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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A25-0087**

State of Minnesota,
Respondent,

vs.

Benard Mogaka Okero,
Appellant.

**Filed February 2, 2026
Affirmed
Ede, Judge**

Goodhue County District Court
File No. 25-CR-22-1887

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

Stephen F. O’Keefe, Goodhue County Attorney, Erin L. Kuester, Assistant County Attorney, Red Wing, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Chang Y. Lau, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Ross, Judge; and Ede, Judge.

NONPRECEDENTIAL OPINION

EDE, Judge

This is an appeal from a final judgment of conviction for fifth-degree criminal sexual conduct. Appellant asks that we reverse and remand for a new trial, claiming that respondent committed plain-error prosecutorial misconduct by (A) arguing to the jury that

his conduct caused “spiritual” and “soul harm,” (B) misusing *Spreigl* evidence,¹ (C) asking the jury to protect society, and (D) contending that, if the jury believed the victim, he is guilty. We affirm.

FACTS

Respondent State of Minnesota charged appellant Benard Mogaka Okero with fifth-degree criminal sexual conduct, in violation of Minnesota Statutes section 609.3451, subdivision 1a(1) (2022), and fifth-degree assault, in violation of Minnesota Statutes section 609.224, subdivision 1(2) (2022). These charges relate to allegations that Okero sexually assaulted E.E. in 2021. The matter proceeded to a two-day jury trial, at which the following witnesses testified: E.E.; E.E.’s mother, K.E.; a *Spreigl* witness, J.M.; an investigator with the Red Wing Police Department; and Okero. The district court also admitted a video recording of the investigator interviewing E.E. and received a redacted transcript of the interview as a court exhibit. The following summary of facts relevant to this appeal and consistent with the jury’s verdict stems from the trial record.

The incident underlying the charges occurred when E.E. was 16 years old and during her first job as a certified nursing assistant at an assisted living facility in Red Wing. On November 6, 2021, while E.E. was in training and working with Okero—who was a

¹ Minnesota Rule of Evidence 404(b)(1) provides that “[e]vidence of another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith.” But such evidence may be admissible “for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Minn. R. Evid. 404(b)(1). Evidence offered for one of these other purposes is called *Spreigl* evidence. *State v. McLeod*, 705 N.W.2d 776, 780 n.1 (Minn. 2005) (citing *State v. Spreigl*, 139 N.W.2d 167, 173 (Minn. 1965)) (other citation omitted).

registered nurse—E.E. and Okero responded to a call from a resident. After E.E. and Okero assisted the resident to the bathroom and closed the bathroom door, and while E.E. and Okero were alone in the resident’s room, Okero began touching E.E. by “massaging [her] shoulders.” He also “bent [her] over” while “rubbing his . . . penis on [her] . . . butt” and “dug his . . . face into [her] neck,” asking: “[Y]ou’re not going to tell your mom about this, are you?”² E.E. “didn’t know what to say” and was “shocked” that the incident occurred “because [she] was just trying to do [her] job” and she “didn’t think anything like that could happen.” The incident ended when E.E. and Okero helped the resident out of the bathroom and E.E. returned to a break area. E.E. cried while testifying about what had occurred.

Although she did not report the matter to the assisted living facility because “there was nobody really around” and she “was just so shocked that . . . [the incident] happened with someone that [she was] just trying to work with,” E.E. later told her mother, K.E., what Okero had done. K.E. reported the incident to law enforcement.

When E.E. was asked at trial why she stopped working at the assisted living facility, she started crying. She later explained that, because of the incident, she quit. In the months that followed, E.E. began smoking “weed” and drinking “every day.” She skipped school and “started doing really bad.” E.E. testified that she never wanted to work alone with men again and that the incident had caused her, and continued to cause her, “emotional and physical harm.”

² During his testimony, Okero denied this conduct.

