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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0061**

State of Minnesota,
Respondent,

vs.

Quinten Lavel Osgood, Jr.,
Appellant.

**Filed February 8, 2021
Affirmed
Hooten, Judge**

Hennepin County District Court
File No. 27-CR-19-546

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

Michael O. Freeman, Hennepin County Attorney, Nicole Cornale, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Hooten, Judge; and Frisch, Judge.

NONPRECEDENTIAL OPINION

HOOTEN, Judge

In this direct appeal from judgment of conviction for second-degree intentional murder, appellant argues that (1) the evidence was insufficient to prove beyond a reasonable doubt that he intended to kill the victim; (2) the district court erred by excluding

testimony about the general effects of synthetic cannabinoids; and (3) the prosecutor committed misconduct during closing argument. We affirm.

FACTS

The following facts are not in dispute. While running an errand on the morning of January 3, 2019, appellant Quinten Lavel Osgood, Jr. and his girlfriend ran into A.M. and A.M.'s girlfriend. Osgood and A.M. were not previously acquainted, but their girlfriends had known each other for a couple of years. A.M.'s girlfriend invited Osgood and his girlfriend to come over that evening to the residence that she and A.M. shared. Osgood and his girlfriend accepted the invitation.

Later that day, Osgood and his girlfriend spent roughly six to eight hours with Osgood's cousin. During that time, Osgood consumed approximately two beers. Osgood and his girlfriend then drove to A.M.'s residence at roughly 7:00 or 8:00 p.m. Osgood and his girlfriend brought a bottle of tequila and a bottle of whisky with them. Osgood, A.M., and their girlfriends all consumed alcohol during the course of the evening.

At some point, Osgood put on an instrumental musical recording, and Osgood and A.M. began "freestyling," improvised rapping where the participants exchange jokes and insults to the beat of the music. Although the freestyling was initially friendly, the exchange became heated when Osgood said something that A.M. found disrespectful. At that point, A.M. told Osgood to leave, and Osgood's girlfriend began gathering their belongings. Just before they left, Osgood used the restroom, and then, as he was leaving, Osgood asked A.M. why he was looking at his penis, thereby insinuating that A.M. was homosexual. Osgood then left the residence.

While walking down an exterior path towards the sidewalk, Osgood kicked a gate in the property's fence with such force that it broke off its hinges. A.M.—dressed in basketball shorts and a tank top despite the January weather—followed Osgood and confronted him.¹ The two threw punches at each other for about one minute, but none of the punches connected. The two then wrestled for less than ten seconds, with A.M. on top of Osgood. During the brief period when he and A.M. were wrestling, Osgood stabbed A.M. three times: once in the chest, once in the abdomen, and once in the buttocks. The stab wounds to A.M.'s chest and abdomen were each of a depth of approximately six inches and, according to a medical expert, both were independently life-threatening.

It is unclear where the knife Osgood used to stab A.M. came from. Osgood's girlfriend testified that she saw A.M. retrieve something from his bedroom before following Osgood outside. Osgood claims that he picked up the knife after A.M. dropped it while the two were wrestling. A.M.'s girlfriend, meanwhile, testified that she observed Osgood reaching for something in his coat pocket during the altercation. Police were never able to locate the knife.

After the stabbing, A.M. stood up, walked toward his residence, and collapsed. He later died. Postmortem testing revealed that he had some unknown amount of a synthetic cannabinoid in his system and a blood alcohol concentration of .073 at the time of his death. Osgood left the scene on foot. He later returned to the scene; he claims to have done so to

¹ Security camera footage depicts portions of the ensuing altercation.

retrieve his eyeglasses, wallet, and cell phone. Osgood was arrested the next morning at a friend's residence in St. Paul.

The state charged Osgood with second-degree intentional murder in violation of Minn. Stat. § 609.19, subd. 1(1) (2018). The state later amended the complaint to add charges for second-degree murder without intent during the commission of a felony in violation of Minn. Stat. § 609.19, subd. 2(1) (2018) and first-degree manslaughter in violation of Minn. Stat. § 609.20(2) (2018).

