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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
CASE NO. 2017AP1889 CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

V.

ASHLEE A. MARTINSON.
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING DEFENDANT-APPELLANT'S MOTION FOR POST-CONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR ONEIDA COUNTY, THE HONORABLE MICHAEL H. BLOOM, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

MARK A. SCHOENFELDT
ATTORNEY FOR DEFENDANT-APPELLANT
230 W. WELLS ST. SUITE 214
MILWAUKEE, WI 53203
(414) 272-2860
STATE BAR NO.: 1010748

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BRIEF OF DEFENDANT-APPELLANT

STATEMENT OF THE ISSUES

1. Did the trial court judge erroneously exercise his discretion by erroneously placing on the defendant an obligation to perceive and make rational choices at a time when, as a matter of law, she was incapable of perceiving and making rational choices?

Denied by the post-conviction judge.

.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The defendant-appellant believes that the briefs filed by the parties to this appeal will adequately develop the issues involved. Therefore, neither oral argument nor publication is requested.

STATEMENT OF THE CASE

On March 11, 2016, the defendant, Ashlee Martinson, appeared before that branch of the circuit court for Oneida County presided over by the Honorable Michael H. Bloom, to enter pleas of guilty, pursuant to plea negotiations, to two counts of second degree intentional homicide, **Wisconsin State statute** section 940.05(1)(b). Pursuant to the Agreed Statement of Facts made part of the record at the time of the defendant's pleas:

> In the days leading to March 7, 2015, the defendant was preparing to leave the Ayers' residence and move in with a friend. This is confirmed by the friend named Shambree Townes. On the morning of her 17th birthday, March 6, 2015, Facebook records reveal that the defendant texted her friend Ryan Daniel Sisco "...I woke up this morning to my step(-)dad beating my mom . . . I can't take that shit anymore, he's gonna kill her if she doesn't leave soon and I don't wanna be around w[h]en that happens. . i've been trying to get her, she just got two jobs now, before she had no money cuz my step(-)dad spent it all, now I think she is gonna leave once the money starts coming in, I fucking hate them too, I want to kill him so fucking bad, just take one of his guns and blow his fucking brains out." Later, the defendant reported she

thought her mother was screaming for her life that morning.

According to LRA, on March 7, 2015, after examining her Facebook account, Thomas and Jennifer Ayers confronted the defendant about her relationship with 22-year old Ryan Daniel Sisco. Thomas Ayers and Jennifer Ayers informed the defendant that she could no longer have communication with Mr. Sisco, and took her keys and phone.

According to the defendant, Jennifer Martinson said that the defendant should leave the house. Thomas Ayers argued she should stay, be homeschooled, and that she should essentially be placed on house arrest for the foreseeable future.

According to the defendant, she gathered some of her belongings and made her way on foot from the home to a neighbor, Jonathan Rasmussen. Thomas Ayers followed the defendant in his truck and directed her to enter the truck in order to come back to the home with him. En route, Thomas Ayers told the defendant that it was in her best interests to remain in the Ayers' home.

According to the defendant, when they arrived home she went to her bedroom. For the purposes of killing herself, she armed herself with one of the many loaded shotguns in the house.

At that same time, according to LRA, Thomas Ayers came from outside of the house and asked Jennifer Ayers the whereabouts of the defendant. When he was told that she was in her bedroom, Thomas Ayers commented "She's probably doing something stupid." L R A saw Thomas Ayers go upstairs to the bedroom of the defendant and loudly bang upon the defendant's bedroom door because he was angry.

> According to the defendant, she at that time considered whether Thomas Ayers should die rather than she.
>
> LRA reports she then heard two (2) gunshots
>
> The first shot fired was to Thomas Ayers neck. A second shot was a contact wound to his temple. The defendant indicates that second shot was fired to ensure that he was dead and could not hurt her.
>
> According to LRA, Jennifer Ayers made her way towards the shots. According to the defendant, she sought comfort from her mother for what she had done. Jennifer Ayers instead tended to Thomas Ayers and yelled at the defendant about what she had done. According to the defendant, her mother than armed herself with a knife and approached the defendant.
>
> According to LRA, a struggle ensued between Jennifer Ayers and the defendant over a knife The defendant wrestled the knife away from Jennifer Ayers and stabbed her more than 30 times. Some of the stab wounds were inflicted with considerable force.
>
> According to Captain Hook, the death of Thomas Ayers occurred within feet and within moments of the death of Jennifer Ayers. The defendant acted upon provocation premised upon a reasonable belief in the conduct of Thomas Ayers and Jennifer Ayers, completely losing control at the time of the commission of the homicides, demonstrating anger, rage and exasperation as a person of ordinary intelligence and prudence under similar circumstances would have done.

