

63463-1

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COA No. 63463-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

J.S., (d.o.b. 1/19/1992)

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF SNOHOMISH COUNTY
JUVENILE DIVISION

The Honorable Anita L. Farris

APPELLANT'S MODIFIED OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. In the respondent's adjudicatory hearing on a charge of second degree rape by having sexual intercourse with a complainant who was less than 14 years old, the juvenile court misconstrued the nature of the affirmative defense at RCW 9A.44.030, and thus committed a material error of law affecting its application of the defense to the facts, requiring reversal.

2. In the absence of substantial evidence, the juvenile court erred in entering JuCR 7.11(d) written finding of fact no. 7.

3. In the absence of substantial evidence, the juvenile court erred in entering JuCR 7.11(d) written finding of fact no. 8.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Whether the juvenile court misconstrued the nature of the affirmative defense at RCW 9A.44.030 by incorrectly reading it as requiring proof that the respondent reasonably believed the complainant to be of a particular specific age, instead of its actual requirement that the accused merely believe the respondent be of any legal age, and thus committed a material error of law affecting its application of the affirmative defense to the facts, requiring reversal so a court may properly apply the law to J.S.'s case.

C. STATEMENT OF THE CASE

1. Charging and State's Case. The juvenile respondent J.S., age 16 at the time of the incident at issue, was charged with one count of rape of a child in the second degree under RCW 9A.44.076, alleged to have occurred on April 19, 2008. CP 109-10.¹ According to the State's allegations, on April 21, 2008, H.B. and her mother arrived at the Monroe Police Department to report that J.S. had engaged in sexual intercourse with H.B. on April 19th, 2008. CP 50. H.B. was actually 13 years old at the time, while the respondent was 16 years old. CP 50.

H.B. and the respondent J.S. had become acquainted through a mutual friend. By and large, the pair communicated by trading messages on the internet web site "MySpace." CP 50. The State indicated in the affidavit of probable cause that, on her MySpace profile page, H.B. declared herself to be 16 years of age.

¹Pursuant to RCW 9A.44.076,

A person commits the crime of rape of a child in the second degree when the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the person.

(Emphasis added.) RCW 9A.44.076.

CP 50. However, the State alleged that H.B. told the respondent face-to-face before the intercourse that she went to an area middle school and was 13 years of age. CP 50 (The juvenile court would later find it not credible that H.B. represented her age to the accused as being 13 years old. See Part D.1., infra).

H.B. told police that on the night in question she snuck out of her parents' home shortly after midnight to meet the respondent. The pair and two others drove around in a car owned by a friend of the respondent for a short time before the car began experiencing mechanical trouble. CP 50. When they were unable to repair the car, H.B. and the respondent walked to the respondent's residence, which was a short distance away. Once there, they smoked marijuana provided by H.B. and engaged in consensual penile/vaginal intercourse. CP 50; 4/1/09RP at 8-14.

2. Defense at adjudicatory hearing; juvenile court's ruling. J.S.'s counsel contended that there was proof of the statutory defense to second degree rape, which is set out at RCW 9A.44.030(2) and (3)(b), because H.B. had falsely declared herself on her MySpace internet profile as being 17 years old, and she also told a friend of the respondent's, within J.S.'s earshot inside a

car they occupied, that she was 15 years old. CP 45-47. In early 2008, J.S. and H.B. had been keeping in touch with each other through the complainant's MySpace page, on which she had represented herself as being 17 beginning back when the pair first met through a mutual friend in the summer of 2007. CP 45-47.

Despite the fact that the respondent's statutory defense would require acquittal irregardless whether J.S. reasonably believed H.B. to be 17, 16, or whether he believed her to be 15, or 14, the juvenile court rejected J.S.'s claim by effectively crafting a new requirement for invoking that defense -- that the respondent, upon receiving differing statements by H.B. as to her age, was required to affirmatively take action to determine the complainant's precise age before he could say he reasonably believed her to be of the legal age meriting acquittal under the statutory defense. 4/22/09RP at 6-8.

The juvenile court therefore found J.S. guilty of the charged offense of second degree rape, 4/22/09RP at 8, but imposed a manifest injustice disposition ("MI") below the standard range, based on the mitigating factor of -- in the court's words -- a "partially proved defense that [the] victim misrepresented [her] age." CP 15

(Order on Adjudication).

