

COURT OF APPEALS
DIVISION II

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No. 38068-4-II

STATE OF WASHINGTON
BY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL JOHN BRAAE,

Appellant.

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

The Honorable Richard A. Strophy
Cause No. 02-1-00845-7

BRIEF OF RESPONDENT

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ORIGINAL

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A. STATEMENT OF THE CASE

On Sunday, July 8, 2001, Lori Jones was found dead in her apartment by a friend who had been caring for Lori's daughter over the weekend. [RP Vol. I, 177-178] Detective Bev Reinhold of the Lacey Police Department responded and was assigned to be the lead detective in the investigation. [RP Vol. II 350] In addition, Cheryl Baker-Rivers, a latent fingerprint examiner with the Washington State Patrol Crime Lab, responded to the scene to conduct a search for fingerprints. [RP Vol. II 268] During her search, she was able to lift several fingerprints, some of which had sufficient value for identification purposes. [RP Vol. II 275]. One of the lifts was from the inside of Lori's bedroom door. [RP Vol. II 276] That print was later identified as that of the defendant, Michael Braae. [RP Vol. II 292] Another print located on a set of damaged blinds was also attributed to Braae. [RP Vol. II 329] Those blinds were not damaged prior to July 8, 2009. [RP Vol. I 140] In addition, semen recovered from Lori's vagina and anus was later identified through DNA evidence as that of Michael Braae. [RP Vol VI 958 – 974]. Finally, hairs that were removed from Lori's body at autopsy were identified as being consistent with the pubic hair of Braae. [RP Vol. VI 1035]

Dr. Daniel Selove performed an autopsy of Lori's body. He determined that Lori had been strangled to death. [RP Vol. III 535 – 536] She had also suffered a severe blow to the head causing her to bleed around her

brain. [RP Vol. III 537] In addition, Dr. Selove located several non-fatal injuries, including one to the Lori's ear, that were consistent with having been inflicted by a screwdriver that was located at the scene. [RP Vol. III 522 – 531]

When Braae's fingerprint from the scene was first identified about two days after Lori's body was found, detectives immediately began looking for him as a person of interest. [RP Vol. III 421 – 424] After having no success, the police then issued a press release saying that they were looking for Braae as a person of interest. [RP Vol. III 424 – 427; RP Vol. I 74.] The press release was issued to local media, as well as Seattle major media. [RP Vol. I 78] Tips began coming in from as far away as Oregon soon thereafter. [RP Vol. I 79]

Braae was ultimately located sleeping in his vehicle in Idaho. [RP Vol. V 858, 895] When officers tried to detain him, he fled in his vehicle and led officer on a lengthy pursuit. [RP Vol. V 868 – 882] Ultimately, the chase ended when on a tire on Braae's vehicle was shot out and Braae jumped into the Snake River. [RP Vol V 880 – 881] He was later captured in the river by use of a trained police dog. [RP Vol V 924 – 930]

Detectives also learned during the investigation that Braae had assaulted another woman in Yakima named Karen Peterson. This assault occurred during the time that police were still seeking Braae for Lori's

murder. Karen Peterson testified that she met a man she later learned was Braae in a bar in Yakima. Eventually, they went back to her apartment where her daughter and her daughter's boyfriend were also staying. Karen testified that she remembers very little about getting to the apartment and what happened at the apartment. She did recall, however, that as she was entering her bedroom, she felt a severe blow to her head which knocked her down. She then remembered being strangled to point where she blacked out. When she awoke, she noticed that her face was covered with a receiving blanket and her pants and underwear were removed. [RP Vol. IV 783 – 798] In addition, She had severe bruises to her neck area. [RP Vol. V 806 – 807]

Karen's daughter Veronica also testified in corroboration of Karen's Testimony. She said that her mother came home with a man that was introduced to her as Michael. They conversed for a time and then Michael and her mother went into her mother's bedroom. Later, she was told by her boyfriend that Michael had left. [RP Vol V 828 – 834] The next morning, her mom came out of her room screaming and very emotional saying that she was being attacked. After calming her down, they called for an ambulance and Karen was taken to the hospital and examined. Later that day, they both saw a picture of Michael Braae in the paper and recognized him as the man who was in the apartment the preceding night. [RP Vol. V 835 – 836]

B. ARGUMENT

1. BRAAE'S CONVICTIONS FOR FIRST DEGREE MURDER AND FIRST DEGREE RAPE DO NOT VIOLATE THE CONSTITUTIONAL PROHIBITION AGAINST DOUBLE JEOPARDY.

Defendant first challenges his convictions for murder in the first degree and rape in the first degree claiming that such convictions violate his protection against double jeopardy and as such should be merged. This claim should be rejected because in this case the rape was not committed to facilitate the murder and the two crimes are separate and distinct.

Article I, Section 9 of the Washington State Constitution provides the same protection as the double jeopardy protection found in the Fifth Amendment of the United States Constitution. *State v. Glocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). Both provisions prohibit (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *Id.* at 100. The only issue raised by defendant in this case is that of multiple punishments for the same offense.

Imposition of more than one punishment for criminal acts that violate more than one criminal statute is not necessarily multiple punishments for a single offense. In order to determine if multiple punishments for a criminal act violates double jeopardy, courts have examined whether the legislature intended to allow multiple punishments. *State v. Calle*, 125 Wn. 2d 769, 767,

888 P.2d 155 (1995). In *State v. Burchfield*, 111 Wn. App. 892, 46 P.3d 840 (2002), the court used a three prong test to determine if the legislature intended to punish the two crimes separately. Under this test, the court examines the legislative intent by examining the statutory language, either express or implied; using the “same elements” test; and analyzing other evidence of legislative intent to treat the crimes as one offense for double jeopardy purposes. If the legislature mandated two punishments for the two crimes, double jeopardy is not violated. *State v. Freeman*, 153 Wn.2d 765, 771, 108 P.3d 753 (2005). Review of this issue is de novo. *Id.*, at 770.

Courts use the merger doctrine as a tool of statutory construction to determine when the legislature intends multiple punishments to apply to particular offenses. *State v. Saunders*, 120 Wn. App. 800, 86 P.3d 232 (2004). The doctrine applies where “the Legislature has clearly indicated that in order to prove a particular degree of crime the State must prove not only that a defendant committed that crime but that the crime was accompanied by an act that is defined as a crime elsewhere in the criminal statutes. *Id.* at 820 (citing *State v. Deryke*, 110 Wn. App. 815, 41 P.3d 1225 (2002); *State v. Vladovic*, 99 Wn.2d 413, 662 P.2d 853 (1983). Merger applies “only when a crime is elevated to a higher degree by proof of another crime proscribed by elsewhere in the criminal code. *State v. Parmelee*, 108 Wn. App. 702, 32 P.3d 1029 (2001).

In the present case, the jury found Braae guilty of first degree felony murder because he killed Lori Jones in the course of, in furtherance of, or in flight from the crime of rape in the first degree. Where a predicate offense is an underlying element of another crime, generally the predicate offense will merge into the second crime and the court will not punish it separately. *Saunders*, at 821 (citing *State v. Johnson*, 92 Wn.2d 671, 600 P.2d 1249 (1979); *Vladovic, supra.*). However, courts apply an exception to this merger doctrine on a case-by-case basis. *Id.* Application of this exception turns on whether the predicate and charged crimes are sufficiently “intertwined” for merger to apply. *Johnson*, at 681, See also, *State v. Peyton*, 29 Wn. App. 701, 720, 630 P.2d 1362 (1981).

The *Saunders* case provides an example of the application of this exception in a situation similar to this case. In *Saunders*, a co-defendant was given a ride to her residence from the victim. When they arrived, the victim was invited into the house where Saunders also resided. The three began drinking and eventually Saunders and his co-defendant asked the victim to participate in a sexual threesome. When she refused, the two defendants then assaulted her and shackled her. Saunders tried to force the victim to perform oral sex on him. She resisted and bit him. He retrieved a knife while his co-defendant anally raped the victim with television antenna. When he returned, he stabbed the victim in the chest. One of the defendants then strangled the

victim. She ultimately died as a result of the stabbing and the strangulation. Saunders was convicted of first degree felony murder, the predicate crimes being rape, robbery and kidnapping.

On appeal, Saunders claimed that his defense counsel was ineffective for failing to raise a motion to merge the rape, robbery and kidnapping convictions with the murder conviction. This court then analyzed the merits of such a claim to determine if such a motion would have been successful. The court found that none of the three predicate offenses would have merged into the murder conviction.

