

NO. 40646-2-II

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CLERK OF COURT
COURT OF APPEALS
DIVISION II
SEASIDE, WA

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL HERSH,

Appellant.

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

The Honorable Robert L. Harris, Judge

REPLY BRIEF OF APPELLANT

Peter B. Tiller, WSBA No. 20835
Of Attorneys for Appellant

The Tiller Law Firm
Corner of Rock and Pine
P. O. Box 58
Centralia, WA 98531
(360) 736-9301

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A. ARGUMENT IN REPLY

In its response, the State argues the appellant has challenged the evidence only insofar as it pertains to a completed rape. Brief of Response at 14-16. The appellant submits that the intention to challenge the finding attempted rape—as well as rape—is rejected and preserved Assignment of Error 1, which states:

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

Brief of Appellant at 1.

In every criminal prosecution, the State must prove every element of the crime charged beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); *State v. Crediford*, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). A reviewing court should reverse the conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); *State v. Hundley*, 126 Wn.2d 418, 421, 894 P.2d 403 (1995); *State v. Chapin*, 118 Wn.2d 681, 692, 826 P.2d 194 (1992); *State v. Green*, 94 Wn.2d 216, 221-22, 616

P.2d 628 (1980).

A person commits an attempt when, with intent to commit a specific crime, the person does any act which is a substantial step toward the commission of that crime. RCW 9A.28.020(1). Hence, the crime of attempt contains two elements: an intent to commit the substantive crime, and the taking of a substantial step toward the commission of that crime. *State v. Chhom*, 128 Wn.2d 739, 742, 911 P.2d 1014 (1996). The attempt to commit rape requires proof that the defendant "took a substantial step toward commission of the crime, with the intent to have sexual intercourse." *State v. Jackson*, 62 Wn. App. 53, 55, 813 P.2d 156 (1991) (a physical assault upon the victim, coupled with an avowed purpose to have sexual intercourse with her, is sufficient to meet the substantial step requirement); RCW 9A.28.020(1). The intent requirement must be corroborated by the steps taken toward the alleged conduct; thus a "substantial step" is conduct that strongly corroborates the actor's criminal purpose. *State v. Townsend*, 147 Wn.2d 666, 679, 57 P.3d 255 (2002). Sexual intercourse is defined in part as "any penetration of the vagina or anus however slight, by an object, when committed on one person by another." RCW 9A.44.010(1)(b); *State v. Tili*, 139 Wn.2d 107, 114, 985 P.2d 365 (1999). There must be unity of intent and an overt act for there to be sufficient evidence of an attempted crime. *State v. Lewis*,

69 Wn.2d 120, 123, 417 P.2d 618 (1966). Mere preparation to commit a crime is not an attempt. *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978). A person's "conduct is not a substantial step 'unless it is strongly corroborative of the actor's criminal purpose.'" *Id.* at 451.

Here, the State presented insufficient evidence of an intent to commit rape or a substantial step towards committing rape. Washington cases demonstrate what is required for an attempted rape conviction. In *State v. Gatalski*, 40 Wn. App. 601, 699 P.2d 804, review denied, 104 Wn.2d 1019 (1985), the defendant physically forced the victim into a bedroom and onto the bed. There, he lay on top of the victim, tried to force his hand under her clothing, and attempted to kiss her. On appeal, the Court found this evidence sufficient to sustain the defendant's conviction for attempted rape in the second degree. Here, the evidence shows that Ms. Simerly's body was found in a bedroom, naked, with her hands tied. Clothing was found in other areas of the house. However, there was no medical testimony regarding penetration or attempted act of rape, nor a showing that Mr. Hersh, or anyone for that matter, tore Ms. Simerly's clothing off.

In *State v. Kroll*, 87 Wn.2d 829, 558 P.2d 173 (1976), the Court upheld a murder and attempted rape conviction when the victim was found in the woods partly nude and lying on her back with her legs spread apart, and defendant had bloodstains on his undershorts, dirt on his genitals, and

his pants were unzipped. In the present case, there was no evidence that Mr. Hersh attempted to engage in penile-vaginal intercourse, or intercourse by any definition.

Finally, in *State v. Ray*, 63 Wn.2d 224, 225-26, 386 P.2d 423 (1963), the Court found sufficient to support an attempted rape conviction, evidence that the defendant grabbed the victim, forced her outside, threw her to the ground, "grappled" with her, tried to unzip his trousers, and told the victim he was going to have intercourse with her. No similar evidence of intent exists in the present case.

Decisions from other jurisdictions are also instructive. In *Tremaine v. State*, 245 Miss. 512, 148 So.2d 517 (1963), the defendant, who gained entry to a woman's home by an apparent ruse, grabbed her bathrobe and yanked it up, then grabbed her arms. She broke away and ran outside. *Tremaine v. State*, 148 So.2d at 519. The Court stated that "there is a strong probability that appellant intended at the time to use force against the prosecutor," but found "proof" of intent to have sexual intercourse lacking, and reversed. *Tremaine v. State*, 148 So.2d at 519-20.

In *People v. Greene*, 34 Cal. App. 3d 622, 110 Cal. Rptr. 160 (1973), the 16-year-old victim was walking down the street at 11:00 p.m. from a babysitting job to her home, when the defendant came up to her, put his arm around her waist and turned her around, saying: "Don't be afraid. I have a gun. Don't move."

She felt something hard in her side. She asked him what he wanted and he said, "I just want to play with you," and he moved his hand up and down her waist a little. She successfully broke away. *People v. Greene*, 110 Cal. Rptr at 177. The Court held that the evidence was insufficient to sustain a finding that the defendant had an intent to engage in sexual intercourse by force or violence, and noted that the girl's testimony that she feared rape could not prove an assault with intent to rape, because it is the defendant's state of mind, not the victim's, which is in issue. *People v. Greene*, 110 Cal. Rptr at 179.

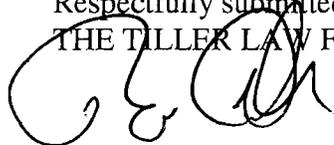
In this case, there was no showing that he made efforts to engage in penetration required for sexual intercourse. Reversal and dismissal with prejudice is required. Where a reviewing court finds insufficient evidence to prove an element of a crime, reversal with prejudice is required. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

F. CONCLUSION

For the reasons stated herein, and in appellant's opening brief, Mr. Hersh respectfully requests this Court to reverse.

DATED: November 7, 2011.

Respectfully submitted,
THE TILLER LAW FIRM



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

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CLARK COUNTY SUPERIOR
COURT NO. 08-1-02077-1

CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that one original and one copy of the Appellant's Reply Brief 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 November 7, 2011, at the Centralia, Washington post office addressed as follows:

Mr. Michael Kinnie
Deputy Prosecutor
P.O. Box 5000
Vancouver, WA 98666-5000

Mr. David Ponzoha
Clerk of the Court
Court of Appeals
950 Broadway, Ste.300
Tacoma, WA 98402-4454

CERTIFICATE OF
MAILING

Michael Allen Hersh
DOC #660056
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326-9723

Dated: November 7, 2011.

THE TILLER LAW FIRM



PETER B. TILLER – WSBA #20835
Of Attorneys for Appellant

CERTIFICATE OF
MAILING

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THE TILLER LAW FIRM
ATTORNEYS AT LAW
ROCK & PINE – P.O. BOX 58
CENTRALIA, WASHINGTON 98531
TELEPHONE (360) 736-9301
FACSIMILE (360) 736-5828