

*This opinion is nonprecedential except as provided by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
A25-0055**

State of Minnesota,
Respondent,

vs.

Edward Alexander Cox,
Appellant.

**Filed January 26, 2026
Affirmed
Larson, Judge**

Wadena County District Court
File No. 80-CR-24-342

Keith Ellison, Attorney General, Timothy C. Rank, Assistant Attorney General, St. Paul, Minnesota; and

Kyra L. Ladd, Wadena County Attorney, Wadena, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Larkin, Judge; and Larson, Judge.

NONPRECEDENTIAL OPINION

LARSON, Judge

Appellant Edward Alexander Cox was convicted on one count of felon in possession of ammunition and on one count of second-degree assault with a dangerous weapon. Cox raises two arguments in this direct appeal. First, he argues the state produced insufficient evidence to prove beyond a reasonable doubt that he possessed ammunition. Second, he

argues his convictions must be reversed because the prosecutor engaged in multiple instances of prosecutorial misconduct. We affirm.

FACTS

The following factual summary is based on the evidence received at Cox's jury trial. On May 22, 2024, Cox was living in a bedroom located in the southwest corner of a house (the southwest bedroom) owned by K.B. (homeowner). That morning, C.R. (victim) arrived at the house to pick up homeowner. Victim knocked on the door, and Cox answered. At the time, Cox and his girlfriend (girlfriend) had been living in the southwest bedroom for approximately eight months.

When victim entered the house, he noticed that homeowner's dogs were whining. Victim, who was familiar with the dogs, believed they needed to relieve themselves, so he let the dogs out of their kennel and followed them outside. While outside with the dogs, Cox confronted victim because he was upset that victim let the dogs out. Cox became aggressive and began yelling at victim, telling him that he was no longer welcome at the house.

Victim tried to get back into the house to retrieve homeowner, but Cox stopped victim from entering. Victim yelled for homeowner. Cox and victim came chest-to-chest with one another. Victim shoved Cox, and Cox pushed back. The two men then entered the house, and Cox grabbed a hammer. Cox and victim were about fifteen to twenty feet away from one another when Cox began swinging the hammer at victim.

After several swings, Cox put down the hammer down, walked to his bedroom, and grabbed a machete. When Cox returned, he swung the machete at victim several times,

coming within a foot of victim. Victim testified that he believed Cox was trying to kill him. Homeowner entered the room and yelled at Cox to stop. Cox eventually stopped swinging the machete and returned to the southwest bedroom.

Victim informed homeowner that he planned to report the incident to the police. Later that day, victim met with Wadena County Sheriff's Deputies and provided a statement. The deputies went to the house to execute a search warrant and arrest Cox. At the house, a deputy spoke to Cox through an open window and presented the signed search warrant. Before leaving the house, Cox returned to the southwest bedroom to put on pants. Cox then exited the house and was arrested.

The deputies searched the house. They located a hammer in the kitchen. In the southwest bedroom, they located mail addressed to Cox that listed the house as Cox's home address, along with men's clothing and items belonging to girlfriend. They also located a machete behind a dresser in the southwest bedroom.

During their search, the deputies saw a box of ammunition sitting "in the open" atop a mini-fridge in the southwest bedroom. They also found a clear plastic bag on the floor of the southwest bedroom containing a prescription bottle with the name of one of homeowner's children. One of homeowner's children, and possibly one of girlfriend's children, had previously occupied the southwest bedroom.

The state filed an amended complaint charging Cox with five counts: (1) felon in possession of ammunition under Minn. Stat. § 624.713, subd. 1(2) (2022); (2) second-degree assault (fear) with a dangerous weapon under Minn. Stat. § 609.222, subd. 1 (2022), related to the hammer incident; (3) second-degree assault (harm) with a dangerous weapon

under Minn. Stat. § 609.222, subd. 1, related to the hammer incident; (4) second-degree assault (fear) with a dangerous weapon under Minn. Stat. § 609.222, subd. 1, related to the machete incident; and (5) second-degree assault (harm) with a dangerous weapon under Minn. Stat. § 609.222, subd. 1, related to the machete incident. Cox moved to have the charges dismissed, which the district court denied. The matter proceeded to a two-day jury trial.

At trial, victim, homeowner, girlfriend, and four responding deputies testified on behalf of the state consistent with the above facts. As relevant to possession of the ammunition, girlfriend testified that she and Cox kept their clothes and possessions in the southwest bedroom. Girlfriend stated that she had seen the ammunition on the mini-fridge. Girlfriend denied that the ammunition belonged to her and stated that she believed it belonged to Cox. Girlfriend also testified that Cox told her that he owned a gun. Homeowner also denied that the ammunition belonged to him.

