

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 35653

QIANA MARIE SMITZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

FILED

JUN 12 2000

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. B. [Signature]*
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of robbery with the use of a firearm and one count of conspiracy to commit robbery. The district court sentenced appellant to 26 to 120 months in prison for robbery with an equal consecutive term for the use of a firearm, and to 12 to 48 months in prison for conspiracy.

Appellant contends that the district court erred by refusing two proposed jury instructions. Specifically, appellant argues that because she was unarmed during the robbery, the district court should have instructed the jury that in order to convict her of the weapon enhancement, the State had to prove that appellant had knowledge of the weapon carried by the other person involved in the robbery and that appellant had the ability to exercise control over the firearm.

Appellant first argues that she is entitled to the jury instructions based on this court's decision in *Harris v. State*, 106 Nev. 667, 799 P.2d 1104 (1990). In *Harris*, this court held that a defendant is entitled to a jury instruction regarding the defendant's theory of the case, so long as there is some evidence to support the theory. Appellant's defense

was based on a theory that appellant was not present when the robbery was committed. The proposed instructions were therefore not based on appellant's theory of the case, and Harris does not apply.

Appellant next argues that the district court should have given the instructions because they go to an essential element of the offense, and none of the other jury instructions covered that element. This court has previously held that "[a]n accurate instruction upon the basic elements of the offense charged is essential, and the failure to so instruct constitutes reversible error." Dougherty v. State, 86 Nev. 507, 509, 471 P.2d 212, 213 (1970). However, failure to instruct the jury as to the elements is subject to harmless-error analysis. See Neder v. United States, 527 U.S. 1 (1999).

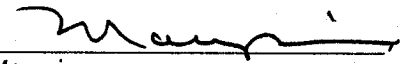
The evidence adduced at trial showed that appellant emptied the cash register while her accomplice held a gun to the head of the clerk being robbed.¹ "When one of two robbers holds a victim at bay with a gun and the other relieves the victim of his properties . . . the unarmed offender benefits from the use of the other robber's weapon, adopting derivatively its lethal potential." Anderson v. State, 95 Nev. 625, 630, 600 P.2d 241, 244 (1979). This court concluded that under such a factual circumstance, the deadly weapon enhancement was properly applied to an unarmed robber. The scenario described in Anderson is essentially identical to the facts in the instant case, and we conclude that any error by the district court in failing to instruct the jury as to

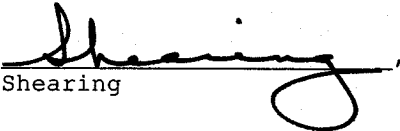
¹The clerk testified that she was able to identify appellant because the clerk and appellant had been friends in high school.


constructive possession of the firearm was harmless beyond a reasonable doubt.

Having considered appellant's contention and concluded it is without merit, we

ORDER this appeal dismissed.


Maupin J.


Shearing J.


Becker J.

cc: Hon. Steven R. Kosach, District Judge
Attorney General
Washoe County District Attorney
Washoe County Public Defender
Washoe County Clerk