Supreme Court No. _____
COA No. 84953-1-I

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY CROUCH,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF
THE PROSECUTION OF WASHINGTON FOR
SNOHOMISH COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Anthony Crouch, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals' decision terminating review. The Court of Appeals issued its opinion on October 14, 2024 (App. A), and it denied Mr. Crouch's motion to reconsider on December 4, 2024 (App. B).

B. ISSUES PRESENTED

1. It is a violation of due process to convict a person of a crime without proof beyond a reasonable doubt of all essential elements of the crime. The crime of sexual misconduct with a minor in the first degree requires that, at the time of the intercourse, the defendant be a foster parent and that the victim be his foster child. The prosecution presented insufficient evidence that J.M. remained Mr. Crouch's foster child during the intercourse underlying count four, since she

was over 18 years of age and Mr. Crouch had not lived with her for a month. The Court of Appeals misinterpreted the elements of the offense and improperly considered acquitted conduct and evidence lacking in personal knowledge to find sufficient evidence to support Mr. Crouch's lone conviction. Should this Court grant review to clarify that sufficient evidence cannot rely on improperly admitted evidence and evidence from acquitted counts? RAP 13.4(b)(4).

2. It is a manifest constitutional error when a trial court fails to instruct the jury regarding a necessary element of a crime. The trial court failed to instruct the jury that it needed to find that J.M. was Mr. Crouch's foster child at the time of the sexual intercourse. The Court of Appeals refused to reach this question because it claimed that Mr. Crouch invited the error. Did the Court of Appeals improperly extend

the invited error doctrine to apply where the trial court relied only on the prosecution's proposed instructions to craft its erroneous to-convict instruction?

C. STATEMENT OF THE CASE

J.M. was over 18 years old when she drove up to Anthony Crouch's new home and had consensual sex with him in March of 2017. [1] RP 314, 339. Mr. Crouch had moved out of the home he previously shared with J.M. the month prior. RP 332; 394.

J.M. disclosed this incident of sexual intercourse. RP 339. She also alleged that Mr. Crouch had sexual contact with her several other times the previous summer. RP 356, 432-33. At that time, she was 17 years old and living with Mr. Crouch and his then-

[1] J.M. turned 18 years old on February 21, 2017. CP 413.

spouse, Kylee Allen. RP 447. Ms. Allen and Mr. Crouch were J.M.'s foster parents at that time. RP 447.

The prosecution initially charged Mr. Crouch with one count of sexual misconduct with a minor in the first degree. RP 3. Just prior to trial, the prosecution amended the information to charge three additional counts of sexual misconduct with a minor in the first degree. CP 413-14; RP 111-12. The first three counts related to alleged incidents of intercourse that took place while J.M. was 17 years old, and they each carried an enhancement for a pattern of sexual abuse. CP 413-14; RP 1234. Although charged with a large date range, the prosecution clarified that the fourth count related to an alleged incident of intercourse that took place in March 2017, when J.M. was over 18 years old. CP 414; RP 1234, 1236. This charge did not include an enhancement. CP 414.

The jury acquitted Mr. Morris of the first three charges of sexual misconduct with a minor. CP 176-78. The special verdict forms for the enhancements for those charges were all accordingly blank. CP 172-74.

The jury found Mr. Morris guilty of only the fourth charge of sexual misconduct of a minor. CP 175. This was the charge the prosecution specified occurred in approximately March 2017, after J.M. turned 18 years of age. RP 1234, 1236.

D. ARGUMENT

1. The Court of Appeals' decision erroneously holds that improperly admitted evidence and evidence from acquitted conduct satisfies an essential element of the offense

The crime of sexual misconduct with a minor in the first degree requires that, at the time of the sexual intercourse, the defendant is the foster parent of the child, who is his or her foster child. RCW 9A.44.093(1) ("A person is guilty of sexual misconduct with a minor

in the first degree when . . . the person is a foster parent who has . . . sexual intercourse with his or her foster child who is at least sixteen."). This statute has two status requirements: that the victim be a "foster child," and that the accused be that child's "foster parent." Without this evidence, Mr. Crouch's conviction violated due process.

