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No. 69942-3-I

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 KING COUNTY

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

The trial court denied Sean O'Dell his right to present a defense.

The Sixth and Fourteenth Amendments separately and jointly guarantee an accused person the right to meaningful opportunity to present a defense. *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006) (citations and internal quotations omitted). Article I, § 22 of the Washington Constitution provides a similar guarantee. *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). A defendant must receive the opportunity to present his version of the facts to the jury so that it may decide “where the truth lies.” *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); *Chambers v. Mississippi*, 410 U.S. 284, 294-95, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973);

RCW 9A.44.040 provides in relevant part:

....
(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

Consistent with the statute, in the first trial, the trial court instructed the jury on the statutory defense. CP 104. During the second trial, however, the court refused to provide the instruction to the jury,

The court concluded the defense failed to present sufficient evidence to warrant the instruction. Specifically the court reasoned that the term “declarations as to age by the alleged victim” required an affirmative and explicit misstatement of age by A.J.N. 1/18/13 RP 608. In response, the State defends the trial court’s ruling, contending the statute requires an requires an explicit misstatement of age by the victim. Brief of Respondent at 7-8. But neither the statute’s plain language nor cases interpreting it have required such a threshold.

The trial court, and the State on appeal, rely upon *State v. Bennett*, 36 Wn. App. 176, 672 P.2d 772 (1983). 1/18/13 RP 608-09. But the court read far too much into *Bennett*. As discussed in Mr. O’Dell’s prior brief, *Bennett* held only that “declarations” did not

include “behavior, appearance, and general demeanor.” *Id.* at 182.

Bennett did not limit the instruction to cases in which the alleged victim affirmatively misstated his or her age. It only required that the defense point to the words from the victim, not just nonverbal conduct, regarding age. *Id.* at 181-82.

The statute does not require an explicit misstatement. In fact, the term “misstatement” does not appear in the statute at all. Instead, the plain language requires nothing more than a statement relating to age. Sean O’Dell presented such evidence. It does not matter that A.J.N. testified that she expressly stated her age. Other witnesses testified she did not. In the light most favorable to the defense, A.J.N. did not state her actual age but instead made statements that implied she was older.

The trial court deprived Sean of his right to present a defense. This Court should reverse the conviction.

B. CONCLUSION

For the reasons above, and as argued in his previous brief, this Court should reverse Sean O’Dell’s conviction and sentence.

Respectfully submitted this 22nd day of November, 2013.



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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 69942-3-I
v.)	
)	
SEAN O'DELL,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF NOVEMBER, 2013, I CAUSED THE ORIGINAL **REPLY 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:

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