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IN THE SUPREME COURT OF WISCONSIN
Case 2023AP874-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOAN L. STETZER,

Defendant-Appellant-Petitioner.

On Review of the Decision of the Wisconsin Court of Appeals, District II

Appeal from the Circuit Court of Waukesha County, Case No. 17 CM 1014,
The Honorable Paul Bugenhagen, Jr., Presiding

NON-PARTY BRIEF OF LEGAL ACTION OF WISCONSIN, INC.

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INTRODUCTION

Forty years ago, *State v. Brown* held that coercion and necessity were defenses to strict liability civil offenses. 107 Wis. 2d 44, 53, 318 N.W.2d 370, 375, 34 (1982). In coming to that conclusion, the Supreme Court rejected the argument that those defenses were unavailable because speeding had no intent requirement.

> While the original rationalization of the defenses… "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. *Id*. (emphasis added; internal citations omitted)

Coercion is thus a perfect defense to all non-murder charges not because an actor is incompetent, but because the legislature has placed a greater social value on immunizing crime victims from liability for offenses that occur when they are trying to escape imminent death or bodily harm than on finding them guilty of a crime for choices made under extraordinary circumstances.[1]

Despite extensive evidence about present and past crimes against Ms. Stetzer, the Court of Appeals affirmed her conviction on the ground that Wis. Stat. § 939.46(1) "require[s] a reasonable belief*, at every*

[1] *See* Jerome Hall, *General Principles of Criminal Law* 425–26 (2d ed. 1960); Wayne La Fave & Austin Scott, *Criminal Law* secs. 49, 50 (1972).

moment that the defendant is asserting she was coerced to engage in otherwise criminal conduct … otherwise criminal conduct is the only way to prevent death or bodily harm." *State v. Stetzer*, 2024 WI App 25, ¶ 20, 6 N.W.3d 285, 2024 WL 1291542, at *5 (emphasis added). According to the Court of Appeals, the coercion privilege is only available to victims who establish that they (1) had a reasonable belief they were in danger of death or great harm; and (2) a reasonable belief that they could only "prevent" or escape those harms through an illegal act; and (3) "that the commission of the criminal act [did] not go on longer than reasonably necessary to escape imminent death or great bodily harm." *Id*. ¶ 17.

This unique version of the coercion defense depends on premises that cannot be reconciled with decades of research about crime victims' behavior, and conflicts with the language of Wis. Stat. § 939.46(1) and Wis. Const. art. I, § 9 (as amended by 2019 Enrolled Joint Res. 3).

For these reasons, this Court should reverse the decision below and issue an opinion clarifying the standard that should be applied in cases like this one.

I. THE COURT OF APPEALS' DECISION DEPENDS ON PREMISES THAT CONFLICT WITH DECADES OF RESEARCH ON CRIME VICTIMS

At trial, Ms. Stetzer's expert witness testified that her history of abuse and previous "adverse relationship with the police" led to a reasonable belief that she could be at risk of "imminent death or great bodily harm" in the police's presence. *Stetzer*, 2024 WI App 25, ¶24, 6 N.W.3d 285. The Court of Appeals dismissed that testimony because the record could not show that she "continu[ed] to hold" a reasonable belief that driving away was "the only means" of saving herself. *Id.* ¶¶23-24. The opinion strongly suggests that no victim, even a victim of intimate partner violence (IPV), could reasonably believe that they are safer trusting themselves than trusting police.

This kind of presumption conflicts with decades of research about the way that individuals respond to long-term victimization. In the Court of Appeals' view, a reasonable person would know that risk goes away with a little distance and police help. But scholars now agree that domestic violence is not a "transaction-bound" offense. *See, e.g.,* Deborah Tuerkheimer*, Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. Crim. L. & Criminology 959, 962 (2004)(rejecting the idea of treating domestic assaults as "discrete, cognizable offenses" …rather than as "an ongoing pattern of conduct" with an impact that manifests over time "making victims vulnerable as the trauma overrides the ability to control their lives and experience feelings of helplessness and terror.")

