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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CR-23-420

BRITTANY CHAMBERS APPELLANT V. STATE OF ARKANSAS APPELLEE	Opinion Delivered April 17, 2024 APPEAL FROM THE CRAWFORD COUNTY CIRCUIT COURT [NO. 17CR-22-840] HONORABLE MICHAEL MEDLOCK, JUDGE AFFIRMED

CINDY GRACE THYER, Judge

A Crawford County jury convicted appellant Brittany Chambers of one count of trafficking fentanyl and sentenced her to fifteen years in the Arkansas Division of Correction. On appeal, Chambers argues that the evidence was insufficient to support the conviction. In addition, she contends that the circuit court erred in refusing to give the jury her proffered instruction regarding the "choice of evils" defense. We affirm.

I. *Trial Testimony*

Drug Task Force (DTF) Investigator Lanny Reese obtained information that Chambers was selling fentanyl. As a result, DTF developed a confidential informant (CI) and arranged a controlled buy on July 27, 2022. Chambers sold forty-five blue pills to the CI in exchange for $500. The CI described the sale, saying that she counted out the money and gave it to Chambers, and then Chambers handed her "the bag of fentanyl pills." At trial,

Chambers stipulated to the admissibility of the laboratory report from the state crime lab. That report stated that forty-five blue tablets, with a net weight of 4.8382 grams, had been submitted; of those forty-five tablets, one tablet, weighing 0.1050 grams, was tested and was determined to be fentanyl and acetaminophen.

At the conclusion of the State's case, Chambers moved for a directed verdict, arguing that while the State had proved that at least one tablet tested positive for fentanyl, that one tablet did not meet the requisite statutory weight for trafficking. The court denied the motion.

Chambers then testified in her own defense, admitting that she sold the fentanyl to the CI. She said, however, that she sold them only because she had been threatened by a man named Tony Cole. Chambers explained that Cole was dating a friend of hers, Elizabeth Bell, and that Cole and Bell had a violent and toxic relationship. On one occasion, Bell called Chambers, and Chambers could hear splashing and screaming in the background. She thought Cole was trying to drown Bell, so she called 911. Cole was arrested and charged. He later found out that Chambers was the person who called the police, and he began threatening her.

In March or May 2022, Chambers drove to the airport to pick up another friend. Cole and Bell were on the plane as well and got into a fight as the plane landed. The police were called, and Cole became enraged when he saw the police vehicles. Chambers fled to her truck and drove off, but Cole chased after her in his own vehicle, pulling up alongside her, brandishing a gun, and threatening to kill her. A few weeks later, Chambers had just

dropped her children off at daycare when Cole pulled up alongside her again, rolled down his window, and again threatened her with a gun.

At an unspecified later date, Chambers found a package containing "a couple hundred" pills at the back of her boutique. At the same time, she received a Snapchat message from "Cocaine Cowboy," whom she knew to be Cole. The message stated that she owed him a substantial amount of money because he had to pay for a lawyer and that if she did not "work it off," he would "chop her up or hurt her children." Chambers testified at trial that she felt that selling the pills was the only way to protect her family.

In rebuttal, the State called Fort Smith Police Detective Chris George. George testified that he met Chambers when the police department was investigating Cole on suspicion of murder. In August 2022, Chambers sent George a screenshot of a text message she said she had received from Cole that contained a threat on her life. George took the threat seriously "because of [the] type of person that [Cole] was." When George subpoenaed the phone-number information from the text message, however, he discovered that the number was generated by a company that provides internet phone numbers.[1] Further investigation revealed that the user name and email address used to generate the phone number belonged to Chambers. In short, he said, Chambers used "a computer generated number . . . to threaten herself."

[1]George explained that there are "different companies, apps like that they can actually log in, create a phone number, and you can use it through your phone, and [it] will display that phone number."

On cross-examination, George added that he initially believed Chambers's claims that Cole was threatening her because he knew Cole was a dangerous person. When she initially told him about the threats, the police set up surveillance at her home and place of business. During redirect, however, George said that the surveillance never uncovered any evidence that Cole was following Chambers or trying to hurt her because Cole was in Arizona at the time.

At the conclusion of the trial, Chambers asked the court to instruct the jury on the "choice of evils" defense, arguing that she was at risk of "immediate ongoing harm at the hand of . . . Cole." The State objected, arguing that there was no immediate emergency situation. The court allowed Chambers to proffer the instruction, but it refused to give the instruction to the jury. The jury went on to find Chambers guilty of trafficking fentanyl. When the jury could not agree on a sentence, the court sentenced her to fifteen years. Chambers timely appealed.

