

COURT OF APPEALS
DIVISION II

NO. 40646-2-II

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

STATE OF WASHINGTON
BY _____
DEPUTY

STATE OF WASHINGTON, Respondent

v.

MICHAEL ALLEN HERSH, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.08-1-02077-1

BRIEF OF RESPONDENT

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A. RESPONSE TO ISSUES PERTAINING TO ASSIGNMENTS OF
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BARK FOUND IN THE SIMERLY HOME

B. STATEMENT OF THE FACTS

I. SUBSTANTIVE FACTS

On July 12, 1978, Joy Towers was at home with her nine year-old son. RP Vol. 6, p. 939. Her husband was at work, her son was outside playing and she was preparing to go play tennis. Id. Joy lived on Westgate Avenue in Battleground and had a neighbor named Michael Hersh. RP Vol. 6, p. 939, 942. He lived in the house behind hers. Id. at 942. On that afternoon Hersh came to Joy's house and told her that her son was throwing eggs at his house. RP Vol. 6, 940. Because she saw an egg or two in her backyard she believed Hersh, although she would soon learn that this was a ruse designed to gain entry into Joy's house. RP Vol. 6, p. 941. Joy invited Hersh inside to discuss the matter and she walked over to the back patio so she could look outside. RP Vol. 6, p. 941.

When she turned around Hersh was standing with a large knife pointed at her. Id. She actually felt as though she'd had a seizure and fell to the ground. RP Vol. 6, p. 942. She suspects that he may have thrown her down from behind. Id. at p. 948. When she looked up she again saw him with the knife and he told her to do as he said or he would kill her. RP Vol. 6, p. 943. Hersh told her he wanted her keys and purse and she told him to take them and go. Id. He told her he wanted to tie her up first but she pleaded with him not to do that. Id. He said he "had" to tie her up and

then pulled something out of his pocket to tie her up with. Id. As he approached her to tie her up he became distracted by noise from the backyard and she fled down the hall to her son's bedroom with the intent of screaming out his window. Id at 943-44.

She was too terrified to scream, however, and he soon found her. Id. at 944. He began tying her up and tied her wrists so tight that her hands began to turn blue. Id. He became distracted again and Joy ran to her bedroom and locked the door. Id. He came crashing through her door, dismantling the door frame, and yelled "Why did you do that? Why did you do that? You have to do as I say or I'll kill you. I've done this before, I will kill you." Id. at 945. To distract him from his anger she told him that her hands were turning green because they were tied too tight. Id. As he either untied or cut the ligature her son came into the house and Hersh told her he would kill her son unless she told him to go back outside. Id. He held the knife to her throat. Id. She yelled to her son "Mommy's okay, go away." Id. Hersh was very angry. Id. At that point he took off his shirt and, in Joy's words, "kind of swoons a little bit," and the phone rings. Id. He wouldn't allow her to answer it. Id.

Throughout this period of time Joy and Hersh were struggling back and forth over the ligature on her wrists. Id. at 946. She was able to loosen or untie her hands and he continually tied them back up at the wrist. Id. at

946-47. At the time Hersh told her “I’ve done this before, I’ll kill you,” he was trying to gain control over her and tie her up. Id. at 949. He said this more than once. Id. at 949-50. He waved the large knife in her face and told her to “behave.” Id. at 950.

After Joy told her son to go away Hersh threw her up on the bed and strangled her to unconsciousness. Id. at 947. The next thing she remembers was when she was regaining consciousness on her bathroom floor. Id. at 951. Her head was throbbing and she heard people calling her name. Id. at 951. She saw three of her neighbors, one of whom, a large guy, was standing by her closet. Id. She heard the women say “look at the blood.” Id. She didn’t realize she was bloody until she heard that remark, and then she realized she was naked from the waste down. Id. at 952. At that point the neighbors said “he’s in the closet” and at first she didn’t believe it, but then she realized Hersh was, in fact, hiding in the closet. Id. He had been thwarted by the arrival of the neighbors. Id.

Joy suffered numerous injuries, such as facial fractures, cuts on her face, a shattered wrist which required a pin, and a loose tooth. Id. at 960-61. She remains permanently blinded in one eye. Id. at 961. She also had to undergo reconstructive surgery on her face. Id. Joy’s facial injuries were depicted in exhibit 100, which was admitted for the jury’s consideration. Id. at 971.

Two months before Joy Towers was attacked in her home by her neighbor Michael Hersh, Norma Simerly was brutally murdered in her home. Norma's naked body was found April 29, 1978. 3 RP, p. 487. Norma's husband of seventeen years, Wally Simerly, was out of town on a business trip. Id. at 478. Norma's hands were bound together. Id. at 488, Exhibit 77. Her body was wedged in between her bed and the wall, propped up against some clothing. Exhibits 66 to 72. There was an unwrapped loaf of bread underneath her body. Exhibit 76. There was an empty bottle of Vodka thrown on top of Norma's body. RP 4, p. 552, Exhibit 71. Norma's face was severely bludgeoned. Exhibit 79. She was also stabbed four times. RP 5, p. 800. Two knives were found in the master bathroom of the Simerly home, which Wally recognized as having come from his kitchen. RP 4, p. 539-41, RP 6, p. 838. Norma Simerly's home was approximately 3.7 miles away from the respective houses of Joy Towers and Michael Hersh. RP 6, p. 909. The Simerlys did not know Michael Hersh and he had no reason to be in the Simerly home. RP 3, p. 480-81. Michael Hersh left a hair on a washcloth which was found on Norma's bed, near her body. RP 6, p. 880-89.

Outside of the Simerlys' home near their bedroom there was a woodpile. RP 3, p. 515. The detectives found a piece of wood with blood stains on it that was similar to the wood in the woodpile in the kitchen. Id.

at 519. They also found pieces of bark in the same area of the kitchen where the piece of wood was found, and the piece of wood was missing some of its bark. RP 4, p. 581, 604. Bark was also found in the master bedroom. RP 4, p. 584. The bark had DNA on it from two males. RP 5, p. 765. Although Wally Simerly was excluded as a contributor to this DNA, Michael Hersh could not be excluded as a contributor. Id.

A young man by the name of Derek Hefely was mowing the lawn of one of the Simerlys' neighbors at about three-thirty or four o'clock on April 28, 1978. RP 4, p. 640-41. He encountered a man who was about seventeen years old and Caucasian, standing between 5'6" and 5'8" tall and weighing between 140 and 150 pounds. Id. at 642, 645. At the time he terrorized Joy Towers, and at the time Norma Simerly was murdered, Michael Hersh was seventeen years old. CP 374. He is a Caucasian man who is 5'6" tall and weighs approximately 138 pounds. CP 374. The man asked what time it was and after answering the question Mr. Hefely went back to mowing the lawn. Id. at 642. The man looked like he was waiting for a ride. Id. After finishing the lawn Mr. Hefely looked to see where the man had gone but couldn't find him, however he did see the Simerlys' garage door was open. Id. at 643.

