

**ORIGINAL**



**IN THE COURT OF CRIMINAL APPEALS  
OF THE STATE OF OKLAHOMA**

**STATE OF OKLAHOMA,** )  
 )  
 **Appellant,** )  
 )  
 )  
 **v.** )  
 )  
 **JOSHUA SETH PROSSER,** )  
 )  
 **Appellee.** )

**NOT FOR PUBLICATION**

**Case No. S-2020-879**

**FILED**  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA

JUN 24 2021

**JOHN D. HADDEN**  
**CLERK**

**SUMMARY OPINION**

**PER CURIAM:**

Prosser was charged with second-degree rape in violation of 21 O.S.Supp.2017, § 1114(B) in Rogers County District Court Case No. CF-2020-170. At preliminary hearing, Prosser argued the state failed to prove an essential element of the crime charged -- that he was over eighteen years of age at the time of the alleged offense. The demurrer was sustained by the magistrate and later upheld by a reviewing judge.

The State appealed. Pursuant to Rule 11.2(A)(4), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2021), the appeal was automatically assigned to this Court's accelerated docket where issues were presented in oral argument on May 13, 2021. At

the conclusion of the argument, the parties were advised of this Court's decision to reverse the ruling of the magistrate.

### **ANALYSIS**

The issue presented is one of statutory construction and is reviewed de novo. *Smith v. State*, 2007 OK CR 16, § 40, 157 P.3d 1155, 1169. The elements of second-degree rape are: 1) sexual intercourse; 2) with a person who is not the spouse of the defendant; and 3) where the victim was under the age of sixteen. Instruction No. 4-124, OUJI-CR (2d). There is no dispute that the testimony of the alleged victim was sufficient to satisfy the State's burden to prove these elements for the purposes of preliminary hearing.

The defense, however, contends that the defendant's age is also an element of second-degree rape by virtue of 21 O.S.2011, § 1112. Section 1112 states:

No person can be convicted of rape or rape by instrumentation on account of an act of sexual intercourse with anyone over the age of fourteen (14) years, with his or her consent, unless such person was over the age of eighteen (18) years at the time of such act.

This Court has rejected claims, identical to the one raised here, for over 100 years. As early as 1917, the Court found the statute's age provision as it pertains to the defendant "merely creates a new

defense, and forms no part of the definition of the crime itself, it was not necessary to negate each defense in the indictment or information. Matters purely of defense need not be pleaded in the indictment or information." *Penn v. State*, 1917 OK CR 97, 372, 164 P. 992, 994.

*Penn* is not an aberration. See e.g. *Williams v. State*, 1919 OK CR 302, 455, 190 P. 892, 893 (finding identical proposition "wholly without merit" because the statute presents "a matter of defense"); *Allen v. State*, 1924 OK CR 266, 216, 230 P. 277, 278 (in prosecution for second-degree rape, "[i]t was not incumbent on the state in the first instance to establish the accused's age"); *Cotts v. State*, 1926 OK CR 138, 61, 244 P. 817, 817 (finding the statute "presents a matter of defense"); *Brasel v. State*, 1929 OK CR 216, 407, 291 P. 807, 808 (in prosecution for second-degree rape, "it was only necessary that the state prove that the female was below the age of 16 years"); *Brown v. State*, 1967 OK CR 217, ¶ 7, 435 P.2d 173, 175 ("proof that defendant is under the age of 18 is an affirmative defense").

Contrary to the assertion of Appellee, these holdings are not antiquated. On this score, we find it persuasive that in revisions

adopted on December 20, 2019 (2019 OK CR 28), this Court's Committee for Preparation of Uniform Jury Instructions concluded that the "age of the defendant is not an element of the crime of second-degree rape." OUJI-CR (2d) 4-124, Committee Comments (2019 Supp.).

Appellee cites *Mullaney v. Wilbur*, 421 U.S. 684 (1975) and *Patterson v. New York*, 432 U.S. 197 (1977) and seems to suggest that it is a violation of due process to burden him with proving that he is entitled to the protections of Section 1112. Under *Mullaney*, the burden of disproving an element of the crime charged cannot be shifted to the defense. 421 U.S. at 704. *Patterson* limited *Mullaney* to situations where a fact is presumed or implied against a defendant. 432 U.S. at 216.

Here, there is no *Mullaney* violation because, as much as Appellee would like it to be, a defendant's age is not an element of second-degree rape. Section 1112 does not make it otherwise. Section 1112 provides those engaged in consensual sexual activity with an affirmative defense to conviction for rape in certain age-specific circumstances.

The fact that the burden to come forward with evidence in support of the affirmative defense is placed on the defendant is not of consequence. *See Patterson v. New York*, 432 U.S. at 211 ("it was constitutionally permissible to provide that various affirmative offenses were to be proved by the defendant"); *Cottrell v. State*, 1969 OK CR 203, ¶ 16, 458 P.2d 328, 334 ("The burden of coming forward with evidence to create a reasonable doubt as to affirmative defenses is properly placed upon defendant"); *De Graff v. State*, 1909 OK CR 82, 545, 103 P. 538, 547 ("he who alleges affirmative must prove it, especially if it is peculiarly within his knowledge").

**DECISION**

The decision granting Appellee's demurrer is **REVERSED** and this matter is **REMANDED** to the District Court for proceedings not inconsistent with this opinion.

**AN APPEAL FROM THE DISTRICT COURT  
OF ROGERS COUNTY  
THE HONORABLE LARA M. RUSSELL, SPECIAL JUDGE**

**APPEARANCES AT TRIAL**

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**PER CURIAM OPINION:**

KUEHN, P.J.: Concur in Result  
ROWLAND, V.P.J.: Concur  
LUMPKIN, J.: Not Participating  
LEWIS, J.: Concur  
HUDSON, J.: Concur

**KUEHN, P.J., CONCURRING IN RESULTS:**

I concur with the Majority that Appellant's demurrer should be reversed and remanded to the District Court. I write separately to discuss the meaning the Majority assigns to the Oklahoma Uniform Jury Instructions.

Similar to my dissent in the 2019 OUJI Revisions, I disagree "to publication of the updated committee comments, insofar as they may advise or require a particular interpretation of the law."<sup>1</sup> Furthermore, "[t]he Notes and Use and Comments are not themselves law; they are intended as useful guides for judges and practitioners in applying the Instructions."<sup>2</sup> As this Court has rejected similar claims for more than one hundred years, it is worth repeating that the Oklahoma Uniform Jury Instructions are neither the law nor binding.

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<sup>1</sup> *In re Adoption of 2019 Revisions to Oklahoma Jury Instructions – Criminal (2D)*, 2019 OK CR 28 (Okl. Cr. Dec. 20, 2019) (Kuehn, J., concurring in part and dissenting in part).

<sup>2</sup> *Id.*