NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 17-2175

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UNITED STATES OF AMERICA

v.

GLENVERT GREEN,

Appellant

_____

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 4-16-cr-00259)
District Judge: Honorable Matthew W. Brann

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Submitted Under Third Circuit L.A.R. 1.2
January 18, 2018

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Before: AMBRO, RESTREPO, *and* FUENTES, *Circuit Judges*

(Filed: April 10, 2018)

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OPINION*

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RESTREPO, *Circuit Judge*

Appellant Glenvert Green appeals the District Court's ruling prohibiting the cross-

* This disposition is not an Opinion of the full Court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

examination of the victim at Green's sentencing hearing. We will affirm.

I

In March of 2016, Green was incarcerated at United States Penitentiary Allenwood in White Deer, Pennsylvania. On March 9, 2016, Green left his housing unit but remained in the "sally port," an area through which inmates enter and exit the unit. Green waited until Senior Officer Jacqueline Showers, a federal Bureau of Prisons correctional officer, entered the sally port to monitor the metal detector. Once Officer Showers and Green were alone and standing within feet of one another, Green exposed his penis and began to masturbate. While doing so, he made sexual remarks to the officer. Officer Showers ordered him to stop, but Green refused and continued his conduct until Officer Showers radioed for assistance.

On December 20, 2016, Green pled guilty to indecent exposure, pursuant to the Assimilated Crimes Act, 18 U.S.C. § 13, in violation of Pennsylvania law, 18 Pa. C.S. § 3127.

On May 11, 2017, the District Court sentenced Green to 21 months' imprisonment, to be served consecutively to his current sentence. At the sentencing hearing, Officer Showers elected to give a victim impact statement on the record. Defense counsel sought to cross-examine her and the Government objected. After hearing argument from both parties, the District Court found that the questions proffered by Green's counsel would not elicit relevant testimony and sustained the objection.

On appeal, Green argues that the Court's ruling prohibiting the cross-examination of Officer Showers after her victim impact statement violated the Confrontation Clause

and Green's due process rights. As a result, he asks us to vacate the judgment of sentence and remand his case for a new sentencing hearing.

II

The District Court had jurisdiction under 18 U.S.C. § 3231, and we have jurisdiction under 18 U.S.C. § 3742 and 28 U.S.C. § 1291. We review constitutional claims *de novo*, except where, as here, the issues were not raised in the court below. In these instances, we review such claims for plain error. *Government of Virgin Islands v. Vanterpool*, 767 F.3d 157, 162 (3d Cir. 2014) (citing *United States v. Marcus*, 560 U.S. 258, 262 (2010)). "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b). Appellate courts may correct unpreserved error only when (1) there is an "error," (2) that is "plain," (3) that affects the complaining party's "substantial rights," and (4) that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *United States v. Olano*, 507 U.S. 725, 736 (1993) (citing *Connor v. Finch*, 431 U.S. 407, 421 n.19 (1977)).

III

Pursuant to the Crime Victims' Rights Act (CVRA), victims have "[t]he right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding." 18 U.S.C. § 3771(a)(4); *see also* Fed. R. Crim. P. 32(i)(4)(B) ("Before imposing sentence, the court must address any victim of crime who is present at sentencing and must permit the victim to be reasonably heard."). "Under the CVRA, courts may not limit victims to a written statement." *United States v. Vampire*

Nation, 451 F.3d 189, 197 n.4 (3d Cir. 2006). At the sentencing hearing, Officer Showers elected to testify to the impact Green's conduct had on her mental state, both at home and in the workplace.

Green argues first that the Court's ruling to prohibit the cross-examination of Officer Showers violated the Confrontation Clause. He acknowledges, however, that the law is settled that the Confrontation Clause does not apply in the sentencing context. *See United States v. Robinson*, 482 F.3d 244, 246 (3d Cir. 2007) ("Both the Supreme Court and this Court of Appeals have determined that the Confrontation Clause does not apply in the sentencing context[.]"); *United States v. McGlory*, 968 F.2d 309, 347 (3d Cir. 1992) ("The Sixth Amendment's confrontation clause does not apply to sentencing hearings and reliable hearsay is generally admissible. . . ."); *United States v. Kikumura*, 918 F.2d 1084, 1099-1100 (3d Cir. 1990) (holding that the Confrontation Clause applies at trial, not sentencing). Because Green did not have the right to confront Officer Showers at his sentencing, the claim that he was deprived of the opportunity to do so does not pose a viable ground for relief.

The assertion that Green's due process rights were violated by the District Court's ruling to prohibit cross-examination is similarly unfounded. The Due Process Clause requires that victim impact statements must have some "minimal indicium of reliability beyond mere allegation" to be admissible at sentencing hearings. *Robinson*, 482 F.3d at 246 (quoting *Kikumura*, 918 F.2d at 1102); *see also United States v. Paulino*, 996 F.2d 1541, 1547 (3d Cir. 1993) ("[T]he introduction of evidence at sentencing is subject to [a] due process standard of reliability.") Green does not contend that Officer Showers'

testimony was insufficiently reliable to be properly considered by the District Court in imposing sentence. He instead asserts, without citation to legal authority, that his due process rights entitled him to cross-examine the victim because she testified to the circumstances of the offense. This assertion, however, is refuted by controlling law. *See Williams v. New York*, 337 U.S. 241, 250-51 (1949) (holding that consideration of information supplied by witnesses at sentencing who are not subject to cross-examination did not violate Due Process Clause); *U.S. ex rel. Gerchman v. Maroney*, 355 F.2d 302, 309 (3d Cir. 1966) ("It is undoubtedly true that the guarantee of the right of confrontation and cross-examination does not apply to sentencing pursuant to a criminal conviction.")

Accordingly, because Green is unable to show a violation of the Confrontation Clause or his due process rights, we will affirm the sentence of the District Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	No. 4:16-CR-00259
	:	
v.	:	(Judge Brann)
	:	
GLENVERT GREEN,	:	
	:	
Defendant.	:	

CERTIFIED SUPPLEMENT TO THE RECORD

MAY 26, 2017

Federal Rule of Appellate Procedure 10(e)(2)(B) provides that if "anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded . . . by the district court before or after the record has been forwarded." Such supplementation is reserved to the district court's discretion. *United States v. Oliver*, 278 F.3d 1035, 1042 (10th Cir. 2001).

This certification supplements my oral ruling that disallowed the Defendant from cross-examining at sentencing the female victim to whom he had indecently exposed himself. Because the request to cross-examine the victim was made for the first time at sentencing, I was previously unable to memorialize a comprehensive statement of my reasoning for the record.

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The Confrontation Clause is inapplicable at the sentencing stage, because "the purpose of any sentencing hearing . . . is to determine the proper punishment to be imposed on a criminal wrongdoer, not to determine whether a defendant should be convicted of the charged crime." *United States v. Hammer*, 564 F.3d 628, 634 (3d Cir. 2009).

As the late Honorable Ruggero J. Aldisert, writing for the United States Court of Appeals for the Third Circuit in *United States v. Robinson*, explained: "The law on this issue is well settled. Both the Supreme Court and our Court of Appeals have determined that the Confrontation Clause does not apply in the sentencing context." 482 F.3d 244, 246 (3d Cir. 2007). In fact, the Supreme Court of the United States has held that "an unsworn statement of the details of the crime" made at sentencing does not "deprive petitioner of fundamental fairness or of any right of confrontation or cross-examination." *Williams v. State of Oklahoma*, 358 U.S. 576, 583 (1959). Neither is due process violated when a sentencing court considers "information about the convicted person's past life, health, habits, conduct, and mental and moral propensities" that is "obtained outside the courtroom from persons whom a defendant has not been permitted to

confront or cross-examine." *Williams v. People of State of New York*, 337 U.S. 241, 245 (1949).

In addition, a confrontation violation cannot lie on the facts of this case, as no relevant portion of the victim's testimony was based upon hearsay. To the contrary, the victim's testimony was comprised of firsthand statements not offered for the truth of the matter asserted, admissions by the Defendant, and characterizations of then-existing mental or emotional states of mind—each of which is shielded from the bar on hearsay by Federal Rules of Evidence 801(c), 801(d)(2)(A), and 803(3), respectively.

A review of the rule governing sentencing hearings is instructive. Federal Rule of Criminal Procedure 32(i)(4)(B) mandates that "[b]efore imposing sentence, the court must address any victim of the crime who is present at sentencing and must permit the victim to be reasonably heard." "This sensible process helps the court gauge the effects of the defendant's crime not only on the victim but on relevant communities. It also may act as a catharsis, facilitating quicker dissipation of bitterness over the assault on the victim's dignity." *United States v. Smith*, 893 F. Supp. 187, 188 (E.D.N.Y. 1995).

Speaking to Rule 32's justifications, the Supreme Court has likewise observed that "consideration of the harm caused by the crime . . .is [ ] a measure of the seriousness of the offense." *Payne v. Tennessee*, 501 U.S. 808, 820 (1991), and

in 2016, the Third Circuit interpreted a parallel provision of Rule 32 to forbid cross-examination of a defendant during his allocution, as such questioning would "subvert the policy goals of Rule 32." *United States v. Moreno*, 809 F.3d 766, 778 (3d Cir. 2016) (Fisher, J.).

Practically speaking, I also believe that defense counsel's request marks the first step down a troubling path. If defendants who have pled guilty to indecent exposure are permitted to question their victims at sentencing, what distinction might be drawn in future cases involving, for instance, rape or child predation? *Cf.* FED. RS. EVID. 412–13; *Gov't of Virgin Islands v. Scuito*, 623 F.2d 869, 875–76 (3d Cir. 1980) ("The principal purpose of [Rule 412] is, as its legislative history demonstrates, . . . is to prevent the victim, rather than the defendant, from being put on trial."). A rule that strictly cabins adversarial examination during victim impact testimony thus prioritizes truth and courage over intimidation.

Importantly, defense counsel also made a corresponding offer of proof on the record when her examination was challenged by counsel for the United States. I reiterate what I stated in open court: the scope of Defendant's desired examination was confined to prior knowledge and remedial measures on the part of the Bureau of Prisons—matters, which although questionable here, fall well beyond our task at sentencing. Because those lines of inquiry speak to criminal liability in the first instance, I excluded them. Even then, however, whether the

Defendant exposed himself in the most secure facility or the least fortified is in my view minimally probative of guilt or innocence.

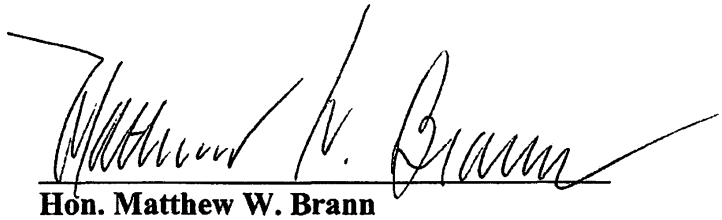
Finally, any deprivation suffered by the Defendant was harmless. As the transcript of the proceeding reveals, the heinous nature of the offense conduct was readily apparent from the facts to which Mr. Green admitted at his change of plea hearing. The Third Circuit explained in *Moreno* that "erroneous admission of testimonial hearsay in violation of the Confrontation Clause is simply an error in the trial process itself that we may affirm if the error was harmless." 809 F.3d at 774. This is particularly true if "the statements were of limited importance to the government's case," and the case "was, as a whole, very strong." *Id.*

Although I appreciated the victim's willingness to speak to me, the twenty-one month sentence imposed was reached independent of her personal observations or their evidentiary propriety. *See United States v. Calabretta*, 831 F.3d 128, 148 (3d Cir. 2016) (Fisher, J., dissenting) ("A district court will now be required to specifically say, no matter what happens in the future, the sentence imposed is the only sentence it would give within its discretion.").

* * *

I recognize that a district court in this Circuit has the responsibility to prevent "inadmissible evidence and highly inflammatory statements" from "rolling in unimpeded" in open court. *United States v. Moore*, 375 F.3d 259 (2004) (Barry, J.), and I believe that my ruling on this issue was calculated to avoid such error.

Pursuant to Federal Rule of Appellate Procedure 10(e)(2)(B), I hereby certify that the preceding information is material to either party and should be read to supplement the record at sentencing.



Hon. Matthew W. Brann
United States District Judge