

No. 1-11-2354

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

| | | |
|----------------------------|---|------------------|
| THE PEOPLE OF THE STATE OF |) | Appeal from the |
| ILLINOIS, |) | Circuit Court of |
| |) | Cook County. |
| Plaintiff-Appellee, |) | |
| |) | |
| v. |) | No. 92 CR 10385 |
| |) | |
| CEDRIC CAL, |) | Honorable |
| |) | Michael Brown, |
| Defendant-Appellant. |) | Judge Presiding. |

JUSTICE HOFFMAN delivered the judgment of the court.
Justices Rochford and Delort concurred in the judgment.

ORDER

¶ 1 *Held:* The judgment of the circuit court was affirmed where its decision to deny the defendant a new trial after a third-stage postconviction evidentiary hearing was not manifestly erroneous.

¶ 2 Following a jury trial in 1994, the defendant, Cedric Cal, was found guilty of two counts of first degree murder and aggravated battery with a firearm for a shooting that occurred on April 21, 1992, which resulted in the deaths of Cedric Herron and Sammy Walker and the serious injuries of Willie Johnson. The defendant was sentenced to natural life imprisonment for the murder convictions and a concurrent term of 30 years' imprisonment for the aggravated battery with a

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firearm conviction. This court affirmed the defendant's convictions on direct appeal. *People v. Cal*, No. 1-94-1158 (Mar. 26, 1996) (unpublished order under Supreme Court Rule 23).

¶ 3 The defendant then filed a *pro se* petition for postconviction relief pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2008)), which the circuit court summarily dismissed as frivolous and patently without merit. On appeal, the public defender filed a motion to withdraw as appellate counsel under *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and this court allowed the motion and affirmed the judgment of the circuit court. *People v. Cal*, No. 1-97-0901 (Oct. 24, 1997) (unpublished order under Supreme Court Rule 23). The defendant next filed a second *pro se* postconviction petition, which was also summarily dismissed by the circuit court; that order was not appealed. The defendant then filed a motion for leave to file a third *pro se* postconviction petition, which was denied by the circuit court; this court affirmed the judgment in *People v. Cal*, No. 1-05-0675 (Sept. 26, 2006) (unpublished order under Supreme Court Rule 23).

¶ 4 On December 21, 2009, with the assistance of counsel, the defendant filed a successive postconviction petition based on actual innocence. The defendant claimed he was entitled to a new trial because Johnson recanted his original trial testimony in which he identified the defendant and co-defendant, Albert Kirkman, as the shooters. According to Johnson's affidavit, he now identified Keith Ford and another unidentified man as the shooters. Without objection from the State, the circuit court advanced the defendant's petition to the third stage of postconviction proceedings and conducted an evidentiary hearing on various dates in 2011. On July 15, 2011, the circuit court denied the defendant's petition, concluding that Johnson's recantation was not credible and that a new trial was not warranted. The defendant timely appealed, and we affirmed in an unpublished order

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pursuant to Supreme Court Rule 23 (eff. July 1, 2011). Following our decision, the Illinois Supreme Court issued an order directing us to vacate and reconsider our judgment in light of *People v. Coleman*, 2013 IL 113307. Upon reconsideration, we affirm.

¶ 5 At trial, Johnson testified that on April 21, 1992, he got into a fight with five men, including the defendant and Kirkman, at the home of Keith Ford, after Ford directed the men to attack him. Johnson testified that the fight concerned a matter involving his sister, Latanya Johnson. Johnson's two friends, Cedric Herron and Sammy Walker, arrived at the scene and helped him fight off the individuals attacking him. Johnson testified that later that night, he was talking to Herron and Walker outside of his home when two men approached and shot at them. While lying on the ground, Johnson looked back and saw the "gun firing and then again [he saw] faces." He said that he saw Kirkman's face and the other young man's face. He also testified that he identified Kirkman and the defendant for the police.

¶ 6 On cross-examination, Johnson denied that the fight involved Herron's drug sales on Ford's "turf." He denied seeing the police speak to his girlfriend, Latrese Buford, or his sister, Latanya, at the hospital.

¶ 7 Latrese Buford testified for the defendant. Buford testified that on April 21, 1992, she was with Johnson when she witnessed an altercation between Herron and Ford over a drug sale. Buford testified that Ford was driving one of two Astro vans that arrived with several people who began fighting one of Herron's dealers. She testified that Johnson pointed to some of the men in the fight and mentioned Kirkman's name. Buford testified that, after the fight, Ford approached Johnson, informing him that it could be dangerous being around Herron because Herron was selling drugs on

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Ford's turf. Buford and Johnson then went to Johnson's home. Buford testified that sometime after 10 p.m., Herron and Walker arrived at Johnson's home, and Johnson stepped outside to talk with them. Buford was inside the home when she heard gunshots.

¶ 8 Upon this evidence, the jury found the defendant guilty of murder and aggravated battery with a firearm.

¶ 9 At the defendant's postconviction evidentiary hearing, Johnson denied ever fighting with Kirkman or the defendant, but he admitted that, on one occasion that April, he walked up to Kirkman and stole his drugs. On cross-examination, Johnson testified that Kirkman allowed him to steal his drugs and did not try to stop him. Johnson admitted that he spoke to Assistant State's Attorney Darren O'Brien and an investigator, Joanne Ryan, in April 2010. However, he denied that he told them that he slammed Kirkman to the ground when he stole the drugs. He also denied that he told them that the defendant was present during the theft. Johnson testified that he could not recall whether the defendant was present at the time he stole Kirkman's drugs. Johnson denied having any other disputes with the defendant or Kirkman, including any dispute involving his sister.

¶ 10 Johnson testified that on the night of the shooting, he was outside talking with Herron and Walker when two men with guns arrived. When asked whether both men were shooting at him, Johnson testified that, while laying on the ground, he saw one man shoot and heard one gun; he explained that he was not able to turn around all the way because he was playing dead. He identified Ford as one of the shooters and recognized the other man, but he did not know that man's name; however, he testified that he knew the man was neither Kirkman nor the defendant.

¶ 11 Johnson testified that he falsely identified the defendant and Kirkman as the shooters because

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he was afraid of Ford and because his family had received threatening calls, which he believed came from Ford. Johnson stated that he never gave the police Ford's name because he "feared to even use his name" and wanted to "take care of it in the streets." When the police returned with the photo lineup, Johnson explained that he again identified the defendant and Kirkman because Ford was "adamant about what he would do to [his] people if [he] implicated [Ford] in any way, type of way, shape, form or fashion." On cross-examination, he denied telling ASA O'Brien and Investigator Ryan that he could not say for sure whether the second shooter was Kirkman or the defendant. Johnson denied telling ASA O'Brien and Ryan that he never provided the defense investigator with a statement that he knew the second shooter was neither the defendant nor Kirkman. He also admitted that he did not come forward in the 17 years since the defendant's trial, until he was contacted by the defendant's lawyers in 2009.

¶ 12 On further cross-examination, Johnson admitted that he and Herron argued with Ford on the day of the shooting, but he denied that a physical fight ensued. He testified that he did not recall whether Kirkman or the defendant were present during the altercation. He denied telling ASA O'Brien and Investigator Ryan that a physical fight occurred, but he admitted telling them that Kirkman and the defendant were both on Ford's side during the argument.

¶ 13 Johnson explained that he heard Latanya and Buford tell the police at the hospital that the defendant and Kirkman were the shooters, so he agreed with them. He explained that "when [his] sister and [Buford] pointed these guys out[,] it was just convenient," because he felt like he was protecting his family. He admitted it was wrong, but he feared for his family. Johnson testified that, during the defendant's trial, he avoided court dates and tried to avoid testifying but eventually

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testified against the defendant after prosecutors threatened him with parole violation charges. Johnson stated that, while he believed that Kirkman and the defendant were aligned with Ford, he feared only Ford and did not fear Kirkman or the defendant.

