COURT OF APPEALS
DECISION
DATED AND RELEASED

June 12, 1997

NOTICE

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. 96-1889-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

STANLEY EARL APPLEBEE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Vernon County: MICHAEL J. ROSBOROUGH, Judge. *Affirmed.*

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

PER CURIAM. Stanley Earl Applebee appeals from a judgment convicting him of first-degree reckless homicide, contrary to § 940.02(1), STATS., felony in possession of a firearm, contrary to § 941.29(1)(a), STATS., endangering safety by use of a dangerous weapon contrary to § 941.20(1)(c), STATS., and endangering safety by use of a dangerous weapon, contrary to § 941.20(1)(b).

Applebee contends that his trial counsel's failure to advise him of his right to individually poll jurors and failure to request a jury poll constituted ineffective assistance of counsel under the United States and Wisconsin Constitutions. We conclude that it does not, and therefore affirm.

Before the jury retired to deliberate, the court instructed the jury that all twelve jurors must unanimously agree in order for the verdict to be legally received. Applebee was present with his counsel when the verdict was returned. After the verdicts had been read, the court asked the jurors to raise their hands if the correct verdicts had been read. Each juror raised his or her hand for each verdict. The trial court then asked defense counsel if there was a request to poll the jury. Defense counsel said, "No your honor."

Applebee filed a postconviction motion requesting that the judgment of conviction be vacated and that a new trial be granted. Applebee contended that his counsel's failure to advise him of the right to poll the jury and failure to consult with him before declining to poll the jury deprived him of effective assistance of counsel, guaranteed by the Wisconsin and United States Constitutions.

At the hearing on the motion, Applebee testified that he had no recollection of any discussion with his defense counsel concerning his right to individually poll the jury. He also testified that he would have requested that the jurors be polled if in fact he had such a right. Defense counsel testified that although he had no independent recollection of specifically asking Applebee about polling the jury, he typically informs his clients of their right to individually poll the jurors and allows the clients to decide whether to request an individual poll. Counsel testified that he does not specifically recall deviating from this practice.

The trial court did not rule on the motion, and it was denied pursuant to § 809.30(2)(i), STATS., which provides that a motion for postconviction relief is considered denied if the trial court does not decide it within sixty days of filing.

The Sixth Amendment of the United States Constitution and Article I, Section 7 of the Wisconsin Constitution guarantee the right to counsel, which includes the right to effective assistance of counsel. ***State v. Smith***, 207 Wis.2d 259, 274, 558 N.W.2d 379, 386 (1997). In order to prove ineffective assistance of counsel, Applebee must prove the defense counsel's actions constituted deficient performance and that the deficient performance resulted in prejudice to the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The trial court's determination of what the attorney did or did not do, and the basis for the challenged conduct, are factual and will be upheld unless clearly erroneous. ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 848 (1990). Whether the attorney's representation was ineffective presents a question of law which this court reviews independently. ***Id.*** at 128, 449 N.W.2d at 848.

Because the trial court did not make a finding on whether defense counsel did or did not discuss jury polling with Applebee, we will assume for purposes of this decision that he did not. The other pertinent facts relating to jury instructions and what occurred when the jury returned with its verdict are not disputed. In ***State v. Yang***, 201 Wis.2d 725, 549 N.W.2d 769 (Ct. App. 1996), we held that a defense counsel's decision not to request individual polling was reasonable under the circumstances and did not constitute deficient performance even though the attorney did not discuss the option with his client. ***Id.*** at 745, 549 N.W.2d at 776-77. We noted several circumstances in ***Yang*** which made the defense counsel's decision in that case reasonable. ***Id.*** at 746, 549 N.W.2d at 777. First, the court read the standard jury instruction on a unanimous verdict before the

jury began deliberations. Second, the jurors answered affirmatively when the court read their verdict. Third, when asked by the court, the jurors raised their hands to indicate that the verdict read was correct. Finally, the jurors only had one question during their deliberations and the defense counsel and prosecutor agreed that the court responded to it in an appropriate manner. ***Id.***

Applebee maintains that ***Yang*** conflicts with United States and Wisconsin Supreme Court precedent concerning whether the right to poll the jury in a criminal case is a personal right which must be waived by the defendant. However, we addressed this same argument in ***Yang*** and rejected it. ***Id.*** at 742-43, 549 N.W.2d at 777. We may not overrule, modify or withdraw language from a previously published appellate court decision. ***Cook v. Cook***, 208 Wis.2d 166, 189-90, 560 N.W.2d 246, 256 (1997). Therefore, ***Yang*** governs the outcome of this case.

As in ***Yang***, the trial court read the standard jury instruction on a unanimous verdict before the jury began deliberations. Each juror affirmed the verdicts read were correct by raising his or her hand upon inquiry by the court. Applebee points to no facts indicating that the verdict was not unanimous. Following ***Yang***, we conclude that defense counsel's failure to request an individual polling even though he did not discuss this option with his client does not constitute deficient performance.

In ***Yang***, we applied the standard for ineffective assistance of counsel established in ***Strickland***, 466 U.S. at 687, which was decided under the Sixth Amendment of the United States Constitution. ***Yang***, 201 Wis.2d at 742, 549 N.W.2d at 775. The right to counsel provided under the Wisconsin Constitution does not differ substantially from the right provided under the United

States Constitution. *See* ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 72 (1996). We see no reason to employ a different analysis in this case. We conclude that defense counsel's performance did not constitute ineffective assistance of counsel under either the federal or state constitution.

By the Court.—Judgment affirmed.

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