

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 21, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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.

No. 98-2850-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

EDWARD F. RAMOS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DIANE S. SYKES, Judge. *Affirmed.*

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

¶1 PER CURIAM. Edward F. Ramos appeals from a judgment entered after a jury found him guilty of first-degree intentional homicide. See § 940.01, STATS. He also appeals from an order denying his motion for postconviction relief. Ramos asserts: (1) that the trial court erred in admitting postmortem

photographs of the child that Ramos killed; (2) that the trial court erred in admitting other acts evidence; and (3) that the trial court erroneously exercised its discretion in imposing sentence upon Ramos. We affirm.

I. BACKGROUND

¶2 On the evening of November 15, 1993, Ramos suffocated Brandon Webster, the two-year-old son of his girlfriend, Michelle Webster, by pressing Brandon's body face-down into a couch cushion for about ten minutes. Webster discovered Brandon's death the next morning at about 9:00 a.m., while Ramos was at work.

¶3 Webster had left Brandon in the care of her roommates, Sonya Smith and Christina Cordova, while she was at work. Brandon fell asleep at about 8:00 p.m. or 9:00 p.m., on November 15, and was placed on the couch. Sometime after 10:00 p.m., Ramos, who also lived with Webster, came home and began arguing with Smith and Cordova. The argument led to a physical confrontation, during which Ramos punched Cordova in the eye, and Cordova kicked Ramos in the groin. Smith ended the fight by hitting Ramos over the head with a plastic cookie jar. Smith and Cordova then left the apartment to use a nearby pay phone to call some friends and ask them to come over.

¶4 Smith and Cordova later returned to the apartment and found that Ramos had locked them out. Smith pounded on the door and told Ramos that she wanted to come in, but he did not unlock the door. About twenty minutes later, the girls' friends, two male and one female, arrived. The girls waited in the car while the two men pounded on the apartment door and demanded that Ramos come out and fight them. Ramos refused to come out, and the two men left, along with the three girls, after a neighbor threatened to call the police.

¶5 Brandon awoke during Ramos's argument with the two men. Ramos told Brandon to go back to sleep, but Brandon resisted and repeatedly said, "No night-night." Ramos lay down on the couch with Brandon, held him down and told him it was time to go to sleep, but Brandon flailed his arms and legs and refused to go to sleep. Brandon left the couch several times, and Ramos repeatedly returned Brandon to the couch and tried to get him to go to sleep.

¶6 After several unsuccessful attempts to get Brandon to sleep, Ramos went to have a cigarette. Brandon followed Ramos, crying and saying, "No night-night." Ramos turned and slapped Brandon, then picked him up and dropped him a short distance onto the couch. Brandon continued to cry and to struggle to get off of the couch, so Ramos held him down. Ramos pressed Brandon face-down into the couch until he stopped moving, about ten minutes later. Ramos then went into a bedroom and slept alongside one of Webster's other two children.

¶7 Webster came home from work at about 12:30 a.m., on November 16, 1993, and woke Ramos. The two of them went to the living room to sleep on the floor. A short time later, Smith and Cordova returned to the apartment. Smith decided to stay at the apartment, but Cordova left. Smith went to sleep on the end of the couch opposite Brandon.

¶8 The next morning, after Webster's two other children left for school and Ramos left for work, Webster checked on Brandon and discovered that he was dead. She touched his body and found that it was cold and stiff; when she rolled his body over she saw bruises around his eyes, nose and mouth, and a bubble of mucus coming out of his nose. She ran to her neighbor's apartment and called 911. She also called Ramos at work, and he returned home shortly thereafter.

¶9 Emergency personnel arrived about ten minutes after they received Webster's call. They examined Brandon's body and determined from its appearance that Brandon had been dead for several hours.

¶10 That evening, at the police station, Ramos was questioned about Brandon's death. Ramos told the police how he had struggled to try to get Brandon to sleep. He admitted that he became frustrated, that he slapped Brandon, and that he dropped Brandon on the couch and then pressed him face-down into the couch until he stopped moving. Ramos said that he pressed on the back of Brandon's neck while Brandon's face was against the couch cushion. He said that he held Brandon in that position for about ten minutes, and that when he stopped pressing on Brandon he heard a sigh. Ramos said that he then got scared because he thought he had killed Brandon. Ramos told the police that he then went to sleep alongside one of Webster's other children, after stroking the child's hair and saying to himself that he was sorry.

¶11 In 1994, Ramos was tried and convicted of first-degree intentional homicide for killing Brandon. That conviction was reversed, however, due to an error in the jury-selection process.¹

¶12 Ramos was retried in 1997. At trial, Ramos admitted that he had killed Brandon, but he asserted that he had not intended to do so. Ramos argued that he had killed Brandon recklessly, and he sought a verdict of first-degree reckless homicide. In support of this argument, Ramos presented evidence that he loved Webster's children and had good relationships with them. In response, the

¹ Ramos's conviction was overturned because the trial court erroneously failed to dismiss for cause a biased juror, thereby forcing Ramos to use a statutory peremptory challenge to dismiss the biased juror. *See State v. Ramos*, 211 Wis.2d 12, 14, 564 N.W.2d 328, 329 (1997).

State presented evidence that Ramos was abusive toward Webster and her children. The State also presented evidence that Ramos became violent when he was drinking, and that he had been drinking on the night he killed Brandon.

¶13 The State also presented testimony from the medical examiner that Ramos applied a great amount of force to hold Brandon face-down on the couch. The medical examiner testified that the pattern from Brandon's shirt collar had been impressed into the back of Brandon's neck, and that there were scratches on the back of Brandon's neck and scalp. He further testified that the pressure from the compression of Brandon's head and neck area was so great that the blood vessels in Brandon's upper chest ruptured. He also testified that there was evidence of a blunt force trauma to the back of Brandon's head.

¶14 The jury found Ramos guilty of first-degree intentional homicide, and the trial court entered judgment accordingly. The trial court imposed a life sentence upon Ramos, with parole eligibility in the year 2024.

II. DISCUSSION

A. Photographs.

¶15 Ramos argues that the trial court erred in admitting postmortem photographs of Brandon. Two of the photographs showed Brandon on the couch, where he died. They show bruising around Brandon's eyes, nose and mouth. They also show a mucus bubble extending from Brandon's nose. The remaining photographs are close-ups of the bruising and discoloration on Brandon's head, neck and chest. Ramos argues that these photographs were not necessary to help the jury resolve the issues before it, and that they were unfairly prejudicial.

¶16 Whether a photograph should be admitted into evidence is within the discretion of the trial court. See *State v. Hagen*, 181 Wis.2d 934, 946, 512 N.W.2d 180, 184 (Ct. App. 1994). “[W]here photographs are not substantially necessary or instructive to show material facts or conditions, and are of such a character as to arouse sympathy or indignation, or divert the minds of the jury to improper or irrelevant considerations, they should be excluded.” *Neuenfeldt v. State*, 29 Wis.2d 20, 33, 138 N.W.2d 252, 259 (1965) (quoted source omitted). Photographs are admissible, however, “if they will help the jury gain a better understanding of material facts.” *Sage v. State*, 87 Wis.2d 783, 788, 275 N.W.2d 705, 708 (1979).

¶17 At trial, Webster testified that she found Brandon lying face-down on the couch, and that when she turned him over she saw that his face was bruised and he had a mucus bubble coming out of his nose. A police officer testified that he believed that Brandon had been dead for several hours because of the appearance of Brandon’s face and body. He said that Brandon’s blood had settled to the front of his body, and that Brandon’s body looked swollen and bruised in areas. The officer also said that Brandon’s nose was pushed slightly upward, indicating that there was pressure on Brandon’s nose when he died. The two photographs of Brandon on the couch were used to illustrate this testimony.

¶18 The medical examiner testified that he arrived at Webster’s home at about 10:30 a.m., on November 16, 1993. The medical examiner observed that Brandon’s muscles were stiff and that his blood had settled to the front of his body, and estimated that Brandon had been dead, lying face-down, for between two and eighteen hours. The medical examiner testified that there was a bruise on the left side of Brandon’s nose, and that Brandon’s nose was pushed up from being pressed into the couch. The medical examiner also testified that there were

bruises on Brandon's left eye and his lower lip. He testified that the bruise to Brandon's eye was caused by a blunt force, but that the bruises to Brandon's nose and lip were caused by the pressure used to hold Brandon down. The close-ups of the bruising and discoloration on Brandon's head, neck and chest were admitted to illustrate the medical examiner's testimony.

¶19 In order to convict Ramos of first-degree intentional homicide, the State was required to prove beyond a reasonable doubt that Ramos caused Brandon's death with the intent to kill Brandon. *See* § 940.01, STATS. The postmortem photographs of Brandon aided the jury in understanding the amount of pressure that Ramos used to hold Brandon into the couch, which was relevant to determining whether Ramos had the intent to kill Brandon when he caused his death. Although Ramos asserts that the photographs could not be admitted to show that he killed Brandon by pressing him into the couch because he did not dispute the fact that he killed Brandon, "[e]vidence is always admissible to prove an element of the charged crime even if the defendant does not dispute it at trial." *State v. Locke*, 177 Wis.2d 590, 598, 502 N.W.2d 891, 895 (Ct. App. 1993). The trial court did not erroneously exercise its discretion in admitting the postmortem photographs of Brandon.