Prior to trial, Osgood filed a notice of intent to offer expert testimony on the general effects of synthetic cannabinoids. In response, the state filed a motion in limine to exclude the testimony by Osgood's expert witness. After oral arguments, the district court issued an order granting the state's motion in limine and excluding testimony by Osgood's expert witness.

Following a jury trial, Osgood was convicted on all three counts. Osgood moved for a new trial on the grounds of insufficient evidence, irregularity in the proceedings, prosecutorial misconduct, and the interests of justice. Osgood also moved for a judgment of acquittal on the grounds of insufficient evidence and self-defense. The district court denied Osgood's motions for acquittal and a new trial. Osgood appeals.

DECISION

Osgood argues that three errors require reversal of his conviction. First, Osgood argues that the evidence is insufficient to support his conviction for second-degree murder with intent. Second, Osgood asserts that the district court erred by excluding his expert witness's testimony on the general effects of synthetic cannabinoids. Third, Osgood claims

that the prosecutor committed misconduct that deprived him of a fair trial. For the reasons that follow, all of Osgood's arguments fail.

I. Sufficient evidence supports Osgood's conviction for second-degree murder with intent.

First, Osgood argues that the evidence is insufficient to support his conviction for second-degree murder with intent. Specifically, he contends that the state failed to prove beyond a reasonable doubt that he intended to kill A.M. because the circumstances proved are also consistent with the rational hypothesis that he intended merely to hurt A.M.

A conviction for second-degree murder under Minn. Stat. § 609.19, subd. 1(1) requires proof that the defendant "cause[d] the death of a human being with intent to effect the death of that person or another." This is a specific intent crime requiring "an intent to cause a particular result." *State v. Fleck*, 810 N.W.2d 303, 308 (Minn. 2012) (quotation omitted). Intent is typically proved through circumstantial evidence. *State v. Davis*, 656 N.W.2d 900, 905 (Minn. App. 2003). This case is no exception; proof of Osgood's intent to kill A.M. rests on circumstantial evidence. Accordingly, we must determine whether there is sufficient circumstantial evidence to support the finding that Osgood specifically intended to kill A.M. Minn. Stat. § 609.19, subd. 1(1); *Fleck*, 810 N.W.2d at 308.

"When the [s]tate relies entirely on circumstantial evidence . . . we use a two-step test to determine whether the [s]tate presented sufficient evidence of intent." *State v. Griffin*, 887 N.W.2d 257, 264 (Minn. 2016). "First, we identify the circumstances proved." *Id.* In doing so, we defer to the jury's acceptance of the proof of these circumstances and its rejection of evidence in the record that conflicted with the circumstances proved. *Id.*

Second, we determine what reasonable inferences can be drawn from the circumstances proved. *Id.* In doing so, we give no deference to the jury's choice between reasonable inferences. *Id.* Where the circumstances proved are consistent with guilt and inconsistent with any other rational hypothesis, the evidence is sufficient to support the conviction. *Id.* Accordingly, the questions here are, first, what circumstances were proved at trial, and second, whether the circumstances proved are consistent with the hypothesis that Osgood intended to kill A.M. and inconsistent with any other rational hypothesis.

First, the circumstances proved are as follows:

- Osgood and his girlfriend accepted an invitation to come to the residence shared by A.M. and his girlfriend. Osgood and A.M. did not know each other, but their girlfriends had known each other previously.
- Osgood drank approximately two beers before arriving at A.M.'s residence, and Osgood and his girlfriend brought two bottles of alcohol to the residence.
- Osgood, A.M., and their girlfriends all consumed alcohol during the evening.
- Osgood and A.M. engaged in "freestyling" or improvised rapping, which was friendly until Osgood said something that A.M. found disrespectful.
- A.M. ordered Osgood to leave. As he was leaving, Osgood accused A.M. of looking at his penis, insinuating that he was homosexual.
- Osgood kicked a gate off its hinges while leaving the residence.
- A.M. followed Osgood, wearing basketball shorts and a tank top, and confronted him.
- Osgood and A.M. threw punches at each other, without connecting, for approximately one minute. Osgood and A.M. then wrestled for less than ten seconds, with A.M. on top.