J.S. appeals. CP 11-12.

D. ARGUMENT

THE JUVENILE COURT MISCONSTRUED THE LEGAL REQUIREMENTS OF THE STATUTORY AFFIRMATIVE DEFENSE TO SECOND DEGREE RAPE AND THEREFORE FAILED TO PROPERLY APPLY THE LAW AT J.S.'s ADJUDICATORY HEARING

a. The trier of fact must apply the correct law defining the offense charged and any defenses thereto. In juvenile court adjudicatory hearings in criminal matters, the juvenile court judge is the trier of fact, akin to the jurors in a jury trial. RCW 13.04.021(2); see State v. J.H., 96 Wn.App. 167, 183-84, 978 P.2d 1121 (1999). Where there is evidence on both sides of an issue, the determination of whether an accused has proved a defense raised is a question of credibility that the trier of fact is entitled to resolve after hearing the evidence. State v. Alvarez, 45 Wn.App. 407, 413, 726 P.2d 43 (1986). Accordingly, if the juvenile court as fact finder in an adjudicatory hearing takes admissible evidence satisfying the requirement of sufficiency to prove the offense beyond a reasonable doubt, and does not believe the respondent-proffered

evidence in support of an affirmative defense, conviction is otherwise proper.

However, the juvenile court must apply the correct law applicable to the case, including the law defining the proofs required to establish a defense, including an affirmative defense. Although there are no jury instructions in bench trials, where the court as fact-finder issues a decision in a manner that demonstrates an incorrect understanding of the law, the trial court's discretion has been abused. State v. Haddock, 141 Wn.2d 103, 110 P.3d 377 (2000); see State ex rel Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971); see also Ryan v. State, 112 Wn.App. 896, 899, 51 P.3d 175 (2002) (discretion is abused where a court bases its decision on an incorrect understanding of the law) (citing Junker, at 12).

The abuse of discretion standard, and the definition of abuse as including the rendering of a decision that is untenable because it is based on an incorrect understanding of the law, fully applies in juvenile court. See, e.g., State v. J.A., 105 Wn. App. 879, 887, 20 P.3d 487 (2001). Additionally, the respondent's due process rights, guaranteed by the federal and state constitutions,

render the juvenile court's legal error a constitutional violation in the form of a failure to apply the correct law to the facts of J.S.'s case.

Part D.1.c, infra.

b. The evidence would have warranted acquittal under the affirmative defense at RCW 9A.44.030(2) and (3)(b), and J.S. was entitled to have the correct legal parameters of that defense applied to his facts. The trial court materially miscomprehended the legal parameters of J.S.'s affirmative defense – i.e., misstating what he was required to prove in order to gain acquittal. Had the correct law been applied, the juvenile court more probably than not would have found the respondent not guilty. See also Part D.1.c, infra (constitutional reversible error standard).

Second degree rape requires proof of the prohibited age of the complainant and the difference in age between the complainant and the accused. RCW 9A.44.076; State v. Sivins, 138 Wn. App. 52, 155 P.3d 982 (2007). However, according to Washington statute, J.S. was entitled to acquittal on such charge of second degree rape if he could prove by a preponderance of the evidence that he reasonably believed that H.B. was at least fourteen years

old, or reasonably believed that H.B. was less than 36 months younger than he was. The statutory affirmative defense provides as follows:

(2) In any prosecution under this chapter in which the offense or degree of the offense depends on the victim's age, it is no defense that the perpetrator did not know the victim's age, or that the perpetrator believed the victim to be older, as the case may be: PROVIDED, That it is a defense which the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed the alleged victim to be the age identified in subsection (3) of this section based upon declarations as to age by the alleged victim.

(3) The defense afforded by subsection (2) of this section requires that for the following defendants, the reasonable belief be as indicated:

* * *

(b) For a defendant charged with rape of a child in the second degree, that the victim was at least fourteen, or was less than thirty-six months younger than the defendant[.]

(Emphasis added.) RCW 9A.44.030(2) and (3)(b) (formerly RCW 9.79.160); Laws 1988 ch. 145 § 20; 1975 1st ex. sess. ch. 14 § 3.

As stated, the accused's belief must be supported by "declarations as to age" made by the complainant. State v. Shuck, 34 Wn. App. 456, 461, 661 P.2d 1020 (1983).

The statutory defense of RCW 9A.44.030 warranted consideration by the trier of fact under its correct legal parameters,

and the juvenile court abused its discretion in misreading the defense's language and therefore disqualifying the respondent from invoking it under the facts presented and found.

The State presented two witnesses at trial, the putative complainant H.B., and Monroe Police Officer Patton. 4/1/09RP at 5,30. H.B. testified that she had been introduced to J.S. by Jeremy Nelson in the summer of 2007 but that following their initial meeting they communicated mainly through their respective MySpace internet web site pages. 4/1/09RP at 7-8. H.B. testified that she lied about her age when opening her MySpace account, and portrayed her age on the internet site as either 16 or 17 years old. 4/1/09RP at 8-9. She claimed, however, that she told J.S. that she was 13 years old, a statement the juvenile court did not later find as a fact. 4/1/09RP at 14; see 4/22/09RP at 5.

On cross-examination, H.B. admitted that she had stated on her MySpace internet page that she was 17 years old. 4/1/09RP at 17-18. She also retracted her earlier claim that she had portrayed herself as a certain age on the web site because she was required by the terms and conditions of MySpace to be 16 to use the site; she admitted that the MySpace site only required her to be 13 to

use the internet page, but that she had portrayed herself as 17. 4/1/09RP at 18-26. H.B. admitted that she portrayed herself as 17 “in order to meet older people,” and noted her new current boyfriend at the time of the adjudicatory hearing was 17 years old. 4/1/09RP at 25-27.

Officer Patton testified that he investigated the case and interviewed both H.B. and J.S.. 4/1/09RP at 32. H.B. told the officer that she thought “he [J.S.] would know” how old she was. 4/1/09RP at 45. Officer Patton conceded that J.S., when questioned, had in fact told him that he believed H.B. was 14 years old, outside the criminal statute. 4/1/09RP at 48. Officer Patton then told J.S. that H.B. was only 13 years old. 4/1/09RP at 49-50.

The defense presented two witnesses at trial, Jeremy Nelson and Walter Meranno. Mr. Meranno testified that he was the driver of the car that picked H.B. up on the evening of this incident. 4/1/09RP at 57. He testified that H.B. and J.S. were in the back seat of his car when he had a conversation with H.B.. 4/1/09RP at 59. He stated that he asked her name and age and she told him she was 15. 4/1/09RP at 59, 61. Meranno remembered the conversation because H.B. and J.S. laughed at his English.

4/1/09RP at 59.

In addition, Jeremy Nelson testified that he was the person who introduced H.B. and J.S. back in the summer of 2007.

4/1/09RP at 69. He testified that he told J.S. that H.B. was 14 years old at the time he introduced them. 4/1/09RP at 69-70.

Curiously, at concluding argument, the State contended that the respondent's defense under RCW 9A.44.030 should not be credited, because it was not reasonable for J.S. to believe that H.B. was of an age older than that required for the crime or that there was an age difference inadequate to constitute the offense, by arguing that J.S. knew H.B. went to "middle school," where students are anywhere from 12 to 15 years of age.² 4/1/09RP at 74-75. Several of these ages are too old to constitute the crime charged, and reasonable belief thereto by the accused plainly would satisfy the affirmative defense.

In its oral and written findings, the juvenile court found that

²See State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997) (the failure to enter a finding as to a fact upon which the State has the burden of proof amounts to a negative finding on that issue). Here, in a slightly different context, and having the result that the chances of success on J.S.'s affirmative defense (if the court had correctly applied it) were materially affected by the juvenile court's error, the court specifically rejected H.B.'s claim that she told J.S. that she was 13 years old. Thus, it cannot be said that the error complained of is harmless on ground that J.S. was told by H.B. that was 13 years old. 4/22/09RP at 5.

