

NO. 40646-2-II

APPELLANT'S BRIEF
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IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL ALLEN HERSH,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF CLARK COUNTY

Before the Honorable Robert L. Harris, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Insufficient evidence exists to support the verdict that appellant Michael Hersh intentionally killed Norma Simerly in the course of committing rape or attempted rape as charged in Count 2.

2. There is insufficient evidence of premeditation to support the conviction for first degree murder as charged in Count 1.

3. The State did not prove beyond a reasonable doubt that Mr. Hersh was guilty of first degree premeditated murder of Ms. Simerly as charged in Count 1, and first degree felony murder as charged in Count 2.

4. The trial court violated double jeopardy when it imposed a conviction for both first degree premeditated murder and first degree felony murder.

5. The trial court abused its discretion in denying Mr. Hersh's motion to suppress evidence that had a flawed chain of custody.

6. The admission of evidence of prior bad acts under RCW 10.58.090 and ER 404(b) to prove identity and motive violated Mr. Hersh's right to a fair trial protected by the due process clauses of the Fourteenth Amendment and article I, § 3 of the Washington Constitution.

7. The trial court erred in concluding the evidence of prior bad

acts was admissible under ER 404(b).

8. The trial court erred in entering the following finding of fact in Findings Re Admissibility of Defendant's Prior Conduct Pursuant to RCW 10.58.090, dated January 26, 2010 (Clerk's Papers (CP) 610):

(a) The defendant's attack on Joy Towers was very similar to the facts of the current case. The Court has previously weighed the similarity in the ER 404(b) hearing and found grounds of similarity between the two incidents.

9. The trial court erred in entering the following finding of fact in Findings Re Admissibility of Defendant's Prior Conduct Pursuant to RCW 10.58.090 (CP 610):

(c) However, while attempting to bind Joy Towers with women's clothing, the defendant stated he had done the same thing to two other women.

10. The trial court erred in entering the following finding of fact in Findings Re Admissibility of Defendant's Prior Conduct Pursuant to RCW 10.58.090 (CP 611):

(e) Evidence of the defendant's attack on Joy Towers is necessary to the State's case. The only other evidence the State has to rely on is Mitochondrial DNA and Y-STR DNA.

11. The trial court erred in entering the following finding of fact in Findings Re Admissibility of Defendant's Prior Conduct Pursuant to RCW 10.58.090 (CP 611):

(g) The probative value of evidence of the defendant's attack on

Joy Tower[s] outweighs any prejudice to the defendant. Evidence of the Joy Towers case will not be misleading, will not confuse the issues, will not cause undue delay, will not waste time, and will not include needless presentation of cumulative evidence.

12. The trial court violated appellant's constitutional rights to confrontation under the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, § 22 of the Washington Constitution when it permitted Dr. Wickham to testify regarding an autopsy report prepared by a previous Medical Examiner, who was deceased at the time of trial.

13. The trial court erred when it permitted the State to introduce Y-STR DNA test results obtained from combined DNA samples.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where the State charged Mr. Hersh with first degree felony murder and one of the predicate crimes was rape in the first or second degree, but the State failed to introduce sufficient evidence of rape, should the conviction be reversed? Assignment of Error No. 1.

2. Was there sufficient evidence to support a finding of premeditation where there is no evidence to infer the killing was a result of deliberation or planning? Assignment of Error No. 2.

3. A defendant may not be convicted of a crime unless the State proves every element of that crime beyond a reasonable doubt. Viewing the

evidence in the light most favorable to the State, must Mr. Hersh's convictions in both counts be dismissed? Assignment of Error No. 3.

4. Did the trial court violate double jeopardy when it sentenced Mr. Hersh for both first degree premeditated murder and first degree felony murder? Assignment of Error No. 4.

5. Did the trial court abuse its discretion in denying Mr. Hersh's motion to suppress evidence that had a flawed chain of custody? Assignment of Error No. 5.

6. A court's failure to follow the requirements of an evidentiary rule may be an abuse of discretion. RCW 10.58.090(6) mandates the trial court make the determination that evidence proffered under the statute be (1) necessary and (2) admissible under ER 403. At a pretrial hearing, the court found that the Joy Towers offense was admissible pursuant to RCW 10.58.090. The trial court conducted a deficient analysis of its admissibility, particularly regarding the statutory requirement of "necessity." Was the trial court's admission of the evidence under the statute an abuse of discretion? Assignment of Error No. 6.

7. To be admissible to prove "identity" under ER 404(b), 'other acts' evidence must be so distinctive and unusual that a signature-like similarity is evidenced between the other acts and the charged offense.

Moreover, the distinctive common features must be shared between the other acts and the charged crime. The State did not establish the existence of shared common features between 'other acts' evidence and the charged crimes, and did not show these features were so distinctive as to bear a signature-like similarity. Was the trial court's conclusion that the other acts evidence was admissible under ER 404(b) to prove identity an abuse of discretion? Assignment of Errors No. 7, 8, 9, and 10.

8. The admission of prejudicial and irrelevant other acts evidence may so taint a jury's consideration of the charged allegations as to deny the defendant a fair trial. Did the admission of inflammatory 'other acts' evidence in the Tower case deny Mr. Hersh a fair trial? Assignment of Error No. 11.

9. The autopsy report was prepared in 1978 by medical examiner Dr. Hamilton, who was deceased by the time of trial. Dr. Wickham read Dr. Hamilton's report and testified on that basis. Is an autopsy report testimonial? Assignment of Error No. 12.

10. Did the court violate Mr. Hersh's rights to confrontation when it admitted the testimony of Dr. Wickham, where the appellant did not have the opportunity to cross examine the Medical Examiner who prepared the autopsy and prepared the report? Assignment of Error No. 12.

11. The State introduced Y-STR DNA results from combined samples obtained from separate pieces of bark found in the Simerly house. Did the trial court err under *Frye* when it permitted the State to introduce the combined sample DNA test results?¹ Assignment of Error No. 13.

C. STATEMENT OF THE CASE

1. Procedural facts:

The nude body of Norma Simerly was found in her house in Vancouver, Washington on April 29, 1978. 3 Report of Proceedings [RP] at 487; 4RP at 578.² Two and a half months later, on July 12, 1978, Joy Towers³ was attacked in her home, which was located approximately 3.7 miles from the Simerly house. 1RP at 105, 117. Michael Hersh was arrested and subsequently convicted of first degree robbery, first degree burglary, and

¹*Frye v. United States*, 293 F. 1013, 34 A.L.R. 145 (1923)

²The record of proceedings consists of eight volumes:

1RP—December 19, 2008, January 9, January 29, February 24, March 6, March 18, April 13, May 4, July 7, July 8, July 21, September 4, September 18, October 8, November 5, December 2, 2009;

2RP—December 10, 2009, January 15, January 25, January 26, February 26, March 24, 2010;

3RP—March 29, 2010, March 30, 2010, jury trial;

4RP—March 30, 2010, jury trial;

5RP —March 31, 2010, jury trial;

6RP —April 1, 2010, April 2, 2010, jury trial;

7RP--April 5, 2010, April 6, 2010, jury trial;

8RP --April 7, 2010, April 8, 2010, jury trial, April 23, 2010, motions and sentencing.

³At the time of trial her name was Joy Fletcher. 1RP at 72. She is predominately referred

first degree assault regarding the Towers case, and has remained in prison since his arrest in that case on July 12, 1978. 1RP at 54.

In 2008, following Y-STR DNA testing of several pieces of bark and a larger piece of wood found in Ms. Simerly's house, and mitochondrial DNA analysis of a hair found on a washcloth on a bed near Ms. Simerly's body, the State charged Mr. Hersh with premeditated first degree murder (Count 1), and felony murder (Count 2), contrary to RCW 9A.32.030(1)(a), (c). CP 1. The State filed an amended information on December 10, 2009, which alleged in relevant part:

COUNT 01- MURDER IN THE FIRST DEGREE –
9A.08.020(3)/9A.32.030(1)(a)

That he, Michael Allen Hersh, a/k/a Michael A Canales, in the County of Clark, State of Washington, on or about April 28, 1978, with a premeditated intent to cause the death of another person, to wit: Norma Simerly, caused the death of said person; contrary to Revised Code of Washington 9A.32.030(1)(a). . .

COUNT 02- MURDER IN THE FIRST DEGREE-
9A.08.020(3)/9A.32.030(1)(c)

That he, Michael Allen Hersh, a/k/a Michael A Canales, in the County of Clark, State of Washington, on or about April 28, 1978, did commit or attempt to commit the crime of robbery in the first or second degree and/or rape in the first or second degree and in the course of or in furtherance of such crime or in immediate flight therefrom, the Defendant, or another participant, caused the death of a person other than

to as Joy Towers in the record and this Brief refers to her as Joy Towers to ensure clarity.

one of the participants, to-wit: Norma Simerly, contrary to Revised Code of Washington 9A.32.030(1)(c) . . .

CP 473.

a. Motion to dismiss due to pre-indictment delay.

Defense counsel moved for dismissal of both counts on the basis that Mr. Hersh was prejudiced by the delay in charging him, particularly in light of a letter written in December, 1983 by then-Chief Criminal Deputy Prosecuting Attorney, now Superior Court Judge Roger Bennett, indicating that the case was sufficiently strong to be filed against Mr. Hersh. 1RP at 55. Judge Bennett testified that the letter, which was sent to a Clark County Detective at the Detective's request, was designed as a "bluff" to try to obtain the cooperation and testimony of Robert Hood against Mr. Hersh and that the case was in fact not ready at that time. 1RP at 44-45.

The trial court found that the defense did not show specific prejudice brought by the delay other than "general degradation" of evidence, that the State's reason for delay appear to be legitimate, and subsequently denied the motion to dismiss. 1RP at 64, 69. Findings of fact were entered July 8, 2009. CP 262-63. The court found:

5. Judge Bennett testified at hearing on this motion that the letter he wrote to Detective Odegard was a bluff that was intended to induce Robert Hood to testify against the defendant.

6. Judge Bennett testified the bluff did not work and the State never had a chargeable case against the defendant in this matter when he was a Deputy Prosecutor.
 7. The only prejudice the defendant has shown in this motion is the passage of time. The potential degradation of evidence inures to the benefit or detriment of both parties.
 8. The reason for the delay in charging in this matter was that the State believes it did not have sufficient evidence to charge the defendant in this matter until recently when the State obtained DNA evidence.
 9. Balancing the prejudice to defendant against the State's interest in the delay, this court finds the delay was justified.
- CP 262-63.

b. Motion to exclude testimony of Joy Towers.

Counsel moved pursuant to ER 404(b) to exclude the testimony of Joy Towers on July 21, 2009, which the State sought to introduce for the purposes of identity and common plan or scheme. 1RP at 106-11, 131, 133. Counsel also argued that Ms. Towers had been hypnotized and that her testimony should be excluded pursuant to *State v. Coe*, 109 Wn.2d 832, 750 P.2d 208 (1988). 1RP at 108.

The State argued that Mr. Hersh was arrested in Ms. Towers' house and made a statement regarding the assault, that the hypnosis did not occur at the request of law enforcement but instead took place as part of her

therapeutic treatment, and took place following her report to law enforcement regarding the offense. 1RP at 114. The State argued that the similarities between the Towers and Simerly cases include “the sexual nature of the attacks” without evidence of vaginal trauma or semen, removal of both women’s clothing, binding of their hands with women’s clothing, that both women were home alone in Vancouver at approximately the same time of day in residential areas, that there was no forced entry, and that both suffered similar facial injuries. 1RP at 118-19. The State also argued that while Mr. Hersh was trying to tie up Ms. Towers, he said: “[‘]I’ve done this before, I’ll kill you if you don’t let me tie you up.[‘]” 1RP at 119-20.

The court found that Ms. Towers could testify regarding her statements made prior to being hypnotized, that her statements were admissible pursuant to ER 404(b) to prove motive and identity, and that the circumstances of the Towers case is sufficiently similar to the facts of the Simerly case to constitute a signature crime. 1RP at 138.

A Memorandum of Opinion was filed August 4, 2009. CP 306. In it, the court ruled:

I am going to permit the evidence of Towers’ attack in this case finding that the misconduct occurred. Here it helps establish identity. There is no question it establishes the intent to commit the assault and/or death. And in weighing the evidence, considering the probative value outweighs any prejudicial effect. [Citation omitted].

...

Here we have close proximity in time and distance; similar aged individuals; daylight assaults, which was uncommon in 1978. The tying up of the two previous women being used by defendant as a basis for Ms. Towers to submit to him is persuasive.

CP 38-09.

The State subsequently moved for admission of Ms. Towers' testimony pursuant to RCW 10.58.090. Defense counsel objected on several grounds, including that the statute of limitations applied to felony murder and therefore the charge should be dismissed, that Mr. Hersh was not convicted of a sex offense in Ms. Towers' case, that there was no evidence of sexual contact in the Simerly case, and that RCW 10.58.090 violates the separation of powers doctrine. Defendant's Response to State's Motion to Admit Joy Towers Evidence By RCW 10.58.090. CP 601.

The court granted the State's motion and on January 26, 2010 entered the following relevant findings regarding admissibility of the defendant's prior conduct pursuant to RCW 10.58.090:

The defendant's conduct in his attack on Joy Towers supports a finding that the incident was a "sex offense" as defined in RCW 10.58.090(4) and (5).

Evidence of the defendant's prior conduct (crimes committed against Joy Towers) should not be excluded pursuant to ER 403 for the following reasons:

(a) The defendant's attack on Joy Towers was very similar to the

facts of the current case. The Court has previously weighed the similarity in the ER 404(b) hearing and found great similarity between the two incidents.

(b) The incidents occurred close in time.

(c) There is one prior act, where the defendant bound Joy Towers with woman's clothing as was done to Norma Simerly. However, while attempting to bind Joy Towers with woman's clothing, the defendant stated he had done the same thing to two other women.

(d) There appear to be no intervening circumstances.

(e) Evidence of the defendant's attack on Joy Towers is necessary to the State's case. The only other evidence the State has to rely on is Mitochondrial DNA and Y-STR DNA. Neither of these types of DNA provides a positive "match" to the defendant's DNA.

(f) The defendant's attack on Joy Towers resulted in a conviction. The defendant was caught in the act.

(g) The probative value of evidence of the defendant's attack on Joy Tower outweighs any prejudice to the defendant. Evidence of the Joy Towers case will not be misleading, will not confuse the issues, will not cause undue delay, will not waste time, and will not include needless presentation of cumulative evidence.

CP 610-11.

c. Chain of Custody.

On July 21, 2009, defense moved to exclude DNA evidence due to breaks in the chain of custody. The court did not hear the motion and ruled that it would consider the matter during trial. Defense renewed its motion to exclude the items, which primarily consisted of pieces of bark found in

various places in the house and a hair found near Ms. Simerly's body, in a memorandum filed March 29, 2010. The court ultimately admitted the challenged items, including Exhibits 109, 110, 111, 112, 113, 114, 115, 120, and 122. 4RP at 600-610.

d. *Frye* motion.

The State's case against Mr. Hersh rested in large part on the results of DNA testing performed on swabs taken from pieces of bark and a twenty inch piece of wood found in the house. 2RP at 256. The pieces of bark and the piece of wood were found in various places in Ms. Simerly's house. 2RP at 257. Stephanie Winter-Sermeno, a forensic scientist employed by the Washington State Patrol Crime Laboratory in Vancouver, Washington, swabbed the piece of bark and wood to obtain potential DNA. 2RP at 259. After swabbing the pieces she determined none of them individually had sufficient DNA to obtain a profile. 2RP at 261. Ms. Winter-Sermeno then combined all of the extracts from the bark and piece of wood and determined that she had sufficient DNA to generate a profile. 2RP at 262. She then "amplified" the sample and obtained a partial DNA typing profile. 2RP at 262. That sample was in turn sent to Orchid Cellmark, a private laboratory in Texas, for Y-STR DNA testing. 5RP at 762.

Dr. Donald Riley testified that although he had seen cases where DNA samples obtained from individual shell casings obtained from a crime scene were combined to create one sample, this was the first time he had seen samples obtained from pieces of wood combined to obtain a profile. 2RP at 281. Dr. Riley testified that cellulose is “a known inhibitor of PCR reactions.” 2RP at 277. He described PCR as the technique that laboratories used to copy a small DNA sample for Y-STR testing. 2RP at 277-78. He stated that an inhibitor reduces the effectiveness of the PCR reaction. 2RP at 278. He also stated that he believed that by combining DNA samples, it “could have created a mixture by combining those samples” and that it could leave to a false result. 2RP at 280. Ms. Winter-Sermeno testified that she used “an extraction technician that is known to get rid of inhibition.” 2RP at 271.

On January 12, 2010, defense counsel moved to suppress all evidence involving DNA because the samples were combined and that the methods used by the lab which did the testing—Orchid Cellmark—were unreliable under ER 702 and ER 703, and had not had gained general scientific acceptance under *Frye v. United States*, 293 F. 1013, 34 A.L.R. 145 (1923). The court filed a Memorandum of Decision on January 26, 2010, denying the

motion and finding that the PCR typing used in the testing had gained general acceptance. The court found:

The method of collection is a commonly accepted practice within the field of DNA and objection may be made as to the weight to be given to the sample based upon the similarity of the specimen and in the manner of which it was collected.

CP 612.

At the close of evidence, defense counsel moved for new trial pursuant to CrR 7.5 or alternatively, arrest of judgment pursuant to CrR 7.4(1) on a number of grounds, including the challenge to the evidence due to the procedure of combining the bark samples, citing *Frye* and ER 702. The motion was denied. CP 889, 927.

e. Jury instructions.

Jury trial in the matter started March 30, 2010, the Honorable Robert L. Harris presiding.

Neither exceptions nor objections were taken to the jury instructions were taken by counsel for the defense. 7RP at 1135-36. The defense did not request a lesser included instruction for felony murder. 7RP at 1136. The court gave the jury the following “to-convict” instruction for first degree murder as charged in this case:

To convict the defendant of the crime of the Murder in the First Degree, as charge in Count 1, each of the following elements of the

crime must be proved beyond a reasonable doubt:

(1) That on or about April 28, 1978, the defendant acted with intent to cause the death of Norma Simerly;

(2) That the intent to cause the death was premeditated . . .

CP 849. Instruction 10.

The court gave the jury the following “to-convict” instruction for first degree felony murder:

To convict the defendant of the crime of Murder in the First Degree, as charged in Count 2, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about April 28, 1978, the defendant committed or attempted to commit Robbery in the First Degree or Robbery in the Second Degree or committed or attempted to commit Rape in the First Degree or Rape in the Second Degree;

(2) That the defendant caused the death of Norma Simerly in the course of or in furtherance of such crime or in immediate flight from such crime. . .

CP 852. Instruction 13.

f. Verdicts

On Verdict Form A, the jury found Mr. Hersh guilty of premeditated first degree murder. CP 881. On Verdict Form B, the jury found Mr. Hersh guilty of first degree felony murder, and found on the Special Verdict Form that he committed or attempted to commit first and second degree rape. CP

882, 883. The Court sentenced Mr. Hersh to a pre-Sentencing Reform Act sentence of a minimum term of 400 months for Count 1 and Count 2 to 400 months, to be served concurrently, and consecutively to any current sentence. 8RP at 1295. CP 945.

Timely notice of appeal was filed on April 22, 2010. CP 952. This appeal follows.

2. **Testimony at trial:**

In 1978 Norma Simerly lived with her husband Wally Simerly at 200 East 38th Street in Vancouver, Washington. 3RP at 478. Mr. Simerly was out of town on a business trip; he learned of his wife's murder when he called home on April 29. 3RP at 478. He learned from law enforcement that a car had also been taken from their house. The car was later recovered at a substation in Vancouver. 3RP at 479, 480.

Ms. Simerly's nude body was discovered lying between the wall and a bed in the master bedroom of the house. 3RP at 488; 4RP at 546, 578. Her hands were bound with a woman's blouse and a bottle of vodka without a cap was found on top of her body. 3RP at 488; 4RP at 546, 552, 584. Exhibits 67, 69, 71. A loaf of bread was found underneath her body. 4RP at 555. Police also found in the master bedroom a bottle of shampoo on the floor,

pieces of bark on the floor, a long-sleeved shirt and a bloody washcloth on the bed, and a towel and a pillowcase. 4RP at 584.

Police obtained six hairs from the washcloth, including one admitted as Exhibit 34(b)(4). 4RP at 605,606. The hair was tested for mitochondrial DNA,⁴ which is a variant of nuclear DNA, which is obtained from the center of a cell. 6RP at 879, 880. Mitochondrial DNA is obtained from a different part of the cell. 6RP at 879. Nuclear DNA comes from both parents, while mitochondrial DNA is inherited from the maternal side only. 7RP at 1007. Nuclear DNA is the analysis that most forensic labs use. 7RP at 1012.

Christie Smith, a DNA analyst from the Arizona Department of Public Safety Crime Lab in Phoenix, testified that the mitochondrial DNA obtained from the hair and the mitochondrial DNA sequence obtained from an oral swab from Mr. Hersh had the same sequence. 6RP at 887. Ms. Smith testified that the sequence obtained from the hair and Mr. Hersh's swab would occur in .98 percent of the Caucasian population. 6RP at 889.

A piece of wood approximately twenty inches in length was found on the floor in the kitchen. 3RP at 519; 4RP at 580. Exhibit 19. Pieces of bark were also found scattered in various rooms in the house. 3RP at 527, 531. Exhibits 33, 38, 39. A high heel shoe was also found on the kitchen floor.

4RP at 580, 581.

Police found blood stains on a swinging door between the kitchen and dining room and a toaster oven on the floor that had bloodstains on it. 4RP at 581. In the hallway police found another high heeled shoe that matched the one found in the kitchen, and part of a necklace chain. 4RP at 582. There were bloodstains toward the doorway portion that leads into the master bedroom and there was blood splatter and stains on one side of the hall. On the other side of the hall there was a handprint in blood close to the floor. 4RP at 518.

In the bathroom, police found a serrated knife on a towel. 4RP at 540, 583. Police also found clothing on the bathroom floor including half-slip, a skirt, a bra and a gown. 4RP at 583. Police found a piece of chain similar to the one found at the other end of the hallway. 4RP 583. In the bathroom sink police found a knife handle of the same type of knife found on the bathroom floor. The knife's blade was broken off and was not recovered. 4RP 583. Wally Simerly identified the knives as having come from the kitchen of the house. 6RP at 838. The knife handle was examined at Orchid Cellmark DNA lab located in Dallas, Texas. 7RP at 1097. The knife handle had a partial profile for male DNA. 7RP at 1099. A DNA sample was obtained

⁴DNA denotes the molecule Deoxyribonucleic acid. 7RP at 1006.

from Mr. Hersh pursuant to a search warrant. 5RP at 811. Mr. Hersh was excluded as donor of the male DNA found on the knife. 6RP at 869. No male DNA was obtained from the vodka bottle. 7RP at 1100.

In the northeast bedroom of the house, police found a woman's purse at the foot of the bed and a photograph with a red substance on it was on the bed. 4RP at 536. 584. Police also a beach towel, a girdle with one nylon still attached with a clip and the other nylon missing. 4RP 583, 584. Police found two paper bags that had bloodstains on them and the cap to a liquor bottle. 4RP at 584. Over defense objections, the State entered several pieces of bark and the piece of wood found in the house and hair collected from the washcloth. 4RP at 599, 600-602, 603, 604, 609, 610.

Police observed wood stacked in a pile outside the house. 3RP at 515,516. Exhibits 11, 12.

Over defense objection, Clark County Medical Examiner Dr. Dennis Wickham testified regarding an autopsy report prepared by Dr. Archie Hamilton, who was deceased at the time of trial. 5RP at 795. Dr. Wickham described injuries to Ms. Simerly's head, which included a broken mandible and four stab wounds to her chest. 5RP at 799, 800, 804. Two of the stab wounds went into the right vertical of her heart. 5RP at 800. Another stab

wound went through the area between the second and third ribs on the right side of the chest, and another in the right side of the chest, lacerating her right lung. 5RP at 800-01, 804. Her cause of death was listed as multiple stab wounds to the chest. 5RP at 805. The autopsy report listed no vaginal trauma or laceration, and no evidence of sexual contact or rape and no presence of spermatozoa. 5RP at 807.

Stephanie Winter-Sermeno testified that she swabbed the pieces of bark and wood samples collected at the scene in order to collect DNA samples from them. 5RP at 726. As she had done during the *Frye* hearing, Ms. Winter-Sermeno testified that there was not enough DNA present in each of the individual samples and so she “made the decision to take all those individual samples and combine them into one sample” 5RP at 728. She testified that she had combined samples in other cases and that it is a generally accepted technique. 5RP at 728. She determined that the partial mixed profile was consistent with Ms. Simerly and one other person. 5RP at 729. She was not able to identify the other person but ascertained that the sample was left by a male due to the presence of a Y ileal at one of the locations she looked at. 5RP at 729. There was not sufficient DNA for her to make an interpretation, so she recommended that the sample be sent to

another laboratory to Y-STR analysis.⁵ 5RP at 729.

She stated that for Y-STR analysis, a technician looks only at locations on the Y chromosome, and that it is used in cases where there is a very small amount of male DNA in comparison with a large amount of female DNA, or where there is merely a small amount of male DNA. 5RP at 729. 730.

Barbara Leal, a forensic DNA analyst employed by Orchard Cellmark in Farmers Branch, Texas, testified that the sample was submitted to her for Y-STR testing. 5RP at 762. She stated that in the procedure, the DNA sample is amplified in a process known as polymerase chain reaction (PCR) in which the sample is "amplified," making several millions of copies of the locations on the Y chromosomes in order to obtain a Y-STR profile. 5RP at 762. The amplified the sample is then analyzed using software that converts the data that was obtained into a profile, which is in turn analyzed. 5RP at 762. Ms. Leal testified that the result obtained from the DNA extracted from the bark was compared to known profiles of Mr. Hersh and Wally Simerly's Y-STR profile. 5RP at 763. Ms. Leal testified that the partial Y-STR profile obtained from the DNA extracted of the bark is a mixture of two males, and

⁵STR denotes "short tandem repeat." 7RP at 1012.

that Wally Simerly was excluded as a contributor, but that Mr. Hersh could not be excluded as a contributor to the mixture. 5RP 763, 765. Ms. Leal testified that she took into account all possible combinations of male profiles that could have contributed to the sample, and stated that the profile was seen three times out of 1267 Caucasians in the database that she used. 5RP at 767.

Dr. Riley testified that the Orchid Cellmark laboratory obtained a “partial profile” from the bark, and that they “tested 16 loci or locations and they only are claiming to have obtained results for eight of them, it means that the test is missing at least half the molecules that are there.” 7RP at 1015. Dr. Riley also stated that Orchid Cellmark obtained “an extremely weak result and there is a lot of controversy on how to interpret samples like this.” 7RP at 1015. Dr. Riley stated that Orchid Cellmark had only four loci that were valid according to their own internal protocol, and that they used “a sort of a concentrating procedure to boost the signals, but that was done after the place in the procedure where you get these artifacts” 7RP at 1018-19. He described an artifact as a result that is “probably not a real result, or is at risk of being a false result.” 7RP at 1018.

Robert Hood testified that he was Mr. Hersh's friend in 1978, and that he and Mr. Hersh would walk "everywhere" in the period between September, 1977 and November, 1978. 5RP at 753. He testified that they would walk in the area around the Simerly's house in order to get to Hazel Dell. 5RP at 750, 751.

Joy Fletcher, who was known as Joy Towers in 1978, testified that in 1978 she lived on Westgate Avenue in Hazel Dell, Washington. 6RP at 939. She stated that on July 12, 1978, she was home getting ready to go play tennis with a friend, and that her husband was at work and her son was outside playing. 6RP at 939-40. She stated that someone knocked on the door and she answered it. 6RP at 940. She testified that a young man told her that her son had been throwing eggs at his house and he wanted to talk about it. 6RP at 940. She let him into the house and then turned around to go back and then thought she had had seizure. 6RP at 941. She stated that she was then on the floor, and when she got up the male had a butcher knife in his hand. 6RP at 942-43. She stated that he told her to do as he said or he would kill her. 6RP at 943. She said that he wanted to tie her up, and she said he could just take her keys and her purse. 6RP at 943. She stated that he tied her hands and then he left the room and she went into her bedroom

and locked the door. 6RP at 944. She stated that he broke through the door and then said: “why did you do that, why did you do that? You have to do as I say or I’ll kill you. I’ve done this before, I will kill you.” 6RP at 945. She stated that he tied her hands several times, and she would untie it when he left, and then come back and retie her. 6RP at 946. She stated that he used pantyhose he got from a dresser in the bedroom to tie her up. 6RP at 959.

Ms. Towers testified that he then put her on the bed in the master bedroom and strangled her until she lost consciousness. 6RP at 947. She had facial fractures, cuts to her face, a broken wrist, and she is blind in one eye. 6RP at 961.

Her assailant, whom she identified as Mr. Hersh, was found hiding in a closet in her house. 6RP at 952. Mr. Hersh was convicted and imprisoned as a result of the offense. 6RP at 962.

Former Vancouver Police Officer Danny Jones testified regarding the investigation in 1978 and the Joy Towers case. 3RP at 489-90. He testified that he remained a detective for a year after Ms. Simerly’s death. 3RP at 491.

He testified in response to inquiry by the State, over defense objection, that he was unaware of other case other than the Simlery and Towers cases in Vancouver or Clark county where a woman was attacked, bound with

women's clothing, and assaulted. 3RP at 491-91.

D. ARGUMENT

1. THE EVIDENCE WAS INSUFFICIENT TO CONVICT MR. HERSH OF FIRST DEGREE FELONY MURDER BASED ON RAPE IN THE FIRST DEGREE.

In a criminal prosecution, the State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. Amend. 14; *Apprendi v. New Jersey*, 530 U.S. 466, 471, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 435 (2000); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). A felony murder conviction must be supported by sufficient evidence of each element of the predicate felony. *State v. Maupin*, 63 Wn. App. 887 at 892, 822 P.2d 355 (1992). Where the commission of a specific underlying crime is necessary to sustain a conviction for a more serious statutory criminal offense, jury unanimity as to the underlying crime is imperative. *State v. Green*, 94 Wn.2d at 233.

In this case, the State was required to prove that Mr. Hersh caused Ms. Simerly's death "in the course of or in furtherance of... or in immediate flight [from]" rape in the first degree. RCW 9A.32.030; Instruction No. 13, CP 852.

First degree murder is defined in relevant part:

(1) A person is guilty of murder in the first degree when: (a) With a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person; or

(c) He or she commits or attempts to commit the crime of either (1) robbery in the first or second degree, (2) rape in the first or second degree, (3) burglary in the first degree, (4) arson in the first or second degree, or (5) kidnapping in the first or second degree, and in the course of or in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants ...

