STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0638

State of Minnesota,
Respondent,

vs.

Zachariah Steven Marczak,
Appellant.

Filed March 30, 2020
Affirmed
Connolly, Judge

Redwood County District Court
File No. 64-CR-18-14

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

Jenna Peterson, Redwood County Attorney, Grey Jensen, Assistant County Attorney, Redwood Falls, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Veronica M. Surges, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Reilly, Judge; and Kirk, 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

CONNOLLY, Judge

Appellant challenges his convictions of second-degree assault and intentional discharge of a firearm under circumstances that endanger the safety of another. He argues that (1) the record contains insufficient evidence to support his convictions, (2) the district court committed plain error by instructing the jury on the lawful use of deadly force in defense of property, (3) the prosecutor committed prosecutorial misconduct in the closing argument, (4) appellant received ineffective assistance of counsel, and (5) the cumulative effect of the alleged trial errors deprived appellant of his due-process right to a fair trial. We affirm.

FACTS

The State of Minnesota charged appellant Zachariah Steven Marczak with three counts of second-degree assault under Minn. Stat. § 609.222, subd. 1 (2016), and one count of intentional discharge of a firearm under circumstances that endanger the safety of another under Minn. Stat. § 609.66, subd. 1a(a)(2) (2016). The district court held a jury trial in January 2019.

At trial, the evidence showed that appellant had a dispute with his former girlfriend, A.P., over the possession of a snowmobile. A.P. had stored her snowmobile in a shed at the farm where appellant resided. On December 29, 2017, A.P. texted appellant and told him that her brother, J.P., and son-in-law, T.S., would come to the farm to retrieve the snowmobile. J.P. and T.S. went to the farm, but appellant refused to allow them to obtain the snowmobile unless A.P. was present. A.P. spoke to appellant over the phone and

informed him that she was going to take the snowmobile. A.P., J.P., and T.S. then drove to appellant's property and went directly to the shed where the snowmobile was stored. As they were attempting to remove the snowmobile, the three trespassers heard gunshots. They quickly finished loading the snowmobile into the back of J.P.'s truck and attempted to leave, but appellant put his vehicle across the driveway to block the road. The trespassers observed appellant fiddling with something and believed that he may have been reloading a firearm. They were able to leave the property by driving around appellant's vehicle.

A contested issue at trial was the direction in which appellant fired his gun while A.P., J.P., and T.S. were retrieving the snowmobile. A.P. testified that she heard multiple gunshots followed by a "tink, tink" sound, which she believed was the sound of bullets hitting the side of the shed they were in. According to her, it sounded like the bullets hit "right there," and she "didn't know if the bullets were gonna go right through the side of the building." T.S. stated that he heard at least four bullets ricochet off the shed "fairly close" to where they were standing. And J.P. testified that he heard at least five "pops" and "pings," which he perceived to be gunfire followed by bullets ricocheting off the shed. J.P. had "no idea" how close to them the bullets striking off the shed were; he knew only that they were close enough to get everyone's attention.

After A.P., J.P., and T.S. left appellant's property, they called the police. The investigator spoke with the trespassers and appellant shortly after the incident. Appellant admitted to the investigator that he had fired several shots but insisted that he had fired into the trees and not at the shed. He stated that he wanted to stop the trespassers from leaving and to see what they had taken.

The investigator then visited the property to search for evidence. He found four shell casings on the ground outside the front door of the house and three additional shell casings on the floor inside the entryway of the house. A rifle capable of shooting those rounds was in a closet just inside the house door. The investigator concluded, based on his experience and the location of the shell casings, that appellant had fired the rifle toward the shed while standing in the entryway of his house, but he conceded that the bullets might have traveled in a different direction. He also acknowledged that determining the direction of bullets based on the location of the shell casings was not an exact science. Additionally, the investigator examined the shed where the snowmobile had been stored and did not see any bullet holes, dents, or ricochets in the metal exterior. He indicated that a round from the rifle used might not pierce the steel on the shed.

Appellant testified at trial and contested the other witnesses' statements. He said that he saw people in his shed, was unsure whether A.P. was one of them, and was concerned about people stealing tools from the shed. He maintained what he had told the investigator: that he had fired his rifle several times away from the shed and into the trees. According to appellant, his intent was to get the trespassers' attention so they would come up to the house or leave the property. Appellant noted that it would have made no sense for him to shoot toward the shed because he stored property in it. On cross-examination, when asked whether the trespassers would have been frightened upon hearing gunshots, appellant replied, "Do you think a thief should be afraid?" He later commented, "I think individuals should have a certain amount of fear of stealing from somebody else."

At the close of evidence, defense counsel requested that the jury receive an instruction on defense of property, and the district court provided one, as well as an instruction on deadly force that neither party requested. This instruction stated that reasonable force includes deadly force only when the "offense against a person involves great bodily harm or death" or such force "is used to prevent the commission of a felony in one's home." Defense counsel did not object to the jury instruction on deadly force.

The jury found appellant guilty on all four counts. The district court entered a conviction for all counts but sentenced appellant on only two counts of second-degree assault to two consecutive 36-month prison terms. This appeal follows.

D E C I S I O N

I. Sufficiency of the Evidence

Appellant first argues that the evidence was not sufficient to support his convictions of second-degree assault and intentional discharge of a firearm. When evaluating the sufficiency of the evidence, appellate courts "carefully examine the record to determine whether the facts and the legitimate inferences drawn from them would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted." *State v. Boldman*, 813 N.W.2d 102, 106 (Minn. 2012). We view the evidence in the light most favorable to the verdict and will not overturn the verdict if the jury could reasonably have found the defendant guilty of the charged offense, consistent with the presumption of innocence and the state's burden of proof beyond a reasonable doubt. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

A conviction based on circumstantial evidence is subject to heightened scrutiny. *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010). Circumstantial evidence is "evidence from which the factfinder can infer whether the facts in dispute existed or did not exist." *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotation omitted). Whereas direct evidence proves a fact without inference or presumption, circumstantial evidence "always requires an inferential step to prove a fact." *Id.* The heightened standard applies when direct evidence of guilt on a particular element is not sufficient to support the verdict by itself. *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017).

We apply a two-step analysis when reviewing the sufficiency of circumstantial evidence. *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). The first step is to identify the circumstances proved. *Id.* In doing so, we consider only the circumstances that are consistent with the verdict, as we defer to the jury's acceptance of the proof of those circumstances and its rejection of conflicting evidence. *Id.* at 598-99. The second step is to examine the reasonableness of the inferences that might be drawn from the circumstances proved. *Al-Naseer*, 788 N.W.2d at 473-74. In order for the evidence to be sufficient, there must be "no other reasonable, rational inferences that are inconsistent with guilt." *Id.* at 474 (quotation omitted). We give no deference to the jury's determination on reasonable inferences. *Id.*

A. Second-degree assault

To prove that appellant was guilty of second-degree assault, the state had the burden of showing that he used a dangerous weapon and committed an assault. Minn. Stat. § 609.222, subd. 1. An assault requires that the defendant either (1) intended to cause fear

in another of immediate bodily harm (assault-fear) or (2) intentionally inflicted or attempted to inflict bodily harm upon another (assault-harm). Minn. Stat. § 609.02, subd. 10 (2016); *see also State v. Fleck*, 810 N.W.2d 303, 305 (Minn. 2012) (categorizing the two types of assault as assault-fear and assault-harm). Appellant does not dispute that he used a dangerous weapon. He argues, however, that the evidence was not sufficient to show that he had the requisite intent for either assault-fear or assault-harm.

Both types of assault at issue required the state to show that appellant had a specific intent when he fired the rifle. Assault-fear is a specific-intent crime that requires the defendant to act with the intent to cause fear of immediate bodily harm. *Fleck*, 810 N.W.2d at 312. Although assault-harm is a general-intent crime when the defendant actually inflicts bodily harm, *id.*, it is a specific-intent crime when the defendant merely attempts to inflict bodily harm, *cf. State v. Noble*, 669 N.W.2d 915, 919 (Minn. App. 2003) (stating, in an attempted second-degree murder case, that an attempt "requires that the actor have specific intent to perform acts and attain a result which if accomplished would constitute the crime alleged"), *review denied* (Minn. Dec. 23, 2003). Therefore, the evidence must be sufficient to prove that appellant fired his rifle with either the intent to cause fear of immediate bodily harm or the intent to inflict bodily harm.

