

NO. 90337-9

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SEAN O'DELL,

Appellant.

Received
Washington State Supreme Court

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Ronald R. Carpenter
Clerk

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

The Honorable Vicki I. Churchill, Judge
Superior Court Cause No. 12-1-00111-2

SUPPLEMENTAL BRIEF OF RESPONDENT

GREGORY M. BANKS
ISLAND COUNTY PROSECUTING ATTORNEY
WSBA # 22926
Law & Justice Center
P.O. Box 5000
Coupeville, WA 98239
(360) 679-7363

By: David E. Carman
Deputy Prosecuting Attorney
WSBA # 39456
Attorney for Respondent

TABLE OF CONTENTS

I. STATEMENT OF THE ISSUES1

 A. Whether the appellant’s conviction should be affirmed when there was no evidentiary basis for the appellant’s requested affirmative defense and when the victim made no declarations as to her age.1

II. ARGUMENT1

 A. The appellant’s conviction should be affirmed when no evidence was offered that he believed the victim was at least 14 years old and when the victim’s alleged statement to the appellant was not a declaration as to age.1

 1. The appellant’s argument regarding the victim’s alleged statement is not necessary for determination of this case when he did not believe A.J.N. was at least 14 years old. 1

 2. A.J.N.’s alleged statement was not a declaration as to age that could support the affirmative defense.4

 B. The appellant was not entitled to an exceptional sentence based solely upon his age.7

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT DECISIONS

Graham v. Florida, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed. 2d 825 (2010) 13
Miller v. Alabama, ___ U.S. ___, 132 S.Ct. 2455, 183 L.Ed 2d 407 (2012) 12
Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed. 2d 1 (2005) 13

WASHINGTON SUPREME COURT DECISIONS

Ajax v. Gregory, 177 Wash. 465, 32 P.2d 560 (1934)..... 1
Bird v. Best Plumbing Group, LLC, 175 Wn.2d 756, 287 P.3d 551 (2012) 1
Johnson v. Morris, 87 Wn.2d 922, 557 P.2d 1299 (1976)..... 1
State v. Benn, 120 Wn.2d 631, 845 P.2d 289 (1993)..... 7
State v. Burke, 163 Wn.2d 204, 181 P.3d 1 (2008)..... 5
State v. Gonzalez, 168 Wn.2d 256, 226 P.3d 131 (2010) 5
State v. Ha'mim, 132 Wn.2d 834, 940 P.2d 633 (1997)..... 8, 9, 10
State v. Law, 154 Wn.2d 85, 110 P.3d 717 (2005) 8, 9
State v. Olsen, 180 Wn.2d 468, 325 P.3d 187 (2014)..... 8
State v. Shove, 113 Wn.2d 83, 776 P.2d 132 (1989)..... 7, 8
State v. Witherspoon, 180 Wn.2d 875, 329 P.3d 888 (2014)..... 11

WASHINGTON COURT OF APPEALS DECISIONS

State v. Bennett, 36 Wn.App. 176, 672 P.2d 772 (Div. 2, 1983) 4, 5, 6, 7
State v. Chase, 134 Wn.App. 792, 142 P.3d 630 (Div. 1, 2006) 2
State v. Dodd, 53 Wn.App. 178, 765 P.2d 1337 (Div. 1, 1989) 6
State v. Hernandez, 53 Wn.App. 702, 770 P.2d 642 (Div. 3, 1989)..... 4
State v. May, 100 Wn.App. 478, 997 P.2d 956 (2000) 2
State v. Scott, 72 Wn.App. 207, 866 P.2d 1258 (1993), *aff'd*, *State v. Ritchie*, 126 Wn.2d 388, 894 P.2d 1308 (1995)..... 10
State v. Shuck, 34 Wn.App. 456, 661 P.2d 1020 (Div. 1, 1983)..... 6

RULES AND STATUTES

LAWS OF 2005, ch. 437..... 12
LAWS OF 2014, ch. 130..... 12
RCW 9.94A.010..... 7
RCW 9.94A.030..... 9
RCW 9.94A.340..... 9
RCW 9.94A.505..... 8
RCW 9.94A.535..... 8, 9, 10
RCW 9A.44.030..... passim

I. STATEMENT OF THE ISSUES

- A. Whether the appellant's conviction should be affirmed when there was no evidentiary basis for the appellant's requested affirmative defense and when the victim made no declarations as to her age.
- B. Whether the appellant's sentence should be affirmed when his age, alone, was not a substantial or compelling basis for a mitigated sentence.

II. ARGUMENT

- A. **The appellant's conviction should be affirmed when no evidence was offered that he believed the victim was at least 14 years old and when the victim's alleged statement to the appellant was not a declaration as to age.**

- 1. The appellant's argument regarding the victim's alleged statement is not necessary for determination of this case when he did not believe A.J.N. was at least 14 years old.*

The appellant's conviction should be affirmed without consideration of the victim's alleged statements because the appellant did not reasonably believe A.J.N. was at least 14 years old. An appellant court will decide only those questions that are necessary for a determination of the case presented for consideration, and will not render decisions in advance of such necessity. *Bird v. Best Plumbing Group, LLC*, 175 Wn.2d 756, 775, 287 P.3d 551 (2012) (citing *Johnson v. Morris*, 87 Wn.2d 922, 931, 557 P.2d 1299 (1976); *Ajax v. Gregory*, 177 Wash. 465, 475, 32 P.2d 560 (1934)). The appellant's challenge to his conviction rests entirely on his claim that the victim's alleged statement constituted a "declaration as

to age” as required by RCW 9A.44.030(2). However, the trial court’s refusal to provide an affirmative defense jury instruction in this case was not an abuse of discretion, regardless of the nature of the victim’s alleged statement, because the appellant also provided no evidence that he actually believed A.J.N. was at least 14 years old.

A defendant is entitled to have the jury instructed on his theory of the case where it is supported by the law and evidence. *State v. May*, 100 Wn.App. 478, 482, 997 P.2d 956 (2000). However, if any element of a defense is missing, the defense should not be presented to the jury in the instructions. *State v. Chase*, 134 Wn.App. 792, 803, 142 P.3d 630 (Div. 1, 2006). An affirmative defense does allow a defendant charged with Rape of a Child in the Second Degree to prove by a preponderance of the evidence that at the time of the offense he reasonably believed the alleged victim to be at least fourteen years old or less than thirty-six months younger than he. RCW 9A.44.030(3)(b). The trial court did not abuse its discretion by refusing to provide an instruction on that affirmative defense in this case because the appellant did not believe A.J.N. was at least fourteen.

A.J.N. testified that she told the appellant she was 12 years old. 1/16/13 RP 256-58, 304, 351. In his turn, the appellant testified and claimed he did not learn A.J.N.’s age during the time prior to the rape.

1/18/13 RP 549. According to the appellant, A.J.N. did not tell him her age, and he was “shocked, surprised, and worried” when he learned the next day that she was twelve. 1/18/13 RP 542, 549-50. He didn’t ask her age, she didn’t tell, and he never really considered it. 1/18/13 RP 571-72. In fact, the appellant admitted he never took an opportunity to make sure the age gap between himself and A.J.N. was not too large. 1/18/13 RP 578. Most damningly, the appellant specifically testified that he did not consider A.J.N.’s age and he did not think she was fourteen. 1/18/13 RP 574.

The statutory affirmative defense to Rape of a Child is only available where evidence shows the defendant reasonably believed the victim was of legal age. In this case, that would require evidence that the appellant believed A.J.N. was at least fourteen.¹ The appellant testified he did not, in fact, believe A.J.N. was fourteen. Therefore, regardless of the nature of the victim’s alleged statement, the trial court did not abuse its discretion in finding no evidentiary support for the affirmative defense, and the appellant’s conviction should be affirmed.

¹ Because appellant was 18 at the time of the rape, any age within 36 months of his would be older than 14, leaving that as the youngest victim’s age that would allow the affirmative defense.

2. *A.J.N.'s alleged statement was not a declaration as to age that could support the affirmative defense.*

Even ignoring the complete lack of evidence that the appellant believed A.J.N. was of legal age, the affirmative defense jury instruction was not appropriate because there was also no evidence that A.J.N. explicitly misrepresented her age. It is no defense to a charge of Rape of a Child that the perpetrator did not know the victim's age or that the perpetrator believed the victim to be older. RCW 9A.44.030(2). The affirmative defense requires not only that the perpetrator reasonably believed the alleged victim to be of legal age, but also that the perpetrator's belief was *based upon declarations as to age by the alleged victim*. RCW 9A.44.030(2) (emphasis added). That affirmative defense is allowed only under closely defined and limited circumstances. *State v. Hernandez*, 53 Wn.App. 702, 707 n.1, 770 P.2d 642 (Div. 3, 1989). In particular, the defense requires an explicit assertion from the victim; generalized, nonassertive manifestations and conduct, alone, are not sufficient to support the affirmative defense. *State v. Bennett*, 36 Wn.App. 176, 181-82, 672 P.2d 772 (Div. 2, 1983). The trial court in this case appropriately did not allow the affirmative defense because A.J.N. made no declarations as to her age that could have caused the appellant to reasonably believe she was at least 14.

A.J.N. testified that she told the appellant she was twelve years old. 1/16/13 RP 256-57. The only contrary evidence was the appellant's testimony that he commented that A.J.N. seemed too young to be drinking and that she responded "I get that a lot." 1/18/13 RP 542. As the Court of Appeals correctly noted, the appellant's own remarks, because they were not made by the victim, are not relevant to the statutory defense. Opinion at 2. Thus, A.J.N.'s brief quip is the only statement that could possibly support the affirmative defense. However, A.J.N.'s alleged statement was not a declaration as to age.

The term "declaration", as used in the statutory defense, is not specifically defined. See RCW 9A.44.030. When a statutory term is undefined, the words of a statute are given their ordinary meaning and the court may look to a dictionary for such meaning. *State v. Gonzalez*, 168 Wn.2d 256, 263, 226 P.3d 131 (2010). A declaration is an act of declaring, proclaiming or publicly announcing, an explicit assertion, or a formal proclamation. *Bennett*, 36 Wn.App. at 182 n.3 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY). Trial and appellant courts have consistently, and correctly, rejected the affirmative defense without evidence the alleged victim actively and affirmatively misrepresented her age. *Compare State v. Burke*, 163 Wn.2d 204, 208, 181 P.3d 1 (2008) (defendant testified the victim told him she was 16) and *State v. Dodd*, 53

Wn.App. 178, 179, 765 P.2d 1337 (Div. 1, 1989) (defendant reasonably believed misrepresentations by victim that she was between 14 and 16 years old) *with State v. Shuck*, 34 Wn.App. 456, 461, 661 P.2d 1020 (Div. 1, 1983) (affirmative defense not available without declarations to the effect that victim was of legal age) *and Bennett*, 36 Wn.App. at 181 (no affirmative defense when the defendant testified neither victim told him how old she was).

Like in *Shuck* and *Bennett*, the trial court correctly excluded the affirmative defense in this case because A.J.N.'s alleged statement provided no information about her age. A.J.N.'s alleged response, "I get that a lot," declared, proclaimed, announced, and asserted nothing. It certainly did not provide any specific information from which the appellant could reasonably believe A.J.N. was any particular age, let alone two years older than her actual age. The appellant's own testimony confirmed the equivocal nature of A.J.N.'s alleged statement. 1/18/13 RP 559 (he did not learn her age the day of the rape), 571-73 (he learned A.J.N.'s age from her mother during a phone call the day after the rape and not from any statements A.J.N. made).

It is no defense to a charge of Rape of a Child that the perpetrator did not know the victim's age. RCW 9A.44.030(2). While a statutory defense is available where a defendant reasonably believed an active,

affirmative misrepresentation by an alleged victim, the defense specifically requires that reasonable belief to be based upon declarations as to age by the victim. RCW 9A.44.030(2). Even when viewed in the light most favorable to the appellant, A.J.N. made no declarations as to age in this case. Instead, the appellant is attempting to grasp the thin reed of one short, equivocal statement to bootstrap nonverbal conduct, general appearance, and demeanor into the statutory defense. See 1/18/13 RP 606. However, generalized, nonassertive manifestations of appearance, behavior, and demeanor, alone cannot support the affirmative defense. *Bennett*, 36 Wn.App. at 181-82. Because A.J.N. made no declaration as to age in this case, the trial court did not abuse its discretion in refusing to instruct the jury on the statutory affirmative defense.