A defendant's right to constitutional due process "prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 309, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) (citation omitted). A conviction is constitutionally infirm if the record is "wholly devoid of any relevant evidence of a crucial element of the offense charged . . ." *Id.* at 314.

When sufficiency of the evidence to support a conviction is challenged, the reviewing court asks

"whether, after viewing the evidence most favorable to the prosecution, any rational trier of fact could have found the essential elements of [the crime] beyond a reasonable doubt." *State v. Green*, 94 Wn.2d 216, 221–22, 616 P.2d 628 (1980). More than a mere "modicum" of evidence is required. *Jackson*, 443 U.S. at 320. Equivocal evidence is also insufficient. *State v. Vasquez*, 178 Wn.2d 1, 7, 309 P.3d 318 (2013).

The benefit of a sufficiency review is "not confined to those defendants who are morally blameless." *Jackson*, 443 U.S. at 323. "[E]ven a thief is entitled to complain that he has been unconstitutionally convicted and imprisoned as a burglar." *Id.* at 323-24.

Ignoring these mandates, the Court of Appeals' decision overlooked the temporal status requirement of the statute (that J.M. remained Mr. Crouch's foster child) when it analyzed the sufficiency of the evidence

to convict Mr. Crouch. This caused it to ignore evidence which showed that Mr. Crouch was no longer J.M.'s foster father, and to overlook the lack of admissible evidence showing that J.M. remained a foster child after her 18th birthday. This Court should accept review to correct the Court of Appeals' improper application of the test for constitutional sufficiency. RAP 13.4(b)(3), (4).

a. Reviewing courts cannot rely on evidence from counts for which Mr. Crouch was acquitted to find sufficient evidence for the remaining count.

Although a sufficiency review requires that the reviewing court interpret the evidence in the light most favorable to the prosecution, *Vasquez*, 178 Wn.2d at 16, no court has held that this means that the reviewing court can borrow evidence which was relevant to other counts. And when the prosecution relies on circumstantial evidence to prove an essential element

of a crime, this evidence is sufficient "where the inferences drawn by the jury are reasonable and the evidence supporting the jury's finding is substantial." *State v. Hummel*, 196 Wn. App. 329, 355, 383 P.3d 592 (2016) (quoting *State v. Pirtle*, 127 Wn.2d 628, 643, 904 P.2d 245 (1995)).

Although there is no definition of "foster child" in RCW 9A.44.093, this Court has established how to give meaning to undefined terms in this statute. In *State v. Hirschfelder*, this Court interpreted the meaning of "registered student"[2] in the parallel provision of RCW 9A.44.093 criminalizing sexual intercourse between a teacher and their "registered student." 170 Wn.2d 536, 543–44, 242 P.3d 876 (2010); RCW 9A.44.093 (2006). In that case, the 33 year old defendant had sex with his

[2] It should be noted that the statute now uses the term "enrolled student" instead of registered student. RCW 9A.44.093(a) (2024).

student after she turned 18 years old and just prior to her graduation from high school. *Id.* at 540. Although the title of the crime—sexual misconduct with a ***minor*** in the first degree—suggests that it applies to victims under the age of 18, this Court turned to other sections of the Revised Code of Washington to determine the meaning of "registered student." *Id.* at 543-44. Since other statutes established that an individual could register as a student until the age of 21, this Court determined that "registered student" had an age cap of 21, not 18. *Id.* at 544.

Just like in *Hirschfelder*, this Court should turn to other, relevant statutes to determine the meaning of "foster child." The child welfare statute defines a child as a person under the age of 18 or a person between the ages of 18 and 21 "who is eligible to receive the extended foster care services authorized under RCW

74.13.031." RCW 74.13.020(3)(a). This statute is part of a section of the Revised Code which governs foster care. *See* RCW 74.13.250 *et seq.* It shows that a "foster child" is a transient status, dependent on age and eligibility for extended services. Thus, J.M.'s age and eligibility for extended foster care services determined whether she was a "foster child" within the meaning of RCW 9A.44.093.

