

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 19, 2007**

David R. Schanker  
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. 2006AP981-CR**

**Cir. Ct. No. 2003CT89**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**REBECCA L. LISIECKI,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and orders of the circuit court for Rock County: MICHAEL J. BYRON, Judge. *Affirmed.*

¶1 HIGGINBOTHAM, J.<sup>1</sup> This appeal arises out of a conviction for operating a vehicle while intoxicated in violation of WIS. STAT. § 346.63(1)(a),

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

and operating with revoked operating privileges in violation of WIS. STAT. § 343.44(1)(b). The defendant, Rebecca L. Lisiecki, appeals her conviction, claiming that the trial court erred in denying her requests for jury instructions on the affirmative defenses of necessity and coercion and in excluding related character evidence. We affirm.

## **BACKGROUND**

¶2 The circumstances giving rise to this case occurred on December 22, 2002, in Rock County, Wisconsin. According to the criminal complaint and the arresting officer's testimony at trial, the officer received a dispatch of a domestic disturbance which also involved a female driving while intoxicated with revoked driving privileges. The officer testified that he observed a car matching the description in the dispatch and stopped it. After stopping the car and identifying the driver as Rebecca L. Lisiecki, he noticed that Lisiecki appeared intoxicated; he confirmed her intoxication through field sobriety tests and an evidentiary blood draw. Lisiecki was consequently charged with operating a motor vehicle while intoxicated, operating a motor vehicle with prohibited alcohol concentration, and operating a motor vehicle after revocation.

¶3 In pretrial motions, Lisiecki moved to have the trial court instruct the jury on necessity and coercion defenses. Lisiecki also moved to introduce character evidence regarding the violent tendencies of her partner, Rodney A. Runge, with whom she had a history of domestic violence. In her motion, Lisiecki made an offer of proof explaining that she was seeking a jury instruction on necessity because the OWI incident for which she was arrested occurred because she had to flee Runge in her vehicle when she thought Runge was going to commit violence against her. After a hearing on the motion, the trial court ruled that the

necessity defense was not available to Lisiecki, since she had not been fleeing from a “natural physical force,” as required for the defense instruction. On that basis, the court also denied Lisiecki’s motion to admit character evidence. The court also denied Lisiecki’s motion for reconsideration of its previous order.

¶4 On the day the jury was selected, Lisiecki again moved the court to instruct the jury on a coercion defense and to admit character evidence in support of the defense. Lisiecki again made an offer of proof of past domestic violence incidents involving Runge and argued that she reasonably believed she had to flee Runge in her car. On the day the jury trial began and immediately preceding the trial, the court held a hearing on the motion and concluded that Lisiecki’s offer of proof did not establish sufficient evidence for a coercion instruction; the court also noted that Lisiecki’s motion had not been timely filed.

¶5 The case was tried to a jury; the jury subsequently convicted Lisiecki of operating a motor vehicle while intoxicated and while revoked in violation of WIS. STAT. §§ 346.63(1)(a) and 343.44(1)(b) (collectively “OWI”). Lisiecki appeals.

### ANALYSIS

¶6 Lisiecki argues that the trial court erroneously denied her requests for jury instructions on the statutory affirmative defenses of necessity and coercion. Trial courts have broad discretion in deciding what jury instructions to issue. *Zak v. Zifferblatt*, 2006 WI App 79, ¶9, 292 Wis. 2d 502, 715 N.W.2d 739. We review a trial court’s denial of jury instructions on a criminal defense applying the clearly erroneous standard. *See State v. Lenarchick*, 74 Wis. 2d 425, 455, 247 N.W.2d 80 (1976).

¶7 We first address the necessity defense. In Wisconsin, a person may violate the law when “conduct occurs under circumstances of ... necessity so as to be privileged under s. ... 939.47.” WIS. STAT. § 939.45(1); *see also State v. Dundon*, 226 Wis. 2d 654, ¶26, 594 N.W.2d 780 (1999). The defense of necessity arises when the “[p]ressure of natural physical forces ... 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 ....” WIS. STAT. § 939.47. The Wisconsin Supreme Court has explained that the defense applies “only when a defendant acts in response to ‘natural physical forces,’ not human forces that pose potential dangers.” *State v. Hamdan*, 2003 WI 113, ¶30, 264 Wis. 2d 433, 665 N.W.2d 785; *see also State v. Anthuber*, 201 Wis. 2d 512, 519-20, 549 N.W.2d 477 (1996); *Drane v. State*, 29 Wis. 2d 208, 211-12 & n.1, 138 N.W.2d 273 (1965). As with all other statutory defenses, a defendant asserting a necessity defense carries the initial burden of presenting sufficient evidence showing an entitlement to the defense. *See State v. Stoehr*, 134 Wis. 2d 66, 87, 396 N.W.2d 177 (1986).

¶8 We conclude that the facts of this case do not support a necessity defense, therefore Lisiecki was not entitled to an instruction on that defense. There is no evidence that the “pressure of natural physical forces” caused Lisiecki to reasonably believe that her act of operating a motor vehicle while under the influence of an intoxicant and after her driving privilege had been revoked was the only means of preventing imminent public disaster or imminent death or great bodily harm to herself or others. The trial court reasonably determined that no reasonable jury would accept a necessity defense that Lisiecki’s only avenue to protect herself was to flee in her car while intoxicated rather than to run to a neighbor’s house, although unfamiliar with that neighbor, to call the police.

Furthermore, the harm Lisiecki allegedly feared was human force, not “natural physical forces.”

¶9 The following is a summary of the evidence Lisiecki presented in her offer of proof to the trial court in support of her motion for an instruction on the necessity defense and her motion for reconsideration. According to Lisiecki, Runge had a history of physically abusing her. On Labor Day of 2002, after spending time at Devil’s Lake and in Cambridge, Lisiecki and Runge got into an altercation, which Lisiecki escaped by fleeing in her car.

¶10 On December 10, 2002, Lisiecki and Runge again were involved in an altercation. According to Lisiecki, Runge grabbed her and threw her to the kitchen floor that day, and threw her down the stairs twice when she was trying to get to her daughter. When she tried to call the police, Runge crushed her cell phone and disabled the home phone. The altercation ended when the neighbor called the police. Lisiecki subsequently required medical treatment for injuries she suffered during the altercation.

¶11 Then, on December 22, 2002, the night Lisiecki was stopped for drunk driving, she and Runge went out drinking. Runge became upset about not having his son for Christmas. When they were leaving the bar, Runge pushed Lisiecki into the car. After returning home, Runge continued the argument, went to push Lisiecki again, and stopped her from reaching for the phone. Lisiecki believed she needed to leave because she thought he was going to physically abuse her again. She then ran for her car.

¶12 While we are sympathetic to Lisiecki's need to avoid being abused once again by Runge, Lisiecki fails to explain why she could not have gone to a neighbor's house and telephoned the police.<sup>2</sup> She provides no evidence that Runge attempted to follow her when she left in her car; she also does not explain why she had to drive more than three miles from the house to be safe from Runge.

¶13 Lisiecki asserts that the case law on what constitutes "pressure of natural physical force" is "unsettled" and "developing." She refers to language in *State v. Olsen* where the court cited examples of "pressure of natural physical force" to include "storms, fires, and privations." *State v. Olsen*, 99 Wis. 2d 572, 576, 299 N.W.2d 632 (Ct. App. 1980). In her view, the *Olsen* court left unclear the reach of the common law defense of necessity. The law in Wisconsin is not as "unsettled" as Lisiecki asserts.

¶14 The *Olsen* court unambiguously stated that a necessity defense is available only when the person asserting the defense "acted under pressure of natural physical forces." *Id.*, quoting WIS. STAT. § 939.47. We see nothing "unsettled" about this clear statement of the law. We are also not persuaded that the *Olsen* court somehow left unclear the reach of the common law. As we explained in *Olsen*, § 939.47 "essentially codifies the common law rule of necessity." *Id.* at 575. Although Lisiecki appears to suggest that the scope of the common law defense of necessity is broader than what § 939.47 provides, the legislature has the last word on the scope of the defense in fashioning § 939.47.

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<sup>2</sup> In her coercion defense offer of proof, which we discuss separately, Lisiecki did explain that she failed to go to a neighbor's house for help because she did not know her neighbors. Even if she had made a similar argument in her necessity defense offer of proof, this explanation is not adequate.

