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 AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE ONEIDA COUNTY CIRCUIT COURT, THE HONORABLE MICHAEL H. BLOOM, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUE

Defendant-appellant Ashlee A. Martinson pled guilty to two counts of second-degree intentional homicide/adequate provocation for fatally stabbing her mother and shooting her stepfather in the head. Did the circuit court erroneously exercise its discretion at sentencing when it said that Martinson "had a choice" when she killed the victims?

The circuit court held that it did not erroneously exercise its discretion.

This Court should affirm the circuit court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication of this Court's decision.

INTRODUCTION

Martinson was charged with two counts of first-degree intentional homicide for shooting her stepfather twice in the head with a shotgun and stabbing her mother more than 30 times. She reached a plea agreement with the State under which she pled guilty to two counts of second-degree intentional homicide/adequate provocation.

Adequate provocation mitigates first-degree intentional homicide to second-degree intentional homicide when the provocation is "sufficient to cause complete lack of self-control in an ordinarily constituted person." Wis. Stat. §§ 939.44(1), 940.01(2)(a). Martinson argues that the circuit court erroneously exercised its sentencing discretion because, in its sentencing remarks, the circuit said that she "had a choice."

Martinson argues that the circuit court's statement that she "had a choice" was an erroneous exercise of discretion because, as a matter of law, her conviction for second-degree intentional homicide/adequate provocation established that she did not have a choice. This Court should reject Martinson's argument because: 1) she does not cite any authority to support that assertion; 2) her argument is contrary to established case law that a circuit court makes its own assessment of the facts at sentencing; 3) under Wis. Stat. § 940.05(1)(b), when the State filed the amended information charging Martinson with second-degree intentional homicide/adequate provocation, the State conceded only that it could not disprove the mitigating circumstances of adequate provocation beyond a reasonable doubt; 4) the parties' agreement that Martinson acted in circumstances that established adequate provocation was not binding on the circuit court; and 5) there was information in the record that supported the circuit court's statement that Martinson had a choice. Accordingly, this Court should affirm the judgment of conviction and the order denying postconviction relief.

STATEMENT OF THE CASE

The charges. Martinson was charged with two counts of first-degree intentional homicide for stabbing her mother, Jennifer Ayers, more than 30 times and shooting her stepfather, Thomas Ayer, in the neck and temple. (R. 15:1–5; 35:32–33.)[1] She was also charged with three counts of false imprisonment for locking her three younger sisters in a bedroom after the murders. (R. 2:2; 15:1–2; 22:1.)

[1] The State's record citations are to the electronically filed record. The pagination in some of the electronically filed transcripts differs from the pagination in the original transcripts.

According to the amended criminal complaint and testimony presented at the preliminary hearing, on March 6, 2015, Martinson, who turned 17 that day, exchanged Facebook messages with her 22-year-old boyfriend, R.S. (R. 76:20–21, 25–26.) In those messages, Martinson told R.S. that she was unhappy at home because her stepfather was beating her mother and that she wanted to leave the area with R.S. (R. 76:26.) In one message, Martinson said that she hated her parents and that she wanted "to kill [Thomas] so fucking bad, just take one of his guns and blow his fucking brains out." (R. 76:26.)

The next morning, Jennifer and Thomas Ayers discovered on the internet that R.S. was 22 years old. (R. 76:27.) R.S. then received a Facebook message that began, "Stay the hell away from my daughter; she's a minor." (R. 76:22.)

Later that day, Thomas confronted Martinson about having a boyfriend who was 22 years old. (R. 76:27.) Martinson argued with her parents, who took her cell phone and the keys to her car. (R. 76:28.)

After the argument, Martinson went upstairs to her bedroom and Thomas went outside. (*Id.*) When Thomas reentered the house, he asked where Martinson was and Jennifer told him she was upstairs. (*Id.*)

One of Martinson's sisters, L.R.A., told police that when Thomas went upstairs, he banged on Martinson's door. (R. 76:29.) L.R.A. then heard two shots. (*Id.*) Jennifer ran up the stairs to find out what had happened. (*Id.*) L.R.A. saw Martinson fighting with Jennifer. (*Id.*) Martinson told L.R.A. to go back downstairs. (*Id.*)

When a bloody Martinson came back to the living room, she put on cartoons for her sisters to watch. (R. 76:30.)

