STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2016AP885-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RON JOSEPH ALLEN,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY A. WAGNER, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Wisconsin Attorney General

TIFFANY M. WINTER
Assistant Attorney General
State Bar #1065853

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9487
(608) 266-9594 (Fax)
wintertm@doj.state.wi.us

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STATEMENT OF ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication.

SUPPLEMENTAL STATEMENT OF THE CASE

The facts of the trial that are not in dispute are as follows:

Victor Stewart, Ashanti McAlister, and Ron Joseph Allen were all members of a street organization known as the Black P. Stones. (81:64-65.) Stewart was the "general." (81:66.) McAlister was the second in command. (81:66-67.) Allen was the third in command. (82:38.) Allen and McAlister were not just yes-men, they were leaders. (81:146.)

Shortly before Christmas 2012, Allen was caught stealing a small amount of marijuana from the Black P. Stones. (81:121; 82:25.) As punishment, Stewart, McAlister, and Devin Seaberry beat Allen on the hand and arm with a meat tenderizer. (81:121-22; 82:25.) While the beating lasted for hours, Allen suffered only abrasions on his hands – there were no broken bones. (81:121-22; 82:57.) And his injuries had mostly healed before New Year's Day. (82:28-29.)

At some point before January 1, 2013, McAlister advised Stewart that the organization needed money. (81:86-124.) McAlister asked if he could burglarize Billy Griffin's home. (81:68, 133.)

Griffin, who happened to be Stewart's cousin, was once affiliated with the Black P. Stones. (81:65-66.) Stewart approved the burglary plan. (81:68.) Griffin and the victim, E.Y., were roommates. (81:68.) When McAlister went to

Griffin's home to commit the burglary, E.Y., who was not a member of the Black P. Stones, let him into the house. (81:69-70.)

On January 1, 2013, Stewart, McAlister, Allen, Seaberry and others were drinking heavily and smoking a large amount of marijuana at Allen's residence. (81:70-72, 192.) At one point they left and went to Griffin's house. (81:72-74, 192-93.) E.Y. was home, and Stewart decided that Griffin should know not to trust E.Y. because E.Y. participated in the burglary of his residence. (81:79-80.) Stewart told E.Y. to tell Griffin what happened. (81:79-80.) E.Y. admitted to helping with the burglary and McAlister and Allen began to beat E.Y. (81:83-84, 199-200.)

Shortly thereafter, Stewart pointed and discharged a pistol into the floor as a show of authority. (81:87.) Allen, McAlister, and Seaberry then took E.Y. to the basement. (81:88-89.) Allen and McAlister beat E.Y., McAlister was the most violent. (81:84, 94.) Allen, however, choked E.Y. with a large chain until his body was lifeless, his face blue, and foam bubbled from his mouth. (81:94-96, 209-11.)

Allen left Griffin's residence to purchase cleaning supplies and duct tape and to get a change of clothes. (81:97-98.) During that time, McAlister shot E.Y. three times in the head. (81:100; 82:48.)

Additional facts, and any pertinent procedural history will be discussed in the argument sections below.

ARGUMENT

I. The circuit court properly concluded that a *Machner*[1] hearing was not warranted because Allen failed to satisfy the pleading standard.

In his postconviction motion, Allen alleged that his trial counsel was ineffective for (1) not proposing a jury instruction defining "co-conspirator" (50:5-9, 10-12); (2) failing to argue in closing that Allen and Victor Stewart were not co-conspirators (50:9-10); (3) failing to explain the plea bargain offered to Allen at the beginning of trial (50:13); (4) failing to call Billy Griffin as a witness (50:13); (5) failing to argue that Ashanti McAlister was the "pawn" of Stewart (53:14); and (6) failing to cross-examine Stewart and Devin Seaberry with their testimony from Griffin's trial (50:14-15).

The court denied all of these claims without a hearing. On appeal, Allen argues that a hearing should have been granted on his claims that trial counsel was ineffective for (1) not proposing a jury instruction defining "co-conspirator" (Allen's Br. 10-22); (2) failing to cross-examine Stewart and Devin Seaberry with their testimony at Griffin's trial (Allen's Br. 21); and (3) failing to explain the plea bargain offered to Allen at the beginning of trial (Allen's Br. 22-23). The State will address Allen's claims in that order.

[1] *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

A. The circuit court had discretion to deny relief without a hearing if Allen failed to allege sufficient facts in his motion, presented only conclusory allegations or subjective opinions, or presented claims contrary to conclusive evidence in the court record.

A postconviction motion alleging ineffective assistance of counsel does not automatically trigger a *Machner* hearing. *State v. Phillips*, 2009 WI App 179, ¶ 17, 322 Wis. 2d 576, 778 N.W.2d 157. "[N]o hearing is required if the defendant fails to allege sufficient facts in his or her motion, if the defendant presents only conclusory allegations or subjective opinions, or if the record conclusively demonstrates that he or she is not entitled to relief." *Id.* (citing *State v. Bentley*, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996)).

Whether Allen's postconviction motion alleged sufficient facts to require a *Machner* hearing presents a mixed standard of review. *State v. John Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433. This Court must first determine if Allen alleged sufficient facts that, if true, would entitle him to relief. This is a question of law and is reviewed de novo. *Id.*; *see also State v. Krueger*, 2008 WI App 162, ¶ 7, 314 Wis. 2d 605, 762 N.W.2d 114. Sufficient facts are facts that establish deficient performance and prejudice under *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *John Allen,* 274 Wis. 2d 568, ¶¶ 12, 26.

Allen's motion must contain sufficient facts to establish that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. He must also allege sufficient facts to establish that "there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

"If the motion fails to allege sufficient facts, the trial court has the discretion to deny the motion without an evidentiary hearing." *Phillips*, 322 Wis. 2d 576, ¶ 17 (citing *Bentley*, 201 Wis. 2d at 310-11). "This discretionary decision will only be reversed if the trial court erroneously exercised that discretion." *Id.* An erroneous exercise of discretion occurs when the court made an error of law, when it does not consider the facts of record under the relevant law, or when it does not reason its way to a rational conclusion. *State v. Davis,* 2001 WI 136, ¶ 28, 248 Wis. 2d 986, 637 N.W.2d 62.

