STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1006

State of Minnesota,
Respondent,

vs.

Brian Kenneth Larkins,
Appellant.

Filed August 23, 2021
Reversed and remanded
Frisch, Judge

Freeborn County District Court
File No. 24-CR-19-1336

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

David J. Walker, Freeborn County Attorney, Abigail H. Lambert, Assistant County Attorney, Albert Lea, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Bryan, Judge; and Frisch, Judge.

NONPRECEDENTIAL OPINION

FRISCH, Judge

Appellant argues that his domestic-assault conviction should be (1) reversed because the state's evidence is insufficient to sustain the jury's verdict, or alternatively,

(2) reversed and remanded because the prosecutor committed misconduct by misstating the elements of the offense during her closing argument. We reject appellant's sufficiency challenge. But because the prosecutor committed plain error prejudicing appellant's substantial rights, we reverse and remand for a new trial to protect the integrity of the proceeding.

FACTS

Domestic-Assault Charge and Pretrial Proceedings

The state charged appellant Brian Kenneth Larkins with one count of felony domestic assault in violation of Minn. Stat. § 609.2242, subds. 1, 4 (2018), alleging generally that "[o]n or about July 28, 2019 . . . the defendant did intentionally inflict or attempt to inflict bodily harm upon a family or household member . . . within ten years of the first of any combination of two or more previous qualified domestic violence-related offense convictions."

One day before the scheduled trial, the state filed a list of proposed jury instructions. The state requested a model instruction defining the crime of domestic assault generally and a model instruction defining the specific elements of domestic assault with intent to cause fear. The model definition of the general crime provides:

> Under Minnesota law, whoever, within ten years of the first of any combination of two or more previous qualified domestic violence-related offense [convictions . . .],
>
> [1] commits an act with intent to cause fear in another of immediate bodily harm or death
>
> [or]

> [2] intentionally inflicts or attempts to inflict bodily harm upon another
>
> is guilty of a crime, if the person assaulted is a member of the defendant's family or household.

10 *Minnesota Practice*, CRIMJIG 13.49 (2020). The model definition requested by the state as to the elements of the offense provides, in relevant part:

> The elements of domestic assault are:
>
> First, the defendant assaulted [the victim].
>
> The term "assault" as used in this (case) (charge) means an act done with intent to cause (the victim) to fear immediate bodily harm or death.
>
> "Bodily harm" means physical pain or injury, illness, or any impairment of a person's physical condition. It is not necessary for the State to prove that the defendant intended to inflict bodily harm or death, but only that the defendant acted with intent that [the victim] would fear that the defendant would so act. In order for an assault to have been committed, it is not necessary that there have been any physical contact with the body of the person assaulted.
>
> "With intent to" or "with intent that" means that the actor either has a purpose to do the thing or cause the result specified, believes that the act, if successful, will cause that result.

10 *Minnesota Practice*, CRIMJIG 13.50 (2020). The state did not request the model instruction regarding a felony offense based on the actual or attempted infliction of bodily harm. *See* 10 *Minnesota Practice*, CRIMJIG 13.51 (2020).

The following evidence was received at trial.

The Victim's Testimony

The victim testified that on July 28, 2019, she lived in her home with her son, her daughter, her son's friend, and Larkins—her boyfriend at the time. The victim recalled that on the evening of July 28, she was in her bedroom with one of her son's friends (A.V.H.) and Larkins. At some point, Larkins told A.V.H. to "shut the f-ck up." The victim told Larkins "that he could not talk to [her] friend that way." Larkins elbowed the victim in the face, grabbed her phone, and left the room.

The victim's son exited his bedroom, confronted Larkins, and attempted to retrieve the victim's phone. A.V.H. meanwhile dialed 9-1-1. Larkins allegedly went downstairs, sat on the couch, and began punching himself while yelling, "She is hitting me." The son and Larkins "tussle[d]" and the victim followed them to the dining room. The victim recalled that Larkins "proceeded to hit me, come at me, threatening me. And I was trying to calm him down . . . [a]nd he did not. And he swung at me and hit me in the face." The victim testified that Larkins hit her "[w]ith a closed fist on [her] right cheek . . . [p]retty hard. And it hurt really bad." When asked what was going through her mind, the victim stated, "At that point I was scared and didn't know what was going to happen." Police officers arrived soon after, and the victim ran outside. She recalled speaking to the officers, describing what had happened, and being "[d]istraught" at the time: "I was nervous, scared, and I had just gotten assaulted."

