IN THE SUPREME COURT OF THE STATE OF NEVADA

JEROMY NELSON A/K/A JEROMY LOWELL NELSEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51408

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of sexual assault on a child and one count of lewdness with a child under the age of fourteen years. Second Judicial District Court, Washoe County; Jerome Polaha, Judge. The district court sentenced appellant Jeromy Nelson to a term of life in prison with the possibility of parole after 20 years for sexual assault, to a consecutive term of life in prison with the possibility of parole after 10 years for lewdness, and to lifetime supervision.

The State's case was based primarily on the victim's testimony, buttressed by inculpatory statements and/or gestures made by Nelson during a police interrogation. At the time of the incidents, the parents of the five-year-old victim and her younger brother ("A.K.") shared physical custody of the children. Nelson, a cousin of the children's father, had been babysitting the children at their father's house for approximately two months when a comment made by A.K. caused the victim's mother to become concerned that something had happened to her daughter. The mother immediately took the victim to the hospital where she and A.K.

were interviewed by a patrol officer who promptly turned the case over to detectives. A medical exam of the victim was not conducted until several days later and revealed no physical evidence of abuse.

Nelson, after being advised of his rights, was interviewed by two detectives on different days. In his first interview, he denied any inappropriate touching and, after being told that A.K. witnessed the incident, he said that A.K. may have misunderstood when he was wrestling with the victim and that any touching would have been accidental. The second interview was conducted in two rooms at the police station. Due to an error, only one room had recording equipment. The interviewing detective testified that, while they were in the room without recording equipment, Nelson first denied any inappropriate touching but then admitted to accidentally putting his mouth on the vagina of the victim, who was not wearing underwear, while he was wrestling with the children. The detective testified that he told Nelson that it could not be accidental and suggested that perhaps Nelson was just curious about what it would feel like to put his mouth on a five-year-old's vagina, to which Nelson nodded. The detective testified that the pair then moved to the interview room with recording equipment to further develop the admission. A redacted tape of the interview was played for the jury. The interviewing detective testified that the taped interview showed Nelson "acting ashamed," his head down and nose stuffy from crying. The detective asked Nelson whether he had made certain statements[1] in the

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[1]The taped interview was not transcribed or made part of the record on appeal, and the specific statements were not testified to in trial. As

continued on next page . . .

prior interview room and Nelson nodded. At no time during the recorded portion of the interview did Nelson deny the detective's statements.

The victim, who was six years old at trial, testified that Nelson had removed her clothes and laid her on a bed and at another time on a couch and touched her vagina with his hand and with his tongue. Her testimony contained only minor inconsistencies[2] and was uncontroverted at trial. Nelson did not testify at trial.

Nelson's sole issue on appeal is that he was denied his right to a fair trial and due process because of the prosecutor's misconduct during closing arguments. More specifically, he alleges that the prosecutor impermissibly commented on his right to remain silent and, throughout her rebuttal argument, denigrated defense counsel and his defense, vouched for and provided personal opinions on the evidence presented, and inflamed the jury against him. For the reasons stated below, we affirm the conviction.

A prosecutor has committed misconduct when her "statements so infected the proceedings with unfairness as to result in a denial of due process." Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005).

. . . continued

such, we do not know the content of the statements beyond what is reflected in the transcribed testimony.

[2]There was some confusion at one point during the questioning as to whether Nelson touched her over or under her clothes. The victim finally testified that Nelson had undressed her and placed the clothes next to her. At another time, the victim first testified that Nelson only touched her with his tongue, then, after prompting by the prosecutor, said he used his hand, too, and used a doll to demonstrate the rubbing motion for the jury.

This court considers such statements in context and will not lightly overturn a conviction on the basis of the prosecutor's comments alone. Id.

When objections are preserved for appeal, we review prosecutorial misconduct under the harmless error standard. Valdez v. State, 124 Nev. 194, 209, 196 P.3d 465, 476 (2008), cert. denied, ___ U.S. ___, 129 S. Ct. 95 (2008). Harmless error review is a two-step analysis where we first determine whether the conduct was improper and, if so, then determine whether the conduct warrants reversal. Id. When no objection was made at trial, appellate review is generally precluded. Rose v. State, 123 Nev. ___, ___, 163 P.3d 408, 418 (2007). However, this court may still review the alleged misconduct for plain error. Valdez, 124 Nev. at ___, 196 P.3d at 477; NRS 178.602. Under plain error review, we first determine whether the conduct was error plain from the record and, if so, whether it affected the appellant's substantial rights. Anderson, 121 Nev. at 516, 118 P.3d at 187. "[T]he burden is on the defendant to show actual prejudice or a miscarriage of justice." Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

Comment on Nelson's decision not to testify

Nelson asserts that the prosecutor twice commented on his decision not to testify at trial and that those comments violated his Fifth Amendment right not to incriminate himself. A direct reference to a defendant's decision not to testify is always improper, while an indirect reference to a defendant's decision not to testify is impermissible only if "the language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be a comment on the defendant's failure to testify." Harkness v. State, 107 Nev. 800, 803, 820 P.2d 759, 761 (1991) (quoting United States v. Lyon,

397 F.2d 505, 509 (7th Cir. 1968)). We hold the prosecutor did not engage in misconduct.

The first comment to which Nelson objects was made as the prosecutor began her closing argument. The district court sustained Nelson's objection below, so we review the comment under the harmless error standard. The prosecutor displayed a visual aid depicting the victim and A.K. with the caption "he said/she said" and an oral statement that this was not a he-said/she-said case. Nelson points to the district court's sustainment as evidence that it was clearly a comment on his decision not to testify. However, the prosecutor quickly explained her meaning: This was a case of he-said (A.K.)[3]/she-said (victim)/he-agreed (Nelson)[4] rather than the typical victim-said/defendant-said paradigm. When read in context, this was not a direct comment on Nelson's failure to testify, nor was it an indirect reference that a jury would naturally and necessarily take to be such a comment. The comment was therefore not improper, and in the absence of any error, we need not address whether it was harmless.

The second comment to which Nelson objects was made during the prosecutor's rebuttal argument in which she challenged the jury to "Ask him (Nelson)." Nelson did not object below, so we review the

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[3]We note that A.K. did not testify at trial, nor were his words otherwise admitted into evidence. However, three witnesses testified to their reactions to his words.

[4]Although Nelson did not testify at trial, a detective who interviewed Nelson said that Nelson admitted to the actions underlying the sexual assault charge and the jury viewed a taped interview of Nelson during which he nodded affirmatively in response to the detective's summary of what had been previously discussed.

comment for plain error. This court addressed a similar comment in another case where the prosecutor stated, "I am going to ask the defendant . . . why the tools?" Miller v. State, 86 Nev. 503, 507, 471 P.2d 213, 216 (1970). In that case, we held that the statement was a rhetorical question directed to the jury rather than a comment upon the defendant's decision not to testify. Id. In this case, considering the statement in context, we conclude that "ask him" was a rhetorical question to the jury and not a direct or indirect comment on Nelson's decision not to testify.

Because the prosecutor did not impermissibly comment on Nelson's decision not to testify, we will not reverse the judgment of conviction on this ground.

Disparaging comments regarding defense and defense counsel

Nelson identifies six passages in the prosecutor's rebuttal argument that he argues disparage either his theory of defense or defense counsel. The prosecutor has a "duty not to ridicule or belittle the defendant or his case." Barron v. State, 105 Nev. 767, 780, 783 P.2d 444, 452 (1989). "Disparaging comments have absolutely no place in a courtroom, and clearly constitute misconduct." McGuire v. State, 100 Nev. 153, 157, 677 P.2d 1060, 1064 (1984). However, a "prosecutor may 'argue inferences from the evidence and offer conclusions on contested issues.'" Miller v. State, 121 Nev. 92, 100, 110 P.3d 53, 59 (2005) (quoting Jones v. State, 113 Nev. 454, 467, 937 P.2d 55, 63 (1997)). Further, we will find no error when a prosecutor's comment during rebuttal is in fair response to an argument made by defense counsel in closing argument. Bridges v. State, 116 Nev. 752, 764, 6 P.3d 1000, 1009 (2000). Because Nelson did not object to any of the referenced comments at trial, we review them for

plain error. We hold that two of the six comments were disparaging but that they do not warrant reversal of the judgment of conviction.

