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CLERK OF WISCONSIN
SUPREME COURT

No. 2023AP874

STATE OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN,
Plaintiff-Respondent,

vs.

JOAN L. STETZER,
Defendant-Appellant-Petitioner.

Appeal from the Circuit Court for Waukesha County
The Honorable Judge Paul Bugenhagen, Jr. Presiding
Case No. 2017CM1014

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER, JOAN L. STETZER

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INTRODUCTION

In creating the coercion privilege the legislature did not restrict, limit or regulate a coerced defendant's commission of the lesser evil crime. The legislature granted a coerced defendant the legal privilege to commit the lesser evil crime, excepting only the crime of first-degree intentional homicide. The legislature could have excepted the crime of operating a motor vehicle while impaired but it has not done so.

The State's concession that Joan's "conduct" was privileged "at its inception" (State's Brief, p.7) necessarily means that the State failed to disprove the coercion defense beyond a reasonable doubt. As the State's evidence was insufficient to sustain a conviction against Joan, the Double Jeopardy Clause of the fifth amendment to the United States Constitution precludes a re-trial and the only remedy is a judgment of acquittal. ***Burks v. United States***, 437 U.S. 1, 18, 98 S.Ct. 2141, 57 L. Ed. 2d 1 (1978). ***State v. Ivy***, 119 Wis. 2d 591, 608, 350 N.W.2d 622 (Wis. 1984).

In the alternative, the State's concession has narrowed the two issues presented for review. Issue #1, asks whether an "act" entitled to privilege at its inception can be subdivided into portions and viewed in isolation before the coercion defense is applied. The answer is "no" on two separate grounds. First, forfeiture; the State argues for the first time that Joan "lost" her

coercion privilege when she saw the police car. (State's Brief, Argument I., pp.21-28). The State never raised this "lost privilege" argument before the circuit court or Court of Appeals.

Second, the plain language of Wis. Stat. §939.46(1) & §939.45, provides that if the state fails to disprove the coercion privilege beyond a reasonable doubt, the privilege "is a defense to prosecution for any crime based on that conduct." ***State v. Keeran***, 2004 WI App 4, ¶ 5, 268 Wis. 2d 761, 674 N.W.2d 570; ***Moes v. State*****,** 91 Wis. 2d 756, 763; 284 N.W. 2d 66 (1979). As the state failed to disprove Joan's coercion defense beyond a reasonable doubt Joan is entitled to a judgment of acquittal.

As to Issue #2, the circuit court did not apply the "reasonableness" standard set forth in **WIS JI-CRIMINAL 790**, which requires that the reasonableness of Joan's beliefs "must be determined from the standpoint of the defendant at the time of [her] acts and not from the viewpoint of the jury now." While acknowledging that Joan's actions were reasonable, the circuit court erred by dismissing them; "So her actions were reasonable. I don't discount that. The law however provides that it has to be the only means of preventing great bodily harm or imminent death." (R124/173:2-5, App.21).

ARGUMENT

I. Under the plain language of Wis. Stat. §939.46(1) the privilege of coercion cannot be subdivided into portions and viewed in isolation.

A. Forfeiture.

Appellate courts generally do not entertain arguments/issues that were not raised in the lower courts on the grounds of forfeiture. ***Shadley v. Lloyds of London***, 2009 WI App 165, ¶25, 322 Wis. 2d 189, 776 N.W.2d 838. Recognizing that a respondent is not limited to the same arguments made in the Circuit Court or Court of Appeals, Joan believes nonetheless that the State's changing grounds of justification for her conviction before the circuit court, the Court of Appeals and now this Court is grounds for the discretionary imposition of the forfeiture rule to the State's new argument of "lost privilege." ***State v. Lock***, 2013 WI App 80, ¶40, 348 Wis. 2d 334, 833 N.W.2d 189.

The State had the burden of proof to disprove the coercion defense at trial and its newly minted "lost privilege" argument before this Court is fundamentally unfair. Fundamental fairness dictates that if the state is going to raise a "lost" privilege defense, that argument had to be made at trial where the State held the entire burden of proof.

B. A Defendant cannot "lose" a privilege won at trial.

In February of 2022, Joan requested a jury instruction on the privilege of coercion and filed **WIS JI-CRIMINAL 790** with the court (R102, 103). Prior to taking evidence at trial, the circuit court clarified with the parties that "the defense still has to put on evidence as to coercion to get that instruction, but then it does become the State's burden, essentially to show that it was not under coercion." (R.125:14-15). Counsel agreed. At the conclusion of the evidence the Court raised the issue of whether Joan had met her burden[1] for the coercion defense to go to the factfinder. The State responded, "I don't disagree that there's evidence that supports having that jury instruction if this were to a jury. I mean, "I think that's pretty clear." (R124/146-147). The State never made an argument to the factfinder that Joan "lost" her privilege. In closing argument, the State did not argue a "lost" privilege, rather, that if the factfinder is satisfied that the coercion defense applies "then you have to find her not guilty." (R124/153:12-15).