¶ 14 The court then questioned Johnson about a few matters. Regarding when he heard Latanya and Buford provide police with the defendant's name, Johnson testified that he heard this while he was still on the floor of his mother's home after the shooting. Regarding the threatening phone calls, Johnson testified that his mother and sister told him they had already received calls while he was in the emergency room. Johnson then testified that he received a call while in the emergency room from someone in the penitentiary named "Bo Dilly." Regarding why Johnson was no longer afraid of Ford, Johnson testified that he spoke to Ray Longstreet, who told him that he had nothing to worry about and to "[j]ust get up there and do the right thing." He understood Longstreet to be advising him to tell the truth and that he would be protected if he did so. Johnson's conversation with Longstreet lasted "probably not even a minute." Johnson testified that Longstreet was a high-ranking member of the Vice Lords; and that he, Kirkman and the defendant were also members of the Vice Lords, although he claimed that he was "retired" from the organization. After speaking to Longstreet, Johnson signed an affidavit that defense counsel had prepared. Johnson also testified that he felt safer coming forward now that he lived in Texas.

¶ 15 At the postconviction hearing, Buford testified that, on the night of the shooting, she did not see any shooters, but she saw a slow-moving grayish or blueish Astro van driving slowly out of the alley between Harding and Pulaski and heading toward Chicago Avenue. Buford saw two or three people in the van, but she did not see their faces and did not see a license plate.

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¶ 16 Buford recalled that, while they were in the emergency room, Johnson told her that the defendant and Kirkman were the shooters. She testified that she gave police this information when the detectives took her home from the hospital. However, Buford denied telling the police that Kirkman or the defendant were the shooters while Johnson was in the emergency room. She also denied hearing Latanya provide that information to the police while in the emergency room. Buford testified that she first heard the names mentioned when Johnson mentioned them in the emergency room. Buford claimed that she did not see Johnson make or receive any phone calls in the emergency room and testified that there were no phones present in the emergency room.

¶ 17 State's Attorney Investigator Joanne Ryan testified that on April 6, 2010, she interviewed Johnson in Monroe, Louisiana. Johnson told her that on the day of the shooting, he slammed Kirkman to the ground and stole his drugs. Johnson stated that the defendant was present during that incident. Johnson further told her that later that day, there was a physical altercation between Ford's gang and other drug dealers doing business nearby. Johnson told Ryan that Ford was one of the shooters, but that he did not get a good look at the second shooter. He admitted to Ryan that he could not identify the second shooter and could not exclude Kirkman or the defendant as the possible second shooter. Johnson also stated to her that he never told the defense investigator that he was certain that the second shooter was neither the defendant nor Kirkman.

¶ 18 On July 15, 2011, the trial court denied the defendant's petition, finding that Johnson's recantation lacked credibility. The court found that Johnson gave conflicting accounts of when he heard Latanya and Buford identify the defendant to the police; when he testified that he saw one man shoot and heard only one gun, but later said two men were shooting; and when he testified that he

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and his family members were receiving calls in the emergency room, which Buford testified had no phone. The court also found Johnson's identification of the shooters at the hospital to be more credible than his explanation that he falsely identified the defendant so that he could handle Ford on the street. Further, the trial court determined that Johnson came forward for no other reason other than his loyalty to the Vice Lords. Additionally, the court found that Johnson seemed more concerned about satisfying Longstreet than he was about justice and that he did not seem concerned about the criminal penalties associated with perjury. In conclusion, the trial court found that the "number of shooters, number of cartridges found at the scene, the testimony concerning the placement of the shooters, all convinced [him] that the other evidence in this case [was] consistent with [Johnson's] testimony" at trial. The court determined, that under all of the circumstances and hearing everything in the case, Johnson's recantation was not credible. The trial court stated that "[b]ecause it [was] not credible, it [was] not material," and it therefore denied the defendant's petition. The defendant timely appealed.

¶ 19 On appeal, the defendant argues that the circuit court erred in denying his postconviction petition and that his conviction deprives him of due process under the United States Constitution. The defendant begins his attack on the circuit court's judgment by arguing that the circuit court erred in limiting the scope of Buford's testimony by not allowing her to testify that: (1) Johnson apologized to her for falsely implicating the defendant in the shooting; (2) the defendant and Kirkman were known in the neighborhood as "neutral" parties, whereas Ford was a feared gang leader; and (3) Ford owned an Astro van similar to the one she saw leaving the scene of the shooting. We disagree that the circuit court's exclusion of this testimony constitutes reversible error.

