

and find no error or potential grounds for appeal. For the following reasons, we now grant the State Appellate Defender's motion to withdraw as counsel on appeal and affirm the judgment of the circuit court of Franklin County.

¶ 3

BACKGROUND

¶ 4 On December 5, 2007, following a jury trial, the defendant was found guilty of two counts of first-degree murder (720 ILCS 5/9-1(a)(1) (West 2006)) for shooting his estranged wife, Amanda Tope Coulter, and her friend, Jack Weston. On March 6, 2008, the defendant was sentenced to two concurrent terms of natural life imprisonment. On direct appeal, the defendant argued solely that the trial court had failed to conduct an adequate inquiry into his posttrial allegations of ineffective assistance of trial counsel. This court affirmed his convictions. See *People v. Coulter*, No. 5-08-0119 (2009) (unpublished order under Supreme Court Rule 23). The defendant filed a *pro se* petition for postconviction relief on June 23, 2010. He filed a *pro se* supplemental petition for postconviction relief on August 30, 2010.

¶ 5 In his petition for postconviction relief, the defendant argues that (1) his sentences were enhanced by the use of a firearm but the jury was not required to find that factor was proven beyond a reasonable doubt, (2) he was entitled to a fitness hearing based on the fact that he was taking Zoloft, a psychotropic medication, at the time of the offense and at trial, and (3) his trial attorneys provided ineffective assistance of counsel by failing to obtain phone records and voice mails to impeach the testimony of a witness, Brandy Helleny-Connor; by failing to obtain a second audio-visual tape from a gas station, Jumpin' Jimmy's, that would have impeached the testimony of a witness, Lisa McConnell; by failing to interview Jack Weston's neighbors about allegedly having heard the victims arguing with each other on the night prior to the murders; and by failing to investigate alleged threats made by the State's Attorney to witnesses. The defendant did not attach any evidence or

affidavits to his postconviction petition or supplemental petition to support these claims. On August 30, 2010, the defendant filed a *pro se* supplemental postconviction petition alleging ineffective assistance of both trial and appellate counsel, alleging that his trial counsel failed to (1) file pretrial motions to suppress evidence, substitute judge, or change venue, and to suppress a falsified confession which the defendant believed to have been staged by police, (2) review the discovery, police reports, and lab reports, (3) consult with the defendant regarding the testimony of Max Kirk, (4) challenge a juror for cause, (5) hire forensics and ballistics experts to rebut the State's case, and (6) present an alibi defense. The defendant again did not attach any evidence or affidavits to support the claims alleged in his supplemental postconviction petition. Also on August 30, 2010, the defendant filed a motion for change of venue or judge arguing that the circuit court judge had displayed "hostile animosity" towards the defendant at his sentencing hearing.

¶ 6 On September 22, 2010, the circuit court denied the motion for change of venue or judge and also summarily dismissed the defendant's postconviction petition and supplemental petition as frivolous and patently without merit. The defendant filed a timely notice of appeal and the State Appellate Defender was appointed to represent him.

¶ 7 ANALYSIS

¶ 8 The Act provides a mechanism by which state prisoners may challenge their convictions or sentences for violations of state or federal constitutional law. *People v. Barrow*, 195 Ill. 2d 506, 518-19 (2001). Postconviction proceedings may consist of as many as three stages. *People v. Pendleton*, 223 Ill. 2d 458, 471-72 (2006). At the first stage, the circuit court has 90 days to examine the petition and to determine, without input from the State, whether it is frivolous and patently without merit and, if so, to summarily dismiss it. 725 ILCS 5/122-2.1(a) (West 2010). "The showing of a violation of constitutional rights must be based on factual allegations, not conclusory statements." *People v. Jackson*, 213

Ill. App. 3d 806, 811 (1991). Section 122-2 of the Act provides that a petitioner must attach affidavits, records, or other evidence to support his allegations or he must state why such information is not attached. 725 ILCS 5/122-2 (West 2010). We review a circuit court's first-stage summary dismissal of a postconviction petition *de novo*. *People v. Trujillo*, 2012 IL App (1st) 103212, ¶ 7.

¶ 9 The defendant's first postconviction claim is that he was deprived of due process and equal protection because the jury was not required to find, beyond a reasonable doubt, that the victims' deaths were caused by the use of a firearm. The defendant mistakenly believes that he was sentenced to a term of natural life imprisonment because he used a firearm to commit the murders. However, the defendant's sentence was based on the jury's finding that he murdered two people. Section 5-8-1 of the Unified Code of Corrections (730 ILCS 5/5-8-1(a)(1)(c)(ii) (West 2006)) mandates that a sentencing court must sentence the defendant to natural life imprisonment if the defendant was 17 years or older and was found guilty of murdering more than one victim. At the time of the murders, the defendant was 46 years old. Therefore, this claim is without merit and fails.

