*This opinion is nonprecedential except as provided by Minn.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**
**A23-1398**

State of Minnesota,
Respondent,

vs.

Olabamidele Olumide Bewaji,
Appellant.

**Filed September 23, 2024**
**Affirmed**
**Cochran, Judge**

Blue Earth County District Court
File Nos. 07-CR-21-738, 07-CR-21-800

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

Patrick Raymond McDermott, Blue Earth County Attorney, Mankato, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota; and

Andrew C. Wilson, Special Assistant Public Defender, Wilson & Clas, Minneapolis, Minnesota (for appellant)

Considered and decided by Wheelock, Presiding Judge; Cochran, Judge; and Smith, John, Judge.*

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* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

Appendix A

## NONPRECEDENTIAL OPINION

**COCHRAN**, Judge

In this direct appeal from two convictions of third-degree criminal sexual conduct, appellant argues that he is entitled to a new trial as a result of prosecutorial misconduct. Alternatively, appellant challenges his sentence, claiming that the district court erred by imposing a lifetime conditional-release period rather than a ten-year conditional-release period. In a pro se supplemental brief, appellant raises additional claims. We affirm.

## FACTS

This case arises from two separate complaints brought by respondent State of Minnesota against appellant Olabamidele Olumide Bewaji, alleging that Bewaji sexually assaulted an 83-year-old woman with Alzheimer's disease. The first complaint charged Bewaji with two counts of third-degree criminal sexual conduct in violation of Minnesota Statutes section 609.344, subdivision 1(d) (2020). The complaint alleged that Bewaji engaged in "sexual penetration with another person" whom Bewaji "knew or had reason to know . . . was mentally impaired, mentally incapacitated, or physically helpless." *See* Minn. Stat.§ 609.344, subd. 1(d). The second complaint charged Bewaji with another count of third-degree criminal sexual conduct and a single count of fourth-degree criminal sexual conduct in violation of section 609.345, subdivision 1(d) (2020), for conduct involving the same elderly woman. The state alleged that the sexual assaults occurred on three dates in February and March 2021. According to the statements of probable cause, the sexual assaults by Bewaji occurred in the victim's apartment at the assisted-living

facility where Bewaji worked. Bewaji pleaded not guilty, and the court files were consolidated for trial.

At trial, Bewaji raised a defense based on consent, arguing that the elderly woman, J.F., had consented to the sexual encounters and was not "mentally impaired," "mentally incapacitated," or "physically helpless" within the meaning of applicable statutes.[1] The jury heard from several witnesses, including J.F.'s son who reported Bewaji to police and the law enforcement agent who interviewed Bewaji following his arrest, among others. J.F. did not testify. Nor did Bewaji. The following facts reflect the evidence received at trial and summarize the relevant procedural history.

*March 8 Incident and Investigation*

J.F.'s son testified that, in March 2021, his mother was living in the assisted-living section of a senior facility. The facility also had a memory-care unit. The son had placed multiple cameras in his mother's apartment to monitor her well-being.

On March 8, the son received an alert on his phone from one of the cameras—the one in his mother's bedroom. He opened the camera's live feed and saw Bewaji laying on the bed with his mother. The son called 911 and was connected to a local law enforcement agent. The son sent a 34-second video clip to the agent. The video, which was recorded immediately before the 911 call, shows Bewaji sexually penetrating J.F. with his penis

[1] Relevant to this appeal, a person is "mentally impaired" if that person "lacks the judgment to give a reasoned consent to sexual contact or to sexual penetration" as a result of "impaired intelligence." Minn. Stat. § 609.341, subd. 6 (2020). A person is physically helpless if they are "unable to communicate nonconsent and the condition is known or reasonably should have been known to the actor." *Id.*, subd. 9 (2020). The term "mentally incapacitated" is not at issue.

while J.F. is lying on her bed. Shortly thereafter, the agent arrested Bewaji as he was leaving the facility and brought him to the police station for an interview.

According to the agent who conducted the interview, Bewaji acknowledged that he was employed as a resident assistant at the assisted-living facility and stated that he was assigned to work on J.F.'s floor. He initially denied sexually penetrating J.F., instead stating that he was in J.F.'s apartment for job-related reasons. But when the agent told Bewaji that there was a video recording from a camera in J.F.'s bedroom that showed Bewaji "being sexual with [J.F.]" and that law enforcement had viewed the video, Bewaji admitted that he undressed J.F. and pulled his pants down. At that point, he still maintained that "nothing else" happened. During a break in the interview, law enforcement obtained a search warrant for Bewaji's DNA. After Bewaji learned about the warrant, he admitted he had sexual intercourse with J.F. that day. Bewaji stated that, when he went to check on her at about 10 p.m., J.F. invited him into her bed, they held one another and talked, and then they had sexual intercourse. He also admitted that two to three weeks prior, he had an encounter with J.F. "just like" the March 8 incident. Bewaji told the agent that he and J.F. had been in a relationship since January 2021. Bewaji claimed that he and J.F. would sit, talk, and hold hands, and they would do so during the time when Bewaji was providing her care services and assistance. Bewaji also stated that he did not see J.F. when he was off duty because he was "not allowed." After the interview, law enforcement obtained a DNA sample from Bewaji.

While police were interviewing Bewaji, J.F.'s daughter-in-law and a police officer took J.F. to the hospital for a sexual-assault evaluation. The examining nurse testified that

J.F. did not "have a full understanding of what happened" or why J.F. was there. The nurse, who was a trained sexual-assault examiner, explained to J.F. why J.F. was at the hospital. During the examination, J.F. told the nurse that a man had removed her underwear. J.F. indicated that the man was familiar to her, but she could not recall his name. The nurse swabbed J.F.'s vagina and perineum. Testing later revealed that the swabs contained sperm cell fractions whose DNA profile match Bewaji's DNA profile, "and statistically that male profile would not be expected to occur more than once among unrelated individuals in the world population."

