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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	FOR PUBLICATION January 07, 2026 2:00 PM
v	No. 373427 Wayne Circuit Court
NORMAN ALLEN, Defendant-Appellant.	LC No. 00-006067-01-FC

Before: TREBILCOCK, P.J., and PATEL and WALLACE, JJ.

TREBILCOCK, P.J.

Defendant contends newly discovered evidence warrants setting aside his conviction for second-degree murder and related firearm charges. The trial court found that the evidence was not newly discovered and denied his second motion for relief from judgment. Because the trial court erroneously conflated the gatekeeping requirement of MCR 6.502(G)(2)—that the evidence in question "was not discovered before" defendant filed his first motion for relief from judgment—with the *Cress*[1] test and the good-cause and actual-prejudice requirements of MCR 6.508(D), we vacate and remand for further proceedings consistent with this opinion.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This case arises from a fatal shooting that occurred in March 2000, following a fight involving multiple people at the home in Detroit where defendant lived. The victim and his friend, William Perry, drove to the home in an attempt to retrieve Perry's car, which they believed Marla Reed stole. A physical altercation ensued outside the home between Perry, Reed, and several others.

Two versions of the events emerged. One view is that defendant retrieved a gun from inside the house and, upon his return, fired two shots into the air. The crowd dispersed, with the victim and Perry running across the street. Defendant then fired three more shots. One struck and

[1] *People v Cress*, 468 Mich 678; 664 NW2d 174 (2003).

killed the victim. The other version is that defendant was upstairs when the shooting occurred and was not involved.

Defendant was ultimately charged with first-degree murder, MCL 750.316; felon in possession of a firearm, MCL 750.224f; and possessing a firearm during the commission of a felony, MCL 750.227b. He elected a bench trial. One of the issues at trial concerned witnesses' observations and how Detroit Police Department ("DPD") officers treated them during their investigation. Two witnesses, Sallie Jackson and Perry, both identified defendant as firing the first two shots into the air, but neither saw who ultimately shot the victim. And despite meeting defendant for the first time on the day in question, Perry testified that the fatal shots sounded as though they had been fired from the same gun as those that defendant fired into the air, and that the shooter's voice sounded like defendant's. Other witnesses provided testimony inconsistent with statements they gave to police, and there was contradictory testimony regarding whether defendant was inside or outside of the home when the shooting occurred. Finally, Jackson and two residents of the home testified that DPD officers threatened and assaulted them during their respective interrogations.

The trial court ultimately found defendant guilty of second-degree murder, MCL 750.317, and the two firearm charges. Defendant unsuccessfully challenged his convictions numerous times, including through a 2006 pro se motion for relief from judgment.[2] Then, in February 2023, defendant moved for relief from judgment a second time, arguing newly discovered evidence entitled him to a new trial. The trial court denied defendant's motion, determining that none of his evidence was newly discovered. Defendant filed for delayed leave, which this Court granted.

II. SUCCESSIVE MOTION FOR RELIEF FROM JUDGMENT

Defendant argues the trial court committed reversible error by denying his second motion for relief from judgment. We agree.

A. OVERVIEW OF LEGAL FRAMEWORK

Generally, criminal defendants are "limited to 'one and only one motion for relief from judgment' with regard to a conviction." *People v Lemons*, 514 Mich 485, 514; 22 NW3d 42 (2024), quoting MCR 6.502(G)(1). MCR 6.502(G)(2) creates a limited exception, however; it sets forth three bases on which a criminal defendant may bring a second or subsequent such motion:

> (a) a retroactive change in law that occurred after the first motion for relief from judgment was filed,

[2] *People v Allen*, unpublished per curiam opinion of the Court of Appeals, issued November 19, 2002 (Docket No. 233206), p 3-4; *People v Allen*, 468 Mich 915; 662 NW2d 750 (2003); *People v Allen*, unpublished order of the Court of Appeals, entered April 27, 2007 (Docket No. 273478); *People v Allen*, 480 Mich 859 (2007).

> (b) a claim of new evidence that was not discovered before the first such motion was filed, or
>
> (c) a final court order vacating one or more of the defendant's convictions either described in the judgment from which the defendant is seeking relief or upon which the judgment was based.

In addition, a court may waive the provisions of MCR 6.502(G) "if it concludes that there is a significant possibility that the defendant is innocent of the crime." MCR 6.502(G). This rule thus imposes an initial procedural threshold that a criminal defendant must overcome before a court can consider the defendant's entitlement to relief under MCR 6.508. See, e.g., *Lemons*, 514 Mich at 514, 522; *People v Owens*, 338 Mich App 101, 114-115; 979 NW2d 345 (2021). More specifically, a defendant must demonstrate that the motion's basis falls within one of the exceptions enumerated in MCR 6.502(G)(2) or that there is a significant possibility of innocence. See *Owens*, 338 Mich App at 114-115; *People v Swain*, 288 Mich App 609, 635-636; 794 NW2d 92 (2010).[3] However, a pro se movant need not specify the subpart of MCR 6.502(G)(2) on which he or she is relying. *Owens*, 338 Mich App at 115-117.

Upon satisfaction of the procedural threshold set forth in MCR 6.502(G), a defendant must then establish entitlement to relief under MCR 6.508. See *Owens*, 338 Mich App at 114-115; *Swain*, 288 Mich App at 635-636. That rule generally prohibits a court from granting relief on grounds that a defendant could have raised on appeal or in a previous motion for relief from judgment, unless the defendant proves: (1) "good cause for failure to raise such grounds on appeal or in the prior motion," MCR 6.508(D)(3)(a), and (2) "actual prejudice from the alleged irregularities that support the claim for relief," MCR 6.508(D)(3)(b). See also *Lemons*, 514 Mich at 514. Like MCR 6.502(G), a court may waive the "good cause" requirement "if it concludes that there is a significant possibility that the defendant is innocent of the crime." MCR 6.508(D). And as to the second requirement, MCR 6.508(D)(3)(b) defines what constitutes "actual prejudice" in various circumstances.

When a defendant claims newly discovered evidence warrants relief, a court may grant relief if the defendant meets four factors set forth in *People v Cress*: "(1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial." 468 Mich 678, 692; 664 NW2d 174 (2003) (quotation marks and citation omitted). As our Supreme Court has explained, *Cress*'s first three prongs relate to the good-cause requirement of MCR 6.508(D)(3)(a), and the fourth prong relates to the actual-prejudice requirement of MCR 6.508(D)(3)(b). *Lemons*, 514 Mich at 515 n 14.

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[3] Both *Owens* and *Swain* involved the interpretation of previous versions of MCR 6.502(G)(2) that only included the exceptions for (1) retroactive changes in law and (2) newly discovered evidence. The version in effect when defendant filed his second, successive motion includes a third exception, see 510 Mich cxxxii, that does not apply here.

After the court has "review[ed] the motion and response, the record, and the expanded record, if any," it must then "determine whether an evidentiary hearing is required. If the court decides that an evidentiary hearing is not required, it may rule on the motion or, in its discretion, afford the parties an opportunity for oral argument." MCR 6.508(B). If, however, "the court decides that an evidentiary hearing is required, it shall schedule and conduct the hearing as promptly as practicable. At the hearing, the rules of evidence other than those with respect to privilege do not apply." MCR 6.508(C). In addition, the court "may direct the parties to expand the record by including any additional materials it deems relevant to the decision on the merits of the motion. The expanded record may include letters, affidavits, documents, exhibits, and answers under oath to interrogatories propounded by the court." MCR 6.507(A). Even so, admissibility remains a pertinent consideration because, as discussed further in this opinion, when deciding whether newly discovered evidence warrants granting a new trial under *Cress*, the reviewing court is required to consider—among other things—the evidence that would be "admitted" on retrial. See *People v Johnson*, 502 Mich 541, 571 & nn 10, 18; 918 NW2d 676 (2018). In other words, if the *substance* of the defendant's "newly discovered" evidence would be inadmissible on retrial, then it could not "make[] a different result probable on retrial." See *Cress*, 468 Mich at 692.

B. PROCEDURAL THRESHOLD

1. MCR 6.502(G), MCR 6.508(D), AND *CRESS*

Defendant contends the trial court erroneously denied him relief from judgment, without an evidentiary hearing, on the basis that none of the evidence supporting his successive motion was newly discovered. "This Court reviews for an abuse of discretion a trial court's decision on a motion for relief from judgment." *Owens*, 338 Mich App at 113. "An abuse of discretion occurs if the court does not select a reasonable and principled outcome," *People v Simon*, 339 Mich App 568, 580; 984 NW2d 800 (2021), or "it makes an error of law or operates within an incorrect legal framework," *People v Langlois*, 325 Mich App 236, 240; 924 NW2d 904 (2018). Any related factual findings are reviewed for clear error, which will be found when the reviewing court is left with a definite, firm conviction that the lower court made a mistake. *Johnson*, 502 Mich at 565. Finally, this Court reviews the interpretation and application of court rules de novo. *People v Pendergrass*, 348 Mich App 81, 85; 17 NW3d 425 (2023). Under MCR 6.508(D), "[t]he defendant has the burden of establishing entitlement to the relief requested."

Here the trial court did not distinguish between the threshold procedural requirements of MCR 6.502(G)(2), on the one hand, and *Cress* and the entitlement-to-relief concerns of MCR 6.508(D), on the other hand, when it concluded that none of the evidence was "newly discovered." After determining that none was newly discovered under MCR 6.502(G)(2)—which should have procedurally barred defendant's successive motion and ended the trial court's inquiry—the trial court nonetheless conducted a cursory good-cause analysis under MCR 6.508(D)(3) without any consideration of the *Cress* factors.[4] Indeed, the trial court expressly

[4] The trial court also appeared to apply a former version of MCR 6.502(G), instead of the version in effect at the time of defendant's successive motion. This error is ultimately harmless here, however, because both versions allow successive motions based on claims of new evidence not discovered before the initial motion. See *Owens*, 338 Mich App at 121; MCR 2.613(A).

(and incorrectly) asserted that *Cress* is entirely inapplicable when analyzing successive motions for relief from judgment.

Despite generally noting that "[a] fundamental misunderstanding of the new evidence standard infects the trial court's entire opinion," defendant focuses his appellate argument on the disputed evidence under the *Cress* factors—but that only becomes pertinent after overcoming the procedural bar set forth in MCR 6.502(G) in the first instance. The prosecution, for its part, correctly identifies MCR 6.502(G)'s procedural threshold. However, it does not meaningfully address this aspect of defendant's successive motion, instead focusing on admissibility and the *Cress* factors.

Given the parties' briefing, the trial court's erroneous application of the applicable legal standards, and recurrent confusion regarding the interplay amongst MCR 6.502(G), MCR 6.508(D)(3), and the *Cress* factors relative to successive motions for relief from judgment based on claims of new evidence, we clarify the correct legal framework. As set forth next, the plain language of MCR 6.502(G)(2) and other existing authority is clear and unmistakable—to overcome MCR 6.502(G)(2)'s procedural hurdle relative to a successive motion for relief from judgment based on a claim of new evidence (and for which the trial court has not waived the provisions of MCR 6.502(G) on the basis of the defendant's innocence), a defendant need only demonstrate that the evidence in question "was not discovered before" the defendant filed his or her first motion for relief from judgment. This step is distinct from evaluating whether evidence was *discoverable*, an inquiry that relates to *Cress*'s third factor and only becomes relevant if the defendant first overcomes the procedural threshold of MCR 6.502(G)(2).

