COURT OF APPEALS
DECISION
DATED AND RELEASED

November 14, 1996

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

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

No. 95-2245-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSEPH PEARCE,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Rock County: JAMES P. DALEY, Judge. *Affirmed*.

Before Eich, C.J., Vergeront, J., and Robert D. Sundby, Reserve Judge.

PER CURIAM. Joseph Pearce appeals from a judgment of conviction for first-degree intentional homicide and arson. Extensive publicity accompanied the investigation of these crimes. The sole issue is whether the trial court's finding that the publicity was inflammatory warranted a change of venue. We conclude that the trial court did not erroneously exercise its

discretion when it denied the motion because it reasoned that: (1) the passage of over eight months between the publicity and jury selection should alleviate any community prejudice; and (2) if not, it would reconsider the motion at the time of jury selection. Because Pearce did not renew the motion, or seek other safeguards during *voir dire,* we affirm.

On September 27, 1993, Pearce moved for a change of venue contending that the extensive, prejudicial publicity deprived him of his right to a fair trial in Rock County. Section 971.22(1), STATS. In support of his motion, Pearce attached newspaper articles from the JANESVILLE GAZETTE, the BELOIT DAILY NEWS, the WISCONSIN STATE JOURNAL and the MILWAUKEE SENTINEL. Excerpts from these articles included information that: (1) "what appear[ed] to be a bloody washcloth and pillowcase" were seized from the scene; (2) the suspect invoked his right to counsel and declined to be questioned by police; (3) the District Attorney's Office "[has] evidence that the suspect committed crimes in a similar manner in the past. But at this point, it's barely above a rumor"; and (4) "Pearce has a history of beating his wife and once broke her leg during a fight."

The trial court denied the motion on November 29, 1993, despite its finding that the publicity was inflammatory. It reasoned that "[t]ime does cure some of these things." However, it cautioned that if "we ... have trouble picking a jury" and "we do run into difficulties at that time, I'll hear the motion again."

The trial court is obliged to grant defendant's motion to change venue under § 971.22(3), STATS., if it determines that there is a reasonable likelihood that community prejudice will preclude a fair trial. *E.g.*, ***State v. Messelt,*** 178 Wis.2d 320, 326-28, 504 N.W.2d 362, 364-65 (Ct. App. 1993), *aff'd*, 185 Wis.2d 254, 283, 518 N.W.2d 232, 244 (1994). The factors to consider are:

> [t]he inflammatory nature of the publicity; the degree to which the adverse publicity permeated the area from which the jury panel would be drawn; the timing and specificity of the publicity; the degree of care exercised, and the amount of difficulty encountered, in selecting the jury; the extent to which the jurors were familiar with the publicity; and the defendant's utilization of the challenges, both peremptory and for cause, available to him on *voir dire*. In addition, the courts have also considered the participation of the state in the adverse publicity as relevant, as well as the severity of the offense charged and the nature of the verdict returned.[1]

Id. 327, 504 N.W.2d at 364 (citations omitted). The appellate court reviews the trial court's order for an erroneous exercise of discretion; however, "we must `make an independent evaluation of the circumstances.'" ***Id.*** (citing ***Sheppard v. Maxwell,*** 384 U.S. 333, 362 (1966); ***Tucker v. State,*** 56 Wis.2d 728, 733, 202 N.W.2d 897, 899 (1973)).

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[1] Pearce mentions, without elaboration, that the severity of the offense--first-degree intentional homicide--favors a change of venue. The Wisconsin Supreme Court rejected that same contention when raised in ***State ex rel. Hussong v. Froelich,*** 62 Wis.2d 577, 594-95, 215 N.W.2d 390, 400 (1974). The ***Hussong*** court instructs trial courts to consider "the entire record" to determine whether a change of venue is warranted. ***Id.*** We have analyzed "the entire record" and are not persuaded by Pearce's undeveloped reference to the severity of the offense that the trial court erroneously exercised its discretion when it did not consider this a significant factor in denying the change of venue motion.

