

No. 08-100197-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF E.R.,

APPELLANT,

DOB: 05-28-1993

vs.

STATE OF KANSAS,

APPELLEE.

BRIEF OF APPELLANT

**Appeal from the District Court of Finney County, Kansas
Honorable Michael L. Quint, Judge of the District Court
District Court Case No. 07JV048**

**Paul Shipp, #20263
KANSAS LEGAL SERVICES
104 South Fourth Street
Manhattan, KS 66502
Office: 785-537-2943
FAX: 785-537-2927
Attorney for Appellant - Juvenile**

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

NATURE OF THE CASE.....1

STATEMENT OF FACTS.....1

ISSUE ON APPEAL.....3

STANDARD OF APPELLATE REVIEW4

ARGUMENTS AND AUTHORITIES.....4

 I. The plain meaning of K.S.A. 21-3522 does not allow for the offender to
be younger than the alleged victim.....5

 II. The general structure of the sex crime statutes, including K.S.A. 21-3522,
requires a real victim and a real offender, even a mens rea and an actus reus.....7

 III. The State’s application of the law achieves ridiculous and absurd results 9

CONCLUSION.....19

CERTIFICATE OF SERVICE.....20

TABLE OF AUTHORITIES

Cases

Dougan v. Rossville Drainage District, 270 Kan. 468, 472, 15 P.3d 338 (2000).....4

In re A.C.W., 26 Kan.App.2d 468, 988 P.2d 742 (1999)..... 10, 11, 12, 13

In re B.M.B., 264 Kan 417, 436, 955 P.2d 1302 (1998).....12

In re Jessie C., 164 A.D.2d 731, 565 N.Y.S.2d 941 (N.Y. App. Div. 1991) 18, 19

In re Z.C., 2007 Utah 54, 165 P.3d 1206 (2007)..... 16, 17

In the Matter of J.R.A., 38 Kan.Ap.2d 86 (2007).....4, 5

State v. Allen, 35 Kan.App.2d 466, Syl. ¶ 4, 131 P.3d 1241 (2006)4

State v. Barnes, 275 Kan. 364, Syl. ¶ 2, 64 P.3d 405 (2003).....4

State v. Haney, 34 Kan.App.2d 232, 241, 116 P.3d 747 (2005) 13, 15

State v. Helms, 242 Kan. 511, 514-15, 748 P.2d 425 (1988).....13

State v. Limon, 280 Kan. 275, 122 P.3d 22 (2005) 14

State v. Rush, 24 Kan.App.2d 113, 115, 942 P.2d 55 (1997) 14

State v. Ussery, 34 Kan.App.2d 250, 259, 116 P.3d 735 (2005) 9, 13, 15

State v. Wells, 223 Kan. 94, 98, 573 P.2d 580 (1977)..... 13

Statutes

K.S.A. 21-3502.....7

K.S.A. 21-3503..... 10, 15

K.S.A. 21-3504.....passim

K.S.A. 21-3506.....7

K.S.A. 21-3507..... 10

K.S.A. 21-3510.....7

K.S.A. 21-3518.....	7
K.S.A. 21-3520.....	8
K.S.A. 21-3522(a)(3).....	passim
K.S.A. 38-16,129.....	3
K.S.A. 38-1603.....	11
K.S.A. 38-1610.....	11
K.S.A. 38-2301 <i>et seq.</i>	1
K.S.A. 38-2302.....	11
K.S.A. 38-2303.....	11
K.S.A. 38-2312.....	11
K.S.A. 38-2328.....	1
Utah Code section 76-5-404.1.....	17

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of E.R.

BRIEF OF APPELLANT

**Appeal from the District Court of Finney County, Kansas
Honorable Michael L. Quint, Judge
District Court Case No. 07 JV 48**

NATURE OF THE CASE

This is an action seeking to have E.R., a twelve (12) year old child, adjudged to be a juvenile offender pursuant to the provisions of the Revised Kansas Juvenile Justice Code, K.S.A. 38-2301 *et seq.*, for allegedly engaging in unlawful voluntary sexual relations with a fourteen year old girl, in violation of K.S.A. 21-3522(a)(3). (R. I, pp. 8-9) The case was tried before a district magistrate judge on stipulated facts on July 31, 2007, and E.R. was found to be a juvenile offender. (R. I, pp. 14-15) The case was appealed to a district judge, who affirmed the decision of the district magistrate judge. (R. I, pp. 30-31) This appeal followed.

