STATE OF WISCONSIN COURT OF APPEALS DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Appeal No. 2024AP524
Circuit Court Case No. 23TR1025

COLIN R. DOWLING,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE CIRCUIT COURT FOR SAUK COUNTY, THE HONORABLE PATRICIA A. BARRETT, PRESIDING.

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

Was there clear, satisfactory, and convincing evidence that the Defendant violated Wis. Stat. § 346.59(1)?

Circuit Court Answer: Yes

This Court Should Answer: Yes

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State is not requesting oral argument or publication.

STATEMENT OF FACTS

This case involves a driver who believed he was above the law because he was driving a Tesla. On January 19, 2023, at approximately 9:52pm, Trooper Cody Nicholson of the Wisconsin State Patrol was in the 97 crossover of Interstate 90 in Sauk County, Wisconsin. R.14-30; App. 030. Interstate 90 in that area is a divided freeway consisting of two lanes eastbound and two lanes westbound. R.14-31; App. 031. The speed limit is 70 miles-per-hour. R.14-31; App. 031. It was cold enough to be snowing, but Trooper Nicholson described the weather as good. R.14-31; App. 031. There were flurries off and on, but nothing that accumulated on the interstate. R.14-31; App. 031.

While stationary in the crossover, Trooper Nicholson observed a slow moving vehicle approaching his location. R.14-31; App. 031. The vehicle, a gray Tesla, had its hazard lights on. R.14-31; App. 031; R.30-98; App. 228. The vehicle was in the right lane moving at a very slow pace. R.14-31–32; App. 031–032. Trooper Nicholson noticed other

vehicles were coming up to the slow vehicle and had to swerve around it. R.14-32; App. 032. Trooper Nicholson described the speed of this slow moving vehicle to be dramatically slower than other vehicles. R.14-32; App. 032.

After the vehicle had passed Trooper Nicholson's location, he observed approximately two vehicles approaching at highway speeds in the right lane that had to move over to the left lane to pass the slow-moving vehicle. R.14-32–33; App. 032–033. The slow-moving vehicle was traveling at approximately 45 miles-per-hour when it passed Trooper Nicholson's location. R. 30-126–127; App. 256–257; Ex. 14. Trooper Nicholson testified that this driving behavior was noteworthy because the slow-moving vehicle was causing a road hazard for other vehicles and other drivers. R.14-33; App. 033. Trooper Nicholson attempted to catch up to the slow-moving vehicle and initiate a traffic stop. R.14-33; App. 033. As he was approaching the slow-moving vehicle at highway speeds, Trooper Nicholson had to dramatically decrease his speed to stay behind the vehicle. R.14-33; App. 033; Ex. 1. Trooper Nicholson testified that the shoulder of the interstate was a safe place for the vehicle to pull over, R.14-50, as it was wide enough to stop a vehicle safely. R.14-51; App. 051.

According to the occupants of the vehicle, they were driving at 45 miles-per-hour on the interstate because the Tesla was directing them to decrease their speed in order to make it to Lake Delton. R.30-95; App. 225. The occupants testified they were low on battery, and that's why they needed to decrease their speed. R.30-95; App. 225; R.30-129–132; App. 259–260. After 3–4 minutes of attempting to get the vehicle to stop, Trooper Nicholson was able to make his traffic stop. R.14-41–42; App. 041–042. He made contact with the vehicle and noticed that all

passengers of the vehicle appeared fine and uninjured. R.14-96; App. 096. Colin Dowling, the defendant-appellant, was the driver of the slow moving vehicle. R. 14-37; App. 037. Once the vehicle had stopped, the traffic stop proceeded as normal. Ex. 1. The traffic stop lasted a total of 27 minutes, and Dowling's vehicle battery did not die during that time. R.14-49; App. 049; R.30-111; App. 241. After the traffic stop, Trooper Nicholson assisted in escorting Dowling and his vehicle to the supercharger in Lake Delton. R.14-48; App. 048; R.30-159–160; App. 289–290. The two vehicles traveled a distance of 3.2 miles. R.14-69; App. 069. Both vehicles, the squad and the Tesla, made it to the supercharger. The Tesla did not break down at any point. R.14-49; App. 049. The battery did not die at any point. R.30-139; App. 269; R.30-161; App. 291.

On January 19, 2023, at the end of the traffic stop, Defendant-Appellant, Colin R. Dowling, was cited for Impeding Traffic by Slow Speed contrary to Wis. Stat. § 346.59(1). R.1. Dowling entered a not guilty plea to the citation. R.5. On November 27, 2023, a trial before the court was conducted, the Honorable Patricia A. Barrett presiding. R.14; R.30. This court trial was held in conjunction with a Jury Trial on a criminal charge of Resisting an Officer – Failure to Stop which was charged in Sauk County Case 2023CT39.[1] *Id.* At the court trial, Trooper Cody Nicholson of the Wisconsin State Patrol testified as the State's only witness. *Id.* Dowling presented two witnesses: himself and his wife, Allison Dowling. *Id.* The trial concluded that same day; however, the trial court's decision on the traffic matter, 23TR1025 was set over for December 20, 2023, to coincide with sentencing in the criminal matter. R.30-221–222; App. 351-352.

1 Dowling does not contest the jury findings of guilt in 2023CT39.

The Circuit Court made the following factual findings related to the Impeding Traffic ticket:

> We saw cars sort of whip around him really pretty quickly, the trucks whipping past his vehicle, the squad's behind him and the squad is trying to get him to pull over on the shoulder, but he hasn't pulled over yet, and there's trucks that went past. R.14-83; App. 083.
>
> What drew this officer's attention was that Mr. Dowling's vehicle was traveling less than the speed limit and he was observing cars kind of having to go around him because they were coming up too close. R.14-86; App. 086.
>
> The very first thing that caught the trooper's attention was that there was a slow-moving vehicle in the right lane and he wasn't quite sure exactly how slow it was going. R.31-8; App. 371.
>
> Cars approached from the back and went around. The trooper thought he saw two of them do that. R.31-9; App. 372.
>
> From a period of about 9:16 on January 19 until about 9:30, the speed that Mr. Dowling was traveling was somewhere between 71 and 84 miles-per-hour. It went up and down in that range. R.31-9; App. 372. At about 9:45pm, there was a significant reduction in the speed that Mr. Dowling was traveling. His speed went down to the sixties then again to the fifties. This was about a 30 percent reduction of that speed that traffic was traveling on the interstate at that point in time. R.31-9; App. 372.
>
> Between 9:45 and 9:53, the speed then went down to the mid-forties. This was a 57 percent reduction of what's traveling at that time. The Court found that it was fairly certain the vehicle was traveling someplace in the forties when the trooper observed it. R.31-9; App. 372. When the trooper got behind the vehicle, and as he was contacting dispatch, the trooper was tracking the vehicle at 27 miles-per-hour. R.31-9; App. 372.
>
> There was a significantly reduced speed and not enough [light] to cause vehicles . . . in the dark to get a clear understanding of how slow the vehicle was going to [travel] around it.[2] R.31-10; App. 373.
>
> At the time that the vehicle was traveling on the side of the road, there were large tractor trailers that went by at a very high rate of speed. R. 31-9; App. 372.

2 Words added and omitted for clearer understanding.

The Court found the defendant guilty of impeding traffic by slow speed. R.31-10; App. 373. Dowling now appeals the Trial Court's ruling.

STANDARD OF REVIEW

The sufficiency of the evidence is a question of law, which appellate courts review de novo. *Lemke v. Lemke*, 2012 WI App 96, ¶28, 343 Wis. 2d 748, 820 N.W.2d 470. However, findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. Wis. Stat. § 805.17(2). A finding is not clearly erroneous if it is supported by *any* credible evidence in the record or any reasonable inferences from that evidence. *See Insurance Co. of N. Am. v. DEC Int'l, Inc.*, 220 Wis. 2d 840, 845, 586 N.W.2d 691 (Wis. Ct. App. 1998). Unless manifestly wrong, the conclusions of the trial judge, on questions of fact, should not be disturbed. *Davies v. Jeffris*, 108 Wis. 244, 84 N.W. 153, 154 (1900). A finding of fact which is supported by significant, but disputed, evidence, should not be modified. *Kehoe v. Burns*, 84 Wis. 372, 54 N.W. 731, 732 (1893).

