FIRST DIVISION
April 17, 2017

No. 1-15-1879
2017 IL App (1st) 151879-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
	)	Cook County.
Plaintiff-Appellee,	)	
	)	Nos. M4501239
v.	)	38198926
	)	38198927
DAVID WILLIAMS,	)	38198928
	)	
	)	Honorable John Allegretti,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justices Harris and Mikva concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court's rejection of necessity defense was based on mistaken recall and consideration of crucial evidence; reversed and remanded for a new trial.

¶ 2 Following a bench trial, defendant David Williams was convicted of multiple traffic offenses and sentenced to supervision, conditional discharge, and community service. On appeal, defendant contends that: (1) the trial court's findings were premised on an incorrect view of the facts in evidence; (2) the trial court erred in placing the entire burden of proving the necessity

defense on defendant; and (3) the facts and circumstances supported defendant's necessity defense. We reverse and remand for a new trial.

¶ 3 Following a traffic incident on March 22, 2014, defendant was charged with speeding more than 35 miles per hour in excess of the maximum speed limit (625 ILCS 5/11-601.5(b) (West 2014)), improper lane usage (625 ILCS 5/11-709(a) (West 2014)), following too closely (625 ILCS 5/11-710 (West 2014)), and reckless driving (625 ILCS 5/11-503 (West 2014)). Throughout the proceedings, defendant maintained that he acted out of necessity.

¶ 4 At trial, Illinois State Trooper Garcia testified that at approximately 11:30 p.m. on March 22, 2014, he was on highway patrol in an unmarked white Ford Crown Victoria with clear windows. Trooper Garcia was traveling northbound on Illinois Route 394 just south of Lansing Road, which had two lanes in each direction, when he observed a Jeep driven by defendant about three to four car lengths in front of him. Trooper Garcia observed defendant accelerate at a high rate of speed, whereupon he closed the distance with defendant's vehicle to start pacing it. Trooper Garcia stated that defendant traveled 100 miles per hour, and the speed limit was 55 miles per hour. Trooper Garcia further stated that he and defendant were on the ramp that leads to I-94, the Bishop Ford Expressway, which has two lanes and goes over I-80. Trooper Garcia observed defendant come within a foot of another vehicle in front of him and change lanes. Defendant then traveled in the center of the road, straddling two lanes. After about a quarter of a mile, defendant approached two more vehicles, one in each lane. Trooper Garcia recalled that defendant abruptly changed lanes and was not more than a foot away from the vehicle in the right lane.

¶ 5 Trooper Garcia further testified that he activated his interior lights as he and defendant approached 175th Street on the Bishop Ford Expressway. Defendant slowed down and

immediately pulled over onto the left shoulder at approximately 167th Street. Trooper Garcia stated that when he approached defendant's vehicle after he was pulled over, a female passenger was in the front seat. Trooper Garcia explained to defendant why he had been pulled over, and defendant replied that he was being chased as a result of an argument on the street. Trooper Garcia stated that the distance from Route 394 at Thorndale and Lansing to I-94 at 176th Street was less than two miles.

¶ 6 Testifying on his own behalf, defendant explained the events that he claimed precipitated the way he drove on March 22. Defendant stated that two days earlier, he had played basketball at a park. Throughout the game, someone on the opposing team named Deandre trash-talked defendant and became aggravated. Defendant recalled that when the game ended, Deandre pushed and shoved defendant and wanted to fight. Defendant did not want to fight and headed to his car. When defendant was 15 to 20 feet away and about to drive off, he observed Deandre retrieve a gun from a friend and flash it at defendant. Defendant did not know Deandre's last name.

¶ 7 Returning to March 22, defendant stated that at 11:30 p.m. that day, he and his girlfriend were going home after leaving his mother's house. Defendant drove down Lincoln Highway to the Route 394 expressway and stopped at a gas station. There, while defendant was returning to his car, he saw Deandre pull up in a "white Crown Ford." Defendant stated that Deandre got out of the car and quickly glanced at defendant, making eye contact. Defendant left the gas station and headed to the expressway. Defendant observed Deandre pull out of the gas station as well, which was within a minute or two of Deandre's arrival. When defendant got to the expressway, Deandre was out of sight. Defendant stated that he drove for around five minutes on the expressway and did not see Deandre. However, at one point, defendant's girlfriend alerted him

that a white Crown Ford was behind them. Defendant did not see the driver, but thought it was Deandre. Defendant immediately started "pulling up" and tried to "get as far away from this guy as possible" because Deandre was known for carrying a gun and being a hot-head, which defendant learned when he asked around about Deandre after the basketball game. Defendant switched lanes twice, and the white Crown Ford did as well. Defendant stated that he was scared for his life, and increased his speed to "try to get somewhere as safe as possible and as quick as possible." Defendant further stated that he sped up because he thought about "the worst of what could happen," including that Deandre "could get on the side of me and shoot at my car." Defendant was afraid for his and his girlfriend's safety and believed he was in "a life or death situation." Defendant stated that when he started losing the white Crown Ford, the Ford's lights turned on and defendant immediately pulled over and stopped. Defendant acknowledged that Trooper Garcia was the actual driver of the white Crown Ford on the expressway.

¶ 8 Defendant and defense counsel had the following exchange:

"Q. Now, during this time didn't you call the police?

A. Yes.

Q. You did call the police?

A. My girlfriend.

Q. Your girlfriend did?

A. Yes.

Q. Did you get on the phone with the police?

A. No."

¶ 9 On cross-examination, defendant acknowledged that he did not see Deandre with a gun at the gas station. Defendant also stated that he had a cell phone with him on March 22.

Additionally, defendant admitted that he did not file a police report about his altercation at the basketball game.

¶ 10 Defendant's girlfriend, Ashonda Parker, also testified for the defense. Parker stated that around 11:30 p.m. on March 22, she and defendant were at a gas station after having been at defendant's mother's house. When defendant returned to the car, he told Parker that he saw someone at the gas station with whom he had an altercation a few days earlier. Defendant pointed out this person to Parker, but Parker only saw that person's car, which was a Crown Victoria with tinted windows. Defendant and Parker left, and once they had been on the expressway for a few minutes, Parker looked behind her and noticed that the Crown Victoria was following them. Parker alerted defendant, who confirmed that the driver looked like Deandre, the person with whom defendant had an altercation. Defendant switched lanes twice, which the Crown Victoria did as well. Defendant sped up, and again, the Crown Victoria did too. According to Parker, the Crown Victoria tailed defendant's vehicle "pretty much the entire time we were on the expressway." Parker stated that ultimately, defendant pulled over as soon as he saw the state trooper's lights. On cross-examination, Parker stated that she cannot see that well at night because she is supposed to wear glasses.

¶ 11 In rebuttal, the State recalled Trooper Garcia, who testified about routes defendant could have taken. Trooper Garcia stated that based on where he first saw defendant's car, the only possible routes were to take I-80 eastbound, I-80 westbound, or I-94 northbound. As for the nearest exit from where Trooper Garcia first saw defendant's car, Trooper Garcia stated that there is an exit at Torrence Avenue from I-80 eastbound, an oasis or exit at Halsted from I-80 westbound, and an exit at 159th Street from I-94 northbound. Trooper Garcia further stated that the Torrence Avenue exit is about a mile from where he first saw defendant's car.

¶ 12 In closing, the State contended in part that defendant had alternatives to driving as he did. The State asserted that defendant could have filed a police report after the basketball game, driven to a police station after seeing Deandre at the gas station, or used his cell phone to call the police. The State further posited defendant could have gotten on I-80 and exited at Torrence Avenue.

¶ 13 In his closing, defense counsel contended that defendant feared for his life and that the State's suggested alternatives were not viable options. Defense counsel questioned whether going to the police would have been fruitful where defendant did not know Deandre's last name. Defense counsel also noted that defendant's girlfriend called the police when she and defendant thought Deandre was following them. Additionally, defense counsel asserted that Trooper Garcia did not testify that defendant was driving erratically before Trooper Garcia came three to four car lengths behind him, which meant that defendant's driving became irregular in reaction to the state trooper's car.

¶ 14 In its ruling, the court found that the State proved defendant's guilt on each of the charges beyond a reasonable doubt. The court stated, "I don't even think—none of the evidence I've heard contradicted, not that you have the burden in anyway, but what I heard you testify in my [gauging] of all the witnesses is that there was no denial of any of the allegations or charges here." The court then considered defendant's necessity defense. The court stated that after the altercation at the basketball game, defendant, "it would appear in a proven manner took reasonable action and got away from the situation." The court recalled defendant's testimony that he never reported the situation to the police or asked for help, "but rather moved on." The court further stated that after seeing Deandre at the gas station, defendant did not go to or call the police, even though he had a cell phone. According to the court, once he was on the expressway,

defendant could have exited at Torrence Avenue, and "defendant could have again called the police. But there were other options. Other options available to the defendant."

¶ 15 The court continued:

> "And I say that because the defense of necessity would suggest that there were not other reasonable options available. And I think in this case I'm making a finding that there were. And I say that because I don't think going a hundred miles an hour down an expressway, going and driving up within a foot of a vehicle or so in front of you is an option when you could have gotten off the expressway. When you could have done something else."

¶ 16 The court stated that other options were available to defendant and that it would not find that the elements of necessity were met. The court found defendant guilty on all the charges and that "the defense of necessity is not available to the defendant under the facts and circumstances here." The court further stated that it "found the officer to be absolutely credible, and I get to make that determination and judgment to the extent if I had to find testimony incredible I would have found, and I'm not going to make that finding necessarily, but I would have found the officer's testimony credible and not necessarily the defendant's account in this situation."

¶ 17 The matter proceeded to a sentencing hearing, where the court stated that it was "absolutely certain that [defendant] didn't prove [his] necessity defense." The court continued that "[y]ou maybe had options and you didn't see them, but in my findings you should have, right, it would have been reasonable to get off the road." The court sentenced defendant to six months of conditional discharge for aggravated speeding, six months of supervision for improper lane usage, six months of supervision for following too closely, six months of supervision and

five days of community service for reckless driving, and $409 in costs. The sentences were to run concurrently.

¶ 18 Defendant subsequently filed a motion to reconsider, asserting in part that defendant testified that he had no option but to try to get away from the area. At the hearing on defendant's motion, defense counsel stated that after defendant sped up on the expressway, Parker started calling the police. Defense counsel further noted that all defendant needed to do was present some evidence to support his necessity defense. Defense counsel added that once the defense was raised, the State failed to prove that necessity was not available beyond a reasonable doubt.

¶ 19 In response, the State asserted that although only some evidence of a necessity defense was required, "that doesn't mean that the evidence rises to the level of granting the necessity defense." The State also maintained that defendant had alternatives to driving as he did, such as asking the gas station attendant if he could borrow a phone to call the police, calling the police while at the gas station, or calling the police while on the highway.

¶ 20 The court denied defendant's motion to reconsider. In its ruling, the court stated that necessity did not apply in this case, and that defendant "could raise the defense, but I had the option or I made the findings of credibility and made the determination that in this case *** it was not a viable defense." The court further stated that it found Trooper Garcia to be "absolutely credible." Defendant subsequently appealed.

¶ 21 On appeal, defendant contends that the trial court's rejection of his necessity defense was based on an incorrect view of the evidence. Defendant argues that he satisfied the required elements for raising the defense, and the trial court's finding that alternatives were available was based on a mistake. Defendant asserts that for the entirety of Trooper Garcia's pursuit of defendant, there was no opportunity to exit the road or seek out the police. Defendant further

contends that after the necessity defense was properly raised, the trial court incorrectly placed the entire burden of proving the defense on defendant, instead of on the State to disprove the defense.

¶ 22 The Criminal Code provides that conduct that would otherwise be an offense is justified by reason of necessity if: (1) the person claiming the defense was without blame in occasioning or developing the situation, and (2) reasonably believed such conduct was necessary to avoid a public or private injury greater than the injury that might reasonably result from his own conduct. 720 ILCS 5/7-13 (West 2014); *People v. Boston*, 2016 IL App (1st) 133497, ¶ 39. The defense applies when the threat of harm was immediate, and the defendant's conduct was the sole option to avoid injury. *People v. Guja*, 2016 IL App (1st) 140046, ¶ 47. The necessity defense "is viewed as involving the choice between two admitted evils where other optional courses of action are unavailable [citations] 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).

¶ 23 A key inquiry when considering the necessity defense is whether a defendant's conduct was the "sole reasonable alternative" available to him under the circumstances. *Guja*, 2016 IL App (1st) 140046, ¶ 49. Defendant suggests that we should abandon this requirement, citing the Third District's decision in *People v. Kucavik*, 367 Ill. App. 3d 176, 180 (2006) (stating that to require the defendant's conduct to be the sole alternative to illegal conduct "would render the language in the statute referring to the accused's reasonable belief meaningless"). We decline to do so. *Kucavik*'s rejection of the "sole reasonable alternative" requirement has not been supported by another court. Moreover, cases decided after *Kucavik* have continued to follow the "sole reasonable alternative" requirement. See, *e.g.*, *Boston*, 2016 IL App (1st) 133497, ¶ 39 (defense applies when conduct was sole option to avoid injury); *Guja*, 2016 IL App (1st)

140046, ¶ 47 (defense applies when conduct was sole option to avoid injury); *People v. Gibson*, 403 Ill. App. 3d 942, 952 (2010) (defense applies only if conduct was only reasonable alternative under the circumstances), *abrogated on other grounds*, *People v. Bailey*, 2014 IL 115459. Our supreme court has not departed from this requirement either. See *Janik*, 127 Ill. 2d at 399 (defense is viewed as involving a choice between two admitted evils where other optional courses of action are unavailable). We follow the overwhelming weight of authority finding that a defendant's conduct must be the sole reasonable alternative.

¶ 24 To raise the affirmative defense of necessity, a defendant must present some evidence on the issue unless the State's evidence raises the issue. *Guja*, 2016 IL App (1st) 140046, ¶ 46. "The quantum of proof necessary to raise an affirmative defense is evidence sufficient to raise a reasonable doubt of defendant's guilt." *People v. Cord*, 258 Ill. App. 3d 188, 192 (1994). After a defendant has presented some evidence in support of his necessity defense, "the State has the burden of disproving that defense beyond a reasonable doubt together with all the other elements of the offense." *People v. Azizarab*, 317 Ill. App. 3d 995, 999 (2000).

¶ 25 Here, the State maintains that the trial court rejected defendant's necessity defense based on a failure to make an initial showing—that is, at the "some evidence" stage. Based on the trial court's ruling, including its finding that the elements of the necessity defense were not met, we agree. However, we find that the trial court's decision on this point was based on an incorrect view of the evidence.

¶ 26 A trial court's failure to recall and consider testimony crucial to a defendant's defense may result in a denial of the defendant's due process rights. *People v. Mitchell*, 152 Ill. 2d 274, 323 (1992). In a bench trial, the trial court is presumed to have considered only competent evidence in reaching its verdict, unless that presumption is rebutted by affirmative evidence in

the record. *People v. Simon*, 2011 IL App (1st) 091197, ¶ 91. Further, where the record affirmatively shows that the trial court failed to recall crucial defense evidence when entering judgment, the defendant did not receive a fair trial. *People v. Williams*, 2013 IL App (1st) 111116, ¶ 75. Whether a defendant's due process rights have been denied is an issue of law that we review *de novo*. *Id*. At the same time, we defer to the findings of the trial court on issues of the credibility of witnesses. *People v. Kite*, 153 Ill. 2d 40, 46 (1992).

¶ 27 Here, the trial court based its ruling on the finding that defendant had options other than driving as he did—namely, exiting Route 394 or contacting the police at various points. As for exiting Route 394, we note as a preliminary matter that we may take judicial notice of information from Google Maps, as defendant requests. See *People v. Crawford*, 2013 IL App (1st) 100310, ¶ 118 n.9; *People v. Clark*, 406 Ill. App. 3d 622, 633 (2010). As defendant points out, it would not have been possible for him to exit at Torrence Avenue, or anywhere else for that matter, before Trooper Garcia activated his lights at 175th Street. Based on our review of a map of the area, there are no exits on Route 394 between where Trooper Garcia first saw defendant's car (just south of Lansing Road[1]) and where Trooper Garcia activated his lights (175th Street). This is consistent with Trooper Garcia's testimony. At trial, Trooper Garcia stated that one of the nearest exits to where he first observed defendant's car was Torrence Avenue off of I-80 eastbound. To exit at Torrence Avenue, however, would have required defendant to drive beyond where Trooper Garcia activated his lights. Trooper Garcia's other suggested options, such as exiting at an oasis or Halsted off of I-80 westbound or at 159th Street off of I-94 northbound, are also past the point where Trooper Garcia activated his lights. Unless defendant

[1]Per Google Maps, there is no road named "Lansing Road." In the relevant area, there is a Glenwood Lansing Road and a Thornton Lansing Road. There are no exits off of Route 394 between either of these roads and 175th Street.

prolonged the chase, defendant could not have exited Route 394 during the time he was followed by Trooper Garcia.

¶ 28 The trial court also stated that defendant did not call the police after seeing Deandre at the gas station or while driving on Route 394. While defendant did not call the police himself, he testified that his girlfriend did at some point while they were in the car. This testimony was unrebutted. The trial court was incorrect that calling the police was an option that was not pursued.

¶ 29 In large part, defendant's necessity defense hinged on whether defendant had reasonable alternatives to driving as he did. Because the trial court failed to consider the geography of the area and recall that defendant's girlfriend called the police—evidence that was crucial to defendant's necessity defense—defendant was denied his due process rights. See *Mitchell*, 152 Ill. 2d at 322-23, 326 (trial court's failure to recall the defendant's testimony that he was not free to leave during a suppression hearing was a violation of the defendant's due process rights); *People v. Bowie*, 36 Ill. App. 3d 177, 179-80 (1976) (the defendant did not receive a fair trial where key issue in battery case was whether police officer or the defendant began the altercation and the trial court incorrectly stated that there was no testimony that the defendant was bleeding).

¶ 30 Having found that defendant's right to due process was violated, we next consider whether the violation was harmless. *Williams*, 2013 IL App (1st) 111116, ¶ 93. In a harmless-error analysis, the State must prove beyond a reasonable doubt that the verdict would have been the same without the error. *People v. Thurow*, 203 Ill. 2d 352, 363 (2003).

¶ 31 For its part, the State asserts that the trial court did not find defendant or his girlfriend credible. We disagree that the trial court made such a finding. While the trial court stated that it found Trooper Garcia to be "absolutely credible," the trial court did not make an explicit finding

either in its initial ruling or in denying defendant's motion to reconsider that defendant and his girlfriend were not credible. Instead, the trial court stated in its ruling that that it would "not necessarily" find defendant's account credible, but it was "not going to make that finding necessarily." In denying the motion to reconsider, the trial court stated that it "made the findings of credibility," but again did not state that defendant's and his girlfriend's accounts were not credible. Further, Trooper Garcia's, defendant's, and defendant's girlfriend's accounts were not mutually exclusive. Defendant did not deny that he drove as Trooper Garcia described, but rather asserted that it was necessary for him to do so.

¶ 32 The State also asserts that the necessity defense was unavailable because there was no specific and immediate threat. See *Cord*, 258 Ill. App. 3d at 194 (stating that "imminent harm" is needed for a necessity defense). Defendant testified that two days before the driving incident, he had an altercation with someone named Deandre who flashed a gun at defendant. Defendant subsequently learned that Deandre had a reputation for carrying a gun and being a hot-head. At the gas station on March 22, defendant testified that he saw Deandre pull up in a white Crown Ford and that Deandre made eye contact with him. Defendant further stated that he left the gas station and drove onto the expressway, whereupon his girlfriend pointed out that a car that was the same as Deandre's was behind him. Defendant testified that the white Crown Ford followed defendant's maneuvers. Defendant believed he was being followed by someone with access to a gun who had been angry with him. Further, defendant was without blame in developing the situation. At each potential interaction with Deandre, defendant left and tried to avoid contact. *Contra People v. Perez*, 97 Ill. App. 3d 278, 280-81 (1981) (the defendant did not demonstrate first requirement of necessity defense where threats he received were prompted at least in part because of the defendant's activities and there was evidence that the defendant stopped to engage

in a gun fight). Of note, the trial court stated that defendant took "reasonable action" by leaving the scene of the basketball game. Overall, we find that defendant's testimony met the low threshold required to show imminent harm and raise the necessity defense. See *Kite*, 153 Ill. 2d at 45.

¶ 33 The State further contends that there were numerous other reasonable alternatives that establish that defendant did not act out of necessity. As noted above, defendant could not have exited Route 394 and his girlfriend called the police. The State's other suggestions, such as calling the police at the gas station or asking the gas station attendant to call the police, would have prolonged his stay at the gas station, where Deandre was. Further, there was no evidence in the record that there was a police station nearby. Without the trial court's mistaken view of the evidence, defendant presented sufficient evidence to raise the necessity defense. The burden should have then shifted to the State to disprove the defense (*Azizarab*, 317 Ill. App. 3d at 999), but did not because of the trial court's error. Further, based on the record before us, we cannot say that the State would have met its burden. Under these circumstances, the trial court's mistaken recall and consideration of the evidence was not harmless. We therefore reverse and remand for a new trial. See *People v. Patrick*, 233 Ill. 2d 62, 76 (2009) (reversing and remanding where error was not harmless).

¶ 34 Because we are remanding this matter for a new trial, we must consider whether another trial would violate the double jeopardy clause. *People v. Ward*, 2011 IL 108690, ¶ 50. If the totality of the evidence presented at the first trial was sufficient for a rational trier of fact to find that the essential elements of the crime were proven beyond a reasonable doubt, then there is no double jeopardy violation created on retrial. *Id*. Here, based on Trooper Garcia's testimony, the

evidence was sufficient to find that defendant committed the offenses at issue. Defendant does not argue otherwise. Thus, double jeopardy does not prevent a retrial.

¶ 35 For the foregoing reasons, we reverse and remand this matter for a new trial.

¶ 36 Reversed and remanded.