COURT OF APPEALS
DECISION
DATED AND FILED

June 13, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP885-CR **Cir. Ct. No. 2013CF461**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RON JOSEPH ALLEN,

DEFENDANT-APPELLANT.

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

Before Brennan, P.J., Kessler and Dugan, JJ.

¶1 KESSLER, J. Ron Joseph Allen appeals a judgment of conviction, following a jury trial, of first-degree intentional homicide as a party to a crime. He also appeals the order denying his postconviction motion. We affirm.

BACKGROUND

¶2 On January 24, 2013, Allen was charged with first-degree intentional homicide as a party to a crime for the death of E.Y. According to the undisputed facts adduced at trial, Victor Stewart, Ashanti McAlister, Ron Joseph, and Allen were members of a gang known as the "Black P. Stones." Stewart was the "general." McAlister was second-in-command. Allen was third-in-command.

¶3 At some point before January 1, 2013, McAlister told Stewart that the Black P. Stones were in need of money and asked if he could burglarize the home of Stewart's cousin, Billy Griffin. Stewart gave McAlister permission to burglarize Griffin because Griffin had been "ousted" from the gang. E.Y., Griffin's roommate, helped McAlister and other Black P. Stones members burglarize Griffin's home, though the extent of E.Y.'s involvement is unknown.

¶4 On January 1, 2013, after a day of drinking and smoking marijuana at Allen's home, Stewart, McAlister, Allen, and Devon Seaberry decided to go to Griffin's house in search of "high grade marijuana" that they knew Griffin to sell. Griffin let all four of the Black P. Stones members into his home. E.Y. was also present. With all of the parties gathered in the kitchen, Stewart told Griffin about E.Y.'s involvement in the burglary. E.Y. admitted involvement. McAlister then hit E.Y. with a firearm. Stewart took the gun from McAlister and shot the gun into the floor as a sign of authority. Ultimately, McAlister, Allen, and Seaberry took E.Y. into the basement and beat E.Y. Allen choked E.Y. with a large chain until E.Y.'s body was lifeless, E.Y.'s face was blue, and E.Y. was foaming at the mouth. Allen then left Griffin's residence to purchase cleaning supplies and duct tape and to get a change of clothes. While Allen was gone, McAlister shot E.Y.

three times in the head. Allen, McAlister, Stewart, and Seaberry then dumped E.Y.'s body in a dumpster, poured gasoline on it, and set E.Y.'s body on fire.

¶5 All of the Black P. Stones members involved in E.Y.'s death were charged for their respective involvement. As relevant to this case, Allen was charged with first-degree intentional homicide as a party to the crime. A jury found Allen guilty. Allen was sentenced to life imprisonment without extended supervision.

¶6 Allen filed a postconviction motion for a new trial, or in the alternative, for resentencing, alleging several instances of ineffective assistance of counsel and trial court error. The postconviction court denied the motion without a hearing. This appeal follows. We will set forth additional facts relevant to each of the issues raised on appeal as necessary in our discussion below.

DISCUSSION

¶7 On appeal Allen contends that his trial counsel was ineffective for: (1) failing to request a jury instruction providing the definition of "conspiracy" or "co-conspirator"; (2) failing to cross-examine Stewart and Seaberry about testimony they gave at Griffin's trial which would have shown Stewart's control over the gang members; and (3) failing to properly explain a plea deal offered to Allen. Allen also alleges: there was insufficient evidence to convict him of first-degree intentional homicide as a party to a crime; he is entitled to a new trial or a directed verdict to a lesser included offense in the interest of justice; prosecutorial misconduct; the trial court erred in denying his pretrial publicity motions; he is entitled to resentencing; and his sentence was unduly harsh. We address each issue in turn.

I. Ineffective Assistance of Counsel

¶8 The following standards govern claims of ineffective assistance of counsel:

> To state a claim for ineffective assistance of counsel, the defendant must demonstrate: (1) that his counsel's performance was deficient; and (2) that the deficient performance was prejudicial.
>
> To prove deficiency, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." The defendant must overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."
>
> To prove prejudice, the defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." The prejudice inquiry asks whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

State v. Romero-Georgana, 2014 WI 83, ¶¶39-41, 360 Wis. 2d 522, 849 N.W.2d 668 (quoted sources and internal citations omitted).

¶9 In order to obtain a hearing on a postconviction motion, a defendant must allege sufficient material facts to entitle him to the relief sought. ***State v. Allen***, 2004 WI 106, ¶¶9, 36, 274 Wis. 2d 568, 682 N.W.2d 433. In the context of a claim of ineffective assistance of counsel, that means the facts alleged would, if true, establish both that counsel provided deficient performance and that the defendant was prejudiced by that performance. *See* ***State v. Swinson***, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12. No hearing is required, though, when the defendant presents only conclusory allegations or when the record conclusively demonstrates that the defendant is not entitled to relief. ***Nelson v.***

State, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). Non-conclusory allegations should present the "who, what, where, when, why, and how" with sufficient particularity for the court to meaningfully assess the claim. ***Allen***, 274 Wis. 2d 568, ¶23.

¶10 We review a postconviction court's decision to deny a postconviction motion without an evidentiary hearing under the *de novo* standard, independently determining whether the facts alleged, if true, would establish the denial of a constitutional right. *See* ***State v. Bentley***, 201 Wis. 2d 303, 308, 548 N.W.2d 50 (1996). As part of that review, we will independently determine whether the record demonstrates that Allen's claims are procedurally barred. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

A. Jury Instruction

¶11 Allen contends that his trial counsel was ineffective for failing to request a jury instruction on the crime of conspiracy because the jury was confused as to whether Stewart was a co-conspirator in E.Y.'s death. Allen contends that counsel should have either requested the instruction or other language explaining to the jury that co-conspirator status requires a mutual agreement to accomplish a criminal objective.

¶12 At trial, Allen submitted evidence to support his theory of defense that he was coerced by Stewart to commit the acts of violence against E.Y. The trial court instructed the jury on the coercion defense as follows:

> The law allows the defendant to act under the defense of coercion only if the threat by another person, other than the defendant's co-conspirator, caused the defendant to believe his act was the only means of preventing imminent death or great bodily harm to himself and which pressure caused him to act as he did.

During the State's closing argument, the State told the jury:

> Ron Allen killed [E.Y] along with [McAlister] … because it was not out of fear of [Stewart]. It was not out of fear of a co-conspirator, ladies and gentlemen. You can't even say that the Black P. Stones is somehow what he's afraid of.

(Some formatting altered.)

¶13 During deliberations, the jury submitted a question, asking "is [Stewart] considered a co-conspirator by law?" The court did not answer the question, but rather instructed the jury to rely on its collective memory and to refer back to the instructions.

¶14 In his postconviction motion, Allen argued that counsel should have requested that the trial court define "co-conspirator" for the jury by providing a jury instruction with the definition. Allen argued that this was prejudicial because the co-conspirator language created an exception to his coercion defense, asserting "[a]s long as [Allen] was not a co-conspirator with [Stewart], the coercion defense applies." The postconviction court rejected Allen's argument, stating that even if the jury was given an additional instruction on the definition of co-conspirator, there was no reasonable probability that a jury would have found Allen's actions were coerced by Stewart. The court stated that there was sufficient evidence presented at trial that Allen was not coerced and that the State proved the absence of coercion beyond a reasonable doubt.

¶15 On appeal, Allen disputes the postconviction court's findings on multiple grounds. First, he contends that the State added to the jury's confusion by using the term "co-conspirator" in its closing statement. Second, he argues that the jury could have believed that aiding and abetting first-degree intentional homicide (the State's party to a crime theory) was the same as conspiracy to

commit first-degree intentional homicide. And third, he argues that because ample evidence supported his coercion defense, the jury must have relied on the co-conspirator exception when rendering its guilty verdict. We disagree.

¶16 We conclude that in the context of the State's entire closing argument, the State's single use of the word "co-conspirator" did not prejudice Allen's defense. The State's closing argument focused on Allen's role in the Black P. Stones gang and alleged that Allen was not scared of Stewart, but rather was a loyal, high-ranking gang member who committed the crime out of pride in the gang. The State's use of the term "co-conspirator" was in passing. Allen's assertion that this single reference infected his trial and confused the jury is purely speculative.

