

No. 1-12-2862

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 MC 232136
	)	
ANTHONY FIORE,	)	Honorable
	)	Israel Abaya Desierto,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE LIU delivered the judgment of the court.  
Justices Neville and Pierce concurred in the judgment.

**O R D E R**

¶ 1 **Held:** Where defendant failed to present a complete record on appeal, we presume the trial court acted in conformity with the law when it denied defendant's posttrial motion and therefore affirm the trial court's judgment.

¶ 2 After a bench trial, defendant, Anthony Fiore, was convicted of misdemeanor battery and sentenced to six months' supervision. On appeal, defendant challenges the trial court's denial of

his posttrial motion which alleged, in relevant part, claims of ineffective assistance of trial counsel. For the following reasons, we affirm.

¶ 3 After an altercation with Emeterio Herrera, a manager at Mid City Parking, defendant was charged with battery (720 ILCS 5/12-3(a)(1) (West 2010)). In April 2012, the parties appeared before the trial court, at which time the State made an unopposed motion *in limine* to bar any testimony or evidence regarding a civil suit related to the case. The court granted the State's motion. Thereafter, the parties presented evidence, a summary of which is as follows.

¶ 4 Herrera testified that on July 17, 2011, at around 2 a.m., he was working at a parking lot on 301 West Huron when a limousine attempted to enter the lot to unload customers near the back door of a nearby club. Herrera instructed the limousine driver to leave, and defendant exited the limousine and pushed Herrera out of the way. After defendant pushed him two more times, Herrera cursed at defendant. Defendant then hit Herrera in the left eye, knocking him off balance, and hit and kicked him in the face as he fell to the ground. He continued kicking Herrera's face while Herrera lay on the ground. Herrera lost consciousness and was later treated for fractures on his left eye, forehead, nose, jaw, and spine. He also underwent rotary cuff and ligament surgery on his right shoulder. Aaron Short, a tow truck driver, testified that he was driving near the 301 Huron lot and saw, from 25 feet away, Herrera trying to push himself off the ground and defendant kicking Herrera "right in the front face."

¶ 5 Defendant testified that when the limousine pulled into the lot, Herrera started yelling at the driver and beating on the front of the car. Defendant got out of the limousine, directed the driver to leave, and started to walk to the club. As he was walking, Herrera punched him in the back of the head and jumped on top of him. Defendant's friend, Jeffrey Cantalupo, pulled

Herrera off. Defendant then saw Herrera "come back after" him, at which point defendant kicked Herrera. Afterward, defendant proceeded to the club.

¶ 6 Charles Ousley, the limousine driver, and Jeffrey Cantalupo and John Springer, both passengers in the limousine, also testified on defendant's behalf. Ousley left the parking lot before any physical altercation between defendant and Herrera. Cantalupo corroborated defendant's testimony that Herrera, who he described as a 215-pound Hispanic male who was approximately 5 feet 8 to 5 feet 9 inches tall, jumped on defendant's back and hit him in the head. Cantalupo pulled him off, and defendant kicked Herrera after he charged at defendant a second time. Springer likewise testified that he saw Cantalupo pull Herrera off defendant and saw defendant kick Herrera as Herrera started to get back up off the ground.

¶ 7 The trial court found defendant guilty, stating that it found Herrera to be a "very credible witness" and that it questioned the credibility of the defense witnesses. The court also stated as follows: "I think the Bible says it best. When faced with an accusation, the innocent man stands firm while the guilty man flees and so where was [defendant]. He certainly wasn't there. I don't believe there was self-defense at all."

¶ 8 In May 2012, defendant, through newly retained counsel, filed a motion for new trial, motion in arrest of judgment, or motion to reconsider the finding of guilt based upon ineffective assistance of counsel. As to his ineffective assistance of counsel claim, defendant alleged trial counsel's performance was deficient because he (1) failed to object to the State's motion *in limine* barring evidence concerning the potential civil law suit; (2) allowed Herrera to testify to a medical diagnosis, which defendant alleged was hearsay; (3) failed to call Kathryn Forrer as a witness; (4) failed to ask John Springer about a statement that contradicted the State's witness; and (5) failed to undertake a reasonable investigation into Herrera's aggressive nature.

¶ 9 Defendant attached to his motion an affidavit from John Springer, in which Springer averred he was prepared to testify at trial that the tow truck driver was not present during the altercation between defendant and the parking lot attendant and, when the driver arrived at the scene, he heard him ask the parking lot attendant "what happened to you, who did this to you." However, trial counsel did not elicit this testimony from Springer. Defendant also attached an affidavit from Kathryn Forrer, defendant's ex-girlfriend, who was a passenger in the limousine. In her affidavit, Forrer averred that after the incident, she instructed defendant to wait in the bar while she remained with the parking lot attendant, who appeared "awake" and "lucid." Because she believed charges were not going to be filed, she told defendant they could leave. Forrer said defendant did not intend to flee the scene and only left because she told him they could leave together. She told defendant's trial counsel that she was available to testify; however, she was out of town on the day defendant's trial took place and had been told her testimony would not be needed until the following day because defendant was picking a jury on the day his trial actually commenced. She also averred, like Springer, that the tow truck driver did not arrive on the scene until after the altercation. Finally, defendant attached to his motion reports from his new attorney's investigator in which the investigator indicated he interviewed two employees of the night club and an employee of an adjacent parking lot, all of whom said they had witnessed a heavy set, Hispanic man, approximately 5 feet 6 inches tall, acting aggressively on other occasions.

¶ 10 The record does not include either a transcript of the hearing on defendant's posttrial motion or the trial court's ruling, either oral or written. In the transcript of the June 2012 sentencing hearing, the trial court expressly mentioned that defendant's posttrial motion had been denied in a prior proceeding where the court "spread of record the reasons for its denial." The

court then proceeded to the sentencing portion. After counsel's arguments, the court imposed a sentence of six months' supervision, with five days of community service in the Sheriff's Work Alternative Program and a scheduled termination date of December 20, 2012.

¶ 11 This appeal followed.

¶ 12 On appeal, defendant asserts the trial court erred by denying his posttrial motion. Specifically, defendant argues the trial court should have held an evidentiary hearing because the court "relied solely on the evidence of flight" to find him guilty, but Forrer's affidavits would have contradicted the notion that defendant fled the scene. He also points out that Forrer's and Springer's affidavits contradicted the tow truck driver's testimony that he saw defendant attack Herrera. Defendant claims that because the State did not call trial counsel to testify in a hearing on the motion, the State has not established counsel's decisions were strategic. Defendant also contends that counsel rendered ineffective assistance by failing to (1) object to the State's motion *in limine*, (2) call Forrer to testify, and (3) investigate Herrera's "aggressive nature."

¶ 13 Initially, we note, defendant has mischaracterized the nature of the matter before us, citing to the Post-Conviction Hearing Act and asserting that when a postconviction petition is dismissed without an evidentiary hearing, our review is *de novo*. In fact, defendant's case is not a proceeding under the Post-Conviction Hearing Act and our review is not *de novo*. Rather, defendant's appeal involves the trial court's denial of a posttrial motion filed by newly retained counsel and alleging ineffective assistance of trial counsel.

¶ 14 Ineffective assistance of counsel claims are governed by the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668, 688 (1984). *People v. Bew*, 228 Ill. 2d 122, 127 (2008). Pursuant to *Strickland*, a defendant must show counsel's performance was deficient and that he suffered prejudice as a result of counsel's deficient performance. *Strickland*, 466 U.S. at 687.

Decisions relating to whether to call certain witnesses for the defense are matters of trial strategy left to the discretion of counsel. *People v. Banks*, 237 Ill. 2d 154, 215 (2010). To satisfy the prejudice prong, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

¶ 15 A trial court's decision to grant or deny a motion for new trial or to conduct an evidentiary hearing will not be disturbed on review absent a showing that the court abused its discretion. *People v. Hall*, 194 Ill. 2d 305, 343 (2000); *People v. Gibson*, 304 Ill. App. 3d 923, 930 (1999). A court abuses its discretion only if its "decision is fanciful, arbitrary, or unreasonable to the degree that no reasonable person would agree with it." *People v. Ortega*, 209 Ill. 2d 354, 359 (2004).

¶ 16 In this case, the omission of a transcript of the posttrial proceeding and the ruling of the trial court precludes our review of the denial of defendant's posttrial motion. The appellant bears the burden of presenting an adequate record to support his claim of error. *People v. Hunt*, 234 Ill. 2d 49, 58 (2009). In the absence of a complete record, we will presume that the trial court's order was in conformity with the law and had a sufficient factual basis. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984).

¶ 17 Here, defendant has failed to present an adequate record because he has failed to include the transcript of the dispositive hearing. Defendant filed his posttrial motion in May 2012. At defendant's June 2012 sentencing hearing, the trial court stated as follows: "I believe that we have addressed the motion for new trial, and I think I spread of record the reasons for its denial. Specifically on creditability [*sic*] issues." Defense counsel responded, "That is correct." Thus, the record establishes the court ruled on defendant's posttrial motion prior to the sentencing

hearing and made a record of its reasons for denying that motion. However, the transcript of the posttrial proceedings and the court's ruling on that motion are not included in the record.

Without the transcript from the hearing on defendant's posttrial motion, we lack a sufficient basis to review the trial court's decision for an abuse of discretion. Therefore, we must presume that in denying defendant's posttrial motion, the trial court acted in conformity with the law and had a sufficient factual basis. *Foutch*, 99 Ill. 2d at 391-92. Accordingly, we affirm the trial court's judgment.

¶ 18 Affirmed.