

DA 13-0081

IN THE SUPREME COURT OF THE STATE OF MONTANA

2014 MT 192

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STATE OF MONTANA,

Plaintiff and Appellant,

v.

EDWARD HAROLD GHOSTBEAR,

Defendant and Appellee.

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APPEAL FROM: District Court of the Twelfth Judicial District,  
In and For the County of Hill, Cause No. DC 12-008  
Honorable Daniel A. Boucher, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Timothy C. Fox, Montana Attorney General, Mardell Ployhar, Assistant  
Attorney General, Helena, Montana

Gina Dahl, Hill County Attorney, Karla Bosse, Special Deputy County  
Attorney, Havre, Montana

For Appellee:

Wade Zolynski, Chief Appellate Defender, Koan Mercer, Assistant  
Appellate Defender, Helena, Montana

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Submitted on Briefs: May 28, 2014  
Decided: July 22, 2014

Filed:

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Clerk

Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 The State of Montana appeals from the District Court’s post-trial decision following the jury’s verdict convicting Edward Ghostbear of sexual assault, that the misdemeanor penalty provided by § 45-5-502(2)(a), MCA, was the maximum sentence that could be imposed.<sup>1</sup> We reverse and remand.

¶2 The issue on appeal is whether the District Court’s post-trial decision was correct.

### **PROCEDURAL AND FACTUAL BACKGROUND**

¶3 In January 2012 the State charged Edward Ghostbear with one count of sexual intercourse without consent and an alternative count of sexual assault. The victim in both counts was the seven-year-old daughter of Ghostbear’s girlfriend, and both offenses were charged as felonies. On October 30, 2012, the jury returned its verdict finding Ghostbear not guilty of sexual intercourse without consent, and finding him guilty of sexual assault.

¶4 A person commits the offense of sexual assault by knowingly subjecting another person to “any sexual contact without consent.” Section 45-5-502(1), MCA. If the victim is less than 14 years old and the attacker is more than three years older, there can be no consent as a matter of law. Section 45-5-502(5)(a)(ii), MCA. A first conviction for sexual assault subjects the offender to imprisonment in the county jail for up to six months or a fine not to exceed \$500, or both. If the victim of sexual assault is less than 16 years old and the offender is three or more years older than the victim, then the

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<sup>1</sup> Ghostbear moved to dismiss the appeal contending that there was no authority for the State to appeal prior to imposition of the sentence. After briefing from the parties, this Court’s order of February 26, 2013, denied the motion to dismiss, concluding that the State could appeal pursuant to § 46-20-103(2)(b), MCA.

offender is subject to enhanced penalties upon conviction. In that case, the offender is subject to a term of not less than four years and up to life in the state prison, along with a fine up to \$50,000. Section 45-5-502(3), MCA.

¶5 After the jury's verdict Ghostbear moved that the District Court sentence him to the misdemeanor penalty for a first conviction of sexual assault under § 45-5-502(2)(a), MCA. Ghostbear argued that the felony penalty in § 45-5-502(3), MCA, did not apply because the jury did not make a finding that the victim was younger than 16 and a finding that Ghostbear was more than three years older. The District Court agreed, concluding that *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000), required the State to prove the ages of Ghostbear and the victim in order to obtain the enhanced felony sentence for sexual assault. The District Court concluded that the State had not provided that proof and that the jury had not made a factual finding as to the ages of the victim and Ghostbear. The District Court concluded that Ghostbear could not be sentenced to the enhanced penalty for felony sexual assault under § 45-5-502(3), MCA. The State appeals.

### **STANDARD OF REVIEW**

¶6 A district court's interpretation of a statute is a conclusion of law which we review for correctness. *Mont. State Fund v. Simms*, 2012 MT 22, ¶ 15, 364 Mont. 14, 270 P.3d 64; *Briese v. Mont. Pub. Employees' Ret. Bd.*, 2012 MT 192, ¶ 11, 366 Mont. 148, 285 P.3d 550; *Olson v. Jude*, 2003 MT 186, ¶ 34, 316 Mont. 438, 73 P.3d 809. We review a district court's findings of fact to determine whether they are clearly erroneous. *Brimstone Mining, Inc. v. Glaus*, 2003 MT 236, ¶ 20, 317 Mont. 236, 77 P.3d 175. A

finding of fact may be clearly erroneous if it is not supported by substantial evidence in the record; if the district court misapprehended the evidence; or when our review of the record leaves this Court with the definite and firm conviction that a mistake has been made. *Brimstone*, ¶ 20.

## DISCUSSION

¶7 In *Apprendi* the United States Supreme Court held that “other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.” *Apprendi*, 530 U.S. at 490, 120 S. Ct. at 2263-64; *Adams v. State*, 2007 MT 35, ¶ 52, 336 Mont. 63, 153 P.3d 601. Error in submitting a sentencing factor to the jury for determination is a trial error, and is not a structural error requiring automatic reversal. *Neder v. United States*, 527 U.S. 1, 8-9, 119 S. Ct. 1827, 1833 (1999); *Washington v. Recuenco*, 548 U.S. 212, 219, 126 S. Ct. 2546, 2551 (2006). The parties agree that the felony sentence authorized by § 45-5-502(3), MCA, for a conviction of sexual assault if there is the specified age disparity is a sentence enhancement covered by the rule in *Apprendi*.

