STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0533

State of Minnesota,
Respondent,

vs.

Michael Robert Weldon,
Appellant.

Filed June 12, 2017
Reversed and remanded
Johnson, Judge
Concurring specially, Bjorkman, Judge

Olmsted County District Court
File No. 55-CR-15-3248

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Mark A. Ostrem, Olmsted County Attorney, James P. Spencer, Assistant County Attorney, Rochester, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Johnson, Judge; and Randall, Judge.*

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

U N P U B L I S H E D O P I N I O N

JOHNSON, Judge

An Olmsted County jury found Michael Robert Weldon guilty of violating a domestic-abuse no-contact order. The statute setting forth the offense requires proof beyond a reasonable doubt that a defendant knew of the existence of the order. The statute also defines the word "know" to mean that a person "believes that the specified fact exists." Weldon argues on appeal that (1) the district court erred by limiting his testimony as to whether he believed that the domestic-abuse no-contact order was in effect, (2) the district court erred by declining to instruct the jury on the statutory definition of the word "know," and (3) the prosecutor engaged in misconduct by misstating the law in closing argument. With respect to the first issue, we conclude that the district court erred in its evidentiary ruling, but we also conclude that the error is harmless. With respect to the second and third issues, we conclude that the district court erred in its jury instructions and that the prosecutor misstated the law in closing arguments. Therefore, we reverse and remand for a new trial.

FACTS

Weldon and P.B. have been married since 2004. On February 17, 2015, they had a physical altercation at their residence. P.B. called the police, who arrested Weldon.

The next day, the state charged Weldon with one count of domestic assault, in violation of Minn. Stat. § 609.2242, subd. 2 (2014). At Weldon's first appearance on February 19, 2015, the district court issued a domestic-abuse no-contact order (DANCO) that prohibited Weldon from contacting P.B.

On March 27, 2015, Weldon pleaded guilty to the domestic-assault charge. At the plea hearing, the district court advised Weldon that the DANCO would remain in effect. The district court also said to the prosecutor, "[I]f you hear something differently on that, that can be addressed in a letter to the Court."

On May 12, 2015, the district court received a letter that was handwritten by P.B. The letter was undated and was not addressed to any particular person. In the letter, P.B. identified herself as Weldon's wife and wrote: "I would like to request DANCO be lifted—ASAP! Thank-you—questions please feel free to contact me! . . . Defendant is Michael Robert Weldon. Please do this ASAP & notify me at above phone #."

On May 17, 2015, law-enforcement officers received a report of an argument at Weldon's and P.B.'s residence. An Olmsted County Deputy Sheriff responded to the report. Before arriving, the deputy learned that a DANCO prohibited Weldon from having contact with P.B. After arriving at the residence and speaking with Weldon and P.B., the deputy arrested Weldon.

The next day, the state charged Weldon with one count of a felony violation of a DANCO, in violation of Minn. Stat. § 629.75, subd. 2(d)(1) (2014). The state later amended the complaint to allege three counts of felony violations of a DANCO. Count 1 is based on an allegation that Weldon had contact with P.B. between May 1 and May 11, 2015. Count 2 is based on an allegation that Weldon had contact with P.B. between May 12 and May 16, 2015. Count 3 is based on an allegation that Weldon had contact with P.B. on May 17, 2015.

The three DANCO-violation charges were tried to a jury on three days in November 2015. The parties stipulated that the DANCO existed on the dates that Weldon was alleged to have contacted P.B. and that Weldon had two or more qualifying prior offenses, which enhanced the charges to felonies. The only disputed issue at trial was whether Weldon knew of the existence of the DANCO at the time of the alleged offenses.

The state called two witnesses: first, the deputy who arrested Weldon on May 17 and, second, P.B. The deputy testified that when he arrived at P.B.'s and Weldon's residence on May 17, P.B. told him that Weldon lived in the home. The deputy also testified that P.B. may have told him that a DANCO prohibited Weldon from having contact with her.

