2015 IL App (2d) 140280-U
No. 2-14-0280
Order filed May 15, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiff-Appellee,	)	
v.	)	No. 01-CF-1421
MATTHEW M. McCAIN,	)	Honorable Randy Wilt,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Hutchinson and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed defendant's *pro se* postconviction petition at the second stage. Neither trial nor appellate counsel rendered ineffective assistance of counsel, and there was no basis for his claims that the victim died of medical malpractice or that he was actually innocent. Therefore, we affirmed.

¶ 2 Following a jury trial, defendant, Matthew M. McCain, was found guilty but mentally ill of first-degree murder (720 ILCS 5/9-1(a)(2) (West 2000)) and sentenced to 35 years' imprisonment. Defendant filed two direct appeals. In his first appeal, this court affirmed and remanded the case. See *People v. McCain*, No. 2-03-0589 (2005) (unpublished order under

Supreme Court Rule 23). In the second appeal, this court affirmed. See *People v. McCain*, No. 2-06-0375 (2008) (unpublished order under Supreme Court Rule 23).

¶ 3 In 2008, defendant filed a *pro se* petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122 *et seq.* (West 2008)). In December 2010, defendant's motion to proceed *pro se* was granted. On August 30, 2011, defendant filed a *pro se* amended postconviction petition that proceeded to the second stage. The State moved to dismiss defendant's petition, and the trial court granted the motion on March 5, 2014.

¶ 4 Defendant appeals the second stage dismissal of his *pro se* postconviction petition, arguing that: (1) his claims were not forfeited or barred by *res judicata*; (2) his trial counsel was ineffective for conceding guilt and pursuing a guilty but mentally ill verdict; (3) the hospital's treatment of the victim was a proximate cause of her death; and (4) he was actually innocent.

¶ 5 We affirm.

¶ 6 I. BACKGROUND

¶ 7 On June 14, 2001, defendant was charged by complaint with attempted murder for the stabbing of Marian Geier. On defense counsel's motion, Dr. Robert Meyer, a licensed clinical psychologist, was appointed to examine defendant and determine if he was fit to stand trial. According to Dr. Meyer, defendant, age 17, suffered from "Major Depression with occasional mood congruent psychotic features." Nevertheless, Dr. Meyer concluded that defendant was fit to stand trial.

¶ 8 Geier died from her injuries on June 22, 2001. On June 27, 2001, defendant was charged by indictment with first-degree murder. The indictment alleged that defendant "knowingly created a strong probability of death or great bodily harm" by stabbing Geier in the neck with a knife.

¶ 9 Pursuant to defense counsel's motion, Dr. Meyer again evaluated defendant to determine if he was fit to stand trial. This time, Dr. Meyer found that defendant was not fit because his mental illness prevented him from concentrating in court. In contrast to Dr. Meyer's opinion, State-appointed psychologist Dr. Robert Gordon opined that defendant was fit to stand trial. Following a fitness hearing, the trial court found defendant fit to stand trial.

¶ 10 A. Trial

¶ 11 A jury trial commenced in March 2003. During opening statements, the State argued that defendant stabbed Geier with a knife while she stayed at his house and slept on the couch.

¶ 12 Defense counsel[1] responded, during her opening remarks, that defendant was a troubled boy who had been in counseling on and off since he was 12 years old (defendant was currently 18 years old). On the night of the incident, defendant drank more than ½ pint of vodka and smoked marijuana. Defense counsel argued that between the drugs, the alcohol, and the emotional and mental difficulties that were coming to a head in defendant's life, he heard a voice telling him to kill Geier. Defense counsel admitted, "yes, he did stab Marian Geier. He stabbed her on the right side of the neck and the shoulder ***, a single stab wound." According to defense counsel, defendant immediately realized that he had done something wrong. Defendant then helped keep Geier conscious and cooperated with the ambulance. After defendant was taken to jail, he tried to commit suicide more than once. Defense counsel stated that Dr. Meyer would testify that defendant suffered from a major mental and emotional illness. It was up to the

[1] As the State points out, defendant was represented by two assistant public defenders. Defendant does not distinguish between the two, and we likewise refer to both of them as "counsel."

jury, according to defense counsel, whether defendant was capable of forming the necessary intent.

¶ 13 Susan McCain, defendant's mother, testified that she and Geier had been friends for 10 years. On the night of the incident, June 12, 2001, Geier spent the night at Susan's home. Around 8 or 9 p.m., Geier took defendant to a friend's house. After Geier returned, they went to bed around 10 p.m., and Geier slept on the couch. Defendant returned home around midnight, and Susan's three Chihuahuas awakened them. Defendant was very happy and appeared to be intoxicated. Susan and Geier talked with defendant for less than one hour and then Susan returned to bed.

¶ 14 About 20 minutes later, Susan heard Geier say that the "dogs jumped on [her] neck and broke it." When Susan went into the living room to check on her, there was blood all over Geier and the couch. Geier had a hole in her neck, and blood spurted out with each heartbeat. Susan used a towel to apply pressure to Geier's neck and told defendant that they could not let Geier fall asleep. Defendant got some water and kept splashing Geier's face; he seemed concerned. Susan called 911, and the police and paramedics arrived within 10 minutes.

