

State v. Clowdus, 530 P.3d 525 (Or. Ct. App. 2023).

530 P.3d 525
Court of Appeals of Oregon.

STATE of Oregon, Plaintiff-Respondent,
v.
Damion Michael CLOWDUS, Defendant-Appellant.

A177572
|
Argued and Submitted February 24, 2023.
|
May 17, 2023

Background: The Defendant was convicted in the Circuit Court, Washington County, Janelle F. Wipper, J., of driving with a suspended license. The Defendant appealed.

Holding: The Court of Appeals, Aoyagi, J., held that instruction on choice-of-evils defense was warranted.

Reversed and remanded.

West Headnotes (5)

^[1] **Criminal Law** ➡ Instructions

Court of Appeals reviews the refusal to allow a defense for legal error, viewing the facts in the light most favorable to the defendant.

^[2] **Criminal Law** ➡ Defenses in general

When a criminal defendant seeks to rely on a defense, the court must allow defendant to do so if there is evidence to support each element of the defense.

^[3] **Criminal Law** ➡ Compulsion or necessity; justification in general

Choice of evils is a statutory justification defense.

^[4] **Criminal Law** ➡ Inferences from evidence

For purposes of determining whether any evidence supports a defense, jurors are permitted to rely on common experience or common knowledge to make reasonable inferences from

evidence, as long as they do not engage in speculation and guesswork.

^[5] **Criminal Law** ➡ Compulsion or necessity; justification in general

The choice-of-evils defense has three elements: first, the conduct must be necessary to avoid a threatened injury; second, the threatened injury must be imminent; and third, it must be reasonable for the defendant to believe that the need to avoid the threatened injury outweighed the injury that the violated statute seeks to prevent.

Attorneys and Law Firms

George W. Kelly, Eugene, argued the case and filed the brief for the Defendant.

Robert W. Wilsey, Assistant Attorney General, argued the case for the State. Also on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Before Aoyagi, Presiding Judge; Joyce, Judge; and Jacquot, Judge.

Opinion

AOYAGI, P. J.

***526** The Defendant was convicted of driving with a suspended driver's license after he drove a car approximately 200 feet from where his girlfriend had left it in the middle of the road. On appeal, the Defendant assigns error to the trial court's refusal to allow the Defendant to raise the statutory choice-of-evils (COE) defense at trial. We agree with the Defendant that the court erred and, accordingly, reverse and remand.

^[1] ^[2] When a criminal defendant seeks to raise a defense, the court must allow the defendant to present the defense at trial if there is evidence to support each element of the defense. *State v. Cruz-Gonzalez*, 303 P.3d 983, 986 (Or. Ct. App.), *rev. den*, 308 P.3d 205 (Or. 2013). We review the refusal to allow a defendant to raise a defense for legal error, viewing the facts in the light most favorable to the defendant. *State v. Oneill*,

State v. Clowdus, 530 P.3d 525 (Or. Ct. App. 2023).

303 P.3d 944, 946 (Or. Ct. App.), *rev. den.*, 313 P.3d 1126 (Or. 2013).

Facts and Procedural History

The facts offered at the pretrial hearing are as follows:

On a February night just before 11:00 p.m. (i.e., well after sunset), the Defendant was riding as a passenger in a car driven by his girlfriend, B. During the drive, the Defendant and B were arguing about car payments. Eventually, B became so upset that she stopped the car in the middle of Baseline Road in Hillsboro, told the Defendant, “Why don’t you just take the car, then,” exited the car, and “stormed off” on foot.

The Defendant has a suspended driver’s license due to a prior conviction for reckless driving. However, after B left, the Defendant—who was “sober but exhausted”—drove B’s car approximately 200 feet, parked it at a gas station, and fell asleep. The gas station attendant eventually approached the car, saw the Defendant sleeping, and called the police. When the police arrived for a welfare check, the Defendant initially denied driving the car but then admitted to having driven it a short distance as described above. The Defendant called B in front of the police officers, and B walked back and met them at the gas station, where she talked to the police. B later testified that she and the Defendant had been arguing, and that she had stopped the car in the middle of the road when they were “almost at the gas station” and walked away.

At the hearing, the Defendant offered additional evidence about the portion of Baseline Road where B had exited the car and walked off. Baseline Road is a “main thoroughfare” and one of two “very main arterial roadways” in the area. It has four car lanes (two in each direction), two bike lanes (one on each side), and no shoulder. The road is “heavily trafficked,” and although the posted speed limit is 40 miles per hour, many vehicles tend to drive faster than the speed limit on this stretch of road. The police officer who testified acknowledged that drivers on Baseline Road often exceed the speed limit and remembered that the traffic on the night of the incident was “just as busy as it is during the day.” The gas station attendant who testified said that he saw “a continuous stream of car

traffic” from his position in the gas station’s convenience store that night.