[1] A defendant is entitled to a coercion defense instruction 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. Regarding the last prong of this test, evidence is sufficient if a reasonable construction of the evidence, viewed in a light most favorable to the accused, supports the defendant's theory. ***State v. Keeran***, 2004 WI App. 4 ¶6, 268 Wis. 2d 761, 766 (Wis. Ct. App. 2003)

The State relies heavily upon ***Keeran,*** but it is difficult to decipher how ***Keeran*** supports the State's argument that Joan "lost" her coercion privilege when she saw a police car. The State does not cite to a single case where a coercion privilege in a criminal matter was won at trial but then lost on post-trial argument.

The plain language of §939.46(1), provides that when a coercion privilege exists, the privilege "***is a defense to a prosecution for any crime based on that act, ...***" and §939.45(1), provides that "when an actor's conduct occurs under circumstances of coercion," the actor's conduct is privileged and "***is a defense to prosecution for any crime based on that conduct***." Whether the State describes Joan's act or conduct of flight from death as a "continuing offense," or a "lost" privilege, or a "new" crime, it is all meaningless as her privilege "***is a defense to prosecution for any crime based on that conduct***."

The State argues that the phrase "***the only means*** of preventing imminent death or great bodily harm to the actor or another" means that Joan "lost" her coercion privilege when she saw the police officer (who considered Joan a "suspect"). (State's Brief p.27) No authority is provided for this assertion and it ignores the State's own concession that Joan's "**conduct" was privileged "at its inception."** The phrase "the only

means" refers to Joan's act or conduct of getting in her vehicle and fleeing from her home as being the "only means" of preventing death or great bodily harm. The phrase "the only means" has no relation to the commission of the crime, it simply reflects that the act/conduct of flight was the "only means" of preventing death or great bodily harm.

Keeran is also not on point with this case. ***Keeran,*** involves the analysis that takes place *pre-trial* where the trial Court sits as a gatekeeper ensuring that a defendant who asserts a privilege meets its burden of production for the defense to go to the jury. The ***Keeran*** court found that Keeran had not produced sufficient evidence for his requested coercion defense to go to the jury. ***Keeran, @ ¶7.***

II. The circuit court erroneously examined the reasonableness of Joan's actions when it found that, "…the law doesn't ask me to determine if her actions were reasonable … The law requires that this is the only means of prevention."

While not determinative to the outcome of this appeal[2] the circuit court erred when it stated that the law does not ask the jury/factfinder to make a determination as to whether the actions of a defendant who is asserting a

[2] The State's concession that Joan's conduct was privileged means that the state failed to disprove the coercion defense and a judgment of acquittal is required. ***Burks v. United States***, 437 U.S. 1, 18 (1978). ***State v. Ivy***, 119 Wis. 2d 591, 608 (Wis. 1984).

coercion privilege were reasonable. **WIS JI-CRIMINAL 790** instructs the jury on the reasonableness standard to apply when a coercion defense is at issue;

> "In determining whether the defendant's beliefs were reasonable, ***the standard is*** what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense. The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of [her] acts and not from the viewpoint of the jury now." **WIS JI-CRIMINAL 790**, (emphasis supplied)

The circuit court found Joan's actions to be reasonable. "So her actions were reasonable. I don't discount that" (R124/173:2-5, App.21). The circuit court then erred by jumping to a conclusion of law; "The law however provides that it has to be the only means of preventing great bodily harm or imminent death" (R124/173:2-5, App.21).

Joan did not drive to Tennessee, did not stop at a tavern, did not drive an unreasonable distance; all of her actions were reasonable. The "ordinary reasonableness" standard does not mean that Joan had one and only one available course of action. The factfinder had to consider what a person of ordinary intelligence and prudence would have believed in Joan's position under the circumstances that existed at the time she was fleeing from her attacker. The reasonableness of Joan's beliefs had to be determined from her standpoint at the time she was fleeing from imminent death. The Circuit

Court's finding that Joan's actions were reasonable should end the inquiry of the reasonableness of Joan's exercise of her coercion privilege.

CONCLUSION

The State is commended for its concession that Joan was coerced and that her conduct was privileged. The State's concession means that the State failed to disprove Joan's coercion defense beyond a reasonable doubt and as such Joan cannot be convicted of the crime she was charged with. ***Moes v. State,*** 91 Wis. 2d 756, 763, 284 N.W.2d 66 (1979). We respectfully ask this court to Reverse the decision of the Court of Appeals and remand this matter to the circuit court for a judgment of acquittal.

Dated at Waukesha, Wisconsin this 27th day of February, 2025.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this petition conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm) and (c) for a reply brief produced with a proportional serif font. The length of this brief is 2,204 words, as calculated using the word count function of Microsoft Word.

Dated at Waukesha, Wisconsin this 27th day of February, 2025.

Electronically signed by Anthony D. Cotton
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