STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1331

State of Minnesota,
Respondent,

vs.

Brad Alan James,
Appellant.

Filed July 20, 2010
Affirmed
Connolly, Judge

Ramsey County District Court
File No. 62-CR-09-133

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Susan Gaertner, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney, Afsheen D. Foroozan, (certified student attorney), St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Bridget Kearns Sabo, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Stoneburner, Judge; and Connolly, Judge.

U N P U B L I S H E D O P I N I O N

CONNOLLY, Judge

Appellant challenges his conviction for felony domestic assault under Minn. Stat. § 609.2242, subd. 4 (2008), arguing the district court abused its discretion by admitting (1) hearsay statements for substantive purposes under the residual hearsay exception, and (2) three incidents of prior domestic abuse between appellant and his girlfriend. Appellant also asserts that statements made by the prosecutor during closing arguments amounted to prosecutorial misconduct. We conclude that the district court properly weighed the *Ortlepp* factors in considering whether to admit the statements and carefully considered which incidents of prior relationship evidence to admit and did not abuse its discretion in these evidentiary rulings. Although we conclude that the prosecutor did err in part, such error was harmless, and therefore we affirm.

FACTS

Appellant Brad Alan James was charged with one count of domestic assault by strangulation in violation of Minn. Stat. § 609.2247, subd. 2 (2008), and one count of felony domestic assault in violation of Minn. Stat. § 609.2242, subd. 4, arising out of a fight with his girlfriend, A.G., in January 2009.

On January 4, 2009, appellant and A.G. were having a dinner party at his home, where the two of them have lived together for approximately three years. A.G.'s two children also lived there, including her six-year-old daughter, S.G. The children's uncle, L.W., arrived around 5:00 p.m. A.G. tends to drink more alcohol when L.W. is around. L.W. brought a bottle of hard liquor and appellant, A.G., and L.W. all had a couple of

shots. Appellant then returned to making dinner. A.G. and L.W. subsequently left the house without telling appellant and were gone for about an hour. When they returned, A.G. was intoxicated and began searching for a bottle of brandy. Appellant and A.G. also began to argue because A.G. was not helping him make dinner.

At trial, A.G. did not have any recollection of what occurred after she and L.W. left the house up to the point that the police arrived and found her hiding from appellant in the bathroom. A.G. testified that she has an alcohol addiction and often drinks until all the alcohol is gone; she estimated that she has blacked out from drinking on more than 50 occasions since she met appellant. A.G. described her black-outs as "hav[ing] no recollection of what's happening, but [that she] is still up, still up drinking." A.G. stated that she blacked out on January 4.

Appellant testified that the fighting began to escalate. A.G. began to call appellant names and started throwing things at him, including a can of deodorant and a leaded crystal candy dish/ashtray. The candy dish/ashtray cut appellant on the nose. Appellant went downstairs to his bedroom and laid down for a little while to stop the bleeding. A.G. subsequently came running down the stairs and threw a steak knife at him. Appellant ultimately returned to the kitchen to finish making dinner. While he was mashing potatoes, A.G. came into the kitchen and continued to yell at him. Appellant reached out to block A.G. and, when he touched her, A.G. snapped and started yelling that appellant hit her. A.G. yelled for L.W. to give her his phone and appellant retreated to his bedroom, in order to separate himself from the situation. Appellant emerged once police arrived at the scene.

Although A.G. did not recall calling 911, she recognized her voice on the recording played at trial. In the recording, A.G. asked the police to come because appellant "just hit [her] hard as hell in [her] face in front of [her] children." Although she had trouble recalling details, S.G. testified that she saw appellant hit her mother.

St. Paul police officer Lynn Manning responded to A.G.'s 911 call. Over defense counsel's objection,[1] the district court permitted the state to introduce statements made by A.G. and S.G. to Officer Manning. Officer Manning found A.G. in the bathroom, holding her children. A.G. told Officer Manning that she and appellant got into an argument and that appellant started pushing her. Officer Manning testified that A.G. told him that, during the fight, appellant "grabbed her around the throat with both hands and started strangling her"; unable to breathe, A.G. took a swing at appellant in an attempt to get away. Officer Manning testified that A.G. told him appellant strangled her with both of his hands and that, while appellant was strangling her, he told her: "I'm tired of your sh--. B----, I'm going to kill you." Officer Manning also observed some red marks on the side of A.G.'s neck and some light scratches. Officer Manning took a few photographs of A.G.'s injuries, which were introduced at trial. Officer Manning testified that A.G. seemed "very scared" and that he tried to calm her down. Officer Manning did not recall if he noted it in his report, but remembered that A.G. had been drinking.

