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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case Nos. 2019AP000105-CR, 2019AP000106-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARVIN FRANK ROBINSON,

Defendant-Appellant.

On Notice of Appeal from a Judgment of Conviction
and Order Denying Postconviction Relief Entered in
the Milwaukee County Circuit Court, the Honorable
Michael J. Hanrahan, Presiding

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

CHRISTOPHER D. SOBIC
Assistant State Public Defender
State Bar No. 1064382

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
sobicc@opd.wi.gov

Attorney for Defendant-Appellant

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ISSUES PRESENTED

1. Was there a factual basis to establish that Mr. Robinson's offenses met the definition of "domestic abuse" as defined in Wis. Stat. §968.075?

The circuit court answered "yes."

2. Was the record sufficient to require Mr. Robinson to pay the domestic abuse surcharges under Wis. Stat. §973.055?

The circuit court answered "yes."

POSITION ON ORAL ARGUMENT AND PUBLICATION

Counsel does not request oral argument. Counsel does request publication because a published decision will guide trial courts on the necessary findings for imposition of the domestic abuse modifier under Wis. Stat. §968.075 and the domestic abuse surcharge under Wis. Stat. §973.055.

STATEMENT OF THE CASE AND FACTS

In Milwaukee County Case 17CM2528, the State charged Mr. Robinson with 4 counts: Count 1—misdemeanor battery, contrary to Wis. Stat. §940.19(1); and Counts 2, 3, and 4—knowingly violating a domestic abuse restraining order, contrary

to Wis. Stat. §813.12(3). (2019AP000106-CR 1:1-2).¹ The complaint asserted that Count 1 was an act of domestic abuse as defined in Wis. Stat. §968.075. (2019AP000106-CR 1:1). The complaint also asserted that all four offenses were subject to the domestic abuse surcharge under Wis. Stat. §973.055. (2019AP000106-CR 1:1-2).

As probable cause for the offenses, the complaint alleged that on July 12, 2017, Mr. Robinson bear-hugged and pushed J.R.D. to the floor, and pulled her hair. (2019AP000106-CR 1:2-3). On July 13, 2017, J.R.D. obtained a temporary restraining order that did not allow Mr. Robinson to have contact with her residence. (2019AP000106-CR 1:2). The complaint indicated that after the temporary restraining order was issued, Mr. Robinson had contact with J.R.D.'s residence on July 15, 17, and 18, 2017. (2019AP000106-CR 1:2-4).

In Milwaukee County Case 17CF3765, the State charged Mr. Robinson with 6 counts: Count 1—stalking resulting in bodily harm, contrary to Wis. Stat. §940.32(2) and (3)(a); Counts 2 and 5—misdemeanor bail jumping, contrary to Wis. Stat. §946.49(1)(a); Counts 3 and 6—disorderly conduct, contrary to Wis. Stat. §947.01; and Count 4—misdemeanor criminal damage to property, contrary

¹ All citations to the record in these consolidated cases are to the record in Case No. 2019AP000105-CR, unless otherwise indicated.

to Wis. Stat. §943.01(1). (1:1-3). The complaint asserted that all six offenses were subject to the domestic abuse surcharge under Wis. Stat. §973.055. (1:1-3).

As probable cause for the offenses in Case 17CF3765, the complaint incorporated the same conduct that was described in the complaint in Case 17CM2528. (1:3-5). Additionally, it alleged that while Mr. Robinson was out on bond in Case 17CM2528, he went to J.R.D.'s residence on August 11 and 12, 2017. (1:5). On August 12, 2017, Mr. Robinson was alleged to have confronted J.R.D. while she was in her car and broke the car's door handle. (1:5-6).

On November 14, 2017, in Case 17CM2528, Mr. Robinson pleaded guilty to misdemeanor battery and knowingly violating a temporary restraining order. (2019AP000106-CR 35:1; App. 101). On that same day, in Case 17CF3763, Mr. Robinson pleaded guilty to misdemeanor bail jumping, criminal damage to property, and disorderly conduct. (33:1; App. 104).

During the plea colloquy, when the court asked Mr. Robinson what his plea was to each of the charges, the court indicated that each of the charges was "with domestic abuse assessments." (44:18-19). And the court indicated that it was accepting Mr. Robinson's guilty pleas to each of the five charges "with domestic abuse assessments." (44:20-21). The plea questionnaire and waiver of rights forms for each case had the letters "DA" written next to each of the charges Mr. Robinson pleaded guilty to.

(2019AP000106-CR 14:1; 11:1). Additionally, the plea questionnaire in Case 17CM2528 listed “\$100 DV surcharge” under the maximum penalty section of the form. (2019AP000106-CR 14:1).

Mr. Robinson’s attorney stipulated that the court could rely on the facts in the criminal complaints to establish the factual basis for Mr. Robinson’s guilty pleas, which the court did. (44:5-6, 12).

On the same day as his guilty pleas, the Honorable Michael J. Hanrahan imposed 2 years concurrent probation on each count and stayed time in the county jail in the event Mr. Robinson’s probation was revoked. (44:40-41; App. 112-113). The court also imposed the domestic abuse surcharges on all five counts Mr. Robinson pleaded guilty to. (2019AP000106-CR 35:1; 33:1; 44:44; App. 101, 104, 116).

The written judgments of conviction list statutory references to “968.075(1)(a) Domestic Abuse” on Count 1 in Case 17CM2528, and assess the domestic abuse surcharge on all five counts the court found Mr. Robinson guilty of. (2019AP000106-CR 35:1; 33:1; App. 101, 104).

Mr. Robinson filed a postconviction motion asking the court to strike the reference to the domestic abuse modifier under Wis. Stat. §968.075 in the judgment of conviction on Count 1 in Case 17CM2528. (36:5). Further, he requested that the court order that the domestic abuse surcharges under

Wis. Stat. §973.055(1)(a) be vacated in Count 1 in Case 17CM2528² and all counts in Case 17CF3763. (36:6-7). Mr. Robinson alleged that there was no factual basis to establish that he and J.R.D. were either married or formerly married, that they resided together or had formerly resided together, or that they had a child in common, which was required for the imposition of the domestic abuse modifier and surcharges. (36:5-7). He also alleged the court did not make a specific finding on the record at the plea and sentencing hearing that he had a qualifying relationship with J.R.D., which is also required for the imposition of the domestic abuse surcharges. (36:6-7).

At a hearing, the court denied Mr. Robinson's postconviction motion. (37:1; App. 130). The court stated that it agreed with Mr. Robinson that there were no statements within the criminal complaint indicating that Mr. Robinson and J.R.D. were either married or formerly married, that they resided together or had formerly resided together, or that they had a child in common. (45:6; App. 123). However, the court determined that there was a factual basis for the domestic abuse modifier and surcharges largely due to the fact that a restraining order in which J.R.D. indicated that she had a "former or current live-in relationship" with Mr.

² The court properly ordered the domestic abuse surcharge in Count 2, knowingly violating a domestic abuse restraining order, in Case 17CM2528 under Wis. Stat. §973.055(1)(b).

Robinson was attached to the criminal complaint in Case 17CM2528. (45:7-10; App. 124-127). The court acknowledged that it did not reference the restraining order during Mr. Robinson's plea and sentencing hearing and place on the record at that hearing that the restraining order formed the factual basis for the court to order the domestic abuse surcharges and domestic abuse modifier. (45:9-10; App. 126-127). Nonetheless, the court stated that it relied on the restraining order at the plea and sentencing hearing to impose the domestic abuse modifier and surcharges. (45:9-10; App. 126-127). Finally, the court found that it made an explicit finding on the record at Mr. Robinson's plea and sentencing hearing that Mr. Robinson and J.R.D. had a qualifying relationship as required for the imposition of the domestic abuse surcharges. (45:6, 9-10; App. 123, 126-127).

Mr. Robinson now appeals the court's denial of his request to strike the domestic abuse modifier in Count 1 of Case 17CM2528 and vacate the domestic abuse surcharge on Count 1 of Case 17CM2528 and all counts in Case 17CF3763.

ARGUMENT

I. The record in this case was insufficient to establish a factual basis for the imposition of the domestic abuse modifier under Wis. Stat. §968.075.

Whether an offense qualifies for the “domestic abuse” modifier within the meaning of Wis. Stat. §968.075 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 a circuit court’s factual findings. *See id.* Here, defense counsel stipulated to and the court accepted the allegations in the criminal complaints as the factual basis for Mr. Robinson’s guilty pleas. Whether those undisputed facts qualify as “domestic abuse” under Wis. Stat. §968.075(1)(a) is therefore a legal question subject to a *de novo* standard of review by this Court. *See id.*

The judgment of conviction in Case 17CM2528 references the Wis. Stat. §968.075 domestic abuse modifier on Count 1. (2019AP000106-CR 35:1; App. 101). Wis. Stat. §968.075, which relates to the arrest and prosecution of domestic abuse incidents, provides:

968.075 Domestic abuse incidents; arrest and prosecution

(1) Definitions. In this section:

(a) “Domestic abuse” means any of the following engaged in by an adult person against his or her

spouse or former spouse, against an adult with whom the person resides or formerly resided or against an adult with whom the person has a child in common:

1. Intentional infliction of physical pain, physical injury or illness.
2. Intentional impairment of physical condition.
3. A violation of s. 940.225(1),(2) or (3).
4. A physical act that may cause the other person reasonably to fear imminent engagement in the conduct described under sub. 1, 2 or 3.

Wis. Stat. §968.075 (emphasis added).

Here, there was an insufficient factual basis to establish that Mr. Robinson’s offense in Count 1 of Case 17CM2528 met the definition of “domestic abuse” under subsection (1)(a). At the plea hearing, the court used the criminal complaints as a factual basis for Mr. Robinson’s guilty pleas in both cases. (45:5-6; 12). However, as the circuit court conceded during the postconviction motion hearing, the complaints did not contain any facts that established that Mr. Robinson and J.R.D. were either married or formerly married, that they resided together or had formerly resided together, or that they had a child in common. (45:6; App. 123). Moreover, no facts were placed on the record at Mr. Robinson’s plea and sentencing hearing from the State, defense counsel, or Mr. Robinson that confirmed he had a qualifying relationship with J.R.D. Therefore, there was no

factual basis for application of the domestic abuse modifier under Wis. Stat. §968.075.

Although the State attached a copy of a temporary restraining order to the criminal complaint in Case 17CM2528 indicating that Mr. Robinson and J.R.D. had a “current or former live-in relationship,” there are no statements in the four corners of either of the criminal complaints incorporating the restraining order into the complaints. (2019AP000106-CR 1:1-16; 1:1-6). To incorporate a document into a complaint, “some statement in the body of the complaint must indicate that another document, outside the four corners of the complaint itself, is intended to be included in the complaint.” *State v. Smaxwell*, 2000 WI App 112, ¶7, 235 Wis. 2d 230, 612 N.W.2d 756. The criminal complaints in these cases simply mentioned the restraining order, which was insufficient to incorporate the restraining order into the complaints. *See id.* at ¶¶5-7. (2019AP000106-CR 1:3-4; 1:5). Further, the State, defense counsel, and Mr. Robinson did not stipulate that the court could use the factual information in the restraining order as part of the factual basis for his guilty pleas or to establish that Mr. Robinson and J.R.D. had a qualifying “domestic abuse” relationship. (45:9; App. 126).

Because the restraining order was not incorporated into the criminal complaint—which the court used as the factual basis in these cases for Mr. Robinson’s guilty pleas—and none of the parties

stipulated to the facts within the restraining order, there was no factual basis that Mr. Robinson had a qualifying relationship with J.R.D necessary for the imposition of the domestic abuse modifier. Since there was no factual basis for application of the domestic abuse modifier under Wis. Stat. §968.075, the reference in the judgment of conviction to domestic abuse and to Wis. Stat. §968.075 in Count 1 of Case 17CM2528 should be stricken.

II. The record in this case was insufficient to require Mr. Robinson to pay the domestic abuse surcharges under Wis. Stat. §973.055.

The court also improperly ordered the domestic abuse surcharges in Count 1 of Case 17CM2528 and all counts in Case 17CF3763. Wis. Stat. §973.055, relating to the imposition of the domestic abuse surcharge, provides:

973.055 Domestic abuse surcharges.

(1) If a court imposes a sentence on an adult person or places an adult person on probation, regardless of whether any fine is imposed, the court shall impose a domestic abuse surcharge under ch. 814 of \$100 for each offense if:

(a)1. The court convicts the person of a violation of a crime specified in s. 940.01, 940.02, 940.03, 940.05, 940.06, 940.19 940.30....; and

2. The court finds that the conduct constituting the violation under subd.1 involved an act by the adult person against *his or her spouse or former*

spouse, against an adult with whom the adult person resides or formerly resided or against an adult with whom the adult person has created a child; or

(b) The court convicts a person under s. 813.12(8)(a) or a conforming municipal ordinance.

Wis. Stat. §973.055 (emphasis added).

While Mr. Robinson's convictions in Count 1 of Case 17CM2528 and all counts in Case 17CF3763 are included in the specified offenses in subsection (1)(a)1 of Wis. Stat. §973.055 that are subject to the domestic abuse surcharge, more is required; subsection (1)(a)2 directs the court to make an explicit finding regarding the parties' relationship that is identical to the definition of domestic abuse contained in Wis. Stat. §968.075(1)(a). Thus, under Wis. Stat. §973.055(1)(a)2, prior to imposing the domestic abuse surcharge, the court was required to make an express finding that Mr. Robinson and J.R.D. had the specified relationship of spouse or former spouse, resided or formerly resided together, or had a child in common.

At the postconviction motion hearing, the court indicated that it did make this specific finding at Mr. Robinson's plea and sentencing hearing. (45:6, 9-10; App. 123, 126-127). However, the court never stated at the plea and sentencing hearing that Mr. Robinson had a qualifying relationship with J.R.D. and,

therefore, it was ordering the domestic abuse surcharges:

THE COURT: I am ordering a DNA assessment and in regard to -- or, I find that there's a factual basis for that assessment in regard to all five charges, and I make that assessment in regard to all five charges. So the Court costs and assessments have to be paid during that 24 months of probation. A failure to pay those would result in a civil judgment against you for any amount owed at the end of the two-year period.

....

STATE: Judge, I did hear you talk about the DNA assessments and the fee was waived. Did the Court impose the five domestic abuse assessments and waive those fees as well?

THE COURT: I imposed those, \$100 on each of the five.

(44:42, 44; App. 114, 116).

The court indicated that it was making a specific finding regarding DNA assessments but not the domestic abuse surcharges. (44:42; App. 114). Because the court did not make a specific finding at the plea and sentencing hearing that Mr. Robinson had a qualifying relationship with J.R.D. and, instead, simply stated that it imposed the domestic abuse surcharges, the surcharges should be vacated. (44:44; App. 116).

Moreover, as discussed above, given the stipulation to the criminal complaints as the factual basis for Mr. Robinson's guilty pleas, there was no basis in the record on which the court could have determined that Mr. Robinson had a qualifying relationship with J.R.D, as required for the court to assess the domestic abuse surcharges under Wis. Stat. §973.055. The criminal complaints did not indicate that Mr. Robinson and J.R.D. were either married or formerly married, that they resided together or had formerly resided together, or that they had a child in common. Additionally, none of the parties made any statements at the plea and sentencing hearing which established that Mr. Robinson had a qualifying relationship with J.R.D. Thus, the lack of a factual basis to establish that Mr. Robinson and J.R.D. had a qualifying relationship also requires this Court to vacate the domestic abuse surcharges in Count 1 of Case 17CM2528 and all counts in 17CF3763.

CONCLUSION

For the reasons stated in this brief, Mr. Robinson requests entry of an order striking all references to the domestic abuse modifier under Wis. Stat. §968.075(1)(a) in the judgment of conviction on Count 1 in Case 17CM2528. Further, Mr. Robinson requests that the court order that the domestic abuse surcharges under Wis. Stat. §973.055 be vacated on Count 1 in Case 17CM2528 and all counts on Case 17CF3763.

Dated this 16th day of April, 2019.

Respectfully submitted,

CHRISTOPHER D. SOBIC
Assistant State Public Defender
State Bar No. 1064382

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
sobicc@opd.wi.gov

Attorney for Defendant-Appellant

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 2,617 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 16th day of April, 2019.

Signed:

CHRISTOPHER D. SOBIC
Assistant State Public Defender

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 including 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.

Dated this 16th day of April, 2019.

Signed:

CHRISTOPHER D. SOBIC
Assistant State Public Defender

APPENDIX

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