rebutted by the record, we must accept it as true at this stage of the proceedings. As our supreme court recently explained, "the existence of a conflict with the trial evidence is not the same as finding that the new evidence is positively rebutted." *People v. Robinson*, 2020 IL 123849, ¶ 60. Instead, "[f]or new evidence to be positively rebutted, it must be clear from the trial record that no fact finder could ever accept the truth of that evidence, such as where it is affirmatively and incontestably demonstrated to be false or impossible." *Id.* Nothing in the trial record affirmatively and incontestably demonstrates the falsity or impossibility of Hall's assertion that Triplett was at home with her around the time that Johnson and Wilson claimed the shooting occurred.

¶ 44 Finally, the State argues that the factfinder would have rejected any alibi testimony from Hall because of her relationship with Triplett. But that is precisely the kind of "[c]redibility determination[ ]" that "may be made only at a third-stage evidentiary hearing." *Sanders*, 2016 IL 118123, ¶ 42. The only question at this stage of the proceedings is whether, taking Hall's affidavit as true, there is a reasonable probability that the result of Triplett's trial would have been different. As we have explained above, in light of the closeness of the evidence at trial, we find that there is

a reasonable probability that alibi testimony from Hall, if found credible, would have changed the result of the trial. We therefore must remand for an evidentiary hearing on this claim.

¶ 45 B. Actual Innocence

¶ 46 Triplett also argues that his petition and Robinson's supporting affidavits made a substantial showing of actual innocence, entitling him to an evidentiary hearing on that claim as well. We agree.

¶ 47 The Illinois Constitution recognizes postconviction claims of actual innocence based on newly discovered evidence. *People v. Coleman*, 2013 IL 113307, ¶ 84. To warrant relief on such a claim, a defendant "must present new, material, noncumulative evidence that is so conclusive it would probably change the result on retrial." *Id.* ¶ 96. New evidence is that which "was discovered after trial and could not have been discovered earlier through the exercise of due diligence." *Id.* Such evidence is material if it "is relevant and probative of the [defendant's] innocence." *Id.* New evidence is noncumulative if it "adds to what the [factfinder] heard" at trial. *Id.* And new evidence is sufficiently conclusive to warrant postconviction relief when the new evidence, viewed in light of the evidence at trial, "would probably lead to a different result." *Id.* As a procedural matter, an actual innocence claim is treated like any other postconviction claim. *Id.* ¶ 84. A defendant is thus entitled to an evidentiary hearing if, accepting as true his well-pleaded allegations and supporting affidavits, his petition makes a substantial showing of actual innocence. *Sanders*, 2016 IL 118123, ¶ 37.

¶ 48 The State does not appear to contest that Robinson's affidavits constitute newly discovered and noncumulative evidence. Triplett alleges that he met Robinson in 2007, when they were housed together following Triplett's conviction. After discussing the details of his case, Triplett

alleges, Robinson told him that Johnson could not have witnessed him shooting Haywood on the evening of November 4, 2002, as Johnson's (and Wilson's) out-of-court statements and grand jury testimony claimed, because Johnson was playing dice with Robinson that evening. Accepting these allegations as true, Robinson's account of Johnson's whereabouts on the night of Haywood's death is evidence that "was discovered after trial and could not have been discovered earlier through the exercise of due diligence." *Coleman*, 2013 IL 113307, ¶ 96. Moreover, because no evidence was presented at trial contradicting Johnson's and Wilson's out-of-court statements about Johnson's whereabouts on the night of the shooting, Robinson's newly discovered account adds to what the factfinder heard at trial. *Id.*

¶ 49 Although closer questions, we think the allegations in Robinson's affidavits, if true, also constitute material evidence that would be sufficiently conclusive to warrant postconviction relief. As noted, new evidence is material if it "is relevant and probative of the [defendant's] innocence." *Id.* Although the State does not directly address the materiality prong, it suggests that Robinson's affidavits cannot be deemed material because Robinson's account merely impeaches or contradicts Johnson's and Wilson's out-of-court statements and grand jury testimony and does not itself offer an eyewitness account of the shooting or claim to place Triplett at a different location. It is true that evidence merely impeaching or contradicting a prosecution witness is generally an insufficient basis for ordering a new trial. *People v. Ortiz*, 235 Ill. 2d 319, 335 (2009); *People v. Barnslater*, 373 Ill. App. 3d 512, 523 (2007). But the allegations in Robinson's affidavits, if credible, would not simply impeach or contradict Johnson's and Wilson's out-of-court statements and grand jury testimony. They would instead undermine the entirety of the State's case against Triplett. As our supreme court recently clarified, "evidence which is 'materially relevant' to a defendant's claim

