COURT OF APPEALS
DECISION
DATED AND FILED

May 7, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1701-CR **Cir. Ct. No. 2009CF130**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KRISTINA K. KUYKENDALL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sawyer County: GERALD L. WRIGHT, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Kristina Kuykendall appeals a judgment of conviction for operating while intoxicated, fifth offense. Kuykendall argues the trial court erroneously rejected her request to give a coercion jury instruction. We

hold that Kuykendall failed to present sufficient evidence to entitle her to a coercion instruction. Accordingly, we affirm.

BACKGROUND

¶2 Kuykendall testified at her trial that on a late-August night she was drinking and socializing with Deanna Johnson at Johnson's house, along with Emily and Felicia Miller. Around 2:30 a.m., while the four women were outside the home, a car pulled into the driveway really fast. Kuykendall observed three females and one male in the car. She recognized the male and one of the females.

¶3 Johnson testified that two of the women exited the car, jumped on Emily and began beating and yelling at her. Johnson explained, "They just—they followed Emily is what they did they followed her there, some personal things going on between one of the girls and Emily." Johnson called police and jumped in to assist Emily. The fight continued until police arrived five to ten minutes later. At some point during the fight, Johnson realized that Felicia and Kuykendall were gone. Johnson did not see anybody threaten or attack Kuykendall. Johnson suffered a broken nose, and Emily had two black eyes and a swollen face and lip.

¶4 Kuykendall testified that the situation unfolded "very fast." She explained that the interlopers "started fighting us … not specifically me, but they were aggressive, they were there to hurt people." They were swearing and said they came to fight. When they arrived, Kuykendall was standing next to her car. The car door was open because they had been listening to the radio. Kuykendall was no more than six feet away from where Emily was on the ground getting hit.

¶5 Kuykendall believed that the interlopers might hurt her because, although she did not know their intentions, they came forcefully and violently.

She explained, "I know what happens in those situations, I personally have been affected by that." She did not, however, observe any knives or guns. Kuykendall stated she entered her car and drove away in order to protect herself. As she was leaving, the interlopers moved their vehicle in front of her and tried to block her exit.

¶6 Kuykendall testified she left "by the only means [she] had to leave." She felt there was no other way to avoid harm because she "wasn't close enough to the house. It's a rural area[,] if I ran they were in a car." She stated she only had "[s]econds" to make her decision. Kuykendall did not know whether Johnson's house had locks because the house had never been locked when she was there. Kuykendall testified she had driven less than a mile when she was stopped by police.

¶7 While responding to the fight, a deputy observed a vehicle leaving the area of the disturbance and traveling directly at the deputy's squad car, in the deputy's lane. The vehicle nearly hit the squad car head on. Shortly thereafter, a second deputy stopped the vehicle. Kuykendall was the sole occupant. She smelled of intoxicants and admitted drinking heavily. Kuykendall was taken to a hospital for a blood draw; her blood-alcohol level was .296.

¶8 Kuykendall requested that the trial court give the coercion jury instruction. The court denied the request, concluding Kuykendall failed to present sufficient evidence to place the defense in issue. The jury convicted Kuykendall of fifth-offense operating while intoxicated, and she now appeals.[1]

[1] Kuykendall was also convicted of battery to an emergency worker for kicking a nurse in the chest, sending her into a wall. Kuykendall does not appeal that conviction.

DISCUSSION

¶9 Kuykendall argues the trial court erroneously declined to instruct the jury on the statutory defense of coercion. A defendant seeking a coercion instruction must meet the initial burden of producing evidence to support the defense. ***State v. Keeran***, 2004 WI App 4, ¶6, 268 Wis. 2d 761, 674 N.W.2d 570. Once a defendant successfully places an affirmative defense in issue, the State is required to disprove the defense beyond a reasonable doubt. ***State v. Head***, 2002 WI 99, ¶106, 255 Wis. 2d 194, 648 N.W.2d 413 (citing ***State v. Stoehr***, 134 Wis. 2d 66, 84 n.8, 396 N.W. 2d 177 (1986)).

¶10 As relevant, the coercion defense is as follows:

> A threat by a person … 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 … and which causes him or her so to act is a defense to a prosecution for any crime based on that act ….

WIS. STAT. § 939.46(1); *see also* WIS. STAT. § 939.45(1) (identifying coercion as a defense of privilege).[2] The defense of coercion "reflect[s] the social policy that one is justified in violating the letter of the law in order to avoid death or great bodily harm." ***State v. Horn***, 126 Wis. 2d 447, 455, 377 N.W.2d 176 (Ct. App. 1985). However, the "coercion defense is limited to the 'most severe form of inducement.'" ***Keeran***, 268 Wis. 2d 761, ¶5 (citing ***State v. Amundson***, 69 Wis. 2d 554, 568, 230 N.W.2d 775 (1975)).

