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2016 IL App (3d) 130593-U

Order filed March 10, 2016

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2016

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-13-0593
LAVON K. YOUNG,)	Circuit No. 12-TR-91322
Defendant-Appellant.)	Honorable
)	Domenica Osterberger,
)	Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Justice Schmidt concurred in the judgment.
Justice McDade dissented.

ORDER

- ¶ 1 *Held:* Because we find that the trial court did not abuse its discretion in excluding testimony from defendant regarding his mother's and cousin's intoxication and his mother's urging that he drive faster, we affirm defendant's conviction for aggravated speeding.
- ¶ 2 Defendant, Lavon K. Young, appeals his conviction of aggravated speeding (625 ILCS 5/11-601.5(b) (West 2012)), arguing that the trial court prevented him from presenting a defense by excluding certain evidence he claims was relevant to his necessity defense. We affirm.

FACTS

¶ 3

¶ 4 Defendant was charged by traffic citation and complaint with aggravated speeding (625 ILCS 5/11-601.5(b) (West 2012)). A jury trial was held. During opening statements, defense counsel indicated that defendant was going to pursue a necessity defense.

¶ 5 Sergeant Ron Caves, an Illinois State police officer, testified that he was patrolling Interstate 55 at approximately 2:50 a.m. on the date of the incident. He observed a gray van travelling at a high rate of speed and used a LiDAR detector to determine that the van was travelling at a speed of 102 miles per hour. The posted speed limit was 55 miles per hour. Caves pulled the van over. Defendant, who had an instructional driver's permit, was driving the van. Caves testified that there were at least three other people in the vehicle with defendant, but there could have been four. The front-seat passenger was over 21 and was a female relative of defendant. Caves wrote defendant a traffic citation for aggravated speeding, gave defendant an I-bond, and released defendant.

¶ 6 The State rested. Before defendant began presenting his case, the State made an oral motion *in limine* to exclude testimony from defendant regarding: (1) whether any passengers in the vehicle were intoxicated; (2) any statements defendant's mother made to him; and (3) any medical testimony beyond the knowledge of defendant. The State argued that such evidence was irrelevant to defendant's necessity defense and that statements made by defendant's mother were hearsay.

¶ 7 The defense made an offer of proof in which defendant testified that he was 16 years old and had an instructional driving permit on the night of the incident. He went to a family party in Chicago with his mother; his 21-year-old cousin, David; his 11-year-old cousin, Armoni; his sister; and a family friend. David drove to the party and was supposed to drive home. At the

party, everyone started drinking because they thought they were going to stay the night.

Defendant did not drink any alcohol at the party. Ultimately, defendant drove home to Plainfield because his mother told him he had to. On the way home, defendant's mother was sitting next to him in the passenger seat, David was sitting in the middle row, and Armoni was sitting in the back row of the van. When they were on the highway, David smoked a cigarette, and Armoni, who had asthma, began having breathing problems. Defendant's mother and David told him to drive faster because Armoni's inhaler was at home. Defendant's mother was in a "crabby mood." Defendant believed that he needed to speed because Armoni was having an asthma attack and his mother and David were telling him he needed to drive faster. They were approximately 15 minutes from home when Armoni began having the asthma attack. Defendant did not pull over because he did not want to waste time. No one in the vehicle had a cell phone. Defendant did not exit the highway to seek emergency help.

¶ 8 A police officer pulled over defendant's vehicle. Defendant did not tell the officer about Armoni's asthma attack or ask him to call 911. Defendant just wanted to get the ticket and leave because he did not want his mother to get in trouble. Defendant's mother had consumed too much alcohol at the party. She started telling defendant to drive away as the officer was writing the ticket. Defendant did not know that there was a hospital within two miles from where he was pulled over.

¶ 9 After the offer of proof, the State objected to any testimony regarding the asthma attack and any testimony regarding information from defendant's mother on the basis that defendant had other legal options and could not establish a necessity defense. The trial court granted the State's motion *in limine* to preclude any testimony regarding defendant's mother and her directives to defendant. However, the court allowed defendant to testify regarding the asthma

attack.

¶ 10 Defendant gave the same testimony in front of the jury as in his offer of proof, except that defendant was precluded from testifying that the adults in the vehicle were intoxicated or regarding any directives he received from his mother. Defendant was permitted to testify that David told him to speed. Defendant additionally testified that: (1) he knew that the speed limit was around 55 miles per hour and that he was driving approximately 102 miles per hour; and (2) although no one threatened him, defendant believed that he would get in trouble and "get hit" if he did not drive that fast because he would have been blamed for Armoni getting sicker.

¶ 11 During closing arguments, the prosecutor stated that the only issue in dispute was whether defendant acted out of necessity when he was speeding. The State argued that it was not necessary for defendant to speed because he had other legal options to address Armoni's asthma attack, including driving the speed limit and seeking medical assistance. Defense counsel argued that defendant reasonably believed he needed to speed to get home to Armoni's inhaler because Armoni was having an asthma attack and David, an adult, told defendant to speed.

¶ 12 The jury found defendant guilty of aggravated speeding. The trial court sentenced defendant to 12 months' conditional discharge, payment of fines and costs in the amount of \$200, 100 hours of community service, and traffic school.

¶ 13 ANALYSIS

¶ 14 On appeal, defendant argues that the trial court violated his right to present a defense by preventing him from testifying that his mother and David were intoxicated and that his mother was urging him to speed because said evidence was admissible and critical in establishing defendant's necessity defense. Because we find that the trial court did not abuse its discretion in excluding said testimony, we affirm.

¶ 15 "While it is true that a defendant has the right to present a defense [citation], it is also true that the trial court is vested with broad discretion in ruling on the admissibility of evidence sought to be excluded as irrelevant." *People v. Hayes*, 353 Ill. App. 3d 578, 583 (2004). "Relevant evidence" includes "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ill. R. Evid. 401 (eff. Jan. 1, 2011). "A trial court may reject offered evidence on grounds of irrelevancy if it has little probative value due to its remoteness, uncertainty or its possibly unfair prejudicial nature." *People v. Ward*, 101 Ill. 2d 443, 455 (1984). We will not reverse the trial court's ruling on the admissibility of evidence absent an abuse of discretion. *Id.*¹

¶ 16 Section 7-13 of the Criminal Code of 2012 defines the affirmative defense of necessity as follows:

"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

¹ We note that defendant argues that the trial court violated his right to present a defense, which is an issue of law surrounding a constitutional violation subject to *de novo* review. *People v. Burns*, 209 Ill. 2d 551, 560 (2004). We reject defendant's argument. The trial court allowed defendant to present evidence of a necessity defense and instructed the jury on the defense of necessity. The propriety exclusion of certain evidence relating to the necessity defense is an evidentiary issue subject to the abuse of discretion standard. *Hayes*, 353 Ill. App. 3d at 583. See also *People v. Lowitzki*, 285 Ill. App. 3d 770, 779 (1996) ("Defendant undeniably has the right to present a defense, but this right does not include the right to introduce irrelevant evidence.").

private injury greater than the injury which might reasonably result from his own conduct." 720 ILCS 5/7-13 (West 2012).

¶ 17 The necessity defense involves "the choice between two admitted evils where other optional courses of action are unavailable [citations], and the conduct chosen must promote some higher value than the value of literal compliance with the law." *People v. Janik*, 127 Ill. 2d 390, 399 (1989). "Conduct that would otherwise be illegal is justified by necessity only if the conduct was the sole reasonable alternative available to the defendant under the circumstances." *People v. Kratovil*, 351 Ill. App. 3d 1023, 1034 (2004). "When another alternative exists besides the two evil choices which, if carried out, would cause less harm, then the accused is not justified in breaking the law." *People v. Haynes*, 223 Ill. App. 3d 126, 128 (1991).

¶ 18 The trial court did not abuse its discretion in excluding intoxication testimony and testimony that defendant's mother instructed him to speed because said testimony was irrelevant to establishing defendant's necessity defense. Evidence that defendant's mother and David were intoxicated does not make it more or less probable that defendant reasonably believed that driving 102 miles per hour was necessary to obtain treatment for Armoni's asthma attack. Additionally, defendant's mother's directives urging him to drive faster do not give rise to a necessity defense. Whether defendant's mother told him to drive faster is irrelevant as to whether he reasonably believed driving at 102 miles per hour was the only reasonable alternative to obtain treatment for Armoni.

¶ 19 Even assuming the trial court abused its discretion in excluding the evidence discussed above, said error was harmless. Where, as here, an alleged evidentiary error is at issue, we apply the "reasonable probability" harmless error standard. *People v. Stull*, 2014 IL App (4th) 120704, ¶ 104. That is, an evidentiary error is harmless if there is no reasonable probability if the jury

would have acquitted the defendant absent the error. *Id.*

¶ 20 Here, there is no reasonable probability that the jury would have acquitted defendant had the excluded testimony been admitted because defendant's necessity defense was weak. The fact that defendant failed to tell the police officer about Armoni's asthma attack belies defendant's contention that Armoni's condition was so serious that he believed his only option to obtain help was to drive at a speed of 102 miles per hour to get home. The prosecution argued during closing arguments that there were other, legal options available to defendant to address Armoni's asthma attack and, consequently, it was not necessary for defendant to speed. The intoxication of defendant's mother and David is irrelevant to whether defendant reasonably believed that it was necessary to speed in order to obtain medical treatment for Armoni. Additionally, defendant was permitted to testify that David, an adult, urged him to drive faster. It is not reasonably probable that testimony that defendant's mother also urged him to drive faster would have caused the jury to acquit him.

¶ 21 CONCLUSION

¶ 22 The judgment of the circuit court of Will County is affirmed.

¶ 23 Affirmed.

¶ 24 JUSTICE McDADE, dissenting.

¶ 25 Defendant, Lavon Young, was charged with driving 31 miles per hour or more in excess of the applicable speed limit in violation of 625 ILCS 5/11-601.5(b). Specifically, he was charged with driving 102 miles per hour in a 55 mile per hour zone and was convicted of a Class A misdemeanor.

¶ 26 At trial, Young raised the defense of necessity and he attempted to present to the jury all of the salient facts giving support to his defense. The State did not challenge the availability of

necessity as an appropriate defense, Young was allowed to advance it, and the jury was instructed on the affirmative defense. The State attempted to exclude any evidence that Young's mother was intoxicated, that she took certain actions in her intoxicated state and that his young cousin was having an asthma attack in the car. The trial judge allowed Young to present some evidence in support of the defense, including the facts of the asthma attack and that one intoxicated person in the car urged him to speed, but excluded any evidence of his mother's intoxication and conduct.

¶ 27 Here on appeal, Young argues that he was denied his constitutional right to present a complete defense to the jury by the trial court's exclusion of the evidence of his mother's intoxication. The State counters, and the majority agrees, that the real issue is not the constitutional one of whether Young was allowed to present a complete defense, but, rather, whether the exclusion of the challenged testimony was an abuse of the trial court's discretion to determine the admissibility of evidence.

¶ 28 The majority has found no abuse of that discretion but, for the reasons that follow, I disagree with that finding and, therefore, respectfully dissent.

¶ 29 The majority has quoted the statutory definition of the affirmative defense of necessity showing that the defense has two prongs, both of which must be met: (1) the accused was without blame in occasioning or developing the situation and (2) the accused reasonably believed his conduct was necessary to avoid a public or private injury greater than the injury which might reasonably result from his own conduct. 725 ILCS 5/7-13 (West 2012). It appears to be undisputed that Young satisfied the first prong, thus my analysis focuses solely on the second prong.

¶ 30 The case was tried to a jury and it was for the jurors to decide whether Young had satisfied his burden of proving the affirmative defense. The determination of whether Young's belief that his conduct was necessary required the jurors to know all of the relevant facts surrounding the commission of the offense. Put another way, the jury had to consider the totality of the circumstances known to and impacting Young at the time of the offense. Included in those circumstances were the facts that his mother was intoxicated, that she was urgently exhorting him to drive faster and that he feared her anger if he did not follow her directives.. The trial court barred defendant from presenting evidence of those facts to the jury on the grounds that they were not relevant.

¶ 31 As the majority has noted, “[r]elevant evidence’ includes ‘evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.’ Ill. R. Evid. 401 (eff. Jan. 1, 2011).” The issue posed by the necessity defense in this case is whether in light of all of the circumstances in play at the time of the offense, *the defendant* reasonably believed his excessive speed was necessary. The excluded facts are not remote in time or substance from the issue, the State has not challenged the *fact* of the intoxication or of the mother's alleged actions, nor do those facts appear, in the circumstances, to carry an unfair prejudicial impact. The facts were clearly relevant both to the reasonableness of Young's belief that he had no other choice than to speed and to the jury's evaluation of the affirmative defense.

¶ 32 Because the evidence is relevant to defendant's affirmative defense, the trial judge needed a reason to exclude it, otherwise the exclusion is arbitrary and, by definition, an abuse of the court's discretion to determine the admissibility of evidence. There has been no showing that the probative value of the evidence was outweighed by unfair prejudice, nor did the trial court make

such a finding. I would find an abuse of the trial court's discretion, which improperly deprived defendant of his right to present a complete defense to the jury.²

¶ 33 The State further argues, however, that even if exclusion of the evidence was an abuse of discretion, the error is harmless because the jury would still have rejected the defense. Interestingly, most of the arguments the State advances in support of this conclusion are those of adults remote from the actual circumstances. These include that: Young was unaware that there was a hospital two miles from where the stop took place; all asthma attacks are not fatal; "it would appear that *on this record* this asthma attack was not a life-threatening emergency" (emphasis added); Young, incredibly, did not tell the trooper about the asthma attack because he feared getting his mother in trouble.

¶ 34 The balance of the State's argument rests on an implied, but unsupported, prescience. "The jury rejected the necessity defense because it lacked any credibility altogether." "[N]o reasonable probability exists that the jury would have acquitted the defendant of aggravated speeding absent the error." However, the State's argument raises the question that if the excluded facts, which were part of the total circumstances, were not unfairly prejudicial or remote from the issue presented by the affirmative defense and, thus, relevant, posed no threat to the State's case, why insist on keeping them out?

¶ 35 The majority agrees with the State that the error, if any, was harmless because (1) Young's claimed belief about the seriousness of his cousin's condition was belied by his failure to inform the police officer about the asthma attack, (2) there were other legal options available

² The majority has found that no such violation occurred because the court allowed Young to present evidence and instructed the jury on the affirmative defense. His claim, however, is that, because the court excluded relevant evidence from the jury, he was deprived of his ability to present a *complete* defense.

to Young to address his cousin's asthma attack, (3) the intoxication of his mother was irrelevant to whether defendant reasonably believed he had to speed to get "medical treatment" for his cousin, and (4) defendant was permitted to testify that David, a second intoxicated adult in the car, urged him to drive faster so the fact that his intoxicated *mother* did so would have had no impact on the jury's decision. These are all arguments made and conclusions reached by adults far removed from the situation in which defendant tried to testify he found himself that night.

¶ 36 The immediate facts relevant to the affirmative defense were as follows. Lavon Young had just turned sixteen. Under Illinois law he was a minor—a child in the eyes of the State. There are many and varied reasons why the distinction is made between adults and minors, one of which is that children do not think and react like adults. They lack a typical adult's maturity and experience. Young's age and the fact that he was driving on a learner's permit and subject to the direction of an adult driver are critical facts in the totality of the circumstances in this case.

¶ 37 Young was driving the van that night because the two adults known to be in the car—his mother and his older cousin, David—were intoxicated and he was conscripted. David, one of the intoxicated adults, lit up a cigarette and began smoking inside the vehicle, which caused defendant's young cousin Armoni to have an asthma attack. During the drive home, Young had to direct the adult to extinguish the cigarette. Armoni's rescue inhaler for arresting his attack had been left at home and Young's mother and David were exhorting him to drive ever faster to get the child to his inhaler. As presented in the offer of proof, not only was he being whipped up by his mother and David with fear of what might happen to Armoni, he was also fearful he would be struck by his mother if he failed to follow her directives as she was inclined to become more physical when she was intoxicated. There is no evidence that he was aware of the hospital or its location—in fact, the evidence appears to be that he was not. There is also no basis to

suppose that, if he had known or consciously considered that not all asthma attacks are fatal, that knowledge would have offset fear—occasioned or exacerbated by the insistence on greater speed by the adults present, including his mother—that *this* attack might be fatal if his cousin did not get his inhaler right away.

¶ 38 The components of the defense Young attempted to present to the jury were that he was a young, inexperienced driver forced, by circumstances beyond his control, to drive a number of people home, not on a driver's license with full autonomy but on a learner's permit with the direction and supervision of an adult driver. During the drive, he was bombarded by a series of events and the urgent directives from his mother and the other adult in the car that he believed left him no option but to speed. The reasonableness of that belief in light of all of the circumstances was for the jury to decide.

¶ 39 I want to emphasize that this is not an argument that Young should be excused because his mother told him to speed. In fact, it is not an argument that he be excused at all. Rather, it is recognition of an error in the *procedure* accorded Young at trial, as a result of which the jury did not have all of the relevant facts for making an accurate assessment of the validity of his affirmative defense.

¶ 40 I would find that the trial court's decision to exclude the evidence of Young's mother's intoxication and resultant conduct and its impact on him as the situation in the van evolved was unreasonable. I would further find that the decision was purely arbitrary, particularly in light of the fact that defendant was allowed to testify that the other, arguably less authoritative and less influential, adult in the car was intoxicated and urging him to drive faster.

¶ 41 In sum, I would find that the trial court abused its discretion in excluding the challenged testimony, that this error deprived defendant, without legal justification, of his right to present a

complete defense, that defendant was thus deprived of a fair trial, and that his conviction should be reversed and the matter remanded for a new trial.