

No. 1-15-0046

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	No. 94 CR 15872
)	
JULIO MENDIOLA,)	Honorable
)	Angela M. Petrone,
Defendant-Appellant.)	Judge, Presiding.

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

ORDER

¶ 1 *Held:* The denial of the defendant's postconviction petition following a third-stage evidentiary hearing is vacated and the matter remanded with instructions. Although we found that the trial court's determination that the recantation by an eyewitness was "not credible" is not manifestly erroneous and that the trial court properly precluded the presentation of evidence that is not newly discovered, cumulative, speculative or not material at the third-stage postconviction hearing, we also found that the trial court erred in precluding the defendant from presenting the testimony of an alleged eyewitness to the murder of which he was convicted.

¶ 2 The defendant, Julio Mendiola, appeals from the third-stage denial of his petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). He argues that

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the trial court erred in: (1) rejecting the recantation testimony of Francisco Carabez; (2) not permitting him to introduce the testimony of Jose Rocha, Bruce Giles, Maria Balderrama, Irving Spergel, Terry Wade, and Francisco Perez; and (3) denying his postconviction petition. For the reasons which follow, we vacate the judgment of the trial court and remand this cause with directions.

¶ 3 The facts leading up to the defendant's conviction for the first degree murder of Manuel Gutierrez and his sentence to 50 years' imprisonment are set forth in detail in this court's decision in *People v. Mendiola*, No. 1-95-2874 (1997) (unpublished order under Supreme Court Rule 23). Consequently, we set forth only those facts necessary to understand the issues raised by the defendant in this appeal.

¶ 4 On May 27, 1994, the victim, Manuel Gutierrez, was a passenger in a vehicle driven by his brother. The vehicle proceeded west on 25th Street in Chicago, but stopped at a stop sign near a funeral home at the corner of 25th Street and Sacramento where a wake was being held for a member of the Latin Kings street gang. Numerous individuals were standing outside the funeral home. When the vehicle stopped at the stop sign, several people began displaying gang gestures and shouting "Flakes" and "King Love." A group of people began chasing after the vehicle and at least two members of the crowd fired shots at the vehicle as it sped away. The vehicle traveled down 25th Street until it crashed at the corner of 25th and Whipple. The four occupants exited the vehicle and three of them escaped. Gutierrez attempted to seek shelter in a grocery store at the corner of 25th and Whipple, but was locked out of the store by one of the store's occupants. The people who had given chase to the car then set upon Gutierrez outside the store, kicking, punching, and otherwise beating him. Ultimately, one individual in the crowd shot Gutierrez several times, and he died several hours later at Mount Sinai Hospital.

¶ 5 The State called Francisco Carabez in its case-in-chief. Carabez testified that he was walking west on the north side of 25th Street just prior to the shooting. He observed the gestures and heard the shouts that the crowd directed at the victim's vehicle. Someone shouted "[s]hoot him," and the defendant, who was standing outside the funeral home, chased after the vehicle and fired a .25 caliber automatic handgun. By the time Carabez reached the corner of 25th and Whipple, Gutierrez had exited the vehicle and people from the crowd were shouting "shoot him, shoot him." The defendant shot Gutierrez five or six times. According to Carabez, the defendant was wearing a hooded sweatshirt, "joggers" with a "Bull" logo, and black gym shoes.

¶ 6 After the shooting, Carabez proceeded to the nearby Mario's Ballroom and told his friend Angelo Torres what he had witnessed. Torres drove Carabez toward the crime scene and Carabez observed the defendant walking on Whipple, wearing the same clothes that he had worn during the shooting. Carabez identified the defendant to Torres. That night, Carabez spoke with Chicago Police Detective March and told him that the shooter weighed approximately 140 pounds and had a dark complexion. One week later, Carabez identified the defendant in a photo array and physical lineup. Carabez identified the defendant in court as the shooter.

¶ 7 Twelve-year-old Maria Balderrama testified that she was playing on the corner of 25th Street and Whipple when the shooting occurred. Her account of events preceding the shooting resembled Carabez's testimony, but her description of the shooter was vague. Balderrama described the shooter as a man who was "not that tall" but "not that short," and "[n]ot that fat and not that skinny." She could not recall what the shooter was wearing or whether he wore a hood, and failed to identify any individual as the shooter in a police lineup. On cross-examination, she stated that she did not get a good look at the shooter and did not see his face.

