

NOTICE
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2012 IL App (4th) 110346-U

NO. 4-11-0346

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
November 27, 2012
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Jersey County
MARK PROUGH,)	No. 09CF122
Defendant-Appellant.)	
)	Honorable
)	Eric S. Pistorius,
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Presiding Justice Turner and Justice Steigmann concurred in the judgment.

ORDER

¶ 1 *Held:* The motion by the office of the State Appellate Defender to withdraw as counsel is granted and the trial court's judgment is affirmed.

¶ 2 Following a March 30, 2011, discharge hearing, the trial court found defendant, Mark Prough, “not not guilty” of first degree murder (720 ILCS 5/9-1(a) (West 2008)) and ordered him to undergo treatment in the Department of Human Services (DHS) for a period of time not to exceed five years.

¶ 3 On April 21, 2011, defendant filed a notice of appeal and the office of the State Appellate Defender (OSAD) was appointed to represent him. OSAD moved to withdraw its representation of defendant pursuant to *Anders v. California*, 386 U.S. 738 (1967), arguing any appeal in this cause would be meritless. We grant OSAD's motion and affirm the trial court's judgment.

¶ 4

I. BACKGROUND

¶ 5 Because the parties are familiar with the facts, we will set forth only those facts necessary for resolving the issues involved in this appeal.

¶ 6 On July 29, 2009, the State charged defendant by indictment with first degree murder where "without lawful justification and with the intent to kill[, his father,] Dennis Prough, [defendant] shot Dennis Prough in the upper chest area with a shotgun, in violation of Chapter 720, Act 5, Section 9-1(a) of the Illinois Compiled Statutes."

¶ 7 On August 10, 2009, defendant's attorney filed a motion for a mental examination and hearing regarding defendant's fitness. That same day the trial court ordered a fitness examination to determine defendant's fitness to stand trial.

¶ 8 On October 29, 2009, Dr. John Rabun filed a fitness evaluation. Dr. Rabun opined, within a reasonable degree of medical certainty, defendant was suffering from paranoid schizophrenia. Both the State and defense counsel stipulated to the findings contained in the fitness report.

¶ 9 On November 2, 2009, the trial court found defendant unfit to stand trial, but a substantial probability existed he could be fit within one year. Defendant was remanded to the custody of DHS for treatment.

¶ 10 On April 28, 2010, DHS filed a notice of change of status because it found defendant fit to stand trial. Dr. Rabun reevaluated defendant and found while defendant had the capacity to understand the proceedings against him and assist in his own defense, he could become unfit again.

¶ 11 Following defendant's July 21, 2010, motion to dismiss his counsel and request to

proceed *pro se*, the trial court *sua sponte* ordered a follow-up examination by Dr. Daniel Cuneo to determine defendant's fitness.

¶ 12 On October 15, 2010, Dr. Cuneo filed a report in which he stated defendant suffered from schizoaffective disorder, bipolar type. Dr. Cuneo concluded defendant was unfit to stand trial because his illness substantially impaired his ability to understand the nature and purpose of the proceedings and assist in his defense.

¶ 13 On December 2, 2010, defendant's counsel moved for a discharge hearing, which the trial court scheduled.

¶ 14 At the March 30, 2011, discharge hearing, Sheriff Mark Kallal testified he received a phone call early in the morning on July 20, 2009, concerning a house fire at Dennis Prough's residence in Kane, Illinois. Officers found Dennis's body in the house and found shotgun shell fragments near the body. An autopsy showed Dennis died from a shotgun wound to the chest. The investigation focused on defendant, as he and his father had a history of problems. In 2008, his father sought an order of protection against defendant. In his request, defendant's father stated defendant was bipolar and schizophrenic and would become violent when not medicated. Police discovered defendant's vehicle in a barn near Dennis's house. Police searched the vehicle and discovered, *inter alia*, 12 bottles of medication. Eight of the bottles were full. The labels bore defendant's name and indicated they were antipsychotic drugs used to treat bipolar and schizophrenic disorders. Prior to defendant's arrest, defendant had been seen carrying a shotgun. When police arrested defendant, they recovered Dennis's shotgun and shotgun shells. The shells were similar to those found near Dennis's body. Dennis's deoxyribonucleic acid was present on the muzzle of the shotgun. Defendant was also wearing Dennis's boots. A report by the

Jerseyville Fire Department indicated the fire was intentionally set to cover up the shooting.

¶ 15 According to Dr. Cuneo's report, introduced as Defendant's Exhibit No. 13, defendant was not receiving any treatment and was not taking his medication on July 19, 2009. Defendant was actively delusional and his judgment was "grossly impaired." Cuneo opined defendant's mental illness prevented him from being able to appreciate the criminal nature of his conduct at the time of the shooting. Dr. Cuneo believed defendant was legally insane at the time of the shooting.

