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IN THE COURT OF APPEALS OF INDIANA

Jennifer R. Holmgren,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

September 30, 2022

Court of Appeals Case No. 21A-CR-2756

Appeal from the Tippecanoe Superior Court

The Honorable Steven P. Meyer, Judge

Trial Court Cause No. 79D02-1911-F1-12

Tavitas, Judge.

Case Summary

[1] Jennifer Holmgren appeals her sentence as a result of her convictions for child molesting, a Level 1 felony; child molesting, a Level 4 felony; and inappropriate communication with a child, a Class A misdemeanor. Holmgren argues that

her classification as a credit-restricted felon and her sentence under Indiana Code Section 35-50-2-4(c) violated her rights under the Sixth Amendment to the United States Constitution. Concluding that the trial court did not err by classifying Holmgren as a credit-restricted felon but that the trial court erred by sentencing Holmgren for Count II under Indiana Code Section 35-50-2-4(c), we affirm in part, reverse in part, and remand for resentencing.

Issues

[2] Holmgren raises two issues, which we revise and restate as:[1]

I. Whether the trial court erred by classifying Holmgren as a credit-restricted felon.

II. Whether the trial court erred by sentencing Holmgren pursuant to Indiana Code Section 35-50-2-4(c).

Facts

[3] Holmgren, who was born in 1979, was employed as a paraprofessional at an elementary school with the Tippecanoe County School Corporation ("School Corporation"). When B.E. was approximately nine years old and in third grade, Holmgren began working with B.E. on reading. Holmgren also met B.E.'s family and began assisting his family, including transporting the family

[1] Holmgren also argues that her sentence is inappropriate in light of the nature of the offenses and the character of the offender. Given our resolution of the other issues and our remand for resentencing, we need not address this issue.

to shop and for appointments. Holmgren would often remain in the vehicle with B.E. to help B.E. with his homework. In the middle of fourth grade, Holmgren began touching B.E.'s penis and later began putting her mouth on his penis. Over the summer between fourth and fifth grade, Holmgren began having sexual intercourse with B.E. on a regular basis.

[4] Holmgren communicated with B.E. on Google Docs, through email, and on social media. B.E. wanted to "say no" but did not because he was scared. Tr. Vol. II p. 176. Holmgren told B.E. that "bad things would happen to [his] family and friends" if he told anyone about the sexual encounters. *Id.* The sexual activity continued until the summer between seventh and eighth grade, at which time B.E. started avoiding Holmgren. B.E. was interested in a girl his own age, and Holmgren became jealous and threatened to kill herself.

[5] On November 1, 2019, the School Corporation discovered inappropriate emails between Holmgren and B.E. Law enforcement interviewed both B.E. and Holmgren. On November 14, 2019, the State charged Holmgren with: (1) Count I, child molesting, a Level 1 felony; (2) Count II, child molesting, a Level 1 felony[2]; (3) Count III, child seduction, a Level 2 felony; (4) Count IV, child molesting, a Level 4 felony; and (5) Count V, inappropriate communication with a child, a Class A misdemeanor.

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[2] Count II alleged that Holmgren had sexual intercourse with B.E. between January 1, 2015, and November 1, 2019.

[6] A jury trial was held in May 2021, and the jury found Holmgren guilty of Count II, Count IV, and Count V. The jury was hung on Count I and Count III.

[7] At the sentencing hearing, the State requested that the trial court find Holmgren was a credit-restricted felon, and Holmgren objected to the trial court finding that B.E. was under the age of twelve at the time of the offense, which would change Holmgren's credit time status. Holmgren argued that the victim's age had to be "found by a jury beyond a reasonable doubt." Tr. Vol. III p. 137. Holmgren also argued that the trial court was required to sentence her pursuant to Indiana Code Section 35-50-2-4(b) rather than subsection 4(c)—the section that references the victim being under the age of twelve.