The victim also testified about past domestic conduct involving Larkins. She recalled an incident that occurred "about two weeks" before the reported domestic assault where "it had gotten really rocky." Larkins had allegedly told the victim she "had no choice

but to go with him" to Janesville, where he was working, and that he "stood over [her], packed a bag for [her], and told [her she] was going with him." She described him as "towering" over her, "puffed up and big . . . like, he was a big[] old bull dog or something that was just going to attack at any minute." The victim recalled being "really scared" that Larkins "was going to hit [her] or something," and so she went with him.[1]

The Victim's Recorded Interview

A responding officer interviewed the victim in her front yard and recorded the interview on his body-worn camera. The jury viewed a portion of the recording. In the interview, the victim denied hitting Larkins and claimed that Larkins hit her. She recalled that she and Larkins had "been arguing for days" and that she had "been trying to get him to leave for days" but that "he wo[uld]n't leave." She later stated, "I just wanted him to leave for a couple hours and he wouldn't even do that. He wouldn't give me peace in my own room, he wouldn't give me anything." The victim told the officer that Larkins "pinched the sh-t out of [her] and left a bruise on [her] t-t" the day before, showing the officer a bruised spot on the upper-left portion of her chest.

In describing the alleged assault, the victim claimed, "He got into [A.V.H.]'s face, got into my face, jerked my phone from me, and punched me in the face." The victim described how she "turned and [Larkins] hit [her]." The officer asked the victim why she turned, and she explained, "Because I saw him coming. He was coming at me and I turned

[1] The district court gave the jury a cautionary instruction regarding the limited purpose of the relationship evidence. *See* Minn. Stat. § 634.20 (2018) (providing that evidence of domestic conduct is generally admissible).

to get away, and I just wanted my phone." The victim stated, "He came downstairs. . . . And he said we were beating him and we weren't beating him. I was trying to get away from him, trying to get my phone from him. And he wouldn't give me my phone."[2]

The Son's Testimony and Recorded Interview

The victim's son testified that he was in his room when he heard the victim begin screaming at Larkins. The son went to the victim's room and Larkins "pushed [him] out of the way and went downstairs." The son followed Larkins and "grabbed the [victim's] phone out of [Larkins'] hand." The son then watched as the victim attempted to calm Larkins, standing approximately three feet from Larkins and holding her hands in the air. Larkins then punched the victim in the face. The police arrived soon after, and the son described the victim as "[c]rying, screaming, mad, [and] upset." A responding officer conducted a video-recorded interview with the son, and the state published portions of the interview to the jury. The son's statements in the interview were generally consistent with his testimony.

The son also testified about past domestic conduct with Larkins. He claimed that sometime in the month or two preceding the alleged assault, Larkins "got mad at [him] because [he] was not doing the dishes." The son testified, "[H]e started yelling at me, he had got up in my face, he had chest bumped me back towards the thing." When asked to

[2] The state introduced the victim's recorded interview without objection, and the published portion of the interview therefore became substantive evidence regardless of potential objections which were not raised. *See State v. Jackson*, 655 N.W.2d 828, 833 (Minn. App. 2003), *review denied* (Minn. Apr. 15, 2003).

elaborate, the son testified that Larkins had come "within centimeters" of the son's nose, that Larkins was taller, and that Larkins "physically pushed" the son with his chest.

