COURT OF APPEALS DECISION DATED AND FILED

April 17, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2011AP2049-CR **Cir. Ct. No. 2009CM5079**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CLARENCE E. BROWN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge. *Affirmed*.

¶1 BRENNAN, J.[1] Clarence E. Brown appeals from the judgment of conviction and the order denying his postconviction motion. Brown was

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

convicted after a jury trial of carrying a concealed weapon, contrary to WIS. STAT. § 941.23. Brown raises three issues on appeal: (1) whether § 941.23, on its face, violates the Second Amendment of the United States Constitution; (2) whether § 941.23, as applied, is unconstitutional under article I, section 25 of the Wisconsin Constitution and ***State v. Hamdan***, 2003 WI 113, 264 Wis. 2d 433, 665 N.W.2d 785; and (3) whether the trial court improperly exercised its discretion in not permitting Brown to assert a coercion defense. We reject each of Brown's arguments in turn below.

BACKGROUND

¶2 Brown testified at the jury trial that on October 2, 2009, he and his friend, Linda, arrived at his brother's house on North 26th Street near Locust Avenue to pick up the mail. Brown testified that as he was gathering the mail and placing it inside the house, he heard gunshots fired nearby. Brown told Linda to get out of the car and take cover in the house. He then observed children playing down the street. Brown yelled at them, "Hey, get in the house. Get in the house. They're shooting." The children did not move and seemed to be looking at something on the ground. Brown ran over to the children and again instructed them to go in the house yelling, "Hey, didn't I say get in the house? They shooting." Brown noticed a gun on the ground, picked it up because he didn't want anyone to get hurt, immediately unloaded it and put it in his pants. Then Brown said he threw the bullets in a truck. When asked on cross-examination why he put the bullets in a stranger's truck if he could have put the bullets in his pants pocket or his car, Brown said because the truck was the safest place around.

¶3 Brown testified that after he saw a police squad car coming down the street, he flagged the squad down and directed the police to a person standing on

the corner of the block, who Brown suspected was the shooter. Brown testified that the police got out of their squad and City of Milwaukee Police Officer Matthew Knight walked towards the man on the corner. Brown testified that as the other officer walked towards him Brown said to the other officer, "Hey, I found a gun on the ground." Brown testified that Officer Knight then yelled, "Gun, gun," put his hand on Brown's back, and asked where it was. Brown told him it was in his waist and Officer Knight removed the gun and placed him under arrest.

¶4 City of Milwaukee Police Officer Joseph Warren also testified at trial. Officer Warren testified that as he, Officer Knight and City of Milwaukee Police Officer Wardell Dodds were responding to a "shots fired complaint," driving northbound on North 26th Street, Brown waived them down and pointed to a person on the corner saying, "That's the guy. He was shooting." Additionally, Officer Warren testified that as they were approaching Brown in the squad car, he observed Brown making a "security adjustment," which Officer Warren described as a common motion armed persons make to secure an item in their waistband.

¶5 Officer Warren testified that as they exited the squad car, Brown continued to frantically point at the suspected shooter on the corner. He also testified that Officer Knight instructed him to check Brown while Officer Knight checked the person on the corner.

¶6 Having noticed Brown making the "security adjustment," Officer Warren was suspicious of Brown's actions. Officer Warren testified that after he exited the squad car, he noticed Brown turn away from him or "blade" his body, concealing the left side of his body, and walk across the street. Fearing that

Brown might leave, Officer Warren walked across the street and ordered Brown to show his hands and walk towards him. From approximately fifteen feet away, Officer Warren witnessed Brown walk to a nearby pickup truck, lean against the tailgate with his upper body and with his left hand drop three unfired cartridges into the truck bed. Up until this point, Brown had not indicated to Officer Warren that he was armed.

¶7 Officer Warren asked Brown why he was in possession of bullets. Brown responded with "[B]ullets? I have a gun." Then, Officer Warren lifted his sweatshirt and began pulling the gun from Brown's waistband. Officer Warren quickly grabbed Brown, and yelled "gun" to his partners. Officer Dodd helped Officer Warren gain control of Brown and placed him in handcuffs, and Officer Knight removed the gun from Brown's waistband.