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¶ 20 The circuit court has wide discretion to limit the type of evidence it will admit at a postconviction evidentiary hearing. *People v. Morgan*, 212 Ill. 2d 148, 162, 817 N.E.2d 524 (2004). Regarding the purported apology, the defendant contests the circuit court's reasoning that the apology was an inadmissible prior consistent statement. However, even if we were to accept the defendant's argument on this point, we would conclude that any error in excluding Buford's testimony regarding the apology was harmless, because it was cumulative of Johnson's testimony in which he acknowledged falsely identifying the defendant was wrong and that he did so only out of fear for his family. *People v. Demeron*, 153 Ill. App. 3d 440, 446, 505 N.E.2d 1222 (1987).

¶ 21 Regarding Buford's testimony about the reputations of the defendant and Ford, we agree with the circuit court that whether the defendant was a "neutral" party in the neighborhood was not relevant to determining the credibility of Johnson's recantation. Further, even if the circuit court erred in excluding this testimony, the error was harmless where Johnson had already testified that he was not afraid of the defendant but was afraid of Ford. Therefore, exclusion of Buford's testimony regarding the defendant's status as a "neutral" party did not prejudice his case.

¶ 22 Finally, regarding Buford's testimony that she knew Ford drove an Astro van similar to the one she saw on the night of the shooting, we agree with the circuit court that the proffered testimony was speculative as to whether the van actually belonged to Ford, because Buford could not identify the occupants of the van and did not see the license plates of the van. Further, the fact that Ford was known to drive an Astro van was already in evidence as Buford testified at the defendant's trial that she saw Ford driving an Astro van to the scene of the altercation between Ford and Herron. Therefore, if the court erred in excluding Buford's testimony that Ford drove a similar van, that error

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was harmless.

¶23 Next, we address the defendant's argument that the circuit court's denial of his postconviction petition was manifestly erroneous. Our courts have recognized the right of postconviction petitioners to assert a claim of actual innocence based on newly discovered evidence. *Morgan*, 212 Ill. 2d 148 at 154. To win relief under that theory, the evidence adduced by the defendant must first be "newly discovered," "material and noncumulative," and of such conclusive character that it would probably change the result on retrial. *Id.*; see also, *Coleman*, 2013 IL 113307, ¶ 96 (reaffirming the requirements to win postconviction relief under an actual innocence theory). In *Coleman*, the supreme court stated that the trial court, when presented with new, material, noncumulative evidence, "must consider whether that evidence places the evidence presented at trial in a different light and undercuts the court's confidence in the factual correctness of the verdict." *Coleman*, 2013 IL 113307, ¶ 97.

¶24 Recanted testimony is generally "regarded as inherently unreliable," and "courts will not grant a new trial on that basis except in extraordinary circumstances." *Morgan*, 212 Ill. 2d at 155. Further, it is "for the trial court to assess the credibility of the recantation testimony after having observed the demeanor of the witness." *Morgan*, 212 Ill. 2d at 165. In *Coleman*, the supreme court reiterated that, while the trial court should not redecide the defendant's guilt in deciding whether to grant relief, postconviction proceedings based on actual innocence involve "a comprehensive approach and involve[] credibility determinations that are uniquely appropriate for trial judges to make." *Coleman*, 2013 IL 113307, ¶ 97. Where the circuit court has held an evidentiary hearing at which it considered the new evidence and weighed the credibility of the witnesses, we will disturb the circuit court's

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judgment only if it is manifestly erroneous. *Morgan*, 212 Ill. 2d at 155. "Manifest error is error which is 'clearly evident, plain, and indisputable.'" *Id.*, (quoting *People v. Johnson*, 206 Ill. 2d 348, 357-60, 794 N.E.2d 294, quoting *People v. Ruiz*, 177 Ill. 2d 368, 384-85, 686 N.E.2d 574 (1997)).

¶ 25 Here, the defendant argues that Johnson's recantation destroys the State's original case and that the outcome upon retrial would likely be different with this new evidence. The State argues that the circuit court's conclusion, that Johnson's recantation was not credible and was therefore immaterial, was not manifestly erroneous. We agree with the State.

