STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2015AP001004-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONALD R. WESO,

Defendant-Appellant.

On Appeal From a Judgment of Conviction and Order Denying Postconviction Relief Entered in Shawano County, the Honorable James R. Habeck, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

Must the domestic abuse surcharge be vacated because the record does not establish that Weso and the complainant resided together within the meaning of the domestic abuse surcharge statute?

The trial court answered: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Weso's offense is a misdemeanor; therefore, this case will be decided by a single judge pursuant to Wis. Stat. § 752.31(2) and (3). Publication is not warranted pursuant to Wis. Stat. § 809.23(1)(b)4. Weso does not request oral argument.

STATEMENT OF THE CASE AND FACTS

On February 6, 2013, at approximately 1:52 a.m., police in Shawano County were dispatched to a bar based on a report of a possible domestic disturbance. (24:4). The complainant, R.D., stated that Donald Weso had struck her in the face. R.D. told police "she and Weso had been dating since June of 2012" and that "she and Weso have been living with each other since October of 2012." (24:4). Weso was arrested and eventually charged with misdemeanor battery as an act of domestic abuse, possession of cocaine, resisting an officer, and two counts of disorderly conduct as an act of domestic abuse. (24:1-2).

On April 29, 2014, Weso pleaded guilty to the domestic abuse-related charges, and no contest to the other

charges. (56:3-6).[1] The court proceeded immediately to sentencing, and followed the parties' joint recommendation for probation. (56:17;22).

Weso subsequently filed a postconviction motion pursuant to Wis. Stat. 809.30(2)(h). He asked the court to vacate the domestic abuse surcharge on the ground that the facts of the case did not support the surcharge, in that Weso did not "reside" with R.D. within the meaning of the domestic abuse surcharge statute. (37:2).

Judge Habeck held a hearing on the motion on April 17, 2015. At the outset of the hearing, counsel moved to vacate the DNA analysis surcharge, which the court granted. (57:3-4; App. 103-104). The court then took testimony and heard argument pertaining to Weso's claim that he did not "reside" with R.D. for purposes of the domestic abuse surcharge statute.

Weso testified he lived with his sister on Highway 47, and that he had lived there "pretty much [his] whole life." (57:5; App. 105). He testified he dated R.D. from June 2, 2012 until February 6, 2013. He testified that R.D. lived with a person named Linda Maskewit. (57:6-7; App. 106-107). He testified he periodically spent the night at Maskewit's home with R.D., but that he did not live there. (57:6,7; App. 106; 107).

R.D. testified she lived with Linda Maskewit for about six months. (57:12; App. 112). Maskewit was her mother's

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[1] Weso did not expressly and personally articulate a plea of guilty or no contest. However, like the defendant in ***State v. Burns***, 266 Wis. 2d 762, 774, 594 N.W.2d 799 (1999), the record supports the conclusion that he demonstrated his intent to enter pleas leading to his conviction.

best friend. (57:12; App. 112). R.D. testified she did not vote from that address, nor she did have a driver's license with that address. She testified that Weso stayed with her at Maskewit's home approximately five or six nights a week while they were dating, but that he also stayed elsewhere for periods of time, and that he had two laundry baskets of clothes at her residence. (57:10-11; App. 110-111). She testified she did his laundry and folded his clothes for him, and said she believed she and Weso were living together. (57:11; 15; App. 111; 115).

The court denied Weso's motion to vacate the domestic abuse surcharge, saying:

> As relates to the matter, I have testimony which is not exactly congruent, but it certainly isn't highly contrasting either. But in any event, I have a situation where I am told by Miss [D], who has credibility in my eyes today from observing her demeanor and, of course, she gave me a story consistent with what she gave the officer at the time when it was all fresh in her mind.
>
> And I do believe that Mr. Weso was spending five or six nights a week ordinarily over there, and then he has clothes there on a regular basis that Miss [D] laundered them. Logically, he would have been eating there.
>
> And we have many people that split time between two homes, that's true. But as to whether this would certainly apply, I believe it does. And they had clearly a domestic relationship that extended for months. This was not something temporary or a very occasional visit.
>
> So clearly the surcharge was valid under the circumstances for the domestic abuse enhancer surcharge.

(57:18-19; App. 118-119).

Weso filed a notice of appeal. (44).

ARGUMENT

The Domestic Abuse Surcharge Must Be Vacated Because the Record Does Not Establish that Weso and the Complainant Resided Together Within the Meaning of the Domestic Abuse Surcharge Statute.

Wisconsin Statute § 973.055 provides for a domestic abuse surcharge in cases involving crimes of domestic violence. The statute provides in pertinent part:

> (1) If a court imposes a sentence on an adult person or places an adult person on probation, regardless of whether any fine is imposed, the court shall impose a domestic abuse surcharge under ch. 814 of $100 for each offense if:
>
> (a) 1. The court convicts the person of a violation of a crime specified in…940.19…and
>
> 2. The court finds that the conduct constituting the violation under subd. 1. involved an act by the adult person against his or her spouse or former spouse, against an adult with whom the adult person resides or formerly resided or against an adult with whom the adult person has created a child….

