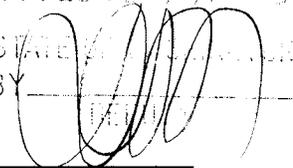


COURT OF APPEALS  
DIVISION II

No. 40539-3-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

FILED 15 JUN 19  
STATE OF WASHINGTON  
BY 

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STATE OF WASHINGTON,

Respondent,

vs.

MARCUS THADDEUS CLAYTON,

Appellant.

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On Appeal from the Pierce County Superior Court  
Cause No. 09-1-01363-4  
The Honorable Frank Cuthbertson, Judge

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OPENING BRIEF OF APPELLANT

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## TABLE OF CONTENTS

<b>I.</b>	<b>ASSIGNMENTS OF ERROR.....</b>	<b>1</b>
<b>II.</b>	<b>ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR.....</b>	<b>1</b>
<b>III.</b>	<b>STATEMENT OF THE CASE.....</b>	<b>2</b>
	<b>A. PROCEDURAL HISTORY .....</b>	<b>2</b>
	<b>B. SUBSTANTIVE FACTS.....</b>	<b>4</b>
<b>IV.</b>	<b>ARGUMENT &amp; AUTHORITIES.....</b>	<b>8</b>
	<b>A. THE STATE FAILED TO PROVE THAT CLAYTON CONSPIRED WITH NATHAN AND MCCOWAN TO COMMIT A THEFT .....</b>	<b>9</b>
	<b>B. THE STATE FAILED TO PROVE THAT CLAYTON KILLED BRACEY IN THE COURSE OF, IN THE FURTHERANCE OF, OR IN IMMEDIATE FLIGHT FROM A ROBBERY.....</b>	<b>13</b>
<b>V.</b>	<b>CONCLUSION .....</b>	<b>16</b>

## TABLE OF AUTHORITIES

### CASES

<u>City of Tacoma v. Luvene</u> , 118 Wn.2d 826, 827 P.2d 1374 (1992).....	8
<u>State v. Bottrell</u> , 103 Wn. App. 706, 14 P.3d 164 (2000) .....	14
<u>State v. Casarez-Gastelum</u> , 48 Wn. App. 112, 738 P.2d 303 (1987) .....	10
<u>State v. Craig</u> , 82 Wn.2d 777, 514 P.2d 151 (1973).....	14
<u>State v. McGonigle</u> , 144 Wn. 252, 258 P. 16 (1927).....	10
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	9
<u>State v. Smith</u> , 65 Wn. App. 468, 828 P.2d 654 (1992) .....	10, 11

### OTHER AUTHORITIES

Blacks Law Dictionary 6th Edition at 66 (1990) .....	9
RCW 9A.28.040.....	9
RCW 9A.32.030.....	13
RCW 9A.56.190.....	13

## **I. ASSIGNMENTS OF ERROR**

1. The State failed to prove beyond a reasonable doubt all of the essential elements of the crime of conspiracy.
2. The State failed to prove beyond a reasonable doubt that Marcus Clayton conspired to commit a theft.
3. The State failed to prove beyond a reasonable doubt all of the essential elements of the crime of first degree murder.
4. The State failed to prove beyond a reasonable doubt that Marcus Clayton shot Darryl Bracey in the course of, in the furtherance of, or in immediate flight from a robbery.
5. The trial court erred when it denied Marcus Clayton's motion to dismiss the murder and conspiracy charges because of insufficient evidence.

## **II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Where the State's evidence showed that Celestine Nathan continually encouraged Marcus Clayton to commit a theft, but that Marcus Clayton never agreed to a theft and largely ignored Celestine Nathan's comments, did the State fail to prove beyond a reasonable doubt that Marcus Clayton conspired to commit a theft? (Assignments of Error 1, 2, & 5)

2. Where the State's evidence did not establish that Marcus Clayton conspired to commit a theft, and did not establish that he independently intended to commit a robbery before or during the shooting of Darryl Bracey, did the State fail to prove beyond a reasonable doubt that Marcus Clayton shot Darryl Bracey in the course of, in the furtherance of, or in immediate flight from a robbery? (Assignments of Error 3, 4, & 5)

### **III. STATEMENT OF THE CASE**

This case arises from the death of Darryl Bracey, who was shot in his apartment after purchasing drugs from Marcus Clayton. (03/11/10 RP 512-13, 522, 523)<sup>1</sup> Clayton admitted to shooting Bracey, but argued that he did so in self-defense. (03/11/10 RP 522, 523) Clayton also denied the State's charge that he and his friends, Airreale McCowan and Celestine Nathan, conspired to steal from Bracey before the shooting. (03/11/10 RP 526)

#### **A. PROCEDURAL HISTORY**

The State charged Marcus Thaddeus Clayton with: (1) murder in the first degree, while committing or attempting to commit

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<sup>1</sup> Citations to the transcripts will be to the date of the proceeding followed by the page number.

the crime of first degree robbery, and while armed with a firearm (RCW 9A.32.030, 9A.08.020, 9.94A. 530); (2) conspiracy to commit first degree theft (RCW 9A.56.020, 9A.28.040); (3) two counts of second degree unlawful possession of a firearm (RCW 9.41.040); (4) possession of a stolen firearm (RCW 9A.56.140); (5) theft of a firearm (RCW 9A.56.020, 9A.56.300); and (6) tampering with a witness (RCW 9A.72.120). (CP 80-83)

The trial court denied Clayton's half-time motion to dismiss the murder, conspiracy, and tampering charges. (03/10/10 RP 478-93) The jury found Clayton not guilty of the tampering charge, but guilty on all the remaining charges. (03/16/10 RP 758-59; CP 338-48)

At sentencing, the parties and court agreed that the theft of a firearm charge and possession of a stolen firearm charge merged for sentencing purposes, and that Clayton's offender score was five points for the murder and conspiracy convictions and three points for the remaining convictions. (04/02/10 RP 3-11; CP 341) The trial court sentenced Clayton within his standard range to a total of 434 months of confinement. (04/02/10 RP 11; CP 344-45) This appeal timely follows. (CP 452)

B. SUBSTANTIVE FACTS

Marcus Clayton and Airreale McCowan met in November of 2008 and briefly dated. (03/03/10 RP 30-31) Clayton, who was 21 at the time, was involved in selling drugs, primarily crack cocaine. (03/03/10 RP 43, 03/10/10 497) Celestine Nathan was one of Clayton's customers. (03/03/10 RP 35; 03/10/10 RP 497) Nathan was a frequent drug user, and neither Clayton nor Nathan's own family members felt she was trustworthy. (03/01/10 RP 100, 113; 03/10/10 RP 503, 504)

On March 9, 2009, Nathan called Clayton and told him that they could do an easy "lick" (robbery) on her friend Daryl Bracey, who was also a drug user, and who always kept about "2G" (two thousand dollars) in cash stashed in his apartment. (03/03/10 RP 48-49, 55) At first Clayton discussed the idea and asked Nathan "what's in it for me?" (03/03/10 RP 51) McCowan told investigators that Clayton ultimately responded to Nathan's proposal by saying: "No. No. No. No. No. No. No." (03/03/10 RP 118-19; 03/10/10 RP 434) At trial, McCowan could not remember whether he specifically said "no" to Nathan, but is certain that he never specifically said

“yes.”<sup>2</sup> (03/03/10 RP 118-19, 138)

Nathan still wanted to buy drugs, and said Bracey might want to buy some too, so Clayton and McCowan drove to Nathan’s house to pick her up. (03/03/10 RP 53, 54, 95-96; 03/10/10 RP 501, 502) Once in Clayton’s car, Nathan continued talking about wanting to steal from Bracey. (03/03/10 RP 55) She told Clayton that Bracey was an “easy mark” because he smoked crack, liked prostitutes, and kept all of his valuables in a metal lockbox. (03/03/10 RP 55) Nathan also told Clayton that Bracey kept a gun under his couch. (03/03/10 RP 56, 58)

Clayton did not respond to Nathan’s ramblings. (03/03/10 RP 104; 03/10/10 RP 503, 504) Clayton drove Nathan to Bracey’s apartment and then he and McCowan left, assuming that Nathan would contact him if Bracey wanted to purchase any drugs. (03/03/10 RP 56; 03/10/10 RP 502, 505; 03/11/10 RP 510) A short time later, Nathan called Clayton and told him that Bracey wanted to purchase \$100 worth of crack cocaine. (03/03/10 RP 58; 03/11/10 RP 511) Clayton and McCowan returned to Bracey’s