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶11 Here, the trial court concluded there was insufficient evidence supporting Kuykendall's coercion defense. To place an affirmative defense in issue, a defendant must satisfy the "some evidence" standard. ***State v. Schmidt***, 2012 WI App 113, ¶8, 344 Wis. 2d 336, 824 N.W.2d 839 (citing ***Head***, 255 Wis. 2d 194, ¶¶106–07, 112). However, the defendant must present sufficient evidence of all components of the defense. *See* ***id.***, ¶¶34, 38 n.8 (defendant not entitled to adequate provocation instruction where there was sufficient evidence of subjective prong of defense, but not of objective prong); ***Head***, 255 Wis. 2d 194, ¶116. "The 'some' evidence standard is a relatively low threshold, in part because of the distinct functions of judge and jury." ***State v. Peters***, 2002 WI App 243, ¶27 n.4, 258 Wis. 2d 148, 653 N.W.2d 300. "When applying the some evidence standard, 'the circuit court must determine whether a reasonable construction of the evidence will support the defendant's theory viewed in the most favorable light it will reasonably admit of from the standpoint of the accused.'" ***Schmidt***, 344 Wis. 2d 336, ¶9 (quoting ***Head***, 255 Wis. 2d 194, ¶113).

¶12 We conclude Kuykendall failed to adequately place the objective component of the coercion defense at issue. Specifically, we hold that no reasonable jury could conclude Kuykendall reasonably believed that driving away in her automobile was the *only* means of preventing harm to herself. The coercion defense "requires [a] finding, under the objective-reasonable [person] test, with regard to the reasonableness of the actor's beliefs that he [or she] is threatened with immediate death or great bodily harm with no possible escape other than the commission of a criminal act." ***Amundson***, 69 Wis. 2d at 568.

¶13 The question is not whether Kuykendall's acts actually avoided harm to herself, nor is it simply whether there were any alternatives available. Rather, we must assess whether Kuykendall could reasonably believe she had no other

alternative. We reject her argument because there were other obvious alternatives, which Kuykendall failed to account for in her presentation of the evidence.

¶14 There is no evidence that any of the interlopers ever directly threatened Kuykendall. Yet, she failed to explain why she could not simply flee on foot to a neighboring residence.[3] Although the incident occurred in a rural area, Kuykendall testified she knew there were other houses in the vicinity. She need not outrun a vehicle if her path of foot travel is unamenable to vehicle traffic; was she surrounded by open fields or forest? Alternatively, Kuykendall could have retreated inside Johnson's house. While we must accept her testimony that she did not know if the house had locks, there was no reason to believe the house did *not* have locks. In the absence of any evidence to the contrary, any such assumption would be unreasonable. Locks are standard on houses, on both exterior and interior doors.

¶15 Kuykendall also failed to establish why she could not have simply entered her car, locked the doors, called police, and waited inside until police arrived.[4] Had the focus of the attack eventually shifted to her, she would have still had the option to drive away if necessary.

¶16 Finally, Kuykendall failed to establish why she had no choice but to *continue* driving after she was out of the driveway. The interlopers did not give chase in their car. Thus, Kuykendall could have promptly pulled to the side of the

[3] Johnson testified there was a house across the street from hers and a house to the right of hers, but nothing on the left.

[4] We are also left to wonder what happened to Felicia. She did not take refuge in Kuykendall's car, yet she was not injured either.

road or into one of the neighbors' driveways. We agree with the foreign cases cited by the State: "[I]n order to satisfy the 'some evidence' test, a person claiming necessity in justification of a "continuing offense" [drunk driving] must offer some evidence that the continued violation of the law—as well as the initial violation—was justified." ***Reeve v. State***, 764 P.2d 324, 326 (Alaska Ct. App. 1988); *see also* ***State v. Riedl***, 807 P.2d 697, 701 (Kan. Ct. App. 1991); ***State v. Dapo***, 470 A.2d 1173, 1175 (Vt. 1983).[5]

By the Court.—Judgment affirmed.

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

[5] Kuykendall did not file a reply brief to refute any of the State's arguments. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded). Furthermore, WIS. STAT. RULE 809.19(4) required Kuykendall to file either a reply brief or "a statement that a reply brief will not be filed." Because she did neither, we deem her to have abandoned the appeal. *See* WIS. STAT. RULE 809.83(2).