# COURT OF APPEALS
# DECISION
# DATED AND RELEASED

May 21, 1996

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

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**No. 95-0816-CR**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT I**

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**ELIJAH ARRINGTON,**

**Defendant-Appellant,**

**IDELLA ARRINGTON,**

**Defendant.**

APPEAL from a judgment of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Elijah Arrington appeals from the judgment of conviction, following a jury trial, for first-degree reckless homicide and physical abuse of a child, both as party to a crime. He argues that: (1) the criminal

complaint was insufficient to establish probable cause that he committed first-degree reckless homicide, party to a crime; (2) the trial court erred in denying his motion to sever the physical abuse of a child charge; (3) the trial court erred in denying his motion to instruct that the jury must be unanimous concerning the act or acts which serve as the basis for conviction; (4) the trial court erred in overruling his objections to a detective's testimony when the detective referred to a report; and (5) the evidence was insufficient to convict him of the reckless homicide. We affirm.

Elijah and Idella Arrington were convicted of the abuse and reckless homicide of Idella's granddaughter, two and one-half year old Christine Gillespie, who died on December 3, 1993, as a result of severe brain swelling. Evidence at the trial established that both Elijah and Idella Arrington abused Christine over a long period of time leading to and including the day of her fatal injuries.

Arrington first argues that the criminal complaint did not allege sufficient facts to establish probable cause that he committed first-degree reckless homicide, party to a crime. He contends that the complaint failed "to state sufficient facts upon which it could be concluded that [his] actions were such that he was aware of the fact that his conduct was reasonably certain to result in death or great bodily harm," and failed to sufficiently "allege that any conduct on [his] part ... was a cause of the death."

Whether a criminal complaint is legally sufficient is a question of law subject to our independent review. ***State v. Manthey***, 169 Wis.2d 673, 685, 487 N.W.2d 44, 49 (Ct. App. 1992). A criminal complaint is legally sufficient if it contains facts that would "'lead a reasonable person to conclude a crime had probably been committed and the defendant named in the complaint was probably the culpable party.'" ***State v. Stoehr***, 134 Wis.2d 66, 74, 396 N.W.2d 177, 179 (1986) (citation omitted). The test is one "of minimal adequacy, not in a hypertechnical but in a common sense evaluation, in setting forth the essential facts establishing probable cause." ***State ex rel. Evanow v. Seraphim***, 40 Wis.2d 223, 226, 161 N.W.2d 369, 370 (1968). Applying this test, we consider not only the alleged facts but also the reasonable inferences fairly drawn from those facts. ***State v. Becker***, 51 Wis.2d 659, 662, 188 N.W.2d 449, 451 (1971).

Section 940.02, STATS., provides that first-degree reckless homicide is committed by one who "recklessly causes the death of another human being under circumstances which show an utter disregard for human life." To commit this crime, a defendant not only must cause death by actions creating an unreasonable and substantial risk of death or great bodily harm, but also must have been "aware of that risk." ***State v. Blair***, 164 Wis.2d 64, 70-71, 473 N.W.2d 566, 569 (1991). Under § 939.05, STATS., party to a crime permits the charging and conviction of a defendant for directly committing the crime or intentionally aiding and abetting the crime. "Charging a person as a party to a crime is a way of establishing criminal liability separate from proving the elements of the offense to which the defendant is charged as a party." ***State v. Zelenka***, 130 Wis.2d 34, 47, 387 N.W.2d 55, 60 (1986).

Proof of the acts which can support liability as a party to a crime is

> separate from proof of the underlying criminal act. In Wisconsin there is no requirement that an aider and abettor share the specific intent required for commission of the substantive offense he aids and abets.

***Id.*** (citations omitted). The actions of a party who aids and abets do not have to constitute "an essential element of the crime executed by the principals." ***Krueger v. State***, 84 Wis.2d 272, 286, 267 N.W.2d 602, 609, *cert. denied*, 439 U.S. 874 (1978). Further, the aider and abettor need not be present at the crime scene. ***Roehl v. State***, 77 Wis.2d 398, 407-408, 253 N.W.2d 210, 214 (1977).

The complaint alleges that, according to Dr. Jeffrey Jentzen of the Milwaukee County Medical Examiner's Office, Christine's death was caused by "closed head trauma, and complications of battered child syndrome." The complaint also alleges that on December 2, 1993, the day an ambulance took Christine from the Arrington residence to Children's Hospital where she died the next day, Elijah Arrington stated that:

he was feeding Christine Gillespie and she was holding the food in

> her mouth and was not chewing or swallowing it, and he needed to get her attention. Elijah Arrington states that he hit her legs more than five or six times,

> "I hit her arms too, and when she turned I got her back."

