No. 99618-1

Court of Appeals # 50424-3-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRUCE LEE FRITZ,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Derek Vanderwood, Judge

PETITION FOR REVIEW

KATHRYN RUSSELL SELK, No. 23879
Attorney for Petitioner

RUSSELL SELK LAW OFFICE
1037 N.E. 65th Street. # 176
Seattle, Washington 98115
(206) 782-3353

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RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

A. IDENTITY OF PETITIONER/DECISION BELOW

Bruce Lee Fritz asks this Court to grant review under RAP 13.4(b) of the unpublished decision of the Court of Appeals, Division Two, in State v. Fritz, __ Wn. App. ___ (2021 WL 798919) (No. 50424-3-II), entered on March 2, 2021. A copy of the decision is attached.

B. ISSUES PRESENTED FOR REVIEW

1. Was counsel prejudicially ineffective and are Petitioner's rights to present a defense implicated where the case involves only credibility, the State is arguing that the victim's "precocious knowledge" is proof of the Petitioner's guilt, yet counsel did not renew a request to introduce evidence that L's biological father was investigated for and self-reported having committed child abuse after it came to light that the father had access to the child before the allegations were made?

2. Should review be granted to address counsel's ineffective assistance and the prosecutor's misconduct when both misstated the standard of reasonable doubt and minimized the State's burden?

3. Does the "witness-advocate" rule prohibit a prosecutor from serving as a fact witness even though her office was prosecuting the case and did the Court of Appeals err in holding otherwise?

C. STATEMENT OF THE CASE

1. Procedural Facts

Petitioner Bruce L. Fritz was retried in 2017 after a successful personal restraint petition. See CP 137-52; In re the Personal Restraint of Fritz, 192 Wn. App. 1030 (2016) (unpublished). He was charged on remand in Clark County with four counts of first-degree child rape and two counts of child molestation, with the aggravating

factors of "abuse of trust" and "ongoing pattern." CP 4; RCW 9A.44.073; RCW 9A.44.083; RCW 9.94A.525(3); RCW 9.94A.545. The jury acquitted of two counts of child rape and one child molestation and found guilt for two counts of child rape and one molestation, with the aggravating factors. CP 503-16; RP 1758-59. Mr. Fritz appealed and, on March 2, 2021, the Court of Appeals, Division Two, affirmed in an unpublished opinion. See Appendix A.

This Petition timely follows.

2. Relevant facts

In 2010, then 8-year-old L was living with her mom, Regina Pack, and her mom's boyfriend, Petitioner Bruce Fritz, when she accused Mr. Fritz of having "child molested" her and of having started when she was six. RP 1052-56, 1086, 1331-42. This was in contrast with what L had said when her mom had discussed "good touch/bad touch" with her, which was often. RP 1331, 1341-42. When Ms. Pack asked if anyone had ever touched her in an improper place, L would always say "no," but on this day she said, to the contrary, that Mr. Fritze had been trying to have sex with her. RP 1317. At trial, Ms. Pack would testify that Mr. Fritz had ultimately admitted to her that night that he had touched L inappropriately. RP 1322, 1345. A prosecutor who testified initially provide a foundation for playing L's testimony from the first trial was called by the State which "reopened" their case after the defense had rested. That prosecutor testified as a "fact" witness that Ms. Pack had told her that Mr. Fritz

had actually admitted to sex, not just touching. RP 1649-50, 1712.

There was no physical evidence. See CP 201-15.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. REVIEW SHOULD BE GRANTED ON THE ISSUE OF COUNSEL'S INEFFECTIVENESS, THE RIGHT TO PRESENT A DEFENSE AND THE PROSECUTOR'S FLAGRANT, ILL-INTENTIONED AND PREJUDICIAL MISCONDUCT

The only issue in this case was credibility; there was no physical evidence to prove guilt. See CP 201-215. The jury already had serious questions about the State's case - enough so that they acquitted on half of the charges the State brought. RP 1627-29. This Court should grant review on the issues of appointed counsel's unprofessional, prejudicial failures on behalf of his client, the resulting negative impact on Petitioner's constitutional right to present a defense, and the prosecutor's flagrant, ill-intentioned and prejudicial misconduct, all of which directly affected the crucial issue of credibility at trial.

First, this Court should grant review on the issue of counsel's prejudicial ineffectiveness, the right to present a defense, and the prosecutor's flagrant misconduct in relation to evidence which would have rebutted the State's claim that L would only know what she knew about sex if Mr. Fritz was guilty of the crimes.

The right to effective assistance of appointed counsel is enshrined in the state and federal constitutions. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987); Strickland v. Washington,

466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); Art. 1, § 22; Sixth Amend. Counsel is ineffective despite a strong presumption of competence when his behavior falls below an objective standard of reasonableness in a way that prejudiced his client. Thomas, 109 Wn.2d at 229. If counsel was ineffective, the Court will reverse if there is a reasonable probability that, absent the errors, the result would likely have been different. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999).

The right to present a defense stems from state and federal due process. See State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 33 L. Ed. 2d 297 (1973). The Court asks 1) whether the excluded evidence was at least minimally relevant, 2) whether the evidence was "so prejudicial as to disrupt the fairness of the factfinding process at trial," and, if so, 3) whether the State's interest in excluding the evidence outweighs the defense need to present it. State v. Orn, __ Wn.2d __, __ P.3d __ (No. 98056-0) (March 18, 2021) (Slip opinion at 10). Where the excluded evidence is relevant, material, and necessary to t\he defense, it is a violation of the defendant's constitutional rights to present a defense to exclude it. See id.

Here, prior to trial, counsel moved for discovery of records from the Oregon Department of Health, which had investigated L's biological father, Dammien Fowler, for sexually abusing L while he had access to or lived with L. CP 289-90, 351; RP 560-70. Mr. Fowler

had been accused of molesting the child of a woman he lived with just a few months after L raised her allegations. RP 804-806. Mr. Fowler also had been accused of molesting his own sister. RP 804.

After those records were provided, the State then successfully prevented Mr. Fritz from presenting any evidence "implicating another." CP 351. The trial court based its ruling on the State's claim that L did not have contact with Mr. Fowler from age 2 or 3 until about 9. RP 868-69. The court also explicitly stated it would reconsider its decision to exclude the evidence if there was evidence to the contrary that Mr. Fowler had more recent access to L. RP 869.

Then, at trial, Ms. Pack, L's mom, testified that L had in fact had some visits with her dad before she made her claims against Mr. Fritz. RP 1353. Ms. Pack could not recall how old L was and thought L had not seen him for some time prior. RP 1365. But counsel did not ask the trial court to reconsider its ruling excluding the evidence, even though the evidence now showed Mr. Fowler had access to L at an unspecified time before the allegations were raised, not, as the State had said, that he had not had such access for years.

As a result, the prosecutor was able to repeatedly claim that a child L's age would not have known how to describe the alleged sex acts or anything similar if she had not "lived this." RP 1631. Even though there was a claim that pornography had been "acted out" in some of the allegations, the prosecutor dismissed that as the source of the detail L provided to jurors. RP 1631-32. The prosecutor

emphasized this point, invoking it in both opening and rebuttal closing argument, asking jurors to question how an eight-year-old girl would "suddenly" know how to describe sexual acts if it had not happened to her, arguing that L had no other access to sexual material or ideas. RP 1631-32, 1698, 1700, 1705-106, 1709-10.

In deciding that counsel was not prejudicially ineffective in failing to raise this issue again, the Court of Appeals found that there was evidence in the record that Mr. Fowler had access to L of "two overnight visits the month [she] made her disclosures." App. A at 13-14. The Court also found that there were not "grounds for defense counsel" to ask the trial court to reconsider its ruling because Ms. Pack did not further explain what "limited visits" meant and focused on Ms. Pack's claim that Mr. Fowler did not have access to L while L was living with Mr. Fritz. App. A at 13-14.

The Court of Appeals thus shifted the issue to whether Mr. Fowler, not Mr. Fritz, had committed the charged crimes. The issue of access by Mr. Fowler, however, was not about accusing him of having been the perpetrator but Mr. Fowler as the source of the precocious knowledge L had about sex.

Allegations of sex abuse invoke strong passions in jurors who are likely to have great sympathy for the child and to presume that a child would not normally know about sexual things unless something untoward had occurred. See State v. Peterson, 35 Wn. App. 481, 485-86, 667 P.2d 645, review denied, 100 Wn.2d 1028

(1984). The Courts of Appeals have recognized that the result of this natural bias of jurors is that any testimony by a child showing precocious knowledge of sex is seen as persuasive evidence of the defendant's guilt. 35 Wn. App. at 485-86; State v. Hunt, 48 Wn. App. 840, 848-59, 741 P.2d 566, review denied, 109 Wn.2d 1014 (1987); State v. Carver, 37 Wn. App. 122, 124-25, 678 P.2d 842, review denied, 101 Wn.2d 1019 (1984). In other words, the jurors are likely to assume that the child was "conversant with such things only because [the] defendant was guilty as charged." Carver, 37 Wn. App. at 122-25.

This Court should grant review. By failing to raise the issue again after learning that Mr. Fowler had more recent access to L than the prosecution had claimed, counsel was prejudicially ineffective. There is no reasonable tactical basis to fail to try to admit evidence which would disprove a huge part of the State's case. Counsel's ineffectiveness violated Mr. Fritz' constitutional rights to present a defense by ensuring that the jurors did not hear a plausible explanation for the child's precocious knowledge *other* than the one upon which the bulk of the State's case rested, i.e, that she only knew about these sexual things she described to jurors because Mr. Fritz had abused her. The State then relied on that evidence on the only issue at trial - the credibility of the child. RP 1698, 1700, 1705-06, 1709-10.

Further, the prosecutor *knew* there was another possible reason for L to have "precocious knowledge" which had nothing to do

with Mr. Fritz, but after moving to exclude, then relied on Mr. Fritz as the only possible source. This is misconduct under State v. Kassahun, 78 Wn. App. 938, 900 P.2d 1109 (1995).

By failing to raise the issue again, counsel deprived his client of the de novo review of the violations of his rights which the caselaw supports. See, Jones, 168 Wn.2d at 719-20. Counsel also kept the burden of proof squarely on his client's shoulders, instead of the constitutional harmless error standard which applies when exclusion of evidence violates the right to present a defense and for which prejudice is presumed. See State v. Franklin, 180 Wn.2d 371, 382, 325 P.3d 159 (2014). In a case which rested entirely on credibility, counsel's unprofessional error in failing to raise the issue again was ineffective assistance highly prejudicial to his client, which compels reversal. Mr. Fritz was deprived of the opportunity to present evidence relevant and material to his case, which would have rebutted one of the State's main supports for its claims. Further, it allowed the prosecutor to first move to exclude the evidence and then rely on the lack of such evidence against Mr. Fritz. The Court of Appeals erred in affirming and this Court should grant review.

The Court should also grant review regarding the prosecutor's other misconduct and counsel's further ineffectiveness at closing argument. As quasi-judicial officers, prosecutors represent the people and must act "with impartiality in the interests of justice," subduing "courtroom zeal for the sake of fairness to the defendant." State v.

Thorgerson, 172 Wn.2d 438, 443, 258 P.3d 43 (2011). Further, prosecutors owe a duty not just to the community but to the defendants themselves, "to see that their rights to a constitutionally fair trial are not violated." State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). As a result, despite enjoying "wide latitude to argue reasonable inferences from the evidence," the public prosecutor is required to "seek convictions based only on probative evidence and sound reason." In re the Personal Restraint of Glasmann, 175 Wn.2d 696, 704, 286 P.3d 673, cert. denied sub nom Glasmann v. Washington, 577 U.S. 938 (2015).

In closing argument, recognizing that L's credibility was the sole issue, the prosecutor told jurors that the defense was "you can't believe" L and that she made everything up as evidenced by inconsistencies in her various versions of events. RP 1644-50, 1696. The prosecutor faulted the defense for cross-examining the child about details, asking "what standard would we be holding her to" if she was expected to remember "every single time" and "every single detail[.]" RP 1706. The prosecutor also asked jurors what "possible benefit" L could get from lying, asking jurors if L looked "like she wanted to be here [at trial]" or had "enjoyed this," referring to trial. RP 1715. The juror reminded jurors about L having to go through a medical exam and having to testify about these acts as a 15-year-old girl to strangers, including that "she had to sit up there for an hour and a half and answer questions." RP 1715-16. The prosecutor told

jurors that counsel had "got to her" through that time but even then she was adamant, and the prosecutor told jurors there was "no reasonable explanation for her to have made this up." RP 1715-16.

For his part, counsel repeatedly misstated the burden of proof. He told jurors the standard was not used in everyday life but rather was whether jurors were "convinced sufficiently to make on of the most important decisions of your lives [.]" RP 1661. Division Two has held that such comments trivialize and ultimately "fail[] to convey the gravity of the State's burden" and the jury's role. State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 1002 (2010). He also told jurors they needed to only have "one reason to doubt" or a "reason to acquit," but that he had shown more than one. RP 1669-96. But jurors need to find a "reason to doubt" in order to acquit - they simply have to think the State did not meet its burden of proof, beyond a reasonable doubt. See State v. Venegas, 155 Wn. App. 507, 520, 228 P.3d 813, review denied, 170 Wn.2d 1003 (2010).

In affirming on this issue, the Court of Appeals held that the misstatement of law by the prosecutor is different than misstatement of law by counsel. Appendix A at 20. Despite the language that counsel used telling jurors about finding a "reason to doubt" or a "reason to acquit," the Court found the statements were not "deficient performance" because of this "different position" of prosecutor and counsel. Appendix A at 20. This court should grant review to answer whether counsel's misstatements of crucial law as exacerbated by

misconduct of the State was reversible error, in contrast to the holding of the Court of Appeals.

2. THE COURT OF APPEALS ERRED IN APPLYING THE "ADVOCATE-WITNESS" RULE

Review should also be granted on the issue of the "advocate-witness" rule. Initially Anna Klein, a deputy prosecutor with the Clark County Prosecutor's Office, testified only to lay a foundation for playing a recording of L's prior testimony, under the guise of it being a recorded "interview." RP 1048-49. Then, after Mr. Fritz had presented his case and jury instructions were discussed, the State moved to reopen, using Ms. Klein this time as a fact witness. RP 1479-1527. Counsel objected to having that testimony from the same prosecutor's office both acting as witness and prosecutor, but it was overruled. RP 1562-63. Ms. Klein then testified about "facts" such as what Ms. Pack had stated to her about Mr. Fritz having admitted touching L's privates with his penis, which was different than Ms. Pack's testimony that he had admitted only touching. RP 1649-50, 1712.

Under the "advocate-witness" rule, this Court has held, a lawyer is prohibited from acting as an advocate in a case in which another lawyer from her office is a witness at trial. State v. Lindsay, 180 Wn.2d 423, 326 P.3d 125 (2014). The issue is that not just the objectivity of the witness but whether "the dual positions artificially bolster the witness' credibility or make it difficult for the jury to weigh the testimony, and whether the dual role raises an appearance of

unfairness." State v. Bland, 90 Wn. App. 677, 680, 953 P.2d 126, review denied, 136 Wn.2d 1028 (1998).

Here in affirming, the Court of Appeals focused on the idea that the jury did not know that Ms. Klein had prosecuted Mr. Fritz in the first trial, which it declared means her testimony "did not carry any more weight" than, say, the testimony of the detective. App. A at 21-22. But Ms. Klein was identified as a deputy prosecutor prior to her being called as a fact witness in reopening. Further, Ms. Klein was called after the defense had presented its case, thus giving her testimony extra emphasis. In Bland, there was no error because the prosecutor tstified only in her capacity as a social worker. 90 Wn. App. at 680. This Court should grant review to address whether allowing the State to call its own prosecutor as a fact witness to testify about crucial statements was in violation of the "advocate-witness" rule.

E. CONCLUSION

For the reasons stated herein, this Court should grant review.

DATED this 1st day of April, 2021.

Respectfully submitted,

KATHRYN RUSSELL SELK, No. 23879
Attorney for Petitioner
RUSSELL SELK LAW OFFICE
1037 N.E. 65th Street, #176
Seattle, Washington 98115
(206) 782-3353

CERTIFICATE OF SERVICE BY MAIL/EFILING

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Petition for Review to opposing counsel via this Court's upload service and to Mr. Fritz, DOC 342644, at Coyote Ridge Corrections Center, P.O. Box 769, Connell, WA. 99326.

DATED this 1st day of April, 2021.

KATHRYN RUSSELL SELK, No. 23879
Attorney for Petitioner
RUSSELL SELK LAW OFFICE
1037 N.E. 65th Street, #176
Seattle, Washington 98115
(206) 782-335

Filed
Washington State
Court of Appeals
Division Two

March 2, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BRUCE LEE FRITZ, Appellant.	No. 50424-3-II UNPUBLISHED OPINION

LEE, C.J. — Bruce L. Fritz appeals his convictions for two counts of first degree rape of a child and one count of first degree child molestation. Fritz argues that he received ineffective assistance of counsel, the prosecutor committed misconduct, and the trial court abused its discretion by allowing testimony from the victim's therapist and a deputy prosecuting attorney who had previously been assigned to the case. Fritz also argues that cumulative error deprived him of a fair trial. We affirm Fritz's convictions.

FACTS

A. PRIOR PROCEDURAL HISTORY

In March 2010, the State charged Fritz with two counts of first degree rape of a child and two counts of first degree child molestation against L.F.[1] The State then amended the information to charge four counts of first degree rape of a child[2] and two counts of first degree child

[1] We use initials to protect the minor victim's privacy. General Order 2011-1 of Division II, *In re The Use of Initials or Pseudonyms for Child Witnesses in Sex Crime Cases*, available at http://www.courts.wa.gov/appellate_trial_courts/.

[2] These were counts 1 through 4.

molestation[3] against L.F. The State also alleged aggravating circumstances of an ongoing pattern of sexual abuse and abuse of trust.

A jury found Fritz guilty of all charged counts. The jury also found aggravating circumstances on all charged counts. Fritz was sentenced to an exceptional sentence of 360 months confinement. Fritz appealed and this court affirmed his convictions in an unpublished opinion.[4]

In February 2016, this court granted Fritz's personal restraint petition and remanded to the trial court for a new trial.[5] The State retried Fritz on the amended information on March 27, 2017.

B. PRE-TRIAL MOTIONS AND RULINGS ON RETRIAL

Prior to Fritz's retrial, Fritz filed a motion for disclosure of records from the Oregon Department of Health regarding an investigation into L.F.'s biological father, Dammien.[6] Fritz argued that the Oregon investigation records show that Dammien was investigated for sex abuse allegations while he was still living with L.F. and could "likely contain information that could cause [L.F.] to have a bias against [Fritz] or which would explain [L.F.]'s knowledge of sexual

[3] These were counts 5 and 6.

[4] *State v. Bruce Lee Fritz*, noted at 169 Wn. App. 1035 (2012).

[5] *In re Pers. Restraint of Fritz*, No. 46091-2-II (Wash Ct. App. February 2, 2016) (unpublished), http://www.courts.wa.gov/opinions/pdf/D2%2046091-2-II%20%20Unpublished%20Opinion.pdf.

[6] We refer to L.F.'s biological father by his first name only to protect L.F.'s privacy. We mean no disrespect.

acts and understanding of sexual terms." Clerk's Papers (CP) at 296. The trial court granted Fritz's motion.[7]

The Oregon investigation records show that in October 2010, Dammien was accused of sexually abusing a four-year old girl. These accusations did not include any mention of oral or anal sex between Dammien and the four-year old girl. As part of this investigation, Oregon Department of Health Services investigated any threat of harm Dammien may have posed to L.F. There was no disclosure that Dammien abused L.F. And the Oregon investigation records do not show that L.F. was told any details about the allegations against Dammien. The Oregon investigation resulted in an unfounded determination.

The Oregon investigation into L.F.'s sexual abuse allegations against Dammien included a medical examination. The medical report from that examination noted that L.F. had only begun visitations with Dammien the same month she reported the allegations against Fritz and that she had completed two overnight visits with Dammien. L.F. did not disclose any sexual abuse committed by Dammien. She also did not disclose seeing any abuse.

After receiving the Oregon investigation records, the State moved to exclude evidence implicating another suspect. The State argued that L.F. did not have contact with Dammien during the relevant time period. The State also pointed out that L.F. was questioned about Dammien and did not indicate that anything happened with Dammien. Fritz argued that he should be able to present evidence that Dammien was another suspect. Fritz also argued that it was "logical" that

[7] The Oregon investigation at issue, which was reviewed in camera by the trial court, is in the record on appeal.

Dammien could have molested L.F. Verbatim Report of Proceeding (VRP) (March 27, 2017) at 807.

The trial court ruled,

> [B]efore such testimony can be received, there must be such proof or of connection with it such as a train of facts or circumstances as tend clearly to point out someone besides the prisoner is the guilty party.
>
> What we have here at least at this point from what I've heard, is a lack, absence of an opportunity if you will, or even any contact between [Dammien] and [L.F.], the victim in our particular case.
>
> To the extent that that is accurate, I'm going to grant the State's motion in limine . . . , but you'll notice I mentioned to the extent that's accurate. If there is a foundation established that somehow provides contact between the father, [Dammien], and [L.F.], the victim in this case, then that would cause me to reconsider my ruling that I've made at this point.

VRP (March 28, 2017) at 868.

C. JURY TRIAL TESTIMONY

1. L.F.'s testimony

L.F. testified that she used to live in an apartment, and then a house, with her mother and Fritz. They began living together when L.F. was six years old.

L.F. stated that Fritz would bring L.F. into the bathroom and make her watch him bathe. Fritz also would have her come into his room, take her clothes off, play adult movies, and forcefully try to put his penis in her butt, which caused her physical pain. These acts occurred more than 10 times. And Fritz would come in her bedroom; open his robe; and rub his penis on her, lick her vagina, or put his penis in her mouth. These acts occurred between one and ten times.

When L.F. was nine years old, she told her mother about the abuse. L.F.'s mother came home for a lunch break and L.F. told her that Fritz tried to have sex with her. L.F. testified that she did not disclose the abuse earlier because Fritz threatened to kill her mother and grandmother.

Fritz also told her she would have to live under a bridge with no family to take care of her if she disclosed the abuse. Throughout her testimony, L.F. stated that she was unable to remember certain things, such as specific things that were said or specific dates or time periods.

The State also introduced a recording of L.F.'s testimony from the first trial. To prevent prejudice, the recording was referred to as an "interview" and references to the first trial were removed from the recording. To authenticate the recording, the State called Deputy Prosecuting Attorney Anna Klein. Klein testified that she was a deputy prosecuting attorney and had previously been assigned to the Children's Justice Center. Klein also testified that she had recorded an "interview" with L.F. on August 3, 2010. And Klein testified that the recording was a fair and accurate representation of the "interview." L.F. was nine at the time of the "interview."

In the "interview," L.F. stated that she lived in a house with her mother and Fritz. Before they lived in the house, they lived in an apartment. L.F. believed she was five-years old when they lived in the apartment. They moved to the house when she was eight. L.F. also made statements about truth versus lie and inside versus outside. She explained that she called her private part vagina and a male private part a weiner.

L.F. also stated in her "interview" that Fritz "child molested" her. VRP (March 29, 2017) at 1056. L.F. explained "child molested" meant when "a grownup does bad things" like "having s-e-x." VRP (March 29, 2017) at 1056. Fritz put his weiner inside of her and it felt horrible. This happened at the apartment when she was five or six. Fritz also put this tongue on her private parts and it tickled and hurt. These acts took place in the bathroom, her bedroom, and his bedroom at the apartment. There was a video that he would show her that depicted the same things he would do to her. The same things also happened at the house.

L.F. further stated in her "interview" that she saw Fritz's weiner and described it as "pink and white." VRP (March 29, 2017) at 1064. Also L.F. explained that she did not tell anyone because Fritz told her that she would have no home and be living under a bridge.

On cross-examination, L.F. testified that she believed she remembered events better in 2016 than she had earlier because she was older and had more time to think about it. L.F. admitted that when she lived with Fritz, she did not think that he was nice. She believed Fritz yelled at her too much, but she did not remember specific statements she had previously made about Fritz yelling at her. There were two instances in which Fritz left large bruises on her body. L.F. admitted that she felt her mother took Fritz's side and she did not like that.

Fritz used L.F.'s prior statements extensively in cross-examination. Fritz also focused on two instances that L.F. testified about, but were not included in statements she had made before or during the first trial. First, L.F. stated that when she was six, Fritz made her smoke cigarettes, but she had not mentioned that in her prior statements. Second, L.F. testified that, after the first sexual contact she had with Fritz she followed him to the garage and confronted him. But she had not told this to anyone in her earlier statements. L.F. also admitted that she had not previously told anyone that Fritz had threatened to kill her mother or grandmother. VRP 1136.

2. Regina's[8] Testimony

Regina, L.F.'s mother, testified that she dated Fritz for approximately five years. Regina and Fritz lived together, and Fritz often watched L.F. while Regina was working. Regina believed that Fritz had a good relationship with L.F.

