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NO. 69942-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

SEAN O'DELL,

Appellant.

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

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

# BRIEF OF RESPONDENT

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## I. STATEMENT OF THE ISSUES

A. Whether the trial court properly exercised its discretion in declining to instruct the jury on an affirmative defense when the appellant did not reasonably believe A.J.N. was younger than fourteen.

B. Whether the trial court exercised its discretion when it considered the facts of the case and the appellant's argument and concluded there was no basis for an exceptional sentence.

## II. STATEMENT OF THE CASE

The appellant was charged with Rape of a Child in the Second Degree based on allegations that he had sexual intercourse with A.J.N., a twelve year-old girl. CP 117-118.

At trial, A.J.N. testified that she spent the weekend of May 19-20, 2012 with her friend, B.A. 1/16/13 RP 233. At the time, A.J.N. was twelve years old and B.A. was thirteen. 1/16/13 RP 218, 1/18/13 RP 570-71. The appellant joined the girls in the afternoon of May 20, 2012. 1/16/13 RP 252-55. The appellant had just turned eighteen. 1/18/13 RP 535-36. The girls met the appellant in some woods near his house and spent some time talking with him there. 1/16/13 RP 254-64. During that conversation, A.J.N. told the appellant she was twelve. 1/16/13 RP 256-57.

A.J.N. and the appellant snuck out of their houses that night, intending to meet with B.A. again. 1/16/13 RP 266. However, when B.A.

was not able to sneak out, the appellant led A.J.N. into some woods near B.A.'s house. 1/16/13 RP 272. Once in the woods, the appellant pulled down A.J.N.'s pants and underwear and raped her. 1/16/13 RP 281-84.

The appellant gave a different description of his time with A.J.N. and B.A. that weekend. He claimed he received a text message from B.A. the night of May 19, inviting him to her house. 1/18/13 RP 538. He went to B.A.'s house and found her and A.J.N. sitting on a couch and drinking wine. 1/18/13 RP 538. He claimed he had not previously met A.J.N., but commented to her that she seemed too young to be drinking and she replied she got that a lot. 1/18/13 RP 542. After about an hour at B.A.'s house, the appellant claimed he and A.J.N. went for a walk and had consensual sex in a clearing in some woods shortly after midnight on May 20. 1/18/13 RP 544-48.

The appellant proposed a jury instruction that would have provided an affirmative defense if he "reasonably believed that A.J.N. was at least fourteen years of age … based upon declarations as to age by A.J.N." CP 79. The trial court found that defense was not supported by sufficient evidence and declined to provide the instruction. 1/18/13 RP 607-08. The appellant was convicted by jury of one count of Rape of a Child in the Second Degree. CP 62.

Prior to sentencing, the appellant provided a brief to the court arguing for an exceptional sentence below the standard sentence range. CP 36-43. In support of that argument, the appellant claimed circumstances that did not constitute a complete defense significantly affected his conduct and that his capacity to conform his conduct to the requirements of the law was significantly impaired by his youth. CP 37. Counsel for the appellant made the same arguments at the sentencing hearing. 3/6/13 RP 34-40. The trial court found the appellant's incomplete defense was not a mitigating factor and that his youth, by itself, also could not be considered a mitigating factor. 3/6/13 RP 72-75. Thus, the trial court found no mitigating factors and imposed standard-range sentence. 3/6/13 RP 75.

The appellant now timely appeals. CP 1-2.

## III. ARGUMENT

### A. The trial court properly exercised its discretion when it determined there was no factual support for an affirmative defense jury instruction.

#### *1. Standard of review*

The standard of review applied to a trial court's refusal to grant jury instructions depends on whether the decision was based upon a matter of law or fact. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). A trial court's refusal to give instructions to a jury, when based on a factual dispute, is reviewable only for abuse of discretion. *Id.* at 772. An

abuse of discretion exists when the trial court's decision is exercised on untenable grounds or for untenable reasons. *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997).

2. *The trial court did not abuse its discretion in finding the statutory affirmative defense was not supported by sufficient factual evidence.*

The appellant's conviction should be affirmed because he did not provide sufficient evidence to allow provision of instruction on his claimed affirmative defense. Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole, properly inform the trier of fact of the applicable law. *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002). While a defendant is entitled to jury instructions allowing him to argue his case theory, those instructions must be supported by sufficient evidence. *State v. Redmond*, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003); *State v. Janes*, 121 Wn.2d 220, 236-37, 850 P.2d 495 (1993). 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) (quoting *State v. Bell*, 60 Wn.App. 561, 566, 805 P.2d 815 (Div.2, 1991)).

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). A defendant may attempt to prove by preponderance of evidence that he reasonably believed the victim to be older based upon her own declarations as to age. *Id.* However, that affirmative defense protects only "the person who, in good faith, acts upon some kind of explicit assertion from the victim." *State v. Bennett*, 36 Wn.App. 176, 182, 672 P.2d 772 (Div. 2, 1983). Inferences of age arising from the victim's general behavior, appearance, and demeanor are insufficient. *Id.* at 181-82. Where no explicit assertion is made by the victim, the statutory defense is not available. *Id.* at 182. In this case, the trial court did not abuse its discretion in finding an insufficient factual basis for the appellant's claimed affirmative defense because he provided no evidence of any explicit assertions of age by A.J.N.

Even considered in the light most favorable to the appellant, the evidence provided during the trial showed he did not reasonably believe A.J.N. to be at least fourteen based upon her own declarations as to age. The appellant did not contest evidence that A.J.N. was twelve years old at the time he engaged in sexual intercourse with her. 1/16/13 RP 218, 304. Similarly, he admitted that he was eighteen years old at that time. 1/18/13 RP 535, 565. In the State's case-in-chief, A.J.N. repeatedly testified that she told the appellant she was 12 years old. 1/16/13 RP 256-58, 304, 351-

52. That evidence would obviously not support presentation of the appellant's claimed affirmative defense.

While the appellant disputed A.J.N.'s recollection of the events leading up to the rape, he did not describe any explicit assertion of age by A.J.N.. He claimed that he made only one, indirect reference to A.J.N.'s age, that she appeared too young to be drinking, and that she replied she got that a lot. 1/18/13 RP 542. A.J.N.'s five-word response was not an explicit assertion of anything, and it certainly could not have given rise to a reasonable belief that A.J.N. was any particular age. At most, that exchange can only imply that A.J.N. did not dispute the appellant's impression, based on her appearance and demeanor, that she was less than 21 years old. When given an opportunity to elaborate, the appellant repeatedly testified that A.J.N. did not tell him how old she was and he did not ask. 1/18/13 RP 542, 571-72, 578. Therefore, A.J.N.'s short, vague response to the appellant's comment was not declaration as to age by A.J.N.

Even more damningly, the appellant admitted that he did not reasonably believe A.J.N. was older than twelve. According to the appellant, A.J.N. never told him her age. 1/18/13 RP 571. And, he never asked her age. 1/18/13 RP 571, 572, 578. Indeed, the appellant testified that he did not consider A.J.N.'s age at all during his time with her.

1/18/13 RP 572, 574. In fact, when asked directly if he thought A.J.N. was fourteen, he admitted he did not. 1/18/13 RP 574. Thus, regardless of the nature of A.J.N.'s statement, the appellant, by his own admission, did not rely on it to believe she was an appropriate age.

The trial court did not abuse its discretion in finding an insufficient factual basis to instruct the jury on the appellant's claimed affirmative defense. A.J.N. testified that she told appellant she was twelve years old. In his turn, the appellant claimed only that he said she looked too young to drink. Her alleged response, that she got that a lot, was not an explicit assertion of age. More significantly, the appellant admitted that he did not believe A.J.N. was at least fourteen. Therefore, the trial court did not abuse its discretion when it refused to instruct the jury on the appellant's unsupported affirmative defense.

**B. The trial court properly exercised its discretion when it considered the facts of the case and the appellant's argument and concluded there was no basis for an exceptional sentence.**

*1. The appellant is precluded from challenging the imposition of a standard-range sentence.*

A sentence within the standard sentence range for an offense shall not be appealed. RCW 9.94A.585(1). As a matter of law, there can be no abuse of discretion and, thus, no right to appeal when the sentence imposed is within the presumptive sentence range. *State v. Ammons*, 105 Wn.2d 175, 183, 713 P.2d 719 (1986). Although *Ammons* allowed for a

challenge of the procedure by which a standard range sentence is imposed, that exception requires a showing that the sentencing court had a duty to follow a specific procedure and failed to do so. *State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993). Review of a court's decision to impose a standard range sentence is limited to circumstances where the court has categorically refused to consider an exceptional sentence. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005); *State v. Garcia-Martinez*, 88 Wn.App. 322, 330, 944 P.2d 1104 (Div. 1, 1997). However, "a trial court that has considered the facts and has concluded that there is no basis for an exceptional sentence has exercised its discretion, and the defendant may not appeal that ruling." *Garcia-Martinez*, 88 Wn.App. at 330. The appellant cannot appeal his standard range sentence in this case because the trial court considered and denied his request for an exceptional sentence.