The complaint also alleges that Idella Arrington stated that "Elijah does more hitting than me. He usually uses something like a strap when he hits Christine. Chris gets a beating at least once a day." The complaint also describes numerous burn marks, scars, bruises, and other injuries on Christine's body.

We conclude that the complaint contains sufficient factual allegations to establish probable cause that Elijah Arrington, as party to a crime, committed first-degree reckless homicide. One reasonably infers from the complaint that the Arringtons' repeated beatings resulted in Christine's death from complications of battered child syndrome and, further, that Elijah Arrington would have been aware that his and Idella's actions created an unreasonable and substantial risk of death or great bodily harm.

Arrington next argues that the trial court should have severed the physical abuse of a child charge. He concedes that the joinder of the charges was permissible under § 971.12, STATS., but maintains that he suffered "substantial prejudice as a result of the joinder." He contends that because intent is not an element of first-degree reckless homicide, evidence of his prior acts of mistreatment of Christine was irrelevant and prejudicial on the homicide charge.

When deciding the propriety of severance, a trial court must weigh the potential prejudice against the "interests of the public in conducting a trial on multiple counts." ***State v. Locke***, 177 Wis.2d 590, 597, 502 N.W.2d 891, 894 (Ct. App. 1993). We will uphold the trial court's denial of severance unless the trial court erroneously exercised discretion and the denial caused "substantial prejudice" to the appellant. ***Id.***

We see no erroneous exercise of discretion. Evidence regarding Elijah Arrington's continual abuse of Christine was relevant to both charges. It was probative not only of physical abuse, but also of the conduct causing complications of battered child syndrome resulting in Christine's death. Moreover, the evidence of physical abuse was relevant to Elijah Arrington's

absence of mistake or accident that, in turn, was probative of his awareness of the risk of death or great bodily harm. Joinder of the charges was proper.

Arrington next argues that "the trial court should have granted [his] motion to instruct the jury that [it] must be unanimous concerning the act or acts which serve as a basis for conviction" for physical abuse of a child. The trial court denied Arrington's request stating, "I do not think it is appropriate ... that all twelve jurors must conclude that the same specific acts constituted the crime." *See* § 805.13(3), STATS.

On appeal, Arrington offers little more than a lengthy quotation from ***State v. Marcum***, 166 Wis.2d 908, 480 N.W.2d 545 (Ct. App. 1992), and then, in an inadvertent or inexplicably abbreviated paragraph, merely states:

> As in ***Marcum***, there was nothing in this case to focus the jury's attention onto a specific act during that time period alleged in Count III (i.e. May 1, 1993 to December 2, 1993). In fact, the State presented evidence of a number of incidents during that period of time which could conceivably be considered physical abuse of a child. The refusal of the trial court to specifically instruct the jury as to unanimity leaves open the possibility that three jurors convicted on count III believing that Elijah did as

***Marcum*** is distinguishable. ***Marcum*** presented an issue of whether counsel was ineffective for failing to object to the standard unanimity instruction where the defendant was charged with numerous sexual assault counts and the standard instruction did not clarify that jurors had to be unanimous about which specific act formed the basis for each count of sexual assault. Here, by contrast, a single count of physical abuse of a child encompassed all of the alleged actions of the defendants related to a continuing course of conduct. Arrington offers no reply to the State's argument that "jurors need not reach unanimous agreement on specific acts when the alleged crime is a series of conceptually similar acts collectively constituting a continuous course of criminal conduct underlying a single charged count." *See* ***State v. McMahon***,

186 Wis.2d 68, 81, 519 N.W.2d 621, 627 (Ct. App. 1994).[1] Accordingly, we reject Arrington's argument that the trial court erred by denying his request for a unanimity instruction on the abuse charge.

Arrington next argues that "the trial court erred in overruling [his] hearsay and confrontation clause objections to Detective Welch reading from his police report and in impairing [his] cross-examination of the officer by ordering him to provide the detective with a copy of his report during cross-examination." The State elicited testimony from Milwaukee Police Detective Thomas Welch regarding his interview of Sandra Harrington, a neighbor, who had testified that she had not seen Elijah Arrington employ "excessive" measures in disciplining Christine. According to Detective Welch, however, Harrington had told him that she both observed and heard Arrington beating Christine. Arrington contends that the trial court improperly allowed Detective Welch to utilize his police report of the Harrington interview and that the report was inadmissible hearsay. We disagree.