The next day, law enforcement collected video footage and photo stills recorded by the cameras in J.F.'s apartment. A detective testified that he reviewed the recordings from February 24, February 28, and March 8, 2021. He observed that there was "some indication that there . . . had potentially been an assault" on each of those dates. The jury also viewed still images and video recordings from those materials showing sexual contact between J.F. and Bewaji, as well photos showing J.F.'s regular activities in the apartment. Regarding the February 24, 2021 allegations, the jury saw still images from that date depicting Bewaji and J.F. embracing one another in bed and Bewaji standing by J.F.'s bed with J.F.'s pants pulled down. Regarding the February 28 and March 8, 2021 allegations, the jury saw videos from those dates depicting Bewaji and J.F. having sexual intercourse. The videos did not have audio.

*Bewaji's Job Duties and Understanding of J.F.'s Condition*

The jury heard testimony regarding Bewaji's knowledge of J.F.'s mental condition and his general job duties. Bewaji worked as a resident assistant at the facility and met J.F.

sometime in January 2021. Bewaji provided "standard care" to J.F., including assistance walking, showering, bathing, doing laundry, and other things she could not do on her own. Bewaji told investigators that he understood that J.F. was not able to do a lot on her own but he did not think that J.F. was "sick." Bewaji also understood that J.F. lived in the assisted-living portion of the facility, not in the memory-care unit.

In terms of Bewaj's training, the facility's executive director testified that all staff undergo about thirty-five hours of "onboarding" training that includes education on the residents' rights, professional boundaries, and working with vulnerable adults and adults with dementia. The executive director added that resident assistants are required to read the care plans for each resident for whom they provide care, and the care plan includes information about each resident's cognitive abilities.

*J.F.'s Health*

In addition, the jury heard lengthy testimony from several witnesses regarding J.F.'s health conditions, including her cognitive abilities. On this topic, the jury heard testimony from J.F.'s son and daughter-in-law, J.F.'s primary-care physician, the health-services director at the facility, and a psychiatrist who independently reviewed J.F.'s medical records.

The testimony established that J.F.'s son first suspected his mother had a memory issue in November 2018. She was diagnosed with Alzheimer's disease, which is a type of dementia, the same year. Following the diagnosis, the son attended each of his mother's medical appointments. The son also had power of attorney over her. According to the son, J.F. lived "relatively independently" at a different care facility in 2019. The son became

concerned about her care in 2020 when the COVID pandemic hit, so the son and daughter-in-law moved J.F. into their home with them until they could find a new assisted-living facility. While living at their home, J.F. had a bedroom on the second floor. In the four months J.F. lived with her son, he developed a care plan to manage her activity. He also purchased cameras with motion sensors to monitor J.F.'s sleep habits and notify him when she needed to go down to the first floor. Around the beginning of 2021, J.F. moved to the assisted-living facility where Bewaji worked. After the move, the son placed the cameras in J.F.'s new apartment.

Following her diagnosis in 2018, J.F.'s dementia symptoms progressively grew worse. Her primary-care physician explained that J.F. experienced short-term memory loss, confusion, and incontinence, and her cognitive deficits accelerated. She also experienced "sundowning," meaning her cognitive deficits tended to worsen towards the end of the day. The son stated that his mother liked to read the newspaper, but she was "[n]ot always" able to commit what she read to short-term memory. J.F.'s cognitive issues would likely be noticeable if asked about recent events, but, according to her primary-care physician, cognitive deficits are not always obvious. J.F. had "better days" and "worse days."

The testimony regarding J.F.'s physical capabilities established that she could walk without assistance. But due to congestive heart failure, J.F. needed support to walk for a sustained period. The same was true for standing, although the son acknowledged that, when J.F. lived with him in 2020, she was physically able to walk down a flight of stairs.

As to J.F.'s sexual activity, the son testified that he never "observed" his mother "engage in any courtships of any type" after his father (her husband) died in 1995, and she was "potential[ly]" involved in only one. Relatedly, J.F. told the nurse who examined her at the hospital that she had not had sexual activity since her husband passed away twenty years earlier.

J.F. lived somewhat independently in her assisted-living apartment at the facility where Bewaji worked. When she moved in, her "cognitive decline was very evident because of her inability to process what was happening." As a result, she received a "high level of care" from facility staff. J.F.'s apartment had a bedroom, living room, small kitchen, and deck. J.F. tended flowers on the deck "[t]o the best of her ability." J.F. read the newspaper nearly every day, completed puzzles, and made coffee for herself. J.F. could schedule her own day, and she had the choice to go to activities, cook for herself or eat meals in the common dining room, attend exercise classes, and go to bed at any time. Although J.F. could cook, she rarely did so after she started "a small fire in the microwave" at the prior care facility where she lived in 2019. The health-services director also acknowledged that she completed an assessment of J.F. in January 2021. The assessment stated that J.F. could independently report her symptoms, open medicine containers, pour liquids, and eat food. J.F. also had a wearable safety-alert device that could be used to call for help, and she was trained to use it.

The defense called one witness, a psychiatrist and adjunct faculty at the University of Minnesota, who testified as follows. The psychiatrist has experience caring for patients with "different forms of dementia including Alzheimer's disease" and reviewed J.F.'s

medical records. The psychiatrist acknowledged that one cannot tell whether someone has Alzheimer's just by looking at them, and the disease can progress in a nonlinear fashion: individuals can have "good and bad days." She acknowledged that an Alzheimer's diagnosis does not mean that one is incapacitated. The psychiatrist said that J.F.'s records indicate that she had some neuropsychological testing but did not complete it. The psychiatrist opined that people with Alzheimer's can sometimes live independently for a long time, depending on their level of support. The psychiatrist added that individuals with dementia can, at times, "make decisions about their life," and that most recently diagnosed patients are not "totally incapacitated." On cross-examination, the psychiatrist acknowledged that she had never met J.F.

During closing arguments, the prosecutor made several statements which drew objections from defense counsel. The district court sustained some objections and overruled others.

*Verdict and Sentencing*

The jury returned a mixed verdict. In court file CR-21-800, the jury found Bewaji guilty of the charges of third-degree criminal sexual conduct and fourth-degree criminal sexual conduct for the offense date of February 28, 2021. The jury also found Bewaji guilty of the charge of third-degree criminal sexual conduct for the offense date of March 8, 2021, in court file CR-21-738. But the jury found Bewaji not guilty of the charge of third-degree criminal sexual conduct for the offense date of February 24, 2021, in court file CR-21-738.

The district court sentenced Bewaji on the two counts of third-degree criminal sexual conduct, but not on the count of fourth-degree criminal sexual conduct because it was a lesser-included offense. Announcing the sentences, the district court stated:

> So, in file CR-21-800, criminal sexual conduct in the third degree, I will commit you to the Commissioner of Corrections for a period of 57 months. In file CR-21-738, criminal sexual conduct in the third degree, I will commit you to the Commissioner of Corrections for a period of 57 months.

The district court ordered that Bewaji serve the sentences consecutively to each other. Lastly, the district court imposed a ten-year conditional-release period for the conviction in file CR-21-800 and a lifetime conditional-release period for the conviction in file CR-21-738.

Bewaji appeals.

## DECISION

Bewaji argues that he is entitled to a new trial because the prosecutor engaged in serious misconduct during his closing argument that deprived Bewaji of a fair trial. In the alternative, Bewaji argues that the district court erred at sentencing by imposing a lifetime conditional-release period. In a pro se supplemental brief, Bewaji raises additional arguments. We conclude that none of Bewaji's arguments warrant reversal.

### I. Bewaji has not established that he is entitled to a new trial because of prosecutorial misconduct.

The "overarching concern regarding prosecutorial misconduct" is that it may deprive a defendant of a fair trial. *State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006). Our standard of review for evaluating prosecutorial misconduct depends on whether the

defense objected at trial. *State v. Jackson*, 773 N.W.2d 111, 121 (Minn. 2009). If there was an objection, we engage in a "two-tiered harmless-error analysis" that considers the seriousness of the misconduct. *Id.* If there was no objection, we apply the modified plain-error test. *State v. Segura*, 2 N.W.3d 142, 160 (Minn. 2024).

Bewaji identifies several instances of alleged prosecutorial misconduct that occurred during the prosecutor's closing argument, some of which Bewaji objected to and some of which he did not.[2] We first analyze whether any of the challenged statements constitute prosecutorial misconduct. Concluding that Bewaji has identified two instances of misconduct, we then consider whether that misconduct, either individually or cumulatively, denied Bewaji a fair trial. *State v. Dobbins*, 725 N.W.2d 492, 506 (Minn. 2006).

**A. Bewaji has established two instances of prosecutorial misconduct.**

"A prosecutor engages in prosecutorial misconduct when he violates clear or established standards of conduct, e.g., rules, laws, orders by a district court, or clear commands in this state's case law." *State v. McCray*, 753 N.W.2d 746, 751 (Minn. 2008) (quotation omitted). In evaluating alleged misconduct during a closing argument, we consider "the closing argument as a whole, rather than just selective phrases or remarks

[2] In a footnote, Bewaji alleges that the state "engaged in prosecutorial misconduct during trial by failing to prepare [the agent]" to avoid referring to J.F. as "the victim" in his testimony. But Bewaji does not claim that this alleged misconduct is error that independently supports reversal, nor does he list it among the errors which cumulatively warrant reversal. Accordingly, we decline to consider whether Bewaji is entitled to relief for his witness-preparation misconduct argument. *See McKenzie v. State*, 583 N.W.2d 744, 746 n.1 (Minn. 1998) ("Issues not argued in briefs are deemed waived on appeal." (quotation omitted)).

that may be taken out of context or given undue prominence." *State v. Munt*, 831 N.W.2d 569, 587 (Minn. 2013) (quotation omitted). For objected-to misconduct, "[t]he determination of the propriety of a prosecutor's closing argument is within the sound discretion of the [district] court." *McCray*, 753 N.W.2d at 751-752 (quotations omitted). For unobjected-to misconduct, the appellant must demonstrate the prosecutor's conduct constitutes an error that is plain. *Ramey*, 721 N.W.2d at 302. "An error is plain if it was clear or obvious. Usually this is shown if the error contravenes case law, a rule, or a standard of conduct." *Id.* (quotations and citations omitted).

We now turn to Bewaji's arguments, beginning with the objected-to statements and then turning to the unobjected-to statements.

*Allegation of Improper Burden-Shifting*

The first type of misconduct Bewaji alleges is burden-shifting. A prosecutor improperly shifts the burden of proof "when they imply that a defendant has the burden of proving his innocence." *State v. McDaniel*, 777 N.W.2d 739, 750 (Minn. 2010). "But a prosecutor's comment on the lack of evidence supporting a defense theory does not improperly shift the burden." *State v. Nissalke*, 801 N.W.2d 82, 106 (Minn. 2011) (quotation omitted).

During closing arguments, the prosecutor made the following statement:

> [J.F.] can't withdraw consent even if there was some and there isn't any. She told [her daughter-in-law] and [the police officer] she didn't remember what happened moments after it occurred. It's always been what she remembered. She doesn't remember. *Now the defense is trying to argue circumstantially there was consent. There is no direct evidence of consent in this case.*

(Emphasis added.) Bewaji objected, and the district court sustained the objection.

On appeal, Bewaji asserts that the prosecutor improperly shifted the burden of proof when he made the challenged statement. The state responds that the statement does not constitute misconduct because the prosecutor was properly commenting on the evidence. The state maintains that the prosecutor needed to emphasize that there was no direct evidence of consent because the state "had to prove the absence of J.F.'s capacity to consent." In the state's view, the district court was incorrect to sustain the objection.