J.S. had seen H.B.'s MySpace page on which she represented herself to be 17 years old (legal age), and that J.S. was listening when H.B. told Mr. Meranno she was 15 (legal age). 4/22/09RP at 3-5; Supp. CP ____, Sub # 60. Each of these ages falls outside the scope of the offense charged. See RCW 9A.44.076. In addition, the juvenile court also stated that it was "not able to find as a fact" that H.B. told J.S. she was 13. (Emphasis added.) 4/22/09RP at 5; Supp. CP ____, Sub # 60.

The juvenile court correctly stated that the affirmative defense required the respondent to prove that the victim represented herself as being "of an age such that" intercourse was not a crime under the statute. 4/22/09RP at 6. The court ruled, however, that the respondent knew the complainant was in middle school and she had represented her age to be different at different times – as 14, 15, and 17 -- therefore, the court found, J.S. "specifically knew that this girl was lying about her age and did that to meet boys on the internet." 4/22/09RP at 6-7. The respondent also knew that H.B. "was sneaking out" of her home. 4/22/09RP at 7. See also Supp. CP ____, Sub # 60. From these circumstances, the court simply proceeded to the conclusion that J.S. had not

“carried [his] burden” on the affirmative defense, reasoning that “when you know the girl is lying, it’s not reasonable to take her word on it.” 4/22/09RP at 7-8. The trial court entered written findings to this same effect. Supp. CP ____, Sub # 60.

But this reasoning was wholly untenable and an abuse of discretion. Pursuant to RCW 9A.44.076, J.S.’s reasonable belief that H.B. was any of these ages, each and every one of which fall outside the criminal statute at hand, would satisfy the affirmative defense and warrant acquittal. First, the crime charged is defined as follows:

A person commits the crime of rape of a child in the second degree when the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the person.

(Emphasis added.) RCW 9A.44.076. Based on the evidence at the adjudicatory hearing, even if J.S. should have reasonably concluded that H.B. was the youngest of the different ages she portrayed, this evidence would satisfy the required proof of the statutory affirmative defense, if the court had properly construed the legal requirements of the defense. See State v. Yates, 64 Wn.

App. 345, 351, 824 P.2d 519 (1992) (evidence supporting an affirmative defense is sufficient to warrant consideration of the defense if the trier of fact “could reasonably infer the existence of the facts needed to use it”). The complainant H.B.’s spoken statements, and her “MySpace” internet web site writings, well constitute “declarations” made by the complainant as to either her age, or the difference in age between the parties as falling within the terms of the defense appearing at RCW 9A.44.030(2) and (3)(b). H.B.’s representations both qualify as the “explicit assertion” of age by the complainant that is required under the defense.

State v. Bennett, 36 Wn. App. 176, 181-82 and n. 4, 672 P.2d 772 (1983) (defining “declaration” pursuant to the Third New International Dictionary as an “act of declaring, proclaiming or publicly announcing; explicit assertions; formal proclamation”).

Importantly, the statutory affirmative defense constitutes a legislative overruling of prior Washington case law that provided that a reasonable, good-faith mistake as to age was not a defense to statutory rape. Douglas B. Ende, 13B Washington Practice § 2408 (2008-09) (citing State v. Randolph, 12 Wn.App. 138, 528 P.2d 1008 (1974) (mistake as to age)). As legislative dictate, the

affirmative defense is construed according to its plain language, which here requires a reasonable belief by the respondent that the complainant was any age of fourteen years or above, or that the complainant was any age “thirty-six months younger than” the respondent. State v. Engel, 210 P.3d 1007 (Washington Supreme Court No. 81072-9, July 9, 2009) (criminal statutes are interpreted according to their plain language).

As a consequence, it was untenable for the juvenile court to, in effect, craft and impose a restriction on the respondent for use of this defense, on ground that his belief that the complainant was within the age or age difference established by the defense was unreasonable in the presence of uncertainty as to the precise age of the respondent or the exact difference in the two teenagers’ ages. The plain language of the statutory defense renders it applicable to acquit where the respondent reasonably believes that the complainant was “at least” fourteen, or was “less than thirty-six months younger than the respondent[.]” (Emphasis added.) RCW 9A.44.030.

As with any other statute, where the language of a statutory defense is clear, its plain language is to be applied as written.

