STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

CASE NO. 2014AP2888-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LONEL L. JOHNSON, JR.,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

On Appeal From the Decision of The Honorable
William M. Atkinson, Circuit Court Judge
Circuit Court for Brown County, Branch VIII

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STATEMENT OF THE ISSUES

Should the jury have been instructed to determine if the disorderly conduct as charged in count 1 of the information was an act of domestic abuse? The trial court decided that even if the jury instruction should have been used, that omission was harmless error, and so denied the postconviction motion for resentencing.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument should not be necessary. However, publication is recommended, because this is a case of first impression on a constitutional issue with statewide impact.

STATEMENT OF THE CASE AND FACTS

In a criminal complaint filed January 8, 2013, the State alleged that on 1/8/13 Mr. Johnson committed four offenses against his wife Amy Johnson: count 1: Disorderly Conduct; count 2: Battery; count 3: Strangulation and Suffocation; and count 4: False Imprisonment; all reference Domestic Abuse,

Domestic Abuse Repeater, and Repeater, per Wis. Stat. §§ 968.075(1)(a), 939.621(1)(b)&(2), and 939.62(1)(b), respectively.[1] (1). The domestic abuse repeater enhancer of Wis. Stat. § 939.621(1)(b)&(2) made count 1, disorderly conduct, a felony and allowed the maximum penalty to be increased by not more than two years. (1). In the information filed January 25, 2013, the State included the same four charges and enhancers. (7, App. 1-4).

The case went to a jury trial. At trial, the State called five witnesses: in order of testimony, Officer Kurt Brester; Officer Nicholas Walvort; Amy Johnson; Tyron Moore, her nine-year-old son; and Officer Joel Haar. For the defense, Mr. Johnson testified.

1. Officer Brester

Officer Brester testified that on 1/8/13, he responded to a residence at 933 Smith Street in Green Bay after a 911 hang-up (60:59). When he arrived, there were other two officers present, Walvort and Haar, who were both trying to kick down the door.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

(60:60). From the outside, the police could hear a male and a female yelling. (60:67). The officer could not see inside the residence: there were blinds on the windows, and the door was solid. (60:69). Officer Brester did not witness what happened inside. (60:70).

After some effort, the police were able to force entry. (60:62). Once inside, they made contact with Mr. Johnson in the kitchen. (60:63). The lights were off, and Mr. Johnson was walking backward toward a hallway. (60:64). The officer did not see anyone else in the kitchen at the time. (60:66). The police yelled for him to raise his hands at least three or four times, and Mr. Johnson did not do so. (60:64). Officer Haar then "decentralized him to the ground in the kitchen." (60:64). Defense counsel twice objected to this line of questioning about Mr. Johnson's conduct with the police as irrelevant, and the trial court overruled. (60:64, 65).

Decentralized on the ground, Mr. Johnson "was on his hands and knees and had his hands under his stomach." (60:65). He refused Officer Brester's commands to get his hands out from underneath his

stomach. (60:65). In response, Officer Brester jumped on top of him and tried "forcefully" with his hands to get Mr. Johnson's hands out from underneath his stomach. (60:65). Mr. Johnson continued to refuse to listen or put his hands behind his back. (60:65). Officer Haar then deployed a taser into the lower portion of Mr. Johnson's back. (60:65). The taser was effective, and after the five-second cycle Mr. Johnson placed his hands behind his back and was handcuffed. (60:65). Officer Brester could smell some alcohol on Mr. Johnson's breath, but he could not recall if the smell was strong or weak. (60:70-71).

2. Officer Walvort

Officer Walvort testified that he was dispatched around 2:55 am; he responded with Officer Haar and knocked on the door, but was unable to make contact with anyone or hear anything. (60:72, 74). Because no one responded, they decided to force entry by kicking the door, unsuccessfully. (60:75). Officer Brester then arrived to help force entry; Officer Walvort went to the back of the residence to cover, and when he heard the other two officers inside the apartment, he ran around

the front to assist. (60:76). Inside, Officer Walvort saw people in a bedroom but could not identify anyone. (60:77). He saw a male lying on the floor in the kitchen. (60:77). He heard a male and a female both say that nobody else was in the apartment. (60:78). However, there were other people inside. (60:79).

3. Amy Johnson

Amy Johnson testified that she had been married to Mr. Johnson for less than a year, and that she has filed for divorce; she had been with him for four years. (60:84). In January 2013, she had been living with him at 933 Smith Street. (60:85). On 1/8/13, she had been arguing with her husband on and off all day about "everything." (60:87). She could not recall anything specific that caused the argument to go from verbal to physical. (60:110). Around 3 am she called 911, because she claimed that Mr. Johnson started choking her in the bedroom with both hands around her neck for "[a]bout a minute." (60:87-91). He was on top of her on her bed. (60:90). She claimed that she could not reach 911 the first time because he "came after" her--"[h]e just walked towards me" with an "aggressive"

demeanor. (60:91). After allegedly being choked, she tried to leave the bedroom, but she claimed Mr. Johnson would not let her out; the bedroom door was closed and he was in front of the door. (60:92). The door was closed "[t]hroughout the whole incident." (60:92). At some point, her young son threw her a cell phone into the bedroom, and she called 911. (60:91). She called 911 three times that night, making contact on the second time. (60:92). At some point, the child came into the room. (60:93).

