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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0042**

State of Minnesota,
Respondent,

vs.

Clifford Lamont Lea,
Appellant.

**Filed April 26, 2021
Affirmed
Bratvold, Judge**

Hennepin County District Court
File No. 27-CR-18-31411

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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Considered and decided by Bjorkman, Presiding Judge; Segal, Chief Judge; and Bratvold, Judge.

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

In this direct appeal from a final judgment of conviction for first-degree criminal sexual conduct, appellant claims the district court and prosecuting attorneys committed prejudicial errors that entitle him to a new trial. Appellant raises three challenges: (1) the

district court failed to advise the complainant about her Fifth Amendment privilege against self-incrimination; (2) the district court abused its discretion by admitting *Spreigl* evidence;¹ and (3) prosecutorial misconduct affected the jury verdict. Because appellant lacks standing to assert the complainant's constitutional rights, the district court did not abuse its discretion by admitting evidence of a prior assault by appellant, and the complained-of prosecutorial misconduct was either not misconduct or harmless error, we affirm.

FACTS

Respondent State of Minnesota charged appellant Clifford Lamont Lea with first-degree criminal sexual conduct (penetration by force or coercion) under Minn. Stat. § 609.342, subd. 1(e)(i) (2018). The following summarizes the evidence received during the jury trial.

In July 2018, Lea met B.S. through an internet dating application. After exchanging messages for a few days, they met in person and began dating. B.S. described their relationship as “friends with benefits,” meaning that their relationship was sexual. At that time, B.S. worked in Rochester for “Alternative to Traditional Incarceration of Citizens” (ATTIC), as a case manager of parolees in transitional housing. B.S. understood that her employer prohibited personal relationships between staff and ATTIC residents to avoid conflicts of interest.

¹ Evidence of other crimes and prior bad acts is “often referred to as *Spreigl* evidence after the supreme court’s decision in *State v. Spreigl*.” *State v. Babcock*, 685 N.W.2d 36, 40 (Minn. App. 2004); *see generally State v. Spreigl*, 139 N.W.2d 167, 170-71 (Minn. 1965); Minn. R. Evid. 404(b).

B.S. did not realize that, when they started dating, Lea was an ATTIC resident in the Twin Cities. Once B.S. learned where Lea was living, she did not meet him at his ATTIC residence. But a few weeks after they started dating, Lea moved to a new residence in Minneapolis that a different company operated. Because of Lea's move, B.S. believed she no longer had a conflict of interest, and she began visiting Lea at his new residence.

B.S. testified that she and Lea engaged in consensual sexual relations, which she described as sometimes "freaky" and involving "love bites." B.S. also related two incidents to describe her relationship with Lea. First, B.S. regularly saw her medical providers because she was recovering from a stroke that happened before she met Lea. One time, Lea picked her up from a medical appointment and then pressured her to have sex, but she declined. Second, in October, B.S. slept with Lea at his place, but they did not have sex. The next morning, Lea expected "some sort of sexual activity." B.S. declined and Lea became "quite physical" with her by holding her down and putting his hands near her neck. B.S. believed that Lea "was going to . . . rape [her] or something." Lea eventually let her up and "laughed it off." B.S. told Lea that type of behavior "wasn't acceptable." Still, they continued their relationship because B.S. felt Lea "understood." But they saw each other less often.

On November 25, Lea sent a text message to B.S. and invited her to come over to help him with "something." B.S. hesitated but packed an overnight bag and went to Lea's house. When she arrived, B.S. told Lea that "sex wasn't on the table" that night, in part, because she was seeing someone new. They watched a football game in Lea's bedroom, and B.S. started setting up her computer to help him with a resume, because she understood

that was what he wanted. Lea said he no longer needed her help, so B.S. began packing up her things and told him she was going home.

Lea stood up, told B.S., “no, you’re not,” and instructed B.S. to take off her clothes. B.S. testified that this was not uncommon, because there were “rules” when she visited Lea. Lea often told B.S. to take her clothes off and remain naked in his bedroom. B.S. also explained that Lea would not allow her to put on clothes when using the bathroom, even though other residents shared the bathroom.

B.S. “just complied” and got into Lea’s bed because she did not want to upset him. Lea also undressed, got into bed, and tried to begin intercourse. B.S. felt uneasy and told him, “no.” Lea persisted and, ultimately, vaginally penetrated B.S. over her objection. B.S. did not physically resist, but tried to leave. Lea told her to get back into bed. B.S. obeyed and fell asleep. B.S. again tried to leave the next morning, but Lea refused to let her dress or leave. B.S. tried to go to the bathroom, but Lea told her to get back into bed. They began to argue.

As B.S. sat on the bed, Lea demanded anal or oral sex from her. Lea rolled B.S. onto her stomach, placed his body on top of B.S., and started to choke her with his left hand. B.S. fought back and banged on the wall; she cried and screamed “no” while trying to keep her legs together. Lea forced her legs apart and pressed on her windpipe using his forearm, making it difficult for her to breathe. B.S. resisted and Lea bit her on the shoulder blade repeatedly. B.S. thought he was trying to “brand[]” her.

B.S. believed she might die, so she stopped resisting and put her hands up to show that she would comply. Lea forcibly penetrated B.S. anally. Because she was in pain, B.S.

asked to retrieve personal lubricant from her purse and Lea let her. Lea resumed and B.S. believed that he was recording her with his cell-phone camera. B.S. testified that Lea penetrated her for about 20 minutes. Lea called B.S. derogatory names and threatened her family if she told anyone about what happened.

B.S. tried to leave yet again. Lea refused, but this time allowed her to use the bathroom. B.S. finally left Lea's residence after she convinced him that she had a medical appointment. As B.S. collected her belongings, Lea laughed and said, "submission looks good on [you]." After B.S. left, Lea called her cell phone and sent her text messages. Lea also sent B.S. a photograph of a map showing her relative's home. B.S. interpreted this as a threat.

B.S. went to the police station and gave a detailed report about the sexual assault and then went to a hospital for a sexual-assault examination. Medical testimony established B.S.'s injuries, which included abrasions to her genitalia, bruises across her body, and bite marks on her back. Forensic testimony established that the DNA on swabs from B.S.'s body matched Lea's DNA profile.

On her way to the police station, B.S. spoke with her ATTIC supervisor, G.C., disclosed her relationship with Lea, and described the sexual assault. B.S. told G.C. that she feared losing her job because Lea had once been an ATTIC resident. After their conversation ended, G.C., who was in charge of Lea's current residence through a different employer, contacted Lea's parole agent. An arrest warrant followed, and Lea was taken into custody for violating parole. During police interviews, Lea admitted having sex with B.S. on November 25 and 26, but maintained it was consensual.

Before trial, the state filed a *Spreigl* notice and moved to admit evidence of Lea's 2016 domestic-assault-by-strangulation conviction, which involved another woman, P.R. The district court overruled Lea's objections and admitted the *Spreigl* evidence.

The state called 11 witnesses and offered about 60 exhibits during trial, most of which is summarized above. The state's evidence included testimony from P.R., a certified copy of Lea's prior conviction, and his petition to plead guilty to that offense. Lea exercised his right to remain silent and called no witnesses. The jury found Lea guilty of first-degree criminal sexual conduct.

Lea waived a jury trial on aggravated sentencing factors and the district court granted, in part, the state's motion for an upward departure from the sentencing guidelines on a stipulated record. Based on two aggravating factors, the district court sentenced Lea to 300 months in prison, with ten years of conditional release. Lea appeals.

DECISION

I. Lea lacks standing to challenge the district court's decision not to advise B.S. about her Fifth Amendment rights and privileges.

After opening statements and just before B.S. took the stand, Lea's counsel urged the district court to advise B.S. of her rights under the Fifth Amendment. Lea's counsel insisted that B.S.'s relationship with Lea while he was an ATTIC resident would likely have adverse consequences for B.S., both professionally and criminally, including liability for third-degree criminal sexual conduct, *see* Minn. Stat. § 609.344, subd. 1(m) (2018). The district court refused the request, reasoning that an advisory was unnecessary because B.S. was aware of the possible adverse consequences. Lea argues that the district court

erred and that he is entitled to a new trial.

We conclude that Lea lacks standing to raise this issue. Both parties discussed standing in the briefs submitted to this court. Standing is a prerequisite to jurisdiction. *Minn. Sands, LLC v. County of Winona*, 940 N.W.2d 183, 192 n.9 (Minn. 2020), *cert. denied*, 141 S. Ct. 1054 (2021). “Jurisdiction is fundamental to the exercise of judicial power” and we review standing *de novo*. *Glaze v. State*, 909 N.W.2d 322, 325 (Minn. 2018). Parties in litigation must have standing at each stage of the case, including appeal. *Id.* Thus, “the absence of a party’s standing ‘bars consideration of the claim by the court.’” *Id.* (quoting *In re Custody of D.T.R.*, 796 N.W.2d 509, 512 (Minn. 2011)).

“Generally, one does not have standing to assert the constitutional rights of a third party.” *In re Welfare of Children of J.R.B.*, 805 N.W.2d 895, 906 (Minn. App. 2011) (quotation omitted), *review denied* (Minn. Jan. 6, 2012). The reason being: “constitutional rights are personal and may not be asserted vicariously.” *State v. Gray*, 413 N.W.2d 107, 112 (Minn. 1987) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 610, 93 S. Ct. 2908, 2915 (1973)). Moreover, a constitutional “[p]rivilege is personal to those to whom it belongs and is waived unless asserted by them.” *Martin v. State*, 865 N.W.2d 282, 288 (Minn. 2015) (quoting *Esser v. Brophrey*, 3 N.W.2d 3, 4 (Minn. 1942)). Thus, “[a] party may not invoke the privilege of [a] witness.” *Esser*, 3 N.W.2d at 4.