¶8 The State first contends that the District Court erred by concluding that it “failed to present any evidence at trial regarding the age of the defendant.” The State correctly notes that during trial the District Court admitted into evidence a recording and a transcript of an interview of Ghostbear by a law enforcement officer. Early in that interview Ghostbear stated that his date of birth was in 1977, making him 34 years old at the time of the offense. In addition, in that same interview Ghostbear acknowledged that

the victim was just turning age 8, making her age 7 at the time of the alleged offense. The jury heard this evidence and was able to corroborate the respective ages of Ghostbear and the victim because each of them testified at trial. The victim also testified that she was age 8. The jurors were entitled to infer from what they observed that the ages of Ghostbear and the victim were as he acknowledged them to be in the admitted interview. The jurors were instructed that they could consider “the appearance of the witnesses on the stand.” The jurors saw, and therefore could consider, the appearance of Ghostbear as a mature man and the victim as a child. Ghostbear does not point to any contrary evidence of age in the record nor does he argue that there was any conceivable way that the jury could fail to conclude that the victim was under the age of 16 and that Ghostbear was more than three years older. Ghostbear does not contend that the respective ages were in any way contested during the trial.

¶9 Therefore, in accordance with the requirement of *Apprendi*, evidence of the ages of Ghostbear and the victim was in fact presented to the jury. The age evidence was admitted by Ghostbear and the evidence was not contested. Clearly there was no reasonable doubt that the young victim was under the age of 16 and that Ghostbear was more than three years older. Decisions following *Apprendi* have confirmed that the rule of that case is satisfied when the facts necessary to impose enhanced punishment are “reflected in the jury verdict or *admitted by the defendant.*” *Recuenco*, 548 U.S. at 216, 126 S. Ct. at 2549 (emphasis added); *Blakley v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 2537 (2004) (for *Apprendi* purposes the judge may impose a sentence supported “solely on the basis of the facts reflected in the jury verdict or admitted by the

defendant”); *Neder*, 527 U.S. at 17, 119 S. Ct. at 1837 (there was overwhelming evidence of materiality that was not contested at trial or on appeal); *Adams*, ¶ 59 (citing *Neder*).

¶10 In addition, the rule of *Apprendi* was satisfied by the jury’s verdict in this case, as revealed by a consideration of the instructions given by the District Court. On appeal we consider the instructions as a whole to determine whether the district court fully and fairly instructed the jury on the applicable law. *State v. Scarborough*, 2000 MT 301, ¶ 47, 302 Mont. 350, 14 P.3d 1202.

¶11 The District Court instructed that Ghostbear was presumed innocent and that the presumption could not be overcome unless the jury was convinced from all the evidence that he was guilty beyond a reasonable doubt. The District Court instructed that the verdict must be unanimous, and that the jury must unanimously agree upon the commission of the same specific act constituting the crime before convicting Ghostbear. The District Court instructed the jury that a statement made by Ghostbear outside the trial could be considered an admission or confession, and that an admission is a statement of facts pertinent to the issue and tending to prove guilt.

¶12 Further, the District Court instructed the jury on the elements of the crime of sexual assault: that the offense requires proof that the victim was subjected to sexual contact; that the victim did not consent; and that Ghostbear acted knowingly. The District Court instructed the jury in the words of § 45-5-502(5)(a)(ii), MCA, that “consent is ineffective if the victim is 14 years of age or younger and the defendant is 3 or more years older than the victim.”

¶13 Having been given these and other instructions, the jury returned a verdict that Ghostbear was guilty of sexual assault. Under the instructions as given, the jury's guilty verdict required the jury to find the essential elements of sexual assault as charged in this case. Under the instructions as given, the jury could not have returned the conviction without determining as a matter of fact that the victim was under the age of 14 and that Ghostbear was more than three years older. By following the instructions and by returning a guilty verdict the jury necessarily found as facts the respective ages of Ghostbear and the victim. This constitutes felony sexual assault under § 45-5-502(3), MCA. The jury's verdict reflects a finding of the age disparity required by § 45-5-502(3), MCA, for imposition of enhanced sentencing. This satisfies any requirement of *Apprendi*. Ghostbear is therefore properly subject to the felony sentencing provisions of that statute.

¶14 The District Court is reversed and this matter is remanded for further proceedings.

/S/ MIKE McGRATH

We Concur:

/S/ MIKE McGRATH  
/S/ PATRICIA COTTER  
/S/ BETH BAKER  
/S/ LAURIE McKINNON

Justice Jim Rice, specially concurring.

¶15 I concur with the Court's decision. The Court undertakes an *Apprendi* analysis because "[t]he parties agree" that imposition of a felony sentence here raises an *Apprendi*

issue. Opinion, ¶ 7. Although I need not belabor the point, I question whether the felony penalty raises an *Apprendi* issue. *Apprendi* requires both elements and sentencing factors to be submitted to and found by the jury. See *Washington v. Recuenco*, 548 U.S. 212, 220, 126 S. Ct. 2546, 2552 (2006) (citing *Apprendi*) (“[W]e have treated sentencing factors, like elements, as facts that have to be tried to the jury and proved beyond a reasonable doubt.”). Here, the parties’ arguments are premised upon the assumption that § 45-5-502(3), MCA, is a sentencing factor that must be independently submitted to and found by the jury. In many cases, this assumption would be correct. However, in this case, all facts that were necessary to establish the age-based sentencing enhancement under § 45-5-502(3), MCA, were also proven, submitted, and found by the jury in its finding of the element of “without consent” under § 45-5-502(5)(a)(ii), MCA. In this unique circumstance, all sentencing enhancement facts were subsumed within the elements and were thus already found by the jury. Proof of further facts was not necessary for imposition of the felony penalty.

/S/ JIM RICE