Michael Hersh and Robert Hood were friends back in 1978. RP 5, p. 750. Hood lived on 33rd Street and the Simerlys lived on 38th and

Creston. Id. at 750-51. When Hersh and Hood would walk to Hazel Dell from Hood's house they would walk in the direction of the Simerly home. Id. at 751.

Norma died as the result of multiple stab wounds to the chest. RP 5, p. 800, 805. She also suffered a severe beating which broke her jaw and caused massive bruising of her eye and face. RP 5, p. 798-99, 805, Exhibit 79.

II. THE TRIAL

a) The motion to admit evidence of Hersh's assault on Joy Towers under ER 404 (b) and RCW 10.58.090

The State sought to admit the assault on Joy Towers, which resulted in Mr. Hersh's convictions for several felonies, as substantive evidence of the identity of Norma Simerly's killer. CP 234-44. The trial court granted the motion, finding that acts committed against Joy Towers were sufficiently similar to the acts committed against Norma Simerly to constitute a signature crime to prove identity. CP 206-09, 509. Although the State also sought to have this evidence admitted to prove motive, and the trial court granted that motion (see CP 208-09, 509), that basis was abandoned at some point for reasons unknown. The trial court instructed the jury that it could only consider Hersh's assault on Joy Towers for the purpose of determining the identity of the person who killed Norma

Simerly. CP 746. Further, Prosecutor Tony Golik specifically told the jury they could only consider the evidence relating to the assault on Joy Towers for the purpose of determining the identity of Norma's killer. RP 8, p. 1151, 1154-55. His argument abided by this limitation at all times. RP 8, p. 1148-1151, 1154-55.

The trial court admitted this evidence under both ER 404 (b) and RCW 10.58.090. CP 206-09, 509-11. Regarding RCW 10.58.090 (herein referred to as "10.58" for brevity), the trial court found, inter alia, that the evidence of the assault on Joy Towers was necessary to the State's case. CP 511. Regarding the admission of this evidence under 10.58, Hersh challenges only the trial court's finding that the evidence was necessary and does not challenge the remaining six findings made by the court. See Brief of Appellant, pgs. 47-51.

Regarding ER 404 (b), the trial court laid out in lengthy detail its reasons for finding the evidence admissible under 404 (b). Hersh does not challenge any of the facts relied upon by the court in its Memorandum of Decision. See Brief of Appellant, pgs. 52-56, CP 206-09. Rather, Hersh complains that the facts relied upon do not support the trial court's conclusion that the two assaults were sufficiently similar to warrant admission of the assault on Joy Towers. See Brief of Appellant, pgs. 52-56.

b) The objection to Dr. Wickham's testimony

Hersh asked the trial court to bar Dr. Dennis Wickham, the Clark County Medical Examiner, from testifying about the autopsy of Norma Simerly. RP 5, p. 784-88. The original coroner, Dr. Archie Hamilton, died prior to trial. 5 RP, p. 795. Dr. Hamilton prepared an autopsy report, and the State sought to have Dr. Wickham render an expert opinion about the injuries suffered by Norma and the cause of death based upon the narrative autopsy report and the photographs taken during the autopsy. RP 5, p. 788. The court ruled that Dr. Wickham would be permitted to rely on the autopsy report to render an expert opinion, but that the report itself would not be admitted. RP 5, p. 790.

Dr. Wickham testified that he reviewed the autopsy photographs and based on those photographs, he offered the following opinions: That Norma had bruising over the right side of her face which was quite prominent over her right eye; she had blood running down the side of her face. RP 7, p. 797-98, Exhibit 79. He saw in the photographs that Norma had bruising from the lower portion of the forehead on the reflective surface of the scalp, which correlated to the bruising around the eye. RP 5, p. 798, Exhibits 77-80. The bruising extended all the way down to the neck. Id. He saw in the photographs that there was an abrasion on the lower portion of the front of the neck, and he could see a laceration just

below the left side of her mouth which revealed her jawbone. Id. at 799, Exhibits 77-80. The pictures also revealed that Norma's wrists were tied in a ligature. Id. at 802, Exhibits 77, 78.

Based on Dr. Hamilton's narrative report, Dr. Wickham testified there were four stab wounds. Id. at 800. Dr. Wickham could see at least one stab wound just by looking at the photographs. Id. at 801. Dr. Wickham testified that based on his review of Dr. Hamilton's narrative report and the autopsy photographs, he concurred with Dr. Hamilton's opinion as to the cause of death. Id. at 802. The cause of death was multiple stab wounds to the chest. Id. at 805. Dr. Wickham testified that he would not be able to offer an opinion as to the cause of death based on the autopsy photographs alone. Id.

Hersh also questioned Dr. Wickham extensively about the information contained in the autopsy report. (5RP). Hersh made objections to the chain of evidence and to the admission of certain DNA evidence that will be addressed in the argument section of this brief.

C. ARGUMENT

I. **SUFFICIENT EVIDENCE SUPPORTS THE
CONVICTION OF FELONY MURDER BY THE
UNDERLYING FELONY OF ATTEMPTED RAPE
BY FORCIBLE COMPULSION.**

In this first assignment of error, Hersh contends that the evidence is insufficient to prove that he committed the completed crime of rape, in any degree, against Norma Simerly in the course of murdering her. Some explanation is warranted of what Mr. Hersh was charged with in Count II: Hersh was charged with felony murder in the first degree. The underlying felonies which the State alleged he committed to support this count were robbery or attempted robbery in the first or second degree, and/or rape or attempted rape in the first degree, and/or rape or attempted rape in the second degree. CP 373, 752. The jury was not unanimous and therefore answered “no” on the question of whether Hersh committed robbery or attempted robbery in either the first or second degree. CP 782. The jury answered “yes” to the interrogatory asking whether Hersh committed rape or attempted rape in the first degree, and answered “yes” to the interrogatory asking whether Hersh committed rape or attempted rape in the second degree. CP 782.

Rape in the First Degree is proscribed by RCW 9A.44.040:

(1) A person is guilty of rape in the first degree when such person engages in sexual intercourse with another person

by forcible compulsion where the perpetrator or an accessory

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

Rape in the Second Degree is proscribed by RCW 9A.44.050:

(1) A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person:

- (a) By forcible compulsion

...

