STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0605

State of Minnesota,
Respondent,

vs.

Sergio Javier Saldana-Viryen,
Appellant.

Filed March 6, 2017
Affirmed
Smith, Tracy M., Judge

Ramsey County District Court
File No. 62-CR-15-4130

Lori Swanson, Attorney General, St. Paul, Minnesota; and

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Schellhas, Judge; and Smith, Tracy M., Judge.

U N P U B L I S H E D O P I N I O N

SMITH, TRACY M., Judge

Appellant Sergio Javier Saldana-Viryen appeals his conviction of second-degree criminal sexual conduct, arguing that the district court committed reversible error by

admitting inadmissible hearsay testimony. Because we conclude that the district court did not plainly err in permitting the testimony, we affirm.

FACTS

Saldana-Viryen and his wife M.T. have four children. Saldana-Viryen was charged with sexually abusing three of their children: his 13-year-old son B.A.S.A.; his 10-year-old daughter B.G.S.A.; and his 6-year-old son C.J.S.A.

The relevant facts begin on January 14, 2015, when C.J.S.A. was found in a bathroom stall at school with a female student. The school's principal spoke with both children's parents about the incident, and the school social worker interviewed the children. At this interview, C.J.S.A. did not mention anything about Saldana-Viryen inappropriately touching him.

Two months later, C.J.S.A. was again found in a bathroom stall with the same female student. The following week, M.T. met with the social worker and the principal to discuss the situation. M.T. informed them that Saldana-Viryen had touched all three children's genital regions on multiple occasions. The social worker then interviewed C.J.S.A. alone. C.J.S.A. told the social worker that Saldana-Viryen had touched C.J.S.A.'s genital region. C.J.S.A. also told her that Saldana-Viryen asked C.J.S.A. to touch Saldana-Viryen's genitals but C.J.S.A. refused.

A St. Paul police officer spoke separately with M.T. and Saldana-Viryen. M.T. informed the officer that Saldana-Viryen touched the two oldest children's genital regions, but explained that she "never saw that he wanted to sexually abuse them." Saldana-Viryen

told the officer that he would playfully grab C.J.S.A. and B.G.S.A.'s genitals, but he denied touching B.A.S.A.

Saldana-Viryen was charged with three counts of second-degree criminal sexual conduct on July 29. A jury trial commenced on November 16.

All three children testified at trial. B.A.S.A. testified that Saldana-Viryen would grab him and his siblings in the genital region "when [they] were just getting out of the bath, or when [they] were just sitting down." B.A.S.A. could not recall whether Saldana-Viryen had touched or grabbed him under the clothes, but he estimated that Saldana-Viryen had touched him 40 times or more. He also testified that the grabbing "usually hurt" and that he repeatedly told Saldana-Viryen to stop. B.G.S.A. testified that Saldana-Viryen would grab her private parts "really hard" underneath her clothes. C.J.S.A. testified that Saldana-Viryen would touch his genital region "on the skin." He stated that he told Saldana-Viryen to stop, but he did not stop. C.J.S.A. recalled talking to a social worker at school regarding Saldana-Viryen's conduct at home, and testified that he told the social worker the truth.

The social worker also testified, recounting her interview with C.J.S.A. She stated that C.J.S.A. informed her that Saldana-Viryen had touched him in the genital region while C.J.S.A. "had his clothes on." Relevant for this appeal, when asked what C.J.S.A. told the social worker during the interview, the social worker responded, "I asked [C.J.S.A] if dad had ever asked him to touch dad. And he said, I never touched dad. But he said, he had asked me to. And I said no. And he said it occurred several times." Saldana-Viryen did not object to this statement.

The St. Paul police officer testified about her conversations with M.T. and Saldana-Viryen. The officer testified that Saldana-Viryen claimed to be "playing with the kids" and he grabbed the children because he was "joking" with them.

Saldana-Viryen testified in his own defense, denying that he ever inappropriately touched the children. He testified that he often played with the children physically by wrestling and grabbing them. During cross-examination, Saldana-Viryen testified that C.J.S.A. would use Spanish-slang terms for genitals, so Saldana-Viryen would grab him by the groin, throw him on the bed, and threaten to spank him if he used those words again. He also testified that he told M.T. that the children were using these slang terms and that, "[i]f she was with them [she should] tell them to stop saying [those words], otherwise [Saldana-Viryen and M.T.] would burn their mouths or cut their [genitals]." Saldana-Viryen later clarified that he touched the children's genital regions in a playful manner.

After three days of trial, the jury returned not-guilty verdicts on the two counts pertaining to Saldana-Viryen's conduct toward B.A.S.A. and B.G.S.A., and a guilty verdict on one count of second-degree criminal sexual conduct pertaining to his conduct toward C.J.S.A. The judge sentenced Saldana-Viryen to 90 months in prison.

Saldana-Viryen appeals.

