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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-258

No. COA20-414

Filed 1 June 2021

Forsyth County, No. 18 CRS 55756

STATE OF NORTH CAROLINA

v.

JOSE ALEX MILTON

Appeal by defendant from judgment entered 6 March 2020 by Judge Craig Croom in Forsyth County Superior Court. Heard in the Court of Appeals 9 March 2021.

*Attorney General Joshua H. Stein, by Assistant Attorney General Orlando L. Rodriguez, for the State.*

*The Epstein Law Firm, PLLC, by Drew Nelson, for defendant.*

DIETZ, Judge.

¶ 1 Jose Milton appeals his conviction for cyberstalking. He contends that the trial court committed plain error by admitting certain witness testimony and erred by failing to intervene *sua sponte* in response to the prosecutor's statements during jury selection.

¶ 2 As explained below, Milton failed to show that his evidentiary challenge rises

to the level of plain error and failed to show that the prosecutor's remarks were so grossly improper that they compelled to trial court to intervene on the court's own initiative. We therefore find no error in the trial court's judgment.

### **Facts and Procedural History**

¶ 3 Between April 2014 and August 2017, Erica Hernandez and Defendant Jose Milton were in a relationship. Hernandez ended the relationship. In June 2018, Hernandez reported to law enforcement that Milton had sent her harassing text messages. Investigators arrested Milton for one count of misdemeanor cyberstalking.

¶ 4 At trial, the State introduced an exhibit that included 27 pages of text messages that Milton sent to Hernandez. Hernandez read several of these text messages aloud to the jury. She testified that, over the course of three days in 2018, she received 120 text messages from Milton. She also testified that she told Milton to stop sending her the messages.

¶ 5 Milton filed a motion in limine seeking to exclude any references to prior arrests from the text messages or Hernandez's accompanying testimony. The trial court granted the motion "in terms of any of the State's witnesses mentioning anything about arrest."

¶ 6 During cross-examination, Milton's counsel referenced Hernandez's direct testimony that, before Milton began texting her in 2018, she had not had any contact with him in nearly a year. On re-direct, the prosecutor asked Hernandez why she had

not had contact with Milton from roughly August 2017 until the text messages in June 2018. Hernandez explained that Milton was in jail during that time. Milton did not object to this testimony.

¶ 7 Later in the trial, a law enforcement officer also testified that Hernandez mentioned Milton’s previous incarceration during the investigation. Milton likewise did not object to this testimony.

¶ 8 During jury selection, the prosecutor informed the jury that Milton had been charged with cyberstalking. The prosecutor stated: “This case is also a case that in at least some sense involves domestic violence. Does anyone feel uncomfortable hearing that?” After seating several new jurors, the prosecutor made similar remarks. Milton did not object to these statements during jury selection.

¶ 9 The jury convicted Milton of cyberstalking and the trial court sentenced Milton to an active sixty-day jail term. Milton appealed.

## **Analysis**

### **I. Testimony concerning Milton’s incarceration**

¶ 10 Milton first argues that the trial court erred by allowing the State’s witnesses to testify that he previously had been incarcerated. Milton concedes that he did not object to the challenged testimony and we therefore review this issue solely for plain error.

¶ 11 “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.*

¶ 12 Milton cannot satisfy the plain error standard. The State introduced the challenged evidence after Milton questioned Hernandez about the fact that they had not communicated in nearly a year. In this context, the trial court’s decision not to intervene, on the Court’s own initiative, to address testimony to which Milton did not object is not the sort of “fundamental error” that “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.” *Id.* Accordingly, we find no plain error in the trial court’s admission of the challenged testimony.

## II. Prosecutor’s statements during jury selection

¶ 13 Milton next contends that the trial court erred by failing to intervene, on the court’s own initiative, during jury selection when the prosecutor stated that this case “in at least some sense” involved domestic violence.

¶ 14 “The regulation of the manner and the extent” of the parties’ statements and inquiries during jury selection “rests largely in the trial judge’s discretion.” *State v. Cummings*, 361 N.C. 438, 464, 648 S.E.2d 788, 804 (2007). When the defendant fails

to object, this Court examines only whether the challenged remarks “were so grossly improper that the trial court abused its discretion by failing to intervene.” *State v. Ward*, 354 N.C. 231, 250, 555 S.E.2d 251, 264 (2001). To carry this burden, “defendant must show that the prosecutor’s comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair.” *Id.*

¶ 15 Here, the prosecutor told the panel that “the defendant is charged with cyberstalking. So I want to ask you all some questions, kind of, related to that.” The prosecutor then stated:

Ladies and gentlemen, you have been told that the defendant here is charged with cyberstalking. But I’ve also talked to you a lot about text messages. Does anyone have a problem with hearing that cyberstalking can occur by the sending of many, many text messages? Does anyone think that that doesn’t make any sense or have any question as to that?

This case is also a case that in at least some sense involves domestic violence. Does anyone feel uncomfortable hearing that?

The prosecutor made similar remarks to new prospective jurors when they were called.

¶ 16 Viewed in context, these statements were not so grossly improper that they required the trial court to intervene on the court’s own initiative. Although Milton was not charged with any crimes described by statute as “domestic violence,” he was charged with cyberstalking his former girlfriend and he had a domestic violence

protective order against him. The prosecutor's statements were a good faith attempt to inform the jurors that the case involved this sensitive topic, which was relevant to jurors' evaluation of whether they could fairly and impartially participate in the trial. We thus reject this argument and find no error during jury selection.

**Conclusion**

¶ 17

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

NO ERROR.

Chief Judge STROUD and Judge CARPENTER concur.

Report per Rule 30(e).