STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0321

State of Minnesota,
Respondent,

vs.

Terry Lee Johnson,
Appellant.

Filed March 29, 2021
Affirmed
Cochran, Judge

Mille Lacs County District Court
File No. 48-CR-18-329

Keith Ellison, Attorney General, Matthew Frank, Assistant Attorney General, St. Paul, Minnesota; and

Joe J. Walsh, Mille Lacs County Attorney, Milaca, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Gina D. Schulz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cochran, Presiding Judge; Gaïtas, Judge; and Cleary, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

COCHRAN, Judge

On appeal from conviction of second-degree assault, appellant argues that the district court erred by instructing the jury that he had a duty to retreat if reasonably possible before acting in self-defense in his driveway. Appellant also argues that the prosecutor committed misconduct by repeatedly implying that appellant had the burden to present evidence at trial. Because we conclude that the district court did not err in its instructions to the jury and that the prosecutorial misconduct identified by appellant did not affect the jury's verdict, we affirm.

FACTS

The state charged appellant Terry Lee Johnson with second-degree assault and third-degree assault following an altercation on his property. The following facts were established at trial.

In early 2018, Johnson was separated from his wife. Although separated, Johnson and his wife continued to live on the same property—Johnson's wife lived in the house while Johnson stayed in a camper parked in the driveway. Because the camper had no gas or water supply, Johnson entered the house to cook and to use the bathroom. The property also had a small cabin located across the driveway from the camper.

At some time prior to the separation, Johnson's wife became romantically involved with another man, S.L. Johnson's wife continued to see S.L. after her separation from Johnson.

On February 2, 2018, S.L. visited Johnson's wife at the residence. Johnson's wife later left the property, leaving S.L. alone in the cabin. Thereafter, Johnson arrived with a friend to retrieve some items from the camper. To avoid a confrontation with Johnson's wife, the pair parked in the parking lot of a bowling alley located next to the property. While Johnson was inside the camper, his friend noticed S.L. in the cabin and alerted Johnson to S.L.'s presence. Shortly afterward, S.L. came out of the cabin and walked to his car, which was parked in the driveway. While S.L. was standing near his car, Johnson exited the camper.

Both standing in the driveway, Johnson and S.L. exchanged "heated words," each asking the other what he was doing on the property. They then began throwing punches, and Johnson and S.L. each struck the other at least one time. S.L. testified that after about 15 seconds, Johnson fell to the ground and stood back up. Johnson then pulled a knife from his pocket and stabbed S.L. Johnson testified that he swung the knife once, striking S.L. "on the left side of the chest, gut." S.L. testified that Johnson swung a "silver" object at him twice, hitting him in the ribs on the left side and on the left hand. Johnson's friend then said to him "we got to go," and Johnson and his friend left the property.

S.L. called 911 and was taken by ambulance to the hospital. He arrived with a five-centimeter wound to his chest and a laceration on his left hand involving a tendon and a nerve. He received stitches for both wounds. At the hospital, S.L. told an investigator that Johnson had stabbed him with "something sharp"—possibly a screwdriver, but S.L. was not certain what the object was.

The state charged Johnson with one count of second-degree assault with a dangerous weapon resulting in substantial bodily harm and one count of third-degree assault resulting in substantial bodily harm. At trial, Johnson argued that he acted in self-defense. The jury heard testimony from Johnson, S.L., and Johnson's friend who was present during the altercation, as well as law enforcement involved in the investigation and a doctor who treated S.L. at the hospital. Although Johnson testified that he stabbed S.L. with a pocketknife, the knife was not introduced as an exhibit. Johnson's testimony at trial was the first time the prosecution was made aware that Johnson had used a knife in the stabbing. After both parties rested, the district court granted the state's request to add a third count—second-degree assault with a dangerous weapon—as a lesser-included offense.

The district court provided a jury instruction on self-defense, which included the duty to retreat if reasonably possible before using reasonable force. The court denied a request by Johnson's counsel to specify in its instructions that there is no duty to retreat from one's home.

The jury found Johnson guilty on all three counts. The district court convicted Johnson of only one offense: second-degree assault with a dangerous weapon resulting in substantial bodily harm. Johnson subsequently moved for downward dispositional and durational departures. The district court denied the motions and imposed an executed sentence of 21 months.

Johnson appeals.

DECISION

Johnson argues that his conviction must be reversed and remanded for a new trial because (1) the district court erred by instructing the jury that Johnson had a duty to retreat from his own property before using reasonable force in self-defense, and (2) the prosecutor committed misconduct by repeatedly implying that Johnson had the burden to present the knife used in the stabbing as evidence at trial. Each of these arguments is addressed in turn below.

I. The district court did not err by instructing the jury that Johnson had a duty to retreat if reasonably possible before acting in self-defense.

Johnson first argues that the district court erred by instructing the jury, over his objection, that he had a duty to retreat before acting in self-defense. He contends that he did not have a duty to retreat because the fight occurred on his own property.

A district court generally has broad discretion in crafting jury instructions, but "a jury instruction is erroneous if it materially misstates the law." *State v. Devens*, 852 N.W.2d 255, 257 (Minn. 2014). Whether the duty to retreat applies in a particular case is a question of law that we review de novo. *Id.* An erroneous duty-to-retreat instruction included as part of a self-defense instruction may constitute reversible error. *See State v. Baird*, 654 N.W.2d 105, 113-14 (Minn. 2002) (affirming an order for a new trial based on an erroneous duty-to-retreat instruction); *see also State v. Koppi*, 798 N.W.2d 358, 366 (Minn. 2011) (granting a new trial based on an objected-to instructional error where the error was not harmless beyond a reasonable doubt).

The right of self-defense is codified in Minn. Stat. § 609.06, subd. 1(3) (2016). That provision provides, in relevant part, that reasonable force may be used upon another without the other's consent "when used by any person in resisting . . . an offense against the person." Minn. Stat. § 609.06, subd. 1(3). The supreme court has interpreted the right of self-defense to include four elements:

> (1) the absence of aggression or provocation on the part of the defendant; (2) the defendant's actual and honest belief that he or she was in imminent danger of . . . bodily harm; (3) the existence of reasonable grounds for that belief; and (4) *the absence of a reasonable possibility of retreat to avoid the danger*.

Devens, 852 N.W.2d at 258 (emphasis added) (quotation omitted). The supreme court has also held that the fourth element—the duty to retreat—is not required when a defendant argues that he acted in self-defense in his home. *Id.* Under the so-called "castle doctrine," a person is not obligated to retreat from his or her home before acting in self-defense because a person's home is a "sanctuary" and a "place critical for the protection of the family." *Id.* (quotation omitted). Accordingly, "[r]equiring retreat from the home before acting in self-defense would require one to leave one's safest place." *Id.* (quotation omitted). Conversely, "if a person is outside his or her home and can safely retreat, then the person's use of force is unreasonable as a matter of law." *Id.*

At trial, the state requested that the district court's self-defense jury instruction include an instruction on the duty to retreat. Johnson's counsel argued that the instruction should reflect that a defendant has no duty to retreat when he is at his home. Johnson's counsel also asserted that case law suggests that a person's "driveway is still part of the

home" and therefore Johnson did not have a duty to retreat. The district court rejected defense counsel's argument. It reasoned that the standard duty-to-retreat instruction was proper because the fight between Johnson and S.L. "happened outside," rather than in the camper or house, and the fight did not involve the defense of a dwelling.

The court thereafter provided a detailed self-defense instruction to the jury on each of the three counts. As part of the self-defense instruction, the district court specified that self-defense involves "the absence of the reasonable possibility of retreat to avoid the danger" and that one who acts in self-defense has a "duty to retreat or avoid the danger if reasonably possible."

On appeal, Johnson argues that the district court erred by including the duty-to-retreat language as part of the self-defense instruction to the jury. He acknowledges that the stabbing occurred outdoors on his property but argues that the case law supports his position that the castle doctrine "extends beyond the four walls of the physical home and onto his surrounding property." The state contends that the district court did not err by including the standard duty-to-retreat language because the case law limits application of the castle doctrine to the interior of the home. Based on our review of the case law, we conclude that there are no precedential Minnesota cases clearly extending the castle doctrine beyond the dwelling itself. Although Johnson cites several cases that he contends support his argument that his driveway is his "home" for the purpose of self-defense, his reliance on those cases is misplaced.

The principal case on which Johnson relies is *Devens*. In *Devens*, the supreme court addressed whether the castle doctrine extended to the hallway of an apartment complex.

852 N.W.2d at 258-60. After emphasizing that a person's home is his "sanctuary," his "safest place," and "critical for the protection of the family," the court explained that "the castle doctrine extends to a house, an apartment or part of a structure where [the] defendant lives and where others are ordinarily excluded—the antithesis of which is routine access to or use of an area by strangers." *Id.* at 258-59 (quotations omitted). The court then centered its analysis on the extent to which Devens exercised "exclusive possession and control" over the hallway in his apartment complex. *Id.* at 259-60 (quotation omitted). Reasoning that "Devens did not exercise exclusive (or anything close to exclusive) possession and control over the apartment hallway," the court concluded that the hallway of the apartment complex "was not [Devens's] safest place or his sanctuary" and that Devens, therefore, had a duty to retreat. *Id.* at 259.

Based on his reading of *Devens*, Johnson urges this court to conclude that his driveway is his home for the purpose of the castle doctrine because he had "exclusive possession and control" of the land on his property. But nothing in *Devens* suggests that the castle doctrine applies where, as here, the altercation occurred outside of the physical structure in which the defendant-appellant lives. The *Devens* court was careful to emphasize that it was "not . . . resolv[ing] for all time the contours of what is 'home'" within the meaning of the castle doctrine. *Id.* at 260. And *Devens* dealt with a specific situation—an altercation that took place within the enclosed shared hallway of an apartment complex. *Id.* at 256. Within that context, it was necessary for the supreme court to examine whether Devens had exclusive possession and control over the hallway to determine whether that space, contained within the larger structure of the apartment

complex, constituted Devens's "sanctuary" and "safest place." The facts of *Devens* are very different from the facts of this case, where the altercation occurred in the open-air driveway of Johnson's property. Johnson provides no compelling rationale for applying *Devens*'s "exclusive possession and control" analysis to an area located outside of a building or structure in which the defendant lives.

Moreover, while we recognize that the *Devens* court did not expressly limit the application of the castle doctrine to the interior of the home, the court noted that the "castle doctrine extends to a *house*, an *apartment* or *part of a structure* where [the] defendant lives." *Id.* at 259 (emphasis added) (quotation omitted). This statement is consistent with cases preceding *Devens*, which have exclusively applied the castle doctrine to the interior of the home. *See, e.g.*, *State v. Glowacki*, 630 N.W.2d 392, 402 (Minn. 2001) (stating that "when acting in self-defense *in* the home, a person should not be required to retreat from the home before using reasonable force to defend himself" (emphasis added)); *State v. Carothers*, 594 N.W.2d 897, 900 (Minn. 1999) (stating that there is no duty to retreat "for people engaging in self-defense *within* their homes" (emphasis added)). *Devens* does not support Johnson's argument.

The remaining cases on which Johnson relies are also inapposite. Johnson cites *State v. Gardner*, 104 N.W. 971 (Minn. 1905), for his contention that the duty to retreat is inapplicable when a person acts in self-defense on the lands surrounding his home. However, contrary to Johnson's assertion, the use of force at issue in *Gardner* occurred on the *victim*'s property, not the defendant's. *See* 104 N.W. at 972 (discussing that Gardner shot the victim outside the victim's cabin, which was located 2.5 miles away from

Gardner's property). And the *Gardner* court's analysis did not focus on the location of the use of force, but rather focused on the practicability of retreat. *Id.* at 975 ("It was apparently as dangerous for him to retreat as to stand his ground. . . . It was accordingly reversible error . . . for the trial court to have charged upon the subject of escape or retreat.").

Johnson also cites *State v. McCuiston*, in which the appellant shot the victim while the appellant was standing inside the doorway to his home and the victim was on the porch. 514 N.W.2d 802, 803 (Minn. App. 1994), *review denied* (Minn. June 15, 1994). But *McCuiston* solely concerned the district court's refusal to provide a defense-of-dwelling instruction; the case did not address the scope of the duty-to-retreat exception. *See id.* at 804.