A. Abusers control their victims by many tactics, including reducing their trust in law enforcement.

Abusers use many tactics to control victims, including isolation, economic dependence, promises of love, and verbal and physical violence.[2] Abusers may force victims to steal, take the blame for their crimes, and even to sell drugs or themselves.[3] Abusers also routinely manipulate the legal system; confident in their manipulative skills, they are not afraid to accuse their victims first.[4] It is not surprising under the circumstances, that efforts to escape victimization may involve criminal acts—such as stealing to obtain money or transportation.[5]

Repeated victimization significantly increases IPV victims' risk of arrest and conviction. According to a recent study, 80-85% of incarcerated women with abuse histories attributed their incarceration to their

[2] Polaris Project, *Domestic Sex Trafficking: The Criminal Operations of the American Pimp*, available at https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/domestic-sex-trafficking-criminal-operations-american-pimp.pdf (last visited Feb. 18, 2025) (discussing the general technique of "pimp control," involving an initial period of affection or romance, followed by a "grooming" period, and then sexual exploitation imposed through psychological coercion and physical violence).

[3] *See* Alaina Richert, *Failed Interventions: Domestic Violence, Human Trafficking, and the Criminalization of Survival*, 120 Mich. L. Rev. 315, 319–21 (2021).

[4] As "Bill" had done in the past and threatened to do on the night at issue in this case. (R. 57, 62:2-22, R. 125, 206: 19-209:3).

[5] *See* Matthew Myatt, *The "Victim-Perpetrator" Dilemma: The Role of State Safe Harbor Law in Creating a Presumption of Coercion for Human Trafficking Victims*, 25 Wm. & Mary J. Race, Gender & Soc. Just. 555, 571 (2019).

abuser.[6] These statistics suggest why the legislature and the public felt it was necessary to recognize victims as a protected class in the statutes and the state constitution.

B. Abuser tactics affect victims' perception of where to find safety.

Abuser tactics have a profound influence on victims' perception of where to find safety. IPV victims are typically isolated from their families and lack the support of friends.[7] They also commonly suffer from substance abuse, post-traumatic stress disorder, and heightened anxiety, all of which influence perception and judgment.[8] Police and courts can be unsympathetic to victims who admit to drinking while being abused.[9] Victims facing criminal charges after abuse report being failed repeatedly by

[6] Sarah Buel, *Effective Assistance of Counsel For Battered Women Defendants: A Normative Construct,* 26 Harv. Women's LJ 217, 219 (2003).
[7] Arezoo Shahbazi Roa, *Suffering Alone: The Impacts of Isolation on the Mental Well-Being of Victims and Survivors of Relationship Violence*, available at https://humanoptions.org/suffering-alone-the-impacts-of-isolation-on-the-mental-well-being-of-victims-and-survivors-of-relationship-violence/. (Last visited February, 17, 2025).
[8] Tashayla Sierra-Kadaya Borden, *Criminalizing Abuse: Shortcomings of the DVSJA on Black Woman Survivorship*, 124 Colum. L. Rev. 2065, 2069–70 (2024).
[9] Jane C. Murphy and Margaret J. Potthast, *Domestic Violence, substance abuse, and child welfare,* 3 J. Health Care L. & Pol'y 88, 93 (1999).

overwhelmed courts, uneducated or dismissive staff, abuser tenacity, and racist practices.[10]

Because of these experiences, IPV victims often have a "reasonable belief" that appealing to or depending on law enforcement is riskier than depending on themselves. Stetzer testified to exactly that: "I thought should I stop, and I thought no, I'm not going to stop, I have called the police on two other occasions when being physically abused. Bill lied and I got arrested." 2024 WI App 25, ¶ 24, 6 N.W.3d 285.

C. Generic standards of reasonability erase crime victims' experiences in multiple ways.

The State, Res. Br. 26-27, and the Court of Appeals agree that Stetzer's reasonable belief that driving was "the only" means to prevent harm became objectively unreasonable when she passed a police car—regardless of her thoughts. There are two problems with this formulation of the standard. It erases the experiences and perceptions of many IPV victims. It also ignores distinctions among victims, whose race, ethnicity, gender identity, and sexual

[10] Buel, supra n.6, at 224. Iris Cardenas *et al.*, *Individuals Who Experience Intimate Partner Violence and Their Engagement with the Legal System: Critical Considerations for Agency and Power*, 27 J. Health Care L. & Pol'y 113 (2024).

orientation may make interactions with police particularly fraught.[11]

Encounters with law enforcement pose a very real threat to the life and physical safety of people of color, particularly those who are disabled or identify as LGBTQ. Past and present violence against people in marginalized groups deters them from seeking law enforcement for safety. As Andrea Ritchie writes:

> [W]omen and girls, and particularly women of color, are sexually assaulted, raped, brutally strip-searched, beaten, shot, and killed by law enforcement agents with alarming frequency.[12]

Ritchie and other scholars recognize that "reasonable person" standards are neither universal nor equitable; they normalize the expectations and beliefs of dominant cultures and diminish those of marginalized people.

