NOT DESIGNATED FOR PUBLICATION

No. 124,800

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

ANDREW FORD ENTSMINGER,
Appellant.

MEMORANDUM OPINION

Appeal from Shawnee District Court; NANCY E. PARRISH, judge. Opinion filed March 10, 2023. Affirmed.

Kasper Schirer, of Kansas Appellate Defender Office, for appellant.

Jodi Litfin, deputy district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before GARDNER, P.J., MALONE and HILL, JJ.

PER CURIAM: Andrew Ford Entsminger appeals the district court's imposition of lifetime registration under the Kansas Offender Registration Act (KORA) and lifetime postrelease supervision following his guilty plea to two counts of sexual exploitation of a child by visual depiction of a child under 18 years old. Entsminger claims the district court's lifetime KORA registration order was unsupported by substantial competent evidence that the victims depicted in the videos were under 14 years old. Entsminger also claims the district court erred in determining the victims' ages when the videos were recorded rather than when Entsminger possessed the videos. Finally, Entsminger claims the district court engaged in judicial fact-finding to extend his postrelease supervision

period, in violation of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). On the first issue, we find there was substantial competent evidence to support the district court's lifetime registration order. On the other two issues, panels of this court previously have rejected the legal arguments Entsminger is making, and we reject them again. Thus, we affirm the district court's judgment.

FACTS

On December 17, 2020, the State charged Entsminger with 15 counts of sexual exploitation of a child by visual depiction of a child under 18 years old, in violation of K.S.A. 2020 Supp. 21-5510(a)(2). Entsminger later agreed to plead guilty to two counts as charged in exchange for the dismissal of the remaining counts. At the plea hearing on August 27, 2021, the State provided the following factual basis for the plea:

> "[THE STATE]: Your Honor, the facts would be, on or about Wednesday October 14th of 2020, at approximately 7:00 in the morning, a search warrant was executed . . . .
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> "Agent Hachmeister with the Kansas Bureau of Investigation [KBI] was present during the search warrant. He did interview the defendant and the defendant did admit to having electronic devices in the house, including a Lenovo laptop indicating that he did own the Lenovo laptop.
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> "After the execution of the—during the search warrant, the Lenovo laptop was located pursuant to that search. After the search was completed, KBI Task Force Agent, Tony Celeste, completed a triage of the Lenovo laptop. Ultimately, a search of the Lenovo laptop included two specific files. One file was located in the download folder and one file was located in the recycling bin.
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> "Specifically, one of the files included a video with a white, prepubescent male on an orange couch on the video, masturbating. The boy appeared to be no older than 12. The video was created, modified, and accessed on May 19th of 2019, at 2:22 PM.
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> "The second video included a prepubescent white male and a pubescent white female in a bedroom. The male did not have a shirt on and the female was wearing a pink and black shirt. During the video, the male takes off his shorts and begins masturbating.

> "It appears the two juveniles are being directed to perform sexual acts on a computer. The girl begins stroking the boy's penis. The boy then lays on the bed next to a dog, and the dog begins to lick his penis. The girl then lifts up her shirt, takes off her bra, and exposes her breasts. The boy then licks the girl's breasts. The girl then performs oral sex on the boy.
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> "The boy appears to be no older than 12, and the girl appears to be no older than 14. The video was created, modified, and assessed [*sic*] on December 10th of 2018, at 9:22 AM.
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> "Again, the search of this Lenovo laptop was completed in Shawnee County, Kansas. For purposes of the plea, these were visual depictions of children under the age of 18, heard and shown engaging in sexually explicit conduct with the intent to arouse or satisfy the sexual desires or appeal to the prurient interest of the offender, contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the State of Kansas."

Entsminger questioned whether the videos were found in his computer's recycle bin, and his attorney explained to him that fact did not matter as to the charges. With that clarification, the district court asked Entsminger if he "admit[ed] to the alleged facts" supporting the plea for both counts. Entsminger responded, "Yes" for each count.

