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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-718

Filed 21 May 2024

Mecklenburg County, No. 21CRS222465

STATE OF NORTH CAROLINA

v.

NICHOLAS IAN MACKAY, Defendant.

Appeal by defendant from judgment entered 2 December 2022 by Judge George Cooper Bell in Superior Court, Mecklenburg County. Heard in the Court of Appeals 19 March 2024.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Sondra C. Panico, for the State.*

*Shawn R. Evans for defendant-appellant.*

STROUD, Judge.

Defendant appeals his conviction for assault on a female. Where the trial court allowed Defendant's pretrial request that the prosecuting witness not be referred to as "victim" and also used the term "prosecuting witness" instead of "victim" in the jury instructions, but witnesses used the word "victim" a few times during the trial without objection from Defendant, the trial court did not commit plain error by

allowing those uses of the word “victim.”

### **I. Procedural Background**

Defendant was arrested for assault on a female. On 1 December 2022, Defendant filed a “Motion to Prohibit Use of the Term ‘Victim’ by the Trial Court[.]” (Capitalization altered.) In Defendant’s motion he contended “whether or not [Samantha Hicks<sup>1</sup>] is a ‘victim’ is still a disputed fact and issue for the jury to resolve” and “[t]he Counsel would allege to this Court that [Samantha Hicks] would not be a ‘victim’ unless or until the jury renders a verdict of guilty in the State’s case.” In Defendant’s motion he relies upon *State v. Walston*, 367 N.C. 721, 766 S.E.2d 312 (2014), contending “that the best practice for the trial court would be to modify the pattern instruction and use the phrase ‘alleged victim, prosecuting witness[.]’”

Also on 1 December 2022, during pretrial motions, Defendant’s counsel requested for the State and witnesses not to use the word “victim” :

But just so the Court is aware, we do wish to object to the State and its witnesses referring to the prosecuting witness as the victim. As Mr. Mackay has not been convicted of anything, that language of victim --

THE COURT: That’s fine. That’s fine. I heard your sidebar, so I already crossed off the word “victim” and wrote “prosecuting victim”. I will refer to her as that. That’s fine, sir.

Defendant’s counsel did not raise any further objection to referring to Ms. Hicks as

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<sup>1</sup> A pseudonym is used.

“prosecuting *victim*.”<sup>2</sup> (emphasis added).

## **II. Factual Background**

The State presented evidence showing Ms. Hicks had rented Defendant a room in her home and about two months after he moved in, they began having an intimate relationship. On or about 17 July 2021, Ms. Hicks picked up a cigarette pack to throw it away, and Defendant “just flipped” and tried to take it away from her. Ms. Hicks found crystal meth in the cigarette pack, and she told Defendant he needed to leave or she would call the police. Defendant grabbed Ms. Hicks’s phone, screamed at her, grabbed her by the arms, kicked her on the back and legs, and prevented her from leaving her home. Ms. Hicks was unable to call law enforcement until at least a day later. When law enforcement arrived, Ms. Hicks frantically ran outside with no shoes on; she was speaking rapidly, shaking, appeared “panicky[,]” and reported that she had been assaulted. Law enforcement called a medic for Ms. Hicks. Two officers testified they saw the bruises on Ms. Hicks.

Although the State and its witnesses referred to Ms. Hicks by her name or as the “prosecuting witness” many times, they also used the term “victim” approximately 14 times in front of the jury. Defendant did not object to these uses of the word

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<sup>2</sup> Based upon *Walston*, 367 N.C. at 732, 766 S.E.2d at 319, it appears the trial court meant to say “prosecuting witness” but the transcript says “prosecuting victim.” The trial court did refer to the “prosecuting witness” later during the trial. Later, during the charge conference, the trial court noted that in the instructions as to “the substantive offense, that’s 208.70, assault on a female, the Court upon request from the defendant, will not refer to the person as the alleged victim, but as to what we have used consistently at this trial, I believe, was prosecuting witness.”

“victim” during the trial or request the trial court to instruct the witnesses to avoid using the word “victim.” The jury instructions used the word “prosecuting witness” in place of the word “victim” in the pattern jury instructions. The jury found Defendant guilty of assault on a female. The trial court entered judgment; Defendant appeals.

### **III. Use of the Word “Victim”**

Defendant’s only argument on appeal is “did the trial court err by repeatedly allowing the State to refer to [the] prosecuting witness as the victim?” (Capitalization altered.)

#### **A. Standard of Review**

Defendant requested before the trial that the word “victim” not be used, and the trial court allowed this request. The State and witnesses instead referred to Ms. Hicks as the “prosecuting witness” except for 14 instances of the word, “victim.” Defendant contends that “[t]his Court should review using a prejudicial error standard because this issue was properly preserved at trial” when Defendant requested the trial court not allow the State and its witnesses to use the word “victim” and the trial court agreed. But Defendant mistakenly relies upon North Carolina Rule of Evidence 103(a)(2) arguing it provides “[o]nce the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.” Indeed, our Supreme Court has held that “to the extent it conflicts with Rule of

Appellate Procedure 10(b)(1), Rule of Evidence 103(a)(2) must fail” because

[t]he Constitution of North Carolina expressly vests in this Court the “exclusive authority to make rules of procedure and practice for the Appellate Division.” N.C. Const. art. IV, § 13, cl. 2. Although Rule 103(a)(2) is contained in the Rules of Evidence, it is manifestly an attempt to govern the procedure and practice of the Appellate Division as it purports to determine which issues are preserved for appellate review.

