

No. 38068-4-II
COURT OF APPEALS, DIVISION II

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DIVISION II
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STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent

vs.

MICHAEL J. BRAAE,

Appellant.

BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY
The Honorable Richard Strophy, Judge
Cause No. 02-1-00845-7

PATRICIA A. PETHICK, WSBA NO. 21324
Attorney for Appellant

P.O. Box 7269
Tacoma, WA 98417
(253) 475-6369

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in not dismissing Braae's conviction for rape in the first degree (Count II) where the rape was incidental to, a part of, or coexistent with his conviction for murder in the first degree (Count I).
2. The trial court erred in admitting evidence of Braae's flight as consciousness of guilt where the evidence was unfairly prejudicial.
3. The trial court erred in admitting the testimony of Karen Peterson and Veronica Culp under the common scheme or plan exception to ER 404(b) where the evidence was unfairly prejudicial.
4. The trial court erred in failing to take the case from the jury for lack of sufficient evidence to prove beyond a reasonable doubt that Braae was guilty of murder in the first degree and rape in the first degree.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in not dismissing Braae's conviction for rape in the first degree (Count II) where the rape was incidental to, a part of, or coexistent with his conviction for murder in the first degree (Count I)? [Assignment of Error No. 1].
2. Whether the trial court erred in admitting evidence of Braae's flight as consciousness of guilt where the evidence was unfairly prejudicial? [Assignment of Error No. 2].
3. Whether the trial court erred in admitting the testimony of Karen Peterson and Veronica Culp under the common scheme or plan exception to ER 404(b) where the evidence was unfairly prejudicial? [Assignment of Error No. 3].
4. Whether there was sufficient evidence elicited at trial to prove beyond a reasonable doubt that Braae was guilty of murder in the first degree and rape in the first degree? [Assignment of Error No. 4].

C. STATEMENT OF THE CASE

1. Procedure

Michael J. Braae (Braae) was charged by first amended information filed in Thurston County Superior Court with one count of murder in the first degree—felony murder based on the underlying crime of rape in the first or second degree or in the alternative murder in the second degree (Count I), and one count of rape in the first degree (Count II). [CP 7-8].

No pretrial motions regarding CrR 3.5 or 3.6 were made or heard. However prior to trial, the court heard a motion wherein the State sought to admit evidence of Braae's flight when confronted by police as evidence of consciousness of guilt. [CP 18-34, 37-38; Vol. I RP 37-116]. After hearing evidence in support of the State's motion, considering the State's argument, and considering Braae's argument in opposition to the evidence, the court allowed evidence of Braae's flight to be admitted. [Vol. I RP 37-116]. The court also heard the State's motion to admit ER 404(b) under the common scheme or plan exception. [CP 18-34, 37-38, 39-41; Vol. RP 626-756]. After hearing evidence in support of the State's motion, considering the State's argument, and considering Braae's argument in opposition to the evidence, the court allowed the State to present only the testimony of Karen Peterson and Veronica Culp regarding

a single incident under the common scheme or plan exception of ER 404(b) with the court giving Braae's limiting instruction on this evidence. [CP 58; Vol. IV RP 626-756, 764-770, 783-784].

Braae was tried by a jury, the Honorable Richard Strophy presiding. Braae had no objections and took no exceptions to the court's instructions. [Vol. VI RP 1165-1166]. The jury found Braae guilty in Count I of murder in the first degree—felony murder based on the underlying crime of rape, and guilty in Count II of rape in the first degree. [CP 71, 72]. The court did not give a unanimity instruction nor did the court give the jury any special verdicts as to what acts were used as a basis for the verdicts on each count. [CP 51-70].

Prior to sentencing, Braae asked that the court “merge” his rape conviction with his murder conviction as his murder conviction required as an element a rape, or find that these crimes constituted the same or similar criminal conduct. [CP 98-107, 114-118, 132-144; 7-24-08 RP 11-49]. After hearing argument, the court denied Braae's motion on both grounds. [CP 98-107, 114-118, 132-144; 7-24-08 RP 11-49]. The court then sentenced Braae to standard range sentence of 450-months on Count I based on an undisputed offender score of 7, and a standard range sentence of 123-months on Count II based on an offender score of zero with sentences running consecutively as required by RCW 9.94A.589(b) for a

total sentence of 573-months. [CP 73-97, 145-156, 157-158, 159-161; 7-24-08 RP 60-67].

A timely notice of appeal was filed on July 24, 2008. [CP 119-131]. This appeal follows.

2. Facts

On July 6, 2001, Dena Deal took her children and Elisa Jones (Lori Jones's 10 year old daughter) on a weekend camping/fishing trip. [Vol. I RP 133-135, 163-166]. Before leaving, Lori Jones asked Deal if she knew of anywhere to go for entertainment as Lori didn't go out much to which Deal told her about Bailey's a bar that had a band. [Vol. I RP 164-165]. Over the weekend Elisa tried repeatedly to call her mother but got no answer. [Vol. I RP 135-136, 166-168]. Melinda Frazier (Lori Jones's older daughter who lived out of state) also tried to call her mother over the July 6th weekend and she too got no answer. [Vol. I RP 151-152, 154]. On Sunday July 8, 2001, Deal returned Elisa home to her apartment but the door was locked (Elisa didn't have a key) and no one answered when they knocked on the door. [Vol. I RP 136-138, 168-169]. The two noted that Lori's car was in its parking space, but the passenger seat was down. [Vol. I RP 136-137, 168]. Deal took Elisa to the apartment manager's office, but the assistant manager could not give out a key. [Vol. I RP 137-136, 169]. The three returned to the apartment and managed to open the

door by reaching in through an opened window. [Vol. I RP 138-139, 169-170]. Once inside the apartment, they called for Lori but got no answer and began searching the apartment. [Vol. I RP 139-145, 170-177]. They entered Lori's bedroom, but couldn't find her until the apartment manager noticed a foot underneath Lori's bed. [Vol. I RP 139-145, 176-177]. She screamed then the apartment manager and Deal looked under the bed and found Lori's body. [Vol. I RP 139-145, 176-179]. Deal took Elisa out of the apartment, and called 911. [Vol. I RP 139-145, 176-179].

Michael Dekluyver, the bartender at Bailey's, testified that he had seen Lori Jones in Bailey's on July 6, 2001, and that she was drinking with a man she seemed to know whom he identified as Braae. [Vol. III RP 569-586, 593-597]. The two left the bar together around closing time. [Vol. II RP 368; Vol. III RP 422, 569-586].

The medical examiner determined that Lori Jones was killed sometime in the earlier hours of July 7, 2001. [Vol. III RP 490-491; Vol. V RP 538-563]. That she died from strangulation during a sexual assault and that she also suffered from an injury where a sharp object was shoved into her ear. [Vol. II RP 357, 370-371; Vol. III RP 476, 481, 512-513, 523-525, 531, 536, 539-542, 544, 567]. The medical examiner also determined that she had been sexually assaulted orally, vaginally, and anally. [Vol. III RP 440-441; Vol. III RP 532, 534, 564-567]. Semen and

hairs recovered from Lori Jones's body were attributed to Braae. [Vol. IV RP Vol. VI 617-618, 776-781; Vol. V RP 956-957, 965-975; RP 1035-1044, 1049-1050]. Braae's fingerprints were also recovered from inside Jones's apartment. [Vol. II RP 248-251, 255, 275-280, 285, 291-294, 329-330].

On July 13, 2001, Karen Peterson met Braae while drinking in a bar in Yakima. [Vol. IV RP 785-791]. She left the bar, went home, and upon entering her home was hit in the head and strangled causing her to black out. [Vol. IV RP 791-795]. The next morning she woke up with a sore neck noticing bruises on her neck and that her panties had been removed. [Vol. IV RP 795-799]. She could not really remember anything that had happened the night before after she came home. [Vol. IV RP 797-799]. Veronica Culp, Karen Peterson's daughter, testified that on July 13th her mom came home from the bar with a man named "Michael," and that the two spent some time in her mom's bedroom before "Michael" came out took some raw hot dogs from the refrigerator, ate them, and left. [Vol. V RP 831-834]. Culp identified Braae as "Michael." [Vol. V RP 835-836]. The next morning, when Peterson woke up, Culp noticed the bruises around her mom's neck as if she had been choked. [Vol. V RP 834-835].

On July 20, 2001, Idaho police officers located Braae and attempted to take him into custody. [Vol. III RP 427-428; Vol. V RP 863-882, 892-902, 912-930]. When Braae realized he was being confronted by the police, he fled leading the police on a lengthy chase in which Braae fired shots at the police and eventually ended with Braae trying to escape by swimming across the Snake River and being apprehended on the Oregon side of the river. [Vol. III RP 427-428; Vol. V RP 863-882, 892-902, 912-930].

Braae testified in his own defense. Braae testified that he knew Lori Jones and in fact had had a relationship with her for a few months beginning in April of 2001, which including going to her apartment thus explaining his fingerprints found therein. [Vol. VI RP 1064-1066, 1085]. Regarding July 6, 2001, he admitted to meeting Lori at Bailey's because she had left a note at his home asking to meet. [Vol. VI RP 1066-1069]. Braae further testified that he and Lori had sex in the passenger seat of her car that night (explaining his DNA and hairs being found on Lori's body), and afterwards he left her in the parking lot talking to some guy in black SUV. [Vol. VI RP 1068-1071]. Braae denied raping or killing Lori Jones. [Vol. VI RP 1085].

Regarding Karen Peterson, Braae testified that he did meet her in Yakima on July 13th at a bar and did accompany her home, but denied ever

hurting her. [Vol. VI RP 1074-1080]. As he explained, Karen Peterson was simply an angry woman trying to get back at him because he hadn't been interested in her. [Vol. VI RP 1074-1080].

Regarding his contact with the Idaho police on July 20th, Braae testified that the only reason he fled was because he was surprised and scared as he was in possession of marijuana, which he dumped during the police chase, and did not want to be arrested for possession. [Vol. VI RP 1081-1087]. He denied ever firing a gun at any of the police officers. [Vol. VI RP 1081-1084].

D. ARGUMENT

- (1) BRAAE MAY NOT BE CONVICTED OF RAPE IN THE FIRST DEGREE (COUNT II) WHERE THE RAPE WAS INCIDENTAL TO, A PART OF, OR COEXISTENT WITH HIS CONVICTION FOR MURDER IN THE FIRST DEGREE (COUNT I).

Article 1, section 9 of the Washington State Constitution and the Fifth Amendment to the United States Constitution provide that no person should twice be put in jeopardy for the same offense. Double jeopardy may be violated by multiple convictions even if the sentences are concurrent. State v. Calle, 125 Wn.2d 769, 775, 888 P.2d 155 (1995). A double jeopardy argument may be raised for the first time on appeal because it is a manifest error affecting a constitutional right. State v. Turner, 102 Wn. App. 202, 206, 6 P.3d 1226, *reviewed denied*, 143 Wn.2d 1009 (2001)

(citing RAP 2.5(a) and State v. Adel, 136 Wn.2d 629, 631, 965 P.2d 1072 (1998)). The issue is whether the Legislature intended to authorize multiple punishments for criminal conduct that violates more than one criminal statute. State v. Calle, 125 Wn.2d at 772.

A three-prong test is applied to determine legislative intent. First, multiple convictions constitute double jeopardy even if the offenses “clearly involve different legal elements, if there is clear evidence that the Legislature intended to impose only a single punishment.” In the Matter of Personal Restraint of Anthony C. Burchfield, 111 Wn. App. 892, 897, 46 P.3d 840 (2002) (citing State v. Calle, 125 Wn.2d at 780). Because the Legislature is free to define crimes and fix punishments as it will, “the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense.” Brown v. Ohio, 432 U.S. 161, 165, 53 L. Ed. 2d 187, 97 S. Ct. 2221 (1977).

Here, neither the murder in the first degree nor the rape in the first degree statutes contain specific language authorizing separate punishments for the same conduct. RCW 9A.32.030¹; RCW 9A.44.040². The offenses at issue here are thus not automatically immune from double jeopardy analysis. In re Burchfield, 111 Wn. App. at 896.

