COURT OF APPEALS
DECISION
DATED AND FILED

February 6, 2003

Cornelia G. Clark
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. 02-1994-CR **Cir. Ct. No. 97-CF-2031**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TODD D. DAGNALL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Dane County: ROBERT DE CHAMBEAU, Judge. *Affirmed*.

Before Vergeront, P.J., Roggensack and Deininger, JJ.

¶1 PER CURIAM. Todd Dagnall appeals a judgment convicting him of first-degree intentional homicide, and an order denying postconviction relief. The issues are: (1) whether the prosecutor violated the constitutional bar to commenting on Dagnall's choice not to testify, and (2) whether the trial court's

parole eligibility determination violated Dagnall's right to equal protection. We affirm the trial court's decisions on both issues.

¶2 At Dagnall's jury trial, Christopher Murray testified that he and Dagnall went to the home of Norman Gross and beat him to death with baseball bats. Other witnesses testified to Dagnall's threats toward Gross before the murder, and his admissions of culpability afterwards.

¶3 Dagnall chose not to testify. He theory of defense pointed to Murray as the killer, although he was admittedly present during the murder.

¶4 In closing arguments the prosecutor said that:

> [Defense counsel] said that the State's case rises or falls on the testimony of Mr. Murray, and if he is lying you can't convict. I have never said this in a courtroom in thirty years, but I am going to say it now. That is unmitigated bull. Two individuals know what happened in that room. One is Mr. Murray, the other is Mr. Dagnall, and the blood spattered room where Norm Gross ….

At this point, defense counsel interrupted and objected to the prosecutor's comment as an impermissible reference to Dagnall's failure to testify. The trial court denied the motion and the prosecutor added "Mr. Dagnall told us through … what happened in that bedroom through the witnesses that he talked to … so Mr. Murray is not the only source of what happened in that bedroom. We got it from the defendant from the people he talked to. So you have his version of events through those witnesses." Counsel then again objected, and the trial court again denied the request for a mistrial or for a curative instruction.

¶5 At sentencing, the trial court imposed the mandatory life sentence. In setting parole the court used actuarial tables to calculate that Gross, a white male, could have expected 39.1 more years of life had he not been murdered.

Consequently, the trial court set Dagnall's parole eligibility date exactly thirty-nine years from the day he killed Gross.

¶6 The trial court properly overruled counsel's objection to the prosecutor's closing arguments. A prosecutor violates the defendant's Fifth Amendment right against self-incrimination with statements "manifestly intended or … of such character that the jury would naturally and necessarily take [them] to be a comment on the failure of the accused to testify." ***State v. Johnson***, 121 Wis. 2d 237, 246, 358 N.W.2d 824, 828 (Ct. App. 1984). Here, the prosecutor was evidently responding to defense counsel's assertion in closing that "Murrary is the only person who can tell you what happened in that room." However, undisputed testimony placed Dagnall in the room also, and counsel conceded as much. Other testimony reported Dagnall's description of the killing. In that context, the jury could have taken the comment, especially as later explained, as a rebuttal to the defense claim, rather than a reference to Dagnall's failure to testify. The prosecutor may use closing arguments to comment on the evidence and to draw conclusions from it. ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979). That is what occurred here.

¶7 Dagnall's parole eligibility date does not have equal protection implications. He contends that the trial court violated equal protection by using the life expectancy of a thirty-seven-year-old white male, like Gross, to compute his parole eligibility date. Had his victim been a thirty-seven-year-old black male, the life expectancy would have been 34.4 years. Consequently, in Dagnall's view, the trial court unconstitutionally extended his parole eligibility date based on the race of his victim.

¶8 However, an equal protection challenge requires proof that persons similarly situated are treated differently. ***State v. Post***, 197 Wis. 2d 279, 318, 541 N.W.2d 115 (1995). Here, Dagnall fails to identify any group of similarly situated persons to which the analysis applies. As far as the record shows, this was a singular case of a court's using the victim's life expectancy to determine parole eligibility on a first-degree intentional homicide conviction. There is no identifiable group of convicted murderers subjected to this test for parole eligibility. There is no group of identifiable murder victims whose killers are receiving different sentences because of it. Dagnall's argument of discrimination is hypothetical only, and this court will not decide issues, including ones of constitutional dimension, based on hypothetical facts. *See* ***State v. Armstead***, 220 Wis. 2d 626, 628, 583 N.W.2d 444 (Ct. App. 1998).

By the Court.—Judgment and order affirmed.

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