A.V.H.'s Testimony and Recorded Interview

A.V.H. testified that she was in the hallway outside the victim's bedroom when Larkins told her to "shut the f-ck up" and that she left the room when Larkins and the victim started arguing. A.V.H. went into the son's room, heard the victim tell Larkins "not to hit her or lay a hand . . . on her," returned to the hall, and saw the victim "very upset" and "crying and yelling." A.V.H. also testified that Larkins was "yelling" and "very angry." A.V.H. next described how she, the victim, the victim's son, and Larkins began "fighting" in the hallway about the victim's phone. She claimed that Larkins then "started to push us around." After everyone moved downstairs, A.V.H. dialed 9-1-1. She watched Larkins begin to hit himself, screaming that he was being hit and that the others had guns, all while A.V.H. was on the phone. A.V.H. claimed that Larkins "was pushing" the victim. Soon after, she saw Larkins "hit [the victim] in the face." A responding officer conducted a video-recorded interview with A.V.H. The jury heard A.V.H.'s statements in the interview, which were generally consistent with her trial testimony.

Officer Testimony

Officers with the Albert Lea Police Department testified about their investigation and observations. A responding officer testified that the victim "was very hysterical, agitated, visibly shaking." The victim told the officer that Larkins had punched her and pointed to her face. The officer observed "bruising and some redness on her face." A responding sergeant arrived and spoke with the victim's son and heard him describe how

Larkins had punched the victim. Another officer spoke with A.V.H., who described her observations of the altercation. Responding officers eventually arrested Larkins.

Jury Instructions

Larkins chose not to testify at trial. The parties proceeded to review and edit the jury instructions, and neither attorney raised any issues regarding the finalized instructions. The district court defined the crime of domestic assault as follows:

> Under Minnesota law, whoever commits an act with intent to cause fear in another of immediate bodily harm or death or intentionally inflicts or attempts to inflict bodily harm upon another is guilty of a crime, if the person assaulted is a member of the defendant's family or household.

The district court then defined the assault element of the crime in the following manner, consistent with the model instruction proposed by the state:

> The term "assault" as used in this case means *an act done with intent to cause [the victim] to fear immediate bodily harm or death*.
>
> "Bodily harm" means physical pain or injury, illness, or any impairment of a person's physical condition. It is not necessary for the State to prove that the defendant intended to inflict bodily harm or death, but only that the defendant *acted with intent that [the victim] would fear that the defendant would so act.* In order for an assault to have been committed, it is not necessary that there have been any physical contact with the body of the person assaulted.
>
> "With intent to" or "with intent that" means that the defendant either has a purpose to do the thing or cause the result specified [or] believes that the act, if successful, will cause that result.

(Emphasis added.) Neither party objected. After defining the elements of the crime, the district court instructed the jury, "If you find that each of these elements has been proven

beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty."

Closing Arguments

The prosecutor urged the jury to find Larkins guilty, emphasizing testimony that Larkins pushed multiple people, shouted, took the victim's phone, and punched the victim in the face. The prosecutor framed the assault element as follows: "The State needs to prove [Larkins] intentionally inflicted or attempted to inflict bodily harm on [the victim]." Larkins did not object. The prosecutor proceeded to argue that testimony and other evidence demonstrated the intentional infliction of bodily harm as follows:

> You have three witnesses stating that [Larkins] was the aggressor and that he assaulted [the victim] and inflicted bodily harm onto her. [The victim] testified she was just simply trying to calm [Larkins] down and was feet away from him when [Larkins] came up to her and punched her in the right side of the face near the jawline area.
>
> [A.V.H.] told you . . . she did see [Larkins] hit [the victim] in the face.
>
> [The son] told you that [Larkins] ran up to his mom and punched her in the face.

The prosecutor also argued that photographs of the victim's face and her testimony regarding her pain were consistent with the infliction of actual bodily harm. She urged that "[t]he testimony and evidence in this case proves that [Larkins] intentionally caused bodily harm to [the victim]. Element 1 is met."

Verdict, Conviction, Sentence, Appeal, and Postconviction Proceedings

The jury found Larkins guilty. The district court adjudicated Larkins guilty and sentenced him to 30 months' imprisonment. Larkins appealed and we stayed the appeal so Larkins could pursue postconviction relief. Larkins secured an amended sentence of 26 months' imprisonment and we reinstated this appeal.

DECISION

Larkins contends that the evidence is insufficient to sustain his conviction or, alternatively, that the prosecutor committed misconduct during her closing argument warranting a new trial. The state argues that the evidence is sufficient to sustain the conviction and that the prosecutor did not commit prejudicial, plainly erroneous misconduct.

I. The circumstantial evidence is sufficient to sustain the conviction.

Larkins urges us to reverse his conviction because the state failed to prove that he committed an act with the specific intent to cause fear. The state urges us to affirm because the evidence is sufficient to support a verdict based on either or both *means* of domestic assault—an act with intent to cause fear or the actual infliction of harm. Larkins insists that domestic-assault-fear and domestic-assault-harm are separate offenses and that we must review the sufficiency of the evidence with respect to domestic-assault-fear because

it was the crime defined to the jury.[3] The parties' disagreement as to the nature of the offense and the focus of our review potentially present threshold questions.

A. We assume without deciding that we must review the sufficiency of the evidence as to the elements of domestic-assault-fear.

Minn. Stat. § 609.2242, subd. 4, provides, "Whoever violates the provisions of this section . . . within ten years of the first of any combination of two or more previous qualified domestic violence-related offense convictions . . . is guilty of a felony." Minn. Stat. § 609.2242, subd. 1, provides:

> Whoever does any of the following against a family or household member . . . commits an assault . . . :
>
> (1) commits an act with intent to cause fear in another of immediate bodily harm or death; or
>
> (2) intentionally inflicts or attempts to inflict bodily harm upon another.

The state proposed, and the district court gave, instructions defining the elements of felony domestic assault based on the commission of "an act with intent to cause fear in another of immediate bodily harm or death." Minn. Stat. § 609.2242, subd. 1(1). The state contends that subdivision 1(1) and 1(2) define separate *means* of committing domestic assault and that we may review the sufficiency of the evidence as to either or both means. Larkins argues that the two provisions define separate *offenses* but that regardless of that distinction, our review should be limited to the elements of the crime defined by the district

[3] Larkins does *not* argue that the district court plainly erred in instructing the jury on the elements of the crime or that the district court erred by constructively amending the charge against him.

court.[4] We need not decide either question because, even if we accept Larkins's framing and limit our review to the evidence of his specific intent to cause fear, we conclude that the evidence is sufficient to sustain the conviction.

B. The circumstantial-evidence test applies.

We must first determine the appropriate standard of review. To prove Larkins guilty of felony domestic-assault-fear, the state was required to establish beyond a reasonable doubt that: (1) Larkins committed an act with intent to cause the victim to fear immediate bodily harm or death, (2) the victim was a household member, and (3) the assault took place on or about July 28, 2019, in Hennepin County. Minn. Stat. § 609.2242, subd. 1(1).[5] The phrase "'[b]odily harm' means physical pain or injury, illness, or any impairment of physical condition." Minn. Stat. § 609.02, subd. 7 (2018). The phrase "'with intent to' . . . means that the actor either has a purpose to do the thing or cause the result specified or believes that the act, if successful, will cause the result." *Id.*, subd. 9(4) (2018). A domestic-assault-fear offense is a specific-intent crime. *Fleck*, 810 N.W.2d at 309. Larkins challenges the sufficiency of the evidence only as to the assault-fear element.

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[4] The first issue implicates the validity of our holding in *State v. Dalbec*, in which we explained that the domestic-assault statute defines "alternative *means* by which an assault may be committed." 789 N.W.2d 508, 512-13 (Minn. App. 2010) (emphasis added), *review denied* (Minn. Dec. 22, 2010). The supreme court subsequently decided *State v. Fleck*, explaining that assault-harm is a general-intent crime whereas assault-fear is a specific-intent crime. 810 N.W.2d 303, 309-12 (Minn. 2012). We have not yet decided whether *Fleck* abrogated *Dalbec* by implication, and we need not decide the question here.

[5] Larkins stipulated to the existence of at least two qualifying domestic-violence-related convictions for the purposes of felony enhancement pursuant to Minn. Stat. § 609.2242, subd. 4.

In considering the sufficiency of the evidence, the applicable standard of review depends on whether the jury reached its finding of guilt based on direct evidence or circumstantial evidence. *State v. Petersen*, 910 N.W.2d 1, 6 (Minn. 2018). If the state proves a disputed element through circumstantial evidence, we first determine the circumstances proved by the state and then consider whether those circumstances preclude any reasonable inference other than guilt. *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017). Circumstantial evidence is "evidence from which the factfinder can infer whether the facts in dispute existed or did not exist" and "requires an inferential step to prove a fact." *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotation omitted). "[I]ntent is a state of mind that is usually proved with circumstantial evidence." *State v. Balandin*, 944 N.W.2d 204, 217 (Minn. 2020). "Intent is inferred from words and acts of the actor both before and after the incident." *Id.* (quotation omitted); *see also State v. Cooper*, 561 N.W.2d 175, 179 (Minn. 1997). Because the state presented only circumstantial evidence of Larkins's specific intent to cause the victim to fear immediate bodily harm or death, we apply the circumstantial-evidence test.

C. The state proved extensive circumstances consistent with the verdict.

In the first step, we identify the circumstances proved by the state. *Loving*, 891 N.W.2d at 643. "We defer at this stage to the jury's acceptance of the [s]tate's evidence and its rejection of any evidence in the record that is inconsistent with the circumstances proved by the [s]tate." *Id.* The state proved the following relevant circumstances.

Sometime in either June or July of 2019, Larkins yelled at the victim's son, got within centimeters of the son's face, and pushed the son backwards with his chest.

Approximately two weeks before the alleged assault, Larkins engaged in intimidating behavior by ordering the victim to pack a bag while "towering" over her, "puffed up and big" like he was "going to attack at any minute," causing the victim to fear that he would hit her. Larkins and the victim had "been arguing for days" before the assault and she "had been trying to get him to leave" without success. The day before the assault, Larkins pinched and bruised the victim's breast. On the day of the assault, Larkins told A.V.H. to "shut the f-ck up." Larkins "got into [A.V.H.]'s face" and "got into [the victim's] face." The victim told Larkins "that he could not talk to [her] friend that way," and Larkins hit the victim in the face. Larkins then took the victim's phone and left the room. When A.V.H. dialed 9-1-1, Larkins began punching himself, screaming that he was being punched and that the others in the home had guns. The son and Larkins "tussle[d]" and the victim followed them to the dining room. The victim held her hands up in the air and attempted to calm Larkins. Larkins "c[a]me at" the victim, "threatening" her. Further, the victim "was scared and didn't know what was going to happen."[6]

[6] Larkins contends that "[t]he fact that the alleged victim may or may not have been scared is irrelevant; what matters is the defendant's intent to cause such fear." It is true that "the intent of the actor, as contrasted with the effect upon the victim, [is] the focal point for inquiry." *State v. Ott*, 189 N.W.2d 377, 379 (Minn. 1971). But Larkins conflates relevance with sufficiency. The victim's fear is neither necessary nor sufficient to prove Larkins's intent. *See State v. Hough*, 585 N.W.2d 393, 396 (Minn. 1998) (explaining that evidence of effect on victim is frequently introduced but "not essential"). But a victim's fear remains *relevant*. *See State v. Schweppe*, 237 N.W.2d 609, 614 (Minn. 1975) (explaining that victim's reaction to threat was circumstantial evidence relevant to defendant's intent in making the threat). Here, the victim's reaction to Larkins's conduct was a relevant, but not dispositive, circumstance proved consistent with the jury's verdict.

D. The circumstances proved preclude any reasonable inference other than guilt.

We next consider whether the circumstances proved preclude any reasonable hypothesis inconsistent with guilt. *Loving*, 891 N.W.2d at 643. "We give no deference to the jury's choice between reasonable inferences at this second step." *Harris*, 895 N.W.2d at 601. "We review the circumstantial evidence not as isolated facts, but as a whole." *State v. Silvernail*, 831 N.W.2d 594, 599 (Minn. 2013).

Larkins suggests that the circumstances do not support a finding of an act committed with specific intent to cause fear because Larkins did not "overtly or impliedly threaten" the victim, "cock his fist," brandish a weapon, or "imply that he might hit [the victim] if she did not do what he wanted." Larkins asserts that he "did not do any of the things that underlie assault-fear convictions." Similarly, Larkins compares the evidence of the alleged assault with the relationship evidence of his intimidating behaviors, arguing that the relationship evidence was a more plausible showing of domestic-assault-fear. But the fact that *other* circumstances might have demonstrated specific intent to cause fear more definitively is not dispositive of whether the circumstances proved demonstrate specific intent to cause fear. The question is whether the circumstances in their totality supported a reasonable inference of guilt and precluded any reasonable inconsistent hypothesis. *Loving*, 891 N.W.2d at 643.

On this record, the circumstances proved do exactly that. The state presented relationship evidence of Larkins's past intimidating conduct toward both the victim and the victim's son, which served to "illuminate the history of the relationship" and "put the

crime charged in the context of the relationship between the two." *State v. McCoy*, 682 N.W.2d 153, 159 (Minn. 2004). The prior context is an important circumstance proved because, "[o]bviously, evidence showing how a defendant treats his . . . household members . . . sheds light on how the defendant interacts with those close to him, which in turn suggests how the defendant may interact with the victim." *State v. Valentine*, 787 N.W.2d 630, 637 (Minn. App. 2010), *review denied* (Minn. Nov. 16, 2010). Similar to previous threatening domestic conduct, the jurors heard how Larkins "got into [A.V.H.'s and the victim's] face[s]." Larkins was hostile to A.V.H., and when the victim told Larkins not to speak to A.V.H. in that manner, Larkins struck her in the face. He followed that hostility by taking the victim's phone away from her and fleeing downstairs. When A.V.H. called the police, Larkins pivoted in an attempt to paint others in the house as the aggressors. And despite the victim's attempts to calm Larkins, his violent behavior continued to escalate, culminating when he punched the victim in the face.

Context matters, *see Silvernail*, 831 N.W.2d at 599, and in this case, the jury heard how Larkins's conduct escalated from aggressive posturing and shouting to striking the victim in the face. Larkins's behavior became more erratic as he took the victim's phone, pushed the others in the hallway, punched himself repeatedly while screaming, and grappled with the victim's son. These actions were so frightening that A.V.H. sought emergency police assistance. And even after the victim tried to calm Larkins, holding her hands in the air, the situation escalated to the point that Larkins came at the victim, "threatening" her, and punched her in the face. Viewed in totality, the circumstances proved are consistent with only one rational hypothesis: that Larkins committed an act with

the specific intent to cause the victim to fear immediate bodily harm or death. Any other hypothesis is unreasonable.

II. The prosecutor plainly erred by misstating the elements of the offense, prejudicing Larkins's substantial rights and requiring a new trial.

Larkins contends that the prosecutor committed misconduct by misstating the elements of the offense during closing arguments and informing the jury that it could find Larkins guilty of assault-harm. The state contends that the prosecutor did not commit plain error and that any potential misconduct did not prejudice Larkins's substantial rights or affect the fairness or integrity of the proceeding.

Larkins did not object to the prosecutor's statements during closing argument. We review unobjected-to claims of prosecutorial misconduct under a modified plain-error framework. *State v. Dobbins*, 725 N.W.2d 492, 508 (Minn. 2006). Under that framework, the defendant "must demonstrate that the stated conduct constitutes an error that is plain." *Id.* If the defendant demonstrates an error that is plain, the burden shifts to the state to demonstrate that the error did not affect the defendant's substantial rights. *Id.* If the state fails to carry its burden, then "[w]e will correct the error only if the fairness, integrity, or public reputation of the judicial proceeding is seriously affected." *Id.*

A. The prosecutor plainly erred by contradicting the district court's instructions regarding a necessary element and urging the jury to find Larkins guilty on that basis.

Larkins bears the initial burden of demonstrating that the prosecutor committed plainly erroneous misconduct. *State v. Wren*, 738 N.W.2d 378, 393 (Minn. 2007). He contends that the prosecutor plainly erred by contradicting the district court's instructions

on the assault element of the offense, materially misstating the law on the element, and urging the jury to find him guilty on the basis of actual infliction of harm. The state contends that the prosecutor's remarks were not plainly erroneous.[7]

An error is plain if it "contravenes case law, a rule, or a standard of conduct." *Id.* (quotation omitted). A prosecutor "may reference the law during trial" but may not misstate the law. *State v. Cao*, 788 N.W.2d 710, 716 (Minn. 2010); *see also State v. McDaniel*, 777 N.W.2d 739, 751 (Minn. 2010); Minn. R. Crim. P. 26.03, subd. 19(3) ("Any party may refer to the instructions during final argument."). A misstatement of law may constitute plainly erroneous misconduct. *E.g.*, *State v. Strommen*, 648 N.W.2d 681, 689-90 (Minn. 2002) (addressing misstatements of law on abandonment and burden of proof); *State v. Shannon*, 514 N.W.2d 790, 791-92 (Minn. 1994) (addressing misstatement of elements of heat-of-passion manslaughter). Further, "it is solely the responsibility of the court to instruct juries on the law necessary to render a verdict." *Cao*, 788 N.W.2d at 716. "When evaluating prosecutorial misconduct during a closing argument, we look to the closing argument as a whole, rather than to selected phrases and remarks." *State v. Smith*, 876 N.W.2d 310, 335 (Minn. 2016) (quotation omitted).

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[7] The state suggests that the district court also instructed the jury on domestic-assault-harm. Although the district court gave an instruction defining the general crime, it gave instructions only as to the elements of domestic-assault-fear and clarified those elements' application to the charge against Larkins, stating: "The term 'assault' *as used in this case* means an act done with intent to cause [the victim] to fear immediate bodily harm or death." (Emphasis added.) And immediately following the instructions regarding the elements of the offense, the district court instructed the jury: "If you find that *each* of *these* elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that *any* element has not been proven beyond a reasonable doubt, the defendant is not guilty." (Emphasis added.)

Here, the prosecutor plainly erred by contradicting the instruction given by the district court regarding a necessary element of the offense. It is the district court's duty to instruct the jury on the law. *Cao*, 788 N.W.2d at 716. And though a prosecutor may properly *refer* to the law, *see id.*, the prosecutor's closing argument here went far beyond mere reference. The district court defined only the elements of domestic-assault-*fear* and did not define the elements of domestic-assault-harm. Yet the prosecutor *twice* characterized the first element of domestic assault as one of assault-*harm*, stating (1) "[t]he [s]tate needs to prove [Larkins] intentionally inflicted or attempted to inflict bodily *harm* on [the victim]" and (2) "[t]he testimony and evidence in this case proves that [Larkins] intentionally caused bodily *harm* to [the victim]. Element 1 is met." This case is therefore distinguishable from the circumstances in *Cao*, where the prosecutor's challenged statement was rhetorical and *not* tantamount to a jury instruction. *Id.*

The state suggests that the prosecutor did not plainly err because her argument was consistent with the charge set forth in the complaint, and Larkins had notice of the state's assault-harm theory. And the state repeats its alternative-means argument, relying on *Dalbec* to claim that the prosecutor's statements were not error because the statute provides alternative *means* of committing domestic assault. But these arguments do nothing to justify a prosecutor's act of defining a necessary element of the crime in contravention of the district court's instruction. And notably, the state fails to acknowledge that the prosecutor argued in contravention of the state's *own proposed jury instructions*. We see no merit in the state's contention because, regardless of the charging language *in the complaint,* the charge *submitted to the jury* was limited on its elements to one of domestic

assault based on an act committed with the specific intent to cause the victim to fear immediate bodily harm or death. We conclude that the prosecutor plainly erred by giving a contradictory instruction on a necessary element and urging the jury to find Larkins guilty on that basis.

B. The error prejudiced Larkins's substantial rights.

Because Larkins has demonstrated plainly erroneous misconduct, the state bears the burden of demonstrating that the error did not affect Larkins's substantial rights. *Dobbins*, 725 N.W.2d at 508. "[T]he [s]tate must show that there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict." *State v. Peltier*, 874 N.W.2d 792, 803-04 (Minn. 2016) (quotation omitted). In assessing prejudice to substantial rights, we may consider the strength of the state's evidence, the pervasiveness of the erroneous conduct, and the defendant's ability to rebut improper remarks. *Id.* at 805-06.

