STATE OF WISCONSIN

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

DISTRICT I

Case No. 2018AP298-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SANDRA D. SOLOMON,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and Order Denying Postconviction Relief Entered in the Milwaukee County Circuit Court, the Honorable Janet C. Protasiewicz, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Ms. Solomon filed a postconviction motion for plea withdrawal, arguing her plea was involuntarily entered. Did the circuit court err in denying Ms. Solomon's plea withdrawal motion without an evidentiary hearing?

The postconviction court denied Ms. Solomon's request for plea withdrawal without a hearing, concluding that her motion's allegations were conclusory and contradicted by the record. (46:6-8; App.127-29).

2. Did the postconviction court err in declining to strike the domestic abuse modifier from the judgment of conviction, where the definition of domestic abuse was not satisfied?

The postconviction court said no, concluding there was a sufficient factual background for the court to find that Ms. Solomon's actions may have caused the victim to reasonably fear imminent physical harm. (46:9; App.129-30).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Ms. Solomon welcomes oral argument if it would be helpful to the court. This case does not meet the statutory criteria for publication. WIS. STAT. RULE 809.23(1)(b)4; § 752.31(2)(f).

STATEMENT OF FACTS

The state charged Ms. Solomon with one count of criminal damage to property (less than $2,500 damage), and with one count of disorderly conduct, both with domestic abuse assessments. (2:1). The complaint alleged that V.G.-J. saw Ms. Solomon walk past her house and pick up a rock, which she threw at the front windshield of V.G.-J.'s car, causing damage. (2:2). V.G.-J. told police she previously lived with Ms. Solomon. (2:2).

Ms. Solomon was originally represented by Attorney Mark Schoenfeldt. On June 22, 2016, Ms. Solomon began to plead guilty[1] to Count 2, the disorderly conduct charge, in exchange for the dismissal of Count 1. (56:2-3). The court, the Honorable Janet C. Protasiewicz, presiding, began asking Ms. Solomon standard plea colloquy questions. (56:4-5). However, the plea stalled when the court advised Ms. Solomon of the firearm consequences of a domestic abuse conviction. (56:6). The court passed the case to give Ms. Solomon time to talk to her attorney; ultimately, the parties were unable to proceed with the plea that day. (56:6-7).

At the next hearing, Attorney Schoenfeldt asked to withdraw from representing Ms. Solomon. (57:2-3; App.102-103). Attorney Schoenfeldt explained he believed he and Ms. Solomon had "reached an impasse" after the previous unsuccessful plea hearing. (57:2; App.102). Attorney Schoenfeldt also informed the court that he was privately

[1] The state explained the agreement called for Ms. Solomon to plead no contest to the disorderly conduct charge, and that the state would recommend 90 days imposed and stayed for 18 months of probation. (56:2-3). Ms. Solomon also agreed to pay restitution. (56:4). The court stated, "I'm not taking a no contest plea for somebody looking at potentially $500….It's got to be a plea of guilty." (56:3).

retained but had not "gotten paid to any full extent to handle this case if she wants to go forward with the trial." (57:3; App.103).

The circuit court directed Ms. Solomon to the public defender's office to see if she qualified for appointed counsel. (57:3; App.103). She did not qualify, and she told the court that at that point, "as far as public defender's lawyers, it seems like I'm better off going at this by myself. I'm in foreclosure with my house. I can't afford an attorney. I might as well pay my mortgage to catch back up to keep my home." (57:4-5; App.104-105). Ms. Solomon and the court discussed her finances, and the court said, "What I'm going to do, if you would like, I will appoint an attorney to represent you, but here's the caveat, you're going to have to pay Milwaukee County back for that representation when the case is closed at the rate of $50 a month. Is that something you want to do?" (57:6-7; App.106-107). Ms. Solomon responded, "I guess I am trying to express to you I don't know what's the difference between this attorney I had here or one that you're going to appoint me." (57:7; App.107).

After some additional discussion, the court stated, "Here's the situation, you're looking at up to a year in jail. You're looking at up to $1,100 in fines. You are looking at many, many consequences. Handling this on your own is not smart. Would you like me to appoint an attorney for you? Yes or no?" (57:7-8; App.107-108). Ms. Solomon said no. (57:8; App.108).

The court responded, "All right. Call Attorney Schoenfeldt. Tell him I'm not letting him off the case." (57:8; App.108). The court called Mr. Schoenfeldt and told him, "Attorney Schoenfeldt, I have no choice but to deny your motion to withdraw. She does not qualify for public defender

assistance nor will she allow me to appoint a different attorney to represent her. I would have appointed someone, but she has declined that. So you will have to stay on her case." (57:8-9; App108-109).

After the court declined Attorney Schoenfeldt's withdrawal motion, at Ms. Solomon's next appearance on her jury trial date, the following exchange occurred:

Mr. Schoenfeldt:	Attorney Mark Schoenfeldt in court.
The Court:	With your client who is still your client.
Mr. Schoenfeldt:	Well—
The Defendant:	No—
Mr. Schoenfeldt:	—I have to disagree with that because I was taken off this case. I realize nothing has been filed in court to have me replaced in this case. But I had probably six discussions with Paul Ksicinski, the attorney that got retained on this case about two-and-a-half to three weeks ago; said he had been retained by Ms. Solomon, who is sitting next to me. And I consider her not my client any longer because someone else has been hired to take over this case.
The Court:	Let me just point out—nobody advised the Court of this. This is the last case ready to go this morning. My understanding is the State is prepared to go. *Attorney Ksicinski has advised this Court he has no information about this case*. He hasn't filed a notice of retainer and he has a

	family emergency this morning. He asked if the matter can be called at 1:30. At 1:30, we will be trying this case.
Mr. Schoenfeldt:	I have a family emergency at 1:30.
The Court:	At 1:30 you will be here trying this case with him. This is ridiculous.
Mr. Schoenfeldt:	This is not the way—this is not the way practice should be.
The Court:	Right. One of you needed to make sure and follow up that this Court had information that Attorney Ksicinski was going to be trying the case this afternoon. Absolutely nobody told us. Nobody. The only way I would ever let somebody withdraw from a case when a jury trial is set is if that person is able to come on and try that case. We didn't even know he was representing her.
Mr. Schoenfeldt:	Wonderful.
The Court:	So Ms. Solomon, I'll see you, Attorney Schoenfeldt, and Attorney Ksicinski at 1:30.

(58:3-4; App.111-12)(emphasis added).

When the case was called on the record again that afternoon, both Attorney Schoenfeldt and Attorney Ksicinski appeared. (59; App.113). The court excused Attorney Schoenfeldt. (59:3-4; App.113). Attorney Ksicinski told the court he had been retained "approximately a week ago," that he had reviewed the discovery, and that he had four motions in limine should the case proceed to trial. (59:3; App.113). He

informed the court he was prepared to try the case that day. (59:3; App.113).

However, Mr. Kscinski had not filed his motions in limine, so the court had to pass the case to allow him to discuss them with the district attorney. (59:4; App.113). Once back on the record, the parties began discussing the motions and Mr. Ksicinski explained, "Your Honor, there is an issue as to the ownership of the vehicle as it relates to Elements 4 and 5 of the—elements for criminal damage to property. It's my understanding, Judge that [V.G.-J.] does not own this car, or at least it was my understanding she—the State checked. She indicates that she said she got it as part of a property settlement. We're disputing that. *Unfortunately, I was not aware of that until today*." (59:8; App.114)(emphasis added).

Discussing defense witnesses, Mr. Ksicinski said, "Possibly my client. I'm not certain as to that, Judge." (59:9; App.114). He then informed the court that he had only received the discovery that day, and he admitted he was not aware of the 911 call in the discovery until the state informed him of its existence. (59:9; App.114). The court accordingly arranged for Mr. Ksicinski to listen to the recording of the call while the jury was brought up. (59:10; App.115).

Prior to voir dire, however, an agreement was reached, and Ms. Solomon pled guilty to Count 1, the criminal damage to property charge, while Count 2 was dismissed and read-in. (59:10-11, 13, 19; App.115, 117). In exchange for Ms. Solomon's plea, the state agreed to recommend 18 months of probation with an imposed and stayed sentence of six months in the House of Correction. (59:13; App.115). After the court accepted Ms. Solomon's plea, the parties proceeded immediately to sentencing, and the court imposed and stayed the maximum sentence of nine months in the House of

Correction, placing Ms. Solomon on probation for 18 months. "[A]s a sole punishment aspect," the court imposed sixty days of condition time. (59:20, 32-33; App.117, 120).

Ms. Solomon filed a postconviction motion, arguing her plea was not entered voluntarily because of the significant problems evidenced in the hearings preceding her eventual guilty plea. (36:1, 8, 10-12). In her motion, Ms. Solomon identified the specific circumstances outside the plea itself that cumulatively affected the freedom and volition with which her plea was entered: the circuit court was insistent that she proceed with counsel and that her case would be tried on her scheduled jury trial date despite serious questions about who was representing her and whether her newly retained attorney was prepared to proceed. (36:11).

Ms. Solomon argued that she lacked confidence in her new attorney's ability to try her case because her attorney had informed the court the morning of her jury trial that he had "no information" about her case; he admitted on the record that he had only received her discovery on the day of trial; he had not filed his motions in limine, was not aware of the existence of a 911 call until the prosecutor told him about it, and he was not aware of an ownership issue relevant to Ms. Solomon's potential defense to the criminal damage to property offense. (36:11). Ms. Solomon explained her anticipated testimony regarding the involuntariness of her plea. (36:11). In addition, Ms. Solomon sought to have the domestic abuse modifier stricken from the judgment of conviction because there was not a factual basis for its imposition. (36:12-13).

The court ordered postconviction briefing, after which it denied the postconviction motion without an evidentiary hearing. (37, 46; App.122-131). The court explained:

> The defendant's claim that her plea was coerced because Attorney Ksicinski seemed unprepared for a trial is self-serving, speculative and wholly belied by the record. The court knows Attorney Ksicinski to be a highly experienced criminal defense attorney in this jurisdiction. Attorney Ksicinski's preparedness and ability to try the case on July 20, 2017 [sic] was fully addressed by the court before he was permitted to substitute as counsel. … The defendant has not alleged any facts to substantiate her speculative opinion that the experienced defense attorney she retained was unprepared to defend her at trial on her misdemeanor charges. When asked during the colloquy whether she agreed with her attorney's statements that he was prepared to try the case, her response was, 'Yes, I do.' The defendant's purported 'worry' that her attorney 'seemed' unprepared to try her case and her 'feeling' that she was 'backed into a corner' runs contrary to her own statements at the plea hearing, does not raise a question of material fact and is insufficient to show by clear and convincing evidence that her plea was involuntarily entered.

(46:6-7; App.127-28)

This appeal follows. Additional facts will be included as necessary below.

ARGUMENT

I. Ms. Solomon was entitled to a hearing on her postconviction motion in which she alleged that her plea was involuntarily entered because of the circumstances preceding her plea.

Ms. Solomon argued in her postconviction motion that her plea was not knowingly, voluntarily, and intelligently entered because her choice to plead was legally coerced.

(36:1-12); *See* ***Rahhal v. State***, 52 Wis. 2d 144, 152, 187 N.W.2d 800 (1971). She argued there were a number of problems inherent in the nature of her plea that cumulatively affected the freedom and volition with which she entered her plea: she was denied the opportunity to represent herself; the circuit court was insistent that her case would be tried July 20th despite serious questions about who was representing her; and her newly-retained attorney had only just received discovery that day, had not filed motions in limine, was not aware of the existence of a 911 call, and was not aware of an ownership issue relevant to her potential defense. (36:11); *See* ***State ex rel. White v. Gray***, 57 Wis. 2d 17, 25, 203 N.W.2d 638 (1973).

As a result of these circumstances, Ms. Solomon's plea was legally coerced, as she felt she had no reasonable alternative but to plead guilty. (36:11-12). Despite the sufficiency of her postconviction pleadings, the postconviction court denied Ms. Solomon's request without an evidentiary hearing. (46:1-10; App.122-131).

A. Standard of review and relevant law.

To withdraw a plea after sentencing, a defendant must show by clear and convincing evidence that withdrawal is necessary to correct a manifest injustice. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). This showing is met if a defendant's plea was not constitutionally valid. ***Hatcher v. State***, 82 Wis. 2d 559, 565, 266 N.W.2d 320 (1978). A plea is not constitutionally valid if it was not knowingly, voluntarily, and intelligently entered. ***State v. Bangert***, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986).

In assessing "whether a plea has been entered voluntarily there are undoubtedly factors which may affect the freedom and volition with which a plea is given. These

factors may be inherent in the nature of the plea or arise from circumstances outside the plea itself." ***Gray***, 57 Wis. 2d at 25. "When the defendant is not given a fair or reasonable alternative to choose from, the choice is legally coerced." ***Rahhal***, 52 Wis. 2d at 152.

When the circuit court denies a postconviction motion without an evidentiary hearing, this Court independently reviews whether the postconviction motion was sufficient to warrant a hearing. ***Bentley***, 201 Wis. 2d at 310. If a defendant "alleges sufficient material facts that, if true, would entitle the defendant to relief," the defendant is entitled to an evidentiary hearing on the postconviction motion. ***State v. Love***, 2005 WI 116, ¶42, 284 Wis. 2d 111, 700 N.W.2d 62.

In determining whether there are sufficient allegations to raise a question of fact, the court must assume the allegations are true. ***State v. Allen***, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433. The circuit court has the discretion to deny a postconviction motion without an evidentiary hearing only if the postconviction motion "fails to allege sufficient facts to raise a question of fact, presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief." ***State v. Roberson***, 2006 WI 80, ¶43, 292 Wis. 2d 280, 717 N.W.2d 111.

B. Ms. Solomon's postconviction motion contained sufficient factual allegations to entitle her to an evidentiary hearing on her claim that her plea was not entered voluntarily.

In her postconviction pleadings, Ms. Solomon explained that she was under unique pressure to resolve her case with a guilty plea. (36:8, 11; 44:1-2). As she noted in her postconviction motion, at age 45, she had no prior experience

with the criminal justice system. (2:1; 59:26; App.119). Yet, by her jury trial date on July 20th, Ms. Solomon had received several clear messages: first, that she had "no choice" but to proceed with the assistance of counsel. Second, Ms. Solomon had received the clear message that her newly retained attorney was not familiar with her case or her discovery. Third, it had been made clear to her that the circuit court was intent on conducting her trial that day.

Due to the confluence of these circumstances, Ms. Solomon asserted that she felt she lacked any reasonable alternative to pleading guilty. (36:11). In her postconviction motion, Ms. Solomon explained she would have testified that she was concerned about Attorney Ksicinski's ability to defend her given his lack of preparation, as demonstrated by his statement to the court the morning of her jury trial that he had "no information" about her case, his lack of awareness of the 911 call and the ownership issue on the criminal damage to property count, and his confession that he had only received the discovery that day. (36:11; 59:4, 8-9; App.112-14). Ms. Solomon argued in her postconviction motion that her guilty plea was not entered voluntarily as a result of the inherently coercive environment preceding the entry of her plea on the day of her trial.

It is understandable that the circuit court was frustrated about the confusion about who was representing Ms. Solomon; however, adjourning the matter to sort out the confusion would have avoided placing Ms. Solomon in a position where she felt compelled to enter a plea because she lacked confidence in Attorney Ksicinski's familiarity with and readiness to try her case. (36:11). In addition, the court should not have forced Ms. Solomon to proceed with Attorney Ksicinski following Attorney Schoenfeldt's withdrawal, and after she declined the court's offer to appoint

an attorney. (36:11). All of these circumstances contributed to a thoroughly overwhelming situation that Attorney Schoenfeldt aptly described as, "not the way practice should be." (36:11; 58:4; App.104).

A court *must* hold an evidentiary hearing on a post-conviction motion if the motion alleges "sufficient material objective factual assertions that, if true, entitle [the defendant] to relief." ***Love***, 284 Wis.2d 111, ¶2. Here, an evidentiary hearing was necessary so that the court could hear testimony in support of Ms. Solomon's involuntariness claim in order to make credibility determinations and then decide whether those facts rendered her plea involuntary. *See* ***State v. Leitner***, 2001 WI App 172, ¶34, 247 Wis. 2d 195, 633 N.W.2d 207 ("When facts are in dispute and credibility is an issue, live testimony is generally preferable.").

The circuit court's denial of Ms. Solomon's motion without an evidentiary hearing resulted in its failure to assess, through live testimony, the credibility of her assertions regarding the pressures that led her to plead guilty, so that the court could then determine whether her plea was entered involuntarily. The postconviction decision suggested Ms. Solomon failed to allege:

> any facts to substantiate her speculative opinion that the experienced defense attorney she retained was unprepared to defend her at trial on her misdemeanor charges. When asked during the colloquy whether she agreed with her attorney's statements that he was prepared to try the case, her response was, 'Yes, I do.' The defendant's purported 'worry' that her attorney 'seemed' unprepared to try her case and her 'feeling' that she was 'backed into a corner' runs contrary to her own statements at the plea hearing, does not raise a question of material fact and is insufficient to show by

> clear and convincing evidence that her plea was involuntarily entered.

(46:7; App.128).

However, Ms. Solomon's motion set forth her anticipated testimony, the credibility of which the circuit court would have been able to evaluate had it conducted an evidentiary hearing. (36:11). Ms. Solomon explained in her postconviction motion that she wanted to go to trial on the charges and identified the fact that she had ended her previous projected plea hearing because she was uncomfortable with the consequences of pleading guilty. (36:11). The motion explained that, at a hearing, Ms. Solomon would testify she was worried about Attorney Ksicinski's ability to defend her because he had not reviewed her discovery by her jury trial date. (36:11). In her postconviction motion, Ms. Solomon asserted that she would testify she did not feel comfortable proceeding to trial with an attorney who was not familiar with her case and who was not sufficiently prepared for trial. (36:11).

In ***State v. Basley***, 2006 WI App 253, 298 Wis. 2d 232, 726 N.W.2d 671, this Court concluded the defendant was entitled to an evidentiary hearing because his postconviction motion had alleged sufficient facts that, if true, would entitle him to withdraw his plea on grounds that the plea was involuntary. In that case, after the defendant's first jury trial ended in a hung jury, his attorney met with him the day before his second trial was scheduled to begin and urged him to plead no contest. ***Id.***, ¶6. On the day of the scheduled second trial, the defendant's attorney "threatened to withdraw unless" the defendant accepted a plea agreement. ***Id.*** The defendant alleged his attorney told him that if he did not plead, counsel would withdraw and it would result in a

significant delay until a new attorney could take the case to trial. ***Id.***

This Court concluded the defendant was entitled to an evidentiary hearing on his motion to withdraw his plea, having sufficiently explained the specific statements preceding his no contest plea which led him to feel he had no real choice but to plead. ***Id.***, ¶9. This Court noted that, if in fact trial counsel told the defendant that he would withdraw as counsel if the defendant would not agree to the state's proffered plea bargain, thereby forcing a potentially lengthy delay of trial—then his plea was tendered under the duress of his attorney's coercive conduct, rendering it involuntary. ***Id.***

Like in ***Basley***, Ms. Solomon was entitled to an evidentiary hearing on her plea withdrawal motion, as she sufficiently explained the specific circumstances that led her to feel she had no real choice but to plead.

The postconviction court concluded without a hearing that Ms. Solomon's argument "that her plea was coerced because Attorney Ksicinski seemed unprepared for a trial is self-serving, speculative and wholly belied by the record. The court knows Attorney Ksicinski to be a highly experienced criminal defense attorney in this jurisdiction." (46:6; App.127). The postconviction decision noted Attorney Ksicinski stated that he was prepared to try the case, and "demonstrated that preparedness by bringing four motions in limine while the case was still in trial posture." (46:6; App.127).

Yet, the postconviction court's general impression of an attorney's experience does not account for the attorney's level of preparation and competence (or lack thereof) in a specific case, and is thus irrelevant to the question of the voluntariness of a particular defendant's plea.

Further, the court's conclusion that Attorney Ksicinski demonstrated his preparedness is contradicted by the record. Attorney Ksicinski had not filed his motions in limine and the case had to be passed so he could discuss the motions with the district attorney. (59:4; App.113). Then, in discussing one of the motions in limine on the record, he admitted he had not been aware of the existence of a 911 call, and was not aware of an ownership issue relevant to one of Ms. Solomon's two counts. (59:8; App.114). While the court deferred to Attorney Ksicinski's description of this case as "simple," the record reflects that he told the court on the morning of jury trial that he had no information about the case, and later demonstrated his unfamiliarity with her discovery and her case, which undermined his stated preparedness for trial. (58:3-4; App.111-12).

In addition, the postconviction decision erroneously analyzed Ms. Solomon's argument about the court's failure to assess her right to self-representation independently from the other circumstances preceding the plea. (46:7-8; App.128-29). In fact, Ms. Solomon argued that the individual problems preceding her plea, including the court's insistence that she proceed with counsel, were cumulative, *together* resulting in her involuntary plea. (36:11-12).

And, regarding the postconviction court's conclusion that Ms. Solomon's argument was contradicted by the record, Ms. Solomon's motion alleged that her plea was not voluntarily entered. (36:1, 7-8, 10-11). A coerced, involuntary plea runs afoul of due process, and that indisputably would be a manifest injustice. *See* ***Henderson v. Morgan***, 426 U.S. 637, 645 (1976) and ***Brady v. United States***, 397 U.S. 742, 748, n.6 (1970). Because Ms. Solomon alleged that she pled guilty under duress, and explained why, the existence of a plea colloquy suggesting that the plea was voluntary should

not bar her postconviction litigation of her claim of involuntariness. *See* ***Basley***, 298 Wis.2d 232, ¶9.

In ***Basley***, the postconviction court, like the court in this case, concluded the defendant's "current backpedaling flies in the face of the no contest plea hearing, and his claims of clouded thinking are not borne out by the plea transcript and what the Court observed during its colloquy with him. If a court is not entitled to rely on the responses given by a defendant during a plea colloquy, the finality of all guilty/no contest pleas would be in severe jeopardy." 298 Wis. 2d 232, ¶13. This Court rejected this reasoning, which had been adopted by the state on appeal, and explained

> The State is simply incorrect that a good and sufficient plea colloquy, one that concededly complies with the requirements of *Bangert*, can be relied on to deny an evidentiary hearing for a defendant who seeks to withdraw his or her plea on non-*Bangert* grounds. The entire premise of a *Nelson/Bentley* plea withdrawal motion is that something not apparent form the plea colloquy may have rendered a guilty or no contest plea infirm. When sufficient, non-conclusory facts are pled in a postconviction plea withdrawal motion that, if true, would entitle a defendant to withdraw his plea, the court must conduct an evidentiary hearing on the motion.

Id., ¶15 (citations omitted).

Accordingly, like it did in ***Basley***, this Court should reverse and remand for an evidentiary hearing.

II. The domestic abuse modifier should be stricken from the judgment of conviction because there was not a sufficient factual basis for its imposition.

In Ms. Solomon's criminal complaint, the State charged both counts with a modifier titled "domestic abuse assessments," that invoked "the provisions of sec. 973.055(1)

Wis. Stats., because this charge is an act of domestic abuse…." (2:1-2). However, neither the criminal complaint nor Ms. Solomon's judgment of conviction refer to the specific statutory section for domestic abuse modifiers, WIS. STAT. § 968.075. (2:1-2; 13:1).

Instead, the section invoked, WIS. STAT. § 973.055, only governs the imposition of the $100 domestic abuse surcharge. As a result, here, the charging document and judgment of conviction apply the functional equivalent of the domestic abuse modifier, by attaching the language, "domestic abuse assessments," to Ms. Solomon's charges and conviction. (2; 13). Though not specifically referring to the domestic abuse modifier under WIS. STAT. § 968.075, the domestic abuse language ultimately functions as a modifier.

Whether an offense qualifies as "domestic abuse" under WIS. STAT. § 968.075(1)(a) is a mixed question of fact and law. *See* ***State v. Schmidt***, 2004 WI App 235, ¶13, 277 Wis. 2d 561, 691 N.W.2d 379. This Court applies a clearly erroneous standard of review to the circuit court's factual findings. *See* ***id.*** Here, Ms. Solomon stipulated to the criminal complaint as the factual basis for her guilty plea. (59:19; App.117). Whether the undisputed facts qualify as domestic abuse is a legal question this Court reviews de novo. *See* ***Schmidt***, 277 Wis. 2d 561, ¶13.

In order for either the domestic abuse modifier or the domestic abuse surcharge to apply, the definition of "domestic abuse" from WIS. STAT. § 968.075 must be met. The definition of domestic abuse requires the existence of (1) a qualifying relationship and (2) qualifying behavior. Specifically, the statutory definition of domestic abuse implicates the following type of behavior:

> 1. Intentional infliction of physical pain, physical injury or illness;
>
> 2. Intentional impairment of physical condition;
>
> 3. A violation of the sexual assault statute; or
>
> 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. WIS. STAT. § 968.075.

WIS. STAT. § 968.075.

Here, while the "qualifying relationship" condition was satisfied,[2] there is no factual basis to support the application of the domestic abuse modifier because the conduct alleged does not satisfy the definition of domestic abuse.

Specifically, the complaint lacked any facts establishing that Ms. Solomon intentionally inflicted physical pain, physical injury, or illness on V.G.-J. (2:1-2). It also failed to establish that Ms. Solomon intentionally impaired V.G.-J.'s physical condition, or that there was a violation of the sexual assault statute. (2:1-2). Last, the complaint failed to establish Ms. Solomon engaged in a physical act that may have caused V.G.-J. reasonably to fear imminent engagement in the conduct described under subd. 1, 2, or 3. See WIS. STAT. § 968.075. (2:1-2).

Words have meaning, and of particular importance here are the words "reasonably" and "imminent." The Cambridge Dictionary, online, defines "imminent" as "likely

[2] The complaint alleged Ms. Solomon and V.G.-J. are adults who formerly lived together. (2:2).

to happen very soon;"[3] the English Oxford Dictionary, online, defines it as "about to happen;"[4] and from the Collins Dictionary, online: "likely to happen without delay; impending; threatening".[5]

In order for the domestic abuse modifier to properly apply, it must have been objectively reasonable for V.G.-J. to fear that the intentional infliction of physical pain, physical injury or illness, intentional impairment of physical condition, or a violation of the sexual assault statute was "impending"—"about to happen"—or "likely to happen without delay." However, it was not objectively reasonable for V.G.-J. to fear the *imminent* occurrence of prongs 1-3 from Ms. Solomon. Ms. Solomon was convicted of criminal damage to property, for throwing a rock at a windshield, causing damage to V.G.-J.'s car. (2:2). V.G.-J. was inside her home. (2:2). Like in ***O'Boyle***, where this Court concluded that not all disorderly conduct constituted domestic abuse, so too, not all criminal damage to property constitutes domestic abuse. ***State v. O'Boyle***, No.2013AP1004-CR, unpublished slip op. (WI App Feb. 4, 2014)(App.132-136).[6]

In ***O'Boyle***, the defendant had been living with his child's mother, K.E., and K.E.'s mother, N.E. ***Id.***, ¶3

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[3] Available at https://dictionary.cambridge.org/us/dictionary/english/imminent.

[4] Available at https://en.oxforddictionaries.com/definition/imminent.

[5] Available at https://www.collinsdictionary.com/us/ dictionary/english/imminent.

[6] Ms. Solomon cites ***State v. O'Boyle*** for persuasive value only. WIS. STAT. § 809.23(3)(b). A copy is included with this brief, in accordance with WIS. STAT. § 809.23(3)(c). (App.132-136).

(App.132). K.E. told O'Boyle to leave late one evening, and early the next morning, she awoke to noises that sounded like rocks hitting her second-story window, followed by the sound of someone on the roof. K.E. called the police. ***Id.*** (App.132). N.E. also called the police, advising them that she woke up around 2:00 a.m. at the sound of something hitting the upstairs part of the house. ***Id.*** (App.132). She observed O'Boyle throwing what she thought was rocks, for approximately 30 minutes. ***Id.*** (App.132). When the police arrived, they identified O'Boyle on the roof. ***Id.***, ¶4 (App.132). O'Boyle pled to disorderly conduct, with a domestic abuse modifier and domestic abuse surcharge. ***Id.***, ¶6 (App.133).

The state at O'Boyle's plea hearing remarked, "[I]n the continuum of disorderly conducts that we see, this is not the most aggravated. The behavior here, while inappropriate and certainly would leave someone to be very frightened, there was no violence against the victim nor any sort of threats made by the defendant." ***Id.***, ¶25 (App.136). The trial court agreed, noting "there weren't any threats or any physical contact." ***Id.*** (App.136). So, too, this Court noted that "while K.E. may have been frightened, it would not have been reasonable for her to fear *imminent* engagement in any of the conduct described in § 968.075(1)(a)1., 2., or 3., as O'Boyle never entered the dwelling, and no threats or, for that matter, conversation took place between the parties." ***Id.***, ¶22 (emphasis original)(App.135).

Likewise, here, there was no physical contact between V.G.-J. and Ms. Solomon, and while Ms. Solomon's behavior, like O'Boyle's, could be characterized as inappropriate and potentially frightening, there was no violence against V.G.-J. nor threats made by Ms. Solomon at the time of the incident. As Ms. Solomon's attorney pointed

out at the sentencing hearing, "Judge, I'm going to start at the obvious. These people should not have contact with each other….I have reviewed my client's cell phone. And I have seen that, unfortunately, as many couples do at the end of their relationship, there is a flurry of texts and messages that I'm sure later on neither party means and severely regrets. And that is true here, where each is calling each other names that I'm sure if it were sent out and opened in public, they would be embarrassed to hear. … Unfortunately, both parties have been in – up on the seventh floor. My client has sought a restraining order. [V.G.-J.] has sought a restraining order." (59:24; App.118). This sentencing argument gives greater context to the situation, and explains that both parties were contacting each other as their relationship ended, and that this was not as one-way a street as the state suggested during sentencing.

What happened here did not provide a sufficient basis for the application of the domestic abuse modifier. There was no reasonable fear of *imminent* intentional infliction of physical pain, physical injury or illness, intentional impairment of physical condition, or that a violation of the sexual assault statute was impending.

Without a sufficient factual basis for its imposition, the domestic abuse modifier should be stricken. In ***O'Boyle***, when this Court concluded the defendant's conduct did not qualify as domestic abuse under the statutory definition, it ordered the references to domestic abuse removed from the judgment of conviction. *See* ***O'Boyle***, 2013AP1004-CR, unpublished slip op. ¶25 (App.136).The question in that case, like here, was whether the complaint alleged conduct that fell under the statutory definition. ***Id.***, ¶22 (App.135).

This Court explained, "Although not specifically mentioned, implicit in WIS. STAT. § 973.055 is that the complained of conduct must fall within the definition of domestic abuse found in WIS. STAT. § 968.075(1)(a)1.-4." ***Id.***, ¶24 (App.136). This Court noted "none of the crimes listed in subparts 1. through 4. were alleged against O'Boyle." ***Id.***, ¶24 (App.136). It concluded that the record concerning that defendant's disorderly conduct failed to fulfill the statutory definition of domestic abuse, and it ordered the domestic abuse modifier stricken. ***Id.***, ¶2, 24-25 (App.132, 136).

In the order denying Ms. Solomon's postconviction motion, the postconviction court noted, "Although ***O'Boyle*** tends to support the defendant's argument, the decision is unpublished and is not binding authority in this state." (46:9; App.130). Nevertheless, here, as in ***O'Boyle***, the record is insufficient to establish the necessary definition of domestic abuse. As a result, the domestic abuse modifier should be stricken from the judgment of conviction.

CONCLUSION

Ms. Solomon respectfully requests that this Court reverse the order denying postconviction relief and remand for an evidentiary hearing on Ms. Solomon's motion for plea withdrawal. In addition, this Court should order that the reference to "domestic abuse assessments" be stricken from the judgment of conviction as it modifies the charge.

Dated this 21st day of May, 2018.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,707 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 21st day of May, 2018.

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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 one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically 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.

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