RCW 9A.32.030.

First degree rape is defined in relevant part as:

(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:

(a) Uses or threatens to use a deadly weapon or what appears to be a deadly weapon; or (b) Kidnaps the victim; or (c) Inflicts serious physical injury, including but not limited to physical injury which renders the victim unconscious; or (d) Feloniously enters into the building or vehicle where the victim is situated.

RCW 9A.44.040

Defense counsel moved to dismiss the charge of felony murder based on rape or attempted rape in Motion for Summary Judgment filed February 26, 2010. CP 627. The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is “[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable

doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *Green*, 94 Wn.2d at 221. A challenge to the sufficiency of the evidence admits the truth of the State’s evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

To convict a defendant of felony murder, the State is required to prove beyond a reasonable doubt each element of the predicate felony. *State v. Quillin*, 49 Wn. App 155, 164, 741 P.2d 589 (1987). Here, the underlying felony found by the jury to support the first degree felony murder charge against Mr. Hersh was rape. Under RCW 9A.32.030(c)(3), rape is a predicate offense to first degree felony murder. First degree felony murder requires no specific criminal mental state other than the one necessary for the predicate crime. *State v. Frazier*, 99 Wn.2d 180, 661 P.2d 126 (1983).

“Forcible compulsion” means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death, physical injury, or kidnapping. RCW 9A.44.010; Instruction No.27. CP 866. Here, the State failed to prove (1) that Ms. Simerly was raped, (2) that Mr. Hersh caused Ms. Simerly’s death, (3) that Mr. Hersh raped Ms. Simerly by means of forcible compulsion, and (4) that Ms. Simerly's death occurred in the course of, in furtherance of, or in the immediate flight from

any such rape.

First, the State lacked any direct evidence that Mr. Hersh caused Ms. Simerly's death. See *infra*, § 3 of this Brief. When taken in a light most favorable to the State, the circumstantial evidence included the presence of a hair on a washcloth found near Ms. Simerly's body which contained mitochondrial DNA for which Mr. Hersh was a possible contributor, pieces of bark and a piece of wood that, when combined, contained Y-STR DNA for which Mr. Hersh was a possible contributor, and the testimony that Ms. Simerly died of multiple stab wounds. 5RP at 805. As argued in §3, *infra*, this is certainly not sufficient to allow a rational jury to conclude beyond a reasonable doubt that he caused her death.

Second, the State lacked any direct evidence that Mr. Hersh raped Ms. Simerly by means of forcible compulsion, or that a rape occurred at all. When taken in a light most favorable to the State, the circumstantial evidence included the clothing found in other areas of the house, that she was nude, that her hands were tied, the fact of her death by stab wounds, and the injuries to her face. Taken in a light most favorable to the State, this does not establish beyond a reasonable doubt that Mr. Hersh forcibly raped or attempted to rape Ms. Simerly, or raped her at all. There were no witnesses to any such sexual act, nor was there any physical evidence of forcible

compulsion or rape by any means. There was no evidence of penetration or attempted penetration. Given the lack of evidence of vaginal trauma and semen, it cannot be said that the evidence was sufficient to establish beyond a reasonable doubt that he raped her or raped her by means of forcible compulsion.

Third, the evidence was insufficient to establish that the death was caused in the course of, in furtherance of, or in the immediate flight from any such rape. The State's evidence on this point was (1) that Ms. Simerly was undressed when her body was discovered, and (2) clothing was found scatted in the house. These facts are insufficient to establish beyond a reasonable doubt that any rape was contemporaneous with Ms. Simerly's death.

"The existence of a fact cannot rest in guess, speculation, or conjecture." *State v. Golloday*, 78 Wn.2d 121, 129-30, 470 P.2d 191 (1970), overruled on other grounds, *State v. Arndt*, 87 Wn.2d 374, 553 P.2d 1328 (1976), quoting *Home Ins. Co. of New York v. Northern Pac. Ry.*, 18 Wn. App. 798, 140 P.2d 507 (1943). The State's rape theory rests entirely on speculation and conjecture, rather than proof beyond a reasonable doubt. Mr. Hersh's conviction should be reversed and this Court should order the dismissal of the charge due to lack of sufficient evidence.

2. **THERE WAS INSUFFICIENT EVIDENCE TO PROVE THE ELEMENT OF PREMEDITATION IN COUNT 1.**

As noted in § 1, *supra*, the State must prove each essential element of the crime beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983). Evidence is sufficient to support a conviction if, after viewing the evidence in the light most favorable to the State, it allows any rational trier of fact to find all of the elements of the crime charged beyond a reasonable doubt. *Salinas*, 119 Wn.2d at 201.

In order to find Mr. Hersh guilty of first degree murder, the State was required to prove beyond a reasonable doubt that he caused Ms. Simerly's death with premeditated intent. RCW 9A.32.030(1)(a). Premeditation can be proved by circumstantial evidence where the inferences drawn by the jury are reasonable and the evidence supporting the jury's verdict is substantial. *State v. Neslund*, 50 Wn. App. 531, 558, 749 P.2d 725, *rev. denied*, 110 Wn.2d 1025 (1988).

Premeditation is the "mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short." *State v. Bingham*, 105 Wn.2d 820, 719 P.2d 109 (1986). The premeditation required in order to support a conviction for the crime of

murder in the first degree must involve more than a moment of time and, merely because a defendant had the time and the opportunity to deliberate, that is insufficient to support a finding of premeditation. *Bingham*, 105 Wn.2d at 824. Therefore, the State must prove a defendant in fact did deliberate or reflect upon the killing of another before it can sustain a conviction for murder in the first degree.

In the light most favorable to the State, the evidence does not show premeditation. The State did not prove that Mr. Hersh actually deliberated or reflected upon killing Ms. Simerly. Although there may be circumstantial evidence supporting the State's argument that Mr. Hersh touched pieces of bark and that Ms. Simerly was beaten, there was no evidence that the beating occurred before her death; Dr. Wickham testified that her death was caused by stabbing, not the other injuries she received. 5RP at 805. Dr. Wickham testified that her death was caused by stab wounds to her heart and to her lung. Assuming *arguendo* the evidence is sufficient to find Mr. Hersh was the person who stabbed Ms. Simerly, there is no conclusive evidence as to what specific knife or knives caused the wounds and there is no evidence that Mr. Hersh planned to kill Ms. Simerly. There was no evidence that a knife was procured beforehand or that the intact knife and the broken knife found

in the bathroom were used to inflict the wounds. There was no evidence that the attack was planned in any manner.

There was a knife and a knife handle found in the bathroom, but there is no evidence as to whether the intact knife was used to inflict the wounds or if both were used and one was broken in the course of the crime. There is no evidence that the murder weapon was not a knife already carried by the assailant and used in the heat of the moment, since there was no conclusive evidence of which knife or knives were used.

The State did not establish anything with regard to premeditation regarding the stab wounds. Because there was no evidence regarding what took place prior to Ms. Simerly's death, there simply was not enough evidence here to prove that her death was premeditated. *Cf. State v. Luvene*, 127 Wn.2d 690, 712-13, 903 P.2d 960 (1995) (evidence showed that the defendant purposely waited for the customers to leave, then shot and robbed the shopkeeper).

This Court should reverse the conviction for Count 1 and order the dismissal of the first degree murder charge due to lack of sufficient evidence of premeditation.

3. **THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT MR. HERSH MURDERED MS. SIMERLY**

As noted *supra*, the due process clauses of the federal and state constitutions require the State prove every element of a crime beyond a reasonable doubt. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. The inquiry on appellate review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Green*, 94 Wn.2d at 220-22.

Mr. Hersh was convicted of premeditated murder and felony murder, which required the State to prove beyond a reasonable doubt that he caused her death with the intent to do so. Here, there is no question that Ms. Simerly was murdered; the issue is whether the State proved beyond a reasonable doubt that Mr. Hersh was responsible.

The State had limited physical evidence connecting Mr. Hersh to the death of Ms. Simerly. Instead, the State relied upon testimony regarding DNA profiles found on pieces of bark in the house and mitochondrial DNA from a hair found on washcloth on the bed near her body. This is not sufficient to prove beyond a reasonable doubt that Mr. Hersh murdered Ms. Simerly. Dr. Wickham testified that the cause of death was stab wounds, not from being hit by an object such as the piece of wood found in the house.

An intact knife and a knife handle were found in the bathroom of the house. DNA was recovered from the knife and Mr. Hersh was excluded as being a contributor of that DNA profile. There was no testimony that the knife or knives found in the bathroom were used to stab Ms. Simerly, and there was no evidence that Mr. Hersh touched either of the knives.

Viewing the evidence in the light most favorable to the State, there is not sufficient evidence to conclude beyond a reasonable doubt that Mr. Hersh murdered Ms. Simerly. His convictions in Counts 1 and Count 2 must be reversed and dismissed.

4. **THE TRIAL COURT VIOLATED DOUBLE JEOPARDY WHEN IT IMPOSED SENTENCES ON BOTH FIRST DEGREE PREMEDITATED MURDER AND FIRST DEGREE FELONY MURDER.**

Mr. Hersh was convicted of both first degree premeditated murder in Count 1, and first degree felony murder in Couth 2. Both charges related to the same act, causing the death of Ms. Simerly.

The court imposed 400 months on Count 1 and 400 months on Count 2, to be served concurrently. 8RP at 1295. But the court erred in doing so because two sentences for the same offense charged as separate counts runs afoul of double jeopardy prohibitions. The conviction for Count 2 should be vacated.

The double jeopardy provisions of Article I § 9 of the Washington Constitution and the Fifth Amendment to the United States Constitution prohibit multiple punishments for the same offense imposed in the same proceedings. *State v. Womac*, 160 Wn.2d 643, 650-51, 160 P.3d 40 (2007). Mr. Hersh's double jeopardy claim is a manifest error affecting a constitutional right. *State v. Brewer*, 148 Wn.App. 666, 673, 205 P.3d 900, 903 (2009). Interpreting and applying the double jeopardy clause is a question of law, subject to *de novo* review. *State v. Knight*, 162 Wn.2d 806, 810, 174 P.3d 1167 (2008).

