

State v. Freih, 348 P.3d 324 (Or. Ct. App. 2015).

348 P.3d 324
Court of Appeals of Oregon.

STATE of Oregon, Plaintiff–Respondent,
v.
Hassan Ali FREIH, Defendant–Appellant.

C112594CR; A153893.
|
Submitted Oct. 31, 2014.
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Decided April 22, 2015.

Synopsis

Background: The Defendant was convicted in the Washington County Circuit Court, James Lee Fun, Jr., J., of second-degree failure to appear. He appealed.

Holding: The Court of Appeals, Lagesen, J., held that the defendant failed to establish that it was “necessary” for him to miss his court date to avoid the threatened psychological harm of failing to care for his ailing mother, and failed to establish that the harm remained “imminent” as of his court date, as required to demonstrate entitlement to statutory choice of evils defense.
Affirmed.

West Headnotes (6)

[1] **Criminal Law**
🔑 Defenses in general

To be entitled to an instruction on statutory choice-of-evils defense, defendant has to offer evidence sufficient to allow the 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 was found to have violated sought to prevent.

[2] **Criminal Law** 🔑 Instructions

A trial judge may withhold a defense to a criminal charge from the jury’s consideration

only if there is no evidence in the record to support an element of the defense.

[3] **Criminal Law**
🔑 Defenses in General

Court of Appeals reviews trial court’s ruling that the defendant would not be entitled to an instruction on the statutory choice-of-evils defense for legal error, viewing the record in the light most favorable to defendant to determine whether a jury permissibly could find sufficient evidence in the record to establish all statutory elements of the defense.

[4] **Criminal Law**
🔑 Compulsion or necessity; justification in general

For a defendant’s conduct to be “necessary” to avoid a threatened injury, as required to demonstrate entitlement to statutory choice-of-evils defense, he must show that his criminal conduct bears some logical relationship to the harm sought to be prevented and could have prevented or abated the harm, and that no other course of action was available to him but to commit the charged crime.

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

To show that the injury defendant sought to avoid was “imminent” within the meaning of the statute governing choice-of-evils defense, defendant was required to show that the threat of injury existed at the time defendant committed his offense. Precise meaning of “at the time” depends on the context of the threatened injury and the type of crime committed.

[6] **Criminal Law**
🔑 Compulsion or necessity; justification in general

A defendant charged with failure to appear for required court date failed to establish that it was “necessary” for him to miss his court date to avoid threatened psychological harm of failing to

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care for his ailing mother, and that the harm remained “imminent” as of defendant’s court date, as required to demonstrate entitlement to statutory choice of evils defense; the defendant received notice of his mother’s ailing health approximately two weeks before scheduled court date, at which time he immediately flew to be with his mother, but available evidence suggested that defendant could have flown back in time for court date and then traveled back to his mother, given absence of financial constraints and evidence that other family members were available to care for mother; and the defendant offered no evidence regarding status of mother’s health on actual date defendant failed to appear.

Attorneys and Law Firms

*325 Peter Gartlan, Chief Defender, and Kyle Krohn, Deputy Public Defender, Office of Public Defense Services, filed the brief for the Defendant.

Ellen F. Rosenblum, Attorney General, Anna M. Joyce, Solicitor General, and Michael S. Shin, Senior Assistant Attorney General, filed the brief for the State.

Before DUNCAN, Presiding Judge; LAGESEN, Judge; and WOLLHEIM, Senior Judge.

Opinion

LAGESEN, J.

The Defendant, Mr. Hassan Ali Freih, failed to appear for a court date in connection with misdemeanor charges against him. As a result, he was charged and convicted of one count of failure to appear in the second degree, in violation of Oregon Revised Statutes § 162.195(1)(a).

In an attempt to defend against the charge for failure to appear, the Defendant sought to argue that, in light of his mother’s medical condition, he had no choice but to miss his court date. Thus, the Defendant attempted to rely on the choice-of-evils (COE) defense established by § 161.200 of the Oregon Revised Statutes. However, the trial judge prohibited him from presenting this defense to the jury. On appeal, the Defendant assigns error to the trial court’s pretrial ruling that he was not entitled to assert the COE defense. We affirm the trial court’s decision.

Factual Background

In his offer of proof to the trial court in support of his claimed entitlement to present the COE defense, the Defendant indicated that he would testify to the following facts at trial if he were permitted to pursue the defense:

The Defendant’s 91-year-old mother lives in Jordan. Approximately two weeks before his scheduled court date, the Defendant received a phone call from his aunt in Jordan. She informed him that his mother was seriously ill from an infection following a recent stomach operation. The aunt told the Defendant that his mother could not walk, was in pain, and was taking multiple medications. The aunt also told the Defendant that although family members in Jordan were taking care of his mother, they wanted the Defendant to travel to Jordan and help them with her care.

