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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A24-1222**

State of Minnesota,
Respondent,

vs.

Mylene Vialard,
Appellant.

**Filed August 18, 2025
Reversed and remanded
Cochran, Judge**

Aitkin County District Court
File No. 01-CR-21-806

Keith Ellison, Attorney General, Ed Stockmeyer, Assistant Attorney General, St. Paul, Minnesota; and

James P. Ratz, Aitkin County Attorney, Aitkin, Minnesota (for respondent)

Claire Nicole Glenn, Climate Defense Project, Minneapolis, Minnesota; and

Karmen McQuity, People's Law Center, Minneapolis, Minnesota (for appellant)

Considered and decided by Schmidt, Presiding Judge; Reyes, Judge; and Cochran, Judge.

NONPRECEDENTIAL OPINION

COCHRAN, Judge

In this direct appeal, appellant argues that her conviction of felony obstruction under Minnesota Statutes section 609.50 (2020), should be reversed because the evidence was

insufficient to prove her guilt beyond a reasonable doubt. Alternatively, appellant contends that the prosecutor committed pervasive misconduct that requires a new trial. While we disagree that the evidence was insufficient for the jury to find appellant guilty of felony obstruction, we conclude that appellant is entitled to a new trial due to pervasive prosecutorial misconduct. We therefore reverse and remand for a new trial.

FACTS

In August 2021, respondent State of Minnesota charged appellant Mylene Vialard with felony obstruction of legal process or arrest in violation of Minnesota Statutes section 609.50, subdivision 1(2), and gross-misdemeanor trespass in violation of Minnesota Statutes section 609.6055, subdivision 2(a)(3) (2020). The charges arose from Vialard's participation in a protest in Aitkin County over the installation of Line 3, a petroleum pipeline owned by Enbridge. The district court dismissed the trespass charge for lack of probable cause but found the obstruction charge was supported by probable cause. That charge proceeded to trial.

At the five-day jury trial, the state called four witnesses: the Aitkin County Sheriff, two sergeants with the sheriff's department (Sergeant 1 and Sergeant 2), and an officer with the local police department. The state introduced one photo exhibit from the day of the protest, as well as three video exhibits that were played for the jury without audio. Vialard testified in her own defense and introduced two physical exhibits—a banner and a device called a “sleeping dragon.” The parties also stipulated to the admission of eight photographs and a redacted police report. The following facts are drawn from the trial evidence.

The State's Case

On a morning in August 2021, law enforcement responded to a disturbance in Aitkin County on an access road that led to the Line 3 pump station. Upon arriving, Sergeant 1 observed an “aerial blockade” occupied by two people. The “aerial blockade” was a 25-foot-tall structure composed of wire cables and bamboo poles, as pictured below.



The structure was mounted with three hammocks, two of which were occupied by protestors. Law enforcement estimated that the protestors were 12 to 15 feet off the ground. One of the protestors was later identified as Vialard. Four other protestors were at the base of the bamboo structure; they had locked themselves to the structure.

Sergeant 2 testified that, shortly after he arrived, he told all the protestors that they were under arrest. Law enforcement first removed the protestors who were locked to the base of the structure. After the protestors on the ground were safely removed, law enforcement began the process of removing Vialard and the other protestor from the bamboo structure. The parties refer to this process as an “extraction.” The sheriff and the police officer ascended in a “bucket truck,” as pictured, to conduct the extraction.



Sergeant 1, who observed the extraction from the ground, saw Vialard and the other protestor attach their arms to opposite ends of a “sleeping dragon” device while the bucket truck ascended. The trial testimony established that a sleeping dragon is commonly used

by protestors as a delay tactic. It consists of a pipe that a protestor can “lock” into by putting their arm into the pipe and clipping onto a pin inside the pipe with a carabiner. Only the user of a sleeping dragon can unclip themselves from the device. According to Sergeant 1, if the user does not unclip themselves, “there’s no way to remove [a sleeping dragon] without having specially trained people use power tools . . . to cut apart the pipe.”

The sheriff testified that law enforcement’s “first goal” during the extraction was “to remove the sleeping dragon” from Vialard and the other protestor. The sheriff “asked [Vialard] a couple times to unhook from the device and climb down on her own free will.” According to the sheriff, Vialard responded that “she wasn’t going to get down.” Similarly, the police officer testified that Vialard refused to unclip herself from the sleeping dragon. The officer felt that Vialard’s conduct “frustrated or hindered” his “purpose” during the extraction.

Because Vialard and the other protestor declined to come down from the structure voluntarily, the sheriff and officer opted to physically extract them. They approached the other protestor first by moving the bucket truck as close to his position as possible. The other protestor “pulled away from” the bucket truck, which caused the entire bamboo structure to “wiggle.” When the structure started moving, Vialard, whose arm was tethered to the other protestor by the sleeping dragon, told the officers that she did not feel safe. Eventually, the other protestor unclipped himself from the sleeping dragon, which allowed the officer to remove Vialard’s arm from the other end of the sleeping dragon. The sheriff and the officer then extracted Vialard and the other protestor from the structure and lowered them to the ground in the bucket truck. The state admitted two video exhibits into evidence

that depicted portions of the extraction process, including the moment when Vialard first attached her arm to the sleeping dragon while the sheriff and officer ascended to begin the extraction process.

