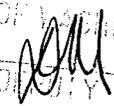


NO. 42089-9-II

COURT OF APPEALS
DIVISION II
12 FEB -8 PM 12:04
STATE OF WASHINGTON
BY 
DEPUTY

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

STATE OF WASHINGTON,

Respondent,

v.

H.S.,

Appellant.

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

The Honorable Robert L. Lewis, 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

TABLE OF CONTENTS

	<u>Page</u>
A. ARGUMENT IN REPLY	1
B. CONCLUSION	4

TABLE OF AUTHORITIES

<u>WASHINGTON CASES</u>	<u>Page</u>
<i>State v. Chapin</i> , 118 Wn.2d 681, 826 P.2d 194 (1992)	1
<i>State v. Crediford</i> , 130 Wn.2d 747, 927 P.2d 1129 (1996)	1
<i>State v. Dawkins</i> , 71 Wn. App. 902, 863 P.2d 127 (1993)	3
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980)	1
<i>State v. Hardesty</i> , 129 Wn.2d 303, 915 P.2d 1080 (1996)	1
<i>State v. Hickman</i> , 135 Wn.2d 97, 954 P.2d 900 (1998).....	1, 4
<i>State v. Hundley</i> , 126 Wn.2d 418, 894 P.2d 403 (1995).....	1
<u>UNITED STATES CASES</u>	<u>Page</u>
<i>In re Winship</i> , 397 U.S. 358, 325 L. Ed. 2d 368, 90 S. Ct. 1068 (1970)	1
<u>CONSTITUTIONAL PROVISIONS</u>	<u>Page</u>
U.S. Const. amend. 14	1
Wash. Const. art. 1, § 3	1

A. ARGUMENT IN REPLY

In its response, the State argues that there is abundant direct testimony from M.G. that H.S. had sexual contact or attempted sexual contact with her, and that he has not cited testimony that damages M.G.'s credibility. Brief of Respondent at 7.

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).

Here, H.S. was found to have committed attempted rape of a child in the second degree and two counts of child molestation in the second degree. The State proffered absolutely no physical evidence in a case that should have been replete with such evidence. M.G. asserted that she had

recorded H.S. walking at the school and recorded the two of them close together using her camera, but claimed at fact-finding that the camera had been “stolen.” 1Report of Proceedings [RP] at 132, 133. M.G. claimed that H.S. arranged for her to sneak out of her house to meet him through text messages, yet neither messages from her to H.S. or from H.S. to her memorializing the alleged meetings or alleged sexual conduct were produced at trial. 1RP at 107, 111, 127, 130.

Moreover, M.G.’s testimony was contradicted on several occasions, directly impacting her credibility:

- Detective Barry Folsom testified that M.G. reported that the principal at Alki Middle School had yelled at H.S. because he wasn’t supposed to be at Alki. 2RP at 174. Alki Principal Curtis Smith testified that he did not warn H.S. away from the school, directly contradicting B.G.’s assertion to Det. Folsom. Principal Smith also stated that he was not aware of any other Alki staff member confronting H.S. at the school. 2RP at 231, 232. Deputy Jon Pound interviewed Principal Smith regarding the allegation that he had told H.S. to stay away from the school, and after speaking with him, determined no further investigation was necessary. 2RP at 222.

- M.G. told Det. Folsom that she had been at H.S.’s house with her brother, B.G., and that she would go to his house because B.G.

would go there. 2RP at 171, 172 At fact-finding, however, she denied saying that she had been at H.S.'s house with her brother. 1RP at 128. B.G. testified that he had been at H.S.'s house five or six times to play video games, and that M.G. had never been with him when he visited. 1RP at 82.

The sum of the State's evidence to prove that H.S. committed the offenses was the testimony of M.G. H.S. testified in his own defense denying the allegations. The State offered no corroborating physical evidence, and H.S.'s testimony was contradicted in several regards, as noted *supra*. The paucity of physical evidence amounts to a 'he said' versus 'she said' case. In these instances, a reviewing court should be extremely cautious where there is no eyewitness other than the alleged victim nor any physical evidence, and the question of guilt necessarily turns on the relative credibility of the accused and the accuser. As noted by Justice Alexander (retired) when he was a member of this Court, where there is no eyewitness nor any physical evidence, and the question of guilt necessarily turns on the relative credibility of the accused and the accuser, the trial court must exercise extreme caution in allowing evidence that prejudices the accused. See *State v. Dawkins*, 71 Wn. App. 902, 909-10, 863 P.2d 127 (1993). Given this caution, what is particularly troubling in this case is that the accusation occurred only after H.S. had a falling out with

