

80727-2

No. 25043-1-III

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

BRIAN WILLIAM FRAWLEY,

Defendant/Appellant.

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Appellant's Brief

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**A. ASSIGNMENTS OF ERROR**

1. The evidence was insufficient to sustain the conviction of first-degree felony murder.
2. The trial court erred in denying the defendant's motion to dismiss at the close of the State's case in chief.
3. The trial court erred in failing to give a unanimity instruction.
4. The trial court erred in denying the defendant's motion to sequester the jury.

*Issues Pertaining to Assignments of Error*

1. Was the evidence insufficient for any rational trier of fact to find the essential elements of the crime of first-degree murder?
2. Was the publicity during trial of such a sensational and prejudicial nature that the mere risk of exposure in not sequestering the jury created a probability of prejudice, thus denying Defendant a fair trial?

**B. STATEMENT OF THE CASE**

Margaret Cordova (hereafter M.C.) disappeared during the early morning hours of 1/17/04. (RP 1129-30) M.C. would often stay up all night with a relative or a friend in order to be on the same sleeping schedule as her boyfriend who worked at night. (RP 1088, 1110, 1123) Since M.C. did not own a car, she would walk from residence to residence to visit or party with her relatives and friends if she could not get a ride. On some occasions, she would walk several miles across town late at night. (RP 1121-22, 1126)

Between 5:00 and 6:00 p.m. on 1/16/04, M.C.'s boyfriend dropped her off at 4300 E. Grace [NE Spokane], the home of Ricci Gonzales, M.C.'s Aunt. (RP 1171) M.C. and Ricci sat around playing cards and visiting while drinking alcohol and smoking marijuana. (RP 1172-75) M.C. was intoxicated to some degree. (RP 1126, 1141-42, 1177) Since Ricci wanted to go to bed, M.C. decided to leave. She left Ricci's place between 10:00 and 11:00 p.m. and walked over to some apartments at 2309 East Euclid [NE Spokane] to visit other relatives. (RP 1175-76, 1287-88)

Ricci's younger sisters, Starr (19 years-old) and Valencia (15 years-old) live with their grandmother at the Euclid apartments. (RP 1136-37) Valencia recalled that M.C. arrived there around midnight. (RP 1139-40) M.C. appeared intoxicated. (RP 1141-42) M.C. wanted to get together with Starr at Starr's boyfriend's place at 2115 West Mallon [West Central Spokane] to party and also to stop Starr from doing "crack" which M.C. did not approve of. (RP 1119, 1142-43, 1184) M.C. had called Starr earlier around 7:00 p.m. She told Starr she had some alcohol and would walk to the Mallon address if she couldn't get a ride. (RP 1123-26, 1176, 1296) Starr called M.C. back later (time uncertain) and told her not to walk over there due to the late hour. M.C. agreed not to come. (RP 1128,

1297) However, Starr testified she would not have been surprised if M.C. had decided to walk over there anyway. (RP 1129, 1133)

Davita Swan, another relative, also lives in the Euclid apartments with her three children and her boyfriend, Jerome Tanks, who is the father of her youngest daughter. (RP 1110-11) Valencia recalled that after M.C. arrived around midnight, she was kind of going back and forth between Davita's apartment and her grandmother's apartment. (RP 1189) Davita got home from work around 3:00 a.m. Jerome Tanks and his daughter were asleep on the couch. Davita noticed M.C.'s purse sitting on the floor. Jerome said M.C. had been there. (RP 1113-14)

Detective Minde Connelly, who started the investigation after M.C. disappeared, spoke with the various family members including Jerome Tanks. (RP 1284-88) After speaking with Mr. Tanks, Detective Connelly determined that he was the last person she knew of to see M.C. alive; that M.C. left the apartment between 2:00-2:30 a.m.; that Tanks wasn't sure where M.C. was going but thought she might be returning to the other relatives in the same apartment complex. (RP 1288-92, 1297-98) M.C. never arrived at the other Euclid apartment or the West Mallon address and was reported missing 1/18/04. (RP 1129-30, 1133, 1189, 1288-89)

M.C.'s body was discovered on 2/22/04, in Spokane County at Freya and Fairview Road [north of the city limits]. (RP 1301, 1328) Dogs or coyotes had eaten away much of the upper part of the body so that little remained but the skeletal remains of the upper body. (RP 1413-14, 1481-82, 1711-13) A ligature was found around the neck with one end secured to the right wrist. (RP 1710) The chief medical examiner, Dr. Sally Aiken, testified it was impossible to tell if the ligature had been used to strangle M.C. because all the soft tissue was gone. (RP 1724)

The lower body from the hips to the feet was fairly intact and unclothed except for a pair of panties that were on the right leg. (RP 1481) M.C.'s ankles were tied by a blue drawstring that belonged to the pajama bottoms she had been wearing. (RP 1499-1500, 1600-02) A hair found embedded in the drawstring near the knot was tested using mitochondrial DNA analysis. (RP 1441, 1871) The hair DNA did not match Mr. Frawley's DNA. (RP 1460)

Dr. Aiken testified it was impossible to tell where or when M.C. died. (RP 1745) The cord around the ankles appeared to be pre-mortem but it was impossible to tell about the neck ligature. (RP 1746) The exact cause of death could not be determined. (RP 1747) The death certificate says the manner of death was homicide with cause unknown. (RP 1748)

There was no evidence any sex act that occurred was not consensual. (RP 1764)

Cervical and vaginal samples taken from the body revealed traces of semen that DNA testing confirmed matched Mr. Frawley. (RP 1511, 1670-76, 1686) No DNA testing was done on the bra, the T-shirt or the pajama bottoms, despite the fact that several areas on these items fluoresced under a forensic light source, indicating the potential presence of DNA. (RP 1681-82, 1684) Likewise, no DNA testing was performed on a “used condom” found an eighth to a quarter mile from where the body was discovered, or the sweatshirt and fingernail clippings taken from the body. (RP 1420, 1433-34, 1685-86, 1785)

There were numerous tears in the clothing M.C. had been wearing. (1497-98, 1508, 1573-74) However, the State’s forensic expert testified none of the tears were caused by a knife cut and may have been caused by dogs. (RP 1575-77) Fibers found on the sweatshirt and pajama bottoms were consistent with fabric fibers taken from the seat of a Pontiac Grand Am belonging to Jessica Hensley. (RP 1588-89, 1592, 1811)

After they received the DNA match, police begin investigating Mr. Frawley. They determined he lived in an apartment complex on North Nevada with a woman named Jessica Hensley and her brother Josh

Hensley. (RP 1803, 1899) Jessica said Mr. Frawley used her car, a Pontiac Grand Am, on occasion. (RP 1912) Josh worked at Northern Farms, which was located next to the area where M.C.'s body was found. Josh got rides to work with either his sister or Mr. Frawley. (RP 1846-48)

Josh and his friend Ryan O'Harran would smoke meth with Mr. Frawley at the apartment after Jessica had gone to bed. (RP 1928-29) Josh recalled a night in either December or January when the three of them had smoked meth after Jessica had gone to bed. Sometime between 10:00 and 12:00 p.m. Mr. Frawley left in the Grand Am taking Jessica's cell phone and the meth with him. (RP 1931-32) Josh said he and Ryan called Mr. Frawley "repeatedly" because they wanted him to come back with the dope. (RP 1933-34) Sometimes Mr. Frawley would answer and say he'd be there in a minute. (RP 1934)

When Mr. Frawley finally returned early the next morning, he was crying and upset. He said he hit some girl with Jessica's car so he took her out to Suncrest in the woods. Josh checked the car later and found no damage. He figured Mr. Frawley was just too high and imagining things. (RP 1936) Ryan O'Harran gave a similar account but thought the incident occurred either shortly before 11/12/03 or shortly after 12/12/03. (RP

1955-60) Ryan also recalled that he and Josh tried calling Mr. Frawley every five or ten minutes that night, a total of 15-20 times. (RP 1964)

Detective Hines subpoenaed the records for Jessica's cell phone for January 2004. He noted a series of six short phone calls between 10:00 p.m. on 1/16/04 and 3:12 a.m. on 1/17/04. (RP 1970-72) Detective Hines admitted on cross-examination that the calls on those dates were not five or ten minutes apart as Ryan had testified. Detective Hines also acknowledged that he never bothered checking the cell phone records for November and December 2003. Detective Hines further said there was no evidence that M.C. had been hit by a car. He also stated that Suncrest is many miles away from where M.C.'s body was found. (RP 1973-76)

When Detective Hines interviewed Josh and Ryan, they both told him they did not believe Mr. Frawley's story. Josh said he did not like Mr. Frawley and did not associate with him any more than necessary. Josh also denied hanging out or partying with Mr. Frawley. (RP 1974) Both Josh and Ryan indicated to the public defender investigator that they had an intense dislike for Mr. Frawley. (RP 2024-25)

Detective Hines and Detective Ruetsch interviewed Mr. Frawley at the Sheriff's office. (RP 1803) He acknowledged his relationship with Jessica Hensley and that he had access to her car, but denied knowing or

ever having sex with M.C. He also said he did not kill M.C. (RP 1806-09) Shortly thereafter, the State charged Mr. Frawley with first-degree felony murder, alleging that he caused the death of M.C. while committing and attempting to commit the crimes of first or second-degree rape or first or second-degree kidnapping. (CP 1-2)

Defense counsel moved to dismiss at the close of the State's case in chief. Defense counsel argued the State had failed to present evidence of rape or kidnapping on the part of Mr. Frawley. (RP 2000-01) The Court denied the motion. (RP 2008)

Mr. Frawley testified he first met M.C. in July or August of 2003. M.C. was hitchhiking on Division Street in Spokane so Mr. Frawley gave her a ride to Northtown Shopping Mall. They smoked some marijuana together and went their separate ways. (RP 2027-28) Mr. Frawley stated he next saw M.C. on 1/16/04 around 10:00 p.m. talking on a pay phone at the Jack in the Box on Division. (RP 2029) M.C. recognized him from their previous encounter and got in the car. After a short conversation they decided to drive somewhere less obvious to smoke some meth. (RP 2030)

Mr. Frawley and M.C. drove to a parking lot in back of Walgreen's on Division, smoked some meth and had consensual sex in the front seat of the car. (RP 2031, 2033) Mr. Frawley then drove M.C. back to the

Jack in the Box because she was waiting to get hold of someone to get a ride. (RP 2034) After dropping her off, Mr. Frawley drove to Wal-Mart to purchase a headlight, and then headed home to the apartment, arriving at approximately 11:20 p.m. (RP 2034-36)

During the trial, the Spokane newspaper published an article, which described among other things pending charges against Mr. Frawley involving rape, kidnapping and bondage. (CP 112) Defense counsel moved to sequester the jury, noting that the court had previously excluded all references to these pending charges. Counsel also noted there had been similar inflammatory television coverage. (RP 1154-55) The court denied the motion. (RP 1156-57)

At the close of the testimony, the jury was instructed in pertinent part as follows:

No. 9. To convict the defendant of the crime of murder in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on, about or between January 17, 2004, and February 22, 2004, Margaret M. Cordova was killed;
- (2) That the defendant was committing and attempting to commit first or second-degree rape or first or second-degree kidnap;
- (3) That the defendant caused the death of Margaret M. Cordova in the course of or in furtherance of such crime or in immediate flight from such crime; ...

(RP 2113)

No. 10. A person commits the crime of rape in the first degree when that person engages in sexual intercourse with another person by forcible compulsion, when the perpetrator uses or threatens to use a deadly weapon or what appears to be a deadly weapon, or kidnaps the victim or inflicts serious physical injury.

(RP 2113-14)

No. 15. A person commits the crime of rape in the second degree when under circumstances not constituting rape in the first degree that person engages in sexual intercourse with another person by forcible compulsion or when the victim is incapable of consent by reason of being physically helpless or mentally incapacitated.

(RP 2115)

No. 18 A person commits the crime of kidnapping in the first degree when he or she intentionally abducts another person with intent to facilitate the commission of rape or flight thereafter or to inflict bodily injury on the person or to inflict extreme mental distress on that person or on a third person.

(RP 2115)

No. 22 A person commits the crime of kidnapping in the second degree when under circumstances not amounting to kidnapping in the first degree he or she intentionally abducts another person.

