

No. 1-15-1765

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Respondent-Appellee,)	Cook County.
)	
v.)	No. 92 CR 25689
)	
WENDELL ROBINSON,)	Honorable
)	Lawrence E. Flood,
Petitioner-Appellant.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Ellis and Justice Burke concurred in the judgment.

ORDER

- ¶ 1 *Held:* We affirm the circuit court’s judgment dismissing defendant’s petition for postconviction relief; the court’s decision to dismiss defendant’s actual innocence claim based on the finding that trial testimony was more credible and consistent than the newly discovered evidence, was not against the manifest weight of the evidence; the trial court did not abuse its discretion in dismissing defendant’s *Brady* claim because disclosure of the evidence would not have altered the result of the trial.
- ¶ 2 Defendant, Wendell Robinson, appeals from a trial court ruling dismissing his petition for

postconviction relief. In 1994, following a bench trial, defendant was found guilty of murdering Larry Walker. In 2012, defendant filed a petition for postconviction relief arguing that he acquired newly discovered evidence of his actual innocence, and that he was denied a fair trial because the State withheld exculpatory evidence. On March 4, 2015, following a third-stage evidentiary hearing, the circuit court denied defendant's petition in its entirety. For the reasons that follow, we affirm the judgment of the circuit court.

¶ 3

BACKGROUND

¶ 4 In August 1994, following a bench trial, defendant was found guilty of the first-degree murder of Larry Walker. Defendant was sentenced to natural life in prison. Defendant filed a direct appeal challenging the sufficiency of the evidence. We affirmed the conviction in an unpublished order. *People v. Robinson*, 281 Ill. App. 3d 1132 (1996). On March 12, 2012, defendant filed a postconviction petition claiming the existence of newly discovered evidence proving his actual innocence of the murder of Larry Walker, and that the State committed a *Brady* violation by failing to reveal at trial that a witness failed to identify defendant in a lineup and by failing to reveal a memorandum which contained potentially exculpatory or impeaching evidence.

¶ 5 The evidence at trial revealed that on the afternoon of June 9, 1992, Larry Walker was walking with his friend Henry Carlie to purchase narcotics at an open-air drug market at 3918 West Grenshaw Street in Chicago. While they were waiting, a group of drug dealers was robbed and Walker was shot in the back as he ran away through a vacant lot across the street. An ambulance picked up Walker from a liquor store at the corner of Springfield and Roosevelt to take him to Mount Sinai Hospital. Walker died from the gunshot wounds at the hospital several hours later. Henry Carlie testified that he was present when the shooting took place and

defendant looked like the man who shot Walker. James Barnes was the only witness to positively identify defendant as one of Walker's murderers. No other shooters were identified.

¶ 6 On October 6, 1992, detectives interviewed Steven Heard while Heard was in Cook County Jail on an unrelated charge. Heard told police that he was present when Walker was shot and that he recognized defendant as the shooter. However, Heard was unable to point to defendant's photo from the high school yearbook police showed him. Heard was bonded out of Cook County Jail on October 8. After the State's Felony Review attorney reviewed the facts of defendant's case, the State refused to approve charges against defendant for Walker's murder until Heard could be interviewed again.

¶ 7 On October 28, 1992, Steven Heard gave a signed statement to police implicating defendant as Walker's shooter. In his statement, Heard informed police that on June 9, 1992, he was visiting with friends on the front porch of Barnes' home at 3918 West Grenshaw Street. At about 2:30 p.m., Heard saw a group of men approach Barnes, but did not hear the conversation. Heard knew it was around 2:30 p.m. because school buses were driving around the area. Heard saw the men pull guns on Barnes and begin their robbery. While the robbery was taking place, Heard saw two men about to cross Grenshaw Street, when someone in the group of robbers yelled at the two men to stop. Heard could not remember which robber yelled out. Heard saw the men pause and exchange some words with the robbers, and then saw them run southward toward a vacant lot across the street from Barnes' home. Heard saw defendant quickly walk after them and fire a few shots. Heard's statement that he was not coerced into giving the statement, that it was an accurate summary of his recollection, and that he recognized defendant because defendant was then dating a girl that Heard had previously dated. After Heard gave his signed statement, the Felony Review attorney approved charging defendant with Walker's

murder.

¶ 8 On June 12, 1994, police brought Heard involuntarily to defendant's trial on a material witness warrant. The State spoke to Heard and declined to call him as a witness. Defendant's counsel, George Nichols, was given an opportunity to speak privately with Heard. After Nichols spoke with Heard, he also decided not to call Heard as a witness. The court admonished Heard concerning his obligation to appear as a witness when called and then released him from the proceedings.

¶ 9 Trial Testimony of James Barnes

¶ 10 James Barnes testified that in June 1992 he was 22 years old, lived at 3918 West Grenshaw, and sold drugs in the area. Barnes stated that he was on his porch with a number of other individuals on June 9, 1992. At around 2:30 p.m., Barnes saw a black Chevy Malibu "pretty much filled to capacity with a group of individuals," driving down Grenshaw Street towards Springfield. After the car drove past, one of the men on Barnes' porch said the car turned the corner on Fillmore Street. About five minutes after the car passed, a number of individuals came to Barnes' group to purchase drugs. The customers were told they needed to wait ten minutes and they went to a different porch to wait. Barnes recalled that Larry Walker was in that group of customers: "the only one that I remember by name that I was familiar with was Larry Walker. He would come by constantly." About five minutes later, an individual came from the Pulaski side of Grenshaw and approached one of Barnes' fellow drug dealers named Travis, but known as "Pumpkin." The individual "hugged Pumpkin" by holding Travis around the neck and asking him what time it was. Then, two individuals approached from a vacant lot on the west side of Barnes' home. Those two individuals asked Barnes' group if anyone knew "Cecil." Everyone on the porch replied that they did not, which is when the two individuals

drew guns and told Barnes' group to "break themselves," slang for a stick-up or robbery. The individual holding Travis also drew a weapon as two more individuals approached from the south side of the street. Out of the group of robbers Barnes only recognized defendant, Wendell Robinson. Defendant stood on the curb across the street from Barnes, brandishing a "blue steel automatic." The five robbers then took \$40 in cash from Barnes, \$10 from Barnes' colleague Trudy, as well as stealing Travis' gym shoes.

