

IN THE SUPREME COURT OF THE STATE OF NEVADA

SHANE DEE JOHNSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45391

FILED

JAN 19 2006

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of felony DUI. Second Judicial District Court, Washoe County; Jerome Polaha, Judge. Appellant Shane Johnson was sentenced to a prison term of 28-72 months.

Johnson's sole appellate question is whether the district court erred by refusing to give appellant's proffered instruction on the defense of necessity or duress. Johnson's counsel presented a theory to the jury that he only drove the vehicle because he was present when shots were fired at a party, he needed to get to safety and he did not have any other options. Johnson, however, testified that he did not drive the vehicle at all. The district court determined Johnson's testimony that he did not drive, necessarily negated a defense of necessity or duress, because the defense only applies to one who admits he committed the crime.

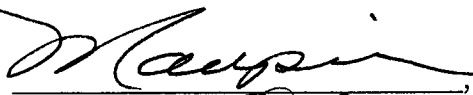
We review the district court's decision to give a jury instruction for abuse of discretion¹ "[T]he defense has the right to have

¹Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001).

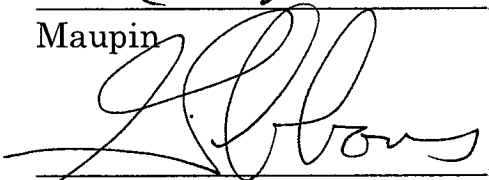
the jury instructed on its theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be."²

The notion that a defendant can deny the misconduct by testifying he did not drive the vehicle, yet require a necessity instruction for in fact, driving the vehicle, is contrary to this court's rationale. A defendant "ha[s] no right to an instruction which [i]s inconsistent with his complete denial of culpability."³ Therefore, we


ORDER the judgment of conviction AFFIRMED.

 J.

Maupin

 J.

Gibbons

 J.

Hardesty

cc: Hon. Jerome Polaha, District Judge
Washoe County Public Defender
Attorney General George Chanos/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

²Vallery v. State, 118 Nev. 357, 372, 46 P.3d 66, 76-77 (2002) (quoting Margetts v. State, 107 Nev. 616, 619, 818 P.2d 392, 394 (1991)).

³Collman v. State, 116 Nev. 687, 710, 7 P.3d 426, 441 (2000).