Section 939.10 provides that “[c]ommon-law crimes are abolished. The common-law rules of criminal law not in conflict with chs. 939 to 951 are preserved.”<sup>3</sup>

¶15 We now turn to the coercion defense. A defense of coercion may be made when a “threat by a person other than the actor’s coconspirator ... 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.” WIS. STAT. § 939.46(1). A person is entitled to assert a coercion defense 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.” *State v. Keeran*, 2004 WI App 4, ¶6, 268 Wis. 2d 761, 674 N.W.2d 570, quoting *State v. Coleman*, 206 Wis. 2d 199, 212-13, 556 N.W.2d 701 (1996). “[E]vidence is sufficient if a reasonable construction of the evidence, viewed in a light most favorable to the accused, supports the defendant’s theory.” *Keeran*, 268 Wis. 2d 761, ¶6 (citation omitted). A person seeking to assert a coercion defense has the burden of producing evidence to support such an instruction. *Id.*

¶16 The coercion defense is limited to the “most severe form of inducement.” See *id.*, ¶5. The defense requires a finding “under the objective-reasonable [person] test [that] the actor’s beliefs that [she] is threatened with immediate death or great bodily harm with no possible escape than the commission of a criminal act” are reasonable. *Id.*

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<sup>3</sup> Lisiecki proposes we adopt broader interpretations of the necessity defense offered by case law from other states. Lisiecki ignores the fact that we are bound by our case law. See *Cook v. Cook*, 208 Wis. 2d 166, 185-90, 560 N.W.2d 246 (1997).

¶17 We conclude, viewing the evidence in a light most favorable to Lisiecki, that her failure to sufficiently explain why she could not find alternative protection from Runge’s abusive conduct in support of the necessity defense also dooms the coercion defense. In other words, Lisiecki failed to present evidence demonstrating that she reasonably believed that the only means to escape imminent threat of death or great bodily harm was to commit a crime. *See* WIS. STAT. § 939.46(1); *Keeran*, 268 Wis. 2d 761, ¶7.

¶18 Lisiecki argues that, in denying her motion for a coercion jury instruction, the trial court erroneously placed itself in the position of the jury, and failed to view the evidence in a light most favorable to her. She appears to argue that her testimony regarding her reluctance to get help from a neighbor she did not know was sufficient to satisfy the “only means” prong of the coercion defense. In support of this proposition, she cites *Coleman* and *State v. Tilot*, No. 2005AP457-CR, unpublished slip op. (Wis. Ct. App. Oct. 18, 2005). We are not persuaded.

¶19 First, we observe that *Tilot* is unpublished. Lisiecki’s citation of *Tilot* consequently violates WIS. STAT. RULE 809.23(3). We therefore are not bound by *Tilot*. Second, *Coleman* does not preclude a trial court or us from determining the reasonableness of the evidence Lisiecki relies on in support of her assertion that she is entitled to a coercion defense. The supreme court in *Coleman* specifically explained that while “neither the trial court nor the reviewing court may weigh the evidence,” we may nonetheless “ask whether a reasonable construction of the evidence, viewed favorably to the defendant, supports the alleged defense’s case.” *Coleman*, 206 Wis. 2d at 213-14.

¶20 Viewing the evidence in a light most favorably to Lisiecki, we do not see how Lisiecki’s testimony that she was hesitant to turn to her neighbors for



help because she did not know them could be reasonably construed to establish that her only means of escaping harm was committing an OWI. As we explained in *Keeran*, the coercion defense is limited to the “most severe form of inducement,” and requires a finding under the objective “reasonable person” test that the defendant’s beliefs ““that [she] is threatened with immediate death or great bodily harm with no possible escape other than the commission of a criminal act”” are reasonable beliefs. See *Keeran*, 268 Wis. 2d 761, ¶5. Lisiecki has failed to make the requisite showing.

¶21 Lisiecki finally argues that the trial court erroneously barred her from presenting character evidence in support of a necessity or coercion defense. This argument hinges on her erroneous assertions that she was entitled to instructions on a necessity and coercion defense. Because we have rejected these assertions, we do not address this argument.

## CONCLUSION

¶22 We conclude that the trial court properly denied Lisiecki’s motions to instruct the jury on necessity and coercion. We therefore affirm the trial court’s judgment and orders.

*By the Court.*—Judgment and orders affirmed.

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

