

NOTICE

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2015 IL App (5th) 140133-U

NO. 5-14-0133

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Massac County.
)	
v.)	No. 89-CF-55
)	
RITA JO BROOKMYER, f/k/a Rita Jo Nitz,)	Honorable
)	Joseph M. Leberman,
Defendant-Appellant.)	Judge, presiding.

JUSTICE SCHWARM delivered the judgment of the court.
Presiding Justice Cates and Justice Welch concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly dismissed the defendant's third petition for postconviction relief.

¶ 2 **BACKGROUND**

¶ 3 In September 1989, a Massac County jury found the defendant, Rita Jo Brookmyer, formerly known as Rita Jo Nitz, guilty of first-degree murder. The defendant's conviction and sentence stemmed from her involvement in the death of Michael Miley, whose headless corpse was found in the trunk of his abandoned car in April 1988. In November 1989, the trial court entered judgment on the jury's verdict and sentenced the defendant to natural life in prison.

¶ 4 The evidence adduced at the defendant's trial is recounted in *People v. Nitz*, 242 Ill. App. 3d 209 (1993), wherein her conviction and sentence were affirmed on direct appeal. That evidence established, among other things, that the defendant's then-husband, Richard Nitz, virulently hated homosexuals, that the defendant generally felt the same way, that the defendant and Richard were members of a group who routinely threatened and harassed homosexuals, and that Miley "was a member of the Carbondale homosexual community." *Id.* at 212-13.

¶ 5 Betty Boyer testified that on the night of April 6, 1988, while she babysat the defendant's son, the defendant and Richard left their trailer together around 6:30 p.m. to go to "John Barwick's car lot in Carterville." *Id.* at 214. "[A]bout 30 minutes later," the defendant and Richard drove back to the trailer, and the defendant retrieved a handgun that she had recently purchased. *Id.* at 214-15. A few hours after that, the defendant and Richard returned to the trailer again, followed by Miley, who parked his car on the road adjacent to the trailer's driveway and approached the trailer on foot. *Id.* at 214. While Miley was standing in the driveway, Richard retrieved a baseball bat and threatened to kill him. *Id.* When Miley subsequently turned away, Richard repeatedly hit him in the back of the head with the bat, while the defendant stood and watched. *Id.* After Miley fell to the ground, the defendant and Richard put him in the trunk of his own car. *Id.* Richard then drove away in the defendant's car, and the defendant followed him in Miley's car. *Id.* Boyer indicated that Richard had later called her at the trailer asking if she could give him and the defendant a ride home. *Id.* "Boyer made arrangements for a neighbor to pick them up." *Id.* When Richard and the defendant subsequently returned,

the defendant "went to bed while Richard tried to clean up the blood on the driveway." *Id.* Three days later, a group of campers discovered Miley's car and decapitated body near Crab Orchard Lake. *Id.* at 212. His head, however, was never found. *Id.* at 217.

¶ 6 In addition to Boyer's testimony, the State presented evidence supporting its theory that Miley was alive when he was placed in the trunk of his car. *Id.* at 216, 221. The State also "offered a variety of physical and circumstantial evidence which tied Richard [and the defendant] to the crime," including evidence that they had used Miley's credit cards to purchase numerous items at Kentucky Oaks Mall on April 7 and 8, 1988. *Id.* at 215-16. Miley's wristwatch was also found in the defendant's car. *Id.* at 216.

¶ 7 Evidence that the defendant told a former cellmate that she and Richard had " 'beat [a] guy with a baseball bat and shot him in the head' " was admitted "for the limited purpose of finding a consciousness of guilt." *Id.* at 215. Statements the defendant made to the police indicating, among other things, that Miley "had struggled and was taken into the woods where he would not be found" were also admitted. *Id.* at 217. The jury further learned that "just weeks before [her] trial," the defendant had suggested that "Miley's head might be found near a field where she and Richard had stopped on the way to the mall." *Id.*

¶ 8 The defendant testified, among other things, that she had nothing to do with Miley's murder and had been at home with her son on the night of April 6, 1988. *Id.* at 218-19. The defendant further testified that Richard had been there, too, but had left to get his car back from Boyer, who had borrowed it earlier. *Id.* at 219. Richard later came back to the trailer for gas money and then left again. *Id.* On April 7, 1988, "about 2 or 3

a.m.," Richard returned to the trailer a second time, wanting the defendant's help because he had gotten his car stuck. *Id.* The defendant suggested that Richard had then taken her to a location where she might have seen a dead body. *Id.* She further suggested that weeks later, she realized that the body might have been Miley's, but "[s]he did not go to the police then because she was not sure what happened." *Id.*

¶ 9 The defendant acknowledged that she and Richard had gone to Kentucky Oaks Mall and made credit-card purchases on April 7 and 8, 1988, but she indicated that Richard had forced her to do so. *Id.* She further indicated that she did not know that the credit cards they had used had belonged to Miley. *Id.* The defendant denied that "she wanted a deal for [Miley's] head." *Id.*

¶ 10 On September 21, 1989, the jury found the defendant guilty as charged. We note that in 1988 and 1998, Richard was also convicted of murdering Miley and that Boyer was among the State's numerous witnesses at both trials. See *People v. Nitz*, 219 Ill. 2d 400 (2006); *People v. Nitz*, 143 Ill. 2d 82 (1991). We further note the following.

¶ 11 At the defendant's trial, Boyer testified that when questioned by the police who were investigating Miley's homicide, she had not been "entirely truthful" with them "at first," because she was "scared" of Richard. Boyer stated that when interviewed on the night of May 6, 1988; however, she had told the police "the whole truth" as to what she had seen. Boyer further stated that Investigators Curt Graff, Larry Eaton, and Monica Joast had been present during the interview and that while Eaton and Joast had treated her "nicely" that night, Graff had been "rude" to her and had "kept on telling [her] that [she] was nothing but a lying bitch."

¶ 12 On cross-examination, Boyer acknowledged that she had been interviewed by the police a total of six or seven times and that some of the interviews had lasted as long as six hours. Boyer also indicated that on more than one occasion, Graff had "threatened" her by stating that if she "did not start telling the truth," he would have her kids taken away from her and would "throw [her] in jail," where she "would never get out." Boyer acknowledged that on August 18, 1989, she had met with the prosecutor, and they had gone over the statement she had given to the police on May 6, 1988.

¶ 13 On redirect, Boyer testified that "from the very beginning," the prosecutor had told her to "tell the truth" and to not "lie about anything." She further testified that the prosecutor had never "told [her] what to say."

¶ 14 Defense witness Ron Roach, a private investigator who interviewed Boyer on August 16, 1988, testified that she had told him that the police had told her that if she refused to give them "a statement about the Miley murder," they "would arrest her and place her in jail." Roach acknowledged, however, that Boyer had also told him that she had ultimately told the police what she had actually witnessed and that the defendant and Richard had previously been unaware that she had seen what they had done.

¶ 15 We also note that after Richard's first trial in 1988, the trial court held an evidentiary hearing on his *pro se* posttrial claim that his trial attorney was ineffective for failing to call Larry Beard and Karen Alexander to testify that Boyer had admittedly lied to the police because they had forced her to give a statement implicating the defendant and Richard in Miley's murder. While the testimony of those witnesses established that Boyer had complained that the police had pressured and threatened her into giving a

statement, however, their testimony did not establish that she had ever stated that she had "lied" to the police about what she had witnessed. Accordingly, the trial court "determined that the witnesses' testimony was not in accord with [Richard's] representations" and thus "denied [his] *pro se* motion alleging ineffective assistance of counsel." *Nitz*, 143 Ill. 2d at 135. Boyer also testified at the hearing, stating that she had been threatened and pressured by the police but had ultimately told them the truth.