B. The appellant was not entitled to an exceptional sentence based solely upon his age.

The legislature has plenary authority over sentencing. *See State v. Benn*, 120 Wn.2d 631, 670, 845 P.2d 289 (1993). The legislature has exercised that authority by enacting the Sentencing Reform Act. See RCW 9.94A.010. A principal purpose of the SRA is to establish guidelines for sentencing judges' discretion, thereby making the exercise of that discretion more principled and providing criteria for review by appellate courts. *State v. Shove*, 113 Wn.2d 83, 88-89, 776 P.2d 132 (1989) (citing

D. BOERNER, SENTENCING IN WASHINGTON, 1-1, 1-2 (1985)). Respectful of that purpose, and of the legislature's plenary authority in this area, courts have consistently interpreted the SRA in a manner that ensures the structuring of trial court discretion. *Shove*, 113 Wn.2d at 89.

A sentencing court is generally required to impose a sentence within a standard range defined by the SRA based on the seriousness of the charged crime and the defendant's offender score. *State v. Olsen*, 180 Wn.2d 468, 472, 325 P.3d 187 (2014); RCW 9.94A.505(2)(i). A court may impose a sentence outside the standard sentence range only when substantial and compelling reasons support the exceptional sentence. RCW 9.94A.535. A trial court may not base an exceptional sentence on factors necessarily considered by the legislature in establishing the standard sentence range, and the asserted mitigating factor must be sufficiently substantial and compelling to distinguish the crime in question from others in the same category. *State v. Law*, 154 Wn.2d 85, 95, 110 P.3d 717 (2005) (citing *State v. Ha'mim*, 132 Wn.2d 834, 840, 940 P.2d 633 (1997)). The appellant was not entitled to a mitigated sentence because legislature has already considered the age of offenders in the SRA and because his age does not distinguish his crime.

The legislature considered the age of offenders when it mandated SRA sentences for all offenders eighteen and older. In enacting the SRA,

the legislature explicitly considered the age at which adult sentencing guidelines would attach when it defined an “offender” as a person who has committed a felony established by state law and *is eighteen years of age or older*. RCW 9.94A.030(34) (emphasis added). In fact, the Legislature even extended the possibility of adult sentencing to defendants under age eighteen when jurisdiction is transferred to a superior court from an appropriate juvenile court. *Id.* The sentencing guidelines of the SRA apply equally to all offenders without discrimination as to any element that does not relate to the crime or the previous record of the defendant. RCW 9.94A.340. Again, a defendant’s age does not relate to the crime or the previous record of the defendant. *Ha’mim*, 132 Wn.2d at 847. The appellant, by his own admission, was over eighteen at the time of his crime, so he is clearly subject to the SRA.

Washington courts have long held that age, alone, is not a substantial or compelling reason that can support a mitigated sentence. *Id.* The SRA includes an illustrative list of factors that may allow a mitigated sentence. RCW 9.94A.535(1). While that list is not exclusive, all the statutory factors relate directly to either the crime or the defendant’s culpability. *Law*, 154 Wn.2d at 94. A defendant’s age does not relate to the crime or the previous record of the defendant. *Ha’mim*, 132 Wn.2d at 847. Thus, the age of an adult offender, alone, is not a mitigating factor

that can support an exceptional sentence. *Id.* In fact, even the youth of a defendant younger than eighteen cannot be considered in sentencing when the offender's age cannot be blamed for his crime. *State v. Scott*, 72 Wn.App. 207, 218-19, 866 P.2d 1258 (1993), *aff'd*, *State v. Ritchie*, 126 Wn.2d 388, 894 P.2d 1308 (1995).

Age may be relevant for the statutory mitigating factor that the defendant's capacity to appreciate the wrongfulness of his conduct, or to conform his conduct to the requirements of the law, was significantly impaired. RCW 9.94A.535(1)(e). But, without evidence that the appellant's capacity to appreciate the wrongfulness of his actions or to conform his conduct was impaired, youth cannot be considered in sentencing. *See Ha'mim*, 132 Wn.2d at 846; *Scott*, 72 Wn.App. at 218-19. Like in *Ha'mim* and *Scott*, there was no evidence in this case that the appellant's capacity to appreciate his actions or to conform his conduct was impaired by his youth. In fact, the evidence in the record in this case shows the appellant did appreciate the wrongfulness of his conduct. See 1/18/13 RP 550 (appellant realized he was in trouble when he learned A.J.N.'s age); 1/18/13 RP 573 (appellant describing the age gap between A.J.N. and himself was "a pretty large age gap in my opinion"). Thus, like the offenders in *Ha'mim* and *Scott*, the appellant's age did not affect his ability to appreciate the wrongfulness of his conduct or to conform his

conduct to the requirements of the law, and an exceptional sentence is not appropriate.

The appellant is asking this court to ignore both the SRA's explicit policy to structure adult sentencing and the legislature's conscious consideration of offenders' ages in favor of findings in federal cases about juvenile defendants. However, the holding of those cases do not control any facts of this case when, unlike those defendants, the appellant was not a juvenile when he committed his crime and when he has not been sentenced to either death or life without the possibility of parole. *See Miller v. Alabama*, ___ U.S. ___, 132 S.Ct. 2455, 183 L.Ed 2d 407 (2012) (two 14 year-old homicide offenders challenging sentences of life imprisonment without the possibility of parole); *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed. 2d 825 (2010) (16 year-old offender challenging sentence of life in prison without parole for non-homicide crime); *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed. 2d 1 (2005) (17 year-old challenging death sentence for capital murder). This court has recently had an opportunity to evaluate the appellant's cases and concurred, finding they "unmistakably rest on the differences between children and adults and the attendant propriety of sentencing children to life in prison without the possibility of release." *State v. Witherspoon*, 180 Wn.2d 875, 890, 329 P.3d 888 (2014).

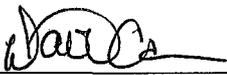
More significantly, the legislature has already exercised its plenary authority in this area in response to the cases cited by the appellant. In response to *Roper*, the legislature eliminated mandatory minimum sentences for juveniles tried as adults. LAWS OF 2005, ch. 437 § 2. However, the legislature explicitly described its intention “to continue to apply all other adult sentencing provisions to juveniles tried as adults.” LAWS OF 2005, ch. 437 § 1. Following *Miller* and *Graham*, the legislature made additional amendments, eliminating mandatory life sentences without parole for offenders under the age of eighteen. LAWS OF 2014, ch. 130. But again, the amendments were explicitly limited to offenders under age eighteen at the time of their crimes. See LAWS OF 2014, ch. 130 § 1 (retaining life sentence without parole/death penalty *for offenders at or over the age of eighteen*) (emphasis added).

The language and policy of the SRA do not allow an adult offender to argue for a mitigated sentence based solely on his relative youth at the time of his crime. The appellant has presented a policy question that is within the plenary authority of the legislature. The legislature has answered that policy question by amending the SRA to limit some adult sentences imposed on offenders who were juveniles at the time of their offenses. However, the legislature made no changes to the sentences to be imposed on offenders who, like the appellant, were over eighteen when

they committed their crimes. Thus, the appellant's relative youth remains insufficient to support an exceptional sentence.

Respectfully submitted this 5th day of December, 2014.

GREGORY M. BANKS
ISLAND COUNTY PROSECUTING ATTORNEY

By: 

DAVID E. CARMAN
DEPUTY PROSECUTING ATTORNEY
WSBA # 39456

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

SEAN O'DELL,

Defendant/Appellant.

NO. 90337-9

DECLARATION OF SERVICE

I, SHARON WALTRIP, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That on the 5th day of December, 2014, a copy of Supplemental Brief of Respondent and Declaration of Service was served on the parties designated below by depositing said documents in the United States Mail, postage prepaid, addressed as follows:

Gregory Link
Washington Appellate Project
1511 3rd Ave., Suite 701
Seattle, WA 98101

Received
Washington State Supreme Court

DEC - 8 2014

Ronald R. Carpenter
Clerk

Signed in Coupeville, Washington, this 5th day of December, 2014.



Sharon Waltrip