One of Nelson's theories of the case was that any touching was inadvertent and that he was nodding during a taped interrogation, not in agreement with the interrogating detective's words, as the prosecutor asserted, but rather to show he understood them. In rebutting Nelson's theory, the prosecutor called it a "stupid story" and asked the jury to consider "the ridiculousness of admitting to something you didn't do." The State concedes, and we agree, that such descriptors serve only to disparage the defense and are therefore improper. However, Nelson has failed to show how the offending words affected his substantial rights in light of the victim's testimony and his failure to deny the detective's allegations of inappropriate touching during the recorded interview, which was presented to the jury.

The remaining four comments to which Nelson refers do not constitute error that is plain from the record. The first comment came when the prosecutor interpreted one of Nelson's closing arguments as advocating for acquittal because the police did not promptly order a physical exam of the victim. Nelson argues, without stating why, that this was disparaging. It is not plain from the record that the prosecutor's interpretation was in any way improper or disparaging.

The next comment came when the prosecutor addressed some inconsistencies in the victim's testimony that defense counsel had highlighted during her argument. Immediately before stating that the inconsistencies did not amount to reasonable doubt, the prosecutor stated, "That's the best she [sic] got." We hold that this comment does not

disparage the defense but rather is a permissible comment on the evidence.

The third comment came when the prosecutor, during rebuttal argument, educated the jury on implied waiver and stated that defense counsel "forgot to explain that part to you." The comment was clearly in response to defense counsel's closing argument where she argued that the jury should acquit Nelson because the State did not show by a preponderance of the evidence that he had explicitly waived his right to remain silent prior to the police interrogation. While the challenged comment may have been superfluous, it was, in context, a fair response to incomplete information presented by defense counsel. It is not plain from the record that this was in any way disparaging of either defense counsel or her tactics.

The final comment came in response to defense counsel's suggestion in closing argument that the victim's testimony may have been coached. In disputing this argument, the prosecutor stated, "News flash. Maybe she was telling the truth." Considering the comment as a whole, we conclude that it was a fair response to Nelson's coaching claim and that it is not plain from the record that the comment was disparaging.

While words such as "stupid" and "ridiculousness" may improperly disparage an opponent, we hold that on the balance, the remarks Nelson complains of are not error plain from the record, and that those that were improper did not affect his substantial rights.

Improper Vouching

Nelson argues that the prosecutor vouched for the victim's testimony and guaranteed the jury that he was guilty. "A prosecutor may not offer his personal opinion of the guilt or character of the accused."

Barron, 105 Nev. at 780, 783 P.2d at 452. A criminal defendant has a "right to be tried solely on the basis of the evidence presented to the jury." United States v. Young, 470 U.S. 1, 18 (1985). By expressing her personal opinion, the prosecutor may improperly imply to the jury that she knows more than is in evidence, and her assurance carries the weight of the government, both of which could lead a juror to decide the case on something other than the evidence presented. Id. at 18-19. Nelson did not object to the comments at trial, so we review for plain error. We hold that only one comment was improper; however, that comment did not affect Nelson's substantial rights.

First, Nelson challenges a statement the prosecutor made at the end of her rebuttal argument: "There are cases of false allegations. We all know about that. But this is not one of them." Nelson argues that this is impermissible vouching by the prosecutor for the strength of the State's case. The State contends that this was simply a summation after several pages of debunking Nelson's theories of the case. While it may have followed rebuttal argument, the prosecutor's comment was nevertheless improper vouching. This case turned largely on the credibility of the victim, and the clear meaning of the prosecutor's statement was that, while we all know that some victims make false allegations, this victim made true allegations. Although the error is plain from the record, Nelson has not shown how this comment affected his substantial rights in light of the victim's testimony and Nelson's failure to deny in the recorded interview that he inappropriately touched the victim. Absent such a showing, we hold that the comment does not constitute plain error warranting reversal.

Next, Nelson challenges another rebuttal comment that the prosecutor made: "And I guarantee you the evidence is that he did it over the clothes; he did it under the clothes; he did it – the clothes were on; the clothes were off." Nelson, culling out "I guarantee" and "he did it," argues that this was an impermissible expression of the prosecutor's opinion. However, when read in its entirety, the prosecutor's comment merely guarantees what the evidence shows, and is therefore a permissible comment on the evidence, not the prosecutor's personal opinion. It is plain from the record that the comment was not error.

