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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-293

Filed: 15 January 2019

Mecklenburg County, Nos. 16 CRS 236559, 236562

STATE OF NORTH CAROLINA

v.

CARLOS SINCLAIR, Defendant.

Appeal by Defendant from judgments entered 13 October 2017 by Judge Jeffrey P. Hunt in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 December 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Thomas J. Campbell, for the State.

Mark Montgomery, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Carlos Sinclair ("Defendant") appeals from judgments entered upon jury verdicts finding him guilty of second-degree forcible sex offense and second-degree kidnapping. We hold Defendant failed to show the trial court committed plain error in referring to S.H. ("Ms. Harper") as "the victim" in its jury instructions or in permitting witnesses for the State to refer to Ms. Harper as "the victim" during their

testimonies.[1] Defendant does not present an argument showing the witnesses' testimonies had a probable impact on the jury. We find no plain error in part and dismiss in part.

I. Factual and Procedural History

The State's evidence at trial showed Ms. Harper had been in a romantic relationship with Defendant. On 18 September 2016, she ended the relationship against Defendant's wishes. At approximately 2:00 a.m. on 20 September 2016, Ms. Harper called police complaining Defendant was banging on the door to her apartment. The police responded, but Defendant left before they arrived. However, when Ms. Harper opened her door to leave for work at 6:00 a.m., Defendant was waiting outside. Defendant forced his way into Ms. Harper's apartment, where he proceeded to sexually assault her multiple times. Defendant allowed Ms. Harper to leave to go to work, and when she got to her car, she called the police. Police transported Ms. Harper to the hospital where she underwent a sexual assault examination. Samples from the sexual assault examination contained Defendant's DNA.

Defendant was arrested and indicted on two counts of second-degree rape, and one count each of second-degree forcible sex offense, second-degree kidnapping, and communicating threats. The charges were joined for trial, and the jury found

[1] We use the pseudonym "Ms. Harper" throughout to protect the victim's identity and for ease of reading.

Defendant guilty of second-degree forcible sex offense and second-degree kidnapping, and not guilty on the remaining charges. The trial court sentenced Defendant to separate, consecutive terms of 110 to 192 and 38 to 58 months imprisonment, and ordered Defendant to register as a sex offender for 30 years upon his release. Defendant gave oral notice of appeal.

II. Standard of Review

It is well established that where no objection is made to the trial court's use of the phrase "the victim" in its instructions to the jury, we review the issue on appeal only for plain error. *See State v. Phillips*, 227 N.C. App. 416, 420, 742 S.E.2d 338, 341 (2013), *disc. review denied*, 367 N.C. 287, 753 S.E.2d 671 (2014). "Plain error is fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done." *State v. McCarroll*, 336 N.C. 559, 566, 445 S.E.2d 18, 22 (1994) (citation and quotation marks omitted).

> 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. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (alteration in original) (citations and internal quotation marks omitted).

III. Analysis

Defendant first argues the trial court erred when it repeatedly referred to Ms. Harper as "the victim" in its jury instructions. Defendant concedes he did not object to the instructions at trial, but contends the jury instructions constituted an expression of a judicial opinion which is preserved for appellate review as a matter of law. *See State v. Young*, 324 N.C. 489, 494, 380 S.E.2d 94, 97 (1989) ("A defendant's failure to object to alleged expressions of opinion by the trial court in violation of those statutes does not preclude his raising the issue on appeal." (citations omitted)). Alternatively, Defendant asks us to review his argument for plain error. Defendant has not pointed to any other instances in the trial where the trial judge made an alleged expression of a judicial opinion other than the jury instructions, and because Defendant did not object, it is unpreserved. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. Thus, we review for plain error.

Our Supreme Court has held "when the State offers no physical evidence of injury to the complaining witnesses and no corroborating eyewitness testimony, the best practice would be for the trial court to modify the pattern jury instructions *at defendant's request* to use the phrase 'alleged victim' or 'prosecuting witness' instead of 'victim.' " *State v. Walston*, 367 N.C. 721, 732, 766 S.E.2d 312, 319 (2014) (emphasis added). Nevertheless, the use of the term "victim" in jury instructions is not improper and does not "intimat[e] that the defendant committed the crime." *Id.* at 731, 766 S.E.2d at 319 (citation and quotation marks omitted); *see also McCarroll*, 336 N.C. at

566, 445 S.E.2d at 22. Moreover, this Court has repeatedly held "it is clear from case law that the use of the term 'victim' in reference to prosecuting witnesses does not constitute *plain error* when used in instructions[.]" *State v. Spence*, 237 N.C. App. 367, 381-82, 764 S.E.2d 670, 681 (2014) (citations and quotation marks omitted).

Here, the trial court instructed the jury pursuant to the North Carolina Pattern Jury Instructions for each of his charged offenses, and Defendant did not request the trial court remove the phrase "the victim" from the pattern jury instructions that used that phrase. *See* N.C.P.I.—Crim. 207.20B, 207.60A, 210.35, 235.18. The trial court properly placed the burden of proof on the State, and specifically told the jury "the law requires the presiding judge to be impartial" and the jury "should not infer from anything that I may have done or said that the evidence is to be believed or disbelieved, that a fact has been proved or what your findings ought to be." Accordingly, we hold the trial court's reference to Ms. Harper in its jury instructions as "the victim" was not plain error. *See Walston*, 367 N.C. at 732, 766 S.E.2d at 319; *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

Defendant next argues the trial court erred when it allowed three of the State's witnesses to refer to Ms. Harper as "the victim" during their testimony. Defendant concedes his trial counsel did not object to the testimony, and thus this argument is reviewed for plain error. However, Defendant has not made any specific argument in his brief to this Court establishing the alleged errors had a probable impact on the

jury's verdict. Therefore, Defendant's argument is not properly before this Court, and he has waived review of this issue. *See State v. Cummings*, 352 N.C. 600, 636-37, 536 S.E.2d 36, 61 (2000) (dismissing an argument under the plain error standard of review where the defendant provided "no explanation, analysis or specific contention in his brief supporting the bare assertion that the claimed error is so fundamental that justice could not have been done."), *cert. denied*, 532 U.S. 997, 149 L. Ed. 2d 641 (2001).

IV. Conclusion

For the foregoing reasons, we hold Defendant received a fair trial, free from plain error.

NO PLAIN ERROR IN PART; DISMISSED IN PART.

Chief Judge McGEE and Judge INMAN concur.

Report per Rule 30(e).