

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

FACTS: D was charged with a misdemeanor and was required to appear in court. Two weeks before his court date, D learned that his elderly mother, who lives in Jordan, was seriously ill. D's aunt asked D to come to Jordan to help care for his mother. D called his attorney and the court but was unable to obtain guidance on how he should handle the situation. D immediately flew to Jordan and stayed there for three months, missing his court date.

PROCEDURAL HISTORY: D was charged with failure to appear. D sought to use the COE defense, arguing that he had to miss his court date in order to avoid the psychological harm that he would suffer if he failed to care for his mother. The trial court ruled that he was not entitled to raise the defense and would not be entitled to a jury instruction on it. D appealed the decision.

ISSUE: Did the trial court err in holding that D could not rely on the COE defense and could not receive a jury instruction on it?

HOLDING: The trial court did not err in its decision.

EXPLICIT RULES:

- Statute that sets forth COE defense (section 161.200)
- Elements: To be entitled to use COE defense in a prosecution for violation of a criminal statute, a defendant must offer evidence sufficient 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 criminal statute seeks to prevent. *State v. Boldt* (Or. Ct. App. 1992).
- A judge can withdraw an affirmative defense from a jury's consideration "only if there is no evidence in the record to support an element of the defense." *State v. Brown* (Or. 1988).
- Standard of review on appeal re: trial court's decision that a defendant is not entitled to an instruction on the COE defense: The appellate court must view the evidence in the light most favorable to the defendant to determine "whether a jury permissibly could find the statutory elements of the defense from the facts or evidence contained in the record." *State v. Boldt*.
- Element-specific rules
 - To establish that his conduct was "necessary" to avoid a threatened injury, a defendant must provide evidence that would allow a jury to find that he had no reasonable alternative but to commit the crime. *State v. Miles* (Or. 2005).
 - To establish that the injury he sought to avoid was "imminent," the defendant must show that the threat of injury existed at the time he committed the offense. *State v. Boldt*.

REASONING:

- The court assumes without deciding that a threatened psychological harm qualifies as a "private injury" for purposes of the COE defense.
- D failed to provide enough evidence to allow a jury to find that his conduct was necessary to avoid the injury.

- The evidence indicates that D could have appeared in court *and* avoided the psychological harm of not caring for his mother. She was not facing imminent death, and other family members were available to care for her. D offered no evidence indicating that flying back and forth was not a reasonable option. He could have stayed in Jordan for a few weeks, flown back for the court appearance, and returned to Jordan afterward.
- In light of the facts provided, no reasonable juror could find that D had no other course of action but to choose the evil of failing to appear in court.
- D failed to provide enough evidence to allow a jury to find that the injury he sought to avoid was imminent.
 - The only evidence D provided pertains to the time period two weeks before his court date. He provided no evidence about the state of her health on (or shortly before, given travel concerns) the day he was supposed to appear in court.
 - Given this evidence, a jury could not find that the threat of psychological harm from two weeks earlier persisted until the time of the court date. It would be speculative for the jury to conclude that he remained under a threat of imminent harm.

POTENTIAL IMPLICIT RULE:

- A threat of injury may exist “at the time” of the offense if it exists on the day of the offense.