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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Case No. 2017AP002253

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

DUSTIN CHARLES YENTER,

Defendant-Appellant.

ON APPEAL OF JUDGMENT OF CONVICTION AND ORDER IN MONROE COUNTY CIRCUIT COURT, THE HONORABLE DALE PASELL PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

SARAH M. SKILES
Assistant District Attorney
State Bar #1093720

Attorney for Plaintiff-Respondent

Monroe County District Attorney
112 South Court Street
Room 2400
Sparta, Wisconsin 54656
(608) 269-8780
monroe.call@da.wi.gov

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STATEMENT OF THE ISSUE

Was the defendant entitled to assert the defense of coercion at trial for civil traffic forfeitures for Operating While Intoxicated and Operating With a Prohibited Alcohol Concentration?

The circuit court answered **no.**

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Plaintiff-Respondent anticipates the issue raised in this appeal can be fully addressed by the briefs. Accordingly, Plaintiff-Respondent is not requesting oral argument. Further, publication is not warranted under Wis. Stat. § 809.23.

STATEMENT OF FACTS

Defendant-Appellant, Dustin Yenter, received companion citations for two civil traffic offenses, Operating While Intoxicated (1st Offense) (OWI) and Operating With a Prohibited Alcohol Concentration (1st Offense) (PAC), for an incident on December 12, 2015. The matters were scheduled for jury trial on November 1 and 2, 2017. In advance of trial, the State filed motions in limine seeking to prohibit Yenter from asserting a privilege defense at trial (14: ¶¶ 11-12).

The circuit court initially took the motions up at the final pre-trial conference (44). At that final pre-trial conference, Yenter indicated he sought to invoke the defense of coercion under Wis. Stat. § 939.46(1) (44:6-7, 13-15).

The circuit court subsequently heard oral arguments on the motions on a later date (45). At the conclusion of the oral arguments, the circuit court ruled the coercion defense might be available to the defense if the facts supported the elements of the instruction, and the court ordered Yenter to provide an offer of proof by way of affidavit (45: 27-32). Yenter filed three affidavits as his offer of proof (26).

The following is a summary of the evidence Yenter alleged in his offer of proof to the circuit court:

> Yenter was at a party at Joe Yoder's residence with Mike VonHaden and Jessica Vandervort. The residence was located in the country.
>
> A violent "riot" involving 15-20 people started. Yenter and VonHaden observed a friend being violently beaten. VonHaden was hit in the head with a bottle and thrown down a flight of stairs. Yenter, VonHaden, and Vandervort fled the residence and got into Yenter's vehicle.
>
> Once they entered the vehicle, a group surrounded Yenter's vehicle and began to damage it. When the group moved, Yenter drove off. Yenter intended to drive to his residence because no one from the party knew where he lived.
>
> At some point as Yenter drove, a single vehicle came behind him and he "assumed" it was someone from the

> party following him. Yenter passed public places near Oakdale but did not stop for help.
>
> After Yenter's arrest, law enforcement permitted VonHaden to drive the vehicle from the scene after he submitted to a Preliminary Breath Test (PBT). Yenter was uncertain if he had his cellphone on him, but VonHaden did have a cellphone in his possession on the night of the incident.

Upon receipt of Yenter's offer of proof, the State filed a letter brief arguing Yenter should be prohibited from asserting the coercion defense at trial because Yenter had not established facts sufficient to justify the instruction (27).

The circuit court ruled Yenter was not entitled to assert the coercion defense at trial because Yenter failed to present evidence demonstrating that he reasonably believed the only means to escape imminent threat of death or great bodily harm was to drive intoxicated (46: 13-15). In reaching its conclusion, the court relied on: the three affidavits submitted by Yenter (26), the parties' stipulation that the distance from Yoder's residence to the location of the traffic stop was approximately 16 miles (46: 7-8, 13), and judicial notice of the homes along the route Yenter traveled (46: 9, 13).

The circuit court ruled under the objective-reasonable man test there were numerous opportunities for Yenter to seek another form of protection "or done something else that would have allowed [him] to engage in conduct that didn't result in a drunk driver driving down the road" and further concluded the danger Yenter faced dissipated over time (46: 13-14, 15).

Following the ruling, a stipulated court trial was held and Yenter was found guilty of both citations (46: 16-69).

Yenter now argues the circuit court erred in denying his assertion of the coercion defense.

ARGUMENT

THE COERCION DEFENSE WAS PROPERLY BARRED BY THE CIRCUIT COURT.

A. Applicable legal principles and standard of review.

The coercion defense allows a person to engage in conduct that would otherwise be criminal if the person reasonably believes that the conduct is "the only means of preventing imminent death or great bodily harm" to the person or another person "and which causes him or her so to act." Wis. Stat. §§ 939.45(1), 939.46(1) (2016-17); Wis. JI-Criminal 790 (2016).