¶ 16 In April 1997, the defendant filed a *pro se* petition for postconviction relief pursuant to the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 1996)). In February 1999, the trial court entered a written order dismissing the petition. In August 2000, the trial court's judgment was affirmed on appeal. *People v. Nitz*, No. 5-99-0208 (2000) (unpublished order under Supreme Court Rule 23).

¶ 17 In September 2002, the defendant, through private counsel, filed a second postconviction petition. In May 2003, the trial court dismissed the petition, and in September 2004, the trial court's judgment was again affirmed on appeal. *People v. Nitz*, No. 5-03-0401 (2004) (unpublished order under Supreme Court Rule 23).

¶ 18 In April 2013, the defendant, through private counsel, submitted a third postconviction petition with a motion for leave to file it. In June 2013, the trial court granted the motion for leave and docketed the defendant's third petition for second-stage proceedings. Thereafter, the State moved to dismiss the petition.

¶ 19 The defendant's third postconviction petition purportedly advanced a "free-standing claim of actual innocence" based on newly discovered evidence as well as a claim that the State had violated her due process rights by knowingly using perjured

testimony to secure her conviction. Attached to the petition was an affidavit from Boyer asserting, among other things, that the State had pressured her into implicating the defendant in Miley's murder and that she had falsely testified against the defendant at trial. Boyer's affidavit indicated that although she had witnessed Richard hit Miley in the head numerous times with a baseball bat as she had previously claimed, she had not seen the defendant during the attack and had not witnessed her help put Miley into the trunk of his car and then drive the car away from the trailer. Boyer's affidavit further asserted that the prosecutor who had allegedly "forced" her to testify had "fed" her information regarding the defendant's involvement in the crime.

¶ 20 In February 2014, the trial court entered a written order granting the State's motion to dismiss the defendant's third petition for postconviction relief. The court determined, among other things, that the defendant had failed to sustain her claim of actual innocence and had failed to make a substantial showing that her due process rights had been violated by the State's knowing use of perjury. In March 2014, the defendant filed a timely notice of appeal.

¶ 21 DISCUSSION

¶ 22 Maintaining that the trial court erred in dismissing her third postconviction petition, the defendant argues that she is entitled to an evidentiary hearing on its underlying claims. For the reasons that follow, we disagree.

¶ 23 The Post-Conviction Hearing Act

¶ 24 The Act sets forth a procedural mechanism through which a defendant can claim that "in the proceedings which resulted in his or her conviction there was a substantial

denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1(a)(1) (West 2012). "A postconviction proceeding is not a substitute for a direct appeal, but rather is a collateral attack on a prior conviction and sentence." *People v. Davis*, 2014 IL 115595, ¶ 13.

¶ 25 The Act provides a three-stage process for the adjudication of postconviction petitions in noncapital cases. *People v. Bocclair*, 202 Ill. 2d 89, 99 (2002). At the first stage, the trial court independently reviews and assesses the defendant's petition, and if the court determines that the petition is "frivolous" or "patently without merit," the court can summarily dismiss it. 725 ILCS 5/122-2.1(a)(2) (West 2012); *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). If a postconviction petition is not summarily dismissed by the trial court, it advances to the second stage, where the State can move to dismiss it. 725 ILCS 5/122-2.1(b), 122-4, 122-5 (West 2012).

¶ 26 At the second stage, the trial court determines whether the defendant has made a substantial showing of a constitutional violation. *Edwards*, 197 Ill. 2d at 245-46. If the trial court determines that a substantial showing has been made, then the defendant's petition proceeds to the third stage for an evidentiary hearing. *Id.* at 246. If the court determines that a substantial showing has not been made, the petition is dismissed. *Id.* "The dismissal of a postconviction petition without an evidentiary hearing is reviewed *de novo*." *People v. Hall*, 217 Ill. 2d 324, 334 (2005).

