

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 3, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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Appeal No. 2006AP1978

Cir. Ct. No. 1996CF960432

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ADAM R. PROCELL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
MEL FLANAGAN, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 BRENNAN, J. Adam Procell appeals *pro se* from an order denying his WIS. STAT. § 974.06 (2005-06)¹ postconviction motion. This is Procell's

¹ All references to the Wisconsin Statutes are to the 1995-96 version unless otherwise noted.

second appeal following his convictions for first-degree intentional homicide and attempted first-degree intentional homicide, both as a party to a crime. We affirmed the judgment following his direct appeal. See *State v. Procell*, No. 97-0182, unpublished slip op. (Wis. Ct. App. Mar. 10, 1998).

¶2 Procell then filed a WIS. STAT. § 974.06 (2005-06) motion, *pro se*. The trial court found that Procell's subsequent motion was not procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994) and ordered a *Machner*² hearing because Procell proffered a sufficient reason for failing to raise his current claims in his direct appeal—namely, his appellate counsel provided ineffective assistance. Ineffective assistance of appellate counsel may provide sufficient reason to avoid the *Escalona-Naranjo* procedural bar. See *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 681-82, 556 N.W.2d 136 (Ct. App. 1996). At the conclusion of the *Machner* hearing, the trial court found appellate counsel was not deficient.

¶3 Here, Procell claims that his appellate counsel provided ineffective assistance by failing to allege that his trial counsel provided ineffective assistance. Specifically he argues that his trial counsel: (1) should have moved to suppress Procell's confession based on statutory violations; (2) failed to adequately explain to Procell the party to a crime concept; (3) failed to object based on Procell's alleged incompetency; (4) failed to properly advise Procell that although the plea offer called for ten years' incarceration, the statute permits requests for early release; and (5) failed to object to the admission into evidence at trial of two guns that were not connected to Procell. Procell also contends that the trial court should

² See *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

have *sua sponte* ordered a hearing on competency due to Procell's difficulty understanding the party to a crime concept. Because we resolve each claim in favor of upholding the trial court's order, we affirm.

BACKGROUND

¶4 Procell was fifteen years old at the time the events in this case occurred. The facts of the underlying events were set forth in Procell's first appeal to this court:

On September 26, 1995, Procell, a member of the Spanish Cobras, was serving in the capacity of a security guard to protect the gang's neighborhood. Late in the afternoon, a brown van drove into the area carrying passengers who were members of a rival gang. Procell exchanged gang signs with these individuals and, after the van left, asked Richie Zapata, the local leader of the Cobras, for a gun because he believed there was going to be trouble. Zapata supplied Procell with a .380 semi-automatic pistol and told him to use it if the same people returned. Procell had previous experience with semi-automatic pistols. He loaded the gun and hid it nearby and then continued his assignment as security guard. Victor Cruz, Procell's accomplice, soon appeared on the scene. He engaged Zapata in conversation while Procell stood nearby. At approximately 6 p.m., Robert Bruce, the homicide victim, Marvin Nororis, the attempted homicide victim, and Ernie Garcia arrived in a blue car at 902 South 21st Street, Milwaukee, to pick up Fernando Garcia to play basketball. Bruce drove past Zapata in order to enter a driveway leading to Garcia's residence. Bruce parked the car toward the back of the driveway. Someone in Zapata's group recognized that passengers in the blue car were members of the rival gang, the Mexican Syndicate or "MS". Procell, Cruz and Zapata stood near the entrance of the driveway. One of them asked whether any of the passengers was a member of the "MS". When Bruce responded affirmatively, Cruz began firing his 9mm, followed by Procell with his .380. Both guns were semi-automatic pistols.

Bruce was shot in the right upper back with the bullet exiting from the right neck area. He bled to death.

Nororis, the other victim, was struck in the right thigh and survived. No bullets were recovered from the bodies of either victim.

