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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1211

Filed: 7 June 2016

Onslow County, No. 13 CRS 055167

STATE OF NORTH CAROLINA

v.

BENJAMIN RYAN MARISIC

Appeal by defendant from order entered 14 April 2015 by Judge John E. Nobles, Jr. in Onslow County Superior Court. Heard in the Court of Appeals 9 March 2016.

Appellate Defender Glenn Gerding, by Katherine Jane Allen, for defendant.

Attorney General Roy Cooper, by Richard L. Harrison, for the State.

DIETZ, Judge.

Defendant Ben Marisic appeals his conviction for first degree murder. Marisic met the male victim at a bar during a night of heavy drinking. Witnesses testified that, before that night, Marisic had not shown any sexual interest in men. Bar patrons saw Marisic and the victim spending time together at the bar and some of Marisic's coworkers saw him kissing the victim in a cab on the way home.

Later that night, Marisic's roommate and her boyfriend awoke to the sound of an argument. In the hallway, they discovered Marisic and the victim, both naked.

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Marisic demanded that the victim leave. The victim insisted that he needed to retrieve his wallet first. Marisic then grabbed a handgun from his room and shot the victim in the head.

On appeal, Marisic argues that the trial court committed plain error by admitting testimony that the victim had a distinguished career as a law enforcement officer. Plain error review requires the defendant to show that the error had a probable impact on the jury's verdict. Applying this standard, we reject Marisic's argument because, in light of the overwhelming evidence of his guilt, the admission of the challenged testimony had no probable impact on the jury's verdict.

Marisic also argues that the trial court erred by failing to intervene, on its own initiative, to strike portions of the State's closing argument that referenced the suffering of the victim's family. This Court can reverse on this ground only if the challenged remarks were so grossly improper that they deprived Marisic of his fundamental right to a fair trial. As explained below, the isolated remarks during closing arguments in this case did not require the trial court to intervene on its own initiative, particularly in light of overwhelming evidence of Marisic's guilt.

Facts and Procedural History

Ben Marisic first met Dale Smith at a bar in Jacksonville in August 2013. At the time, Marisic was a Marine stationed at Camp Lejeune and Smith was a military contractor specializing in cleaning up unexploded military ordinances.

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Smith and two coworkers went to the bar around 9:30 p.m. on 8 August 2013. Marisic and Smith began talking and spent much of the night together at the bar. According to Smith's coworkers, Smith was drunk by the time he left the bar. One of Smith's coworkers testified that Marisic also was drunk; the other coworker described Marisic as being "like anyone else at the bar" and "pretty aware of what was going on."

Marisic, Smith, and Smith's two coworkers took the same cab home from the bar. On the ride home, Marisic and Smith began kissing each other. When the cab arrived at the hotel where Smith and his coworkers were staying, the two coworkers got out, but Smith chose to go home with Marisic.

Sometime later that night, Marisic's roommate and her boyfriend awoke to the sound of Marisic and Smith arguing. Marisic and Smith were both naked. Marisic's roommate, who lived with him for about one-and-a-half years, testified that Marisic had never shown any sexual interest in men.

Marisic told Smith to leave, and Smith stated that he first needed to get his wallet from Marisic's bedroom. Marisic offered to give Smith \$60.00 if he would leave immediately. Smith again said he needed his wallet, and the two men continued to argue for about ten minutes. Marisic then said, "If you don't get out of my house, I'm going to shoot you," to which Smith responded, "No, I just want my wallet."

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At that point, Marisic retrieved a pistol from his bedroom and told Smith that he would shoot him in the head if he did not leave. Smith continued to ask for his wallet, and Marisic continued threatening to shoot Smith if he did not leave. Marisic then shot Smith in the head, killing him instantly. Smith never harmed or threatened to harm Marisic before Marisic shot him in the head.

Marisic's roommate and her boyfriend immediately called the police. Within minutes of the call, law enforcement arrived at Marisic's house and ultimately arrested Marisic after he admitted shooting Smith. On 9 September 2014, a grand jury indicted Marisic for first degree murder.

At trial, the State established that Smith had a ten-year distinguished career in law enforcement before beginning his current career as a military contractor. Marisic did not object to this testimony.

Marisic did not dispute at trial that he killed Smith. Marisic's trial strategy was to show that Marisic committed manslaughter, not murder. In its closing argument, the State argued that Smith did not adequately provoke Marisic and thus failed to satisfy the elements of manslaughter. The State also emphasized the loss experienced by Smith's family:

[Smith] was killed because the defendant murdered him, because the defendant pointed that gun at him with the intent to kill him and, for that reason, Dale Smith's mama will never have a child to hug again, Dale Smith's brother will never have a brother. He'll never know his cousin—or his nephew and his niece. None of those things will

happen, because of the defendant's actions.

The jury convicted Marisic of first degree murder and the trial court sentenced him to life in prison without parole. Marisic timely appealed.

Analysis

I. Plain Error

Marisic first argues that the trial court plainly erred when it admitted testimony that the victim “was a retired law enforcement officer with a decade of experience as a sheriff's deputy.” Marisic contends that this evidence “ultimately tipped the scales with the jury as the evidence permitted conviction based on the jury's sympathy for Mr. Smith, not because it perceived the State's case was sufficient to establish Mr. Marisic's guilt.” We reject this argument.

Marisic concedes that he did not preserve this issue at trial and thus we must review it for plain error. “For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial.” *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). “To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty.” *Id.* Plain error should be “applied cautiously and only in the exceptional case” where the error “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.” *Id.*

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Here, Marisic has not shown that the alleged error had a probable impact on the jury's verdict. To convict Marisic of manslaughter instead of murder, the jury had to find that (1) Marisic shot the victim in the heat of passion; (2) that this passion was provoked by acts of the victim which the law regards as adequate provocation; and, (3) that the shooting took place so soon after the provocation that the passion of a person of average mind and disposition would not have cooled. *State v. Robbins*, 309 N.C. 771, 777–78, 309 S.E.2d 188, 192 (1983).

The jury did not hear any evidence supporting Marisic's claim that he committed manslaughter, not murder. At most, the evidence showed that Marisic engaged in some form of consensual sexual conduct with the victim while under the influence of alcohol and then was overcome by anger and regret when he realized what he had done. Importantly, the evidence did not show that the victim provoked Marisic in any way. *See State v. Forrest*, 321 N.C. 186, 192, 362 S.E.2d 252, 256 (1987). Thus, Marisic has not shown that this was such a close case that the admission of the evidence concerning the victim's service probably "tipped the scales" and caused the jury to convict him of murder instead of manslaughter.

II. Failure to Intervene

Marisic next argues that the trial court erred by failing to intervene on its own initiative during the State's closing argument when the prosecutor referenced the victim's family and their loss. As explained below, we reject this argument.

A trial court is required to intervene during the State's closing argument only when the prosecutor's comments are so "grossly improper" that they "infect the trial with unfairness" and would "render the conviction fundamentally unfair." *State v. Davis*, 349 N.C. 1, 23, 506 S.E.2d 455, 467 (1998). Here, although the prosecutor's remarks about the family of the victim plainly were intended to appeal to the jurors' emotions, we cannot say that those comments were so grossly improper that they rendered Marisic's trial fundamentally unfair. Accordingly, we find no error in the trial court's decision not to intervene on its own initiative in response to the prosecutor's remarks during closing argument.¹

Conclusion

We find no error in the trial court's judgment.

NO ERROR.

Judges CALABRIA and DILLON concur.

Report per Rule 30(e).

¹ Marisic also challenges the validity of his short-form indictment but concedes that his argument is barred by precedent from the North Carolina Supreme Court. Marisic acknowledges that this Court must reject his argument and notes that he asserted it solely to preserve the issue for possible U.S. Supreme Court review.