

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

August 13, 1996

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

NOTICE

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No. 96-0764-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LUSTER GOODMAN, JR.,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

FINE, J. Luster Goodman appeals his jury-trial conviction for possessing cocaine. See §§ 161.16(2)(b)1 and 161.41(3m), STATS. He claims that the trial court violated his right to present the affirmative defenses of “necessity” and “defense of others.” We affirm.

I.

The essential facts in this case are not disputed. Goodman was visiting a friend when he and the friend broke up a fight between Tomica Wesley, the friend's niece, and Gregory Johnson. Shortly afterward, Wesley was sitting on the porch of the friend's house holding her thirteen-month-old baby. Goodman testified that he was attempting to calm her down following the fight when Johnson approached. At that point, according to Goodman, Wesley "immediately turned, and the baby's head missed the corner of the brick pillars maybe, inch and a half, twice as she was moving, trying to snatch and get around to Johnson."

The fight between Wesley and Johnson was over cocaine that Wesley had. According to Goodman's lawyer, Goodman took the cocaine from Wesley as well as a knife, as she was about to pull the knife from her daughter's diaper bag. Police officers saw the disturbance, arrested Goodman for disorderly conduct, and discovered the cocaine and knife during a search incident to his arrest. Goodman's theory of defense was that he *had* to get the cocaine away from Wesley in order to protect the baby.¹ This is how Goodman's trial lawyer explained the syllogism to the trial court:

[T]he argument between [Wesley and Johnson] was over the drugs.

THE COURT: So what?

[Goodman's attorney]: So if he takes the drugs away, the argument is over.

[Interjection by the prosecutor deleted]

[Goodman's attorney]: And the child is thereby protected from having a mother who is geeked out on crack cocaine.

¹ Goodman was not charged for possessing the knife.

As expressed in Goodman's proffered jury instruction in support of this theory, Goodman claimed that he was protecting the baby's "legally protected interest in being cared for by a caregiver who refrains from, or is prevented from, using illegal drugs." The trial court rejected Goodman's offer of proof and did not allow Goodman to testify that he took the cocaine from Wesley in order to protect Wesley's baby.

II.

A. *Necessity.*

Under Wisconsin law, a person has a privilege to violate the law when, as material to this case, his or her "conduct occurs under circumstances of ... necessity so as to be privileged under s. ... 939.47." Section 939.45(1), STATS.² Section 939.47, STATS., provides:

² Section 939.45(1), STATS., reads in full:

Privilege. 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.

Section 939.46, STATS., is not applicable here. It provides:

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.

- (2) It is no defense to a prosecution of a married person that the alleged crime was committed by command of the spouse nor is there any

Necessity. 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.

This statute “essentially codifies the common law rule of necessity.” *State v. Olsen*, 99 Wis.2d 572, 575, 299 N.W.2d 632, 634 (Ct. App. 1980). Although Goodman contends that the scope of the defense of “necessity” under the common law is broader than the formulation in § 939.47, and cites authority that arguably supports that contention, the legislature’s recast of the doctrine for Wisconsin in § 939.47 governs. See § 939.10, STATS. (“Common-law crimes are abolished. The common-law rules of criminal law not in conflict with chs. 939 to 951 are preserved.”).³ Thus, “[t]he ability justifiably to choose between evils is available in Wisconsin only if the person asserting the defense acted under ‘pressure of natural physical forces.’ Sec. 939.47, Stats.” *Olsen*, 99 Wis.2d at 576, 299 N.W.2d at 634. Accordingly, despite Goodman’s yeoman efforts to frame this case as one involving “natural physical forces,” the defense of “necessity” under § 939.47 does not apply here, and the trial court’s decision to preclude the defense and not instruct the jury on the defense conformed with the applicable legal principles. There was no error.

(.continued)

presumption of coercion when a crime is committed by a married person in the presence of the spouse.

³ We thus reject Goodman’s suggestion that we construe § 939.47, STATS., to conform with some of the broader common-law interpretations. We must construe statutes as they are written. See *State v. Dwyer*, 181 Wis.2d 826, 836, 512 N.W.2d 233, 236 (Ct. App. 1994). Moreover, Goodman has not pointed to any common-law doctrine in Wisconsin—apart from “necessity,” which has been codified and limited by § 939.47—that would trigger the applicability to this case of § 939.45(6), STATS., which provides a defense to a criminal prosecution “[w]hen for any other reason the actor’s conduct is privileged by the statutory or common law of *this state*.” (Emphasis added.)

B. *Defense of others.*

Section 939.45, STATS., provides, as material to Goodman's defense-of-others argument:

Privilege. 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:

....

(2) When the actor's conduct is in defense of persons or property under any of the circumstances described in s. 939.48

Section 939.48, STATS., provides, as material here:

Self-defense and defense of others. (1) A person is privileged to threaten or intentionally *use force* against another for the purpose of preventing or terminating what the person reasonably believes to be an unlawful interference with his or her person by such other person. The actor may intentionally use only such force or threat thereof as the actor reasonably believes is necessary to prevent or terminate the interference. The actor may not intentionally use force which is intended or likely to cause death or great bodily harm unless the actor reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself.

....

(4) A person is privileged to defend a third person from real or apparent unlawful interference by another under the same conditions and by the same means as those under and by which the person is privileged to defend himself or herself from real or apparent unlawful interference, provided that the person reasonably believes that the facts are such that the third person would be privileged to act in self-defense and that the person's intervention is necessary for the protection of the third person.

(Emphasis added.) Although Goodman correctly notes that a jury question might have been presented if he were charged with using force against Wesley to protect Wesley's child from either Wesley or from Johnson, Goodman was not prosecuted for using "force" against Wesley; he was prosecuted for possessing cocaine.⁴ Sections 939.48(1) & (4) have no application here.

By the Court. – Judgment affirmed.⁵

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.

⁴ As noted, Goodman was not prosecuted for carrying a concealed weapon even though the police officers also found on his person the knife that he had taken from Wesley.

⁵ Goodman did not argue before the trial court, and does not argue on appeal, that his possession of the cocaine was merely transitory and with the intent to immediately dispose. See *People v. Mijares*, 491 P.2d 1115 (Cal. 1971) (handling of a controlled substance merely for the purpose of disposal is not "possession"). Indeed, in his opening statement to the jury, Goodman's trial lawyer told the jury that Goodman was going to give the cocaine to Wesley's mother!