The written plea agreement included a provision stating: "Notice has been provided to the Defendant that post-release [supervision] would be for Defendant's lifetime." The agreement also stated Entsminger's date of birth as June 15, 1991. At the end of each section including the above information, Entsminger initialed to signify his agreement that he read, understood, and agreed with those sections of the agreement.

At the sentencing hearing on November 19, 2021, Entsminger argued that there was no factual basis for the district court to find that the children depicted in the videos were under 14 years old to support lifetime KORA registration as opposed to 25 years. The district court said it would review the transcript of the factual basis made at the plea hearing. Entsminger's counsel acknowledged that the district court could review the

transcript, but he made it clear that Entsminger's position was that the State had not established a factual basis to support lifetime registration. The parties reconvened on December 3, 2021, and the district court announced that after reviewing the plea hearing transcript including Entsminger's agreement with the State's factual basis for the plea, the district court found there was an adequate factual basis to support lifetime registration. The district court sentenced Entsminger to a controlling term of 32 months' imprisonment with lifetime postrelease supervision and lifetime registration but granted probation for 36 months to be supervised by community corrrections so that Entsminger could continue with his treatment program. Entsminger timely appealed his sentence.

WAS THE DISTRICT COURT'S IMPOSITION OF LIFETIME KORA REGISTRATION SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE?

Entsminger first claims the district court's lifetime KORA registration order was unsupported by substantial competent evidence that the victims depicted in the videos were under 14 years old. The State responds by trying to convince us this issue is not preserved for appeal. At the sentencing hearing, Entsminger argued that there was no factual basis for the district court to find that the children depicted in the videos were under 14 years old to support lifetime KORA registration as opposed to 25 years. The district court said it would review the transcript of the factual basis made at the plea hearing, and Entsminger's counsel agreed that the court could do so.

At the next hearing, Entsminger's counsel acknowledged that the plea hearing transcript "says . . . what it says . . . ." The district court then interrupted counsel and he never finished his thought on the record. The State now argues that this dialog shows that Entsminger "appeared to concede that the factual basis established that the children were less than 14 years old." We disagree. Counsel made it clear at both hearings that Entsminger's position was that the State had not established a factual basis to support

lifetime registration and that the transcript of the plea hearing was insufficient to do so. This issue is preserved for appeal.

Entsminger argues that the district court lacked substantial competent evidence to require him to register under KORA for the rest of his life. The adequacy of factual findings supporting a registration order are reviewed for substantial competent evidence. *State v. Carter*, 311 Kan. 206, 211, 459 P.3d 186 (2020). To the extent that Entsminger's arguments require us to interpret and apply statutes, we have unlimited review. *State v. Stoll*, 312 Kan. 726, 736, 480 P.3d 158 (2021).

K.S.A. 2020 Supp. 22-4906(d)(7) requires lifetime KORA registration if a defendant is convicted of sexual exploitation of a child, as defined in K.S.A. 2020 Supp. 21-5510, "if the victim is under 14 years of age." The duration of the registration is for 25 years from the date of conviction if the victim is 14 or more years old but less than 18 years old. K.S.A. 2020 Supp. 22-4906(b)(1)(G). Thus, the question is whether there was substantial competent evidence for the district court to find that at least one of the victims of Entsminger's crimes was under 14 years old. Substantial competent evidence refers to legal and relevant evidence that a reasonable person could accept as adequate to support a conclusion. *State v. Smith*, 312 Kan. 876, 887, 482 P.3d 586 (2021).

Entsminger focuses on one sentence toward the end of the State's factual basis at the plea hearing when the prosecutor stated, "*For the purposes of the plea*, these were visual depictions of children under the age of 18 . . . ." (Emphasis added.) Entsminger places too much weight on this one sentence which, in fact, was a correct statement of the law. For the purposes of the plea, the prosecutor needed to establish that the children depicted in the videos were under 18 years old because that fact was an element of the crimes for which Entsminger was pleading guilty. See K.S.A. 2020 Supp. 21-5510(a)(2). But for the purposes of supporting lifetime registration under KORA, the prosecutor

needed to establish that at least one of the victims was under 14 years old. And the prosecutor established this fact with more specific statements at the plea hearing.

