COURT OF APPEALS
DECISION
DATED AND RELEASED

January 16, 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. 95-0625-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID WILLIAM NEWBURY,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

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

PER CURIAM. David William Newbury appeals from a judgment entered after a jury convicted him of one count of first-degree intentional homicide, party to a crime, and one count of second-degree sexual assault, party to a crime, contrary to §§ 940.01(1), 940.225(2)(d), and 939.05, STATS. Newbury also appeals from an order denying his postconviction motion. Newbury raises two issues for our consideration: (1) whether the trial

court erroneously exercised its sentencing discretion; and (2) whether the trial court erroneously exercised its discretion in denying Newbury's motion to change venue. Because the trial court did not erroneously exercise its sentencing discretion, and because the trial court did not erroneously exercise its discretion in denying the motion to change venue, we affirm.

I. BACKGROUND

On May 14, 1993, Newbury and a friend sexually assaulted and beat to death fifteen-year-old Charlene D. The court set Newbury's jury trial for November 8, 1993. On October 28, 1993, the trial court denied Newbury's motion to change venue based on prejudicial pretrial publicity. In denying the motion, the trial court determined that the news coverage was purely of an informational nature and, therefore, did not create prejudice within the community.

A jury was selected in voir dire proceedings conducted on November 8, 1993, and on the morning of November 9, 1993. A jury of twelve, plus three alternates, was selected from a panel of fifty prospective jurors. Thirty-three of the prospective jurors indicated that they had some knowledge of the case through exposure to media stories and newspaper accounts. These thirty-three jurors were individually questioned in chambers. From these thirty-three, twelve expressed an opinion about defendant's guilt based on their exposure to pretrial publicity. All twelve of these prospective jurors were struck from the panel.

The jury convicted Newbury on both counts. Newbury now appeals.

II. DISCUSSION

A. Sentencing.

Newbury claims the trial court erroneously exercised its sentencing discretion and imposed an excessive sentence. Newbury was sentenced to life imprisonment on the homicide count, with a parole eligibility date of January 1, 2040, and a ten-year sentence on the sexual assault count, to run concurrent with the homicide sentence.

"Our review of sentencing is limited to a two-step inquiry. We first determine whether the trial court properly exercised its discretion in imposing the sentence. If we determine that it did, we next decide whether that discretion was [erroneously exercised] by imposing an excessive sentence." ***State v. Smith***, 100 Wis.2d 317, 323, 302 N.W.2d 54, 57 (Ct. App. 1981), *overruled on other grounds by*, ***State v. Firkus***, 119 Wis.2d 154, 350 N.W.2d 82 (1984).

We will not find that a sentencing court erroneously exercised its sentencing discretion if it states on the record a justifiable basis for imposing the sentence. ***McCleary v. State***, 49 Wis.2d 263, 281-82, 182 N.W.2d 512, 521-22 (1971). The sentencing court must consider three primary factors: (1) the gravity of the offense; (2) the character of the offender; and (3) the need to protect the public. ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633, 639 (1984). The trial court may also consider: the defendant's past record of criminal offenses; the defendant's history of undesirable behavior patterns; the defendant's personality, character and social traits; the presentence investigation results; the viciousness or aggravated nature of the defendant's crime; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentance or cooperativeness; the defendant's rehabilitative needs; the rehabilitative needs of the victim; the needs and rights of the public; and, the length of the defendant's pretrial detention. ***State v. Jones***, 151 Wis.2d 488, 495-96, 444 N.W.2d 760, 763-64 (Ct. App. 1989).

Our review of the sentencing transcript demonstrates that the sentencing court considered the appropriate factors and stated a justifiable basis for imposing sentence. In imposing sentence, the court indicated that it considered:

> [T]he gravity of the offense, the character of the defendant, the need to protect the community ... past

criminal offenses of this defendant, the history of undesirable behavior patterns, his personality, character, social traits, the results of the presentence investigation, the vicious or aggravated nature of the offense, the degree of defendant's culpability, the defendant's demeanor at trial, his age, educational background, employment record, his remorse, repentance, cooperativeness, the defendant's need for close rehabilitative control, the rights of the public, the effects of the [sic] crime had on the victim's family, including their rehabilitative needs [and] the facts at the trial.

[A]ccording to the facts in this case there is absolutely no possible mitigation for the act that was done.... This was a severe and savage and brutal homicide that Mr. Newbury had the choice not to participate in, had the opportunity to walk away from, administer help, and subsequently had the possibility upon returning to the scene of coming back and helping that young lady whose life was literally beat out of her.

And suffering that she must have gone through from the beginning of the acts to the absolute end is unimaginable, and then suffering contin[u]es today based upon what this Court's heard from family members and friends, the community.

....

