IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MARCUS CLAYTON, Appellant.	No. 40539-3-II UNPUBLISHED OPINION

Armstrong, J. — Marcus Clayton appeals his convictions for conspiracy to commit a theft and first degree felony murder, arguing that the evidence is insufficient to support the convictions. We affirm.

FACTS

On March 9, 2009, Marcus Clayton shot and killed Darryl Bracey in Bracey's apartment. Bracey was a cocaine addict, and Clayton, also known as "Smoke," was a crack dealer.

Earlier in the day, Celestine Nathan, one of Clayton's crack clients, called Clayton suggesting they steal from Bracey. Airreale McCowan,[1] a friend of Clayton's, heard Clayton say

[1] The State charged McCowan with first degree robbery as a principal and first degree murder under an accomplice theory. She testified at Clayton's trial under a plea agreement.

"[l]ick,"[2] "2Gs,"[3] and "how much." during the phone conversation. Report of Proceedings (RP) (Mar. 3, 2010) at 48. Clayton also asked, "What do I get out of it?" or "What's in it for me?" RP (Mar. 3, 2010) at 51-52; RP (Mar. 11, 2010) at 607. McCowan never heard Clayton specifically agree to the robbery plan.

Clayton and McCowan left to pick up Nathan, who wanted to purchase some drugs. Clayton often carried a gun in his car when selling crack and he had a gun in a backpack behind the driver's seat.

Clayton picked up Nathan and the three drove to Bracey's apartment. Nathan continued suggesting they steal from Bracey. She explained that Bracey was an easy mark, he was open to prostitution, and he kept a large sum of money in the apartment. Clayton asked if Bracey had a gun and Nathan explained that he kept one in the couch.

When they arrived at Bracey's apartment, Nathan went in with a small amount of cocaine. Clayton and McCowan then ran errands, returning to the apartment after Nathan called to confirm a sale. Nathan went out to the car and again suggested they rob Bracey, stating that the time was right. Nathan, Clayton, and McCowan went into the apartment where Clayton completed a drug sale to Bracey. The three left but the two women went back to the apartment to see if Bracey was interested in sex. After a while, Clayton also returned to the apartment.

Inside, Clayton told the women it was time to leave. McCowan and Nathan left, but Clayton stayed inside, closing the door behind the women. McCowan heard Bracey and Clayton

[2] "Lick" is slang for "robbery," but not necessarily a taking by violent action. RP (Mar. 3, 2010) at 49.

[3] "2Gs" is slang for "$2,000." RP (Mar. 3, 2010) at 49.

scuffling. Clayton testified that he released the safety on his gun as the door was shutting because Bracey was "tweaking"[4] and his eyes were darting around the room, which made Clayton nervous. RP (Mar. 11, 2010) at 521. Bracey stated, "[Y]ou ain't going to do it," and then grabbed a gun from the closet. RP (Mar. 11, 2010) at 522. Clayton wrestled with Bracey, and ultimately pulled his own gun up to Bracey's face and fired.

Clayton took Bracey's gun, stepped out of the apartment door, and said, "[H]e's dead." RP (Mar. 3, 2010) at 67. The women re-entered the apartment and began taking items. Clayton put the guns in the trunk of his car and returned to wipe down the apartment. When McCowan returned to the car, it was unlocked with the keys in the ignition, which was unusual. McCowan and Clayton spent the night at Stephanie Dennis's home, Clayton's sister. They returned to Bracey's apartment during the night where Clayton further wiped down the apartment.

Clayton gave his gun to someone in Seattle and tried to sell Bracey's gun to a friend, Quayvis Thomas, where Clayton and McCowan spent the next night. The police later found Bracey's gun in a coat pocket in Thomas's closet.

While being booked, Clayton volunteered that he "cannot believe this is happening." RP (Mar. 2, 2010) at 113. He also said he needed to ask God for forgiveness because God was the

[4] "Tweaking" is when the user is in a highly irritable and paranoid state. A "tweaker" may initially appear normal, but a close look at the eyes shows rapid eye movement (10 times faster than normal) and jerky movements generally. University of Maryland, Methamphetamine, Center for Substance Abuse Research, http://www.cesar.umd.edu/cesar/drugs/meth.asp (last updated Oct. 18, 2005) (the web site discusses "tweaking" only in reference to methamphetamine addicts).

only one he had to answer to about this situation. Later, he volunteered that "it wasn't supposed to go down that way," that he did not even know Bracey, that he thought he was fighting for his life, and that "[h]e [Bracey] was on drugs and coming at me." RP (Mar. 10, 2010) at 447, 451. Finally, Clayton stated, "I can't even claim self-defense. I was in his house." RP (Mar. 11, 2010) at 527.