The State recovered and possessed a separate video supporting each count of sexual exploitation of a child for which Entsminger pleaded guilty. In one video, the prosecutor stated that "[t]he boy appeared to be no older than 12." In the other video, the prosecutor stated that "[t]he boy appears to be no older than 12, and the girl appears to be no older than 14." Granted, the prosecutor stated that the boy in each video *appeared* to be no older than 12. But Entsminger agreed with the alleged facts. Thus, the evidence shows that at least one child in each video was under 14 years old.

We conclude that the factual basis for the plea together with Entsminger's agreement on the record amounted to substantial competent evidence that at least one victim for each count was under 14 years old. Just because the factual basis does not conclusively establish the ages of the victims, that does not mean it cannot support the KORA finding. See *State v. Green*, 283 Kan. 531, 547-48, 153 P.3d 1216 (2007) (finding that a factual basis supporting a plea need not rise to the level of proof beyond a reasonable doubt). Here, the factual basis for the plea together with Entsminger's agreement on the record supported the district court's order for lifetime KORA registration under K.S.A. 2020 Supp. 22-4906(d)(7).

DID THE DISTRICT COURT ERR IN IMPOSING LIFETIME KORA REGISTRATION BASED ON A DETERMINATION OF THE VICTIM'S AGES WHEN THE VIDEOS WERE RECORDED?

Entsminger next claims the district court erred in determining the victims' ages when the videos were recorded rather than when Entsminger possessed the videos. Entsminger does not dispute that he is raising this issue for the first time on appeal. He argues that this court should address the issue for the first time on appeal because it involves only a question of law arising on proved or admitted facts and is finally

determinative of the case or because consideration of the issue is necessary to serve the ends of justice or to prevent denial of fundamental rights. See *State v. Allen*, 314 Kan. 280, 283, 497 P.3d 566 (2021). This court has already addressed the identical issue for the first time on appeal because the claim involved the denial of a fundamental right in *State v. Kewish*, No. 121,793, 2021 WL 4352531, at *2 (Kan. App. 2021) (unpublished opinion), *rev. denied* 316 Kan. 761 (2022). The State does not provide any reason to reject the logic in *Kewish*, and even acknowledges the adverse holding. Thus, we will address the issue for the first time on appeal under the same exception.

Turning to the merits, Entsminger argues that the district court erred in ordering lifetime KORA registration because the district court improperly determined the ages of the victims were when the videos were recorded. Instead, Entsminger asserts that the district court should have considered the victims' ages when he possessed the videos depicting them. Entsminger asks this court to interpret the KORA statutes and their applicability to K.S.A. 2020 Supp. 21-5510(a)(2). Statutory interpretation presents a question of law over which this court exercises unlimited review. *Stoll*, 312 Kan. at 736.

The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be ascertained. *State v. LaPointe*, 309 Kan. 299, 314, 434 P.3d 850 (2019). An appellate court must first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. *State v. Ayers*, 309 Kan. 162, 163-64, 432 P.3d 663 (2019). When a statute is plain and unambiguous, an appellate court should not speculate about the legislative intent behind that clear language, and it should refrain from reading something into the statute that is not readily found in its words. 309 Kan. at 164. Where there is no ambiguity, the court need not resort to statutory construction. Only if the statute's language or text is unclear or ambiguous does the court use cannons of construction or legislative history to construe the Legislature's intent. *State v. Pulliam*, 308 Kan. 1354, 1364, 430 P.3d 39 (2018).

Entsminger pleaded guilty to two counts of sexual exploitation of a child by visual depiction of a child under 18 years old in violation of K.S.A. 2020 Supp. 21-5110(a)(2), which prohibits "possessing any visual depiction of a child under 18 years of age shown or heard engaging in sexually explicit conduct with intent to arouse or satisfy the sexual desires or appeal to the prurient interest of the offender or any other person." The only sensible reading of the plain language of the statute is that the age of the child when the video was recorded controls; the age of the child when the defendant is later found in possession of the video is immaterial.