Given this standard of review, this Court looks to Allen's postconviction motion, not his appellate brief, to determine whether the circuit court's denial of a *Machner* hearing should be upheld. If Allen's postconviction motion did not contain sufficient facts that, if true, would entitle him to relief, this Court then looks to the circuit court's decision to determine if the court properly exercised its discretion in denying the motion.

B. Allen's claim that trial counsel was ineffective for failing to request that the jury be instructed as to the definition of "co-conspirator" lacked sufficient facts to conclude that Allen was prejudiced by counsel's conduct.

Allen's primary defense was coercion, specifically that Victor Stewart coerced him to kill E.Y. The circuit 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.

(82:79-80 (emphasis added).)

During deliberations the jury submitted a question asking "is Victor considered a co-conspirator by law?" (50:8, 83:2.) That question was not answered, and the court responded by directing the jury to use its collective memory and to refer back to the instructions. (50:9, 83:2-3.)

In his postconviction motion, Allen argued that, because the coercion jury instruction contained the term "co-conspirator," counsel was deficient for not requesting that the court define co-conspirator by either using the standard conspiracy jury instruction or by submitting a customized instruction. (50:7-8.) Allen further argued that he was prejudiced by counsel's failure to do so because the co-conspirator language created an exception to the defense of coercion. (50:10-12.) He asserted that "[a]s long as he was not a co-conspirator with Victor Stewart, the coercion defense applies." (50:8.) And to prevail on that defense, Allen only needed to create a reasonable doubt that Stewart coerced him to murder E.Y. (50:11-12.)

In considering Allen's postconviction claim, the circuit court concluded that even if a further explanation of conspiracy would have assisted the jury, Allen was not prejudiced because there was no reasonable probability that the jury would have found that his actions were coerced by Stewart. (61:5-6.) The court ruled that the trial evidence supported the jury's finding that Allen was acting on his own and was neither threatened nor coerced by Stewart. (61:5.) Moreover, the court concluded that the State's brief reference to Allen and Stewart as co-conspirators during

closing was so innocuous that it had no prejudicial impact on the defense. (61:6.)

The State will assume for the purpose of argument that counsel performed deficiently by not requesting that the coercion jury instruction contain a definition of conspiracy or co-conspirator.[2] [3] However, contrary to Allen's assertion, he was not prejudiced by counsel's failure and thus it was proper for the circuit court to deny this claim without a *Machner* hearing.

The circuit court concluded that Allen did not establish prejudice because there was ample evidence at trial that Allen was not coerced by Stewart and that the jury could reasonably conclude that the State proved absence of

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[2] The discussion and resulting stipulation to the jury instructions occurred off the record. (82:66.) Therefore, it is unclear what, if any, discussion occurred before the parties concluded that the coercion instruction should contain the co-conspirator language. However, because the issue on appeal is whether Allen met the pleading standard for a *Machner* hearing, the State is accepting as true Allen's assertion that defense counsel failed to object to the language or failed to request that co-conspirator be defined. The State is not conceding that counsel was deficient. Rather, because Allen's claim fails for lack of prejudice, the State is assuming deficient performance for the purpose of argument.

[3] On appeal, Allen also argues that counsel should have requested that the co-conspirator language be deleted from the instruction altogether because conspiracy was not at issue. (Allen's Br. 21 & n.4.) That argument, however, was not before the circuit court and is not considered on review. *See State v. Caban*, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997) (issues not presented in trial court will not be considered for the first time on appeal). The State notes Allen's additional argument for the sake of completeness and posits that, in this case, the co-conspirator language should have been deleted, not further defined. See Wis. JI-Criminal 790, n.3 (A-App. 112).

coercion beyond a reasonable doubt. (Allen's Br. 13-20.) Allen takes issue with that conclusion on several grounds. First, Allen asserts that the State's reference to Allen as a co-conspirator during the closing rebuttal argument compounded the confusion caused by the instruction, leading the jury to conclude that the co-conspirator exception applied. (Allen's Br. 14-15.) Second, Allen asserts that the jury could have believed that aiding and abetting first-degree intentional homicide was the same as conspiring to commit first-degree intentional homicide. (Allen's Br. 16-17.) And third, Allen asserts that trial testimony and outside evidence establish that he was coerced by Stewart and thus the jury must have relied on the co-conspirator exception to the coercion defense. (Allen's Br. 18-22.)

First, the State's passing reference to Allen as a co-conspirator with Stewart was innocuous in the context of the entire rebuttal argument. The State was focused on arguing that Allen committed the crime not out of fear, but because he was a proud, high ranking member of the Black P. Stones. The State argued:

> The elements are very clear. Ron Allen killed [E.Y.] along with Ashanti. . . .
>
> And because of that, ladies and gentlemen, and because it was not out of fear of Victor. 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.
>
> This is a life he's chosen. . . . He's got a lot of respect, according to him, for a peaceful man, if you believe anything. I don't know a single violent gang that respects the peacefulness of its No. 3 guy.
>
> Let's point something out. This occurred. And Ron Allen choked [E.Y.] not because he was fearing for his life. Because even though he can't remember

> how many times he left that night - - and that changed even during his own testimony - - he says that he left . . . and she was still alive.
>
> He didn't come back out of fear, ladies and gentlemen, he didn't come back and refuse to tell the police because of fear. *He did it because he is a Black P. Stone through and through. And that's why he's guilty.*

(82:108-09 (emphasis added).) Thus, the record supports the circuit court's conclusion that the State's one small reference to co-conspirators did not prejudice Allen in conjunction with the co-conspirator language in the instruction.

Second, Allen's assertion that the jury could have believed that aiding and abetting first-degree intentional homicide was the same as conspiring to commit first-degree intentional homicide is a conclusory statement insufficient to support a finding of prejudice. *See Phillips*, 322 Wis. 2d 576, ¶ 17. The State's theory of party-to-a-crime liability was that Allen was an aider and abettor. The jury was instructed accordingly. (82:75-76.) Thus, Allen's theory of jury confusion between the two bases of liability is entirely speculative.

Third, contrary to Allen's assertion, the trial testimony did not establish that he was coerced and he cannot rely on evidence not before the jury as proof of either coercion or *Strickland* prejudice. Allen argues that the State did not disprove coercion because the following supported his coercion defense: (1) Stewart's testimony at a prior trial that death was a possibility for disobeying an order, (2) Allen's statement to Detective Graham about the incident in which Stewart held him at gunpoint while Stewart, Seaberry, and McAlister took turns beating Allen's hand and arm with a meat tenderizer, and (3) Griffin's statement to police asserting that he was afraid of Stewart. (Allen's Br. 18-20.)