¶ 15 Ronald Schwartz, the responding paramedic, testified that Geier was hemorrhaging profusely, and her speech was garbled. Geier's blood pressure would not have been able to sustain her life. However, Geier was reported as a 12 out of 15 on the Glasgow Coma Scale, which was "a nice high level of consciousness." Geier was in bad condition and considered a "load and go."

¶ 16 Susan testified that she and defendant went to the hospital for two hours and then returned home as Geier underwent surgery. About one hour later, Susan saw defendant in the backyard, scratching at the ground with his foot. A short time later, defendant said, "Mamma, I

might as well tell you. I did it." Defendant brought Susan a paper bag with a knife in it. After Susan called the police, defendant asked her for pills so that he could kill himself.

¶ 17 Officers Joe Viola and Edward Ritter testified that they responded to a second 911 call at defendant's home around 6:30 a.m. on June 13, 2001. Susan informed them that defendant had stabbed Geier in the neck and that voices had told him to do it. When asked, defendant affirmed that what Susan said was true. Susan showed the officers the bag containing the folding knife, and defendant was arrested without resistance. Defendant began crying in the squad car. He stated that he had voices telling him to kill her and that he had grabbed the knife and stabbed her.

¶ 18 At the police station, defendant gave a detailed version of events to Detective Eric Bruno. On the day of the incident, Geier gave defendant a ride to his friend's house, and he brought a bottle of vodka that he had hidden in his pants. While at his friends' house, defendant consumed about five shots of vodka mixed with orange juice. He then finished the bottle of Vodka on his walk home. Upon arriving home around 12:30 a.m., the dogs barked and woke up Susan and Geier. He talked with them before going to his room; Geier's raspy, high-pitched voice annoyed him. After that, he watched a show about murderers and listened to "Fight Song" by Marilyn Manson.

¶ 19 During this time, defendant was "plastered" and "started thinking about what it would be like to kill someone." Defendant thought about how Geier annoyed him, although he had no particular reason to be angry with her. Defendant also thought about how other kids at school treated him. He recalled an incident where another student had called him a "faggot"; he had responded by calling that student a "nigger"; and he received the harsher discipline. As these thoughts swirled around in his head, defendant heard a voice tell him to "kill the b*tch." Picking up the folding knife lying on the entertainment center, defendant went to his mother's room,

kissed her, and told her that he loved her. He then walked to the living room with the knife in his right hand, saw Geier sleeping on her back, and stabbed her on the right side of her neck. Geier cried out in pain.

¶ 20 Defendant told detective Bruno that as soon as he stabbed Geier, he realized that he was "f**cked." Defendant went into the backyard, wiped the knife on his t-shirt to remove his fingerprints, dug a hole, and buried the knife. When defendant came back inside, his mother had already called 911, and Geier was bleeding profusely. The police arrived, and defendant said that he had been urinating in the backyard. He and Susan went to the hospital to check on Geier and then returned home. After returning home, defendant retrieved the knife from the backyard and soaked it in alcohol. Then, he wrapped it in plastic, put it inside a paper bag, and tried to light it. When that did not work, he put the fire out and told his mother what had happened. Defendant felt badly about what had happened and said that he would apologize to Geier if she were present.

¶ 21 Defendant further stated that he had just finished his junior year in high school. In 1999 or 2000, defendant had received counseling at the recommendation of a teacher, who thought that he was depressed. Although defendant was prescribed Prozac, he stopped taking it after three days. Defendant had previously tried to commit suicide by ingesting half a bottle of Excedrin. Defendant denied ever hurting a person but admitted that he had cut off the head of a mouse and then burned its head and body. Defendant had also used a knife to carve a Marilyn Manson lyric on his arm. Prior to this incident, defendant had never hurt another person. However, "in the past [he had] thought about what it would be like to kill someone."

¶ 22 Defendant agreed to make a written statement. He also identified a photograph of the folding knife he used to stab Geier. The folding knife found at defendant's house was wrapped

in plastic, and it was located on two paper bags that appeared to have been set on fire or burned. Testing of the knife revealed Geier's blood. In addition, there was a small hole dug in the back yard of defendant's house.

¶ 23 Dr. Ernest Vesta, an emergency room physician, testified that he examined Geier on June 13, 2001. She was in a life-threatening situation due to a laceration in the right side of her neck. Dr. Vesta estimated the wound to be 1 to 1½ centimeters. The clean-edged incision penetrated into the muscle tissue of the neck and appeared to cut a vein or artery. Dr. Vesta opined that the wound was caused by a very sharp object. Geier was declared a Level 1 trauma and sent to surgery. On cross-examination, Dr. Vesta testified that he thought Geier was taking Clonopin, which was used to relieve stress and sometimes keep seizures under control. He did not recall if Clonopin interfered with blood clotting.

¶ 24 Geier died several days later, on June 22, 2001. Dr. Blum, a medical doctor specializing in forensic pathology, testified that he conducted an autopsy. The characteristics of the wound revealed that it was caused by a sharp object, because it had a clean border and the edges were not frayed or bruised. The wound was over 2 inches deep; Geier's jugular vein had been severed. Dr. Blum opined that the stab wound was the cause of Geier's death, and the stab wound caused the complications or intermediate causes of her death.