¶17 Also speculative is Allen's assertion that the jury was confused between aiding and abetting and conspiracy. The State's party-to-crime liability theory was that Allen aided and abetted in E.Y.'s murder. An individual is considered a party to a crime under in one of three ways: if he or she "(a) [d]irectly commits the crime; *or* (b) [i]ntentionally aids and abets the commission of it; *or* (c) [i]s a party to a conspiracy with another to commit it...." WIS. STAT. § 939.05(2) (2015-16) (emphasis added).[1] The State proceeded under the aiding-and-abetting theory of party to a crime. The court instructed the jury accordingly. The instructions did not use the term "co-conspirator." Therefore, Allen's contention that the jury could have understood "aid and abet" to actually mean "conspiracy" is not only speculative, but also contradicts the long-standing

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

notion that we assume juries follow instructions. *See* ***State v. Johnston***, 184 Wis. 2d 794, 822, 518 N.W.2d 759 (1994).

¶18 Allen also argues that "ample" evidence supported his coercion defense, but was not relied upon by the jury because "the defense did not explain that the [conspiracy] exception to the coercion defense did not apply here." Again, Allen's assertion that the jury was unable to consider the coercion evidence because it did not understand the conspiracy exception to the defense is speculative. Allen ignores the possibility that the jury simply dismissed his "ample evidence" as incredible. Moreover, Allen ignores the fact that ample evidence *did* support the conviction.[2] Counsel was not ineffective for failing to request an instruction defining "conspiracy."

B. Cross-Examination of Stewart and Seaberry

¶19 Allen argues that trial counsel was ineffective for failing to cross-examine Stewart and Seaberry with their testimony from Griffin's trial. Specifically, Allen contends that counsel should have elicited testimony from Stewart that Stewart controlled whether McAlister carried a gun and that death was a possible punishment for not following Stewart's orders. As to Seaberry, Allen contends that counsel should have elicited testimony that Seaberry was afraid of Stewart. We fail to see how this lack of testimony prejudiced Allen's case.

¶20 The jury heard Stewart testify that he was the "general" of the Black P. Stones and that he implemented punishments for disloyalty to the gang, including "death" if gang members cooperated with law enforcement. Stewart

[2] We discuss the sufficiency of the evidence further in Section II of this opinion.

also testified that he could have stopped Allen and McAlister from beating E.Y., and that if he had, E.Y. would probably still be alive. Both Stewart and Seaberry testified that on the day of E.Y.'s death, Stewart shot a firearm into the ground. Stewart told the jury that he did so as a show of authority. Stewart also testified, in no uncertain terms, that he controlled the gang's activities. Stewart also testified that shortly before Christmas, he implemented a "punishment" on Allen because Allen stole a "joint." The punishment involved Stewart and McAlister beating Allen's hand and arm with a meat tenderizer for hours.

¶21 While Seaberry did not state that he was afraid of Stewart, he testified that Stewart was the "direct[or]" of the actions leading to E.Y.'s death. Therefore, the jury was well aware of Stewart's authority over the gang and the potential punishments for noncompliance with Stewart's orders. Any additional testimony regarding what Stewart specifically controlled and whether Seaberry feared Stewart would have been merely cumulative. Counsel's decision not to present irrelevant or cumulative testimony constitutes neither deficient performance nor prejudice.

C. Failure to Explain Plea

¶22 Allen argues that counsel was ineffective for failing to properly explain the State's plea offer.

¶23 Immediately prior to *voir dire*, the State offered Allen a deal in which Allen would plead guilty to first-degree reckless homicide, a Class B felony. Allen rejected the offer. He now argues that had he properly understood the felony classes and the State's offer, he would have accepted the plea deal. Allen's claim is belied by the record.

¶24 At a hearing a few days prior to *voir dire*, during a discussion regarding the jury instruction on coercion, trial counsel told the court that Allen knew "that [coercion] [is] not an all or nothing-type defense." Counsel said that Allen knew that if the jury "decides that there was enough coercion involved," that Allen would be convicted of second-degree intentional homicide, at best. The State confirmed that second-degree intentional homicide was also a Class B felony. Allen was present during this discussion. Therefore, Allen's contention that he was unaware that the best he could do at trial was a Class B felony is contrary to the record.