¶8 Officer Knight's testimony corroborated Officer Warren's testimony. Officer Knight testified that Brown waived them down as they drove on North 26th Street and was pointing to the individual on the corner. Officer Knight further testified that he noticed Brown making the "security adjustment" to his waistband as they approached Brown in their squad car. This led Officer Knight to believe Brown might be armed.

¶9 As the police exited their squad car, Officer Knight began to approach Brown. As Officer Knight approached, Brown continued to draw attention to the person on the corner. Officer Knight focused his attention on the person on the corner but instructed his partners to check Brown. Officer Knight then approached the individual on the corner, ordered him to stop and patted him down, but did not recover any weapons from the suspected shooter. Shortly thereafter, Officer Knight heard Officer Warren yell, "[g]un." Officer Knight

immediately ran over and recovered the gun from Brown. Officer Knight also testified that Brown never told him that he possessed a gun.

¶10 Brown was arrested at the scene and charged with carrying a concealed weapon. In a pretrial supplemental motion *in limine*, Brown raised a constitutional defense to the charge of carrying a concealed weapon. During a later motion hearing, Brown moved for a jury instruction on the issue of coercion as a defense. In an oral ruling, the trial court denied Brown's constitutionality challenge and later denied the coercion jury instruction.

¶11 On July 13, 2010, a jury found Brown guilty of the charge of carrying a concealed weapon. At sentencing, the same trial court judge, who had presided over the trial, noted in her sentencing comments that she found incredible Brown's testimony that he: (1) immediately told the police that he was armed; and (2) was unfamiliar with the gun. The trial court found the police officers' testimony credible that: (1) Brown did not immediately inform the police that he had a gun; and (2) a person would need familiarity with that gun to unload it quickly because it was an older model that was difficult to unload. Brown was sentenced to four months in the House of Corrections with Huber privileges.

¶12 Following trial, Brown filed a motion for postconviction relief, raising the same three issues as this appeal. The trial court denied the motion for postconviction relief in a written order. Brown now appeals.

DISCUSSION

I. Brown's Constitutional Challenges

¶13 The constitutionality of a statute presents a question of law that we review *de novo*. *See* ***Hamdan***, 264 Wis. 2d 433, ¶19; *see also* ***State v. Cole***, 2003 WI 112, ¶10, 264 Wis. 2d 520, 665 N.W.2d 328. In construing a statute, we give effect to the legislature's intent, using the plain meaning of the words of the statute. ***Cole***, 264 Wis. 2d 520, ¶10. Statutes are presumed constitutional and will be sustained unless the challenger proves, beyond a reasonable doubt, that there is no possible application or interpretation of the statute which would be constitutional. ***Id.***, ¶¶11, 18.

A. Brown's facial challenge to WIS. STAT. § 941.23 fails.

¶14 Brown's first argument is that WIS. STAT. § 941.23, on its face, violates the Second Amendment to the United States Constitution. "A 'facial' challenge to the constitutionality of a statute means that the 'challenger must establish, beyond a reasonable doubt, that there are no possible applications or interpretations of the statute which would be constitutional.'" ***Cole***, 264 Wis. 2d 520, ¶30 (citation omitted). In 2009, when Brown was arrested and charged, section 941.23 provided:

> Any person except a peace officer who goes armed with a concealed and dangerous weapon is guilty of a Class A misdemeanor. Notwithstanding s. 939.22 (22), for purposes of this section, peace officer does not include a commission warden who is not a state-certified commission warden.[2]

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[2] WISCONSIN STAT. § 941.23 has since been renumbered as § 941.23(2) and amended to provide:

(continued)

The Second Amendment of the United States Constitution states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

¶15 Brown's facial unconstitutionality argument is principally based on ***District of Columbia v. Heller***, 554 U.S. 570 (2008), in which the United States Supreme Court held that the District of Columbia handgun ban violated the

