

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RANDALL LEE DAHL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 83489-COA

FILED

JUN 13 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Randall Lee Dahl appeals from a judgment of conviction entered pursuant to a jury verdict of second-degree murder. Second Judicial District Court, Washoe County; Scott N. Freeman, Judge.

Dahl claims the State committed prosecutorial misconduct during its closing argument. When reviewing claims of prosecutorial misconduct, this court considers whether the conduct was improper and, if it was, whether it warrants reversal or was harmless. *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). Statements alleged to be prosecutorial misconduct should be considered in context. *Byars v. State*, 130 Nev. 848, 865, 336 P.3d 939, 950-51 (2014). This court presumes the jury followed the instructions. *See Summers v. State*, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006).

First, Dahl argues the prosecutor improperly suggested that the jury need not be unanimous in reaching a verdict of second-degree murder. Dahl objected to the prosecutor's statement. The district court sustained the objection and instructed the jury that its verdict needed to be

unanimous. Therefore, although the comment may have been improper, the error was harmless because the district court corrected the potential error. We therefore conclude Dahl is not entitled to relief on this claim.

Second, Dahl argues the prosecutor acted improperly when he stated that it was the jury's "job" to "make justice happen for [the victim] and the people of this community who say you can't just cold-bloodedly murder someone and get away with it." Dahl did not object and therefore must demonstrate plain error. *Valdez*, 124 Nev. at 1190, 196 P.3d at 477. To prevail on plain error review, Dahl must demonstrate that: (1) there was an error; (2) the error is plain, meaning that it is clear under current law from a casual inspection of the record; and (3) the error affected his substantial rights. *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018). "[A] plain error affects a defendant's substantial rights when it causes actual prejudice or a miscarriage of justice (defined as a 'grossly unfair' outcome)." *Id.* at 51, 412 P.3d at 49. Although the prosecutor's comments may have been improper, Dahl relies entirely on authority from other jurisdictions in support of his argument and fails to argue actual prejudice or a miscarriage of justice. Dahl thus fails to demonstrate error plain from the record or that the alleged error affected his substantial rights. Therefore, we conclude Dahl is not entitled to relief on this claim.

Third, Dahl argues the prosecutor indirectly commented on Dahl's decision not to testify by stating that the jury did not hear evidence about malice because Dahl is the only "live witness" present. Dahl did not object and therefore must demonstrate plain error. In context, the prosecutor argued there was no direct evidence of malice because the only witnesses to the events were the deceased victim and Dahl. The prosecutor

further argued that the jury could imply malice from the evidence of trauma to the victim “because his body is a witness.” These comments, although arguably improper, do not appear to be manifestly intended nor of such a character “that the jury would naturally and necessarily take it to be comment on the defendant’s failure to testify.” See *Harkness v. State*, 107 Nev. 800, 803, 820 P.2d 759, 761 (1991) (internal quotations omitted). In addition, the jury was instructed that a defendant may not be compelled to testify and that no presumptions or inferences may be made from a defendant’s decision not to testify. And Dahl fails to argue actual prejudice or a miscarriage of justice. Dahl thus fails to demonstrate error plain from the record or that the alleged error affected his substantial rights. Therefore, we conclude Dahl is not entitled to relief on this claim.

Fourth, Dahl argues the prosecutor mischaracterized defense counsel’s opening statement, thereby disparaging defense tactics and misleading the jury away from considering a verdict of manslaughter. In her opening statement, defense counsel argued that Dahl did not commit first-degree murder. The prosecutor stated in closing argument that the defense did not deny Dahl committed murder, only that he did not commit first-degree murder, and that the defense did not address manslaughter. Dahl did not object and therefore must demonstrate plain error.

The prosecutor’s statements did not allege the defense was doing something unethical or belittle the defense. Cf. *Butler v. State*, 120 Nev. 879, 898-99, 102 P.3d 71, 84-85 (2004) (concluding that statements portraying the defense’s presentation of evidence and defense tactics as a dirty technique and implying that defense counsel acted unethically were improper); *McGuire v. State*, 100 Nev. 153, 157, 677 P.2d 1060, 1064 (1984)

(concluding that statements with no discernable purpose other than to belittle defense counsel constitute misconduct). In addition, the jury was properly instructed that because Dahl was charged with open murder, he may be convicted—if at all—of first-degree murder, second-degree murder, voluntary manslaughter, or involuntary manslaughter. And Dahl fails to argue actual prejudice or a miscarriage of justice. Dahl thus fails to demonstrate error plain from the record or that the alleged error affected his substantial rights. Therefore, we conclude Dahl is not entitled to relief on this claim.

Fifth, Dahl argues the prosecutor improperly suggested that the presumption of innocence no longer applied. The prosecutor stated, “[Y]ou’re presumed innocent until proven guilty. But when you hear the evidence in a case, it’s that evidence that pulls that cloak off that person presumed innocent, and what’s underneath that cloak, in this case [is] a man guilty of first degree murder. That’s what the evidence showed.” Dahl did not object and therefore must demonstrate plain error. Here, although arguably improper, a casual inspection of the record does not support a clear conclusion that the prosecutor improperly suggested that the presumption of innocence no longer applied to Dahl. *See Morales v. State*, 122 Nev. 966, 972, 143 P.3d 463, 467 (2006) (holding that a “prosecutor may suggest that the presumption of innocence has been overcome” but may never “suggest that the presumption no longer applies to the defendant.”). In addition, the jury was properly instructed on the presumption of innocence and Dahl fails to argue actual prejudice or a miscarriage of justice. Dahl thus fails to demonstrate error plain from the record or that the alleged error affected

his substantial rights. Therefore, we conclude Dahl is not entitled to relief on this claim.

Finally, Dahl argues that the cumulative effect of the above instances of prosecutorial misconduct warrants reversal. Dahl's bare assertion that the errors collectively warrant reversal is insufficient to demonstrate cumulative error. *See Jeremias*, 134 Nev. at 59-60, 412 P.3d at 55. Accordingly, we

ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Scott N. Freeman, District Judge
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk