IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

August 30, 2013

COREY JOSHUA ROCKER,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. 2D10-5060
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

Upon consideration of the Appellant's motion for rehearing filed November 28, 2012, it is ordered that the Appellant's motion for rehearing is granted; this court's opinion dated November 14, 2012, is withdrawn; and the attached opinion is substituted therefor.

Appellant's motion for rehearing en banc is denied as moot.

I HEREBY CERTIFY THE FOREGOING IS A
TRUE COPY OF THE ORIGINAL COURT ORDER.

JAMES R. BIRKHOLD, CLERK

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

COREY JOSHUA ROCKER, Appellant, v. STATE OF FLORIDA, Appellee.	)	Case No. 2D10-5060

Opinion filed August 30, 2013.

Appeal from the Circuit Court for Pinellas County; Philip J. Federico, Judge.

Howard L. Dimmig, II, Public Defender, and William L. Sharwell, Assistant Public Defender, Bartow, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Anne Sheer Weiner, Assistant Attorney General, Tampa, for Appellee.

WALLACE, Judge.

Corey Joshua Rocker appeals his conviction and sentence for first-degree felony murder, a violation of section 782.04(1)(a)(2)(d), Florida Statutes (2008). Because the State failed to meet its burden of proving that Rocker intended for the

predicate offense of robbery to be committed and that he assisted in the commission of the attempted robbery, we conclude that the trial court erred in denying Rocker's motion for judgment of acquittal, and we reverse his conviction for felony murder and remand for discharge.[1]

I. FACTUAL BACKGROUND

The evidence at Rocker's trial established that on January 24, 2008, sixteen-year-old Rocker made arrangements to meet the victim, Brennon Days, to purchase drugs. At about 6:48 p.m., Rocker contacted an acquaintance, Ryan Haynes, and told him he wanted to purchase drugs. When Haynes informed Rocker that he was unable to provide the drugs, Rocker requested the victim's telephone number. According to the testimony elicited at trial, the victim sold drugs to Rocker at least three times in the past. At 6:55 p.m., Rocker called the victim.

Later that same night around 10 p.m., Rocker and his codefendant, Miterrio Banks, went to the home of another acquaintance, Golden Butler. While at Butler's home, Rocker attempted to call the victim three times between 10:18 p.m. and 10:30 p.m. The victim returned Rocker's phone calls around 10:32 p.m. Rocker then called the victim around 10:40 p.m., and the victim's last phone call to Rocker was at 10:45 p.m. While Rocker was on the phone with the victim, Butler asked Rocker to whom he was talking and Banks told him to "shush," to be quiet.

When Rocker and Banks arrived at Butler's home, they had a pistol with them, and Butler testified that Rocker and Banks passed the pistol back and forth,

[1]Rocker raised several arguments on appeal; however, because we conclude that his conviction warrants reversal on this ground, we need not address the merits of the other grounds raised.

"fondling it." During their brief stay at Butler's, neither Banks nor Rocker mentioned anything about using the pistol or robbing anyone. Before Rocker and Banks left Butler's home, they asked Butler if he wanted to "go handle something." Butler testified that the question could have meant, "Anything. Girls, money, anything." Butler declined the invitation, and Rocker and Banks left Butler's home with the pistol. Butler left his house almost immediately after Rocker and Banks left, walking about a car length behind them. Butler testified that he left the house to sell cocaine.

Butler walked behind Rocker and Banks toward the entrance of the neighborhood. Butler then saw the victim's car drive up, and Butler testified that Banks approached the car by himself and bent down at the driver's side window. At this point, Butler did not see Rocker anywhere nearby. Butler heard Banks ask the victim, "Where the money at?" Butler then heard a gunshot. At the sound of the gunshot, Butler became frightened and ran back toward his house. He also saw Rocker and Banks running away from the victim's car. Banks told Rocker, "I think he's dead." The victim died from a gunshot wound to his head.

Neighbors testified that they saw people running from the scene after the shooting. Frederick and Lisa Dessaure testified that they heard a gunshot. When Mr. Dessaure looked outside his window, he saw one man running past his window. Mrs. Dessaure looked out from a different window and saw two people running past her house. Mr. Dessaure called 911 at about 10:50 p.m. Neither Mr. Dessaure nor Mrs. Dessaure could identify the people running past their house.

Henry Hall, Rocker's uncle, testified that Rocker called him at about 11 p.m. and asked Hall to pick him up at a location close to where the shooting took place.

When Hall picked up Rocker, he noticed police activity in the area and asked Rocker if he knew what happened. Rocker denied knowing why police cars were in the area. Shortly after Hall picked up Rocker from the neighborhood, Rocker was arrested and charged with first-degree felony murder. Although police found trace amounts of gun residue on Rocker's hands the day after the shooting, testimony was presented that such trace amounts could come from merely handling a gun.