As a *Spreigl* witness, J.M. testified about a separate incident of sexual assault by Okero in the workplace.³ In early 2020, J.M. worked as a certified nursing assistant in a long-term care facility in Edina. Okero was her supervisor. On her first or second day of work, J.M. and Okero were assisting a resident when Okero reached around J.M., put his hand up her shirt, grabbed her breasts, and began kissing her neck. Okero “didn’t stop when [J.M.] said, ‘Stop.’” Because J.M. was trained not to “freak out in front of [her] residents,” she “just kind of stood there” until Okero “finally stopped” and left.

The parties’ opening statements and closing arguments reflect that E.E.’s credibility and Okero’s intent were disputed throughout the trial. In his opening statement, Okero asserted:

There [were] no witnesses. And you will hear [E.E.’s] experience that night or that evening. And as we go forward, . . . you just have to ask yourself, was it really sexual contact? Is there any reason not to believe the witness? Did . . . Okero have sexual or aggressive intent? If there wasn’t sexual contact or if you determine that . . . Okero did not have sexual or aggressive intent, then you must acquit on the criminal sexual conduct charge. And we leave it up to you to make that decision. . . .

³ Before trial, the district court ruled that this *Spreigl* evidence was admissible to show Okero’s “intent, lack of mistake, and common plan or scheme.” When J.M. testified, the district court provided a cautionary instruction that the “evidence [was] being offered for the limited purpose of assisting [the jury] in determining whether . . . [Okero] committed those acts with which . . . [Okero was] charged here in this complaint,” that the evidence was “not to be used to prove the character of . . . [Okero] or that . . . [Okero] acted in conformity with such character,” that Okero was “not being tried for and may not be convicted of any offense other than the charged offense,” and that the jury was “not to convict . . . [Okero] on the basis of any conduct on a separate occasion” because “[t]o do so might result in unjust double punishment.”

And throughout cross-examination, Okero's counsel challenged E.E.'s credibility, including by: stating that Okero was "foreign" and asking whether E.E. "resent[ed] people from other countries that come over here"; questioning whether, "around the date of the incident, . . . [E.E. was] experimenting with drugs or alcohol"; and inquiring about perceived discrepancies between E.E.'s direct testimony and her responses on cross-examination.

During its summation and without objection, the state discussed the elements of fifth-degree criminal sexual conduct, provided a detailed review of how E.E.'s testimony satisfied each of those elements, and argued as follows:

In looking at all of the circumstances, reviewing the testimony, you're asked to determine who you believe; and when looking at who you believe, let us look at the full circumstances. Let us look at the why, let us look at who has the most to lose and who has nothing to lose because they've already lost so much of themselves.

. . . .

When we look at the element of harm, you think of a harm in the way that maybe when you look at it from a first dimension, maybe harm is bruises, broken bones, maybe it is a cut. We know that broken bones heal. We know that bruises fade. We know that cuts become scars and maybe they lighten in time. And then we look at the harm that we heard described yesterday over and over and over again. There are some types of physical harm, sexual harm that cause harm on all the levels of the being. The physical harm, the emotional harm, the spiritual harm. This is harm of the soul. This is what we collectively heard and saw described in December of 2021 and in July of 2024, harm of the soul. Because there are some injuries that we can't capture on a photograph, that video doesn't show; but the body knows those scars and carries [them], and we collectively in this room saw the pain that those scars . . . leave behind. That sexual assault that happened on

November 6th, 2021, defined [E.E.], not because it was just her first job, not because she didn't understand what . . . happened to her, it's because it harmed the soul and has continued to this day.

. . . .

This is a case about who you believe. You're asked to look at all of the facts, all of the circumstances; and, yes, you're asked to look at what that person said happened. [E.E.] made a report to her mom, made a report to law enforcement. She came into this courtroom three-plus years later. She answered questions about a sexual assault, private questions from me and intrusive questions from the defense. We are all doing our job, and yet she didn't back down, she maintained what she has from the very beginning. That she was alone in a resident's room with a registered nurse, . . . Okero, someone she didn't even know what his last name was because they had worked such a short time together; that he positioned the bodies and that he intentionally ground his penis on her while telling her, you're not going to tell your mother. What more could she do? She's come into the courtroom, she's faced cross examination, and yet she's maintained . . . what her experiences [were] from 2021 all the way until today and at great cost to her. We've heard what her life was before and the soul harm that happened after, and we've heard about the struggle that she did every single day to get herself back to where she was before she was sexually assaulted by . . . [Okero].