To demonstrate why, we begin with the relevant language of MCR 6.502. See *Owens*, 338 Mich App at 114. It allows a defendant to "file a second or subsequent motion based on . . . a claim of new evidence that was not *discovered* before the first such motion was filed[.]" MCR 6.502(G)(2)(b) (emphasis added). This language is plain and unambiguous, and nothing in it—or the remaining provisions of MCR 6.502—further limits this exception to evidence that *could have been* discovered before the first motion. *People v Traver*, 502 Mich 23, 31; 917 NW2d 260 (2018) (explaining that interpreting courts read the rule's "individual words and phrases in their context within the Michigan Court Rules").

Bolstering this plain-text reading is a comparison with MCR 6.508(D)(3), which contains a discoverability limitation. *Traver*, 502 Mich at 31. As discussed, it generally prohibits a court from granting the requested relief if the motion "alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion" for relief from judgment. Indeed, the third *Cress* factor requires a defendant to show, as part of the good-cause requirement of MCR 6.508(D)(3)(a), that the defendant "could not, using reasonable diligence, have discovered and produced the evidence at trial . . . ." *Lemons*, 514 Mich at 514-515 & n 14 (quotation marks and citation omitted). Interpreting MCR 6.502(G)(2)(b) to require successive motions for relief from judgment to be based on discoverable evidence, rather than discovered evidence, would conflate the procedural and substantive analyses set forth in the court rules and improperly render the language of MCR 6.508(D)(3) surplusage. See, e.g., *People v Comer*, 500 Mich 278, 287; 901 NW2d 553 (2017) ("We must give effect to every word, phrase, and clause and avoid an interpretation that would render any part surplusage or nugatory."). It also would require us to set aside the statutory-interpretation principle providing that the inclusion

of language in one selection can mean an intent to exclude similar language in another. *People v Robar*, 321 Mich App 106, 121; 910 NW2d 328 (2017).

This interpretation comports with existing authority. "*Cress* does not apply to the *procedural threshold* of MCR 6.502(G)(2), as the plain text of the court rule does not require that a defendant satisfy all elements of the test." *People v Swain*, 499 Mich 920, 920 (2016) (emphasis added). That is, a trial court making a threshold determination of whether MCR 6.502(G)(2) procedurally *bars* a defendant's successive motion may not consider the *Cress* factors as part of that analysis. If—and only if—a defendant overcomes that procedural barrier, a trial court then examines the *Cress* factors when determining the defendant's entitlement to relief under MCR 6.508(D)(3). See, e.g., *Lemons*, 514 Mich at 514-522 (determining the defendant's successive motion overcame the procedural threshold set forth in MCR 6.502(G)(2) and then applying the *Cress* factors to analyze the defendant's entitlement to relief); *Johnson*, 502 Mich at 565-566 (same).

Given that MCR 6.502(G)(2)(b) permits a successive motion to be filed based on "a *claim* of new evidence that was not discovered before the first such motion was filed," this procedural hurdle is not a particularly difficult one to overcome. (Emphasis added.) Indeed, our Supreme Court has repeatedly held that successive motions for relief from judgment were based on claims of new evidence not discovered before the first motions—and, thus, not procedurally barred under MCR 6.502(G)(2)—where the evidence was "not previously presented to the trial court." *People v Wagle*, 508 Mich 950, 950 (2021); *People v McClinton*, 501 Mich 944, 944 (2017). And this Court too has said that "MCR 6.502(G) concerns a threshold showing, not the defendant's ultimate burden." *Owens*, 338 Mich App at 114. For that reason, for example, this Court noted in *Swain* that, based on the unambiguous language of MCR 6.502(G)(2), "there [was] merit" to the defendant's argument that the rule merely requires "new evidence that was not discovered." 288 Mich App at 634 (quotation marks omitted). And if the defendant makes a sufficient offer of proof that the evidence in question might not have been discovered before his or her first motion for relief from judgment was filed, an evidentiary hearing may be necessary to resolve the issue. See *People v Gross*, 509 Mich 875 (2022).