We agree with the state that the prosecutor did not improperly shift the burden of proof to Bewaji by making the challenged statement. Instead, the prosecutor accurately observed that there was no direct evidence of J.F.'s consent. Such a statement was a proper "comment on the lack of evidence supporting a defense theory." *Nissalke*, 801 N.W.2d at 106. Therefore, we conclude the challenged statement does not constitute prosecutorial misconduct based on burden shifting.

*Allegation of Alignment with the Jury*

The second type of misconduct Bewaji alleges is that the prosecutor improperly aligned himself with the jury and against the defendant. It is inappropriate for a prosecutor to "align[] [himself] with the jury" because "a prosecutor is not a member of the jury" and such language "may be an effort to appeal to the jury's passions." *State v. Mayhorn*, 720 N.W.2d 776, 790 (Minn. 2006). During closing, the prosecutor made the following statement:

> What you should look at [sic] the video, you will see a 200-pound man confining an 83-year-old woman with severe

> physical limitations and mental impairments confined to a bed, being held down and being sexually assaulted. *I don't know what world the defense lives in but in my world and our world that's not consent.*

(Emphasis added.) Defense counsel objected, and the district court did not announce whether it sustained or overruled the objection.

Bewaji argues that the prosecutor improperly aligned himself with the jury by stating: "I don't know what world the defense lives in but in my world and our world that's not consent." The state acknowledges that the statement was "phrased inartfully" but maintains that it sought to "isolate the defense *argument* as being outside the bounds of what reasonable people could infer" instead of isolating Bewaji "on a personal level."

Based on our review of the record, we conclude the prosecutor's statement improperly aligned him with the jury against Bewaji by implying that the jury and prosecutor live in a different "world" than Bewaji. The supreme court's decision in *Mayhorn* is instructive. In *Mayhorn*, the supreme court considered a prosecutor's closing argument that described a "drug world" of which the defendant was a part, but the prosecutor and the jury were not. 720 N.W.2d at 789. Specifically, the prosecutor stated: "This is kind of foreign for all of us, I believe, because we're not really accustomed to this drug world and drug dealing." *Id.* (quotation marks omitted). The supreme court concluded the statement constituted misconduct because the prosecutor described *herself* and the jury as outside the "drug world." *Id.* at 790. In a subsequent case, the supreme court concluded that the use of "we" or "us" language by a prosecutor that refers to what "we learned" from evidence was distinguishable from the language at issue in *Mayhorn*

and did not constitute misconduct because the language "could reasonably be interpreted in this context to refer to everybody who was in court when the evidence was presented," including the defendant. *Nunn v. State*, 753 N.W.2d 657, 663 (Minn. 2008). But here, the prosecutor's statement excludes the defendant because he describes "my world and our world" in opposition to Bewaji's world. By using language that aligned himself with the jury and against Bewaji, the prosecutor contravened our caselaw that prohibits such statements.

*Allegations of Expressing Personal Opinion*

The third type of misconduct Bewaji alleges is that the prosecutor improperly inserted his personal opinion into the closing argument. "[T]o prevent exploitation of the influence of the prosecutor's office," prosecutors must not "interject their personal opinions into a case." *State v. Blanche*, 696 N.W.2d 351, 375 (Minn. 2005) (quotation omitted). Bewaji argues that the prosecutor expressed his personal opinion three times. The first instance is the "my world and our world" statement, which we already determined constitutes prosecutorial misconduct for other reasons. The second instance is an incomplete sentence by the prosecutor, "what I saw in the video was approximately---," which was interrupted by an objection before any opinion was expressed. Consequently, we limit our analysis to the final instance identified by Bewaji.

The final instance of alleged personal-opinion misconduct was made during rebuttal in response to defense counsel's argument that J.F.'s ability to "lift up the window" in her apartment was evidence that refutes the prosecutor's suggestion that J.F. was physically helpless at the time of the alleged sexual assaults by Bewaji. Specifically, the prosecutor

stated, "You saw a lot of direct evidence in this case. I don't see how . . . opening a window shows that she has the ability to push off a two-hundred-pound man who is sexually assaulting her."

Bewaji did not object to this statement at trial but argues on appeal that the statement amounts to the prosecutor improperly interjecting his personal opinion on the evidence into the argument. The state claims that the prosecutor was not impermissibly offering a personal opinion as to a witness's credibility or Bewaji's guilt, but instead "offering an interpretation" of the evidence.

We conclude that the prosecutor's statement does not violate the rule against a prosecutor expressing a personal opinion. In closing argument, a prosecutor "may argue that the evidence does not support particular defenses." *State v. Davis*, 982 N.W.2d 716, 726 (Minn. 2022) (quotation omitted). Here, the prosecutor's statement offers an interpretation regarding the testimony about J.F.'s ability to open a window, and how that testimony does not show that J.F. was physically capable of pushing off a 200-pound man who was sexually assaulting her. While he prefaces his evidentiary comparison with, "I don't see how it equates," the record reflects that his use of the first-person pronoun was "inadvertent and rooted in the prosecutor's rhetorical idiosyncrasies" rather than expressing his personal view on the evidence. *Blanche*, 696 N.W.2d at 375. Because Bewaji has not identified, and we are unaware of, any established rule that prohibits the inadvertent and idiosyncratic use of an "I" statement to compare evidence, we conclude that the prosecutor's statement was not error that is plain.

*Allegation Regarding Facts Not in Evidence*

The fourth type of misconduct Bewaji alleges is that the prosecutor improperly argued facts not in evidence. "During closing argument, a prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw." *State v. Bobo*, 770 N.W.2d 129, 142 (Minn. 2009) (quotations omitted).

Bewaji claims that there was no evidence at trial showing that J.F. could not write a personal check. He also contends that there was not any evidence that J.F.'s son was given power of attorney because of J.F.'s "declining mental state." He therefore argues that the following argument by the prosecutor was improper:

> THE STATE: [B]ecause of [J.F.'s] mental impairment [her son] has actually had power of attorney for over ten years. Ladies and gentlemen of the jury, [J.F.] can't even write a personal check.
>
> DEFENSE COUNSEL: Objection, assumes facts not in evidence.
>
> THE COURT: Sustained.
>
> THE STATE: [J.F.] does not have the capacity to do the simple things in life, to deal with her own personal affairs. Her son has been given that responsibility because of her memory deficits and because of her Alzheimer's.

