STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1224

State of Minnesota,
Respondent,

vs.

Joe NMN Xiong,
Appellant.

Filed September 1, 2009
Affirmed
Kalitowski, Judge

Lyon County District Court
File No. 42-CR-07-752

Lori Swanson, Attorney General, Kelly O'Neill Moller, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Rick Maes, Lyon County Attorney, Lyon County Courthouse, 607 West Main Street, Marshall, MN 56258 (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, G. Tony Atwal, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Ross, Judge; and Willis, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

KALITOWSKI, Judge

Appellant Joe NMN Xiong was convicted of second-degree criminal sexual conduct, in violation of Minn. Stat. §§ 609.343, subd. 1(a) (2006) and 609.101, subd. 2 (2006). Appellant argues that the district court committed reversible error by admitting the statements of his daughter and spouse in violation of his confrontation rights, as established in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004). We affirm.

D E C I S I O N

I.

Respondent argues that appellant did not raise a *Crawford* challenge before the district court and therefore forfeited this argument on appeal. Appellant replies that his hearsay objection sufficiently implicated *Crawford*. We conclude that appellant has not forfeited his *Crawford* argument, but that plain-error review applies.

This court will generally decline to consider matters not argued to and considered by the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). But the Minnesota Supreme Court, post-*Crawford*, has reviewed for plain error Confrontation Clause challenges not brought before the district court. *See State v. Tscheu*, 758 N.W.2d 849, 863 (Minn. 2008) (applying plain-error analysis to a claimed violation of the Confrontation Clause). Following *Tscheu*, we conclude that appellant has not forfeited his *Crawford* argument.

In his principal brief, appellant's argument relies on the harmless-error standard of review. But generally, when a defendant fails to object to the admission of evidence, we

review challenges to the admission of that evidence for plain error. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Our review of the record here indicates that appellant did not object to the admission of any testimony as violative of the Confrontation Clause. We therefore apply the plain-error standard enunciated in *Griller*.

II.

Appellant argues that the admission of statements by his daughter, N.X., and his spouse, M.X., violated his Confrontation Clause rights and requires reversal of his conviction. We agree that the admission of the statements was error but conclude that reversal is not required under the plain-error standard because the error did not affect appellant's substantial rights.

The plain-error standard requires that the defendant show (1) error; (2) that is plain; and (3) that affected substantial rights. *Id.* at 740. The defendant bears the heavy burden of persuasion on the third prong of the test. *Id.* at 741. If these prongs are met, we then assess whether we should address the error to ensure the fairness and integrity of the judicial proceedings. *Id.* at 740.

Error

Appellant contends that it was error to admit the parts of Detective Krogman's testimony that included out-of-court statements made by appellant's spouse and daughter. We agree.

The Confrontation Clause of the Sixth Amendment to the United States Constitution guarantees a criminal defendant's right to confront witnesses against him. U.S. Const. amend VI. In *Crawford v. Washington*, the Supreme Court held that the

admission of out-of-court testimonial statements made by a nontestifying declarant violates the Confrontation Clause unless the declarant is unavailable to testify and the defendant has had a prior opportunity for cross-examination. 541 U.S. at 59, 124 S. Ct. at 1369. *Crawford* did not exhaustively define "testimonial statement," but did identify as "testimonial," statements taken by police officers during the course of interrogation. *Id.* at 51-52, 124 S. Ct. at 1364.

Two years after *Crawford*, in *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266 (2006), the Supreme Court further clarified when a statement taken by a police officer is testimonial:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later prosecution.

Id. at 822, 126 S. Ct. 2273-74. Applying this framework, the Court determined that statements to a 911 operator describing an ongoing domestic assault were not testimonial. *Id.* at 827-28, 126 S. Ct. at 2276-77. But the Court determined that a domestic-assault victim's informal statement to police at her home when no emergency was in progress was a testimonial statement. *Id.* at 829-30, 126 S. Ct. 2277-78.

Following *Crawford* and *Davis*, the Minnesota Supreme Court identified four important factors for distinguishing between testimonial and nontestimonial statements in the context of a 911 call. *State v. Wright*, 726 N.W.2d 464, 473 (Minn. 2007). Those

distinctions are whether: (1) the 911 caller is speaking about events actually happening or describing past events; (2) any reasonable listener would recognize that the 911 caller was facing an ongoing emergency; (3) the questions and answers during the 911 call were necessary to resolve the present emergency; and (4) whether the 911 caller was providing frantic answers or responding calmly to stationhouse questions. *Id.* at 473.

Here, the circumstances objectively indicate that M.X.'s statements to Detective Krogman were testimonial. After the incident, which occurred at approximately 4:00 p.m., M.X. and N.X. traveled with appellant to the City of Tracy to visit relatives. After arriving in Tracy, M.X. made up an excuse to leave the relative's home and, with N.X. and her son, drove to the Tracy Police Department. Once at the Tracy Police Department, M.X. telephoned the City of Marshall Police Department and spoke with Detective Krogman at approximately 7:10 p.m. M.X. told Krogman that she believed that her husband had raped N.X. and relayed other details of the incident to Detective Krogman. Detective Krogman asked M.X. not to scrub the child, to save any evidence, and to come to the Marshall Police Department.

On these facts, we conclude that there was no ongoing emergency and that the primary purpose of the statement was to establish or prove past events potentially relevant to later prosecution. Therefore, M.X.'s statements were testimonial. And because M.X. was unavailable to testify and appellant had no opportunity to cross-examine M.X., the admission of M.X.'s statements violated appellant's right to confront witnesses against him.

Appellant also argues that the admission of statements by N.X. violated the Confrontation Clause because her statements were testimonial. We disagree that N.X.'s statements were testimonial, but agree that their admission violated his rights under the Confrontation Clause.

Here, M.X. returned home from a job fair and N.X. told her the details of what happened, including that "daddy tried to put his penis inside [her] private area" and that appellant bent her over, spit on her vagina, and tried to put his penis inside of her. We conclude that N.X.'s statements are not testimonial under either *Crawford* or *Davis.* The statements were not (1) ex parte in-court testimony; (2) pretrial statements that the five-year-old N.X. would reasonably expect to be used prosecutorially; or (3) statements taken by police officers during interrogation. *See Crawford*, 541 U.S. at 51-52, 124 S. Ct. at 1364 (describing three classes of testimonial statements).

Nevertheless, we conclude that the admission of N.X.'s statements violated the Confrontation Clause. Here, both N.X. and M.X. were unavailable to testify at trial and their statements were admitted into evidence through the testimony of Detective Krogman. The statements by N.X. were first made to her mother, M.X., who in turn relayed them to Detective Krogman. And, as discussed above, the admission of M.X.'s statements through Detective Krogman's testimony violated the Confrontation Clause.

We therefore conclude that appellant has shown the existence of error under the first prong of the plain-error analysis. We next examine whether the error was plain and whether it affected appellant's substantial rights. *See Griller*, 583 N.W.2d at 740 (stating that the defendant must show plain error that affected substantial rights).

Plain Error

"An error is plain if it was clear or obvious." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (quotation and citations omitted). This is usually shown if the error contravenes caselaw, a rule, or a standard of conduct. *Id.*; *see Tscheu*, 758 N.W.2d at 863-64 (concluding erroneous admission of testimonial statement was plain). Here, the erroneously admitted evidence consisted of out-of-court statements made by M.X. at a police station when there was no ongoing emergency. On this record, we conclude that the error is plain.

Substantial rights

Appellant's principal brief relies on the harmless-error standard. After the state submitted its responsive brief, arguing that either the Confrontation Clause challenge was forfeited or that the plain-error standard applies, appellant submitted a reply brief arguing that the prejudice prong of the plain-error standard is met because the error was not harmless. We disagree.

Although the standards of plain and harmless error are different, the supreme court has acknowledged that "both the harmless error standard and the third prong of the plain error test consider whether the error contributed to the verdict." *State v. Vance*, 734 N.W.2d 650, 660 n.8 (Minn. 2007).

Griller explained the third prong of the plain-error test:

> The third prong, requiring that the error affect substantial rights, is satisfied if the error was prejudicial and affected the outcome of the case. The defendant bears the burden of persuasion on this third prong. We consider this to be a heavy burden. We have defined plain error as prejudicial if

> there is a reasonable likelihood that the [error] would have had a significant effect on the verdict of the jury.

583 N.W.2d at 741 (footnotes and quotation omitted). We conclude that appellant has not met his heavy burden to show that the error was prejudicial and affected the outcome of the case.

Here, a perineal swab from N.X. revealed the presence of amylase, a constituent of saliva. DNA testing revealed that the Y-chromosome of the DNA profile obtained from the perineal swab matched the Y-chromosome of the DNA profile from appellant. Neither appellant nor any of his paternally related male relatives could be excluded as a contributor to the DNA found on the swab.

In addition, during an interrogation the day after the incident, appellant confessed to placing his erect penis on his daughter's vagina. Specifically, appellant admitted that after work he was upstairs lying down on his bed and his penis was erect. Appellant stated that he started wrestling and playing around with N.X. And when asked whether he spit on N.X.'s vagina, appellant replied, "I didn't force it but just put it there."

Appellant's confession and the DNA evidence lead us to conclude that there is no reasonable likelihood that the erroneously admitted testimony had a significant effect on the verdict of the jury. Therefore, appellant has not shown the presence of prejudice, and we affirm appellant's conviction.

Affirmed.