STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1489

State of Minnesota,
Respondent,

v.

Christopher Lee Holloway,
Appellant.

Filed November 20, 2017
Affirmed
Ross, Judge

Olmsted County District Court
File No. 55-CR-14-8517

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Mark A. Ostrem, Olmsted County Attorney, James Spencer, Assistant County Attorney, Jennifer D. Plante, Assistant County Attorney, Rochester, Minnesota (for respondent)

Max A. Keller, Lexie D. Stein, Keller Law Offices, Minneapolis, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Ross, Judge; and Rodenberg, Judge.

S Y L L A B U S

Minnesota Statutes sections 609.344, subdivision 1(b) (2014), and 609.345, subdivision 1(b) (2014), do not violate a criminal-sexual-conduct defendant's substantive due process or equal protection rights by limiting the mistake-of-age defense only to defendants who are less than 120 months older than their child-victims.

O P I N I O N

ROSS, Judge

The mother of a 14-year-old boy called police after she found 44-year-old stranger Christopher Holloway naked in bed with her son. The district court prohibited Holloway from raising the mistake-of-age affirmative defense against the consequent criminal-sexual-conduct charges because Minnesota law allows the defense only for a defendant who is no more than 120 months older than his victim. On appeal from his convictions of third-degree and fourth-degree criminal sexual conduct, Holloway challenges the constitutionality of this limitation, arguing that it violates his substantive due process and equal protection rights. We affirm his conviction because the legislature was not required to make knowledge of the child's age an element of statutory rape and the 120-month window is rationally related to the legitimate objective of most vigorously protecting younger children from sexual abuse.

FACTS

Forty-four-year-old Christopher Holloway met 14-year-old J.D. on a social-media application designed to facilitate meetings between homosexual men. The two began exchanging messages, and J.D. told Holloway that he was 18 years old. They agreed to meet. Holloway went to J.D.'s house in the middle of the night in December 2014. He engaged sexually with J.D. The next night Holloway went there again. He sexually penetrated J.D. in his basement bedroom. J.D.'s mother heard noises and walked in. She found Holloway naked in bed with her son and called the police. Holloway fled. Police soon found and arrested him.

The state charged Holloway with criminal sexual conduct in the third and fourth degrees. The statutes that define both crimes permit a mistake-of-age affirmative defense only for a defendant who, unlike Holloway, is no more than 120 months older than the child. Minn. Stat. §§ 609.344, subd. 1(b), 609.345, subd. 1(b) (2014). Holloway argued to the district court that this limitation in both statutes is unconstitutional on substantive due process and equal protection grounds. The district court held the statutes constitutional.

A jury found Holloway guilty of both offenses. Holloway appeals.

ISSUES

I. Did the district court abuse its discretion by failing to include a jury instruction about the state's need to prove that Holloway knew the victim's age?

II. Do Minnesota Statutes sections 609.344, subdivision 1(b), and 609.345, subdivision 1(b), violate a defendant's substantive due process rights by not requiring the state to prove that the defendant knew the victim's age?

III. Do Minnesota Statutes sections 609.344, subdivision 1(b), and 609.345, subdivision 1(b), violate a defendant's equal protection rights by limiting the mistake-of-age defense only to defendants who are no more than 120 months older than their victims?

ANALYSIS

Holloway raises three constitutional arguments. He contends that the district court's jury instructions unconstitutionally failed to include a *mens rea* element that Holloway knew that the victim was a minor because, he maintains, we must infer that element despite its omission from the statutes. He also contends that the statutes violate his right to substantive due process by not allowing him to raise the affirmative defense of mistake-of-age. And he contends similarly that the statutes violate his right to equal

protection of the laws by disallowing him, while allowing others, to raise the affirmative defense. We address each argument in turn.

I

Holloway challenges the district court's jury instructions describing the elements of his two charges. We review the district court's jury instructions for an abuse of discretion. *State v. Kuhnau*, 622 N.W.2d 552, 555 (Minn. 2001). Holloway argues particularly that the two statutes underlying his convictions—section 609.344, subdivision 1(b), and section 609.345, subdivision 1(b)—implicitly include a *mens rea* element requiring the state to prove that he knew that the boy he was sexually molesting was younger than 16. By failing to include the required element, Holloway maintains, the district court violated his due process rights. *See Middleton v. McNeil*, 541 U.S. 433, 437, 124 S. Ct. 1830, 1832 (2004) (holding that failing to instruct jury on all elements of offense may violate a defendant's right to due process); *and see Neder v. United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 1837 (1999) (holding that harmless-error review applies to cases in which jury instructions omit an element of the charged offense). The argument requires us to interpret the statutes, a duty we undertake de novo. *State v. Thonesavanh*, ___ N.W.2d ___, ___, 2017 WL 3880768, at *2 (Minn. Sept. 6, 2017).