Johnson further relies upon *State v. Penkaty*, 708 N.W.2d 185 (Minn. 2006), contending that the case provided that an open-air deck was part of defendant's dwelling and he had no duty to retreat. In *Penkaty*, the appellant stabbed the victim while both men were on the appellant's deck. 708 N.W.2d at 207. On appeal, Penkaty argued that "the jury instructions on self-defense, defense of others, and defense of dwelling, when read as a whole, were confusing and suggested that Penkaty had a duty to retreat despite being on the front deck of his own home." *Id.* The supreme court explained that "[g]enerally, there is a duty to retreat if reasonably possible when acting in self-defense . . . [b]ut there is no duty to retreat when acting in defense of dwelling." *Id.* The supreme court then noted that "[t]he district court concluded as a matter of law that the front deck was a part of Penkaty's dwelling." *Id.* The supreme court also recognized that the district court's instructions "state[d] in two places that Pentaky had no duty to retreat from his own home" and

concluded that the "jury instructions did not materially misstate the law because they repeatedly stated that Penkaty had no duty to retreat from his own home." *Id.* Here, unlike in *Penkaty*, there was no defense-of-dwelling claim. This case is also factually distinguishable from *Penkaty* because Johnson was not on a deck or other structure attached to his home at the time of his actions. In sum, *Penkaty* lends no support to Johnson's argument. *Penkaty* did not extend the castle doctrine to a person's driveway or yard.

Lastly, Johnson cites the United States Supreme Court's 1895 opinion in *Beard v. United States*, 158 U.S. 550, 15 S. Ct. 962 (1895). In *Beard*, the Court examined the self-defense jury instruction provided in a federal criminal trial. 158 U.S. at 551, 15 S. Ct. at 962. The Court ordered a new trial on the basis that the jury was improperly instructed that Beard had a legal duty to retreat from an "orchard lot" located about 50 to 60 yards from his house before acting in self-defense. *Id.* at 552, 563-64, 15 S. Ct. at 962, 967. The Court stated: "[W]e cannot agree that the accused was under any greater obligation when on his own premises, near his dwelling house, to retreat or run away from his assailant, than he would have been if attacked within his dwelling house." *Id.* at 559-60, 15 S. Ct. at 965. While we are mindful of *Beard*, we apply Minnesota state law "[e]xcept in matters governed by the Federal Constitution or by acts of Congress." *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 822 (1938). Accordingly, because the right to self-defense and the application of the castle doctrine is a matter of state law, *Beard* does not dictate the result of the present case.[1] *See* Minn. Stat. § 609.06,

[1] At oral argument, Johnson's counsel also referenced *Baird*, in which the defendant assaulted a co-resident of the defendant's motor home. 654 N.W.2d at 108. The supreme

subd. 1(3) (setting forth the right to self-defense); *Devens*, 852 N.W.2d at 258 (discussing the statutory right to self-defense).

Minnesota case law is clear that one's "home" within the meaning of the castle doctrine is one's "safest place" and "sanctuary." *Devens*, 852 N.W.2d at 258. This court applied that principle in *State v. Clayborne*, where Clayborne stood in the open doorway of his house and shot the victim who, in turn, was standing in the yard on the sidewalk to Clayborne's house. 404 N.W.2d 385, 386-87 (Minn. App. 1987), *review denied* (Minn. May 28, 1987). We concluded that the district court did not err by providing a duty-to-retreat instruction even where Clayborne was standing in his own doorway. *Id.* at 387.

In light of precedential Minnesota case law, we cannot conclude that the district court erred by instructing the jury that Johnson had a duty to retreat if reasonably possible before acting in self-defense. Johnson, who was standing in his driveway at the time of the stabbing, was not located in his safest place or sanctuary. At trial, Johnson testified that the fight occurred while he was standing "about five or six feet away from the door of the camper" in which he was living at the time. He also indicated that he was standing between the camper and S.L., meaning that S.L. was not blocking his path to the camper during the fight. Accordingly, Johnson had at least two options of locations to which to retreat: into the camper or, alternatively, into the house located on the property. Both of those locations

---

court held that the district court erred by instructing the jury that the defendant had a duty to retreat before acting in self-defense. *Id.* at 113-14. *Baird* is inapposite to this case because, while the dispute between the residents began outside the motor home, the use of force constituting self-defense occurred inside the motor home. *Id.* at 108.

more squarely fit the definition of Johnson's "safest place" or "sanctuary" than his driveway.

In sum, none of the Minnesota cases that Johnson relies upon hold that the castle doctrine applies beyond the dwelling itself. And we are aware of no precedential Minnesota cases that support his argument. As an error-correcting court, we must "apply the best law available to us." *State v. Kelley*, 832 N.W.2d 447, 456 (Minn. App. 2013), *aff'd*, 855 N.W.2d 269 (Minn. 2014). We therefore decline Johnson's suggestion that we extend the parameters of the castle doctrine to a homeowner's driveway, and we conclude that the district court did not err by instructing the jury that Johnson had a duty to retreat if reasonably possible.

II. The prosecutorial misconduct identified by Johnson does not require reversal because it did not affect the jury's verdict.

Johnson next argues that the prosecutor engaged in misconduct by twice implying that Johnson had the burden to present the knife used in the stabbing as evidence at trial. The first instance occurred during the prosecutor's cross-examination of Johnson, and the second instance occurred during the prosecutor's closing argument. Johnson contends that the alleged misconduct, both alone and cumulatively with the duty-to-retreat instruction, deprived him of a fair trial and therefore requires reversal. Because Johnson did not object to the first instance of alleged misconduct but did object to the second, we address each instance separately under the applicable standard of review.

A. Cross-Examination Questions

The first instance of alleged misconduct occurred during the state's cross-examination of Johnson. On direct examination, Johnson testified that he stabbed S.L. in the chest or gut with a pocketknife. On cross-examination, the prosecutor asked Johnson several questions about the knife, which resulted in the following exchange:

> Q: Okay. Well, what—you still haven't told me what the knife is. What kind of knife are we talking about? You said it's a pocket knife.
>
> A: Yeah, a—
>
> Q: What does that mean?
>
> A: A little swiss army kind of style knife. The blade's—
>
> Q: How long is the blade?
>
> A: A few inches or something.
>
> Q: Just a few inches?
>
> A: Yeah. Yes.
>
> Q: Did you bring the knife here today?
>
> A: No.
>
> Q: Okay. So we just kind of take your word for it?
>
> A: Yes.

Defense counsel did not object to the prosecutor's questions.

When a defendant fails to object to a prosecutor's questions during trial, prosecutorial misconduct alleged on appeal is reviewed under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Under this standard, the

appellant-defendant bears the burden of establishing an error by the prosecutor that is plain. *Id.* An error is plain if it "contravenes case law, a rule, or a standard of conduct." *Id.* If the appellant makes the required showing, the burden shifts to the state to prove that the error did not affect the appellant's substantial rights. *Id.*

Here, Johnson argues that the prosecutor's questions concerning the knife on cross-examination constituted plain error based on this court's previous decision in *State v. Montgomery*, 707 N.W.2d 392 (Minn. App. 2005). In *Montgomery*, a jury found the appellant guilty of selling a controlled substance. 707 N.W.2d at 395. At trial, Montgomery argued that he was present in the car where the drug sale occurred but did not know that drugs were in the car and was unaware that the sale was taking place. *Id.* at 396. On cross-examination, the prosecutor asked Montgomery whether he had subpoenaed a witness who was also in the car during the sale but who did not testify at trial:

> Q. We don't hear that from Shawntan, do we?
>
> A. Pardon me?
>
> Q. We hear that from you, right?
>
> A. Yes.
>
> Q. And you know Shawntan Smith is refusing to talk to anybody, don't you?
>
> A. Like . . . .
>
> Q. You know that, don't you?
>
> A. What do you mean?
>
> Q. He is refusing to talk.

