IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 47242

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	**Boise, April 2021 Term**
	)	
v.	)	**Opinion Filed: June 25, 2021**
	)	
EDWARD LEE GARDNER,	)	**Melanie Gagnepain, Clerk**
	)	
Defendant-Appellant.	)	
	)	

Appeal from the District Court of the First Judicial District of the State of Idaho, Kootenai County. Benjamin Simpson, District Judge.

The judgment of the district court is affirmed.

Phelps & Associates, Spokane, Washington, for appellant. Douglas Phelps argued.

Lawrence G. Wasden, Idaho Attorney General, Boise, for respondent. Andrew Wake argued.

BRODY, Justice.

Edward Lee Gardner appeals his conviction and sentence for sexual exploitation of children over the internet. Over the span of a year, the Internet Crimes Against Children Task Force ("ICAC") received downloads of suspected child pornography from an internet protocol ("IP") address associated with Gardner's home. ICAC executed a search warrant and discovered that Gardner was in possession of 771 images and 10 videos of child pornography. The State charged Gardner with eight counts of willfully possessing or accessing sexually exploitative material of a child, and two counts of knowingly distributing sexually exploitative material of a child. Gardner pleaded not guilty and requested a jury trial. After a three-day trial, the jury found Gardner guilty on all 10 counts.

Gardner now asks that his convictions be vacated and that he receive a new trial under several theories: (1) the district court erred in denying his motion for acquittal after determining

there was sufficient evidence that the pornographic images he was accused of possessing and distributing were depictions of actual children, as opposed to drawings or virtual depictions of children; (2) the district court violated his due process rights by prohibiting him from presenting certain arguments in closing; and (3) the State committed prosecutorial misconduct that independently or cumulatively constitute reversible error when it (a) failed to redact references to a polygraph examination from an audio recording of Gardner's interview with ICAC detectives, and (b) allegedly violated a district court order by introducing evidence about videos of child pornography that were found on Gardner's computer, but which did not underlie the charges against him.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Investigation and Interview of Gardner.

In May 2016, ICAC began monitoring an IP address associated with Gardner's residence after a number of electronic files of child pornography were downloaded from the IP address by an ICAC computer over a peer-to-peer file-sharing network called BitTorrent. Over the next year, several more files of child pornography were shared from this and another IP address associated with Gardner's residence. Agents then obtained a search warrant for Gardner's home.

On June 22, 2017, ICAC agents stopped Gardner as he drove away from his home, and officers executed the search warrant. When Detective Paul Farina approached Gardner's car, he introduced himself and said, "I'm with [ICAC], and we're here to speak to you about some suspicious activity on the Internet." Farina's microphone was not on at the time, but Gardner allegedly replied, "I don't have child pornography." Farina then turned on his microphone, and Gardner was escorted to Farina's vehicle, where he was interviewed. Simultaneously, ICAC agents searched Gardner's home and seized his computers.

Gardner's interview by Detective Farina and Detective Neil Uhrig lasted approximately 50 minutes. The detectives informed Gardner that over the past year they had received downloads of multiple images of child pornography from IP addresses at Gardner's home. Gardner admitted that he used peer-to-peer file sharing programs such as BitTorrent, but initially denied that law enforcement could have received any child pornography from his IP address. However, as the detectives pressed Gardner about his online activities, Gardner told them he used BitTorrent to "grab [] whole swath[s]" of pornography in large batches that sometimes contained child pornography. Gardner said he sorted through the batches to erase the child pornography and he

"didn't think it would be illegal if [he] just got rid of it."

Gardner also told the detectives that when searching for pornography he did not "look for children in particular[,]" but admitted that he sought out pornography of "teens mainly. . . . 16 to 21, 22[.]" Gardner further admitted to using "15YO" and "14YO" as search terms. While Gardner claimed he used these terms to find non-pornographic material, such as images of girls in bikinis and "nudist stuff," he acknowledged that he used such material for his sexual gratification. A forensic examination of one of Gardner's seized computers later recovered the search terms "13yr" and a term that Detective Uhrig testified is child pornography shorthand for "pre-teen hardcore." Investigators also recovered several other search terms specifically associated with child pornography. Uhrig testified that these included the names of two well-known child pornography series and multiple terms referencing a Ukrainian child pornography "studio" known to have victimized more than 1500 pre-teen girls.

