NOTICE

Memorandum decisions of this court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law.

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

BRIAN R. STRODTBECK,	)	
	)	Court of Appeals No. A-11295
Appellant,	)	Trial Court No. 3KN-11-816 CR
	)	
v.	)	
	)	MEMORANDUM OPINION
STATE OF ALASKA,	)	
	)	
Appellee.	)	No. 6127 — December 10, 2014
	)	

Appeal from the District Court, Third Judicial District, Kenai, Jennifer K. Wells, Magistrate Judge.

Appearances: Megan Webb, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Tamara E. de Lucia, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Michael C. Geraghty, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Hanley, District Court Judge.[*]

Judge HANLEY.

A jury convicted Brian R. Strodtbeck of driving under the influence after a police officer found him sleeping in the driver's seat of a vehicle with the motor

[*] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

running. Strodtbeck appeals, arguing the trial court erred by denying his proposed necessity defense. Because Strodtbeck's reason for operating the vehicle did not amount to a legal necessity, we affirm Strodtbeck's conviction.

Background

For purposes of evaluating Strodtbeck's claim that he was entitled to a necessity instruction, we recount the evidence in the light most favorable to him.[1]

Brian Strodtbeck was visiting from Montana to work on a friend's cabin in Sterling in May 2011. Near the end of his trip, he went out to dinner with his friend. Later, Strodtbeck decided to go to Good Time Charlies, a strip club. Strodtbeck arrived at about midnight. He parked his friend's truck at a nearby business because the truck had a business logo on it and he did not want to embarrass his friend by parking at a strip club.

Strodtbeck drank Black Velvet and Coke that evening and purchased lap dances, spending approximately $300-$400. He had $808 left at the end of the evening. While at the club, Strodtbeck met a stripper who agreed to go with him, presumably to a hotel, after the bar closed. He asked if she wanted to get a cab or if she was driving, and she said she could take care of things if they wanted to go somewhere. They arranged to meet at his vehicle after she got off work. After the bartender called out "last call" at 3:00 or 4:00 a.m., Strodtbeck went out to his truck to wait for the woman, but she never arrived. He waited for thirty minutes to an hour before realizing she was not coming.

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[1] *See Lacey v. State*, 54 P.3d 304, 308 (Alaska App. 2002).

As Strodtbeck left Good Time Charlies, the bartender asked him if he needed a taxi. Strodtbeck said no. After he realized the woman stood him up, he used his cell phone to call his friend, but he did not get an answer. Strodtbeck was cold, so he turned on the truck and went to sleep in the driver's seat. He did not wake up until an Alaska State Trooper knocked on his window at approximately 7:00 a.m.

Alaska State Trooper Larry Duran saw Strodtbeck slumped over the wheel with his vehicle running and contacted him. The trooper observed signs of impairment and, based on his investigation, arrested Strodtbeck for driving under the influence. A subsequent breath test showed that Strodtbeck's breath alcohol content was .123 percent.

At a jury trial before Magistrate Judge Jennifer K. Wells, Strodtbeck testified that when the woman he was waiting for did not show up, he realized he did not have the number for a cab and he was cold. He testified that he did not have a phone book with him, that he did not know he could call for directory assistance from his cell phone, and that he did not have cold weather gear. He knew he was approximately a mile-and-a-half or two from town, and he did not know what might be open at that time of the morning. He also testified that he did not think he had an emergency for which he could call 911 for assistance.

Strodtbeck requested a jury instruction on the defense of necessity, arguing that he had to turn on the vehicle to stay warm. After argument from both parties, the trial court denied the necessity defense instruction, and the jury convicted Strodtbeck of DUI.

Why we conclude Strodtbeck was not entitled to a necessity instruction

To establish a necessity defense, a defendant must show that (1) the act charged was done to prevent a significant evil; (2) there was no adequate alternative

method to prevent this evil; and (3) the harm caused was not disproportionate to the foreseeable harm the defendant was trying to avoid.[2] In the case of a continuing offense like driving under the influence, the defendant also must show some evidence that (4) he stopped violating the law as soon as the necessity ended.[3]

The first, second, and fourth elements are established if the defendant shows he reasonably believed at the time of acting that those elements were present, even if that belief was mistaken.[4] For the third element, which involves balancing the harm caused against the harm sought to be avoided, the court must make "an objective determination ... as to whether the defendant's value judgment was correct, given the facts as [the defendant] reasonably perceived them."[5] The defendant's actions should be weighed against the harm reasonably foreseeable at the time, rather than the harm that actually occurred.[6]

To receive a necessity defense instruction, Strodtbeck had to show "'some evidence' to put the matter at issue."[7] "Some evidence" in this context is evidence that "if viewed in the light most favorable to the defendant, is sufficient to allow a reasonable

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[2] *Id.* at 307.

[3] *State v. Garrison*, 171 P.3d 91, 94 (Alaska 2007) (citing *Allen v. State*, 123 P.3d 1106, 1108 (Alaska App. 2005)).

[4] *Id.*; *Nelson v. State*, 597 P.2d 977, 979 (Alaska 1979).

[5] *Seibold v. State*, 959 P.2d 780, 782 (Alaska App. 1998) (quoting *Bird v. Anchorage*, 787 P.2d 119, 120-21 (Alaska App. 1990)).

[6] *Nelson*, 597 P.2d at 979-80.

[7] *Lacey*, 54 P.3d at 308 (citing AS 11.81.900(b)(2)(A) (governing affirmative defenses) and AS 11.81.900(b)(19)(A) (governing normal defenses)).

juror to find in the defendant's favor on each element of the defense."[8] We review de novo whether the defendant presented some evidence of each element of the necessity defense.[9]

Like the trial court, we focus our analysis on the third element of the necessity defense: Strodtbeck's judgment that the harm caused by operating the vehicle while under the influence was not disproportionate to the foreseeable harm he was trying to avoid — being cold. To determine whether Strodtbeck established this third element of the necessity defense, we make an objective determination as to whether Strodtbeck's value judgment was correct, given the facts as he reasonably perceived them to be.[10]

At the time, May 22, 2011, in the early morning hours in Soldotna, it was thirty-five to forty degrees out, there was no snow on the ground, and it was not raining. Strodtbeck was wearing a light jacket. Strodtbeck testified he did not think he faced an emergency and therefore it did not occur to him to call for emergency help. He said the only alternative he saw to turning on the truck was walking in the cold, which he said "sounded about as dumb as, you know, anything. It's like I've always learned, if you've got something to stay warm, stay warm."

In *State v. Garrison*,[11] the Alaska Supreme Court rejected a proposed necessity defense under similar facts. Garrison was riding as the passenger in her car because she was intoxicated and her license was revoked. The vehicle was not steering

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[8] *Id.*

[9] *Greenwood v. State*, 237 P.3d 1018, 1023 (Alaska 2010).

[10] *Id.* at 1026.

[11] 171 P.3d 91 (Alaska 2007).

properly because a pin in the steering column had popped out.[12] Garrison asserted that the driver parked the car on the side of the road, about five miles from downtown Juneau, and left on foot, telling Garrison he would get help.[13] A police officer checked on the vehicle and offered to call a tow truck, but Garrison declined, indicating she would call for help on her cell phone.[14] After the officer left, Garrison realized her phone was not working.[15] Concerned for her safety, she re-inserted the pin into the steering column and drove the vehicle toward town.[16] The police stopped her, and she was subsequently charged with felony driving under the influence and driving with a revoked license.[17]

Garrison requested a necessity instruction at trial, contending, among other things, that it was unsafe for her to walk along the roadway because it was dark and icy and she was wearing dark clothing; it would be unsafe to cross four lanes of traffic to get help; she was afraid of being taken advantage of as a female alone; hitchhiking would be unsafe because it was dark; and it was cold and she suffered from a rare skin disorder that caused her to suffer an allergic reaction to the cold.[18] The Alaska Supreme Court ruled that Garrison was not entitled to raise a necessity defense based on this evidence.[19] The court held that Garrison "provided no plausible basis" for finding that her "supposed

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[12] *Id.* at 93.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.* at 97.

[19] *Id.* at 97-98.

harms were real."[20] Because Garrison did not point to evidence that would permit a reasonable person to find that driving under the influence was safer than the other options she rejected, the supreme court held as a matter of law that she was not entitled to present a necessity defense.[21]

Like the defendant in *Garrison*, Strodtbeck points to no evidence that would allow a reasonable jury to find that the harm he was trying to avoid (being cold) outweighed the danger he presented by operating his vehicle while under the influence. As already noted, the temperature was in the mid thirties to low forties. Strodtbeck did not point to any evidence suggesting that it would be dangerous for him to walk some two miles to town to find a hotel or some other open facility to ask for assistance. We further note that Strodtbeck had previously turned down the offer of a cab, his cell phone was working, and he had a substantial amount of cash on him.

We acknowledge that in *Garrison* the defendant actually drove the vehicle, while Strodtbeck did not. But Alaska courts have repeatedly emphasized that a DUI suspect does not have to actually drive a vehicle to pose a threat to the public.[22] Based on the facts before the district court, we conclude that Strodtbeck was not entitled to present a necessity defense.

For these reasons, we uphold the trial court's decision to not instruct the jury on Strodtbeck's proposed defense.

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[20] *Id.* at 97.

[21] *Id.* at 98.

[22] *See Shearer v. Anchorage*, 4 P.3d 336, 339 n.6 (Alaska App. 2000) (citing *Jacobson v. State*, 551 P.2d 935, 938 (Alaska 1976) ("An intoxicated person seated behind the steering wheel of a motor vehicle [that is not moving] is a threat to the safety and welfare of the public.") (citations omitted)); *see also State, Dep't of Pub. Safety v. Conley*, 754 P.2d 232, 236 (Alaska 1988); *Lathan v. State*, 707 P.2d 941, 943 (Alaska App. 1985).

Conclusion

Accordingly, the judgment of the district court is AFFIRMED.