This court has rejected the exact argument Entsminger is now making in *State v. Haynes*, No. 120,533, 2020 WL 741458, at *3-4 (Kan. App. 2020) (unpublished opinion), and in *Kewish*, 2021 WL 4352531, at *4-6. In *Haynes*, the court explained:

> "Both of the KORA provisions cited above specifically refer to K.S.A. 2017 Supp. 21-5510, which, relevant here, defines sexual exploitation of a child as 'possessing any visual depiction of a child under 18 years of age shown or heard engaging in sexually explicit conduct with intent to arouse or satisfy the sexual desires or appeal to the prurient interest of the offender or any other person.' K.S.A. 2017 Supp. 21-5510(a)(2). Implicit within the definition of the crime is that the victim is the *child* who is visually depicted at the time the depiction is created. Possessing the depiction *of a child* engaged in sexually explicit conduct is the criminal act. Adopting Haynes' position and using the age of the victim on the date the offender is charged with possession necessarily begs the question of whether a crime is even committed under K.S.A. 2017 Supp. 21-5510, which sets forth the elements of sexual exploitation of a *child*, when there is no child victim. This is an absurd result. To the contrary, the fact that the child victim who is shown in the visual depiction possessed by the offender reached the age of majority at the time of the offense is a fact completely immaterial to proving the elements of the underlying crime and, in turn, completely immaterial to deciding the age of the child victim for purposes of imposing the applicable period of offender registration." 2020 WL 741458, at *4.

We adopt the court's reasoning in *Haynes*. According to the factual basis at the plea hearing, the video that was the subject of Count 12 to which Entsminger pleaded guilty was created on May 19, 2019. The boy depicted in that video appeared to be no older than 12. Entsminger was charged with possessing the video on or about May 19, 2019, through October 20, 2020. The boy depicted in the video would have still been under 18 years old when Entsminger was charged with possessing the video, but it is less clear whether the boy would still have been under 14 years old. Likewise, the video that was the subject of Count 13 to which Entsminger pleaded guilty was created on December 10, 2018. The boy depicted in that video appeared to be no older than 12. Entsmnger was charged with possessing that video on or about December 10, 2018, through October 20, 2020. Again, the boy depicted in the video would have still been under 18 years old when Entsminger was charged with possessing the video, but it is less clear whether the boy would still have been under 14 years old.

Adopting Entsminger's position and using the age of the victim when the offender is charged with possessing the video leads to an absurd and unreasonable result. Under Entsminger's interpretation of the statute, a party could produce a pornographic video depicting a 13-year-old child, hold the video for 5 years before distributing it, and the person then possessing the video would not be committing a crime. The only reasonable interpretation of K.S.A. 2020 Supp. 21-5510(a)(2) together with K.S.A. 2020 Supp. 22-4906(d)(7) is that the age of the child when the video was recorded controls whether possession of the video constitutes a crime and the duration of offender registration. The age of the child when a party is later found in possession of the video is immaterial.

Entsminger acknowledges the adverse rulings in *Kewish* and *Haynes* but asserts those cases were wrongly decided. He also argues that the 2022 amendments to K.S.A. 22-4906 changes the result. Entsminger points out that under the 2022 amendments to K.S.A. 22-4906, other subsections of the statute require only 25-year offender registration and there is no requirement for longer registration if the victim is under 14,

even for more serious crimes. But these amendments do not change the fact that under the plain language of K.S.A. 2022 Supp. 22-4906(d)(7), the duration of registration for any offender convicted of sexual exploitation of a child, as defined in K.S.A. 2022 Supp. 21-5510, is for the offender's lifetime if the victim is under 14 years old.

For these reasons, we find that the district court did not err in determining the victims' ages were when the videos were recorded rather than when Entsminger possessed the videos. As a result, the district court correctly ordered lifetime offender registration under K.S.A. 2020 Supp. 22-4907(d)(7).

DID THE DISTRICT COURT ENGAGE IN UNCONSTITUTIONAL JUDICIAL FACT-FINDING WHEN ORDERING LIFETIME POSTRELEASE SUPERVISION?