None of this alleged evidence of coercion was before the jury. Thus, it cannot be used to argue that if a different instruction had been given, the jury would have found Allen not guilty on grounds of coercion.

The pertinent evidence before the jury was Stewart's, Seaberry's, and Allen's testimony. From that testimony the jury could conclude that the State disproved coercion beyond a reasonable doubt. First, regarding the meat tenderizer event, Allen never testified that he was held at gunpoint. Moreover, he testified that the meat tenderizer incident was about respect for the Black P. Stones organization. (82:26.) Allen never even associated "fear" with that occasion until it was raised by his attorney. (82:26.) And practically speaking, the episode appeared to be for show. Allen was beaten for hours, but somehow suffered only abrasions when a meat tenderizer could easily break a finger. (82:25, 57.) In addition to the seemingly dramatized nature of the incident, Stewart testified that after it occurred he and Allen apologized to each other, cried about the whole situation, and resumed their friendship. (81:143-44.) Thus, the jury could conclude that the meat tenderizer incident did not create a *reasonable* belief that Allen faced death or great bodily harm if he did not kill E.Y.

Second, while Stewart testified that he discharged a gun into the floor before E.Y.'s murder, he did so to assert his dominance over *Griffin*, not Allen. (81:87.) Meanwhile, Allen's version of the story was too outlandish to believe. Allen testified that in the middle of the initial beating of E.Y., Stewart stopped everything to individually ask for the allegiance of his fellow gang members at gunpoint. (82:19-20.) If that did occur, and was meant as a threat and not a ritual, it would be reasonable to expect that Seaberry would remember such an event. Seaberry's testimony, however, contained no mention of it.

Third, Allen left the premises during the commission of the crime multiple times. (82:46-51.) The fact that he left and willingly came back indicates that he was not under an imminent threat of death or great bodily harm. He removed himself from the situation without harm multiple times. Yet he chose to return each time and resumed his participation in this heinous crime.

Finally, as the State pointed out in closing, Allen's testimony was contrary to both Seaberry's and Stewart's, his testimony was inconsistent, and while he was the only person to receive a deal in exchange for a truthful statement before the statement was made, he still lied to police. (82:92, 94-95, 108, 109.) Allen simply was not credible. The circuit court discounted his testimony for that reason. (61:5-6.) A trial court's credibility determination is virtually unassailable. *State v. Oswald*, 2000 WI App 3, ¶ 47, 232 Wis. 2d 103, 606 N.W.2d 238.

This Court should not be swayed by the fact that the jury questioned whether Allen and Stewart were co-conspirators as a legal matter. It is impossible to know why the jury asked that question. The circuit court concluded that a *Machner* hearing was unnecessary because the record conclusively demonstrated that Allen was not prejudiced. The court came to that conclusion after considering all the evidence presented at trial. (61:5.) Thus, the court properly exercised its discretion when it denied this ineffective assistance of counsel claim without a hearing.

C. Allen is not entitled to a hearing on his claim that counsel was ineffective for failing to cross-examine or impeach Victor Stewart and Devin Seaberry with their testimony from the Billy Griffin trial.

In his postconviction motion, Allen argued that trial counsel was ineffective for not cross-examining Stewart and Seaberry with their testimony in the Billy Griffin trial. (50:14-15.) Regarding Stewart, Allen alleged that counsel could have elicited from Stewart that he controlled whether McAlister carried a gun and that death was a possible punishment for not following his orders. (50:14-15.) Regarding Seaberry, Allen alleged that counsel could have elicited that Seaberry was afraid of Stewart. (50:15.)

The circuit court concluded, based on the credibility of the testimony presented at trial, that questioning Stewart and Seaberry about their prior testimony would have had no reasonable probability of producing a different outcome. (61:8.)

The extent of Allen's argument on appeal is:

> [T]rial counsel was ineffective for not cross examining Seaberry and Stewart about prior testimony in Griffin's trial. R50:14-15. This would have elicited that Stewart was in control, that he told Allen what to do, and that death was a possibility for not following orders in the Black P. Stones. *Id*. (citing Griffin trial testimony exhibits).

(Allen's Br. 21.)

Allen's argument is insufficient to address the prejudice issue. The circuit court concluded that Allen failed to allege sufficient facts to establish prejudice. Remarkably, Allen does not even try to challenge that conclusion. Rather,

he submits a cursory argument that does not address prejudice. The argument is inadequate and should be rejected by this Court. *See State v. Pettit,* 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) ("We may decline to review issues inadequately briefed.").

D. Allen is not entitled to a hearing on his claim that trial counsel was ineffective for failing to explain that if Allen accepted the State's plea offer, Allen would face the same felony classification as he would if he was successful with his coercion defense.

Allen alleged that counsel failed to explain that, if he accepted the plea bargain offered before trial, he would plead guilty to a Class B felony. This was significant because, if Allen's coercion defense had been successful, he would not have been acquitted, but would have been convicted of a Class B felony. (50:13.) Thus, Allen alleged that he was prejudiced by counsel's alleged failure because he would have accepted the plea bargain if he had known that the felony levels would be the same whether he pleaded guilty or prevailed on the coercion defense. (50:13.) The circuit court rejected this claim as contrary to the record and for a lack of facts establishing prejudice. (61:6-7.)

Immediately prior to voir dire, the State offered a deal in which Allen would plead guilty to first-degree reckless homicide, a Class B felony, amount of prison to be determined by the court. (79:14.) Allen rejected the offer. (79:14.) Four days earlier, Allen was in court when his trial counsel advised the court that Allen understood that (1) coercion was not a complete defense and (2) that a successful coercion defense would result in a conviction of second-degree intentional homicide, a Class B felony. (78:3-4.) Thus, 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.

Moreover, as the circuit court noted, the bigger advantage to accepting the State's offer was not chancing a conviction of a Class A felony. (61:7.) There was no guarantee that Allen's defense was going to be successful at trial. And he makes no claim that he would have accepted a plea to a Class B felony to eliminate the potential of being convicted of a Class A felony. (61:7.) Thus, the court found his contention that he would have accepted the plea offer to be incredible.

