STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 4

STATE OF WISCONSIN,
Plaintiff-Respondent,
v.
Appeal No. 2017AP002253
DUSTIN CHARLES YENTER
Defendant-Appellant.

ON APPEAL FROM AN OWI 1ST OFFENSE AND PAC 1ST OFFENSE CONVICTION ENTERED BY THE CIRCUIT COURT FOR MONROE COUNTY THE HONORABLE DALE T. PASELL, PRESIDING

BRIEF OF DUSTIN C. YENTER

Respectfully submitted,
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STATE OF WISCONSIN COURT OF APPEALS

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Plaintiff-Respondent,
V.
Appeal No.: 2017AP002253
Circuit Court Case Nos.: 2015TR4108, 2016TR192

DUSTIN CHARLES YENTER,
Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

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CASES CITED

STATUTES CITED

ISSUE

1. Did the trial court erroneously deny the defendant's request to give a jury instruction of coercion?

   The trial court answered no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Appellant believes that the Court can decide the issues based on the briefs and the need for oral argument is not necessary in this matter. Furthermore, publication is most likely not warranted pursuant to Wis. Stat. §809.23.

STATEMENT OF THE CASE

The defendant was charged with operating while intoxicated 1st offense and operating with prohibited alcohol concentration 1st offense arising from an incident on December 12, 2015. The defendant was going to a party at Joe Yoder's house with his girlfriend, Jessica Vandervort and his friend, Michael VonHaden out in the county in Wilton. They left from the defendant's house and had trouble finding Yoder's house, so when they were on their way there, they pulled off to the side of the road in an effort to try to figure it out. Shortly thereafter, a car pulled up next to them. The people in the car indicated that they were going to the same party and to follow them. The defendant and VonHaden had been to Yoder's house one other time roughly a month before this party. When they went to Yoder's house the month before, they came from VonHaden's house and found it much easier to find.

The plan for the three was to stay the night at the party. They stayed the night at the last party they were at a month ago as well. Since they were staying the night

there, they began drinking alcohol once they arrived. The defendant, VonHaden and Vandervort had no intentions of leaving the party until the next morning. After being at the party for some time, a fight broke out and Tim Schmitz, a friend of theirs, was punched repeatedly and brought down to the ground very violently. People began threatening the defendant, VonHaden and Vandervort. At this time, the defendant found out that a guy came after VonHaden, took VonHaden to the ground and smashed him over the head with a beer bottle, and then VonHaden was thrown down a flight of stairs.

The defendant and Vandervort then ran outside and called VonHaden's name. VonHaden came out and they all ran to the car together as approximately 15-20 people from the party came chasing after them. The defendant got into the driver's seat as it was his vehicle and when the three ran to the vehicle, the defendant was the one with the keys in his pocket. They had no time to decide who was driving or to give the keys to someone else. Since the defendant had the keys, he felt that he had to drive.[1] They were able to get into the car, but the people from the party surrounded the defendant's car immediately after they got inside and began beating/denting it with rocks as well as their hands, the roof was getting smashed in and the individuals were kicking the tail lights out and they damaged the driver's side mirror. They thought that the individuals were going to tip the car over and were also fearful that their goal was to gain access to the inside of the car. The three were certain that if these individuals did gain access to the inside of the car, they would suffer great bodily harm or death. These three knew that they couldn't stay and attempt to fight 15-20 people when there was only three of them. Furthermore, Vandervort is a petite female and was the defendant's girlfriend at the time and therefore, he felt a need to keep her protected. The individuals that were standing in front of the car all of a sudden moved and the three inside the vehicle saw a man pick up a huge rock and come towards the car with it. They then drove away in a panic and their plan was to get somewhere safe which was the defendant's house as no one at the party knew where he lived.

The defendant took main roads (when he could) on the way home because he was not trying to hide out, he was just trying to get back to a place of safety as quickly as possible. However, there appeared at least one cell phone with the three. This was not used because of the spotty service of Verizon in that area. The defendant, along with VonHaden and Vandervort, felt as though they were in imminent danger and they knew that the fear would not stop until they got to the defendant's home and locked all of the doors. [2]

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[1] Offer of proof from Defendant

[2] Offer of proof from VonHaden

While driving to Yenter's house, they continued to be very fearful the entire way. The defendant was constantly checking his rearview mirror. VonHaden was notifying the defendant anytime he saw headlights. A state trooper then pulled them over about half a mile away from the defendant's house due to the back taillights not being activated. The inactivation of the taillights was a direct result of the individuals damaging the car at the party. Law enforcement, after having stopped the defendant's vehicle, was told by the defendant about what happened at the party, and the damage done to the vehicle. VonHaden was allowed to drive the car after the defendant was arrested for operating a motor vehicle while intoxicated 1st offense.

The defendant attempted to assert the privilege defense of coercion based on the facts. The trial court denied the instruction of coercion at an oral ruling hearing the morning before the jury trial. [3] A court trial was then held, rather than a jury trial based on that pretrial ruling, and the defendant was found guilty of OWI 1st offense and PAC 1st offense.[4] [5] The defendant now appeals the trial court's pretrial ruling denying his request to give a jury instruction of coercion to the jury members.