In *Womac*, the defendant was charged in three separate counts and convicted of three crimes: homicide by abuse, felony murder based on criminal mistreatment, and first degree assault. *State v. Womac*, 160 Wn.2d 643, 647, 160 P.3d 40 (2007). All three of the charges related to a single incident with a single victim, Womac's young son. *Id.* The trial court entered judgment on all three convictions, but imposed sentence only on the homicide by abuse. *Id.* On appeal, the Court of Appeals 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. *Id.* Our state Supreme Court took matters further. It vacated the felony murder and assault convictions on double jeopardy

grounds holding that Womac had in actuality committed a single offense against a single victim yet was held accountable for three crimes in violation of the double jeopardy prohibition against multiple punishments for a single offense. *Womac*, 160 Wn.2d at 658-60. In doing so, the court determined that double jeopardy was violated even though Womac received no sentence on the felony murder and assault convictions. The Court noted that a conviction, 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* [*State v. Calle*, 125 Wn.2d 769, 777 n. 3, 888 P.2d 155 (1995)], “[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.”

Womac, 160 Wn.2d at 657-58.

In the present case, the State filed multiple charges for the same death: premeditated first degree murder and first degree felony murder based on a second degree assault. CP 473. The jury returned guilty verdicts on the first degree murder and the felony murder. CP 881, 883. Like *Womac*, the trial court entered convictions for both counts. Under *Womac*, the lesser charge, the felony murder, must be vacated. *Womac*, 160 Wn.2d at 660 (remedy for double jeopardy violation is to vacate lesser offense (citing *State v. Weber*,

159 Wn.2d 252, 265-66, 149 P.3d 646 (2006)).

5. **THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO SUPPRESS EVIDENCE AND TEST RESULTS OBTAINED FROM THE EVIDENCE FOR WHICH THE CHAIN OF CUSTODY HAD LARGE GAPS AND WAS TENUOUS.**

A trial court's decision to admit evidence is reviewed for abuse of discretion. *State v. Campbell*, 103 Wn.2d 1, 21, 691 P.2d 929 (1984), cert. denied, 471 U.S. 1094, 85 L.Ed.2d 526, 105 S.Ct. 2169 (1985). A trial court abuses its discretion if its decision is manifestly unreasonable or based upon untenable grounds or reasons *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), cert denied, 523 U.S. 1008, 140 L.Ed.2d 323, 118 S.Ct. 1193 (1998). Mr. Hersh's counsel objected to the admission of the DNA test results obtained from pieces of bark, a piece of wood, and a hair, due to a flawed and incomplete chain of custody.

A physical object connected with a crime may properly be admitted into evidence when properly identified and when shown to be in substantially the same condition as when the crime was committed. *Campbell*, 103 Wn.2d at 21.

While the evidence need not be identified with absolute certainty, nor must every possibility of alteration or substitution be eliminated, the item

must be properly identified as the same item placed into custody. *Campbell*, 103 Wn.2d at 21, citing, *Brown v. General Motors Corp.*, 67 Wn.2d 278, 285-86, 407 P.2d 461 (1965). Factors to be considered "include the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it." *Campbell*, 103 Wn.2d at 21, quoting, *United States v. Gallego*, 276 F.2d 914, 917 (9 Cir. 1960). Chain of custody may established even without proof of an unbroken chain of custody . . . "A failure to present evidence of an unbroken chain of custody does not render an exhibit inadmissible if it is properly identified as being the same object and in the same condition as it was when it was initially acquired by the party." *State v. Picard*, 90 Wn. App. 890, 897, 954 P.2d 336, review denied, 136 Wn.2d 1021, 969 P.3d 1065 (1998) (citation omitted) quoting, *State v. DeCuir*, 19 Wn. App. 130, 135, 574 P.2d 397 (1978). "[M]inor discrepancies or uncertainty on the part of the witness will affect only the weight of evidence, not its admissibility." *Campbell*, 103 Wn.2d at 21 citing, 5 KARL TEGLAND, *Washington Practice* § 90, at 203 (2d ed. 1982).

In this case, in 1978 items that were collected by police were brought to the police evidence room, or if no one was on duty to accept an item, it was placed in an evidence locker. 4RP at 564, 565. A bag that contained items that were wet or had blood evidence were left open to dry "so that it

wouldn't mold or rot and destroy the evidence." 4RP at 565. Exhibits 109, 110, 111, 112, 113, 114 and 115, which contained bark collected from various places in the house, and Exhibit 122, passed through the hands of many people between 1978 and 2010. Counsel argued that for pieces of bark, the piece of wood, and the hair that were obtained from the house in 1978 were inadmissible due to the manner in which the material was collected and stored, and due to a substantial gap in the chain of custody for the items. 4RP at 595, 618, 621; 5RP at 684. Some of the pieces of bark were stored together with other items in the same bag, such as Item 115, which was a piece of bark and an earring, and Item 109, which consisted of two pieces of bark and shampoo bottle. 4RP at 620, 621. The evidence from this case was stored until 2002—when work began on the case again—in a cardboard barrel in the Vancouver police storage facility, and later moved to another facility. 5RP at 661. The evidence from the Joy Towers case was kept in the same barrel, separated by a layer of paper. 5RP at 678.

In this case, the large gaps in the chain of custody in the period between 1978 and 2010, and the way in which the evidence was collected, combined and stored, cannot be considered a "minor discrepancy." Instead, the gaps regarding the whereabouts of the evidence, and treatment and storage of the evidence undermines the foundation requirement needed to

apply the more the permissive language in the chain of custody rules.

In *State v. Neal*, 144 Wn.2d 600, 607-08, 610-11, 30 P.3d 1255 (2001), the Court held that the trial court abused its discretion by admitting the flawed lab certification evidence without the proper foundation and chain of custody. The abuse of discretion was held to be reversible error. The court reasoned that CrR 6.13(b), an exception to the hearsay rule, only provided for the admission of lab certifications in lieu of live testimony when the rule was strictly complied with. The Supreme Court, agreeing with the Court of Appeals, affirmed that the lab report and certification have two functions, "furnishing *prima facie* evidence of both the test results and the chain of evidence custody to and from the testing expert." *State v. Neal*, 144 Wn.2d. at 607. (Citation omitted). In *Neal*, the Deputy was able to testify that he was the person who handled the substance between the Tacoma crime lab and the Skamania evidence vault, but his testimony did not supply the information specifically required by the court rule: the name of the person from whom the tester of the substance received the evidence. *State v. Neal*, 144 Wn.2d at 606. In *Neal*, in the context of introducing hearsay, the Supreme Court recognized that failure to strictly comply with the rules would create an unintended "catch-all" that would create an unacceptably unpredictable application of the law.

In the instant case the chain of custody is insufficient to establish the necessary foundation. The trial court abused its discretion by failing to dismiss the case based on an incomplete chain of custody because the ability to tamper with the state's most critical pieces of evidence against Mr. Hersh, and the inability to protect the material from degradation or contamination over the course of three decades, completely undermined required foundation and trustworthiness for admission into evidence. Admission of the bark, wood, hair and test results obtained from the items under these circumstances amounted to the type of "catch-all" held impermissible in *State v. Neal, supra*. In the instant case, the trial court abused its discretion because the State was unable to establish an unbroken chain of custody and was unable to show that the items, particularly the bark and hair, were kept free of contaminants at the time of collection and during the intervening years until DNA testing. *State v. Neal*, 144 Wn.2d at 607-08.

When the trial court abuses its discretion, the reviewing court must determine whether the error was harmless or prejudicial. Reversal is required if the error results in prejudice. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). An error is prejudicial if, "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been

materially affected." *State v. Neal*, 144 Wn.2d at 611, quoting, *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). Improper admission of evidence constitutes harmless error only if the evidence is of minor significance in reference to the evidence as a whole. *Thieu Lenh Nghiem v. State*, 73 Wn. App. 405, 413, 869 P.2d 1086 (1994). Under this test, State's Exhibits 109, 110, 111, 112, 113, 114, 115, 120, and 122 should have been excluded because the State could not prove that the items had been properly preserved, not exposed to contaminants, and were reliable for DNA tests. The State could not have proceeded in its prosecution of Mr. Hersh without the test results, because without it, there was insufficient evidence to find the elements needed to prove the offenses alleged by the prosecution.

6. **THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF THE ASSAULT AND BURGLARY CONVICTIONS INVOLVING JOY TOWERS UNDER ER 404(b) AND RCW 10.58.090.**

On May 4, 2009, the defense moved to prohibit admission of evidence of Mr. Hersh's convictions for kidnapping, assault, and burglary, and Ms. Towers' testimony regarding the 1978 case. The State sought to introduce evidence of the convictions under ER404(b), and later under RCW 10.58.090. The State argued that the similarities between the prior and

current offenses justified admission of the other acts to show identity. The State argued the existence of similarities between the offenses including the fact that both offenses took place within a relatively short time of each other, the houses were approximately 3.7 miles from one another, both women were of similar age, both women's faces were beaten, Ms. Towers was threatened with a knife, and Ms. Simerly was stabbed, and that Ms. Towers was tied and had her clothing partially removed and Ms. Simerly was found tied and without clothing. The State also argued that Mr. Hersh told Ms. Towers to let him tie her up and that he had done this on two previous occasions.

The trial court found that the evidence was admissible for the purpose of showing identity and motive. Findings Re Admissibility of Prior Conduct Pursuant to RCW 10.58.090, CP 609. Defense counsel also challenged the State's subsequent motion for admission of the evidence pursuant to RCW 10.58.090 on the basis of due process and separation of powers . 2RP at 344-45.

On review, the appellant submits that the court erred, and that motive was not relevant to prove either rape or burglary, and that identity was not an issue because the State intended to introduce DNA evidence to establish Mr. Hersh was in the Simerly house. The trial court found the similarities probative, most particularly the fact that both women's hands were tied. The

court concluded the evidence was very probative, and not unfairly prejudicial. CP 611.

Evidence of other crimes is presumptively inadmissible to prove character to show action in conformity therewith. ER 404(b); *State v. Powell*, 126 Wn.2d 244, 258-259, 893 P.2d 615, 24 (1995). Such evidence may be admissible for other purposes, such as to prove “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b); *Powell*, 126 Wn.2d at 259, citing *State v. Goebel*, 36 Wn.2d 367, 369, 218 P.2d 300 (1950).

In reviewing an ER 404(b) challenge, this Court considers the State’s theory for offering the evidence, the trial court’s theory for admitting it, and harmless error. *State v. Stanton*, 68 Wn. App. 855, 861, 845 P.2d 1365 (1993). The decision to admit or exclude ER 404(b) evidence is reviewed for abuse of discretion. *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995).

