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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Appeal No.: 2019-AP-000318

CHRIS K. FELLER,

Defendant-Appellant.

APPEAL OF JUDGMENT FROM
WAUSHARA COUNTY CASE NO. 18-TR-2889
HONORABLE GUY D. DUTCHER PRESIDING

DEFENDANT-APPELLANT'S BRIEF

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STATEMENT OF ISSUES

QUESTION 1: Was there evidence that Chris Feller was not legally justified in speeding to avoid an accident, but instead sped and simply slowed down when he saw the police car, which was the basis for the trial court's ruling that he was not so justified?

Answer by the Trial Court: Yes.

Answer by Appellant: No.

QUESTION 2: Did Chris K. Feller have a legal justification defense for speeding when he sped to avoid a danger caused by a private, non-public driver?

Answer by the Trial Court: Not expressly addressed, but implicitly yes.

Answer by Appellant: Yes.

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

Appellant does not request oral argument or publication.

STATEMENT OF THE CASE

This case arises from a speeding ticket issued to Defendant-Appellant Chris K. Feller (“Feller”) on October 22, 2018. (R. 12 at 13-14) Feller was cited for traveling eighty-one (81) miles per hour in a seventy (70) mile per hour speed limit zone. (R. 12 at 15)

Prior to the citation, Feller was traveling south along I-39. (R. 12 at 12) While driving in the right lane, he came upon a gray car that was varying speeds, including below the speed limit. (R. 12 at 16) As a result, Feller “pulled around that car” into the left lane “to pass him.” (R. 12 at 16)

Upon pulling into the passing lane, another car came up very quickly behind Feller. (R. 12 at 16-17) Specifically, when Feller “got about halfway around the car” he was trying to pass, the car “coming up behind me was already on my bumper.” (R. 12 at 16-17) The car was about “two feet away” from Feller’s bumper, “basically telling [Feller] to get out of his way; he was very aggressive.” (R. 12 at 17)

Feller then accelerated to avoid an accident, getting past the car in the right lane, returning safely to the right lane, and reducing his speed. (R. 12 at 17) Feller testified:

And I felt as though, if I didn't speed up and get around this guy, he was actually going to rear-end me, because he was speeding up at me, going back, weaving back and forth when I was in the passing

lane. And, yes, at that point, I got scared because I thought he was going to rear-end me. I sped up to 81 miles an hour. I moved back over in front of the car quick, and I slowed back down.

(R. 12 at 17) The car that had been tailgating Feller then proceeded to come up next to Feller “at a rapid rate.” (R. 12 at 17)

Feller noticed a police vehicle in front of him. (R. 12 at 17) Apparently, the driver of the tailgating car did as well, as that car then “faded back” and “got right behind” Feller, again “right on [Feller’s] tail.” (R. 12 at 17) The driver was, again, tailgating Feller, “so close behind [Feller] in that tape, that you can’t even see him” on the police officer’s squad cam, “until the police officer slows down.” (R. 12 at 17) At that point, the police officer slowed down, and that tailgating car pulled into the left lane, rapidly passing Feller and the police officer. (R. 12 at 17)

The police officer then turned on his lights. (R. 12 at 18) The previous tailgater – per Feller’s testimony, the “aggressor” – actually pulled over to the side of the road, as if the driver believed the officer was pulling over that car. (R. 12 at 18) The officer instead came up on Feller, who pulled over per the officer’s lights. (R. 12 at 18) The tailgating car then “took off and sped around both of us again.” (R. 12 at 18)

When the police officer approached Feller, Feller was “kind of dumbfounded on what had happened” and initially “didn’t have a whole lot to

say.” (R. 12 at 21) He thereafter, in real time, explained to the officer what had happened:

Well, basically, you know, that car, the aggressor, is behind me. I told him exactly what I just explained to the Court here right now, that he was very aggressively came up behind me as I was passing that car and got right on my -- I mean, literally, he was probably two feet away from my bumper, swerving back and forth a little bit, and moving back, you know, forward and backwards a little bit; and, you know, I thought he was going to rear-end me.

* * * * *

So I explained the whole incident to the officer, and I told the officer that, yes, I know I went 81 miles an hour, but I did it as an evasive move to keep from an accident happening, because it would have been really bad going 81 miles an hour and getting rear-ended by someone, you know.

(R. 12 at 21-22) Feller testified he was afraid of potential bodily harm and that, without speeding to avoid the car, would “get in an accident and possibly killed.”

(R. 12 at 22)

Feller testified the officer stated, at the time, that he had not seen the prior aggressive driving, but told Feller speeding was against the law and, in effect, he should have gotten in an accident rather than speed. (R. 12 at 23) The exact conversation appears at eight minutes and thirty seconds (8:30) of the squad cam.

(R. 12 at 23-24)

The officer confirmed at trial that Feller told him, during the pullover, he had only sped to avoid a rear-end accident. (R. 12 at 13) The officer did not see the prior tailgating car, and admitted Feller’s account was “possible.” (R. 12 at

12-13) The squad cam did not contradict Feller's account either, as it was not turned on until the cars approached the police car, which was after the original tailgating which caused Feller to accelerate. (R. 12 at 20)

Even though Feller's account was uncontradicted, the Circuit Court rejected it. (R. 12 at 31-32) The Circuit Court postulated what it thought to be a more logical theory of what happened:

What is the far more logical explanation of what occurred is that he was involved in a pretty significant pass. And I do note the officer saw your vehicle coming up from the rear well before he conducted the radar analysis. You are in the passing lane. I'm sure there was somebody probably going 85, 81, whatever everybody was going in that lane that was with you. You were probably the lead car. You get around the silver vehicle, and you say, "Oh shit. There is a cop," and you pull over, and the other guy keeps right on going. That's what happened, and you are the one that got caught. That's what happened here.