Procell, No. 97-0182, unpublished slip op. at 1-2. As a result of this incident, Procell was charged in juvenile court with one count of first-degree reckless homicide, while armed, and one count of first-degree recklessly endangering safety, while armed, both as a party to a crime. Attorney Steven Kohn was assigned by the State Public Defender's office to represent Procell.

¶5 In December 1995, the State filed a petition seeking to waive Procell into adult court. In January 1996, the waiver hearing was held and Procell was waived into adult court. The State offered Procell a plea bargain to prevent the waiver to adult court, wherein Procell would plead guilty and spend ten years in juvenile detention with release on his 25th birthday. Procell refused to accept the plea bargain.

¶6 In adult court, both charges were amended. The first-degree reckless homicide count was raised to first-degree intentional homicide and the recklessly endangering safety count was raised to attempted first-degree intentional homicide. Procell also turned down the plea bargain offered in adult court. The case was tried to a jury in May 1996.

¶7 In our decision in Procell's direct appeal, we recounted the evidence presented at trial:

Maureen Lavin of the Milwaukee County Medical Examiner's Office performed the autopsy on Bruce. She determined that he suffered a gunshot wound to the right upper back and that the bullet exited from the right side of his neck. No bullet was found in the body. Thus, the source of the wound was not determinable. Detective Richard Weibel testified that he recovered sixteen 9mm shell casings and four .380 automatic shell casings at the crime scene. Detective David Klabunde testified that

fragments of .380 bullets were found underneath the tail end of the blue car and in the car itself. Monty Lutz of the Wisconsin State Crime Laboratory testified that all of the 9mm casings were fired from one gun and all of the .380 casings had been fired from another separate gun.

Three citizen witnesses testified for the State: Ana Rosas, Cynthia Mendoza, and Renee Koutsio. Rosas was Cruz's girlfriend. She arrived at the scene with Cruz shortly before the incident and remained in Cruz's car during the shooting. Because of her location in the car she did not witness the shooting, but heard Cruz summon Procell to come across the street where he was standing in the driveway. She heard the shooting and saw Procell leave the scene with a gun in his hand.

Mendoza was a friend of the Cobras and lived across the street from the driveway where the shooting occurred. She observed Zapata coming down off the porch of the house located next to the driveway. Procell was standing nearby. She then saw Cruz pull up in his car in front of the same house, get out, and talk to Zapata. She heard Zapata tell Cruz in Spanish to "get out the cannon!" She observed Procell run across the street toward her house and obtain a gun from under the porch. He then ran back to where Cruz was standing and began firing. She testified that Procell and Cruz were shooting at the three persons in the blue car, although she admitted that because of her location she could not say where the three individuals were at the time of the shooting. After the shooting, Procell ran back across the street and into her house. Cruz left in his car and Zapata drove off on a bike.

Koutsio also lived across the street from the driveway. Her residence was above Mendoza's. Prior to the incident, she had been out on the front porch. She observed the brown van and the sign exchange that occurred between Procell and the passengers in the van. She testified that the passengers in the van were from a rival gang. After the van left, Procell asked Zapata for a gun. Zapata left and soon returned with a .380, which he gave to Procell. Procell hid the gun near Koutsio's house. In the meantime, Cruz arrived. Procell stood guard at the front of the porch where Zapata was sitting. Soon the blue car arrived and turned into the driveway. Koutsio observed that some of the passengers in the blue car had been in the brown van. She then returned to her residence. Moments later she heard someone yell "MSL8 Killers"; then the shooting began. Based on her experience, Koutsio concluded that the first shots were from a .380 and the

continuing firing came from a 9mm. She testified that five or six days later she spoke to Procell while he was staying at a friend's house. Procell said that the first shot he fired hit somebody in the neck and that the three individuals did not return fire or shoot back.

Detective Daniel Phillips testified that he took a statement from Procell at the time of the arrest. He testified that Procell admitted that he was a Cobra and that he recognized the passengers in the blue car as members of MSL8, a rival gang with whom they were "at war." Procell stated that he stood next to Cruz and fired at the rival group that stood thirty-to-forty feet away, as fast as he could, until he ran out of ammunition or the gun jammed. He fired four times, not at anyone in particular, but to the right side of the blue car just to scare them out of the neighborhood. Procell further admitted that he was experienced with guns and that he recognized the victim from a picture as someone who had shot at him some time earlier.

