IN THE SUPREME COURT OF THE STATE OF NEVADA

ANDRE GRANT SNIPES, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 82384

RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County

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ROUTING STATEMENT

This appeal is appropriately assigned to the Court of Appeals pursuant to NRAP 17(b)(2)(B) because it is a direct appeal from a judgment of conviction that challenges only the sufficiency of the evidence.

STATEMENT OF THE ISSUES

1. Whether any reasonable trier of fact could have found Appellant returned for a refund items that had been previously stolen under Counts 5, 10, and 15.
2. Whether any reasonable trier of fact could have found Appellant or his co-conspirator used a deadly weapon under Counts 3 and 4.

STATEMENT OF THE CASE

On November 1, 2019, Andre Snipes (hereinafter "Appellant") was charged by way of Indictment in connection with a series of robberies he committed with a co-conspirator between September 20, 2019, and October 6, 2019. 1AA0086-91.

The Indictment charged as follows: Count 1 – Grand Larceny (Category C Felony, NRS 205.220.1, 205.222.2); Count 2 – Conspiracy to Commit Robbery (Category B Felony, NRS 200.380, 199.480); Count 3 – Robbery with Use of a Deadly Weapon (Category B Felony, NRS 200.380, 193.165); Count 4 – Burglary While in Possession of a Deadly Weapon (Category B Felony, NRS 205.060); Count 5 – Burglary (Category B Felony, NRS 205.060); Count 6 – Burglary While in Possession of a Deadly Weapon (Category B Felony, NRS 205.060); Count 7 – Grand Larceny (Category C Felony, NRS 205.220.1, 205.222.2); Count 8 – Conspiracy to Commit Robbery (Category B Felony, NRS 200.380, 199.480); Count 9 – Robbery with Use of a Deadly Weapon (Category B Felony, NRS 200.380, 193.165); Count 10 – Burglary (Category B Felony, NRS 205.060); Count 11 – Grand Larceny (Category C Felony, NRS 205.220.1, 205.222.2); and Count 12 – Burglary (Category B Felony, NRS 205.060). Id.

After Appellant's co-conspirator pled guilty, a third Amended Superseding indictment was filed on November 9, 2020, adding four counts as follows: Count 13 – Burglary (Category B Felony, NRS 205.060); Count 14 – Grand Larceny (Category C Felony, NRS 205.220.1, 205.222.2); Count 15 – Burglary (Category B Felony, NRS 205.060); and Count 16 – Participation in Organized Retail Theft (Category B Felony, NRS 205.08345). 3AA0518, 524-31.

Appellant's jury trial began on November 9, 2020, and lasted four days, ending on November 13, 2020. 3AA0534, 5AA1155. The jury convicted Appellant on November 13, 2020, of 16 counts. 5AA1151-54. On Count 6, the jury convicted Appellant of Burglary rather than Burglary While in Possession of a Deadly Weapon. 05AA1152. On Count 9, the jury convicted him of Robbery rather than Robbery with Use of a Deadly Weapon. 05AA1153; see also Snipes Event Chart, affixed as an appendix to AOB.

The District Court adjudicated Appellant guilty and sentenced him to the Nevada Department of Corrections on December 30, 2020. 5AA1183-87. An Amended Judgment of Conviction was filed January 7, 2021. 5AA1189-93. Sentence was pronounced as follows: Count 1 – 12 to 36 months; Count 2 – 24-72 months; Count 3 – 24-60 months plus a consecutive term of 12-36 months for the use of a deadly weapon; Count 4 – 24-72 months; Count 5 – 12-36 months; Count 6 – 12-36 months; Count 7 – 12-36 months; Count 8 – 24-72 months; Count 9 – 24-60 months: Count 10 – 12-36 months; Count 11 – 12-36 months; Count 12 – 12-36 months; Count 13 – 12-36 months; Count 14 – 12-36 months; Count 15 – 12-36 months; and Count 16 – 12-60 months. Id., see also Snipes Event Chart. Appellant received an aggregate total sentence of 60-156 months. 5AA1193. He received credit for 450 days already served. Id.

The Notice of Appeal was filed on January 17, 2021.

STATEMENT OF THE FACTS

Bryan Laws worked the cash register at the Footlocker in the Fashion Show Mall on a busy Friday, September 20, 2019. 3AA0707. Appellant followed his co-conspirator into the store and attempted to return two items. 3AA0708-09, 724-25. The store's computer system only accepted one return. 3AA0708. The inventory control system flagged the items as potentially stolen. 3AA0712. Suspicious of the men's behavior, Mr. Laws alerted his team to remain vigilant. 3AA0711. Shortly after, the two men walked out of the store with approximately 15 NBA jerseys in their hands. 3AA0714-15. Mr. Laws notified the police and followed the men. 3AA0716.

In the parking lot, Appellant's co-conspirator lifted his shirt to expose the butt of a gun. 3AA0718. Mr. Laws held his hands up in surrender and stopped pursuing the men. 3AA0720. On the 911 recording played in court, Mr. Laws indicated he saw the gun fall out, so he was positive they had a weapon. 3AA0723-24. He identified Appellant as the man who stole the jerseys in the company of the man with the gun. 3AA0725. In the parking garage, he stood about 25 yards away from the man brandishing the gun. 4AA0753. Mr. Laws affirmed he saw a gun. 4AA0762.

Alden Abrego worked as manager at Champs at the same mall four days later, on September 24th. He asked Appellant if he needed assistance and noted Appellant appeared nervous. 4AA0827. Appellant and his co-conspirator took 14 NBA jerseys

and left without paying. 4AA0829-30. Mr. Abrego called security but they did not arrive in time. 4AA0830. Mr. Abrego pursued them to the door but Appellant warned him off, saying "trust me, you don't want to do this." 4AA0831. Appellant's co-conspirator lifted his shirt and Mr. Abrego saw a gun sticking out of his waistband. 4AA0831-33. He never saw the entire gun. 4AA0841.

A week later, on September 29th, Samantha Alvarez was on duty as store manager at a Footlocker in Downtown Summerlin. 4AA0769. Appellant entered the store with his co-conspirator. 4AA0788. They swooped up 21 NBA jerseys and left without paying for them. 4AA0791-4AA0792.

Carmina Panlilio, manager and loss prevention liaison for Nike on Eastern Avenue, stood by the entrance on October 2nd, 2019, when Appellant and his co-conspirator selected items and left without paying. 4AA0799-801.

Elvin Castillo, manager of the Meadows Mall Footlocker in September 2019, appeared by video. 4AA0854-55. He testified that he personally handled returns of NBA jerseys without receipts for Appellant on September 20th and 24th. 4AA0856-59. Based on his familiarity with the store's inventory system and business records, he testified regarding the returns made by Appellant on September 20th, September 24th, and October 6th. 5AA0855-60.

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SUMMARY OF THE ARGUMENT

Appellant cannot entice this Court into invading the province of the jury by mislabeling a credibility argument as a sufficiency of the evidence claim. Appellant fails to demonstrate that no rational jury could have convicted him on the evidence presented. Instead, Appellant invites this Court to discredit the testimony presented during his trial in favor of his version of events.

ARGUMENT

The State presented sufficient evidence at trial for a rational trier of fact to find Appellant committed Counts 3, 4, 5, 10, and 15 beyond a reasonable doubt.

When reviewing a sufficiency of the evidence claim, the relevant inquiry is *not* whether the reviewing court is convinced of the defendant's guilt beyond a reasonable doubt. Wilkins v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980). Rather, the proper standard is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." McNair v. State, 108 Nev. 53,

56, 825 P.2d 571, 573 (1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979)).[1]

"The rule is well established that it is the function of the jury, not the appellate court, to weigh the evidence and pass upon the credibility of the witness." Walker v. State, 91 Nev. 724, 726, 542 P.2d 438, 438–39 (1975). Jackson elaborated on this point:

> This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution. The criterion thus impinges upon "jury" discretion only to the extent necessary to guarantee the fundamental protection of due process of law.

