.

COURT OF APPEALS
DECISION
DATED AND FILED

December 28, 2001

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 01-1494-CR **Cir. Ct. No. 99-CM-155**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAWRENCE M. VENTRICE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marquette County: RICHARD O. WRIGHT, Judge. *Reversed and cause remanded*.

¶1 DYKMAN, J.[1] Lawrence Ventrice appeals from a judgment of conviction for four counts of causing injury by use of a motor vehicle while under

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

the influence of an intoxicant pursuant to WIS. STAT. § 346.63(2)(a)1, and four counts of causing injury while operating a motor vehicle with a prohibited alcohol concentration pursuant to WIS. STAT. § 346.63(2)(a)2. Ventrice contends: (1) the strict liability offense he is charged with entitles him to assert a defense of coercion, and (2) because he offered sufficient evidence to warrant a jury instruction on coercion, he should have been permitted to assert that defense at trial. We conclude that § 346.63(2)(a) does not preclude a coercion defense and that Ventrice satisfied his burden of production so that he was entitled to argue the defense before a jury. We therefore reverse and remand for a new trial.

BACKGROUND

¶2 In May 1999, Ventrice accompanied friends and relatives to a local tavern. After he spent some time inside drinking, Ventrice moved to an outer porch of the tavern, then re-entered to play pool with a friend. Wanda Jessman, the owner of the tavern, approached Ventrice and accusing him of failing to shut the back door of the tavern. After a brief verbal altercation between Ventrice and Jessman, Ventrice struck Jessman on the face.

¶3 Ventrice left the tavern, and sat in his automobile for a few minutes. He was then followed by a number of patrons who appeared agitated about his conduct. The patrons began hitting his car windows, demanding that he leave. Ventrice started his vehicle and began driving out of the parking lot. He struck four of the patrons who had followed him out of the bar. Ventrice was charged with four counts of causing injury by intoxicated use of a motor vehicle pursuant to WIS. STAT. § 346.63(2)(a)1 (1999-2000), and four counts of causing injury while operating a motor vehicle with a prohibited alcohol concentration pursuant to WIS. STAT. § 346.63(2)(a)2.

¶4 During trial, Ventrice attempted to assert the defense of privilege, based on the theory that the tavern patrons forced him to leave the parking lot quickly and strike members of the crowd because he feared he would be attacked and injured if he remained. The State filed a motion in limine to prevent Ventrice from asserting the defense. The court reserved its ruling, and the case proceeded to trial. On the second day of trial, the court ruled that Ventrice could not assert the privilege based on the facts presented.

¶5 Ventrice made an offer of proof, in which he asserted several facts. He testified that shortly before the incident, Jessman accused Ventrice of leaving the back door open, and shouted several obscenities at him. Ventrice said that the first time Jessman yelled at him, he told her that he had not left anything open, and Jessman walked away. A few minutes later, Jessman came back and again reprimanded for Ventrice for opening the "fucking doors and the windows." In response, Ventrice threw his cue stick against the wall and his cue ball on the floor. Ventrice stated that Jessman put her finger in his face, and when Ventrice attempted to push her out of the way, his hand slipped and he struck her in the jaw. Ventrice's friend, Ruth Baker, warned Ventrice to "Get out of here. Get the hell out of here." Ventrice left.

¶6 Ventrice testified that when he got to his vehicle, "I was sitting there for a few minutes. I was going to wait for my daughter because she was going to drive." He then testified that patrons began leaving the tavern and coming toward him. Ruth Baker came out of the tavern at the same time and told Ventrice to lock the doors because "They're after you. They're going to kill you." Ventrice locked the doors, and soon after his car was surrounded with tavern patrons who were "banging on the window and yelling and screaming" and trying to get inside the car. Ventrice stated that he was "terrified" because he had recently had surgery on

his back. He was concerned that a physical confrontation with the tavern patrons would leave him crippled. Ventrice stated that he started the vehicle to try and scare the patrons who were trying to enter the vehicle.

¶7 As he left the parking lot, Ventrice recalled that patrons began running towards the vehicle. He estimated his speed at ten to fifteen miles per hour when a patron stepped in front of his car. Ventrice stated that he took his foot off the gas pedal but did not apply the brake, and admitted that he struck bar patrons with his vehicle. He was fearful that if he stopped his vehicle, "they would all get me and that would be it." After his offer of proof was completed, the trial court found Ventrice guilty on all eight counts. He appeals.

DECISION

A. Standard of Review

¶8 We use a specialized standard of review when considering a trial court's decision to prevent a defendant from asserting a particular defense. To be entitled to assert a defense, Ventrice has the initial burden of production. ***State v. Staples***, 99 Wis. 2d 364, 376-77 n.4, 299 N.W.2d 270 (Ct. App. 1980). The State then carries the burden of persuasion in negating the defense beyond a reasonable doubt. ***Moes v. State***, 91 Wis. 2d 756, 766, 284 N.W.2d 66 (1979). To meet his burden of production, Ventrice must show that a reasonable construction of the evidence supports his defense. *See* ***State v. Coleman***, 206 Wis. 2d 199, 213, 556 N.W.2d 701 (1996). We may not consider the totality of the evidence, but must view the evidence in a light most favorable to the defendant. *See* ***Johnson v. State***, 85 Wis. 2d 22, 29, 270 N.W.2d 153 (1978).

B. Availability of Defense of Coercion for WIS. STAT. § 346.63(2)(a).

¶9 The availability of any defense of privilege is governed by WIS. STAT. § 939. 45.[2] That statute provides six circumstances in which such a defense may be claimed: (1) coercion or necessity as defined in WIS. STAT. § 939.46 and WIS. STAT. § 939.47; (2) self-defense, defense of others or defense of property; (3) fulfilling the duties of public office; (4) the reasonable accomplishment of a lawful arrest; (5) parental discipline; and (6) where otherwise provided by statutory or common law. Ventrice argues that his conduct falls within the defense of coercion under WIS. STAT. §§ 939.45(1) and 939.46(1). Section 939.46(1) provides:

---

[2] WIS. STAT. § 939.45 provides in part:

> The fact that the actor's conduct is privileged, although otherwise criminal, is a defense to prosecution for any crime based on that conduct. The defense of privilege can be claimed under any of the following circumstances:
>
> (1) When the actor's conduct occurs under circumstances of coercion or necessity so as to be privileged under s. 939.46 or 939.47; or
>
> (2) When the actor's conduct is in defense of persons or property under any of the circumstances described in s. 939.48 or 939.49; or
>
> (3) When the actor's conduct is in good faith and is an apparently authorized and reasonable fulfillment of any duties of a public office; or
>
> (4) When the actor's conduct is a reasonable accomplishment of a lawful arrest; or
>
> ….
>
> (6) When for any other reason the actor's conduct is privileged by the statutory or common law of this state.

> **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.

¶10 Therefore, to be entitled to assert the defense of coercion, Ventrice would have to show that a reasonable jury could conclude: (1) he was threatened by a person other than a coconspirator; (2) he reasonably believe that he was in danger of death or great bodily harm; (3) the harm was imminent; (4) he reasonably believed that violating the law was the only means of preventing the harm; and (5) the threat of harm caused him to act as he did.

¶11 The State argues that WIS. STAT. § 346.63(2)(a) is a strict liability crime, and therefore, "privilege defenses are to be restrictively applied." The State then asserts that Ventrice is required to satisfy the five-part test set forth in ***State v. Coleman***, 206 Wis. 2d at 212-13.