Sergeant 2 estimated that he was at the protest site from about 6:30 a.m. to 11:30 a.m. that day and Vialard was in the structure for approximately two to three hours while he was on site. The sheriff testified that law enforcement removed the protestors on the ground “long before” he and the officer went up in the bucket truck to extract Vialard. The sheriff estimated that he and the officer were elevated in the bucket truck for 25 to 30 minutes during the extraction process.

Given the height of the bamboo structure, several of the law-enforcement witnesses had concerns for the safety of Vialard and “the personnel on scene” during the extraction. According to the sheriff, a fall from the bamboo structure could have been “catastrophic” given the height of the structure and because, if someone did fall, the structure’s cables and wires “[c]ould cause cuts or burns or maybe even . . . decapitation.” But the sheriff clarified that he was never concerned about his own safety during the extraction—he was only worried about Vialard’s safety.

Vialard’s Version of the Events

Vialard elected to testify in her own defense. Vialard, who is a United States citizen and lives in Colorado, was born and raised in France. Vialard has a French accent. Vialard testified that she travelled to Minnesota in August 2021 to participate in a protest of Enbridge’s Line 3 pipeline. Vialard met with other individuals to coordinate the protest.

Vialard, who has a background in rock climbing, was asked to climb the bamboo structure during the protest.

Vialard testified about the preparation that went into the bamboo structure. According to her, the protestors performed a “weight check” on the structure and practiced setting up the structure and climbing it “a lot” before the actual protest. Vialard used climbing slings and clips to anchor herself to the structure. She also wore a harness and helmet for “basic safety.”

Vialard then described what happened the day she was arrested. She testified that the protestors got to the site early in the morning. By the time law enforcement arrived, the protestors had erected the bamboo structure and Vialard and the other protestor had already climbed up into the structure. Vialard heard law enforcement tell the group of protestors that they were all under arrest and she assumed that the announcement applied to her as well. While officers were removing protestors from the base of the structure, Vialard and the other protestor in the structure prepared to lock themselves into the sleeping dragon. According to Vialard, she was “not really paying attention to what was going on below.” But Vialard conceded that she clipped her arm into the sleeping dragon while the bucket truck was ascending with the sheriff and police officer. And Vialard acknowledged that this fact “might have looked bad.” But she maintained that her plan was always to lock herself into the sleeping dragon as a “statement” against Enbridge, regardless of any law-enforcement activity.

Vialard added that she did not refuse to unclip from the sleeping dragon. Instead, she asserted that she told law enforcement she could not release her arm from it because

she was in an extremely uncomfortable position and could not reach the release pin within the sleeping dragon. Soon after Vialard told law enforcement that she could not release her arm, the other protestor unclipped from the sleeping dragon. At that point, Vialard was able to “get out of the [device].” Law enforcement then extracted Vialard from the bamboo structure, lowered her down to the ground, and transferred her to a vehicle.

Vialard’s Objections to the Prosecutor’s Tactics

During the trial, Vialard objected to certain questions on the basis that the prosecutor sought to elicit evidence that the district court had previously ruled inadmissible. Before trial, the district court granted several of Vialard’s motions in limine, including her request to prohibit the state’s law-enforcement witnesses “from making irrelevant self-aggrandizing statements to improperly bolster and vouch for their own testimony” and her request to exclude all evidence of injuries allegedly sustained by law-enforcement officers while removing other individuals from the protest.

While examining the state’s witnesses, the prosecutor asked multiple questions related to these inadmissible topics. For instance, Vialard objected when the prosecutor asked Sergeant 1 on redirect examination whether he had “ever been subject to any sort of ethical violations.” Vialard asserted that she had not alleged that Sergeant 1 had any ethical violations. In response, the prosecutor argued in the jury’s presence that Sergeant 1’s answer was relevant to “further validate” his testimony. The district court sustained the objection. The prosecutor also asked Sergeant 2 on direct examination whether he suffered injuries on the day of the protest. After Sergeant 2 answered affirmatively, the prosecutor asked him to describe his injuries. Vialard objected on the ground that the sergeant’s

injuries were unrelated to Vialard's extraction. The district court then sustained the objection.

During closing arguments, Vialard also objected to several of the prosecutor's statements on the basis that they touched on inadmissible topics. Among the objected-to statements were the prosecutor's assertions to the jury that (1) if the state had "perfect" body-camera footage of Vialard's extraction, the state would not be "at liberty to discuss whether or not this case would be taken to trial," (2) the sheriff was elected to protect "the members of [the sheriff's] community, of our community," and (3) the jury could "draw reasonable inferences off of what's not in evidence." Vialard specifically interrupted the prosecutor's rebuttal argument to object to his statement about making inferences about nonevidence, but the district court instructed Vialard to "[w]ithhold objection." Only after the jury began deliberating did the district court permit Vialard to discuss her objections to the state's closing argument. The district court considered Vialard's objections, opted to take no curative measures, and told the parties, "We'll let the jury continue to deliberate."

Verdict

The jury found Vialard guilty of felony obstruction of legal process or arrest. After a sentencing hearing, the district court entered judgment of conviction and sentenced Vialard to one year of probation. Vialard appeals.

DECISION

Vialard seeks reversal of her conviction, challenging the sufficiency of the evidence supporting her conviction of felony obstruction. In the alternative, Vialard argues that the prosecutor's misconduct requires a new trial.¹

I. The state's evidence was sufficient for the jury to find beyond a reasonable doubt that Vialard committed felony obstruction of legal process or arrest.