A trial court abuses its discretion if it relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

In addition to admitting the evidence under ER 404(b) to prove identity and motive, the court rejected constitutional challenges to RCW

10.58.090, and ruled the evidence would separately be admissible. The court's ruling denied Mr. Hersh a fair trial.

RCW 10.58.090 allows evidence that is not admissible for a more limited purpose under ER 404(b) to be admitted for any purpose whatsoever. RCW 10.58.090(1). During closing argument, the State asked the jurors to use the evidence in this case as bald propensity evidence—arguing that in addition to the two different types of DNA technology, they could just look at “the defendant’s actions just two and a half months later, uncontested, no doubt about it, what he did to Joy two and a half months after he killed Norma.” 8RP at 1140. The State argued at length about the similarities between the Tower and Simerly cases, but clearly delved into the propensity, arguing that:

The Defendant’s words: Stop fighting me or I’ll kill you. I’ve done this before. Two and a half months after Norma is killed.

8RP at 1151.

The State’s argument was clear: Mr. Hersh had attacked a woman and he was likely to have attacked and killed Ms. Simerly a few months before that. Washington courts have long excluded this class of evidence precisely because this propensity link was deemed unreliable, irrelevant, and overly prejudicial. *See e.g. State v. Bokien*, 14 Wash 403, 414, 44 P. 889

(1896). More specifically, though, RCW 10.58.090 substantially disadvantaged Mr. Hersh.

a. The Tower evidence was neither “necessary” under RCW 10.58.090 nor admissible under ER 404(b).

Here, the trial court found the evidence was “necessary” under RCW 10.58.090. CP 611. RCW 10.58.090 provides that in a prosecution for a sex offense, “evidence of the defendant’s commission of another sex offense or sex offenses is admissible, notwithstanding Evidence Rule 404(b), if the evidence is not inadmissible pursuant to Evidence Rule 403.” RCW 10.58.090(1). Before a court may admit propensity evidence under RCW 10.58.090, the statute requires:

When evaluating whether evidence of the defendant’s commission of another sexual offense or offenses should be excluded pursuant to Evidence Rule 403, the trial judge shall consider the following factors:

- (a) The similarity of the prior acts to the acts charged;
- (b) The closeness in time of the prior acts to the acts charged;
- (c) The frequency of the prior acts;
- (d) The presence or lack of intervening circumstances;
- (e) The necessity of the evidence beyond the testimonies already offered at trial;
- (f) Whether the prior act was a criminal conviction;
- (g) Whether the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence; and
- (h) Other facts and circumstances.

RCW 10.58.090(6).

In its findings, the court found that evidence of the Towers offense is necessary to the State's case in the Simerly case. CP 611. The court found that the mitochondrial DNA and Y-STR DNA evidence does not provide a positive "match" to Mr. Hersh's DNA. CP 611.

The State argued in closing, however, that the State's case was "overwhelming," and that

99 percent of all Caucasians are excluded from having the DNA profile on that hair right next to normal. That DNA profiles is the same as the Defendant's DNA profile. 99 percent of people are excluded. The Defendant isn't.

8RP at 1163.

The court, which based its ruling on the lack of "a positive 'match'" in the DNA, erred by finding the evidence was necessary in light of the State's reliance on and emphasis on the DNA evidence during closing argument.

Absent a contrary legislative intent, statutory terms are given their ordinary meaning. *Tommy P. v. Board of Cy. Comm'rs*, 97 Wn.2d 385, 391, 645 P.2d 697 (1982). The rules of statutory construction require that we give undefined words their common and ordinary meaning. To ascertain the common and ordinary meaning of a term, we may use a dictionary. *State v.*

Agueta, 107 Wn.2d 532, 536, 27 P.3d242 (2001) (footnotes and citations omitted).

“Necessity” means: 1: the quality or state or fact of being necessary as: a: a condition arising out of circumstances that compels to a certain course of action . . . b: INEVITABLENESS, UNAVOIDABILITY . . . c: great or absolute need : INDISPENSABILITY . . . 3: something that is necessary: REQUIREMENT, REQUISITE

Webster’s Third New International Dictionary 1511 (1993).

There was nothing in the testimony regarding the present charges against Mr. Hersh that required the introduction of the Towers evidence that made it necessary or indispensable. Indeed, the State, by arguing that the mitochondrial DNA excluded 99 percent of all Caucasians from the hair found on the washrag, and that “the DNA profile is the same as the Defendant’s DNA profile,” the State was able to present significant testimony regarding the present charges without the Towers evidence. Although the State claimed that identity was an issue in the case, in point of fact, the State had DNA evidence which the State asserted tied Mr. Hersh to the scene. 8RP at 1140-41.

In addition, in the Tower case the similarities were not sufficiently distinct to create a *modus operandi*, and thus could not have been necessary to prove identity. See *State v. Thang*, 145 Wn.2d 630, 643, 41 P.3d 1159

(2002) (to prove “modus operandi,” method used to commit one crime must be so unique that it makes it highly likely the defendant committed the other crime). In *State v. Foxhoven*, 161 Wn.2d 168, 163 P.3d 786 (2007), the trial court admitted photographs seized from defendants’ home paintings by defendant to show common plan or scheme. The court held that where a signature is provided, the signature alone is sufficiently distinctive to be admissible under the modus operandi exception to ER 404(b), but that the existence of a common scheme or plan is not relevant to show identity.

Nor were they relevant to establish a common scheme or plan. *State v. DeVincentis*, 150 Wn.2d 11, 19-21, 74 P.3d 119 (2003) (common scheme or plan evidence requires prior acts to be probative of fact that defendant used a single plan repeatedly to commit separate, but very similar acts, requires substantial similarity between the prior and current acts, and may be utilized only where the existence of the charged crime is in question). Thus the claim that the evidence was “necessary” to prove Mr. Hersh’s identity was nothing more than a convenient blind for using the inflammatory, devastatingly prejudicial evidence of prior acts from the Tower case to obtain a swift conviction in the instant case. After discussing the DNA evidence, the State spent considerable time arguing the similarities between the cases and arguing that Mr. Hersh told Ms. Tower “[‘]Stop fighting me or I’ll kill you.

I've done this before.['] two and a half months after Norma is killed.” 8RP at 1151. The State's argument, particularly its reliance on Ms. Tower's statement that Mr. Hersh told her that he had done this before, went far beyond mere identity evidence, into propensity evidence. Nothing made the propensity evidence necessary. The trial court erred by finding the Tower evidence admissible, and the admission over the evidence was an abuse of the court's discretion. ER 404(b).

c. The evidence was inadmissible under ER 404(b).

In addition, the evidence was inadmissible under ER 404(b). Here, the State's theory for offering the prior bad acts evidence and the court's reasons for admitting it are erroneous under ER 404(b).

The State must prove the essential elements of the charged crime and the nonexistence of any defense that negates one of those elements. *State v. Clausing*, 147 Wn.2d 620, 627, 56 P.3d 550, 554 (2002), citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). To admit prior "bad acts" evidence, the State must prove by a preponderance of the evidence that the alleged misconduct actually occurred. ER 404(b); *State v. Lough*, 125 Wn.2d 847, 853, 864, 889 P.2d 487 (1995).

Once the court is satisfied the defendant in fact committed the misconduct, it must then identify a legitimate purpose for which the evidence

is relevant. ER 404(b) excludes prior acts evidence if its sole relevance is to show propensity. *Lane*, 125 Wn.2d at 831-32; *Powell*, 126 Wn.2d at 259. Finally, the court weighs the probative value of the evidence against its potential prejudicial effect. *Lough*, 125 Wn.2d at 853.

The court ruled that Ms. Tower's testimony was admissible under ER 404(b) to prove identity and motive. This was an erroneous ruling and an abuse of judicial discretion. ER 404(b) provides:

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.

ER 404(b).

i. Identity:

As noted *supra*, when evidence of other crimes is admitted to prove identity, the evidence is relevant to the current charge "only if the method employed in the commission of both crimes is 'so unique' that proof that an accused committed one of the crimes creates a high probability that he also committed the other crimes with which he is charged." *Thang*, 145 Wn.2d at 643 (citation omitted). The device used must be "so unusual and distinctive as to be like a signature." *Id.* (quoting *State v. Coe*, 101 Wn.2d 772, 777,

684 P.2d 668 (1984)). “The greater the distinctiveness, the higher the probability that the defendant committed the crime, and thus the greater the relevance.” *Id.* “Moreover, to establish signature-like similarity, the distinctive features must be shared between the two crimes.” *Id.* (emphasis added). There is no indication in the record that the court gave any consideration to these requisite components of the ER 404(b) analysis. Had it done so, it would have ruled that the Tower assault was inadmissible to prove identity.

The so-called distinctive features were not shared between the crimes. There is nothing specific or distinctive such as the type of knot used to bind the women. Instead the offense involve generalities such as the victims were both middle aged women in residential areas. In *Thang*, the discrepancies between the other acts and the charged offense, considered together with the claimed similarities, defeated the contention that the other acts were admissible to prove identity:

The shared features as represented to the court in this case are: (1) both cases involved the theft of a purse and jewelry; (2) both victims were elderly; (3) in both cases the perpetrator allegedly remarked that “the bitch is dead” and (4) both victims were kicked, Morgan three times and Klaus repeatedly. However, there are also several dissimilarities between the two crimes: (1) they occurred 18 months apart; (2) they took place in different parts of the state; (3) one victim was kicked three times and the other until she died; (4) In one case, entry occurred through a door, and in the other, through a window; (5) in one case, the perpetrators fled in the victim’s car, and in the

other case, on foot.

Thang, 145 Wn.2d at 645.

In criticizing the admission of other acts evidence in this circumstance, the Supreme Court remarked, “[t]he error was exacerbated by the prosecutor, who argued during closing argument: “[t]his is from a man that committed the same type of crime three years earlier.” *Id.* Similarly in this case, the State sought to capitalize on the Towers evidence and argued the facts of that case strenuously. 8RP at 1151.