¹ RCW 9A.32.030, as Braae was charged in Count I, provides in pertinent part:

(1) A person is guilty of murder in the first degree when:

(c) He or she commits or attempts to commit the of either... (2) rape in the first or second degree..., and in the course 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....

² RCW 9A.44.040, as Braae was charged in Count II, provides in pertinent part:

(1) A person is guilty of rape in the first degree when such person engages in sexual intercourse with another person by forcible compulsion where the perpetrator or an accessory:

(c) inflicts serious physical injury, including but not limited to physical injury which renders the victim unconscious...

Second, when, as here, the Legislature has not expressly authorized multiple punishments for the same act, this court applies the “same evidence test,” which asks “whether each offense has an element not contained in the other.” *Id.* The statute under which Braae was convicted of murder in the first degree requires a death during a rape. RCW 9A.32.030. The rape in the first degree statute requires a sexual intercourse by forcible compulsion and a physical injury. RCW 9A.44.040. These offenses appear to contain the same elements and, therefore, may be established by the “same evidence.” Thus the prohibition against double jeopardy may be violated here by applying the same evidence test.

The “same evidence” test, however, is not always dispositive. In re Burchfield, 111 Wn. App. at 897; In re Personal Restraint of Percer, 150 Wn.2d 41, 50-51, 75 P.3d 488 (2003). This court must also determine whether there is evidence that the Legislature intended to treat conduct as a single offense for double jeopardy purposes. Id. This merger doctrine is simply another way, in addition to the “same evidence” test, by which this court may determine whether the Legislature has authorized multiple punishments. State v. Frohs, 83 Wn. App. 803, 811, 924 P.2d 384 (1996). “Thus, the merger doctrine is simply another means by which a court may determine whether the imposition of multiple punishments violates the Fifth Amendment guarantee against double jeopardy....” Id. The question is whether there is clear evidence that the Legislature intended not to punish the conduct at issue with two separate convictions. State v. Calle, 125 Wn.2d at 778. If a defendant is convicted of two crimes, his or her second conviction will stand if that conviction is based on “some injury to the person or property of the victim or others, *which is separate and distinct from and not merely incidental to the crime of which it forms the element.* [Emphasis Added]. State v. Johnson, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979).

Here, Lori Jones was killed during a sexual assault (rape). This court should construe this as evidence that the first crime (felony murder in the first degree) was not completed as the second crime (rape in the first degree) was in progress, then the rape *was incidental to, a part of, or coexistent with the felony murder in the first degree*, with the result that the second conviction (rape in the first degree (Count II)) will not stand under the reasoning in State v. Johnson, *supra*. This seems especially true given the court's to-convict instruction on Count I, Instruction No. 10 [CP 63], which specifically sets forth as an element that Lori Jones's death occurred during the course of a rape.

The Washington Supreme Court has observed that “[t]he United States Supreme Court has been especially vigilant of overzealous prosecutors seeking multiple convictions based upon spurious distinctions between the charges.” State v. Adel, 136 Wn.2d at 635. Accordingly, if this court determines that the rape in the first degree (Count II) “was incidental to, a part of, or coexistent” with the felony murder in the first degree (Count I), then Braae's conviction in Count II cannot be sustained established on these facts and must, therefore, be reversed.

Recent caselaw from our State Supreme Court supports this conclusion. Formerly, as set forth in State v. Wanrow, 91 Wn.2d 301, 588 P.2d 1320 (1978), the State Supreme Court rejected an argument that a

defendant cannot be convicted of both felony murder and the underlying felony. The court upheld both convictions by considering statutory merger and due process finding neither was principle violated. However, recently in State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007), the State Supreme Court apparently reversed this decision by analyzing the issue in terms of double jeopardy.

In Womac, the defendant was charged in three separate counts and convicted of homicide by abuse, felony murder based on criminal mistreatment, and assault. The trial court accepted all three convictions, but imposed sentence only on the homicide by abuse. On appeal, remanded the case for resentencing on the homicide by abuse and conditionally dismissed the felony murder and assault convictions so long as the homicide by abuse conviction withstood further appeal. The State Supreme Court vacated the felony murder and assault convictions on double jeopardy grounds holding Womac had in actuality committed a single offense against a single victim yet was held accountable for three crimes in violation of double jeopardy prohibition against multiple punishments for a single offense. In doing so, the State Supreme Court engaged in the three-part analysis set forth above. The State Supreme Court determined that double jeopardy was violated even though Womac received no sentence on the felony murder and assault convictions as

“conviction” in itself, even without imposition of sentence, carries an unmistakable onus which has a punitive effect. In sum, the court held:

As this court noted in Calle, “[i]t is important to distinguish between charges and convictions—the State may properly file an information charging multiple counts under various statutory provisions where evidence supports the charges, *even though convictions may not stand* for all offenses where double jeopardy protections are violated.

[Citations omitted]. State v. Womac, 160 Wn.2d at 657-58.

That is what exactly what has happened here. The State properly filed an information charging multiple counts (the murder in the first degree charge based on the underlying felony of rape as well as a charge for the underlying felony), obtained convictions on these multiple counts, but all the convictions cannot stand given double jeopardy principles for the reasons set forth above. Under the facts of this case, it was imperative to know whether the jury convicted Braae of felony murder in the first degree based on the same act of rape that it convicted Braae for rape in the first degree in order to properly determiner whether double jeopardy principles were violated. Absent a definitive answer to this issue since the court neither gave a unanimity instruction nor gave special verdicts regarding this issue, it is likely that Braae has been convicted of crimes and is serving a sentence in violation of double jeopardy principles. This court should reverse Braae's conviction on Counts II.

(2) THE TRIAL COURT ERRED IN ADMITTING
EVIDENCE OF BRAAE'S FLIGHT AS
CONSCIOUSNESS OF GUILT AS THIS EVIDENCE
WAS UNFAIRLY PREJUDICIAL.

To be admissible, evidence must be relevant. ER 402. Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence more or less probable than it would be without the evidence. ER 401. Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the likelihood it will mislead the jury. ER 403.

It has long been the law that evidence of flight is admissible if it creates "a reasonable and substantive inference that the defendant's departure from the scene was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution." State v. Hebert, 33 Wn. App. 512, 515, 656 P.2d 1106 (1982), *citing* State v. Nichols, 5 Wn. App. 657, 660, 491 P.2d 677 (1971). The admission of potentially prejudicial evidence lies within the discretion of the trial court. State v. Mulder, 29 Wn. App. 513, 629 P.2d 462 (1981).

In Hebert, the defendant was suspected of committing a burglary and immediately apprehended by police just after the burglary. While the police were conducting a pat-down search, Hebert broke away and fled the scene. He was soon recaptured. The trial court allowed the State to present evidence of Hebert's flight to demonstrate his consciousness of guilt. Hebert explained that he had fled from the police not because he was conscious of his guilt for the burglary but because he was a parolee in possession of marijuana. On appeal, Hebert challenged the admission of this evidence, but the appellate court affirmed its admission specifically noting that Hebert's flight could reasonably have been considered a deliberate effort to evade arrest and prosecution for the burglary despite Hebert's claim. Hebert, 33 Wn. App. at 515.

Here, the trial court conducted a lengthy hearing on whether Braae's flight from Idaho police on July 20, 2001 should be admitted. [Vol. I RP 37-116]. During the hearing of note, was the fact that the Lacey police had issued a press release days before July 20th seeking Braae in relation to the death of Lori Jones, that newspapers were found in Hebert's car after he was apprehended but could not be produced at the hearing so, unlike Hebert, there was no way of ascertaining whether Braae was in fact aware that he was sought in connection with Lori Jones's death before he fled. It was error for the court to admit evidence of Braae's flight based on this last distinction alone.

However, the court did allow the State to present the testimony of several officers involved in the apprehension of Braae including allowing a portion of the police vehicle cam video recording of Braae's flight to be presented to the jury. [Vol. III RP 427-428; Vol. V RP 863-882, 892-902, 912-930]. In doing so the court allowed the State to present evidence that was unfairly prejudicial to Braae given how dramatic the incident was including the length of the flight, the fact that officers testified that shots were fired at them during the flight, that a K-9 officer was involved, and that it ended in the Snake River. It cannot be said that this evidence did not unduly influence the jury in reaching its finding of guilt against Braae. This court should reverse Braae's convictions.

