

No. 1-11-0967

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IN THE APPELLATE
COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 93CR22103(01)
)	
CHRISTOPHER ALLEN,)	
)	The Honorable
Defendant-Appellant.)	Clayton J. Crane,
)	Judge Presiding.
)	

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Lavin and Justice Pucinki concur in the judgment.

Held: Third-stage denial of postconviction petition following an evidentiary hearing affirmed where circuit court's finding that a trial witness' recantation was not credible and was insufficient to establish defendant's actual innocence was not manifestly erroneous.

¶ 1

ORDER

¶ 2 Defendant Christopher Allen appeals from an order of the circuit court denying his petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2010))

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following an evidentiary hearing. On appeal, defendant contends that new evidence of the recanted testimony of an eyewitness established that he was actually innocent of the crimes for which he was convicted. For the following reasons, we affirm.

¶ 3 Following a jury trial, defendant was convicted of two counts of attempted murder and one count of first degree murder. He was sentenced to concurrent 30-year prison terms for his attempted murder convictions, to be served consecutively to a 60-year prison term for his first degree murder conviction, for a total of 90 years' imprisonment. On direct appeal, this court affirmed defendant's convictions and sentence. *People v. Allen*, No. 1-96-3831 (2000) (unpublished order under Supreme Court Rule 23). Because the facts of the offense are fully set out in our order on direct appeal, we restate here only those facts necessary to an understanding of defendant's current appeal.

¶ 4 Defendant's convictions arose from a gang-related shooting in the early morning of August 27, 1993. Following the shooting, defendant and Gordon Thornton were charged by indictment with first degree murder, two counts of attempt first degree murder, and aggravated battery with a firearm. The case proceeded to a joint jury trial, which resulted in a hung jury. A mistrial was declared. Defendant and Thornton brought a joint motion to dismiss the indictment based on double jeopardy, which the court denied. Thornton filed an interlocutory appeal of the trial court's decision and defendant then proceeded to trial alone.

¶ 5 By the time of the second trial, one of the two eye witnesses who had testified at the first trial, Rosemary Lumpkin, was deceased. Rosemary's testimony from the first trial was read into the record at the second trial. The jury at defendant's second trial returned a verdict of guilty to

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all charges.

¶ 6

BACKGROUND

¶ 7 The charges against defendant arose from events occurring in the summer of 1993.

During that time, Yvette Malone¹ ran a drug operation wherein she and approximately 10 employees were involved in the sale of crack cocaine in the area near Madison Street and Menard Avenue in Chicago. She had been selling cocaine for approximately two years, but denied using drugs herself. Malone testified at trial that one of her employees, Rosemary Lumpkin, was her cousin. Rosemary bagged cocaine in preparation for sale at the nearby Grand Hotel. They used a room at the Grand Hotel to conduct business, package cocaine, store their money, and keep a handgun for protection.

¶ 8 Malone testified that she was not a member of a street gang. She knew, however, that the area in which she conducted her drug operation was "turf" for the Four Corner Hustlers (Hustlers) street gang. Prior to the summer of 1993, Malone had no problems with the gang regarding her drug selling. However, during that summer, she learned that Gordon, known to her as "Gordy", was trying to contact her. She did not know who Gordy was at that time.

¶ 9 Malone testified that, near the end of July 1993, she and Rosemary were on the corner of Madison Street and Menard Avenue when several cars pulled up. A group of 20 to 30 people exited the cars and proceeded to spread out across the street from the women. A man who introduced himself as Gordon approached her, along with defendant and another person, whom

¹Yvette Malone was also known as Marie Bennett.

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Gordon introduced as Cinque. Gordon told Malone that he was a five star elite, a position of rank in the Four Corner Hustlers. He did not introduce defendant or tell Malone what defendant's position was in the gang.

¶ 10 Malone walked with Gordon and Cinque, who were standing side by side, while defendant stood about two feet behind them. Malone testified that she was very nervous and continually looked back at defendant.

"[DEFENSE COUNSEL] Q: And during this half hour conversation [on the street with Gordy and Cinque], were you concentrating on Gordy Thornton?

[MALONE] A: I was concentrating on Gordy, [Cinque], and [defendant]. The ones that was around me.

Q: But you've testified [defendant] stood behind you; is that correct?

A: Yes.

Q: How many times did you look back at this person you've identified as [defendant]?

A: So many times I can't count. Just watching behind. I am watching behind because I am nervous. I am watching him."

¶ 11 Rosemary began to walk with them, but was told she could not do so. She then remained at their original location. During the walk, Gordon told Malone that he was looking for her because she was working on that corner and had to pay the "nation" (meaning the Four Corner

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Hustlers street gang) \$3000 if she wanted to continue to work on that corner. Because Malone did not have the money readily available and needed a few days to obtain it, Gordon gave her a telephone number and told her to contact him when she had the money. The 20 to 30 people then got back into their cars and drove away.