¶ 27 Actual Innocence

¶ 28 "The conviction of an innocent person violates the due process clause of the Illinois Constitution." *People v. Morgan*, 212 Ill. 2d 148, 154 (2004). Accordingly, "the

due process clause of the Illinois Constitution affords postconviction petitioners the right to assert a freestanding claim of actual innocence based on newly discovered evidence." *People v. Ortiz*, 235 Ill. 2d 319, 331 (2009). "The elements of a claim of actual innocence are that the evidence in support of the claim must be 'newly discovered'; material and not merely cumulative; and of such conclusive character that it would probably change the result on retrial." *People v. Edwards*, 2012 IL 111711, ¶ 32. To sustain an actual-innocence claim, a defendant must satisfy all three elements as a matter of law. See *id.* ¶¶ 37-41.

¶ 29 "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). Here, it is undisputed that Boyer's recantation affidavit was obtained nearly 25 years after the defendant's trial and conviction. It is further undisputed that Boyer's affidavit was obtained by Cynthia Estes, a private investigator retained by private counsel in April 2011. Attached to the defendant's third postconviction petition is an affidavit from Estes stating that "[o]ver the course of many months," she had attempted to locate Boyer, who is now known as Betty Lindsey. Estes' affidavit further states that private counsel had also utilized "a private investigator service in another state" to find Boyer. The affidavit states that after "eventually" learning that Boyer was living in Colorado, Estes traveled to Colorado in May 2012 and met with Boyer after locating her at her place of employment. "In the months that followed," Estes tried to initiate additional communications by phone, but Boyer did not answer or return any of her calls. In December 2012, Estes traveled to Colorado a second time and attempted to meet with

Boyer again. In February 2013, Estes met with Boyer in Colorado "for approximately two hours," and Boyer executed her affidavit recanting her testimony against the defendant. Notably, Estes' affidavit does not indicate when Boyer moved to Colorado or changed her last name.

¶ 30 The defendant maintains that Boyer's affidavit constitutes newly discovered evidence because it could not have been discovered sooner through due diligence. Asserting that Boyer falsely implicated the defendant in Miley's murder as recently as 1998, when she testified at Richard's second trial, the defendant suggests that there is "no reason to believe" that Boyer would have recanted her "false trial testimony" prior to February 2013. The defendant further suggests that even if she had reason to believe that Boyer might have recanted before then, "Boyer's whereabouts were unknown until 2012, when an experienced private investigator" retained by private counsel located her after undertaking "extensive efforts" to do so.

¶ 31 In response, the State argues that the defendant has failed to sufficiently demonstrate that she could not have obtained Boyer's affidavit sooner through due diligence. Noting that there is no evidence that the defendant had ever previously attempted to locate or contact Boyer, the State argues that the defendant's contentions as to Boyer's availability and willingness to recant are hypothetical and should be rejected. We agree.

¶ 32 Due diligence assumes at least some level of deductive reasoning in an active effort to discover evidence based on knowledge and information already possessed by the litigants. *People v. Barnslater*, 373 Ill. App. 3d 512, 526 (2007). "The defendant bears

the burden of showing no lack of due diligence on his or her part." *People v. Snow*, 2012 IL App (4th) 110415, ¶ 21.

¶ 33 Here, the defendant does not allege that she had ever attempted to locate or contact Boyer prior to April 2011, when Estes was retained by private counsel. The defendant further fails to explain why she did not try to locate or contact Boyer in 2002, when private counsel represented her on her second postconviction petition. Furthermore, although Estes' affidavit generally recounts how Boyer's affidavit was obtained, Estes' affidavit does not particularly describe what "extensive efforts" it took to locate Boyer or exactly how she was "eventually" found living in Colorado as Betty Lindsey. *Cf. People v. Almo*, 123 Ill. App. 3d 406, 410-11 (1984) (finding investigator's testimony detailing what specific investigatory steps had been taken to locate a material and necessary witness sufficiently established that the State had exercised due diligence in attempting to locate the witness). Under the circumstances, we cannot conclude that the defendant could not have located Boyer before May 2012, nor can we conclude that Boyer would not have recanted before February 2013. See *Barnslater*, 373 Ill. App. 3d at 526 (declining to assume that the complaining witness would not have recanted her testimony sooner where there was "no indication that defense counsel even attempted to interview her"). The defendant has therefore failed to meet her burden of alleging and showing that she could not have obtained Boyer's affidavit sooner through due diligence and has thus failed to establish that Boyer's affidavit constitutes newly discovered evidence.