¶ 26 In arguing that the circuit court erred in denying him a new trial, the defendant sets forth six factors, taken from various cases, for assessing whether a newly discovered recantation would probably change the result on retrial: (1) the recantation's internal consistency and inherent plausibility (*People v. Ortiz*, 235 Ill. 2d 319, 336-37, 919 N.E.2d 941 (2009); *Morgan*, 212 Ill. 2d at 159-61; and *People v. Burrows*, 172 Ill. 2d 169, 188-91, 665 N.E.2d 1319 (1996)); (2) the plausibility of the recanter's motive for perjuring himself at trial (*Morgan*, 212 Ill. 2d at 159-60); (3) the plausibility of the recanter's motive for stepping forward now (*Id.* at 159-61); (4) whether the recantation is against his interest (*Id.* at 162-63); (5) the importance of the recanted testimony to the original guilty verdict (*Ortiz*, 235 Ill. 2d at 336-37; *People v. Washington*, 171 Ill. 2d 475, 498, 665 N.E.2d 1330 (1996)); and (6) whether other evidence supports or contradicts the recantation (*Ortiz*, 235 Ill. 2d. at 336-37; *Morgan*, 212 Ill. 2d at 163; *Burrows*, 172 Ill. 2d at 182-191). The State argues that, even though the circuit court used these factors in its analysis, no Illinois court has adopted these six factors as a "fixed matrix" for determining the credibility of a recantation. We agree with the State that the courts have not adopted a six-factor test for reviewing recantations. However, these

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factors have been considered by courts, and we consider some of these factors in our analysis.

¶ 27 The circuit court concluded that Johnson's recantation was not credible because: (1) Johnson's recantation was internally inconsistent and implausible; (2) Johnson had no motivation to lie at trial; and (3) Johnson recanted out of allegiance to the Vice Lords and not out of reasons related to justice. We agree with all three conclusions.

¶ 28 First, Johnson's recantation contained internal inconsistencies and implausible explanations. For instance, Johnson testified that he was terrified of Ford, but falsely accused the defendant and Kirkman because he wanted to take care of Ford "on the streets." Johnson also testified at the evidentiary hearing that he heard Latanya and Buford provide police with the defendant's name at the hospital and that he just "rolled with it." Later in his testimony, he said that they gave the police this information while he was still in his living room, waiting for the paramedics. At trial, Johnson testified that he did not see Latanya or Buford talk to the police. Buford denied giving police the information at the hospital. In his affidavit and at the hearing, Johnson identified Ford as one shooter and averred that he knew that the other shooter was neither Kirkman nor the defendant but did not know the second shooter's identity. However, Investigator Ryan testified that Johnson told her that he could not say for sure that the second shooter was not Kirkman or the defendant and that he denied providing the defense with the statement in his affidavit indicating he knew the second shooter was not the defendant or Kirkman. Further, Johnson testified that his mother and sister were receiving threatening calls in the emergency room and that he received a call while in the emergency room. Yet, Buford testified that she did not see Johnson make or receive phone calls in the emergency room and that there was no phone in the emergency room. We agree with the defendant

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that the circuit court misconstrued Johnson's testimony as to the number of shooters; Johnson only stated that he saw one man shooting directly at him while lying on the ground because he could not turn all the way around. Johnson never changed the story that two men were shooting. However, on the overall record, we do not agree that the circuit court erred in its ultimate finding that Johnson's recantation contained internal inconsistencies and implausible explanations.

¶ 29 Next, we do not find that the circuit court erred in its conclusion that Johnson's original identification was more believable than his recantation. Johnson testified at the evidentiary hearing that, while in the emergency room, he thought that he was dying. Yet, he testified that he falsely identified the defendant and Kirkman because he was afraid of Ford, wanted to deal with Ford on the streets, and wanted to protect his family from Ford's threats. Based on this evidence, we agree with the circuit court that the circumstances surrounding Johnson's initial identification make it more believable than his rather implausible recantation.

¶ 30 Finally, we do not find that the circuit court erred in concluding that Johnson's reason for recanting appeared to be out of his gang allegiance. Johnson testified that he came forward after a less-than-one-minute phone call with Longstreet, a high-ranking Vice Lord, who promised Johnson that he would be protected if he came forward. The circuit court's conclusion was not unfounded given Johnson's testimony and the fact that he, the defendant, Kirkman and Longstreet were all members of the Vice Lord gang family and Ford was a member of a rival gang.