The Defendant then called his attorney’s office, but a receptionist told him that his attorney was on vacation for two weeks. After attempting twenty-four more times over the next two days to reach his attorney, and having no success, the Defendant then called the trial court. However, the court staffer with whom he spoke told him that he must “talk to [his] lawyer to deal with it.” Ultimately, the Defendant decided to fly to Jordan without consulting his attorney because, *326 as he explained in the offer of proof, he “love[s] [his] mom and . . . wanted to assist her.” He did not return for his court date two weeks later; instead, he remained in Jordan for three months. Upon questioning, the Defendant acknowledged that he had the financial means to travel back and forth from Jordan multiple times, if necessary.

Legal Framework

As generally recognized in United States law, the COE defense is a defense of justification; it allows a defendant to argue that even if the State can technically prove all elements of an offense, the defendant is nonetheless entitled to an acquittal because he chose the lesser of two evils in committing the crime. Many states recognize the COE defense as a matter of either state statutory or state common law. In Oregon, § 161.200 creates a statutory COE defense. This statute provides in pertinent part:

(1) Unless inconsistent with other provisions of chapter 743, Oregon Laws 1971, defining justifiable use of physical force, or with some other provision of law,

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conduct which would otherwise constitute an offense is justifiable and not criminal when:

(a) That conduct is necessary as an emergency measure to avoid an imminent public or private injury; and

(b) The 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).

^[1] As we have explained, to be entitled to an instruction on the COE defense, a defendant must offer evidence that makes it possible for 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 that he was found to have violated seeks to prevent.

State v. Boldt, 483, 841 P.2d 1196, 1198 (Or. Ct. App. 1992) (internal quotation marks and citation omitted). When evaluating whether sufficient evidence exists to satisfy each element, the trier of fact must view the facts from the viewpoint of “a person of ordinary intelligence and understanding, not a person with the unique history or mental characteristics of any particular defendant.” *State v. O'Neill*, 303 P.3d 944, 948 (Or. Ct. App.), *rev. den.*, 313 P.3d 1126 (Or. 2013). “In other words, [the COE defense] requires that a defendant’s perception of the situation be reasonable as gauged by an objective ‘reasonable person’ standard, rather than a subjective, defendant-specific standard.” *Id.* at 948-49.

Although a defendant seeking to rely on the COE defense must offer evidence that would make it *possible* for a jury to find in the defendant's favor, *see, e.g., Boldt*, 841 P.2d at 1197-98, the Oregon COE defense is not an “affirmative defense.”¹ Instead, once a defendant sufficiently *raises* the COE defense by providing pretrial notice to the court and prosecution and offering evidence that could possibly establish all three of the defense’s

elements, *see* Or. Rev. Stat. § 161.055(1), (3)—the burden falls on the State to *disprove* the defense beyond a reasonable doubt, Or. Rev. Stat. § 161.055(1).

^[2] ^[3] *327 If a defendant gives pretrial notice that they intend to assert the COE defense at trial, the State may move *in limine*, as it did in this case, to ask the court to preclude the defendant from asserting the defense at trial, on the ground that the available facts could not possibly allow a reasonable juror to conclude that the defendant’s situation satisfies all elements of the defense. Of course, in any case, reasonable jurors could reasonably disagree about whether the COE defense justified a defendant’s criminal conduct. That determination, though, is one that a defendant exercising his right to a jury trial is entitled to have resolved by the jury, on the record. In other words, the defendant is entitled to rely on the defense at trial as long as the evidence creates the *possibility* that a jury could find in his favor. As a result, after considering a defendant’s pretrial offer of proof, a trial court should not withdraw a defense from jury consideration unless the evidence in the record could not possibly support one or more elements of the defense. *State v. Brown*, 761 P.2d 1300, 1303 (Or. 1988).

Accordingly, on appeal, we review the trial court’s ruling that a defendant would not be entitled to assert the COE defense for legal error, with no deference to the trial court’s decision, viewing the record in the light most favorable to the defendant to determine whether it would be possible for a jury to find that the facts contained in the record satisfy all elements of the defense. *E.g., Boldt*, 841 P.2d at 1197 (citation omitted).

Legal Analysis

On appeal, the Defendant argues—as he did below—that that evidence entitled him to assert the COE defense in response to the charge of failure to appear in court. In particular, the Defendant argues that the evidence would permit a factfinder to find that he failed to appear so that he could avoid the psychological harm that he would suffer from failing to care for his ailing mother. However, based on the evidence in the record, we disagree with the Defendant contention that he was entitled to present the COE defense to the jury.

