Supreme Court No. 102482-7
COA No. 39021-7-III

THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

v.

NICK BAGGARLEY,

Appellant.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Under RAP 13.4, Appellant Nick Baggarley asks for review of the September 26, 2023 opinion of the Court of Appeals. (attached as Appendix).

B. ISSUE PRESENTED FOR REVIEW

1. Article I, section 21 requires a jury unanimously agree as to each element of an offense. This in turn requires that where the State presents evidence of multiple acts which can support an element, the State must either explicitly elect which act the jury is to rely on or the court must instruct the jury they must unanimously agree on one act. Here the State presented evidence of two acts which could establish robbery. The State did not explicitly elect which act the jury must rely on to convict Mr. Baggarley of robbery, nor did the trial court instruct them they must unanimously agree on one act. The

absence of either an explicit election or instruction deprived Mr. Baggarley of his right to a unanimous jury. The Court of Appeals's decision to the contrary conflicts with its own precedential decisions, as well as those of this Court. RAP 13.4(b)(1), (2), (3), and (4). Review is warranted to reverse the robbery charge.

2. Effective July 1, 2023, the legislature requires trial courts to strike the victim penalty assessment and other legal financial obligations if the defendant is indigent. Because Mr. Baggarley's case is not yet final, this change in the law is applicable to him. The Court of Appeals incorrectly held that only a defendant who has already been found indigent at sentencing can obtain relief. If a trial court enters an indigency order after sentencing, the indigent defendant must pay the VPA and other LFOs. This decision conflicts with this Court's precedent, as well as several Court of Appeals

decisions that have stricken the VPA on the basis of indigency. RAP 13.4(b)(1),(2).

C. STATEMENT OF THE CASE

Mr. Baggarley was hanging out with friends, Justin Yapp, Jason Cunnington, Cameron Owens and Sarah Smith at the Scoreboard Tavern one Saturday night. RP 281. While waiting to play pool, Mr. Robert Bain admired Mr. Yapp's Jameson Whiskey t-shirt. RP 125. The two men agreed to wager the t-shirt on a game of pool. Mr. Bain won and they exchanged shirts. RP 157. Later, a remorseful Mr. Yapp wanted his t-shirt back or, in the alternative, demanded Mr. Bain pay him $50. RP 127. When Mr. Bain refused, the two men discussed their differences outside and a scuffle ensued. RP 128. Bouncers broke up the fight and kicked Mr. Bain and Mr. Yapp out. RP 130. Mr. Bain left wearing the t-shirt. RP 130.

As Mr. Bain was walking to his next destination, he received a call from an unknown number. RP 131. It was Ms. Smith, and she offered to meet him at the Black Diamond Bar. RP 131. Instead, Mr. Bain told Ms. Smith he was walking and they should meet outside a nearby store. RP 131.

According to Mr. Bain, when he arrived at the store parking lot, three men from the Scoreboard got out of a car. RP 136. The men punched, kicked, and grabbed him by the neck for 10 to 15 minutes. RP 136-37. Then someone—he did not remember who—took his t-shirt and his cell phone. RP 138-39.

Mr. Baggarley testified that in the store parking lot, only Mr. Yapp got out of the car to "confront" Mr. Bain about his t-shirt, and the pair fought. RP 207-08. Mr. Yapp fell and Mr. Bain got on top of him and repeatedly beat him. RP 208. Mr. Cunnington, Mr.

Owens, and Mr. Baggarley then got out of the car to help Mr. Yapp. RP 208. Mr. Bain came at them thinking they would attack him. RP 208. Mr. Bain swung his fists first at Mr. Owens. RP 290. Mr. Baggarley swung at Mr. Bain three times and hit him in the side of the face. RP 290. Mr. Yapp took the t-shirt from Mr. Bain. RP 292.

Mr. Baggarley saw a cellphone on the ground where Mr. Yapp had fallen and assumed it belonged to one of his three friends. RP 292. Mr. Baggarley took the cellphone and asked his friends whether the cellphone belonged to them. RP 292. He later discovered the cellphone belonged to Mr. Bain. RP 293.

The State charged Mr. Baggarley with two counts: first degree robbery of Mr. Bain and second degree assault of Mr. Bain.CP 1-2.

The jury convicted Mr. Baggarley of first degree robbery and second degree assault. RP 380-81.

