United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
November 2, 2026
Thomas B. Plunkett, III
Clerk

No. 25-40388

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

DESNIQUE DESHAWN HERNDON,

Defendant—Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 6:21-CR-54-1

Before SMITH, GRAVES, and HO, *Circuit Judges*.

JAMES C. HO, *Circuit Judge*:

Desnique Deshawn Herndon was convicted on six counts of sex trafficking of children under 18 U.S.C. § 1591(a), and one count of conspiring to traffic children for sex under 18 U.S.C. § 1594(c), and sentenced to life imprisonment. He appeals his conviction, arguing that the jury instructions submitted at trial constructively amended his indictment and thus warrants reversal on plain error review. We disagree and accordingly affirm.

I.

Herndon organized and led a prostitution ring involving a number of girls as young as 13, 15, and 16 years old. Herndon doesn't deny trafficking these girls. He simply denies that he knew how young they actually were.

His indictment charged him with sex trafficking of children under 18 U.S.C. § 1591(a). But notably, the indictment did not include the mental state provision set out in § 1591(c), which provides that, in a prosecution under § 1591(a), the government need not prove knowing or reckless disregard of age, so long as it can prove the defendant had a "reasonable opportunity to observe" the minor victim—language that transforms the offense into one of strict liability. *United States v. Lockhart*, 844 F.3d 501, 515–16 (5th Cir. 2016) (discussing 18 U.S.C. § 1591(c)). The indictment alleged only that Herndon committed those crimes "knowing and in reckless disregard of" the minor victims' ages.

At trial, however, the court instructed the jury that it could return a guilty verdict if it believed beyond a reasonable doubt either that Herndon knew or recklessly disregarded the girls' ages, or that he had a reasonable opportunity to observe them.

Both parties fully acknowledge that the latter instruction constructively amended the indictment, by providing an alternative theory of criminal liability not alleged in the indictment itself. *See id.* So we must decide whether the constructive amendment warrants reversal on plain error review.

We hold that it doesn't. That's for two reasons. First, the amendment didn't affect Herndon's substantial rights. Second, discretionary reversal of his conviction isn't warranted in any event, given the substantial evidence against him.

II.

When a defendant does not timely object to a constructive amendment of his indictment, we review for plain error. *United States v. Fulton*, 928 F.3d 429, 439 (5th Cir. 2019). A conviction will be reversed under plain error review only when (1) error occurred; (2) the error was plain; and (3) the plain error affected the defendant's substantial rights. *Id.* And even when those three requirements are met, relief under plain error review is discretionary, and need only be provided where such errors "seriously affect[] the fairness, integrity or public reputation of judicial proceedings." *Rosales-Mireles v. United States*, 585 U.S. 129, 137 (2018).

A.

The parties agree that submission of the jury instruction containing the § 1591(c) "reasonable opportunity to observe" language was plain error. They disagree over whether Herndon's substantial rights were affected as a result.

But as the government correctly observes, Herndon had ample notice—more than a year and a half's worth—that the prosecution intended to seek a conviction under the "reasonable opportunity to observe" theory. The government made this clear (1) during Herndon's initial detention hearing (18 months before trial); (2) during multiple pre-trial meetings between Herndon, his counsel, and the prosecution; (3) in its pre-trial filings and proposed jury instructions; (4) at trial in its opening statement, during multiple conferences with the court to finalize the jury instructions; and (5) in closing.

Indeed, by our count, Herndon had twelve opportunities (if not more) to object to the government's alternative strict liability theory. Yet he never did.

Herndon claims that his trial counsel was constitutionally ineffective in failing to object. But the district court aptly noted that, had his trial counsel timely objected to the "reasonable opportunity to observe" jury instruction, the government could have easily secured a superseding indictment to make that revision. Because any objection likely would have been futile given that the government had notified Herndon—more than once—of its intent to rely on § 1591(c), trial counsel's decision not to object was not unreasonable. *See United States v. Herndon*, 2025 WL 1410016, at *9–10 (E.D. Tex. May 13, 2025). We therefore agree that Herndon's substantial rights weren't affected based on ineffective assistance of counsel.

B.

Herndon's substantial rights weren't affected for a second reason. The evidence at trial supports a finding that Herndon knew—or at the very least, acted with reckless disregard as to—the minor victims' ages.

During his post-arrest interview, federal agents asked whether Herndon ever verified the girls' ages while prostituting them.

His response: "Oh, nah, nah, nah . . . I don't know . . . who's a minor, man, like . . . she [] might not be a minor, but she might be a minor, you know what I'm saying?"

That response alone demonstrates Herndon's recklessness with regard to the age of all of his victims.

Moreover, the evidence further shows that Herndon acted with reckless disregard as to (if not knowledge of) the age of each individual victim.

Take MV1, who was 13 years old at the time of the offense. Herndon sat about six feet away from MV1 in a hotel room for about an hour and remembered her when he was later interviewed. Others who observed MV1

for even shorter periods—like Herndon's co-conspirators and customers—suspected that she was a minor, and even asked for her ID.

When Herndon booked a hotel room for MV2 and MV3, who were friends, he had to put it in his name because neither girl had an ID. The two girls believed it was "obvious" to Herndon that they were both younger than 18 because of how "they acted." And Herndon had told MV2 to lie about her age if anyone asked.

MV5 initially lied to Herndon about her real age (15 years old), but when she later told him the truth, he didn't care.

MV6 was a high school student when Herndon recruited her—a fact she said he knew. He also told MV6 to "dress up" to make herself look older to customers. Later, in a jail call with his mother, Herndon admitted he knew MV6 was a minor because she'd been reported as a runaway and had been picked up from the hotel where Herndon was trafficking her.

Finally, MV8 was said to have a close relationship with Herndon. MV8 didn't testify at trial, but in an interview with investigators, she let on that Herndon knew she was a minor when she told them she didn't think he was "bold enough" to tell others her real age (16 years old). During his own interview, Herndon corrected investigators when they got MV8's age wrong, confirming he knew how old she really was at the time of the offense.

Given all of this evidence, a jury easily could have reasonably concluded that Herndon either knew or recklessly disregarded the fact that the minor victims were younger than 18 years old. Any error that resulted from constructive amendment of the indictment was accordingly harmless. *See*, *e.g.*, *United States v. Olano*, 507 U.S. 725, 734–35 (1993) (substantial rights affected only if the error is prejudicial).

So Herndon can't show that his substantial rights were affected by the jury instructions. Reversal on plain error review is accordingly unwarranted.

III.

What's more, an appellate court need only exercise its discretion to correct a forfeited error if it "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Rosales-Mireles*, 585 U.S. at 135–37.

That is not the case here. This court routinely declines to reverse convictions where there is "substantial evidence" against the defendant. *Fulton*, 928 F.3d at 439; *see also Lockhart*, 844 F.3d at 515 n.3. Given the evidence presented above, and Herndon's own concession that there's "overwhelming" evidence that he was involved in promoting prostitution, we decline to exercise our discretion here.

* * *

We affirm.