**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A18-1483**

State of Minnesota,
Respondent,

vs.

Kathleen Lynn Alvar,
Appellant.

**Filed August 26, 2019**
**Affirmed**
**Smith, Tracy M., Judge**

Morrison County District Court
File No. 49-CR-18-188

Keith Ellison, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Brian Middendorf, Morrison County Attorney, Little Falls, Minnesota (for respondent)

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

Considered and decided by Smith, Tracy M., Presiding Judge; Schellhas, Judge; and

Peterson, 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

**SMITH, TRACY M.**, Judge

In this direct appeal, appellant Kathleen Alvar argues that her convictions for third-degree assault and domestic assault must be reversed and a new trial granted because (1) the prosecutor committed misconduct by arguing the wrong legal standard for self-defense during closing argument and (2) the district court abused its discretion by not permitting Alvar to introduce evidence of past abuse by S.A. to support her claim of self-defense. We affirm.

## FACTS

According to trial testimony, on February 2, 2018, Alvar's husband, S.A., returned home from work around midnight. Alvar was there, vacuuming. S.A. went into his room and noticed that the room had been disrupted. Alvar then started to yell at S.A., accusing him of cheating on her. S.A. yelled back and complained to Alvar about leaving their dog's hard-plastic shock-collar case in the kitchen. In the middle of the argument, Alvar threw a water glass at S.A. The glass broke, causing a laceration close to S.A.'s left eye and extensive bleeding. At that moment, S.A. had a toiletry bag and the shock-collar case in his hands. S.A. went into the bathroom and looked at his injury. He then drove himself to an emergency room, where he received 14 stitches to his face and 2 stitches to his ear, leaving him with a facial scar.

Alvar called 911. She reported that S.A. had assaulted her and mentioned that she had a fat lip from S.A. hitting her with the shock-collar case. The responding officers arrived at the house. They found a broken water glass on the kitchen floor and saw blood

in the hallway, kitchen, and bathroom. Alvar initially told the officers that S.A. had been bleeding from the eye but later said that she did not know where the blood came from. Alvar told the officers that S.A. had yelled at her and hit her with the shock-collar case.

The state charged Alvar with third-degree assault causing substantial bodily harm, in violation of Minn. Stat. § 609.223, subd. 1 (2016), and domestic assault by intentionally inflicting or attempting to inflict bodily harm on another, in violation of Minn. Stat. § 609.2242, subd. 1(2) (2016). Alvar asserted self-defense. The jury found Alvar guilty of both crimes, and the district court entered convictions on both. The district court sentenced Alvar to a stay of imposition and five years' probation on the third-degree-assault offense.

This appeal follows.

## D E C I S I O N

### I. The prosecutor did not commit misconduct during closing argument.

Alvar argues that the prosecutor committed reversible misconduct by arguing the wrong legal standard for self-defense during closing argument. Alvar objected at trial. Objected-to prosecutorial misconduct is reviewed for harmless error. *State v. Hunt*, 615 N.W.2d 294, 301-02 (Minn. 2000). Under *State v. Caron*, the standard for determining whether an error was harmless varies based upon the severity of the misconduct:

> [I]n cases involving unusually serious prosecutorial misconduct this court has required certainty beyond a reasonable doubt that the misconduct was harmless before affirming. . . . On the other hand, in cases involving less serious prosecutorial misconduct this court has applied the test of whether the misconduct likely played a substantial part in influencing the jury to convict.

218 N.W.2d 197, 200 (Minn. 1974). The supreme court has questioned whether *Caron*'s two-tiered approach is still good law, while declining to decide the question. *See State v. McDaniel*, 777 N.W.2d 739, 749 (Minn. 2010). The answer does not matter here, however, because the prosecutor did not commit misconduct at all.

It is misconduct for a prosecutor to misstate the law during closing argument. *Id.* at 750-51. Alvar argues that the prosecutor misstated the self-defense standard by arguing that Alvar had to fear that her life was in danger to justify self-defense.

