

NO. 65494-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

REC'D
FEB 23 2011
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

JASON KNUTH,

Appellant.

2011 FEB 23 PM 4:32

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

The Honorable Douglass J. North, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court's denial of appellant's motion for a second interview with the complainant violated appellant's right to a fair trial. Supp. CP ___ (Sub no. 150, Order Denying Motion to Interview, 11/29/2009).¹

2. The prosecutor committed misconduct during closing argument when he misstated the jury's role, telling jurors, "[Y]our job is to decide what happened." 21RP 44.

3. The prosecutor committed misconduct in presenting evidence and arguing guilt based on sympathy for the complaining witness and her father's bad parenting.

4. Appellant was denied his constitutional right to effective assistance of counsel when his attorney failed to request a witness deposition and failed to object to improper argument that misstated the law and urged a verdict on improper grounds of sympathy and guilt by association.

5. Cumulative error denied appellant a fair trial.

Issues Pertaining to Assignments of Error

1. The complaining witness initially accused appellant, then recanted at the first trial resulting in a mistrial. Between the first and second trials, she changed her story again and new evidence came to light suggesting she had been abused by her brother. The court denied

¹ A supplemental designation of clerk's papers was filed on February 22, 2011.

counsel's motion for a second witness interview because the court appointed special advocate (CASA) refused. Where defense counsel's request to interview the complainant was not only reasonable but also necessary to provide effective representation, did the trial court's denial of counsel's request deny appellant his right to a fair trial?

2. A jury's job is not to solve a case or declare what happened. It is to determine whether the State has proved every element of the crime beyond a reasonable doubt. Here, the prosecutor misstated the law, telling the jury, "[Y]our job is to decide what happened." Does the prosecutor's misconduct require reversal?

3. The State presented irrelevant evidence the complaining witness lived in a trailer in a junkyard, had to bathe in the public marina, and was told by her father that he considered putting her up for adoption. The prosecutor also focused on the family's miserable living conditions in opening and closing argument. Did the prosecutor commit misconduct in urging a verdict based on sympathy rather than on proof beyond a reasonable doubt?

4. Was counsel ineffective in failing to request a deposition, failing to object when the prosecutor argued the jury's role is to decide what happened, and failing to object to improper evidence and argument that urged a verdict based on sympathy?

5. Did cumulative error violate appellant's right to a fair trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged appellant Jason Knuth with one count of first-degree child molestation. CP 1. At the first trial, the child, L.S., recanted her accusation and a mistrial was declared when the jury could not reach a verdict. 4RP² 710; 7RP 1306. At the second trial, L.S. testified her accusation was true and she had lied at the first trial. 19RP 188, 194. The jury found Knuth guilty and the court imposed an indeterminate sentence of 108 months to a maximum term of life. CP 46, 94. Notice of appeal was timely filed. CP 89.

2. Substantive Facts

a. Background to Allegations

David Windhausen was in a bind. 7RP 155. A single parent with a demanding job, he needed a babysitter for his two children, L.S., age seven, and her brother L.V.S., age nine. 17RP 124-25, 154. The children's mother, a chronic drug user, was only occasionally in the picture. 17RP 135. L.S. in

² There are 22 volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Apr. 15, 16, 20, 21, 2009; 2RP – Apr. 22, 2009; 3RP – Apr. 23, 2009; 4RP – Apr. 30, 2009; 5RP – May 4, 2009; 6RP – May 5, 2009; 7RP – May 6, 2009; 8RP – Nov. 6, 2009; 9RP – Dec. 18, 2009; 10RP – Feb. 22, 2010; 11RP – Feb. 24, 2010; 12RP – Feb. 24, 2010, cont'd; 13RP – Feb. 25, 2010; 14RP – Feb. 25, 2010, cont'd; 15RP – Feb. 26, 2010; 16RP – Mar. 1, 2010; 17RP – Mar. 1, 2010, cont'd; 18RP – Mar. 2, 2010; 19RP – Mar. 2, 2010, cont'd; 20RP – Mar. 3, 2010; 21RP – Mar. 4, 2010; 22RP – May 21, 2010.

particular missed her mother and wanted to have more of a relationship with her. 18RP 90; 19RP 174-75, 198. Windhausen was concerned about L.S.'s need for her mother, but he did not permit the mother to spend time with the children when she was using drugs. 16RP 73; 17RP 143.

Knuth became friends with Windhausen while helping with odd jobs around the marina where they both lived and worked. 17RP 146-47, 156-58, 169. Windhausen saw Knuth as a "kindred spirit" since both were mistreated by the marina's managers. 17RP 156-57. Over the course of roughly eight weeks, Knuth had numerous conversations with Windhausen and was invited for dinner on occasion. 17RP 146-47, 158, 169. Knuth got to know the children, who became comfortable with him to the point of climbing into his lap while Windhausen cooked dinner. 17RP 155, 168-69.

When Windhausen mentioned his need for childcare, Knuth offered to help. 17RP 155. From November 2007 until January 2008, Knuth watched the children when Windhausen was at work, about 12 hours a day Thursdays, Fridays, and weekends. 17RP 147-48, 167-68.

In early January, the children's mother, arrived for one of her sporadic visits. 17RP 135, 171-72. She stayed in the trailer with Windhausen and the children, temporarily eliminating the need for Knuth's babysitting services. 17RP 171-72.

b. L.S.'s Initial Disclosures

On Saturday night, January 20, 2008, L.S. told her mother that while they were all watching television in the trailer one night, she was sitting on Knuth's lap and he touched her privates. 19RP 187-89. The mother reported this to Windhausen, who spoke to L.S. the next morning in the presence of her mother and brother. 17RP 173. She told him Knuth touched her privates. 17RP 178. He wanted to get to the bottom of it and, asked L.S. to show him exactly what Knuth supposedly did. 17RP 178-79. He testified she was sheepish in the presence of her mother and refused to show him what happened. 17RP 179. Her sheepishness and refusal to demonstrate confirmed Windhausen's doubts that his friend would do such a thing. 17RP 179-81; 18RP 65-66. Later that week, the children's mother did not return to the trailer, and Knuth was again tasked with watching Windhausen's children. 17RP 179-80.

On February 28, 2008, L.S. had her first session with school counselor Julie Turcott. 16RP 46. L.S. had suffered from psychological problems throughout her childhood, including suicidal urges as early as kindergarten. 12RP 169-71. Both L.S. and her father were concerned about her lack of contact with her mother. 16RP 73. In the initial intake, Windhausen and L.S. were both there and L.S. mentioned she did not like her babysitter. 16RP 50. In the first session when she was alone with

Turcott, L.S. told Turcott she did not like Knuth because he touched her vagina while watching television one night. 16RP 51-53.

That afternoon, L.S. told an AmeriCorps volunteer at her school that she was afraid CPS would take her from her family because of what she told the counselor. 16RP 91-92. L.S. told the volunteer her babysitter had been hurting her, that he touched her in places he shouldn't and made her sit on his lap. 16RP 94-95. She said it happened on the bed while her brother was on the couch watching television. 16RP 95. She said she very much wanted to live with her mother and was very hurt when Knuth said her mother was a drug addict. 16RP 98.

L.S. also told the volunteer she was afraid to tell her teacher because she did not want the teachers discussing this incident. 16RP 99. Nevertheless, L.S.'s second-grade teacher, Gale Myles, testified L.S. came up to her very happy to have told someone that Knuth touched her privates. 12RP 173. The school notified Child Protective Services, who alerted law enforcement. 16RP 57.

L.S. returned home with Knuth when he picked her up after school that day, but a short time later, Detective Keith Savas investigated and placed L.S. in protective custody. 16RP 99-100; 20RP 30-31. In an interview on February 29, 2008, L.S. told Savas her babysitter "did something" to her. 14RP 150.

Savas referred L.S. to child interview specialist Carolyn Webster. 13RP 7, 27. L.S. told Webster Knuth touched her one time while she was watching television and sitting on his lap. 13RP 41, 68. Webster also testified L.S. said Knuth bragged about being a “sex fedender” and being “one of those things that touch little kids.” 13RP 69-70.

Initially, L.S. was placed in licensed foster care for a few days, and then transferred to the care of her aunt, David Windhausen’s sister Robin. 14RP 149. L.S. lived with her aunt for roughly four months from March until June 2008. 14RP 178. While L.S. lived with Robin, her brother sometimes called and said mean things to her. 14RP 179. Robin testified L.S. said she wanted her brother out of the house, but said nothing about Knuth. 16RP 7-8.

Windhausen brought L.S. toys and clothes, but did not visit as often as she or Robin would have liked. 14RP 169; 18RP 73; 20RP 5. He explained that this was “mild social disapproval,” a discipline skill he learned in parenting classes. 18RP 4-6, 58-60. With this tool, he hoped to correct L.S.’s improper behavior, namely, being coached by her mother into falsely accusing Knuth. 18RP 58-60.

Meanwhile, Knuth was arrested. Believing his friend to be falsely accused, Windhausen visited him in jail and gave him money for phone calls

and personal items. 17RP 188, 193. He told Knuth he would do everything he could to stop this. 17RP 197-98.

During the dependency proceedings regarding custody of L.S., Windhausen testified he was concerned that his sister Robin was threatening to “shoot her mouth off” although she did not know what was going on. 17RP 203. He warned her not to do so and threatened to expose her drug use if she did. 17RP 204-06. Robin testified that her brother probably knows things about her she would not like to have made public, but denied that he ever threatened or pressured her regarding her testimony. 14RP 175.

c. L.S.’s Recantations

In June 2008, L.S. was returned home to her father. 14RP 178. Shortly after her return, she met with CASA volunteer Vanessa Allen. 13RP 81, 87. L.S. sat with Allen in her car near the trailer for a private talk. 13RP 95. While she explained her role as the judge’s eyes and ears, Allen testified, L.S. interrupted her almost immediately. 14RP 104-05. L.S. put her head down and said there was something she needed to tell. 14RP 105. She then told Allen her accusation of Knuth was a fib. 14RP 106. Allen told L.S. it is not unusual for children to take back their accusations when they see the trouble it can cause in a family. 14RP 107. L.S. said again that she had fibbed. 14RP 107.

Tammi Powelson, Windhausen's former wife and occasional babysitter, testified that L.S. was very upset about having lied and told her in July 2008 her accusations against Knuth were not true. 20RP 105-07.

Windhausen also testified that, just before her meeting with Allen, L.S. also told him she had made up the allegation about Knuth. 18RP 79. In August 2008, despite a dependency court order that he not discuss the case with her, Windhausen brought L.S. and her brother to Knuth's attorney for an interview. 18RP 12, 20-21. In this interview, defense counsel asked if there was anything L.S. wanted to say differently from what she said before. 18RP 27. L.S. said she had not told the truth before and that Knuth did not touch her in the wrong way. 18RP 27-28. Defense counsel asked if there was any reason why she said it. 18RP 29. L.S. at first said she did not really know, but then explained she said it so the kids at school would care about her and not call her stupid anymore. 18RP 29-30.

d. First Trial and Subsequent Statements

In the first trial, in April 2009, L.S. testified she fibbed about what happened with Knuth. 19RP 194. In addition to the statements discussed above, L.S.'s friend Tanner testified that, on October 24, 2008, L.S. had told her a secret. 19RP 125, 130. She told Tanner her babysitter touched her and wrote in Tanner's journal that a "boy" touched her. 19RP 127-30. At first, Tanner did not understand what L.S. meant, but she explained it was a touch

in her private area. 19RP 131. L.S. told her not to tell anyone. 19RP 131. The jury was unable to reach a verdict and the court granted a mistrial. 7RP 1305-06.

After the first trial, L.S. was again removed from her father's care and sent to live with her aunt Robin from May to August 2009. 14RP 182. During that time she met again with CASA Vanessa Allen. 14RP 112. L.S. told Allen Knuth did actually touch her but it was not his fault because he had been drinking. 14RP 116-18.

During this time she also talked with her aunt Robin, who testified L.S. told her she made up the story about Knuth molesting her. 16RP 10. When Robin asked why, L.S. responded by asking if her mother was going to get in trouble. 16RP 12. Robin testified L.S. was very attached to her mother who was physically and emotionally unavailable. 16RP 13.

A few days before the second trial, L.S. talked to her friend Tanner again. First, in a "friendship circle," L.S. told Tanner it was not true what she said previously about her babysitter. 19RP 134-35. Then later, when the two were alone, Tanner testified L.S. told her it did actually happen, she just did not want anyone to know. 19RP 134-35. Tanner testified L.S. told her Knuth did not mean to do it because he was drunk. 19RP 130-31.

e. Motion to Interview Witnesses

At some point after the first trial, L.S. revealed she may have been involved in some sort of sexual touching or molestation with her brother. Supp. CP ____ (Sub no. 142, Defense Motion for Order to Interview State's Witness, 11/23/2009). Defense counsel learned the siblings had watched pornography together and had had sexual intercourse. Id. Based on this new information and L.S.'s subsequent statements essentially recanting her previous recantation, Knuth requested a new witness interview to explore L.S.'s latest version of events and new information that seemed to suggest another perpetrator, one who she might have a motive to protect, namely, her brother. Id.; 8RP 27. Defense counsel explained he had retained an expert, Dr. Yuille, but he could not prepare a report without a new witness interview and a transcript of the previous testimony. 8RP 11, 13.

The court ordered him to go through L.S.'s CASA and then come back to court for an order authorizing new interviews. 8RP 32; Supp. CP ____ (Sub no. 140, Omnibus Order, 11/6/2009). A few weeks later, defense counsel moved in writing for an order permitting new witness interviews because L.S.'s CASA was refusing to permit the interview. Supp. CP ____ (Sub no. 142, Defense Motion for order to Interview, 11/23/2009). One week later, the court denied counsel's request by written order. Supp. CP ____ (Sub no. 150, Order Denying Motion to Interview, 11/30/2009).

f. Testimony at Second Trial

At trial, L.S. testified she lied at the first trial. 20RP 3, 15-16. She testified Knuth touched her privates while she sat on his lap. 19RP 188. She testified she told her mother, her father, her friend Tanner, someone at the courthouse, and someone at school about it. 19RP 189-91. She testified she was not sure why she lied and told her CASA, her father, the defense attorney, and her friend Tanner that it never happened. 19RP 191; 20RP 6-7, 9-10.

L.S.'s older brother L.V.S. testified he thought L.S. must have misinterpreted Knuth's conduct. 19RP 160. He recalled L.S. sitting on Knuth's lap, and Knuth simply laying his hand down on her lap instead of holding it up in the air because he was sleepy. 19RP 160-61.

L.V.S. also testified L.S. was aware of a previous accusation against a previous babysitter. 19RP 173-74. He testified Windhausen's former wife Tammi Powelson stopped babysitting them after L.V.S. accused her of touching his private parts. 19RP 173-74. When his father asked if it were really true, L.V.S. admitted it was not. 19RP 174. He was simply upset and wanted his mother to come back. 19RP 174. He believed that if the babysitter went away, his mother would return. 19RP 175. Powelson recounted the same incident. 20RP 101-04. L.V.S. testified L.S. was aware

of this incident and knew the previous babysitter left because of his false accusations of sexual abuse. 19RP 175.

Windhausen's adult daughter testified she was occasionally at the trailer while Knuth babysat. 20RP 92. She never saw anything that would cause her concern. 20RP 93, 96. Windhausen's friend Forest Rapp testified he saw beer cans in the garbage but never saw Knuth drink while caring for the children. 20RP 136.

The prosecutor questioned Windhausen about the circumstances of the life he led with his children at the marina. 17RP 130-31. He was asked to describe the cranes in the background. 17RP 129. He testified there was "a lot of crap" outside the trailer where they lived, including an old bicycle, oil drums, and an old semi-truck. 17RP 130-31. Windhausen testified the children had to shower in the public marina bathroom. 17RP 139-40. In response to direct questioning by the prosecutor, Windhausen also admitted he greatly upset L.S. when he told her, at age six or seven, that he had contemplated putting her up for adoption. 17RP 142.

g. Opening and Closing Arguments

In both closing and opening arguments, the State focused heavily on Windhausen's inadequacies as L.S.'s parent and provider. 21RP 8-24. He opened by discussing "the clutter of an old marina on the banks of the Duwamish River." 12RP 136. L.S. could not "spend the afternoons on her

swing set or riding her bike through her front yard” because “her front yard was littered with old engines, steel barrels and junk.” 12RP 136. L.S. and her brother lived in a trailer, “maybe twice the size of the jury box you’re sitting in” and “would bathe in the public bathroom at the marina.” 12RP 136. “This,” the prosecutor argued, “was the place that their father, David Witenhousen [sic] chose for her and [her brother] to be raised. And it was in the middle of something that any of us would look at and simply call ____.” 12RP 136.

Closing argument followed a similar theme. The prosecutor discussed the family’s life in a trailer in an industrial area where they had to bathe at the public marina:

And on the banks of the Duwanish [sic] River in an industrial areas surrounded by cargo containers and cranes, burnt out engines and junk David Windhausen put his children in a 5 wheel or a 5th wheel trailer and decided this is where I will raise them. This is where they will have their meals and their toys and this is where they will bathe in the public marina.

21RP 9. He referred to the scenario as “two kids being raised in the middle of a junk yard.” 21RP 9. The State argued these miserable circumstances exacerbated the impact of the abuse: “for a little girl where she lives in the circumstance where she has to shower in a public restroom where she really has so little control over her life. And the one thing the one thing she can control even at seven years old is who touches her.” 21RP 11.

C. ARGUMENT

1. THE TRIAL COURT'S DENIAL OF KNUTH'S REASONABLE REQUEST TO INTERVIEW L.S. VIOLATED HIS RIGHT TO A FAIR TRIAL.

Courts have long recognized that effective assistance of counsel and access to evidence are crucial elements of due process and the right to a fair trial. State v. Boyd, 160 Wn.2d 424, 434, 158 P.3d 54 (2007). The right to effective assistance includes a “reasonable investigation” by defense counsel. See Strickland v. Washington, 466 U.S. 668, 684, 691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); In re Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). The right to interview witnesses before trial is essential to protecting both the right to reasonably prepared counsel and the due process right to compulsory process. State v. Burri, 87 Wn.2d 175, 180, 550 P.2d 507 (1976).

A court in a criminal case should look to Superior Court Criminal Rule (CrR) 4.7 to determine the permissible scope of criminal discovery. State v. Gonzales, 110 Wn.2d 738, 744, 757 P.2d 925 (1988). Under CrR 4.7, the prosecution is required to disclose to the defendant the information it intends to rely on in a hearing. CrR 4.7(a)(1)(i) (requiring the prosecution to disclose names of witnesses it intends to call at a hearing and the substance of their testimony). If a defendant requests the disclosure of information beyond that which the prosecutor is specifically obligated to disclose under

the discovery rules, the defendant's request must meet the requirements of CrR 4.7(e)(1). State v. Blackwell, 120 Wn.2d 822, 828, 845 P.2d 1017 (1993). This rule provides:

Upon showing of materiality to the preparation of the defense, and if the request is reasonable, the court in its discretion may require disclosure to the defendant of the relevant material and information [not otherwise specified in the rule].

CrR 4.7(e)(1).

Thus, a defendant's discovery request under CrR 4.7(e)(1) must meet two threshold requirements before the court may exercise its discretion in granting the request: (1) the information sought must be material, and (2) the discovery request must be reasonable. If these two requirements are met, the trial court has discretion to condition or deny the disclosure request if it finds the disclosure's usefulness is outweighed by a substantial risk of harm or unnecessary annoyance to any person. CrR 4.7(e)(2).

Knuth was denied his constitutional right to a fair trial when the court denied him an additional opportunity to interview L.S. The second interview would have provided material information because L.S.'s testimony and out-of-court statements formed the sole basis for the criminal charge against Knuth. Supp. CP ____ (Sub no. 142, Defense Motion for Order to Interview State's Witness, 11/23/2009); 8RP 11, 13,

27; Burri, 87 Wn.2d at 180. Given the circumstances of her changed story and the new information about potential sexual assault by her brother, the request for a second interview was reasonable. Knuth met the threshold requirements, but instead of weighing Knuth's right to prepare for trial against the potential for hardship or unnecessary annoyance, the court failed to exercise its discretion by deferring to the CASA's decision. The court's denial of a second interview prevented Knuth's attorney from conducting a reasonable investigation in this case. Reversal is required because the ruling violated Knuth's constitutional rights to effective assistance of counsel and compulsory process.

a. The Request for a Second Interview Was Material Because Defense Counsel Needed to Determine How and Under What Circumstances L.S. Had Changed Her Testimony Since the First Trial.

Evidence is material when there is a reasonable probability it would impact the outcome of the trial. State v. Gregory, 158 Wn.2d 759, 791, 147 P.3d 1201 (2006) (citing Pennsylvania v. Ritchie, 480 U.S. 39, 57, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987)). A defense interview of a critical witness – particularly in a sexual assault case – is crucial to the defense in two respects: both to discern the witness' likely testimony at trial and also to evaluate the witness' credibility. Here, the State's case depended entirely on L.S. Therefore, it was critical that defense counsel

have the opportunity, before trial, to assess her credibility and inquire both about her changing version of events and about the new information that she was molested by her brother. The previous interview and testimony did not and could not address this new information. The second interview was necessary not only to prepare to cross-examine the State's witnesses, but also to provide background information to a consulting defense expert and potential expert witness at trial. 8RP 11. Given the new developments in the case, the record of the previous defense interview and the transcribed testimony from the first trial was insufficient discovery.

Witness interviews are particularly essential when a key witness may have changed his or her story. See Burri, 87 Wn.2d at 179. In Burri, after a special inquiry hearing that defense counsel was not allowed to attend, the prosecutor instructed defense alibi witnesses not to speak with the defense. Id. at 176. The court upheld the trial court's dismissal because the State violated Burri's rights to effective assistance of counsel and compulsory process when he was denied access to the witnesses. The court specifically noted Burri had a right "to ascertain what [the witnesses'] testimony will be." Id. at 181 (quoting State v. Papa, 32 R.I. 453, 459, 80 A. 12, 15 (1911)). According to the Burri court, "It was highly important for defendant to (1) ascertain whether the alibi witnesses

had changed their testimony and if so, for what reason.” Burri, 87 Wn.2d at 179. Additionally, the defense must be able to

(2) discover the areas in testimony that needed further investigation; (3) review with the witnesses any additional facts that might have been overlooked by the witnesses in their testimony supportive of the defendant's alibi; and (4) ascertain whether the illegally held special inquiry hearing-conducted in the absence of defendant and his counsel-had caused friendly witnesses to become hostile.

Id. Similarly, here it was “highly important” for Knuth to interview L.S. to ascertain the extent to which her testimony had changed since the first trial and discover areas for further investigation. This information was more than material, it was critical to effective preparation of the defense.

b. The Request for a Second Defense Interview Was Reasonable to Ensure the Defense an Opportunity for Effective Cross-Examination.

“The discovery rules ‘are designed to enhance the search for truth’ and their application by the trial court should ‘insure a fair trial to all concerned, neither according to one party an unfair advantage nor placing the other at a disadvantage.’” Boyd, 160 Wn.2d at 433 (quoting State v. Boehme, 71 Wn.2d 621, 632-33, 430 P.2d 527 (1967)). In order to afford opportunity for effective cross-examination, “discovery prior to trial should be as full and free as possible consistent with protections of persons, effective law enforcement, the adversary system, and national security.” State v. Yates, 111 Wn.2d 793, 797, 765 P.2d 291 (1988)

(quoting Criminal Rules Task Force, Washington Proposed Rules of Criminal Procedure 77 (West Pub'g Co. ed. 1971)). Under the second prong, the request to interview L.S. was reasonable. CrR 4.7. This was a request for a second interview, not a fourth or fifth. The child's parent did not object, and as noted above, exploring the new information was reasonably necessary to adequately prepare for trial.

Other alternatives, such as merely informing the defense that L.S. was now recanting her previous recantation, were insufficient. Even a copy of the testimony without personal interaction is not an adequate substitute for a witness interview. Burri, 87 Wn.2d at 179. Moreover, only the advocate can determine what facts may be necessary for impeachment or other purposes. Dennis v. United States, 384 U.S. 855, 874, 86 S. Ct. 1840, 16 L. Ed. 2d 973 (1966). In our adversary system, "The determination of what may be useful to the defense can properly and effectively be made only by an advocate." Id. at 875. Here, Knuth was denied the right to have his attorney interview the witness ahead of the trial to determine what may be useful.

c. The Court Failed to Exercise Its Discretion When It Deferred to the CASA's Decision Instead of Weighing the Usefulness of the Information Against Any Risk of Harm or Annoyance Under the Rule.

Having satisfied the threshold showing of materiality and reasonableness, Knuth was entitled to interview L.S., unless the usefulness of the proposed interview was outweighed by a substantial risk of harm or unnecessary annoyance to any person. CrR 4.7(e)(2). The record does not establish a substantial risk of harm or unnecessary annoyance to L.S. It merely established that the CASA refused to permit the interview based on the best interests of the child. Supp. CP ___ (Sub no. 142, Defense Motion for Order to Interview State's Witness, 11/23/2009); 8RP 32. The CASA did not state what the risk was to the child, only that she was "fragile" and it was not in her best interests to attend another interview. Supp. CP ___ (Sub no. 142, Defense Motion for Order to Interview State's Witness, 11/23/2009). Without any showing of a risk of substantial harm or unnecessary annoyance, the court abused its discretion in denying the interview request.

Even if it is assumed that a second interview posed a risk of embarrassment or annoyance to L.S., "A risk of annoyance or embarrassment is an attendant consequence of trial." Boyd, 160 Wn.2d at 440; see also Allied Daily Newspapers of Washington v. Eikenberry, 121

Wn.2d 205, 214, 848 P.2d 1258 (1993) (risk of trauma and violation of child's privacy in sexual assault case). Such a risk should not foreclose the defense from discovering material information unless the harm or annoyance to be caused actually outweighs the usefulness of the information. CrR 4.7.

But instead of performing this weighing function under the discovery rules, the court merely deferred to the CASA's refusal. 8RP 32; Supp. CP ____ (Sub no. 150, Order Denying Motion to Interview, 11/30/2009). The court did not consider whether the harm or annoyance of a second interview was any greater than that which necessarily accompanies this sort of trial. Nor did it consider the "highly important" role the interview would play in the defense's preparation to cross-examine the only witness to the events constituting the charged offense in this case.

If the trial court were concerned about L.S., it could have heard from the CASA personally regarding the child's best interests. It could have ordered conditions on the interview, such as the presence of the prosecutor or the CASA or both. Even if the court ordered the interview, L.S. could have refused to answer individual questions at her discretion. See State v. Clark, 53 Wn. App. 120, 124, 765 P.2d 916 (1988) ("The

right to interview a witness does not mean that there is a right to have a successful interview.”).

The court had many options even if the CASA’s refusal to permit an interview could be construed as the witness herself refusing. A witness may refuse to be interviewed, but here, there is no evidence L.S. refused. State v. Hofstetter, 75 Wn. App. 390, 397, 878 P.2d 474 (1994). A CASA or guardian ad litem does not stand in for the child or represent her as an attorney. See Karl B. Tegland, 4A Washington Practice: Rules Practice, GALR 1 (quoting WSBA comment) (rule “does not contemplate that a GAL stands in place of” a juvenile and juvenile “should not lose their legal existence by appointment of a GAL”). However, even if this court finds L.S. refused the interview via her CASA, that refusal warranted a court ordered deposition under CrR 4.6 because her “testimony is material,” and “it is necessary to take his deposition in order to prevent a failure of justice.” CrR 4.6(a). Yet the court failed to consider any of these alternatives.

The trial court erred in refusing to exercise its discretion and abdicating to the CASA the court’s authority to control discovery. While the trial court’s discovery orders are reviewed for an abuse of discretion, they are not immune from reversal. See e.g. State v. Norby, 122 Wn.2d 258, 858 P.2d 21 (1993) (trial court abused its discretion in granting

defense discovery request). It is an abuse of discretion for a court to utterly fail to exercise its discretion. See, e.g., State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (categorical refusal to consider sentencing alternative is abuse of discretion). It is also an abuse of discretion to fail to consider alternatives. See State v. Wilson, 149 Wn.2d 1, 65 P.3d 657 (2003) (court abused discretion in dismissing case for prosecutorial mismanagement because court did not consider less extreme alternatives before doing so). That is what occurred here.

At counsel's initial request, the court simply ordered that the children's guardian ad litem and CASA be consulted. 8RP 32. When the CASA refused, the court simply permitted that decision to stand. Supp. CP ____ (Sub no. 142, Defense Motion for Order to Interview State's Witness, 11/23/2009); Supp CP ____ (Sub no. 150, Order Denying Motion to Interview, 11/30/2009). It did not hear testimony from the CASA as to why another interview would have been harmful. It did not ascertain whether the child herself or her parent was opposed to the interview. There is no indication the court even considered the requirements of CrR 4.7 or that Knuth's significant constitutional rights were at issue.

d. The State Cannot Rebut the Presumption of Prejudice from the Violation of Knuth's Constitutional Right to Interview Witnesses.

Both sides have the right to interview witnesses before trial. Callahan v. United States, 371 F.2d 658, 660 (9th Cir. 1967); United States v. Long, 449 F.2d 288, 295-96 (8th Cir. 1971). Only the “clearest and most compelling considerations” can justify an exception to this rule. Dennis, 384 U.S. at 873. The trial court in this case failed to even consider Knuth’s constitutional rights. And there is certainly no record of the “clearest and most compelling considerations” that would have justified denying the right to prepare for trial by interviewing a witness whose story had changed. Id.

Denial of pre-trial interviews in violation of the constitutional rights to compulsory process and effective assistance of counsel is presumed prejudicial. Burri, 87 Wn.2d at 181. Reversal is required unless the record affirmatively shows beyond a reasonable doubt that counsel was not actually deprived of an opportunity to adequately prepare for trial. Id. at 182. The Burri court rejected the State’s harmless error argument even though the State gave the defense a copy of the witness’s testimony at its special inquiry hearing (which the defense was not permitted to attend). Id. at 179. Without a transcript of what occurred there, it could not determine whether the error was harmless. Id. at 182.

The circumstances here are nearly the same. There is no record of what L.S. may have said to the prosecutor in his preparation for trial. There is no indication the trial court considered that information. Even if there were, only the defense advocate is in a position to determine what might be helpful. Dennis, 384 U.S. at 874-75. On these facts, the State cannot refute the presumption of prejudice and reversal is required.

L.S. was not merely a key witness. She was essentially the only witness. The other testimony involved repetition of her statements under the child hearsay rules or attempts to impeach her various statements by both sides. Her changing statements were the only evidence that any crime occurred. Denying him an opportunity to re-interview the only witness after she recanted her testimony at the previous trial was an unreasonable violation of Knuth's constitutional rights to compulsory process and effective assistance of counsel. Burri, 87 Wn.2d at 182.

2. THE PROSECUTOR MISSTATED THE LAW AND DIMINISHED THE BURDEN OF PROOF BY TELLING THE JURY ITS JOB WAS TO DECIDE WHAT HAPPENED.

Prosecutorial misconduct is established when the prosecutor's comments were improper and were substantially likely to affect the outcome of the proceedings. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). Even if not objected to at trial, prosecutorial misconduct

requires reversal when the prosecutor's comments were so flagrant and ill intentioned they could not have been cured by instruction. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988).

Misconduct that directly violates a constitutional right requires reversal unless the State proves it was harmless beyond a reasonable doubt. State v. French, 101 Wn. App. 380, 386, 4 P.3d 857 (2000); State v. Fleming, 83 Wn. App. 209, 213-216, 921 P.2d 1076 (1996). Moreover, because such misconduct rises to the level of manifest constitutional error, the absence of objection does not preclude appellate review. Fleming, 83 Wn. App. at 216. The touchstone of a prosecutorial misconduct analysis is the fairness of the trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Here, flagrant prosecutorial misconduct rendered Knuth's trial incurably unfair

The presumption of innocence and the corresponding burden to prove every element of the crime charged beyond a reasonable doubt is the "bedrock upon which the criminal justice system stands." State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007). The proof beyond a reasonable doubt standard "provides concrete substance for the presumption of innocence." State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d 188 (1977) (quoting In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). For that reason, the failure to give clear instruction on reasonable

doubt is not only error, it is a “grievous constitutional failure” mandating reversal. McHenry, 88 Wn.2d at 214; Sullivan v. Louisiana, 508 U.S. 275, 280-81, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). Here, the court gave a correct instruction, but the prosecutor misstated the law.

A prosecutor’s misstatement of the law is a particularly serious error with “grave potential to mislead the jury.” Davenport, 100 Wn.2d at 763. Thus, a prosecutor may not attempt to shift or diminish the burden of proof beyond a reasonable doubt in closing argument. State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008) (improper for prosecutor to argue reasonable doubt does not mean to give the defendant the benefit of the doubt); People v. Harbold, 124 Ill. App. 3d 363, 371, 464 N.E.2d 734, 742 (1984) (“[A]rguments which diminish the presumption of innocence are forbidden.”).

It is improper for a prosecutor to tell the jury its job is to declare the truth or determine what happened. State v. Anderson, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009). “A jury’s job is not to ‘solve’ a case. It is not . . . to ‘declare what happened on the day in question.’” Id. The jury’s duty is to determine whether the State has proved its allegations beyond a reasonable doubt. Id. Here, the prosecutor misstated the law when he told the jury its job was to “decide what happened,” essentially, to solve the case. This is precisely the argument held to be improper in Anderson. Id.

Courts look at prosecutorial misconduct in the context of the entire argument, but in this case the rest of the prosecutor's argument did not mitigate the prejudice. Warren, 165 Wn.2d at 28. During closing and rebuttal arguments, the only reference the prosecutor made to the jury's role or the burden of proof was, "Your job is to decide what happened. That is your job. . . . Your job is to decide what happened here and what happened here is that Jason Knuth committed the crime of child molestation in the first degree. . . ." 21RP 44.

This argument prejudiced Knuth's right to a fair trial because it implies a lesser burden of proof. It implied that if the defense fails to present a complete alternative story, the State's version of events must be "what happened." Additionally, this argument was prejudicial in light of the prosecutor's focus throughout the trial on Windhausen's parenting instead of Knuth's guilt. See argument section C.3, infra. Urging the jury to decide what happened, instead of whether the elements were proved beyond a reasonable doubt, reinforced the prosecutor's other improper arguments focusing on Windhausen's bad parenting. If the jury's job is to "decide what happened" the scope of facts to be considered is much wider. This argument encouraged the jury to speculate as to why Windhausen would be raising his children in such miserable conditions and why he would support the man accused of abusing his daughter – all

considerations which have no bearing on this case except to encourage a verdict based on sympathy for L.S. and antipathy for her father.

3. THE PROSECUTOR COMMITTED MISCONDUCT BY MAKING THE TRIAL ABOUT WINDHAUSEN'S PARENTING AND SYMPATHY FOR L.S.

“A person being tried on a criminal charge can be convicted only by evidence, not by innuendo.” State v. Yoakum, 37 Wn.2d 137, 222 P.2d 181 (1950). Therefore, all advocates have a duty not to intentionally introduce prejudicial inadmissible evidence. State v. Montgomery, 163 Wn.2d 577, 593, 183 P.3d 267 (2008). A prosecutor is a quasi-judicial officer, with a special duty to act impartially in the interests of justice and to seek verdicts free of prejudice and based on reason. Reed, 102 Wn.2d at 146-47. Consistent with their duties, prosecutors must not urge guilty verdicts on improper grounds such as passion, prejudice, or sympathy. Belgarde, 110 Wn.2d at 507-508.

In this case, the prosecutor attempted to show L.S. recanted because of pressure from her father. However, the prosecutor went far beyond what was relevant to that issue and also presented evidence her father's parenting was deplorable in ways utterly unrelated to this case. The prosecutor also relied on this irrelevant and inflammatory evidence in closing argument thereby encouraging the jury to make its decision out of

sympathy for poor little L.S. or a desire to punish her father. This flagrant and ill-intentioned misconduct requires reversal.

a. The Prosecutor Presented and Relied on Inflammatory Evidence that Windhausen Raised his Children in a Junk Yard and Told His Daughter He Considered Putting Her Up for Adoption.

The prosecutor elicited copious testimony in this case tending to show David Windhausen was not a good parent. He raised his children in a tiny trailer at a marina that looked more like a junkyard. 17RP 130-31. Numerous photographs of the exterior of the home and the surrounding area were admitted over defense objection that they were cumulative and irrelevant. 13RP 92-93. The family showered in the public marina bathroom. 17RP 139-40. Windhausen told his seven-year-old daughter L.S. that when she was an infant, he had contemplated putting her up for adoption. 17RP 142. All of this occurred long before Knuth's contact with the family, let alone L.S.'s disclosures of abuse. Therefore it has no bearing on the credibility of her accusations or recantations.

In both closing and opening arguments, the prosecutor focused on this irrelevant and inflammatory evidence of the circumstances of L.S.'s family life. He opened by discussing "the clutter of an old marina on the banks of the Duwamish River." 12RP 136. L.S. could not "spend the afternoons on her swing set or riding her bike through her front yard"

because “her front yard was littered with old engines, steel barrels and junk.” 12RP 136. L.S. and her brother lived in a trailer, “maybe twice the size of the jury box you’re sitting in” and “would bathe in the public bathroom at the marina.” 12RP 136. “This,” the prosecutor argued, “was the place that their father, David Witenhousen [sic] chose for her and [her brother] to be raised. And it was in the middle of something that any of us would look at and simply call ____.” 12RP 136.

Closing argument followed similar lines:

And on the banks of the Duwanish [sic] River in an industrial areas surrounded by cargo containers and cranes, burnt out engines and junk David Windhausen put his children in a 5 wheel or a 5th wheel trailer and decided this is where I will raise them. This is where they will have their meals and their toys and this is where they will bathe in the public marina.

21RP 9. Knuth came to that marina, the prosecutor continued, “and what he saw there and what would any of us would have seen was really an astonishing thing. Two kids being raised in the middle of a junk yard.”

21RP 9. The prosecutor also related these circumstances to L.S.’s victimization: “for a little girl where she lives in the circumstance where she has to shower in a public restroom where she really has so little control over her life. And the one thing the one thing she can control even at seven years old is who touches her.” 21RP 11. In summary, the prosecutor presented evidence L.S.’s life was difficult in ways unrelated to

Knuth, and then urged a verdict based on sympathy for her and antipathy for her father.

b. Urging a Verdict Based on Antipathy Towards Windhausen Was Flagrant, Ill-Intentioned, and Incurable Misconduct.

It is well-established that prosecutors may not intentionally inject inadmissible evidence or urge a verdict on grounds of sympathy or unfair prejudice. Belgarde, 110 Wn.2d at 507-08; State v. Jones, 71 Wn. App. 798, 808, 863 P.2d 85 (1993) (citing State v. Ray, 116 Wn.2d 531, 806 P.2d 1220 (1991)). The prosecutor's improper focus on denigrating persons allied with the defense, namely Windhausen, is analogous to the improper argument in Reed. In Reed, the prosecutor denigrated the defense's expert witnesses as "city doctors who drove down here in their Mercedes Benz." 102 Wn.2d at 143. The court explained that the prosecutor's portrayal of the defense experts as outsiders was "calculated to align the jury with the prosecutor and against the petitioner." Id. at 147. Here, the prosecutor's focus on encouraging the jury's distaste for Windhausen aligned the jury with the prosecutor against Windhausen and Knuth.

The misconduct here is also comparable to the improper argument in Belgarde, where the prosecutor urged the jury to convict based on the defendant's association with a group the prosecutor portrayed as terrorists.

In Belgarde, the prosecutor compared the defendant's involvement in AIM, the American Indian Movement, to involvement in the Irish Republican Army, and described AIM as "butchers" who killed indiscriminately. Id. at 506-07. He argued that while the jury might not be afraid of AIM, the witnesses in this case certainly were. Id.

The court held that no instruction could have cured the "fear and revulsion" the jury would have felt had they believed the prosecutor's description of AIM. Id. at 508. Similarly here, no instruction could cure the revulsion the jury likely felt for a father who would raise his children in such circumstances and tell his small daughter he considered putting her up for adoption. The jury was encouraged to convict Knuth based on his association with Windhausen and his bad parenting.

In analyzing the prejudice resulting from prosecutorial misconduct, appellate courts do not look at the conduct in isolation, but consider the cumulative effect of the total argument, the issues in the case, the evidence, and the instructions given to the jury. Warren, 165 Wn.2d at 28 (citing Yates, 161 Wn.2d at 774). In determining whether misconduct warrants reversal, the courts examine the prejudice and the cumulative effect. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). Thus, the improper evidence and argument regarding Windhausen's bad

parenting must be viewed in the context of the other evidence showing his attempts to influence testimony and the lack of any limiting instruction.

Copious evidence was admitted to show the pressure Windhausen purportedly placed on L.S. He violated a court order by bringing her to an interview with defense counsel. 18RP 12, 20-22. He engaged in a “silent protest” and refused to visit her when she was removed from the home and sent to live with her aunt. 14RP 169; 17RP 199-201. When she initially told him she had been molested, he tried to get her to “re-enact” the events for him and told her he did not believe her. 17RP 178-81. Knuth does not dispute this was admissible to show L.S.’s potential bias or motivation for recanting her statements. But this evidence also had enormous potential to arouse irrational sympathy for L.S. and the desire to punish someone.

Instead of treading carefully, according to the duty of every advocate to avoid presenting inadmissible and inflammatory evidence, the prosecutor went further and elicited evidence without any bearing on the permissible purpose of witness bias. Montgomery, 163 Wn.2d at 593. The detailed evidence of Windhausen’s parenting and the circumstances of the family’s housing were entirely irrelevant to any valid purpose. The evidence of bad parenting (as opposed to intentional pressure) had no purpose other than to condemn Windhausen as a bad parent, to vilify

Windhausen and, by association, Knuth, and inspire the jury to punish someone for the circumstances of L.S.'s life.

This evidence and argument went far beyond what was relevant to the issue of witness bias and made the trial not about whether Knuth was guilty beyond a reasonable doubt, but about "what happened" to L.S., much of which was done to her by her father. This theme, which pervaded the trial, of inspiring the jury to punish Knuth because Windhausen is a bad father, was flagrant and ill-intentioned prosecutorial misconduct that could not have been cured by instructing the jury. This Court should reverse Knuth's conviction.

4. KNUTH WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO REQUEST A DEPOSITION AND FAILED TO OBJECT TO IMPROPER ARGUMENT THAT MISSTATED THE JURY'S ROLE AND URGED A VERDICT ON IMPROPER GROUNDS.

Defense counsel is constitutionally ineffective where (1) the attorney's performance was unreasonably deficient and (2) the deficiency prejudiced the defendant. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing Strickland, 466 U.S. 668). Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). The presumption of competent performance is overcome by demonstrating "the absence of legitimate

strategic or tactical reasons supporting the challenged conduct by counsel.” State v. Crawford, 159 Wn.2d 86, 98, 147 P.3d 1288 (2006). Failure to preserve error can also constitute ineffective assistance and justifies examining the error on appeal. State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980); see State v. Allen, 150 Wn. App. 300, 316-17, 207 P.3d 483 (2009) (addressing ineffective assistance claim where attorney failed to raise same criminal conduct issue during sentencing).

“A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude.” State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). Whether counsel provided ineffective assistance is a mixed question of fact and law reviewed de novo. In re Pers. Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

In the event this Court concludes the above errors were not preserved, Knuth was denied his constitutional right to effective assistance of counsel. Ermert, 94 Wn. App. at 848. CrR 4.6 authorizes depositions when a witness refuses to be interviewed. If this court finds L.S. refused to be interviewed, counsel was unreasonably deficient in failing to move under CrR 4.6 for a deposition. If this Court finds counsel waived objection to the misstatement of the jury’s role, the failure to object was also deficient performance. Finally, if the Court should find Knuth waived objection to evidence and argument calculated to elicit a verdict

based on sympathy for L.S. and antipathy towards her father, that failure was also deficient performance. Counsel's failure to take the necessary steps to ensure sufficient preparation for cross-examination and failure to object to extremely damaging argument that also misstated the jury's role undermines confidence in the outcome and this Court should grant Knuth a new trial.

a. Counsel Was Unreasonably Deficient in Failing to Request to Depose L.S.

Even if this court finds L.S. refused the interview via her CASA, that refusal warranted a court-ordered deposition under CrR 4.6. State v. Mankin, 158 Wn. App. 111, 241 P.3d 421 (2010). If a witness refuses to be interviewed, the court may compel a deposition under CrR 4.6. Mankin, 158 Wn. App. at ___, 241 P.3d at 426. The rule provides for depositions "if a witness refuses to discuss the case with either counsel," "his testimony is material," and "it is necessary to take his deposition in order to prevent a failure of justice." CrR 4.6(a). The prerequisites for a deposition order under CrR 4.6 were met in this case. When the only witness to the crime changes her testimony between the first trial and the second, that testimony is material and the interview was necessary to prevent a failure of justice. Because a deposition was clearly authorized

by court rule and was necessary to an effective defense, the failure to request a deposition was unreasonably deficient performance.

b. Counsel's Failure to Object to Improper Argument that Violated Knuth's Constitutional Rights Was Ineffective Assistance of Counsel.

The prosecutor's argument that the jury should "decide what happened" was clearly improper under Anderson. 153 Wn. App. at 429. If this court should find the argument waived by the lack of an objection or request for instruction, counsel's failure to object or request instruction was ineffective assistance. Burns v. Gammon, 260 F.3d 892 (8th Cir. 2001).

There is "no sound trial strategy" in failing to object when the prosecutor's argument violates the defendant's constitutional rights. Burns, 260 F.3d at 897. In Burns, the prosecutor argued the defendant had humiliated a rape victim by requiring her to re-live the experience through testimony and cross-examination. Id. at 895. The court found the prosecutor's argument infringed the rights to jury trial and to confront witnesses. Id. at 897. There could be no strategic reason for failing to object. Id. The failure to object was deficient in this case as well.

c. Counsel Was Ineffective in Failing to Object to Inflammatory and Improper Evidence and Argument that Urged a Verdict on Improper Grounds of Sympathy.

Courts need not “wink at” unfair arguments by prosecutors merely because defense counsel failed to object. State v. Neidigh, 78 Wn. App. 71, 79, 895 P.2d 423 (1995). However, if this court should conclude this issue is not preserved because trial counsel did not object to evidence or argument relating to Windhausen’s bad parenting, the failure to object to the prosecutor’s pervasive and persistent attempts to urge a verdict on improper grounds was deficient performance and Knuth’s conviction should be reversed for ineffective assistance of counsel.

The failure to object was objectively unreasonable because evidence relating only to Windhausen’s bad parenting and poverty of living was inadmissible and extremely prejudicial. It was utterly irrelevant to any element of the offense and the potential for unfair prejudice far outweighed its probative value, which was non-existent. ER 402, 403.

ER 402 provides, “Evidence which is not relevant is not admissible.” Evidence is only relevant if it has some “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the

evidence.” ER 401. This evidence did not make any fact of consequence more or less likely. ER 401. The fact that L.S. was raised by a man who saw fit to raise children in a junkyard has no bearing on Knuth’s guilt or innocence. It does not affect the probability of any element of the crime. Nor does it affect the credibility of L.S.’s testimony. Even if this evidence were relevant, the court would likely have excluded it due to the extreme danger of unfair prejudice. ER 403.

“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” ER 403. Evidence causes unfair prejudice when it is more likely to arouse an emotional response than a rational decision by the jury. City of Auburn v. Hedlund, 165 Wn.2d 645, 654, 201 P.3d 315 (2009) (citing State v. Cronin, 142 Wn.2d 568, 584, 14 P.3d 752 (2000)). In Hedlund, the court held that the trial court abused its discretion in admitting a 911 tape with gruesome discussion of the aftermath of a crash that killed five people. 165 Wn.2d at 655. The court noted the nature of the crash was not relevant to any element of the crimes of driving while intoxicated and furnishing alcohol and tobacco to minors. Id. at 656. The emotional reaction of the 911 caller seemed calculated to inflame the jury. Id.

The evidence of bad parenting here was no more relevant than the nature of the crash in Hedlund. There was virtually no probative value to

weigh into the analysis. Evidence of Windhausen's bad parenting and the miserable living conditions to which he subjected his children served only to arouse the sympathy of the jury for L.S. and the desire to punish someone for her father's behavior. Counsel was deficient in failing to object to this evidence and argument that encouraged a verdict based on the jury's sympathy for L.S. and antipathy toward her father.

d. These Instances of Deficient Performance Undermine Confidence in the Outcome.

To show prejudice, Knuth need not show his attorney's deficient performance more likely than not altered the outcome of the proceeding. Thomas, 109 Wn.2d at 226. Rather, he need only show a reasonable probability that the outcome would have been different but for the mistake, i.e., "a probability sufficient to undermine confidence in the reliability of the outcome." Fleming, 142 Wn.2d at 866 (quoting Strickland, 466 U.S. 668). That confidence is undermined in this case because the verdict necessary depended entirely on L.S.'s credibility as a witness and the errors directly impacted the jury's perception of her credibility.

First, a deposition would likely have been granted and more effective cross-examination could have more adequately shown L.S.'s lack of credibility. Second, an objection to the "decide what happened"

argument would likely have been sustained because it is clearly improper under Anderson. 153 Wn. App. at 429. In Burns, the court held the defendant was prejudiced by counsel's failure to object when the prosecutor's argument diminished the burden of proof for two main reasons, both of which are present here. 260 F.3d at 897-98. Burns was prejudiced because the failure to object deprived him of a cautionary instruction that could have ameliorated or even eliminated the prejudice. Id. at 897. The failure to object also prejudiced Burns on appeal because it left him in the unenviable position of arguing the prosecutor's misconduct was "plain error." Id. at 897-98. This was a more difficult standard to meet, analogous to Washington's requirement that when there is no objection, prosecutorial misconduct requires reversal only if it is so flagrant and ill-intentioned that no instruction could have cured the prejudice.

The impact of the prosecutor's argument in this case was no different, and Knuth was also prejudiced when his attorney failed to object to argument that diminished the burden of proof. Also, without that argument, the jury would have focused more on the elements of the crime and less on figuring out "what happened" to L.S.

Finally, because the evidence of Windhausen's bad parenting had nothing to do with any element of the crime, the court would likely have

sustained objections to evidence and argument on that basis. ER 401, 402. When the only evidence of guilt was L.S.'s testimony and out-of-court statements, a strategy that focused on evoking sympathy for her was substantially likely to affect the outcome. Counsel's failure to insist on a deposition and failure to protect Knuth from unfairly inflammatory evidence and improper argument denied him a fair trial.

5. CUMULATIVE ERROR REQUIRES REVERSAL.

Every defendant has the right to a fair trial. U.S. Const. amend. VI; Const. art. 1, § 22. Cumulative error may deprive a defendant of this right. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). Even unpreserved errors may contribute to a finding of cumulative error. State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992). Even if this Court concludes the above errors do not individually require reversal, their combined effect does. The prosecutor compounded the misconduct in misstating the jury's role by presenting irrelevant and inflammatory evidence and using it in both opening and closing argument to inspire the jury to punish someone for the misery of L.S.'s life and her father's bad parenting.

D. CONCLUSION

For the foregoing reasons, Knuth asks this Court to reverse his conviction with prejudice, or alternatively to reverse and remand for a new trial.

DATED this 28th day of February, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in cursive script, reading "Jennifer J. Sweigert", is written over a horizontal line.

JENNIFER J. SWEIGERT

WSBA No. 38068

Office ID No. 91051

Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

| | | |
|----------------------|---|-------------------|
| STATE OF WASHINGTON, |) | |
| |) | |
| Respondent, |) | |
| |) | |
| v. |) | COA NO. 65494-2-1 |
| |) | |
| JASON KNUTH, |) | |
| |) | |
| Appellant. |) | |

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 28TH DAY OF FEBRUARY 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JASON KNUTH
DOC NO. 882069
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF FEBRUARY 2011.

x *Patrick Mayovsky*