II. Sufficiency of the Evidence

¶25 Allen contends that "[t]here was insufficient evidence to convict [him] of first degree intentional homicide because it wasn't proven beyond a reasonable doubt that the coercion defense did not apply or that there was an intent to kill." (Bolding and some capitalization omitted.)

¶26 When reviewing whether there was sufficient evidence to support a jury's verdict, this court "may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). This standard applies whether the evidence is direct or circumstantial. *See* ***id.*** at 503. "Our review of a sufficiency of the evidence claim is … very narrow." ***State v. Hayes***, 2004 WI 80, ¶57, 273 Wis. 2d 1, 681 N.W.2d 203. This court "will uphold the conviction if there is any reasonable hypothesis that supports it." ***State v. Smith***, 2012 WI 91, ¶24, 342 Wis. 2d 710, 817 N.W.2d 410.

¶27 Allen contends that the State failed to prove that he acted without coercion and failed to prove that Allen had the requisite intent to kill E.Y. Allen's argument is based on the lack of testimony that: Allen ever possessed a gun; Allen gave McAlister a gun; Allen intended to kill E.Y.; and Allen knew a murder would take place when he was on his way to Griffin's home. While Allen's argument focuses on the testimony that was not presented, he fails to consider the testimony that *was* presented.

¶28 It was undisputed that Allen was a member of the Black P. Stones gang. Stewart testified that Allen was not only a member, but was third in command and was considered a leader. Stewart testified that at one point, while he, Allen, McAlister, and E.Y. were in Griffin's basement, Allen attempted to suffocate E.Y. with a plastic bag, but the bag broke. Stewart said that Allen then took a large chain that was already in the basement and choked E.Y. from behind. Stewart also stated that McAlister always carried a gun and had a gun with him earlier in the day while the gang members were gathered at Allen's house.

¶29 Stewart also testified about his leadership role in the gang and his relationship with Allen, telling the jury that he (Stewart) was in a position to prevent E.Y.'s beating and death simply by saying "no." Stewart also told the jury that despite the meat tenderizer incident, he and Allen were close friends. He stated that Allen understood that "the rules of the organization" necessitated the meat tenderizer beating and that Stewart and Allen apologized to each other.

¶30 Seaberry testified that Allen and McAlister "jumped" E.Y. and that Allen was holding a firearm while kicking E.Y. Seaberry also stated that Allen pointed the gun at E.Y. and that Stewart directed all of the gang members and E.Y. to go the basement. Seaberry stated that he, Allen, McAlister, Stewart, and E.Y.

all went to the basement, but that he went back upstairs. Seaberry stated that he could hear "tussling" and "fighting" coming from the basement, where Allen, McAlister, and E.Y. remained. Seaberry went back to the basement and saw Allen "choking" E.Y. from behind. Seaberry went back upstairs, and shortly thereafter, Allen came upstairs and said "suffocation don't work." Seaberry said that shortly after Allen returned to the basement, Seaberry heard "dead silence." Seaberry went back downstairs and saw E.Y. "lifeless." Seaberry said that all of this occurred before McAlister fired the gunshots into E.Y.'s head.

¶31 Allen testified that he hit E.Y. because Stewart "told him to" while "basically point[ing] the gun at me." Allen admitted to choking E.Y., but stated that he did so because he felt "threatened" and was fearful of the "punishment" he would receive for not complying with "the general['s]" orders.

¶32 Based on this testimony, we conclude that there was sufficient evidence to support the conviction. The jury heard testimony about Allen's high rank in the gang, his close relationship with Stewart, and his multiple attempts at suffocating E.Y. And while Allen claims he did not possess a gun, Seaberry testified that Allen indeed did possess a gun, and Stewart testified that McAlister always carried a firearm. A jury could reasonably infer that Allen, as a high-ranking officer of the Black P. Stones, knew McAlister was always armed and would be armed at Griffin's house. While the jury also heard testimony regarding Allen's fear of "punishment" and Stewart's authoritative role in the Black P. Stones, it clearly did not believe that this testimony was sufficient for a coercion defense. The jury is the sole arbiter of the credibility of witnesses and alone is charged with the duty of weighing the evidence. *See* ***Poellinger***, 153 Wis. 2d at 506. A jury, as ultimate arbiter of credibility, has the power to accept one portion of a witness's testimony and reject another portion; a jury can find that a witness is

partially truthful and partially untruthful. *See* ***O'Connell v. Schrader***, 145 Wis. 2d 554, 557, 427 N.W.2d 152 (Ct. App. 1988).