Cox invoked his right not to testify. At the close of evidence, Cox moved for acquittal on the felon-in-possession-of-ammunition charge. The district court denied his motion. The jury acquitted Cox on the second-degree assault (harm) with a dangerous weapon count related to the hammer incident and returned guilty verdicts on the remaining four counts. The district court then entered convictions on and sentenced Cox to a 60-month prison term for the felon-in-possession-of-ammunition count and a 39-month prison term for one count of second-degree assault, to be served concurrently. The district court did not adjudicate the other two counts. *See* Minn. Stat. § 609.04 (2024).

Cox appeals.

DECISION

Cox raises two arguments in this direct appeal. First, he argues the state presented insufficient evidence to prove that he possessed the ammunition found in the southwest bedroom. Second, he asserts the prosecutor engaged in prosecutorial misconduct that warrants a new trial. We address each argument in turn.

I.

Cox first argues the state presented insufficient evidence to prove that he possessed the ammunition found in the southwest bedroom. When evaluating the sufficiency of the evidence, we review the evidence presented at trial “to determine whether the facts in the record and the legitimate inferences drawn from them would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted.” *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010) (quotation omitted). Section 624.713, subdivision 1(2), prohibits persons “convicted of . . . a crime of violence” from possessing ammunition. Minn. Stat. § 624.713, subd. 1(2). Cox admits that he was prohibited from possessing ammunition on the date of the offense but argues that the state failed to prove that he, in fact, possessed the ammunition.

The state can prove Cox’s guilt by establishing that Cox actually or constructively possessed the ammunition. *State v. Loyd*, 321 N.W.2d 901, 902 (Minn. 1982). The state proves actual possession when it presents evidence that the defendant had “direct physical control” over the contraband. *State v. Barker*, 888 N.W.2d 348, 353 (Minn. App. 2016) (quotation omitted). The state proves constructive possession in cases in which it “cannot prove actual possession, but the inference is strong that the defendant physically possessed

the [contraband] at one time and did not abandon [their] possessory interest in it.” *State v. Smith*, 619 N.W.2d 766, 770 (Minn. App. 2000), *rev. denied* (Minn. Jan. 16, 2001). The state can prove constructive possession when either (1) the contraband was found “in a place under [the] defendant’s exclusive control to which other people did not normally have access,” or (2) if the contraband was found “in a place to which others had access, there is a strong probability (inferable from other evidence) that [the] defendant was at the time consciously exercising dominion and control over it.” *State v. Florine*, 226 N.W.2d 609, 611 (Minn. 1975).

The parties assert, and we agree, that the state did not prove Cox had actual possession of the ammunition. Therefore, we must determine whether the state proved Cox had constructive possession over the ammunition.¹ The state can prove constructive possession with either direct or circumstantial evidence. *See State v. German*, 929 N.W.2d 466, 472 (Minn. App. 2019). Direct evidence is “based on personal knowledge or observation and, . . . if true, proves a fact without inference or presumption.” *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotation omitted). Circumstantial evidence is “evidence from which the factfinder can infer whether the facts in dispute existed or did not exist.” *Id.* (quotation omitted).

¹ Cox argues the state failed to prove constructive possession “because [the state] did not prove that he ever actually possessed the contraband.” Cox effectively argues the state needed to establish prior actual possession to prove constructive possession. Cox’s argument is inconsistent with the legal concept of constructive possession, which requires a “strong” *inference* “that the defendant physically possessed the [contraband] at one time and did not abandon [their] possessory interest in it.” *See Smith*, 619 N.W.2d at 770.

Here, the parties assert, and we agree, that the state used circumstantial evidence to prove constructive possession. When the state relies on circumstantial evidence, we apply a heightened two-step standard. *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012). First, we “identify the circumstances proved.” *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). The circumstances proved are “a subset of facts” identified “by resolving all questions of fact in favor of the jury’s verdict.” *Harris*, 895 N.W.2d at 600. “[W]e defer to the [factfinder’s] acceptance of the proof of these circumstances” and “assume that the [factfinder] believed the State’s witnesses and disbelieved the defense witnesses.” *Silvernail*, 831 N.W.2d at 598-99 (quotations omitted). Second, we determine whether the circumstances proved, in their entirety, “are consistent with guilt and inconsistent with any rational hypothesis except that of guilt,” and “not simply whether the inferences that point to guilt are reasonable.” *Id.* at 599 (quotations omitted). During this step, we do not defer “to the fact finder’s choice between reasonable inferences.” *State v. Andersen*, 784 N.W.2d 320, 329-30 (Minn. 2010) (quotation omitted). The circumstantial evidence the state presents “must form a complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt.” *Al-Naseer*, 788 N.W.2d at 473 (quotation omitted).

Beginning with the first step, the state proved the following circumstances at trial: (1) on the day the deputies executed the search warrant, Cox and girlfriend had lived in the southwest bedroom of the house for approximately eight months; (2) before the deputies executed the search warrant, Cox went to the southwest bedroom to put on his pants; (3) when the deputies searched the southwest bedroom they found Cox’s personal items,

including Cox's clothing and Cox's mail addressed to him at the house; (4) the deputies also found ammunition in the southwest bedroom, plainly visible sitting atop a mini-fridge; (5) girlfriend believed the ammunition belonged to Cox; (6) the ammunition did not belong to homeowner or girlfriend; and (7) Cox told girlfriend he owned a gun.

Moving to the second step, Cox first argues the circumstances proved are inconsistent with guilt because the state failed to prove he exercised dominion and control over the ammunition. On this argument, our decision in *State v. Dickey* is instructive. 827 N.W.2d 792 (Minn. App. 2013). There, we listed several facts that have previously been deemed sufficient to prove constructive possession beyond a reasonable doubt, including locating the contraband: (1) near papers and personal documents containing the defendant's name; (2) near the defendant's clothing or personal property; or (3) in a room used as the defendant's bedroom. *Id.* at 797. All the facts discussed in *Dickey* are present in this case. The ammunition was found near mail addressed to the house with Cox's name on it and Cox's clothing, and in a room that Cox had used for his bedroom for approximately eight months. Therefore, we conclude that the circumstances proved are consistent with guilt.²

Cox argues in the alternative that, even if the facts are consistent with guilt, they nonetheless support a reasonable inference other than guilt. Specifically, Cox contends the evidence that children had previously occupied the southwest bedroom supports a

² We further note that, even if the jury did not believe girlfriend's testimony that she did not possess the ammunition, the jury still could have found Cox jointly possessed the ammunition with girlfriend. See *Smith*, 619 N.W.2d at 770 ("[C]onstructive possession need not be exclusive, but may be shared.").

reasonable inference other than guilt—namely, that the children had exclusive possession of the ammunition. To support his argument, Cox relies on *Harris* and *State v. Sanchez*, No. A20-0136, 2021 WL 318463 (Minn. App. Feb. 1, 2021).³ But both cases are readily distinguishable. In *Harris*, law enforcement found hidden contraband in a vehicle the defendant did not own. 895 N.W.2d at 602. And in *Sanchez*, the contraband was found in a common area of a trailer home where the prior owner had left “pretty much everything [he] owned.” 2021 WL 318463, at *1, 3. Here, the circumstances proved demonstrate that Cox and girlfriend had been in possession of the southwest bedroom for eight months and the ammunition was plainly visible in the southwest bedroom.⁴ Accordingly, the circumstances proved support only one reasonable inference—that Cox constructively possessed the ammunition.

Because the state proved Cox constructively possessed the ammunition, we affirm his felon-in-possession-of-ammunition conviction on sufficiency grounds.

II.

Cox argues second that he is entitled to a new trial because the prosecutor engaged in six instances of prosecutorial misconduct: (1) eliciting improper opinion testimony about his possession of ammunition (opinion testimony (possession)); (2) playing body-camera footage referencing Cox’s prior jail time and probation status (jail-time and probation evidence); (3) eliciting improper testimony about Cox’s “bad temper” (bad-

³ This opinion is nonprecedential and, therefore, not binding. We cite nonprecedential opinions as persuasive authority only. See Minn. R. Civ. App. P. 136.01, subd. 1(c).

⁴ We further note that this case is substantially similar to our persuasive, nonprecedential decision in *State v. Lopez*, No. A22-1211, 2023 WL 4861790 (Minn. App. July 31, 2023).

temper evidence); (4) eliciting improper vouching testimony (vouching testimony); (5) eliciting improper opinion testimony tracking the elements of second-degree assault (opinion testimony (elements)); and (6) improperly shifting the burden of proof during closing argument (burden of proof).

The standard we apply when reviewing claims of prosecutorial misconduct depends on whether the defendant objected at trial. *State v. Wren*, 738 N.W.2d 378, 389-90 (Minn. 2007). We first review the two alleged instances of objected-to prosecutorial misconduct regarding the opinion testimony (possession), and jail-time and probation evidence. Then we review the four instances of alleged unobjected-to prosecutorial misconduct regarding the bad-temper evidence, vouching testimony, opinion testimony (elements), and burden of proof. Finally, we address Cox’s argument that the cumulative instances of alleged prosecutorial misconduct warrant a new trial.

