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STATE OF CONNECTICUT *v.* KIRK R.[1]
(SC 16940)

Borden, Norcott, Palmer, Vertefeuille and Zarella, Js.

Argued March 11—officially released October 19, 2004

Donald D. Dakers, special public defender, with whom was *Jason Cyrulnik*, law student intern, for the appellant (defendant).

Frederick W. Fawcett, supervisory assistant state's attorney, with whom, on the brief, were *Jonathan C. Benedict*, state's attorney, and *Stephen J. Sedensky III*,

senior assistant state's attorney, for the appellee (state).

Opinion

BORDEN, J. The defendant appeals, following our grant of certification,[2] from the judgment of the Appellate Court affirming the trial court's judgment of conviction, rendered after a jury trial, of two counts of sexual assault in the first degree in violation of General Statutes (Rev. to 1997) § 53a-70 (a) (2),[3] and two counts of risk of injury to a child in violation of General Statutes (Rev. to 1997) § 53-21 (2).[4] The defendant claims that the Appellate Court improperly concluded that § 53a-70 (b), which provides for a mandatory minimum sentence of ten years imprisonment if the victim is less than ten years of age, did not require a finding by the jury, as opposed to a finding by the sentencing court, that the victims were in fact less than ten years of age.[5] We agree with the defendant that the issue of whether the victims were less than ten years of age should have been submitted to the jury. We affirm the judgment of the Appellate Court, however, because we conclude that the absence of such a jury finding in the present case was harmless beyond a reasonable doubt.

The defendant, Kirk R., was charged with two counts of sexual assault in the first degree and two counts of risk of injury to a child in connection with certain incidents involving his minor stepdaughters, Z and F. The jury found the defendant guilty of all charges and the trial court rendered judgment of conviction in accordance with the verdict. The trial court, relying on § 53a-70 (b), imposed ten years of the defendant's fifteen year sentence of confinement as a mandatory minimum sentence.[6] The defendant appealed to the Appellate Court, claiming, among other things, that the trial court should not have imposed the ten year mandatory minimum sentence under § 53a-70 (b) without first submitting the question of the victims' ages to the jury. *State* v. *Kirk R.*, 74 Conn. App. 376, 379, 812 A.2d 113 (2002). The Appellate Court affirmed the judgment of the trial court, concluding that the question of whether the victims were less than ten years of age was not an element of the crime, but merely a sentencing factor properly determined by the trial court. Id., 386. This certified appeal followed.

The following facts and procedural history are relevant to this appeal. The information on which the defendant was charged, alleged, among other things, the following: "[D]uring the time period of approximately July, 1997 through approximately September, 1998 . . . [the defendant] engaged in sexual intercourse with another person and such other person was under thirteen (13) years of age, in violation of § 53a-70 (a) (2) . . . ." In its instructions to the jury, the trial court stated: "A person is guilty of sexual assault in the first degree when such person engages in sexual intercourse with another person and such other person is under

thirteen years of age and the actor is more than two years older than such person. The statute sets up three elements which must be established beyond a reasonable doubt in order to justify a verdict of guilty. . . . The second element of the offense charged is that the sexual intercourse was with a person [who] was under thirteen. That is, as she had not yet reached her thirteenth birthday at the time of the sexual intercourse. . . . There is no requirement that the state prove that intercourse was done by force or even without consent of the other person. . . . The only requirements are that the accused engaged in sexual intercourse with another person who was under thirteen and the defendant was more than two years older than that person.'' The jury found the defendant guilty as charged.

Thereafter, at the sentencing hearing, the trial court, acknowledging that it was required to impose a mandatory minimum sentence of ten years for the two counts of sexual assault in the first degree, sentenced the defendant to a period of incarceration beyond that mandatory minimum period.[7] See footnote 6 of this opinion. The defendant appealed to the Appellate Court claiming, among other things, that the trial court committed plain error by imposing a ten year mandatory minimum sentence under § 53a-70 (b) without submitting the question of the victims' ages to the jury.[8] *State* v. *Kirk R.*, supra, 74 Conn. App. 379. Relying primarily on *Harris* v. *United States*, 536 U.S. 545, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002), the Appellate Court reasoned that, because § 53a-70 (b) does not increase the potential maximum sentence for a conviction of sexual assault in the first degree, but specifies the minimum sentence in instances in which the victim is less than ten years of age, the question of whether the victims were less than ten years of age did not constitute a ''sentencing enhancement,'' which ordinarily must be submitted to the jury. *State* v. *Kirk R.*, supra, 74 Conn. App. 385. Instead, the Appellate Court concluded that the issue of whether the victims were less than ten years of age constituted a ''sentencing factor,'' and, therefore, the trial court did not commit plain error by failing to submit that issue to the jury.[9] Id., 386. Accordingly, the Appellate Court affirmed the trial court's judgment of conviction. Id., 391.

The defendant claims that the Appellate Court improperly concluded that § 53a-70 (b), does not require a finding by the jury that the victim was less than ten years of age. Specifically, the defendant contends that, under *State* v. *Velasco*, 253 Conn. 210, 218, 751 A.2d 800 (2000),[10] irrespective of whether § 53a-70 (b) constitutes a sentencing enhancement or a sentencing factor, the proper inquiry centers on legislative intent, and that basic tools of statutory construction reveal that the legislature intended for the jury to determine whether the victim of a sexual assault under § 53a-70 (a) was less than ten years of age.[11] The state argues, on the

other hand, that the legislature did not intend to make the question of whether the victim was less than ten years of age an element of § 53a-70 (a), nor did the legislature intend ''to expand the length of incarceration . . . proscribed by the statute.'' Thus, the state contends, the Appellate Court correctly construed § 53a-70 (b) as a sentencing factor properly decided by the trial court. In the alternative, the state argues that any impropriety in the present case constituted harmless error because the ages of the victims were not challenged and were ''supported by overwhelming evidence.''

We agree with the defendant that the legislature intended for the jury, and not for the sentencing court, to determine whether the victim of a sexual assault under § 53a-70 (a) was less than ten years of age, and, consequently, the trial court improperly imposed the ten year mandatory minimum sentence under § 53a-70 (b) without having first instructed the jury that it must find that the victims were less than ten years of age. We agree with the state, however, that the trial court's failure to do so in the present case was harmless beyond a reasonable doubt.

As an initial matter, we note that the defendant did not object to the trial court's failure to instruct the jury that it must find that the victims in the present case were less than ten years of age. As a result, the defendant seeks to prevail under either *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989),[12] or the plain error doctrine contained in Practice Book § 60-5.[13] Essentially, the defendant claims that he was deprived of a jury determination regarding an element of § 53a-70 (a). It is well settled that a criminal defendant is constitutionally entitled ''to a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'' (Internal quotation marks omitted.) *Apprendi* v. *New Jersey*, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); see *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) (''[d]ue [p]ocess [c]lause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged''); *Duncan* v. *Louisiana*, 391 U.S. 145, 149, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968) (sixth amendment right to trial by jury extended to states through due process clause of fourteenth amendment); see also *Sullivan* v. *Louisiana*, 508 U.S. 275, 277–78, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993) (explaining *In re Winship* and *Duncan*). Accordingly, because the defendant's claim is one of constitutional magnitude, and because there is no dispute that the record is adequate for review, the defendant properly may seek to prevail under *Golding*.[14]

''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 the jury, and proved beyond a reasonable doubt.'' *Apprendi* v. *New Jersey*, supra, 530 U.S. 490. ''[T]he statutory maximum for *Apprendi* purposes 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*. . . . In other words, the relevant statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.'' (Citations omitted; emphasis in original; internal quotation marks omitted.) *Blakely* v. *Washington*, 542 U.S. , 124 S. Ct. 2531, 2537, 159 L. Ed. 2d 403 (2004).[15] A trial court is free to determine a fact that triggers a mandatory minimum sentence, however, because such a ''finding merely require[s] the judge to impose 'a specific sentence within the range authorized by the jury's finding that the defendant [was] guilty.' '' *Harris* v. *United States*, supra, 536 U.S. 563–64; see *McMillan* v. *Pennsylvania*, 477 U.S. 79, 88, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986) (mandatory minimum sentencing provision ''operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it''). The defendant does not dispute that § 53a-70 (b) creates a mandatory minimum sentencing provision and does not *increase*, in an *Apprendi* sense, the statutorily authorized penalty for the underlying crime. See footnote 11 of this opinion. Thus, it is undisputed that the legislature was not constitutionally prohibited from permitting the sentencing court, as opposed to a jury, to determine whether a victim of sexual assault in violation of § 53a-70 (a) was less than ten years of age.

Nevertheless, there is nothing that *prevents* our legislature from requiring the jury to make a finding in order to oblige a trial court to impose a mandatory minimum sentence—indeed it has done so in a similar context. See, e.g., General Statutes §§ 53a-59a, 53a-60b, 53a-60c and 53a-61a (mandatory minimum sentence for assault if victim was at least sixty years of age). Accordingly, the United States Supreme Court, as well as this court, has expressed that the first step in determining whether a particular statutory provision constitutes an element of an offense or merely a sentencing factor presents a question of statutory interpretation.[16] See *Harris* v. *United States*, supra, 536 U.S. 552; *State* v. *Velasco*, supra, 253 Conn. 220–21. ''Statutory construction is a question of law and, therefore, our review is plenary. . . . [O]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In seeking to discern that intent, we look to the words of the statute itself, to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter. . . .