¶ 11 At this time, Larry Walker and Henry Carlie walked from across the street approaching Barnes' porch. As Walker and Carlie approached Barnes' group, Barnes observed defendant turn towards Carlie and tell him not to move. Walker said he had nothing to do with the hold-up and started walking westward on Grenshaw, towards Pulaski. Defendant then turned towards Walker and also instructed him not to move. When defendant told Walker to stop, Walker took off running southward through the vacant lot across from Barnes' home. As Walker ran through the lot, defendant and another individual gave chase while shooting at Walker. The remaining robbers with guns began shooting at the porch and into the air. Defendant and another individual chased Walker through an alley at the back of the vacant lot. Walker turned eastward from the alley, towards Springfield. Barnes then lost sight of Walker. Barnes could not recall if Carlie was running or still crouched behind a car. While people were shooting, a school bus pulled up to drop children off. Barnes yelled out to stop shooting so that he could gather his niece and nephew from the bus to take them inside the home. The shooting abated while Barnes took the children inside. He returned outside to his porch some ten minutes later and the shooting did not resume. Police approached Barnes on a number of occasions later, attempting to gather information following the shooting. When police interviewed Barnes on June 24, 1992, he initially told detectives he knew nothing of the incident and did not implicate defendant. Barnes

testified that he did not give defendant's name to police because defendant was still on the streets, and Barnes feared for his life and his family's lives. Barnes told police that Walker and Carlie approached his porch prior to the shooting and that Walker and Carlie regularly purchased cocaine and heroin from him. Barnes testified that he was a member of the Gangster Disciples at the time of the shooting and that his gang had a code of not testifying at trial against either fellow or rival gang members. At approximately 6:30 a.m. of the day Barnes testified at defendant's trial, a member of the Gangster Disciples approached Barnes at the Illinois Department of Corrections asking why Barnes was going to court. Barnes replied that he "was going for my appeal." After that, Barnes was approached by three individuals he believed belonged to the Vice Lords, a rival gang defendant also belonged to. Barnes subsequently testified that prior to his testimony at defendant's trial, Barnes' mother informed Barnes that she received a phone call from a person telling her that Barnes should not say anything and should not testify in front of a jury. On cross-examination, Barnes admitted that prior to June 9, 1992, he had a case pending in Cook County circuit court on a charge of unlawful use of a weapon. Subsequently, Barnes was convicted and received six years in the Illinois Department of Corrections. Barnes was taken into custody for that offense on September 2, 1992, and was incarcerated at the Cook County Department of Corrections. The following day police interviewed Barnes, and it was then that Barnes first implicated defendant as one of Walker's shooters. Barnes testified that he finally implicated defendant as one of Walker's shooters because Barnes thought of how his niece or nephew could have been killed at that time, and that police told him defendant was in custody so Barnes believed "no harm would come to me or my people."

¶ 12 Testimony of Detective Baiocchi

¶ 13 On September 30, 1992, detective Baiocchi spoke with Barnes. Detective Baiocchi

testified it was then that Barnes first gave police Steven Heard's name as a possible witness. Barnes stated Heard was on the porch with him at the time of the shooting. On October 6, 1992, police brought Barnes to view a photo array and a lineup. Police showed Barnes a high school yearbook with names blocked off. Barnes pointed to defendant's yearbook photo when asked to identify any of Walker's shooters. Barnes was then shown a lineup of five individuals. Barnes identified defendant from the lineup. Barnes then spoke with a State's Attorney named Joseph Magats, and Barnes gave a signed statement. On cross-examination, detective Baiocchi confirmed that on October 9, 1992, Henry Carlie viewed a lineup that Robinson was present in, and that Carlie did not make a positive identification at that lineup.

¶ 14 Trial Testimony of Henry Carlie

¶ 15 Henry Carlie testified he and Walker were together on Grenshaw just prior to when Walker was shot. Carlie testified that at the time of defendant's trial he was 42 years old and that he had known Larry Walker for a couple of years prior to Walker's murder. Carlie met Walker at Independence Hall while there for treatment for heroin and cocaine addiction. Carlie explained how he had served in the navy from 1970-72 and that Walker was a close friend of his, who was also a former service member. On June 9, 1992, at about 2:30p.m., Carlie and Walker drove Walker's truck to Springfield and Grenshaw, and parked on Springfield. They exited the truck and walked northbound towards Grenshaw. They then turned on Grenshaw and walked westward in order to purchase heroin, but then stopped in the middle of the block when they heard some person yell "police." Walker and Carlie sat on the front stairs of an abandoned building. Carlie saw a drug dealer coming back, so Carlie began to walk to the curb when Walker told him that something didn't look right. Carlie recalled hearing someone announce a stick-up after Walker said things didn't look right. Then, Carlie "saw the defendant point his

weapon at [Carlie], and he said, don't run." In Carlie's view, defendant appeared to be holding a 9 mm automatic. After the man with the gun told Carlie not to run, Walker yelled out that they had nothing to do with it. When Carlie saw the man with the gun point his weapon at Walker, Carlie made his exit to run away eastward by crouching down under some parked cars. At that point, Carlie lost sight of Walker. Carlie then ran to Springfield where he started running southward. It was then that Carlie spotted Walker running in the alley behind the vacant lot. Walker had a spot on his shirt that grew bigger as he approached Carlie. Walker told Carlie "that MF shot me." Carlie then helped Walker over to a laundromat where he leaned Walker against the side of the building. Carlie went inside and called 911. Meanwhile, Walker had walked around the corner and made his way into the liquor store next to the laundromat. Carlie found Walker lying on the ground of the store. Police arrived shortly thereafter and Walker was taken to the hospital in an ambulance. Carlie spoke with a female officer after Walker was taken to the hospital. At defendant's trial, officer Marian McCullough testified she received a call around 2:40 p.m. on June 9, 1992, that a man was shot and that when she arrived at Springfield and Roosevelt, she saw a man being taken into an ambulance. She further testified that she spoke with Carlie there. Carlie testified he did not know James Barnes and had not spoken to Barnes prior to June 9, 1992. Carlie further testified that he was shown a lineup in 1992, though he could not remember if he was shown the lineup on October 9, 1992. It was adduced at trial that Carlie viewed the same lineup as Barnes. Carlie was asked whether he indicated that the defendant was the man who pointed the gun at him and shot Walker and Carlie replied "absolutely positive." However, after the court asked Carlie to take a closer look at defendant, Carlie stated that he could not say absolutely positively that defendant was the shooter. Carlie testified that defendant "looks like the person" who shot Walker.

¶ 16 The State, in its closing argument, contended that Barnes made a credible identification of defendant as Walker's shooter: "I don't believe that Mr. Barnes had anything to gain. He certainly had everything in the world to lose to testify against Mr. Barnes, he had everything in the world to lose by coming forward initially and he had more to lose by testifying before your Honor than he had to gain." The trial court agreed and found Barnes' testimony concerning his identification of defendant credible: "It is obviously a question of credibility and I believe the testimony of Barnes and I cannot find any sufficient motivation for him to come in and lie against Mr. Robinson." The court found defendant guilty of the first degree murder of Larry Walker. On September 22, 1994, the court sentenced defendant to the mandatory minimum sentence: natural life in prison. We affirmed defendant's conviction on appeal.

¶ 17 Postconviction Proceedings

¶ 18 On March 12, 2012, defendant filed a postconviction petition under 735 ILCS 5/122-1 (West 2012) arguing that he had newly discovered evidence proving his actual innocence. In support of his petition, defendant attached the affidavits of Steven Heard, Xavier Cox, and the video recorded statement of James Barnes (the only witness to positively identify defendant as Walker's shooter). The transcript of the video statement demonstrates Barnes recanted his trial testimony. Steven Heard stated defendant was not present at the shooting and Xavier Cox's affidavit supported defendant's position that defendant was not the shooter. During discovery on September 12, 2013, the State tendered to the defense a memorandum dated July 16, 1994 (the "July 1994 Memo"). ASA Maria McCarthy wrote the July 1994 Memo to memorialize a meeting between Heard and ASA Andrews. In this appeal, defendant argues that the State violated his right to a fair trial by failing in its obligation under *Brady v. Maryland*, 373 U.S. 83 (1963) to disclose exculpatory evidence based on the State's communications with Steven Heard.

The July 1994 Memo indicated Heard previously spoke with Andrews and told Andrews that both he and Barnes concocted the story implicating defendant. The memo also noted Heard contradicted himself and that during the conversation told Andrews that he lied when he said that he and Barnes made up the story:

“During the conversation, Heard was asked about an earlier conversation between [ASA Andrews] and Heard, during which Heard had stated that he and James Barnes made up the story implicating Robinson so that they, Heard and Barnes, would be allowed to leave the police station. Heard now stated that this was not true; that he and Barnes did not concoct a story.”

¶ 19 The July 1994 Memo went on to note Heard’s statement that Heard was not present during the shooting and that Barnes was not present at the shooting. On September 30, 2013, defendant’s postconviction counsel contacted defendant’s trial counsel, Nichols, regarding defendant’s 1994 trial. Unfortunately, Nichols was extremely ill at the time and had no recollection of defendant’s case. However, the Cook County Public Defender’s office retained Nichols’ case files. Defendant’s postconviction counsel reviewed Nichols’ files about defendant and did not find the July 1994 Memo or any reference to exculpatory or impeaching statements made by Heard or Carlie. On November 18, 2013, defendant filed a motion to supplement the record in support of his *Brady* claim to include the July 1994 Memo. On January 27, 2014, Nichols passed away. Due to the advanced nature of his illness, Nichols was unable to provide an affidavit or other statement regarding his representation of defendant. On March 5, 2014, the court granted a third-stage evidentiary hearing on defendant’s claim of actual innocence and began to rule on the *Brady* violation. The court initially found defendant could not support his claim of a *Brady* violation because Heard was made available to Nichols and that because

Carlie's trial testimony indicated Carlie was unsure of his identification of defendant, the record did not support a *Brady* violation. However, the defense then informed the court that it supplemented the *Brady* claim to include the July 1994 Memo and that the court did not address this issue. The court agreed and set a date to supplement or amend its ruling. On May 6, 2014, the court denied the State's motion to dismiss, finding a third-stage evidentiary hearing was required on the entire *Brady* violation issue as well as the claim of actual innocence.

¶ 20 Evidence Submitted During Defendant's Postconviction Evidentiary Hearing

¶ 21 I. Video Recorded Interview of James Barnes

¶ 22 On April 17, 2010, defendant's postconviction counsel conducted a video recorded interview of James Barnes where Barnes recanted his trial testimony. The trial court viewed this recording on its own and the recording was admitted into evidence. The recording was not included in the record on appeal, though a transcript was. Barnes did not testify at defendant's postconviction proceedings, and was never subjected to cross-examination about the contents of his 2010 video recorded interview. In the interview, Barnes testified he was selling drugs on June 9, 1992, and that the vacant lot on the 3900 block of West Grenshaw Street was an open-air drug market. He explained that around the time school buses were dropping children home from school, about four or five robbers approached from different sides of the street as well as from the alley by the vacant lot, and that the robbers were bearing weapons. Barnes said the robbers approached his neighbor "Trudie," and that Barnes was standing on his porch alone. Barnes heard the men saying they were sticking-up Trudie. He stated that people began to scatter when they saw the men brandishing weapons, but that he never heard anyone yell "call the police." Barnes then told defendant's postconviction counsel that as the robbers appeared, a school bus came to drop off his niece and nephew and that the robbers allowed him to take the children into

the home. In this video interview, Barnes stated the shooting began shortly after the school bus pulled away and he had already gotten his niece and nephew into their home. Barnes stated he saw a colleague run from the middle of the street, that gunshots started then, and that he ducked and covered behind his porch when he heard the gunshots. After the shooting stopped, Barnes saw a man lying in the middle of the street, that the ambulance came within a few minutes to pick up the body, and that he saw defendant standing in front of defendant's aunt's house across the street from Barnes' home.

¶ 23 Postconviction counsel read to Barnes the statement he gave to police in 1992, to which Barnes shook his head and said "that's not what I told them." Barnes claimed that detectives wanted him to corroborate their story and fed him details of how defendant was the shooter. Barnes stated that police told him to say a black Malibu with five people inside drove past his house prior to the robbery and shooting, but that it was actually a green Malibu. Although later in the interview Barnes stated it was not a Malibu at all that drove past, but a Chevy Nova. Barnes explained that he finally corroborated the State's story because he was worried that with police repeatedly coming to him and asking him questions, that his fellow gang members would suspect him of cooperating too much and beat him to death. Counsel asked Barnes if he knew Larry Walker, and Barnes replied "I knew of him. I didn't know him per se." When asked if Walker was a regular customer Barnes replied: "He was a customer. I wouldn't say a regular." Barnes then stated he knew Walker by the nickname "Pumpkin." Earlier in the interview, Barnes explained: "I don't even know a Travis," and denied that anyone stole \$10 and gym shoes from Travis on June 9, 1992. Barnes told counsel that he corroborated the State's version of the shooting because he felt that police would continue to harass him and even put the case on him. He said that he "had no reason to fear [defendant]" at the time of trial and that he "never knew if

[defendant] owned a gun.” Barnes remained adamant that he saw defendant standing across the street from his house after the shooting, that he did not see defendant with a gun, that he did not see defendant chase anybody, and that defendant was not the person who shot Larry Walker.

¶ 24

II. Steven Heard’s Affidavit and Testimony

¶ 25 On March 13, 2011, Heard gave an affidavit recanting the statements he made in the October 28, 1992 interview with police. Heard testified at defendant’s postconviction proceedings on November 5, 2014. Heard testified he was selling drugs on the 3900 block of West Grenshaw Street all day on June 9, 1992 and a shooting occurred, but he could not recall the time of the shooting. Just before Walker’s murder, several individuals were selling drugs with Heard and several more were acting as security while other people lined up to purchase drugs. As Heard was walking toward the alley he could hear people screaming that there was a robbery going on. Heard went back toward the line of people waiting to purchase drugs, when he saw two people he thought were robbers run toward the vacant lot in the direction of Springfield Avenue. Heard saw several people shooting and running, but stated he never saw defendant on that block of Grenshaw that day. He stated that when he was in Cook County jail, two detectives took him aside to speak with him and he saw Barnes in the waiting area. Heard said Barnes told him that detectives could help them in their cases if they identified defendant as Walker’s shooter. According to Heard, Barnes told him that defendant was not connected with their “crew,” so they might as well lie and back up the police’s story. Heard recalled detectives showing him a high school yearbook, but could not recall if defendant’s picture was in it. He explained that detectives told him to name defendant else they would implicate Heard as Walker’s murderer. Heard recalled police coming to take him to court on June 12, 1994. Heard remembered speaking with Nichols, but could not recall anything about the conversation. Heard

later met with ASA Andrews in a library. Heard said that Andrews told him to testify and that Andrews could put Heard away for a long time if Heard did not. Heard explained he did not know who shot Walker and he did not see defendant that day. Heard stated that he told Andrews he did not know anything else.

¶ 26 During his testimony, Heard was shown a copy of his 2011 affidavit. Heard confirmed that it was a true and correct copy, and the court admitted Heard's affidavit as evidence. Heard explained how he came forward with his affidavit in 2011 because he didn't realize that his 1992 statement given to police directly led to defendant being charged for Walker's murder. In his affidavit, Heard explained that his statement signed on October 28, 1992 was false, and that he gave the current statement freely and willingly.

¶ 27 III. Affidavit of Xavier Cox

¶ 28 The affidavit of Xavier Cox was entered into evidence during the evidentiary hearing, but Cox did not testify in open court and was not subject to either direct or cross-examination under oath. Defendant's postconviction counsel contacted Cox in December 2010, while Cox was incarcerated. Although Cox did not testify at defendant's trial, he claimed to be present at the time of Walker's murder. In his affidavit, Cox explained that he knew of defendant and that defendant was not present on the 3900 block of West Grenshaw Street at the time of the shooting. Cox was selling drugs that day and he recalled seeing a grey Monte Carlo drive by. He saw three individuals leave the car, and he knew two of them as "Nut and Swany," but not the third. Cox heard people yell out the code for robbery or police, and saw "Nut and Swany" run east on Grenshaw before he heard a few gunshots. Cox explained that he was only coming forward with this affidavit now because in 2010 he overheard a fellow inmate talk about his case and Cox recalled that he was present for that shooting because he sold drugs on that block of

Grenshaw in June 1992. Cox stated that prior to 2011 no one interviewed him regarding the case. Cox affirmed that he gave the affidavit freely and was not threatened or promised anything in exchange for his testimony.

¶ 29

Trial Court Ruling

¶ 30 At closing arguments on January 29, 2015, defendant's counsel argued defendant's actual innocence as well the failure of the State to disclose exculpatory evidence: "When Mr. Heard told the assistant state's attorney, when he admitted that it was a lie, the statement that he signed and he also implicated James Barnes in that, the State had a duty to inform defense counsel right then and there, and they did not." Defendant's claim was not simply that the memo was exculpatory, but that the State failed to disclose impeachment evidence and that the July 1994 memo corroborates the State knew of the impeachment evidence. Defendant's counsel also addressed whether defendant met his burden under *Brady* to prove the state failed to disclose exculpatory evidence to defendant's trial counsel, Nichols:

"The only other thing I would add about the Brady violation is that -- I understand that it's our burden, but there were no ASAs that appeared at this hearing to tell your Honor whether they ever told Mr. Nichols that Mr. Heard admitted he lied. And if you look at the entire record, there's absolutely not one shred of evidence to suggest that Mr. Nichols knew that Steven Heard had admitted that he lied, nothing. And given that, I would say that we've met our burden of showing by a preponderance that it is more likely than not that the State withheld Mr. Heard's admission, and Mr. Heard -- Robinson deserves a new trial in this matter."

¶ 31 The trial court issued its ruling on May 4, 2015, denying defendant's petition for postconviction relief in its entirety. The court found defendant failed to meet his burden to prove

his actual innocence by a preponderance of the evidence. The court found defendant's witnesses and Barnes' videotaped recantation lacked credibility. The court explained how each claim of evidence of actual innocence lacked credibility and that certain pieces of new evidence contradicted each other. The court gave little weight to Cox's affidavit because Cox failed to come forward for almost two decades, and because Cox did not testify as a witness under oath and subject to cross-examination. The court also found Barnes' recantation was not credible because it contained a number of inconsistencies, contradicted other testimonies, and was not subject to cross-examination. Finally, the court found Heard's testimony and affidavit contained a number of contradictions, including how Heard identified "J-Dog, Turtle, and Pumpkin" as the shooters. The court also found defendant failed to establish a *Brady* violation. The court found it was not clear whether or not the memo was turned over to defendant. The fact that the memo was not in Nichols' file does not conclusively establish the memo was never turned over. The court found the July 1994 Memo was "hardly exculpatory," and "it is logical to conclude that whether or not the memo was turned over, Mr. Herd [*sic*] would have told Mr. Nicholas [*sic*] about the interview in light of the police report accounts of his statement earlier in the case in which he implicated Wendell Robinson." The court also found that no matter which side called Heard he would have been subject to impeachment based on the contents of this memo. And it is clear that neither side wanted to call him as a witness in this case. On June 1, 2015, defendant filed his notice of appeal from the trial court's May 4, 2015 ruling.

¶ 32

ANALYSIS

¶ 33 Under Illinois' Post-Conviction Hearing Act (Act)(725 ILCS 5/122-1 (West 2012)) any imprisoned person may initiate postconviction proceedings by claiming a substantial denial of his or her rights under the Constitution, or by presenting newly discovered evidence of actual

innocence. Defendant sought postconviction relief under the Act claiming two grounds for relief: newly discovered evidence of actual innocence; and, the State violated his right to a fair trial by not complying with its disclosure obligations under *Brady*. The “Act provides a three-stage process for adjudication of postconviction petitions [citation].” *People v. Carter*, 2013 IL App (2d) 110703, ¶ 74.

“If the petitioner makes the requisite substantial showing that his constitutional rights were violated, he is entitled to a third stage evidentiary hearing. [Citation.] At such a hearing, the circuit court serves as the fact finder, and, therefore, it is the court’s function to determine witness credibility, decide the weight to be given testimony and evidence, and resolve any evidentiary conflicts.” *People v. Domagala*, 2013 IL 113688, ¶ 34.

In the present case, the trial court granted a third-stage evidentiary hearing on both the issue of newly discovered evidence of actual innocence and the *Brady* violations. For defendant to succeed in his claim that he was deprived of due process of law by the prosecution’s suppression of favorable evidence, in violation of *Brady*, defendant must prove three things: (1) the State suppressed evidence either willfully or inadvertently; (2) the undisclosed evidence is favorable to the accused; and (3) that defendant was prejudiced by the lack of disclosure because the evidence was material to guilt or punishment. *People v. Beaman*, 229 Ill. 2d 56, 73-74 (2008).

¶ 34 Following the evidentiary hearing, the trial court dismissed both claims for postconviction relief. Defendant appeals from both the ruling on his claim of actual innocence and his claim of a *Brady* violation. “After an evidentiary hearing where fact-finding and credibility determinations are involved, the circuit court’s decision will not be reversed unless it is manifestly erroneous.” *People v. English*, 2013 IL 112890, ¶ 23. A court’s ruling is

manifestly erroneous if the decision “is palpably erroneous and wholly unwarranted” (*Frankenthal v. Grand Trunk Western R. Co.*, 120 Ill. App. 3d 409, 415 (1983)), or “when the opposite conclusion is clearly evident [citation] *** or appears to be unreasonable, arbitrary, and not based upon the evidence. [Citation.]” *Gabrenas v. R.D. Werner Co., Inc.*, 116 Ill. App. 3d 276, 285 (1983).

¶ 35 I. Defendant’s Claim of Newly Discovered Evidence of Actual Innocence

¶ 36 Defendant argues the trial court’s denial of his claim of actual innocence was not based on the evidence, was arbitrary, and unreasonable. For newly discovered evidence to warrant a new trial, the evidence must be: (1) sufficiently conclusive to probably change the result on retrial; (2) material and not cumulative; and (3), must have been discovered after the trial and be of such nature that defendant could not have discovered the evidence by exercising due diligence. *Carter*, 2013 IL App (2d) 110703, ¶ 75. Defendant argues he sufficiently presented newly discovered evidence of actual innocence based on the recantations of James Barnes and Stephen Heard, and the affidavit of Xavier Cox. On the issue of newly discovered evidence of actual innocence, the State conceded the evidence was newly discovered but contested its materiality.

¶ 37 Of the three, only Barnes testified at defendant’s original trial, but only gave his recantation through a video recorded interview with defendant’s attorneys. Though both Heard and Cox provided affidavits entered into evidence, only Heard testified at the evidentiary hearing and was subject to cross-examination.

“[A] new trial is warranted if all of the facts and surrounding circumstances, including the new evidence, warrant closer scrutiny to determine the guilt or innocence of the defendant. [Citation.] Requests for a new trial based on newly

discovered evidence are not looked upon with favor by the courts and must be closely scrutinized. [Citation.]” *Id.*

Here, the trial court conducted a third-stage evidentiary hearing where it found the new testimonies and recantation lacked credibility. “[C]redibility and factual determinations will not be reversed unless they are manifestly erroneous.” *Id.* ¶ 76. For the reasons that follow, we find the trial court’s ruling that defendant did not present credible evidence of actual innocence was not manifestly erroneous.

¶ 38 The trial court found that “recantation evidence is regarded as inherently unreliable and untrustworthy,” relying on our supreme court’s finding in *People v. Steidl* that “recantation of testimony is regarded as inherently unreliable, and a court will not grant a new trial on that basis except in extraordinary circumstances.” *People v. Steidl*, 177 Ill. 2d 239, 260 (1997). Defendant argues the State relies on inapposite case law for the proposition that recantations are inherently unreliable. Specifically that *People v. Morgan*, 212 Ill. 2d 148 (2004), and *People v. Gonzalez*, 407 Ill. App. 3d 1026 (2011), are both distinguishable from the present case. However, Defendant’s argument that it is not a recognized general principle of Illinois law to regard recantation testimony as inherently suspect is without merit. Defendant’s argument ignores this court’s holdings and our supreme court’s repeated rulings that “recantations are inherently unreliable.” *People v. Steidl*, 142 Ill. 2d 204, 254 (1991); see also *People v. Marquis*, 344 Ill. 261, 265 (1931) (“Recanting testimony is regarded as very unreliable, and a court will usually deny a new trial based on that ground where it is not satisfied that such testimony is true.”); *People v. Beard*, 356 Ill. App. 3d 236, 242 (2005) (“recantations are regarded as inherently unreliable, and a trial court will not grant a new trial on that basis except in extraordinary circumstances. [Citation.] Because recantation testimony is inherently suspect, it is treated with

caution and is not sufficient to require a new trial absent proof the witness's earlier testimony was perjured. [Citation.]”). Defendant further argues that even if recantation evidence is inherently unreliable, that extraordinary circumstances exist in his case justifying a new trial. However, the purpose of an evidentiary hearing is for the trial court to assess the credibility of the witnesses and “determine whether the new evidence was of such conclusive character that it would probably change the result on retrial.” *Carter*, 2013 IL App (2d) 110703, ¶ 77.

¶ 39 Defendant argues Barnes’ recantation is credible because Barnes consistently stated defendant was not the shooter, and that Barnes’ inability to recall numerous details did not fatally undermine his credibility. Defendant further argues the trial court erred in its finding that Heard’s affidavit lacked credibility because the court failed to explain which portions of Heard’s statements were contradictory. However, the trial court did not commit manifest error in its finding that Heard’s testimony at the evidentiary hearing and Barnes’ recantation were unreliable. The trial court noted Heard implicated “Pumpkin” as one of the shooters, and that Heard said he did not recall telling detectives he was with Barnes the day of the shooting. We note how at trial, “Pumpkin” was named Travis and was a member of Barnes’ group that was robbed. In Barnes’ recantation, Barnes stated “Pumpkin” was Walker’s alias, that he did not know a Travis, and that this Travis was never robbed on June 9, 1992. Heard stated that defendant was never present at the 3900 block of West Grenshaw the day of the shooting, but in Barnes’ recantation, Barnes recalled defendant standing in front of his aunt’s home. Heard also testified at the third-stage evidentiary hearing that Barnes was not present the day of the shooting and that Heard was present, even though Heard previously told ASA Andrews that he wasn’t present for the shooting and had no idea where Barnes was. Moreover, Barnes’ trial testimony indicated Walker was a regular customer of his, but in Barnes’ recantation he stated that Walker

was not a regular customer. These pieces of evidence, when considered together, demonstrate just some of the discrepancies between various witness' recantation evidence that the trial court relied on to determine that defendant did not prove his actual innocence claim by a preponderance of the evidence. Defendant additionally argued the trial court reviewed but gave little weight to Xavier Cox's affidavit. However, defendant failed to argue the trial court committed any error in giving Cox's testimony little weight. Defendant made only the general argument that "the circuit court appears to have considered each piece of new evidence individually and determined that each individual witness's testimony would not likely change the outcome at trial." This argument in no way explains why the court erred in finding Cox's affidavit specifically lacked credibility.

¶ 40 As to defendant's argument the trial court erred by considering each piece of new evidence individually and failed to consider the new evidence in light of the trial evidence, we find it is without merit. Though the trial court individually listed how each piece of new evidence was unreliable, the court conducted comparative analysis noting contradictions between the new testimonies, how the recantations contradicted trial testimony, and overall how all the recantation evidence lacked a coherent timeline of events whereas the trial testimony was far more consistent. In Barnes' recantation, Barnes adamantly maintained that Walker's body was lying in the middle of Grenshaw Street, but both Carlie and officer McCullough testified to Walker's body being taken into an ambulance from a completely different street. Carlie testified that Walker made his way toward Springfield from Grenshaw and managed to get to a liquor store at the corner. Officer McCullough testified to seeing Walker's body being taken into an ambulance on the corner of Springfield and Roosevelt, only one block southwest of the 3900 block of Grenshaw. Further, Barnes' trial testimony included him seeing Walker run southward.

Defendant maintains that even though Barnes' recantation and Heard's testimony were replete with references to how they could not recall details of what occurred, and that they also contradict in many regards, that the trial court erred in finding the testimonies lacked the credibility of the testimonies at defendant's trial. Defendant's burden on appeal is to prove that the trial court's determination at the third-stage evidentiary hearing was manifestly erroneous. *Carter*, 2013 IL App (2d) 110703, ¶ 76. The trial court explained the testimonies offered at the evidentiary hearing contained numerous contradictions and explained it found the trial testimony more credible. We cannot say the trial court did not base its decision on the evidence or that the trial court's decision was arbitrary or unreasonable or that the opposite conclusion was clearly evident.

¶ 41 Defendant further argues that *People v. Ortiz* supports his argument for a new trial. *People v. Ortiz*, 235 Ill. 2d 319 (2009). In *Ortiz*, the defendant was convicted of first degree murder and filed multiple postconviction petitions. In his third postconviction proceeding, the defendant offered testimony of his actual innocence, but the trial court rejected the defendant's petition for retrial because it found the newly discovered evidence was merely cumulative. However, our supreme court found that "[t]he trial court's finding that [the] testimony was cumulative of other evidence was manifestly erroneous." *Ortiz*, 235 Ill. 2d at 336. The court found that the new testimony contradicted trial testimony and should have been weighed against the trial testimony: "it added to what was before the factfinder." *Id.* "The factfinder will be charged with determining the credibility of the witnesses in light of the newly discovered evidence and with balancing the conflicting eyewitness accounts." *Id.* at 337. However, the trial court in the present case did not find the newly discovered evidence was cumulative. Instead, the trial court evaluated defendant's claims of actual innocence, weighed the evidence in light of

trial testimony, and found the trial testimony more credible. As such, we cannot say that the opposite conclusion is clearly evident.

¶ 42 II. Defendant's Claim the State Violated his Right to Fair Trial Under *Brady*

¶ 43 Defendant argues the State violated his right to a fair trial when it failed to disclose to defendant a memorandum which contains information that Heard told a prosecutor his statement implicating defendant was false and that he and Barnes made up the story implicating defendant as the person who shot the victim in this case. The trial court held that it was not clear whether the report was turned over to defense counsel. The evidence shows the report was not in defense counsel's file. However defendant has cited no cases to support his argument that the absence of the report in defense counsel's file is proof that it was never tendered. We note defendant has the burden of proof in this case. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006) ("Throughout the second and third stages of a postconviction proceeding, the defendant bears the burden of making a substantial showing of a constitutional violation."). The trial court found that defendant did not sustain his burden of proof. We cannot say a contrary conclusion is clearly evident. *Gabrenas*, 116 Ill. App. at 285. Therefore, we find the trial court's finding is not against the manifest weight of the evidence.

¶ 44 The State argued that the evidence was not material even if it was not turned over. We agree that disclosure of the memo and Heard's testimony at trial would not have changed the outcome of defendant's trial because Heard contradicted himself on the issue of whether he made up the story implicating defendant. Under *Brady*, a defendant's Constitutional right to fair trial requires the prosecution to tender, upon request, any evidence favorable to the accused. *Brady*, 373 U.S. at 87. The trial court denied defendant's claim of a *Brady* violation because the July 1994 "memorandum is hardly exculpatory to the petitioner," and "it is logical to conclude that

whether or not the memo was turned over, Mr. Herd [*sic*] would have told Mr. Nicholas [*sic*] about the interview in light of the police report accounts of his statement earlier in the case in which he implicated Wendell Robinson.” Because defendant’s *Brady* claim “requires applying established law to the facts, including those elicited at the evidentiary hearing,” our review encompasses whether the trial court’s decision was manifestly erroneous. *Id.* at 73. A decision is manifestly erroneous when the opposite conclusion is clearly evident. *Gabrenas*, 116 Ill. App. at 285. Nonetheless, we may uphold the judgment of a trial court for any reason called for in the record, regardless of whether the trial court considered those grounds. *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 97 (1995). As noted above, it is necessary for defendant to show that the evidence the State withheld was material to guilt or punishment for defendant’s claim that his right to a fair trial under *Brady* was violated. *Beaman*, 229 Ill. 2d 56, 73-74. Withheld exculpatory evidence is material under *Brady* if it had a reasonable probability of altering the result of defendant’s trial had the evidence not been withheld. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). If the withheld evidence was not material, then defendant’s *Brady* claim fails and it becomes unnecessary to our disposition to resolve whether the State suppressed the evidence.

¶ 45 Providing guidance after its decisions in *Brady v. Maryland* and *United States v. Bagley* (*United States v. Bagley*, 473 U.S. 667 (1985)), the Supreme Court of the United States clarified in *Kyles v. Whitley* how withheld exculpatory evidence is material under *Brady* if the withheld evidence undermines the confidence in the trial court’s verdict had it not been suppressed. *Kyles*, 514 U.S. at 435. The Court explained:

“The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he

received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A ‘reasonable probability’ of a different result is accordingly shown when the government’s evidentiary suppression ‘undermines confidence in the outcome of the trial.’ ” *Id.* at 434 (quoting *Bagley*, 473 U.S. at 678).

Whether the suppression of evidence undermines confidence in the outcome of the trial turns on whether “had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *People v. Harris*, 206 Ill. 2d 293, 311 (2002) (citing *Kyles*, 514 U.S. at 434; *Bagley*, 473 U.S. 667). A defendant can show he was deprived of his due process rights under *Brady* if he can show that the “favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” *Kyles*, 514 U.S. at 435. It is not enough for defendant to show that “evidence allegedly withheld was merely cumulative of other evidence presented at trial which challenged [the witness’s] credibility.” *Harris*, 206 Ill. 2d at 312. Rather, the materiality of the withheld evidence turns on if the evidence had not been suppressed and evaluating that evidence in light of all the other evidence introduced at trial, if the confidence in the verdict was undermined. *Kyles*, 514 U.S. at 435.

¶ 46 Defendant argues the State deprived him of his right to a fair trial under *Brady v. Maryland* when the State failed to disclose to defense ASA Andrews’ conversation with Heard in which Heard recanted his signed statement and informed Andrews that Barnes only implicated defendant in order to get out of jail. The trial court made two findings on defendant’s *Brady* claim: first, that it was logical to infer that Heard informed defendant’s trial counsel of his earlier statements to Andrews that he and Barnes concocted the story implicating defendant; second, that even if trial counsel had not been made aware and the memo was not disclosed, that the memo was not exculpatory material under *Brady*. The State argues that any possible

impeachment by Heard of Barnes would not change the result of defendant's trial because Heard later told Andrews that he did not know where Barnes was on the day of the shooting.

Furthermore, in the same memo it is noted that Heard said that the statements implicating the defendant were not made up.