¶ 12 Malone continued to sell cocaine on the corner of Menard and Madison. A few days later, she contacted Gordon by telephone and set up a meeting at a nearby gas station. Malone drove to the gas station with her cousin Rosemary. When they arrived, Gordon, defendant, and another individual were already there. Gordon approached the women in their vehicle while defendant remained standing by a telephone booth about five feet away. Malone gave Gordon \$1,500. Gordon instructed her to telephone him when she had the rest of the money. Although she learned from her employees over the following days that Gordon was trying to contact her, she did not call him regarding the additional money he had demanded because she did not have the funds.

¶ 13 Malone testified that around 7:00 p.m. on August 26, 1993, she went to the Maywood racetrack with her four-year old son and a man named Willie. After leaving the racetrack around 11:30 p.m., Malone saw Rosemary and her cousin, Venita Savage, near Madison Street and Menard Avenue. Malone and her son got out of the car and, while she was conversing with Rosemary, Venita, and some other men who worked for her, Gordon and a man Malone identified as defendant approached on a motorcycle. They stopped the motorcycle just two or three feet from Malone. Gordon asked Malone who was selling drugs for her that night. Malone responded that everyone "out there" was. Gordon said he would return, and rode away on the

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motorcycle, with Gordon driving and defendant riding on the back. Malone testified that, when Gordon spoke, she watched him directly in the face because he scared her.

¶ 14 Malone testified that she then expected trouble. She, Rosemary, and Venita went to the Grand Hotel to get her gun and inform the next shift not to sell any drugs that night. When Malone left the hotel, she placed the gun under the passenger seat of the car. Malone testified that, after dropping her son off at a relative's house, she, Venita, and Rosemary drove around looking for other people that worked for Malone to warn them of the possible trouble. Venita was driving, Malone was in the front passenger seat, and Rosemary was in the back seat. While they were driving down Waller Street, they saw Gordon driving his motorcycle ahead of them. Malone saw that a man she knew as Glenn was now riding on the back of Gordon's motorcycle.

¶ 15 Gordon and Glenn motioned for Venita to pull around the motorcycle. Gordon and Glenn then followed them as they drove down Waller street.

¶ 16 Malone testified they saw a police car at Waller and Madison. They debated stopping the car, but Malone decided not to stop because she knew she had a warrant out for her arrest and she currently had a gun in the car. Instead, they turned right onto Madison. Gordon and Glenn did not follow them, but instead continued straight down Waller.

¶ 17 Malone, Rosemary, and Venita proceeded straight down Menard until they reached Washington. While they were stopped at a red light, Gordon's motorcycle drove up again on the right side of their car. Gordon was still driving the motorcycle, but now defendant was riding on the back. The motorcycle stopped near the front of the car, on the passenger side by where Malone was seated. Malone had a clear view of who was on the motorcycle. Although she did

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not know defendant's name at the time, she recognized him. She testified:

"[WITNESS MALONE] A: I can remember so well about [defendant] that day on the bike, he was wearing a cartoon character hat, and his eyebrows. And I saw him before. I could remember."

Malone identified defendant in open court as the man riding on the back of Gordon's motorcycle.

¶ 18 Malone then watched as Gordon said something to defendant which she could not hear. Defendant, who was about five feet from Malone, reached between his legs, removed a gun, and shot repeatedly into the car. Malone testified that the motorcycle had been stopped next to the car for about 40 seconds when defendant fired the gun and that while he fired the weapon, she was staring at Gordon and defendant, and they were staring at her. Malone was shot twice. The bullets struck her in the arm and entered her chest. Malone threw up her arms and yelled, "I've been shot. I've been shot." Venita yelled, "I've been shot, too." Venita had been struck repeatedly in the chest, and died as a result of her injuries.

¶ 19 After the shooting began, Venita pulled away but soon crashed into some parked cars. Malone and Rosemary fled to the nearby home of Malone's grandmother. When the police arrived, Malone identified herself to them as Marie Bennet because there was an outstanding warrant for her arrest. Rosemary, who had hit her head during the collision, and Malone were taken by ambulance to different hospitals for treatment.

¶ 20 Chicago police detectives Joel Boyle and Robert Borris spoke to Rosemary at Loretto Hospital. Rosemary gave them a description of the driver of the motorcycle as well as of the

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shooter. She described the shooter as a black male, around 21 to 23 years old, 5'10" to 6', and 150-160 pounds. The detectives then spoke with Malone at Mt. Sinai Hospital. Malone gave the detectives the same description of the driver and the shooter as did Rosemary.

¶ 21 Malone did not know defendant's name at the time of the shooting, but testified that after learning it was "Chris" from the "word on the street", she informed police of this prior to identifying him in a photo array. Malone also identified defendant on September 15, 1993, in a police lineup. In open court, Malone identified defendant as the person who shot her and Venita.

¶ 22 On cross-examination, Malone testified that her "correct" name was Yvette Malone and that she had previously used the names Yvette Lee, Carolyn Savage, Brenda Fields and Marie Bennett. She testified that, at the time of the shooting, she was on probation for an unlawful possession of a weapon conviction and that a warrant for her arrest was outstanding. She further testified that subsequent to the shooting, she had not been prosecuted for her involvement in drug sales or for having the gun in her car the night of the shooting. Malone denied using any drugs the night of the shooting.

¶ 23 Malone admitted that throughout the course of the police investigation, she told police that her name was Marie Bennett and that Rosemary and Venita had gone with her to the Maywood racetrack the night of the shooting. Malone stated that she eventually told police she had lied to them about her real name, but did not remember when she disclosed that. Malone further admitted that when she testified before the grand jury on September 3, 1993, she used the name Marie Bennett, and stated that Rosemary and Venita had been at the racetrack with her before the shooting.

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¶ 24 Chicago police sergeant William Johnston testified that he conducted photo spreads and police lineups in which both Rosemary and Malone identified Gordon as the driver of the motorcycle and defendant as the gunman.

¶ 25 Rosemary testified at defendant's first trial. However, she died before his re-trial. Her earlier testimony was read into the record at the second trial by the court reporter who had taken it down. Rosemary testified that, during the summer of 1993, Malone was in the business of selling drugs. Rosemary worked for Malone bagging cocaine. Rosemary's testimony was substantially the same as Malone's testimony regarding the occasion in July 1993 when Gordon demanded money from Malone in return for allowing her to continue her drug sales business in the area. Rosemary identified defendant in open court as one of the men with Gordon that day, and stated she had not known him prior to that occasion.

¶ 26 Rosemary testified that Malone was eventually informed by the people working for her that she needed to get in touch with Gordon because he had been looking for her. After Malone contacted Gordon, Rosemary accompanied her to a gas station to pay him. Gordon and defendant were already there when they arrived. Gordon approached the car and Malone gave him \$1,500. Gordon asked when he would get the rest of the money and Malone responded that she would contact him when she had the remainder of the money. While this conversation took place, defendant remained about five feet from the car. After Gordon got the money, he left with defendant.

¶ 27 Regarding the night of the shooting, Rosemary testified that, at approximately 11 p.m., she and Venita were on Menard Avenue when Malone, who had been at the racetrack, and her

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son joined them. As the women were talking, Gordon and defendant approached on a motorcycle. Gordon got off the motorcycle, approached Malone, and asked her why she had not contacted him. At his demand, Malone told Gordon who was working for her that night selling drugs. As Gordon and defendant prepared to leave on the motorcycle, Gordon stated that he would return.

¶ 28 Malone, Venita, and Rosemary then went to the Grand Hotel where Malone attempted to contact the people who were going to sell drugs for her later that night. They left the hotel about 25 minutes later to take Malone's son to someone's house. Malone took the gun she kept at the hotel with her. After dropping Malone's son off and driving along Waller Avenue, they saw Gordon and another man on a motorcycle. At this point, Venita was driving, Malone was in the front passenger seat, and Rosemary was behind Malone. The women passed the motorcycle and were followed by it for a time. Eventually the two vehicles separated. A few minutes later, while the women were stopped at a red light on the corner of Menard Avenue and Washington Street, Gordon reappeared on a motorcycle, now with defendant as his passenger. They pulled up to about five feet from the passenger side of the car. There were street lights on the corner, which were working the night in question. Gordon, who was driving the motorcycle, turned his head and mouthed something to defendant. Defendant then removed a gun from between his legs and "shot the car up." Rosemary testified that the motorcycle was stopped next to the car for about a minute before the first shot was fired and that, when the shooting began, she ducked down, while looking in the direction from where the shots were coming. Rosemary identified defendant in open court as the person riding with Gordon at the time of the shooting.

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¶ 29 Rosemary, who hit her head when the car crashed into the parked vehicles, was taken to Loyola hospital where she spoke with police and gave them descriptions of Gordon and defendant. She did not know defendant's name at the time of the shooting, explaining, "I knew the face, we just didn't know the name." She testified that she told police his name was Chris after learning it from people "on the streets." She subsequently identified Gordon and defendant in photo spreads and police lineups. On September 2, 1993, Rosemary gave a statement to police in which she described what had happened the night of the shooting. The following day, she testified before a grand jury.

¶ 30 On cross-examination, Rosemary admitted that she did not tell police Malone's real name. She believed she was protecting Malone from trouble because of an outstanding warrant for her arrest. Rosemary denied having used cocaine on the night of the shooting, but admitted to having used it 24 hours before. According to Rosemary, she was "more aware" when she used drugs.

¶ 31 Rosemary admitted her statement to police included that she had gone with Venita and Malone to the racetrack the night of the shooting. She also admitted that her statement did not include anything about the shooter having heavy eyebrows or that she had seen him on occasions prior to the shooting. She conceded her statement did not include the fact that the women had taken a gun with them when leaving the hotel the night of the shooting.

¶ 32 Chicago police officer John Nee testified as an expert on gangs. At the time of trial, he had been a police officer for 25 years, including 11 years as a gang crimes specialist. In that position, he monitored numerous gangs, including the Four Corner Hustlers. As part of his job, he developed information on matters such as where the gangs' activities were conducted, who the

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gang leaders were, how the gangs made money, and their involvement in crimes. Officer Nee testified he had been monitoring the Hustlers for about 18 years and had collected information on it from citizens, arrests, and through field contacts with gang members and informants.

¶ 33 Officer Nee testified that the Hustlers operated in the area of Menard Avenue and Madison Street and that, during the summer of 1993, it attempted to expand its involvement in narcotics activities. This expansion included having drug sellers who were not members of the Hustlers pay the gang money. Nee stated "Cinque" was the main leader of the Hustlers in the area and that Gordon, whom Officer Nee had known for about 10 years, was second in command. Officer Nee testified that defendant was an "enforcer" in the Hustlers, which meant he "took care" of any "street problems" by shooting or beating people. Officer Nee admitted, however, that he had never seen defendant beat anyone or possess a gun, and he did not recall who had told him defendant was an enforcer.

¶ 34 Chicago police lieutenant John Farrell testified that he was assigned as a watch commander in Area 5 Violent Crimes. He became involved in the murder investigation of Venita Savage when Detective Johnston asked him if he had any information about a person named Gordy. He knew Gordy's last name was Thornton, and that he was a member of a street gang. Lieutenant Farrell had known Gordy Thornton for approximately seven or eight years. He gave Detective Johnston a photograph of Gordon Thornton, which Detective Johnston used to make a photo array. When shown the photo array, both Yvette Malone and Rosemary Lumpkin separately identified Gordon from this first set of photographs. At this time, Malone and Rosemary told the detectives that they had learned from people on the street the shooter's name

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was Chris and that he was an enforcer for the Four Corner Hustlers street gang.

¶ 35 Later that same day, Detective Johnston returned and asked Lieutenant Farrell if he had any information on another person named Chris. Lieutenant Farrell contacted gang crime specialist Nee regarding that name. He then provided Detective Johnston with a photograph of defendant, which he used to compose a second photo array. After being shown this photo array, both Malone and Rosemary separately identified defendant as the man who shot into their car, killing Venita and injuring Malone.

¶ 36 On September 2, 1993, Gordon was located and arrested. That day, both Malone and Rosemary identified him in a lineup as the driver of the motorcycle.

¶ 37 Officer Johnston testified that he had arrested defendant and Darnell Bryant, also known as Cinque, one month prior to the shooting in the instant case. During processing, defendant identified himself as a member of the Four Corner Hustlers. In September 1993, Officer Johnston learned there was a warrant for defendant's arrest in relation to the Venita Savage homicide. Officer Johnston located and arrested defendant. On September 15, 1993, Malone and Rosemary both identified defendant in a lineup as the person who shot Venita and Malone.

¶ 38 The parties stipulated that, if called to testify, Devon Savage, Venita's brother, would testify that Rosemary Lumpkin died of a heart attack on July 7, 1995. He would also testify that, near the end of July 1993, Gordon and Cinque approached him, looking for Malone. At that time, he saw a group of 20 to 25 members of the Four Corner Hustlers street gang, but did not see anyone he would identify as defendant.

¶ 39 After the State rested, the defense made a motion for a directed finding. The court denied

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the motion. Defendant presented no further evidence on his behalf.

¶ 40 The jury returned a verdict of guilty on all charges. Defendant was thereafter sentenced to sixty years' imprisonment for first degree murder, and a consecutive term of thirty years' imprisonment for each of the two counts of attempted first degree murder, to be served concurrently with one another.

¶ 41 On direct appeal, defendant argued that: (1) the State failed to prove him guilty beyond a reasonable doubt; (2) the trial court improperly allowed Officer Nee to testify as an expert on gangs and gang membership; and (3) his sentence was excessive. *People v. Allen*, No. 1-96-3831 (2000) (unpublished order under Supreme Court Rule 23). This court affirmed defendant's conviction and sentence, finding that the evidence was sufficient to find him guilty beyond a reasonable doubt, the trial court did not err in allowing Officer Nee to testify as an expert, and his sentence was proper. *People v. Allen*, No. 1-96-3831 (2000) (unpublished order under Supreme Court Rule 23). Regarding the challenged identification evidence, this court found:

"[Rosemary] and Malone identified defendant as the shooter after observing him under conditions adequate to support a positive identification. The shooter was about five feet from the side of the car on which both were sitting and they were able to view him at that time for at least 40 seconds. Malone testified that she looked at the shooter 'dead in his face' and [Rosemary] stated that she was looking in the direction from where the shots were fired. In addition, both gave consistent descriptions of him to

Boyle soon after the shooting and subsequently identified him in photo spreads, police lineups and open court. The identification testimony of [Rosemary] and Malone is further strengthened because both testified they had observed him on occasions prior to the shooting. See *People v. Zarate*, 264 Ill. App. 3d 667, 674 (1994). Therefore, we cannot say that the evidence was so unsatisfactory that no rational trier of fact could find it sufficient to find defendant guilty beyond a reasonable doubt. See *People v. Nitz*, 143 Ill. 2d 82, 95-96 (1991)." *People v. Allen*, No. 1-96-3831 (2000) (unpublished order under Supreme Court Rule 23).

¶ 42 In September 2006, defendant, represented by counsel, filed a postconviction petition claiming there was newly discovered evidence which impacted his case, that is, Malone had changed her testimony identifying defendant as the shooter. He explained, in pertinent part:

"4. The bases for this petition is newly discovered evidence. The surviving victim in this case has now come forward and recanted her testimony where she identified [defendant] as the shooter in this case (see attached sworn affidavit).

5. The recanted testimony was not available at [defendant's] original trial. Nor could [defendant have] discovered it sooner through due diligence. This recantation was not available and therefore could not have been raised in prior Post Conviction

Proceedings or Appeal. The substance of the recantation is material and non cumulative and is of such conclusive character that it would change the results in this case. It was the testimony of the surviving victim, Yvette Malone, that was the fundamental evidence at the trial which resulted in [defendant's] conviction and sentence."

In support of his petition, defendant attached Malone's affidavit in which she averred, in pertinent part:

"3) After having been informed by friends for many years that I had made a mistake in the case of [defendant], I was eventually provided with a photograph of a man by the name of Tygie Hill. After viewing this photograph, I am now convinced that I made a big mistake in identifying Christopher Allen as the person who killed Venita Savage and wounding myself in the early morning hours of August 27, 1993. After viewing this photograph I am now convinced that Christopher Allen was no where [sic] around the night of the shooting. I feel for certain that it was Tygie Hill that killed my cousin Venita Savage and shot me twice.

4) After becoming aware of the fact that I had made a big mistake I contacted members of [defendant's] family and asked to speak with [defendant's] Attorney.

5) I am giving this recantation without having any threats or promises made to me. I am not under the influence of drugs or alcohol at this time, and I am of sound mind. I declare under the penalty of perjury that this statement is true to the best of my personal knowledge and belief."

¶ 43 The postconviction court docketed the petition and moved it to the second stage of postconviction proceedings. The State filed a motion to dismiss. The court subsequently denied the State's motion to dismiss and moved the petition to the third stage of postconviction proceedings. Prior to the evidentiary hearing at this stage, defendant filed an additional affidavit from Yvette Malone in which she averred, in pertinent part:

"1. I am the same Yvette Malone that testified against [defendant] in two separate trials.

2. For many years I was informed by friends that I had made a mistake in the case of [defendant]. The rumors and word on the street was Tygie Hill killed my cousin Venita Savage and shot me twice. With the help of my son I was able to obtain a prison photo of Tygie Hill. I do not have the photo that I originally saw, but it was very similar to the one attached to this affidavit. After viewing the photo I realized that I made a mistake by identifying [defendant] at trial. I am now certain that it was Tygie Hill that shot me and killed my cousin.

3. When I informed my friends that I did make a big mistake, I believe they contacted members of [defendant's] family, because a paralegal contacted me and asked me to speak to [defendant's] Attorney.

4. I am giving this statement freely and voluntary [*sic*] because I now believe I made a mistake by identifying [defendant] as the person who shot me and killed my cousin Venita Savage."

¶ 44 Malone testified at the evidentiary hearing. According to Malone, at the time she originally testified at defendant's two trials, she was positive that defendant was the shooter. Subsequent to that, however, "[a]ll the talk in the neighborhood, on the block, everybody was talking saying" she had made a mistake by identifying defendant as the shooter. She heard from these people that a man named Tygee Hill was actually the shooter. Eventually, Malone asked her son to look up a photograph of Hill on the internet. He did so. When he showed Malone the photograph of Hill he printed from the Illinois Department of Corrections website, she knew immediately she had made a mistake when identifying defendant as the shooter. Although Malone did not keep the photograph, she eventually saw another photograph of Hill and confirmed that he was the person she now believes to have been the shooter.

¶ 45 Malone acknowledged that, during the original investigation, the police showed her photographs of associates of Gordon and she picked out a photograph of defendant as the shooter. However, the police never showed her a photograph of Hill. Malone testified that, although she knew Gordon at the time of the shooting, she did not know defendant. She

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testified:

"[DEFENSE COUNSEL] Q: Did you know the individual that was on the back of the motorcycle, did you know him very well?

[WITNESS MALONE] A: No.

Q: But at the time you testified you believed he was - - it was [defendant] that was the shooter?

A: Yes.

Q: Now, you think you're sure that it was Tygee Hill that was the shooter?

A: Now 100 percent sure that it was Tygee Hill."

¶ 46 On cross-examination, Malone acknowledged she had never actually seen Hill in person, but had only seen photographs of him. She further acknowledged she had never heard the name Tygee Hill until 2004 and did not see his picture until between 2005 and 2006. Malone testified about numerous people who had told her she made a mistake in her identification of defendant, including defendant's cousin Carol Allen. She testified:

"[ASSISTANT STATE'S ATTORNEY] Q: Some of the people you referred to [who informed her she had identified the wrong individual] were friends and family members?

[WITNESS MALONE] A: Yes.

Q: None of them were there [at the time of the shooting]?

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A: No.

Q: None of them testified at trial?

A: No.

Q: None of them went and reached out to the police to tell the police you had the wrong person?

A: They reached out to me.

Q: They didn't go to the police?

A: They was just telling me, you know. They just said, you know, you might want to think about it and I thought about it.

Q: Okay. Now, another thing you told us on the afternoon or the morning of our interview was that one of the reasons you changed your mind about the identification of the shooter is because, and I'll quote what you told us, 'Everybody knows that Tygee did it.'

A: The reason why I changed my mind and I told you this and I know I told you this because it's the honest to God truth, the reason why I told you Tygee did it is because I saw his picture. When my son pulled that picture up off the Internet when I looked at Tygee I saw his face, he did it. Trust me, he did it."

¶ 47 Malone also testified on cross-examination that defendant was with Gordon when he first approached her on the street corner. During that meeting, she kept an eye on defendant because

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he, Gordon, and Cinque separated from the group and she was frightened. She admitted testifying at trial that defendant was with Gordon when she met them at the gas station, but testified at the evidentiary hearing that she no longer knew if the individual with Gordon was defendant. She admitted she previously testified that defendant was on the back of the motorcycle and was the shooter, and she had identified defendant in a photo array, in a lineup, and again in open court at trial. She acknowledged her trial testimony that she saw the shooter's face, and was certain he was defendant because the shooting was the third time she had seen him.

¶ 48 The defense rested after presenting Malone's testimony. The State made a motion for a directed finding, which the court denied. The State then rested.

¶ 49 The postconviction court denied defendant's postconviction petition, acknowledging that recantation testimony should be taken with great caution, and specifically stating it did not believe Malone's testimony at the evidentiary hearing:

"THE COURT: And the issue in this matter really comes down to the credibility of Ms. Malone as she testified in this case. I had the ability to observe her. I had the ability to review both these affidavits. They're somewhat fuzzy as to what the process was, whether or not she contacted family members, whether or not the attorneys contacted her, they're a little different, but the essential affidavit in these matters is, I identified the wrong person in this particular matter, and I am absolutely sure this time that Mr. Hill was the shooter in this particular situation.

It appears to me that over the course of the 13-year-period, an, it's less than that, over the course of about an 11-year-period that her loyalty to her cousin wanes a little bit because her cousin is no longer on the scene, and she's not coming back. She's dead. And it appears that a fair amount of pressure was exerted on her, because there's a particular line of the testimony in this case that she indicated that an individual said to her, you better think about that, which probably sums up what may, what it appears to this court happened. This is a recantation of eyewitness testimony. And all the case law indicates here that it should be taken with great caution in this particular matter. I not only take this testimony in this with great caution, I didn't believe Ms. Malone when she testified in front of me."

This appeal follows.

ANALYSIS

¶ 50 Defendant contends that the postconviction court erred in denying his petition. Specifically, he maintains that relief in the form of a new trial is warranted where the sole surviving witness testified at the evidentiary hearing that she had misidentified defendant as the shooter. Moreover, he argues that the postconviction court misapprehended Malone's testimony, mistakenly believing that Malone testified she had been pressured to recant when she actually specifically testified that she was not coerced to abandon her identification of defendant. For the

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following reasons, we affirm.

¶ 51 The Post-Conviction Hearing Act provides a remedy to a criminal defendant whose federal or state constitutional rights were substantially violated in his original trial or sentencing hearing. *People v. Pitsonbarger*, 205 Ill. 2d 444, 455 (2002); 725 ILCS 5/122-1 *et seq.* (West 2010). Proceedings are initiated by the filing of a petition verified by affidavit in the circuit court in which the conviction took place (725 ILCS 5/122-1(b) (West 2010)), and ultimately may consist of up to three distinct stages (*People v. Pendleton*, 223 Ill. 2d 458, 471-72 (2006)). If a petition is not summarily dismissed by the trial court, it advances to the second stage, where an indigent defendant is provided assistance by counsel. *People v. Hobson*, 386 Ill. App. 3d 221, 230-31 (2008). At the second stage, the petition under consideration must make a substantial showing of a constitutional violation or be subject to a motion to dismiss. See *People v. Vasquez*, 356 Ill. App. 3d 420, 422 (2005); 725 ILCS 5/122-5 (West 2010). If the State's motion to dismiss is denied, or no such motion is filed, the State must file a timely answer to the postconviction petition. 725 ILCS 5/122-5 (West 2010). If, upon consideration of the petition, with any accompanying documentation and in light of the State's answer, the trial court determines that the requisite showing of a constitutional violation has been made, a third-stage evidentiary hearing must follow. *Hobson*, 386 Ill. App. 3d at 231.

Where, as here, a postconviction evidentiary hearing involves fact-finding and credibility determinations, we will only disturb the decision of the trial court where it is manifestly erroneous. *Pendleton*, 223 Ill. 2d at 473. Manifest error is error that is clearly evident, plain, and indisputable. *People v. Morgan*, 212 Ill. 2d 148, 155 (2004).

¶ 52 Here, defendant contends he established his actual innocence based on newly discovered evidence where the only surviving witness to the shooting, Malone, testified at the evidentiary hearing that she was mistaken when she identified defendant as the shooter. A claim of innocence must be based on newly discovered evidence that establishes the defendant's innocence rather than merely supplementing an assertion of a constitutional violation with respect to trial. *People v. Ortiz*, 235 Ill. 2d 319, 330 (2009), citing *Morgan*, 212 Ill. 2d at 154, citing *People v. Washington*, 171 Ill. 2d 475, 479 (1996). The supporting evidence must be newly discovered, material, noncumulative, and of such conclusive character as would probably change the result on retrial. *Morgan*, 212 Ill. 2d at 154. Newly discovered evidence is evidence that was unavailable at trial and could not have been discovered sooner through due diligence. *People v. Harris*, 206 Ill. 2d 293, 301 (2002). 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. *People v. Barnslater*, 373 Ill. App. 3d 512, 520 (2007).

¶ 53 In this case, the evidence presented by defendant to establish his claim of actual innocence is Malone's recantation of her earlier identification of him as the shooter. Our supreme court has noted, however, that recantation testimony is inherently unreliable and will not result in a new trial except in extraordinary circumstances. *People v. Steidl*, 177 Ill. 2d 239, 260 (1997); *Morgan*, 212 Ill. 2d at 155.

¶ 54 The record in this case shows that when the shooting occurred, the shooter—whom Malone identified as defendant—was approximately five feet from the side of the car in which Malone was sitting. She was at the window, looking at the shooter for at least 40 seconds.

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¶ 55 In addition, she had seen defendant on at least two previous occasions, which increased the certainty of her identification. See *People v. Zarate*, 264 Ill. App. 3d 667, 674 (1994). On the first occasion, when the large group of gang members approached her, she had a 30 minute conversation with Gordon and Cinque. Throughout this entire conversation, defendant was close behind them. She testified that she continuously looked behind her and watched defendant:

"[DEFENSE COUNSEL] Q: And during this half hour conversation [on the street with Gordy and Cinque], were you concentrating on Gordy Thornton?

[WITNESS MALONE] A: I was concentrating on Gordy, [Cinque], and [defendant]. The ones that was around me.

Q: But you've testified [defendant] stood behind you; is that correct?

A: Yes.

Q: How many times did you look back at this person you've identified as [defendant]?

A: So many times I can't count. Just watching behind. I am watching behind because I am nervous. I am watching him."

On the second occasion, she met defendant and Gordon at a gas station when she paid Gordon money. She saw both Gordon and defendant exit a car. Gordon approached her car, she handed him money, and they had a conversation. Throughout this exchange, defendant stood approximately five feet away. She testified at trial:

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"[WITNESS MALONE] A: I can remember so well about [defendant] that day on the bike, he was wearing a cartoon character hat, and his eyebrows. And I saw him before. I could remember."

After the shooting, Malone gave the police descriptions consistent with both defendant and Gordon. During her cross-examination at trial, when asked what she had told the police when she was at the hospital, Malone responded:

"[WITNESS MALONE] A: I said Gordy asked me for the money, and I gave it to him. And [defendant] was with him. I knew who shot me. And I knew who killed my cousin because the night when everything happened that was the third time that I had seen him."

She later identified defendant as the shooter in a photo array, a police lineup, and in open court during both trials. On cross-examination during the second trial, she affirmed her certainty of the identification, stating:

"[DEFENSE COUNSEL] Q: You say you know [defendant] did it; is that correct?

[WITNESS MALONE] A: I was looking at him; he had shot me.

Q: How far away from him were you at the time the shots were fired?

A: Three to four feet from me. We looked at each other. I am

looking him dead in his face when he shot me and killed my
cousin."

¶ 56 The record thus shows that Malone made a positive identification of defendant as the shooter both soon after the shooting and at the two subsequent trials. These positive identifications were corroborated by the testimony of another witness, Rosemary.² Even then, Malone did not actually recant her identification of defendant as the shooter until many years later. The record clearly supports the postconviction court's conclusion that Malone's testimony at the evidentiary hearing was not credible.

¶ 57 In addition, we reject defendant's attempts to discredit Rosemary's testimony based on her cocaine use. Defendant argues that Rosemary's "powers of observation were likely diminished by her cocaine use, a factor that did not affect Malone, who did not use illegal drugs." This question was explored at trial, however, when Rosemary denied having used cocaine on the night of the shooting, but admitted to having used it 24 hours before. According to Rosemary, she was "more aware" when she used drugs.

¶ 58 This case is similar to *Morgan*, 212 Ill. 2d 148. In *Morgan*, the defendant filed a postconviction petition alleging that the only living eyewitness from his trial had recanted his testimony and provided a supporting affidavit from that witness. This recantation took place 18 years after the killings and 17 years after the defendant's trial. *Id.* Finding the witness' new testimony not credible, the circuit court denied his petition following an evidentiary hearing.

²There is no evidence before this court that Rosemary recanted her testimony before her death.

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Morgan, 212 Ill. 2d at 152. Our supreme court subsequently affirmed that dismissal, holding:

"In the end, defendant's postconviction petition turned on a single factor: the credibility of [the recanting witness]. Here, as in every case of this kind, it was for the trial court to assess the credibility of the recantation testimony after having observed the demeanor of the witness. The trial judge studied the record, listened to [the witness'] testimony, and watched how he reacted when he was questioned and cross-examined. Based on our examination of the record, we cannot say that the trial judge's decision to reject [the witness'] recanted testimony was manifestly erroneous." *Morgan*, 212 Ill. 2d at 165.

Similarly here, the surviving eyewitness, Malone, suddenly recanted her testimony over a decade after the murder and trials occurred. Like the recanting witness in *Morgan*, Malone previously testified under oath on numerous occasions implicating defendant as the shooter. The postconviction court held an evidentiary hearing during which Malone testified regarding her recanted testimony. During this hearing, the court, like the court in *Morgan*, was in a unique position to observe Malone and assess her credibility. Like *Morgan*, the court in the instant case found the witness lacked credibility. Finally, just as in *Morgan*, the record here supports the postconviction court's conclusion that Malone's new claims are not worthy of belief, and the court's decision to reject her recantation testimony was not manifestly erroneous.

¶ 59 Finally, we disagree with defendant that the trial court "misapprehended" Malone's

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testimony when it determined that she had been pressured to recant her testimony. To the contrary, Malone's testimony throughout the evidentiary hearing indicates that she was, in fact, pressured to recant her testimony against defendant. She testified that she first started to believe she was mistaken in her identification of defendant because "all the talk in the neighborhood, on the block, everybody was talking saying" that she had made a mistake and that it was not defendant on the motorcycle the night of the shooting. She acknowledged on cross-examination that "everybody" was saying she had the wrong person from the time the shooting occurred. She noted that currently "a lot of people" would tell her she made a mistake in her identification whenever she returned to the neighborhood, including members of defendant's family.

¶ 60 Malone's two affidavits also support the conclusion that she felt pressured, insofar as individuals telling her she was mistaken. In her first affidavit, she averred:

"3) After having been informed by friends for many years that I had made a mistake in the case of [defendant], I was eventually provided with a photograph of a man by the name of Tygie Hill."

In her second affidavit, she averred:

"2. For many years I was informed by friends that I had made a mistake in the case of [defendant]. The rumors and word on the street was Tygie Hill killed my cousin Venita Savage and shot me twice."

The evidence before the postconviction court was clear: people in the neighborhood exerted

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influence over Malone, urging her to change her story and, eventually, Malone did so. The court's finding "that a fair amount of pressure was exerted on her" is supported by the record.

¶ 61 In conclusion, Malone testified consistently and credibly throughout defendant's two separate jury trials that he was the person on the back of the motorcycle who produced a handgun and shot numerous times into her car, wounding her and killing her cousin. She identified him repeatedly and without hesitation in a photo array, a lineup, and both times in open court. A second eyewitness, Rosemary Lumpkin, also identified defendant as the shooter.

¶ 62 Over a decade after the shooting, Malone claimed to have determined that she misidentified defendant after being informed by people in the neighborhood that she had done so. These people, who included relatives of defendant and members of his gang, also convinced her that the real shooter was a man named Tygee Hill. None of these individuals who apparently knew so much about the shooting were actually present at the shooting. Nor did any of these individuals notify the police regarding their information. Although she has never seen Tygee Hill in person, Malone testified that, when she saw a photograph of Hill produced from the internet, she was convinced that he was the shooter rather than defendant. She no longer has the photograph.

¶ 63 The postconviction court listened to Malone's testimony, observed her demeanor, and assessed her credibility during the evidentiary hearing. The court had opportunity to review the record of defendant's two previous trials and weigh Malone's new testimony against her sworn testimony in both previous proceedings. In its ruling denying the petition, the court specifically stated:

"I not only take this [recantation] testimony with great caution, I didn't believe Ms. Malone when she testified in front of me."

The postconviction court was in a unique position to evaluate Malone's new testimony, with opportunity to assess both her demeanor and credibility. It did so, and found that her testimony at the evidentiary hearing was not credible. We do not think this determination was manifestly erroneous. *Pendleton*, 223 Ill. 2d at 473 (Where, as here, a postconviction evidentiary hearing involves fact-finding and credibility determinations, we will only disturb the decision of the trial court where it is manifestly erroneous.).

¶ 64 We defer to the trial court's determination in this situation unless there is clear error and, as noted above, we find none. Accordingly, we find defendant's claims to be without merit, and conclude that the circuit court did not err in denying defendant's petition for postconviction relief after an evidentiary hearing.

¶ 65 CONCLUSION

¶ 66 For all of the foregoing reasons, the decision of the circuit court of Cook County is affirmed.

¶ 67 Affirmed.