

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 9, 2012

Diane M. Fremgen
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP590-CR

Cir. Ct. No. 2009CF1066

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID A. WAPP,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: J. MAC DAVIS, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. David Wapp appeals from a judgment convicting him of first-degree intentional homicide and domestic abuse and from an order denying his postconviction motion seeking resentencing due to ineffective assistance of counsel at sentencing. On appeal, Wapp challenges the circuit

court's decision to publish certain photographs to the jury and his trial counsel's assistance at sentencing. We affirm the circuit court.

¶2 Four days after he was released from prison, Wapp stabbed his former fiancée to death, inflicting thirty-seven knife wounds.¹ At his jury trial, Wapp objected to publication to the jury of six photographs depicting the victim's injuries and bloodied clothing because the photographs were unfairly prejudicial and would only inflame the jury. The circuit court overruled the objection to the photographs because the photographs had evidentiary value and more accurately conveyed what they depicted than would testimony describing the scenes depicted. The court found that the photographs would neither overwhelm the jurors nor compromise the jurors' rationality. The court concluded that the photographs were not unduly prejudicial to Wapp.

¶3 Whether to publish the photographs to the jurors was discretionary with the circuit court. *State v. Lindvig*, 205 Wis. 2d 100, 108, 555 N.W.2d 197 (Ct. App. 1996). We will uphold the court's discretionary decision "unless it is wholly unreasonable or the only purpose of the photographs is to inflame and prejudice the jury." *Id.* (citation omitted).

¶4 Wapp argues that the circuit court overestimated the photographs' probative value and underestimated their shock value. We disagree. The court found that the photographs had evidentiary value. The photographs were probative because Wapp argued that he did not intend to kill the victim. The

¹ After he murdered the victim, Wapp fled to a hotel, where he was later arrested. In Wapp's hotel room, police found a bloody knife bearing the victim's DNA. Shortly after Wapp murdered the victim, he encountered an acquaintance to whom he confessed.

photographs, showing the viciousness and extent of the knife attack, suggested otherwise. The court properly balanced the photographs' probative value and their tendency to inflame or unfairly prejudice the jury. The court properly exercised its discretion in publishing them to the jury.

¶5 Wapp seeks resentencing because he did not receive effective assistance of counsel at sentencing. Wapp died during the pendency of this appeal. Therefore, review of counsel's representation at sentencing is moot. *DeLaMatter v. DeLaMatter*, 151 Wis. 2d 576, 591, 445 N.W.2d 676 (Ct. App. 1989) (our review of counsel's assistance at sentencing "cannot have a practical effect on an existing controversy").² Even if we were to conclude that counsel was ineffective at sentencing, there would be no remedy for such ineffectiveness in this appeal.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

² The appeal continues, however. *State v. McDonald*, 144 Wis. 2d 531, 536, 424 N.W.2d 411 (1988) (right to appeal continues despite defendant's death).