Officer Manning testified that he also spoke with S.G. S.G. told him that she saw appellant hit her mother in the face. Officer Manning asked S.G. to demonstrate what she saw, and S.G. "reached back with her closed fist and started swinging at [his] face."

[1] Trial counsel was different than appellate counsel.

Officer Manning testified that A.G.'s children appeared scared. Officer Manning also observed that appellant had a small cut above his nose, but did not take any pictures of appellant. Officer Manning did not conduct any investigation into appellant's account of what happened.

St. Paul police officer Jeffrey Schwab interviewed A.G. the morning following the assault. Over defense counsel's objection, the district court permitted the state to introduce statements made to Officer Schwab during his follow-up interview. Officer Schwab testified that, while it appeared he had just woken up A.G., she did not appear intoxicated to him. A.G. told Officer Schwab that she was hung over. A.G. told Officer Schwab that she might have provoked appellant. She also told him of the significant age difference between herself and appellant.[2] A.G. described herself to Officer Schwab as "being a little too wild for [appellant]." A.G. emphasized to Officer Schwab how big of a problem her alcohol use is. Officer Schwab testified that A.G. told him that there was some pushing; she was struck in the face with closed fists by appellant; and, when she attempted to get away, appellant squeezed her throat. Officer Schwab did not observe any visible injuries, but stated that A.G. told him that she was very tender and sore, while pointing to her head. Officer Schwab testified that A.G. did not tell him about throwing a knife or an ashtray at appellant, and he did not investigate either of these allegations.

Officer Schwab testified that he recorded his interview with A.G. The recorded interview was subsequently played for the jury. During the interview, A.G. acknowledged that they had been drinking and tried to take most of the blame. A.G. told

[2] Appellant is approximately 18 years older than A.G.

Officer Schwab that appellant strangled her, but that she was probably making it up when she reported that she felt dizzy or light-headed as a result. When Officer Schwab asked A.G. if appellant had told her that he was going to kill her this time, A.G. stated that appellant probably did not say that. A.G. also told Officer Schwab that she was likely done with her relationship with appellant.

Appellant testified that he did not strangle A.G.; did not threaten to kill her; and did not punch her in the face. Appellant testified that, as a result of being hit with the candy dish/ashtray, his face was swollen and his eye was black and swollen shut.

Over defense counsel's objection, the district court also allowed the state to introduce three prior incidents of domestic violence that had occurred between appellant and A.G. in the summer of 2007. The district court gave a cautionary instruction to the jury before this evidence was introduced, stating that it was being offered "for the limited purpose of illuminating the history of the relationship between [A.G.] and [appellant]."

A. June 9, 2007 "Casino" Incident

A.G. testified that on June 9, 2007, she went to a casino with a group of friends. Appellant did not accompany A.G. to the casino initially, but drove over after A.G. called him. At some point, appellant and A.G. were in a hotel room together. Appellant and A.G. were arguing, but A.G. did not remember much of what occurred because she was extremely intoxicated. Although she did not recall many of the details, A.G. remembered punching appellant in the eye and then being stomped on or hit. A.G. was subsequently transported to the hospital and had a CAT scan. She had some neck injuries as a result of the incident and was very sore.

Appellant testified that he thought he and A.G. were "going to fool around a little bit," but then A.G. started getting angry, hit him, and then "grabbed [his] privates and just—she just about pulled them off." Appellant acknowledged that he hit A.G. in order to get her off of him, and that A.G. rolled off the bed.

B. June 20, 2007 "Neighbor" Incident

A.G. testified that, on June 20, 2007, she and appellant began fighting in the yard, but ended up in the street. A.G. again had a hard time recalling the details, but testified that she thought that appellant pushed her. A.G. testified that she had difficulty recalling details about the last few years of her life because of her drinking problem. One of A.G.'s neighbors observed the fight and testified as to what happened. The neighbor heard A.G. screaming and walked over to find appellant kicking A.G, who was laying on the ground. Appellant stopped once the neighbor appeared. A.G. went over to the neighbor's house to use the phone to call the police. The neighbor believed A.G. had been drinking, but testified that she did not appear intoxicated.

St. Paul police officer Joshua Lego responded to the June 20th call. Although Officer Lego smelled alcohol, A.G. did not appear intoxicated to him. Officer Lego testified that A.G. told him she had been struck by appellant with his hands and feet. A.G. described being hit in the head, kicked in the hips, and pushed to the ground. Officer Lego observed some discoloration on A.G.'s hips and some red marks on one side of her body. Officer Lego also observed some physical damage to a vehicle where A.G. stated that appellant kicked the vehicle and some scuff marks on the ground.

Appellant stated that he did not disagree with the neighbor's account of what happened. Appellant admitted to kicking A.G., was not proud of his actions, and stated he was probably using drugs that day.

C. August 19, 2007 "Daughter" Incident

A.G. also testified regarding another fight she and appellant had on August 19, 2007. A.G. said she was "very drunk" that day and did not recall exactly what happened, but believed the fight had something to do with A.G. throwing a cell phone that belonged to appellant's daughter.

St. Paul police officer Paul Cottingham testified that he responded to a call regarding a woman in the street. Officer Cottingham knocked on appellant's door and A.G. answered, upset, crying, and with blood on her shirt and face. A.G. told Officer Cottingham that appellant assaulted her and started choking her, to the point that she was "seeing stars" and was afraid she was going to lose consciousness. Officer Cottingham testified that A.G. stated she was able to escape appellant by scratching him and that appellant pursued her up the stairs, taking away a cell phone and tearing it apart so that A.G. could not make a phone call. A.G. also told Officer Cottingham that appellant subsequently slammed her onto the floor. Officer Cottingham observed blood coming from A.G.'s nose and face and that she had blood on her shirt.

Officer Cottingham described the house as being in disarray. Officer Cottingham also said that A.G. was very insistent on leaving the home and so he took her to a women's shelter. Officer Cottingham did not observe any indicia of intoxication while he was assisting A.G.

Appellant stated that A.G. suddenly attacked him and was clawing his face. He recalled grabbing her by the arms and throwing her to the ground, and then taking his keys and leaving. Appellant returned briefly to pick up his daughter, who called and told him she was scared.

Appellant testified that 2007 was a chaotic year for him and that he was using methamphetamine at the time. He also testified that he pleaded guilty to two drug-related felonies. Appellant contacted Ramsey County, got himself into treatment, and has been methamphetamine-free for 18 months.

Appellant was subsequently convicted of domestic assault in violation of Minn. Stat. § 609.2242, subd. 4.[3] Appellant was sentenced to 24 months in prison. This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion when it allowed statements made by A.G. to police officers to be introduced substantively under Minn. R. Evid. 807.

"Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted). Appellant argues that the district court abused its discretion in admitting statements made by A.G. to Officers Manning and Schwab because the statements did

[3] The parties agreed to allow the jury to stop deliberating on the strangulation charge when the jury expressed that it was having trouble reaching a unanimous verdict.

not have sufficient indicia of reliability to be admitted under the residual exception to the hearsay rule articulated in Minn. R. Evid. 807.

Hearsay is a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted" and is generally not admissible unless it falls within one of several exceptions. Minn. R. Evid. 801(c), 802. Minn. R. Evid. 807 sets forth a residual exception that allows a statement not specifically covered by another exception to be admitted for substantive purposes if it bears "equivalent circumstantial guarantees of trustworthiness" and the district court determines that:

> (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Minn. R. Evid. 807. The statement may not be admitted however, "unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing, to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it." *Id.*

First, appellant claims that he did not have sufficient notice of the state's intention to offer the statements A.G. made to police officers for substantive purposes. Appellant acknowledged that he timely received the police reports made by the officers. This acknowledgment establishes that appellant received sufficient notice. *See Oliver v. State*, 502 N.W.2d 775, 778 (Minn. 1993) (holding under prior version of rule that, despite lack

of formal compliance with notice requirement, defense counsel had sufficient notice when he referred to the challenged statement in his opening statement).

