

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

July 1, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-3316-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH BOIVIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: VIVI L. DILWEG, Judge. *Affirmed.*

Before Cane, P.J., Myse and Mohr, JJ.

PER CURIAM. Kenneth Boivin appeals a judgment convicting him of first-degree reckless homicide party to a crime as a repeater, contrary to §§ 940.02(1), 939.05, 939.62(1)(c), STATS., and an order denying postconviction relief. Boivin argues that the trial court erroneously (1) admitted statements of a co-defendant; (2) denied his severance motion; and (3) exercised its sentencing

discretion. Boivin also argues that he was denied effective assistance of counsel. The State concedes that the trial court erroneously admitted parts of the co-defendant's statement, but that the error was harmless. We agree. We reject Boivin's remaining arguments and affirm the judgment and order.

Clinton Cardish was found dead on the floor of his apartment. The next day, the police obtained a statement from Boivin. A few days later, Melvin Stick, the co-defendant, gave a written statement. During these first interviews, both men largely blamed the other for inflicting the greatest harm on the victim. The officers did not believe either man and conducted second interviews. In the second interviews, both men admitted they had not told the truth in their first statements and both gave new statements that accepted more responsibility for participation in the beating.

The trial court denied Boivin's motion to try him separately and now complains certain statements Stick made were improperly admitted at the joint trial. The State concedes that Stick's statements describing Boivin's criminal conduct were inadmissible against Boivin because they were not self-incriminating as to Stick. The State contends, however, that there is no doubt that Boivin would have been convicted even without this inadmissible testimony. We agree that portions of Stick's statements were admitted erroneously at the joint trial and, therefore, we focus our discussion on the parties' harmless error analyses.

The admission of a co-defendant's statement in violation of evidentiary rules and the confrontation clause is subject to a harmless error analysis. See *State v. King*, 205 Wis.2d 81, 97-98, 555 N.W.2d 189, 196 (Ct. App. 1996). The test for harmless error is whether it is reasonably possible that the error contributed to the verdict. *Id.* at 94, 555 N.W.2d at 194. An appellate court

must consider the entire record to determine whether the error contributed to the trial outcome. *State v. Patricia A.M.*, 176 Wis.2d 542, 556-57, 500 N.W.2d 289, 295 (1993).

A careful review of the record indicates that a retrial without the erroneously admitted testimony would yield the same result. The medical testimony at trial disclosed that Cardish was beaten to death. The autopsy doctor testified to Cardish's blunt force injuries, which were consistent with being hit with a fist or kicked with a shoe and included massive bruising, scrapes, lacerations, broken blood vessels on the surface of the brain, internal injuries, and broken thyroid cartilage, resulting in blood breathed into Cardish's lungs.

Boivin's first statement minimized his involvement, stating that he saw Stick hitting and kicking Cardish and that Stick "killed the guy because he was the guy that kept kicking the guy when he was down on the ground." Boivin claimed he told Stick repeatedly to stop, and rendered assistance to Cardish by turning him on his stomach so he would not choke. Boivin knew that Cardish was badly hurt and might die, but did not call a rescue squad because he was afraid he would get into trouble.

After the officer pointed out marks on Boivin's hands, Boivin admitted to hitting and pushing Cardish a few times, but that he did not "go out last night with the idea of killing that guy. It just happened after we got into a fight with him."

A doctor who examined Boivin a few days later testified that multiple contusions, abrasions, swelling and discoloration on Boivin's knuckles and backsides of Boivin's hands were consistent with striking someone and only repeated trauma would cause the injuries. The doctor testified that the injuries

were not consistent with a month-old auto accident as Boivin had claimed to the doctor.

Boivin was questioned a second time and gave a more detailed account of his participation in the beating. Boivin stated that he had lied during the first interview because he was scared and nervous. Boivin testified that Cardish called him a punk and grabbed him by the leg, so Boivin hit him in the face a couple of times. "I must have hit him hard otherwise my knuckles wouldn't be puffed up like this." Stick grabbed Cardish and swung him down. Boivin stated "I went over and kicked him in the face I think about three or four times, not hard but kind of hard. I think he was knocked out. I think he was because he wasn't doing nothing right away. He just laid there."

After drinking more beer, Boivin and Stick went back to check on Cardish. Boivin stated: "I don't know if I kicked him first or [Stick], but I know I kicked him a couple more times in the face the same as before." Cardish moved a little bit and Stick kicked him in the face and jumped up and stomped on Cardish's face. Boivin stated that he went back and checked on Cardish who was gurgling when he breathed, "so I rolled him onto his stomach so he wouldn't choke on his own puke."

Stick's second statement contended that Cardish and Boivin started fighting and Stick broke them up. Stick then started fighting with Cardish. He stated that he hit Cardish in the face and Boivin knocked Cardish down. Boivin kicked him in the face and head. Stick went over and started kicking Cardish all over, on the back, side, face and head. When Cardish stopped moving, Stick stopped kicking him. Boivin kicked him a couple more times, and then stopped. Cardish came to, and Stick helped him wash up. Stick claimed that Boivin

resumed punching Cardish in the face. Stick stated that Boivin's hands were red from bruises and that Boivin said he thought he broke his knuckle. Stick also stated that the two left, but later returned to Cardish's apartment, where they found Cardish laying where they left him. He was not moving. They both began kicking him. Boivin was kicking his head, and Stick was kicking his chest and legs.

Marissa Cardish, the victim's sixteen-year-old cousin, also testified that Boivin and Stick were punching and kicking Cardish. She saw Stick kicking him in the head. John Kassube, who was also with them the night of the murder, testified that he saw Boivin hitting and throwing Cardish around, kicking him hard all over, including his chest, face and head. Kassube had met Stick while they were together in jail for about a month. He did not see Stick hit or kick Cardish. Waunita Batiste, Stick's girlfriend, testified that she saw Boivin and Cardish pushing each other and calling each other "punks" that night. She did not see Stick hit Cardish, but saw Boivin hitting him in the face.

Defense counsel maintained that Cardish's intoxication (.34 and .329 grams percent blood alcohol) was the major cause of death. The autopsy doctor testified that Cardish's intoxication could have compromised his ability to protect himself, but maintained that it was the beating that caused his death. The defense expert, forensic scientist Thomas Burr, agreed that the beating was a substantial cause of Cardish's death in addition to alcohol.

In his defense, Boivin's mother testified that Boivin was involved in an accident approximately one month prior to the homicide and received cuts on his hands. She was concerned that this hands were not healing.

Her testimony, however, was undercut by the doctor's testimony and Boivin's own statements. Boivin's own statement expressly admitted beating and

kicking Cardish in the face the night of the beating. Melissa Cardish, Kassube, and Batiste also testified they witnessed the beating. Because Boivin was charged as party to the crime, it did not matter whether Stick or Boivin administered the more vicious blows. Section 939.05, STATS. First-degree reckless homicide has three elements: (1) that the defendant caused the victim's death, (2) by criminally reckless conduct (3) under circumstances showing utter disregard for human life. *See* WIS J I—CRIMINAL 1020 (1989). Repeatedly kicking a man in the face and head who had been knocked to the ground and then returning later to do the same is plainly showing utter disregard for human life.

We conclude that in light of this record, the additional evidence of Stick's statement that Boivin had punched and kicked Cardish would not reasonably affect the trial's outcome. We conclude there is no reasonable possibility that Stick's erroneously admitted statements contributed to the verdict.

Next, Boivin argues that the trial court erroneously denied his motion to sever made pursuant to § 971.12(3), STATS. He argues that the prosecutor's intent to use Stick's statement entitled him to severance. Because we concluded that the admission of Stick's statement was harmless error, we conclude that Boivin was not prejudiced by the failure to sever the trials. *See* § 805.18, STATS. "[T]he harmless error rule applies to joint trials in which § 971.12(3), is violated." *King*, 205 Wis.2d at 98, 555 N.W.2d at 196.

Next, we reject Boivin's claim that he was denied effective assistance of counsel. In his motion for a new trial, Boivin contended that his defense counsel's performance was deficient for failing to investigate as follows: (1) whether the stains on Boivin's clothing and shoes were blood or food; (2) whether a stain on Ellsworth Kelley's clothing was blood; (3) whether any

blood, hair or bodily fluids of the victim were on the clothing of Kelley, Kassube or Richard Mahkimetas; and (4) Boivin's sobriety at the time he was interviewed by the police. Boivin also contends that defense counsel was ineffective by failing to inquire of police officers at trial with respect to the demeanor of Mahkimetas, Kelley or Kassube when interviewed shortly after the alleged crime; by failing to call Lori Elm as a witness to explain the injuries to Boivin's hands; and failing to elicit police testimony that Boivin's statement was the fifth statement he gave to the police.

Boivin argues that had defense counsel made further inquiry, Kelley's involvement in the crime would have been shown to be greater than reported. Also, had it been analyzed, stains found on Boivin's clothing may have been found to have been food stains. Boivin also states, without citation to the record, that "There further was evidence available which would have supported the theory that, after Stick and Boivin left the scene, Kassube, Kelley and/or Mahkimetas returned upstairs and caused the victim's death."

The record fails to support Boivin's claims. To show ineffective assistance of counsel, Boivin must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced his defense. *See State v. Pitsch*, 124 Wis.2d 628, 633, 369 N.W.2d 711, 714 (1985). To demonstrate deficiency, Boivin must show that counsel's representation fell below an objective standard of reasonableness. *Id.* at 636, 369 N.W.2d at 716. To demonstrate prejudice, Boivin must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Id.*

Boivin fails to demonstrate prejudice with respect to counsel's failure to investigate clothing stains. There is no showing what the analyses of the

stains would have revealed. Without showing what the analysis would have revealed and how it would have affected the outcome, Boivin's claims must fail. *See State v. Flynn*, 190 Wis.2d 31, 48, 527 N.W.2d 343, 349-50 (Ct. App. 1994). Boivin also fails to allege any prejudice resulting from his failure to inquire as to his sobriety when interviewed. Boivin does not suggest any evidence showing intoxication that would have impaired his ability to respond to the officer's questions.

We also conclude that Boivin fails to demonstrate how nervousness on the part of witnesses at the time of their police interview would have undermined the outcome of the trial. Boivin fails to cite to any evidence of record to support his claim that these witnesses were responsible for Cardish's death. *See* § 809.19(1)(e), STATS.

With respect to the contention that counsel's performance was deficient for failing to demonstrate five separate interviews, the record is not clear that five separate interviews occurred. It shows three questioning sessions between 9:10 a.m. and 10:35 a.m. on May 13, and two questioning sessions between 5:50 and 9:05 p.m. on May 17. Because the interviews were so closely related in time, it was reasonable to characterize the sessions as two in number.

Boivin also fails to cite to any evidence of record demonstrating what Lori Elm's testimony would have been. *See* § 809.19(1)(e), STATS. Supporting his allegations with factual references is particularly necessary in light of Boivin's statement that Elm did not know about the injuries to his hands. We conclude that Boivin has failed to show ineffective assistance of counsel.

Finally, we conclude the record demonstrates that the trial court reasonably exercised its sentencing discretion. We approach sentencing review

with great deference. Sentencing lies within the trial court's discretion, and our review is limited to whether the trial court erroneously exercised its discretion. *State v. Larsen*, 141 Wis.2d 412, 426, 415 N.W.2d 535, 541 (Ct. App. 1987). The primary factors to be considered are the gravity of the offense, the character of the offender and the public's need for protection. *Id.* at 427, 415 N.W.2d at 541.

The record discloses that the trial court reasonably exercised its sentencing discretion. The court considered the vicious and aggravated nature of the offense; Boivin's prior record; and his need to address his substance abuse. The court stated: "When I look at his history of undesirable behavior patterns, there is no history of *any desirable* behavior patterns."¹ The court observed that Boivin is twenty-nine years old, had dropped out of school, has not supported his child and has not benefited from treatment. The court further considered: "My most important concern here is the rights of the public, their protection and the deterrence of this man, Mr. Boivin, to deter him from further crime." The court concluded that the maximum sentence of fifty years was appropriate. The record shows a reasoned consideration of proper factors.

Boivin argues that the court erred because it wrongly assumed that Boivin would be released after serving 25% of his sentence, when in fact he will be merely eligible for parole. *See* § 304.06, STATS. Boivin mischaracterizes the court's remarks. Following a discussion regarding drug and alcohol treatment and anger management programs, the court stated:

¹ At page 15 of his appellate brief, Boivin misquotes the italicized portion of the quotation, arguing that the court stated that "there is no history of *undesirable* behavior patterns."

I hope that Mr. Boivin can learn in the prison system because he will get out. He will get out in approximately 25 percent of the time that I put him in for, and at any rate no more than two-thirds the time that I put him in for, so it's important that he prepare to live in society because he's going to have to do that, and society and his family, people that are here today to support him, are going to have to know that it's going to be difficult for him because he spent so much time in prison, and he hasn't lived in this society.

We conclude that when read in context, the trial court's remarks were to the effect that Boivin needed time to take advantage of the rehabilitative opportunities, in light of his age and his needs, because he would likely be released before his entire sentence was served. The court's remarks provide no basis for reversal.

Boivin further argues that the court failed to consider certain mitigating factors, such as that his criminal record was not a violent one, that he accepted responsibility for his actions, and did not cause problems at trial. We disagree. The sentencing court specifically stated that Boivin's prison term would be concurrent rather than consecutive to the sentence that he was presently serving, "because of his cooperation, because of his truthfulness with this court, because of his admission of guilt, and because of his apparent desire to learn not to be a danger to society when he finally is released." The record discloses a proper exercise of sentencing discretion.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

