STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1275

State of Minnesota,
Respondent,

vs.

Gary James,
Appellant.

Filed July 27, 2010
Affirmed
Stoneburner, Judge

Hennepin County District Court
File No. 27CR0846932

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Suzanne Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

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

STONEBURNER, Judge

Appellant challenges his conviction of second-degree criminal sexual conduct, arguing that the prosecutor committed prejudicial misconduct; the district court

committed prejudicial error in ruling that appellant could be impeached with a prior conviction if he testified and by instructing the jury on appellant's right not to testify; and that the cumulative effects of the errors denied appellant a fair trial. We affirm.

FACTS

A jury found appellant Gary James guilty of second-degree criminal sexual conduct, in violation of Minn. Stat. § 609.343, subd. 1(a) (2008) (engaging in sexual contact with another person where the complainant is under 13 years of age and the actor is more than 36 months older than the complainant). Evidence at trial established that James, who was 43-years old at the time of the offense, engaged in sexual contact with a six-year-old boy, touching the boy's "private parts" as the boy struggled to perform push-ups that James had challenged him to perform; that James gave the child money and asked him to accompany James to a store; and that James later, but before the child had reported the inappropriate touching, tried to give the child more money in the presence of the child's father, insisting that the child had earned the money. James does not challenge the sufficiency of the evidence to support the verdict; rather, he argues that the cumulative effect of trial errors deprived him of a fair trial. The following is a description of the errors alleged.

During closing argument, the prosecutor posed five unobjected-to questions asking "why" someone would do the things that James was alleged to have done that supported an inference that he engaged in sexual contact with the child. James argues that the questions constitute misconduct because they drew attention to his failure to testify and shifted the burden to him to prove his innocence. James also argues that the prosecutor's

repeated references to the innocence of the child constituted misconduct designed to inflame the jury's passion and sympathy. James additionally argues that the prosecutor impinged on the district court's duty to instruct the jury by making three statements that all that was needed to find appellant guilty was for the jury to believe the child's testimony, erroneously implying that a victim's testimony never needs corroboration.

The district court granted the state's pretrial request to impeach James with evidence of a November 28, 2000 conviction of felon in possession of a firearm if he chose to testify at trial. James asserts that this ruling constituted prejudicial error. James also asserts that the district court committed prejudicial error by instructing the jury on his right not to testify without obtaining James's permission for such an instruction.

D E C I S I O N

I. The prosecutor did not commit misconduct that affected James's substantial rights.

"If a defendant fails to object to alleged prosecutorial misconduct at trial or to seek cautionary instructions, we review the defendant's claim to determine if plain error occurred." *State v. Leake*, 699 N.W.2d 312, 327 (Minn. 2005). Plain error requires: (1) error; (2) that is plain; and (3) that affects substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). The non-objecting defendant has the burden of demonstrating the first two prongs. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). An error is plain if it is "clear or obvious"; this is usually shown if the error contravenes case law, a rule, or a standard of conduct. *Id.* (quotation omitted). The state bears the burden of proving the third prong: that there is no reasonable likelihood that the absence

of the misconduct would have had a significant effect on the jury's verdict. *Id.* If all three prongs are met, this court assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings. *Leake*, 699 N.W.2d at 327.

James concedes that no objection was made to any of the conduct that he now claims constituted misconduct. The state argues that no prosecutorial misconduct occurred and that James's conviction is supported by "ample" evidence.

A. "Why" questions

James assigns error to five statements by the prosecutor. During her 26-page closing argument, the prosecutor asked:

> 1. "Why would you want to take somebody else's six-year-old kid, who you've never met before, in your car to the store with you?"
>
> 2. [Referencing James's insistence on giving the child money in the presence of the child's father because the child "earned it"] "Why? Because [the child] already told his dad something and [James is] afraid he might tell him the rest of it?"
>
> 3. [After describing appellant's second attempt to give more money to the child] "Why? Use your common sense. Why? Dad didn't take the money at that point, there's no testimony that dad had taken the [initially given] money away from [the child] at that point or that [the child had] given it back to [James]. Why was he so adamant [that the child had earned the money]? . . . Because what's the alternative? That he gave it to him for a different reason. A reason that [the child] hadn't told his dad yet."