Vialard argues that the evidence at trial was insufficient for a jury to find beyond a reasonable doubt that she obstructed her arrest in violation of section 609.50, subdivision 1(2). To convict Vialard under section 609.50, subdivision 1(2), the state had to prove that Vialard “intentionally . . . obstruct[ed], resist[ed], or interfere[d] with a peace officer while the officer [was] engaged in the performance of official duties.” We focus our analysis on Vialard's act of locking her arm into the sleeping dragon while police ascended in the bucket truck.

We have narrowly interpreted the language in section 609.50, subdivision 1(2), “to proscribe conduct *directed at* [a] [law-enforcement] officer that obstructs, resists, or interferes with the [law-enforcement] officer in the performance of official duties.” *State v. Morin*, 736 N.W.2d 691, 698 (Minn. App. 2007) (emphasis added) (quotation marks omitted), *rev. denied* (Minn. Sept. 18, 2007). Accordingly, the state had to prove that Vialard's use of the sleeping dragon was “directed at” a law-enforcement officer. We also assume, without deciding, that the legislature's inclusion of the word “intentionally”

¹ Vialard also contends that she is entitled to a new trial on the grounds of erroneous jury instructions and due-process concerns. Because we reverse Vialard's conviction and remand for a new trial based on prosecutorial misconduct, we need not reach these issues.

in section 609.50, subdivision 1, required proof that Vialard specifically intended her use of the sleeping dragon to obstruct law enforcement.² Lastly, because it charged Vialard with *felony* obstruction, the state also had to prove that Vialard “knew or had reason to know” that engaging the sleeping dragon “created a risk of death, substantial bodily harm, or serious property damage.” Minn. Stat. § 609.50, subd. 2(1). The state was required to prove each of these elements beyond a reasonable doubt to satisfy due process. *State v. Beganovic*, 991 N.W.2d 638, 654 (Minn. 2023).

Vialard challenges the sufficiency of the evidence supporting each of these three elements. First, Vialard asserts that the state failed to prove that her allegedly obstructive act of clipping into the sleeping dragon was directed at law enforcement. Second, Vialard argues that the state failed to prove that she specifically intended to obstruct her arrest by using the sleeping dragon. Third, Vialard contends that the state did not prove that she

² Section 609.50 criminalizes conduct that is done “intentionally.” Minn. Stat. § 609.50, subd. 1. Vialard contends that obstruction under section 609.50 is therefore a specific-intent offense. Specific-intent crimes require the state to prove that the offender had “an intent to cause a particular result.” *State v. Fleck*, 810 N.W.2d 303, 308 (Minn. 2012) (quotation omitted). The state responds that section 609.50 requires only a showing of general intent. General-intent offenses require the state to prove that the defendant “intentionally engag[ed] in the prohibited conduct.” *Id.* (quotation omitted). The state contends it therefore had to prove only that Vialard volitionally used the sleeping dragon, not that she used the sleeping dragon with the specific intent to obstruct law enforcement.

There is no binding precedent on whether obstruction under section 609.50 is a specific- or general-intent offense. We acknowledge that another panel of this court recently observed in a nonprecedential decision that obstruction under section 609.50 is a general-intent offense. *State v. Sprowls*, No. A24-1584, 2025 WL 2042275, at *6-7 (Minn. App. July 21, 2025). We need not resolve this legal question for purposes of our analysis because we conclude that the state satisfied its burden under the more onerous specific-intent standard. We therefore assume without deciding that obstruction is a specific-intent offense.

knew or had reason to know that her use of the sleeping dragon created a risk of harm. We first discuss the applicable standard of review and then turn to each of Vialard’s arguments.

Standard of Review

The supreme court has “adopted two tests for evaluating a sufficiency-of-the-evidence” argument—the traditional test and the heightened two-step test. *State v. Jones*, 4 N.W.3d 495, 500 (Minn. 2024). Under the traditional test, we conduct “a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did.” *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The traditional test applies when a disputed element is proved by direct evidence. *Jones*, 4 N.W.3d at 500. But, when a disputed element is proved at least in part by circumstantial evidence, appellate courts apply the heightened two-step test. *Id.*; *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017). This test is also known as the circumstantial-evidence standard of review. *Loving*, 891 N.W.2d at 643.

Here, the state relied on circumstantial evidence to prove the disputed elements of Vialard’s obstruction conviction. Circumstantial evidence is “evidence from which the factfinder can infer whether the facts in dispute existed or did not exist.” *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotations omitted). By contrast, direct evidence “proves a fact without inference or presumption.” *Id.* (quotation omitted). In other words, circumstantial evidence, unlike direct evidence, “always requires an inferential step to prove a fact.” *Id.*

The state offered no direct evidence that Vialard’s use of the sleeping dragon (1) was directed at law enforcement, (2) was specifically intended to obstruct, and (3) created a risk of harm that she knew of or should have known of. Instead, the jury was required to infer the existence of these elements from the state’s evidence. Accordingly, the state’s proof of these elements depended on circumstantial evidence, and so we apply that heightened two-step standard of review. *Jones*, 4 N.W.3d at 500. Under the two-step circumstantial-evidence test, an appellate court’s first step is to “identify the circumstances proved by the state.” *Loving*, 891 N.W.2d at 643. In doing so, we “winnow down the evidence presented at trial by resolving all questions of fact in favor of the jury’s verdict, resulting in a subset of facts that constitute ‘the circumstances proved.’” *Harris*, 895 N.W.2d at 600. At step two, we “independently examine the reasonableness of all inferences that might be drawn from the circumstances proved,” giving no deference to the jury verdict. *Loving*, 891 N.W.2d at 643 (quotation omitted). “To sustain the conviction, the circumstances proved, when viewed as a whole, must be consistent with a reasonable inference that the accused is guilty and inconsistent with any rational hypothesis except that of guilt.” *Harris*, 895 N.W.2d at 601.