Holloway argues that, because strict-liability statutes are disfavored and the legislature did not clearly intend these two statutes to constitute strict-liability offenses, the district court should have inferred a *mens rea* element about his knowledge of J.D.'s age and instructed the jury accordingly. Holloway is correct that the statutes do not constitute

strict-liability offenses. But he is not correct that they include a *mens rea* element about knowledge of the victim's age.

The supreme court has already established that another provision in this statutory scheme does not constitute a strict-liability offense. In *State v. Wenthe*, the court looked at section 609.344, subdivision 1(l), the clergy sexual conduct portion of section 609.344, and held that it does not impose strict liability because it requires the offender's general intent to sexually penetrate the victim. 865 N.W.2d 293, 303 (Minn. 2015); *see also State v. Bookwalter*, 541 N.W.2d 290, 296 (Minn. 1995) (holding that Minn. Stat. § 609.342, criminal sexual conduct in the first degree, does not impose strict liability because it requires the general intent to sexually penetrate the victim). We apply this holding by analogy to both statutes here, inferring the general intent to sexually penetrate the child as an element of section 609.344, subdivision 1(b), and to sexually contact the child as an element of section 609.345, subdivision 1(b). So understood, neither statute is a strict liability offense.

But neither statute requires proof that the defendant knew the child's age. The legislature expressly established that, when the defendant is more than 120 months older than the child-victim, "mistake as to the complainant's age shall not be a defense." Minn. Stat. §§ 609.344, subd. 1(b), 609.345, subd. 1(b). This demonstrates both that the legislature contemplated whether the state must prove that the defendant knew the victim's age and that it chose not to include the requirement. The district court therefore did not abuse its discretion by failing to instruct the jury to consider whether the state proved that Holloway knew that J.D. was 14 years old.

We turn to Holloway's substantive due process argument.

II

Holloway argues that the two statutes violate his substantive due process rights. We review the constitutionality of a statute de novo. *State v. Cox*, 798 N.W.2d 517, 519 (Minn. 2011). We will presume a statute is constitutional and we will strike it down only if necessary. *State v. Melde*, 725 N.W.2d 99, 102 (Minn. 2006). To prevail, Holloway must establish beyond a reasonable doubt that the statutes are unconstitutional. *Cox*, 798 N.W.2d at 519. Holloway contends that not being allowed to raise the mistake-of-age defense prevented him from presenting a complete defense, which infringed on his right to a fair trial. Although Holloway frames this constitutional challenge as one of substantive due process, "[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *See Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct. 1727, 1731 (2006) (quotation omitted).

We first determine the constitutional standard of review governing Holloway's due process claim. Holloway argues that we must analyze the constitutionality of the statutes using the most exacting judicial standard, the strict-scrutiny test. This is so, he says, because the statutes implicate his fundamental right to a fair trial. Holloway paints the issue too broadly. Of course defendants have a right, broadly painted, to a fair trial, but the Supreme Court has "required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest." *Washington v. Glucksberg*, 521 U.S. 702, 721,

117 S. Ct. 2258, 2268 (1997); *see also McDonald v. City of Chicago*, 561 U.S. 742, 797, 130 S. Ct. 3020, 3053–54 (2010) (Scalia, J., concurring) (explaining that, under the due process framework, the Supreme Court has "sought a careful, specific description of the right at issue in order to determine whether that right, thus narrowly defined, was fundamental"). We will therefore narrowly construe Holloway's claimed right and decide whether it is fundamental.

Holloway's specifically claimed right—the right to present the mistake-of-age defense to the charge of criminal sexual conduct—is not fundamental in the constitutional sense. As the Supreme Court has recounted,

> [W]e have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition . . . and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.

