Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-096

NOVEMBER TERM, 2002

State of Vermont v. Larry J. Wheelock	}	APPEALED FROM: District Court of Vermont, Unit No. 3, Lamoille Circuit DOCKET NO. 135-3-01 Lecr Trial Judge: Howard VanBenthuysen

In the above-entitled cause, the Clerk will enter:

Defendant appeals from a judgment of conviction, based on a jury verdict, of DUI sixth offense. He contends the court erred in rejecting his request to instruct on the necessity defense. We affirm.

The record evidence may be summarized as follows. On the morning of February 16, 2001, at approximately 3:30 a.m., Deputy Darin Barber of the Lamoille County Sheriff' s Office was dispatched to the Bushnell home in the Town of Johnson to investigate a report by the homeowner. When he arrived, Deputy Barber observed a Bronco four-wheel drive vehicle parked in the driveway with its engine running and headlights on. Approaching, he observed an individual in the driver' s seat whom he recognized as defendant. Defendant appeared to be asleep. There was a beer can between his legs, and two twelve-packs of beer in the back seat. The gear shift lever was in reverse. Deputy Barber woke defendant with some difficulty, observed obvious signs of intoxication, and arrested and processed him for DUI.

Defendant' s brother testified at trial that he and defendant had been drinking at a bar earlier in the evening, and that when they left he drove the Bronco while his brother slept in the passenger seat. On their way home, according to the brother's testimony, they passed a car driven by his boss " a logger " who stopped and asked them to help him find some missing chainsaws. The brother couldn't wake defendant, so he pulled into the nearest driveway, parked, turned off the engine and headlights, and went with his boss. Defendant testified that he remembered waking up in the car, felt cold, and shifted to the driver' s seat to start the engine and turn on the heat.

The trial court denied defendant' s request to instruct on the affirmative defense of necessity, finding that the evidence failed to establish the requisite elements. The jury returned a verdict of guilty, and defendant stipulated to his prior DUI convictions. He was sentenced to serve two and a half to five years. This appeal followed.

Defendant contends the court committed reversible error by rejecting his request to instruct the jury on the defense of necessity. He acknowledges that counsel did not object to the court' s failure to give the charge at the conclusion of the instructions, and that our review is therefore limited to plain error. State v. Tahair, 172 Vt. 101, 104-105 (2001). To warrant an instruction on the necessity defense, defendant must adduce evidence establishing a prima facie case as to each of the elements of the defense, which we have identified as follows: (1) an emergency situation arising without fault on the part of the actor concerned; (2) the emergency must be so imminent and compelling as to raise a reasonable

expectation of harm; (3) the emergency must present no reasonable opportunity to avoid the injury without doing the criminal act; and (4) the injury impending from the emergency must be of sufficient seriousness to outmeasure the criminal wrong. State v. Baker, 154 Vt. 411, 415 (1990).

The trial court here correctly concluded that the record evidence failed to support the requested instruction. Defendant claimed that the emergency consisted of the threat of freezing or hypothermia if he failed to move to the driver' s seat and start the engine in order to turn on the heat. Yet the undisputed evidence also showed that defendant could simply have started the car and driven home, which was only two miles away, if he had not been intoxicated, a state induced by his own actions. Therefore, defendant failed to establish a prima facie case on the " without fault" element of the defense. See State v. Squires, 147 Vt. 430, 431 (1986) (defendant failed to establish " without fault" element of necessity defense where evidence showed that defendant' s intoxication created the claimed emergency). Equally deficient was the evidence relating to the third element, concerning the absence of reasonable opportunities to avoid the injury without committing the criminal act. Defendant testified that he thought he was in his mother' s driveway when he awoke and started the car, yet " as the trial court observed " he offered " no explanation for why he didn' t just get out of the car and go into his mother' s house." The evidence thus failed to establish even a prima facie case as to the absence of reasonable alternatives. Accordingly, we discern no error in the court' s decision denying the request to instruct on the necessity defense.

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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John A. Dooley, Associate Justice

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James L. Morse, Associate Justice