STATEMENT OF FACTS

This case was initiated on February 15, 2007, with the filing of a complaint pursuant to K.S.A. 38-2328 alleging that on or about April 21, 2006, and April 29, 2006, E.R., a twelve year old child, had engaged in voluntary lewd fondling or touching with M.H., a fourteen year old child, that E.R. was less than nineteen years of age and less than four years older than M.H., that E.R. and M.H. were the only parties involved and were members of the opposite sex, and that E.R.'s actions constituted a violation of

K.S.A. 21-3522(a)(3), a severity level 10 person felony. (R. I, pp. 8-9) On June 26, 2007, E.R. filed a motion to dismiss for failure to state a crime, on the basis that K.S.A. 21-3522 requires that the alleged offender be older than the alleged victim (R. I, pp. 10-11), and that E.R. by law could not legally form the necessary intent to commit the crime alleged.

On July 31, 2007, E.R. and the State submitted the case to a district magistrate judge for trial upon stipulated facts. The stipulated facts were as follows:

1. That filed herein with the Court was a Motion to Dismiss for Failure to State a Crime, by defense counsel, alleging that the complaint was defective in that it fails to state a crime. The said motion was denied this date.
 2. That the parties agree that the said motion and argument is hereby preserved for appeal as timely objection was made prior to trial by stipulation.
 3. That the Juvenile is herein charged with Unlawful Voluntary Sexual Relations, a violation of K.S.A. 21-3522(a)(3), "Lewd Fondling," a Level 10 person felony, with the allegation being that the act occurred on or about April 21, 2006.
 4. That Jeopardy has attached herein.
 5. That the juvenile herein, [E.R.] was born on May 28, 1993, and that the alleged victim, M.H. was born on December 27, 1991; making the alleged perpetrator the age of twelve and the alleged victim the age of fourteen on April 21, 2006, the date of the incident.
 6. That the juvenile (alleged perpetrator) was younger than the alleged victim on the date of the incident, he being age 12 and she being age 14.
 7. That on April 21, 2006, that [E.R.] did fondle in a sexual manner, M.H., the alleged victim herein; and that M.H. voluntarily participated in the act.
 8. That [E.R.] and M.H. are of the opposite sex, and that no other party was involved the (sic) acts stipulated to herein.
 9. That all the said acts alleged occurred in Finney Couty (sic), Kansas.
- (R. I, pp. 12-13) By journal entry of the same date, District Magistrate Judge

Donna L. J. Blake adjudicated E.R. to be a juvenile offender for violation of K.S.A. 21-3522(a)(3). (R. I, p. 16)

On December 4, 2007, a dispositional hearing was held in this matter. The trial court found that E.R. had been adjudicated a juvenile offender and that pursuant to K.S.A. 38-16,129, he was a serious offender II. It committed E.R. directly to a juvenile correctional facility for a term of 12 months, with an aftercare term of 12 months. The court then stayed the direct commitment to a juvenile correctional facility and granted E.R. supervised probation for 18 months, subject to numerous conditions. (R. I, pp. 17-19) E.R. appealed the orders of adjudication and sentencing to a district judge. (R. I, p. 16)

E.R. renewed his motion to dismiss for failure to state a crime before the district judge, and both the motion and the issue of guilt or innocence were submitted to District Judge Michael L. Quint on the same stipulation of facts submitted to the district magistrate judge. Oral argument was heard on these matters on January 31, 2008. (R. II) On March 4, 2008, the district judge denied E.R.'s motion to dismiss and affirmed the district magistrate judge's adjudication of E.R. as a juvenile offender for violation of K.S.A. 21-3522(a)(3). The judge found that K.S.A. 21-3522 does not contain a requirement that an offender be older than the victim and places no limit on how young a child may be to be convicted of violating this statute, except that the offender must be at least ten years of age. (R. I, pp. 30-31); this appeal followed.

ISSUE ON APPEAL

WHETHER A CHILD WHO IS YOUNGER THAN THE ALLEGED VICTIM CAN BE CHARGED WITH, AND CONVICTED OF UNLAWFUL VOLUNTARY SEXUAL RELATIONS UNDER K.S.A. 21-3522?

AND/OR

WHETHER A CHILD UNDER AGE FOURTEEN IS LEGALLY CAPABLE OF FORMING THE NECESSARY INTENT TO COMMIT A CRIME UNDER K.S.A. 21-3522?