Glucksberg, 521 U.S. at 720–21, 117 S. Ct. at 2268 (quotations omitted). Holloway therefore has a fundamental right to present the mistake-of-age defense only if the defense is deeply rooted in history and tradition. It is not. Indeed, it is the absence of the mistake-of-age defense that is deeply rooted. English common law historically included criminal intent as an element of a crime. *Morissette v. United States*, 342 U.S. 246, 250–51, 72 S. Ct. 240, 243–44 (1952). But nineteenth century commentators recognized exceptions to this rule, including statutory "sex offenses, such as rape, in which the victim's actual age was determinative despite defendant's reasonable belief that the girl had reached [the] age of

consent." *Id.* at 251 n.8, 72 S. Ct. at 244 n.8. The mistake-of-age defense has no roots in age-based sexual assault trials because knowledge of age has never been an element.

Because Holloway's claimed right to present the mistake-of-age defense to the charge of criminal sexual conduct is not a fundamental right, we will review the challenged statutory limitation under the deferential rational-basis standard. *See State v. Behl*, 564 N.W.2d 560, 567 (Minn. 1997). All that we ask in the face of a substantive due process challenge under this standard is whether the limitation reflects "a reasonable means to a permissive object." *Id.* We hold that it does for the reasons we discuss more fully in the next section as we address Holloway's equal protection argument.

We recognize that "[t]he right of a defendant to present a complete defense is an essential principle of our criminal justice system and is guaranteed by the Due Process Clause of both the United States Constitution and the Minnesota Constitution." *State v. Beecroft*, 813 N.W.2d 814, 838–39 (plurality opinion) (Minn. 2012). But courts do not typically apply this principle to require the legislature to make a substantive defense available to a defendant. Instead, courts have commonly applied the principle to prevent a defendant from being procedurally prohibited from making a substantive defense that is already available under the law. For example, courts have applied the principle to protect a defendant's "right to offer the testimony of witnesses" and "to compel their attendance," *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 1923 (1967), a defendant's right "to take the witness stand and to testify in his or her own defense," *Rock v. Arkansas*, 483 U.S. 44, 49, 107 S. Ct. 2704, 2708 (1987), and a defendant's right "to make all legitimate arguments on the evidence, to explain the evidence, and to present all proper inferences to

be drawn therefrom." *State v. Atkinson*, 774 N.W.2d 584, 589 (Minn. 2009) (quotation omitted).

The Minnesota Supreme Court long ago foreshadowed our result today in *State v. Morse* when it addressed the knowledge-of-age issue in two statutes that criminalized taking "indecent liberties" with a girl under 16 years old. 281 Minn. 378, 379–80, 161 N.W.2d 699, 700 (1968). The statutes did not require proof that the defendant knew the victim's age, despite the fact that age was a material element of the crime. *Id.* at 700. Without defining the issue as one of "substantive due process"—a term the Minnesota Supreme Court would not use until five years after it decided *Morse*, see *Anderson v. Lappegaard*, 302 Minn. 266, 271, 224 N.W.2d 504, 507 (1974) (quoting favorably from a reference in appellant's brief)—the *Morse* court considered the substance of the laws and held them constitutional. *Id.* at 700–01. The court explained that, although knowledge and intent are fundamental elements at common law, legislatures have the authority to define a crime without them. *Id.* at 701–02. As a result, Morse was not constitutionally entitled to raise a mistake-of-age defense. *Id.* at 700–01.

Although we more recently found a substantive due process violation when a defendant was not allowed to raise a mistake-of-age affirmative defense, we do not do so here. In *State v. Moser* we examined a challenge to Minnesota Statutes section 609.352, subdivision 3(a) (2014), the child-solicitation statute. 884 N.W.2d 890, 893 (Minn. App. 2016). We held that the statute violated due process as applied to Moser by not allowing a mistake-of-age defense "when the person solicited represents that he or she is 16 or older, the solicitation occurs over the Internet, and there is no in-person contact between the

defendant and the person solicited." *Id.* at 905–06. We distinguished *Morissette* and *Morse* by reasoning that interacting only online differs substantially from in-person encounters, where a defendant can more practically assess the age of the alleged victim. *Id.* at 899. The challenged statutes and circumstances here mirror *Morse*, not *Moser*, and we hold that Holloway's substantive due process rights were not violated by his inability to raise a mistake-of-age affirmative defense.

III

We turn to Holloway's argument that the 120-month window allowing the mistake-of-age defense violates his right to equal protection because the statutes arbitrarily deny some defendants the defense and allow it to others. The Fourteenth Amendment prohibits the state from denying any person equal protection of the laws, and the state supreme court has recognized that equal protection is also an "unenumerated" right in Article I, Section 2, of the Minnesota Constitution. U.S. Const. amend. XIV, § 1; *State v. Russell*, 477 N.W.2d 886, 893 (Minn. 1991) (Simonett, J., concurring specially). The threshold question in an equal protection challenge is whether the challenged statute creates two similarly situated classes. *See Cox*, 798 N.W.2d at 521. If the answer to the threshold question is yes, we then again must determine what level of constitutional scrutiny to apply. *See State v.* Garcia, 683 N.W.2d 294, 298 (Minn. 2004). The classes here are those criminal-sexual-conduct defendants who are more than 120 months older than their child victims and those who are not. We can assume they are similarly situated for our analysis. We turn to the level of scrutiny.

We will test an equal protection challenge to a statute only for rational basis unless it "involves a suspect classification or a fundamental right." *Id.* The two classes of defendants here are not constitutionally suspect classes, and we have already disposed of Holloway's contention that he has a fundamental right to the mistake-of-age defense. Holloway nonetheless argues that we should examine the statutes under intermediate scrutiny, relying on the Eighth Circuit's decision in *Stiles v. Blunt* to support his argument. 912 F.2d 260 (8th Cir. 1990). We are not bound by federal appellate decisions and, in any event, *Blunt* does not support Holloway. *Blunt* involved an equal protection challenge to a Missouri law that included a minimum-age requirement for state representatives. *Id.* at 262. While *Blunt* does discuss intermediate scrutiny, it reasons that intermediate scrutiny applies only to classifications involving gender, alienage, or legitimacy. 912 F.2d at 263. In fact, *Blunt* applied only a rational-basis review to the minimum-age law. *Id.* at 264. And the Minnesota Supreme Court has held that age is not a suspect class. *In re Estate of Turner*, 391 N.W.2d 767, 769 (Minn. 1986). We will conduct only a rational-basis review.

Minnesota tends to apply a different rational-basis test to equal protection challenges than federal courts apply. It is a three-part test:

> (1) The distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs; (2) the classification must be genuine or relevant to the purpose of the law; that is there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy; and (3) the purpose of the statute must be one that the state can legitimately attempt to achieve.

Russell, 477 N.W.2d at 888. Minnesota's stricter test differs from the federal standard also in that the Minnesota test does not hypothesize a rational basis for a classification. *Id.* at 889. The *Russell* court said there must instead be a "reasonable connection between the actual, and not just the theoretical, effect of the challenged classification and the statutory goals." *Id.*

We will apply this stricter rational-basis test here, but with some hesitation. As one justice observed, "[I]t is unclear whether equal protection challenges under the Minnesota Constitution are evaluated under the federal rational basis test or the three-part rational basis test that we apply in some cases but not others." *Cox*, 798 N.W.2d at 525 (Minn. 2011) (Stras, J., concurring). Justice Simonett had initially raised separation-of-powers concerns about the more stringent three-factor rational basis test and advocated that it be limited only to cases that, like *Russell*, dealt with "a facially neutral criminal statute [that] has, in its general application, a substantial discriminatory racial impact." *Russell*, 477 N.W.2d at 894 (Simonett, J. concurring specially). But the supreme court has not followed Justice Simonett's urging and has occasionally applied the test to address a variety of implied classifications having nothing to do with race in criminal appeals. *See, e.g.*, *State v. Barnes*, 713 N.W.2d 325, 332 (Minn. 2006) (applying three-factor rational basis test to address harsher punishment for those who have a past pattern of domestic abuse); *Garcia*, 683 N.W.2d at 299 (applying three-factor test to statute that treated differently those juveniles designated for extended juvenile jurisdiction who violate probation and have an adult sentence executed and juveniles certified as adults who are initially placed on probation and then violate probation and have their sentence executed); *State v.*

Benniefield, 678 N.W.2d 42, 46–47 (Minn. 2004) (applying three-factor test to statute that differentiates between those who possess controlled substances in a school zone and those who possess them outside a school zone).

