STATE OF WISCONSIN

IN SUPREME COURT

No. 2023AP874-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOAN L. STETZER,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

Stetzer seeks review of a highly fact-intensive question of whether the circuit court correctly determined that the State proved beyond a reasonable doubt that the privilege of coercion did not apply when Stetzer drove with a prohibited alcohol content (PAC) in her blood to escape her abusive husband.

Believing she faced imminent death or great bodily harm, Stetzer, after having consumed several glasses of wine, got into her car to drive to her lake house. However, on the way, she passed a police officer. The circuit court found that, at that point, Stetzer knew that continuing to drive to her lake house was not her only means of escaping the danger she faced. Therefore, the circuit court found, the State had proven beyond a reasonable doubt that Stetzer no longer held a reasonable belief that continuing to drive with a PAC was the only way to avoid imminent death or bodily injury, so her actions were no longer privileged. With that, the circuit court found Stetzer guilty and convicted her.

On appeal, Stetzer argued that the circuit court misapplied the law when it focused on whether her actions were the only means of avoiding imminent death or bodily harm instead of whether she reasonably believed that her actions were the only means. The court of appeals affirmed the circuit court. Stetzer had not addressed the circuit court's factual finding that, after she passed the police officer, she knew she had alternatives to avoid the danger short of continuing to drive with a PAC.

Before this Court, Stetzer presents three issues. First, Stetzer takes issues with the way the circuit court divided her driving and considered the reasonableness of her belief that driving was necessary to avoid the danger. Next, Stetzer asks whether this construction—continuing to judge the reasonableness of a defendant's beliefs in response to

changing circumstances—violates Marsy's Law[1] by forcing domestic violence victims to choose between staying in a dangerous situation or commit a crime to leave and risk conviction. Finally, Stetzer argues that the circuit court misapplied the legal standard when determining the reasonableness of her beliefs because it did not consider her particular background.

This Court should not accept review. Stetzer did not present the Marsy's Law issue below, so this Court is without the benefit of analysis of any lower courts. This Court should deem it forfeited. Stetzer's proposed construction of the coercion privilege is nonsensical—a defendant would have absolute immunity to commit crimes as long as their belief was, at some point, reasonable. That is an absurd outcome. Fact finders must judge the reasonableness of a defendant's belief based on the evolving circumstances of the facts of the case; a reasonable belief can be turned unreasonable by new facts.

That being the natural construction of the coercion statute, there is no conflict with Marsy's Law. Being a victim of domestic violence is not a license to commit crimes, but escaping an abuser might present a basis for a coercion defense—as the circuit court found here. The evolving facts of the case made continuing to violate the law by driving with a PAC unreasonable. There is no need for this Court to weigh in on this because the law is clear.

Finally, the circuit court did consider Stetzer's personal circumstances and background. That is what made the initial decision to drive to escape her husband privileged. But once

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[1] A victim's rights amendment to our state constitution. *Wisconsin Just. Initiative, Inc. v. Wisconsin Elections Comm'n*, 2023 WI 38, ¶¶ 8–9, 407 Wis. 2d 87, 990 N.W.2d 122. *See also* Wis. Const. art. I, § 9m.

Stetzer passed the officer, her belief that continuing to drive was the only way to escape became unreasonable because she knew she could stop. In any event, Stetzer merely seeks error correction on this issue.

With that, this case does not have a "special and important reason[ ]" for this Court to accept review under Wis. Stat. § (Rule) 809.62(1r).

ARGUMENT

This Court should deny the petition.

Stetzer presents three issues for review. First, whether a trial court can divide an act and determine whether it was privileged at different points in time. (Pet. 4.) [2] If a trial court can, then Stetzer questions whether doing so violates Marsy's Law. (Pet. 4.) Finally, Stetzer claims that the trial court failed to consider her unique experiences and perspective in determining whether her belief that she faced death or great bodily harm remained reasonable. (Pet. 4.)

Stetzer argues that review "will help develop and harmonize the law surrounding the treatment of victims of intimate violence who must violate the law to escape death or great bodily harm, and the extent to which courts should dissect the actions and alternatives available to the victim in a hyper-technical manner." (Pet. 5.) She also argues that the court of appeals' decision "is at odds with recent significant development in the treatment of victims by our criminal justice system." (Pet. 5.) Neither are correct.

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[2] The State uses the pagination assigned by e-filing, rather than Stetzer's.

A. There is no need to review the circuit court's consideration of whether Stetzer's belief remained reasonable; that is obviously how the law works.

Under Wis. Stat. § 939.45(1), criminal conduct is privileged when it "occurs under circumstances of coercion" as set forth in Wis. Stat. § 939.46. "Coercion" occurs when a "threat by a person other than the actor's coconspirator . . . causes the actor reasonably to believe that his or her act is the only means of preventing imminent death or great bodily harm to the actor or another and which causes him or her so to act." Wis. Stat. § 939.46(1).[3]

"The coercion defense is limited to the 'most severe form of inducement.'" *State v. Keeran*, 2004 WI App 4, ¶ 5, 268 Wis. 2d 761, 674 N.W.2d 570 (quoting *State v. Amundson*, 69 Wis. 2d 554, 568, 230 N.W.2d 775 (1975)). The defense of coercion "reflect[s] the social policy that one is justified in violating the letter of the [criminal] law in order to avoid death or great bodily harm." *State v. Horn*, 126 Wis. 2d 447, 455, 377 N.W.2d 176 (Ct. App. 1985); *see also State v. Brown*, 107 Wis. 2d 44, 54-55, 318 N.W.2d 370 (1982).

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[3] Wisconsin Stat. § 939.46 defines the affirmative defense of coercion as follows:

> **939.46 Coercion. (1)** A threat by a person other than the actor's coconspirator which causes the actor reasonably to believe that his or her act is the only means of preventing imminent death or great bodily harm to the actor or another and which causes him or her so to act 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.

"A defendant seeking a coercion defense instruction must meet the initial burden of producing evidence to support such an instruction." *Keeran*, 268 Wis. 2d 761, ¶ 6.

Considering the evolving circumstances and whether a basis for a coercion privilege exists is consistent with prior decisions on statutory privileges. For instance, there is a narrow privilege for a felon to possess a firearm, but one of the requirements is that "the defendant did not possess the firearm for any longer than reasonably necessary." *State v. Coleman*, 206 Wis. 2d 199, 211, 556 N.W.2d 701 (1996). When a defendant's belief that breaking the law is the only way to avoid imminent death or bodily harm becomes unreasonable, then their privilege to violate the law ends.

Stetzer complains that the trial court's finding that her belief she faced death or great bodily harm became unreasonable once she passed the police cruiser failed to account for the times she was arrested and charged with domestic violence crimes. (Pet. 20.) She does not cite to the record to support this claim. She essentially argues that the entirety of her driving with a PAC should be treated as "a single offense." (Pet. 20.) This is an absurd claim. If the entirety of her driving with a PAC was one act, how far could she drive and remain privileged? To another county? To another state? Across the country? Stetzer's construction has no limiting principle and therefore does not merit serious consideration by this Court.

Stetzer also complains that what the trial court did limits coercion as a defense to "the most limited of cases." (Pet. 20.) Correct. As a matter of law, it is only available when acting under "the 'most severe form of inducement.'" *Keeran*, 268 Wis. 2d 761, ¶ 5 (citation omitted).

The only reasonable way to interpret the privilege of coercion must take into account the evolving facts of the case. Merely because an act starts as privileged does not mean it

remains privileged until a defendant decides the risk has abated—the belief that a defendant faces death or great bodily harm must remain reasonable in order for illegal conduct to remain privileged.

B. Stetzer did not bring a challenge based on Marsy's Law below, so this Court should not accept review; in any event, Marsy's Law cannot mean that victims of domestic violence can freely commit crimes as long as their belief they needed to do so was at one point reasonable.

"It is a fundamental principle of appellate review that issues must be preserved at the circuit court." *State v. Huebner*, 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 611 N.W.2d 727. The forfeiture rule gives parties incentive to "apprise circuit courts of specific arguments in a timely fashion so that judicial resources are used efficiently and the process is fair to the opposing party." *Townsend v. Massey*, 2011 WI App 160, ¶ 26, 338 Wis. 2d 114, 808 N.W.2d 155. "Raising a general issue does not preserve all arguments that might somehow relate to that issue." *Lewis v. Village of Hobart*, 2014 WI App 90, ¶ 16, 356 Wis. 2d 328, 855 N.W.2d 492. "Instead, the forfeiture rule focuses on whether particular arguments have been preserved." *Id.* "Framing the rule in this way prevents circuit courts from being 'blindsided' by appellate courts and gives circuit courts the ability to 'correct any error with minimal disruption of the judicial process, eliminating the need for appeal.'" *Id.* (quoting *Townsend*, 338 Wis 2d 114, ¶ 26). Accordingly, the forfeiture rule "is not merely a technicality or a rule of convenience; it is an essential principle of the orderly administration of justice." *Huebner*, 235 Wis. 2d 486, ¶11. A party seeking to raise a claim on appeal therefore has the burden to show that the party first raised the claim in the circuit court. *Id.* ¶10.

Stetzer did not raise a constitutional challenge before the circuit court or the court of appeals. (Stetzer's Br. 18–22.) Arguments raised for the first time on appeal are forfeited. *Townsend*, 338 Wis. 2d 114, ¶¶ 19, 25. This should not be excused, especially considering the special requirement of notifying the Legislature when a statute's constitutionality is challenged. Wis. Stat. § 806.04(11).

Nonetheless, nothing in Marsy's Law expands the coercion privilege for victims of domestic abuse. *See* Wis. Const. art. I, § 9m(2). Stetzer's argument in this regard lacks citations to any authority and is therefore undeveloped.

Further, Stetzer's coercion claim comes from Wis. Stat. § 939.46(1) and not from Wis. Stat. § 939.46(1m). Under the latter statute, a defendant has a privilege that covers any offense committed as a direct result of human trafficking. *State v. Kizer*, 2022 WI 58, ¶ 30, 403 Wis. 2d 142, 976 N.W.2d 356. The broader privilege based on coercion envisioned under (1m) shows a legislative policy choice. Stetzer's argument must fail because it is up to the legislature, not this Court, to expand any privilege based on coercion. *See Id.* ¶ 41.

Stetzer notes that no charges have been filed against her husband and complains that she has not been treated with fairness, dignity, and respect. (Pet. 23.) Similarly, she alleges that her rights were not protected like an accused. (Pet. 23.) These are red herrings. Any charging decision is within the discretion of the district attorney. *State v. Dums,* 149 Wis. 2d 314, 321, 440 N.W.2d 814 (Ct. App. 1989). And without a criminal proceeding where Stetzer is the victim, there is no forum for her rights to be protected in the manner she wants. If she feels that her rights as a victim have been violated, there is a statutory mechanism for her to make a complaint. Wis. Stat. § 950.09(2). But, put simply, nothing about Marsy's Law or victim's rights expands coercion as a privilege. There is nothing of substance in this issue for this Court to review.

C. The trial court properly considered the reasonableness of Stetzer's beliefs, and she seeks only error correction.

Stetzer complains that the trial court did not consider the reasonableness of her actions based on her "personal characteristics and histor[y]." (Pet. 20.) In particular, she claims that she deliberately chose not to stop at the police cruiser and report her husband's alleged abuse "because it was not certain that stopping and reporting her assault to the police would have resulted in her safety." (Pet. 20.) In part "because the last times that she had reported that she was being physically abused, her husband lied to the police and Joan herself was arrested and charged." (Pet. 19–20.)

Stetzer cites only to *State v. Johnson*, 2021 WI 61, ¶ 24, 397 Wis. 2d 633, 961 N.W.2d 18, for the proposition that the circuit court had to consider her unique characteristics and history. (Pet. 20.) She reads too much into this citation. This part of *Johnson* refers to the evidence that a defendant must adduce in order to be entitled to a self-defense instruction: "he must present some evidence that he reasonable believed this force was necessary to prevent great bodily harm or imminent death to himself." *Johnson*, 397 Wis. 2d 633, ¶ 24. To that end, personal characteristics and history are relevant. *Id.* This citation, however, by no means makes personal history and characteristics determinative. A defendant's belief must still be reasonable. *Id.* ¶ 20. Further, this section only speaks to whether a defendant would be entitled to the instruction, but in a court trial, the circuit court "is presumed to know the law." *Tri–State Mech., Inc. v. Northland Coll.,* 2004 WI App 100, ¶ 10, 273 Wis. 2d 471, 681 N.W.2d 302. *See also, Bell v. Cone,* 543 U.S. 447, 456 (2005) (citation omitted) (recognizing 'the presumption that state courts 'know and follow the law'"); *Woodford v. Visciotti,* 537 U.S. 19, 24 (2002) (there is a "presumption that state courts know and follow the law");

The trial court did assess whether Stetzer reasonably believed that driving with a PAC was necessary to avoid death or great bodily harm. It found Stetzer's belief reasonable when Stetzer started driving, but that belief became unreasonable when Stetzer passed a police officer because at that point continuing to drive was not her only—or most reasonable—option. To that end, Stetzer merely disagrees; she seeks only error correction. This Court is "not, primarily, an error-correcting tribunal, and [it] normally hear[s] only those cases that present something more than just an error of law." *State ex rel. DNR v. Wis. Ct. of Appeals, Dist. IV*, 2018 WI 25, ¶ 43, 380 Wis. 2d 354, 909 N.W.2d 114.

CONCLUSION

This Court should deny Stetzer's petition for review.

Dated this 12th day of November 2024.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a response produced with a proportional serif font. The length of this response is 2,583 words.

Dated this 12th day of November 2024.

Electronically signed by:

John D. Flynn
JOHN D. FLYNN
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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the Clerk of the Wisconsin Supreme Court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 12th day of November 2024.

Electronically signed by:

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