The record reflects that as soon as Detective Welch was called to the stand, Elijah Arrington's trial counsel stated, "Your Honor, before we start, the witness has his report face up in front of him. I ask that not be referred to until a foundation is laid and that not be on his desk with him." The trial court responded, "Just turn—okay, that's fine. It's been turned over and you may proceed, counsel." Detective Welch then did not refer to his report until the prosecutor asked him, "Did [Harrington] say approximately how many times she had observed Elijah Arrington strike Christine Gillespie?" Detective Welch responded that he could not specifically recall without referring to his report. The trial court then, and throughout the balance of his brief testimony, permitted Detective Welch to refer to his report of the Harrington interview to refresh his recollection.

[1] In fact, in his reply brief to this court, not only does Arrington fail to counter the State's argument, he also alters his argument by arguing extensively that reckless homicide cannot be committed as a continuing offense and, therefore, that he was entitled to a unanimity instruction on the homicide count. Arrington failed, however, to raise this issue with specific reference to the homicide charge in the trial court, and failed to present this argument in his brief-in-chief to this court. Accordingly, we will not address the unanimity issue with reference to the homicide charge. *See* § 805.13(3), STATS.

We conclude that the trial court acted properly. As the supreme court has explained, "if a witness can locate a writing which refreshes his memory as to the facts and he can then testify from his independent recollection, his testimony and not the writing is admitted in evidence, as present recollection refreshed." ***State v. Wind***, 60 Wis.2d 267, 274, 208 N.W.2d 357, 362 (1973).

Arrington's additional argument that the trial court erred in ordering that Detective Welch be provided with a copy of his report during cross-examination is misguided. Apparently, at some point during his testimony, Detective Welch had given the report to Elijah Arrington's trial counsel. The record establishes that trial counsel then was asking Detective Welch specific questions regarding whether he had written quoted statements in his report. When Detective Welch responded, "That's what's in the report, to the best of my recollection, since it's not in front of me," the trial court stated, "Why don't you give back the copy so if you're going to be asking those kinds of questions—would you please give the report back to the officer, please." The trial court properly exercised discretion in allowing Detective Welch to refer to the report when asked whether he had written specific words.[2]

Finally, Arrington argues that the evidence was insufficient to convict him of first-degree reckless homicide, party to a crime. He contends that "no reasonable interpretation of [his] conduct may result in the conclusion that this type of behavior created a substantial risk of great bodily harm or death." He concedes, however, that his "reasons why the evidence was insufficient ... are nearly identical to those set forth in support of [his] motion to dismiss the complaint." Again, we reject his argument.

As the supreme court has explained:

> in reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its

[2] This court need not address Arrington's additional argument that these trial court rulings violated the Confrontation Clause because the appellant failed to make an objection on this basis. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443-444, 287 N.W.2d 140, 145-146 (1980).

> judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

***State v. Poellinger***, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990) (citations omitted).

"[V]iewed most favorably to the State and the conviction," the evidence clearly was sufficient to convict Elijah Arrington of first-degree reckless homicide, party to a crime. The evidence included testimony from several witnesses that Elijah Arrington frequently hit Christine with objects including a rubber strip, a plastic strip, and a comb. The rubber strip, which tested positive for human blood, was over an inch wide and was slightly curved as if bent around an adult hand by the force of striking. The evidence established that Arrington beat and whipped Christine with these objects. A detective read from his report of Arrington's statement describing his actions the morning of Christine's fatal injuries:

This morning, I did spank Christine with that red plastic strip. I was feeding her and she was just holding her food in her mouth and not chewing or swallowing.

> I needed to get her attention. I used the strip and spanked her legs and arms. I hit her legs more than five or six times. I hit her arms, too, and when she turned, I got her back, but that was not on purpose.... Subject demonstrated how hard he hit Christine with the plastic. It made a whooshing sound as it whipped the air.

Witnesses stated that Elijah Arrington punched Christine with a closed fist, and slapped her "real hard" numerous times. The evidence also included portions of Idella Arrington's statement relating that Christine was beaten at least once a day and that Elijah Arrington did more hitting than she did.

This evidence, in combination with substantial additional evidence that including medical testimony detailing the bruising, brain swelling, burning, scarring, and subdural hemorrhaging, established that Christine died from complications of battered child syndrome. A reasonable jury could have found that Elijah Arrington's conduct, both directly and as a party to this crime, caused Christine's death. Accordingly, we reject his claim that the evidence was insufficient to support the conviction.

*By the Court.* – Judgment affirmed.

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