Here, Mr. Crouch initially faced four charges of sexual misconduct with a minor in the first degree. Although each of the charges contained a range of dates, at trial, the prosecution identified incidents supporting each of the charges. CP 413-14; RP 1234, 1236. The first three incidents dated to a time when J.M. was below 18 years of age and both Mr. Crouch and Mr. Morris were living in the same home. RP 1234, 1236. This home was J.M.'s foster home. VRP 445. The

prosecution presented sufficient evidence that Mr. Crouch was J.M.'s foster parent during those dates, but the jury acquitted Mr. Crouch of each of these charges. CP 176-78.

Despite the jury's rejection of the prosecution's evidence through its verdict acquitting Mr. Crouch, the Court of Appeals relied on the evidence supporting the acquitted charges to conclude that J.M. was still a foster child of Mr. Crouch. Slip op. at 5-6. At trial, J.M. identified Ms. Allen as "still" her foster mom. RP 315; Slip op. at 5. She identified Mr. Crouch as her "foster father." RP 315; Slip op. at 5. Ms. Allen testified that she and Mr. Crouch were J.M.'s foster parents. RP 447; Slip op. at 5.

But "foster child" is legally a temporary status. The Court of Appeals did not consider how the legal status is different than how the term is used

colloquially—as a foster child may call the person who was their "foster parent" that term long past its legal application. What terms are used to describe these relationships thus is not sufficient evidence that the person still satisfies the legal definition for "foster child" or "foster parent."

Legally, J.M.'s "foster child" status ended at her 18th birthday unless she was eligible to receive extended foster care services. RCW 74.13.020(3)(a). Neither J.M. nor Ms. Allen testified that J.M. was "eligible" to receive extended foster care services past her 18th birthday. A court cannot reasonably infer from vague, colloquial statements about J.M.'s foster child status that she remained a foster child of Mr. Crouch after she turned 18 and he moved out. It was thus error for the Court of Appeals to rely on this evidence to conclude that J.M. remained Mr. Crouch's

foster child even after he moved out of the home and she had turned 18.

b. Reviewing courts cannot rely on improperly admitted evidence to hold evidence is sufficient to support a conviction

The court also could not rely on improperly admitted testimony to establish that J.M. remained in foster care after she turned 18. Mr. Crouch objected to a "lack of foundation" to testimony by a CPS investigator that J.M. was in extended foster care after her 18th birthday. RP 864. This objection should have been sustained, but the trial court overruled it. *Id.* Mr. Crouch challenged this error on appeal, but the Court of Appeals wrongly rejected it.

An objection to "lack of foundation" is properly understood to be an objection to a witness's lack of personal knowledge. *Hockett v. Seattle Police Dep't*, 31 Wn. App. 2d 210, 224, 548 P.3d 271 (2024). It upholds a

basic evidentiary requirement that a witness "may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." ER 602; *State v. Vaughn*, 101 Wn.2d 604, 611, 682 P.2d 878 (1984) ("Under ER 602, a witness must testify concerning facts within his personal knowledge, that is, facts he has personally observed.") (citing 5 Tegland, *Washington Practice* § 218 (2d ed. 1982)).

The proponent of the testimony bears the burden of establishing that the witness "had an adequate opportunity to observe the facts to which he testifies." *Vaughn*, 101 Wn.2d at 611. Testimony must be excluded if no trier of fact could reasonably conclude that the witness had firsthand knowledge. *Id.*

For example, a defense investigator lacks personal knowledge to testify about video he reviewed

when he neither visited the scene of the video nor knew the location of the cameras. *State v. Jefferson*, 199 Wn. App. 772, 803, 401 P.3d 805 (2017). A mayor lacks personal knowledge to testify about an event which he did not observe but was instead relayed to him by staff. *Simmons v. City of Othello*, 199 Wn. App. 384, 391–92, 399 P.3d 546 (2017). An attorney cannot testify to the contents of a police report he did not author. *Burmeister v. State Farm Ins. Co.*, 92 Wn. App. 359, 367, 966 P.2d 921 (1998). A plaintiff cannot testify to an elected official's candidacy which the plaintiff only knew through hearsay statements. *State v. (1972) Dan J. Evans Campaign Comm.*, 86 Wn.2d 503, 506–07, 546 P.2d 75 (1976).