B. Other acts evidence.

¶20 Ramos next argues that the trial court erred in admitting evidence that he had abused Brandon and Webster before the night he killed Brandon. He further argues that the trial court erred in admitting evidence that he had an alcohol problem and that he became violent when he was drinking.

¶21 Trial courts are granted broad discretion in determining whether to admit or exclude proffered evidence. *See State v. Larsen*, 165 Wis.2d 316, 319–

320, 477 N.W.2d 87, 88 (Ct. App. 1991). Our review is limited to determining whether the trial court erroneously exercised this discretion. *See id.*, 165 Wis.2d at 320 n.1, 477 N.W.2d at 89 n.1. We will not overturn a trial court's evidentiary ruling unless there was no reasonable basis for it. *See State v. McConohie*, 113 Wis.2d 362, 370, 334 N.W.2d 903, 907 (1983).

¶22 RULE 904.04(2), STATS., provides:

OTHER CRIMES, WRONGS, OR ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

To determine if evidence of other acts is admissible, we engage in a three-step analysis. First, the proffered evidence must fit within one of the exceptions of RULE 904.04(2), STATS.; second, the proffered evidence must be relevant under RULE 904.01, STATS.; third, pursuant to RULE 904.03, STATS., the probative value of the proffered evidence must not be substantially outweighed by the danger of unfair prejudice to the defendant. *See State v. Sullivan*, 216 Wis.2d 768, 772–773, 576 N.W.2d 30, 32–33 (1998).

1. Evidence of prior abuse.

¶23 As noted, Ramos admitted at trial that he had killed Brandon, but asserted that he had acted recklessly, rather than intentionally. In support of this argument, Ramos elicited testimony from Webster, on cross-examination, that he had a good relationship with her children, and that he appeared to love them. Ramos also elicited testimony from Webster that she called Ramos after Brandon's death because she was upset and wanted Ramos to be with her. He also

elicited testimony during cross-examination of Cordova that Ramos and Brandon referred to each other as father and son. From this evidence, Ramos argued that he had a loving, caring relationship with Webster and her children, and that he would not have intentionally harmed Brandon.

¶24 In response to Ramos's cross-examination of Webster, the State brought out that Ramos had abused Webster and Brandon before the night he killed Brandon; specifically that Ramos hit Webster two times while she was holding Brandon. The State also brought out that Ramos had hit Brandon on several occasions and was otherwise abusive towards him. Cordova testified that Ramos often slapped Brandon on the head, butt or thigh. She further testified that Ramos sometimes yelled at Brandon and threw him on the couch. This evidence directly rebutted Ramos's argument that he would not have intentionally harmed Brandon because he had a loving relationship with Webster and her family. It was therefore relevant to Ramos's intent when he killed Brandon, and was thus within the scope of RULE 904.04(2), STATS.

¶25 Moreover, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice to Ramos. The evidence was highly relevant to Ramos's intent, and was offered only in rebuttal to Ramos's claim that he would not have harmed Brandon intentionally. The trial court did not erroneously exercise its discretion in admitting evidence that Ramos had abused Brandon and Webster.

2. Evidence of violence when under the influence of alcohol.

¶26 The State also elicited testimony that Ramos became violent when he was under the influence of alcohol. Prior testimony indicated that Ramos had been drinking before he came home on the evening he killed Brandon. The State

asserts, and Ramos concedes, that Ramos did not object to the testimony about his behavior when under the influence of alcohol. The issue, therefore, has not been properly preserved for appeal. See RULE 901.03(1)(a), STATS.; *Holmes v. State*, 76 Wis.2d 259, 271, 251 N.W.2d 56, 62 (1977); *Caccitolo v. State*, 69 Wis.2d 102, 113, 230 N.W.2d 139, 145 (1975).

¶27 Moreover, any error in admitting the evidence was harmless. The undisputed evidence established that Ramos killed Brandon. Ramos used much pressure to hold Brandon face-down into the couch, and he applied that pressure for between four and ten minutes. In light of the compelling evidence regarding how Ramos killed Brandon, there is no reasonable probability that the challenged evidence contributed to Ramos's conviction. We therefore reject this claim of error. See *State v. Dyess*, 124 Wis.2d 525, 543–545, 370 N.W.2d 222, 231–232 (1985) (a conviction will be upheld despite trial court error if the State can demonstrate beyond a reasonable doubt that there is no reasonable possibility, i.e., no possibility sufficient to undermine confidence in the outcome of the proceeding, that the error contributed to the conviction).