¶ 8 Angelo Torres testified that he drove Carabez toward the crime scene. According to Torres, Carabez observed the defendant walking a bike with an other individual, and identified

the defendant as the shooter. The following week, Torres identified the defendant in a photo array and physical lineup. Torres also identified the defendant in court.

¶ 9 Detective David March testified that he interviewed 15 to 20 people on the night of the shooting, but that Carabez was the only eyewitness he could find. According to March, Carabez described the shooter as a 20-year-old male white Hispanic, 5'10" in height and weighing 140 pounds, with short black hair, dark complexion, mustache, and goatee. March testified that Carabez indicated that the shooter wore a blue hooded sweatshirt with a white shirt, black warm-up pants with a Bulls logo near a side pocket, and dark-colored gym shoes. Based on Carabez's description, police arrested the defendant one week after the shooting. According to March, the defendant admitted that he was a member of the Latin Kings.

¶ 10 Officer John Naujokas testified that he recovered six .25-caliber shell casings from the scene of the shooting. The State produced the casings at trial. Ernest Warner from the Chicago Police Department's crime laboratory testified as a firearms expert. He stated that the casings recovered by Officer Naujokas were fired from the same gun, and that bullets extracted by the Cook County Medical Examiner from Gutierrez's body were .25-caliber.

¶ 11 Officer Thomas Cepeda testified as an expert in Hispanic gangs in Chicago. He testified that the shooting took place in the "turf" of a specific group of Latin Kings. According to Cepeda, the term "Flake" refers to someone who is not a Latin King, and the term "King Love" is a "battle cry" used by that gang. Cepeda also testified that he had known the defendant for six or seven years and had seen him use Latin King hand gestures and slogans. According to Cepeda, the defendant had admitted to him on several occasions that he was a member of the Latin Kings.

¶ 12 Several defense witnesses who testified that they were near the scene of the shooting stated that the individual who shot Gutierrez was young, husky, chunky and dark-complexioned, wearing a dark hooded sweatshirt. Roberta Garcia Gonzalez testified that she did not see the

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shooter's face, but described him as short and thin. Ramonita Reyes testified that she never saw the shooter's face, but described him as between 5'4" and 5'6" in height, wearing dark pants and a black hooded sweatshirt. Pedro Morales and Ricardo DeSantiago testified that they never saw the actual shooting. Morales described the shooter as husky, short and dark-complexioned, wearing a black hooded sweatshirt and black pants. DeSantiago testified that the shooter was chunky, short, and dark-complexioned, wearing a black hooded sweatshirt. Alvaro Ruiz testified that the shooter was 5'4" or 5'5" in height, dark skinned, stocky, and short, wearing dark clothing. Each of these witnesses testified that the defendant was not the shooter. In addition, Morales, DeSantiago, and Ruiz denied that they were gang members, although DeSantiago acknowledged that he formerly belonged to the Latin Kings.

¶ 13 Francisco Ortega testified that he had known the defendant all his life and that he and Luis Salgado were in the defendant's vehicle drinking beer with him when the shooting occurred. Ortega denied that he belonged to a street gang or that he told Officer Cepeda that he was a Latin King.

¶ 14 The defendant testified that he was 23 years old, approximately 5'11" in height, and weighed 180 pounds. He denied shooting Gutierrez, and testified that he was drinking beer in his car with Ortega and Salgado when the shooting occurred. The defendant admitted that, following his arrest, he gave police officers conflicting accounts of his whereabouts at the time of the shooting. The defendant stated that he had confused his Friday night activities with his Saturday night activities. He also denied that he was ever a member of the Latin Kings.

¶ 15 In rebuttal, Officer Cepeda testified that a crown tattoo on the defendant's shoulder was an insignia of the Latin Kings. He also testified that, in a 1990 booking photo, the defendant's hands were positioned in a gesture employed by the Latin Kings. According to Cepeda, Ortega and DeSantiago both admitted to him that they were members of the Latin Kings.

¶ 16 Officer William Soraghan testified that both the defendant and Ortega had admitted to him that they belonged to the Latin Kings. Officer Lara testified that Ruiz had admitted to him that he belonged to the Latin Kings. The State recalled Detective March, who testified that the defendant identified himself as a member of the Latin Kings on the night of his arrest.

