

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 28, 2026

Samuel A. Christensen
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. 2024AP2307
STATE OF WISCONSIN

Cir. Ct. No. 2023TR25

**IN COURT OF APPEALS
DISTRICT II**

CITY OF KENOSHA,

PETITIONER-RESPONDENT,

V.

JACKSON RATHOD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County:
DAVID P. WILK, Judge. *Affirmed.*

¶1 GUNDRUM, J.¹ Jackson Rathod appeals from the trial court's judgment convicting him of operating a motor vehicle while intoxicated (OWI), first offense, after a jury trial. He contends the court erred in refusing to instruct

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2023-24). All references to the Wisconsin Statutes are to the 2023-24 version.

the jury on the affirmative defense of necessity. For the following reasons, we conclude the court did not err and affirm.

BACKGROUND

¶2 In the early morning of December 11, 2022, a law enforcement officer arrested Rathod for OWI after finding him asleep in his running vehicle and subsequently observing significant indicia of intoxication. After the close of evidence at the trial on the citation, Rathod asked the trial court to instruct the jury on the affirmative defense of necessity. The court denied Rathod's request, and the jury returned a guilty verdict. He now appeals, seeking a new trial, asserting the court erred by declining to instruct the jury on necessity. The relevant trial testimony and the court's discussion of Rathod's request for a necessity jury instruction are as follows.

¶3 An officer testified that at approximately 4:00 a.m. on December 11, 2022, he approached a vehicle parked on the side of a city street with its engine running. The vehicle's sole occupant, Rathod, was in the driver's seat and "slumped over the center console kind of." When the officer knocked on the window and shone his light in the vehicle, Rathod woke up. The officer noticed a stain on the passenger seat that he believed was vomit. Rathod indicated he had "been at a party, left around midnight, and then was warming up his car before he was going to drive home." During his interactions with Rathod, including administering field sobriety tests, the officer observed that Rathod was exhibiting

multiple different indicia of intoxication² and concluded Rathod “was too impaired to be operating a vehicle.”

¶4 On cross-examination, the officer agreed that, at the time of the interaction, it was cold outside and Rathod informed him he had started up his car to warm up.

¶5 Rathod also testified. He stated he lived about 30 minutes from the party, which was at his supervisor’s home and included other colleagues from work. He arrived at the party “about 8:00, 8:30” p.m., and after finding a place to park, he walked to the party. He drank a Jello shot, “a couple of beers,” and “a couple mixed drinks,” and he remained at the party until “about midnight, 12:30.” Around that time, he went outside and got food at a food truck servicing the party, but after eating a bit, “didn’t feel right,” so he put the food in his car and went back inside the house in an attempt to use the bathroom. The bathroom was occupied, so he went back outside “and just sat in the car ... trying to think what [he was] going to do.”

¶6 On the way to his car, which was “no more than [a] two minute[]” walk from the party, Rathod “thr[e]w up a little.” He did not want to go back into the house because he smelled vomit on himself, so he instead decided, “I’m just going to sit here and try to feel a little better.” He testified that he “wasn’t

² In addition to numerous “clues” of impairment from the field sobriety tests, the officer noted that Rathod admitted to having been at a party and drinking; emitted “a strong odor of alcohol”; was “slumped over” in his car; and appeared to have vomit on his jacket, the seat next to him, the inside of the car door, and the ground by the driver’s door. Further, Rathod’s eyes appeared bloodshot and glossed over, and Rathod “kind of stumble[d]” when he exited the car.

properly dressed for the weather,” and after sitting in the car for some time, he decided to turn it on to stay warm.

¶7 Rathod testified that he “was going to go back inside, but ... wasn’t feeling good. I was sick. So I thought I’d just sit it out here in the car for a little bit. And then when I didn’t feel good is when I turned the car on, and then that’s when I must have slept.” After explaining that he was wearing dress shoes and socks, so he was “shivering,” his “feet were freezing,” and he “didn’t want to get frostbite,” he testified that he “just sat there for [about 20 to 30 minutes] debating whether I was going to go back inside or not. And when I was shivering, that’s when I thought I would stay warm and turned on the car.” He said he turned on the car “because my feet were really cold.” He agreed he did it “just to warm up.”

¶8 When asked why he did not call for an Uber, Rathod stated he “was sleepy” and “wasn’t thinking that was an option. My only thinking was to get in the car and stay warm because I did not want to go back inside smelling like throw-up.” He repeated, “I didn’t want to go back inside smelling like throw-up so I’m like, I’ll just sit out here, feel better and then after that, after I warm up a little, maybe I can go back inside.” Rathod turned the heat on, the car warmed up, he put his head back on the seat, “[a]nd the next thing I know is a[n] ... officer arrives knocking on the window,” after he had slept for about three and one-half hours. He stated he believed his feet probably would have frozen had he not turned on the car and that he “believed it was necessary to turn the car on to keep my body warm.” He agreed he was concerned about hypothermia or other negative effects on his circulation.

¶9 On cross-examination, Rathod again testified that while sitting in the car and before turning it on, he

was just debating whether to go back inside, but I wasn't in the right condition to go back inside because I had just thrown up. I didn't want to go inside like that, smelling like throw-up, so I was just debating whether to sit here and feel better and go back inside or not.

When asked, "So your plan was essentially just to sit there until you determined to go back inside or leave," Rathod responded, "To go back inside or just sit there, yes." On re-direct examination, he again testified that the reason he started up his vehicle

was just for me to feel better. And as I said, I was debating whether to go back inside or not. It was cold. My feet were freezing. I didn't have a jacket or proper winter gear on so I felt that it was for my own safety to turn the car on and ... stay warm.

¶10 Rathod's work supervisor, who hosted the party, also testified. She testified that there was beer, wine and "hard alcohol" available at the party and stated her belief that the last person left the party at around 1:00 a.m.

¶11 After the close of testimony, Rathod requested that the jury be instructed on the defense of "necessity." The trial court denied the request, noting that by Rathod's own testimony,

the reason ... he didn't return to the party was not due to any reason other than perhaps his shame or embarrassment, which is not the pressure of a natural physical force. He didn't operate the car because he was afraid he was going to die. He didn't operate the car because he was afraid he was going to suffer great bodily harm. He did so because he was embarrassed to go back into the house having thrown up.

... So he knew where safety was.... [Rathod] was, as he said, two minutes from safety.

The jury found Rathod guilty of OWI, and he now appeals.

DISCUSSION

¶12 While a trial court generally has broad discretion in instructing a jury, *State v. Ferguson*, 2009 WI 50, ¶9, 317 Wis. 2d 586, 767 N.W.2d 187, “[w]hether the evidence, viewed in the light most favorable to the defendant and the instruction, establishes a sufficient basis for the instruction presents a question of law, which we review *de novo*,” *State v. Giminski*, 2001 WI App 211, ¶11, 247 Wis. 2d 750, 634 N.W.2d 604.

¶13 As relevant to this case, the necessity defense, codified in Wis. STAT. § 939.47, provides:

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

(Emphases added.) Similarly, the necessity jury instruction indicates that it is applicable “*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.” WIS JI—CRIMINAL 792 (emphases added; footnotes omitted). Furthermore, a “defendant’s beliefs must have been reasonable,” “even [if] mistaken.” *Id.*

¶14 Our case law has restated and broken down the statute into four elements comprising 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.

State v. Anthuber, 201 Wis. 2d 512, 518, 549 N.W.2d 477 (Ct. App. 1996) (emphases added; citing **State v. Olsen**, 99 Wis. 2d 572, 299 N.W.2d 632 (Ct. App. 1980)). We have further stated that there is “no substantive difference” between this four-part test and the test stated by the jury instruction, even though “[the] jury instruction ... combines the second [and] third element[s] ... into the single question of whether the defendant believed that his or her act was the *only* means of preventing the great harm.” **Id.** at 518 n.1.

¶15 Citing **State v. Stietz**, 2017 WI 58, 375 Wis. 2d 572, 895 N.W.2d 796, Rathod asserts the trial court was required to provide his requested necessity jury instruction as long as there was “some evidence” supporting it, and he claims there was some evidence supporting each element, such that the court erred in not giving the instruction. We disagree, as no evidence supported, at a minimum, the third element, which requires that a defendant “had no alternative means of preventing the harm.” **Anthuber**, 201 Wis. 2d at 518 (citation omitted).

¶16 The second and third elements under **Anthuber** respectively require a showing that a defendant reasonably believed his unlawful act “was necessary to prevent imminent ... great bodily harm” and he “had no alternative means of preventing the harm.” **Id.** (citation omitted). The statute and jury instruction similarly require a showing that the defendant reasonably believed his unlawful act was the “only means” of preventing great harm. WIS. STAT. § 939.47; WIS. JI—CRIMINAL 792. The evidence presented at Rathod’s trial as to this latter element was insufficient to require submission of the necessity instruction to the jury.

