STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal Case No. 2018AP000298-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

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 SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

John Chisholm
District Attorney
Milwaukee County

Elaine Fehrs
Assistant District Attorney
State Bar No. 1107232
Attorneys for Plaintiff-Respondent

District Attorney's Office
821 West State Street, Room 405
Milwaukee, WI 53233-1485
(414) 278-4646

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ISSUES PRESENTED

I. Did the circuit court err in denying Solomon's post-conviction motion to withdraw her guilty plea without an evidentiary hearing?

The post-conviction court ruled that Solomon had not alleged sufficient facts to require a hearing.

II. Did the post-conviction court properly uphold the domestic abuse modifier in the judgement of conviction?

The post-conviction court held that there had been sufficient facts in the record to support a domestic abuse assessment.

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 March 16, 2016, Ms. V.G.-J. reported to the Milwaukee Police Department that her ex-girlfriend, Sandra K. Solomon (hereafter "Solomon") had come to her house and thrown a rock through the window of her car. (R39:1). V.G.-J. provided her cellphone to police which revealed she had received hundreds of emails, voice messages, and text-messages from Solomon in the days immediately prior to the incident. *Id*. Some of the messages threatened V.G.-J. with bodily harm. (R39:2-3). Officers observed the windshield of V.G.-J.'s car had been broken and that there was a rock lying nearby. (R39:2). V.G.-J. told police she had lived with Solomon for approximately one year during which time they had been romantically involved. *Id*. Approximately one month before the incident, V.G.-J. had broken up with Solomon, moved out of Solomon's house, and V.G.-J. had then moved in with her boyfriend. *Id*.

On May 4, 2016, a final pretrial and jury trial were scheduled for June 22nd and July 20th of 2016 respectively. (R55:3).

On June 22, 2016, Solomon appeared at the final pretrial conference before the Honorable Janet Protasiewicz. (R56). A plea colloquy began as Solomon started to plead guilty to Count 2, disorderly conduct. (R56:2). However, when the court asked if Solomon understood that she would "not be able to possess a firearm for the remainder of [her] lifetime" Solomon responded "that doesn't sit well with me." (R56:5-6). The court then stated "well, you don't have to do it. You can have a trial. It's up to you." (R56:6). Solomon replied "I can't afford an attorney" and the court stated "well, you can't plead guilty just because you can't afford an attorney" and advised Solomon to speak with her attorney (R56:6). Proceedings concluded for the day, the case was calendared for a motion hearing on July 6, 2016. (R56:7).

On July 6, 2016 Solomon's attorney, Mark Schoenfeldt, moved to withdraw because he had not been paid and believed he had reached an "impasse" with Solomon. (R57:3). Attorney Schoenfeldt believed Solomon would qualify for a public defender. *Id*.

Seeking clarification, the court asked Solomon "what's going on?" *Id*. In response, Solomon began to discuss her small-claims matter with V.G.-J. *Id*. The court clarified it wished to hear about Solomon and her attorney. *Id*. Solomon stated she believed part of the problem had to do with the small claims matter, stating that she and Attorney Schoenfeldt were "having a conflict on how we should approach this whole thing." *Id*. The court sent Solomon to be evaluated by the public defender's office. *Id*.

Later on that same day of the July 6, 2016, the case was recalled and Solomon informed the court she did not qualify for a public defender. (R57:4-5). Only then did Solomon state "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." (R57:5).

Solomon again began to attempt discussing her personal relationship with the victim, asking to "do a little back-story" about her and V.G.-J. *Id*. The court again asked Solomon only to discuss the issue of her attorney. (R57:6). The court asked

about how she came to retain Attorney Shoenfeldt and Solomon stated that she had primarily sought legal advice following the issuance of an arrest warrant and went on to say "I didn't know I had to keep him for the duration of the time." (R57:6).

The court offered to appoint an attorney. (R57:6). Solomon stated "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." (R57:7). The court reminded Solomon that Attorney Schoenfeldt "doesn't want to be your attorney anymore because you haven't paid him." (R57:7).

Solomon clarified there were other conflicts as well and then stated "I guess I didn't want an attorney on record because I'm trying to, which you wouldn't let me discuss right here. Seems like I need to go back through the DA office myself to explain some other things to do with this case right here." *Id*. The court then reminded Solomon of the maximum penalties possible in her case and stated "handling this on your own is not smart." *Id*. Solomon did not want an appointed attorney, and accordingly the court denied Attorney Schoenfeldt's motion to withdraw. (R57:8). The court concluded the proceedings by stating "I'll see you back here for your jury trial." (R57:9).

