COURT OF APPEALS
DECISION
DATED AND FILED

October 7, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3480-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TODD A. LAGERSTROM,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Grant County: MICHAEL KIRCHMAN, Judge. *Affirmed.*

Before Eich, Vergeront and Deininger, JJ.

¶1 EICH, J. Todd A. Lagerstrom was convicted, following a jury trial, of being a party to the crimes of attempted first-degree intentional homicide (two counts) and escape. He was sentenced to a total of 100 years in prison. He

appeals from the judgment, and from the order denying his motions for postconviction relief, arguing a long list of issues, none of which have merit.

¶2 Lagerstrom and an accomplice escaped from the Grant County Jail, seriously injuring two jail guards in the process. They were eventually apprehended and charged with escape and attempted murder of the guards. Their trial was moved to an adjacent county, Richland County, due to potential prejudice resulting from pretrial publicity. As indicated, the jury found Lagerstrom guilty of the three charges and he now appeals his conviction and sentence. Other facts will be discussed below.

¶3 Lagerstrom argues that the trial court erred in: (1) not requiring individual voir dire of prospective jurors; (2) denying his motion to change venue a second time to a county farther away from Grant County; (3) declining to recuse itself from the trial; (4) denying his motion to sever his trial from that of his accomplice; (5) declining to question other jurors after one juror informed the court during trial that one of her relatives had been shot and seriously injured by an escaped prisoner several years earlier; and (6) denying his motion for mistrial based on an allegedly improper closing argument by the prosecutor. He also contends that the evidence was insufficient to establish that he intended to kill the victim(s), that his trial counsel was ineffective for failing to investigate the crime scene, and that his sentence was excessive. We reject his arguments and affirm the order.

I. Individual Voir Dire

¶4 Lagerstrom argues first that the trial court erred when it failed to require individual voir dire of all prospective jurors. The argument is based on

Lagerstrom's assertion that, in his view, the fairness and impartiality of the jury may have been compromised by pretrial publicity.

¶5 Control of the voir dire rests with the discretion of the circuit court—***State v. Britt***, 203 Wis.2d 25, 32, 553 N.W.2d 528, 531 (Ct. App. 1996)—including whether to order individual voir dire of prospective jurors who have allegedly been exposed to pretrial publicity about the case. ***State v. Koch***, 144 Wis.2d 838, 848, 426 N.W.2d 586, 590 (1988). We review the court's decision under the well recognized abuse-of-discretion standard, keeping in mind that the court's broad discretion "is subject to the essential demands of fairness." ***Id.*** at 847, 426 N.W.2d at 590. Our review of discretionary rulings is highly deferential: We do no more than examine the record to gauge whether the circuit court reached a reasonable conclusion based on the proper legal standard and a logical interpretation of the facts. ***State v. Salentine***, 206 Wis.2d 419, 429-30, 557 N.W.2d 439, 443 (Ct. App. 1996). "Indeed, … we generally look for reasons to sustain discretionary decisions." ***Burkes v. Hales***, 165 Wis.2d 585, 591, 478 N.W.2d 37, 39 (Ct. App. 1991).

¶6 We are satisfied that the trial court, in exercising its discretion, adequately addressed Lagerstrom's concerns and impaneled a jury untainted by pretrial publicity. The court announced at the outset that it would conduct individual voir dire of any potential jurors who had heard or read about the case, and it did so. And any prospective juror who demonstrated an inability to fairly and impartially decide the case was excused for cause. Lagerstrom has not persuaded us that the trial court erroneously exercised its discretion in its conduct of the voir dire.

II. Change of Venue

¶7 Lagerstrom next argues that the court should have changed the venue of the trial—again, because of pretrial and ongoing publicity—to a county that wasn't adjacent to Grant County, where the escape attempt occurred. Again, we disagree.

¶8 Whether to change venue, like decisions relating to the conduct of the voir dire and several other issues raised on this appeal, is committed to the trial court's discretion, subject to the rules we have discussed above. Section 801.52, STATS.; *see also* ***State v. Messelt***, 178 Wis.2d 320, 327, 504 N.W.2d 362, 364 (Ct. App. 1993) (we review the trial court's denial of the change of venue motion under the erroneous exercise of discretion standard).

¶9 The parties stipulated to move the trial out of Grant County. However, when the trial was then transferred to Richland County, Lagerstrom objected, arguing that a move to an adjacent county wouldn't remove the pretrial publicity problems. The court specifically found that there was no persuasive community prejudice in Richland County, that what publicity there was in Richland County had not been inflammatory, and that most of that publicity had occurred over six months earlier. Additionally, as we have indicated above, the court conducted an individual voir dire of all prospective jurors who indicated any familiarity with, or reservations about, the case. Finally, in denying Lagerstrom's motion, the court noted that "if it be shown during voir dire that it is impossible to select a fair and impartial jury and that awareness of prejudicial information is substantial, the Court could … reconsider this motion."

¶10 We see no erroneous exercise of discretion here. There is nothing in the record to indicate that Richland County was "permeated with publicity," or that the jury panel was in any way tainted.[1]

III. Recusal

¶11 Lagerstrom's argument—that Judge Kirchman, a Crawford County judge who sits occasionally in Grant County, should not have been assigned the case because of his professional relationship with people in the Grant County Sheriff's Department—is equally unavailing. Indeed, because there is nothing in the record to indicate that Lagerstrom ever sought the judge's recusal or disqualification, we need not consider the argument further. *See* ***Wengerd v. Rinehart***, 114 Wis.2d 575, 580, 338 N.W.2d 861, 865 (Ct. App. 1983) (appellate court will decline to consider contentions raised for the first time on appeal).[2]

[1] Lagerstrom also claims that the "courthouse décor … gave potential jury members notice that this was an unusual proceeding," and he offers this as an additional reason for reversal. What he complains about is a computer printout posted in the courthouse stating that all persons entering the courtroom are subject to search, and the placement of some yellow tape across the back stairwell to the courtroom area limiting public access to the floor from the main stairway. We agree with the State that these measures are anything but extraordinary in a courthouse. Beyond that, the prospective jurors were certainly aware—when they were called to serve on a double attempted homicide and jail escape case—that it was indeed a serious matter. Most trials are. We agree with the State that, under these circumstances, the security measures were "[r]easonable … [and] would be accepted as routine by the prospective jurors."

[2] Even so, we are satisfied that Lagerstrom's argument—that because the judge had, on occasion, heard cases in Grant County, he must have had a personal or professional relationship with the Grant County Sheriff's Department of such a nature as would disqualify him from presiding over a case involving a jail escape and the shooting of two jail guards—finds no support in the record.

IV. Severance

¶12 Lagerstrom next argues that the trial court erred when it denied his motion to sever his trial from that of his accomplice in the escape, Jon Cantwell. The motion was based solely on Lagerstrom's claim that he would be prejudiced by the admission of certain incriminatory statements Cantwell had given to the police. We agree with the State that his motion became moot when the State didn't introduce any of Cantwell's statements at trial. And, to the extent he now argues that severance should have been granted for other reasons—*e.g.*, that certain testimony relating to the question of "intent to kill" relates only to Cantwell—it is another argument that was never presented to the trial court and thus need not be considered on appeal. ***Wengerd***, 114 Wis.2d at 580, 338 N.W.2d at 865.

V. The Juror's Statement

*¶*13 Lagerstrom next argues that the trial court erroneously exercised its discretion when it declined to question various other jurors after one, Agatha Neefe, advised the court during trial that, eight years earlier, her sister-in-law had been shot by two juveniles who had escaped from a correctional institution. Lagerstrom says that, based on that revelation, the court should have questioned one juror whose husband was a cousin of Neefe's, and three other jurors from Lone Rock, the area where the shooting incident occurred, and who Lagerstrom surmised may have heard about the matter at the time.

¶14 Our independent review of the record satisfies us that the court properly exercised its discretion when it declined to further question the four jurors. When Neefe told the court about her relative's experience, the court questioned her at some length outside the presence of the other jurors. She

assured the court that she had neither mentioned nor discussed the incident with any other juror.[3] When asked if she thought any other juror might have known about the incident, she responded that one juror's husband was a cousin of hers—but she also said she didn't know the juror very well, and didn't know whether she was aware that Neefe was related to the woman who had been shot years earlier. Finally, when Neefe told the court that her recollection of the incident made her feel "uncomfortable" remaining on the jury, she was excused.

¶15 Defense counsel subsequently advised the court that there were three other jury members from Lone Rock, and requested that they be questioned to determine whether they had any knowledge of the incident. The court denied the request, explaining that doing so might expose the jurors to information or knowledge they didn't previously possess, and the court didn't want to "invite[] them to attempt to recall such an incident." On this record, and again applying the deferential review standards discussed earlier, we see no misuse or erroneous exercise of the court's discretion in denying Lagerstrom's requests for additional voir dire.[4]

[3] She also stated that she didn't believe any of the jurors overheard her when she initially told the court's clerk about the matter because they were alone at the time.

[4] Lagerstrom's other argument with respect to juror Neefe—that a mistrial was required because Neefe's "late admission" suggests that "[she] was not honest or complete about her background and her ability to act as a fair juror" during the voir dire—is equally unavailing. First, the record shows that defense counsel asked several times whether any prospective juror had been the victim of a crime—not whether any of their relatives had been. Second, there was no evidence that Neefe was dishonest or lying, or trying to remain on the jury. And, because she was excused before deliberations, and stated that she didn't mention her recollection to any other juror, we don't see how she, or the information she possessed, could have affected the jury's deliberations or the verdict. The court did not erroneously exercise its discretion in declining to declare a mistrial.

VI. Prosecutor's Remarks

¶16 Lagerstrom next argues that the trial court erred when it denied his motion for a mistrial based on what he claims were the prosecutor's "personal prejudicial comments to the jury during closing arguments." Again, we see no error.

¶17 A motion for mistrial on grounds of improper prosecutorial conduct is also addressed to the sound discretion of the trial court, "and will not be reversed … unless there is evidence of abuse of discretion and prejudice to the defendant." ***State v. Camacho***, 176 Wis.2d 860, 886, 501 N.W.2d 380, 390 (1993) (quoted source omitted). Counsel is allowed considerable latitude in closing argument, and it is within the trial court's discretion to determine the propriety of counsel's arguments to the jury. ***State v. Wolff***, 171 Wis.2d 161, 167, 491 N.W.2d 498, 501 (Ct. App. 1992). And when a prosecutor is charged with misconduct for remarks made in a closing argument, the test is whether those remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." ***Id.***

¶18 During his closing argument, the prosecutor, referring to defense counsel's aggressive cross-examination of one of the State's witnesses, remarked to the jury that, in his opinion, the personal questions put to the witness in an attempt to impeach his credibility were obnoxious and embarrassing. He then stated: "I personally don't think I would have accepted it. I'd have been angry. Personally offended, frankly." Defense counsel objected, arguing that the comments improperly interjected the prosecutor's personal views into the argument. The court promptly sustained the objection, telling the jury that the

prosecutor's personal views were irrelevant and directing the jurors to disregard them.

¶19 The argument continued and defense counsel objected to three other remarks by the prosecutor, which defense counsel characterized as expressing, or "vouching," to the jury that his own personal views supported Lagerstrom's guilt. Specifically, counsel objected to the following statements: (1) "I believe I can tell you what occurred in that sequence based on everybody's testimony"; (2) "I believe, ladies and gentlemen, that the State has proven attempted first degree intentional homicide as to both [defendants]"; and (3) "Somebody had to do something to [Conley] by a severe beating which I believe was intended to kill."

¶20 The trial court denied Lagerstrom's motion for mistrial, reasoning that these latter remarks were merely expressions of the prosecutor's belief that the evidence established Lagerstrom's guilt—simply "his view of how the events occurred." Our own reading of the challenged remarks leads us to agree with that conclusion. We see nothing in the three challenged remarks by the prosecutor indicating either that he had personal knowledge, over and above the evidence admitted at trial, that Lagerstrom was guilty, or that would otherwise warrant directing a mistrial. Indeed, the prosecutor concluded his argument by asking the jury to reach a verdict based on the evidence admitted at trial. Lagerstrom has not persuaded us that it was error to deny the motion.

VII. Sufficiency of the Evidence

¶21 Lagerstrom next argues that the court should have directed a verdict of acquittal based on the insufficiency of the evidence of his guilt. The test for sufficiency of the evidence on a motion to dismiss at the close of the State's case is "whether, considering the state's evidence in the most favorable light, the

evidence …, believed and rationally considered [by a jury], is sufficient to prove the defendant's guilt beyond a reasonable doubt." ***Lofton v. State***, 83 Wis.2d 472, 483, 266 N.W.2d 576, 580-81 (1978). Remembering that Lagerstrom was charged as a party to the attempted homicide of the two guards—that is, not as one who directly committed the crime(s), but simply one "concerned in [their] commission" within the meaning of § 939.05(1), STATS.—we will briefly summarize the evidence against him.

¶22 Another jail inmate testified that he heard Lagerstrom and his accomplice, Jon Cantwell, planning their escape earlier in the day of the attempt. He said the two men discussed luring the guards into the hallway and then hitting them hard enough to knock them out, and that when Cantwell remarked that he would like to kill them, Lagerstrom replied that while they didn't have to kill the guards, "they would do whatever they had to do." One of the victims, Jailer Lynn Easler, testified that, while she and the other guard, Craig Conley, were escorting Lagerstrom and Cantwell to the library, Lagerstrom attacked her, punching her in the face, grabbing her hair and throwing her to the ground, where he began bashing her head against the cement floor. During this assault, Easler was able to work her arm underneath her head so that a dozen or so of the fifteen or more blows were at least partially deflected in that her head was striking her arm rather than the floor.

¶23 Before she lost consciousness, Easler heard Conley moaning and heard his head being slammed against the floor by Cantwell. An inmate in a nearby cell who was awakened by the noise peered under his door, seeing what he recognized as Conley's head being slammed against the floor and hearing Cantwell yell "Die, die, die." There was medical evidence that Conley's injuries were indeed serious—he was admitted to the hospital in critical condition with,

among other things, a skull fracture and a brain contusion—injuries a medical witness characterized as potentially life-threatening. Easler's injures were less severe—bruises and abrasions to her head, a brain concussion, and heavy bruises, swelling and discoloration of her upper arm.

¶24 Lagerstrom argues that none of this establishes his guilt as a party to the crime(s) of attempted intentional homicide. He says—as he argued to the jury—that he never intended to kill anyone, only to escape from the jail by overcoming the guards. In his escape, however, he and his accomplice intentionally elected to do so by repeatedly smashing the two guards' heads against the concrete floor, causing one of them life-threatening injuries, while the other escaped a similar fate only by the good fortune of being able (apparently surreptitiously) to deflect some of the blows with her arm. A person's intent is ascertained from his or her words or actions, ***State v. Lossman***, 118 Wis.2d 526, 542-43, 348 N.W.2d 159, 167 (1984), and both Lagerstrom's words ("we'll do what we have to do") and his actions as we have just described them, could be believed by a reasonable jury as establishing his guilt on the charge of attempted intentional homicide (party to the crime) beyond a reasonable doubt.

VIII. Ineffective Assistance of Counsel

¶25 Lagerstrom also argues that his trial counsel was ineffective for failing to properly investigate the crime scene. To establish ineffective assistance of counsel, the defendant must show both that his or her attorney's performance was deficient and that the deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The first element requires a showing that counsel made errors that were so serious as to deprive the defendant of the Sixth Amendment right to counsel. ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 847

(1990). Reviewing such claims, we pay great deference to counsel, invoking a "strong presumption that counsel acted reasonably within professional norms"; and we make "every effort to avoid determinations of ineffectiveness based on hindsight. ***Id.*** at 127, 449 N.W.2d at 847-48. And, as we said in ***State v. Elm***, 201 Wis.2d 452, 464-65, 549 N.W.2d 471, 476 (Ct. App. 1996), "[we] will not second-guess a trial attorney's 'considered selection of trial tactics … in the face of alternatives that have been weighed by trial counsel,'" and "[a] strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel."

¶26 In this case, Lagerstrom claims his trial attorney should have investigated the cell block in the area where the assaults took place in order to determine whether the inmate who claimed to have seen Jailer Conley's head being slammed against the floor was in a position to do so. The inmate had testified that he could see the hallway through a two-inch crack under his cell door, and Lagerstrom says that an investigator he retained after the trial examined the scene and reported that, while a person lying on the floor of the inmate's cell could see under the door and down the hallway, the view could be blocked if someone was lying on the hallway floor in the area of the cell door.

¶27 Lagerstrom's trial counsel testified at the hearing on the motion. He stated that he considered hiring an investigator to view the scene but decided not to after his examination of photographs of the cell and hallway, and his conversations with Easler, which satisfied him that a person could see down the hallway from under the cell door. He said he made a strategic decision to leave the record ambiguous on this point so that he could argue from Easler's testimony (that she couldn't remember where she was lying on the floor) that her body could have blocked the inmate's view of the hallway. In trial counsel's view, the report

of the investigator hired by Lagerstrom after the trial could also be viewed as confirming the inmate's testimony—that he could have been in a position to observe what he testified to at trial—and that was the type of evidence counsel did not want the jury to hear.

