In the

United States Court of Appeals

for the Seventh Circuit

No. 21-1637

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

AVERY SMARTT,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Illinois.
No. 18-CR-30138-NJR-01 — **Nancy J. Rosenstengel**, *Chief Judge*.

ARGUED AUGUST 3, 2022 — DECIDED JANUARY 24, 2023

Before SYKES, *Chief Judge*, and SCUDDER and ST. EVE, *Circuit Judges*.

SYKES, *Chief Judge*. Avery Smartt had a sexual relationship with a 15-year-old runaway and traveled around the country with her as he worked as an over-the-road trucker. Along the way he took sexually explicit photos of her. When she got pregnant, he returned her to her hometown of Alton, Illinois. The FBI started investigating when the girl—identified as S.S. in the district court and here—sought

medical care at an Alton hospital during the fourth month of her pregnancy. Agents obtained a warrant to search Smartt's home in East St. Louis, where they seized electronic devices containing sexually explicit photos of S.S. DNA tests confirmed that Smartt is the father of her child.

A federal grand jury indicted Smartt for producing child pornography. A charge of witness tampering was added after Smartt sent letters addressed to S.S. and third parties trying to influence her testimony. A jury found him guilty on both counts, and the district judge imposed a long prison term.

On appeal Smartt raises two claims of error related to remarks by the judge during trial. S.S. was the first witness to testify. Just before she took the stand, the judge explained to the jury that the government's first witness was the victim, who would be referred to only by her initials. Smartt claims that it was error for the judge to refer to S.S. as "the victim." The second challenged remark came at the end of S.S.'s testimony. During her direct examination, she identified 14 sexually explicit photos Smartt had taken of her, but the prosecutor moved to admit only one. The judge asked the prosecutor if she planned to admit the other photos through another witness. The prosecutor said yes. The judge replied: "All right. Just making sure." Smartt contends that the "just making sure" comment signaled pro-government bias to the jury.

Because Smartt did not object to either statement at trial, he must clear the high hurdle of plain-error review. He barely acknowledges this standard, mentioning it only in passing in his reply brief. And he does not come close to

carrying his burden. Indeed, his arguments are frivolous. We affirm.

I. Background

In April 2017 the Illinois Department of Children and Family Services notified the FBI that S.S., then 15 years old and four months pregnant, was at the hospital in Alton reporting that she had traveled across the country with a 38-year-old truck driver and was pregnant with his child. The FBI opened an investigation, and Special Agent Tyrone Forte interviewed S.S. with other agents. She identified the truck driver as Avery Smartt and said that she met him in East St. Louis in the early fall of 2016 after she ran away from home. They had a sexual relationship, and she lived with him for several months. She said that she had accompanied Smartt on his trips around the country as an over-the-road trucker and that Smartt had taken nude photos of her during these travels. When she discovered she was pregnant, Smartt took her back to Alton.

S.S. described the mobile devices—phones and tablets—that Smartt used to take the photos. Based on the interview with S.S. and additional investigation, the agents obtained a search warrant for Smartt's home, where they seized his digital devices. Forensic searches of the devices revealed text messages between Smartt and S.S and also photos of S.S., some depicting her engaging in sex acts. A federal grand jury in the Southern District of Illinois indicted Smartt for producing child pornography, 18 U.S.C. § 2251(a).

While in jail pending trial, Smartt attempted to mail letters to friends urging them to contact S.S. to persuade her to recant her statements about their relationship or just "disap-

pear" before trial. One of these mailings included a letter directed to S.S. urging her to recant. The government returned to the grand jury seeking a superseding indictment adding a charge of attempted witness tampering, *id.* § 1512(b)(1).

The grand jury obliged, and the two-count case proceeded to trial. As is customary, before opening statements the judge instructed the jurors that they should "not infer or conclude from any ruling or other comment I may make that I have any opinions on the merits of the case favoring one side or the other." She amplified the point:

> THE COURT: The law of the United States permits the [j]udge to comment on the evidence in the case during the trial or in instructing the jury. Such comments are only expressions of the [j]udge's opinions of the facts[,] and the jury may disregard them entirely since the jurors are the sole judges of the facts.

After brief opening statements, the government called S.S. as its first witness. While the exhibits were being readied and the podium sanitized (the trial took place in the first year of the COVID-19 pandemic), the judge told the jurors what would happen next:

> THE COURT: So, while they are preparing that, this is the victim in the case that will be testifying. We are, in order to protect her privacy, just going to refer to her by initials. And, then, again, the nature of some of the evidence is obviously very sensitive, so instead of show-

> ing some things on the overhead or even on the monitors, the [g]overnment will have a—[i]t's a folder, right, … for each juror?
>
> THE GOVERNMENT: Yes, Your Honor. That's correct, Your Honor.
>
> THE COURT: All right. And then we will collect those whenever we are finished.
>
> THE GOVERNMENT: And, Your Honor, just for the record, we won't distribute those folders until a different witness testifies.
>
> THE COURT: Oh, I'm sorry. Okay, so at a different time. But, at some point you [the jurors] will get an individual folder [of exhibits].

S.S. testified that she met Smartt in East St. Louis sometime around Labor Day of 2016 and they began a sexual relationship almost immediately. He was 38 at the time, and she had just turned 15 (she was born in August 2001). She admitted that she initially lied to Smartt about her age: she told him she was 18. S.S testified that she lived with Smartt at his home in East St. Louis and often accompanied him as he traveled around the country as an over-the-road trucker. On some of these trips, she said, Smartt took photos of her engaging in sex acts.

Continuing her testimony, S.S. explained that sometime in January 2017, she discovered that she was pregnant with Smartt's child. At first she was too scared to say anything to him. At some point during a long road trip to California, she told him that she was pregnant and came clean about her age. They eventually returned to East St. Louis, and he packed up her belongings and took her back to Alton.

During her direct examination, S.S. identified 14 sexually explicit photos that Smartt had taken of her. The prosecutor moved to admit one of these photos into evidence but not the others. When S.S. concluded her testimony, the judge dismissed her and then turned to the prosecutor with a question about the exhibits:

> THE COURT: Now, you did not move for the admission of anything except [Exhibit] 8. Are you going to do that through a different witness?
>
> THE GOVERNMENT: That's correct, Judge.
>
> THE COURT: All right. Just making sure.

The second witness was an FBI digital expert who explained how the images were extracted from Smartt's mobile devices. Next up was Agent Forte, who testified about the interview with S.S., the text messages Smartt sent to her, the letters Smartt sent from jail, and the photographs obtained from Smartt's devices depicting his sexual relationship with S.S. The government also called two DNA experts: the first laid the foundation for the paternity test results, including the chain of custody for the DNA samples; the second testified that according to DNA analysis, Smartt is the father of S.S.'s child to a 99.9999% probability. Finally, the prosecutor called two jail officials to testify about Smartt's letters. The government rested, and the defense called no witnesses.

Smartt's closing argument focused on the government's burden to prove every element of each crime beyond a reasonable doubt, with specific emphasis on the requirement to prove that S.S. was a minor—under 18 years of age—at the time the photos were taken, an essential element of the

child-pornography offense. Defense counsel pointed out that the government relied entirely on S.S.'s testimony about her age and did not produce any corroborating documentary evidence such as a birth certificate or driver's license.

The jury found Smartt guilty on both counts. The judge sentenced him to concurrent prison terms of 300 months on the child-pornography count and 240 months on the witness-tampering count.

II. Discussion

Smartt argues that the judge committed reversible error by referring to S.S. as "the victim" in front of the jury and by saying that she was "just making sure" that the prosecutor planned to move the admission of all 14 sexually explicit photos at some point during the trial. These remarks, he contends, signaled pro-government bias.