- Osgood stabbed A.M. three times: once in the chest, once in the abdomen, and once in the buttocks. The stab wounds to A.M.'s chest and abdomen were both approximately six inches deep.
- Immediately after the stabbing, A.M. stood up, walked towards his residence, and fell over. He later died.
- Osgood left the scene on foot without attempting to render aid to A.M. Osgood suffered no visible injuries during the altercation.
- After leaving, Osgood later returned to the scene to retrieve his eyeglasses, wallet, and cellphone. He was arrested the next morning at a friend's residence.

Second, we must determine what reasonable inference or inferences can be drawn from these circumstances, giving no deference to the jury's choice between reasonable inferences. *Griffin*, 887 N.W.2d at 264. Specifically, we must determine whether the circumstances proved are consistent with the rational hypothesis that Osgood intended to kill A.M. and inconsistent with any other rational hypothesis. Minn. Stat. § 609.19, subd. 1(1); *Fleck*, 810 N.W.2d at 308. The circumstances proved are clearly consistent with the hypothesis that Osgood intended to cause A.M.'s death, given that Osgood stabbed A.M. in the chest and abdomen with a knife of sufficient length to leave six-inch-deep wounds. The closer question is whether the circumstances proved are also consistent with the hypothesis that Osgood intended merely to hurt A.M. and not kill him.

Osgood argues that the circumstances proved could also support the rational inference that he intended to hurt A.M. but not kill him. Osgood points to the following facts as supporting his argument: the stabbing, as well as the whole of his physical altercation with A.M., lasted a matter of seconds; Osgood did not pursue A.M. after A.M.

got up and walked away; Osgood was attempting to leave A.M.'s residence when the altercation began; and that A.M. was on top of Osgood during the stabbings.

In response, the state claims that “[t]he circumstances proved eliminate the rational inference that [Osgood] wanted anything less than the death of A.M.” The state points to the following facts as undercutting Osgood’s contention that he intended merely to hurt A.M. and not kill him: Osgood stabbed A.M. in the chest and abdomen, not the extremities; Osgood stabbed A.M. three times; the stab wounds to A.M.’s chest and abdomen were of a depth of approximately six inches each; Osgood escalated tensions by destroying the gate; Osgood fled the scene and did not contact the authorities; Osgood was not seriously injured in the fight; and A.M. and Osgood wrestled only briefly before Osgood stabbed A.M.

Based upon this record, we conclude that the circumstances proved are inconsistent with any rational hypothesis other than that Osgood intended to kill A.M. In particular, the use of a knife capable of leaving six-inch-deep wounds to stab someone once in the chest and once in the abdomen is inconsistent with an intent merely to cause the victim less-than-lethal harm; Osgood himself admitted that he understood the lethality of the type of wounds he inflicted. Likewise, the fact that Osgood fled the scene after A.M. collapsed, without attempting to aid A.M. or contacting medical personnel, is inconsistent with his claim that he only intended to hurt A.M., but it is consistent with the hypothesis that Osgood intended A.M.’s wounds to prove fatal. The only reasonable inference that can be drawn from the circumstances proved is that Osgood, in stabbing A.M. multiple times and then

immediately leaving the scene without assisting him, intended to kill A.M. Accordingly, sufficient evidence supports Osgood's conviction.

II. The district court did not abuse its discretion by excluding testimony from Osgood's expert witness.

Osgood argues that "[t]he district court erred by precluding helpful expert testimony on the general effects of synthetic cannabinoids." Prior to trial, Osgood filed a notice of intent to offer expert testimony on the general effects of synthetic cannabinoids. In connection with this notice, Osgood provided the state with an interoffice memorandum from the office of the public defender indicating that the expert was prepared to testify about synthetic cannabinoids generally, not the specific drug—5-fluoro-MDMB-PICA²—that was found in A.M.'s system at the time of his death.

The state filed a motion in limine to exclude this testimony because it was "not supported by sufficient scientific analysis and experimentation to be considered reliable and useful to the jury." The state further contended that the testimony "would be akin to testimony of the general effects of other intoxicants, such as alcohol," and that such evidence is not helpful to the jury and is therefore inadmissible under Minnesota Rule of Evidence 702.

Osgood's counsel then provided the district court with a second interoffice memorandum from the public defender's office, which indicated that the expert was now

² Throughout the proceedings, both parties have at various times referred to 5-fluoro-MDMB-PICA as "K2." K2 appears to be a street name under which 5-fluoro-MDMB-PICA is sometimes sold. 5-fluoro-MDMB-PICA is the exact name of the chemical compound that was found in A.M.'s system.

prepared to testify about the potential effects of 5-fluoro-MDMB-PICA in particular and not merely about the effects of synthetic cannabinoids generally. This second interoffice memorandum indicated that the expert was prepared to testify that “[l]aboratory (non-human) testing . . . suggests that [5-fluoro-MDMB-PICA] would be psychoactive in humans,” and that, because 5-fluoro-MDMB-PICA is a synthetic cannabinoid, it “would be expected that symptoms associated with 5-fluoro-MDMB-PICA would include agitation or irritability, restlessness, anxiety, confusion, short-term memory and cognitive impairment, and psychosis.”

In granting the state’s motion in limine to exclude the testimony, the district court found that the “testimony regarding synthetic cannabinoids and regarding 5-flouro-MDMB-PICA is outside the realm of a typical juror’s common knowledge.” Nevertheless, the district court found that the testimony would “not assist the trier of fact to understand the evidence or determine a fact in issue.” The district court also found that the expert’s “opinion lack[ed] foundational reliability,” and that “the opinion ha[d] not been shown to be generally accepted in the relevant scientific community.” Based on these findings, and because of “the many qualifiers and limitations on [Osgood]’s expert’s opinion that were necessary given the newness of the compound at issue and the limited available research,” the district court concluded that “the expert’s opinion d[id] not comply with the requirements of Rule 702.”

Osgood argues that the district court abused its discretion in excluding his expert witness’s testimony under rule 702. Specifically, he contends that the district court erred by finding that the testimony would not be helpful. He also asserts that the district court

erred by basing its decision on inconsistencies between the two interoffice memos, the finding that the expert's "opinion ha[d] not been shown to be generally accepted in the scientific community," and the finding that the expert's opinion lacked foundational reliability.

We review the district court's decision to exclude expert testimony for an abuse of discretion. *State v. Thao*, 875 N.W.2d 834, 840 (Minn. 2016). "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). Erroneous exclusion of expert testimony requires reversal unless the error was harmless. *State v. Hakala*, 763 N.W.2d 346, 350 (Minn. App. 2009), *review granted* (Minn. June 16, 2009). "An error is harmless if there is no reasonable possibility that it substantially influenced the jury's decision." *State v. Taylor*, 869 N.W.2d 1, 14 (Minn. 2015) (quotation omitted). For the reasons that follow, Osgood has failed to demonstrate that exclusion of his expert witness's testimony requires reversal of his conviction.

At the outset, it is important to identify what testimony the expert likely would have given if he had been permitted to testify. Based on the two interoffice memos provided to the district court and the representations of Osgood's counsel, the expert appears to have been prepared to testify that 5-fluoro-MDMB-PICA is a synthetic cannabinoid, and that studies have shown that synthetic cannabinoids generally cause agitation and aggressive behavior in humans. As a caveat to that testimony, however, the expert was also expected to testify that no laboratory testing of the drug had been performed on humans.

We conclude that, based upon this record, the district court did not abuse its discretion by excluding Osgood’s expert witness’s testimony. First, the district court did not err in finding that the testimony would be unhelpful and that it lacked foundational reliability. “Minnesota Rule of Evidence 702 provides that an expert may testify in the form of an opinion if his or her scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.” *State v. Vang*, 774 N.W.2d 566, 576 (Minn. 2009) (quotation omitted). “The ultimate question of admissibility under Rule 702 is whether the expert’s testimony will help the jury evaluate evidence or resolve factual issues.” *Id.* We review the district court’s finding that expert testimony will not be helpful for an abuse of discretion. *Goeb v. Tharaldson*, 615 N.W.2d 800, 815 (Minn. 2000).

Minnesota Rule of Evidence 702 also provides that, in order for an expert to testify, the expert’s “opinion must have foundational reliability.” The proponent of expert testimony bears the burden of demonstrating that the testimony is supported by sufficient foundational reliability. *See State v. Garland*, 942 N.W.2d 732, 745 (Minn. 2020). “When determining whether an opinion is foundationally reliable under Rule 702, the district court must analyze the proffered testimony in light of the purpose for which it is being offered . . . [and] consider the underlying reliability, consistency, and accuracy of the subject about which the expert is testifying.” *Id.* at 742 (alterations in original) (quotation omitted). “The district court must also determine whether the expert reliably applied the underlying theories and methodologies in the particular case.” *Id.* We review the district

court's determination that testimony lacks foundational reliability for an abuse of discretion. *Id.*

The district court did not err in finding that the expert testimony would not be helpful to the jury and that it lacked foundational reliability. The district court based its finding that the testimony lacked foundational reliability principally on the newness of 5-fluoro-MDMB-PICA, the lack of any human testing on its effects, and the fact that the amount of the compound in A.M.'s system at the time of his death is unknown. The expert specifically indicated that 5-fluoro-MDMB-PICA is a new compound and that there has been no human testing on its effects, and there was no evidence in the record of what amount of 5-fluoro-MDMB-PICA was in A.M.'s system at the time of his death or when he had ingested the drug. Finally, the proposed testimony—particularly the assertion that “it would be expected that symptoms associated with 5-fluroro-MDMB-PICA would include agitation or irritability, restlessness, anxiety, confusion, short-term memory and cognitive impairment, and psychosis”—draws inferences about the likely effects the drug would have on humans even though the drug has never been studied in humans, and it draws such inferences on the basis of minimal animal testing. Based on this record, the district court's conclusions that the proposed testimony would not be helpful to the jury and that it lacked sufficient foundational reliability were not an abuse of discretion.

Osgood's other claims of error are also unconvincing. Osgood argues that the district court abused its discretion by excluding the testimony on the basis of inconsistencies between the two interoffice memos provided to the court. While the district court did point out inconsistencies between the two memoranda, the district court does not

appear to have relied on these inconsistencies as a reason to exclude the testimony. Instead, the district court merely mentions the inconsistencies in passing before concluding that—regardless of the inconsistencies—the testimony that the second memo indicated the expert would give was still too general and vague in nature to be helpful to the jury.

Osgood also argues that the district court abused its discretion in excluding the testimony because its decision to do so was based in part on the finding that the expert’s “opinion has not been shown to be generally accepted in the scientific community.” Osgood contends that the district court erred as a matter of law in making such a finding because the “generally accepted” standard only applies when an expert will testify on the basis of a novel scientific theory, and the expert would not have done so here. The district court did state that the “opinion has not been shown to be generally accepted in the relevant scientific community.” But the district court mentioned the lack of general acceptance only once in its order, while it devoted the bulk of its discussion to the issue of helpfulness and to an analysis of the case law cited by the parties. The district court again appears merely to have been reciting the full language of rule 702, and it does not appear to have relied on its finding that the testimony was not generally accepted in the relevant scientific community as a reason to exclude it.

Even if we were to conclude that the district court abused its discretion in excluding this testimony, we would not reverse Osgood’s conviction because any such error would have been harmless. *Hakala*, 763 N.W.2d at 350. Osgood admitted to fatally stabbing A.M. Because of this, the only relevant facts that were in dispute at trial were (1) whether Osgood intended the stabbing to be fatal—to which A.M.’s potential intoxication is

irrelevant—and (2) whether Osgood acted reasonably in self-defense. *See* Minn. Stat. §§ 609.19, subd. 1(1), .19, subd. 2(1), .20(2). While A.M.’s behavior is relevant to Osgood’s claim of self-defense, it was only A.M.’s outward behavior that could have rendered the stabbing reasonable in self-defense, not the inward reasons—such as any potential intoxication—for that behavior. In other words, what A.M. did in the time that led up to the stabbing was far more important than why he did it.