Rocker and Banks, his codefendant, were tried jointly. Following the close of the State's case, Rocker moved for judgment of acquittal, arguing that the State failed to meet its evidentiary burden. The trial court denied the motion. Rocker renewed his motion at the close of all the evidence, and the trial court again denied it. The jury returned a verdict finding Rocker guilty of first-degree felony murder, and he was sentenced to a mandatory term of life in prison. On appeal, Rocker argues that the trial court erred in denying his motion for judgment of acquittal because the State presented insufficient evidence that he acted as a principal in the attempted robbery of the victim.

II. DISCUSSION

A. The Standard of Review

When "the evidence is insufficient to warrant a conviction," the trial court must enter a judgment of acquittal. Fla. R. Crim. P. 3.380(a). Our review of the trial court's ruling denying Rocker's motion for judgment of acquittal is de novo. Pagan v. State, 830 So. 2d 792, 803 (Fla. 2002); Evans v. State, 26 So. 3d 85, 88 (Fla. 2d DCA 2010). " 'However, where a conviction is based wholly upon circumstantial evidence, a special standard of review applies.' " Deparvine v. State, 995 So. 2d 351, 376 (Fla. 2008) (quoting Darling v. State, 808 So. 2d 145, 155 (Fla. 2002)). " 'Where the only

proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence.' " Id. (quoting Darling, 808 So. 2d at 155).

B. Analysis

First-degree murder includes the unlawful killing of a person when committed by someone engaged either in the perpetration of, or in the attempt to perpetrate, a robbery. § 782.04(1)(a)(2)(d), Fla. Stat. (2008). Rocker was convicted of first-degree murder as a principal under section 777.011, Florida Statutes (2008), on the theory that he aided and abetted Banks in the attempted robbery of the victim. In order to convict Rocker as a principal, the State had to prove two elements: (1) that Rocker intended for the robbery to be committed and (2) that Rocker assisted Banks in the commission of the offense. See McBride v. State, 7 So. 3d 1146, 1148 (Fla. 2d DCA 2009) (citing Acord v. State, 841 So. 2d 587, 589 (Fla. 2d DCA 2003)). Stated differently, the State was required to prove that Rocker aided and abetted the commission of the attempted robbery and that he had the requisite specific intent to participate in the offense. See Valdez v. State, 504 So. 2d 9, 10 (Fla. 2d DCA 1986).

Under the case law, Rocker's mere presence at the scene, knowledge of the robbery attempt, and flight from the scene are insufficient to support his conviction as a principal for Banks' conduct. See McBride, 7 So. 3d at 1148 (citing A.B.G. v. State, 586 So. 2d 445, 447 (Fla. 1st DCA 1991)); Valdez, 504 So. 2d at 10. Granted, the State could show Rocker's intent by circumstantial evidence. But if the State's proof of intent rested solely upon circumstantial evidence, then the proof had to be not only consistent

with Rocker's guilt, but also inconsistent with his reasonable hypothesis of innocence. Valdez, 504 So. 2d at 10.

> Evidence which furnishes nothing stronger than a suspicion, even though it would tend to justify the suspicion that the defendant committed the crime, . . . is not sufficient to sustain [a] conviction. It is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof sufficient to convict. Circumstantial evidence which leaves uncertain several hypotheses, any one of which may be sound and some of which may be entirely consistent with innocence, is not adequate to sustain a verdict of guilt. Even though the circumstantial evidence is sufficient to suggest a probability of guilt, it is not thereby adequate to support a conviction if it is likewise consistent with a reasonable hypothesis of innocence.

Davis v. State, 90 So. 2d 629, 631-32 (Fla. 1956).

At the trial, the general outline of the events leading to the botched robbery and the victim's death was essentially undisputed. However, the nature of the involvement of Rocker and Banks in these events was substantially different. Butler, the State's only eyewitness to the attempted robbery and to the shooting of the victim, testified that Banks walked to the victim's car, bent down to the driver's side window, and demanded money. At that point, the pistol held by Banks discharged, fatally wounding the victim. The argument in footnote 5 of the dissent concerning the jury's ability to assess the credibility of Butler's testimony ignores the jury's express finding of fact in the verdicts naming Banks—not Rocker—as the shooter. Physical evidence corroborated Butler's identification of Banks—not Rocker—as the individual who approached the victim's car and demanded money. A forensic technician found a latent fingerprint matching Banks' left thumbprint on the exterior of the front door of the victim's

car. Thus the State presented direct evidence of Banks' guilt as the perpetrator of the attempted robbery that resulted in the victim's death.