[8] The trial court found "ample evidence for the jury to conclude that this happened when the boy was under twelve" and found that Holmgren was a credit-restricted felon. *Id.* at 148. The trial court further found that Holmgren would be sentenced pursuant to Indiana Code Section 35-50-2-4(c), which establishes a greater sentencing range than 4(b).

[9] The trial court found the following aggravating factors: Holmgren was in a position of care, custody, and control of B.E.; Holmgren threatened B.E. if he told anyone of the abuse; and "the overall seriousness and circumstances of the offenses (offenses went on for a long period of time)." Appellant's App. Vol. III p. 62. The trial court found the following mitigating factors: Holmgren had no criminal history; Holmgren had strong family support; Holmgren was a

caregiver to an elderly neighbor; and Holmgren provided care and support for her elderly parents.

[10] The trial court found that the aggravating factors outweighed the mitigating factors and sentenced Holmgren as follows: forty years for Count II; seven years for Count IV; and one year for Count V. The trial court ordered the sentences for Count II and Count IV to run consecutively and the sentence in Count V to run concurrently to Count II and Count IV for an aggregate sentence of forty-seven years in the Department of Correction. The trial court ordered five years of the sentence to be suspended to probation. Holmgren now appeals.

Discussion and Decision

[11] Holmgren argues that her Sixth Amendment rights were violated when she was classified as a credit-restricted felon and when she was sentenced under Indiana Code Section 35-50-2-4(c) based upon a fact found by the trial court, not the jury. The Sixth Amendment[3] provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory

[3] The *Apprendi* decision was also based upon the Fourteenth Amendment's "proscription of any deprivation of liberty without 'due process of law.'" *Apprendi v. New Jersey*, 530 U.S. 466, 476, 120 S. Ct. 2348, 2355 (2000). Holmgren, however, does not mention the Fourteenth Amendment in her argument.

> process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

[12] Holmgren relies on *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000), *Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 2536 (2004), and *Alleyne v. United States*, 570 U.S. 99, 106, 133 S. Ct. 2151, 2157 (2013), for the proposition 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."[4]

I. Credit Time Status

[13] Holmgren first argues that her Sixth Amendment rights were violated when she was classified as a credit-restricted felon based upon a factor not found by the jury—that the victim was under the age of twelve. "A defendant's status as a credit-restricted felon is relevant to the defendant's initial assignment to a credit-time class, which, in turn, affects the defendant's accrual of credit time toward her sentence." *Neal v. State*, 65 N.E.3d 1139, 1141 (Ind. Ct. App. 2016); *see also*

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[4] Our Supreme Court noted:

> The Court in *Apprendi v. New Jersey* declared that "other than the fact of 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." 530 U.S. 466, 490, 120 S .Ct. 2348, 147 L.Ed.2d 435 (2000). As clarified in *Blakely*, the statutory maximum of which the Court spoke was "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*, 542 U.S. at [303], 124 S. Ct. at 2537.

Trusley v. State, 829 N.E.2d 923, 925 (Ind. 2005).

I.C. § 35-50-6-4(c) (discussing available credit time classes for credit-restricted felons); I.C. § 35-50-6-3.1 (explaining the credit time classes).

[14] Indiana Code Section 35-31.5-2-72 provides, in part:

> "Credit restricted felon" means a person who has been convicted of at least one (1) of the following offenses:
>
> (1) Child molesting involving sexual intercourse . . . if:
>
> (A) the offense is committed by a person at least twenty-one (21) years of age; and
>
> (B) **the victim is less than twelve (12) years of age**.
>
> * * * * *

(emphasis added).

[15] Indiana Code Section 35-38-1-7.8 details the procedure for a credit-restricted felon finding and provides:

> (a) At the time of sentencing, a court shall determine whether a person is a credit restricted felon (as defined in IC 35-31.5-2-72).
>
> (b) A determination under subsection (a) must be based upon:
>
> (1) evidence admitted at trial that is relevant to the credit restricted status;
>
> (2) evidence introduced at the sentencing hearing; or

(3) a factual basis provided as part of a guilty plea.

> (c) Upon determining that a defendant is a credit restricted felon, a court shall advise the defendant of the consequences of this determination.

Thus, the trial court, not the jury, makes the determination of whether a person is a credit-restricted felon. *Pierce v. State*, 29 N.E.3d 1258, 1270-71 (Ind. 2015) ("As the statute makes plain, it is the trial court, and not the jury, that determines whether a defendant is a credit[-]restricted felon.").

[16] In general, claims of insufficiency of the evidence to sustain a determination regarding a defendant's credit-restricted status are reviewed as any other sufficiency claim. *See id.* at 1265. "We neither reweigh the evidence nor reevaluate the witnesses' credibility; rather, we view the evidence in the light most favorable to the verdict, and we will affirm that verdict unless we cannot find substantial evidence of probative value to support it." *Id.*

[17] The trial court here found that the victim was less than twelve years of age; and the evidence presented at trial established that the victim was ten years old when the sexual intercourse began. Accordingly, there was substantial evidence of probative value to support the trial court's determination at the sentencing hearing that the victim was under the age of twelve. *See, e.g., id.* at 1271 ("We believe there is substantial evidence of probative value to support that determination. V.H. testified Pierce molested her in his apartment, but

before her twelfth birthday, Pierce and his wife moved from that apartment to a house.").

[18] Holmgren, however, argues that the credit-restricted felon statutes violate her right to trial by jury guaranteed by the Sixth Amendment of the United States Constitution. *Apprendi* and its progeny, however, are inapplicable here. The credit-restricted felon statutes impact the credit time that a defendant receives against his or her sentence. "Credit time is a bonus created by statute and the deprivation of credit time does nothing more than take that bonus away." *State v. Mullins*, 647 N.E.2d 676, 678 (Ind. Ct. App. 1995). "The deprivation of credit time cannot lengthen the fixed term of a prisoner's sentence . . . ." *Id.* Holmgren's classification as a credit-restricted felon and the resulting impact on her credit time does not change her sentence. Accordingly, Holmgren's Sixth Amendment argument related to her status as a credit-restricted felon fails.

II. Sentence

[19] Holmgren also argues that her Sixth Amendment rights were violated when she was sentenced for Count II pursuant to Indiana Code Section 35-50-2-4(c) based upon a fact not found by the jury—that the victim was under the age of twelve.[5] Holmgren's argument that her sentence under Indiana Code Section 35-50-2-4(c) violates the Sixth Amendment argument is a matter of first impression.

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[5] The State did not address this portion of Holmgren's argument.

[20] In *Apprendi*, the United States Supreme Court held that a criminal defendant is entitled to "'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'" *Apprendi*, 530 U.S. at 477, 120 S. Ct. at 2356 (quoting *United States v. Gaudin*, 515 U.S. 506, 510, 115 S. Ct. 2310 (1995)). A State cannot circumvent these protections "merely by 'redefin[ing] the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.'" *Id.* at 485, 120 S. Ct. at 2360 (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 698, 95 S. Ct. 1881, 1889 (1975)).

[21] In *Apprendi*, the Court considered a defendant's sentence pursuant to a New Jersey statute that classified the possession of a firearm for an unlawful purpose as a second-degree offense punishable by imprisonment for "between five years and 10 years." *Id.* at 468, 120 S. Ct. at 2351. A separate "hate crime" statute provided for an "extended term" of imprisonment if the **trial judge** found, **by a preponderance of the evidence**, that "[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." *Id.* at 468-69, 120 S. Ct. at 2351. The hate crime statute authorized imprisonment for "between 10 and 20 years" for second-degree offenses. *Id.* at 469, 120 S. Ct. at 2351. Because of the trial judge's determination that the hate crime statute applied, the defendant—who had fired several bullets into a neighboring home because of the race of its occupants—received a twelve-year sentence for the

commission of a second-degree offense, when the statutory maximum penalty for such crime was ten years.