¶28 The trial court's determination that Lagerstrom's trial counsel made a reasonable strategic decision with respect to inspecting the jail area, and thus did not provide ineffective assistance in that regard, is amply supported by the record.[5]

IX. Excessive Sentence

¶29 Finally, Lagerstrom argues that the trial court erroneously exercised its discretion by imposing the maximum sentence—fifty years on each of the two counts of attempted first-degree intentional homicide.

¶30 Sentencing is committed to the sound discretion of the trial court, and our review is limited to determining whether there has been a "clear" misuse of that discretion. ***McCleary v. State***, 49 Wis.2d 263, 278, 182 N.W.2d 512, 520 (1971). Our limited review of sentencing decisions reflects the strong public policy against interference with the trial court's sentencing discretion; we presume the court acted reasonably, and we assign to the defendant the burden of

[5] Lagerstrom also complains of the trial court's denial of his request to take the jury to the jail to view the cell for a similar purpose—to let them judge whether the inmate was testifying accurately. In denying the request, the court said that the factual issue could be adequately addressed at trial through witness testimony, diagrams and photographs, and Lagerstrom offers no viable challenge to that ruling. He does no more than to refer us to his post-trial investigator's testimony and diagrams of the scene, which he characterizes as exhibiting—in his words—"certain optical properties involved with th[e] cell door that can confuse an observer"—apparently referring to the investigator's observation that, from the outside, the cell door appears to be a few inches above the floor, while the inside space is closer to one inch. Aside from his own characterization of that observation, Lagerstrom offers no viable reason to overturn the trial court's discretionary decision not to take the jury to the jail.

"show[ing] some unreasonable or unjustified basis in the record for the sentence complained of." ***State v. Harris***, 119 Wis.2d 612, 622-623, 350 N.W.2d 633, 638-639 (1984). We do so, at least in part, because the trial court "has a great advantage in considering the relevant factors and the defendant's demeanor." ***State v. Roubik***, 137 Wis.2d 301, 310, 404 N.W.2d 105, 108 (Ct. App. 1987).

¶31 When imposing a sentence, a trial court may consider—in addition to the gravity of the offense, the offender's character and the public's need for protection—a variety of other factors, including: the defendant's prior record of offenses; his or her age, personality, character and social traits; the viciousness or aggravated nature of the crime and the degree of the defendant's culpability; his or her demeanor, including remorse, repentance, or cooperation with authorities; the defendant's—and the victim's—rehabilitative needs; and the needs and rights of the public. ***State v. Thompson***, 172 Wis.2d 257, 264-65, 493 N.W.2d 729, 732-33 (Ct. App. 1992). Whether a particular factor or characteristic will be considered an aggravating or mitigating circumstance will depend upon the particular defendant and the particular case, ***id.*** at 265, 493 N.W.2d at 733, and we will not substitute our own sentencing preference for that of the trial court. ***McCleary,*** 49 Wis.2d at 281, 182 N.W.2d at 521.

¶32 The trial court carefully explained the sentence. It began by acknowledging the seriousness and violent nature of the offenses, and went on to recount the victims' testimony about "the injuries that they've suffered, the pain, the discomfort, the agony, the unknowingness about the injury, the lasting effects, psychological effects from the injuries and the event." The court also considered Lagerstrom's extensive criminal record, emphasizing the fact that he was in jail awaiting sentences for armed robbery and false imprisonment—also crimes of personal violence—when he engaged in violent acts with which he was charged in

this case. The court felt a maximum sentence was warranted because of Lagerstrom's propensity for violence and the commission of serious crimes, and it considered protection of the public from these acts as a primary factor justifying a lengthy sentence. "People need to be protected … from others who become violent in the community," said the court, "[and this] is the type of situation where you get the longer prison sentences rather than the shorter ones for the property crimes."

¶33 In sum, the trial court considered and weighed the relevant legal factors in imposing the sentence and we have consistently held that the weight to be given to any particular sentencing factor is left to the court's discretion. *See* ***Thompson***, 172 Wis.2d at 264, 493 N.W.2d at 732. Lagerstrom's sentence was a product of the court's informed discretion, and he has not shown any erroneous exercise of that discretion in the sentences imposed.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.