¶12 A crime imposes strict liability if the prohibited behavior is punishable based on a defendant's behavior regardless of his or her intent. ***State v. Polashek***, 2001 WI App 130, ¶31, 246 Wis. 2d 627, 630 N.W.2d 545. A conviction under WIS. STAT. § 346.63(2)(a) can be proven by showing that the defendant: (1) was driving; (2) caused injury to another person; and (3) was either under the influence of an intoxicant or had a prohibited alcohol concentration. Intent is not included among the elements for a violation of WIS. STAT. § 346.63(2)(a); "the offender need not have culpability or bad purpose" to be convicted. ***State v. Dundon***, 226 Wis. 2d 654, 664, 594 N.W.2d 780 (1999). We therefore agree that it is a strict liability offense.

¶13 The State concedes that even strict liability crimes may be subject to a privilege defense.[3] The preamble to WIS. STAT. § 939.45 states: "The fact that the actor's conduct is privileged, although otherwise criminal, is a defense to prosecution for *any crime* based on that conduct." (Emphasis added.) Further, in ***State v. Brown***, 107 Wis. 2d 44, 52-53, 318 N.W.2d 370 (1982), in which the defendant sought to assert a privilege defense to speeding, the supreme court rejected the argument that "strict liability" may be equated with "absolute liability." The court explained:

> [R]ecognizing a defense of legal justification does not necessarily conflict with the concept that violation of a traffic law is a strict liability offense. The basic concept of strict liability is that culpability is not an element of the offense and that the state is relieved of the burdensome task of proving the offender's culpable state of mind. When the defendant in the case at bar claims legal justification, he is not seeking to disprove a statutorily required state of mind. Instead he is claiming that even though he knowingly violated the law, his violation was privileged under the circumstances.
>
> … [T]he 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 observed.

Id. at 53. The court then concluded that "when determining whether we should recognize any defenses to a strict liability traffic defense, we must determine

[3] The State has made this same concession in a related case currently pending before the supreme court. At issue in ***State v. Nollie***, 00-0744-CR, is whether and under what circumstances a defendant may assert the defense of self-defense under WIS. STAT. § 939.45(2) with regard to the crime of carrying a concealed weapon. At oral argument, the State argued that the defendant should not be able to assert self-defense "under the facts of this case." *See* Real Player Audio File: Oral argument for ***State v. Nollie***, *available at* http://www.courts.state.wi.us/ra/000744/.ram. The majority of the justices' questions likewise focused on whether the facts merited use of the defense rather than whether the defense was available for the crime at all. However, some of the justices questioned whether carrying a concealed weapon might be conceptually inconsistent with self-defense because carrying a concealed weapon does not involve a threat of force.

whether the public interest in efficient enforcement of the traffic law is outweighed by other public interests which are protected by the defenses claimed." ***Id.*** at 54.

¶14 The supreme court again considered the availability of privilege defenses to strict liability crimes in ***Coleman***. There, the court considered "under what circumstances does a defense of privilege exist to a charge of felon in possession of a firearm?" ***Coleman***, 206 Wis. 2d at 202. After noting that courts in other jurisdictions had "overwhelmingly determined that a defense of privilege exists" to felony possession of a firearm, the court concluded that "a narrow defense of privilege under WIS. STAT. § 939.46(6) [common law privilege] exists to a charge of felon in possession of a firearm." ***Id.*** at 208, 210.[4] The court then set forth a five-element test that a defendant must "prove" in order to be entitled to the defense.[5]

[4] Although ***Coleman*** addressed only the availability of a defense under WIS. STAT. § 939.45(6), a later case suggests that each of the privileges enumerated in § 939.45 may be available as a defense to a felony possession charge. *See* ***State v. Black***, 2001 WI 31, ¶21, 242 Wis. 2d 126, 624 N.W.2d 363. ("A felon who violates § 941.29(2)(b) may be able to assert one of the six privileges enumerated in WIS. STAT. § 939.45 by way of a defense.")