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> Any person, other than one of the following, who carries a concealed and dangerous weapon is guilty of a Class A misdemeanor:
>
> (a) A peace officer, but notwithstanding s. 939.22, for purposes of this paragraph, peace officer does not include a commission warden who is not a state-certified commission warden.
>
> (b) A qualified out-of-state law enforcement officer....
>
> (c) A former officer....
>
> (d) A licensee, as defined in s. 175.60 (1) (d), or an out-of-state licensee, as defined in s. 175.60 (1) (g), if the dangerous weapon is a weapon, as defined under s. 175.60 (1) (j). An individual formerly licensed under s. 175.60 whose license has been suspended or revoked under s. 175.60 (14) may not assert his or her refusal to accept a notice of revocation or suspension mailed under s. 175.60 (14) (b) 1. as a defense to prosecution under this subsection, regardless of whether the person has complied with s. 175.60 (11) (b) 1.
>
> (e) An individual who carries a concealed and dangerous weapon, as defined in s. 175.60 (1) (j), in his or her own dwelling or place of business or on land that he or she owns, leases, or legally occupies.

See 2011 Wis. Act 35, §§ 50–55. The amendments to the statute do not affect our analysis in any way.

Second Amendment.[3] *See **id.*** at 635. Brown argues that, although the Wisconsin Supreme Court upheld the constitutionality of WIS. STAT. § 941.23 in ***Cole***, 264 Wis. 2d 520, ¶50: (1) ***Cole***'s holding was limited to the Wisconsin Constitution; (2) ***Heller*** and other federal cases make clear that the Wisconsin Supreme Court used the wrong test for constitutionality in ***Cole***; and (3) under the stricter test required by those cases, the Wisconsin statute is unconstitutional.[4]

¶16 As Brown concedes, the Wisconsin Supreme Court in ***Cole*** held that WIS. STAT. § 941.23 does not violate the Wisconsin Constitution, facially or as applied.[5] *See* ***Cole***, 264 Wis. 2d 520, ¶50. ***Cole*** did not address the constitutionality of § 941.23 under the United States Constitution and no published Wisconsin case has yet addressed that issue under ***Heller***, although several unpublished opinions have done so. *See* ***State v. Little***, No. 2011AP1740, unpublished slip op. (WI App Jan. 26, 2012), and ***State v. Flowers***, No. 2011AP1757, unpublished slip op. (WI App Dec. 13, 2011).

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[3] Brown also relies on ***McDonald v. City of Chicago***, 561 U.S. ___, 130 S. Ct. 3020 (2010), in which the United States Supreme Court found that the holding in ***Heller*** was enforceable against the states through the Due Process clause of the Fourteenth Amendment. ***Id.*** at 3021.

[4] While Brown generally describes the statute as overbroad, he does not develop an overbreath argument. *See* ***Bachowski v. Salamone***, 139 Wis. 2d 397, 411, 407 N.W.2d 533 (1987) ("A statute is overbroad when its language, given its normal meaning, is so sweeping that its sanctions may be applied to constitutionally protected conduct which the state is not permitted to regulate."). Rather, Brown argues, based on ***Heller***, that WIS. STAT. § 941.23 directly violates the Second Amendment's right to keep and bear arms, an argument we reject herein.

[5] Article 1, section 25 of the Wisconsin Constitution states: "The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose."

¶17 But ***Cole*** is applicable here. In ***Cole***, the supreme court rejected the very argument for a stricter test that Brown advances, stating: "Nevertheless, we do not agree with Cole's position that strict scrutiny or intermediate scrutiny is required in this case. This court has previously recognized that it need not apply strict scrutiny every time a governmental burden upon fundamental rights is implicated." *See* ***id.***, 264 Wis. 2d 520, ¶21. Instead, the court adopted a reasonableness test, adopted in many other jurisdictions, stating that "the reasonableness test focuses on the balance of the interests at stake, rather than merely on whether any conceivable rationale exists under which the legislature may have concluded the law could promote the public welfare." ***Id.***, ¶27.

¶18 Applying the reasonableness test to the facts in ***Cole***, the supreme court concluded that WIS. STAT. § 941.23 was constitutional "because the interests of public safety involved … are compelling." ***Cole***, 264 Wis. 2d 520, ¶23. Noting that "the right to bear arms is not absolute," ***id.***, ¶24, the court held that the balance of protecting the public safety by imposing restrictions on the manner of gun possession, i.e., concealed, did not impermissibly infringe upon the right to self-defense. *See* ***id.***, ¶¶24, 43.

¶19 In ***Hamdan***, addressing an "as applied" challenge to the carrying-a-concealed-weapon statute under the Wisconsin Constitution and decided the same day as ***Cole***, the Wisconsin Supreme Court utilized the same reasonableness test as it did in ***Cole***. *See* ***Hamdan***, 264 Wis. 2d 433, ¶45. ***Cole*** and ***Hamdan*** are binding on this court with respect to the Wisconsin Supreme Court's interpretation of the Wisconsin Constitution unless they conflict with a subsequent decision of the United States Supreme Court. *See* ***State v. Jennings***, 2002 WI 44, ¶¶17-19, 252 Wis. 2d 228, 647 N.W.2d 142. Accordingly, we next turn to whether ***Heller***,

a United States Supreme Court decision, which we are obligated to follow, conflicts with ***Cole*** and ***Hamdan*** and requires a stricter test.

¶20 Brown contends first that ***Heller*** mandates "something close to strict scrutiny," and under such a test WIS. STAT. § 941.23 violates the Second Amendment. We disagree with both parts of his argument. We note at the start that the District of Columbia statute at issue in ***Heller*** was far broader than § 941.23, in that the District of Columbia statute banned all handgun possession. *See* ***Heller***, 554 U.S. at 574. Section 941.23 does not; section 941.23 imposes limitations on the manner of transport of a weapon, generally prohibiting concealment.

¶21 Although the United States Supreme Court found the District of Columbia statute unconstitutional "as applied," it did not analyze the level of scrutiny required for Second Amendment analysis.[6] The only mention of the standards of scrutiny appears in dicta and a footnote. *See* ***Heller***, 554 U.S. at 628

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[6] In ***District of Columbia v. Heller***, 554 U.S. 570 (2008), the United States Supreme Court held that the District of Columbia's:

> handgun ban amounts to a prohibition of an entire class of "arms" that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family," would fail constitutional muster.

Id. at 628-29 (citation and footnote omitted).

n.27. As the Seventh Circuit Court of Appeals observed in ***Ezell v. City of Chicago***, 651 F.3d 684 (7th Cir. 2011), ***Heller*** is not authority for imposition of a particular Second Amendment test because "[t]he Court resolved the Second Amendment challenge in ***Heller*** without specifying any doctrinal 'test' for resolving future claims." ***Ezell***, 651 F.3d at 701. Thus, we conclude that ***Heller*** does not mandate a different test from the ***Cole*** reasonableness test.

¶22 Brown next argues that we should adopt the other, stricter tests articulated in federal cases, such as ***Ezell***. First, we are not bound to honor federal district court or court of appeals decisions. *See* ***Elections Bd. of the State of Wis. v. Wisconsin Mfrs. & Commerce***, 227 Wis. 2d 650, 670 n.19, 597 N.W.2d 721 (1999). Second, none of the cases Brown relies on proscribes a strict scrutiny test or even any particular test to be applied to all Second Amendment challenges.

¶23 With regard to ***Ezell***, the Seventh Circuit Court of Appeals did not impose a strict scrutiny test. Rather, in words very similar to those used by the Wisconsin Supreme Court in ***Hamdan*** and ***Cole***, the court described a balancing test, requiring the City to "demonstrate that civilian target practice at a firing range creates such genuine and serious risks to public safety that prohibiting range training throughout the city is justified." *See* ***Ezell***, 651 F.3d at 709.

