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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A12-0012**

State of Minnesota,  
Respondent,

vs.

Michael Sherman,  
Appellant.

**Filed February 4, 2013  
Affirmed  
Hooten, Judge**

Ramsey County District Court  
File No. 62-CR-11-566

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

John Choi, Ramsey County Attorney, Kaarin Long, Assistant County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Connolly, Judge; and Hooten, Judge.

**UNPUBLISHED OPINION**

**HOOTEN**, Judge

Appellant, who was convicted of second-degree unintentional felony murder, argues that he was denied a fair trial because: (1) the district court erred in giving a

defense-of-dwelling jury instruction that addressed an intentional killing of a victim when appellant claimed the killing was unintentional; (2) the district court refused to allow cross-examination of a witness about his prior acts of dishonesty and untruthfulness; and (3) there was prosecutorial misconduct. We affirm.

## **FACTS**

Before January 20, 2011, appellant lived in the same building as L.K.S. and may have had a sexual relationship with her that included the exchange of money. Because appellant was deaf, he and L.K.S. communicated by exchanging written messages. On the evening of January 20, 2011, appellant paid for sex with L.K.S. Sometime later, during the early morning hours of January 21, 2011, appellant was awakened by L.K.S., who, appearing aggressive and restless, pushed her way into his apartment and began pacing around. L.K.S. initiated communication by writing “fall on the bus,” and appellant responded by telling her to leave so he could sleep. According to appellant, L.K.S. interpreted this communication as an invitation to go to bed with her and she took off her pants. Appellant indicated that he did not want sex, but L.K.S. offered to have sex with him for \$20. Appellant gestured for her to leave, but L.K.S. offered sex for \$10, and appellant accepted. L.K.S. then began to perform oral sex upon appellant, but appellant indicated that he wanted to stop, retrieved \$10 from his wallet to pay her, and again gestured for her to leave. L.K.S. then became enraged and began yelling. While appellant was still holding the money in his hand, L.K.S. aggressively pointed to his wallet in a manner indicating that she wanted something from inside. L.K.S. then wrote “my hus bush is a poly.” She then attempted to grab the \$10 from him, but in doing so,

pulled his arm, causing him to have pain from an old elbow injury. Appellant then handed her the money.

L.K.S. continued to pace around aggressively without leaving and asked him for more money from his wallet. Appellant testified that he was frightened and recalled a prior occasion when she punched him. He further testified that L.K.S. quickly approached him and tried to grab his wallet from his pants that were located next to him on the floor. Appellant explained that he then picked up a bat trying to defend himself. He stated that she was “physically upon me” and that, with the bat in one hand, he pushed her away with his other hand and also swung the bat, causing her to fall, saying “that’s enough.” He claimed he hit her “[m]aybe two really quickly, two fast times.” He stated that she was standing “right up close to me when I swung the bat, and it hit her right here on the left side of her head near the eye.” He also explained that she fell backwards after he hit her near her eye with the first blow, and that he swung again at her mouth or jaw. He denied hitting her a third time.

Appellant then ran out of his apartment and knocked on his neighbor’s door to ask her to call 911. When the neighbor answered, appellant signed for help in American Sign Language (ASL), asked that the neighbor call for help and that she come with him to his apartment. When a police officer arrived on the scene, appellant again signed for help. The paramedic who next arrived on scene testified that L.K.S. was lying supine with a pool of blood in her mouth and appeared to be dead. Other first responders testified that L.K.S. was in a seated position with no clothes from the waist down, but some witnesses also testified that L.K.S. was lying while straddling a stool and that it appeared as if she

had fallen off of the stool. Appellant was transferred to the homicide unit at police headquarters and was placed in a conference room, where he gestured, to no one in particular: “She’s crazy. She wanted money. I planned to give it to her, but she wanted more.” It was also noted that appellant signed that he “hit that person . . . with a closed fist,” that he felt “like a fool,” that there was some sort of oral sex act, and that he pushed someone away and hit her.

