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FIFTH DIVISION
December 23, 2016

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 03 CR 18303
)	
JOSE SILVA,)	The Honorable
)	Lawrence J. Flood,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Gordon and Justice Reyes concurred in the judgment.

ORDER

¶1 *HELD:* The recantations in support of defendant’s postconviction petition failed to establish defendant’s actual innocence based on newly discovered evidence. The trial court did not commit manifest error in dismissing the petition following a third-stage evidentiary hearing.

¶2 Defendant, Jose Silva, appeals the third-stage dismissal of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). Defendant contends the trial court erred in dismissing his petition where newly discovered evidence in the form of

affidavits recanting the victim's accusatory statements demonstrate his actual innocence. Based on the following, we affirm.

¶3

FACTS

¶4 Following a bench trial, defendant was found guilty of two counts of predatory criminal sexual assault. Defendant was later sentenced to natural life imprisonment as mandated by section 12-14.1(b)(2) of the Criminal Code of 1961 (720 ILCS 5/12-14.1(b)(2) (West 2003)) due to a prior conviction for aggravated criminal sexual assault. The trial evidence demonstrated that, in two separate incidents on August 2, 2003, defendant used his hand and fingers to rub the vagina of the victim, C.A. Defendant was 45 years old at the time and the victim was 9. This court affirmed defendant's conviction and sentence on direct appeal. *People v. Silva*, No. 1-06-0175 (Dec. 13, 2007) (unpublished under Supreme court Rule 23).

¶5

We quote the relevant facts from our direct appeal order.

“C.A. testified that [petitioner] was a long-time family friend. On the date in question, [petitioner] picked up C.A. and her two older sisters, Naomi and Maria, from their home in Indiana. He dropped off C.A.'s sisters at their aunt's house in Illinois and then he and C.A. proceeded to his mother's house. Inside, in the basement, defendant told C.A. to wash up. C.A. did not take off her clothes, so defendant removed some of her clothing, leaving C.A. naked from the waist down. Defendant carried C.A. to the sink, put her down on the sink, and told her to wash up. According to C.A., she told defendant she was not dirty, so defendant ‘did it for me’ and ‘touched her private part’ with his hand. She explained that her private part was ‘in front.’ C.A. testified that she felt scared as defendant rubbed her. After a ‘short time,’ C.A. told him she wanted to go with her

sisters, and defendant stopped rubbing her and told her to get dressed. After C.A. put on her panties and other clothes, defendant took her to her aunt's house.

At some point that day, C.A.'s aunt took her and her sisters back to their home in Indiana. That evening, defendant picked up C.A. and her sister, Naomi, and drove them to his house 'to sleep over.' C.A. testified that upon arriving, defendant told Naomi and her to take a shower. After C.A. finished showering, defendant gave her a towel and a t-shirt. C.A. dried herself and put on the t-shirt and underwear. Defendant then reached his hand into her underwear, rubbed her in her 'private part,' and smelled his hand. C.A. testified that defendant was checking to see if she was clean. Naomi also took a shower, and after she finished, Naomi and defendant went into defendant's room. Defendant's brother then walked in and said he was going to call the police. C.A. left defendant's house when the police arrived and went home.

C.A. testified that the police came to talk to her and then took her to Chicago to talk to a woman. The woman asked C.A. some questions, and afterwards, C.A. was taken to the hospital, where she was examined by doctors. C.A. testified that defendant touched her on the outside of her private parts and did not put his finger inside of her. She also said that, after the second time defendant touched her, he told her not to tell anyone.

Alexandra Levi, a forensic interviewer at the Chicago Children's Advocacy Center, testified that she conducted an interview with C.A. five days after the incidents in question. C.A. told Levi that when she was at defendant's mother's house for a party, she got dirty and defendant told her to go downstairs with him and clean up. There, C.A. showered, after which defendant said he had to check to see if she was clean. Defendant put his hand under her panties and moved his hands on her 'private part.' When asked

what she meant by 'moving his hand,' C.A. showed Levi a rubbing motion on the arm of a chair. C.A. said that it hurt on her private part. C.A. also told Levi that while this was happening, defendant placed a towel to her mouth and told her that he wanted her to try on some clothing. Defendant stopped when his brother came downstairs and saw what was happening. C.A. told Levi that defendant's brother called the police.

Levi testified that C.A. also described a second incident that occurred when she was at defendant's grandmother's house, having a sleepover with defendant's daughter. At some point, the daughter and grandmother left the house. Defendant sat down next to C.A. on the couch and began touching her on her 'private part.' C.A. related that she told defendant to stop and that she was going to tell her mother when she got home. According to Levi, C.A. gave no more details of this incident.

Dr. Deanna Ward testified that five days after the incidents in question, she performed a physical examination of C.A. in the pediatric emergency room at Stroger Hospital. C.A. told Dr. Ward that she had been touched underneath her clothes in her vaginal area. Dr. Ward defined the 'vaginal area' as 'the clitoris, the urethra, the labia majora, labia minora, [and] the vagina introitus,' which is the vaginal opening, and agreed that the clitoris is located 'within the entire sex organ.' Dr. Ward testified that she did not discover any evidence of trauma while performing the examination of C.A. Ward asked C.A. if she had been penetrated, which Ward defined for C.A. as '[e]ntry of either a digit or finger, or male genitalia or penis, into the vaginal opening or introitus.' C.A. indicated that she had not been penetrated, but said she had been 'touched.' Ward indicated that, based on her education and experience, there is not always evidence of trauma in the vaginal area of a young female victim who has been sexually assaulted.

Assistant State's Attorney Christina Frenzel testified that five days after the incidents, she spoke with defendant at the police station, where defendant gave a statement. In his statement, defendant stated that on the date in question, he picked up C.A. and her sister Naomi from their house in Indiana and drove to defendant's brother's house. According to his statement, defendant told his brother that C.A. and Naomi wanted to spend the night because their beds at home were bad. Defendant thought C.A. smelled bad, so he told her to take a shower. He gave C.A. a long t-shirt to wear and put C.A.'s clothes in the washing machine. After C.A. finished showering, she sat on a bed and began coloring. Defendant, who was in the doorway, asked C.A. if she 'cleaned herself good.' C.A. opened her legs and defendant noticed that her vagina was red, swollen, looked irritated, and 'wasn't washed right.' Defendant 'took his thumb and rubbed the outside lips of [C.A.'s] vagina and the clitoris area' and 'something white rubbed onto his thumb.' He rubbed C.A.'s vagina twice with his thumb. He was going to tell C.A. to take another shower, but decided not to because C.A. was coloring and Naomi was in the shower. After C.A. and Naomi went to bed, defendant went home." *Silva*, No. 1-06-0175, slip op. at 2-6.

¶6 In his postconviction petition, filed on November 29, 2011, defendant claimed that he obtained newly discovered evidence in the form of affidavits by C.A., Naomi Dixon, and Maria Almodovar demonstrating his actual innocence. The affidavits were attached to the petition and were dated June 20, 2009. The postconviction petition claimed that C.A., Naomi, and Maria made up the allegations against defendant in an attempt to gain protection from their father, who was molesting the girls, and to be removed from the poor living conditions that existed in their home. The trial court docketed the petition for second-stage review and subsequently denied the

State's motion to dismiss the petition. The trial court then ordered a third-stage evidentiary hearing.

¶7 A hearing was conducted on April 16, 2014, and June 12, 2014. C.A. testified that she was 20 years old. According to C.A., in August 2003, she provided false allegations regarding defendant sexually touching her by rubbing his fingers against her vagina. C.A. stated that she made the false complaint "because we were trying to get out of the environment we was [sic] in. We were trying to get out of our parents' home." C.A. described her parents as bad people that did not take care of her or her sisters, Naomi and Maria. Her parents did not provide food, water, clothes, or electricity. According to C.A., she and her sisters concocted the story against defendant with her posing as the victim because she was the youngest. Maria then executed the plan by informing the girls' aunt that defendant had sexually assaulted C.A. C.A. testified that DCFS visited their home and removed the girls upon investigation of the quality of the home. C.A. stated that she continued providing false allegations against defendant throughout the trial because she and her sisters did not compose a plan for after they had been removed from their home.

¶8 C.A. testified regarding her affidavit. In the affidavit, C.A. attested it was her father that molested her and her sisters, but that they were too scared to report their father. According to C.A., however, as she became older she was compelled to tell the truth. As a result, C.A. and her sisters spoke to defendant's mother and apologized for their false allegations.

¶9 C.A. recalled speaking with Assistant State's Attorney (ASA) James Papa twice in December 2012, once at her home and again at the police station. The meeting at the police station was videotaped. C.A. admitted that, during her conversations with ASA Papa, she stated that her affidavit was false, in that defendant did in fact molest her. C.A., however, stated that

she lied to ASA Papa and only told him what he wanted to hear so she would no longer be bothered. C.A. did not want any involvement in the case. C.A. testified that she told her mother she was going to advise ASA Papa that she no longer wanted to be involved in the case and that the information ASA Papa had about the incident up until that point was correct. C.A. admitted that, while she was talking to ASA Papa, she received a text message from her mother saying, “Be on Joe’s¹ side.” C.A. explained that the message meant she should not turn her back on defendant.

¶10 During the hearing, C.A. identified a letter ASA Papa had shown her during their December 2012 conversation. The letter had been drafted by someone else and signed by C.A., but contained C.A.’s words. The letter, admitted into evidence, provided that defendant had not done anything to C.A., that he was a good person who tried to help the sisters, and that C.A. was sorry for lying. C.A. asked for forgiveness in the letter. C.A. testified that the letter provided the truth.

¶11 C.A. testified that she was not paid to testify favorably for defendant and that no one manipulated her or promised her anything to recant her accusations. C.A. added that she did not decide to testify to be nice to defendant’s mother. C.A. maintained that defendant never touched her, but has been “in jail for too long over a mistake” or a plan that went wrong.

¶12 On cross-examination, C.A. testified that she met with an ASA in preparation of defendant’s trial. At the time, C.A. never indicated that she lied about defendant having touched her or that she falsely accused defendant. C.A. acknowledged having promised to tell the truth at trial. Moreover, C.A. acknowledged that, at the time of trial, she was living in a foster home, away from the harmful environment provided by her parents.

¹The family referred to defendant as Joe.

¶13 C.A. recalled the events of August 2, 2003. C.A. stated that defendant picked her and Naomi up from their home and took them to his house in Chicago. C.A. was almost 9 years old at the time and Naomi was 16 years old. C.A. identified defendant as a long-time friend of the family. When they arrived at defendant's house, she and Naomi took showers and washed their clothes. After the shower, Naomi informed C.A. of the plan to accuse defendant. Naomi coached C.A. regarding what to report to their aunt. C.A. explained that they chose to accuse defendant because he was the closest male they knew. C.A. recalled defendant drove them to their aunt's house at which time C.A. informed her aunt that defendant had abused her. C.A.'s aunt then called the police.

¶14 C.A. further testified on cross-examination that her father never sexually abused her, despite what she stated in her 2009 affidavit. C.A. acknowledged that she lied in her affidavit. C.A. also acknowledged that, at defendant's trial, she was shown the letter composed by Naomi and signed by her, which provided that petitioner was innocent. C.A., however, explained that she testified at trial that Naomi told her they could go back to their mother's home, instead of remaining in separate foster homes, if they wrote the letter.

¶15 C.A. additionally testified that her mother accompanied her to the meeting with ASA Papa in December 2012. However, when C.A. was alone with ASA Papa, she reported to Papa that her 2009 affidavit was false. According to C.A., she maintained the affidavit was false even after receiving the text message from her mother to "[b]e on Joe's side." C.A. denied being threatened during her conversations with ASA Papa. Over defense counsel's objection, C.A.'s videotaped statement was published. In the videotape, C.A. accused defendant of having touched her private parts while at his mother's house. C.A. admitted her videotaped statement was consistent with her trial testimony.

¶16 C.A. further added that she met with defendant's attorney at defendant's mother's house on two occasions prior to the evidentiary hearing. C.A. reported having stayed at defendant's mother's house the evening before the evidentiary hearing and being driven to court by defendant's brother-in-law. Naomi, Naomi's boyfriend, and defendant's mother were also passengers in the car.

¶17 On redirect examination, C.A. explained that she slept at defendant's mother's house and was driven by defendant's family member because it was convenient, as she did not have a car. C.A. insisted her affidavit was not inaccurate because her father had sexually molested her sisters even if he had not sexually molested C.A. C.A. maintained that the letter she and Naomi wrote to defendant attempted to apologize for lying. C.A. denied being manipulated into recanting her allegations against defendant. C.A. stated that she only provided the videotaped statement to ASA Papa in 2012 so prosecutors would leave her alone.

¶18 Naomi testified that she and Maria concocted the plan to accuse defendant of sexually abusing C.A. in order to be removed from their parent's house. Naomi stated that, at the time, she was being sexually molested by her father and they were living in poor conditions, such as having a flooded basement, lacking food, and having parents that consumed drugs. Naomi identified defendant as the "closest one to us," which is why they chose to accuse him despite his innocence. Naomi insisted she never observed defendant sexually abuse C.A.

¶19 According to Naomi, on August 3, 2003, defendant picked her and C.A. up and transported them to his brother's house. Naomi and C.A. requested to take a shower because they lacked hot water at their house. Naomi recalled showering and being with C.A. the whole time. Naomi and C.A. then went to their aunt's house where they initiated their plan by telling their aunt that defendant had abused C.A. Naomi testified that she was 16 years old at the time and,

after the police became involved, the girls were placed in foster care. Initially, Naomi and C.A. were placed in the same foster home, but were later separated.

¶20 Naomi stated that she was unaware of the consequences of their false allegations on defendant at the time. Naomi added she did not know that C.A. testified against defendant at trial. According to Naomi, when she turned 22 years old, she told her mother they falsely accused defendant. Naomi's mother advised her to tell the truth "because there is basically an innocent man in prison." Naomi then contacted C.A. at her foster home and C.A. agreed to tell the truth about what occurred on August 3, 2003. Naomi testified that, in June 2009, she met with defendant's attorney at defendant's mother's house at which time she provided an affidavit. In her affidavit, Naomi attested that she falsely accused petitioner of sexually abusing C.A. Naomi acknowledged that her affidavit stated C.A. had been sexually abused by their father when she had not. Naomi maintained that she had been sexually abused by their father and that the sisters accused defendant in order to get away from their father. Naomi testified that she had not been offered money for her testimony and that she was not testifying to be nice to defendant's mother. Naomi admitted that defendant's family member drove her to court for the evidentiary hearing and that she had stayed at defendant's mother's home the prior night. Naomi claimed she did so because she lived in Gary, Indiana.

¶21 On cross-examination, Naomi identified a letter addressed to defendant and signed by C.A. which stated, "Im [*sic*] sorry for what I say [*sic*] is that my aunt told me to say that but you didn't do anything to me[.] [Y]ou were a good person[.] [Y]ou helped us in [*sic*] everything we needed help in [*sic*] and Im [*sic*] sorry your there cause [*sic*] of my lying[.] Please forgive me[.]" Naomi stated that she did not know who drafted the letter and she was not present when C.A. signed it. Naomi denied advising C.A. as to what to write in the letter. Naomi admitted she

learned in 2006 or 2007 that defendant had been arrested and convicted based upon C.A.'s false allegations. Naomi, however, did not attempt to rectify the matter until 2009 by providing her affidavit.

¶22 Naomi additionally identified a letter written to her by her mother "sometime in 2004ish" when she was 16 or 17 years old. In the letter, Naomi's mother wrote, "I'm going to take Ms. [sic] Morales out the door to talk to him[.] While I'm doing that, I need you to talk to [C.A.] and tell her to make sure that if Mr. Morales asks her if she was lying about what [defendant] did to her, that for her to say yes because she was tired of being with me because I was on drugs and didn't was [sic] to pay attention to her so she got mad and made up any lie." The letter further instructed to "make sure [the] camera doesn't hear you tell her" and to "rip this letter" afterward. Naomi testified that she followed her mother's instructions.

¶23 Naomi further testified on cross-examination that the portion of her affidavit stating her father sexually abused all of the sisters was untrue. Naomi added that she met with ASA Papa and Investigator Joanne Ryan on January 8, 2013, at her house. During the conversation, C.A. reported to Naomi that defendant touched her butt and privates. Then, after touching C.A.'s privates, defendant smelled his fingers. Naomi also told ASA Papa and Investigator Ryan that she was not present on the date in question when defendant sexually abused C.A. Naomi was unaware of what occurred between defendant and C.A.

¶24 Naomi added that she had known defendant's mother since she was 11 or 12 years old. Defendant's mother had provided Naomi with money to assist with paying her bills. Naomi approximated receiving between \$20 and \$60 from defendant's mother. Naomi denied that defendant's mother purchased items for her, but admitted having told ASA Papa in January 2013 that defendant's mother did purchase things for her.

¶25 On redirect examination, Naomi claimed that she was resistant to meet with ASA Papa in January 2013 as she had a number of life events occurring at the time, like a divorce. Naomi admitted she learned of defendant's arrest and trial when she was 19 or 20. Naomi could not explain why she failed to come forward at that time.

¶26 Following Naomi's testimony, defendant's counsel informed the trial court that he was unable to locate Maria, C.A.'s other sister, to testify.

¶27 On October 15, 2014, the trial court denied defendant's postconviction petition. In so doing, the court stated:

“The defendant has filed a petition for postconviction relief based upon a claim of actual innocence. The petition is supported by the affidavits of [C.A.], Maria Almodovar and also Naomi Davis.

[C.A.] was abused by the defendant, and the other affiants were her sisters. All of the affidavits claim that [defendant] is innocent of the claims made against him by the victim, [C.A.], in that all three just wanted to leave their home and furthermore they claim that their father and not [defendant] has molested the sisters. That's basically what the affidavit[s] set forth.

And they also set forth in the affidavit[s] that there was [a] plan concocted to accuse [defendant] of the acts for which he was tried and convicted.

Based upon these affidavits, in particular the recantation of [C.A.], the Court conducted a third-stage evidentiary hearing.

*** [a]fter hearing the evidence and the testimony of [C.A.] and her sister Naomi Davis as well as the items entered into evidence, the Court makes the following findings:

One, I found that [C.A.'s] testimony regarding the recantation is not credible.

At the time that the defendant was arrested, [C.A.] was interviewed by the police, doctors who examined her. She was interviewed at the children's advocacy center, the state's attorneys assigned to the case, and she was subject to cross-examin[ation] after testimony [*sic*] at trial. In each instance her statements and testimony were consistent. It wasn't until several years later with the influence of her family and the defendant's family that the affidavit of recantation was filed with the petition for postconviction relief.

It should be mentioned that the defendant's family and the victim's family are friends and have been so for a number of years.

In her testimony before this Court she recanted her prior trial testimony and said that the defendant had never molested her. She testified that the story was made up by her and her sister Naomi in order to be placed in another home. They didn't want to remain in their particular home. She said that they also wanted to get away from their father who she claimed was molesting her and her sister.

It is noted that while testifying here, the family, her family and the defendant's family were present in court and had provided transportation to her to court.

Prior to her testimony at the third-stage hearing, she was interviewed two times by the State's Attorney's Office. One interview was videotaped and played at the hearing. At both the interview and videotaping, no other family members or defendant's family were present. In both instances [C.A.] recanted her recantation and confirmed her trial testimony as the truth about what happened to her and how defendant had touched her. She also spoke about the influence of her mother and the defendant's family in her now recantation of what happened to her several years ago.

As to Naomi Davis, her testimony, I did not find her credible. Again I considered the relationship between the defendant and her family in evaluating her testimony. Additionally her testimony about knowing about the plan to frame the defendant and never coming forward until now made no sense and her testimony regarding what had happened to her and her sister at [defendant's] house was inconsistent not only with her sister's trial testimony, but also the defendant's own admission and statement to the police admitting to touching [C.A.]

The defendant's own statement admitting the crime contradicted the witnesses at the third-stage hearing. ***. And that statement *** undercuts the testimony of the witnesses that there was some plan made up to implicate the defendant in this case.

For those reasons I find that there is no credible evidence of actual innocence presented by the [defendant] and that this was an effort by his family to attempt to grant him a new trial.”

¶28 This appeal followed.

¶29 ANALYSIS

¶30 Defendant contends the trial court erred in denying his postconviction petition where the newly discovered evidence revealed in the affidavits and the testimony from his evidentiary hearing demonstrated his actual innocence.

¶31 The Act provides a statutory method by which a defendant may challenge his conviction or sentence for substantial violations of federal or state constitutional rights. 725 ILCS 5/122-1 *et seq.* (West 2010); *People v. Edwards*, 2012 IL 111711, ¶ 21. The Act is a collateral attack on a final judgment. *Id.* As a result, where a petitioner previously has raised an appeal from a judgment of conviction, the reviewing court's judgment will bar postconviction review of all

issues actually decided pursuant to the doctrine of *res judicata* and will waive any other claim that could have been presented. 725 ILCS 5/122-3 (West 2010); *Edwards*, 2012 IL 111711, ¶ 21.

¶32 There are three potential stages of postconviction review. *People v. Lofton*, 2011 IL App (1st) 100118, ¶ 27. At the first stage, the trial court reviews the petition to ascertain whether it is frivolous or patently without merit, *i.e.*, whether it presented “the gist of a constitutional claim.” *Id.* If the petition is frivolous or patently without merit, it must be dismissed by the trial court. *Id.* However, if the petition proceeds to second stage review, the trial court may appoint defense counsel and the State may move to file a motion to dismiss. *Id.* The second-stage considers whether the petition establishes a substantial showing of a constitutional violation. *Id.* If the petition is not dismissed at the second-stage, it proceeds to the third-stage where the trial court conducts an evidentiary hearing. *Id.* At the third-stage of review, the defendant has the burden of demonstrating a substantial showing of a constitutional violation. *Id.* ¶ 28.

¶33 Defendant’s petition was dismissed following a third-stage evidentiary hearing. We review the denial of a postconviction petition following an evidentiary hearing for manifest error. *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009). A judge’s ruling on a postconviction petition following a third-stage evidentiary hearing is entitled to substantial deference. *People v. Jones*, 2012 IL App (1st) 093180, ¶ 49. Manifest error is defined as error that is “clearly evident, plain, and indisputable.” *People v. Ruiz*, 177 Ill. 2d 368, 384-85 (1997). On review, manifest error will be found only if the trial court’s decision is not based on the evidence, is arbitrary, and is unreasonable. *Jones*, 2012 IL App (1st) 093180, ¶ 49. “The burden of convincing a reviewing court that a trial court’s decision was manifestly erroneous is a heavy one.” *Id.*

¶34 Pursuant to the due process clause of the Illinois Constitution, a postconviction petition may present a freestanding claim of actual innocence based upon newly discovered evidence.

Ortiz, 235 Ill. 2d at 333. The evidence in support of such a claim must be newly discovered, material and not merely cumulative, and of such conclusive character that it would probably change the result on retrial. *Id.* This court has advised:

“New means the evidence was discovered after trial and could not have been discovered earlier through the exercise of due diligence. [Citation.] Material means the evidence is relevant and probative of the petitioner’s innocence. [Citation.] Noncumulative means the evidence adds to what the jury heard. [Citation.] And conclusive means the evidence when considered along with the trial evidence, would probably lead to a different result. [Citation.]” *People v. Coleman*, 2013 IL 113307, ¶ 84.

¶35 The newly discovered evidence presented by defendant was C.A.’s affidavit and testimony, along with Naomi’s affidavit and testimony and Maria’s affidavit, recanting C.A.’s trial testimony and prior statements which accused defendant of the underlying crime. “Courts have held that defendants will not be precluded from presenting a witness’s recantation as newly discovered evidence, though they knew the witness to be perjuring himself or herself.” *People v. Barnslater*, 373 Ill. App. 3d 512, 524 (2007). That said, “the recantation of testimony is regarded as inherently unreliable;” therefore, a court will not grant a new trial on that basis except in extraordinary circumstances. *People v. Morgan*, 212 Ill. 2d 148, 155 (2004); *People v. Steidl*, 177 Ill. 2d 239, 260 (1997); *Jones*, 2012 IL App (1st) 093180, ¶ 63. Moreover, this court has instructed:

“Most importantly for the instant case, recantation evidence, standing alone, does not rise to the level of a constitutional violation that would entitle a convicted person to a postconviction evidentiary hearing, let alone postconviction relief. [Citations.] Our supreme court has long reasoned that ‘[i]n the absence of an allegation of the knowing

use of false testimony, or at least some lack of diligence on the part of the State, there [is] no involvement by the State in the false testimony to establish a violation of due process. [Citation.] Without such involvement, the action of a witness falsely testifying is an action of a private individual for which there is no remedy under the due process clause.’ ” *Jones*, 2012 IL App (1st) 093180, ¶ 63.

¶36 We conclude that the trial court did not commit manifest error in denying defendant’s postconviction petition following the evidentiary hearing. We find C.A.’s and Naomi’s affidavits and testimony were unreliable and not of such conclusive character that the admission of which would probably result in a different outcome at retrial. *Coleman*, 2013 IL 113307, ¶ 84. C.A.’s affidavit and postconviction hearing testimony recanted accusations against defendant that she repeatedly had made to various authorities directly following the events in question, including the police, the admitting doctor, the forensic interviewer for the Chicago Children’s Advocacy Center, and an ASA, as well as her aunt. These accusations were testified to at trial and subject to cross-examination in November 2005. In contrast, the affidavits, averring that the accusations against defendant were false and were merely concocted as a plan to remove C.A. and her sisters from their parental home, were created while at defendant’s mother’s home (a close family friend) and in front of defendant’s attorney. Despite having obtained those affidavits in June 2009, defendant did not file his postconviction petition until November 2011. Then, in December 2012, C.A. recanted her recantation while speaking with ASA Papa. In fact, a videotape of C.A.’s conversation with ASA Papa supported her trial testimony that defendant committed the underlying crime. Importantly, these conversations with ASA Papa were conducted outside the presence of defendant’s and C.A.’s family members, despite C.A.’s mother’s attempt to influence C.A. by sending a text message saying “Be on Joe’s side.” In addition, C.A. testified at

the postconviction evidentiary hearing that her affidavit contained false statements. More specifically, C.A. admitted she falsely attested that her father sexually abused her. C.A. also testified inconsistently regarding the 2005 apology letter allegedly authored by Naomi, but signed by C.A.

¶37 Naomi then testified at the postconviction evidentiary hearing that she did not author the apology letter. Naomi also admitted to falsely attesting in her 2009 affidavit that their father sexually abused C.A. Furthermore, Naomi was unable to explain why she waited two to three years to attempt to clear defendant's name by providing the truth, wherein she learned of C.A.'s false trial testimony in 2006 or 2007, but waited until June 2009 to complete an affidavit. Additionally, at her meeting with ASA Papa in January 2013, Naomi confirmed that C.A. reported having been sexually abused by defendant.

¶38 Critically, both C.A. and Naomi acknowledged their close relationships with defendant's family, specifically his mother. The close familial ties were exhibited by the fact that C.A. and Naomi reported having slept at defendant's mother's house the night before the evidentiary hearing and having been driven to the hearing by defendant's family.

¶39 The trial court and this court also must consider defendant's statement admitted at trial, which contradicted the recantations. Specifically, defendant's statement described the events and inculpated him in the underlying crime.

¶40 Given the inconsistencies in C.A.'s accounts of the events, along with Naomi's unreliable testimony and defendant's inculpatory statements, the trial court was well within its discretion to reject defendant's actual innocence claim. The recantations offered in this case were not so extraordinary to overcome the inherent lack of reliability attached to such statements. See *Morgan*, 212 Ill. 2d at 155; *Steidl*, 177 Ill. 2d at 260; *Jones*, 2012 IL App (1st) 093180, ¶ 63. As

stated, the recantations were not so conclusive that their admission on retrial would likely result in a different outcome. *Coleman*, 2013 IL 113307, ¶ 84. In sum, defendant failed to demonstrate manifest error where the trial court's decision was based on the evidence, was not arbitrary, and was reasonable. *Jones*, 2012 IL App (1st) 093180, ¶ 49. We, therefore, find the trial court properly dismissed defendant's postconviction petition alleging his actual innocence based on newly discovered evidence following the third-stage evidentiary hearing.

¶41

CONCLUSION

¶42 We affirm the third-stage dismissal of defendant's postconviction petition claiming actual innocence where defendant failed to demonstrate the trial court engaged in manifest error.

¶43 Affirmed.