STANDARD OF APPELLATE REVIEW

The issue on appeal is the proper interpretation of K.S.A. 21-3522. Interpretation of a statute is a question of law, over which the appellate court has unlimited review. *Dougan v. Rossville Drainage District*, 270 Kan. 468, 472, 15 P.3d 338 (2000).

In construing a statute, it is presumed that the legislature intended that the statute be given a reasonable construction in order to avoid unreasonable or absurd results. *State v. Barnes*, 275 Kan. 364, Syl. ¶ 2, 64 P.3d 405 (2003). In determining the legislature's intent, the court is not limited in its consideration only to the statutory language, but may consider also the historical background and circumstances attending the enactment of the statute, the purpose to be accomplished, and the effect of various suggested constructions. 275 Kan. at Syl. ¶ 1. If the language of a criminal statute creates any reasonable doubt as to its meaning, it must be construed strictly in favor of the accused. *State v. Allen*, 35 Kan.App.2d 466, Syl. ¶ 4, 131 P.3d 1241 (2006). In this case it is the Juvenile's contention that the statute should be strictly construed in his favor because the State is asking the Court to read the statute too broadly, even more broadly than the legislature ever thought it would be read, creating great ambiguity, and absurd results. Further, the Court should neither add to that which is not readily found in the statute, nor read out what is in it. *In the Matter of J.R.A.*, 38 Kan.Ap.2d 86 (2007).

ARGUMENTS AND AUTHORITIES

The State contends that the meaning of K.S.A. 21-3522(a)(3) requires the allowance that all persons between the ages of ten and nineteen be prosecuted. The State

contends that age eighteen years plus (but under age 19) is the upper limit, and that age ten is the lower limit, because the Revised Kansas Juvenile Justice Code allows for prosecution beginning at age ten. The District court agreed with the State.

It is the juvenile's position that this interpretation and application of the statute is in error, and such a construction allows for ridiculous and absurd results in this case (and others like it), and that it does violence to the meaning and purpose behind the statute. More important is the fact that the plain meaning of the statute requires the offender to be older. The relevant section of K.S.A. 21-3522 reads as follows:

(a) Unlawful voluntary sexual relations is engaging in voluntary: (1) Sexual intercourse; (2) sodomy; or (3) lewd fondling or touching with a child who is 14 years of age but less than 16 years of age and the offender is less than 19 years of age and less than four years of age older than the child and the child and the offender are the only parties involved and are members of the opposite sex.

I. THE PLAIN MEANING OF K.S.A. 21-3522 DOES NOT ALLOW FOR THE OFFENDER TO BE YOUNGER THAN THE ALLEGED VICTIM

The Court is not allowed to read into the statute and garner a meaning that was never intended, see *J.R.A. infra*. However, a mere mechanical reading of the statute could indicate that E.R. *is* less than four years older than M.H. because being twelve is technically "less than" four years older than twelve. Such a mechanical analysis fails to fully account for the entire purpose behind the law, and overlooks the fact that such a reading is nonsense.

It is the Juvenile's position that the offender must always be older than the victim under the law because the older child is presumed to know better, and is also presumed to be better able to exercise better judgment. It is apparent that the parties agree that the

issue herein really does revolve around the meaning of “less than four years older than the child,” and how that phrase is to be applied in cases such as this one.

If the phrase is taken entirely out of the statute, and read on its own, it could be interpreted as meaning that the offender who is younger than the alleged victim will *always* be “less than four years older,” because *being younger* is *always* less than four years younger, but this is too broad. It is the Juvenile’s contention that the entire section of the statute must be read together, “. . . the offender is less than 19 years of age and less than four years of age older than the child. . .” (Emphasis added) and so the phrase itself means that the offender must be less than 19 years old, and *less than four years older than the child*, exactly as it is written, and that the statute on its face does not have a double meaning, but only one meaning, and that *the offender must be older*, but by no more than four years. Another way to state the meaning would be that the phrase on its own clearly states that the offender must always be “older than the child.”

For example, if the victim/child were exactly age fourteen, and the offender were exactly four years and one day older than the victim/child, the offender cannot be charged under K.S.A. 21-3522, because the offender is more than four years of age older than the victim/child. This is true because if there is greater than four years of separation in age between the parties, then the offender must be charged under K.S.A. 21-3504, a more harsh law, carrying more harsh punishments, presumably because the offender should have known better. This particular application illustrates that the offender under K.S.A. 21-3522 must indeed be older, and it also assumes that the offender should have known better. Further, the application just outlined clearly illustrates how the legislature intended the phrase to be used and applied. The statute clearly does not state that the

parties must be “within four years of age,” but instead that the offender must be “older than” the child/victim. The legislature could have used the phrase “within four years of age” but it did not.