[8] Regina is L.F.'s mother. We refer to L.F.'s mother only by her first name to protect L.F.'s privacy. We mean no disrespect.

Regina and Fritz discussed L.F.'s allegations, and after talking for hours, Fritz admitted the allegations. However, Regina could not remember what Fritz said. The next morning, Regina and Fritz went to see Fritz's family. Regina wanted Fritz to tell his family what he had done. Fritz told his family that he had touched L.F., but she did not remember what was said.

During the investigation, Regina gave two digital video discs (DVDs) of pornography that were in the house to Detective Aaron Holladay. To Regina's knowledge, L.F. had never watched the DVDs before and did not have access to them. Regina also testified that she did not recall L.F. ever walking in on Regina and Fritz having sex.

During Regina's relationship with Fritz, L.F. did not have a relationship with Dammien. During cross examination, Regina testified that Dammien had always tried to obtain visits with L.F., and L.F. had "some limited visits" with Dammien before L.F. made the allegations against Fritz. VRP (March 30, 2017) at 1353. During redirect examination, Regina clarified that Dammien was never around while Fritz was around.

3. Dr. Preston's Testimony

Dr. Susan Preston testified that she was a psychologist at the Willamette Valley Family Center in 2010. L.F. was one of her patients, and one of her treatment goals for L.F. was for L.F. to "be able to talk about the sexual abuse." VRP (March 30, 2017) at 1413.

L.F. told Dr. Preston that Fritz "had child molested her and that he was a mean person and that he had yelled at her, and yelled in her face." VRP (March 30, 2017) at 1415. And L.F. told Dr. Preston that Fritz had threatened her and told her she would lose her house, go to foster care, and be disliked by her family if she ever told about the abuse. Fritz did not object to any of Dr. Preston's testimony.

4. Klein's Additional Testimony

After the defense rested, the State moved to reopen the case to present testimony from Klein regarding statements Regina made during interviews for the first trial. Fritz stated that he did not "believe having the prosecutor testify would be appropriate." VRP (March 31, 2017) at 1537. The trial court ruled that the subject matter of Klein's testimony was admissible and allowed the State to reopen its case. The trial court did not address the propriety of a deputy prosecuting attorney testifying under the advocate-witness rule because it was not raised.

However, immediately before Klein took the stand, Fritz objected because Klein was a member of the same office as the prosecutor and it was "improper to have members of the same office testifying as a witness and acting as an attorney." VRP (March 31, 2017) at 1562. The State argued that it was not aware of authority that would prevent Klein from testifying. Fritz conceded he did not have any specific authority at hand. The trial court overruled Fritz's objection based on the lack of authority and the fact that Klein had already testified.

Klein testified that she was present for an interview conducted with Regina. During the interview, Regina stated that she had questioned Fritz throughout the night and into the next morning. Regina also stated that eventually Fritz said he did it, and then later Fritz told Regina that he had put his penis on L.F.'s privates.

D. CLOSING ARGUMENTS

The prosecutor opened her closing argument by arguing that Fritz was given a place in L.F.'s family and then used that place to abuse her. The prosecutor then explained how she intended to meet her burden of proof. The prosecutor then went through the elements of each charge on the to-convict instructions and explained the evidence supporting each element.

During argument, the prosecutor noted that L.F. was not reciting a rehearsed story; instead, her statement changed in each interview because she was being asked different questions and, therefore, she gave slightly different answers. And L.F.'s testimony went beyond describing what happened, but described how it felt, which she would not be able to do unless she experienced it.

The prosecutor argued that the details L.F. testified to could not have been known to a child who did not have actual sexual contact. Specifically, L.F. did not get the details just from watching pornography.

Defense counsel objected only once during the State's closing argument, when he believed the State misquoted Fritz's testimony. The trial court reminded the jury that the attorneys' statements were not evidence and that they had to decide the case on the testimony provided.

The beginning of defense counsel's closing argument focused on the State's burden to prove each charge beyond a reasonable doubt. Defense counsel also emphasized that the main issue of the case was credibility of the State's evidence. And defense counsel emphasized the presumption of innocence.

Defense counsel argued that there were inconsistencies in L.F.'s statements. First, defense counsel discussed the inconsistencies in L.F.'s statements regarding why she disclosed the abuse. Second, he argued that whether the abuse occurred in the house or the apartment was material, despite the fact that it was not an element the State was required to prove. And third, he pointed out inconsistencies in L.F.'s statements about the first time Fritz had sexual contact with her. When arguing how the inconsistencies reflected on L.F.'s credibility, defense counsel stated,

> And it doesn't matter that somebody's going to say well, she's trying to block this out. That's too bad. Read the first instruction on about the second page

> partway down, the factors you've got to consider in credibility are people's ability to recall events.
>
> She can talk about it now. [The prosecutor] quoted a whole bunch of things. But the bottom line is she can't say where it happened first or she gives changing stories about it and some of this other stuff. How she reacted. She said I fought every time. And then a different time she said well, one time we had oral sex, and she told somebody else this, and it tickled and I laughed. Her whole story changes constantly. And it's not based on time. It's because she has to come up with some of this stuff as she goes. That's what's happening.

VRP (March 31, 2017) at 1688. Defense counsel also argued there were material differences in the statements L.F. gave about the threats Fritz made to her.

Defense counsel then argued that he did not have to prove why L.F. made up the accusations. However, defense counsel argued that L.F. admitted that Fritz was mean, yelled at her, and was rough with her. He also noted that L.F. was upset that her mother often took Fritz's side. He also argued that L.F. did not want Regina to marry Fritz or to have Fritz in her life.

Defense counsel concluded by arguing that the jurors now had the responsibility of applying the law to the facts. Defense counsel reminded the jurors that "there's many, many, many reasons to doubt." VRP (March 31, 2017) at 1695. And the jurors only needed one reason to doubt to find Fritz not guilty.

In rebuttal argument, the prosecutor argued that L.F.'s statements could not have come from watching the pornography DVDs because she described how certain things felt rather than simply describing something she saw or was told about. The prosecutor also argued that Washington law did not require corroboration of sexual assault. And she argued,

> When you look at what [L.F.] described—and again, in order to accept the premise that she's making this up, I mean, that is essentially what we would have to believe to believe—to disbelieve her story because she has been given so much detail that she could not gave (sic) accounted for it, have to believe that she's making this up (sic).

VRP at 1704. Defense counsel did not object to the prosecutor's arguments. \

The prosecutor also argued that L.F.'s testimony was more credible because there were inconsistencies in her statements. The prosecutor stated,

> Adults can not remember things exactly as they happened seven years ago, how can we expect a child to.
>
> If we expect [L.F.] to remember every single time that the Defendant violated her, every single detail of it, what standard would we be holding her to.

VRP (March 31, 2017) at 1707. The prosecutor went on to address the inconsistencies in L.F.'s statements that defense counsel argued in his closing argument.

The prosecutor then went on to argue credibility and whether L.F. had any motive to make up the allegations. The prosecutor argued that, even if the jury believed L.F. had a motive to make up the allegations when she was a child, she had no motive to continue making up the allegations.

The prosecutor argued that the jurors needed to look at the case as a whole and make reasonable inferences.

> After that, since then, [L.F.] has had to talk about this to so many people. She had to get a medical exam, she had to move out of the house that she was living in, she (inaudible) to strangers and talk to them about sexual things, this 15 year old girl. And you saw her on the stand. Did she look like she wanted to be here? Did she look like she enjoyed this? What did this family get out of this, especially seven years later? What possible benefit could they have to come here and tell you that these things happened like they did? Regina lost her fiancé, her home.
>
> [L.F.] had to have interview after interview. She had to have a medical exam that you heard was uncomfortable, that's what Marsha Stover told you. Then she had to come here seven years later, a 15 year old girl, and talk to all of you about these things. And she had to sit up there for an hour and a half and answer questions.
>
> Now through that time, [defense counsel] got to her but she was up there for an hour and a half being asked about every statement she had ever made about abuse she endured for over – for about two years. And even then at the end, after she had been asked about every statement, everything that could be thought of, she still was very adamant. [Defense counsel] said did this happen and she said it did.

> Beyond a reasonable doubt means that you have an abiding belief in the truth of the charges. There is no reasonable explanation for her to have made this up. Everything that she said in those tapes, is something that she had to experience to describe.

VRP (March 31, 2017) at 1714-16. The prosecutor also argued that the jury saw multiple adults and professionals who needed to refer to their reports because they could not remember everything that happened seven years ago. Therefore, the jury should not expect a 15-year old to remember every detail either.

Defense counsel did not object to any of the prosecutor's arguments regarding L.F.

E. VERDICT AND SENTENCING

The jury found Fritz guilty of first degree rape of a child (count 1), first degree rape of a child (count 2), and first degree child molestation (count 5). The jury found aggravating circumstances on all three of these counts. The jury found Fritz not guilty of counts 3, 4, and 6. The trial court imposed a standard range sentence of 216 months confinement.

Fritz appeals.

ANALYSIS

A. INEFFECTIVE ASSISTANCE OF COUNSEL

Fritz argues that defense "counsel was prejudicially ineffective in handling the issue of [L.F.]'s precocious sexual knowledge." Br. of Appellant at 19. Specifically, Fritz contends that defense counsel should have reopened the issue of whether evidence regarding the Oregon investigation into Dammien should be admitted.[9]

[9] Fritz also argues that failure to present evidence regarding Dammien "resulted in violation of Fritz's state and federal due process rights to present a defense." Br. of Appellant at 24. However, Fritz does not argue that the trial court's initial ruling excluding the evidence was erroneous; he

To prevail on an ineffective assistance of counsel claim, the defendant must show both that the defense counsel's representation was deficient and the deficient performance resulted in prejudice to the defendant. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011), *cert. denied*, 574 U.S. 860 (2014). Counsel's performance is deficient if it falls below an objective standard of reasonableness. *Id.* at 33. There is a strong presumption that counsel's performance was reasonable. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). A defendant may overcome this presumption by showing that "'there is no conceivable legitimate tactic explaining counsel's performance.'" *Grier*, 171 Wn.2d at 33 (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). There must be evidence regarding counsel's strategic or tactical decisions in the record for this court to determine whether counsel's performance was deficient. *State v. Linville*, 191 Wn.2d 513, 525-26, 423 P.3d 842 (2018). To establish prejudice, the defendant must "prove that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different." *Kyllo*, 166 Wn.2d at 862.

Here, Fritz has failed to establish that defense counsel's performance was deficient for failing to ask the trial court to reconsider its ruling excluding evidence of the Oregon investigation against Dammien. The trial court stated that it would reconsider its ruling if there was evidence that Dammien had access to L.F. during the period she was abused. Here, the trial court had already reviewed the Oregon investigation records prior to its ruling; therefore, Fritz would have

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only argues that counsel should have asked the trial court to reconsider its ruling. Therefore, because there is no argument supporting the right to present a defense argument, we do not address the right to present a defense. RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

to have established that Dammien had more access to L.F. than simply two overnight visits the month that L.F. made her disclosures. At trial, Regina testified twice that Dammien did not have access to L.F. during the relevant time period. Fritz argues that Regina admitted that Dammien had visits with L.F. But Regina never explained what she meant by "limited visits" and later clarified that Dammien did not have access to L.F. while she was living with Fritz. Therefore, the assertion that there were grounds for defense counsel to ask the trial court to reconsider its ruling is not supported by the record.

The record also does not show that the evidence of the Oregon investigation into Dammien would have been relevant for the purpose Fritz now argues it should have been admitted. Fritz argues that defense counsel should have asked the trial court to reconsider its ruling because the evidence regarding Dammien provides an alternative explanation for L.F.'s precocious sexual knowledge. Evidence is relevant if it makes a fact of consequence more or less probable than it would be without the evidence. ER 401. Irrelevant evidence is not admissible. ER 402.

Here, there is nothing in the records of the Oregon investigation that are relevant to demonstrating an alternative explanation for L.F.'s precocious sexual knowledge. The investigation was triggered by a report that Dammien possibly abused a different child, not L.F. These accusations did not include any mention of oral or anal sex between Dammien and the other child, which would explain L.F.'s precocious sexual knowledge of those acts. And nothing in the Oregon investigation records show that L.F. was told any details about the abuse accusations which could account for L.F.'s precocious sexual knowledge. Therefore, it is unlikely that the Oregon investigation into Dammien would be relevant to explaining L.F.'s precocious sexual knowledge and, therefore, would be likely be inadmissible. Accordingly, defense counsel's performance was

not deficient for failing to ask the trial court to reconsider its ruling.[10] Fritz's ineffective assistance of counsel claim fails.