In sum, to overcome MCR 6.502(G)(2)'s procedural hurdle relative to a successive motion for relief from judgment based on a claim of new evidence (and for which the trial court has not waived the provisions of MCR 6.502(G) on the basis of the defendant's innocence), a defendant need only make some offer of proof that the evidence in question "was not discovered before" the defendant filed his or her first motion for relief from judgment.

2. DEFENDANT HAS PRESENTED NEWLY DISCOVERED EVIDENCE

With this understanding, we turn to the trial court's conclusion that the evidence on which defendant based his successive motion was not newly discovered.

Defendant based his second motion for relief from judgment on the following evidence, which he claimed was newly discovered: (1) Boyd's eyewitness account; (2) Jackson's recantation; (3) Sanford's implication of another perpetrator; and (4) evidence of Hughes's misconduct. We address each claim of newly discovered evidence in turn, which—because defendant's motion for relief from judgment was not his first (and he does not claim on appeal that

the trial court should have waived the procedural threshold)—he must demonstrate was discovered after his first motion, filed in 2006. MCR 6.502(G)(2)(b); *Swain*, 499 Mich at 920.

Boyd's eyewitness account. Boyd described his eyewitness account in a 2015 affidavit, relevant portions of which were tested via polygraph that same year. In the affidavit, Boyd claims that he saw defendant inside the home at the time of the shooting. He also contends he witnessed a man involved in the original fight, "Jay," retrieve a gun from inside the home and take it outside shortly before the shots were fired. In the trial court's view, Boyd's exculpatory eyewitness account was not "newly discovered" for purposes of MCR 6.502(G)(2) because he was present when the shooting occurred and, thus, "able to truthfully attest to [his] version of the events" before defendant's initial motion for relief from judgment. This reasoning, however, improperly conflates the analysis under MCR 6.502(G)(2) with *Cress*'s third factor—i.e., whether defendant could "have discovered and produced the evidence at trial" using "reasonable diligence," *Cress*, 468 Mich at 692—and thus constitutes an abuse of discretion, see *Langlois*, 325 Mich App at 240 ("A trial court abuses its direction when it makes an error of law or operates within an incorrect legal framework.").

When reviewed without considering the *Cress* factors, Boyd's eyewitness account satisfies the "claim of new evidence" threshold of MCR 6.502(G)(2)(b). See *Wagle*, 508 Mich at 950. Neither the affidavit nor polygraph results existed until 2015, Boyd did not testify at trial, and nothing in the record indicates that defendant otherwise discovered the substance of Boyd's eyewitness account before filing his first motion for relief from judgment.

Takeia Sanford's affidavit. Takeia Sanford—who was not present when the shooting occurred—attested in her 2018 affidavit that Jay's sister told her (1) she saw Jay, not defendant, shoot the victim; and (2) Jay later expressed remorse about the shooting. Concluding that Sanford's affidavit was not discovered after defendant's first motion, the trial court reasoned:

> The issue/claim is not newly discovered, merely the person upon which the defendant has relied to bring it forth. Defendant was afforded the opportunity to present a defense during trial and present evidence negating his involvement, which included the ability to raise all available defenses including those herein now presented by this witness.

This analysis erroneously focuses on whether defendant discovered the general defense the evidence supports, rather than the evidence itself, before his initial motion. Notably, Sanford did not complete her affidavit until 2018, and nothing in the record indicates that defendant otherwise discovered the contents of the affidavit before his original 2006 motion for relief from judgment. Again, because the affidavit itself did not exist when defendant filed his first motion for relief from judgment, it necessarily constitutes a piece of "new" evidence for purposes of MCR 6.502(G)(2). See *Wagle*, 508 Mich at 950. By holding otherwise, the trial court abused its discretion. *Langlois*, 325 Mich App at 240.

Jackson's recantation. Although much of Jackson's 2019 affidavit reiterates her trial testimony, it also includes a recantation of her earlier identification of defendant as the shooter. Jackson's recantation did not exist until 2019 and thus constitutes "new evidence" for purposes of MCR 6.502(G)(2). See *Wagle*, 508 Mich at 950. Nevertheless, without making any clear

threshold determination of whether such evidence satisfied MCR 6.502(G)(2), the trial court held that "the affidavit of Sallie Jackson consists of recantation testimony that cannot be considered newly discovered evidence." The trial court went on to hold that it would "disregard" Jackson's recantation solely on credibility grounds, stating: "Here, the recanting affidavit is unreliable due to its nature. The content and quality of the statements made by this witness cause the Court to question her truthfulness, sincerity and motive." As noted, if the trial court meant that Jackson's 2019 affidavit was not "new evidence" for purposes of MCR 6.502(G)(2), it was incorrect. And insofar as the trial court might have meant that recantation testimony can *never* serve as "newly discovered" evidence that warrants granting a new trial under *Cress*, such a ruling would also be erroneous. See *Johnson*, 502 Mich at 578-579 (holding that, although courts should approach recantation testimony "with suspicion," such testimony can nevertheless warrant granting a new trial under an application of the "reasonable juror" standard). The trial court further erred inasmuch as it disregarded *Johnson*'s "reasonable juror" standard and made unilateral credibility determinations regarding Jackson's recantation testimony. See *id*. at 568 ("If a witness's lack of credibility is such that *no* reasonable juror would consciously entertain a reasonable belief in the witness's veracity, then the trial court should deny a defendant's motion for relief from judgment. However, if a witness is not patently incredible, a trial court's credibility determination must bear in mind what a reasonable juror might make of the testimony, and not what the trial court itself might decide, were it the ultimate fact-finder.").[5] The trial court, therefore, abused its discretion by tethering its ultimate decision to errors of law. See *Langlois*, 325 Mich App at 240.

Hughes's misconduct. Finally, defendant points to Jackson's affidavit, as well as an affidavit from Anthony Legion, as new evidence of misconduct by one of the DPD officers purportedly involved in defendant's case, Officer Donald Hughes. Defendant posits that these two affidavits corroborate Jackson's recantation and certain trial testimony regarding DPD officers' misconduct towards witnesses in his case.

In Jackson's affidavit, she claims Officer Hughes induced her to falsely implicate suspects in two separate cases—one of which was defendant's—through threats of incarceration and physical violence. Though Jackson testified at trial regarding the DPD's interrogation techniques relative to defendant's case, she did not identify Officer Hughes, specifically, or testify as to his behavior in the second case. The trial court disregarded Jackson's affidavit without consideration of whether it constituted new evidence. In our view, Jackson's 2019 affidavit provides new evidence of Officer Hughes's alleged pattern of misconduct to which she did not previously testify, and there is no indication defendant otherwise discovered this evidence before filing his 2006 motion. And yet again, we note that the affidavit did not exist when defendant filed his first motion for relief from judgment. Accordingly, for the purely procedural analysis under MCR 6.502(G)(2), Jackson's affidavit constituted new evidence.

Legion, for his part, did not testify at trial and is not directly involved in defendant's case. However, he alleges in his 2022 affidavit that his and his co-defendant's convictions were vacated

[5] Although defendant was convicted following a bench trial, not a jury trial, *Johnson*'s "reasonable juror" standard still applies. See *Johnson*, 502 Mich at 549 (noting that Johnson had been convicted following a bench trial).

after a Wayne County Conviction Integrity Unit report detailed Officer Hughes's suppression of evidence in a case in which Legion was a defendant. The trial court disregarded Legion's affidavit without determining whether it constituted new evidence, stating instead that the affidavit "has nothing whatsoever to do with defendant's case" and that "any connection alleged by defendant is rendered moot due to the lack of merit" of the other affidavits with which defendant supported his motion. We cannot agree. Several witnesses at defendant's trial testified regarding DPD officers' interview-related misconduct. And, during defense counsel's closing argument, he relied in part on Jackson's own claims of officer misconduct to discredit her inculpatory testimony against defendant. Jackson's affidavit expressly connects Officer Hughes's alleged misconduct to defendant's case—in it, she claims Officer Hughes conducted her interrogation, during which he threatened and "beat" her when she initially did not identify defendant as the shooter. Through her allegations of similar treatment in an unrelated case, Jackson's affidavit further indicates Officer Hughes had a pattern of pressuring witnesses to falsely implicate criminal defendants. Within this context, we cannot conclude that Legion's affidavit—which alleges a similar pattern of misconduct by Officer Hughes—has "nothing" to do with defendant's case. In any event, like Jackson's affidavit, Legion's affidavit constituted new evidence of Officer Hughes's misconduct under MCR 6.502(G)(2). Thus, the trial court erred by holding that it would "disregard the evidence" entirely.

