State v. Hirschfelder, Matthew J.

No. 82744-3

C. JOHNSON, J. (dissenting)—The majority analyzes one statutory subsection and fails to apply the determinative statutory provision. Perhaps more disturbing are the reasons why the majority does not apply other, determinative statutory subsections. The majority's conclusion is inconsistent with the statutory scheme, taken as a whole, and does not, ultimately make sense.

In this case, the issue centers on chapter 9A.44 RCW. Under that chapter, the legislature has expressly indicated what conduct is being criminalized. More specifically the legislature has provided expressly what conduct is not criminal. RCW 9A.44.030, entitled "Defenses to prosecution under this chapter," provides an affirmative defense to persons charged under former RCW 9A.44.093(1)(b)(2005):

> (2) . . . 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:
>
> . . . .
>
> (d) *For a defendant charged with sexual misconduct with a minor in the first degree, that the victim was at least eighteen*, or was less than sixty months younger than the defendant.

RCW 9A.44.030 (emphasis added). The legislature expressly provides that a person charged with sexual misconduct with a minor may defend that charge by establishing that the "minor" was an adult, i.e., at least 18 years old. The defendant has done so in this case where the "victim" was 18 years old at the time of the incident.

The majority's explanation for ignoring RCW 9A.44.030(3)(d) is both unpersuasive in form and imprecise in application.

The majority disregards the affirmative defense expressly provided in RCW 9A.44.030(3) by noting that a different statute, RCW 9A.44.093, was amended in 2001. Regardless of how the majority substantiates its result, the majority fails to respect the plain language of RCW 9A.44.030(2), which states that the affirmative defense will apply to "*any prosecution under this chapter* in which the offense or degree of the offense depends on the victim's age." (Emphasis added.) RCW 9A.44.030(3)(d) is equally clear and applies when "a defendant charged with sexual

misconduct with a minor in the first degree." Since the legislature did not qualify the statutory language creating the affirmative defense, this court must apply the clear directive of RCW 9A.44.030(3)(d).

As additional support, the majority also applies a general rule of statutory interpretation, "When 'statutes irreconcilably conflict, the more specific statute will prevail . . . .'" Majority at 8 (quoting *Hallauer v. Spectrum Props., Inc*., 143 Wn.2d 126, 146, 18 P.3d 540 (2001)). But the majority's analysis is flawed for several reasons. First, the majority states just half of the rule of interpretation regarding statutes relating to the same subject matter. Before looking to the "more specific statute," both statutes "are to be read together as constituting a unified whole . . . which maintains the integrity of the respective statutes." *Hallauer,* 143 Wn.2d at 146 (quoting and citing *State v. Wright*, 84 Wn.2d 645, 650, 529 P.2d 453 (1974); *Wark v. Nat'l Guard*, 87 Wn.2d 864, 867, 557 P.2d 844 (1976); *Pearce v. G. R. Kirk Co*., 22 Wn. App. 323, 327, 589 P.2d 302 (1979)). In this case, RCW 9A.44.093(1)(b) provides the substantive crime and RCW 9A.44.030(3)(d) provides an affirmative defense to that crime. The former statute establishes the prosecution's claim, and the latter permits a defendant's assertion of facts that, if proved, will defeat the prosecutor's claim. Since both statutes are in harmonious agreement, we should not abrogate the application of one statute simply to facilitate

an interpretation of another.

Second, the majority appears to disregard the fact that a statutory interpretation limiting an *affirmative defense* is significantly different from a statutory interpretation limiting the *reach of a criminal statute*; an application that is more consistent with the general rule of interpretation that the majority relies upon. Tellingly, the majority does not cite to a single case in this state supporting the proposition that a statute providing an affirmative defense to a substantive crime "irreconcilably conflict[s]" with the statute establishing the underlying crime. Majority at 8. The majority fails to cite such precedent because no such precedent exists.

In sum, the majority's application of former RCW 9A.44.093(1)(b) rewrites a bright-line rule. We should not use the statute to criminalize conduct between two consenting adults where the legislature has expressly provided otherwise. We should hold that the former statute did not criminalize sexual intercourse between a school employee and an 18-year-old adult student. We affirm the Court of Appeals, and remand to the trial court for dismissal. Because the majority conspicuously fails to apply RCW 9A.44.030(3)(d), I respectfully dissent.

AUTHOR:
Justice Charles W. Johnson

WE CONCUR:
Justice Susan Owens

Justice Richard B. Sanders

Justice Tom Chambers