The law is settled that Lea lacks standing to assert B.S.’s constitutional rights and privileges: “[A] defendant does not have standing to challenge a district court’s determination that a witness has or does not have a Fifth Amendment privilege against

self-incrimination.” *State v. Booker*, 770 N.W.2d 161, 167 (Minn. App. 2009), *review denied* (Minn. Oct. 20, 2009). Thus, we lack appellate jurisdiction to consider this issue.

II. The district court did not abuse its discretion by admitting Lea’s 2016 assault of P.R. as *Spreigl* evidence.

Spreigl evidence is generally “not admissible to show that a defendant acted in conformity with such behavior.” *State v. Tomlinson*, 938 N.W.2d 279, 286 (Minn. App. 2019), *review denied* (Minn. Feb. 26, 2020); *see Spreigl*, 139 N.W.2d 167. *Spreigl* evidence may be admissible, however, for another purpose (e.g., to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident). Minn. R. Evid. 404(b)(1).

The state sought to introduce evidence of Lea’s 2016 assault of P.R. under the common scheme or plan exception to Minn. R. Evid. 404(b)(1). Lea argues on appeal that the district court’s decision to admit the *Spreigl* evidence was prejudicial error. The state argues that the district court did not abuse its discretion because the *Spreigl* evidence tends to prove that Lea’s sexual conduct with B.S. was nonconsensual and that B.S. did not fabricate the allegation, as Lea claimed during the trial.

We review a district court’s decision to admit *Spreigl* evidence for abuse of discretion. *State v. Griffin*, 887 N.W.2d 257, 261 (Minn. 2016). To prevail on evidentiary error, an appellant must show two things: the district court erred by admitting the evidence and resulting prejudice. *See, e.g., State v. Smith*, 940 N.W.2d 497, 505-06 (Minn. 2020) (requiring a showing of error and prejudice). Prejudice requires that “there is a reasonable probability that the wrongfully admitted evidence significantly affected the verdict.”

Griffin, 887 N.W.2d at 262. “Prejudice does not mean the damage to the opponent’s case that results from the legitimate probative force of the evidence; rather, it refers to the unfair advantage that results from the capacity of the evidence to persuade by illegitimate means.” *State v. Welle*, 870 N.W.2d 360, 366 (Minn. 2015) (quotations omitted).

We first examine the disputed evidence and then address Lea’s specific arguments.

A. The *Spreigl* evidence

In the summer of 2016, Lea met P.R. through the same dating application that he later used to meet B.S. Their relationship soon led to consensual intercourse. In fall 2016, P.R. ended things with Lea. Even so, P.R. went to see Lea one evening in early September after Lea threatened to send a sexually explicit photograph of P.R. to her family unless she came over. P.R. was pregnant with Lea’s child at the time.

Lea brought P.R. to his bedroom, threw her on the bed, and told her that he was “going to have his friends come over and rape [her] all weekend.” Lea then pinned P.R. down with his body while she screamed and cried for help. Lea used his hands and knees to choke P.R., making it difficult for her to breathe. At some point, Lea tried to put his penis in P.R.’s mouth but she refused. Lea ripped P.R.’s shirt off, pulled her pants down, and tried to penetrate her anally, but P.R. resisted. Lea placed handcuffs on P.R.’s wrists and tried to gag her while she continued to struggle. Lea eventually gave up and let P.R. leave.

P.R. ran outside, told a neighbor about the assault, police responded, and P.R. told them what happened. The state charged Lea with domestic assault by strangulation under Minn. Stat. § 609.2247 (2016), along with another charge. Lea pleaded guilty to the

strangulation charge, the state agreed to dismiss the other charge, and Lea received a 28-month prison sentence in December 2016. Lea was released from prison and placed on parole in March 2018. He met B.S. about four months later.

B. The *Spreigl* factors

Minnesota courts use a five-factor test to determine whether *Spreigl* evidence is admissible: (1) the state must give proper notice of the intent to admit the evidence; (2) the state must indicate the purpose of the evidence by specifying what the evidence will prove; (3) the state must provide clear and convincing evidence of the prior bad act that involved the defendant; (4) the state must indicate how the evidence is relevant and material to the current case; and (5) the probative value must outweigh the risk of unfair prejudice to the defendant. *See State v. Ness*, 707 N.W.2d 676, 685-86 (Minn. 2006); Minn. R. Evid. 404(b)(2). Lea does not challenge the state's notice, but argues that the district court erred because factors two through five weighed against admission.