The State asserts that reading the entire Juvenile Justice Code, and referring to the definition of a Juvenile Offender, that it was clearly intended to create a range, however, the state failed to articulate the application of the words “older than,” and wants the court to apply the “older than” language in cases where the offender is actually “older than” the child/victim, but not in cases where the offender is “younger than” the child/victim, and this is nonsense, and essentially says that the words “older than” are used in one instance and have a specific meaning, but that those same words have a different meaning when the alleged offender is younger than the victim/child. Essentially the State wants the Courts to ignore the words “older than” all together.

II. THE GENERAL STRUCTURE OF THE SEX CRIME STATUTES, INCLUDING K.S.A. 21-3522, REQUIRES A REAL VICTIM AND A REAL OFFENDER, EVEN A MENS REA AND AN ACTUS REUS

Further review of the statute and its overall structure lends more credit to the argument that the law requires the offender to always be older than the child/victim, especially with regard to sex crimes dealing with children. The fact is that the ages of the parties (both the victim and the offender) in sex cases are essential considerations in charging an alleged offender, especially in consensual encounters.

In Kansas there are sex crimes that are committed where duress or coercion is involved (and these are among the most severely punished crimes, K.S.A. 21-3502, 21-3504, 21-3506, 21-3510, 21-3518, etc), and then there are other sex crimes that are committed where mitigation is allowed because the victim formulated some type of

consent, yet there was some sort of unequal relationship with the alleged victim. These crimes are treated less severely than the crimes where there is outright coercion or force. This case is not one about coercion or force. Even though, it appears obvious that the law assumes that there must be some level of “taking advantage” of the victim, either because of age or some form of legal status.

At common law there is a requirement that the defendant have *mens rea* -- the Latin term for a "guilty mind." *Mens rea* is still one of the necessary elements of crime. There must be an "*actus reus*" (a bad act) accompanied by some level of *mens rea* to constitute the crime with which the defendant is charged. Every sex crime in Kansas has some element of *mens rea* within it, and the interpretation being sought by the State in this case basically does away with the requirement of *mens rea* and *actus reus*.

For example, under K.S.A. 21-3520 a person can be convicted of a felony sex crime (in consensual encounters) but only if there is an unequal relationship between the parties, i.e. teacher/child, parole officer/parolee, law enforcement officer/person in jail. It is because of the unequal relationship that the law presumes that the person in the position of authority “should have known better.” K.S.A. 21-3522 is commonly known as the Romeo & Juliet statute, and it obviously accounts for the age of the offender and the age of the victim/child, and it follows, as does the other statutes, that there must exist some sort of an unequal relationship between the parties, the older child verses the younger the child. In other words the older child “should have known better.” Essentially this meets the requirement that there be some *mens rea* and *actus reus*. Otherwise there is created a situation where ridiculous and absurd results are the unintended consequences, like this case. Argument on this is expanded *infra*.

This Court in *State v. Ussery*, 34 Kan.App.2d 250, 116 P.3d 735 (2005), which is mentioned later in this brief (while in dicta) does state quite succinctly that the legislature agrees with the overall notion that the general structure of the Kansas sex offender laws assume that children under age fourteen (14) cannot exercise any judgment regarding consensual sexual activity:

Indeed, with respect to children under the age of 14, society presumes the child cannot exercise any judgment regarding consent to sexual activity. The legislature has consistently promulgated this public policy throughout the criminal statutes proscribing sex offenses. See K.S.A. 2004 Supp. 21-3502(a)(2) (rape); K.S.A. 21-3504(a)(1) (aggravated indecent liberties with a child); K.S.A. 21-3506(a)(1) and (a)(2) (aggravated criminal sodomy); K.S.A. 21-3511 (aggravated indecent solicitation of a child); K.S.A. 2004 Supp. 21-3522 (unlawful voluntary sexual relations).

And so if the above is true, how could this Court now find that a child under age fourteen can exercise the requisite judgment?