(3) THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY OF KAREN PETERSON AND VERONICA CULP UNDER THE COMMON SCHEME OR PLAN EXCEPTION TO ER 404(b) WHERE THE EVIDENCE WAS UNFAIRLY PREJUDICIAL.

The admission of other crimes, wrongs or acts is governed by ER 404 (b). Under the rule, “(e)vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” ER 404(b). To admit such evidence, the trial court must first determine whether the evidence is relevant and, if so, whether its probative value outweighs its potential for prejudice. ER 401; State v. Kelly, 102 Wn.2d 188, 198, 685 P.2d 564 (1984); ER 403; State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982). Additionally, evidence admissible under ER 404(b) requires proof by a preponderance of the evidence of the commission of the alleged wrong or act and the defendant’s connection to it. State v. Tharp, 96 Wn.2d 591, 594, 637 P.2d 961 (1981).

Here after a hearing, the State was allowed to elicit testimony from Karen Peterson and Veronica Culp that Braae had met Peterson in a bar, that Braae had gone to her home where she was hit on the head and strangled, and that she awoke the next morning naked from the waist down. [Vol. IV RP 626-756, 764-770, 783-799; Vol. V RP 831-836]. The State argued that the admission of this evidence was proper to show

Braae's common scheme or plan due to the similarities between what had happened to Lori Jones compared to what happened to Karen Peterson; the court agreed. In making this ruling the court rested its decision on its interpretation of the holding in State v. DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003).

This rationale is unpersuasive. In DeVincentis, our State Supreme Court established the test by which the common scheme or plan exception to ER 404(b) must be considered. The court articulated this test as follows:

In sum, admission of evidence of a common scheme or plan requires substantial similarity between the prior bad acts and the charged crime. Such evidence is relevant when the existence of the crime is at issue. Sufficient similarity is reached only when the trial court determines that the "various acts are naturally to be explained as caused by a general plan...." State v. Lough, 125 Wn.2d 847, 860, 889 P.2d 487 (1995).

[Emphasis added]. DeVincentis, 125 Wn.2d at 21. In so holding, the State Supreme Court "emphasize[d] that the degree of similarity for the admission of evidence of a common scheme or plan must be substantial. Id at 14-15.

Here, initially, the existence of the crime(s) is not at issue. As conceded by Braae's counsel in closing argument [Vol. VII RP 1201], Lori Jones was raped and murdered. The only question was who was the perpetrator of these acts. Braae denied killing or raping Lori Jones but did

admit at trial to having consensual sex with her. Given this the common scheme or plan exception was not applicable in Braae's case despite the court's ruling to the contrary. Moreover, even if the common scheme or plan exception was applicable the circumstances surrounding the bad act and the charged crime(s) were not so "substantially similar" that they were "naturally to be explained as caused by a general plan." The only similarities between the two events were Braae met both women in a bar; Karen Peterson was choked and Lori Jones's death was due to strangulation; and Karen Jones awoke to find her face covered and Lori Jones's body was discovered with a covering over her head. The dissimilarities between the two events include the fact that Karen Peterson's daughter was home with her boyfriend when Braae arrived with Peterson and Lori Jones's child was away on a camping/fishing trip the weekend she was killed; Lori Jones was raped while Karen Peterson could not testify that she had been sexually assaulted only that she awoke the next morning naked from the waist down; and most important of all Lori Jones was killed and Karen Peterson was obviously not. Under this analysis, the trial court erred in allowing the admission of evidence under common scheme or plan exception.

Any claim of relevancy as contrasted to the prejudicial effect fails when considering that this testimony only served to establish in the jury's

mind that because Braae preyed on women and therefore because he had attacked Karen Peterson, which he denied, he had raped and murdered Lori Jones. Despite any claim to the contrary, this evidence merely established propensity with any claimed probative value being outweighed by danger of unfair prejudice under ER 403.

