NOT DESIGNATED FOR PUBLICATION

No. 125,550

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

CHACE W. CALVERT,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; BRUCE C. BROWN, judge. Submitted without oral argument. Opinion filed October 6, 2023. Affirmed.

Darby VanHoutan, of Kansas Appellate Defender Office, for appellant.

Lance J. Gillett, assistant district attorney, *Marc Bennett*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before BRUNS, P.J., PICKERING, J., and TIMOTHY G. LAHEY, S.J.

PER CURIAM: Chace W. Calvert appeals his sentence after pleading guilty to kidnapping, attempted rape, aggravated domestic battery, and aggravated sexual battery. On appeal, Calvert contends that the district court improperly engaged in judicial fact-finding in ordering lifetime postrelease supervision. Specifically, he argues that the district court inappropriately found that he was 18 years of age or older at the time he committed these offenses. But a review of the record shows that on multiple occasions he represented to the district court that he was over the age of 18 when he committed his crimes. Thus, we find no error and affirm the district court.

FACTS

On March 31, 2021, the State filed six charges against Calvert: (1) aggravated kidnapping, (2) rape, (3) aggravated criminal sodomy, (4) aggravated domestic battery, (5) domestic battery, and (6) intimidation of a witness or victim. These charges arose from an incident that occurred on March 27, 2021. In May 2022, Calvert pled guilty pursuant to a plea agreement to the following amended counts: (1) kidnapping, (2) attempted rape, (3) aggravated domestic battery, and (4) aggravated sexual battery. In exchange for Calvert's agreement to plead guilty to the amended charges, the State dismissed all other charges.

In the written plea agreement, Calvert affirmatively represented that he was 18 years of age or older at the time he committed the offenses. Additionally, Calvert signed an acknowledgment of rights and entry of plea form in which he stated that he was 38 years old at the time he entered into the plea agreement. Furthermore, at the plea hearing on May 2, 2022, the State provided the factual basis for the charges—including the fact that both Calvert and the victim were over the age of 18 at the time he committed the crimes. In response, Calvert acknowledged that the State indeed had a true and accurate factual basis for the charges. After a colloquy between Calvert and the district court, he voluntarily entered guilty pleas to the four amended charges.

Prior to sentencing, Calvert filed a departure motion asking the district court to grant him either a dispositional or a durational departure. At the sentencing hearing held on June 20, 2022, the district court denied Calvert's motion for departure. Calvert did not object to the presentence investigation (PSI) report that showed his criminal history score as A and which stated that he was 37 at the time he committed the crimes of conviction on March 27, 2021. After hearing arguments from the parties and listening to a statement from Calvert, the district court sentenced him to the low grid box number of 221 months

in prison as the controlling sentence, with his sentences on the other counts to run concurrent. The district court also ordered lifetime postrelease supervision.

Thereafter, Calvert filed a timely notice of appeal.

ANALYSIS

The sole issue presented on appeal is whether the district court improperly found that Calvert was over the age of 18 when he committed the sexually violent crimes to which he pled guilty. Calvert contends that the district court engaged in improper judicial fact-finding that increased his period of postrelease supervision in violation of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). In response, the State points out that Calvert represented to the district court on several occasions that he was older than 18 when he committed these crimes. In support of its position, the State cites several cases that have rejected similar—if not identical—arguments as those raised by Calvert in this case. In the alternative, the State argues that even if we determine that an *Apprendi* violation occurred, such an error would be harmless in light of the representations made by Calvert to the district court regarding his age.

Whether a sentencing court violated a defendant's constitutional rights under *Apprendi* raises a question of law over which our review is unlimited. *State v. Dickey*, 301 Kan. 1018, 1036, 350 P.3d 1054 (2015). Here, the district court imposed lifetime postrelease supervision pursuant to K.S.A. 2022 Supp. 22-3717(d)(l)(G)(i), which provides that a person imprisoned for committing a sexually violent crime "when the offender was 18 years of age or older . . . shall be released to a *mandatory* period of postrelease supervision for the duration of the person's natural life." (Emphasis added.) It is undisputed that under Kansas law that both attempted rape and aggravated sexual battery are deemed to be sexually violent crimes. See K.S.A. 2022 Supp. 22-

3717(d)(5)(A); K.S.A. 2022 Supp. 22-3717(d)(5)(O); K.S.A. 2022 Supp. 22-3717(d)(5)(I).

In *Apprendi*, the United States Supreme Court held—as a general rule—that "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." 530 U.S. at 490. The Supreme Court explained that the "'statutory maximum'" is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Significantly, the Supreme Court held in *United States v. Booker*, 543 U.S. 220, 244, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), that facts established by a guilty plea and admitted by a defendant could elevate a sentence without violating *Apprendi*.

