

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

OCTOBER 14, 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

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No. 97-0108-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MELVIN L. STICK,

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 Hoover, JJ.

PER CURIAM. Melvin Stick appeals a judgment convicting him of first-degree reckless homicide, party to a crime, as a repeat offender. He also appeals an order denying his postconviction motion. He argues that the trial court erred when it denied his motion to sever his case from his co-defendant, Kenneth Boivin, and allowed introduction of Boivin's confession implicating Stick at the

trial even though Boivin did not testify. He also argues that his trial counsel was ineffective for failing to call a witness and for failing to object to the prosecutor's closing argument. We conclude that the error in allowing Boivin's confession to be introduced at the joint trial was harmless beyond a reasonable doubt and that Stick has not established ineffective assistance of his trial counsel.

The victim, Clinton Cardish, was beaten to death in an altercation with Stick and Boivin. The doctor who performed the autopsy testified that Cardish's injuries 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 a broken thyroid cartilage, resulting in blood breathed into his lungs. In their initial witness statements, Boivin and Stick accused each other of inflicting the greatest harm on Cardish. In their second interviews, both men admitted that they had not told the truth in their first statements and both gave new statements that accepted more responsibility for the beating. The trial court allowed both of Boivin's statements into evidence. The State concedes that parts of these statements were not admissible because they were not self-incriminatory and Boivin was not available for cross-examination. *See generally Williamson v. United States*, 114 S. Ct. 2431, 2436 (1994); *Bruton v. United States*, 391 U.S. 123 (1968). Therefore, the issue is whether the admission of Boivin's statements constituted harmless error.

Harmless error analysis applies to the admission of a co-defendant's statement in violation of evidentiary rules and the confrontation clause. *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. Before constitutional error can be

deemed harmless, this court must be able to state that it was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 22 (1967).

The objectionable portions of Boivin's statements did not affect the verdict beyond a reasonable doubt. Stick was charged as a party to a crime. Evidence tending to establish which of the defendants struck the fatal blow is irrelevant. By Stick's own admission, he kicked Cardish until Cardish passed out. Later Stick and Boivin returned to the scene and Stick again admitted to kicking Cardish in the legs and chest while Boivin kicked his head. Cardish's sixteen-year-old cousin testified that Boivin and Stick were punching and kicking Cardish and she saw Stick kicking him in the head. The only objectionable information provided by Boivin's statements relates to which of the co-defendants administered the more vicious blows, an irrelevant question when each is charged as a party to the other's crime. Section 939.05, STATS. Without considering the inadmissible portions of Boivin's statements, overwhelming evidence establishes that Boivin and Stick acted in concert when they beat Cardish to death, regardless of which blows incapacitated Cardish and rendered him defenseless or which blow was the direct cause of death.

Stick argues that Boivin's inadmissible statements might have led the jury to decide whether Stick was guilty of first-degree or second-degree reckless homicide. The difference between those offenses is that first-degree reckless homicide requires a showing that the circumstances of the defendant's conduct showed utter disregard for human life. *See* WIS J I—CRIMINAL 1022. Because Stick was charged as a party to a crime, it makes no difference which of the defendants' conduct showed the utter disregard for human life. Even if the jury believed that Stick merely kicked and punched Cardish and that it was Boivin

who stomped on this throat and kicked his head, it still would be appropriate to find Stick guilty of first-degree reckless homicide as a party to Boivin's crime.

Stick argues that his trial counsel was ineffective because he failed to object to the prosecutor's closing argument in which the prosecutor used Boivin's statement that Stick stomped on Cardish's face, and suggested that Stick caused the injury to Cardish's airway, a possible cause of death. Stick has established neither deficient performance nor prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). There are twenty pages of transcript between the prosecutor's reference to Boivin's statement and his comment regarding Stick stomping on Cardish. Stick's own admissions that he kicked Cardish in the face during the first altercation and kicked him again while he was on the floor during the second beating might give rise to the same inference. Because it was not readily apparent that the prosecutor was making any reference to Boivin's statement, counsel was not required to object to the requirement. In addition, for the same reasons we conclude that admission of Boivin's statement was harmless error, we conclude that Stick has established no prejudice from his counsel's failure to object.

Stick also argues that his trial counsel is ineffective for failing to call a police officer for the purpose of impeaching the testimony of Cardish's cousin. At trial, she testified that Stick kicked Cardish in the head and continued kicking him for a couple of minutes after Cardish fell to the floor. She was cross-examined based on a police report in which she allegedly told a detective that Stick and Boivin stopped hitting Cardish when he fell to the floor. Stick argues that his trial counsel should have called the detective for the purpose of supporting the version given in the police report. We conclude that Stick has not established any prejudice from his counsel's decision to rely on the cross-examination. It is

obvious from the cross-examination that a police report did not comport in all details with the witness's testimony. There is little utility in taking the formal step of calling a witness to verify what the jurors already assumed to be true. In addition, Stick's own confession in which he admitted kicking Cardish after he was down supports the witness's testimony and not the version recited in the police report. Counsel's failure to call the detective for the purpose of contradicting Stick's own account of the incident does not undermine this court's confidence in the outcome. *Strickland*, 466 U.S. at 694.

By the Court.—Judgment and order affirmed.

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