Smartt did not object to either statement, which forfeits plenary review of these claims on appeal. Our review is therefore limited to correcting plain error. FED. R. CRIM. P. 52(b); *United States v. Olano*, 507 U.S. 725, 732 (1993); *United States v. Chavez*, 12 F.4th 716, 728 (7th Cir. 2021). Plain-error review is a "stringent" legal standard. *United States v. Nance*, 236 F.3d 820, 825 (7th Cir. 2000). Smartt must establish that (1) an error occurred; (2) the error was "plain"—i.e., obvious or clear; (3) the error affected his substantial rights; and (4) the error seriously affected the fairness, integrity, or public reputation of the proceedings. *Chavez*, 12 F.4th at 728.

Smartt must carry his burden on all four of these elements. Even errors that are obvious or clear do not warrant reversal unless the defendant can show an effect on his

substantial rights—that is, a "reasonable probability that, but for the error, the outcome of the proceeding would have been different." *Molina-Martinez v. United States*, 578 U.S. 189, 194 (2016) (quotation marks omitted). And even if the defendant satisfies his burden on the first three elements, the decision to correct a forfeited error remains discretionary; our exercise of discretion is reserved for errors that *seriously* affected the fairness, integrity, or reputation of the proceedings. *Puckett v. United States*, 556 U.S. 129, 135 (2009). Satisfying all four conditions "is difficult, as it should be." *Id.* (quotation marks omitted).

Smartt's claims fail at the first step. Referring to S.S. as "the victim" was not an error at all, much less a plain error. That she was the victim in the case would become obvious in the first minutes of her testimony, and the jury needed to know why she would be referred to by her initials. The judge simply accurately identified her relationship to the case and explained why her full name would not be used.

Even if it was error (it was not), the remark caused no harm to the defense. The judge had just instructed the jurors not to infer from any of her rulings or comments that she favored either side. She further instructed the jurors to "disregard … entirely" any comment she might make about the evidence and that they, the jurors, "are the sole judges of the facts." The law presumes that jurors follow the judge's instructions. *United States v. Warner*, 498 F.3d 666, 683 (7th Cir. 2007). Smartt neither acknowledges this presumption nor offers any argument for overcoming it.

Moreover, the remark was fleeting—the judge referred to S.S. as "the victim" only once—and it was utterly inconsequential given the mountain of evidence of Smartt's guilt.

We've summarized the trial record above and see no need for repetition. With such extensive evidence of guilt, there is not the remotest possibility that Smartt would have been acquitted had the judge not referred to S.S. as the victim. *See United States v. Barnhart*, 599 F.3d 737, 746 (7th Cir. 2010) (holding that the judge's improper questioning of a witness did not prejudice the defendant under the plain-error standard because the evidence pointed strongly to the defendant's guilt).

Nor was the "just making sure" comment an error. The judge had just heard S.S. identify and testify about 14 sexually explicit photographs that were the subject of the child-pornography charge, but the prosecutor had moved the admission of only one. The judge's comment reflected a reasonable effort to manage the flow of trial evidence rather than a pro-government signal to the jury. Judges have wide discretion to control the mode and order of the presentation of evidence at trial and even to question witnesses to clarify testimony or otherwise assist the jury's understanding of the evidence. *See* FED. R. EVID. 611(a), 614(b); *see also Barnhart*, 599 F.3d at 743; *United States v. Winbush*, 580 F.3d 503, 508 (7th Cir. 2009); *United States v. Washington*, 417 F.3d 780, 783–84 (7th Cir. 2005). The judge's comment was well within this broad discretion. Indeed, it was entirely unremarkable; nothing about it conveyed a thumb on the scale in favor of the prosecution.

And for the reasons we've already explained, the "just making sure" comment had no effect on the outcome of the trial given the overwhelming evidence of guilt. There is no possibility that Smartt would have been acquitted but for this unobjectionable comment from the judge.

We therefore affirm the judgment. As our analysis makes clear, Smartt's arguments are not simply meritless; they are frivolous. This was a counseled criminal appeal, briefed and argued by an attorney appointed pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A. By separate order, we address counsel's pursuit of frivolous claims in this appeal.

AFFIRMED