III. Interests of Justice

¶33 Allen contends that he is entitled to a new trial or to "a directed verdict to a lesser included offense in the interests of justice." (Bolding and capitalization omitted.) Allen's argument is based on his assertion that counsel was ineffective for the various reasons we have already discussed. Where a defendant argues under WIS. STAT. § 752.35 that he "is entitled to a new trial because his counsel's deficiencies prevented the real controversy from being fully tried," the appropriate analytical framework is provided by ***Strickland***. *See* ***State v. Mayo***, 2007 WI 78, ¶60, 301 Wis. 2d 642, 734 N.W.2d 115. We have already conducted the ***Strickland*** analysis and have concluded that counsel was not ineffective. We do not address this issue further.

IV. Prosecutorial Misconduct

¶34 Allen alleges two instances of prosecutorial misconduct: (1) the State improperly vouched for Stewart's credibility; and (2) the State improperly used a prior statement for impeachment purposes.

A. The State's Closing Argument

¶35 Allen claims that the State improperly vouched for Stewart's credibility when it made the following statement during its closing argument:

> Victor Stewart, ladies and gentlemen, he's trying to get a deal from detectives, and they won't give it to him. They won't give him the piece of paper. They won't give it to him.

> And he talks about what happened. And he talks about his role. And he talks about the defendant with the bag and the defendant with the chain and [McAlister] shooting and his role as the general, and when this was over. Without deals, ladies and gentlemen. Without deals, they told the detectives. Did they get them? Yes, they did ladies and gentleman. We needed witnesses to testify. I'm not asking you to like the deals, ladies and gentlemen, but the question is, are they telling the truth? They are.

¶36 Because trial counsel did not object to this statement, Allen relies on the "plain error" doctrine, which allows appellate courts to review errors waived by a party's failure to timely object. This doctrine is recognized in WIS. STAT. § 901.03(4). "'Plain error is error so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time. The error, however, must be obvious and substantial. Courts should use the plain error doctrine sparingly.'" ***State v. Cameron***, 2016 WI App 54, ¶11, 370 Wis. 2d 661, 885 N.W.2d 611 (citation omitted).

¶37 When a defendant alleges that a prosecutor's statements constituted plain error, the test we apply is whether, in the context of the entire record of the trial, the statements "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *See* ***State v. Davidson***, 2000 WI 91, ¶88, 236 Wis. 2d 537, 613 N.W.2d 606 (citation and one set of quotation marks omitted).

¶38 During closing arguments, a prosecutor is entitled to "comment on the evidence, detail the evidence, argue from it to a conclusion, and state that the evidence convinces him or her and should convince the jurors." *See* ***State v. Adams***, 221 Wis. 2d 1, 19, 584 N.W.2d 695 (Ct. App. 1998). Further, "a prosecutor is permitted to comment on the credibility of witnesses as long as that

comment is based on evidence presented." ***Id.*** at 17. That is what the prosecutor did here.

¶39 The State reviewed the evidence for the jury, recapping Allen and Stewart's testimonies and drawing the jury's attention to a few of the exhibits. The State discussed the particularities of the Black P. Stones, reviewed the timeline of events leading up to E.Y.'s death, discussed Allen's coercion defense, and even called Stewart "a horrible person who did a horrible act." The State argued that the jury should conclude that Stewart told the truth based on Stewart's admission of his own involvement even without a plea deal on the table. We are not persuaded that the prosecutor's remarks were so egregious as to constitute plain error or usurp the role of the jury as arbiter of witness credibility. *See* ***Davidson***, 236 Wis. 2d 537, ¶88. The comments were limited in scope and were an exercise of the prosecution reasoning from the evidence to a conclusion. *See* ***id***.

B. Allen's Prior Statement

¶40 Allen argues that the State violated his right to due process when it used Allen's prior statement to police to impeach his trial testimony. We decline to address this argument because Allen's counsel did not object to the use of this statement at trial, nor did Allen raise this issue in his postconviction motion. *See* ***State v. Ndina***, 2007 WI App 268, ¶11, 306 Wis. 2d 706, 743 N.W.2d 722 (issues not objected to at trial are generally forfeited); ***Hayes***, 273 Wis. 2d 1, ¶21 ("'[I]ssues not raised in the [trial] court will not be considered for the first time on appeal.'") (citation omitted).

V. Pretrial Motions

¶41 Allen argues that the trial court erred in denying his pretrial motions to change venue and to sequester the jury due to the pretrial publicity surrounding the case.

¶42 "We review the trial court's denial of [a] change of venue motion under the erroneous exercise of discretion standard." ***State v. Albrecht***, 184 Wis. 2d 287, 306, 516 N.W.2d 776 (Ct. App. 1994). However, we independently evaluate the circumstances "'to determine whether there was a reasonable likelihood of community prejudice prior to, and at the time of, trial and whether the procedures for drawing the jury evidenced any prejudice on the part of the prospective or empaneled jurors.'" *See* ***id.*** (citation omitted). When evaluating the publicity alleged to be prejudicial, we consider:

> (1) the inflammatory nature of the publicity; (2) the timing and specificity of the publicity; (3) the degree of care exercised, and the amount of difficulty encountered, in selecting the jury; (4) the extent to which the jurors were familiar with the publicity; (5) the defendant's utilization of peremptory and for cause challenges of jurors; (6) the State's participation in the adverse publicity; (7) the severity of the offense charged; and (8) the nature of the verdict returned.

State v. Fonte, 2005 WI 77, ¶31, 281 Wis. 2d 654, 698 N.W.2d 594 (citation omitted).

¶43 Prior to trial, Allen submitted a change of venue/jury sequestration motion alleging that "a fair jury cannot be selected in Milwaukee" due to media coverage of E.Y.'s death, particularly the trials of Griffin and McAlister. Allen alleged that "[m]uch of the coverage identified Allen by name" and recounted Stewart's testimony. An affidavit attached to the motion described seven articles from *The Milwaukee Journal Sentinel* dated January 23, 2013, through July 2, 2013. The affidavit also cited twenty-five instances of web or television coverage

of the trials from those same dates, three of which showed a mug shot or trial image of Allen.

¶44 The trial court denied the motion at a hearing on September 6, 2013, finding that media coverage of E.Y.'s murder and the trials was virtually nonexistent at that point. The court found that Allen did not meet his burden of showing prejudice, stating that a jury's knowledge of the facts of the case did not equate prejudice. The trial court also denied the sequestration motion.

¶45 We conclude that the trial court did not err in denying the motion for change of venue. "The mere fact that [pretrial] publicity has taken place ... does not establish prejudice." ***Turner v. State***, 76 Wis. 2d 1, 27, 250 N.W.2d 706 (1977). The trial court may examine the publicity to determine whether the articles were "calculated to form public opinion against the defendant." ***Id.*** Articles that discuss the facts of the case are merely informational and not inflammatory. *See* ***id.*** "'An informed jury is not necessarily a prejudicial one.'" ***Id.*** at 28 (citation omitted). In this case, the articles discussed the facts of the case and were not designed to influence public opinion against Allen. The publicity was not inflammatory but was merely informational.

¶46 Moreover, the trial court took great care to ensure an impartial jury uninfluenced by the publicity. The court granted Allen's request to not extensively discuss the publicity during *voir dire*. During *voir dire*, the court also told the jury:

> This case generated some publicity during the course of the trial. You may recollect certain things that you have heard on TV or radio.
>
> The court would remind you that anything you heard outside the courtroom is not evidence is in this case.

> You're only to strictly pay attention to the evidence that's brought before this Court.

The trial court confirmed that the jury understood its instruction. The court appropriately exercised its discretion.

¶47 As to the sequestration motion, we conclude that the trial court appropriately denied Allen's motion. *See* ***State v. Wilson***, 149 Wis. 2d 878, 908, 440 N.W.2d 534 (1989) (whether to sequester a jury falls within the discretion of the trial court). Allen's motion, like his venue motion, was based on his concern that jurors could conduct simple internet searches and subsequently access a "cornucopia of prejudicial information." As stated, the trial court instructed the jury not to conduct outside research and to rely only on the evidence presented in rendering its verdict. We presume juries follow instructions. *See* ***Johnston***, 184 Wis. 2d at 822. We have also concluded that the publicity in this case was not prejudicial. The trial court properly exercised its discretion in denying Allen's sequestration motion.