III. THE STATE'S APPLICATION OF THE LAW ACHIEVES RIDICULOUS AND ABSURD RESULTS

Probably the most ridiculous result that is achieved in the case at bar is the requirement that all children between the ages of ten and sixteen who participate in consensual acts (and who did not have any *mens rea* or *actus reus* at all) are therefore both guilty, and should be charged. In other words, under the State's theory of an upper and lower age limit both children are guilty when they are both under age sixteen. But how can this be justified, especially when, like this case, the prosecutor chooses to charge one child of crime, and not the other? And in this case the older child would be guilty of an even higher crime under K.S.A. 21-3504 (and consent is not even an issue), and so the choice not to prosecute the alleged victim, amounts to no more than selective prosecution, and an abuse of discretion. This could not possibly be what the legislature intended. Even when two adults commit an act of adultery (a purely consensual act),

which is a misdemeanor under K.S.A. 21-3507 (class C misdemeanor), there is a requirement that either one, or both of the parties “know” the other is married (*mens rea* and *actus reus*) at the time of the offense. Why is it that when children do a similar act they should be “mutually” charged with a person felony? This is clearly not fair, and a violation of all notions of fairness under the law, and such an interpretation flies in the face of the overall structure of the statute.

At oral argument before the district court, the State suggested that E.R. is simply trying to cut off his nose to spite his face, in that if he may not be charged under K.S.A. 21-3522, he will be charged with aggravated indecent liberties with a child (K.S.A. 21-3504), which is a more severe person felony, a result that the State itself conceded is absurd. (R. II, pp. 14-15.) (Actually, the pertinent statute would be K.S.A. 21-3503(a)(1), since the parties have stipulated that M.H. consented to the conduct in question.) Although the issue is collateral, it must be addressed.

The position of the State is based on *In re A.C.W.*, 26 Kan.App.2d 468, 988 P.2d 742 (1999). In this case A.C.W., a 12 year old boy, was adjudicated a juvenile offender for aggravated indecent liberties with his eight year old half-sister, in violation of K.S.A. 21-3504 (a)(3)(A) or (a)(3)(B). The Court of Appeals affirmed the adjudication. It found that the evidence supported the conclusion that A.C.W. knew his actions were inappropriate, that his actions were not accidental, and that the nature of his actions, together with his obvious sexual maturity, established the requisite intent. 26 Kan.App.2d at 469-71.

But A.C.W. also argued that, regardless of intent, the legislature did not intend for a twelve year old child to be prosecuted under K.S.A. 21-3504, as is argued herein. The

Court of Appeals rejected this argument. Perhaps the argument made by *A.C.W.* would have been more compelling if *A.C.W.* had, at the time his argument was made, the Romeo and Juliet provision, but that law was not enacted until after the *A.C.W.* case was briefed, argued and submitted, July 1999. The Court in *A.C.W.* noted that K.S.A. 21-3504 is specifically mentioned in two places in the Kansas Juvenile Offender Code—in K.S.A. 38-1603(b) (now K.S.A. 38-2303(b)), which establishes a statute of limitations for proceedings under the Code for certain sex offenses when the victim is under sixteen, and in K.S.A. 38-1610(b) (now K.S.A. 38-2312(b)) relating to the expungement of records. It noted further that a juvenile offender is defined as a person between the ages of ten and eighteen. K.S.A. 38-2302(n). Finally, it stated that K.S.A. 21-3504 does not specify the age of the offender, but mentions only the age of the victim. It concluded that the plain and unambiguous language of the statute permits prosecution of a twelve year old child for aggravated indecent liberties. 26 Kan.App.2d at 471-72. The position of the State is that *A.C.W.*, in conjunction with the provisions of the Revised Juvenile Justice Code, permits anyone between the ages of ten and eighteen to be charged with and prosecuted for any of the crimes in the criminal code. (R. II, p. 14)

The State reads *A.C.W.* too broadly, plus the State fails to recognize that the Romeo & Juliet provisions were not even considered, because those provisions weren't even law when the case was argued. It is not clear which statute the court had in mind when it stated that the plain and unambiguous language permitted prosecution of a twelve year old child for aggravated indecent liberties. It seems unlikely that it was referring to the provisions of the Juvenile Justice Code, and it is obvious it was not referring to the Romeo and Juliet law because it was not even contemplated. There are juveniles as

defined by the Code who are clearly subject to prosecution for sex offenses, i.e., those between sixteen and eighteen years of age. The references in the Code to a statute of limitations and expungement provisions as instances in which juveniles are charged with and prosecuted under the Code for such offenses clearly does not support a conclusion that the Code therefore contemplates that all juveniles subject to the Code may be charged with and prosecuted for these offenses. And although K.S.A. 21-3504, as well as most of the other sex offenses set forth in K.S.A. Chapter 21, Article 35, does not specify the age of the offender, the absence of such a provision does not support the conclusion that it plainly permits prosecution of a child of any age, or even, if read in conjunction with the Revised Juvenile Justice Code, of any child between ten and nineteen years of age. The Kansas Supreme Court cast doubt on that proposition in *In re B.M.B.*, 264 Kan 417, 436, 955 P.2d 1302 (1998) when it observed that:

. . . charging a 10-year old boy with “statutory rape” is arguably unacceptable. In this case, the issue would not be that he was unaware that the victim was underage; instead, it would be a question whether his own youth permitted him to form the necessary intent.

There may be circumstances under which it is appropriate to charge and prosecute a twelve year old child such as E.R. for indecent liberties or other sex crimes. However, this Court does not need to decide that issue, because this case is not one of them. Although the decision in *A.C.W.* may be defensible based on its specific facts, the conclusion drawn by the State from its rationale sweep much too broadly. It requires the Court to assume that the legislature intended that when two minor children engage in voluntary unlawful sexual relations, with no element of coercion or force or other factor justifying or characterizing one party as an “offender” and the other as a “victim” other than the relative ages of the parties, the younger child may be subject to greater

punishment than the older. In other words, it requires an assumption that the legislature intended to accord less protection to more vulnerable children, which defies both logic and reason. See *State v. Helms*, 242 Kan. 511, 514-15, 748 P.2d 425 (1988). As noted above, the State itself concedes that this conclusion is absurd. The sex offenses set forth in Article 35 of K.S.A. Chapter 21, particularly as they relate to minors, are couched in terms of a victim and an offender. There is nothing to suggest that when a twelve year old and a fourteen year old engage in voluntary sexual relations which are unlawful only because of the youth of the parties involved, and where the only basis for categorizing one party as an “offender” and the other as a “victim” is the relative ages of the parties, the legislature intended that the younger party should be adjudicated and punished for committing a sex offense, particularly when that party is deemed to be incapable of exercising any judgment regarding consent to sexual activity. The legislature should not be assumed to have intended such a manifestly unjust result. Also, it may be too obvious, but the facts of the A.C.W. case are not even close to the facts herein, as the victim in the A.C.W. case presumably exercised no consent whatsoever, and the offender had the requisite intent, whereas the alleged victim in this case voluntarily participated.

Also, the Kansas Courts have held that the sex crime laws were clearly enacted to protect the moral integrity of the child. Cf. *State v. Wells*, 223 Kan. 94, 98, 573 P.2d 580 (1977), but at the same time the Courts have held that a child under the age of fourteen is presumed to be unable to exercise any judgment whatsoever regarding consent to sexual activity. *State v. Haney*, 34 Kan.App.2d 232, 241, 116 P.3d 747 (2005); *State v. Ussery*, 34 Kan.App.2d 250, 259, 116 P.3d 735 (2005). Therefore, the willing participation in and even initiation of the act in question by a child less than fourteen years of age is no

defense and is irrelevant to the establishment of the crime. *State v. Rush*, 24 Kan.App.2d 113, 115, 942 P.2d 55 (1997). If the child is between the ages of fourteen and sixteen, consent is still not a defense to the crime, but it causes the act to be treated less severely, presumably because of the increasing judgmental capacity and sexual and emotional maturity of the child.

The legislative history of the Romeo and Juliet statute was extensively reviewed by the court in *State v. Limon*, 280 Kan. 275, 122 P.3d 22 (2005). The court found that the only statutory purposes revealed in the legislative history were to impose less harsh punishment on persons less than nineteen years of age who had voluntary sexual relations with another teen, at least fourteen years of age, and to adjust disparities in sentencing. 280 Kan. at 293. It noted that the state clearly has a significant interest in prohibiting sex between adults and minors, both because the adult's influence is potentially coercive, and because of concerns about the ability of the minor to reach an informed consent. But it found that the legislature had determined with this statute that a mutual relationship between teenagers is likely to be less coercive than one between an older adult and a child, and is more likely to involve voluntary participation by the minor, even though not "legally" consensual. 280 Kan. at 297. More importantly the *Limon* case did not establish that mutual charging is required, but instead that there must be an offender and a victim, but the offender must still be treated fairly under the law.

Further, by definition the sexual relations covered by K.S.A. 21-3522 are voluntary/consensual, however there still exists the assumption that there is some sort of unequal relationship that undermines the volitional nature of the acts, which are unlawful only because at least one of the parties—the "victim"—is between the ages of fourteen

and sixteen (and younger than the offender) and therefore unable to legally consent. And so it follows that there is a good reason for treating the parties differently based on the relative “voluntariness” of their actions, and that is based on their relative ages. The statute presumes that the only reason for treating one party as a victim, and the other as an offender, is that the older party is deemed to be relatively more capable of exercising better judgment, or “knows better.” There is no basis whatever for treating the younger party as more culpable. To the extent that the party between fourteen and sixteen years of age is not deemed to be capable of exercising better judgment due to young age and lack of experience, an even younger child cannot be expected to exercise even better judgment. See *State v. Haney*, 34 Kan.App.2d 232, 241, 116 P.3d 747 (2005); *State v. Ussery*, 34 Kan.App.2d 250, 259, 116 P.3d 735 (2005). Indeed, as noted above, a twelve year old child, which E.R. was at the time of the incident in question, is presumed to be unable to exercise any judgment whatsoever with respect to consent to sexual activity. Although both parties may be “victims” of their own bad, or lack of “judgment,” if any party is to be punished for the actions at issue here, it must be the older child, which did not happen.

This conclusion is reinforced by an examination of the Kansas statutes on indecent liberties with a child, which also addresses lewd fondling. K.S.A. 21-3503(a) defines indecent liberties with a child to be, in pertinent part, any lewd fondling or touching of a person between fourteen and sixteen years of age. This describes the action of which E.R. was convicted in this case, and it is a severity level 5, person felony. K.S.A. 21-3504 (a) defines aggravated indecent liberties with a child to be, in pertinent part, any lewd fondling or touching of either a child under the age of fourteen or the

offender, done or submitted to with the intent to arouse or satisfy sexual desire. This describes the action of M.H. in this case and is a severity level 3, person felony. It is apparent that the legislature regards the younger child as meriting greater protection in this type of situation, not less.

Also, is it even rational to assume that E.R. can be both a “child/victim” and an “offender” under the law? To carry the State’s theory to its logical and absolute extreme would result in the inevitable conclusion that children under age fourteen who have consensual sex with each other could and should be dually charged, but with a level one (1) rape charge, and they would not have the benefit of the Romeo and Juliet provision. In other words, if two children under age fourteen (but older than ten) participate in what is considered statutory rape they are both guilty under all circumstances, this is also ridiculous. Is the Court going to give credence to the State’s assertions herein, and allow such a ridiculous theory to be perpetuated? If it does then prosecutors wield an extreme, unchecked power, to bully very young children, and while not the real issue in this case, it is worth noting that this actual theory is often flouted and implemented by the very prosecutor in this case.

Although there are no Kansas cases directly on point, two cases from other jurisdictions are instructive. In *In re Z.C.*, 2007 Utah 54, 165 P.3d 1206 (2007), Z.C., a thirteen year old girl, became pregnant as a result of consensual sex with a twelve year old boy. The state brought delinquency actions against both Z.C. and the boy, charging each with sexual abuse of a child. Z.C. (the older child) challenged her adjudication as delinquent on the basis that it was not the legislature’s intent that one child be charged for consensual sexual activity with another child. The court found that although the language

of the statute permitted Z.C. to be charged with child sex abuse, applying the statute to treat Z.C. as both a victim and a perpetrator for the same act led to an absurd result and was not contemplated by the legislature.

The court began its analysis by noting that sexual abuse of a child is a heinous crime meriting severe punishment because of the psychological harm that the perpetrator may cause the victim, and that the child sex abuse statute, like other forms of sexual assault, presupposed a single act of abuse with a victim to be protected and a perpetrator to be punished. However, the state, by charging both parties, had elected to treat both as perpetrators and neither as a victim. The court found that although the legislature might have intended some type of mutual culpability under a statute such as the fornication statute, it was absurd to think that the legislature intended to simultaneously punish both parties under a statute that clearly contemplated a victim and a perpetrator. 165 P.3d at 1211-12. Significantly for this case, the court in *Z.C.* noted that its analysis would be equally applicable to similar cases even if the state charged only one of the minors involved, stating:

We hold that the application of Utah Code section 76-5-404.1 is absurd where no true perpetrator or victim exists. And the State may not create a perpetrator and a victim through selective prosecution. Rather, charges against the perpetrator must be based upon a material gap in the maturity of the two participants, evidence of coercion or force, or a wider age differential than exists in this case.

165 P.3d at 1213 fn. 10.

K.S.A. 21-3522, like the other Kansas statutes in Article 35 relating to sex offenses, also contemplates a victim and an offender (as outlined *supra*), and the requirement that the offender be older than the victim provides a rational basis for making this distinction. But there is no discernible basis in the statute for designating the

younger child as an offender, and arguable grounds, such as the coercion or force suggested by the court in *Z.C.*, would render this statute inapplicable in any case, since the acts would be no longer mutually voluntary. It appears that the State's designation of E.R. as the offender in this case is, again, nothing more than selective prosecution.

In a New York case, *In re Jessie C.*, 164 A.D.2d 731, 565 N.Y.S.2d 941 (N.Y. App. Div. 1991), the respondent Jessie C., a thirteen (13) year old boy, was found to be delinquent because he had engaged in sexual intercourse with a fifteen (15) year old girl, in violation of a statute which made it sexual misconduct for a male to engage in sexual intercourse with a female without her consent. No force was involved, but the girl was legally incapable of giving consent due to her age. The respondent argued that the statute violated the equal protection guarantees of the federal and state constitutions by impermissibly discriminating on the basis of sex, and the appellate court agreed. However, it determined that the proper remedy was to strike the illegal gender bias, which did not require it to reverse the respondent's adjudication. 164 A.D.2d at 734-35. It further found that the language of the sexual misconduct statute permitted the respondent to be charged as a perpetrator, since, even though he was incapable of consenting to sexual intercourse, consent of the perpetrator was not an element of the offense. 164 A.D.2d at 735. Nonetheless, it reversed the respondent's conviction in the interests of justice, finding it to be manifestly unfair. It found no force had been involved, that the respondent was only 13, but that the female, who was two years older, could not be charged as a perpetrator because of the gender bias in the statute, and the respondent's action was a crime only because the female could not legally consent because of her age. It found that the respondent was no more at fault than the female, and

his adjudication solely because of a gender-biased statute was manifestly unfair. 164 A.D.2d at 736.

The result in this case is equally unjust. The stipulation of the parties provides no basis for assessing greater fault to E.R. than to M.H., and his younger age renders him less capable, “legally,” of exercising good judgment, or giving consent with respect to the acts in question. The statute should not be interpreted to permit such an unreasonable and unjust result. Such an interpretation would permit a ten year old child to be convicted under the statute for voluntary sexual relations with a 15.99 year old child, even though the “victim” would be almost six years older than the “offender.” This simply stands the statute on its head, and cannot possibly be what the legislature intended.

CONCLUSION

This is a straightforward case of statutory interpretation. The interpretation of K.S.A. 21-3522 advanced by the State and endorsed by the District Court, which would permit a child to be charged and convicted as a sex offender for engaging in voluntary sexual relations with another child who is older than he, leads to an absurd and unjust result. Due to the voluntary nature of the activity at issue, the only basis for treating one party as an “offender” and the other as a “victim” is the disparity in the ages of the parties and the presumed greater capacity of the older party to exercise judgment and refrain from the action. To permit the State to arbitrarily charge the younger party as an offender is inconsistent not only with the plain meaning of the statute, but with Article 35 of K.S.A. Chapter 21 in its entirety, which is crafted to provide greater protection to younger, more vulnerable children. Moreover, if there is any ambiguity in the language of the statute, it must be construed strictly in favor of the accused. There is no basis for

finding that E.R. has violated the provisions of K.S.A. 21-3522, and his adjudication as a juvenile offender for violation of that statute must be reversed.

Respectfully submitted,

Paul Shipp, #20263
Attorney for the Juvenile, Appellant

CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 6.09 and 6.10, I hereby certify that I caused to be hand-delivered the original and sixteen (16) copies of above and foregoing BRIEF OF APPELLANT to:

Carol Green
Clerk of the Appellate Court
Kansas Judicial Center
301 SW 10th Avenue
Topeka, KS 66612

with two copies of the said BRIEF OF APPELLANT to each of the following individuals via first class mail, postage prepaid, and addressed as follows:

Ms. Lara Blake Bors
Assistant Finney County Attorney
409 N. 9th Street
Garden City, KS 67846

Office of Attorney General Stephen Six
120 SW 10th Ave., 2nd Floor
Topeka, KS 66612

This 19th day of May 2008.

Paul Shipp, #20263
Attorney for the Juvenile/Appellant