Finally, Entsminger claims the district court engaged in judicial fact-finding to extend his postrelease supervision period to lifetime, in violation of *Apprendi*, 530 U.S. 466. More specifically, Entsminger argues that the district court ordered lifetime postrelease supervision without a jury finding that he was 18 years old when he committed his sexually violent crimes. The State responds that this court lacks jurisdiction to address this issue because Entsminger received a plea-negotiated sentence. The State also asserts the issue is not preserved for appeal. On the merits, the State argues that the district court did not violate *Apprendi* when it ordered lifetime postrelease supervision and any constitutional error was harmless.

Turning first to jurisdiction, the State points out that under K.S.A. 2022 Supp. 21-6820(c)(2), on appeal from a judgment of conviction entered for a felony committed on or after July 1, 1993, the appellate court shall not review "any sentence resulting from an agreement between the state and the defendant which the sentencing court approves on the record." The State asserts that Entsminger received lifetime postrelease supervision under a plea agreement approved by the district court, so he cannot appeal the sentence.

We disagree with the State that Entsminger's plea agreement required lifetime postrelease supervision. The written plea agreement stated that Entsminger would plead guilty to two counts of sexual exploitation of a child in exchange for the dismissal of the remaining counts. The agreement stated: "Sentencing will be open." The agreement also stated: "Notice has been provided to the Defendant that post-release supervision would be for Defendant's lifetime." At the plea hearing, the parties again agreed that "[s]entencing will be open," and they said nothing about postrelease supervision.

Entsminger did not agree to lifetime postrelease supervision under his plea agreement with the State. The agreement stated that "[s]entencing will be open" which means that the parties were free to argue about the sentence the district court would impose. The written plea agreement specified that "[n]otice" was provided to Entsminger about lifetime postrelease supervision, but that does not mean he accepted that sentence as part of the plea agreement. We disagree with the State that Entsminger's appeal on this issue violates K.S.A. 2022 Supp. 21-6820(c)(2).

Turning to preservation, Entsminger does not dispute that he is raising this issue for the first time on appeal. He argues that we should address the issue for the first time on appeal because it involves only a question of law on proved or admitted facts and is finally determinative of the case or because consideration of the issue is necessary to serve the ends of justice or to prevent denial of fundamental rights. This court has already addressed the identical issue for the first time on appeal because the claims involve "purely legal questions based on undisputed facts." *State v. Schmeal*, No. 121,221, 2020 WL 3885631, at *8 (Kan. App. 2020) (unpublished opinion). We will address the issue under the same exception.

Turning to the merits, the parties agree that whether a defendant's constitutional rights under *Apprendi* were violated by a sentencing court raises a question of law subject to unlimited review. *State v. Anthony*, 273 Kan. 726, 727, 45 P.3d 852 (2002).

Under K.S.A. 2020 Supp. 22-3717(d)(1)(G), "persons sentenced to imprisonment for a sexually violent crime committed on or after July 1, 2006, when the offender was 18 years of age or older, and who are released from prison, shall be released to a mandatory period of postrelease supervision for the duration of the person's natural life." Entsminger points out the question of his age was never submitted to a jury. Thus, he argues that the district court could not have found he was 18 or older when he committed his crimes without violating the rule in *Apprendi*, 530 U.S. at 490 ("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.").

The State responds that Entsminger admitted his age in the written plea agreement and by signing a notice of his duty to register under KORA. Both documents included his birthdate. The State also points out that the presentence investigation (PSI) report stated Entsminger's age as "29," and he did not object to the PSI report at the sentencing hearing. Entsminger acknowledges that he signed the plea agreement containing his birthdate, but he argues that signing the plea agreement was not an informed waiver of his right to a jury trial on the issue of his age when he committed his crimes.

In *Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), the United States Supreme Court clarified that facts admitted by a defendant could elevate a sentence without violating *Apprendi*. See also *United States v. Booker*, 543 U.S. 220, 244, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005) ("Accordingly, we reaffirm our holding in Apprendi: Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the statutory maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."). Under *Apprendi*, *Booker*, and *Blakely*, any fact necessary to increase a sentence, other than a prior conviction, must be admitted by the defendant or proved to a jury beyond a reasonable doubt. Entsminger initialed a provision in his written plea agreement stating his birthdate was June 15, 1991. He also signed a notice of

his duty to register under KORA which included his birthdate. The record is clear, by Entsminger's own admissions, that he was over 18 years old when he committed his crimes, and he makes no attempt to refute that fact.