¶ 17 The jury convicted the defendant of first degree murder. Subsequently, the defendant filed a motion for new trial, alleging that Balderrama realized, as she testified, that the defendant was not the shooter and that she apprised an assistant State's Attorney of such. According to the motion, the assistant State's Attorney told Balderrama not to tell defense counsel. The motion also asserted that a newly-discovered eyewitness, Jose Rocha, would offer testimony exculpating the defendant. Copies of Balderrama and Rocha's court-reported statements were attached to the motion. The trial court denied the defendant's motion for a new trial without an evidentiary hearing and sentenced him to 50 years' imprisonment.

¶ 18 The defendant raised four issues in his direct appeal: (1) whether the evidence at trial was sufficient to establish his guilt beyond a reasonable doubt; (2) whether the introduction of "gang evidence" prejudiced the jury and deprived him of a fair trial; (3) whether the trial judge erred in denying his motion for new trial based on newly-discovered evidence without an evidentiary hearing; and (4) whether he was denied a fair trial by the assistant State's Attorney's alleged suppression of Balderrama's exculpatory evidence.

¶ 19 This court affirmed the defendant's conviction and sentence. We found that Carabez's identification testimony was sufficient to prove the defendant's guilt beyond a reasonable doubt and that the gang evidence was both relevant and admissible to prove motive and explain the slogans and gestures that the crowd used prior to the shooting. We observed that Rocha's testimony was cumulative of the testimony of other witnesses who described the shooter as young and short and, therefore, did not warrant a new trial. Additionally, we found that the trial

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court did not abuse its discretion in rejecting Balderrama's proposed testimony, as it appeared to have been in response to leading questions by the defendant's attorney and contradicted the testimony of every other witness. Moreover, Balderrama's statement relating the conduct of the assistant State's Attorney was "highly incredible" and did not constitute material evidence, as her cross-examination at trial "undercut [her] ability to inculpate or exculpate *any* suspect." (Emphasis in original.) *Mendiola*, No. 1-95-2874 (1997) (unpublished order under Supreme Court Rule 23).

¶ 20 The defendant next filed a petition for a writ of *habeas corpus* in the Federal District Court for the Northern District of Illinois. He raised the same claims of error which were rejected by this court in his direct appeal, and proffered the same alleged newly-discovered, exculpatory statements of Rocha and Balderrama discussed *supra*. The district court found that the evidence upon which the defendant relied was neither "newly discovered" nor potentially outcome determinative, and denied the defendant *habeas corpus* relief. *U.S. ex rel. Mendiola v. Carter*, No. 98 C 3183, 1998 WL 748276, at *7 (N.D. Ill. Oct. 21, 1998). On appeal, the judgment of the district court was affirmed. *Mendiola v. Schomig*, 224 F.3d 589, 590 (7th Cir. 2000).

¶ 21 Next, the defendant filed a postconviction petition under the Act, asserting: (1) actual innocence; (2) newly-discovered evidence that he was not a member of the Latin Kings; and (3) newly-discovered evidence impeaching his identification by Torres. He supported his petition with affidavits from Carabez, Sergio Serritella, Balderrama, Bruce Giles, Terry Wade, Francisco Perez, and Irving Spergel. The petition also included two affidavits from the defendant.

¶ 22 In his affidavit, Carabez essentially recanted his trial testimony identifying the defendant as the individual who shot and killed Gutierrez. Carabez attested that he was "less than 10% certain" when he identified the defendant in a photo array and physical lineup, but that the police "pressured" him to identify someone and led him to believe that he would "get in trouble" if he

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did not make an identification. Carabez averred that he testified at trial due to "pressure" from police officers.

¶ 23 Serritella, a private detective, attested that he interviewed Rocha in 2005 and that Rocha told him that the defendant was not the shooter. According to Serritella, Rocha stated that the shooter was an individual named Belsain Rodriguez, who lived across the street from him. Serritella averred that Rocha's wife also claimed to have witnessed Rodriguez commit the offense, but that Rocha and his family "did not want to come forward" due to "fear of gang retaliation."

¶ 24 Balderrama, in her affidavit, "reaffirmed" the representations that she made in the court-reported statement that was included with the defendant's motion for new trial. She attested that she was "absolutely certain" that the defendant "was in no way involved with the shooting."

