

No. 1-11-0706

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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
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 10 MC 1201870
)	
VINCENT BUCARO,)	Honorable
)	David A. Skryd,
Defendant-Appellant.)	Judge Presiding.

JUSTICE R. GORDON delivered the judgment of the court.
Presiding Justice Lampkin and Justice Hall concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court's denial of defendant's posttrial motion alleging ineffective assistance of trial counsel is vacated and an evidentiary hearing is ordered to determine if there was ineffective assistance of counsel for failure to subpoena the person who claims he actually committed the offense and two other claimed eyewitnesses.
- ¶ 2 Following a bench trial, defendant Vincent Bucaro was found guilty of battery and sentenced to one year of misdemeanor probation. On appeal, defendant contends the trial court erred in denying his posttrial motion, which he mischaracterizes on appeal as a postconviction

petition, alleging that his trial counsel was ineffective for failing to interview, subpoena, and secure the trial attendance of additional defense witnesses.

¶ 3 BACKGROUND

¶ 4 The State's evidence showed that an employee of the City of Chicago Department of Revenue, David Goodpaster, was about to place a boot on a BMW motor vehicle when the driver of the BMW struck Goodpaster with the vehicle. At trial, the State claimed that the BMW was driven by defendant, while defendant claimed it was driven by a valet from the Manor Nightclub, Alex Dobre.

¶ 5 I. Evidence at Trial

¶ 6 At trial, David Goodpaster testified he was employed by the Chicago Department of Revenue (Department) as a "booter." His job entailed scanning license plates of motor vehicles parked on the street to determine whether any were "eligible" to have their tires booted because they owed money to the city for unpaid traffic violations. During his employment with the city, he had booted about 2,800 vehicles.

¶ 7 On the evening of January 15, 2010, Goodpaster was in uniform and driving a Ford van that was clearly marked as a Department vehicle. At about 11:30 p.m., he was driving in the 600 block of North Clark Street in Chicago where he observed a black BMW parked in front of a nightclub called the Manor. It was dark out, but there were lights on Clark Street right in front of the club and where the BMW was parked. The license plate of the BMW registered as being boot-eligible. A limousine was parked on the driver's side of the BMW, near the drive-through lane of Portillo's Hot Dogs.

¶ 8 Goodpaster pulled his vehicle on an angle about 15 to 20 feet in front of the BMW and exited his vehicle. As he approached the rear of his van, he heard the BMW's engine start up. He testified that he turned and observed defendant driving the BMW. The side windows of the

BMW were tinted, but the front windshield was clear glass. Defendant drove forward and struck Goodpaster in the knees four times. On the third and fourth time, the BMW's bumper pinned Goodpaster against his van. At that point, defendant's face was about two feet from Goodpaster. Then defendant backed up about 15 feet, drove into Portillo's drive-through to Ontario Street, and drove away. Goodpaster paged his security people, and within two minutes police officers arrived. Goodpaster was not injured and did not require medical attention.

¶ 9 On January 30, 2010, Goodpaster met with Detective Leavitt at the police station. Leavitt showed him six photographs, and he identified the photograph of defendant as the man who struck him with the BMW. Another man in the photographic array looked like defendant, but it was defendant that he testified hit him with the BMW. At trial, Goodpaster identified defendant as the man who drove the BMW and struck him four times in the knees.

¶ 10 Detective Leavitt testified that, on January 30, 2010, he showed Goodpaster six photographs. One photograph was of defendant, to whom the BMW was registered; the other five were "random fillers from the computer system." Goodpaster immediately identified defendant as the offender. Among the remaining five photographs, Goodpaster observed a photograph of a man who looked "similar." However, he went back to defendant's photograph and said, "That's definitely him."

¶ 11 Morgan McMeel¹ testified for the defense that, on the night of January 15, 2010, he was working at the front door of the Manor Night Club on North Clark Street, letting people in and out. At about 11:30 p.m. he was in front of the nightclub, which was extremely well-lit. He testified that he observed the Department truck pull up and observed a man exit the vehicle and go to the back of the vehicle to obtain a boot. McMeel was just two or three feet from defendant's black BMW, which was parked in front of the nightclub. Alex, the nightclub valet

¹Also spelled "McNeal" in the record.

who was in the BMW, placed the vehicle in gear, drove it through Portillo's drive-through, and drove away. He testified that the BMW did not come in contact with the Department agent. McMeel did not recall observing a limousine parked there. After the incident, the Department worker remained there and "a lot of guys showed up."