¶24 Brown also relies on other Seventh Circuit Court of Appeals cases, ***United States v. Skoien***, 614 F.3d 638 (7th Cir. 2010), and ***United States v. Williams***, 616 F.3d 685 (7th Cir. 2010), for the proposition that some stronger test is required. In both ***Skoien*** and ***Williams***, the Seventh Circuit Court of Appeals rejected Second Amendment challenges to bans on possessing a firearm after certain criminal convictions. *See* ***Skoien***, 614 F.3d at 639, 645 (banning gun possession by individuals convicted of misdemeanor domestic violence);

Williams, 616 F.3d at 691 (banning gun possession by felons). In neither case did the Seventh Circuit Court of Appeals adopt a strict scrutiny test. Rather, the court used a "strong showing" or intermediate test and under that test found in both cases that the government met its burden of showing that its objective was an important one and that its objective was advanced by means substantially related to that objective. ***Skoien***, 614 F.3d at 641; ***Williams***, 616 F.3d at 692. This is essentially the same balancing test applied by the Wisconsin Supreme Court in ***Cole***.

¶25 Whatever the name of the test, we conclude that WIS. STAT. § 941.23 does not violate the Second Amendment. It imposes reasonable restrictions on the right to bear arms. *See* ***Cole***, 264 Wis. 2d 520, ¶28. The important government objectives of public safety are advanced by prohibiting concealment of firearms. *See* ***Hamdan***, 264 Wis. 2d 433, ¶¶51-56. The court in ***Heller*** noted, "[l]ike most rights, the right secured by the Second Amendment is not unlimited." ***Heller***, 554 U.S. at 626. Similarly, the court in ***Hamdan*** stated that, "[a]rticle I, [s]ection 25 does not establish an unfettered right to bear arms. Clearly, the State retains the power to impose reasonable regulations on weapons, including a general prohibition on the carrying of concealed weapons." *See* ***Hamdan***, 264 Wis. 2d 433, ¶41.

¶26 Certainly, it is true that "the State may not apply these regulations in situations that functionally disallow the exercise of the rights conferred under [a]rticle I, [s]ection 25." ***Hamdan***, 264 Wis. 2d 433, ¶41. But WIS. STAT. § 941.23 does not do so. Unlike the statute addressed in ***Heller***, which completely banned handgun possession, and the statute addressed in ***Ezell***, which completely banned firing ranges, which were necessary for gun licenses, § 941.23 does not restrict firearm possession or even the right to possession in self-defense. It

restricts *concealed* possession unless in self-defense or as authorized by the statute for significant public safety reasons.

¶27 As the court in ***Hamdan*** observed, WIS. STAT. § 941.23 promotes several valuable public safety purposes: (1) it discourages a person from acting violently on impulse, whether from anger or fear; (2) it puts people on notice when they are dealing with an individual who is carrying a dangerous weapon; and (3) it promotes the preservation of life by stigmatizing malfeasant behavior, such as carrying a concealed weapon contrary to the law. ***Hamdan***, 264 Wis. 2d 433, ¶¶53-56.

¶28 Applying our Wisconsin jurisprudence, "[i]n analyzing reasonableness, one must balance the conflicting rights of an individual to keep and bear arms for lawful purposes against the authority of the State to exercise its police power to protect the health, safety, and welfare of its citizens." ***Id.***, ¶45. Brown has failed to establish that there are no applications of WIS. STAT. § 941.23 in which it would be constitutionally permissible under the Second Amendment. *See* ***Cole***, 264 Wis. 2d 520, ¶30. Like the court in ***Cole***, we conclude that § 941.23 is a reasonable regulation and does not unreasonably infringe on the right to keep and bear arms. *See* ***Cole***, 264 Wis. 2d 520, ¶28.

B. Brown's "as applied" constitutional challenge fails.

¶29 Brown next argues that under the test established in ***Hamdan***, WIS. STAT. § 941.23 is unconstitutional as applied to him under article I, section 25 of the Wisconsin Constitution, which states: "The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose."

¶30 Under the test established in ***Hamdan***, to sustain an as applied challenge to WIS STAT. § 941.23, a defendant must show that: (1) the defendant's need to conceal the weapon substantially outweighed the State's interest in exercising its police power, and (2) the defendant lacked any other reasonable alternative to concealment, to exercise his or her constitutional right to bear arms. ***Hamdan***, 264 Wis. 2d 433, ¶86.

¶31 In granting Hamdan's "as applied" challenge, our supreme court used a reasonableness balancing test and concluded that Hamdan's right to possess a weapon—concealed in his pocket, to protect his business—was more compelling than the State's interest in enforcing the statute. ***Id.***, ¶81. The court concluded that a person's interest in the right to bear arms for security purposes is at its highest "when undertaken to secure one's home or privately owned business." ***Id.***, ¶67. Conversely, the State's interest is at its least compelling in these circumstances. ***Id.***

¶32 Brown contends that his concealment of the gun was for his and others' security and substantially outweighs any State interest in prohibiting concealed carry. But Brown, unlike Hamdan, was not seeking to protect his business. And as the Wisconsin Supreme Court has noted, an "individual's interest in the right to bear arms for purposes of security will not, as a general matter, be particularly strong outside" one's home or privately-owned business. ***State v. Fisher***, 2006 WI 44, ¶27, 290 Wis. 2d 121, 714 N.W.2d 495.

¶33 Because an "as applied" analysis requires that the defense be raised before trial and that the resolution of constitutionality be made by the court prior to trial, *see* ***Hamdan***, 264 Wis. 2d 433, ¶86, we conclude we must review the facts from the perspective of the challenger before any fact-finding has occurred. Here,

that means we review Brown's testimony to determine whether his interests were stronger than the State's and whether he had any reasonable alternatives to carrying a concealed weapon. We conclude that Brown had several reasonable alternatives to carrying a concealed weapon and therefore the State's interests outweighed Brown's.

¶34 First, we note that Brown's own testimony establishes that the shooting was over by the time the police arrived. The shooter was nowhere near the gun. The gun was on the ground and no one was touching it. Brown's testimony makes clear that there was no threat of death or great bodily harm from the shooter.

¶35 Second, the presence of children in the area did not require Brown to pick up, unload and conceal the gun. Brown attempts to justify concealing the gun in his pants on the basis of his concern for the children standing nearby. Yet, his own testimony establishes that none of the children touched the gun or even attempted to. Brown could have left the gun where it was on the ground and stood guard over it.

¶36 Third, Brown could have told the police *immediately* when he flagged them down that there was a gun on the ground. He testified that he flagged the police down and first directed them to a person standing on the corner of the block, who Brown suspected was the shooter. Only after the second officer started walking toward him, did Brown tell that officer that he had found the gun. He could have told the police about the gun right away and let the police take control of the gun.

¶37 Fourth, there was no need to conceal the gun at all. He could have held it or guarded it on the ground. Nothing in his concern for safety required that the gun be concealed.

¶38 The State has a compelling interest in prohibiting concealed carry when police officers enter an area where shots have been fired. *See* ***id.***, ¶55. For their own safety as well as the safety of others in the area, police officers must be aware of who is carrying dangerous weapons. In contrast, Brown's need to conceal the weapon in this situation is not as compelling because he had other reasonable alternatives to concealing the gun and the police were on the scene, mitigating any threat to Brown's or others' safety. We conclude that WIS. STAT. § 941.23 as applied to Brown served the very public safety purposes recognized in ***Hamdan***, 264 Wis. 2d 433, ¶¶53-56, and does not violate the Wisconsin Constitution.

II. Coercion Defense

¶39 We turn next to Brown's argument that the trial court erred in denying his request for the coercion jury instruction. Brown contends that he was entitled to the instruction because, in order to prevent death or great bodily harm to himself or a group of children, he had no reasonable alternative, other than to conceal the gun on his person and violate WIS. STAT. § 941.23 thereby. We disagree and affirm because coercion is not an available defense to § 941.23 under ***State v. Dundon***, 226 Wis. 2d 654, 594 N.W.2d 780 (1999), and even if it was, the evidence does not support giving the coercion jury instruction here.