The Defendant was charged with driving with a suspended license. He sought a jury instruction on the COE defense. The court declined to give one. The Defendant was convicted and now appeals. *527

Legal Analysis

^[3] Unlike an affirmative defense, on which the defendant bears the burden of proof, the COE defense is a justification defense that, when properly raised, the state must negate beyond a reasonable doubt. *State v. Freih*, 348 P.3d 324, 326 (Or. Ct. App. 2015) (citing Or. Rev. Stat. § 161.055(1)). However, “the trial court has a screening function in determining whether the evidence is sufficient to send the choice of evils question to the jury.” *State v. Phillips*, 503 P.3d 1284, 1285 (Or. Ct. App. 2022) (citation omitted)

^[4] A “defendant is entitled to rely on the [COE] defense at trial as long as the evidence allows for the *possibility* that a jury could find in his favor.” *Freih*, 348 P.3d at 327. “[I]n any case, reasonable jurors could reasonably disagree about whether the COE defense justified a defendant’s criminal conduct,” but “[t]hat determination. . . is one that a defendant . . . is entitled to have resolved by a jury, on the record.” *Id.* Therefore, the defense “must be submitted for the jury’s consideration, no matter whether the judge is personally persuaded[,]” if there is any evidence to support all elements of the defense. *State v. Brown*, 761 P.2d 1300, 1303 (Or. 1988).

For purposes of determining whether any evidence supports a defense, a court should keep in mind that jurors may rely on common experience or common knowledge to make “reasonable inferences” from evidence, as long as they do not engage in “speculation and guesswork.” *State v. Bivins*, 83 P.3d 379, 386 (Or. Ct. App. 2004). *See also Dodge v. Tradewell Stores*, 474 P.2d 745, 746 (Or. 1970) (concluding that jury could reasonably infer, based on common knowledge, that vinyl flooring is slippery when wet).

State v. Clowdus, 530 P.3d 525 (Or. Ct. App. 2023).

Subject to certain exceptions, conduct that would otherwise constitute an offense “is justifiable and not criminal” when it “is necessary as an emergency measure to avoid an imminent public or private injury” and “[t]he threatened injury is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue.” Or. Rev. Stat. § 161.200(1).

^[5] Thus, a defendant may assert the COE defense at trial if the evidence would allow a jury to find that

- (1) his conduct was necessary to avoid a threatened injury;
- (2) the threatened injury was imminent; and (3) it was reasonable for him to believe that the need to avoid that injury was greater than the need to avoid the injury that the statute he violated seeks to prevent.

Phillips, 503 P.2d at 1286 (citation omitted).

Here, the threatened injury identified by the Defendant is a car accident triggered by another vehicle striking B’s car while it was parked in the road. Therefore, the Defendant was entitled to an instruction if the evidence would allow the jury to find that (1) driving the car was necessary to avoid an accident, (2) an accident was imminent, *528 and (3) it was reasonable for him to believe that the need to avoid an accident was greater than the need to avoid driving with a suspended license.

A. Necessity

First, the evidence would allow a reasonable jury to find that the Defendant’s driving the car with a suspended license was necessary to avoid an accident. “Part of showing that a defendant’s conduct was necessary as an emergency measure is showing that the conduct bears some logical relationship to the harm sought to be prevented or abated and could have prevented or abated the harm.” *Freih*, 348 P.3d at 327.

Additionally, conduct is necessary only if the defendant “had no reasonable alternative but to commit the crime,” so “the evidence must allow for the inference that the defendant had

no other course of action than committing the crime charged to avoid a threatened injury. *Phillips*, 503 P.3d at 175-76 (citations omitted). Therefore, a jury cannot reasonably infer that a defendant’s conduct was necessary if “the facts suggest one or more reasonable, legal alternatives that the defendant could have taken to prevent the threatened injury or alleviate the ongoing injury.” *State v. Dewhitt*, 368 P.3d 27, 37 (Or. Ct. App. 2016) (internal quotation marks and citations omitted) (reasoning that defendant’s unlawful marijuana use was not necessary to treat chronic pain because he had medical insurance and could visit a physician to obtain legal pain medication or physical therapy). Nor could a jury reasonably infer that an evident legal alternative was not reasonable merely because it was inconvenient, expensive, or otherwise subjectively unpalatable to the defendant. *See State v. Webber*, 736 P.2d 220, 223 (Or. Ct. App. 1987) (reasoning that facts failed to support inference that defendant had no reasonable alternative to illegally shooting property-damaging deer, because even though defendant did not want to undertake steps required to comply with kill-permit program, he had means and ability to do so). However, a legal alternative that might have existed in a literal sense does not preclude a defendant from asserting the defense if the facts would allow a reasonable jury to reject the notion that it was a reasonable alternative to the action that the defendant took. *See Phillips*, 503 P.3d at 1287-88 (reasoning that jury could permissibly infer that defendant had no reasonable alternative to illegally shooting mortally-wounded dog, because jury could conclude that driving 75 minutes to nearest veterinarian’s office for legal euthanasia—thereby prolonging dog’s suffering—was not a reasonable alternative).

Here, the Defendant’s evidence would allow a reasonable jury to infer that his conduct was necessary to avoid a traffic accident.