of actual innocence is simply evidence which tends to significantly advance that claim." *Robinson*, 2020 IL 123849, ¶ 55 (quoting *People v. Savory*, 197 Ill. 2d 203, 213 (2001)). Because the State's case rested exclusively on Johnson's and Wilson's out-of-court statements that they were with Triplett on the evening of November 4, 2002 and witnessed (or heard) him shoot Haywood, we think that testimony from Robinson that Johnson was somewhere else that evening (directly rebutting Johnson's account and implicitly rebutting Wilson's) would, if credible, "tend[ ] to significantly advance" Triplett's claim of innocence. *Id.*

¶ 50 As with Hall's affidavit, the fact that the contentions in Robinson's affidavits contradict Johnson's and Wilson's out-of-court statements and grand jury testimony, which were admitted as substantive evidence at trial, does not mean that Robinson's contentions are positively rebutted by the trial record and need not be accepted as true at this stage of the proceedings. See *Robinson*, 2020 IL 123849, ¶ 60 ("the existence of a conflict with the trial evidence is not the same as finding that the new evidence is positively rebutted"). Because nothing in the record "affirmatively and incontestably demonstrate[s]" that the assertions in Robinson's affidavits are "false or impossible," we cannot say that "no fact finder could ever accept the truth of" those claims. *Id.* We must thus accept Robinson's assertions as true when assessing whether Triplett is entitled to an evidentiary hearing on his actual innocence claim.

¶ 51 For the same reason, we also find that the allegations in Robinson's affidavits, if accepted as true and considered in light of the trial evidence, "would probably lead to a different result." *Coleman*, 2013 IL 113307, ¶ 96. As explained above in connection with Triplett's ineffective assistance claim, the evidence of Triplett's guilt was not overwhelming. The State's case hinged on out-of-court statements and grand jury testimony that Johnson and Wilson ultimately recanted

at trial. The State offered no other evidence connecting Triplett to Haywood's death, and some of the circumstantial evidence at trial—like when Haywood's body was discovered and the direction that the bullets entered his body—tended to undermine the State's theory of the case. And while Johnson's and Wilson's out-of-court statements generally corroborated each other, Wilson gave conflicting accounts of where Haywood was located when he was shot.

¶ 52 The State contends that Robinson's assertion that Johnson was playing dice with him at the time the shooting allegedly occurred is not sufficiently "dispositive" to support a claim of actual innocence. But newly discovered evidence need not "total[ly] vindicat[e] or exonerat[e]" a defendant to warrant postconviction relief. *Robinson*, 2020 IL 123849, ¶ 55. As our supreme court has explained, "the new evidence supporting an actual innocence claim need not be entirely dispositive to be likely to alter the result on retrial." *Id.* ¶ 56. "Rather, the conclusive-character element [of the actual innocence test] 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.* Robinson's assertion that Johnson was playing dice with him on the evening Haywood was killed, if credited, would contradict Johnson's and Wilson's accounts of Triplett's actions that evening, which together formed the entirety of the State's case against Triplett. The new evidence would thus place the trial evidence in a significantly different light and undermine confidence in the verdict.

¶ 53 Finally, the State argues that the allegations in Robinson's affidavits are incredible and internally inconsistent. The State notes, for instance, that in his first affidavit, Robinson asserted that he was able to recall the dice game he and Triplett allegedly attended on November 4, 2002, because he won $200 that evening, whereas in his second affidavit, Robinson claimed to recall the

event because he learned that evening that his girlfriend had gone into labor. But as we have repeatedly stressed above, it is not appropriate to make credibility determinations at the second stage of postconviction review. Instead, for now, we must accept the well-pleaded allegations of Triplett's petition and supporting affidavits as true and assess only "the legal sufficiency of the petition." *Domagala*, 2013 IL 113688, ¶ 35. Because Robinson's assertions, accepted as true, make a substantial showing of Triplett's actual innocence, Triplett is entitled to an evidentiary hearing on this claim.

¶ 54 III. CONCLUSION

¶ 55 For the foregoing reasons, we reverse the judgment of the circuit court and remand for an evidentiary hearing on Triplett's ineffective assistance of counsel and actual innocence claims.

¶ 56 Reversed and remanded with directions.