Intent is a state of mind, so it is generally proved by circumstantial evidence based on a totality of the circumstances. *State v. Cooper*, 561 N.W.2d 175, 179 (Minn. 1997). Such circumstances include "the defendant's conduct, the nature of the assault, and the events leading up to and immediately following the crime." *State v. Barshaw*, 879 N.W.2d 356, 367 (Minn. 2016). Because appellant's specific intent in firing the rifle is based on

circumstantial evidence and is an element of second-degree assault, we apply the two-step analysis to determine the sufficiency of the evidence.

Applying the first step, the circumstances proved at trial are as follows. Appellant knew that people were in his shed (he suspected, but was not certain, that A.P. was among them) and fired his rifle in response. A.P., J.P., and T.S. heard gunshots and ricochets, which they believed were bullets hitting the metal shed. Two of them thought that the bullets hit close to the place they were standing, while the other was unsure of the bullets' proximity. The investigator found shell casings outside the front door and inside the entryway of the house. Based on the location of the shell casings, he concluded that appellant fired in the direction of the shed. At trial, appellant made comments indicating that "a thief should be afraid" and that "individuals should have a certain amount of fear of stealing from somebody else."

Under the second step, we must determine whether those circumstances proved lead to a reasonable inference that appellant did not intend to cause fear of immediate bodily harm or to inflict bodily harm. At trial, the parties disputed whether appellant fired his rifle toward the shed or into the trees. But the direction in which appellant shot does not matter—in both scenarios, there are no rational inferences inconsistent with guilt. Appellant fired his rifle in response to the trespassers' presence in his shed. If he shot toward the shed, then the only reasonable inference is that he intended to inflict bodily harm upon the trespassers. *Cf. State v. Thompson*, 544 N.W.2d 8, 11-12 (Minn. 1996) (determining that intent to kill is the only reasonable inference when defendant pointed a pistol at victim's head and pulled the trigger). As such, there would be sufficient evidence

that he committed assault-harm. And if appellant shot into the trees, then the only rational inference is that he intended to cause fear of immediate bodily harm. In that situation, there would be sufficient evidence that he committed assault-fear.

Appellant insists that the circumstances proved lead to a rational inference inconsistent with guilt—that he fired the rifle with the intent to "get the attention of the intruders and scare them off his property." This argument fails. Appellant attempts to distinguish the intent to cause fear of immediate bodily harm (which is required for assault-fear) from the intent to create a general feeling of fear (which he maintains was his actual intent). Such a distinction makes little sense. If appellant's intent in firing a rifle (in any direction) was to make the trespassers afraid so that they would leave his property, then the only rational inference is that he intended them to fear that they would be hit with a bullet immediately if they did not leave—which is an intent to cause fear of immediate bodily harm. Appellant's proposed inference is not reasonable under the circumstances proved.

In sum, the only rational inferences based on the circumstances proved are that appellant fired his rifle with either the intent to cause fear of immediate bodily harm or the intent to inflict bodily harm. Either intent is sufficient for a conviction of second-degree assault. Minn. Stat. §§ 609.02, subd. 10, .222, subd. 1. Thus, the record contains sufficient evidence to support appellant's conviction of second-degree assault.

B. Intentional discharge of a firearm

To prove intentional discharge of a firearm, the state had to show that appellant discharged a firearm intentionally and under circumstances that endangered the safety of another. Minn. Stat. § 609.66, subd. 1a(a)(2). Appellant does not challenge that he

discharged a firearm intentionally, but he maintains that the state did not prove that he did so in a way that endangered the safety of the trespassers in the shed. Whether this element is satisfied necessitates an inquiry into "whether, under the totality of the circumstances extant at the moment the trigger was pulled—including what the defendant knew and . . . what the defendant did not know—would the discharge of the firearm place another person's safety in danger." *In re Welfare of A.A.E.*, 590 N.W.2d 773, 777 (Minn. 1999).