State v. Jensen, 149 Wn. App. 393, 400-01, 203 P.3d 393 (2009) (RCW 9A.52.090(1)'s statutory affirmative defense of abandonment is to be applied to the charge of residential burglary according to the defense's plain language); see also Hines v. Data Line Systems, Inc., 114 Wn. 2d 127, 787 P.2d 8 (1990) (affirmative defense to claim of securities violations was to be interpreted according to its plain language). By its plain language, via the presence of alternatively sufficient defenses based on age or age difference, the statutory language of “at least” and “less than” means that the respondent in the case sub judice was only required to reasonably believe the complainant was of a certain, legal, age range corresponding to ages above that required for commission of the crime. See Jensen, 149 Wn. App. at 400-01. In simple terms, it matters not whether J.S. believed that H.B. was 15, 16, 17, or even 14 years old, so long as he reasonably believed she was of some age or age difference outside the parameters established as criminally violative under the crime defined at RCW 9A.44.076. By effectively narrowing the scope of the affirmative defense, the juvenile court committed legal error.

c. Reversible error was committed. In determining the

guilt of a juvenile respondent to a criminal charge, and any defenses thereto, the juvenile court must accurately apply the correct legal standard as to each. See Haddock, supra, 141 Wn.2d at 103, State v. Hiott, 97 Wn. App. 825, 826-27, 987 P.2d 135 (1999). Where the juvenile court imposes an incorrect legal standard regarding a respondent's potential defense to a charge, legal error is committed, and discretion has been abused, requiring reversal where the error likely affected the outcome. State v. L.B., 132 Wn. App. 948, 954, 135 P.3d 508 (2006). Furthermore, under J.S.'s Due Process rights pursuant to the federal and state constitutions, the juvenile court's legal error was a constitutional violation. U.S. Const., amend. 14; Wash. Const. Art. 1, § 3. These constitutional provisions provide that an accused is entitled to have the trier of fact apply an accurate statement of the law to the facts. See State v. Miller, 131 Wn.2d 794, 803, 872 P.2d 502 (1994) (citing State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986)).

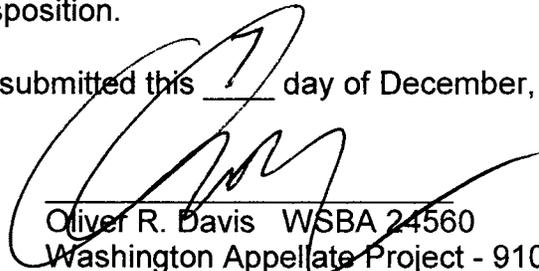
By miscomprehending the law to be applied to the affirmative defense, the juvenile court committed error akin to an instructional error that is of constitutional magnitude in an adult jury

trial because it was a failure to correctly instruct the fact-finder as to each element of the offense charged. State v. Pawling, 23 Wn.App. 226, 232, 597 P.2d 1367 (1979); State v. Ng, 110 Wn.2d 32, 44, 750 P.2d 632 (1988); see also State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1988) and RAP 2.5(a) (both stating that such an error may be raised for the first time on appeal). Here, the proper consideration of the correct legal elements of the respondent's viable affirmative defense merited acquittal, where the juvenile court found the respondent credible, but incorrectly found the statutory defense legally unavailable to him. Such constitutional error requires reversal unless it can be said beyond a reasonable doubt that the error complained of did not contribute the adjudication outcome obtained. See State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (instructional error in adult trial). This Court of Appeals should therefore reverse the adjudication of guilty.

E. CONCLUSION

Based on the foregoing, the juvenile respondent J.S. respectfully requests that this Court reverse the Juvenile Court's adjudication and disposition.

Respectfully submitted this _____ day of December, 2009.



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Washington Appellate Project - 91052
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	NO. 63463-1-I
)	
)	
JONATHON S.,)	
)	
Juvenile Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF DECEMBER, 2009, I CAUSED THE ORIGINAL **MODIFIED OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	MATTHEW PITTMAN, DPA SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	(X) U.S. MAIL () HAND DELIVERY () _____	
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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION ONE
SEATTLE

SIGNED IN SEATTLE, WASHINGTON, THIS 7TH DAY OF DECEMBER, 2009.

X _____ 