After Martinson showered, she told the girls to go to one of their bedrooms, put food and drink in there, and locked them in by using a phone cord to tie the doorknob to the staircase bannister. (R. 76:30–31.)

Jennifer Ayers died from multiple stab wounds. (R. 15:6.) Thomas Ayers died from gunshot wounds to the head and neck. (*Id*.)

NGI plea. At her arraignment on June 29, 2015, Martinson entered pleas of not guilty and not guilty by reason of mental disease or defect to each of the five counts. (R. 77:2.) The circuit court appointed Dr. Brad Smith to conduct an evaluation and received Dr. Smith's report on December 3, 2015. (R. 33; 79:2.)

The defense then informed the court that it would retain its own examiner to conduct an evaluation. (R. 79:2.) Both the defense expert, Dr. Sheryl Dolezal, and Dr. Smith diagnosed Martinson with post-traumatic stress disorder and major depressive disorder; both concluded that their findings did not support a plea of not guilty by reason of mental disease or defect. (R. 81:133–36.)

Plea agreement. The parties reached a plea agreement under which Martinson would plead guilty to an amended information charging her with two counts of second-degree intentional felony, "conceding that the homicides of Jennifer F. Ayers referenced in Count One and Thomas H. Ayers referenced in Count Two were caused under the influence of adequate provocation as defined in Wis. Stats. § 939.44." (R. 35:1–2.) The State agreed to dismiss the false imprisonment counts and Martinson withdrew her NGI plea. (R. 35:2, 8.)

The plea agreement provided that the State would recommend consecutive 20-year terms of initial confinement

on the two counts, that Martinson would recommend consecutive four-year terms of initial confinement, and that the parties were free to argue any amount of extended supervision. (R. 35:6.)

The plea agreement also included an agreement that the factual basis for the plea was set forth in an attachment. (R. 35:3.) The attachment described abuse that Jennifer Ayers had suffered as a child and in a previous marriage and relationship; physical and sexual abuse of Martinson committed by Jennifer Ayers's previous partner; and Thomas Ayers's history of committing crimes and physically abusing family members. (R. 35:11–22.)

The attachment described circumstances in the household after Jennifer and Thomas Ayers moved to Wisconsin in 2014 with Martinson and her stepsisters. (R. 35:25–30.) Thomas physically assaulted Jennifer repeatedly, physically and emotionally abused Martinson's stepsisters, and abused a dog. (R. 35:25–29.) Thomas did not sexually or physically abuse Martinson, though she "report[ed] consistent mental and verbal abuse coming from Thomas Ayers, principally involving strict house rules." (R. 35:30.)

The plea agreement attachment described the events leading to the homicides. (R. 35:30–33.) In the days leading to March 7, 2015, Martinson was preparing to leave home and move in with a friend. (R. 35:30.) On March 6, 2015, she sent R.S. a Facebook message stating that she had woken up to Thomas beating her mother, that he was going to kill her mother if her mother did not leave soon, and that Martinson did not want to be around when that happened. (R. 35:31.) Martinson's message also said that she hated her parents and that she wanted "to kill [Thomas] so fucking bad, just take one of his guns and blow his fucking brains out." (*Id.*)

On the morning of March 7, 2015, Jennifer and Thomas confronted Martinson about her relationship with R.S., told Martinson that she could no longer communicate with him, and took her keys and phone. (*Id*.) Jennifer told Martinson that Martinson should leave the house, but Thomas argued that she should stay, be homeschooled, and "should essentially be placed on house arrest for the foreseeable future." (*Id*.)

Martinson gathered some of her belongings and left the house on foot. (*Id*.) Thomas followed her in his truck and told her to get in the truck to come home. (*Id*.)

According to Martinson, when they arrived home, she armed herself with a loaded shotgun with the intent of killing herself and went to her bedroom. (R. 35:32.) When Thomas banged on her bedroom door, Martinson reported, "she at that time considered whether Thomas Ayers should die rather than she." (*Id*.) The attachment does not include any information from Martinson about what happened next. (R. 35:32–33.)

The attachment states that Martinson "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." (R. 35:33.)

The plea agreement attachment also states that Dr. Smith and Dr. Dolezal had determined that on the day of the killings, Martinson was suffering from Major Depressive Disorder and PTSD. (*Id*.) According to the attachment, "[t]he doctors believe the defendant has been the victim of many types of abuse and trauma"; "has personally experienced physical, sexual and verbal abuse"; "has also directly

witnessed the physical, sexual and verbal abuse of her mother and the physical and verbal abuse of her stepsisters and her half-sister"; and "has also witnessed severe abuse of animals by Thomas Ayers." (R. 35:34.) The attachment also states that Martinson "has suffered neglect by her mother by not providing a safe environment for her." (*Id.*)

Plea hearing. The circuit court began the plea hearing by summarizing the elements of the offense and briefly discussing some of the facts in the attachment to the plea agreement. (R. 80:4–7.) The court then addressed whether allowing the State to file an amended information was consistent with the public interest. (R. 80:7.) The court noted that if the case went to trial, the State would have to prove beyond a reasonable doubt that the facts constituting adequate provocation were not present. (*Id.*)

The circuit court said that "given the nature and the large extent of the information available in support of the defense position that there was adequate provocation, the State's ability to secure a conviction for first-degree intentional homicide would be compromised to a legitimate extent." (R. 80:8.) The court further said that it was "not able to make any finding as to how a jury would or would not come out on the question; but the record is sufficient for me to find that were a jury to be presented with evidence consistent with the information set forth in the attachment to the stipulation, a reasonable jury would certainly be within its rights to find that the State had not disproven adequate provocation beyond a reasonable doubt." (*Id.*)

The circuit court noted that if it allowed the proposed amendment and accepted Martinson's plea, "there will be sufficient exposure where the defendant could be sentenced to serve time in prison until she is 97 years of age." (R. 80:8–9.) The court "accept[ed] the amended information for filing, finding that it is reasonable under all the circumstances and

not inconsistent with the public interest." (R. 80:9.) After conducting a plea colloquy, the court accepted Martinson's guilty pleas and found her guilty of two counts of second-degree intentional homicide. (R. 80:9–19.)

Sentencing. In its sentencing remarks, the circuit court said that it had reviewed a variety of materials, including the preliminary hearing testimony, the written reports of Dr. Smith and Dr. Dolezal as well as Dr. Dolezal's testimony at the sentencing hearing, and the attachment to the plea agreement. (R. 81:207, A-App. 101.) The court said that it was taking into account decisions of the United States Supreme Court that indicate "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." (R. 81:209, A-App. 103.)

The circuit court noted that Martinson had been convicted of second-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." (R. 82:1–2, A-App. 104–05.) The court noted that there was "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." (R. 82:2, A-App. 105.)

The circuit court said that "[t]here are two diametrically opposed forces that are at work in this case that are difficult to reconcile." (R. 82:2, A-App. 105.) The court noted "the enormity of the acts committed by the defendant, actions against two people, one involving a 12 gauge shotgun used at close range" and the other "a knife used in excess of 30 times." (*Id.*) The court said that Martinson's conduct was "extreme and the gravest of crimes

or at least among the absolute gravest of crimes that a person can face sentencing for." (*Id.*)

The other force at work, the circuit court said, was the "lifetime really of information regarding the life that Ashlee Martinson has [led] with her mother, her biological father, a man named [J.H.], 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." (R. 82:2–3, A-App. 105–06.)

The circuit court noted that Dr. Dolezal and Dr. Smith agreed that Martinson "suffered at the time of the offenses with major depressive disorder and post-traumatic stress disorder." (R. 82:3–4, A-App. 106–07.) The court also noted Dr. Dolezal's testimony that "the condition 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." (R. 82:4, A-App. 107.)

The circuit court said that it did not 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." (R. 82:9, A-App. 112.) The court noted that the killings had "outraged

members of the public" and that it "cannot say that that outrage is unjustified." (R. 82:10, A-App. 113.)

The circuit court further stated "just like sympathy must yield in the face of truth, outrage must yield in the face of justice" and that "[j]ustice 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." (*Id.*) But, the court said, "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." (R. 82:12, A-App. 115.)

