IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. HAYDEN THOMAS SIMS, Appellant.	No. 42089-9 UNPUBLISHED OPINION

Bridgewater, J.P.T.[1] — Hayden Thomas Sims appeals his juvenile adjudications of attempted second degree child rape and two counts of second degree child molestation. Sims contends that the juvenile court abused its discretion in excluding evidence of the victim's reputation for untruthfulness under ER 608(a) and that the court erred in finding him guilty because of the lack of corroborating evidence. Finding no error, we affirm.

FACTS

When he was 16 years old, Sims often played video games with his friend B.G at B.G.'s house. B.G. had a 12-year-old sister, M.G. Early on the morning of December 24, 2009, Sims sent a series of suicidal text messages to M.G. In response to B.G.'s call, Clark County Deputy

[1] Judge C.C. Bridgewater is serving as a judge pro tempore of the Court of Appeals, Division II, pursuant to CAR 21(c).

Sheriff Rob Ternus went to Sims's house and spoke to him and then his parents. Sims told the deputy that his messages were in response to threatening texts B.G. had sent, warning him to stay away from M.G. When Deputy Ternus spoke to M.G., she said that she and Sims had kissed, but she did not reveal any sexual contact. A few months later, M.G. told a friend's mother, her own mother, and then law enforcement about sexual encounters between her and Sims.

The State charged Sims with two counts of second degree child rape and two counts of second degree child molestation. At his trial in juvenile court, Deputy Ternus testified about investigating Sims's suicidal text messages. M.G.'s friend Vanessa Shore then testified that she saw Sims at B.G.'s residence "a handful of times" and that Sims and M.G. were in the same room a couple of times. RP 61. Shore also testified that M.G. told her that she and Sims were dating, and when M.G. complained a few months later that she didn't feel safe and that Sims had been following her, Shore began to walk home from school with M.G. When Shore asked M.G. why she did not feel safe, M.G. reported that she and Sims had been "making out" and that he would not stop at her request. RP 68.

B.G. testified that after Shore told him about M.G. seeing Sims, he twice asked Sims to leave M.G. alone. B.G. added that when he texted that request early on Christmas Eve, Sims responded with the suicidal texts.

M.G.'s mother testified that she knew M.G. and Sims had exchanged texts. When she saw Sims in M.G.'s presence in her home, she told him that her daughter was 12 years old. She added that B.G. was upset about the relationship between his sister and Sims and that M.G. had called her, also upset, after she saw Sims on her school campus at Alki Middle School.

M.G. testified that she was alone with Sims once before the text incident and three times afterwards. They usually met late at night after sneaking out of their homes. The first time, they walked around the Alki school campus and kissed, and Sims touched her breast. The second time, Sims kissed her, touched her breast, and put his hands down her pants, over her underwear. He asked her for oral sex, but after he pressed against her and put his penis into her mouth, she withdrew. She went to his house the third time, and he kissed her, put his hands underneath her underwear and on her breasts, and again asked for oral sex with his penis exposed. She again refused. The last time, back at Alki, Sims put his fingers inside her vagina, asked for oral sex, and left in anger when she refused. M.G. testified that she later told the Alki principal, a school counselor, and her mother that Sims had been waiting for her outside after school. She also testified that she had no reason to lie about her allegations.

Detective Barry Folsom testified that when he interviewed Sims about M.G.'s allegations, Sims initially denied knowing M.G. or having any contact with her. Sims's parents testified that their son could not have sneaked out of the house because they would have heard the garage door open. They admitted, however, that their house also has a front door and a sliding door. Sims testified that he made the suicidal threats only to get his PlayStation back from B.G. He admitted not telling Detective Folsom the truth about knowing M.G., but he did not remember telling Deputy Ternus that he sent the texts after B.G. threatened to beat him up if he did not stop talking to M.G. He denied having sexual contact with M.G.

Heidi Moses, a school counselor at Alki, then took the stand. She testified that she had started working at the school in October 2010; the trial occurred on March 2, 2011. Moses said

she had talked to M.G. 7-10 times, sometimes in an office and sometimes in passing. When defense counsel asked whether she knew M.G.'s general reputation for truthfulness in the Alki school counseling staff community, the State objected, arguing that the defense had not presented an adequate foundation for admitting reputation evidence under ER 608. Moses then testified that Alki had a counseling staff of three and that she believed all three counselors had talked to M.G. When defense counsel asked whether M.G.'s reputation was good or bad, the trial court intervened and asked for argument on whether a community of three was adequate to give reputation rather than opinion evidence. The trial court eventually excluded the testimony, finding the community inadequate under ER 608.

The Alki principal testified that M.G. had never told him that Sims was following her and that he had never confronted Sims on the school grounds. He remembered hearing, however, that a high school boy had been bothering her. The State recalled Moses, who testified that M.G. was insistent that Sims had been on school property.

The trial court found Sims guilty of the lesser offense of attempted second degree child rape on count I, not guilty of count II, and guilty of the two molestation counts. The court entered findings of fact and conclusions of law in support of the adjudications and imposed a Special Sex Offender Disposition Alternative. Sims assigns error to the following findings of fact:

> 3. [M.G.] and Sims were engaged in a secretive relationship.
> . . . .
> 6. [M.G.] lacked a motive to falsely accuse Sims.
> 7. [M.G.'s] accusations were corroborated by the statements Mr. Sims made.
> . . . .
> 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.G.] and Sims.
> 12. [M.G.] was sneaking out of her mother's home at night to see Mr. Sims and

> he was sneaking out to see her.
> 13. [M.G.] and Sims engaged in mutual kissing on multiple occasions.
> 14. Sims touched [M.G.'s] breasts, which was sexual contact done for purposes of sexual gratification.
> 15. Sims and [M.G.] pressed against each other in a sexual way, which was sexual contact done for purposes of sexual gratification.
> 16. Sims made an attempt to penetrate [M.G.'s] vagina with his fingers. Sims made repeated requests of [M.G.] and started the process to engage in oral sex with her. [M.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.

Clerk's Papers at 56-58. Sims also assigns error to the court's conclusions that the State provided evidence proving beyond a reasonable doubt that he attempted to have sexual intercourse with M.G. and on two separate occasions had sexual contact with her.

DISCUSSION

I. Reputation Evidence

Sims asserts initially that the trial court abused its discretion by excluding the school counselor's testimony about M.G.'s reputation for untruthfulness in the school counseling community and that this error violated his constitutional right to present a complete defense. *See State v. Cheatam*, 150 Wn.2d 626, 648, 81 P.3d 830 (2003) (criminal defendant has right to offer testimony of his witnesses in order to present a defense). Sims now describes the community at issue as the school as a whole, but this is not the community he tried to establish at trial, so it is not the community we address here. *See State v. Hilton*, 164 Wn. App. 81, 100, 261 P.3d 684 (2011) (appellate courts will address evidentiary challenges only on theories that were raised at trial), *review denied*, 173 Wn.2d 1037 (2012), *cert. petition filed July 24, 2012*.

ER 608 provides that the credibility of a witness may be attacked by evidence of the

witness's reputation for untruthfulness in the community. *State v. Gregory*, 158 Wn.2d 759, 804, 147 P.3d 1201 (2006). To establish a valid community, the party seeking to admit the reputation evidence must show that the community is both neutral and general. *Gregory*, 158 Wn.2d at 804 (citing *State v. Land*, 121 Wn.2d 494, 500, 851 P.2d 678 (1993)). Factors relevant to this showing may 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." *Land*, 121 Wn.2d at 500. Whether a party has established the proper foundation for reputation testimony is within the trial court's discretion. *Gregory*, 158 Wn.2d at 804-05. A trial court abuses its discretion when it acts in a manner that is manifestly unreasonable or based on untenable grounds or reasons. *Land*, 121 Wn.2d at 500.

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 testimony. *Land*, 121 Wn.2d at 499. A witness's reputation is deemed reliable where the witness is well known in a substantial community:

> [T]oday it is generally agreed that proof may be made not only of the reputation of the witness where he lives, but also of his repute, as long as it is "general" and established, in any substantial community of people among whom he is well known, such as the group with whom he works, does business or goes to school.

Land, 121 Wn.2d at 499 (quoting 1 Charles T. McCormick, *Evidence* § 43 (John W. Strong ed., 4th ed. 1992)).

In *Gregory*, the Supreme Court concluded that a community consisting of the victim's ex-boyfriend and sister was too small to constitute a general community for the purposes of ER 608. 158 Wn.2d at 804-05. Division Three found that the Boy Scouts constituted a community

sufficient to allow a witness to testify about the victim's reputation for untruthfulness within that organization, but the court provided no facts about the size of the community or the witness's contact with the victim. *State v. Carol M.D.*, 89 Wn. App. 77, 95, 948 P.2d 837 (1997); *see also* 5A Karl B. Tegland, Washington Practice: Evidence, §608.5 n.6 at 428-29 (5th ed. 2007) (court in *Carol M.D.* provided few factual details; generalization to draw from its holding is less than obvious).

Here, the community at issue had three members. Sims provided no offer of proof concerning the school counseling community's contact with M.G. beyond Moses's testimony that she had spoken to M.G. 7-10 times, sometimes only in passing, and that she thought the other two counselors had spoken with M.G. as well. The trial court did not abuse its discretion in finding that the school counseling community was not the type of general community that supports the introduction of reputation evidence under ER 608. *See Guijosa v. Wal-Mart Stores, Inc.*, 101 Wn. App. 777, 787, 6 P.3d 583 (2000) (trial court did not act in manner that was manifestly unreasonable or base its decision on untenable grounds or reasons in finding that criminal justice community was not sufficiently general and neutral to warrant admitting reputation testimony), *affirmed on other grounds,* 144 Wn.2d 907, 32 P.3d 250 (2001).

II. Sufficiency of the Evidence

Sims also argues that the evidence was insufficient to support his adjudications because they are based solely on M.G.'s often conflicting testimony.

When reviewing a challenge to evidentiary sufficiency, we view the evidence in the light most favorable to the State to determine whether a rational trier of fact could find the elements of

the offense beyond a reasonable doubt. *State v. Gentry*, 125 Wn.2d 570, 596-97, 888 P.2d 1105 (1995). Review of juvenile court adjudications requires us to determine whether substantial evidence supports the trial court's findings of fact and whether the findings support the conclusions of law. *State v. Alvarez*, 105 Wn. App. 215, 220, 19 P.3d 485 (2001).

We review conclusions of law de novo. *State v. C.D.C.*, 145 Wn. App. 621, 627, 186 P.3d 1166 (2008). A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004), *abrogated in part on other grounds, Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Circumstantial and direct evidence are equally reliable. *State v. Varga*, 151 Wn.2d 179, 201, 86 P.3d 139 (2004).

Sims challenges several of the trial court's findings of fact. He does not discuss the evidence relevant to these findings, arguing instead that they are faulty because they are based solely on M.G.'s inconsistent and uncorroborated testimony.

The trial court acknowledged that as a young teenager, M.G. was not the most accurate relater of details, but it found her testimony credible and corroborated by Sims's testimony. During his interview with Deputy Ternus, Sims confirmed testimony from both M.G. and her brother that he had texted suicidal threats because B.G. told him to stay away from M.G. The trial court also found the amount of corroboration consistent with the type of secretive relationship M.G. described.

Sims assigns error to the finding that he and M.G. were engaged in a secretive relationship. The existence of this relationship is supported not only by M.G.'s testimony but also by testimony from Shore that M.G. told her the two were going out and by B.G.'s concern about their relationship. Sims's admission to the deputy that he responded with suicidal text messages when B.G. told him to stay away from M.G. also supports the court's finding.

Sims next assigns error to the finding that M.G. lacked a motive to falsely accuse Sims. He does not explain what motive she might have had, and this finding is supported by her testimony that she had no reason not to tell the truth.

As for the finding that the dispute that surfaced on December 24, 2009 was about the relationship between M.G. and Sims in addition to the PlayStation, the testimony already described fully supports that finding. The trial court found M.G.'s testimony that she and Sims sneaked out of their homes at night to see each other fully plausible. The finding regarding M.G. and Sims kissing is supported by M.G.'s testimony and by her statements to Deputy Ternus, and her descriptions of the sexual contact that ensued are supported by her statements to Shore that she and Sims were making out and that he would not stop when she asked. The fact that there is no corroboration of the details of each incident is not determinative; corroborating evidence is not necessary for the offenses at issue. RCW 9A.44.020(1).

M.G.'s testimony supports the elements of attempted second degree child rape as it describes 16-year-old Sims's efforts to have sexual intercourse with M.G. when she was 12, and her testimony about the two additional incidents at Alki supports the elements of second degree child molestation, as it describes sexual contact made for the purpose of sexual gratification.

RCW 9A.44.076, .086. We reject Sims's challenges to the trial court's findings of fact and conclusions of law and hold that the State produced sufficient evidence to support the adjudications.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Bridgewater, J.P.T.

We concur:

Hunt, P.J.

Van Deren, J.