

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 18, 2005

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. 2005AP457-CR

Cir. Ct. No. 2003CF799

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK J. TILOT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: KENDALL M. KELLEY, Judge. *Reversed and cause remanded for further proceedings.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Mark Tilot appeals a judgment convicting him of operating a vehicle while under the influence of an intoxicant, fifth offense. Because we conclude the circuit court erred when it failed to submit a jury

instruction on his coercion defense, we reverse the judgment and remand the matter for a new trial.

BACKGROUND

¶2 At approximately 2 a.m. on August 24, 2003, off-duty Brown County sheriff's deputy Fred Heitl observed a woman in a dress and no shoes walking beside County Highway G in the town of Ledgeview. The woman was later identified as Wanda Tilot, Tilot's wife.¹ Wanda told Heitl that she had been at her class reunion with her husband, that they got into an argument, and that he instructed her to get out of the truck.

¶3 At trial, Wanda testified that Tilot was intoxicated when the couple left the class reunion, so Wanda drove their truck. Wanda said she got lost during the drive and the couple began to argue about the best route home. She stopped the truck in the middle of the highway, in an area that was dark, hilly and curvy. She began walking toward the nearest gas station, and Tilot yelled her name and asked her to return to the truck.

¶4 Tilot testified that he waited a while for Wanda to return to the truck. He then began to walk up and down the road looking for her. Because he was concerned that the truck was a hazard to other motorists and because the highway's shoulders were too narrow to pull the truck off the road, Tilot decided to drive the truck to the gas station approximately a mile away. After Tilot pulled

¹ Wanda was married to Tilot at the time of the incident; however, the couple divorced before the June 30, 2004, trial.

the truck into the gas station, he was stopped and arrested by a Brown County deputy.

¶5 Tilot was charged with operating while under the influence of an intoxicant, fifth offense. Tilot asserted an affirmative defense of privilege based on coercion, pursuant to WIS. STAT. § 939.46,² and requested a jury instruction be submitted to the jury.³ He contended that Wanda created an imminent threat of death or great bodily harm by leaving the truck in the roadway and therefore he was privileged to drive the truck to prevent that harm. The circuit court denied Tilot's request for a jury instruction on his coercion defense.

¶6 The jury found Tilot guilty of OWI. The circuit court entered judgment in accordance with the jury's verdict.

STANDARD OF REVIEW

¶7 Generally, a circuit court has broad discretion to determine what instruction to submit to the jury, and we review for an erroneous exercise of that discretion. *State v. Coleman*, 206 Wis. 2d 199, 212, 556 N.W.2d 701 (1996). However, a defendant is entitled to a theory-of-defense jury 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.

² All references to the Wisconsin statutes are to the 2003-04 version unless otherwise noted.

³ Tilot also requested a jury instruction on common law duress. Tilot has not appealed the court's denial of that instruction.

Id. at 212-13 (citations omitted).

¶8 The State challenges only the fourth prong, contending that Tilot's coercion defense is not supported by sufficient evidence. We review whether a reasonable construction of the evidence, viewed most favorably to Tilot, supports Tilot's coercion defense. *See id.* at 213-14. If the defense is supported by evidence, "it is for the jury, not the trial court or this court, to determine whether to believe" Tilot's version of events. *Id.* at 214.

DISCUSSION

¶9 "The statutory defense of coercion is a complete defense to any crime except first-degree intentional homicide." *State v. Keeran*, 2004 WI App 4, ¶5, 268 Wis. 2d 761, 674 N.W.2d 570. Coercion is defined in WIS. STAT. § 939.46(1) as 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" Accordingly, to establish his coercion defense, Tilot must provide sufficient evidence that:

- (1) he was threatened by a person other than a coconspirator;
- (2) he reasonably believed he or another person 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.

