2014 IL App (1st) 123456-U

SECOND DIVISION
March 17, 2015

No. 1-12-3456

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 95 CR 1762
	)	
YARMO GREEN,	)	Honorable
	)	Joseph M. Claps,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Simon and Justice Neville concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in denying defendant postconviction relief following a third stage evidentiary hearing on a supplemental postconviction petition.

¶ 2 Defendant, Yarmo Green, appeals from the circuit court's denial of postconviction relief following an evidentiary hearing on his supplemental petition. Before this court, defendant argues that the circuit court erred in: (1) finding that an eyewitness's recantation testimony was not sufficient to support a claim of actual innocence; (2) denying his claim under *Brady v. Maryland*, 363 U.S. 83 (1963); and (3) denying his due process claim. For the following

reasons, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 Defendant was charged by indictment with attempt first degree murder, armed violence and aggravated battery. The following evidence was adduced at trial.

¶ 5 In the early morning hours of December 26, 1994, Claudia Marchan, Natalie Perez, Tito Lopez and Alfonso Briseno were moving furniture out of an apartment at 2501 North Washtenaw in Chicago. Briseno remained in the apartment while Marchan, Perez and Lopez moved some tables to a van parked in a nearby alley. As they were walking toward the van, Marchan saw a car drive by, stop, reverse and then block the van in the alley. Defendant and codefendants Juan Cardenas and David Robles[1], who Perez and Lopez recognized from the neighborhood, got out of the car and walked toward the van. Perez and Lopez testified that defendant and Cardenas were members of a rival gang.

¶ 6 Defendant approached the driver's door of the van. Marchan and Perez hid in the back of the van and Lopez was holding the van door shut as he attempted to start the van. Cardenas opened the sliding door, removed one of the tables and struck Lopez in the face. Cardenas then dragged Lopez into the back of the van where he and defendant continued to hit him. Defendant struck Lopez with his fists, knees and elbows more than 10 times and told Lopez, "[y]ou're going to die, mother fucker. You're coming with us." Cardenas and Robles also struck Lopez. Defendant attempted to light Lopez's shoes on fire but Lopez was able to kick the lighter out of his hand. Defendant tried to pull Lopez out of the van but Lopez resisted. Defendant then told Lopez to get out of the van and fight one of them one-on-one. Lopez said he would fight Robles

[1] Juan Cardenas and David Robles are not parties to this appeal.

if they promised to let him go. Lopez testified that he chose Robles because he was closest to his size. Cardenas promised Lopez "on his gang's nation" that if Lopez fought Robles, they would let him go.

¶ 7 Robles got out of the van first. A minute later Cardenas and defendant, followed by Lopez and Marchan, got out of the van. Marchan and Lopez testified that when they stepped out of the van, they saw Briseno lying face down on the ground, bleeding from the head. He appeared to be unconscious. Defendant picked Briseno up by the back of his shirt and said, "[o]h, this mother fucker is dead." Then, defendant dropped Briseno to the ground and kicked him in the groin. Cardenas also kicked Briseno several times while he was lying on the ground.

¶ 8 Natalie Perez testified that she saw Briseno walking from the apartment toward the van and saw someone strike him on the head. Initially, she was reluctant to state the name of the person who she saw strike Briseno because she had received threats from several gang members. The following day, the State recalled Perez and she testified that she observed defendant strike Briseno on the forehead with his hand. She testified that she thought defendant had something in his hand when he struck Briseno, but she was uncertain what the object was.

¶ 9 Robles and Lopez were fighting during this time. After the fight ended, Lopez ran away. When Marchan was able to get the van started, defendant said, “[y]ou're lucky bitch.” The three men then walked to their car and drove away.

¶ 10 When they left, Marchan got out of the van to look for Lopez, but Lopez was gone. She told Briseno to get up but he was nonresponsive. Marchan and Perez put Briseno in the van and drove around the block to look for Lopez. When they were unable to find him, they drove to Perez's house where they called the police. Shortly thereafter, an ambulance arrived and took

Briseno to the hospital.

¶ 11 The parties stipulated that Briseno was admitted to the hospital on December 26, 1994, and was immediately taken into surgery for an "evacuation subdural hematoma and drainage" and an "external ventricular drain." Briseno was discharged from the hospital on January 5, 1995, and was transferred to a rehabilitation hospital where he remained until February 16, 1995. Briseno was unable to walk, talk or respond to questions for over a month after the incident.