(RP 2116)

The Court discussed the possibility of a unanimity instruction with both counsel. The defense had apparently informally proposed a unanimity instruction in chambers, but did not formally propose one after the Court indicated it was inclined not to give a unanimity instruction.

(RP 2103) The Court acknowledged the issue was brought to the Court

but didn't remember what was said or whether the Court had indicated it would hear argument on the issue. (RP 2104-05) The Court then made it clear that based on the facts of the case it would not have allowed a unanimity instruction. (RP 2105)

The jury convicted Mr. Frawley as charged. (CP 111) This appeal followed. (CP 128-42)

### C. ARGUMENT

#### **Issue No. 1. The evidence was insufficient for any rational trier of fact to find the essential elements of the crime of first-degree murder.<sup>1</sup>**

In determining the sufficiency of the evidence, the test is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." Salinas, 119 Wn.2d at 201, 829 P.2d 1068 (citing State v. Partin, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). "A claim of insufficiency

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<sup>1</sup> Assignments of Error Nos. 1-3.

admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201, 829 P.2d 1068 (citing State v. Theroff, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

While circumstantial evidence is no less reliable than direct evidence, State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. State v. Baeza, 100 Wn.2d 487, 491, 670 P.2d 646 (1983).

A felony murder conviction must be supported by sufficient evidence of each element of the predicate felony. Green, at 224, 616 P.2d 628; State v. Quillin, 49 Wn.App. 155, 164, 741 P.2d 589 (1987).

Here, the jury was instructed in pertinent part:

To convict the defendant of the crime of murder in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on, about or between January 17, 2004, and February 22, 2004, Margaret M. Cordova was killed;
- (2) That the defendant was committing and attempting to commit first or second-degree rape or first or second-degree kidnap;
- (3) That the defendant caused the death of Margaret M. Cordova in the courts of or in furtherance of such crime or in immediate flight from such crime; ...

(RP 2113)<sup>2</sup>

The evidence is insufficient to show that Mr. Frawley had anything to do with the death of M.C. Dr. Aiken testified it was impossible to tell where or when M.C. died. The exact cause of death could not be determined. The death certificate says the manner of death was homicide with cause unknown. Dr. Aiken also testified it was impossible to tell if the ligature found around the neck had been used to strangle M.C. because all the soft tissue was gone.

The evidence is also insufficient to prove the predicate felonies of rape or kidnapping. Dr. Aiken testified there was no evidence any sex act that occurred was other than consensual, hence, no physical evidence of rape or kidnapping based on an examination of the body. The fact that Mr. Frawley's semen was found on the vaginal and cervical slides only confirms that he had sex with M.C. It does not mean that he raped or kidnapped her.

Mr. Frawley stated the sex was consensual and occurred at least 3-4 hours before M.C. disappeared. Mr. Frawley's account is consistent with the timeline of events put forth by the family members in their

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<sup>2</sup> The jury instructions for the predicate felonies are set forth in the Statement of the Case and will not be repeated here. However, the elements of the predicate felonies are certainly an essential consideration in this argument.

testimony. M.C. left Ricci's place between 10:00 and 11:00 p.m. and next appeared at the Euclid apartments around midnight. M.C.'s whereabouts during that intervening period of 10:00 p.m. to 12:00 a.m. is unaccounted for except through Mr. Frawley's testimony. There was plenty of time for their brief sexual encounter as he described in his testimony.

The State may argue that the testimony of Josh Hensley and Ryan O'Harran contradicts Mr. Frawley's version of events that evening. However, that assertion is incorrect when you consider the totality of the evidence. The evidence strongly suggests that the events Josh and Ryan recalled occurred perhaps months before M.C.'s disappearance. Josh recalled the night of the hit and run incident occurring in either December or January. Ryan O'Harran thought the incident occurred either shortly before 11/12/03 or shortly after 12/12/03.

Ryan also recalled that he and Josh tried calling Mr. Frawley every five or ten minutes that night for a total of 15-20 times, but the records for Jessica's cell phone for January 2004 show only six short phone calls between 10:00 p.m. on 1/16/04 and 3:12 a.m. on 1/17/04. Moreover, the calls on those dates were not five or ten minutes apart as Ryan had testified. Detective Hines never bothered checking the cell phone records

for November and December 2003 to establish whether the incident that Josh and Ryan recalled occurred during that timeframe.

