

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal Case No. 2016AP000896-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

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 SUPPLEMENTAL APPENDIX
OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

| | Page |
|---|----------|
| ISSUE PRESENTED | 1 |
| STATEMENT ON ORAL ARGUMENT AND PUBLICATION | 2 |
| STATEMENT OF THE CASE | 2 |
| STANDARD OF REVIEW | 5 |
| ARGUMENT | 5 |
| I. This court should decline to strike any reference to Wis. Stat. § 968.075(1)(a) from Brayson’s judgment of conviction because the notation has no effect on Brayson’s conviction..... | 5 |
| II. The circuit court properly ordered Brayson to pay the domestic abuse surcharge..... | 7 |
| A. The domestic abuse definition and surcharge statute | 7 |
| B. There was an adequate factual basis to establish a qualifying relationship as to Brayson and L.R. for the domestic abuse statute..... | 8 |
| CONCLUSION | 12 |
| INDEX TO SUPPLEMENTAL APPENDIX AND CERTIFICATION..... | APP. 100 |

TABLE OF AUTHORITIES

CASES CITED

| | Page |
|---|------|
| <i>Bradley v. Flynn</i> , No. 13-cv-859-bbc, slip op, at *4 (W.D. Wis. Jan. 9, 2015) (unpublished) | 6 |
| <i>State v. Brown</i> , 2004 WI App 179, 276 Wis. 2d 559, 687 N.W.2d 543 | 7 |
| <i>State v. Edwards</i> , 2013 WI App 51, 347 Wis. 2d 526, 830 N.W.2d 109 | 6 |
| <i>State v. Houghton</i> , 2015 WI 79, 364 Wis. 2d 234, 868 N.W.2d 143 | 9 |
| <i>State v. Kennedy</i> , No. 2015AP475-CR, unpublished slip op. (WI App. Sept. 29, 2015) | 7 |
| <i>State v. Neis</i> , No. 2009AP1287-CR, unpublished slip op. (WI App. July 15, 2010)..... | 5 |
| <i>State v. O’Boyle</i> , No. 2013AP1004-CR, unpublished slip op. (WI App. Feb. 4, 2014) | 5 |
| <i>State v. Radaj</i> , 2015 WI App 50, 363 Wis. 2d 633, 866 N.W.2d 758 | 7 |
| <i>State v. Sample</i> , 215 Wis. 2d 487, 573 N.W.2d 187 (1998)..... | 9 |
| <i>State v. Schmidt</i> , 2004 WI App 235, 277 Wis. 2d 561, 691 N.W.2d 379 | 5, 9 |
| <i>United States v. Gonzalez-Mancilla</i> , 551 F. App’x 128 (5th Cir. 2014) (unpublished) | 5 |

WISCONSIN STATUTES CITED

| | |
|---------------------------------|-------------------|
| § 46.95(1)(a) (1979-1980) | 11 |
| § 55.01 | 10, 11 |
| § 6.10(1) | 10 |
| § 939.32 | 2 |
| § 939.50(3)(c) | 2 |
| § 939.51(3)(a) | 2, 3 |
| § 939.621 | 6, 7 |
| § 940.19(1) | 2, 3 |
| § 940.225(2)(6) | 2, 8 |
| § 943.20(2)(ac) | 11 |
| § 968.075 | passim |
| § 973.055 | 1, 4, 6, 7, 8, 11 |
| § 973.09(2)(a)1.b | 6 |

OTHER AUTHORITIES CITED

| | |
|---|-------|
| <i>Black's Law Dictionary</i> , 1308 (6th ed. 1990) | 9, 10 |
|---|-------|

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ISSUE PRESENTED

Were there sufficient facts on the record to establish that Mr. Brayson and L.R. engaged in a qualifying domestic relationship to support the imposition of the domestic abuse modifier and the domestic abuse surcharge pursuant to Wis. Stats. §§ 968.075 and 973.055?

The circuit court said yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. *See* Wis. Stat (Rule) 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not be eligible for publication. *See* Wis. Stat (Rule) 809.23(1)(b)4.

STATEMENT OF THE CASE

On June 6, 2015, the State issued a criminal complaint against Michael Brayson charging him with three violations of Wisconsin law. (R2:1-3). Those charges included: one count of attempt second degree sexual assault, domestic abuse in violation of Wis. Stats. §§ 940.225(2)(a), 939.50(3)(c), 939.32, 968.075(1)(a); one count of second degree sexual assault, domestic abuse in violation of Wis. Stats. §§ 940.225(2)(a), 939.50(3)(c), 968.075(1)(a); and one count of misdemeanor battery, domestic abuse in violation of Wis. Stats. §§ 940.19(1), 939.51(3)(a), 968.075(1)(a). (R2:1-2).

The criminal complaint alleged that on Tuesday, June 2, 2015, officers were called to respond to Love's Travel Center in Oak Creek for a domestic disturbance call. (R2:2). Officers were notified that the individuals involved were located in a D&D Transportation semi-trailer. (R2:2). As officers were responding to the call, they were updated that the truck left the stop and was headed southbound on I-94. (R2:2). Officers were ultimately able to locate the truck and conduct a traffic stop. (R2:2). Upon conducting the stop, officers spoke to the driver, L.R., who was visibly shaken and scared. (R2:2). L.R. stated she is a cross-country truck driver and that Brayson, her boyfriend, lived with her in the truck. (R2:2). L.R. stated that while they were at the Travel Center Brayson returned to the truck and appeared to be intoxicated. (R2:2). An argument then occurred over money. (R2:2). During the course of the argument, Brayson told L.R. he wanted to have sex with her. (R2:2). L.R. stated 'no,' she had to work. (R2:2). Brayson got mad and ripped L.R.'s shorts and took off her underwear. (R2:2). Brayson then spread L.R.'s legs open and attempted to

“lick” L.R.—having mouth to vagina contact with her. (R2:2). Eventually L.R. was able to get up and move away from Brayson. (R2:2).

During this encounter L.R. received a phone call from her employer stating that they had received some concerning phone calls regarding Brayson being loud and drunk. (R2:2). As L.R. was on the phone, Brayson began to pull L.R.’s hair and he placed his hand on her neck while trying to get the phone from her. (R2:2). L.R. further stated that when she would not give Brayson the phone, he hit her with a closed fist causing pain and redness. (R2:2). Brayson then began to yell at L.R. to drive the truck and she complied. (R2:2). While driving, Brayson demanded oral sex from L.R. L.R. stated ‘no.’ (R2:2). Brayson then began to grab L.R.’s breasts while she was driving. (R2:2). Shortly after this, the truck was stopped by police. (R2:2).

After some litigation, Brayson ultimately plead guilty on August 26, 2015, to an amended information, alleging two counts of misdemeanor battery, domestic abuse, in violation of Wis. Stats. §§ 940.19(1), 939.51(3)(a), 968.075(1)(a). (R29:5). During that plea hearing, the Honorable Ellen Brostrom confirmed with Brayson that he was pleading guilty to two counts of misdemeanor battery, domestic abuse. (R29:3). Further, Brayson confirmed that the facts in the criminal complaint were true and correct, as it related to the battery charges. (R29:8). Based upon this information, the court accepted Brayson’s guilty plea. (R29:10).

On August 31, 2015, the court sentenced Brayson to nine months on each count, to be served consecutive to one another and to any other sentence. (R30:16). During the sentencing hearing, the State noted that L.R. is an “over the road truck driver” and that the “cab was her home.” (R30:4-5). The court specifically requested this information to make a determination about the domestic abuse surcharge. (R30:7-8). The State relayed to the court the information it had regarding the nature of L.R. and Brayson’s relationship. (R30:7-8). That information about the relationship was further supplemented by Defense Counsel. (R30:8). Counsel indicated L.R. and Brayson have been “boyfriend and girlfriend for a number of years now” and that they “live separately in Mississippi,

however, he travels with her when she goes on the road for her job.” (R30:8). Further, counsel indicated, that the incident occurred while L.R. and Brayson were at the truck stop and “[t]hey were going to be staying there overnight....” (R.30:9-10). Additionally, Brayson told the judge that his “fiancé” was the victim in the case. (R30:12-13). The court ultimately made a finding “that this is 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.” (R30:16-17).