¶ 12 Defendant testified on his own behalf that, on the night in question, he was tending bar at the nightclub from 10 p.m. to 1 a.m. He drove to work in his vehicle, a 2004 BMW, handed the keys to Alex, the valet, and walked inside to start his shift. At 2 a.m., he received his keys from Alex, who told him that "a slight incident" had occurred in front of the club and that defendant had a ticket on his vehicle. Defendant learned that Alex had driven the vehicle away from a city employee who was attempting to place a boot on defendant's BMW. About two weeks later, defendant was arrested for battery. Defendant never used his vehicle to strike Goodpaster. Defendant testified that Alex had been present in the courtroom earlier in the trial but was no longer in court.

¶ 13 II. Sentencing and Posttrial Proceeding

¶ 14 At the conclusion of the trial, the trial court found defendant guilty of battery. The trial court found Goodpaster's testimony "clear and credible" and Detective Leavitt's testimony credible. The trial court found McMeel's testimony to be "not credible and inconsistent" and that defendant's testimony was "incredible and defies logic." The trial court observed that the testimony revealed a rapid response to the incident by police officers but that defendant later was told there had been only "a slight incident." The trial court sentenced defendant to a one-year term of probation and 30 days in the Sheriff's Work Alternative Program (SWAP).

¶ 15 Represented by new counsel, defendant filed within 30 days of sentencing a posttrial motion entitled "Motion for Judgment Notwithstanding the Verdict / Motion for New Trial / Motion to Reconsider Finding of Guilty / Motion to Vacate Sentence Based upon a Defective

Finding of Guilty." The motion was directed against the judgment on the basis that trial counsel was ineffective for failing to interview, subpoena, or call to testify at trial three additional defense witnesses who could have established defendant's innocence. Attached to the motion was an affidavit of defendant, as well as non-sworn statements of three other individuals: Patrick Comer; Steve Loncar; and Alex Dobre.

¶ 16 Defendant's new counsel stated that, at this stage of the hearing, defendant needs to show only the gist of a constitutional claim. Apparently counsel for defendant thought that his posttrial motion was a postconviction petition. Defense counsel argued that defendant's prior trial counsel was ineffective and asked the trial court to "consider the motion for judgment notwithstanding the verdict or a motion for a new trial or a motion to vacate the sentence based upon a defective finding of guilt." Later in his argument, defendant's counsel noted: "[W]e were within the 30 days for a judgment notwithstanding a verdict; *** a motion for new trial, motion to reconsider." Neither the motion nor counsel's written argument in support referred to the Post-Conviction Hearing Act (Act) (730 ILCS 5/122-1 *et seq.* (West 2010)) at that point in time.

¶ 17 Defendant's affidavit stated that, prior to his battery trial, he told his prior trial attorney about several potential defense witnesses: Patrick Comer, Steve Loncar, Morgan McMeel, and Alex Dobre. The affidavit stated: (1) that Comer was the Manor Night Club's general manager and could testify defendant never left the bar during his shift on the night of the incident; (2) that McMeel and Loncar witnessed the altercation and could testify defendant was not driving his vehicle and that Loncar would testify that Alex Dobre was the driver; and (3) that Dobre was the nightclub's valet and was willing to testify that he was the actual driver. Defendant averred that his prior trial counsel failed to subpoena the witnesses, that only McMeel and Dobre appeared in court on the trial date, and that counsel spoke to the witnesses that day for the first time. Defendant's trial counsel told defendant that Alex Dobre, the valet, had told the prosecutor and

defendant's counsel that he, not defendant, drove the BMW. Dobre was not called as a defense witness at trial as explained below.

¶ 18 The statements of Loncar, Comer, and Dobre were each labeled "affidavit," but each statement was unsworn and unnotarized. Steve Loncar's statement related that he was a doorman at the nightclub, that he observed the altercation involving the Department agent, but that Alex Dobre, the nightclub valet, drove defendant's BMW. Patrick Comer's statement related that he was the nightclub's general manager, that defendant was working as a bartender in the nightclub on the night in question, that bartenders were not allowed to leave the bar area during their shift, and that defendant did not leave the nightclub at the time of the offense. Loncar and Comer signed their respective statements and witnessed each other's statement.

