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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0141**

State of Minnesota,
Respondent,

vs.

Laurie Ann Gregor,
Appellant.

**Filed March 8, 2021
Affirmed
Bratvold, Judge**

Scott County District Court
File No. 70-CR-17-17213

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

Ronald Hocesvar, Scott County Attorney, Todd P. Zettler, Assistant County Attorney,
Shakopee, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Melissa Sheridan, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Reilly, Judge; and Bratvold,
Judge.

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

After a six-month-old child was injured at appellant's Shakopee daycare, a jury found her guilty of first-degree assault and two other offenses. In this appeal from a final judgment of conviction, appellant raises three issues: (1) whether the district court abused

its discretion by precluding appellant from cross-examining the child's parents about a civil lawsuit against appellant; (2) whether the district court abused its discretion by denying appellant's request for a jury instruction on a lesser-included offense; and (3) whether the prosecuting attorney committed prejudicial misconduct during rebuttal arguments. Because the district court did not abuse its discretion by excluding evidence about the civil lawsuit and by declining the requested jury instruction, and because any misconduct during the prosecuting attorney's rebuttal argument does not warrant a new trial, we affirm.

FACTS

The respondent State of Minnesota charged appellant Laurie Ann Gregor with first-degree assault, Minn. Stat. § 609.221, subd. 1 (2016) (causing great bodily harm) (count one); malicious punishment of a child, Minn. Stat. § 609.377, subds. 1 and 6 (2016) (count two); and malicious punishment of a child under age four, Minn. Stat. § 609.377, subd. 4 (2016) (count three). The following summarizes testimony and other evidence received during the 14-day jury trial.

B.M. and C.M. have three children; their youngest is N.M., who was born on March 9, 2017. B.M. and C.M. testified that N.M. was a healthy baby; he had a six-month checkup on September 12, 2017, shortly before he was injured, and he was developing normally. He could hold up his head and chest, sit up for several seconds at a time, scoot and roll, track people with his eyes, and recognize his parents and siblings.

B.M. was a teacher and cared for N.M. much of the summer. He testified that “[N.M.] was a really fussy baby” and preferred to be held. B.M. would put N.M. in the

exersaucer¹ to “give [him]self a few breaks.” N.M. could only be in the exersaucer or have “tummy time” for 10-15 minutes before he would start fussing.

Gregor ran a licensed child daycare in her home for almost 26 years. In 2017, Gregor’s daycare roster listed eight children. But in September 2017, she had ten children at her daycare, five of whom were under age two and two of whom were under age one. A county social worker testified that Gregor violated her license on the day N.M. was injured because she had two more children in her care than her license allowed.

C.M. and B.M. had taken their other two children to Gregor’s daycare for about five years. N.M. was in his third week of daycare on September 14 when C.M. took him and his three-year-old brother to Gregor’s home at about 7:00 a.m. C.M. testified that N.M. was healthy and that she did not see any bruises or injuries while dressing him that morning. As usual, N.M. cried when C.M. passed him to Gregor. Gregor described N.M. as a “great kid” and a “typical baby,” but “he’s got some separation issues with mom and dad.”

Gregor gave different accounts of what happened that morning. The first detective who interviewed Gregor on September 14 testified that Gregor stated she gave N.M. a bottle at 10:45 a.m. and then put him in an exersaucer. At 11:10 a.m., Gregor saw N.M. slumped forward and sleeping. The first detective testified, “[Gregor] went over and picked him up. And she discovered that his head somewhat fell to the side. He felt limp. And she described his behavior as odd and bizarre.” Gregor told the first detective that she put N.M.

¹ An exersaucer is an updated version of a baby walker, with no wheels. It has a seat with a saucer-shaped bottom, stays in one place, and is equipped with toys.

in his crib and noticed his eyes roll back. Gregor was unsure if N.M. was breathing. According to the first detective, Gregor told him that she picked up N.M. “with her hands underneath his armpits” and shook him “in a back and forth motion while hollering and screaming his name.”

A second detective testified that, during the evening of September 14, 2017, he interviewed Gregor, the recording of which was introduced into evidence. Gregor told the second detective roughly the same thing she told the first detective. Gregor also stated she did not drop N.M. and demonstrated how she shook him. Later, police discovered that, the day after the second interview, Gregor texted family members and stated N.M. fell off a counter. The cell-phone messages were received into evidence.

Gregor interviewed a third time with the police on September 18, 2017. The first and second detectives met Gregor at her home, along with Gregor’s defense attorney, who had called the police and said Gregor wanted “to provide a truthful statement.” Gregor’s third statement was also recorded and received into evidence. During the third interview, Gregor told the detectives that she tried to feed N.M. while standing in the kitchen, and N.M. “may have arched his back. And he fell out of her arms and onto the floor.” Gregor admitted her earlier statements were not truthful because she was scared of losing her daycare license. Gregor also recorded a reenactment of events, which was played for the jury.

During trial, Gregor testified that she gave N.M. a bottle around 11:00 a.m. after picking him up from the exersaucer. Because N.M. was not eating very much, Gregor

thought that “his bottle was cold.” Gregor brought him to the kitchen to add hot water and formula to his bottle. Gregor set N.M. on the counter and put her hip “against his legs in between the counter trying to stabilize him with [her] hip.” She “reached around to turn the hot water on” and simultaneously reached for N.M.’s formula, “and that’s when he fell.”

Gregor testified that she did not see N.M. fall. N.M. cried so she picked him up, comforted him, and he settled down after “a couple of minutes.” Gregor returned N.M. to his exersaucer and saw that he watched the others play. Gregor made lunch for the children and noticed that N.M. “was a bit squawky.” According to Gregor, “he wasn’t really crying, but he wasn’t—he wasn’t very content either. So I picked him up, and I laid him on the blanket that was on the floor.” Gregor again put N.M. in his exersaucer. Gregor testified that she noticed N.M. “had slumped over in the exersaucer,” much like how he often fell asleep. Gregor picked up N.M. and “his head just fell to the side.” Gregor brought him into the nap room and noticed that N.M.’s “eyes started rolling in the back of his head.” According to Gregor, she panicked.

Gregor testified that she “kind of yelled at him . . . and I said, ‘[N.M.], [N.M.], please, please wake up, please wake up,’ and his eyes just kept turning in the back of his head.” Gregor testified, “I shook him pretty hard, it scared the crap out of me.” Gregor testified, “I laid him on the floor. I rubbed his chest (indicating). I pounded his chest (indicating). I—I yelled his name a couple of times to get him to open his eyes, and he just didn’t open his eyes.”

Six-year-old L.M. testified that he attended daycare with N.M. on September 14, 2017. L.M. testified that N.M. cried and Gregor told N.M. to stop crying.² L.M. also testified that Gregor shook N.M. He demonstrated by putting his hands in front of his torso and moving them up and down vertically and “out and back” horizontally.

After Gregor realized N.M. was not opening his eyes, she made 14 phone calls to members of her family before calling 911. Gregor called her husband around 11:16 a.m. and told him a child was not waking up. Her husband told her to call 911. Gregor made similar calls to her daughter-in-law and her son, both of whom advised calling 911. Gregor then called C.M., N.M.’s mother, at 11:34 a.m., and said that N.M. was not waking up. C.M. also told Gregor to call 911.

Gregor called 911 at 11:35 a.m. Paramedics arrived within minutes and took N.M., who was breathing but unconscious, to St. Francis Regional Medical Center. An emergency-room (ER) doctor testified that he treated N.M. when he arrived. A CT scan showed that N.M. had “two subdural hematomas”—pools of blood between the brain and the skull—and he “had a small area of bleeding of the brain tissue itself.” The ER doctor transferred N.M. to Hennepin County Medical Center (HCMC), where they “typically transferred all of young trauma head injuries.” N.M. remained in intensive care for nine days.

² Shortly after N.M.’s injury, a nurse from Midwest Children’s Resource Center interviewed L.M. about what he saw at daycare on September 14. She recorded the interview, which the state showed to L.M. during trial to refresh his memory. The district court received the video and transcript of L.M.’s interview into evidence.

During trial, the state offered testimony from eleven medical witnesses who had either treated N.M. or examined him to provide testimony at trial about the cause and severity of his injuries. A pediatrician on HCMC's child-maltreatment team treated N.M. from September 14 to September 16. He testified that N.M. had "an intracranial hemorrhage, bleeding in and around the brain, he had a linear skull fracture" of the parietal bone—or top of his skull—and some bruising and swelling. According to the HCMC pediatrician, N.M.'s injuries were "way more severe than what should be seen with a fall of that distance."

A pediatric intensivist, who treats critically ill children at HCMC, also testified. In his opinion, N.M. suffered from abusive head trauma and life-threatening injuries based on subdural and subarachnoid bleeding, i.e., bleeding in the fluid-filled space between the brain and the skull. He also testified about the severity of N.M.'s skull fracture and concluded that "falling off a countertop height to a ceramic tile floor" could not cause a skull fracture similar to N.M.'s injury.

A pediatric ophthalmologist at HCMC testified that N.M. had several different types of eye bleeds—preretinal, intraretinal, and subretinal hemorrhages—caused by abusive head trauma. He testified that he saw N.M. "several times throughout 2018," and in December 2018, N.M. continued to suffer from optic disc pallor, which indicates damage to the optic nerve, and exotropia, which is where "the eyes are turning outward." The pediatric ophthalmologist testified that, in his opinion, N.M.'s optic nerve is permanently damaged. He agreed that shaking caused N.M.'s injuries.

A second pediatrician with a subspecialty in child abuse consulted on N.M.'s care and examined him at HCMC. She testified that N.M. had experienced a traumatic brain injury, a fractured sternum or breastbone, and "grip mark" bruises. According to the second pediatrician, "babies, after a brain injury, look sleepy. And so people often put them back in a crib and think that they're just going to take a nap." She testified that N.M.'s injuries resulted from "rotational acceleration." She explained that a short fall can cause injuries similar to abusive head trauma "when abusive head trauma looks less extensive" than it did in N.M.'s case. The second pediatrician agreed that "severe retinal hemorrhaging, a subarachnoid hemorrhage, [and] subdural hemorrhaging" could not be caused by a three-foot fall.

The state's medical experts also testified that, at the time of trial, two years after N.M.'s injuries occurred, he suffered from speech delays, motor-skill delays, learning delays, balance impairment, and optic disc pallor with exotropia.

We briefly summarize the defense medical testimony next because it is relevant to some of the legal arguments on appeal. On Gregor's behalf, an ER doctor reviewed N.M.'s medical records, police reports, videos, and photographs related to N.M.'s injuries. Like the other defense medical experts, the ER doctor focused on the cause of N.M.'s injuries. He testified that he had seen 30 to 40 cases of children and infants diagnosed with head trauma and "hundreds" of children injured in falls. He testified that the extent and severity of N.M.'s injuries are "explained by the fall that Mrs. Gregor describe[d]." Based on the

lack of any injury to N.M.'s neck, an injury associated with babies that have been shaken, the ER doctor concluded that N.M.'s injuries are "consistent with a fall."³

The jury found Gregor guilty on all three counts. The district court convicted and sentenced Gregor for only first-degree assault. The district court imposed an executed prison term of 180 months, which is an upward durational departure from the guidelines range of 74-103 months, based on the jury's findings of particular cruelty and victim vulnerability. Gregor appeals.

DECISION

I. The district court did not violate Gregor's due-process rights by excluding evidence of the parents' civil lawsuit.

Six months after the state charged Gregor, C.M. and B.M. brought a civil suit against Gregor on behalf of N.M. for his injuries. Gregor gave the state notice of her intent to cross-examine B.M. and C.M. about their civil complaint for impeachment purposes. The state objected, arguing that Gregor filed for bankruptcy so the only source available to pay damages would be Gregor's insurance, which typically excludes coverage for criminal acts. Thus, the state argued, "neither [B.M.] nor [C.M.] have a beneficial financial interest in the

³ Some of the defense medical experts disagreed with the state's medical experts on the severity of N.M.'s injuries. For example, a pediatric ophthalmologist, who specializes in children's retinal disorders, reviewed N.M.'s medical and legal records and testified that he would "characterize the retinal hemorrhages as a modest to moderate amount of superficial retinal hemorrhaging." But the defense pediatric neurologist agreed that the top of N.M.'s skull was fractured. Like the ER doctor who testified for the defense, the pediatric neurologist testified that the fracture was "an impact injury" most likely caused by "a fall or a drop." He also testified N.M.'s injuries were not consistent with abusive head trauma.

outcome of the case and do not have a bias to be explored on cross-examination.” The district court decided “to prohibit the defense from this line of questioning . . . on cross-examination,” but stated it would revisit its decision after direct-examination of the parents at Gregor’s request.⁴

Gregor argues that the district court erred by refusing to allow her to cross-examine N.M.’s parents about their pending civil lawsuit to show the parents’ bias. Gregor also argues that her defense of negligence in the criminal case aligns with the civil suit’s theory—that N.M.’s injuries resulted from negligence. Gregor finally contends that the district court’s ruling violated her constitutional right to fully present a defense. The state argues that the district court correctly recognized that “evidence of a civil lawsuit could be relevant, but then so would the related bankruptcy and insurance policy, which would lead to a trial within a trial” that would be unduly confusing for the jury.

⁴ The state argues that Gregor failed to preserve this issue for appeal. “Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error.” Minn. R. Evid. 103(a). Here, the district court made a pretrial ruling but stated it would revisit the ruling at Gregor’s request during trial. Thus, the district court’s ruling was likely not “definitive.” Generally, “a party whose evidence is excluded is not required to ‘object’ to the court’s ruling; instead, the correct procedure is to make an offer of proof regarding the substance of the excluded testimony.” *State v. Pak*, 787 N.W.2d 623, 627 (Minn. App. 2010). Gregor did not make an offer of proof during trial to preserve the issue. But the purpose of an offer of proof is to “provide a record for a reviewing court to determine whether the lower court ruling was correct.” *Id.* (quotation omitted). Here, the substance of the excluded evidence is apparent—Gregor sought to offer evidence that N.M.’s parents had sued her on behalf of N.M. and alleged her negligence caused his injuries. Thus, the issue was sufficiently preserved for appeal.

Under the Due Process Clause, the United States and Minnesota Constitutions protect a defendant's right to "a meaningful opportunity to present a complete defense." *State v. Pass*, 832 N.W.2d 836, 841 (Minn. 2013); *see also* U.S. Const. amend. XIV; Minn. Const. art. I, § 7. But, generally, "a defendant's due process right to present a complete defense yields to the application of an evidentiary rule" absent exceptions not argued here. *Pass*, 832 N.W.2d at 841-42.

Evidentiary rules guide our analysis of this issue. The scope of cross-examination is left largely to the district court's discretion and will not be reversed absent a clear abuse of that discretion. Minn. R. Evid. 611 (b); *State v. Parker*, 585 N.W.2d 398, 406 (Minn. 1998).⁵ Only relevant evidence is admissible; evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action" more or less probable. Minn. R. Evid. 401, 402. Relevant evidence may be excluded, however, if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Minn. R. Evid. 403.

Evidence of bias "or interest of the witness for or against any party to the case is admissible." Minn. R. Evid. 616. Generally, a party may cross-examine a witness "to show

⁵ To obtain reversal based on an erroneous evidentiary decision, an appellant generally must also establish prejudice. *State v. Peltier*, 874 N.W.2d 792, 802 (Minn. 2016). When the district court's evidentiary decision violates a constitutional right, the verdict must be reversed unless the error was harmless beyond a reasonable doubt. *See State v. Post*, 512 N.W.2d 99, 102 (Minn. 1994). Because we determine that the district court did not abuse its discretion by excluding evidence of the civil suit, we do not need to consider these other requirements.

the pendency of a civil action for damages by the witness against the accused.” *State v. Underwood*, 281 N.W.2d 337, 341 (Minn. 1979). “The theory behind this [rule] is that pendency of such a suit indicates possible bias on the witness’ part and is relevant to the witness’ state of mind when testifying.” *State v. Goar*, 249 N.W.2d 894, 895 (Minn. 1977).

Still, caselaw supports the district court’s decision to preclude cross-examination about the civil suit. In *State v. Tenhoff*, the defendant “unjustifiably and without provocation hit a patron of [a] bar in the face” with a pool cue. 322 N.W.2d 354, 356 (Minn. 1982). The state charged the defendant with assault, and the victim sued the defendant. *Id.* During the criminal trial, the district court ruled that the defendant could not cross-examine the victim about the civil suit to show the victim’s interest in the outcome of the criminal case. *Id.* The supreme court affirmed and reasoned that the victim had no personal knowledge of “the key issues in dispute—the degree of defendant’s intoxication and his intent.” *Id.*

Gregor argues that *Tenhoff* is inapplicable because, through their allegations in the civil complaint, C.M. and B.M. “purported to have knowledge about . . . whether Gregor intentionally assaulted and maliciously punished N.M. or whether his injuries were the result of her negligence.” We disagree that the civil complaint established personal knowledge, a basic requirement before a witness may testify. *State v. Ferguson*, 581 N.W.2d 824, 832 (Minn. 1998); Minn. R. Evid. 602. N.M.’s parents did not testify about what happened during Gregor’s supervision of N.M. because they were not there and did not see what happened. On direct-examination, C.M. did not testify about what

happened after she left N.M. with Gregor. During cross-examination, Gregor's attorneys asked no questions of either parent.

The district court also properly excluded the cross-examination about the civil suit under rule 403. Gregor claims that evidence of the civil suit proves that N.M.'s parents have a financial stake in the outcome of the criminal case. But caselaw establishes that serious violations of criminal law are not covered by insurance as a matter of public policy. *State Farm Fire & Cas. Co. v. Schwich*, 749 N.W.2d 108, 114 (Minn. App. 2008) ("Minnesota courts have repeatedly declined to find [insurance] liability coverage for unlawful conduct and serious criminal acts."). Thus, as the state points out, rebutting evidence of the civil suit would yield evidence about Gregor's bankruptcy and insurance coverage, and permit the state to prove that Gregor's criminal conviction was against the parents' financial interest. Accordingly, the district court did not abuse its discretion under rule 403 because any probative value from evidence of the civil suit would be substantially outweighed by the danger of unfair prejudice or confusion of the issues. *See State v. Anderson*, 789 N.W.2d 227, 235 (Minn. 2010).

The district court therefore properly applied the rules of evidence and did not abuse its discretion by denying Gregor's request to cross-examine B.M. and C.M. about their civil suit. We also conclude that the court's evidentiary ruling did not violate Gregor's due-process rights.

II. The district court did not abuse its discretion by declining to instruct the jury on third-degree assault as a lesser-included offense.

Gregor argues that the district court erred by denying her request for a jury instruction on third-degree assault as a lesser-included offense.⁶ The state contends the district court correctly determined that third-degree assault is not a lesser-included offense of first-degree assault.

A district court must give a lesser-included-offense instruction when “(1) the lesser offense is included in the charged offense; (2) the evidence provides a rational basis for acquitting the defendant of the offense charged; and (3) the evidence provides a rational basis for convicting the defendant of the lesser-included offense.” *State v. Dahlin*, 695 N.W.2d 588, 598 (Minn. 2005). The appellate court reviews the denial of a requested jury instruction on a lesser-included offense for abuse of discretion. *Id.* at 597. But “where the evidence warrants an instruction, the [district] court must give it.” *Bellcourt v. State*, 390 N.W.2d 269, 273 (Minn. 1986). When assessing the evidence, courts “must look at the evidence in the light most favorable to the party requesting the instruction.” *Dahlin*, 695 N.W.2d at 598. If the lack of an instruction prejudiced the appellant, reversal is appropriate. *Id.* at 598-99.

First, we consider whether third-degree assault is a lesser-included offense of first-degree assault. This is a legal question that we determine de novo. *See State v. Cox*, 820 N.W.2d 540, 552 (Minn. 2012). The state charged Gregor with first-degree assault

⁶ During trial, Gregor also requested an instruction on the crime of child endangerment, but does not raise this issue on appeal.

under Minn. Stat. § 609.221, subd. 1, which provides that “[w]hoever assaults another and inflicts *great bodily harm* may be” guilty of first-degree assault. (Emphasis added.) In contrast, third-degree assault under Minn. Stat. § 609.223, subd. 3 (2018), provides that “[w]hoever assaults a victim under the age of four, and causes *bodily harm* to the child’s head, eyes, or neck, or otherwise causes multiple bruises to the body, is guilty of” third-degree assault. (Emphasis added.)

An “included offense” may be, in relevant part, “a lesser degree of the same crime.” Minn. Stat. § 609.04, subd. 1(1) (2018). In *State v. Hackler*, the supreme court determined that second-degree assault was a lesser-included offense of first-degree assault, reversing this court’s contrary conclusion:

[S]ection 609.04 makes it clear that the term “included offense” includes “a lesser degree of the same crime.” Contrary to what the court of appeals said, the fact that the lesser offense is not necessarily proved by proof of the commission of the greater offense does not mean that the lesser offense is not an included offense under section 609.04. *If the lesser offense is a lesser degree of the same crime or a lesser degree of a multi-tier statutory scheme dealing with a particular subject, then it is an “included offense” under section 609.04.*

532 N.W.2d 559, 559 (Minn. 1995) (citations omitted) (emphasis added). While *Hackler* did not consider an error in jury instructions, its reasoning is still instructive.

Gregor argues that third-degree assault is a lesser degree of assault and is therefore an included offense of first-degree assault under Minn. Stat. § 609.04, subd. 1(1). She cites general support for her view. *See State v. Ali*, 752 N.W.2d 98, 103 (Minn. App. 2008) (“[I]t is undisputed that fifth-degree assault is an included offense of first-degree assault.”), *review granted* (Minn. Sept. 23, 2008) and *order granting review vacated* (Minn. May 27,

2009). We agree with Gregor. Because third-degree assault is “a lesser degree of the same crime” of first-degree assault, it is a lesser-included offense. *See* Minn. Stat. § 609.04, subd. 1(1); *Hackler*, 532 N.W.2d at 559.

Still, the state contends that the district court did not err by refusing to instruct on third-degree assault because “there is no rational basis for a jury to acquit on the great bodily harm but convict of the bodily harm.” First-degree assault requires proof of “great bodily harm.” Minn. Stat. § 609.221, subd. 1. “Great bodily harm” is “bodily injury which creates a high probability of death, or which causes serious *permanent* disfigurement, or which causes a *permanent or protracted loss* or impairment of the function of any bodily member or organ or other serious bodily harm.” Minn. Stat. § 609.02, subd. 8 (2018) (emphasis added). Third-degree assault, on the other hand, requires proof of “bodily harm,” which is “physical pain or injury, illness, or any impairment of physical condition.” *Id.*, subd. 7. Thus, the critical distinction between “great bodily harm” and “bodily harm” is permanent or protracted loss. *See, e.g., Ali*, 752 N.W. 2d at 103-04 (determining loss of victim’s fingertip was permanent and was thus great bodily harm).

Gregor argues that a “reasonable jury could have concluded that N.M. suffered bodily harm to his head, neck or eyes or multiple bruises to his body but that the injuries did not rise to the level of great bodily harm.” The state responds by listing N.M.’s injuries, as proven by medical evidence at trial: fractured skull, traumatic brain injury, subarachnoid and subdural brain bleeding, and severe retinal eye damage. The state’s experts testified that, two years after the incident, N.M. continued to suffer from speech delays, motor-skill delays, learning delays, balance impairment, and optic disc pallor with exotropia. The state

acknowledges that “some of the consequences of N.M.’s brain injury are unknown at this time but may manifest later in life, when he starts school.”

Dahlin instructs that a district court “must look at the evidence in the light most favorable to the party requesting the instruction when determining whether a lesser-included offense instruction is warranted.” *Dahlin*, 695 N.W.2d at 598. Here, Gregor’s medical experts did not offer evidence about the permanency of N.M.’s injuries, only the cause of his injuries. But permanency of N.M.’s injuries determines this issue. Gregor’s medical evidence did not dispute that N.M. suffered a fractured skull or that his injuries were affecting him two years after the incident. And Gregor herself testified that she did not dispute the severity of N.M.’s injuries or that his injuries could have been fatal. As noted in *Dahlin*, a district court need not instruct on a lesser-included offense if “no evidence is adduced” to support it. *Id.* at 595; *see also Ali*, 752 N.W. 2d at 103-04 (holding district court did not err by refusing to instruct on fifth-degree assault as a lesser-included offense of first-degree assault).

Because the evidence, even when viewed favorably to Gregor, establishes that N.M. suffered from a fractured skull and the effects of his injuries persisted two years after the incident, the evidence does not provide a rational basis for acquitting Gregor of first-degree assault and convicting her of third-degree assault. Therefore, the district court did not abuse its discretion by refusing to instruct the jury on third-degree assault.

III. A new trial is not warranted based on misconduct during the prosecuting attorney's rebuttal argument.

Gregor argues that, because the prosecuting attorney committed misconduct during closing arguments, she is entitled to a new trial. The state contends no plain error occurred and, alternatively, there is no reasonable likelihood any error affected Gregor's substantial rights.

