ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

FERRILL JOSEPH VOLPICELLI,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

/

No. 43203



# RESPONDENT'S ANSWERING BRIEF

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04-14371

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RESPONDENT'S ANSWERING BRIEF

## I. STATEMENT OF THE CASE

This is an appeal from a judgment of conviction upon a jury verdict finding appellant Volpicelli guilty of eight counts of burglary (NRS 205.060), one count of conspiracy (NRS 199.480) and one count of possession of counterfeit pricing labels (NRS 205.965).

The case was first presented to a grand jury. At the conclusion of the evidence, the prosecutor also presented a certified prior conviction for burglary, with the admonishment that it had no bearing on whether the suspect had committed the instant offenses. Joint Appendix, Volume 1 (1JA) at 145-46. The grand jury returned a true bill. The indictment included the finding that Volpicelli had been previously convicted of burglary. 1JA at 150-159. Thus by virtue of NRS 205.060(2), he was not eligible for a suspended sentence.

Volpicelli sought to quash the indictment, asserting that the indictment must be set aside because the grand jurors learned of the prior conviction.[1] The district court apparently found that the

[1]The effort to quash the indictment was through a petition for writ of habeas corpus. The petition is not included in the joint appendix for unknown reasons. An unsigned and unfiled copy is in the appendix at Volume 2 (2JA), pp. 381-82. The State does not dispute its authenticity but suggests that it should not have been included in the appendix.

evidence of the prior conviction should not have been presented, but that the evidence was nevertheless sufficient to allow the prosecution to go forward. 1JA at 192-93.

The defense sought and obtained a competency evaluation. 1JA at 163. The court received the reports of the sanity commission, reviewed the arguments of counsel and determined that Volpicelli, even if mentally ill, was competent to stand trial. 1JA at 163-66.

Prior to trial, the State filed its notice of intent to seek sentencing as a habitual criminal. 1JA at 190. The cause was then tried to a jury and Volpicelli was found guilty.

At sentencing, the district court received evidence of the requisite number of prior convictions, evaluated the pertinent facts and determined to sentence Volpicellis as a habitual criminal for two of the counts. 1JA at 205 - 2JA at 266. The court imposed sentence. This appeal followed.

## II. STATEMENT OF THE FACTS

This case involves a series of crimes in which Volpicelli entered stores, noted information on the price codes of merchandise, printed forged UPC codes, attached the codes to the merchandise and purchased the items for substantially less than the price fixed by the retailer. As indicated in the opening brief, the primary witness was one Brett Bowman who participated in the crimes. Other witnesses included police officers who observed parts of the crimes, store employees who verified receipts, and officers who recovered goods from Volpicelli's car and his storage unit.

## III. ARGUMENT

### A. THE DISTRICT COURT DID NOT ERR IN FAILING TO DISMISS THE INDICTMENT.

Volpicelli contends that he could not be required to stand trial because the grand jury heard of his prior burglary conviction. This argument has two flaws. First, the correct standard asks only if the evidence without the disputed bit of evidence was sufficient to sustain the indictment. State v. Logan, 1 Nev. 509 (1865). See also, Collins v. State, 113 Nev. 1177, 1182, 946 P.2d 1055, 1059 (1997); Franklin v. State, 89 Nev. 382, 513 P.2d 1252 (1973); Robertson v. State, 84 Nev. 559, 445 P.2d 352 (1968). There is no dispute but that the evidence was sufficient and so this Court may disregard the argument.

Nevertheless, the remaining flaw warrants a brief discussion.

The dispute here concerns the evidence of the prior conviction. Nevada law has several diverse provisions regarding pleading and proving prior convictions. For instance, in the habitual criminal context, following an indictment, the legislature has ensured that the accused will receive notice but provided that the notice may be given by a separate pleading filed by the prosecutor. NRS 207.010. In cases of driving while under the influence, a statute requires the prior convictions to be pleaded in the charging document. NRS 484.3792. In death penalty cases, SCR 250 requires a separate pleading giving notice of aggravating circumstances. Nevertheless, the State is not required to show those circumstances at a grand jury proceeding. Floyd v. State, 118 Nev. 156, 42 P.3d 249 (2002).

In certain charges involving controlled substances, a prior conviction that enhances the penalties for an offense must be pleaded in the charging document. NRS 453.346.[2] In Lewis v. State, 109 Nev. 1013, 862 P.2d 1194 (1993), this Court may have set in motion the law of unintended consequences. The Court noted that NRS 453.346 included a list of crimes in which the prior conviction must be pleaded in the charging document. The Court then held that the exclusion of another similar crime from the list is irrational. That holding was unusual because ordinarily an under-inclusive statute that does not impact on fundamental constitutional rights or a suspect class does not violate the equal protection or due process clauses of the Constitution. See generally, San Antonio School District v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278 (1973). That is, the Court ordinarily inquires to determine if the statute is rational, not if the exclusion of other matters is irrational. A rule of constitutional law requiring all legislative classifications to be neither under-inclusive nor over-inclusive in order to survive the "rational basis" test is not generally applied by other courts.

In Lewis, the Court went on to another unusual ruling. The Court held that the proper response to the under-inclusive statue was not to invalidate the requirement that some folks were entitled

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[2]There is no general constitutional requirement that prior convictions affecting sentencing must be pleaded in the charging document. Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219 (1998).

to notice in the pleadings. Instead, the Court determined to essentially re-write the statute to require the State to give notice in the charging document in any case where a prior conviction enhances a subsequent offense. Thus, by implication, the Court found that when the legislature mandated pleading a prior conviction for some cases, then some source of constitutional law mandated pleading prior convictions in all cases. Hence, the unintended consequences. In the effort to protect the accused by requiring that prior convictions be pleaded, this Court necessarily held that the prior convictions must also be shown to the grand jury. Now we have a defendant who complains that he has been prejudiced by this Court's efforts to ensure that defendants get adequate notice.