In applying the two-step analysis, the circumstances proved are the same as those listed above. And the only reasonable inference to be drawn from the circumstances is that appellant endangered the safety of another, regardless of the direction in which he fired his rifle. Although the cases involving Minn. Stat. § 609.66, subd. 1a(a)(2), have generally involved situations in which the defendant fired toward the victim, we have emphasized that the central inquiry is what the defendant knew at the time of discharge, and not whether the victim was actually shot. *State v. Kycia*, 665 N.W.2d 539, 543-44 (Minn. App. 2003). Here, even accepting appellant's version of events, appellant knew that other people were on his property and fired a rifle into the trees while it was dark outside. Even if appellant believed that he was shooting away from the trespassers, he could have been mistaken about the location of the trespassers, or the bullets could have ricocheted and hit someone. The only reasonable inference under the totality of the circumstances is that appellant's actions endangered the safety of others.

Thus, the evidence is sufficient to support appellant's conviction of intentional discharge of a firearm under circumstances that endanger the safety of another.

II. Plain Error for Jury Instructions

Next, appellant contends that the district court committed plain error by instructing the jury on the use of deadly force in its instructions regarding defense of property. Since appellant did not object to the jury instructions at trial, we review for plain error. Minn. R. Crim. P. 31.02. There are three requirements for a defendant to show plain error: (1) there must be an error, (2) the error must be plain, and (3) the error must affect substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If the defendant satisfies those three requirements, then we will order a new trial only if it is "necessary to ensure fairness and the integrity of judicial proceedings." *Id.* at 742.

Since defense counsel indicated that he would argue defense of property, the district court proposed its own jury instruction on that subject, which included an instruction on the use of deadly force. After some discussion, counsel for both parties agreed to the proposed instruction. The jury instruction provided:

> The Defendant asserts the defense of property. Reasonable force may be used upon another person without the other's consent when used by any person in lawful possession of real or personal property . . . in resisting a trespass upon or other unlawful interference with such property. The legal excuse of defense of property is available only to those who act honestly and in good faith. The kind and degree of force a person may lawfully use in defense of property is limited by what a reasonable person in the same situation would believe to be necessary. Any use of force beyond that is regarded by the law as excessive. In determining whether Defendant's actions were reasonable you should examine whether the Defendant's judgment as to the gravity of the situation was reasonable under the circumstances and whether the . . . election to defend his property was such as a reasonable person would have made in light of the danger to be apprehended. *Intentional discharge of a firearm in the direction of another person or in a vehicle*

> *in which the other person is believed to be, constitutes deadly force. Reasonable force includes deadly force only when A, . . . the offense against a person involves great bodily harm or death or B, is used to prevent the commission of a felony in one's home.*

(Emphasis added.) Appellant now takes issue only with the portion of the instruction regarding deadly force.

Under the first requirement for plain error, appellant must show that the district court erred by instructing the jury on deadly force. Although the district court has "considerable latitude" in the selection of a jury instruction, the instruction "must not materially misstate the law." *State v. Pendleton*, 567 N.W.2d 265, 268 (Minn. 1997). Defense of dwelling[1] enables the defendant to use deadly force when he either feared death or great bodily harm or acted to prevent the commission of a felony in his home. *Id.* at 271; Minn. Stat. § 609.065 (2016). Deadly force is "force which the actor uses with the purpose of causing, or which the actor should reasonably know creates a substantial risk of causing, death or great bodily harm." Minn. Stat. § 609.066, subd. 1 (2016). Deadly force includes the intentional discharge of a firearm in the direction of another person. *Id.* Therefore, the jury instruction correctly described the substance of the law.

Appellant objects not to the substance of the deadly-force instruction, however, but to its inclusion in the first place. He argues that the district court should have instructed the jury only on reasonable force and defense of property. Appellant contended at trial that he fired his rifle away from the shed, and he insists that such actions were not deadly force.

[1] Although the district court referred to the defense as "defense of property," caselaw generally uses the term "defense of dwelling."

According to appellant, the district court assumed that he shot toward the shed by including the deadly-force instruction.

The inclusion of the deadly-force instruction was not error. Contrary to appellant's assertion, the jury instructions did not assume that appellant shot toward the trespassers. The instruction stated that the intentional discharge of a firearm in the direction of another person is deadly force. As such, if the jury rejected appellant's testimony and found that appellant had fired toward the trespassers, then it would have been proper for the jury to consider such actions to be deadly force and to analyze the reasonableness of those actions according to that standard. But the jury was free to accept appellant's testimony. In that case, it would not have had to consider the instruction on deadly force. Therefore, appellant has not satisfied the first requirement of the plain-error test.

But even if appellant can show that the jury instruction was error that was plain, he cannot demonstrate that the error affected his substantial rights. Under the third requirement of the plain-error test, appellant has the "heavy burden of proving that there is a reasonable likelihood that giving the instruction in question had a significant effect on the jury verdict." *State v. Kelley*, 855 N.W.2d 269, 283 (Minn. 2014) (quotation omitted). Generally, an erroneous jury instruction does not have a significant effect on the verdict if there is "considerable evidence of the defendant's guilt." *Id.* at 283-84. Here, the evidence that appellant fired toward the trespassers was strong. All three trespassers testified that they heard bullets hitting the shed they were in, and the investigator concluded that appellant fired in the direction of the shed based on the location of the shell casings. If the jury discredited that testimony and determined that appellant fired away from the shed,

then it still could have found him guilty if it determined that his actions were unreasonable under the circumstances. As such, any error in the jury instructions did not have a significant effect on the jury's verdict.

III. Prosecutorial Misconduct

Appellant argues that the prosecutor committed misconduct during the closing argument. Specifically, he asserts that the prosecutor disparaged his defense, misstated the law, and appealed to the greater societal good. "Prosecutors have an affirmative obligation to ensure that a defendant receives a fair trial, no matter how strong the evidence of guilt." *State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006). Appellant did not object to any of the alleged instances of misconduct at trial, so this court applies a modified plain-error test. *State v. Matthews*, 779 N.W.2d 543, 551 (Minn. 2010). Under that test, the defendant has the burden of showing that an error occurred and that the error was plain. *Ramey*, 721 N.W.2d at 302. If the defendant meets that burden, then the state has the burden of showing that the misconduct did not affect the defendant's substantial rights. *Id.*

A. Disparaging the defense

First, appellant maintains that the prosecutor "belittled" his defense. In responding to appellant's argument that he acted in defense of property, the prosecutor stated, "Under no stretch of the . . . imagination is that even close to a reasonable response." He also called appellant's use of deadly force "ridiculous." Prosecutors may not belittle the defendant or a particular defense in the abstract, but they may argue that the defendant's specific defense has no merit. *Matthews*, 779 N.W.2d at 552. Indeed, the Minnesota Supreme Court found no error when a prosecutor called a defendant's version of events

"ridiculous" and "100 percent unbelievable" because the argument dealt with the defendant's credibility. *Id.* Here, the prosecutor's statements were in response to appellant's argument that he fired his rifle to defend his property. They challenged appellant's specific argument that the amount of force used was reasonable under the particular circumstances; they did not attack defense of property as an abstract concept. Appellant therefore has not shown error.

B. Misstating the law

Second, appellant argues that the prosecutor misstated the law regarding the use of force. He takes objection to two particular statements. The prosecutor told the jury that a person cannot use a firearm "for anything other than legitimate clear cut self-defense, hunting or sports" and that "using a firearm to scare somebody because you think they're committing a minor crime on your property . . . is not a valid reason under the law." Also, the prosecutor stated that "under the law regarding the use of force [appellant] cannot start shooting rounds. . . . [I]t's deadly force, it's excessive and the law is clear that it can't be used in this situation . . . ." Appellant insists that these comments misstated the law because "the law does not prohibit using a firearm to shoot into the distance in order to frighten a person off your property." Appellant notes that a statement that he could not "start shooting rounds *at another person*" may not have been error.

As appellant indicates, it is deadly force to discharge a firearm in the direction of another person. Minn. Stat. § 609.066, subd. 1. Otherwise, deadly force is force that the actor either uses with the purpose, or should reasonably know creates a substantial risk, of

causing death or great bodily harm. *Id.* As such, simply firing a gun into the distance does not meet the definition of deadly force. The prosecutor's statements were error.

Nevertheless, the error was not plain. An error is plain "if it is 'clear' or 'obvious,' which is typically established 'if the error contravenes case law, a rule, or a standard of conduct.'" *State v. Webster*, 894 N.W.2d 782, 787 (Minn. 2017) (quoting *Ramey*, 721 N.W.2d at 302). Appellant does not cite, nor does there appear to be, any caselaw indicating that it is lawful for a person to shoot a gun in no particular direction to frighten trespassers on the property, nor is there caselaw that stands for a comparable proposition. Indeed, the circumstances here appear to be unique, with no precedent directly on point. Any error in the prosecutor's comments was neither clear nor obvious, so there is no plain error.