A. Objected-To Prosecutorial Misconduct

We first address Cox’s arguments regarding the opinion testimony (possession), and the jail-time and probation evidence.⁵ When reviewing objected-to prosecutorial misconduct, we apply a harmless-error test, the application of which varies based on the severity of the misconduct. *State v. Carridine*, 812 N.W.2d 130, 150 (Minn. 2012). “In cases involving unusually serious prosecutorial misconduct, we require certainty beyond a

⁵ Cox objected to admission of the opinion testimony (possession), and the jail-time and probation evidence pursuant to a motion in limine which the district court granted, and, therefore, he preserved these objected-to claims on appeal. *See State v. Litzau*, 650 N.W.2d 177, 183 (Minn. 2002) (“[A] party need not renew an objection to the admission of evidence to preserve a claim of error for appeal following a ruling on a motion in limine.”).

reasonable doubt that the misconduct was harmless before we affirm.” *Id.* “On the other hand, in cases involving less serious prosecutorial misconduct, we apply the test of whether the misconduct likely played a substantial part in influencing the jury to convict.” *Id.*

Cox contends that the alleged objected-to prosecutorial misconduct in this case was serious, warranting the more stringent harmless-error test. The state does not take a clear position on which harmless-error standard applies. We need not resolve this question because we conclude that Cox cannot establish that he is entitled to relief under the more demanding test that applies to objected-to and unusually serious misconduct.

Under the more stringent harmless-error test, “[p]rosecutorial misconduct is harmless beyond a reasonable doubt if the jury’s verdict was surely unattributable to the misconduct.” *State v. Whitson*, 876 N.W.2d 297, 304 (Minn. 2016) (quotation omitted). In *State v. Bigbear*, the supreme court clarified that when evaluating harmlessness, “the question is not whether the [other] evidence was *sufficient* to support the conviction, but rather whether the error substantially influenced the verdict.” 10 N.W.3d 48, 54 (Minn. 2024) (quotation omitted). The supreme court provided a list of “non-exclusive” factors to assist in determining whether a “reasonable possibility exists that the erroneously admitted evidence significantly affected the jury’s verdict,” including: “(1) the manner in which the party presented the evidence, (2) whether the evidence was highly persuasive, (3) whether the party who offered the evidence used it in closing argument, and (4) whether the defense effectively countered the evidence.” *Id.* (quotation omitted). We may also consider the strength of the state’s evidence. *Id.* (“Strong evidence of guilt undermines the persuasive value of wrongly admitted evidence.” (quotation omitted)).

1. Opinion Testimony (Possession)

Cox asserts the prosecutor committed misconduct when they introduced a deputy's opinion testimony that Cox possessed the ammunition. Specifically, Cox challenges the following exchange:

PROSECUTOR: And why do you believe that Mr. Cox possessed this ammunition?

DEPUTY: It was – it was very much in plain view when we entered the room. And based on the information that we believe Mr. Cox was staying there; it was well within his bedroom and possession.

A prosecutor engages in misconduct when they introduce evidence the district court previously ruled inadmissible. *See State v. Ray*, 659 N.W.2d 736, 744-46 (Minn. 2003). Here, the district court granted Cox's motion in limine to exclude witnesses from offering opinion testimony as to whether Cox possessed the ammunition. Because the prosecutor's question elicited testimony the district court ruled was inadmissible, we conclude the prosecutor engaged in misconduct. We, therefore, must assess whether the misconduct was harmless beyond a reasonable doubt.

For the foregoing reasons, we conclude the verdict is "surely unattributable" to the challenged exchange. *See Bigbear*, 10 N.W.3d at 54. Reviewing the record, the prosecutor did not emphasize the testimony or the improper premise of its question, and the prosecutor did not rely on or feature the testimony in its closing arguments. Furthermore, viewing the question in context, the prosecutor did not present the testimony for its conclusive value. Rather, the exchange was the first in a series of questions regarding the objects discovered

in the southwest bedroom. Moreover, the prosecutor relied on the testimony from multiple witnesses and other corroborating evidence to demonstrate Cox's guilt for the possession offense. And, finally, the district court gave extensive jury instructions regarding the elements of constructive possession. Therefore, we conclude that the jury's verdict was "surely unattributable" to the opinion testimony.

2. Jail-Time and Probation Evidence

Cox next argues the prosecutor engaged in misconduct when they admitted the jail-time and probation evidence. *See* Minn. R. Evid. 404(b) (prohibiting admission of "[e]vidence of another crime, wrong, or act . . . to prove the character of a person in order to show action in conformity therewith"); *see also State v. Ness*, 707 N.W.2d 676, 682 (Minn. 2006) (stating evidence of other crimes, wrongs, or acts, often referred to as *Spreigl* evidence). Specifically, Cox challenges the state's admission of body-camera footage in which Cox and a deputy discuss his probation status and prior jail time.

As explained above, a prosecutor engages in misconduct when they introduce evidence the district court previously ruled inadmissible. *See Ray*, 659 N.W.2d at 744-46. Here, the district court issued a pretrial order that prohibited the state from discussing Cox's prior jail time and probationary status. Thus, the prosecutor engaged in misconduct when they introduced this portion of the body-camera footage.⁶ We, therefore, must assess whether the misconduct was harmless beyond a reasonable doubt.

⁶ The state argues that the prosecutor did not engage in misconduct because defense counsel was charged with redacting the body-camera footage. We find this argument unpersuasive because the prosecutor is responsible for the evidence they present for admission at trial.

For the foregoing reasons, we conclude the verdict is “surely unattributable” to the challenged exchange. *See Bigbear*, 10 N.W.3d at 54. The exchange comprised less than ten seconds of body-camera footage that was played for over an hour, and the state did not emphasize the references in its arguments. Further, the evidence was not highly persuasive in the context of the trial evidence as a whole, given the strong evidence that Cox was guilty of the charged crimes. Therefore, we conclude that the jury’s verdict was “surely unattributable” to the jail-time and probation evidence.

B. Unobjected-To Prosecutorial Misconduct

We next address Cox’s arguments regarding the alleged bad-temper evidence, vouching testimony, opinion testimony (elements), and burden of proof. When a defendant fails to object to alleged prosecutorial misconduct at trial, we apply a modified plain-error test. *State v. Portillo*, 998 N.W.2d 242, 248 (Minn. 2023). Under this test, the defendant must show that the prosecutor’s conduct constituted (1) an error (2) that was plain. *Id.* An error is plain if it “contravenes case law, a rule, or a standard of conduct.” *State v. Ramey*, 721 N.W.2d 294, 302 (Minn 2006). “If the defendant is successful, the burden then shifts to the State to demonstrate that the error did not affect the defendant’s substantial rights.” *Portillo*, 998 N.W.2d at 248 (quotation omitted). Misconduct does not affect substantial rights if “there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury.” *Ramey*, 721 N.W.2d at 302. To determine whether a reasonable likelihood exists, “we consider the strength of the evidence against the defendant, the pervasiveness of the improper suggestions, and whether the defendant had an opportunity to (or made efforts to) rebut the improper suggestions.”

Portillo, 998 N.W.2d at 251 (quotation omitted). If the state fails to meet its burden, we “will not grant relief to correct the error unless our failure to do so will cause the public to seriously question the fairness and integrity of our judicial system.” *Pulczynski v. State*, 972 N.W.2d 347, 359 (Minn. 2022).

1. Bad-Temper Evidence

Cox argues the prosecutor committed plain-error misconduct when they elicited testimony describing Cox as a “hothead” with a “bad temper.” Specifically, during direct examination, the prosecutor asked homeowner and girlfriend whether Cox had a “short fuse” or a “bad temper.” Both gave affirmative responses. Then, during closing arguments, the prosecutor called Cox a “hothead.” And, following this statement, the district court gave a cautionary instruction to the jury, stating that evidence of “[Cox’s] character or his propensity for any type of character trait, is not something you should consider, when determining if Mr. Cox did the acts that he is charged with doing today.”

Cox asserts the testimony was *Spreigl* evidence and required notice prior to its admission, which the state did not provide.⁷ *Spreigl* evidence refers to evidence of a defendant’s prior crimes, wrongs, or bad acts. *See* Minn. R. Evid. 404(b); *see also* *Ness*, 707 N.W.2d at 682 (stating evidence of other crimes, wrongs, or acts, often is referred to as *Spreigl* evidence). The state contends the relevant testimony is not *Spreigl* evidence but is instead character evidence governed by Minn. R. Evid. 404(a).

⁷ The prosecutor submitted two *Spreigl* notices, but neither related to Cox’s “bad temper.”

We agree with the state that the challenged evidence is properly categorized as character evidence—not *Spreigl* evidence—because the testimony did not relate to specific incidents and, instead, conveyed Cox’s propensity for having a bad temper more generally. *See* Minn. R. Evid. 404(a). Nevertheless, we conclude the prosecutor plainly committed misconduct when they introduced this evidence, as rule 404(a) provides that character evidence is inadmissible “for the purpose of proving action in conformity therewith on a particular occasion.” Here, the prosecutor introduced this evidence and stated in closing argument that Cox was a “hothead” to support the state’s theory that Cox lost his temper during the incident—like he had in the past—making it more likely that he committed the assaults. The introduction of the bad-temper evidence was plain error.

