

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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NO. 42089-9-II

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

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STATE OF WASHINGTON,

Respondent,

v.

H.S.,

Appellant.

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

The Honorable Robert L. Lewis, Judge

OPENING BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred by excluding the testimony of a school counselor regarding the complaining witness's reputation in the community for truthfulness.

2. The trial court violated the appellant's constitutional right to present a complete defense.

3. The State did not present sufficient evidence to sustain a conviction for attempted rape of a child in the second degree beyond a reasonable doubt, in violation of appellant's constitutional due process rights.

4. The State did not present sufficient evidence to sustain a conviction for child molestation in the second degree beyond a reasonable doubt as alleged in Counts 3 and 4, in violation of appellant's constitutional due process rights.

5. Appellant assigns error to Finding of Fact 3, which provides:

M.A.G. and [S.] were engaged in a secretive relationship.

Clerk's Papers [CP] 56.

6. Appellant assigns error to Finding of Fact 6, which provides:

M.A.G. lacked a motive to falsely accuse [S.]

CP 57.

7. Appellant assigns error to Finding of Fact 7, which provides:

M.A.G.'s accusations were corroborated by the statements Mr. [S.] made.

CP 57.

8. Appellant assigns error to Finding of Fact 11, which provides:

The dispute on December 24, 2009 was not just about a Playstation and the statements that were made were not just about a Playstation. Rather, the dispute was also about the relationship between M.A.G. and [S.]

CP 57.

9. Appellant assigns error to Finding of Fact 12, which provides:

M.A.G. was sneaking out of her mother's home at night to see Mr. [S.] and he was sneaking out to see her.

CP 57.

10. Appellant assigns error to Finding of Fact 13, which provides:

M.A.G. and [S.] engaged in mutual kissing on multiple occasions.

CP 57.

11. Appellant assigns error to Finding of Fact 14, which provides:

[S.] touched M.A.G.'s breasts, which was sexual contact done for the purposes of sexual gratification.

CP 58.

12. Appellant assigns error to Finding of Fact 15, which provides:

[S.] and M.A.G. pressed against each other in a sexual way, which was sexual contact done for purpose of sexual gratification.

CP 58.

13. Appellant assigns error to Finding of Fact 16, which provides:

[S.] made an attempt to penetrate M.A.G.'s vagina with his fingers. [S.] made repeated requests of M.A.G. and started the process to engage in oral sex with her. M.A.G. did not ultimately follow through with that.

CP 58.

14. Appellant assigns error to Finding of Fact 17, which provides:

The acts described in findings of fact fourteen through sixteen occurred on three separate and distinct incidents at Alki Middle School in Clark County, Washington between December 1, 2009 and January 31, 2010.

CP 58.

15. Appellant assigns error to Conclusion of Law 2, which provides:

All of the above facts have been proven by the State beyond a reasonable doubt.

CP 58.

16. Appellant assigns error to Conclusion of Law 3, which provides:

Between December 1, 2009 and January 31, 2010, on an occasion separate and distinct from that charged in Counts 3 and 4, in Clark County, Washington, [H.S.] did attempt to have sexual intercourse with M.A.G. who was at least twelve years old but less than fourteen years old and at least thirty-six months younger than [S.] and not married to [S.] and not in a state registered domestic partnership with [S.] [S.] is guilty of the lesser included crime of Attempted Rape of a Child in the Second Degree as charged in Count 1.

CP 58-59.

17. Appellant assigns error to Conclusion of Law 5, which provides:

Between December 1, 2009 and January 31, 2010, on an occasion separate and distinct from that charged in Counts 1 and 4, in Clark County, Washington, [H.S.] did have sexual contact with M.A.G. who was at least twelve years old but less than fourteen years old and at least thirty-six months younger than [S.] and not married to [S.] and not in a state registered domestic partnership with [S.] [S.] is guilty of the crime of Child Molestation in the Second Degree as charged in Count 3.

CP 59.

18. Appellant assigns error to Conclusion of Law 6, which provides:

Between December 1, 2009 and January 31, 2010, on an occasion separate and distinct from that charged in Counts 1 and 3, in Clark County, Washington, [H.S.] did have sexual contact with M.A.G. who was at least twelve years old but less than fourteen years old and at least thirty-six months younger than [S.] and not married to [S.] and not in a state registered domestic partnership with [S.] [S.] is guilty of the crime of Child Molestation in the Second Degree as charged in Count 4.

CP 59.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. M.G. was the prosecution's key witness and her testimony was crucial to the State's case. Did the trial court violate appellant's constitutional right to present a complete defense by excluding evidence of her reputation for untruthfulness when the defense witness had knowledge of M.G.'s reputation in the community and the evidence was vital to appellant's defense that the allegations were false? Assignments of Error 1 and 2.

2. A defendant may not be convicted unless the State proves every element of the crime beyond a reasonable doubt. Did the State present evidence sufficient to support the convictions for attempted rape of a child in the second degree and two counts of child molestation in the second degree when the record contains no corroborating evidence whatsoever and where the complaining witness's testimony was often

contradictory to her previous statements and claims? Assignments of Error No. 3-18.

**C. STATEMENT OF THE CASE**

**1. Procedural history:**

The State charged the juvenile in this case, H.S., born July 27, 1993, with two counts of rape of a child in the second degree (Counts 1 and 2), and two counts of child molestation in the second degree. (Counts 3 and 4) Clerk's Papers [CP] 1; RCW 9A.44.076 and RCW 9A.44.086. Appendix A.

The matter proceeded to a fact-finding hearing on March 2, 2011, the Honorable Robert L. Lewis presiding. Defense counsel waived a CrR 3.5 suppression hearing. 2Report of Proceedings [RP] at 168.<sup>1</sup>

**a. ER 608 testimony:**

Heidi Moses, a substitute counselor for the Vancouver School District at Alki Middle School [Alki], testified that she knows the complaining witness M.G. and has spoken with her between seven and ten times. 2RP at 224. She stated that there are two other school counselors with whom she worked at Alki who also knew B.G. 2RP at 226. The trial court sustained the State's objection to Moses' testimony regarding

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<sup>1</sup> The Verbatim Report of Proceedings consists of two volumes, all consecutively paginated. Fact-finding occurred on March 2, 2011 and is found at 1RP 38-158 and 2RP 159-252. Disposition took place on April 12, 2011 and is found at 2RP 253-261.

M.G.'s reputation for truthfulness in the community. 2RP at 225-229. Defense counsel did not make an offer of proof following the court's ruling. 2RP at 229.

**b. Adjudication:**

H.S. was adjudicated guilty of the lesser included offense of attempted rape of a child in the second degree in Count 1, and child molestation in the second degree as alleged in Counts 3 and 4. The court acquitted H.S. of Count 2. 2RP at 250.

**c. Findings of fact and conclusions of law:**

The court entered the following findings of fact on May 13, 2011:

1. M.A.G.'s date of birth is June 18, 1997.
2. [H.S.]'s date of birth is July 27, 1993.
3. M.A.G. and [S.] were engaged in a secretive relationship.
4. In the early morning hours of December 24, 2009, Mr. [S.] had been awake for number of hours texting suicidal threats to M.A.G. and her brother.
5. When the police showed up to the [S.]'s residence on December 24, 2009 at three in the morning, [H.S.] went to the door and talking to the police for some period of time without his parents knowing about it.
6. M.A.G. lacked a motive to falsely accuse [S.]
7. M.A.G.'s accusations were corroborated by the statements Mr. [S.] made.

8. When [S.] talked to Detective Folsom he denied even knowing M.A.G. yet he told Deputy Ternus that he did know her.
9. M.A.G.'s brother, B.L.G., testified that part of the argument on December 24, 2009, was not just about a Playstation but was about the fact that B.L.G. thought something was going on between M.A.G. and [S.] and he told them to stay away from each other and they got into a text war about it.
10. In the middle of the night on December 24, 2009, Officer Ternus went over to talk to Mr. [S.] and [S.] said B.L.G. had texted him, threatened him to stay away from his sister, and that he, Mr. [S.] had emailed M.A.G. back about that.
11. The dispute on December 24, 2009 was not just about a Playstation and the statements that were made were not just about a Playstation. Rather, the dispute was also about the relationship between M.A.G. and [S.]
12. M.A.G. was sneaking out of her mother's home at night to see Mr. [S.] and he was sneaking out to see her.
13. M.A.G. and [S.] engaged in mutual kissing on multiple occasions.
14. [S.] touched M.A.G.'s breasts, which was sexual contact done for the purposes of sexual gratification.
15. [S.] and M.A.G. pressed against each other in a sexual way, which was sexual contact done for purpose of sexual gratification.
16. [S.] made an attempt to penetrate M.A.G.'s vagina with his fingers. [S.] made repeated requests of M.A.G. and started the process to engage in oral sex with her. M.A.G. did not ultimately follow through with that.
17. The acts described in findings of fact fourteen through sixteen occurred on three separate and distinct incidents at

Alki Middle School in Clark County, Washington between December 1, 2009 and January 31, 2010.

18. M.A.G. and [S.] are not married and are not in a State registered domestic partnership.
19. In December, 2009 and January 2010 M.A.G. was twelve years of age and [S.] was sixteen.
20. M.A.G. and [S.] are forty-seven months apart in age.

CP 56-59.

The court entered the following conclusions of law:

1. The court has jurisdiction over the parties hereto and the subject matter of the action.
2. All of the above facts have been proven by the State beyond a reasonable doubt.
3. Between December 1, 2009 and January 31, 2010, on an occasion separate and distant from that charge in Counts 3 and 4, in Clark County, Washington, [H.S.] did attempt to have sexual intercourse with M.A.G. who was at least twelve years old but less than fourteen years old and at least thirty-six months younger than [S.] and not married to [S.] and not in a state registered domestic partnership with [S.] [S.] is guilty of the lesser included crime of Attempted Rape of a Child in the Second Degree as charged in Count 1.
4. [S.] is not guilty of Count 2, Rape of a Child in the Second Degree.
5. Between December 1, 2009 and January 31, 2010, on an occasion separate and distinct from that charged in Counts 1 and 4, in Clark County, Washington, [H.S.] did have sexual contact with M.A.G. who was at least twelve years old but less than fourteen years old and at least thirty-six months younger than [S.] and not married to [S.] and not in a state registered domestic partnership

with [S.] [S.] is guilty of the crime of Child Molestation in the Second Degree as charged in Count 3.

6. Between December 1, 2009 and January 31, 2010, on an occasion separate and distinct from that charged in Counts 1 and 3, in Clark County, Washington, [H.S.] did have sexual contact with M.A.G. who was at least twelve years old but less than fourteen years old and at least thirty-six months younger than [S.] and not married to [S.] and not in a state registered domestic partnership with [S.] [S.] is guilty of the crime of Child Molestation in the Second Degree as charged in Count 4.

CP 58-59.

**d. Disposition and appeal:**

After a disposition hearing on April 12, 2011, Judge Lewis granted the defense request for a Special Sex Offender Disposition Alternative. 2RP at 256.

Timely notice of appeal was filed on May 4, 2011. CP 42. This appeal follows.

**2. Evidence presented at fact-finding:**

H.S. loaned a Playstation game system to B.G. in November 2009, but B.G. did not return it when H.S. requested. 2RP at 208. Early on the morning of December 24, 2009, H.S. sent a series of text messages to B.G. 2RP at 209. The complaining witness, M.G., is B.G.'s sister. M.G. was born June 28, 1997, and was twelve years old in December 2009. 1RP at

103. H.S. was born July 27, 1993 and was 16 in December, 2009. 2RP at 168, 208.

Clark County Deputy Sheriff Rob Ternus was dispatched to B.G.'s house at approximately 3 a.m. on December 24, 2009, regarding a report of "suicidal threats" contained in text messages that had been received at the residence. 1RP at 44, 45. Deputy Ternus said that while at the house, M.G. said that she had kissed H.S., and it was consensual, but made no other allegation of sexual contact. 1RP at 49, 50. Four text messages were photographed by Deputy Ternus. Exhibits 2, 3, 4, and 5. 1RP at 51.