The record is clear that Allen wanted to tell his story in court. Prior to rejecting the offer on the record, Allen had asserted that he wished to fire counsel and represent himself at trial. (79:3-6.) When his intentions were questioned by the court, Allen advised the court that he already knew what he was going to do at trial – meaning that he had already planned his defense. (79:4, 7.) The court urged Allen to speak with his attorney about his defense and recessed to give him time to do so. (79:7-8.) After that recess Allen advised the court that he wished to proceed with his attorney and affirmed that he had rejected the State's offer. (79:8-9, 14.)

The record conclusively demonstrates that Allen was aware that the best he could do at trial with the coercion defense and the State's plea offer carried the same felony classification. And the record conclusively demonstrates that Allen wanted to proceed to trial. Therefore, it was proper for the circuit court to deny Allen's claim without a hearing.

II. The State presented sufficient evidence for the jury to conclude that Allen committed first-degree intentional homicide without coercion.

This Court may overturn the verdict on sufficiency of the evidence grounds "only if the trier of fact could not possibly have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt." *State v. Watkins*, 2002 WI 101, ¶ 68, 255 Wis. 2d 265, 647 N.W.2d 244.

"[W]hether the evidence was sufficient to sustain a verdict of guilt in a criminal prosecution is a question of law, subject to . . . de novo review." *State v. Smith,* 2012 WI 91, ¶ 24, 342 Wis. 2d 710, 817 N.W.2d 410 (citing *State v. Booker*, 2006 WI 79, ¶ 12, 292 Wis. 2d 43, 717 N.W.2d 676). However, review of a sufficiency of the evidence challenge is very narrow, and great deference is given to the trier of fact. *State v. Hayes*, 2004 WI 80, ¶ 57, 273 Wis. 2d 1, 681 N.W.2d 203.

This is because the trier of fact decides which evidence is worthy of belief, which evidence is not, and how to resolve any conflicts in the evidence. *State v. Wilson,* 149 Wis. 2d 878, 894, 440 N.W.2d 534 (1989) (citations omitted). "[A]n appellate 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) (emphasis added).

Allen argues that the State failed to prove that Allen was not acting under the defense of coercion, and relies on his ineffective assistance of counsel argument for the

proposition that no reasonable trier of fact could have found that the State proved the absence of coercion beyond a reasonable doubt. (Allen's Br. 24.) This Court should reject Allen's argument as deficient on its face. The pleading standard for a *Machner* hearing is fundamentally different from the standard for a new trial.

Allen also argues that the State failed "to prove the mens rea element of attempted[4] first-degree homicide." (Allen's Br. 24.) Allen argues that the State failed to prove mens rea because there was no evidence that Allen had a gun. (Allen's Br. 24.) Such a statement is absurd since Allen, by his own admission, literally choked the life out of E.Y. (82:31; Allen's Br. 24.) Allen also asserts that even though he choked the life out of E.Y., he did not testify that he intended to do so. (Allen's Br. 24.) His intent, however, could easily be inferred from his actions and the inference that supports the trier of fact's verdict must be the one followed on review. *State v. Allbaugh*, 148 Wis. 2d 807, 809, 436 N.W.2d 898 (Ct. App. 1989); *see also Smith,* 342 Wis. 2d 710, ¶ 31.

As the circuit court concluded, Allen's sufficiency of the evidence argument is "ludicrous." (61:8.) The jury was not required to believe Allen's defense and it was not required to believe his testimony. The jury could conclude that Allen acted without coercion based upon the following:

Stewart, McAlister, Allen, and Seaberry were all members of a street organization known as the Black P. Stones. (81:64-65.) Stewart was the "general." (81:66.) McAlister was the second in command. (81:66-67.) Allen was

[4] As a point of clarification, Allen was convicted of first-degree homicide, party-to-a-crime, not attempted first-degree homicide.

the third in command. (82:38.) Allen and McAlister were not just yes-men, they were leaders. (81:146.)

Shortly before Christmas 2012, Allen was caught stealing a small amount of marijuana from the Black P. Stones. (81:121; 82:25.) As punishment, Stewart, McAlister, and Seaberry beat Allen on the hand and arm with a meat tenderizer. (81:121-22; 82:25.) While the beating lasted for hours, Allen suffered only abrasions on his hands – there were no broken bones. (81:121-22; 82:57.) And his injuries had mostly healed before New Year's Day. (82:28-29.) Allen and Stewart had no ill feelings towards each other after the event. In fact, they spoke on the phone, cried together, and each apologized to the other. (81:143.) They were good friends. (81:143.)

Allen characterized the Black P. Stones as a peaceful organization. (82:38-40.) Stewart was a small man, not feared by everyone. (81:229; 82:26.) But he was the leader and demanded respect. (82:26.) At some point before January 1, 2013, McAlister advised Stewart that the organization needed money. (81:86-124.) McAlister asked if he could burglarize Griffin's home. (81:68, 133.)

Griffin, who happened to be Stewart's cousin, was a prior member of the Black P. Stones. (81:65-66.) Stewart approved the burglary plan. (81:68.) Griffin and E.Y. were roommates. (81:68.) When McAlister went to Griffin's home to commit the burglary, E.Y., who was not a member of the Black P. Stones, let him into the house. (81:69-70.) That appeared to be the extent of E.Y.'s involvement.

On January 1, 2013, Stewart, McAlister, Allen, Seaberry, and others were drinking heavily and smoking a large amount of marijuana at Allen's residence. (81:70-72, 192.) They ran out of marijuana and went to Griffin's house,

a known dealer, in search of more. (81:72-74, 192-93.) There was no other motive to go to Griffin's and Stewart was not aware that E.Y. was home at the time. (81:132-33.)

E.Y. was home, and Stewart decided that Griffin should know not to trust E.Y. because E.Y. participated in the burglary of his residence. (81:79-80.) Stewart told E.Y. to tell Griffin what happened. (81:79-80.) E.Y. admitted to helping with the burglary and McAlister and Allen began to beat E.Y. (81:83-84, 199-200.)

Griffin told everyone that he did not want anything going down in his house. (81:86.) Stewart, who was not armed, grabbed a gun from McAlister and shot it into the floor to show Griffin that Griffin could not tell Stewart what to do. (81:87.)

Allen, McAlister, and Seaberry took E.Y. to the basement. (81:88-89.) Allen tried to suffocate E.Y. with a plastic bag, but it broke. (81:92-93.) Allen and McAlister beat E.Y., McAlister was the most violent. (81:84, 94.) Allen found a chain in the corner of the basement and choked E.Y. with it until his body was lifeless, his face blue, and foam bubbled from his mouth. (81:94-96, 209-11.)

Allen then left Griffin's residence to purchase cleaning supplies and duct tape and to get a change of clothes. (81:97-98.) During that time McAlister shot E.Y. three times in the head. (81:100; 82:48.) Stewart could have stopped the killing. (81:148.) He did not, but he also did not order it. (81:83, 146, 200.)

From that evidence, the jury could easily conclude, beyond a reasonable doubt, that Allen was not acting out of a reasonable fear of imminent death or great bodily harm at the hands of Stewart. The jury was free to disbelieve Allen's

self-serving testimony. Therefore, there is no basis to overturn the jury's finding of guilt.

III. Justice does not demand a new trial in this case.

In a one sentence argument, Allen urges this Court to use its discretionary power under Wis. Stat. § 752.35 to order a new trial in the interest of justice. (Allen's Br. 25.) Discretionary reversal is available to this Court only if the real controversy was not fully tried or if there was a miscarriage of justice. Wis. Stat. § 752.35. Each category has its unique standards. Allen alleges that there was a miscarriage of justice that warrants a new trial. (Allen's Br. 25.)

Under the miscarriage of justice standard, this Court must be convinced "that the defendant should not have been found guilty and that justice demands the defendant be given another trial." *Lock v. State*, 31 Wis. 2d 110, 118, 142 N.W.2d 183 (1966). Stated another way, the defendant must convince this Court that there is a substantial degree of probability that a new trial would produce a different result. *State v. Darcy N.K.*, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998).

Requiring Allen to show a substantial probability of a different result is an even higher burden than establishing the prejudice component under *Strickland*, which only requires a reasonable probability. *Strickland*, 466 U.S. at 687. Allen ignores the difference between the two standards and simply refers this Court to the ineffective assistance of counsel argument. (Allen's Br. 26.) Such a cursory argument does not warrant the exercise of a power that is to be wielded with great caution and only utilized in exceptional cases. *State v. Williams*, 2006 WI App 212, ¶ 36, 296 Wis. 2d 834, 723 N.W.2d 719; *Vollmer v. Luety*, 156 Wis. 2d 1, 11,

456 N.W.2d 797 (1990). However, if this Court were to find that Allen adequately briefed this argument, the Court should reject it for the same reasons that it should reject the ineffective assistance of counsel argument as addressed above. *See, e.g., State v. Mayo*, 2007 WI 78, 301 Wis. 2d 642, 734 N.W.2d 115.

IV. Allen's claims of prosecutorial misconduct do not entitle him to a new trial.

Allen alleges that he is entitled to a new trial due to two alleged instances of prosecutorial misconduct. First, he alleges that the State vouched for the credibility of the witnesses against him. (Allen's Br. 25-28.) Second, he argues that the State violated his due process rights by using a prior unsworn statement to the police to impeach him. (Allen's Br. 28-29.)

The reversal of a criminal conviction because of prosecutorial misconduct is a "drastic step" that "should be approached with caution." *State v. Ruiz*, 118 Wis. 2d 177, 202, 347 N.W.2d 352 (1984). While not the case here, prosecutorial misconduct can rise to such a level that it violates the defendant's due process right to a fair trial if it poisons the atmosphere of the entire trial. *State v. Wolff*, 171 Wis. 2d 161, 167, 491 N.W.2d 498 (Ct. App. 1992). Allegations of prosecutorial misconduct are reviewed in light of the entire record of the case. *State v. Lettice*, 205 Wis. 2d 347, 353, 556 N.W.2d 376 (Ct. App. 1996). The determination of whether the record establishes that prosecutorial misconduct occurred is within the circuit court's discretion. *Lettice*, 205 Wis. 2d at 352 (citing S*tate v. Bembenek*, 111 Wis. 2d 617, 634, 331 N.W.2d 616 (Ct. App. 1983)).

This Court should affirm the circuit court's conclusion that the State did not vouch for the witnesses against Allen, and deny Allen's second claim because it was not properly preserved for appellate review.

A. The State did not vouch for Stewart's testimony in closing arguments.[5]

Prosecutors are given considerable latitude in closing arguments. "[A] prosecutor may comment on the evidence, argue to a conclusion from the evidence, and may state that the evidence convinces him or her and should convince the jury." *Mayo*, 301 Wis. 2d 642, ¶ 43 (citing *State v. Adams*, 221 Wis. 2d 1, 19, 584 N.W.2d 695 (Ct. App. 1998)). Moreover, the prosecutor may comment on the credibility of witnesses as long as the comments derive from evidence presented at trial. *Adams*, 221 Wis. 2d at 17. It is only when the prosecutor "goes beyond reasoning from the evidence to a conclusion of guilt and instead suggests that the jury arrive at a verdict by considering factors other than the evidence" that misconduct occurs. *State v. Draize*, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979).

During the State's closing argument, the prosecutor took great care in reviewing the evidence. When it came time to review Stewart's testimony, the prosecutor argued that the jury should not discredit Stewart's testimony simply

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[5] In his postconviction motion, Allen argued that the State vouched for both Stewart and Seaberry. (56.) In his appellate brief, his heading for the argument is "The Prosecutor Engaged in Misconduct for Arguing That *One* of the Witnesses was Credible . . ." (Allen's Br. 25 (emphasis added).) He then cites to the transcript of the prosecutor's comments about Victor Stewart. (Allen's Br. 25.) The State assumes, then, that the *one* witness Allen is referring to is Stewart and that Allen has abandoned his claim regarding Seaberry.

because he was testifying in exchange for an offer to plead guilty to a reduced charge. (82:93-95.) The prosecutor argued: "I'm not asking you to like the deals, ladies and gentleman, but the question is, are [the witnesses] telling the truth? They are." (82:94-95.)

The circuit court concluded that the prosecutor was not engaging in vouching. Rather, he was arguing that the fact that Stewart received a deal should not lead the jury to discredit Stewart's testimony. (61:10.) Because the prosecutor's comment was derived from the evidence presented at trial, the prosecutor was free to make that argument. *Adams*, 221 Wis. 2d at 17. There was no impermissible vouching and there was no suggestion that the jury consider facts other than the evidence. Thus, Allen is not entitled to relief on this claim.