On July 20, 2016, Solomon appeared for jury trial before the Honorable Janet Protasiewicz accompanied by Attorney Schoenfeldt. (R59:2). Attorney Schoenfeldt appeared by stating he was "in court" and the court clarified "with your client who is still your client." *Id*. Attorney Schoenfeldt replied

> 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…and I consider [Solomon] not my client any longer because someone else has been hired to take over this case.

(R59:2).

The court stated:

> let me just point out –nobody advised the court of this…one of you needed to make sure and follow up that this court had information that Attorney Ksicinski was going to be trying this case this afternoon. Absolutely nobody told us. Nobody. The only way I would let somebody withdraw from a case when a jury trial date is set is if that person is able to come on and try the case. We didn't even know he was representing her.

(R59:2-3).

The court then instructed Attorney Schoenfeldt to return with Solomon and Attorney Ksicinski for the afternoon session. (R59:3).

When the case was recalled, Attorney Ksicinski explained he had been retained by Solomon and then asked the court that he take the place of Attorney Schoenfeldt as her attorney of record. (R58:2). Attorney Ksicinski stated he had not had a chance to file a notice of retainer or substitution of attorney but that he had reviewed discovery and would make his motions in limine orally. (R58:2). The court asked "are you prepared to try this case today?" Attorney Kscinski replied "Yes." *Id*. Attorney Ksicinski explained he had not given the DA's Office notice of his motions in limine because he had "no idea who the DA was, given that it's a team." (R58:3). The court passed the case so that the defense attorney could discuss his potential motions with the Assistant District Attorney. *Id*.

The case was recalled and Attorney Ksicinski made four motions in limine orally. (R58:4-8). In his last motion Attorney Kscinski illuminated the small-claims issue Solomon had tried to raise in the previous motion hearing on June 6th. (R58:7). Solomon contended that V.G.-J. did not own the car which had been damaged but that she had gotten it as part of a small claims settlement which was disputed. *Id*. The court stated that Solomon's attorney could cross-examine the State's witnesses on those issues. *Id*. Attorney Ksicinski remarked that "the state did make me aware of a 911 call… I would be asking to be allowed to hear that before it's played for the jury." (R58:8). The court stated that the State would play the 911 call it intended to introduce as evidence for Attorney Ksicinski before he made his opening statements. *Id*. Proceedings were paused

while a jury was brought up and when they resumed the parties informed the court that they had arrived at a resolution.

(R58:9).

The court asked that the proposed resolution be put on the record and then asked "Miss Solomon, is that something you're going to want to do? Miss Solomon is that something you're going to want to do?" (*sic*.) (R58:10). Solomon replied "I'm questioning the amount of damage." *Id*. The court stated "I've got a jury panel on the way up. So this is really last minute. Is it something you want to do?" *Id*. The case was passed so Solomon could confer with Attorney Ksicinski again. *Id*. When it resumed, Attorney Ksicinski again outlined the proposed resolution. (R58:11). The court asked "Ms. Solomon, is that what you want to do?" *Id*. Solomon replied "yes." *Id*.

Proceedings were paused for Solomon to fill out the paperwork for a guilty plea and the court then began a colloquy. During that colloquy the court asked "are you satisfied with the way Attorney Ksicinski is representing you?" Solomon answered "[y]es." (R58:17). The court asked "counsel, are you satisfied her plea is being made freely and voluntarily?" *Id*. Attorney Ksicinski replied:

> Judge, I'd just like to point out that in the plea questionnaire waiver of rights form I had her initial each line. Given that, as the court indicated, we were prepared to go through jury trial….to make sure she understood each one of the lines…she indicated to me she did…[i]t should also be clear, judge, as I indicated, I believe I am prepared for trial. I did receive discovery today. But in all candor, it was relatively simple. …I don't think there was a lot of preparation that could have been done outside of even what was done today…I believe she is giving you a free, voluntary, and intelligent plea.

(R58:17-18).

The court asked "Ms. Solomon, do you agree with everything your attorney just said?" to which Solomon replied "Yes, I do." (R58:18). The court then asked Attorney Ksicinski: "and, counsel, are you satisfied that there is factual basis for her plea?" Attorney Ksicinski replied "we stipulate to the complaint." *Id*. The complaint states, in part, that officers

> spoke with [V.G.-J.], who stated that she previously lived with [Solomon]. Ms. [V.G.-J] reported that on the night of March 13, 2016, she received a message from [Solomon], telling her that [Solomon] was coming over…Ms. [V.G.-J.] observed [Solomon] as she walked past the house, then picked up a rock and threw the rock at the front windshield of Ms. [V.G.-J.]'s car. She did not consent to [Solomon]'s actions.

(R2:2).

The court then raised the issue of domestic abuse assessments and asked if Solomon understood it, stating "this is a domestic abuse case, so there is going to be a domestic abuse assessment that you're required to pay that is 100 dollars. And, further, you'll never be able to possess a firearm the remainder of your lifetime. Do you understand that?" *Id*. Solomon answered "yes." (R58:19). Upon completion of the guilty plea colloquy, the court found Solomon guilty of criminal damage to property and entered a judgment of conviction. (R58:19). With consent of both parties, the court then proceeded to sentencing. *Id*. V.G.-J. made a statement before the court followed by Assistant District Attorney Lewand's remarks:

> Ms. Lewand: "Miss Solomon had refused to leave [V.G.-J.] alone. She called her, [V.G.-J.] described, hundreds and hundreds of time[s] and then, again, sending hundreds of e-mails.
>
> And just before this incident occurred, sent her a text message saying she was on her way to [V.G.-J.'s] address. [V.G.-J.] said that she didn't even know how Miss Solomon had gotten her address. But she did arrive at that location… [V.G.-J.] observed her from inside of her residence take a rock and smash through her windshield."

(R58:23).

During Attorney Ksicinski's remarks, the court interrupted his discussion of whether batterer's intervention programming was appropriate:

> The Court: Let me interject. Attorney Lewand, tell me about the assessments.
>
> Ms. Lewand: [V.G.-J.] answered yes to the following questions: does she have a gun or can she easily get one? Has she ever tried to choke you? Is she violently or constantly jealous or does she control most of your daily activities? Have you left her or separated after living together? Do you have a child that she knows is not hers? And does she follow or spy on you or leave threatening messages? She answered yes to all those questions and also answered yes to a prior history of unreported domestic violence.

(R58:25).

Solomon next addressed the court and sentencing arguments were concluded. (R58:29).

The court stated that:

> anytime I sentence anybody, I look at how serious the crime is, the need to protect the public, and what do I know about you and what do I know about your character. What I just observed was extremely disturbing. I didn't hear any real acceptance of responsibility. I heard your finger pointed at the victim of this crime…I saw somebody in front of me, Miss [V.G.-J.], looking scared, looking humiliated.
>
> …Miss Solomon, I see people take responsibility by pleading guilty to cases every single day. This is probably about one of the least heartfelt apologies I have ever heard after being in the criminal justice system for decades. …[a]nd even though you plead guilty, you really accepted no responsibility, Ms. Solomon.

(R58:30-31).

The court sentenced Solomon to nine months in the house of correction, stayed for eighteen months of probation with conditions to include sixty days of imposed and stayed condition time to be used at her probation agent's discretion along with an additional sixty days of condition term to be served up front as condition time. (R58:32-33). The court ordered that Solomon pay $282.11 in restitution to V.G.-J. (R58:32). The court also ordered that Solomon "pay the DV surcharge along with the DNA surcharge." (R58:33).

Solomon filed a post-conviction motion to withdraw her guilty plea and strike the domestic abuse assessment. (R36). Solomon alleged she felt coerced due to her attorney's seeming lack of preparation. (R36:11). Solomon relied on her prior statement "it seems like I'm better off going at this by myself." (R36:8,11). The post-conviction court denied this motion, holding that "Solomon's claim that her plea was coerced because Attorney Ksicinski seemed unprepared for trial is self-serving, speculative and wholly belied by the record." (R46:6). The post-conviction court found that the issue of Attorney Ksicinski's preparedness had been "fully addressed by the court before he was permitted to substitute as counsel." *Id*. The post-conviction court found that Solomon had not "alleged any facts to substantiate her speculative opinion that the experienced defense attorney she retained was unprepared to defend her at trial on misdemeanor charges." (R46:7). The court held that Solomon had not shown clear and convincing evidence that her plea was involuntarily entered. *Id*. The court also held that Solomon did not make a clear and unequivocal demand to represent herself. (R46:7-8). The court therefore denied Solomon's post-conviction motion without an evidentiary hearing. (R46:8). The court also held that the record supported the imposed domestic abuse assessments. (R46:8-9). This appeal follows.