Procell testified on his own behalf. He said that Zapata was his gang leader and he had to obey his orders at the risk of a "head crack." He stated that after the brown van drove by, Zapata gave him the .380 and told him to shoot if they came back. He loaded the gun and hid it across the street. When the blue car arrived Zapata told him he better shoot, so he retrieved the gun and, before he came back across the street, the shooting began. He stated he tried to shoot to the right of the blue car, but did not know where the bullets ended up. He denied aiming at anyone or intending to kill.

Procell, No. 97-0182, unpublished slip op. at 2-4. The jury returned guilty verdicts on both counts. Procell was sentenced to life in prison on the first count with parole eligibility on his forty-second birthday, September 23, 2022. He was sentenced to twenty-five years, concurrent, on the second count. Procell, via appointed counsel, filed a postconviction motion, which was denied. Again, with the assistance of counsel, Procell filed his direct appeal, challenging the sufficiency of the evidence and the sentence. We affirmed the judgment and order. *See Procell*, No. 97-0182, unpublished slip op. at 1. His petition seeking review in the supreme court was denied.

¶8 On July 27, 2005, Procell filed a *pro se* WIS. STAT. § 974.06 (2005-06) postconviction motion in the trial court alleging ineffective assistance of appellate counsel. The trial court found that the allegations of ineffective assistance were sufficient to avoid the *Escalona-Naranjo* procedural bar of subsequent postconviction motions. In January 2006, the trial court issued a written decision denying most of the motion, but ordering a *Machner* hearing on one issue, ruling as pertinent to this appeal that: (1) trial counsel was not ineffective for failing to seek suppression of (or object to the admission of) Procell's confession; (2) a hearing was necessary before deciding whether trial counsel failed to adequately explain the party to a crime concept to Procell; (3) there was no error relative to the juvenile plea agreement; and (4) admission of the additional guns into evidence was not prejudicial.

¶9 A *Machner* hearing was held in May 2006. Attorney Kohn and Procell testified. On June 26, 2006, the trial court ruled that Kohn's representation of Procell was not deficient, reasoning in pertinent part:

The testimony presented first by Mr. Kohn was that he had been in practice about 17 years at the time that he took the representation of the defendant, that his practice involved a great deal of juvenile court work, as well as homicide cases, both in juvenile and adult court, that he had -- he remembered representing the defendant. ... He could not remember ... exact conversations that they had, but he described what his practice was and some of his particular memories in regard to Mr. Procell. ... He had a way of explaining "party to a crime" which seemed very age appropriate, and did explain, ..., the concept that under party to a crime, this defendant did not have to actually be the shooter in order to be found ... guilty of the charge ..., and [Kohn] explained it to [Procell].... He remembers the defendant as being young, and he remembers him being intelligent for his age. ... [G]iven [Procell's] age, and his intelligence, and his education, he was certainly capable of understanding the concepts that were explained to him. ... [H]is memory also was that he strongly advised the defendant not to go to trial and to accept the negotiations

both in juvenile court and then in adult court, that he encouraged him to accept the negotiations because he felt that his case was not particularly strong, and he thought that the negotiations were appropriate and in the best interest of the defendant. He repeatedly tried to advise him to take those negotiations as did his family members, and he explained to him ... the reasons why he should take the negotiations including the strength of the case and the charge under party to a crime.

... Procell's testimony was that he didn't understand party to a crime, that he felt that if he was not the shooter, he could not be found guilty, but he could not testify to ever actually saying that to Mr. Kohn, that he expressed that concern or that belief to his attorney such that his attorney would have an opportunity to rebut that. ... Mr. Kohn did strongly advise him not to go to trial and to accept negotiations both at the juvenile court and then at the adult court, and he chose on his own not to do so.