Finally, Nelson complains that the final sentence uttered by the prosecutor in her rebuttal was improper. Nelson argues that by closing with "Thank you very much for your time *on behalf of all of us*" (emphasis added), the prosecutor underlined the weight of the State's opinion. In context, we conclude that the prosecutor was merely thanking the jurors on behalf of those involved in the trial, not on behalf of the government. Even were this an attempt to influence the jury with the weight of the government, Nelson fails to demonstrate how this affected his substantial rights.

Although the prosecutor improperly interjected her own opinion by vouching to the jury that this was not a case of false allegations, we hold that the error did not affect Nelson's substantial rights and so was not plain error. We also hold that the other challenged comments were not improper vouching.

Inflaming the jury's passions

Nelson argues that the prosecutor inflamed the jury's passions against him such that his due process rights were violated. Comments designed to inflame the emotions of the jury are improper and have no

place in a trial. Moser v. State, 91 Nev. 809, 813, 544 P.2d 424, 427 (1975). "Such comments clearly exceed the boundaries of proper prosecutorial conduct." Shannon v. State, 105 Nev. 782, 789, 783 P.2d 942, 946 (1989). Further, in light of a defendant's right to be tried solely on the admitted evidence, it is improper for a prosecutor to exhort a jury to do its duty and convict. Young, 470 U.S. at 18. We review the comments for plain error as Nelson did not object to them at trial.

The State concedes that the challenged comments were impermissibly inflammatory, and we agree. The prosecutor first stated that the victim "gets the importance of making sure this never happened again. So should you." Then later, at the end of her rebuttal argument, the prosecutor told the jury that if it found Nelson not guilty, "You are allowing an admitted child molester to not be held accountable for his conduct." These comments were clearly appeals to the jurors' emotions and impermissible exhortations to the jury to do its duty and convict Nelson.

Next, after asking rhetorically whether the jury would acquit Nelson just because they were disappointed the police did not conduct a physical exam of the victim sooner, the prosecutor told the jury, "That's not the message that the criminal justice system wants you to send. It is not the message the State wants you to send." This not only encouraged the jury to decide the case based on something other than the evidence presented, but it also appeared to throw the weight of the government behind the message that the jury should send.

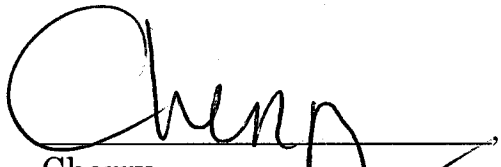
Later in rebuttal, after reminding the jury how comfortable the victim was talking about the inappropriate touching, the prosecutor asked, "How sick is that? . . . How sick is that; that she has to come in

here and do that." Not only was the comment as a whole clearly intended to inflame the jury against Nelson, but the inference that Nelson was "sick" for making the victim come and testify was an improper comment on his right to appear and defend against the charges. See In re Oliver, 333 U.S. 257, 273 (1948) ("A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence.").

It is plain from the record that the above comments were impermissible as they were intended to inflame the jurors' passions. However, before plain error warrants reversal, an appellant must demonstrate actual prejudice or miscarriage of justice. Considering the evidence supporting Nelson's guilt, we conclude that he has not shown that the error affected his substantial rights.

Having considered Nelson's claims and concluding that no relief is warranted, we

ORDER the judgment of conviction AFFIRMED.



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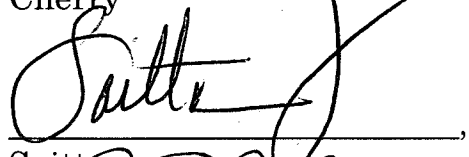

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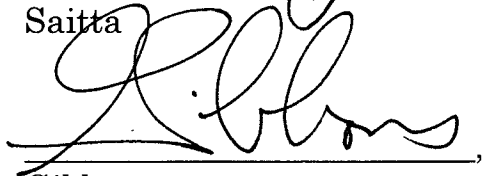

_____, J.
Gibbons

cc: Hon. Jerome Polaha, District Judge
Washoe County Public Defender
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk