

*This opinion is nonprecedential except as provided by  
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A22-1373**

State of Minnesota,  
Respondent,

vs.

Kristopher Daniel Schwabe,  
Appellant.

**Filed August 14, 2023  
Affirmed  
Cochran, Judge**

Chisago County District Court  
File No. 13-CR-21-1053

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

Janet Reiter, Chisago County Attorney, John L. Lovasz, Assistant County Attorney, Center City, Minnesota (for respondent)

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

Considered and decided by Wheelock, Presiding Judge; Cochran, Judge; and Frisch, Judge.

**NONPRECEDENTIAL OPINION**

**COCHRAN, Judge**

In this direct appeal of two convictions of domestic assault, appellant argues that he is entitled to a new trial because the prosecutor engaged in prejudicial misconduct. While we agree with appellant that the prosecutor engaged in misconduct, we conclude that the

prosecutor's misconduct did not affect appellant's substantial rights such that he is entitled to a new trial. We therefore affirm.

## **FACTS**

In the spring of 2022, respondent State of Minnesota charged appellant Kristopher Schwabe with three counts of misdemeanor domestic assault, in violation of Minn. Stat. § 609.2242, subd. 1(2) (2020). These charges stemmed from allegations that Schwabe physically assaulted three family members—his son, his girlfriend's son, and his ex-wife—on December 29, 2021. A jury found Schwabe guilty of assaulting his son and his girlfriend's son but acquitted him of assaulting his ex-wife.

At trial, the state presented testimony from two of the alleged victims: the son of Schwabe's girlfriend and Schwabe's ex-wife. The third alleged victim—Schwabe's biological son—did not testify. The state also presented testimony from the person who gave shelter to Schwabe's son after the alleged assault and testimony from the police officer who interviewed Schwabe's girlfriend's son about the alleged assault. In addition, the state introduced three exhibits, which the district court admitted into evidence.

At trial, Schwabe's girlfriend's son (E.P.) testified about how Schwabe assaulted him in the early morning hours of December 29. He also testified that Schwabe assaulted his own son (L.S.) on the same morning. According to E.P., he was living in Schwabe's home with his mother, Schwabe, and L.S. on the date of the assaults. At that time, E.P. and L.S. were both fourteen years of age.

Around 1:00 a.m. on December 29, E.P. was in his room watching a movie. Schwabe came into E.P.'s room and asked E.P. if he wanted to play video games in the

living room. E.P. agreed. Schwabe then woke up L.S. Schwabe told the boys to look in the garage for the game-unit controllers. E.P. went to the garage, but L.S. stayed in the living room. From the garage, which is connected to the house, E.P. could hear Schwabe yelling at L.S. E.P. then saw Schwabe “shove” L.S. into the garage. Schwabe followed L.S. into the garage. He then started yelling at both boys about “how [they] didn’t respect” E.P.’s mother. E.P. testified that, at the time, he was kneeling on the floor, still looking for the controllers. Schwabe then “grabbed the back of [his] head so that [E.P.] would [look] at him.” Next, Schwabe picked up a glass jar and smashed it on a counter, about a foot from E.P.’s face. Glass went onto E.P.’s neck and head, and L.S. ended up stepping in some of the glass. Schwabe then took both boys’ cell phones, put the phones in the house, and returned to the garage.

According to E.P., Schwabe thereafter hit L.S. several times with an open hand “in the side of the head and in the face.” E.P. testified that Schwabe hit L.S. hard, in a manner that looked painful. E.P. also testified that “it sounded like a smack” and that L.S. screamed.

After this escalation, Schwabe went back into the house. E.P. and L.S. went back inside as well but to a different part of the house. Schwabe found the boys and started yelling at them again. At that point, L.S. ran out the front door, and E.P. went to his room “to assess everything that had happen[ed].” Schwabe then came into E.P.’s room and continued to yell at him. Schwabe pinned E.P. against the doorframe between E.P.’s room and the hallway, “got[] up in [E.P.’s] face,” grabbed E.P.’s hair, and pulled E.P.’s head up

by his hair so that E.P. would meet his eyes. E.P. testified that it hurt when Schwabe grabbed his head and that he was scared. He also testified that Schwabe smelled of alcohol.

After pinning E.P. to the doorframe and grabbing his hair, Schwabe walked away. He came back about ten minutes later in a calmer state and told E.P. to get in the car so they could go look for L.S. They were unable to find L.S. and returned home sometime before 4:00 a.m. E.P. testified that his relationship with Schwabe before this incident was “so-so” and that he “didn’t like him, but [he] had to deal with him.”

