

NO. 34809-8-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

THOMAS J. MANAOIS, APPELLANT

BY _____
STATE OF WASHINGTON
07 FEB 2011 PM 1:55
COURT OF APPEALS

Appeal from the Superior Court of Pierce County
The Honorable Thomas J. Felnagle

No. 05-8-02060-9

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to show that his equal protection rights were violated by the child rape statute where the legislative classification therein furthers the legitimate state interest of protecting children?
2. Were defendant's due process rights violated when the State did not prove the victim's lack of consent beyond a reasonable doubt where lack of consent was not an element of the crime charged?

B. STATEMENT OF THE CASE.

1. Procedure

On October 10, 2005, the State charged THOMAS J. MANAOIS, defendant, with first degree child rape in Pierce County Juvenile Court. CP 1. On May 8, 2006, the trial court entered its findings of fact and conclusions of law, finding defendant guilty as charged. CP 15-19. The trial court sentenced defendant to the special sex offender disposition alternative (SSODA). CP 4.

This timely appeal follows.

2. Facts

During the summer of 2005, the victim, J.B., and his older brother, S.B., spent one night at defendant's home. CP 17. J.B. was under 12 years of age and defendant was more than 24 months older than J.B. CP 16. That night, J.B., S.B., and defendant went to bed in a bunk bed. CP 17. J.B. and defendant remained awake after S.B. had fallen asleep. CP 17.

Defendant told J.B. he could play with his Gameboy if J.B. did what defendant wanted J.B. to do. CP 17. Defendant then kissed J.B. on the lips with his tongue. CP 17. J.B. told him to stop because it was "gay." CP 17. Defendant, saying it was cool, licked J.B.'s nipple and put his mouth on J.B.'s genitals while J.B.'s clothes were off. CP 17. J.B. then did the same to defendant. CP 17.

The trial court found defendant guilty as charged. CP 18.

C. ARGUMENT.

1. DEFENDANT'S EQUAL PROTECTION RIGHTS WERE NOT VIOLATED BY THE CHILD RAPE STATUTE WHICH FURTHERS THE LEGITIMATE STATE INTEREST OF PROTECTING CHILDREN.

The Fourteenth Amendment to the U.S. Constitution provides that no state shall make or enforce any law which denies "to any person within its jurisdiction the equal protection of the laws." Similarly, article I, § 12 of the Washington Constitution requires that "[n]o law shall be passed

granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.”

These clauses require that persons similarly situated with respect to the legitimate purpose of the law receive like treatment. State v. Schaaf, 109 Wn.2d 1, 17, 743 P.2d 240 (1987); State v. Garcia-Martinez, 88 Wn. App. 322, 329, 944 P.2d 1104 (1997)(citing State v. Shawn P., 122 Wn.2d 553, 559-60, 859 P.2d 1220 (1993)). However, equal protection does not require “that all persons be dealt with identically[.]” In re Det. of Thorell, 149 Wn.2d 724, 745, 72 P.3d 708 (2003). Rather, it requires that a classification “have some relevance to the purpose for which the classification is made.” Id. Thus, equal protection demands only “similar treatment, not identical impact, on those similarly situated.” In re Binding Declaratory Ruling of Dep't of Motor Vehicles, 87 Wn.2d 686, 695, 555 P.2d 1361 (1976). Otherwise, it would “paralyze the legislature in its attempt to correct social and economic wrongs.” Id.

To enforce equal protection rights, courts must first determine which of three levels of scrutiny is appropriate. Shawn P., 122 Wn.2d at 560. Strict scrutiny applies if a state action threatens a “suspect class” or “fundamental right.” Garcia-Martinez, 88 Wn. App. at 326. Intermediate scrutiny is appropriate in the limited circumstances where the state action affects “important rights” or “semi-suspect classifications.” Id. Otherwise, courts apply “rational basis” review. Id.

Defendant concedes that rational basis is the appropriate standard of review in the present case. BOA at 5. This analysis involves minimal scrutiny. State v. Heming, 121 Wn. App. 609, 90 P.3d 62 (2004), review denied, 153 Wn.2d 1009, 111 P.3d 1190 (2005).

“Under this test, a legislative classification will be upheld unless it rests on grounds **wholly irrelevant** to the achievement of legitimate state objectives.” State v. Thorne, 129 Wn.2d 736, 771, 921 P.2d 514 (1996). This test is “the most relaxed and tolerant form of judicial scrutiny under the equal protection clause.” State v. Shawn P., 122 Wn.2d 553, 561, 859 P.2d 1220 (1993). “Even ‘rational speculation unsupported by evidence or empirical data’ provides a basis for upholding the classification under this level of review.” In re Det. of Thorell, 149 Wn.2d 724, 749, 72 P.3d 708 (2003) (*quoting* Heller v. Doe, 509 U.S. 312, 320, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993)), *cert. denied*, 541 U.S. 990, 158 L. Ed. 2d 496, 124 S. Ct. 2015, No. 03-7728, 2004 WL 827768 (2004). **The party challenging the classification bears the burden of proving it is “purely arbitrary.”** Thorne, 129 Wn.2d at 771.

Id. at 611-12 [emphasis added].

Washington courts emphasize that rational basis review is “highly deferential.” Thorell, 149 Wn.2d at 749. A state action is sustained if the reviewing court can find a “legitimate governmental objective” and a “rational means of achieving it.” Id. Classifications are upheld unless they rest on grounds “wholly irrelevant to the achievement of legitimate state objectives.” Id. (Quoting State v. Thorne, 129 Wn.2d 736, 771, 921 P.2d 514 (1996)). In fact, a classification meets the rational basis standard where “there is any reasonably conceivable state of facts that could

provide a rational basis for the classification.” F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 313, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993). Reviewing courts must disregard “the existence of alternative methods of furthering the objective[.]” Thorell, 149 Wn.2d at 749 (citing Heller v. Doe, 509 U.S. 312, 330, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993)). Even “speculation unsupported by evidence or empirical data” will be upheld, so long as that speculation is rational. Id. (quoting Heller, 509 U.S. at 320). Finally, the party challenging the classification bears the burden of showing that it is purely arbitrary. Id.

Here, the child rape statute is rationally related to a legitimate state objective. The Heming court stated:

The obvious objective of the child rape statutes 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). **This is indisputably a legitimate state interest.**

Heming at 612 [emphasis added]. Heming is controlling authority.

Defendant, without analysis, concludes that where the age difference is “only a few years” versus “the significant difference of four years” (as in Heming), Heming “does not retain currency.” BOA at 6. This argument is without merit because unless defendant can show the distinction is purely arbitrary, he has failed to meet his burden. See Thorne, 129 Wn.2d at 771. In Heming, defendant was charged with third degree child rape under RCW 94A.44.079(1), which criminalizes sexual

intercourse with another who is at least 14 year old, but less than 16, and the perpetrator is at least 48 months older than the victim. Heming at 610.

As the Heming court noted:

Other child rape provisions similarly limit criminal liability to persons who are more than a specific number of months older than the victim. See RCW 9A.44.073 (defendant more than 24 months older than victim who is younger than 12 years old); RCW 9A.44.076 (defendant more than 36 months older than victim who is 12 to 14 years old).

Heming at 611. Thus, it is seen that the younger the victim child, the less the age difference required between victim and perpetrator to constitute a crime. These three classifications illustrate the objective on the part of the legislature to provide greater protection for younger children than for more mature, older children. This cannot be construed as a purely arbitrary action, wholly irrelevant to achieve the state's objective. Defendant's claim fails.

2. DEFENDANT WAS NOT DENIED DUE PROCESS BASED ON A "MANDATORY PRESUMPTION" ON THE ISSUE OF CONSENT BECAUSE LACK OF CONSENT WAS NOT AN ELEMENT OF THE CRIME CHARGED AND THEREFORE NEED NOT BE PROVED.

Defendant argues that he was denied due process because the trier of fact was bound by a mandatory presumption that the victim did not have capacity to consent based solely on proof of the difference in age between defendant and his victim. BOA at 6-7. Defendant relies on State v. Randhawa, 133 Wn.2d 67, 941 P.2d 661 (1997), a vehicular homicide

case where the trial court instructed the jury that it could infer recklessness, an **element** of the crime, from a person driving in excess of the speed limit. *Id.* at 75. The Randhawa court held that if the effect of the permissive inference instruction is to relieve the State of its burden to prove each and every element of the crime beyond a reasonable doubt, the instruction violates due process. *Id.* at 76 (citation omitted).

However, in the present case, lack of consent is **not an element** of the crime. RCW 9A.44.073. Thus, not requiring the State to prove that J.B. lacked the capacity to consent to the sexual act, did not relieve the State of its burden to prove each and every element beyond a reasonable doubt. Therefore, defendant's due process rights were not violated.

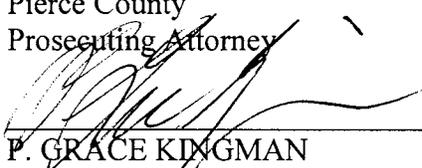
Further, even though lack of consent is not an element of the crime, defendant argues that it is a factual determination that should be made by the trier of fact. BOA at 7. Heming also made the argument that whether a child has consented to a sexual act should be a factual determination. The Heming court rejected this contention. Heming, 121 Wn. App. at 613. In order to assess the victim's capacity to consent, the trier of fact would have to look at many factors. *Id.* However, "these factors, which require careful examination *after the fact*, would be impractical as a standard to guide a person's behavior. The legislature thus rationally chose to identify a precise age limit that makes it easy to predict criminal liability." *Id.* [italics in original]. Defendant's due process claim must also fail.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this court to affirm defendant's conviction.

DATED: February 8, 2007

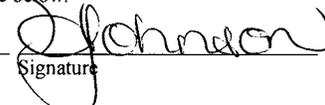
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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