The CPS investigator lacked personal knowledge of J.M.'s foster care status because any knowledge she had about J.M.'s status would have been based on

hearsay statements or documents. The CPS investigator also stated that she was not part of the licensing division, so she did not have knowledge to testify whether Mr. Crouch's name was on the foster parent licensure. RP 866.

The prosecution never showed that the investigator had personal knowledge of J.M.'s foster care status. Indeed, the investigator's answer belied her lack of personal knowledge: tautologically, she concluded that J.M. was in extended foster care because J.M. was over the age of 18 and still in foster care. RP 864. The CPS investigator never testified regarding how she determined that J.M. was still in foster care past her 18th birthday.

Extended foster care requires documentation and a court order. RCW 13.34.267, 74.13.020(12)(a-b); WAC 110-90-0040. The CPS investigator never testified that

she was involved in the extended foster care application process. The CPS investigator also never testified that she observed any documents or other evidence of extended foster care. Even if she did, those documents would be hearsay and her testimony would still lack personal knowledge.

It was thus error for the trial court to admit this evidence and further error for the Court of Appeals to rely on this evidence to support its conclusion that sufficient evidence supported Mr. Crouch's conviction. The Court of Appeals' decision to credit this testimony conflicts with the multiple, published decisions of Courts of this State holding that testimony which relies on hearsay documents or statements lacks personal knowledge and is inadmissible. RAP 13.4(b)(2). This Court should grant review to rectify

these errors because they deprived Mr. Crouch of due process.

Without this evidence or the evidence from the acquitted counts, there was insufficient evidence to establish that J.M. was Mr. Crouch's foster child at the time of their consensual sexual intercourse in May 2017. This left the conviction without sufficient evidence, which violated Mr. Crouch's right to due process.

2. The Court of Appeals misapplied the invited error doctrine to wrongly preclude review of a to-convict instruction which failed to define the essential elements of the crime

The trial court gave a to-convict instruction which erroneously failed to require proof beyond a reasonable doubt of the essential element that J.M. was a foster child at the time of the sexual intercourse in March 2017. CP 191. This deprived Mr. Crouch of his right to due process and was a manifest error requiring

reversal. RAP 2.5(a)(3); *State v. Smith*, 131 Wn.2d 258, 265, 930 P.2d 917 (1997). The Court of Appeals failed to reach this issue, erroneously claiming that Mr. Crouch invited the error. Slip op. at 3.

It was error for the Court of Appeals to invoke the invited error doctrine because the trial court did not rely on Mr. Crouch's proposed instructions. Instead, the court prepared its own set of instructions which were adopted from the prosecution's proposed instructions. RP 1183-84. This included the to-convict instruction, which omitted the necessary element that the jury find that J.M. remained Mr. Crouch's foster child at the time of the sexual intercourse. CP 191.

The trial court did not review the prosecution's and defense's proposed instructions on the record and solicit individual objections or modifications. *See* RP 1183-87. Instead, the court asked defense counsel if she

objected to any of the court's pre-prepared instructions without explaining how the court's instructions departed from those the defense requested. RP 1185-87, 1202, 1207. Although the court once mentioned that it included an instruction requested by the defense, it was not the to-convict instruction. RP 1187.

The court never explained why it declined to give any other instruction proposed by the defense or even otherwise indicate that it reviewed the defense's proposed instructions. In short, the trial court prepared the jury instructions without reliance on Mr. Crouch's proposed instructions.

The doctrine of invited error is court-made and based on equitable considerations. *State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), (*overruled on another point of law by State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995)). Courts currently invoke it to

reject review of manifest constitutional errors raised for the first time under RAP 2.5(a) (Slip op. at 3), although the doctrine is not codified in the Rules of Appellate Procedure. *See also City of Seattle v. Patu*, 147 Wn.2d 717, 720, 58 P.3d 273 (2002).

The invited error doctrine dictates that if a party sets up an error at trial they cannot complain of it on appeal. *Pam*, 101 Wn.2d at 511; *State v. Carson*, 179 Wn. App. 961, 973, 320 P.3d 185 (2014). Such a procedure undermines the adversarial process and prevents issues from being adequately presented for review. *Pam*, 101 Wn.2d at 511.

