DISTRICT COURT OF QUEENSLAND

CITATION:	*R v McGeady* [2020] QDC 65
PARTIES:	**R** **v** **McGEADY, Robert Daniel Patrick**
FILE NO:	Indictment No. 2439/2018
PROCEEDING:	Trial
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	24 April 2020
DELIVERED AT:	Brisbane
HEARING DATES:	6 and 7 April 2020
JUDGE:	Judge A J Rafter SC
VERDICT:	**Guilty**
CATCHWORDS:	CRIMINAL LAW – where the defendant was charged with one count of armed robbery in company – where the defendant was tried by a judge sitting without a jury – where the defendant pleaded not guilty – where the Crown case against the defendant was based on circumstantial evidence – where a fingertip fragment of a latex glove was found at the scene of the robbery – where the defendant's DNA was found on the fingertip fragment of the latex glove – where there was no other evidence implicating the defendant in the commission of the offence – where expert evidence was given on the direct, secondary and tertiary transfer of DNA – whether the prosecution could prove beyond reasonable doubt that the defendant was a participant in the robbery based on the DNA evidence – whether an inference of guilt could be safely drawn in the circumstances *Criminal Code* 1899 (Qld), s 1, s 7, s 390, s 391, s 409, s 411, s 615C, s 644 *Evidence Act* 1977 (Qld), s 39PB, s 39PC *Azzopardi v The Queen* (2001) 205 CLR 50, cited *R v Doyle* [2018] QCA 303, cited *R v GBF* [2019] QCA 4, cited *R v Hyatt* [2019] QCA 106, cited *R v Kaddour* [2018] QCA 37, cited *R v KAR* [2019] 2 Qd R 370, cited *R v McEwan* [2019] QCA 16, cited

Shepherd v R (1990) 170 CLR 573, cited
Weissensteiner v The Queen (1993) 178 CLR 217, considered

COUNSEL: G J Seaholme for the Crown
K T Bryson for the defendant

SOLICITORS: Director of Public Prosecutions (Qld) for the Crown
Kilroy & Callaghan, Lawyers for the defendant

Introduction

[1] The defendant Robert Daniel Patrick McGeady is charged: that on the 8th day of November 2017 at Mansfield in the State of Queensland, he robbed Jacob Lachlan Pinna and Ashleigh Maree Dougherty, and that he was in company with another person, and was armed with an offensive instrument.

[2] On 27 March 2020 an order was made pursuant to s 615(1) *Criminal Code* 1899 (Qld) that the defendant be tried by a judge sitting without a jury.

[3] The trial commenced before me on 6 April 2020. The defendant entered a plea of not guilty. The evidence concluded later that day. On 7 April 2020 counsel addressed me on the relevant law and factual issues. At the conclusion of submissions I reserved my decision.

[4] In a trial by a judge sitting without a jury, the judge is required by s 615B(1) *Criminal Code*, so far as is practicable, to apply the same principles of law and procedure as would be applied at a trial before a jury. Section 615B(3) *Criminal Code* provides that if an Act or the common law requires information or a warning or an instruction to be given to the jury in particular circumstances, the judge in a trial by a judge sitting without a jury must take the requirement into account if the circumstances arise.

[5] The judge sitting without a jury may make any findings and give any verdict a jury could have made or given if the trial had been before a jury: s 615C(1)(a) *Criminal Code*. Any finding or verdict has the same effect as the finding or verdict of a jury: s 615C(1)(b) *Criminal Code*. The judgment must include the principles of law that have been applied and the findings of fact that have been relied upon: s 615C(3) *Criminal Code*.

Preliminary matters

[6] A defendant in a criminal trial is presumed to be innocent. The Crown has the burden of proving the defendant's guilt beyond reasonable doubt. Before making a finding of guilt I must be satisfied beyond reasonable doubt of the elements of the offence.

[7] The offence of robbery is defined in s 409 *Criminal Code* as follows:

> "**409 Definition of *robbery***
> (1) Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain the thing stolen or to prevent or overcome

> resistance to its being stolen, is said to be guilty of ***robbery***.
> …"

[8] The offence of stealing is defined in s 391(1) *Criminal Code* and includes fraudulently taking anything capable of being stolen. Anything that is the property of any person is capable of being stolen if it is moveable, or capable of being made moveable.[1] The term "property" includes money.[2]

[9] The indictment includes circumstances of aggravation that the defendant was in company with another person, and was armed with an offensive instrument.[3]

[10] The Crown provided particulars[4] which simply state that on 8 November 2017 at Mansfield, the defendant robbed the Mansfield Tavern, and at the time he was armed with an offensive instrument and was in the company of another person. The particulars state that the defendant's liability arises under s 7(1)(a) and/or s 7(1)(c) *Criminal Code*.

[11] There was no dispute that on the morning of 8 November 2017, there was an armed robbery at the Mansfield Tavern. There were two perpetrators who had their faces covered and wore gloves. The sum of $77,937.35 was stolen.

[12] The issue for determination is whether the prosecution is able to prove beyond reasonable doubt that the defendant was one of the participants in the robbery.

[13] The Crown called the following witnesses:

- Jacob Pinna, duty manager at the Mansfield Tavern;
- Ashleigh Dougherty, gaming attendant at the Mansfield Tavern;
- Penelope Taylor, reporting scientist within the Forensic DNA Analysis Unit of Queensland Health Forensic and Scientific Services;
- Therese Galbraith, asset protection investigator for the Mansfield Tavern;
- Duncan Tresise, scenes of crime officer;
- Christopher Holman, senior constable of police.

[14] The Crown tendered a floor plan of the Mansfield Tavern,[5] photographs of relevant areas of the Mansfield Tavern[6] and CCTV footage.[7]

[15] The following facts were admitted pursuant to s 644 *Criminal Code*:[8]

(a) a DNA sample was taken by police from the defendant on 12 November 2012;

(b) the DNA swab taken from the fingertip of a latex glove located by Duncan Tresise at the Mansfield Tavern on 8 November 2017 was the sample analysed by Jacqueline Wilson;

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1 *Criminal Code*, s 390.
2 *Criminal Code*, s 1.
3 *Criminal Code*, s 411.
4 Item marked "A" for identification.
5 Exhibit 1.
6 Exhibits 2, 3, 5 and 6.
7 Exhibit 4.
8 Exhibit 7.

(c) the DNA swab taken from the defendant on 22 December 2017 by Leigh Michael Verner was the DNA swab analysed by Jacqueline Wilson.[9]

[16] Mr Seaholme indicated that the factual admissions were made for the purpose of continuity of the DNA evidence.[10]

[17] It is apparent that the defendant became a suspect in the Mansfield Tavern robbery because the police already held his DNA sample. That fact simply explains how the defendant became a suspect, but is not otherwise relevant.

[18] The defendant did not give or call evidence. The defendant is not bound to give or call evidence. The defendant is entitled to insist that the Crown prove the case against him, if it can. The prosecution has the burden of proving the defendant's guilt beyond reasonable doubt. The fact that the defendant did not give evidence is not evidence against him, and does not amount to an admission of guilt by conduct. The defendant's election not to give evidence cannot be used to fill any gaps that might exist in the evidence called by the Crown.

[19] However, Mr Seaholme submitted that in the absence of an explanation for the evidence adduced by the Crown, an inference of guilt could be more safely drawn in the circumstances.[11] Ms Bryson for the defendant submitted that such an inference could not be drawn. I will deal with this issue after discussing the evidence.

Findings of fact

[20] There was no challenge to the credibility of any witnesses. There was also no issue taken in relation to the qualifications of Ms Taylor to give expert evidence. The opinions expressed by Ms Taylor were not in issue.

The circumstances of the offence

[21] The Melbourne Cup 2017 was held on Tuesday 7 November, and it was a particularly busy day at the Mansfield Tavern. The duty manager, Jacob Pinna worked split shifts on 7 and 8 November 2017. He commenced work at 7.30 am on Tuesday 7 November 2017. He finished at 3.30 pm and went home. He returned at 5.30 pm and his shift was to end at approximately 1.30 am on Wednesday 8 November 2017.

[22] The hotel closed at 12.00 midnight. After closure, the doors that are open to the public were locked and the poker machines cleared. The only staff remaining at the hotel were the duty manager, Jacob Pinna and a gaming attendant, Ashleigh Dougherty. At about 12.20 am Mr Pinna and Ms Dougherty commenced counting money in the office area. The door to the office was locked and a key was required in order to gain entry. There is a closed circuit television camera in the office and footage recorded Mr Pinna and Ms Dougherty counting the money.

[23] Shortly before 12.50 am Mr Pinna and Ms Dougherty heard a bang outside the office. Mr Pinna said that the noise came from the direction of two soundproof

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9 I was informed that Jacqueline Wilson was not available to give evidence and Penelope Taylor gave evidence instead. Counsel raised no issue in relation to continuity or the opinions given by Ms Taylor.

10 Transcript of proceedings 6 April 2020, p 56, ll 35-42.

11 *Weissensteiner v The Queen* (1993) 178 CLR 217.

doors between an area described as the Rock Arena and the passageway that led to the office. Mr Pinna said that shortly after hearing that noise there were voices at the office door yelling "Let us in. We know you're in there." There was also banging on the door. Ms Dougherty similarly described hearing banging on the office door and hearing voices saying "Let us in. Let us in." The closed circuit television footage shows two persons outside the office trying to gain entry by the use of an implement.

[24] Mr Pinna told Ms Dougherty to get under the desk. He then opened the door. Mr Pinna said that one person pushed his way in and continued yelling. The second person then came in. He said that the offenders "had a hammer of some sort". The CCTV footage shows that the first offender to enter the office was carrying an object that appears to be a hammer. That person directed Mr Pinna to open the safe. The second person entered the office and immediately moved the CCTV camera. That person does not appear to be carrying any object. That person briefly leaves the office and returns with a bag. Although the second offender moved the CCTV camera, there is nevertheless a reasonably clear view of the offence taking place. Both offenders were wearing similar white gloves.

[25] Mr Pinna said that he was thrown a duffle bag and told to "load up all the cash". When he was unable to get the bag open he was told to hurry up. He opened the bag and then proceeded to unload the contents of the safe into it. He said that he was told to hurry up and that he was "going too slow". He said that a hammer was placed to his head at one stage and he was told "You are going too slow. Hurry up." Mr Pinna said that he proceeded to load the money into the duffle bag but at one stage he was pushed out of the way and one of the offenders tried to load more money in the bag. After all the money had been placed in the duffle bag one of the offenders said "You need to give us at least 10 minutes or we'll come back and kill you."

[26] Mr Pinna said that notes and coins were taken and placed in the duffle bag.

[27] Mr Pinna said that the person who made the threats spoke in a male voice. He said that the other person grunted in a way that "sounded like a very manly grunt." He said that the offenders were wearing blue jeans, gloves and joggers, and that their faces were covered.

[28] Ms Dougherty said that the offenders were wearing "Everlast, Kmart branded clothing". She noticed that the offenders were wearing gloves. She was asked to describe the type of gloves and said "I remember one of the guys had white gloves on, but one had a white shirt and I think the other one had a pinky, sort of, peachy shirt." She said that both offenders were wearing long black pants. Ms Dougherty said that she only heard one of the offenders speak.

[29] Ms Dougherty said that she remained under the table during the entire incident. She said that one of the offenders told her not to look at him and kept kicking the chair at her. She said that they were told "Not to call anyone or they'll … come back and kill us."

[30] The offenders had gained entry to the Mansfield Tavern through fire exit doors.[12] The locking mechanism at the base of one of the doors was faulty.[13] Mr Pinna said

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12 Exhibit 1, photograph no. 1.

that the "lock wouldn't generally lock into its spot where it's supposed to. It would lock where it is, which isn't actually into the locking mechanism itself." He said that he had reported the issue to the venue manager, Michael Fixter. He said that the lock had been in that state for "quite a while."

Scenes of crime

[31] Sergeant Tresise, a scenes of crime officer, attended the Mansfield Tavern on 8 November 2017 at 1.45am. During his examination of the Rock Arena he found a fingertip fragment of a latex glove.[14] He found no other debris on the floor area of the Rock Arena. Sergeant Tresise secured the area by having another officer stand guard over the item to ensure that it was not contaminated. After completing his assessment of the scene he then returned and took a swab sample from inside the fingertip fragment of the glove. The fragment appeared to be torn rather than having been cut off. The gloves worn by the offenders appeared to be consistent with the fragment.

[32] Sergeant Tresise found a $5 note in a tiled area directly outside the doors that lead to the hallway where the office is located.[15] He believed that the $5 note would have been fingerprinted and returned a negative result.

[33] The Rock Arena is used for concerts and events such as boxing. The maximum capacity of the Rock Arena for a concert is 1100 people. Generally, events would be held in the Rock Arena every Friday and Saturday. Mr Pinna said that his recollection was that the last time the Rock Arena had been used before 7 or 8 November 2017 was "at least … on a Saturday prior to that date", although had no specific memory of an event being held on the Saturday night.

[34] Mr Pinna said that the hotel employed two cleaners. He believed that the Rock Arena was cleaned on the morning of 7 November 2017. The cleaning of the hotel included vacuuming and mopping of the floors. He said that the cleaning of the Rock Arena would have been done in the morning before he started his shift.

[35] The appearance of the floor arena in the photographs[16] is consistent with the Rock Arena having been cleaned on or before 7 November 2017. The fact that Sergeant Tresise observed no other debris apart from the fingertip fragment of the glove is also indicative of the area having been cleaned prior to the robbery.

[36] The offenders left the premises by proceeding through the Rock Arena towards the fire exit doors.

DNA analysis

[37] Ms Taylor gave evidence by audio link.[17]

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13 Exhibit 1, photograph no. 3.
14 Exhibit 5, photograph nos. 1, 2 and 3.
15 Exhibit 3, photograph nos. 1, 4 and 5.
16 Exhibit 5.
17 *Evidence Act 1977* (Qld), s 39PB(2). The mandatory directions in s 39PC *Evidence Act 1977* (Qld) are required only where there is a trial by jury: s 39PB(1)(c). I have nevertheless adopted the

[38] The swab taken from the fingertip of the latex glove was delivered to the Forensic DNA Analysis Unit of Queensland Health Forensic and Scientific Services on 8 November 2017. On 2 January 2018 the DNA swab taken from the defendant on 22 December 2017 was delivered to Queensland Health Forensic and Scientific Services.

[39] Ms Taylor said that a DNA profile was obtained from the reference sample in the defendant's name, which was a single source DNA profile, as would be expected, given that the source was a known person. A DNA profile was obtained from the swab taken from the fingertip of the latex glove which indicated the presence of a single contributor. That DNA profile matched the defendant's DNA profile. Based on a statistical analysis it was estimated that the DNA profile obtained was greater than 100 billion times more likely to have occurred if the DNA originated from the defendant rather than if the DNA had originated from someone else.

[40] Ms Taylor was asked whether there was any evidence of any contribution of DNA from another person on the fingertip of the glove and she said the DNA profile indicated the presence of possible low level DNA. It was not suitable for comparison purposes and she explained that, "We're not sure whether it is DNA or if it is indeed just … sort of background noise or from machinery. So we never ever use it for comparison purposes, and it does not interfere with the interpretation that we have made."

[41] Ms Taylor was asked to comment on the degree of concentration of DNA within latex gloves if they were worn for 15-20 minutes. She said that there were many factors that came into consideration such as whether a person was "a particularly good shedder of DNA", which is the person's ability to release DNA from their body, the conditions under which the gloves were worn, how hot it was and whether the person's hands were dirty. She said "there are so many factors that come into play with respect to how much DNA a person may or may not deposit … on a particular surface."

[42] Ms Taylor was asked whether the DNA process enabled the DNA to be aged and she said that that sort of testing is unable to be done in their laboratory.

[43] Ms Taylor said that DNA can be passed through direct touch or through transfer. She explained the possibilities saying "So in the instance of direct touch, that might for example involve me directly touching the surface of a desk, for example, and my DNA will be directly transferred onto that desk. Transfer can occur, for example – I may shake your hand and my DNA goes on to your hand and then you touch a surface and it's only my DNA that's transferred to that surface, but there is no DNA from you on that surface. So in that particular instance, that is secondary transfer of DNA. I haven't actually touched that desk, but my DNA has been transferred onto that desk from our handshake."

[44] In cross-examination Ms Taylor explained that the technology that is used to undertake a DNA analysis is particularly sensitive. She said that the optimum amount of DNA required for the amplification process is approximately 0.5

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approach in s 39PC(2) *Evidence Act 1977* (Qld) and not given Ms Taylor's evidence any more or less weight, or drawn any adverse inferences against a party to the proceeding, because the evidence was given by audio link.

nanograms of DNA. She agreed that a very small amount of biological material was required to undertake the process of analysis.

[45] Ms Taylor said that DNA can last indefinitely when stored in the right conditions. However, DNA is destroyed by such things as heat, UV light, moisture, and certain dyes in fabrics can inhibit the process of obtaining a DNA profile.

