

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

STATE OF WASHINGTON,

Respondent,

v.

JEREMY ARTHUR OVERTON

Appellant.

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

The Honorable Gary R. Tabor
Cause No. 14-1-00438-2

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was the evidence presented at trial sufficient to support a conviction for attempted rape?
2. Overton has requested that this court not impose appellate costs, and the State does not contest.

B. STATEMENT OF THE CASE

On January 26, 2014, what began as a simple night of celebration amongst friends, ended with the Appellant, Jeremy Overstreet, under arrest for sexually assaulting Kelsey Schmidt as she was passed out in her bed. According to their testimony, Schmidt, her boyfriend, Toby Clark, and her friends Adam Thayer and Monica Trabue, met up with Overton at a local bar.¹ RP Vol. I at 162-66. The group drank throughout the night, and around two in the morning, they returned to Schmidt's home to continue their festivities. RP Vol. I at 162-71. At some point in the night, an inebriated Schmidt retired to bed, and changed her clothes in preparation for an early morning jog. RP Vol. I at 172-73.

At approximately 4 AM, Overton stated that he was heading home, and went to Schmidt's room to say goodbye. RP Vol. II at 161. Thayer testified that after a length of time had passed, he grew suspicious, and

¹ Overton and Schmidt had been coworkers at the Department of Corrections, though they had never spent time together outside of work prior to the assault. RP Vol. I at 165-68.

went to check on Overton and Schmidt.² RP Vol. II at 163. According to Thayer, he walked in on Overton kissing an unconscious Schmidt's lower abdomen, and Schmidt's pants had been removed; her underwear was lowered to her knees; and her tank top had been raised, exposing her breasts. RP Vol. II at 162-65. Thayer began yelling at Overton, and called 9-1-1 once Overton had been escorted out of the house.³ RP Vol. II at 168-76. Schmidt remained unconscious throughout most of these events, though she testified that she vaguely remembered Overton on top her, telling her to "tell me when to stop;" then waking up when Thayer began yelling; noticing that her clothes were missing; and quickly falling back asleep. RP Vol. I at 182-84.

Following the 9-1-1 call, Officer John Kenderesi of the Tumwater PD arrived at the scene, and interviewed Clark and Thayer. RP Vol. II at 37. Schmidt was then taken to a local hospital, where she met with a sexual assault nurse, who took DNA swabs from Schmidt's stomach. RP Vol. II at 128-30. The swabs were tested, and showed the presence of

² At this point in the night, Clark had been in the bathroom for an extended period of time. RP Vol. II at 162-63. Thayer testified that he knocked on the door to the bathroom to let Clark know he was suspicious of Overton's absence. RP Vol. II at 163.

³ Thayer testified that when confronted, Overton claimed to not know where he was or what was happening. RP Vol. II at 166-67. Once Overton was outside the house, Thayer observed him wandering around before he finally drove off. RP Vol. II at 168-76. Overton was arrested at his home several hours later. RP Vol. II at 40.

Overton's DNA, and amylase, an enzyme found in saliva. RP Vol. III at 422-23, 427.

At trial, the State argued that the DNA swabs showed that Overton had been kissing Schmidt's lower abdomen. RP Vol III at 532, 535. That evidence, combined with the testimony of Schmidt, Thayer and Clark, led to Overton's conviction for attempted rape in the second degree. RP Vol. III at 585. Subsequently, Overton was given a sentence of 60 months to life. RP Vol. IV at 607.

C. ARGUMENT

1. There Is Sufficient Evidence to Support Overton's Conviction For Attempted Rape.

In his only point of error, Overton argues that there is insufficient evidence to support his conviction for attempted rape, specifically that facts did not show that he acted with the intent to have sexual intercourse. App. Brief at 10. This argument is meritless. The jury heard evidence that prior to being interrupted by Thayer, Overton removed Schmidt's clothes, exposing her breasts and vagina; was straddling her while kissing her lower abdomen; and told an unconscious Schmidt "tell me when to stop." RP Vol. I at 182-84; Vol. II at 162-65. A rational trier of fact could absolutely find that Overton acted with the intent to have sexual intercourse from these facts.

To prove an attempted rape, the State was only required to establish that Overton took a substantial step towards the commission of the crime, with the intent to have sexual intercourse. RCW 9A.44.050; RCW 9A.28.020; *State v. Jackson*, 62 Wn. App. 53, 55, 813 P.2d 156 (1991) (citing *State v. Workman*, 90 Wn.2d 443, 449, 584 P.2d 382 (1978)). A substantial step is defined as an act which is strongly corroborative of the actor's criminal purpose. *State v. Workman*, 90 Wn.2d 443, 452, 584 P.2d 382 (1978) (quoting Model Penal Code § 5.01(1)(c)). Evidence is sufficient to support a verdict when, viewing the evidence most favorably to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); *see also In re Personal Restraint of Gentry*, 137 Wn.2d 378, 410-11, 972 P.2d 1250 (1999) (holding that credibility determinations are left to the triers of fact to decide).