Defense counsel did not object to the last quote at trial.

We first consider Bewaji's argument that the record does not support the prosecutor's statements that her son was given power of attorney due to J.F.'s cognitive decline. To demonstrate prosecutorial misconduct as alleged, Bewaji must demonstrate

that the prosecutor "intentionally" misstated the evidence or misled the jury. *Id.* We conclude that Bewaji has not shown that the statements relating to power of attorney constitute prosecutorial misconduct. While the record does not reflect why the son originally received power of attorney over his mother, his testimony establishes that he exercised that power to make medical decisions for his mother at "every medical appointment she's had" since she began exhibiting dementia symptoms in 2018. From that testimony, the prosecutor could argue the reasonable inference that the son had power of attorney over his mother because of her developing dementia symptoms. And given the detailed testimony the prosecutor elicited regarding the progression of J.F.'s disease from late 2018 to March 2021, we conclude that Bewaji has not demonstrated the prosecutor *intentionally* misled the jury or misstated the evidence by stating that J.F.'s son had power of attorney for over ten years "because of [J.F.'s] mental impairment."

We reach a different conclusion about the prosecutor's statement that "[J.F.] can't even write a personal check." The state identified no evidence from which that inference could be reasonably drawn, and our review of the record reveals none. While J.F.'s son testified that he has power of attorney over his mother, no evidence was presented to show that, because his power of attorney, J.F. cannot write a personal check. Similarly, there was no evidence that J.F.'s physical and cognitive conditions prevented her from writing a personal check. Given the absence of any evidence to support this statement, we conclude that the misstatement was intentional. *See State v. Peltier*, 874 N.W.2d 792, 805 (Minn. 2016) (concluding that the prosecutor violated the intentional-misstatement rule by

advancing claims which "have no basis in the record"). Thus, the statement improperly misled the jury and constituted prosecutorial misconduct.

*Allegations of Urging the Jury to Protect Society*

The fifth type of misconduct Bewaji alleges is that the prosecutor improperly urged the jury to convict Bewaji to protect society. It is improper for a prosecutor to "distract the jury from its proper role of deciding whether the state has met its burden" by urging the jury "to protect society with its verdict." *State v. Hoppe*, 641 N.W.2d 315, 320 (Minn. App. 2002) (quoting *State v. Ashby*, 567 N.W.2d 21, 27 (Minn. 1997)), *rev. denied* (Minn. May 14, 2002). To support his argument, Bewaji challenges the prosecutor's two separate statements that the "assaults would have continued" against J.F. had Bewaji not been caught by J.F.'s son. Bewaji objected to neither statement at trial.[3] The state argues these statements were merely about J.F.'s son catching Bewaji and did not urge the jury to convict Bewaji to send a message or to protect society.

We conclude that Bewaji has not established that these unobjected-to statements constitute prosecutorial misconduct under the applicable modified plain-error test. Bewaji cites no caselaw holding that a prosecutor's argument that focuses on the defendant's conduct against the alleged victim equates to urging the jury to protect society. Instead, Bewaji relies on two factually distinguishable cases in which we found reversible error. In

[3]After the prosecutor's first statement about the assaults continuing, Bewaji objected on the basis of speculation. But at trial, Bewaji did not clarify that the statement improperly urged the jury to protect society. And on appeal, Bewaji concedes that he did not preserve an objection under this category of prosecutorial misconduct. Accordingly, we apply the modified plain-error test to Bewaji's argument under this category of misconduct.

*Hoppe*, the prosecutor asked the jury to convict the defendant for driving while impaired while stating in his closing, "We are trying to get people to understand that they have to get designated drivers" and "thank God [the arresting officer] stopped [the defendant] . . . before he went any further and did more damage." *Id.* at 320 (alteration regarding arresting officer in original). And in *State v. Duncan*, we concluded that the prosecutor engaged in misconduct by arguing that it was "fortunate" the defendant was caught "because the progression of perpetration and control of a victim . . . leads from sexual contacts to multiple incidents of penetration over an extended period of time." 608 N.W.2d 551, 556 (Minn. App. 2000), *rev. denied* (Minn. May 16, 2000). We noted that these "remarks could be construed as a request that the jury return a guilty verdict . . . to protect future victims of Duncan." *Id.*

Here, unlike in *Hoppe* and *Duncan*, the prosecutor's statement does not suggest that the prosecutor was asking the jury to use its verdict to protect Bewaji from victimizing more people in the future. Rather, the prosecutor emphasized that *the son* protected his mother from Bewaji's assaults by catching Bewaji on March 8, 2021, and now Bewaji must "face justice." Accordingly, the prosecutor did not "distract the jury" because he maintained his focus on J.F. and Bewaji's conduct with J.F., which was the issue in the trial. Therefore, we conclude that Bewaji has not demonstrated that the prosecutor's statements violated a rule established in our caselaw and thereby constitute plain error. *See Segura*, 2 N.W.3d at 160. Consequently, we reject Bewaji's argument that the prosecutor improperly urged the jury to convict to protect society.

*Allegations Regarding Calling Bewaji a "Predator"*

The sixth type of misconduct Bewaji alleges involves the prosecutor's references to Bewaji as a "predator." "Prosecutors may not make arguments that are . . . designed to inflame the passions and prejudices of the jury." *Bobo*, 770 N.W.2d at 142. Bewaji argues that the prosecutor plainly erred when he referred to Bewaji as a predator three times in his closing argument:

> When someone is being sexually assaulted, they essentially have three choices fight, flight, or freeze. However, because of [J.F..'s] mental and physical conditions she had only one choice. Freeze. [J.F.] did not have the ability to fight or flee. The defendant knew this and took advantage of that. *The defendant's conduct was predatory.* It was planned out. In each assault he waits until [J.F.] is groggy or sleepy or actually sleeping and then begins to sexually assault her. . .
>
> Finally, thankfully, *that predatory behavior directed toward [J.F.] by the defendant comes to an end* when he is finally caught on March 8. If not, those sexual assaults would have likely continued.
>
> . . . .
>
> Thankfully, the evidence that was presented in this trial shows that on March 8, 2021, *the predator assaulting [J.F.] was finally caught.*

(Emphasis added.) Bewaji also argues that the prosecutor inflamed the jury's passions by saying that Bewaji "trapped" J.F. Defense counsel did not object to these statements at trial.

To support his argument, Bewaji again analogizes to *Duncan*, in which "[t]he prosecutor referred to Duncan as a 'predator' and used various forms of the word several other times during his closing argument." *Duncan*, 608 N.W.2d at 556. In *Duncan*, this

court concluded that, despite "some evidence regarding the predatory behavior of child molesters in the record, we can only infer that the prosecutor's repeated use of this term during his closing argument was intended to inflame the prejudices of the jury." *Id.*

The state responds that *Duncan* is not controlling and instead argues that this case is closer to the supreme court's more recent decision in *State v. Radke*. 821 N.W.2d 316, 330 (Minn. 2012). There, the supreme court affirmed Radke's first-degree murder conviction, rejecting his argument that he was denied a fair trial after the state compared him to "Rambo" and called him an "enraged predator."[4] *Id.* at 330 (quotation marks omitted). The supreme court concluded that the term was "a reasonable and descriptive way to convey the [s]tate's version of what happened in this case, and it was not outside the bounds of what is permissible." *Id.* In *Radke*, the state's version of what happened was that Radke murdered his father-in-law by shooting him twice with a scoped rifle. *Id.* at 320-21, 330. Here, the state contends that "predator" was also permissible language because it accurately describes the state's theory that Bewaji "acted as a sexual predator by repeatedly sexually assaulting an 83-year-old woman whom he knew suffered from" dementia.

Based on our review of the record, we conclude that Bewaji has not met his burden to show that the prosecutor committed plain error through his use of the challenged language. Prosecutors have "considerable latitude in closing argument" and are not "required to make a colorless argument." *State v. Smith*, 541 N.W.2d 584, 589

[4] "Rambo" appears to refer to John Rambo, the titular character in an American action film series.

(Minn. 1996). The state's reference to Bewaji as a "predator," his behavior as "predatory," and his actions as "trapping" were consistent with the state's version of what happened. And *Radke* establishes that similar language may be permissible when it is reasonable, descriptive, and within bounds. The state's limited use of "predator," "predatory," and "trapped" did not exceed the bounds permitted by *Radke*. Therefore, we conclude the prosecutor did not plainly err by using such language. *See Segura*, 2 N.W.3d at 160.

*Allegations of Disparaging the Defense*

The seventh type of prosecutorial misconduct Bewaji alleges is disparaging the defense. A prosecutor "may argue that the evidence does not support particular defenses." *Davis*, 982 N.W.2d at 726 (quotation omitted). But a prosecutor "may not belittle the defense, either in the abstract or by suggesting that the defendant raised the defense because it was the only defense that may be successful." *State v. Westrom*, 6 N.W.3d 145, 157 (Minn. 2024) (quotation omitted).

Bewaji claims that the prosecutor committed misconduct when he told the jury that Bewaji "realized he need[ed] to come up with an explanation for what he did[,] . . . a false claim of consent. Was baseless. Once again, the defendant is spinning deception, and he is caught again." Bewaji did not object to this statement at trial. On appeal, Bewaji argues that the prosecutor implied that the prosecution accused him of submitting "the sort of defense that defendants raise when nothing else will work," which the supreme court has declared improper. *State v. Williams*, 525 N.W.2d 538, 549 (Minn. 1994) (quotation omitted).

The state counters that the prosecutor was merely "recount[ing] the shifting stories [Bewaji] told the police after he was detained." The state emphasizes that Bewaji first denied having sexual intercourse with J.F., but later—after being told that there was video evidence and the police had a warrant for his DNA—his story changed. Bewaji then admitted to having sexual intercourse with J.F. but claimed the sex was consensual. The state argues that, read in context, the prosecutor's statement is not improper disparagement. We agree with the state.

When reviewing a claim of prosecutorial misconduct during a closing argument, we consider "the closing argument as a whole rather than just selective phrases or remarks that may be taken out of context or given undue prominence." *Munt*, 831 N.W.2d at 587. The relevant portion of the prosecutor's closing argument leading up to and including the challenged statement is as follows:

> He is taken to the Blue Earth County Justice Center for more investigation and questioning. He immediately begins to be untruthful. States nothing happened . . . . However, [the agent] when he's interviewing him finally discloses to him [that] this was caught on camera. . . . At that time, the defendant admits to [the detective] I did it. . . . [H]e admitted that he had sexual intercourse with her . . . . He realized he needs to come up with an explanation for what he did. The only explanation at that time for him was a false claim of consent. Was baseless. Once again, the defendant is spinning deception, and he is caught again.

Placed in context, it is clear that the prosecutor was not attacking Bewaji's consent defense in the abstract by saying that it is the kind of defense that defendants come up with in similar situations. *See Williams*, 525 N.W.2d at 549. Instead, the prosecutor described the specific sequence of events that led to Bewaji asserting that he had consensual sexual

relations with J.F., and the prosecutor ended by stating that Bewaji's claim of consent was "baseless" and "spinning deception." This statement, taken as a whole, was part of the prosecutor's effort to demonstrate that Bewaji lacks credibility. The supreme court found no misconduct in a similar situation when the prosecutor described the defense's explanation of events as "concocted" and "unbelievable." *State v. Matthews*, 779 N.W.2d 543, 552 (Minn. 2010) (quotation marks omitted). The supreme court reasoned that the prosecutor's statement was directed at the defendant's credibility, "not the validity of a particular defense in the abstract." *Id.* We reach the same conclusion here and therefore conclude that the statement is not prosecutorial misconduct.