¶ 19 Alex Dobre's statement related that he was the nightclub's valet and that, on the night in question, he was in defendant's vehicle. When Dobre observed a city worker attempting to place a boot on the vehicle, he drove defendant's vehicle away. After being charged with battery, defendant asked Dobre to testify on his behalf. Dobre never heard from defendant's attorney and was not subpoenaed, but he came to court on the trial date defendant gave him. Dobre told both defendant's lawyer and the prosecutor that defendant had not committed the battery and that he, not defendant, was involved. Dobre's statement related that he was told he could leave but did not identify who told him. The prosecutor indicated that Dobre could be prosecuted and sent to jail, and "therefore I left after being told that I would be sent to jail, and the lawyer did not call me as a witness on [defendant's] behalf." Dobre's statement was not notarized. Purported names on the signatory line and the witness line of the statement were illegible.

¶ 20 Loncar, Comer, and Dobre were not present in court when the posttrial motion was heard. Defense counsel informed the trial court that all defendant had to show at this stage of the

proceedings was a gist of a constitutional claim. The trial court held, "[b]ased on the evidence" presented, the posttrial motion was denied.

¶ 21 Subsequently, defendant filed this appeal. The State argues that the notice of appeal was file stamped by the clerk's office on Monday, February 14, 2011, 32 days after the trial court denied his motion and is a late notice of appeal, depriving this court of any jurisdiction to review this matter. By contrast, defendant's notice of appeal was filled out indicating the filing date was Friday, February 11, 2011. However, defendant states in his appellate brief that his appeal was filed on February 14, 2011, the Monday following a weekend.

¶ 22 ANALYSIS

¶ 23 On appeal, defendant claims that the trial court erred in denying his posttrial motion, which defendant erroneously asserts was a petition for postconviction relief. Defendant's appellate brief cites the Post-Conviction Hearing Act and indicates that the posttrial motion was filed pursuant to section 122-1 of the Act. 730 ILCS 5/122-1(d) (West 2010).

¶ 24 The Act mandates that a petition brought under section 122-1 must specify in the petition or its heading that it is being filed under that section. 730 ILCS 5/122-1(d) (West 2010). Neither defendant's posttrial motion nor his counsel's argument in the trial court in support of the motion referenced the Act. Defense counsel's statement to the trial court that the motion needed "to make a gist of a constitutional claim to go forward with a hearing," is the only information in the record that the motion sought to present a claim under the Act.

¶ 25 At other times in his argument, counsel referred to the motion as one for judgment notwithstanding the verdict or for a new trial or to reconsider or to vacate the sentence. Defendant's notice of appeal stated the appeal was taken from his battery conviction, not from a denial of postconviction relief.

¶ 26 Defendant's posttrial motion is not a postconviction petition under the Act, and his argument on appeal that the trial court erroneously dismissed the motion without holding a hearing pursuant to the Act has no merit. We will treat defendant's motion as a posttrial motion as it is labeled.

¶ 27 I. Jurisdiction

¶ 28 Before addressing the merits of defendant's claims, we must first consider the question of our jurisdiction. *Village of Sugar Grove v. Rich*, 347 Ill. App. 3d 689, 693 (2004). Whether or not the issue of jurisdiction has been raised by the parties, this court has an independent duty to consider its own jurisdiction, before addressing the merits of any appeal. *Ferguson v. Riverside Medical Center*, 111 Ill. 2d 436, 440 (1985).

¶ 29 The filing of a notice of appeal is a jurisdictional step in the appeals process. Ill. S. Ct. R. 606(b) (eff. Mar. 20, 2009). *People v. Lugo*, 391 Ill. App. 3d 995, 997 (2009). Illinois Supreme Court Rule 606(b) provides that "the notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from, or if a motion directed against the judgment is timely filed, within 30 days after the entry of the order disposing of the motion." Ill. S. Ct. R. 606(b) (eff. Mar. 20, 2009).