The State's case against Rocker was very different. Rocker was not carrying the pistol, and he made no demand for money. Butler did not place Rocker at or near the victim's car during the attempted robbery and shooting. Indeed, the evidence at trial did not establish Rocker's precise whereabouts or actions at the time that Banks was pursuing his robbery attempt. Of course, the State did establish that Rocker made a series of telephone calls to the victim designed to induce him to come to the neighborhood where the robbery occurred. If Rocker intended to commit the robbery, then one could conclude that Rocker assisted Banks by luring the victim to the scene. However, because the purpose of Rocker's telephone calls is unknown, the critical question on the motion for judgment of acquittal was Rocker's intent. On the one hand, the State's theory of the case was that Rocker and Banks jointly planned to lure the victim to the neighborhood to rob him. On the other hand, Rocker's hypothesis of innocence was that he contacted the victim to set up a drug transaction without prior knowledge that Banks intended to take advantage of the situation to rob the victim.[2]

The State's case against Rocker as a principal to the attempted robbery was purely circumstantial and can be summarized as follows: (1) Rocker made a series of phone calls designed to lure the victim to the place where he was ultimately killed; (2) Rocker was seen handling the murder weapon before the attempted robbery; (3) Rocker was seen going to the arranged location for the meeting where the murder occurred; (4) Rocker and Banks asked Butler if he wanted "to go handle something";

[2]Another possible scenario is that Banks acted on the spur of the moment in committing his robbery attempt.

and (5) Rocker was seen running from the scene within minutes of the murder. Neither Rocker nor Banks testified at the trial. Nor did the State introduce evidence of any out-of-court inculpatory statements made by either man after the event. Butler was the State's only eyewitness to the botched robbery perpetrated by Banks. But Butler's testimony did not provide any evidence concerning Rocker's intent. Furthermore, beyond the general motive for robbery that can be inferred from mere commission of the crime, no evidence existed that Rocker had a vendetta against the victim or had expressed a need or desire for money that could have motivated the crime and provided evidence of Rocker's intent. Thus, to avoid a judgment of acquittal, the State had to present evidence that was not only consistent with Rocker's guilt but that was also inconsistent with his reasonable hypothesis of innocence. See Valdez, 504 So. 2d at 10.

It was undisputed at trial that Rocker placed several telephone calls to the victim to induce him to come to the neighborhood where the attempted robbery and murder occurred. Nevertheless, Rocker cannot be properly convicted as a principal based on this evidence alone. "Merely creating circumstances or conditions that allow another to commit an independent offense is not enough to establish one as a principal to that offense." C.D. v. State, 2 So. 3d 994, 995 (Fla. 2d DCA 2008). Rocker's telephone calls to the victim certainly caused the circumstances or conditions that enabled Banks to pursue his attempt to rob the victim. However, Rocker's placement of the telephone calls is insufficient to establish his liability as a principal for that offense.

Moreover, as we have already seen, Rocker's placement of the telephone calls to the victim was subject to more than one explanation. The calls may have been

part of a ruse to set up a robbery of the victim. However, the calls may also have been nothing more than an attempt to set up a purchase of drugs. The evidence showed that Rocker had bought drugs from the victim at least three times in the past—and probably more—without incident. The telephone calls cannot support the conviction of Rocker as a principal absent evidence of his specific intent that the robbery occur. The telephone calls themselves are not sufficient to establish such intent. See Chaudoin v. State, 362 So. 2d 398, 401 (Fla. 2d DCA 1978); Grover v. State, 581 So. 2d 1379, 1381 (Fla. 4th DCA 1991) (finding that "it is the tendency to establish one fact to the exclusion of contrary facts which gives circumstantial evidence the force of proof . . . [,] and when circumstances are reasonably susceptible of two conflicting inferences they are probative of neither [guilt nor innocence]"); Fox v. State, 469 So. 2d 800, 802 (Fla. 1st DCA 1985).

Additionally, the record reflects that before Rocker called the victim from Butler's residence, he called Haynes. Haynes testified for the State at trial that Rocker had called him seeking to buy drugs. Haynes had just been released from jail, and he was confined to his residence; Haynes told Rocker that he was unable to supply anything. During Rocker's telephone conversation with Haynes, Rocker asked for the victim's telephone number. Haynes furnished the number, and Rocker then telephoned the victim. This evidence suggests that Rocker's intent in later contacting the victim was to buy drugs, not to commit a robbery.

It was also undisputed at trial that Rocker and Banks shared possession of a pistol at Butler's residence. But Rocker's joint possession of a pistol with Banks does not establish that Rocker intended to rob the victim. Butler testified that he did not

consider the possession of a pistol by Rocker and Banks to be unusual. On the contrary, he said that the possession of guns is common in his neighborhood. Our common sense and experience tells us that the presence of firearms at drug transactions is a frequent occurrence. Thus the possession of a firearm by Rocker and Banks is just as consistent with a planned drug buy as it is with a proposed robbery.

Next, Butler testified that he observed Rocker walking with Banks to the arranged location for the planned drug buy. However, similar to Rocker's joint possession of a pistol with Banks, Rocker's act of approaching the scene with Banks is just as consistent with the theory that he was participating in a drug transaction as it is with the theory that he was participating in a robbery. In the absence of additional proof, such evidence is insufficient to prove Rocker's intent to commit a robbery.

As evidence of Rocker's intent, the State highlights that before Rocker and Banks left Butler's house, they asked him if he wanted to "go handle something."[3] However, this request is vague at best and subject to more than one explanation. Butler did not infer from the inquiry the nature of the activity that was being proposed. On direct examination, he testified that it could have meant, "Anything. Girls, money, anything." When asked about the inquiry again on cross-examination, Butler agreed that it could have meant "[g]irls, drugs, anything." Notably, Butler also testified that he did not think that whatever it was he was being asked if he wanted to "handle" would involve the pistol that Rocker and Banks had already displayed to him. The inquiry at issue is just as consistent with Rocker's innocence as it is with his guilt.

[3]Butler did not specify whether Rocker or Banks asked him this question. Unfortunately, neither the prosecutor nor defense counsel requested clarification on this point.

In addition, an assumption that an inquiry to Butler about "handling something" necessarily referred to a planned robbery of the victim is at odds with the known facts in two respects. First, Butler was adamant that neither Rocker nor Banks said anything to him about robbing someone. Second, assuming that Rocker and Banks were planning to rob the victim, they had no reason to add a third person to their group. Rocker and Banks had only one gun; they did not require additional personnel. If the two men had involved Butler in their hypothetical plot, Butler's involvement would have only resulted in reducing the shares of the loot for Rocker and Banks from one-half to one-third.

Last, the State points to Rocker's flight from the scene within minutes of the murder as evidence of his intent to commit a robbery. While Butler testified that he observed Rocker and Banks running away from the victim's car after Banks shot the victim, this evidence is also unavailing. Flight from the scene is insufficient to support a conviction of an accused as a principal. Staten v. State, 519 So. 2d 622, 624 (Fla. 1988) (finding that " 'mere presence at the scene . . . or a display of questionable behavior after the fact, is not sufficient to establish participation [as a principal]' " (quoting Collins v. State, 438 So. 2d 1036, 1038 (Fla. 2d DCA 1983))); see also McBride, 7 So. 3d at 1148; A.S.F. v. State, 70 So. 3d 754, 757 (Fla. 4th DCA 2011); A.B.G., 586 So. 2d at 447; J.H. v. State, 370 So. 2d 1219, 1220 (Fla. 3d DCA 1979).

Moreover, Rocker may have fled the scene for a variety of reasons. He may have been concerned about his culpability in the failed drug transaction. The unexpected discharge of the pistol wielded by Banks provided ample cause for fright and flight. Butler, who was not involved in the purchase of drugs from the victim or in

the attempted robbery, also fled the scene. The evidence of Rocker's flight does not provide evidence of his intent to participate in the robbery of the victim.

III. CONCLUSION

Based on the foregoing review of the evidence, which was purely circumstantial, we find that the State did not present facts inconsistent with Rocker's reasonable hypothesis of innocence. The State failed to present any evidence indicating Rocker's intent. Therefore, to reach the conclusion that the evidence was sufficient to support Rocker's conviction as a principal would require an impermissible stacking of inferences. See I.Y.D. v. State, 711 So. 2d 202, 203 (Fla. 2d DCA 1998). Here, "one could intuitively conclude that [Rocker] might be guilty. However, 'guilt cannot rest on mere probabilities.' " Davis v. State, 761 So. 2d 1154, 1159 (Fla. 2d DCA 2000) (quoting Arant v. State, 256 So. 2d 515, 516 (Fla. 1st DCA 1972)). Accordingly, we reverse Rocker's judgment and sentence and remand for his discharge.

Reversed and remanded for discharge.

NORTHCUTT, J., Concurs with opinion.[4]
VILLANTI, J., Dissents with opinion.

NORTHCUTT, Judge, Concurring.

I wholly agree with the majority opinion, but I write separately for two reasons. The first is to clarify the precise way in which the State's evidence was

[4]Judge Northcutt has been substituted for Judge Whatley (who retired after serving on the original Rocker panel), and he has reviewed a video recording of the August 7, 2012, oral argument.

insufficient to present the question of Rocker's guilt or innocence to the jury. The majority and the dissent quite properly focus on whether the evidence was sufficient to prove that Rocker intended the robbery of Day and that he assisted that endeavor. These were the elements necessary to establish Rocker's guilt as a principal to the robbery attempt. As the dissent points out, the question of intent—that is, what did the defendant intend—is usually for the jury. But the State's case failed at a more basic level: nothing in the evidence showed that Rocker was even aware that Banks intended to rob Day.

The question of knowledge is not the same as that of intent. As both of my colleagues recognize, a defendant's mere knowledge that another plans to commit a crime is insufficient to prove that the defendant was a principal to that crime, i.e., that he intended for the crime to be carried out. But it is certainly also true that the defendant could not be a principal to the crime without prior knowledge of it. In other words, knowledge coupled with other circumstances may or may not be sufficient to show intent, but intent cannot be circumstantially proved unless one or more of the circumstances demonstrate knowledge.

Thus, before the jury could be called upon to decide whether Rocker intended for Day to be robbed, the State was obliged to demonstrate that Rocker knew of Banks' intention to do so. It failed in that proof because none of the State's circumstantial evidence, whether examined singly or collectively among the "surrounding circumstances", demonstrated Rocker's knowledge of Banks' plan. None of the circumstances even preponderated over the reasonable theory that Rocker was unaware of Banks' intention, let alone refuted it. As such, the evidence could not, as a

matter of law, support a jury's determination that Rocker knew of the planned robbery attempt beyond a reasonable doubt.

With that said, my second purpose is to address the dissent's mistaken interpretation of the special standard of review applicable to circumstantial evidence cases. The basis of that misunderstanding can be seen in the dissent's quotation from a two-sentence passage in State v. Law, 559 So. 2d 187, 188 (Fla. 1989). The dissent writes:

> "Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence." State v. Law, 559 So. 2d 187, 188 (Fla. 1989). However, "[t]he question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine," and the jury's decision will not be reversed where there is substantial, competent evidence supporting it. Id. (emphasis added)

The dissent seizes on the second sentence as justification for treating the circumstantial evidence rule as purely a jury matter. It carries this premise forward to embrace a highly deferential standard of review in circumstantial evidence cases. In so doing, it has overlooked that Law was written for the very purpose of reconciling the roles of the judge and jury in a circumstantial criminal case—and it rejected the view advanced by the dissent.

The Law court described the issue before it as "whether a trial judge may send a criminal case to the jury if all of the state's evidence is circumstantial in nature and the state has failed to present competent evidence sufficient to enable the jury to exclude every reasonable hypothesis of innocence." 559 So. 2d at 188. Put another

way, the court wrote, "does the common law circumstantial evidence rule apply when a trial judge rules on a motion for judgment of acquittal?" Id.

In Law, the state contended that the rule did not apply to a motion for judgment of acquittal. It argued that because a defendant moving for judgment of acquittal admits all reasonable inferences from the evidence in favor of the state, the case should go to the jury regardless of whether the state's evidence is inconsistent with the defendant's reasonable hypothesis of innocence. Id. at 188. At bottom, this is the same reasoning by which the dissent concludes that in this case the State met its burden of introducing evidence that is inconistent with Rocker's theory of innocence simply by tendering evidence from which the jury could infer his guilt.

But, of course, the fact that a circumstance might support an inference of guilt does not mean that it does not also support an inference of innocence. If the circumstantial evidence rule only required the state to submit evidence from which the jury could infer guilt, the standard of review could hardly be considered "special", because circumstantial cases would be like any other. Rather, to satisfy the circumstantial evidence rule, the state's evidence must be truly inconsistent with the defendant's theory of innocence; it must contradict it or exclude it as a reasonable possibility.

As we know, the Law court rejected the state's argument. It held that the state's burden is "to introduce competent evidence which is inconsistent with the defendant's theory of events." Id. at 189. Only after that burden is met does it fall to the jury to determine whether the evidence is sufficient to "exclude every reasonable hypothesis of innocence beyond a reasonable doubt." Id. Indeed, the court wrote that if

the state does not offer evidence that is inconsistent with the defendant's hypothesis of innocence, "'the evidence [would be] such that no view which the jury may lawfully take of it favorable to the [state] can be sustained under the law.'" Id. at 189 (quoting Lynch v. State, 293 So. 2d 44, 45 (Fla. 1974) (alteration in original)).

Thus, the Law court expressly agreed with the following statements in Fowler v. State, 492 So. 2d 1344, 1347 (Fla. 1st DCA 1986):

> [I]t is for the court to determine, as a threshold matter, whether the state has been able to produce competent, substantial evidence to contradict the defendant's story. If the state fails in this initial burden, then it is the court's duty to grant a judgment of acquittal to the defendant as to the charged offense, as well as any lesser-included offenses not supported by the evidence.

559 So. 2d at 189 (emphasis supplied) (quoting Fowler, 492 So. 2d at 1347).

The upshot is that it is a judicial function to determine in the first instance whether the circumstances shown by the state's evidence contradict the defendant's reasonable hypothesis of innocence. If it does not, as a matter of law the jury cannot infer the defendant's guilt. To be sure, when making that assessment the court must give the state the benefit of any conflicts in the evidence. But it is not, as the dissent maintains, a question of whether the jury might reasonably infer in favor of the state over the defense. The circumstances either contradict the defense theory or they do not. If the latter, it is the trial court's duty to grant a judgment of acquittal. Failing that, it is the appellate court's duty to reverse.

In the case before it, the Law court examined the record and identified specific aspects of the state's evidence that contradicted the defendant's theories of innocence. For example, the defendant's theory that the fatal blow was delivered by the

young victim's mother, who was the last one to check on him the night he died, "was refuted by evidence that the fatal blow likely had been delivered well before [the mother] entered the room to check on the child's breathing." Id. at 190 (emphasis supplied). Also, the court noted that an expert pathologist gave testimony "refuting" Law's theory that the victim's fatal subdural hematoma could have been caused during roughhousing with the victim's older brother. Id. The pathologist's testimony was also "sufficiently at odds" with Law's theory that the fatal injury and others present on the child's body could have been caused by a series of accidental falls. Id. at 190-91. The defense theory that Law may have accidentally caused the boy's head injury while the two were playing on the night of his death was contradicted by the defendant's own testimony as well as that of the pathologist. Id. at 191. The Law court concluded that, because the state presented evidence that contradicted the defendant's theories of innocence, the case was properly submitted to the jury.

As did the supreme court in Law, in this case the majority has painstakingly examined the State's circumstantial evidence. It has accurately concluded that none of that evidence contradicted the theory that Rocker's involvement in the fatal incident was as the organizer of an intended drug transaction, not as a principal to an attempted robbery. As such, the evidence was legally insufficient to support Rocker's conviction no matter how strongly it might have suggested his guilt.

In contrast, for the most part the dissent recites circumstances that merely supported an inference of Rocker's guilt without regard to whether that evidence contradicted his theory of innocence. This is consistent with the dissent's assertion that when assessing the legal sufficiency of the evidence we must defer to the jury's ability

to draw inferences, but it contravenes the circumstantial evidence rule as prescribed by the supreme court.

To be fair, I note that in its recitation of circumstances the dissent mentions three that it suggests were at odds with Rocker's theory of events. First, it posits that "if Rocker and Banks had simply wanted to purchase drugs that night, they could have purchased them from Butler, who testified that he left his house to sell cocaine." But this is an inference improperly stacked atop two others, i.e., that Rocker and Banks knew that Butler had cocaine to sell, and that Butler would have sold it to them. No evidence supported this. To the contrary, the evidence suggested good reasons why Butler would have kept to himself his own intention to engage in a drug deal. For one thing, in his testimony Butler noted that Rocker was not a close friend and that Banks was merely an acquaintance who arrived with Rocker unexpectedly. Butler also testified that he did not want to get involved with whatever Rocker and Banks were about that evening because he was "straight"; he was on probation and did not want to have it violated. And, as we know, Butler had his own business to transact. Having arranged to sell cocaine to a buyer—Butler testified that he was going to meet a regular customer—it likely was not in his best interest to instead offer the drugs to Rocker and Banks. In short, the fact that Butler intended to sell cocaine that night in no way contradicted the theory that Rocker was planning a cocaine buy from Brennon Days.

Next, the dissent points out that "although Rocker was the person who had purchased cocaine from the victim in the past, when the victim drove to the neighborhood, Rocker apparently hid." It is worth noting that the testimony did not

establish that Rocker was the person who had purchased cocaine from Days in the past. Days was Rocker's drug dealer, but no one testified that Rocker was his only customer or that he had never sold to Banks. Indeed, although Rocker apparently made calls to arrange a cocaine buy from Days that night, no evidence suggested that Days was expecting to meet only Rocker—or, for that matter, that Rocker was the prospective buyer. All told, there was nothing to suggest that Banks was not an intended participant in the transaction from the start. Finally on this point, Butler did not testify that Rocker hid; rather, he lost sight of Rocker in the dark and did not know his whereabouts when the shooting occurred. But even if Rocker could be said to have hid, this does not mean that he was hiding from Days. It would have been perfectly reasonable for him to stand back in the shadows to avoid being observed while the younger Banks made an illegal drug purchase in a public place. Again, these circumstances were fully consistent with Rocker's theory of innocence; they did not undermine it in any way.