Furthermore, the state has met its burden, under the modified plain-error test, that the error did not affect appellant's substantial rights. The supreme court has found misstatements of the law during closing argument to be harmless beyond a reasonable doubt when the prosecutor stated the law correctly at some point during the argument and the district court properly instructed the jury on the law. *State v. Atkins*, 543 N.W.2d 642, 648 (Minn. 1996). Here, although the prosecutor may have exceeded the definition of deadly force at one point during the closing argument, he did provide the correct legal definition at another point. And the district court gave the proper definition in the jury instructions and told the jury to disregard any attorney's statements of law that differed from the law that it provided. As such, any error in the prosecutor's statements did not affect appellant's substantial rights.

C. Appealing to greater societal good

Third, appellant asserts that the prosecutor committed misconduct by appealing to the greater societal good. The prosecutor stated that appellant's use of the firearm was "not responsible gun ownership" and "not the point of the Second Amendment." He also said that "[w]e are a nation of laws and law enforcement for a reason" and that "[i]t's just a matter of common sense and responsible gun use." It is improper for prosecutors to indicate that the jury's role is to enforce the law, teach defendants lessons, or make statements to the public. *State v. Salitros*, 499 N.W.2d 815, 819 (Minn. 1993). The jury's role is to determine whether the state has met its burden of proving the defendant guilty beyond a reasonable doubt. *Id.* But here, contrary to appellant's assertions, the prosecutor's comments did not suggest that the jury must convict appellant in order to uphold the law or defend the Second Amendment. Instead, the statements were directly related to appellant's credibility and the reasonableness of appellant's actions in defending his property. The prosecutor did not commit misconduct.

IV. Ineffective Assistance of Counsel

Appellant contends that he received ineffective assistance of counsel because his attorney conceded that appellant used deadly force during closing argument. This court generally analyzes a claim of ineffective assistance of counsel under the two-prong test set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003). To prevail on such a claim, the defendant must show that "counsel's performance was

deficient" and that "the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064.

There is an exception to the two-prong test when defense counsel concedes the defendant's guilt. "The decision to admit guilt is the defendant's decision to make. In situations when counsel admits guilt without the consent of the defendant, the defendant is entitled to a new trial, regardless of whether he would have been convicted without the admission." *Dukes v. State*, 621 N.W.2d 246, 254 (Minn. 2001) (citation omitted). In other words, when counsel concedes the defendant's guilt, the defendant does not have to show prejudice. When analyzing a claim for concession of guilt, we first determine, based on a de novo review of the record, whether counsel in fact conceded the defendant's guilt. *State v. Prtine*, 784 N.W.2d 303, 318 (Minn. 2010). If there was a concession, we then determine whether the defendant acquiesced to that concession. *Id.*

Appellant argues that defense counsel conceded his guilt by admitting that he used deadly force. He points to the part of counsel's closing argument that dealt with defense of property:

> Based on that trespass, was [appellant's] response reasonable? [The prosecutor] did accurately portray . . . and describe what the . . . standards were. There is a high standard [for the] use of deadly force. There's not any denying that under the law, under this description that [appellant's] use of a weapon was . . . a use of deadly force.

Appellant insists that the acknowledgment that he used deadly force effectively conceded his guilt to all four charges because it implicitly admitted that he fired his rifle toward the trespassers and not into the trees as he had contended at trial.

These statements are not a concession of guilt. The Minnesota Supreme Court has consistently held that defense counsel's concession of an element of the charged offense is a concession of guilt. *See, e.g.*, *State v. Luby*, 904 N.W.2d 453, 457-58 (Minn. 2017) (determining that admitting premeditation is a concession of guilt in a first-degree murder case); *Prtine*, 784 N.W.2d at 317-18 (determining that admitting intent is a concession of guilt when discussing a lesser charge of second-degree murder). Here, defense counsel did not concede an element of the charged offenses. Instead, he conceded that appellant's actions constituted deadly force. At most, this concession undercut appellant's defense-of-property argument. But the concession did not demonstrate the absence of that defense either. Even though defense counsel admitted that firing a rifle into the distance was deadly force, he then argued that such force was reasonable because appellant "was afraid for his safety." He also suggested that appellant acted in fear of "great bodily harm or death" or "to prevent the commission of a felony in a home"—which are the circumstances under which a person may use deadly force. Therefore, counsel conceded neither an element of the offenses nor the absence of a defense. There was no concession of guilt.