STANDARD OF REVIEW

To withdraw a plea after sentencing, a defendant must demonstrate by clear and convincing evidence that a manifest injustice exists. *State v. Bentley*, 201 Wis. 2d 303, 311, 538 N.W.2d 50 (1996). A plea will be considered manifestly unjust if it was not entered knowingly, voluntarily, and intelligently. *State v. Giebel*, 198 Wis. 2d 207, 212, 541 N.W.2d 815 (Ct. App. 1995). A defendant who seeks to withdraw a guilty plea is not automatically entitled to an evidentiary hearing. A circuit court must have an evidentiary hearing on the facts alleged in a post-conviction motion only when that motion alleges sufficient facts that, if true, would establish that the defendant is entitled to relief. *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 576, 682 N.W.2d 433. If a defendant does not allege sufficient facts, presents only conclusory allegations, or if the

record supports that a defendant is not entitled to relief, a trial court may exercise its legal discretion to deny the motion without a hearing. *Nelson v. State*, 54 Wis. 2d 489, 497-498, 195 N.W.2d 629 (1972).

Whether a defendant's post-conviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. *Allen*, 274 Wis. 2d at 576, ¶9. Whether a defendant's post-conviction motion showed sufficient facts to demonstrate she would be entitled to relief is a question of law that this court reviews de novo. *Bentley*, 201 Wis. 2d 303, 310 (1996). Should such a motion fail to allege sufficient facts, the question as to whether a trial court properly used its discretion to deny a post-conviction motion without an evidentiary hearing is analyzed using the deferential erroneous exercise of discretion standard. *Bentley*, 201 Wis. 2d 303, 311 (1996).

With respect to the imposition of a domestic abuse assessment, when the trial court finds a fact, this court reviews that finding under the clearly erroneous standard. *State v. Walli*, 2011 WI App 86 ¶14, 334 Wis. 2d 402, 410, 799 N.W.2d 898. Wis. Stat. Section 973.055(1) provides that:

> 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 assessment …for each offense if: 973.055(1)(a)(a) 973.055(1)(a)1.1**.** The court convicts the person of a violation of a crime specified in s. …943.01…; and 2. The court finds that the conduct constituting the violation under subd. 1. involved an act by the adult person …against an adult with whom the adult person resides or formerly resided….

ARGUMENT

I. Solomon Failed To Allege Sufficient Facts To Require The Court To Hold An Evidentiary Hearing Before Denying Her Post-Conviction Motion

It is the State's position that the trial court properly denied Solomon's post-conviction motion, because Solomon had failed to allege any material facts to support the conclusion that her plea of guilty was coerced.

The Supreme Court, in *Bentley*, held that a "defendant cannot rely on conclusory allegations, hoping to supplement them at a hearing". *Bentley*, 201 Wis. 2d 303, 313 **(**quoting *Levesque v. State*, 63 Wis. 2d 412, 217 N.W.2d 317 (1974)**)**. Yet, this is precisely what Solomon did. In her post-conviction motion, Solomon stated she would testify that she "worried about Mr. Ksicinski's ability to defend her given his seeming lack of preparation." (R36:11). This speculative assertion is directly contradicted by the record. Attorney Ksicinski stated on the record that he was fully prepared to proceed to trial and did not believe any further preparation as possible other than what had been accomplished before the plea. (R58:17-18). When Solomon was asked during the plea colloquy if she was satisfied with Attorney Ksicinski's representation of her, Solomon answered "yes." (R58:17). The post-conviction court also noted that Attorney Ksicinski is a very experienced attorney who frequently handles jury trials in Milwaukee County courts. (R46:6) . The court further noted that he had demonstrated his preparedness by bringing four motions in limine. *Id*. The court noted that Attorney Ksicinski had characterized the trial as "simple," and primarily involved a single witness (V.G.-J.). (R46:6-7). The post-conviction court noted that in her motion Solomon had not "alleged any facts to substantiate her speculative opinion that the experience defense attorney she retained was unprepared to defend her at trial on misdemeanor charges." (R46:7).