. . . .

. . . What is an experience that causes soul harm? It comes down to who you believe. [E.E.] was 16, only days on the job, her first job. [Okero] was an adult, a supervisor. On so many levels he had more power than her. It wasn't so simply a 40-year-old versus a 16-year-old, a registered nurse versus a trainee. It was the fact that he was the adult in power at the time and took advantage of that power. This isn't a situation where they knew each other. They were basically strangers who happened to work in the same building . . . for days, not weeks, not years. These are two individuals that were only brought together by . . . [Okero's] actions. [E.E.] was chosen. . . . [S]he was chosen by . . . [Okero], yes, for her age, yes, for the

opportunity that presented itself, yes, for the power imbalance; but most of all, she was chosen because he believed that she wouldn't tell anyone. Remember the statement, you're not going to tell your mom, are you? Because he also believed that no one would believe her if she did.

We are here asking you to believe [E.E.] If you believe [E.E.], . . . [Okero] is guilty. That's as simple as the law is. And doesn't [E.E.] warrant belief? [E.E.] and [J.M.], two people who should never have passed. [J.M.] in 2020; [E.E.] in 2021. [J.M.], two days on the job; [E.E.], maybe four days on the job. [J.M.], 23 years of age; [E.E.], 16 years of age. [J.M.], Edina, Minnesota; [E.E.], Red Wing, Minnesota. Fast forward three years. [J.M.], state of Georgia; [E.E.], Red Wing, Minnesota. Never shall these two pass. Two women, two lifetimes away, two different communities, two different states, brought together by one shared, soul-harming experience, brought together because they were sexually assaulted by . . . Okero. Both went to the police asking that . . . Okero never be able to do this again.

I ask you to review the instructions, to look at the two charges in front of you. I ask you to believe [E.E.], find . . . [Okero] guilty, ensure that no one else has to experience this level of harm to the soul. Thank you.

Okero did not object to these closing arguments by the state.

During the defense summation, Okero's counsel maintained his challenges to E.E.'s credibility and the state's evidence of his intent, arguing:

This . . . decision, I'd like you to base it on what you heard today, take into consideration the lack of eyewitnesses, the alleged victim's testimony[,] . . . Okero's testimony, the investigator's testimony, . . . as well as [E.E.'s] mom, her testimony, you're the ones that determine who to believe. We heard the mother and investigator attest to . . . [E.E.'s] story, and they weren't eyewitnesses. There were no eyewitnesses.

We heard how the incident impacted [E.E.] She told the investigator that she had been made aware that . . . Okero was a creep. . . . And . . . in her testimony yesterday, she also left

out that people at her work considered . . . Okero to be a creep. So [E.E.] . . . already had a negative perception of . . . Okero before the incident. She testified, she left some things out, she added some things from her forensic interview with [the] investigator. . . .

. . . Okero's hands were never on a breast or a butt, [E.E.'s] breasts or butt. No clothes were taken off either, [E.E.] or . . . Okero. . . . You decide the additional details that came out in [E.E.'s] testimony after hearing the forensic interview.

. . . [A]nd it's going to be your duty . . . to decide whether to believe beyond a reasonable doubt that the acts happened. And so when we talk about reasonable doubt, it's not a hunch, it's not more likely than not. It's a really high standard, it's . . . beyond a reasonable doubt. Changing stories should raise doubt.

Further, you're going to have to determine whether beyond a reasonable doubt . . . Okero had sexual or aggressive intent during this incident. . . . [H]e was in close quarters with [E.E.] in this incident. And [in] these close quarters, there was a machine with them. And . . . he testified that after he deposited the resident in the bathroom, that he extracted this machine, and . . . I can see . . . Okero pulling back the machine (indicating) and possibly making a grunt sound.

But it's up to you who to believe; and . . . if you don't think that . . . beyond a reasonable doubt there was sexual conduct, then you must acquit. But that decision is for you to make. . . .

The jury found Okero guilty of gross misdemeanor fifth-degree criminal sexual conduct and not guilty of misdemeanor fifth-degree assault. The district court sentenced Okero to 364 days in jail, with credit for 109 days served. Okero appeals.

DECISION

Okero contends that the state committed plain-error prosecutorial misconduct by (A) arguing to the jury that his conduct caused "spiritual" and "soul harm," (B) misusing

the *Spreigl* evidence, (C) asking the jury to protect society, and (D) contending that, if the jury believed E.E., he is guilty.

When a defendant fails to object—including during summation, as is the case here—appellate courts review claims of prosecutorial misconduct under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Under that standard, a defendant bears the initial burden of establishing error that is plain. *Id.* “For an error to be plain, the issue must have been clear or obvious.” *State v. Portillo*, 998 N.W.2d 242, 250 (Minn. 2023) (quotation omitted). “Usually this is shown if the error contravenes case law, a rule, or a standard of conduct.” *Id.* (quotation omitted). “An error is plain if it contravenes a principle that is conclusively resolved at the time of appeal.” *Id.* (quotation omitted).

A successful demonstration of plain-error prosecutorial misconduct by the defendant shifts the burden to the state to show that the error did not affect the defendant’s substantial rights. *Id.* at 248. “To meet its burden, the State must show that there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury.” *State v. Thompson*, 3 N.W.3d 257, 264 (Minn. 2024). “To determine whether there is a reasonable likelihood that the prosecutor’s error had a significant effect on the verdict, [appellate courts] consider the strength of the evidence against the defendant, the pervasiveness of the improper suggestions, and whether the defendant had an opportunity to (or made efforts to) rebut the improper suggestions.” *Portillo*, 998 N.W.2d at 251 (quotation omitted). In addition, “[t]he impact of a prosecutor’s improper remarks during closing argument may be lessened by the district court’s jury instructions.” *State v. Segura*, 2 N.W.3d 142, 163 (Minn. 2024). “If the State

fails to demonstrate that the alleged error did not affect the defendant’s substantial rights, [appellate courts] consider whether the error should be addressed to ensure fairness and the integrity of judicial proceedings.” *State v. Parker*, 901 N.W.2d 917, 926 (Minn. 2017).

“A reviewing court considers the closing argument as a whole and does not focus on selective phrases or remarks.” *State v. Chauvin*, 989 N.W.2d 1, 34 (Minn. App. 2023) (quoting *State v. Taylor*, 650 N.W.2d 190, 208 (Minn. 2002)), *rev. denied* (Minn. July 18, 2023). “‘The state has a right to vigorously argue its case’ and its argument ‘is not required to be colorless.’” *Id.* (quoting *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007)). While the state may neither “inflame[e] the passions and prejudices of the jury” nor “misstat[e] . . . the burden of proof,” *Ramey*, 721 N.W.2d at 300, “the [s]tate may present all legitimate arguments on the evidence and all proper inferences that can be drawn from that evidence,” *State v. Westrom*, 6 N.W.3d 145, 157 (Minn. 2024), *cert. denied*, 145 S. Ct. 418 (2024).

We address each of Okero’s arguments in turn.

A. Okero has not carried his burden of establishing that the state committed plain-error prosecutorial misconduct in arguing that Okero caused “soul” and “spiritual harm.”

Okero argues that the prosecutor “inflame[d] the passions and prejudices of the jury” by improperly appealing to religious prejudice through references to “soul” and “spiritual harm” in summation. This argument is unavailing.

To support his position, Okero relies on the Minnesota Supreme Court’s decision in *State v. Wangberg*, 136 N.W.2d 853 (Minn. 1965). In *Wangberg*, “the state asked for a conviction under Divine law even if the defendant was innocent under Minnesota law,”

and the supreme court held that the “argument constituted an unwarranted and improper appeal to religious prejudice [that] require[d] a new trial.” 136 N.W.2d at 855. But considering the closing arguments here as a whole rather than focusing on selective phrases or remarks, *see Chauvin*, 989 N.W.2d at 34, we conclude that the prosecution’s references to “soul” and “spiritual harm” are ambiguous rather than overt appeals to religious prejudice, as in *Wangberg*.

Soul is defined as “[a] part of humans regarded as immaterial, immortal, separable from the body at death, capable of moral judgment, and susceptible to happiness or misery in a future state.” *The American Heritage Dictionary of the English Language* 1672 (5th ed. 2018). And spiritual is defined as “[o]f, concerned with, or affecting the soul.” *Id.* at 1689. Taken together and in context, the prosecution’s references to “soul” and “spiritual harm” are not unwarranted and improper appeals to religious prejudice. *See Wangberg*, 136 N.W.2d at 855. E.E.’s testimony—during which she cried—established several ways that the incident had caused her, and continued to cause her, “emotional and physical harm,” including: leading her to quit working at the assisted living facility and to avoid working alone with men; smoking “weed” and drinking “every day”; skipping school; and “doing really bad.” Because the totality of the state’s summation used this testimony in “asking [the jury] to believe” E.E., we conclude that the prosecutor made “legitimate arguments on the evidence and all proper inferences that can be drawn from that evidence” as to the credibility of E.E.’s account. *Westrom*, 6 N.W.3d at 157.

The Minnesota Supreme Court’s decision in *State v. Hanson* is instructive. 176 N.W.2d 607 (Minn. 1970). In *Hanson*, the supreme court characterized *Wangberg* as

“concerning the mischief [that] results when jurors are urged to apply sanctions for the enforcement of divine law,” yet ruled that a “reference by the prosecution in . . . closing argument to the words of the Fifth Commandment, ‘Thou shalt not kill,’ was, at best, inappropriate.” *Id.* at 615. Considering “the entire argument of the prosecuting attorney in light of . . . *Wangberg*,” the supreme court described the state’s summation as “temperate,” and, “[f]or the most part[,] . . . an objective analysis of the evidence,” reasoning that “[t]he reference to the Fifth Commandment was very much incidental to its main thrust.” *Id.* Consequently, the supreme court held that the prosecution’s closing arguments did “not constitute a prejudicially erroneous appeal to bias and prejudice” and the court did “not consider it a basis for reversal.” *Id.*

Given the supreme court’s decision in *Hanson* that the state’s reference to the Fifth Commandment in closing argument was not reversible error, we cannot say that Okero has carried his initial burden of establishing plain error as to the prosecutor’s discussion of the “soul” and “spiritual harm” that E.E. experienced here, which was incidental to the summation’s main thrust—that E.E.’s account is credible. *See Ramey*, 721 N.W.2d at 302. Put differently, the state’s closing arguments do not amount to “clear or obvious” error by “contraven[ing] case law, a rule, or a standard of conduct,” and it did not violate “a principle that is conclusively resolved at the time of appeal.” *Portillo*, 998 N.W.2d at 250 (quotations omitted). We therefore conclude that the state did not commit plain-error prosecutorial misconduct in arguing that Okero caused “soul” and “spiritual harm.”

B. Okero has not carried his burden of showing that the state committed plain-error prosecutorial misconduct in its closing argument about the *Spreigl* evidence.

Okero maintains that the prosecutor sought to “inflam[e] the passions and prejudices of the jury” by improperly using the *Spreigl* evidence “to imply that [he] had a propensity for sexually assaulting young women.” We conclude that Okero has not carried his burden of showing that the state’s closing argument about the *Spreigl* evidence amounted to plain-error prosecutorial misconduct.