As an initial matter, we assume without deciding that a threatened psychological harm to a defendant could, in some circumstances, qualify as a “private injury” within the meaning of § 161.200(1)(a) that would support a

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defendant's use of the COE defense if the situation also satisfies the other criteria for the defense. *See* Paul H. Robinson, 2 *Criminal Law Defenses* § 124(b)(1), 47–48 (1984) (“Deprivation of a defendant’s opportunity to see his dying mother could potentially qualify as an injury under the choice-of-evils defense.”).

However, even accepting that the claimed psychological harm is a qualifying injury, the Defendant’s offer of proof did not establish his entitlement to assert the COE defense. Specifically, the evidence could not possibly permit a jury finding either that it was “necessary” for the Defendant to miss his court date to avoid that threatened psychological harm, or that that threatened psychological harm was “imminent” on the Defendant’s court date.

A. The evidence does not permit a finding that the Defendant’s failure to appear in court was necessary.

^[4] First, the Defendant failed to offer evidence that would support a jury finding that his conduct was necessary to avoid the threatened injury. 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 and could have prevented or abated the harm. Additionally, to show that criminal conduct was necessary, a defendant also must put forth evidence that would allow the jury to find that he had no reasonable alternative but to commit the crime. *State v. Miles*, 104 P.3d 604, 608 (Or. Ct. App. 2005) (“[F]or a defendant’s conduct to be ‘necessary’ to avoid a threatened injury, he must show that no other course of action was available to him but to ‘choose an evil.’”) (citation omitted).

In this case, the evidence in the record does not permit a finding in the Defendant’s favor on the necessity element. First, the Defendant’s offer of proof *would* permit a juror to find that his failure to appear in court bore some logical relationship to, and could have prevented, the psychological harm he would suffer from failing to care for his mother, because failing to appear allowed him to remain in Jordan, and in Jordan, he would be present to care for her.

However, his offer of proof would *not* permit a juror to find that he had no reasonable alternative but to commit the crime to avoid that potential harm. To the contrary, the available facts suggest that the Defendant had the financial means to travel to and from Jordan as needed, and that other family members were available to care for

his mother during his absences. Therefore, the only inference these facts permit is that the Defendant could have appeared for his court date *and* avoided the psychological harm of not caring *328 for his mother: He could have traveled to Jordan when he initially did, returned for his court date two weeks later, and then traveled back to Jordan after the court date to further care for his mother. Therefore, no reasonable juror could find that the Defendant had no other course of action but to choose the “evil” of committing the crime of failure to appear. Therefore, the evidence would not make it possible for a jury to find that his failure to appear was necessary to avoid a threatened injury.

B. The evidence does not permit a finding that the threatened injury to the Defendant was imminent.

^[5] Next, the Defendant failed to offer evidence that would support a jury finding that the injury he sought to avoid was imminent. To show that the injury that a defendant sought to avoid was “imminent” within the meaning of the statute, the defendant must show that the threat of injury existed “at the time” that he committed his offense. *Boldt*, 841 P.2d at 1198. Unfortunately, the 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.

In this case, the evidence in the record would not make it possible for a jury to conclude that the Defendant faced an imminent threat of injury. Again, we assume without deciding that the psychological harm that the Defendant would suffer if he failed to care for his ailing mother qualifies as a threatened injury. However, the Defendant’s offense was failure to appear for a required court date, so he needed to put forth evidence that would allow a jury to find that the alleged threat of injury was ready to take place on the day that he was scheduled to appear. But the Defendant’s offer of proof consisted solely of testimony that, *two weeks* before his trial date, his mother had an infection and needed extensive at-home care *at that time*. Although the Defendant also testified that he ultimately remained in Jordan for three months, he did not explain whether he stayed that long because of his mother’s health condition or for other reasons. In sum, the offer of proof was deficient because it provided no information concerning the Defendant’s mother’s health status on the date that he failed to appear in court. Thus, it does not permit a finding that the threat of psychological harm that caused the Defendant to travel to Jordan two weeks

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before his court date persisted on his actual court date. Absent this evidence, a jury could not find that he faced a threat of “imminent” psychological harm at the time that he committed the charged offense of failure to appear, unless the jurors impermissibly speculated about facts not offered at trial. Therefore, the Defendant failed to establish the imminence element.

^[6] Ultimately, the Defendant failed to offer sufficient evidence to establish at least two of the three elements required for the COE defense. Therefore, we affirm the lower court’s decision.

ⁱ An affirmative defense is a defense that the defendant must prove by a preponderance of the evidence at trial. Or. Rev. Stat. § 161.055(2). Oregon’s legislature explicitly identifies affirmative defenses in the Criminal Code by referring to them as such in the statutory language creating those defenses. *See, e.g.*, Or. Rev. Stat. § 161.305 (“Qualifying mental disorder constituting insanity [as defined by separate statute] is an affirmative defense.”). Thus, the choice-of-evils defense is not an affirmative defense because the state legislature did not declare it to be one in the statute that created the defense. *See* Or. Rev. Stat. § 161.200.