An attempt to commit a crime is addressed as follows in RCW

10.61.003:

Upon indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense.

Attempted crimes are further addressed in RCW 10.61.010:

Upon the trial of an indictment or information, the defendant may be convicted of the crime charged therein, or of a lesser degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a lesser degree of the same crime. Whenever the jury shall find a verdict of guilty against a person so charged, they

shall in their verdict specify the degree or attempt of which the accused is guilty.

An attempt to commit the charged offense is included in the charged offense. *In re Personal Restraint of Heidari*, 159 Wn.App. 601, 606, 248 P.3d 550 (2011); *State v. Mannering*, 150 Wn.2d 277, 284, 75 P.3d 961 (2003); *State v. Bigger*, 34 Wn.2d 69, 208 P.2d 102 (1949); *State v. Peterson*, 109 Wash. 25, 186 P. 264 (1919).

RCW 9A.28.020 (1) defines criminal attempt as follows:

A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.

The jury was instructed on attempted rape as follows:

“A person commits the crime of attempted rape when, with the intent to commit that crime, he or she does any act that is a substantial step toward the commission of that crime.” Instruction 28 at CP 767.

The jury was instructed on the definition of substantial step:

“A substantial step is conduct that strongly indicates a criminal purpose and that is more than mere preparation.” Instruction 23 at CP 762.

The jury was also instructed on the definition of a building and instructed how to determine when a person feloniously enters a building. Instructions 29 and 30 at CPs 768-69.

In this appeal, Hersh only challenges the sufficiency of the evidence to prove he committed *completed* rape, not attempted rape. In the table of contents, Hersh introduces his argument for his first assignment of error as follows: “The evidence was insufficient to convict Mr. Hersh of first degree felony murder *based on rape in the first degree.*” (Emphasis added).

His first assignment of error, found on page one of his brief, states “Insufficient evidence exists to support the verdict that appellant Michael Hersh intentionally killed Norma Simerly in the course of committing rape or attempted rape as charged in Count 2.” Then, on page 26 of his brief, Hersh again introduces the assignment of error saying “The evidence was insufficient to convict Mr. Hersh of first degree felony murder *based on rape in the first degree.*” (Emphasis added). Thereafter, Hersh states “In this case, the State was required to prove that Mr. Hersh caused Ms. Simerly’s death ‘in the course of or in furtherance of...or in immediate flight [from]’ rape in the first degree.” See Brief at p. 26. Hersh then includes the statute proscribing rape in the first degree. See Brief at 27. On page 28 of his brief, Hersh states “Here, the underlying felony found by the jury to support the first degree felony murder charge against Mr. Hersh was rape.” Hersh ignores, or fails to realize, that the jury found Mr. Hersh committed *attempted* rape in both the first and second degree.

Thereafter throughout his argument pertaining to this assignment of error, Hersh repeatedly asserts that the evidence is insufficient to find that he committed a completed rape in any degree. (See Brief at page 28, final paragraph; Brief at page 29, second full paragraph, first sentence; Brief at bottom of page 29 and top of page 30; Brief at page 30, top paragraph, second sentence; Brief at page 30, second full paragraph, third sentence.) The only mention Hersh makes of attempted rape is at page 29 of his brief, second full paragraph, third sentence (he says “Taken in a light most favorable to the State, this does not establish beyond a reasonable doubt that Mr. Hersh forcibly raped or attempted to rape Ms. Simerly, or raped her at all.”), and again at page 30, first full sentence (he says “There was no evidence of penetration or attempted penetration.”) However, Hersh provides no specific argument about attempted rape. He doesn’t address how the evidence fails to prove that Hersh took a substantial step toward the commission of rape. In fact, he confines the substance of his argument to the question of *completed* rape, not attempted rape.

The State submits that Hersh has only challenged the sufficiency of the evidence as it pertains to the question of whether he committed a completed rape. As such, Hersh’s conviction for felony murder, as charged in Count II, must stand because he has not challenged the

sufficiency of the evidence as it pertains to attempted rape. Nevertheless, the State offers the following argument to support its contention that the evidence is, in fact, sufficient to prove that Hersh committed the predicate felony of attempted rape in the first or second degree.

Constitutional due process requires that in any criminal prosecution, every fact necessary to constitute the crime charged must be proven beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368 (1970). On appeal, a reviewing court should reverse a conviction for insufficient evidence where no rational trier of fact, viewing the evidence in the light most favorable to the State, could find that all the elements of the crime charged were proven beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992); *State v. Green*, 94 Wn.2d 216, 220-2, 616 P.2d 628 (1980).

When sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Theroff*, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980).

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 substantial step is conduct that strongly corroborates the actor’s criminal purpose.” *State v. Townsend*, 147 Wn.2d 666, 57 P.3d 255 (2002). In *Jackson*, the evidence of attempted rape by forcible compulsion was found sufficient where the defendant told the victim “Well, maybe I ought to ‘F’ you up the ass,” and he physically assaulted the victim by shoving her back on the couch, pushing up her legs and jabbing her rectum with his fingers. *Jackson* at 57. The defendant’s words were deemed strongly indicative of his intent and the physical assault clearly established a substantial step toward the commission of the crime. *Id.* Forcible compulsion is the force used or threatened to overcome the resistance of the victim. *State v. Ritola*, 63 Wn.App. 252, 254-55, 817 P.2d 1390 (1991). The charge of attempted rape in the second degree does not require the State to prove that the defendant actually used a level of force which overcame the victim’s resistance. Instead, the State is merely required to prove that the defendant took a substantial step toward the commission of rape in the second degree with the intent to have sexual intercourse. *Jackson* at 55.

Here, Norma's body was found naked and her wrists were tied up to prevent her resistance. Her clothes were strewn throughout the house and her nylons had been ripped from her girdle. She died after a violent struggle. Although the medical examiner could not find evidence of rape, he also testified he could not rule penetration out. There is little reason to violently rip a victim's clothes from her body but for the intent to commit an act of rape. That a level of violence was used against Norma indicating a substantial step toward the commission of rape by forcible compulsion is indisputable. Norma suffered a horrific beating.

Although the evidence was insufficient to sustain a finding of completed rape (see argument of the Prosecuting Attorney, RP 8, p. 1158, line 8), the evidence was more than sufficient to support the jury's finding of attempted rape by forcible compulsion. Mr. Hersh's conviction for felony murder in the first degree is supported by sufficient evidence.

**II. THERE IS SUFFICIENT EVIDENCE OF
PREMEDITATION TO SUPPORT THE VERDICT IN
COUNT I.**

Hersh claims that the evidence is insufficient to prove that he acted with premeditation in murdering Norma Simerly. Evidence is sufficient, if, taken in the light most favorable to the State, any reasonable trier of fact could have found the disputed element beyond a reasonable doubt. See *Winship, et al., supra*, §1.