*State v. Oglesby*, 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007).

However, Defendant’s brief also acknowledges that plain error review may apply and requests plain error review as an alternative. During the trial, Defendant did not object to use of the word “victim” and did not move to strike. “Preserved legal error is reviewed under the harmless error standard of review. Unpreserved error in criminal cases, on the other hand, is reviewed only for plain error.” *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012) (citations omitted); *see State v. Gullette*, 252 N.C. App. 39, 42, 796 S.E.2d 396, 399 (2017) (“The law in this State is now well settled that a trial court’s evidentiary ruling on a pretrial motion to suppress is *not* sufficient to preserve the issue of admissibility for appeal unless a defendant renews the objection during trial. To preserve for appellate review a trial court’s decision to admit testimony, objections to that testimony must be contemporaneous with the time such testimony is offered into evidence and not made only during a hearing out of the jury’s presence prior to the actual introduction of the testimony.” (emphasis in original) (citations, quotation marks, and brackets omitted.)) Therefore, we review

for plain error.

For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. 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 affects the fairness, integrity or public reputation of judicial proceedings.

*Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (citations, quotation marks, and brackets omitted).

#### **B. Use of the Word “Victim”**

The majority of Defendant’s brief focuses on identifying use of the word “victim” instead of “prosecuting witness” in testimony. For example, during a law enforcement officer’s testimony:

Q: Did you later arrest the defendant for assault on female?

A: That’s correct.

Q: Why did you do that?

A: The allegation of assault, the victim has bruises. That’s why I did the arrest.

Q: Now, would you have made an arrest of the defendant if you believed that all the victim’s injuries were related to injection sites of illicit drugs or possibly legal drugs?

A: I would not.

Q: Did you ever go to the victim's home?

A: I did.

Defendant contends that

[t]he prosecuting witness is the only testifying witness who was present when the alleged assault occurred. . . . The prosecutor and law enforcement witnesses for the prosecution referring to Ms. [Hicks] as the “victim” was prejudicial to . . . [Defendant] and contributed to his conviction. This classification by the State as a “victim”, in violation of the trial court’s order, bolstered the testimony of Ms. [Hicks] by tending to show that both the prosecutor and the officers involved in the case considered Ms. [Hicks] to be the victim of the crime . . . Defendant is accused of committing.

Just as in his motion, Defendant’s argument on appeal relies heavily upon *State v. Walston*, though it is a case that was reviewed for prejudicial, and not plain error. *See Walston*, 367 N.C. at 722, 766 S.E.2d at 314. In *Walston*, the “defendant unsuccessfully sought to have the word ‘victim’ changed to ‘alleged victim’ in the pattern jury instructions used by the trial court.” *Id.* at 723-24, 766 S.E.2d at 314. The Court of Appeals agreed with the defendant and mandated a new trial. *Id.* at 724, 766 S.E.2d at 314-15. On petition for discretionary review from the State, the Supreme Court took up the appeal, and analyzed this preserved error under a prejudicial error standard. *Id.* at 724-32, 766 S.E.2d at 315-19. Ultimately, in *Walston*, the Supreme Court reversed the Court of Appeals after concluding there was no prejudicial error. *See id.* at 732, 766 S.E.2d at 319. The Supreme Court

stated,

we hold in this case that the trial court did not err in using the word “victim” in the pattern jury instructions to describe the complaining witnesses. We stress, however, 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.”

*Id.*

*Walston* deals with jury instructions, not witness testimony, and this distinction is relevant. *See id.* The jury instructions provided by the trial court arguably could create a greater risk of prejudice to a defendant than witness testimony, but our Supreme Court held that even jury instructions using the word “victim,” over defendant’s objection, were not prejudicial error. *See id.* In addition, here the trial court also used the “best practice” as noted by *Walson* as it did “modify the pattern jury instructions” “to use the phrase . . . ‘prosecuting witness[.]’” *Id.*

It is apparent from the transcript that here the trial court, counsel, and witnesses did use “prosecuting witness” or Ms. Hicks’s name frequently but in a few instances in questions or testimony, the word “victim” is used also. Even if we assume these instances of the word “victim” were not a “best practice” under *Walston*, this was *not* a case where “the State offers no physical evidence of injury to the complaining witnesses and no corroborating eyewitness testimony[.]” *Id.* Here, Ms. Hicks testified about her injuries, the State introduced photos of her injuries, and two



law enforcement officers corroborated her testimony and testified that they saw the physical injuries on Ms. Hicks. “[B]est practice” plainly indicates what trial courts and the parties should aspire to, not what is always required of them. *Id.*

Defendant has not demonstrated any error, much less plain error, or prejudice from the occasional use of the word “victim” by the State and witnesses, especially coupled with jury instructions using the term “prosecuting witness.” Misspoken words or poorly chosen words are not unusual in any setting where people are communicating. We cannot say that approximately 14 uses of the word “victim” is an error “that, after examination of the entire record . . . had a probable impact on the jury’s finding that the defendant was guilty.” *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

#### **IV. Conclusion**

We conclude it was not plain error for the State and its witnesses to use the word “victim.”

NO ERROR.

Judges MURPHY and FLOOD concur.

Report per Rule 30(e).