[5] The five-part test provide that the defendant must prove:

(continued)

¶15 Finally, in ***Dundon***, 226 Wis. 2d at 662, the supreme court considered "whether, and to what extent, the defense of privilege is available to a person charged with the crime of carrying a concealed weapon." Although the court noted that WIS. STAT. § 939.45 provides that it applies to "any crime," the court suggested that "any crime" does not necessarily mean "any crime":

> [C]ommon sense suggests that the defense of privilege does not fit easily with certain crimes. Recognition of the privilege for some crimes would undermine the objective in criminalizing conduct. In other instances, the limitations of a privilege may be incompatible with the elements of a crime. In still other situations, the nature of the crime is such that the defense of privilege cannot reasonably apply.

Id. at 662-63. The court then concluded that "the defense of privilege applies by statute to 'any crime' but the defense may be limited for some crimes to extraordinary facts." ***Id.*** at 663. Further, because carrying a concealed weapon is a strict liability crime, WIS. STAT. § 939.45 "must be applied restrictively so as not to undermine the objective of the statute." ***Id***. at 665.

> (1) the defendant was under an unlawful, present, imminent, and impending threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury, or the defendant reasonably believes he or she is under such a threat; (2) the defendant did not recklessly or negligently place himself or herself in a situation in which it was probable that he or she would be forced to possess a firearm; (3) the defendant had no reasonable, legal alternative to possessing a firearm, or reasonably believed that he or she had no such alternative; in other words, the defendant did not have a chance to refuse to possess the firearm and also to avoid the threatened harm, or reasonably believed that he or she did not have such a chance; (4) a direct causal relationship may be reasonably anticipated between possessing the firearm and the avoidance of the threatened harm; (5) the defendant did not possess the firearm for any longer than reasonably necessary.

State v. Coleman, 206 Wis. 2d 199, 210-11, 556 N.W.2d 701 (1996).

¶16 The court considered the applicability of each provision of WIS. STAT. § 939.45, but concluded: "we find no possible basis for their application to the facts in this case." ***Id.*** at 665-69, 677. Relevant to this case, the court determined that Dundon could not claim a defense of coercion under § 939.45(1) because he did not establish any "threat by a person." ***Id.*** at 666. Finally the court rejected Dundon's request to extend the common law privilege recognized in ***Coleman*** to carrying a concealed weapon, noting that Dundon had failed to point out case law that had created such a privilege. ***Id.*** at 670-71.

¶17 Comparing ***Brown*** and ***Coleman*** to the present case provides us with little guidance. Both decisions considered only the application of common law defenses of privilege and not explicit statutory defenses such as coercion. We therefore reject the State's assertion that the five-element test adopted in ***Coleman*** should apply here. This conclusion is further supported by ***Dundon***, which suggested that the common law defense recognized in ***Coleman*** for felony possession of a firearm was not widely applicable to other crimes.

¶18 The legislature has not foreclosed a coercion defense in cases under WIS. STAT. § 346.63(2)(a). WIS. STAT. § 939.46(1) provides that coercion is a defense for any crime except first-degree intentional homicide. The fact that the legislature excepted homicide from the statute suggests that had it intended to eliminate the defense for other crimes, it would have done so. Further, there are no limitations of the defense that are incompatible with the elements of the crime. And the trend in other jurisdictions is to allow such a defense if the evidence supports it. *See, e.g.,* ***Bodner v. State***, 752 A.2d 1169 (Del Supr. 2000); ***State v. Reidl***, 807 P.2d 697 (Kan. Ct. App. 1991); ***State v. Shotton***, 459 A.2d 1105 (Vt. 1983).

¶19 Under ***Dundon***, WIS. STAT. § 939.45 applies to any crime, but must be "applied restrictively so as not to undermine the objective of the statute." 226 Wis. 2d at 665. We therefore conclude that a defense of coercion under WIS. STAT. §§ 939.45(1) and 939.46(1) may be asserted in a prosecution for injury by intoxicated use of a vehicle. Accordingly, we will apply the elements of the defense of coercion to the facts of this case to determine if a reasonable construction of the evidence supports this defense, viewing the facts in the light most favorable to Ventrice, as we must.