The difference in the facts contemplated by Solomon and those in the record at trial are illustrated by the legal analogies selected by Solomon.

In both her post-conviction motion and her Appellant's Brief in Chief, Solomon analogizes her case to that of *Basley*. (R36:10; Appellant's brief page 13). In *Basley*, the defendant had been told by his attorney that if he did not plead guilty, the attorney would withdraw as his counsel of record and the defendant would be forced to wait until the case could be re-set for trial. *State v. Basley*, 2006 WI App 253 ¶6, 298 Wis. 2d

232, 238, 726 N.W.2d 671. That allegation is highly specific and clearly explains why the plea colloquy did not adequately assess how voluntary Basley's plea had been. *Basley*, 2006 WI App 253 ¶9-10, 298 Wis. 2d 232, 239-240. In this case, Solomon makes no specific allegations and relies on speculations that are clearly and specifically refuted by the record.

Solomon also cites to *State v. Love*. In *Love*, the defendant moved for post-conviction relief after being convicted at trial. *State v. Love*, 2005 WI 116 ¶20, 284 Wis. 2d 111, 121, 700 N.W.2d 62. Love argued that he had new testimony the trial court had not had the opportunity to consider and further that his counsel had been ineffective. *Love*, 2005 WI 116 ¶1-2, 284 Wis. 2d 111, 115 . The post-conviction court found that the new evidence that Love wished to submit, as well as his ineffective assistance claim, was a specific allegation which merited an evidentiary hearing. *Love*, 2005 WI 116 ¶32, 284 Wis. 2d 111, 130. Following the subsequent evidentiary hearing, the case made its way to the Supreme Court. *Love*, 2005 WI 116 ¶1-2, 284 Wis. 2d 111, 115. The court found that the new evidence, as well as the credible claim of ineffective assistance of counsel, was sufficient to merit a new trial and ultimately remanded the case to be heard again. *Id*.

The *Love* court paid special attention to defense counsel's failure to investigate a witness's identification of the defendant, which made no mention of his very obvious facial scar. *Love*, 2005 WI 116 ¶38, 284 Wis. 2d 111, 131-132. This failure is a singular identifiable action by defense counsel which resulted in obvious harm to the defendant. In this case, Solomon speculates that her experienced defense attorney that she herself retained was not prepared, despite his own assertions on the record, as well as her own statement that she was satisfied with is representation. (R58:17-18).

The *Love* court also noted that the defendant was entitled to a new trial which would consider a newly discovered witness. *Love*, 2005 WI 116 ¶45, 284 Wis. 2d 111, 135-136. This witness was an incarcerated person who bragged about committing the crime of which Love was accused. *Id*. This new narrative, the court held, would be sufficient to give a jury

reasonable doubt as to Love's culpability if it were admitted at trial. *Love*, 2005 WI 116 ¶55, 284 Wis. 2d 111, 142.

In this case, Solomon had no information to offer which was not directly addressed in the record by the trial court. Further, although Solomon claims she was "coerced" by her client's failure to prepare for trial, she does not claim that her attorney was ineffective under a *Strickland* test. The facts in this case are in contrast with those in *Love* wherein there were allegations that counsel had failed to meet the *Strickland* standard. *Love*, 2005 WI 116 ¶38, 284 Wis. 2d 111, 130 (referring to *Strickland v. Washington*, 466 U.S. 668 (1984)).

Solomon further analogizes to *State v. Leitner*. In *Leitner*, the defendant argued that his motion should not have been denied following an evidentiary hearing. *State v. Leitner*, 2001 WI App 172 ¶34, 247 Wis. 2d 195, 214, 633 N.W.2d 207 (Affirmed on other grounds: *State v. Leitner*, 2002 WI 49, 253 Wis.2d 449, 646 N.W.2d 341). Leitner had suggested that his fiancée would be willing to testify at the evidentiary hearing but ultimately she did not. *Leitner*, 2001 WI App 172 ¶28, 247 Wis. 2d 195, 209. The court found that since Leitner did not present his fiancée's testimony at a hearing and relied on the facts in his brief, the brief alone did not allege sufficient facts to warrant an evidentiary hearing. *Leitner*, 2001 WI App 172 ¶34, 247 Wis. 2d 195, 211. In the instant case, Solomon did not make any similar allegation of absent testimony, instead turning down her opportunity to present any testimony at trial. Further, Solomon was denied an evidentiary hearing so the question at issue is materially different.