She claimed that she "pushed past [her husband]" and was able to leave the room. (60:93). She then went to the living room, heard the police, and ran toward the kitchen door. (60:93). She had heard the police knocking when she was in the bedroom. (60:94). She was not able to make it to the kitchen door, because Mr. Johnson came running after her and blocked the kitchen door. (60:94). She was trying to push him away to open the door, but he would not allow her to let the police in. (60:94). She could hear the police trying to kick the door. (60:95). While the officers were yelling and trying to kick the door, her husband

was in front of the door pushing against it. (60:96). While the police were on the other side of the door, she claimed that he told her, "Don't open. I'll go to jail." (60:96). He told her to say that he didn't do anything. (60:97). She admitted that she had been drinking that night, "a few beers"--cans, not 40s. (60:99, 102). She did not know how much her husband had been drinking. (60:107).

She testified that that night there were other people inside, but she could not remember telling the officers that there was nobody else was inside, except for her husband and herself. (60:103). She admitted on cross-examination that if she told officers that nobody else was there, that would have been a lie. (60:104). On redirect, she admitted that her brother, his girlfriend, and their infant daughter were in the front room of the apartment. (60:108). Once she was in the living room, she did not yell out, "You're choking me." (60:104).

She denied rescued that night, because she "wasn't that injured. [She] was fine." (60:108). She claimed that it hurt, even though she did not have "any cuts or scrapes." (60:110).

After the incident, she sent letters and made contact with her husband. (60:105). He did not tell her not to come to court (60:105). He did not tell her to deny everything. (60:106).

4. Tyron Moore

Tyron Moore, Ms. Johnson's child, testified that at some point in the night of 1/8/13, he woke up because his mother and Mr. Johnson were yelling "loud." (60:115). He went into the hallway and saw Mr. Johnson choking his mother in her bedroom, standing over her, with his hands or his arm on her throat. (60:116-117). She was on the bed, bent very far back. (60:116). The bedroom door was open. (60:117). He testified that he had a phone and "I think I was trying to give it to my mom or that was another night." (60:118). Other than saying that "I was just a witness," he did not tell the police anything else. (60:118).

5. Officer Haar

The last witness for the State was Officer Haar, who testified that he responded to the address with Officer Walvort. (60:121). When he walked up the door, he knocked and could hear a male and female

arguing. (60:122). He announced himself and said, "Come to the door," but there was no response. (60:122). The arguing continued, and he "heard a female scream." (60:122). The officer knocked again, and a male came toward the door, standing right behind the door, and the male said, "There's nothing going on in here. We're just arguing." (60:122). Right after that, he heard a female say, right behind the door, "You're choking me." (60:123).

The officer then told them to open the door and banged on the door and warned that he was going to kick it in. He then heard some "scruffling" behind the door, "just a little bit of commotion." (60:124). He heard a male say, "Don't do this to me, Amy. I'm going to jail." (60:125). Officer Haar asked for another car, and he started kicking the door. (60:124). Officer Brester then arrived, and Officer Walvort was sent around the back. (60:124). There was some resistance when he tried kicking the door. (60:126).

Officer Haar was the first into the apartment, with his gun and flashlight out, and he saw Mr. Johnson standing in a hallway just off the kitchen. (60:126). At

gunpoint, he ordered Mr. Johnson to the ground, yelling probably two times. (60:127). Mr. Johnson did not get to the ground, so Officer Haar decentralized him to the ground. (60:128). The officer grabbed him behind the head, kneed him a couple times in the stomach, and directed him to the ground. (60:128). Officer Brester then jumped on top of Mr. Johnson and was trying to get his hands out but was having trouble. (60:128). Officer Haar then deployed his taser. (60:128). Under the circumstances, Mr. Johnson was a threat to officer safety. (60:129). Once Mr. Johnson was handcuffed, Officer Haar went to the front room, right off the living room. (60:130). There he saw three people, a male, a female, and an infant. (60:130).

Officer Haar also met and spoke with Tyron Moore, who came up to the officer on his own and said, "I'm a witness." (60:131). The officer asked him what happened, and the boy replied, "He was holding her down, and he had his hands over her mouth"--not throat. (60:131). The officer did not take a written statement from the child at his mother's request. (60:131). Officer Haar, after being refreshed with a

transcript of his prior testimony from the preliminary hearing, said that he probably said what the transcript stated, which was that the child had said that he had seen his mother and Mr. Johnson "on the ground"--not on the bed. (60:136).

Officer Haar then spoke with Ms. Johnson, who at first was "shaken up. And just real hesitant to give me a statement." (60:131). The officer could smell "moderate odor of alcohol" on her breath. (60:131). But she appeared fine enough to make a statement. (60:132). The officer did not observe any red marks on her neck while on scene. (60:134).

6. Mr. Johnson

Before the defense presented its case, outside the presence of the jury but on the record, the parties and trial court discussed the issue of proof for the two prior qualifying offenses for the domestic abuse repeater. (60:140-141). Initially Mr. Johnson disagreed that he had two prior domestic abuse convictions, and the State replied that if Mr. Johnson would not stipulate, then the State would have to prove up the priors with judgments of conviction marked and submitted for the

jury to review, "analogous to an OWI four or five." (60:141-142). After conferring with counsel, Mr. Johnson personally stipulated on the record but outside the presence of the jury that he had two prior domestic abuse offenses, each a battery-domestic abuse from November 2008 with a single conviction date of February 1, 2010. (60:143). The State submitted certified copies of the Judgment of Conviction, marked and received as exhibits. (60:143).

When the jury returned, Mr. Johnson testified that on the day in question he did not go to work--he worked the night shift--because of car problems. (60:155). He and his wife started arguing, *e.g.*, about her husband missing work, about her share of the rent, about alleged infidelity. (60:156, 157). He claimed that she was yelling and then "started getting aggressive," eventually hitting him in the mouth (60:158). He denied hitting her, but did grab her hand: " 'Cause when she ran for the knife, she came at me." (60:159). She allegedly swung the knife at him, cutting him on the chest. (60:159-160). She also allegedly pulled his hair, and at some point they "stumbled into the wall."

(60:161). He admitted that he had been drinking that night, but she had drunk two and a half 40 ounces of beer versus his one half 40 ounce. (60:161-162). He denied choking his wife. (60:163). Eventually she called the police, the police arrived at the door, and he heard an officer order him to open the door. (60:165). He claimed that he said, "We only arguing. I'm not doing anything to her." (60:166). He said that his wife then suddenly said, "Oh, you're choking me." (60:166). He said that he did not call the police on her, because he did not want her to go to jail. (60:169, 180).

After the close of evidence, the trial court then gave the jury the standard instructions for the charged offenses, including the instruction for generic Disorderly Conduct: "The first count of the information in this case charges that the above-named defendant, on or about Tuesday, January 8, 2013, in the City of Green Bay, Brown County, Wisconsin, while in a public or private place, did engage in abusive, boisterous, indecent, profane, unreasonably loud, violent, or otherwise disorderly conduct under circumstances in which such conduct tended to cause

or provoke a disturbance, contrary to 947.01(1)." (60:209-210). The trial court then recited that standard two elements for generic Disorderly Conduct, stating that "[d]isorderly conduct may include physical acts or language or both." (60:210). The trial court continued with the standard language: "Conduct is disorderly *although it may not be violent, abusive*, indecent, profane, boisterous, or unreasonably loud, if it is of a type which tends to disrupt good order and provoke a disturbance" (emphasis added). (60:211). Nowhere in the instructions for count 1, Disorderly Conduct, did the trial court mention Amy Johnson.

In contrast, when reading the instruction for count 2, Battery, the trial court specifically mentioned Amy Johnson in each of the four elements. (60:213). In reading the standard instruction for count 3, Strangulation, the trial court specifically mentioned Amy Johnson for element one. (60:214). For count 4, False Imprisonment, the trial court mentioned Amy Johnson in each of the four elements. (60:216).

Afterwards the trial court gave the standard admonition that "[r]emarks of the attorneys are not evidence." (60:219).

The jury returned a Guilty verdict on count 1, generic Disorderly Conduct, and Not Guilty verdicts on counts 2-4. (60:242). Filed May 8, 2013, the verdict form states: "As to offense of Disorderly Conduct, as charged in Count 1 of the Information, we the jury, find the defendant, Lonel L. Johnson, Jr., GUILTY." (31, App. 5-6). The trial court entered a judgment of conviction on count 1, and judgments of acquittal on the other counts. (60:245).

The trial court then initially reduced the bond to $1,000, but the State opposed, arguing that the domestic abuse repeater elevates the Disorderly Conduct to a felony and "increases the amount of the prison time that he is facing as well." (60:246). The trial court agreed and revoked bond and held Mr. Johnson without bond pending sentencing. (60:247).

Before sentencing, in a letter to the trial court dated June 13, 2013, Mr. Johnson by counsel challenged the PSI recommendation of 5 years prison, citing the

argument against prison sentences for enhanced misdemeanors--the vexing question that the Court of Appeals later answered in ***State v. Lasanske***, 2014 WI App 26, 353 Wis. 2d 280, 844 N.W.2d 417, *review denied sub nom.* ***State v. Lasanke***, 2014 WI 122, 855 N.W.2d 694. (33). In a reply letter dated June 17, 2013, the State argued that prison was permissible, citing the domestic abuse penalty enhancer that makes the disorderly conduct a felony and increases the maximum penalty by not more than two years. (34).

At sentencing on June 18, 2013, defense counsel raised an ***Apprendi*** issue, citing a case that a colleague had forwarded to him that morning and that the United States Supreme Court had decided the day prior.[2] (61:3). Trial counsel argued that the "[d]omestic abuse enhancer obviously enhances the penalties for that disorderly conduct a great deal. It turns it from a misdemeanor into a felony and because of that habitual offender statute enhances it another four years." (61:3). He continued: "I believe that the State--the jury in this

[2] ***Alleyne v. United States***, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013) (decided June 17, 2013)

case would have needed to make a determination as to whether or not this was disorderly conduct as a domestic violence offense. That question did not go to the jury, and it wasn't on the verdict form. They just found him guilty of disorderly conduct, and we don't know why. There was testimony about obviously the arguing going on inside, but there was testimony about his conduct with law enforcement when they arrived and tried to take him into custody." (61:4).

Trial counsel argued that "the jury has to determine that this was an act of domestic violence," and implicitly citing ***Apprendi***, "the Sixth Amendment says that when a penalty is being enhanced, the jury needs to determine that enhancer." (61:6). Trial counsel argued that the jury should have had a special verdict form. (61:7). The State replied, "The DVO enhancer does not affect the overall penalty. It doesn't increase the penalty." (61:7).