Throughout the interview, the detectives told Gardner one of their goals was to determine if, in addition to possessing and distributing child pornography, he had sexually abused children. Thirteen and a half minutes into the interview, Detective Uhrig told Gardner he and Farina were trying to "make sure you're not some predator running around the streets." At approximately 20 minutes into the interview, detectives reiterated this theme, directly asking Gardner whether he abused children:

> UHRIG: We know – Eddy, we know you're going out and looking for this stuff. We need to talk about that issue, why you're doing that, and are you going out and hurting children?
>
> GARDNER: God, no.
>
> FARINA: Okay.
>
> UHRIG: Then help us understand what your problem is so we can believe that. . . .
>
> FARINA: . . . I've got to make a judgment in 30 minutes with you, 45 minutes, whether you're a predator or not. That's what I'm trying to judge you right now.
>
> GARDNER: Uh-hmm.
>
> FARINA: Do you touch children?
>
> GARDNER: No.

About eight minutes later, Farina asked Gardner whether he would be willing to take a polygraph about abusing children:

> FARINA: So, you know, one of the things that we certainly are worried about you

> because there's a correlation of looking at children and touching children. Would you be willing to do a polygraph with us that you have never touched children?
>
> GARDNER: Yes, sir.

Shortly after, Farina said:

> So – so what we're gonna do . . . I'm gonna . . . write up a report, and I'm gonna say what kind of guy you are, I'm gonna say what you told me, and I'm gonna say you did the polygraph, and I've got to submit it to the prosecutors for – to see if they want to charge you or not. I don't make that decision. I'm merely a fact finder.

Finally, in the last minutes of the interview, Farina told Gardner he believed Gardner was downplaying the seriousness of possessing and sharing child pornography, and reiterated the correlation between viewing child pornography and abusing children:

> FARINA: Should we hold you accountable for your actions? I'll answer that for you. Yes, we should hold you accountable for your actions. That's not the point. Doesn't mean you're gonna go to prison, you can get probation. I don't know what's gonna happen. I'm just saying, you're gonna be held accountable for your actions. But, in the greater scheme of things, are you molesting children?
>
> GARDNER: God, no –
>
> FARINA: I don't know. I don't know.
>
> GARDNER: – no, it's not about children.
>
> FARINA: So – but there's a correlation, a strong correlation, between people that are looking at images of children being raped to people touching.

Ultimately, the forensic examination of Gardner's computer uncovered 771 still images and 10 videos of child pornography. Significantly, Gardner admitted during the interview with ICAC detectives that any materials found on his computer would be his. He also admitted that he was responsible for sharing the child pornography downloaded by ICAC computers from his IP address:

> GARDNER: You're saying I'm sharing it, but I thought, you know, you gotta take it and then like purposely get out there –
>
> . . .
>
> FARINA: So you know that when you set up your BitTorrent program, you're sharing, because it tells you you're sharing.
>
> GARDNER: You're sharing, yeah.
>
> . . .
>
> FARINA: So – so I think you know to know that from when you download . . . that BitTorrent program . . . .

GARDNER: Which I'm aware.

FARINA: Okay. You're aware, so –

GARDNER: Doesn't –

FARINA: – so you've committed a crime.

GARDNER: I suppose I have, yeah.

FARINA: So, I'm gonna write up the report just like you said, and I'm gonna submit it to the prosecutor's office and let them make a decision[.]

The State charged Gardner with two counts of distribution of child pornography under Idaho Code section 18-1507(2)(d) for allegedly sharing two still images of child pornography with an ICAC computer. The State also charged Gardner with eight counts of possessing child pornography under Idaho Code section 18-1507(2)(a) for eight still images recovered from his seized computer. All ten images were watermarked with the logo of the Ukrainian producer of child pornography mentioned above.

B. The State's Idaho Rule of Evidence 404(b) notice of intent and agreement to redact polygraph references from the recording of Gardner's interview.

