IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES VAUGHN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47199

FILED

DEC 21 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of robbery with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Valorie Vega, Judge. The district court sentenced appellant James Vaughn to serve two consecutive prison terms of 60 to 240 months.

First, Vaughn contends that the district court erred by allowing a police officer to testify to Vaughn's police statement. The police officer testified that Vaughn told him he "knew shots were being fired at this other individual . . . [and] he thought about calling the police, but he didn't want to." Vaughn argues that the evidence that he did not call police should have been excluded because the "constitutional right to say nothing includes the right not to have to contact police . . . [and the] failure to [contact police] cannot be used against the accused as evidence of his guilt." Vaughn also argues that "[t]he fact that Defendant's [police] statement may have been voluntary and may have involved a Miranda warning, does not mean that Defendant was also waiving his right against self-incrimination to the extent of having the fact that he had not called police brought before the jury." We disagree.

Preliminarily, we note that the legal authority Vaughn cites is inapposite because it concerns a defendant's exercise of his right to remain silent. Here, Vaughn did not exercise his right to remain silent, but instead gave a statement to police describing his participation in the robbery. Notably, Vaughn does not challenge the voluntariness of his police statement and admits that he was given Miranda warnings. Pursuant to Miranda, anything Vaughn said could potentially be used against him at trial.[1] Further, evidence that Vaughn failed to contact police was relevant to show consciousness of guilt.[2] Accordingly, the district court did not abuse its discretion by admitting the evidence.[3]

Second, Vaughn argues that the jury instruction defining the use of a deadly weapon for an unarmed aider and abettor was erroneous. The jury instruction stated that "[a]n unarmed aider and abettor must have knowledge that a weapon was used in the crime in order to be held liable for the 'use' of a deadly weapon." Vaughn argues that the jury instruction failed to include a necessary element in support of the deadly weapon enhancement--that the jury find that Vaughn had the ability to exercise control over the firearm. We conclude that the error is harmless beyond a reasonable doubt.

It is well established that an unarmed aider and abettor may be found guilty of using a deadly weapon if the unarmed participant has

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[1]Miranda v. Arizona, 384 U.S. 436 (1966).

[2]See Dettloff v. State, 120 Nev. 588, 597, 97 P.3d 586, 592 (2004).

[3]We also conclude that the prosecutor's comment in closing argument that Vaughn "didn't call the police" was permissible and not prosecutorial misconduct.

(1) knowledge that the principal offender is armed, and (2) the ability to exercise control over the deadly weapon.[4] This court has held that the control requirement of this test is met where the defendant had the ability to verbally deter the armed codefendant from using the weapon.[5]

In this case, the jury instruction was erroneous because it did not include the required element that Vaughn have the ability to control the weapon. However, in light of Vaughn's active role in the robbery as a getaway driver, we are persuaded beyond a reasonable doubt that the verdict would have been the same absent the erroneous instruction.[6]

Third, Vaughn argues that the district court erred by allowing the prosecutor, on redirect examination, to question a police officer witness on Vaughn's failure to produce evidence. At trial, the prosecutor inquired whether Vaughn had given police a check stub to substantiate his claim that the money police found in the car came from a cashed worker's compensation check. Vaughn claims that the prosecutor's inquiry into Vaughn's failure to produce evidence impermissibly shifted the burden of proof to the defense. We disagree.

This court has recognized that, generally, it is "improper for a prosecutor to comment on the defense's failure to produce evidence" because such comments shift the burden of proof to the defense.[7]

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[4]Anderson v. State, 95 Nev. 625, 630, 600 P.2d 241, 244 (1979).

[5]Moore v. State, 105 Nev. 378, 382, 776 P.2d 1235, 1238 (1989), overruled on other grounds by Peck v. State, 116 Nev. 840, 7 P.3d 470 (2000).

[6]Chapman v. California, 386 U.S. 18 (1967).

[7]See Whitney v. State, 112 Nev. 499, 502, 915 P.2d 881, 883 (1996).

However, so long as the prosecutor does not comment on the defendant's decision not to testify, it is permissible for the prosecutor to comment on the fact that the defendant failed to substantiate the defense theory of the case with supporting evidence.[8]

In this case, the prosecutor's inquiry was permissible because it was relevant to show that Vaughn did not substantiate his allegation that money found in the car was proceeds from a workman's compensation claim, not proceeds from a robbery. Moreover, the prosecutor's question about the check stub, made on redirect examination, was a fair response to defense counsel's prior inquiry on the subject. On cross-examination, defense counsel asked whether he had ever investigated Vaughn's claim that the money found in the car was proceeds from a worker's compensation claim. Accordingly, the district court did not abuse its discretion by allowing the inquiry.

Fourth, Vaughn argues that the jury instruction defining reasonable doubt was unconstitutional because it impermissibly diluted the presumption of innocence. The jury instruction stated in part, "The Defendant is presumed innocent until the contrary is proven." Vaughn argues that the use of the word "'until' . . . nullif[ies] the presumption of innocence by implying that there will come a time when the presumption ends . . . and guilt is proven beyond a reasonable doubt." Recently, this court rejected a similar argument, concluding that the use of the word "until" in an identical reasonable doubt instruction did not dilute the presumption of innocence, especially when the jury instruction was "read

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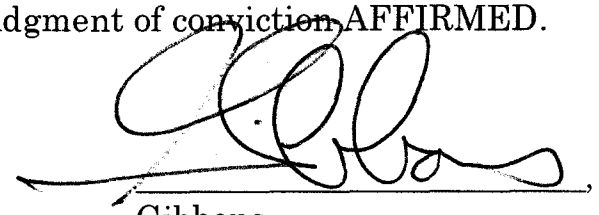
[8]Evans v. State, 117 Nev. 609, 631, 28 P.3d 498, 513 (2001); see also Leonard v. State, 117 Nev. 53, 81, 17 P.3d 397, 415 (2001).

as a whole."[9] Accordingly, the district court did not err by giving the instruction.

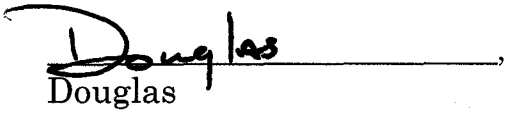
Having considered Vaughn's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
Gibbons

_____, J.
Maupin



_____, J.
Douglas

cc: Hon. Valorie Vega, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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[9]See Blake v. State, 121 Nev. 779, 799, 121 P.3d 567, 580 (2005).