Additionally, the jury was instructed that closing arguments were arguments and not evidence. (61:10; 82:71, 109.) The jury is presumed to have followed that instruction. *State v. Deer*, 125 Wis. 2d 357, 364, 372 N.W.2d 176 (Ct. App. 1985).

B. This Court should decline to address Allen's argument that the State improperly used his prior statement for impeachment purposes because Allen did not raise this issue in the circuit court.

Allen argues that the State violated his right to due process when it used Allen's prior statement to police to impeach Allen's trial testimony. (Allen's Br. 28-29.) Allen made no objection to the use of his prior statement at trial, and did not raise this argument in his postconviction motion. "It is a fundamental principle of appellate review that issues must be preserved at the circuit court." *State v. Huebner*,

2000 WI 59, ¶ 10, 235 Wis. 2d 486, 611 N.W.2d 727. "Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal." *Id.*

This Court should decline to address this issue. "The waiver rule is not merely a technicality or a rule of convenience; it is an essential principle of the orderly administration of justice . . . . The rule promotes both efficiency and fairness, and go[es] to the heart of the common law tradition and the adversary system." *Id.* ¶ 11. Allen did not object to the use of his statement at trial, nor did he raise this issue in his postconviction motion. The circuit court has discretion in assessing claims of prosecutorial misconduct. By not raising the claim below, Allen has circumvented the circuit court and has essentially and improperly asked for de novo review of the issue.

V. Pretrial publicity did not warrant a change of venue or jury sequestration.

A. There is no evidence that the venire was affected by any of the pretrial publicity.

The right to a change of venue is grounded in due process, and a change of venue is required when "adverse community prejudice will make a fair trial impossible." *McKissick v. State*, 49 Wis. 2d 537, 544, 182 N.W.2d 282 (1971); *see also Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966) (due process requires "an impartial jury free from outside influences").

When a change of venue is requested, the focus of the inquiry is prejudice. Pretrial publicity alone does not establish prejudice. Even pervasive, adverse pretrial publicity does not inevitably lead to an unfair trial. *Nebraska Press Association v. Stuart*, 427 U.S. 539, 554

(1976). Publicity that recounts facts is not inflammatory and "[a]n informed jury is not necessarily a prejudicial one." *Turner v. State*, 76 Wis. 2d 1, 27-28, 250 N.W.2d 706 (1977) (citation omitted). The question is whether publicity was "*calculated* to form public opinion against the defendant." *Id.* at 27 (emphasis added). Thus, to obtain a change of venue, the defendant must present sufficient evidence to show a reasonable likelihood of community prejudice that would preclude the possibility of a fair trial in that community. *State v. Albrecht,* 184 Wis. 2d 287, 306, 516 N.W.2d 776 (Ct. App. 1994).

A defendant may move the court for a change of venue pursuant to Wis. Stat. § 971.22, or alternatively request that a jury be impaneled from a different county pursuant to Wis. Stat. § 971.225. While impaneling a jury from a different county is an alternative to a change of venue, it is only available if there are grounds for changing the venue. Wis. Stat. § 971.225(1)(b). Allen moved the court to change the venue of trial or to impanel a jury from a different county. (17.) The circuit court concluded that there were no grounds for changing the venue, and thus both requests were denied. (71:8.)

An appellate court reviews a circuit court's denial of a change of venue motion under the erroneous exercise of discretion standard. *State v. Fonte*, 2005 WI 77, ¶ 12, 281 Wis. 2d 654, 698 N.W.2d 594. However, this Court "independently evaluate[s] 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." *Id.* (quotation omitted).

The factors considered include:

> "(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."

Id. ¶ 31 (quoting *Albrecht,* 184 Wis. 2d at 306).

Allen supplied the trial court with an affidavit identifying the following: seven articles from the Milwaukee Journal Sentinel from January 31, 2013 to July 2, 2013, that recounted certain facts of the case; one article from the Milwaukee Journal Sentinel in June of 2013, that explained the hung jury in the Griffin trial; and 25 instances of web or television coverage from January 31, 2013 to July 2, 2013, that recounted certain facts of the murder, three of which showed a mug shot or trial image of Allen. (17:11-14).

In considering the motion at a September 6, 2013 hearing, the court noted that there was a complete lack of local publicity at that time. (71:5.) The most recent local story presented by Allen occurred two months prior to the hearing, and there was a considerable time lag between the crime and trial. The court also correctly noted that the issue is not whether the crime and trial generated publicity, but whether that publicity was inflammatory. (71:5-6.) The court concluded that Allen had not met his burden to establish that a change of venue was necessary. (71:8.) Every instance of publicity presented in Allen's affidavit related to a *factual* account of the crime or the trials of his co-actors. There was no inflammatory rhetoric about Allen.

During the change of venue hearing, Allen requested that there be no extensive discussion of the publicity during voir dire because that would only inform others who were unaware of the attention this case had garnered. (71:9.) The court agreed. It further proposed that individual voir dire would be conducted regarding pretrial publicity if necessary. (71:9-10.)

Voir dire occurred five months later. During voir dire, the court admonished the jury as follows:

> This case generated some publicity during the course of the trial. You may recollect certain things that you may have heard on TV or radio.
>
> The Court would remind you that anything you heard outside the courtroom is not evidence in this case. You're only to strictly pay attention to the evidence that's brought before the Court.

(79:39.) The court then asked: "Does everybody understand that? Everybody can go with that?" (79:39.) There was no response from any member of the jury. The court also asked if anyone knew the defendant. (79:37.) No one responded.

There was no indication that anyone on the venire was affected by any of the pretrial publicity that occurred some months prior. Thus, there was no further mention of the publicity pursuant to the court's pretrial ruling. Allen, surprisingly, now faults the court for not taking proper care during voir dire even though the court was executing the agreed-upon strategy. (Allen's Br. 30-31.) Thus, this Court should reject Allen's contention that the circuit court did not take care in addressing this issue with the venire.

In addition to the court addressing the issue of pretrial publicity directly, the State also extensively questioned

members of the venire that had experience with the crime of homicide. (79:41-58.) Ultimately 13 members of the venire were impaneled from the original 26. Thus, the parties had no difficultly impaneling a jury.

Regarding the factors considered upon review, this Court should conclude that the circuit court appropriately exercised its discretion in denying Allen's motion because (1) the publicity was not inflammatory in nature; (2) there was a significant lag in time between the publicity and Allen's trial; (3) the court admonished the venire regarding any potential exposure to pretrial publicity, and it was not difficult to impanel a jury; (4) there was no indication that any juror was familiar with Allen or the publicity; (5) there was no need to utilize any peremptory and for cause challenges of jurors due to the publicity; (6) there was no evidence of the State's participation in the little publicity that was generated; (7) any basis towards the severity of the charge was rooted out during voir dire; and (8) as addressed above, the verdict returned was consistent with the evidence. As such, this Court should affirm.

B. It was not necessary to sequester the jury.

Sequestering the jury is a matter of circuit court discretion, pursuant to Wis. Stat. § 972.12. *See also*, *State v. Wilson*, 149 Wis. 2d 878, 908, 440 N.W.2d 534 (1989). The circuit court's decision not to sequester the jury during trial is reviewed for an erroneous exercise of discretion. *Id.*

Allen sought sequestration on grounds that once the members of the jury found out that Allen was charged with the murder of E.Y., they could possibly go home, do an internet search, and have access to a "cornucopia of prejudicial information." (71:8.) The court concluded that sequestration was not appropriate because the court

routinely instructs the jury not to conduct any outside research. (71:8-10.)

As addressed above, the publicity in this case was not prejudicial. And Allen does not assert that the court failed to admonish the jury regarding outside research. Thus, there is no basis to conclude that the court erroneously exercised its discretion when it denied Allen's motion to sequester the jury for the course of the trial.

VI. The court properly exercised its discretion when it sentenced Allen to life without extended supervision.

In general, to properly exercise discretion in sentencing, the sentencing record must illustrate that the court had a rational and explainable basis for the sentence imposed. *State v. Gallion*, 2004 WI 42, ¶¶ 22, 39, 270 Wis. 2d 535, 678 N.W.2d 197. Proper exercise of discretion requires the court to identify the general objectives of greatest importance and describe how the sentence furthers those objectives. *Id.* ¶¶ 41-43. The appellate court reviews a sentencing decision for erroneous exercise of discretion. *Id.* ¶ 17.

In this case, the court's sentencing choices were limited. Allen was convicted of first-degree intentional homicide. (34.) As such, he faced a mandatory life sentence. Wis. Stat. §§ 940.01(1)(a), 939.50(3)(a). The only discretion the court had in sentencing was whether Allen would be eligible for extended supervision. Wis. Stat. § 973.014(1g)(a).

Thus, to warrant a finding of erroneous exercise of discretion, Allen must establish that the record reveals an unreasonable or unjustifiable basis for the court's decision that Allen is ineligible for release to extended supervision.

See Elias v. State, 93 Wis. 2d 278, 281-82, 286 N.W.2d 559 (1980). "In reviewing a sentence to determine whether or not discretion has been abused, the court will start with the presumption that the trial court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence complained of." *Id.* The burden to prove an erroneous exercise of sentencing discretion is a heavy one and must be established by clear and convincing evidence. *State v. Landray M. Harris*, 2010 WI 79, ¶¶ 30, 34, 326 Wis. 2d 685, 786 N.W.2d 409.

Allen submits a cursory argument, with only one citation to the court's sentencing decision. He does not address the court's sentencing objective and fails to present any evidence that the court erroneously exercised its discretion. Rather, he simply asserts that the court erroneously exercised its discretion because (1) the "court apparently held it against Mr. Allen that the jury did not believe his coercion defense"; (2) the court did not properly take into consideration Allen's "remorse, repentance and cooperativeness"; (3) the court failed to consider Allen's level of culpability and that the co-actors did not receive life sentences; (4) the court failed to consider that he lacked a significant prior record; and (5) the court failed to explain why a lesser sentence would not meet the court's sentencing objectives. (Allen's Br. 33-34.) This Court should conclude that Allen's argument is woefully inadequate to overcome the strong presumption that the court's sentencing decision was reasonable.

First, in considering Allen's character, credibility, and culpability, the court noted that the jury did not believe that Allen's life was on the line when he committed this horrific crime. (84:22.) In response to the court's comment, Allen rebuffed: "The jury can believe whatever they want to believe. That is the truth coming from me. I'm sorry."

(84:22.) That exchange occurred after the court reasoned that it was Allen's choice to become a member of a gang and that Allen's self-serving characterization of himself as a man of peace was not credible. (84:17, 21.) The court explained: "So, when you say this is somebody I'm not, that is not true, because it was your choice. You chose this life. Because of that choice, you are not a man of peace. Men of peace don't do things like this. You did it. You are convicted of the ultimate offense." (84:22.)

Allen's character, his credibility, and his culpability are relevant and proper sentencing factors. An unreasonable or unjustifiable basis for sentencing occurs when the circuit court bases the sentence on irrelevant or improper factors. *Gallion*, 270 Wis. 2d 535, ¶¶ 17, 38. That did not happen here. Thus, the court did not erroneously exercise its discretion in considering Allen's failed defense.

Second, while the court did not expressly address Allen's alleged "remorse, repentance and cooperativeness," it was not required to do so. A defendant's "remorse, repentance and cooperativeness" is a secondary sentencing factor. *Robert Lee Harris v. State*, 75 Wis. 2d 513, 519, 250 N.W.2d 7 (1977). A failure to address secondary factors is not an erroneous exercise of discretion. *State v. Echols*, 175 Wis. 2d 653, 683, 499 N.W.2d 631 (1993).

Third, contrary to Allen's assertion, the court did consider Allen's level of culpability and the fact that the co-actors did not receive life sentences. In considering Allen's culpability related to that of the co-actors, the court commented:

> This was a significant amount of pain and torture that resulted at your hands. You are the one who placed that plastic bag over that victim's head,

> suffocated the victim, put a chain around that victim's neck and as you said, you felt the life being extinguished as a result of your actions . . . and it's purely senseless, mindless, how one can possibly be involved in a complete facilitation of taking one's life like this. There is really not much that can be said.

(84:20.) Furthermore, unlike his co-actors, Allen faced a *mandatory* life sentence. Again, the only discretion the court had during sentencing was whether Allen would be eligible for extended supervision.