On appeal, Mr. Baggarley argued he was denied his constitutional right to a unanimous verdict. Br. of Apellant 6-11. The State conceded it presented evidence of multiple criminal acts, any one of which could satisfy the charge—taking of a t-shirt by Mr. Justin Yapp and taking of a cellphone by Mr. Baggarley. Br. of Resp. at 6. And it did not elect the act which the jury could rely upon. Br. of Resp. at 6. The State also conceded the court did not instruct the jury they must unanimously agree on a particular act. Br. of Resp. at 9. The State argued the unanimity requirement did not apply because the two distinct acts occurred as part of a "continuing course of conduct." Br. of Resp. at 10-11.

The State agreed such an error is constitutional, but pivoted into maintaining the error was not "manifest." Br. of Resp. at 12-13.

The Court of Appeals ruled the lack of unanimity was not manifest error because, although there was evidence of the taking of both the cell phone and the t-shirt from the victim, the prosecution "exclusively" focused only presenting evidence concerning the t-shirt.

First, the opinion acknowledged the State's opening statement told the jury: "The group [of robbers] had taken the t-shirt off of his [Bain's] body, thrown the other shirt back at him and left with his cell phone." App. 4 citing RP 117. There is no denying the State in opening argued the two possible acts satisfy the charge—taking of a t-shirt and taking of a phone. *Id*. The opinion overlooks the fact that the State

itself already conceded it presented evidence of both acts and told the jury in opening and rebuttal that the taking of the cell phone also satisfied the robbery charge. Br. of Resp. at 6. The opinion purports to distinguish "multiple acts" cases by manufacturing out of whole cloth an "exclusive focus" exception to the *Petrich* Rule. App. 7. The opinion reasons that because the "exclusive focus" of the prosecution at trial was on presenting evidence of taking of the t-shirt, there is no unaminity issue. App. 7. Despite the prosecution's presentation of evidence and summations concerning Mr. Baggarley's taking of the cellphone. *Id*. Mr. Baggarley seeks review of this fault Court of Appeals' opinion under RAP 13.4.

D. ARGUMENT

1. The Court should accept review because the lack of either a unanimity instruction or a clear election by the State denied Mr. Baggarley his right to a unanimous verdict.

a. The State presented evidence of two criminal acts, any of which could satisfy the charge, but the jury was not told it must unanimously agree on a particular act.

Article I, section 21 and the Sixth Amendment require a unanimous jury verdict. *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994); *Ramos v. Louisiana*, 590 U.S. ___, 140 S. Ct. 1390, 1397, 206 L. Ed. 2d 583 (2020).

To protect this right where multiple acts may support a conviction, one of two processes must be employed: (1) the State may clearly elect before the jury which act the jury should rely on for each charge; or (2) the court must instruct the jury "that all 12 jurors must agree that the same underlying criminal

act has been proved beyond a reasonable doubt." *State v. Carson*, 184 Wn.2d 207, 217, 357 P.3d 1064 (2015) (*citing State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984)).

The *Petrich* rule only applies "where several acts are alleged, any one of which could constitute the crime charged." *State v. Crane*, 116 Wn.2d 315, 325, 804 P.2d 10 (1991); *see also Petrich*, 101 Wn.2d at 571 (rule applies where State presents evidence of several distinct acts but not where evidence indicates a continuing course of conduct). To determine whether *Petrich* is applicable, the courts consider three questions: (1) what must be proved under the applicable statute, (2) what does the evidence disclose, and (3) does the evidence disclose more than one violation of the statute. *State v. Hanson*, 59 Wn. App. 651, 656-57 & n.5, 800 P.2d 1124 (1990). The third

inquiry "requires a comparison of what the statute requires with what the evidence proves. If the evidence proves only one violation, then no *Petrich* instruction is required, for a general verdict will necessarily reflect unanimous agreement that the one violation occurred," even though it may have been done through alternative means. *Id.* at 657.

The State had to prove Mr. Baggarley and/or his accomplice, unlawfully took personal property from Mr. Bain against his will by force or violence. RCW 9A.56.200;Jury Instruction 7; RP 320. The State presented evidence that three men, beat Mr. Bain, and Mr. Yapp took the t-shirt and Mr. Baggarley took the phone. RP 240, 242, 292-93, 307. Mr. Yapp's taking of the t-shirt disclosed one violation of the statute that could have supported a robbery conviction. And Mr. Baggarley's taking the phone also disclosed yet another

violation that could also have supported a robbery conviction.

There is no dispute the evidence disclosed two distinct criminal acts, any one of which could satisfy the charge—taking of a t-shirt by Mr. Justin Yapp and taking of a cellphone by Mr. Baggarley. Br. of Resp. at 6. There is also no dispute the State did not make an election between the shirt and the cell phone as the basis for the personal property taken during the robbery." Id. citing RP 115-118, 337-53, 371-77. The State also conceded it told the jury about the cell phone during opening and rebuttal closing argument, but not during the initial closing argument. Br. of Resp. at 6. The *Petrich* clearly applies. *State v. Crane*, 116 Wn.2d 315, 325, 804 P.2d 10 (1991); *Petrich*, 101 Wn.2d at 571.

a. Mr. Baggarley can challenge the lack of unanimity for the first time on appeal.

Petrich error may be raised for the first time on appeal. "[T]he right to a unanimous verdict is a fundamental constitutional right and may, therefore, be raised for the first time on appeal." *State v. Holland*, 77 Wn.App. 420, 424, 891 P.2d 49 (1995) *citing State v. Gitchel*, 41 Wn.App. 820, 821–22, 706 P.2d 1091,*review denied*, 105 Wn.2d 1003 (1985). Included in the constitutional requirement of jury unanimity is the requirement that the jury unanimously agree on the act underlying each charge. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). A defective verdict which deprives the defendant of a unanimous verdict invades the fundamental constitutional right to a trial by jury. *State v. Fitzgerald*, 39 Wn. App. 652, 655, 694 P.2d 1117, 1120 (1985) *citing State v. Russell*, 101

Wn.2d 349, 678 P.2d 332 (1984). The issue may, therefore, be raised for the first time on appeal. *Id.*

"When the evidence indicates that several distinct criminal acts have been committed, but defendant is charged with only one count of criminal conduct, jury unanimity must be protected." *State v. Doogan*, 82 Wn. App. 185, 191, 917 P.2d 155 (1996); *State v. McNearney*, 193 Wn. App. 136, 140–41, 373 P.3d 265 (2016); *State v. Bobenhouse*, 166 Wn.2d 881, 892 n.4, 214 P.3d 907 (2009).

Mr. Baggarley can challenge the lack of unanimity for the first time on appeal because it concerns a manifest constitutional error. *Bobenhouse*, 166 Wn.2d at 892 n.4(reviewing issue concerning lack of unanimity instruction); *Doogan*, 82 Wn. App. at 191; McNearney, 193 Wn. App. 136, 140–41; RAP 2.5(a)(3).

This Court of Appeals opinion concludes RAP 2.5 (a)(3) "precludes" review because Mr. Baggarley failed to raise the issue in trial court and has not demonstrated the lack of unaminity instruction was manifest constitutional error. App. 1, 6-7.

If an appellate court determines that the claim raises a constitutional error for the first time on appeal, it must then determine whether the error was "manifest," or caused actual prejudice. *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2010). A defendant must show how the constitutional error actually affected his rights at trial. *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). And to establish actual prejudice, a defendant must show that the error had practical and identifiable consequences at trial. *O'Hara*, 167 Wn.2d at 99.

The opinion clearly erred in finding this was not a manifest constitutional error. App. 7. An error in failing to provide a unanimity instruction is presumed prejudicial and the conviction will be upheld only if the error is harmless beyond a reasonable doubt. *State v. Coleman*, 159 Wn.2d 509, 512, 150 P.3d 1126 (2007); *State v. Kitchen*, 110 Wn.2d 403, 411-12, 756 P.2d 105 (1988) *abrogated on other grounds by In re Stockwell*, 179 Wn.2d 588, 597, 316 P.3d 1007 (2014). The error is not harmless if a rational juror could have a reasonable doubt as to whether at least one alleged act supporting the charge occurred. *Coleman*, 159 Wn.2d at 510.

Here, a rational juror could have a reasonable doubt as to whether the t-shirt Mr. Yapp wagered became property of Mr. Bain, and whether the re-taking of that t-shirt constituted robbery. This jury could nevertheless still convict Mr. Baggarley of

robbery because he took the cell phone. Contrary to the opinion's holding, the lack of a unanimity instruction had practical and identifiable consequences at trial deprived Mr. Baggarley of a fair trial. *O'Hara*, 167 Wn.2d at 99.

Here, the Court of Appeals overlooked or glossed over the fact the lack of unanimity in this case actually affected Mr. Baggarley's right to a fair trial. First, the opinion acknowledged the State's opening statement told the jury: "The group [of robbers] had taken the t-shirt off of his [Bain's] body, thrown the other shirt back at him and left with his cell phone." App. 4 citing RP 117. The opening told the jury of two possible acts—taking of a t-shirt and taking of a phone. *Id*.

Next the opinion seems to gloss over the fact that the State elicited from Mr. Bain that after he was

jumped one of his attackers must have taken his cell phone during the melee:

> **Q.** That evening did you have a cell phone with you?
> **A.** I did.

RP 130.

> **Q.** Later on did you check to see if you had your phone?
> **A.** Yeah.
> **Q.** Did you have your phone?
> **A.** No, I didn't have it.

RP 139.

To counter the State's evidence and the suggestion that Mr. Baggarley took Mr. Bain's phone as part of the robbery, Mr. Baggarley testified that he found the phone on the ground and mistakenly took it believing it belonged to one of his friends. RP 307-09.

The prosecution took Mr. Baggarley to task in cross-examination to suggest to the jury his intent to steal the cell phone:

Q. Did you take anything from the scene?
A. Just the cell phone, yes.
Q. And you testified previously that you picked it up and got in the car and you guys left. Why didn't you ask whose phone it was at the scene?
A. I'm not sure. Just too much going on, I guess, at the time that I just forgot that I even had it in my hand until we got there.
Q. Did you pick up cell phones -- I'm so sorry -- did you pick up any headphones?
A. No.
Q. And you testified previously that it was when you got to Sarah's house that you asked whose phone it was; is that correct?
A. Yes.

. . . .

Q. So when you get there and you realize it is not Mr. Yapp's phone, it's not anybody's phone, you probably realized it was the victim's phone -- pardon me -- it was Mr. Bain's phone, right?
A. Yes.
Q. So did you consider just driving back and trying to give it to him back at the parking lot?
A. Since I wasn't driving, that's why I gave it to Sarah.
Q. So did you -- you already stated that you didn't try to drive back and give it to him at the parking lot. Did you try to find Mr. Bain?
A. No.

> **Q.** Did you try to take the phone back to the bar?
> **A.** No.
> **Q.** Or turn it over to law enforcement?
> **A.** No.

RP 307-309.

Mr. Baggarley argued in closing the State had not proved his intent to steal the phone because he mistakenly believed it belonged to one of his friends:

> Now, there was an issue about a phone and the evidence also shows that Mr. Baggarley did not know that that belonged to Mr. Bain. He picked it up thinking, well, these guys are rolling around on the ground, must be Justin's.
>
> . . . .
>
> He [Mr. Baggarley] has no motive to steal a phone or to steal a shirt that he doesn't even remember anything about.

RP 363-65.

In rebuttal closing, the State countered the fact that Mr. Baggarley slipped the phone into his pocket without trying to ascertain its owner suggested otherwise:

> Another thing to consider is the phone. He took the phone. Mr. Baggarley's testimony was, "Hey, at one point the fight stopped. Mr. Yapp, they start fighting, we are all standing there, I found the phone." Is it reasonable that -- if you find a phone in the Safeway parking lot,would you say, "Hey, whose phone is this?" He didn't do that. Why did he put it in his pocket?

RP 376.

Clearly, the State presented evidence from which a jury could convict Mr. Baggarley of taking a t-shirt and a cell phone. And it bears repeating, the State made no election.

The opinion overlooks the fact that the State itself already conceded it presented evidence of both acts and that it argued both in opening and rebuttal about that Mr. Baggarley took the cell phone. Br. of Resp. at 6. Central to the incorrect opinion is the fiction that the "exclusive focus" of the robbery charge at trial was the taking of the t-shirt. App. 7. The

evidence at trial, the opening argument, the closing arguments, and the State's last word in rebuttal belie the opinion's central holding and demonstrate the lack of unanimity actually prejudiced Mr. Baggarley's right to a fair trial.