R.J., who is Schwabe’s ex-wife and L.S.’s mother, testified next. She testified that she missed a call from L.S. at about 1:30 a.m. on December 29. The call came via a Facebook account belonging to L.S.’s ex-girlfriend, not from L.S.’s phone. L.S. also sent a message through the Facebook account that said, “This is [L.S.]. You need to answer.” R.J. did not get L.S.’s message until she woke up at about 5:00 a.m. She was worried by the message but was not able to reach L.S. until later that morning. R.J. eventually picked up L.S. at his ex-girlfriend’s house, where he had gone after leaving Schwabe’s house. L.S. explained to R.J. what had happened with Schwabe the night before. She drove L.S. back to Schwabe’s house so he could “pack a bag” and to see if they could find E.P. Schwabe was not there when they arrived but came home before they left. When Schwabe pulled into the driveway, L.S. ran out of the house to his mother’s car. He waited there while she talked with Schwabe.

R.J. testified that Schwabe asked her why she was at his house. She responded by asking Schwabe why he had not told her that their son left Schwabe’s house in the middle of the night without his phone or a jacket. According to R.J., Schwabe then “came rushing

towards [her], grabbed [her] arms, started shaking [her],” and screamed in her face: “[I]s this why the kids are so scared of me . . . because I do this?” and “I don’t understand why they just don’t listen to me.” R.J. was only able to get back to her car when Schwabe became distracted by his girlfriend, who was also at Schwabe’s house. As R.J. was backing up the car, Schwabe pounded on the hood of the car and R.J.’s window. Schwabe followed the car for about 50 feet, still screaming and hitting the car, before they were able to drive away. R.J. and L.S. then went to the police department to report the incident.

J.P., the mother of L.S.’s ex-girlfriend, testified next. She testified that she awoke in the middle of the night on December 29 to a loud banging sound. The sound was being made by L.S., who was banging on the side of the house and asking J.P.’s daughter to let him in. L.S. was wearing a T-shirt, jeans, and socks but no shoes. J.P. testified that L.S. had “specks of blood on him” and that he was “very distraught.” J.P. let L.S. into the house, where he unsuccessfully tried to contact his mother. L.S. and his ex-girlfriend left for a short time to look for E.P., but L.S. otherwise stayed at J.P.’s house until his mother picked him up in the morning. According to J.P., this was the first time that L.S. had come to their house in the middle of the night.

The last witness for the state was the police officer who took a recorded statement from E.P. on the day after the alleged assault. The recording of E.P.’s statement was played for the jury. In the recorded statement, E.P. told the officer that Schwabe was very angry the night before, that he was yelling loudly, and that he hit L.S. and “put his hands on [E.P.]” E.P. clarified for the officer that he first heard Schwabe yelling at L.S., and then Schwabe started yelling at E.P. too. E.P. told the officer that he both heard and saw

Schwabe hit L.S. in the head. And E.P. told the officer that after L.S. had left the house and E.P. had gone to his room, Schwabe came back upstairs to E.P.'s room, pinned E.P. against the doorframe between his room and the hallway, and grabbed E.P.'s hair to pull his head back while continuing to yell at him. E.P. told the officer that Schwabe then walked away but came back later and told E.P. to help him look for L.S. E.P. also told the officer that Schwabe smelled of alcohol.

On cross-examination, defense counsel asked the officer—who was also a student resource officer at the local high school—some questions about the truthfulness of minors. First, defense counsel asked the officer if “any kid that you’re investigating [has] lied to [you] before?” The officer said, “Yes.” Defense counsel also asked the officer if he would agree that “minors can lie to police officers” and if the officer had experienced that before in his job. The officer said, “Yes.” On re-direct, the prosecutor noted the officer’s testimony that students at the local high school “will sometimes lie” and asked the officer if students are also “sometimes truthful?” The officer said, “Yes.” He testified that students are more often truthful. The prosecutor then asked the officer: “Did anything lead you to think that [E.P.] was lying to you when you talked to him?” The officer said, “No.”