(R. 12 at 32-33) Thus, the Circuit Court adjudged him guilty of speeding. (R. 12 at 33)

STANDARD OF REVIEW

This appeal is subject to the “clearly erroneous” standard, as appellant contends the Circuit Court’s finding that he did not speed in order to avoid an accident is unsupported by any evidence. *See Phelps v. Physicians Ins. Co. of Wisconsin*, 2009 WI 74, ¶ 39, 319 Wis. 2d 1, 25, 768 N.W.2d 615, 628 (Circuit Court’s finding of fact is reviewed under a “clearly erroneous” standard and may be reversed if “it is against the great weight and clear preponderance of the evidence.”)

ARGUMENT

In this case, the Circuit Court concluded literally “out of thin air” a situation in which Defendant-Appellant, Chris K. Feller, did not speed to avoid an accident. There was not one scintilla of evidence that that was case – to the contrary, the unrebutted evidence was that Feller accelerated in order to avoid a car dangerously tailgating him until he could safely change lanes, get out of the car’s way, and reduce speed again.

Whatever the leniency given to trial court’s in finding facts, such facts must be supported by some evidence. As no such evidence exists, the Circuit Court’s judgment must be reversed.

I. THE CIRCUIT COURT’S FINDING OF FACT ABOUT WHAT WAS “LOGICAL” WAS UNSUPPORTED BY THE EVIDENCE AND CLEARLY ERRONEOUS.

The trial court’s decision was based on a single factual conclusion: Feller did not speed to avoid an emergency; rather he was “probably the lead car” in a two-car speeding caravan, and returned to the right lane not to avoid an accident, but because he concluded “Oh shit. There is a cop.” (R. 12 at 32-33) That is a clearly erroneous finding based on speculation, and unsupported by any evidence.

A trial court's factual findings are clearly erroneous when no evidence in the record supports the finding. *See State v. Santiago*, 206 Wis. 2d 3, 26-27, 556 N.W.2d 687 (1996). When the “only evidence” proffered at trial is of one version

of the facts by the defendant, and the supposedly-counter evidence was “conclusory and did not refute the testimony of the defendant,” a finding of fact contrary to the defendant’s testimony is clearly erroneous and should be reversed. *Id.*

As in *Santiago*, that is precisely what happened here. Feller testified he sped to avoid a rear-end accident. The officer confirmed Feller told him that at the time of the accident. There was no cognizable “counter” evidence – the officer testified he did not see the prior incident, but did not deny it happened. As in *Santiago*, any supposedly counter evidence is, at best, conclusory and does not contradict Feller’s testimony or support the Circuit Court’s finding to the contrary.

The Circuit Court may have a belief about what it believed was “logical,” but there was no evidence to support that belief. Its finding of fact was erroneous, and its judgment should be reversed.

II. FELLER WAS LEGALLY JUSTIFIED IN SPEEDING TO AVOID HARM.

In the present case, the trial court at least implicitly concluded that necessity could be used as a defense to the speeding charge, as it evaluated the facts of Feller’s legal justification defense, and did not conclude the defense failed as a matter of law. (*See, generally*, R. 12) Feller contends that, having established a legal justification as to why he was speeding, his defense was indeed valid.

In *State v. Brown*, Wisconsin Supreme Court “conclude[d] 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.” *State v. Brown*, 107 Wis. 2d 44, 51 318 N.W.2d 370, 375 (1982). Admittedly, the Supreme Court concluded “[w]e need not and we do not decide whether a defense of legal justification is available to the defendant in a civil forfeiture action for speeding if the causative force is someone or something other than a law enforcement officer.” *Id.* at 56, 318 N.W.2d at 376. Feller is aware of no controlling authority holding such a defense does not apply in that latter situation.

The legal justification defense should apply in cases, such as here, where the defendant speeds to avoid harm. As the Supreme Court stated in *Brown*, “for reasons of social policy it is better to allow the defendant to violate the criminal law (a lesser evil) to avoid death or great bodily harm (a greater evil).” *Id.* at 54-55, 318 N.W.2d at 376. The proper focus, per the Supreme Court, is balancing the potential harm to be avoided versus the harm of violating the speeding law. That balance is not altered based on who is causing the harm, whether a public officer or a private driver. Feller was justified in speeding to avoid harm of an accident, regardless who was the person causing the danger.

Thus, as the Circuit Court at least implicitly held, such a legal justification is valid, upon the facts of the case satisfying the defense.

CONCLUSION

For the foregoing reasons, Defendant-Appellant Chris K. Feller requests the judgment of the Circuit Court be reversed.

Respectfully submitted this 6th day of August, 2019.

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CERTIFICATION OF FORM AND LENGTH OF BRIEF

I certify that this brief conforms to the rules contained in section 809.19(8)(b) and (c), Stats., for a brief produced using the following font: proportional serif font; 200 dots per inch; 13-point body text; 11-point quote and footnote text; double spaced; 1.5 margins on the left side and 1-inch margins on the other 3 sides. The length of this brief is 9 pages and 1,921 words.

Respectfully submitted this 6th day of August, 2019.

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)(f), STATS.

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. 809.19(2), Stats.

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.

Respectfully submitted this 6th day of August, 2019.

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CERTIFICATION OF THIRD-PARTY COMMERCIAL DELIVERY

I certify that on August 6, 2019, this brief was delivered to a third-party commercial carrier for delivery to the Clerk of the Court of Appeals within three calendar days. I further certify that the brief was correctly addressed.

Respectfully submitted this 6th day of August, 2019.

Amy R. Cushman