Prior to trial, the State filed a notice under Idaho Rule of Evidence 404(b) of its intent to offer evidence relating to child pornography other than the images charged, to "include but not be limited to the child pornography downloaded from the defendant when first investigating this case as well as the total number of images found on the defendant's computer and/or other devises [sic]." Gardner never responded to the notice.

In addition, the State and Gardner stipulated that the State would redact references to Gardner taking a polygraph from the recording of Gardner's interview with Detectives Farina and Uhrig. However, the parties' precise agreement is not clear because the stipulation is not in the record. Notably, before trial, Gardner was administered a polygraph by an ICAC investigator, which indicated he was truthful when he said he had not sexually abused children.

C. Trial proceedings.

During the State's opening statement, the prosecutor argued the evidence would show that "700-plus images of suspected child pornography and ten videos" were discovered on Gardner's computer. Though there was no immediate objection from Gardner, it appears he objected to some aspect of this statement after the opening statements were complete. However, the basis for Gardner's objection is unclear because there is a gap in the recording of the trial from which the transcript on appeal was prepared. In response, the State argued it was entitled to discuss the

number of still images and videos of child pornography, as well as publish some of the uncharged pornography to the jury, because Gardner did not object when the State filed the 404(b) notice informing him that it intended to use this evidence. Nevertheless, after a recess, the prosecutor stated that he would not introduce any videos of child pornography:

> I will not be putting in any images or I mean, excuse me, any videos. [Gardner's counsel] questioned me on that. I think under my 404(b) — I intended on doing that, but . . . when I take a look at [the 404(b) notice] . . . there's one statement in there that just says the child pornography, but everything else says image, and so I could see how that could be . . . unintentionally misleading to [Gardner's counsel], so . . . I will not be putting [in] any videos of children being molested.

Gardner, however, requested the district court go further and direct witnesses not to mention the existence of videos in their testimony, arguing it would "simply inflame[] the jury, [and] possibly just confuse[] the issues." In a colloquy with counsel, the district court noted that despite the State's 404(b) notice indicating it would present evidence about the videos, Gardner had not objected to the notice before trial. However, it reserved ruling on the issue of whether such evidence was admissible. Instead, the district court instructed the State that, pending a later ruling, witnesses should not reference the videos in their testimony.

On the second day of trial, the State again raised the admissibility of evidence about videos as an issue. The State told the district court that it intended to have Detective Farina testify that an ICAC computer downloaded videos of child pornography from the IP address at Gardner's home and describe their content to the jury. In turn, Gardner asked the district court to exclude all evidence relating to the videos. However, the State suggested a compromise, to which Gardner was amenable, whereby Farina would use the word "images" instead of "video," though he would still describe their content. The district court noted that "in my opinion, images would include videos," but, because the parties reached an agreement, it stated that the use of the word "video" was a non-issue. As such, the district court did not expressly address whether evidence about videos was inflammatory or confusing, as Gardner contended. The court did, however, rule that the State's forensic expert would be allowed to use the word "video" when describing the number of child pornography files recovered from Gardner's computer.

Detective Farina testified later on the second day of trial. During his testimony, the prosecutor asked Farina about the child pornography ICAC computers downloaded from Gardner's IP address. In his response, Farina twice used the word "video":

> PROSECUTOR: Could you describe – were they images you received?

> FARINA: Yes, I received, uh, approximately twenty-ish images. They're broken down to complete and incomplete, so some are complete videos and some are incomplete where if a video might be –
>
> PROSECUTOR: Do you mean images?

Immediately thereafter, the district court instructed the jury to "[d]isregard the reference to video please. Substitute the word "images." Farina then went on to describe the content of the videos.

Farina also testified about his and Detective Uhrig's interview of Gardner and the State played a recording of the interview for the jury. As noted above, the recording included an exchange between Farina and Gardner about whether Gardner would be willing to submit to a polygraph. After the jury listened to the recording, the district court called a recess and the jury was excused. At this point, the prosecutor admitted to the district court that he had made an error. Though the parties had previously stipulated that references to Gardner taking a polygraph would be redacted from the recording, the State had played an unredacted copy for the jury. Accordingly, the State suggested the district court give a curative instruction telling the jury to disregard the reference to the polygraph. Gardner's counsel expressed reservation about the effectiveness of a curative instruction and stated "I don't know if now you just say . . . he passed the polygraph . . . for whether or not he'd ever molested any children, which I think almost does better than a curative instruction[.]" The State agreed that this might be a solution to the problem and noted that the ICAC investigator who conducted the polygraph would be testifying later at trial. The district court then asked if Gardner wanted evidence he passed the polygraph introduced, but Gardner declined. Instead, he moved for a mistrial and requested that the court give a curative instruction if it denied the motion.

The district court denied the motion for mistrial, holding that it was unlikely the references to the polygraph would influence the jury's decision. The district court then, sua sponte, addressed Farina's use of the word "video," holding that evidence about the videos found on Gardner's computer was admissible. The district court found that Gardner's possession of videos was "so interconnected with the charged offense" that evidence relating to them was not subject to exclusion under Rule 404. Further, it held that even if Rule 404 applied, evidence about the videos was admissible as non-character evidence tending to show motive, intent, lack of mistake, and identity. When the jury returned, the district court instructed them that they were to disregard the references to the polygraph in the recording.

On the third day of trial, the ICAC investigator who conducted the forensic analysis of Gardner's computer testified about the recovery of the images underlying the eight charges of possession of child pornography and the images were shown to the jury. On cross examination, Gardner's counsel asked the investigator "you've heard of pictures that are not real people, haven't you, where they're actually drawn[,]" and then, referring to the charged images, elicited testimony that the investigator had not personally "verif[ied] these were living, live people."

Later, the State called Detective Farina to testify for a second time. Farina stated that based on their apparent sexual development, the girls in the charged images were most likely between 10- and 12-years old. On cross-examination, Gardner's counsel asked Farina whether he had attempted to identify any of the children in the images. Farina testified he had sent the images to the National Center for Missing and Exploited Children, which maintains a database of identified victims of child pornography, but that the children in the charged images had not been identified. Gardner's counsel then asked Farina if he was certain the children in the photographs were real:

> GARDNER'S COUNSEL: So if you can't identify them as particular individuals, you don't know if these are merely graphic drawings, do you?
>
> FARINA: I would disagree with that. I would say they're photographs.
>
> GARDNER'S COUNSEL: Well, that's your guess.
>
> FARINA: That's my training and experience.

Farina then explained that, in his experience as a detective with ICAC, the "artist" depictions of child pornography he had encountered were "nothing like" the charged photographs. The State rested after Farina's testimony.

Gardner declined to put on evidence of his own and made a motion for judgment of acquittal under Idaho Criminal Rule 29. Gardner argued the State had failed to provide sufficient evidence that the images depicted real children, as opposed to virtually portrayed children, pointing to the State's inability to identify the particular children in the images. The State argued that it had no burden to identify the particular children and that whether the photographs were genuine was a question of fact for the jury. Further, the State made a motion to prohibit Gardner from making certain arguments in closing. First, the State sought a ruling that Gardner could not argue the State failed to meet its burden by failing to identify the children in the images, because the law did not require specific identification of the victims. Second, the State sought to prohibit Gardner from arguing the charged images were not real photographs because "if he thought these were mocked-

up photos, you know, the defense could have put on a case too, and they haven't[.]"

The district court granted the State's motion to limit Gardner's argument in part. The district court ruled that there was no requirement the State prove the identities of the victims to support conviction. Thus, it held Gardner could not argue this was part of the State's burden. However, the court ruled Gardner could argue the State had failed to prove the images were real, so long as the argument was tied to evidence in the record. Further, the district court denied Gardner's motion for judgment of acquittal. The district court held that a judgment of acquittal was not appropriate because (1) the State had presented testimony from Detective Farina and other witnesses from which the jury could conclude the images were genuine photographs, (2) Gardner admitted during his interview that he possessed some pornographic pictures of children, and (3) the jury had been shown the charged images and was able to evaluate for itself whether they were photographs, as opposed to virtual depictions.

In his closing arguments, Gardner did not argue the State had the burden to identify the children nor that the images were not depictions of real children. The jury convicted Gardner on all counts.

II. ANALYSIS

Gardner raises three broad issues on appeal, each subject to a different standard of review: (1) that the district court erred in denying his motion for a judgment of acquittal, (2) that the district court violated his right to a fair trial by prohibiting certain statements during closing arguments, and (3) that the prosecutor committed misconduct entitling Gardner to a new trial. We will address the relevant standard of review as we address each issue below.

A. The district court did not err in denying Gardner's motion for a judgment of acquittal.

Gardner argues that the district court erred in denying his Idaho Criminal Rule 29 motion because the State failed to prove the charged images depicted real children, instead of "virtual" child pornography. The State maintains the district court was correct in rejecting Gardner's motion because there was substantial evidence upon which a reasonable jury could find the State proved each element of the crimes charged beyond a reasonable doubt. We agree with the State.

1. Standard of Review

"In reviewing the denial of a motion for judgment of acquittal, the appellate court must independently consider the evidence in the record and determine whether a reasonable mind could

conclude that the defendant's guilt as to such material evidence of the offense was proven beyond a reasonable doubt." *State v. Clark*, 161 Idaho 372, 374, 386 P.3d 895, 897 (2016) (quoting *State v. Mercer*, 143 Idaho 108, 109 138 P.3d 308, 309 (2006)). However, this Court's "review of the sufficiency of the evidence is limited in scope." *State v. Gomez-Alas*, 167 Idaho 857, ___, 477 P.3d 911, 915 (2020).

> The relevant inquiry is not whether this Court would find the defendant to be guilty beyond a reasonable doubt, but whether after viewing the evidence in the light 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. Tryon, 164 Idaho 254, 258, 429 P.3d 142, 146 (2018) (quoting *State v. Adamcik*, 152 Idaho 445, 460, 272 P.3d 417, 432 (2012)). Thus, this Court does not "substitute its judgment for that of the jury on the issue of witness credibility, weight of the evidence, or reasonable inferences to be drawn from the evidence." *Id*. (internal punctuations omitted).

2. Analysis.

Citing *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), *State v. Morton*, 140 Idaho 235, 91 P.3d 1139 (2004), and *State v. Gillespie*, 155 Idaho 714, 316 P.3d 126 (Ct. App. 2013), Gardner claims his judgment of conviction must be vacated for insufficient evidence because of a single fact: investigators submitted the charged images to the National Center for Missing and Exploited Children ("NCMEC"), but NCMEC was not able to identify the victims. Gardner's argument is unavailing. To begin, Gardner cites *Ashcroft*, *Morton*, and *Gillespie* to support a point that has never been in dispute, namely that the purpose of Idaho Code section 18-1507 is to protect children (and presumably only real ones) from harm. Further, Gardner does not address, even tangentially, the State's evidence that the charged images depicted real children nor the standard of review requiring us to affirm the jury's verdict if there is evidence in the record from which a reasonable juror could find the defendant guilty. Thus, Gardner's argument could only succeed if (1) the State has the burden to individually identify children in order to prove that they are real or (2) the failure of the NCMEC to identify a child in a pornographic image is conclusive proof that the image is virtual pornography.

Neither possibility is supported by law or logic. Idaho Code section 18-1507 requires the State to prove that a pornographic image depicts an actual child, but nowhere does it require the State to individually identify the victim. *See* I.C. §§ 18-1507(1)(b) - 1507(2)(j). As to NCMEC's failure to identify the victims, we express no opinion about the probative value of such evidence

as a general matter. However, we observe that the only way that NCMEC's failure to identify a child would be conclusive proof that an image is virtual pornography, is if *every* victim of child pornography has been identified by NCMEC. This defies reason.

In reviewing the evidence in the record, we note, as the district court did, that Detective Farina testified that, based on his training and experience, the images depicted real children, and that the images were in evidence for the jury to evaluate in light of their own experience. Further, each image was watermarked with an identifier of the Ukrainian entity that Detective Uhrig testified was known to have produced pornography of pre-teen girls. Based on this evidence, we hold that a reasonable juror could conclude the images depicted real children beyond a reasonable doubt. Therefore, the district court did not err in denying Gardner's Rule 29 motion for a judgment of acquittal.

B. The district court did not violate Gardner's right to a fair trial by prohibiting certain statements during closing arguments.

Gardner also argues that the district court erred "by limiting the defense's ability to argue its theory of the case by not allowing argument" whether the pornographic images depicted actual children, as opposed to digitally-generated images of children, or images of adults altered to appear as children. Gardner contends the district court's alleged limitation of his argument violated his Fourteenth Amendment right to a fair trial. The State contends the district court did not improperly limit Gardner's argument. The State is correct.

1. Standard of review.

The Sixth Amendment, in conjunction with the Fourteenth Amendment right to due process, requires that criminal defendants have "a meaningful opportunity to present a complete defense." *State v. Jones*, 160 Idaho 449, 452, 375 P.3d 279, 282 (2016). As a constitutional question, we consider de novo whether this requirement has been satisfied. *Id.* at 450, 375 P.3d at 280.

2. Analysis.

Gardner's assertion that the district court prevented him from arguing the images did not depict real children is flatly contradicted by the record. The district court clearly ruled that Gardner could argue the images did not depict real children, then twice reiterated its ruling in an exchange with Gardner's counsel:

> THE COURT: I'm going to prohibit any argument as to the State having failed to meet its burden of proof because it was unable to present testimony as to the identity

> of the children or purported children in the images. . . . You may argue, however, that the State has failed to prove that these images are of children.
>
> . . .
>
> GARDNER'S COUNSEL: So we can't say the State's failed to meet their burden that these are real people.
>
> GARDNER'S CO-COUNSEL: No, that's not true.
>
> THE COURT: You can argue they failed to meet that burden.
>
> . . .
>
> GARDNER'S COUNSEL: So, if I argue they could've been photo shopped, I'm fine.
>
> THE COURT: You could argue that, but there's no evidence in the record, and you're going to face potential objections that you're arguing matters not in the record, so you need to be very careful.

This exchange demonstrates that the only limitations placed on Gardner's closing arguments were (1) that he not mischaracterize the law by arguing the State was required to specifically identify the child pornography victims, and (2) that he only present arguments supported by the evidence. To the extent these were limitations of Gardner's argument at all, they promoted, rather than undermined, the fairness of the trial. *See State v. Herrera*, 164 Idaho 261, 276–77, 429 P.3d 149, 164–65 (2018) (observing, in a due process analysis, that closing arguments must fairly represent the law and evidence). Thus, Gardner's argument the district court deprived him of a fair trial is not well taken.

C. Gardner is not entitled to a new trial because of prosecutorial misconduct.

Gardner asserts he is entitled to a new trial because the prosecutor failed to redact the references to the polygraph in the recording of Gardner's interview. Further, Gardner argues that even if this error does not warrant a new trial on its own, he is entitled to a new trial under the cumulative error doctrine. In support, Gardner asserts that, in addition to the polygraph error, the prosecutor "blatantly violated the court's order regarding videos by introduction of multiple statements about videos." The only example of these statements Gardner points to are uses of the word "video" in the recording of Gardner's interview by ICAC detectives that the prosecutor played for the jury.

The State argues that Gardner has failed to show there was any misconduct regarding statements about videos. Further, though the State admits the prosecutor erred in not redacting the polygraph references, it argues the error does not entitle Gardner to a new trial. In addition, the

State contends the cumulative error doctrine needs not be considered because Gardner has failed to show more than a single error.

1. Standard of review.

Review of claims of prosecutorial misconduct depends on whether the alleged misconduct was objected to at trial. *State v. Garcia*, 166 Idaho 661, 676–77, 462 P.3d 1125, 1140–41 (2020). When a defendant has made a contemporaneous objection to prosecutorial misconduct, we review the error under the harmless error standard. *Id*. (citing *State v. Severson*, 147 Idaho 694, 716, 215 P.3d 414, 436 (2009)). As we have recently clarified, our harmlessness analysis requires examining and weighing the "probative force of the evidence untainted by error . . . against the probative force of the error itself." *Id.* at 675, 462 P.3d at 1139 (citing *Yates v. Evatt*, 500 U.S. 391, 403 (1991)). "When the effect of the error is minimal compared to the probative force of the record establishing guilt 'beyond a reasonable doubt' without the error, it can be said that the error did not contribute to the verdict rendered and is therefore harmless." *Id.* at 674, 462 P.3d at 1138 (citing *Yates*, 500 U.S. at 404–05).

However, when a defendant has not made an objection to prosecutorial misconduct at trial, "the misconduct will serve as a basis for setting aside a conviction only when the conduct is sufficiently egregious to result in fundamental error." *State v. Folk*, 162 Idaho 620, 632, 402 P.3d 1073, 1085 (2017) (quoting *Severson*, 147 Idaho at 716, 215 P.3d at 436). To establish fundamental error, a defendant must demonstrate that: (1) "one or more of the defendant's unwaived constitutional rights were violated"; (2) the error is clear, meaning the record contains evidence of the error, "including information as to whether the failure to object was a tactical decision"; and (3) it is clear from the record that the error "actually affected the outcome of the trial proceedings." *State v. Miller*, 165 Idaho 115, 119–20, 443 P.3d 129, 133–34 (2019).

"The doctrine of cumulative error provides that 'a series of errors, harmless in and of themselves, may in the aggregate show the absence of a fair trial.' " *State v. Moses*, 156 Idaho 855, 873, 332 P.3d 767, 785 (2014) (quoting *State v. Perry*, 150 Idaho 209, 230, 245 P.3d 961, 982 (2010)). "It is well-established that alleged errors at trial, that are not followed by a contemporaneous objection, will not be considered under the cumulative error doctrine unless said errors are found to pass the threshold analysis under our fundamental error doctrine." *Id.*

2. Analysis.

To begin, we dispose with Gardner's argument that the prosecutor committed misconduct

"by introduction of multiple statements about videos" contrary to an order of the district court. Nothing suggests the prosecutor committed misconduct as Gardner alleges. The order that Gardner contends the prosecutor violated directed the State to have its witnesses (other than the investigator who conducted the forensic examination of Gardner's computer) substitute the word "image" for "video" when testifying. Yet the instances of "misconduct" highlighted by Gardner have nothing to do with witness testimony; they are two passing uses of the word "video" in the recording of Gardner's interview by ICAC detectives that was played for the jury. And although Gardner does not discuss Farina's use of the word "video" in his trial testimony, we note this was a violation of the district court order, but it was harmless because the district court ultimately held that evidence about the videos and use of the word "videos" was admissible. Moreover, Gardner made no objection at trial to the State's alleged violation of the district court's order. Thus, even if the State violated the order, our review would be limited to a fundamental error analysis. However, Gardner does not identify the fundamental error test or argue it has been satisfied. In sum, Gardner's argument that the prosecutor committed misconduct regarding evidence of videos is meritless.

Turning to the prosecutor's failure to redact the polygraph references from the recording of the interview, there is no question this was error. The prosecutor admitted as much after the recording was played and the jury was excused. However, weighing the probative force of this error against the probative force of the evidence untainted by error, we hold the error was harmless.

Gardner advances two overlapping arguments why the references to the polygraph were not harmless. First, Gardner argues the jury may have inferred he was guilty of sexually abusing children, even though he was not charged with such crimes, because detectives stated in the portion of the interview surrounding the polygraph references that there is a correlation between possessing child pornography and sexually abusing children. Second, Gardner argues that jurors were likely to infer that he had taken and failed a polygraph about abusing children because he was facing trial and Farina stated that prosecutors would factor polygraph results about abusing children into their charging decision. Because Gardner contends "many in the public consider" the sexual abuse of children to be a "much more serious violation[]" than child pornography offenses, he asserts the prejudice caused by the prosecutor's error was great.