D E C I S I O N

Saldana-Viryen argues that the district court erred in admitting the social worker's testimony about what C.J.S.A. told her during the March 2015 interview because the testimony contained inadmissible hearsay. In particular, Saldana-Viryen argues that the

admission of C.J.S.A.'s out-of-court statement that Saldana-Viryen asked C.J.S.A. to touch him was plainly erroneous and warrants reversal of his conviction.

In the absence of an objection at trial, we review the admission of evidence for plain error. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Under the plain-error standard, the defendant must show: (1) an error, (2) that is plain, and (3) that affected the defendant's substantial rights. *Id.* An error is plain if it "contravenes case law, a rule, or a standard of conduct." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). An error affects the defendant's substantial rights if the prejudice "forms the basis for a reasonable likelihood the error substantially affected the verdict." *State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006). If the defendant shows all three conditions of the plain-error standard, we consider whether reversal is necessary to ensure the fairness and integrity of the judicial proceeding. *Griller*, 583 N.W.2d at 740. "Because courts are not required or even advised to make such affirmative intrusions on proceedings," the failure of the district court to act sua sponte in reaction to objectionable testimony at trial typically does not constitute plain error. *Manthey*, 711 N.W.2d at 505.

Hearsay is defined in the Minnesota Rules of Evidence as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). Hearsay is not admissible unless a recognized exception applies. Minn. R. Evid. 802. In *Manthey*, the Minnesota Supreme Court recognized that "[t]he number and variety of exceptions to the hearsay exclusion make objections to such testimony particularly important to the creation of a record of the [district] court's decision-making process in either admitting or excluding a

given statement." 711 N.W.2d at 504. In *Manthey*, the defendant did not object to the allegedly inadmissible statements at trial and therefore, the supreme court reasoned, "the state was not given the opportunity to establish that some or all of the statements were admissible under one of the numerous exceptions to the hearsay rule." *Id*. The court thus held that the admission of the statements did not constitute plain error. *Id.* Similarly, in *State v. Smith*, this court concluded that a district court did not commit plain error by admitting hearsay testimony "because [the defendant's] counsel failed to object at trial and, as a result, the prosecutor did not have the opportunity to argue for the admissibility of the statements under several hearsay exceptions." 825 N.W.2d 131, 138-39 (Minn. App. 2012), *review denied* (Minn. Mar. 19, 2013).

Saldana-Viryen did not object to the social worker's testimony regarding C.J.S.A.'s allegedly inadmissible statements. Absent an objection, the state did not have an opportunity to argue for the admissibility of the social worker's testimony under the hearsay exceptions. *See Manthey*, 711 N.W.2d at 504. We cannot say that the district court plainly erred in allowing this allegedly inadmissible testimony. *See id.*

Even if the district court plainly erred in admitting the social worker's testimony, we conclude that any plain error did not affect Saldana-Viryen's substantial rights. *See Griller*, 583 N.W.2d at 740. An error affects the defendant's substantial rights if it is "prejudicial and affect[s] the outcome of the case." *Id.* at 741. The defendant bears the heavy burden of persuasion on this third prong of the plain-error standard. *Id.*

All three children testified that Saldana-Viryen grabbed their genitals on multiple occasions, but the jury found him guilty of sexual misconduct only on the count pertaining

to C.J.S.A. Saldana-Viryen argues on appeal that the "key difference between [C.J.S.A.'s] version of what happened and [B.A.S.A.'s] and [B.G.S.A.'s] versions of what happened came from [C.J.S.A.'s] out-of-court statement to [the social worker]," specifically that Saldana-Viryen had asked C.J.S.A. to touch him. Saldana-Viryen contends that this allegedly inadmissible testimony provided the jury with evidence of sexual or aggressive intent that was absent in B.A.S.A. and B.G.S.A.'s versions of events.

Our review of the trial transcript suggests that C.J.S.A.'s out-of-court statement about Saldana-Viryen asking C.J.S.A. to touch him had no prejudicial impact on the proceedings. While C.J.S.A. was on the stand, neither the defense attorney nor the prosecutor asked him to elaborate on this statement to the social worker. Moreover, the attorneys did not question C.J.S.A. about whether Saldana-Viryen had ever asked C.J.S.A. to touch him, and they did not revisit the issue during their closing arguments. Rather, the difference in the verdicts may be explained by Saldana-Viryen's own testimony. Saldana-Viryen admitted at trial to grabbing C.J.S.A.'s genitals, but denied touching B.A.S.A. and B.G.S.A. During its closing argument, the state emphasized that Saldana-Viryen's stated motive for grabbing C.J.S.A. as a "game" he played with the children had changed during the course of the trial to "disciplining [C.J.S.A.]." As such, we cannot say that any plain error affected the outcome of the case. *See Griller*, 583 N.W.2d at 741.

Because we conclude that the district court did not plainly err in admitting the social worker's testimony about C.J.S.A.'s out-of-court statement and that, in any event, any error was not prejudicial, we affirm.

Affirmed.