B. PROSECUTORIAL MISCONDUCT

Fritz argues the prosecutor committed misconduct based on numerous statements made during closing argument. Specifically, Fritz contends that the prosecutor improperly inflamed the passions and prejudices of the jury, drew negative inferences from Fritz's exercise of constitutional rights, and improperly maligned defense counsel. Fritz also contends that counsel was ineffective for failing to object to the prosecutor's arguments.

To prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). The prosecutor's conduct is viewed in "'the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011) (internal quotation marks omitted) (quoting *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006)).

First, we determine whether the prosecutor's conduct was improper. *Emery*, 174 Wn.2d at 759. If the prosecutor's conduct was improper, then the question turns to whether the prosecutor's improper conduct resulted in prejudice. *Id.* at 760. To establish prejudice, the defendant must show a substantial likelihood that the prosecutor's misconduct affected the verdict. *Id*.

[10] To the extent Fritz argues that the State improperly argued that there was no other basis for L.F.'s precocious sexual knowledge and counsel was ineffective for failing to object, those arguments are addressed in the section on prosecutorial misconduct. Because we conclude there was no prosecutorial misconduct, defense counsel's conduct was not deficient; thus, defense counsel was not ineffective. *See Grier*, 171 Wn.2d at 33.

Because Fritz did not object to any of the prosecutor's arguments that he now alleges are improper, he "is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice." *Id.* at 760-61. Under this heightened standard of review, the defendant must show that "(1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'" *Id.* at 761 (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)). The focus is on whether the resulting prejudice could have been cured. *Id.* at 762.

1. Prosecutor's Closing Argument

First, Fritz argues that the prosecutor improperly invoked sympathy; bolstered L.F.'s testimony; drew negative inferences from Fritz's exercise of rights by making comments regarding L.F.'s experience preparing for trial, specifically, during cross-examination; and disparaged defense counsel. To support this argument, Fritz relies exclusively on the following statements the prosecutor made during rebuttal closing argument:

> After that, since then, [L.F.] has had to talk about this to so many people. She had to get a medical exam, she had to move out of the house that she was living in, she (inaudible) to strangers and talk to them about sexual things, this 15 year old girl. And you saw her on the stand. Did she look like she wanted to be here? Did she look like she enjoyed this? What did this family get out of this, especially seven years later? What possible benefit could they have to come here and tell you that these things happened like they did? Regina lost her fiancé, her home.
>
> [L.F.] had to have interview after interview. She had to have a medical exam that you heard was uncomfortable, that's what Marsha Stover told you. Then she had to come here seven years later, a 15 year old girl, and talk to all of you about these things. And she had to sit up there for an hour and a half and answer questions.
>
> Now through that time, [defense counsel] got to her but she was up there for an hour and a half being asked about every statement she had ever made about abuse she endured for over – for about two years. And even then at the end, after

> she had been asked about every statement, everything that could be thought of, she still was very adamant. [Defense counsel] said did this happen and she said it did.
>
> Beyond a reasonable doubt means that you have an abiding belief in the truth of the charges. There is no reasonable explanation for her to have made this up. Everything that she said in those tapes, is something that she had to experience to describe.

VRP (March 31, 2017) at 1714-16.

"Although it is improper for a prosecutor to vouch for a witness's credibility, a prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence." *State v. Lewis*, 156 Wn. App. 230, 240, 233 P.3d 891 (2010) (footnote omitted). It is also improper for a prosecutor to disparage defense counsel and defense counsel's role in a criminal trial. *State v. Lindsay*, 180 Wn.2d 423, 431-32, 326 P.3d 125 (2014). And comments that are manifestly intended to comment on the defendant's exercise of his constitutional rights are generally improper. *State v. Wilkins*, 200 Wn. App. 794, 816, 403 P.3d 890 (2017). However, prosecutorial remarks, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel, are responsive to defense counsel's arguments, and could have been cured by an appropriate instruction. *State v. Carver*, 122 Wn. App. 300, 306, 93 P.3d 947 (2004).

Here, the prosecutor did not express a personal opinion or vouch for L.F. in order to improperly bolster L.F.'s testimony. The prosecutor asked the jury to consider the evidence, the amount of interviews L.F. participated in, and L.F.'s demeanor during trial to determine her credibility. Furthermore, the prosecutor made the remarks in response to defense counsel's arguments regarding L.F.'s testimony. And the prosecutor did not improperly disparage defense counsel because the remarks were not meant to undermine defense counsel's role in trial, but rather

to explain the inconsistencies that defense counsel identified in L.F.'s testimony. Finally, the prosecutor's remarks were not manifestly intended to comment on Fritz's right to trial because they were not tied directly to the fact that Fritz went to trial, and the number of interviews L.F. had and the number of statements she made were all in the record. Therefore, the prosecutor's arguments made during rebuttal closing argument were not improper.

Next, Fritz argues that the prosecutor misstated the burden of proof by arguing that the jury had to find a reasonable explanation for why L.F. would have made up her claims. Specifically, Fritz contends that it was improper for the prosecutor to argue that the jury had to find a reasonable explanation for L.F. fabricating the allegations.

Here, the prosecutor's comment was also made in rebuttal closing argument. The prosecutor stated, "There is no reasonable explanation for her to have made this up." VRP (March 31, 2017) at 1716. When making this comment, the prosecutor was not referencing the burden of proof. Instead, the prosecutor was discussing L.F.'s credibility. Thus, the prosecutor was arguing that L.F.'s testimony was credible because her testimony was more reasonable than the alternative proposed by the defense, which the prosecutor argued was not reasonable. The jury was instructed that evaluating credibility of witnesses may involve considering personal interest, bias, or the reasonableness of the statements. On this record, the prosecutor's comment was not improper, and the prosecutor did not misstate the burden of proof.

Fritz also argues that the State improperly relied on L.F.'s precocious sexual knowledge after purposefully excluding evidence that would provide an alternative explanation for such knowledge. As explained above, there is nothing in the Oregon investigation records that establishes Dammien was the source of L.F.'s precocious sexual knowledge because the

allegations against Dammien were not similar to the acts L.F. described. The Oregon investigation records show that L.F. denied that Dammien touched her inappropriately or molested her. There is also no indication that anyone involved in the Oregon investigation gave L.F. details about the Oregon accusations to account for L.F.'s precocious sexual knowledge, and the Oregon accusations against Dammien did not include reference to oral or anal penetration. Because the State did not improperly move to exclude evidence that would have provided an alternative explanation for L.F.'s precocious sexual knowledge, Fritz has not met his burden to prove prosecutorial misconduct.