Jackson, 443 U.S. at 318–19, 99 S. Ct. at 2788–89.

The evidence presented is only insufficient when "the prosecution has not produced a minimum threshold of evidence upon which a conviction may be based, even if such evidence were believed by the jury." Evans v. State, 112 Nev. 1172, 1193, 926 P.2d 265, 279 (1996) (internal citations removed). When there is substantial evidence in support of a jury's verdict, it will not be disturbed on appeal. Brass v. State, 128 Nev. 748, 291 P.3d 145 (2012). Further, circumstantial evidence

[11] Appellant incorrectly cites a federal standard, United States v. Shipley, 363 F.3d 962, 971 n.8 (9th Cir. 2004). The cited footnote then refers to Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979), the same standard used by Nevada.

alone may support a conviction. Collman v. State, 116 Nev. 687, 711, 7 P.3d 426, 441 (2000) (*citing* Deveroux v. State, 96 Nev. 388, 391, 610 P.2d 722, 724 (1980)).

The jury experienced the testimony of the State's witnesses and heard Appellant's story. The jury evaluated the credibility of both versions in light of the other evidence presented. That judgment call is the very definition of the credibility determination reserved exclusively to the jury.

I. THE STATE PRESENTED SUFFICIENT EVIDENCE AT TRIAL THAT THE ITEMS APPELLANT RETURNED WERE STOLEN UNDER COUNTS 5, 10, AND 15.

In counts 5, 10, and 15, Appellant was charged with burglary. 5AA1115-19. The burglary statute has the following elements: "A person who, by day or night, unlawfully enters or unlawfully remains in any … Business structure with the intent to commit grand or petit larceny, assault or battery on any person or any felony is guilty of burglary of a business." NRS 205.060(1)(B). Count 5 refers to the returns made at the Footlocker at Meadows Mall on September 20, 2019; Count 10 refers to the returns made at that store on September 14; and Count 15 refers to the returns made on October 6, 2019. 5AA1115, 5AA1117, 5AA1119.

It is uncontested that Appellant entered the businesses and returned items on the dates in question. AOB at 6. Appellant contends that all the items he returned without a receipt on those dates were not stolen. Id. Appellant also states he received a credit to his credit card for the returned items, though the record shows he only

received store credit since the returns were made without a receipt and Appellant concedes this point in his brief. AOB at 6, 4AA0858, 0869, 0871, 0873.

The thrust of Appellant's argument is that it is illogical for a person to return stolen merchandise for store credit when he could simply have stolen what he actually wanted in the first place. AOB at 6. Appellant also claims he would be too clever to give his name for the store's loyalty program while committing a crime. Id. However, the jury heard extensive evidence about the returns in question and had the opportunity to review the receipts for Appellant's returns. 4AA0946-75.

On September 20th, after stealing armloads of jerseys from Footlocker in the Fashion Show Mall, Appellant returned four NBA jerseys to Footlocker at Meadows Mall on the same day for a total store credit of $476.32. 3AA0707, 0774, 0778-79.

On September 24th, after stealing merchandise from Champs at the Fashion Show Mall, Appellant returned a jersey for $97.41 to Footlocker at Meadows Mall on the same day. 4AA0829-30, 0782.

After stealing 21 jerseys from Footlocker in Downtown Summerlin on September 29th, Appellant executed two returns without receipts at Footlocker in Meadows Mall on October 6th, returning shoes for $216.50 and a jersey for $140. 4AA0791-92, 0785-86.

The jury, as trier of fact in this case, is privileged to apply its common sense to deduce that a man stealing jerseys on certain days and then returning jerseys for

store credit shortly thereafter is returning stolen goods. Larceny or obtaining money or store credit or other merchandise under false pretenses by returning goods which had never been purchased is the criminality that lays at the heart of Appellant's burglary convictions on Counts 5, 10, and 15. 5AA1071-72, 1129-31, 1130-31. As the jury instructions noted, the "intention with which entry was made is a question of fact, which may be inferred from the Defendant's conduct and all other circumstances disclosed by the evidence." 5AA1131. "The gist of burglary is the unlawful entry with criminal intent." 5AA1132.

The jury may infer that a thief might not take sufficient time to select the precise merchandise he wants but rather might gather armloads of things and return some of them later for other items or cash. Here, the jury, the ultimate 'trier of fact', resolved conflicts in the testimony, weighed the evidence, and made reasonable inferences from the basic facts to the ultimate facts. Ample evidence in the record supports the jury's finding that the items returned in Counts 5, 10, and 15 were stolen. Appellant's conclusory statement to the contrary does not create reasonable doubt or allow this Court to second-guess the jury.

Appellant would like this Court to substitute its credibility determination for that of the jury who heard the evidence and weighed its value. The Court should affirm the convictions on Counts 5, 10, and 15.

II. THE STATE PRESENTED SUFFICIENT EVIDENCE AT TRIAL THAT APPELLANT'S CO-CONSPIRATOR USED A DEADLY WEAPON UNDER COUNTS 3 AND 4.

The State presented sufficient evidence for the trier of fact to find that Appellant's co-conspirator used a gun when he robbed Footlocker on September 20, 2019.[2] Appellant cites to Berry v. State, 125 Nev. 265, 212 P.3d 1085 (2009) for the false assertion that a victim of a robbery committed at gunpoint must first establish that the weapon is in operable condition. AOB at 8. He also misstates the record to say that the victim, Mr. Laws, only saw a black handle. AOB at 9.

Berry held the opposite of Appellant's claim. Berry held that a weapon need not be loaded or operable to be a deadly weapon, saying the jury could determine that "the weapon's capabilities are established by its design, not its operability." Berry, 125 Nev. at 270, 212 P.3d at 1089. Notably, in Berry, the weapon brandished by the defendant was a plastic toy whose design precluded it from firing bullets. Id. at 271, 212 P.3d at 1090. The Court found that the toy was not designed to be a weapon. Id. at 278, 212 P.3d at 1094. If it had been a real gun, though, "whether the weapon was unloaded or inoperable at the time of the crime [would be] irrelevant." Berry, at 270, 212 P.3d at 1089.

[2] Appellant claims he was charged and convicted under 193.164. AOB at 7, n. 21. He was actually charged and convicted under 193.165. 3AA0524, 5AA1189.

Here, Mr. Law testified that he actually saw the semi-automatic handgun used by Appellant's co-conspirator in the parking garage when the co-conspirator raised his shirt to expose its butt. 3AA0718. The jury evaluated his credibility and found that he knew a deadly weapon when he saw one. Unlike in Berry, Mr. Laws testified that he saw a real gun, whether it would have turned out to be operable or loaded if it had been located. Id.

Mr. Laws, familiar with guns himself, identified the butt as belonging to a semi-automatic pistol. Id. On seeing the gun, Mr. Laws stopped pursuing the men through the garage and allowed them to make their escape. 3AA0720. On the 911 recording played in court, Mr. Laws indicated he saw the gun fall out, so he was positive they had a weapon. 3AA0723-24. Mr. Laws affirmed in court that he was certain he saw a gun. 4AA0762.

The jury weighed the testimony of Mr. Laws. "[I]t is exclusively within the province of the trier of fact to weigh evidence and pass on the credibility of witness and their testimony." Lay v. State, 110 Nev. 1189, 1192, 886 P.2d 448, 450 (1994). Mr. Laws said he saw a gun in the waistband of Appellant's partner-in-crime. The jury chose to believe him. This Court will not substitute its judgment for that of the jury. This Court should affirm Appellant's conviction on Counts 3 and 4.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court affirm the Judgment of Conviction on all counts.

Dated this 19th day of July, 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page and type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 2,661 words and does not exceed 30 pages.
3. **Finally, 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)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. 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 19th day of July, 2021.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on July 19, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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