Appellant also argues that defense counsel's admission that he used deadly force conceded an element of intentional discharge of a firearm under circumstances that endanger the safety of another. According to appellant, since the district court instructed the jury that the "[i]ntentional discharge of a firearm in the direction of another person" constitutes deadly force, then it would be impossible for the jury to find that appellant fired toward the trespassers but did not satisfy that element of the offense. This contention misconstrues defense counsel's statements during closing argument. Defense counsel did

not admit that appellant fired toward the trespassers; in fact, he reiterated appellant's argument that appellant fired away from the shed to get the trespassers' attention. And, as noted above, counsel still argued that the use of deadly force was reasonable under the circumstances. Thus, defense counsel's statements were not a concession of guilt to any element of intentional discharge of a firearm.

Nevertheless, appellant contends that defense counsel's statements during the closing argument constituted ineffective assistance of counsel under *Strickland*, even if they were not a concession of guilt. Again, *Strickland* requires the defendant to show that "counsel's performance was deficient" and that "the deficient performance prejudiced the defense." 466 U.S. at 687, 104 S. Ct. at 2064. Counsel's representation is deficient when it falls below an objective standard of reasonableness. *Id.* at 688, 104 S. Ct. at 2064. And the deficient representation is prejudicial when "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695, 104 S. Ct. at 2068-69.

Appellant cannot meet the *Strickland* standard. There is a strong presumption that counsel acted competently. *Dukes*, 621 N.W.2d at 252. Defense counsel's admission that appellant used deadly force may not have been the best strategy, considering that he was also arguing that appellant fired away from the trespassers. But appellate courts generally defer to defense counsel's tactical decisions in closing arguments because there is a "broad range of legitimate defense strategy at that stage." *Yarborough v. Gentry*, 540 U.S. 1, 5-6, 124 S. Ct. 1, 4 (2003). Furthermore, appellant cannot show prejudice. All three trespassers testified that they heard bullets ricochet off the shed they were in, the investigator

concluded based on his investigation that appellant fired toward the shed, and appellant made comments at trial indicating that he thought people should be afraid when stealing from others. Defense counsel, despite admitting that appellant used deadly force, still argued that appellant acted reasonably in defense of property. The fact that counsel's strategy was not successful does not mean that counsel was ineffective. *See State v. Eling*, 355 N.W.2d 286, 293 (Minn. 1984) (indicating that effective assistance of counsel does not require counsel to "obtain a favorable result").

V. Cumulative Error

Finally, appellant argues that, even if each alleged trial error was harmless by itself, the cumulative effect of the errors deprived him of his right to a fair trial. A criminal defendant is entitled to a new trial when the appellate court cannot conclude that "the cumulative effect of [the] errors was harmless beyond a reasonable doubt," even though "the impact of any one of [the] errors, standing alone, may not have affected the verdict." *State v. Penkaty*, 708 N.W.2d 185, 206 (Minn. 2006). Appellate courts have reached such a determination only "in rare cases." *State v. Davis*, 820 N.W.2d 525, 538 (Minn. 2012). For example, the supreme court found cumulative error when a trial contained ten instances of prosecutorial misconduct, which was a "pervasive force at trial," as well as two evidentiary errors. *State v. Mayhorn*, 720 N.W.2d 776, 791-92 (Minn. 2006).

This case is a far cry from the cases in which appellate courts have found cumulative error. Appellant points to only two specific errors that, according to him, cumulatively deprived him of the right to a fair trial—the jury instruction on deadly force and the alleged prosecutorial misconduct. As discussed above, the jury instruction on deadly force was

not error in the first place, and the only alleged prosecutorial misconduct with any merit is the prosecutor's misstatement of the law on deadly force. The evidence against appellant was quite strong, as the testimony of the trespassers and the investigator, as well as appellant's own admissions, supported the convictions. This is not one of the "rare" cases in which the cumulative effect of the errors deprived appellant of the right to a fair trial.

Affirmed.