

2011 IL App (1st) 091026-U
No. 1-09-1026

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 08 CR 6405
)	
DONZELL EPHRAIM,)	Honorable Evelyn B. Clay,
)	Judge Presiding.
Defendant-Appellant.)	

Murphy, J., delivered the judgment of the court.
Quinn, P.J., and Neville, J., concurred in the judgment.

ORDER

HELD: The trial court did not err in finding defendant guilty of unlawful use of a weapon by a felon despite his assertion of a necessity defense, where the court did not improperly place the burden of proof upon defendant but made a legal assessment of whether that defense had been stated.

¶ 1 Following a bench trial, defendant Donzell Ephraim was convicted of unlawful use of a weapon by a felon and sentenced to six years' imprisonment. On appeal, defendant contends that the trial court erred by placing the burden upon him to prove his affirmative defense of necessity.

¶ 2 At trial, police officer Peter Haritos testified that, at about 11:45 p.m. on March 18, 2008, he stopped a car that he had just seen pass through an intersection in disregard of a red traffic

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signal. The car, driven by defendant with no other occupants, stopped within seconds of Officer Haritos' signal to stop. As Officer Haritos approached the car, he saw defendant "drop his shoulders [and] lean forward *** partially out of my view towards the lower front part of his vehicle." Defendant exited his car, leaving the driver's door open. Officer Haritos could see a gun on the driver's floorboard. After Officer Haritos picked up the gun, defendant said that he "worked for the FBI." However, his wallet contained no indication that he was a federal agent. In addition to the arrest on the instant charge, defendant received a citation for disobeying a red light.

¶ 3 The parties stipulated to defendant's prior felony convictions, and his motion for a directed finding was denied.

¶ 4 Defendant's son Donzell Swarn testified that, at about 10 p.m. on March 18th, he told Rick, a friend of defendant's, that he was "mad" because he believed that Nathaniel Greer had stolen his car. Swarn was openly carrying a gun, which he believed he would need to recover his car as Greer had stated that he would shoot Swarn on sight. When Rick left, defendant came to Swarn a few minutes later. (Swarn did not testify to the details of his interaction with defendant that evening due to self-incrimination concerns.) Two days later, Greer shot Swarn. As of the instant trial, Greer was facing charges for that incident.

¶ 5 Defendant testified that, on the day in question, he was at a friend's house playing cards from about 7 p.m. At about 10 p.m., Rick came in and told defendant that he had met his son Swarn, who seemed "upset." Defendant went to where Rick had seen Swarn and found him there. Swarn "was acting like something was bothering him," and when defendant asked what that was, Swarn told him that he believed someone had stolen his car and threatened him. Defendant asked Swarn for his gun so that he would not "get hurt," telling Swarn that he would buy him another car if the police did not recover his. Swarn gave defendant his gun, and defendant placed the gun under the driver's seat of his car. Defendant sent Swarn home and returned to his card game.

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¶ 6 While driving home from the game shortly before midnight, defendant was stopped by police. He leaned over to pull his wallet out of his back pants pocket, then got out of the car because it was easier to remove his wallet that way. The police found in the car the gun that defendant had taken from Swarn and arrested defendant. He denied telling the police that he worked for the FBI but admitted that, out of panic, he did not tell them that he had taken his son's gun to keep him out of trouble. Had defendant not been stopped, he would have taken the gun home and conferred with his wife about the best way to dispose of it. He acknowledged that he had an opportunity to take the gun to the police but did not, but he explained that he was more concerned about Swarn not having the gun and thus being safe than the consequences of himself having it.

¶ 7 During closing arguments, the State argued that "as to the defense of necessity, *** I don't believe the defense has raised or met the burden of necessity" because "defendant failed to establish that a situation existed to cause the need for necessity." Defendant in turn argued that "the State has not rebutted the defendant or his son's testimony." He argued that he had no other reasonable alternative, as he would have been arrested if he brought the gun to a police station and Swarn would have been arrested if he had called the police while Swarn had the gun.