On the day of the guilty plea, Solomon's case was on the precipice of jury trial, unlike the case in *Basley*, where the defendant risked waiting months for another trial date if he did not plead guilty. *Basley*, 2006 WI App 253 ¶6, 298 Wis. 2d 232, 238. Rather, the jury was, in the words of the trial court, "on the way up." (R58:10). Solomon in the instant case was able to choose between a jury trial and entering a guilty plea, either of which would have been initiated at the moment she made her selection. Solomon cannot be compared to the defendant in *Basley* because she did not experience the sort of coercive time pressure invoked in the *Basley* case.

Also unlike *Basley*, Solomon has introduced no allegation in her post-conviction motion that her attorney was in any way attempting to incentivize her to plea. Solomon has offered no specific statement nor any generalized statement that her attorney was more interested in a guilty plea than a trial. In fact, the defense was moving swiftly toward what he characterized as a "simple" trial. (R58:17-18)

When asked by the court "[a]nybody threaten you or promise you something to get you to plead guilty today?" Solomon responded "No." (R58:16).

The record reflects a specific colloquy with the defense counsel, who both the trial and post-conviction courts noted was a very experienced trial attorney, to ensure his preparedness for trial. When asked on the record if she was satisfied with the way Attorney Ksicinski represented her, Solomon replied "Yes." (R58:17).

In her post-conviction motion, Solomon alleged that Attorney Ksicinski was not prepared because he did not file any motions in limine prior to the day of trial. (R36:11). Attorney Ksicinski arrived with four motions prepared for the court, but stated he had not formally filed them because he did not know which ADA he should have addressed them to, not because he was not prepared to argue them. (R58:2-3). Indeed, Attorney Ksicinski did argue on each of them and thereby demonstrated a familiarity with the evidence and the case. (R58:4-8).

In her post-conviction motion, Solomon further alleged that Attorney Ksicinski was not prepared because he did not know about the 911 call the state intended to introduce. (R36:11). The post-conviction court noted that it "knows Attorney Ksicinski to be a highly experience criminal defense attorney in [that] Jurisdiction." (R46:6). The court further found that Attorney Ksicinski both "plainly stated" he was prepared but also demonstrated that preparedness in his handling of the case while it was then in trial posture. *Id*. The record reflects that the trial court ensured that Attorney Ksicinski had access to that call and would be able to hear it before proceeding to trial. (R58:8).

Solomon makes no showing that an inability to hear the 911 call before the day of trial rendered Attorney Ksicinski unable to competently argue the case. Instead, Solomon makes the conclusory statement assuming that Attorney Ksicinski was unprepared despite Attorney Ksicinski's own statements on the record in which he characterized the facts as "simple" and remarked that he did not believe there was any preparations for trial that could have been done outside of what had been already been accomplished prior to the plea colloquy. (R58:18).

During the plea colloquy, the court specifically asked "did you discuss defenses and motions with your client?" to which Attorney Ksicinski replied "I did, Your Honor." (R58:16). The court then asked "[d]id you go over the discovery with [Solomon]?" and Attorney Ksicinski replied "I did." *Id*.

Solomon contended in her post-conviction motion that she was "specifically told she was not entitled to represent herself; that Attorney Schoenfeldt was not going to represent her; that her case had to be tried on July 20th." (R36:11). Solomon thus alleged that the trial court "forced" her to hire Attorney Ksicinski. (R36:11). And further that she then was "forced" to proceed with Attorney Ksicinski. (R36:11).

A motion to proceed pro se must be made clearly and unequivocally. *State v. Darby*, 2009 WI App 50 ¶18-19, 24, 317 Wis. 2d 478, 489, 493, 766 N.W.2d 770. Here, there was no such motion. Instead, the post-conviction court properly interpreted Solomon's remarks as no more than "musings on the benefits of self-representation" which were insufficient to trigger the right to self-representation. (R46:8, quoting *Darby*, 2009 WI App 50 ¶20, 317 Wis. 2d 478, 491.).

This case was called on the record on six distinct dates. At no time did Solomon make a clear request to represent herself either on her own or through her attorneys. At no time did Solomon express doubts as to her attorney's ability to represent her. Rather, Solomon declined the trial court's offer of an appointed attorney as a matter of personal preference for the services of Attorney Shoenfeldt as compared with a hypothetical appointed attorney. (R57:7). Only after the final pre-trial conference and Attorney Shoenfeldt's subsequent

motion to withdraw did Solomon seek out another attorney to represent her. (R59: 2). This was not an appointed attorney or one issued to Solomon by the Public Defender's Office, rather this attorney was one Solomon personally sought out, selected, and retained.

In her post-conviction motion, Solomon stated that "an adjournment would have been a better way…to avoid putting Ms. Solomon in a position where she felt no confidence in Attorney Ksicinski's ability to be ready to try her case." (R36:11). However, neither attorney Ksicinski nor Solomon herself made any motion to adjourn. (R58) The court had no obligation to adjourn a trial when defense counsel had clearly stated he was ready and able to proceed.

Taking Solomon's arguments as a whole, the post-conviction court found them to be "self-serving, speculative and wholly belied by the record." (R46:6). These are precisely the circumstances under which a court may properly decline to hold an evidentiary hearing. *Bentley*, 201 Wis. 2d 303, 313 (1996).

Therefore, the trial court properly exercised its discretion in denying Solomon's motion without an evidentiary hearing.

II. The Domestic Abuse Assessment Was Properly Applied

The post-conviction court held that the domestic abuse assessment was properly applied. (R46:9). The court noted that section 973.055, Stats., does not require the court to make a finding that the acts committed by Solomon were domestic abuse. *Id*. The statute requires a sentencing court to apply a domestic abuse assessment if a defendant is convicted a crime specified under 973.055(1)(a)(1), which included section 943.01 and, under section 973.055(1)(a)(2), was committed against a person with whom the defendant resides or formerly resided. Both of these facts have been shown amply in the record, most specifically when Solomon stipulated to the criminal complaint. (R58:18).

However, the post-conviction court noted that even had the case been charged under 968.075, which requires a finding of an action that satisfies the definition supplied by that statute, the record still would support such a finding. *Id*. The court cited to the victim's statement made at sentencing which described a "long pattern of stalking and emotional abuse the preceded the offenses." (R46:9). The court found that given the "context, there was more than a sufficient factual basis for the court to find Solomon's actions…may have caused the victim to reasonably fear imminent physical harm." *Id*.

Damage to property is an enumerated statute under the statute defining crimes of domestic abuse. Wis. Stat. Section 973.055(1)(a). The inclusion of 943.01 under the statute authorizing domestic abuse surcharges suggests that the legislature specifically contemplated damage to property as an offense which might satisfy the requirement that a victim feared imminent fear of physical harm. Solomon stipulated to the complaint in which [V.G.-J.] identified her as a person with whom she had formerly cohabitated. (R2:2).

This case is distinguishable from *State v. O'Boyle*, No. 2013AP1004-CR, unpublished (WI App. February 4, 2014); (App. 101-112), in several ways. First, in *O'Boyle*, the record did not support a finding of a disorderly conduct such that the victim in that case could reasonably fear imminent bodily harm. (App. 110). In this case, V.G.-J. had received "hundreds and hundreds" of texts including threats to her person before seeing Solomon outside her house. (R46:9). The post-conviction court held that there was "more than a sufficient factual basis for the court to find that the defendant's actions…may have caused the victim to reasonably fear imminent bodily harm." Second, this case was not charged under Wis. Stat 968.075 as the case in *O'Boyle* was. (App. 107).

The record supports a finding that Solomon's actions satisfy the requirements for the imposition of a domestic abuse assessment and the trial court was not clearly erroneous in finding the facts which supported imposing such an assessment. The assessment was properly upheld.

CONCLUSION

The State respectfully requests that the court uphold the post convictions court's denial of Solomon's motion for plea withdrawal and find that the domestic abuse assessment was properly applied.

Dated this _____ day of August, 2018.

Respectfully submitted,

JOHN CHISHOLM
District Attorney
Milwaukee County

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Elaine Fehrs
Assistant District Attorney
State Bar No. 1107232

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 5,560.

_____ _____

Date Elaine Fehrs
Assistant District Attorney
State Bar No. 1107232

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:

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_____ _____

Date Elaine Fehrs
Assistant District Attorney
State Bar No. 1107232

P.O. Address:
Milwaukee County District Attorney's Office
821 West State Street- Room 405
Milwaukee, Wisconsin 53233-1485
(414) 278-4646
Attorneys for Plaintiff-Respondent.