¶ 47 We first turn to the defendant's argument that the failure to disclose Heard's communications was a material *Brady* violation. Defendant argued that the July 1994 Memo was exculpatory and impeached Barnes identification. Heard's statement that Barnes told him to implicate defendant based on police encouragement would provide evidence impeaching Barnes. Such evidence would go to Barnes' motive to be truthful in his identification of defendant as Walker's shooter. In *Giglio v. United States*, the Supreme Court of the United States found that where

“the Government's case depended almost entirely on [one witness'] testimony; without it there could have been no indictment and no evidence to carry the case to the jury. [That witness'] credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it.” *Giglio v. United States*, 405 U.S. 150, 154–55 (1972).

Here, defendant argued that Heard could impeach Barnes' credibility at trial by providing evidence of motive to lie, and Barnes' credibility as a witness was the central issue in defendant's case. The trial court considered Heard's ability to impeach Barnes based on Barnes' location, and observed Heard was not a credible witness on that matter because Heard directly impeached his statement impeaching Barnes' motive to lie as well as Barnes' location, thus addressing defendant's distinct argument concerning Heard's ability to impeach Barnes based on

Barnes' motive to be truthful in his testimony implicating defendant. Heard's potentially exculpatory statement to Andrews was thus impeached by Heard's later statement to Andrews that the earlier statement was a lie, as corroborated by the July 1994 Memo.

¶ 48 Our review of whether the State violated defendant's rights under *Brady* does not evaluate each individual piece of evidence in isolation, but rather turns on whether confidence in the verdict is undermined when viewing the new evidence in light of all evidence, both newly discovered and presented at trial. *Kyles*, 514 U.S. at 435. While defendant makes the unique argument that Heard's statement impeached Barnes by disclosing Barnes' motive to lie, Heard himself stated that he lied when he told Andrews that Barnes concocted the story. Even if Heard did testify at trial consistent with the conversation cited in the memo about Barnes' motive to lie, it still does not undermine confidence in the verdict because Heard contradicts himself concerning Barnes' motive to lie in the same conversation. At the conclusion of the postconviction hearing, the trial court concluded that Heard would have been impeached and was not a good witness for either side; therefore, since the content of the July 1994 memo would not have changed the outcome of the trial it was not material. Therefore, defendant failed to prove his *Brady* violation. *Id.* Defendant argues that had defense counsel Nichols been informed of Heard's impeachment of Barnes, Nichols could have questioned Barnes about why he chose to come forward with his identification of defendant months after the crime. However, the July 1994 Memo clearly states that Heard told Andrews that he was lying when he told Andrews that he and Barnes concocted a story to just get out of jail. Even if Heard was able to testify as to one statement impeaching Barnes' motive to be truthful, Heard himself impeached that very impeachment. Another ASA documented that Heard impeached himself. Even had both conversations detailed in the July 1994 Memo been disclosed to Nichols, defendant has not

shown that these disclosures would have undermined confidence in the verdict against him because Heard's potential as an impeachment witness of Barnes was tainted by Heard's impeachment of his own ability to impeach Barnes' location and Barnes' motive to be truthful.

¶ 49 Another compelling reason why disclosure of the statement would not have changed the outcome of the trial is because if Heard had testified favorably for defendant, his written statement identifying defendant as the murderer could then be used as substantive evidence against defendant.

“Admissibility of Prior Inconsistent Statements. In all criminal cases, evidence of a statement made by a witness is not made inadmissible by the hearsay rule if

(a) the statement is inconsistent with his testimony at the hearing or trial, and

(b) the witness is subject to cross-examination concerning the statement, and

(c) the statement--

(1) was made under oath at a trial, hearing, or other proceeding, or

(2) narrates, describes, or explains an event or condition of which the witness had personal knowledge, and

(A) the statement is proved to have been written or signed by the witness.” 725

ILCS 5/115-10.1 (West 2016).

Therefore, not calling Heard prevented the State from admitting Heard's signed statement into evidence as substantive evidence against defendant because that statement was inadmissible under the hearsay rule so long as Heard did not testify. Had Nichols called Heard as a witness, Nichols would have helped the State's case by allowing the State to introduce more evidence identifying defendant as Walker's murderer. Therefore, confidence in the verdict is not

undermined and suppression of Heard's statement to ASA Andrews was not a material *Brady* violation. *Harris*, 206 Ill. 2d at 311.

¶ 50 Defendant contends that if Nichols had been informed of Heard's statement to ASA Andrews, it would have been ineffective assistance of counsel for Nichols to not call Heard as a witness. We disagree. Heard's written and signed statement identifying defendant as the shooter was not admitted into evidence at defendant's trial. The State was only able to bring one witness, Barnes, to positively identify defendant as Walker's killer at trial. Contrary to defendant's suggestion that it was ineffective assistance of counsel to not call Heard, Nichols would have arguably provided ineffective assistance of counsel had he called Heard because that would have helped strengthen the State's case. The prior written and signed statement by Heard would be admitted as substantive evidence against his client. Thus, any suppression of Heard's statements to Andrews could not have been *Brady* violations because they would not have altered the result of the trial and the statements are therefore immaterial. Viewing the evidence as a whole, defendant has not met his burden to show that the State's failure to disclose Heard's statements to Andrews would have undermined confidence in the verdict convicting defendant. *Kyles*, 514 U.S. at 435.

¶ 51 In sum, the trial court's judgment that defendant failed to sufficiently show his actual innocence was not manifestly erroneous. We also hold the trial court's finding that defendant failed to prove the memo was not turned over to defense counsel is not manifestly erroneous. Finally, even if the memo had not been turned over to defense counsel we would still affirm the trial court's judgment dismissing defendant's claim that the State denied him his right to a fair trial under *Brady* because disclosure of that evidence would not have changed the outcome of the trial and therefore the evidence was not material.

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¶ 52

CONCLUSION

¶ 53 For the foregoing reasons the judgment of the circuit court of Cook County is affirmed.

¶ 54 Affirmed.