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NO. 67946-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL BENJAMIN,

Appellant.

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

BRIEF OF APPELLANT

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A. INTRODUCTION

Angela Pettifer's death remains a mystery. Her body was found in her bedroom a day after she spent the night binge-drinking with her father. The two had drunk so much they both appeared "zombie-like". Ms. Pettifer's father could not account for his whereabouts at the time of his daughter's death.

The forensic evidence showed Ms. Pettifer had been hit over the head with a bottle of hot sauce, then strangled to death. Detectives thought marks on Ms. Pettifer's neck showed she had fought for her life by trying to pry the killer's hands off of her neck. They accordingly asked the crime lab to test Ms. Pettifer's fingernails for DNA. DNA from both Ms. Pettifer's father and her boyfriend were found under her nails. The boyfriend had been told by the victim's sister and brother-in-law to stay away from her.

But detectives did not investigate the father or boyfriend further after receiving the fingernail evidence. Neither was charged with Ms. Pettifer's murder. The State had already charged Michael Benjamin with the crime, and did not want to change course. Mr. Benjamin lived in the same building as Ms. Pettifer, and along with two other people had helped her get into her apartment after her drinking binge. It was undisputed that Ms. Pettifer closed and locked her door after the three had helped her in.

It was undisputed that Mr. Benjamin's DNA was not under Ms. Pettifer's fingernails. But the State argued he must have committed the crime because he had the same brand of hot sauce with which Mr. Pettifer was hit, and because trace amounts of his DNA may have been on her chest. The boyfriend's DNA was also on Ms. Pettifer's chest, and another resident of the building was an additional possible match. Only the father's DNA was on the shirt the killer removed after the homicide.

Instead of exploring the case further to make sure they charged the right person, the State proceeded to trial against Mr. Benjamin. Apparently knowing his case was weak, the prosecutor repeatedly told the jury Mr. Benjamin had to explain the presence of his DNA on Ms. Pettifer. The prosecutor disregarded the court's rulings sustaining Mr. Benjamin's objections to the burden-shifting. Each time, he repeated the unconstitutional argument immediately after the adverse ruling.

Having successfully shifted the burden, the State secured a guilty verdict. It could not have obtained a conviction otherwise, because it presented insufficient evidence as a matter of law to prove beyond a reasonable doubt Mr. Benjamin killed Ms. Pettifer. This Court should reverse.

B. ASSIGNMENTS OF ERROR

1. The conviction violated Mr. Benjamin's Fourteenth Amendment right to due process because the State presented insufficient evidence to prove he committed the crime charged.

2. The prosecutor committed misconduct and violated Mr. Benjamin's Fifth and Fourteenth Amendment rights during closing argument.

3. The trial court erred in denying Mr. Benjamin's motion to suppress evidence obtained in violation of the Fourth Amendment and article I, section 7.

4. The trial court abused its discretion and violated ER 402 and 403 by admitting evidence that Mr. Benjamin purchased bleach.

5. The trial court abused its discretion and violated ER 403 by admitting evidence of a statement Mr. Benjamin made to neighbor Lauren Chapman.

6. The trial court abused its discretion by excluding a relevant, non-hearsay statement under ER 801.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. For any crime, the State bears the burden of proving the identity of the perpetrator beyond a reasonable doubt. In this murder case, the State had no direct evidence of the identity of the perpetrator. Although

trace amounts of Mr. Benjamin's DNA were found on the victim's chest, it was undisputed that he had interacted with her earlier that evening in close quarters, that he had handled her keys, and that he was sweating profusely at the time because of record temperatures. Detectives and the medical examiner believed the victim used her hands to fight off the killer, but Mr. Benjamin's DNA was not under the victim's fingernails, while DNA from both the victim's father and boyfriend was found there. Did the State fail to prove the identity of the perpetrator beyond a reasonable doubt, requiring reversal of Mr. Benjamin's conviction and dismissal of the charge?

2. It is misconduct for a prosecutor to subvert the presumption of innocence, shift the burden of proof, or urge the jury to draw an adverse inference from the defendant's failure to testify. In this case, the prosecutor in closing argument repeatedly told the jury that Mr. Benjamin was guilty because he did not provide an innocent explanation for the fact that trace amounts of his DNA were on the victim's chest. The prosecutor made the argument at least four times, repeating it even after the court had sustained Mr. Benjamin's objections. Because the State cannot prove beyond a reasonable doubt that its misconduct did not contribute to the verdict, must Mr. Benjamin's conviction be reversed and his case remanded for a new trial?

3. Article I, section 7 of the Washington Constitution prohibits the invasion of private affairs absent authority of law. The Washington Supreme Court has held “private affairs” include the telephone numbers one has dialed and the fact that a person is staying in a particular motel. Did detectives violate article I section 7 by entering Mr. Benjamin’s telephone number in a Safeway computer without a warrant and without his consent, and thereby discovering that Mr. Benjamin has a Safeway Club Card account and the last four digits of the account number?

4. A warrant is overbroad in violation of the Fourth Amendment and article I, section 7 if it fails to describe with particularity items for which probable cause exists to search. In this case, detectives had probable cause to believe that Angela Pettifer’s killer hit her over the head with a bottle of Frank’s RedHot hot sauce, that the Safeway in Monroe carried this brand, and that Mr. Benjamin was a suspect in the crime. The warrant at issue here did not simply authorize the seizure of records of Mr. Benjamin’s hot-sauce purchase history, but authorized the seizure of all of Mr. Benjamin’s Safeway club card purchase records. Was the warrant unconstitutionally overbroad?

5. ER 402 prohibits the admission of irrelevant evidence and ER 403 prohibits the admission of evidence whose probative value is substantially outweighed by the danger of unfair prejudice. Over Mr.

Benjamin's objections, the State presented evidence that he bought a bottle of bleach and that bleach is generally used to clean up crime scenes, even though there was no evidence that this crime scene had been cleaned up or that Mr. Benjamin had even opened his bottle of bleach. Did the trial court abuse its discretion in admitting the bleach evidence?

6. Did the trial court abuse its discretion under ER 403 by admitting evidence that Mr. Benjamin had told a neighbor it was "too hot for sex," where the crime at issue was murder and there was no semen or other evidence of sexual assault?

7. ER 801 prohibits hearsay, which is an out-of-court statement offered for the truth of the matter asserted. ER 803 allows evidence of prior threats to show motive or intent. In this murder-by-strangulation case, the trial court allowed Mr. Benjamin to argue that the victim's boyfriend, Jason Chapman, might have killed her, but excluded the following statement he allegedly made to her: "if I ever see you with another man, I'll chop you up with a hatchet." Did the trial court err in excluding the statement under ER 801 because the statement was not offered for its truth but to show the motive or intent of the other suspect?

D. STATEMENT OF THE CASE

Angela Pettifer's body was discovered in her apartment in Monroe's Savoy Building on Sunday, August 15, 2010. 9/20/11 RP 26.