Trial counsel argued that the domestic relationship should have been on the verdict, but did not dispute that element: "That was obvious that they were husband and wife. They were living together. They

were in a domestic relationship." (61:8). The trial court deemed that the domestic relationship was a "status issue," not an element of the offense. (61:8). Trial counsel instead focused on the disorderly conduct: the jury needed to determine who was the target of that conduct, the police or the wife. (61:9).

The State replied that "both the officer as well as the other testimony elicited demonstrated that the police overheard the argument behind the closed door...There was obviously the argumentative behavior between the defendant and his wife at that time too." (61:10).

The trial court denied the defense motion, stating, "And the Court of Appeals can sort that out if they want to decide that's what the verdict form should include these days, but I think it clearly here differs because it's a status rather than a factual determination." (61:11).

The trial court then sentenced Mr. Johnson to five years in the Wisconsin State Prisons, bifurcated at three years initial confinement and two years of extended supervision. (61:36-37). The Judgment of

Conviction-Sentence to Wisconsin State Prisons was filed on 6/21/13, awarding 161 days credit (40, App. 7-8). On June 30, 2013, Mr. Johnson filed a timely notice of intent to seek postconviction relief. (39).

Because the Court of Appeals decided ***Lasanske*** in a published case that the Wisconsin Supreme Court declined to review, on October 14, 2014, postconviction counsel filed a postconviction motion for resentencing only on the ***Apprendi*** issue, arguing that the jury should have decided if the conduct was an act of domestic abuse as defined in Wis. Stat. § 968.075(1)(a). (44, App. 9-18). Just as trial counsel had done, the postconviction motion did not dispute the "domestic" part of the "domestic abuse" definition per Wis. Stat. § 968.075(1)(a). The motion stated that there was no dispute that Amy Johnson was Mr. Johnson's wife, but that it was not undisputed or undisputable that he committed domestic *abuse* against her. (44, App. 16-17). The motion thus argued that failure to instruct the jury regarding the "abuse" criteria of Wis. Stat. § 968.075(1)(a)1-4 was not harmless error per ***State v. Harvey***, 2002 WI 93, 254

Wis. 2d 442, 647 N.W.2d 189. (44, App. 16-17). The postconviction motion further argued that Mr. Johnson had not waived this ***Apprendi*** issue, though trial counsel had raised it for the first time at sentencing. (44, App. 15-16).

The State filed its brief opposing on October 30, 2014, the afternoon before the Postconviction Motion Hearing. (48, App. 19-24). In a reply filed the next morning, October 31, 2014, postconviction counsel clarified and expanded the ***Apprendi*** argument, addressing the four arguments that the State had made in its brief. (49, App. 25-35).

At the Postconviction Motion Hearing, postconviction counsel set forth the arguments made in the two defense briefs. (62, App. 36-53). Postconviction counsel also submitted to the trial court a copy of Wis JI-Criminal 984, which the Criminal Jury Instruction Committee approved February 2014. (62:2; 49.1). This published jury instruction sets forth the two additional elements for the jury: first, the abuse, defined by the four criteria of Wis. Stat. § 968.075(1)(a)1-4; and second, the domestic

relationship as defined per Wis. Stat. § 968.075(1)(a). (49.1, App. 54-56).[3]

The State claimed that an unidentified female member of the Committee has changed positions and now believes that both the domestic abuse repeater status and the domestic abuse for the charged offense are issues for the trial court to decide. (62:7, App. 42). When the trial court asked the prosecutrix how she knew who on the Committee changed votes, the State replied, "I contacted the domestic violence unit in Milwaukee." (62:15, App. 50).

In a one-page decision denying Mr. Johnson's Motion for Resentencing, the trial court stated that

[3] With all due respect to the Committee, it makes more sense to have the instructions about domestic abuse in the grammatical, logical order of 1. domestic, and 2. abuse, not the other way around. This is how Wis. Stat. § 968.075(1)(a) is ordered anyway: first defining "domestic" and then defining "abuse."

The backwards order of the jury instruction likely comes from the backwards order of Wis. Stat. § 973.055(1)(a). There, when determining the domestic abuse surcharge, the trial court first must take time to run down the laundry list of eligible offenses to see if the crime of conviction is included, but then could hit a dead end when it turns out that there was no domestic relationship in the first place. Likewise, a jury could work hard to determine if the conduct met any of the four criteria of Wis. Stat. § 968.075(1)(a)1-4, but then find that the issue is moot because there was no domestic relationship, which should be a much easier inquiry. So the grammatical, logical, and more efficient order is for the jury to determine 1. if there was the domestic relationship; and then and only then, 2. if there was abuse.

"even if the newly drafted Criminal Jury Instruction 984 should have been used, that the omission was harmless error. There was nothing in the court record that would find the Defendant guilty of disorderly conduct towards any victim other than the Defendant's wife." (51, App. 57). Mr. Johnson then filed a timely Notice of Appeal. (52).

ARGUMENT

I. The trial court erred when it denied the motion for resentencing: there was an *Apprendi* violation that was not harmless error.

The trial court should have granted the motion for resentencing, because in violation of ***Apprendi***, the jury did not receive the instructions to determine if the charge of Disorderly Conduct was an act of domestic abuse per Wis. Stat. § 968.075(1)(a), as now set forth in Wis JI-Criminal 984. The omission of that instruction was not harmless error, because it is not clear beyond a reasonable doubt that Mr. Johnson committed an act of domestic abuse.

A. The jury should have been instructed to determine if the disorderly conduct was an act of

domestic abuse, which requires a finding of two facts: if there was a domestic relationship as defined in Wis. Stat. § 968.075(1)(a), and if the conduct was abuse as defined in § 968.075(1)(a)1-4.

In his postconviction motion, in his reply brief to the State's brief opposing that motion, and at the postconviction motion hearing, Mr. Johnson has argued in considerable detail that ***Apprendi*** applies because the domestic abuse repeater statute, Wis. Stat. § 939.621, increases the statutory maximum penalty based on facts other than the fact of a prior conviction--namely, whether the charged offense is "an act of domestic abuse, as defined in sec. 968.075(1)(a)." (46, App. 7-16; 49, App. 17-27; 62, App. 28-45). The annotations in Wis JI-Criminal 984 state the case, and while are not precedential, this published instruction is persuasive authority. (App. 55-56). ***State v. Seymour***, 183 Wis. 2d 683, 702, 515 N.W.2d 874 (1994).

To summarize, Wis. Stat. § 968.075(1)(a), upon which Wis. Stat. § 939.621 relies, defines “domestic abuse" as having two parts:

> 1.The defendant, an adult, acted “against his or her spouse or former spouse, against an adult

> with whom the person resides or formerly resided or against an adult with whom the person has a child in common." Wis. Stat. § 968.075(1)(a).
>
> 2. The defendant's act(s) against that other adult was/were "any of the following":
>
> 1. "Intentional infliction of physical pain, physical injury or illness.
>
> 2. Intentional impairment of physical condition.
>
> 3. A violation of s. 940.225 (1), (2) or (3) [first, second, third degree sexual assault]
>
> 4. A physical act that might have caused the other adult reasonably to fear imminent engagement in the conduct described under subd. 1., 2. or 3."

Wis. Stat. § 968.075(1)(a)1-4. Subdivisions 1., 2., and 3. encompass other existing offenses (*e.g.*, 1. and 2. match the standard jury instructions for Battery[4]). Subdivision 4. could cover a crime like attempted battery, or attempted sexual assault.

The legislative history of both Wis. Stat. §§ 968.075(1)(a) and 973.055 shows the common denominator that domestic abuse means a physical act, not just words, even angry words.

Wis. Stat. § 973.055 predates § 968.075 by almost a decade. 1979 Assembly Bill 169, enacted as Chapter

[4] " 'Bodily harm' means physical pain or injury, illness, or any impairment of physical condition." Wis JI-Criminal 1120.

111, Laws of 1979, Sec. 15m (published February 29, 1980) created Wis. Stat. § 973.055. As originally written, Wis. Stat. § 973.055 did not include, as today, a laundry list of Domestic Abuse Surcharge (DAS)-eligible offenses.[5] Rather, the law referenced another existing statute, Wis. Stat. § 46.95 (domestic abuse grants, since renumbered § 49.165[6]) to define "domestic abuse" for purposes of the DAS.[7] In 1979, § 46.95(1)(a) stated, " 'Domestic abuse' means *physical abuse or threats of physical abuse* between persons living in a spousal relationship or persons who formerly lived in a spousal relationship" (emphasis added).[8] Thus, at the time that the

[5] The litany of DAS-eligible offenses in Wis. Stat. § 973.055 did not appear until two decades later, via 1999 Wisconsin Act 185, Sec. 184 (published June 1, 2000).

[6] 2007 Act 20, §§ 1181 to 1200, effective July 1, 2008.

[7] Later that same year of 1979, the legislature amended the law slightly (to correct what must have been a simple typographical error): Chapter 355, Laws of 1979, Sec. 234, stated, "973.055 of the statutes, as created by chapter 111, laws of 1979, is amended by substituting 'domestic abuse, as defined in s. 46.95(1)(a)' for 'domestic abuse, as defined in s. 46.95(1)(b)."

[8] Furthermore, even though § 973.055 currently no longer references the domestic abuse grant statute to define "domestic abuse," it is telling that § 49.165(1)(a) today remains substantially the same on the point at issue (physicality). The law currently reads: " 'Domestic abuse' means **physical abuse**, including a violation of s. 940.225 (1), (2) or (3), or any **threat**

Wisconsin Legislature created Wis. Stat. § 973.055, "domestic abuse" meant "physical abuse" or the threat thereof. "Domestic abuse" did not mean conduct that did not entail a threat of *physical* harm.[9]

The legislative history to Wis. Stat. § 968.075 is even more telling. 1987 Wis. Act 346 Sec. 3 (published May 2, 1988) created Wis. Stat. § 968.075. This new statute defined "domestic abuse" just the same as exists today, with one key difference: the original version of Wis. Stat. § 968.075(1)(a)4. read "A physical act, *or a threat in conjunction with a physical act*, which that may cause the other person reasonably to fear imminent engagement in the conduct described under subd. 1, 2 or 3" (emphasis

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of physical abuse between adult family or adult household members, by a minor family or minor household member against an adult family or adult household member, by an adult against his or her adult former spouse or by an adult against an adult with whom the person has a child in common" (emphasis added). The only real change is the addition of sexual assault, which is manifestly physical and not just verbal.

[9] The legislature has since amended Wis. Stat. § 973.055 to include offenses that do not necessarily involve physical abuse or a threat thereof, such as Bail Jumping, Criminal Damage to Property, and Disorderly Conduct. But these crimes could involve a violent physical act. For example, a person smashes a plate right in front of his spouse, sending shards everywhere. A reasonable person could then fear an imminent battery, *e.g.* from flying debris.

added). Logically and indeed grammatically, a "physical act" is distinct from a "threat"; after all, the plain meaning of the term "physical act" is a deed, not just a word. "Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage." ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶ 46, 271 Wis.2d 633, 681 N.W.2d 110. If "physical act" can encompass words (*e.g.*, a threat), then is the adjective not mere surplusage to the noun, a useless modifier?[10] To avoid this surplusage, "domestic

[10] There is also a long history of "physical act" in both criminal and civil cases referring, not surprisingly, to actual physical conduct, not just words. *See*, *e.g.*, ***Vill. of Cross Plains v. Haanstad***, 2006 WI 16, ¶ 22, 288 Wis. 2d 573, 709 N.W.2d 447 ("While physical manipulation or activation of the controls necessary to put a snowmobile in motion does not necessarily require the snowmobile to actually be in motion, it does plainly require some affirmative **physical act** of manipulation or activation of the controls necessary to put it in motion"). *See also* ***State v. Land Concepts, Ltd.***, 177 Wis. 2d 24, 32, 501 N.W.2d 817, 820 (Ct. App. 1993) ("all of the recited exempt activities in the ordinance relate to **physical acts** that involve physical use of the water bed"); ***State v. Skow***, 141 Wis. 2d 49, 56 n.5, 413 N.W.2d 650, 653 (Ct. App. 1987) ("one killing a deer could use another's tag but only if the hunter who killed the deer performed the **physical act** of attaching the tag"); ***Verhaalen v. State***, 195 Wis. 345, 218 N.W. 378, 378 (1928) ("No corroboration as to the **physical act** [of the crime] is necessary….").

See also Wis. Stat. § 853.11(1m) Revocation by **physical act**. "A will is revoked in whole or in part by burning, tearing, canceling, obliterating or destroying the will, or part, with the intent to revoke, by the testator or by some person in the testator's conscious presence and by the testator's direction." It is not enough to revoke the will verbally.

abuse" would have to be more than just verbal—more than just yelling and arguing at a spouse. Domestic abuse would be taking action like battering her.

Almost exactly two years after creating Wis. Stat. § 968.075, the Wisconsin Legislature amended the law. 1989 Wis. Act 293 Sec. 1 (published May 7, 1990) excised any reference to "threat": "A physical act, ~~or a threat in conjunction with a physical act, which~~ that may cause the other person reasonably to fear imminent engagement in the conduct described under subd. 1, 2 or 3." Upon information and belief, this is the last time that the legislature has changed the substantive definition of "domestic abuse" in criminal law. In sum, the legislative history for both Wis. Stat. §§ 968.075(1)(a) and 973.055(1)(a) show that domestic abuse in criminal law means a *physical* act.

If the charged offense is an act of domestic abuse--there was a domestic relationship per Wis. Stat. § 968.075(1)(a), and the conduct fits at least one of the four criteria listed in Wis. Stat. § 968.075(1)(a)1-4--and if the person is a domestic abuse repeater, by having two qualifying prior domestic abuse offenses

in the past ten years, then the domestic abuse repeater enhancer applies. This repeater increases the status of the offense from a felony to a misdemeanor and increases the maximum penalty by not more than two years. Thus, the fact that the charged offense is an act of domestic abuse increases, substantially, the statutory maximum penalty, and these facts--the domestic relationship, and the abuse--are not simply facts of prior convictions, which do not go to the jury.

This is the key exception to the Sixth Amendment stated in ***Apprendi v. New Jersey***, 530 U.S. 466, 490 (2000): "*Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt" (emphasis added). These facts must be proven to a jury beyond a reasonable doubt. The court cannot find those facts on its own. ***State v. Saunders***, 2002 WI 107, ¶ 44, 255 Wis.2d 589, 649 N.W.2d 263, quoting ***Apprendi***.

As the Committee notes in the annotation to Wis JI-Criminal 984, the two qualifying prior domestic

abuse convictions should not go to the jury. (App. 55). Here Mr. Johnson stipulated to the prior qualifying convictions anyway.[11] But he did not stipulate that he committed an act of domestic abuse, as defined in Wis. Stat. § 968.075(1)(a). Wis JI-Criminal 984 neatly sets out what the jury should be instructed, and there should be an accompanying special verdict. (App. 56). Here, the jury heard no special instruction nor delivered any special verdict.

[11]While not applicable to this case, there could be other cases in which the two prior offenses had Domestic Abuse Surcharges imposed per Wis. Stat. § 973.055, but either or both of those offenses should not have qualified as domestic abuse per Wis. Stat. § 968.075(1)(a)1-4.

For example, a person was convicted of two counts of Bail Jumping-Domestic Abuse for leaving two non-threatening voicemails with his wife saying "I love you and am sorry" in violation of a no-contact order. Because Bail Jumping is on the both over- and under-inclusive "laundry list" of eligible crimes in Wis. Stat. § 973.055, the trial court imposed Domestic Abuse surcharges on both counts. But the voicemails were not physical acts that might have caused the other adult reasonably to fear imminent engagement in a battery or sexual assault. Because the conduct did not meet the criteria of domestic abuse per Wis. Stat. § 968.075(1)(a)1-4, it makes little sense that the domestic abuse surcharge should have applied.

"Although not specifically mentioned, implicit in Wis. Stat. § 973.055 is that the complained of conduct must fall within the definition of domestic abuse found in Wis. Stat. § 968.073(1)(a)1.–4." ***State v. O'Boyle***, 2014 WI App 38, ¶ 24, 353 Wis. 2d 305, 844 N.W.2d 666, *review dismissed*, 2014 WI 22, 353 Wis. 2d 451, 846 N.W.2d 16, and *review denied*, 2014 WI 122, 855 N.W.2d 695 (unpublished but as a single-judge opinion citable as persuasive per Wis. Stat. § 809.23(3)(b)) (App. 58-62). Thus, Wis. Stat. § 968.075(1)(a)1-4, not Wis. Stat. § 973.055, should control if the surcharge could be imposed, and thus if the conviction qualifies for the domestic abuse repeater.

Further, though trial counsel did not raise the issue until sentencing, Mr. Johnson did not personally waive the issue of the missing jury instruction per Wis. Stat. § 805.13(3). The State still must prove each element of each offense beyond a reasonable doubt. ***In re Winship***, 397 U.S. 358, 364 (1970). "[A]ny waiver of the defendant's right to trial by jury must be made by an affirmative act of the defendant himself. The defendant must act personally." ***State v. Smith***, 2012 WI 91, ¶ 53, 342 Wis. 2d 710, 741, 817 N.W.2d 410, 425 (internal citation omitted). Here, while Mr. Johnson did personally stipulate outside the presence of the jury that he had two prior domestic abuse offenses, he did not also give an express personal jury waiver on whether the disorderly conduct was an act of domestic abuse.

Moreover, the valid waiver of a constitutional right can never occur where the defendant is unaware of the right at issue. ***Id.*** at ¶ 54. The State has the burden of proof to show that Mr. Johnson knew his constitutional right to a jury trial on the two facts that constitute domestic abuse. ***Id.*** Neither Mr. Johnson

nor trial counsel were aware of the ***Apprendi*** issue until sentencing, so Mr. Johnson was not and could not have been aware beforehand. He did not waive his constitutional right to a jury trial on these elements.

B. The omission of this instruction was not harmless error, because it is not clear beyond a reasonable doubt that Mr. Johnson committed an act of domestic abuse as Wis. Stat. § 968.075(1)(a) so defines.

An error is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. ***Harvey,*** 2002 WI 93 at ¶ 49. In that case there was harmless error because "The elemental fact on which the jury was improperly instructed [by the trial court to accept as true] is undisputed and indisputable: Penn Park is a city park, and no one says otherwise." ***Id.*** at ¶ 48.

Here, in contrast, the key issue--whether Mr. Johnson committed an act of domestic abuse against his wife--is anything but undisputed and indisputable. While Mr. Johnson stipulated to the prior qualifying convictions, and while he did admit that Amy Johnson was his wife and they argued and there was physical

contact between them, he did not admit that he committed an act of domestic *abuse* against her. Both the State and the trial court fixated on the idea that it is clear beyond a reasonable doubt that Mr. Johnson committed generic disorderly conduct against her. But that is not all that Wis. Stat. § 939.621 requires: rather, the law mandates that the conduct be an act of domestic abuse. Domestic *and* abuse. It is not clear beyond a reasonable doubt that his conduct was both.

Some of his conduct could have been abusive, but not against someone with whom he had a domestic relationship. Mr. Johnson's conviction for generic Disorderly Conduct could been because of his indisputably disorderly interaction with the arresting officers. The trial court read the jury the standard instruction for generic Disorderly Conduct, including the disjunctive conjunction with the catch-all "otherwise disorderly." The trial court stated the standard two elements for generic Disorderly Conduct, stating that "[d]isorderly conduct may include physical acts or language or both." (60:210). The trial court used the standard language: "Conduct is disorderly

although it may not be violent, abusive, indecent, profane, boisterous, or unreasonably loud, if it is of a type which tends to disrupt good order and provoke a disturbance" (emphasis added). (60:211). Not once in the instructions for Disorderly Conduct did the trial court mention Amy Johnson.

Instead, three Green Bay Police Department officers testified, in accord and despite defense counsel's objections as irrelevant--objections that the trial court overruled--that Mr. Johnson was wild with them. Mr. Johnson did not obey their commands to open the door. Police had to kick down the door. It was dark inside. Mr. Johnson did not obey repeated commands to raise his hands. Officer Haar had to grab him behind the head, knee him a couple times in the stomach, and decentralize him to the floor. Mr. Johnson did not obey Officer Brester's commands to get his hands out from underneath his stomach, so Officer Brester had to jump on top of him. Even then Mr. Johnson continued to refused to listen or get his hands from underneath his stomach, Officer Haar then had to deploy his taser. Though he tried to minimize

his culpability in that regard, Mr. Johnson did not dispute that he was physical with the police. Even if his conduct with police had not been abusive, boisterous, indecent, profane, unreasonably loud, violent, or otherwise disorderly, his interaction with them tended to disrupt good order and provoke a disturbance.

Given this record, it strains credulity and common sense to claim, as the trial court did its *ipse dixit* decision, "There was nothing in the court record that would find the Defendant guilty of disorderly conduct towards any victim other than the Defendant's wife." If that is so, then the police can kick down the door, grab a head, deliver knee strikes to the stomach, decentralize to the ground, jump on top of, and deploy a taser against a person who is not at all disorderly toward them. That is patent folly.

But even if abusive per Wis. Stat. § 968.075(1)(a)--*e.g.*, a physical act that might have caused the police reasonably to fear imminent engagement in a battery--Mr. Johnson's disorderly conduct with the police cannot be an act of *domestic* abuse. The State

presented no evidence that Mr. Johnson had a domestic relationship with any of the officers that night.

In contrast, some of Mr. Johnson's conduct that night was with a domestic partner, his wife, but it is not undisputed or undisputable that such conduct was abuse. Given the generic jury instruction, a jury could have found beyond a reasonable doubt that Mr. Johnson committed generic disorderly conduct against her. She called 911. Police responded. The police heard arguing through the door. He admitted that they had been arguing most the day. Police had to kick down the door, and he made quite a scene when the police came inside. QED, there not only tended to be, but there was, a *bona fide* disturbance. But arguing is not abuse per Wis. Stat. § 968.075(1)(a). As explained at length above, there has to be a *physical* act of abuse.

Battery encompasses half the categories of abuse per Wis. Stat. § 968.075(1)(a), namely sub 1. and sub. 2. But the jury acquitted Mr. Johnson of Battery. Amy Johnson claimed that he choked her, which could also be covered in sub. 1 and 2. But the jury acquitted him of Strangulation. The third subsection of Wis. Stat. §

968.075(1)(a) includes sexual assault, and Amy Johnson never alleged sexual assault. As for the fourth subsection, the jury acquitted Mr. Johnson of all the crimes--Battery, Strangulation, and False Imprisonment--whose elements, unlike Disorderly Conduct--require physical acts, not just words.

Because the jury found reasonable doubt in Amy Johnson's allegations of actual physical acts of his choking her and keeping her from leaving the bedroom and then later the residence proper, there is reasonable doubt that Mr. Johnson committed any other physical act that might have caused her reasonably to fear imminent engagement in a battery. She claimed that he "came after" her--"[h]e just walked towards me" with an "aggressive" demeanor. (60:91). But these vague accusations do not prove a reasonable fear of an imminent battery. His "just walking toward" her, even with an "aggressive" demeanor, is not rushing at her with a cocked fist, ready to punch her in the face.

The only intentional physical act against her to which Mr. Johnson admitted was while in the living room, he grabbed her hand in self-defense. (60:159).

He also testified that in the commotion, after she grabbed his hair, the two both stumbled into the wall--not likely an intentional act. But Amy Johnson did not even accuse him of grabbing her hand or pushing her into a wall. Her focus was what he allegedly did in the other room--the bedroom. And the jury found reasonable doubt on the charges connected with the bedroom.

Thus, while it is clear that Mr. Johnson was disorderly with the police, and also was generically disorderly with his wife (*e.g.*, conduct which tends to provoke a disturbance like arguing), it is not clear beyond a reasonable doubt that his conduct that night were both domestic and abuse.

CONCLUSION

For these reasons, Lonel Johnson, Jr., respectfully requests that the Court reverse the trial court's decision denying the motion for resentencing. It was not harmless error that the jury did not receive special instructions and a special verdict. It is not harmless error that Mr. Johnson received a five year prison

sentence for disorderly conduct, when he could have been acquitted of all charges if the jury had received the special instructions and verdict that ***Apprendi*** and the Sixth Amendment require.

Mr. Johnson should be resentenced for the crime of conviction, Disorderly Conduct, not Domestic Abuse and thus not as a Domestic Abuse Repeater, but as a "regular" Repeater per Wis. Stat. § 939.62(1)(b). Per ***Lasanske***, 2014 WI App 26, ¶ 12, the maximum sentence is 18 months initial confinement and 6 months extended supervision. He has already served two years of incarceration for this case.[12] Both law but equity requires that he should be released forthwith.

Alexander Hamilton noted that at the time of the Founding, both sides of the fierce constitutional debate could agree on the value of the right to a jury trial:

> The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.

[12] When he was first sentenced on June 18, 2013, the trial court awarded 161 days credit. (40, A. App. 7). Since that day to this day of filing, he has served 623 days: 1 year, 8 months, 13 days. Total credit is 784 days, over 26 months.

(Federalist 83). Like the statue of Pallas Athena that shielded Troy when kept within the city walls, the right to a trial by jury helps safeguard the Republic.[13]

In a time in which jury trials dwindle, on this the 800th anniversary of the signing of the Magna Carta of 1215, this historic clause bears repeating:

> *Nullus liber homo capiatur, vel imprisonetur, aut disseisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum vel per legem terre*.

No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, *except by the lawful judgment of his equals* or by the law of the land." (emphasis added).[14]

Respectfully submitted this 3rd day of March 2015,

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[13] And Harmless Error should not be the Trojan Horse that so invites, but at what cost.

[14] See the British Library Magna Carta anniversary website: http://www.bl.uk/magna-carta/articles/magna-carta-english-translation. Last accessed March 3, 2015.

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 7,977 words.

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CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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AFFIDAVIT OF MAILING

I certify that copies of this brief and appendix were deposited in the United States mail for first class delivery on Dated this 3rd day of March 2015 to the following:

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CERTIFICATION AS TO APPENDIX

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 § 809.19(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 of 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.

Dated this 3rd day of March 2015.

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APPENDIX

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INDEX TO APPENDIX

[1] At the postconviction motion hearing, Mr. Johnson submitted the instruction without annotations to the trial court. (R. 49.1, 62, App. 37). Counsel offered to submit the instruction with annotations, but the court said that was not necessary because the published instruction would be available anyway. (R. 62, App. 51-52). Because the Court of Appeals presumably has this published instruction as well, counsel did not deem it necessary to file a motion to enlarge the record with a copy of the instruction with the annotations. As a courtesy counsel provides a full copy here.