Photos of L.K.S.’s face showed that she had a swollen eye, lacerations around the left eye and cheek, and lacerations and abrasions on the lip and chin. An autopsy revealed that she had fractures on the left side of her nose and jaw. Her upper lip had a gap where teeth were dislodged from the upper right side of her mouth due to significant force. The collective injuries to her face resulted in extreme deformity to the left side of her face and bruising from the front to back of her neck. Significant internal injuries were found as well, including hemorrhages within the left side of her neck and back of the brain near the neck and a fracture to the hyoid bone behind the jaw. There was also a tear in her left vertebral artery where the skull and vertebral column meet. The state’s forensic pathologist examined the bat retrieved by the police and observed smears and splatters of blood, as well as indentations around the blood which were consistent with tooth imprints.

Based on an autopsy evaluation, the medical examiner opined that L.K.S. received at least three blows: to the left front part of the mouth and chin, to the left side of the eye, and to the left lateral region of the neck. A possible defensive wound was also observed in the form of an abrasion on the left forearm and chest. The medical examiner indicated

that his evaluation revealed that L.K.S. had used potentially fatal amounts of cocaine, which she took shortly before her death. However, according to the medical examiner, the cause of her death was “blunt force trauma to the head and neck,” which caused a tearing of the left vertebral artery.

Appellant was charged with one count of second-degree intentional murder in violation of Minn. Stat. § 609.19, subd. 1(1) (2010), and one count of second-degree unintentional felony murder in violation of Minn. Stat. § 609.19, subd. 2(1) (2010). The jury acquitted appellant of second-degree intentional murder, but found that he was guilty of second-degree unintentional felony murder. Appellant challenges his conviction for second-degree unintentional felony murder.

## **D E C I S I O N**

### **1. Jury Instructions**

Appellant argues that the district court committed plain error by instructing the jury using the following defense-of-dwelling instruction:

No crime is committed when a person takes the life of another person, even intentionally, if the Defendant’s act was taken in preventing the commission of a felony in the Defendant’s dwelling. A dwelling means a building used as a permanent or temporary residence. In order for a killing to be justified for this reason, three conditions must be met. First, the Defendant’s action was done to prevent the commission of a felony in the dwelling. The felonies here are attempted simple robbery and first degree burglary.

Second, the Defendant’s judgment as to the gravity of the situation was reasonable under the circumstances. Third, the Defendant’s election to defend his dwelling was such as a reasonable person would have made in light of the danger perceived. All three conditions must be met. The Defendant

has no duty to retreat. The state has the burden of proving beyond a reasonable doubt that the Defendant did not act in self-defense.

This instruction, derived from 10 *Minnesota Practice*, CRIMJIG 7.05 (2006), and Minn. Stat. § 609.065 (2010), was provided at appellant's request and over objection from the state. After beginning deliberation, the jury sent a question to the district court regarding the defense-of-dwelling instruction, referencing the state's burden to overcome beyond a reasonable doubt appellant's claim of self-defense and asking if self-defense means defense-of-dwelling or person. In response, the district court instructed the jury that the last line of the defense-of-dwelling instruction should refer to defense-of-dwelling, and not self-defense.

“District courts have broad discretion in selecting the language of jury instructions, so long as the instructions do not materially misstate the law.” *State v. Penkaty*, 708 N.W.2d 185, 207 (Minn. 2006). “A district court errs in instructing the jury if the challenged jury instruction confuses, misleads, or materially misstates the law.” *State v. Larson*, 787 N.W.2d 592, 601 (Minn. 2010). “[W]hen instructing on self-defense, courts must use analytic precision.” *State v. Hare*, 575 N.W.2d 828, 833 (Minn. 1998) (quotation omitted).

This court reviews “a district court’s decision to give a requested jury instruction for an abuse of discretion.” *State v. Carridine*, 812 N.W.2d 130, 142 (Minn. 2012). “Under the invited error doctrine, a party cannot assert on appeal an error that he invited or that could have been prevented at the district court.” *Id.* “The invited error doctrine does not apply . . . if an error meets the plain error test.” *Id.* “[A] failure to object will

not cause an appeal to fail if the instructions contain plain error affecting substantial rights or an error of fundamental law.” *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). The plain-error doctrine is satisfied by ““(1) error; (2) that is plain; and (3) the error must affect substantial rights.”” *State v. Barrientos-Quintana*, 787 N.W.2d 603, 611 (Minn. 2010) (quoting *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). If these prongs are met, a reviewing court must address whether “the fairness, integrity, or public reputation of the judicial proceeding is seriously affected.” *Id.* (quotation omitted).