[22] The Court found that "this practice cannot stand" and held:

> 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. . . . "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the **prescribed range of penalties to which a criminal defendant is exposed**. It is equally clear that such facts must be established by proof beyond a reasonable doubt."

Id. at 490, 120 S. Ct. at 2362-63 (internal citations omitted) (emphasis added).

A. Child Molesting Statute and Charge

[23] Here, Holmgren was charged in Count II with child molesting, a Level 1 felony, pursuant to Indiana Code Section 35-42-4-3(a), which provides: "A person who, with a child **under fourteen (14) years of age**, knowingly or intentionally performs or submits to sexual intercourse or other sexual conduct (as defined in IC 35-31.5-2-221.5) commits child molesting . . . ." (emphasis added). The offense is a Level 1 felony if "it is committed by a person at least twenty-one (21) years of age." I.C. § 35-42-4-3(a)(1).

[24] The charging information for Count II provided: "Between January 1, 2015 through and including November 1, 2019, [Holmgren], a person of at least twenty-one (21) years of age, . . . did perform or submit to sexual intercourse . . . with Victim 1, a child **under the age of fourteen years** (14)[.]" Appellant's

App. Vol. II p. 21 (emphasis added). Additionally, the jury instructions and closing arguments to the jury addressed the requirement that B.E. be under the age of fourteen. *See id.* at 181, 182, 192, 196, (jury instructions); Tr. Vol. II p. 39 (closing arguments). The jury was not instructed to make a finding that the child was under the age of twelve.

B. Sentencing Statute

[25] Following her conviction, the trial court sentenced Holmgren for Count II under Indiana Code Section 35-50-2-4, which details the sentencing range for a Level 1 felony and provides, in relevant part:[6]

> (b) Except as provided in subsection (c), a person who commits a Level 1 felony (for a crime committed after June 30, 2014) shall be imprisoned for a fixed term of between twenty (20) and forty (40) years, with the advisory sentence being thirty (30) years. In addition, the person may be fined not more than ten thousand dollars ($10,000).
>
> (c) A person who commits a Level 1 felony child molesting offense described in:
>
> (1) IC 35-31.5-2-72(1); or
>
> * * * * *
>
> shall be imprisoned for a fixed term of between twenty (20) and fifty (50) years, with the advisory sentence being thirty (30) years.

[6] Subsection (c) was added effective July 1, 2014.

> In addition, the person may be fined not more than ten thousand dollars ($10,000).

Subsection 4(c) references Indiana Code Section 35-31.5-2-72(1), which as noted above defines a credit-restricted felon. Indiana Code Section 35-31.5-2-72(1) provides:

> Child molesting involving sexual intercourse . . . or other sexual conduct (as defined in IC 35-31.5-2-221.5) for a crime committed after June 30, 2014, if:
>
> > (A) the offense is committed by a person at least twenty-one (21) years of age; and
> >
> > (B) the victim is less than twelve (12) years of age.

[26] Thus, a defendant convicted of Level 1 felony child molesting where the defendant is at least twenty-one years of age and the victim is less than twelve may be sentenced according to a longer sentencing range in subsection 4(c). This sentencing statute appears to be an anomaly in this State's sentencing scheme because it provides different sentencing ranges for the same level of offense based upon certain facts.[7] The statute, however, does not explain how those facts are to be determined or the required standard of proof.

[7] We encourage the General Assembly to reconsider these statutes, which are unnecessarily confusing. Prosecutors should not be required to reference three statutes to determine the proper manner to charge an offense.