¶ 12 Defendant was ultimately convicted of attempted first degree murder and two counts of aggravated battery, one count as to each victim. Defendant was sentenced to an extended term sentence of 40 years' imprisonment.

¶ 13 On direct appeal, defendant argued: (1) the State did not prove beyond a reasonable doubt that he had the intent to kill Briseno; and (2) his sentence was excessive. This court affirmed defendant's conviction and sentence. *People v. Green*, No. 1-96-0161 (unpublished order under Supreme Court Rule 23).

¶ 14 Defendant filed a *pro se* postconviction petition on December 1, 1998, wherein he alleged: (1) ineffective assistance of counsel for failure to verify the physical condition of the victim, and for failing to raise the sentencing issue in a motion to reconsider sentence ; (2) he was prevented from cross-examining a therapist who Briseno's mother made reference to in her testimony; (3) his sentence was excessive; and (4) ineffective assistance of appellate counsel for failure to raise the issue of trial counsel's ineffectiveness. On November 9, 1999, defendant supplemented his postconviction petition with a brief. The State filed a timely motion to dismiss defendant's petition that was granted by the court after arguments. On January 12, 2007, this court affirmed the dismissal of petitioner's postconviction petition. *People v. Green*, No. 1-04-

1552 (unpublished order under Supreme Court Rule 23).

¶ 15 On February 4, 2009, defendant requested leave to file a supplemental postconviction petition in the circuit court. Petitioner attached a May 14, 2008, affidavit of Adelaide Cornell, who testified at trial using the name Natalie Perez. For the sake of clarity and consistency, we will identify this person as Cornell.

¶ 16 In her affidavit, Cornell acknowledged that she testified under the assumed name of Natalie Perez at defendant's trial and that the police officers knew her real name but allowed her to testify under her assumed name. She stated that defendant was innocent and that he was talking to her during the entire incident. She stated that despite her testimony at trial, she never saw defendant hit Briseno. She stated her testimony at trial was false and that the police and prosecution told her to testify against defendant rather than Robles or Cardenas. She also stated that she had been threatened by the prosecution between the first and second day of trial; that her daughter would be taken away if she did not testify against defendant. She further averred that she had been paid "a nominal amount of case money by the prosecution" to testify against defendant and after that she testified that she saw defendant hit Briseno in the head.

¶ 17 The court denied the State's motion to dismiss, allowed defendant leave to file and advanced the supplemental petition for a third stage evidentiary hearing.

¶ 18 At the evidentiary hearing, Cornell testified that she testified at trial under the assumed name of Natalie Perez because she was a ward of the Department of Children and Family Services (DCFS) at the time, had run away and had a baby on November 14, 1994, and the State was looking for her. She was 15-years-old at the time of the offense. Cornell stated that the officers in the district where she was questioned following the incident knew her real name

because one of the officers, Officer Kirschner, knew her. When she was taken in for questioning Officer Kirschner, who was not involved in this case, did not specifically tell her to pick defendant, "but kind of sort of in a way hinted around it. Like he didn't like them because they were just a piece of shit because they gang bang a lot, you know." None of the officers actually told her to say that defendant did it but told her to just stick with what she had previously told them which was that she saw defendant hit Briseno with a rock. Cornell testified that what she had told the officers was not true. She stated that she was forced by her friends and the other gang, was pressured by the police and was afraid that her baby would be taken away.

¶ 19 Cornell explained that she spoke with the prosecutor before she testified at defendant's trial. During that conversation, a male prosecutor, whose name she could not remember, told her that she needed to be honest, to remember what happened and to do the right thing or her baby would be taken away by DCFS. After she testified at trial, a male police officer told her she did a good job and gave her money. She could not remember who the officer was or how much money he gave her. Marchan and Lopez were present at the time but neither saw the transaction.

¶ 20 On cross-examination, Cornell stated that she, Lopez and Marchan were at that location on the night of the incident to buy drugs, not to move furniture. She stated that her baby's father and defendant were both members of the Maniac Latin Disciples but she hung with the Latin Lovers, a rival gang. Her uncles and cousins were members of the Latin Lovers. She was afraid to testify at trial because of the rival gang issue.

¶ 21 She testified that Robles and Cardenas tried to light Lopez's shoes on fire but Lopez got away and ran. She testified that she did not remember if defendant told her "someone is going to die tonight." However, Cornell was impeached with both her grand jury and trial testimony.

Cornell also testified that defendant, Cardenas and Robles never hit Lopez. She was then impeached with her grand jury and trial testimony. She was also impeached with her grand jury and trial testimony wherein she stated that defendant hit Briseno on the head, Briseno fell to the ground, defendant picked him up, said he was dead, punched him again and threw him back on the ground. Cornell testified that she did not remember being at the grand jury and did not remember much of the trial because her memory was "totally gone from back then."

¶ 22 Cornell testified that she was present during the entire incident on December 26, 1994, and never saw defendant strike Briseno. She stated that she never saw Briseno come out of the building, and never saw him come into the alley that day. She found Briseno unconscious inside the apartment building by the fireplace. She did not know why he was unconscious but said that he had been drinking and doing drugs earlier in the evening. She further testified that defendant never picked Briseno up off of the ground, never said "this bitch is dead" and never dropped him back to the ground. Instead, she stated that she and defendant had a conversation and smoked cigarettes next to the van while Lopez was being attacked by Robles and Cardenas.

¶ 23 With respect to her affidavit, Cornell testified that Attorney James Zeas wrote the affidavit and she reviewed it before signing it. She acknowledged that her affidavit stated that the prosecutor paid her to testify. She stated that this was wrong. It was a police officer who paid her, not the prosecutor. Cornell acknowledged that at the time of the hearing she was in custody and had prior convictions for aggravated battery, attempt aggravated arson, aggravated battery to a police officer, misuse of a credit card and theft and possession of stolen property.

¶ 24 Defendant testified on his own behalf at the evidentiary hearing and stated that he was asserting his actual innocence regarding his attempt murder conviction only. Defendant stated

that on the night in question he and Cornell were having a conversation in the alley near the van. He thought Cornell was pregnant by one of his friends and did not think that she should be out there with a gang war going on. While he was talking with Cornell, he heard a thud and when he turned around, he saw a body on the ground, face down. Defendant knelt down and turned the body over and saw that it was Briseno. He hadn't seen Briseno before then. He denied hitting or kicking Briseno. He also denied that he spoke with Robles or Cardenas about getting into a fight with Briseno and stated that he did not have a weapon.

¶ 25 Defendant explained that he, Robles and Cardenas went into the alley that night because they saw Lopez spray painting disrespectful things about their gang, the Maniac Latin Disciples, on the walls. He and his friends went into the alley to confront Lopez. Defendant stated that he hit Lopez repeatedly but did not try to light his shoes on fire.

¶ 26 After hearing the testimony of Cornell, defendant, Officer Kischner, Detective Crespo, assistant State's Attorney Make Shlifka and assistant State's Attorney Robert Heilingoetter, the court denied defendant postconviction relief. The court found that Cornell's testimony suffered from various inconsistencies and found her to be incredible. The court went on to state that even if Cornell were credible, her testimony "would fall far from completely exonerating" defendant. The court stated that even if defendant never hit the victim, as alleged by Cornell, defendant would still be guilty of the crime of attempted first degree murder under a theory of accountability based on Cardenas' actions. The court also found that Cornell's recantation failed to explain defendant's remorseful statement at sentencing, where he apologized to Briseno's family and stated "I made the biggest mistake anyone can ever make." The court also rejected defendant's claim that the State violated *Brady* by failing to disclose the use of false testimony

and its role in procuring that testimony by threatening Cornell and paying her for her false testimony. Finally, the court dismissed defendant's claim that the State violated his due process rights by knowingly using Cornell's perjured testimony at trial. It is from this order that defendant now appeals.

¶ 27 ANALYSIS

¶ 28 The Post Conviction Hearing Act (Act) (725 ILCS 5/2-122-1 *et seq*. (West 2010)), allows criminal defendants to collaterally attack a prior conviction and sentence where there was a substantial violation of his or her constitutional rights. *People v. Gosier*, 205 Ill.2d 198, 203 (2001). In order for a defendant to successfully challenge a conviction or sentence pursuant to the statute, he or she must demonstrate that there was a substantial deprivation of federal or state constitutional rights. *People v. Morgan*, 187 Ill.2d 500, 528 (1999).

¶ 29 The Act contemplates the filing of only one postconviction petition and restricts the use of successive petitions. *People v. Evans*, 186 Ill. 2d 83, 89 (1999); 725 ILCS 5/122-1(f) (West 2010). For the court to order an evidentiary hearing on a successive postconviction petition, the petitioner must either meet the cause and prejudice test (725 ILCS 5/122–1(f) (West 2010)), or he must present new evidence of actual innocence. *People v. Ortiz*, 235 Ill.2d 319, 330 (2009).

¶ 30 Our supreme court recently clarified the standard to be used in actual innocence cases:

> "Substantively, in order to succeed on a claim of actual innocence, the defendant must present new, material, noncumulative evidence that is so conclusive it would probably change the result on retrial. *Washington*, 171 Ill. 2d at 489. New means the evidence was discovered after trial and could not have been discovered earlier through the exercise of due diligence. See [*People v. Burrows*, 172 Ill.2d 169, 180 (1996)].

> Material means the evidence is relevant and probative of the petitioner's innocence. *People v. Smith*, 177 Ill.2d 53, 82–3 (1997). Noncumulative means the evidence adds to what the jury heard. *[People v. Mostad*, 101 Ill.2d 128, 135 (1984)]. And conclusive means the evidence, when considered along with the trial evidence, would probably lead to a different result. *Ortiz*, 235 Ill.2d at 336–37." *People v. Coleman*, 2013 IL 113307, ¶ 96.

¶ 31 In determining whether the evidence is so conclusive as to probably change the result on retrial, the court must engage in a balancing test of the evidence before it. *Id*. ¶ 97. In *Coleman*, our supreme court specified that, once the postconviction court determines that the evidence presented at the third-stage evidentiary hearing was new, material, and noncumulative:

> "the trial court must then 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 guilty verdict. This is a comprehensive approach that involves credibility determinations that are uniquely appropriate for trial judges to make. But the trial court should not redecide the defendant's guilt in deciding whether to grant relief. * * * Probability, not certainty, is the key as the trial court in effect predicts what another jury would likely do, considering all the evidence, both new and old, together." *Id*.

¶ 32 We review the trial court's decision to deny postconviction relief following an evidentiary hearing for manifest error. *Id*. at ¶ 98. Manifest error is "clearly evident, plain and indisputable" and occurs when the opposite conclusion is clearly evident. *People v. Morgan*, 212 Ill. 2d 148, 155 (2004).

¶ 33 Defendant argues that the trial court erred in denying his postconviction relief following

an evidentiary hearing based on its finding that Cornell's testimony was insufficient to support a claim of actual innocence. There is no dispute in this case that Cornell's recantation of her trial testimony is considered both newly discovered and material for purposes of actual innocence analysis. However, the parties do dispute whether Cornell's recantation testimony is so conclusive that it would change the result on retrial. We note that recantation evidence is generally considered unreliable (*People v. Deloney*, 341 Ill.App.3d 621, 632 (2003)), and claims of actual innocence must be based on reliable evidence (*People v. Edwards*, 2012 IL 111711,¶ 32 (quoting *Schlup v. Delo*, 513 U.S. 298, 324 (1995)).

¶ 34 In the context of a postconviction hearing, it is the function of the trial court to assess the credibility of the recantation testimony after having observed the demeanor of the witness. *Morgan*, 212 Ill. 2d 155. The circuit court found Cornell to be entirely incredible due to inconsistencies in her testimony. The court did not believe Cornell that she would be calmly chatting and smoking cigarettes with defendant, a rival gang member, whom she was afraid of, while Lopez was being beaten by defendant's accomplices. Cornell also testified at the evidentiary hearing that Lopez was not being beaten by defendant's accomplices, which was in direct contradiction with defendant's testimony at trial that he repeatedly hit Lopez in the face with an open hand. Cornell's testimony on this issue is also in direct contradiction with Marchan's and Lopez's trial testimony, as well as Cornell's grand jury and trial testimony. The testimony at trial was that defendant and Cardenas beat Lopez in the back of the van and defendant attempted to pull Lopez out of the van after attempting unsuccessfully to light his shoes on fire. Cornell acknowledged at the evidentiary hearing that defendant tried to light Lopez's shoes on fire, which directly contradicts her testimony that defendant was standing to the

side, talking and smoking cigarettes with her. Furthermore, Cornell testified that Briseno never came into the alley and was not found lying on the ground adjacent to the van, but that she found him unconscious inside the apartment building by a fireplace. This testimony is in direct contradiction to defendant's testimony at the hearing and Marchan's, Lopez's and Cornell's trial testimony. The court also found Cornell's recantation testimony to be incredible based on her extensive criminal record, including aggravated arson, aggravated battery to a police officer, misuse of a credit card, theft and possession of stolen property.

¶ 35 We agree with the circuit court's assessment of Cornell's credibility and cannot find the circuit judge's decision to reject her recanted testimony based on credibility to be manifestly erroneous. As we can affirm the judgment of the circuit court on any basis found in the record (*People v. Johnson*, 237 Ill.2d 81, 88–89 (2010)), we need not consider whether the court's finding that defendant was liable under a theory of accountability was manifestly erroneous.

¶ 36 Defendant also argues that Cornell's recantation testimony that the police pressured her to testify against defendant was withheld from the defense in violation of *Brady* and further contends the State knowingly used Cornell's false testimony at trial. We note that these issues are closely related to defendant's claim of actual innocence, in that they are also based on Cornell's affidavit.

¶ 37 In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court held that the prosecution violates a defendant's constitutional right to due process of law by failing to produce evidence favorable to the accused and material to guilt or punishment. To prove that he was denied due process of law under *Brady*, a defendant must show that: (1) the evidence is favorable because it is exculpatory or impeaching; (2) the evidence was suppressed by the State either willfully or

inadvertently; and (3) the accused was prejudiced because the evidence was material to guilt or punishment. *People v. Beaman*, 229 Ill. 2d 56, 73-74 (2008). A defendant must show that the favorable evidence could reasonably have put the whole case in such a different light as to undermine confidence in the verdict. *People v. Coleman*, 183 Ill. 2d 366, 393 (1998).

¶ 38 The circuit court found that there was no *Brady* violation in this case. Cornell alleged in her affidavit that an assistant State's Attorney threatened to take her baby away if she did not testify against defendant and that the State offered her money in exchange for her testimony. The court found Cornell's allegations regarding the alleged payment and coercion by the State's Attorney's Office suffered from numerous inconsistencies namely that Cornell never testified at the hearing that anyone from the State's Attorney's Office threatened her, promised to pay her money for her testimony or actually paid her money for her testimony. At the evidentiary hearing, Cornell could not remember who the assistant was or where she was threatened. The court also considered that the State denied all of defendant's allegations pertaining to this claim and stated that Cornell was never threatened or paid by the Cook County State's Attorney's Office.

¶ 39 The circuit court also found Cornell's allegations with respect to the police officers involved in this case suffer from similar inconsistencies. Cornell testified that no police officers promised to pay her in exchange for her testimony. The only testimony regarding money exchanging hands was when Cornell testified that a police officer paid her after trial, an event that occurred in the presence of Marchan and Lopez, but that neither saw. Cornell was also inconsistent in that she testified that Officer Kischner "hinted" that she should identify defendant as the perpetrator rather than all three defendants, but also testified that he wanted her to pick

defendant and his two co-defendants because they were gang members and belonged in jail.

¶ 40 The circuit court also based its ruling on the fact that the evidence showed that Cornell's fear for her safety came from threats from two rival gangs, not from the police or prosecution. Cornell testified that her baby's father was a member of the same gang as defendant, and her friends and relatives were members of a rival gang. Cornell testified that she was threatened by both gangs. The court also found that Cornell testified at the grand jury that she did not receive any promises or threats in exchange for her testimony.

¶ 41 Recantation testimony is generally regarded as unreliable, and it is for the trier of fact to determine the credibility of such testimony. *People v. Brooks*, 187 Ill.2d 91, 132 (1999). Based on the record before us, we cannot find that the circuit court's denial of postconviction relief based on the absence of a *Brady* violation was manifestly erroneous.

¶ 42 We also reject defendant's argument that the State used Cornell's perjured testimony at trial. It is well established that the State's knowing use of perjured testimony to obtain a criminal conviction violates a defendant's right to due process of law. *People v. Olinger*, 176 Ill. 2d 326. 345 (1997). A conviction obtained by the knowing use of false testimony is set aside if there is a reasonable likelihood that the false testimony could have affected the verdict. *People v. Thurman*, 337 Ill. App. 3d 1029, 1032 (2003). These principles are also applicable when the State, while not soliciting false testimony, fails to correct it when it occurs. *Id.* The circuit court found there was simply no evidence here to suggest that Cornell's testimony was perjured. Based on the record before us, we do not find that the opposite is clearly evident.

¶ 43 CONCLUSION

¶ 44 Based on the foregoing, we affirm the judgment of the circuit court denying defendant

postconviction relief following an evidentiary hearing.

¶ 45 Affirmed.