She had been hit over the head with a bottle of hot sauce and strangled to death. 9/20/11 RP 46-48; 9/21/11 RP 64, 69. Marks on her hands and neck showed she had tried to pry the killer's hands off during the struggle. 9/21/11 RP 57; 9/27/11 RP 48. The culprit removed Ms. Pettifer's pants and pulled up her shirt after killing her. CP 148; 9/21/11 RP 22; 9/23/11 RP 172-73. Detectives believed Ms. Pettifer was killed between midnight and 1:00 a.m., because it was during that time that her neighbors heard a loud thump. 9/22/11 RP 119.

Ms. Pettifer's sister told detectives to investigate the victim's boyfriend, Jason Chapman. 9/21/11 RP 139; 9/22/11 RP 203. The sister said a week before her death, Ms. Pettifer told her Mr. Chapman threatened to "chop her up" if he saw her with another man. 9/16/11 RP 35. Because of this threat, Ms. Pettifer's sister and brother-in-law both warned Mr. Chapman to stay away from Ms. Pettifer. 9/21/11 RP 140-41. Mr. Chapman refused, and continued to date Ms. Pettifer. He admitted he spent time with her the day before her body was found. 9/23/11 RP 35-55.

Ms. Pettifer's father, Mike, also spent time with her that day; in fact, she had invited him to stay with her for the weekend. 9/23/11 RP 35-36. Ms. Pettifer and her father were both alcoholics and they spent Friday the 13th and Saturday the 14th drinking. 9/21/11 RP 113; 9/22/11 RP 208. They drank so much that the elder Pettifer accidentally urinated all over

the floor and suffered paranoid delusions that another woman was in the apartment. 9/23/11 RP 37, 71.

After bar-hopping Saturday night, Ms. Pettifer and her father returned to the Savoy building but could not open the door. 9/22/11 RP 208. Back doors and windows were propped open because of record temperatures, and Ms. Pettifer had her keys, but the Pettifers were so drunk they could not figure out how to get in. 9/22/11 RP 101-03, 109, 128; 9/26/11 RP 128. Ms. Pettifer went to the nearby Eagle's Club, and passed out in front of the door. 9/21/11 RP 169-72. Two Eagle's Club patrons, Karla and Kerry Prosser, escorted Ms. Pettifer back to the Savoy Building at around 10:00 p.m. 9/21/11 RP 163-207; 9/22/11 RP 7-26. Mike Pettifer was no longer at the front door. 9/21/11 RP 163-207; 9/22/11 RP 7-26, 104.

Michael Benjamin, a resident of the building, was suspicious of the three and asked to see Ms. Pettifer's keys. 9/21/11 RP 177-79, 204. He tried the keys in the exterior door, and after verifying that they worked, he gave them back to Ms. Pettifer. 9/21/11 RP 179, 205; 9/22/11 RP 10. Mr. Benjamin and the Prossers then helped Ms. Pettifer to her apartment. Ms. Pettifer closed and locked the door behind her, and the three helpers left. 9/21/11 RP 181-84, 205.

Mike Pettifer took a cab back to his own house in Shoreline after 1:00 a.m. on Sunday, August 15. 9/23/11 RP 97, 106.

Detectives investigating Ms. Pettifer's death canvassed the Savoy Building. 9/20/11 RP 52. Lauren Chapman, another resident, told them she was suspicious of Michael Benjamin because she had seen him on the stairway about the time of the murder and when she mentioned the unbearable heat he said something about it being "too hot for sex." 9/22/11 RP 151. Detectives also knew that Mr. Benjamin had a criminal record consisting of misdemeanor sex crimes. CP 149.

Detectives determined that the brand of hot sauce with which Ms. Pettifer had been hit was Frank's RedHot. 9/23/11 RP 152. It is the most popular brand of hot sauce in the country, and was the one used at Red Robin, where Ms. Pettifer worked. 9/21/11 RP 157-59; 9/23/11 RP 195. When detectives searched Mr. Benjamin's apartment, they saw that he had a bottle of Frank's. 9/23/11 RP 127. They searched his Safeway Club Card records, and discovered he bought Frank's RedHot hot sauce approximately once per month. 9/23/11 RP 142. Detectives also learned that on August 15 Mr. Benjamin had purchased dog food and a bottle of bleach. 9/23/11 RP 144-45. This aroused their suspicions because murderers have been known to wash away evidence with bleach. 9/23/11 RP 146. But there was no indication of bleach use at this crime scene, and

although detectives saw a bottle of bleach in Mr. Benjamin's apartment, they did not check to see if it had been opened. 9/23/11 RP 190.

Detectives sent many items and DNA samples to the crime lab for testing. On October 6, they discovered that Jason Chapman's DNA was on Ms. Pettifer's chest, along with trace amounts of Mike Pettifer's DNA and Michael Benjamin's DNA. 9/26/11 RP 64; 9/27/11 RP 24-25. On October 7, 2010, Michael Benjamin was charged with the murder of Angela Pettifer. CP 150.

Detectives believed that Ms. Pettifer was manually strangled and that her killer's DNA would be under her fingernails because forensic evidence showed she had tried to pry her assailant's hands off of her neck. CP 147; 9/21/11 RP 91; 9/27/11 RP 48. It was not until June 6, 2011, that the lab ascertained whose DNA was under the victim's fingernails. 9/27/11 RP 50. The major DNA contributor under Ms. Pettifer's nails was Mike Pettifer. 9/27/11 RP 35. The secondary contributor was Jason Chapman. 9/27/11 RP 34. Michael Benjamin was excluded as a contributor. 9/27/11 RP 34, 49.

The lab also reported that Jason Chapman's DNA was on the jeans and belt the killer removed, and Mike Pettifer's DNA was on the shirt the killer pulled up. 9/26/11 RP 51, 74. Michael Benjamin's DNA was not on either of these items. 9/26/11 RP 53, 106.

Despite the updated lab results the State proceeded to trial against Michael Benjamin. Mr. Benjamin moved to suppress evidence of his Safeway purchase history on the basis that it was obtained in violation of his constitutional right to privacy, but the trial court denied the motion. CP 106-33; 9/16/11 RP 8-26. The trial court allowed Mr. Benjamin to argue that either Mike Pettifer or Jason Chapman committed the crime, but excluded evidence that Mr. Chapman had recently threatened to “chop up” Ms. Pettifer. 9/16/11 RP 34-42. Over Mr. Benjamin’s objections that it was irrelevant and unfairly prejudicial, the trial court allowed the State to introduce evidence that Mr. Benjamin bought bleach on August 15. 9/16/11 RP 90-91.

During closing argument, the prosecutor repeatedly told the jury that it had to convict because Mr. Benjamin had not provided an innocent explanation for the presence of his DNA. 9/27/11 RP 72, 77, 122, 123. The trial court twice sustained Mr. Benjamin’s objections, but the prosecutor repeated the argument. 9/27/11 RP 77, 122, 123.

The jury convicted Mr. Benjamin of second-degree murder as charged. CP 34. Mr. Benjamin maintained his innocence through sentencing. 11/2/11 RP 154-55.

E. ARGUMENT

1. The State presented insufficient evidence to convict Mr. Benjamin of the crime, requiring reversal of the conviction and dismissal of the charge.

- a. Due Process requires the State to prove each element of the offense charged beyond a reasonable doubt.

The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 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 368 (1970). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. Id.; U.S. Const. amend. XIV; Const. art. I, § 3; City of Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). On appellate review, evidence is sufficient to support a conviction only if, "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, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

"The reasonable-doubt standard is indispensable, for it impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue." State v. DeVries, 149 Wn.2d 842, 849, 72 P.3d 748

(2003) (internal citations omitted). “[I]t is critical that our criminal law not be diluted by a standard of proof that leaves the public to wonder whether innocent persons are being condemned.” *Id.*

- b. The State failed to prove Mr. Benjamin was the perpetrator; its evidence showed it was more likely the father committed the crime, at least as likely the boyfriend committed the crime, and possible that another acquaintance or stranger perpetrated the act.

The State presented sufficient evidence to prove that someone killed Angela Pettifer. However, the State failed to prove Mr. Benjamin was the perpetrator. “It is axiomatic in criminal trials that the prosecution bears the burden of establishing beyond a reasonable doubt the identity of the accused as the person who committed the offense.” *State v. Hill*, 83 Wn.2d 558, 560, 520 P.2d 618 (1974). The State’s evidence did not show beyond a reasonable doubt that Mr. Benjamin was the person who committed this offense. Indeed, the State’s evidence showed that Ms. Pettifer’s father most likely killed her during an alcoholic blackout.

- i. *The father, Mike Pettifer*

Multiple witnesses testified that both Ms. Pettifer and her father, Mike, were severe alcoholics. 9/21/11 RP 110, 113; 9/23/11 RP 36, 41, 79. Ms. Pettifer, who had recently been released from jail, was supposed to take Antabuse pills to prevent drinking, but she refused to take her

medicine on the weekend in question. 9/21/11 RP 122; 9/23/11 RP 33. Instead, she invited her father to spend the weekend bar-hopping with her. The elder Pettifer lived in Shoreline with his mother, but went to Monroe on Thursday, August 12, to spend time with his daughter. 9/21/11 RP 114, 117.

The next day, according to Jason Chapman, Mike Pettifer got so drunk he stumbled, fell, passed out, and “pissed all over the floor.” 9/23/11 RP 37. Also at some point that weekend, Mr. Pettifer was so inebriated that he appeared to be hallucinating. Mr. Pettifer thought there was a woman in the apartment who was not there. 9/23/11 RP 71.

Angela Pettifer was similarly incapacitated that weekend. On Saturday the 14th, she drank so much that she stumbled down a busy street barefoot, acted “belligerent,” and pulled up her shirt and “flashed” the cars going by. 9/23/11 RP 46-50. According to Mr. Chapman, this behavior caused him to decide against spending the rest of the day with the Pettifers, so he went home. 9/23/11 RP 50-51. After passing out for a while, Angela – who was supposed to work at Red Robin that night – instead went out drinking with her father. 9/23/11 RP 59, 87. Video surveillance shows the two of them together at an ATM after 8:00 p.m. 9/22/11 RP 75, 79.

At about 8:50 p.m., Mike Brady, who lives and works in the Savoy building, left his apartment to deposit some checks. 9/22/11 RP 99-101. He saw two people later identified as Ms. Pettifer and her father trying to get in the front door. 9/22/11 RP 102. According to Mr. Brady, “[s]omething just didn’t look right.” 9/22/11 RP 102. Both people had “glazed eyes” and seemed “very inebriated.” 9/22/11 RP 102-03. Mr. Brady said, “they were both pretty glassy-eyed, and there appeared to be something going on.” 9/22/11 RP 107. Mr. Brady described both Ms. Pettifer and her father as “zombie-like”. 9/22/11 RP 108. Mr. Brady was “nervous about the guy more than the gal,” so much so that he went back and locked his apartment and office before going to deposit his checks. 9/22/11 RP 102-03. When Mr. Brady returned a short time later, both Pettifers were gone. 9/22/11 RP 104.

According to Mike Pettifer, Angela was upset because she could not open the door, so she told him to wait for her and then walked away. 9/23/11 RP 92-93. Mike Pettifer said he waited by or near the front door of the Savoy building for several hours and finally caught a cab home because Angela never returned. 9/23/11 RP 94-97. However, no one saw him outside the Savoy building during that period. Mike Brady did not see him when he returned from the ATM, even though he was nervously

looking out for him based on Mr. Pettifer's strange behavior minutes earlier when Mr. Brady left. 9/23/11 RP 103-04.

Between 9:30 and 10:00 p.m., Kerry and Karla Prosser escorted Angela Pettifer back to the Savoy Building after she had passed out in front of the nearby Eagle's Club. 9/21/11 RP 164-76, 200-07. Like Mike Brady, neither Kerry nor Karla Prosser saw Mike Pettifer waiting for Angela out front as he said he had. 9/21/11 RP 162-207. Mr. Pettifer did not catch a cab back to Shoreline until about 1:30am on August 15th – approximately an hour after Angela Pettifer's homicide. 9/22/11 RP 119, 124, 135; 9/23/11 RP 106. No one ever explained where Mike Pettifer really was during the period that Angela Pettifer was killed. 9/22/11 RP 210.

Mike Pettifer was the primary source of the DNA under Angela Pettifer's fingernails. 9/27/11 RP 35. According to the medical examiner, Ms. Pettifer had injuries on her hands consistent with defensive injuries, and therefore the killer's DNA could be under her nails. 9/21/11 RP 57, 91. Detective Hatch similarly testified that the fingernails were important because Ms. Pettifer had pry marks on her neck that looked like she was trying to pry the killer's hands off her throat. 9/27/11 RP 48. The fact that Mr. Benjamin was definitively excluded as a source of DNA under the fingernails, while Mike Pettifer was found to be a "major contributor," is

virtually dispositive on the question of whether Mr. Benjamin's conviction violates due process.

Mr. Benjamin does not suggest Mr. Pettifer knowingly killed his own daughter. The evidence showed he was so extraordinarily drunk that he did not know what he was doing or what was happening around him. It is likely he made his way back into the apartment and again hallucinated – as he had earlier when Jason Chapman was there – and again thought a female intruder was in the apartment. He may well have killed his daughter thinking she was someone else.

Regardless of his mental state, the evidence shows he most likely perpetrated the homicidal act. The fact that the State might not have been able to prove intent as to the father does not excuse proceeding to trial against someone else. Viewed in the light most favorable to the State, its own evidence shows it is likely that Mike Pettifer killed Angela Pettifer. As a matter of law, therefore, it failed to prove beyond a reasonable doubt that Michael Benjamin perpetrated this crime.

ii. *The boyfriend, Jason Chapman*

The State's evidence also showed that a number of other people might have committed this crime. Ms. Pettifer and her boyfriend, Jason Chapman, had argued that afternoon. 9/23/11 RP 50-51. Ms. Pettifer's sister had been so worried about Mr. Chapman that both she and her

husband warned him to stay away from Ms. Pettifer. 9/21/11 RP 140-41. When Detective Hatch went to Mr. Chapman's sister's house the day Ms. Pettifer's body was found, Mr. Chapman's sister lied at first and said he was not there. 9/22/11 RP 44; 9/23/11 RP 21. Mr. Chapman had an orange stain on his pants, but the detective took his word for it when he said it was from cheese puffs rather than hot sauce. 9/22/11 RP 52-53, 92. Although the victim's sister had identified Mr. Chapman as a suspect, Mr. Chapman's house was not searched, his clothing was not collected, he was not evaluated for defensive injuries, and cell tower records were not checked for his location at the time of the murder. 9/21/11 RP 139; 9/22/11 RP 93, 203; 9/23/11 RP 28.

Mr. Chapman's DNA was the only male DNA other than Mike Pettifer's that was found under the victim's fingernails. 9/27/11 RP 34-35. Mr. Chapman's DNA was the "major contributor" on Ms. Pettifer's breasts, and his DNA was the only male DNA on Ms. Pettifer's jeans and belt. 9/26/11 RP 51, 54; 9/27/11 RP 24. The State minimized the significance of this evidence, arguing that Mr. Chapman's DNA was in all of these places because he was the victim's boyfriend. But the fact that Mr. Chapman's DNA was the only male DNA on the jeans and belt is particularly significant. The detectives repeatedly claimed that based on the location of the hot sauce stains, the jeans had to have been removed

after the homicide, by the killer. 9/21/11 RP 22; 9/23/11 RP 173. But Mr. Benjamin's DNA was not on the jeans and belt, and Mr. Chapman's was. 9/26/11 RP 51, 54, 106. The State presented insufficient evidence to prove beyond a reasonable doubt that Michael Benjamin rather than either Jason Chapman or Mike Pettifer committed this crime.

Indeed, the mystery of this case is so great that the killer could have been any number of other people. Because it was 90 degrees that weekend and the Savoy building was sweltering, the residents left back doors and windows propped open. 9/22/11 RP 109, 128, 146; 9/26/11 RP 128. According to Jason Chapman, even the front door was unlocked. 9/23/11 RP 55. Anyone could have entered.

Joel Smith agreed with Jason Chapman that when Ms. Pettifer drank she became "mean, violent, aggressive and promiscuous." 9/20/11 RP 39. Jason Chapman assumed that Ms. Pettifer "hooked up" with someone that night. 9/23/11 RP 76. Possible DNA matches on Ms. Pettifer's right breast included not only Mr. Benjamin, but also Savoy resident Jarold Ripley. 9/27/11 RP 35. The data for the right breast was very weak: one in five men in the population would "match" the DNA found there. 9/27/11 RP 35-36. The State simply did not do the work to ascertain a definitive killer. It could have been any number of people; the State did not prove beyond a reasonable doubt it was Mr. Benjamin.

iii. Hot sauce and trace DNA

The State charged Michael Benjamin with this crime before receiving the crucial fingernail evidence which pointed toward either Mike Pettifer or Jason Chapman as the real killer. CP 150; 9/27/11 RP 50. Instead of questioning earlier assumptions and investigating further, the State continued on the path in which it was invested and prosecuted Mr. Benjamin for the crime.¹ Mr. Benjamin's conviction violates due process because the evidence was insufficient as a matter of law to show that he was the perpetrator.

There were trace amounts of Mr. Benjamin's DNA on Ms. Pettifer's breasts. As explained above, both Mr. Benjamin and Jarold Ripley were "matches" on the right breast, but so is 20% of the male population. 9/27/11 RP 25, 35-36. As to the left breast, Jason Chapman was the "major contributor," but Michael Benjamin was found to be a minor contributor. 9/27/11 RP 24. This would be true for every one in 1300 males. 9/27/11 RP 24. The possible presence of trace amounts of Mr. Benjamin's DNA is easily explained by his encounter with Ms. Pettifer and the Prossers earlier that evening. The four stood close

¹ According to The Innocence Project, this problem of "tunnel vision" is present in most, if not all, wrongful conviction cases. See, e.g., http://www.innocenceproject.org/docs/TunnelVision_WEB.pdf (last viewed 3/23/12).

together in a small space, and Mr. Benjamin, who is a large man, was sweating profusely due to the oppressive heat. CP 23; 9/21/11 RP 186; 9/22/11 RP 20; 9/26/11 RP 126. His sweat may have dripped down onto Ms. Pettifer's chest as he towered over her and fumbled with her keys. Furthermore, he handled her keys for more than a brief moment; he took them and tested them in the outer door before allowing her to enter and returning her keys to her. 9/22/11 RP 10. Especially given how sweaty he was and the fact that he handled Ms. Pettifer's keys, it is no wonder the lab found trace amounts of his DNA on Ms. Pettifer.

But Mr. Benjamin's DNA was not present – even in trace amounts – on the items most relevant to the homicide. Not only was his DNA absent from the fingernails the victim had used to fight her attacker, it was also absent from the belt and jeans the killer removed after the homicide, and from the shirt the killer pulled up after the crime. Jason Chapman's DNA was on the belt and pants, and Mike Pettifer's DNA was on the bottom of the front of the shirt. 9/26/11 RP 51, 54, 74, 106. Both Mike Pettifer's and Jason Chapman's DNA were under the nails. 9/27/11 RP 34-35.

The State argued that Mr. Benjamin's Safeway purchases – including a bottle of hot sauce found in his apartment – showed he killed Ms. Pettifer. 9/27/11 RP 89-91, 101. The argument was absurd, but may

have influenced the jury. Obviously the killer probably hit the victim with a bottle of hot sauce that was in the victim's apartment; it would make no sense for a person to pick up a bottle of hot sauce from his own apartment, go to another person's apartment, and hit her over the head with it. The victim's sister said that Ms. Pettifer loved spicy food, including jalapeños, Tabasco, Tapatio hot sauce, and "I don't know what else." 9/22/11 RP 211-12. The sister said Ms. Pettifer "put hot sauce on everything she ate." 9/22/11 RP 212.

The brand of hot sauce detectives believed was used to hit Ms. Pettifer was Frank's RedHot. 9/23/11 RP 152. It is apparently the most popular brand of hot sauce in the country. 9/23/11 RP 195. Mr. Benjamin purchased it regularly, and had a bottle about 1/3 full in his apartment when officers searched it August 26. 9/23/11 RP 127, 142-43. Frank's is also the brand used at Red Robin, where Ms. Pettifer worked. 9/23/11 RP 195. Someone had purchased it at the Safeway in Monroe on August 14, but detectives did not ascertain who made the purchase – other than that it was not Michael Benjamin. 9/23/11 RP 195-98. Detectives never asked Safeway for records of Angela Pettifer's purchases. 9/23/11 RP 198. Neither Mr. Benjamin's fingerprints nor DNA were found on the hot sauce bottle remnants found in Ms. Pettifer's apartment. The fact that Mr.

Benjamin uses Frank's hot sauce on his food is, as his attorney argued, a red herring.

Apart from the trace DNA and hot sauce, the only evidence the State offered to support its theory that Mr. Benjamin was the killer was a bottle of bleach. The bleach was even less relevant than the hot sauce. Mr. Benjamin purchased a bag of dog food and a bottle of bleach on August 15. 9/23/11 RP 144-45. Detectives testified this was important because killers tend to clean up crime scenes after their murders. 9/23/11 RP 146. But there was no evidence that the killer cleaned Ms. Pettifer's body or apartment with bleach, and detectives did not even bother to ascertain whether Mr. Benjamin's bottle of bleach was still full or had been opened. 9/23/11 RP 190.

In sum, Mr. Benjamin's conviction was based on his purchase of standard food and household items and trace amounts of DNA that were likely transferred during his sweaty encounter with Ms. Pettifer prior to her murder. Meanwhile, neither person whose DNA was under the victim's fingernails or on the clothing the killer removed was charged with the crime. The State did not come close to presenting sufficient evidence of the killer's identity to satisfy due process. This Court should reverse.

c. The remedy is reversal and dismissal with prejudice.

In the absence of evidence from which a rational trier of fact could find beyond a reasonable doubt Mr. Benjamin committed the offense for which he was convicted, the judgment may not stand. State v. Spruell, 57 Wn. App. 383, 389, 788 P.2d 21 (1990). The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution prohibits a second prosecution for the same offense after a reversal for lack of sufficient evidence. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) (citing North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969)). The appropriate remedy for the error in this case is reversal of the conviction and dismissal of the charge with prejudice.

This Court need not reach the alternative arguments below.

2. The prosecutor repeatedly violated Mr. Benjamin's Fifth and Fourteenth Amendment rights during closing argument, requiring reversal and remand for a new trial.

a. It is misconduct for a prosecutor to subvert the presumption of innocence, shift the burden of proof, or urge the jury to draw an adverse inference from the defendant's failure to testify.

Every prosecutor is a quasi-judicial officer, charged with the duty of ensuring that an accused receives a fair trial. State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). It is misconduct for a prosecutor to

suggest a shift in the burden of proof during a criminal trial. State v. Cleveland, 58 Wn. App. 634, 648, 794 P.2d 547 (1990) (holding prosecutor committed misconduct by stating defense attorney “would not have overlooked any opportunity to present admissible, helpful evidence”). “The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.” Coffin v. United States, 156 U.S. 432, 453, 15 S.Ct. 394 (1895). To overcome this presumption, the State must prove every element of the charged offense beyond a reasonable doubt. Winship, 397 U.S. at 364.

- b. In this case, the prosecutor committed misconduct by repeatedly telling the jury Mr. Benjamin had to explain the presence of his DNA on the victim.

The prosecutor in this case committed no fewer than five instances of unconstitutional misconduct in closing argument. First, the prosecutor told the jury that Mr. Benjamin “had the means, the motive, the opportunity, and most importantly has no innocent explanation for his DNA being on her left nipple and areola.” 9/27/11 RP 72 (emphasis added). This argument improperly implied a presumption of guilt, shifted the burden of proof to the defense, and urged the jury to draw an adverse inference from the failure to testify.

Second, the prosecutor said, “The only issue for you folks to decide when you go back into the jury room is if this guy didn’t do it.” 9/27/11 RP 74. This argument again improperly subverted the presumption of innocence. The jury was supposed to presume Mr. Benjamin “didn’t do it,” and go back into the jury room to decide whether the State proved beyond a reasonable doubt that he did do it. The prosecutor instead implied the jury was to presume Mr. Benjamin was guilty, and decide if he was not.

Third, the prosecutor again said, “You have to come up with some explanation for his DNA on her left nipple.” 9/27/11 RP 77. At this point, Mr. Benjamin objected, and the court sustained the objection. The judge stated, “The jury will disregard that. I will remind the jury that the State alone bears the burden of proof in this matter.” 9/27/11 RP 77.

Undeterred, the prosecutor committed a fourth violation during rebuttal closing argument, stating, “One thing that I kept waiting for throughout the entirety of the defendant’s lawyer’s closing argument was an explanation for one bit of evidence. How do you account for the DNA on her left nipple?” 9/27/11 RP 122. Mr. Benjamin again objected, and the court again sustained the objection, stating, “The jury’s reminded that the State bears the burden of proof solely in this case.” 9/27/11 RP 122-23.

The prosecutor ignored the court, immediately stating, “There is no innocent explanation for that DNA.” 9/27/11 RP 123.

The prosecutor’s flagrant, repeated violations of Mr. Benjamin’s constitutional rights require reversal. It is well-settled that the above arguments are improper. For example, in a series of cases out of Pierce County, Division Two of this Court reversed convictions where the prosecutor told the jury it had to provide a reason for acquittal. See, e.g., State v. Johnson, 158 Wn. App. 677, 243 P.3d 936 (2010), review denied 249 P.3d 1029 (2011); State v. Venegas, 155 Wn. App. 507, 228 P.3d 813 (2010), review denied 245 P.3d 226. “[T]he argument was improper because it subverted the presumption of innocence by implying that the jury had an initial affirmative duty to convict and that the defendant bore the burden of providing a reason for the jury not to convict him.” Johnson, 158 Wn. App. at 684.

This Court’s decision in Fleming is also on point. State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996). There, the prosecutor told the jury:

[T]here is absolutely no evidence ... that [the victim] has fabricated any of this or that in any way she’s confused about the fundamental acts that occurred upon her back in that bedroom. And because there is no evidence to reasonably support either of those theories, the defendants are guilty as charged of rape in the second degree.

...

[I]t's true that the burden is on the State. But you would expect and hope that if the defendants are suggesting there is a reasonable doubt, they would explain some fundamental evidence in this [matter]. And several things, they never explained.

Id. at 214 (emphases in original). The prosecutor went on to argue that the defendants had not explained various pieces of evidence, “implying that the defendants had a duty to explain this evidence, and that because they did not, the defendants were guilty.” Id. at 215.

This Court reversed, noting, “[a] defendant has no duty to present evidence; the State bears the entire burden of proving each element of its case beyond a reasonable doubt.” Id. The Court cited with approval another case in which a conviction was reversed because the prosecutor questioned the defendant’s failure “to provide innocent explanations for the State’s evidence.” Id. (citing State v. Traweck, 43 Wn. App. 99, 106, 715 P.2d 1148, review denied, 106 Wn.2d 1007 (1986)). “The State must convict on the merits, and not by way of misstating the nature of reasonable doubt, misstating the role of the jury, infringing on the right to remain silent, and improperly shifting the burden of proof to the defense.” Id. at 216.

Another case in which the prosecutor committed similar misconduct is State v. Fiallo-Lopez, 78 Wn. App. 717, 899 P.2d 1294 (1995). There, the prosecutor stated in closing argument that “there was

‘absolutely’ no evidence to explain” why the defendant was present at the crime scene and “there was no attempt by the defendant to rebut the prosecution’s evidence regarding his involvement in the drug deal.” Id. at 729. This Court held, “[b]ecause the argument improperly commented on the defendant’s constitutional right not to testify and impermissibly shifted the burden of proof to the defendant, it was misconduct.” Id.

In a Michigan case, the prosecutor in closing argument stated that she had “prepared about eleven questions” for defense counsel to answer in his closing argument, and asked the jury to “pay attention” to see if he “adequately answers those questions in your mind.” People v. Green, 131 Mich. App. 232, 234-35, 345 N.W.2d 676 (1984). She proceeded to ask questions like why the defendant had a gun and why he matched the description of the suspect. Id. at 235. The Michigan Court Appeals held this closing argument constituted misconduct: “a prosecutor may not imply in closing argument that defendant must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof.” Id. at 237. “Moreover, such a technique indirectly focuses upon a defendant’s exercise of his or her Fifth Amendment right to remain silent should defendant decide not to testify.” Id. The court reversed the conviction because the prosecutor’s

argument was “unduly offensive to the sound maintenance of the judicial system.” Id. at 239.

The same is true here. The prosecutor repeatedly told the jury Mr. Benjamin was required to provide an innocent explanation for the evidence, thereby violating Mr. Benjamin’s Fifth Amendment right not to testify and Fourteenth Amendment rights to the presumption of innocence and proof beyond a reasonable doubt. The prosecutor ignored the judge’s rulings sustaining Mr. Benjamin’s objections and flagrantly violated Mr. Benjamin’s constitutional rights.

c. The remedy is reversal and remand for a new trial.

Because the prosecutor violated Mr. Benjamin’s Fifth and Fourteenth Amendment rights, the constitutional harmless error standard applies. The State must prove beyond a reasonable doubt the misconduct did not contribute to the verdict. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); Fleming, 83 Wn. App. at 216. The State cannot meet its heavy burden here.

As this Court noted in Fleming, prosecutors do not engage in these tactics unless necessary to sway the jury in a close case. Fleming, 83 Wn. App. at 215. As in Fleming, this case was close. Indeed, as explained above, the State presented insufficient evidence to prove Mr. Benjamin was the perpetrator. A fortiori, the State cannot prove beyond a

reasonable doubt its misconduct did not contribute to the verdict. It was only by shifting the burden multiple times during closing argument that it was able to secure a conviction. This Court should reverse and remand for a fair trial.

3. The admission of Mr. Benjamin's Safeway purchase history violated his right to privacy under the Fourth Amendment and article I, section 7, requiring reversal of the conviction and suppression of the illegally obtained evidence.

During their investigations, detectives determined that the brand of hot sauce with which Ms. Pettifer was hit was likely Frank's RedHot, which was sold at the Monroe Safeway. Detectives also determined that Mr. Benjamin was a suspect in the case, and that he had a bottle of Frank's in his apartment. The detectives accordingly searched and seized records from the Safeway in Monroe as part of their investigation. They learned, inter alia, that Mr. Benjamin purchased hot sauce roughly once per month and that he had bought a bottle of bleach on August 15. As explained below, the trial court erred in denying Mr. Benjamin's motion to suppress these records.

The issue involves three separate searches and seizures:

First: On August 28, 2010, Detective Dunn purchased items at the Safeway in Monroe. Instead of using his own Safeway Club Card account, he entered Mr. Benjamin's telephone number without a warrant

and without Mr. Benjamin's knowledge or consent. In so doing, Detective Dunn determined that Mr. Benjamin has a Safeway Club Card account and that the account number ends in 0941. CP 86, 107. The trial court concluded this action did not constitute a search. As explained below, that conclusion was erroneous.

Second: After Detective Dunn ascertained that Mr. Benjamin had a Club Card account, Detective Hatch called Safeway and without a warrant or Mr. Benjamin's consent obtained information about Mr. Benjamin's Club Card Account purchase history. Safeway personnel told Detective Hatch that Mr. Benjamin bought Frank's RedHot hot sauce on August 11, and that the store had a videotape of the transaction. CP 107-08, 123-24. The State later conceded that Detective Hatch violated Mr. Benjamin's constitutional right to privacy by calling Safeway and obtaining this information without a warrant or consent. CP 87. The trial court accepted the State's concession, but erroneously admitted the fruits of the search anyway.

Third: Detectives then used the above information to obtain a warrant for (1) the information Detective Hatch had already concededly obtained illegally, and (2) records of all of Mr. Benjamin's purchases at the Monroe Safeway. CP 115, 123-24, 128. The warrant read:

You are commanded to:

1. Search, within ten (10) days of this date, the premises, vehicle or person described as follows: Safeway in Monroe, also known as store number 537, located at 19651 State Route 2, Monroe, Washington 98272, and/or Safeway Loss Prevention, Seattle Division, located in Seattle, Washington,
2. Seize, if located, the following property or person(s): Records related to the purchase of "Frank's RedHot Cayenne Pepper Sauce" from a transaction on August 11, 2010 at 07:33 hours at store number 537, register number 3, transaction number 0142. To include all club card history under the name of Michael Benjamin and referencing telephone number 253-709-8035, as well as any related surveillance video of said transaction.

CP 115. In response to the warrant, Safeway provided records of everything Mr. Benjamin purchased from May 1, 2010 through September 10, 2010. CP 115, 123-24, 128. The trial court erroneously concluded the warrant was not overbroad and that all evidence provided by Safeway in response to the warrant was admissible.

- a. The detective violated Mr. Benjamin's constitutional right to privacy by accessing Mr. Benjamin's Safeway club card account without his knowledge or consent and without a warrant.

Article I, section 7 of the Washington Constitution prohibits government invasion of private affairs absent authority of law. Const. art. I, § 7. The state constitutional protection "is explicitly broader than that of the Fourth Amendment." State v. Ladson, 138 Wn.2d 343, 348, 979 P.2d

833 (1999). It “clearly recognizes an individual’s right to privacy with no express limitations and places greater emphasis on privacy.” Id. In short, “Article I, section 7 is a jealous protector of privacy.” State v. Buelna Valdez, 167 Wn.2d 761, 777, 224 P.3d 751 (2009).

When Detective Dunn accessed Mr. Benjamin’s account on August 28, he violated Mr. Benjamin’s right to privacy under article I, section 7. Detective Dunn invaded Mr. Benjamin’s private affairs by using his telephone number without a warrant or consent and thereby learning that Mr. Benjamin had a Safeway Club Card account and that the account number ended in 0941. The State argued that Detective Dunn’s unauthorized use of Mr. Benjamin’s account was not a search because it did not reveal a purchase history. CP 86. The State is wrong.

In Gunwall, law enforcement officers obtained only the telephone numbers dialed rather than the content of the conversations, but our supreme court held the officers’ actions constituted a search under article I, section 7. State v. Gunwall, 106 Wn.2d 54, 63-64, 720 P.2d 808 (1986). Stated differently, the numbers dialed constituted a “private affair” which the government may not invade without “authority of law.” Id.; Const. art. I, § 7. Similarly in Jorden, the Supreme Court held that police officers invaded the defendant’s private affairs by looking at a motel’s guest registry and determining that the defendant was staying there. State v.

Jorden, 160 Wn.2d 121, 130, 156 P.3d 893 (2007). The violation occurred before the search of the room itself; the mere fact that the defendant was staying in the motel was a private affair which could not be invaded absent authority of law. Id.

If the mere fact that a person was staying in a motel was held to be a private affair in Jorden and the mere numbers dialed were held to be private affairs in Gunwall, then the fact that Mr. Benjamin had a Safeway Club Card Account, as well as the number of the account, were private affairs here. The State conceded it had neither a warrant nor consent for the invasion of the private affair. Accordingly, Detective Dunn's use of Mr. Benjamin's account violated article I, section 7.

The court ruled the detective's use of Mr. Benjamin's account was not unconstitutional because "anybody could have" entered a phone number other than his or her own. 9/16/11 RP 24. But whether a private actor could have obtained information is irrelevant to whether the government may do so without a warrant.² In Boland, for example, the Supreme Court held that garbage set out on the curb is a private affair

² In any event, although it is easy for a person to use another's account, that does not mean it is legal. Use of another person's account without that person's consent could be prosecuted under statutes prohibiting identity theft or possession of stolen access devices. See RCW 9A.35.020; RCW 9A.56.160(1)(c). Furthermore, as Mr. Benjamin pointed out below, Safeway assures its customers that their club card information will be kept private. CP 132.

which the government may not invade without authority of law. State v. Boland, 115 Wn.2d 571, 578, 800 P.2d 1112 (1990). This is true even though anybody could rifle through another person's garbage – and poor people often do so to look for food. The constitution prohibits the State's invasion of private affairs without authority of law. It has nothing to do with the actions of private individuals.

In sum, the trial court erred in concluding that Detective Dunn did not invade a private affair through his unauthorized use of Mr. Benjamin's Safeway Club Card account. Under Gunwall, Boland, and Jorden, the existence and number of Mr. Benjamin's Safeway account were private affairs which the government may not invade absent authority of law. Because the State conceded there was no warrant, no consent, and therefore no authority of law, Detective Dunn's actions were unconstitutional.

b. The warrant was invalid because it was overbroad and based on information obtained illegally.

As explained above, Detective Dunn's initial use of Mr. Benjamin's Club Card account was unconstitutional, and the State conceded that Detective Hatch's subsequent request for hot-sauce purchase information was unconstitutional. The third Safeway records search was unconstitutional as well because (1) the critical information in

the warrant affidavit consisted of the fruits of the first two unconstitutional searches, and (2) the warrant was unconstitutionally overbroad. CP 115, 123-24.

The warrant authorized the seizure of “[r]ecords related to the purchase of ‘Frank’s RedHot Cayenne Pepper Sauce’ from a transaction on August 11, 2010 at 07:33 hours at store number 537, register number 3, transaction number 0142.” CP 115. But the only reason the detectives knew there was such a purchase was because of Detective Hatch’s concededly unconstitutional search in which he telephoned Safeway’s loss prevention office and requested this information without a warrant. CP 87-88; 123-24. Thus, this portion of the warrant cannot support the search.³

But the remainder of the warrant cannot support the search either, because it is an unconstitutional general search. It did not simply allow a search for recent hot-sauce purchases. It authorized the seizure of “all club card history under the name of Michael Benjamin and referencing telephone number 253-709-8035.” CP 116. In response to this warrant,

³ For this reason, the Court technically need not reach the issue of whether Detective Dunn’s actions invaded a private affair. The first clause of the warrant relied on Detective Hatch’s concededly unconstitutional search, and the second clause was unconstitutionally overbroad, so all of Mr. Benjamin’s Safeway records must be suppressed regardless of Detective Dunn’s search.

Safeway provided the State with a list of all of Mr. Benjamin's purchases from May 1, 2010 through September 10, 2010. At trial, the State not only referenced Mr. Benjamin's hot-sauce purchases, but also his purchase of a bottle of bleach. This was so even though there was no evidence of bleach use at the crime scene, no evidence that Mr. Benjamin had even opened his bottle of bleach, and nothing in the warrant affidavit mentioning bleach.

A warrant is overbroad in violation of the Fourth Amendment and article I, section 7 if it fails to describe with particularity items for which probable cause exists to search. State v. Riley, 121 Wn.2d 22, 28, 846 P.2d 1365 (1993); State v. Maddox, 116 Wn. App. 796, 805, 67 P.3d 1135 (2003). Probable cause requires a nexus between the criminal activity and the item to be seized. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). "[T]he probable cause question is closely intertwined with the particularity requirement." State v. Perrone, 119 Wn.2d 538, 545, 834 P.2d 611 (1992).

The State did not have probable cause to search and seize records of all of Mr. Benjamin's Safeway purchases because there was no nexus between the alleged crime and all grocery purchases. At most, the State had probable cause to seize records of recent hot-sauce purchases. The

warrant was clearly overbroad, and the trial court erred in concluding to the contrary.⁴

- c. The remedy is reversal of the conviction and suppression of all of Mr. Benjamin's Safeway purchase records.

Because the first clause of the warrant simply repeated information obtained during a concededly unconstitutional search, and the second clause of the warrant was unconstitutionally overbroad, all fruits of the Safeway search must be suppressed. In some cases in which a warrant violates the particularity requirement, the offending portion may be severed from the constitutional portion, such that only evidence obtained pursuant to the unconstitutional portion is suppressed. Perrone, 119 Wn.2d at 556. But as in Perrone, severance does not apply here.

The severability doctrine does not apply in every case Where a search warrant is found to be an unconstitutional general warrant, the invalidity due to unlimited language of the warrant taints all items seized without regard to whether they were specifically named in the warrant.

Perrone, 119 Wn.2d at 556.

The record of Mr. Benjamin's August 11 hot sauce purchase was obtained pursuant to Detective Hatch's unconstitutional telephonic search,

⁴ The trial court concluded the warrant was not overbroad because it did not authorize "Club Card information going back for 20, 30 years or something like that" and because "warrants are not to be viewed in a hyper-technical manner." 9/16/11 RP 25-26.

repeated in the first clause of the warrant. The records of Mr. Benjamin's other hot sauce purchases, his bleach purchase, and all other purchases were obtained pursuant to the unconstitutionally overbroad second clause of the warrant. There is simply no valid portion of the warrant which may be severed from the rest. As in Perrone, then, all evidence obtained pursuant to the warrant is inadmissible. The remedy is reversal of the conviction and remand with instructions to suppress the evidence. Thein, 138 Wn.2d at 151.

4. Multiple evidentiary errors prejudiced Mr. Benjamin, requiring reversal and remand for a new trial.

a. The bleach was inadmissible under ER 402 and ER 403.

Evidence which is not relevant is inadmissible. ER 402. And even relevant evidence is inadmissible if it is substantially more prejudicial than probative. ER 403. The trial court abused its discretion under ER 402 and 403 by admitting (1) evidence that Mr. Benjamin bought a bottle of bleach on August 15 and (2) testimony speculating about its purpose. 9/16/11 RP 90-91.