A. No, I don't know that.

Q. And you didn't subpoena him, did you?

A. No, I did not.

Id. at 396-97. This court determined that the prosecutor's questioning constituted misconduct that deprived Montgomery of a fair trial. *Id.* at 400-01. We stated that "[a] defendant is not required to present evidence in his own behalf, *and any suggestion or insinuation to the contrary is improper*." *Id.* at 400 (emphasis added). And we reasoned that by asking Montgomery whether he subpoenaed the witness, the prosecutor "clearly implied that, if Montgomery were going to be believed, he had a duty to subpoena Smith to testify." *Id.* We concluded that the question was "serious prosecutorial misconduct" because it "suggested that Montgomery had a duty to present evidence on his own behalf." *Id.*

Johnson contends that the prosecutor's questions in the present case constitute plain error because they "mirror the question this [c]ourt found to be misconduct in *State v. Montgomery*." We agree. Similar to the prosecutor's question in *Montgomery*, the prosecutor's questions in this case clearly implied that if Johnson were to be believed regarding the size and appearance of the knife, he had a duty to present the knife at trial. We therefore conclude that the prosecutor's questions improperly suggested that Johnson had a duty to present evidence on his own behalf and that those questions constitute error that is plain.

Having concluded that the prosecutor's questions were plainly erroneous, we next consider whether the state has met its burden to show that the error did not affect Johnson's

substantial rights. *Ramey*, 721 N.W.2d at 302. To meet its burden, the state must show that "there is no reasonable likelihood that the absence of the misconduct . . . would have had a significant effect on the verdict of the jury." *Id.* (quotation omitted). In evaluating the effect on substantial rights, this court considers "the strength of evidence against the defendant, the pervasiveness of improper suggestions, and whether the defendant had an opportunity to (or made efforts to) rebut the improper suggestions." *State v. Cao*, 788 N.W.2d 710, 717 (Minn. 2010).

Here, the state has met its burden to show that the improper questions did not affect Johnson's substantial rights. First, the evidence presented against Johnson at trial was strong. Johnson was found guilty of (1) second-degree assault with a dangerous weapon resulting in substantial bodily harm; (2) third-degree assault resulting in substantial bodily harm; and (3) second-degree assault with a dangerous weapon. To meet its burden of proof on those counts collectively, the state needed to establish that Johnson assaulted another person with a dangerous weapon and inflicted substantial bodily harm. Minn. Stat. §§ 609.222, .223, subd. 1 (2016). During Johnson's own testimony, he admitted to stabbing S.L. with a knife and stated that he did so in part because he "wanted to keep fighting." In addition, the trial testimony further tended to show that the stabbing caused substantial bodily harm, as S.L. continued to experience numbness in his left hand at the time of trial. *See* Minn. Stat. § 609.02, subd. 7a (2016) (providing that the definition of "substantial bodily harm" includes "bodily injury . . . which causes a temporary but substantial loss or impairment of the function of any bodily member or organ"). And the prosecution elicited testimony refuting Johnson's claim of self-defense. The testimony

demonstrated that Johnson had an opportunity to retreat from the altercation prior to the stabbing, based both on the location of the fight and the amount of time it must have taken for Johnson to reach into his pocket and open the knife. Given the strength of the evidence against Johnson, the prosecutor's statements were likely inconsequential to the verdict.

Second, the prosecutor's comments about Johnson's failure to present the knife at trial were brief. The improper questions make up a few lines out of a nearly 450-page trial transcript. And, even if the cross-examination questions are considered together with the prosecutor's comments in closing argument discussed below, the statements were brief and not pervasive. The prosecutor emphasized the state's burden of proof in his opening argument and twice reminded the jury of that burden during his closing argument. And the district court repeatedly instructed the jury about the state's burden of proof and defined "reasonable doubt." *See State v. Hall*, 764 N.W.2d 837, 845 (Minn. 2009) (presuming that jurors will follow instructions from the district court).

Third, defense counsel had an opportunity to rebut the improper comments, and did so. In her own closing argument, defense counsel stated:

> I will just remind you there were a couple comments during the State's closing—but just to remind the Court and the jury—Mr. Johnson has nothing to prove. There is no duty for him to prove anything at this point. He does not need to put on any evidence. He does not need to bring any evidence. There's no requirement for that.

Defense counsel's comments made it clear to the jury that Johnson had no duty to produce any evidence at trial.

In his brief, Johnson suggests that the prosecutor's questions regarding the knife implicated the credibility of his self-defense claim because the jury may have inferred from the questions that "Johnson didn't simply reach for his utility knife in a moment of fear, but rather brought a larger knife from the camper specifically in anticipation of fighting S.L." But even if the jury were to make such an indirect inference from the prosecutor's improper questions, it is improbable that the inference would have significantly affected the jury's verdict given the strength of the other evidence presented against Johnson. In light of the strength of the evidence against Johnson, the brevity of the prosecutor's comments about the knife, and the reminders by both parties and the district court of the state's burden of proof, we conclude that the prosecutor's improper questions did not have a reasonable likelihood of significantly affecting the jury's verdict. Accordingly, the prosecutorial misconduct during questioning of Johnson on cross-examination does not warrant a new trial.

B. Closing Argument Comments

The second instance of alleged misconduct took place during the state's closing argument. There, the prosecutor stated:

> [A]nd I would note we don't have that blade. Don't know where that blade is. Never even heard about that blade until today. Pretty easy to bring it in, show it. Blade and a half—inch and a half. Maybe not. I don't know. Maybe it's lost.

After the prosecutor finished his remarks and the jurors exited the courtroom, Johnson's attorney objected to the prosecutor's statement, saying:

> I wanted to object to part of the State's closing where they were talking about "not bringing the knife. It would be easy to bring

> in the knife," just as a reminder it's not defense's duty to prove anything in this case or bring in evidence. So I felt like that was shifting the burden.

Because defense counsel objected to the prosecutor's comments, we review the alleged prosecutorial misconduct for harmless error. *State v. Wren*, 738 N.W.2d 378, 389 (Minn. 2007).

As with the prosecutor's questions during cross-examination, the prosecutor's comments during his closing argument constitute error. In particular, the prosecutor's statement that the knife would be "[p]retty easy to bring" to court suggested that Johnson would have presented the knife at trial if his testimony regarding the size of the knife were true. This comment amounts to prosecutorial misconduct because it implied that Johnson had a duty to present evidence on his own behalf. *See Montgomery*, 707 N.W.2d at 400 ("A defendant is not required to present evidence in his own behalf, and any suggestion or insinuation to the contrary is improper.").

Having concluded that the prosecutor's closing-argument comments were error, we must address whether the objected-to comments were nonetheless harmless error. *Wren*, 738 N.W.2d at 389 (providing that objected-to prosecutorial misconduct is reviewed for harmless error). In assessing whether an error is harmless in the context of prosecutorial misconduct, we must look at the severity of the misconduct. *State v. Hunt*, 615 N.W.2d 294, 302 (Minn. 2000). In cases involving less serious misconduct, we examine "whether the misconduct likely played a substantial part in influencing the jury to convict." *Wren*, 738 N.W.2d at 390 n.8 (quotation omitted). In contrast, in cases of serious

misconduct, the misconduct must be "harmless beyond a reasonable doubt," meaning that "the verdict rendered was surely unattributable to the error." *Hunt*, 615 N.W.2d at 302.

Assuming, without deciding, that the prosecutorial misconduct in this case qualifies as serious misconduct, we conclude that the misconduct was harmless beyond a reasonable doubt. As discussed with respect to the prosecutor's cross-examination questions, the improper statements made during the prosecutor's closing argument were brief when considered in the context of the closing argument as a whole. The evidence of Johnson's guilt was overwhelming. And defense counsel countered the improper statements in her own closing argument. Accordingly, we conclude that the jury's verdict was not attributable to the prosecutor's improper statements.

Johnson also contends that the instances of prosecutorial misconduct, when considered together along with the district court's duty-to-retreat instruction, had the cumulative effect of denying Johnson a fair trial. But, because we have determined that the district court did not err by instructing the jury that Johnson had a duty to retreat if reasonably possible and that the prosecutorial misconduct did not affect the jury's verdict, we conclude that Johnson was not deprived of a fair trial. We therefore conclude that Johnson's arguments do not require reversal.

Affirmed.