On appeal, Okero has not challenged the district court’s pretrial ruling admitting the *Spreigl* evidence for the purposes proffered by the state—intent, lack of mistake, and common plan or scheme. *See* Minn. R. Evid. 404(b)(1). In fact, he concedes that “it was appropriate for the state to argue [that Okero] perpetrated the alleged sexual assault against E.E. in light of the similarity in the circumstances under which J.M. and E.E. claimed to have been assaulted.” Although Okero relies on our decision in *State v. Peterson* to claim that the state used the *Spreigl* evidence in “an improper manner,” we conclude that *Peterson* is distinguishable and that the prosecutor appropriately referred to J.M.’s testimony to argue that Okero committed the charged conduct. 530 N.W.2d 843 (Minn. App. 1995).

In *Peterson*, the prosecutor argued in closing that the alleged victim and a *Spreigl* witness “reported what happened to them at the hands of [the defendant,] totally independent of each other, and the idea that this [was] somehow one big coincidence just stretche[d] reality and common sense too far.” *Id.* at 848. Reasoning that “[t]his argument turned *Spreigl* evidence into improper substantive evidence” by “turn[ing] the case from

one in which [the defendant] was on trial for molesting [the alleged victim of the charged conduct] to one in which the jury was deciding whether [the defendant] molested” both the alleged victim and the *Spreigl* witness, we held that “[t]he prosecutor’s comments impermissibly implied that the jury would be defying common sense if they did not convict” the defendant. *Id.*

Unlike the prosecutor in *Peterson*, however, the prosecutor here argued that Okero was guilty of the charged conduct by properly using the *Spreigl* evidence for the admitted purposes of showing intent—which Okero had contested throughout the trial—as well as lack of mistake and common plan or scheme. The prosecutor highlighted the similarities between the circumstances of E.E.’s and J.M.’s experiences with Okero, including when and where they encountered him, how long they had been on the job, and their relative ages at the time. And consistent with both Minnesota Rule of Evidence 404(b)(1) and the district court’s cautionary instruction, the state did not use the *Spreigl* evidence to prove Okero’s character and argued neither that he acted in conformity with such character nor that he was being tried for and could be convicted based on his conduct against J.M.

Okero has failed to carry his initial burden of establishing plain error that is clear or obvious. *See Portillo*, 998 N.W.2d at 250; *Ramey*, 721 N.W.2d at 302. Thus, we conclude that Okero has not shown that the state committed plain-error prosecutorial misconduct in its closing arguments about the *Spreigl* evidence.

C. The state has carried its burden of showing that the prosecutor’s plainly erroneous arguments about protecting society did not affect Okero’s substantial rights.

Okero contends that the state “urged the jury to convict him to ‘ensure’ he did not continue in [a] pattern of [sexually assaultive] behavior,” which he asserts was “plain misconduct” that was “aimed at inflaming the passions and prejudices of the jury” by “ask[ing] the jury to protect society with its verdict.” This contention does not merit reversal.

As Okero points out, we have held that “[i]t is improper for the prosecutor to make statements urging the jury to protect society or send a message with its verdict.” *See State v. Duncan*, 608 N.W.2d 551, 556 (Minn. App. 2000) (citing *State v. Salitros*, 499 N.W.2d 815, 819 (Minn. 1993)) (other citation omitted), *rev. denied* (Minn. May 16, 2000); *see also State v. Hoppe*, 641 N.W.2d 315, 320 (Minn. App. 2002) (“It is improper for a prosecutor to urge the jury to protect society with its verdict.”), *rev. denied* (Minn. May 14, 2002). Here, the prosecutor argued that E.E. and J.M. “went to the police asking that . . . Okero never be able to do this again” and requested that the jury “ensure that no one else has to experience this level of harm to the soul.” These arguments are clearly and obviously erroneous because they contravene caselaw and violate “a principle that is conclusively resolved at the time of appeal.” *Portillo*, 998 N.W.2d at 250 (quotation omitted). Accordingly, Okero has carried his initial burden of establishing that the state’s closing arguments constituted plain-error prosecutorial misconduct. *See Ramey*, 721 N.W.2d at 302.

But the state has met its burden to show that this plain error did not affect Okero's substantial rights. *See Portillo*, 998 N.W.2d at 248. Based on the strength of the evidence against Okero, the limited nature of the prosecutor's improper suggestions, and Okero's opportunity and efforts to rebut the state's initial closing argument, there is no reasonable likelihood that the plain-error prosecutorial misconduct had a significant effect on the verdict. *See id.* at 251.

The evidence against Okero was relatively strong. E.E.'s trial testimony about Okero's conduct largely aligned with her statements to her mother, K.E., and to the investigator during her interview, which was video recorded and received as an exhibit. The state also presented evidence of Okero's intent, lack of mistake, and common plan or scheme through J.M.'s testimony about her similar experience of sexual assault by Okero in the workplace.

The improper suggestions about protecting society were limited rather than pervasive. The prosecutor's statement about E.E. and J.M. asking police that "Okero never be able to do this again" and the prosecutor's request that the jury "ensure that no one else has to experience this level of harm to the soul" are constrained to four lines on one page of the trial transcript. By contrast, the state's initial and rebuttal closing arguments span 235 lines across ten transcript pages, and the entire trial transcript is 285 pages long. *See State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007) (concluding that "the prosecutor's improper suggestions were not pervasive" because they "cover[ed] less than one of the 64 pages of the transcript").

Because the prosecutor made the challenged statements during the state’s initial closing argument, Okero had the opportunity to rebut improper suggestions during the defense summation. And Okero did so, including by maintaining that his “hands were never on . . . [E.E.’s] breasts or butt,” that E.E.’s “[c]hanging stories should raise doubt,” and that he “possibly ma[de] a grunt sound” while “pulling back the machine” after helping the resident to the bathroom while “in close quarters with” E.E., which suggested that he did not have “sexual or aggressive intent during this incident.”

As a result, we conclude that the state has carried its burden of showing that the prosecutor’s plainly erroneous arguments about protecting society did not affect Okero’s substantial rights. *See id.*

D. Okero has not carried his burden of showing that the state committed plain-error prosecutorial misconduct in its closing arguments that, if the jury believed E.E., he is guilty.

Okero argues that “[t]he prosecutor committed plain misconduct by diluting the state’s burden of proof” in asking the jury to believe E.E. and asserting that, if the jury believed E.E., he is guilty. We conclude that, on this issue, Okero has not met his initial burden of identifying plain-error prosecutorial misconduct.

In support of his claim that the prosecutor committed “clear or obvious” error by “contraven[ing] case law” and violating “a principle that is conclusively resolved at the time of appeal,” *Portillo*, 998 N.W.2d at 250 (quotations omitted), Okero relies on our nonprecedential and therefore nonbinding decision in *State v. Cooper*, No. A13-2318, 2014 WL 7011140 (Minn. App. Dec. 15, 2014). *See* Minn. R. Civ. App. P. 136.01, subd. 1(c) (“Nonprecedential opinions . . . are not binding authority except as law of the case, res

judicata or collateral estoppel, but nonprecedential opinions may be cited as persuasive authority.”). In *Cooper*, we concluded that the prosecutor plainly erred in making “several arguments to the jury, all of which were some variation of[:] ‘[I]f you believe when [the victim] got up in here and told you his testimony, if you believe that is true, [the defendant] is guilty.’” 2014 WL 7011140, at *5.⁴ Here, *Cooper* is not persuasive authority because it is distinguishable.

Considering the state’s closing arguments as a whole rather than focusing on the challenged phrases that Okero highlights, *see Chauvin*, 989 N.W.2d at 34, we conclude that—unlike *Cooper*—the prosecutor here did not “necessarily impl[y]” that, if Okero was not guilty, then E.E. was not telling the truth, 2014 WL 7011140, at *5. Instead, the totality of the state’s summation shows that the prosecutor informed the jury that it could find Okero guilty if it believed E.E. The prosecutor responded to Okero’s challenges to E.E.’s credibility throughout the trial, which began during his opening statement and continued through cross-examination and summation. The state’s closing arguments included a discussion of the elements of fifth-degree criminal sexual conduct, a detailed review of how E.E.’s testimony satisfied each of those elements, a request that the jury believe E.E., and an explanation of why, based on all the trial evidence, E.E. “warrant[ed] belief.”

⁴ On the fairness-and-integrity prong of the modified plain-error standard, we ultimately affirmed the defendant’s conviction based on our conclusion that “reversal [was] not warranted” because “granting a new trial under [the] circumstances [of that case] would [have] be[en] an exercise in futility and a waste of judicial resources.” *Id.* at *6 (quotation omitted).

Cooper is also distinguishable because, in that opinion, we relied on Minnesota Supreme Court caselaw that “noted the dangers inherent in . . . [the challenged closing] argument when analyzing the validity of ‘were they lying’ questions.” 2014 WL 7011140, at *5 (citing *State v. Pilot*, 595 N.W.2d 511 (Minn. 1999)).⁵ But after its decision in *Pilot*, the supreme court later characterized that case as “indicat[ing] that [were-they-lying] questions are permitted in the circumstance when the defendant ‘[holds] the issue of the credibility of the state’s witnesses in central focus.’” *State v. Morton*, 701 N.W.2d 225, 235 (Minn. 2005) (quoting *Pilot*, 595 N.W.2d at 517). This occurs “when the defense . . . by unmistakable insinuation accuses a witness of a falsehood.” *Leutschaft*, 759 N.W.2d at 423. *Cooper* did not analyze whether the defense had “unmistakably insinuated” that the victim was not credible. 2014 WL 7011140, at *5. Here, however, Okero held the issue of E.E.’s credibility in central focus throughout the trial, concluding with his closing argument that unmistakably insinuated E.E. had testified falsely. Okero asserted that E.E. “already had a

⁵ In *Pilot*, the supreme court explained that

“[w]ere they lying” questions, in general, are questions the state poses to a criminal defendant on cross-examination. Typically, the prosecutor will first ask the defendant if he heard the testimony of one or more of the state’s witnesses. Then the prosecutor will ask the defendant if the witnesses’ testimony was accurate. If the defendant states that the witnesses’ testimony was not accurate, the prosecutor will ask the defendant to comment on the veracity of the witnesses’ testimony by asking the defendant, “Were they lying?”

595 N.W.2d at 516 n.1. Minnesota is in the minority of jurisdictions that “have held that such questions are generally improper, but have opted to decline a bright-line prohibition in favor of case-by-case resolution through the exercise of judicial discretion.” *State v. Leutschaft*, 759 N.W.2d 414, 421 (Minn. App. 2009), *rev. denied* (Minn. Mar. 17, 2009).

negative perception of . . . Okero before the incident,” that “she left some things out” and “added some things from her forensic interview with [the] investigator,” and that she was “[c]hanging stories” about conduct that Okero had denied and for which “[t]here were no eyewitnesses.”

Finally, following its decision in *Pilot*, the supreme court held that “[t]he State telling jury members during closing arguments that they must decide who they believe is not analogous to ‘were they lying’ questions of witnesses on the stand.” *State v. Caine*, 746 N.W.2d 339, 360 (Minn. 2008). Consistent with *Caine*, the prosecutor here appropriately told the jury during closing arguments that, “[i]n looking at all of the circumstances, reviewing the testimony, [the jury was] asked to determine who [it] believe[d.]”

For these reasons, we conclude that *Cooper* is distinguishable and that Okero has not carried his initial burden of showing that the state committed plain-error prosecutorial misconduct in its closing arguments that, if the jury believed E.E., he is guilty. *See Portillo*, 998 N.W.2d at 250; *Ramey*, 721 N.W.2d at 302.

Affirmed.