VI. Sentencing

¶48 Finally, Allen contends that at sentencing, the trial court erred by: (1) erroneously exercising its discretion; (2) imposing an excessive sentence; and (3) imposing an unduly harsh sentence that warrants sentence modification. We disagree.

¶49 Sentencing is committed to the discretion of the trial court and our review is limited to determining whether the trial court erroneously exercised its discretion. ***McCleary v. State***, 49 Wis. 2d 263, 278, 182 N.W.2d 512 (1971). A strong public policy exists against interfering with the trial court's discretion in determining sentences and the trial court is presumed to have acted reasonably.

State v. Wickstrom, 118 Wis. 2d 339, 354, 348 N.W.2d 183 (Ct. App. 1984). A defendant claiming that his or her sentence was unwarranted must "show some unreasonable or unjustified basis in the record for the sentence imposed." ***State v. Borrell***, 167 Wis. 2d 749, 782, 482 N.W.2d 883 (1992), *overruled on other grounds by* ***State v. Greve***, 2004 WI 69, 272 Wis. 2d 444, 681 N.W.2d 479.

¶50 At sentencing, the court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and it must determine which objective or objectives are of greatest importance, ***State v. Gallion***, 2004 WI 42, ¶41, 270 Wis. 2d 535, 678 N.W.2d 197. In seeking to fulfill the sentencing objectives, the trial court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and it may consider several subfactors. ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the trial court's discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶41.

¶51 Allen claims that the trial court issued an excessive sentence because the trial court sentenced Allen to life imprisonment without extended supervision. He also argues that his sentence was unduly harsh compared to Stewart and McAlister's sentences.

¶52 A sentence is unduly harsh when it 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 (1975). This court reviews a trial court's conclusion that a sentence was not

unduly harsh and unconscionable using an erroneous exercise of discretion standard. ***State v. Giebel***, 198 Wis. 2d 207, 220, 541 N.W.2d 815 (Ct. App. 1995). A sentence within the statutory maximum is presumed not to be unduly harsh. *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507.

¶53 Allen was tried for, and found guilty of, first-degree intentional homicide, which carries a mandatory life sentence. *See* WIS. STAT. §§ 940.01, 939.50(3) (2013-14). The only discretionary issue before the sentencing court was whether Allen would be eligible for extended supervision. *See* WIS. STAT. § 973.014(1g)(a) (2013-14). In making this determination, the trial court applied the standard sentencing factors and explained their application in accordance with the framework set forth in ***Gallion*** and its progeny. The court discussed the nature of the offense, describing the "horrific and callous" circumstances surrounding E.Y.'s death. The court told Allen that E.Y. suffered "a significant amount of pain and torture at your hands." The court also discussed Allen's character, telling Allen that E.Y.'s death was a direct result of Allen's conscious decision to participate in gang activity. The court further noted that Allen was ten years older than McAlister, the other main actor in this series of horrific events, yet did nothing to prevent E.Y.'s death. The court discussed the "devastation" incurred by the victim's family, and stated that Allen left behind "a legacy of sadness." The court also discussed the need to protect the public, noting that community safety "must be taken into account." The trial court clearly properly exercised its discretion. The court's decision was within the parameters of § 973.014(1g)(a), which permits a sentencing court to determine that a defendant is not eligible for extended supervision.

¶54 As to Allen's contention that he is entitled to sentence modification because his sentence was unduly harsh as compared to other defendants in this case, we have repeatedly held that a sentencing court is not required to base a sentencing decision on the sentences of other defendants. *See* ***State v. Tappa***, 2002 WI App 303, ¶20, 259 Wis. 2d 402, 655 N.W.2d 223. Nor is a mere disparity among sentences improper if the individual sentence is based on the three main sentencing factors. ***State v. Toliver***, 187 Wis. 2d 346, 362-63, 523 N.W.2d 113 (Ct. App. 1994). The record demonstrates that the trial court considered the appropriate sentencing factors. Given the facts of this case, Allen's sentence is not so harsh as to shock public sentiment.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.