The nature of the verdict may be pertinent when the defendant is acquitted on one count and convicted on another. *See* ***State v. Messelt,*** 178 Wis.2d 320, 333, 504 N.W.2d 362, 367 (Ct. App. 1993), *aff'd,* 185 Wis.2d 254, 283, 518 N.W.2d 232, 244 (1994). The converse is not necessarily true. Here, the crimes are interrelated and the commission of arson supports the first-degree and intentional nature of the homicide. Therefore, the nature of the verdict is not a pertinent factor in this case.

NATURE OF PRETRIAL PUBLICITY

"Uneditorialized news of an informational nature may inform possible members of a jury, but this does not necessarily make the information objectionable. News reports become objectionable when they editorialize, amount to `rabble rousing' or attempt to influence public opinion against a defendant." ***Briggs v. State,*** 76 Wis.2d 313, 327, 251 N.W.2d 12, 18 (1977) (footnote omitted). "Where the reporting is objective, informational, and noneditorial, it is not to be considered prejudicial." ***Hoppe v. State,*** 74 Wis.2d 107, 112, 246 N.W.2d 122, 126 (1976) (citations omitted). The trial court found that the nature of the publicity was inflammatory. Articles containing prejudicial matter are not, by themselves, sufficient to warrant a change of venue. The defendant must demonstrate a reasonable likelihood of juror or community prejudice. *See* ***Miller v. State,*** 35 Wis.2d 777, 784-85, 151 N.W.2d 688, 692 (1967). Pearce raises four examples of objectionable publicity which he claims warranted a change of venue.

Pearce's first example is the article reporting the bloody washcloth and pillowcase seized from the scene because neither was introduced at trial.[2] We are not persuaded that an article reporting a bloody washcloth and pillowcase seized from the scene is designed to influence public opinion. It is informational and noneditorial. Had a juror remembered this information, that juror would have realized that no such evidence was introduced at trial, thereby negating its validity.

The second example of objectionable publicity is the article which reported that the suspect invoked his right to counsel. While this information is inadmissible, this disclosure, in the context of the entire article, is informational and does not identify the suspect.[3]

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[2] However, the jury heard testimony that Pearce had asked his wife to burn his shirt which he had washed three or four times on the day of the murder.

[3] The article stated that:

> The man whose home was searched Sunday, Dec. 27, has not been identified by police as a suspect in the murder. He was

The third example discloses that the suspect has a prior record, "[b]ut at this point, it's barely above a rumor." Thus, the article reported the prosecutor's qualification about the validity of the statement. Moreover, accurately reporting that a defendant has committed prior crimes does not necessarily warrant a change of venue. *E.g.,* ***McKissick v. State,*** 49 Wis.2d 537, 546-47, 182 N.W.2d 282, 286-87 (1971); ***Holland v. State,*** 87 Wis.2d 567, 575-79, 275 N.W.2d 162, 167-68 (Ct. App. 1979), *rev'd on other grounds,* 91 Wis.2d 134, 280 N.W.2d 288 (1979). We conclude that this qualified disclosure about an unidentified suspect does not warrant a change of venue.

The fourth example of objectionable publicity is the article which identified Pearce as having a history of domestic violence and having once broken his wife's leg during a fight. We conclude that this article could be characterized as prejudicial. However, the evidence of domestic violence was admitted at trial as relevant to Mrs. Pearce's fear of the defendant and her reluctance to disclose her knowledge of his activities on the night of the crimes. Because the jury heard considerable testimony about Pearce's history of domestic violence, we conclude that this publicity did not warrant a change of venue.

