

the court's judgment.

¶ 4

I. BACKGROUND

¶ 5 In March 2000, a grand jury indicted defendant on a charge of aggravated battery (720 ILCS 5/12-4(b)(6) (West 1998)) for striking correctional officer Bryan K. Wagner in the face with his fist. The trial court appointed the public defender to represent defendant, and assistant public defender, Jeff Page, was assigned the case.

¶ 6 Defendant's jury trial was scheduled to begin in August 2002. Prior to trial, Page filed defendant's disclosure of five witnesses: Maurice Hardaway, Mauricio Rivas, Jason Bartman, and Lonnie Henry, who were all prison inmates, and correctional officer Michael Littleton. Page attached a statement from each of the inmates. At trial, the State presented the testimony of Wagner and correctional officer Craig Cowan. Defendant testified on his own behalf and also presented the testimony of inmate Rivas. A jury found defendant guilty. In October 2002, the trial court granted defendant's motion for a new trial and a second jury trial was conducted in November 2003.

¶ 7 At defendant's retrial, the State's witnesses, Officers Wagner and Cowan, testified that the incident in question occurred on January 12, 2000, at Logan Correctional Center, a transfer point for the relocation of inmates from one prison to another. Defendant boarded the transfer bus and refused to exit despite orders to do so. Wagner took defendant by the arm to escort him off the bus and defendant struck him at least three times. When Wagner and Cowan were able to restrain him, defendant spit in Wagner's face. Lieutenant Littleton was also on the bus and witnessed the incident. According to these witnesses, the bus driver, David Young, was not on the bus at the time.

¶ 8 Defendant testified as the only defense witness. The jury found defendant guilty. In December 2003, the trial court denied defendant's motion for a new trial and sentenced defendant

to seven years and six months in prison, consecutive to his current unexpired sentences. Defendant appealed, raising claims of (1) ineffective assistance of trial counsel for failing to call certain witnesses and (2) a *Montgomery* violation (see *People v. Montgomery*, 47 Ill. 2d 510 (1971)). This court affirmed. *People v. Birdo*, No. 4-03-1076 (December 7, 2005) (unpublished order under Supreme Court Rule 23). In particular, we determined that defendant's ineffective-assistance-of-counsel claim would be better adjudicated in a postconviction proceeding where a complete record could be made. *Birdo*, slip order at 8.

¶9 In July 2006, defendant filed a *pro se* postconviction petition, alleging Page provided ineffective assistance of counsel at trial by failing to, *inter alia*, interview several "important witnesses." (The circuit court granted the State's motion to dismiss every other ineffective-assistance claim alleged.) The court appointed counsel, Richard Wray, to represent defendant and Wray filed an amended petition. Pursuant to the amended petition, witnesses Hardaway, Rivas, and Bartman had provided written statements, which demonstrated "the potential value of the testimony of these individuals to the defendant." Further, in the amended petition, defendant alleged Page failed to investigate whether Young, the bus driver, was present or had knowledge of the incident. According to defendant, these errors constituted substandard performance and prejudiced him, requiring that his conviction be vacated.

¶10 In March 2010, the circuit court conducted a third-stage evidentiary hearing on defendant's petition. Page, the only witness at the hearing, testified to the following. He represented defendant at both trials. Page said, prior to the first trial, he personally interviewed Rivas. Because Rivas provided some information which Page deemed to "be potentially helpful" to defendant, he called him as a witness. He did not call Rivas as a witness at the second trial because Page was

concerned that Rivas's testimony would not benefit defendant's case because some of his testimony contradicted that of defendant. As far as Page could recall, Hardaway, Henry, and Bartman were inmates who were either involved or present during the incident. He recalled interviewing three inmates on the first day of defendant's first trial, but he could not recall their names, other than Rivas. He did not generate a report from the interviews. He stated:

"There were three witnesses interviewed. I don't recall their names. It is in the file I'm sure. The writs would show which ones would have been brought over and interviewed. If you look at the writs and subpoenas, the names on the writs are the names of the witnesses I interviewed prior to Mr. Birdo's trial. I interviewed those witnesses and decided that none of them were credible in my mind other than Mr. Rivas. I felt he did have pertinent information to offer and he was called at the first trial. Although after he testified in the first trial, I made a strategic decision not to call him in the second trial."

¶ 11 Page said his "strategic decision" regarding Rivas was based upon Rivas's testimony in the first trial. Rivas's version of the incident differed from defendant's version. For example, Rivas testified that defendant was in full restraints, that defendant's hands were handcuffed and chained to a waist belt, whereas defendant testified that he was just handcuffed with no waist belt. This testimony was important given that the State had alleged defendant struck Wagner in the face with his fist. In Page's opinion, defendant "came across well" and he "was insistent" that he wanted to testify, so rather than presenting contradictory testimony at the second trial, Page decided not to

call Rivas as a witness. Page believed "eliminating Mr. Rivas from the second trial would be better for Mr. Birdo's chances." Page said that he had already made the assessment that the other inmates were not credible and they would not, in his opinion, benefit defendant, so he did not re-interview them prior to the second trial.

¶ 12 On cross-examination, Page was presented with the circuit clerk's docket entry dated June 2002, prior to defendant's first trial, indicating that writs for three inmates, Rivas, Henry, and Bartman, had been issued. He said during the interviews, Page assessed each potential witness based on his overall appearance, demeanor, information, presentation of the information, criminal history, and credibility. After assessing these factors, Page made the strategic decision not to call Henry and Bartman as witnesses in the first trial, and not to call any of them in the second trial.

¶ 13 With regard to the bus driver, Young, Page testified that he had not received a report from the State in discovery that Young knew anything about or was even present during the incident. In fact, during Page's cross-examination of correctional officer Cowan during the first trial, Cowan testified that Young was not on the bus at the time of the incident.

¶ 14 On redirect examination, Page acknowledged that defendant had told him that Young was present during the incident and admitted he could have "track[ed] him down." On recross-examination, Page believed that the brief interviews he conducted of the three inmates prior to the start of defendant's first trial was sufficient in terms of having time to review their testimony with them. Page testified that he (1) had previously participated in approximately 50 felony jury trials (most of which he conducted the witness interviews on the first day of trial), (2) had previously reviewed the discovery in this case, and (3) was familiar with the witnesses's statements as they appeared in the file.

¶ 15 At the close of defendant's case, the State filed a motion for a directed verdict. The circuit court granted the motion, finding defendant had failed to satisfy the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). The court held as follows:

"Under the *Strickland* test[,] the defendant is responsible for establishing that defense counsel fell below an objective standard of reasonableness in his presentation of the case, and secondly, and this is just as important, that there is a reasonable probability that counsel's performance was prejudicial to the defense. Certainly during the course of the evidence presented here today, Mr. Page has given explanations as to why he did certain things and didn't do certain things.

In the amended petition or the amendments to the petition for postconviction relief, Mr. Birdo alleges ineffective assistance by failing to call certain witnesses, and those are witnesses whose names have been mentioned here today, three individuals; Jason Bartman, Mauricio Rivas, and Lonnie Henry who were apparently all interviewed prior to trial. Mr. Rivas actually gave trial testimony, and it was at the time of the second trial that Mr. Page determined that Mr. Birdo's best chances at an acquittal would involve not calling Mr. Rivas.

The explanations given by Mr. Page as to why he did not call Mr. Rivas are on their face reasonable. He had an opportunity to

observe Mr. Rivas testifying at the first trial, heard what he had to testify to, found that it conflicted with the testimony of Mr. Birdo, and after the jury returned a guilty verdict[,] determined at the time of retrial that Mr. Rivas' testimony would not be helpful.

Mr. Page indicated that he did in fact interview Mr. Bartman and Mr. Henry and chose not to call them as witnesses. The court can't find that Mr. Page's conduct fell below an objective standard of reasonableness if it were to consider that element alone, but the court finds there has been a complete lack of evidence supporting the second element of *Strickland* and that is the reasonable probability that counsel's performance was prejudicial to the defense. There has not been a single witness presented here. No evidence to indicate what any of these witnesses would have testified to, and they are identified by name in the petition for post[.]conviction relief.

Mr. Page indicated why he didn't call these individuals, but here in terms of the presentation of evidence nothing has been presented as to what those individuals would have said to put the court in a position to be able to indicate whether the failure to call them was prejudicial or was not prejudicial. In that vacuum that exists the court cannot resolve the *Strickland* question in favor of the defendant, and for that reason the court must allow the State's motion for directed finding and that is the ruling."

This appeal followed.

¶ 16

II. ANALYSIS

¶ 17 Defendant claims the circuit court erred in denying his postconviction petition because he sufficiently demonstrated that Page had rendered constitutionally deficient representation at trial by failing to investigate the bus driver, Young, a potentially exculpatory witnesses. He further claims that Wray rendered ineffective assistance by failing to call the potential exculpatory witnesses to testify at the third-stage evidentiary hearing.

¶ 18 We review a circuit court's order denying postconviction relief after an evidentiary hearing under a manifest-weight-of-the-evidence standard. *People v. Taylor*, 237 Ill. 2d 356, 373 (2010). " 'Manifest error' is error which is clearly plain, evident, and indisputable." *Taylor*, 237 Ill. 2d at 373.

¶ 19 As the circuit court noted, a claim of ineffective assistance of counsel is reviewed under the two-part *Strickland* standard—a standard adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504 (1984). That is, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness and that he was prejudiced by counsel's substandard performance in that there exists a reasonable probability that the outcome of the proceedings would have been different but for counsel's conduct. *Strickland*, 466 U.S. at 687-88.

¶ 20

A. Ineffective Assistance of Trial Counsel

¶ 21 Decisions concerning which witnesses to call at trial and what evidence to present are generally matters of trial strategy and cannot form the basis for a claim of ineffective assistance of counsel unless the strategy is so unsound that it is apparent that counsel entirely failed to subject the State's case to any meaningful adversarial testing. *People v. Campbell*, 332 Ill. App. 3d 721, 731

(2002). Neither mistakes in strategy nor the fact that another attorney with the benefit of hindsight would have handled the case differently indicates the trial lawyer was incompetent. *Campbell*, 332 Ill. App. 3d at 731. Though, "[t]he failure to interview witnesses may indicate actual incompetence [citations], particularly when the witnesses are known to trial counsel and their testimony may be exonerating [citation]. However, incompetence is not indicated where defendant can point to no potentially favorable testimony the witnesses might offer [citation], or testimony which effect is not cumulative [citation]." *People v. Williams*, 147 Ill. 2d 173, 245 (1991).

¶ 22 In this appeal, defendant raises an issue only regarding Page's failure to speak with the bus driver, Young. He does not challenge the circuit court's order as it relates to Page's failure to call Bartman, Rivas, and Henry. In its oral pronouncement, the court did not analyze or mention Page's conduct of not contacting Young. However, we find the court's analysis would apply equally to Young. Page indicated he did not contact Young, though he could have "track[ed] him down," because references in the discovery and testimony at the first trial indicated that Young had no knowledge of the incident. (We note that testimony at the second trial also indicated Young was not on the bus at the time of the incident.) Failing to investigate a witness that purportedly had no knowledge cannot constitute substandard performance. See *People v. Orange*, 168 Ill. 2d 138, 150 (1995) ("Where the circumstances known to counsel at the time of his investigation do not reveal a sound basis for further inquiry in a particular area, it is not ineffective for the attorney to forgo additional investigation.").

¶ 23 Further, as the circuit court noted, defendant failed to present evidence that would demonstrate that he was prejudiced by counsel's alleged ineffectiveness. He did not produce any information to the court by way of testimony or affidavits that would have revealed the extent of

Young's knowledge or the nature of his proposed testimony had he been called as a witness. See *People v. Enis*, 194 Ill. 2d 361, 380 (2000) ("A claim that trial counsel failed to investigate and call a witness must be supported by an affidavit from the proposed witness."). Defendant failed to demonstrate that the outcome of his trial would have been different had Page contacted Young. Without more, defendant cannot establish a successful claim that Page rendered ineffective assistance of counsel by not investigating Young's involvement in or knowledge of the incident.

¶ 24 B. Ineffective Assistance of Postconviction Counsel

¶ 25 Defendant also argues that Wray, his appointed postconviction counsel, was ineffective for not presenting the necessary testimony of or statements from Young, Hardaway, Rivas, Bartman, and Henry at the third-stage evidentiary hearing. We disagree.

¶ 26 Postconviction counsel cannot be deemed ineffective for failing to perform a futile act. *People v. Ivy*, 313 Ill. App. 3d 1011, 1018 (2000). Page testified at the hearing that he had interviewed three inmates prior to the start of defendant's first trial. Based on those interviews, he decided to call only one, Rivas, as a witness. The others, he decided, would not help defendant's case; he made a strategic decision not to call them as witnesses. Likewise, with regard to Young, Page testified that he made a reasonable professional judgment not to investigate Young's involvement. The reasonableness of this particular decision is supported by the record. Contrary to defendant's representation, two witnesses testified at defendant's trials that Young was not present during the incident. After hearing this testimony, the circuit court found nothing unreasonable about Page's decisions. Instead, the court determined that Page's conduct had not fallen "below an objective standard of reasonableness." Thus, based on these facts, we cannot say that Wray was ineffective for failing to present the testimony of these witnesses in an attempt to undermine Page's

strategic trial decisions.

¶ 27 Even if Wray had called Henry, for example, to testify at the third-stage evidentiary hearing, and even if Henry would have testified to facts that would otherwise have seemed beneficial to defendant had he been called at trial, it would not change the fact that Page had made a strategic decision not to call him as a witness. Page's decision was based on his interview with the witness and the witness's perceived demeanor, credibility, criminal history, and general character. Because strategic decisions are highly deferential and exclusively belong to trial counsel, they generally cannot support a claim of ineffective assistance of counsel. See *People v. Manning*, 241 Ill. 2d 319, 327, 333 (2011). In sum, there would have been no need to present the testimony of any of the named witnesses at the postconviction hearing when it had been determined that Page's "failure" to call them as witnesses at trial constituted, respectively, reasonable and strategic trial decisions.

¶ 28 Defendant's claim also fails because, without an allegation that postconviction counsel failed to sufficiently comply with the mandates of Illinois Supreme Court Rule 651(c) (Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984)), there can be no question on appeal about the adequacy of counsel's representation. Though defendant makes a bald assertion in his brief that counsel "failed to render reasonable assistance and satisfy the requirements of Rule 651(c) where he failed to present any of the identified witnesses," defendant does not raise any specific claim the certificate filed by postconviction counsel below was deficient in any manner or that counsel failed to comply with any of the specific duties imposed by the rule. Instead, he equates counsel's failure to present adequate witnesses at the hearing with a violation of Rule 651(c).

¶ 29 A court of review requires only a reasonable level of assistance by postconviction counsel. *People v. Moore*, 189 Ill. 2d 521, 541(2000). The level of postconviction counsel's

competence is measured by counsel's compliance with Rule 651(c). *People v. McNeal*, 194 Ill. 2d 135, 142-43 (2000). Rule 651(c) requires the record to show that postconviction counsel has (1) consulted with the petitioner to ascertain his contentions of constitutional rights deprivation, (2) examined the record of the trial proceedings, and (3) made amendments to the *pro se* petition necessary to adequately present the petitioner's constitutional contentions. *People v. Johnson*, 154 Ill. 2d 227, 238 (1993). Where a Rule 651(c) certificate is filed, the presumption is raised that the postconviction petitioner received the required representation by counsel. Whether counsel fulfilled his duties under the rule is reviewed *de novo*. *People v. Suarez*, 224 Ill. 2d 37, 41-42 (2007).

¶ 30 Here, it is apparent that Wray satisfied his duties under the rule. He filed an amended postconviction petition setting forth in detail defendant's contentions of error. He also filed a certificate setting forth his compliance with the duties mandated by the rule. Without evidence of a specific violation, defendant's allegation that counsel's effort fell below an objective standard of reasonableness is without merit. See *People v. Suarez*, 224 Ill. 2d 37, 42 (2007) ("To ensure that postconviction petitioners receive [the] *** assistance [provided by the Act], Rule 651(c) imposes specific duties on postconviction counsel"); *Moore*, 189 Ill. 2d at 543 ("[W]e hold that post-conviction counsel complied with the requirements of Rule 651(c) and thus rendered reasonable assistance"). It appears from this record that defendant received the level of assistance to which he was entitled in his postconviction proceedings.

¶ 31 III. CONCLUSION

¶ 32 For the foregoing reasons, we affirm the circuit court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 33 Affirmed.