''Several additional tenets of statutory construction guide our interpretation of a penal statute. . . . [C]riminal statutes are not to be read more broadly than their language plainly requires and ambiguities are ordinarily to be resolved in favor of the defendant. . . . [U]nless a contrary interpretation would frustrate an evident legislative intent, criminal statutes are governed by the fundamental principle that such statutes are strictly construed against the state.'' (Citations omitted; internal quotation marks omitted.) *State* v. *Velasco*, supra, 253 Conn. 219–20.

We begin our analysis with ''the language of the statute, because that is the most important factor to be considered.'' *State* v. *Courchesne*, 262 Conn. 537, 577, 816 A.2d 562 (2003). The structure of § 53a-70 suggests that the legislature did not intend the factual predicate of the ten year mandatory minimum sentence, that the victim was less than ten years of age, to be an element of first degree sexual assault. At the time of the acts alleged in the present case, General Statutes (Rev. to 1997) § 53a-70 (a) provided in relevant part: ''A person is guilty of sexual assault in the first degree when such person . . . (2) engages in sexual intercourse with another person and such other person is under thirteen years of age and the actor is more than two years older than such person . . . .'' General Statutes (Rev. to 1997) § 53a-70 (b) provided: ''Sexual assault in the first degree is a class B felony[17] for which one year of the sentence imposed may not be suspended or reduced by the court or, if the victim of the offense is under ten years of age, for which ten years of the sentence imposed may not be suspended or reduced by the court.'' Structurally speaking, § 53a-70 (a) (2) sets forth the elements of the offense of sexual assault in the first degree, namely, that the actor: (1) engages in sexual intercourse; (2) with a person less than thirteen years of age; and (3) the actor is more than two years older than the victim. Thus, the age of the victim *is* an element of the offense of sexual assault in the first degree, but only, at least explicitly, inasmuch as the state is required to prove that the victim was less than *thirteen* years of age.

Indeed, the fact that the ten year mandatory minimum sentence provision of General Statutes (Rev. to 1997) § 53a-70 is contained in subsection (b), while the other elements of that statutory section are contained in subsection (a), suggests that the legislature did not intend that the factual predicate for that mandatory minimum sentence, namely, that the victim was less than ten years of age, constitute an element of sexual assault in the first degree under § 53a-70 (a). That suggestion is strengthened by the fact that subdivision (2) of § 53a-70 (a) expressly refers to victims under thirteen years of age. The legislative debate on the amendment creating the mandatory minimum sentence under § 53a-70

(b) reflects, however, the understanding of legislators on both sides of the amendment, enacted through No. 95-142, § 13, of the 1995 Public Acts (P.A. 95-142), that the factual question of whether the victim was under ten years of age at the time of the offense is to be determined by the jury.[18]

As the Appellate Court noted, the ten year mandatory minimum sentencing provision was first proposed as an amendment to Senate Bill No. 872, which primarily established Connecticut's sex offender registration law. *State* v. *Kirk R.*, supra, 74 Conn. App. 383 n.12. The amendment was offered by Representative Andrew M. Norton in response to a highly publicized case in which a nine month old child was raped. Id. Representative Norton stated that the purpose of the amendment was to ''increase the penalty on a person convicted of raping or seriously physically assaulting someone who is under ten years old.'' 38 H.R. Proc., Pt. 8, 1995 Sess., p. 2667. In opposition to the amendment, Representative Michael P. Lawlor noted that the language of the bill was ''flawed'' because the amendment did not make it an element of the offense that the victim was under the age of ten. Id., p. 2670. Representative Lawlor also stated: ''So you could change it and write it correctly to make it an element, but it is not, at least the way I read it.'' Id.

In response to Representative Lawlor's criticism of the amendment, Representative Dale Radcliffe noted that the amendment is similar to statutes that impose a mandatory minimum sentence if the victim of an assault was at least sixty years of age.[19] Id., p. 2671; see, e.g., General Statutes § 53a-59a (five years not suspendable for assault in first degree); General Statutes § 53a-60b (two years not suspendable for assault in second degree); General Statutes § 53a-60c (three years not suspendable for assault in second degree with firearm); General Statutes § 53a-61a (one year not suspendable for assault in third degree). Representative Radcliffe also stated: ''And in terms of problems [of proof] for trial, it is very easy to prove the age of the victim. You simply introduce an official birth certificate or ask the mother or father or guardian how old the individual was at the time this particular heinous, particularly offensive crime was committed. And they will be able to answer it and there will be information on the record to substantiate a conviction.'' 38 H.R. Proc., supra, p. 2672.

In addition, Representative Robert M. Ward likened the mandatory minimum sentencing provision contained in § 53a-70 (b) to the enhanced penalties contained in the statute concerning driving while under the influence of intoxicating liquor or drugs. Id., p. 2674; see General Statutes § 14-227a (g). Representative Ward stated: ''My recollection . . . is that an information charging an offense for which there is an enhanced

penalty must be spelled out and may require a two count provision. For example, in our drunk driving law, if you are to get the enhanced penalty for operating under suspension, it is the same offense, but . . . there has to be notice to the defendant at trial if the prosecution is seeking the enhanced penalty and it needs to be an information in two parts and they need to be advised of it at trial. It seems to me it would be very easy for a prosecutor in this case to say, you are charged with rape in the first degree. The following facts constitute that in violation of [§] 53a-70 and in the second part, we are alleging that the victim was under ten years of age at the time of the offense and we are therefore seeking the enhanced penalty of a mandatory minimum of ten years. . . . [T]he age of the victim . . . is a matter of proof at trial and I believe the charge to the jury would be, if it were a jury case, would a reasonable person have understood the person was under that age?''[20] 38 H.R. Proc., supra, pp. 2674–75.

This exchange indicates that the legislature intended § 53a-70 (b) to operate as if it were a separate aggravated offense. Representative Radcliffe's comments demonstrate that § 53a-70 (b) was intended to operate similarly to the statutes concerning an assault on an elderly person. See General Statutes §§ 53a-59a, 53a-60b, 53a-60c and 53a-61a. Those statutes create separate aggravated offenses when the victim is at least sixty years of age, and the state is required to prove the age of the victim as an element of that separate aggravated offense.[21] The comments of Representative Lawlor, in opposition to the amendment, support this conclusion. Indeed, Representative Lawlor did not attack the purpose of the mandatory minimum sentencing provision, namely, to increase the minimum sentence for especially heinous sexual assaults. Rather, he objected solely on structural grounds, arguing that the amendment, as it was written, would not validly accomplish its purpose. As a solution, Representative Lawlor suggested that the amendment be rewritten to create a separate aggravated offense when the victim is less than ten years of age. 38 H.R. Proc., supra, p. 2673; see footnote 19 of this opinion. Thus, Representative Lawlor's remarks indicate that, notwithstanding the structural irregularities of the amendment, he understood that the proponents of the amendment nonetheless intended for § 53a-70 (b) to operate as if it were a separate offense.

Representative Ward's comments, which analogized the enhanced penalties available for driving while under the influence, indicate that the state must allege in the information that the victim is less than ten years of age. See 38 H.R. Proc., supra, pp. 2674–75. This strongly suggests that § 53a-70 (b) was not intended to create a sentencing factor, but an element of the aggravated offense.

Finally, both Representatives Radcliffe and Ward discussed scenarios that were likely to occur at trial. In this regard, Representative Radcliffe indicated that the state may introduce the victim's birth certificate into evidence at trial; id., p. 2672; and Representative Ward proposed a potential jury instruction referencing the age of the victim. Id., p. 2674. Again, these remarks suggest that the state would need to prove that the victim was less than ten years of age during the guilt phase of the trial, as opposed to during the sentencing phase.

All of these comments taken together persuade us that the legislature intended for the jury, and not for the court, to determine whether a victim of a sexual assault under § 53a-70 (a) was less than ten years of age at the time of the alleged offense.[22] Accordingly, the trial court improperly imposed the mandatory minimum sentence under § 53a-70 (b) without having first instructed the jury that it must find that the victims in the present case were less than ten years of age.

With those principles in mind, we now address the state's claim that the trial court's failure to instruct the jury that it must have found that the victims in the present case were less than ten years of age constituted harmless error.[23] ''A jury instruction that improperly omits an essential element from the charge constitutes harmless error if a reviewing court concludes beyond a reasonable doubt that the omitted element was *uncontested and supported by overwhelming evidence*, such that the jury verdict would have been the same absent the error . . . . *Neder* v. *United States*, 527 U.S. 1, 17, 119 S. Ct. 1827, 114 L. Ed. 2d 35 (1999).'' (Emphasis in original; internal quotation marks omitted.) *State* v. *Velasco*, supra, 253 Conn. 232–33; see also *State* v. *Davis*, 255 Conn. 782, 794, 772 A.2d 559 (2001); *State* v. *Montgomery*, 254 Conn. 694, 737–38, 759 A.2d 995 (2000). Thus, our sole task is to determine, beyond a reasonable doubt, whether the fact that the victims in the present case were less than ten years of age was uncontested and supported by overwhelming evidence. We conclude that it was, and, accordingly, the defendant's claim fails under the fourth prong of *Golding*. See footnote 12 of this opinion.