A person is entitled to assert the coercion defense if "(1) the defense relates to a legal theory of a defense, as opposed to an interpretation of evidence; (2) the request is timely made; (3) the defense is not adequately covered by other instructions; and (4) the defense is supported by sufficient evidence." *State v. Keeran*, 268 Wis.2d 761, 766, 674 N.W.2d 570 (Ct. App. 2003) (citation omitted).

"[E]vidence is sufficient if a reasonable construction of the evidence, viewed in a light most favorable to the accused, supports the defendant's theory." *Id.* at 766 (citation omitted). Therefore, in order to be entitled to the defense, the defendant must show that a reasonable jury could conclude:

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

State v. Coleman, 206 Wis.2d 199, 214-15, 556 N.W.2d 701 (1996).

While courts may not weigh the evidence, courts must ask "whether a reasonable construction of the evidence, viewed favorably to the defendant, supports the alleged defense." *Id.* (citation omitted).

A person seeking to assert a coercion defense has the burden of producing evidence to support the instruction. *Keeran*, 268 Wis.2d at 766. The State then carries the burden of persuasion in negating the defense beyond a reasonable doubt. *Moes v. State*, 91 Wis.2d 756, 766, 284 N.W.2d 66 (1979).

This defense is limited to the "'most severe form of inducement.'" *Keeran,* 268 Wis.2d at 766 (citation omitted). It requires a finding under an objective-reasonable person test that the person had no possible escape other than the commission of the criminal act. *Id*. The coercion defense is not a license to take the safest course. *Id.* at 770.

A circuit court has broad discretion to determine what instructions to submit to the jury and such determination should not be reversed absent an erroneous exercise of that discretion. *Coleman,* 206 Wis.2d at 212; *Johnson v. State*, 85 Wis.2d 22, 28-29, 270 N.W.2d 153 (1978) (trial court are not required to give requested instructions unless the evidence reasonably supports it). Privilege defenses such as coercion must be "applied restrictively [to strict liability crimes] so as not to undermine the objective of the statute." *State v. Dundon*, 226 Wis.2d 654, 665, 594 N.W.2d 780 (1999). A defendant is not entitled to have jurors consider his theory of defense when there is no evidence to support it. *Id.* at 675.

B. The statutory defense of coercion does not apply to civil charges of Operating While Intoxicated and Operating With a Prohibited Alcohol Concentration.

The statutorily-created defense of coercion may not be asserted in a civil forfeiture action for Operating While Intoxicated (1st Offense) and Operating With a Prohibited Alcohol Concentration (1st Offense). Under Wis. Stat. § 939.46(1), coercion is "a defense to a prosecution for **any crime** based on that act, except that if the prosecution is for first-degree intentional homicide, the degree of the crime is reduced to 2nd-degree intentional homicide." (emphasis added).

In *State v. Brown*, the Wisconsin Supreme Court held the defense of legal justification, such as coercion, could be raised in a civil speed violation matter in the limited circumstance in which the actions of the arresting officer caused the violation. 107 Wis.2d 44, 318 N.W.2d 370 (1982). However, the court expressly declined to decide whether a legal justification defense was available in a civil forfeiture action for speeding if the causative force of the violation was someone or something other than law enforcement. *Id.* at 56. The court explicitly

noted it was only deciding "that a defendant in a civil forfeiture action for speeding may claim that his violation of the law should be excused if it was caused by the state itself through the action of a law enforcement officer." *Id*.

The State is not aware of any Wisconsin authority extending *Brown* to a civil forfeiture action for Operating While Intoxicated or With a Prohibited Alcohol Concentration, nor to a civil forfeiture action where the causative force was something other than officer conduct, which is the situation in this case.

While the plain language Wis. Stat. 939.46(1) seems to arguably indicate the coercion defense would be available to a criminal Operating While Intoxicated or With a Prohibited Alcohol Concentration charge, it also suggests that the defense is not available to civil forfeitures. If the legislature intended to apply the defense to civil forfeitures, it could have done so in the same manner in which it explicitly excepted homicide.

Wisconsin law does not provide for the statutorily-created defense of coercion to be applied in a civil forfeiture action for Operating While Intoxicated or With a Prohibited Alcohol Concentration. To allow this defense to be asserted in such actions would decrease the efficient enforcement of strict liability civil traffic offenses.

Therefore, the circuit properly denied the defendant's assertion of the coercion defense.

C. The evidence was not sufficient to justify an instruction on the coercion defense.

If it is determined the statutory defense of coercion may be asserted in civil Operating While Intoxicated or With a Prohibited Alcohol Concentration cases, the circuit court correctly determined Yenter was not permitted to assert the coercion defense as Yenter did not present sufficient evidence in support of the defense that would have allowed a jury, in reasonably construing the evidence, to determine that Yenter satisfied the five-part test.

More specifically, Yenter failed to meet his burden of producing sufficient evidence demonstrating that: 1) he reasonably believed he was in danger of "imminent death or great bodily harm" or 2) he reasonably believed driving while under the influence and in excess of

the legal limit was the "only means" of preventing death or great bodily harm.

1. The evidence did not sufficiently establish a reasonable belief of "imminent" death or great bodily harm.

A reasonable construction of the evidence does not support a finding that Yenter had a **reasonable** belief that he or another person were in danger of "imminent" death or great bodily harm.

"Imminent" is not defined in the applicable jury instruction, but the Wisconsin Supreme Court has examined its definition and cited Webster's Dictionary's definition with approval. *See State v. McCoy*, 143 Wis.2d 274, 287, 421 N.W.2d 107 (1988) (examining "imminent" in the context of the concealing a minor child charge). Webster's Dictionary defines "imminent" as "ready to take place; near at hand; hanging threateningly over one's head; menacingly near." *Id*.

The offer of proof alleges there was a large, violent altercation at a party so Yenter and his two companions left with Yenter driving his vehicle. The offer of proof further alleges Yenter was attempting to get to his residence and he was stopped by law enforcement approximately half a mile from his home. The record established Yenter drove approximately half an hour, approximately sixteen miles, from the party toward his residence.

There was no evidence any person followed or pursued Yenter from the party or even knew where Yenter lived. While there was some assertion Yenter was fearful someone from the party followed him, Yenter did not adequately develop that assertion. Yenter asserted he drove on main, rural roads and at "one point" saw headlights and he "assumed" it was someone from the party, but Yenter did not assert that vehicle drove at or near him in any sort of threatening or aggressive manner.

In order to be entitled to a coercion defense, Yenter was required to provide details explaining why he **reasonably** believed he or another were in "imminent" danger of death or great bodily harm. These details are lacking.

While Yenter **may** have had a reasonable belief of "imminent" death or great bodily harm when he immediately left the party, the facts

do not remotely support that Yenter and his companions were under a continuing threat of "imminent" death or great bodily harm.

Assuming, *arguendo*, Yenter's initial intoxicated driving from the party was excused under the defense of coercion, Yenter put forth no evidence that establishes how or why the imminency continued past the initial escape from the party.

Yenter drove for approximately half an hour, approximately sixteen miles, away from any threat. The lack of continuous threat is fatal to the imminency requirement. The distance traveled separated Yenter from any immediate threat and provided him ample opportunity to withdraw from his intoxicated driving and seek aid in another manner.

2. The evidence did not sufficiently establish a reasonable belief that violating the law was the "only means" of preventing death or great bodily harm.

A reasonable construction of the evidence also does not support a finding that Yenter had a **reasonable** belief that driving while intoxicated and with an alcohol concentration in excess of the legal limit was the "only means" of preventing imminent death or great bodily harm.

Yenter had viable alternatives. He could have pulled over and switched with his passenger after the initial flight from the party. After all, law enforcement permitted VonHaden to drive the vehicle away from the stop location after they gave him a roadside PBT following Yenter's arrest. Yenter could have stopped at a residence for help. Yenter could have stopped at public places in Oakdale and asked for help. Yenter or one of his two companions could have used a cellphone to call for help. Yenter could have parked his car and walked after his initial flight. Yenter could have stopped at any time throughout the approximate half hour, approximate sixteen miles, that he drove, but he did not.

Yenter's offer of proof does not provide sufficient justification or any explanation for why driving was his "only" means of preventing death or great bodily harm. It is unreasonable to drive miles past residences, public places, and various other means of support and safety. Thus, the circuit court properly concluded no reasonable jury

could accept Yenter's only avenue to protect himself was to drive his vehicle.

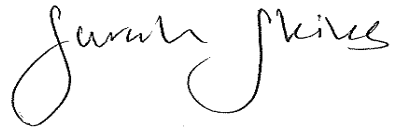
CONCLUSION

This Court should uphold the circuit court's ruling that Yenter was not entitled to assert the coercion defense at trial.

The coercion defense is a limited defense by design, and Yenter did not make a sufficient requisite showing of the essential elements of the defense so as to justify the defense being brought to the jury.

For the above reasons, the State respectfully requests this Court affirm the circuit court and affirm the judgment of conviction.

Dated this 11th day of June, 2018.



SARAH M. SKILES
Assistant District Attorney
State Bar #1093720

Attorney for Plaintiff-Respondent

CERTIFICATION AS TO FORM AND LENGTH

I certify this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 points for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The length of the brief is 2,458.

Dated this 11th day of June, 2018.

SARAH M. SKILES
Assistant District Attorney
State Bar #1093720

Attorney for Plaintiff-Respondent

CERTIFICATION 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 Rule 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 11th day of June, 2018.

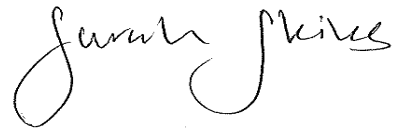
SARAH M. SKILES
Assistant District Attorney
State Bar #1093720

Attorney for Plaintiff-Respondent

CERTIFICATION OF MAILING

I certify that this brief was mailed via the United States Postal Service to the Wisconsin Court of Appeals, District IV and to all parties associated with this action on June 12, 2018.

Dated this 11th day of June, 2018.



SARAH M. SKILES
Assistant District Attorney
State Bar #1093720

Attorney for Plaintiff-Respondent