

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

August 28, 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.

NOTICE

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

No. 97-1173-CR-NM

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CLARENCE L. MARTIN,

DEFENDANT-APPELLANT.

APPEAL from judgment of the circuit court for Dane County:
SARAH B. O'BRIEN, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Roggensack, J.

PER CURIAM. Counsel for Clarence Martin has filed a no merit report pursuant to RULE 809.32, STATS. Martin received a copy of the report and was advised of his right to respond, but has elected not to do so. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S.

738 (1967), we conclude that there is no arguable merit to any issue that could be raised on appeal.

The no merit report addresses whether Martin was denied effective assistance of counsel because his trial attorney did not object to statements Martin made to the police or to the admission of the victim's photo line-up identification of Martin, and whether the eight-year sentence was excessive. Our independent review of the record confirms counsel's analysis of these issues. In addition, we conclude that sufficient evidence supports the verdict.

Martin was convicted of first-degree reckless injury while using a dangerous weapon. The victim, Steven Hill, testified that he entered an apartment building looking for a friend. He saw Martin in the stairway and had a brief conversation, after which Martin kicked him in the chest and a fight ensued. Hill, who was a professional boxer, testified that he had the better of Martin and managed to exit the building. As he was leaving, Hill was confronted by Martin and three or four of his friends. Martin told Hill that he "must want to die." Hill was then struck from behind with a board and fell to the ground. When he tried to get up, Martin stabbed him in his left side with a butcher knife. Hill was again struck with the board and Martin stabbed him a second time in the chest. Hill identified Martin as his assailant and told police that he knew Martin by his nickname "Farley," which Martin acknowledges.

A police officer testified that Hill immediately identified Martin upon seeing his photograph. The photograph was one of twelve pictures showed to Hill. After Martin was read his *Miranda* rights,¹ he denied having been at the

¹ See *Miranda v. Arizona*, 384 U.S. 436 (1966).

scene of the crime. Later, he admitted that he had been there and had fought Hill, but denied involvement in the stabbing.

Through its cross-examination of the State's witnesses, the defense suggested that someone other than Martin was the assailant, but presented no witnesses in support of that theory. The defense argued that the police were unable to find the jacket the assailant wore on the night of the incident or the butcher knife. It also argues that Martin's appearance on the day of his arrest, two days after the stabbing, did not reflect his involvement in any fight.

The State presented sufficient evidence to support the jury's finding that Martin was the assailant. This court must affirm the jury's findings of fact unless the evidence, considered most favorably to the State, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact acting reasonably could be convinced beyond a reasonable doubt. *See State v. Koller*, 87 Wis.2d 253, 266, 274 N.W.2d 651, 658 (1979). It is the jury's function to determine the credibility of witnesses and the weight to be given their testimony. *See State v. Holt*, 128 Wis.2d 110, 121, 382 N.W.2d 679, 685 (Ct. App. 1985). Hill's testimony, if believed by the jury, constitutes sufficient evidence to support the verdict.

The record does not support any claim of ineffective assistance of trial counsel. To establish ineffective assistance of counsel, Martin must show that his counsel's performance was inadequate and prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel's failure to move to suppress Martin's statements or the photo line-up identification did not prejudice Martin because the record discloses no basis for suppression. Uncontradicted testimony establishes that Martin was informed of his *Miranda*

rights before he made the statements to police. As to the photo line-up, the record shows that Hill observed Martin's face in a well-lit area, was familiar with him before the stabbing and immediately identified his photograph. The record discloses no basis for suppressing the identification.

Martin apparently told his postconviction counsel that he knew the name of a person who told him that the police suggested to Hill that he should identify Martin in the photoarray. He also claims to have given this information to his trial counsel. He has not provided the name of this person to his postconviction counsel despite several requests, his trial attorneys deny having received that information and Martin has not filed a response to the no merit report providing this court with that information. On the record before this court, there was no basis for trial counsel to object to testimony relating to the photo line-up identification.

Finally, there is no basis for challenging the exercise of the trial court's sentencing discretion. The maximum sentence Martin could have received is fifteen years. The court considered the seriousness of the offense and Martin's seven prior convictions, including a previous assault. The court considered no improper factors and the eight-year sentence is not so excessive as to shock public sentiment. See *Ocanas v. State*, 70 Wis.2d 179, 185, 233 N.W.2d 457, 461 (1975).

Our independent review of the record discloses no other potential issues for appeal. Therefore, we relieve Attorney Paul Nesson of further representing Martin in this matter and affirm the judgment of conviction.

By the Court.—Judgment affirmed.

