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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Cook County.
Plaintiff-Appellee,)	
)	
v.)	No. YP 418681-85
)	
SANDRA VALLEJO,)	
)	The Honorable
Defendant-Appellant.)	Gregory Robert Ginex,
)	Judge, presiding.

JUSTICE HYMAN delivered the judgment of the court.
Presiding Justice Pucinski and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in refusing to instruct the jury on the affirmative defense of necessity where defendant presented no evidence of a continuing threat of sexual assault that would reasonably justify driving intoxicated a distance of about 15 miles on a major interstate highway.

¶ 2 In the early morning hours of Sunday, September 12, 2010, after leaving a club on the north side of Chicago, defendant Sandra Vallejo was pulled over by a police officer for speeding. After noticing a strong odor of alcohol and seeing an open beer bottle in the car, the officer conducted three field sobriety tests, which Vallejo failed. At the police station, Vallejo

submitted to a Breathalyzer test, which revealed a blood alcohol concentration of .187. Vallejo was charged with driving under the influence of alcohol (625 ILCS 5/11-501(a)(2) (West 2010)), driving with a breath alcohol concentration of .08 or more (625 ILCS 5/11-501(a)(1) (West 2010)), and illegal transportation of alcohol in a motor vehicle (625 ILCS 5/11-502(a) (West 2010)).

¶ 3 Vallejo conceded she was driving under the influence of alcohol, but sought to raise a defense of necessity on the grounds that she had been sexually assaulted after leaving the nightclub and needed to drive to her boyfriend's house to tell him what happened. The trial court denied her request to raise a necessity defense. After the jury convicted Vallejo on all three counts, the trial court sentenced her to 18 months supervision and 100 hours of community service.

¶ 4 Vallejo contends the court should vacate her convictions and remand for a new trial because the trial court erred in declining to instruct the jury on the affirmative defense of necessity. We affirm. The trial court did not abuse its discretion in refusing to give the jury instruction for the defense of necessity because Vallejo did not provide evidence of a continuing threat of sexual assault that would reasonably justify driving intoxicated on a major interstate highway for about 15 miles.

¶ 5 **BACKGROUND**

¶ 6 On September 11, 2010, 28-year-old Vallejo and her then-boyfriend, Michael Lopez, attended a birthday party at Transit nightclub near Ashland Avenue and Lake Street in Chicago. Departing from Vallejo's residence on the north side of Chicago, Lopez drove Vallejo's minivan to the nightclub. Lopez brought and placed a 12-pack of beer in Vallejo's car before their departure.

¶ 7 Lopez and Vallejo arrived at the nightclub around 11:30 p.m., and Lopez parked the minivan about three blocks away. Before getting out of the car, Lopez drank a bottle of beer and placed the bottle in the center console cup holder. In the club, Vallejo and Lopez spent the evening drinking and dancing with Lopez's friends. At some point, Lopez and another club patron were involved in a brief verbal altercation. Later, club security removed Lopez and had him arrested by Chicago police after he tried to force his way back in. The Chicago police released Lopez around 7:00 a.m. the next morning.

¶ 8 Unaware that Lopez had been kicked out of the club, Vallejo spent the rest of the night looking for him and trying to call him, but she could not find him or get a signal on her phone. When the club closed at 5 a.m., Vallejo went outside to wait for Lopez, carrying her purse and cell phone. When the crowd began to thin, she tried to go back inside the club to look for Lopez, but bouncers told her she could not regain entrance. She waited outside the club for Lopez until it officially closed and all patrons left.

¶ 9 According to Vallejo, she started walking back to the minivan, alone, thinking that Lopez might be waiting for her there. She was carrying her purse, cell phone, and car key. As she was crossing an alley, a 4-door silver sedan pulled in front of her and cut her off. Two of the four passengers jumped out, grabbed Vallejo's arm, and pushed her into the middle of the back seat of the car. The car then began to drive away.

¶ 10 While in the back seat, two of the men held Vallejo down, pried her legs apart, and put their fingers in her vagina. Vallejo was upset, crying, and pleading for the men to stop. She struggled with the men, and when the driver eventually stopped the car, she was able to climb over one of the men and escape. On the way out, Vallejo lost one of her shoes and hurt her leg

as she landed on muddy terrain. At this point, Vallejo testified that she could not recall whether she had her purse or cell phone.

¶ 11 As Vallejo got up, she saw the car make a U-turn. Fearing that the men were circling back for her, she ran, found the minivan, and fled the area. Although Vallejo was not certain if she had her purse or cell phone after the assault, she did have her keys as she was able to get into the minivan and head towards Lopez's house in Berwyn, about 10-15 miles away. She took the Eisenhower Expressway and exited at Harlem Avenue. Vallejo testified that she wanted to see Lopez to tell him what happened so he could "make it better."

¶ 12 Near the end of her journey on Harlem Avenue in North Riverside, police officer Kopka noticed Vallejo speeding at 55 mph in a 35 mph speed zone. Kopka followed Vallejo's vehicle for a short distance and stopped her after witnessing her make a right turn onto Cermak Avenue. Vallejo hit the curb as she pulled over.

¶ 13 Kopka approached the minivan, told Vallejo that he clocked her speeding, and asked for her driver's license and proof of insurance. After searching the passenger compartment, Vallejo produced the proof of insurance but not her license because she could not locate her wallet or purse. Kopka noticed an open bottle of beer in the center console cup holder and an open 12-pack of beer behind the front passenger seat. Kopka also noticed that Vallejo's speech was slurred and her breath smelled of alcohol. He then returned to his squad car to run Vallejo's name in the status computer.

¶ 14 When Kopka and Officer Joann Dooley, who arrived on the scene as backup, approached the minivan again, they found Vallejo in the back with the open beer bottle and 12-pack. Vallejo got out from the rear passenger side door. Kopka noticed that Vallejo was barefoot and had dirty legs. When he asked her where her shoes were, she told the officers she had been involved in a

fight with Lopez, and asked them for help locating her purse and cell phone. At this point, Vallejo told the officers that she was "confident" her phone was in the van. She repeatedly asked the officers for help in finding her cell phone so she could call Lopez. The officers were unable to find her purse or cell phone in the van, but they did find one of Vallejo's shoes. Kopka testified that Vallejo giggled when he told her he found one of her shoes.

¶ 15 Kopka administered three field sobriety tests. Vallejo failed all three. She could not follow directions, was unable to maintain her balance, and giggled throughout the tests. Kopka then placed Vallejo under arrest for suspicion of driving under the influence. At no point during the stop did Vallejo tell either officer that she had been sexually assaulted. Vallejo testified that she did not go the police or tell the police officers what happened because she was embarrassed. She also testified that she thought it would be pointless to seek assistance from the police because she had been sexually assaulted when she was 14-years-old and the police did not take her complaint seriously.

¶ 16 Vallejo was taken to the North Riverside police station. She agreed to submit to a Breathalyzer test. Initially, Vallejo blew into her fist instead of the Breathalyzer mouthpiece. On her second attempt, the machine registered Vallejo's blood alcohol level at .187. Vallejo did not mention her sexual assault to anyone at the police station. The State charged Vallejo with driving under the influence of alcohol (625 ILCS 5/11(a)(2) (West 2010)), driving with a breath alcohol concentration of .08 or more (625 ILCS 5/11(a)(1) (West 2010)), and illegal transportation of alcohol in a motor vehicle (625 ILCS 5/11-502(a) (West 2010)).

¶ 17 Before the trial started, the issue of the sexual assault was raised when Vallejo filed a notice that she sought to assert the affirmative defense of necessity. At trial, Vallejo testified that she was forced into the 4-door silver sedan by the two rear passengers and she then struggled to

stop the men from prying her legs apart and placing their fingers in her vagina. She further testified that she escaped by lunging over one of the men in the backseat and, during her escape, she lost one of her shoes but held onto her car keys. On cross-examination, Vallejo testified that she ran to her minivan after she escaped to see if Lopez was there, and when she realized he wasn't there, she chose to drive to Berwyn because she "needed to get to Michael." She also testified that she told Lopez about the assault when he picked her up from the police station the morning after her arrest, but she never reported it to the police.

¶ 18 At the jury instruction conference, defense counsel tendered IPI Criminal 4th No. 25-25.22, the instruction on necessity. The trial court, however, declined to instruct the jury on Vallejo's defense. The trial court ruled that Vallejo satisfied the first element of the defense of necessity because she was without blame for the sexual assault. But the trial court determined that Vallejo failed to satisfy the second element of the defense because she did not have a reasonable belief that her conduct was necessary to avoid a greater injury when reasonable alternatives were available to her.

¶ 19 The jury found Vallejo guilty of driving under the influence of alcohol (625 ILCS 5/11(a)(2) (West 2010)), driving with a breath alcohol concentration of .08 or more (625 ILCS 5/11(a)(1) (West 2010)), and the illegal transportation of alcohol in a motor vehicle (625 ILCS 5/11-502(a) (West 2010)). The trial court merged the first two counts and sentenced Vallejo to 18 months supervision and 100 hours of community service. Vallejo now argues that the trial court erred in declining to instruct the jury on her defense of necessity for driving under the influence because she testified she was sexually assaulted and had to flee the scene in the car despite being intoxicated, and the trial court should have allowed the jury to decide whether her actions were reasonable under the circumstances.

¶ 20

ANALYSIS

¶ 21

Vallejo concedes she was driving under the influence of alcohol but argues she was justified because she was sexually assaulted and had no option other than to flee the scene in her car. She requests the court to vacate her convictions and remand for a new trial because the trial court erred in refusing to instruct the jury on her defense of necessity.

¶ 22

The form and extent of jury instructions lies within the trial court's discretion. *People v. Jones*, 219 Ill. 2d 1, 31 (2006). And a defendant is entitled to jury instructions on an affirmative defense which the evidence supports, even where the evidence might be weak. *People v. Everett*, 141 Ill. 2d 147, 156 (1990). But the trial court will not instruct on the affirmative defense should the evidence be so clear and convincing that as a matter of law there is no affirmative defense. *People v. Hari*, 218 Ill. 2d 275, 296-97 (2006).

¶ 23

Generally, we review the trial court's refusal to issue a specific jury instruction under an abuse of discretion standard. *People v. Jones*, 219 Ill. 2d 1 at 31. Vallejo notes, in *People v. Washington*, 2012 IL 110283, the Illinois Supreme Court decided that "whether sufficient evidence exists in the record to support the giving of a jury instruction is a question of law subject to *de novo* review." *Id.* at ¶19. But, the issue before the court in *Washington* concerned giving an instruction on self-defense and whether an instruction on second degree murder must be given as a mandatory counterpart. *Id.* at ¶56. The court in *Washington* did not address the differing standards for jury instructions nor did it overrule supreme and appellate court decisions that have applied a different standard. See generally *id.* at ¶¶19-56. The *Washington* court also limited its holding to those cases "where the trial court has determined that the giving of an instruction on self-defense is warranted and the defendant requests the giving of a second degree murder instruction." *Id.* at ¶56. Moreover, the appellate court has since explained, "[w]e review

a trial court's decision to give a particular jury instruction for an abuse of discretion." *People v. Love*, 2013 IL App (3d) 120113, ¶24 (explaining standard of review in context of jury instruction concerning conversion calculations for defendant's blood alcohol level); see also *People v. Gilliam*, 2013 IL App (1st) 113104, ¶41 ("A reviewing court will reverse a trial court's determination as to what instructions to give only if it finds that the trial court abused its discretion"). Thus, we will review the trial court's failure to give the jury instruction on the defense of necessity under an abuse of discretion standard.

