

No. 36590-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

HENRY Q. MARSHALL,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY *[Signature]* DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Christine A. Pomeroy, Judge
Cause No. 07-1-00689-7

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the defendant's conviction for conspiracy to commit theft in the first degree merged with his conviction for arson in the first degree.

2. Whether the defendant was provided ineffective assistance of counsel for failing to argue that the convictions for conspiracy to commit theft in the first degree and arson in the first degree merged.

3. Whether there was sufficient evidence to support the defendant's conviction for conspiracy to commit theft in the first degree.

B. STATEMENT OF THE CASE.

The State accepts Marshall's statement of the case.

C. ARGUMENT.

1. Marshall's conviction for conspiracy to commit theft in the first degree does not merge with his conviction for arson in the first degree.

The Washington constitution provides the same protection against double jeopardy as does the federal double jeopardy clause. State v. Womac, 160 Wn.2d 643, 650, 160 P.3d 40 (2007). Washington adheres to the "same evidence" rule first adopted in 1896. The "same evidence" test is similar to that articulated in Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). This rule controls unless the legislature clearly

indicated that multiple punishments were not intended. Womac, *supra*, at 652.

The first tool of statutory construction is to inquire whether the offenses are the same both in law and in fact. If so, conviction for both offenses violates double jeopardy. If they are not the same in law, there is a strong presumption that the legislature intended separate punishment for each offense, even if they are committed by a single act. . . . This presumption "should be overcome only by clear evidence of contrary intent."

State v. Cole, 117 Wn. App. 870, 875, 73 P.3d 411 (2003), (cites omitted).

Marshall cites to State v. Johnson, 92 Wn.2d 671, 600 P.2d 1249 (1979), for the holding that when a person is convicted of two or more crimes stemming from the same set of facts, even if the crimes are not "included" offenses, only one conviction can stand unless the other involves an injury separate and distinct from the first. In Johnson, the defendant was convicted of first degree kidnapping, first degree rape, and first degree assault, all from the same conduct of restraining, threatening, and raping two teen-age girls. The court held that the kidnapping and assault were only incidental to the rapes, and did not add any injury.

In Marshall's case, however, he was charged with first degree arson as an accomplice and with conspiracy to commit first

degree theft. [CP 6-7] Conspiracy is viewed differently from the underlying crime itself. "A conspiracy has been defined as 'a partnership in criminal purposes. The gist of the crime is the confederation or combination of minds.'" State v. Dent, 123 Wn.2d 467, 475, 869 P.2d 392 (1994).

Conspiracy focuses on the additional dangers inherent in group activity. In theory, once an individual reaches an agreement with one or more persons to perform an unlawful act, it becomes more likely that the individual will feel a greater commitment to carry out his original intent, providing a heightened danger.

Dent, *supra*, at 476.

[T]he appropriate focus in Washington is on the conspiratorial agreement, not the specific criminal object or objects. . . . Additionally, conspiracy is an inchoate crime. To obtain a conviction, all a prosecutor needs to prove is that the conspirators agreed to undertake a criminal scheme and that they took a substantial step in furtherance of the conspiracy. . . . The defendant need not commit any other crime. . . .

Considering the Legislature is presumed to be familiar with its rules, its prior legislation, and prior court decisions pertaining to double jeopardy, we conclude the Legislature intended the unit of prosecution for conspiracy, within the meaning of double jeopardy, to be an agreement and an overt act rather than the specific criminal objects of the conspiracy.

State v. Bobic, 140 Wn.2d 250, 265, 996 P.2d 610 (2000).

Convictions for criminal conspiracy and accomplice liability have separate elements and do not meet the Blockburger analysis for double jeopardy.

Criminal conspiracy requires an element of intent, while accomplice liability requires a lesser culpable state of knowledge. Likewise, accomplice liability requires a completed crime, while criminal conspiracy requires only proof that one of the conspirators took a substantial step toward the commission of the agreed crime, which can consist of mere preparatory conduct.

State v. Gocken, 127 Wn.2d 95, 109, 896 P.2d 1267 (1995). In Gocken, Mistie Crisler (the appellant in a case consolidated with Gocken's), along with another woman, shoplifted a substantial amount of clothing from a Lamonts store; the value was determined to be over \$250 because as she was being chased from the store she dropped the clothing. She was charged in district court with misdemeanor criminal conspiracy, to which she plead guilty. Subsequently, she was charged in superior court with second degree theft arising from the same incident. She was convicted at trial, at which the accomplice instruction was given to the jury. She claimed double jeopardy. The Supreme Court held that "Const. art. I, § 9 does not bar a prosecution for accomplice liability to second-degree theft subsequent to a conviction for criminal conspiracy." Gocken, *supra*, at 109.

In this case, the situation is very similar. Marshall was convicted of conspiracy to commit first degree theft. This conviction should not merge because it is the conspiracy itself that is the crime. It is irrelevant whether he or any of his codefendants actually accomplished the theft, only that there was an agreement to do so and any one of the conspirators took a substantial step in pursuance of that agreement. A conspiracy is completed before the underlying crime is committed. Here the jury could have reasonably found that the object of the entire plot was theft—to defraud the insurance company. All of the conspirators took substantial steps—the car did get burned, it was reported stolen, and an insurance claim was filed.

“Substantial step” has more than one definition, and in this case the court instructed the jury on the wrong one. WPIC 110.03 sets forth the definition to be used when criminal conspiracy is charged:

A substantial step is conduct of the defendant which strongly indicates a criminal purpose.¹

WPIC 100.05 sets forth the definition to be used in attempt cases:

¹ RCW 9A.28.040(1). 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.

A substantial step is conduct which strongly indicates a criminal purpose and which is more than mere preparation.²

The Supreme Court approved this difference in Dent:

We agree that the conspiracy statute requires a lesser act than does the attempt statute. We are particularly persuaded by the fact that RCW 9A.28.040 requires only an act that is a “substantial step in pursuance of [the] agreement” as opposed to a “substantial step toward the commission of the crime”. RCW 9A.28.020. We hold that preparatory conduct which furthers the ability of the conspirators to carry out the agreement can be “a substantial step in pursuance of [the] agreement”. Therefore, we hold that the trial court properly refused to instruct the jury that the “substantial step” element of a conspiracy requires more than mere preparation.

Dent, *supra*, at 477.

The jury in Marshall's case was given WPIC 100.05, the one that applies in attempt cases. [CP 43] Under the law of the case doctrine, if the State does not object to the jury instructions, and here the State did not [RP 44], an appellate court treats them as the law on appeal. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). Marshall was clearly not prejudiced by this error, because it raised the State's burden of proof. Even under that higher standard, however, the State more than met its burden by

² RCW 9A.28.020(1). A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.

establishing that there was a conspiracy and that acts which were more than “mere preparation” were carried out by every one of the conspirators. Marshall was tried under the accomplice liability theory [Instructions 9 and 13, CP 30, 34, RP 62]. It was only necessary to prove that any one of the group did such an act. They all did more than mere preparation; they actually committed the crime.

The legislature has made it clear that conspiracy is to be punished separately and in addition to other crimes. Conspiracy to commit first degree theft and first degree arson have different elements, as Marshall points out in his brief, and thus do not pass the same evidence test. By all of the tests used to examine convictions for double jeopardy violations, Marshall’s convictions pass muster.

2. Marshall did not receive ineffective assistance of counsel because his trial attorney failed to argue double jeopardy.

Marshall correctly states the law to be applied in determining whether counsel was ineffective. Because the double jeopardy argument is incorrect, his counsel was not ineffective for failing to raise it.

3. There was sufficient evidence to support Marshall’s conviction for conspiracy to commit theft in the first degree.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

“[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” (Cite omitted.) This inquiry does not require a reviewing court to determine whether *it* believes the evidence at trial established guilt beyond a reasonable doubt. “Instead, the relevant question 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*. (Cite omitted, emphasis in original.)

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” Salinas, *supra*, at 201. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). It is the function of the fact finder, not the appellate court, to discount theories which are determined to be unreasonable in light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

Marshall argues that the State was required to prove that he knew that the Isuzu Rodeo was actually owned by the bank when he agreed to burn it. That is not the case. The State has to prove that he intended that “conduct constituting a crime be performed.” RCW 9A.28.040. Marshall admits that he agreed to assist in burning the vehicle, and in fact, did assist.

The jury heard testimony from Shawn Leras, Marshall’s erstwhile roommate, who said Marshall told him before the Isuzu was burned that “they” were going to get rid of a vehicle and do insurance fraud. [RP 10-11] In his first recorded statement made to Detective Haller, Marshall said that he agreed to help Paul Zamora strip and burn a vehicle, and “I did know it was wrong.”

[Exhibit 8, p. 3] Later in the same interview, he said, "I was slightly under the impression that it might have been stolen, I wasn't for sure." [Exhibit 8, p. 4] In his second recorded interview with the detective, Marshall makes reference to a conversation with his co-conspirators following the fire, in which Paul was concerned that they could all get into trouble. That did not appear to be news to Marshall. [Exhibit 7, p. 7]

The jury also heard, by way of Marshall's recorded statements, that his friend John Wilkerson, for no reason other than he didn't like the Isuzu Rodeo any longer, asked Marshall's help in getting rid of it. He enlisted Paul Zamora, who, along with Paul's wife Jennifer, took the car to a deserted area off the Yelm Highway, removed the wheels and tires from the Isuzu (everything else of value may have already been stripped off the car [Exhibit 8, p. 5]), poured lighter fluid on it, and set it afire. [Exhibit 7] A jury weighs the evidence as it sees fit, and makes its own credibility determinations. Presumably none of the jurors were born yesterday, and it strains credulity to the breaking point to conclude that Wilkerson wanted his car stripped and burned just so he could avoid the hassle of selling it, or that Marshall believed that to be true. Having called it insurance fraud when speaking with Shawn

Leras, it is unlikely he then suffered amnesia about the reasons for destroying the car. It doesn't matter if Marshall knew who the victim would be—he apparently believed it would be the insurance company—only that he knew somebody was going to be suffering the loss, and it wasn't going to be Wilkerson. The jury was entitled to find that no one is so naïve or dim-witted as to believe that he did not know he was conspiring to commit theft.

Taking the evidence, along with the reasonable inferences therefrom, in the light most favorable to the State, there was ample evidence to support the conviction for conspiracy to commit the crime of first degree theft. Marshall does not challenge the value of the vehicle, or the evidence that Wilkerson did, in fact, report the car stolen and file an insurance claim. The State does not have to prove that the insurance proceeds would equal or exceed the value of the car. It only has to prove, and did, that Marshall knew that somebody other than Wilkerson was going to lose more than \$1500 worth of interest in the car.

D. CONCLUSION.

The crimes of arson in the first degree and conspiracy to commit theft in the first degree do not merge, and thus there is no double jeopardy violation. Marshall's trial counsel was not

ineffective for failing to raise the double jeopardy issue. There was sufficient evidence to support the conviction for conspiracy to commit first degree theft. For all the reasons argued above, the State respectfully asks this court to affirm Marshall's convictions.

Respectfully submitted this 9th of April, 2008.

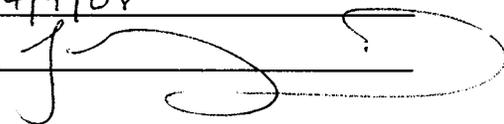


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A copy of this document was properly addressed and mailed, postage prepaid, to the following individual(s) on April 9, 2008.

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I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: 4/9/08
Signature: 

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