"In Minnesota, a person may act in self-defense if he or she reasonably believes that force is necessary and uses only the level of force reasonably necessary to prevent the bodily harm feared." *State v. Devens*, 852 N.W.2d 255, 258 (Minn. 2014). The state has the burden of persuasion for the self-defense issue. *Id.* Here, the state had to disprove that Alvar had a reasonable belief of imminent bodily injury.

When evaluating claims of prosecutorial misconduct arising out of closing argument, appellate courts "consider the closing argument as a whole rather than focus on particular phrases or remarks that may be taken out of context or given undue prominence." *State v. Johnson*, 616 N.W.2d 720, 728 (Minn. 2000) (quotation omitted). The prosecutor began her closing argument by arguing why S.A.'s testimony was credible and Alvar's was not. S.A. testified that he did not strike Alvar with the dog-collar case, and Alvar testified that he did. The prosecutor reviewed the inconsistencies in Alvar's version of events and argued why her testimony was inconsistent with the physical evidence.

Then, after describing the elements of the two charged offenses, the prosecutor discussed the self-defense claim, correctly stating:

> The judge also read the instruction to you that self-defense means that the person used reasonable force against [the victim] to resist an assault against the person and such an offense was being committed or the person reasonably believed it was.

The prosecutor continued:

> The question is, do you believe reasonably that [Alvar's] belief that [S.A.] was going to assault her is that reasonable?

The prosecutor then argued that the evidence—including the physical evidence, Alvar's behavior, and the inconsistencies in her story—did not support a finding that S.A. was assaulting or going to assault Alvar when she threw the glass at him.

The prosecutor then argued that, even if Alvar feared harm, her response had to be reasonable under the circumstances because the amount of force that may lawfully be used in self-defense is limited by what a reasonable person in the same situation would believe necessary. The statements in controversy followed. Contrasting a photograph of S.A.'s injuries with a photo of Alvar's face in which part of Alvar's upper lip appears to be slightly swollen and red, the prosecutor said, "I don't understand how this (indicating) warrants this (indicating) even if you believe her. This idea that somehow her life was in danger has been disproved if you believe this picture." Alvar objected, and the district court overruled the objection. The prosecutor then added, "You will get to determine if this picture shows that [S.A.] injured [Alvar] in such a way that she had reasonable grounds to believe that her life was in danger."

If read in isolation, these statements could imply, wrongly, that Alvar had to reasonably believe her life was in danger in order to act in self-defense. But, in context, the

prosecutor did not so mislead the jury. The prosecutor was discussing the reasonableness-of-force requirement of self-defense. Alvar had testified that, when she threw the glass, "[her] life [was] in danger, getting hurt and hit." Alvar's fear of death was relevant to the question of reasonableness. If the jury credited Alvar's testimony and concluded that Alvar had reasonably believed her life was in danger, the state would not have been able to meet its burden. The prosecutor, in comparing the photographs and making the challenged statements, was again challenging the credibility of Alvar's testimony that S.A. had assaulted her. In context, the prosecutor's statements were consistent with the law of self-defense. Alvar thus fails to show that the prosecutor committed misconduct by misstating the law.

## II. The district court did not abuse its discretion by not allowing Alvar to introduce evidence of past abuse by S.A.

Alvar argues that the district court violated her constitutional right to present a complete defense by not allowing her to introduce evidence of past abuse by S.A. A criminal defendant is guaranteed a constitutional right to present a meaningful defense. U.S. Const. amend. IV; Minn. Const. art. I, § 6. "That right, however, is not unlimited. Evidence that is repetitive . . . , only marginally relevant or poses an undue risk of harassment, prejudice [or] confusion of the issues may be excluded." *State v. Greer*, 635 N.W.2d 82, 91 (Minn. 2001) (alterations in original) (citation and quotation omitted).

"Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. The appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby

prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted). Where, as here, a district court excludes evidence, the abuse of discretion has to be shown on a record that is fairly limited in scope: "an offer of proof provides the [district] court with an opportunity to ascertain the admissibility of the proffered evidence and provides a record for a reviewing court to determine whether the lower court ruling was correct." *Santiago v. State*, 644 N.W.2d 425, 442 (Minn. 2002); *see also State v. Munt*, 831 N.W.2d 569, 583 (Minn. 2013) ("When the district court excludes evidence, an offer of proof provides the evidentiary basis for the court's decision.").

Alvar made multiple offers to introduce evidence of past abuse by S.A. First, in a motion filed a day before trial, Alvar explained that she wanted to introduce evidence of past abuse in order to support her claim of self-defense and to give context to the relationship between her and S.A. On the first day of trial, Alvar's attorney argued the motion and indicated that he wanted to introduce testimony from Alvar's father. When asked what the substance of the testimony would be, the attorney replied: "The relevant substance . . . is that he does know that [Alvar and S.A.] fought. He saw bruises on my client's arms, possibly on her throat at one time, that he did have a conversation with the alleged victim in this case, telling him never to put his hands on her."[1] Alvar's attorney also sought clarification on whether Alvar could "talk about past abuse against herself."

The district court ruled that neither Alvar nor her father could testify on past abuse by S.A. in general. After the trial began, Alvar's attorney objected to the ruling multiple

[1] Alvar's attorney did not say that Alvar's father could link the observed bruises to acts of abuse by S.A.

times and offered to introduce evidence of past abuse by S.A., but the district court did not change its ruling. The thrust of the district court's rationale for denying Alvar's offers of proof was that Alvar did not particularize the incidents of alleged past abuse. Given that the proffered evidence was not argued to be on any specific act of abuse perpetrated by S.A., the district court decided that it would be improper to open the door for Alvar or her father to testify generally on S.A.'s abusive proclivities.

Alvar does not argue that she offered to introduce evidence of specific incidents of abuse. Instead, she invokes two evidentiary rules to show that the proffered evidence was in fact admissible. First, she argues that the evidence was admissible under *State v. Zumberge*, 888 N.W.2d 688, 694 (Minn. 2017). *Zumberge* states:

> When self-defense is asserted, evidence of a specific act is admissible only to show that a defendant reasonably feared great bodily harm, provided that the defendant proves that he knew of the specific act at the time of the alleged offense. Evidence of specific acts of violence is admissible where commonsense indicates that these acts could legitimately affect a defendant's apprehensions.

888 N.W.2d at 694 (citation and quotation omitted).

Second, Alvar argues that the evidence of past abuse by S.A. was admissible as general relationship evidence. By "general relationship evidence," Alvar seems to be referring to the basis of introducing relationship evidence established under Minnesota caselaw, "independent of Minn. Stat. § 634.20, the *Spreigl*/rule 404(b) process, or the immediate-episode doctrine." *See State v. Hormann*, 805 N.W.2d 883, 890 (Minn. App. 2011), *review denied* (Minn. Jan. 17, 2012). In *State v. Loving*, the supreme court articulated the basic standard for this caselaw-based introduction of relationship evidence:

"[R]elationship evidence is character evidence that may be offered to show the strained relationship between the accused and the victim . . . . [S]uch evidence has further probative value when it serves to place the incident for which appellant was charged into proper context." 775 N.W.2d 872, 880 (Minn. 2009) (quotations omitted). Although *Spreigl*/rule 404(b) notice is not required before introducing relationship evidence under this standard, "[c]ourts typically apply parts of the *Spreigl*/rule 404(b) analysis to relationship evidence," *Hormann*, 805 N.W.2d at 890, including that the district court must find the prior bad act by clear and convincing evidence, *State v. Bauer*, 598 N.W.2d 352, 364 (Minn. 1999).

In sum, both of Alvar's asserted grounds for admission require the proffered evidence to be on a particular act committed in the past. But, as discussed earlier, Alvar did not make an offer of proof alleging any specific act of abuse by S.A. The district court therefore did not abuse its discretion by not allowing Alvar to introduce evidence of past abuse by S.A.

**Affirmed.**