The following additional facts are necessary to resolve this issue. The trial in the present case occurred in November, 2000, and the information alleged that the acts for which the defendant was convicted allegedly occurred between July, 1997, and September, 1998. Colleen Bush, an investigative social worker employed by the department of children and families, testified that Z, the elder of the two victims, was born on October 26, 1990, and that F, the younger of the two victims, was born on December 5, 1993. Bush also testified that, at the time of the trial, Z was ten years of age and F was six years of age.

During both direct examination and cross-examination, Z testified that, at the time of the trial, she was ten years of age. On direct examination, F testified that, at the time of the trial, she was six years of age, and that Z was eleven years of age.[24] On cross-examination, F repeated that she presently was six years of age.

Anne Yost, a social worker employed by Bridgeport Hospital, testified that she had interviewed the victims at the hospital on January 7, 1999. Referring to each victim's medical records prepared from that visit, which the state marked for identification but did not introduce as full exhibits, Yost testified that Z was born on October 23, 1990,[25] and that F was born on December 5, 1993. Yost also testified that, at the time of that particular visit in January, 1999, Z and F were eight and five years of age, respectively. Jean Massey, the victims' foster mother for several months, also testified that, in January, 1999, Z and F were eight and five years of age, respectively. Finally, Ralph S. Welsh, a psychologist who examined the victims, answered in the affirmative when asked if Z and F were born in 1990 and 1993, respectively.

With respect to documentary evidence, the state submitted into evidence a transcript of a recorded statement made to the police by Z on February 2, 1999, wherein Z stated that she was eight years of age. The defendant submitted into evidence the hospital records of the victims, which indicated that, on September 14, 1998, Z and F were seven and four years of age, respectively. These hospital records also listed the victims' dates of birth, indicating that Z was born on October 26, 1990, and that F was born on December 5, 1993. The victims' hospital records were the only exhibits that the defendant submitted into evidence.

On the basis of the foregoing, and after a careful review of the entire record, we conclude, beyond a reasonable doubt, that the fact that the victims in the present case were less than ten years of age was supported by overwhelming evidence and was not contested by the defendant. Given the jury's verdict, we know that the jury found that the victims were less than thirteen years of age. The only evidence, testimonial or otherwise, that established the victims' dates of birth indicated that Z was born in 1990, and that F was born in 1993. Indeed, the defendant himself submitted documentary evidence that listed the victims' dates of birth. In addition, Z and F testified that, at the time of the trial, they were ten and six years of age, respectively. All of this testimony was corroborated by Bush, Yost, Massey and Welsh. Considering that the acts for which the defendant was convicted allegedly occurred between July, 1997, and September, 1998, simple arithmetic, either counting backward from the date of the trial, or forward from the victims' dates of birth, indicates that the victims were less than ten years of age

when the alleged sexual assaults had occurred.

In addition, several witnesses testified regarding the ages of the victims in 1998 and 1999, all of whom indicated that the victims were less than ten years of age. The defendant, furthermore, never contested the ages of the victims. Rather, the defendant's sole defense was that he never sexually assaulted the victims. Lastly, there was no evidence submitted to the jury on which it could have concluded that the victims were ten years of age or older at the time of the acts alleged in the present case. Although it could be argued that the defendant may not have contested the ages of the victims to the extent that their ages were less than *thirteen* years of age, we are convinced, beyond a reasonable doubt, that the jury, had it been instructed to do so, would have found that the victims in the present case were less than ten years of age.

The judgment of the Appellate Court is affirmed.

In this opinion NORCOTT, PALMER and VERTEFEUILLE, Js., concurred.

[1] In accordance with the spirit of General Statutes § 54-86e, as amended by Public Acts, No. 03-202, § 15, and this court's policy of protecting the privacy interests of victims in sexual abuse matters, we will not use the defendant's full name or the names of the victims in this opinion.

[2] We granted the defendant's petition for certification to appeal, limited to the following issue: "Did the Appellate Court properly determine that the provisions of General Statutes § 53a-70 (b), which provides for a mandatory minimum sentence of ten years imprisonment upon conviction of sexual assault in the first degree if the victim is under ten years of age, was not a sentencing enhancement statute so that a jury finding that the victims were under ten years of age was not required?" *State* v. *Kirk R.*, 262 Conn. 950, 817 A.2d 110 (2003).

[3] General Statutes (Rev. to 1997) § 53a-70 provides: "(a) A person is guilty of sexual assault in the first degree when such person (1) compels another person to engage in sexual intercourse by the use of force against such other person or a third person, or by the threat of use of force against such other person or against a third person which reasonably causes such person to fear physical injury to such person or a third person, or (2) engages in sexual intercourse with another person and such other person is under thirteen years of age and the actor is more than two years older than such person, or (3) commits sexual assault in the second degree as provided in section 53a-71 and in the commission of such offense is aided by two or more other persons actually present.

"(b) Sexual assault in the first degree is a class B felony for which one year of the sentence imposed may not be suspended or reduced by the court or, if the victim of the offense is under ten years of age, for which ten years of the sentence imposed may not be suspended or reduced by the court."

Because the conduct for which the defendant was convicted occurred between July, 1997, and September, 1998, we refer to the revision of § 53a-70 as it existed at that time.

[4] The convictions under General Statutes (Rev. to 1997) § 53-21 (2) are not relevant to this appeal.

[5] For the sake of clarity, and as we discuss later in this opinion, this claim is legally equivalent to a claim that the trial court improperly omitted an element of the offense in its instructions to the jury. See *State* v. *Velasco*, 253 Conn. 210, 232, 751 A.2d 800 (2000).

[6] "[T]he trial court sentenced the defendant to a term of twenty years incarceration, suspended after fifteen years, followed by thirty-five years of probation on the first count, which alleged violations of General Statutes (Rev. to 1997) § 53a-70 (a) (2), ten years suspended with thirty-five years of probation on the second count, which alleged risk of injury to a child in violation of General Statutes (Rev. to 1997) § 53-21 (2), twenty years suspended after fifteen years followed by thirty-five years of probation on count

three, which alleged a violation of § 53a-70 (a) (2), and ten years suspended with thirty-five years probation on the fourth count, which alleged risk of injury to a child in violation of § 53-21 (2). The sentences on the first and third counts were ordered to be concurrent, and the sentences on counts two and four were ordered to be consecutive to each other and to the sentences on counts one and two.'' *State* v. *Kirk R.*, 74 Conn. App. 376, 378 n.2, 812 A.2d 113 (2002).

[7] The defendant's counsel also acknowledged the application of the ten year mandatory minimum sentence to the defendant, and requested that the court not impose any period of incarceration beyond that mandatory period.

[8] Because the defendant conceded that his claim was not properly preserved at trial, and was not of constitutional magnitude, he sought to prevail under the plain error doctrine. *State* v. *Kirk R.*, supra, 74 Conn. App. 379–80.

[9] The Appellate Court also noted that, although ''the legislative debate . . . [did] not reveal any evident legislative intent'' behind the mandatory minimum sentencing provision; (internal quotation marks omitted) *State* v. *Kirk R.*, supra, 74 Conn. App. 384; the fact that ''the legislature added the aggravating factor to the sentencing portion of the statute, separated from the substantive elements of the crime . . . suggests an implicit intent to make the age of the victim a sentencing factor.'' Id.

[10] In *State* v. *Velasco*, supra, 253 Conn. 217–18, we determined that it was not the legislature's intent to eliminate the jury's role as fact finder during an application of General Statutes § 53-202k, which authorizes a nonsuspendable five year addition to the sentence of a defendant who is convicted of an underlying class A, B or C felony with a firearm. Accordingly, we held that § 53-202k requires the jury, and not the trial court, to determine whether a defendant uses a firearm in the commission of a class A, B or C felony for purposes of the enhancement. Id., 218. We also noted, however, that the trial court's failure to allow the jury to make such factual determinations was amenable to harmless error analysis. Id., 232–33; see also *State* v. *Davis*, 255 Conn. 782, 793–94, 777 A.2d 559 (2001) (discussing *Velasco*). Although § 53a-70 (b) does not necessarily enhance the penalty for a violation of § 53a-70 (a), but rather imposes a mandatory minimum sentence; see footnote 11 of this opinion; *Velasco* nonetheless informs our resolution of the present case.

[11] The defendant concedes that, because § 53a-70 (b) establishes a mandatory minimum sentence and does not increase the maximum penalty for a conviction under § 53a-70 (a), the legislature would not have been constitutionally prohibited from removing the question of whether the victim was less than ten years of age from the jury. See *Harris* v. *United States*, supra, 536 U.S. 567 (''Read together, *McMillan* [v. *Pennsylvania*, 477 U.S. 79, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986)] and *Apprendi* [v. *New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)] mean that those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis. Within the range authorized by the jury's verdict, however, the political system may channel judicial discretion—and rely upon judicial expertise—by requiring defendants to serve minimum terms after judges make certain factual findings.'').