In the present case, when viewing the evidence in the light most favorable to the State, it is apparent that there is sufficient evidence to support a claim for attempted rape. Testimony was offered that Overton went into the bedroom of an unconscious woman, pulled down her underwear, partially removed her top, and began kissing her lower abdomen. RP Vol. I at 182-84; Vol. II at 162-65. Presuming those facts to

be true, these are the actions of a dangerous sexual predator,⁴ and if disrobing and mounting an unconscious woman is not a substantial step towards sexual assault, then it is not clear what could ever constitute attempted rape, short of actual penetration.

Furthermore, Schmidt testified that she remembered Overton stating “tell me when to stop,” as he climbed atop her.⁵ RP Vol. I at 183. The implication behind that statement is that Overton was prepared to keep going until he was stopped, despite the fact that Schmidt wasn’t in any condition to object. These facts are fully in line with past cases where courts have found sufficient evidence to support attempted rape. *See Jackson*, 62 Wn. App. at 58 (holding that evidence of the defendant entering the victim’s bedroom, and ordering her to lift up her skirt was

⁴ Based on the witness testimony, if it wasn’t Overton’s intent to have sexual intercourse with Schmidt, then it is unclear what his intent actually was. Did he intend to disrobe an unconscious woman, straddle her while kissing her stomach, then merely give her a pat on the head, and call it a night? Overton’s argument that even when viewing evidence in the light most favorable to the State, no rational trier of fact could find that he acted with the intent to have sexual intercourse simply defies logic. *See Green*, 94 Wn.2d at 221.

⁵ Although Schmidt testified that she was partially asleep when she heard Overton speaking to her, RP Vol. I at 183-84, and Thayer testified that she was unconscious when he saw her, RP Vol. II at 165, when determining whether evidence was sufficient to support a conviction, it is viewed in the light most favorable to the State. *Jackson*, 62 Wn. App. at 55; *In re Gentry*, 137 Wn.2d at 410-11. Therefore, for the purposes of this analysis, it should be assumed that Schmidt remembered the night’s events accurately.

sufficient to establish a substantial step towards rape); *State v. Gatalski*, 40 Wn. App. 601, 608, 699 P.2d 804 (1985) (finding sufficient evidence of rape where the defendant forced the victim onto a bed, tried to force his hand under her clothing, and attempted to kiss her, and where the defendant attempted to forcibly bring victim to his apartment).

Nevertheless, Overton still argues that the facts did not show that he acted with the intent to have sexual intercourse, because 1) Overton knew Clark and Thayer were nearby, and had seen him enter Schmidt's room; 2) Overton had his pants on when Thayer confronted him; and 3) there is no evidence that Overton had touched Schmidt's breasts or vagina. App. Brief at 14. Again, Overton's arguments are meritless. First, rape is a crime of passion, not logic, therefore it is irrelevant that it wasn't logical for Overton to try to have sexual intercourse when Clark and Thayer were nearby.⁶ After all, it isn't exactly logical to disrobe and straddle Schmidt when Clark and Thayer were nearby either, but if the allegations are true, Overton didn't let that stop him. Secondly, the substantial step was removing Schmidt's clothes, not his own, thus the state of Overton's pants is irrelevant. Thirdly, while there is no evidence that Overton actually groped Schmidt after disrobing her without her consent, there isn't any

⁶ According to testimony, Clark had been in the bathroom for some time, and Thayer was very intoxicated. RP Vol. II at 162-63. Accordingly, it is not unreasonable for Overton to have thought his acts would go unnoticed.

evidence that he didn't either, and that isn't a situation where someone earns the benefit of the doubt. Regardless, the question of groping is irrelevant, as disrobing and straddling Schmidt was the substantial step indicating an intent to have sexual intercourse.

In conclusion, no one but Overton knows what he was thinking when he saw Schmidt asleep in her bed, or what would have happened had Thayer not walked in. What is known is that witnesses testified that Overton entered Schmidt's room, saw her sleeping, pulled up her top to expose her breasts, removed her pants, pulled her underwear down to her knees to expose her vagina, climbed atop her, told her "tell me when to stop," and began kissing her lower abdomen, at which point he was interrupted by Thayer. RP Vol. I at 182-84; Vol. II at 162-65. The suggestion that no rational trier of fact could find that these acts indicated an intent to have sexual intercourse is both meritless and confounding. *See Green*, 94 Wn.2d at 221. Accordingly, Overton's claim must be denied.

2. Overton Has Requested That This Court Not Impose Appellate Costs, and the State Does Not Contest.

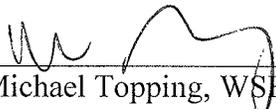
The State does not contest Overton's request that appellate costs not be imposed.

D. CONCLUSION

For these reasons, the State asks that the court affirm Overton's conviction.

Respectfully submitted this 16th day of March, 2016.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 16th day of March, 2017, at Olympia,

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CYNTHIA WRIGHT, PARALEGAL

THURSTON COUNTY PROSECUTOR
March 16, 2017 - 2:59 PM
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