¶ 24 The elements of the affirmative defense of necessity are: (1) defendant without blame in occasioning or developing the situation, and (2) defendant reasonably believed his or her conduct necessary to avoid a public or private injury greater than injury which might reasonably result from his or her own conduct. 720 ILCS 5/7-13 (West 2010). This defense usually involves the choice between two admitted evils where other optional courses of action are unavailable, 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). The defense of necessity justifies defendant's illegal conduct if defendant reasonably believed it was necessary to avoid a greater harm than resulted from the illegal conduct. *Id.* at 400.

¶ 25 The trial court determined that "[t]here is no question*** that [the] evidence thus far has fulfilled prong one of the necessity defense" and that Vallejo was not responsible for bringing about the sexual assault from which she was fleeing. The State did not contest that determination. Thus, we do not need to address the first element of the necessity defense.

¶ 26 Vallejo contends there is sufficient evidence to establish that she reasonably believed driving to Lopez's house 15 miles away was necessary to avoid greater private or public injury because she was unfamiliar with the surrounding area where the sexual assault occurred, she was

embarrassed to seek official assistance because of her past experiences, and there were no people in the area at the time of the sexual assault.

¶ 27 Vallejo relies primarily on *People v. Kucavik*, 367 Ill. App. 3d 176 (2006), to support her claim that she is entitled to the jury instruction for the defense of necessity. In *Kucavik*, the defendant and her boyfriend became intoxicated at a bar, and afterwards, the boyfriend got behind the wheel of defendant's car, intending to drive it. *Id.* at 177. The defendant, who was in the backseat, told her boyfriend he was too drunk to drive. *Id.* The boyfriend became angry, pulled into the parking lot of a high school, and began squealing the tires and doing " 'doughnuts'. " *Id.* As they continued to argue, the boyfriend stopped the vehicle in the middle of the road, got out of the car, and threatened to hurt the defendant if she did not drive the car. *Id.* The defendant then drove the car two blocks to a side street. *Id.* A police officer approached the vehicle and asked the defendant if she had been fighting with her boyfriend in the high school parking lot. *Id.* The defendant testified she told the officer she had not because she was afraid her boyfriend might hurt her if she told the truth. *Id.* She also testified that she thought driving the car two blocks way " 'was the best thing to do at the time', " because the car had been in the middle of the road and could have injured someone and she was worried about what her boyfriend would do to her if he got arrested. *Id.* She also thought it was a safe place from which she could walk home. *Id.* at 177-78. The trial court, however, declined to give the defendant's proposed instruction on the defense of necessity. *Id.* at 178.

¶ 28 The appellate court reversed and held the defendant was entitled to the jury instruction on the necessity defense. *Id.* at 181. The court determined that the existence of other reasonable alternatives does not automatically preclude the availability of the necessity defense. *Id.* at 180. Based on the defendant's testimony, the court reasoned that "[t]he jury could find that defendant

reasonably believed that simply activating her flashing lights or pulling her car to the side of the road was insufficient to avoid a greater injury than driving the car to a side street. The record contains no evidence concerning the width of the road or the availability of a shoulder." *Id.* at 179-80. Thus, the court concluded the evidence presented and the reasonable inferences available sufficient for a reasonable person to conclude that the second prong of the necessity defense was met. *Id.* at 181.

¶ 29 Unlike in *Kucavik*, Vallejo drove her van 15 miles before Officer Kopka stopped her. Vallejo presented no evidence that the men who sexually assaulted her were still in pursuit when she left scene of the sexual assault, got into the minivan, and continued driving for nearly 15 miles. Moreover, unlike in *Kucavik*, Vallejo did not testify that she was driving because she feared for her safety or the safety of others but rather, because she wanted to see her boyfriend so that she could tell him what happened and "needed him to make it better." She made no attempt to seek assistance from anyone before being pulled over some 15 miles away and failed to notify any of the police officers who stopped her.

¶ 30 Even if Vallejo was worried that the perpetrators might follow her and attack her again, as the trial court noted, she had a number of options available after she fled the immediate vicinity of the assault. Vallejo could have stopped at a hospital, a fire station, a local business, or she could have driven to her own home. As the trial court noted, Vallejo "certainly had the phone with her at some point after the assault," but she did not attempt to call anyone for help. Again, unlike in *Kucavik*, where the defendant drove her car a few blocks because she was concerned about the safety of other drivers who might hit the car parked in the middle of the road and was concerned for her own safety after her boyfriend threatened to hurt her, nothing in the record indicates Vallejo felt she was in immediate danger and needed to drive far away to ensure

her safety. Thus, in the absence of any evidence of an ongoing threat to her safety and the availability of multiple reasonable alternatives, the trial court did not err in refusing Vallejo's request for a necessity instruction.

¶ 31 *People v. Cord*, 258 Ill. App. 3d 188 (1994) is instructional. In *Cord*, the defendant was involved in a three car accident. *Id.* at 190. After the accident, the defendant, while intoxicated, moved his car to a parking lot for safety, about 30 to 50 yards away. *Id.* The other two drivers waited until the police arrived to move their cars. *Id.* The defendant told the police officers that his girlfriend was driving at the time of the accident, but the girlfriend was not present. *Id.* The defendant refused to perform field sobriety tests because he was "inebriated" and could not pass them. *Id.* at 191. The officers arrested Cord for driving under the influence. *Id.* At trial, Cord requested jury instructions on the defense of necessity, claiming that his subjective belief that it was safer to move his car into the parking lot was reasonable under the circumstances. *Id.* The trial court ruled there was insufficient evidence to raise the defense of necessity. *Id.* at 192. The appellate court affirmed on the lack of evidence to support the second prong of the defense. *Id.* at 193. The defendant had "other reasonable and lawful alternatives available to him rather than driving the vehicle to the parking lot while he was under the influence of alcohol." *Id.* For instance, the defendant could have activated his flashers to warn approaching cars or he could have asked another person to drive the vehicle off the road. *Id.* at 194. There was "no evidence of a compelling and imminent danger to be averted by defendant's conduct in driving the vehicle which itself could have posed an even greater danger to others since he was admittedly intoxicated." *Id.* at 193-94. Because the defendant's subjective concern regarding the potential danger did not equate with the imminent harm needed for the defense of necessity, this court affirmed the trial court's refusal to give the instruction. *Id.* at 194.

¶ 32 As in *Cord*, Vallejo presented no evidence of a continued, compelling, and imminent danger to be averted. While it may have been necessary for her to flee the scene of the sexual assault, was it necessary to drive all the way to her boyfriend's house to tell him what happened? Vallejo presented no evidence that the perpetrators were chasing her that would justify her conduct at the time. According to Vallejo's own testimony, she was driving to Berwyn from Chicago because she wanted to tell her boyfriend about the assault. The testimony at trial indicated Vallejo was not emotionally distraught or upset when pulled over. Instead, the arresting officer testified that she giggled when the officers found one of her shoes and during the field sobriety tests. She also seemed more concerned with moving the beer bottles from the front of the minivan to the back and finding her cell phone so she could contact her boyfriend. It seems likely that if Vallejo felt she was still in danger from the perpetrators when Kopka pulled her over, she would have relayed those fears or sought protection from a police officer. She did none of those things. Also, the sexual assault was never mentioned until her defense attorney filed a pre-trial motion for a defense of necessity.

¶ 33 Thus, the evidence suggests Vallejo's sole reason for driving from Chicago to Berwyn while intoxicated was so she could talk to her boyfriend. Vallejo's subjective needs in the absence of evidence of imminent harm were not sufficient to warrant a defense of necessity. *Cord*, 258 Ill. App. 3d at 194. Ultimately, we cannot say the trial court abused its discretion by ruling that Vallejo's account of that night provided insufficient evidence on the second prong to entitle her to an instruction on the defense of necessity.

¶ 34 CONCLUSION

¶ 35 We affirm the judgment of the circuit court of Cook County.

¶ 36 Affirmed.