We disagree. In light of the record as a whole, we hold the effect of the prosecutor's error was minimal. As to Gardner's first argument, it is unclear whether the scope of the agreement between the parties required the prosecutor to redact only the word "polygraph" or the greater

context of the polygraph references. But even assuming the prosecutor agreed to redact the greater context, the redacted recording would still include multiple statements by detectives that there is a correlation between possessing child pornography and abusing children, and that they suspected Gardner might have abused children. Detectives raised these themes throughout the 50-minute interview. Aside from the statements made in the immediate context of the polygraph references, Gardner did not object to the statements at trial and has not complained of them on appeal. As such, we conclude there is no possibility of prejudice in the prosecutor's failure to redact these statements in the context of the polygraph references.

Gardner's second argument is similarly unpersuasive. While Farina indicated the results of the polygraph would likely be a factor in a charging decision, this was only one of three factors Farina listed. In the recording played for the jury, Farina told Gardner he was going to "write up a report, and I'm gonna say [1] what kind of guy you are, I'm gonna say [2] what you told me, and I'm gonna say [3] you did the polygraph," and that he would submit this report to prosecutors. As for "what kind of guy" Farina believed Gardner to be, Farina indicated in the recording that he believed Gardner was a person who intentionally downloaded child pornography, who downplayed that this was a serious offense, who needed to be held accountable, and whose denials about abusing children were unconvincing. As for what Gardner told Farina, Gardner admitted he sought out pornography of teenagers, that anything found on his devices would be his, and that he agreed with Farina he had committed a crime by sharing child pornography over BitTorrent. Significantly, just after Gardner's admission that he had shared child pornography, Farina indicated this would appear in his report submitted to prosecutors: "So, I'm gonna write up the report just like you said, and I'm gonna submit it to the prosecutor's office and let them make a decision[.]" Thus, in light of the recording as a whole, we do not think it likely jurors would assume the determinative factor in the prosecutor's decision to charge Gardner was that he took and failed a polygraph about crimes unrelated to those for which he stood trial.

On the other side of the scale, there was significant and compelling evidence of Gardner's guilt. Multiple law enforcement officers testified that they received child pornography through BitTorrent from an IP address associated with Gardner's home; Gardner denied he had child pornography before investigators told him they suspected he had committed child pornography offenses; Gardner later admitted he searched for pornography of teenagers using BitTorrent; he admitted to using search terms such as "16YO," "15YO" and "14YO"; investigators recovered

search terms specifically relating to child pornography from Gardner's computer, including terms associated with a known producer of child pornography in Ukraine; nearly 800 files of child pornography were discovered on Gardner's computer; the charged images were watermarked with an identifier from a Ukrainian child pornography producer, which is known for victimizing pre-teen girls; the charged images depicted girls that detective Farina testified were likely between the ages of 10 and 12; and Gardner admitted that anything found on his computers would be his. As against the minimal effect of the prosecutor's error, we are assured the result of trial would have been the same in light of this evidence. Therefore, the error was harmless.

Further, we note that Gardner argues the curative instruction compounded the effect of the prosecutor's error by metaphorically "re-ringing the bell." However, the record shows that Gardner requested the instruction. Further, Gardner demurred when the district court asked for his opinion on the possibility of introducing evidence he had passed the polygraph—even though he had earlier suggested the introduction of such evidence would be a more effective remedy than a curative instruction. As such, Gardner has no basis to complain about the curative instruction on appeal. *Thomson v. Olsen*, 147 Idaho 99, 106, 205 P.3d 1235, 1242 (2009) ("The doctrine of invited error applies to estop a party from asserting an error when his own conduct induces the commission of the error.").

Finally, Gardner's cumulative error argument is unavailing. Besides the failure to redact the references to the polygraph, the only misconduct that Gardner alleges the prosecutor committed were the mentions of the videos. As we explained above, this allegation of misconduct is meritless. Therefore, there is no basis for Gardner to allege the cumulative error doctrine applies. *See Moses*, 156 Idaho at 873, 332 P.3d at 785 (quoting *Perry*, 150 Idaho at 230, 245 P.3d at 982) ("A necessary predicate to the application of the [cumulative error] doctrine is a finding of more than one error."). In light of the foregoing, Gardner is not entitled to a new trial.

III. CONCLUSION

The district court's judgment of conviction is affirmed.

Chief Justice BEVAN, and Justices BURDICK, STEGNER, and MOELLER CONCUR.