Weso pleaded guilty to misdemeanor battery of R.D., contrary to Wis. Stat. § 940.19(1), which is an offense to which the domestic abuse surcharge applies. As a result, the crime exposed Weso to the potential imposition of the domestic abuse surcharge. The question presented in this case is whether Weso's relationship with R.D. met the criterion for the imposition of the surcharge.

Under the statute, the surcharge shall be imposed if the crime involves an adult against his or her former spouse. As Weso and R.D. were not married, nor had ever been married to one another, that provision would not apply. The statute also provides that the surcharge shall be imposed if the crime involves adults who had had a child together. Again, that provision of the statute does not apply to Weso and R.D. As quoted above, the surcharge would be imposed, however, if the crime was committed "against an adult with whom the adult person resides or formerly resided."

Because Weso and R.D. did not "reside" together, the domestic abuse surcharge should not have been imposed, and should now be vacated.

Wisconsin Statute § 973.055 uses the words "resides" or "formerly resides." The court must accordingly determine the meaning of "resides" within the meaning of the statute. The interpretation of a statute is a question of law which this court reviews de novo. ***Harnischfeger Corp. v. Labor and Industry Review Com'n.***, 196 Wis. 2d 650, 659, 539 N.W.2d 98 (1995).

Statutory interpretation "begins with the language of the statute." ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. Unless the words of the statute are technical or "specially-defined," the "[s]tatutory language is given its common, ordinary, and accepted meaning…." ***Id.*** In addition, the court will look at the context and structure of the statute so that the statute is interpreted in the context of which it is used, rather than in isolation. ***Id.*** at ¶46. Where the statutory language is unambiguous, the court generally does not resort to extrinsic sources of interpretation such as legislative history. ***Id.***

If, however, the statute's meaning or language is ambiguous, the court "turns to the scope, history, context and purpose of the statute." ***Id.*** at ¶48. A statute is ambiguous "if it is capable of being understood by reasonably well-informed persons in two or more senses." ***Id.*** at ¶47.

The "common and approved usage of a word in a statute may be ascertained by reference to a recognized dictionary." ***State v. Woods***, 117 Wis. 2d 701, 735-36, 345 N.W.2d 457 (1984). Here, the operative word in the statute is "resides." The first definition of "reside" in Webster's Third New International Unabridged Dictionary (Second College Edition) defines "reside" as: "To live in a place for an extended or permanent period of time." The Merriam Webster on-line dictionary (www.merriam-webster.com) defines "reside" first as "to be in residence as the incumbent of a benefice or office;" and second as "to dwell permanently or continuously: occupy a place as one's legal domicile." Oxford Dictionaries on-line (www.oxforddictionaries.com) defines "reside" this way: "Have one's permanent home in a particular place."

The evidence in this case does not support the conclusion that Weso "resided" with R.D. within the ordinary meaning of "reside." The dictionary definitions suggest a permanency to "reside" that is lacking in a dating relationship like that of R.D. and Weso. R.D. testified she lived at the home of Linda Maskewit for about six months while she was dating Weso. (57:12; App. 112). Another friend, Raphael Boivin, lived at Maskewit's home as well. (57:12; App. 112). R.D. testified she did Weso's laundry and that he had two laundry baskets of clothing there. (57:14-15; App. 114-115). She did not testify that Weso ate his meals there or that he spent time there during the day. She answered affirmatively to the prosecutor's question that "he

would go for a day or two, possibly a week, someplace else, but he stayed with you between five and six days a week?" (57:10-11; App. 110-111). Weso never testified that he received mail at Maskewit's home, that he used that address for any business purpose, or that he was at that address for any reason other than to visit R.D. The record shows Weso did not "dwell permanently" with R.D. at Maskewit's residence, nor did he live there for an "extended or permanent" period of time. This record certainly fails to show that R.D.'s home with Maskewit was Weso's "legal domicile."

In addition to general dictionaries, the definitions for "residence" in Wisconsin statutes demonstrate that the idea of "residing" together is different from spending time together in a dating relationship. In Wis. Stat. § 6.10(1)(2013-14), "Elector Residence," the "residence of a person is the place where the person's habitation is fixed, without any present intent to move, and to which, when absent, the person intends to return." Wisconsin Statute § 6.10(2)(2013-14) clarifies that if a married person's "family place" is "temporary or for transient purposes, it is not the residence."

In Wis. Stat. § 46.27(1)(d)(2013-14), a "residence" is: the "voluntary concurrence of physical presence with intent to remain in a place of fixed habitation. Physical presence shall be prima facie evidence of intent to remain." Wis. Stat. § 49.001(6)(2013-14) uses the same definition as § 46.27(1)(d), as does § 252.16(1)(e)(2013-14), the definition provisions for the statute on health insurance premium subsidies. Wisconsin Statute § 938.991(2013-14), the "Interstate Compact on Juveniles," defines "residence" as "a place at which a home or regular place of abode is maintained."

As such, both the general dictionary definitions and those contained in Wisconsin statutes demonstrate that "reside" requires an intent to remain. In contrast, the evidence in this case shows *at best* that Weso frequently stayed overnight at Linda Maskewit's home during the six-month period that R.D. lived in Maskewit's home.

If the court were to conclude that the word "reside" is ambiguous, the legislative history also supports Weso's position that the domestic abuse surcharge is applicable to those who are truly residing together as domestic partners, rather than persons in a dating relationship. Wisconsin Statute § 973.055 was created in 1979. Chapter 111, Laws of 1979. At that time, Wis. Stat. § 973.055(1979) required the court to determine whether the criminal conduct involved "domestic abuse," which was defined in Wis. Stat. § 46.95(1)(a)(1979) as : "physical abuse or threats of physical abuse between persons living in a spousal relationship or persons who formerly lived in a spousal relationship." "Spousal relationship" was defined as either a "marital relationship or 2 persons of the opposite sex who share one place of abode with minor children and live together in a relationship which is similar to a marital relationship…." *See* Wis. Stat. § 46.95(1)(c)(1979). That definition was changed to the current language in 91 Wis. Act 39, so that the domestic abuse surcharge applies where the crime "involved an act by the adult person against his or her spouse or former spouse," or "against an adult with whom the adult person resides or formerly resided or against an adult with who the adult person has created a child…."[2]

[2] Wisconsin Statute § 973.055 was amended in minor ways in other statutory revisions, not relevant here. For example, when created, the penalty was a surcharge based on a percentage of the fine imposed, rather than an assessment.

The context and history of the statute envisions a domestic relationship between adults who "reside" together in a spousal-type of relationship. When the legislature created Wis. Stat. § 973.055 and § 46.95 for "Domestic abuse grants," in 1979, the "Legislative findings" were that "Domestic abuse is a serious social problem which requires a comprehensive, informed and determined response by a concerned society." *See* Chapter 111, Laws of 1979, Section 1. The legislature did *not* say that misdemeanor battery was a serious social problem that needed to be addressed in a way different from the criminal statutes. The social ill the legislature addressed was violence within a spousal-type of relationship, where it determined there was a "critical need for specialized assistance to victims of domestic abuse, as well as their abusers, and the state should share in supplying this assistance." *See* Chapter 111, Laws of 1979 at Section 1 (3).

As shown, dictionary and statutory definitions as well as the history of Wis. Stat. § 973.055 support the conclusion that the domestic abuse surcharge is reserved for those situations where individuals reside together in a spousal-type of relationship in an arrangement intended to be permanent. It does not apply to a dating relationship where individuals spend the night at one another's homes, even if they spend more nights together than apart.

This court should thus reject the circuit court's conclusion that Weso and R.D. "clearly had a domestic relationship that extended for months." (57:19; App. 119). The only factors the court could cite to were that they stayed together most nights, R.D. did his laundry, and Weso had clothes at her place. The court inferred, without any testimony, that Weso must have eaten his meals at Maskewit's home with R.D. (57:19; App. 119). The court's

conclusion that Weso and R.D. "resided" together is not consistent with a spousal-type of relationship, intended to be permanent. R.D. was living with Maskewit because she was "getting sick of her parents." (57:12; App. 112). She did not have a driver's license with that address, which would be an indicator that she intended to make the Maskewit home her residence. (57:14; App. 114). She lived with Maskewit for only six months. (57:12:App. 112).

Similarly, this court should not put much stock in R.D.'s statement to the police at the time of the offense that she and Weso were living together, or her testimony at the postconviction hearing that she believed they lived together. (24:4; 57:11; App. 111). In denying Weso's postconviction motion, the court observed that R.D. had told the police she and Weso were living together, and that her testimony was consistent with "the time when it was all fresh in her mind." (57:19; App. 119). R.D.'s consistency between her testimony and her statement to the police is irrelevant. Her statement is not of the sort where recency would make a difference. Her statement that she and Weso lived together was an opinion, not a statement of fact.

The phrase "living together" is not the same as "residing" together. The legislature is presumed to have chosen the words of the statute deliberately, and the definitions of "reside" noted above connote an intent at permanency that is lacking with the phrase "living together."

Similarly, the court should not put much stock in the fact that Weso's attorney at sentencing said that Weso and R.D. "used to reside together." (56:18). The context of that argument was to persuade the court to not impose jail as a probation condition. In her sentencing argument, counsel listed reasons not to impose jail, including that Weso and

R.D. had resided together, but also that he had not had any contact with R.D. for over a year, that he had had a serious snowmobile accident requiring surgery and rehabilitation, and that he was pursuing AODA counseling. (56:18-19). Counsel's argument to the sentencing court should not be definitive.

In sum, the record does not establish that Weso and R.D. resided together within the meaning of the domestic abuse surcharge statute. As a result, the court should vacate that surcharge.

CONCLUSION

For the reasons argued above, Donald R. Weso respectfully requests that the court reverse the trial court's denial of his postconviction motion, and vacate the domestic abuse surcharge imposed in this case.

Dated this 17th day of August, 2015.

Respectfully submitted,

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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 2,789 words.

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.

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 17th day of August, 2015.

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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; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) 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.

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