

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

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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-

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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.

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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

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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.

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

March 23, 2023

Before

DIANE S. SYKES, *Chief Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

No. 21-1637

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Nancy J. Rosenstengel,
Chief Judge.

ORDER

On consideration of the petition for rehearing and for rehearing en banc, no judge in active service requested a vote on the petition for rehearing en banc, and all judges on the original panel voted to deny rehearing. It is therefore ordered that the petition for rehearing and for rehearing en banc is DENIED.

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

January 21, 2022

By the Court:

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 21-1637

v.

AVERY SMARTT,
Defendant-Appellant.

] Appeal from the United
] States District Court for
] the Southern District of
] Illinois.

] No. 3:18-cr-30138-NJR-1
]
] Nancy J. Rosenstengel,
] Chief Judge.

Pursuant to this court's order of December 16, 2021, IT IS ORDERED that Amir Mohabbat, CHICAGOLAND & SUBURBAN LAW FIRM, P.C., 248 S. Marion Street, Oak Park, IL 60302, amir@chicagolandlawfirm.com, is appointed to represent defendant-appellant Avery Smartt pursuant to the provisions of the Criminal Justice Act. Counsel is directed to contact the defendant-appellant immediately.

Briefing shall proceed as follows:

1. Defendant-appellant shall file his brief and required short appendix on or before April 21, 2022.
2. Plaintiff-appellee shall file its brief on or before May 23, 2022.
3. Defendant-appellant shall file his reply brief, if any, on or before June 13, 2022.

IT IS FINALLY ORDERED that the District Court add attorney Amir Mohabbat to their CM/ECF database for purposes of accessing District Court documents.

Important Scheduling Notice !

Hearing notices are mailed shortly before the date of oral argument. Please note that counsel's unavailability for oral argument must be submitted by letter, filed electronically with the Clerk's Office, no later than the filing of the appellant's brief in a criminal case and the filing of an appellee's brief in a civil case. See Cir. R. 34(b)(3). The court's calendar is located at <http://www.ca7.uscourts.gov/cal/argcalendar.pdf>. Once scheduled, oral argument is rescheduled only in extraordinary circumstances. See Cir. R. 34(b)(4), (e).