Premeditation is “the deliberate formation of and reflection upon the intent to take a human life” and involves “thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.” *Finch*, 137 Wn.2d at 831 (quoting *State v. Pirtle*, 127 Wn.2d 628, 644, 904 P.2d 245 (1995) (quoting *State v. Gentry*, 125 Wn.2d 570, 597-98, 888 P.2d 1105 (1995); *State v. Ortiz*, 119 Wn.2d 294, 312, 831 P.2d 1060 (1992))). It must span more than a moment in time. RCW 9A.32.020(1).

State v. Allen, 159 Wn.2d 1, 147 P.3d 581 (2006).

In *Allen*, the defendant murdered his mother after arguing with her by strangling her with a telephone cord and hitting her with a rifle. *Allen* at 5-6. The Supreme Court found sufficient evidence of premeditation where the assault took place over an “appreciable period of time” prior to the strangulation. *Allen* at 7, citing *State v. Harris*, 62 Wn.2d 858, 868, 385 P.2d 18 (1963). Moreover, injuries inflicted by various means over a period of time can support a finding of premeditation. *State v. Bingham*, 105 Wn.2d 820, 825-26, 719 P.2d 109 (1986). Sufficient evidence of premeditation may also be found where the weapon used was not readily available, where multiple wounds are inflicted, or where the victim was struck from behind. *Gentry* at 599.

The evidence proved that the assault on Norma took place in multiple rooms throughout the house, and was carried out with multiple weapons. In the kitchen the detectives found a piece of wood resembling the wood from woodpile outside of Norma’s bedroom. There were several

pieces of bark in the area of the piece of wood and in the master bedroom, indicating that Norma had been bludgeoned with the piece of wood. The evidence established that this was one of the murder weapons not only because of the separated pieces bark found strewn throughout the house, but also because Mr. Hersh could not be excluded as a contributor to the DNA found on the wood. One of Norma's shoes was found in the kitchen and there was blood on the kitchen countertop, as well as blood spattered on the kitchen cabinet door. RP 3, p. 519-23. The bread box was open and there was an empty bread bag which presumably held the unwrapped whole loaf of bread found underneath Norma's body. RP 3, p. 524. There was blood spattered on the door that divided the kitchen and the dining room. RP 3, p. 529. A large amount of blood was found on a picture frame on the bed in the guest bedroom. RP 4, p. 536, Exhibits 43, 44. There was also a screw cap for a liquor bottle on the bed, presumably belonging to the empty bottle of Vodka found on Norma's body in the master bedroom. RP 4, p. 584. In this same bedroom detectives found a girdle with one nylon still attached but the other nylon, which would have been attached to clips, torn away. RP 4, p. 584. There was blood smeared on the wall in the hallway leading toward the guest bedroom, with what appeared to be actual bloody handprints on the wall. RP 4, p. 536, 582, Exhibit 45. Norma's other shoe was found in the hallway, indicating a significant

struggle with her attacker in which she lost one shoe in the kitchen and the other in the hallway. RP, 4, pl. 582. There was blood spattered on the door frame leading into the master bedroom. RP 4, p. 537, Exhibits 48, 49.

In the master bathroom the detectives found a pair of pants and a necklace on the floor protruding out into the hallway. RP 4, p. 538, Exhibit 52.

There was blood on the floor of the master bathroom as well as a knife. RP 4, p. 539-40, Exhibit 54, 55. Detectives found blood and a knife handle (but no blade) in the bathroom sink. RP 4, p. 541, Exhibit 59.

In the master bedroom detectives found clothing and blood on the bed, and they found the window open. RP 4, p. 544, Exhibit 61. Detectives believed that the open window was possibly the point of entry into the home. RP 4, p. 545. An empty bottle of Vodka was left on top of Norma's body, an act of bravado by Hersh as he sought to advertise how little he cared for Norma's life. RP 4, p. 552, Exhibit 71. The bark in the master bedroom suggests that Hersh continued to bludgeon Norma there with the wood from the wood pile.

Norma sustained multiple injuries inflicted with multiple weapons. She was beaten severely, bludgeoned with a piece of wood, and stabbed with one or more knives. Hersh had no reason to be in that house, yet we know from the evidence he was there. He did not know Norma, rendering Hersh's claim, at page 33 of his brief, that the attack could have been

carried out in the “heat of the moment” absurd. This was not a crime of passion; Norma had no relationship with Hersh, a seventeen year-old man 30 years her junior. Hersh makes much in his brief about the lack of evidence about which knife was used to stab Norma and what happened to the blade of the broken knife. He also argues that because Hersh could have brought a knife with him, rather than procuring one from the kitchen, that this somehow negates a finding of premeditation. These questions go to the weight of the evidence and do not negate the jury’s finding of premeditation.

Hersh argues there “is no evidence Mr. Hersh planned to kill Ms. Simerly.” Hersh misstates the definition of premeditation. Premeditation does not require a formal plan; rather, as noted above, all that is required is thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.

Even if proof of a formal plan were required, the State met that burden. What was Hersh doing in Norma’s home? Why did he bring a piece of wood from the wood pile into the home? The evidence of premeditation in this case was not merely sufficient but was overwhelming. This was a brutal assault that occurred over a sustained period of time. Norma’s wrists were bound in a ligature to prevent her from resisting the attack. The evidence in the house such as the strewn

clothing found in various rooms, the shoes found in different places, the massive amount of blood found throughout the house, and the severe injuries inflicted on Norma suggest a violent struggle of significant duration. The apparent consumption of a bottle of Vodka suggests that Hersh was taking his time and enjoying himself. As argued by the prosecutor and by Mr. Hersh in his brief, the only issue in this case was the identity of the perpetrator. The evidence overwhelmingly supports a finding of premeditation and this Court should affirm the jury's verdict in Count I.

III. THE EVIDENCE IS SUFFICIENT TO SUPPORT THE JURY'S FINDING THAT MICHAEL HERSH IS THE PERSON WHO MURDERED NORMA SIMERLY.

The test for sufficiency of the evidence outlined in Sections I and II, *supra*, are incorporated for this section. The State relies on those citations to authority for the argument set forth below. Hersh argues: "Here, there is no question that Ms. Simerly was murdered; the issue is whether the State proved beyond a reasonable doubt that Mr. Hersh was responsible." Brief of Appellant, p. 34. The evidence of the assault on Joy Towers was admitted exclusively for the purpose of determining the identity of Norma's murderer. The evidence established that two months after Norma was murdered in her home, Michael Hersh gained entry into

Joy Towers' home by engaging in a ruse and attacked her with his fists and with a knife. He bound her wrists and struggled with her violently and extensively. The assault was carried out throughout multiple rooms in the house and Joy was severely beaten about her face, just as Norma was. Indeed, Respondent asks this Court to carefully review Exhibits 79 and 100, both designated in this appeal by Mr. Hersh. They could be mirror images of one another. Exhibit 79 depicts Norma's face, beaten to a pulp, while Exhibit 100 depicts Joy's face beaten in precisely the same way. If one didn't notice Joy's hospital gown he or she might initially conclude that the pictures were of the same woman, such is their frightening resemblance. Moreover, both Joy and Norma were stripped below the waist, and Norma was entirely naked (the evidence suggests that before Hersh had an opportunity to finish ripping off Joy's clothes he was thwarted by the neighbors and retreated to the closet to hide). He told Joy Towers "I've done this before, I'll kill you." Last, in an era in which women were often home during the day while their husbands were at work, both Joy and Norma were attacked during the day. Retired Detective Danny Jones testified that in 1978, there were no other cases like the Towers and Simerly cases, in which a woman was attacked in her home by an assailant who bound her with women's clothing and severely beat her about the face. RP 3, p. 492. There can be no real question that

the person who assaulted Joy Towers is the same person who murdered Norma Simerly.

The vicious assault on Joy Towers' notwithstanding, the evidence is sufficient to prove that Michael Hersh is the man who murdered Norma Simerly. Derek Hefely saw a man fitting his description nearly to a tee outside the Simerly home on the date of the murder and he left a hair in the Simerly home—a hair found on a washcloth which was left on the bed right next to Norma's body. Hersh lived only 3.7 miles from Norma Simerly and he regularly walked in the direction of her house with his friend Robert Hood.

The evidence is sufficient, when viewed in the light most favorable to the State, to prove that Michael Hersh was the person who murdered Norma Simerly.

IV. THE STATE CONCEDES THE CONVICTIONS FOR PREMEDITATED MURDER IN THE FIRST DEGREE AND FELONY MURDER IN THE FIRST DEGREE MERGE.

Mr. Hersh was convicted of premeditated murder in the first degree (Count I) and felony murder in the first degree (Count II) based on the same criminal transaction. The convictions merge. The convictions bear identical punishment. Generally, the lesser punished crime is subject to vacation. *State v. Turner*, 169 Wn.2d 448, 238 P.3d 461 (2010). Mr.

Hersh has requested that Count II be vacated. Assuming this Court affirms Count I, the State agrees that Count II should be vacated.

V. CHAIN OF EVIDENCE

Hersh challenges the admission of exhibits 109, 110, 111, 112, 113, 114, 115 and 122 because they “passed through the hands of many people between 1978 and 2010.” See Brief at p. 40. At trial, the battle over chain of evidence is largely found in the exchange found between pages 587 and 598 of the Report of Proceedings. A fair summary of defense counsel’s argument was that the State was required to produce every single witness in the chain of custody for each item (which, of course, it could not do because some witnesses were deceased) and that the passage of time (30 years), standing alone, required exclusion of the evidence. Defense counsel said, in objecting to the chain of evidence: “There’s 32 years of stuff in between.” RP at 587. The Prosecutor replied “So what if it sat on a shelf in VPD evidence for 30 years? If it sat on the shelf in VPD evidence for a week, it wouldn’t make a difference...I don’t know what the difference is between this and something that was recovered six months ago. I’d still be doing it the exact same way.” Id. at 588, 590. Defense counsel responded “Well, there’s not the same issues. I mean, now there’s all sorts of contamination issues,” to which the Prosecutor responded “Oh, this goes to weight, not admissibility. You can argue

contamination.” RP at 590. Defense again pointed to the “30-year gap where all of this evidence can be contaminated. We don’t know, for instance, did Mr. Taylor use gloves when he handled things, and whoever the person is down there that I can’t read, it might be—“ RP at 594. The Court agreed with the Prosecutor that such matters went to weight rather than admissibility. The trial court ruled correctly.

Relying exclusively on *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001), Hersh argues that the trial court abused its discretion in admitted the challenged exhibits because the State failed to lay a proper foundation for the admission of the evidence.

Hersh’s reliance on *Neal* is baffling because *Neal* is a case based on hearsay and the improper admission of a laboratory report under CrR 6.13 (b). *Neal* is wholly inapplicable to this case. Hersh makes the same bald assertions that his trial counsel made below, namely that evidence collected thirty two years ago is presumptively contaminated and therefore inadmissible. This goes to weight, not admissibility. As the Supreme Court stated in *State v. Campbell*:

The jury is free to disregard evidence upon its finding that the article was not properly identified or there has been a change in its character. However, minor discrepancies or uncertainty on the part of the witness will affect only the weight of evidence, not its admissibility.

State v. Campbell, 103 Wn.2d 1, 21, 691 P.2d 929 (1984). Further, “[t]he trial court is necessarily vested with a wide latitude of discretion in determining admissibility, which will not be disturbed absent clear abuse.” *Campbell* at 21. The trial court did not abuse its discretion in admitting the challenged exhibits.

VI. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF THE ASSAULT ON JOY TOWERS UNDER ER 404 (b) AND RCW 10.58.090

a) ER 404 (b)

The trial court was asked to admit evidence of the assault on Joy Towers, to which Michael Hersh confessed and pled guilty (See CP 421) after being caught in the act by Joy Towers’ neighbors. This evidence was only admitted to the jury for the purpose of determining the identity of Norma Simerly’s killer. It was not admitted to prove motive or intent. As noted in the Statement of the Case, the trial court initially ruled the evidence would be admissible to prove motive or intent but those bases were abandoned for unknown reasons. The jury was instructed it could only consider the evidence for the purpose of identity and the Prosecuting Attorney admonished the jury repeatedly that they could only consider the evidence for the purpose of determining identity. As such, Hersh’s complaint that the evidence should not have been admitted to prove

motive or intent (see Brief at pages 54-56) is not ripe for review by this Court because that simply didn't occur.

ER 404 (b) prohibits the admission of evidence which would only serve to prove bad character or propensity to commit bad acts; it is not intended to deprive the State of relevant evidence necessary to establish an essential element of its case. *State v. Lough*, 125 Wn.2d 847, 859, 889 P.2d 487 (1995). The admission of evidence of "other crimes, wrongs, or acts" is left to the sound discretion of the trial court and the admission of such evidence will not be disturbed on appeal absent a showing of abuse of discretion. *State v. Norlin*, 134 Wn.2d 570, 951 P.2d 1131 (1998); *State v. Terrovona*, 105 Wn.2d 632, 649, 716 P.2d 295 (1986); *State v. Benn*, 120 Wn.2d 631, 653-54, 845 P.2d 289 (1993). Discretion is not abused when the trial court's decision to admit evidence is reasonable and rests upon tenable grounds and reasons. *State v. Stenson*, 132 Wn.2d 668, 940 P.2d 1239 (1997); *State v. Brown*, 132 Wn.2d 529, 572, 940 P.2d 546 (1997).

Prior to admitting evidence of other acts or misconduct, the trial court must (1) find by a preponderance of the evidence that the misconduct occurred; (2) identify the purpose for which the evidence is sought to be introduced; (3) determine whether the evidence is relevant to prove an element of the crime charged; and (4) weigh the probative value

of the evidence against its prejudicial effect. *State v. Pirtle*, 127 Wn.2d 628, 904 P.2d 245 (1995), *reversed on other grounds*, *Pirtle v. Morgan*, 313 F.3d 1160 (2002), citing *Lough* at 853.

Here, the trial court found the assault on Joy Towers to be so similar to the murder of Norma Simerly as to constitute a signature crime. A signature crime is found where the method used to commit both crimes is so unique that proof that the defendant committed one crime makes it highly probable that the defendant committed the other crime. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002); *State v. Hartzell*, 156 Wn.App. 918, 931, 237 P.3d 928 (2010). “The greater the distinctiveness, the higher the probability that the defendant committed the crime, and thus the greater the relevance. *State v. Coe*, 101 Wn.2d 772, 777, 684 P.2d 668 (1984).

In *State v. Russell*, 125 Wn.2d 24, 882 P.2d 747 (1994), our Supreme Court upheld the admission of other bad acts under ER 404 (b) where the defendant was charged with three murders upon three separate victims. They occurred at different times and at different locations. *Id.* The Court found the crimes to be unique because each of the victims was sexually assaulted and posed naked with a variety of props. The props were different, and the weapons used were different. *Russell* at 30-37. The first and second murders occurred approximately one and a half months

apart while the third murder occurred 22 days after the second murder. *Russell* 30-36. Even though the victims in *Russell* were posed, they were not posed in the same manner. *Id.* Despite the numerous variances in how the victims were found and how they were killed, the *Russell* Court found the crimes sufficiently unique to be admissible under ER 404 (b) to determine the identity of the killer. *Russell* at 84.

Here, the similarities between the assault on Joy Towers and the murder of Norma Simerly are equally compelling. As with the assault on Joy Towers, there was no sign of forced entry into Norma's home. RP 4, p. 563. Both victims lived close to Michael Hersh and close to one another. Both were married, middle-aged, with husbands who were gone during the daytime when they were assaulted. The crimes occurred within two months of each other. Both victims were savagely beaten and the crime scenes indicated a violent struggle of substantial duration. Both victims were assaulted in multiple places throughout the home. Both women were stripped naked below the waist, and Norma was stripped entirely. Both victims sustained multiple serious injuries, and the injuries were highly similar. The injuries inflicted on the faces of the two women, standing alone, compel a finding of signature. See Exhibits 79 and 100. Although Joy Towers had not yet been stabbed when rescued by her neighbors, Hersh threatened her with a knife from the inception of the

assault and when she regained consciousness on the bathroom floor she found the knife near her head. Perhaps most significantly, both women's wrists were bound with women's clothing. Sensing the power of this signature evidence Hersh dismisses this in his brief, stating "[t]here is nothing specific or distinctive such as the type of knot used to bind the women." What type of knot is Hersh suggesting would be required before binding the wrists of two women with women's clothing would be considered a similarity? The uniqueness of the ligatures used on both Joy and Norma, combined with the numerous other similarities, compels a finding of signature and the trial court did not abuse its discretion in admitting this evidence.

The trial court properly and carefully weighed the probative value of this evidence against its prejudicial effect and found the evidence relevant to prove identity. CP 208. This ruling was reasonable and tenable and based upon a proper application of the law. This Court should affirm the admission of evidence of the assault on Joy Towers under ER 404 (b).

b) RCW 10.58.090

Pursuant to RCW 10.58.090 provides:

"(1) In a criminal action in which the defendant is accused of a sex offense, evidence of the defendant's commission of another sex offense or

sex offenses is admissible, notwithstanding Evidence Rule 404 (b), if the evidence is not inadmissible pursuant to Evidence Rule 403.”

RCW 10.58.090 (6) provides that when evaluating whether evidence of the defendant’s commission of another sexual offense or offenses should be excluded pursuant to Evidence Rule 403, the trial judge shall consider the following factors:

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

Here, Hersh does not challenge the trial court’s finding that the offenses against Joy Towers and Norma Simerly were sex offenses. Hersh challenges only subsection (e) of 10.58.090 (6), namely that the evidence

of the Joy Towers assault was necessary, and subsection (g), whether the probative value of the evidence outweighed its prejudicial effect.

Regarding necessity, Hersh relies almost exclusively on the State's closing argument in which the Prosecutor argued that the State's case was "overwhelming," and pointed to the DNA evidence demonstrating that Hersh left a hair on Norma Simerly's bed. It is a basic rule of prosecutorial trial advocacy that when opening one's case, one must under-promise but over-deliver. However, when the time comes for closing argument one must argue the strengths of his case and argue to the jury that he has met his burden of proving his case beyond a reasonable doubt. Such was the case here. Hersh cannot rely on the argument of the Prosecutor, which is not evidence, to prove that the trial court erred in finding the evidence of the Joy Towers assault necessary. A large part of the reason the State's case was "overwhelming" was because of the Joy Towers evidence. Hersh employs circular reasoning to argue that because the case was made so strong by the evidence of the Joy Towers assault, the evidence was then not necessary to the State's case. As noted by the Prosecutor in his closing argument, the sole issue in this case was the identity of the perpetrator who committed an indisputably premeditated murder. Without the Joy Towers evidence, the State's case would have been severely, if not irreparably, weakened. This evidence was necessary and the trial court, in

its reasoned findings of fact, noted “The only other evidence the State has to rely on is Mitochondrial DNA and Y-STR DNA. Neither of these types of DNA provides a positive ‘match’ to the defendant’s DNA.” CP 511. The trial court did not abuse its discretion in admitting this evidence.