Having identified a plain error, the burden shifts to the state to demonstrate that this error did not affect Cox’s substantial rights. We conclude the state met its burden here. Cox’s assault conviction was amply supported by other record evidence and witness accounts of the incident. And while the prosecutor referenced the testimony in their closing argument, the district court contemporaneously paused the argument and gave a cautionary instruction to the jury to disregard this evidence. The supreme court has previously stated that appropriate cautionary instructions lessen the impact of improper comments. *See State v. Hawkins*, 511 N.W.2d 9, 13 (Minn. 1994) (stating that the court’s instructions “lessened the impact of the [prosecutor’s] improper comments”). Finally, “[w]here the jury has acquitted the appellant of some counts, but convicted the appellant of others, we view the verdicts as an indica[tion] that the members of the jury were not unduly inflamed by the

prosecutor's comments." *State v. Washington*, 521 N.W.2d 35, 40 (Minn. 1994) (quotation omitted). Here, the jury acquitted Cox on one count of second-degree assault.

For these reasons, we conclude the plain-error misconduct did not affect Cox's substantial rights.

2. Vouching Testimony

Cox next argues that the prosecutor improperly elicited testimony from deputies on multiple occasions that "vouched" for victim's testimony. "Prosecutors may not elicit credibility-vouching testimony from trial witnesses." *State v. Robideau*, 783 N.W.2d 390, 400 (Minn. App. 2010), *rev'd on other grounds*, 796 N.W.2d 147 (Minn. 2011). Improper vouching occurs when one witness testifies that another witness is telling the truth or is more believable than another witness. *See State v. Ferguson*, 581 N.W.2d 824, 835 (Minn. 1998); *see also State v. Koskela*, 536 N.W.2d 625, 630 (Minn. 1995) (stating that vouching generally occurs when one witness makes an explicit statement about credibility of another witness). Vouching is improper because "the credibility of a witness is for the jury to decide, not [another] witness." *Koskela*, 536 N.W.2d at 630.

Cox argues the following exchanges were improper vouching testimony. Cox highlights testimony regarding the deputy's decision not to charge victim with a crime:

PROSECUTOR: [D]id you ultimately cite [victim] with anything?

DEPUTY: I did not.

PROSECUTOR: Why not?

DEPUTY: It was determined there was no evidence or witnesses to support any of that.

Cox contends the “vouching” continued when the prosecutor asked another deputy whether, “[i]n that version of events by Mr. Cox, did that support the facts as you knew them at that time?” The deputy responded: “They did not.” Cox then asserts that the prosecutor engaged in improper vouching when they asked one deputy how Cox “was . . . trying to portray his involvement in the incident.” The deputy responded that “[t]o [him], it seemed [Cox] was attempting to shift the blame off of himself and onto [victim].” When the prosecutor asked the deputy why he believed that Cox was “trying to shift or divert that blame,” the deputy replied, “[b]ecause [Cox] made mention of [victim]. I don’t remember the exact words, but coming at him first, and that he was ending up going to jail for it.” Finally, Cox contends that the prosecutor elicited improper vouching testimony when they asked a deputy whether Cox mentioned anything that “appeared to [him] that [Cox] was trying to minimize the incident when he was in the house.” The deputy responded, “Mr. Cox came back into the kitchen area where the window was, with a chrome-colored shower head in his hand, and said that that is what he had in his hand at the time of the incident.”

For the following reasons, we are not persuaded that the above testimony constitutes improper vouching. First, in a persuasive, nonprecedential opinion, we recently concluded that similar testimony did not constitute vouching. *See State v. Dorsey*, No. A24-0816, 2025 WL 1430522, at *1 (Minn. App. May 19, 2025), *rev. denied* (Minn. Aug. 12, 2025). In *Dorsey*, we examined the following exchange:

PROSECUTOR: Did you ever take any action against
[witness] for filing a false police report?

DEPUTY: No, I did not.

PROSECUTOR: And is that based on your review of the evidence in this case?

DEPUTY: Yes.

Id. We reasoned that, because the prosecutor asked the deputy if he based his decision on “the evidence in this case,” and not whether he believed or found the defendant credible, there was no “explicit or implied vouching for [the witness’s] credibility.” *Id.* Here, the prosecutor’s questions, and the deputy’s response, are similarly premised on a lack of evidence. Because the testimony was based on the deputy’s knowledge of the evidence in the case, there was no improper vouching.

Cox further argues that, even if explicit vouching did not occur, the testimony impliedly vouched for victim’s testimony, relying on *State v. Nowels*, 941 N.W.2d 430 (Minn. App. 2020), *rev. denied* (Minn. June 16, 2020) and *State v. Richardson*, 514 N.W.2d 573 (Minn. App. 1994). In *Nowels*, we concluded implied vouching occurred when the prosecutor stated the witness “didn’t lie.” 941 N.W.2d at 438-39. And in *Richardson*, we concluded the prosecutor engaged in implied vouching when he asked a witness-attorney if he was aware that attorneys are ethically prohibited from “put[ting] a witness on the stand who is going to perjure himself or herself?” 514 N.W.2d at 578.

We are not persuaded that the prosecutor’s questioning in this case implied a “guarantee of a witness’s truthfulness” like in *Nowels* and *Richardson*. See *Nowels*, 941 N.W.2d at 438 (quotation omitted); see also *Richardson*, 514 N.W.2d at 578. The challenged testimony does not reference either the deputy’s or the prosecutor’s personal

opinions about the veracity of victim’s testimony. And the deputy did not testify about any ethical codes. We therefore conclude Cox did not meet his burden to demonstrate a plain error.⁸

3. Opinion Testimony (Elements)

Cox also argues that the prosecutor elicited improper opinion testimony when they asked witnesses questions that mirrored the elements for second-degree assault with a dangerous weapon.⁹ Under Minn. R. Evid. 701, lay witnesses can provide opinion testimony, but only to opinions “which are (a) rationally based on the perception of the witness; (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge.” In general, lay opinion testimony is not objectionable merely because “it embraces an ultimate issue to be decided by the trier of fact.” Minn. R. Evid. 704. Opinion testimony is helpful to the trier of fact if it concerns factual matters. *See id.*, cmt. 1977.

⁸ Cox also argues that the prosecutor elicited improper vouching testimony when they asked victim whether girlfriend yelled at him for his actions during the altercation. Victim testified that “[girlfriend] was very cordial . . . she felt like I was the victim more.” This is not improper vouching because it does not involve one witness testifying that another witness is telling the truth or is more believable than another witness. *See Ferguson*, 581 N.W.2d at 835. The question elicited testimony from victim about why he believed girlfriend was not upset with victim following the incident.

⁹ Under Minn. Stat. § 609.222, subd. 1, a person is guilty of second-degree assault if they “assault[] another with a dangerous weapon.” And under Minn. Stat. § 609.02, subd. 6 (2022), a “dangerous weapon” includes “any device designed as a weapon and capable of producing death or great bodily harm.”

Here, the record shows that the prosecutor asked victim, homeowner, and two deputies¹⁰ questions that ultimately tracked the language of the elements for second-degree assault with a dangerous weapon. We conclude most of this testimony does not constitute plain error because the testimony was from lay witnesses, based upon their rational perceptions of the events, and therefore was helpful to the jury's understanding of the weapons used during the incident.¹¹ Moreover, we have concluded that whether an item used in the course of second-degree assault could "constitute a dangerous weapon" is "a question of fact." *See State v. Davis*, 540 N.W.2d 88, 89-90 (Minn. App. 1995) (stating that whether defendant's use of hands or feet as dangerous weapon is question of fact), *rev. denied* (Minn. Jan. 31, 1996). As such, we are satisfied that most of the challenged testimony is not objectionable and, therefore, Cox did not meet his burden to demonstrate plain error.

However, Cox highlights three instances in which the prosecutor specifically asked victim to offer his opinion regarding Cox's *intent* during the altercation:

¹⁰ Law-enforcement testimony is properly considered lay testimony where it is "based on personal observations" and helpful to the jury. *See State v. Ards*, 816 N.W.2d 679, 685 (Minn. App. 2012) (concluding that officer's personal observations of defendant's alcohol impairment was helpful to jury).

¹¹ The prosecutor asked victim: "And in the way that Mr. Cox was using the hammer that morning, do you feel like he was using the hammer in a manner that would be likely to produce death or great bodily harm to you?" and "And when Mr. Cox approached you with that hammer cocked up by his head, were you in fear of imminent bodily harm?" The prosecutor asked homeowner: "And based on the manner in which Mr. Cox was swinging that machete at [victim], do you feel if Mr. Cox would have made contact, he would have caused [victim], immediate bodily harm?" The prosecutor also asked the deputies whether the hammer and machete they found during their search of the house could have caused "death or great bodily harm."

PROSECUTOR: And by raising the hammer and coming after you, do you believe that that was an intentional act by Mr. Cox where he was trying to put you in fear of immediate bodily harm?

PROSECUTOR: And do you feel like he was trying to inflict bodily harm upon you at that time?

PROSECUTOR: Do you feel that Mr. Cox intended to put you in fear of immediate bodily harm or death?

In *State v. Witucki*, we concluded that “it is improper to testify as to the subjective intention or knowledge of another.” 420 N.W.2d 217, 222 (Minn. App. 1988) (citing *State v. Salazar*, 289 N.W.2d 753, 755 (Minn. 1980)), *rev. denied* (Minn. Apr. 15, 1988). The questions above plainly required victim to testify about his views of Cox’s subjective intent.¹² As such, we conclude the prosecutor engaged in plain-error misconduct when they asked these questions.