Entsminger acknowledges that this court has rejected the exact argument he is now making in many prior decisions, including his argument that he did not waive his right to a jury trial on the issue of his age when he committed his crimes. See *State v. Reinert*, No. 123,341, 2022 WL 1051976, at *4 (Kan. App. 2022) (unpublished opinion), *rev. denied* 316 Kan. 762 (2022); *Kewish*, 2021 WL 4352531, at *3-4; *Haynes*, 2020 WL 741458, at *2-3; *Schmeal*, 2020 WL 3885631, at *8-9; *State v. Zapata*, No. 120,529, 2020 WL 741486, at *8-9 (Kan. App. 2020) (unpublished opinion); *State v. Cook*, No. 119,715, 2019 WL 3756188, at *1-3 (Kan. App. 2019) (unpublished opinion). In *Schmeal*, this court stated:

> "The record in this case reflects that Schmeal formally acknowledged his age to the district court on numerous occasions throughout the proceedings, which necessarily renders the fact that he was at least 18 years old when he committed the crime at issue here a factual admission that does not come within the protection of the *Apprendi* rule. In the written plea-agreement he submitted to the court, Schmeal admitted he was 21 years old when he signed the agreement, which would have made him 19 years old at the time he committed the crime of conviction. When the State made its proffer of facts in response to Schmeal's no contest plea, his age was included in that proffer. When the district court accepted the proffer—without any objection from Schmeal—and found Schmeal guilty of committing the charged offense, those proffered facts became part of the record. A review of the record also reflects that Schmeal provided his age in the written financial affidavit he signed seeking court appointed counsel. Given Schmeal's repeated admissions throughout the proceedings about his age, the district court's finding that he was at least 18 years old when he committed the crime of conviction falls under the *Blakely* exception to the *Apprendi* rule when the defendant admits a fact. 542 U.S. at 303 (fact established by guilty plea).
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> . . . .

> "Because Schmeal repeatedly admitted his age before the district court imposed lifetime postrelease supervision under the applicable statute, we necessarily conclude Schmeal was not deprived of his constitutional right under *Apprendi* to have the State prove his age to a jury beyond a reasonable doubt or to have the State obtain a waiver from him voluntarily relinquishing his right to a jury trial on the issue of age for purposes of imposing lifetime postrelease supervision." *Schmeal*, 2020 WL 3885631, at *9.

Finally, the State argues that even if this court finds an *Apprendi* violation, the error is harmless. This court has addressed the issue in several unpublished cases, including *Schmeal*, where, under similar facts, it found that while *Apprendi* violations are subject to constitutional harmless error analysis, *Apprendi* errors do not automatically require reversal. *Schmeal*, 2020 WL 3885631, at *11. In *Schmeal*, this court cited *Washington v. Recuenco*, 548 U.S. 212, 222, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006), and *State v. Reyna*, 290 Kan. 666, 681-82, 234 P.3d 761 (2010), to find that, under similar facts: "A reviewing court must determine whether the record contains evidence that would lead to a contrary finding regarding the defendant's age. If the answer to that question is 'no,' any error in not submitting the issue of defendant's age to a jury may be held harmless. [Citations omitted.]" *Schmeal*, 2020 WL 3885631, at *11. Entsminger points to no evidence in the record showing he was under 18 years old when he committed his crimes.

Entsminger fails to persuasively explain why we should reject our court's many prior opinions directly adverse to his argument. Entsminger admitted to his age in the plea agreement and the United States Supreme Court has made clear that admitted facts are an exception to the general rule in *Apprendi*. We conclude that the district court did not violate *Apprendi* when it sentenced Entsminger to lifetime postrelease supervision, and even if there were an *Apprendi* violation, any error was harmless.

Affirmed.