Finally, the dissent observes: "As the trial court noted, 'you don't go up to somebody that you're going to do a dope deal with and say where's the money at.' " The fallacy in this argument is plain to see: Rocker was not the one who said it. There was no evidence to show that he heard it said, and there was no evidence suggesting that he knew it would be said. That Banks demanded money from Days and then shot him simply did not refute the defense theory that Rocker's involvement was purely as the organizer of a drug transaction.

In sum, the three members of this panel have separately and meticulously combed through the record, and none of us has identified any evidence that

contradicted Rocker's theory of innocence. To the contrary, all of the circumstantial evidence—every last bit of it—was fully consistent with Rocker's innocence. Accordingly, we are duty bound to reverse his conviction.

VILLANTI, Judge, Dissenting.

I respectfully dissent because I disagree with the majority's conclusion that, as a matter of law, "the State failed to meet its burden of proving that Rocker intended for the predicate offense of robbery to be committed and that he assisted in the commission of the attempted robbery."

Rocker was convicted of first-degree murder as a principal on the theory that he aided and abetted Banks in the attempted robbery of the victim. To be a principal in a crime, a person " 'must have a conscious intent that the crime be done and must do some act or say some word which was intended to and does incite, cause, encourage, assist, or advise another person to actually commit the crime.' " State v. Tovar, 110 So. 3d 33, 36 (Fla. 2d DCA 2013) (quoting L.J.S. v. State, 909 So. 2d 951, 952 (Fla. 2d DCA 2005)). Because intent is a state of mind, it is rarely ascertainable by direct evidence, State v. Stenza, 453 So. 2d 169, 171 (Fla. 2d DCA 1984), and it is usually proven through inference and circumstantial evidence, Manuel v. State, 16 So. 3d 833, 835 (Fla. 1st DCA 2005).

When a conviction is based entirely upon circumstantial evidence, the sufficiency of the evidence is measured on appeal by a "special" standard of review. Bronson v. State, 926 So. 2d 480, 482 (Fla. 2d DCA 2006). "Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a

conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence." State v. Law, 559 So. 2d 187, 188 (Fla. 1989). The State does not have to conclusively rebut every possible variation of events which could be inferred from the evidence; it only has to introduce competent evidence inconsistent with the defendant's theory of events. Id. "The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine," and the jury's decision will not be reversed when there is substantial, competent evidence supporting it. Id.

" 'Under the circumstantial evidence standard, when there is an inconsistency between the defendant's theory of innocence and the evidence, when viewed in a light most favorable to the State, the question is one for the finder of fact to resolve and the motion for judgment of acquittal must be denied[.]' " Kocaker v. State, 38 Fla. L. Weekly S8, S12 (Fla. Jan. 3, 2013) (quoting Durousseau v. State, 55 So. 3d 543, 556-57 (Fla. 2010)); see also Orme v. State, 677 So. 2d 258, 262 (Fla. 1996) ("[T]he sole function of the trial court on motion for directed verdict in a circumstantial-evidence case is to determine whether there is prima facie inconsistency between (a) the evidence, viewed in the light most favorable to the State and (b) the defense theory or theories. If there is such inconsistency, then the question is for the finder of fact to resolve."). Stated another way, "[w]hether to grant a motion for judgment of acquittal hinges on the sufficiency of the evidence presented at trial and what factual findings the jury could 'fairly and reasonably infer' from that evidence." Grohs v. State, 944 So. 2d 450, 456 (Fla. 4th DCA 2006). I recognize that the State cannot defeat a motion for judgment of acquittal by accepting the defendant's uncontradicted theory of

the facts and simply arguing that a competing theory is equally reasonable. See Ginn v. State, 26 So. 3d 706, 710 (Fla. 2d DCA 2010). But that is not what happened in this case.

The issue in this case was Rocker's intent. Intent can be proven by a combination of surrounding circumstances from which the jury can reasonably infer the defendant's guilt. Salter v. State, 77 So. 3d 760, 763 (Fla. 4th DCA 2011) (stating that the question of a defendant's intent to participate in a crime is one for the jury). As this court has stated:

> "[A] trial court should rarely, if ever, grant a motion for judgment of acquittal based on the state's failure to prove mental intent." Hardwick v. State, 630 So. 2d 1212, 1214 (Fla. 5th DCA 1994) (quoting Brewer v. State, 413 So. 2d 1217, 1220 (Fla. 5th DCA 1982)). "Whether one had intent is generally a question given to a jury, for reasonable men may differ in determining intent when taking into consideration the surrounding circumstances." State v. Herron, 70 So. 3d 705, 706 (Fla. 4th DCA 2011).

Tovar, 110 So. 3d at 36; see also State v. Hurley, 676 So. 2d 1010, 1011 (Fla. 2d DCA 1996); Washington v. State, 737 So. 2d 1208, 1215-16 (Fla. 1st DCA 1999) (explaining that judgment of acquittal is rarely granted on the issue of intent "because proof of intent usually consists of the surrounding circumstances of the case [and] reasonable persons might differ as to facts tending to prove ultimate facts or inferences to be drawn from the facts").

In this case, the majority's approach disregards this admonition and decides the issue of intent by analyzing the facts of the case one by one, instead of *in toto* taking into account the surrounding circumstances. After analyzing the facts one by one, the majority opinion culminates in the conclusion that the State did not "present

any evidence indicating Rocker's intent." This conclusion ignores the fact that the State's evidence of all the circumstances surrounding the event is what the jury could legally rely on to find such an intent. See generally Tovar, 110 So. 3d at 36 (reversing judgment of acquittal after concluding that trial court had improperly "operat[ed] on its belief [of defendant's] version" of his intent and removed that credibility determination from the jury).

Here, the State met its burden of introducing evidence inconsistent with Rocker's hypothesis of innocence which would then allow the jury to infer his intent to commit the crime. That evidence showed that Rocker aided in commission of the attempted robbery by making repeated phone calls to the victim to get the victim to drive to the neighborhood—a neighborhood he neither lived in nor frequented. While Rocker was on the phone with the victim, Butler asked who he was talking to and Banks told him, "shush," to be quiet, which suggested that Rocker and Banks were working together to lure the victim. As the trial court noted in its ruling, a jury could conclude that this was evidence of "shushing the other guy . . . so the guy who is the object of the robbery doesn't know there's going to be multiple people there." Rocker and Banks brought a gun with them to Butler's home and were passing it back and forth, "fondling it." Right before they left Butler's house, they asked Butler if he wanted to "go handle something." Notably, although Rocker was the person who had purchased cocaine from the victim several times in the past, when the victim drove to the neighborhood Rocker did not approach the vehicle; he let Banks approach the victim and apparently

hid.[5] When Banks approached the victim, he did not ask the victim about drugs. Instead, Banks asked only, "Where the money at?" As the trial court noted, "you don't go up to somebody that you're going to do a dope deal with and say where's the money at." The shooting followed. These facts contradicted the defense theory that Rocker simply intended to purchase drugs that night and did not intend to participate in the victim's robbery. Finally, after the victim was shot, Rocker was seen running away from the scene with Banks. While mere presence at the scene, knowledge of the crime, and flight are insufficient to justify a conviction, elements of assistance of the perpetrator and intent may be proven by a combination of surrounding circumstances. Salter, 77 So. 3d at 763; T.S. v. State, 675 So. 2d 196, 198 (Fla. 4th DCA 1996). For example, evidence of a person's flight away from a crime scene is evidence of consciousness of guilt. Brown v. State, 85 So. 3d 1160, 1163 (Fla. 4th DCA 2012). Based on the totality of the evidence "a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt." Pagan v. State, 830 So. 2d 792, 803 (Fla. 2002). When viewed in context and *in toto*, as found by the trial court in performing its gatekeeping function, there was sufficient evidence that contradicted Rocker's theory that this was simply a consensual drug deal gone bad. Therefore, I conclude that the trial court did not err in denying Rocker's motion for judgment of acquittal, and I would affirm.

Finally, I note that in Knight v. State, 107 So. 3d 449 (Fla. 5th DCA 2013), the Fifth District recently made a compelling argument advocating that the supreme

[5]Of course, the only testimony to this fact comes from Butler, who was Rocker's childhood friend and who barely knew Banks. And this testimony seems to be contradicted by the State's evidence that Rocker had gunshot residue on his hands upon arrest while Banks did not. The upshot of this is that the jury in this case was properly permitted to assess the credibility of Butler's testimony—a credibility determination that should not be taken from it.

court abandon the use of a "special" circumstantial evidence standard of review in wholly circumstantial evidence cases. Knight also rejected the manner in which this court and other district courts have applied that "special" circumstantial evidence standard to state-of-mind elements such as knowledge, intent, or premeditation, and it certified conflict to the supreme court. Id. at 462-66. The Fifth District articulated the difficulty posed by applying this "special" standard of review to state-of-mind elements: "a person can always claim to have a different state of mind than his or her actions suggest. And, when you remove the role of the fact-finder (in the courtroom) and view the explanation solely as a logic exercise on a cold appellate record, the explanation will almost always appear plausible." Id. at 464. In fact, this case demonstrates the problem with applying this "special" standard of review to state-of-mind elements such as intent. Hence, I too would encourage the supreme court to reconsider Florida's use of the "special standard of review" in circumstantial evidence cases for all of the reasons discussed in Knight.