2. Defense Counsel's Conduct

Fritz argues that defense counsel's failure to object to the prosecutor's arguments was ineffective assistance of counsel. Fritz further argues that defense counsel was ineffective for misstating the burden of proof during his own closing argument.

As discussed above, Fritz has not shown that the prosecutor's arguments were improper. Because the prosecutor's arguments were not improper, there was no basis for defense counsel to object during closing argument. Therefore, Fritz has not shown that defense counsel's performance was deficient for failing to object to the prosecutor's argument, and his ineffective assistance of counsel based on the failure to object to the prosecutor's closing argument fails.

Fritz also argues that defense counsel was ineffective for misstating the burden of proof during his own closing argument. Specifically, Fritz contends that defense counsel misstated the burden of proof by arguing that there were reasons to doubt and reasons to acquit Fritz.

It is improper for a prosecutor to tell the jury that they need a reason to doubt in order to acquit the defendant. *See State v. Venegas*, 155 Wn. App. 507, 523-24, 228 P.3d 813, review

denied, 170 Wn.2d 1003 (2010) (prosecutor committed misconduct by arguing, "'In order to find the defendant not guilty, you have to say to yourselves: I doubt the defendant is guilty, and my reason is—blank.'" (quoting 27A RP at 3286)). But defense counsel is in a different position than the prosecutor. When defense counsel used the phrase reason to doubt, he was referring to a reason to doubt the State's case, a reason why the State failed to meet its burden, not a reason necessary to acquit the defendant. Therefore, defense counsel's arguments were not deficient performance. Accordingly, Fritz's ineffective assistance of counsel claim based on defense counsel's closing argument fails.

C. HEARSAY STATEMENTS TO DR. PRESTON

Fritz argues that the trial court abused its discretion by admitting the statements that L.F. made to Dr. Preston. Specifically, Fritz contends that the State failed to lay an adequate foundation to admit the statements under the hearsay exception allowing statements made for the purpose of diagnosis or treatment.

Generally, a party may not raise an issue for the first time on appeal. RAP 2.5(a). However, RAP 2.5(a)(3) allows a party to raise an issue for the first time on appeal where the issue involves a "manifest error affecting a constitutional right." "Application of RAP 2.5(a)(3) depends on the answers to two questions: '(1) Has the party claiming error shown the error is truly of constitutional magnitude, and if so, (2) has the party demonstrated that the error is manifest?" *State v. Grott*, 195 Wn.2d 256, 267, 458 P.3d 750 (2020) (quoting *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015)).

"Manifest error requires 'a plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.'" *Id.* at 269 (alteration in original)

(internal quotation marks omitted) (quoting *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009)). "'[T]o determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.'" *Id.* (quoting *O'Hara*, 167 Wn.2d at 100).

Here, the trial court's initial ruling on the statements to Dr. Preston was conditioned on the State laying an adequate foundation for their admissibility. During Dr. Preston's testimony, Fritz did not object to the admission of the statements based on inadequate foundation. Because Fritz did not object to the foundation for admissibility and he did not argue that RAP 2.5(a)(3) justifies raising this issue for the first time on appeal, Fritz may not raise this issue for the first time on appeal. RAP 2.5(a).

D. KLEIN'S TESTIMONY

Fritz argues that the trial court abused its discretion by allowing the State to reopen its case to present additional testimony about statements Regina previously made in an interview from deputy prosecutor Klein. Fritz contends that Klein's testimony violated the advocate-witness rule.[11]

The advocate-witness rule, contained in the Rule of Professional Conduct (RPC) 3.7, prohibits a lawyer from acting as an advocate in a trial in which another lawyer from the same firm

[11] Although Fritz states that the trial court abused its discretion by allowing the State to reopen its case to present Klein's testimony, he does not present any argument or authority on whether it was improper for the trial court to allow the State to reopen its case. We do not address issues that are not supported by argument or citation to authority. RAP 10.3(a)(6); *State v. Mason*, 170 Wn. App. 375, 384, 285 P.3d 154 (2012), *review denied*, 176 Wn.2d 1014 (2013). Therefore, we only address whether Klein's testimony was proper, not whether the trial court abused its discretion by allowing the State to reopen its case.

is likely to testify. *State v. Bland*, 90 Wn. App. 677, 679, 953 P.2d 126, *review denied,* 136 Wn.2d 1028 (1998). Before allowing a deputy prosecuting attorney to testify in a trial, "[t]rial courts should consider whether the testifying deputy can be an objective witness, whether the dual positions artificially bolster the witness's credibility or make it difficult for the jury to weigh the testimony, and whether the dual role raises an appearance of unfairness." *Id*. at 680.

Here, there is no evidence that Klein was unable to testify objectively as to the statements Regina had previously made in an interview. And Klein's dual position did not artificially bolster her testimony. The trial court was very careful to prevent the jury from knowing that there was a previous trial. The jury did not know that Klein had prosecuted Fritz in the first trial, they only knew that she was a deputy prosecuting attorney assigned to the Children's Justice Center and participated in some interviews regarding the investigation into L.F.'s allegations. Given that information, Klein's testimony did not carry any more weight than Detective Holladay's testimony regarding the interviews he performed. Furthermore, because Klein did not testify as prosecutor, but more as an investigator, there is not a high risk that her dual role would cause an appearance of unfairness. *See id*. at 681. The remedy for any concern Fritz had regarding Klein's bias could be remedied through cross-examination. *Id*.

Here, because the trial court limited the jury's knowledge of the first trial and Klein's role in that first trial, there was little chance that Klein's role artificially bolstered her testimony or created an appearance of unfairness. Therefore, the trial court was not required to exclude Klein's testimony regarding the statements Regina had previously made. Accordingly, there was no error.

E. CUMULATIVE ERROR

Finally, Fritz argues that, even if the individual errors in his trial do not require reversal, the cumulative errors deprived him of his right to a fair trial.

"Under the cumulative error doctrine, a defendant may be entitled to a new trial when cumulative errors produce a trial that is fundamentally unfair." *Emery*, 174 Wn.2d at 766. Here, Fritz's has not met his burden to show that any error occurred in his trial. Therefore, the cumulative error doctrine does not apply here.

For the reasons articulated above, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, C.J.

We concur:

Worswick, J.

Glasgow, J.

RUSSELL SELK LAW OFFICE

April 01, 2021 - 2:03 PM

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