IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KATHY ANN PERRAULT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 67025



*ORDER OF AFFIRMANCE*

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of first-degree kidnapping. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellant Kathy Ann Perrault claims the district court erred by instructing the jury on flight because the instruction unduly emphasized the inconsequential testimony of one witness and prejudiced her in the eyes of the jury.

We review a district court's decision to give a jury instruction for abuse of discretion or judicial error. *Grey v. State*, 124 Nev. 110, 122, 178 P.3d 154, 163 (2008). "[A] district court may properly give a flight instruction if the State presents evidence of flight and the record supports the conclusion that the defendant fled with a consciousness of guilt and to evade arrest." *Rosky v. State*, 121 Nev. 184, 199, 111 P.3d 690, 699-700 (2005).

The State presented evidence that upon seeing the victim's father talking with the police, Perrault lifted the four-year-old victim out of the pick-up truck and set him on the ground, she jumped into the cab of the truck and ducked below the dashboard, and she gestured for the driver



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to take off. Thereafter, the police blocked the truck's path of travel to prevent Perrault from fleeing. Given this evidence, we conclude the district court did not abuse its discretion by instructing the jury on flight.

Perrault also claims she was deprived of a fair trial as a result of prosecutorial misconduct. Perrault did not contemporaneously object to the alleged instances of prosecutorial misconduct. "Generally, to preserve a claim of prosecutorial misconduct, the defendant must object to the misconduct at trial because this allows the district court to rule upon the objection, admonish the prosecutor, and instruct the jury. When an error has not been preserved, this court employs plain-error review." *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) (internal quotation marks, alteration, and citation omitted). Under this standard, the defendant must demonstrate the error affected her substantial rights by causing "'actual prejudice or a miscarriage of justice.'" *Id.* (quoting *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)).

First, Perrault claims the prosecutor committed misconduct by making a brief reference to her custodial status. The prosecutor asked defense witness Matthew Wolfe, "Now, shortly after this occurred—you called her several times while she was in custody, correct?" A prosecutor's reference to a defendant's in-custodial status is generally considered prejudicial. *Haywood v. State*, 107 Nev. 285, 287, 809 P.2d 1272, 1273 (1991). However, we conclude the reference in this case did not affect Perrault's substantial rights because it did not reveal her custodial status at the time of the trial and the jury had already heard testimony that she was transported to jail after her arrest.

Second, Perrault claims the prosecutor committed misconduct during his closing argument by improperly referring to his personal

experience. The prosecutor began his argument by saying, "Now, this trial was short. Probably the shortest trial I've had in my career working here, but it's incredibly important. You only have one charge. We have to consider those elements of that charge." We conclude this comment does not plainly convey an improper suggestion, insinuation, or assertion of personal knowledge about the case. *See Berger v. United States*, 295 U.S. 78, 88 (1935). It does not suggest the prosecutor is vouching for his own credibility and the credibility of the State's case. *See United States v. Leon-Reyes*, 177 F.3d 816, 822 (9th Cir. 1999). And Perrault has not demonstrated that it affected her substantial rights.[1]

Third, Perrault claims the prosecutor committed misconduct during his closing argument by making an indirect reference to her decision not to testify. The prosecutor argued,

> [What] I really want to emphasize is motive is not intent. We might never know what her motive is, what the defendant's motive is does not matter. The State does not have to prove motive. Whatever was going through defendant's head at eight in the morning or 8:30 in the morning, whenever she took the child doesn't matter, as long as she intended to take the child.

An *indirect* reference to a defendant's decision not to testify violates the Fifth Amendment when "'the language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily

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[1]Although the use of the pronoun "I" in a closing argument does not necessarily signal an improper personal belief or opinion, *U.S. v. Jones*, 468 F.3d 704, 708 (10th Cir. 2006), we caution the parties that "using such expressions as 'I personally believe,' or 'In my opinion,' so as to in effect place their own certification on their arguments" constitutes misconduct, *Jimenez v. State*, 106 Nev. 769, 772, 801 P.2d 1366, 1368 (1990).

take it to be 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 conclude the prosecutor's language does not plainly allude to Perrault's decision not to testify and therefore Perrault has failed to demonstrate that his comment affected her substantial rights.

Having concluded Perrault is not entitled to relief, we ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Silver

cc: Hon. Michelle Leavitt, District Judge
Law Office of Benjamin Nadig, Chtd.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk