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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1989**

State of Minnesota,
Respondent,

vs.

Corey David Johnson,
Appellant.

**Filed January 19, 2021
Affirmed
Connolly, Judge**

McLeod County District Court
File No. 43-CR-18-1544

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

Michael K. Junge, McLeod County Attorney, Glencoe, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne Senecal-Hill, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Connolly, Judge; and Gäitas,
Judge.

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

Appellant challenges his convictions of a methamphetamine crime involving
children in violation of Minn. Stat. § 152.137, subd. 2(a)(4) (2018); fifth-degree controlled-

substance crime in violation of Minn. Stat. § 152.025, subd. 2(1) (2018); and domestic assault in violation of Minn. Stat. § 609.2242, subd. 1(2) (2018). Appellant argues that his convictions must be reversed and a new trial ordered because: (1) the district court abused its discretion by admitting hearsay statements under Minn. R. Evid. 807 without conducting the required analysis; and (2) five prosecutorial errors violated appellant’s substantial rights and require a new trial. We affirm.

FACTS

On September 21, 2018, M.J. got into an argument with her husband, appellant Corey Johnson. M.J. is deaf. Prior to leaving home around 8:20 a.m., M.J. woke appellant up to make sure he could take care of their four-year-old child. Appellant replied: “leave [me] the f*ck alone” and then hit M.J. in the chest. M.J. fell backwards onto a dog kennel and hit the wall. As she fell, appellant grabbed her cell phone and began walking around the house looking at her phone. Appellant then noticed that M.J. was bent over struggling to breathe and offered to take her to the doctor or call the police.

Prior to the incident, M.J. was scheduled to be picked up by her daughter, K.C., who also serves as her interpreter. M.J. was scheduled to go to the McLeod County Alliance for domestic-abuse victims due to previous issues between appellant and M.J. Instead of going to the Alliance, K.C. took her mother to the police station.

At the police department, Officer Greg Nadeau took a formal taped statement from M.J.; K.C. was present to translate.¹ Officer Nadeau asked what the argument was about

¹ This conversation is referred to as the “audio statement” at trial.

and M.J. said: “Basically stress, he was saying that she was lying about everything, calling her names and calling [the] kids names, accusations.” This outburst occurred because M.J. “thinks [the] biggest part of it is . . . of the way . . . he is now. He got back in touch with his old friend.” She stated that everything was going well until “he got back in touch with [his old friend] that’s why his mood has just drastically declined. Plus also not having a job.” M.J. believes appellant’s old friend is a bad influence on appellant because “his demeanor, behavior and everything about him changed when he started hanging out with [the old friend] again. And [appellant] also lost almost 30 pounds in one month.” M.J. believed this was due to drug use. M.J. attributed several things to recent drug use: appellant is paranoid; he accuses M.J. of lying about everything; calls her and the kids names; makes accusations such as that M.J. was “kidnapping” their four-year-old son on the morning of the incident; he put baby powder on the stairs; locked the children’s bedrooms; and was hearing noises at night when the house was silent. Appellant also had a gun in the home. M.J. brought drugs to the station that she said were appellants, and that she had more of his drugs at home but was too scared to bring them with her to the police station.

Officer Nadeau asked further questions about the physical altercation that morning. M.J. explained how appellant pushed her and she fell onto the dog kennel and into the wall. M.J. stated that her chest is sensitive due to an accident with a horse when she was younger and that is why she was taking medication at the time of the altercation with appellant. Officer Nadeau asked if there was a red mark on her chest; M.J. stated “I don’t know. I can’t even see. Probably not,” but K.C. stated: “I mean it looks like it’s a little red right

here, but I don't know." Without prompting from the police, K.C. also informed Officer Nadeau of a previous domestic-assault incident in front of the children where the police had been called. K.C. witnessed appellant push M.J. and told the police at the scene that she saw him push her. In response to this, appellant became "very hostile" and called K.C. a liar.

Throughout the entire interview, both M.J. and K.C. expressed concern about appellant retaliating. K.C. volunteered that she had had an issue with appellant when she was younger. Appellant allegedly threatened to use a naked picture of K.C. against her; a picture that was taken of K.C.'s back by her sister I.C. when she was only 14 years old. K.C. told Officer Nadeau that the picture was not intended to be "anything weird, malicious, sexual or anything like that," but that appellant had said he would use it against her. In response, Officer Nadeau informed K.C. and M.J. that if appellant were to distribute the photograph, it would be disseminating child porn, and soliciting. K.C. insisted that appellant never did anything with the photograph. M.J. said she is especially "afraid of . . . retaliation and how he's going to come after her cuz he's always saying like I'm going to ruin your life." M.J. also expressed concern for the boys if the police were to get in contact with appellant, stating that "if [appellant] believes that they were talking to you about anything, about him . . . he'll flip on the boys. And then he just twist everything around, anything that gets said, he twists."

Officer Nadeau went to the couple's home and arrested appellant for domestic assault. Officer Nadeau read appellant his Miranda rights. Appellant then voluntarily told Officer Nadeau that M.J. had woken him up despite knowing that he needed space. He

admitted that they got into an argument; he said that he never struck M.J. but “brushed her aside” and then she fell on top of the dog crate.

After arresting appellant, Officer Nadeau went back to the couple’s residence to meet with M.J. and K.C. again. He activated his body camera at this time.² He informed them of appellant’s statements and the three individuals spoke about the inconsistencies between M.J. and appellant’s versions of the story for several minutes. Officer Nadeau stated that appellant was twisting the story to make him the victim, and that in his “opinion,” appellant was trying to discredit M.J. and make her sound crazy. Officer Nadeau added that, according to appellant, he could barely walk without crutches due to an accident that occurred in his childhood, which made no sense to M.J. or K.C.

Officer Nadeau also asked about the location of the drugs, which M.J. had stated at the police station were at the house. M.J. went to the home office and came back and gave Officer Nadeau a backpack, which she said was appellant’s. M.J. began going through the backpack and pulling out clothes; she stated that appellant had plans to go stay with [his old friend], which explained why he had clothes packed. She told the officer that appellant offered her drugs in the past, but that she refused to take them.

Officer Nadeau took possession of the backpack and took photos of the inside. The items found inside the bag included two straws that appeared to be paraphernalia for methamphetamine. Preliminary testing was completed on one straw, and it tested positive for methamphetamine. There was also a scale, a Ziploc bag of empty pill capsules, and

² This footage is referred to as the “video statement” at trial.

three baggies containing a white residue. These items were sent to the Bureau of Criminal Apprehension (BCA) for testing; one of the bags tested positive for methamphetamine.

Respondent State of Minnesota charged appellant with three crimes based on M.J.'s statements and the backpack: a methamphetamine crime involving children in violation of Minn. Stat. § 152.137, subd. 2(a)(4); fifth-degree controlled-substance crime in violation of Minn. Stat. § 152.025, subd. 2(1); and domestic assault in violation of Minn. Stat. § 609.2242, subd. 1(2). Prior to trial, the state learned that M.J. was no longer going to testify to the same events that she told police about on the date of the offense. As a result, the state filed notice that, pursuant to Minn. R. Evid. 807, it intended to offer statements made by M.J. to Officer Nadeau on September 21, 2018.

On the morning of trial, both parties participated in conversations with the district court in chambers prior to going on the record to address the motions in limine. The state asked to introduce two statements under the residual exception to the hearsay rule pursuant to Minn. R. Evid. 807. The first was the audio statement M.J. gave to Officer Nadeau at the police station. The second was the video statement, the body camera footage from M.J.'s home. The district court reviewed both the audio statement and the video statement. After a recess, the court stated on the record that both statements were admissible under Rule 807. The state also filed a request to order M.J. to provide testimony under a grant of use immunity pursuant to Minn. Stat. § 609.09 subds. 1, 2 (2018). The district court issued an order granting M.J. use immunity and appointed advisory counsel for her.

The majority of M.J.'s testimony at trial was denying any recollection of events; recanting her statements made to the police at the station and at her home; and offering

alternative explanations for the backpack and drugs. In response to basic questions, such as, “did you have plans with your daughter to go to the McLeod County Alliance for Domestic Abuse Victims,” and, “[d]o you remember that the morning, your daughter was going to be picking you up from home,” M.J. stated: “I don’t remember.” The prosecutor asked why she was fighting with her husband on the morning of September 21, 2018, and she said “I just don’t remember.” M.J. also told a starkly different story about the backpack which she gave to Officer Nadeau. According to her testimony at trial, she found the backpack in the trash, on her property, and she decided to pick it up because “it was different, and I didn’t know what it was.” The prosecution pressed her on this issue because M.J. had kept the bag in her safe, which was unusual, especially because she “didn’t know” if the backpack even had drugs in it. She then testified that “[i]t was just – it was just a set up. . . . I set up my husband so he couldn’t get the kids or have them taken from me.” She continued to deny any abuse the morning of the incident, or knowledge of drugs. Appellant did not testify.

The jury found appellant guilty of all three charges. He received a stay of imposition and probation for up to three years for the methamphetamine crime involving children, and a stay of imposition and probation up to two years for the domestic assault, to be served concurrently. This appeal follows.

DECISION

“Evidentiary rulings rest within the sound discretion of the district court, and we will not reverse an evidentiary ruling absent a clear abuse of discretion.” *State v. Ali*, 855 N.W.2d 235, 249 (Minn. 2014). “A district court abuses its discretion when its decision is

based on an erroneous view of the law or is against logic and the facts in the record.” *State v. Hallmark*, 927 N.W.2d 281, 291 (Minn. 2019) (quotation omitted).

I. Admission of Evidence under Minn. R. Evid. 807

Hearsay is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Minn. R. Evid. 801(c). Hearsay is not admissible unless an exception applies. Minn. R. Evid. 802. “A determination that a statement meets the foundational requirements of a hearsay exception is reviewed for an abuse of discretion.” *Holt v. State*, 772 N.W.2d 470, 483 (Minn. 2009). The “residual exception” to the hearsay rule is outlined in Rule 807; specifically, the rule states:

A statement not specifically covered by rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will be best served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing, to provide the adverse party with a fair opportunity to prepare to meet it, the proponent’s intention to offer the statement and the particulars of it, including the name, address and present whereabouts of the declarant.

Minn. R. Evid. 807.

Appellant begins his argument by characterizing the admission of the statements as impeachment evidence; as an “egregious attempt to gain a conviction” when, “[d]espite

knowing [M.J.] was not going to testify consistently with her statements to police whatsoever, the state called her to testify precisely so that it could use her prior statements as evidence against [appellant].” Rather than address the residual hearsay exception under rule 807, appellant argues that the state erred by relying on impeachment evidence under rule 607. To support this argument, appellant relies on *State v. Ortlepp*, which in relevant part analyzes *State v. Dexter*, 269 N.W.2d 721 (Minn. 1978). 363 N.W.2d 39, 42-43 (Minn. 1985).

Dexter precludes calling a witness for the sole purpose of impeaching that witness. 269 N.W.2d at 721-22. The court in *Ortlepp*, when referencing *Dexter*, notes that it is a problem if “the prosecutor is permitted to call [a] witness and use the prior statement for impeachment purposes” because “the jury, even if properly instructed, will consider the prior statement as substantive evidence.” 363 N.W.2d at 42-43. The analogy that appellant attempts to make between the present case and *Ortlepp* is misplaced because here the record clearly shows that the evidence was admitted as substantive evidence under the residual hearsay exception, rule 807, not as impeachment evidence under rule 607.

As stated, both the audio statement and the video statement were admitted as substantive evidence under rule 807. “A defendant claiming error in the district court’s reception of [hearsay] evidence has the burden of showing both the error and the prejudice resulting from the error.” *Holt*, 772 N.W.2d at 483 (quotation omitted). The decision to admit hearsay statements pursuant to the residual exception is a two-step process. *Hallmark*, 927 N.W.2d at 292. First, the court must look at the “totality of the circumstances” to determine whether or not the hearsay statement has “circumstantial

guarantees of trustworthiness.” *State v. Davis*, 864 N.W.2d 171, 181 (Minn. 2015) (quotation omitted). Second, the court must determine whether the three conditions enumerated in rule 807 are met. *Hallmark*, 927 N.W.2d at 293.

Appellant argues that the court failed to conduct a “careful analysis of the totality of the circumstances to determine whether the statements had circumstantial guarantees of trustworthiness.”³ The record however, reflects an analysis of the circumstances to determine trustworthiness because both parties had the opportunity to argue the relevant rule 807 factors that supported their positions, and the district court reviewed those arguments as well as the offered hearsay statements prior to making a ruling on the record.

A. Circumstantial Guarantees of Trustworthiness

The first step in the process of admitting evidence under rule 807 is to ensure that the hearsay statement meets the same “circumstantial guarantees of trustworthiness” as those statements that meet the other enumerated hearsay exceptions. *Davis*, 864 N.W.2d at 181 (quotation omitted). The court must examine the totality of the circumstances surrounding the making of the statements. *Id.* Historically, courts have relied on the four *Ortlepp* factors: (1) whether there is a confrontation problem presented by admission of the

³ Appellant relies heavily on *State v. Wernsinger*, No. A19-0738, 2020 WL 2703718, (Minn. App. May 26, 2020), which is a nonprecedential case. Moreover, it is clearly distinguishable. In *Wernsinger*, this court concluded that the district court abused its discretion by failing to consider any relevant rule 807 factors on the record. 2020 WL 2703718, at *4. Appellant argues that the same issue is present here. But, in *Wernsinger*, the district court applied the wrong legal standard and instead only considered factors relevant to impeachment; that is why no relevant rule 807 factors were considered on the record. *Id.* at *3. Here, the district court applied the correct legal standard and stated so on the record.

statement as substantive evidence; (2) whether the declarant admitted to making the prior statement; (3) whether the statement was against the declarant's penal interest; and (4) whether the statement was consistent with all the other evidence. 363 N.W.2d at 44.

Other relevant circumstances include, but are not limited to:

whether the statement was given voluntarily, under oath, and subject to cross-examination and penalty of perjury; the declarant's relationship to the parties; the declarant's motivation to make the statement; the declarant's personal knowledge; whether the declarant ever recanted the statement; the existence of corroborating evidence; and the character of the declarant for truthfulness and honesty.

State v. Davis, 820 N.W.2d 525, 537 (Minn. 2012).

Here, the state argued extensively on the record that the audio and video statements had guarantees of trustworthiness, and restates these arguments in its brief. Specifically, the state brought six factors to the district court's attention: (1) the statements were against M.J.'s own penal interest – M.J. was granted immunity because she admitted she possessed drugs and also admitted that she gave the defendant painkillers; (2) the statements were against M.J.'s own relationship interest – she stated on numerous occasions that she was afraid of retaliation by her husband; (3) the statements were spontaneous – she was at the police station to discuss the domestic assault, but volunteered information about drugs and brought drugs to the station; (4) the statements made at the police station and at the home were consistent; (5) the statements were close in time to the event; and (6) the other version of events that M.J. disclosed after the fact are not consistent with the evidence – her story that she found a bag of drugs does not make sense in light of her other statements to police.

Appellant argues that there are factors that show M.J.'s prior statements are not trustworthy. First, they were not made under oath or subject to cross-examination under penalty of perjury. But this is not entirely true. Her statements were not initially made under oath because they were made voluntarily at the police station. But just because M.J. was granted immunity does not mean she was not under penalty of perjury. In fact, the order granting immunity states that she is subject to the penalty of perjury.

Second, M.J. admits she was scared and not in her right mind at the time she made the statements. M.J. did testify that she was not in her right mind, but this testimony was not given in reference to the statements to police; appellant takes M.J.'s statement out of context. At trial, the prosecutor asked: "You didn't even think they were drugs, yet you wanted to set up your husband. Do you understand why that doesn't make any sense?" M.J. responded: "It didn't make sense back at that time, and it doesn't make sense right now. I was just not in my right mind then." And in another line of questioning, M.J. continued to say that she was not afraid of appellant because of the fight that morning. In response to M.J.'s answers, the prosecutor asked: "[s]o who were you scared of?" M.J. replied: "I was just scared. I wasn't in my right mind." Therefore, appellant's argument that M.J. was not in her right mind, and that is why she told the police about the assault and the drugs, is unpersuasive.

Appellant also argues that M.J. recanted her statements. She did. But the timing of the inconsistent statements indicates that the first statement – which was made spontaneously, without the presence of appellant, and immediately after the incident occurred – is more trustworthy than her statements on the witness stand after having to

confront appellant. M.J. even admitted on the record that her memory was better at the time of the incident than it was at trial. The prosecutor asked if her memory of what took place would “be better then than it is now?” and M.J. said, “Yes.”

The court considered all of the surrounding circumstances of the audio and video statements. It also reviewed both statements prior to making its decision, and then engaged in an analysis on the record. This is evidence of the exercise of sound discretion by the district court. The district court stated that there were sufficient guarantees of trustworthiness, and specific reasons for this ruling were explicitly stated on the record, such as, M.J. “was available for cross-examination,” and

[t]he two versions of [M.J.’s] statements were consistent against her interests by the fact of her possessing the controlled substances, providing the controlled substances to [appellant], which I know . . . has been redacted, which will not come in, and then also because of the relationship. And, finally, it references ‘a red mark’ in the statement, which would corroborate the – what she does state.

Because the record does contain an analysis of the totality of the circumstances surrounding the statements, and the district court’s conclusion that there was evidence of trustworthiness is supported by the record, the district court did not abuse its discretion.

B. Three Conditions Enumerated in Rule 807

The second step in the process of the decision to admit hearsay evidence as substantive evidence under the residual exception is to ensure that the statement satisfies the three enumerated conditions in Minn. R. Evid. 807. *Davis*, 820 N.W.2d at 537. The statement must be offered as a material fact; it must be “more probative on the point for which it is offered than any other evidence” procurable “through reasonable efforts” by the

proponent; and admitting the statement into evidence must serve the general purpose behind the Minnesota Rules of Evidence and the interests of justice. *Id.*

The district court addressed these factors on the record. Specifically, the court stated:

The Court is finding that the statement is offered as evidence of a material fact. It is more probative than other evidence as only she and [appellant] were present in their home on September 21, 2018. The Court is not considering the four-year-old as a person who would be able to provide other evidence of what happened. And it is in the interest of justice to allow the statement.

Because the record shows that the district court went through the required analysis, it did not abuse its discretion.

II. Cumulative Prosecutorial Errors

Appellant did not object to any of the alleged prosecutorial misconduct at trial. Therefore, this court reviews the issue under a plain-error standard. Minn. R. Crim. P. 31.02. Plain error is an error, that is plain, that affects a defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). "An error is plain if it is clear or obvious, which is typically established if the error contravenes caselaw, a rule, or a standard of conduct." *State v. Webster*, 894 N.W.2d 782, 787 (Minn. 2017) (quotation omitted). For unobjected-to prosecutorial error, review is under a modified plain-error standard, which requires that the appellant first establish that the prosecutorial error is plain, then the burden shifts to the state to show that the misconduct did not affect the appellant's substantial rights. *State v. Ramey*, 721 N.W.2d 294, 299-300 (Minn. 2006). The error must be so serious that it impairs a person's constitutional right to a fair trial. *State v. Johnson*,

616 N.W.2d 720, 727-28 (Minn. 2000). This requires a showing that there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury. *State v. Matthews*, 779 N.W.2d 543, 551 (Minn. 2010).

Appellant argues that he is entitled to a new trial because of five instances of alleged prosecutorial misconduct. First, appellant alleges that the prosecutor urged the jury to use impeachment testimony as substantive evidence during closing arguments. Second, he alleges that it was error to allow the jury to hear Officer Nadeau's statements made during the investigation, which was played for the jury in the video statement. Third, he alleges that the failure to exclude I.C.'s statements about appellant's prior drug use contained in the audio statement was inadmissible bad-act evidence. Fourth, he alleges that the prosecutor materially misrepresented the facts by stating that there was a red mark on M.J.'s chest. Fifth, he alleges that the prosecutor erroneously appealed to the jury's passions and sympathies during closing argument. Every one of appellant's arguments deals with portions of the audio and video statements which were played to the jury. Most important, the state provided notice of its intent to use the statements, and clearly outlined which portions would be played to the jury. Yet, appellant failed to object to the prosecution playing any of the statements now complained of. Each of the alleged errors are taken up separately.

A. The state did not erroneously use impeachment evidence as substantive evidence in its closing argument.

A prosecutor may not use impeachment evidence for any purpose other than to aid credibility determinations. Minn. R. Evid. 613. Appellant argues that the prosecution used

testimony elicited as impeachment evidence from K.C. and M.J. as substantive evidence in closing arguments. In its closing argument, the state pointed out the many inconsistencies between M.J.'s statements on the date of the incident and on the witness stand to aid the jury in making a credibility determination. Specifically, the state referred to the fact that K.C. stated in the video statement that her sister, I.C., had walked in on appellant "snorting a white powder" in the same office where the backpack was found. M.J. testified that neither she nor her children have ever seen him using drugs.

Appellant argues that "the state essentially used impeachment evidence as substantive evidence to argue to the jury that, because I.C. saw [appellant] snorting the white powder, the items in the backpack must be his." This argument fails. The prosecution used this evidence to point out inconsistencies in M.J.'s testimony. As appellant concedes, impeachment evidence is meant to be used as credibility evidence. That is exactly what the prosecutor used the testimony for. Accordingly, the prosecutor properly referenced this testimony during closing arguments.

B. The failure to exclude Officer Nadeau's statements vouching for M.J. from the video statement was not error.

The credibility of a witness is for a jury to decide. *State v. Koskela*, 536 N.W.2d 625, 630 (Minn. 1995). Opinion testimony about the credibility of a witness or "vouching occurs when the government implies a guarantee of a witness's truthfulness . . . or expresses a personal opinion as to a witness's credibility." *State v. Patterson*, 577 N.W.2d 494, 497 (Minn. 1998) (quotation omitted). Appellant asserts that the prosecutor committed misconduct when it did not exclude Officer Nadeau's comments "vouching" for M.J.'s

credibility from the video statement. Specifically, appellant complains that “the jury heard Officer Nadeau intimate that [appellant] was feigning his need for crutches and that he was twisting the situation around to claim he was the victim, not [M.J].”

Here, the statements were not made in the course of trial testimony. They were also not an expression of opinion. Rather, they were phrased as inquiry to M.J. when Officer Nadeau arrived at the couple’s house after arresting appellant and getting his side of the story. Officer Nadeau was attempting to gather more information about appellant’s leg problem because M.J. had not mentioned this at the police station; that is why he started the investigation with the statement, “quick couple of questions for you.” Another comment made by the officer in the video that appellant argues was improper was “he basically was twisting this around . . . he’s more the victim.” But this statement was not an expression of the officer’s opinion regarding appellant’s credibility; it was providing M.J. with information as to what had occurred when Officer Nadeau spoke to appellant. Accordingly, it was not plain error to allow the jury to hear this portion of the video.

C. The failure to exclude K.C.’s statements of a prior bad act from the audio statement was not error.

Appellant argues that the prosecutor committed misconduct by improperly introducing evidence of a prior bad act without advance notice. See Minn. R. Evid. 404(b)(2). Specifically, in the audio statement, K.C. is heard telling the police that appellant had threatened to use a photo of her naked back against her. Officer Nadeau told K.C. that if appellant “disseminate[s] that out into social media, that’s child porn.” K.C. told the officer that appellant had not done anything with the photo. Still, appellant argues

that the statements were improper character evidence. However, the state provided notice of its intent to use the audio statement and the defense did not object to this portion at trial. Further, the statements made do not amount to a “bad act” because appellant did not do anything. K.C. stated that appellant did nothing with the photo; he just threatened her; that the photo was of her back; and that the taking of the picture “wasn’t anything weird, malicious, sexual or anything like that.” The jury did not hear anything about how appellant planned to use the photo against her; the jury actually heard that he did not distribute the photo. There was no bad act. Accordingly, it was not error for the jury to hear K.C.’s voluntary statements to the police.

Even if the prosecutor committed misconduct by allowing the jury to hear this portion of the audio statement, we conclude that it did not affect appellant’s substantial rights. The statement was harmless beyond a reasonable doubt because it was an isolated, vague, and brief statement, which was entirely unrelated to the crime for which appellant was being tried. The prosecution did not mention it in its closing argument. Other than the short audio statement, the jury did not hear anything else about the matter.

D. The prosecution materially misrepresented the red mark on M.J.’s chest.

Appellant argues that the state committed prosecutorial misconduct when the prosecutor misstated facts by telling the jury that M.J. had a red mark on her chest after being hit by the appellant. Specifically, the prosecutor said: “She said, and I put it in quotes because this is verbatim from the transcript: Her chest really hurts right now. She has a red mark. She had trouble breathing.” However, neither transcript of M.J.’s comments to

Officer Nadeau contain this statement. She did state that her chest hurt and that she had trouble breathing. Appellant conceded this, too. However, whether there was a red mark on her chest is disputed. At the police station, Officer Nadeau asked M.J. if she had a red mark on her chest and M.J. said: “I don’t know. I can’t even see. Probably not.” K.C. then stated, “I mean, it looks like it’s a little red right here, but I don’t know.” Because the prosecutor misstated the facts to the jury, making this comment to the jury was plain error. *See State v. Mayhorn*, 720 N.W.2d 776, 788 (Minn. 2006) (stating that it is misconduct to intentionally misstate evidence).

However, we conclude that the error was harmless beyond a reasonable doubt. The evidence against appellant was overwhelming. The audio and video statements, testimony from K.C., testimony from Officer Nadeau, testimony from the BCA, and M.J.’s inconsistent statements show that appellant was guilty of the crimes charged beyond a reasonable doubt. Whether there was actually a red mark was not the deciding factor for the jury; to find the appellant guilty of domestic assault there is no requirement that M.J. have a mark on her chest. The assault was discussed in great detail throughout the entire trial, and no mention of a red mark was made. The passing comment in the closing statement did not affect appellant’s substantial rights.

E. The prosecution did not inflame the jury’s passions.

A prosecutor is prohibited from inflaming the jury’s passions. *State v. Salitros*, 499 N.W.2d 815, 818 (Minn. 1993). This includes urging the jury to protect society with its verdict. *State v. Hoppe*, 641 N.W.2d 315, 320 (Minn. App. 2002), *review denied* (Minn. May 14, 2002).

Appellant argues that the state committed prosecutorial misconduct when the prosecutor inflamed the jury's passions. Specifically, the prosecutor argued to the jury:

The other question you might be asking yourself is, "Why should I care?" You might have asked yourself during the testimony. . . . If the victim doesn't care, why should I care?

It is not just about [M.J.]; it's about storing methamphetamine in the residence of, it sounds like, six children, at least four or five children.

. . . .

Just because [M.J.] is back together with her husband doesn't mean that the state should stop pursuing domestic assault charges; that's not how it works. That's why you should care.

Because it's not just about [M.J.]; it's about her multiple children who live in the home and making sure they're not exposed to methamphetamine, and it's about protecting [M.J.]. So that's why you should care.

This is not prosecutorial misconduct. The prosecutor did not urge "the jury to protect society with its verdict." *Hoppe*, 641 N.W.2d at 320. Rather, the prosecutor urged the jury to consider the victims in the case despite M.J. not appearing to care. The Minnesota Supreme Court stated: "[i]t is proper for a prosecutor to talk about what the victim suffers and to talk about accountability, in order to help persuade the jury not to return a verdict based on sympathy for the defendant." *State v. Montjoy*, 366 N.W.2d 103, 109 (Minn. 1985). The prosecutor's comments here were proper because they addressed the importance of prosecuting the offense despite M.J.'s clear instruction that she did not want appellant prosecuted.

Appellant argues that the multiple instances of prosecutorial misconduct cumulatively affected appellant's substantial rights and entitle him to a new trial. This argument fails.

Affirmed.