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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A19-0869**

State of Minnesota,  
Respondent,

vs.

Jose Patricio Rosendo Dominguez,  
Appellant.

**Filed July 6, 2020  
Affirmed in part, reversed in part, and remanded  
Smith, Tracy M., Judge**

Hennepin County District Court  
File No. 27-CR-18-10756

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

Michael O. Freeman, Hennepin County Attorney, Adam E. Petras, Assistant County  
Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Workman Jesness,  
Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reilly, Presiding Judge; Smith, Tracy M., Judge; and  
Florey, Judge.

**UNPUBLISHED OPINION**

**SMITH, TRACY M.,** Judge

In this direct appeal, appellant Jose Patricio Rosendo Dominguez argues that (1) his  
convictions for first- and second-degree criminal sexual conduct must be reversed because

respondent State of Minnesota committed prosecutorial misconduct in closing argument, (2) the district court abused its discretion by imposing an aggravated upward departure in sentencing because his offense was not significantly more serious than typical, (3) the district court erred by imposing a lifetime term of conditional release because he did not have a prior sex-offense conviction since his convictions were entered simultaneously in the same proceeding, and (4) the district court likewise erred by imposing a lifetime requirement of predatory-offender registration. We conclude that, though prosecutorial misconduct occurred, appellant was not prejudiced by it. We also conclude that the district court did not err by imposing an aggravated departure in sentencing. We further conclude that the district court erred by imposing a lifetime term of conditional release because the convictions were simultaneous, but that the district court did not err by imposing a lifetime registration requirement. We therefore affirm in part, reverse in part, and remand.

## **FACTS**

The following facts are drawn from Rosendo Dominguez’s jury trial. Rosendo Dominguez married E.G. in 2010. E.G. brought two children to their relationship, including M.S., and the couple had two more children. The family lived in several different homes over the course of M.S.’s childhood. At those different locations, and while M.S. was in the third to eighth grades, Rosendo Dominguez engaged in repeated and escalating sexual abuse of M.G., including vaginal penetration with his penis. When M.G. was 13 years old, she disclosed the abuse to her mother and grandmother.

The state charged Rosendo Dominguez with one count of first-degree criminal sexual conduct for “[p]enetration or [c]ontact with person under 13” pursuant to Minn.

Stat. § 609.342, subd. 1(a) (2016); and another count of second-degree criminal sexual conduct for sexual contact with a victim age 13 to 15 while the defendant is in a position of authority over the victim pursuant to Minn. Stat. § 609.343, subd. 1(b) (2016).<sup>1</sup> Rosendo Dominguez denied the charges, and the case proceeded to a three-day jury trial.

The jury found Rosendo Dominguez guilty on both counts. The jury also answered in the affirmative all nine questions on a special verdict form relating to an aggravated sentence. At sentencing, the district court concluded that the jury's findings established the aggravating factors of particular cruelty and abuse of a position of authority or trust. Based on these aggravating factors, the district court sentenced Rosendo Dominguez to a prison sentence of 204 months for the first-degree criminal-sexual-conduct count, which is a 32-month departure from the top of the presumptive guidelines range. The district court also imposed a consecutive 36-month executed sentence for the second-degree count. The district court ordered that Rosendo Dominguez be placed on conditional release for the remainder of his life and register as a predatory offender for the remainder of his life.

Rosendo Dominguez appeals.

## D E C I S I O N

**I. Although the prosecutor committed plain error in the closing argument, the error did not affect Rosendo Dominguez's substantial rights.**

Rosendo Dominguez argues that the state committed prosecutorial misconduct during its closing argument. Rosendo Dominguez did not object to the closing argument at trial but argues that he should receive a new trial under the plain-error doctrine.

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<sup>1</sup> A third count of criminal sexual misconduct was charged but dismissed during trial.

Prosecutors are ministers of justice who have an “affirmative obligation” to ensure that a defendant receives a fair trial. *State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006). This obligation includes being familiar with standards of conduct and practicing proper conduct in closing arguments. *Id.* at 300-01. Appellate courts apply the modified plain-error analysis when examining allegations of unobjected-to prosecutorial misconduct. *Id.* at 299-300. Under that test, the defendant bears the burden of establishing error that is plain. *Id.* at 302. “An error is plain if it is clear or obvious, and usually this is shown if the error contravenes case law, a rule, or a standard of conduct.” *State v. Davis*, 735 N.W.2d 674, 681 (Minn. 2007) (quotations omitted). If the defendant establishes plain error, the burden shifts to the state to prove that the error did not affect the defendant’s substantial rights. *State v. Parker*, 901 N.W.2d 917, 926 (Minn. 2017). To do so, the state must establish 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.” *Ramey*, 721 N.W.2d at 302 (quotation omitted). If the state fails to meet that burden, appellate courts consider whether the error should be addressed to ensure the fairness and integrity of the proceedings. *Parker*, 901 N.W.2d at 926.