C. Application of WIS. STAT. § 939.46(1) to the Facts

1. Threat by a Person Other than a Coconspirator

¶20 Ventrice satisfied this requirement. He was threatened by not just one but many people who had surrounded his car and, obviously, none of these people could be described as "co-conspirators." The record does not reflect whether anyone in the crowd was making express verbal threats while he was in his car. However, witnesses testified that they were shouting at him, had surrounded his car, and were banging on the windshield. This is sufficient to allow a reasonable jury to conclude that Ventrice was being threatened.

2. Reasonable Belief of Death or Great Bodily Harm

¶21 Ventrice must also show that a reasonable construction of the evidence would support a finding that he had a reasonable belief he was at risk of death or great bodily harm. Although the standard is an objective one, *see* ***State v. Horn***, 126 Wis. 2d 447, 455, 377 N.W.2d 176 (Ct. App. 1985), reasonableness is

"determined from the standpoint of the defendant at the time of his acts." WIS JI-CRIMINAL 790. Further, "a belief may be reasonable even though mistaken." ***Id.***[6]

¶22 Ventrice testified during his offer of proof that while seated in his vehicle during the incident, several patrons from the bar surrounded the vehicle, began shouting, pounding on the windshield, leaning on the car, and attempting to open the doors. The bar owner, Wanda Jessman, tried but was unable to physically restrain the crowd from pursuing Ventrice. Ventrice's friend, Ruth Baker, warned Ventrice, "They're after you. They're going to kill you." Amy Kruger testified that patrons also surrounded her car and began pounding on her windows. They indicated to her that they believed she was Ventrice's daughter.

¶23 The record does not reflect whether anyone outside had weapons. Regardless, a reasonable person in Ventrice's position could have believed that he was in danger of great bodily harm. Ventrice stated, "I was terrified. I had just undergone a slipped disk surgery …. And, god, if they would have got me, they would have crippled me. They would have paralyzed me if they would have hit me on the neck."

¶24 The combined factors of an angry crowd yelling and pounding on his car, a warning from a friend that the crowd would kill him, and a medical condition making Ventrice significantly more vulnerable to serious injury are sufficient to satisfy this element. Ventrice could have reasonably believed he was in danger of great bodily harm.

[6] We note, however, that we do not consider Ventrice's state of intoxication in determining whether he acted reasonably.

3. Imminent Harm

¶25 This requirement was also clearly satisfied. At the moment Ventrice began to pull away, the crowd was exhibiting the threatening behavior described above. This was not a hypothetical or distant threat of harm, but was being experienced even as Ventrice injured members of the crowd.

4. Only Means of Preventing the Harm

¶26 The State offers a number of alternatives they contend Ventrice should have chosen instead of violating the law. First, the State asserts that Ventrice could have taken someone with him when he left the bar to drive him home. This is not a realistic alternative, however, as Ventrice was not aware that the crowd would turn as hostile it did when he left the bar. We agree with the State that Ventrice's conduct inside the tavern with regard to the physical confrontation with Jessman and Ventrice's throwing of a pool cue was negligent, if not reckless. We cannot conclude, however, that, by throwing a cue stick, Ventrice should have known to take his daughter with him when he left the bar because his safety would soon be in danger.

¶27 It was not until several minutes later, after Ventrice was alone in his car, that the danger of the situation became clear. Perhaps Ventrice could have expected that his actions would provoke some type of response, at least from Jessman. But, viewing the facts most favorably to Ventrice, we cannot conclude that he should have known that he would provoke the anger of the number of people that he did, and that they would become violently hostile to the point that they were surrounding his car, banging on the windows, and trying to enter. It is true that Ventrice could have avoided the confrontation by driving away immediately after he entered the car. However, we are reluctant to penalize

Ventrice for waiting for his daughter to arrive when he did so with the hope that he could avoid driving while intoxicated.