In its analysis, the court focused on the degree to which the predicate crimes were factually distinct from the murder. The court focused on the analysis in *State v. Peyton, supra.*, in which the court declined to merge the offense of robbery with that of a first degree felony murder. The court in *Saunders* concluded that the rape in that case was not “merely incidental” to the murder. *Id.* at 823. The injury from the rape was distinguishable from the subsequent murder and the conduct did not facilitate the murder. Thus, the court concluded, the rape was separate and distinct from the murder. *Id.*

In the present case, the evidence indicated that the two crimes were separate and distinct as evidenced by the different injuries sustained. The rape and murder of Lori Jones involved of a series of events much like *Saunders*, and, like *Saunders*, the injuries inflicted during each crime were significantly

different. For instance, during the rape, Braae likely used a screwdriver as a compliance weapon, resulting in a non-lethal injury to her ear and superficial cuts to her face and hands. These injuries are distinct from those which are actually associated with her death, namely the bruises on her neck and the internal injuries of the larynx, tongue, and the muscles of the neck. From this, the court can conclude that the strangulation that caused Lori's death was not used to force her to submit to the rape. As such, the court should find that the rape was separate and distinct from the murder and not subject to merger. If merger does not apply, then the presumption is that the legislature intended to allow punishment for each charge and double jeopardy will not bar those punishments.

As an additional note, it would seem unreasonable for the legislature to preclude the separate crime of rape from being punished in this case when a sentence for a combination of lesser offenses, namely second degree murder and first degree rape, would result in only a slightly less sentence. In this case, the court determined that his standard range for both crimes was 338 to 450 months for Murder in the First Degree plus 93 to 123 months for Rape in the First Degree. However, if these crimes were merged, his range would have been only 338 to 450 months for the murder charge. If Braae had been convicted of the lesser charge of intentional murder in the second degree and rape in the first degree (two crimes that would not merge even under

defendant's theory), his standard range would have been 216 to 316 months for Murder in the Second Degree plus 93 to 123 months for Rape in the First Degree, resulting in a total range of 312 to 439 months. Thus, a combination lesser degree crimes, that clearly would not merge, would result in only a slightly lower standard range. The court should presume that the legislature would not intend such an absurd result and therefore intended to allow for separate punishments as a matter of public policy for these two crimes.

The defendant contends that *State v. Womac*, 160 Wn.2d 643, 160 P.3d 40 (2007) has changed the application of the merger doctrine and is controlling. Braae argues that in *Womac* the Washington Supreme Court held that a defendant cannot be convicted both of felony murder and the underlying felony. However, *Womac* is not only distinguishable from the present case, it also did not involve charges that were elevated through a predicate felony. In *Womac*, the defendant was convicted of homicide by abuse, second degree felony murder, and first degree assault for the murder of his four-month old son. The Court vacated the felony murder and assault convictions because the court found that the assault and felony murder charge (predicated on criminal mistreatment) could not be punished separately from the homicide by abuse conviction. Instead, the court held that Womac had committed a single crime against a single victim and thus could not be punished multiple time for that crime through several different statutory means. The *Womac* case is in fact

very different from the instant case as Braae was not convicted of more than one type of murder in relation to the death of Lori Jones.

Instead, Braae was convicted and sentenced for a murder that occurred separate and distinct from the preceding rape as the defendant was in *Saunders*. That case should control and the trial courts refusal to merge these two crimes should be upheld.

2. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF THE DEFENDANT'S FLIGHT BECAUSE THE EVIDENCE WAS MORE PROBATIVE THAN PREJUDICIAL

The Defendant next assigns error to the trial court's admission of evidence of the defendant's flight from Thurston County that ended in a high speed chase and shootout with police in Idaho. The trial court did not abuse its discretion in admitting this evidence and the defendant's contention on this issue should also be denied.

The interpretation of a rule of evidence is a matter of law to be reviewed de novo. *State v. Williams*, 131 Wn. App. 488, 494, 128 P.3d 98 (2006). However, once it has been determined that the rule of evidence has been properly interpreted, the court's decision to admit evidence is reviewed only for abuse of discretion. *State v. Stubsjoen*, 48 Wn. App. 139, 147, 738 P.2d 306, *review denied*, 108 Wn.2d 1033 (1987). Abuse of discretion occurs only when the trial court's discretion is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v.*

Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The appellant bears the burden of proving abuse of discretion. *State v. Hentz*, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), *rev'd on other grounds*, 99 Wn.2d 538, 663 P.2d 476 (1983). In this case, the defense makes no claim that the trial court improperly interpreted the rules of evidence as they relate to evidence of flight. Therefore, the court's decision to admit this evidence should be reviewed only for an abuse of discretion.

To be admissible, evidence must be relevant under ER 402. Under ER 401, 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. Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger unfair prejudice under ER 403. Unfair prejudice does not mean that evidence is harmful to the defendant. Instead, unfair prejudice is "caused by evidence of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect." *Wilson v. Olivetti N. Am. Inc.*, 85 Wn. App. 804, 813, 934 P.2d 1231 (quoting *United States v. Roark*, 753 F.2d 991, 994 *reh'g denied*, 761 F.2d 698 (11th Cir. G.A. 1985)). Or when the evidence "appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or "triggers other mainsprings of human action." *Id.* (quoting 1 J. Weinstein & M. Berger, *Evidence* §403[03] at 403-36 (1985)).

Evidence of flight is relevant and admissible if it creates a reasonable and substantive inference that the defendant's departure from the scene was either an instinctive or impulsive reaction to a consciousness of guilt, or 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 inference, however, must be substantive and real, not speculative, conjectural, or fanciful. *State v. Bruton*, 66 Wn. 2d 111, 113, 401 P.2d 340 (1965). The state need not prove that the defendant was aware that he is being officially sought for a specific crime for the evidence to be admissible. See, *Nichols*, 5 Wn. App. at 660. Additionally, if the circumstances require the defendant — if he wishes to rebut the flight evidence — to assert that he was fleeing on the basis of another crime, he is not unduly prejudiced. See, *Hebert*, 33 Wn. App. at 515.

In the present case, the connection between the defendant's flight and the crimes charged is reasonable and substantive because of his sustained pattern of flight from July 12th to July 20th and because of the dramatic nature of his chase with police on July 20th.

First, there was a sustained pattern of movement that mirrored the path of the police investigation demonstrating a reasonable and substantial connection of the defendant's flight in an effort to evade arrest. Starting on July 10th (three days after Jones' death, and two days after the start of the

police investigation) police identified the defendant as a person of interest in their investigation. [Vol. I, 75]. From July 10th to July 12th the police checked on his most recent addresses, searched the bars he usually frequented, and asked bartenders and acquaintances about the defendant's whereabouts. [Vol. I, 76-77]. On July 12th police released to the media that the defendant was a person of interest in the case, with coverage in the Olympia, Pierce and King County newspapers, and several Seattle and other northwest TV stations. [Vol. I, 78]. Media exposure was extensive and was picked up by the Associated Press on July 17th as well as other news sources up through July 20th, the day of the defendant's arrest. [Vol. I, 79-83]. The breadth of the media coverage was demonstrated by the fact that the police received tips from Snohomish County all the way to Oregon and Idaho. [Vol. I, 85]. Tips were given to the police that the defendant was sighted in Yakima on July 13th and 14th after the media exposure began, and followed the defendant as he moved east across the state until he reached Idaho. [Vol. I, 86-88]. The defendant was eventually arrested after a high-speed chase on the Idaho Oregon border. In addition, when the defendant was arrested, officers discovered various newspapers from the eastern Washington and Idaho area dating from July 17th and 18th. [Vol. I, 103-104].

From these facts, there are many reasons why the jury could infer that the defendant knew he was being sought in connection with Lori Jones'

murder. First, police had questioned his acquaintances and after questioning had started on July 10th the defendant could not be found in the bars he usually frequented. Second, starting from the time of police questioning, a clear path can be traced from Lacey, Washington; out to the Spokane area; and then to Idaho: from which a sustained pattern of flight can be maintained. Third, the media exposure was immense, leading to tips from three states, making it very unlikely that he did not know he was being sought in this case. Finally, police found newspapers when he was arrested, proving that he was at least reading media articles during the period from July 12th-July 20th.

The evidence presented in this case supports both types of flight evidence. The defendant had engaged in a pattern of flight from July 12th through July 20th which is evidence of attempting to evade arrest. Also, the defendant's forty minute car chase is also evidence of an impulsive decision to flee. Because of the close connection between when the defendant began to be sought by police as well as the intensity of the defendant's flight from police the evidence tends to strongly prove that the defendant was conscious of his guilt of the crime.

In *State v. Hebert, supra*, the defendant argued that admission of the evidence would require him to reveal that he fled because he was a parolee in possession of illegal drugs rather than because he had stolen a wallet. *Id.* The *Hebert* court held that the evidence of flight would be probative to prove a

consciousness of guilt, and that the requirement that he reveal his status as a parolee and that he possessed illegal drugs did not unduly prejudice him. *Id.* at 516.

In this case, the defense also raised the concern that the defendant would be prejudiced by the fact that to defend against the flight evidence he would have to instead assert that he was fleeing from another crime, namely the attempted murder of a woman in Yakima. [Vol. I, 63]. But as *Hebert* illustrates, such a need does not make the evidence unduly prejudicial. Furthermore, from a policy perspective, it would be very odd if someone who only committed one crime could have flight evidence introduced against him when someone who committed two or more crimes could have the flight evidence excluded because of unfair prejudice.

The defense also asserts that because of the dramatic nature of the defendant's flight, the evidence was unfairly prejudicial to admit the evidence. However, following the definition of prejudice established in *Wilson*, the evidence of flight does not qualify as prejudicial. In this case it is true that the defendant's flight was dramatic, but the evidence was not introduced merely for a prejudicial effect nor was it cumulative. Instead, the dramatic nature of the defendant's flight is strong probative evidence of guilt. The greater the lengths that a defendant goes in his flight, the more serious the crime a jury can infer the defendant is fleeing from (in this case a charge of murder and

rape). It is certainly not consistent with someone who is merely carrying some marijuana and doesn't want the police to find it as he asserted.

Finally, defense argues that if the court finds that the defendant did not know he was being sought for a crime then the flight evidence cannot be admitted. That assertion is wrong. The defendant need not know that he is wanted by the police for a specific crime for flight evidence to be admissible. In *Hebert*, the defendant immediately fled apprehension and since the defendant asserted he was fleeing for a different crime it is likely he had not been informed why the police stopped him at the time his flight occurred. *Hebert*, 33 Wn. App. at 515. In *Nichols*, a hitchhiker robbed a driver and fled on foot. *Nichols*, 5 Wn. App. at 660. Police, informed by the driver, picked up the hitchhiker running in the same manner and direction as the driver described. *Id.* The court held that "there was substantial evidence of flight from the scene of the crime" and found the evidence admissible. *Id.* 659. The defendant in *Nichols* had no indication that he was being pursued for a crime when police spotted him already fleeing. See, *Id.* at 679.

In neither of these foundational cases in Washington flight law did the defendant know that law enforcement was pursuing him for the charged crime during his time of flight. Therefore, the defense in the current case is wrong to assert there is a need to know, and furthermore, is wrong in asserting that it is

clear from the record in *Hebert* that the defendant in that case knew for what crime he was being sought.

The defendant in the present case has not met his burden of proving that the court abused its discretion in admitting the evidence of flight given the high probative value and the strong support for the use of such evidence in Washington case law.

3. THE TRIAL COURT CORRECTLY ADMITTED THE TESTIMONY OF KAREN PETERSON AND VERONICA CULP UNDER THE COMMON SCHEME OR PLAN EXCEPTION TO ER 404(b) BECAUSE THE PROBATIVE VALUE OUTWEIGHED ANY PREJUDICIAL EFFECT

As in the previous issue, the interpretation of a rule of evidence is a matter of law reviewed de novo, however once the court determines that the rule was properly interpreted the admission of evidence is reviewed for abuse of discretion. *State v. Stubsjoen*, 48 Wn. App. 139, 147, 738 P.2d 306, review denied, 108 Wn.2d 1033 (1987).

The admissibility of evidence of other bad acts is governed by ER 404(b), which reads:

(b) Other Crimes, Wrongs or Acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Evidence of bad acts admitted under ER 404(b) must be more probative than unfairly prejudicial *State v. Kelly*, 102 Wn.2d 188, 198, 685 P.2d 564 (1984).

The purpose of *ER 404(b)*, which generally prohibits the admission of evidence of a criminal defendant's prior acts, is not to deprive the State of relevant evidence necessary to establish an essential element of its case but is, rather, to prevent the State from suggesting that a criminal defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged. *State v. Foxhoven*, 161 Wn.2d 168, 163 P.3d 786 (2007). To be admissible under *ER 404(b)*, the state must prove by a preponderance of the evidence that the bad act was committed and that the defendant is connected to the act. *State v. Tharp*, 96 Wn.2d 591, 594, 637 P.2d 961 (1981).

In the present case, the trial court admitted the testimony of Karen Peterson and Veronica Culp under two different exceptions under *ER 404(b)*: (1) evidence tending to prove a common scheme or plan and (2) evidence tending to prove identity from a *modus operandi* or the “signature” nature of the crime. *See, Foxhoven*, 161 Wn.2d 168, 176-180. The common scheme or plan exception is only to be used when the existence of the crime charged is contested. *Foxhoven*, 161 Wn.2d at 179. When appropriate, the common scheme or plan exception can be used to admit evidence proving the intent element of a crime, if this element is contested. *Id.* The signature-like crime exception may be used when the commission of the crime is not contested but instead the identity of the perpetrator is contested. *Id.* at 180.

In the current case, the defense contends that the trial court mistakenly applied the common scheme or plan test. To support their claim, they note that in the defense's closing argument the defense conceded that the victim had been both murdered and raped. This fact is then put forth as proof that the only issue of fact contested in this trial was the identity of the perpetrator not the existence of the crime. This argument overlooks the fact that at the time of the evidentiary hearing the defense had only conceded that the victim was murdered, not that the victim was raped. [Vol. IV, 747-748]. In fact, the defense had not yet asserted that the defendant had even engaged in consensual sex with the victim. The trial court, therefore, correctly found that because the intent to rape—a necessary element to prove the existence of the crime—was contested that the common plan or scheme exception was the appropriate grounds. Furthermore, on policy grounds, it would be inappropriate to allow defendants to stipulate to the existence of all the crimes charged after evidence was introduced under the common plan or scheme exception of ER 404(b) and then use that stipulation as a means to attack, on appeal, the admission of such evidence.

Additionally, the evidence in this case is also admissible under 404(b) for the common scheme or plan exception if the similarities between the acts are “naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations”

State v. Lough, 125 Wn.2d 847, 860, 889 P.2d 487 (1995). Furthermore, the level of the similarity must be substantial. *State v. DeVincentis*, 150 Wn.2d 11, 20, 74 P.3d 119 (2003). But uniqueness is not required. *Id.* at 21. In offering evidence under this exception the court is not required to find that a common plan or scheme was used, only that the evidence is sufficient that a jury could find that a common plan or scheme existed. See *State v. Carleton*, 82 Wn. App. 680, 684, 919 P.2d 128 (1996). In order to admit evidence of prior bad acts, it must pass a four-part test: (1) it must be offered for the purpose of proving a common plan or scheme; (2) it must be relevant to prove an element of the crime charged or to rebut a defense; (3) the bad act must be proved by a preponderance of the evidence; and (4) it must be more probative than prejudicial. While the court has acknowledged that evidence of prior sexual misconduct can be highly prejudicial, the court has also acknowledged that due to the high level of difficulty in proving the commission of a sex crime when prior conduct is relevant it is also highly probative. *DeVincentis*, 150 Wn.2d at 22-23.

In the current case, the prosecution directly offers this evidence for the proof of a common scheme or plan. [Vol. I, 11]. The act has substantive similarities to the crime charged because in both cases the defendant met each victim in a bar, from which they both went to the victim's residence. Karen Peterson was struck in the head. A head injury was also located on Lori Jones

during autopsy. Karen Peterson was then strangled, presumably to unconsciousness. The autopsy in the present case reveals that Lori Jones was strangled to death. Furthermore, when Karen Peterson woke up, she noticed that her pants had been removed, suggesting that there was a sexual assault, or at the least, a sexual motivation to the physical assault. Laboratory analysis reveals that there was semen in Lori Jones' vagina and anus, supporting a conclusion that she was raped. Moreover, when Karen Peterson woke up she had a blanket draped over her head. Lori Jones was discovered with a pillow case over her head. The acts were also committed in a close proximity in time, making them more likely to be part of a common plan.

The defense contests that the differences between the crimes outweighs any similarities. The defense asserts that in Karen Peterson's case her daughter and her daughter's boyfriend were at home during the attack while in Lori Jones' case no one was home. This is not a significant difference at all. The fact that Lori Jones was raped and killed while alone does not provide proof that the same assailant would not be willing to also assault someone while there are others at the victim's home. Each assault did in fact occur in a private setting.