¶ 25 Bruce Giles, a former member of the Latin Kings, attested that he was in the crowd of people outside the funeral home at 25th Street and Sacramento on the evening of May 27, 1994. Giles averred that shots were fired from a vehicle driving westbound on 25th Street. A man ran into the street and fired at the vehicle. The vehicle crashed and a few passengers fled, but one of them was dragged down by a "group of guys." Giles observed a man discharge a firearm more than four times. According to Giles, the shooter was approximately 18 years old, 5'5" to 5'6" in height, with a dark complexion and a black hooded sweatshirt covering his head. Giles averred that the defendant was not the shooter, and that he did not see the defendant in the area that day. Giles stated that he formerly belonged to the Latin Kings but that the defendant, who he had known since he was 11 years old, "was not in any way involved with the Latin Kings in 1994." Giles asserted that he had not come forward sooner because he feared retaliation by the Latin Kings.

¶ 26 Wade, a counselor at the Pontiac Correctional Center where the defendant was incarcerated, stated in his affidavit that the defendant was not listed in the prison's records as part of a "Security Threat Group."

¶ 27 The defendant stated in his two affidavits that he did not murder Gutierrez and had never met him or heard of him prior to being arrested. The defendant denied walking northbound on Whipple on the day of the shooting, or that he had walked with a bike or had been in the "immediate vicinity" of a bike. The defendant also denied that he had ever been a member of the Latin Kings or any other street gang, and submitted that the tattoo on his back was not a gang tattoo, but signified his "Catholic faith and Mexican national heritage." According to the defendant, the Illinois Department of Corrections characterized his tattoo as "religious, and not gang-related." He attested that he had not been requested to remove or cover the tattoo, and that no other inmates had "objected" to the tattoo. The defendant averred that inmates had "assaulted" him due to his "lack of gang affiliation," and that prison officials did not classify him as a member of a gang-related "Security Threat Group."

¶ 28 In his two affidavits, Perez, a former member of the Latin Kings, identified differences between the defendant's tattoo and typical Latin King tattoos. According to Perez, the facts that the defendant was accosted in prison for not being gang affiliated, was not required to cover his tattoo, and was not listed as a gang member in prison records indicated that the defendant's tattoo does not signify membership in the Latin Kings. He also opined that Officer Cepeda was mistaken when he testified that the defendant was photographed displaying a gang hand gesture.

¶ 29 Spergel, a professor emeritus at the University of Chicago, provided two affidavits. In one affidavit, Spergel attested that he coordinated a research project targeting violent members of street gangs and created a roster of the Latin Kings. As the defendant was not listed on the roster, Spergel opined that the defendant was not a "known shooter or key figure in charge of violence

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for the Latin Kings." In another affidavit, Spergel attested that he led the Gang Violence Reduction Project in the Little Village neighborhood from 1992 to 1997, and that Torres worked for the program in 1994. According to Spergel, Torres was familiar with Chicago police officers involved with the project, including Officer Eugene Schleder. Spergel averred that Torres married "a 10th District police officer," and that he was "overidentified and too closely associated" with the police when he worked for the program.

¶ 30 The postconviction petition included a copy of Torres' marriage certificate to Josephine Anzaldua and a copy of the State's answer to discovery, which listed officers "J. Anzaldua" and "E. Schleger" as possible witnesses in the defendant's case. Other exhibits included articles that identified Torres as a member of the Two Six gang and listed the names of Latin King gang leaders, including an individual named "Juan Mendiola." The postconviction petition also included a copy of a photo of the defendant that had been shown to Carabez and Torres and admitted into evidence at the defendant's trial. On the back of the photo was the name "Juan Mendiola."

¶ 31 The State filed an answer to the defendant's postconviction petition and a "Motion *In Limine* to Bar Matters That Do Not Constitute 'Free Standing and Newly Discovered Evidence of Actual Innocence.'" The State conceded the defendant's right to a third-stage evidentiary hearing addressing Carabez's recantation of his trial testimony.

¶ 32 The defendant filed a motion to take an *in camera* videotaped deposition of Rocha, which the trial court granted. Rocha's deposition was taken in the presence of the trial judge. Rocha testified that he had witnessed the shooting of Gutierrez and that the defendant was not the shooter. He described the shooter as a Mexican boy, age 10 or 12, who was small and had a dark complexion. Rocha stated that he had seen the shooter before but did not know his name or where he lived.

¶ 33 Arguments were held on the State's motion to bar evidentiary material which did not address the defendant's claim of actual innocence. The trial judge granted the motion and allowed only the issue of Carabez's recantation to go forward to a third-stage postconviction hearing. The trial court entered a written order, addressing each of the affidavits submitted by the defendant in support of his postconviction petition and the reasons for barring the testimony of the affiants during a third-stage evidentiary hearing. We address the court's findings as to each affidavit in turn.

¶ 34 As to Serritella's affidavit, the trial court found that his account of statements made by Rocha and his family constituted "vague hearsay" and was "not of such conclusive character that it would probably change the result at retrial."

¶ 35 The trial court found that Balderrama's affidavit contained the same information which the defendant submitted in support of his posttrial motion: namely, that the defendant did not shoot Gutierrez and that she told that to the assistant State's Attorney after her testimony. The same assertions were rejected by the trial court in ruling on the defendant's posttrial motion, which this court affirmed on his direct appeal. *Mendiola*, No. 1-95-2874 (1997) (unpublished order under Supreme Court Rule 23). These claims were also rejected by the United States Circuit Court of Appeals on review of the denial of the defendant's petition for a writ of *habeas corpus*. *Mendiola v. Schomig*, 224 F.3d 589 (7th Cir. 2000).

¶ 36 The trial court found that the averments in Giles' affidavit that the defendant was not the shooter and was not a member of the Latin Kings could have been discovered earlier through the exercise of due diligence, and that they were cumulative and not likely to change the result at retrial.

¶ 37 Addressing the Wade affidavit, the trial court found that the fact that the defendant was not listed as a security threat in prison records was "speculative, immaterial, irrelevant and

remote to whether [the defendant] was a member of the Latin Kings in 1994 when the murder occurred."

¶ 38 As to the defendant's affidavits alleging that he was not a member of the Latin Kings, that his tattoo has religious significance, that he never heard of Gutierrez before he was arrested, did not shoot Gutierrez, and was not walking on Whipple Avenue with a bike at the time of the shooting, the trial court found that they did not present newly discovered evidence.

¶ 39 The trial court found that Perez's affidavit, which stated that the defendant's tattoo "might not be connected" to the Latin Kings because, allegedly, prison authorities had not required the defendant to cover the tattoo and the defendant was attacked in prison after declining to join the Latin Kings, is "speculative, remote, collateral, irrelevant, immaterial and not likely to change the result on retrial." As to Perez's affidavit that, in his opinion, Officer Cepeda was in error when he testified that the defendant was pictured displaying a gang sign, the court found the assertion to be inadmissible, speculative, and not so conclusive as to probably change the result on retrial.

¶ 40 The trial court found that Spergel's opinion that the defendant was not a known shooter or key figure in charge of violence for the Latin Kings was irrelevant because there was no evidence that, in their investigation of the Gutierrez killing, the police were looking for a known shooter or key figure in charge of violence for the Latin Kings. Additionally, the court found that Spergel's opinion regarding Torres' police relationships was irrelevant, and that his "understanding" that Spergel was married to a police officer was immaterial hearsay. As Officer Anzaluda did not testify at trial, and apparently had "minimal" involvement in the case, the court found that the marriage certificate was immaterial.

¶ 41 As to the articles regarding Torres' involvement with the Two Six gang, the trial court found that the material constituted immaterial hearsay that did not establish the defendant's

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innocence. Additionally, the trial court found that the photo which was shown to Carabez and Torres was admitted in evidence at the defendant's trial, and the witnesses testified that they identified the defendant from the photo, not the name on the back.

¶ 42 Regarding Rocha's statements, the trial court found that his testimony could have been discovered prior to trial through the exercise of due diligence, and that his proposed exculpatory testimony was raised by the defendant in support of his posttrial motion and rejected by the trial court. In this court's order affirming the denial of the defendant's posttrial motion, we found that Rocha's proposed testimony was cumulative, inconclusive, not likely to change the outcome on retrial, and could have been discovered prior to the defendant's trial by the exercise of due diligence. *Mendiola*, No. 1-95-2874 (1997) (unpublished order under Supreme Court Rule 23).

¶ 43 The trial court concluded that none of the affidavits contained newly-discovered evidence that was material, noncumulative, or of such a character that would probably change the result on retrial. Consequently, the trial court barred the testimony of each affiant, except for Carabez, at a third-stage evidentiary hearing. We agree with the trial court as to each of the affiants except for Giles.

¶ 44 "[I]n 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. [Citation.] 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, ¶ 96.

¶ 45 Issues that were raised and decided on direct appeal are barred from consideration in a postconviction proceeding by the doctrine of *res judicata*. *People v. West*, 187 Ill. 2d 418, 425 (1999). The trial court denied the defendant's posttrial motion for a new trial based upon the sworn statements of Balderrama and Rocha to the effect that the defendant did not shoot Gutierrez. Its decision in that regard was affirmed on direct appeal. *Mendiola*, No. 1-95-2874 (1997) (unpublished order under Supreme Court Rule 23). As a consequence, we find no abuse of discretion in the trial court's decision to bar the testimony of Balderrama, Serritella, and Rocha at a third-stage evidentiary hearing on the defendant's petition for postconviction relief.

¶ 46 The affidavits of Spergel, Wade, and Perez address only the defendant's membership in the Latin Kings. The information is cumulative of the defendant's trial testimony denying membership in the Latin Kings. Evidence of the significance of the defendant's tattoo could certainly have been discovered earlier through the exercise of due diligence. More significantly, these affidavits contain speculative opinions that are not probative of the defendant's guilt and, when considered along with the trial evidence, are not of a character that would probably lead to a different result on retrial. Therefore, we find no abuse of discretion in the trial court's rejection of the proffered testimony of Spergel, Wade, and Perez in support of the defendant's petition for postconviction relief.

¶ 47 The defendant contends that he presented newly-discovered evidence impeaching the trial testimony of Torres, Carabez's coworker who identified the defendant as the person Carabez said was the shooter. The defendant alleged that he submitted documentation indicating that Torres was a member of the Two Six gang and had previously worked in the Gang Violence Reduction Project, but had been too closely associated with police officers who may have been involved in the defendant's case. However, “[a] distinction is to be drawn between evidence which impeaches a witness in the sense that it affects the credibility of the witness, and evidence

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which is probative in that it presents a state of facts which differs from that to which the witness testified.” *People v. Holzman*, 1 Ill. 2d 562, 568 (1953). The defendant’s new evidence of Torres’ gang membership, his close association with police officers, and his alleged marriage to a police officer who may have investigated the shooting at issue could only have been admitted to discredit and impeach Torres. Consequently, the evidence does not afford a basis for granting a new trial. *Id.*; see also *People v. Smith*, 177 Ill. 2d 53, 82-83 (1997).

¶ 48 The defendant also claims that he was misidentified by Carabez and Torres by reason of the police having shown them a photo of him, on the back of which was the name Juan Mendiola. The trial court found that the photo which was shown to Carabez and Torres was admitted in evidence at the defendant’s trial, and the witnesses testified that they identified the defendant from the photo, not the name on the back. Consequently, the mislabeling contained on the rear of the photo is not newly-discovered evidence.

¶ 49 The trial court did hold a third-stage evidentiary hearing addressed to Carabez’s recantation of his trial testimony. Carabez’s testimony relating to the events preceding the shooting of Gutierrez was consistent with his trial testimony, as was his description of the perpetrator’s clothing. However, he testified that he “didn’t see the person’s face so I wasn’t sure who did the crime.” He stated that he told Torres that he never saw the person’s face, and that he identified the defendant as the shooter from a picture he was shown by the police because the detective told him that “it was the person that did the shooting.” When Carabez viewed the physical lineup, he identified the same man that he had seen in the photo array. According to Carabez, he felt pressured by the police, the prosecutors, and Torres to identify someone despite his doubts. He remembered speaking to Joseph Mahr in 2001 and telling him that he was not certain that the defendant was the shooter. Carabez stated that, when Mahr told him that he was the only person who had identified the defendant as the shooter, he told Mahr that he had been

intimidated by the police. On cross-examination, Carabez admitted that it was not until he was confronted by Mahr in 2001 that he began to believe that he was wrong in his identification of the defendant. He denied ever telling an assistant State's Attorney and Joanne Ryan in 2010 that he did not doubt his identification of the defendant.

¶ 50 Joseph Mahr, a private investigator, testified that he interviewed Carabez in 2001, at which time Carabez expressed uncertainty about his identification of the defendant. He denied ever telling Carabez that he had identified the wrong man or that the defendant was innocent. Mahr admitted that he took a court reporter with him when he interviewed Carabez, but never had the notes of his interview transcribed. He also admitted that Carabez said that no one told him to lie about the defendant.