On June 10, 2016, the defendant, Ashlee A. Martinson, again appeared before that branch of the circuit court for

Oneida County presided over by the Honorable Michael H. Bloom for sentencing. The court imposed concurrent bifurcated sentences of 23 years of initial confinement and 17 years of extended supervision in connection with each of the pled to charges. (R. 55-1-2)

Ms. Martinson is currently incarcerated at the Taycheedah Correctional Institution in Fond du Lac, Wisconsin. She brought a motion for post-conviction relief (R. 63-1-2) and supporting brief (R. 64-1-19) pursuant to **Wisconsin State Statute** section 809.30(2)(h) which was denied, after a hearing, the Honorable Michael H. Bloom, presiding, by an Order dated September 14, 2017. (R.69-1; A. App. 122) This appeal followed.

ARGUMENT

1. The trial court judge erroneously exercised his discretion by erroneously placing on the defendant an obligation to perceive and make rational choices at a time when, as a matter of law, she was incapable of perceiving and making rational choices

A. Standard of Review – Sentencing

Sentencing lies within the sound discretion of the trial court. A strong policy exists against appellate interference with that decision. **State v. Haskins**, 139 Wis. 2d 257, 268, 407 N.W. 2d 309 (Ct. App. 1987). The primary factors on which a sentencing decision should be based are the gravity of the offense, the character of the offender, and the need to protect

the public. **State v. Harris**, 119 Wis. 2d 612, 623, 350 N.W. 2d 633 (1984). As the Wisconsin Supreme Court has noted, review of sentencing is limited to a two-step inquiry. The reviewing court must first determine whether the trial court properly exercised its discretion in imposing sentence. If it is determined that it did, the court must next decide whether that discretion was abused by imposing an excessive sentence.

There must be evidence in the record that the trial court exercised discretion in imposing sentence. If the record shows a process of reasoning based on legally relevant factors, the sentence will be upheld against an attack that the trial court failed to exercise its discretion. **State v. Smith**, 100 Wis. 2d 317, 323-24, 302 N.W. 2d 54 (1981); overruled on other grounds, **State v. Firkus**, 119 Wis. 2d 154, 350 N.W. 2d 82 (1984).

However, discretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning dependent upon facts that are of the record or that are reasonably derived by inference from that record and a conclusion based on a logical rationale founded upon proper legal standards. **McCleary v. State**, 49 Wis. 2d 263, 277 182 N.W. 2d 512, 519 (1971)

A sentence well within the limits of the maximum sentence is not so disproportionate as to shock the public sentiment or violate the judgment of reasonable people concerning what is right and proper under the circumstances.

State v. Daniels, 117 Wis. 2d 9, 22, 343 N.W. 2d 411 (1983) Further, as a general rule, the significance of each factor in the total sentencing process lies solely within the sentencing court's discretion as demonstrated by the record. **State v. Patino**, 177 Wis. 2d 348, 385, 502 N.W. 2d 601 (Ct. App. 1993)

"[A] good sentence is one which can be reasonably explained." **McCleary v. State**, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971). If the trial court gives inadequate reasons for the sentence imposed, the defendant's sentence is the product of an erroneous exercise of discretion. See **id**.

Because there is a strong public policy against interfering with the sentencing discretion of the trial court, See **State v. Harris**, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984), sentencing is left to the discretion of the trial court, and review is limited to determining whether the trial court erroneously exercised that discretion. See **id**. Nevertheless, the supreme court has said that "an [erroneous exercise] of discretion might be found if circumstances indicate: (1) a [f]ailure to state on the record the relevant and material factors which influenced the court's decision; (2) reliance upon factors which are totally irrelevant or immaterial to the type of decision to be made; and (3) too much weight given to one factor on the face of other contravening considerations." **Ocanas v. State**, 70 Wis. 2d 179, 187, 233 N.W.2d 457 (1975) (citing **McCleary**).

The statement of the Wisconsin Supreme Court in **McCleary** as to the importance of a sentencing record that adequately develops and explains the sentencing judge's logic is instructive:

> [T]he legislature vested discretion in the sentencing judge, which must be exercised on a rational and explainable basis. It flies in the face of reason and logic, as well as the basic precepts of our American ideals, to conclude that the legislature vested unbridled authority in the judiciary when it so carefully spelled out the duties and obligations of the judges in all other aspects of criminal proceedings....[T]he requirement that the sentencing judge articulate the basis for [a] sentence will assist ... in developing ... a set of consistent principles on which to base his [or her] sentences....[The trial judge's] decisions will not be understood by the people and cannot be reviewed by the appellate courts unless the reasons for decisions can be examined. It is thus apparent that requisite to a prima facie valid sentence is a statement by the trial judge detailing his [or her] reasons for selecting the particular sentence imposed. The purpose of the sentencing statement is not only to aid in appellate review but also to facilitate the trial judge's rationale of his [or her] sentences. The requirement that the reasons for sentencing be stated will make it easier for trial judges to focus on relevant factors that lead to their conclusions. **Id**. at 280-82

McCleary requires that the trial court to make a sufficient record detailing their reasons for the sentence

imposed: (1) to provide the defendant, the victim, the victim's family, and the community as a whole with a satisfactory explanation of the debt owed to society; (2) to provide the appellate courts with an adequate record for review; and (3) to aid the trial court in focusing on relevant factors in order to impose just sentences. See also **ABA Standards for Criminal Justice Sentencing**, § 18-5.18 (Commentary), at 209 (3d ed. 1994) ("The requirement of findings of fact serves multiple purposes. First, the discipline of thought necessary for a court's reasoned determination of a sentence is fostered by the process of articulation of the factual bases for the judgment. Second, findings of fact are essential to meaningful appellate review of sentences.")

These requirements were reaffirmed in **State v. Gallion**, 2004 WI 42, where the Wisconsin Supreme Court indicated that sentencing courts **must** identify the general objectives of greatest importance in the case, **Id**, ¶ 41, describe the facts relevant to these objectives, **Id.**, ¶ 42, identify the factors considered in arriving at the sentence, **Id.**, ¶ 43, consider aggravating and mitigating factors in Wis. Stat. § 973.017(3); **Id**., ¶ 43, n.12, consider any applicable sentencing guidelines, as required by Wis. Stat. § 973.017(2)(a), **Id**., ¶ 47 indicate how the identified factors fit the objectives and influence the decision, **Id.**, impose a sentence calling for the minimum amount of custody that is consistent with protecting the public, the gravity of the offense, and the rehabilitative needs of the

defendant, **Id.**, ¶ 44, meet this minimum-custody standard by considering probation as the first alternative, **Id**., and impose probation unless confinement is necessary to protect the public, the offender needs treatment available only in confinement, or probation would unduly depreciate the seriousness of the offense, **Id**.

In order to comply with **Gallion**, the trial court is required "by reference to the relevant facts and factors, [to] explain how the sentence's component parts promote the sentencing objectives. By stating this linkage on the record, courts will produce sentences that can be more easily reviewed for a proper exercise of discretion." **Id.**, ¶ 46.

B. The trial court judge's statement at sentencing

At sentencing, the record shows the following statement by the trial court judge:

> THE COURT: All right. The record should reflect that for purposes of sentencing today's proceeding, I have reviewed the criminal complaint originally filed in this case, the testimony that I heard at the time of the preliminary examination, the report of Doctor Brad Smith, Attachment A of the written plea agreement that was filed previously, read the transcript of the recorded interviews of the defendant's step-siblings, I have read the sentencing memorandum submitted on behalf of the defendant along with recommendation of the Governor's of Juvenile Justice Commission

dated October 29th of 2015, as well as a report of the McGyver Institute and the Texas Public Policy Foundation regarding 17 year-olds in adult court.

I have reviewed the written report of Doctor Dolezal as well as heard her testimony today. I was provided statements by the defendant's step-siblings today in chambers. I have considered the statement of Sandra Rumore given here in court.

I will be considering the contents of the DVD recording that was played in court today as well as the testimony of Ms. Kibbee and the arguments of counsel. Ms. Martinson has declined to speak. A letter to me from her was provided by Mr. Wilmouth and Ms. Ferguson. I have read that. That will be marked as an exhibit and entered into the record.

As has been indicated, at sentencing when determining a sentence a Circuit Court must consider three primary factors; the seriousness of the offense, the character of the offender, and the need to protect the public. There are a variety of secondary factors which are to be considered as well.

The sentence imposed pursuant to the Wisconsin Supreme Court should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant.

As has been pointed out, the United States Supreme Court has held on various issues relative to criminal sentencing in regard to persons under the age of 18, in the United States Supreme Court decision of Roper vs. Simmons, the Supreme Court held that imposition of a death penalty on offenders who are under the age of 18 when their crimes were committed is unconstitutional. The court stated that juveniles differ from adults in three fundamental ways;

immaturity, vulnerability, and character changeability.

In the Supreme Court decision in Graham vs. Florida, it was held that a life sentence without parole for juveniles who committed non-homicide offenses is unconstitutional.

In the case in 2012 of Miller vs. Alabama, the United States Supreme Court held that mandatory life imprisonment without parole even for homicide offenders under the age of 18 at the time of their crimes is unconstitutional.

The upshot of the Supreme Court's pronouncement on juvenile sentencing or sentencing of individuals who committed crimes before the age of 18 is that although a juvenile is not absolved of responsibility for his or her actions, the transgression is not as morally reprehensible as that of an adult.

The court is required to consider those aspects of the law relative to sentence, although the court is also obligated to acknowledge that the legislative policies of the State of Wisconsin at this time and at the time these crimes were committed holds that anyone who's attained the age of 17 years is an adult for purposes of sentencing, and that is something I cannot ignore either.

The seriousness of the offense in this case, in my judgment, is the paramount aspect of this situation. On the face of things, we have a situation where the defendant has acknowledged being responsible for the violent death of two individuals. One by way of two shotgun blasts and one by way of in excess of 30 stab wounds. That, on the face of it, is what I'm dealing with in terms of the nature of this offense.

Now, there has been substantial material put into the record that number one establishes, as has been conceded by both parties, that there was adequate provocation in this case, and adequate provocation is defined by statute insofar as adequate means sufficient to cause a

complete lack of self-control in an ordinarily constituted person, and provocation means something which the defendant reasonably believes the intended victim has done which causes the defendant to lack self-control completely at the time of causing death.

The defendant has been convicted of second degree intentional homicide rather than first degree intentional homicide as a result of an agreement, more or less, between the parties that adequate provocation was present, and that agreement has been approved by the court at the time of the plea hearing.

There is also a substantial amount of material in the record relative to what can only be called abusive circumstances that have existed in the life of the defendant over the course of her entire life including the time that she and her mother were residing with Thomas Ayers.

There are two diametrically opposed forces that are at work in this case that are difficult to reconcile. We have the enormity of the acts committed by the defendant, actions against two people, one involving a 12 gauge shotgun used at close range. The other a knife used in excess of 30 times.

There is no way to characterize such conduct as extreme and the gravest of crimes or at least among the absolute gravest of crimes that a person can face sentencing for. That is a force that exists in this case and cannot be ignored.

There is another force at work which cannot be ignored, and that is that we have a lifetime really of information regarding the life that Ashlee Martinson has lead with her mother, her biological father, a man named Jerry Hrabe, and more recently Thomas Ayers that has given rise to an acknowledgment by the state that we have the adequate provocation which mitigates a first degree intentional homicide to a second degree, and we also have a substantial amount of

evidence indicating what can only be characterized as an ongoing, abusive environment which the defendant was forced to live and which, in essence, came to a head in March of 2015 when these acts were committed.

The counter-force to the pure gravity of the defendant's acts supports prospective sympathy, to some degree leniency, and the court has to be mindful of that. But the starting point -- the starting point for this case is a case of two counts of second degree intentional homicide committed against two people under extraordinarily harsh circumstances.

The court must consider the character of the offender. The testimony of Doctor Dolezal, in large part, contributed to the court's impression of the defendant's character. I found Doctor Dolezal's testimony credible and her approach was reasonable. She did not invade the province of the court in terms of determining the sentence in this case.

Her testimony established a number of things that the court must consider in determining the character of the offender as well as the need to protect the public. There appears to be no dispute between Doctor Dolezal or Doctor Smith that Ms. Martinson suffers from or suffered at the time of the offenses with major depressive disorder and post-traumatic stress disorder.

There is no indication that she suffers from psychopathy, there is apparently no malingering or feigning mental illness, and the upshot of the testimony of Doctor Dolezal as it dovetails with the report of Doctor Smith is that the condition that Ms. Martinson suffered from likely caused a reasonable fear of future violence to herself and others and also possessed a reasonable belief that she had no other options.

Aside from that, we have anecdotal information from some of the individuals who agreed to speak for purposes of the recorded

interviews that were presented in the DVD recording, none of which described the defendant as anything other than a more or less normal teenager despite the fact that those abusive circumstances more or less dogged her entire life.

The defendant's character appears to be a combination of a normal teenager mired in abusive circumstances who suffers from bona fide mental illnesses.

It does not appear that there as a result of there being a lack of psychopathy detected by either of the two doctors who evaluated her that there is an inner bad character to the defendant other than the fact that she committed these acts, and also importantly that there was something inside of her on March 7th of 2015 that allowed her to do these things, and that cannot be ignored in terms of assessing the defendant's character.

That particular aspect of the situation falls for the most part into the gravity of the offense more so than her character, but it is an aspect of the situation that cannot be ignored, in my judgment.

It is important to assess the input of Doctor Dolezal and Doctor Smith in assessing the need to protect the public. The need to protect the public, as I see it, to be candid is not a situation where we have to fear that at some point in the future when Ms. Martinson leaves incarceration that she will kill again. Based on everything I have heard and read in this case, I do not believe in my heart or in my mind that that is something that the public needs to worry about.

There are other things that are of concern, the most striking being the potential that she could walk the path if not adequately treated, rehabilitated, accountable for what she's done, walk the path that her mother walked which I think it is fair to say based on everything that's been presented here today had enormously

negative consequences for a large number of people, the defendant and others included.

The court has to look at other factors in addition to the three primary factors which, in my judgment, enhance the analysis of the three mandatory factors.

Relative to a past record of criminal offenses or history of undesirable behavior pattern, we really have none.

One thing that has been pointed out is art work and writings of the defendant which suggests a morbid or anti-social preoccupation with poor or gothic art that is unhealthy and that potentially would predispose a person to the kind of acts that were ultimately committed against Thomas Ayers and Jennifer Ayers in this case.

I accept the proposition that has been confirmed by a number of individuals that the way that this incident played out is not consistent with a preplanned endeavor. The manner in which the incident arose, the manner in which Ms. Martinson departed the residence basically leaving everything as it was and all other aspects of the situation lead me to conclude that as horrific as the defendant's acts were, they were spontaneous and not premedicated and the result of as has been acknowledged by both parties adequate provocation.

This aspect of the situation dovetails with the defendant's personality, character, and social traits. There are many young people who are apparently fascinated by this type of entertainment or art. I don't necessarily know what to make of that, but I do not see these aspects of the defendant's behavior and activity prior to these events as being an underlying cause of what happened here.

The degree of the defendant's culpability is a factor that the court may consider. The defendant has pled guilty to two counts of second degree intentional homicide based on acts that she committed which I have already described.

Her culpability in committing those acts is obvious on its face.

There are other factors that need to be looked at. The court needs to reconcile these competing forces that I alluded to earlier, but the defendant's culpability is on its face obvious, in my judgment.

I believe that the defendant is remorseful and ultimately was cooperative in responding to the prosecution which was started following her arrest in Indiana. It is of limited significance to the sentencing decision, in my judgment, the fact that there was some lack of candor at the very beginning of Ms. Martinson's contact with law enforcement.

The court may also consider the defendant's need for close rehabilitative control. There does not appear to be any dispute that Ms. Martinson suffers from some significant problems what has been described as a major mental illness and that she needs treatment.

There is no dispute that the defendant has been incarcerated since March 8th of 2015. The length of pretrial detention is a factor, her age, educational background, employment record are a factor. She's a young lady 18 years of age at this time. She's a high school graduate as of yesterday. She has had employment.

The last factor that's been cited in the materials provided to the court are the rights of the public which is sometimes a hard to define concept in criminal proceedings. Criminal proceedings are brought by the state. Criminal proceedings are not brought on behalf of a victim or victims. Criminal proceedings are not brought on behalf of the general public. They are brought on behalf of the government. And in my judgment, the meaning of the rights of the public is that the public entrusts the government to administer the criminal justice system in a way that is fair to all participants including the defendant and the victims of crime and

administers justice in a way that rises to the level necessary when a crime is committed.

The public has a right to expect something of Mr. Schiek. The public has a right to expect something of me in terms of pronouncing sentence.

A lot of material has been presented today. I have made specific reference to the materials that I have reviewed for purposes of imposing sentence. I don't believe it's necessary for me to regurgitate all of that information in detail at this time. It has been presented on the record, it has been elaborated on by Mr. Schiek and Mr. Wilmouth, and it's appropriate that Mr. Wilmouth pointed out the words that I stated at the time of the plea hearing that the information that's been provided should make any person sympathetic to Ms. Martinson. I believed that then and I believe that now.

I don't believe that any person of conscience could or should approach the situation without sympathy for the things that happened to Ms. Martinson in her life before the events of the March 7th of 2015, but sympathy must yield in the face of truth, and part of the truth of what's happened here is that two people were killed. One by a close shotgun blast to the neck followed by an up close shot to the head with a 12 gauge shotgun. The other hacked up with a knife. That's part of the truth of what happened here, and that truth, that part of the truth, has caused outrage in people. It's caused outrage in some of the family members of the victims who have written letters and provided information in court today. It's outraged members of the public, and I cannot say that that outrage is unjustified.

However, just like sympathy must yield in the face of truth, outrage must yield in the face of justice. Justice must recognize that another part of the truth of what's happened here is the reality of the abusive circumstances in which the

defendant lived with her mother, Jennifer Ayers, and eventually Thomas Ayers.

Now, what was that really like? We have seen a lengthy video presentation that gave a very thorough picture through the statements of real people who had a basis to know what they were talking about, to some extent, and what things were like.

Like Mr. Wilmouth, I look to literature and philosophy to help bring things in focus, and there's a poem I recall from college which says "Roses, the flowers are easy to paint. The leaves, difficult." It's easy to see what's right there and obvious. Pulling the background of a situation into proper focus is difficult.

There is one common theme that sort of goes through everything that has been presented about Thomas Ayers and the life that he lived both before and while with Jennifer Ayers and the defendant, and that common theme is isolation. Ms. Rumore spoke about isolation, and in some ways Ms. Rumore exemplifies these diametrically opposed forces at work in this case. She appeared here as she indicated speaking as an anguished -- a justifiably anguished sister of one of the victims in this case, but she also has a relatively thorough set of experiences as an advocate for the rights of victims of domestic abuse and her statements on her own behalf and her responses to the questions put to her by Mr. Wilmouth illustrate those counter-veiling forces. She mentioned that victims are often isolated to the extent that they do not have access to resources. She acknowledged that her brother, Thomas Ayers, exercised control over others including intimate partners in his life.

In my experience, isolation is a technique that one uses to exercise control, control often being one of the motivating forces behind domestic abuse.

The record establishes that the abusive circumstances that are alleged to have existed in

this case did, in fact, exist. However, as Mr. Schiek more or less indicated in his statements, whatever Thomas Ayers did in his life and whatever Jennifer Ayers may have done they did not deserve to die at the hands of the defendant in the manner in which they were killed.

Again, Ms. Rumore indicated that, and this exemplifies the fact that while obviously she came to court today with a prospective, she talked herself about people looking at a situation from different perspectives through different lenses, very insightful things to say about the case and more or less consistent with what I'm trying to say. There are two different perspectives, two different lenses that this case can be seen through that are both there and they are not consistent with each other, but they have to be reconciled. It appears that Ms. Rumore recognized that when she said in response to one of Mr. Wilmouth's questions that it is the totality of the circumstances that needs to be taken into account.

There is ample support in the record justifying the amendment of the two counts in this case from first degree intentional homicide to second degree intentional homicide. There is ample support in the record that the full maximum penalty of in essence 80 years of initial confinement is not required in this case. And, in my judgment, there is ample support in the record to conclude that some amount of incarceration less than 40 years is called for in this case, but one of the primary focuses of the discussion in this case focuses on the proposition that the defendant did not have a choice.

Doctor Dolezal spoke about the fact and testified and her, testimony I find to be psychologically supported that the defendant did not believe that she had a choice. The report of Doctor Smith indicates, and Doctor Dolezal did not necessarily address this explicitly, but her testimony did not refute it. Doctor Smith

concluded that the extent of Ms. Martinson's mental illness though real did not deprive her of an appreciation of the wrongfulness of her conduct and also did not deprive her of the ability to conform her conduct to the law.

The existence of the defendant's mental illness as it applies to her character and to the situation as a whole is a mitigating factor, but I don't believe that it refutes the proposition that the defendant did have a choice on March 7th of 2015 and, in my judgment, the most important point that needs to be made by way of this proceeding is that yes, the defendant had a choice.

Some of the comments that were made by Ms. Leonard, the lady from Missouri, were very well reasoned. The circumstances in her case were although the gory details thankfully were not included in the recording were that she was apparently the victim of ongoing sexual assaults by her father over a number of years ultimately resulting in her killing her father.

I have no doubt that the quality of the defendant's life was severely threatened by the continuing presence of Thomas Ayers, but your life itself was not threatened based on the information that's been presented to me. Of everything that can be said about Thomas Ayers and the things that he's done, it does not appear that he laid his hands on you in the manner in which he apparently has others.

I believe it's true to say that while the quality of your life was severely effected by the continuing presence of the Thomas Ayers, your life itself was not threatened. You did have a choice.

It's possible that at that moment a friendly hand on your shoulder or a kind voice to say wait, don't do this, may have been enough to stop this from having happened. I recognize the fact that there was no friendly hand or kind voice available to you and that there had not been for a

lengthy period of time, but even without that kind of support, society expects its citizens, I believe even 17 year-old citizens, to find the strength within themselves to stop themselves from pointing a 12 gauge shotgun at someone and pulling the trigger. Again, you did have a choice.

There is justification in the record in this case for showing mercy to the defendant, and justice must be tempered by mercy, but justice cannot be replaced by mercy.

There are many aspects of this case that weigh in favor of the defendant relative to her character and the need to protect the public and many of the other factors, but in the face of what we have here, two people killed in the harshest possible way, that the gravity of the offense and the rights of the public call for a sentence in excess of what is being recommended by the defense.

For the reasons stated on each of the two counts of second degree intentional homicide, I am imposing two concurrent prison sentences totalling 40 years in length to be comprised of 23 years of initial confinement and 17 years of extended supervision. The defendant will be required to provide a DNA sample, although you are advised you have the right to request expungement of your DNA under Wisconsin statute 165.77(4).

I am assessing court costs to the extent that they can be collected while the defendant is serving her sentence. They may, if they are unpaid at the time that she is released, payment will be made a condition of extended supervision.

I am not setting any particular conditions of extended supervision at this time. I'm assuming that though there is no guarantee to what extent the defendant will be able to utilize programming in the prison system, I believe that a better time to assess the conditions will be at

the time of her release. I will only require that she engage in whatever treatment or counseling is required by her agent hopefully consistent with programming that has been able to occur in the institution prior to her release.

The defendant was taken into custody on March 8th of 2015?

MS. FERGUSON: Yes.

THE COURT: By my calculations, that entitles her to 467 days of sentence credit. Is there any dispute with that number, Mr. Wilmouth?

MR. WILMOUTH: No.

THE COURT: Mr. Schiek?

MR. SCHIEK: No, judge.

THE COURT: The judgment of conviction will so reflect. Is there any detail of the sentence that needs to be elaborated or clarified from the state's prospective?

MR. SCHIEK: I don't think so, your Honor.

THE COURT: Mr. Wilmouth?

MR. WILMOUTH: No.

THE COURT: Ms. Martinson, you have the right to appeal my decision if you believe I made an error of law or abused my discretion. The clerk will provide an information sheet regarding your rights to appeal. Please go over that with your attorney. Sign the top sheet so that can be returned to the clerk. Look to Mr. Wilmouth and Ms. Ferguson for further advice regarding your rights to appeal.

Good luck to you.

MS. FERGUSON: Judge, I do have a couple housekeeping matters before we go off the record. The video that needs to be marked and received into evidence. I would move that along with Exhibit "8" and "9" which were the two doctor reports, but those I would ask that they be kept under seal.

THE COURT: Any objection?

MR. SCHIEK: No, judge. I will try to submit the restitution number to Mr. Wilmouth in the next week or two if the court is okay with that.

THE COURT: That's fine. I have a copy of the DVD in chambers along with a copy of Ms. Martinson's letter. They will be marked as exhibits and submitted to the clerk. The doctor's reports are received and will be filed under seal. That's all.

(R. 86-206-226; A. App. 101-121)

C. The Decision and Order Denying Post-Conviction Relief

A hearing was conducted in the above-captioned action on September 13, 2017, relative to the Defendant's Motion for Postconviction Relief, which was filed on July 26, 2017. The state appeared by District Attorney Michael W. Schiek. The defendant, Ashlee A. Martinson, appeared via telephone from the Taycheedah Correctional Institution. Posteonviction counsel for the defendant, Attorney Mark A. Schoenfeldt, appeared in person. Based on all of the files, records and proceedings herein, and for the reasons set forth on the record during the September 13, 2017, hearing,

THE COURT HEREBY FINDS that that sees. 940.01(2)(a) and 940.05(1), Stats., do not, as a matter of law, foreclose a court from considering, when sentencing a defendant convicted of 2'-degree intentional homicide on the basis of adequate provocation, that the defendant "had a choice" in regards to the conduct which caused the underlying death(s). As such, the court did not abuse its discretion by doing so. Therefore,

IT IS HEREBY ORDERED that the Defendant's Motion for Postconviction Relief is DENIED

(R. 69-1; A. App.122)

D. The trial court judge erroneously exercised his discretion

It is the defendant's contention that the court erroneously exercised its discretion by failing to consider that the adequate provocation that the court conceded existed at the time of the defendant's actions rendered her, as a matter of law, incapable of making rational choices. The record shows that, in the end, the reason for the court's sentence was the court's conclusion that the defendant had a choice in this matter. That she could have chosen, even at the last moment, not to kill. This is apparent in the following quote from the transcript:

> I have no doubt that the quality of the defendant's life was severely threatened by the continuing presence of Thomas Ayers, but your life itself was not threatened based on the information that's been presented to me. Of everything that can be said about Thomas Ayers and the things that he's done, it does not appear that he laid his hands on you in the manner in which he apparently has others.
>
> I believe it's true to say that while the quality of your life was severely effected by the continuing presence of the Thomas Ayers, your life itself was not threatened. You did have a choice.
>
> It's possible that at that moment a friendly hand on your shoulder or a kind voice to say wait, don't do this, may have been enough to stop this from having happened. I recognize the fact that there was no friendly hand or kind voice available to you and that there had not been for a lengthy period of time, but even without that kind of support, society expects its citizens, I believe even 17 year-old citizens, to find the strength within themselves to stop themselves from pointing a 12 gauge shotgun at someone and pulling the trigger. Again, you did have a

choice.
(R. 86-222; A. App. 117)

In the first instance, the court was, of course, aware of the defendant's horrendous history of a lifetime of exposure to sexual, physical, mental and emotional abuse at the hands of virtually every adult that she had more than incidental contact with. It is the defendant's contention that the court erred in improperly assigning to her the duty to act in the same fashion and with the same knowledge of options that a 17 year old who had not been abused and isolated for her entire life would have had. The defendant was not a "normal" 17 year old. The defendant was, as a result, incapable of assessing the situation in the same way that a "normal" 17 year old would have done. The actual choice that the defendant believed that she had, at the moment of this incident, was whether to kill herself as she had initially planned or whether to kill Thomas Ayers.