The bottom line is that I understand the problems that [Newbury's] gone through and the Court's very empathetic toward that. But it should not be an excuse to go out and commit a vicious homicide....

He made a decision. It was his choice to participate in this repulsive, horrific act and he has to take responsibility for it.

....

> So based upon the totality of the circumstances and based upon those factors the Court must take into consideration, there's a need for him to be institutionalized for a long period of time, not only for what the Court already stated on the record to certainly to act as a specific and general deterrence to others.

It is clear from this exposition that the trial court considered the appropriate factors. The trial court emphasized the gravity of the offense, but also indicated that Newbury's character and the need to protect the public demands a lengthy period of incarceration for the crime he committed. The emphasis on the gravity of the offense, therefore, does not constitute an erroneous exercise of discretion. ***State v. Curbello-Rodriguez***, 119 Wis.2d 414, 434, 351 N.W.2d 758, 768 (Ct. App. 1984) (The weight to be given to each of the factors is within the trial court's discretion.).

We now turn to whether the sentence imposed was unduly harsh or excessive. When a defendant argues that his or her sentence is unduly harsh or excessive, we will find an erroneous exercise of discretion "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457, 461 (1975). As noted above, Newbury's sentence set a parole date of January 1, 2040, which means he will spend a minimum of forty-seven years in prison.

The offenses that Newbury committed were horrific and gruesome. He participated in a crime where a young girl was beaten, dragged across railroad ties, sexually assaulted, hit in the head with a brick and board, and then left to die. The effects of Newbury's crime will last much longer than forty-seven years. Charlene D.'s family members clearly expressed that the loss of their loved one will affect them forever. Given the aggravated nature of Newbury's crime, we cannot say that a forty-seven-year sentence is "so disproportionate to the offense committed as to shock public sentiment." Accordingly, we reject Newbury's request for resentencing.

B. Motion to Change Venue.

Newbury also claims that the trial court erroneously exercised its discretion when it denied his motion to change venue because of prejudicial pretrial publicity. A motion for change of venue is committed to trial court discretion. ***McKissick v. State***, 49 Wis.2d 537, 544-45, 182 N.W.2d 282, 285-86 (1971). We will conclude that the trial court erroneously exercised its discretion in denying the motion if the record demonstrates that there was a reasonable likelihood that the pretrial publicity prejudiced the prospective jurors so that the defendant could not receive a fair trial. *See* ***id.*** at 545, 182 N.W.2d at 286.

Factors to consider in this determination include:

> the 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.

Id. at 545-46, 182 N.W.2d at 286. Our independent review of the record demonstrates that the trial court did not erroneously exercise its discretion in denying Newbury's motion for change of venue.

In reaching this conclusion, we considered the following: The publicity that occurred was purely informational, *see* ***Briggs v. State***, 76 Wis.2d 313, 327, 251 N.W.2d 12, 18 (1977) (purely informational publicity is not prejudicial), the publicity occurred a substantial time (six months) prior to the trial, *see* ***Hoppe v. State***, 74 Wis.2d 107, 114, 246 N.W.2d 122, 127 (1976) (four-month break before trial contributes to ability to conduct a fair trial despite publicity), the jurors who recalled hearing news reports did not have specific recollections of what they had heard, only five of the jurors that actually heard

the case had been exposed to pretrial publicity, and none of these five had been prejudicially affected by the pretrial publicity.

Four of these five jurors who had been exposed to pretrial publicity testified that the pretrial publicity clearly did not prejudice them against Newbury. One juror testified that he would put a lot more faith in the evidence than anything he might recall from the media. Another juror testified that she would not be prejudiced by the publicity because she really did not remember the details because she read about this case in the paper "a while ago." A third juror said that she could set aside whatever she heard from the media and base her decision solely on the evidence presented at trial. The fourth juror testified that he had not formed any opinions regarding guilt and would base his decision on the evidence presented at trial.

Newbury complains mostly about the fifth juror among the group that was exposed to publicity and actually sat on the case. We are not persuaded by his complaints. This fifth juror testified that he would think he could come to a fair and impartial decision based on what was presented at trial because "that's what justice is supposed to be all about." This juror also testified that he has no idea whether the men arrested for this crime had actually committed it and that if he heard testimony in court that contradicted what he remembered hearing through the media, he would *absolutely* be able to set aside the news media reports and base his decision solely on the evidence presented in court.

In addition to the other factors, it is apparent from the record that the extensive *voir dire* ensured that Newbury received a fair trial. *See* ***McKissick***, 49 Wis.2d at 545, 182 N.W.2d at 286 (*voir dire* rather than change of venue can assure a fair trial in the face of pretrial publicity). Accordingly, we conclude that the trial court did not erroneously exercise its discretion in denying Newbury's motion to change venue.

By the Court.—Judgment and order affirmed.

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