Rosendo Dominguez asserts four instances of prosecutorial misconduct in closing argument. We first analyze whether any of the challenged conduct constituted plain error, and we then evaluate prejudice.

**A. Plain error**

**1. Inflaming the passions of the jury**

Rosendo Dominguez argues that the prosecutor inflamed the jury's passions. "When credibility is a central issue, this court pays special attention to statements that may inflame or prejudice the jury." *State v. Mayhorn*, 720 N.W.2d 776, 787 (Minn. 2006). "While the state's argument need not be 'colorless,' it must be based on the evidence produced at trial, or the reasonable inferences from that evidence." *State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995). "It is improper for the prosecutor to make statements urging the jury to protect society or to send a message with its verdict." *State v. Duncan*, 608 N.W.2d 551, 556 (Minn. App. 2000), *review denied* (Minn. May 16, 2000).

Rosendo Dominguez argues that the prosecutor inflamed the jury with these opening lines:

Children speak quietly, that's why we have to listen. The men who abuse children are counting on their silence. That's why they pick them. Children are easily confused. They're afraid. They may not have the language or the framework to understand what's happening. They don't remember or understand things the way adults do. They don't talk or think in a linear or sequential way all the time. Children are the perfect victims.

The state argues that the statements were grounded in the evidence and, in any event, any error was not plain. We disagree. The statements went beyond the evidence in the case, and they attempted to inject into the trial the broader societal issue of protecting children from sexual abuse. In both ways, they were plainly erroneous.

Rosendo Dominguez also argues that the prosecutor inflamed the jury's passions by speculating that he abused his stepdaughter because his wife was too busy for intimacy. The prosecutor said in her closing argument, "[A]bout how much time and maybe how much intimacy this defendant was getting with his wife during that time? Sometimes the sexual abuse of kids isn't about sex, but sometimes it is." The state contends that the argument was proper because it was grounded in the evidence of E.G.'s absence from home while working multiple jobs to support her four children and the prosecutor was trying to identify a possible motive for Rosendo Dominguez's sexual abuse. As misguided as this part of the state's closing argument was, we cannot conclude that it constituted error that was plain.

## **2. Disparaging the defense**

Rosendo Dominguez argues that the state disparaged the defense by "improperly impl[y]ing that all criminal defendants, including appellant, lie on the stand" and "by implying that his defense rested solely on the hope that the jury would believe an adult over a child."

The supreme court has repeatedly warned prosecutors against disparaging the defense. *State v. Bailey*, 677 N.W.2d 380, 403-04 (Minn. 2004). "The State may argue that there is no merit in a particular defense, but it may not belittle that defense either in the abstract or by suggesting that the defendant raised the defense because it was the only one with any hope for success." *State v. Peltier*, 874 N.W.2d 792, 804 (Minn. 2016).

Here, the state said to the jury, "Criminal defendants don't admit to the charges when they take the witness stand; they get on the witness stand and they deny everything,

and that's just what he did." The state also said that "the grown-up's always going to have the upper hand in that context, and that is what he is counting on."

Implying that all criminal defendants lie when they take the stand is plain error. The prosecutor lumped Rosendo Dominguez into a category of criminal defendants who all lie when they take the stand—nothing in the prosecutor's statement was connected to Rosendo Dominguez's actual testimony. The prosecutor committed plain error by disparaging the defense.

### **3. Vouching for the victim's credibility**

Rosendo Dominguez next argues that the state committed plain error during closing argument by vouching for the victim's credibility. "Vouching occurs when the government implies a guarantee of a witness's truthfulness, refers to facts outside the record, or expresses a personal opinion as to a witness's credibility." *In re Welfare of D.D.R.*, 713 N.W.2d 891, 900 (Minn. App. 2006) (quotation omitted). But a prosecutor may argue that certain witnesses were or were not credible. *State v. Jackson*, 714 N.W.2d 681, 696 (Minn. 2006).

The portion of the testimony in question is when the prosecutor stated:

Only the most amoral, Machiavellian individual would make this up because they are mad at their stepfather for taking their cell phone, and then repeat it again at CornerHouse, and then come into a courtroom full of adults and strangers, promise to tell the truth, and make it up again.

The state asserts that it is not vouching for a witness's credibility to explain why the witness's testimony is credible. This assertion is supported by *Jackson*, 714 N.W.2d at 695-96. In *Jackson*, the supreme court held that a prosecutor did not improperly vouch for a

witness's credibility by emphasizing how she was afraid of retaliation for snitching. *Id.* at 696. The supreme court noted that the prosecutor simply highlighted that the witness's comments were not self-serving. *Id.* This case is similar to *Jackson*. The prosecutor was arguing that the victim's testimony was credible because it was consistent and not self-serving. The argument does not amount to error.

#### **4. Misstating the burden of proof**

Finally, Rosendo Dominguez argues that the state committed plain error when the prosecutor misstated the burden of proof during its closing argument. "A prosecutor's misstatement of the burden of proof is highly improper and constitutes misconduct." *State v. Martin*, 773 N.W.2d 89, 105 (Minn. 2009) (quotation omitted). This is true even if the district court states the correct burden in jury instructions. *State v. Strommen*, 648 N.W.2d 681, 689-90 (Minn. 2002).

Rosendo Dominguez argues that the state misstated the burden of proof when the prosecutor said, "If you believed [the victim] when she testified, this case is proven. The law does not require more than that." The prosecutor later reiterated, "In the law it is enough if you believed [the victim]." Rosendo Dominguez contends that these statements misstated the burden of proof because there is possibility that the jury could have believed the witness but not concluded that the case was proved beyond a reasonable doubt. The state counters by citing Minn. Stat. § 609.347, subd. 1 (2018), which states that "the testimony of the victim need not be corroborated."

We are not persuaded that the state misstated the burden of proof. The prosecutor did not recite a burden of proof other than beyond a reasonable doubt. Rather, in context,



the prosecutor was explaining that the testimony of a victim need not be corroborated. Immediately after one of the challenged statements, the prosecutor explained to the jury: “The word of a credible witness is enough to prove a case; we wouldn’t be here if it wasn’t. And that’s the best evidence that you are ever going to have in a case like this; the person who experienced it telling you what happened to her.” The challenged statements were not plain error.

### **B. Substantial rights**

Because Rosendo Dominguez has shown that the prosecutor committed plain error in two instances in closing argument, the burden shifts to the state to show that there is no reasonable likelihood that the absence of the misconduct would have had a significant effect on the jury’s verdict. *Ramey*, 721 N.W.2d at 302. In determining whether misconduct affected an appellant’s substantial rights, appellate courts consider “(1) the strength of the evidence against [appellant]; (2) the pervasiveness of the erroneous conduct; and (3) whether [appellant] had an opportunity to rebut any improper remarks.” *Peltier*, 874 N.W.2d 792, 805-06 (Minn. 2016). Courts also consider the district court’s jury instructions. *State v. Washington*, 521 N.W.2d 35, 40 (Minn. 1994).

First, the evidence against Rosendo Dominguez is relatively strong. The victim testified in great detail about Rosendo Dominguez’s misconduct, and several witnesses were called at trial who confirmed that she made consistent allegations throughout the investigation process. There was also evidence that the victim was looking up depression tests and trying to understand sexual abuse through Wikipedia. Second, the plainly erroneous conduct was not pervasive; the misconduct occurred twice in a closing argument

that spans 16 pages of transcript. Third, Rosendo Dominguez had an opportunity to give a closing argument after the state, which allowed him an opportunity to rebut the errors and alleged errors. Finally, the district court instructed the jury that the lawyers' statements were not evidence and that the jury should follow the law given by the district court and not the attorneys. For these reasons, we conclude that the prosecutor's misconduct did not affect Rosendo Dominguez's substantial rights and therefore does not warrant reversal of his convictions.

**II. The district court did not abuse its discretion by imposing an upward durational departure in sentence.**

Rosendo Dominguez argues that the district court erred by imposing a 32-month upward durational departure for the sentence on the first-degree criminal-sexual-conduct count because compelling circumstances did not show that his offense was more serious than the typical first-degree criminal-sexual-conduct offense.<sup>2</sup> He also argues that only a "small subset" of first-degree criminal sexual offenders receive an upward durational departure.

Appellate courts review a district court's decision to apply an upward durational departure for an abuse of discretion. *State v. Edwards*, 774 N.W.2d 596, 601 (Minn. 2009). "If the reasons given for an upward departure are legally permissible and factually supported in the record, the departure will be affirmed." *Id.* The sentencing guidelines permit the district court to depart if the district court articulates "substantial and

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<sup>2</sup> Rosendo Dominguez does not challenge the district court's decision to impose a consecutive sentence on the other count.

compelling” circumstances to justify the departure. *Id.* ““Substantial and compelling” circumstances are those showing that the defendant’s conduct was significantly more or less serious than that typically involved in the commission of the offense in question.” *Id.*

At the *Blakely* stage of the trial,<sup>3</sup> the jury found nine facts on a special-verdict form. These findings by the jury related to Rosendo Dominguez being in a position of authority of M.S. and to his commission of different sexual acts multiple times before the victim turned 13 years old. In imposing an upward durational departure, the district court adopted the findings of the jury and concluded that Rosendo Dominguez “treated [his] stepdaughter, the victim, with particular cruelty” and was “clearly in a position of authority over her and her trust was severely violated at the time of these offenses.”

Rosendo Dominguez first attacks this determination by arguing that the district court did not find that these circumstances were “*significantly*” more serious than typical. He cites *Edwards*, in which we explained that “substantial and compelling circumstances” are those that show that the defendant’s conduct was “significantly more or less serious” than typical for the offense. 774 N.W.2d at 601. But Rosendo Dominguez has not provided any authority for the proposition that the district court must use the term “significantly” when determining that substantial and compelling circumstances exist, and he does not dispute that particular cruelty and abuse of a position of authority may be substantial and compelling circumstances warranting upward departure.

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<sup>3</sup> Under *Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 2536 (2004), any fact, other than a conviction, that increases the penalty for a crime beyond the presumptive sentence must be submitted to a jury and proved beyond a reasonable doubt. *State v. Shattuck*, 704 N.W.2d 131, 135, 141 (Minn. 2005).

Rather, he argues that the underlying facts do not justify a determination that the offense was more serious than typical, citing the absence of evidence of physical injuries to the victim and the fact that respondent did not engage in certain types of sexual abuse. But “[m]ultiple acts of sexual contact and penetration . . . have served as aggravating factors justifying an upward sentencing departure.” *State v. Morales-Mulato*, 744 N.W.2d 679, 691 (Minn. App. 2008). The jury found that Rosendo Dominguez sexually abused M.G. on multiple occasions before she turned 13 years old, including by penetrating her genital opening with his hand and penis on more than one occasion; by putting his mouth on her genital opening on more than one occasion; and by biting her at least once during the sexual abuse. Together with the jury’s finding that Rosendo Dominguez was in a position of authority, the record supports the district court’s determination that the offense was more serious than typical.

Finally, Rosendo Dominguez argues that his sentence is improper based on Minnesota’s criminal-sentencing statistics. He asserts that, because only a small percentage of criminal convictions, and specifically first-degree criminal-sexual-conduct convictions, result in an aggravated sentence, his sentence is inequitable and inconsistent with the principles underlying the guidelines. But even if statistics are consulted, Rosendo Dominguez has not shown how the particular aggravating factors in his case compare with the cases underlying those statistics. He therefore fails to show how the statistics establish an absence of aggravating factors in his case.

The district court did not abuse its discretion by departing upward in sentencing.

### **III. The district court erred by imposing a lifetime term of conditional release.**

Rosendo Dominguez argues that his lifetime term of conditional release must be reversed and conditional release limited to ten years for each offense because the convictions were entered simultaneously and he did not have any other previous or prior sex-offense convictions.

Defendants will be placed on conditional release for the remainder of their life if they are sent to prison for specified criminal-sexual-conduct offenses and they have a previous or prior sex-offense conviction. Minn. Stat. § 609.3455, subd. 7(b) (2016). A “conviction” occurs when any of the following is “accepted and recorded” by the district court: a plea of guilty, a verdict of guilty by a jury, or a finding of guilty by a court. Minn. Stat. § 609.02, subd. 5 (2016). “A defendant who, in a single hearing, is convicted of two sex offenses, one immediately after another, each arising out of separate behavioral incidents, has a ‘prior sex offense conviction’” and is subject to lifetime conditional release. *State v. Nodes*, 863 N.W.2d 77, 77 (Minn. 2015). “As long as one conviction is entered before the second, it is a ‘prior conviction’ under the plain language of the statute.” *Id.* at 82. Conversely, when a defendant is convicted of two sex offenses not sequentially but simultaneously, neither conviction is a “prior sex offense conviction,” and neither can be the basis for lifetime conditional release as to the other. *State v. Brown*, 937 N.W.2d 146, 156-57 (Minn. 2019). Whether a conviction is a prior conviction is a matter of statutory interpretation that appellate courts review de novo. *Nodes*, 863 N.W.2d at 80.

Here, the district court said as follows at sentencing:

So you, Jose Rosendo Dominguez, having been found guilty on February 4, 2019 of the crimes of Count 1, criminal sexual conduct in the first degree, in violation of Minnesota Statute 609.342 subdivision 1(a), and Count 3, criminal sexual conduct in the second degree, in violation of Minnesota Statute 609.343 subdivision 1(b), and standing convicted of said crimes, it is the sentence of law and the judgment of this Court that as punishment therefor you shall be committed to the Commissioner of Corrections . . . .

Rosendo Dominguez argues that this language is virtually identical to the language in *Brown* and therefore, as in *Brown*, his convictions were simultaneous, not sequential. In *Brown*, the district court stated:

[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 . . . .

*Brown*, 937 N.W.2d at 155 (alteration in original). The state argues that the language is more like that used in *Nodes* and that his convictions were therefore sequential, as in that case. In *Nodes*, the district court stated:

I will now formally accept the pleas, and *on count one* adjudicate him guilty of criminal sexual conduct in the first degree, a felony, in violation of Minnesota Statute 609.342, [s]ubd. 1(a) and [s]ubd. 2(a), on or about February 26, 2013, and also *on count three*, criminal sexual conduct in the second degree, a felony, in violation of Minnesota Statute 609.343, [s]ubd.1(a) and [s]ubd. 2(a) on or about March 19, 2013.

*Nodes*, 863 N.W.2d at 79 (emphasis added).

We conclude that the Rosendo Dominguez's convictions were simultaneous, not sequential. It is true, as the state observes, that the district court began by separately

identifying the two crimes that the jury found Rosendo Dominguez guilty of. But those guilty verdicts were not “accepted and recorded” by the district court until the next sentence, when the district court said of Rosendo Dominguez: “and standing convicted of said crimes.” Because Rosendo Dominguez points to no other time at which the district court accepted and recorded the jury’s verdicts of guilty, we conclude that this was the moment of both convictions. What happened in *Nodes* was different. There, the district court separately and explicitly “adjudicate[d]” the defendant guilty of each offense, and, as the *Nodes* court recognized, “when a court adjudicates a defendant guilty on the record,” that is a conviction. *Id.* at 81. Thus, the convictions in *Nodes*, unlike here, were sequential.

Because Rosendo Dominguez did not have a prior sex-offense conviction, the district court erred by imposing lifetime conditional release.

**IV. The district court did not err by imposing a lifetime predatory-registration requirement for the conviction of first-degree criminal sexual conduct.**

Finally Rosendo Dominguez argues that the prior-conviction argument addressed above also prevents the district court from imposing on him a lifetime predatory-offender-registration requirement. But, with respect to the lifetime registration requirement attached to Rosendo Dominguez’s first-degree conviction, the state correctly observes that Rosendo Dominguez is relying on the wrong statutory paragraph. Rosendo Dominguez cites Minn. Stat. § 243.166, subd. 6(d)(1) (2016), but the applicable statutory subdivision is Minn. Stat. § 243.166, subd. 6(d)(3) (2016). That subdivision provides for lifetime registration “if the person is required to register based upon a conviction for an offense under section 609.342, subdivision 1, paragraph (a).” Minn. Stat. § 243.166, subd. 6(d)(3). For a conviction under

section 609.342, subdivision 1(a), the subdivision does not require a prior conviction to trigger the lifetime registration requirement. The district court therefore did not err by imposing a lifetime registration requirement as part of the sentence for first-degree criminal sexual conduct.

We note that the district court also imposed a lifetime registration requirement as part of its sentence for Rosendo Dominguez's second-degree criminal-sexual-conduct conviction. But with respect to that offense, as Rosendo Dominguez argues, Minn. Stat. § 243.166, subd. 6(d)(1), does apply and a prior conviction is required. *See* Minn. Stat. § 243.166, subd. 6(d)(1) (providing that lifetime registration is required when a person is convicted of violating Minn. Stat. § 609.343 and has a prior conviction requiring registration). Although it may not have practical effect since a lifetime requirement already applies, the lifetime registration requirement attached to the sentence for the second-degree offense was error.

In sum, we affirm Rosendo Dominguez's convictions and the upward departure in sentencing. We reverse the lifetime terms of conditional release. We affirm the lifetime predatory-offender registration requirement attached to the first-degree conviction but reverse the lifetime registration requirement attached to the second-degree conviction. We remand to the district court to correct the warrant of commitment. With respect to the sentence for first-degree criminal sexual conduct, the district court should vacate the lifetime term of conditional release and impose a ten-year term of conditional release; the district court should retain the lifetime predatory-offender-registration requirement. With respect to the sentence for second-degree criminal sexual conduct, the district court should



vacate the lifetime term of conditional release and impose a ten-year term of conditional release; for the sake of accuracy, the district court should vacate the condition of lifetime predatory-offender registration and impose the appropriate registration term.

**Affirmed in part, reversed in part, and remanded.**