2019 IL App (2d) 170391-U
No. 2-17-0391
Order filed September 16, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RICHARD L. DICK, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 00-DT-4850 Honorable Paul A. Marchese, Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Hutchinson and Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly rejected defendant's necessity instruction: necessity was not available as a defense to a strict-liability offense like DUI, defendant did not admit that he committed the offense, and in any event there was no evidence that defendant committed the offense to avert a greater danger.

¶ 2 Defendant, Richard L. Dick, appeals from his conviction in the circuit court of Du Page County of driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(a)(2) (West 2000)), contending that the trial court erred in refusing to instruct the jury on the necessity defense. Because defendant was not entitled to an instruction on the necessity defense, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged by complaint with several traffic offenses, including DUI. The State nol-prossed all of the charges except DUI, and defendant opted for a jury trial.

¶ 5 Before trial, defendant submitted a proposed jury instruction on the necessity defense. See 720 ILCS 5/7-13 (West 2000). The trial court stated that it would rule on the instruction after the evidence was in.

¶ 6 The following facts were established at the trial. At about 7:49 p.m. on October 31, 2000,[1] Sergeant Michael Paup of the Itasca Police Department was on routine patrol. Sergeant Paup was dispatched to a homeless shelter in Itasca to investigate a report of someone driving under the influence.

¶ 7 When Sergeant Paup arrived, he saw a van in the parking lot with defendant in the driver's seat. A shelter employee told Sergeant Paup that the original driver had difficulty parking the van. That driver exited the van, and defendant backed up the van, bumping into the parking stall curb.

¶ 8 After speaking to the shelter employee, Sergeant Paup approached defendant. According to Sergeant Paup, defendant was wearing eyeglasses with only one lens. Defendant had a strong odor of an alcoholic beverage, bloodshot eyes, and slurred speech. When Sergeant Paup asked defendant how much he had to drink, defendant answered "way too much." Sergeant Paup saw two beer bottles in the van and found a cap to one of the bottles in defendant's front pocket.

¶ 9 Sergeant Paup asked defendant to complete several field sobriety tests. When asked to recite the alphabet, defendant began with A but ended with P, omitting several letters in between. Defendant was unable to complete the walk-and-turn test, stating that he was "too drunk to [do the test] and he wasn't driving anyways." Defendant refused to perform two other field sobriety

[1] Defendant was charged in 2000 but did not appear again until 2016.

tests. At that point, Sergeant Paup arrested defendant for DUI. At the police station, defendant refused to take a breath test. Sergeant Paup opined that defendant was under the influence of alcohol.

¶ 10 When Sergeant Paup told defendant that he saw him park the van, defendant said that, although he did not drive the van to the shelter, his friend had difficulty backing it up, so defendant backed the van into the parking space. Sergeant Paup could not recall defendant saying that his friend almost backed into a garage.

¶ 11 On cross-examination, Sergeant Paup admitted that he wrote in his report that defendant told him that his friend had a hard time parking, as opposed to backing, the van. Sergeant Paup also admitted that his report did not state that defendant backed up the van. Sergeant Paup explained that when he arrived the van was already backed into the parking space. He further admitted that he never actually saw defendant driving the van.

¶ 12 According to defendant, on the evening of October 31, 2000, he rode with a friend to the shelter. When they arrived, his friend pulled into the driveway. As the van rolled toward a garage, his friend jumped out of the van. Defendant then climbed into the driver's seat, hit the brakes, and put the van into park. Defendant denied driving the van before the parking incident. He also denied that the van was backed into a parking space.

¶ 13 Defendant could not recall speaking with Sergeant Paup or giving a written statement. He denied having consumed any alcohol on the day of the incident. He further denied taking any field sobriety tests.

¶ 14 Sergeant Paup testified for the defense that he never saw the van moving backward. Nor did he put in his report that the van was backed into a parking space.

¶ 15 Following the close of the evidence, the trial court addressed defendant's request for an instruction on the necessity defense. Relying on *People v. Janik*, 127 Ill. 2d 390 (1989), the court denied the instruction. In doing so, the court explained that, because defendant had denied drinking any alcohol, he was not forced to choose between two evils.

¶ 16 Defendant was found guilty and filed a motion for a new trial, contending, among other things, that the trial court erred in refusing to instruct the jury on the necessity defense. The trial court reiterated that, because defendant testified that he was not drinking, he never had to choose between two evils. The court added that, although the parties had not raised the issue, the necessity defense did not apply to a strict-liability offense such as DUI. Accordingly, the court denied the motion for a new trial.

¶ 17 Defendant was sentenced to 90 days in jail and two years' probation. He then filed this timely appeal.

¶ 18 II. ANALYSIS

¶ 19 On appeal, defendant contends that, because there was sufficient evidence that he was forced to drive the van to avoid it crashing into a garage, he was entitled to an instruction on the necessity defense.

¶ 20 Jury instructions provide the jury with the proper legal principles to apply to the evidence. *People v. Pierce*, 226 Ill. 2d 470, 475 (2007). An instruction that is not supported by either the law or the evidence should not be given. *People v. Mohr*, 228 Ill. 2d 53, 65 (2008). A defendant is entitled to have the jury instructed on his theory of the case if he provides some evidentiary foundation for such an instruction, even if such evidence is slight. *People v. Jones*, 175 Ill. 2d 126, 131-32 (1997). That is so even if the defendant's own testimony is inconsistent with the other evidence. *People v. Everette*, 141 Ill. 2d 147, 156 (1991). We review a trial

court's decision on jury instructions for an abuse of discretion. *Mohr*, 228 Ill. 2d at 66. The trial court abuses its discretion when it refuses to instruct the jury on a defendant's theory of the case, if the defendant provided some evidentiary foundation for the instruction. *Jones*, 175 Ill. 2d at 131-32. We may affirm a trial court's refusal to give a defense instruction on any basis that is supported by the record. *People v. Mulvey*, 366 Ill. App. 3d 701, 711 (2006).

¶ 21 The affirmative defense of necessity applies to conduct that would otherwise be an offense but that is justified because the accused was without blame in occasioning or developing the situation and reasonably believed that such conduct was necessary to avoid a public or private injury greater than the injury that might reasonably result from the criminal conduct. 720 ILCS 5/7-13 (West 2000). Accordingly, the elements of the necessity defense are (1) the defendant was without blame for the situation; and (2) the defendant reasonably believed that his conduct was necessary to avoid a greater injury than the one that might reasonably have resulted from his otherwise illegal conduct. *People v. Janik*, 127 Ill. 2d 390, 399 (1989). The defense involves the choice between two admitted evils where no other options are available, and the conduct chosen must provide some higher value than the value of complying with the law. *Janik*, 127 Ill. 2d at 399. Put another way, a balancing of two evils is required under the necessity defense. *Janik*, 127 Ill. 2d at 400.

¶ 22 In the present case, the trial court, in denying the motion for a new trial, ruled that, because DUI is an absolute-liability offense, the affirmative defense of necessity was not applicable. We agree.

¶ 23 Affirmative defenses, such as necessity, do not apply to an absolute-liability offense. *People v. Jackson*, 2013 IL 113986, ¶ 23; *People v. Avery*, 277 Ill. App. 3d 824, 830 (1995). Further, DUI is an absolute-liability offense. *Avery*, 277 Ill. App. 3d at 830; *People v. Gassman*,

251 Ill. App. 3d 681, 689-92 (1993); *People v. Teschner*, 76 Ill. App. 3d 124, 125-27 (1979). Thus, the trial court properly refused to give the necessity instruction.

¶ 24 Even if the necessity defense were applicable to a DUI offense, the trial court did not err in refusing to give the instruction. The necessity defense is not available to a defendant who does not admit that he committed the charged offense. *People v. Sanchez*, 2013 IL App (2d) 120445, ¶ 84 (Birkett, J., dissenting).

¶ 25 In this case, although defendant admitted that he drove the van, he denied being under the influence of alcohol. Indeed, he testified that he never drank any alcohol on the day of the incident. Because he did not admit to an essential element of the DUI offense, he could not assert the necessity defense. Thus, on that separate basis, we affirm the trial court's refusal to give the necessity instruction.

¶ 26 Finally, even if defendant had admitted the offense, the evidence did not support giving the instruction. As discussed, the necessity defense requires, among other things, that a defendant chose to commit a criminal act to avoid a greater injury than the one that would result from the criminal act. See *Janik*, 127 Ill. 2d at 399. Although the evidence need only be slight to support such an instruction (see *Jones*, 175 Ill. 2d at 131-32), there was simply insufficient evidence here that the danger from the van striking the garage was greater than that arising from the DUI offense. As our supreme court recently noted, there is a serious threat to public safety from the commission of a DUI offense. *People ex rel. Hartrich v. 2010 Harley-Davidson*, 2018 IL 121636, ¶ 19; see also *Avery*, 277 Ill. App. 3d at 830 (legislature has determined that drunk drivers are ticking time bombs). Accordingly, defendant, while intoxicated, engaged in very dangerous conduct when he got behind the wheel of the van. On the other hand, there was little evidence of the extent of the danger he sought to avoid. Although defendant testified that the

driverless van was rolling toward a garage, there was no evidence of how fast the van was moving, the distance to the garage, the structure of the garage, the presence of any obstacles between the van and the garage, or any other indication of the extent of the potential injury should the van have collided with the garage. Nor was there any evidence that the garage was occupied or that any bystanders were at risk of being injured. Although defendant still occupied the van, there was no indication that he would have been injured in any collision or that he could not have safely exited the van as had the driver. Given the significant dangers of DUI, and the lack of any evidence of any greater danger from the van colliding with the garage, the trial court properly refused the necessity instruction.

¶ 27 III. CONCLUSION

¶ 28 For the reasons stated, we affirm the judgment of the circuit court of Du Page County.

¶ 29 Affirmed.