STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0678

State of Minnesota,
Respondent,

vs.

Aka Lawrence Fualefeh,
Appellant.

Filed June 23, 2014
Affirmed
Hudson, Judge

Anoka County District Court
File No. 02-CR-11-7278

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

Anthony C. Palumbo, Anoka County Attorney, M. Katherine Doty, Assistant County Attorney, Anoka, Minnesota (for respondent)

Mark D. Nyvold, Special Assistant Public Defender, Fridley, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Hudson, Judge; and Smith, Judge.

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

HUDSON, Judge

On appeal from his conviction of first-degree criminal sexual conduct, appellant argues that the district court plainly erred by admitting relationship evidence under Minn.

Stat. § 634.20 (2010). Because appellant waived any objection to the evidence by failing to object at trial and actively seeking to use the evidence as part of his case, we affirm.

FACTS

Appellant Aka Lawrence Fualefeh lived in the home of his friends C.F. and P.F. C.F. and P.F. have a daughter, B.N., who was 11 at the time. B.N. testified that appellant came into her bedroom one night and woke her up. Appellant asked her to go downstairs, and they went into the living room where he started kissing her. She testified that he put his hand down her pants and put his fingers in her vagina. The next morning, B.N. reported the encounter to her mother. B.N.'s parents confronted appellant; he denied B.N.'s allegations. B.N.'s parents chose not to call the police at that time but instructed B.N. to let them know if it happened again.

A few months later, A.W., B.N.'s five-year-old female cousin, who also lived in the home, reported that appellant had kissed her on the mouth. B.N.'s parents immediately called the police, and a Fridley police deputy was dispatched to the home. The deputy learned that several immigrant families from Cameroon were living at the residence. The deputy also learned of the alleged sexual contact between appellant and B.N. B.N. and A.W. gave interviews describing their encounters with appellant to a detective trained in interviewing children. Appellant was charged with one count of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(a) (2010), based on the encounter with B.N.; no charges were filed with respect to his encounter with A.W.

Before trial, the state filed notice that it intended for A.W. to testify about appellant kissing her as "relationship history evidence" under Minn. Stat. § 634.20. The state claimed that the evidence put the incident with B.N. in context because it helped explain why there was a delay in reporting that incident to the police. Defense counsel did not object to this evidence because A.W.'s testimony was "substantive in [his] theory of the case." The defense theory was that A.W. and B.N. conspired to lie about appellant's actions because they did not like him and did not want him living in the house. The district court permitted the evidence but included a limiting instruction, explaining to the jury twice that appellant was not on trial for his conduct with A.W. and that the evidence was only being offered to help understand "the background of the relationship between the defendant and some of the witnesses." The jury found appellant guilty, and he was sentenced to 144-months' incarceration. This appeal follows.

D E C I S I O N

Appellant argues that the district court improperly admitted A.W.'s testimony under Minn. Stat. § 634.20 because the evidence was not relevant to establishing appellant's relationship with B.N.; thus, it was nothing more than inadmissible *Spreigl* evidence. Appellant erroneously argues that "defense counsel made clear he objected to the evidence [about A.W.] being offered as relationship evidence" at the district court. Indeed, the relevant exchange between appellant's counsel and the district court shows that appellant did not object to admission of the evidence:

> **Appellant's Counsel:** Your Honor, I don't have an objection with this coming in, not for the reasons [the prosecutor] stated, in the sense that it's substantive in my theory of the

> case, but not for the reasons that she stated. I mean, for relevance. I mean, she is talking about the second incident. The second incident, not to [B.N.]. This is to another person who he is not even being charged for that conduct. And so if that's the link that caused this, and he is not being charged for this conduct, I don't see how relevant it is. I take it for the – I'm not objecting to it because of my theory of the case on how this comes about. I'm really not objecting to it, but it's not for the reasons that she stated.
> **Court:** Well, you have your own purposes in mind, sounds like.
> **Appellant's Counsel:** Yeah. For strategy purposes, yes, correct, but it's not for this argument that I laid out here. The short of it is, Your Honor, I'm not opposed to them bringing it in.

Appellant's counsel went even further and requested at the pretrial hearing that the DVD of A.W.'s interview with police be admitted into evidence, despite the fact that the state was not seeking to introduce it. During trial, appellant's counsel renewed his request to enter the DVD into evidence, but that request was denied.

Because appellant did not object to A.W.'s testimony at trial, it may only be reviewed now, if at all, under the plain-error standard. *See* Minn. R. Crim. P. 31.02. "In reviewing for plain error, we examine whether (1) there was error, (2) the error was plain, and (3) the error affected the defendant's substantial rights." *State v. Bahtuoh*, 840 N.W.2d 804, 811 (Minn. 2013). Here, although we have serious doubts about the admissibility of A.W.'s testimony, we cannot conclude that any error affected appellant's substantial rights when appellant actively sought to use the evidence to which he now objects. *See State v. Tovar*, 605 N.W.2d 717, 726 (Minn. 2000) (stating that counsel "cannot have it both ways: failing to raise a specific objection at trial for its own reasons of trial strategy, then claiming the admission of such evidence as error on appeal.").

Affirmed.