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CLERK OF COURT

34809-8-II  
No. 34809-9-II

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

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STATE OF WASHINGTON,

Respondent,

v.

THOMAS MANAOIS,

Appellant.

---

ON APPEAL FROM THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON,  
PIERCE COUNTY,  
JUVENILE DIVISION

---

The Honorable Thomas J. Felnagle, Judge

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APPELLANT'S OPENING BRIEF

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P.M. 12-1-06

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A. ASSIGNMENT OF ERROR

Appellant's equal protection and due process rights were violated.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Does the first-degree child rape statute violate equal protection by precluding the defense of consent even though the defense is available for similar crimes?

2. By excluding consent as a defense to first-degree rape of a child, the Legislature effectively created the mandatory presumption that, with proof of an age difference of at least 24 months between the victim and "perpetrator," there can be no valid consent. Is this mandatory presumption improper and were appellant's due process rights violated where the presumption requires assuming a fact which does not necessarily flow from the proven fact of the age difference?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant T.M., a juvenile, was charged by information with first-degree rape of a child. CP 1-3; RCW 9A.44.073.

Pretrial and trial proceedings were held before the Honorable Thomas Felnagle on March 7, 8, 9 and 14, 2006, and T.M. was found guilty as charged.<sup>1</sup> On April 12, 2006, Judge Felnagle ordered T.M. to serve a SSODA sentence. CP 4-9; SRP 32-35. T.M. appealed, and this

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<sup>1</sup>The six volumes of the verbatim report of proceedings will be referred to as follows:  
March 7, 2006, as "1RP;"  
March 8, 2006, as "2RP;"  
March 9, 2006, as "3RP;"  
March 14, 2006, as "4RP;"  
March 21, 2006, as "5RP;"  
April 12, 2006, as "SRP."

pleading follows. See CP 14.

2. Overview of facts relating to incident

The charges in this case stemmed from an incident which the victim, 11-year old J.B., spent the night at the home of his neighbor, T.M., along with J.B.'s brother, S. 2RP 122-68, 3RP 1-74. J.B. testified that, after the light had been turned off and the boys went to bed, T.M. told J.B. that he could play with the "Game boy" if J.B. did "something." 2RP 160-79. According to J.B., T.M. then climbed into bed next to him, asked J.B. to take his clothes off, took his own clothes off, kissed J.B. on the lips and licked J.B.'s nipples and testicles, after which J.B. licked T.M.'s nipples and testicles. 2RP 181-200, 3RP 1-74. J.B. testified that he did not know why he took his clothes off and that, when he first said he did not want to take off their clothes, T.M. said it what they would be doing would be "cool." 2RP 177-84. After T.M. kissed him, J.B. said he wanted to stop because it was "gay." 2RP 182-83. T.M. then said "[n]o, it's cool." 2RP 183. J.B. also said that, when he said to stop, T.M. did not take "no" for an answer and just kept saying it was "cool," and if J.B. did "the cool thing" with him, J.B. could then play with T.M.'s Game boy. 2RP 186.

J.B. said neither his penis nor T.M.'s penis was "hard" during the brief encounter and nothing came out of T.M.'s penis at any time. 2RP 191. J.B. later reported to an interviewer that, at some point, T.M. said he would put his "balls" up J.B.'s "butt" if J.B. did not do as T.M. asked. 3RP 110-15.

After hearing all of the testimony but before hearing closing arguments, the juvenile court judge stated some concerns about the

possibility of a “materially unfair result,” saying:

it has to do with a couple of factors. One is the way the Legislature has ratcheted up these sexual offenses so that they stay with you for the rest of your life and really make a huge impact on not just an adult, but even more so a child. And the second is the fact that the Court is so limited in its ability to structure things in sentencing because of the inflexibility surrounding sexual abuse cases.

And what I am concerned about is this: I am concerned about a scenario where somebody, if he were to be convicted, gets the label of Child Rape in the First Degree when what we’ve really got is a situation of sexual experimentation. And I am not at all suggesting that’s a scenario in this case. I am just - - you folks know better about this than I do, but if we have a good kid that’s doing some sexual experimentation, they ought not to be labeled, for the most part, with a Child Rape in the First Degree.

3RP 193-94. The court urged the parties to “continue dialogue” to try to resolve the case “in a way that’s more fair than an all-or-nothing outcome.” 3RP 194.

No resolution was made, and the parties then met for closing arguments. 4RP 4-5. In finding T.M. guilty, the court stated that what the prosecution showed was not that T.M. was a “sex predator” but that “this is more consistent with what one would expect from youths of this age who don’t particularly have any sexual offending in their background and that this is a question of sexual experimentation.” 4RP 35. The judge found that the fact that J.B. did not have any behavior issues or act out after the incident was not “inconsistent” with the alleged offense because this was not “some predatory act, some lack of consensual act, some event that inflicted immediate trauma.” 4RP 38. Instead, the court said, the incident was, in the court’s “assessment,” “sexual experimentation.” 4RP 38. The court found it would not be “unusual” for there “to be a certain degree of ambivalence on both boys’ parts about what happened and

certainly a certain degree of embarrassment about what happened.” 4RP 39.

The court concluded that the evidence and even J.B.’s description of it was “completely consistent with sexual experimentation and not predatory behavior on the part of T[M].” 4RP 42. The court also noted that J.B. had agreed “to go along with it, albeit reluctantly.” 4RP 42. The judge stated that he felt compelled to find T.M. guilty but did so “with some reluctance,” because

this result has the potential, given the fact that I think this is not predatory behavior and the label is going to not necessarily match up with the severity of the behavior, given the ages and the events that took place[.]

4RP 44.

D. ARGUMENT

APPELLANT’S EQUAL PROTECTION AND DUE PROCESS RIGHTS WERE VIOLATED

Both the state and federal constitutions guarantee the accused the right to equal protection. See In re Ramsey, 102 Wn. App. 567, 573, 9 P.3d 231 (2000); 14<sup>th</sup> Amend., Art. I, § 12. As a result, persons similarly situated with respect to the legitimate purposes of the law must receive like treatment. In re Bratz, 101 Wn. App. 662, 668, 5 P.3d 755 (2000). In this case, T.M.’s rights to equal protection were violated by the statute under which he was convicted, because it does not permit a defense of consent. Further, because the statute under which he was convicted effectively creates an improper mandatory presumption, his due process rights were also violated.

In general, consent is a defense to rape. See State v. Camara, 113

Wn.2d 631, 636-37, 781 P.2d 483 (1989). Under RCW 9A.44.010(7),

“consent” exists when there is proof:

that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact.

Under RCW 9A.44.073, however, consent is not a defense to the crime of first-degree rape of a child. Instead, a child can be found guilty of a sex crime and branded a sex offender for the rest of his life even if the sexual activity was entirely consensual. This is because there is, effectively, a mandatory presumption created by the Legislature that no victim can consent to sexual contact of any kind when there is 24 months or more difference between their age and that of the “perpetrator.” Put another way, by requiring only an age difference and no proof of lack of consent or use of force, the Legislature created the presumption that with proof of fact A (an age difference of 24 months or more), proof of fact B is presumed (lack of consent or inability to consent).

It is appellant’s position that RCW 9A.44.073 does not withstand rational basis scrutiny, and violates due process. While rational basis scrutiny is the most lenient, it still requires proof of a “rational relationship” between the legitimate purposes of the law and the distinctions made therein before a statute can be found in conformance with equal protection principles. See, State v. Shawn P., 122 Wn.2d 533, 561, 855 P.2d 1220 (1993).

Here, the legitimate purpose of the law is to protect children who are “too immature to rationally or legally consent.” State v. Clemens, 78 Wn. App. 458, 467, 898 P.2d 324 (1995). In the past, Division Three

found that there was a “rational relationship” between that purpose and a law which did not provide the defense of consent for a sex crime where there was a four-year difference between the age of the victim and that of the perpetrator. State v. Heming, 121 Wn. App. 609, 90 P.3d 62 (2004), review denied, 111 P.3d 1190 (2005). As the Court noted, “older, more mature persons are in a position to prey on the relative immaturity of the child, unlike other persons within the child’s general age group who are similarly sexually immature.” 121 Wn. App. at 612. The Court concluded that the classification “rationally draws a distinction between older, *potentially predatory* persons and younger, less mature persons in the victim’s age group,” and the distinction was “not wholly unrelated to the legitimate interest of protecting children from sexually predatory adults.” Id. (Emphasis added).

Here, rather than the significant difference of four years, the statute at issue requires only two years of difference, so that the perpetrator could be very close in age to the victim. This is not a situation where there is a far “older, more mature” person capable of preying on the child’s immaturity; this is a situation where a child only a few years older asked another child to sexually experiment. The “rational relationship” found in Heming does not retain currency where, as here, the children are so close in age.

Further, the statute’s effective “mandatory presumption” violates due process. Even a permissive inference is unconstitutional if it cannot be said with substantial assurance that the presumed fact flows “more likely than not” from the proved fact on which it is made to depend. See

State v. Randhawa, 133 Wn.2d 67, 76, 941 P.2d 661 (1997). Here, the presumption is that a victim has no capacity to consent does *not* flow more likely than not from proof of an age difference. Instead, the determination of whether there is consent is factual, made not only by considering the relevant testimony and the victim's demeanor on the stand but also "IQ, mental age, ability to understand fundamental common non-sexual concepts, and mental faculties generally, as well as the victim's ability to translate information acquired in one situation to a new situation." See, State v. Ortega-Martinez, 124 Wn.2d 702, 714, 881 P.2d 231 (1994) (answering the question in the context of whether a victim was so mentally incapacitated she could not consent). .

Thus, age alone does not prove an inability to consent. Other factors must be examined in order to make that determination. The statute, precluding T.M. from raising the defense of consent and requiring the court to convict a child only two years older for sexual experimenting in which they both engaged violated equal protection and due process, and this Court should so hold and should reverse.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 30<sup>th</sup> day of November, 2006.  
Respectfully submitted,



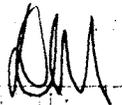
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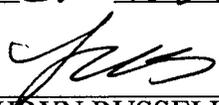
CERTIFICATE OF SERVICE BY MAIL

STATE OF WASHINGTON  
BY 

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office,  
946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;  
to Mr. Thomas Manaois, 818 - 131<sup>st</sup> St. Ct. E., Tacoma, WA.  
98445.

DATED this 30<sup>th</sup> day of November, 2006.



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