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April 28, 2020

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You are hereby notified that the Court has entered the following opinion and order:

2018AP1757-CR State of Wisconsin v. Huandra J. Murray (L.C. No. 2015CF1197)

Before Stark, P.J., Hruz and Seidl, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Huandra Murray appeals a judgment, entered upon a jury's verdicts, convicting him of second-degree sexual assault, false imprisonment, and second-degree recklessly endangering safety, with all three counts as a repeater and as domestic abuse incidents. Murray also appeals the order denying his postconviction motion. Murray argues he is entitled to a new trial because the circuit court committed plain error based on a comment made in front of the jury. Based

upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).[1] We reject Murray's arguments and summarily affirm the judgment and order.

An amended Information charged Murray with second-degree sexual assault; second-degree recklessly endangering safety; false imprisonment; intimidation of a victim; and misdemeanor battery—all five counts as a repeater, and all but the battery count as acts of domestic abuse. The charges arose from allegations that Murray attacked and sexually assaulted Sally,[2] a woman with whom he lived and shared a child, after coming home to find Sally with another man, Cole. According to the complaint, Murray also battered Cole when he encountered him with Sally. The State further alleged that in telephone conversations from jail, Murray asked Sally to retract the statement she gave to law enforcement about the attack.

The matter proceeded to a jury trial. After Murray had a disagreement with his counsel regarding trial strategy, Murray was granted permission to proceed pro se. A jury found Murray guilty of second-degree sexual assault, false imprisonment, and second-degree recklessly endangering safety, but it acquitted Murray of the battery and intimidation of a victim charges. The circuit court imposed concurrent sentences resulting in an aggregate seventeen-year term consisting of seven years' initial confinement and ten years' extended supervision, to run

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

[2] Pursuant to the policy underlying WIS. STAT. RULE 809.86(4), we use pseudonyms instead of the victims' names.

consecutive to any other sentence Murray was then serving. Murray filed a postconviction motion for resentencing. The court denied the motion after a hearing, and this appeal follows.[3]

Murray argues that a circuit court comment made in front of the jury constituted plain error warranting a new trial. WISCONSIN STAT. § 901.03(4) recognizes the "plain error" doctrine, which allows appellate courts to review errors that were otherwise forfeited by a party's failure to object. *See* ***State v. Lammers***, 2009 WI App 136, ¶12, 321 Wis. 2d 376, 773 N.W.2d 463. Plain error is "error so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time." ***Id.*** The error, however, must be "obvious and substantial," and courts should use the plain error doctrine sparingly. ***Id.*** The defendant bears the burden of showing "that the unobjected to error is fundamental, obvious, and substantial." ***State v. Jorgensen***, 2008 WI 60, ¶23, 310 Wis. 2d 138, 754 N.W.2d 77.

There is no bright-line rule for what constitutes plain error. ***Lammers***, 321 Wis. 2d 376, ¶13. Rather, the existence of plain error will turn on the facts of the particular case. ***Id.*** An allegation of plain error affecting constitutional rights, including a defendant's due process rights, presents a question of law that we review de novo. ***State v. Bell***, 2018 WI 28, ¶8, 380 Wis. 2d 616, 909 N.W.2d 750.

At trial, police detective sergeant Matthew Guth testified on direct examination that he was assigned to listen to Murray's calls from the Brown County Jail because law enforcement

[3] Although Murray purports to appeal the order denying his postconviction motion for resentencing, he raises no argument on appeal specific to that motion or the order denying it. Therefore, his challenge to that order is deemed abandoned. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) (issues raised before the circuit court but not raised on appeal are deemed abandoned).

was concerned Murray may have been intimidating Sally. Guth identified a call placed through Murray's jail account to a number assigned to Sally, recounting that the conversation included comments to Sally that she "could have said nothing happened" and that she could go to the district attorney and say, "That's not what happened." Later in the call, Murray told Sally: "You can retract your statement. You can go into the DA, speak to my lawyer, and be, like, you know what, you were drunk. That's not what happened. You know what I mean. What you said to the cops is not what happened."

On cross-examination, Murray asked Guth about whether certain parts of the phone conversation had been deleted. The State objected, explaining that it would stipulate there was additional discussion between Murray and Sally, and Guth had testified regarding excerpts from their conversation. The circuit court sustained the objection, concluding there was no evidence of "deliberate deletion" and the State stipulated that the entire conversation was not reflected.