¶28 The State argues, however, that Ventrice did not wait long enough. He should have waited for someone to drive him home instead of driving himself. This is exactly what Ventrice initially did. Hesitant about driving while intoxicated, Ventrice waited in the car for his daughter. At the time Ventrice decided to leave, however, the crowd had surrounded his car. It would have been very difficult from Ventrice's perspective to allow his daughter into the car without also providing an opportunity for those outside to attack him.

¶29 The State also contends that Ruth Baker was standing near Ventrice's vehicle while the motor was running, without any tavern patrons near the scene. However, Ventrice asserts that there was no window of opportunity to allow Baker to drive the vehicle, because patrons followed Baker to the parking lot in order to confront Ventrice. Again, viewing the facts most favorably to Ventrice, he would have been unable to provide access to Baker without also doing so for others in the crowd.

¶30 Next, the State argues that Ventrice had a cell phone and he could have used it to call the police rather than drive himself. Ventrice denies that the record reflects he had a cell phone. Even if he did have a cell phone, however, we do not believe that, given the circumstances, this was a reasonable alternative. Faced with an angry crowd pounding on windows and attempting to open doors, it would be reasonable to believe that calling the police and waiting for their arrival would be an ineffective means of avoiding harm, particularly considering a potentially debilitating medical condition. In the minutes it would take for the police to arrive, a catastrophic occurrence could have already taken place.

¶31 Finally, the State argues that Ventrice could have left the scene at slower speed. He cites to the testimony of Baker, who stated he moved forward fast. Ventrice testified, however, that he was traveling at only ten to fifteen miles per hour, and that he took his foot off the gas pedal as soon as he saw someone in front of the car. He did not stop completely, he said, because "I was afraid if I stopped they would all get me and that would be it."

¶32 In the brief period of time that Ventrice had to consider his options, his perceived heightened fear of injury stemming from his recent surgery served to control his thought process. In Ventrice's mind, the number of angry patrons who surrounded his car forced him to exercise the only option he had, leaving the scene before he was injured.

5. Causal Connection

¶33 Ventrice must next demonstrate that a causal relationship existed between his action in striking patrons with his vehicle and his avoidance of threatened physical harm. Ventrice stated that when his vehicle was moving forward while in the parking lot, one patron ran in front of the vehicle, motioning for Ventrice to stop. When asked how he proceeded, Ventrice stated that he looked in his rear view mirror, and observed that several patrons were headed towards his vehicle. Ventrice stated, "I didn't stop. I was afraid if I stopped they would all get me and that would be it." Ventrice feared that stopping his vehicle for the patron standing immediately in front of him would allow other patrons to reach the vehicle and possibly harm him. His statements about his fear of physical harm demonstrates a causal connection between his actions and concerns.

¶34 Finally, we note that we do not believe that allowing Ventrice to assert a defense of coercion in this case will undermine the objective of WIS.

STAT. § 346.63(2)(a). Undoubtedly, the objective of § 346.63(2)(a) is public safety. However, the statute itself recognizes a defense if the defendant can prove that the injury would have occurred "even if he or she had been exercising due care and he or she had not been under the influence of an intoxicant." WIS. STAT. § 346.63(2)(b). Although this defense may not be available to Ventrice, it does suggest that the legislature believed there were circumstances when the conduct should not be punished. In the present context and viewing the facts most favorably to Ventrice, the potential risk to Ventrice in staying was greater than the risk to others if he attempted to leave. Although Ventrice may not have made the wisest choices throughout the evening, he was entitled to present his case to a jury.

¶35 Under a reasonable construction of the evidence, Ventrice has demonstrated that he should have been entitled to assert the privilege defense. While it is left to the fact finder to determine the weight and/or credibility of the evidence presented, *see* ***State ex rel. T.R.S. v. L.F.E.***, 125 Wis. 2d 399, 401, 373 N.W.2d 55 (Ct. App. 1985), Ventrice demonstrated sufficient evidence to assert the defense. Accordingly, we reverse and remand for a new trial.

By the Court.—Judgment and order reversed and cause remanded.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.