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<sup>2</sup> McCowan was originally charged as an accomplice to the murder and robbery of Darryl Bracey, but subsequently entered into an agreement to testify against Clayton in exchange for a reduction in the charges and a guilty plea to one count of first degree robbery. (03/03/10 RP 43, 44)

apartment, and Nathan came outside and got into Clayton's car. (03/03/10 RP 58; 03/11/10 RP 512)

Nathan again started talking about stealing from Bracey, and told Clayton that this moment would be a good time to do it. (03/03/10 RP 58-59; 03/11/10 RP 514) Clayton ignored Nathan, and told her that he needed a place to cut the crack cocaine for Bracey. (03/03/10 RP 59; 03/11/10 RP 512, 514) The threesome walked into Bracey's apartment, and Clayton went into the bathroom to cut the cocaine. (03/03/10 RP 59, 60)

Clayton returned to the living room, where he and Bracey exchanged the drugs for money. (03/03/10 RP 59, 60) They all sat in the living room and chatted for a few minutes, then Clayton, McCowan and Nathan left. (03/03/10 RP 60) As they walked towards the car, Nathan continued to urge Clayton to rob Bracey. (03/03/10 RP 61)

Nathan and McCowan decided to stay at Bracey's for a while, but Clayton sat and waited in his car. (03/03/10 RP 63, 03/11/10 RP 516) McCowan thought that Bracey might be interested in paying her for sex, so she decided to undress and take a shower. (03/03/10 RP 64; 03/10/10 RP 436, 437) Bracey did not follow her into the shower, so she got dressed and rejoined

Bracey and Nathan in the living room. (03/03/10 RP 64) McCowan noticed that Bracey and Nathan were “bickering,” and Bracey seemed “fidgety.” (03/03/10 RP 64)

Clayton knocked on the door, and Bracey let him back into the apartment. (03/03/10 RP 64, 65; 03/11/10 RP 517) Clayton told McCowan and Nathan that it was time to leave, and the two women walked out the door. (03/03/10 RP 65; 03/11/10 RP 519, 520) According to McCowan, as she and Nathan stepped outside, Clayton closed the door but remained inside the apartment. (03/03/10 RP 65) She heard a short scuffle, then a pop that sounded like a gunshot. (03/03/10 RP 66) Then Clayton opened the door and said: “he’s dead.” (03/03/10 RP 67)

According to Clayton, after he entered the apartment and the women left, the door closed on its own and he noticed that Bracey seemed to be “tweaking.” (03/11/10 RP 519, 521) Clayton was nervous because he did not know Bracey well, and Bracey was acting strange. (03/11/10 RP 521-22) Clayton had a gun inside his jacket pocket, so he reached in and disabled the safety trigger as a precaution. (03/11/10 RP 521-22) Clayton believed Bracey heard the click of the safety trigger, because at that moment Bracey said “you ain’t going to do it,” then lunged towards the closet door,

reached inside, and grabbed his own gun. (03/11/10 RP 522) Clayton and Bracey began wrestling and fell to the ground. (03/11/10 RP 522) Clayton testified that he felt Bracey's gun against his forehead, so he fired his own gun and shot Bracey in the face. (03/11/10 RP 522-23) Clayton picked up Bracey's gun, and walked out of the apartment. (03/11/10 RP 524)

Clayton walked directly to his car, but McCowan and Nathan went back inside and began grabbing Bracey's belongings. (03/03/10 RP 67, 68; 03/11/10 RP 524) McCowan testified that it was Nathan's idea to go back inside. (03/03/10 RP 68)

The threesome drove away, and Clayton dropped off Nathan after giving her some additional crack. (03/03/10 RP 72, 73) Clayton and McCowan spent the night at a friend's house, but were apprehended and taken into custody on March 11. (03/02/10 RP 44-45, 55, 56; 03/03/10 RP 76, 82)

#### **IV. ARGUMENT & AUTHORITIES**

"Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt." City of Tacoma v. Luvene, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to

support a conviction only 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). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” Salinas, 119 Wn.2d at 201.