Murray then continued to question Guth about the telephone conversation, including questions about the jail's phone system. Murray asked: "Okay. So when you—when you block or when you—when you don't accept a call, you actually have to push a number." When the State objected on the ground that Murray was testifying, the circuit court sustained the objection and told Murray he could ask the question in the form of a hypothetical. The following exchange then occurred:

> Q. [Murray] Hypothetically speaking, let's say I was to receive a call from you and I didn't want to accept it, when I push it, that exact statement is made, correct?
>
> A. [Guth] That I do not know. That's beyond my scope of how that system works.
>
> Q. [Murray] I believe that to—not in the CDs that you gave, in the ones with the—if you have a—because I believe that the copy

> of the CDs that I received was—had all the calls, and if you actually listen to all the calls in all the calls there's a—there's a statement that says—
>
> [Prosecutor]: Objection, again, to the form of the question. He's testifying. It's not a question, your Honor. He's telling the witness something.
>
> [The Court]: I don't disagree with what you're saying.
>
> [Prosecutor]: Thank you.
>
> [The Court]: You're winning the battle. I'm going to sustain the objection, and the point of the objection is you can't testify.
>
> [Murray]: Testify.
>
> [The Court]: You can ask questions and you can ask a hypothetical question if it's a question.
>
> Q. [Murray] Hypothetically speaking, I'm going to try to—I try—I just thought again. You said that this is not formal procedure because it requires listening to a lot of calls. Is that correct?
>
> A. [Guth] I'm not understanding that question.

Focusing on the circuit court's statement, "You're winning the battle," Murray argues that the court improperly expressed its views to the jury, thus violating his due process right to a fair trial. Murray therefore contends the comment constituted plain error necessitating a new trial. We are not persuaded.

To determine whether an improper comment constitutes a due process violation, "the court must ask whether the statements 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" ***Jorgensen***, 310 Wis. 2d 138, ¶40 (citation omitted). However, not every "inappropriate statement" at trial "result[s] in a due process violation that gives rise to plain error." ***Id.***, ¶41. An improper comment "standing alone" should not be a basis for overturning a conviction—the comment "must be looked at in context of the

entire trial." ***State v. Burns***, 2011 WI 22, ¶49, 332 Wis. 2d 730, 798 N.W.2d 166. In determining whether a statement infected a trial with unfairness, we may consider "the significance, timing, repetition, and manner in which the improper statements were presented to the jury" and whether they "occurred at critical junctures of the trial." ***Jorgensen***, 310 Wis. 2d 138, ¶44.

Here, the circuit court's statement was clearly made in the context of the State's objections to the form of Murray's questions regarding the jail's protocol for phone calls. Immediately after making the statement, the court sustained the objection, telling Murray he could not testify with his questions. Thus, in context, "winning the battle" referred to the State winning its argument about the form of Murray's questions. There is no reasonable way the jury could interpret the comment as an expression of the court's overall opinion about the outcome of the case. Rather, in proper context, it related to the evidentiary issue only.

Even if we could construe the circuit court's singular comment as an inappropriate opinion about the merits of Murray's prosecution, we are not persuaded that it so infected the trial with unfairness that it violated his due process right. The court's single, isolated statement was made during the cross-examination of a law enforcement officer who was testifying about the jail calls that formed the basis for the witness intimidation count, and Murray was ultimately acquitted of that charge. Further, Murray was able to ask the questions that he wanted once they were properly framed. Ultimately, nothing about the "significance, timing, repetition, and manner in which the improper statements were presented to the jury" undermined Murray's right to a fair trial. *See* ***Jorgensen***, 310 Wis. 2d 138, ¶44. In addition, the court instructed the jury at the close of evidence: "If any member of the jury has an impression of my opinion as to whether the defendant is guilty or not guilty, disregard that impression entirely and decide the issues of

fact solely as you view the evidence. You, the jury, are the sole judges of the facts." Juries are presumed to follow the court's instructions. ***State v. Delgado***, 2002 WI App 38, ¶17, 250 Wis. 2d 689, 641 N.W.2d 490.

Upon the foregoing,

IT IS ORDERED that the judgment and order are summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals