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

REPLY BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CASES CITED

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ARGUMENT

1. The trial court judge erroneously exercised his discretion

The defendant contends, again, that 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. As noted in the defendant's brief-in-chief, the ultimate basis for the sentence imposed in this case was the court's conclusion that the

defendant was capable, even at the last moment, of making the choice not to kill.

The record is, replete with examples 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. In light of this, the court's action of 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 has to be considered to be error.

The defendant was not a "normal" 17 year old. The defendant was, as a result of her history, both past and recent, absolutely 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.

The defendant concedes that the court, at sentencing, is not foreclosed from considering that the defendant acted intentionally and with a purpose. That, after all, is a consideration that inherent in the fact that the operation of adequate provocation mitigates the crime charged to second degree intentional homicide.

However, the sentencing 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. The sentencing court is not, the defendant contends, allowed, in the exercise of its discretion, to impose upon the defendant the same ability to make choices as would be found in a person who had not sustained a complete loss of control over his or her actions. The court is not, thereby, empowered to create "if only" situations that might, conceivably, have prevented the defendant from acting as she did, but which find no basis in fact in the situation in which the defendant actually found herself. It may be true, as the court stated at sentencing, that in some other, perhaps more perfect, world, a friendly voice or a supportive ally might have prevented this tragedy. But in the tragically imperfect world in which the defendant actually lived, there was no friendly voice. There was no supportive ally. There was only the defendant and her complete and utter loss of control. Her loss of the ability to make choices.

As the parties conceded in the court below, and as the court accepted when it agreed that there had been a sufficient showing of adequate provocation, *any* person placed in the same situation as the defendant would have suffered the same complete and utter loss of self-control. The defendant asserts that the existence of that state of mind – the fact that 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. The concept of adequate provocation describes and delineates a state of mind that was in operation at the time of the crime. To do anything other than to sentence the defendant as a person who was, at

the time of her crime, incapable of exercising control over her actions, as the court did here, is to reduce the defendant's state of mind to a fiction – to a mere device that operates at the time of the plea but may then be discarded.

The defendant asserts that the concept of adequate provocation has, must have, more meaning than that. It may be true that, 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. The sentence imposed in this case failed to recognize or accept that. The defendant is, therefore, entitled to resentencing.

2. The court erred by recourse to the legislative history

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 State, in its Brief to this court, repeats that analysis.

The problem with the court's, (and the State's), reliance on the legislative history of the statute in order to determine the subjective intent of the legislators is that it ignores the primary canons of statutory construction. As the defendant noted in her brief-in-chief, 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.

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).

However, Section 904.01 is not ambiguous. Even the most cursory review of section 904.01 and its related elements shows 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. None of these terms are ambiguous. None of them as susceptible to more than one

meaning. 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.

CONCLUSION

The court 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.

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.

_____

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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 1,187 words.

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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 26th day of April, 2018.

_____
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