The state contends that any potential misconduct was not prejudicial because its case was strong, defense counsel failed to object, and Larkins responded to the assault-harm theory. Larkins contends that the error was prejudicial because (1) the state's proof of Larkins's intent to cause the victim to fear immediate bodily harm or death was weak and (2) the jury likely found Larkins guilty on a domestic-assault-harm theory because the evidence for that charge was much stronger.

The strength of the evidence weighs in the state's favor, but not overwhelmingly so. Through witness testimony and video-recorded interviews, the state introduced ample evidence from which the jury *could* infer Larkins's specific intent to cause fear. Although

we have concluded that the evidence is sufficient to sustain a conviction for domestic-assault-fear, our review in that context differs from our consideration of the strength of the state's evidence on a claim of prosecutorial misconduct. Our sufficiency review requires us to assume, on the basis of the guilty verdict, that the jury accepted the state's evidence as true. *See Loving*, 891 N.W.2d at 643. But on a claim of prosecutorial misconduct, we consider the strength of evidence to assess how a claimed error might have influenced the verdict. *See Peltier*, 874 N.W.2d at 803-04.[8] Here, there were numerous inconsistencies between testimony and recorded statements, and as Larkins has emphasized, there was no direct evidence of clearer types of intent to cause fear, such as intimidation with weapons or threats of violence.

The pervasiveness of the misconduct weighs heavily in Larkins's favor. The prosecutor (1) defined the assault-harm element, (2) recounted each witness's testimony and emphasized the physical act of Larkins punching the victim, (3) emphasized corroborating evidence that the physical assault occurred, (4) argued that the redness on the victim's face and the fact of her pain "is enough . . . to find a defendant caused bodily harm," (5) argued that Larkins "intentionally caused" this bodily harm, and (6) concluded that the evidence proved the element based on the intentional infliction of bodily harm. The prosecutor made limited references to the victim's panic and distress, but the arguments were aimed at preempting responsive arguments regarding witness credibility.

[8] The state conflates these frameworks, quoting *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989), for the proposition that we assume the jury believed the state's witnesses. The relevant language from *Moore* concerns a challenge to the sufficiency of the evidence, not a claim of prosecutorial misconduct.

The prosecutor's emphasis on the actual physical harm continued to pervade her rebuttal argument.

Larkins had an opportunity to rebut the prosecutor's challenged remarks either by objecting or in the responsive closing argument. He failed to do so. This factor weighs in the state's favor.

The state suggested during oral argument that any potential prejudice was mitigated by the district court's cautionary instructions to the jury indicating that they should follow the law defined by the court and ignore inconsistent statements of the attorneys. But the state did not raise this argument in its responsive brief, and so it is forfeited. *See State v. Tracy*, 667 N.W.2d 141, 145 (Minn. App. 2003) (declining to consider argument raised for first time at oral argument).

Larkins's argument regarding the strength of the state's case of domestic-assault-harm is also persuasive. The potential prejudice of the prosecutor's improper arguments was magnified because the state presented overwhelming evidence of the actual infliction of harm and then focused on this evidence during closing argument as the basis for returning a guilty verdict. We weigh this factor in Larkins's favor.

On this record, the state's arguments fail to convince us that "there is no reasonable likelihood that the absence of the misconduct . . . would have had a significant effect on the verdict." *Peltier*, 874 N.W.2d at 803-04 (quotation omitted). The state therefore has failed to demonstrate that the improper remarks did not affect Larkins's substantial rights.

C. Reversal and remand is necessary to protect the integrity of the judicial proceeding.

"If all three prongs of the test are met, we may correct the error only if it seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 804. Larkins contends that we "cannot countenance" the prosecutor's argument "that the jury should find Larkins guilty of a crime on which the court did not instruct the jury" because the error deprived him of his right to a fair trial. We agree that a new trial is warranted to protect the integrity of the judicial proceeding. "Prosecutors have an affirmative obligation to ensure that a defendant receives a fair trial" and are obliged "to guard the rights of the accused." *State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006) (quotation omitted). Where the prosecutor proposed an instruction defining assault-fear, failed to object to the instruction when it was given to the jury, gave a contradictory instruction to the jury on assault-harm, and urged the jury to find Larkins guilty on that basis, the error implicates fundamental concerns of fairness and integrity of the proceeding, warranting a new trial.

Reversed and remanded.