Section 609.06, subdivision 1 (2010), provides that

[R]easonable force may be used upon or toward the person of another without the other’s consent . . . (4) when used by any person in lawful possession of real or personal property, or by another assisting the person in lawful possession, in resisting a trespass upon or other unlawful interference with such property.

In contrast:

The intentional taking of the life of another is not authorized by section 609.06, except when necessary in resisting or preventing an offense which the actor reasonably believes exposes the actor or another to great bodily harm or death, or preventing the commission of a felony in the actor’s place of abode.

Minn. Stat. § 609.065. CRIMJIG 7.05, which is captioned “Justifiable Taking of Life,” is modeled after this latter section.

On appeal, contrary to his position at trial, appellant argues that the district court should not have instructed the jury under CRIMJIG 7.05. Instead, appellant argues, the district court should have instructed the jury based on section 609.06, subdivision 1(4),

on which 10 *Minnesota Practice*, CRIMJIG 7.06 (2006) is based. CRIMJIG 7.06, captioned “Self-Defense—Death Not the Result,” provides:

The defendant is not guilty of a crime if the defendant used reasonable force against \_\_\_\_\_ to resist (or to aid \_\_\_\_\_ in resisting) an offense against the person, and such an offense was being committed or the defendant reasonably believed that it was.

It is lawful for a person, who is being assaulted and who has reasonable grounds to believe that bodily injury is about to be inflicted upon the person, to defend from an attack. In doing so, the person may use all force and means that the person reasonably believes to be necessary and that would appear to a reasonable person, in similar circumstances, to be necessary to prevent an injury that appears to be imminent.

The kind and degree of force a person may lawfully use in self-defense is limited by what a reasonable person in the same situation would believe to be necessary. Any use of force beyond that, is regarded by the law as excessive.

The State has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense.

Appellant claims that this instruction would have been more appropriately tailored to his claim that he did not intend to kill L.K.S., but was only defending personal property in his dwelling from a trespasser. He maintains that in so doing, all that the law requires, as is set forth in section 609.06, subdivision 1(4), is that he use “reasonable force . . . in resisting a trespass upon or other unlawful interference with” his real or personal property.

Appellant cites to an array of cases in which it has been held that, when a defendant is claiming an unintentional killing in self-defense, the district court erred in

instructing the jury under the justifiable-taking-of-life instruction set forth in CRIMJIG 7.05. See, e.g., *Carradine*, 812 N.W.2d at 143–44; *Hare*, 575 N.W.2d at 832–33; *State v. Robinson*, 536 N.W.2d 1, 2–3 (Minn. 1995); *State v. Marquardt*, 496 N.W.2d 806 (Minn. 1993); see also *State v. Fidel*, 451 N.W.2d 350, 355 (Minn. 1990). However, with the exception of *Hare*, these cases involved only claims of an accidental or unintentional killing in self-defense, not defense-of-dwelling claims. While the defendant in *Hare* asserted a defense-of-dwelling claim, it was held that the defendant was not entitled to an instruction on that defense since the victim was not an intruder, but actually lived in the dwelling with the defendant. 575 N.W.2d at 832. In all of these cases, the supreme court found that while the district court may have committed plain error in instructing the jury under CRIMJIG 7.05, rather than CRIMJIG 7.06 or a modified version of CRIMJIG 7.06, such error was harmless. In *State v. Sanders*, 376 N.W.2d 196, 200–01 (Minn. 1985), an appeal from a second-degree felony murder conviction in which the defendant claimed he acted in self-defense but did not intend to kill the victim, the appellate court held that the district court’s instruction under CRIMJIG 7.05 was a “technical deficiency in the self-defense instruction” that was non-prejudicial.

A defense-of-dwelling claim is similar, but not identical, to a claim of self-defense. *State v. Carothers*, 594 N.W.2d 897, 900 (Minn. 1999) (“[D]efense of dwelling and self-defense have not been clearly distinguished in Minnesota caselaw.”). Generally, if a person has a reasonable fear of great bodily harm or death from another, that person may use reasonable force against the aggressor to resist such attack. *State v. Johnson*, 719 N.W.2d 619, 629 (Minn. 2006). Unless one is attacked in his dwelling, the “legal

excuse of self-defense . . . includes the duty to retreat or avoid the danger if reasonably possible.” 10 *Minnesota Practice*, CRIMJIG 7.08 (2006); *see also State v. Morrison*, 351 N.W.2d 359, 362 (Minn. 1984). Unlike the theory of self-defense outside one’s dwelling, there is no duty to retreat if such attack upon a person or commission of a felony takes place in the dwelling. *State v. Glowacki*, 630 N.W.2d 392, 399–402 (Minn. 2001); *Carothers*, 594 N.W.2d at 899–904. The right of self-defense in one’s dwelling is broader in that it includes not only the right to use reasonable force to defend oneself from “great bodily harm or death,” but also the right to use reasonable force “to defend against the commission of a felony” in his or her dwelling. *State v. Pendleton*, 567 N.W.2d 265, 269 (Minn. 1997).

[R]easonable force may be used when a person reasonably believes that he or she is resisting an offense against a person or a trespass upon lawfully held property. This ‘reasonable force’ includes deadly force only when the offense against a person involves great bodily harm or death or is used to prevent the commission of a felony in one’s home.

*Id.* at 268; *see also* Minn. Stat. § 609.065.

Here, appellant requested the defense-of-dwelling portion of the justifiable-taking-of-life instruction in CRIMJIG 7.05. The state objected, but the district court granted the instruction and explained that it believed that it was “the [c]ourt’s responsibility to instruct the jury on the law to be applied in the case as it relates to the facts.” Appellant testified that L.K.S. “was very aggressively approaching” him and trying to “grab the wallet out of [his] pants” while he was “trying to push her back.” As he was trying to get her away, he “picked up the bat.” Appellant then claimed that he “pushed her away” with

his other hand and then “swung the bat” “two fast times,” making contact with her head. The state’s primary claim was that appellant’s killing of L.K.S. was intentional, that the killing was unreasonable and that it did not meet the criteria required for a justifiable taking of a life. Appellant claimed that the killing was unintentional and that the force used to resist the robbery and burglary by L.K.S. was reasonable.

Since appellant invited the district court to give CRIMJIG 7.05, we must review the district court’s decision to give the instruction under the invited-error doctrine unless the error was plain and affected appellant’s substantial rights. *See Carridine*, 812 N.W.2d at 142–43; *State v. Dolbeare*, 511 N.W.2d 443, 446 (Minn. 1994) (“Failure to challenge a jury instruction at trial waives the right to appeal that issue unless the error is one of fundamental law and results in substantial and material prejudice to a defendant’s rights.”). Appellant, then, has the “heavy burden” of showing that any such error was prejudicial. *Carridine*, 812 N.W.2d at 143 (quotation omitted).

Based upon the record, appellant has failed to meet his burden under the plain-error test. Throughout most of the trial, the main point of controversy was whether appellant used unreasonable force in taking actions that led to L.K.S.’s death. The evidence regarding the events just prior to the killing of L.K.S. consisted of appellant’s indication that the killing occurred in response to L.K.S.’s attempt to rob him in his dwelling. Appellant argued that the killing was justified since it was done to prevent the commission of a felony in the dwelling. Thus, under CRIMJIG 7.05, if the killing was done to prevent a robbery and burglary, if appellant’s judgment as to the gravity of the situation was reasonable under the circumstances, and if appellant’s election to defend his

dwelling was such as a reasonable person would have made, the killing would have been justified under the law, regardless of whether it was intentional or unintentional. Appellant has not shown that CRIMJIG 7.05 is a misstatement of the law as applied to his defense-of-dwelling defense because such instruction is consistent with the facts and appellant's defense. *See Pendleton*, 567 N.W.2d at 270 (“A defendant is entitled to an instruction on his theory of the case if there is evidence to support it.”). Under these circumstances, we conclude that appellant has failed to show that the district court's use of CRIMJIG 7.05 was an abuse of discretion or that the instruction misstated the law.

Even if the district court erred by giving CRIMJIG 7.05 rather than CRIMJIG 7.06, we conclude that appellant has not met his burden of proof to show that he was prejudiced. Jury instructions are to be evaluated as a whole to determine whether they fairly and adequately explain the law. *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988). Here, the district court instructed the jury regarding the elements for both murder in the second degree under Minn. Stat. § 609.19, subd. 1(1), which included a requirement that the state prove that the killing was intentional, and murder in the second degree under Minn. Stat. § 609.19, subd. 2(1), which did not require proof of intent to kill. The jury acquitted appellant of second-degree intentional murder but found him guilty of unintentional murder after being instructed by the district court that appellant was justified in using deadly force under the criteria set forth in the defense-of-dwelling instruction. *See Hare*, 575 N.W.2d at 833 (concluding that the erroneous use of CRIMJIG 7.05 was harmless error based on the “determination, after a thorough review of the record, that the jury understood that it should acquit Hare if it believed that he

acted reasonably”). Appellant is not able to show that the jury was confused or misled by the district court’s instructions. Given the state’s primary contention that appellant used unreasonable force in killing L.K.S., appellant was not prejudiced by the district court’s instruction regarding the circumstances under which such killing was justified.

## **2. Minn. R. Evid. 608(b)**

Appellant claimed that the district court erred in refusing to allow him to impeach one of the state’s witnesses, a sergeant who was the principal investigator, with evidence of two disciplinary proceedings against the sergeant in 2000 and 2002. In the first incident, the sergeant violated department policy when he used funds obtained in a narcotics-related arrest for a controlled buy in a sting operation and then falsely reported that the replaced funds were the original funds obtained as a result of the arrest. In the second incident, the sergeant was disciplined for pressuring a known drug dealer to submit to a search during a traffic stop without reading the form “consent to search” advisory and then failing to handle money found in the vehicle in accordance with department procedures. Appellant claimed that under Minn. R. Evid. 608(b), these instances of misconduct were admissible to attack the sergeant’s credibility and truthfulness.

The district court denied appellant’s request to cross-examine the sergeant about these particular instances of misconduct, reasoning that there had “not been a showing that there [was] any issue regarding the witness’ character for truthfulness as it relates to this case.” While there were inconsistencies in the sergeant’s testimony about the number of blows to the head received by L.K.S. as relayed to him by the medical

examiner, there was no showing that this testimony evinced any possibility of untrustworthiness, or that the purpose of the sergeant's testimony was to establish the number of blows to the head that L.K.S. received. Rather, the purpose of the sergeant's testimony was to set up an overview of his investigation. The sergeant also testified that there was no discrepancy between a timeline provided by the apartment manager and a surveillance video of the apartment complex. Later in his testimony, he clarified that he only reviewed the surveillance video, and that his earlier testimony was based on the assumption that the surveillance video was "a timeline depicted by video." In addition, the district court, while conceding that the 2000 incident was indicative of untruthfulness, noted that the incident was over ten years old and that there must be some limit to the use of such information. Relative to the 2002 incident, the district court ruled that it was not probative of truthfulness or untruthfulness, but only showed that the sergeant had failed to follow departmental procedures.

"Evidentiary rulings rest within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003); *see also State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007) ("[P]rior misconduct, other than conviction of a crime, may be admissible for the purpose of attacking the witness's credibility if the prior misconduct is probative of untruthfulness."). Acts of dishonesty and lying may be proper subjects of impeachment under rule 608(b). *See State v. Haynes*, 725 N.W.2d 524, 531 (Minn. 2007) (concluding that district court did not abuse its discretion in permitting state to cross-examine defendant about two instances of being untruthful to police under rule 608(b)); *Johnson v.*

*Washington Cnty.*, 506 N.W.2d 632, 638 (Minn. App. 1993) (concluding that the district court did not abuse its discretion by admitting evidence of prior conduct, under rule 608(b), that witness lied about being able to meet with a supervisor and hid in a bathroom to avoid meeting with an attorney), *aff'd*, 518 N.W.2d 594 (Minn. 1994).

We conclude that appellant failed to show that the district court clearly abused its discretion in refusing to allow appellant to cross-examine the sergeant regarding these two disciplinary proceedings. The district court properly considered the admission of such evidence under Minn. R. Evid. 608(b) and 403. In so doing, the district court did not abuse its discretion in finding that evidence of the 2000 and 2002 disciplinary proceedings had limited or no probative value relative to the sergeant's character for untruthfulness. Any limited probative value in admitting this evidence was outweighed by the substantial risk that the jury's consideration of such evidence would have resulted in confusion of the issues or misled the jury "without any significant corresponding benefit to the truth-seeking process." *See State v. Patterson*, 329 N.W.2d 840, 841 (Minn. 1983); Minn. R. Evid. 403. This is particularly true here, because the evidence regarding the number of blows L.K.S. sustained was more appropriately presented by the medical examiner and the sergeant did not provide any testimony about the scene not provided by other law enforcement witnesses.

### **3. Prosecutorial Misconduct**

Finally, appellant argues that the prosecutor's closing argument deprived him of a fair trial. Appellant alleges that four separate aspects of the prosecutor's closing argument constituted misconduct: (1) informing the jury that it was appellant's burden to

prove that he acted in self-defense; (2) arguing that it was the jury's job "to pass moral judgment on [appellant's] actions by deciding whether those actions were 'acceptable' or 'okay'"; (3) appealing to the jury's passions and prejudices by "equating [appellant's] actions with beating a Girl Scout to death in a cookie-price dispute"; and (4) pleading for the jury to hold appellant accountable.

"Prosecutors have an affirmative obligation to ensure that a defendant receives a fair trial, no matter how strong the evidence of guilt." *State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006). "For claims of prosecutorial misconduct to which a defendant did not object, we apply a modified plain-error test." *State v. Yang*, 774 N.W.2d 539, 559 (Minn. 2009). Appellant must first show "that the misconduct is error and that it is plain." *Id.* "The burden then shifts to the State to demonstrate that the error did not affect the defendant's substantial rights." *Id.*

*a. Improper Shifting of the Burden of Proof*

"Misstatements of the burden of proof . . . constitute prosecutorial misconduct." *Fields*, 730 N.W.2d at 786. Once a defendant comes forward with evidence supporting a claim of self-defense, "the state has the burden of disproving one or more of these elements beyond a reasonable doubt." *State v. Basting*, 572 N.W.2d 281, 286 (Minn. 1997). "The state has a right to vigorously argue its case, and it may argue in individual cases that the evidence does not support particular defenses." *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007). We agree with appellant that the prosecutor improperly stated during her closing argument that appellant was "asking" the jury to excuse his behavior and that appellant had no right to a self-defense or a defense-of-dwelling defense.

*b. Improperly Encouraging the Jury to Cast Moral Judgment and Hold Appellant Accountable*

Appellant also claims that the prosecutor erred by asking the jury to decide whether appellant's actions were morally correct or whether the jurors wished to condone his actions. He also argues that the prosecutor improperly urged the jury to hold appellant accountable for his actions. Appellant takes issue with the prosecutor's assertions that appellant was asking the jury to "excuse his behavior, . . . to conclude that his actions were okay and that his behavior is acceptable in society," and to conclude "that it is ok to brutally murder a vulnerable woman because she was indeed vulnerable."

The prosecutor ended her closing argument with the following assertion:

On behalf of [L.K.S.] and on behalf of my client, the State of Minnesota, I am asking every single one of you, every single one of you individually and I am asking you collectively to please hold this Defendant accountable for his actions in the brutal and violent death of [L.K.S.]. Thank you.

Similarly, the prosecutor ended her rebuttal closing argument by stating:

[L.K.S.'s] family cannot get her daughter back or their mother or their grandmother or their aunt or their friend. But you can hold the person responsible for this brutal homicide. You can hold him accountable, and the law requires you to do so under these facts. Thank you.

"Prosecutors are not to make closing arguments intended to inflame the passions or prejudices of the jury, or to attempt to divert the jury from the facts of the case by making broad policy arguments." *State v. Myrland*, 681 N.W.2d 415, 421 (Minn. App. 2004) (quotation omitted), *review denied* (Minn. Aug. 25, 2004). It is improper for a prosecutor to suggest "that the jury represent[s] the people of the community and that

their verdict would determine what kind of conduct would be tolerated on the streets.”

*State v. Threinen*, 328 N.W.2d 154, 157 (Minn. 1983).

[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”; its role is limited to deciding dispassionately whether the state has met its burden in the case at hand of proving the defendant guilty beyond a reasonable doubt.

*State v. Salitros*, 499 N.W.2d 815, 819 (Minn. 1993).

It is proper for a prosecutor to talk about what the victim suffers and to talk about accountability, in order to help persuade the jury not to return a verdict based on sympathy for the defendant, but the prosecutor should not emphasize accountability to such an extent as to divert the jury’s attention from its true role of deciding whether the state has met its burden of proving defendant guilty beyond a reasonable doubt.

*Id.* at 819–20 (quoting *State v. Montjoy*, 366 N.W.2d 103, 109 (Minn. 1985)).

“When reviewing claims of prosecutorial misconduct during closing argument, we consider the argument as a whole, rather than focusing on particular phrases or remarks that may be taken out of context or given undue prominence.” *State v. Jones*, 753 N.W.2d 677, 691 (Minn. 2008) (quotation omitted). There were only two references to the notion of “accountability,” and each was phrased as part of the prosecutor’s final remarks of her closing and rebuttal arguments, respectively. There were multiple references to appellant’s desire for the jury to find his actions to be “okay” or “acceptable.” We conclude that the repetitiveness of these references constituted error in

that they likely served to distract from the issue of whether or not the evidence supported appellant's affirmative defense.<sup>1</sup>

c. *Improperly Appealing to the Jurors' Passions and Prejudices*

In arguing that L.K.S. did not commit any of the felonies set forth in the defense-of-dwelling instruction, the prosecutor used analogies that went beyond the scope of the evidence and appealed to the passions of the jury. The prosecutor compared the situation of L.K.S. to a cable man wanting payment for the installation of cable or a Girl Scout wanting payment for Girl Scout cookies. The prosecutor asked the jury: "Is that homeowner justified in picking up a bat and bludgeoning the cable man to death?" and "Is that homeowner justified in getting a bat and bludgeoning that Girl Scout to death?"

We agree that these analogies, ostensibly intended to address appellant's testimony about L.K.S.'s conduct prior to her death, appear to have been calculated to inflame the passions of the jury against appellant and to appeal to the juror's emotions by comparing L.K.S. to a seemingly innocent cable man or Girl Scout. Importantly, "where credibility is the central issue, . . . special attention should be paid to statements that may prejudice or inflame the jury." *State v. Rucker*, 752 N.W.2d 538, 551 (Minn. App. 2008), *review denied* (Minn. Sept. 23, 2008). "[A]ttempt[s] by the prosecutor to exacerbate

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<sup>1</sup> Appellant also argues that the prosecutor's references to excusing his conduct also misstated the law of self-defense insofar as self-defense is regarded as a justification and not an excuse. A prosecutor's misstatement of the law may constitute misconduct. *See State v. Strommen*, 648 N.W.2d 681, 689–90 (Minn. 2002). However, the prosecutor's various references to excusing appellant's conduct appear to be more reasonably characterized as an indelicate attempt at combatting the defense-of-dwelling claim than actual assertions of law. *See State v. Atkins*, 543 N.W.2d 642, 648 (Minn. 1996) (noting that "[u]nartful statements inevitably occur in the midst of a heated and impassioned closing argument," and that prosecutors' statements do not need to be perfect).

[emotional] reactions by making ‘any emotive appeal’ to the jury ‘is likely to be highly prejudicial’” in cases that “generally evoke emotional reactions,” such as sexual-abuse cases or the facts in the current matter. *Id.* (quoting *State v. Danielson*, 377 N.W.2d 59, 61 (Minn. App. 1985)).

The analogies were also inconsistent with the evidence from trial insofar as appellant testified that L.K.S. did not merely demand additional money after engaging in oral sex, but attempted to retrieve appellant’s wallet in an aggressive manner justifying the defense-of-dwelling instruction. *See State v. Ferguson*, 729 N.W.2d 604, 616 (Minn. App. 2007) (“[I]t is misconduct for a prosecutor to mischaracterize evidence or make arguments unsupported by the record.”), *review denied* (Minn. June 19, 2007). While the prosecutor was entitled to argue that appellant’s actions were not reasonable in light of the evidence, a central aspect of the defense-of-dwelling analysis, the focus of this portion of the argument was calculated to attack appellant’s credibility as to his version of the events in a manner that served to “evoke emotional reactions” from the jurors. As such, these statements constituted plain error.

*d. Error Affecting Appellant’s Substantial Rights*

In sum, we conclude that the prosecutor committed misconduct by making statements implying that appellant had the burden of proof relative to his claim of defense-of-dwelling, making comments implicating whether appellant’s actions were “okay” or excusable, and by offering analogies appealing to the jurors’ passions and emotions. “Prosecutorial misconduct affects substantial rights if there is a reasonable likelihood that the absence of misconduct would have had a significant effect on the

jury's verdict." *Davis*, 735 N.W.2d 681–82. This assessment considers “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.” *Id.* at 682.

We conclude, based upon our careful review of the record, that the prosecutorial misconduct did not affect appellant's substantial rights. First, any errors committed by the prosecutor in her closing argument were countered by the district court's multiple instructions that the state had the burden of proving that appellant committed the charged crimes beyond a reasonable doubt. The jury was also instructed that the state had the burden of proof beyond a reasonable doubt that appellant did not act in defense of his dwelling. This instruction regarding the state's burden of proof was again emphasized by the district court after the jury asked about the defense-of-dwelling instruction during deliberations. Appellant's trial attorney also referenced the correct burden of proof during his closing argument, and the jurors were instructed to disregard statements of fact or law by the attorneys in conflict with the evidence or instructions. The district court's instructions and the arguments of appellant's trial counsel also countered the other troublesome portions of the prosecutor's closing arguments, including the district court's instruction regarding the proper role of the jury and the definition of “evidence” as not including anything that the attorneys say during the trial, including their opening statements and closing arguments.

“We presume that the jury followed the court's instruction.” *State v. Taylor*, 650 N.W.2d 190, 207 (Minn. 2002). We fail to see any reasonable likelihood that the

prosecutor's misconduct had a significant effect on the jury's verdict. *See Carridine*, 812 N.W.2d at 148 (finding no prejudice from prosecutor's potentially burden-shifting comments during closing arguments because the jury was correctly instructed on that point). There is no indication that the jury's verdict, which included an acquittal relative to the second-degree intentional murder charge, was a product of inflamed passion. If appellant had been so concerned about the emotional appeal of the prosecutor's improper remarks, he could have requested curative instructions. His failure to do so weighs against this court reversing appellant's conviction. *See Taylor*, 650 N.W.2d at 208 (failure to object or request a curative instruction weighs against reversal). The closing arguments, as a whole, focused upon the evidence and the application of the evidence to the elements of the charged crimes and appellant's defense-of-dwelling claim. Under these circumstances, we conclude that there is not a reasonable likelihood that the misconduct had a significant effect on the jury's verdict given the strength of the state's physical and medical evidence supporting appellant's guilt.<sup>2</sup>

**Affirmed.**

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<sup>2</sup> Appellant has submitted two pro se supplemental letter briefs that make various arguments about the evidence but has not asserted any substantive legal arguments or authorities. He makes the general argument that the district court violated his constitutional rights by refusing to permit the testimony of two witnesses who apparently would have testified about L.K.S.'s reputation for violence and drug addiction. However, since no specific arguments or citations are provided, we decline to address them. *See State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002).