When the police asked McCowan why Clayton had closed the door after the women left the apartment, she said, "[Clayton] went in [to the apartment] by himself to rob [Bracey]." RP (Mar. 10, 2010) at 438.

Police officers testified that the apartment appeared to be rifled through. For example, the closet by the front door had items falling out of it and strewn around the area. The officers discovered an empty gun holster in the living room area and a loaded ammunition magazine in the bedroom. Bracey's body was in the front hallway area with his pants down around his ankles. The medical examiner testified that Bracey died from a gunshot wound to his head and showed no defensive wounds on his hands or otherwise.

In a recorded phone call from jail, Clayton said he had a plan that night and nothing went according to the plan. In another call, he said he was not acting in self-defense when he shot Bracey.

The jury found Clayton guilty of felony murder during the course of a robbery and criminal conspiracy to commit theft.[5] The jury also answered yes to the special verdicts regarding count I (felony murder), finding that Clayton was armed with a firearm at the time of the robbery

[5] The State also charged Clayton with unlawful possession of firearms, possession of a stolen firearm, and tampering with a witness. The jury acquitted Clayton of tampering with a witness. The convictions regarding firearms are not at issue here.

and the robbery was in the first degree.

ANALYSIS

I. Sufficiency of the Evidence

We test the sufficiency of the evidence by asking whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). In reviewing a sufficiency challenge, we draw all reasonable inferences from the evidence in the State's favor. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Raleigh*, 157 Wn. App. 728, 736-37, 238 P.3d 1211 (2010), *review denied*, 170 Wn.2d 1029 (2011).

A. Conspiracy to Commit Theft

Clayton argues that the State failed to prove that he conspired to commit theft because it did not show that he agreed with Nathan to commit the theft.

> A person is guilty of criminal conspiracy when, with intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement.

RCW 9A.28.040(1). A theft occurs when a person "wrongfully obtain[s] or exert[s] unauthorized control over the property . . . of another . . . ." RCW 9A.56.020(a).

"[T]he essence of a conspiracy is the *agreement* to commit a crime." *State v. Pacheco*, 125 Wn.2d 150, 156, 882 P.2d 183 (1994) (emphasis added) (citing *State v. Dent*, 123 Wn.2d 467, 476, 869 P.2d 392 (1994)). But the State is not required to prove a formal agreement

between the conspirators. *State v. Casarez-Gastelum*, 48 Wn. App. 112, 116-17, 738 P.2d 303 (1987) (quoting *Marino v. United States*, 91 F.2d 691, 693-98 (9th Cir. 1937)). Instead, the State must show only a "'concert of action, all the parties working together understandingly, with a single design for the accomplishment of a common purpose.'" *Casarez-Gastelum*, 48 Wn. App. at 116-17 (quoting *Marino*, 91 F.2d at 693-98). The State may prove such "concert of action" through circumstantial evidence such as the conduct of the conspirators. *Casarez-Gastelum*, 48 Wn. App. at 116-17 (citing *Marino*, 91 F.2d at 693-98.

Division I upheld a conspiracy conviction where the defendant (1) transported another to a drug deal, knowing the person intended to sell drugs and (2) supported the drug transaction by endorsing the drug quality. *State v. Smith*, 65 Wn. App. 468, 473, 828 P.2d 654 (1992). In *Smith*, Erickson set up a drug deal with an undercover police officer. *Smith*, 65 Wn. App. at 469. Erickson asked the defendant for a ride to meet up with another friend, but with the understanding that they would first stop to make a drug sale. *Smith*, 65 Wn. App. at 469-70. The defendant, wanting to visit the friend, took Erickson to the meeting place for the drug transaction. *Smith*, 65 Wn. App. at 469-70. During the discussion between Erickson and the undercover officer, the defendant was asked about the quality of the drugs. *Smith*, 65 Wn. App. at 470. Although the defendant denied having any personal knowledge, he stated that his wife had used the drugs and they produced the desired effect. *Smith*, 65 Wn. App. at 470. The court reasoned that although the defendant's primary purpose (visit a friend) was legal, it did not negate his secondary purpose (facilitate the drug deal), which was illegal. *Smith*, 65 Wn. App. at 472-73.

Although the State never proved that Clayton explicitly agreed to steal from Bracey, his

conduct supports the conviction for conspiracy to commit a theft. During the phone conversation, Nathan explained that Bracey would be an easy target and that she wanted to steal from him. Clayton asked Nathan "[w]hat's in it for me." RP (Mar. 3, 2010) at 51-52. Clayton also used the terms "lick" (robbery), and "2Gs" ($2,000). RP (Mar. 3, 2010) at 48. Clayton then picked up Nathan and took her to Bracey's apartment. During the trip, Nathan reiterated her belief that Bracey was an easy mark and that they should steal from him. Clayton asked about Bracey's gun. Then when Clayton returned to the apartment the second time, Nathan again suggested the robbery. Clayton took his gun from the back seat and put it in his coat pocket. When Clayton returned to the apartment to tell the women to leave, he entered and closed the door; the drug sale was complete and Bracey had showed no interest in the offered sex. The jury could have reasonably inferred that Clayton's only remaining purpose was to rob Bracey. That Clayton left the car unlocked with the keys in the ignition supports an inference he intended the robbery and planned for a quick getaway. Finally, Clayton took Bracey's gun immediately after shooting him.

Clayton points to McCowan's belief that they visited Bracey to sell him drugs. But a defendant can have dual purposes that do not negate the conspiracy. *See Smith*, 65 Wn. App. at 472-73. Also, we construe the evidence in the State's favor and defer to the jury on all decisions affecting credibility and the persuasive force of the evidence. *Raleigh*, 157 Wn. App. at 736-37. Doing so here, we conclude that the evidence is sufficient to support Clayton's conspiracy conviction.

B. Murder in the Course of a Robbery

Clayton also argues that the State failed to prove the first degree felony murder charge because it did not show that he "independently intended to commit a robbery before or during the shooting." Br. of Appellant at 13-14. Additionally, Clayton argues that the State did not show that the robbery and shooting were part of the same transaction.

First degree felony murder requires the State to prove two elements: "(1) a homicide; (2) committed 'in the course of or in furtherance of . . . or in immediate flight' from a robbery." *State v. Bottrell*, 103 Wn. App. 706, 718, 14 P.3d 164 (2000) (quoting RCW 9A.32.030(1)(c)).[6] To prove first degree felony murder, the State must show that the person "committed or attempted to commit a predicate felony *and* that he or she, or a coparticipant, committed homicide in the course of commission of the felony." *State v. Carter*, 154 Wn.2d 71, 80, 109 P.3d 823 (2005). Thus, the State must prove all the elements of the predicate felony. *State v. Quillin*, 49 Wn. App. 155, 164, 741 P.2d 589 (1987) (citing *State v. Gamboa*, 38 Wn. App. 409, 412, 415, 685 P.2d 643 (1984)).

"Robbery" is defined as:

> A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property . . . Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking . . . Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the

[6] RCW 9A.32.030(1)(c) defines the crime of first degree felony murder:

> (1) A person is guilty of murder in the first degree when:
> . . . .
> (c) He or she commits or attempts to commit the crime of either (1) robbery in the first or second degree . . . and in the course of or in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants . . . .

> knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

Former RCW 9A.56.190 (1975). One of the elements of robbery is "[i]ntent to deprive the victim of the property . . . ." *Quillin*, 49 Wn. App. at 164-65.

Clayton contends that the State failed to prove that he conspired to commit theft or that he "independently intended to commit a robbery before or during the shooting." Br. of Appellant at 13-14. But as we have just discussed, the evidence was sufficient to prove conspiracy to commit theft. Moreover, the evidence was also sufficient to prove that Clayton "independently intended to commit a robbery." When Clayton last entered the apartment, he had his gun with him, he closed the door after the women stepped out, the drug sale had been completed, and Bracey had declined sex. Thus, the jury could infer that Clayton's last entry before the killing was to rob Bracey.

To prove felony murder, the State must show that the predicate felony and murder are not separate and distinct acts. *State v. Temple*, 5 Wn. App. 1, 7, 485 P.2d 93 (1971). But it is immaterial when the homicide occurs, as long as the death occurred in connection with the predicate felony. *State v. Craig*, 82 Wn.2d 777, 783, 514 P.2d 151 (1973). "A homicide is committed in connection with the perpetration of a felony if it is in 'close proximity in terms of time and distance between the felony and the homicide and there was no break in the chain of events from the inception of the felony to the time of the homicide.'" *Bottrell*, 103 Wn. App. at 720 (quoting Charles E. Torcia, 2 Wharton's Criminal Law § 150, at 312-14 (15th ed. 1994)). That the shooting occurred before the theft does not make the incidents separate and distinct. *Temple*, 5 Wn. App. at 7-8.

Here, the "taking" occurred immediately after Clayton shot Bracey. But a "taking" after the use of force does not break the chain of events connecting the homicide and the underlying felony. *Bottrell*, 103 Wn. App. at 720. We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Quinn-Brintnall, J.

Penoyar, C.J.