STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

NO. 2016AP2114 CR

STATE OF WISCONSIN,

Plaintiff- Respondent,

v.

CYNTHIA A. HANSEN,

Defendant-Appellant.

APPELLANT'S REPLY BRIEF

Appeal From Final Order
Signed and Entered October 17, 2016,
Kenosha County Circuit Court Case No. 2015CM001439,
The Honorable Jodi L. Meier, Presiding

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ARGUMENT

I. The prosecution asks this Court to sustain a plea colloquy that omitted an explanation relevant to the "property of another" element of the offense, in a unique circumstance where the prosecution alleged that Cynthia Hansen had criminally damaged her spouse's car, which was marital property.

The prosecution would excuse the circuit court at Cynthia Hansen's guilty plea hearing for not having explained how the "property of another" element of Wisconsin's criminal damage to property offense is defined or described in Wis. Stat. § 939.22(28), the criminal code's definition section. The plea colloquy did not make Cynthia Hansen aware of that definition's particular relevance to the "property of another" element, given the unique circumstances of her case: the damaged property was marital property. That subsection's definition expressly states the offense is not committed if the accused also has a legal interest in the "property of another" *and* a right to defeat or impair "another's" ownership interest. In the unique circumstances of Cynthia Hansen's case, which involved a dispute between spouses about damage to marital property, the "property of another" element of the offense was not sufficiently explained so that the court could have been assured that Cynthia was aware of how that element may or may not exist in that context.

Defendant agrees with the point made in the prosecution's brief (pp. 8-9) that § 939.22(28) "clarifies" the "property of another" element; it does not add an

element to the offense of criminal damage to property under Wis. Stat. § 943.01.[1] However, the prosecution's point does not remove or neutralize the plea colloquy error: the court did not explain the "property of another" element of the offense, which was defined in particular terms that were directly relevant to the facts alleged in Hansen's case, so that Hansen was made aware of that definition's operation where marital property is alleged to have been damaged.[2]

The prosecution poses several arguments as to why the trial court did not need to make Hansen aware of the specific definition of "property of another." It starts (p. 3) by asserting, in part, that the trial court stated all that needed to be stated when it recited the elements of the offense found in § 943.01. In the other part (pp. 3-4) the prosecution claims that the trial court matched its description of the elements of the offense to the standard jury instruction (WIS JI–Criminal 1400). But that is not entirely accurate. The instruction footnotes the third element of an offense under § 943.01 (*i.e.*, "The property belonged to another person"), and the footnote not only cites § 939.22(28), it then quotes it in full. While the footnote also provides a quick summary of the *Sevelin* case (which will be discussed below), the relevant part of the definition for the third element of the offense in

[1] To the extent that defendant Hansen's opening brief suggested otherwise (pp. 8, 11), she would correct her argument in agreement with the prosecution, and instead would reassert that the error here was the trial court's failure to *clarify* the "property of another" element of the offense, when the prosecution alleged that marital property had been damaged.

[2] The explanation could have easily been made, if the court had read the definition of "property of another" in § 939.22(28) to the defendant. Then it would have been assured that the "awareness

Hansen's case is the modifying phrase which excludes "property of another" when the defendant has a "right to defeat or impair" the property owner's interest. Defendant Hansen was not informed of that important phrase in the definition. As her postconviction affidavit noted, prior to her plea she had thought she might not be guilty because Alexis Hansen's car was considered marital property in their pending divorce, but her defense attorney stated otherwise. Had the court provided the definition, quoted in the jury instruction (or the statute), Cynthia Hansen could have decided not to plead guilty, based on her own conclusion that her conduct was not covered by the offense, as defined.

The prosecution's assertion (p.4) that the five "elements enumerated in" WIS JI–Criminal 1400 were sufficient to inform Hansen misses the mark. The instruction, by footnoting the third element with a full quote to its definition, gave the trial court sufficient notice that it could be necessary to include that definition – either when read to a jury or as part of a plea colloquy. Moreover, other parts of that same instruction (p. 4) encourage the court to articulate other definitions when applicable or relevant, such as "common carrier" and "without consent." Because the trial court referred to the standard instruction's recitation of the elements of the offense, it had good cause to go further and provide clarification, by reciting a definition that was key to the defendant's understanding of the offense, as the

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requirement" for plea colloquies, *e.g.*, *State v. Lackershire*, 2007 WI 74, ¶¶ 31, 34, 301 Wis. 2d 418, 734 N.W.2d 23, had been observed.

instruction suggests. Interestingly, the prosecution (at p. 9) concedes that the instruction would need a clarification that "is believed to be necessary" when a case involves an issue about the fourth element of the offense -- the "without consent" element. Defendant's whole argument is that the same process of clarification was needed in her case with regard to the third element.

In a second argument (pp. 9-12) the prosecution claims that defendant Hansen really has faulted the trial court for failing to advise her about a possible privilege or defense, and that *State v. Brandt*, 226 Wis. 2d 610, 594 N.W.2d 759 (1999), and its progeny, do not require that of the court. The prosecution contends (p. 9) that § 939.22(28) "may also elaborate a privilege defense that would be available to some defendants" and (p.10) in those cases "the defendant joint owner would have available an affirmative defense. . . ." It then states, with authority, that the trial court has no duty in plea colloquies to inform defendants of possible defenses. This simply is a strawman argument: defendant does not contest that authority or its application because defendant Hansen has not contended that Judge Frankel failed to advise her of any defense or privilege she might have. Rather, the focus of her argument has always been that, in the specific context of a prosecution against a spouse for causing criminal damage to marital property, the court should advise that spouse of the precise meaning of "property of another;" if the court fails to do so, the defendant is not made aware of that phrase's legal meaning for

property in a marital estate where one spouse can defeat or impair the other spouse' property interest.[3] At any rate, "defenses" and "privileges" are separately codified in Wis. Stats. §§ 939.42-939.49, and Hansen has not relied on those provisions; instead she argues that a "words and phrases defined" provision in § 939.22(28) was relevant to an element of the offense and was critical to her awareness of the nature of the charge against her.

In a third argument (pp. 4-6) the prosecution struggles to distinguish the "*Nichelson* line of cases," meaning *State v. Nichelson*, 220 Wis.2d 214, 582 N.W.2d 460 (Ct. App.1998) and *State v. Jipson*, 2003 WI App 222, 267 Wis. 2d 467, 671 N.W.2d 18 (Ct. App. 2003). It contends that defendant Hansen cannot rely on plea colloquy requirements imposed by that "line of cases" in sexual assault crimes. Those cases hold that the "sexual contact" element of the offense must be described by reference to its separately-codified definition. The *Nichelson* court deemed a separately-codified definition to be necessary to the defendant's awareness of the nature of the charge that he intentionally sexually touched a victim. The prosecution here seems unwilling to acknowledge that the definition of "property of another" was just as necessary to Hansen's understanding. Instead the only explanation offered by the prosecution for that "line of cases" is that

[3] Interestingly, the prosecution suggests that Cynthia Hansen may have had a privilege or defense to the charge. But it never completes the thought by acknowledging that she in fact does. But Hansen spoke to that question in her Opening Brief's second main argument and she does so now in her second reply argument.

Nichelson is "a unique case that established a unique legal precedent. . . ." Defendant Hansen respectfully submits that her case is no less unique; her circumstance was in fact similar to Nichelson's because neither court could be assured that each defendant was aware of the nature of the criminal charge without resort to the controlling definitions for an element of the offense.

Finally, the prosecution relies (pp. 7-8) on the *Sevelin case*. *State v. Sevelin*, 204 Wis.2d 127, 554 N.W.2d 521 (1996). But, as defendant Hansen notes below, the appeals court simply did not articulate, much less consider whether §939.22(28) had an impact on defining the essential elements of criminal damage to property. Further, no consideration appears to have been given to whether Mark Sevelin could have defended the accusation against him if he had asserted that he could have legally impaired or defeated his wife's joint interest in their home. So *Sevelin* simply does not answer the issues posed in this case.

II. The prosecution ignores the fact that the trial court was on notice that Cynthia Hansen had a legal right to defeat or impair her partner's ownership interest so that there could not have been a factual basis for her guilty plea.