The circuit court said that "[t]here 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" and "ample support in the record that the full maximum penalty of in essence 80 years of initial confinement is not required in this case." (R. 82:12, A-App. 115.) The court also said that "there is ample support in the record to conclude that some amount of incarceration less than 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." (R. 82:12–13, A-App. 115–16.)

The circuit court noted that "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." (R. 82:13, A-App. 116.) The court said that Dr. Smith's report indicated, and Dr. Dolezal did not refute, "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." (*Id.*) The court said that "[t]he 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." (*Id*.)

The circuit court said that it had "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" and "it does not appear that he laid his hands on you in the manner in which he apparently has others." (R. 82:14, A-App. 117.) "[W]hile the quality of your life was severely effected by the continuing presence of . . . Thomas Ayers, your life itself was not threatened. You did have a choice." (*Id*.) The court recognized that Martinson lacked emotional support, but said that "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. 82:14–15, A-App. 117–18.)

The circuit court said that there were "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." (R. 82:15, A-App 118.) The court imposed two concurrent 40-year sentences, consisting of 23 years of initial confinement and 17 years of extended supervision. (*Id*.)

Postconviction motion. Martinson filed a motion for postconviction relief in which she argued that the circuit court erroneously exercised its sentencing discretion.

(R. 63:1.) She contended that when the court said at sentencing that she "had a choice," it "erroneously placed 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" (R. 63:1; 64:18.)

The circuit court denied the motion. (R. 69:1, A-App. 122.) In its oral ruling, the court said that "there is a tension that exists between the concepts of a person acting with intent as required under section 940.05(1), and a person acting under the influence of adequate provocation as provided under section 940.01(2)(a) and, therefore, acting under a complete lack of self-control as 'adequate provocation' is defined under section 939.44." (R. 83:12–13, A-App. 123–24.) That tension, the court said, "creates an ambiguity that justifies looking to the legislative history of the applicable statutes." (R. 83:13, A-App. 124.)

Based on its review of the legislative history (R. 83:13–19, A-App. 124–30), the court concluded that "the applicable statutes do not provide, as a matter of law, that a person found guilty of second-degree intentional homicide on the basis of adequate provocation is absolved of volitional responsibility for their actions" and "that the applicable statutes do not foreclose, as a matter of law, a Court from considering at sentencing that a person found guilty of second-degree intentional homicide on the basis of adequate provocation had a choice" (R. 83:19, A-App. 130). For that reason, the court held, it did not erroneously exercise its discretion by considering that Martinson had a choice when she killed her mother and stepfather. (R. 69:1, A-App. 122; 83:19, A-App. 130.)

STANDARD OF REVIEW

This Court reviews a circuit court's sentencing decision under the erroneous exercise of discretion standard. *State v. Gallion*, 2004 WI 42, ¶ 17, 270 Wis. 2d 535, 678 N.W.2d 197.

ARGUMENT

I. Legal standards governing appellate review of sentences.

An appellate court will uphold a sentence unless the circuit court erroneously exercised its discretion. *Gallion*, 270 Wis. 2d 535, ¶ 17. The reviewing court presumes that the circuit court acted reasonably, and the defendant must show that the court relied upon an unreasonable or unjustifiable basis for its sentence. *Id.* ¶¶ 17–18. Public policy strongly disfavors appellate court interference with the circuit court's sentencing discretion because that court is best suited to consider the relevant factors and the defendant's demeanor. *Id.* ¶ 18.

The "sentence imposed in each case should call for the minimum amount of custody or confinement [that] is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." *Id.* ¶ 23. "Circuit courts are required to specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." *Id.* ¶ 40.

A circuit court erroneously exercises its discretion when it bases a sentence on an irrelevant or improper factor. *Id.* ¶ 17. To properly exercise its discretion, a circuit court must provide a rational and explainable basis for the sentence. *Id.* ¶ 39.

II. The circuit court properly exercised its sentencing discretion.

The circuit court provided a thorough and thoughtful explanation of its sentencing decision. The court said that the extreme severity of the offense warranted significant punishment, noting "the enormity of the acts committed by the defendant, actions against two people, one involving a 12 gauge shotgun used at close range" and the other "a knife used in excess of 30 times." (R. 82:2, A-App. 105.) Martinson's conduct was "extreme and the gravest of crimes or at least among the absolute gravest of crimes that a person can face sentencing for." (*Id.*)

The circuit court weighed the severity of the offense against the "substantial amount of evidence indicating what can only be characterized as an ongoing, abusive environment [in] which the defendant was forced to live and which, in essence, came to a head in March of 2015 when these acts were committed." (R. 82:2–3, A-App. 105–06.) The court said that "any person of conscience" would have "sympathy for the things that happened to Ms. Martinson in her life before the events of the March 7th of 2015." (R. 82:9, A-App. 112.), But, the court said, "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." (R. 82:12, A-App. 115.)

The circuit court discussed Martinson's character, describing her as "a combination of a normal teenager mired in abusive circumstances who suffers from bona fide mental illnesses." (R. 82:4, A-App. 107.) The court noted that Dr. Dolezal and Dr. Smith agreed that at the time of the killings Martinson had major depressive disorder and post-traumatic stress disorder. (*Id.*) But, the court further noted, Dr. Smith concluded, and Dr. Dolezal did not dispute, that

"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." (R. 82:13, A-App. 116.) The court said that "[t]he 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." (*Id*.)

The circuit court said that it had "no doubt that the quality of the defendant's life was severely threatened by the continuing presence of Thomas Ayers." (R. 82:14, A-App. 117.) But, the court said, Martinson's "life itself was not threatened. [She] did have a choice." (*Id*.)

Martinson argues that the circuit court erroneously exercised its sentencing discretion when it said that she "had a choice." (Martinson's Br. 25–29.) That is so, she contends, because her conviction for second-degree intentional homicide/adequate provocation meant that "as a matter of law, she was incapable of perceiving and making rational choices." (*Id*. at 29.)[2]

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[2] Martinson does not argue that the circuit court based her sentence on inaccurate information. *See State v. Tiepelman*, 2006 WI 66, ¶ 9, 291 Wis. 2d 179, 717 N.W.2d 1 ("A defendant has a constitutionally protected due process right to be sentenced upon accurate information.").

Martinson criticizes the postconviction court's reliance on the legislative history of the adequate provocation defense, arguing that the statutes governing that defense are not ambiguous. (Martinson's Br. 26–27.) The State agrees that the relevant statutes, Wis. Stat. § 939.44 (defining adequate

There are several flaws in that argument.

First, Martinson does not cite any authority to support her assertion that because she was convicted of second-degree intentional homicide/adequate provocation, the circuit court was prohibited as a matter of law from considering whether she had a choice to kill her parents. This Court does not consider arguments unsupported by references to relevant legal authority. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("Arguments unsupported by references to legal authority will not be considered.").

Second, Martinson's argument is contrary to established sentencing law. When sentencing a defendant, a circuit court is not restricted to the facts that supported the conviction. The court may base its sentencing decision on information that has not been established beyond a reasonable doubt. *See State v. Marhal*, 172 Wis. 2d 491, 502, 493 N.W.2d 758 (Ct. App. 1992). Indeed, the sentencing court may consider charges of which a defendant has been acquitted. *See State v. Arredondo*, 2004 WI App 7, ¶ 54, 269 Wis. 2d 369, 674 N.W.2d 647 (citing *United States v. Watts*, 519 U.S. 148, 152 (1997) (per curiam)).

This rule is based upon "the well-recognized distinction between the fact-finder's function at the guilt stage, where the fact-finder must determine whether the

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provocation) and Wis. Stat. §§ 940.01(2)(a) and 940.05(1) (defining second-degree intentional homicide/adequate provocation), are unambiguous and that it is inappropriate to consider legislative history when construing those statutes. *See State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. The issue before this Court, however, is not whether the postconviction court's analysis was correct but whether the sentencing court properly exercised its discretion.

government has proved a defendant's guilt beyond a reasonable doubt, and the sentencing judge's role, which is to assess the defendant's character using all available information, unconstrained by the rules of evidence that govern the guilt-phase of a criminal proceeding." *Id.* ¶ 53. Accordingly, even though Martinson was convicted of second-degree intentional homicide—which applies when provocation is "sufficient to cause complete lack of self-control in an ordinarily constituted person," Wis. Stat. § 939.44(1)(a)[3]—the circuit court was not prohibited from making its own assessment based upon all the information before it whether Martinson "had a choice."

Third, by statute, the effect of charging Martinson under Wis. Stat. § 940.05 with second-degree intentional homicide/adequate provocation was that "[t]he state concede[d] that it is unable to prove beyond a reasonable doubt that the mitigating circumstances specified in s. 940.01(2) did not exist." Wis. Stat. § 940.05(1)(b). Consistent with that statutory concession, the circuit court said at the plea hearing that "given the nature and the large extent of the information available in support of the defense position that there was adequate provocation, the State's ability to secure a conviction for first-degree intentional homicide would be compromised to a legitimate extent." (R. 80:8.) The court said that it was "not able to make any finding as to how a jury would or would not come out on the question; but the record is sufficient for me to find that were a jury to be presented with evidence consistent with the information set forth in the attachment to the stipulation, a reasonable jury

[3]*See also* Wis. Stat. § 940.01(2) ("adequate provocation" mitigates first-degree intentional homicide to second-degree); *State v. Schmidt*, 2012 WI App 113, ¶¶ 6–7, 344 Wis. 2d 336, 824 N.W.2d 839 (discussing components of adequate provocation defense).

would certainly be within its rights to find that the State had not disproven adequate provocation beyond a reasonable doubt." (*Id.*)

As a matter of law, therefore, by charging Martinson with second-degree homicide, the State conceded that it was unable to prove beyond a reasonable doubt that the mitigating circumstance of adequate provocation did not exist. *See* Wis. Stat. § 940.05(1)(b). But nothing in Wis. Stat. §§ 939.44(1)(a), 940.01(2), or 940.05 prohibited the circuit court from making its own evaluation of Martinson's conduct or state of mind.

Fourth, as Martinson notes (*see* Martinson's Br. 29), the parties agreed in the attachment to the plea agreement that Martinson "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." (R. 35:33.) However, the circuit court was not bound by that agreement. "[T]he [circuit] court is not bound by a sentencing recommendation from the prosecutor or any other term of the defendant's plea agreement." *State v. Hampton*, 2004 WI 107, ¶ 42, 274 Wis. 2d 379, 683 N.W.2d 14; *see also State v. Smith*, 207 Wis. 2d 258, 281, 558 N.W.2d 379 (1997) ("The sentencing court always has an independent duty to look beyond the recommendations and to consider all relevant sentencing factors.").

Fifth, there was information in the record that supported the circuit court's statement that Martinson had a choice. The day before she stabbed her mother and shot her stepfather, Martinson sent a message to her boyfriend in which she said that she hated her parents and that she

wanted "to kill [Thomas] so fucking bad, just take one of his guns and blow his fucking brains out." (R. 35:31; 76:26.) And the facts set out in the attachment to the plea agreement, state that when Thomas was banging on her door, "[a]ccording to the defendant, she at that time considered whether Thomas Ayers should die rather than she." (R. 35:32.)

The State is not suggesting that those were Martinson's only options or that the choice of shooting herself would have been a reasonable alternative to shooting Thomas. But Martinson's statement that she was considering whether to kill Thomas allows an inference that Martinson had some measure of control over her conduct. And while Dr. Dolezal testified at the sentencing hearing that Martinson may have failed to perceive other options (R. 81:143–44), the circuit court was not bound by that opinion. *See Wiederholt v. Fischer*, 169 Wis. 2d 524, 533–34, 485 N.W.2d 442 (Ct. App. 1992) (a circuit court is not bound by an expert's opinion, even if that opinion is uncontroverted).

Finally, the State notes that in the conclusion of her brief, Martinson asks this Court to "enter an order modifying the sentence." (Martinson's Br. 29.) Martinson does not identify any authority to support that remedy. Were this Court to conclude that the circuit court erroneously exercised its sentencing discretion, resentencing would be the appropriate remedy. *See State v. Walker*, 117 Wis. 2d 579, 583, 345 N.W.2d 413 (1984); *State v. Hall*, 2002 WI App 108, ¶¶ 18, 21, 255 Wis. 2d 662, 648 N.W.2d 41. Resentencing is not appropriate here, however, because the circuit court properly exercised its discretion.

CONCLUSION

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

Dated this 7th day of March, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,438 words.

_____
JEFFREY J. KASSEL
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 7th day of March, 2018.

_____
JEFFREY J. KASSEL
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