First, the Defendant’s driving with a suspended license logically related to the threatened harm of a traffic accident because B’s car was in the middle of the road and was likely to be the object that triggered an accident. Next, the Defendant’s driving with a suspended license could have prevented the harm associated with an accident, because the Defendant could drive the car to a place where it would not be an obstacle in the middle of the roadway.

State v. Clowdus, 530 P.3d 525 (Or. Ct. App. 2023).

Lastly, the evidence would allow a reasonable jury to infer that the Defendant had no reasonable, legal alternative to driving with a suspended license. The *529 State argues that there were other alternatives available to him. Specifically, the State posits that instead of driving the car, the Defendant could have (1) called B and tried to persuade her to come back and drive the car herself, (2) physically pushed the car off the road (by himself at night) without driving it, (3) left the car where it was and turned on the emergency flashers to make the care more visible to other drivers, (4) called the police nonemergency line to ask an officer to come drive the car out of the road, or (5) left the car in the road and walked to the gas station for help. However, the facts make it possible for a reasonable jury to infer that the numerous alternatives identified by the State were not actually reasonable under the circumstances: some of them could increase the risk to the Defendant's safety by forcing him to exit the car and walk in the busy traffic lanes, and others could keep the car in the middle of the roadway for an extended time period. On this record, reasonable jurors could disagree about whether the Defendant had no other reasonable alternatives. Therefore, the Defendant created a jury question on this element because he offered evidence that would permit a jury to find that his driving was necessary to avoid a threatened injury.

Imminence

Second, the evidence would allow a reasonable jury to find that the threatened injury was imminent. An essential component of imminence is specificity; thus, "vague, unspecified, or generalized potential harms fail to satisfy this requirement." *City of Eugene v. Adams*, 495 P.3d 187, 191 (Or. Ct. App. 2021).

Additionally, imminence requires the threat of injury to exist "at the time" that the defendant committed the offense. *E.g., Freih*, 348 P.3d at 328 (citations omitted). "[T]he term 'at the time' is not easily amenable to more rigid definition, and instead its precise meaning may vary depending on the context of the threatened injury and the type of crime committed." *Id.* However, "imminent" typically means "immediate, ready to take place, or near at hand." *State v. Taylor*, 858 P.2d 1358, 1360 (Or. Ct. App. 1993) (citation omitted).

We conclude that the evidence in this case was sufficient to create a jury question on whether the Defendant faced an imminent threat of injury at the time that he drove with a suspended license.

First, the Defendant offered evidence of more than a generalized threat of harm. The Defendant has not merely asserted that roads are inherently dangerous at night. Instead, he offered evidence of a threat specific to the stretch of road where B left the car, the time of day, and the level of traffic on the specific night in question. The Defendant's evidence indicated that B had left the car parked in the dark, on a heavily traveled stretch of a multi-lane "main thoroughfare" on which drivers often exceed the speed limit. Furthermore, the police officer and gas station attendant who testified both recalled an ongoing stream of traffic on the night in question. Based on this evidence and common experience, a reasonable jury could infer that other drivers would drive their vehicles down this road that night, that those other drivers would not expect to encounter a stopped vehicle in the middle of this road, and that the situation involved a specific risk of injury and property damage stemming from a vehicle crashing into B's car or attempting to swerve around B's car and colliding with another moving vehicle.

Next, the Defendant's evidence would permit a jury to find that the threat was ready to take place or near at hand. The testifying police officer recalled that the stretch of road on which B had left the car was "just as busy as it is during the day." The gas station attendant who testified said that on the night in question, he had seen "a continuous stream of car traffic" from his position at the station located 200 feet from the spot in the road where B had parked. The evidence regarding the traffic stream would permit a jury to infer that at the time the Defendant began driving, one or more cars in the stream of traffic would be reaching his location momentarily.

For these reasons, the evidence would allow a jury to conclude that the situation satisfied the COE defense's second element.

State v. Clowdus, 530 P.3d 525 (Or. Ct. App. 2023).

***530 The balancing of evils**

Finally, a jury could find on this record that it was reasonable for the Defendant to believe that the threatened injury posed by B's parked car in the middle of Baseline Road late at night outweighed the injury that Or. Rev. Stat. § 811.182 (the statute that creates the offense of driving with a suspended license) seeks to prevent.

A jury must evaluate whether “the desirability and urgency of avoiding the injury clearly outweighed the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue” by reference “to ordinary standards of intelligence and morality.” Or. Rev. Stat. § 161.200(1)(b). Thus, when deciding whether the evidence would permit a particular finding on this element, the court must evaluate from the perspective of “an objectively reasonable person of ordinary intelligence and understanding, not a person with the unique history or mental characteristics of any particular defendant.” *Phillips*, 503 P.3d at 1288 (internal quotation marks and citation omitted).

Here, a jury could reasonably conclude that the need to avoid the injuries attendant to a motor vehicle crash was greater than the need to prevent a person with a history of reckless driving from driving a distance of 200 feet. As a result, the jury could reasonably conclude that the facts satisfy the third element.

Because there was sufficient evidence to create a jury question on the choice-of-evils defense, the court erred in refusing to instruct the jury on that defense. That error was not harmless, so we reverse and remand for a new trial.

Reversed and remanded.