After the state rested, Schwabe testified in his own defense. On direct examination, Schwabe did not testify in detail about what happened with the two boys, but he described his later interaction with R.J. Schwabe testified that he found R.J. at his house on the morning of December 29 and that she was “distraught” and accused Schwabe of lying about what had happened with the boys the night before. Schwabe testified that he walked up to R.J. and “was showing her what [he] did to [L.S.] because [he] just kind of

straightened [L.S.] out a little bit.” He further testified that he “wasn’t hurting her” and “wasn’t coming at her in an aggressive manner.”

On cross-examination, Schwabe seemed to dispute the testimony of the state’s witnesses regarding the timing of certain events, such as when L.S. left the house. When the prosecutor asked Schwabe how he knew the timing of these events, Schwabe said: “Because it’s on video.” Schwabe explained that he has a “video thing” at his home that looks down on the front yard and part of the driveway. Schwabe confirmed that he had never provided this video to the state.

The prosecutor then asked Schwabe a series of questions about whether the state’s witnesses were lying and whether they were engaged in a conspiracy against Schwabe. The prosecutor first noted Schwabe’s disagreement with the other witnesses’ testimony on the timing of events on December 29 and then asked if Schwabe was asserting that “because [the witnesses] were off by an hour, none of it happened?” Schwabe disagreed with this characterization of his position and acknowledged that “some of it happened” and that he did yell at the boys. But he asserted that the state’s witnesses were “incorrect about the fact that there was any physical violence.” The prosecutor then asked, “So is it your testimony today that [L.S.], [E.P.] and [R.J.] are all conspiring against you to get you in trouble for three separate assaults that you did not commit?” Schwabe responded, “In a sense, yes.” The prosecutor asked again if Schwabe was asserting that “they’re all lying about you physically assaulting them.” Schwabe said, “Yes.” The prosecutor then asked if “they all conspired together to do this?” And Schwabe responded, “Not necessarily together. It was kind of a team project though, yes.”

In closing argument, the prosecutor summarized the testimony of the state's witnesses in detail and argued that the state's evidence supported a guilty verdict for each of the three domestic-assault counts against Schwabe. When discussing the evidence supporting the first count—the charge that Schwabe assaulted L.S., the prosecutor argued: “All of this evidence does not support [that] there's some vast conspiracy for all of these victims to come forward.” In addressing the second count—the charge that Schwabe assaulted E.P., the prosecutor argued that, even if E.P. did not have a great relationship with Schwabe, “That does not mean that he should be disbelieved or that because he's a teenager we can't believe him.” And the prosecutor again noted that Schwabe had not presented any video from his home video monitoring system, which apparently has a view of his front yard and driveway, as relevant evidence. The prosecutor concluded by asking the jury to focus on the testimony that they heard, including: E.P.'s description of what happened on the night in question, J.P.'s testimony that she awoke to L.S. seeking shelter at her house in the middle of the night, and R.J.'s explanation of what occurred when she and L.S. returned to Schwabe's house.

The jury found Schwabe guilty of domestic assault of the two boys, L.S. and E.P. The jury found Schwabe not guilty of domestic assault of his ex-wife, R.J. The district court sentenced Schwabe to two concurrent 90-day jail terms for the two convictions.

Schwabe appeals.

## **DECISION**

Schwabe seeks reversal of his convictions and a new trial on the ground that the prosecutor engaged in prejudicial misconduct. Schwabe argues that the prosecutor

engaged in misconduct that prejudiced his right to a fair trial by (1) asking Schwabe if the alleged victims were lying, (2) eliciting “vouching” testimony from the police officer, (3) aligning with the jury by referring to the prosecutor and jury as “we,” and (4) commenting on Schwabe’s failure to produce the video evidence. Schwabe did not object to any of the alleged misconduct at trial.

We review unobjected-to prosecutorial misconduct under a modified plain-error standard. *State v. Parker*, 901 N.W.2d 917, 925-26 (Minn. 2017). Under this standard, a defendant has the burden of proving that the alleged misconduct constitutes an error that is plain. *Id.* at 926 (citing *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006)). An error is plain if it “contravenes case law, a rule, or a standard of conduct.” *Ramey*, 721 N.W.2d at 302. If a defendant establishes that the misconduct constitutes plain error, then the burden shifts to the state to prove that the misconduct did not affect the defendant’s substantial rights—in other words, “that there is no reasonable likelihood that the absence of the misconduct . . . would have had a significant effect on the verdict.” *Id.* (quotation omitted). If the state meets its burden, that ends our inquiry. *See id.* But if the state fails to prove that the error did not affect the defendant’s substantial rights, then we must decide whether to “address the error to ensure fairness and the integrity of the judicial proceedings.” *Caldwell v. State*, 886 N.W.2d 491, 500 (Minn. 2016).

