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STATE OF WISCONSIN
COURT OF APPEALS

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT III

Case No. 2014AP2888-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LONEL L. JOHNSON JR.

Defendant-Appellant.

APPEAL FROM AN ORDER DENYING MOTION
FOR RESENTENCING, ENTERED IN BROWN
COUNTY CIRCUIT COURT, THE HONORABLE
WILLIAM M. ATKINSON, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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**STATEMENT ON ORAL ARGUMENT
AND PUBLICATION**

The State requests neither oral argument nor publication. This court may resolve this case by applying well-established legal principles to the facts presented.

SUPPLEMENTAL STATEMENT OF FACTS AND STATEMENT OF THE CASE

As respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § 809.19(3)(a)2.¹ Instead, the State presents the following summary and will present additional facts, if necessary, in the argument portion of its brief.

In January 2013, the Brown County District Attorney's Office charged Lonel L. Johnson, Jr., with four offenses stemming from an altercation with his wife, A.J., at their residence: Disorderly Conduct, Battery, Strangulation and Suffocation, and False Imprisonment (1:1-4; 7:1-4; 60:83-85).²

The case was tried to a jury on May 8, 2013, and in her opening statement, the prosecutor outlined the case, specific to each charge:

All of this evidence is going to come together and it's going to tell you what happened that morning, and it's going to show beyond a reasonable doubt that the defendant committed the four crimes that he's charged with. He was charged with disorderly conduct. The evidence is going to show that he engaged in violent, abusive conduct and that that provoked a disturbance with the victim.

¹ Unless indicated otherwise, all citations to Wisconsin Statutes refer to the 2013-14 editions.

² Each count was charged as a domestic abuse offense, Wis. Stat. § 968.075(1)(a) (1:1-4; 7:1-4). In addition, Johnson was charged both as a domestic abuse repeater, Wis. Stat. § 939.621(1)(b) and (2), and as an habitual criminal, Wis. Stat. § 939.62(1)(b), with respect to all of the charges (1:1-4; 7:1-4).

You are going to hear about the battery. The defendant caused bodily harm to the victim when he placed his hands around her neck and choked her. That caused pain. She didn't consent to that, and he knew that she didn't consent to that. In the process of that you're also going to hear that she had trouble breathing and that the defendant did that intentionally and that forms the basis for the strangulation and suffocation.

And then you are also going to hear that after the choking incident with the defendant, he didn't let her leave the apartment. She had called the police officers. The police were on the other side of that door, and he would not let her get out to get to the police officers. All of that is going to show that he confined her. He knew he didn't have her permission to do that, and he didn't have any lawful authority to do what he did to her.

Based upon all the testimony that you're going to hear from our witnesses, we believe the evidence will show beyond any reasonable doubt that he is guilty of these four crimes, and we would ask that you find him guilty and return such a verdict.

(60:53-54).

In his opening statement, Johnson's attorney pointed out that when the police arrived at Johnson's apartment, they heard arguing, but the door was closed and the officers could not see what was happening inside:

The question is what was really going on on the other side of that door? Police don't know. Police will testify that they don't know what happened before they got there, of course, and they don't know what

was happening on the other side of the door after they got there.

(60:56).

At trial, Johnson's wife, A.J., testified that she and Johnson had been arguing all day leading up to her calling 911³ (60:87). She testified that at some point "things became physical" and that she called 911 because Johnson "started choking" her in the bedroom by squeezing both of his hands around her neck (60:88-90).

After the choking incident, A.J. tried to leave the bedroom, but Johnson positioned himself in front of the door and would not let her out (60:92-93). She eventually pushed past Johnson and ran out when she heard the police outside the kitchen door to the apartment (60:93-94). Johnson came after A.J. and stood in front of the kitchen door, preventing A.J. from opening it (60:94).

The police forced entry when they heard someone inside say she was being choked (60:75, 79, 123-26, 133, 136).⁴ Once inside, the officers encountered Johnson, who refused to comply with their commands to get on the ground and to show his hands (60:62-65, 68, 127-28). The officers took Johnson to the ground and tasered him to get him into custody

³ A.J. placed three calls to 911 during the encounter with Johnson (60:87, 91-92).

⁴ At trial, A.J. denied saying or yelling "You're choking me" (60:104). When Johnson took the stand, he testified that A.J. had been the aggressor in the fight, and that she did say "Oh, you're choking me" when the police arrived (60:166). He claimed, however, that A.J. was not telling the truth (60:165-66).

(60:60-65, 75-76, 79, 127-29). On scene, A.J. refused medical treatment because she did not feel like she had suffered any injuries (60:106, 108). Nonetheless, she maintained that Johnson had choked her and caused her to experience pain (60:110).

A.J.'s nine-year-old son, T.M., also testified at Johnson's trial (60:112-19). On the night of the incident between Johnson and his mother, T.M. woke up to them yelling (60:115). He went into the hallway of the apartment and saw Johnson "choking" A.J. in the bedroom (60:116-17).

Johnson testified in his own defense (60:154-200). He admitted that he and A.J. had been arguing (60:156-58). He claimed that at some point A.J. hit him in the mouth and then grabbed a knife and swung it at him, cutting his chest and arm (60:158-60, 177). Johnson did not receive medical treatment, and he testified that the police refused his requests to photograph his injuries (60:177-80). Johnson denied choking A.J. that night (60:163, 66). He also denied barring her from the door when the police arrived (60:167).

At the close of evidence, the State and defense counsel stipulated to standard jury instructions for all four charges (60:200-05). None of the instructions for the four counts asked the jury to determine whether the crimes were "domestic abuse"⁵ offenses (*see* 60:208-22).

⁵ Wis. Stat. § 939.621(2), which was applicable to all four charges (1:1-4; 7:1-4), provides an increased penalty for domestic abuse offenders who commit a new crime that constitutes "an act of domestic abuse, as defined in s. 968.075(1)(a)[.]" Wis. Stat. § 939.621(2).

That provision defines "domestic abuse" as follows:

Ultimately, the jury found Johnson guilty of disorderly conduct, but not guilty of the remaining charges (60:241-42).

At Johnson's sentencing hearing, his attorney challenged the application of the domestic violence penalty enhancer, Wis. Stat. § 939.621(2), based on the fact that the jury had not determined whether Johnson's crime was one of "domestic abuse" (61:3-10). Without discussing the statutory definition of "domestic abuse" under Wis. Stat. § 968.075(1)(a), the circuit court rejected the argument, finding that: (1) the jury's guilty verdict on the disorderly conduct charge was based on Johnson's actions toward his wife, and (2) the jury was not required to decide whether the crime was one of domestic abuse because "it's a status rather than a factual determination" (61:11). Applying both the domestic abuse penalty enhancer and the habitual criminality enhancer, the court sentenced Johnson to three

(a) "Domestic abuse" means any of the following engaged in by an adult person 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:

1. Intentional infliction of physical pain, physical injury or illness.
2. Intentional impairment of physical condition.
3. A [sexual assault] violation of s. 940.225(1), (2) or (3).
4. A physical act that may cause the other person reasonably to fear imminent engagement in the conduct described under subd. 1., 2. or 3.

Wis. Stat. § 968.075(1)(a)1-4.

years of initial confinement and two years of extended supervision (61:29, 36-37; 40).

Johnson later filed a postconviction motion for resentencing, again arguing that application of the domestic abuse penalty enhancer was improper because the question of whether Johnson's crime was one of "domestic abuse" had not been decided by the jury (44; 62). The circuit court denied Johnson's motion based on its conclusion that any error in failing to instruct the jury to determine whether the offense was one of "domestic abuse" was harmless (51).

Johnson appeals.

ARGUMENT

I. JOHNSON WAIVED ANY CHALLENGE TO THE JURY INSTRUCTIONS.

Wisconsin Stat. § 805.13(3) provides that the failure to object to the proposed jury instructions or verdicts at the required conference "constitutes a waiver of any error in the proposed instructions or verdict."⁶ At conference, Johnson's attorney not only failed to object to the standard jury instructions and verdict forms, he stipulated to their use (60:200-05). More important, Johnson has not raised an ineffective assistance of counsel claim with respect to his attorney's performance. Johnson forfeited his claim based on the omission of a specific "domestic abuse" jury instruction in

⁶ That provision applies to criminal proceedings pursuant to Wis. Stat. § 972.11(1). *State v. Paulson*, 106 Wis. 2d 96, 101-02, 315 N.W.2d 350 (1982).

this case. *See Hoff v. Wedin*, 170 Wis. 2d 443, 454, 489 N.W.2d 646 (Ct. App. 1992).

As discussed below, Johnson's claim also fails because the omission of a domestic abuse jury instruction and verdict form was harmless error.

II. II. THE OMITTED DOMESTIC ABUSE INSTRUCTION WAS HARMLESS ERROR BECAUSE IT WOULD NOT HAVE CHANGED THE JURY'S GUILTY VERDICT.

"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." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Because Wis. Stat. § 939.621 increases a domestic abuse repeater's maximum penalty for an underlying crime that constitutes "domestic abuse," *Apprendi* requires that the elements of "domestic abuse" be submitted to the jury and proven beyond a reasonable doubt. *State v. Harvey*, 2002 WI 93, ¶ 26, 254 Wis. 2d 442, 647 N.W.2d 189. It was error not to do so in this case.

That error, however, is subject to the harmless error rule. *Harvey*, 254 Wis. 2d 442, ¶¶ 35-38; *Neder v. United States*, 527 U.S. 1, 9-10 (1999). Such 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*, 254 Wis. 2d 442, ¶ 49 (citing *Neder*, 527 U.S. at 18).

The record in this case demonstrates beyond a reasonable doubt that the jurors would have found

Johnson guilty of disorderly conduct even if they had been instructed to decide whether the crime was one of “domestic abuse” under the related penalty enhancer statute, Wis. Stat. § 939.621(2). The penalty enhancer incorporates the definition of “domestic abuse” from another statutory section, which provides:

(a) “Domestic abuse” means any of the following engaged in by an adult person 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:

1. Intentional infliction of physical pain, physical injury or illness.
2. Intentional impairment of physical condition.
3. A [sexual assault] violation of s. 940.225(1), (2) or (3).
4. A physical act that may cause the other person reasonably to fear imminent engagement in the conduct described under subd. 1. 2. or 3.

Wis. Stat. § 968.075(1)(a)1-4. So, the jury would have had to find that Johnson’s disorderly conduct offense was against A.J. (his wife) and that it met one or more of the four listed criteria to find that it was an act of “domestic abuse.” Contrary to Johnson’s argument, the record provides ample evidence that Johnson’s disorderly conduct offense was an act of “domestic abuse.”

It was and still is undisputed that the victim, A.J., was Johnson’s wife and that they lived together at the time of the incident underlying the charges against Johnson. Johnson also appears to concede that he was guilty of disorderly conduct toward A.J. (*see* Johnson Br. 38) (“it is clear that Mr. Johnson ... was generically disorderly with his

wife”). Johnson’s claim of error is that there was insufficient evidence that the disorderly conduct offense was “domestic abuse” according to one or more of the criteria listed in Wis. Stat. § 968.075(1)(a)1-4.

Johnson’s argument ignores the evidence at trial. A.J. testified that Johnson “choked” her by placing his hands around her neck and squeezing, which she said caused her pain (60:88-90). Her son also testified that he saw Johnson “choking” his mother (60:116-17). A.J. also described how Johnson barred her from leaving the bedroom and answering the door when the police arrived (60:92-94). The police testified that they forced entry to the apartment because they heard arguing and they heard A.J. say “You’re choking me” (60:75, 79, 123-26, 133, 136). Then, when the police did enter, they had to physically subdue Johnson because he was uncooperative (60:60-65, 75-76, 127-29).

All of this evidence, individually and together, easily satisfies three of the four statutory criteria for an act of “domestic abuse.” Choking A.J. clearly would demonstrate both the “[i]ntentional infliction of physical pain,” and the “[i]ntentional impairment of physical condition.” Wis. Stat. § 968.075(1)(a)1 and 2. In addition, blocking her from leaving the room to answer the door, and even resisting the police in her presence, are “physical act[s] that may cause the other person reasonably to fear imminent engagement in” similar conduct. Wis. Stat. § 968.075(1)(a)4.⁷

⁷ The State agrees that the four criteria under Wis. Stat. § 968.075(1)(a) must be used to determine whether a crime is “an act of domestic abuse” under Wis. Stat. § 939.621(2). The State does not agree, however, with Johnson’s lengthy

Johnson improperly dismisses this evidence simply because the jury chose to acquit him of the remaining charges. He may not do so. The jury may have found him not guilty for a number of reasons specific to those charges. The acquittals do not invalidate any of the evidence presented at trial, and they are irrelevant to the jury's guilty verdict on the disorderly conduct count.⁸

The question is whether it is clear beyond a reasonable doubt that the jury would have found Johnson guilty even if the "domestic abuse" instruction had not been omitted. The answer to that question is "yes." *Harvey*, 254 Wis. 2d 442, ¶ 49 (citing *Neder*, 527 U.S. at 18). From beginning to end, this case was about what happened between Johnson and A.J. behind the closed doors of their apartment. All of the charges very clearly related to that. Despite the short scuffle that took place when the police finally entered and placed Johnson in custody, no rational jury would have mistook that as the basis for the disorderly conduct charge. In addition, no rational jury would have concluded that the disorderly

pitch that these criteria always require some "physical" act by the defendant. While that will be true in a vast majority of situations, it is not at all clear that it must be true. More important, the point is moot here given the clear evidence that Johnson did, in fact, perform "physical" acts that satisfy three of the four criteria.

⁸ It is worth pointing out that although A.J. and her son were clear that Johnson had "choked" her, A.J.'s testimony and the remaining evidence at trial was relatively weak in terms of proving the other charges. There was no evidence of injury (apart from pain and difficulty breathing), and A.J. refused medical treatment (60:88, 106, 108, 110). A.J. also testified that Johnson stood in front of her to keep her from answering the door, but that she had been able to push past him to get out of the bedroom (60:93-94).

conduct offense was not “an act of domestic abuse” given all of the evidence presented.

CONCLUSION

For the foregoing reasons, this court should affirm the circuit court’s denial of Lonel L. Johnson, Jr.’s motion for resentencing.

Dated this 4th day of June, 2015.

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 2,676 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 4th day of June, 2015.

Nancy A. Noet
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