During her 11-page rebuttal argument, the prosecutor asked:

> 4. "Why would somebody touch the penis of a six-year-old boy? I don't know that either. But that's not something I have to prove."

> 5. "Why would a 43-year-old man be rubbing the chest and stomach of a six-year-old boy he doesn't know with his shirt off? I can't answer that question for you either. But you have an independent adult witness who saw that happening."

James asserts that these "why" questions constitute prejudicial prosecutorial misconduct because "[t]he effect of the argument was to draw attention to [James's] failure to testify and to shift the burden onto [James] to prove his innocence by providing non-guilty reasons for all of the prosecutor's 'why' questions." A prosecutor may not allude to a defendant's failure to testify. Minn. Stat. § 611.11 (2008). And a prosecutor may not shift the burden of proof to the defendant, *State v. Haynes*, 725 N.W.2d 524, 530 (2007), or suggest that the defendant has a burden of proof, *State v. Martin*, 773 N.W.2d 89, 105 (Minn. 2009).

"Indirect references to a defendant's failure to testify . . . are prohibited if they either (1) manifest the prosecutor's intention to call attention to the defendant's failure to testify, or (2) are such that the jury would naturally have understood them as a comment on defendant's failure to testify." *State v. DeRosier*, 695 N.W.2d 97, 107 (Minn. 2005) (quotation omitted). In *DeRosier*, the supreme court held that a prosecutor's remarks that the defendant "knows" what happened and "it would be nice to know" what had happened constituted improper indirect references to a defendant's failure to testify. *Id.* at 107 & n.5. Similarly, in *State v. Schneider*, the prosecutor made several statements in anticipation of an argument that he expected defense counsel to make. 311 Minn. 566, 567, 249 N.W.2d 720, 722–23 (1977). The prosecutor stated that injuries sustained by

defendant in a car accident might explain why he was staggering, but the injuries would not explain why defendant's breath smelled of alcohol and why there were empty beer bottles in the car. *Id.* The prosecutor noted: "We don't have any evidence before us to refute these things." *Id.* The supreme court concluded that these statements could have been understood by the jury as comments on defendant's failure to testify "because the only person who could have refuted the things the prosecutor referred to was defendant and he did not take the stand." *Id.* at 567, 249 N.W.2d at 722.

But a prosecutor is allowed to "pose rhetorical questions to the jury, asking it to use common sense to determine whether the defense presented is reasonable." *State v. Bauer*, 776 N.W.2d 462, 474 (Minn. App. 2009), *review granted* (Minn. Mar. 16, 2010); *see also State v. Ashby*, 567 N.W.2d 21, 28 (Minn. 1997) (stating that a prosecutor is "free to anticipate arguments defense counsel will make" and to argue that there is no merit to a particular defense or argument, so long as the prosecutor does not "generally belittle a particular defense in the abstract"); *State v. Race*, 383 N.W.2d 656, 664 (Minn. 1986) (distinguishing a prosecutor's remarks that challenged a defense theory from remarks that would shift the burden to the defense). A prosecutor is also permitted to present to the jury all legitimate arguments on the evidence, to analyze and explain the evidence, and to present all proper inferences to be drawn from the evidence. *State v. Starkey*, 516 N.W.2d 918, 927–28 (Minn. 1994).

In the first challenged statement in this case, the prosecutor appears to have been arguing that the evidence showed that James acted with sexual intent. *See* Minn. Stat. § 609.341, subd. 11 (Supp. 2009) (defining sexual contact). In the second and third

statements, the prosecutor appears to have been arguing that the only rational interpretation of James's behavior when confronted by the child's father is that he was attempting to keep the child from disclosing the sexual contact. The fourth statement appears to refer to motive, which the state is not required to prove. And the fifth statement, taken in context, reminds the jury that there was an independent witness who saw James touching the child as the child did push-ups.