II. *Sufficiency of the Evidence*

Chambers argues that the circuit court erred in denying her motion for directed verdict on the count of trafficking fentanyl.[2] On appeal, we treat a motion for directed verdict as a challenge to the sufficiency of the evidence. *Armstrong v. State*, 2020 Ark. 309, 607

[2]Chambers's actual first point on appeal pertains to the court's alleged error regarding jury instructions; however, double-jeopardy considerations require this court to consider her challenge to the sufficiency of the evidence first. *See Lester v. State*, 2024 Ark. App. 206, at 2, ___ S.W.3d ___, ___ ("Preservation of an appellant's right to freedom from double jeopardy requires a review of the sufficiency of the evidence prior to a review of trial errors.").

S.W.3d 491. In reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State and consider only the evidence that supports the verdict. *Price v. State*, 2010 Ark. App. 111, 377 S.W.3d 324. We affirm a conviction if substantial evidence exists to support it. *Id.* Substantial evidence is evidence of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other without resorting to speculation or conjecture. *Id.*

As charged in this case, a person engages in trafficking a controlled substance if he or she possesses, possesses with the purpose to deliver, delivers, or manufactures one gram or more of fentanyl. Ark. Code Ann. § 5-64-440(b)(2) (Supp. 2023). On appeal, Chambers argues that the State failed to prove that she possessed or delivered one gram or more of fentanyl. Specifically, she cites the crime-lab report indicating that only one of the forty-five tablets was tested and that its weight was only 0.105 grams, far less than the one gram required for a trafficking conviction.

In *Abbott v. State*, 256 Ark. 558, 508 S.W.2d 733 (1974), the supreme court rejected a similar argument. Abbott was convicted of possession of amphetamine with intent to deliver. On appeal, although he admitted that he was in possession of two hundred tablets on the day he was arrested, he argued that the State failed to prove his possession of the requisite amount of amphetamine because the state chemist failed to quantitatively test the samples sent to the state health department. The chemist testified that the lab had frequently analyzed similar tablets and found them to average about eight milligrams of amphetamine per tablet. She further testified that the samples were of a similar size and similarly marked.

The supreme court rejected Abbott's argument, concluding that it "would not be unreasonable for the jury to have inferred that Abbott possessed as much as 1600 milligrams of amphetamines. We certainly cannot say there was no substantial evidence that Abbott possessed more than 200 milligrams." *Abbott*, 256 Ark. at 561, 508 S.W.2d at 735.

In the instant case, a photograph of the pills was introduced into evidence at trial. The photograph shows that each pill is identical: they are round blue pills, pressed with a letter M in a square on one side and the number 30 pressed above a horizontal line on the other side. Although only one tablet, with a net weight of 0.1050 grams, was tested and was determined to be fentanyl and acetaminophen, the crime-lab report reflects that forty-five blue tablets, with a net weight of 4.8382 grams, were submitted for analysis. Chambers stipulated to the introduction of the laboratory-analysis report. Moreover, she admitted during her testimony that the pills she sold to the CI were, in fact, fentanyl. Viewing the evidence in the light most favorable to the State, we cannot say that the circuit court erred in denying her motion for directed verdict.

III. *"Choice of Evils" Jury Instruction*

In what is actually her first point on appeal, Chambers argues that the circuit court erred in refusing to instruct the jury regarding her "choice of evils" defense. We will not reverse the circuit court's refusal to submit an instruction to the jury absent an abuse of discretion. *Calkins v. State*, 2024 Ark. 23, 682 S.W.3d 681. An abuse of discretion is a high threshold that does not simply require error in the circuit court's decision but requires that

the circuit court act improvidently, thoughtlessly, or without due consideration. *Collins v. State*, 2019 Ark. 110, 571 S.W.3d 469.

The law is clear that a party is entitled to an instruction on a defense if there is sufficient evidence to raise a question of fact or if there is any supporting evidence for the instruction. *Humphrey v. State*, 332 Ark. 398, 966 S.W.2d 213 (1998). In *Jones v. State*, 336 Ark. 191, 984 S.W.2d 432 (1999), our supreme court held that a party is entitled to a jury instruction when it is a correct statement of the law and there is some basis in the evidence to support giving the instruction. When the defendant has offered sufficient evidence to raise a question of fact concerning a defense, the instructions must fully and fairly declare the law applicable to that defense. There is no error, however, in refusing to give a jury instruction if there is no basis in the evidence to support the giving of the instruction. *Yocum v. State*, 325 Ark. 180, 925 S.W.2d 385 (1996). On appeal, our role is not to weigh the evidence to determine if the justification instruction should have been given; rather, we limit our consideration to whether there is any evidence tending to support the existence of a defense. *Prodell v. State*, 102 Ark. App. 360, 285 S.W.3d 673 (2008).

Arkansas Code Annotated section 5-2-604 (Repl. 2013),[3] found in the subchapter of the Arkansas Criminal Code regarding justification, sets out the "choice of evils" defense. It provides in pertinent part that

[3]At trial, Chambers proffered AMI Crim. 702, Justification––Choice of Evils, on the basis of this statute. Her proffered instruction read as follows:

(a) Conduct that would otherwise constitute an offense is justifiable when:

(1) The conduct is necessary as an emergency measure to avoid an imminent public or private injury; and

(2) According to ordinary standards of reasonableness, the desirability and urgency of avoiding the imminent public or private injury outweigh the injury sought to be prevented by the law proscribing the conduct.

(b) Justification under this section shall not rest upon a consideration pertaining to the morality or advisability of the statute defining the offense charged.

This defense is to be rarely used and is narrowly construed and applied. *See Polk v. State*, 329 Ark. 174, 947 S.W.2d 758 (1997).

The commentary to section 5-2-604 states that the defense requires extraordinary attendant circumstances. *Whisenant v. State*, 85 Ark. App. 111, 146 S.W.3d 359 (2004). In *Whisenant*, this court cited the commentary, which lists illustrations of situations that might permit recourse to this defense, including (1) the destruction of buildings or other structures

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Defendant asserts as a defense to the charge of Trafficking a Controlled Substance that she was forced by circumstances to choose between evils. This is a defense only if:

First: Her conduct was necessary as an emergency measure to avoid an immediate public or private injury; and

Second: The desirability and urgency of avoiding that public or private injury outweighed, according to ordinary standards of reasonableness, the harm sought to be prevented by the law prohibiting the charged offense.

Defendant, in asserting this defense, is required only to raise a reasonable doubt in your minds. Consequently, if you believe that this defense has been shown to exist, or if the evidence leaves you with a reasonable doubt as to her guilt of the offense, then you must find her not guilty.

to keep fire from spreading; (2) breaking levees to prevent flooding a city, while in the process causing flooding of an individual's property; and (3) temporary appropriation of another's vehicle to remove a seriously injured person to a hospital. *Id.* at 126, 146 S.W.3d at 369 (citing Original Commentary to Ark. Code Ann. § 5-2-604 (Repl. 1995)). Where reasonable, legal alternatives to the charged conduct can be pursued or the necessity has ended, the "choice of evils" defense is not available. *Prodell*, 102 Ark. App. at 364, 285 S.W.3d at 675.

Chambers argues that the circuit court should have allowed her to utilize this defense to the charge of trafficking fentanyl because "she was forced by circumstances to choose between two evils." Specifically, she claims there was evidence that she received multiple threats from Tony Cole prior to selling the fentanyl pills to the CI and that she sold the fentanyl to avoid any further threats or "perilous situations" from Cole. She concludes that there was "clearly a basis in the evidence" for the "choice of evils" instruction because she "began selling fentanyl with a reasonable belief that her life and her family's lives were in danger."

The State responds that there was "no evidence that Chambers['s] selling the fentanyl was necessary as an emergency measure to avoid an imminent public or private injury from Cole." It notes that there was no evidence that Cole was nearby when Chambers sold the fentanyl to the CI, and Chambers did not mention being afraid of Cole during her postarrest interview. The State adds that even if she were afraid of Cole at the time of the fentanyl sale, she had a "reasonable, legal alternative" to selling the fentanyl––she could have taken the drugs to the police and told them about the alleged threats from Cole.

Even accepting Chambers's testimony as true, it still failed to support the existence of a "choice of evils" defense. The last threat conveyed to Chambers by Cole occurred an indeterminate period of time before she sold the fentanyl to the CI. There was no "imminent public or private injury" to be avoided by selling the fentanyl. It is well settled that where the evidence does not support an instruction, it should be refused. *Pursley v. State*, 21 Ark. App. 107, 110, 730 S.W.2d 250, 252 (1987). Even if the instruction contains a correct statement of the law, it is not erroneous for the circuit court to refuse it if there is no basis in the evidence for giving it. *Id.* (citing *Clark v. State*, 15 Ark. App. 393, 695 S.W.2d 396 (1985); *Wilson v. State*, 9 Ark. App. 213, 657 S.W.2d 558 (1983)). Because there was no basis in the evidence for giving the instruction, the circuit court did not err in refusing to instruct the jury on Chambers's "choice of evils" defense.

Affirmed.

ABRAMSON and MURPHY, JJ., agree.

Trent D. Thomas, for appellant.

Tim Griffin, Att'y Gen., by: *Jacob H. Jones*, Ass't Att'y Gen., for appellee.