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

REPLY BRIEF OF DUSTIN C. YENTER

Respectfully submitted,
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STATE OF WISCONSIN COURT OF APPEALS

STATE OF WISCONSIN,
Plaintiff-Respondent,

V.

Appeal No.: 2017AP002253
Circuit Court Case Nos.: 2015TR4108, 2016TR192

DUSTIN CHARLES YENTER,
Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

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CASES 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.

ARGUMENT

I. The evidence does sufficiently establish a reasonable belief of "imminent" death or great bodily harm.

The defendant stated in his initial brief all of the reasons in which this incident created a reasonable belief of imminent death or greatly bodily harm. However, the State indicates in their brief that the definition of imminent, according to Webster's dictionary, is "ready to take place; near at hand; hanging threateningly over one's head; menacingly near."

The individuals at the party were not only making imminent threats, they were carrying out physical violence against the people in Yenter's party. Once VonHaden, Yenter, and Vandervort found each other, they took off running to Yenter's car as they feared they were in further danger of death or great bodily harm. Considering that the individuals ran after them and then began to do extreme and serious damage to Yenter's vehicle, which was supported by the police and this record, there is no question that real harm was imminent, no matter what definition of imminent is applied. At one point, the defendant saw someone carrying a large rock (aka boulder) over to his vehicle before he was able to drive off. It seems as though that would be the exact definition of imminent. Major damage had already occurred. At the time of driving away, Yenter was aware that VonHaden had been struck over the head with a beer bottle, that a different friend was violently beat up by the individuals at the party, and Yenter had extreme damage done to his vehicle. Therefore, it is natural to believe that this riotous situation would follow them. Furthermore, established in the affidavits of Yenter and VonHaden they continued to believe that they were in imminent harm and believed that they were being followed. The sixteen miles that they drove did not dissipate the fear of imminent harm.

II. The evidence does sufficiently establish a reasonable belief that violating the law was the "only means" of preventing death or great bodily harm.

The State indicates that the defendant had "viable alternatives". One of the alternatives the State listed was that the defendant could have pulled over and had

VonHaden drive (since VonHaden was later allowed to drive by police after the defendant was arrested). The fact that the defendant didn't pull over and have VonHaden drive further goes to prove that the threat of harm did not dissipate at any point on the drive home. The State cannot determine what the threat of harm was at the time that the defendant was driving. The threat of harm can only be determined by the defendant. This is displayed in their affidavits where they continued to feel in imminent great bodily harm or death throughout the ride and believed that they were being followed. It is for the jury to determine whether Yenter's belief was reasonable and not for the Trial Court to interject his opinion. Testimony at trial would have shown that the three did not feel that they were at a "point of safety" the entire time 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. This was the defendant's (along with VonHaden and Vandervort's) reasonable belief. Therefore, the fact that this was a sixteen mile car ride is irrelevant. The defendant did not feel safe and could not stop because of the constant threat of harm throughout the entire drive.

Furthermore, Yenter was shook up from what had occurred at the party and very afraid. It was reasonable for Yenter to believe that the only place that he would be safe and be able to calm down was his own home. The fact that they did not stop at any businesses on their way home further shows how scared the three really were. They feared that if they did stop at a business, if anyone from the party was following them, they would be exposed at that point. This incident occurred fairly early in the night and if Yenter and his two passengers did not truly fear for their lives, why would they be going back to the defendant's home? As young kids, wouldn't they have continued drinking somewhere else or stopped at a bar?

The State indicates that a cell phone could have been used to call for help since it is likely that three young individuals would have at least one cell phone on them in the vehicle. 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 made by the State 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. If people are willing to damage the vehicle to the extent that they did, it would be natural logic that they would continue to follow them.

Lastly, the defendant, VonHaden and Vandervort had plans to stay the night at the house of the party. This is proven by the offers of proof from VonHaden and the defendant. Therefore, this shows that only the threat of harm caused him to act as he did. He had no plans to drive his vehicle that night, but because of the imminent threat of harm, he felt that he had to drive to escape the threat of harm.

Furthermore, the State indicates that the drive from the party to where Yenter was stopped by police was 30 minutes. There is nothing in the record to indicate that, however, the length of time in this incident, given the affidavits, as well as the distance, are not relevant as the imminent harm never dissipated.

III. The statutory defense of coercion can apply to civil charges of Operating While Intoxicated and Operating with a Prohibited Alcohol Concentration.

The State's position indicating that coercion cannot be applied to civil offenses 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).

As stated in the defendant's initial brief, the Supreme Court concluded in *State v. Brown,* 107 Wis.2d 44, 318 N.W.2d 370 (1982)„ 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."

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.* Further case law is provided to support this in the defendant's initial brief.

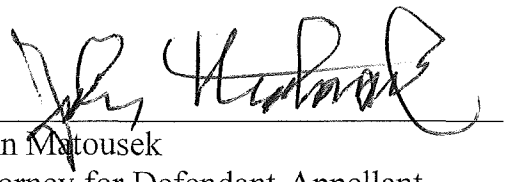
Furthermore, the Trial Court did acknowledge that a legal justification defense is allowed in an OWI case where the causative factor was not a law enforcement officer, but a third-party. This page of the transcript was attached as App. 3 in the defendant's initial brief (lines 14-19).

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 17th day of August, 2018.



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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 five pages and 1,489 words.

Signed: 

John Matousek, Attorney for Appellant
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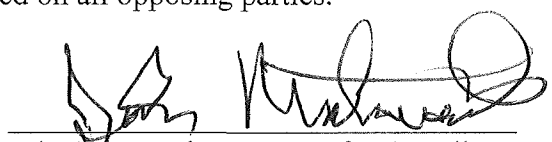
Signed: 

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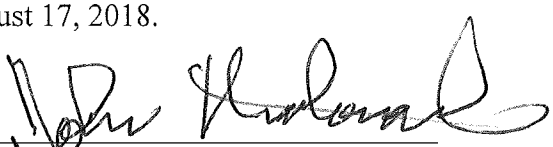
Signed: 

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