Last, the evidence was admissible under ER 403. The probative value of this evidence simply cannot be overstated. As with all evidence admitted against a defendant in a criminal trial, the evidence prejudiced the defendant in that it negated his presumption of innocence. It was not, however, unfairly prejudicial. Hersh complains repeatedly that the State used this evidence to argue propensity but points to nothing in the record which supports this claim. A careful review of the Prosecutor’s argument reveals that he admonished the jury on several occasions that this evidence could be used to determine the identity of Norma’s killer and for no other purpose. As if this was not enough, the jury was instructed by the court that the use of this evidence was strictly limited to the question of identity. Hersh’s bald assertion that this evidence was used to argue propensity is simply unsupported by the record. The admission of this evidence was proper under ER 403 and this Court should affirm the trial court and reject this assignment of error.

VII. **MR. HERSH'S SIXTH AMENDMENT RIGHT OF CONFRONTATION WAS NOT VIOLATED BY THE ADMISSION OF DR. WICKHAM'S TESTIMONY.**

Hersh complains that his Sixth Amendment right to confrontation was violated when Dr. Dennis Wickham was permitted to render an opinion about the cause of Norma Simerly's death, having based his opinion on information contained within the autopsy report prepared by Dr. Archie Hamilton, who is deceased.

The Confrontation Clause of the Sixth Amendment protects an accused person from use by the government of "testimonial" statements at a criminal trial without an opportunity for confrontation. *Davis v.*

Washington, 547 U.S. 813, 126 S.Ct. 2266, 2273 (2006); *Crawford v.*

Washington, 541 U.S. 36, 51, 124 S.Ct. 1354 (2004); U.S. Const. amend.

VI. In *Crawford*, the Court identified the "core class" of testimonial statements which require confrontation: (1) ex-parte, in-court testimony; (2) "extrajudicial statements...contained in formalized testimonials materials, such as affidavits, depositions, prior testimony, or confessions," and (3) "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford* at 51-52 (quoting *White v. Illinois*, 502 U.S. 346, 365, 112 S.Ct. 736 (1992) (Thomas, J., concurring in part). A confrontation clause challenge is reviewed de novo. *State v.*

Koslowski, 166 Wn.2d 409, 416, 209 P.3d 479 (2007); *State v. Mason*, 160 Wn.2d 910, 922, 162 P.3d 396 (2007). The State bears the burden of establishing that the challenged statements are non-testimonial. *Koslowski* at 416, n. 3, citing *United States v. Arnold*, 486 F.3d 177, 192 (6th Cir. 2007), *cert. denied*, 552 U.S. 1103 (2008). Article 1, §22 of the Washington Constitution affords no greater protection of the right of confrontation than the Sixth Amendment. See *State v. Pugh*, 167 Wn.2d 825, 225 P.3d 892 (2009).

For the following three reasons, Hersh's right of confrontation was not violated: (1) The autopsy report was not admitted into evidence or seen by the jury; (2) the autopsy report was not used in lieu of live testimony; and (3) Dr. Wickham offered an expert opinion, permissible under ER 703 and which was subjected to cross examination, that was based, in part, on information contained in Dr. Hamilton's report and his testimony did not merely parrot the autopsy report. His opinion was largely based on his review of the autopsy photographs, which Mr. Hersh conceded below did *not* violate his right of confrontation. RP 3, p. 423.

a) Autopsy report not admitted into evidence

In his brief Hersh states: "The issue here is whether the *admission* of an autopsy report violates the right to confrontation after *Crawford*" and "Admission of the medical examiner's report violated Mr. Hersh's

right to confrontation.” See Brief of Appellant at p. 60-62. The autopsy report was not admitted. There is a stark difference between admission of a document and expert testimony based, in part, on information contained in the document. *State v. Lui*, 153 Wn.App. 304, 319, 221 P.3d 948, review granted, 168 Wn.2d 1018, 228 P.3d 17 (2010). Hersh’s brief alleges that this document was admitted into evidence (which would have rendered it accessible to the jury during deliberations), but this is simply not the case. This portion of Mr. Hersh’s complaint should be disregarded by this Court because it is unsupported by the record.

b) The autopsy report was not used in lieu of live testimony.

In *Lui*, supra, the facts are strikingly similar to those presented by this case. The medical examiner who performed the autopsy in *Lui* was not available to testify at the trial. Instead, the State presented testimony by her colleague who reviewed her report and offered an expert opinion about the injuries sustained by the victim and the cause of death. Division I of this Court held:

Here, in contrast, the autopsy and DNA reports were not offered in lieu of live testimony. Indeed, the reports themselves were not admitted into evidence at all. Rather, Dr. Harruff testified to his own opinions and conclusions about the cause and timing of Boussiacos's death. And Pineda testified to her own analysis of the DNA testing data. The evidence against Lui was the experts' opinions—

not their underlying data—and the testimony that was introduced was introduced live. Moreover, in *Melendez-Diaz*, the disputed evidence was a “bare-bones statement” that the substance tested contained cocaine, and the defendant “did not know what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or the use of skills that the analysts may not have possessed.” *Melendez-Diaz*, 129 S. Ct. at 2537. But here, both experts testified extensively about their own expertise and that of their employees, the protocols and procedures used in their respective offices, and the tests employed in Lui's case. Lui had the opportunity to challenge their assertions in the “crucible of cross-examination.” *Melendez-Diaz*, 129 S. Ct. at 2536 (quoting *Crawford*, 541 U.S. at 61-62). This situation is fundamentally different from *Melendez-Diaz*, where the State improperly used ex parte out-of-court affidavits to prove its case. Here, the very live testimony absent in *Melendez-Diaz* was present.

Here, as in *Lui*, Hersh was given the opportunity to confront a live witness offering expert testimony about the death of Norma Simerly. Hersh took advantage of that opportunity, effectively cross-examining Dr. Wickham about what he could determine by looking at the photographs alone and what he could determine only by relying on the autopsy report. Much of Dr. Wickham's testimony was based on his visual inspection of the photographs, to which Hersh did not object. Moreover, Hersh effectively made Dr. Wickham a witness for the defense by eliciting testimony that Dr. Hamilton found no evidence of rape in the autopsy of Norma Simerly. This evidence was critical to Hersh's defense and he

presumably would have called Dr. Wickham for that purpose himself had the State chosen not to call him.

The State asks this Court to follow the reasoned opinion in *Lui* and hold that Mr. Hersh's right of confrontation was not violated.

- c) The testimony of Dr. Wickham was proper opinion testimony which was subject to cross examination by Hersh.