P.B. testified as follows: Weldon cannot read because of a permanent vision impairment, so he relies on her to read documents aloud to him. Before Weldon's first appearance on the underlying domestic-assault charge, she told a victim advocate that she wished to maintain contact with Weldon, but Weldon nonetheless moved out after the district court issued the DANCO. After Weldon's first appearance on the underlying domestic-assault charge, she wrote a letter to the county attorney in which she asked that the DANCO be lifted. She does not remember when she wrote the letter, except that she sent it approximately two weeks after writing it. She does not recall whether she mailed the letter or hand-delivered it to the county attorney. After sending the letter, she did not appear in court and did not have any communication with the district court. In late April 2015, she told Weldon about the letter and "told him that he was welcome to come home."

Weldon returned home approximately two or three weeks before he was arrested on May 17. P.B. suffers from Wernicke's disease, which impairs her memory.

The state's evidence included several exhibits, including the DANCO that was issued by the district court on February 19, an amended DANCO issued by the district court on March 27, P.B.'s handwritten letter requesting that the DANCO be lifted, and audio-recordings of the pre-trial hearings on February 19 and March 27.

In the defense case, Weldon testified as follows: He understood that the district court had issued a DANCO, and he understood that the DANCO prohibited him from contacting P.B. Consequently, he did not live with P.B. and had no contact with her after the district court issued the DANCO. Because of the district court's comments at the March 27 hearing, he believed that the DANCO could be lifted by making a request to the county attorney's office. He typically relies on P.B. to read his written correspondence because of his vision impairment. On a date he cannot remember, P.B. called him and told him that she had written a letter and that "it was taken care of, and . . . I could come home." P.B. read the letter to him over the telephone. He did not receive any written communication from the district court saying that the DANCO had been cancelled. He does not remember when he moved back into the home. He was surprised when he was arrested on May 17 because he believed that the DANCO had been cancelled. Weldon did not call any other witnesses.

The jury found Weldon guilty on all three counts. The district court pronounced a sentence of 18 months of imprisonment on count 3, which concerned Weldon's contact with P.B. on May 17, but stayed imposition of the sentence for five years and placed

Weldon on probation. The district court dismissed counts 1 and 2 without an adjudication. Weldon appeals.

D E C I S I O N

Weldon argues that he should receive a new trial for three reasons: (1) the district court erred by excluding some of his testimony as to whether he believed in May 2015 that the DANCO was in effect, (2) the district court erred by not instructing the jury on the statutory definition of the word "knows," and (3) the prosecutor engaged in misconduct by misstating the law in closing argument.[1]

Weldon's three arguments are inter-related. Each argument depends on the meaning of the statute that sets forth the offense of which he was convicted. The statute provides that a person commits a crime if he "knows of the existence of a domestic abuse no contact order issued against the person and violates the order." Minn. Stat. § 629.75, subd. 2(b) (2014). In *State v. Watkins*, 840 N.W.2d 21 (Minn. 2013), the supreme court interpreted a

[1]Because the district court pronounced a sentence on count 3 but dismissed counts 1 and 2, we consider Weldon's arguments only with respect to count 3. In general, a defendant may pursue a direct appeal "from any adverse final judgment." Minn. R. Crim. P. 28.02, subd. 2(1). "A final judgment within the meaning of these rules occurs when the district court enters a judgment of conviction and imposes or stays a sentence." *Id.* "The record of a judgment of conviction must contain," among other things, the "sentence." Minn. R. Crim. P. 27.03, subd. 8. If a defendant is found guilty of an offense but the district court has neither imposed a sentence nor stayed imposition of a sentence, the defendant has not been convicted of that offense and, thus, does not have a right to pursue a direct appeal with respect to that offense. *See State v. Hoelzel*, 639 N.W.2d 605, 609-10 (Minn. 2002) (holding that verdict of guilt, without recorded judgment of conviction, is not final, appealable judgment); *State v. Ashland*, 287 N.W.2d 649, 650 (Minn. 1979) (declining to address sufficiency-of-evidence argument with respect to counts on which defendant was found guilty but not formally adjudicated or sentenced). Thus, we will not consider Weldon's arguments as they relate to counts 1 and 2.

prior version of the statute, which provided that, in a felony DANCO-violation prosecution, the state was required to prove that the defendant knew of the order and *knowingly* violated the order. *Id.* at 25 n.2 (citing Minn. Stat. § 629.75, subd. 2(d) (2012)). The supreme court concluded that, to knowingly violate a DANCO, a defendant must "perceive directly" that his contact violates a DANCO and that a defendant's "reasonable belief that his contact did not violate the DANCO could negate the mental state of the charged offense." *Id.* at 29. Shortly after *Watkins*, the legislature amended the statute by deleting the word "knowingly." 2013 Minn. Laws 203 ch. 47, § 5, at 207-08. As a result, the state no longer must prove that a defendant *knowingly* violated a DANCO. *See id.* But the state still must prove that a defendant knew of the existence of a DANCO and violated it. *See* Minn. Stat. § 629.75, subd. 2(b) (2014).