Although the trial court found that these articles were inflammatory, Pearce does not refute the principal basis of its ruling--the effect of the eight-month delay between the most recent publicity and trial, and the trial court's willingness to reconsider the motion at the time of jury selection. "[E]ven where community prejudice is found to exist initially, a delay or cooling-off period contributes to the ability of the state to conduct a fair trial." ***Hoppe,*** 74 Wis.2d at 114, 246 N.W.2d at 127 (four-month cooling-off period between publicity and jury selection); *see also* ***Turner v. State,*** 76 Wis.2d 1, 28, 250 N.W.2d 706, 720 (1977) (five-month cooling-off period between publicity and jury selection); ***State v. Albrecht,*** 184 Wis.2d 287, 307, 516 N.W.2d 776, 784

(..continued)

> taken into custody on unrelated traffic charges on Dec. 26.
>
> Cmdr. George Brunner declined to say if officers asked the man questions about the murder.
>
> "He stated he did not want to talk to the police about anything and said he wanted to contact an attorney. Therefore, no further questioning was conducted," Brunner said.

(Ct. App. 1994) (six-month cooling-off period between publicity and jury selection); ***Messelt,*** 178 Wis.2d at 330-31, 504 N.W.2d at 366 (six-month cooling-off period between publicity and jury selection). Here, the cooling-off period" exceeded those in ***Turner, Hoppe, Albrecht*** and ***Messelt***, and we conclude that Pearce had not shown that any inflammatory effect survived the eight-month cooling-off period. Moreover, the trial court offered to reconsider the motion at the time of jury selection. *See* ***Miller,*** 35 Wis.2d at 785, 151 N.W.2d at 692 (trial court conditionally denied motion to change venue, but allowed renewal if *voir dire* demonstrated that the accused could not receive a fair trial). However, Pearce did not renew his motion.

JURY SELECTION

Jury selection began on May 23, 1994. Although the prosecutor had previously requested individual *in camera voir dire,* he abandoned that request at the time of jury selection. Defense counsel did not renew his motion for a change of venue at the time of jury selection.

During *voir dire,* the trial court asked whether anyone had been exposed to the pretrial publicity and, if so, whether that panelist would disregard the content of that publicity. The trial court also asked whether anyone had determined the defendant's guilt or innocence. The trial court struck the two panelists who responded affirmatively. Thirteen other panelists acknowledged their exposure to the publicity, but claimed that the publicity would not affect their obligation to decide the case on the evidence. Defense counsel did not ask any supplemental publicity-related questions of the panel, or request the recording of objections to the *voir dire.* Both parties struck panelists who claimed that they had not seen any pretrial publicity.

Despite the trial court's willingness to allow Pearce to renew his motion to change venue, Pearce did not do so, nor did he request the recording of objections to the *voir dire*. Pearce has not shown that the trial court erroneously exercised its discretion. *See* ***Jones v. State,*** 66 Wis.2d 105, 111, 223 N.W.2d 889, 892 (1974) (without a record of jury selection, we can only conclude that the jury was drawn "with great ease and without any evidence of prejudice"); *see also* ***State v. Kramer,*** 45 Wis.2d 20, 34-35, 171 N.W.2d 919, 925-26.

Pearce contends that the State contributed to the adverse publicity when the District Attorney disclosed that Pearce had committed similar offenses. However, the District Attorney characterized that information as "barely above a rumor." Moreover, this disclosure was informational. The District Attorney's disclosure to the media in this context was not improper, or sufficiently significant to warrant a change of venue.

CONCLUSION

Our independent evaluation does not persuade us that there was a reasonable likelihood that community prejudice would preclude Pearce from receiving a fair trial in Rock County. We also are not persuaded on the record before us, that the trial court erroneously exercised its discretion. Although it found that the publicity was inflammatory, its principal basis for denying the motion was the passage of time and Pearce did not demonstrate that the effect of this inflammatory publicity survived the eight-month cooling-off period. We further conclude that the trial court's willingness to reconsider that ruling at the time of jury selection was a proper exercise of discretion. Pearce did not believe that safeguards during *voir dire* were warranted, as demonstrated by the fact that he did not request such safeguards as: (1) supplemental *voir dire* on the effect of this publicity; (2) individual *in camera voir dire*; (3) recording objections to individual panelists and to jury selection; and (4) renewing the change of venue motion. Pearce's acquiescence to the *voir dire* and jury impaneling process supports our conclusion that the trial court properly exercised its discretion.

By the Court.—Judgment affirmed.

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