

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 5, 1998

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. 96-2787-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

IAN J. TANNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Grant County:
JOHN R. WAGNER, Judge. *Affirmed.*

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

PER CURIAM. Ian Tanner appeals from a judgment convicting him of second-degree reckless homicide, as a party to a crime, contrary to § 940.06, STATS. Tanner was charged with one count of first-degree reckless homicide, as a party to the crime, and one count of concealing a corpse, as a party to the crime. He pleaded guilty before trial to the count of concealing a corpse and

a jury found him guilty on the reckless homicide count. This appeal concerns only the homicide conviction, and the dispositive issues are whether the trial court erred by refusing to submit a lesser-included offense instruction on second-degree reckless injury, and whether the trial court erred by refusing to sever the trial of a co-defendant or to instruct the jury to disregard the evidence against the co-defendant. We affirm on both issues.

The State charged Tanner with one count of first-degree reckless homicide, as a party to the crime, and one count of concealing a corpse, as a party to the crime, in the beating death of Norman Bennett. He was tried along with a co-defendant, Cecil Knutson. Tanner's defense consisted of evidence that Bennett died from blows and kicks inflicted by Jason McIntosh, without Tanner's participation. Tanner admitted twice fighting with Bennett earlier on the night of Bennett's death. In the first fight, Tanner punched Bennett without noticeable effect. In the second, Tanner hit him once or twice, again failing to knock him down or causing any bleeding or noticeable injury.

Tanner also admitted that he helped conceal Bennett's corpse after the fight with McIntosh. However, Tanner moved to sever his trial from Knutson's, contending that the probative value of the evidence on Knutson's concealment charge was substantially outweighed by its unfair prejudice to him. Alternatively, he asked the trial court to instruct the jury to disregard the evidence of concealment used against Knutson when judging his guilt. The trial court denied both motions, and the evidence of concealment was used against both co-defendants, including evidence that Bennett's body was dragged behind a truck and that Tanner threatened his accomplices with death if they did not participate in the concealment or if they reported it.

At the close of evidence, the trial court instructed the jury on the lesser-included offense of second-degree reckless homicide, but denied Tanner's request to instruct on second-degree reckless injury. The jury returned a verdict finding Tanner guilty of the lesser-included homicide charge.

The trial court properly denied the reckless injury instruction. The trial court should instruct on a lesser-included offense only when there are reasonable grounds for both acquittal on the greater offense and conviction on the lesser offense. *State v. Foster*, 191 Wis.2d 14, 23, 528 N.W.2d 22, 26 (Ct. App. 1995). In deciding this question, de novo, we view the evidence in the light most favorable to the defendant. *Id.* Here there was no evidence to convict Tanner of second-degree reckless injury while acquitting him of second-degree reckless homicide. The jury heard evidence from the State that Tanner was a party to the entire chain of events culminating in McIntosh's beating death of Bennett, and from Tanner that he was guilty of nothing more than misdemeanor assault earlier in the evening. Neither party presented evidence that Tanner was a party to or committed acts that caused Bennett great bodily harm that did not also cause his death.

The trial court properly denied the motion to sever Knutson's trial and to instruct the jury to disregard the evidence of concealment used against Knutson. Whether to sever the trial was discretionary, *State v. Brown*, 114 Wis.2d 554, 559, 338 N.W.2d 857, 860 (Ct. App. 1983), as was the decision to allow the Knutson evidence to be used against Tanner. *Johnson v. Kokemoor*, 199 Wis.2d 615, 636, 545 N.W.2d 495, 503 (1996). In both instances, Tanner contends that the court erred because while the evidence was admittedly relevant, its probative value was substantially outweighed by its unfair prejudice. We conclude, however, that the trial court reasonably determined otherwise. The evidence of

concealment was highly probative of Tanner's culpable role in Bennett's death, and his awareness of that role. Additionally any unfair prejudice was minimized because the jury was made aware of Tanner's participation in the concealment, through his own testimony. Given those circumstances, the trial court reasonably chose not to protect Tanner from the evidence presented against Knutson.

By the Court.—Judgment affirmed.

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

