NUMBER 13-18-00586-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

BETHANY GRACE MACIEL, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the County Court at Law No. 1 of Brazos County, Texas.

MEMORANDUM OPINION

Before Justices Hinojosa, Perkes, and Tijerina
Memorandum Opinion by Justice Tijerina

A jury convicted appellant Bethany Grace Maciel of driving while intoxicated (DWI) with an alcohol concentration level of 0.15 or more, a Class A misdemeanor. *See* TEX. PENAL CODE ANN. § 49.04(d). The trial court assessed punishment at twenty days in jail

and a $2,500 fine. By one issue, Maciel argues that the trial court erred by denying her requested jury instruction on the defense of necessity. We affirm.[1]

I. BACKGROUND

At trial, Maciel stated that on January 31, 2016, she, her brother Jonathan, and his wife Megan, were coming back from a night out drinking. She admitted to being intoxicated to the point where she did not feel safe to drive. Jonathan drove her vehicle while she was in the passenger seat, and Megan was in the back seat. Maciel testified that her brother began vomiting, so he stopped the car in the middle of the road. At that point, Maciel climbed over from the passenger's seat to the driver's seat. She stated she did not feel like she was all right to drive at that point, but her intentions were "to try and move [her] car out of the middle of the road to the closest parking lot to figure out how to get home from there." Maciel further stated that "[I] couldn't get the car to move, so I wasn't driving. I don't think I was operating it."

Officer Philip Shaw with the Texas A&M University Police Department testified that he located Maciel's vehicle stopped in a lane of traffic with smoke coming from the hood. He made contact with Maciel in the driver's seat while the engine was still running, and he smelled a burning mechanical odor emanating from the vehicle. Officer Shaw stated that Maciel attempted to switch the car gear, and he instructed her not to do that.[2] Officer Shaw suspected that Maciel was driving while intoxicated, and he administered a field sobriety test.

Maciel requested that the trial court instruct the jury on the defense of necessity,

[1] This case is before this Court on transfer from the Tenth Court of Appeals in Waco pursuant to a docket-equalization order issued by the Supreme Court of Texas. *See* TEX. GOV'T CODE ANN. § 73.001.

[2] Maciel's vehicle had a standard transmission.

arguing that she was trying to move the vehicle off the roadway. In response, the State asserted that Maciel's argument could not be that "she wasn't driving or operating" the vehicle and that she was driving, but "she had a necessity." *See id.* § 9.22. The trial court denied the request. A jury convicted her of DWI, and this appeal followed.

II. NECESSITY DEFENSE

By her sole issue, Maciel argues the trial court erred by denying her requested jury instruction on the defense of necessity because her testimony "did not amount to a blanket denial of the underlying actions . . . ."

A. Applicable Law

We apply a "raised by the evidence standard" in determining whether the trial court erred when it denied defendant's request for jury charge on a necessity defense. *Shaw v. State*, 243 S.W.3d 647, 657 (Tex. Crim. App. 2007). "[U]nder § 2.03(c) [of the Texas Penal Code], a defense is supported (or raised) by the evidence if there is some evidence, from any source, on each element of the defense that, if believed by the jury, would support a rational inference that that element is true." *Id*. at 657–58.

> If a defense is supported by the evidence, then the defendant is entitled to an instruction on that defense, even if the evidence supporting the defense is weak or contradicted, and even if the trial court is of the opinion that the evidence is not credible. But the evidence must be such that it will support a rational jury finding as to each element of the defense.

Id. at 658.

Section 9.22 of the Texas Penal Code outlines the defense of necessity and requires the actor to reasonably believe her conduct is "immediately necessary to avoid imminent harm . . . ." *Id*. § 9.22. The desirability and urgency of avoiding the harm must

"clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law proscribing the conduct . . . ." *Id*.

A defendant is not entitled to the defense of necessity for DWI if the defendant does not admit to committing the offense. *Pentycuff v. State*, 680 S.W.2d 527, 528–29 (Tex. App.—Waco 1984, pet. ref'd.) ("Without an admission that he committed the offense [of DWI], the defendant is not entitled to the defense of necessity."); *Moncivais v. State,* No. 04-01-00568-CR, 2002 WL 1445200, at *2 (Tex. App.—San Antonio July 3, 2002, no pet.) (mem. op., not designated for publication) (providing that appellant denied being intoxicated and was therefore not entitled to the defense of necessity). "To raise the necessity defense, a defendant must admit that he committed the offense charged then offer the alleged necessity as justification for his conduct." *Vrba v. State*, 69 S.W.3d 713, 724 (Tex. App.—Waco 2002, no pet.) (holding that because defendant testified he was not intoxicated, he thereby denied his guilt and was not entitled to an instruction on the necessity defense); *see Young v. State*, 991 S.W.2d 835, 839 (Tex. Crim. App. 1999); *see also Klein v. State*, 662 S.W.2d 166, 170 (Tex. App.—Corpus Christi–Edinburg 1983, no pet.) (providing that appellant was not entitled to the defense of necessity because he did not admit to intentionally or knowingly committing the act of aggravated assault).

B. Discussion

When Maciel requested the necessity defense, counsel argued that Maciel "doesn't have to say 'Yes, I am guilty of D.W.I.' in order to get the defensive instruction. She has to admit to the conduct that could be, uh, consistent with operating a motor vehicle." However, as set out above, "the defendant is not entitled to the defense of necessity unless he admits the charged offense," and Maciel did not agree that she

operated the vehicle stating, "I couldn't get the car to move, so I wasn't driving. I don't think I was operating it." *Goodin v. State*, 750 S.W.2d 857, 862 (Tex. App.—Corpus Christi–Edinburg 1988, pet ref'd). It was Maciel's defense that she did not operate the vehicle. *See* TEX. PENAL CODE ANN. § 49.04(d) ("A person commits an offense if the person is intoxicated while operating a motor vehicle in a public place."). In closing arguments, counsel asked, "[I]s sitting behind the wheel with the engine on, does that constitute operating a vehicle . . . she was not operating the vehicle because she couldn't . . . that vehicle did not move from that place."

Accordingly, under the facts of this case, we cannot say the evidence raised the defense of necessity. Because Maciel denied she operated the vehicle, she denied she committed the offense of DWI. *See id*.; *Vrba*, 69 S.W.3d at 724. For this reason, she was not entitled to a jury instruction on the defense of necessity, and we hold the trial court properly refused to submit an instruction on the defense of necessity. *See Pentycuff*, 680 S.W.2d at 528–29. We overrule Maciel's issue.

III. CONCLUSION

We affirm the trial court's judgment.

JAIME TIJERINA,
Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
16th day of July, 2020.