We first address whether any of the four claims of misconduct alleged by Schwabe constitute plain error. Because we conclude that three of the four claims of prosecutorial misconduct constitute plain error, we next consider whether the state met its burden to prove that the prosecutor’s misconduct did not affect Schwabe’s substantial rights. We

ultimately conclude that the prosecutor's misconduct did not affect Schwabe's substantial rights such that he is entitled to a new trial, although we recognize that this is a close case.

**I. Schwabe has demonstrated that the prosecutor engaged in conduct that constitutes plain error.**

*A. The prosecutor engaged in misconduct that constitutes plain error by asking "were they lying" questions.*

Schwabe first argues that the prosecutor engaged in misconduct by asking Schwabe "were they lying" questions. "Were they lying" questions are generally posed by the state to a criminal defendant on cross-examination. *State v. Pilot*, 595 N.W.2d 511, 516 n.1 (Minn. 1999). "Typically, the prosecutor will first ask the defendant if [they] heard the testimony of . . . the state's witnesses. Then the prosecutor will ask the defendant if the witnesses' testimony was accurate." *Id.* If the defendant disputes the witnesses' testimony, then "the prosecutor will ask the defendant to comment on the veracity of the witnesses' testimony by asking the defendant, 'Were they lying?'" *Id.*

As a general rule, it is inappropriate for the state to ask a criminal defendant "were they lying" questions because such questions "are perceived as unfairly giving the jury the impression that in order to acquit, it must determine that the witness whose testimony contradicts the defendant's testimony is lying." *State v. Morton*, 701 N.W.2d 225, 233 (Minn. 2005) (citing *Pilot*, 595 N.W.2d at 516). However, "'were they lying' questions are permissible when the defendant holds the issue of the credibility of the state's witnesses in *central focus*." *Id.* (emphasis added) (quotation omitted). In *Pilot*, for example, "the focus of the defense was that the state's witnesses were lying and that the evidence against [the defendant] was fabricated as part of a vast conspiracy to convict him of a crime he did

not commit.” 595 N.W.2d at 518. Therefore, the supreme court concluded that the prosecutor did not engage in misconduct by asking the defendant “were they lying” questions because, under the circumstances, the prosecutor’s questions “could well have assisted the jury in weighing [the defendant’s] own veracity and in evaluating his conspiracy theory.” *Id.* In *State v. Leutschafft*, we clarified that the “central focus” test established in *Pilot* and reaffirmed in *Morton* “appears to apply [only] when the defense *expressly* accuses opposing witnesses of falsehoods or fabrications.” 759 N.W.2d 414, 422 (Minn. App. 2009), *rev. denied* (Minn. Mar. 17, 2009).

Here, during cross-examination, the prosecutor initiated the following exchange with Schwabe about the timing of certain events on the night of December 29 and the credibility of the state’s witnesses:

Q: And now you’re saying that because [the video] shows 12:24 [as the time] that [L.S.] left, all of this was made up. Not one or 1:30 like they were saying. Because they were off by an hour none of it happened is that what you’re saying?

A: No, that’s not what I’m saying.

Q: Okay. So some of it happened?

A: Some of it absolutely, yeah.

Q: They’re just wrong about the dates—or the times?

A: No. They’re also incorrect about the fact that there was any physical violence.

Q: Okay. So you did yell at them, yes?

A: Absolutely, I did.

Q: Okay. So is it your testimony today that [L.S.], [E.P.] and [R.J.] *are all conspiring against you* to get you in trouble for three separate assaults that you did not commit; is that right?

A: In a sense, yes.

Q: In a sense. What sense?

A: Well, the sense that, well, my son [L.S.], he had just broke up with his girlfriend. He was very emotional . . . .

. . . .

Q: So—*so they're all lying* about you physically assaulting them; is that right?

A: Yes.

Q: Okay. And they all conspired together to do this?

A: Not necessarily together. It was kind of a team project though, yes.

Q: A team project but not necessarily all together?

A: I'm not sure how I can explain.

Q: Please do.

A: Okay. Well—

Q: How do you think they conspired to make this up against you?

A: Well, because I believe my son was under some emotional distress because of his first relationship ending. I believe that turned him into wanting to kind of get the victim stance on things . . . .