The court concluded that Allen and McAlister were the two most culpable actors (84:21), and then explained to Allen that his sentence was more severe

> because of the nature of the offense and the fact that you had and you felt that victim's life leave that person, based upon what was stated, you deserve that life sentence. It sets you apart from the rest of those individuals.

(84:23).

Fourth, contrary to Allen's assertion, the court did consider Allen's prior criminal record. The court initially noted Allen's prior conviction at the beginning of the court's sentencing remarks. (84:19.) Later, the court explained why Allen's history was not a mitigating factor:

> The correctional experiences; your personal history, your academic, I understand that you graduated school, that you were employed for some period of time. You would think, based upon that and your life experiences you wouldn't be involved in something like this. But you are and you were the, in the hierarchy of individuals who had the culpability, you are one of two. You and your buddy Mcalister and you had ten years of more life experiences than

> he did and you did nothing to terminate what was going on.

(84:21.)

And finally, the court did explain why a life sentence without eligibility for extended supervision was necessary to meet its sentencing objective. The court concluded:

> You, sir, have basically lost your right to live in a civilized society because of your horrific and callous . . . however you want to describe it, you did it. And because of that the Court's going to impose a sentence in the Wisconsin State Prison system of life without the eligibility of extended supervision.
>
> The Court's thought hard and long about that, those type of sentences, because that is completely the maximum that you can get in a situation like this. But you deserve every single year of your life thinking about it, confined in a state institution because what you have done and the legacy of sadness that you have left behind.

(84:24.)

Allen committed a brutal murder and his defense of coercion was not credible. (61:9.) The sentencing transcript clearly establishes that the court identified the main objective to be furthered by the sentence imposed, described the facts relevant to that objective, and considered appropriate sentencing factors. (84:18-24.) "[W]here the exercise of discretion has been demonstrated, the appellate court follows a consistent and strong policy against interference with the discretion of the trial court in passing sentence." *Gallion*, 270 Wis. 2d 535, ¶ 18. Thus, this Court should affirm the postconviction order denying resentencing.

VII. Allen's sentence is not unduly harsh or excessive.

The circuit court has the discretion to determine the length of a sentence within the permissible statutory range. *Hanson v. State*, 48 Wis. 2d 203, 207, 179 N.W.2d 909 (1970). An appellate court will not substitute its preference for a particular sentence, and reviews the denial of a motion for sentence modification for an erroneous exercise of discretion. *Cresci v. State*, 89 Wis. 2d 495, 504, 278 N.W.2d 850 (1979); *Cunningham v. State*, 76 Wis. 2d 277, 281, 251 N.W.2d 65 (1977).

In denying a motion to modify on grounds that the sentence is unduly harsh or excessive, an erroneous exercise of discretion will only be found if the sentence is so excessive, unusual, and disproportionate that it shocks public sentiment and defies reasonableness. *State v. Grindemann*, 2002 WI App 106, ¶ 31, 255 Wis. 2d 632, 648 N.W.2d 507.

Allen argues that his sentence is excessive because it is longer than the sentence received by the co-actors. Specifically, Allen asserts that his sentence was excessive because (1) he received a life sentence and Stewart only received a sentence of 16 years, and (2) he was found not eligible for extended supervision while McAlister was found eligible for extended supervision after 50 years. (Allen's Br. at 35-37.) Allen asserts that he was more cooperative and less culpable, and thus his sentence should have been shorter. (*Id.*)

Allen's assertion is contrary to the conclusion of the court addressed above, and contrary to Wisconsin's long

standing policy that sentencing must be highly individualized. *Gallion*, 270 Wis. 2d 535, ¶ 48.

> It is not the philosophy of modern criminal law that the punishment fit the crime alone and that for every violation of particular statute there be an identical sanction. In light of the function of the law to deter similar acts by the defendant and others and to rehabilitate the individual defendant, it is essential that a sentencing court consider the nature of the particular crime, i.e., the degree of culpability—distinguishable from the bare-bones legal elements of it—and the personality of the criminal. The interests of both society and the individual must be weighed in each sentencing process. Clearly, the use of such an empirical guide will properly result in wide deviations from one sentence imposition to another.

McCleary v. State, 49 Wis. 2d 263, 271-72, 182 N.W.2d 512 (1971).

Courts are not bound by determinations made in different cases. *Ocanas v. State*, 70 Wis. 2d 179, 188, 233 N.W.2d 457 (1975). And while a sentence could be unduly harsh in light of a co-actor's sentence, leniency in one case does not transform a reasonable punishment in another case to a cruel one. *See State v. Ralph*, 156 Wis. 2d 433, 456 N.W.2d 657 (Ct. App. 1990); *Ocanas*, 70 Wis. 2d at 189.

The court "may impose a sentence within the limits set by statute . . . if it considers appropriate factors." *State v. Wagner*, 191 Wis. 2d 322, 332-33, 528 N.W.2d 85 (Ct. App. 1995) (citations omitted). As addressed above, the court did just that. Allen cannot reasonably compare a discretionary sentence to a mandatory sentence, and he cannot ignore the fact that the court concluded that he was the most culpable because he was the individual that actually choked the life out of the victim's body.

The court was bound by law to sentence Allen to a life sentence. Wis. Stat. §§ 940.01(1)(a), 939.50(3)(a). The only discretion the court had was whether Allen would be eligible for extended supervision. Wis. Stat. § 973.014(1g)(a). In sentencing Allen and his co-actors, the court considered each individual's action and background and concluded that the severity of the crime, the need for punishment, and the need to protect the community warranted each sentence imposed. (61:9.) Those factors establish a reasonable and justifiable basis for the court to conclude that Allen should not be eligible for extended supervision. Thus, this Court should affirm the postconviction order denying sentence modification.

CONCLUSION

For the foregoing reasons this Court should affirm the judgment of conviction and order denying postconviction relief.

Dated this 3rd day of November, 2016.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

TIFFANY M. WINTER
Assistant Attorney General
State Bar #1065853

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9487
(608) 266-9594 (Fax)
wintertm@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 9,577 words.

Dated this 3rd day of November, 2016.

_____

TIFFANY M. WINTER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 3rd day of November, 2016.

_____

TIFFANY M. WINTER
Assistant Attorney General