With our standard of review in mind, we turn to Vialard’s specific arguments regarding the sufficiency of the state’s evidence. We begin by identifying the circumstances proved. We then consider for each challenged element whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis other than guilt.

Step 1 - Circumstances Proved

In identifying the circumstances proved, we defer to the jury's fact-finding and disregard any evidence that is inconsistent with the verdict. *Id.* at 600-01. The circumstances proved "do not include every circumstance as to which there may be some testimony in the case, but only such circumstances as the jury finds proved by the evidence." *State v. Stein*, 776 N.W.2d 709, 715 (Minn. 2010) (quotation omitted).

Based on our review of the trial record, we determine that the state proved the following circumstances:

- In August 2021, Vialard participated in a protest of Enbridge's Line 3 pipeline in Aitkin County. As part of the protest, a bamboo structure was erected on an access road.
- Before the protest, Vialard and other protestors practiced using the bamboo structure "a lot."
- On the day of the protest, Vialard, who is an experienced climber, used climbing slings, a harness, and a helmet for "basic safety."
- When law enforcement arrived at the protest, Vialard and another protestor were already elevated in the bamboo structure and other protestors had locked themselves to the base of the structure. Vialard was suspended from the structure at a height of between 12 to 15 feet. There was a banner hanging from the bamboo structure displaying the words "Stop Line 3" and "Resistance is Love."
- Law enforcement informed all the protestors that they were under arrest.

- “Long before” the sheriff and an officer ascended in a bucket truck to extract Vialard, law enforcement removed the other protestors from the base of the structure.
- When the sheriff and officer began ascending in the bucket truck to perform the extraction, Vialard and the other protestor each locked one of their arms into opposite ends of one sleeping dragon.
- A sleeping dragon is a tool used by protestors as a delay tactic. Only the protestor can release their arm from the device without the use of special tools.
- The sleeping dragon put Vialard and the other protestor in “extremely uncomfortable” positions. While locked into the sleeping dragon, Vialard said that she felt unsafe and it was difficult for her to move.
- Vialard refused to unclip from the sleeping dragon when asked to do so by law enforcement. Vialard’s use of the sleeping dragon made it difficult to arrest her.
- Vialard was suspended from the bamboo structure for a total of two to three hours, and her extraction took 25 to 30 minutes.
- Multiple law-enforcement officers were concerned for Vialard’s safety.
- A fall from the structure could be “catastrophic” and cause injuries including cuts, burns, and decapitation.

Step 2- Sufficiency of the Evidence for the Challenged Elements

Having identified the circumstances proved, we next consider the reasonable inferences that might be drawn from these circumstances with regard to the challenged elements of the obstruction offense, including inferences other than guilt. *See Loving*, 891 N.W.2d at 643. “We do not defer to the jury at this stage, but rather we independently examine the reasonableness of all inferences that might be drawn from the circumstances proved, including inferences consistent with a hypothesis other than guilt.” *Id.* (quotation omitted). If the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt, the evidence is sufficient to sustain the conviction. *State v. Tscheu*, 758 N.W.2d 849, 857 (Minn. 2008).

We begin by addressing the circumstances proved that relate to whether Vialard’s conduct was directed at law enforcement and whether she intended to obstruct her arrest. We address these two elements in tandem because the same circumstances proved are relevant to both. We then turn to the third element disputed by Vialard—whether she knew or should have known that using the sleeping dragon created a risk of substantial bodily harm. We conclude that the circumstances proved are consistent with the jury’s verdict on each of the three disputed elements and inconsistent with any other rational hypothesis.

A. The only rational hypothesis from the circumstances proved is that Vialard’s use of the sleeping dragon was directed at law enforcement and specifically intended to obstruct her arrest.

A reasonable inference from the circumstances proved is that Vialard’s act of locking her arm into the sleeping dragon was directed at law enforcement and was specifically intended to obstruct her arrest. The circumstances proved establish that

Vialard was suspended from the bamboo structure for a total of two to three hours while law enforcement was on site. Vialard engaged the sleeping dragon only when law enforcement ascended in the bucket truck to extract her from the bamboo structure. And the extraction, which took only 20 to 30 minutes, occurred well after law enforcement removed protestors from the base of the structure. A reasonable inference from these circumstances proved is that Vialard was in the bamboo structure for more than one hour while law enforcement was on site, and she only engaged the sleeping dragon once law enforcement began their attempt to extract her from the structure. Additionally, the circumstances proved include that a sleeping dragon is a tool used as a delay tactic by protestors and that Vialard's use of the sleeping dragon made it difficult to arrest her. From these circumstances proved, the jury could reasonably infer that Vialard's conduct was both directed at law enforcement and specifically intended to obstruct her arrest.

Having concluded that the circumstances proved as to these two elements are consistent with guilt, we next consider whether these circumstances proved support a rational hypothesis other than guilt. *See id.* Vialard argues that one such rational hypothesis is that her use of the sleeping dragon was not directed at law enforcement but rather at Enbridge. Similarly, she argues that a rational inference is that her specific intent in using the sleeping dragon was to protest Enbridge, not to obstruct her arrest.

In support of her argument, Vialard primarily relies on her own testimony that she locked into the sleeping dragon to protest Enbridge's construction of Line 3. But, as Vialard acknowledges in her brief, her testimony in this regard is inconsistent with the jury's verdict. Consequently, we must disregard this testimony in our analysis of whether

there is a rational alternative hypothesis other than guilt because Vialard's testimony on this point is not a circumstance proved. *See Harris*, 895 N.W.2d at 600 (providing that we resolve all questions of fact in favor of the verdict when identifying the circumstances proved and only consider the circumstances proved at the second step).³

In addition to her testimony, Vialard relies on the fact that a banner was hanging from the bamboo structure, which is a circumstance proved, to support her argument that her conduct of clipping into the sleeping dragon was directed at Enbridge, not law enforcement. But she focuses on this circumstance in isolation from the other circumstances proved. Vialard emphasizes the banner that hung from the bamboo structure and displayed the phrases "Stop Line 3" and "Resistance is Love." She contends that the existence of the banner supports an inference that her use of the sleeping dragon was a component of the larger protest aimed at Enbridge. Vialard's reliance on the banner is not persuasive because we "review the circumstantial evidence not as isolated facts, but as a whole." *State v. Silvernail*, 831 N.W.2d 594, 599 (Minn. 2013). And the whole of the circumstances proved demonstrate that Vialard only engaged the sleeping dragon after law enforcement ascended to extract Vialard, as discussed above. The mere existence of the

³ Vialard also cites the sheriff's testimony that her participation in the protest "was directed at Enbridge" or in "support of her daughter." We note that the sheriff's testimony was ambiguous and did not refer specifically to Vialard's use of the sleeping dragon. But even if we assume that the circumstances proved lead to the rational inference that Vialard's use of the sleeping dragon was directed at and intended to protest Enbridge, that inference is not inconsistent with guilt. The inference that Vialard's use of the sleeping dragon was part of a broader protest of Enbridge is not inconsistent with the inference that the act was simultaneously directed at and meant to obstruct law enforcement. Thus, Vialard's alternative inference is not inconsistent with guilt. *See Harris*, 895 N.W.2d at 601.

banner is inconsequential to whether Vialard's particular act of locking into the sleeping dragon while law enforcement ascended to extract her was directed at and intended to obstruct law enforcement. Accordingly, the existence of the banner does not support a rational inference other than guilt on the elements of conduct and intent.

Vialard also argues that there is a rational alternative hypothesis on whether she intended to obstruct her arrest because the circumstances proved are devoid of any evidence that she made "disparaging or violent statements toward law enforcement." But "the absence of evidence in the record regarding a certain circumstance does not constitute a circumstance proved." *State v. German*, 929 N.W.2d 466, 473-74 (Minn. App. 2019). Moreover, Vialard offers no legal authority suggesting that an act is not obstructive within the meaning of section 609.50 if not accompanied by "disparaging or violent statements toward law enforcement." Vialard's reliance on her lack of violent statements is therefore unavailing.

In sum, Vialard has not demonstrated that the circumstances proved, taken as a whole, are consistent with any rational inference other than that her use of the sleeping dragon was directed at law enforcement with the specific intent of obstructing her arrest. The evidence supporting these elements was therefore sufficient.

B. The only rational inference from the circumstances proved is that Vialard knew or should have known that using the sleeping dragon created a risk of substantial bodily harm.

Vialard also challenges the sufficiency of the evidence as to a third element of the offense—whether she "knew or had reason to know" that her act of using the sleeping dragon "created a risk of death, substantial bodily harm, or serious property damage."

Minn. Stat. § 609.50, subd. 2(1). “Substantial bodily harm” is defined as “bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or which causes a fracture of any bodily member.” Minn. Stat. § 609.02, subd. 7a (2020). Examples of substantial bodily harm include cuts that leave scars, bruises that leave permanent discoloration, and chipped teeth. *State v. Harlin*, 771 N.W.2d 46, 51 (Minn. App. 2009), *rev. denied* (Minn. Nov. 17, 2009). The loss of consciousness or a concussion also rise to substantial bodily harm. *State v. Larkin*, 620 N.W.2d 335, 337-38 (Minn. App. 2001).

Based on these examples, a reasonable inference from the circumstances proved is that Vialard’s use of the sleeping dragon created a risk of substantial bodily harm to both her and the other protestor. Although Vialard is an experienced climber, she wore safety gear and practiced “a lot” with the bamboo structure, indicating that she was aware of safety risks associated with climbing the structure. And the circumstances proved include that attaching her arm to the other protestor’s arm with the sleeping dragon caused her to contort her arm into an uncomfortable position. Vialard also told law enforcement that she felt unsafe when she was still attached to the sleeping dragon.

From the circumstances proved, the jury could reasonably infer that Vialard’s use of the sleeping dragon increased the risk that she or the other protestor would suffer a “catastrophic” fall from the bamboo structure. And it is reasonable to infer that a 12- to 15-foot fall from the bamboo structure could result in substantial bodily injury, such as fractured bones, a concussion, chipped teeth, or cuts that leave permanent scars. *See* Minn. Stat. § 609.02, subd. 7a; *Harlin*, 771 N.W.2d at 51; *Larkin*, 620 N.W.2d at 337-38. Another

reasonable inference from the circumstances proved is that Vialard could have suffered substantial bodily harm during the extraction as a result of her arm being locked into the sleeping dragon. Lastly, the jury could reasonably infer that Vialard knew or had reason to know of these risks, given her climbing experience, her use of protective gear, and the amount of precaution she used in implementing the bamboo structure. Accordingly, the circumstances proved are consistent with the jury's verdict on the risk-of-injury element.

Vialard contends that her use of climbing equipment supports the alternative inference that she “took appropriate safety precautions to remove risks of danger, rather than that she knowingly created a danger.” As before, we are not persuaded by Vialard's focus on isolated circumstances. *See Silvernail*, 831 N.W.2d at 599. A rational inference based on Vialard's use of safety precautions is that she reduced, but did not completely remove, the overall risk of injury during the protest. And this inference is not inconsistent with the inference that her obstructive act of engaging the sleeping dragon nonetheless “created a risk” of her or the other protestor suffering substantial bodily harm, regardless of the safety precautions that they took. *See* Minn. Stat. § 609.50, subd. 2(1). For instance, although a helmet may have protected her head, it would not have prevented Vialard from suffering broken bones or cuts in the event of a fall during the extraction process. *See* Minn. Stat. § 609.02, subd. 7a (defining “substantial bodily harm” to include “temporary but substantial loss or impairment of the function of any bodily member or organ” and “a fracture of any bodily member”). And, by clipping her arm into the sleeping dragon, Vialard complicated the extraction process and thereby increased the risk of harm to herself notwithstanding her safety precautions. We therefore disagree with Vialard that the

circumstances proved support a rational inference that Vialard did not know or have reason to know that locking her arm into the sleeping dragon while suspended from the structure would create “a risk” of substantial bodily harm. *See* Minn. Stat. § 609.50, subd. 2(1). In sum, Vialard’s proposed alternative hypothesis is not inconsistent with guilt.

Vialard also argues that the risk of harm referred to in section 609.50, subdivision 2(1), cannot include the risk of harming oneself. But the plain language of section 609.50 required the state to prove only that Vialard knew or had reason to know that her obstructive act created “a risk” of substantial bodily harm. Minn. Stat. § 609.50, subd. 2(1) (emphasis added). “‘A’ is an indefinite article, meaning that it does not refer to a specific person or thing.” *State v. Walton*, 14 N.W.3d 840, 844 (Minn. App. 2024). Accordingly, “a risk” of substantial bodily harm under section 609.50 includes a risk of substantial bodily harm to anyone, *including the obstructor*. We therefore reject Vialard’s interpretation of section 609.50.⁴

In conclusion, the circumstances proved are consistent with the rational inference that Vialard knew or had reason to know that engaging the sleeping dragon while suspended from the bamboo structure created a risk of substantial bodily harm. Vialard has not established a rational alternative hypothesis to guilt that is based on the circumstances proved. The evidence was therefore sufficient for the jury to find Vialard guilty of felony obstruction beyond a reasonable doubt.

⁴ Regardless, Vialard cannot reasonably dispute that her obstructive act of attaching herself to the other protestor in the structure also created a risk that the other protestor would suffer substantial bodily harm.

II. The prosecutor committed pervasive misconduct that deprived Vialard of a fair trial.

Next, Vialard argues that the prosecutor engaged in repeated and flagrant misconduct at trial that deprived her of her right to a fair trial. Vialard alleges over 20 instances of prosecutorial misconduct. The state concedes that five of the instances amount to misconduct. We conclude that the five conceded acts of misconduct had the effect of depriving Vialard of a fair trial and warrant reversal. Accordingly, we focus our analysis on those five instances.⁵

“Prosecutors have an affirmative obligation to ensure that a defendant receives a fair trial, no matter how strong the evidence of guilt.” *State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006). And prosecutors are “minister[s] of justice” who “may not seek a conviction at any price.” *Id.* (quotation omitted). For these reasons, prosecutors must refrain from conduct such as endorsing a witness’s credibility, *State v. Martin*, 773 N.W.2d 89, 106 (Minn. 2009), attempting to bring inadmissible evidence to the attention of the jury, *State v. White*, 203 N.W.2d 852, 857 (Minn. 1973), “inflaming the jury’s passions and prejudices against the defendant,” *State v. Morton*, 701 N.W.2d 225, 236 (Minn. 2005) (quotation omitted), and discussing facts not in evidence during closing argument, *State v. Bobo*, 770 N.W.2d 129, 142 (Minn. 2009).

The state concedes that the prosecutor committed misconduct while examining witnesses on two occasions and three times during the state’s closing arguments.

⁵ While we focus our analysis on the five instances of misconduct conceded by the state, we note that many of the other alleged instances of prosecutorial misconduct raise serious concerns.

Specifically, the state admits that the prosecutor committed misconduct when he (1) attempted to bolster Sergeant 1’s testimony by asking him about his lack of ethical violations; (2) asked Sergeant 2 about the injuries he sustained that were unrelated to Vialard; (3) suggested to the jury that Vialard would have pleaded guilty had the state’s video evidence been better; (4) aligned himself and the state’s witness with the jury by telling the jury that the sheriff was elected to protect “our community”; and (5) invited the jury to “draw reasonable inferences off of what’s not in evidence.” And the state does not dispute that Vialard objected to each of the five instances of conceded misconduct.

Objected-to misconduct is reviewed under a “two-tiered,” harmless-error approach adopted by the supreme court. *State v. McDaniel*, 777 N.W.2d 739, 749 (Minn. 2010). For “less serious prosecutorial misconduct,” the appellant must establish that the misconduct “likely played a substantial part in influencing the jury to convict.” *Id.* (quotation omitted). “For more serious prosecutorial misconduct, we have reversed unless the misconduct is harmless beyond a reasonable doubt.” *Id.*⁶

Based on our review of the record, we conclude that all three instances of conceded misconduct arising from the state’s closing argument are “more serious” for purposes of

⁶ Since adopting the two-tiered harmless error approach, the supreme court has expressed skepticism regarding the viability of the approach. *See, e.g., State v. Whitson*, 876 N.W.2d 297, 304 n.2 (Minn. 2016) (“Recent cases have questioned whether the two-tiered . . . standard for reviewing objected-to misconduct remains viable.”); *McDaniel*, 777 N.W.2d at 749 (“We have not yet decided whether this two-tiered approach . . . remains viable.”). But the supreme court has not expressly rejected or modified the approach, and so we are bound to apply it here. *See State v. Curtis*, 921 N.W.2d 342, 346 (Minn. 2018) (“The court of appeals is bound by supreme court precedent.”).

the two-tiered harmless-error test.⁷ We reach this conclusion for the following reasons. Two of the three instances of misconduct involved the prosecutor suggesting to the jury that the jury was not limited to considering the evidence at trial in deciding whether to convict Vialard of obstructing her arrest. First, during closing argument, the prosecutor told the jury that he was “not at liberty to discuss whether or not this case would be taken to trial” if better body-camera footage existed, intentionally implying that such footage would have forced Vialard to plead guilty. Later, during rebuttal, the prosecutor invited the jury to make inferences based on facts not in evidence when he told the jury that “in addition to the evidence you’re allowed to draw reasonable inferences off of what’s not in evidence.” It is well established that prosecutors may not make arguments that are not supported by the evidence before the jury. *Bobo*, 770 N.W.2d at 142. It is extremely troubling that the prosecutor made explicit arguments during the state’s closing and rebuttal encouraging the jury to base its verdict on facts outside the record. Indeed, the state concedes that “there is no defense” for these comments.

Likewise, the prosecutor’s use of the word “our” during the state’s closing argument is particularly serious given the context of this case. His reference to “our community” when discussing the sheriff’s testimony only served to align the state and its witnesses, who were all members of local law enforcement, with the jury. This comment was especially improper because Vialard travelled from Colorado to Minnesota to participate in the protest. Vialard also speaks English with a French accent. By using the word “our,”

⁷ We note that the caselaw is silent as to how to distinguish between unusually serious and less serious objected-to misconduct.

the prosecutor may have impermissibly inflamed the passions of the jury by creating an “us versus them” scenario by painting Vialard as an outsider. *See State v. Mayhorn*, 720 N.W.2d 776, 790 (Minn. 2006) (determining that prosecutor committed misconduct when she attempted to “appeal to the jury’s passions” by using the words “we” and “us”). Such conduct is egregious, especially because the state was attempting to prove Vialard obstructed local law enforcement’s efforts to arrest her. Considering the transcript of the closing argument as a whole, we can only conclude that the prosecutor’s tactics during closing argument were an attempt to secure a guilty verdict by improperly influencing the jury. This was particularly serious misconduct.

We next consider the two instances of conceded misconduct that occurred during questioning of the witnesses, which involved the prosecutor inquiring into topics that the district court previously ruled were inadmissible. We conclude that those two instances of misconduct were less serious when examined in isolation but more serious when considered in light of the other instances of misconduct discussed above. Notably, the state admits that the prosecutor’s questions about Sergeant 1’s lack of ethical violations and Sergeant 2’s injuries were in violation of the district court’s pretrial rulings. These questions undoubtedly constitute misconduct. *See White*, 203 N.W.2d at 857 (stating that it is misconduct for a prosecutor to knowingly attempt to bring inadmissible evidence to the jury’s attention). And, while asking questions that the district court had prohibited does not necessarily equate to serious misconduct, *see State v. Steward*, 645 N.W.2d 115, 123 (Minn. 2002), the prosecutor’s attempts here to elicit inadmissible evidence tie in with the prosecutor’s more-serious misconduct during closing argument. Specifically, the

prosecutor's questions played to the "us versus them" narrative argued during closing argument by attempting to "further validate" Sergeant 1's testimony and suggest that Sergeant 2's unrelated injuries were somehow related to Vialard's extraction. Therefore, while perhaps less serious in isolation, the prosecutor's misconduct during questioning was part of a pattern of unusually serious misconduct.

Having concluded that this case involves "more serious" misconduct, we must determine whether the misconduct was harmless beyond a reasonable doubt. *McDaniel*, 777 N.W.2d at 749. A prosecutor's misconduct is harmless beyond a reasonable doubt when the guilty verdict is "surely unattributable" to the misconduct. *State v. Dobbins*, 725 N.W.2d 492, 507 (Minn. 2006) (quotation omitted). Factors relevant to this consideration are the strength of the state's evidence, the pervasiveness of the misconduct, and whether the district court's instructions addressed the misconduct. *See McDaniel*, 777 N.W.2d at 753 (concluding that misconduct was harmless based on the strength of the evidence, the "sporadic, minimal" nature of the misconduct, and the district court's admonitions). "[W]e will reverse only where the misconduct, viewed in light of the entire record, is of such serious and prejudicial nature that appellant's constitutional right to a fair trial was impaired." *State v. Haynes*, 725 N.W.2d 524, 529 (Minn. 2007).

The state contends that its evidence was particularly strong. We disagree. Although we concluded above that the state's evidence was sufficient for the jury to find Vialard guilty of felony obstruction, we reached that conclusion viewing the evidence in the light most favorable to the verdict. *See Loving*, 891 N.W.2d at 643 (stating that under the circumstantial-evidence test, appellate courts defer to the jury's acceptance of the state's

evidence and its rejection of any evidence that is inconsistent with that evidence). Without that presumption, the state's evidence was not particularly strong because the testimony of the state's witnesses was inconsistent at times and conflicted with Vialard's testimony. "Moreover, strength of the case is not determinative, and prosecutorial error may deprive a defendant of a fair trial even in a case in which the evidence of guilt is strong." *State v. Portillo*, 998 N.W.2d 242, 253 (Minn. 2023). We therefore conclude that the strength of the state's evidence does not overcome the possibility that the prosecutor's serious misconduct influenced the jury's verdict.

Regarding pervasiveness, the record reflects that the prosecutor's misconduct was not "sporadic" or "minimal." See *McDaniel*, 777 N.W.2d at 753. The five instances of conceded misconduct in this case were part of the prosecutor's apparent strategy of bolstering the state's law-enforcement witnesses while appealing to the jury's potential biases against Vialard. We need not look further than the prosecutor's statement to the judge—in the presence of the jury—that his irrelevant question about a sergeant's ethical violations was meant to "further validate" the sergeant's testimony. The prejudicial effects of the prosecutor attempting to bolster the state's witnesses and introduce inadmissible evidence were amplified by the prosecutor's statement in closing that the sheriff was elected to protect "our community." Consequently, each successive act of misconduct during questioning and closing arguments magnified the previous misconduct, culminating in the prosecutor's improper remark during rebuttal on the jury's ability to rely on facts that were not in evidence. Because the prosecutor's misconduct was pervasive, this factor

weighs heavily in favor of determining that the misconduct was not harmless beyond a reasonable doubt.

Finally, we consider whether the district court's instructions limited any prejudicial effect of the misconduct. *See id.* The state contends that the district court's instructions mitigated the potential prejudice. The state points out that, during the state's case in chief, the district court specifically instructed the jury to "disregard any evidence that was given about [law-enforcement injuries] because it was not in relation to Ms. Vialard and was held by the court earlier to not be admissible at trial." And, while instructing the jury after closing arguments, the district court also issued general instructions that went to some of the misconduct. For instance, the district court instructed the jury that it should (1) "not permit sympathy, bias, [or] prejudice to affect [its] decision," (2) "base [its] verdict entirely upon the evidence that has been received," (3) "disregard all evidence [the court had] ordered stricken or that [the jury had] been told to disregard," and (4) "disregard" any statement by the attorneys that conflicts with the evidence or the law.

We are not convinced that these cautionary instructions sufficiently limited any prejudicial effect of the prosecutor's pervasive misconduct. We acknowledge that the district court did specifically address one instance of misconduct by instructing the jury to disregard the evidence of Sergeant 2's injuries. And we typically presume that the jury followed the district court's instructions. *Whitson*, 876 N.W.2d at 305. But that instruction only went to one of five conceded instances of prosecutorial misconduct. And "once the jury's prejudices or passions have been invoked, a cautionary instruction may not be sufficient to undo the damage, particularly, where as here, the [district] court's curative

instruction, while strong, addressed *some but not all of the misconduct.*” *State v. Porter*, 526 N.W.2d 359, 365 (Minn. 1995) (emphasis added) (citation omitted). We are therefore not persuaded that the one instruction completely mitigated any potential prejudice resulting from *all five conceded instances* of prosecutorial misconduct.

Likewise, the district court’s general instructions about bias and evidence were insufficient to ameliorate any potential prejudice. Even if those general instructions correctly stated the law, they did not “obviously and clearly correct” the prosecutor’s statements about “our community” or how Vialard would have pleaded had there been “perfect” video evidence. *See Portillo*, 998 N.W.2d at 253-54 (noting that generalized instructions about the presumption of innocence did not adequately correct prosecutor’s erroneous statement of the law regarding the presumption of innocence).

Lastly, the prosecutor’s statement inviting the jury to consider facts not in evidence came during the state’s rebuttal argument. Thus, Vialard had no opportunity to effectively rebut the misconduct and correctly explain the law to the jury.⁸ And the supreme court has expressed concern about misconduct that occurs during rebuttal because such misconduct is “part of the last argument that the jury hear[s] before the district court [gives] the jury its final instructions.” *Id.* at 253.

Weighing the relevant factors, we conclude that the prosecutorial misconduct conceded to by the state was not harmless beyond a reasonable doubt. The state’s evidence

⁸ Notably, Vialard attempted to object to the prosecutor’s evidentiary comment during the state’s rebuttal, but the district court instructed Vialard to “[w]ithhold objection” until the end of the argument. And the district court only addressed Vialard’s objections after the jury began its deliberations, leaving no opportunity to issue a curative instruction.

against Vialard was not particularly strong, the misconduct was pervasive, and the district court's instructions did not cure any prejudicial effect of the misconduct. On this record, we cannot say that the guilty verdict was surely unattributable to the prosecutor's misconduct. We therefore conclude that the prosecutor failed to meet his "affirmative obligation to ensure that" Vialard received a fair trial, and instead sought "a conviction at any price." *Ramey*, 721 N.W.2d at 300 (quotations omitted). Accordingly, Vialard is entitled to a new trial.

Reversed and remanded.