COURT OF APPEALS
DECISION
DATED AND FILED

September 15, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2888-CR **Cir. Ct. No. 2013CF34**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LONEL L. JOHNSON, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Reversed and cause remanded with directions*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 STARK, P.J. Lonel Johnson appeals a judgment convicting him of disorderly conduct—domestic abuse, as both a repeater and a domestic abuse

repeater. Johnson also appeals an order denying his postconviction motion for resentencing.

¶2 Johnson challenges the application of the domestic abuse repeater enhancer to his sentence. He contends that, because the domestic abuse repeater enhancer increased the maximum penalty for the charged offense, the jury was required to find beyond a reasonable doubt that his underlying conduct qualified as an act of domestic abuse. The State concedes a jury determination of whether Johnson's conduct constituted domestic abuse was required, pursuant to ***Apprendi v. New Jersey***, 530 U.S. 466 (2000). Nevertheless, the State argues the circuit court's failure to submit the domestic abuse issue to the jury was harmless error. In the alternative, the State argues Johnson forfeited his ***Apprendi*** argument by failing to object during the jury instruction and verdict conference.

¶3 We agree with Johnson and the State that a jury determination of whether Johnson's conduct constituted domestic abuse was required under ***Apprendi***. We further conclude the error in failing to submit that issue to the jury was not harmless. Finally, we conclude Johnson did not forfeit his ***Apprendi*** argument by failing to object during the jury instruction and verdict conference, and, even if he did, we nevertheless exercise our discretion to address the error. We therefore reverse the judgment of conviction and the order denying postconviction relief, and we remand for resentencing without consideration of the domestic abuse repeater enhancer.

BACKGROUND

¶4 Johnson was charged with four counts, stemming from an incident that occurred on January 8, 2013: disorderly conduct; battery; strangulation and suffocation; and false imprisonment. Each count was charged as a domestic abuse

offense, pursuant to WIS. STAT. § 968.075(1)(a).[1] In addition, for all four offenses, Johnson was charged as both a repeater, *see* WIS. STAT. § 939.62(1), and a domestic abuse repeater, *see* WIS. STAT. § 939.621.

¶5 At trial, Johnson's wife testified she and Johnson were in their apartment on the evening in question. They had been arguing "[a]ll day" about "[e]verything[,]" and they had both been drinking. At some point, "things bec[a]me physical[,]" and Johnson started choking her on the bed in their bedroom, causing her pain. After Johnson removed his hands from his wife's neck, she attempted to call 911, but Johnson "came after [her]." Her son later threw her cell phone into the bedroom, and she was able to call 911.

¶6 Johnson's wife testified that she tried to leave the bedroom after the choking incident, but Johnson stood in front of the door and would not let her out. She eventually pushed past him and ran into the living room. She tried to get to the kitchen door, where she could hear police knocking, but Johnson ran after her and stood in front of the door, preventing her from opening it. Johnson told her, "Don't open. I'll go to jail." He also told his wife to "say he didn't do anything." Officers ultimately kicked in the door to the apartment. However, Johnson's wife testified they had difficulty doing so because Johnson was in front of the door, pushing his weight against it.

¶7 On cross-examination, Johnson's wife conceded there were other people in the apartment during the choking incident—specifically, her brother, his girlfriend, and their infant child. She denied yelling "You're choking me" at any

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

point. She also admitted that she refused medical treatment following the incident because she did not feel she had been injured.

¶8 Johnson's wife's nine-year-old son testified he awoke on the night of January 8, 2013, when he heard his mother and Johnson yelling. He went into the hallway of the apartment and saw Johnson choking his mother on the bed in the couple's bedroom. When asked whether he gave a phone to anyone, he testified, "I think I was trying to give it to my mom or that was another night."

¶9 Three police officers testified for the State. Officer Kurt Brester testified officers Nicholas Walvort and Joel Haar arrived at Johnson's apartment before him and were attempting to kick in the door when he arrived. Brester could hear a male and female yelling inside. Brester and Haar were ultimately able to kick in the door after "twenty to twenty-five attempts[.]" Brester testified it "felt like there was something behind [the door], either somebody pushing it or there was something wedged behind the handle."

¶10 Once inside the apartment, the officers made contact with Johnson in the kitchen. The lights were off, and Johnson was walking backward toward a hallway. Brester testified the officers yelled at Johnson three or four times to show them his hands, but he did not comply. Haar then "decentralized [Johnson] to the ground in the kitchen[,]" such that Johnson was "on his hands and knees and had his hands under his stomach." Brester "told [Johnson] multiple times to get his hands out from underneath his stomach," but Johnson refused to do so. Brester then jumped on top of Johnson and tried to "forcefully" remove Johnson's hands from underneath his stomach. After that attempt failed, Haar deployed a taser into Johnson's lower back. Johnson then placed his hands behind his back, and Brester was able to handcuff him.

¶11 Walvort testified that, when he and Haar arrived at Johnson's apartment, they knocked on the door, and Haar identified himself as a police officer. They were unable to make contact with anyone inside, so Walvort walked away to check another door. However, Haar then informed him they "would have to be forcing entry because nobody was coming to the door and he heard somebody say that they were being choked." Walvort stated he and Haar attempted to kick in the door to the apartment "at least ten times, if not more."

¶12 Haar testified he arrived at the apartment about a minute before Walvort. He could hear a male and female arguing inside. He knocked on the door, identified himself as a police officer, and told the occupants to come to the door. However, the arguing inside continued, and he "heard a female scream." Haar knocked again, and a male voice said, "There's nothing going on in here. We're just arguing." Haar then heard a female say, "You're choking me."

¶13 Haar told the occupants of the apartment to open the door several more times, but they refused to comply. He heard "some scruffling [sic] behind the door" and thought "somebody was messing with the door … the doorknob[.]" He also heard a male say, "Don't do this to me, [Johnson's wife's name]. I'm going to go to jail." The officers then began attempting to kick in the door. Haar testified it felt like there was resistance behind the door, and he has "never had to kick [a door] that many times where it didn't even budge."

¶14 Haar confirmed Brester's testimony about Johnson's failure to comply with the officers' requests to get on the floor and the actions they took to gain Johnson's compliance. When asked why he felt the need to use force against Johnson, Haar replied:

> To me it's just an officer safety thing. I mean obviously we're getting no compliance from inside the house. There is a disturbance. Somebody is sitting there being choked, screaming. We're kicking on the door. We don't know what's on the other side. And then when he's giving me that kind of, all right, I don't know if I'm going to listen or he's going to fly into the back bedroom. You know, it's—it was just to me a very obvious situation to use force mainly because he didn't follow the commands to get on the ground when I told him to several times.

¶15 Haar testified Johnson's wife was "shaken up" after this incident and was hesitant to give a statement. Haar could smell a moderate odor of alcohol on her breath. He did not see any red marks on her neck.

¶16 Before the defense presented its case, outside the presence of the jury, Johnson personally stipulated for purposes of the domestic abuse repeater enhancer that he had two convictions for battery—domestic abuse. *See* WIS. STAT. § 939.621(1)(b). However, Johnson was not asked to stipulate, and did not stipulate, that any of pending charges against him qualified as acts of domestic abuse. *See* § 939.621(2).

¶17 Johnson testified in his own defense. He stated he was supposed to work the night shift on the evening in question, but he did not go to work because of car trouble. He and his wife started arguing about him missing work, her share of the rent, and other matters. His wife had consumed two and one-half forty-ounce bottles of beer, and he had drunk half of a forty-ounce bottle. Johnson testified his wife "started getting aggressive[,]" and he threatened to divorce her. At some point, his wife hit him in the mouth. She also came at him with a knife, which she ultimately used to cut his chest. Johnson further alleged that his wife pulled his hair, and at some point they "stumbled into the wall." He denied hitting or choking his wife, but he admitted "grab[bing] her hand" when she came at him with the knife.

¶18 Johnson testified his wife then called 911. He did not call the police about his wife's actions because he was embarrassed and did not want his wife to go to jail. When police arrived at the apartment, Johnson heard an officer order him to open the door. He told police, "We only arguing. I'm not doing anything to her." Then, his wife suddenly said, "Oh, you're choking me." Johnson responded, "You going to try to say that so you going to try to send me to jail[,]" and they began arguing again. Johnson testified neither he nor his wife held the apartment door closed, and police had trouble kicking the door in because it is made of metal.

¶19 Following the close of evidence, the State and defense counsel stipulated to the court giving the standard jury instructions for all four charges. None of the instructions asked the jury to determine whether the charged counts were acts of domestic abuse. The jury found Johnson guilty of disorderly conduct, but not guilty of the other charges.

¶20 At Johnson's sentencing hearing, defense counsel challenged the application of the domestic abuse repeater enhancer, arguing the jury was required to, but did not, determine whether Johnson's disorderly conduct was an act of domestic abuse. The circuit court rejected defense counsel's argument, reasoning: (1) the guilty verdict on the disorderly conduct charge was indisputably based on Johnson's conduct toward his wife, and the crime was therefore an act of domestic abuse; and (2) the jury was not required to decide whether the crime was one of domestic abuse because "it's a status rather than a factual determination." Applying both the domestic abuse repeater enhancer and the repeater enhancer, the court sentenced Johnson to three years' initial confinement and two years' extended supervision.

¶21 Johnson filed a postconviction motion for resentencing, again arguing the domestic abuse repeater enhancer was improperly applied to his sentence without a jury determination that his crime constituted an act of domestic abuse. The circuit court denied Johnson's motion, concluding any error in failing to submit the domestic abuse question to the jury was harmless. Johnson appeals.

DISCUSSION

I. *Apprendi* violation

¶22 "The Fifth Amendment's due process guarantee, applied to the states by operation of the Fourteenth Amendment, protects 'the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he [or she] is charged.'" ***State v. Harvey***, 2002 WI 93, ¶19, 254 Wis. 2d 442, 647 N.W.2d 189 (quoting ***In re Winship***, 397 U.S. 358, 364 (1970); footnotes omitted). In addition, "[t]he Sixth Amendment right of trial by jury in criminal cases includes, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of guilty." ***Id.***, ¶20 (quoting ***Sullivan v. Louisiana***, 508 U.S. 275, 277 (1993); internal quotation marks and footnote omitted). In ***Apprendi***, the United State Supreme Court held that these principles extend to the elements of penalty enhancers. *See* ***Apprendi***, 530 U.S. at 490; ***Harvey***, 254 Wis. 2d 442, ¶21. Accordingly, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." ***Apprendi***, 530 U.S. at 490.

¶23 Johnson argues, and the State concedes, that the jury in this case should have been asked to determine whether Johnson's disorderly conduct constituted an act of domestic abuse. We agree. Pursuant to WIS. STAT.

§ 939.621(2), if a person who is a "domestic abuse repeater"[2] commits an act of domestic abuse, as defined in WIS. STAT. § 968.075(1)(a), and the act constitutes the commission of a crime, "the maximum term of imprisonment for that crime may be increased by not more than 2 years[.]" In addition, this penalty increase "changes the status of a misdemeanor to a felony[.]" Sec. 939.621(2).

¶24 Thus, when applicable, the domestic abuse repeater enhancer "increases the penalty for a crime beyond the prescribed statutory maximum[.]" *See* ***Apprendi***, 530 U.S. at 490. Consequently, under ***Apprendi***, aside from the fact of the defendant's prior domestic abuse convictions, the elements of the domestic abuse repeater enhancer must be submitted to the jury and proved beyond a reasonable doubt. *See* ***id.*** In other words, the jury in this case should have been asked to determine whether Johnson's disorderly conduct constituted an act of domestic abuse, as defined in WIS. STAT. § 968.075(1)(a). *See* WIS. STAT.

[2] As relevant to this case, a "domestic abuse repeater" is:

> A person who was convicted, on 2 separate occasions, of a felony or a misdemeanor for which a court imposed a domestic abuse surcharge under s. 973.055 (1) or waived a domestic abuse surcharge pursuant to s. 973.055 (4), during the 10-year period immediately prior to the commission of the crime for which the person presently is being sentenced, if the convictions remain of record and unreversed.

WIS. STAT. § 939.621(1)(b). It is undisputed that Johnson qualified as a domestic abuse repeater under this definition.

§ 939.621(2). The failure to submit this issue to the jury violated Johnson's constitutional rights under the Fifth and Sixth Amendments.[3]

II. Harmless error

¶25 Although the State concedes the circuit court erred by failing to submit the domestic abuse determination to the jury, it argues reversal of Johnson's conviction is not warranted because the error was harmless. *See* ***Harvey***, 254 Wis. 2d 442, ¶¶35-38 (***Apprendi*** violations subject to harmless error analysis). An error is harmless "if it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" ***Id.***, ¶49 (quoting ***Neder v. United States***, 527 U.S. 1, 18 (1999)). The State has the burden to prove that an error was harmless. *See* ***State v. Lobermeier***, 2012 WI App 77, ¶14, 343 Wis. 2d 456, 821 N.W.2d 400. Whether an error was harmless is a question of law for our independent review. ***State v. Anthony***, 2015 WI 20, ¶44, 361 Wis. 2d 116, 860 N.W.2d 10.

¶26 To find Johnson guilty of disorderly conduct, the jury had to find two elements beyond a reasonable doubt: (1) that Johnson engaged in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly

[3] Notably, in February 2014, the Criminal Jury Instruction Committee approved WIS JI—CRIMINAL 984, entitled "COMMITTING A DOMESTIC ABUSE CRIME AS A DOMESTIC ABUSE REPEATER—§ 939.621(1)(b) and (2)[.]" The instruction states it is to be given "immediately after the instruction on the offense charged." ***Id.*** (capitalization omitted). Pursuant to the instruction, if the jury finds the defendant guilty of the charged offense, it must then determine whether that offense was an "act of domestic abuse." ***Id.*** The instruction sets forth the elements of "domestic abuse," as that term is defined in WIS. STAT. § 968.075(1)(a). *See* WIS JI—CRIMINAL 984 (Feb. 2014). It further informs the jury that it must find the existence of these elements "beyond a reasonable doubt." ***Id.*** The comment to the jury instruction includes a recommended special verdict form, which first asks the jury to determine whether the defendant is guilty of the charged offense, and then asks whether the charged offense was an act of domestic abuse. ***Id.***

conduct; and (2) that, under the circumstances as they then existed, Johnson's conduct tended to cause or provoke a disturbance. WIS. STAT. § 947.01(1); *see also* WIS JI—CRIMINAL 1900 (Apr. 2012). In addition, to convict Johnson of disorderly conduct as a domestic abuse repeater, the jury would have had to find that Johnson's disorderly conduct was an "act of domestic abuse." *See* WIS. STAT. § 939.621(2). The relevant definition of "domestic abuse" provides:

> "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 subd. 1., 2. or 3.

WIS. STAT. § 968.075(1)(a). Applying this definition, the jury would have had to find that Johnson's disorderly conduct was committed against his wife, and that his actions met one or more of the criteria listed in § 968.075(1)(a)1.-4.

¶27 The State contends there was ample evidence at trial from which the jury could have concluded Johnson's disorderly conduct was an act of domestic abuse. We agree. Johnson's wife testified Johnson "choked" her by placing his hands around her neck and squeezing, causing her pain. Her son similarly testified that he saw Johnson "choking" his mother. Johnson's wife also testified that Johnson barred her from leaving the bedroom and from answering the door when police arrived. The responding officers testified they forced entry to the apartment because they heard arguing and heard a female voice say, "You're choking me."

¶28 Based on this evidence, the jury could have found that Johnson's actions toward his wife fulfilled the elements of disorderly conduct—that is, that he engaged in violent, abusive, or otherwise disorderly conduct, and that his conduct tended to cause or provoke a disturbance. *See* WIS. STAT. § 947.01(1). The jury could also have found that Johnson's disorderly conduct constituted an act of domestic abuse—that is, that it was committed against Johnson's wife, and that Johnson intentionally inflicted physical pain, physical injury or illness on his wife; intentionally impaired her physical condition; or committed a "physical act that caused her reasonably to fear imminent engagement in" similar conduct. *See* WIS. STAT. § 968.075(1)(a).

¶29 However, while the evidence discussed above would have permitted the jury to conclude Johnson's disorderly conduct was an act of domestic abuse, other evidence supported a conclusion that Johnson committed disorderly conduct, but his actions did not constitute domestic abuse. Specifically, the jury could have found Johnson guilty of disorderly conduct based on his actions toward the police. There was evidence at trial that Johnson refused police commands to open the door to his apartment and then put his weight against the door, hindering the officers' efforts to force entry. Once the officers entered the apartment, Johnson disobeyed repeated commands to show them his hands. Police therefore "decentralized" Johnson to the floor, but even then he disobeyed commands to remove his hands from underneath his stomach. Police were able to handcuff Johnson only after deploying a taser into his lower back.

¶30 On these facts, the jury could easily have found that Johnson's conduct toward the police was "otherwise disorderly" and "tend[ed] to cause or provoke a disturbance[.]" *See* WIS. STAT. § 947.01(1). The jury was specifically instructed that

> [t]he general phrase "otherwise disorderly conduct" means conduct having a tendency to disrupt good order and provoke a disturbance. It includes all acts and conduct that are of a nature to corrupt the public morals or to outrage the sense of public decency whether committed by words or acts. Conduct is disorderly although it may not be violent, abusive, indecent, profane, boisterous, or unreasonably loud, if it is of a type which tends to disrupt good order and provoke a disturbance.

See WIS JI—CRIMINAL 1900 (Apr. 2012). A rational jury could have found that, by repeatedly disobeying police commands, thus necessitating the use of force, Johnson engaged in conduct of a type that tended to disrupt good order and provoke a disturbance. On this record, we cannot agree with the circuit court that "[t]here was nothing in the court record that would find [Johnson] guilty of disorderly conduct towards any victim other than [his] wife."

¶31 Two additional considerations support our conclusion that the jury may have found Johnson guilty of disorderly conduct based on his interactions with police. First, unlike the jury instructions on the other three charged offenses, the instructions on disorderly conduct did not specifically mention Johnson's wife. Second, the jury acquitted Johnson of the other charges, which were indisputably based on his conduct toward his wife. While not determinative, this result is consistent with the jury discrediting Johnson's wife's testimony about what he did to her that evening, but nevertheless concluding Johnson committed disorderly conduct with respect to his actions toward police.[4]

[4] The State observes that the prosecutor referred to Johnson's wife when discussing the disorderly conduct charge during her opening statement. However, the jury was properly instructed that the remarks of counsel are not evidence. The prosecutor's remarks do not convince us beyond a reasonable doubt that the jury would have convicted Johnson of disorderly conduct as a domestic abuse repeater had it been asked to address the domestic abuse question. *See* ***State v. Harvey***, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189.

¶32 If the jury convicted Johnson of disorderly conduct based on his actions toward police, it could not have concluded his conduct constituted an act of domestic abuse because Johnson and the officers did not have any of the domestic relationships specified in WIS. STAT. § 968.075(1)(a). As a result, it is not clear beyond a reasonable doubt that the jury would have concluded Johnson's disorderly conduct was an act of domestic abuse, had it been asked to address that issue. *See* ***Harvey***, 254 Wis. 2d 442, ¶49. We therefore agree with Johnson that the circuit court's error in failing to submit the domestic abuse question to the jury was not harmless.[5]

III. Forfeiture

¶33 In the alternative, the State argues Johnson forfeited his argument that the jury was required to determine whether his disorderly conduct constituted an act of domestic abuse.[6] WISCONSIN STAT. § 805.13(3) provides that the failure

[5] Johnson's brief includes a lengthy argument that the criteria for "domestic abuse" listed in WIS. STAT. § 968.075(1)(a)1.-4. always require a physical act by the defendant. Johnson then argues the error in this case was not harmless because the jury could have found that his actions toward his wife constituted disorderly conduct, even if it concluded he did not commit any physical act against her. Under that scenario, Johnson argues the disorderly conduct would not have qualified as domestic abuse.

However, we have already concluded the error in this case was not harmless because the jury may have convicted Johnson of disorderly conduct based on his actions toward police. Consequently, we need not address Johnson's argument that "domestic abuse" under § 968.075(1)(a) always requires a physical act by the defendant. *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (When a decision on one issue is dispositive, we need not reach other issues raised.).

[6] In reply, Johnson argues the State forfeited its forfeiture argument by failing to raise it in the circuit court. However, the forfeiture rule generally applies only to appellants, and we will usually permit a respondent to employ any theory or argument on appeal that will allow us to affirm the circuit court's judgment, even if not raised previously. *See* ***State v. Holt***, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679 (Ct. App. 1985), *superseded by statute on other grounds*.

to object to proposed jury instructions and verdicts at the jury instruction and verdict conference "constitutes a waiver of any error in the proposed instructions or verdict."[7] The State observes that Johnson's attorney not only failed to object to the standard jury instructions and verdict forms, he stipulated to their use. The State also notes that Johnson has not raised an ineffective assistance of counsel claim with respect to his trial attorney's performance.

¶34 We reject the State's forfeiture argument for two reasons. First, in his brief-in-chief, Johnson argues that, because the error in this case involved a violation of his right to a trial by jury, in order to give up that right he was required to personally waive it by means of an affirmative act. *See* ***State v. Livingston***, 159 Wis. 2d 561, 569, 464 N.W.2d 839 (1991) ("[A]ny waiver of the defendant's right to trial by jury must be made by an affirmative act of the defendant himself. The defendant must act personally[.]"). Johnson contends he never personally waived his right to a jury determination of the domestic abuse issue. Johnson further asserts that the valid waiver of a constitutional right can never occur when the defendant is unaware of the right. *See* ***State v. Smith***, 2012 WI 91, ¶54, 342 Wis. 2d 710, 817 N.W.2d 410. Johnson contends neither he nor his trial attorney was aware of the ***Apprendi*** issue until sentencing. The State fails to respond to these arguments, and we therefore deem them conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

[7] Although WIS. STAT. § 805.13(3) uses the term "waiver," our supreme court has clarified that "forfeiture" is the proper term for the concept described in the statute. *See* ***Best Price Plumbing, Inc. v. Erie Ins. Exch.***, 2012 WI 44, ¶37 n.11, 340 Wis. 2d 307, 814 N.W.2d 419.

¶35 Second, even assuming Johnson forfeited his right to raise an ***Apprendi*** argument by failing to object at the jury instruction and verdict conference, "[w]e have the discretionary power to review a waived instructional error if the error goes to the 'integrity of the fact-finding process.'" ***State v. Hatch***, 144 Wis. 2d 810, 824, 425 N.W.2d 27 (Ct. App. 1988) (quoting ***State v. Shah***, 134 Wis. 2d 246, 254, 397 N.W.2d 492 (1986)). Errors that affect the integrity of the fact-finding process are those that violate a defendant's constitutional right to a fair trial. ***Id.*** at 824 n.2. These include "constitutional questions relative to the state's burden of proof beyond a reasonable doubt[.]" ***Id.***

¶36 Here, it is undisputed that the jury instructions and verdict relieved the State of its burden to prove, beyond a reasonable doubt, that Johnson's disorderly conduct qualified as an act of domestic abuse. It is also undisputed that this error violated Johnson's constitutional rights. Moreover, we have already concluded the error was not harmless. Under these circumstances, we conclude the error goes to the integrity of the fact-finding process. Accordingly, even assuming Johnson forfeited his right to raise the error, we would nevertheless exercise our discretion to address it.

By the Court.—Judgment and order reversed; cause remanded with directions.

Not recommended for publication in the official reports.