

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROSWOLD PALL ADKINS,

Defendant-Appellant.

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UNPUBLISHED

January 19, 2006

No. 257845

Calhoun Circuit Court

LC No. 2003-003708-FH

Before: Bandstra, P.J., and Fitzgerald and White, JJ.

PER CURIAM.

A jury convicted defendant of two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a), and the trial court sentenced him as an habitual offender, second offense, MCL 769.10, to concurrent prison terms of 6 ½ to 22 years. Defendant appeals as of right. We affirm.

Defendant engaged in both penile and digital-vaginal penetration of the fourteen-year-old victim who intentionally misrepresented her age. Defendant asserts that he relied on this misrepresentation, and that he had no criminal intent and would not have engaged in sexual contact had he known the victim's true age. He argues that the absence of a criminal intent requirement under MCL 750.520d(1)(a) renders his convictions unconstitutional. We disagree.

Defendant failed to preserve this issue by raising it in the trial court. *People v Russell*, 266 Mich App 307, 314; 703 NW2d 107 (2005). However, we will review the claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-765, 774; 597 NW2d 130 (1999). We review de novo questions involving the constitutionality of a statute. *Russell, supra* at 310.

The sexual penetration of a minor between the ages of thirteen and sixteen is a strict liability offense. MCL 750.520d(1)(a); *People v Cash*, 419 Mich 230, 240; 351 NW2d 822 (1984); *People v Apgar*, 264 Mich App 321, 328-329; 690 NW2d 312 (2005). A defendant's reasonable or good-faith mistake of fact concerning the victim's age is not a defense. *Cash, supra* at 242. "[T]he actual, and not the apparent, age of the complainant governs in statutory rape offenses." *Id.* at 241. Contrary to defendant's contention, a mistake-of-age defense, at least

with regard to statutory rape crimes, is not mandated by the state or federal constitutions. *Id.* at 245.<sup>1</sup>

Citing *People v Olson*, 181 Mich App 348; 448 NW2d 845 (1989), defendant argues that the elimination of a criminal intent element from an offense is unconstitutional where the penalty is great and a conviction would severely injure the defendant's reputation. In *Olson*, this Court opined that "[t]he elimination of the element of criminal intent does not violate the due process clause where (1) the penalty is relatively small, and (2) where conviction does not gravely besmirch." *Id.* at 352, quoting *United States v Wulff*, 758 F2d 1121, 1125 (CA 6, 1985). But defendant's argument disregards the fact that *Wulff*, from which this language was taken, relied on the reasoning set forth in *Morissette v United States*, 342 US 246, 251 n 8; 72 S Ct 240; 96 L Ed 288 (1952), where the United States Supreme Court specifically observed that statutory rape offenses form an exception to the general, common-law rule requiring a criminal intent element. Our Supreme Court has explicitly recognized this reasoning, observing that "sex offenses such as statutory rape are exceptions to the general rule from the common law that every criminal offense requires a 'vicious will.'" *People v Lardie*, 452 Mich 231, 255 n 40; 551 NW2d 656 (1996), rev'd on other grounds 473 Mich 418 (2005), quoting *Morissette*, *supra* at 251 n 8. Thus, defendant's reliance on *Olson*, *supra*, is misplaced.

Defendant also argues that the trial court improperly responded to a question from the jury after deliberations had begun. Defendant argues that the court's response prevented the jury from exercising its power of nullification and effectively directed a verdict of guilty. We review jury instructions in their entirety to determine whether error requiring reversal occurred, and whether the instructions "fairly present the issues to be tried and sufficiently protect the defendant's rights." *People v Heikkinen*, 250 Mich App 322, 327; 646 NW2d 190 (2002).

Upon receiving a note from the jury asking whether "misrepresentation of age [can] be used in determining the basis for guilt or innocence," the trial court responded:

Assuming you conclude there was mis-representation [sic] of any fact by any witness, you may certainly consider that, if you wish, in determining the credibility of that witness.

However, concerning this charge of criminal sexual conduct third degree in which the allegation is that sexual penetration was committed with a person 13, 14, or 15 years of age, even a reasonable belief by the perpetrator that the person was 16 years of age or older is not a defense.

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<sup>1</sup> The gravamen of the charged offense is sexual penetration or contact with an underage person. The present case illustrates that the exclusion of a reasonable-mistake-of-age defense in statutory rape cases can result in harsh consequences where there is no dispute that defendant was informed that the victim was "eighteen or nineteen" years old. Concerns that the punishment that results in a case like this is too harsh should be addressed to the Legislature. Cf. Model Penal Code § 213.6(1) (when criminality depends on the child's being below a critical age other than 10, it is a defense for the actor to prove by a preponderance of the evidence that he reasonably believed the child to be above the critical age).

This supplemental instruction was an accurate statement of the law. *Cash, supra* at 242; *Lardie, supra* at 255 n 40, and defendant does not challenge the legal accuracy of the instruction. Rather, defendant contends that the court's response deprived the jury of its power to nullify. Defendant's argument is unavailing. While a jury has the power to exercise jury nullification, it does not have the right to do so. *People v Demers*, 195 Mich App 205, 206-207; 489 NW2d 173 (1992). Further, criminal defendants have no right to an instruction on jury nullification. *People v St Cyr*, 129 Mich App 471, 473-474; 341 NW2d 533 (1983).

Contrary to defendant's assertion, the court's supplemental instruction to the jury did not foreclose the power of leniency. By its very nature, jury nullification consists of the power to disregard the trial court's instructions. *Demers, supra* at 206-207. The jury *could have* ignored the trial court's supplemental instruction, taking into account the victim's misrepresentations and acquitting defendant out of sympathy. However, the jury chose not to do so, instead following the law as put forward by the trial court's instructions. The court's supplemental instruction sufficiently protected defendant's rights.

Affirmed.

/s/ Richard A. Bandstra  
/s/ E. Thomas Fitzgerald  
/s/ Helene N. White