C. Application to Holmgren

[27] The State presented evidence at trial of incidents of sexual intercourse occurring both before and after B.E. turned twelve. The State, however, specifically identified the elements of the offense by the language in the charging information. It chose to allege the victim's age as "under fourteen" and not "under twelve" in the charging information. Although Count II alleged that Holmgren had sexual intercourse with B.E. between January 1, 2015, and November 1, 2019, while B.E. was less than fourteen years old, the trial court determined at the sentencing hearing that there was some evidence B.E. was less than twelve years old at the time of the molestation and sentenced Holmgren pursuant to the harsher sentencing range of Indiana Code Section 35-50-2-4(c).

[28] The jury unanimously determined the victim was under the age of fourteen. The jury, however, was not asked to determine whether the victim was under the age of twelve. We have no way of knowing whether the jury found unanimously that the victim was under the age of twelve. The determination that B.E. was under the age of twelve at the time of the molestation was based solely upon the trial court's finding at sentencing.

[29] We conclude that Holmgren's Sixth Amendment rights as described in *Apprendi* were violated by the procedure utilized here. The trial court's finding that the victim is less than twelve years old "expose[d] the defendant to a greater punishment than that authorized by the jury's guilty verdict." *Apprendi*, 530 U.S. at 494, 120 S. Ct. at 2365. *Apprendi* held 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." *Id.* at 490, 120 S. Ct. at 2362-63. Here, the trial court determined that the victim was under the age of twelve, which increased the possible penalty beyond the typical statutory maximum found in Indiana Code Section 35-50-2-4(b). We conclude that, because the jury here was not presented with the determination of whether B.E. was under the age of twelve when he was molested, the trial court could not sentence Holmgren under Indiana Code Section 35-50-2-4(c) without violating Holmgren's Sixth Amendment rights.[8]

[30] Our Supreme Court has held: "Where we find an irregularity in a trial court's sentencing decision, we have the option to remand to the trial court for a clarification or new sentencing determination, to affirm the sentence if the error is harmless, or to reweigh the proper aggravating and mitigating circumstances independently at the appellate level." *Baber v. State*, 842 N.E.2d 343, 345 (Ind. 2006)*, cert. denied*, 549 U.S. 855, 127 S. Ct. 128 (2006). We elect the first option here.[9] Accordingly, we reverse and remand for a new sentencing hearing regarding Count II in which the State: (1) may elect to prove before a jury that

[8] Under the statutes as they are currently written, to sentence Holmgren under subsection (c), the State would have been required to charge Holmgren in a manner that allowed the jury to determine whether B.E. was under the age of twelve at the time of the molestations.

[9] We recognize that the trial court sentenced Holmgren to forty years, which is ten years below the maximum sentence under subsection 4(c) but would be the maximum sentence under subsection 4(b). We cannot say the trial court would have imposed the same sentence if it sentenced Holmgren under subsection 4(b).

B.E. was molested when he was under the age of twelve; or (2) have Holmgren resentenced for Count II pursuant to Indiana Code Section 35-50-2-4(b).[10]

Conclusion

[31] Holmgren's classification as a credit-restricted felon did not violate her Sixth Amendment rights. Holmgren's sentencing under Indiana Code Section 35-50-2-4(c) for Count II, however, violated her Sixth Amendment rights as discussed in *Apprendi*. Accordingly, we affirm in part, reverse in part, and remand for resentencing of Count II.

[32] Affirmed in part, reversed in part, and remanded for resentencing.

Riley, J., and May, J., concur.

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[10] We also note that our Supreme Court has held:

> [W]hen a conflict arises over the question of imposing a harsher penalty or a more lenient one, the longstanding Rule of Lenity should be applied. "It is a familiar principle that statutes which are criminal or penal in their nature or which are in derogation of a common-law right must be strictly construed." Also, "where there is ambiguity it must be resolved against the penalty . . . ."

Dye v. State, 984 N.E.2d 625, 630 (Ind. 2013) (quoting *Ross v. State*, 729 N.E.2d 113, 116 (Ind. 2000)).