¶ 16 At the conclusion of the discharge hearing, the trial court found sufficient evidence was presented to prevent an acquittal on the first degree murder charge. The court found there "was ample evidence, not only from Dr. Cuneo's report, but from other evidence presented by his attorney that the defendant has long standing psychological issues." However, the court was unable to conclude defendant was not guilty by reason of insanity. According to the court, because of "the defendant's inability or unwillingness to cooperate with the expert retained by counsel for defendant, sufficient evidence was not gathered, in this court's view, as to the defendant's state of mind at the time of the incident for a determination of that issue." The court found defendant "not not guilty" and ordered him committed to DHS for five years.

¶ 17 On April 21, 2011, defendant filed a notice of appeal. Thereafter, OSAD was appointed to represent defendant. On April 18, 2012, OSAD filed a motion to withdraw as counsel and attached to its motion a supporting memorandum pursuant to *Anders*. The proof of service shows service of the motion upon defendant. This court granted defendant leave to file additional points and authorities on or before May 18, 2012. On May 21, 2012, defendant *pro se* filed a largely inscrutable document titled "Issue of Consent Not Appeal." The State also filed a

brief in this matter, agreeing with OSAD that no meritorious issues can be raised on appeal.

After examining the record and executing our duties consistent with *Anders*, we grant OSAD's motion and affirm the trial court's judgment.

¶ 18

II. ANALYSIS

¶ 19

A. Jurisdictional Issues

¶ 20 OSAD argues no colorable argument involving jurisdictional issues can be made. We agree.

¶ 21 First, the state's attorney clearly had jurisdiction to charge defendant. "A person is subject to prosecution in this State for an offense which he commits *** if the offense is committed either wholly or partly within the State." See 720 ILCS 5/1-5(1) (West 2008). Here, it is undisputed the offense was committed in Kane, Illinois.

¶ 22 Second, our review of the indictment in this case reveals it was sufficient to notify defendant of the charged offense. See *People v. Gilmore*, 63 Ill. 2d 23, 28-29, 344 N.E.2d 456, 460 (1976) (due process requires an indictment or information must apprise the defendant of the offense charged with sufficient specificity to enable him to prepare his defense).

¶ 23 Finally, section 104-25(f) provides a defendant may appeal the trial court's order in a discharge hearing "in the same manner provided for an appeal from a conviction in a criminal case." 725 ILCS 5/104-25(f) (West 2008). Illinois Supreme Court Rule 606 (eff. Mar. 20, 2009) provides a notice of appeal must be filed within 30 days after the entry of the final judgment appealed. Here, defendant filed his notice of appeal on April 21, 2011, which was within 30 days of the trial court's March 30, 2011, "not not guilty" finding. As a result, this court has jurisdiction to hear defendant's appeal.

¶ 24

B. Procedural Issues

¶ 25 Next, OSAD argues no colorable argument can be made any procedural errors occurred. We agree.

¶ 26 The March 30, 2011, discharge hearing in this case took place within the statutorily proscribed 120-day period following defendant's December 2, 2010, hearing request. See 725 ILCS 5/104-23(a) (West 2008). It also took place after the trial court found defendant unfit to stand trial. See 725 ILCS 5/104-25 (2008). Following the discharge hearing, the trial court is required by statute to find defendant is (1) acquitted, (2) not guilty by reason of insanity, or (3) "not not guilty." *People v. Waid*, 221 Ill. 2d 464, 469-70, 851 N.E.2d 1210, 1213-14 (2006). Under section 104-25(d), if a defendant is found "not not guilty," he is initially subject to a treatment period of one to five years. 725 ILCS 5/104-25(d) (West 2008). Here, the trial court, after considering the evidence presented, found defendant "not not guilty" and remanded him to DHS for further treatment for a period not to exceed five years. Such procedure is required by the statute. See 725 ILCS 5/104-25 (West 2008).

¶ 27

C. Evidentiary Issues

¶ 28 During the discharge hearing, defendant's counsel raised various objections. OSAD argues no colorable argument can be made the trial court erred in any of its evidentiary rulings. We agree.

¶ 29 Defendant's counsel objected on foundational grounds to the State's request to admit certain photographs showing, *inter alia*, fire damage to the victim's house. The trial court correctly overruled that objection. The conditions for the admissibility of photographic evidence are its relevance and its accuracy. *People v. Myles*, 131 Ill. App. 3d 1034, 1042, 476 N.E.2d

1333, 1339 (1985). Here, the photographs were relevant because the State argued the individual who killed the victim also set the victim's house on fire to cover up the crime. Further, a photograph's accuracy can be established by a witness who can identify the photograph and testify that it is an accurate depiction of the subject it portrays. *People v. Beasley*, 109 Ill. App. 3d 446, 451-52, 440 N.E.2d 961, 965 (1982). In this case, the individuals who took the photographs at the scene testified regarding their foundation.

