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2013 IL App (3d) 110564-U

Order filed April 16, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 14th Judicial Circuit,
Plaintiff-Appellee,)	Mercer County, Illinois,
)	
v.)	Appeal No. 3-11-0564
)	Circuit No. 11-CF-9
CINDY STEWART,)	
)	Honorable
Defendant-Appellant.)	Frank R. Fuhr,
)	Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Presiding Justice Wright and Justice O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The trial court did not abuse its discretion in denying defendant's request for jury instructions on the affirmative defenses of necessity (720 ILCS 5/7-13 (West 2010)) and compulsion (720 ILCS 5/7-11 (West 2010)) where there was not even slight evidence to support either instruction; (2) the trial court failed to comply with section 113-3.1(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/113-3.1(a) (West 2010)) when it imposed a public defender fee; and (3) the penalty enhancement under section 15(b)(1)(H) of the Methamphetamine Control and Community Protection Act (720 ILCS 646/15(b)(1)(H) (West 2010)) for manufacturing within 1,000 feet of a place of worship or parsonage does not constitute an unconstitutional establishment of religion.

¶ 2 Defendant, Cindy Stewart, was convicted by a jury of aggravated participation in methamphetamine manufacturing (720 ILCS 646/15(b)(1)(H) (West 2010)), where the manufacturing occurred within 1,000 feet of a place of worship. Defendant requested that the jury be given instructions on the affirmative defenses of necessity (720 ILCS 5/7-13 (West 2010)) and compulsion (720 ILCS 5/7-11 (West 2010)), but the trial court denied both requests, finding that the evidence did not support the instructions. After sentencing, the trial court held a hearing at which defendant was not present, and during which the court ordered defendant to pay a public defender fee. Defendant raises three claims on appeal: (1) the trial court abused its discretion in refusing defendant's requests for jury instructions; (2) the trial court failed to comply with section 113-3.1(a) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/113-3.1(a) (West 2010)) when it imposed the public defender fee; and (3) the enhanced penalty under section 15(b)(1)(H) of the Methamphetamine Control and Community Protection Act (Act) (720 ILCS 646/15(b)(1)(H) West 2010)) for manufacturing methamphetamine within 1,000 feet of a place of worship or parsonage constitutes an unconstitutional establishment of religion. We affirm in part, vacate in part, and remand for a sufficient hearing in compliance with section 113-3.1(a).

¶ 3 **FACTS**

¶ 4 On January 16, 2011, Mercer County Deputy Sheriff Jesse Doty was investigating James Stewart, who had an active arrest warrant. Doty arrived at James's residence and saw James near his garage. As Doty approached the garage, he heard a fan blowing and smelled anhydrous ammonia. Doty observed James inside the garage using a container to stir something, which Doty believed to be methamphetamine. After backup arrived, officers arrested James along with

two other people found in the house's basement: Joseph Engle and defendant, who was married to James at the time.

¶ 5 Defendant was questioned after her arrest. She admitted that she knew methamphetamine was being made in her home. She told the investigator that she and James were having financial problems, and, as a result, James was manufacturing and selling methamphetamine to make extra money. Defendant admitted that she had purchased lithium batteries for James on four or five occasions, which she knew James used to manufacture methamphetamine. In a written statement, defendant admitted to purchasing lithium batteries twice within the two days before her arrest. She also admitted to helping Engle remove pseudoephedrine pills from their packaging. (Pseudoephedrine pills can be used to manufacture methamphetamine.) She explained that she and James needed the money from methamphetamine sales to avoid losing their house. Defendant told the investigator that, upon James's request, she had retrieved a blue funnel and three plastic containers from the garage and brought them inside the house for James to use in manufacturing methamphetamine. During her interview with the investigator, defendant never mentioned being forced by her husband to participate in the manufacturing of methamphetamine.

¶ 6 Pharmacy records were introduced at trial establishing that defendant had purchased pseudoephedrine from McKnight Pharmacy on July 14 and August 25, 2010; from Walmart Pharmacy five times within the two years prior to her arrest; and from Walgreens on January 15, 2011, and six other times within the two years prior to her arrest.

¶ 7 At trial, defendant testified that she had been married to James for about 30 years. Defendant had worked part time but was financially dependent on James. She testified that

James was "controlling," had hit her several times, had choked her once, and had threatened to kill her two or three times. This kind of behavior had gone on for 15 years. Defendant testified that if she refused to buy pseudoephedrine pills for James or bought the wrong pills, he would get physically abusive, sometimes shoving defendant, and would scream and yell at her. She complied with James's demands to buy the pills because she was scared of him. Defendant did not leave the abusive situation because she was financially dependent on James, did not have sufficient employment, did not own a vehicle, and had two small children. She testified that those same reasons prevented her from reporting the abuse. On redirect examination, defendant testified that she agreed to purchase batteries and pseudoephedrine for her husband:

"Because my husband asked me to, he told me to, I done what I was told to do—he always told me—I was brought up old school, that's the way my mother raised me, old school, that's what you done for your husband, sometimes it's not right but that's what you done."

¶ 8 Defendant testified that on January 16, 2011, James asked her for the lithium batteries and pseudoephedrine he had instructed her to buy. Defendant gave James the materials because she believed he would physically abuse her if she refused. She claimed she never assisted James in the cooking of the methamphetamine and never went into the garage to participate in the manufacturing, although she admitted to consuming the methamphetamine. She stated that January 16, 2011, was the first time that James had manufactured methamphetamine at the Stewart residence, but that she was aware that James had manufactured it on previous occasions at other locations. Defendant also denied obeying James's instruction to bring him a funnel from the garage. Defendant testified that she refused to bring in the funnel, and as a result James got

mad and stormed out to the garage to get it himself.

¶ 9 The State presented testimony that St. Mary's Catholic Church was located within 1,000 feet of the Stewart residence.

¶ 10 Defendant offered jury instructions on the affirmative defenses of necessity (720 ILCS 5/7-13 (West 2010)) and compulsion (720 ILCS 5/7-11 (West 2010)). The trial court found that neither defense was supported by the evidence and refused the instructions. The jury found defendant guilty. On August 5, 2011, the trial court sentenced defendant to six years' imprisonment. Defendant's notice of appeal was timely filed on August 5, 2011.

¶ 11 On October 18, 2011, the trial court held a hearing on defendant's appointed counsel's petition for fees. Defendant was not present at the hearing. The record of the hearing does not contain any consideration by the trial court of defendant's financial circumstances. The hearing focused entirely on counsel's costs of representation. The court ordered defendant to pay a public defender fee of \$8,759.33.

¶ 12 Defendant appeals.

¶ 13 ANALYSIS

¶ 14 I. Trial Court's Refusal of Defendant's Requested Jury Instructions

¶ 15 The giving of jury instructions is within the sound discretion of the trial court. *People v. Jones*, 219 Ill. 2d 1 (2006). However, a defendant is entitled to instructions on affirmative defenses which the evidence supports, even when the evidence is slight. *People v. Everette*, 141 Ill. 2d 147 (1990). Where there is evidentiary support for a requested defense instruction, the trial court abuses its discretion if it fails to give the instruction. *People v. Gibson*, 403 Ill. App. 3d 942 (2010); see also *Jones*, 219 Ill. 2d 1. The trial court should determine whether there is

evidence for the jury to consider and not weigh the evidence for itself. *People v. Lyda*, 190 Ill. App. 3d 540 (1989).

¶ 16 Defendant argues that the trial court abused its discretion when it refused to give requested instructions on the affirmative defenses of necessity (720 ILCS 5/7-13 (West 2010)) and compulsion (720 ILCS 5/7-11 (West 2010)). To answer this question, we must determine whether these defenses were supported by evidence. *Gibson*, 403 Ill. App. 3d 942.

¶ 17 The affirmative defense of necessity is available to a defendant if: (1) the defendant is without blame in occasioning or developing the situation; and (2) the defendant reasonably believed that her conduct was necessary to avoid a public or private injury greater than the injury which might reasonably result from her own conduct. 720 ILCS 5/7-13 (West 2010); *Gibson*, 403 Ill. App. 3d 942. Necessity involves the choice between two evils where other options are unavailable. *People v. Kratovil*, 351 Ill. App. 3d 1023 (2004). The necessity defense is not available when there is a reasonable alternative to the illegal action. *People v. White*, 78 Ill. App. 3d 979 (1979).

¶ 18 Defendant argues that the evidence supported a necessity defense because defendant's illegal actions were necessary for defendant to avoid being physically harmed by James. Defendant argues any reasonable alternative to participating in the manufacture of methamphetamine was precluded because defendant was suffering from battered women's syndrome. However, defendant did not raise the issue of battered women's syndrome at trial. She presented no expert witness testimony establishing that she suffered from battered women's syndrome, and the testimony that she did present is insufficient to establish a diagnosis on appeal.

¶ 19 The trial court acted within its discretion in denying defendant's request for a jury instruction on necessity because defendant did not present even slight evidence to support a necessity defense. The evidence is lacking in several ways. First, defendant's testimony does not establish that defendant reasonably believed that physical abuse would occur if she refused to participate in the manufacturing of methamphetamine. Rather, defendant testified in general terms to sporadic abuse that occurred over the span of 10 to 15 years. She did not cite a single specific occasion in which she was physically harmed for refusing to participate in the methamphetamine manufacturing. Her testimony was insufficient to establish a reasonable belief that private injury would result if she refused to participate.

¶ 20 Second, even if we were to assume, *arguendo*, that defendant reasonably believed she would have suffered physical abuse if she refused to participate in the methamphetamine manufacturing, reasonable alternative actions were available. Defendant could have called the police and had her husband arrested or left the home, if not permanently, then at least temporarily, while James was cooking methamphetamine.