C. Sentencing

¶28 Ramos's final argument is that the trial court erroneously exercised its sentencing discretion in determining his parole eligibility date. Ramos argues that the trial court failed to consider evidence of his behavior while in custody, and that the trial court improperly considered that Ramos successfully appealed his first conviction.

¶29 Sentencing is left to the sound discretion of the trial court, and we are limited on review to determining whether the trial court erroneously exercised its discretion. See *State v. Harris*, 119 Wis.2d 612, 622, 350 N.W.2d 633, 638

(1984). We presume that the trial court acted reasonably in imposing sentence, and the defendant has the burden to show some unreasonable or unjustified basis in the record for the sentence of which the defendant complains. *Id.*, 119 Wis.2d at 622–623, 350 N.W.2d at 638–639.

¶30 In making a determination of a parole eligibility date, the trial court considers the same factors as those it considers in imposing sentence. See *State v. Borrell*, 167 Wis.2d 749, 774, 482 N.W.2d 883, 892 (1992). The primary factors to be considered in imposing sentence are the gravity of the offense, the character and rehabilitative needs of the defendant, and the protection of the public. See *State v. Sarabia*, 118 Wis.2d 655, 673, 348 N.W.2d 527, 537 (1984); *State v. Curbello-Rodriguez*, 119 Wis.2d 414, 433, 351 N.W.2d 758, 767 (Ct. App. 1984). The trial court may also consider the defendant’s criminal record; history of undesirable behavior patterns; personality and social traits; degree of culpability; demeanor at trial; remorse, repentance and cooperativeness; age, educational background and employment record; the results of a presentence investigation; the nature of the crime; the need for close rehabilitative control; and the rights of the public. See *Curbello-Rodriguez*, 119 Wis.2d at 433, 351 N.W.2d at 767. The weight afforded to each of the relevant factors is particularly within the wide discretion of the trial court. See *id.*, 119 Wis.2d at 434, 351 N.W.2d at 768. “Imposition of a sentence may be based on any of the three primary factors after all relevant factors have been considered.” *Id.* (citation omitted).

¶31 When the sentencing court fails to specifically set forth the reasons for the sentence imposed, “we are obliged to search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained.” *McCleary v. State*, 49 Wis.2d 263, 282, 182 N.W.2d 512, 522 (1971). “It is not only our duty not to interfere with the discretion of the trial judge, but it

is, in addition, our duty to affirm the sentence on appeal if from the facts of record it is sustainable as a proper discretionary act.” *Id.*

¶32 At the sentencing hearing, Ramos’s attorney advised the court that Ramos had been adjusting well while in custody. Ramos had maintained employment while incarcerated, he was attempting to further his education, and he was seeking to participate in programs offered at the correctional facility. Ramos’s attorney asked the trial court to consider these factors in setting Ramos’s parole eligibility date.

¶33 As noted, the trial court imposed a sentence of life imprisonment, with parole eligibility in the year 2024. This was the same sentence that was imposed upon Ramos by the court that sentenced him prior the reversal of his first conviction. After considering the gravity of the crime, Ramos’s character and rehabilitative needs, and the need to protect the public, the trial court concluded that the sentence previously imposed was the appropriate punishment for Ramos’s crime.

¶34 The trial court first considered the gravity of the crime, and concluded that the crime was very serious because Ramos had killed a young child in a brutal manner. The trial court then considered Ramos’s character and rehabilitative needs. The trial court observed that Ramos was on probation for burglary at the time he killed Brandon; that he was a former gang member; that he had dropped out of high school; that he had a sporadic work history; that he had substance abuse problems; and that he had anger control problems. The trial court concluded that Ramos’s behavior did not “indicate a high level of rehabilitative potential” because Ramos was not “able to grasp the horrible nature of [his] conduct.” Finally, the trial court concluded that a severe punishment was

necessary to protect the public from Ramos and to deter others from committing this type of crime. The trial court concluded, however, that it was inappropriate to increase Ramos's parole eligibility date beyond the date set by the first sentencing court. Therefore, the trial court imposed the same sentence as the prior sentencing court.

¶35 Ramos argues that the trial court erred in failing to consider the positive efforts he made while in custody. The record, however, reveals that the trial court considered Ramos's rehabilitative efforts, and determined that Ramos had not exhibited much rehabilitative potential.

¶36 Ramos also argues that the trial court erred in considering the fact that he successfully appealed his first conviction. The record reveals that the trial court did not weigh this factor in determining Ramos's sentence. Rather, the trial court indicated that Ramos's sentence should not differ from the one previously imposed because the primary factors to be considered in imposing sentence had not significantly changed.

By the Court.—Judgment and order affirmed.

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