The State argued the evidence was relevant because Mr. Benjamin bought the bleach (along with dog food) the day after someone killed Angela Pettifer, and because in general killers tend to clean up their crime scenes. 9/16/11 RP 90-91; 9/23/11 RP 145 (Detective Hatch testifies he

found it “interesting” that Mr. Benjamin bought bleach because, “I know that in other cases where people have committed crimes, there’s oftentimes an effort to conceal who committed that crime”). But there was no evidence that this crime scene was cleaned up – let alone with bleach. Nor was there evidence that Mr. Benjamin had even opened his bottle of bleach. The bleach purchase was thus irrelevant and inadmissible. ER 402; see Houck v. University of Washington, 60 Wn. App. 189, 201-02, 803 P.2d 47 (1991) (evidence of elevator safety devices in one dormitory irrelevant to tort claim involving elevator in a different dormitory).

Furthermore, the evidence was substantially more prejudicial than probative because Detective Hatch told the jury he “found it interesting” that Mr. Benjamin bought bleach on August 15 because killers tend to use bleach to clean up crime scenes. 9/23/11 RP 144-46. He said, “I think most people would probably realize that if you’re trying to wash away any sort of evidence such as DNA, blood, tissue matter, whatsoever, bleach is a good product for that.” 9/23/11 RP 146. The admission of the bleach purchase and the testimony about it was unfairly prejudicial because it allowed the jury to speculate that Mr. Benjamin cleaned up the crime scene even though there was absolutely no evidence that he did. ER 403; See Anderson v. Akzo Nobel Coatings, Inc., 172 Wn.2d 593, 611, 260

P.3d 857 (2011) (ER 403 protects litigants from “deductions that are mere speculation”).

b. Mr. Benjamin’s statement to Lauren Chapman was inadmissible under ER 403.

Another resident of the Savoy building, Lauren Chapman (no relation to Jason), testified that she was on the outside stairwell smoking after midnight when she saw Mr. Benjamin come down the stairs. 9/22/11 RP 149-50. She testified they chatted for a while, and she said “it’s really, really hot.” 9/22/11 RP 151. Over Mr. Benjamin’s objection, the court allowed Ms. Chapman to testify that Mr. Benjamin’s response was “yes, it’s a hot night for having sex.” 9/16/11 RP 74-81; 9/22/11 RP 151.

The admission of this statement violated ER 403 because the comment about sex had virtually no probative value and any probative value it did have was substantially outweighed by the danger of unfair prejudice. The crime charged was not a sex crime; it was a homicide. Although the victim’s pants had been removed and her shirt pulled up, there was no evidence that the victim had been raped. No sperm was found in or on the victim’s body or at the crime scene. 9/26/11 RP 34. Thus, the statement had almost no probative value.

Furthermore, its admission was unfairly prejudicial. Courts have recognized that the potential for prejudice is at its highest where evidence

of prior sex acts is admitted. State v. Sutherby, 165 Wn.2d 870, 886, 204 P.3d 916 (2009); State v. Saltarelli, 98 Wn.2d 358, 363, 655 P.2d 697 (1982). Although Mr. Benjamin's statement was not a prior sex "act," it was similarly prejudicial because it was a statement about sex. The court abused its discretion in admitting the statement.

- c. Jason Chapman's statement that he would chop up Ms. Pettifer if she ever went out with someone else was not hearsay and was admissible regardless to show motive or intent.

About a week before the homicide, Ms. Pettifer told her sister that Jason Chapman said, "If I ever see you with another man, I'll chop you up with a hatchet." 9/16/11 RP 36-37. It was because of this statement that Ms. Pettifer's sister and brother-in-law both called Mr. Chapman and told him to stay away from Ms. Pettifer. The trial court granted the State's motion to exclude this statement as hearsay. 9/16/11 RP 37-43. The ruling was incorrect. The statement was not hearsay and even if it was hearsay it was admissible to show motive or intent.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801. Statements not offered to prove the truth of the matter asserted are not hearsay. Id.; State v. Crowder, 103 Wn. App. 20, 26, 11 P.3d 828 (2000).

The statement the victim's sister said Mr. Chapman made to the victim was not hearsay because it was neither true nor false; it was a conditional statement. 9/16/11 RP 36-37. Indeed, even if it had been a statement of fact rather than a conditional statement ("I chopped Angela up with a hatchet because I saw her with another man") it would not have been offered for its truth because Angela Pettifer was not chopped up with a hatchet. Accordingly, the statement was not hearsay and the trial court erred in excluding the statement as hearsay. ER 801.

Even if the statement were hearsay, it would be admissible under an exception to the rule against hearsay. ER 803 provides, in relevant part:

(a) **Specific Exceptions.** The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

...

(3) *Then Existing Mental, Emotional, or Physical Condition.* A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of the declarant's will.

ER 803(a)(3) (emphasis added); cf. ER 404(b) (prior acts admissible to show motive or intent).

“[E]vidence of prior quarrels and ill-feeling is admissible to show motive.” State v. Powell, 126 Wn.2d 244, 260, 893 P.2d 615 (1995). Evidence of prior threats is also admissible to show motive. Id. Furthermore, “evidence of quarrels between the victim and the defendant preceding a crime, and evidence of threats by the defendant, are probative upon the question of the defendant’s intent.” State v. Parr, 93 Wn.2d 95, 102, 606 P.2d 263 (1980). The trial court abused its discretion in excluding this statement because it was not hearsay and even if it was it was admissible to show motive or intent.

d. The evidentiary errors prejudiced Mr. Benjamin, requiring reversal and remand for a new trial.

Evidentiary errors require reversal if, “within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” State v. Thomas, 35 Wn. App. 598, 609, 668 P.2d 1294 (1983). “[W]here there is a risk of prejudice and no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary.” Salas v. Hi-Tech Erectors, 168 Wn. 2d 664, 673, 230 P.3d 583 (2010).

As explained in the first argument section above, the evidence of identity in this case was extremely weak. Accordingly, it is reasonably

likely that the outcome of the trial would have been different if any of these evidentiary errors had not occurred. A new trial is necessary.

5. Cumulative error deprived Mr. Benjamin of a fair trial.

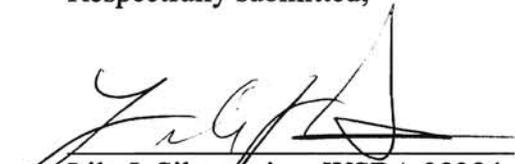
Even if each of the above errors individually does not warrant a new trial, they do in the aggregate. “Under the cumulative error doctrine, we may reverse a defendant’s conviction when the combined effect of errors during trial effectively denied the defendant [his] right to a fair trial, even if each error standing alone would be harmless.” Venegas, 155 Wn. App. at 522. Here, the combination of improper evidentiary rulings, an erroneous suppression ruling, and prosecutorial misconduct denied Mr. Benjamin his right to a fair trial. This Court should reverse and remand for a new trial.

E. CONCLUSION

For the reasons set forth above, Mr. Benjamin respectfully requests that this Court reverse his conviction and remand for dismissal of the charge with prejudice. In the alternative, the conviction should be reversed and the case remanded for a new trial.

DATED this 3rd day of April, 2012.

Respectfully submitted,



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