Therefore, the burden shifts to the state to prove this misconduct did not have an impact on Cox’s substantial rights. *See Ramey*, 721 N.W.2d at 302. We conclude the state met its burden here. The improper questioning was not pervasive; it was limited to three questions. And, although Cox did not testify, given the strength of the state’s evidence, we conclude that there is no reasonable likelihood that this brief misconduct affected Cox’s substantial rights.

¹² Intent is relevant to Cox’s assault (fear) charges under Minn. Stat. § 609.222, subd. 1. Assault fear is defined as “an act done with intent to cause fear in another of immediate bodily harm or death.” Minn. Stat. § 609.02, subd. 10 (2022).

4. Burden of Proof

Lastly, Cox argues the prosecutor committed misconduct when they allegedly shifted the burden of proof in closing argument, stating: “And when you add up all of the testimony of the witnesses here, you consider that with [girlfriend] and [homeowner], there’s one consistent story here.” Cox asserts that, by asking the jury to “add up” the testimony of the witnesses, the prosecutor misled the jury into thinking that proof beyond a reasonable doubt depends on the quantity of evidence or the number of witnesses.

Our caselaw recognizes that “[m]isstatements of the burden of proof are highly improper and would, if demonstrated, constitute prosecutorial misconduct.” *State v. Hunt*, 615 N.W.2d 294, 302 (Minn. 2000). However, “courts must look at the closing argument as a whole, rather than just selective phrases or remarks that may be taken out of context or given undue prominence to determine whether reversible error has occurred.” *State v. McDaniel*, 777 N.W.2d 739, 751 (Minn. 2010) (quotation omitted).

Cox argues the prosecutor’s statement is analogous to a metaphor offered in *State v. Trimble*. 371 N.W.2d 921, 926 (Minn. App. 1985), *rev. denied* (Minn. Oct. 11, 1985).

There, the prosecutor stated during closing arguments:

Presumption of innocence is like a blank chalkboard. There is nothing on there against the defendant, and until you go into the jury room and start determining what evidence is credible and what evidence there is against the defendant, that presumption stays with him. . . . *As more and more evidence against the defendant is found to be credible, gradually the presumption of innocence disappears.*

Id. We determined that the prosecutor’s statement was “troublesome” because “the legal standard for conviction is proof beyond a reasonable doubt, and that standard does not depend on quantity.” *Id.*

Cox argues that, like the *Trimble* metaphor, the prosecutor’s statement suggested that, once a large amount of evidence has been presented, the defendant loses the presumption of innocence. We disagree. Unlike *Trimble*, the prosecutor’s statement did not instruct the jury on the presumption of innocence; the prosecutor did not reference the burden of proof in conjunction with the remark.

Instead, we conclude the prosecutor’s statement in this case is more analogous to *Hunt*. 615 N.W.2d at 302. There, during closing argument the prosecutor “made an analogy to the ancient Greek juries, the substance of which implied that Greek juries would place a stone on either side of a scale for each successful argument by one party or the other.” *Id.* The supreme court found the analogy “questionable” but held that the argument did “not rise to the level of plain error.” *Id.* Like in *Hunt*, the prosecutor’s statement was not an attempt to instruct the jury on the burden of proof. We therefore conclude the prosecutor’s statement did not rise to the level of plain error.

C. Cumulative Error

Finally, Cox argues that he was deprived of his right to a fair trial because of the cumulative errors in the proceedings. A defendant “may be entitled to a new trial in rare cases where the errors, when taken cumulatively, have the effect of denying [the] appellant a fair trial.” *State v. Fraga*, 898 N.W.2d 263, 278 (Minn. 2017) (quotation omitted).

“When considering a claim of cumulative error, we look to the egregiousness of the errors and the strength of the State’s case.” *Id.*

In this case we identified that four errors occurred that did not affect the verdict separately—opinion testimony (possession), jail-time and probation evidence, bad-temper evidence, and opinion testimony (elements). Viewing the errors together, we reach the same conclusion. Even collectively, the errors amounted to very little of the entire trial, and other than the bad-temper evidence—to which the district court swiftly gave a cautionary instruction—the state did not rely on the improper evidence during closing argument.

Moreover, the supreme court has stated that we should be more inclined to order a new trial “in very close factual cases.” *Id.* at 279. We do not discern that we have such a case here. With regard to the assault conviction, the state presented evidence in the form of testimony from victim, homeowner, girlfriend, and four responding deputies regarding the incident. And, as described in Part I, while circumstantial, the evidence presented regarding possession of the ammunition was strong given its location in Cox’s bedroom near his possessions. Based upon this record, we cannot conclude that the errors, when considered cumulatively, denied Cox a fair trial.

Affirmed.