Starting with the second factor, evidence of a prior bad act may be admitted to show a common scheme or plan. Minn. R. Evid. 404(a), (b)(1). "Offenses that have a 'marked similarity' to the charged offense can be used to show a common scheme or plan." *Tomlinson*, 938 N.W.2d at 286.

Lea argues that the *Spreigl* evidence shares only general similarities with the assault on B.S. and the two events were not similar enough to satisfy the common scheme or plan exception. He claims the two incidents were not close in time or location, and the 2016 assault involved an *attempted* sexual penetration, unlike the 2018 assault. Lea also points

out that B.S. alleged he bit her, which did not happen in 2016, and that B.S. did not allege that he used handcuffs, as did P.R. in 2016.

The state counters that the two assaults have many similarities because, in both instances, Lea: (1) became angry and aggressive with a romantic partner he met over the internet; (2) assaulted both women in his bedroom; (3) used intimidation, threats, and confinement; (4) used his size and strength to overpower both women; (5) strangled both women; (6) engaged in, or attempted, anal penetration; and (7) later accused the women of fabricating their allegations. The state also observes that, after setting aside the time Lea was confined in prison, the assaults were “separated by mere months.”

We agree with the state on the second factor. These two assaults were similar enough to fall under the common scheme or plan exception. Moreover, as the state asserts, the *Spreigl* evidence corroborated B.S.’s testimony by showing Lea’s sexual conduct was nonconsensual and that B.S. did not fabricate the allegations. And the two assaults were close in time when we consider Lea’s confinement. *See State v. Wermerskirchen*, 497 N.W.2d 235, 242 n.3 (Minn. 1993) (“[T]he passage of a number of years may be without real significance if it turns out that the defendant was in prison in the interval between the prior offense and the current offense and was incapacitated from committing crime.”).

On the third factor, Lea appears to concede that the state offered clear and convincing evidence of the 2016 domestic assault. But he asserts that P.R. should not have been allowed to testify about the attempted sexual assault because those facts were not part of his guilty plea to domestic assault. “[A] defendant’s participation in a *Spreigl* incident

may be considered clear and convincing when it is highly probable that the facts sought to be admitted are truthful.” *Ness*, 707 N.W.2d at 686. This standard does not demand that the state corroborate every detail of the *Spreigl* evidence as a precondition to its admission. *State v. Kennedy*, 585 N.W.2d 385, 390 (Minn. 1998) (“[W]e see no reason why corroboration of the *Spreigl* victim’s testimony is necessary as a matter of law to meet the clear and convincing standard.”).

Together with P.R.’s testimony, the state introduced clear and convincing evidence of the 2016 domestic assault: Lea’s petition to plead guilty to the 2016 assault and a certified copy of his conviction. But simply because Lea did not plead guilty to the attempted sexual assault does not mean P.R.’s testimony did not satisfy the clear and convincing standard. The state offered to present additional witnesses to corroborate P.R.’s testimony, including Lea’s neighbors and police officers who would verify P.R.’s allegations and that they observed marks on her wrists consistent with handcuffs. The district court found that P.R.’s proffered testimony was clear and convincing evidence of the attempted 2016 sexual assault. The district court also stated that “depending on how vigorously [P.R.’s] account is challenged,” additional witnesses might be needed to corroborate her testimony. There was no objection during P.R.’s testimony and the need for other witnesses was never revisited. We see no error in the district court’s determination that P.R.’s testimony provided clear and convincing evidence of the 2016 sexual assault. *See, e.g., Kennedy*, 585 N.W.2d at 390 (explaining *Spreigl* witness is not required to testify at a hearing before the trial court may exercise its broad discretion and rule on admissibility of *Spreigl* evidence).

On the fourth factor, Lea argues that the 2016 assault was irrelevant to whether B.S. consented to his sexual conduct in 2018. He accordingly insists that the real purpose of the evidence was to “persuade the jury by illegitimate means” and “show that [he] acted in conformity with a bad character trait.” His argument, however, mischaracterizes the record and overlooks important details about the disputed evidence that enhances its probative value. Lea claimed during trial that B.S. fabricated the assault and her conflict of interest gave her a motive to file a false report against him. To be sure, Lea challenged B.S.’s credibility during cross-examination.

Caselaw recognizes that *Spreigl* evidence may be relevant to rebut a charge of fabrication. “[W]hen a defendant contends that the conduct on which the charge was based was a fabrication, *Spreigl* evidence is admissible to rebut that contention as long as the district court is satisfied that the evidence is sufficiently relevant to the charged crime.” *State v. Clark*, 738 N.W.2d 316, 346 (Minn. 2007) (quotation omitted).

While the 2016 assault on P.R. did not *directly* prove whether B.S. consented to Lea’s sexual conduct in 2018, it was *circumstantial* evidence that corroborated B.S.’s testimony about Lea’s behavior. And much like our discussion of factor two, the 2016 assault was probative to evaluate Lea’s pattern of claiming fabrication when faced with similar criminal allegations.

On the fifth factor, Lea argues that “[t]he prejudicial effect of the *Spreigl* evidence greatly outweighed its probative value.” He claims that the state did not “need” the evidence, which posed a serious risk of misleading the jury, and the evidence was unduly prejudicial because it involved an assault on a pregnant woman. “[T]he need for the

evidence is among a number of factors, perhaps even the major factor, to be considered in deciding whether the danger of unfair prejudice outweighs the probative value of other-acts evidence.” *Ness*, 707 N.W.2d at 690.

We conclude that the state needed the evidence of the 2016 assault. Lea’s defense suggested to the jury that B.S. knowingly engaged in an improper relationship with Lea and fabricated the assault to save herself from possible adverse consequences. Lea sought to undermine B.S.’s credibility, which underscores the state’s need for the *Spreigl* evidence. *See State v. Scruggs*, 822 N.W.2d 631, 644 (Minn. 2012) (considering the state’s need for *Spreigl* evidence “to strengthen weak or inadequate proof in the case” (quotation omitted)); *Wermerskirchen*, 497 N.W.2d at 241-42 (ratifying use of *Spreigl* evidence to counter a defendant’s theory of fabrication). Given the probative value of the *Spreigl* evidence to rebut specific arguments made by Lea, we conclude that evidence of the 2016 assault did not give the state an unfair advantage or persuade the jury by illegitimate means.

We are also satisfied that the district court’s cautionary instructions appropriately mitigated the risk of the jury being misled by the *Spreigl* evidence. The district court gave two standard instructions on how to properly consider evidence of a defendant’s prior bad act so the jury could evaluate the pending charge and refrain from improperly finding Lea guilty because of his past conduct. *See 10 Minnesota Practice*, CRIMJIG 2.01, 3.16 (2020). We assume that jurors understand and follow the instructions provided to them, and see no

reason to conclude that this jury did not do so.² See *State v. Campbell*, 861 N.W.2d 95, 103 (Minn. 2015).

Even so, we agree with Lea that P.R.’s testimony about being pregnant at the time of the 2016 assault had no probative value.³ We conclude, however, that any prejudice stemming from P.R.’s testimony about her pregnancy was harmless. See *Griffin*, 887 N.W.2d at 262. P.R. briefly mentioned being pregnant, the state did not emphasize it, and the district court gave limiting instructions to the jury on how to properly consider P.R.’s testimony. Moreover, regardless of the *Spreigl* evidence, the state presented a strong case through ten other witnesses during a two-week long trial.

In sum, the district court carefully applied the five-factor test before admitting the *Spreigl* evidence and we discern no abuse of discretion.

² We are not persuaded by Lea’s argument that the jury did not understand how to properly consider the *Spreigl* evidence simply because one juror asked, “Could you repeat what you told us before [P.R.] came up? You read something. I’m not sure I understood that.” The district court repeated the instruction near the end of trial. At best, this shows that one particular juror did not fully understand the instruction when it was read the first time. But nothing in the record suggests that any other juror misunderstood the first instruction, or that the second instruction confused any of the jurors.

³ It is not clear whether Lea objected to P.R.’s testimony about being pregnant or whether we should review this evidence for plain error. While the state included P.R.’s pregnancy in its *Spreigl* notice, the state did not include this fact in its motion to admit the 2016 assault as *Spreigl* evidence. Lea’s attorney did not specifically mention the potential prejudice of P.R.’s pregnancy when opposing admission of the *Spreigl* evidence, but generally argued the evidence was more prejudicial than probative. Furthermore, Lea’s attorney did not object during P.R.’s testimony. Because we find any error harmless, we need not decide whether Lea preserved this error.

III. The prosecution did not engage in reversible misconduct.

The standard of review for claims of prosecutorial misconduct depends on whether the defendant objected during trial. *See State v. Nissalke*, 801 N.W.2d 82, 103-05 (Minn. 2011). If the defendant objected, we apply a two-tiered harmless-error test that differentiates between “less serious” and “unusually serious” instances of misconduct. *Id.* at 105. “Less serious” misconduct is reversible if it “played a substantial part in influencing the jury to convict.” *Id.* (quotation omitted). “Unusually serious” misconduct is reversible unless its admission was “harmless beyond a reasonable doubt.” *Id.* (quotations omitted). Misconduct is harmless beyond a reasonable doubt when the jury’s verdict was “surely unattributable to the error.” *Id.* at 106 (quotation omitted).

If the defendant did not object to the prosecutorial misconduct, a modified plain-error test applies. *Id.* at 103. “Under this test, the defendant has the burden of proving (1) that an error was made and (2) that it was plain.” *Id.* If the defendant meets this burden, the burden shifts, and the state must show “that the error did not affect the defendant’s substantial rights.” *Id.*; *see also State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006).

