STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2174

State of Minnesota,
Respondent,

vs.

Nichole Marjorie Atha,
Appellant.

Filed November 17, 2009
Affirmed
Johnson, Judge

Stearns County District Court
File No. 73-CR-07-12484

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Jan F. Petersen, St. Cloud City Attorney, Renee N. Courtney, Assistant City Attorney, 400 Second Street South, St. Cloud, MN 56301 (for respondent)

Jenny Chaplinski, Stearns County Public Defender, 816 West St. Germain, Suite 410, St. Cloud, MN 56301 (for appellant)

Considered and decided by Larkin, Presiding Judge; Halbrooks, Judge; and Johnson, Judge.

U N P U B L I S H E D O P I N I O N

JOHNSON, Judge

A Stearns County jury convicted Nichole Marjorie Atha of two counts of driving while impaired (DWI). At trial, Atha admitted that she was intoxicated when she drove her

vehicle approximately one block from a residence to a gas station so that she could place a telephone call to 911 to report an alleged assault at the residence. The district court refused Atha's request for a jury instruction on the defense of necessity. We conclude that the district court did not abuse its discretion by refusing to give the requested instruction and, therefore, affirm.

FACTS

One evening in October 2007, Atha and her fiancé went to a bar in St. Cloud with Atha's cousin, her cousin's husband, and some of her cousin's friends. While at the bar, Atha discovered that some of her money had disappeared from the table at which she was sitting. She and her fiancé accused one of her cousin's friends of taking the money. The accused person denied taking the money. Atha and her fiancé left the bar and returned to her cousin's residence, where they planned to spend the night.

The remainder of the group returned to the cousin's residence approximately one hour later. A confrontation ensued after Atha's cousin's husband expressed anger that Atha had accused the cousin's friend of theft. Atha testified that she left the residence after her cousin's husband threw a beer bottle at her. She drove to a gas station that is less than one block away to call 911. After calling 911, Atha drove back to her cousin's residence to pick up her fiancé and children, whom she initially had left behind. Atha testified that when she returned to the residence, one of the cousin's friends attempted to attack her fiancé. As Atha attempted to drive away with her fiancé and children, one of the men jumped in front of the van and then attempted to chase it on foot. To evade the man, she drove away but later made a U-turn to return to the gas station.

A Stearns County sheriff's deputy saw Atha make the U-turn and drive onto a curb. The deputy stopped Atha as she arrived at the gas station again. St. Cloud police officers also were at the gas station because they had been dispatched there after Atha called 911. The officers suspected that Atha was intoxicated because they noted that her speech was slurred and that her breath smelled of alcohol. Atha failed a series of field sobriety tests. A subsequent breath test revealed that she had an alcohol concentration of .11.

The state charged Atha with two counts of second-degree DWI, in violation of Minn. Stat. § 169A.20, subds. 1(1), 1(5) (2006). Before trial, Atha served notice of her intent to rely on the defense of necessity. In response, the state filed a motion *in limine* seeking an order that Atha was not entitled to a jury instruction on necessity. After a hearing, the district court denied the motion in part and reserved ruling in part. The district court ruled that Atha could present evidence in support of a necessity defense but reserved ruling until the close of the evidence as to whether she was entitled to an instruction on necessity.

The case was tried on two days in November 2008. Before submitting the case to the jury, the district court denied Atha's request for a necessity instruction on the ground that she had not established a *prima facie* showing of necessity. The jury found Atha guilty of both counts of DWI. In December 2008, the district court sentenced Atha to 365 days in jail, with 320 days stayed for six years. Atha appeals.

D E C I S I O N

Atha argues that the district court erred by refusing to instruct the jury on the defense of necessity. We apply an abuse-of-discretion standard of review to a district court's decision to not give a requested jury instruction. *Id.*

The necessity defense "applies only in emergency situations where the peril is instant, overwhelming, and leaves no alternative but the conduct in question." *State v. Johnson*, 289 Minn. 196, 199, 183 N.W.2d 541, 543 (1971). To prove the necessity defense, the defendant must show that (1) she had no legal alternative to breaking the law, (2) the harm to be prevented was imminent, and (3) a direct, causal connection existed between breaking the law and preventing the harm. *State v. Rein*, 477 N.W.2d 716, 717 (Minn. App. 1991), *review denied* (Minn. Jan. 30, 1992). The defense applies only if "the harm that would have resulted from compliance with the law would have significantly exceeded the harm actually resulting from the defendant's breach of the law." *Id.* (quotation omitted). Furthermore, the defense is unavailable if the emergency situation is a result of the defendant's own recklessness or negligence. *Johnson*, 289 Minn. at 199, 183 N.W.2d at 543.

"A party is entitled to an instruction if the evidence produced at trial supports the instruction." *State v. Hall*, 722 N.W.2d 472, 477 (Minn. 2006). To be entitled to a jury instruction on the necessity defense, a defendant must make a *prima facie* showing of necessity. *State v. Brodie*, 532 N.W.2d 557, 557 (Minn. 1995). Because the alleged necessity in this case does not directly negate an element of the crime, but rather seeks to excuse criminal conduct, Atha ultimately would be required to prove the defense by a preponderance of the evidence. *See State v. Hage*, 595 N.W.2d 200, 206 (Minn. 1999). Thus, to obtain an instruction on necessity, Atha was required to produce evidence capable of proving all requirements of the defense by a preponderance of the evidence.

Atha's necessity defense rests on the assertion that she needed to drive to the gas station, later drive back to her cousin's residence, and then return to the gas station, in order to protect her children and her fiancé from potential harm at the hands of her cousin's friends. Atha testified at trial that several people confronted and physically threatened her and her fiancé at her cousin's residence and that she also was concerned for the safety of her children. Atha contends that she "met the threshold burden for presentation [of the defense of necessity] to the jury" and that "the weight or persuasiveness of that evidence was a jury question" but that the district court erroneously weighed the evidence in declining to give the requested instruction.

The district court concluded that Atha had not made a *prima facie* showing of necessity. The district court explained:

> The defense is really, by nature, a very exceptional defense that requires an extraordinary set of circumstances; particularly, you know, a clear choice between the lesser of two evils, and it requires that the harm or the peril be instant and overwhelming and leave no alternative but the conduct in question. I think the law is also clear that the defense of necessity is not available if the choice of action is necessitated by the defendant's own recklessness or negligence, and the harm has to be imminent . . . .

The district court also noted Atha's admission that she did not make a wise choice to drive to and from the gas station.

The district court properly analyzed Atha's request for an instruction on necessity. We assume Atha's testimony to be true, but the evidence supporting the necessity defense must be considered in light of Atha's admissions on cross-examination and the evidence in the trial record that is undisputed. First, Atha admitted on cross-examination that she could

have avoided a confrontation with her cousin's friends by going to sleep rather than remaining awake. Second, the gas station is less than one block from the cousin's residence. Atha could have walked or run to the gas station to place a telephone call to the police in nearly the same time as was required to drive there. Third, Atha's own testimony tended to diminish the risk of injury to her fiancé and children. She said, "I didn't think they would directly go do something to my kids, but I figured [my fiancé] was in harm . . . ." Fourth, she admitted that "the best way to go about it" would have been to wait at the gas station for the police to arrive and escort her back to the residence to get her children. Her own testimony precludes her from proving that "the peril [was] instant, overwhelming, and leaves no alternative but the conduct in question." *Johnson*, 289 Minn. at 199, 183 N.W.2d at 543. Based on her own testimony, Atha did not establish a *prima facie* showing of necessity. Thus, the district court did not abuse its discretion by refusing to give the requested necessity instruction.

This result is consistent with caselaw arising from similar situations. In fact, the exigencies presented by Atha are less compelling than those presented in *Brodie*, in which the defendant was stopped and charged with DWI as he was driving a friend to a hospital because he believed the friend was having a heart attack. *See* 529 N.W.2d 395, 397 (Minn. App. 1995), *rev'd*, 532 N.W.2d 557 (Minn. 1995). The supreme court held that the district court did not err by refusing to give a necessity instruction because Brodie had not established a *prima facie* showing of necessity. 532 N.W.2d at 557. Likewise, in *Johnson*, the defendant unlawfully drove his snowmobile on the shoulder of a highway because it was otherwise impossible to cross a waterway. 289 Minn. at 197-98, 183 N.W.2d at 542. The

supreme court held that Johnson was not entitled to the necessity defense because he did not act "for the preservation of life," was not avoiding immediate or physical harm, was not reacting to an emergency situation, and could have avoided the situation by taking adequate precautions. *Id*. at 201-02, 183 N.W.2d at 544-45. Minnesota's standard for the necessity defense is high; it requires that harm be imminent and that there be no legal alternative to breaking the law. *Rein*, 477 N.W.2d at 717.

At oral argument, Atha also attacked the district court's decision to refrain from a definitive pre-trial ruling on the state's motion *in limine*. She contends that by reserving ruling on the matter of a necessity instruction until after the close of evidence, she was required essentially to admit to the elements of the DWI charges before learning whether she would be permitted to argue necessity to the jury. Atha contends that she was prejudiced by the delayed ruling, although she did not identify any alternative strategy except a guilty plea.

Atha's oral argument concerning the allegedly erroneous lack of a pre-trial ruling was not included in her brief. Atha's argument is forfeited by her failure to brief the issue. *See State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997), *review denied* (Minn. Aug. 5, 1997). Even if the issue were properly before this court, Atha could not establish error because she has not identified any caselaw that would require a district court to issue a definitive ruling on a pre-trial request for a jury instruction on an affirmative defense. To require a district court to issue such a ruling would be contrary to a district court's generally broad discretion to determine the manner in which it will conduct trials. *See State v. Erickson*, 610 N.W.2d 335, 341 (Minn. 2000) (stating that district courts "have discretion in

managing the trials before them"). Such a ruling also would be contrary to the general rule that a district court may refrain from rulings until the relevant facts are known. *See, e.g.*, *State v. Reed*, 737 N.W.2d 572, 588-89 (Minn. 2007) (declining to hold that district court must rule on admissibility of other-acts evidence before defendant's case-in-chief). The situations in which district courts are required or encouraged to make advance rulings are quite few. *See, e.g.*, *State v. Tscheu*, 758 N.W.2d 849, 862 (Minn. 2008) (noting that defendant is entitled to ruling regarding admissibility of prior convictions before deciding whether to testify). In the absence of any caselaw in support of the particular argument being made by Atha, we would conclude that the district court did not commit error by reserving ruling on the state's pre-trial motion *in limine*.

In sum, the district court did not abuse its discretion by refusing to instruct the jury on the defense of necessity.

Affirmed.