The next difference the defense submits is that Lori Jones was raped but Karen Peterson was not sure if she was raped. But Karen Peterson was attacked in her bedroom and when she awoke she was naked from the waist

down illustrating that her assailant intended to sexually assault her, even if there was no conclusive evidence of rape. The final difference that the defense asserts is that Lori Jones was killed and Karen Peterson was not. While this is certainly true, one could also reasonably infer that Braae may have believed that he had killed Karen Petersen at the time. At the very least, the fact that both victims were incapacitated lends itself more to a similarity than a difference in how these crimes were committed.

The testimony of Karen Petersen is also admissible because of the signature-like similarity. Evidence can be introduced to prove a modus operandi if the method employed is so unique that proof that the defendant committed the act “creates a high probability that the defendant also committed the charged crime.” *State v. Thang*, 145 Wn. 2d 630, 643, 41 P.3d 1159 (2002). As already stated, there are many strong similarities between the two crimes. Of particular value in establishing a signature or modus operandi is that both women had coverings over their faces after their attacks. This fact is so unique that rises to the level of a signature in the commission of the crime.

Because the defense’s assignment of error rests on a matter of fact, not on a matter of law this court reviews the issue under an abuse of discretion standard. The trial court agreed with the defense’s offered (and correct) interpretation of the law: that if the only contested issue in the case is identity

not existence of the crime then the higher standard of *modus operendi* would apply. [Vol. IV, 738, 748-749]. The court did not abuse its discretion in finding that the existence of the crime of rape was still contested nor in its decision to admit the testimony concerning Karen Peterson's attack.

4. THE EVIDENCE WAS SUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT RAPED AND MURDERED LORI JONES.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the state, any rational trier of fact would have found the elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992). A claim of insufficiency of the evidence admits the truth of the state's evidence and all inferences that can reasonably be drawn therefrom. *Id.* Circumstantial evidence is no less reliable than direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 618 P.2d 99 (1980). All reasonable inferences from the evidence must be drawn in favor of the state and interpreted most strongly against the defendant. *Salinas*, at 201.

In the present case, the evidence is clearly sufficient to support the jury's verdicts convicting Braae of rape and murder. Braae was the last person seen with the victim before her death, and they were seen leaving a bar together. His fingerprints were found at the crime scene and, in fact, one of his fingerprints was located on a set of window blinds that were likely

damaged during a struggle. Additionally, his pubic hair was found on her body and his DNA was located in her vagina and anus, linking him directly to the rape. This combined with all of the other evidence leaves no reasonable doubt that the defendant is guilty of these crimes.

The defendant's uncorroborated claim that he knew Lori Jones prior to meeting her at Bailey's bar is not sufficient to overcome the state's evidence. No other witness corroborated the fact that he knew her. In fact, Lori's daughter testified that she had never met or knew Braae, yet he claimed to have been at the apartment at times when she would have been home. His claims were clearly rejected by the jury.

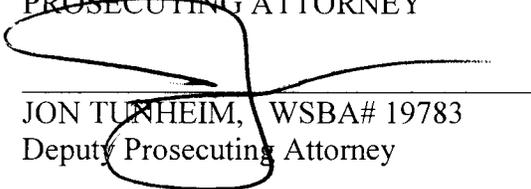
When viewed in its totality, the evidence in this case was overwhelming in proving that the defendant was guilty of the charged crimes beyond a reasonable doubt. Therefore, the convictions should stand.

C. CONCLUSION

Based on the forgoing, the state respectfully requests that this court affirm the conviction on both counts and decline to merge the rape conviction into the murder conviction.

Respectfully Submitted this 12th day of June, 2009.

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CERTIFICATE OF SERVICE

09 JUN 12 PM 4:05

I certify that I served a copy of the Brief of Respondent, on all parties or

STATE OF WASHINGTON
By _____

DEPUTY

their counsel of record on the date below as follows:

- US Mail Postage Prepaid
- ABC/Legal Messenger
- Hand delivered by

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I certify under penalty of perjury under laws of the State of
Washington that the foregoing is true and correct.

Dated this 12 day of June, 2009, at Olympia, Washington.



CAROLINE M. JONES