The court’s conclusion that the prior offenses were admissible to prove identity was an abuse of discretion.

ii. Motive and intent:

Nor was the evidence relevant to prove motive or intent. “Motive” means “[a]n inducement, or that which leads or tempts the mind to indulge a criminal act.” *Saltarelli*, 98 Wn.2d 358, 365, 655 P.2d 697 (1982) (quoting *State v. Tharp*, 96 Wn.2d 591, 597, 637 P.2d 961 (1981)). In *Saltarelli*, the Supreme Court held that even where a prior rape was similar in nature to the currently charged offense, it was not logically relevant to motive where the current offense involved a different victim and occurred five years later. It showed no more than a propensity to commit the charged crime. *Saltarelli*, 98 Wn.2d at 363-365. Likewise, neither the State nor the court explained

how Mr. Hersh's crimes against Ms. Towers served as the inducement to offend against Ms. Simerly. This was no more than propensity evidence.

The same is true for intent. There are situations where “the prior doing of other similar acts, whether clearly part of a scheme or not, is useful as reducing the possibility that the act in question was done with innocent intent.” *Saltarelli*, 98 Wn.2d at 365 (quoting 2 J. Wigmore, *Evidence* § 302 at 245 (Chadbourn rev. ed. 1979)). “But where the acts, if committed, indisputably show an evil intent and the defendant does not specifically raise the issue of intent,” the prior crimes are not admissible for this purpose. *Saltarelli*, 98 Wn.2d at 366 (quoting *People v. Kelley*, 66 Cal.2d 232, 242, 424 P.2d 947 (1967)). Here, Mr. Hersh did not admit the conduct and argue an innocent intent; instead he has consistently denied committing the murder. Short of specifically disputing intent, a not guilty plea does not place intent at issue. *Saltarelli*, 98 Wn.2d at 366 (quoting *Kelley*, 66 Cal.2d at 242); see also *State v. Powell*, 126 Wn.2d 244, 262, 893 P.2d 615 (1995) (defense of general denial; prior misconduct improperly admitted to prove intent where intent implicit in the act of manual strangulation of the victim).

Had Mr. Hersh admitted killing Ms. Simerly but asserted a defense such as diminished capacity or mental defect, evidence of the prior crimes would have been relevant to intent. But Mr. Hersh's defense was general

denial. Therefore, the evidence was not relevant for this purpose.

d. The evidence was inadmissible under ER 403.

Given the absence of any showing that the evidence was necessary, and that the evidence's only probative value was to shore up the prosecution's theory that Mr. Hersh had a propensity for committing violent offenses, the court erred in concluding the evidence was more probative than prejudicial under ER 403. Under ER 403, even relevant evidence must be excluded if its probative value is substantially outweighed by its prejudicial effect. ER 403. That the Legislature requires trial courts to engage in the ER 403 balancing analysis before admitting evidence under RCW 10.58.090 signals that the Legislature did not intend the statute serve as a carte blanche for prosecutors to taint trials with highly prejudicial other acts evidence. Here, however, the trial court gave the prosecutor free license to introduce exceptionally prejudicial evidence of the Tower assault, without properly evaluating the "necessity" element and without assessing the devastating impact of such evidence on the jury. The evidence should have been excluded.

Accordingly, this Court should reverse Mr. Hersh's convictions to allow him a trial free of the unwarranted prejudice of the improperly admitted propensity evidence. The erroneous admission of evidence requires reversal

unless this Court can conclude that, within reasonable probabilities, the error did not materially affect the trial. *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984); *State v. Robtoy*, 98 Wn.2d 30, 44, 653 P.2d 284 (1982). The erroneously admitted evidence was not inconsequential to the State's case. Instead, the introduction of the evidence consumed a substantial portion of the trial and was introduced at the end of the State's case-in-chief for maximum impact on the jury. The prosecutor also emphasized the Tower assault in his closing argument. 8RP at 1148-50. This Court cannot conclude that the other acts evidence did not materially affect the outcome of the case.

Where a constitutional error occurs during a trial, the error is presumed to be prejudicial unless the State can prove beyond a reasonable doubt the jury would have reached the same verdict had the error not occurred. *Chapman*, 386 S. at 24. Thus, the State must convince this Court beyond a reasonable doubt that the guilty verdicts in this case were not attributable to the erroneously admitted evidence. *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). The State cannot meet that burden here. The jury heard an extensive amount of evidence regarding the Towers assault, and it is impossible to remove the taint of that improperly included evidence or, more importantly, to guess at what the jury might have done without it. The State cannot prove beyond a reasonable

doubt that the jury's verdict was not attributable to the erroneously admitted evidence. This Court must reverse Mr. Hersh's convictions.

7. **DR. WICKHAM'S TESTIMONY REGARDING
THE AUTOPSY REPORT PREPARED
BY DR. HAMILTON VIOLATED MR.
HERSH'S CONSTITUTIONAL RIGHT TO
CONFRONTATION.**

Clark County Medical Examiner Dr. Dennis Wickham testified regarding the autopsy report prepared by Dr. Archie Hamilton, who was deceased by the time of trial. 5RP at 795. The autopsy lab report contained testimonial statements. Defense counsel did not have the opportunity to cross examine Dr. Hamilton. Admission of the report and Dr. Wickham's testimony based on the report violated Mr. Hersh's right to confrontation.

a. Standard of review.

The issue is whether the autopsy report is testimonial and whether use of the report by Dr. Wickham for his testimony violated the appellant's right to confront the author of the report. Review of an alleged violation of the confrontation clause is de novo. *State v. Kirkpatrick*, 160 Wn.2d 873, 881, 161 P.3d 990 (2007) (citing *Lilly v. Virginia*, 527 U.S. 116, 137, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999)).

b. The autopsy report contains testimonial statements.

The Sixth Amendment and Article 1, § 22⁶ guarantee criminal defendants' the right to confront witnesses. In *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the Supreme Court held "testimonial" statements by a witness not present at trial may be admitted only if the witness (1) is unavailable and (2) was subject to cross-examination when the statement was made. The *Crawford* Court explained testimonial statements include "material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially." *Crawford*, 124 S. Ct. at 1364); *State v. Mason*, 160 Wn.2d 910, 918, 162 P.3d 396 (2007). A statement is testimonial if it is made for the purpose of reporting a crime or to assist in apprehension and prosecution of a suspect. *State v. Powers*, 124 Wn. App. 92, 98, 99 P.3d 1262 (2004).

In this case the trial court, in denying the defense motion to exclude Dr. Wickham's testimony, cited *Kirkpatrick* and stated that the report was admissible as a business record. 3RP at 424; 4RP at 532; 5RP at 785-87. In

⁶ The Sixth Amendment to the United States Constitution provides in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." Article I, § 22 of the Washington Constitution provides in part: "In criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face . . ."

Kirkpatrick, following *Crawford*, the Washington Supreme Court held Department of Licensing (DOL) reports are not testimonial. *Kirkpatrick*, 160 Wn.2d at 889.

The *Kirkpatrick* Court reasoned a certification of the absence of a driver's license is not functionally different from a certification of the existence of a license. The Court also reasoned "[w]hile it is undoubtedly true that the protections of the Sixth Amendment should not turn on practicality, the conclusion that cross-examination of DOL employees will not advance the truth-seeking process goes to the heart of the constitutional issue before this court." *Id.* at 888. The Court explained, "[I]n short, certification that a license has not been issued to a particular defendant is not an accusatory statement or testimony; it is not testimonial evidence." *Id.* at 887.

The issue here is whether the admission of an autopsy report violates the right to confrontation after *Crawford*. The appellant submits that the autopsy is testimonial under *Crawford*. The report was prepared in part to ascertain the cause of death. Unlike the DOL report in *Kirkpatrick*, the autopsy report is an accusatory statement regarding the injuries sustained by Ms. Simerly, and most compellingly, regarding the cause of death. SRP at

805.

Moreover, unlike cross examination of an employee who prepares a DOL report, which the *Kirkpatrick* Court found would not advance the truth-seeking process because the employee is only a custodian of the records, cross examination of the medical examiner who makes findings regarding injuries and the cause of death advances the truth-seeking process. Cross examination could reveal a myriad of details about the decedent and cause of death, including the angle of the stab wounds, the depth of the wounds, whether the wounds appeared to be inflicted by a right or left-handed individual, whether the wounds appeared to be caused by straight blade, a blade with a serrated edge, whether more than one knife was used, and whether the wounds were from a single- bladed or double-bladed knife.

c. Admission of the medical examiner's report violated Mr. Hersh's right to confrontation.

Testimonial statements by a witness not present at trial may be admitted only if the witness (1) is unavailable and (2) was subject to cross examination when the statement was made. *Crawford*, 124 S. Ct. at 1364. Here, Dr. Hamilton was deceased and had not been subject to cross examination when the report was made. Dr. Wickham did not supervise or

assist in preparation of the report. Admission of the autopsy report violated Mr. Hersh's right to confrontation.

8. **THE TRIAL COURT ERRED WHEN IT ADMITTED ORCHID CELLMARK'S Y-STR DNA TEST RESULTS WITHOUT A SHOWING OF GENERAL SCIENTIFIC ACCEPTANCE.**

Washington has adopted the *Frye* standard for the admissibility of novel scientific evidence. *Frye v. United States*, 293 F. 1013, 1014, 34 A. L.R. 145 (D.C. Cir. 1923); *State v. Copeland*, 130 Wn.2d 244, 261, 922 P.2d 1304 (1996). Under that standard, scientific evidence is admissible only if it has achieved general acceptance within the relevant scientific community. *Frye*, 293 F. at 1014. The proposed evidence must be "based on established scientific methodology." *State v. Cauthron*, 120 Wn.2d 879, 889, 846 P.2d 502 (1993). "If there is a significant dispute between qualified experts as to the validity of scientific evidence, it may not be admitted." *Id.* at 887. The *Frye* inquiry involves two questions: (1) whether the underlying theory is generally accepted in the appropriate scientific community and (2) whether the technique used to implement that theory is also generally accepted. *Cauthron*, 120 Wn.2d at 889.

The theory and technique in question here is whether it is generally accepted within the scientific community that the STR markers can provide a reliable DNA sample where samples from individual pieces of bark found

scattered in the house are combined to obtain a single sample.

Stephanie Winter-Sermeno determined that some of the pieces of bark collected from the house did not provide enough DNA for testing. 5RP at 728. She subsequently combined all the samples she collected into a single sample. 5RP at 728. She stated that this was a practice “we use frequently on cases where there are low levels of DNA.” 5RP at 728. She stated that after combining the samples, she determined there was enough DNA to proceed with the “amplification” process in which the sample is copied. 5RP at 729. She stated that that after amplification, she obtained “a partial mixed DNA typing profile” that was consistent with Ms. Simerly and one other person. 5RP at 729.