¶40 The defense of coercion is a statutorily recognized privilege defense under WIS. STAT. § 939.46(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.

A defendant is entitled to raise the defense of coercion 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. Coleman***, 206 Wis. 2d 199, 212-13, 556 N.W.2d 701 (1996) (citations omitted).

¶41 Whether the privilege of coercion is available here as a defense to carrying a concealed weapon is a question of law which we review *de novo*. *See* ***Dundon***, 226 Wis. 2d 654, ¶16.

¶42 The Wisconsin Supreme Court has recognized that "[t]he crime of carrying a concealed weapon has many of the earmarks of a strict liability offense." ***Id.***, ¶23. The supreme court has determined that a defense of privilege is available to some strict liability offenses, such as speeding and felon in possession of a firearm, but it has expressly rejected its availability as a defense to the crime of carrying a concealed weapon, the statute at question here. *See* ***Hamdan***, 264 Wis. 2d 433, ¶¶35-37 ("It is now recognized that the holding in ***Dundon*** forecloses application of the ***Coleman*** privilege to [carrying-a-concealed-weapon] offenses."); *see also* ***Dundon***, 226 Wis. 2d 654, ¶36 ("We decline to extend the privilege recognized in ***Coleman*** to the unrelated crime of carrying a concealed weapon.").

¶43 We are compelled to follow the mandates of our supreme court. *See* ***Jennings***, 252 Wis. 2d 228, ¶¶17-19. Thus, we conclude coercion is not an available defense to WIS. STAT. § 941.23.

¶44 But even if the defense of coercion was generally available in a WIS. STAT. § 941.23 case, Brown would still have to show that there was sufficient credible evidence to show that his belief of death or great bodily harm was reasonable, so that concealing the gun in his pants was justified under the privilege of coercion. A defendant is entitled to any instruction on a valid defense theory if it is timely and supported by credible evidence. *See* ***Dundon***, 226 Wis. 2d 654, ¶46. Although the defendant has the burden of producing sufficient evidence, sufficiency is viewed from the light most favorable to the defendant. *See* ***Coleman***, 206 Wis. 2d at 213.

¶45 Reasonableness is subject to an objective test. "Coercion … is a defense limited to the most severe form of inducement." ***State v. Amundson***, 69 Wis. 2d 554, 568, 230 N.W.2d 775 (1975). "It requires an additional finding, under the objective-reasonable man test, with regard to the reasonableness of the actor's beliefs that he is threatened with immediate death or great bodily harm with no possible escape other than the commission of a criminal act." ***Id.***

¶46 Brown's testimony shows that he had several reasonable alternatives to concealing the gun in his pants and that his belief to the contrary was not reasonable. As discussed in the preceding section, Brown could have left the gun on the ground and stood guard over it—the shooting was over, the shooter was a distance away and the children had not touched the gun. Because the police arrived on the scene right away, Brown could have told them about the gun immediately instead of waiting and the police could have taken control over it.

Nothing required that Brown conceal the gun in his pants. If he felt that he had to pick the gun up, he did not have to conceal it.

¶47 Brown's testimony of unloading the gun and dropping the bullets into a nearby truck bed as a safety measure undercuts his claim of concern for the children's safety. Why leave bullets around in an open truck bed for the children, or anyone, to get them? On cross-examination, Brown admitted he had a pocket in his pants and had no explanation for not putting the bullets in there. The inconsistency between Brown's actions and his stated safety concerns for the children shows that his belief in no other alternatives to concealing the gun in his pants was not reasonable.

¶48 Brown fails to show sufficient evidence in the record justifying the giving of the coercion jury instruction. His belief that concealing the gun was the *only means* of preventing death or great bodily harm was not reasonable under the circumstances. Certainly, he has failed to establish that he had "no possible escape other than the commission of a criminal act." *See **id.*** Thus, we conclude that the trial court did not err in denying the coercion instruction.

By the Court.—Judgment and order affirmed.

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