Second, although conceding the district court properly considered the relevant factors for the admissibility of hearsay evidence as stated by the Minnesota Supreme Court in *State v. Ortlepp*, 363 N.W.2d 39, 44 (Minn. 1985), appellant argues the district court ultimately abused its discretion in admitting the statements. In *Ortlepp*, the supreme court identified four factors to consider when deciding whether to admit a statement under the residual hearsay exception: (1) the availability of the declarant for cross-examination; (2) the presence of proof that the prior statement was made; (3) the extent to which the statement was against the declarant's penal interest; and (4) the statement's consistency with all other evidence introduced. 363 N.W.2d at 44. In cases of domestic abuse, the third factor was modified to encompass statements made against a declarant's romantic interests. *State v. Plantin*, 682 N.W.2d 653, 659 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004). Notably, these factors are not "all-encompassing," and the district court must review the totality of the circumstances to determine whether the statement has sufficient guarantees of trustworthiness. *State v. Martinez*, 725 N.W.2d 733, 737 (Minn. 2007). The first factor does not appear to be in dispute as A.G. testified at trial.

When considering whether to admit statements made by A.G. to Officer Manning, the district court concluded that the remaining three *Ortlepp* factors were satisfied because Officer Manning's own testimony would provide proof that the statement was made; the statement was against A.G.'s romantic interest on the date it was made and the

fact that she was living with appellant at the time; and the statement was consistent with photographic evidence showing red marks on A.G.'s neck.

Appellant concedes that A.G.'s statements to Officer Manning were material and probative and does not appear to dispute that A.G. talked with Officer Manning. *See* Minn. R. Evid. 807. Appellant argues that there was no evidence to support the trial court's conclusion that A.G.'s statements were against her romantic interests because A.G. did not testify that she was attempting to reconcile with appellant. But, as the state points out, A.G. was living with appellant at the time she talked with Officer Manning and had been his girlfriend for approximately four years. Appellant also argues that the statements were only consistent with some of the evidence.

The district court used the same bases in allowing the state to introduce statements made by A.G. to Officer Schwab and the recorded interview. The district court also emphasized that the reliability of A.G.'s statement was enhanced because "[h]er exculpatory testimony at trial contradicted her statement to the police at the time of the interview, the day after the incident." Appellant reiterates the same arguments as to the statement's trustworthiness and argues that only one of A.G.'s statements to the officers can be more probative than the other. *See* Minn. R. Evid. 807 (requiring the district court to determine whether "the statement is more probative on the point for which it is offered than *any other evidence* which the proponent can procure through reasonable efforts (emphasis added)).

Appellant's overarching argument appears to be that neither statement was sufficiently trustworthy under the totality of the circumstances based on A.G.'s own

testimony that, when she drinks, she tends to exaggerate; she was intoxicated on January 4, 2009; and she did not in fact recall speaking with Officer Manning. A.G. expressly stated: "I don't really know what I'm like when I'm drunk because I usually can't remember, but I don't usually like what I do when I'm drinking."

Although we are troubled by A.G.'s testimony that she was unable to recall what she said to Officer Manning because she was so intoxicated and that she did not remember speaking with Officer Manning, we conclude that the district court properly considered the *Ortlepp* factors for each statement. There was proof that A.G. made each statement; A.G. was in a relationship with appellant and living with him at the time of the incident and when the statements were made; and the statements appear consistent with other evidence, including S.G.'s testimony and the photographs showing red marks on A.G. Furthermore, "[t]he weight and credibility of the testimony of individual witnesses is for the jury to determine." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). Appellant was free to argue that A.G.'s trial testimony was more truthful than her initial statements to police. Moreover, the record appears to reflect that the jury questioned A.G.'s credibility when it expressed that it was having trouble reaching a unanimous verdict as to whether appellant had in fact strangled A.G., which A.G. initially told Officer Manning.

Finally, appellant does not provide any authority for his narrow reading of Minn. R. Evid. 807 and argument that only one of the officers should have been allowed to testify regarding A.G.'s statement, and caselaw suggests otherwise. *See State v. Jones*, 755 N.W.2d 341, 352-53 (Minn. App. 2008) (concluding testimony from the mother of

defendant's girlfriend, defendant's probation officer, and the investigating officer regarding statements made by defendant's girlfriend were all properly admitted under Minn. R. Evid. 807), *aff'd*, 772 N.W.2d 496 (Minn. 2009). Therefore, although this is a close case, the district court did not abuse its discretion in admitting the statements under Minn. R. Evid. 807.

II. The district court did not abuse its discretion when it admitted evidence of prior acts of domestic abuse committed by appellant against A.G.

Under Minnesota law,

> [e]vidence of similar conduct by the accused against the victim of domestic abuse . . . 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.

Minn. Stat. § 634.20 (2008). Such evidence "may be offered to illuminate the history of the relationship, that is, to put the crime charged in the context of the relationship between the two." *State v. McCoy*, 682 N.W.2d 153, 159 (Minn. 2004). Prior relationship evidence can also "assist[] the jury by providing a context with which it c[an] better judge the credibility of the principals in the relationship." *Id.* at 161. A district court's admission of prior domestic abuse by the accused against the alleged victim is also reviewed for an abuse of discretion. *Id.*

Appellant argues that the district court abused its discretion in admitting three prior incidents of domestic abuse between A.G. and appellant in the summer of 2007 because the evidence was unduly prejudicial, confusing, and cumulative. Appellant also appears to take issue with the district court's failure to fully articulate its reasoning on the

record and contends that a linguistic slip by the district court "reflects [the district court's] lack of care regarding this important evidence."

We first address appellant's insinuation that the district court did not take sufficient care in considering the prior relationship evidence. After citing to Minn. Stat. § 634.20 and relevant caselaw, the district court stated the following:

> Cautionary instructions generally mitigate any unfairly prejudicial impact of the prior incidents. So I am going to exclude the January 17th, '07 incident for which there is not a conviction because I believe the probative value is not substantially outweighed—I mean because the probative is not substantially outweighed by the danger of unfair prejudice.
>
> But I think the other incidents from June 9th, June 20th, and August 19th are all admissible *because the probative value is substantially outweighed by the danger of prejudice*, etc.

(Emphasis added.) We note that this ruling came after the district court took a break over the lunch hour in order to reread the statute before ruling. The record appears to reflect nothing more than an accidental slip of the tongue by the district court. Additionally, the district court was not required to engage in an on-the-record analysis. *State v. Bell*, 719 N.W.2d 635, 640 (Minn. 2006) (stating district court's decision to admit two incidents of prior domestic abuse while excluding two others "because they were 'probably . . . more prejudicial than probative'" indicated district court properly considered the evidence's probative value balanced against the danger of unfair prejudice).

We now turn to the prior relationship evidence. Appellant conceded that the evidence had "some probative value" at the pretrial hearing. Appellant argues, however, that the prior relationship evidence was unduly prejudicial because it required additional

witnesses and took up a substantial amount of time at trial. The record reflects that while A.G. had some recollection of the June 20 and August 19 incidents, she had difficulty remembering the details. This court has previously held that more extensive relationship evidence is properly admitted when it assists the jury in providing context for the charged offense and the victim's trial testimony was contrary to the victim's prior statements to investigators. *State v. Lindsey*, 755 N.W.2d 752, 757 (Minn. App. 2008) (noting district court's observation that it had allowed in "a significant amount of evidence" regarding two incidents and concluding relationship evidence was properly admitted because it gave context to the jury, which was particularly important given defendant's decision not to testify and victim's contradictory trial testimony), *review denied* (Minn. Oct. 29, 2008).

Furthermore, the district court's assessment of whether the evidence was unduly prejudicial was not simply confined to whether the evidence was damaging to appellant, but whether the evidence persuaded the jury by *illegitimate* means, giving the state an unfair advantage. *Bell*, 719 N.W.2d at 641. The record reflects that each time the state introduced prior relationship evidence, the district court paused to give the jury a limiting instruction:

> Members of the jury, the state is about to introduce evidence of an occurrence on [prior incident date]. This evidence is being offered for the limited purpose of illuminating the history of the relationship between [A.G.] and [appellant] and assisting you in determining whether [appellant] committed those acts arising from conduct on or about January 4, 2009.
>
> [Appellant] is not being tried for and may not be convicted of any offense other than the charged offenses.

> You are not to convict [appellant] on the basis of an occurrence on [prior incident date]. To do so will result in an unjust double punishment.

The district court gave a nearly identical instruction to the jury six times during trial and again as part of its final instructions to the jury. As a result, the district court minimized any potential prejudice to appellant. *See Lindsey*, 755 N.W.2d at 757 (concluding fact that district court gave the jury a limiting instruction regarding the relationship evidence several times throughout trial lessened the likelihood of the jury according undue weight to the evidence).

Therefore, because the evidence helped the jury to put appellant and A.G.'s relationship in context and because the record reflects that the district court carefully considered which incidents to admit based on an assessment of the incident's probative value versus the danger of unfair prejudice, we conclude that the district court did not abuse its discretion in admitting three incidents of prior relationship evidence involving appellant and A.G. under Minn. Stat. § 634.20. Additionally, any potential prejudicial effect was minimized by the district court's numerous instructions.

III. Although the prosecutor did err during closing arguments, such error was harmless, and the majority of the statements challenged by appellant did not amount to prosecutorial misconduct.

Appellant also argues that the prosecutor committed misconduct during closing arguments by inflaming the passions of the jury, vouching for S.G., and misstating the evidence. Appellant objected to only some of the prosecutor's statements. Objected-to prosecutorial misconduct is reviewed under a "higher standard of harmless error, requiring that the error be harmless beyond a reasonable doubt, and [appellate courts]

examine whether the verdict was surely unattributable to the misconduct." *State v. Wren*, 738 N.W.2d 378, 393-94 (Minn. 2007) (quotation omitted). Unobjected-to prosecutorial misconduct is reviewed for plain error. *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). Notably, before the closing arguments began, the district court instructed the jury that the lawyers' arguments were not evidence.

A. Domestic Violence as a Crime Against Society

Shortly after beginning closing arguments to the jury, the prosecutor stated:

> PROSECUTOR: Now, domestic violence affects not only the abuser and the victim, but also the children, the friends, the family, the neighbors. And that ripple effect is that it affects all of our lives—
> DEFENSE COUNSEL: Objection, Your Honor.
> PROSECUTOR: —as members of society.
> DISTRICT COURT: Sustained.
> PROSECUTOR: And so the state steps in and takes responsibility of prosecuting these crimes because it is not just a crime involving two people. It's a crime against our society.
> DEFENSE COUNSEL: Objection, Your Honor.
> DISTRICT COURT: Sustained.
> DEFENSE COUNSEL: Your Honor, move to strike.
> DISTRICT COURT: That will be stricken.

Defense counsel did not request, nor did the district court give, any follow-up instruction to the jury. Appellant argues these statements were an improper appeal to the jury to convict appellant out of a sense of duty.

A prosecutor may discuss the "generally tragic nature of domestic abuse" while urging the jury not to look away from the facts and render a true verdict against the defendant. *State v. Bradford*, 618 N.W.2d 782, 799 (Minn. 2000). A prosecutor may not, however, "appeal to the jury's passion and then urge them to reach the right verdict." *Id.*

(citing *State v. Porter*, 526 N.W.2d 359, 365 (Minn. 1995)). "[T]he jury's role is not to enforce the law or teach defendants lessons or make statements to the public or to 'let the word go forth'. . . ." *State v. Salitros*, 499 N.W.2d 815, 819 (Minn. 1993). We conclude that the prosecutor committed misconduct by directing the jury's attention away from this particular case and attempting to refocus it on the broader societal implications of domestic abuse as a crime against "us," as a society. *See State v. Peterson*, 530 N.W.2d 843, 848 (Minn. App. 1995) (concluding prosecutor's argument to jury that "you can't turn your back on these children" in child sex abuse case was improper because it had the inevitable result of "dr[awing] the jury's attention away from the particular facts of the case to broader societal problems"). Because appellant objected to the prosecutor's remarks, this court applies a harmless-error-beyond-a-reasonable-doubt analysis. *Wren*, 738 N.W.2d at 393-94.

When considering whether the error was harmless beyond a reasonable doubt, appellate courts look to several factors: "how the improper evidence was presented, whether the state emphasized it during trial, whether evidence was highly persuasive or circumstantial, and whether the defendant countered it." *Id.* at 394. The strength of the evidence against the defendant is also considered. *Id.* While the prosecutor erred in making these statements, we conclude that the error was harmless. As the state points out, these statements comprised a few lines of the prosecutor's approximately 20-page closing argument, and were not particularly persuasive on the central question of whether appellant had committed the charged offenses. Appellant also countered the statements by objecting and asking that they be stricken from the record, which the district court

granted. And while the evidence against appellant does not appear to be especially strong in this case given A.G.'s difficulties in recalling what happened, there was substantial evidence against appellant given the testimony of S.G. and the officers; photographs of A.G.'s injuries; and history of appellant and A.G.'s volatile relationship. It appears to us that the jury's verdict was "surely unattributable" to the prosecutor's improper statements. *See id.* (quotation omitted).

B. Vouching for the Credibility of S.G.

Next, appellant takes issue with statements made by the prosecutor regarding the testimony of A.G.'s six-year-old daughter, S.G.:

> And realize that these little kids lack any motivation, any real ability under those circumstances to say anything other than what actually happened. They have no personal interest or knowledge of consequences. You saw [S.G.]. She is a very sweet little girl, but mature and able to manipulate facts. In those circumstances she was not and the officer found that to be the case, as well.