Procell now appeals.

DISCUSSION

¶10 In all but one of his contentions, Procell raises issues asserting ineffective assistance of counsel. To sustain a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's errors were prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. *Strickland*, 466 U.S. at 697.

¶11 An attorney's performance is not deficient unless he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. To satisfy the prejudice prong, defendant must demonstrate that counsel's deficient performance was "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* In

other words, there must be a showing that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694.

¶12 Whether counsel’s actions constitute ineffective assistance is a mixed question of law and fact. *See State v. Pitsch*, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). “The trial court’s determinations of what the attorney did, or did not do, and the basis for the challenged conduct are factual and will be upheld unless they are clearly erroneous.” *State v. Johnson*, 133 Wis. 2d 207, 216, 395 N.W.2d 176 (1986). The ultimate conclusion, however, of whether the conduct resulted in a violation of defendant’s right to effective assistance of counsel is a question of law for which no deference to the trial court’s decision need be given. *See State v. Harvey*, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987). “[A]n accused is not entitled to the ideal, perfect defense or the best defense but only to one which under all the facts gives him reasonably effective representation.” *State v. Harper*, 57 Wis. 2d 543, 557, 205 N.W.2d 1 (1973). There is a strong presumption that counsel acted reasonably within professional norms. *See Pitsch*, 124 Wis. 2d at 637.

A. *Suppression*

¶13 The first issue is whether trial counsel was deficient for failing to argue for the suppression or exclusion of Procell’s confession to police. Procell argues that the “confession was taken in violation of § 48.067(2), 48.19(2), and 48.20(7)(a),” and therefore should have been excluded. We cannot agree.

¶14 The State correctly points out that Procell’s statutory references relate to the process of taking children into custody when they are in need of

protection or services under WIS. STAT. ch. 48 of the Wisconsin statutes. This case, involved taking Procell into custody not because he needed the State's protection, but because he violated the law. Accordingly, the correct statutes to apply are WIS. STAT. §§ 938.067(2), 938.19(2) and 938.20(7)(a).

¶15 The Wisconsin Supreme Court in *State v. Popenhagen*, 2008 WI 55, ¶¶57-71, 309 Wis. 2d 601, 749 N.W.2d 611, recently revised the law regarding suppression when a statute has been violated: “the circuit court has discretion to suppress or allow evidence obtained in violation of a statute that does not specifically require suppression of evidence obtained contrary to the statute, depending on the facts and circumstances of the case and the objectives of the statute.” *Id.*, ¶68. Stated another way: “evidence obtained in violation of a statute ... may be suppressed under the statute to achieve the objectives of the statute, even though the statute does not expressly provide for the suppression or exclusion of the evidence.” *Id.*, ¶62.

¶16 Thus, the question for us in Procell's case is whether the trial court would have exercised its discretionary authority to exclude Procell's confession under the facts and circumstances in this case *if* trial counsel would have moved to suppress it. *Popenhagen* did not then exist. We conclude that suppression would not have occurred. We address each statute in turn.

¶17 WISCONSIN STAT. § 938.067 states in pertinent part: “[I]ntake workers shall ... (2) Interview, unless impossible, any juvenile who is taken into

physical custody and not released.”³ Procell contends that this statute was violated because he was held for a seventeen-hour period without being interviewed by an intake worker. Accordingly, he argues that the statements he gave to police during this period should have been suppressed. We are not convinced.

¶18 The purpose of WIS. STAT. § 938.067(2) is to determine whether a juvenile defendant should be continually held in custody, and if so, where he should be held. There is nothing in the language of the statute which even impliedly provides for the exclusion of evidence if the statute is not observed. The statute does not control the acquisition of evidence from the defendant by interrogation or otherwise. Under these circumstances, we conclude that even if Procell’s trial counsel had sought suppression of his confession based on a violation of § 938.067(2), the trial court would have exercised its discretion to deny the motion and the confession would have been admitted.

