IN THE COURT OF APPEALS OF IOWA

No. 5-101 / 94-748

FILED
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CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

JEFFREY JON GENUNG,

Appellant.

Appeal from the Iowa District Court for Muscatine County, James A. Weaver, Judge.

Jeffrey Jon Genung appeals the judgment and sentence entered upon his conviction, following a jury trial, of driving while barred as an habitual offender in violation of Iowa Code sections 321.560 and 321.561 (1993).

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and Sarah Hennesy, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Ann E. Brenden, Assistant Attorney General, Richard R. Phillips, County Attorney, and Christine Dalton, Assistant County Attorney, for appellee.

Heard by Donielson, C.J., and Hayden and Habhab, JJ.

DONIELSON, C.J.

The defendant, Jeffrey Jon Genung, contends the trial court erred in refusing to instruct the jury on his defense theory of necessity. We have reviewed the record and the parties' arguments, and we affirm.

I. BACKGROUND.

At 3:20 p.m. on December 30, 1993, the defendant was stopped on Highway 22 in Muscatine County and charged with operating a motor vehicle while his driver's license and driving privileges were barred. At his trial the defendant and his girlfriend, Janice, a passenger in the vehicle, testified they had been visiting Janice's mother at a hospital in Iowa City. Before they left the hospital they were informed Janice's mother was dying. Their testimony indicated Janice was driving the vehicle when they left the hospital and did so until the exhaust system came off of the car. At that point the defendant and Janice claim Janice become hysterical and was unable to drive the car.

Janice pulled the car off to the side of the road, but, due to heavy snow on the shoulder, a portion of the vehicle remained in the traveled part of the road. The defendant testified he removed the exhaust from the car and then took over driving the vehicle so he could find a place to pull the car off of the roadway. He claimed he did so because there was a lot of traffic, and he believed there was a threat of immediate harm if the car remained where it was.

The defendant requested the court give the jury an instruction on the defense of necessity. The court refused to give the instruction finding the defendant's necessity defense was based on the assumption "someone would come along and commit either an act of negligence or an act of recklessness and place the defendant at danger." The court concluded the defendant's purported threat of harm was too

speculative and did not constitute the immediate threat of harm necessary to warrant submission of the necessity defense.

The jury found the defendant guilty as charged. On appeal the defendant argues the trial court erred in refusing to give an instruction on the defense of necessity. He contends he made the required threshold showing that an emergency existed, the threatened harm was immediate, the threatened disaster imminent, and he had no other option than to act as he did.

II. NECESSITY DEFENSE.

The Iowa Supreme Court has long recognized the defense of necessity. See, *e.g., State v. Ward*, 170 Iowa 185, 152 N.W. 501 (1915) (necessity defense prevailed on charge of unlawful killing of a deer). However, its application is limited. "We apply the necessity defense only in emergency situations where the threatened harm is immediate and the threatened disaster imminent; the individual must be stripped of all options available to avoid both evils." *Planned Parenthood of Mid-Iowa v. Maki*, 478 N.W.2d 637, 640 (Iowa 1991). The fear of a potential harm or future injury will not suffice. *See State v. Walton*, 311 N.W.2d 113, 115 (Iowa 1981); *State v. Harrison*, 473 N.W.2d 242, 244 (Iowa App. 1991).

"The rationale of the necessity defense lies in defendant being required to choose the lesser of two evils and thus avoiding a greater harm by bringing about a lesser harm." *Walton*, 311 N.W.2d at 115. The defense does not negate any element of a crime. *State v. Reese*, 272 N.W.2d 863, 866 (Iowa 1978). "Rather, the question of necessity arises only after it has been determined that a crime has occurred as an entirely independent inquiry." *Id.*

Ordinarily a court must instruct a jury on all material issues raised by the evidence. *State v. Babers*, 514 N.W.2d 79, 82 (Iowa 1994). To warrant submission

of a defense to the jury, a defendant must produce substantial evidence from any source to support the theory. *Id.* at 83. "Substantial" evidence means evidence which could convince a rational finder of fact the defendant has established his affirmative defense. *State v. Broughton*, 425 N.W.2d 48, 52 (Iowa 1988). If there is substantial evidence, the trial court has a duty to give a requested instruction on a defense. *Babers*, 514 N.W.2d at 82.

The defendant has the burden of generating a fact question on the defense of necessity. *Walton*, 311 N.W.2d at 115; *Reese*, 272 N.W.2d at 867. If all the requirements of the defense are not addressed in the defendant's evidence, a trial court is not obligated to submit the issue to the jury. *Walton*, 311 N.W.2d at 115.

In numerous cases our appellate courts have concluded defendants have failed to generate a jury question on the defense of necessity. *See, e.g., Walton*, 311 N.W.2d at 116; *Reese*, 272 N.W.2d at 867-68; *Harrison*, 473 N.W.2d at 244. We review for an abuse of discretion the question of whether a trial court should have instructed a jury on a defendant's theory of defense. *See State v. Cunningham*, 463 N.W.2d 887, 889 (Iowa App. 1990).

We can envision situations in which the incapacity of a driver creates a sufficient emergency to warrant the operation of a motor vehicle by a nonlicensed driver. However, the driver must offer substantial evidence of <u>immediate</u> threatened harm and <u>imminent</u> threatened disaster. Absent such substantial evidence, a defendant is not entitled to an instruction on the defense of necessity.

The defendant had the burden to establish: 1) there was an emergency situation; 2) the threatened harm was immediate; 3) the threatened disaster was imminent; and 4) the defendant was stripped of options by which he might avoid both evils. *See Walton*, 311 N.W.2d at 115. The defendant failed to establish anything but a speculative, future harm. He also failed to offer substantial evidence that he had no

option but to commit a lesser harm (driving while barred) to avoid a greater harm (an accident). We affirm the trial court's refusal to submit the necessity defense to the jury.

AFFIRMED.