STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2016AP0896-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

MICHAEL LEE BRAYSON,
Defendant-Appellant.

On Appeal from a Judgment of Conviction and Order Denying Postconviction Relief Entered in the Milwaukee County Circuit Court, the Honorable Ellen R. Brostrom, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

Were there sufficient facts to establish that Mr. Brayson and L.R. resided together in a qualifying domestic relationship to support the imposition of the domestic abuse modifiers and the domestic abuse surcharges pursuant to WIS. STAT. §§ 968.075 and 973.055?

The circuit court said no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Brayson was convicted of two misdemeanor offenses, and therefore, this case will be decided by a single judge pursuant to WIS. STAT. § 752.31(2) and (3). Pursuant to WIS. STAT. RULE 809.23(4)(b), publication is not warranted. Mr. Brayson believes the briefs will fully present the issues raised, but welcomes oral argument if this Court would find it helpful.

STATEMENT OF FACTS

On June 6, 2015, the State charged Mr. Brayson with: (1) attempted second degree sexual assault, domestic abuse, in violation of WIS. STAT. §§ 940.225(2)(a), 939.50(3)(c), 939.32, 968.075(1)(a); (2) second degree sexual assault in violation of WIS. STAT. §§ 940.225(2)(a), 939.50(3)(c), 968.075(1)(a); and (3) misdemeanor battery, domestic abuse, in violation of WIS. STAT. §§ 940.19(1), 939.51(3)(a), 968.075(1)(a). (R.2:1-2; App.101-102).

According to the criminal complaint, Oak Creek police stopped L.R. and Mr. Brayson on Interstate 94 after receiving

calls reporting Mr. Brayson was arguing with L.R. at a travel stop, and that he hit L.R. with a closed fist in the head and chest multiple times. (R.2:2-3; App.102-103). The complaint alleged L.R. was a cross-country semi-truck driver and that her boyfriend, Mr. Brayson, lived with her in her truck. (R.2:2; App.102). L.R. told police that she and Mr. Brayson got into an argument after Mr. Brayson came back to the truck, and "appeared to be drunk." (R.2:2; App.102). L.R. stated that she told Mr. Brayson she had to work when he wanted to have sexual intercourse with her, and that upon her refusal, Mr. Brayson ripped L.R.'s shorts and removed her underwear, and attempted to have mouth-to-vagina contact with her. (R.2:2; App.102).

L.R. further stated that when she received a phone call from her employer regarding complaints about Mr. Brayson's behavior at the travel stop, Mr. Brayson pulled her hair, placed his hands around her neck, tried to get her phone away from her, and ordered her to drive away from the truck stop. (R.2:2; App.102). L.R. complied, and Mr. Brayson then removed his clothes and asked L.R. for mouth-to-penis contact. (R.2:2; App.102). When L.R. refused, Mr. Brayson grabbed her breasts. (R.2:2; App.102). Police stopped the vehicle shortly thereafter. (R.2:2; App.102).

Mr. Brayson pled guilty on August 26, 2015 to two amended counts of misdemeanor battery, each with the domestic abuse modifier pursuant to WIS. STAT. § 968.075(1)(a). (R.16; 29:10; App.104).

At the plea hearing, the Honorable Ellen R. Brostrom asked whether the facts in the complaint were substantially true and correct. (R.29:7). Mr. Brayson's trial counsel noted, and Mr. Brayson confirmed, that he denied engaging in any of the behavior that was the basis for the sexual assault

charges, but admitted everything else. (R.29:8). The circuit court then sought and received confirmation that it could use the facts as stated in the criminal complaint, with the above-described caveat, as the factual basis for Mr. Brayson's guilty pleas. (R.29:9).

At the August 31, 2015 sentencing hearing, the State noted L.R. was an "over-the-road truck driver" and that "the cab was her home and Mr. Brayson was on her route with her and apparently had been. The two of them had been together as she reports for a period of time." (R.30:4-5; App.106-107). The circuit court asked the attorneys about the parties' relationship:

> The Court: And so in terms of meeting the statutory prerequisites for the domestic violence surcharge, do they have any children in common?
>
> State: They do not have any children in common. They were boyfriend and girlfriend. They were residing in her cab.
>
> The Court: Is that where she lived when she was working?
>
> State: So my understanding is she did keep a residence in a state down south but she was on the road most of the year so that was what she told me she considered her home.
>
> The Court: And do you know did she stay in hotels or did she pretty much sleep on the truck?

> State: My understanding was that this cab was equipped for sleeping in the cab because she was over-the-road….

(R.30:7-8; App.107). Defense counsel added that Mr. Brayson "has been with [L.R.] as boyfriend and girlfriend for a number of years now down in Mississippi. My understanding is that they have separate addresses, that they live separately in Mississippi, however, he travels with her when she goes on the road for her job." (R.30:8; App.107). Toward the end of the sentencing hearing, the circuit court determined Mr. Brayson's relationship with L.R. was "a relationship that fits under the domestic violence statute." You were girlfriend and boyfriend. You were romantically involved and I find that [the] truck was in fact your moving home that you shared together for significant periods of time throughout the year." (R.30:16-17; App.109).

Mr. Brayson filed a postconviction motion on February 11, 2016, asking the circuit court to vacate the domestic abuse surcharges and to strike the domestic abuse modifiers from the judgment of conviction. (R.17). Mr. Brayson argued that he did not reside with L.R. within the meaning of WIS. STAT. §§ 968.075(1)(a) and 973.055(1). (R.17:3-6).

The circuit court ordered further briefing from the parties, and in a written decision and order dated April 7, 2016, denied Mr. Brayson's motion for postconviction relief. (R.18; 21; App.111). The circuit court concluded neither domestic abuse statute at issue provided a definition for the term "residence," or limited what could qualify as a residence. (R.21:3; App.113). It looked to Black's Law Dictionary for its definition of "residence" and concluded:

> The victim used the truck as her home while she was on the road for her job. Although she and the defendant had separate addresses in Mississippi, they lived together in the truck while the victim was on the road for work trips. The victim was on the road most of the year and considered the truck to be her home. It was not necessary to establish how long the victim's work trips last on average, how often the defendant accompanied the victim on work trips, how many trips they took together per year, when they began dating or when they began their arrangement of traveling in the same truck together. Establishment of a residence, while involving intent to make a home for an indefinite period, does not require intent to remain in the residence for any particular length of time, nor does it require that a victim have only one residence at a time. It is sufficient that the victim intended to use the truck as her home during the periods that she was on the road for work, and during those periods that the defendant shared the truck with her, they resided together for purposes of sections 968.075(1)(a) and 973.055(1), Stats.

(R.21:4; App.114).

The court further found its interpretation of the statutes was consistent with legislative policy as well as interpretations from other jurisdictions. (R.21:4-5; App.114-15). The circuit court was persuaded by the notion that it was the nature of the relationship, not where the parties resided, that was relevant. (R.21:5; App.115). This appeal follows. (R.22).

ARGUMENT

I. The Domestic Abuse Modifiers Must Be Stricken and the Surcharges Must Be Vacated Because the Record Does Not Establish that Mr. Brayson and L.R. Resided Together Under WIS. STAT. §§ 968.075 and 973.055.

A. Introduction.

At issue in this case are two statutes: one which governs domestic abuse modifiers, and another providing for domestic abuse surcharges. WISCONSIN STAT. § 968.075 delineates what constitutes a domestic abuse relationship for purposes of the domestic abuse modifier, as well as the definition for domestic abuse:

> (1) Definitions. In this section:
>
> (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 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 sub. 1, 2 or 3.

In turn, the domestic abuse surcharge statute contains a fundamentally identical definition of what constitutes a relationship that will fall under its purview. WISCONSIN STAT. § 973.055(1) states, in relevant part, that a court that "imposes a sentence on an adult person or places an adult person on probation…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….

The domestic abuse modifiers and domestic abuse surcharges should not have been applied to Mr. Brayson's two convictions for misdemeanor battery in violation of Wis. Stat. § 940.19(1). It is undisputed that Mr. Brayson was convicted of offenses to which the domestic abuse modifier and surcharge can apply, that Mr. Brayson and L.R. have never been married, and that they do not have any children together.

Thus, this appeal centers around the meaning of the term "resides" as it is used in both the domestic abuse modifier and domestic abuse surcharge statutes. Because Mr. Brayson and L.R. did not "reside" together within the meaning of the statutes, their relationship does not fall under one of the qualifying relationships demarcated in the domestic abuse statutes. *See* WIS. STAT. §§ 968.075(1)(a) and 973.055(1)(a)2. Accordingly, the domestic abuse

modifiers should be stricken from the judgment of conviction and the surcharges should be vacated.

B. Standard of Review.

This Court must interpret WIS. STAT. §§ 968.075 and 973.055 and apply those statutes to the facts of this case as found by the circuit court. The interpretation of a statute is a question of law that this Court reviews de novo. ***State v. Kirch***, 222 Wis. 2d 598, 602, 587 N.W.2d 919 (Ct. App. 1998). This Court will only reverse the circuit court's findings of facts if they are clearly erroneous. ***Bray v. Gateway Ins. Co.***, 2010 WI App 22, ¶11, 323 Wis. 2d 421, 779 N.W.2d 695.

Statutory language is generally given its common, ordinary, and accepted meaning. ***State ex rel. Kalal v. Circuit Court for Dane Cnty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. It is interpreted in the context in which it is used, and to avoid absurd or unreasonable results. ***Id.***, ¶46. In addition, 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).

C. Mr. Brayson's relationship with L.R. does not meet the required criterion for the imposition of the domestic abuse modifier or the domestic abuse surcharge.

The record in this case does not support the conclusion that Mr. Brayson and L.R. resided together within the statutory or ordinary meaning of the word "reside." The criminal complaint, on which the circuit court relied for the factual basis for Mr. Brayson's guilty pleas, stated that L.R. told police she and Mr. Brayson were in a dating relationship

and that they lived in her semi-truck. (R.2:2; App.102). However, sleeping together in a truck for an unknown period of time while traveling for work is insufficient to show that the couple "resided" together, and therefore, is insufficient to establish they have a qualifying relationship under the domestic abuse statutes.

While neither of the domestic abuse statutes at issue define "residence," other Wisconsin statutes provide guidance on the definition of this term. For example, WIS. STAT. § 6.10(1) governs "elector residence" and states that "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." Subsection (2) observes that if a married person's "family place" is "temporary or for transient purposes, it is not the residence." WIS. STAT. § 6.10(2). Similarly, a survey of other statutory sections reveals that WIS. STAT. §§ 46.27(1)(d), 49.001(6), 55.01(6t), 252.16(1)(e) and 980.105(1)(a), among others, all define—with slight variations—a "residence" as "the voluntary concurrence of physical presence with intent to remain in a place of fixed habitation. Physical presence is prima facie evidence of intent to remain."

Further, looking to dictionary definitions, the word "reside" denotes permanence, longevity, an intent to remain. The Oxford Dictionaries, online, defines "reside" as: "Have one's permanent home in a particular place."[1] The Merriam-Webster dictionary, also online, defines "reside" first with regards to incumbency of an office, and secondly in the following way: "to dwell permanently or continuously:

[1]Available at http://www.oxforddictionaries.com/us/definition/american_english/reside.

occupy a place as one's legal domicile."[2] Similarly, Black's Law Dictionary 907 (abridged 6th ed. 1991), which the circuit court cited in its decision, defines a "residence" as:

> [p]lace where one actually lives or has his home; a person's dwelling place or place of habitation; an abode; house where one's home is; a dwelling house. Personal presence at some place of abode with no present intention of definite and early removal and with purpose to remain for undetermined period, not infrequently, but not necessarily combined with design to stay permanently.

(R.21:3-4; App.113-14).

Contrary to the statutory and dictionary definitions of "reside" and "residence," Mr. Brayson's and L.R.'s temporary living situation in a truck while on the road is transient and does not constitute "residing." The complaint lists Mr. Brayson's address as 1168 West Union Road, Carriere, Mississippi. (R.2:1; App.101). It provides no information about L.R.'s residence other than her statement to police that she lived in her semi-truck. (R.2; App.101-103). However, defense counsel noted at sentencing that L.R. and Mr. Brayson lived at separate addresses in Mississippi. (R.30:8; App.107). Maintaining separate permanent residences, but traveling together for an undetermined period of time in a truck that had sleeping quarters is insufficient to constitute a qualifying relationship under the domestic abuse statutes. It is unlikely that Mr. Brayson or L.R. could use the semi-truck as their residence for purposes of obtaining a

[2] Available at http://www.merriam-webster.com/dictionary/reside.

driver's license (requires proof of residence),[3] voter registration (same),[4] or receiving a paycheck or bills. Consequently, they should not be considered to reside together in the semi-truck for purposes of the domestic abuse surcharge and modifier.

The explicit defining of qualifying relationships in the domestic abuse modifier and surcharge statutes indicates a legislative desire to limit their application to specific relationships that involve some level of commitment. The legislature provided limitations, recognizing that not all living situations would constitute domestic abuse.

Had L.R.'s truck not contained a makeshift bed in the back, Mr. Brayson and L.R. likely would have had to stay overnight in hotels while on the road —plainly a temporary living situation. Extending the circuit court's logic from this case could mean that two friends who sleep in the back of a van while on a summer road trip could be considered to "reside" together for purposes of the domestic abuse statutes, should trouble arise in the friendship in the future. Likewise, two adults who go camping and share a tent could be considered to "reside" together. This is illogical, and creates an absurd result. *See* ***Kalal***, 271 Wis. 2d 633, ¶46 (this Court

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[3] See the State of Wisconsin Division of Motor Vehicle's requirements for proving Wisconsin residency for purposes of obtaining a driver's license, *available at*: http://wisconsindot.gov/Pages/dmv/license-drvs/how-to-apply/residency.aspx

[4] See the State of Wisconsin Government Accountability Board's guide to proof of residence documents that can be used when registering to vote in Wisconsin, *available at*: http://www.gab.wi.gov/sites/default/files/publication/154/27_28_proof_of_residence_pdf_21278.pdf

interprets statutory language to avoid absurd or unreasonable results).

In its decision, the circuit court discussed the legislative history of the domestic abuse surcharge statute. (R.21:4-5; App.114-15). That history, however, merely explains the creation and funding of the surcharge, and does not answer the question of the interpretation of "resides" nor provides any context for its meaning in the domestic abuse statutes at issue.

The circuit court also referred to cases from other jurisdictions for the proposition that "residing together" has been interpreted broadly. (R.21:5; App.115). However, the cases it cited are distinguishable. In ***People v. Holifield***, 205 Cal.App.3d 993 (1989), the court interpreted the term "cohabiting"—not "residing." In ***State v. Tripp***, 795 P.2d 280 (Haw. 1990), the court found there was sufficient evidence to establish the parties had formerly resided together. In ***Tripp***, the victim testified that the defendant lived with her for approximately three and one-half months in a house she was taking care of for its owner. ***Id.*** at 282. Evidence was elicited during trial that the defendant kept clothes at the house, "did laundry there, had meals there, and slept there, and that these activities occurred on a continuous basis." ***Id.*** In addition, during this time, the victim became pregnant. ***Id***. Accordingly, the court held there was sufficient evidence that the parties had formerly resided in the same dwelling unit, based on the victim's testimony. ***Id.*** at 283.

No such evidence exists here. No testimony was taken regarding the living situation, and the record does not provide sufficient evidence otherwise to establish that Mr. Brayson and L.R. resided together while traveling in her semi-truck. The record does not reflect how often Mr. Brayson traveled

with L.R., how long L.R.'s work trips lasted, or when this situation first began. (R.2; App.101-103). That they had been on L.R.'s route together is meaningless without greater specificity, which does not exist in this record. (R.30:5; App.107). Instead, the record shows that Mr. Brayson and L.R. had separate residences despite sleeping under the same roof while traveling.

Altogether, there was not enough information available to support the imposition of the domestic abuse modifiers and surcharges. Mr. Brayson's conduct did not meet the statutory requirements because there is not sufficient support for the finding that he and L.R. were in a qualifying relationship by residing together.

CONCLUSION

Because the record is insufficient to establish Mr. Brayson resided with L.R. within the meaning of the statute, it thus fails to fulfill the statutory definitions of domestic abuse from §§ 968.075(1) and 973.055. This Court should reject the circuit court's conclusion, and strike the modifiers from the judgment of conviction and vacate the surcharges.

Dated this 13th day of July, 2016 in Milwaukee.

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 3,005 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 13th day of July, 2016.

Signed:

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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; (3) a copy of any unpublished opinion cited under § 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.

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 13th day of July, 2016.

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