While the expert could have testified about the behavioral effects that a synthetic cannabinoid like 5-Fluoro-MDMB-PICA may have had on A.M. on the night of the murder, a number of lay witnesses testified to A.M.’s behavior before, during, and after the altercation and stabbing of A.M. These witnesses included appellant; appellant’s girlfriend; A.M.’s girlfriend; a neighbor of A.M.’s who witnessed the fight; and a passerby who witnessed part of the fight and assisted A.M. afterward. The jury also viewed video footage of the fight between Osgood and A.M.

Given the extensive eyewitness testimony, the expert’s tenuous inferences regarding the potential impact of 5-fluoro-MDMB-PICA on A.M.’s behavior on the night of the murder would not have been necessary, or even helpful, to the jury in determining the merits of Osgood’s self-defense claim. As such, there is not a reasonable probability that exclusion of that testimony substantially influenced the jury’s decision, and any error in excluding the testimony was harmless. *Taylor*, 869 N.W.2d at 14.

III. The prosecutor did not commit misconduct rising to the level of plain error.

Osgood argues that the prosecutor committed misconduct that deprived him of a fair trial. Specifically, Osgood contends that during closing argument the prosecutor misstated

the law of self-defense and the burden of proof, improperly injected gender into the trial, and suggested that Osgood had failed to introduce certain evidence when the prosecutor had convinced the district court to exclude that evidence. Osgood admits that he did not object to this alleged misconduct at trial, but he nonetheless asserts that the prosecutor's unobjected-to misconduct constitutes plain error and that this court must reverse his convictions to ensure the fairness and integrity of judicial proceedings.

When an appellant has failed to object during trial, we review allegations of prosecutorial misconduct under a modified plain error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Under this standard, the appellant bears the burden of establishing an error that is plain. *Id.* An error is plain when it is “clear or obvious,” as where the error “contravenes case law, a rule, or a standard of conduct.” *State v. Cao*, 788 N.W.2d 710, 715 (Minn. 2010).

If the appellant establishes such a plain error, “the burden shifts to the [s]tate to demonstrate that the plain error did not affect the defendant’s substantial rights.” *State v. Parker*, 901 N.W.2d 917, 926 (Minn. 2017). As part of this task, the state bears the burden of proving 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.” *Ramey*, 721 N.W.2d at 302 (quotations omitted). In considering whether the misconduct significantly affected the jury’s verdict, we consider such factors as “the pervasiveness of improper suggestions and the strength of evidence against the defendant.” *Parker*, 901 N.W.2d at 926 (quotations omitted). If the state fails to demonstrate that the error did not affect

appellant's substantial rights, we then consider "whether the error should be addressed to ensure fairness and the integrity of judicial proceedings." *Id.*

First, the prosecutor did not misstate the law of self-defense. Minnesota law recognizes self-defense as a defense to criminal liability for murder. *State v. Zumberge*, 888 N.W.2d 688, 694 (Minn. 2017). This defense has four elements:

- (1) the absence of aggression or provocation by the defendant,
- (2) the defendant's actual and honest belief that he or another was in imminent danger of death or great bodily harm,
- (3) the existence of reasonable grounds for the belief, and
- (4) the absence of a reasonable possibility of retreat to avoid danger.

Id. "Once a defendant offers evidence supporting each element of the defense, the prosecution bears the burden of disproving at least one of the elements beyond a reasonable doubt." *Id.*

"A prosecutor's misstatement of the burden of proof is highly improper and constitutes misconduct." *State v. Jackson*, 773 N.W.2d 111, 122 (Minn. 2009) (quotation omitted). "However, a prosecutor's comment on the lack of evidence supporting a defense theory does not improperly shift the burden." *State v. McDaniel*, 777 N.W.2d 739, 750 (Minn. 2010). This court "must look at the closing argument as a whole, rather than just selective phrases or remarks that may be taken out of context or given undue prominence[,] to determine whether reversible error has occurred." *Id.* at 751 (quotation omitted).

Here, the prosecutor made the following relevant statements during closing argument:

- “There is no reasonable facts before you for you to conclude that the defendant had no other option but to take [A.M.’s] life.”
- “I would argue that [A.M.] at no point had a knife, and there’s no evidence to support the defendant’s allegation that he did.”
- “You guys have seen it enough times, but I would argue that there’s nothing in that clip that shows that anybody’s life was in danger at that moment.”
- “And that’s why we’re here. The defendant does not deny stabbing him. The question is, is was it reasonable to stab him three times. And I would argue that the evidence shows that it was not reasonable.”
- “He wants you to believe that he had no other option but to kill [A.M.].”
- “What, during this testimony, have you heard that would lead you to believe that Mr. Osgood had no other choice but to take the life of [A.M.]”
- “[T]here is no evidence that he ever made any attempt to truly retreat from this physical altercation.”
- “Would a reasonable person believe that the defendant had to stab Mr. Osgood three times in this situation? And I would argue to you, no. There is nothing that warranted the use of a knife in this case.”
- “But he wants you to believe in this case he was the peaceful one, that he was trying to avoid confrontation. And there is no facts to support that.”
- “[T]he only thing in dispute is whether or not the defendant had to fatally stab [A.M.] three times. And I would argue to you there’s no evidence to support that he had a reasonable basis, or that there is a reasonable basis, to do that.”

These statements did not misstate the burden of proof for Osgood’s claim of self-defense. Instead, the prosecutor was merely drawing the jury’s attention to a lack of evidence to support that theory. It was not prosecutorial misconduct to do so. *McDaniel*, 777 N.W.2d at 750. Viewing the closing argument as a whole, the above statements also did not misstate the law of self-defense. Some of the prosecutor’s statements do seem to

imply that the use of force in self-defense requires that the defendant have no other option. In half of those instances, however, the prosecutor's statements also indicate that the question is whether Osgood's use of force in self-defense was objectively reasonable. Osgood cites no case law in support of the proposition that the prosecutor's representation of the self-defense standard as one of "no other option" was a misstatement of the law.

Second, the prosecutor did not misstate the law or improperly inject gender into the trial. The prosecutor made the following statement during closing argument:

Mr. Osgood did not attempt to run and flee as he would have you believe. You saw the video. He turned around, dropped his bag of alcohol, and engaged in a physical altercation. He said he is normally ready to fight. And that's what he did on this case. The only difference in this situation is that when [A.M.] got the better of Mr. Osgood, instead of him taking his butt-whooping like a man and walking away, he reacted in a fit of anger and stabbed him three times.

This was not a misstatement of the law. While it is true, as Osgood points out, that "nothing in Minnesota law requires a person being assaulted to 'take his butt-whooping' and 'walk away' without using reasonable force to defend him- or herself," the prosecutor was not contending that that is what the law requires. Viewed in context, it is clear that the above statement by the prosecutor was merely intended to convey that nothing about the fight justified Osgood's use of deadly force in self-defense. This statement also did not improperly inject gender into the proceedings. The prosecutor's statement did not communicate that there are separate self-defense standards for individuals who identify as men or women. Nor was the prosecutor inviting the jury to find Osgood guilty because he had failed to conform to some objective standard of masculinity, as Osgood contends.

Third, the prosecutor did not commit misconduct by suggesting that Osgood had failed to present evidence. Osgood argues that the prosecutor committed misconduct by arguing that there was no evidence before the jury that 5-fluoro-MDMB-PICA caused A.M. to act aggressively, when it was the prosecutor who had convinced the district court to exclude the testimony about the possible effects of 5-fluoro-MDMB-PICA. Osgood cites our decision in *State v. Rule*, 355 N.W.2d 496, 498 (Minn. App. 1984), as support for the proposition that making such an argument rises to the level of prosecutorial misconduct.