The sample was then submitted to Orchid Cellmark in Texas for Y-STR analysis. 5RP at 729, 730, 761. Barbara Leal, a DNA analyst employed by Orchid Cellmark, testified that the partial Y-STR profile she obtained from the sample was “a combined mixture of two males” and that Mr. Hersh “cannot be excluded as a contributor to the mixture.” 5RP at 763, 765. At the hearing on the defense’s motion to exclude the test results on January 25, 2010, Ms. Winter-Sermeno testified that combining samples is “not novel” and that it is a technique she uses with cases involving multiple shell casings or where samples are obtained from the interior of a vehicle. 2RP at 263. She cited an article in *Journal of Forensic Sciences* pertaining to STR

analysis to detect DNA from pieces of exploded pipe bombs. 2RP at 264. She also stated that combining samples is accepted at conferences where DNA analysts discuss sampling techniques. 2RP at 267.

This Court should compare the evidence regarding combining pieces of bark which purport to contain 30 year old DNA samples, with that regarding the markers at issue in *State v. Russell*. 125 Wn.2d 24, 882 P.2d 747 (1994). In *Russell*, the defendant challenged the general acceptance of the PCR technique using a DQ Alpha genetic marker system. *Russell*, 125 Wn.2d at 39. In finding that the technique had achieved acceptance, the Supreme Court noted that over 30 private and government laboratories were using the markers (including the FBI), they had been used in over 250 cases involving some 1,000 evidence samples, and they had withstood the scrutiny of repeated validation studies. *Russell*, 125 Wn.2d at 42, 49-50. Moreover, as the trial court found, the gene targeted by the DQ Alpha markers:

ha[d] been subjected to considerable scientific study, especially in the fields of immunology and medicine. The variations of the gene [were] well known, readily identified, and easily for forensic use. . . .

Russell, 125 Wn.2d at 44, 49-50.

None of the above holds true for the Y-STR markers obtained by Orchid Cellmark from the combined sample created by Ms. Winter-Sermeno. The testimony presented consisted merely of her assertion that combining

samples was “not novel,” and was a practice used in her laboratory and by others. Nowhere does the State address or proffer testimony regarding combining samples that are not *a priori* from the same source. The examples cited by Ms. Winter-Sermeno, involve examples that are logically from the same source. The combination of the pieces of bark was based upon an assumption by the State that the pieces came from the same source. In addition, the State has offered no evidence regarding the effect of age upon combined DNA samples. In this case, the samples were approximately 30 years old at the time Ms. Winter-Sermeno chose to combine them. No testimony was presented whether the combining samples of that age is accepted in the scientific community. The trial court erred in admitting Orchid-Cellmark's findings into evidence and based on the foregoing Mr. Hersh should receive a new trial.

F. CONCLUSION

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

DATED: December 8, 2010.

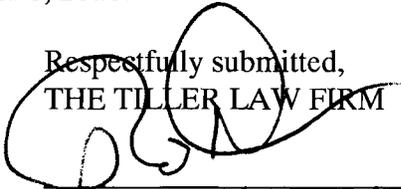
Respectfully submitted,
THE TILLER LAW FIRM

PETER B. TILLER-WSBA 20835
Of Attorneys for Michael A. Hersh

EXHIBIT A

STATUTES

RCW 9A.32.030

Murder in the first degree.

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

(a) With a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person; or

(b) Under circumstances manifesting an extreme indifference to human life, he or she engages in conduct which creates a grave risk of death to any person, and thereby causes the death of a person; or

(c) He or she commits or attempts to commit the crime of either (1) robbery in the first or second degree, (2) rape in the first or second degree, (3) burglary in the first degree, (4) arson in the first or second degree, or (5) kidnapping in the first or second degree, and in the course of or in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants: Except that in any prosecution under this subdivision (1)(c) in which the defendant was not the only participant in the underlying crime, if established by the defendant by a preponderance of the evidence, it is a defense that the defendant:

(i) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and

(ii) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury; and

(iii) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance; and

(iv) Had no reasonable grounds to believe that any other participant

intended to engage in conduct likely to result in death or serious physical injury.

(2) Murder in the first degree is a class A felony.

RCW 9A.44.010

Definitions.

As used in this chapter:

(1) "Sexual intercourse" (a) has its ordinary meaning and occurs upon any penetration, however slight, and

(b) Also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and

(c) Also means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

(2) "Sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.

(3) "Married" means one who is legally married to another, but does not include a person who is living separate and apart from his or her spouse and who has filed in an appropriate court for legal separation or for dissolution of his or her marriage.

(4) "Mental incapacity" is that condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or from some other cause.

(5) "Physically helpless" means a person who is unconscious or for any

other reason is physically unable to communicate unwillingness to an act.

(6) "Forcible compulsion" means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped.

(7) "Consent" means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact.

(8) "Significant relationship" means a situation in which the perpetrator is:

(a) A person who undertakes the responsibility, professionally or voluntarily, to provide education, health, welfare, or organized recreational activities principally for minors;

(b) A person who in the course of his or her employment supervises minors; or

(c) A person who provides welfare, health or residential assistance, personal care, or organized recreational activities to frail elders or vulnerable adults, including a provider, employee, temporary employee, volunteer, or independent contractor who supplies services to long-term care facilities licensed or required to be licensed under chapter 18.20, 18.51, 72.36, or 70.128 RCW, and home health, hospice, or home care agencies licensed or required to be licensed under chapter 70.127 RCW, but not including a consensual sexual partner.

(9) "Abuse of a supervisory position" means:

(a) To use a direct or indirect threat or promise to exercise authority to the detriment or benefit of a minor; or

(b) To exploit a significant relationship in order to obtain the consent of a minor.

(10) "Person with a developmental disability," for purposes of RCW 9A.44.050(1)(c) and 9A.44.100(1)(c), means a person with a

developmental disability as defined in RCW 71A.10.020.

(11) "Person with supervisory authority," for purposes of RCW 9A.44.050(1) (c) or (e) and 9A.44.100(1) (c) or (e), means any proprietor or employee of any public or private care or treatment facility who directly supervises developmentally disabled, mentally disordered, or chemically dependent persons at the facility.

(12) "Person with a mental disorder" for the purposes of RCW 9A.44.050(1)(e) and 9A.44.100(1)(e) means a person with a "mental disorder" as defined in RCW 71.05.020.

(13) "Person with a chemical dependency" for purposes of RCW 9A.44.050(1)(e) and 9A.44.100(1)(e) means a person who is "chemically dependent" as defined in RCW 70.96A.020(4).

(14) "Health care provider" for purposes of RCW 9A.44.050 and 9A.44.100 means a person who is, holds himself or herself out to be, or provides services as if he or she were: (a) A member of a health care profession under chapter 18.130 RCW; or (b) registered under chapter 18.19 RCW or licensed under chapter 18.225 RCW, regardless of whether the health care provider is licensed, certified, or registered by the state.

(15) "Treatment" for purposes of RCW 9A.44.050 and 9A.44.100 means the active delivery of professional services by a health care provider which the health care provider holds himself or herself out to be qualified to provide.

(16) "Frail elder or vulnerable adult" means a person sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself. "Frail elder or vulnerable adult" also includes a person found incapacitated under chapter 11.88 RCW, a person over eighteen years of age who has a developmental disability under chapter 71A.10 RCW, a person admitted to a long-term care facility that is licensed or required to be licensed under chapter 18.20, 18.51, 72.36, or 70.128 RCW, and a person receiving services from a home health, hospice, or home care agency licensed or required to be licensed under chapter 70.127 RCW.

RCW 9A.44.040

Rape in the first degree.

(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:

(a) Uses or threatens to use a deadly weapon or what appears to be a deadly weapon; or

(b) Kidnaps the victim; or

(c) Inflicts serious physical injury, including but not limited to physical injury which renders the victim unconscious; or

(d) Feloniously enters into the building or vehicle where the victim is situated.

(2) Rape in the first degree is a class A felony.

RCW 10.58.090

Sex Offenses — Admissibility.

(1) In a criminal action in which the defendant is accused of a sex offense, evidence of the defendant's commission of another sex offense or sex offenses is admissible, notwithstanding Evidence Rule 404(b), if the evidence is not inadmissible pursuant to Evidence Rule 403.

(2) In a case in which the state intends to offer evidence under this rule, the attorney for the state shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(3) This section shall not be construed to limit the admission or consideration of evidence under any other evidence rule.

(4) For purposes of this section, "sex offense" means:

(a) Any offense defined as a sex offense by RCW 9.94A.030;

(b) Any violation under RCW 9A.44.096 (sexual misconduct with a minor in the second degree); and

(c) Any violation under RCW 9.68A.090 (communication with a minor for immoral purposes).

(5) For purposes of this section, uncharged conduct is included in the definition of "sex offense."

(6) When evaluating whether evidence of the defendant's commission of another sexual offense or offenses should be excluded pursuant to Evidence Rule 403, the trial judge shall consider the following factors:

(a) The similarity of the prior acts to the acts charged;

(b) The closeness in time of the prior acts to the acts charged;

(c) The frequency of the prior acts;

(d) The presence or lack of intervening circumstances;

(e) The necessity of the evidence beyond the testimonies already offered at trial;

(f) Whether the prior act was a criminal conviction;

(g) Whether the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence; and

(h) Other facts and circumstances.

[2008 c 90 § 2.]

COURT OF APPEALS
STATE OF WASHINGTON
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IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL ALLEN HERSH, Appellant.	COURT OF APPEALS NO. 40646-2-II CLARK COUNTY SUPERIOR COURT NO. 08-1-02077-1 CERTIFICATE OF MAILING
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The undersigned attorney for the Appellant hereby certifies that one original and one copy of the Opening Brief of Appellant were mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to Michael Kinnie, Deputy Prosecutor, and Michael Allen Hersh, Appellant, by first class mail, postage pre-paid on December 8, 2010, at the Centralia, Washington post office addressed as follows:

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Deputy Prosecutor
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Vancouver, WA 98666-5000

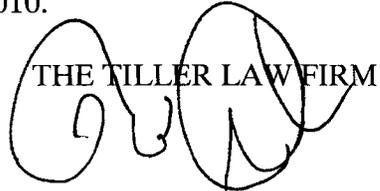
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