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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A24-1927**

State of Minnesota,
Respondent,

vs.

Ajee Arylce King,
Appellant.

**Filed January 20, 2026
Affirmed
Slieter, Judge**

Hennepin County District Court
File No. 27-CR-21-19250

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

Mary F. Moriarty, Hennepin County Attorney, Nicole Cornale, Assistant County Attorney,
Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Workman Jesness,
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Considered and decided by Smith, Tracy M., Presiding Judge; Slieter, Judge; and
Harris, Judge.

NONPRECEDENTIAL OPINION

SLIETER, Judge

In this direct appeal from the judgment of conviction for second-degree criminal sexual conduct, appellant argues that the district court plainly erred by violating the law-of-the-case doctrine and by admitting prejudicial relationship evidence and that the

prosecutor committed prosecutorial error during his closing-argument rebuttal by misstating the law and evidence, vouching for the truthfulness of witnesses, disparaging the defense, and inflaming the passions and prejudices of the jury. Because we conclude that the district court did not plainly err in its application of the law by admitting relationship evidence and the prosecutor did not commit prosecutorial error, we affirm.

FACTS

This case arises from allegations that appellant A’jee Arylce King¹ inappropriately touched his girlfriend’s niece, D.H., on the butt and breast while she was in bed in their home. Respondent State of Minnesota charged King with second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(a) (2018), in connection with this event. At trial, King argued that D.H. fabricated the allegations so that she could live with a different family member who was less strict.

King had two jury trials, the first of which ended in a mistrial. Following the jury’s guilty verdict in the second trial, the district court convicted King and imposed a 36-month sentence, execution of which was stayed for three years with probationary conditions.

Background Facts

The victim, D.H., and her sister, K.H., lived in Minneapolis for several years with their aunt. Their aunt’s boyfriend, King, and the couple’s two children also lived in the home with them. Around 2019 or 2020, King entered D.H. and K.H.’s shared bedroom. King placed his hand under D.H.’s dress, touched her butt over her underwear, and

¹ In appellant’s brief to this court, his first name is spelled “A’jee” with an apostrophe. We use that spelling of his name even though it differs from the spelling in the case caption.

squeezed. D.H. adjusted herself by rolling over and fixing the covers to deter King. After leaving the room King returned, pulled the covers down, reached under D.H.'s dress with his hand, and touched and squeezed her left breast. King left the bedroom and closed the door. K.H. observed this conduct. The girls told their aunt about King's conduct, but she did not believe them.

Several months later, D.H. reported King's conduct to a school counselor who reported it to Hennepin County Child Protective Services (CPS). Shortly thereafter, D.H. explained the incident to a Hennepin County CPS investigator. After conducting an investigation, which included CornerHouse forensic interviews of D.H. and K.H., the state charged King with second-degree criminal sexual conduct (victim under 13, actor greater than 36 months older) under Minn. Stat. § 609.343, subd. 1(a), second-degree criminal sexual conduct (victim 13-15, position of authority) under Minn. Stat. § 609.343, subd. 1(b) (2018), and two counts of malicious punishment of a child under Minn. Stat. § 609.377, subd. 1 (2018).

Prior to King's first trial, the state agreed with King to sever the malicious-punishment charges and filed an amended complaint charging only the criminal-sexual-conduct offenses. The state later dismissed one of the criminal-sexual-conduct charges.

King's First Trial

King's first trial was held in early 2024. Prior to opening statements, the prosecutor raised concerns that, because of the parties' agreement to sever the malicious-punishment charges, he had prepared for trial with the anticipation that the parties would focus only on

the sexual-abuse allegation and present no evidence of other physical abuse. He explained, however, that King’s defense—that D.H. and K.H. fabricated sexual-abuse allegations as a means to escape King and their aunt’s strict rules—might open the door to other physical-abuse evidence. The prosecutor further explained that he likely could not effectively counter King’s defense without introducing evidence of other physical abuse.