In sum, we find no merit in Bewaji's allegations that the prosecutor engaged in misconduct by shifting the burden, expressing a personal opinion, urging the jury to protect society, inflaming the jury's passions through use of the word "predator," or disparaging the defense. But we agree with Bewaji that the prosecutor engaged in misconduct when he aligned himself with the jury through his "your world and our world" statement and when he misstated the evidence by declaring that J.F. cannot write a personal check. Accordingly, we proceed to analyze whether this misconduct prejudiced Bewaji and warrants a new trial.

### B. Bewaji is not entitled to relief because the prosecutor's errors were harmless.

Bewaji claims that he is entitled to a new trial because he was prejudiced by each instance of prosecutorial misconduct and because the cumulative effect of the misconduct

deprived him of a fair trial. We first consider the individual impact of each instance of misconduct and then turn to the cumulative impact.

*Individual Errors*

When a defendant objects to conduct at trial, the standard of review depends on the seriousness of the misconduct. *Jackson*, 773 N.W.2d at 121. If the prosecutor's misconduct was unusually serious, we must be certain beyond a reasonable doubt that the error was harmless before affirming. *State v. Caron*, 218 N.W.2d 197, 200 (Minn. 1974). Here, even assuming without deciding that each instance of misconduct was unusually serious, we conclude that each instance was harmless beyond a reasonable doubt. *See State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012) (applying the harmless-beyond-a-reasonable-doubt test and declining to "reach the issue of the continued applicability of the *Caron* test to objected to prosecutorial misconduct").

"Prosecutorial 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) (quotations omitted). Several factors are relevant to that determination, including the state's emphasis on the improper conduct, its persuasive value, the defense's opportunity to counter it, and the strength of the other evidence supporting the verdict. *See id.* We address each instance of prosecutorial misconduct in turn.

*Alignment with the Jury*

We begin by considering the prosecution's improper alignment of itself with the jury by using the phrase "my world and our world." In light of the relevant factors, we conclude this statement was harmless beyond a reasonable doubt for several reasons. First,

the prosecutor used the improper language only once during his lengthy closing and rebuttal arguments. He did not emphasize the language. Second, read in context, the language was used to support the prosecutor's argument that Bewaji's consent defense was not credible, which the prosecutor vigorously and properly argued elsewhere in his closing argument without engaging in any misconduct. Third, the state presented significant testimony from J.F.'s primary care physician, residential care facility staff, and family members that supports the jury's conclusion that J.F. lacked the capacity to consent. Consequently, while the "my world and our world" language was improper, our review of the record leaves us certain that the verdict was surely unattributable to the prosecutor's use of the phrase "my world and our world" and therefore the misconduct was harmless beyond a reasonable doubt. *See id.*

*Misstatement of the Evidence Regarding Check Writing*

We reach the same conclusion about the prosecutor's minor misstatement that "J.F. cannot even write a personal check." The prosecutor uttered this misstatement once, and the district court sustained an objection to the statement. In addition, the jury was instructed to disregard evidence the judge ordered stricken and to disregard attorney statements that differ from the jury's recollection of the evidence. Appellate courts assume that a jury follows a district court's instructions. *State v. Vang*, 774 N.W.2d 566, 578 (Minn. 2009). For these reasons, the verdict was surely unattributable to this objected-to statement about J.F.'s ability to write a personal check. *Whitson*, 876 N.W.2d at 304. In sum, we conclude that each instance of misconduct shown by Bewaji was harmless beyond a reasonable doubt.

*Cumulative Error*

Bewaji further argues that the cumulative effect of the instances of prosecutorial misconduct deprived him of a fair trial. "An appellant 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) (quotations omitted). "When considering a claim of cumulative error, we look to the egregiousness of the errors and the strength of the [s]tate's case." *Id.*

This case is not one of the rare cases in which the errors, taken cumulatively, deprived the defendant of a fair trial. Here, we discerned only two instances of error, both of which were harmless beyond a reasonable doubt. Viewing the two instances together, we conclude that the errors did not deprive Bewaji of a fair trial. As to the egregiousness of the errors, we acknowledge that the first error involving the prosecutor aligning himself with the jury was somewhat egregious, but the second error involving the evidence about the writing of checks was very minor. In considering whether these errors affected the fairness of the trial, we note that the state presented significant testimony from several witnesses to refute Bewaji's consent defense. We further note that the jury produced a mixed verdict, acquitting Bewaji of one count of third-degree criminal sexual conduct and convicting him of the other two counts of third-degree criminal sexual conduct as well as one count of fourth degree-criminal sexual conduct. When the jury has acquitted the defendant on some counts but convicted the defendant of others, "we view the verdicts as an indication 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).

For these reasons, we conclude that "[t]hese errors, when taken together, were not enough to tip the scales toward producing an unfair trial." *Fraga*, 898 N.W2d at 278 (quotation omitted).

## II. The district court did not err by imposing a lifetime conditional-release period.

Bewaji argues, in the alternative, that the district court erred by imposing a lifetime conditional-release term on one of Bewaji's third-degree criminal-sexual-conduct convictions. Bewaji asserts that the district court should have instead imposed a ten-year-conditional-release term on both of his third-degree criminal-sexual-conduct convictions. The state disagrees, arguing that the district court appropriately sentenced Bewaji. We agree with the state.

Whether a sentence conforms to the requirements of a statute is a question of law this court reviews de novo. *State v. Williams*, 771 N.W.2d 514, 520 (Minn. 2009). We "may at any time correct a sentence not authorized by law." Minn. R. Crim. P. 27.03, subd. 9.

A person convicted of third-degree criminal sexual conduct is "subject to conditional release under [Minnesota Statutes section 609.3455 (2020)]." Minn. Stat. § 609.344, subd. 2 (2020). Pursuant to section 609.3455, when a district court sentences a defendant to prison for third-degree criminal sexual conduct, "the court shall provide that, after the offender has been released from prison, the commissioner shall place the offender on conditional release for ten years." Minn. Stat. § 609.3455, subd. 6. But when a district court sentences a defendant to prison for third-degree sexual conduct "and the offender has a previous or prior sex offense conviction, the court shall provide that, after the offender

has been released from prison, the commissioner shall place the offender on conditional release for the remainder of the offender's life." *Id.*, subd. 7(b). A defendant has a "prior sex offense conviction" if he was convicted of "a sex offense before [he] has been convicted of the present offense, regardless of whether [he] was convicted for the first offense before the commission of the present offense, and the convictions involved separate behavioral incidents." *Id.*, subd. 1(g).

Under section 609.3455, a "prior sex offense conviction" includes "a conviction for a separate behavioral incident entered before a second conviction, whether at different hearings or during the same hearing." *State v. Nodes*, 863 N.W.2d 77, 82 (Minn. 2015); *see also* Minn. Stat. § 609.3455, subd. 1(g) (defining "prior sex offense conviction"). In other words, one conviction entered at the same hearing as a subsequent conviction may serve as a prior sex-offense conviction. *Nodes*, 863 N.W.2d at 82. But when a district court enters multiple criminal-sexual-conduct convictions *simultaneously* in the same hearing, one conviction cannot serve as a prior sex-offense conviction for another. *State v. Brown*, 937 N.W.2d 146, 157 (Minn. App. 2019). "A conviction occurs when the district court accepts and records 'a verdict of guilty by a jury . . . .'" *Id.* at 156 (quoting Minn. Stat. § 609.02, subd. 5 (2016)). Adjudication is simultaneous when there is "no temporal gap whatsoever between a district court's adjudication of offenses, [and] no conviction is entered 'before' the other." *Id.* at 157.

The record reflects that Bewaji had no prior sex offenses before his sentencing hearing in this case. Consequently, we must determine whether any of his three convictions

here occurred "before" another and thus qualified as a "prior sex offense" under section 609.3455, subd. 1(g).

Bewaji argues that the district court "skipp[ed] the adjudication phase" and proceeded to sentencing, meaning convictions were entered simultaneously. To support his argument, Bewaji analogizes to *Brown*. There, we concluded that the district court adjudicated the counts simultaneously when it referenced multiple convictions at the same time while using phrases like "those crimes" and "both counts":

> [Y]ou were convicted on June 22, 2018, of the crimes of criminal sexual conduct in the [first and second degree]. *And standing convicted of those crimes, so you're going to be convicted today on both counts*, it is the sentence of law and the judgment of this court that as punishment, therefore, you shall be committed to the Commissioner of Corrections of this state for a period of 216 months on Count 1 and 140 months on Count 2. Count 2 will run concurrently with Count 1.

*Id.* at 155-56 (alteration in original). Here, the state contends the convictions were sequential because the district court "used separate statements to enter each disposition on each conviction separately."

Based on our review of the sentencing transcript, we conclude that Bewaji's two convictions for third-degree criminal sexual conduct were entered sequentially. The district court announced its sentence and conviction of Bewaji in the following statement:[5]

> So, in file CR-21-800, criminal sexual conduct in the third degree, I will commit you to the Commissioner of Corrections for a period of 57 months. In file CR-21-738, criminal sexual conduct in the third degree, I will commit you to the Commissioner of Corrections for a period of 57

[5] The warrant of commitment in court file CR-21-800 also reflects that the district court sentenced Bewaji to a ten-year conditional-release period for his first conviction.

> months . . . . [Y]ou will be subject to a lifetime conditional release period.

The Minnesota Rules of Criminal Procedure explicitly provide that a sentence "is *an adjudication of guilt*." Minn. R. Crim. P. 27.03, subd. 8 (emphasis added). And because the district court sentenced Bewaji for third-degree criminal sexual conduct in file CR-21-800 before sentencing him for third-degree criminal sexual conduct in file CR-21-738, there was a temporal gap between his convictions. *See Brown*, 937 N.W.2d at 157 (providing that convictions are simultaneous when there is "no temporal gap whatsoever between a district court's adjudication of offenses"). Consequently, the record reflects that the convictions were not entered simultaneously.

In sum, we conclude that the district court did not err by sentencing Bewaji to a lifetime conditional-release period for one of his third-degree criminal-sexual-conduct convictions because it accepted and recorded Bewaji's two sex offenses sequentially.

**III. The claims in Bewaji's pro se supplemental brief do not warrant relief.**

In a supplemental brief, Bewaji asks for a new trial, states that the trial was not fair, asserts that he was convicted based on circumstantial evidence about J.F.'s ability to consent, and recites various pieces of testimony and procedural history. Bewaji's supplemental brief cites no legal authority and provides no argument about why the allegations he makes support the relief he requests. "An assignment of error based on mere assertion and not supported by any argument or authorities in appellant's brief is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection." *State v. Andersen*, 871 N.W.2d 910, 915 (Minn. 2015) (quotation omitted).

Because the pro se supplemental brief is inadequate and no prejudicial error is obvious on mere inspection, we decline to consider the claims therein.

In sum, Bewaji has identified no basis for reversing his convictions of third-degree criminal sexual conduct or vacating the lifetime conditional release period.

**Affirmed.**

FILED

December 17, 2024

OFFICE OF APPELLATE COURTS

STATE OF MINNESOTA

IN SUPREME COURT

A23-1398

State of Minnesota,

Respondent,

vs.

Olabamidele Olumide Bewaji,

Petitioner.

O R D E R

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the petition of Olabamidele Olumide Bewaji for further review is denied.

Dated: December 17, 2024

BY THE COURT:

Natalie E. Hudson

Natalie E. Hudson
Chief Justice

Appendix B

Additional material from this filing is available in the Clerk's Office.