Lea claims the prosecuting attorneys engaged in five instances of misconduct. Lea objected to the first four instances, so we apply the two-tiered harmless-error test. But we review his fifth misconduct claim under the modified plain-error test because Lea did not object to that instance.

A. Misstating the burden of proof

Lea contends that the prosecuting attorneys misstated the burden of proof during opening statements and closing arguments. “A prosecutor’s misstatement of the burden of

proof is highly improper and constitutes misconduct.” *State v. Martin*, 773 N.W.2d 89, 105 (Minn. 2009) (quotation omitted). A prosecuting attorney improperly shifts the burden of proof by implying “that a defendant has the burden of proving his innocence.” *Nissalke*, 801 N.W.2d at 106 (quotation omitted). For instance, a prosecuting attorney who comments on the defendant’s failure to call a witness implicitly suggests to the jury that the defendant neglected to prove his innocence. *See State v. Mayhorn*, 720 N.W.2d 776, 787 (Minn. 2006).

1. Opening statements

During opening statements, the prosecuting attorney stated that B.S. believed Lea had recorded her with his cell phone during the sexual assault: “[B.S. will] testify that, when she’s on the ground, crying, . . . she looks up, and he’s recording her with his camera—with his cell phone.” Then, while discussing the delay that occurred after B.S. reported the assault and before the police investigation of the assault, the prosecuting attorney stated:

You will hear and learn about a time delay between when [B.S.] reported this to [police] and when an investigator was assigned. And that time delay will be explained by [B.S.] calling and saying, is anyone going to do anything? Does anyone care about my case? By the time [an investigator] was assigned, you’ll learn that a considerable amount of time had passed—over a week. In that time, [B.S.] was saying, can somebody look into this? I want—I want someone to look at [Lea’s] phones. He was recording me.

Lea’s counsel objected, a bench conference was held off the record, and Lea’s phone was not mentioned again during the prosecuting attorney’s opening statement. Lea claims that the district court “clearly ruled in pre-trial motions that the state was not allowed” to

mention his phone because the state was unable to produce the phone, which was missing. Lea insists the prosecuting attorney's remarks about his phone "shifted the burden of proof by implying that [Lea] was responsible for the missing phone[]." For two reasons, we are unpersuaded.

First, the district court did not prohibit the state from mentioning the missing phone before opening statements. The district court ruled *after* opening statements and directed the state not to suggest that Lea orchestrated the phone's disappearance. Second, the prosecuting attorney's comment did not shift the burden of proof to Lea. Instead, the prosecuting attorney addressed the reason for the delay in the police investigation of B.S.'s allegations.

We note, however, that the better practice is to obtain a ruling before using challenged evidence in opening statements. *See State v. Smallwood*, 594 N.W.2d 144, 150 (Minn. 1999) (explaining, "if the evidence sought to be admitted is questionable, a prosecutor should obtain a ruling from the trial court before commenting on the evidence"); *see also State v. Milton*, 821 N.W.2d 789, 804 (Minn. 2012) (warning prosecuting attorneys not to refer to evidence without good-faith basis that the evidence is admissible). Because the prosecuting attorney's opening statement commented on the delayed investigation without wrongly suggesting that Lea either disposed of incriminating evidence or had the burden to produce the phone to prove his innocence, we conclude that the prosecuting attorney did not commit misconduct.

2. Closing arguments

Lea's second claim concerns the prosecuting attorney's closing argument. After reviewing the conflicting versions of events, the prosecuting attorney told the jury: "[E]ither [B.S.] is lying about what happened there, or the Defendant was lying about what happened. If you believe her, he's guilty. If you believe him" Lea's counsel objected, a bench conference was held, and the issue was discussed outside the presence of the jury. Lea contends this argument improperly shifted the burden of proof. He also maintains the prosecuting attorney misstated the law because "the [state's] burden of proof is not satisfied by proof that the complainant told the truth."

The state responds, first, that B.S.'s testimony addressed each element of the offense and was sufficient for the jury to find Lea guilty beyond a reasonable doubt. The state is correct. A thorough review of the record reveals that B.S. testified about each element of first-degree criminal sexual conduct: (A) penetration; (B) without B.S.'s consent; (C) personal injury to B.S.; (D) use of force or coercion; and (E) venue. *See* Minn. Stat. § 609.342, subd. 1(e)(i). The state also argues that the jury believed B.S., as shown by the verdict, and that her testimony alone proved Lea guilty beyond a reasonable doubt.⁴

Still, the prosecuting attorney's argument gives us pause. We are mindful that prosecuting attorneys must tread lightly when discussing the burden of proof and, as

⁴ In a sexual-assault prosecution, the complainant's account need not be corroborated by other evidence. *See* Minn. Stat. § 609.347, subd. 1 (2018) ("In a prosecution under sections 609.342 . . . the testimony of a victim need not be corroborated."); *State v. Wright*, 679 N.W.2d 186, 190 (Minn. App. 2004) ("Corroboration is not required in criminal sexual conduct cases."), *review denied* (Minn. June 29, 2004).

discussed, the state is prohibited from shifting that burden to the accused. *See Nissalke*, 801 N.W.2d at 106. Here, before making the challenged argument, the prosecuting attorney correctly addressed the burden of proof by stating that it was *the state's burden* to prove Lea guilty “beyond a reasonable doubt.” And during the bench conference, defense counsel stated, “there was corrective action and . . . the rest of the [prosecuting attorney's] statement did not go there.” Thus, because the prosecuting attorney correctly stated the state's burden of proof and did not frame the evidence as an ultimatum for the jury to believe either B.S. or Lea, we conclude that the challenged argument does not amount to prosecutorial misconduct.

B. Emphasizing improper character evidence

Lea contends the prosecuting attorney erred in rebuttal by highlighting the *Spreigl* evidence. The state urges us to consider the prosecuting attorney's argument in context. We agree with the state's approach. Rather than focusing on “selective phrases or remarks that may be taken out of context or given undue prominence,” precedent requires that we examine closing arguments “as a whole.” *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993).

Lea's counsel addressed the jury with the following closing argument:

[B]ringing [P.R.] in at the end of the State's case to tell her story about a past offense Mr. Lea committed—that he pled guilty to, that he did his time for—*it's a last-ditch effort* to convince you that Mr. Lea raped [B.S.]. And that's because [B.S.] isn't reliable. She's not credible.

(Emphasis added.) On rebuttal, the prosecuting attorney replied:

The Defense talked about [P.R.] and suggested that . . . it's maybe unfair to call her and have her relate what happened to her. But . . . I suggest to you, members of the jury, you *deserve to know that*. You deserve to know what the Defendant had done in his past

(Emphasis added.) Lea claims that the prosecuting attorney exploited the *Spreigl* evidence “to imply in the rebuttal closing that [he] had the propensity to engage in similar violent acts and acted in conformity with that trait in this case.” He asserts that the rebuttal attacked his character and misused the *Spreigl* evidence. The state argues the prosecuting attorney was responding to defense counsel’s claims that P.R.’s testimony was a “last-ditch effort” by the state and that B.S. was neither “reliable” nor “credible.”

“Prosecutors have considerable latitude during closing arguments and are not required to make a colorless argument.” *State v. Patzold*, 917 N.W.2d 798, 808 (Minn. App. 2018) (quotations omitted), *review denied* (Minn. Nov. 27, 2018). Lea compares this prosecuting attorney’s remarks to those in *State v. Peterson*, where we reversed a defendant’s conviction because the prosecuting attorney’s closing argument essentially put the defendant on trial for crimes against the victim *and* the *Spreigl* witness. *Peterson*, 530 N.W.2d 843, 847-49 (Minn. App. 1995). But unlike the closing in *Peterson*, rebuttal here did not put Lea on trial for the 2016 assault against P.R. The jury received evidence that Lea had been held accountable for the 2016 assault. Moreover, the prosecuting attorney in *Peterson* was not responding to the defense’s closing argument, as happened here.

Even though this prosecuting attorney could have phrased the rebuttal argument more carefully, we conclude that the challenged argument directly responded to defense counsel’s closing argument and no misconduct occurred under these circumstances.

C. Arguing facts not in evidence to inflame the jury's passions

On his fourth claim, Lea circles back to the state's opening statement and challenges the prosecuting attorney's introduction of B.S.:

I want to tell you a little bit about [B.S.]. You're going to hear from her next. She's the first witness that the State is going to call, and she's going to testify

She will tell you that, last summer—a little bit more about [B.S.,] she suffered a stroke; so she has some cognitive impairments. And you might even hear evidence that Mr. Lea himself—

Defense counsel: Objection, Your Honor. . . .

(Bench conference held off the record.)

Prosecuting attorney: You'll hear evidence that [B.S.] is a *vulnerable adult, looking at obtaining social security*—

Defense counsel: Objection, Your Honor.

. . . .

Prosecuting attorney: And, ladies and gentlemen, understanding her medical condition is important for you to understand [B.S.] as she presents in this courtroom—as she's testifying, as she's talking. So it's important to know—and she'll talk about this—her medical history, to that extent. And—so I will ask you to consider that when you're evaluating her testimony.

(Emphasis added.) After the second objection, the district court told the jury: “Whether or not [B.S. is] vulnerable in a sense isn't an issue that I expect you're going to have to decide on.”

Lea argues that the prosecuting attorney's comments included facts not in evidence—that B.S. was vulnerable after suffering a stroke. Lea also claims that these comments garnered sympathy for B.S. and inflamed the jury's passions against him. The

state contends that Lea has taken the prosecuting attorney's comments out of context. The state also argues that the prosecuting attorney only mentioned these facts to prepare the jury for any difficulties that B.S. may experience while testifying.

Prosecuting attorneys must “avoid inflaming the jury’s passions and prejudices against the defendant.” *State v. Morton*, 701 N.W.2d 225, 236 (Minn. 2005) (quotation omitted). We heed statements that might inflame or prejudice jurors “[w]hen credibility is a central issue.” *Id.*; see also *State v. Bradford*, 618 N.W.2d 782, 799 (Minn. 2000) (“[T]he state may discuss the victim’s life if it does not attempt to influence the jury’s prejudice or passion.”). Equally important, prosecuting attorneys must refrain from misstating evidence or discussing facts not in evidence. *State v. Bobo*, 770 N.W.2d 129, 142 (Minn. 2009); *State v. McArthur*, 730 N.W.2d 44, 53 (Minn. 2007).

Having considered the prosecuting attorney’s opening statements and relevant caselaw, we see merit to both parties’ positions. The state later elicited testimony from B.S. about her medical history—explaining that she suffered from a stroke before she met Lea. B.S. also testified that Lea pressured her to have intercourse after he picked her up from a doctor appointment and that, on the day of the sexual assault, she escaped from Lea by telling him she needed to attend a medical appointment. Thus, the prosecuting attorney’s opening statement about B.S.’s vulnerability was supported by B.S.’s testimony.

Lea validly points out, however, that the prosecuting attorney created sympathy for B.S. by telling the jury that B.S. was “looking to obtain social security.” This comment served no purpose other than to inflame the jury’s passions. But this comment was brief, less serious misconduct, and did not play a substantial part in the jury’s verdict. For these

reasons, the prosecuting attorney's comments about B.S. seeking social security was harmless and Lea has not met his burden to show reversal is warranted.

D. Excusing jury unanimity

Lea finally alleges prosecutorial misconduct during closing argument, based on the prosecuting attorney's description of the offense elements and jury unanimity:

Again, you don't all have to agree—you know, 12 of you don't have to agree that there's force or coercion—could be split, six or six, on that one—just as long as all 12 of you agree beyond a reasonable doubt the State has proven either one of those two pieces of that element.

Lea argues that the prosecuting attorney misled the jury by telling them that they did not need to agree unanimously on whether the state proved force *or* coercion during trial. Defense counsel did not object, and Lea asserts that the prosecuting attorney's argument amounts to prejudicial plain error. The state disagrees and relies on a recent unpublished decision.

The state is correct, and *State v. Epps* is instructive to our decision. 949 N.W.2d 474 (Minn. App. 2020), *review granted* (Minn. Nov. 25, 2020); *see also State v. Chauvin*, 955 N.W.2d 684, 691 (Minn. App. 2021) (holding “a precedential opinion of this court has immediate authoritative effect” even after the supreme court has granted review), *review denied* (Minn. Mar. 10, 2021). *Epps* involved a prosecuting attorney's closing argument that resembles the argument here. *See* 949 N.W.2d at 480. There, we determined that “the terms ‘force’ and ‘coercion’ establish alternative means of committing one element of the first-degree criminal sexual conduct offense.” *Id.* at 485. We also clarified that “a jury need not unanimously agree which of those means was used to commit the offense.” *Id.* at 486.

Thus, just as we concluded in *Epps*, this prosecuting attorney “did not misstate the law in his closing argument so as to commit prosecutorial misconduct.”⁵ *Id.*

IV. Lea was not deprived of a fair trial by the cumulative effect of the errors he has alleged.

“Cumulative error exists when the cumulative effect of the errors and indiscretions, none of which alone might have been enough to tip the scales, operate to the defendant’s prejudice by producing a biased jury.” *State v. Penkaty*, 708 N.W.2d 185, 200 (Minn. 2006) (quotations and alterations omitted). When faced with a claim of cumulative error, appellate courts examine “the egregiousness of the errors and the strength of the State’s case.” *State v. Williams*, 908 N.W.2d 362, 366 (Minn. 2018) (quotation omitted). If the state presented strong evidence of the appellant’s guilt and the case was not a close call, the reviewing court is unlikely to reverse the appellant’s conviction for a new trial based on the aggregation of errors. *Id.*

Here, the state’s evidence against Lea was strong and the few errors raised by Lea on appeal did not affect the jury’s verdict. The only errors that we recognize relate to P.R.’s testimony about being pregnant in 2016 and the prosecuting attorney’s opening remarks about B.S. seeking social security. But even when we consider these errors together, Lea has not shown that the errors tipped the scales in the state’s favor during trial. Without a demonstration of prejudice, Lea is not entitled to a new trial.

Affirmed.

⁵ We also note that jury unanimity does not appear to be a critical issue. B.S.’s testimony established that Lea’s assault involved *both* force and coercion, thus, the jury likely relied on both theories to arrive at a unanimous verdict of guilty.