¶ 30 In the case at bar, the trial court denied defendant's motion on January 13, 2011. Defendant filed a notice of appeal file stamped on February 14, 2011. In addition, defendant states in his appellate brief: "A timely notice of appeal was filed on February 14, 2011." The file stamp indicates that the appeal was filed 32 days after the motion was denied. Supreme Court Rule 606(b) provides that an appeal must be filed 30 days after "the entry of the order disposing of the motion." Ill. S. Ct. R. 606(b) (eff. Mar. 20, 2009). However, because the thirtieth day following the trial court's order was a Saturday, the weekend is not considered in the computation and defendant's notice of appeal is considered timely filed. 5 ILCS 70/1.11 (West

2010). This statute provides: "The time within which any act provided by law is to be done shall be computed by excluding the first day and including the last, unless the last day is Saturday or Sunday or is a holiday as defined or fixed in any statute now or hereafter in force in this State, and then it shall also be excluded." Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rule 606. *People v. Lesure*, 408 Ill. App. 3d 12, 13-14 (2011).

¶ 31 II. Ineffective Assistance of Trial Counsel

¶ 32 In reviewing a trial court's denial of a defendant's posttrial motion claiming ineffective assistance of counsel, we will reverse only if the trial court's action was manifestly erroneous. *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 25. "Manifest error" has been defined as error that is clearly plain, evident, and indisputable. *Tolefree*, 2011 IL App (1st) 100689, ¶ 25. A defendant's claim of ineffective assistance of counsel is guided by the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), which requires a showing of deficient performance by counsel and prejudice to the defendant from the deficient performance. *People v. Hodges*, 234 Ill. 2d 1, 17 (2009). To prevail on his claim of ineffective assistance, defendant must satisfy both prongs of *Strickland*. *People v. Salas*, 2011 IL App (1st) 091880, ¶ 91. The decisions of what witnesses to call and what evidence to present are generally unassailable matters of trial strategy, rather than incompetence, that cannot form the basis of a claim of ineffective assistance of counsel. *People v. Enis*, 194 Ill. 2d 361, 378 (2000); *People v. Ward*, 371 Ill. App. 3d 382, 433 (2007).

¶ 33 At issue is whether trial counsel was ineffective for failing to call three additional witnesses to testify for the defense at trial: Steve Loncar, Patrick Comer, and Alex Dobre. The most crucial witness from the defense standpoint was Dobre, the valet. Defendant's trial theory was that Dobre, not defendant, was the individual who drove the BMW at the time of the incident. Defendant testified during trial that Dobre had been present earlier in the trial but was

no longer in the courtroom. Defendant's affidavit and Dobre's unsworn statement, both appended to the posttrial motion, also related that Dobre was present in court when the trial commenced. Dobre's statement admitted he was present on the day of trial and that defendant's trial attorney was present when Dobre told the Assistant State's Attorney he was the individual who drove defendant's motor vehicle. Dobre's statement related that he was told he could leave the courtroom and that defendant's attorney did not call him as a witness, but he did not state that it was defendant's attorney who excused him from testifying. Rather, Dobre stated he left the courtroom after the prosecutor told him that he possibly could go to jail for admitting to being the one who drove the motor vehicle involved in the battery. The record discloses that Dobre was present at the outset of the trial and that his failure to testify on behalf of defendant was due to Dobre's own decision to leave the courtroom, which defendant claims was motivated by the prosecution telling him he could go to jail. This was done in the defense attorney's presence and we do not know why defense counsel did not inform the trial court of this conversation if it occurred in his presence.

¶ 34 The statements of Loncar and Comer reveal that their testimony would not have been cumulative of testimony adduced at trial. Together with Dobre's admission, the testimony may have provided the trial court with new evidence that could illustrate defendant was convicted wrongfully for a crime he did not commit. Critically, all of the statements, appended to the posttrial motion, were not sworn or notarized; there was no certificate of a notarial act as required by section 6-103 of the Illinois Notary Public Act (5 ILCS 312/6-103 (West 2008)). None of the individuals were present in court when the posttrial motion was presented and argued. Evidence is considered cumulative when it adds nothing to what was already before the trier of fact. *People v. White*, 2011 IL App (1st) 092852, ¶ 44 (citing *People v. Ortiz*, 235 Ill. 2d 319, 335 (2009)). Here, the testimony would add to the proceedings. Loncar's testimony would have

supplied an eyewitness account of the incident and would support McMeel's testimony, which the trial court found to be unbelievable. Comer's testimony would also support the testimony of all the other witnesses except for Goodpaster's testimony. In order for defendant to meet his burden to overcome the presumption that his trial counsel's decision not to secure the attendance and testimony of certain additional witnesses was a matter of trial strategy, the trial court needed to hold an evidentiary hearing. It is within the trial court's discretion to hold an evidentiary hearing, which is reviewed under the abuse of discretion standard. *People v. Gibson*, 304 Ill. App. 3d 923, 930 (1999). When defense counsel argued that defendant needed only to show the gist of a constitutional claim, the trial court denied the posttrial motion. The conduct of defendant's second attorney, who is claiming that defendant's first lawyer was ineffective for failing to call the three witnesses to testify, was not helpful. He failed to have the claimed affidavits notarized; he was confused as to the law concerning posttrial motions; and he failed to adequately explain why an evidentiary hearing was needed.

¶ 35 Under the first prong of *Strickland*, defendant was required to overcome a strong presumption that the challenged action or inaction of counsel was the product of sound strategy and not of incompetence. *People v. Olinger*, 176 Ill. 2d 326, 356 (1997). “[C]ounsel’s tactical decisions may be deemed ineffective when they result in counsel’s failure to present exculpatory evidence of which he is aware.” *People v. King*, 316 Ill. App. 3d 901, 913 (2000). “[T]hat where a defendant’s attorney is aware of exculpatory evidence and does not present it, counsel can be deemed ineffective.” *King*, 316 Ill. App. 3d at 915 (citing *People v. O’Banner*, 215 Ill. App. 3d 778, 790 (1991)).

¶ 36 In *King*, a bus driver was convicted of the abduction and rape of a girl on his bus route. *King*, 316 Ill. App. 3d at 904. His trial counsel failed to call a witness, a female bus attendant, who could have testified as to her having stayed on the bus until the victim was dropped off on

the day of the alleged rape. *King*, 316 Ill. App. 3d at 904. The proposed witness signed an affidavit that she would testify that the victim was dropped off at the victim's stop. *King*, 316 Ill. App. 3d at 904. The witness' job required that she stay on the bus until every student was dropped off. *King*, 316 Ill. App. 3d at 904. She was in the courtroom on the day of the bus driver's trial, but she was told to leave and wait in another room. *King*, 316 Ill. App. 3d at 904. The State in *King* argued that counsel's decision not to call the proposed witness was exempt from scrutiny on the issue of ineffective counsel because counsel investigated his available options, contacted the proposed witness, issued a subpoena for her to appear at trial and made a tactical decision not to call her as a witness. *King*, 316 Ill. App. 3d at 914. The court recognized that counsel took such actions, but still reasoned that the witness' "statements provided an alibi for defendant that could only have served to bolster the defense theory that the rape did not occur." *King*, 316 Ill. App. 3d at 914. The bus attendant swore that she did not leave the bus early and that the bus driver was never alone on the bus with the victim. *King*, 316 Ill. App. 3d at 914. The court reasoned that the statements in the affidavit were unequivocally exculpatory. *King*, 316 Ill. App. 3d at 914.

¶ 37 In *King*, the proposed witness' testimony could have corroborated the defense that rape did not occur. Similarly, in the case at bar, Dobre would have testified to being the driver of the vehicle and that the battery did not occur. Dobre was also in court and prepared to testify, much like the proposed witness in *King*. Such testimony was unequivocally exculpatory because the issue was the identification of the driver of the BMW. In the case at bar, defendant claims that he told his trial counsel about Dobre, yet he claims his lawyer failed to investigate or contact the proposed witness. In *King*, counsel did contact and investigate the proposed witness yet was still found to be ineffective. Additionally, according to his statement, Dobre told the prosecutor at trial that he was the driver while in the presence of defendant's counsel. If this is shown to be

accurate at a hearing, defendant's counsel was aware of exculpatory evidence and did not present it. Further, if the prosecutor told Dobre he could go to jail if he testified, the State's conduct compounded the error. Accordingly, defendant's trial counsel may have been ineffective.

¶ 38 The State argues that the decision not to call a witness is usually within the realm of trial strategy to be determined by trial counsel and does generally not constitute ineffective assistance of counsel. *People v. Flores*, 128 Ill. 2d 66, 85-86 (1989). "Defendant must overcome the strong presumption that the challenged action or inaction of counsel was the product of sound trial strategy and not incompetence." *People v. Powell*, 355 Ill. App. 3d 124, 141 (2004). However, "the mere characterization of counsel's decision not to call an available alibi witness as "trial strategy" does not preclude inquiry as to the reasonableness of counsel's strategy." *People v. King*, 316 Ill. App. 3d 901, 916 (2000).