Appellant did not object to this statement at trial and argues on appeal that the prosecutor vouched for the credibility of S.G.

"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 (Minn. 1998) (quotation omitted). A prosecutor may not personally endorse the credibility of a witness. *Porter*, 526 N.W.2d at 364. But a prosecutor may vigorously argue a witness's credibility. *State v. Googins*, 255 N.W.2d 805, 806 (Minn. 1977). As appellant concedes, the prosecutor's statement does not contain any sort of personal testimonial that S.G. was credible.

In *State v. Swanson*, the Minnesota Supreme Court distinguished between two types of argument used by the prosecutor at summation when discussing witness credibility. 707 N.W.2d 645, 656 (Minn. 2006). For some witnesses, the prosecutor stated they were "very believable." *Id.* "Later, the prosecutor stated, . . . 'The state believes [this witness] is very believable, primarily because her case is done.'" *Id.* The supreme court concluded the first statements were permissible argument, but the second statement was improper because the prosecutor directly endorsed the credibility of the witness. *Id.* In this case, the prosecutor's statements regarding S.G. are more like the first statements in *Swanson* and were not a direct endorsement of S.G.'s credibility. We conclude that these statements did not amount to prosecutorial misconduct.

C. Misstating the Evidence

Finally, appellant argues that the prosecutor misstated the evidence to the jury twice during summation. "A prosecutor's closing argument should be based on the evidence presented at trial and inferences reasonably drawn from that evidence." *State v. DeWald*, 463 N.W.2d 741, 744 (Minn. 1990). However, prosecutors are also "free to make arguments that reasonably anticipate arguments defense counsel will make." *Salitros*, 499 N.W.2d at 818.

During her closing, the prosecutor stated:

> And then Officer Manning talked to [A.G.] about strangulation, and she told him that she was strangled, both sides of her throat with both hands. She told him she couldn't breathe. She told him she lost bladder control. And the next morning, though, she stated that may have also been just from fear.

Appellant objected that this argument misstated the evidence and the district court ruled that it would let the jury determine the issue. Although appellant argues these statements have no support in the record, Officer Manning testified that he believed that A.G. told him that she lost bladder control while she was being strangled and that A.G. feared appellant was going to kill her, and, during Officer Schwab's testimony, the jury heard the interview in which Officer Schwab asked A.G. if she lost bladder control and she stated that she did not remember that happening. It does not appear that the prosecutor intentionally misstated the evidence, but instead, as argued by the state, misstated the order in which these events occurred when summarizing the evidence. Moreover, the fact that the parties agreed to let the jury stop deliberating on the strangulation charge after the jury expressed that it had difficulty reaching a unanimous decision also tends to suggest that appellant was not prejudiced by any misstatement by the prosecutor. *See DeWald*, 463 N.W.2d at 745 (stating fact that jury acquitted defendant of one count of first-degree murder indicated jury was not unduly inflamed by prosecutor's improper statements).

Appellant also argued that the prosecutor erred when she stated that "[a]nd clearly the injury to defendant's nose is a defensive wound. I mean, [A.G.] is a foot shorter than him. To throw something at him, an ashtray, whatever, would be very difficult, you know, given that we have our hands to block whatever is coming at us." Appellant did not object to this statement at trial. While appellant again argues that this is not supported by the record, appellant himself testified that A.G. threw a candy dish/ashtray at him and it hit him in the nose, causing him to bleed. Officer Manning also testified

that the cut was consistent with A.G.'s statement that she was wearing a ring and swung at appellant in order to get away from him. During its closing arguments, defense counsel argued that appellant was injured when A.G. threw the object at him and also argued that A.G. hit appellant in the face. The prosecutor was simply arguing in anticipation of defense counsel's closing argument. *See Salitros*, 499 N.W.2d at 818.

In sum, the prosecutor's statement that domestic violence was a crime against society was in error, but the record reflects that the error was harmless because it was only a small part of the overall argument; was not particularly persuasive; was stricken from the record; and was countered by the balance of evidence against appellant. Appellant's contentions that the prosecutor improperly vouched for S.G. and misstated the evidence are without merit because the prosecutor did not personally endorse the credibility of S.G. and the other arguments were reasonable inferences from the evidence in the record and in anticipation of the arguments presented by defense counsel at closing.

Affirmed.