Detective Hines further said there was no evidence that M.C. had been hit by a car. He also stated that Suncrest is many miles away from where M.C.'s body was found.

Then there is the bias and credibility factor. When Detective Hines interviewed Josh and Ryan, Josh said he did not like Mr. Frawley and did not associate with him any more than necessary. Josh also denied hanging out or partying with Mr. Frawley—not a true statement. Moreover, both Josh and Ryan indicated to the public defender investigator they had an intense dislike for Mr. Frawley. These factors combine to suggest that the events described by Josh and Ryan were unrelated to what happened on 1/16/04 and 1/17/04.

There were also lines of inquiry not pursued by law enforcement that may have shed some light on what actually occurred that fateful night. No DNA testing was done on the bra, the T-shirt or the pajama bottoms found at the scene, despite the fact that several areas on these items fluoresced under a forensic light source, indicating the potential presence of DNA. Likewise, no DNA testing was performed on a “used condom”

found an eighth to a quarter mile from where the body was discovered, or the sweatshirt and fingernail clippings taken from the body.

Other evidence was simply inconclusive. There were numerous tears in the clothing that M.C. had been wearing. However, the State's forensic expert testified that none of the tears were caused by a knife cut and may have been caused by dogs. M.C.'s ankles were tied by a blue drawstring--a fact strongly suggestive of criminal activity. However, there was no evidence that Mr. Frawley was responsible for binding M.C.'s ankles. In fact, a hair found embedded in the drawstring near the knot that was tested using mitochondrial DNA analysis did not match Mr. Frawley's DNA.

Even if this court should find that only one of the alternative methods upon which this charge is based fails, the verdict must be set aside unless the court can ascertain that it was based on remaining grounds for which sufficient evidence was presented. State v. Maupin, 63 Wn.App. 887, 894, 822 P.2d 355 (1992), *citing* Green, 94 Wn.2d at 230, 616 P.2d 628. Here, the trial court declined to provide the jury with a special verdict form which would have shown which of the underlying felonies the jury relied upon in reaching its verdict. There is no way for this court to know whether the jury based its verdict on a unanimous

determination Mr. Frawley committed first-degree rape, second degree rape, first-degree kidnapping or second degree kidnapping. Id.

In summation, after reviewing the evidence in the light most favorable to the State, no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

**Issue No. 2. The publicity during trial was of such a sensational and prejudicial nature that mere risk of exposure in not sequestering the jury created a probability of prejudice, thus denying Defendant a fair trial.<sup>3</sup>**

CrR 6.7 provides, in pertinent part: "During trial and deliberations the jury may be allowed to separate unless good cause is shown, on the record, for sequestration of the jury." Under this rule, the trial court has broad discretion to determine if sequestration is needed. State v. Dictado, 102 Wn.2d 277, 299, 687 P.2d 172 (1984). Appellate court will not presume that a defendant was prejudiced by a trial court's refusal to sequester a jury prior to jury deliberation. State v. Smalls, 99 Wn.2d 755, 766, 665 P.2d 384 (1983). To demonstrate that a trial court abused its discretion under CrR 6.7, the defendant must show that either (1) jurors were exposed to publicity during trial, or (2) the publicity during trial was of such a sensational or prejudicial nature that mere risk of exposure

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<sup>3</sup> Assignment of Error No. 4.

created a probability of prejudice. State v. Ng, 104 Wn.2d 763, 776, 713 P.2d 63 (1985).

Here, there is no evidence that any juror saw or heard publicity during trial. However, the nature and degree of publicity during trial was so sensational or prejudicial that a probability of prejudice occurred. The Spokane newspaper article in question described pending charges against Mr. Frawley involving rape, kidnapping and bondage. Defense counsel noted that there had been similar inflammatory television coverage. Given the facts of the present case, it is clearly highly prejudicial. If even one juror got a whiff of the information contained in this article, his or her influence over the other jurors would be profound and the resulting verdict a foregone conclusion. Therefore, the court abused its discretion in not sequestering the jury.

**D. CONCLUSION**

For the reasons stated, the conviction should be reversed.

Respectfully submitted November 13, 2006.



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