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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1120**

State of Minnesota,
Respondent,

vs.

Abdulla Ibn Kaabar Venson,
Appellant.

**Filed June 15, 2020
Affirmed
Johnson, Judge**

Dakota County District Court
File No. 19HA-CR-18-2342

Keith Ellison, Attorney General, St. Paul, Minnesota; and

James C. Backstrom, Dakota County Attorney, Heather Pipenhagen, Assistant County Attorney, Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Gina D. Schulz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Slieter, Presiding Judge; Johnson, Judge; and Bjorkman, Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

The district court found Abdulla Ibn Kaabar Venson guilty of first- and third-degree criminal sexual conduct, threats of violence, and domestic assault by strangulation. Venson

argues on appeal that the district court plainly erred by admitting a police officer's testimony concerning a conversation with a physician who treated the victim, in violation of the rule against hearsay evidence and his rights under the Confrontation Clause. We conclude that the district court did not plainly err and, therefore, affirm.

FACTS

In the early morning hours of September 12, 2018, law enforcement received a report that, a few hours earlier, a woman was assaulted by Venson, with whom she shared a residence in the city of Burnsville. The woman, K.H., reported that she returned home at approximately 11:00 p.m., parked her vehicle in the garage, and closed the garage door. K.H. reported that Venson entered the garage, grabbed her throat, slammed her into a vehicle, pushed her onto the floor, and began to strangle her with both hands. K.H. also reported that, during the incident, Venson inserted his finger into her vagina. She further reported that Venson told her that he should have “blew your f---ing brains out.”

The state charged Venson with third-degree sexual conduct using force or coercion, in violation of Minn. Stat. § 609.344, subd. 1(c) (2018); threats of violence, in violation of Minn. Stat. § 609.713, subd. 1 (2018); and domestic assault by strangulation, in violation of Minn. Stat. § 609.2247, subd. 2 (2018). The state later amended the complaint by adding one count of first-degree criminal sexual conduct while causing fear of imminent great bodily harm, in violation of Minn. Stat. § 609.342, subd. 1(c) (2018), and one count of first-degree criminal sexual conduct using force or coercion, in violation of Minn. Stat. § 609.342, subd. 1(e)(i) (2018).

Venson waived his right to a jury trial, and the case was tried to the district court over two days in January 2019. The state called three witnesses: K.H. and two police officers. K.H. testified in a manner consistent with the allegations in the complaint but with greater detail and with additional information about her actions after the incident. During the direct examination of Officer Wical, the following colloquy took place regarding K.H.'s evaluation at a hospital:

Q: And did you make a request for a sexual assault examination to take place?

A: Initially I did, but after speaking with [K.H.'s] doctor at the hospital, he advised that based on the circumstances, it was not necessary. I spoke with my sergeant, . . . and he stated that we should go with what the doctor recommended.

Q: And why did you withdraw that decision to request that test or exam?

A: [K.H.] told the physician at the hospital that she was penetrated by Mr. Venson by his finger, but not so deep that it would cause enough trauma for a sexual assault exam to identify that anything had happened. And as it was alleged to just be his finger, there would be no fluids or DNA to collect; there was no physical evidence to collect from a sexual assault kit, based on the circumstances that [K.H.] provided.

Venson's trial attorney did not object to these questions or to Officer Wical's answers. On cross-examination, Venson's trial attorney asked Officer Wical 18 questions about his conversation with the physician and the subject of a sexual-assault examination.

During the defense case, Venson testified that he did not assault K.H. on September 11, 2018, and that he was unaware of the allegations of criminal sexual conduct until he was charged.

Counsel presented oral closing arguments to the district court. In the state's closing argument, the prosecutor did not mention Officer Wical's conversation with the physician concerning a sexual-assault examination. But during Venson's closing argument, his attorney argued, in part, that law enforcement performed an inadequate investigation by not requesting and insisting on a sexual-assault examination. In the state's rebuttal argument, the prosecutor argued that law-enforcement officers reasonably withdrew the request for a sexual-assault examination because the physician said it was unlikely to yield any evidence of a sexual assault accomplished by penetration with a finger.

One week later, the district court filed a 16-page order with its findings of fact, conclusions of law, and order. The district court found Venson's testimony to be not credible because "[h]e was vague and evasive," his "timeline . . . was inconsistent," and "his attorney had to ask him simple questions multiple times." Conversely, the district court found that K.H. credibly testified that Venson penetrated her vagina with his finger. The district court also noted corroborating physical evidence, such as "photographs showing redness to K.H.'s neck and leaves, grass, or dirt in K.H.'s hair." In one paragraph of its findings of fact, the district court stated:

After Defendant was arrested, Officer Wical responded to the hospital and spoke with K.H.'s doctor. Officer Wical testified that he initially requested that a sexual assault evaluation be performed but that he withdrew that request after speaking with the doctor and his sergeant. Officer Wical testified that the doctor informed him that there would be no physical evidence or DNA to collect from finger penetration to the vagina.

The district court found Venson guilty of the first four charges but not guilty of the fifth charge, first-degree criminal sexual conduct using force or coercion. The district court imposed a sentence of 144 months of imprisonment on the conviction of first-degree criminal sexual conduct while causing fear of imminent great bodily harm. Venson appeals.

D E C I S I O N

Venson argues that the district court erred by admitting Officer Wical's testimony concerning the physician's statement that a DNA test would not be worthwhile. Venson contends that the physician's statement is inadmissible hearsay and that its admission into evidence violated his rights under the Confrontation Clause.

Venson concedes that his trial attorney did not object to the evidence that he now contends is inadmissible. Accordingly, this court applies the plain-error test. *See* Minn. R. Crim P. 31.02; *State v. Smith*, 932 N.W.2d 257, 271 (Minn. 2019); *State v. Litzau*, 650 N.W.2d 177, 182 (Minn. 2002). Under the plain-error test, this court will reverse only if (1) the district court committed an error, (2) the error is plain, and (3) the plain error affected the defendant's substantial rights. *Smith*, 932 N.W.2d at 271. "An error is plain if it is clear or obvious, which is typically established if the error contravenes case law, a rule, or a standard of conduct." *State v. Webster*, 894 N.W.2d 782, 787 (Minn. 2017) (quotation omitted). If these three requirements are satisfied, an appellant also must satisfy a fourth requirement, that the error "seriously affects the fairness and integrity of the judicial proceedings." *State v. Little*, 851 N.W.2d 878, 884 (Minn. 2014). If any

requirement of the plain-error test is not satisfied, the appellate court need not consider the other requirements. *State v. Brown*, 815 N.W.2d 609, 620 (Minn. 2012).

A. Hearsay

Hearsay is defined 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). As a general rule, hearsay is inadmissible. Minn. R. Evid. 802. But the rules of evidence provide a number of exceptions to the rule of exclusion. See Minn. R. Evid. 803, 804.

Venson contends, “The unidentified doctor’s statement was hearsay because it was an out-of-court statement offered to prove the truth of what it asserted: that a sexual assault exam was not necessary because DNA evidence could not be found where there were no fluids.” The state responds that the physician’s out-of-court statements were not hearsay because they were not admitted for the truth of the matter asserted but, rather, to explain why law-enforcement officers withdrew the request for a sexual-assault examination. The trial record does not reveal with clarity whether the testimony at issue was offered to prove the truth of the matter asserted, primarily because there was no objection to the evidence and, thus, no need for the prosecutor to clarify its purpose and to justify its admission. The supreme court has stated:

The number and variety of exceptions to the hearsay exclusion make objections to such testimony particularly important to the creation of a record of the trial court’s decision-making process in either admitting or excluding a given statement. The complexity and subtlety of the operation of the hearsay rule and its exceptions make it particularly important that a full discussion of admissibility be conducted at trial.

State v. Manthey, 711 N.W.2d 498, 504 (Minn. 2006). For those reasons, the supreme court has expressed its reluctance to conclude that the admission of hearsay evidence is plain error. *See id.* at 504-05.

We are similarly reluctant in this case to conclude that the district court plainly erred by admitting Officer Wical's testimony concerning his conversation with the physician. The state's explanation for why the testimony was offered—to explain why law-enforcement officers withdrew the request for a sexual-assault examination—appears at least plausible and even likely. The state's explanation finds support in cases in which similar evidence about a law-enforcement officer's investigation was not deemed hearsay because it was not offered to prove the truth of the matter asserted. *See, e.g., State v. Swaney*, 787 N.W.2d 541, 552-53 (Minn. 2010); *State v. Ford*, 322 N.W.2d 611, 615 (Minn. 1982). Given the lack of a record, we cannot conclude that the district court clearly erred by not *sua sponte* excluding or striking Officer Wical's testimony.

B. Confrontation Clause

The Sixth Amendment to the United States Constitution provides, “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const. amend. VI; *see also* Minn. Const. art. I, § 6. If a statement is testimonial in nature, its admission violates the Confrontation Clause, unless the person who made the statement is unavailable and the defendant has had a prior opportunity to cross-examine the person. *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 1365 (2004). But if a statement is non-testimonial in nature, its admission does not violate

the Confrontation Clause. *Davis v. Washington*, 547 U.S. 813, 840, 126 S. Ct. 2266, 2284 (2006). Whether a statement is testimonial in nature turns on the primary purpose or reason for the statement. *See id.* at 822, 126 S. Ct. at 2273-74. A statement is testimonial in nature if its primary purpose is to “establish or prove past events” for purposes of later criminal prosecution. *Id.*

Nonetheless, even if a statement is testimonial in nature, its admission “does not implicate the Confrontation Clause if the statements are not offered to prove the truth of the matter asserted.” *Swaney*, 787 N.W.2d at 552. We have concluded above in part A that the record does not plainly indicate that the physician’s statements were offered to prove the truth of the matter asserted. Thus, Venson’s confrontation argument fails for the same reason that his hearsay argument fails.

C. Substantial Rights

Even if Venson could establish a plain error under either of his theories, he would be unable to satisfy the third requirement of the plain-error test, that the alleged error affected his substantial rights. *See Smith*, 932 N.W.2d at 271. “A plain error affects the substantial rights of the defendant when there is a reasonable likelihood that the error substantially affected the verdict.” *State v. Matthews*, 800 N.W.2d 629, 634 (Minn. 2011) (quotation omitted). That standard is not met in this case. There is no indication that Officer Wical’s testimony concerning the physician’s statements caused the district court to find Venson guilty. The physician’s statements warranted only a brief mention in the district court’s findings of fact. The district court’s finding of guilt hinged primarily on its credibility determinations with respect to Venson and K.H.

In sum, the district court did not plainly err by admitting Officer Wical's testimony concerning the physician's statement that a DNA test would not be worthwhile.

Affirmed.