Deputy Ternus was told that the texts were sent by H.S., and the deputy, along with other officers, went to H.S.'s house at 2101 NW 141<sup>st</sup> Street in Vancouver, Washington. 1RP at 45, 52. At the house, Deputy Ternus made contact with H.S. and asked if they could go inside to talk about the text messages. 1RP at 45. H.S. did not allow them inside the house. 1RP at 46, 52. Deputy Ternus stated that the police then knocked and announced their presence and then entered the house. 1RP at 46. He stated that no weapons were drawn at that time, but that H.S. was handcuffed. 1RP at 46, 52. Deputy Ternus stated that he handcuffed H.S. because "based on what I read in those text messages, I was concerned that, you know, we may be dealing with suicidal threats, and not being able to go in the house and check the safety of the residence was

paramount at that point.” 1RP at 46. After he was handcuffed, H.S. was asked about the text messages. 1RP at 46. Deputy Ternus stated that he did not administer constitutional warnings because he was being detained for “safety reasons for himself and other people.” 1RP at 46. He testified that H.S. was calm, answered questions politely, and did not show the demeanor of somebody who was suicidal. 1RP at 54.

Deputy Ternus stated that H.S. initially denied sending the messages, and then said that he actually sent the messages. 1RP at 47.

Michael Sims, H.S.’s father, stated that police entered the house carrying M-16 rifles, had H.S. handcuffed, and that he was placed against the wall outside the house. 2RP at 187. He stated that he told the officers with weapons to leave the house and that they then released H.S. from handcuffs. 2RP at 187. Mr. Sims stated that B.G. had expensive game consoles belonging to his son and that H. wanted them returned. 2RP at 188. He stated that police would not retrieve the consoles for him and told him that he could get them himself. 2RP at 188. Later that morning on December 24 he went to B.G.’s house and retrieved the games and console. 2RP at 188.

Vanessa Shore testified, without defense objection, that M.G. had told her that she was going out with H.S. 1RP at 61, 62. Shore stated that M.G. wanted her to walk her home from school starting in March, 2010,

because she did not feel safe walking home by herself. 1RP at 63. Shore went to Skyview High School [Skyview], and M.G. went to Alki, which is located close to Skyview. 1RP at 63, 64. Shore stated that she saw H.S. ride by on his bicycle once or twice when she was walking M.G. home. 1RP at 64. H.S. goes to Skyview and lives near the school. 1RP at 64.

B.G. testified that he heard from Shore that there was a dating relationship between his sister and H.S. 1RP at 71. He stated that prior to that, he had told H.S. to leave his sister alone. 1RP at 71. B.G. said that he got a call from Shore telling him "what was going on," and that he confronted M.G. about it on December 24, 2009. 1RP at 72. He stated that he saw on her phone that she was texting H.S. 1RP at 72. He texted H.S. from his phone, telling him to leave his sister alone. 1RP at 71, 72. He stated that H.S. texted back that there was nothing that he could do about it and that he started sending suicidal text messages. 1RP at 73. B.G. denied that the texting was about the Playstation. 1RP at 73.

Michael Sims said that his son could not have sneaked out of the house because the doors are locked at night and he only goes in and out of the house through the garage. 2RP at 189-90. He stated that there is a loose board in the hallway and that it squeaks whenever someone walks down the hall. 2RP at 190. He stated that H. does not have a housekey and that he would have to open the garage door using a keypad, and that

they would know if he left the house at night because the noise of the opening garage door would wake him up. 2RP at 194-95.

Julie Sims stated that she had never known H. to sneak out of the house and did not think it was possible because the floors creak and because he would have to go through the garage, which would have woken her up. 2RP at 201-02.

M.G. said that she agreed to sneak out of the house at night and meet H.S. at Skyview. 1RP at 107. She said that they then went to the back of Alki, and that they “walked around and kissed.” 1RP at 108. She said that H.S. also put his hand on her breast. 1RP at 109. She alleged that the meetings were arranged by text, but she did not show them to anyone, except one text showed her mother. 1RP at 146. She said that she thought this was a week before Christmas Eve. 1RP at 111.

M.G. said that she met him again at Skyview, and then walked through a field to Alki, which is located about a block away from Skyview. 1RP at 112. She alleged that at Alki they started kissing, that he touched her breast and put his hand down her pants outside her underwear and had contact with her genital area outside her underwear. 1RP at 113. She said that he tried to put his penis in her mouth and that she pushed him away and hold him she needed to go home. 1RP at 114, 115.

M.G. said she took her camera the first or second time she went to Alki and that she took video of them walking around and showed it to other people. 1RP at 139, 140. M.G. said she showed her friend M.R. a recording on her phone of H.S. walking around and of them close enough to be kissing because the camera “was like pinned in between his chest and mine.” 1RP at 132. She said that the camera on which it was recorded was stolen. 1RP at 133. She also said that she waved to a surveillance camera the first time they went at Alki. 1RP at 143.

M.G. alleged that she went to H.S.’s house after school and watched him play videogames, and that after a while they started kissing, and that he touched her breast, put his hand down her pants, inside her underwear, but did not touch her vagina. 1RP at 116, 117.

M.G. alleged that two or three weeks later she sneaked out of her house and met H.S. at Alki and went with him behind the school and kissed him, and that he put his fingers into her vagina. 1RP at 119.

H.S. testified that he knew he was going to get Playstation games for Christmas in December, 2009 and wanted B.G. to return the Playstation console and games he had let him borrow, but B.G. would not return the items. 2RP at 208. On Christmas Eve he figured that B.G. was not going to give them back, so he wanted to scare him into giving them

back by threatening to kill himself in text messages. 2RP at 209. Exhibits 2, 3, 4, and 5.

H.S. was later questioned by police and denied knowing M.G. 2RP at 168. Detective Barry Folsom testified that H.S. told him that he did not know who M.G. was, that he had not met her at school or at her house, and denied that he had sneaked out of the house at night to see her. 2RP at 169. H.S. testified that he told Detective Folsom that he did not know M.G. because he was scared of the detective. 2RP at 211-12. He stated that he knew M.G. through B.G, but testified that he never really talked to her when he was at their house. 2RP at 211. He denied going to Alki to meet M.G., denied having sexual contact with her of any kind, and denied sneaking out of the house to meet her. 2RP at 214. H.S. testified that he did not spend the night at M.G.s' house as she alleged. 2RP at 210.

Detective Folsom testified that M.G. reported that the principal at Alki yelled at H.S. because he wasn't supposed to be at Alki. 2RP at 174. He stated that he tried to get video surveillance tape from Alki but was told that the tapes have to be retrieved within a short period of time or they will be recorded over. 2RP at 167.

Alki Principal Curtis Smith testified that M.G. had never told him that H.S. was following her around on Alki school property and that he did

not confront H.S. at the school and tell him to leave the school grounds.  
2RP at 231.

**D. ARGUMENT**

**1. THE TRIAL COURT ABUSED ITS DISCRETION BY EXCLUDING EVIDENCE OF M.G.'S REPUTATION FOR UNTRUTHFULNESS, VIOLATING H.S.'S CONSTITUTIONAL RIGHTS TO PRESENT A COMPLETE DEFENSE.**

Evidence Rule 608(a) authorizes inquiry into a complainant's credibility in the form of questioning as to his or her knowledge of the complainant's reputation in the community for truthfulness or untruthfulness, if a proper foundation is laid. ER 608(a). The rule provides:

The credibility of a witness may be attacked or supported by evidence in the form of reputation, but subject to the limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness[.]

Appendix A.

H.S. sought to introduce testimony from Alki Middle School counselor Heidi Moses that M.G. had a poor reputation for truthfulness. 2RP at 224-25. The trial court erred in sustaining the State's objection and excluding evidence of M.G.'s reputation for untruthfulness because the defense witness had knowledge of M.G.'s reputation in the community and the evidence was vital to H.S.'s defense that the allegations against

him were false. Reversal is required because the trial court violated H.S.'s constitutional rights to present a complete defense.

The Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. *State v. Cheatam*, 150 Wn.2d 626, 648, 81 P.3d 830 (2003) (citing *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)). The Fourteenth Amendment requires that criminal prosecutions conform with prevailing notions of fundamental fairness and that criminal defendants be given a meaningful opportunity to present a complete defense. *State v. Wittenbarger*, 124 Wn.2d 467, 474-75, 880 P.2d 517 (1994); *State v. Lord*, 117 Wn.2d 829, 867, 822 P.2d 177 (1991), cert. denied, 506 U.S. 856, 113 S. Ct. 164, 121 L. Ed. 2d 112 (1992); *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984). Under both the state and federal constitutions, due process in criminal prosecutions requires fundamental fairness and a meaningful opportunity to present a complete defense. *State v. Burden*, 104 Wn. App. 507, 511, 17 P.3d 1211 (2001).

A party seeking to admit such evidence bears the burden of establishing a foundation for that evidence. To establish a valid "community" under ER 608, the party seeking to admit reputation evidence must show that the community is both neutral and general. *State v. Lord*, 117 Wn.2d at 874-75. Some relevant factors might include the

frequency of contact between members of the community, the amount of time a person is known in the community, the role a person plays in the community, and the number of people in the community. *State v. Land*, 121 Wn.2d 494, 500, 851 P.2d 678 (1993).

In *State v Carol M.D.*, 89 Wn. App. 77, 948 P.2d 837 (1997), the trial court excluded a witness's testimony regarding the victim's poor reputation for truthfulness in the community. The community was a Boy Scout troop. The trial court excluded the testimony on the basis the community "has to be large enough that it means something other than personal opinion." *M.D.*, 89 Wn. App. at 95. In other words, the trial court believed that a Boy Scout troop was not a general and neutral community from which to gather an opinion on a witness' reputation for truthfulness. The *M.D.* Court held that the trial court had erred in excluding this testimony. The Court reasoned that "the realities of our modern, mobile impersonal society mean that a witness may have a reputation for truth and veracity in other communities." *Id.*

In *Land*, 121 Wn.2d at 502, the Washington Supreme Court held that the trial court properly admitted evidence of Land's reputation for truthfulness in the business community where he worked under ER 608(a). The trial court allowed business acquaintances to testify as to Land's reputation for truthfulness in the wooden box manufacturing community. *Id.* Land objected on the grounds that under ER 608, evidence of one's reputation for truthfulness must be based on the community where a

person lives, not where a person works. *Id.* The Supreme Court held the meaning of "community" included any substantial community of people among whom the witness is known, such as a work group, a business, or a school, as well as the community in which the witness resides. *Id.* at 499. The Court noted that factors to consider included frequency of contact between members of the community, how long the person has been known in the community, the role the person plays in the community, and the number of people in the community. *Id.* at 500. The Court reasoned that "the only community where his reputation for truth and veracity could be garnered was the business community in which he operated as a salesman." *Id.* at 501. Adopting a "functional approach," the Court concluded that community constitutes "any substantial community of people among whom he is well known." *Id.* at 498-501. The Court emphasized that ER 608 is "designed to facilitate testimony from those who know a witness's reputation for truthfulness so that the trier of fact can properly evaluate witness credibility." *Id.* at 498 (citing 5A Karl B. Tegland, Wash. Prac., Evidence sect. 230(1), at 197 (3d ed. 1989)).

Here, defense counsel called Alki school counselor Heidi Moses to testify regarding M.G.'s reputation in the community for untruthfulness. Defense counsel argued that M.G.'s community consists of counselors at the school who know her. 2RP at 227-28. The trial court excluded the evidence, concluding that the community of counselors was inadmissible because they are not a "neutral and generalized community," and were

“people who had to deal with the person in specific situations.” 2RP at 229.

As was the case in *Land, supra*, where Land’s only community was his business colleagues because he did not have a permanent residence and traveled regularly, M.G.’s community was logically limited to school, particularly because she was only thirteen years old at the time of trial. Under the functional approach adopted in *Land*, the school was her only community.

Evidence from school counselors would be general and neutral because the counselors had no motive to disparage M.G.’s reputation, and in fact, may be reluctant to be critical of her. In addition, the motivation of a reputation witness is always subject to cross-examination. *Land*, 121 Wn.2d at 499.

Here, the trial court’s ruling prevented any attack on M.G.’s reputation for truth and veracity by finding a school counselor could not be considered neutral, thus leaving the defense unable to make inquiries. Therefore, the sole person accusing H.S. was rendered untouchable. Although counsel did not make an offer of proof, Moses would presumably testify that M.G. had a poor reputation for truthfulness in the school. The court’s ruling was blatantly unfair and inconsistent with the purpose behind ER 608 and the case law that has interpreted it.

A reputation may be derived from any community in which the person has a well-known or established reputation. *State v. McEachern*,

283 N.C. 57, 67, 194 S.E. 2d 787 (1973), cited with approval in *State v. Lord*, 117 Wn.2d at 498. Here, H.S. attempted to show M.G.'s poor reputation for truthfulness within the community that knew her best---her school counselors. The trial court failed to apply ER 608 in the functional and practical manner directed by the Supreme Court in *Land*, 121 Wn.2d at 500-01. Consequently, the trial court erred in excluding the reputation evidence because defense counsel laid a proper foundation for Moses' testimony by showing that she had knowledge of M.G.'s reputation for untruthfulness within the school community.

M.G.'s reputation testimony was vital to H.S.'s defense that the allegations against him were false. His fate hinged on whether the court believed M.G. because there were no other witnesses to the alleged offenses. Therefore, evidence that M.G. had a reputation for untruthfulness would have substantially aided H.S.'s defense.

Reversal is required because the court erred in excluding the reputation evidence, violating the appellant's constitutional right to present a complete defense. *State v. Burden*, 104 Wn. App. at 511. The erroneous exclusion of pertinent reputation testimony was not harmless beyond a reasonable doubt. The prejudicial effect of the trial court's erroneous ruling is reviewed under the harmless beyond a reasonable doubt standard, which the State bears the burden of proving. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S.

1020 (1986). An error is not harmless beyond a reasonable doubt if there is any reasonable possibility that it could have affected the verdict. *Id.* at 426; *State v. Wheeler*, 95 Wn.2d 799, 806, 631 P.2d 376 (1981) (citing *Chapman v. California*, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967)). In this case a reasonable possibility exists that the reputation evidence could have affected the verdict, particularly in light of the complete absence of physical or corroborating evidence, discussed in Section 2, *infra*. Without this testimony, the appellant was left with little support for his theory of the case. Thus, the error was not harmless beyond a reasonable doubt. H.S.'s convictions should be reversed.

2. **THE TRIAL COURT ERRED BY FINDING H.S. GUILTY OF THE OFFENSES ALLEGED IN COUNTS 1, 3, AND 4.**

Under due process, to convict one accused of a crime, the State must prove every fact necessary to constitute the crime charged beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.368 (1970). However, the conviction must be reversed if, when viewing the evidence most favorably toward the State, the court concludes the evidence is insufficient to uphold a criminal conviction because no rational trier of fact could have found one of the essential elements proved beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99

S.Ct. 2781, 61 L.Ed.2d 5610 (1979); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

An insufficiency of evidence claim admits the truth of the State's evidence and all inferences the court can reasonably draw from it. *State v. Theroff*, 25 Wn.App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980). The inferences must, however, be reasonable. The minimum requirements of due process demand more than conjecture or speculation. The evidence must, on review, be more than sufficient to persuade a fair-minded and rational person of the truth of the matter. *State v. Carlson*, 130 Wn.App. 589, 592, 123 P.3d 891 (2005).

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. These findings were based entirely upon the often conflicting testimony of M.G. M.G.'s testimony at fact-finding, her statements to police officers, and her statements to defense counsel were contradictory and unsupported by physical evidence or other corroborating evidence.

No evidence places H.G. and M.G. together at Alki or at H.S.'s house--no one testified that they were together at Alki or at his house other than M.G.

M.G. claimed that she had recorded H.S. walking at the school and recorded the two of them close together using her camera, but claimed, without further explanation, that the camera had been “stolen.”

M.G. claimed that H.S. arranged to meet her through text messages. The State introduced absolutely no text messages referring to sexual contact or clandestine meetings. The only text messages introduced were from December 24, 2009 and supported H.S.’s testimony that he and B.G. were engaged in a “text war” over the return of the Playstation console and that H.S. made the “suicidal” texts in order to scare B.G. and “creep him out” so that he would return the Playstation. 2RP at 209.

Principal Smith did not warn H.S. from the school, directly contradicting B.G.’s assertion to Det. Folsom.

The State presented no forensic or physical evidence to support M.G.’s claims; evidence such as text messages, school surveillance tapes, and the recording that M.G. claimed to have made on her camera were not presented. The only physical evidence introduced—four text messages—supported H.S.’s testimony that he wanted the Playstation returned.

A rational trier of fact could not find H.S. guilty beyond a reasonable doubt based upon these facts. In light of the inconsistent testimony of M.G., lack of any corroborating evidence whatsoever, and

lack of any physical evidence or forensic evidence, there was insufficient evidence to support a determination of guilt for the offenses which the court found H.S. had committed. There was nothing presented during trial demonstrating that they had met at either school or at his house, or that H.S. ever touched M.G. for any reason.

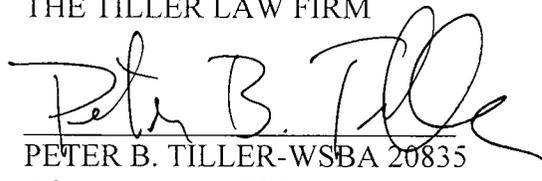
Based on the clear lack of sufficient evidence implicating him, H.S. respectfully requests that this Court find that there was insufficient evidence to adjudicate him guilty of the offenses of attempted rape of a child and child molestation in the second degree.

**E. CONCLUSION**

Based on the arguments presented above, H.S. respectfully requests that this Court reverse the convictions on all counts for lack of sufficient evidence.

DATED: November 21, 2011.

Respectfully submitted,  
THE TILLER LAW FIRM

  
PETER B. TILLER-WSBA 20835  
Of Attorneys for H.S.

CLERK OF COURT  
DIVISION II

CERTIFICATE OF SERVICE

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STATE OF WASHINGTON  
BY \_\_\_\_\_ DEPUTY

The undersigned certifies that on November 21, 2011, that this Opening Brief was mailed by U.S. mail, postage prepaid, to the Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and a copies were mailed by U.S. mail, postage prepaid to Ms. Anne Crusier, Deputy Prosecutor, P.O. Box 5000 Vancouver, WA 98666-5000 and to the appellant, Mr. H. S., 2101 NW 141<sup>st</sup> St., Vancouver, WA 98685, true and correct copies of this Brief.

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on November 21, 2011.

  
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PETER B. TILLER

## EXHIBIT A

### STATUTES AND COURT RULES

#### **RCW 9A.28.020**

#### **Criminal attempt.**

(1) 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.

(2) If the conduct in which a person engages otherwise constitutes an attempt to commit a crime, it is no defense to a prosecution of such attempt that the crime charged to have been attempted was, under the attendant circumstances, factually or legally impossible of commission.

(3) An attempt to commit a crime is a:

(a) Class A felony when the crime attempted is murder in the first degree, murder in the second degree, arson in the first degree, child molestation in the first degree, indecent liberties by forcible compulsion, rape in the first degree, rape in the second degree, rape of a child in the first degree, or rape of a child in the second degree;

(b) Class B felony when the crime attempted is a class A felony other than an offense listed in (a) of this subsection;

(c) Class C felony when the crime attempted is a class B felony;

(d) Gross misdemeanor when the crime attempted is a class C felony;

(e) Misdemeanor when the crime attempted is a gross misdemeanor or misdemeanor.

#### **RCW 9A.44.076**

#### **Rape of a child in the second degree.**

(1) A person is guilty of rape of a child in the second degree when the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

(2) Rape of a child in the second degree is a class A felony.

**RCW 9A.44.086**

**Child molestation in the second degree.**

(1) A person is guilty of child molestation in the second degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

(2) Child molestation in the second degree is a class B felony.

**RULE ER 608**

**EVIDENCE OF CHARACTER AND CONDUCT OF  
WITNESS**

(a) Reputation Evidence of Character. The credibility of a witness may be attacked or supported by evidence in the form of reputation, but subject to the limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence or otherwise.

(b) Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.