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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>UNITED STATES OF AMERICA,</p> <p>Plaintiff - Appellee,</p> <p>v.</p> <p>ARVIN BON RED STAR,</p> <p>Defendant - Appellant.</p>
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No. 10-30351

D.C. No. 4:10-cr-00060-SEH

MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
Sam E. Haddon, District Judge, Presiding

Submitted September 27, 2011**

Before: HAWKINS, SILVERMAN, and W. FLETCHER, Circuit Judges.

Arvin Bon Red Star appeals from his jury-trial conviction and 216-month sentence for aggravated sexual abuse, in violation of 18 U.S.C. §§ 1153(a) and 2241(a). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

Red Star contends that the district court improperly applied a two-level

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

enhancement under U.S.S.G. § 3A1.3 for restraining his victim during the commission of the offense. Red Star argues that there was no evidence of physical restraint presented at trial, and that any evidence of physical restraint had already been taken into account by the statute and the sentencing Guidelines.

The record supports the district court's application of the enhancement because the evidence shows that Red Star physically restrained the victim in such a way that "added to the basic crime." *United States v. Old Chief*, 571 F.3d 898, 901 (9th Cir. 2009); *United States v. Foppe*, 993 F.2d 1444, 1452-53 (9th Cir. 1993) (defining physical restraint). Restraint of the victim is not an element of the offense of aggravated sexual abuse nor was it incorporated in the aggravated sexual abuse offense Guideline applied here. *See* 18 U.S.C. § 2241; U.S.S.G. § 2A3.1. Accordingly, the district court did not err by increasing Red Star's base offense level two levels under § 3A1.3. *See* U.S.S.G. § 3A1.3 cmt. n.2; *Old Chief*, 571 F.3d at 900.

AFFIRMED.