

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1028**

State of Minnesota,
Respondent,

vs.

Phillip Michael Johnson,
Appellant.

**Filed July 8, 2019
Affirmed
Smith, Tracy M., Judge**

Todd County District Court
File No. 77-CR-17-1153

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

Charles G. Rasmussen, Todd County Attorney, Long Prairie, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jenna Yauch-Erickson, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

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

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

SMITH, TRACY M., Judge

Following a jury trial, appellant Phillip Johnson was found guilty and convicted of
one count of domestic assault for an incident in which he threatened his then-girlfriend,
M.N. In this direct appeal, Johnson argues that a prior statement that M.N. made to the

police was not “read into evidence” within the meaning of Minn. R. Evid. 803(5), and that, without that statement, the evidence was insufficient to prove his guilt beyond a reasonable doubt. He also argues that the prosecutor committed misconduct by referring to the prior statement as substantive evidence in his closing argument. We affirm.

FACTS

In November 2017, Johnson and M.N. were in a romantic relationship. Both suffer from alcoholism; they spent much of November 26 drinking. During the day, Johnson was verbally abusive toward M.N. on several occasions; she responded to each incident by leaving the house for a while and then returning. M.N. did not remember the details of everything that Johnson said to her. At some point, though M.N. did not remember how, the police were contacted, and M.N. provided a recorded statement to an officer. In that statement, M.N. told police that Johnson had threatened to “bash [her] in the head” and to “choke [her] out.” The state charged Johnson with domestic assault based on those threats, which it alleged were made with intent to cause fear of immediate bodily harm or death.

At trial, M.N. remembered Johnson making various insulting statements but did not recall any threats. She also remembered giving the statement to the police but not everything that she said in it. M.N. was allowed to review the transcript of her statement, but doing so did not refresh her recollection. The prosecution then asked permission to use the transcript as a recorded recollection and “to impeach the witness on what’s on that part of the statement.” The parties and the court discussed whether, why, and how M.N.’s transcribed statement to the police would be admissible. After the district court determined that the transcribed statement would be admissible as a recorded recollection under Minn.

R. Evid. 803(5), the state explained how it intended to read the recollection into evidence: “What I intend on doing is . . . asking [M.N.] isn’t it true questions that ‘Q’ says this and ‘A’ says that, and she can answer for me” While Johnson’s counsel objected to the use of the recorded recollection as substantive evidence, he made clear that he had no comment on that method of reading the statement into evidence.

The prosecutor ultimately engaged in the following exchange with M.N. before the jury:

Q: Okay. And where the question says “Okay” and then underneath it says “Answer,” and is it true that the answer portion says, “He said that I should bash you in the head. I should choke you out.” Is that correct? Is that what that says?

A: That’s what it says.

Q: Okay. Then the next question says, “He say those things tonight?” Is that correct?

A: That’s what it says, correct.

Q: And the answer is, “Yeah. He says them on a daily basis.” The next question is “Okay.” Is that – is that all correct?

A: Yes.

Q: And is it true the answer that comes after okay says, “It is true. I’m not lying. I swear to God I’m not lying.”

A: Correct.

Q: Is that what that says?

A: Yes.

The state presented testimony from several other witnesses, but none testified to having witnessed the assault.

After the state rested, Johnson moved for a directed verdict of acquittal, arguing that M.N.’s testimony did not prove that she had a fear of imminent bodily harm or death and also did not prove that Johnson intended to cause such fear. Johnson’s attorney based this argument on M.N.’s recorded recollection. He noted in particular M.N.’s statement from

the transcript that Johnson made such threats daily, implying that it would be unreasonable to understand Johnson's words as an actual threat and unreasonable to infer that Johnson intended the words to be threatening. In evaluating the motion, the district court treated the statements, read by the prosecutor and affirmed as an accurate reading by M.N., as substantive evidence that had been read into the record. The district court denied the motion.

Johnson testified in his own defense, admitting that it was possible that he made the specific threats from M.N.'s recorded recollection but stating that, because of his intoxication, he did not recall. He denied intentionally assaulting M.N. on November 26.

In the state's closing argument, the prosecutor repeatedly asserted that his reading of M.N.'s statement counted as evidence. Specifically, he said:

[M.N.] had a difficult time with memory regarding those six lines on the top of page two. Those were lines that I read into the record with her sitting on the witness stand, but let's not forget those were her words. Those were her words that she gave to law enforcement the day this incident occurred. Those were the words she used—she gave to Deputy Brittney when she took her statement. That's evidence. You heard the arguments of the attorneys are not evidence, but that's evidence. Yes, she was—indicated she could not recall specifically what she said, but those words were read into evidence and she testified again she remembers making that statement and that she reviewed that transcript, that she just simply couldn't recall some portions of that. Those were read into evidence and that is evidence.

....

Again, the evidence is what was stated in court by the witnesses and also includes the transcript, six lines that I read into evidence.... Statements again myself and that [defense counsel] would make, they're not evidence, they're argument,

and the only exception is statements that I read into the record that were [M.N.'s] words.

On several occasions, the prosecutor both referred to “those first six lines of page two,” and quoted the words of the threats—“bash her head in” and “choke her out.”

In the defense’s closing argument, Johnson’s counsel did not contend that the state’s reading of M.N.’s recorded recollection was not substantive evidence. Rather, he argued that the statements described by M.N. in the recorded recollection were not specific threats—they were “I should” statements rather than “I am about to” statements. Johnson’s attorney also argued that the evidence did not provide context that could tell the jury whether the statements were intended to, or in fact did, cause fear of imminent bodily harm or death.

After deliberations began, the jury requested the transcript of M.N.’s recorded recollection. The state’s position was that the court should not comply with the request because the recorded recollection had been read into the record but had not been introduced as an exhibit; neither the court nor defense counsel disagreed with that position.

The jury found Johnson guilty. Johnson was convicted and sentenced to 32 months’ imprisonment. He now appeals, asserting that M.N.’s recorded recollection was never read into evidence. Based on that claim, he argues that there was insufficient evidence to support his conviction and that the prosecutor committed misconduct by referring to his own questions about the transcribed statement as evidence.

DECISION

I. M.N.'s statement was read into evidence.

A witness's prior out-of-court statement about an event is generally hearsay and may not be admitted for the truth of the matter asserted. Minn. R. Evid. 801, 802. An exception to the hearsay rule allows admission of "[a] memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to testify fully and accurately." Minn. R. Evid. 803(5). To be admissible, the record must be shown, first, "to have been made or adopted by the witness when the matter was fresh in the witness' memory" and, second, "to reflect that knowledge correctly." *Id.* The record may be "read into evidence" but can only be made an exhibit if offered by an adverse party. *Id.*

Here, Johnson does not dispute that M.N.'s statement to the police qualified as a recorded recollection and was admissible under rule 803(5). Instead, Johnson argues that the prosecutor's reading of the transcript in leading questions to M.N. did not count as reading it into evidence within the meaning of Minn. R. Evid. 803(5). His position is that it was actually introduced for the limited purpose of impeachment.

Johnson's main contention is that the transcript was never "read into evidence" within the meaning of Minn. R. Evid. 803(5). We review de novo the meaning of the rules of evidence. *See State v. Sanchez-Sanchez*, 879 N.W.2d 324, 329 (Minn. 2016) ("[Appellate courts] review the interpretation and application of the rules of evidence de novo."). Because Johnson's argument turns primarily on whether the phrase "read into

evidence” includes the process used by the prosecutor in this case, our review proceeds de novo.

In support of his argument that the transcript was not “read into evidence,” Johnson points to three facts from trial. First, the transcript of the prior statement was read to M.N. in a series of questions. Second, the state did not play the audio recording for the jury. Third, the state did not introduce a transcript of the statement as an exhibit. Because of these facts, Johnson contends that the state did not introduce the statement as substantive evidence. Implicit in Johnson’s argument is a claim that a recorded recollection is only “read into evidence” when the audio recording is played, when the prosecutor reads directly to the jury, or when the transcript is introduced as an exhibit.¹

But Johnson cites no law as to what it means for a recorded recollection to be “read into evidence.” From our review, while caselaw has addressed the admissibility of evidence pursuant to Minn. R. Evid. 803(5), *see, e.g., State v. Stone*, 784 N.W.2d 367 (Minn. 2010) (evaluating whether a witness had “insufficient recollection to testify fully and accurately” and whether the witness “made or adopted” the recorded recollection for purposes of rule 803(5)), no Minnesota case governs how a recorded recollection may be read into evidence.

Other jurisdictions allow a witness to read a recorded recollection into evidence. *See, e.g., Parker v. Reda*, 327 F.3d 211, 214 (2d Cir. 2003) (holding that a district court did not err by allowing a police sergeant to read the contents of his recorded recollection

¹ The last part of the assertion—that the state should have introduced the record as an exhibit—is certainly incorrect. Rule 803(5) expressly prohibits a nonadverse party from introducing the record as an exhibit. Thus, reading the record into evidence is not the same as introducing it as an exhibit. Minn. R. Evid. 803(5).

into evidence); *Rudy v. Bossard*, 997 P.2d 480, 484 (Wy. 2000) (stating that, under Wyoming’s comparable rule, “a memorandum or record may be read into evidence by a witness”). Here, while M.N. did not actually read aloud the recorded recollection, the prosecutor’s method of reading in the transcript was functionally identical: the prosecutor read from the statement, and then asked M.N. whether his reading was accurate. There is no substantive difference between asking a witness to confirm the accuracy of a reading and having the witness perform the reading personally.² See Kenneth J. Melilli, *Examination of a Witness Based on a Prior Statement*, in 49 Am. Jur. Trials 501, 532-35 (Richard Kohlman Hughey et al. eds., 1994) (illustrating the use of leading questions to read a recorded recollection into evidence where the attorney reads the recollection and the witness confirms that the reading was accurate). Thus, the district court did not err by allowing this method of reading the transcript into evidence.

² This is not to say that there are no differences; one method results in leading questions while the other does not. To the extent Johnson claims that the district court should not have allowed the prosecutor to use leading questions when questioning M.N., we reject his argument. The district court has “control over the mode . . . of . . . presenting evidence.” Minn. R. Evid. 611(a). A district court may permit leading questions as necessary to develop a witness’s testimony. Minn. R. Evid. 611(c). District courts’ discretion over the use of leading questions “is practically absolute.” *Garedpy v. Chi., Milwaukee, St. Paul & Pac. R.R. Co.*, 223 N.W. 605, 606 (Minn. 1929); see also *Bigham v. J. C. Penney Co.*, 268 N.W.2d 892, 898 (Minn. 1978) (requiring that a party asserting that a district court erred by allowing leading questions show a “clear abuse of discretion” and clearly show specific prejudice). And leading questions may be particularly appropriate when a witness is having difficulty recalling prior statements. See *Behlke v. Conwed Corp.*, 474 N.W.2d 351, 356 (Minn. App. 1991), review denied (Minn. Oct. 11, 1991). Here, the prosecutor said that he intended to read from the transcript and ask M.N. whether or not his reading was accurate. The district court approved of the method proposed by the prosecutor, and defense counsel did not object. We see no abuse of discretion in permitting the state to ask leading questions of M.N. under the circumstances.

Johnson's argument that the state only introduced the evidence as impeachment also fails. While it is not entirely without support—the prosecutor did say that he wanted to use M.N.'s statement to the police to impeach M.N.—his argument ignores other circumstances around the admission of the statement. First, the prosecutor also specifically asked for the evidence to come in under rule 803(5). Johnson gives no reason why this court should take the prosecutor at his word with respect to impeachment but not with respect to the introduction of the statement as a recorded recollection. Second, M.N.'s answers to the prosecutor's questions, in which she affirmed that he had accurately read the transcript of her prior statement, did not tend to impeach her other testimony. M.N. had testified that she did not recall the events that the statement described and did not recall giving those parts of the statement. Her lack of present memory was not inconsistent with the substance of the statement she gave to the police. Third, when ruling that the transcript could be admitted, the court required that further foundation be laid, showing that the statement was an accurate reflection of M.N.'s knowledge at the time. Such testimony is required for the admission of evidence under rule 803(5). But impeachment by prior inconsistent statement does not require a witness to acknowledge that the prior statement accurately reflected the witness's knowledge at the time. *See State v. Martin*, 614 N.W.2d 214, 224 (Minn. 2000) (describing the foundation that must be laid to impeach a witness by prior inconsistent statement). Thus, the district court intended that the evidence be admitted for substantive purposes, not for impeachment. Finally, Johnson's attorney, in moving for a directed verdict of acquittal, relied on the substance of M.N.'s prior statement, indicating that he believed it had been admitted for more than just impeachment purposes.

In sum, the prosecutor's comment about impeachment did not prevent the recorded recollection from being introduced as substantive evidence.

M.N.'s recorded recollection was "read into evidence" within the meaning of Minn. R. Evid. 803(5).

II. The evidence was sufficient to support the conviction.

Johnson argues that there was insufficient evidence on which to convict him because there was no evidence that he ever engaged in conduct constituting assault.

When considering a claim of insufficient evidence, appellate review "is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict they did." *State v. Bowen*, 921 N.W.2d 763, 765 (Minn. 2019) (quotation omitted). "We assume that the jury believed the witnesses whose testimony supports the verdict." *State v. Pendleton*, 706 N.W.2d 500, 512 (Minn. 2005).

Johnson was charged with, and convicted of, domestic assault in violation of Minn. Stat. § 609.2242 (2016). That charge required the state to prove, among other things, that Johnson assaulted M.N. See Minn. Stat. § 609.2242, subd. 1 (defining the crime). Under the state's theory of the case, "assault" meant an act done "with intent to cause fear in [M.N.] of immediate bodily harm or death." See *id.*

Johnson argues that, because the transcript of M.N.'s prior statement was never "read into evidence," there was no evidence that he ever did anything with the intent to cause M.N. to fear immediate bodily harm or death. But, as previously concluded, M.N.'s statement was read into evidence within the meaning of Minn. R. Evid. 803(5), and the

statement described Johnson's threats to "bash [her] in the head" and "choke her out." If credited, as we presume it to have been, *Pendleton*, 706 N.W.2d at 512, M.N.'s statement was sufficient evidence for the jury to have found that Johnson threatened M.N. with intent to cause her to fear immediate bodily harm or death.

III. The prosecutor did not plainly commit misconduct.

Johnson's last argument is that he is entitled to a new trial because the prosecutor committed misconduct in his closing argument by referring to the reading of the transcript as substantive evidence. Johnson did not object to the state's closing argument at trial.

Appellate courts review claims of unobjected-to prosecutorial misconduct for plain error, using a modified test. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Under that test, the defendant bears the burden of showing that there was misconduct constituting error and that the error was plain; to be plain, the error must "contravene[] case law, a rule, or a standard of conduct." *State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012) (quotation omitted). If the defendant shows plain error, the burden "shifts to the [s]tate to demonstrate that the error did not affect the defendant's substantial rights." *Id.* If the state fails to meet its burden, an appellate court then "must decide whether the error seriously affected the fairness and integrity of the judicial proceedings." *State v. Radke*, 821 N.W.2d 316, 329 (Minn. 2012).

Johnson asserts that the prosecutor violated three related rules in his closing argument. The first is the rule against referring to evidence not introduced at trial. *See State v. Morton*, 701 N.W.2d 225, 237 (Minn. 2005) ("While the state's argument need not be 'colorless,' it must be based on the evidence produced at trial, or the reasonable inferences

from that evidence.”). The second prohibits the use of impeachment evidence as substantive evidence. See *Radke*, 821 N.W.2d at 329 (holding that it was plain error for a prosecutor to “invite[] the jury to use [impeachment evidence] as substantive evidence of guilt”). And the last forbids an attorney from referring to the attorney’s questions as evidence. See *State v. McCoy*, 682 N.W.2d 153, 158 (Minn. 2004) (“[T]he questions and arguments of attorneys are not evidence.” (quotation omitted)).

The prosecutor did not plainly violate any of the rules Johnson identifies. First, because the prosecutor read the transcript into evidence within the meaning of Minn. R. Evid. 803(5), it was “evidence produced at trial,” *Morton*, 701 N.W.2d at 237, and the prosecutor could properly refer to it in closing.

The second rule that Johnson identifies was not violated for a similar reason. Evidence introduced under Minn. R. Evid. 803(5) may be used for the truth of the matter asserted and not merely for impeachment. See Minn. R. Evid. 801(c) (defining hearsay as “a statement . . . offered in evidence to prove the truth of the matter asserted”), 803 (creating exceptions to the rule against hearsay). Because M.N.’s prior statement was read into evidence under rule 803(5), it was substantive evidence of Johnson’s threatening statements.

The third rule that Johnson identifies presents the closest thing to error. Johnson contends that the prosecutor committed misconduct by repeatedly stating that his reading of the transcript constituted evidence. Whether the prosecutor wrongly referred to his questions as evidence turns on a rather arcane question: when, exactly, during the prosecutor’s questioning of M.N., was the transcript read into evidence? There appear to

be two possibilities. First, the transcript may have been “read into evidence” at the moment the prosecutor read it aloud. If this is the case, then the prosecutor’s description of his words as evidence is correct. Second, the transcript may have been “read into evidence” when M.N. affirmatively answered the prosecutor’s question. If this is the case, then M.N.’s affirmative answer was evidence, and the prosecutor’s reading of the transcript was merely a question, not evidence. But, because no case law, rule, or standard of conduct defines when a recorded recollection is “read into evidence,” there was no plain error. *Carridine*, 812 N.W.2d at 146.

The prosecutor did not plainly commit misconduct in his closing argument.

Affirmed.