RENDERED: May 7, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000181-MR

ROBIN VANESSA STEWART — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 01-CR-00513

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; SCHRODER AND TACKETT, JUDGES.

TACKETT, JUDGE: Robin Stewart appeals from the judgment of the Hardin County Circuit Court, following a jury verdict, where she was convicted of Attempt to Elude in the first degree, Driving Under the Influence, Driving on a Suspended or Revoked License due to DUI, Resisting Arrest, and Possession of an Open Alcoholic Beverage Container. She received a sentence of five years' imprisonment and fines of $1,155.00. The sole issue

before this Court is whether Stewart was entitled to a choice of evils jury instruction. We affirm.

On September 16, 2001, Stewart was driving on US 31W in Hardin County and pulled in front of Officer Michael Keffer's patrol vehicle. Following behind her, he observed her go off the paved highway on two separate occasions. The officer decided to stop her vehicle and turned on his emergency lights. Stewart then made a left turn against the light onto Centennial Road, striking the median and nearly striking another vehicle. The officer followed her onto Frontier Court where she almost struck a stop sign, then onto Wagon Wheel where she finally came to a complete stop.

According to the testimony of Officer Keffer, Stewart refused to follow the officer's orders to exit the vehicle, refused to let go of the steering wheel, and had to be forcibly removed from the vehicle. A bottle of beer was found between her legs and an open gin bottle was found on the passenger seat. Stewart became combative, resisting the officer's attempt to place handcuffs on her, and began screaming and cursing. She refused the field sobriety tests and later refused to take a blood alcohol test. After being arrested and transported to the Radcliff Police Station, Stewart called Charles Evans, the owner of the car she was driving, and complained to him that she was in trouble because he would not drive her home.

At the conclusion of her trial, Stewart requested a choice of evils instruction. She testified that she had spent the evening in question socializing with Charles Evans at his apartment, drinking and dancing. During her second visit to Evans' apartment that evening, Stewart alleges that she passed out and awakened to find Evans having anal intercourse with her, and that she told him to stop. The next thing she remembered was awakening again and finding him asleep on the other side of the bed. She got up, cleaned herself in the bathroom and awakened Evans, telling him she wanted to go home. He ignored her and fell back asleep. She awakened him a second time and asked him to take her home. Again he refused and resumed sleeping. She then took his keys off the table and left the apartment. She sat in his car for a couple of minutes contemplating her actions, then began driving. Officer Keffer observed her driving erratically, and ultimately arrested Stewart for multiple offenses. This appeal followed.

Stewart's sole claim of error is that she was improperly denied a Kentucky Revised Statute (KRS) 503.030 choice of evils instruction. In order for the choice of evils defense to be available, it must be shown that defendant's conduct was necessitated by a specific and imminent threat of injury to her person under circumstances that left her no reasonable and viable alternative, other than the violation of

the law for which she stands charged. Senay v. Commonwealth, Ky., 650 S.W.2d 259 (1983). The court in Senay further stated that "the danger presented to the defendant must be compelling and imminent, constituting a set of circumstances which affords him little or no alternative other than the commission of the act which otherwise would be unlawful." Id. This defense has its roots in the common law doctrine of necessity and has long been recognized as a defense to a charge predicated upon an act which otherwise would be criminal. Senay v. Commonwealth, Ky., 650 S.W.2d 259 (1983). See 21 Am.Jur.2d *Criminal Law* Section 14.8, page 283; Nall v. Commonwealth, Ky., 271 S.W. 1059 (1925). This defense has been codified in Kentucky by KRS 503.030 which reads in pertinent part:

> . . . . [C]onduct which would otherwise constitute an offense is justifiable when the defendant believes it to be necessary to avoid an *imminent public or private injury* greater than the injury which is sought to be prevented by the statute defining the offense charged . . . . (Emphasis added).

Justifiable conduct on the part of an offender is conditioned upon at least four contingencies. Beasley v. Commonwealth, Ky., 618 S.W.2d 179, 180 (1981). First, the person believes the necessity of his action is mandated by his subjective value judgment (weighed by a reasonableness standard); that such action must be contemporaneous with the danger of injury sought to be avoided, see Duvall v. Commonwealth, Ky., 593 S.W.2d 884

(1980); the injury is imminent, requiring an immediate choice if to be avoided; and finally, the danger or injury sought to be avoided must be greater than the penalty or offending charge occasioned by the action chosen by the party. Beasley, *supra*.

Unfortunately, Stewart's claim for the choice of evils instruction meets none of these requisites. She claims that she attempted to drive the four-tenths of a mile distance to her apartment in Evans' car because she feared that if she remained at his apartment she would be subject to further sexual abuse. This defense hinges on a specific and imminent threat of injury. There was no specific or imminent threat of injury in this situation. The testimony does not indicate there was an imminent danger to Stewart at the time the offenses were committed. Hence, there was no fulfillment of the element of necessity for Stewart's actions. According to Stewart, her attacker was asleep. Fortifying this argument is the fact that Stewart at least twice attempted to awaken Evans, asking him to take her home. Had he posed an imminent and specific threat to her safety as she alleges, she would have been intent on escaping his apartment without awakening him.

KRS 503.030 requires that the circumstances leave the defendant with no reasonable and viable alternative, other than violation of the law. Stewart admits that there were other options at her disposal. Perhaps the most obvious alternative

course of action would have been for Stewart to have simply walked back to her apartment. She could have called the police. She could have called a taxi. She could have knocked on a neighbor's door and requested their help. In sum, there were a number of viable alternatives at her disposal that would have safely allowed her to leave her attacker and return home.

Further compounding matters, it is not clear for which of the offenses Stewart asserts the choice of evils defense. The action must be contemporaneous with the danger of injury to be avoided. Beasley v. Commonwealth, Ky., 618 S.W.2d 180 (1981). The defense would not be applicable to the resisting arrest charge; nor would it be applicable to the felony charge of first-degree fleeing or evading the police. In fact, the defense could not even be asserted once she had removed herself from Charles Evans' presence and hence removed herself from the dangerous situation. Had Evans been pursuing Stewart, the analysis might be quite different. Stewart's actions, most notably her reckless driving, evasion of an officer, and possession of an open container of alcohol, preclude the applicability of a choice of evils defense in this situation.

The court did not err by denying the request for a choice of evils instruction in the clear absence of a specific and imminent threat. Senay v. Commonwealth, Ky., 650 S.W.2d 259, Damron v. Commonwealth, Ky., 687 S.W.2d 138 (1985), and

Montgomery v. Commonwealth, Ky., 819 S.W.2d 713 (1991). Even if Stewart had shown such a threat, she still would not have been entitled to an instruction unless she had little or no alternative other than the commission of the unlawful acts. Senay, *supra*.

For the foregoing reasons, the judgment of the trial court is hereby affirmed.

ALL CONCUR.

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