¶10 The State concedes the second and fifth elements, but challenges Tilot's showing on the remaining three. Regarding the first element, the State

concedes that Wanda's leaving the truck parked in the lane of highway traffic threatened both Tilot and anyone in a vehicle approaching the truck. However, the State contends that Tilot must be "blameless" in creating the threat to be entitled to the defense.

¶11 The State cites no Wisconsin authority in support of its argument and instead quotes extensively from a Missouri case, *State v. Smith*, 884 S.W.2d 104 (Mo. Ct. App. 1994). In *Smith*, Smith's wife testified that she was driving the vehicle occupied by Smith and his father. *Id.* at 105. She and Smith got into an argument, and she abandoned the vehicle in the roadway. An approaching vehicle struck the Smith vehicle. Smith argued at trial that he only drove the vehicle while intoxicated to a nearby gas station to avoid further accidents and requested a jury instruction on necessity. *Id.* The Missouri court affirmed the trial court's decision to deny the jury instruction, stating, "Assuming [Smith's] intoxication and further assuming the truth of his wife's testimony, he could have avoided any necessity of violating the law by simply resolving the argument with his wife." *Id.* It also noted that Smith's father was in the vehicle and that Smith introduced no evidence regarding his father's ability to move the car out of harm's way. *Id.* at 105-06.

¶12 The State argues that Tilot similarly created the threat by arguing with Wanda, angering her to the point of causing her to stop and abandon the vehicle. It argues that, like Smith, Tilot could have prevented the threat by resolving the argument with Wanda. However, unlike Smith, there were no additional passengers who potentially could have moved the vehicle off the roadway. Furthermore, we cannot conclude, as the Missouri court did, that as a matter of law, participating in an argument equates to contributing to the threat. Indeed, viewing the evidence most favorably to Tilot, he did attempt to resolve the argument with Wanda by calling after her and imploring her to return to the truck.

Tilot has introduced sufficient evidence that he and others were threatened by Wanda.

¶13 Next, the State concedes that Tilot could reasonably believe that leaving the truck on a rural highway presented a danger of death or great bodily harm to anyone in a vehicle coming up behind the truck. However, it contends he has not established that the harm was imminent. The State argues that while the testimony established that the highway going away from where the truck was parked was hilly and curvy, there is little evidence of the terrain behind the truck from which motorists would be approaching. Accordingly to the State, this lack of evidence about the terrain behind the truck, combined with the light traffic on a rural highway late at night, makes it likely that any approaching motorist would be able to stop or avoid the truck. Thus, the State contends the threat presented by the truck was not imminent.

¶14 However, Tilot introduced evidence that Wanda abandoned the truck on a winding, hilly highway with a speed limit of between forty-five and fifty-five miles per hour. It was dark, the road was not well lit, and the truck was parked in the lane of travel. This evidence, viewed most favorably for Tilot, establishes an imminent threat to approaching motorists.

¶15 Finally, the State argues that Tilot has not established sufficient evidence that he reasonably believed violating the law was the only means of preventing the harm. The State contends that no reasonable person in Tilot's position could reasonably believe that driving the vehicle to the nearby gas station while intoxicated was the only means of preventing the harm to approaching motorists. It provides four alternatives to Tilot's course of action, which it contends would have prevented the threat to approaching motorists. However,

three of them involve operating the vehicle, certainly for a shorter period of time than driving to the gas station, but violating the law nonetheless. The fourth proposes Tilot should have turned on the truck's emergency lights, signaled for help and called the police. Tilot's testimony was that he considered waiting for help, but thought it was too dangerous to leave the vehicle on the highway until help could arrive. Viewed most favorably for Tilot, the testimony provides sufficient evidence for a jury to conclude that Tilot reasonably believed violating the law by driving the truck to the gas station was the only way to avoid the threat.

¶16 Whether the jury will believe Tilot's coercion defense is not for us to decide. Thus, because the court erred by failing to submit to the jury an instruction on Tilot's coercion defense, we reverse the judgment and remand the matter for a new trial.

By the Court.—Judgment reversed and cause remanded for further proceedings.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

