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.

REPLY BRIEF OF DEFENDANT-APPELLANT

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I. This Court Should Strike the Domestic Abuse Modifiers and Vacate the Surcharges Because the Record Does Not Establish that Mr. Brayson and L.R. Resided Together Under WIS. STAT. §§ 968.075 and 973.055.

The statutes governing the domestic abuse modifier and surcharge explicitly delineate the requirements for their application. In order for the surcharge and modifier to apply, the court must find that "the conduct constituting the violation…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); *see also* WIS. STAT. § 968.075(1)(a).

Despite the specific requirement that two adults "reside[] or formerly resided," the State argues that intimate partner violence should be sufficient to satisfy the statute's requirements. (State's brief at 11). The State urges going outside the language of the statute to apply "a broad, expansive[] definition to the term 'reside' in the context of domestic abuse cases[,]" an argument that inherently recognizes the narrowness of the statutes' application. (State's brief at 11).

The State emphasizes that Mr. Brayson referred to L.R. as his fiancée at sentencing, and that trial counsel discussed Mr. Brayson and L.R.'s relationship "in terms of years." (State's brief at 9,12). However, the legislature did not choose to expansively apply the statutes to all instances of

intimate partner violence, although it could have done so. Instead, the statutes provide for limited application of the surcharge and modifier for certain qualifying relationships. Thus, a couple's length of relationship or engagement status does not qualify them under the domestic abuse statutes for the imposition of the surcharge or the modifier. Dating relationships, even those that last for many years, are not covered under the statute—unless the couple resides or formerly resided together, or has a child in common. Therefore, relying on the nature of Mr. Brayson's and L.R.'s relationship is not adequate without evidence that they resided together, and in this case, the record does not contain sufficient evidence of that.

The State also identifies "public policy motives," noting, "[a]t the heart of the 'domestic abuse' modifier and surcharge is the desire to recognize, identify, and end, intimate partner violence." (State's brief at 11). However, despite the State's public policy arguments, this Court must first focus on the language of the statute as written. *See* ***State ex rel. Kalal v. Dane Cnty***., 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110. (It is "a solemn obligation of the judiciary to faithfully give effect to the laws enacted by the legislature…. Judicial deference to the policy choices enacted into law by the legislature requires that statutory interpretation focus primarily on the language of the statute."). The Wisconsin Supreme Court has explained that "[i]t is the enacted law, not the unenacted intent, that is binding on the public." ***Id.*** Thus, the language of a statute should be given its common, ordinary, and accepted meaning, except that technical or specially defined words are given their technical or special definitions. ***Id.*** at ¶45. If the words chosen by the legislature demonstrate a "plain, clear statutory meaning," no further analysis is undertaken. ***Id.*** at ¶46. However, statutory language is ambiguous if it can be

understood "by reasonably well-informed persons in two or more senses." ***Id.*** at ¶47. If a statute is ambiguous, extrinsic sources, such as legislative history explaining public policy, may be applied to the statutory text. ***Id.*** at ¶¶48-51.

Here, WIS. STAT. §§ 968.075 and 973.055 are not ambiguous. Neither Mr. Brayson nor the State argues that either statute is ambiguous, and therefore, this Court should give the statutes their common, ordinary, and accepted meaning, rather than proceeding to statutory history or public policy concerns. ***Kalal*** at ¶¶44-46.

It is worth repeating that Mr. Brayson's and L.R.'s living situation was transient, and that the record does not reflect how often Mr. Brayson traveled with L.R., how often L.R. went on long work trips, how long those trips lasted on average, or when Mr. Brayson first began traveling with L.R. on her work trips. (*See* R.2; App.101-103). Where they had separate residences in their home state of Mississippi, these questions matter if the overnights-while-traveling are to constitute the parameters of their residing together. (R.30:8; App.107). There is simply not enough information to support the imposition of the domestic abuse modifiers and surcharges.

The State also argues that this Court should not strike Mr. Brayson's domestic abuse modifiers because "the notation has no effect on [Mr.] Brayson's conviction" and "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." (State's brief at 5,7). The State is incorrect. First, there is no reason that a domestic abuse modifier should remain on a judgment of conviction where the record does not satisfy the statutory criteria for the domestic abuse modifier. The modifier, in that

case, would be incorrectly imposed, and should not remain on the judgment of correction. A criminal record is designed to follow a person throughout their life,[1] unless under limited circumstances he or she is able to expunge the conviction. *See, e.g.*, WIS. STAT. § 973.015(1m). Employers, schools, landlords, courts, and many others obtain and review criminal records as a routine matter. *See supra*, fn.1. Keeping a descriptive label on Mr. Brayson's case where the record does not satisfy the statutory requirements for the label would be improper.

Moreover, this Court has previously ordered domestic abuse modifiers stricken from the judgment of conviction, where it determined the conduct alleged in the complaint failed to meet the statutory definition of domestic abuse. ***State v. O'Boyle***, No. 2013AP1004-CR, unpublished slip op. ¶25 (WI App Feb. 4, 2014).[2] As in ***O'Boyle***, this Court should order the domestic abuse modifiers stricken, as Mr.

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[1] *See, e.g.*, Pager, Devah. "The Mark of a Criminal Record," *American Journal of Sociology*, vol.108, no.5 (Mar. 2003), available at: http://scholar.harvard.edu/files/pager/files/pager_ajs.pdf; Solomon, Amy L. "In Search of a Job: Criminal Records as Barriers to Employment," *National Institute of Justice Journal*, no. 270 (June 2012), available at: http://www.nij.gov/journals/270/pages/criminal-records.aspx; "Reconsidered: The Use of Criminal History Records in College Admissions," Center for Community Alternatives, available at: http://www.communityalternatives.org/pdf/Reconsidered-criminal-hist-recs-in-collegeadmissions.pdf; Gaines, Joshua. "How A Parent's Criminal Record Limits Children," Collateral Consequences Resource Center (Jan. 2016), available at: http://ccresourcecenter.org/2016/01/06/6767/; Etzioni, Amitai. "Second Chances, Social Forgiveness, and the Internet," *The American Scholar* (Mar. 2009), available at: https://theamericanscholar.org/second-chances-social-forgiveness-and-the-internet/#.V_2Z7jY-jww.

[2] Mr. Brayson cites this unpublished, authored opinion for its persuasive value only. WIS. STAT. § 809.23(3)(b). A copy of ***State v. O'Boyle*** is included with this reply brief, in accordance with WIS. STAT. § 809.23(3)(c).

Brayson's relationship with L.R. does not satisfy the requisite statutory criteria for the domestic abuse modifier.

Lastly, Mr. Brayson notes that he at no time requested plea withdrawal or alleged a ***Bangert***[3] violation, despite the State's argument that this Court "deny Brayson's request because there was no defect within the plea colloquy that would entitle Brayson to plea withdrawal." (State's brief at 7). In a similarly inexplicable fashion, the State asserts "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*.). Mr. Brayson did not argue otherwise. Neither of those points is responsive to any arguments raised in Mr. Brayson's brief-in-chief, and should be disregarded by this Court.

[3] ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

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 WIS. STAT. §§ 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 18th day of October, 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 1,309 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 18th day of October, 2016

Signed:

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CERTIFICATION AS TO SUPPLEMENTAL APPENDIX

I hereby certify that filed with this reply brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with § 809.19(4)(b) and that contains a copy of any unpublished opinion cited under § 809.23(3)(a) or (b).

Dated this 18th day of October, 2016.

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