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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0747**

State of Minnesota,
Respondent,

vs.

Desmond Lamart Jones,
Appellant.

**Filed April 3, 2017
Affirmed
Schellhas, Judge**

Stearns County District Court
File No. 73-CR-15-5787

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Minnesota (for respondent)

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Considered and decided by Kirk, Presiding Judge; Schellhas, Judge; and Bratvold,
Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges his conviction of first-degree arson, arguing that (1) the district
court violated his right of self-representation and erroneously admitted relationship

evidence, (2) the prosecutor committed misconduct, and (3) the evidence is insufficient to support his conviction. We affirm.

FACTS

In June of 2015, appellant Desmond Lamart Jones frequently stayed at the St. Cloud townhome of his girlfriend, V.W., who resided with her four children; her adult brother, S.W.; and an uncle of V.W. and S.W. About June 22, V.W. ended her relationship with Jones. Jones left V.W.'s townhome at her request but frequently called and texted V.W., telling her that he did not want to end the relationship, asking her to return his belongings, and seeking a place to stay temporarily. V.W. drove Jones to a storage garage in which to put his belongings. During the drive, Jones snatched the ignition key, jumped out of the vehicle, and ran away (the key incident). The next morning, S.W. found a Snickers candy bar stuffed into the fuel-filler neck of V.W.'s vehicle (the Snickers-bar incident). As a result of these incidents, V.W. took her children to stay at her mother's house on the evening of June 24.

V.W. had a male guest in her townhome the evening of June 24, 2015, until shortly after midnight and then went to her mother's house. Around that time, Jones called and texted V.W., implying with hostility that she was having sex with her house guest. About 1:36 a.m. on June 25, S.W. was awoken by a "whoosh" sound, looked out a window, and discovered that the exterior of the townhome was aflame. S.W. exited the townhome and saw a person, whom he believed to be Jones, running away from the townhome. The fire damaged the townhome's siding and back door, and police determined that the fire had been caused by arson. They arrested Jones later that day.

Respondent State of Minnesota charged Jones with first-degree arson (dwelling). On June 29, 2015, at a combined first appearance on the arson charge and a violation-of-release-conditions hearing in connection with an unrelated pending criminal case, Jones stated that he wanted to fire his public defender and represent himself. The district court told Jones, “I’m not going to allow you to do that here today,” and Jones continued to be represented by a public defender at all relevant times.

In November 2015, the state noticed its intent to introduce unspecified “evidence of the relationship of [V.W.] and [Jones],” claiming admissibility under Minn. R. Evid. 404(b), Minn. Stat. § 634.20 (2014), or “any other exception to the general exclusionary rule.” The state subsequently supplemented its notice to include the introduction of “evidence of the relationship of [V.W.] and [Jones],” specifically, that “approximately a little over a month prior to the [arson], [Jones] held a knife to V.W. because her brothers called him a b-tch” (the knife incident). On December 15, before the start of Jones’s jury trial, the district court ruled that “some” evidence “to get the context of the relationship” was admissible but prohibited the state from introducing evidence of the knife incident.

During a three-day trial, the jury heard testimony from 11 prosecution witnesses and considered more than 20 exhibits, including surveillance video of Jones purchasing an accelerant just before the fire occurred, audio recordings of Jones’s voicemail messages to V.W., a covert recording of a call by V.W. to Jones, and a recording of V.W.’s 911 call. In some of the exhibits, V.W. referenced the key incident, the Snickers-bar incident, and the knife incident. V.W. also testified about the key incident, the Snickers-bar incident, and, despite the district court’s ruling, the knife incident; twice mentioned Jones’s prior

incarceration; and three times expressed her personal belief that Jones had committed the arson. S.W. testified and identified Jones as the person whom he saw running away from the scene of the fire and briefly mentioned the key incident. The prosecutor referenced the key incident in her opening statement. Jones did not request, and the court did not give, any cautionary instruction on relationship evidence.

The jury found Jones guilty as charged, and the district court sentenced him to 132 months' imprisonment. This appeal follows.

DECISION

I.

Jones first argues that the district court violated his right to represent himself when it denied his June 29, 2015 request to discharge his public defender and represent himself. We read this argument to include Jones's claim that the district court violated his right to represent himself at his first appearance and at every subsequent stage of the criminal process, including trial. A criminal defendant has a Sixth Amendment right to represent himself in state court. *State v. Rhoads*, 813 N.W.2d 880, 885 (Minn. 2012) (citing *Faretta v. California*, 422 U.S. 806, 819, 95 S. Ct. 2525, 2533 (1975)). The defendant's first appearance is a critical stage in the criminal process. *Rothgery v. Gillespie Cty., Tex.*, 554 U.S. 191, 212–13, 128 S. Ct. 2578, 2591–92 (2008). We assume without deciding that the defendant's right of self-representation applies at all critical stages of the criminal process. *See Marshall v. Rodgers*, 133 S. Ct. 1446, 1449 (2013) ("It is beyond dispute that the Sixth Amendment safeguards . . . the right to counsel at all critical stages of the criminal process." (quotation omitted)); *United States v. Conklin*, 835 F.3d 800, 804 (8th Cir. 2016)

(describing right of self-representation as “alternative” to right to counsel); *State v. Camacho*, 561 N.W.2d 160, 170 (Minn. 1997) (describing right of self-representation as “reciprocal[]” to right to counsel).

The right of self-representation is not absolute; a district court may refuse a request for self-representation under some circumstances. *State v. Blom*, 682 N.W.2d 578, 613 (Minn. 2004). “When a criminal defendant asks to represent himself, the court must determine (1) whether the request is clear, unequivocal, and timely, and (2) whether the defendant knowingly and intelligently waives his right to counsel.” *Id.* (quotation omitted). The court bears “the responsibility to clarify and address a defendant’s request to discharge counsel.” *State v. Paige*, 765 N.W.2d 134, 139 (Minn. App. 2009). And the court cannot deny a request for self-representation solely because the defendant is unable to be an effective legal advocate. *See State v. Richards*, 456 N.W.2d 260, 264–65 (Minn. 1990) (stating that a defendant’s inability to “conduct his own defense” does not invalidate his knowing and intelligent waiver of the right to counsel). We review a refusal of a self-representation request for clear error, and a clearly erroneous refusal is a violation of the right of self-representation. *Blom*, 682 N.W.2d at 613.

Denial of a defendant’s right to represent himself at trial is a structural error that results in automatic reversal. *Colbert v. State*, 870 N.W.2d 616, 624 (Minn. 2015) (citing *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8, 104 S. Ct. 944, 950 n.8 (1984)). But denial of the defendant’s right to represent himself at another stage of the criminal process is not a structural error unless it undermines the fairness of the criminal proceeding as a whole. *See Arizona v. Fulminante*, 499 U.S. 279, 309–10, 111 S. Ct. 1246, 1265 (1991) (describing

structural error as “structural defects in the constitution of the trial mechanism” that affect “[t]he entire conduct of the trial from beginning to end” and identifying as structural error denial of “the right to self-representation *at trial*” (emphasis added) (citing *McKaskle*, 465 U.S. at 177–78 & n.8, 104 S. Ct. at 950–51 & n.8)).

Here, at Jones’s first appearance on June 29, 2015, the district court confirmed that Jones had read and understood the “Felony/Gross Misdemeanor First Appearance Statement of Rights” and noted that Jones had applied for a public defender and that the public defender standing next to him was his attorney. The prosecutor requested a domestic-abuse no-contact order (DANCO) in connection with the arson charge and alleged that Jones had violated his conditions of release in the unrelated pending criminal case by drinking alcohol at a bar on the night of the fire. Jones then interjected, asking about the prosecutor’s statements regarding a DANCO and why he was “being charged with an OFP” when he “did not have an OFP.” The prosecutor clarified that the state was not charging Jones with a DANCO violation, and Jones again interjected with a question, told the district court that he did not understand what his public defender was doing, and said, “He’s just standing here.” The following colloquy between the court and Jones then occurred:

THE COURT: That’s what he’s supposed to do.

JONES: Well, then I’m firing him. I want to represent myself pro se. Get out of here.

THE COURT: No. Sir, I’m not going to allow you to do that here today.

JONES: How come I can’t? It’s my right.

THE COURT: Because we’re not here to argue all those issues. Those are later on. We’re here only to address release conditions. And I would advise you not to say anything

because anything you say can be used against you. I understand you're confused, you don't understand the process, but this is just how it goes.

The hearing then continued and Jones's public defender informed the district court that Jones would be unable to post any bail, asked for an omnibus hearing, and made a speedy-trial demand. The prosecutor proceeded with a bail argument, alleging that Jones was "in violation of his conditions of release because he didn't sign up for the [electronic home monitoring] alcohol sensitive." Jones interjected:

JONES: I suffer from a [traumatic brain injury].

THE COURT: The Court will set bail—

JONES: It doesn't matter. I can't make it. She can set it at a billion dollars.

The court set bail and conditions, and Jones once more interjected:

JONES: I have one question. She said I didn't set up the monitoring thing when I did.

THE PUBLIC DEFENDER: You'll have your opportunity to dispute all that.

The hearing concluded without further interjection by Jones.

The record reflects that the district court flatly denied Jones's self-representation request without any analysis. In so doing, the court erred, denying Jones his Sixth Amendment right to represent himself at his first appearance on June 29, 2015. But the district court's error was harmless beyond a reasonable doubt. *See Davis v. Ayala*, 135 S. Ct. 2187, 2197, *reh'g denied*, 136 S. Ct. 14 (2015) ("Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." (quotation omitted)). Jones's public defender preserved Jones's omnibus issues, asserted his speedy-trial right, and did nothing that compromised Jones's

position at any subsequent stage of the criminal process. Because the denial of Jones's right to represent himself at the June 29, 2015 hearing was harmless beyond a reasonable doubt, we conclude that reversal of Jones's conviction is not warranted on that ground.

And the denial of Jones's right to represent himself at the June 29, 2015 hearing did not deny him his right to represent himself at any subsequent stage of the criminal process. On June 29, the attorney who represented Jones was only standing in for Jones's attorney, whom the district court had appointed to represent him in the unrelated pending criminal case and who represented Jones at every subsequent stage of the arson case. At no time subsequent to the June 29 hearing did Jones seek to dismiss his attorney and represent himself. Indeed, at his July 27, 2015 omnibus hearing, when Jones's attorney informed the court that Jones wanted him to file "some motions" and to withdraw the speedy-trial demand, Jones affirmed that he was in agreement with his attorney's statements. Similarly, at a December 10 motion hearing, Jones affirmed that his attorney's statements regarding his rejection of the state's plea offer were correct. On these facts, we are confident that the district court's denial of Jones's right to represent himself was limited to the June 29 hearing and that the court's error was harmless beyond a reasonable doubt.

II.

Jones next argues that the district court committed plain error that warrants reversal of his conviction by admitting evidence of the Snickers-bar incident and failing to give the jury a cautionary instruction on relationship evidence.¹ According to Jones, evidence of the

¹ Jones implicitly concedes the admissibility of evidence of the key incident.

Snickers-bar incident was not admissible under Minn. R. Evid. 404(b) or Minn. Stat. § 634.20, and it was not admissible as a distinct type of relationship evidence. Jones did not object to the state's introduction of evidence of the Snickers-bar incident and did not request a midtrial or final instruction cautioning the jury about the limitations on its use of relationship evidence. The parties agree that the plain-error standard of review therefore applies. Under that standard, the defendant must show "(1) error; (2) that is plain; and (3) the error must affect substantial rights." *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). "With respect to the substantial-rights requirement, [the defendant] bears the burden of establishing that there is a reasonable likelihood that the absence of the error would have had a significant effect on the jury's verdict." *State v. Horst*, 880 N.W.2d 24, 38 (Minn. 2016) (quotation omitted).

"Evidence of another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith." Minn. R. Evid. 404(b). Such evidence may be admitted "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," but only if

- (1) the prosecutor gives notice of its intent to admit the evidence consistent with the rules of criminal procedure;
- (2) the prosecutor clearly indicates what the evidence will be offered to prove; (3) the other crime, wrong, or act and the participation in it by a relevant person are proven by clear and convincing evidence; (4) the evidence is relevant to the prosecutor's case; and (5) the probative value of the evidence is not outweighed by its potential for unfair prejudice to the defendant.

Id. Notwithstanding Minn. R. Evid. 404(b), Minnesota law provides that "[e]vidence of domestic conduct by the accused against the victim of domestic conduct, or against other

family or household members, is admissible unless the probative value is substantially outweighed by the danger of unfair prejudice.” Minn. Stat. § 634.20.

Here, the state has abandoned its argument made in the district court that evidence of the Snickers-bar incident was admissible under Minn. R. Evid. 404(b) or Minn. Stat. § 634.20. We note that the state neither met the generally applicable procedural requirements for admission of evidence under rule 404(b) nor established that Jones’s underlying conduct constitutes domestic abuse, as required for admission of evidence of the Snickers-bar incident as section 634.20 relationship evidence. *See State v. Barnslater*, 786 N.W.2d 646, 651 (Minn. App. 2010), *review denied* (Minn. Oct. 27, 2010) (stating that admissibility of relationship evidence under section 634.20 is based on whether “the accused’s underlying conduct constitutes domestic abuse” (emphasis omitted)). “Domestic abuse” is defined for this purpose as “(1) physical harm, bodily injury, or assault; (2) the infliction of fear of imminent physical harm, bodily injury, or assault; or (3) terroristic threats, . . . criminal sexual conduct, . . . or interference with an emergency call,” where such conduct is “committed against a family or household member by a family or household member.” Minn. Stat. § 518B.01, subd. 2 (2014); *see* Minn. Stat. § 634.20 (expressly adopting section 518B.01’s definition of “domestic abuse”).

The state nevertheless argues that the district court properly admitted evidence of the Snickers-bar incident because Minnesota common law permits the admission of a distinct type of relationship evidence and that evidence of the Snickers-bar incident met the requirements for such admission. The state is only partially correct. Minnesota Rule of Evidence 404(b) describes a class of evidence, also known as *Spreigl* evidence, regarding

a person's other bad acts. *State v. Rossberg*, 851 N.W.2d 609, 615 (Minn. 2014). “Within this class of evidence of other bad acts, [the supreme court] ha[s] distinguished traditional ‘collateral’ *Spreigl* evidence, which concerns an unrelated crime against another person, not the present victim, from evidence that illuminates the history of the relationship *between an accused and a victim*.” *Id.* (quotation omitted). This latter type of *Spreigl* evidence, i.e., relationship evidence, “is treated differently than other evidence offered under Minn. R. Evid. 404(b). The notice requirement under Minn. R. Evid. 404(b) is not a condition for admissibility of evidence directly pertaining to the relationship history between the defendant and the victim.” *State v. Loving*, 775 N.W.2d 872, 880 (Minn. 2009) (citation omitted); *see also State v. Hormann*, 805 N.W.2d 883, 890 (Minn. App. 2011) (stating that “Minnesota precedent [does not] require[] . . . *Spreigl*/rule 404(b) notice prior to the introduction of relationship evidence”), *review denied* (Minn. Jan. 17, 2012).

But unless relationship evidence is independently admissible under Minn. Stat. § 634.20, such evidence is admissible only on the district court's determinations that “there is clear and convincing evidence that the defendant committed the prior bad act” and “the probative value of the evidence outweighs any potential for unfair prejudice.” *State v. Bauer*, 598 N.W.2d 352, 364 (Minn. 1999); *see* Minn. Stat. § 634.20 (providing for admissibility of relationship evidence “unless the probative value is substantially outweighed by the danger of unfair prejudice”); *State v. Word*, 755 N.W.2d 776, 784 (Minn. App. 2008) (stating that admissibility of section 634.20 relationship evidence does not require clear and convincing evidence that defendant committed the other domestic conduct). And because relationship evidence is a form of *Spreigl* evidence, its admission

generally should trigger a cautionary instruction “prior to the admission of [the] evidence and again at the end of trial to help ensure that the jury does not use the evidence for an improper purpose.” *Bauer*, 598 N.W.2d at 365. A cautionary instruction ordinarily should be given even if it is not requested by the defendant. *Id.*

In this case, the district court did not determine that clear and convincing evidence showed that Jones was responsible for the Snickers-bar incident. And we cannot conclude that the state’s evidence about the Snickers-bar incident was clear and convincing. Because the state did not prove Jones’s responsibility for the Snickers-bar incident by clear and convincing evidence, Snickers-bar-incident evidence was not admissible as relationship evidence. *See State v. Mayhorn*, 720 N.W.2d 776, 784 (Minn. 2006) (“If the state intends to present relationship evidence, it bears the burden of proving that the incident at issue actually involved the relevant parties in the present case. The evidence otherwise has no probative value as relationship evidence.”). Moreover, the district court provided no cautionary instruction regarding the limitations on the jury’s use of relationship evidence about the key incident or the Snickers-bar incident.

Even if the district court plainly erred by admitting evidence of the Snickers-bar incident and failing to give a cautionary instruction on relationship evidence, the record belies Jones’s assertion that the inadmissible relationship evidence was extensive. The state’s evidence of the Snickers-bar incident was limited to (1) three brief, general references by V.W. in recordings of her 911 call and her covert recorded call to Jones, and (2) a single exchange between the prosecutor and V.W., as follows:

THE PROSECUTOR: [D]id [Jones] come to your residence and do anything else other than try to get his stuff back?
V.W.: No. He just try. He was, like, sleeping at the park down the street from my house and just been around my residence. Then he put a Snicker [sic] in my gas tank.
THE PROSECUTOR: A Snicker, right?
V.W.: Yeah.
THE PROSECUTOR: Some people say Sneaker.
V.W.: Yeah, a candy bar in my tank.

These brief references to the Snickers-bar incident were, by their nature, unlikely to inflame the passions and prejudices of the jury. On cross-examination, Jones’s attorney effectively dismantled the state’s evidence of the Snickers-bar incident, and the prosecutor did not mention the Snickers-bar incident in her closing argument. On these facts, we conclude that Jones’s substantial rights were not affected by any plain error in the court’s admission of evidence of the Snickers-bar incident and failure to give the jury a cautionary instruction on relationship evidence.

III.

Jones seeks reversal of his conviction based on alleged prejudicial prosecutorial misconduct in the form of elicitation of inadmissible testimony from V.W. and failure to prepare V.W. in order to avoid inadmissible testimony.² Jones complains about V.W.’s

² The state takes umbrage with Jones’s use of the phrase “prosecutorial misconduct” rather than the phrase “prosecutorial error” and urges us to use the latter phrase here. We have stated that “[w]e agree that there is an important distinction to be made between prosecutorial misconduct and prosecutorial error,” in that “[t]he former implies a deliberate violation of a rule of practice, or perhaps a grossly negligent transgression,” while the latter “suggests merely a mistake of some sort, a misstep of a type all trial lawyers make from time to time.” *State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn. App. 2009), *review denied* (Minn. Mar. 17, 2009). But the phrases “prosecutorial misconduct” and “prosecutorial error” largely have been used interchangeably by this court and by the supreme court. *See, e.g., State v. Yang*, 774 N.W.2d 539, 559 (Minn. 2009) (using the two phrases

testimony about the Snickers-bar incident, Jones’s prior incarceration, the knife incident, and V.W.’s personal belief that Jones had committed the arson.

A prosecutor commits misconduct by “seek[ing] to introduce evidence that has previously been ruled inadmissible by the district court.” *State v. Fields*, 730 N.W.2d 777, 782 n.1 (Minn. 2007). And a prosecutor’s “attempts to elicit clearly inadmissible evidence, even if that evidence was not previously ruled inadmissible by the district court, may constitute misconduct.” *Id.* Moreover, “[t]he state has a duty to prepare its witnesses, prior to testifying, to avoid inadmissible or prejudicial statements.” *State v. McNeil*, 658 N.W.2d 228, 232 (Minn. App. 2003) (citing *State v. Carlson*, 264 N.W.2d 639, 641 (Minn. 1978)), *review denied* (Minn. June 25, 2003); *see also State v. Hogetvedt*, 623 N.W.2d 909, 914 (Minn. App. 2001) (“The state has a duty to ensure that its witnesses know the limits of permissible testimony.”), *review denied* (Minn. May 29, 2001). As a result, improper testimony by a witness for the state—even if not purposely elicited by the prosecutor—may constitute prosecutorial misconduct. *See State v. Mahkuk*, 736 N.W.2d 675, 689 (Minn. 2007) (concluding that whether the state’s witness’s “violation of the trial court’s order” prohibiting the witness from testifying about a gang’s possession of firearms “was

interchangeably); *State v. Simion*, 745 N.W.2d 830, 844 (Minn. 2008) (same); *State v. Smith*, 825 N.W.2d 131, 139 (Minn. App. 2012) (same), *review denied* (Minn. Mar. 19, 2013); *State v. Ferguson*, 729 N.W.2d 604, 616 (Minn. App. 2007) (same), *review denied* (Minn. June 19, 2007). And in *Leutschafft* itself, we noted that “[t]he standard for prosecutorial misconduct . . . would seem equally applicable to prosecutorial error.” 759 N.W.2d at 418. Moreover, the supreme court recently referred to an appellant’s claim that “the prosecutor committed prejudicial misconduct by failing to adequately prepare [the state’s witness] to testify and eliciting inadmissible testimony from him” as a claim of “prosecutorial misconduct.” *State v. Whitson*, 876 N.W.2d 297, 304 (Minn. 2016). We follow that example here.

intentional or not,” the witness’s “reference to firearms during his testimony” constituted “misconduct attributable to the prosecutor”). “Where such misconduct is alleged, the standard of review depends on whether the defendant objected at trial.” *Whitson*, 876 N.W.2d at 304.

In this case, Jones did not object either to V.W.’s testimony about the Snickers-bar incident or to V.W.’s testimony about Jones’s prior incarceration. We therefore apply the standard of review for unobjected-to misconduct to the prosecutor’s alleged acts and omissions relating to that testimony. Because Jones did object both to V.W.’s testimony about the knife incident and to one of V.W.’s testimonial statements about her belief that Jones was guilty of arson, we apply the standard of review for objected-to misconduct to the prosecutor’s alleged acts and omissions relating to that testimony.

Unobjected-to misconduct

“When a defendant alleges unobjected-to prosecutorial misconduct, [appellate courts] apply a modified plain-error standard that requires the defendant to show an error was made that was plain.” *Caldwell v. State*, 886 N.W.2d 491, 501 n.6 (Minn. 2016). “An error is plain if it is clear or obvious; this means an error that violates or contradicts case law, a rule, or an applicable standard of conduct.” *State v. Mosley*, 853 N.W.2d 789, 801 (Minn. 2014). “If plain error is established, the burden then shifts to the State to demonstrate that the error did not affect the defendant’s substantial rights.” *State v. Peltier*, 874 N.W.2d 792, 803 (Minn. 2016). To do so, “the State 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.” *Id.* at 803–04 (quotation omitted).

As to the prosecutor's alleged elicitation of inadmissible testimony from V.W. about the Snickers-bar incident, as quoted above, Jones must show plain error. But we need not determine whether the prosecutor committed misconduct by allegedly eliciting this evidence because no reasonable likelihood exists that V.W.'s testimony about the Snickers-bar incident had a significant effect on the verdict.

As to the prosecutor's alleged failure to prepare V.W. to avoid inadmissible testimony about Jones's prior incarceration, Jones must show plain error in the following testimonial exchanges between his attorney and V.W.:

Q: You had his Biolife card, correct?

A: Correct. Because he gave it to me when he was in jail. He told me to come pick it up.

....

Q: [Y]ou kept his property.

A: It was in my truck.

....

Q: It was all those things I listed, right?

A: Yeah.

Q: Including his Bio card, right?

A: He released his Bio card to me while he was incarcerated. That's how I got his Bio card.

We need not determine whether the prosecutor committed misconduct in connection with this testimony because V.W.'s references to Jones's prior incarceration were brief and unaccompanied by any other evidence of his prior incarceration. The prosecutor did not mention Jones's prior incarceration in her opening statement or closing argument. On these facts, we conclude that no reasonable likelihood exists that V.W.'s testimony about Jones's prior incarceration had a significant effect on the verdict.

Objected-to misconduct

For objected-to prosecutorial misconduct, “[appellate courts] have used a two-tiered harmless-error test under which the standard of review varies based on the seriousness of the misconduct.” *Whitson*, 876 N.W.2d at 304. “Under this test, unusually serious prosecutorial misconduct is reviewed to determine whether the misconduct was harmless beyond a reasonable doubt.” *Id.* (quotation omitted).

Prosecutorial misconduct is harmless beyond a reasonable doubt if the jury’s verdict was surely unattributable to the misconduct. Factors relevant to the determination of whether prosecutorial misconduct is harmless beyond a reasonable doubt include how the improper evidence was presented, whether the State emphasized it, whether it was highly persuasive, and whether the defendant countered it. The strength of the other evidence supporting the verdict is also a factor in the analysis, but it is not dispositive. Finally, the prejudicial effect of misconduct can be cured by proper instructions to the jury.

Id. (quotation and citations omitted).

Knife Incident

The district court prohibited the state from introducing evidence of the knife incident, and the prosecutor therefore had a duty to prepare V.W. to avoid any reference to the knife incident. Yet the following exchange occurred between the prosecutor and V.W. on redirect examination:

Q: Prior to the fire, did you call law enforcement about anything other than the key taken from your ignition?

A: Yes.

Q: Okay. On [Jones] that week?

A: Yes.

Q: Okay. Why did you call?

A: ‘Cuz he pulled a knife on me.

