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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-2067**

State of Minnesota,
Respondent,

vs.

Cassie Ann Garza,
Appellant.

**Filed December 16, 2019
Affirmed
Kirk, Judge***

Olmsted County District Court
File No. 55-CR-16-1524

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Mark A. Ostrem, Olmsted County Attorney, Jennifer D. Plante, Senior Assistant County Attorney, Rochester, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Florey, Judge; and Kirk,
Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

KIRK, Judge

Appellant challenges her conviction of malicious punishment of a child, arguing that she is entitled to a new trial because the prosecutor committed prejudicial misconduct by arguing facts not in evidence during closing argument. We affirm.

FACTS

On January 26, 2016, a staff member at J.C.'s school observed red marks on J.C.'s neck. The staff member asked about the marks, and J.C. responded that he could not say how he got them because his mom would hurt him. Appellant Cassie Ann Garza is J.C.'s mother. The staff member submitted a report to child-protection services, which contacted law enforcement. On January 27, Investigator Anne Johnson of the Rochester Police Department met with J.C. Investigator Johnson noticed red marks on J.C.'s neck and under his eyes. J.C. was initially hesitant to talk and stated that he did not want to get his mom in trouble. He told Investigator Johnson that the marks on his neck were from a rash and that the marks under his eyes were from him rubbing his eyes. But he ultimately told Investigator Johnson that he had gotten in trouble and his mother put her arms around his neck, shoved him down, and shoved her knee into the side of his face. Later that day, Dr. Maria Fernanda Bellolio Avaria, M.D. examined J.C. and observed petechiae on his face and neck. Petechiae indicate a minor bleed from a broken capillary blood vessel, and are often caused by trauma, such as strangulation or direct force.

Respondent State of Minnesota charged Garza with one count of domestic assault by strangulation and one count of malicious punishment of a child. A jury convicted Garza

of malicious punishment of a child but acquitted her of domestic assault by strangulation. The district court stayed imposition of sentence for two years, placed Garza on probation, and ordered her to serve 15 days in jail. Garza appealed, and this court reversed and remanded for a new trial after determining that the prosecutor committed misconduct during closing arguments. *State v. Garza*, No. A16-2070 (Minn. App. Nov. 20, 2017).

On September 17-19, 2018, the district court held a jury trial. J.C. testified that on January 25, 2016, Garza became angry with him because he brought home a pair of shoes that he was supposed to keep at school. He testified that the argument escalated and Garza put him in a chokehold and that his brother, C.C., pulled Garza off of him. C.C. testified to a consistent version of events. Garza testified in her own defense and denied choking J.C. She testified that the red marks on J.C.'s neck were caused by a rash. The jury found Garza guilty of malicious punishment of a child. The district court imposed the same sentence it ordered following the first trial, and noted that the sentence had been completed. Garza made a pro se motion for a new trial, which the district court denied. This appeal follows.

D E C I S I O N

Garza argues that the prosecutor committed misconduct during closing argument that entitles her to a new trial. Garza did not object during trial. Because Garza did not object at trial, we consider whether there is “(1) error, (2) that is plain, and (3) affects substantial rights.” *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Error is plain if it “contravenes case law, a rule, or a standard of conduct.” *Id.* Even where misconduct

occurs, we will reverse only when the defendant was denied a fair trial. *State v. Porter*, 526 N.W.2d 359, 365 (Minn. 1995).

Garza contends that the prosecutor argued that she “implied in her testimony that her ex-husband had coached J.C. and C.C. to fabricate the allegations,” which was not an accurate portrayal of her testimony and therefore based on facts not in the record. At trial, Garza was asked if J.C. and C.C. have lived with their father since January 27, 2016 and she responded “That’s when the allegations started.” During closing arguments, the prosecutor made the following statement based on this testimony:

Ms. Garza also testified to a motive for her children to fabricate this incident. If you recall, there was testimony about when the children transitioned to their father’s house, and she said that’s when all the allegations started. This is frankly inconsistent with the facts of the case. You heard about, in her own testimony, that these children lived with her and they lived with her leading up to the 25th of January, and it wasn’t until after these allegations came out that they went to their father’s home. Yet she testified this is—this is when all the allegations started, when they went to their father’s house, implying coaching, implying fabrication.

Garza argues that this statement constitutes misconduct because she never testified that she blamed her ex-husband for the allegations and therefore the statement is based on facts not in the record. A prosecutor’s closing argument must be based on the evidence produced at trial. *Id.* at 363-64. But the prosecutor has “considerable latitude” and may “present all proper inferences to be drawn” from the evidence presented. *State v. Williams*, 586 N.W.2d 123, 127 (Minn. 1998) (quotation omitted). Here, Garza testified that the allegations started when J.C. and C.C. went to live with their father. It was therefore reasonable for the prosecutor to infer that she was linking the children going to live with

their father and the allegations against her. The record makes clear that the children went to live with their father because of the allegations and did not live with him prior. And Garza's theory of defense, which the jury rejected, was that J.C. had made up the allegations.

On this record, we discern no plain error. Garza testified that the incident did not occur and incorrectly suggested that the allegations started when the children went to live with their father. The prosecutor's statements during closing argument that Garza was implying that J.C. fabricated the incident, that she was incorrect about when the allegations occurred, and that she was suggesting her ex-husband was involved with the children's allegations were therefore proper inferences based on the evidence presented. Because no misconduct occurred, Garza is not entitled to a new trial.

Affirmed.