¶ 51 Luis Pinedo testified that, when he was a law student, he and another law student interviewed Carabez in 2005, and Carabez told them that he did not recognize the shooter's face. According to Pinedo, Carabez stated that, during the line-up, he told the police he only recognized the hoodie that the shooter was wearing and not the shooter's face. He said that the police made him feel as if he would be in trouble if he did not identify someone. Pinedo testified that Carabez also told him that he felt pressured to testify at the defendant's trial. Pinedo stated that he asked Carabez if he would be willing to sign an affidavit, and that, in January 2006, Carabez came to the law school and signed a prepared affidavit.

¶ 52 Joanne Ryan, an investigator for the State's Attorney's office, testified that she interviewed Carabez in 2010 and 2012. In 2010, she and an assistant State's Attorney interviewed Carabez in his home. According to Ryan, Carabez told them that he did not doubt his identification of the defendant as the shooter. She testified that Carabez stated that he was told that the wrong person had been convicted, and he agreed to sign an affidavit because he was told that, if he did, he would not be bothered anymore. She stated that Carabez said that he

identified the defendant in a line-up and was never threatened by the police. She admitted that Carabez told her that, during the line-up, a police officer pointed to the defendant and asked “is that him[?]” Ryan testified that she, along with two assistant State’s Attorneys, interviewed Carabez for a second time in 2012. According to Ryan, Carabez told them that he could not see the shooter’s face. When she inquired as to how Torres was able to identify the defendant if Carabez did not see the shooter’s face, Carabez stated that he saw the shooter at the scene and shortly thereafter, and that he pointed him out to Torres. She stated that Carabez said that, although he had not been threatened into signing an affidavit for the defendant, he was continuously contacted until he agreed to do so. Ryan testified that during this interview, Carabez disavowed his recantation.

¶ 53 Following the evidentiary hearing, the trial court entered a 33-page, single-spaced “Ruling” in which it recounted the trial testimony, the posttrial procedural history of the case, the defendant’s postconviction petition, and the testimony of the witnesses at the third-stage evidentiary hearing. The trial court found Carabez’s recantation in his affidavit and testimony not credible and contradictory. The court did not believe Mahr when he testified that he only told Carabez that he was the only witness to identify the defendant after Carabez stated that he was unsure about his identification. Additionally, the court found Ryan’s testimony to be credible, clear, and not exaggerated. We find no basis upon which to disturb the trial court’s credibility findings.

¶ 54 At a third-stage evidentiary hearing, the trial court acts as the fact finder and determines the credibility of the witnesses and the weight to be given their testimony, and resolves any conflicts in the testimony. *People v. Domagala*, 2013 IL 113688, ¶ 34. We will not disturb the trial court’s determination of these issues unless the determination was manifestly erroneous. *People v. Coleman*, 183 Ill. 2d 366, 384 (1998). Manifest error is error which is clear, plain, and

indisputable. *Coleman*, 2013 IL 113307, ¶ 98; *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009). "[A] decision is manifestly erroneous when the opposite conclusion is clearly evident." *Coleman*, 2013 IL 113307, ¶ 98. In this case, the trial court found that Carabez's recantation testimony was not credible, and based upon the record before us, we are unable to conclude that the finding is manifestly erroneous.

¶ 55 Carabez's trial testimony was corroborated by other trial evidence. His description of the events preceding the shooting of Gutierrez was essentially the same as Balderrama's testimony. He testified that he saw the defendant shoot at the automobile in which Gutierrez was riding with a .25 caliber automatic pistol. Officer Naujokas testified that he recovered six .25 caliber shell casings from the scene of the shooting, and Warner testified that the bullets extracted from Gutierrez's body were .25 caliber. At trial, Carabez testified that, as he and Torres were driving, he identified the defendant as the shooter. Torres testified at trial that Carabez identified the defendant as the shooter as they were driving on Whipple Avenue. Carrabez identified the defendant as the shooter from a photo array, in a physical line-up, and in court during the defendant's trial. From a photo array, in a physical line-up and again in court, Torres identified the defendant as the person that Carabez pointed out to him as the shooter. In 1995, Carabez testified that he saw the defendant shoot Gutierrez. It was not until he was interviewed by Mahr six years later that Carabez stated that he was not sure of his identification of the defendant as the shooter.

¶ 56 Recantation testimony "is regarded as inherently unreliable." *People v. Morgan*, 212 Ill. 2d 148, 155 (2004). Absent extraordinary circumstances, such evidence will not be the basis of a new trial. *Id.*; *People v. Steidl*, 177 Ill. 2d 239, 260 (1997). We find no such extraordinary circumstances in this case.