The first district court judge deferred a definitive ruling. He stated that the amount of physical-abuse evidence he would allow the state to admit during trial depended on what and how much evidence King presented to support his defense. The judge acknowledged that if King “question[ed] [the girls’] motive for leaving” the home, then it may be fair for the state to “add context to that” and “bring up other experiences they had that may have motivated them to leave.” The judge offered to provide a clearer ruling during testimony.

During the first trial, D.H. testified about physical abuse in the home. She stated that her aunt would physically punish her when she broke the rules and that King beat her when he discovered that she had stolen items from a store. D.H. further testified that King physically disciplined the younger children. King objected to D.H.’s testimony about the other children, and the court sustained it and read a limiting instruction.

King’s first trial ended in a mistrial.

King’s Second Trial

King’s second trial was held in May 2024 before a different district court judge. At the start of the trial, the district court judge stated, “Counsel made me aware of the motions [*in limine*] that had been disputed in front of [the first district court judge] when this case

had its first trial, and I indicated that I agreed with all of [the first judge's] decisions, and so those would be the way we'd be going forward in this trial as well."

During trial, D.H. testified about the conduct related to the alleged offense. She explained that King entered her bedroom, put his hand on her butt, and then touched her chest. On cross-examination, D.H. stated that while living with King and her aunt she was not allowed to use her phone much or take it to school. D.H. stated that both King and her aunt controlled her behavior and appearance and were strict. On redirect, D.H. explained that her aunt would use physical violence against her. She stated that "everything" King and her aunt did made her want to leave the home.

K.H. also testified during trial. K.H. corroborated D.H.'s testimony about King's conduct. During her testimony, K.H. affirmed that the children in King and her aunt's household sometimes received physical punishments for failing to follow the rules.

The Hennepin County CPS investigator, who had met with D.H. in September 2021, testified. The CPS investigator testified that D.H. told her about physical abuse in the home. The investigator also testified that D.H. had told her that "there was physical abuse against all of the children in the home" that included "whoopings, being hit with a belt, being hit in the face, being slapped, pushed around against a wall, [and] being punched in the head." She testified that King and the aunt both committed this abuse. The investigator confirmed that she personally observed King and the aunt's three-year-old child who had "marks that were congruent with a belt on her body."

Later, outside the presence of the jury, the district court explained that it had allowed the witnesses to discuss the physical abuse of the other children because King opened the

door to such evidence by asking questions about the problems in the house and why D.H. wanted to leave. The district court ruled that the state was allowed to introduce this evidence as relationship evidence under Minn. Stat. § 634.20 (2024) to give context for why D.H. wanted to leave King and her aunt's house. The district court noted that there was no objection from King about this evidence. When the jury returned, the district court gave the jury a limiting instruction on the proper use of the relationship evidence.

Each party presented a closing argument, after which the jury entered a guilty verdict. The district court sentenced appellant to 36 months in prison stayed for three years on probation.

King appeals.

DECISION

I. The district court did not commit plain error based on either the law-of-the-case doctrine or its application of Minnesota Statutes section 634.20.

King argues that the district court erred when it allowed the state to admit evidence that he committed physical abuse against the other children in the household. He argues that the district court's decision deviated from two legal rules: law-of-the-case doctrine and Minn. Stat. § 634.20.

King did not object to the admission of this relationship evidence at his second jury trial. Appellate courts review an unobjected-to error under the "plain error test." *State v. Myhre*, 875 N.W.2d 799, 804 (Minn. 2016); *see also State v. Vasquez*, 912 N.W.2d 642, 649-50 (Minn. 2018) (articulating that plain-error review applies to forfeited issues, such as where defendant fails to object to state's admission of evidence). "In order to meet the

plain error standard, a criminal defendant must show that (1) there was an error, (2) the error was plain, and (3) the error affected the defendant's substantial rights." *Myhre*, 875 N.W.2d at 804. An error is a "deviation from a legal rule unless the rule has been waived." *State v. Kelley*, 855 N.W.2d 269, 274 (Minn. 2014) (quotation omitted). "The party asserting plain error has the burden of establishing all three elements." *State v. Hollins*, 765 N.W.2d 125, 131 (Minn. App. 2009). "If these three prongs are met, the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings." *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). We address each of the grounds for King's plain-error claim in turn.