¶ 10 Next, the defendant argues that he was denied due process, equal protection, the effective assistance of counsel, and a fair trial because he was not examined for fitness nor was a fitness hearing conducted to determine if he was able to stand trial. The defendant bases this argument on the fact that he was taking Zoloft, a psychotropic medication, both at the time of the offense and at the time of trial. There is no information contained within the record, nor does the defendant attach any affidavit or point to any information in the record, that would indicate that the defendant was not fit to stand trial. Further, according to section 104-21(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/104-21(a) (West 2006)), a defendant who is using psychotropic medication is not presumed to be unfit to stand trial solely because he is using those medications. This claim, too, fails.

¶ 11 The defendant's next argument is that his trial counsel was ineffective for the multiple reasons, stated above. First, the defendant argues that his counsel should have impeached the testimony of a witness by obtaining phone records and voice mail records. He also argues that his counsel should have obtained a second audio video tape from Jumpin' Jimmy's gas station to impeach the testimony of a second witness. He does not suggest how the testimony of the two witnesses would have been impeached had his counsel obtained voice mail records and audio video records. He does not submit any information by affidavit or otherwise to support his allegations about the testimony of the two witnesses. We find this claim, therefore, to be unsupported and without merit.

¶ 12 Next, the defendant argues that his counsel should have interviewed the neighbors of Jack Weston. The defendant believes that Jack Weston's neighbors would have testified that they heard Jack Weston and Amanda Tope Coulter arguing the day before the murders took place. He did not attach any affidavit or statements to his petition from Jack Weston's neighbors to support his allegation that the neighbors would have testified that they heard the victims arguing the day before the murder. This claim is also without merit.

¶ 13 The defendant also does not attach any statement by any witness to suggest that the State threatened any witness into testifying. The defendant alleges that the State threatened the defendant's sister into testifying. He does not attach an affidavit or any information outside of the record to support this allegation. This claim is unsupported. Not only does the defendant not attach any affidavit or supporting evidence to his petition, he does not explain why he does not attach such information, as is required by section 122-2 of the Act (725 ILCS 5/122-2 (West 2010)).

¶ 14 In his supplemental postconviction petition, the defendant further argues that his counsel was ineffective for failing to file various pretrial motions. Again, the defendant does not set forth any legal or factual basis for this claim. The defendant's counsel did, in

fact, file various motions and was an active advocate for the defendant before, during, and after the defendant's trial. The defendant argues that counsel did not review discovery and lab reports. However, the record indicates that counsel was well-versed and prepared during trial with respect to discovery and reports and both counselors were able to effectively cross-examine the State's witnesses.

¶ 15 The defendant next argues that his counsel was ineffective because counsel failed to impeach the testimony of a witness, Max Kirk, who admitted that he had identified the defendant in a photo array due to the media attention surrounding the case. However, counsel presented testimony from an Illinois State Police officer to impeach Kirk's testimony and did so successfully. Therefore, this claim is belied by the record.

¶ 16 Next, the defendant argues that his counsel was ineffective for not challenging a prospective juror. During *voir dire*, the defendant could not decide whether to challenge the juror, so he specifically told counsel to decide whether to challenge the juror. Counsel decided not to challenge the juror. The juror indicated that he could be impartial. The decision to challenge a juror is a strategic decision left up to the discretion of trial counsel. *People v. Palmer*, 162 Ill. 2d 465, 476 (1994). Here, the defendant explicitly told his counsel to make the decision. Counsel had determined that the particular juror would not be biased and had not already formed an opinion about the defendant's guilt. We cannot agree with the defendant that this was ineffective representation by his trial counsel.

¶ 17 The next contention is that the defendant's counsel failed to call any forensics or ballistics experts to rebut the State's experts regarding various evidence that was found at the scene of the crime. The decision to call a witness is a matter of trial strategy for trial counsel to determine. *People v. Sims*, 167 Ill. 2d 483, 520 (1995). Counsel was able to cross-examine the State's experts and may have rightly decided that there was no need to hire any experts of its own. We do not find this to be an issue with any support behind it.

Further, the defendant does not attach any affidavit or evidence to show what an expert would have said that would have supported his claims.

¶ 18 The defendant also argues that his counsel should have provided an alibi defense. Again, this contention is belied by the record. The defendant testified in his own defense, explaining where he was at various times throughout the night of the murders, in an effort to show that he was not at the home of the victim. He also indicated that he could not say for certain that he did *not* commit the murders. Any alibi defense would have been contradicted by the defendant's own testimony. Therefore, this claim is also without merit.

¶ 19 Counsel's representation is judged by the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted in Illinois by *People v. Albanese*, 104 Ill. 2d 504, 525-26 (1984). *Strickland* asks whether counsel's representation fell below an objective standard of reasonableness and whether there is a reasonable probability that the result of the trial would have been different but for counsel's errors. This case was not a close case. Even if defense counsel had impeached the testimony of the witnesses and had presented the evidence that the defendant argues counsel should have, the jury would have still likely determined that the defendant was guilty. In fact, there were two other witnesses who testified that the defendant admitted that he had killed the victims. The defendant's ineffective assistance claims are too broad and are unsupported by affidavit or other evidence to state the gist of a constitutional claim.

¶ 20 Next, the defendant argues that his appellate counsel was ineffective for failing to raise, on direct appeal, (1) that the court erred in denying all of his for-cause juror challenges, (2) that the court erred in overruling the defendant's objection to the testimony of witness Max Kirk, (3) that he was denied a fair trial by statements made by the State during closing arguments, and (4) any of the issues he raised in his supplemental petition.

¶ 21 Appellate counsel is held to the standard set forth in *Strickland v. Washington*, 466

U.S. 668 (1984). The defendant must show that there is a reasonable probability that his conviction would have been reversed but for his counsel's ineffective representation. *People v. Titone*, 151 Ill. 2d 19, 36 (1992). Appellate counsel need only raise meritorious issues on appeal. *People v. Easley*, 192 Ill. 2d 307, 329 (2000).

¶ 22 First, the defendant argues that his appellate counsel should have raised the trial judge's denial of for-cause juror challenges. One juror, Tottleben, acknowledged that one of the victims and two of the witnesses had been students at the elementary school where she taught and that her brother was married to a witness's sister-in-law. Defense counsel made a for-cause challenge to Tottleben as a juror. However, Tottleben said she could be a fair and impartial juror. The judge denied the challenge. The circuit court's decision to deny a for-cause challenge is viewed under an abuse of discretion standard. *People v. Seuffer*, 144 Ill. 2d 482, 502 (1991). We find that the circuit court did not abuse its discretion here because Tottleben said she could be fair and impartial. Therefore, appellate counsel was not ineffective for raising this issue on appeal. Incidentally, the defendant's counsel used a peremptory challenge on the potential juror, so Tottleben did not serve on the jury anyway.

¶ 23 As for the second for-cause challenge that the circuit court overruled, that potential juror, juror Sims, had an injured foot that would, at some speculative time, need surgery. Counsel challenged Sims because it was not definite that Sims could serve the entire time on the jury. The circuit court overruled the challenge because Sims's surgery was not set for a definite date and was speculative, at best. She was able to serve the whole trial. Again, we find that the circuit court did not abuse its discretion when it overruled the challenge. Furthermore, the defendant waived any argument that an objectionable juror was allowed to sit on the jury because the defendant did not use all of his peremptory challenges. *People v. Dixon*, 382 Ill. App. 3d 233, 240 (2008). Therefore, it would have been frivolous for appellate counsel to raise the issue on direct appeal.

¶ 24 The defendant alleges that the State engaged in prosecutorial misconduct when it said, "This day, this day, is reserved for Jack Weston and Amanda Tope because this day, ladies and gentlemen, is the day you get to exert control and grant them justice." The prosecutor said this in response to defense counsel saying that the jurors were the "stars of the show." We find that such comment by the State was invited by defense counsel's argument and was completely acceptable in light of defense counsel's statements. See *People v. Williams*, 332 Ill. App. 3d 254, 266 (2002). Therefore, this claim was frivolous and appellate counsel was correct to not argue the issue on direct appeal.

¶ 25 The defendant next argues that appellate counsel was ineffective because it failed to raise the issue of the circuit court overruling the defense's objection to the testimony of Max Kirk, who admitted he identified the defendant from media reports. We find this to be a nonissue because trial counsel effectively impeached Max Kirk's testimony by introducing testimony from an Illinois State Police officer. Further, even if Max Kirk had not testified, there were other witnesses who presented evidence that would have pointed to the defendant's guilt.

¶ 26 With respect to the claim that appellate counsel should have argued everything that the defendant presented in his supplemental postconviction petition, we have already addressed the defendant's claims and find that appellate counsel could not have been ineffective for having failed to raise such claims on direct appeal, as those claims were frivolous.

¶ 27 Finally, the circuit court did not err when it denied the defendant's motion for change of venue or judge. A petitioner has no absolute right to a substitution of judge in postconviction proceedings. *People v. Harvey*, 379 Ill. App. 3d 518, 522 (2008). The defendant argues that the circuit court was biased because it had "hostile animosity" and had made "derogatory statements" towards the defendant. The defendant did not identify any

statements within the record nor do any such statements appear within the record. Therefore, the circuit court did not err when it dismissed the motion.

¶ 28

CONCLUSION

¶ 29 For the foregoing reasons, the motion of the State Appellate Defender to withdraw as counsel is granted, and the judgment of the circuit court of Franklin County is affirmed.

¶ 30 Motion granted; judgment affirmed.