Weldon's theory at trial was that he did not know of the existence of the DANCO because, even though he knew that it had been issued, he believed that it had been cancelled in some way. In opening statements, his attorney stated, "At the end of the day, this case [is] about what Mr. Weldon knew, or what he thought he knew, and why he thought it." During the evidentiary phase of the case, Weldon introduced evidence (as described above) that P.B. told him that she had written a letter to the county attorney to ask that the DANCO be cancelled and that Weldon believed that her letter caused the DANCO to be cancelled. In closing argument, Weldon's trial attorney argued to the jury that Weldon did not know that the DANCO continued to exist on the date of his arrest because he relied on and trusted in P.B.'s statements that the DANCO had been cancelled. Meanwhile, the prosecutor argued to the jury that Weldon's subjective belief concerning the effectiveness of the

DANCO is irrelevant. On appeal, Weldon contends that he was prevented from persuading the jury that he should be found not guilty on the ground that he believed that the DANCO no longer was in effect. In response, the state contends that, to prove that Weldon knew of "the existence of" the DANCO, the state need prove only that Weldon knew that the DANCO had been issued but need not prove that Weldon knew that the DANCO was valid or that it still was in effect at the time of the alleged criminal conduct.

The parties' contentions raise an issue of statutory interpretation. We begin the task of interpreting a statute by asking "whether the statute's language, on its face, is ambiguous." *American Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001). A statute is unambiguous if it "is susceptible to only one reasonable interpretation." *Nelson v. Schlener*, 859 N.W.2d 288, 292 (Minn. 2015). If a statute is unambiguous, we "interpret the words and phrases in the statute according to their plain and ordinary meanings." *Graves v. Wayman*, 859 N.W.2d 791, 798 (Minn. 2015). A statute is ambiguous, however, if it has "more than one interpretation." *Lietz v. Northern States Power Co.*, 718 N.W.2d 865, 870 (Minn. 2006) (quotation omitted). If a statute is ambiguous, we apply "the canons of statutory construction to determine its meaning." *County of Dakota v. Cameron*, 839 N.W.2d 700, 705 (Minn. 2013). We apply a *de novo* standard of review to a district court's interpretation of a statute. *Caldas v. Affordable Granite & Stone, Inc.*, 820 N.W.2d 826, 836 (Minn. 2012).

As stated above, a person may not be convicted of violating a DANCO unless the person "knows of the existence of a domestic abuse no contact order issued against the person." Minn. Stat. § 629.75, subd. 2(b). By definition, a court order is "a command or

direction" that requires a person to take certain action or refrain from taking certain action. *See Garner's Dictionary of Legal Usage* 640 (3d ed. 2011). If an order has been vacated, a person who previously was subject to the order no longer is required to take action or refrain from taking action. In that situation, the order would cease to exist because there no longer would be an effective command or direction. The interpretation urged by the state would continue to recognize the existence of an order even after it had been vacated, apparently because a piece of paper signed by a judge continues to exist. But an order is in existence, in the sense used in section 629.75, subdivision 2(b), only if the order remains in effect such that a person is required to comply with the terms of the order. Thus, a person "knows of the existence of a domestic abuse no contact order," Minn. Stat. § 629.75, subd. 2(b), only if the person knows that a DANCO has been issued and knows that it continues to be in effect at the time of the alleged violation.

I. Evidentiary Ruling

Weldon argues that the district court erred by excluding his testimony concerning whether be believed that a DANCO was in effect when he had contact with P.B. During Weldon's direct examination, his attorney asked, "When you were at [P.B.]'s, did you believe—when you had returned home in May of 2015, did you believe there was an active DANCO?" Weldon answered, "No." The state objected on the ground of lack of relevance. The district court sustained the objection and instructed the jury to disregard Weldon's answer.

On appeal, Weldon contends that the district court's ruling on the state's objection violated his constitutional right to present a complete defense. Weldon did not present that

particular theory to the district court at trial. Nonetheless, a criminal defendant's due process right to present a complete defense generally "yields to the application of an evidentiary rule unless the rule 'infringe[s] upon a weighty interest of the accused and [is] arbitrary or disproportionate to the purposes [the rule is] designed to serve'" or unless the rules of evidence "'serve no legitimate purpose or . . . are disproportionate to the ends that they are asserted to promote.'" *State v. Pass*, 832 N.W.2d 836, 841-42 (Minn. 2013) (quoting *Holmes v. South Carolina*, 547 U.S. 319, 324-26, 126 S. Ct. 1727, 1731-32 (2006)) (alterations in original). Because there is no argument in this case that the district court applied an evidentiary rule that is arbitrary or disproportionate or serves no legitimate purpose, we will apply the rules of evidence concerning relevance.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. With some exceptions, "[a]ll relevant evidence is admissible," and "[e]vidence which is not relevant is not admissible." Minn. R. Evid. 402. Furthermore, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Minn. R. Evid. 403. This court applies an abuse-of-discretion standard of review to a district court's evidentiary ruling based on relevance. *State v. Schulz*, 691 N.W.2d 474, 477 (Minn. 2005).

As described above, a person may be found guilty of violating a DANCO if the state proves that the person "knows of the existence of a [DANCO] issued against the person

and violates the order." Minn. Stat. § 629.75, subd. 2(b). Furthermore, the legislature has defined the word "know" as follows: "'Know' requires only that the actor *believes* that the specified fact exists." Minn. Stat. § 609.02, subd. 9(2) (2014) (emphasis added). Accordingly, evidence concerning whether Weldon believed that the DANCO was in effect when he had contact with P.B. is directly relevant to the factual issue that the jury was asked to determine. Thus, the district court erred by sustaining the state's relevance objection to Weldon's attorney's question concerning whether Weldon believed that the DANCO was in effect.

The state does not argue in the alternative that any error would be a harmless error. *See* Minn. R. Crim. P. 31.01. This court nonetheless has discretion to conduct a harmless-error analysis if the error obviously is harmless or if certain factors are present. *State v. Porte*, 832 N.W.2d 303, 312-14 (Minn. App. 2013). In the circumstances of this case, the error obviously is harmless. In other parts of his direct examination, Weldon was allowed to testify extensively and without objection to his belief that the DANCO had been cancelled before he had contact with P.B. For example, before the district court sustained the state's relevance objection, Weldon's attorney asked him, "Do you believe the [DANCO] had been cancelled or lifted somehow?" Weldon responded, "Yes." Shortly thereafter, Weldon testified about his belief that the DANCO could be cancelled by writing a letter to the county attorney and that he believed that the DANCO had been cancelled because P.B. had told him that she had written such a letter. Later, after the district court sustained the state's relevance objection, Weldon's attorney asked him about his reaction when he was arrested on May 17, and Weldon testified that he was surprised because "I

didn't think there was any [DANCO]." Despite the district court's single erroneous ruling, it is obvious that Weldon was allowed to give essentially the same testimony at other times during his direct examination.

Thus, the district court erred by excluding part of Weldon's testimony as to whether he believed that the DANCO was in effect, but the error was harmless.

II. Jury Instruction

Weldon argues that the district court erred by denying his request for a jury instruction that would have explained the charged offense by informing the jury of the statutory definition of the word "know." As stated above, the legislature has defined the word "know" as follows: "'Know' requires only that the actor believes that the specified fact exists." Minn. Stat. § 609.02, subd. 9(2).

A district court must instruct the jury in a way that "fairly and adequately explain[s] the law of the case" and does not "materially misstate[] the applicable law." *State v. Koppi*, 798 N.W.2d 358, 362 (Minn. 2011). To accomplish those goals, "jury instructions must define the crime charged and explain the elements of the offense to the jury." *State v. Vance*, 734 N.W.2d 650, 656 (Minn. 2007), *overruled on other grounds by State v. Fleck*, 810 N.W.2d 303, 311 (Minn. 2012); *see also State v. Milton*, 821 N.W.2d 789, 806 (Minn. 2012). A jury instruction may inaccurately define the charged offense and inaccurately explain the elements of the offense by omitting a statutory definition. *State v. Bustos*, 861 N.W.2d 655, 662-63 (Minn. 2015). In explaining the elements of an offense, "detailed definitions of the elements to the crime need not be given . . . if the instructions do not mislead the jury or allow it to speculate over the meaning of the elements." *Peterson v.*

State, 282 N.W.2d 878, 881 (Minn. 1979). However, "detailed definitions of an element of an offense may be necessary if, without the additional detail, the instructions could mislead the jury or cause the jury to speculate about what the state must prove to obtain a guilty verdict." *State v. Moore*, 863 N.W.2d 111, 120 (Minn. App. 2015), *review denied* (Minn. July 21, 2015). This court applies an abuse-of-discretion standard of review to a district court's jury instructions, *Koppi*, 798 N.W.2d at 361, reviewing them "as a whole to determine whether [they] accurately state the law in a manner that can be understood by the jury," *State v. Kelley*, 855 N.W.2d 269, 274 (Minn. 2014).

In this case, the district court instructed the jury that the first element of the charged offense is that "there was an existing Domestic Abuse No-Contact Order." The district court further instructed the jury that "[t]he parties have stipulated that there was an existing Domestic Abuse No-Contact Order" and, thus, the first element "has been proved beyond a reasonable doubt." The district court then instructed the jury that the second element of the offense is that "the Defendant knew of the existence of the order." The district court's instruction concerning the elements of the offense is nearly identical to commonly used pattern instructions for this offense. *See* 10 Minn. Dist. Judges' Ass'n, *Minnesota Practice—Jury Instruction Guides* §§ 13.53, .54, at 501, 502-03 (5th ed. 2006).

At the instructions conference, Weldon asked the district court to insert one sentence after the instruction on the second element to incorporate the statutory definition of the word "know." Weldon requested this instruction: "'To know' requires only that the actor believes that the specified fact exists." *See* 10 Minn. Dist. Judges' Ass'n, *Minnesota Practice—Jury Instructions Guides* § 7.10, at 124 (5th ed. 2006). The instruction requested

by Weldon is virtually identical to the statutory definition. *See* Minn. Stat. § 609.02, subd. 9(2). The state opposed the requested instruction. The district court expressed doubt that a defendant could avoid criminal liability if a jury found that the defendant believed, but did not know, that a DANCO was not in existence. After extensive discussion with counsel, the district court declined to include the statutory definition in the instructions on the ground that the statutory definition would not clarify the second element of the offense.

On appeal, Weldon contends that he should be found not guilty if he were able to convince a jury that he *believed* that the order no longer was in existence on May 17, even if he was not *certain* that the DANCO no longer was in existence on that date. Weldon relies on *Moore*, in which this court concluded that a district court erred by not including a statutory definition of the word "force" in its instructions on the elements of third-degree criminal sexual conduct. 863 N.W.2d at 119-20. We reached that conclusion for two reasons. First, the legislature had defined the word within the statute and, thus, had given the word a specific meaning as a matter of law. *Id.* at 120. Second, the statutory definition was significantly different from the common understanding of the word, which might have caused jurors to find a defendant guilty based on facts that are within the lay definition of the word but not within the statutory definition of the word. *Id.* at 120-21. We noted, "Such an outcome would be inconsistent with a defendant's right to 'a jury determination that he is guilty of every element of the crime with which he is charged.'" *Id.* at 121 (quoting *State v. Caldwell*, 803 N.W.2d 373, 384 (Minn. 2011) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S. Ct. 2348, 2356 (2000), and *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1072 (1970))).

The statutory definition of the word "know" that Weldon sought to include in the instruction is meaningfully different from the common understanding of the word such that, without the statutory definition, the instructions might "mislead the jury or allow it to speculate over the meaning of the elements." *See Peterson*, 282 N.W.2d at 881. The common understanding of the word "know" reflects the concept of certainty. The supreme court adopted such a definition in *Watkins*, stating that the word "know" means '"to perceive directly; grasp in mind *with clarity or certainty*."' 840 N.W.2d at 29 (quoting *The American Heritage Dictionary of the English Language* 970 (4th ed. 2006)) (emphasis added). The dictionary cited in *Watkins* goes further by also defining the word "know" to mean, "To regard as true beyond doubt." *American Heritage*, *supra*, at 970. Another leading dictionary also defines the word in a way that incorporates the concept of certainty: "To perceive or apprehend as true; . . . to have mental certitude in regard to, together with clear, comprehension of." *Webster's New International Dictionary* 1372 (2d ed. 1946). Thus, when jurors were asked to decide whether Weldon "knew" of the existence of the DANCO, the jurors likely understood the instruction to ask whether Weldon *knew with certainty* that the DANCO no longer was in existence. That is the question that the prosecutor suggested to the jury in closing argument.[2]

[2]We acknowledge that, in a different case, the state (rather than the defendant) might prefer that the district court include the statutory definition in the instructions. Such an instruction might allow the state to argue that, if there was doubt or ambiguity as to whether a DANCO had been vacated, the jury should find that the defendant nonetheless continued to *believe* that a DANCO was in existence (rather than that the defendant did not believe that it was not in existence). But that was not the state's position at trial in this case, and it is not the state's position on appeal.

In contrast, the word "believe," which is the operative verb in the statutory definition of "know," connotes a degree of uncertainty. A leading contemporary dictionary defines "believe" to mean, "To have faith, confidence, or trust," and "To have confidence in the truth or value of something." *American Heritage*, *supra*, at 169; *see also Webster's New International*, *supra*, at 248 (providing similar definitions). Accordingly, if jurors had been asked to decide whether Weldon *believed* in the existence of the DANCO, the jurors likely would have understood the instruction to ask whether Weldon *had confidence* or *trusted* that the DANCO no longer was in existence. The jury might have decided that Weldon did not believe that a DANCO existed based on the evidence that he heard the district court say that the DANCO could be lifted by writing a letter, the evidence that P.B. had told him that she had written such a letter and that "it was taken care of," and Weldon's testimony that he believed that the DANCO had been cancelled.

The difference between the statutory definition of "know" and the common definition of the word may be subtle, but it was a meaningful difference in the circumstances of this case. Whether Weldon knew of the existence of the DANCO was the sole issue in dispute. Weldon presented evidence that, even though he knew that a DANCO had been issued, he believed that it had been cancelled. The statutory definition of the word "know" would have supported his theory of the defense. But without an instruction on the statutory definition, his attorney was unable to fully present the theory to the jury. Meanwhile, the prosecutor took advantage of the absence of such an instruction by arguing that Weldon's belief was not a valid defense. *See infra* part III.

For these reasons, we conclude that the district court erred by denying Weldon's request to include the statutory definition of "know" in the jury instructions. The statutory definition of "know" is law and, furthermore, is meaningfully different from the common definition of the word. The absence of the statutory definition might have "misl[ed] the jury or allow[ed] it to speculate over the meaning of the elements." *See Peterson*, 282 N.W.2d at 881. The state does not argue in the alternative that any error would be harmless, and the error does not obviously appear to be harmless, *see Porte*, 832 N.W.2d at 312-14. Therefore, Weldon is entitled to a new trial with a properly instructed jury.

III. Closing Argument

Weldon argues that the prosecutor committed misconduct by misstating the law during closing argument.

The right to due process of law includes the right to a fair trial, and the right to a fair trial includes the absence of prosecutorial misconduct. *Spann v. State*, 704 N.W.2d 486, 493 (Minn. 2005); *State v. Ferguson*, 729 N.W.2d 604, 616 (Minn. App. 2007), *review denied* (Minn. June 19, 2007). A prosecutor engages in misconduct if he or she misstates the applicable law in closing argument. *State v. Cao*, 788 N.W.2d 710, 715 (Minn. 2010); *State v. Strommen*, 648 N.W.2d 681, 689-90 (Minn. 2002).

Weldon concedes that he did not object to the prosecutor's alleged misstatement of the law at the time that it occurred. Accordingly, this court must apply a modified plain-error test. *State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012). To prevail, Weldon must establish that there was an error and that the error is plain. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). If Weldon can establish a plain error, the burden would

shift to the state to show that the plain error did not affect Weldon's substantial rights. *Id.* "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." *State v. Peltier*, 874 N.W.2d 792, 804 (Minn. 2016).