King first argues that pretrial evidentiary rulings made before a mistrial are generally considered the law of the case in later trials under *State v. Ferguson*, 729 N.W.2d 604, 612 (Minn. App. 2007), *rev. denied* (Minn. June 19, 2007). King contends that the second district court judge reversed the first district court judge's previous ruling that excluded evidence of physical abuse against the other children, and that this decision constituted plain error. The state counters that *Ferguson* is inapposite and that the law-of-the-case doctrine does not apply under the circumstances of this case.

In *Ferguson*, we addressed whether the district court abused its discretion when, in Ferguson's subsequent trial following an earlier mistrial, it empaneled an anonymous jury. 729 N.W.2d at 610-12. Following our conclusion that the district court acted within its discretion when, like the district court in the previous trial, it empaneled an anonymous jury, we stated:

Pretrial evidentiary decisions made before a mistrial are generally viewed as the law of the case and may be reapplied absent clear error or a change in circumstances. *United States v. Tham*, 960 F.2d 1391, 1397 n.3 (9th Cir. 1991). Evidentiary decisions and anonymous-jury decisions are similar in requiring a case-by-case determination. Thus, absent clear error or a change in circumstances, the district court's reliance on the previous determination did not constitute prejudicial error.

Ferguson, 729 N.W.2d at 612. King relies on the first sentence of this quotation to support his claim that the law-of-the-case doctrine applies here. But in *Ferguson* we did not, and were not asked to, decide whether the law-of-the-case doctrine binds a later district court to the evidentiary rulings of a first district court. See *Dahlin v. Kroening*, 784 N.W.2d 406, 410 (Minn. App. 2010) (explaining that *dicta*, meaning a court's expressions that are not applicable to the facts before it, are "not binding in subsequent cases" (quotation omitted)), *aff'd*, 796 N.W.2d 503 (Minn. 2011). Because *Ferguson* did not address whether the law-of-the-case doctrine applies under the circumstances of this case, and King has cited no legal authority for this proposition, nor have we found any, King has not shown that the district court erred. Accordingly, we need not consider the other prongs of the plain-error test.

King next argues that the district court committed plain error by deviating from Minn. Stat. § 634.20. First, King, quoting *State v. Matthews*, 779 N.W.2d 543, 549 (Minn. 2010) (quotation omitted), contends that section 634.20 prohibits the admission of evidence of physical abuse against the other children because "[r]elationship evidence is only relevant to 'illuminate the history of the relationship between the victim and defendant and may also help prove motive or assist the jury in assessing witness credibility.'" He argues

that the evidence was irrelevant because it did not “illuminate the relationship between [himself] and D.H.” and constituted inadmissible propensity evidence under Minn. R. Evid. 404(b). Second, King asserts that section 634.20 prohibits the admission of the evidence because its probative value is substantially outweighed by its potential for prejudice.

Minnesota Statutes section 634.20 provides that “[e]vidence of domestic conduct by *the accused* against the victim of domestic conduct, or *against other family or household members*, is admissible unless the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” (Emphasis added.)²

Although King correctly identifies the rationale for admitting relationship evidence under section 634.20, *see State v. Valentine*, 787 N.W.2d 630, 637 (Minn. App. 2010) (citing *McCoy*, 682 N.W.2d at 159) (“[T]he rationale for admitting relationship evidence under section 634.20 is to illuminate the relationship between the defendant and the alleged victim and to put the alleged crime in the context of that relationship.”), *rev. denied* (Minn. Nov. 16, 2010), he incorrectly assumes that this rationale limits the evidence to his physical abuse of D.H. This claim is not supported by either the plain language of the statute or

² In *State v. McCoy*, the supreme court explicitly adopted Minnesota Statutes § 634.20 as a rule of evidence. 682 N.W.2d 153, 161 (Minn. 2004). In doing so, the court differentiated between relationship evidence admissible under Minn. Stat. § 634.20 and evidence admissible for noncharacter purposes under Minnesota Rule of Evidence 404. *McCoy*, 682 N.W.2d at 161. The court clarified that the former “provides for the admission of similar conduct in domestic abuse cases without requiring the heightened standard that the evidence be clear and convincing.” *Id.* at 159.

caselaw interpreting the statute. Section 634.20 itself provides that “[e]vidence of domestic conduct by the accused against . . . other family or household members, is admissible.” The statute defines “domestic conduct” to include “evidence of domestic abuse” as defined in another statute. Minn. Stat. § 634.20; *see also* Minn. Stat. § 518B.01, subd. 2(a)(1) (2024) (defining “domestic abuse” to include “physical harm, bodily injury, or assault”). Under the language of the statute, then, evidence of physical harm that King committed against the other children in the household is admissible. Furthermore, we have explained that “evidence showing how a defendant treats his family or household members . . . sheds light on how the defendant interacts with those close to him, which in turn suggests how the defendant may interact with the victim.” *Valentine*, 787 N.W.2d at 637. The evidence of King’s physical abuse of other children in the household sheds light on how King interacts with those close to him, including D.H. We conclude that it was not error for the district court to consider the evidence as relationship evidence. We next consider King’s argument about the weight of the evidence.

King next argues that the district court erred because the probative value of the relationship evidence was substantially outweighed by the danger of unfair prejudice. The supreme court has explained that “[w]hen balancing the probative value against the potential prejudice, unfair prejudice is not merely damaging evidence, even severely damaging evidence; rather, unfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage.” *State v. Bell*, 719 N.W.2d 635, 641 (Minn. 2006) (quotation omitted). Even assuming evidence of King’s physical abuse of the other children in the household had the potential to persuade by illegitimate means, the district

court sought to mitigate any unfair prejudice. After the evidence had been admitted, the district court gave a limiting instruction. The district court explained that the evidence “was offered for the limited purpose of demonstrating the nature and extent of the relationship between [King and D.H.]” and that the jury could not “convict [King] on the basis of the conduct.” The district court’s limiting instruction mitigated the risk of unfair prejudice such that it did not substantially outweigh the evidence’s probative value. *See State v. Lindsey*, 755 N.W.2d 752, 755-57 (Minn. App. 2008) (affirming the admission of relationship evidence and explaining that a limiting instruction “lessened the probability of undue weight being given by the jury to the evidence” (quotation omitted)), *rev. denied* (Minn. Oct. 29, 2008). Accordingly, we conclude that the district court did not err when it admitted the evidence under section 634.20. Because there was no error, we need not consider the other prongs of the plain-error test.

II. The prosecutor did not commit prosecutorial error during rebuttal.

King argues that the prosecutor committed prosecutorial error at several points during his closing-argument rebuttal. First, he argues that the prosecutor misstated the law; second, he argues that the prosecutor vouched for the truthfulness of the witnesses and belittled his chosen defense; and third, he argues that the prosecutor misstated the evidence, which inflamed the passions of the jury.

“The overarching concern regarding prosecutorial misconduct . . . is that [the] misconduct may deny the defendant’s right to a fair trial.” *State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006). Prosecutors are ministers of justice who “have an affirmative

obligation to ensure that a defendant receives a fair trial, no matter how strong the evidence of guilt.” *Id.*

When, as is the case here, a defendant does not object to alleged prosecutorial error, an appellate court reviews for plain error under a modified standard of review. *See id.* at 302; *see also State v. Epps*, 964 N.W.2d 419, 423 n.4 (Minn. 2021) (explaining that modified plain-error standard applies to claims of both prosecutorial error and prosecutorial misconduct). Plain error requires “(1) [an] error; (2) that is plain; and (3) [that] . . . affect[s] substantial rights.” *Griller*, 583 N.W.2d at 740. Even if an appellate court identifies a plain error that affects substantial rights, reversal is warranted only if it is necessary to “address the error to ensure fairness and the integrity of the judicial proceedings.” *Bernhardt v. State*, 684 N.W.2d 465, 475 (Minn. 2004) (quotation omitted). Modified plain error differs from traditional plain error because, if the defendant shows plain error, the burden shifts to the state on the third step of the analysis; that is, the state must demonstrate “no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict.” *See Ramey*, 721 N.W.2d at 302 (quotation omitted).

A. The prosecutor did not misstate the law.

During closing-argument rebuttal, the prosecutor stated, “A couple other things I want to get straight. [D.H.] is a *victim*, she’s not a complaining witness.” This comment responded to a statement defense counsel made during its closing argument: “And I’ll -- as I work towards other examples here, we go back to the testimony from the complaining witness here, [D.H.]”

King first claims that the prosecutor plainly erred by misstating the law. King argues that the prosecutor’s statement that D.H. was a “victim” was a misstatement of the law because it suggested that King had lost the presumption of innocence before the jury had completed its deliberation.

Criminal defendants are afforded certain protections under the U.S. and Minnesota Constitutions, including the presumption that they are innocent until proven guilty beyond a reasonable doubt. *E.g.*, *In re Winship*, 397 U.S. 358, 363-64 (1970); *State v. Portillo*, 998 N.W.2d 242, 248-49 (Minn. 2023). “[I]t has long been held that one accused of crime has the right to have the jury take the presumption of innocence to the jury room with them as the voice of the law.” *Portillo*, 998 N.W.2d at 249 (quotation omitted).

King cites *Portillo* to support his claim of prosecutorial error. In *Portillo*, the supreme court held that a prosecutor committed plain error when the prosecutor “said on three separate occasions during the closing-argument rebuttal that [the defendant] had already lost the presumption of innocence.” *Id.* (emphasis omitted). Specifically, the prosecutor stated that:

[*The defendant*] *no longer has that presumption.* You’ve heard all of the evidence. You’ve heard all of the state’s case against [him.] *He no longer has that presumption of innocence.* He has been proven guilty beyond a reasonable doubt. We’ve gone through those elements. You’ll be able to talk and consider each other’s thoughts and the information you heard throughout the course of the case, but *he no longer has that presumption of innocence.*

Id. The supreme court reasoned that a “defendant is only proven guilty beyond a reasonable doubt . . . when the jury has deliberated and reached that conclusion, not before.” *Id.* at

250. Thus, the suggestion that the defendant was not entitled to the presumption at the time of closing arguments was a misstatement of the law that constituted plain error. *Id.* at 250-51.

While analyzing the statements in *Portillo*, the supreme court distinguished the prosecutor's statements from those made in *State v. Young*, 710 N.W.2d 272, 280 (Minn. 2006). *Id.* at 251. In *Young*, the prosecutor never explicitly mentioned the presumption of innocence in the portion of the state's closing argument at issue. *Young*, 710 N.W.2d at 280-81. Specifically, the prosecutor stated that:

When the trial began, the Court told you that that young man right there is an innocent man. He was. Until the defense stood up and rested. Because at that time the state had presented to you sufficient evidence to find the defendant guilty of all the crimes that the Court just gave you the—instructions on. He's no long [sic] an innocent man. The evidence that's been presented to you by the state has shown you that he's guilty beyond a reasonable doubt. Let me tell you why[.]

Id. at 280. The supreme court concluded that “the prosecutor’s argument appears to be that the state had produced sufficient evidence of Young’s guilt to overcome the presumption of innocence, not that he was not entitled to the presumption in the absence of proof beyond a reasonable doubt.” *Id.* at 280-81; *see also State v. Vue*, 797 N.W.2d 5, 13-14 (Minn. 2011) (holding that prosecutor’s statement that defendant “has now lost that presumption of innocence as a result of the evidence that you have heard” was not a “plain or obvious” error). Thus, the prosecutor’s argument was not a misstatement of the law and did not constitute error.

Here, the prosecutor's statement does not expressly nor implicitly reference the presumption of innocence. Thus, the prosecutor's statements are more similar to those in *Young* than *Portillo*. Under Minnesota caselaw, the mere statement that an alleged victim is a "victim," without the qualifying adjective "alleged," is not sufficient to constitute error by deviating from the constitutional presumption that criminal defendants are innocent until proven guilty beyond a reasonable doubt. Accordingly, we conclude that the prosecutor did not commit prosecutorial error.

B. The prosecutor did not vouch for the truthfulness of the witness or belittle King's chosen defense.

During closing-argument rebuttal, the prosecutor, referencing D.H. and K.H.'s desires to stop living with King and their aunt, also stated:

[Defense counsel] would have you believe that it is because they want more phone privileges, they want to make TikTok videos. They want to be able to talk to boys on their phone, that this is what this is all about, that that's why they made up this story. *You would have to think pretty little of [D.H. and K.H.] to believe that story. You would have to think pretty little of them to believe that they are that petty and manipulative.*

You'd also have to believe that they are absolute pathological liars. That they would come up with this story and they would stick with it and they would be consistent with the details over and over and over again. Also, if the whole point of the story, the whole plan, the whole idea is to get them out of the house, that's why they're doing it.

(Emphases added.)

King claims that the prosecutor plainly erred here by vouching for the truthfulness of certain witnesses and belittling his chosen defense. King asserts that the prosecutor's

argument improperly vouched for the veracity of D.H.'s and K.H.'s testimony by "impliedly guaranteeing" they were truthful, deviating from the rule under *State v. McArthur*, 730 N.W.2d 44, 53 (Minn. 2007) that a prosecutor must not "vouch for the veracity of any particular evidence." King, relying on *State v. MacLennan*, 702 N.W.2d 219, 236 (Minn. 2005), further argues that the prosecutor belittled his chosen defense, deviating from the rule that the prosecutor must not "denigrate a particular type of defense, either explicitly or in the abstract."

Vouching occurs "when the government implies a guarantee of a witness's truthfulness, refers to facts outside the record, or expresses a personal opinion as to a witness's credibility." *State v. Patterson*, 577 N.W.2d 494, 497-98 (Minn. 1998) (quoting *United States v. Beasley*, 102 F.3d 1440, 1449 (8th Cir. 1996)). It is prosecutorial misconduct to bolster the credibility of the state's witnesses with the prosecutor's own opinion: an advocate "may not throw onto the scales of credibility the weight of his own personal opinion." *State v. Ture*, 353 N.W.2d 502, 516 (Minn. 1984).

King cites two Minnesota Supreme Court cases to support his claim that the prosecutor erred by vouching for the truthfulness of the witnesses. *See McArthur*, 730 N.W.2d at 53; *Patterson*, 577 N.W.2d at 497-98. In *McArthur*, the supreme court concluded that the prosecutor did not vouch for the validity of a witness's fears where the witness testified about her concerns that testifying could create intrafamily conflict or result in harm. 730 N.W.2d at 53. Similarly, in *Patterson*, the supreme court concluded that the prosecutor did not vouch for the truthfulness of a witness where the prosecutor elicited testimony from the witness related to a plea agreement with a truthfulness provision. 577

N.W.2d at 497-99. King does not explain why his case is distinguishable from these cases to demonstrate error. As the party asserting error, he bears the burden of proving this element. *Hollins*, 765 N.W.2d at 131. Accordingly, we conclude that King has failed to establish that, under Minnesota law, the prosecutor's statements constitute error.

We next turn to King's argument that the prosecutor erred by belittling his chosen defense that D.H. and K.H. fabricated the allegations of sexual abuse. "[T]he state has a right to vigorously argue its case," and it may argue in individual cases that the evidence does not support particular defenses. *MacLennan*, 702 N.W.2d at 236. Furthermore, the state's argument need not be "colorless." *State v. Bolstad*, 686 N.W.2d 531, 544 (Minn. 2004). But the state "may not belittle the defense, either in the abstract or by suggesting that the defendant raised the defense because it was the only defense that may be successful." *MacLennan*, 702 N.W.2d at 236.

Here, the prosecutor did not suggest that King raised his defense merely because it was the only defense that may succeed. The tenor of the prosecutor's comments is also distinguishable from cases where the court has determined that the prosecutor committed error. *See, e.g., State v. Porter*, 526 N.W.2d 359, 363-64 (Minn. 1995) (holding prosecutorial error occurred when the prosecutor told the jury members they were "big . . . suckers" if they believed testimony that supported the defense); *State v. Griesse*, 565 N.W.2d 419, 426-28 (Minn. 1997) (collecting cases where Minnesota appellate courts have concluded prosecutorial misconduct occurs when prosecutors suggest that a defense is offered "when nothing else will work" (quotation omitted)). We therefore conclude that the prosecutor did not commit error by belittling King's chosen defense.

C. The prosecutor did not misstate the evidence.

During closing-argument rebuttal, the prosecutor also stated:

Lastly, the explanation simply isn't reasonable, it's not supported by the evidence that they would make this up for such petty reasons. So why? What other reasons could there be? *Well, it could be the fact that they're suffering from incredible abuse in that home.* Is that something that might make more sense? Is that something that explains the evidence in this case that is reasonable? . . .

Beyond that, she is beaten in the home by [her aunt]. Beyond that, there is other physical abuse in the home. *A three-year-old child who she sees as basically a sister is covered in belt marks. She tells [the CPS investigator] that it was the defendant whooping the three-year-old with a belt.*

What makes more sense here? Why did they want out of that house?

(Emphases added.)

King's final claim is that the prosecutor plainly erred by misstating the evidence in his description of physical abuse which inflamed the passions of the jury. Specifically, he argues that the prosecutor's statement that D.H. and K.H. "suffer[ed] from incredible abuse in that home" was a misstatement about "who was abused and the frequency of that abuse" because he alleges that there was no evidence K.H. suffered any physical abuse. King further argues that the prosecutor's statements about the three-year-old daughter were not supported by evidence presented during trial.

"It is misconduct for a prosecutor to intentionally misstate evidence or to appeal to the passions of the jury." *McArthur*, 730 N.W.2d at 53. Prosecutors "should not refer to facts not in evidence." *Id.*

The record does not support King's characterization of the prosecutor's statements or the facts in evidence. The prosecutor did not state that D.H. and K.H. suffered *physical* abuse but rather made a general statement about abuse in the home. But even if the prosecutor's statement had focused on physical abuse, testimony admitted during trial demonstrated that "there was physical abuse against all of the children in the home." Therefore, the evidence submitted at trial supports the prosecutor's first contested statement.

King also contends that there was "no evidence in the record about the severity of the marks" on the three-year old and that there was "no evidence that [he] inflicted the belt marks." During trial, however, the CPS investigator testified that D.H. told her that the physical abuse in the house included "being hit with a belt." The investigator also testified that D.H. told her that King used a belt on his three-year-old child. The investigator personally observed "marks that were congruent with a belt" on this child. Although the investigator did not describe the number of marks or the area covered with marks, the prosecutor's use of "covered" was a reasonable inference based on the evidence presented at trial. *State v. Crane*, 766 N.W.2d 68, 74 (Minn. App. 2009) ("[A] prosecutor may make 'reasonable inferences from [the] evidence' presented at trial." (quoting *Young*, 710 N.W.2d at 281 (Minn. 2006))), *rev. denied* (Minn. Aug. 26, 2009). Accordingly, we conclude that the prosecutor did not misstate the evidence.

In sum, King has not established that the prosecutor committed error.

Affirmed.