¶ 31 The defendant argues that Johnson recanted despite the risk of prosecution for perjury, as the perjury statute allows a conviction for two inconsistent testimonial statements even if the State cannot prove which statement was false. See 720 ILCS 5/32-2(b) (West 2010). The State concedes

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that Johnson was indicted for perjury after the evidentiary hearing. Further, the defendant counters that there was no evidence in the record that Longstreet or the Vice Lords pressured Johnson into recanting. The defendant argues that Johnson testified that he retired from the Vice Lords and was therefore no longer bound to satisfy Longstreet's request. Johnson also testified that he spoke to Longstreet after defense counsel spoke to him and prepared an affidavit, which he signed after talking to Longstreet. The circuit court, however, inferred that Johnson was acting in the interest of the Vice Lords and did not fear any penalty for perjury; it did not conclude that Longstreet pressured Johnson or that he was never at risk for perjury charges. The circuit court had a basis for its inference given Johnson's testimony; it was also in the best position to observe the demeanor of the witnesses. *People v. Gonzalez*, 407 Ill. App. 3d 1026, 1035, 944 N.E.2d 834 (2011) (credibility determinations are properly made by the trier of fact). Under these facts, we cannot find that the circuit court manifestly erred in finding Johnson's recantation lacked credibility.

¶ 32 Additionally, the defendant argues that the importance of the recanted testimony in this case warrants a new trial because without Johnson's identification, the State could never have prosecuted him. However, the defendant cites no authority that in cases involving only one key witness, a trial court may not make credibility determinations in a third-stage postconviction evidentiary hearing. The defendant cites *Robinette v. State*, 494 So. 2d 952 (Alab. Cr. App. 1986) and *State v. York*, 704 P.2d 1252 (Wash. App. 1983) for the proposition that when a defendant is convicted solely on the testimony of a recanting witness, it is an abuse of discretion to deny the defendant a new trial. However, the defendant acknowledges that there is no authority in Illinois setting forth such a rule. As it stands, in Illinois, the trial court may make credibility determinations during a third-stage

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postconviction evidentiary hearing in deciding whether the defendant is entitled to a new trial. See *Morgan*, 212 Ill. 2d at 165 ("In the end, defendant's postconviction petition turned on a single factor: the credibility of [the recanting witness]"); *People v. English*, 406 Ill. App. 3d 943, 954, 943 N.E.2d 689 (2010) (after a third-stage postconviction evidentiary hearing, appellate court found that the trial court did not manifestly err in deeming that the recanting identification witness and the new witness were not credible and in denying the defendant a new trial). Our supreme court recently reaffirmed that the trial court may make credibility determinations during a third-stage postconviction evidentiary hearing by stating that such credibility determinations are "uniquely appropriate for trial judges to make." *Coleman*, 2013 IL 113307, ¶ 97.

¶ 33 The defendant further argues that the circuit court applied the wrong legal standard when it stated that it had to determine whether it believed Johnson's recantation. He argues that the circuit court should have determined whether the new evidence was worthy of belief by a jury, not whether the court believed the evidence to be true or false. The circuit court's comment that it had to determine whether or not it "believe[d]" Johnson's recantation was made in the course of a discussion regarding the court's duty to make credibility determinations in deciding whether the new evidence was material and could likely affect the outcome if a new trial was granted. Reading the record in its entirety, we reject the defendant's argument that the circuit court's comment reflects that it used an improper legal standard in ruling on the defendant's postconviction petition.

¶ 34 Finally, the defendant argues that even if this court finds that he was not entitled to a new trial following the postconviction evidentiary hearing, we must reverse his conviction because it is based upon the "inherently unreliable testimony of an admitted liar" and thereby violates his right

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to due process. U.S. Const. amend. XIV. The defendant's argument is premised on the assumption that Johnson's original trial testimony was perjured and his recantation is honest. The circuit court rejected that assumption, and we have determined that its conclusion was not manifestly erroneous. Therefore, the defendant's additional due process argument cannot be sustained. See *Morgan*, 212 Ill. 2d at 165 (similarly rejecting the defendant's due process argument where the court affirmed the lower courts' determination that the recanted testimony was not credible and a new trial was not warranted).

¶ 35 Based on the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 36 Affirmed.