¶ 39 In the case at bar, the issue was one of identification. The victim, Goodpaster, testified that defendant was the offender. The three absent witnesses could have cast a doubt on Goodpaster's identification and created a reasonable doubt that defendant was the offender. The additional testimony could have overcome the presumption that trial counsel's inaction in not calling the three additional witnesses was sound trial strategy. "A defendant can overcome the strong presumption that defense counsel's choice of strategy was sound if counsel's decision appears so irrational and unreasonable that no reasonably effective defense attorney, facing similar circumstances, would pursue such a strategy." *King*, 316 Ill. App. 3d at 916. Particularly, the proposed testimony of Loncar and Dobre would have identified Dobre as the driver of the BMW. For counsel to not consider the actual perpetrator of the act, who is willing to admit to it in court, constitutes such an irrational strategy that no reasonably effective defense attorney would pursue it. Thus, not allowing Loncar and Dobre to testify could have been unsound trial strategy. Although Comer's proposed testimony would not have identified Dobre as the driver of

the BMW, Comer's testimony would have shown that the incident did not involve the bartender because the bartender never left his work area. Accordingly, defendant's trial counsel's failure to call the three proposed witnesses could rise to the level of ineffective assistance.

¶ 40 The second prong of the *Strickland* standard requires a showing that the ineffective assistance of counsel prejudiced the defense. *Strickland*, 466 U.S. at 687. Such a showing requires a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *King*, 316 Ill. App. 3d at 917 (quoting *Strickland*, 466 U.S. at 694).

¶ 41 The State claims the three witnesses' testimony was cumulative. Testimony from a witness is cumulative if it does not significantly differ from the testimony of a different witness. *People v. Smith*, 195 Ill. 2d 179, 190 (2000). The State cites *Smith*, where the defendant was convicted of first degree murder, aggravated criminal sexual assault, and home invasion. *Smith*, 195 Ill. 2d at 186. In *Smith*, the defendant claimed ineffective assistance of counsel for failing to introduce corroborating testimony relating to the defendant's claim that his confession to the police was coerced. *Smith*, 195 Ill. 2d at 189. One witness had already testified that she heard the defendant screaming and calling for her at the police station. *Smith*, 195 Ill. 2d at 189. The proposed witness that defense counsel did not call was the mother of the first witness who would have also testified to hearing the defendant's screams. *Smith*, 195 Ill. 2d at 189. The court characterized the proposed witness' testimony as cumulative because it did not significantly differ from the first witness' testimony. *Smith*, 195 Ill. 2d at 190. In *Smith*, our Illinois Supreme Court concluded that "[t]here was no reasonable probability that the outcome of defendant's motion to suppress would have been different." *Smith*, 195 Ill. 2d at 191.

¶ 42 *Smith* is inapposite to the case at bar. In *Smith*, the corroborating evidence dealt with coercion, which the court found to be cumulative. The issue in the case at bar is about the

identity of the driver of the BMW. The court in *Smith* found that information in affidavits that is cumulative provides “no reasonable probability that the result of [a] defendant’s sentencing would [be] different.” *Smith*, 195 Ill. 2d at 203. Such cumulative testimony described in *Smith* is unlike the proposed testimony in the case at bar. Both defendant and McMeel already testified that Dobre was the driver of the BMW. Two more witnesses testifying to the same thing can be cumulative on its face, but not when one of the individuals will testify to being the offender. Such testimony goes right to the heart of the case. It is important for the court to find the correct person guilty of the crime. Since the proposed testimony is not cumulative, there is reasonable probability that the additional testimony could change the outcome of the case.

¶ 43

CONCLUSION

¶ 44 We conclude that, based on the affidavit of defendant, along with the statements of Dobre, Loncar, and Comer, defendant is entitled to a hearing on the allegations of ineffective assistance of counsel. Additionally, because defendant's second defense counsel misunderstood the difference between a posttrial motion and a postconviction petition, for the better administration of justice, we will vacate the denial of the posttrial motion and remand this case to the trial court to hold an evidentiary hearing so that defendant can present the testimony of the three witnesses. *People v. Williams*, 396 Ill. App. 3d 175, 176-77 (2009) (appellate court remanded to trial court to conduct an evidentiary hearing).

¶ 45 Order vacated and case remanded with directions.