As in *Lui*, Dr. Wickham offered expert testimony that was based, in part, on the autopsy report prepared by Dr. Hamilton. Dr. Wickham did not merely parrot the information contained in the report and did not act as a "mere conduit for the testimonial assertions" of Dr. Hamilton. *Lui* at

319. The *Lui* Court observed:

While *Lui* is correct that the expert opinion testimony against him was partially based on the reports of others, expert witnesses are not required to have personal, firsthand knowledge of the evidence on which they rely. *In re Disability Proceeding Against Keefe*, 159 Wn.2d 822, 831, 154 P.3d 213 (2007). In Washington, ER 703 expressly allows experts to base their opinion testimony on facts or data that are not admissible in evidence "[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject ...". The Federal Rules of Evidence are in accord. *See* FED. R. EVID. 703. And ER 705 gives the trial court discretion to permit an expert to relate hearsay or otherwise inadmissible evidence to the jury for the limited purpose of explaining the reasons for his or her opinion. *Deep Water Brewing, LLC v. Fairway Res., Ltd.*, 152 Wn. App. 229, 215 P.3d 990 (2009); *State v. Brown*, 145 Wn. App. 62, 74, 184 P.3d 1284 (2008).

The trial court properly admitted the testimony of Dr. Wickham as expert testimony and Hersh's right to confrontation was not violated.

d) Any error was harmless.

If Hersh concedes that "there is no question that Ms. Simerly was murdered," and argues that the sole issue was the identity of the person responsible (See Brief of Appellant, p. 34), he has suffered no prejudice by any erroneous admission of opinions offered by Dr. Hamilton as to the injuries suffered by Norma or the cause of her death. Confrontation error is "classic trial error" that is subject to harmless error analysis. *State v. Watt*, 160 Wn.2d 626, 633-35, 160 P.3d 640 (2007). A constitutional error does not require reversal when it is clear beyond a reasonable doubt that the jury verdict is unattributable to the error. *Watt* at 635; *Neder v. United States*, 527 U.S. 1, 19, 119 S. Ct. 1927, 144 L. Ed. 2d 35 (1999). The pictures of Norma's body would have been admissible irrespective of Dr. Wickham's testimony. The pictures demonstrate that 47 year-old Norma Simerly, whose life would be expected to continue for several more decades, died of homicidal violence. If anything, Hersh substantially benefitted from Dr. Wickham's testimony because it was through Dr. Wickham that the jury learned there was no physical evidence that Norma had been raped. Indeed, Hersh's lawyer, who complained loudly about the possibility that Dr. Wickham would actually read from the autopsy report,

questioned Dr. Wickham at length about the contents of that report. At several points (when it benefitted Hersh) he asked Dr. Wickham to read directly from the report. If the trial court erred in admitting the expert opinions of Dr. Wickham which were based, in part, on the autopsy report of Dr. Hamilton, the error was harmless beyond a reasonable doubt.

Should this Court be inclined to find that Mr. Hersh's right of confrontation was violated when Dr. Wickham was allowed to offer expert testimony based, in part, on this report, and that such error was not harmless, the State respectfully asks this Court to stay this appeal until the Supreme Court renders its opinion in *State v. Lui*, supra. Oral argument has been heard and an opinion should be forthcoming.

VIII. THE TRIAL COURT DID NOT ERR IN ADMITTING Y-STR DNA TEST RESULTS CONDUCTED ON THE BARK FOUND IN THE SIMERLY HOME.

Stephanie Winters-Sermeno, a DNA analyst for the Washington State Crime Laboratory, testified that the DNA present on the pieces of bark collected from the crime scene were not of sufficient quantity, each standing alone, to generate any meaningful information. RP at 727-28.

Accordingly, she combined the individual samples into one sample:

WINTERS: All of the pieces of bark looked similar to each other, so it seemed logical to me to increase the likelihood that I would have enough DNA on those items to get a profile, to go ahead and combine them into one.

PROSECUTOR: All right. Is that something that you have done before on other cases?

WINTERS: Yes, it is. It's something that we use frequently on cases where there are low levels of DNA.

PROSECUTOR: Okay. So you combine the samples that appear to come from like pieces of evidence to get a profile?

WINTERS: Correct.

PROSECUTOR: Okay. Is that a generally accepted technique?

WINTERS: Yes, it is.

RP at 728.

Winters-Sermeno testified at a pre-trial hearing, as well, that this practice is accepted in the scientific community. RP 2, p. 266. She testified that if appropriate to the particular case, combining samples is done all the time. *Id.* at 267.

Defense counsel's cross examination of Ms. Winters-Sermeno on this point focused on whether she was an expert in wood comparison and whether she was absolutely positive that that the pieces of bark came from the same piece of wood. RP at 737-41. Hersh's complaint in this appeal is identical to his complaint below, namely that "The combination of the pieces of bark was based upon an assumption by the State that the pieces came from the same source." See brief at p. 65. Hersh also states "In

addition, the State has offered no evidence regarding the effect of age upon combined DNA samples.” Id. Hersh seeks to add his own novel requirement to the question of acceptability within the scientific community, to wit: “[W]hether the combining of samples of that age is accepted in the scientific community.” Id. Hersh then concludes, in cursory fashion, “[t]he trial court erred in admitting Orchid-Cellmark’s findings into evidence and based on the foregoing Mr. Hersh should receive a new trial.” Id.

Hersh’s complaints about the techniques used here go to weight, not admissibility. The jury determines the credibility of witnesses and those determinations are not reviewable on appeal. *State v. Camarillo*, 115 Wn.2d 60, 794 P.2d 850 (1990). Hersh argued below that the results of the Y-STR testing were not reliable and the jury rejected that argument, finding the State’s witnesses on this matter credible. The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole.” *Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997) (citing *Nghiem v. State*, 73 Wn. App. 405, 413, 869 P.2d 1086 (1994)). "In assessing whether the error was harmless," the reviewing court measures the admissible evidence of guilt "against the prejudice, if any, caused by the inadmissible testimony." *Bourgeois*, 133 Wn.2d at 403. The trial court

did not abuse its discretion in admitting this evidence. This evidence was of minor significance when compared to the evidence demonstrating that the hair left of the washcloth near Norma's body was Mr. Hersh's hair, and when compared to the evidence of the Joy Towers assault which established that Mr. Hersh was the perpetrator who murdered Norma Simerly. The Court should affirm the trial court.

D. CONCLUSION

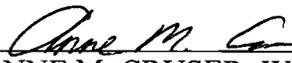
This Court should affirm Mr. Hersh's convictions. However, Mr. Hersh must be resentenced, wherein one of his convictions must be vacated on the ground that both convictions cannot stand under the principles of double jeopardy.

DATED this _____ day of _____, 2011.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By:



ANNE M. CRUSER, WSBA #27944
Deputy Prosecuting Attorney

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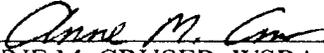
D. CONCLUSION

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DATED this 27th day of April, 2011.

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