As the transcript of the Motion Hearing in this case shows, the court grounded its denial of the Motion, largely, in a review of the legislative history of the Statute. (R. 83-12-19; A. App. 123-130) The court's reliance on the legislative history of the statute in order to determine the subjective intent of the legislators was, the defendant asserts, inappropriate and violative of the primary canons of statutory construction. The purpose of legislative interpretation is to discern the intent of the legislature, first considering the language of the statute. If the statute clearly and unambiguously sets forth the legislative intent, the court does not look beyond the statute to find the statute's meaning. In construing a statute, all words and phrases

should be construed according to common and approved usage unless a different definition is designated by statute. Resort to a dictionary may be made to ascertain the common and ordinary usage of an undefined term. Resort to a dictionary does not render a term ambiguous. **State v. Curiel**, 227 Wis. 2d 389, 597 N.W.2d 697 (1999).

When a statute is written in objective terms not susceptible to more than one meaning, the subjective intent of lawmakers is not controlling. **State v. Derenne**, 102 Wis. 2d 38, 306 N.W.2d 12 (1981). It is impermissible to apply rules of statutory construction to ascertain legislative intent when the legislation is clear on its face. **Jones v. State**, 226 Wis. 2d 565, 594 N.W.2d 738(1999).

It is clear, from even the most cursory review of section 904.01 and its related elements, that the ambiguity needed to trigger a review of the legislative history does not exist. Pursuant to **Wisconsin State Statute** section 940.01, first-degree intentional homicide occurs whenever a person causes the death of another human being with intent to kill that person or another. Subsection 940.01(2) sets forth a number of different mitigating circumstances which constitute affirmative defenses to prosecution for first-degree intentional homicide and which mitigate the offense to second-degree intentional homicide. Subsection (2)(a) of that statute sets forth the affirmative defense of adequate provocation. "Adequate provocation" is defined in section 939 44. According to section 939.44(1)(a), "adequate" means *sufficient to cause complete lack of self-control in an ordinarily constituted person*.

[Emphasis added]. Under subsection (1)(b), “provocation" means something which the defendant reasonably believes the intended victim has done which causes the defendant to lack self control completely at the time of causing death. It is, therefore, clear that the quantum of ambiguity needed to trigger a review of the legislative history of the meaning of the term "adequate provocation" simply does not exist. The court, therefore, erroneously exercised its discretion by engaging in a review of the legislative history.

As noted, the defense of “adequate provocation” which the court at the time of the plea conceded applied in this case, requires that there be a complete loss of self-control. By definition, someone who has completely lost self-control has also lost the ability to rationally consider his or her options. Has lost the ability to make choices.

The defendant concedes that the court, at sentencing, is not foreclosed from considering that the defendant acted intentionally. That she acted with a purpose. However, the defendant contends that the court is not thereby allowed to treat the state of mind inherently present in cases of adequate provocation as nothing more than a legal device that operates only to mitigate the charge, but that then need not be considered as part of the sum and substance of the case at sentencing.

As all parties concede, the defendant here was at the time of her actions, suffering from a complete loss of self-control, and that *any* person placed in the same situation as the defendant would have suffered the same complete and utter

loss of self-control. The existence of that state of mind – the fact that the not only the defendant but any person placed in her situation would have been absolutely unable to exert any control over her actions – cannot be ignored at the time of sentencing. Objectively, the defendant had the choice not to pull the trigger. But, the defendant asserts, the operation of the element of adequate provocation means that she was, as a matter of law, unable to exercise that choice, even if she had perceived it. (Which according to the Agreed Statement of Facts, she did not.)

The court therefore erroneously placed on the defendant the obligation to perceive and make rational choices at a time when, as a matter of law, she was incapable of perceiving and making rational choices. In so doing, the court erroneously exercised its discretion, entitling her to modification of the sentence.

CONCLUSION

For all of the above reasons the defendant-appellant requests that this court enter an order modifying the sentence imposed in connection with the defendant's conviction.

____
Mark A. Schoenfeldt
Attorney for the defendant-appellant

P.O. Address:
230 W. Wells Street Suite 214
Milwaukee, WI 53203
State Bar No.: 1010748

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief and appendix produced with a proportionally spaced font. The length of the brief is 7,704 words.

____

Mark A. Schoenfeldt
Attorney for the defendant-appellant

P.O. Address:
230 W. Wells Street Suite 214
Milwaukee, WI 53203
State Bar No.: 1010748

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.1 9(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names or persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

____
Mark A. Schoenfeldt
Attorney for the defendant-appellant

P.O. ADDRESS:
230 W. Wells Street Suite 214
Milwaukee, WI 53203
(414) 272-2860

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 11th day of December, 2017.

____
Mark A. Schoenfeldt
Attorney for the defendant-appellant

P.O. ADDRESS:
230 W. Wells Street Suite 214
Milwaukee, WI 53203
(414) 272-2860