(Emphasis added.)

The prosecutor later asked Schwabe about R.J.'s testimony specifically:

Q: [Y]our position is that you didn't shake [R.J.] or cause her pain?

A: Absolutely not, no.

Q: And *she was lying* about that too?

A: Yes. I mean, I don't know what level of pain she has, but . . . it was a very light touch before she backed up.

(Emphasis added.)

On appeal, Schwabe argues that the prosecutor's "were they lying" questions constitute plain error because "the defense theory [of the case] was *not* that the witnesses against Schwabe were lying," and "Schwabe did not put [E.P.'s] or [R.J.'s] credibility in central focus." (Emphasis added.) We agree.

We conclude that the prosecutor engaged in misconduct that constitutes plain error by asking Schwabe "were they lying" questions on cross-examination because the prosecutor did not have a proper basis for doing so. Schwabe did not *expressly* accuse any

of the state's witnesses of lying about the relevant events or accuse them of conspiring against him during his direct testimony or at any time before the prosecutor initiated that line of questioning during cross-examination.<sup>1</sup> See *Leutschaft*, 759 N.W.2d at 422. In fact, Schwabe did not testify much at all about the alleged assaults of L.S. and E.P. during direct examination, and he initially only disputed the *timing* of the alleged events, not the events themselves, during cross-examination. Therefore, even though the credibility of the state's witnesses was important to the state's case, these circumstances do not meet the "central focus" test as clarified in *Leutschaft*. See *id.* For this reason, we conclude that the prosecutor engaged in misconduct that constitutes plain error by asking Schwabe "were they lying" questions on cross-examination.

*B. The prosecutor did not elicit improper vouching testimony that amounts to plain error.*

Next, Schwabe argues that the prosecution engaged in misconduct that constitutes plain error by eliciting vouching testimony from the police officer who took E.P.'s statement. The state counters that the prosecutor did not engage in misconduct because Schwabe opened the door to the prosecutor's questioning.

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<sup>1</sup> Defense counsel did challenge the credibility of E.P.'s testimony while questioning him on cross-examination. But, even assuming without deciding that this challenge passes the "central focus" test as clarified in *Leutschaft*, defense counsel only directly challenged the credibility of E.P.'s testimony. Neither Schwabe nor his defense counsel asserted at any point *before* the prosecutor began asking the "were they lying" questions that any of the other state's witnesses were lying or that they were engaged in a conspiracy against Schwabe. Yet the prosecutor asked Schwabe if L.S., E.P., and R.J. were *all* conspiring against him and if R.J. was lying, despite the fact that L.S. did not testify at trial.

Because “[t]he credibility of a witness is for the jury to decide,” prosecutors may not elicit testimony from one witness vouching for or against the credibility of another witness at trial. *State v. Ferguson*, 581 N.W.2d 824, 835 (Minn. 1998) (quotation omitted); *see, e.g., State v. Koskela*, 536 N.W.2d 625, 630 (Minn. 1995) (noting the supreme court’s concern about a police officer’s testimony, regarding a defendant’s confession, that the officer “had no doubt whatsoever that [he] was taking a truthful statement”). But, where the defense opens the door, the state may “respond with material that would otherwise have been inadmissible.” *State v. Bailey*, 732 N.W.2d 612, 622 (Minn. 2007) (quotation omitted). The opening-the-door doctrine “is essentially one of fairness and common sense, based on the proposition that one party should not have an unfair advantage and that the factfinder should not be presented with a misleading or distorted representation of reality.” *Id.* (quotation omitted). Whether the door was opened as to any particular subject “depends on the effect of questioning on the jury, not the intentions of counsel.” *Id.* at 622 n.4.

Here, defense counsel asked a series of questions when examining the police officer that called into doubt E.P.’s credibility. During cross-examination, defense counsel asked the officer if “any kid that you’re investigating [has] lied to [you] before?” The officer said, “Yes.” Defense counsel asked the officer if he would agree that “minors can lie to police officers” and if the officer had experienced that before in his job. The officer said, “Yes.” Defense counsel asked, “Not uncommon is it?” The officer responded: “It depends.” Defense counsel’s next question was: “During the course of this investigation you spoke with [E.P.], correct?”

In response to this line of questioning, on re-direct, the prosecutor first acknowledged the officer's testimony that students "will sometimes lie" and then asked the officer if students are also "sometimes truthful?" The officer said, "Yes." The officer then testified that students are more often truthful. The prosecutor then asked the officer: "Did anything lead you to think that [E.P.] was lying to you when you talked to him?" The officer said, "No."

We conclude that the prosecutor's question did not elicit improper vouching testimony because defense counsel opened the door to the testimony at issue here. Defense counsel initiated the line of questioning about the truthfulness of teenage witnesses by asking the officer if students that he had investigated had lied to him and if he agreed that "minors can lie to police officers." After the officer said yes, the prosecutor followed up with: "Not uncommon is it?" The officer responded: "It depends." The prosecutor's next question was: "During the course of this investigation you spoke with [E.P.], correct?" The clear implication of this questioning was that E.P. might be an unreliable or untruthful witness because "minors can lie to police officers." Thus, defense counsel opened the door to the prosecutor's follow-up question, on re-direct, about whether the officer had any reason to believe that E.P. was lying when he gave his statement. In other words, defense counsel's questioning on cross-examination presented "a misleading or distorted representation of reality" to the jury that, in fairness, the state was entitled to rebut. *See id.* at 622. We therefore conclude that the prosecutor did not engage in misconduct or commit plain error by eliciting vouching testimony from the officer about E.P.'s credibility.

C. *The prosecutor engaged in misconduct that constitutes plain error by improperly aligning the prosecution with the jury.*

Next, Schwabe argues that the prosecutor engaged in misconduct that constitutes plain error by improperly aligning with the jury when they made a statement during closing argument that referred to the prosecutor and the jury as “we.”

Because “a prosecutor is not a member of the jury,” a prosecutor’s use of “we” statements in closing argument “is inappropriate.” *State v. Mayhorn*, 720 N.W.2d 776, 790 (Minn. 2006). In *Mayhorn*, the supreme court concluded that the prosecutor had engaged in misconduct by stating: “This is kind of foreign for all of us, I believe, because *we*’re not really accustomed to this drug world.” *Id.* at 789 (emphasis added). The supreme court was concerned that the prosecutor’s comment “aligned [the prosecutor] with the jury” and against the defendant and that the statement highlighted “cultural differences between the predominantly white jury and the defendant.” *Id.* at 789-90.

But a prosecutor’s use of “we” statements does not automatically constitute misconduct. *Nunn v. State*, 753 N.W.2d 657, 663 (Minn. 2008). In *Nunn*, for example, the supreme court determined that the prosecutor’s use of “we” statements during closing argument was not misconduct, noting that the statements were used to summarize the evidence presented at trial, and that the use of the pronoun “we” could reasonably be interpreted to refer to everyone who was in the courtroom when the evidence was presented and did not necessarily exclude the defendant. *Id.*

Here, while discussing E.P.’s testimony during closing argument, the prosecutor contended that, even if E.P. did not have a great relationship with Schwabe, it was not

atypical for a teenager to have a difficult relationship with a parental figure. The prosecutor then argued: “That does not mean that [E.P.] should be disbelieved or that because he’s a teenager *we* can’t believe him.” (Emphasis added.)

Schwabe argues that the prosecutor used “we” in the above statement to improperly align the prosecution with the jury, citing *Mayhorn*. The state argues that “[t]he challenged statement, in this case, is more like those in *Nunn* than those in *Mayhorn*” because the prosecutor was just “summarizing the evidence to the jury,” not attempting to highlight differences between the jury and the defendant.

We conclude that the prosecutor’s “we” statement was misconduct that constitutes plain error. The state is correct that the prosecutor made no attempt to highlight differences between the jury and the defendant, as the prosecutor did in *Mayhorn*. But the prosecutor’s statement here was part of an argument about E.P.’s credibility, not just a summary of the evidence. The prosecutor’s phrasing—“[t]hat does not mean that [E.P.] should be disbelieved or that because he’s a teenager *we* can’t believe him”—did improperly align the prosecutor with the jury. (Emphasis added.) And the prosecutor’s statement is meaningfully distinguishable from those at issue in *Nunn*, where the supreme court explained that the prosecutor’s use of “we” during the closing argument “could reasonably be interpreted . . . to refer to everybody who was in court when the evidence was presented,” including the defendant. 753 N.W.2d at 663. Here, the prosecutor was emphasizing E.P.’s credibility in contrast to Schwabe’s. Thus, we conclude that the prosecutor improperly aligned themselves with the jury and engaged in misconduct that constitutes plain error by referring to the prosecution and the jury as “we.”

D. *The prosecutor engaged in misconduct that constitutes plain error by commenting on Schwabe's failure to present evidence.*

Finally, Schwabe argues that the prosecutor engaged in misconduct that constitutes plain error by commenting on Schwabe's failure to present evidence—the video of Schwabe's front yard and driveway discussed during Schwabe's cross-examination.

“The prosecutor may not shift the burden of proof to the accused by commenting about his failure to call witnesses or to present evidence.” *State v. Race*, 383 N.W.2d 656, 664 (Minn. 1986). To do so “is highly improper and constitutes prosecutorial misconduct.” *State v. McDaniel*, 777 N.W.2d 739, 750 (Minn. 2010) (quotation omitted). But “a remark by a prosecutor on the lack of evidence regarding the defense's theory [does] not shift the burden of proof to the defense.” *State v. Gassler*, 505 N.W.2d 62, 69 (Minn. 1993) (citing *Race*, 383 N.W.2d at 664). To determine whether the prosecutor misstated the burden of proof in closing argument, we assess the argument “as a whole, rather than just selective phrases or remarks that may be taken out of context or given undue prominence.” *State v. Carridine*, 812 N.W.2d 130, 148 (Minn. 2012) (quotation omitted).

Here, Schwabe's video evidence was first discussed during the prosecutor's cross-examination of Schwabe, when the prosecutor asked Schwabe the following:

Q: You would agree [the video] might be the best evidence on what occurred that night, wouldn't you?

A: It doesn't show anything of the night.

Q: You would agree it would be the best evidence of what occurred that night wouldn't you?

A: Oh, yes. Mm-hmm.

Q: That it would tell the jury what occurred?

A: Mm-hmm.

Q: At least from your perspective, correct?

A: Yes.

Q: And you've waited [un]til now to disclose that you have one and you have never provided it to the State before, correct?  
A: That's correct.

The prosecutor addressed the video again during closing argument, saying:

The defendant took the stand in this case and he testified to a vast conspiracy to set him up for these charges. I'd ask you this about what would all have to go into that to make it true. We have four distinct witnesses that testified to their own experiences. Consistent statements with statements they made earlier in the case to different individuals. And then *we also heard from the defendant just today that apparently there's a video that exists that shows exactly what happened except there is no video and it's not here and you can't see it.*

(Emphasis added.)

Schwabe argues that the prosecutor's comment in closing argument about Schwabe's failure to present the video was misconduct because it "impermissibly suggested that Schwabe had some burden in the case" and implied that he failed to meet that burden by not presenting the video evidence. By contrast, the state asserts that Schwabe mentioned the video during his testimony as a means of challenging E.P.'s credibility as a witness and argues that the prosecutor was merely commenting on the theory of Schwabe's case—that E.P. was an unreliable witness—by mentioning the video in closing argument.

We conclude that the prosecutor's comment was misconduct that constitutes plain error. Our review of the record shows that the prosecutor's statement was not a permissible comment on Schwabe's theory of the case. Rather, it implied to the jury that Schwabe had the burden to present the video evidence at trial because it might have proved his innocence. That suggestion is "highly improper and constitutes prosecutorial misconduct." *McDaniel*,

777 N.W.2d at 750 (quotation omitted). We therefore conclude that the prosecutor engaged in misconduct that constitutes plain error by commenting on Schwabe’s failure to present the video evidence.

## **II. The prosecutor’s misconduct did not affect Schwabe’s substantial rights.**

Having concluded that the prosecutor engaged in conduct that is plainly erroneous, we next consider whether the prosecutor’s errors—asking Schwabe “were they lying” questions, improperly aligning with the jury, and impermissibly commenting on Schwabe’s failure to present evidence—cumulatively affected Schwabe’s substantial rights. “A plain error affects a defendant’s substantial rights if it was prejudicial and affected the outcome of the case.” *Parker*, 901 N.W.2d at 926 (quotation omitted). “An error is prejudicial if there is a reasonable likelihood that the error had a significant effect on the jury’s verdict.” *Id.* (quotation omitted). The state has the burden to prove that any plain errors did not affect the defendant’s substantial rights. *Ramey*, 721 N.W.2d at 302.

In evaluating whether prosecutorial misconduct affected a defendant’s substantial rights, we consider several factors, including: “(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.” *State v. Peltier*, 874 N.W.2d 792, 805-06 (Minn. 2016). We also consider the cumulative effect of the prosecutor’s misconduct on the defendant’s right to a fair trial. *State v. Dobbins*, 725 N.W.2d 492, 506 (Minn. 2006).

Based on our review of the relevant factors and the potential cumulative effect of the errors, we acknowledge that this is a close case.<sup>2</sup> But we are ultimately convinced that the prosecutor's plain errors did not affect Schwabe's substantial rights. We reach this conclusion for several reasons. First, the evidence against Schwabe was strong. The state presented direct testimony from two eyewitnesses—E.P. and R.J. Their stories were corroborated by additional testimony that L.S. showed up at his ex-girlfriend's home on the night of the incident without shoes or a jacket on, appearing distraught and with specks of blood on him. The state also presented E.P.'s prior consistent statement to police and other corroborating evidence, like confirmation that L.S. tried to reach his mother around 1:30 a.m. after the incident occurred.

Second, the prosecutor's errors were not pervasive, even when considered together. Although the prosecutor asked Schwabe a series of "were they lying" questions (approximately six questions in total), that line of questioning is fairly limited when viewed in the context of Schwabe's entire cross-examination, which spans approximately 13 transcribed pages. The prosecutor's single "we" statement, which improperly sought to align the prosecutor with the jury, was also quite limited in the context of the entire closing argument. The prosecutor used the "we" pronoun only one time and otherwise consistently

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<sup>2</sup> We are concerned by the state's arguments on appeal asserting that the prosecutor did not engage in *any* misconduct constituting plain error. We emphasize that Minnesota law generally prohibits prosecutors from asking a defendant "were they lying" questions on cross-examination, using "we" statements to refer to the prosecutor and the jury in closing argument, and shifting the burden of proof by commenting on a defendant's failure to present evidence. *Morton*, 701 N.W.2d at 233; *Mayhorn*, 720 N.W.2d at 790; *McDaniel*, 777 N.W.2d at 750. And we underscore the seriousness of this misconduct.

referred to the jury as “you” throughout the argument. *See Ture v. State*, 681 N.W.2d 9, 19 (Minn. 2004) (explaining that when considering whether prosecutorial misconduct prejudiced a defendant, we “look to the closing argument as a whole, rather than to selected phrases and remarks”). And the prosecutor’s comment on Schwabe’s failure to present the video evidence was similarly limited to a single statement. While the three errors are necessarily more pervasive in combination, they are still limited in nature.

Third, any cumulative pervasiveness of the prosecutor’s misconduct was off-set by defense counsel’s opportunity to rebut the prosecutor’s questions and comments and by the district court’s curative jury instructions. Defense counsel had the opportunity to object to the prosecutor’s “were they lying” questions or mitigate their effect by questioning Schwabe on re-direct examination about why he believed the state’s witnesses were lying. And defense counsel could have rebutted the prosecutor’s “we” statement and improper comment on Schwabe’s failure to present the video evidence during closing argument. In addition, the district court gave several relevant jury instructions, including that the arguments of attorneys are not evidence, the jury is the sole judge of witness credibility, the state has the burden to prove a defendant’s guilt, and a defendant does not have the burden to prove his innocence. These instructions likely cured the prosecutor’s misconduct during the closing argument. *See Race*, 383 N.W.2d at 664 (noting that “[p]rosecutorial error is curable by corrective [jury] instructions”); *State v. Henderson*, 620 N.W.2d 688, 703 (Minn. 2001) (explaining that a prosecutor’s improper suggestion that a defendant has the burden of proof may be cured by a jury instruction that the defendant does *not* have to prove their innocence).

In sum, while we are concerned by the prosecutor's misconduct, we are convinced that the strength of the evidence against Schwabe outweighs the possibility of any prejudicial effect from the prosecutor's misconduct. Any prejudicial effect was also tempered by defense counsel's ability to rebut the prosecutor's improper questions and comments during re-direct examination and closing argument, and by the district court's curative jury instructions. We therefore conclude that there is no reasonable likelihood that the absence of any of the prosecutor's plain errors would have had a significant effect on the jury's verdict. This conclusion is reinforced by the fact that the jury acquitted Schwabe of the charge of domestic assault on R.J., which shows that the jury was able to independently evaluate the evidence presented and was not improperly swayed by the prosecutor's misconduct. Therefore, the state has met its burden to establish that Schwabe's substantial rights were not prejudiced.

**Affirmed.**