ARGUMENT

I. The defendant should have been entitled to assert a privilege defense of coercion.

The defendant is attempting to assert the privilege defense of coercion. This defense is based on the theory that the individuals at the party forced him to get into his car and drive away as he and the two others whom he was with feared that they would suffer great bodily harm or death if they stayed.

A specialized standard of review is used when considering a trial court's decision to prevent a defendant from asserting a particular defense. To be entitled to assert a defense, the defendant has the initial burden of production. *State v. Staples,* 99 Wis.2d 364, 299 N.W.2d 270 (Ct. App. 1980). To meet the burden of production, the defendant must show that a reasonable construction of the evidence supports his defense. *State v. Coleman,* 206 Wis.2d 199, 213, 556 N.W.2d 701 (1996). The Court must view the evidence is a light most favorable to the defendant. *Johnson v. State,* 85 Wis.2d 22, 270 N.W.2d 153 (1978).

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[3] Oral ruling and court trial transcript pages 11-14.

[4] Oral ruling and court trial transcript page 63.

[5] Minutes from Court Trial

Wis. Stat. §939.45 provides us with circumstances in which such a defense may be claimed:

1. Coercion or Necessity
2. Self-defense
3. Fulfilling the duties of public office
4. The reasonable accomplishment of a lawful arrest
5. Parental discipline
6. Where otherwise provided by statutory or common law

Coercion is a threat by a person other than the actor's coconspirator which causes the actor to reasonably believe that his act is the only means of preventing imminent death or great bodily harm to the actor or another and which causes him to act is a defense to a prosecution for any crime based on that act. Wis. Stat. §939.45(1), §939.46(1).

In order for the defendant to assert the defense of coercion, he would have to show that a reasonably jury could conclude:

1. He was threatened by a person other than a coconspirator
2. He reasonably believed that he was in danger of death or great bodily harm
3. The harm was imminent
4. He reasonably believed that violating the law was the only means of preventing the harm
5. The threat of harm caused him to act as he did

The Wisconsin Supreme Court held that the burden is on the State to disprove an asserted coercion defense beyond a reasonable doubt. *Moses v. State,* 91 Wis.2d 756, 284 N.W.2d 66 (1979). Here, testimony would have been given at trial confirming that the defendant and VonHaden were in fact threatened by several individuals who could not be described as "co-conspirators". Further testimony would have shown that the defendant along with VonHaden and Vandervort reasonably believed that they were in danger of death or great bodily harm. The testimony would have indicated that another friend of theirs was beaten up by one of the individuals at the party and then a beer bottle was smashed over the head of VonHaden when attempting to intervene which caused him to run, hide, and fear for his life.

Furthermore, the harm was clearly imminent as the individuals at the party were making imminent threats and smashed a beer bottle over VonHaden's head. Once VonHaden, Yenter, and Vandervort found each other, they took off running to Yenter's car as they feared they were in danger of death or great bodily harm. Considering that the individuals ran after them and then began to do extreme and

serious damage to the defendant's vehicle, there is no question that the harm was imminent.

Once the defendant, VonHaden and Vandervort were all inside the vehicle, the individuals began attacking the car. The defendant, Vandervort, and VonHaden believed that they were going to tip the car over or get access to the inside of the car. They felt the only choice was to drive away before either of those things happened. Therefore, the defendant (and the two others in the vehicle) reasonably believed that violating the law was the only means of preventing the harm and the threat of this harm caused him to get into the vehicle and drive. Driving home, given the area, was a reasonable decision and that the imminent harm did not dissipate because of the magnitude of the threat and damage.

An accused is entitled to a jury instruction if evidence has been produced to support a particular defense. *Bodner v. State,* 752 A.2d 1169 (Del. Supr. 2000). Yenter argues the evidence shows that he was confronted with a situation that caused him to either suffer great bodily harm or death, or drive while under the influence. A rational trier of fact could conclude that the situation that they were in constitutes an imminent danger and therefore, driving while under the influence is justified. However, the credibility of the defendant's testimony along with VonHaden and Vandervort's testimony, in regard to all aspects, was for the jury to determine.

The State will argue that this is a strict liability matter and therefore, privilege defenses are to be restrictively applied. In order to apply a privilege defense, the defendant must satisfy the five-part test set forth above. However, the five part test is satisfied and therefore, the defendant is entitled to the privilege defense. The parties do not dispute that sec. 346.63(1)(a) and 346.63(1)(b) establishes a "strict liability" civil offense since these violations are first offenses. Therefore, the State believes that a first offense of sec. 346.63(1)(a) and (1)(b) creates not only a strict liability offense in the sense that the statute eliminates proof of defendant's state of mind but also creates an absolute liability offense in the sense that every violation of the literal terms of the statutes renders the offender guilty without exception. The State further believes that the doing of the proscribed act constitutes the wrong and the moral turpitude (scienter or state of mind) or purity of motive (justification) which prompts the proscribed act are not material to the question of guilt. The State's position is supported by the Legislature's failure to specify any defenses to the offense. *State v. Brown,* 107 Wis. 2d 44, 318 N.W.2d 370 (1982).

However, the Supreme Court concluded in *Brown,* that "recognizing a defense of legal justification does not necessarily conflict with the concept that violation of a

traffic law is a strict liability offense. The basic concept of strict liability is that culpability is not an element of the offense and that the state is relieved of the burdensome task of proving the offender's culpable state of mind. When the defendant in the case at bar claims legal justification, he is not seeking to disprove a statutorily required state of mind. Instead he is claiming that even though he knowingly violated the law, his violation was privileged under the circumstances." *Id at State v. Brown.*

Brown goes on to further state that "[w]hile the original rationalization of the defenses of self-defense, coercion, necessity and entrapment "may have been based on the notion that moral culpability was absent . . . the real basis for the defenses is that the conduct is justified because it preserves or has a tendency to preserve some greater social value at the expense of a lesser one in a situation where both cannot be preserved. *Moes v. State,* 91 Wis. 2d 756, 768, 284 N.W.2d 66 (1979)."

Brown further states "[i]f we were to consider only the 'scienter' aspect of strict liability we might conclude that the defendant's claim of legal justification does not relate to scienter, and we would recognize the defense of legal justification. But we must go further. We must, in determining whether to recognize the defenses claimed, consider the reason scienter is eliminated as an element of the offense. One of the objectives of the legislature in adopting the concept of strict liability in statutes designed to control conduct of many people, such as operating motor vehicles is to assure the quick and efficient prosecution of large numbers of violators. Where the conduct is harmful and the number of prosecutions anticipated is large, the legislature will often define the offense in such a way as to avoid the need for lengthy trials. Although the claimed defenses, if allowed in prosecutions of strict liability offenses, may not relate to scienter, they do impair the case with which these cases are processed. Consequently when determining whether we should recognize any defenses to a strict liability traffic offense, we must determine whether the public interest in efficient enforcement of the traffic law is outweighed by other public interests which are protected by the defenses claimed." *Id at State v. Brown.* Furthermore, there are many public interests protected by the defense of coercion. The rationale of the defenses of coercion (and necessity) is that for reasons of social policy it is better to allow the defendant to violate the law (a lesser evil) to avoid death or great bodily harm (a greater evil) of himself and others. *Id at State v. Brown.*

The privilege defense of coercion is appropriate when the evidence reflects a situation where someone must decide to commit an act if a threat by another person (other than the defendant's co-conspirator) caused the defendant to believe that his act was the only means of preventing [imminent public disaster]

[imminent death or great bodily harm to himself (or to others)] and which pressure caused him to act as he did. The State will argue that once the defendant left the party, he had reached a "point of safety" and was under an obligation to stop driving. However, testimony at trial would have shown that the three did not feel that they were at a "point of safety" at all while driving. The three individuals felt as though someone was following them the entire way which caused them to keep driving and because of that, they planned to keep driving until they got back to the defendant's home. The State will further argue that there were businesses (i.e. taverns, gas stations, etc.) on the way to the defendant's home that they could have stopped at to get help instead of continuing to the drive to the defendant's home. However, the defendant, VonHaden and Vandervort did not want to stop at one of these businesses out of fear that someone from the party was following them and they would follow them into the business that they stopped at. All three of them thought the safest thing for them to do was get to the defendant's home, go inside and lock all of the doors.

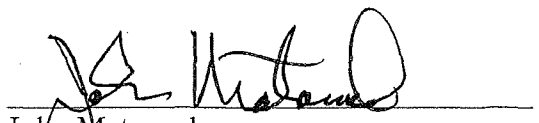
Lastly, the State will argue that the defendant, VonHaden or Vandervort could have used a cell phone to call for help since it is likely that three young individuals would have at least one cell phone on them. All three individuals would have testified that the area that they were in for a majority of the car ride caused them to not have enough service to make a phone call. This argument is merely a red herring as making a phone call to the police out in this rural area does not decrease the imminent nature of the harm.

CONCLUSION

In summary, it is ultimately for the jury to decide whether the defendant reasonably believed that violating the law was the only means of preventing the harm. The trial court was in error by prohibiting the introduction of such evidence of the privilege of coercion.

For the reasons set forth above, the defendant-appellant respectfully requests this Court reverse and remand for a jury trial at the trial court.

Dated this 18 day of March, 2017.



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FORM AND LENGTH CERTIFICATION §809.19(8)(d))

I hereby certify that this brief conforms to the rules contained in s.809.19(8)(b) and (c) for a brief and appendix produced with a proportional font. The length of this brief is eight pages and 3,082 words.

Signed:

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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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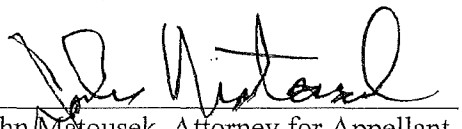
Signed: 

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CERTIFICATION AS TO APPENDIX (Wis. Stat. §809.19(2)(b))

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 s. 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 s. 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 the final decision of the administrative agency.

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