¶ 25 On cross-examination, defense counsel asked Dr. Blum whether any intervening conditions developed during Geier's hospitalization. Dr. Blum agreed that there were several complications subsequent to the stabbing, but none were unrelated or independent conditions that developed during her hospitalization. Dr. Blum's examination of Geier revealed that she did not have any teeth and that she was on medication for bipolar disorder.

¶ 26 Susan testified on behalf of the defense about defendant's history and mental condition. Susan and defendant did not have other family and were very close. When defendant was young, he witnessed his father get drunk and hit Susan on several occasions. Eventually, Susan left and moved to a housing project with defendant. Defendant was around five years old. At the housing project, Susan allowed a woman, Nancy Purifoy, and her children to stay in one of their bedrooms for one year because they had no place to go. However, Nancy had drug and alcohol problems and would sometimes physically attack Susan in front of defendant to get money. About a year after Nancy moved out, Debbie Crabtree came to live with Susan as her intimate companion. Defendant, who was 11 or 12, did not get along with Debbie and expressed his anger about Debbie's behavior during counseling at Ken-Rock facility. Debbie moved out after about two years.

¶ 27 Susan testified that beginning in fifth grade, children teased defendant about his weight. When he started high school, defendant told Susan that he was being bullied and called names such as "faggot" and "fatty." Although defendant had previously been on the honor roll, he started having trouble at school, and Susan had difficulty getting him up in the morning. He entered counseling for depression at Janet Wattles Mental Health Center, was prescribed Prozac, but stopped taking it. Defendant began using drugs, wearing black clothing, and cutting himself. His relationship with Susan deteriorated.

¶ 28 Mark Lolli, a supervising correctional officer, testified that defendant did not appear to be mentally stable when he entered the jail on June 13, 2001. Lolli saw defendant kneeling on the floor, screaming, yelling, and rambling. Defendant was placed on suicide watch. The next day, defendant attempted to kill himself by tying a towel around the cell bars.

¶ 29 Dan Figiel, a psychiatric social worker, interviewed defendant at the jail on three occasions. Defendant fold Figiel that he was suicidal; that he had been using alcohol and cannabis for a while; and that he heard voices telling him to hurt people. Figiel felt that defendant was truthful and was in fact depressed, suicidal, and experiencing auditory hallucinations (hearing voices). Figiel recommended that defendant be kept under observation, and defendant did try to hang himself while in jail. Figiel's last visit with defendant was on June 18. At that point, Figiel recommended that defendant leave the observation cell based on defendant's assurances that he was feeling better and would not hurt himself.

¶ 30 Dr. Meyer testified that he had interviewed defendant four times and reviewed his records. The tests revealed themes consistent with depression, such as anger, alienation, and the expectation of rejection and failure in life. Although Dr. Meyer did not find defendant insane at the time of the offense, he concluded that defendant suffered from a mental illness. In particular, defendant suffered from major depressive disorder, dysthymic disorder, cannabis dependency, identity disorder, oppositional defiance disorder, and paranoid and avoidant personality features. With respect to the lead diagnosis of major depressive disorder, defendant fell toward the severe end of the spectrum. During the clinical interviews, Dr. Meyer also found defendant to demonstrate "mood congruent hallucinations" in the form of voices that would command him to do things or to harm himself.

¶ 31 In Dr. Meyer's opinion, the disorders had been present on June 13, 2001, substantially impairing defendant's ability to appropriately judge and control his behavior. Dr. Meyer noted that defendant claimed to have been in a dream-like state when the impulse to act came upon him. Dr. Meyer opined that had it not been for the disinhibition effect of alcohol, defendant may not have followed through on the "command hallucination" on June 13, 2001. Defendant's

underlying anger, hostility, and depression, combined with the alcohol and cannabis consumption, and the auditory hallucination, impacted his ability to make an appropriate judgment and to control his behavior.

¶ 32 Dr. Meyer further stated that, although defendant suffered a brief psychotic break at the time of the incident, defendant did not lose all awareness and did understand right from wrong. Defendant's ability to understand right from wrong was evidenced by his immediate reaction to stabbing Geier; defendant "came out of his state" and knew that what he had done was wrong. Defendant helped stop Geier's bleeding and expressed remorse. For this reason, defendant did not meet the standard of insanity.

¶ 33 Dr. Gordon, the State's rebuttal witness, opined that defendant was not mentally ill at the time of the incident. Dr. Gordon interviewed defendant three times but did not review defendant's records of past mental health treatment. When Dr. Gordon saw defendant, he was taking medication (Prozac) and no longer experiencing auditory hallucinations.

¶ 34 During the jury instruction conference, defense counsel requested an involuntary manslaughter instruction that defendant acted recklessly as opposed to intentionally. The trial court found no evidence of unintentional conduct and denied defense counsel's request. In addition, defense counsel requested a special verdict form allowing the jury to find defendant guilty but mentally ill. Defense counsel argued that the jury pattern instructions supported her request. At this point, the court confirmed that defense counsel was not requesting a special verdict form of not guilty by reason of insanity. In response, defense counsel explained that although she had wanted to raise an insanity defense, no lay witnesses or experts were "willing to offer that opinion." Therefore, the insanity defense was not available to defendant.

¶ 35 The court noted that the jury pattern instructions conflicted with the statute (725 ILCS 5/115-4(j) (West 2000)) and case law stating that a defendant could not be found guilty but mentally ill unless an insanity defense was raised. Nevertheless, the court allowed defense counsel to give the jury a special verdict form that defendant was guilty but mentally ill. In so ruling, the court stated that the jury would be instructed on the definitions of insanity and mental illness. The jury was instructed that it could find defendant: (1) not guilty of first-degree murder; (2) guilty of first-degree murder; or (3) guilty but mentally ill of first-degree murder. The jury was not instructed that it could find defendant not guilty by reason of insanity.

¶ 36 During closing argument, defense counsel highlighted defendant's troubled past, including abusive relationships between Susan and defendant's father and then with her female partner. Defense counsel pointed out how defendant needed counseling and began self-mutilating and using alcohol and drugs. Defense counsel summarized Dr. Meyers's testimony, arguing that defendant did not know what he was doing when he stabbed Geier because he was in a dissociative state. Defense counsel argued that defendant was mentally ill at the time of the incident. Furthermore, defense counsel questioned whether Geier's continued blood loss occurred at the scene or whether it was caused by the sub-standard care of the paramedics, who "screwed things up."

¶ 37 The jury found defendant guilty but mentally ill of first-degree murder. Following a sentencing hearing, the court sentenced defendant to 35 years' imprisonment.

¶ 38 B. Appeals and Postconviction Proceedings

¶ 39 Defendant appealed, raising three issues: (1) the trial court's decision to allow certain photographs to go to the jury deprived him of a fair trial; (2) a portion of the insanity statute (720 ILCS 5/6-2(a) (West 2000)) violated the equal protection and due process clauses of the

constitution; and (3) the trial court failed to admonish him in compliance with Illinois Supreme Court Rule 605(a)(3) (eff. Oct. 1, 2001). We affirmed defendant's conviction but remanded the case to the trial court for proper admonishments pursuant to Rule 605(a)(3) so that defendant could file a motion to reconsider his sentence. *McCain*, No. 2-03-0589.

¶ 40 On remand, defendant moved to reconsider his sentence, and the trial court denied his motion. Defendant appealed a second time, arguing only that his 35-year sentence was excessive. This court affirmed, noting that the sentencing range was between 20 and 60 years and that defendant's 35-year sentence was closer to the minimum than the maximum. *McCain*, No. 2-06-0375. In addition, we noted that in fashioning a sentence, the trial court specifically found defendant's mental illness to be a mitigating factor. *Id*.

¶ 41 In 2008, defendant filed a *pro se* petition under the Act, and, as stated, his motion to proceed *pro se* was granted. On August 30, 2011, defendant filed a *pro se* amended postconviction petition accompanied by an affidavit and other documents. Defendant's petition proceeded to the second stage.

¶ 42 The State filed a motion to dismiss, and the parties appeared in court on November 26, 2013. At that hearing, the court noted that defendant had also filed a motion to supplement or expand the record with a doctor's curriculum vitae, police reports, medical reports, an autopsy report, and various articles. The court granted defendant's motion.

¶ 43 After reviewing defendant's most recent submissions, the court granted the State's motion to dismiss defendant's *pro se* postconviction petition on March 5, 2014. Defendant timely appealed.

¶ 44 II. ANALYSIS

¶ 45 The Act provides a remedy for defendants who have suffered a substantial violation of constitutional rights at trial. *People v. Snow*, 2012 IL App (4th) 110415, ¶ 13. The Act sets forth three stages, and at the first stage, the trial court independently reviews the petition and determines whether it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2008). If the court finds that the petition is frivolous or patently without merit, the court must dismiss the petition. 725 ILCS 5/122-2.1(a)(2) (West 2008). If the court does not dismiss the petition, it proceeds to the second stage, at which the State may file a motion to dismiss or an answer. *Snow*, 2012 IL App (4th) 110415, ¶ 14. In this case, the State filed a motion to dismiss, which the trial court granted.

¶ 46 At the second stage, the trial court is concerned merely with determining whether the petition's allegations sufficiently demonstrate a constitutional infirmity that would necessitate relief under the Act. *Id.* At this stage, the defendant bears the burden of making a substantial showing of a constitutional violation, and all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true. *Id.* At a hearing on the State's motion to dismiss, the trial court is prohibited from engaging in any fact finding. *Id.* "[T]he dismissal of a postconviction petition at the second stage is warranted only when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation." *Id.* Our review of a dismissal at the second stage is *de novo*. *Id.*

¶ 47 A. Forfeiture

¶ 48 Defendant first argues that the trial court erred by determining that he had forfeited certain issues raised in his postconviction petition based on his failure to raise them on direct appeal. We consider defendant's general forfeiture argument in the context of his individual arguments as appropriate.

¶ 49 B. Ineffective Assistance of Counsel

¶ 50 Defendant first argues that his trial counsel was ineffective in two ways. First, defendant argues that his trial counsel pursued a defective trial strategy by conceding his guilt during opening statement and then pursuing a defense that he was guilty but mentally ill. Second, defendant argues that his trial counsel was ineffective because a guilty but mentally ill verdict was statutorily unauthorized without raising the affirmative defense of insanity.

¶ 51 The State points out that these issues would normally be forfeited based on defendant's failure to raise them on direct appeal. Nevertheless, the State acknowledges that the forfeiture rule may be relaxed where a defendant alleges that appellate counsel was ineffective for failing to raise an issue on direct appeal. Here, defendant alleges that appellate counsel was ineffective for failing to raise this issue.

¶ 52 The purpose of a proceeding under the Act is to permit inquiry into constitutional issues involved in the original conviction and sentence that were not, and could not have been, adjudicated previously on direct appeal. *People v. Turner*, 2012 IL App (2d) 100819, ¶ 51. "Issues that were raised and decided on direct appeal are barred by the doctrine of *res judicata*, and issues that could have been presented on direct appeal, but were not, are forfeited." *Id*. Still, reviewing courts may relax the forfeiture rule in postconviction proceedings where the defendant's failure to raise an issue on direct appeal is attributable to the ineffective assistance of appellate counsel. See *id*. ¶ 55. That said, appellate counsel's choices concerning which issues to pursue are entitled to substantial deference, and if the underlying issue is nonmeritorious, the defendant has suffered no prejudice. *People v. Jones*, 399 Ill. App. 3d 341, 372 (2010). Accordingly, in order to determine whether appellate counsel was ineffective for failing to raise these issues on appeal, it is necessary to determine whether the issues are meritorious.

¶ 53 As stated, defendant's first argument is that defense counsel was ineffective for conceding his guilt during opening statement and pursuing a defense of guilty but mentally ill. During opening statement, defense counsel focused on defendant's history as a troubled boy who had been in counseling on and off since he was 12 years old. She also focused on him drinking ½ pint of vodka and smoking pot on the night of the incident. Defense counsel argued that between the drugs, the alcohol, and the emotional and mental difficulties that were coming to a head in his life, defendant heard a voice telling him to kill Geier, and counsel admitted that defendant did indeed stab Geier once on the right side of the neck. Defense counsel pointed out that Dr. Meyer would testify that defendant suffered from a major mental and emotional illness, and that it was up to the jury to determine whether defendant was capable of forming the necessary intent.

¶ 54 Under the familiar two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant must show that (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant in that, but for counsel's deficient performance, there is a reasonable probability that the result would have been different. *People v. Houston*, 226 Ill. 2d 135, 144 (2007). "In demonstrating, under the first *Strickland* prong, that his counsel's performance was deficient, a defendant must overcome a strong presumption that, under the circumstances, counsel's conduct must be considered sound trial strategy." *Id.* Under the second prong, a reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome. *Id.* In order to establish ineffective assistance of counsel, a defendant must satisfy both the performance and prejudice prongs of *Strickland*. *Id.* at 144-45; see also *People v.*

Clendenin, 238 Ill. 2d 302, 317-18 (2010) (because a defendant must satisfy both prongs of this test, the failure to establish either prong is fatal to the claim).

¶ 55 In support of his argument, defendant cites *People v. Hattery*, 109 Ill. 2d 449 (1985), where the supreme court noted that there are some circumstances so likely to prejudice the accused that such prejudice need not be shown, but instead will be presumed. *Id*. at 461. In *Hattery*, despite the defendant's not guilty plea, defense counsel told the jury that the defense was not asking the jury to find the defendant not guilty but rather was asking the jury to find him ineligible for the death penalty. *Id*. at 458-59. In addition, defense counsel advanced no theory of defense, presented no evidence, and declined to make a closing statement. *Id*. at 459. Based on defense counsel's actions, the supreme court determined that the State's case was not subjected to the " 'meaningful adversarial testing' " required by the sixth amendment. *Id*. at 464. The supreme court held that defense "counsel may not concede his client's guilt in the hope of obtaining a more lenient sentence where a plea of not guilty has been entered, unless the record adequately shows that the defendant knowingly and intelligently consented to his counsel's strategy." *Id*. at 465.

¶ 56 Later, in *People v. Johnson*, 128 Ill. 2d 253 (1989), the supreme court limited the reach of *Hattery*, explaining that *Hattery* did not hold that it is *per se* ineffectiveness whenever the defense attorney concedes his client's guilt to offenses in which there is overwhelming evidence of that guilt but fails to show on the record consent by the defendant. *Johnson*, 128 Ill. 2d at 269. The *Johnson* court held that *Hattery* must be narrowly construed and that a defendant faces a high burden before he can forsake the two-part *Strickland* test. *Id*. at 269-70.

¶ 57 Likewise, in *People v. Shatner*, 174 Ill. 2d 133 (1996), the supreme court rejected the defendant's argument that his trial counsel was *per se* ineffective for conceding his guilt in a

robbery during which the victim was killed. *Id*. at 144-45. The supreme court reasoned that unlike the counsel in *Hattery*, trial counsel in *Shatner* served as the defendant's advocate by presenting opening and closing arguments, cross-examining almost all of the State's witnesses, presenting witnesses for the defense, making objections, and moving for a mistrial on several occasions. *Id*. at 145-46. As a result, the court applied the traditional *Strickland* test to determine whether trial counsel was ineffective. *Id*. at 146.

¶ 58 As in *Johnson* and *Shatner*, we apply the traditional *Strickland* test because defense counsel subjected the State's case to meaningful adversarial testing. *Cf. People v. Woods*, 2011 IL App (1st) 092908, ¶ 25 (where defense counsel has conceded guilt, prejudice may be presumed if counsel entirely fails to subject the State's case to meaningful adversarial testing). In this case, defense counsel filed a motion *in limine* to suppress defendant's confession to police, she presented opening and closing arguments, she vigorously cross-examined the State's witnesses, she presented defense witnesses, she made objections, and she requested a jury instruction on involuntary manslaughter.

¶ 59 Applying *Strickland*, and specifically the first prong, it is clear that defense counsel was not deficient. We begin by clarifying that defense counsel did not concede defendant's guilt as to every element of the offense. While she did concede that defendant stabbed Geier, she did *not* concede that defendant had the intent to do so, *i.e.*, that defendant "knowingly" stabbed her. Rather, defense counsel's strategy was to focus on defendant's troubled emotional and mental state at the time of the stabbing, as well as the fact that he had drank a considerable amount of vodka and smoked pot. Defense counsel's strategy was reflected in her opening statement, in which she argued that given defendant's mental illness and impaired state at the time of the stabbing, it was up to the jury to determine whether defendant was capable of forming the

necessary intent. See *People v. Elam*, 294 Ill. App. 3d 313, 320 (1998) (defense counsel did not unequivocally abdicate the defendant's innocence to the State's charges or concede all the elements of the offense).

¶ 60 Defense counsel's strategy of conceding guilt as to the stabbing was reasonable given the overwhelming evidence against defendant. See *People v. Wood*, 2014 IL App (1st) 121408, ¶ 61 (to establish that trial counsel's performance was deficient, a defendant must overcome the strong presumption that counsel's action or inaction was the result of sound trial strategy, and a reviewing court is highly deferential to trial counsel on such matters). Defendant confessed that he had stabbed Geier to Susan, the police, and Dr. Meyer. Defendant admitted burying the knife in the backyard, and the investigating detective saw a small hole that corroborated defendant's version of events. Defendant also admitted putting the knife in plastic and then in a bag, and trying to light it. The knife that was recovered from the scene was wrapped in plastic and located with a paper bag that had been set on fire or burned. Geier's blood was found on the knife, and Dr. Blum, the forensic pathologist confirmed that the stab wound, which was made by a sharp object, was the cause of Geier's death. In the face of this overwhelming evidence, it was reasonable for defense counsel to concede that defendant stabbed Geier. See *Woods*, 2011 IL App (1st) 092908, ¶ 34 (defense counsel may have attempted to preserve his credibility in the eyes of the jury by conceding guilt in light of the overwhelming evidence against the defendant).

¶ 61 It was also reasonable strategy to pursue a guilty but mentally ill verdict, especially after the court refused defense counsel's request for an involuntary manslaughter instruction. Consistent with defense counsel's overall strategy of challenging defendant's ability to form the necessary intent, defense counsel requested an involuntary manslaughter instruction that defendant acted recklessly as opposed to intentionally. After the court denied this request,

defense counsel requested a special verdict form allowing the jury to find defendant guilty but mentally ill. In an effort to evoke the sympathy of the jury, defense counsel argued during closing arguments that defendant was a troubled, suicidal person who did not know what he was doing when he stabbed Geier. See *Woods*, 2011 IL App (1st) 092908, ¶ 34 (although counsel may not argue that jurors should ignore the law in coming to a decision, counsel may present a defense evoking the empathy, compassion, sympathy, or understanding of the jurors).

¶ 62 The alternative, which defendant argued during the dismissal hearing on his *pro se* postconviction petition, is that defense counsel should have argued "mistake of fact or ignorance." See 720 ILC 5/4-8(a) (West 2000) (a person's ignorance or mistake as to a matter of fact or law is a defense if it negatives the existence of the mental state which the statute prescribes with respect to an element of the offense). According to defendant, the "truth of what happened" was very different than the version defense counsel pursued because defense counsel refused to listen when defendant tried to tell her that he did not hear voices. In this way, defendant argues that defense counsel presented a "fraudulent defense."

¶ 63 Even assuming that defendant told defense counsel that he was not really hearing voices, our result does not change. As the State points out, there was ample evidence of defendant's mental illness, his prior depression, and his suicide attempts. In defendant's petition, he admits that Dr. Meyer found him mentally ill, and he could not "honestly say he wasn't." Given that defendant told Susan, the police, Dr. Meyer, and Figiel about hearing a voice to kill Geier, defense counsel could have doubted defendant's claim that he was denying that he heard a voice. Moreover, the State elicited evidence that defendant had heard a voice telling him to kill Geier, meaning this evidence was already before he jury, regardless of whether defense counsel focused

on it. In short, the facts in defendant's case did not support an ignorance or mistake defense, and defense counsel was not deficient for pursuing the strategy she did.

¶ 64 While defendant's failure to establish the first prong of *Strickland* is sufficient to defeat his claim, defendant also cannot show prejudice. Defense counsel's strategy was successful, in that she obtained a lesser verdict than that of a general verdict of guilty of first-degree murder. In other words, to pursue a defense *other* than guilty but mentally ill would have likely resulted in a general guilty verdict. During sentencing, the trial court specifically found defendant's mental illness to be a mitigating factor, and the 35-year sentence imposed is closer to the minimum than the maximum. In addition, a finding of guilty but mentally ill affords defendant ongoing treatment of defendant's mental illness while incarcerated. See *Wood*, 2014 IL App (1st) 121408, ¶ 67 (upon a finding of guilty but mentally ill, the Illinois Department of Corrections shall cause periodic inquiry and examination to be made concerning the nature, extent, continuance, and treatment of defendant's mental illness and shall provide such psychiatric, psychological, or other counseling for the treatment as it determines necessary). Therefore, defendant cannot establish prejudice.

¶ 65 In a related argument, defendant argues that his trial counsel was ineffective because a guilty but mentally ill verdict was statutorily unauthorized without raising the affirmative defense of insanity. Defendant is correct that "[u]nder Illinois law, a defendant must raise the defense of insanity in order to be eligible for a GBMI [guilty but mentally ill] conviction." *Id.* ¶ 62 (citing *People v. Gosier*, 145 Ill. 2d 127, 142 (1991)). Conversely, when the defendant has raised an insanity defense but has failed to prove insanity, the defendant may be found guilty but mentally ill if the State has proven the defendant guilty of the offense beyond a reasonable doubt,

and the defendant has proven by a preponderance of the evidence that he was mentally ill at the time of the offense. See 725 ILCS 5/115-4(j) (West 2000).

¶ 66 In this case, defense counsel requested a special verdict form allowing the jury to find defendant guilty but mentally ill, and she argued that the jury pattern instructions supported her request. When the court asked whether defense counsel was requesting a special verdict of not guilty by reason of insanity, defense counsel explained that although she had wanted to raise an insanity defense, no lay witnesses or experts were "willing to offer that opinion." Therefore, the insanity defense was not available to defendant. The court noted the conflict between jury pattern instructions and the statute and resolved it in favor of defendant, allowing the guilty but mentally ill special verdict form.

¶ 67 The trial court, in dismissing defendant's *pro se* postconviction petition, agreed with defendant that "without the affirmative defense of insanity being raised, the defense should not have been able to submit a verdict form of guilty but mentally ill." However, the trial court went on to say that, for the same reasons stated above, defendant cannot show how he was prejudiced. The jury returned the lesser verdict of guilty but mentally ill; defendant's mental illness was considered a mitigating factor during sentencing; and defendant receives ongoing treatment for his mental illness. The trial court noted that had the evidence against defendant not been so overwhelming, a guilty but mentally ill verdict form could have been prejudicial, but here it was not. We agree.

¶ 68 A fifth district case, *Elam*, contains similar facts. In *Elam*, the defendant argued that trial counsel was ineffective for presenting evidence and argument that he was guilty of all charges but suffered from a mental illness. *Elam*, 294 Ill. App. 3d at 320. The reviewing court rejected the defendant's reliance on *Hattery* for the argument that trial counsel was *per se* ineffective. *Id.*

The court noted that the evidence against the defendant was overwhelming, and "[r]ather than lose credibility by contesting the remaining charges in which there was overwhelming evidence of [the] defendant's guilt and no valid defense, counsel opted to ask the court for the entry of a judgment of guilty but mentally ill." *Id*. at 321.

¶ 69 The defendant in *Elam* also claimed that trial counsel was ineffective under *Strickland* for pursuing a mentally ill defense when he did not raise an insanity defense. *Id*. at 322. He argued that, unlike insanity, mental illness was not an affirmative defense and that a guilty but mentally ill defense was tantamount to a guilty plea. *Id*. The reviewing court rejected that argument as well, noting that although defense counsel had intended to present an insanity defense, the expert doctor concluded that the defendant was not legally insane at the time of the offense but fit the category of guilty but mentally ill. *Id*. While the defendant in *Elam* went on to argue that defense counsel should have sought a second opinion to determine whether insanity might exist, the reviewing court disagreed, finding no ineffective assistance of counsel. *Id*.

¶ 70 In this case, defendant is not arguing that he was insane or that the insanity defense should have been pursued at trial. Instead, he argues that defense counsel was ineffective for pursuing a defense that was not statutorily authorized. Even assuming that defense counsel erred by pursuing a guilty but mentally ill verdict form because it was not statutorily authorized, defendant benefitted from counsel's error, for the reasons discussed above. Accordingly, defendant cannot establish how he was prejudiced, and his *Strickland* claim fails.

¶ 71 Because defendant has not shown that trial counsel was ineffective under *Strickland*, appellate counsel cannot be considered ineffective for not raising either of these arguments on direct appeal.

¶ 72 C. Proximate Causation

¶ 73 Defendant's next argument is that he had a right to a proximate causation defense. While not entirely clear, it appears that defendant is arguing that Geier died as a result of improper treatment and the side effects of medication rather than from the stab wound. In particular, defendant argues that the responding technicians' mistaken belief that they could control Geier's bleeding, the 90-minute delay in performing her surgery, and the medications she was taking, constituted an intervening cause of her death. Defendant's argument fails on several bases.

¶ 74 First, as the State points out, defendant's claim is not cognizable under the Act because he has not alleged a substantial violation of a constitutional right. See *People v. Washington*, 171 Ill. 2d 475, 486 (1996) (relief under the Act is impossible if no constitutional right is implicated in the claim asserted).

¶ 75 Second, the claim is forfeited based on defendant's failure to raise it on direct appeal. See *Turner*, 2012 IL App (2d) 100819, ¶ 51 (the purpose of a proceeding under the Act is to permit inquiry into constitutional issues involved in the original conviction and sentence that were not, and could not have been, adjudicated previously on direct appeal; issues that could have been presented on direct appeal, but were not, are forfeited).

¶ 76 Third, aside from forfeiture, even if we give defendant the benefit of the doubt and consider the merits of his argument in the context of a constitutional claim, such as ineffective assistance of counsel or actual innocence, his claim still fails.

¶ 77 Prior to trial, defense counsel subpoenaed Geier's medical records to investigate what occurred during her stay at the hospital. Defense counsel advised the court that Geier's condition had been improving during the days after the stabbing, and her condition was listed as stable. The records, according to defense counsel, would reveal whether there was some intervention or act of malpractice. See *People v. Robinson*, 199 Ill. App. 3d 494, 503 (1990) (when a defendant

causes serious life-threatening injuries to another, he cannot insulate himself from the consequences of his actions unless the medical treatment is so bad that it can be classified as gross negligence or intentional malpractice). After defense counsel retained a doctor to review the records and address potential concerns, this theory was abandoned. The trial court, in its written order dismissing defendant's postconviction petition, stated that defense counsel was "unsuccessful in finding an expert who identified the quality of treatment or the effects of medication as being even a contributing factor let alone the actual cause of the victim's death."

¶ 78 We note that defense counsel vigorously cross-examined the responding paramedics, the emergency room physician, and the forensic pathologist (Dr. Blum) who conducted the autopsy, questioning whether Geier received appropriate care. To this end, defense counsel questioned, during closing argument, whether Geier's continued blood loss occurred at the scene or whether it was caused by the sub-standard care of the paramedics, who "screwed things up." While defense counsel did her best to challenge Dr. Blum's opinion that Geier died as a result of the stab wound, which in turn caused the complications or intermediate causes of her death, she cannot be faulted for abandoning a theory of medical malpractice that lacked support. Thus, defendant cannot show that defense counsel was deficient or that he suffered prejudice.

¶ 79 Likewise, defendant has not made a substantial showing of actual innocence because the evidence he relies on is not newly discovered. See *People v. Harper*, 2013 IL App (1st) 102181, ¶ 38 (in order to succeed on a claim of actual innocence, a defendant must show that the evidence he now presents is: (1) newly discovered; (2) material and not cumulative; and (3) of such conclusive character that it would probably change the result on retrial). Newly discovered evidence is evidence that has been discovered since the trial and that the defendant could not have discovered sooner through due diligence. *Id*. ¶ 39.

¶ 80 As the trial court noted, defendant presented no new evidence regarding his proximate cause theory. Although defendant has attached various medical reports to his appendix on appeal, in an effort to show the medications that Geier was taking, these documents are not properly before this court. See *In re O.R.*, 328 Ill. App. 3d 955, 961 (2002) (attachments to briefs not otherwise of record are not properly before a reviewing court and cannot be used to supplement the record).

¶ 81 In sum, defendant's claim is pure speculation, and defendant essentially admits as much given his request, in his *pro se* postconviction petition, that the court hire a medical doctor to assist him in his proximate causation argument. See *People v. Hobley*, 182 Ill. 2d 404, 452 (1998) (because the defendant's claim is pure speculation, he has not made the required showing to warrant a third-stage evidentiary hearing on this claim). Accordingly, there is no basis for defendant's claim that Geier's death was the result of medical malpractice.

¶ 82 D. Actual Innocence

¶ 83 Defendant's final claim is actual innocence; namely, he did not possess the mental state for first-degree murder. Defendant argues that he "accidentally hurt" Geier and that he did not know what he was doing. In his brief, defendant argues that on the night of the incident, he ran out of Susan's room "drunk and ran into [Geier] asleep on the couch." As before, defendant argues that he lied about hearing a voice tell him to kill Geier.

¶ 84 As stated, in order to succeed on a claim of actual innocence, a defendant must show that the evidence he now presents is: (1) newly discovered; (2) material and not cumulative; and (3) of such conclusive character that it would probably change the result on retrial. *Harper*, 2013 IL App (1st) 102181, ¶ 38. We determine that there is no basis for defendant's claim because it is not newly discovered evidence.

¶ 85 To qualify as "newly discovered evidence," the evidence must have been discovered since the trial. *People v. Barnslater*, 373 Ill. App. 3d 512, 523 (2007). "Usually, to qualify as new evidence, it is the facts comprising that evidence which must be new and undiscovered as of trial, in spite of the exercise of due diligence." *Id.* Evidence does not qualify as "newly discovered" if it was already known to the defendant at or prior to trial. *Id*. Clearly, defendant's claim that he "accidentally" stabbed Geier is not new evidence discovered since the trial. Rather, it is simply a self-serving version of events that defendant always had available but now wishes to pursue. Accordingly, defendant's claim of actual innocence fails.

¶ 86 III. CONCLUSION

¶ 87 For all of these reasons, the Winnebago County circuit court's second stage dismissal of defendant's *pro se* amended postconviction is affirmed.

¶ 88 Affirmed.