A. THE STATE FAILED TO PROVE THAT CLAYTON CONSPIRED WITH NATHAN AND MCCOWAN TO COMMIT A THEFT

RCW 9A.28.040(1) provides: “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.” The statute does not define the term “agrees” or “agreement.”

Blacks Law Dictionary defines “agree” as “[t]o concur; come into harmony; give mutual assent; unite in mental action[.]” and defines “agreement” as “[a] meeting of two or more minds; a coming together in opinion or determination; the coming together in accord of two minds on a given proposition.” BLACKS LAW DICTIONARY 6TH EDITION at 66, 67 (1990). Thus, “[t]he gist of the

crime is the confederation or combination of minds.” State v. Casarez-Gastelum, 48 Wn. App. 112, 116, 738 P.2d 303 (1987) (quoting Marino v. United States, 91 F.2d 691, 694, 113 A.L.R. 975 (9th Cir.1937)).

However, to prove a conspiracy, it is not necessary to show a formal agreement. State v. Smith, 65 Wn. App. 468, 471, 828 P.2d 654 (1992). A conspiracy “may be proven by showing the declarations, acts and conduct of the conspirators.” State v. McGonigle, 144 Wn. 252, 260, 258 P. 16 (1927) (quoting State v. Ryan, 47 Or. 338, 82 P. 703 (1905)). The agreement may be shown by 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 (quoting Marino, 91 F.2d at 694).

For example, in Smith, Bruce Erickson agreed to sell LSD to an undercover narcotics officer, and arranged to meet the officer at a parking lot in Snohomish. 65 Wn. App. at 469. Erickson asked his friend, Brian Smith, to give him a ride from Everett to Snohomish so that he could meet the officer, and also visit a friend named David Hensler. 65 Wn. App. at 469. Smith agreed to give Erickson a ride knowing Erickson’s plan because he too wanted to

see Hensler. 65 Wn. App. at 469, 470.

Smith drove Erickson to his prearranged meeting spot, and was present in the car when Erickson completed the drug sale to the undercover officer. Smith, 65 Wn. App. at 470. Smith and Erickson were both arrested, and Smith was eventually convicted of conspiracy to deliver a controlled substance. 65 Wn. App. at 470.

On appeal, Smith argued that the State failed to prove a conspiracy. Smith, 65 Wn. App. at 471. Division 1 disagreed, stating:

By agreeing to drive Erickson to Snohomish with prior knowledge that the purpose of Erickson's trip was to sell LSD, Smith agreed to engage in the delivery. That the trip also satisfied Smith's own primary purpose of meeting up with Hensler does not negate the agreement and concerted action.

65 Wn. App. at 472-73.

Thus, in Smith, Erickson had a firm plan in place and expressed his plan to Smith. In Division 1's opinion, Smith became a co-conspirator because he agreed to aid Erickson in the commission of Erickson's plan. But here, unlike in Smith, Clayton did not have "prior knowledge that the purpose of" Nathan's trip was to commit a theft against Bracey. Rather, Nathan had an idea and a desire to commit a theft, but she did not have a prearranged,

concrete plan that she was asking for assistance with. By driving Nathan to Bracey's apartment, Clayton was merely doing her a favor in the hopes that he would be able to make an eventual drug sale.

Clayton testified that he never agreed nor intended to steal from Bracey. (03/10/10 RP 501; 03/11/10 RP 514, 519, 526) His only intention was to sell drugs to Bracey. (03/11/10 RP 526) McCowan also testified that she never heard Clayton agree to a plan to steal from Bracey. (03/03/10 RP 104, 105, 138) She believed Clayton went to Bracey's apartment because he was told Bracey wanted to buy drugs. (03/03/10 RP 95-96) In fact, based on what she saw and heard, she believed there was no plan to steal from Bracey, and did not think a theft was going to happen. (03/03/10 RP 104, 138) Even after Bracey was shot, it was Nathan who directed her to go back into the apartment to take Bracey's belongings, not Clayton. (03/03/10 RP 68, 122)

There is simply no evidence of a meeting of the minds or a coming together of opinion. Clayton, Nathan and McCowan were not unified in purpose and working in concert to achieve a common purpose. There was an idea hatched and promoted by Nathan, but never agreed to by Clayton. And even if Clayton eventually

decided to steal from Bracey, it is not enough for the State to show that two people share an idea, the State must show that they mutually agreed to execute that idea together. There is simply no evidence of that mutuality of purpose here, and Clayton's conspiracy conviction must be reversed.

**B. THE STATE FAILED TO PROVE THAT CLAYTON KILLED BRACEY IN THE COURSE OF, IN THE FURTHERANCE OF, OR IN IMMEDIATE FLIGHT FROM A ROBBERY**

First degree felony murder has two elements: (1) a homicide; (2) committed "in the course of or in furtherance of ... or in immediate flight" from a robbery. RCW 9A.32.030(1)(c). "Robbery" is defined as:

[U]nlawfully tak[ing] 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 knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

RCW 9A.56.190.

As argued above, the State failed to prove that Clayton conspired with Nathan and McCowan to commit a theft before the shooting occurred. And the State also failed to prove that Clayton

independently intended to commit a robbery before or during the shooting. Clayton never expressed an intention to steal from Bracey, but rather ignored Nathan's pleas to commit a theft and left Bracey's apartment and waited in the car for the women to finish their business. (03/03/10 RP 59, 61, 104; 03/11/10 RP 516) The only other evidence presented to indicate Clayton's intentions is that he closed the door of Bracey's apartment after the women left. (03/03/10 RP 65) This action is ambiguous, at best, and does not establish that at that moment Clayton intended to rob Bracey.

Furthermore, Clayton's actions directly following the shooting, i.e. taking Bracey's firearm, cannot establish the required elements of the crime of first degree murder. It is true that a person can still be guilty of first degree murder even if the homicide precedes the robbery. See State v. Craig, 82 Wn.2d 777, 783, 514 P.2d 151 (1973) (the fact that death may have momentarily preceded the actual taking of the property from the person does not affect guilt). But the homicide and the robbery must be part of the same transaction, and there must be "no break in the chain of events from the inception of the felony to the time of the homicide." State v. Bottrell, 103 Wn. App. 706, 720, 14 P.3d 164 (2000) (quoting CHARLES E. TORCIA, 2 WHARTON'S CRIMINAL LAW § 150 at

312-14 (15th ed.1994)).

Therefore, without proof that Clayton intended to rob Bracey before or during the shooting, the State cannot prove that the “inception of the felony” preceded the shooting, and therefore cannot prove that the shooting was committed in the course of, furtherance of, or in immediate flight from the robbery.

Because the State did not prove that Clayton intended or conspired to commit a theft, or that the robbery and the shooting were part of the “same transaction,” the State failed to prove all of the essential elements of the crime of first degree murder. Clayton’s conviction on this charge must also be reversed.

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**V. CONCLUSION**

The State's evidence showed nothing more than Nathan repeatedly advocating an idea to commit a theft, but did not establish that Clayton ever agreed to aid in the commission of a theft. The State also did not establish that Clayton formed the intent to commit a robbery before or during the shooting of Bracey. Accordingly, Clayton's convictions for conspiracy and first degree murder must be reversed.

DATED: February 14, 2011



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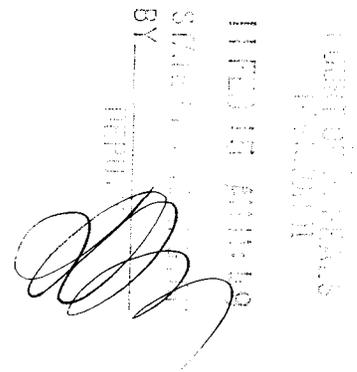
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I certify that on 02/14/2011, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: (1) Kathleen Proctor, DPA, Prosecuting Attorney's Office, 930 Tacoma Ave. S., Rm. 946, Tacoma, WA 98402; and (2) Marcus T. Clayton, DOC#339614, Washington State Penitentiary, 1313 N 13th Ave., Walla Walla, WA 99362.



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STEPHANIE C. CUNNINGHAM, WSBA #26436



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