¶ 8 The court found defendant guilty, finding that the necessity defense was inapplicable because he caused the circumstances of his alleged necessity. The court stated that necessity was not "established by" defendant but instead "rebutted *** by the circumstances." Though defendant may have been concerned about Swarn, he did not take Swarn home but sent him home and continued with his own socializing while the unsupervised Swarn could have obtained another weapon. Moreover, defendant was stopped by police for a traffic offense, then did not give the officers an explanation involving Swarn when they found the gun in the car.

¶ 9 In his post-trial motion, defendant argued that he "put forth the affirmative defense of necessity which the State was unable to rebut." He argued at the motion hearing that he acted out of necessity when he took the gun from Swarn, which was corroborated by the fact that Swarn

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was later shot. The court denied the motion, reiterating that defendant's conduct negated his necessity defense.

¶ 10 At sentencing, the court found defendant to be a mandatory Class X felon based on prior convictions and sentenced him to six years' imprisonment. His post-sentencing motion was denied, and this appeal followed.

¶ 11 On appeal, defendant contends that the trial court erred by placing the burden upon him to prove his affirmative defense of necessity.

¶ 12 Under section 7-13 of the Criminal Code:

"Conduct which would otherwise be an offense is justifiable by reason of necessity if the accused was without blame in occasioning or developing the situation and reasonably believed such conduct was necessary to avoid a public or private injury greater than the injury which might reasonably result from his own conduct." 720 ILCS 5/7-13 (West 2008).

¶ 13 The necessity defense is available as a matter of law to a defendant who (1) was without blame in occasioning or developing the situation, and (2) reasonably believed that his conduct was necessary to avoid a public or private injury greater than the injury that might have resulted from his conduct. *People v. Gibson*, 403 Ill. App. 3d 942, 951 (2010), citing *People v. Janik*, 127 Ill. 2d 390, 399 (1989). Necessity involves a choice between two admitted evils where other options are unavailable, so that a defendant's illegal conduct is justified by necessity only if that conduct was the only reasonable alternative available under the circumstances. *Gibson*, 403 Ill. App. 3d at 952. Thus, if other alternatives existed that would have caused less harm, the defendant was not justified in breaking the law and not entitled to the necessity defense as a matter of law. *Gibson*, 403 Ill. App. 3d at 952.

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¶ 14 Necessity is an affirmative defense. 720 ILCS 5/7-14 (West 2008). Thus, "unless the State's evidence raises the issue [of necessity], the defendant, to raise the issue, must present some evidence thereon," but "then the State must sustain the burden of proving the defendant guilty beyond a reasonable doubt as to that issue together with all the other elements of the offense." 720 ILCS 5/3-2 (West 2008). In order to properly raise the affirmative defense of necessity, a defendant must present "some evidence" in support of his claim. *People v. Kratovil*, 351 Ill. App. 3d 1023, 1033 (2004).

¶ 15 Here, it is apparent that the court made no credibility determinations but instead evaluated the defense account for compliance with the definition of necessity. Stated another way, the court's decision was not based upon placing the factual burden of proof on defendant but upon a legal determination of whether defendant had even stated the requisite elements of a defense of necessity, without which the State would not have the burden of disproving the necessity defense. In that light, the court's finding that necessity was not "established by" defendant was not erroneous, and the court's findings as a whole were consistent with the law and the defense account of the facts.

¶ 16 We also find that the court's legal analysis was not erroneous. Though taking the gun from Swarn at about 10 p.m. may indeed have avoided a greater harm, there were reasonable alternatives to defendant's offense of being in possession of the gun near midnight when he encountered the police. In terms of the statutory requirement that defendant be "without blame in occasioning or developing the situation" (720 ILCS 5/7-13 (West 2008)), it may well be that defendant was blameless in creating the situation that resulted in him taking the gun, but by returning to the card game and then disregarding the red light he was responsible for creating the situation of having the gun in his car when the police stopped him.

¶ 17 Accordingly, the judgment of the circuit court is affirmed.

¶ 18 Affirmed.