While we do not know whether the prosecutor instructed V.W. to avoid such testimony, we conclude that V.W.’s violation of the court’s prohibition of evidence of the knife incident constitutes “misconduct attributable to the prosecutor.” *See Mahkuk*, 736 N.W.2d at 689 (attributing misconduct to prosecutor where state’s witness made testimonial reference to firearms in violation of district court’s ruling).

Immediately after Jones objected to V.W.’s testimony about the knife incident, the district court instructed the jury: “[Y]ou are to strike the comments that this witness just stated.” The prosecutor placed no midtrial emphasis on V.W.’s testimony about the knife incident, and the prosecutor made no mention of the knife incident during her opening statement or closing argument. We conclude that the court’s instruction cured any prejudicial effect of the evidence about the knife incident and that the jury’s verdict was surely unattributable to the misconduct. *See Whitson*, 876 N.W.2d at 304 (stating that “the prejudicial effect of misconduct can be cured by proper instructions to the jury”).

V.W.’s opinion about Jones’s guilt

Although Jones objected to only one of V.W.’s three testimonial statements about her belief that Jones was guilty of arson, we apply the standard of review for objected-to misconduct to the prosecutor’s alleged acts and omissions relating to all three statements by V.W. *See State v. Nissalke*, 801 N.W.2d 82, 105–07 (Minn. 2011) (treating as objected-to misconduct each asserted instance of prosecutor “improperly shifting the burden of proof to [defendant],” even though defendant objected only to “some of the asserted instances of burden-shifting”); *cf. State v. McDaniel*, 777 N.W.2d 739, 749 (Minn. 2010) (assuming for

purposes of analysis that “all instances [of alleged prosecutorial misconduct] were objected to” where defendant “generally made objections regarding the alleged misconduct during witness examination” but “did not make any objections during the prosecutor’s opening statement or closing argument”).

We conclude that the prosecutor committed misconduct by reason of V.W.’s inadmissible opinions about Jones’s guilt, i.e., her testimony that Jones “did that arson”; that the night of June 24–25, 2015, was “[w]hen [Jones] did the arson”; and that “[Jones] did the arson.” The state perplexingly argues that V.W.’s lay opinion that Jones had committed the arson was admissible evidence. The state is incorrect. *See State v. Bonner*, 275 Minn. 280, 287, 146 N.W.2d 770, 775–76 (1966) (“We have held that voluntary statements of a state’s witness before a jury which expressed the witness’ opinion as to defendant’s guilt . . . were prejudicial to the extent of denying the accused a fair trial”); *Hogetvedt*, 623 N.W.2d at 915–16 (concluding that appellant was entitled to new trial where police officer’s testimony conveyed his personal belief that appellant was guilty as charged).

We assume without deciding that the prosecutor’s misconduct in this regard is “unusually serious,” i.e., subject to “the most stringent standard of review.” *See Whitson*, 876 N.W.2d at 304 & n.2 (noting that “[r]ecent cases have questioned whether the two-tiered . . . standard for reviewing objected-to misconduct remains viable” and assuming without deciding that unusually-serious standard applied to appellant’s claim that “the prosecutor committed prejudicial misconduct by failing to adequately prepare [the state’s witness] to testify and eliciting inadmissible testimony from him”).

Immediately after Jones objected to V.W.'s third and final testimonial opinion about Jones's guilt, the district court instructed the jury: "Just because she calls it an arson, that's what the whole trial is about. That's for the jury to decide. That's how she refers to [sic] but that doesn't necessarily mean that that's what it is." And shortly before the jury began its deliberations, the court instructed the jury: "You are to disregard all evidence I have ordered stricken or have told you to disregard." We conclude that these instructions cured any prejudicial effect of V.W.'s testimonial assessments of Jones's guilt and that, under the unusually-serious standard, the attributed misconduct was harmless beyond a reasonable doubt because the jury's verdict was surely unattributable to the misconduct. *See id.* at 304 (stating that "the prejudicial effect of misconduct can be cured by proper instructions to the jury").

IV.

Jones challenges the sufficiency of the evidence to support his conviction, arguing that because S.W.'s identification of Jones was based on his limited, fleeting observation, the identification requires corroboration that is not in the record. Citing *State v. Outlaw*, 748 N.W.2d 349 (Minn. App. 2008), *review denied* (Minn. July 15, 2008), Jones broadly claims that "identification based on limited or fleeting observation requires corroboration." But that case actually states that "[c]orroboration is required when a *single witness's* identification of the defendant is made after only 'fleeting or limited observation.'" *Outlaw*, 748 N.W.2d at 357 (emphasis added) (quoting *State v. Walker*, 310 N.W.2d 89, 90 (Minn. 1981)). *Walker*, in turn, notes:

Although it is commonly stated that uncorroborated eyewitness identification testimony of a *single witness* is sufficient to support a guilty verdict, we have recognized that not all *single eyewitness cases* are the same and have emphasized that when the *single witness*' identification of a defendant is made after only fleeting or limited observation, corroboration is required if the conviction is to be sustained.

310 N.W.2d at 90 (emphasis added) (citing *State v. Spann*, 287 N.W.2d 406, 407–08 (Minn. 1979)). The state's identity evidence is insufficient if it consists of nothing more than identification testimony by a single eyewitness whose observation of the perpetrator was fleeting or limited. *Cf. State v. Lloyd*, 345 N.W.2d 240, 244 (Minn. 1984) (stating that "[w]ith respect to identifying defendant as [the victim]'s murderer, the state's evidence essentially rested on the eyewitness identification of a single witness," acknowledging that the witness observed the murderer for as little as one minute from "approximately 85 feet away" at night with limited lighting that reflected off snow, yet concluding that state's identity evidence was sufficient because "[s]hortly before the shooting occurred, it is undisputed that defendant got into [the victim]'s car and they drove off alone," and "[t]here was also evidence tending to establish that defendant was at the crime scene shortly after the victim was killed").

In this case, the identity of the arsonist was at issue—indeed, identity was the only element of the crime that Jones disputed at trial. But even if we accept Jones's characterization of S.W.'s "limited" and "fleeting" observation of the person whom he saw running away from the scene of the fire, the record shows that the state presented other evidence that Jones was the arsonist, because the state presented admissible evidence of Jones's motive, means, and opportunity to set the fire. We view that evidence "in the light

most favorable to the State” and “assume that the jury believed the State’s witnesses and disbelieved contrary evidence,” *State v. Vue*, 797 N.W.2d 5, 18 (Minn. 2011) (quotation omitted), as follows.

Jones and V.W. had a somewhat tumultuous romantic relationship, and after V.W. ended the relationship, Jones was homeless and had limited access to his belongings. In the few days between the breakup and the fire, Jones frequently called and texted V.W., leaving messages that expressed strong emotions and sometimes suggested that he was passing by or lingering near the townhome. V.W. ignored Jones’s repeated requests to reconcile or to let him stay temporarily at V.W.’s townhome or in her car. When V.W. tried to drive Jones to a storage garage in which to put his belongings, Jones grabbed the key out of the ignition and fled, temporarily disabling V.W.’s vehicle. He refused to give the key back for a time.

A few hours before the fire, V.W. had a male guest in her townhome. Around the time that V.W. and the man left the townhome, Jones called and texted V.W.; the relevant voicemails and text messages implied that V.W. was having sex with the man and expressed hostility towards V.W., e.g., “I hope he gives you AIDS and you die” and “Die of AIDS, B-tch.” About an hour later, Jones went to a gas station a short walking distance from V.W.’s townhome. He acquired a gas can, purchased \$3.50 in gas, pumped most of the purchased gas into the can, and departed on foot in the general direction of the townhome. About 15 minutes after that, gasoline was used to set fire to the townhome. Gasoline was found on Jones’s shoes after his arrest.

In sum, the state presented circumstantial evidence that corroborated S.W.’s identification of Jones as the person whom he saw running away from the scene of the fire.

The state's evidence of identity therefore consisted of more than identification testimony by a single eyewitness whose observation of the perpetrator was fleeting or limited. *See Lloyd*, 345 N.W.2d at 244–45 (acknowledging that state's evidence on identity was “not particularly strong” but concluding that identity evidence was sufficient because “there is some circumstantial evidence that tends to corroborate the identification” of defendant by a single eyewitness with fleeting or limited observation). And any inconsistencies between or gaps in S.W.'s identification testimony and the above-described corroborating evidence do not undermine the corroborative force of that evidence. *See id.* at 245 (rejecting defendant's inconsistency-based attacks on single eyewitness's identification testimony because “[t]he resolution of conflicting testimony is the exclusive function of the jury”). We conclude that the state presented sufficient evidence of Jones's guilt of first-degree arson.

Affirmed.