Applying the three-factor test, as we must, requires us to comprehend what the relevant statutes are trying to achieve. The overall scheme informs our analysis. Minnesota Statutes sections 609.342 through 609.345 define first-, second-, third- and fourth-degree criminal sexual conduct. All four statutes contain similar provisions criminalizing sexual conduct with minors.

We believe that these statutes evince the legislature's clear intent to afford the most protection to the youngest children. The statutes group children in three classes—those younger than 13, those age 13 through 15, and those age 16 to 18. They include age-proximity ranges (the difference between the child's age and the offender's age) to define the crimes. *See*, *e.g.*, Minn. Stat. § 609.345, subd. 1(b) (criminalizing sexual contact when the child "is at least 13 but less than 16 . . . and the actor is more than 48 months older"). Applying the age-proximity range to each class, for example, a 21-year-old adult commits fourth-degree criminal sexual conduct by having sexual contact only with the youngest children in the 16-to-18 age group but he commits the crime by having sexual contact with *any* child in either of the two younger age groups. *See* Minn. Stat. § 609.345, subds. 1(a), 1(b), and 1(e). Also for example, an 18-year-old adult commits third-degree criminal sexual conduct by sexual penetration of the youngest children in the 13-through-15 age group and all children in the under-13 age group, but none of the children in the oldest age group of 16 to 18. *See* Minn. Stat. § 609.344, subds. 1(a), 1(b),

and 1(e). In these statutes that criminalize sexual activity with children, the youngest children are the most protected.

According to Holloway, the legislature's limit on the mistake-of-age defense—permitting the defense only for a defendant who is 120 months or less older than the child he sexually molested—establishes age-based classes irrationally. He argues that the legislature has no rational basis to distinguish "between a 23 year old male who has sex with a 14 year old, and [Holloway], a 44 year old male who had sex with a 14 year old." The argument overlooks the legislature's apparent overall intent to afford the most protection to the youngest victims. Assume any finite, hypothetical class of potential offenders of varying ages from 18 to 80. The younger the potential victim, the smaller the segment of that class of offenders who can avoid conviction using the mistake-of-age affirmative defense. Reducing the number of potential offenders who can avoid conviction in this manner necessarily affords greater protection to the youngest potential victims.

Holloway points to comments made by one legislator who emphasized that the law would hold older offenders more responsible than younger offenders, and he asks us to deem the distinction irrational. But that isolated discussion does not establish the overall legislative purpose. We cannot suppose that statements by a single lawmaker constitute the reasons each of the senators and representatives voted for the 120-month affirmative-defense window, or the purpose of the legislature collectively. And we observe that a later exchange between two senators as quoted by Holloway suggests exactly the obvious intent we have just inferred based on the practical effect of the law. After Senator Olson explained, "[A]ll we're asking for here is if it's a relationship between a 13 year old and a

23 year old, that [the] 23 year old isn't gonna be able to try to claim that he didn't understand that this 13 year old was . . . too young," Senator Limmer asked, "In order to protect more potential victims, would it be better if we go with a 5-year [limit for the defense] instead [of the 10-year window]?" That the senators were expressly concerned about "protect[ing] more potential victims," all of whom are children, supports our understanding that the limit on the affirmative defense, consistent with the overall statutory scheme, is aimed at affording the most protection to the youngest victims.

With this understanding, we have no difficultly deciding whether the limit on the affirmative defense satisfies the three-pronged rational-basis test. We can readily answer the first prong: the 120-month distinction that prevents some defendants from asserting the defense while allowing others to assert it is neither arbitrary nor fanciful. It is manifestly rational. On the second prong, the distinction is relevant and evidently connected to the purpose of the overall statutory scheme as we have discerned it. The distinction, like the overall statutory scheme, is necessarily more protective of the youngest victims by being harder on their molesters. And on the third prong, as counsel for Holloway acknowledged during the oral argument in this appeal, providing greater protection to younger potential victims is a legitimate legislative objective. Finally, for the reasons we have presented, we are satisfied that the challenged classification actually rather than theoretically furthers the statutory objective.

D E C I S I O N

The district court did not abuse its discretion by failing to instruct the jury that the defendant's knowledge of the victim's age is an element of criminal sexual conduct. And Minnesota Statutes sections 609.344, subdivision 1(b), and 609.345, subdivision 1(b), do not violate due process or equal protection by limiting the use of the mistake-of-age affirmative defense.

Affirmed.