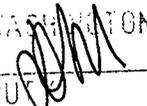


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
DEPUTY 

NO. 42089-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
CLARK COUNTY CAUSE NO. 10-8-00788-7
DIVISION II, COURT OF APPEALS NO. 42089-9-II

STATE OF WASHINGTON,

RESPONDENT,

vs.

HAYDEN THOMAS SIMS

APPELLANT.

BRIEF OF RESPONDENT

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Clark County, Washington

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COURT RULES

Evidence Rule 608(a)

I. STATEMENT OF THE CASE

A) PROCEDURAL HISTORY

Hayden Thomas Sims, dob: 07-27-1993 appeals a conviction for Attempted Rape of Child in the Second Degree, RCW 9A.44.076 and two counts of Child Molestation in the Second Degree, RCW 9A.44.086 for sexual activity between December 1, 2009 and January 31, 2010, with M. A. G., dob: 06-28-1997.

In his appeal, he challenges some of the Court's findings of fact, makes a sufficiency of the evidence argument, and cites err in the Court's decision to disallow certain reputation testimony.

II. STATEMENT OF FACTS

Officer Ternus testified that he contacted Mr. Sims on December 24, 2009 in response to a text message exchange for safety reasons as they appeared to contain suicidal threats. (R. P. Vol 1 P. 44). Further, that initially Mr. Sims denied sending the messages to M. A. G., but then admitted he sent them (R. P. Vol 1 P. 45). Further Mr. Sims said he

received text messages from Brannon G. which were threatening in regards to his seeing Brannon's sister, M. A. G. and that he had e-mailed M. A. G. back because Brannon threatened to beat him up, and to get back a gaming system. (R. P. Vol 1 P.49). Officer Ternus clarified that M. A. G. did not express that she felt threatened and had stated she had kissed Mr. Sims (R. P. Vol. 1 P. 50)

Vanessa Shore testified she knew M. A. G. and Mr. Sims, had seen Mr. Sims at M. A. G.'s residence a couple of times and said M. A. G. told her she had been in an intimate relationship with Mr. Sims right before and a couple of days after Christmas. (R. P. Vol 1 P. 61). Further, that she had at some point expressed concerns about that relationship to Brannon G. She stated that some months later, in March, she started walking M. A. G. home because M. A. G. didn't feel safe and M. A. G. had seen Mr. Sims following her a couple of times (R. P. Vol 1 P. 62-63)

On cross-examination, Ms. Shore clarified that in November M. A. G. had told her she liked Mr. Sims, later said she was going out with him but never told her any sexual goings on. (R. P. Vol 1 P. 65). But later when she asked M. A. G. why she did not feel safe she indicated the reason was they had been making out, she told him to stop and he would not (R. P. Vol 1 P. 68).

Brannon G. testified he was friends with Mr. Sims and they played video games. (R. P. Vol 1 P. 70) He heard from Vanessa about some sort of dating relationship between his sister M. A. G. and Mr. Sims. (R. P. Vol 1 P.71) That he confronted his sister who denied doing anything, but after another call from Vanessa found M. A. G. and Mr. Sims were texting so he texted Mr. Sims saying leave my sister alone (R. P. Vol 1 P. 72) and said after Mr. Sims said no that he received suicidal messages so he called the police. (R. P. Vol 1 P. 73) He testified that after he told Mr. Sims he was calling the police that Mr. Sims asked from his gaming system back. (R. P. Vol 1 P. 74). Further, that after the Christmas school break, he again asked Mr. Sims to leave his sister alone when only he, his teacher, and Mr. Sims were present, because he had heard that his sister had again seen Mr. Sims. (R. P. Vol 1 P. 75)

M. A. G. testified that she did have feelings for Mr. Sims, wanted to date him, and flirted around with him sometime before Christmas (R. P. Vol 1 P.106) On cross she explained the first occurrence at her house where Mr. Sims poked her breasts was an accident or he had said that. (Vol 1 P. 128) Similarly, parent Cherie Lathrop testified she came down her hall and saw M. A. G. and Mr. Sims on opposite couches, didn't feel comfortable but

not uncomfortable either and expressed to Mr. Sims that M. A. G. was twelve (12) years old. (R. P. Vol 1 P. 91-92)

M. A. G. testified to several sexual encounters with Mr. Sims. Before Christmas at Alki School late at night where they walked around and kissed where Mr. Sims tried to touch her breasts alot saying he actually touched me. (R. P. Vol 108-109)

The second encounter was after Christmas where at Alki they kissed, he tried to touch her breasts, tried to put his hand down her pants, was pressing up against her and asked her for a blow job – further, his penis was out and he kind of like put in her mouth. (R. P. Vol 1 P. 113 & 114)

A few days later, while at his house, kissing, he again tried to touch her breasts, put his hands down her pants under her underwear and asked for a blow job over and over until she was actually going to do that but as his penis barely had contact with her mouth that something clicked in her head and she stopped. (R. P. Vol 1 P. 117-118)

Finally at Alki while kissing Mr. Sims put his hands down her pants, and on her breasts again asking for a blow job with his penis out when M. A. G. told him no. Mr. Sims was upset and angry almost and just left her there. (R. P. Vol 1 P. 119-120)

Mr. Sims testified that statements he made to Officer Folsom were not true and that he denied all that because he was scared. He also admitted texts to M. A. G.'s phone and said Brannon was saying to leave his sister alone. (R. P. Vol I, 211-218)

Heidi Moses was called by the defense to testify about reputation in the community. She testified she started as a substitute counselor at Alki Middle School in October of 2010 and had spoken to M. A. G. between seven to ten times. (R. P. Vol II, P. 224)

Michael Gordon Sims testified that he son could not have snuck out of his house at night because he would have heard that (R. P. Vol II, P. 189-190) but also said that once a week or every other week that he had to go to Canada on business (R. P. Vol II, P. 185)

RE-STATEMENT OF ISSUES PRESENTED FOR REVIEW

- A) DID THE TRIAL COURT ERR WHEN IT FOUND SUFFICIENT EVIDENCE TO CONVICT MR. SIMS OF THE CHARGES OF ATTEMPTED RAPE OF CHILD IN THE SECOND DEGREE AND TWO COUNTS OF MOLEST OF CHILD IN THE SECOND DEGREE.
- B) DID THE TRIAL COURT ERR WHEN IT FOUND THAT COUNSEL HAD NOT LAYED A PROPER FOUNDATION FOR ADMISSION OF REPUTATION EVIDENCE BY HEIDI MOSES.

ARGUMENT:

The Appellant challenges some of the Court's Findings of Fact. Because he is asking for a factual review of a factual determination, a "clearly erroneous standard" is applied to a trial Court's findings of fact. State v. Nordby, 106 Wn.2d 514, 517-518 (1986). A trial Court's findings will be reversed only if no substantial evidence support its conclusion. State v. Grewe, 117 Wn.2d 211 (1991). Mr. Sims also argues that the evidence was not sufficient to support the conviction. Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it is enough to permit any rational Trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wn2d 333, 338 (1993); State v. Green, 94 Wn.2d 216, 221 (1980). A claim of insufficiency admits the truth of the State's evidence and requires that all reasonable inferences from the evidence be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201 (1992).

In Count one Mr. Sims was convicted of the crime of Attempted Rape of a Child as a lesser included to the charges Rape of a Child. Rape of a Child has no Mens rea element and in State v. Chhom, 128 Wn2d 739 (1996), Mr. Chhom argued that without that element there was no support

for a charge of attempt. Similar to our case the attempt statute brings into the crime of Rape of a Child the element to have sexual intercourse but does not add anything to the remaining strict liability requirements of age disparity and lack of marriage, which means attempted Rape of a Child is still a strict liability offense. Chhom at 743.

Multiple Courts have also looked at the issue of sexual gratification and have found that is not an oblique concept. State v. Halstien, 122 Wn.2d, 109, 119 (1993). Acts such as a young man putting his hand down a young girl's pants over and under her underwear, fondling breasts, rubbing against private parts with requests toward obtaining a blow job make the purpose of an encounter very clear.

There is abundant direct testimony from M. A. G. that on multiple separate occasions that Mr. Sims attempted to rape through oral and penile contacts and committed acts of child molestation on twelve (12) year old M. A. G. Mr. Sims has presented no authority that requires the State to present text messages or other physical evidence to prove a case of this nature. Nor does he point out perceived testimony that damages M. A. G.'s credibility.

ARGUMENT ISSUE NO. 2

The State understands that an error in the admission of evidence may require reversal if it materially affected the outcome of a trial. State v. Tharp, 96 Wn.2d 591 (1981)

However, in this case it is clear that no such error occurred. Counsel failed to lay a proper foundation for reputation evidence and presented no offer of proof suggesting what that testimony would contain. Ms. Moses indicated she had only spoken to M. A. G. a few times, sometimes only in passing and her contact was months after the charged allegation in this case.

Similar to rulings in State v. Lord, 117 Wn.2d 829, 874, contact in a counseling session is neither neutral enough or generalized enough to present an unbiased and reliable evaluation of general reputation for truth telling as these types of contacts are insufficient for her to have knowledge of reputation in the community. Therefore, even though Evidence Rule 608 allows reputation evidence in some situations it was not in error to disallow that under the circumstances of this case.

As indicated in State v. Rohrich, 132 Wn.2d 472 (1997) the confrontation clause prefers the State elicit the damaging testimony from witnesses while under oath in a face to face confrontation. (Id at 479)

Viewed in the context of testimony substantially more than a year after acts upon a twelve (12) year old, M. A. G.'s testimony is remarkably coherent as she explained why she liked Mr. Sims, why she participated and why she only gave limited information to trusted peers while these acts occurred. In contrast to M. A. G.'s testimony, Mr. Sims admits the statements he made to officer Folsom were not true saying he denied all that because he was scared and just got a bad vibe. He also admitted texts to M. A. G.'s phone and that Brannon was saying to leave his sister alone.

The Court must give deference to the Trier of fact who resolves conflicting testimony, evaluates the credibility of witnesses and generally weighs the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, review denied, 119 Wn.2d 1011 (1992). Thus, credibility determinations are for the Trier of fact and are not subject to review. State v. Camarillo, 115 Wn2d 60, 71 (1990).

CONCLUSION

The Court did not err in finding Hayden Thomas Sims guilty of the crimes of Attempted Rape of a Child in the Second Degree and two counts of Molest of a Child in the Second Degree. Further, the Court did not err in disallowing reputation evidence under the circumstances of this case.

Based upon the arguments and authorities cited above, the respondent respectfully requests the court affirm the disposition previously entered in this case.

DATED this 6 day of January, 2012.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Rick W. Olson", written over a horizontal line.

RICK W. OLSON
Deputy Prosecuting Attorney
WSB# 14810

Clerk
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____
DEPUTY

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

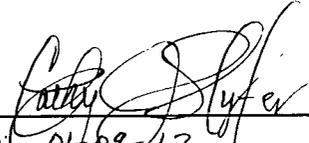
STATE OF WASHINGTON,
Respondent,
v.
HAYDEN THOMAS SIMS,
Appellant.

No. 42089-9-II
Clark County No. 10-8-00788-7
DECLARATION OF MAILING

STATE OF WASHINGTON)
) :ss
COUNTY OF CLARK)

On January 9, 2012, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the Court of Appeals – Division II and the attorney for the Appellant, containing the original and a copy of Brief of Respondent. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

TO: Peter B. Tiller, Attorney at Law, PO Box 58, Centralia, WA 98531



Date: 01-09-12, 20 12
Place: Vancouver, Washington



PROSECUTING ATTORNEY | ANTHONY F. GOLIK

JOHN P. FAIRGRIEVE
Chief Deputy

SCOTT JACKSON
Chief Criminal Deputy

E. BRONSON POTTER
Chief Civil Deputy

SHARI JENSEN
Administrator

January 6, 2012

Clerk of the Court of Appeals
Division II
950 Broadway, Suite 300
Tacoma, WA 98402

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CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

Re: STATE OF WASHINGTON vs. HAYDEN THOMAS SIMS
COURT OF APPEALS NO. 42089-9-II

Dear Sir/Madam:

Enclosed please find the original and copy of the BRIEF OF RESPONDENT and DECLARATION OF MAILING in regard to the above-entitled matter for filing in the Court of Appeals. Please feel free to contact me at 360-397-2261, ext. 4051 if you have any questions.

Thank you for your assistance in this matter.

Sincerely,

RICK W. OLSON
Deputy Prosecuting Attorney
WSBA 14810

RWO:cjs
Encl.

Cc to: PETER B. TILLER, Attorney at Law
PO Box 58
Centrailia WA 98531