Sevelin simply did not consider the consequence of a spouse's guilty plea to damaging marital property where the spouse could assert a right to "defeat or impair" the other spouse's ownership interest. In particular, *Sevelin* did not consider Wis. Stat. §943.20(2)(c)'s exception to criminal liability for thefts of marital property by a spouse. The question here is whether that part of the

"property of another" definition, whether deemed a clarification of that element of the offense, or a privilege, or a defense to the offense, means that Cynthia Hansen, as a matter of fact and law, could not have been guilty.

The issue comes to the fore in this case, now that the prosecution has conceded (p. 10) that the "right to defeat or impair" does indeed excuse criminal conduct; the prosecution concedes that "in some cases, a joint owner [who] may have a right to defeat or impair a co-owner's legal interest in property. . .would have available an affirmative defense . . . ." It would have been helpful for the prosecution to explain, at least by example, just what "some cases" might be, so that it could be determined whether Hansen's case would or would not be distinguishable. But it did not do so.

But having now conceded that a co-owner's right to defeat or impair the other owner's property interest could serve to excuse the co-owner from liability for criminal damage to property, the prosecution could also have been expected to respond to defendant Hansen's next point: if Wis. Stat. §943.20(2)(c) creates an exception to criminal liability for thefts of marital property by a spouse,[4] it necessarily forecloses prosecutions and findings of guilt for criminal damage against a spouse for damaging marital property. In short, if Cynthia Hansen had

[4] The exception is also recognized in the standard jury instruction for theft, Wis J I-Criminal 1440, where the "property of another" phrase again appears. The instruction directs the trial court to provide either the definition in §939.22(28) *or the definition in §943.20(2)(c).* The latter definition

taken Alexis' car and could do so with an intent to permanently derive Alexis of the car (thereby committing theft but for the exception for spouses), she obviously could have defeated or impaired Alexis' interest; and because Cynthia legally could have taken the car and impaired Alexis' interest, Cynthia is similarly excepted from criminal liability for intentionally damaging the car.

The prosecution simply chose to ignore the operation of Wis. Stat. §943.20(2)(c) and its significance; the statute is neither mentioned, nor its operation discussed, in the prosecution's brief. Yet this argument was specifically raised in defendant Hansen's opening brief (Opening Brief, pp. 11, 13-14). Hence, the prosecution's silence amounts to another concession to defendant's appeal argument. *"*Respondents on appeal cannot complain if propositions of appellants are taken as confessed which they do not undertake to refute*." State ex rel. Blank v. Gramling,* 219 Wis. 196, 199, 262 N.W. 614, 615 (1935).

The prosecution complains (p. 17) that defendant's position, if adopted, would bar charges of criminal damage to property in marital property cases. That result, however, would be totally consistent with existing Wisconsin law that already bars charges of theft of marital property against a spouse. The issue arises because of the tension between the treatment of spouses under two statutes: the theft and criminal damage to property statutes. The former expressly

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expressly states that *"property of another" in the theft statute does not apply where the actor is a co-owner of the property and "the actor and the victim are husband and wife."*

decriminalizes spousal thefts of marital property, but the latter, the prosecution argues, impliedly criminalizes spousal damage to marital property; yet because the former confers on one spouse the right to impair or defeat the right of the other spouse to maintain possession and control of marital property, it also has the consequence of excusing a spouse for criminal damage to a marital property in which the other spouse retains an interest. Accordingly, there was neither a legal nor factual basis for Cynthia Hansen's plea.

CONCLUSION

For the foregoing reasons, appellant Hansen respectfully requests that the decision and order of the circuit court be reversed and that this matter be remanded either with instructions that the criminal damage to property offense be dismissed or that the plea be vacated.

Dated at Milwaukee, Wisconsin, April 23, 2017.

Respectfully submitted,

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RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,889 words.

Electronically signed by

_____

James A. Walrath

RULE 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

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James A. Walrath

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on April 24, 2017, I caused 10 copies of the Defendant-Appellant's Reply Brief to be mailed, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O. Box 1688, Madison, Wisconsin 53701-1688 and that three copies were served by mail on opposing counsel of record, Assistant District Attorney Andrew J. Burgoyne, 912 56th Street, Kenosha, Wisconsin 53140-3747.

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