¶ 30 Defendant's counsel also made hearsay objections in response to the State's request to admit certain reports. The trial court overruled those objections and stated the following:

"[T]he court would note that this discharge hearing is governed by 725 ILCS 5/104 *et. seq.* Specifically, the statute that controls how this hearing is to be conducted is 725 ILCS 5/104-25[,] which specifically provides that the court may admit hearsay or affidavit evidence on secondary matters such as testimony to establish the chain of possession of physical evidence, laboratory reports, authentication of transcripts taken by official reporters, court business records[,] and public documents. This would constitute one of those such documents and therefore while in most circumstances it would be a very good objection, under these circumstances that is permitted."

¶ 31 We agree with the trial court. Section 104-25(a) explicitly permits a court to admit hearsay evidence on secondary matters such as laboratory reports. 725 ILCS 5/104-25(a) (West 2008) ("The court may admit hearsay or affidavit evidence on secondary matters such as

testimony to establish the chain of possession of physical evidence, laboratory reports, authentication of transcripts taken by official reporters, court and business records, and public documents"); *Waid*, 221 Ill. 2d at 474, 851 N.E.2d at 1216 ("The plain language of section 104-25(a) unambiguously includes 'laboratory reports' ").

¶ 32 D. Sufficiency of the Evidence

¶ 33 OSAD also argues no colorable argument can be made the trial court erred in finding defendant "not not guilty." We agree.

¶ 34 As the supreme court has explained in *Waid*, a discharge hearing is an " 'innocence only' proceeding that results in a final adjudication of charges only if the evidence fails to establish the defendant's guilt beyond a reasonable doubt (resulting in the defendant's acquittal) or the defendant is found not guilty by reason of insanity. If the evidence is found to be sufficient to establish the defendant's guilt, no conviction results. Instead, the defendant is found *not not guilty* [(citation)] and may be held for treatment. A criminal prosecution of the charges against the defendant does not take place unless or until the defendant is found fit to stand trial." (Emphasis in original.)
Waid, 221 Ill. 2d at 469-70, 851 N.E.2d at 1213-14.

¶ 35 Our review of the record in this case supports the trial court's "not not guilty" finding. The State charged defendant with first degree murder. The victim, defendant's father, died as a result of a shotgun wound to the chest. Prior to defendant's arrest, defendant had been seen carrying a shotgun. When police arrested defendant, they recovered his father's shotgun,

shotgun shells, and his father's boots, which defendant was wearing at the time. The muzzle of the shotgun had his father's blood on it. Thus, sufficient circumstantial evidence existed to prevent the trial court from entering an order of acquittal. However, the record contains no evidence of defendant's state of mind at the time of the shooting. In fact, defendant refused to talk about the offense or what had occurred. See 720 ILCS 5/6-2(e); 5/6-4 (West 2008) (the defendant has the burden of proving the affirmative defense of insanity by clear and convincing evidence). As a result, the trial court had insufficient evidence from which it could enter a "not guilty by reason of insanity" finding. Under the circumstances of this case, no colorable argument can be made the trial court's ruling defendant was "not not guilty" was error.

¶ 36 E. Substitution of Judge

¶ 37 Finally, OSAD argues no colorable argument can be made defendant's counsel was ineffective for not requesting a substitution of judge. We agree.

¶ 38 We analyze ineffective-assistance-of-counsel claims under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), which requires the defendant to prove (1) his counsel's performance failed to meet an objective standard of competence and (2) counsel's deficient performance resulted in prejudice to the defendant. *People v. Evans*, 186 Ill. 2d 83, 93, 708 N.E.2d 1158, 1163-64 (1999). The *Strickland* court noted that, when a case is more easily decided on the ground of lack of sufficient prejudice rather than that counsel's representation was constitutionally deficient, the court should do so. *Strickland*, 466 U.S. at 697.

¶ 39 A defendant does not have an absolute right to substitution of judge and has the burden of showing prejudice on the judge's part. *People v. Buck*, 361 Ill. App. 3d 923, 932, 838 N.E.2d 187, 195 (2005). Our review of the record reveals nothing to indicate any prejudice on

the judge's part which would support a substitution request. Thus, no reasonable argument can be made on appeal defendant's counsel was ineffective for not requesting a substitution of judge.

¶ 40

III. CONCLUSION

¶ 41 For the reasons stated, we grant OSAD's motion and affirm the trial court's judgment.

¶ 42 Affirmed.