In *Rule*, “[t]he prosecutor argued, over objection, that appellant had totally failed to show a history of bad blood between the parties that would justify self defense.” 355 N.W.2d at 498. We found that the prosecutor’s argument was improper “because it suggest[ed] that defendant failed to call witnesses to support his self-defense claim and indicate[d] that a defendant has a burden of disproving the case against him.” *Id.* We found the argument particularly improper “in light of the trial court’s ruling that prior instances of violent conduct over more than two years old were inadmissible.” *Id.*

Here, the prosecutor made the following statement during rebuttal:

Now, they talk about everybody is in this conspiracy against Mr. Osgood. He’s the only one being truthful, from the investigators, to the witnesses who are not related to any of the parties, to [A.M.’s girlfriend], to everybody but him. And they say it’s all about this K2 and the [s]tate was trying to hide this evidence from you. If I remember correctly, one of the [s]tate’s first witnesses was [the medical examiner]. And I recall her testifying that [A.M.] had K2 in his system.

Now, there’s no evidence before you that this K2 caused [A.M.] to act a certain way or irrational. We just know that it was in his system. Now, they would have you believe that this K2 caused him to just be irrational and be crazy and that he

was the only one under the influence. Ladies and gentlemen, we are not disputing the fact that [A.M.] had K2 in his system or the fact that everybody was drinking.

What we are disputing is the fact that it was unreasonable for Mr. Osgood to stab [A.M.] under these circumstances. That is the crutch of the argument. And the facts before you do not show any evidence to reasonably believe that there was a good-faith basis for him to stab him.

This statement did not rise to the level of prosecutorial misconduct. Unlike in *Rule*, the prosecutor's statement here did not imply that Osgood failed to present any evidence to support his self-defense claim. *See id.* Nor did it imply that Osgood bore the burden of proving his innocence. The prosecutor's statement was instead a response to Osgood's contention—made during closing argument—that A.M.'s consumption of 5-fluoro-MDMB-PICA on the night of the murder had made him act aggressively.³ The prosecutor was merely drawing the jury's attention to the fact that there was nothing in the evidence that established that 5-fluoro-MDMB-PICA consumption makes a person act aggressively, as Osgood had claimed. *Rule* is thus distinguishable, and the prosecutor's statement here did not rise to the level of prosecutorial misconduct.

Even if we were to conclude that the prosecutor committed misconduct rising to the level of plain error, that conclusion would not require us to reverse Osgood's conviction. When an appellant establishes prosecutorial misconduct rising to the level of plain error, the burden shifts to the state to prove "that there is no reasonable likelihood that the absence

³ During closing argument, Osgood's trial counsel made the following statement: "[A.M.] is sitting there screaming, getting aggressive. And we know he's getting aggressive because he tested positive for K2 and he's been drinking. Use your common sense and experience. We know he is out of his right mind."

of the misconduct in question would have had a significant effect on the verdict of the jury.” *Ramey*, 721 N.W.2d at 302 (quotations omitted). In considering whether the misconduct significantly affected the jury’s verdict, we consider such factors as “the pervasiveness of improper suggestions and the strength of evidence against the defendant.” *Parker*, 901 N.W.2d at 926 (quotations omitted). We also consider whether the appellant had the opportunity to rebut any improper argument the prosecutor made. *State v. Peltier*, 874 N.W.2d 792, 806 (Minn. 2016).

Here, even if any prosecutorial misconduct occurred, it would not have substantially affected the jury’s verdict. Any allegedly improper statements made by the prosecutor were limited to those set forth above and were not pervasive. The evidence against Osgood was relatively strong, even on the intent element of second-degree murder—Osgood himself admitted that he understood the potential lethality of the type of wound he inflicted on A.M. Two witnesses also testified that nothing about the fight warranted the use of a knife, undercutting Osgood’s self-defense argument. Finally, Osgood had an opportunity to rebut all of the prosecutor’s allegedly improper statements except the statement about the absence of evidence on 5-fluoro-MDMB-PICA made during rebuttal, and that statement was likely not improper, as is discussed above.

Affirmed.