¶ 57 We found no abuse of discretion in the trial court's rejection of the affidavits of the defendant, Serritella, Balderrama, Spergel, Wade, and Perez, and the sworn statements of Balderrama and Rocha as the basis for a third-stage evidentiary hearing, and we find no manifest error in the trial court's rejection of Carabez's recantation testimony as not credible. If we could end our inquiry, we would affirm the trial court's denial of the defendant's postconviction petition, but there is one issue remaining—Giles' affidavit.

¶ 58 In his affidavit, Giles averred that he witnessed the shooting of Gutierrez. He described the shooter as short, dark-complexioned, and about 18 years of age, which is consistent with the trial testimony of Gonzalez, Reyes, Morales, DeSantiago, and Ruiz. Giles also stated that he has known the defendant since childhood and was certain that the defendant was not the shooter. He asserted that he had not come forward sooner because he feared retaliation by the Latin Kings. The trial court declined to admit Giles' testimony at the third-stage evidentiary hearing, finding that his testimony could have been discovered earlier with due diligence and that his assertion that he did not come forward earlier due to fear of retaliation is illogical, as his testimony would exculpate a fellow member of the Latin Kings. Additionally, the trial court stated that Giles' testimony would be cumulative and not likely to change the result at retrial. We believe, however, that it was error to exclude Giles' testimony from consideration at the evidentiary hearing.

¶ 59 Whether Giles did, or did not, witness the shooting of Gutierrez and whether he did, or did not, come forward with his testimony earlier out of fear of retaliation rests upon his credibility. Credibility assessments require an evidentiary hearing. The credibility of the averments of an individual whose affidavit has been submitted in support of a postconviction petition can only be resolved at a third-stage evidentiary hearing. *People v. Sanders*, 2016 IL 118123, ¶ 42. In addition, Giles' proffered testimony, if credible, would not be cumulative.

¶ 60 Evidence is cumulative "when it adds nothing to what was already before the jury." *Ortiz*, 235 Ill. 2d at 335. Giles' testimony is a first-hand account that directly contradicts Carabez's recanted trial testimony identifying the defendant as the individual who shot Gutierrez. His testimony goes to the ultimate issue—who shot and killed Gutierrez. If on remand Giles' proffered testimony was found credible, evidence of the defendant's innocence at retrial would be stronger when weighed against Carabez's recanted identification, especially in light of the fact that no physical evidence linked the defendant to the shooting. See *id.* at 335-36.

¶ 61 We, therefore, vacate the trial court's denial of the defendant's postconviction petition and remand this matter with directions to conduct a third-stage evidentiary hearing to consider Giles' testimony. If on remand Giles' testimony is found credible, the trial court is instructed to vacate the defendant's conviction and order a new trial.

¶ 62 When a trial court holds an evidentiary hearing on a postconviction petition to consider evidence and weigh the credibility of witnesses, we will disturb its ultimate judgment only if it is manifestly erroneous. *Morgan*, 212 Ill. 2d at 155. Absent Giles' proffered testimony, we would be unable to find that the trial court's denial of the defendant's postconviction petition is manifestly erroneous. Consequently, if on remand, Giles' testimony is found not credible, the trial court is at liberty to reinstate its order denying the defendant's postconviction petition.

¶ 63 As a final issue, the defendant argues that he is entitled to a hearing before a different judge, claiming that the trial court demonstrated bias against him and prejudged his guilt. We disagree.

¶ 64 Trial judges are presumed to be fair and impartial, and a party alleging judicial bias must overcome this presumption. *Eychaner v. Gross*, 202 Ill. 2d 228, 280 (2002). "A judge's rulings alone almost never constitute a valid basis for a claim of judicial bias or partiality. [Citation].

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Allegedly erroneous findings and rulings by a trial court are insufficient reasons to believe that the court has a personal bias for or against a litigant.” *Id.*

¶ 65 In this case, the defendant directs our attention to nothing, other than rulings by the trial court with which he disagrees, to support his claims of bias and prejudice. We have found no error other than the trial court’s failure to allow the defendant to present the testimony of Giles at the third-stage evidentiary hearing. Further, our examination of the record fails to disclose any evidence of either bias or prejudice on the part of the trial judge. Accordingly, we decline the defendant’s request that this case be assigned to a different judge on remand.

¶ 66 Vacated and remanded with directions.