We conclude that these statements do not manifest an intention by the prosecutor to call attention to appellant's failure to testify; we also conclude that the statements are not statements that the jury would naturally have understood to be alluding to James's failure to testify. Unlike the prosecutor in *DeRosier*, the prosecutor here did not tell the jury that James knew what had actually happened or that it would be helpful to hear James's side of the story. Instead, the prosecutor anticipated and responded to James's arguments that the child's story was inconsistent, did not make sense, and that James had merely bet with the child about how many push-ups the child could do. The prosecutor stressed that sexual contact could be inferred from James's conduct, and the challenged statements were part of the prosecutor's argument that the state's theory made sense and that no other rational conclusion could be drawn from the evidence. *See State v. Jones*, 516 N.W.2d 545, 549 (Minn. 1994) (stating that circumstantial evidence must form a complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt).

Additionally, even if one or more of these statements could be construed to constitute prosecutorial misconduct, we conclude that none of the statements affected James's substantial rights. *See DeRosier*, 695 N.W.2d at 107–08 (holding that prosecutor's improper indirect references to defendant's failure to testify did not constitute reversible error); *Schneider*, 311 Minn. at 567, 249 N.W.2d at 722 (same). The rhetorical questions here were only a small part of the prosecutor's lengthy argument. *See State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993) (stating that an appellate court must examine the whole argument in context when reviewing alleged misconduct in closing statements). The state correctly argues that the evidence amply supported the verdict such that there is no reasonable likelihood that the absence of the statements would have had a significant effect on the verdict. We conclude that James has failed to show that the prosecutor's "why" questions constituted plain error.

B. Inflaming the jury's passion and sympathy

James argues that the prosecutor improperly played upon the jury's passion and sympathy by reminding the jury of the child's innocence, stating:

- "The innocence of a child. That's what this case centers around."
- "So, being an innocent six-year-old, [the child] got down on the ground and started doing pushups."
- "[James] approached [the child] . . . and asked him about doing pushups. Seemingly innocent questions to an innocent six-year-old boy."
- "[The child] ended up in the back of the building where [James] again engaged with him, this innocent six-year-old boy. This time it was, get in my car, go to the store with me."

- "[The child] is a bright, sometimes shy, innocent, but forthright seven-year-old boy. And he came in here and he told you what happened to him."

- "Think about a six-year-old boy having something like this happen to him. . . . This is a six-year-old boy. An innocent six-year-old boy who probably as it's happening is troubled, traumatized, whatever word you want to use for it, but confused about what's even going on. He's not going to jump up and look at this grown man who is hovering over him and say, what are you doing?"

The state argues that the prosecutor was merely commenting on the evidence and rebutting James's argument that the child was untruthful because, for example, he had not objected to James's behavior.[1]

"[A] prosecutor must avoid inflaming the jury's passions and prejudices against the defendant." *State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995). An appellate court "pay[s] special attention to statements that may inflame or prejudice the jury where credibility is a central issue." *Id.* The supreme court has also noted that "[s]exual-abuse cases inevitably evoke an emotional reaction, and any attempt by the prosecutor to exacerbate this natural reaction by making any emotive appeal to the jury is likely to be highly prejudicial." *State v. McNeil*, 658 N.W.2d 228, 234 (Minn. App. 2003) (quotation omitted).

James relies upon *McNeil* to support his argument. In that case, the prosecutor told the jury that while it could not give the victim back her childhood or virginity, it

[1] James's counsel argued in closing: "If a man is down squeezing the boy's genitals, [the boy is] not going to do anything? He's not going to be crying, alarmed, hurt, scared, something?"

could give her justice. *Id.* at 234–35. The supreme court held that these statements were made "to play on the sympathies of the jury" and "were wholly unrelated to the elements of the offenses with which appellant was charged or the evidence at trial." *Id.* at 235.

The state relies on *Finnegan v. State*, 764 N.W.2d 856 (Minn. App. 2009), *aff'd*, ___ N.W.2d ___ (Minn. June 30, 2010). In that case, the prosecutor stated that the victim was a "14-year-old girl, stripped of her innocence . . . she was a virgin at the time"; she "didn't get to choose to have it with someone of her choosing"; she was "hiding this disgusting act"; "she's a 14-year-old girl that just had [her] first sexual experience"; "we're talking about a 14-year-old girl here with a first intimate act of embarrassment, of shyness, of newness, not knowing what to do about it"; she "didn't know how everybody would react, what would they think and how would you know if you're 14 years old and never been through this situation"; and "a 14-year-old girl was assaulted and taken away from being able to choose." 764 N.W.2d at 865. In *Finnegan*, defendant's attorney challenged the credibility of the victim and questioned why her report of the assault was delayed. *Id.* at 865–66. This court held that the prosecutor's comments were made to explain the evidence, "rather than [to] evok[e] sympathy and comment[] on issues wholly unrelated to the elements of the offenses or the evidence at trial." *Id.* at 866.

We conclude that, as in *Finnegan*, the comments here explained the evidence and did not amount to an argument that the jury should punish James because of the child's innocence. The comments attempted to show that the child's version of events was credible because of his youth and innocence and that his behavior was consistent with that of a young, uncomfortable child who did not understand James's actions. We

conclude that the prosecutor's remarks about the child's innocence do not constitute prosecutorial misconduct; James has therefore failed to establish error, let alone plain error, due to these comments.

C. Comments implying that the child's testimony need not be corroborated

James asserts that the following statements of the prosecutor constitute prejudicial misconduct:

- "If you believe [the child], [James] is guilty."
- "If you believe [the child], [James] is guilty of criminal sexual conduct[] in the second degree. That is all you need."
- "You were here, heard the evidence. There is no requirement for you to convict other than do you believe [the child]? Because if you believe him and what he's told you here, what he told [the CornerHouse interviewer], what he told his dad, if you believe him, that is all you need."

James argues that, through these comments, the prosecutor impinged on the district court's duty to instruct the jury on the law by telling the jury it did not need evidence other than the child's testimony to convict him. To support this argument, James relies on the unpublished case of *State v. Cao*, No. A08-1932, 2009 WL 2595967 (Minn. App. Aug. 25, 2009) (reversing and remanding for a new trial because the prosecutor's statements that "the law in this state does not require corroboration," and "[y]ou can find a person guilty of criminal sexual conduct just on a victim's testimony alone," misstated the law), *review granted* (Minn. Nov. 17, 2009).

The statutory rule that a victim's testimony need not be corroborated is not unqualified. *See Marshall v. State*, 395 N.W.2d 362, 365 (Minn. App. 1986) (stating that

"in an individual case the absence of corroboration might mandate a holding on review that the evidence was legally insufficient."), *review denied* (Minn. Dec. 17, 1986); *see also State v. Cichon*, 458 N.W.2d 730, 735 (Minn. App. 1990) (noting that corroboration is required if the other evidence of guilt is insufficient), *review denied* (Minn. Sept. 28, 1990). But in this case, the prosecutor did not misstate the law by telling the jury that corroboration of the child's testimony was not required because the child's testimony constituted sufficient evidence of guilt. And the statements are related to the prosecutor's permissible argument that the child was credible. *See State v. Lopez-Rios*, 669 N.W.2d 603, 614 (Minn. 2003) (stating that the prosecution may argue the credibility of witnesses in final argument if the argument is tied to the evidence). We conclude that in the circumstances of this case, the prosecutor's statements were not error, and that any potential misstatement of the law was cured by the district court's instructing the jury to disregard any statement of the law that differed from the law stated by the district court. *See State v. Taylor*, 650 N.W.2d 190, 207 (Minn. 2002) (stating that a jury is presumed to follow instructions).

II. The district court did not abuse its discretion by ruling that James could be impeached by a prior conviction.

An appellate court reviews a district court's decision to admit evidence of a defendant's prior convictions for an abuse of discretion. *State v. Williams*, 771 N.W.2d 514, 518 (Minn. 2009). Here, the district court granted the state's request to impeach James with evidence of his November 28, 2000 conviction of felon in possession of a firearm if James testified at trial. James argues that this ruling was prejudicial error.

Minn. R. Evid. 609 provides generally that that any felony conviction that is not stale may be used to impeach a witness if the probative value of the evidence outweighs its prejudicial effect. It is undisputed that the conviction here was not stale. A district court is to consider five factors (the *Jones* factors) in determining whether the probative value of impeachment evidence outweighs its prejudicial effect: "(1) the impeachment value of the prior crime; (2) the date of the conviction and the defendant's subsequent history; (3) the similarity of the past crime with the charged crime; (4) the importance of defendant's testimony; and (5) the centrality of the credibility issue." *Williams*, 771 N.W.2d at 518 (citing *State v. Jones*, 271 N.W.2d 534, 538 (Minn. 1978)).

Here, the district court did not address the *Jones* factors but simply stated that it would allow the state to impeach James with the prior conviction. A district court errs when it fails to demonstrate on the record that it has considered and weighed the *Jones* factors. *State v. Swanson*, 707 N.W.2d 645, 655 (Minn. 2006). But an appellate court may conduct its own review of the *Jones* factors in determining whether this type of error is harmless. *Id.* at 655–56 (conducting review of *Jones* factors in absence of district court analysis and concluding that the district court did not abuse its discretion under Minn. R. Evid. 609(a)(1)). We therefore consider the *Jones* factors.

A. Impeachment value of the prior conviction

The supreme court has stated that "impeachment by prior crime aids the jury by permitting it to see the 'whole person' of the testifying witness and therefore to better judge the truth of his testimony." *Williams*, 771 N.W.2d at 518. James notes that based on this proposition, Minnesota courts have come to accept that conviction of any crime

bears on credibility under the "whole person" concept, yielding the result that the first factor "always weighs in the state's favor." James cites cases from other jurisdictions recognizing that factfinders have a tendency to misuse prior-conviction evidence as propensity evidence, and argues that evidence of his prior conviction does not show "the whole person" but merely highlights "a negative character trait—that he commits crimes." James argues that rather than helping the jury evaluate his credibility, this evidence encourages the jury to use the information as evidence of his bad character. James argues that a fair and balanced application of the first factor weighs against admission. Because we are an error-correcting court,[2] we conclude that under caselaw firmly establishing the "whole person" concept and its relationship to credibility, the first factor does not weigh against admissibility. While appellant's prior conviction does not appear to provide much illumination regarding the truth of what he might have testified to, a crime need not involve truth or falsity to have impeachment value under the "whole person" rationale. *See Williams*, 771 N.W.2d at 518 (citing *State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993) for the observation that the fact that a prior conviction did not directly involve truth or falsity does not mean it has no impeachment value). Nonetheless, this factor weighs only slightly, if at all, in favor of admission.

B. Date of the prior conviction and James's subsequent history

Caselaw indicates that a conviction—even if it is not stale—should "show a pattern of lawlessness" for this factor to weigh in favor of admissibility. *See Swanson*,

[2] *Lake George Park, L.L.C. v. IBM Mid-Am. Employees Fed. Credit Union*, 576 N.W.2d 463, 466 (Minn. App. 1998) (stating that "[t]his court, as an error correcting court, is without authority to change the law"), *review denied* (Minn. June 17, 1998).

707 N.W.2d at 655 (noting that an "older conviction" occurring within ten years of the charged crime "can remain probative if later convictions demonstrate a history of lawlessness" (quotation omitted)); *State v. Ihnot*, 575 N.W.2d 581, 586 (Minn. 1998) (concluding that the second *Jones* factor favored admissibility of a fairly old conviction because subsequent convictions showed a pattern of lawlessness indicating that the older offense had not lost any relevance through the passage of time).

James argues that his firearm-possession conviction from November 2000 does not establish a pattern of lawlessness. We agree. It is undisputed that James's prior conviction is not "stale" under rule 609(b). *See Gassler*, 505 N.W.2d at 67 (noting that a conviction occurring within ten years of the instant prosecution is not "stale"). But because James's prior conviction occurred nearly eight years before the charged offense in this case and because it does not show a pattern of lawlessness, this factor weighs against admissibility.

C. Similarity of the prior conviction to the charged crime

"[I]f the prior conviction is similar to the charged crime, there is a heightened danger that the jury will use the evidence not only for impeachment purposes, but also substantively." *Id.*; *see also Swanson*, 707 N.W.2d at 655. James concedes that the prior conviction is not similar to the charged offense here and that this factor weighs in favor of admissibility.

D. Importance of James's testimony

E. Centrality of the credibility issue

The fourth and fifth *Jones* factors may be analyzed together. *See Swanson*, 707 N.W.2d 655–56; *Ihnot*, 575 N.W.2d at 587; *Gassler*, 505 N.W.2d at 67. The state argues that these factors, analyzed together, weigh in favor of admissibility because credibility was a central issue in the case. We agree.

It is undisputed that credibility was a central issue in this case. *See Ihnot*, 575 N.W.2d at 587 & n.3 (assuming, in absence of offer of proof as to what appellant's testimony would have been, that appellant would have denied allegations of criminal sexual conduct, making credibility a central issue); *State v. Bettin*, 295 N.W.2d 542, 546 (Minn. 1980) (stating that credibility is a central issue when the issue for the jury "narrows to a choice between defendant's credibility and that of one other person"). The supreme court has held that where credibility is a central issue in the case, the fourth and fifth *Jones* factors weigh in favor of admitting a prior conviction. *Swanson*, 707 N.W.2d at 655–56; *Ihnot*, 575 N.W.2d at 587. Therefore, the fourth and fifth *Jones* factors weigh in favor of admissibility.

Because the majority of the *Jones* factors weigh in favor of admissibility, we conclude that the district court did not abuse its discretion by ruling that the state could impeach appellant with evidence of this prior conviction if he testified. *See State v. Hochstein*, 623 N.W.2d 617, 624–25 (Minn. App. 2001) (affirming admission of prior conviction when first *Jones* factor was neutral, second and third factors weighed against admission, and fourth and fifth factors weighed in favor of admission); *see also Swanson*,

707 N.W.2d at 655–56 (conducting review of *Jones* factors in absence of district court analysis and concluding that any error in the district court's failure to weigh the factors was harmless and that the district court did not abuse its discretion under Minn. R. Evid. 609(a)(1)).

III. The no-adverse-inference jury instruction did not affect James's substantial rights.

If a defendant requests the no-adverse-inference instruction, a record must be made of the defendant's clear consent to the instruction. *State v. Gomez*, 721 N.W.2d 871, 880 (Minn. 2006). James's counsel requested that the district court give the instruction, but the district court failed to make a record of James's consent. The district court instructed the jury:

> The State must convince you by evidence beyond a reasonable doubt that the defendant is guilty of the crime charged. The defendant has no obligation to prove innocence. The defendant has the right not to testify. This right is guaranteed by the federal and state constitutions. You should not draw any inference from the fact that the defendant has not testified in this case.[3]

Because no objection was made to the instruction or the failure to record James's consent, we apply the plain-error test outlined above. *Gomez*, 721 N.W.2d at 880. In this case, the first two prongs of the plain error test—error that was plain—are established by the absence from the record of James's consent. *See id.* at 881 (stating that because the record does not contain defendant's consent to the giving of the no-adverse-inference instruction, giving the instruction was error and the error was plain).

[3] This instruction is identical to 10 *Minnesota Practice*, CRIMJIG 3.17 (2006).

The next step of the plain-error test is whether James has satisfied the heavy burden of showing that his substantial rights were affected by the giving of the instruction. *See id.* at 880. This third prong is satisfied if the error was prejudicial and affected the outcome of the case. *Id*.

James argues that his substantial rights were affected because the instruction called the jury's attention to the fact that he did not testify. James also argues that the instruction, combined with the prosecutor's previously analyzed challenged "why" questions, created a connection between James's silence and "the jury's assumption of [James's] guilt was too direct and too natural for the jury to resist." We disagree.

Although giving the no-adverse-inference instruction always calls the jury's attention to the fact that the defendant did not testify, the giving of this instruction without a defendant's consent has not always been held to have affected the defendant's substantial rights. *See, e.g.*, *Gomez*, 721 N.W.2d at 881–82 (holding that erroneously giving the instruction did not affect appellant's substantial rights); *State v. Darris*, 648 N.W.2d 232, 240 (Minn. 2002) (same); *State v. Thompson*, 430 N.W.2d 151, 153 (Minn. 1988) (same); *State v. Duncan*, 608 N.W.2d 551, 558 (Minn. App. 2000) (holding that giving the no-adverse-inference instruction was not reversible error), *review denied* (Minn. May 16, 2000).

In *Duncan*, the defendant was convicted of four counts of criminal sexual conduct for the sexual assaults of two girls, ages nine and ten. 608 N.W.2d at 554–55. This court held that giving the no-adverse-inference instruction without the defendant's consent was not reversible error—even though "the central issue in the case was the credibility of the

girls' statements, [and] the jury instructions may have had the deleterious effect of emphasizing [the defendant's] failure to take the witness stand and deny the allegations." *Id.* at 558.

In considering the third prong of the plain-error test, this court examines the strength of the evidence. *State v. Juarez*, 572 N.W.2d 286, 292 (Minn. 1997). In this case, the state's evidence was strong. The child testified that James touched his "private parts," and the child's testimony was consistent with what he told his father and what he told the CornerHouse interviewer. And the child's version of events was corroborated in several important respects: a neighbor saw James touching the child as the child did push-ups and saw James give the child cash and kiss the child; and the child's father testified that he confiscated $13 from the child, who said James had given him the money. We conclude that the no-adverse-inference instruction could not have affected the outcome of the case. James has therefore failed to establish that the district court's error in failing to obtain his personal consent to the instruction constitutes plain error that entitles him to the relief sought.

IV. James's cumulative-error argument is without merit.

James argues that the errors he alleges cumulatively deprived him of a fair trial. *See State v. Mayhorn*, 720 N.W.2d 776, 792 (Minn. 2006) (concluding that the cumulative effect of evidentiary errors and prosecutorial misconduct denied defendant the right to a fair trial). We disagree.

"Cumulative error exists when the cumulative effect of the . . . errors and indiscretions, none of which alone might have been enough to tip the scales, operate to

the defendant's prejudice by producing a biased jury." *State v. Penkaty*, 708 N.W.2d 185, 200 (Minn. 2006) (quotation omitted); *see also Duncan*, 608 N.W.2d at 558 (concluding that defendant was deprived of a fair trial by cumulative effect of "all the trial errors and misconduct" where the criminal-sexual-conduct case was "relatively close" and the prosecution "depended almost solely on the somewhat imprecise and equivocal interviews and testimony of the young victims").

In this case, James has established only one error that was plain, and, therefore, there is no "cumulative effect" as asserted by James.

V. James's pro se arguments are without merit.

In addition to the arguments raised in his principal brief, James asserts in a pro se supplemental brief: (1) ineffective assistance of trial counsel; (2) absence of a probable-cause hearing; (3) inconsistent testimony about what clothes he was wearing at the time of the incident and the fact that those clothes were not returned to him; (4) the failure of CornerHouse to provide the child's records upon James's request and lack of opportunity to cross-examine a person who called the CornerHouse interviewer during the child's interview; and (5) the failure of the prosecutor to disclose information.

We have thoroughly reviewed these assertions and conclude, primarily based on James's failure to adequately brief these issues and the lack of support in the record for several of the assertions, that the issues have been waived on appeal, are unsupported by the record and/or would not entitle James to relief on appeal. *See State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002) (stating that pro se appellant's assertions are deemed waived if they contain no argument or citation to legal authority to support allegations).

Some of the issues raised have been addressed above. And several issues were never raised in the district court; we therefore decline to address them on appeal. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating that an appellate court generally will not consider matters not argued to and considered by the district court).

Affirmed.