When an appellant fails to object during trial, as here, appellate courts review 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 that (1) an error occurred and (2) the error was plain; upon doing so, the burden shifts to the state to prove that (3) there is no reasonable likelihood that the absence of the misconduct would have affected the jury's verdict. *Id.* If the state fails on the third factor, then the appellate court must decide whether the error seriously affected the "fairness, integrity, or public reputation of judicial proceedings." *Peltier*, 874 N.W.2d at 804 (quotation omitted).

This court "will reverse a conviction if prosecutorial error, considered in light of the whole trial, impaired the defendant's right to a fair trial." *State v. Washington*, 725 N.W.2d 125, 133 (Minn. App. 2006), *review denied* (Minn. Mar. 20, 2007). Appellate courts examine a prosecuting attorney's closing arguments as a whole, rather than examining selective phrases "that may be taken out of context or given undue prominence." *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993). A prosecuting attorney has the right to "vigorously argue" the state's case, but may not disparage the defense, *see Peltier*,

874 N.W.2d at 804, or inflame the jury’s passions to win a guilty verdict. *State v. Bailey*, 677 N.W.2d 380, 404 (Minn. 2004). “Prosecutors have an affirmative obligation to ensure that a defendant receives a fair trial.” *Ramey*, 721 N.W.2d at 300.

A. Some of the prosecuting attorney’s rebuttal arguments were plain error.

“An error is ‘plain’ if it is clear or obvious. Typically, a ‘plain’ error contravenes case law, a rule, or a standard of conduct.” *Peltier*, 874 N.W.2d at 799 (citation omitted). Gregor identifies four parts of the prosecuting attorney’s rebuttal argument as plain error. We address each in turn.

1. Urging jurors to look at their own experiences

Gregor argues the “prosecutor committed plain error during closing argument by encouraging the jurors to look to their own experiences as proof that Gregor’s defense was not credible.” The state argues that Gregor’s attorney did likewise in his closing argument and that jurors are generally encouraged to use their own experiences in assessing a defendant’s claim.

The prosecuting attorney argued during rebuttal:

And at this point if [NM arches back], who doesn’t try anything to catch the baby? It’s instinct. My goodness. If you drop your pen, you would try to catch it. *You surely would try to catch an infant. And even if you don’t grab it, isn’t your instinct to use your body, your leg, anything to catch the baby?* And how does she not know how he landed? How do you not at least have that instinct to look and see?

And this:

And, again, if you’ve ever dropped a baby or had a child that got in an accident, when it’s an accident, that’s your

instinct. *You call the nurse line. You call 911. You maybe scoop them up and take them to the clinic. You do something.*

(Emphasis added.)

We agree with Gregor that the prosecuting attorney asked the jurors to put themselves in Gregor's shoes to determine the credibility of her defense. In *State v. Williams*, appellant argued she was entitled to a new trial on the state's charge that she was a drug courier; her claim was that she did not know drugs were in her luggage. 525 N.W.2d 538, 548-49 (Minn. 1994). The prosecuting attorney asked the jury during closing arguments if they had traveled and opened their luggage to "just magically find something in your bag that you hadn't put in there when you packed." *Id.* at 549. The supreme court determined this statement was misconduct because it urged "the jurors to put themselves in the defendant's shoes" and to rely on their own experience "as proof that the defendant's defense is not credible." *Id.*

Similarly, the prosecuting attorney asked the jury to reject Gregor's defense that she negligently failed to catch N.M. when he fell and did not call 911 because she panicked. The state is correct that the jury is instructed to rely "upon your own experience, good judgment, and common sense" when determining the credibility of witnesses. 10 *Minnesota Practice* CRIMJIG 3.12 (2019). But the prosecuting attorney here went beyond arguing that Gregor was not credible and instead argued that the jury should reject her defense by putting themselves in her shoes. For that reason, under *Williams*, the prosecuting attorney committed plain error.

2. Disparaging defense counsel

Gregor argues that the prosecuting attorney committed plain error by disparaging the defense counsel. The state contends that the prosecuting attorney's arguments were appropriate responses to improper arguments Gregor's counsel made during closing.

Gregor points to these arguments by the prosecuting attorney:

They say, oh, there's a glaring problem. You can't prove the impact. The State doesn't have to prove the injury. It's in the JIGS. So, again, *he misled you. He misled you.* The State has to prove the action, not the injury.

...

Justice demands integrity. Absolutely it demands integrity from all parties. And, unfortunately, *the defense attorney in this case misled you multiple times.* So rely on your own account, not his. He told you that the State has to prove motive. And that's not true. He told you that we have to prove great bodily harm. That's not true. He improperly vouched for their own witnesses. It's for you to decide credibility. He doesn't get to vouch. That's improper. And he knows it, which is why I drew objections. He knows.

(Emphasis added.)

The supreme court has "repeatedly warned prosecutors that it is improper to disparage the defense in closing arguments." *Bailey*, 677 N.W.2d at 403 (quoting *State v. Griese*, 565 N.W.2d 419, 427 (Minn. 1997)). In *State v. McDaniel*, the supreme court considered arguments like those made in Gregor's case. 777 N.W.2d 739 (Minn. 2010).

There, the prosecuting attorney stated:

There's a reason why attorneys' arguments, closing arguments, opening statements, questions and so forth are not evidence and cannot be considered by you as evidence. *Because the attorneys will, oftentimes like to manipulate the*

evidence, make it what it isn't—hoping [] that you don't recall the evidence that was presented and *then misrepresent the evidence to you* and ask you to rely on their representations of the evidence as if that's the truth.

Id. at 751-52 (emphasis added). The supreme court reasoned that, while prosecuting attorneys may comment that arguments are not evidence, they may not “personal[ly] attack” defense counsel for “misrepresenting the truth.” *Id.* at 752. Because the prosecuting attorney had questioned the “personal credibility” of defense counsel, the supreme court determined that the argument was disparaging and improper. *Id.*

Here, the prosecuting attorney told the jury three times that the defense attorney had misled them, which *McDaniel* prohibits. The state is correct that the defense attorney also made some improper arguments by saying the state had to prove motive. The district court sustained the state's objection and told the prosecuting attorney she could correct the misstatement during rebuttal. But the district court did not say the prosecuting attorney could disparage defense counsel. We conclude that the prosecuting attorney plainly erred by telling the jury that the defense attorney misled them because the arguments attacked counsel's personal credibility.

3. Belittling the defense experts

Gregor argues the prosecuting attorney committed plain error by belittling the defense experts. The state contends that the “prosecutor's argument about the credibility of most of the expert witnesses was obviously [an] appropriate argument based on their testimony at trial.”

Gregor asserts these arguments were plain error:

And Dr. Justis, interestingly, is the guy who made up facts about the case that weren't true and it was stricken from the record. Certainly calls into—calls into question—question his credibility why somebody who's here neutral to educate you on an area of medicine would make something up. *It's dirty.*

. . . .

Dr. Tawansy, on the other hand, had very brashly said your question's sloppy. Rephrase it. What was his manner? And when I said it's a yes or no question, did [NM] have papilledema, I can't answer that. Consider the manner. What was the interaction?

Haber. My goodness. I don't even think he let the defense attorney—he directed him. The manner. Consider that.

Dr. Scheller, I don't know if you noticed. He actually wouldn't look at Ms. Lund. He talked to the defense attorney. And then when Ms. Lund took the podium, he literally turned his chair and then would answer the questions and look at you and then listen to the question and then look at you (indicating). Why? If you're here to help just simply to educate, to get to the truth, to find justice, why be *such a jerk*?

(Emphasis added).

The supreme court in *Bailey* instructed that the prosecuting attorney's argument may not disparage defense experts. 677 N.W.2d at 403-404. There, the prosecuting attorney called the defense expert a "paid witness" who testified "because he gets paid for it." *Id.* at 404. The supreme court held this to be plain error after reasoning that "it was improper for the prosecutor to go beyond the testimony of the expert witness by making these references to the witness's character." *Id.*

Here, the prosecuting attorney attacked the defense experts by using terms like "such a jerk" and "dirty." While the prosecuting attorney also asked the jury to consider

the expert witness's demeanor, which is fair argument, name-calling is a character attack and improper. *See id.*

4. Criticizing Gregor based on her testimony

Gregor argues that “the prosecutor committed misconduct by repeatedly denigrating Gregor, with inflammatory characterizations, throughout the rebuttal closing argument.”

The state argues that all of its critiques of Gregor reflected her admissions during trial.

The prosecuting attorney made these arguments:

The defendant admitted under oath that she was a lazy daycare provider. She admitted that [N.M.] spent hours in that exersaucer. And she admitted he even took catnaps in that exersaucer.

. . . .

She just leaves him there crying. These are her babies she said. No. This is her paycheck. Don't mistake that.

. . . .

And she's allowing extra kids to come because every little head that walks in that door is a dollar sign to her. Safety doesn't matter. It's the money.

And it's easy to watch the infants. Because like she said under oath, I contain them in the exersaucer. That's a really easy way to make a dollar. You take the kid immediately. She told you when he arrived, she took him from [C.M.] and put him in the exersaucer. She doesn't touch him again until she took him out to feed him. Put him down for a nap. Picked him up from the nap. Put him back in the exersaucer. And there he dangled until it was time to feed him again.

[N.M.] deserved more than that. Eleven days he endured that (indicating).

. . . .

So now she takes [N.M.] to the kitchen with her. And what's funny about that is she never has [N.M.] with her because *we know that [N.M.] lives in the exersaucer when he's at daycare.* So any chance to get him out of her hands means he goes into the exersaucer. *And so if she's in the living room by the exersaucer, she would have put him where he—he belonged in his little exersaucer prison. Right?*

(Emphasis added.)

A prosecuting attorney must not influence the jury's decision by inflaming their passions and prejudices against the defendant. *Bailey*, 677 N.W.2d at 404. Here, however, the prosecuting attorney's arguments accurately reflect Gregor's testimony at trial. Gregor agreed that it "was lazy childcare on [her] part to warehouse" N.M. in the exersaucer "all day." Gregor agreed that "every child that walks in [her] door represents income to [her]." Because the prosecuting attorney's arguments paraphrased Gregor's testimony, they are not plain error.

We conclude the prosecuting attorney committed plain error during rebuttal argument by urging jurors to look at their own experiences as proof of Gregor's guilt, disparaging the defense counsel, and belittling the defense experts.

B. Despite prosecutorial misconduct during rebuttal argument, a new trial for Gregor is not warranted.

To determine whether the prosecuting attorney's misconduct significantly affected the jury's verdict, or whether Gregor's substantial rights were affected, appellate courts consider three factors: (1) the "strength of the evidence" against the defendant; (2) "the pervasiveness of the erroneous conduct"; and (3) whether the defendant had "an opportunity to rebut any improper remarks." *Peltier*, 874 N.W.2d at 805-06. Appellate

courts also consider the effect of relevant jury instructions. *State v. Jones*, 753 N.W.2d 677, 693 (Minn. 2008); *State v. Washington*, 521 N.W.2d 35, 40 (Minn. 1994).

First, the evidence of Gregor's guilt is overwhelming. Gregor admitted that she lied about how N.M. was injured, Gregor admitted to shaking N.M. and delaying any medical treatment, L.M. testified to seeing Gregor shake N.M. when he was crying, and the state's medical experts determined N.M.'s injuries were not caused by a fall. Also, Gregor made 14 calls before calling 911. We agree with the state that Gregor's delay in helping N.M. receive medical treatment after she injured him is strong evidence of her guilt.

Second, we consider the pervasiveness of the misconduct and conclude the plain error was brief. We often determine the pervasiveness of a prosecuting attorney's misconduct by considering the overall length of the closing argument. In *Peltier* and *Davis*, the supreme court determined the misconduct was not pervasive when it occurred on one page of a 39-page closing argument and a 64-page testimony, respectively. *Peltier*, 874 N.W.2d at 806; *Davis*, 735 N.W.2d at 682. Here, the misconduct was more than one page, unlike in *Davis* and *Peltier*, but the improper remarks were still brief. The state's first closing argument covered 37 pages of trial transcript, Gregor's closing argument was 39 pages, and the rebuttal argument was 24 pages. Each of the prosecuting attorney's offending statements were brief remarks and totaled six pages of the state's 61-page closing argument. Thus, we conclude that the misconduct was not pervasive. *See, e.g., State v. Martin*, 773 N.W.2d 89, 106 (Minn. 2009) ("Martin has failed to establish prejudice under a harmless-error analysis. This was a brief comment by the prosecutor directed at Martin's codefendant in a 75-page closing argument.").

Third, we consider Gregor’s argument that, since the improper statements occurred during rebuttal, Gregor’s attorneys “could not respond to those improper remarks.” The state argues that, even if we conclude that the prosecuting attorney’s rebuttal was misconduct, “there was no objection from either of her very experienced criminal defense attorneys.” The lack of objection “implies that the comments were not prejudicial.” *State v. Ives*, 568 N.W.2d 710, 713 (Minn. 1997). While the state’s shift in strategy from its opening argument to its rebuttal is troubling because Gregor had no chance to respond to the improper arguments, it is still notable that Gregor’s attorneys did not object to the improper arguments.

Fourth, the district court’s “instructions to the jury are also relevant in determining whether the jury was unduly influenced by the improper comments.” *Washington*, 521 N.W.2d at 40. Here, the district court instructed the jury, “It is your recollection of the evidence that should control . . . the arguments or other remarks of the parties, outside of the defendant’s testimony on the witness stand, are not evidence.” We have held that a district court’s jury instructions ameliorate a prosecuting attorney’s misconduct during closing arguments, especially when the court instructs jurors to focus on the evidence and that attorney arguments are not evidence. *Jones*, 753 N.W.2d at 693 (determining that because district court instructed the jury on “the difference between evidence and the arguments of counsel,” among other things, “the prosecutor’s misconduct was not prejudicial”); *State v. Hawkins*, 511 N.W.2d 9, 13 (Minn. 1994) (deciding that prosecutor’s improper statements did not deny appellant a fair trial because “[t]here was overwhelming evidence of appellant’s guilt and because the trial court’s instructions—that the arguments

of counsel were not evidence”). Thus, the district court’s jury instructions mitigated the prosecuting attorney’s misconduct.

Because evidence of Gregor’s guilt was overwhelming, the plain error during the prosecuting attorney’s argument was not pervasive, and the jury instruction mitigated the misconduct, we may conclude that the state has met its burden to prove that Gregor’s substantial rights were not affected by prosecutorial misconduct. But because the misconduct occurred during rebuttal arguments, we also consider the fourth step. If the state fails to meet its burden of proving that the appellant’s substantial rights were not affected, “we may correct the error only if it seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.” *Peltier*, 874 N.W.2d at 804 (alteration in original) (quotation omitted). \

Gregor was afforded a fair adversarial trial over 14 days. During that trial, Gregor thoroughly presented her defense, including medical evidence. The jury considered and rejected Gregor’s version of events and her medical evidence. Accordingly, because procedural safeguards were respected throughout Gregor’s trial, and because the evidence sustains the jury’s verdict when viewed in the light most favorable to it, we conclude that the prosecuting attorney’s misconduct during rebuttal arguments did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings. *See, e.g., State v. Griller*, 583 N.W.2d 736, 742 (Minn. 1998) (determining that granting a new trial based on prosecutorial misconduct “would be an exercise in futility”). Thus, we affirm Gregor’s judgment of conviction.

Affirmed.