¶19 The second statute Procell contends was violated is WIS. STAT. § 938.19(2), which provides: “When a juvenile is taken into physical custody as

³ The rest of WIS. STAT. § 938.067(2) provides:

If the juvenile cannot be interviewed, the intake worker shall consult with the juvenile’s parent or a responsible adult. No juvenile may be placed in a secure detention facility unless the juvenile has been interviewed in person by an intake worker, except that if the intake worker is in a place which is distant from the place where the juvenile is or the hour is unreasonable, as defined by written court intake rules, and if the juvenile meets the criteria under s. 938.208, the intake worker, after consulting by telephone with the law enforcement officer who took the juvenile into custody, may authorize the secure holding of the juvenile while the intake worker is en route to the in-person interview or until 8 a.m. of the morning after the night on which the juvenile was taken into custody.

provided in this section, the person taking the juvenile into custody shall immediately attempt to notify the parent, guardian and legal custodian of the juvenile by the most practical means.”⁴ Section 938.19(3) states: “Taking into custody is not an arrest except for the purpose of determining whether the taking into custody or the obtaining of any evidence is lawful.” The purpose of the notification statute is to prevent coerced confessions from juvenile defendants.

¶20 The language set forth in WIS. STAT. § 938.19(3) does, at least, “impliedly” raise the issue of suppressing evidence when the statute is not followed. Procell argues here that this statute was violated too because his parents were not immediately notified that he had been taken into custody. He thus asserts his confession should have been suppressed on this basis and trial counsel was ineffective for failing to make such argument. We disagree.

¶21 The failure to contact a juvenile’s parents immediately when the juvenile in custody is being questioned, does not automatically require suppression of the statements. *See State v. Jerrell C.J.*, 2005 WI 105, ¶¶42-43, 283 Wis. 2d 145, 699 N.W.2d 110. The totality of the circumstances must be considered. *Id.*, ¶43. Here, Procell did not argue in his postconviction motion that the failure to comply with the statute constituted coercive action by police requiring suppression

⁴ The remainder of WIS. STAT. § 938.19(2) provides:

The person taking the juvenile into custody shall continue such attempt until the parent, guardian and legal custodian of the juvenile are notified, or the juvenile is delivered to an intake worker under s. 938.20 (3), whichever occurs first. If the juvenile is delivered to the intake worker before the parent, guardian and legal custodian are notified, the intake worker, or another person at his or her direction, shall continue the attempt to notify until the parent, guardian and legal custodian of the juvenile are notified.

of his confession. Instead, he argued that the statutory violation standing alone should have triggered a motion from trial counsel to suppress his confession. We reject his contention on the bases that he waived any claim that his statement was involuntary, *see State v. Dean*, 67 Wis. 2d 513, 526, 227 N.W.2d 712 (1975); *Ford Motor Co. v. Lyons*, 137 Wis. 2d 397, 417, 405 N.W.2d 354 (Ct. App. 1987), and because a violation of the statute standing alone does not automatically require suppression of a confession, *see Jerrell*, 283 Wis. 2d 145, ¶¶42-43.

¶22 Procell also contends that WIS. STAT. § 938.20(7)(a) was violated. This statute provides: “When a juvenile is interviewed by an intake worker, the intake worker shall inform any juvenile possibly involved in a delinquent act of his or her right to counsel and the right against self-incrimination.” Procell contends that the statute was violated because the intake worker never informed him of his rights.

¶23 The statute was not violated because, first, Process was never interviewed by an intake worker, and second, the purpose of the statute was met in any case. The purpose of this statute, obviously, is to ensure that the juvenile defendant is advised of his right to counsel and right against self-incrimination. In this case, Procell concedes that the police officer who interviewed him advised him of those rights before he was interviewed by police. Accordingly, the purpose of the statute was accomplished and any motion to suppress his confession on this basis would have failed.

¶24 Based on the foregoing analysis, we conclude that any statutory violations that occurred in this case would not have resulted in suppression of the confession even after *Popenhagen*; therefore, trial counsel’s failure to make such

argument did not prejudice Procell. Likewise, appellate counsel's failure to make this argument did not constitute ineffective assistance of counsel.