¶ 34 We lastly note that in her affidavit, Boyer asserts that she does "not want to be involved in this case" because she is "still scared" of the prosecutor who allegedly

threatened her and forced her to testify. Referencing this contention, the defendant suggests that Boyer's fear of the prosecutor explains why she did not voluntarily "come forward" and recant sooner. Boyer's affidavit does not indicate that she would have ever voluntarily come forward had she not been afraid of the prosecutor, however, nor does it indicate that she would not have recanted sooner had she been contacted sooner. Moreover, a witness's "failure to come forward sooner on [her] own accord *** does not address the question of the due diligence of the defendant." *People v. Wingate*, 2015 IL App (5th) 130189, ¶ 27.

¶ 35 Here, given that Boyer has always been a known witness, that she never came forward on her own accord does not alter our conclusion that the defendant has failed to meet her burden of alleging and showing that Boyer's affidavit could not have been obtained sooner through due diligence. *Cf. People v. Adams*, 2013 IL App (1st) 111081, ¶ 33 (determining that affidavits from eyewitnesses who were unknown until "they came forward and signed their affidavits" could not have been obtained by the defendant sooner through due diligence, as the defendant "would not have had any reason to seek them out" prior to their coming forward). We further agree with the trial court's determination that even if the defendant were able to establish that Boyer's recantation affidavit constitutes newly discovered evidence, she is still unable to demonstrate that the evidence is of such conclusive character that it would probably change the result on retrial.

¶ 36 Whether newly discovered evidence is of such conclusive character that it would probably change the result on retrial is the most important element of any actual-

innocence claim. *People v. Washington*, 171 Ill. 2d 475, 489 (1996). When considering whether newly discovered evidence is of such conclusive character that it would probably change the result on retrial, "conclusive means the evidence, when considered along with the trial evidence, would probably lead to a different result." *People v. Coleman*, 2013 IL 113307, ¶ 96. Additionally, "[e]vidence of actual innocence must support total vindication or exoneration, not merely present a reasonable doubt." *Adams*, 2013 IL App (1st) 111081, ¶ 36. Here, we cannot conclude that Boyer's recantation affidavit is of such conclusive character that it would probably change the result on retrial.

¶ 37 First of all, Boyer's affidavit is consistent with her trial testimony in many respects, effectively refutes the defendant's trial testimony and theory of defense, and, most notably, does not preclude the possibility that the defendant participated in Miley's murder. *Cf. People v. Lofton*, 2011 IL App (1st) 100118, ¶ 40 (determining that affidavit from newly discovered witness who claimed that he had shot the victim and that the defendant "was not even there" deemed so conclusive that it would probably change the result on retrial where the testimony was "consistent with [the defendant's] insistence from the beginning, supported by alibi witnesses, that he was not present at the scene" and the evidence otherwise supported the discovered witness's claim that he was the shooter). At trial, the defendant testified that she had not participated in Miley's murder, that she had been at the trailer with her son on the night of April 6, 1988, and that she had remained there until the early morning hours of April 7, 1988, when she left to help Richard retrieve his car sometime around 2 or 3 a.m. Boyer's affidavit, on the other hand, is consistent with her trial testimony that she was at the trailer babysitting the defendant's

son on the night of April 6, while the defendant and Richard were away together. Boyer's affidavit is further consistent with her testimony that Richard attacked Miley outside the trailer with a baseball bat after Miley followed him home. Contrary to her trial testimony, however, Boyer now claims that she did not see the defendant during or near the time of the attack, indicating that she did not see the defendant help put Miley into the trunk of his car and drive the car away from the trailer. Boyer specifically claims that after witnessing Richard attack Miley, she retreated to the back bedroom of the trailer and did not see the defendant until she and Richard returned four to six hours later. Intimating that she had not seen the defendant retrieve the gun that night, Boyer's affidavit further suggests that she had fallen asleep sometime after the defendant and Richard had left and had not woken up until Richard's initial return.