Likewise, the Kansas Supreme Court has held that a plea of guilty to a sexually violent crime provides a basis to order lifetime postrelease supervision without violating the rule established in *Apprendi*. *State v. Walker*, 275 Kan. 46, 51, 60 P.3d 937 (2003). In addition, our court has previously held that a district court may rely upon a defendant's repeated representations that he or she was at least 18 years old when the sexually violent crime was committed to order lifetime postrelease supervision without violating *Apprendi*. *State v. Schmeal*, No. 121,221, 2020 WL 3885631, at *9 (Kan. App. 2020) (unpublished opinion); see *State v. Reinert*, No. 123,341, 2022 WL 1051976, at *4 (Kan. App. 2022) (unpublished opinion), *rev. denied* 316 Kan. 762 (2022).

In *Schmeal*, the defendant pled guilty to aggravated indecent liberties with a child and was sentenced to lifetime postrelease supervision. The defendant argued on appeal that the district court violated *Apprendi* by improperly finding he was 18 years or older when ordering lifetime postrelease supervision without either proving his age to a jury beyond a reasonable doubt or obtaining a jury trial waiver from him on the issue of his

age. Our court rejected the defendant's argument under the circumstances presented because the defendant had represented to the district court that he was over 18 years of age when he committed the crime in his written plea agreement, at his plea hearing, and in his written financial affidavit. Because of these numerous formal acknowledgments of his age, our court found that the district court did not deprive the defendant of his constitutional rights under *Apprendi* when it ordered lifetime postrelease supervision. *Schmeal*, 2020 WL 3885631, at *8-10. Moreover, our court found that lifetime postrelease supervision is the statutory presumptive sentence and is not the equivalent of an upward departure. 2020 WL 3885631, at *3.

Similarly, the record in this case reflects that Calvert represented to the district court that he was over 18 years of age several times throughout the criminal proceedings. In fact, a review of the record reveals that he made such representations to the court both before and after he entered his guilty plea. In his written financial affidavit seeking the appointment of legal counsel—which is dated March 31, 2021—Calvert stated that he was 37 years old and that he was born in 1983. Then, in his written plea agreement dated May 2, 2022, Calvert admitted that he was 18 years of age or older when he committed the crimes.

In his acknowledgment of rights and entry of plea form Calvert represented to the district court that he was 38 years old at the time that he signed the document on May 2, 2022. At the plea hearing, Calvert agreed with the factual basis presented by the State to support his plea that specifically included the fact that he was over the age of 18 when he committed his crimes. And, after a colloquy with the district court to determine whether he was voluntarily entering a plea, Calvert pled guilty to the sexually violent crimes of attempted rape and aggravated sexual battery. Kansas law establishes that a guilty plea "is admission of the truth of the charge[s] and every material fact alleged therein." K.S.A. 22-3209(1). Finally, at the sentencing hearing, Calvert did not object to the PSI report which listed his age as 37 at the time he committed the crimes to which he pled guilty.

Given his repeated representations regarding his age throughout the criminal proceedings, we find that the district court was not required to present the question of whether Calvert was 18 years or older when he committed the sexually violent crimes to a jury. Likewise, we find that Calvert's constitutional rights under *Apprendi* were not violated under the circumstances presented in this case. Accordingly, we conclude that the district court did not err in ordering lifetime postrelease supervision based on Calvert's plea of guilty to two sexually violent crimes.

Furthermore, even if the district court had committed an *Apprendi* error, we find any such error to be harmless. As the United States Supreme Court has held, such an error is subject to a harmless error analysis. *Washington v. Recuenco*, 548 U.S. 212, 222, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). Moreover, both the United States Supreme Court and the Kansas Supreme Court have held that *Apprendi* violations do not automatically require reversal. *Recuenco*, 548 U.S. at 220-22; *State v. Garza*, 290 Kan. 1021, 1031, 236 P.3d 501 (2010).

The harmless error analysis requires that "[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." *Schmeal*, 2020 WL 3885631, at *11 (citing *State v. Reyna*, 290 Kan. 666, 681-82, 234 P.3d 761 (2010), *overruled on other grounds by State v. Dunn*, 304 Kan. 773, 375 P.3d 332 [2016]). As discussed above, the record reflects that the Calvert never disputed his age. Instead, he made repeated representations to the district court that he was over the age of 18 when he committed the sexually violent crimes, and there is no evidence in the record that would lead to a contrary finding regarding Calvert's age.

Affirmed.