> [B]lack and white Americans have drastically different life experiences, particularly in regard to law enforcement. Thus, the black view of what is reasonable under certain circumstances may differ widely from the generally accepted white view.[13]

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH WIS. STAT. § 939.46(1), EXISTING PRECEDENT,

[11] Michele R. Decker, *et al.*, *"You do not think of me as a human being": Race and Gender Inequities Intersect to Discourage Police Reporting of Violence against Women.* J Urban Health (2019). *Available online at* https://doi.org/10.1007/s11524-019-00359-z.
[12] Andrea J. Ritchie, *Law Enforcement Violence Against Women of Color, in* Color of Violence: The INCITE! Anthology 138, 139 (INCITE! Women of Color Against Violence, eds., 2006).
[13] *See* Kerry L. Shipman, *The Reasonable Black Person Standard in Criminal Law: Impartiality, Justice and the Social Sciences,* 13 S. J. Pol'y & Just. 74, 76 (2019); *see also* Dolores A. Donovan & Stephanie M. Wildman, *Is the Reasonable Man Obsolete: A Critical Perspective on Self-Defense and Provocation*, 14 Loy. L.A. L. Rev. 435 (1981).

AND THE WISCONSIN CONSTITUTION.

The Court of Appeals insists that Wis. Stat. § 939.46(1) requires that "the commission of the criminal act [does] not go on longer than reasonably necessary to escape imminent death or great bodily harm." *Stetzer* ¶ 17. But that limitation appears nowhere in the statute's express language and the opinion identifies no textual ambiguity that requires this narrow construction. The Court of Appeals manufactures its extreme standard out of narrowing constructions imposed in some self-defense cases and by citing unpublished cases that adopt those standards without any persuasive reasoning.

A. The plain language of Wis. Stat. § 939.46(1) measures reasonability based on victims' experiences and perceptions.

Under Wis. Stat. § 939.46(1), a coercion defense requires:

> *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*. (emphasis added.)

The "actor" and "his or her act" are both singular and individual. The express language of the text thus mitigates against measuring reasonability by the responses of a person of "ordinary intelligence and

prudence"[14] who has not been a victim, and has not had to resort to desperate measures to protect themselves.

B. If Wis. Stat. § 939.46(1) is ambiguous, the rule of lenity applies.

Alternatively, this Court could find that the phrase "only means" —defined variously[15] as unquestionably the best, the best available, few, or sole—is ambiguous. If the statute is ambiguous, the rule of lenity applies.

This Court has already found a portion of Wis. Stat. § 939.46(1m), another coercion-based privilege, ambiguous, concluding that Kizer could present her defense because "when an ambiguity exists in a criminal statute, we … resolve the ambiguity in the defendant's favor." *State v. Kizer*, 2022 WI 58, ¶ 27, 403 Wis. 2d 142, 162, 976 N.W.2d 356, 366. That same principle should apply here.[16]

Under the rule of lenity, the reasonability of a particular actor must be considered in light of a reasonable crime victim's beliefs about the "only way" to protect themselves.

[14] Res. Br, 30.
[15] Meriam Webster's Online Dictionary. Available at https://www.merriam-webster.com/dictionary/only
[16] *See* Steffen Seitz, *The Rule of Lenity and Affirmative Defenses*, 102 Wash. U.L. Rev. 427, 446 (2024) ("The flip side of the court's obligation to read ambiguous penal statutes narrowly, then, is that it must read ambiguous justifications broadly.")

Several federal courts have endorsed a similar standard. In *U.S. v. Nwoye II*, 824 F.3d 1129 (D.C. Cir.2016) (Kavanaugh, J), the DC Circuit recognized that a jury might not find the appearances sufficient to provoke a reasonable person's fear, [but] they might conclude otherwise…when enlightened by expert testimony on…hypervigilance." *Id.* at 1137. The Seventh Circuit recognized the same necessity "to consider the defendant's situation, and the reasonableness of her actions and choices…in light of what is known about the objective effects of such violent and psychological abuse. *United States v. Dingwall*, 6 F.4th 744, 754, 2021 WL 3238848 (7th Cir. 2021).

C. The Court of Appeals misconstrues the precedent it cites.

The Court of Appeals cites *State v. Amundson*, 69 Wis. 2d 554, 566, 230 N.W.2d 775, 782, 1975 WL 462509 (1975), *overruled by State v. Wayerski*, 2019 WI 11, 385 Wis. 2d 344, 922 N.W.2d 468 (holding that it was not prejudicial error to instruct the jury on both the coercion and entrapment defenses) for the general proposition that "coercion is highly analogous to the privilege of self-defense." *Id*. at 568. That proposition is meaningless in the context of this case. There the Court used the analogy to explain that coercion was more like self-defense than either was like entrapment (which required inquiring into whether the defendant had a predisposition to commit a crime). *Id*.

Based on this generic claim of likeness between coercion and self-defense, the Court of Appeals cites two

self-defense cases as authority for the claim that the coercion defense requires that the criminal act go on no longer than necessary. *Stetzer* ¶ 17. This opinion does not explain why the limitations applied to self-defense claims should be applied to a coercion defense raised in an OWI case. The first case, *State v. Nollie*, 2002 WI 4, ¶ 21, 249 Wis. 2d 538, 548, cites precedent that any exception that would justify carrying a concealed weapon must be extremely narrow and not undermine the purpose of the statute. The second case involves a charge of murder and the privilege of self-defense in defense of another. *State v. Jones*, 147 Wis. 2d 806, 815, 434 N.W.2d 380 (1989). There the Court decided that the defendant was entitled to present the defense even though the amount of time that elapsed between the alleged threat and the murder could provide proof that the act was not reasonable. *Id*. at 818.

The Court of Appeals relies upon two categories of cases as justification for narrowing the privilege of self-defense: extreme crimes (such as murder) or crimes which have a previous felony conviction as a prerequisite. However, the Court of Appeals neglected to explain why the same narrowing should be applied to all crimes in which a coercion defense could be raised.

In the unpublished slip opinion in *State v. Yenter*, a case involving the coercion defense and a drunk driving crime, the Court of Appeals rejected Yenter's claim that the standard for assessing the reasonability of his actions was the subjective belief. *State v. Yenter*, 2019 WI App 1, ¶ 17, 385 Wis. 2d 211, 923 N.W.2d 167, 2018 WL 6264593 at *3. The

problem with the *Yenter* opinion is that it contains no legal analysis of what the proper standard requires and cites no precedential authority in support of its final conclusions.

The precedent cited by the Court of Appeals' opinion thus provides no legal or rational basis for rewriting Wis. Stat. § 939.46(1) to add a narrowing construction applicable to all criminal offenses.

D. *The Court of Appeals' new standard is incompatible with public policy choices recently made by the legislature and people of Wisconsin.*

Brown's central holding is that the coercion defense embodies a public policy choice between greater and lesser evils. The language of Wis. Stat. § 939.46(1), with its focus on victims seeking to protect themselves against dangers which only they can assess and respond to based on their experience, clearly recognizes a significant social value in not doubly punishing victims. And nothing in the text even hints that the "greater good" is to criminalize the failure to ask the police for help.

The recent crime victim amendments to the Wisconsin Constitution demonstrate that the legislature and the people of Wisconsin have doubled down on the public policy choice articulated in the coercion statute. The "social value" we now place on treating crime victims as people who have reasonable beliefs based on their experiences and perceptions as crime victims gives them a constitutional right "to be treated with dignity…and fairness" and a further right to

"reasonable protection from the accused." Art. I, § 9. Like the statutory provisions at issue in *Democratic Party of Wisconsin v. Wisconsin Dep't of Just.*, the key terms in Wis. Stat. § 939.46(1) should not be construed in ways that are "contrary to the policies enshrined in our state constitution, statutes, and case law." 2016 WI 100, ¶ 34, 372 Wis. 2d 460, 487, 888 N.W.2d 584, 597.

CONCLUSION

For these reasons, this Court should reverse the Court of Appeals in a decision that clarifies that the standard for establishing coercion does not depend on what is objectively reasonable to "everyman," but on what is reasonable given the experience, history, and perceptions of crime victims.

CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief produced with a proportional serif font. The length of this brief is 2,918 words.

Dated this 19th day of February, 2024.

Electronically signed by Lauren Hamvas
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