¶ 38 As the State notes on appeal, if Boyer's affidavit is taken as true, "then she has no idea" whether the defendant helped Richard and might have been asleep when the defendant retrieved the gun. Additionally, the defendant's own testimony placed her at the scene of the crime, and as the trial court observed, Boyer's affidavit "does not say the defendant was not present," it merely states that Boyer did not see her. Given that the evidence adduced at the defendant's trial supported her conviction under a theory of accountability, this distinction is "critical[]" and " 'does little to exonerate [the] defendant.' " *Edwards*, 2012 IL 111711, ¶ 39 (quoting *People v. Edwards*, Nos. 1-07-0714, 1-08-1089 cons. (2010) (unpublished order under Supreme Court Rule 23)).

¶ 39 Secondly, under oath, Boyer has thrice implicated the defendant in Miley's murder and was subject to cross-examination on each occasion, *i.e.*, at the defendant's trial and at

both of Richard's trials. As the State suggests on appeal, on retrial, Boyer's prior testimony from all three trials could therefore be admitted as substantive evidence (725 ILCS 5/115-10.1 (West 2012)), which alone would be sufficient to establish the defendant's guilt (see *People v. Armstrong*, 2013 IL App (3d) 110388, ¶ 23 (noting that even in the absence of corroborative evidence, "a recanted prior inconsistent statement admitted under section 115-10.1 can support a conviction")). Moreover, while Boyer might ostensibly claim that the prosecution had coerced her into falsely implicating the defendant in Miley's murder, at the defendant's trial, Boyer testified that "from the very beginning," the prosecutor had told her to "tell the truth" and to not "lie about anything" and that he had never "told [her] what to say." That testimony could thus be introduced as substantive evidence that Boyer had not been pressured or forced to falsely testify at the defendant's trial. See *People v. Lewis*, 361 Ill. App. 3d 1006, 1015-17 (2005); *People v. Morales*, 281 Ill. App. 3d 695, 699-700 (1996); *People v. Carlos*, 275 Ill. App. 3d 80, 84 (1995).

¶ 40 Lastly, as noted on direct appeal, in addition to Boyer's testimony, the State offered a variety of physical and circumstantial evidence which tied the defendant to Miley's murder and supported her conviction under the common-design rule. *Nitz*, 242 Ill. App. 3d at 215-16, 221-22. The defendant's statements that were admitted at trial for the limited purpose of finding consciousness of guilt and her statements intimating that she had firsthand knowledge of the crime are also significant.

¶ 41 While ostensibly material and noncumulative (see *Coleman*, 2013 IL 113307, ¶ 96 (noting that "[m]aterial means the evidence is relevant and probative of the petitioner's

innocence" and that "[n]oncumulative means the evidence adds to what the jury heard")), Boyer's affidavit is not of such conclusive character that it would probably change the result on retrial. Boyer's affidavit falls far short of establishing the defendant's "total vindication or exoneration" (*Adams*, 2013 IL App (1st) 111081, ¶ 36), and "when considered along with the trial evidence," we cannot conclude that Boyer's proposed testimony "would probably lead to a different result" (*Coleman*, 2013 IL 113307, ¶ 96). Thus, even if the defendant were able to establish that Boyer's recantation affidavit constitutes newly discovered evidence, her claim of actual innocence would still fail. *Edwards*, 2012 IL 111711, ¶ 40.

¶ 42

Knowing Use of Perjury

¶ 43 The defendant next argues that the trial court erred in denying her an evidentiary hearing on her due-process claim that the State knowingly used perjured testimony to secure her conviction. We disagree.

¶ 44 "The rule is well-established that the State's knowing use of perjured testimony to obtain a criminal conviction constitutes a violation of due process of law." *People v. Olinger*, 176 Ill. 2d 326, 345 (1997). "A conviction obtained by the knowing use of perjured testimony must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's verdict." *Id.*

¶ 45 At the outset, we note that because the defendant relies on Boyer's affidavit in support of her due-process claim, her petition does not technically advance a freestanding claim of actual innocence. "A 'free-standing' claim of innocence means that the newly discovered evidence being relied upon 'is not being used to supplement an assertion of a

constitutional violation with respect to [the] trial.' " *People v. Hobley*, 182 Ill. 2d 404, 443-44 (1998) (quoting *Washington*, 171 Ill. 2d at 479). Accordingly, evidence used to support a claim of a constitutional violation with respect to a defendant's trial "cannot also be used to support a freestanding claim of actual innocence." *People v. Brown*, 371 Ill. App. 3d 972, 984 (2007). Procedurally, this rule is meaningful because a defendant who asserts a freestanding claim of actual innocence need not satisfy the cause-and-prejudice test generally applicable to successive postconviction petitions. See *Ortiz*, 235 Ill. 2d at 330 (holding that "where a defendant sets forth a claim of actual innocence in a successive postconviction petition, the defendant is excused from showing cause and prejudice").

¶ 46 Arguably, the trial court could have disposed of the defendant's actual-innocence claim solely on the basis that it was not freestanding. See *People v. Orange*, 195 Ill. 2d 437, 459-60 (2001); *Brown*, 371 Ill. App. 3d at 984; but cf. *Coleman*, 2013 IL 113307, ¶ 91 ("Where a defendant makes a claim of trial error, as well as a claim of actual innocence, in a successive postconviction petition, the former claim must meet the cause-and-prejudice standard, and the latter claim must meet the *Washington* standard."). After granting the defendant leave to file her third postconviction petition, the trial court nevertheless addressed the defendant's actual-innocence claim in conjunction with her allegation that the State had violated her due process rights by its knowing use of perjured testimony. We note that while this approach could prove problematic given the different standards applicable to each claim, on appeal, in addition to arguing that she has made a substantial showing on her due-process claim, the defendant also argues that she

has satisfied the cause-and-prejudice test required to advance it. Because our review of the defendant's claims are *de novo*, and we "may affirm a trial court's dismissal at the second stage on any grounds substantiated by the record" (*Snow*, 2012 IL App (4th) 110415, ¶ 17), we will address the defendant's due-process claim as presented and briefed by the parties on appeal.

¶ 47 Because the Act contemplates the filing of only one postconviction petition, to advance a cognizable postconviction claim in a successive petition, a defendant must generally satisfy the "cause-and-prejudice" test. *People v. Davis*, 2014 IL 115595, ¶ 14. " 'Cause' refers to some objective factor external to the defense that impeded [the defendant's] efforts to raise the claim in an earlier proceeding," and " '[p]rejudice' refers to a claimed constitutional error that so infected the entire trial that the resulting conviction or sentence violates due process." *Id.* "Both prongs must be satisfied for the defendant to prevail." *Id.*

¶ 48 The defendant contends that she has cause for failing to raise her due-process claim in an earlier proceeding by employing the same reasoning she offered in support of her contention that Boyer's affidavit constitutes newly discovered evidence, *i.e.*, "Boyer did not come forward with this new evidence until [Estes] located Boyer out of state after a prolonged investigation," and Boyer "continues to be scared" of the prosecutor who allegedly forced her to testify. As previously determined, however, the defendant has failed to meet her burden of alleging and showing that Boyer's affidavit could not have been obtained sooner through due diligence. The defendant has therefore failed to establish "cause" for not raising her due-process claim earlier. *Davis*, 2014 IL 115595,

¶ 56. The defendant is also unable to establish "prejudice" because, as the trial court determined below, she is unable to make a substantial showing that her due process rights were violated by the State's knowing use of perjury.