[46] Ms Taylor was asked whether, if a person was a particularly good shedder of DNA, it was easy for DNA to be transferred from one person to another. She said "I believe that factors would come into play, because you're talking about other people being involved in the process… So, there are a number of factors that can affect the touch and transfer of DNA between people, between surfaces and so on."

[47] Ms Taylor agreed that it was possible for DNA to transfer from one person to another and then onto another person.

[48] Ms Bryson cross-examined Ms Taylor in relation to a murder investigation "a few years ago" where the DNA of a particular person was found on a sock belonging to the deceased. It transpired that the person whose DNA was on the sock had no contact with the deceased. Apparently that person's wife worked at a nursing home where the ambulance attended prior to going to the murder scene. This was described by Ms Taylor as a very complex example of transfer of DNA through multiple mediums. She referred to this as being tertiary transfer, which she explained as being "transfer through two other mediums".

[49] Ms Taylor agreed that DNA transfer includes primary, secondary and tertiary transfer and said that "It just depends on what factors come into play, what sort of things are affecting the transfer and touch of DNA at each step, but certainly, direct, primary, secondary, tertiary and possibly even beyond transfer of DNA is possible." When asked whether the testing that was conducted could establish whether the DNA was deposited through direct touch or through transfer, Ms Taylor said that she couldn't comment on that.

The police investigation

[50] Senior Constable Holman conducted the police investigation. Inquiries were made with neighbouring businesses and residences to obtain CCTV footage. Members of the public provided footage which showed vehicles driving around the streets at about the time of the robbery, but nothing emerged from that.

[51] On 24 December 2017 a search warrant was obtained in relation to a vehicle owned by the defendant. A search of the vehicle was conducted and nothing was located. Senior Constable Holman attended a residence where the defendant had lived previously and nothing was located there.

[52] The defendant's bank accounts were looked into but no relevant information was obtained.

[53] Senior Constable Holman was asked in cross-examination whether he had cause to do a Cellebrite download of the defendant's mobile phone and he said that he was not aware that the mobile phone was taken at the time.

[54] Senior Constable Holman was aware that there had been previous robberies at the Mansfield Tavern but he did not conduct any particular investigations in relation to possible suspects for those robberies.

[55] Senior Constable Holman agreed in cross-examination that the focus of the investigation included looking into employees and previous employees of the Mansfield Tavern because of the circumstances of the offence. Ms Bryson asked "So the fact that on the CCTV when one of the offenders walks in and dislodges the camera downwards without looking around the room, that didn't prompt you to look closer at staff than you otherwise would … in the normal course of an investigation?" Senior Constable Holman said "I found it to be strange, yes, and so as part of the investigation, it was looked at." He was not able to recall which staff members were investigated.

[56] Senior Constable Holman agreed that the defendant was not a suspect prior to the DNA results being returned. The defendant was not linked to any staff member or patron at the Mansfield Tavern.

The evidence of the asset protection investigator for the Mansfield Tavern

[57] Ms Galbraith was employed as the asset protection investigator for the Mansfield Tavern. She calculated that based on takings, the sum of $77,937.35 was stolen.

[58] Ms Galbraith said that having checked the staff records for the Mansfield Tavern, the defendant had never been employed there.

[59] She said that cleaners are employed every day.

[60] Ms Galbraith said that the robbery on 8 November 2017 was the fourth robbery or attempted robbery at the Mansfield Tavern in a period of 20 months. On 31 January 2016 two offenders entered the Mansfield Tavern, one of whom was armed with a knife. A third offender was driving a motor vehicle. She said that following that robbery the manager, Michael Fixter was given a first and final warning in relation to his response to the robbery.

[61] On 9 October 2016 staff members were counting money in the cash room when two persons entered and made demands for the safe to be opened. On 6 July 2017 an offender wearing a motorcycle helmet entered the gaming room.

[62] Ms Galbraith said that she had not been alerted to a fault with the locking mechanism of one of the fire doors in the Rock Arena.

[63] Ms Galbraith said that she received a request from the police to provide details of employees who had resigned or been terminated. She was not able to recall the number of people she identified in those categories.

Circumstantial evidence

[64] The Crown case is based on circumstantial evidence. In a case based entirely on circumstantial evidence, a verdict of guilty may only be returned if the defendant's guilt is the only rational inference that can be drawn from the circumstances. If there is an inference reasonably open which is adverse to the defendant and an inference in his favour, an inference of guilt may only be drawn if it so overcomes any other possible inference as to leave no reasonable doubt.

[65] As was explained by Sofronoff P in *R v Kaddour*[18]:

> "[29] Any circumstantial case is pregnant with competing inferences. It is therefore 'essential to inquire with the most scrupulous attention what other hypotheses there may be which may agree wholly or partially with the facts in evidence'. Such a hypothesis might arise from within the prosecution case or it might arise from evidence led by the defence.
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> [30] However, to be material for consideration, any hypothesis had to be a reasonable one.https://www.queenslandjudgments.com.au/case/id/306606 - _ftn15 In order for a hypothesis to be a reasonable one in that sense it must be based upon something more than mere conjecture. In *Peacock v The Queen* O'Connor J said:
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> > '… an inference to be reasonable must rest upon something more than mere conjecture. The bare possibility of innocence should not prevent a jury from finding the prisoner guilty, if the inference of guilt is the only inference open to reasonable men upon a consideration of all the facts in evidence.'"

[66] In *R v Doyle*[19] Sofronoff P said:

> "[29] …in a circumstantial case, in order to secure a conviction the Crown only has to exclude every *reasonable* hypothesis consistent with innocence. It is important to appreciate that the word 'reasonable' does not mean 'logically open in theory'. Many inferences might be open as a matter of theoretical logic but which, in truth, are entirely unrealistic. Various terms have been used to describe such unreal, but theoretically possible, inferences. They have been called 'light' or 'rash' and they have been described as 'mere conjecture'. An alternative hypothesis must be a reasonable one in the sense that it rests on something more than a theoretical possibility or, if one prefers, upon 'something more than mere conjecture'. It must be based upon evidence."

[67] Any facts that are an indispensable step in the process of reasoning to guilt must be proved beyond reasonable doubt if the ultimate inference is to be the only reasonable hypothesis.[20]

Weissensteiner v The Queen

[68] Mr Seaholme for the Crown submitted that in the absence of an explanation for the defendant's DNA being on the fingertip of the latex glove, an inference of guilt could be more safely drawn.

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18 [2018] QCA 37 (footnote references omitted).
19 [2018] QCA 303 (footnote references omitted).
20 *Shepherd v R* (1990) 170 CLR 573 at 581 per Dawson J.

[69] Ms Bryson for the defendant submitted that the Crown's circumstantial case against the defendant relied solely on a single piece of DNA evidence. She submitted that in the circumstances there are no additional facts solely within the knowledge of the defendant, and therefore, an inference of guilt could not be more safely drawn. She submitted that there were a number of possible innocent explanations for the defendant's DNA being on the glove, including, primary transfer at some time prior to the commission of the robbery without the defendant's knowledge, or by primary transfer at some time prior to the robbery with his knowledge. She submitted that the possibilities also included secondary and tertiary transfer of DNA onto the glove. She submitted that a number of the possible explanations consistent with innocence were not necessarily matters that the defendant could explain.

[70] In *R v Doyle*[21] Sofronoff P, with whom Fraser JA and Douglas J agreed, explained the reasoning in *Weissensteiner v The Queen*[22] as follows:

> "[13] In *Weissensteiner*https://jade.io/ - _ftn3 Mason CJ, Deane and Dawson JJ observed that the right of the jury to take into account the silence of the accused does not arise from the right of the trial judge to comment upon it. Juries know that an accused has a right to give evidence and might well consider it material that, in a particular case, the accused has chosen not to do so. Long before 1893, when seven judges of the New South Wales Supreme Court considered the point in *R v Kops*, it was settled law that the failure of an accused person to contradict or explain incriminating evidence was a matter that a jury was entitled to take into account in weighing inferences.
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> [14] The point of *Weissensteiner* was that, although the failure of an accused to give evidence is not evidence of guilt, nor is it an admission of guilt by conduct, in some circumstances the failure may bear upon the probative value of evidence which has been led by the Crown. In such cases, when evaluating the prosecution evidence, the jury may take into account a failure by the accused to explain it. The jury cannot, and cannot be required to, shut their eyes to the fact that the accused has chosen not to give evidence in such a case. On the hearing of this appeal, Counsel, who appeared for the appellant, accepted that that process of reasoning was open to a jury but submitted that a judge may not tell the jury about it. That submission must be rejected."

[71] In *R v McEwan*[23] Brown J, with whom Sofronoff P and Morrison JA agreed, said:

> "[29] The right of an accused to remain silent is one of the pillars of our criminal justice system. However, the High Court has recognised that there is a distinction between the drawing of an inference from the silence of an accused alone, as opposed to the drawing of an inference otherwise available on the evidence given, where the accused has not supported any hypothesis which is consistent with innocence

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21 [2018] QCA 303 (footnote references omitted).
22 (1993) 178 CLR 217.
23 [2019] QCA 16.

> by explaining or contradicting the inference with facts which are peculiarly within his or her knowledge. The comment is directed to the failure to explain or answer evidence which could only be explained by an accused, not the failure of an accused to give evidence. In this context, the majority of the High Court in *Weissensteiner* acknowledged that while the accused has a right to silence, an accused should take into account the consequences of not giving evidence, where the failure of the accused to give evidence may bear upon the probative value of the evidence which has been given and which the jury is required to consider."

[72] In *Weissensteiner v The Queen*[24] Mason CJ, Deane and Dawson JJ said:

> "Of course, an accused may have reasons not to give evidence other than that the evidence would not assist his or her case. The jury must bear this in mind in determining whether the prosecution case is strengthened by the failure of the accused to give evidence. Ordinarily it is appropriate for the trial judge to warn the jury accordingly.
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> Not every case calls for explanation or contradiction in the form of evidence from the accused. There may be no facts peculiarly within the accused's knowledge. Even if there are facts peculiarly within the accused's knowledge the deficiencies in the prosecution case may be sufficient to account for the accused remaining silent and relying upon the burden of proof cast upon the prosecution. Much depends upon the circumstances of the particular case and a jury should not be invited to take into account the failure of the accused to give evidence unless that failure is clearly capable of assisting them in the evaluation of the evidence before them."

[73] The inferences consistent with the defendant's innocence relied upon by Ms Bryson include secondary or tertiary transfer of the defendant's DNA in circumstances where that would not necessarily be known to him. However, the hypothesis advanced that there may have been a primary transfer of the defendant's DNA with his knowledge is certainly a fact that would presumably be known to him, although that is just one of the possible inferences raised.

[74] A comment on the failure by a defendant to offer an explanation is appropriate only if there is a basis for concluding that there are **additional facts** peculiarly within the knowledge of the defendant, that would explain or contradict the inference the prosecution contends should be drawn.[25] The cases where such a comment is appropriate are rare and exceptional.[26] A comment on the failure by a defendant to provide an explanation is not appropriate simply because the defendant failed to contradict an aspect of the prosecution case.[27]

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24 (1993) 178 CLR 217 at 228

25 *Azzopardi v The Queen* (2001) 205 CLR 50 at 74 [64].

26 *Azzopardi v The Queen* (2001) 205 CLR 50 at 75 [68]; *R v McEwan* [2019] QCA 16 at [24]-[26].

27 *Azzopardi v The Queen* (2001) 205 CLR 50 at 75 [68]; *R v GBF* [2019] QCA 4 at [109] (Special leave to appeal was granted by the High Court on 15 April 2020: [2020] HCATrans 047).

[75] In the circumstances of the present case, where the inferences relied upon by the defendant include possibilities that are not within his means of knowledge, I am not prepared to place any significance upon the absence of explanation by him.

Conclusions

[76] The sole issue for determination is whether the prosecution has proved beyond reasonable doubt that the defendant was one of the offenders. The elements of the offence of robbery[28] and the circumstances of aggravation of being in company with another person and being armed with an offensive instrument[29] are not in issue. There was no issue that the perpetrators of the robbery were liable for the offence and circumstances of aggravation by virtue of s 7(1)(a) and/or s 7(1)(c) *Criminal Code* (Qld). The perpetrator who was not armed with the hammer is nevertheless liable for the circumstance of aggravation of being armed with an offensive instrument.[30]

[77] The offenders stole the sum of $77,937.35. The offender armed with the hammer held it to Mr Pinna's head and told him to hurry up. After the money had been placed in the duffel bag, that offender threatened to kill Mr Pinna and Ms Dougherty if they called anyone within 10 minutes. The offenders were clearly in company with each other. Having regard to the manner in which the hammer was used, it was clearly an offensive instrument.[31]

[78] In opening the Crown case, Mr Seaholme said that one offender was armed with a hammer and the other was armed with "what can be described as bolt cutters".[32] Mr Pinna did not refer to the other offender having bolt cutters or any similar item. Ms Dougherty made no reference to either of the offenders being armed. The CCTV footage[33] shows the first offender entering the office with what appears to be a hammer and another object. It is difficult to say exactly what that object was. I have of course had regard only to the evidence given by the witnesses and the exhibits, rather than the opening of the evidence by Mr Seaholme.