In his closing argument, the prosecutor emphasized the state's position that Weldon could not escape criminal liability on the ground that he believed that the DANCO was not in effect when he had contact with P.B. For example, the prosecutor stated to the jury that Weldon could not defend against the charges by saying, "I thought the DANCO had been cancelled" because such a belief "simply does not give rise to a defense under these circumstances in this case." The prosecutor also stated,

> [O]nce the Defendant has been notified of this order, that he knows of the existence, that he is on notice that this is now the Defendant's responsibility. And it's the Defendant's responsibility to ascertain once and for all if this order is in effect before he has contact with the victim, or he assumes the risk of the consequences in doing so.

The prosecutor also stated that it would be impractical to prove "what he believed or didn't believe" and that the state need only prove that Weldon "knew about the order and violated it." These are mere examples; an incorrect principle of law permeated the prosecutor's closing argument.

The first question is whether the prosecutor committed an error by misstating the applicable law. In *Strommen*, the prosecutor committed misconduct by misstating the law of abandonment, which was the defendant's defense at trial. 648 N.W.2d at 689. This case is similar in that the prosecutor misstated the law concerning Weldon's state of mind with

respect to the effectiveness of the DANCO. The state contends that the prosecutor's closing argument was consistent with the jury instructions and with the district court's comments during the instructions conference. But, as discussed above in part II, the district court's jury instructions were erroneous. In any event, the focus of the analysis "is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219, 102 S. Ct. 940, 947 (1982). Thus, we conclude that the prosecutor engaged in misconduct by misstating the applicable law in his closing argument.

The second question is whether the error is plain. A misstatement of law in closing argument is plain if the statement clearly "contravenes case law, a rule, or a standard of conduct." *Cao*, 788 N.W.2d at 715; *see also Strommen*, 648 N.W.2d at 689. As explained above, the state must prove that a defendant "knows of the existence" of the DANCO, Minn. Stat. § 629.75, subd. 2(b), and the word "knows" is defined by statute to mean that the defendant "*believes* that the specified fact exists," Minn. Stat. § 609.02, subd. 9(2) (emphasis added). The prosecutor's closing argument plainly is inconsistent with the statute setting forth the offense of conviction, which includes a statutory definition of "know." Thus, we conclude that the error is plain.

The third question is whether the state has shown that the plain error did not affect Weldon's substantial rights. *Ramey*, 721 N.W.2d at 302. The state does not attempt to make such a showing. Its responsive brief addresses the first and second requirements of the modified plain-error test but goes no further. Accordingly the state has not carried its burden of showing that the plain error did not affect Weldon's substantial rights. *See Ramey*, 721 N.W.2d at 302. Furthermore, the prosecutor's plain error "seriously affect[s]

the fairness, integrity, or public reputation of" Weldon's trial. *See Peltier*, 874 N.W.2d at 804.

Thus, we must conclude that the prosecutor's plain error is a reversible error. Thus, the prosecutor's plain error in misstating the law in closing argument also requires a new trial.

Reversed and remanded.

BJORKMAN, Judge (concurring specially)

I concur in the result and join in parts I and III of the court's opinion. I do not join in part II because I discern no abuse of discretion by the district court. The jury instructions, when viewed as a whole, "accurately state the law in a manner that can be understood by the jury." *State v. Kelley*, 855 N.W.2d 269, 274 (Minn. 2014). In my view, the common understanding of the phrase "to know of" does not so far depart from the statutory elements of the domestic-abuse no-contact order (DANCO) offense or the statutory definition of "know" to confuse the jury or alter the state's burden of proof. But I agree that the prosecutor's closing argument misstated the law in a way that affected Weldon's substantial rights.

After objecting to Weldon's testimony and opposing his request that the jury be instructed on the Minn. Stat. § 609.02, subd. 9(2) (2014) definition of "know"—requiring only that a person "believes that the specified fact exists"—the prosecutor chose to frame his closing argument around the notion that Weldon cannot escape criminal responsibility based on his subjective belief that the DANCO had been cancelled. The state cannot have it both ways. As noted in part I, to establish a DANCO violation, the state must prove that the defendant "knows of the existence of a [DANCO]" at the time of the alleged violation. Whether "know" is construed as a belief, awareness, understanding, or certain knowledge, the state must prove the defendant was cognizant that the DANCO existed at the time of the offense. The prosecutor's contrary argument to the jury constitutes prejudicial plain error.