¶25 Perhaps even more significant than our analysis of the statutes is that the issue of suppressing Procell's confession was explicitly considered and addressed in the circuit court. Trial counsel explained to the circuit court, during the trial just before the State sought to admit Procell's confession, that after consulting with Procell, a specific strategic decision had been made *not* to seek suppression of the statement. Trial counsel made the following record with respect to this issue:

MR. KOHN: Your Honor, I have reviewed those issues [whether to seek suppression] with Adam Procell on several occasions. He has indicated to me that in fact he was read his rights, that it was a voluntary statement, and that what ... he stated in that statement is what he told the police officers.

However, I did wish to make a record -- and I would like to thank the Court for allowing me to make the record -- prior to the statement being read by the officer, and I would like to also just ask Mr. Procell if in fact that is the case, as I have stated it just now?

....

MR. KOHN: Do you recall that we did in fact go over these issues regarding your statement, Mr. Procell?

THE DEFENDANT: Yeah.

MR. KOHN: And I explained to you the fact that you had a right to contest the admissibility of the statement for various reasons, as I have stated on the record here today. Is that correct?

THE DEFENDANT: Yes.

MR. KOHN: And you indicated that you did not wish to do that. Is that correct?

THE DEFENDANT: Yeah.

....

THE COURT: Possible suppression theories aside, I'm trying to recall your opening statement. Is the statement consistent with what your theory of defense is?

MR. KOHN: That is correct, your Honor.

THE COURT: My recollection is in opening you stated that the defendant was going to testify. Do I remember that right?

MR. KOHN: I believe that is correct.

THE COURT: And that you made an important -- it seemed to be important to you that he said the same things to the officers that he was going to be saying at trial.

MR. KOHN: Correct

THE COURT: Is it fair to say that in your judgment ... you want this in evidence?

MR. KOHN: I do, your Honor. Yes, I want it in evidence. I also think regardless of what my desires are, it would come into evidence and, therefore, that's why we have taken the strategy with it that we have.

THE COURT: All right. I'm satisfied that the defendant understands his right to seek the suppression of this statement and has made a voluntary and intelligent decision with the assistance of his counsel not to seek suppression.

It is clear from this passage that Kohn and Procell made a strategic decision not to seek suppression of his confession. The reason was based not only on Kohn's belief that suppression would not be granted, but also on the fact that the content of the confession was consistent with the theory of the defense. The decision was a reasonable strategic decision and therefore cannot constitute ineffective assistance of counsel. *See State v. Vinson*, 183 Wis. 2d 297, 307-08, 515 N.W.2d 314 (Ct. App. 1994). Moreover, Procell acknowledged *on the record* his consent to this strategy. He is, therefore, barred from asserting an opposing position in this appeal. *See State v. McDonald*, 50 Wis. 2d 534, 538, 184 N.W.2d 886 (1971) (A

deliberate choice of strategy is binding on a defendant and an appellate claim of error based on a defendant's own choice will not be considered by a reviewing tribunal, even if the chosen strategy backfires.).

B. Party to a Crime

¶26 Procell's next claim is that his trial counsel was ineffective for failing to adequately explain what party to a crime liability meant, which "resulted in Procell testifying against himself, being unable to aid in his own defense, and rejecting numerous plea bargains." Procell melds into this argument a contention that his trial counsel should have raised the issue of his competence based on his failure to understand the party to a crime concept. We reject his claim.

¶27 At the conclusion of the *Machner* hearing on this issue, the trial court found that trial counsel repeatedly advised Procell about party to a crime liability in terms that he could understand. Procell admitted at the hearing that trial counsel explained the concept of party to a crime to him and told him it did not matter if Procell's bullet hit the victim or if someone else's bullet struck the victim. Procell also testified that both trial counsel and his family strongly encouraged him to take the plea bargain. There is nothing in the record and nothing that Procell offers on appeal to require a reversal on this issue. Rather, the record supports the circuit court's finding.

¶28 It appears that Procell, despite being told that he would be found guilty as a party to a crime even if the jury believed his testimony that he did not shoot at the victim, just did not want to believe it. From the record it appears Procell did not agree with the concept of guilt as a party to a crime, not that he did not understand it. Nonetheless, the record is clear that his trial counsel accurately

explained the law and cannot be found to have performed deficiently because a client refused to believe what he was being told.

¶29 Procell argues that his young age rendered him incompetent to understand the party to a crime concept. A person is competent if they have the capacity to understand the proceedings and assist counsel in the defense. *See State v. Byrge*, 2000 WI 101, ¶31, 237 Wis. 2d 197, 614 N.W.2d 477. If defense counsel has reason to doubt a defendant's competency and fails to raise the issue with the circuit court, counsel's performance is deficient. *See State v. Johnson*, 133 Wis. 2d 207, 220, 395 N.W.2d 176 (1986).

¶30 Although age can be a factor in understanding legal concepts, the record demonstrates here that Procell's age was not a factor. The trial court found Procell was very intelligent and according to trial counsel "had the capacity to understand a lot of things." Procell was an honor student at school. His intelligence is obvious to this court based on the contents of his *pro se* briefs. Trial counsel repeatedly explained to Procell the concept of party to a crime, utilizing the jury instruction and easily understandable examples. Procell acknowledged that his counsel talked to him about it and that his counsel strongly advised him to accept a plea bargain. Procell testified that he understood party to a crime to mean "if there's other people with me during the commission of the crime, I'm party to the crime."⁵ He bases his lack of capacity on his testimony that what he did not understand was the concept of transferring any accomplices'

⁵ We note that on its face, this admission alone is not sufficient for party to a crime liability. *See State v. Howell*, 2007 WI 75, ¶69, 301 Wis. 2d 350, 734 N.W.2d 48. His statement was simply one factor to consider in our analysis of the issue discussed here.

intent to kill to himself. He did not recall, however, ever expressing that to his trial counsel.

¶31 Based on this record, we conclude that Procell has failed to establish that he was incompetent based on his contention that he did not fully understand the party to a crime concept. The record reflects that trial counsel explained to Procell what it meant, that Procell was capable of understanding the concept and that Procell was very intelligent. Accordingly, he certainly was capable of understanding the proceedings and assisting in the defense of his case. Moreover, based on the foregoing, we are not convinced that trial counsel had any reason to doubt Procell's competency, and therefore, trial counsel's failure to raise the issue did not constitute ineffective assistance of counsel.

C. Sua Sponte

¶32 Procell also asserts that the trial court should have *sua sponte* held a competency hearing. We reject his assertion. WISCONSIN STAT. § 971.14(1) requires a circuit court to conduct competency proceedings if there is "reason to doubt" that the defendant is competent to proceed. *Byrge*, 237 Wis. 2d 197, ¶29. As noted above, a "defendant is incompetent if he or she lacks the capacity to understand the nature and object of the proceedings, to consult with counsel, and to assist in the preparation of [a] defense." *Id.*, ¶27.

¶33 The only factor in the record which could possibly trigger a competency evaluation was Procell's age. Procell's age, however, given his level of intelligence, education and capacity to understand, did not prove to raise a competence issue. Nothing else in the record gave the trial court "reason to

doubt” Procell’s competence. As a result, there was no basis upon which the trial court should have *sua sponte* conducted competency proceedings.⁶

D. Juvenile Plea Bargain Offer

¶34 Procell also argues that his trial counsel provided ineffective assistance for failing to explain to him that if he would have accepted the ten-year juvenile plea offer, he could have petitioned for earlier release under WIS. STAT. § 48.366(6). We reject his argument.

¶35 The record reflects that trial counsel accurately explained the plea bargain to Procell. Trial counsel encouraged Procell to take the deal. Procell rejected the deal on the basis that he viewed ten years as a life sentence. As aptly stated by the trial court in its written order denying Procell’s postconviction motion, failure by counsel to mention the possibility of petitioning for early release did not constitute ineffective assistance:

This is what the State contemplated with its plea offer, and there is no support for defendant’s conclusory statement that the plea agreement would have allowed for his early

⁶ We note that the trial court did order Procell to undergo a mental examination as part of the determination on waiver to adult court. Psychologist Joseph L. Collins examined Procell and reported that:

Adam Procell demonstrated at least bright normal to perhaps superior resources. Functional literacy was also demonstrated. Reading word recognition skills were on a beginning ninth grade level and math computational skills were found to be on a 7.1 grade level. Neurosensory development appeared to be normal. Personality data did not show major distortions of reality or perception. He did not manifest major altercations of mood. He clearly is alert, well oriented, and able to adequately look at this situation. He tends to offer symptomology indicative of a person concerned with his own well being and future. Commentary did reveal that he is rather self-assured, verbal, and self-serving.

release. The plea offer was for a *mandatory* incarceration of ten years because the State felt that any less time would have been inappropriate given the extreme seriousness of the offense. Moreover, even if the defendant would have petitioned for early release under sec. 48.366(6), Stats., there is no guarantee that the court would have granted it given the nature of the plea agreement. Under these circumstances, trial counsel cannot be deemed to have been ineffective.

Because trial counsel was not ineffective in this regard, it logically follows that appellate counsel was not ineffective for failing to raise this issue.

E. Admission of Guns

¶36 Finally, Procell argues that his trial counsel should have objected to the admission of the two other guns introduced by the State at his trial and two boxes of .22-caliber ammunition. One gun was a 9mm gun found at the safe house of the Spanish Cobras gang to which Procell belonged and the other was a 9mm gun found buried in the ground just north of the place where the shooting occurred. At trial, the State's firearm expert testified that neither gun was involved in the commission of the crimes involved in this case.

¶37 Procell argues that his trial counsel should have objected to the introduction of this evidence on the basis that it was irrelevant under WIS. STAT. § 904.01 ("Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). Procell is wrong. These guns were relevant as they eliminated others as suspects. As explained by the State, the gun evidence narrowed down the list of possible shooters:

The other guns were weapons that might have been used by other people to commit the crime. The 9 mm. gun found in the Spanish Cobras safe house only a few blocks

from the scene of the shooting might have been used by other members of that gang to shoot at the members of a rival gang who were the victims in this case. And the 9 mm. gun found buried just a few feet from the scene of the shooting might have been buried there because it had been used by someone in a shooting there.

But other members of the Spanish Cobras who would have had access to the gun found in their safe house were eliminated as suspects because that gun was not used in the shooting. Similarly, other persons who would have had access to the gun found buried near the scene of the crime were eliminated as suspects because that gun was not used in the shooting.

¶38 We conclude that trial counsel was not deficient for failing to object to this evidence on the basis of relevance. In addition we agree with the trial court that this evidence was not unfairly prejudicial because the guns were never linked to Procell. The evidence at trial linked Procell only to one gun, the .380-caliber pistol. Procell concedes these facts. He argues instead that the mere presence of these guns inflamed the jury at trial and made him look like he was a “gun-obsessed individual of bad character.” See *State v. Veach*, 2002 WI 110, ¶87, 255 Wis. 2d 390, 648 N.W.2d 447 (evidence is unfairly prejudicial if it has a tendency to influence the outcome by improper means that appeal to the jury’s sympathy, sense of horror or instinct to punish, or by other means that cause a jury to base its decision on something other than the established facts in the case). His argument is without merit. Procell has offered nothing but a conclusory allegation that the gun evidence inflamed the jury. Given the strength of the State’s case against him, we hold that admitting the gun evidence was not unfairly prejudicial. Accordingly, trial counsel’s failure to object to the gun evidence did not constitute ineffective assistance.

¶39 In sum, we reject each of Procell's contentions and conclude that appellate counsel provided effective assistance of counsel.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