¶17 The undisputed testimony—Rathod’s own testimony—unambiguously indicated that at the time he chose to start/operate his car, Rathod knew he had another means of staying warm—going back inside the house he had just recently left. In fact, he testified that he “debat[ed]” doing just that but instead chose to stay warm by “turn[ing] on the car.” With no more than a two-minute walk and some risk of potential embarrassment with colleagues, due to apparently having some vomit on his clothes, he could have stayed warm and avoided violating the OWI law. To track the necessity statute, there was no evidence presented in this case that the “cold winter temperatures”—which Rathod appears to present as the pressuring “natural physical forces”—caused Rathod to reasonably believe that his act of starting his car was “the *only means* of preventing ... imminent ... great bodily harm” to himself. See WIS. STAT. § 939.47 (emphasis added). Rathod admittedly knew he could have prevented any harm from the cold had he made the two-minute walk back to his colleague-host’s house.

¶18 Rathod was not on a backcountry road, miles from the nearest alternative warmth, where his choice literally would have been to turn on his car while drunk to stay warm or suffer harm from the cold. Here, his choice was not to operate his vehicle while intoxicated or otherwise lose his feet to frostbite or suffer hypothermia; his choice—the very choice he “debat[ed]” for some time while sitting in his car before turning it on—was to operate his vehicle while intoxicated to stay warm or go back into the nearby house of his colleague to stay

warm.³ Either way, he would have avoided any physical harm from the cold, and he knew it.

¶19 Again, “[t]he defense of necessity exists when ‘Pressure of natural physical forces ... causes the actor reasonably *to believe* that his or her act is the *only means* of preventing imminent ... great bodily harm to the actor or another and which causes him or her to so act.’” ***State v. Dundon***, 226 Wis. 2d 654, 666-67, 594 N.W.2d 780 (1999) (emphases added; citation omitted). Here, Rathod’s own testimony conclusively shows he in fact *did not believe* his act of turning on his car was “the only means” of preventing harm to himself. He admittedly knew he could prevent potential harm from the cold by simply going back to the house.

¶20 Our decision in ***State v. Keeran***, 2004 WI App 4, 268 Wis. 2d 761, 674 N.W.2d 570, provides helpful guidance. In that case, we concluded the trial court did not err in declining to provide a coercion defense instruction to the jury. ***Id.***, ¶4. Tracking the relevant statute language, the question before us was whether sufficient evidence was presented at trial that threats against Keeran by a co-actor “caused Keeran to believe that participating in the crimes ... was ‘the only means of preventing [his] imminent death or great bodily harm.’” ***Id.***, ¶7. We concluded “that Keeran ha[d] failed to meet his initial burden of producing sufficient evidence to support a finding that he had no ‘means of preventing imminent death or great bodily harm’ to himself, except by participating in the crimes.” ***Id.***

³ Added to this, Rathod’s testimony suggests he may not have been as concerned as he otherwise indicated about the possibility of embarrassment from the smell of vomit on his clothes if he went back into the house, as he also testified that he planned to just “sit out [in his car], feel better and then ... after I warm up a little, maybe I can go back inside,” without any apparent laundering of his clothes occurring in between.

(citation omitted). Borrowing language from an earlier supreme court case, we stated, “[i]n the words of the **Amundson** court, Keeran failed to present evidence showing that he reasonably believed there was ‘no possible escape other than the commission of a criminal act.’” **Keeran**, 268 Wis. 2d 761, ¶7 (quoting **State v. Amundson**, 69 Wis. 2d 554, 568, 230 N.W.2d 775 (1975)). We explained,

Keeran testified that he was afraid of Barreau and, viewing the evidence in a light most favorable to Keeran, the evidence supports a finding that Keeran reasonably believed that Barreau would attempt to harm Keeran if Keeran did not comply with Barreau’s orders. But that only suggests that Keeran’s *safest* course was to comply with Barreau’s orders; it does not mean that Keeran’s *only* course was to comply with Barreau’s orders. The coercion defense is not a license to take the safest course.

Id., ¶15.

¶21 Similarly here, Rathod’s own testimony undisputedly showed that starting up his car for warmth was his *least embarrassing* means of avoiding harm from the cold but was not his *only* means. “The [necessity] defense is not a license to take the [least embarrassing] course.” See **id.** To also borrow from the **Amundson** language, here, Rathod would have had to show that there was “no possible” other way for him to avoid harm to himself from the cold other than by starting his car. See **Amundson**, 69 Wis. 2d at 568. He failed to show this.⁴

¶22 The defense of necessity excuses otherwise criminal conduct when there are “no alternative means of preventing the harm.” **Anthuber**, 201 Wis. 2d

⁴ Aside from the embarrassment factor, the evidence provides only support for the conclusion that Rathod could also have warmed up by calling an Uber or taxi and going home. He testified that his phone rang while he was in his car, so the evidence indicates it was with him and functioning.

at 518 (citation omitted). Here, Rathod had an alternative means to avoid both potential harm from the cold and breaking the law—going back into his colleague’s house; he simply did not prefer that choice because of the risk of embarrassment.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