On February 11, 2016, Brayson filed a postconviction motion requesting an order from the court vacating his domestic abuse surcharges and striking from the judgement of conviction all references to the domestic abuse modifiers. (R17). The State responded on March 21, 2016, asking the court to deny the motion. (R19). After a reply brief was submitted, the court issued a decision denying Brayson’s postconviction motion. (R21).

In its decision denying Brayson’s postconviction motion, the court was not persuaded by Brayson’s argument that the record did not support the surcharges or modifiers. (R21:3). The court noted that neither statute at issue, sections 968.075(1)(a) nor 973.055(1), set forth a “definition for the term “residence” or set forth any limitation on what may qualify as a residence.” (R21:3). After a persuasive discussion about the legislative intent behind the domestic abuse modifier and surcharge, the court ultimately determined:

not only did the parties manifest an intent to use the truck as their home during that time, the court finds that the amount of time they resided together living in the truck was long enough to support a finding that they resided together for purposes of domestic abuse statutes. As the court indicated, the legislative purpose of the domestic abuse surcharge is to fund organizations that provide domestic abuse services to victims of violence committed by their intimate partners—the very type of violence that occurred in this case.

(R21:6)

After the denial of the postconviction motion, Brayson appealed.

STANDARD OF REVIEW

Whether facts on the record qualify as “domestic abuse” under Wis. Stat. § 968.075(1)(a) is a mixed question of both law and fact. *See State v. Schmidt*, 2004 WI App 235, ¶ 13, 277 Wis. 2d 561, 691 N.W.2d 379. While the court applies a “clearly erroneous” standard of review to a circuit court’s factual findings, construction of a statute and its application to the facts, as found by a circuit court, is a question of law, which is reviewed de novo. *See Id.*

ARGUMENT

I. This court should decline to strike any reference to Wis. Stat. § 968.075(1)(a) from Brayson’s judgment of conviction because the notation has no effect on Brayson’s conviction.

Being convicted of a crime that is noted on the judgment of conviction as an act of domestic abuse under Wis. Stat. § 968.075(1)(a) has no ramifications. Unlike traditional modifiers or penalty enhancers, Wis. Stat. § 968.075(1)(a) does not affect criminal liability or punishment for the person accused of domestic abuse. As this court previously concluded:

While Wis. Stat. § 968.075(1)(a) appears in the court documents, the statute entitled ‘Domestic abuse incidents; arrest and prosecution,’ plainly governs law enforcement procedures in domestic abuse cases. It does not create criminal liability for the domestic abuse perpetrator.

State v. Neis, No. 2009AP1287-CR, ¶ 15, unpublished slip op (WI App. July 15, 2010) (App. 113-122). *See also, State v. O’Boyle*, No. 2013AP1004-CR, ¶ 14, unpublished slip op. (WI App. Feb. 4, 2014) (App. 123-134).

This distinction has been accepted and relied upon for the proposition that the Wis. Stat. § 968.075(1)(a) notation does not establish that a defendant was convicted of an offense of “domestic abuse.” *United States v. Gonzalez-Mancilla*, 551 F.

App'x 128, 132 (5th Cir. 2014) (unpublished) (App. 135-141). *See also, Bradley v. Flynn*, No. 13-cv-859-bbc, slip op, at *4 (W.D. Wis. Jan. 9, 2015) (unpublished) (App. 101-105). Rather, the use of Wis. Stat. §968.075(1)(a) in court documents denotes that specific law enforcement procedures were followed and flags the case to alert the court and the parties that Wis. Stat. §§ 939.621, 973.055, or 973.09(2)(a)1.b.¹ may be applicable. Thus, it is primarily a tool of judicial economy.

In contrast to Wis. Stat. § 968.075(1)(a), Wis. Stat. § 939.621 was created to enhance the maximum sentence for those who commit repeated acts of domestic abuse. Under Wis. Stat. § 939.621, the penalty enhancer cannot be applied to the underlying crime unless the defendant's action also fell within the statutory definition of domestic abuse under Wis. Stat. § 968.075(1)(a). *See* Wis. Stat. § 939.621(2). In other words, if a crime is charged with the enhancer under Wis. Stat. § 939.621, additional facts need to be established. However, it is Wis. Stat. § 939.621, not Wis. Stat. § 968.075(1)(a) that operates as the enhancer. (R2:1). Wis. Stat. § 968.075(1)(a) merely contains the definition for an act of domestic abuse. In this matter, the State did not charge Brayson with the domestic abuse enhancer. Thus, the only statute triggered by Wis. Stat. § 968.075(1)(a) was the domestic abuse surcharge in Wis. Stat. § 973.055.

Like Wis. Stat. § 939.621, the imposition of the domestic abuse surcharge under Wis. Stat. § 973.055 depends on additional facts: whether the defendant committed one of the enumerated offenses and the nature of the relationship between the defendant and the victim. *See* Wis. Stat. §§ 973.055(1)(a)1. and 2. Therefore, the surcharge cannot be imposed simply by noting Wis. Stat. § 968.075(1)(a) on the judgment of conviction. Moreover, by labeling it as a

¹ Under Wis. Stat. § 973.09(2)(a)1.b., “a person convicted of a misdemeanor that was an act of domestic abuse is subject to two years of probation.” *State v. Edwards*, 2013 WI App 51, ¶ 2, 347 Wis. 2d 526, 830 N.W.2d 109. However, it is not necessary that the underlying crime be charged as an act of domestic abuse in order for Wis. Stat. § 973.09(2)(a)1.b. to apply. *Edwards*, 347 Wis. 2d 526, ¶¶ 10, 14. Rather, in the context of probation, “[w]hether Edwards engaged in domestic abuse is a finding of fact for the trial court *at the time probation is imposed*.” *Edwards*, 347 Wis. 2d 526, ¶ 11 (emphasis added).

“surcharge,” the Legislature denoted that Wis. Stat. §973.055 imposes a civil, not criminal liability. *See State v. Radaj*, 2015 WI App 50, ¶ 17, 363 Wis. 2d 633, 866 N.W.2d 758. Therefore, the domestic abuse surcharge is a collateral consequence because it does not automatically flow from the conviction. *See, e.g., State v. Brown*, 2004 WI App 179, ¶ 7, 276 Wis. 2d 559, 687 N.W.2d 543. Thus, the court is not required to inform a defendant of the potential imposition of the surcharge at the time of the defendant’s plea to the underlying crime. *Id.*²

Striking Wis. Stat. § 968.075(1)(a) from the judgment of conviction would only be an act of appeasement to Brayson without any practical consequence. If this court chooses to grant Brayson’s request to strike any reference to Wis. Stat. § 968.075(1)(a) from the judgment of conviction, it should be clear that its order to do so has no impact on Brayson’s conviction, the imposition of the domestic abuse surcharge, or the use of Brayson’s conviction to satisfy Wis. Stat. § 939.621 in the future. If this court disagrees and concludes that the notation of Wis. Stat. § 968.075(1)(a) in the judgment of conviction, in and of itself, has ramifications that the State is unaware of, then this court should deny Brayson’s request because there was no defect within the plea colloquy that would entitle Brayson to plea withdrawal.

II. The circuit court properly ordered Brayson to pay the domestic abuse surcharge.

A. The domestic abuse definition and surcharge statute.

Wisconsin Stat. § 968.075 sets forth the definition of domestic abuse as follows:

968.075 Domestic abuse incidents; arrest and prosecution. (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

² *But see, State v. Kennedy*, No. 2015AP475-CR, ¶ 8, unpublished slip op. (WI App. Sept. 29, 2015) (App. 106-112) (the notation of Wis. Stat. §968.075 requires the court to inform the defendant at the time of the plea that the offense pled to may subject the defendant to the domestic abuse assessment).

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 subd. 1., 2. or 3.

Wisconsin Stat. § 973.055(1) states the domestic abuse surcharge in relevant part:

973.055 Domestic abuse surcharges. (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:

[...]

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.

B. There was an adequate factual basis to establish a qualifying relationship as to Brayson and L.R. for the domestic abuse statute.

Brayson is not disputing that he committed crimes that are enumerated in Wis. Stat. § 973.055(1)(a)1 that would make him eligible for the imposition of the domestic abuse surcharge. (*See* Defendant-Appellant Brief at 7). Therefore, the sentencing court was required to impose the domestic abuse surcharge if the court found that Brayson’s conduct “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.” Wis. Stat. § 973.055(1)(a)2. That condition is substantially similar to the definition of the qualifying relationship for an act of domestic abuse under Wis. Stat. § 968.075(1)(a).

Brayson’s argument is that the domestic abuse modifier was improperly applied because there was not a factual basis to

determine that he “resided” with L.R.; thus, failing to establish the necessary qualifying relationship for “domestic abuse,” as defined by statute. As previously discussed, “domestic abuse” is not a separate crime, it is a modifier that is attached to other offenses. Whether facts on the record qualify as “domestic abuse” under Wis. Stat. § 968.075(1)(a) is a mixed question of both law and fact. *See State v. Schmidt*, 2004 WI App 235, ¶ 13, 277 Wis. 2d 561, 691 N.W.2d 379. While the court applies a “clearly erroneous” standard of review to a circuit court’s factual findings, construction of a statute and its application to the facts, as found by a circuit court, is a question of law, which is reviewed de novo. *See id.*

Brayson argues that his relationship with L.R., the woman whom he called his “fiancé,” the woman whom he accompanied on cross country business trips while they stayed in the truck, is not factually sufficient to establish that he “resided” with her under the domestic abuse statute. (*See Defendant-Appellant Brief at 8*). While it is clear from the record that all parties agreed that Brayson and L.R. were engaged in an intimate partner relationship, Brayson argues that staying with and sleeping with L.R. in the cabin of her over the road truck while she would be on work trips is insufficient to show that they “resided” together for the purpose of the statute. (R30:3, 7,8, 13) (*See Defendant-Appellant Brief at 8-9*). The issue boils down to what does it mean to “reside” with another for the purpose of the domestic abuse modifier and surcharge.

Although neither statute at issue here defines the term “reside,” a plain reading of the statute does not require more than the factual basis adopted in the complaint and clarified on the record by the court. Where the term is not defined in the statute, the court will give the term “its common, ordinary, and accepted meaning.” *State v. Houghton*, 2015 WI 79, ¶ 61, 364 Wis. 2d 234, 868 N.W.2d 143 (citation omitted).

The court may also consult dictionary definitions to ascertain any additional meanings of a word. *See State v. Sample*, 215 Wis. 2d 487, 499, 573 N.W.2d 187 (1998). According to a recognized legal dictionary, the intransitive verb “reside” as used in the present context means to: “Live, dwell, abide, sojourn, stay, remain, lodge.” *Black’s Law Dictionary*

1308 (6th ed. 1990). The circuit court also looked to Black's Law Dictionary to define "residence" as:

Place 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.

Black's Law Dictionary 907 (abridged 6th ed. 1990). (R21:3-4).

The circuit court made a factual finding that Brayson had committed acts of domestic abuse and that Brayson and L.R. resided together. (R30:16-17). The court found "this is a relationship that fits under the domestic abuse 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." (R30:16-17). In line with Black's legal definition, the court found Brayson's status with L.R. was sufficient to invoke the domestic abuse statute and surcharge.

Brayson attempts to discern the definition of "reside" in the context of the domestic abuse statute by merging an unrelated statutory definition of "residence" into its meaning. (See Defendant-Appellant Brief, 9). Brayson argues that the court could look to Wis. Stat. § 6.10(1) for guidance as that statute defines residence for the purpose of voting. (See Defendant-Appellant Brief at 9). Brayson also cites to other statutes, including Wis. Stat. § 55.01(6t) that defines a "residence" as "the voluntary concurrence of an individual's physical presence with his or her intent to remain in a place of fixed habitation." (See Defendant-Appellant Brief at 9). From this definition, Brayson argues that he lacked a "continuous residence" with L.R. to satisfy the residence requirement under Wis. Stat. § 968.075. (See Defendant-Appellant Brief at 10). But Brayson fails to articulate any persuasive legal basis for the additional specificity that he thinks is required. Wis. Stat. § 968.075(1)(a) does not incorporate Wis. Stat. § 6.10(1) nor Wis. Stat. § 55.01(6t) as a definition. If it was the Legislature's intent to limit the definition of "residence" in this way, the

Legislature would have done so. *See* Wis. Stat. § 943.20(2)(ac) (defining “Adult at risk” under Wisconsin’s theft statute as the meaning derived in Wis. Stat. § 55.01.). Thus, Brayson’s restrictive construction of the term “reside” is unsupported and inapplicable here.

There are strong public policy motives that support applying a broad, expansive, definition to the term “reside” in the context of domestic abuse cases. In the circuit court’s decision Denying Post Conviction relief, it very eloquently discussed the legislative policy behind sections 968.075(1)(a) and 973.055(1), Stats. (R21:4). The court summarized that this legislation was enacted to recognize domestic violence as a significant social issue, which required a comprehensive response on levels both inside, and outside the criminal justice system. (R21:4). Initially, the legislation defined “domestic abuse” as “physical abuse or threats of physical abuse between persons living in a spousal relationship or persons who formally lived in a spousal relationship.” Wis. Stat. § 46.95(1)(a) (1979-1980). (R21:5). But as time went on the definition of domestic violence became more expansive to embrace the different types of domestic relationships acknowledged by society today. (R21:5). At the heart of the “domestic abuse” modifier and surcharge is the desire to recognize, identify, and end, intimate partner violence. The incident that occurred between Brayson and L.R. was, without a doubt, intimate partner violence. It is this type of situation that the modifier and surcharge was designed to address.

The facts on the record support the circuit court’s finding that Brayson and L.R. were in fact in a relation that qualifies for the “domestic abuse” modifier and surcharge. The criminal complaint established the factual basis for the relationship and it was clear at the sentencing hearing that Brayson and L.R. resided together. The State explained that L.R. was an over the road trucker for her employment and during the time she was working Brayson would accompany her in their moving home. (R30:4-5). Further, L.R.’s truck was equipped with sleeping quarters where her and Brayson would stay. (R30:5). Defense counsel discussed Brayson’s relationship with L.R. in terms of years. (R30:8). Counsel also explained to the court that Brayson would travel with L.R. when she was on the road for her job, and that Brayson bought

the truck that he and L.R. stayed in while she worked. (R30:8-9). Additionally, Brayson himself told the court that L.R. was his fiancée. (R30:13). Thus, as the circuit court concluded, the qualifying relationship was firmly established.

Because a sufficient factual basis existed to support the domestic abuse statute, the circuit court correctly denied Brayson's postconviction motion to modify the judgment of conviction and vacate the domestic abuse surcharges.

CONCLUSION

For the aforementioned reasons, the State respectfully requests that this court affirm Brayson's judgment of conviction and the circuit court's order denying postconviction relief.

Dated this _____ day of September, 2016.

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 word count of this brief is 3,732.

Date

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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 s. 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.

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