[79] In reaching my conclusion, I have had regard to the matters raised by Ms Bryson on behalf of the defendant. She submitted that there were significant deficiencies in the police investigation, particularly in relation to the fact that Senior Constable Holman was not aware that the venue manager had been told by staff that the locking mechanism on one of the fire doors was faulty and that the venue manager had been given a formal warning in relation to his handling of the robbery on 31 January 2016. Senior Constable Holman had not investigated suspects in the earlier robberies when investigating the present matter. He was unable to say which staff members and former staff members had been investigated as possible suspects.

[80] The defendant did not become a suspect until his DNA was matched. There is no evidence linking the defendant to any staff member or patron of the hotel. There is no evidence of unexplained wealth in the defendant's bank accounts. Apart from

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28 Supreme and District Courts Criminal Directions Bench Book no. 174.1
29 Supreme and District Courts Criminal Directions Bench Book no. 124.1
30 *R v KAR* [2019] 2 Qd R 370 at 390-396 [52]-[69].
31 *R v Hyatt* [2019] QCA 106 at [82].
32 Transcript of proceedings 6 April 2020, p 3 l 30.
33 Exhibit 4.

the DNA evidence, there is no evidence implicating the defendant in the commission of the offence.

[81] These points raised by Ms Bryson highlight the fact that the Crown case depends entirely on the presence of the defendant's DNA on the fingertip fragment of the latex glove. The fact that there were robberies of the Mansfield Tavern in the previous 20 months, including the one on 9 October 2016 which was somewhat similar to the present robbery, does not diminish the significance of the presence of defendant's DNA on the fingertip of the fragment of the latex glove.

[82] Ms Bryson referred to the fact that the Rock Arena had a large capacity and that Mr Pinna was by no means certain that the area had been cleaned on the morning of Tuesday 7 November 2017. Ms Bryson appeared to raise the possibility that the fingertip fragment of the latex glove had been left on the floor in circumstances other than during the course of the robbery.

[83] I am satisfied beyond reasonable doubt that the fingertip fragment of the latex glove was left by one of the offenders. Although Mr Pinna did not actually see the Rock Arena being cleaned on the morning of Tuesday 7 November 2017, the appearance of the area in the photographs is consistent with it having been cleaned in accordance with the usual practice at the Mansfield Tavern. The location of the fragment is in a position where the offenders would have passed as they made their way to the fire exit doors. The fingertip fragment appears to be similar to the type of gloves worn by the offenders. It is not necessary to conclude exactly how the fingertip fragment came to be left in the Rock Arena, although it seems likely to have been torn off in the process of dragging the bag of money through that area.

[84] I am also satisfied that the only rational inference to be drawn from the presence of the defendant's DNA on the fingertip of the latex glove is that he was one of the offenders. The theoretical possibility of the transfer of DNA by other means is unrealistic.

[85] The fact that the defendant's DNA was located on the inside surface of the fingertip of the latex glove is significant. Ms Taylor said that DNA can last indefinitely when stored in the right conditions. However, DNA is destroyed by such things as heat, UV light and moisture. There is also the fact that there is no evidence of any contribution of DNA from any other person. The analysis revealed the presence of possible low-level DNA from another contributor, but it is by no means clear that there was another contributor.

[86] The theoretical possibilities of secondary and tertiary transfer of the defendant's DNA, leading to it being on the inner surface of the fingertip of the latex glove are not reasonable hypotheses and, in my view, can be excluded.

[87] The robbery appears to have been well planned. The offenders were dressed in similar clothing and wore similar gloves. The possibility that an offender would have worn latex gloves previously worn by the defendant is not a reasonable possibility. The presence of the defendant's DNA by secondary or tertiary transfer would involve a highly unlikely combination of circumstances.

[88] I am satisfied that the defendant's guilt is the only rational inference that can be drawn from the circumstances. I am satisfied beyond reasonable doubt that the defendant was one of the offenders, and that the elements of the offence and the

circumstances of aggravation are established. Accordingly, I find the defendant guilty.