The equitable and policy-based considerations underlying the invited error doctrine do not support its application in this case. Mr. Crouch did not set up an error at trial. The trial court neither considered nor relied on his proposed instructions. Instead, the court

generated its own set of instructions for the jury. The *trial court* acted independently of the adversary system. It was not the actions of Mr. Crouch or his counsel that prevented the full exercise of the adversarial process during the instructional phase of the trial.

Since the invited error doctrine was created to deter circumvention of the adversarial process by the litigants, its policy underpinnings do not support its extension to trial-court created circumvention of the adversarial process. The Court of Appeals erred to invoke the invited error doctrine in this case because it failed to consider how the ideals underlying the invited error doctrine counsel against its application here. Where errors of manifest constitutional magnitude are at stake, a reviewing court must carefully and

intentionally invoke an equitable doctrine to deny review. That did not happen here.

a. This case is similar to cases where a defendant simply fails to object to the trial court's instructions

Courts will review manifest instructional errors of constitutional magnitude where the defendant simply fails to object to the court's erroneous to-convict instruction. *See State v. Painter*, 27 Wn. App. 708, 715, 620 P.2d 1001 (1980); *State v. Corn*, 95 Wn. App. 41, 56, 975 P.2d 520 (1999).

Mr. Crouch's case is more similar to those cases than to the typical invited error case. In the typical invited error case, the defense submits an erroneous instruction and the court relies on the defense's proposed instruction, which the defense then complains about on appeal. *State v. Studd*, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999).

Here, by contrast, the trial court prepared its own set of instructions which relied on the prosecution's proposed instructions. The trial court did not consider the defense's instructions except to include one additional instruction not requested by the prosecution (and which is not at issue here). RP 1186-87. The trial court did not rely on the defense's proposed to-convict instruction. *See id.*

After constructing a to-convict instruction from the prosecution's proposal, the court then solicited objections from defense counsel. RP 1185, 1186, 1202, 1207. Defense counsel did not object to this specific instruction, just like in cases where instructional error is preserved. The Court of Appeals failed to consider how the process employed by the trial court undermined application of the invited error doctrine to this circumstance.

Mr. Crouch did not "affirmatively assent[]" to the to-convict instruction, "materially contribute[] to it, or "benefit[] from it." *State v. Momah*, 167 Wn.2d 140, 154, 217 P.3d 321 (2009). Therefore, application of the invited error doctrine was inappropriate.

b. The instructional error deprived Mr. Crouch of his due process and fair trial rights because it omitted the essential element that J.M. be Mr. Crouch's foster child at the time of the incident.

Omission of an essential element from the "to convict" instruction "is of sufficient constitutional magnitude to warrant review when raised for the first time on appeal." *State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). The "to-convict" instruction must contain all elements essential to a conviction because "the jury treats the instruction as a 'yardstick' by which to measure a defendant's guilt or innocence." *Id.* at 6-7. "An 'essential element is one whose specification is necessary to establish the very illegality of the

behavior' charged." *State v. Ward,* 148 Wn.2d 803, 811, 64 P.3d 640 (2003) (quoting *State v. Johnson,* 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)). If the lack of a necessary element in a to-convict instruction causes the jury to guess at the meaning of the element or assume that the element need not be proven, "[i]t cannot be said that the defendant had a fair trial." *State v. Davis*, 27 Wn. App. 498, 506, 618 P.2d 1034 (1980).

Here, the to-convict instruction for sexual misconduct with a minor in the first degree omitted the necessary element that J.M. be Mr. Crouch's foster child at the time of the sexual intercourse. CP 191. RCW 9A.44.093 required that the defendant be a foster parent who had sexual intercourse with his foster child who is at least 16 years old.

The instruction should have followed the format outlined in the pattern jury instruction for sexual misconduct with a minor when the minor is an enrolled student. WPIC 44.31.01. That is an alternative version of the crime that Mr. Crouch was charged with, and it similarly contains a legal term of art: "enrolled student." RCW 9A.44.093(1); CP 414. The pattern instruction for sexual misconduct with an enrolled student has a separate, additional element requiring that the prosecution prove that the minor was an enrolled student. WPIC 44.31.01; RCW 9A.44.093(1).

Instead of following this format, the to-convict instruction in Mr. Crouch's case erroneously removed "foster child" from the instruction and replaced the term with J.M.'s initials. CP 191. This deprived Mr. Crouch of the due process because it allowed the jury to convict him without the prosecution presenting proof

beyond a reasonable doubt that J.M. was a foster child. Since J.M.'s status as a foster child is an essential element of this offense, the to-convict instruction violated Mr. Morris's right to due process by allowing his conviction without proof beyond a reasonable doubt of all the essential elements of the crime.

The Court of Appeals erred to fail to remedy this constitutional violation, and this Court should review because the proper construction of the jury instruction for this offense is an issue of substantial public interest which affects the constitutionality of every conviction for this offense in the future. RAP 13.4(b)(4).

E. CONCLUSION

For all of the foregoing reasons, Mr. Crouch requests that this Court grant review and reverse and dismiss his conviction for insufficient evidence, or,

alternatively, reverse and remand for a new trial with constitutionally adequate instructions.

Counsel certifies this brief contains approximately 4,108 words and complies with RAP 18.17.

DATED this 3rd day of January, 2025.

Respectfully submitted,

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APPENDIX A

FILED
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Court of Appeals
Division I
State of Washington

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

STATE OF WASHINGTON, Respondent, v. CROUCH, ANTHONY ALLEN, DOB: 02/20/1977, Appellant.	No. 84953-1-I UNPUBLISHED OPINION

BOWMAN, J. — Anthony Allen Crouch appeals his jury conviction for first degree sexual misconduct with a minor for having sexual intercourse with his foster child, J.M. He argues that the trial court's jury instructions were deficient because the "to convict" instruction did not require that the victim be under the age of 18 and no instruction defined "foster child." In the alternative, Crouch argues that insufficient evidence supports the jury's determination that J.M. was "his foster child." In a statement of additional grounds for review (SAG), Crouch argues the trial court erred by admitting hearsay evidence, the trial judge was biased, and the prosecutor committed misconduct. Finding no error, we affirm.

FACTS

Crouch and his then-partner, Kylee Allen, were licensed foster parents in Washington. In February 2014, the State placed 15-year-old J.M. in Crouch and Allen's foster care. Allen also had three biological children, and Crouch and Allen had one adopted child and one other foster child. They lived together as a

family in Arlington until about February 2017, when Crouch and Allen separated. Crouch moved out of the home and into a trailer in Stanwood. In February 2017, J.M. turned 18 but remained in "extended" foster placement.

In May 2017, J.M. disclosed to Allen that Crouch had been having sex with her since early 2016. Allen immediately reported J.M.'s disclosure to Child Protective Services (CPS). CPS then contacted law enforcement. And in January 2019, the State charged Crouch with first degree sexual misconduct with a minor under RCW 9A.44.093.

In November 2022, a few days before trial, the State amended the information to add three more counts of first degree sexual misconduct with a minor. All four counts alleged violation of RCW 9A.44.093(1)(c), stating Crouch was "a foster parent" and J.M. was "his foster child, who was at least [16] years old at the time of the sexual intercourse." Counts 1, 2, and 3 added the aggravating factor that the crimes were part of an "ongoing pattern of sexual abuse of the same victim under the age of 18." Count 4 did not include the aggravator.

At the jury trial, J.M. testified that she and Crouch "cuddled" often. But starting in summer 2016, when she was 17 years old, she and Crouch had sexual contact about three times a week, usually when Allen was at work. And in May 2017, a couple of months after J.M. turned 18, Crouch had sex with her in his trailer. Crouch also testified. He denied any sexual contact with J.M. During closing, the State clarified for the jury that count 4 "relates to the incident in the trailer when [J.M.] was over the age of 18."

A jury acquitted Crouch of the first three counts but convicted him on count 4. The court sentenced him to a standard-range sentence of 12 months' confinement. Crouch appeals.

ANALYSIS

Crouch argues the trial court erred because it did not properly instruct the jury that the State had to prove J.M. was under the age of 18 at the time of the incidents and failed to define "foster child." In the alternative, Crouch argues sufficient evidence does not support finding that J.M. was "his foster child."

1. Jury Instructions

Crouch first argues that the trial court's "to convict" instruction was deficient because it did not tell the jury that under RCW 9A.44.093(1)(c), "child" means a person under the age of 18.[1] We decline to address the issue because Crouch invited any error.

When a trial court fails to include an essential element in a to-convict jury instruction, it is a manifest constitutional error that requires reversal. *State v. Smith*, 131 Wn.2d 258, 265, 930 P.2d 917 (1997). But a party may not request an instruction and later complain on appeal that the trial court gave their requested instruction. *City of Seattle v. Patu*, 147 Wn.2d 717, 721, 58 P.3d 273 (2002). So, when a defendant proposes an instruction identical to the instruction the trial court gives, the invited error doctrine bars us from reversing the conviction for instructional error. *State v. Summers*, 107 Wn. App. 373, 381, 28

[1] A person commits sexual misconduct with a minor in the first degree under RCW 9A.44.093(1)(c) when he "is a foster parent who has . . . sexual intercourse with his or her foster child who is at least [16]."

P.3d 780 (2001). That is true even if the defendant requests a standard Washington pattern jury instruction. *Id.*

Here, in relevant part, instruction 10 told the jury that to convict Crouch of first degree sexual misconduct with a minor, the State must prove beyond a reasonable doubt that he "was a foster parent of J.M." But Crouch also proposed his own to-convict instruction that required the State to prove that he "was a foster parent of [J.M.]." And his proposed instruction did not separately require the State to prove that J.M. was under the age of 18. So, even assuming the trial court's instruction omitted an essential element of the crime, Crouch invited any error, and we are barred from considering this assignment of error.[2]

2. Sufficiency of the Evidence

Crouch argues that sufficient evidence does not show J.M. was "his foster child" at the time he had sex with her. We disagree.

In a criminal case, the State must provide sufficient evidence to prove each element of the charged offense beyond a reasonable doubt. *State v. Jones*, 13 Wn. App. 2d 386, 398, 463 P.3d 738 (2020). In reviewing a challenge to the sufficiency of the evidence, we ask whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found

[2] Crouch also argues that the trial court erred by failing to define "foster child." According to Crouch, if a victim is over the age of 18, the State must show that the victim is in an "extended foster care" program. But Crouch offered no such instruction. Nor did he challenge the court's failure to give one. Because there is no constitutional requirement to *define* for a jury the elements of a charged crime, we will not address the issue for the first time on appeal. *See State v. Whitaker*, 133 Wn. App. 199, 232, 135 P.3d 923 (2006) (while the constitution requires the court to instruct the jury on each element of the charged crime, there is no constitutional requirement to define those elements for a jury, so a defendant may not raise the absence of a definitional instruction for the first time on appeal).

guilt beyond a reasonable doubt. *Id.* at 389-99. We draw all reasonable inferences from the evidence in favor of the State and interpret the evidence most strongly against the defendant. *Id.* at 399. And we defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *Id.*

Here, the court instructed the jury on count 4 that the State must prove Crouch "had sexual intercourse with J.M.," that it occurred between January 2016 and May 2017 "in an act separate and distinct from those alleged in Counts 1, 2, and 3," that "J.M. was at least [16] years old at the time of the sexual intercourse," that Crouch "was a foster parent of J.M," and that "this act occurred in the State of Washington." Crouch does not dispute that sufficient evidence supports he had sexual intercourse with J.M. in the state of Washington when she was at least 16 years old. He argues only that insufficient evidence shows that he was J.M.'s foster parent. The record does not support his argument.

At the 2022 trial, J.M. testified that the State removed her from her biological parents' home and placed her into Crouch and Allen's foster care when she was 15 years old. She testified that Allen is "still" her "foster mom" and that Crouch is her "foster father."[3] And Allen testified that J.M. is her "daughter," that the state "placed [J.M.] in foster care around February of 2014," and that she and Crouch were J.M.'s "foster parent[s]." Further, Shannon Hamilton, a CPS investigator who interviewed J.M. about the incident, testified that J.M. was in "extended foster care," a program that "allows a youth to stay in foster care over

[3] J.M. also considered the other children her "foster" siblings.

the age of 18" and "up to the age of 21." She said she knew J.M. was "enrolled" in the program because "[J.M.] was in foster care, and she was over the age of 18."[4] On follow-up questioning, Hamilton again affirmed that J.M. was over 18 but "still under the purview of foster care."

Sufficient evidence supports the jury's determination that Crouch was J.M.'s foster father when he had sex with her.

3. SAG

In a SAG, Crouch argues that the trial court erred by admitting hearsay evidence, that the trial judge was biased, and that the prosecutor committed misconduct. We find no error.

First, Crouch argues that the trial court allowed a detective to testify about inadmissible hearsay. The detective told the jury that during his investigation, he called Crouch on the phone. Crouch told the detective that he " 'didn't do anything' " with J.M. until " 'after she was 18.' " Crouch did not object to the testimony as hearsay at trial. But even if he had, the statement was admissible as a statement by a party opponent. *See* ER 801(d)(2)(i) (a party's own

[4] Crouch argues that the trial court abused its discretion by overruling his objection that Hamilton lacked the necessary foundation to testify that J.M. was enrolled in extended foster care. He contends that "[t]here are specific requirements for the extended foster care program," and that there was no evidence that J.M. fit the eligibility criteria. But a witness' own testimony can establish foundation. ER 602. And a court should exclude testimony only if no trier of fact could reasonably find that the witness had firsthand knowledge of the events in question. *State v. Vaughn*, 101 Wn.2d 604, 611-12, 682 P.2d 878 (1984). Here, Hamilton testified that it was her job to investigate foster care abuse, that she identified Crouch as J.M.'s foster father during her investigation of J.M.'s abuse, that Crouch became the subject of Hamilton's investigation, and that she determined J.M. was over the age of 18 and still in foster care during the abuse. Because a trier of fact could reasonably find that Hamilton had personal knowledge that Crouch was J.M.'s foster father, the court did not abuse its discretion by overruling Crouch's objection to lack of foundation.

statement that is offered against the party is not hearsay). The court did not allow inadmissible hearsay.

Crouch next argues that the trial judge was biased against him because she overruled many of his objections at trial. The federal and state constitutions guarantee a criminal defendant's right to be tried and sentenced by an impartial court. U.S. CONST. amends. VI, XIV; WASH. CONST. art. I, § 22. A court must also appear to be impartial. *State v. Solis-Diaz*, 187 Wn.2d 535, 540, 387 P.3d 703 (2017). But the party asserting a violation of the appearance of fairness must show a judge's actual or potential bias. *Id.* And a trial court's rulings against a party are generally not evidence of actual or potential bias. *See Santos v. Dean*, 96 Wn. App. 849, 857, 982 P.2d 632 (1999) (while Division Three would have "concluded differently than the trial court" on summary judgment, "that does not establish evidence of [the trial judge's] actual or potential bias"). Crouch fails to show judicial bias.

Finally, Crouch argues that the prosecutor committed misconduct by "lying during closing arguments" when she said that Crouch admitted in a text message to having sex with J.M. According to Crouch, his admission was made during "a[n] alleged phone call with [a detective]," not by text message. A defendant alleging prosecutorial misconduct must show that the comments were both improper and prejudicial. *State v. Lindsay*, 180 Wn.2d 423, 430, 326 P.3d 125 (2014). Crouch shows neither. So, he cannot show prosecutorial misconduct.

Because the invited error doctrine bars Crouch from challenging the trial court's jury instructions, we do not address that assignment of error. And

because sufficient evidence supports the jury finding that Crouch was J.M.'s foster father at the time of the incident, and Crouch identifies no error in his SAG, we affirm his conviction.

Bowman, J.

WE CONCUR:

Díaz, J.

Smith, C.J.

APPENDIX B

FILED
12/4/2024
Court of Appeals
Division I
State of Washington

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

STATE OF WASHINGTON, Respondent, v. CROUCH, ANTHONY ALLEN, DOB: 02/20/1977, Appellant.	No. 84953-1-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Anthony Allen Crouch filed a motion for reconsideration of the opinion filed on October 14, 2024. A majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Judge

WASHINGTON APPELLATE PROJECT

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