The trial court heard arguments from both counsels and from multiple witnesses on each side during the sentencing hearing. The court also reviewed the appellant's sentencing brief, letters from interested parties, and a presentence investigation report prepared by the Department of Corrections. CP 36-57, 3/6/13 RP 2. The court considered the appellant's claim that he committed the crime under circumstances that did not constitute a complete defense to his crime. CP 40-42, 3/6/13 RP

72-73. However, the court found the appellant's claim that he thought A.J.N. was older was not a mitigating factor. 3/6/13 RP 73. The court also considered the appellant's argument that his capacity to appreciate the wrongfulness of his conduct was impaired by his youth. CP 38-40, 3/6/13 RP 73-74. That argument was precluded by case law. 3/6/13 RP 74. Thus, the trial court considered the appellant's claimed mitigating factors and found they did not warrant an exceptional sentence. 3/6/13 RP 76.

The trial court reviewed multiple materials and arguments presented by the appellant. It specifically considered two separate arguments for an exceptional sentence and found neither presented a sufficiently mitigating factor. The court then exercised its discretion in denying the appellant's request for exceptional sentence. Therefore, the appellant's standard range sentence cannot be appealed.

2. *The trial court correctly found the appellant's request for an exceptional sentence was not supported by any mitigating factors.*

The trial court did not abuse its discretion in imposing a standard range sentence. The appellant is only challenging the court's finding that his youth and immaturity were not mitigating factors that warranted an exceptional sentence below the standard range. So, he is conceding that his failed claim that he believed A.J.N. to be older was not a mitigating

factor. The trial court also correctly found appellant's age could not support an exceptional sentence.

In determining an appropriate sentence, a court may not consider any element that does not relate to the crime or the previous record of the defendant. RCW 9.94A.340. The appellant correctly concedes that, under Washington law, "the age of the defendant does not relate to the crime or the previous record of the defendant." App. Brief at 9-10 (citing *State v. Ha'mim*, 132 Wn.2d 834, 847, 940 P.2d 633 (1997)). In fact, the court in *Ha'mim* specifically held that the age of a young adult defendant is not a substantial or compelling reason to impose an exceptional sentence. *State v. Ha'mim*, 132 Wn.2d at 847. Thus, the trial court correctly followed clear Washington law in declining to impose an exceptional sentence based on the appellant's age.

In his attempt to avoid that clear precedent, the appellant bases his argument on three federal cases that are not factually similar to the current case. All three federal cases involved Eighth Amendment challenges for cruel and unusual punishments based on imposition of adult sentences on juvenile offenders. *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). Unlike the offenders in those cases, the appellant was not a juvenile; he was 18 years old when he raped A.J.N. 1/18/13 RP 535-36. He was, also unlike those offenders, not subject to a sentence of death or life in prison without parole. CP 24. And, again unlike the offenders in the federal cases he cites, the appellant has not argued any constitutional violation in the trial court's imposition of his sentence. So, the federal decisions regarding impositions of life sentences and death penalties for juvenile offenders have no effect on the appellant's request for an exceptional sentence.

Instead, the trial court correctly followed Washington law as clearly stated in *State v. Ha'mim*. Like the appellant, the defendant in *Ha'mim* was 18, and thus not a juvenile, when she committed her crimes. *State v. Ha'mim*, 132 Wn.2d at 837. Also like the appellant, the defendant in *Ha'mimí* requested an exceptional sentence below her standard sentence range based on her youth. *Id.* The trial court in *Ha'mim* granted the exceptional sentence, but that sentence was overturned because the defendant's age was "not alone a substantial and compelling reason to impose an exceptional sentence." *Id.* at 847. Given this case's similarity

with the binding precedent in *Ha'mim*, the trial court correctly declined to impose exceptional sentence.

## IV. CONCLUSION

The trial court did not abuse its discretion in refusing to provide a proposed instruction when the appellant did not produce sufficient factual evidence to support the defense. In addition, the trial court correctly imposed a standard range sentence, which the appellant cannot now challenge. This Court should, therefore, affirm both the appellant's conviction and sentence.

Respectfully submitted this 10th day of October, 2013.

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COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

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|---|---|
| STATE OF WASHINGTON, | |
| Plaintiff/Respondent, | NO. 69942-3-I |
| vs. | DECLARATION OF SERVICE |
| SEAN O'DELL, | |
| Defendant/Appellant. | |

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 10th day of October, 2013, a copy of 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 C. Link
Washington Appellate Project
1511 3rd Ave., Suite 701
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Signed in Coupeville, Washington, this 10th day of October, 2013.

Sharon Waltrip

Sharon Waltrip