If the only logical relevancy is to show propensity to commit similar acts, admission of prior acts may be reversible error. State v. Pogue, 104 Wn. App. 981, 985, 17 P.3d 1272 (2001). For example, in Pogue's trial for possession of cocaine, the court allowed the State to elicit Pogue's admission that he had possessed cocaine in the past on the issue of knowledge and to rebut his assertion that the police had planted the drugs. The conviction was reversed. The appellate court held:

The only logical relevance of (Pogue's) prior possession is through a propensity argument: because he knowingly possessed cocaine in the past, it is more likely that he knowingly possessed it on the day of the charged incident.

Pogue, 104 Wn. App. at 985.

Similarly, here, the only logical relevancy of the evidence at issue was through a propensity argument; i.e., since Braae had according to Peterson and Culp's testimony attacked Peterson he must have done the same thing to Lori Jones.

The evidence should not have been allowed. And the error was not harmless. This court examines evidentiary, non-constitutional error to see if the error, within reasonable probability, materially affected the outcome of the trial. *See State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). It is within reasonable probability that but for the admission of the evidence the jury would have acquitted Braae considering the totality of the remaining evidence.

The prejudice resulting from the introduction of this evidence denied Braae his right to a fair and impartial jury trial and outweighed the probative value, if any, of the evidence. *See State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Oughton*, 26 Wn. App. 74, 612 P.2d 812 (1980). The evidence materially affected the outcome and the error in admitting this evidence was of major significance and not harmless. This court should reverse Braae's convictions.

- (4) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO PROVE BEYOND A REASONABLE DOUBT THAT BRAAE WAS GUILTY OF MURDER IN THE FIRST DEGREE AND RAPE IN THE FIRST DEGREE.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact would have found the essential elements of a crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d

1068 (1992); Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct, 2781 (1979). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

Here, Braae was charged with and convicted in Count I of felony murder in the first degree with the underlying felony being rape and in Count II of rape in the first degree of Lori Jones. [CP 7-8]. There is no question that Lori Jones was raped and murdered as conceded by Braae’s counsel in closing argument. [[Vol. VII RP 1201]. The only question was who was responsible for these crimes. And it is on this question where the State failed to present sufficient evidence to prove beyond a reasonable doubt that it was Braae.

The sum of the evidence to prove that Braae committed these crimes was the fact that he was with Lori Jones at Bailey’s on July 6, 2001, that he was seen leaving Bailey’s with her around closing time, that

Lori Jones's time of death during a sexual assault was estimated at the early morning hours of July 7, 2001, that hairs and semen (DNA) attributable to Braae were found on Lori Jones's body, and that Braae's fingerprints were found in Lori Jones's apartment coupled with the improper common scheme or plan evidence of Karen Peterson and Veronica Culp as well as the unfairly prejudicial evidence regarding Braae's flight when confronted by Idaho police. However, Braae testified and acknowledged that he had met Lori Jones at Bailey's on July 6, 2001, that they left together and had consensual sex in her car, that he had been to Lori Jones apartment because they had had a relationship for a couple of months beginning in April 2001, that when he left Lori in the parking lot of Bailey's she was talking to some guy in a black SUV, that he denied the events as related by Karen Peterson and Veronica Culp asserting that Peterson was essentially a "woman scorned," and that he only fled from the Idaho police because he was in possession of marijuana not because he had done anything to Lori Jones. Given the totality of the evidence, the record does not constitute proof beyond a reasonable doubt that it was Braae who raped and murdered Lori Jones. This court should reverse and dismiss Braae's convictions.

E. CONCLUSION

Based on the above, Braae respectfully requests this court to reverse and dismiss his convictions.

DATED this 28th day of January 2009.

Patricia A. Pethick
PATRICIA A. PETHICK
Attorney for Appellant
WSBA NO. 21324

CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 28th day of January 2009, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

Michael J. Braae
DOC# 270679
65804
IMSI Resource Center B-54
P.O. Box 51
Boise, ID 83707

Carol La Verne
Thurston County Dep. Pros. Atty.
2000 Lakeridge Drive SW
Olympia, WA 98502
(and the transcript)

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DEPUTY

Signed at Tacoma, Washington this 28th day of January 2009.

Patricia A. Pethick
Patricia A. Pethick