¶ 21 There was not even slight evidence to support defendant's necessity defense. As a result, the trial court did not abuse its discretion in refusing defendant's request to give a necessity instruction.

¶ 22 The affirmative defense of compulsion is available to a defendant where the illegal conduct was performed "under the compulsion of threat or menace of the imminent infliction of death or great bodily harm, if he or she reasonably believes death or great bodily harm will be inflicted upon him or her." 720 ILCS 5/7-11 (West 2010). Defendant argues that there was evidence to support a compulsion defense because she participated in manufacturing of

methamphetamine under the reasonable belief that refusing to participate would result in the imminent infliction of great bodily harm against her by her husband James.

¶ 23 Defendant did not provide any evidence to support a compulsion instruction. As explained, *supra*, defendant's testimony did not establish that her refusal to participate in the manufacturing of methamphetamine would result in imminent bodily harm. Defendant's testimony on this point was vague; she did not testify to a particular incident in which she had suffered imminent bodily harm as a result of her refusal to participate. In fact, defendant testified that on the night of her arrest, she did refuse one of defendant's demands to participate by refusing to retrieve a blue funnel from the garage. Rather than responding to this refusal with the infliction of imminent bodily harm, James "[g]ot mad, stormed out, went to the garage."

¶ 24 Defendant's testimony did not establish a reasonable belief that her refusal to participate would result in imminent bodily harm. As a result, the trial court did not abuse its discretion in refusing to give a compulsion instruction.

¶ 25 II. Public Defender Fee Hearing

¶ 26 Defendant claims that the trial court's order imposing a public defender fee against her violated section 113-3.1(a) of the Code (725 ILCS 5/113-3.1(a) (West 2010)) and must be vacated.

¶ 27 Section 113-3.1(a) requires that prior to imposing a public defender fee upon a defendant, the trial court must conduct a hearing to determine defendant's ability to pay. 725 ILCS 5/113-3.1(a) (West 2010). The hearing must be held within 90 days of the entry of a final judgment disposing of the defendant's case. *Id.* In its recent opinion in *People v. Somers*, 2013 IL 114054, the Illinois Supreme Court reiterated the requirements of a section 113-3.1(a) hearing:

"To comply with the statute, the court may not simply impose the fee in a perfunctory manner. [Citation.] Rather, the court must give the defendant notice that it is considering imposing the fee, and the defendant must be given the opportunity to present evidence regarding his or her ability to pay and any other relevant circumstances. [Citation.] The hearing must focus on the costs of representation, the defendant's financial circumstances, and the foreseeable ability of the defendant to pay. [Citation.] The trial court must consider, among other evidence, the defendant's financial affidavit. [Citations.]" *Id.* ¶ 14.

¶ 28 In the present case, defendant was not given notice of the hearing, defendant was not present at the hearing, and the court did not consider defendant's financial circumstances or her ability to pay. The hearing did not satisfy the requirements of section 113-3.1(a). The trial court's order imposing the public defender fee is vacated, and the cause is remanded for a sufficient hearing under section 113-3.1(a). A new hearing may be held, despite the fact that 90 days has passed since the entry of a final judgment, because the initial hearing was held within 90 days. *Somers*, 2013 IL 114054.

¶ 29 III. Constitutionality of the Penalty Enhancement

¶ 30 Finally, defendant claims that section 15(b)(1)(H) of the Act (720 ILCS 646/15 (West 2010)), which creates a penalty enhancement for participating in methamphetamine manufacturing that occurs within 1,000 feet of a place of worship or parsonage, violates the establishment clauses of the first amendment to the United States Constitution (U.S. Const., amend. I) and article I of the Illinois Constitution (Ill. Const. 1970, art. I, § 3). The constitutionality of a statute is a matter of law subject to *de novo* review (*People v. Sharpe*, 216 Ill. 2d 481 (2005)); however, a statute enjoys a presumption of constitutionality (*People v. Lantz*,

186 Ill. 2d 243 (1999)).

¶ 31 Defendant concedes, and we agree, that our decision on this issue is bound by the Supreme Court's holding in *People v. Falbe*, 189 Ill. 2d 635 (2000) (upholding as constitutional a penalty enhancement for unlawful possession of a controlled substance within 1,000 feet of a place of worship). The penalty enhancement of section 15(b)(1)(H) acts not as an establishment of religion but, rather, as a protection for those people particularly vulnerable to the evils of drug trafficking. *Id.*

¶ 32

CONCLUSION

¶ 33 The judgment of the circuit court of Mercer County is affirmed in part and vacated in part. The cause is remanded for a sufficient public defender fee hearing in compliance with section 113-3.1(a) of the Code (725 ILCS 5/113-3.1(a) (West 2010)).

¶ 34 Affirmed in part and vacated in part; cause remanded.