[12] ''[A] defendant can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt.'' *State* v. *Golding*, supra, 213 Conn. 239–40. ''The first two steps in the *Golding* analysis address the reviewability of the claim, while the last two steps involve the merits of the claim. . . . In the absence of any one of the four *Golding* conditions, the defendant's claim will fail.'' (Citation omitted; internal quotation marks omitted.) *State* v. *Andresen*, 256 Conn. 313, 325, 773 A.2d 328 (2001). ''The appellate tribunal is free, therefore, to respond to the defendant's claim by focusing on whichever condition is most relevant in the particular circumstances.'' *State* v. *Golding*, supra, 240.

[13] Practice Book § 60-5 provides in relevant part: ''The court may reverse or modify the decision of the trial court if it determines that the factual findings are clearly erroneous in view of the evidence and pleadings in the whole record, or that the decision is otherwise erroneous in law.

''The court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. The court may in the

interests of justice notice plain error not brought to the attention of the trial court. . . .

"It is the responsibility of the appellant to provide an adequate record for review as provided in Section 61-10."

[14] Although the defendant did not seek to prevail under *Golding* in the Appellate Court, the court nonetheless stated that "his claim is not one of constitutional magnitude alleging a violation of a constitutional right . . . and therefore fails to satisfy the second prong of *Golding*." (Citation omitted; internal quotation marks omitted.) *State* v. *Kirk R.*, supra, 74 Conn. App. 379–80. On the basis of the foregoing discussion, we disagree with that determination. See also *State* v. *Denby*, 235 Conn. 477, 483–84, 668 A.2d 682 (1995) (applying *Golding* to claim that trial court failed to instruct jury on element of crime).

We also disagree with the Appellate Court's determination that the defendant's claim was *reviewable* "under the plain error doctrine as set forth in *State* v. *Velasco*, [supra, 253 Conn. 218–19 n.9]." *State* v. *Kirk R.*, supra, 74 Conn. App. 380. "[T]he plain error doctrine, which is now codified at Practice Book § 60-5 . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court *invokes* in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless *requires reversal of the trial court's judgment*, for reasons of policy." (Emphasis added; internal quotation marks omitted.) *State* v. *Cobb*, 251 Conn. 285, 343 n.34, 743 A.2d 1 (1999), cert. denied, 531 U.S. 841, 121 S. Ct. 106, 148 L. Ed. 2d 64 (2000). In addition, the plain error doctrine "is reserved for truly extraordinary situations where the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . Plain error is a doctrine that should be invoked sparingly. . . . A party cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest injustice." (Citations omitted; internal quotation marks omitted.) *State* v. *Toccaline*, 258 Conn. 542, 552–53, 783 A.2d 450 (2001). Implicit in this very demanding standard is the notion, explained previously, that invocation of the plain error doctrine is reserved for occasions requiring the reversal of the judgment under review. Although we invoked the plain error doctrine in *State* v. *Velasco*, supra, 218–19 n.9, we also reversed the trial court's judgment of conviction after concluding that the instructional impropriety was *not* harmless beyond a reasonable doubt. Id., 236. The instructional impropriety in the present case, however, was harmless beyond a reasonable doubt. Thus, because the defendant's claim does not mandate a reversal of the trial court's judgment, the present case is not an appropriate occasion in which to invoke the plain error doctrine.

[15] After oral argument in the present case, the United States Supreme Court decided *Blakely* v. *Washington*, supra, 124 S. Ct. 2535, wherein it held unconstitutional, in violation of the *Apprendi* rule, Washington's sentencing guideline scheme that permitted a court to impose an " 'exceptional' " sentence if it finds " 'substantial and compelling reasons' " to justify such a departure. In *Blakely*, the defendant pleaded guilty to kidnapping in the second degree and, pursuant to his plea agreement, the state recommended a sentence within the standard sentencing range of forty-nine to fifty-three months. Id. The trial court sentenced the defendant to ninety months, however, because it found that the defendant had acted with " 'deliberate cruelty.' " Id., 2537. Because the finding of " 'deliberate cruelty,' " which increased the defendant's sentence beyond the standard range, was neither stipulated to by the defendant nor found by a jury, the defendant's sentence violated his sixth amendment right to a jury trial. Id., 2538. As the foregoing discussion makes clear, *Blakely* does not alter our analysis in the present case because: (1) the present case involves a factual finding that triggers the imposition of a mandatory minimum sentence *within* the prescribed statutory range of penalties available to the sentencing court; see footnote 17 of this opinion; and (2) we nonetheless conclude, on the basis of the legislative history of § 53a-70 (a), that the jury should have made the findings that the victims in the present case were less than ten years or age.

[16] We are aware, of course, that the legislature recently imposed the method by which this court is to interpret statutes. Number 03-154, § 1, of the 2003 Public Acts provides: "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." The text of § 53a-70 (b) does not address

whether the jury or the trial court is to determine whether the victim of a sexual assault is less than ten years of age. In addition, neither party contends that the statutory text at issue is plain and unambiguous, and both parties have relied on the legislative history of § 53a-70 (b) in support of their positions. Accordingly, Public Act 03-154 does not govern our interpretation of § 53a-70 (b), and, therefore, our analysis may properly consider sources of meaning in addition to the text of § 53a-70 (b). See *Ames* v. *Commissioner of Motor Vehicles*, 267 Conn. 524, 532, 839 A.2d 1250 (2004).

[17] A class B felony has a maximum penalty of twenty years imprisonment. See General Statutes § 53a-35a, which provides in relevant part: ''For any felony committed on or after July 1, 1981, the sentence of imprisonment shall be a definite sentence and the term shall be fixed by the court as follows . . . (5) for a class B felony other than manslaughter in the first degree with a firearm under section 53a-55a, a term not less than one year nor more than twenty years . . . .''

[18] The precedential value of this case necessarily is limited by virtue of the legislative history that is uniquely pertinent to § 53a-70 (b). Our review of any other mandatory minimum sentencing provision must be undertaken with primary emphasis on the particular language, structure, legislative history and genealogy of *that* provision, not § 53a-70 (b).

In their briefs to this court, the parties did not present arguments regarding *their* interpretation of the legislative debate surrounding P.A. 95-142. Instead, the defendant submitted, by way of facsimile, a transcript of that debate to this court the day before oral arguments in the present case, and the state merely referenced the Appellate Court's interpretation of that debate in its brief to this court. See footnote 9 of this opinion; *State* v. *Kirk R.*, supra, 74 Conn. App. 383 n.12, 384.

[19] Representative Lawlor disagreed, noting that, unlike the amendment at issue, the assault of a victim who is at least sixty years of age is a separate offense. 38 H.R. Proc., supra, p. 2673. In this connection, Representative Lawlor stated: ''We have two separate statutes, [§] 53a-59 assault in the first degree, Class B felony, has its own penalty. There is a separate statute, [§ 53a-59a] assault on a victim over [sixty]. In order to have an enhanced penalty, you have to have a separate crime and this flawed amendment simply says at the penalty phase, if the person has been convicted of, in this case, assault—first degree, without a separate offense, it just says that if the victim happens to be under ten, there is an enhanced penalty. You can't do it that way. You could easily fix this. You could have a separate section for which someone could be convicted and then punished. This is flawed. I acknowledge that in a few minutes you could fix this and we could vote on a proper bill . . . .'' Id.

[20] Despite Representative Ward's statement, § 53a-70 does not require that the state prove that the defendant believed, or a reasonable person would have believed, that the victim was less than ten years of age. Rather, § 53a-70 creates a strict liability crime, and the state is not required to prove the actor's knowledge or intent as an element of the offense. Nevertheless, Representative Ward's comments strongly suggest that the issue of the victim's age was intended to be submitted to the jury.

[21] For instance, General Statutes § 53a-59a provides in relevant part: ''(a) A person is guilty of assault of an elderly . . . person in the first degree, when such person commits assault in the first degree under section 53a-59 (a) (2), 53a-59 (a) (3) or 53a-59 (a) (5) and (1) the victim of such assault has attained at least sixty years of age . . . .

''(d) Assault of an elderly . . . person in the first degree is a class B felony and any person found guilty under this section shall be sentenced to a term of imprisonment of which five years of the sentence imposed may not be suspended or reduced by the court.''

Thus, in order to obtain a conviction under § 53a-59a for assaulting an elderly person, the state must first prove all of the elements necessary to obtain a conviction of assault in the first degree under General Statutes § 53a-59; then it must prove an additional element, that the victim was at least sixty years of age.

[22] The state argues, nonetheless, that, had the legislature intended for § 53a-70 (b) to be an element of the offense, then it could have created a separate statutory offense. The short answer to this contention is that, on the basis of the legislative debate surrounding the statute, we are persuaded that the legislature intended to accomplish that very functional result, despite the structural irregularity of § 53a-70.

[23] The defendant has not addressed the issue of harmlessness in his brief to this court.

[24] The parties have not commented on the fact that F testified that Z presently was eleven, as opposed to ten, years of age. In any event, even if the jury believed F's statement that Z was presently eleven years of age, on the basis of the dates contained in the information, Z still would have been less than ten years of age at the time of the acts alleged in the present case.

[25] After reading Z's date of birth aloud, Yost testified: "Is that right? I'm sorry. It's kind of unclear . . . . The stamp is a little blurry."