¶ 49 To make a substantial showing of a constitutional violation, a defendant's allegations "must be supported by the record in the case or by its accompanying affidavits." *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). When determining whether a defendant has made a substantial showing, "all well-pleaded facts in the petition and affidavits are to be taken as true, but nonfactual and nonspecific assertions which merely amount to conclusions are not sufficient to require a hearing under the Act." *People v. Rissley*, 206 Ill. 2d 403, 412 (2003). Claims based on allegations that are "contradicted by the record from the original trial proceedings" are further insufficient to require a hearing. *Coleman*, 183 Ill. 2d at 382. "[T]he defendant bears the burden of making a substantial showing of a constitutional violation." *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006).

¶ 50 Here, Boyer's affidavit asserts that the police and the prosecutor questioned her seven or eight times; that each time, they pressured her into implicating the defendant in Miley's murder; and that they threatened her with criminal charges and the loss of her children if she refused to testify. Excepting Boyer's assertion that the prosecutor was present when she was questioned, pressured, and threatened, a fact which we note is arguably belied by the record and ultimately irrelevant to the defendant's due-process claim (see *Olinger*, 176 Ill. 2d at 347 (stating that "[i]n order to establish a violation of due process, the prosecutor actually trying the case need not have known that the

testimony was false; rather, knowledge on the part of any representative or agent of the prosecution is enough"))), these allegations are essentially the same as those previously addressed at the defendant's trial and at the evidentiary hearing following Richard's trial in 1988. On both occasions, the evidence established that although Boyer had been pressured and threatened into cooperating with the State, she had ultimately told the truth regarding what she had witnessed and had never subsequently claimed that she had lied. Notably, Boyer's affidavit does not state that she ever lied to the police or the prosecutor, nor does it claim that she lied when she testified that on the night of May 6, 1988, she had told the police "the whole truth." Furthermore, although Boyer's affidavit generally asserts that she "did not tell the truth" at the defendant's trial, it does not allege that the prosecutor or the police were aware that such was the case.

¶ 51 Boyer's affidavit further claims that the prosecutor "fed [her] information that [she] had no knowledge of regarding [the defendant's] involvement in [Miley's] homicide," threatened her into testifying "about facts of which [she] had no knowledge," and "forced" her to testify. As the trial court observed, however, these allegations are "conclusory charges" that "are not supported by any specific facts." See *People v. Blair*, 215 Ill. 2d 427, 453 (2005); *Barnslater*, 373 Ill. App. 3d at 525. As the State notes, for example, Boyer does not reveal what information the prosecutor allegedly "fed" her; she does not claim that any of the information was false; and she does not state that she actually testified about facts of which she had no knowledge. Boyer's affidavit does not claim that the prosecutor "forced" her to testify falsely, either. Nor does it recant her

prior testimony that "from the very beginning," the prosecutor had told her to "tell the truth" and to not "lie about anything" and that he had never "told [her] what to say."

¶ 52 Under the circumstances, the defendant has failed to meet her burden of making a substantial showing that the State knowingly used perjured testimony to secure her conviction. To warrant an evidentiary hearing "[a]n allegation in a postconviction petition must be based on factual allegations and not mere conclusory statements." *People v. Ivy*, 313 Ill. App. 3d 1011, 1019 (2000). Here, as the State notes on appeal, the defendant's due-process claim is unsupported by "any specific facts demonstrating that the State knowingly suborned perjury from Ms. Boyer."

¶ 53 CONCLUSION

¶ 54 For the foregoing reasons, we hereby affirm the trial court's judgment dismissing the defendant's third petition for postconviction relief.

¶ 55 Affirmed.