Conclusion. The evidence on which defendant based his second motion for relief from judgment was not discovered until after he filed his initial motion in 2006—in fact, it appears that most of it did not yet *exist* at that time—and defendant therefore met the procedural threshold set forth in MCR 6.502(G). The trial court erred to the extent it concluded to the contrary, which necessarily led to an abuse of discretion.

C. ENTITLEMENT TO RELIEF FROM JUDGMENT

Because the trial court did not address defendant's entitlement to relief under MCR 6.508(D) and *Cress* in light of all of the properly considered evidence, we remand for it to do so in the first instance, including by conducting an evidentiary hearing if necessary under MCR 6.508(C).

We offer a few points of further clarification regarding the legal principles applicable to determining whether actual prejudice occurred. When analyzing actual prejudice under MCR 6.508(D)(3)(b) and the fourth *Cress* factor, the trial court must begin by determining whether the proffered evidence is credible. *Johnson*, 502 Mich at 566-567. However, "[a] trial court's function is limited when reviewing newly discovered evidence, as it is not the ultimate fact-finder; should a trial court grant a motion for relief from judgment, the case would be remanded for retrial, not dismissal." *Id*. at 567 (emphasis omitted). As such, "a trial court's credibility determination is concerned with whether a *reasonable juror* could find the testimony credible on retrial." *Id*. If a reasonable juror could find the evidence credible, the court must then consider that evidence's impact "in conjunction with the evidence that would be presented on retrial." *Id*. at 571. In this regard, a trial court must consider both the evidence admitted at the original trial and the evidence that would be admitted at a new trial. *Id*. at 571-572.

As to credibility determinations involving lay witnesses' recantations, courts properly view such recantations "with suspicion." *Id*. at 578. See also *Lemons,* 514 Mich at 517-518

(distinguishing between recantation testimony from expert witnesses and lay witnesses). However, a trial court cannot disregard such evidence as incredible merely because it is a recantation. Rather, as with other newly discovered evidence, the trial court "should consider all relevant factors tending to either bolster or diminish the veracity of the witness's testimony." *Johnson*, 502 Mich at 567. By way of example only, relevant considerations could include the strength of the witness's original testimony, whether the record evidence supports the recantation, whether the recantation testimony is more credible than the witness's original testimony, and the importance of the witness's original testimony to the defendant's conviction. *Id*. at 578-579.

D. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, defendant argues the trial court abused its discretion by failing to address his alternative claim that defense counsel was ineffective for failing to identify and call Boyd as a witness at trial. We agree that the trial court never addressed this alternative argument in its opinion and order denying defendant's successive motion for relief from judgment. The trial court's failure to do so constituted error. See MCR 6.508(E) ("The court, either orally or in writing, shall set forth in the record its findings of fact and its conclusions of law, and enter an appropriate order disposing of the motion."); *People v White*, 337 Mich App 558, 578; 977 NW2d 138 (2021) ("in light of the trial court's failure to address the issue as originally presented, we direct the trial court to rule on defendant's argument that trial counsel was ineffective"). Accordingly, on remand, the trial court should ensure that its opinion properly addresses and decides this issue.

III. CONCLUSION

We vacate the trial court's opinion and order denying defendant's second motion for relief from judgment and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Trebilcock
/s/ Sima G. Patel
/s/ Randy J. Wallace