One of three propositions seems to be true. Either it is not error to show a grand jury prior convictions affecting sentencing because such prior convictions must be pleaded, or; the cases indicating that prior convictions must be pleaded should be abrogated. A third possibility is that prior convictions must be pleaded in some cases, but only where the prior convictions are a true element of the offense, not just a fact that affects the sentencing court's options among otherwise available sentences. See Roberts v. State, 120 Nev. ___, 89 P.3d 998 (2004). Of course there may be other alternatives, but none seem apparent.

It is not necessary for this Court to resolve the debate concerning scope and the continuing vitality of Lewis v. State. This Court could simply note that the other evidence was sufficient to allow the indictment. Nevertheless, because the argument now presented seems to be a product of a decision of this Court, the State invites this Court to inquire and to determine if some provision of state or federal law required the indictment to include the allegation of the prior burglary conviction. If it was properly pleaded, then there was no error in presenting the evidence to the grand jury and the district court should not have acted at all. If the prior conviction was not properly included in the indictment, then there was no error because the remaining evidence was sufficient to sustain the indictment.

B. THE DISTRICT COURT DID NOT ERR IN FAILING TO FIND THE DEFENDANT WAS INCOMPETENT.

Volpicelli next argues that "Appellant may not have been competent during the crimes." This one is odd. Ordinarily, the question of one's competency refers to one's ability to stand trial, not to one's

mental state during the commission of a crime. Because the opening brief refers to evidence presented at the competency hearing, and because appellant did not plead insanity or otherwise create issue regarding his mental state during the commission of the crimes, the State assumes that Volpicelli is referring to competency to stand trial.

The opening brief is phrased as though this Court conducts a de novo review of competency. That is not the correct standard. A finding of competence should be affirmed if it is supported by substantial evidence. Tanksley v. State, 113 Nev. 844, 847, 944 P.2d 240, 242 (1997). Here, the record includes the reports of the sanity commission opining that Volpicelli had an understanding of the charges and was able to assist in his defense. 2JA at 373-79. That finding should therefore be affirmed.

### C. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN SENTENCING APPELLANT AS A HABITUAL CRIMINAL.

Volpicelli next makes two contentions regarding his sentencing as a habitual criminal. First, he claims error because the district court did not utter the phrase "just and proper" when finding that he was a habitual criminal. Instead, the district court noted that appellant was a "poster child for habitual criminality." 2JA at 262.

The Ninth Circuit once held that Nevada law requires uttering of talismanic phrases when declaring one to be a habitual criminal. Walker v. Deeds, 50 F.3d 670 (9th Cir. 1995). That learned court incorrectly interpreted Nevada law. Hughes v. State, 116 Nev. 327, 996 P.2d 890 (2000). Here, the record reveals that the district court carefully evaluated all the appropriate circumstances and determined that society would be best served by putting this full-time thief behind bars for a period commensurate with his crimes and his criminal history.

Volpicelli also contends that the consecutive sentences amount to an abuse of discretion. This Court has long held that it will not interfere with a sentencing decision unless the record affirmatively reveals some legal error or that the sentence was based solely on impalpable or suspect evidence. Allred v. State, 120 Nev. ___, 92 P.3d 1246, 1253-54 (2004). Volpicelli has not identified any error or any questionable evidence. Therefore, this claim should also be rejected.

D. THE VERDICTS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

Volpicelli next contends that some of the guilty verdicts may not be supported by substantial evidence beyond the testimony of an accomplice. He fails to mention which ones are not so supported.

Assuming the witness to be an accomplice, the State contends that there was ample corroboration. Whether one is an accomplice is ordinarily for the jury to decide. Rowland v. State, 118 Nev. ___, 39 P.3d 114, 120 (2002). If the witness is deemed an accomplice, the jury may still convict if there is even slight evidence connecting the defendant to the crime. Evans v. State, 113 Nev. 885, 891-92, 944 P.2d 253, 257 (1997). See also Gallego v. State, 101 Nev. 782, 787, 711 P.2d 856, 860 (1985). Here, the corroborative testimony described in the opening brief included eye-witnesses to the planning and execution of the crimes, as well as physical evidence possessed by Volpicelli, including the booty and the instruments of the crimes. That is sufficient to relieve the Court of the notion that witness Bowman was merely trying to dilute his own culpability by dragging an innocent person into the case.

IV. CONCLUSION

Volpicelli is a professional thief who got caught. He was fairly tried and sentenced and now this Court should affirm his court-ordered retirement.

DATED: August 5, 2004.

RICHARD A. GAMMICK
District Attorney

By 
TERRENCE P. McCARTHY
Appellate Deputy

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 5 day of August, 2004.

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**CERTIFICATE OF MAILING**

Pursuant to NRAP Rule 25, I hereby certify that I am an employee of the Washoe County District Attorney's Office and that on this date, I deposited for mailing at Reno, Washoe County, Nevada, postage prepaid, a true copy of the foregoing document, addressed to:

Mary Lou Wilson, Esq.
333 Marsh Avenue
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DATED: August 6, 2004.

Stella Mudd