

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES ABBIE, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38126

FILED

AUG 15 2003

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 second-degree murder with the use of a deadly weapon. The district court sentenced appellant James Abbie, Jr., to serve two consecutive life prison terms with parole eligibility in 10 years.

Abbie contends that his conviction should be reversed because the record does not demonstrate that Abbie made a knowing and voluntary waiver of his right to testify. In particular, Abbie argues that: "acquiescence in the loss of his fundamental right to testify cannot be presumed" from a silent record. We conclude that Abbie's contention lacks merit.

This court has already considered and rejected a similar argument in Phillips v. State.¹ In Phillips, we recognized that while it was "good practice" for the district court to elicit a waiver by a criminal defendant of his right to testify, its failure to do so will not generally result in the reversal of a criminal conviction.² Here, the district court thoroughly advised Abbie of his right to testify and the implications of

¹105 Nev. 631, 633, 782 P.2d 381, 382 (1989).

²Id.

doing so and Abbie acknowledged that he understood, stating that he had “nothing to hide.” The district court then advised Abbie to talk with his defense counsel and inform the court the next day whether he would testify. The next day, the defense rested without presenting any evidence or witnesses. While Abbie notes that the record below does not indicate that he decided to waive his right to testify, this court has held that an express waiver of the right to testify is not required for a valid conviction.³ Accordingly, we conclude that reversal of Abbie’s conviction is not warranted on this basis.

Abbie next contends that the district court erred in allowing the State to present evidence and make arguments about Abbie’s desire to flee to Mexico. Relying on Tavares v. State,⁴ Abbie argues that the State drew an impermissible inference by arguing that Abbie’s videotaped comment to his girlfriend that she should bail him out of jail so they could flee to Mexico was evidence of his consciousness of guilt. We conclude that Abbie’s contention lacks merit.

Preliminarily, we note that Abbie failed to object to the admission of the allegedly improper evidence or to the prosecutor’s references to that evidence in closing argument. Generally, the failure to object below precludes appellate review, absent plain or constitutional error.⁵ Further, we note that Tavares is distinguishable from the instant case because, unlike the trial in Tavares, no flight or modified flight jury

³See id.


⁴117 Nev. 725, 30 P.3d 1128 (2001).


⁵Sterling v. State, 108 Nev. 391, 394, 834 P.2d 400, 402 (1992).

instructions were given at Abbie's trial.⁶ Finally, we conclude that any error involving the evidence of Abbie's desire to flee to Mexico does not rise to the level of plain or constitutional error because it did not affect his substantial rights.⁷

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

ORDER the judgment of conviction AFFIRMED.


_____, J.
Rose


_____, J.
Maupin


_____, J.
Gibbons

cc: Hon. Steven R. Kosach, District Judge
Washoe County Public Defender
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

⁶Tavares, 117 Nev. at 734, 30 P.3d at 1133 (the modified flight instruction provided, in relevant part, that "[a] plan or desire to flee . . . is a fact which tends to show a consciousness of guilt").

⁷See NRS 178.602.