Questions of statutory interpretation are reviewed de novo. *State v. Patterson*, 2010 WI 130, ¶ 45, 329 Wis. 2d. 599, 790 N.W.2d 909.

ARGUMENT

Dowling asks this Court to set aside his conviction for Impeding Traffic by Slow Speed because (1) his slow speed was necessary for safe operation of his vehicle and (2) his slow speed did not impede the normal and reasonable movement of traffic. Dowling seemingly raises a

sufficiency of the evidence issue that requires some statutory interpretation by the Court.

I. The Trial Court's Findings of Fact Were Not Clearly Erroneous and Should be Upheld.

Dowling fails to make any argument in his brief that the factual findings by the trial court were clearly erroneous. He merely argues the facts are not sufficient to uphold a conviction. Such assertion is not sufficient to satisfy the heavy burden of showing that the circuit court's finding of facts were clearly erroneous; and thus, this court must not set aside those finding of facts and should affirm the ruling of the circuit court based on the discretion of the circuit court to weigh the credibility of the witnesses. It is not this court's responsibility to develop arguments for the appellant, and this court is not required to address arguments that are undeveloped or not supported by citations to the record. *See Doe 1 v. Madison Metro. Sch. Dist.*, 2022 WI 65, ¶35, 403 Wis. 2d 369, 976 N.W.2d 584 (stating that appellate courts "do not step out of [their] neutral role to develop or construct arguments for parties" (citation omitted)).

II. The Evidence Presented at Trial Was Sufficient to Support the Trial Court's Finding That The Defendant Impeded Traffic By Slow Speed.

Having established that the circuit court's findings of fact were not clearly erroneous, this Court must determine whether "a reasonable trier of fact could be convinced of the defendant's guilt to the required degree of certitude by the evidence which it had a right to believe and accept as

true." *City of Milwaukee v. Wilson,* 96 Wis. 2d 11, 21, 291 N.W.2d 452 (1980) (citing *Lock v. State,* 31 Wis.2d 110, 114–15, 142 N.W.2d 183 (1966)). A reviewing court's task is limited "to determining whether the evidence presented could have convinced a trier of fact, acting reasonably, that the appropriate burden of proof had been met." *Wilson,* 96 Wis. 2d at 21. While appellate courts are to review the application of law *de novo,* they are able to benefit from the lower court's analysis. *See City of Muskego v. Godec,* 167 Wis.2d 536, 545, 482 N.W.2d 79 (1992).

In relevant part, Wis. Stat. § 346.59(1) states, "[n]o person shall drive a motor vehicle at a speed so slow as to impede the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation …." Proof of violation of this statute requires proof of two elements:

(1) The defendant was driving a motor vehicle.
(2) The speed of the defendant's vehicle was so slow as to impede the normal and reasonable movement of traffic.

Wis. JI—Civil 1300. The evidence presented at trial was sufficient to show Dowling violated Wis. Stat. § 346.59(1). The officer's attention was drawn to Dowling's vehicle based on its slow speed and the fact that cars were having to go around him. R.14-86; App. 086; R.31-8; App. 371. The trial court seemed to find the Trooper credible in his testimony that he saw two vehicles going around Dowling's vehicle because the circuit court noted "Cars approached from the back and went around. The trooper thought he saw two of them do that." R.31-9; App. 372. The circuit court also found that vehicles whipped around the defendant's vehicle pretty quickly. R.14-83; App. 083.

The circuit court then went on to analyze the change in Dowling's speed. The Court noted that from a period of about 9:16pm until about

9:30pm, Dowling traveled at somewhere between 71 and 84 miles-per-hour. It went up and down in that range. R.31-9; App. 372. There was a significant reduction in speed at about 9:45pm when Dowling reduced his speed to the sixties and then to the fifties. The circuit court noted this was about a 30 percent reduction of the speed that traffic was traveling on the interstate (i.e. a 30 percent reduction from 70 miles per hour). R.31-9; App. 372. Between 9:45pm and 9:53pm, Dowling reduced speed again to the mid-forties. This was a 57 percent reduction of normal interstate speed. The Court found that it was fairly certain Dowling traveled at someplace in the forties when the trooper observed Dowling's vehicle. R.31-9; App. 372.

Dowling has not challenged the circuit court's factual findings, nor presented any evidence the court's findings were clearly erroneous. Thus this court shall not set aside the circuit court's findings, and shall give due regard to the opportunity of the trial court to judge the credibility of the witnesses. *See* Wis. Stat. § 805.17(2). Here, Dowling drove his vehicle at 40 miles-per-hour on the interstate. This is after Dowling decreased his speed from 71-84 miles-per-hour to "someplace in the forties" in the span of seven minutes. That slow speed combined with the trooper's observations of two vehicles approaching from the back and going around Dowling's slow-moving vehicle show that those two vehicles were impeded by Dowling's slow speed.

a. By Its Plain Language, Wis. Stat. § 346.59(1) Does Not Require Traffic Be Impeded For a Violation to Occur.

"The purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended

effect." *State v. Buchanan*, 2013 WI 31, ¶ 23, 346 Wis. 2d 735, 828 N.W.2d 847 (quoting *State v. Ziegler*, 2012 WI 73, ¶42, 342 Wis. 2d 256, 816 N.W.2d 238) (additional citations omitted). When a reviewing court interprets a statute, it "begins with the plain language of the statute." *State v. Dinkins*, 2012 WI 24, ¶ 29, 339 Wis. 2d 78, 810 N.W.2d 787 (citing *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110). A court "generally give[s] words and phrases their common, ordinary, and accepted meaning." *Id.* (citing *Kalal*, 271 Wis. 2d 633, ¶ 45). A reviewing court is to "interpret statutory language reasonably, 'to avoid absurd or unreasonable results.'" *Id.* (quoting *Kalal*, 271 Wis. 2d 633, ¶ 46). "An interpretation that contravenes the manifest purpose of the statute is unreasonable." *Id.* (citing *Kalal*, 271 Wis. 2d 633, ¶ 49). "[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Kalal*, 271 Wis. 2d 633, ¶ 46. In determining the plain language meaning of a statute, a court may consider the scope, context, and purpose of the statute, so long as they "are ascertainable from the text and structure of the statute itself." *Id.* ¶ 48.

Wis. Stat. § 346.59 governs minimum speed violations. Subsection (1) of that statute states,

> "No person shall drive a motor vehicle at a speed so slow as to impede the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or is necessary to comply with the law."

Wis. Stat. § 346.59(1). The issue here is whether Wis. Stat. § 346.59 requires a certain number of vehicles to be affected by another driver's speed for the statute to be violated. The State argues it does not.

Interpretation of this statute hinges on the meaning of the preposition "as to" within the context of the statute. In reading the statute, the legislature appears to focus on the speed of the vehicle, not what happens as a result of the speed. The word "impede" is understood to mean "to interfere with or slow the progress of." See Impede, MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/impede (last visited Dec. 3, 2024). "As to" is directly before "impede," which means "as to" modifies the verb "impede."

If the legislature intended to prohibit impeding traffic, the legislature would have phrased the statute to focus on impeding. For example, the statute would say, "No person shall impede traffic by slow speed except when reduced speed is necessary for safe operation or is necessary to comply with the law." But that's not what the statute says. The statute prohibits driving at a speed so slow such that it would interfere with *or* slow down traffic. The subject of the statute is the speed of the vehicle. Dowling asks the court to focus on whether he slowed traffic, but this argument ignores half of the definition of "impede." The State asserts Dowling both interfered with and slowed the normal movement of traffic.

Dowling's slow speed interfered with the normal movement of traffic as it caused vehicles to deviate from their intended lane of travel in an effort to avoid colliding with Dowling's rear. Trooper Nicholson testified that he saw two vehicles approached from the back and go around Dowling's vehicle. R.31-9; App. 372. Whether the other vehicles had to slow down to do so is not the key factor. What matters is that Dowling interfered with the progress of those two vehicles on the road.

Dowling also violated the statute by slowing down the movement of traffic. Wis. Stat. § 340.01(68) defines "traffic" as "pedestrians, ridden or herded or driven animals, vehicles and other conveyances, either singly or together, while using any highway for the purpose of travel." Wis. Stat. § 346.01 states that the words and phrases defined in § 340.01 are used in the same sense in this chapter unless a different definition is specifically provided. A police squad car is indisputably a "vehicle" and thus constitutes traffic under Wis. Stat. § 346.59 because even a single vehicle constitutes "traffic" under the Wisconsin statutes. Trooper Nicholson testified that as he was approaching the slow-moving vehicle at highway speeds, he had to dramatically decrease his speed to stay behind the vehicle. R.14-33; App. 033; Ex. 1. This shows that Trooper Nicholson's vehicles was impeded by the defendant's slow speed, thus the defendant violated the statute regardless of whether other vehicles were actually impeded.

The cases cited by the defendant do not support the defendant's arguments on this point. *State v. Baudhuin*, 141 Wis. 2d 642, 416 N.W.2d 60 (1987) does not state that a minimum number of vehicles is necessary to violate § 346.59, and the clear language of Wis. Stat. § 340.01(68) demonstrates a single vehicle constitutes "traffic" for the purposes of § 346.59. *Baudhuin* concluded that a police officer's subjective intent not to issue a citation did not impact the reasonable suspicion analysis where articulable facts to believe a defendant violated a traffic law were present. Further, *Slattery v. Lofy,* 45 Wis. 2d 155, 172 N.W.2d 341 (1969), involved a civil suit where the court determined that a motorist traveling 15 to 18 miles per hour, when he was struck from the rear, was not the cause of the accident where the motorist was entering an area where

reduced speed was required and passing lane was free of traffic. Neither case state that a specific number of vehicles need to be affected by another driver's speed for Wis. Stat. § 346.59 to be violated. Dowling provides little argument as to why *Baudhuin or Lofy* require a different interpretation of Wis. Stat. § 346.59 than an interpretation that follows the clear language of § § 340.01 and 346.01.

III. "Safe Operation of the Vehicle" Does Not Include the Ability of a Driver to Reach His/Her Destination.

Determination of whether Dowling's speed was necessary for safe operation requires interpretation of what qualifies as safe operation under the statute. Dowling argues he needed to drive 45 miles-per-hour on the interstate so that his vehicle would not run out of fuel and he would not be stranded on the shoulder of the highway. Def. Br. 16–20. In other words, Dowling argues he needed to drive slow so he could reach his destination.

Wis. Stat. § 346.59(1) provides an exception in the event that "reduced speed is necessary for safe operation or is necessary to comply with the law." Before determining whether the speed was necessary for safe operation, the Court must determine what qualifies as safe operation for the purpose of the statute. The State has not found any case law interpreting this specific statutory language. However, the term "safe operation" is found in four other statutes in the Motor Vehicle Code (Chapters 340-351 of the Wisconsin Statutes).

Wis. Stat. § 346.03(2)(b), which governs the applicability of rules of the road to authorized emergency vehicles, states "[t]he operator of an authorized emergency vehicle may proceed past a red or stop signal

or stop sign, but only after slowing down as may be necessary for safe operation." In practice, this allows authorized emergency vehicles to proceed through a stop sign as long as doing so will not endanger other vehicles around it.

The term "safe operation" is also found in Wis. Stat. § 343.13, which governs restrictions on driving licenses. Wis. Stat. § 343.13(1) states:

> [t]he department upon issuing any license pursuant to this chapter may . . . impose restrictions suitable to the licensee's operating ability with respect to the type of or special mechanical control devices required on a motor vehicle which the licensee may operate, or such other restrictions applicable to the licensee as the department may determine to be appropriate to assure the safe operation of a motor vehicle by the licensee.

The term is found, again, in Wis. Stat. § 343.16, which governs driver's license examination of applicants and re-examination of licenses persons. Wis. Stat. § 343.16(2)(d), which provides a waiver for testing standard to motor bicycles or mopeds, states:

> The department may promulgate rules authorizing a license examiner to waive the operating skill examination of a person applying for a license to operate a motor bicycle or moped if the applicant has the physical ability to operate the vehicle safely. The rules shall ensure that the applicant demonstrates knowledge of the traffic laws necessary for the safe operation of the vehicle.

Finally, "safe operation" is found in Wis. Stat. § 343.21, which governs license fees. Subsection (2)(b) of that statute, which applies to fees a driver, states, in part,

> Payment of the examination fee entitles the person to not more than 3 tests of the person's ability to safely operate the vehicle proposed to be used under s. 121.555(1)(a). If the applicant does not pass the examination for safe operation of the vehicle in 3 such tests, then a 2nd examination fee in the same amount shall be paid, which payment entitles the person to not more than 3 additional tests.

While the term "safe operation" is not explicitly used in the statutory language of Wis. Stat. § 346.63, which governs OWI-related offenses, at trial, the State must prove that the defendant is under the influence to a point where their ability to "safely control the vehicle be impaired." Wis. JI—Criminal 2663. The State has to establish that "the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle." *Id.*

Looking at "safe operation" throughout the motor vehicle code, "safe operation" is clearly used to refer to safely keeping the vehicle in motion. Nowhere can the State find any law that states reaching a destination qualifies as safe operation of the vehicle. Throughout the Wisconsin Statutes, it's clear that "safe operation" applies to the motion of the vehicle and the driver's ability to control it. Not the destination where the vehicle is headed.

There is no evidence in this case that indicates Dowling needed to drive as slow as he did in order to keep his vehicle in motion. In fact, we know that he could have safely driven at highway speeds because he was traveling at that rate prior to receiving the low battery notification from his vehicle.

Accordingly, this Court should find that the use of "safe operation" in Wis. Stat. § 346.59(1) does not consider the ability to reach one's destination without running out of fuel. Further, because Dowling's excuse is not considered under the exception carved out in § 346.59(1), that exception is not available to him.

IV. The Evidence Presented at Trial Was Sufficient to Support the Trial Court's Finding That The Defendant's Slow Speed Was Not Necessary for Safe Operation of the Vehicle.

As discussed above, the State contends that reaching a destination does not qualify as "safe operation" for the purposes of the statute, thus this Court should find the exception does not apply to Mr. Dowling. Assuming, *in arguendo*, that reaching a destination does qualify as safe operation, Dowling's slow speed was unnecessary as he had multiple options available to him that evening to safely operate his vehicle.

Dowling asks the Court to set aside his conviction because his slow speed was necessary for safe operation of his vehicle. Def. Br. 20. Dowling argues it was undisputed that his reduced speed was necessary for safe operation of the vehicle. That's a disingenuous argument to present to the Court as that was the disputed issue at trial. Dowling's trial counsel argued to the trial court that the slow speed was necessary for safe operation of the vehicle. R. 15-3. The State provided brief argument on that point as well. R.41-3–5; App. 377–379. One of the issues at the trial was clearly whether the slow speed was necessary for safe operation of the vehicle. To say it was undisputed mis-understands and mis-represents the issues at the trial.

The evidence presented at the trial shows that Dowling's speed was not necessary. Necessary is understood to mean "absolutely needed," "of inevitable nature." See Necessary, MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/necessary (last visited Dec. 4, 2024). Necessity is not defined within the traffic code; however, necessity is a recognized defense available to defendants in criminal cases. While not raised in this case, reviewing how that defense

is used and defined will help the court determine how "necessary" is used and defined in the context of Wis. Stat. § 346.59.

Wis. Stat. § 939.47 governs the necessity defense. That statute states,

> Pressure of natural physical forces which causes the actor reasonably to believe that his or her act is the only means of preventing imminent public disaster, or 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.

When raised at trial, the jury is given the following instruction for a necessity defense:

> The defense of necessity is an issue in this case. The defense of necessity allows a person to engage in conduct that would otherwise be criminal under certain circumstances.
>
> The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant was not acting lawfully under the defense of necessity.
>
> The law allows the defendant to act under the defense of necessity only if the pressure of natural physical forces caused the defendant to believe that his act was the only means of preventing [imminent public disaster] [imminent death or great bodily harm to himself (or to others)] and which pressure caused him to act as he did.
>
> In addition, the defendant's beliefs must have been reasonable. A belief may be reasonable even though mistaken. 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 his acts and not from the viewpoint of the jury now.

Wis. JI—Criminal 792. In *State v. Anthuber*, 201 Wis.2d 512, 538, 549 N.W.2d 477 (Ct. App. 1996) (citing *State v. Olsen*, 99 Wis.2d 572, 577-78, 299 NW.2d 632 (Ct. App. 1980)), the Court of Appeals broke up the jury instruction into four elements for the necessity defense: (1) the defendant

must have acted under pressure from natural physical forces; (2) the defendant's act was necessary to prevent imminent public disaster, or death, or great bodily harm; (3) the defendant had no alternative means of preventing the harm; and (4) the defendant's beliefs were reasonable.

There is no evidence that Dowling acted under pressure from natural physical force. In *State v. Anthuber*, 201 Wis.2d 512, 518, 549 N.W.2d 477 (Ct. App. 1996), the court rejected a claim that heroin addiction, coupled with the Department of Corrections refusal to provide him with methadone treatment, established a necessity defense. The Court held that "the "force" affecting Anthuber was not a "natural physical force" because he set it in motion when he made the decision to start using heroin and there is no evidence that he had no control over whether to make this initial choice. *State v. Anthuber*, 201 Wis. 2d 512, 520, 549 N.W.2d 477, 480 (Ct. App. 1996). Likewise, Dowling set in motion any low fuel notification when he made the choice to not fill his battery all the way. Dowling only fueled his vehicle as much as he believed he needed to get to the next place. Thus, any low fuel level is a problem of Dowling's own making.

There is no evidence that Dowling's slow speed was necessary to prevent imminent public disaster, or death, or great bodily harm. The vehicle was not in danger. There was snow; however, it was not accumulating on the roadway such that drivers would need to drive slow to avoid sliding. There was no rain or other weather that was reducing visibility. There is no evidence to show that public disaster, death, or great bodily harm would have occurred had Dowling continued at normal highway speeds. The State contends Dowling's slow speed produced the

opposite result: danger to all vehicles on the roadway, including Dowling's vehicle.

The evidence is sufficient to clearly show Dowling had alternative means of preventing the harm. He could have pulled over to assess the status of his vehicle. He could have exited any of the exits between Madison and Lake Delton to fuel his vehicle. He could have proactively called law enforcement for assistance. He could have been a responsible driver and fully fueled his vehicle. Instead, his made a careless decision to continue driving.

Dowling relies on two cases to support his argument, *Slattery v. Lofy*, 45 Wis. 2d 155, 172 N.W.2d 341, and *Leon v. Fedex Ground Package Sys., Inc.*, 163 F. Supp. 3d 1050 (D.N.M. 2016), Def. Br. 18–20. The defendant's reliance on *Slattery v. Lofy* is misplaced. *Lofy* involved a civil suit where the court determined that a motorist traveling 15 to 18 miles per hour when he was struck from the rear was not the cause of the accident where motorist was entering area where reduced speed was required and passing lane was free of traffic. The *Lofy* court did not address whether the speed was necessary for safe operation of the vehicle, as that was not in issue. To the contrary, the issue here is not whether slow speed was necessary to comply with the law, but whether Dowling's speed was necessary for safe operation of the vehicle.

The facts in *Leon* also do not support Dowling's claim that his speed was necessary for safe operation of his vehicle. In *Leon*, there was evidence that the other driver, Payne, had mechanical issues with his truck. Payne stopped his vehicle on the shoulder of the interstate to evaluate a mechanical defect in the vehicle he was operating. Whereas, here, there is no evidence that Dowling's vehicle had mechanical issues

which required slow speed. Further, Payne was re-entering the interstate from the shoulder which inherently required him to drive slower than traffic until such a time he was able to reach highway speeds. In this case, Dowling was not re-entering the interstate. He was traveling continuously on Interstate 90/94 between Madison and Lake Delton.

As discussed above, the State contends that reaching a destination does not qualify as "safe operation" for the purposes of the statute, thus this Court should find the exception does not apply to Mr. Dowling. Assuming, *in arguendo*, that reaching a destination does qualify as safe operation, this Court should find Dowling's slow speed was unnecessary as he had multiple options available to him that evening to safely operate his vehicle.

CONCLUSION

For all the foregoing reasons, the State respectfully requests this Court affirm the Circuit Court's conviction.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.49(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 5,595 words.

Signed:

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I certify that an electronic copy of this brief complies with the requirement of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed brief filed this date. A copy of this certificate has been served with the paper copies of this brief and served upon all opposing parties.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(3)(b)

I hereby certify that filed with this brief, in a separate document, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under Wis. Stat. §§ 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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