The Court of Appeal's ruling denying review under RAP 2.5(b)(3) clearly conflicts with *Petrich*, and/or any number of subsequent "multiple acts" cases that overturned convictions for lack of jury unanimity. *State v. Espinoza*, 14 Wn. App. 2d 810, 823, 474 P.3d 570 (2020);*State v. Holland*, 77 Wn.App. 420, 424, 891 P.2d 49 (1995) *citing State v. Gitchel*, 41 Wn.App. 820, 821–22, 706 P.2d 1091,*review denied*, 105 Wn.2d 1003 (1985); RAP 13.4(b)(1), (2), (3), and (4). Review is warranted to reverse the robbery charge.

b. The opinion pretends the"exclusive focus" of the prosecution was on presenting one act and deemphasizing the other, and thus the failure to require a unanimous verdict was not harmless nor manifest error under RAP 2.5.

The opinion manufactures an "exclusive focus" exception to the *Petrich* rule. App. 7. It holds that election and a *Petrich* instruction are not necessary in multiple acts cases where the prosecution "exclusive focus" on one act and deemphasizes all other evidence it presented to show another violation of the statute. See App. 7. This tortured logic makes no sense.

Without any basis for doing so, the Court of Appeal's opinion conveniently assumes the State only relied on the evidence that Mr. Baggarley took the cell phone from the limited purpose of assailing Mr. Baggarley's credibility and not to show prove he committed robbery. App. 5. The record belies all these unfounded conclusions.

Notably, on appeal, the State already conceded it presented evidence of multiple criminal acts, any one of which could satisfy the charge—taking of a t-shirt by Mr. Justin Yapp and taking of a cellphone by Mr. Baggarley. Br. of Resp. at 6. The State agreed "the State did not make an election between the shirt and the cell phone as the basis for the personal property taken during the robbery." *Id. citing* RP 115-118, 337-53, 371-77. The State also conceded it told the jury about the cell phone during opening and rebuttal closing argument, but not during the initial closing argument. *Id.* The State agreed there was no election of the act which the jury could rely upon. Br. of Resp. at 6.

In short, the opinion supplies no basis why Mr. Baggarley's robbery conviction should not have been dismissed for lack of unanimity. The opinion clearly

conflicts with establish precedent from the Supreme Court in *O'Hara*, 167 Wn.2d at 99, *Coleman*, 159 Wn.2d at 510, and *Kitchen*, 110 Wn.2d at 411-12. It also conflicts with the several Court of Appeals' decisions. *Espinoza*, 14 Wn. App. 2d at 823; *Holland*, 77 Wn.App. at 424; *Gitchel*, 41 Wn.App. at 821–22.This Court's review is appropriate to reverse the faulty opinion of the Court of Appeals.

2. The Court should also accept review because the opinion incorrectly holds that the recent changes in the laws governing previously mandatory LFOs do not apply to Mr. Baggarley.

Effective July 1, 2023, the legislature amended RCW 7.68.035 to require striking the victim penalty assessment if the defendant is indigent, as defined in RCW 10.01.160(3). Engrossed Substitute House Bill 1169, Chapter 449, Laws of 2023. Because Mr. Baggarley's case is not yet final, this change in the law

is applicable to him. *State v. Ramirez*, 191 Wn.2d 732, 749, 426 P.3d 714 (2018); *State v. Ellis*, ___ Wn. App. 2d ___, 530 P.3d 1048, 1057 (2023); *see also State v. Peterson*, 2023 WL 5702424 (2023) (unpublished, cited pursuant to GR 14.1) (following *Ellis* and refusing to find LFO challenges waived by failing to object below).

A month after the trial court sentenced Mr. Baggarley it entered an order of indigency as to him. CP 97-98. The trial court imposed the $500 victim penalty assessment and $200 in court costs.

The recent statutory amendments have changed the law on legal financial obligations. Now, it is categorically impermissible to impose the VPA on an indigent defendant and the court has discretion to waive accumulating interest on restitution, which was previously mandatory. *Ramirez*, 191 Wn.2d at 748-49; Laws of 2023, ch. 449, §§ 1, 4; Laws of 2022, ch. 260,

§ 12. This change in the law "applies on appeal to invalidate" these LFOs imposed upon an indigent person. *Ramirez*, 191 Wn.2d at 746. These statutes were not in effect at the time of Mr. Baggarley's sentencing but still apply to his case. *Ellis*, 530 P.3d at 1057.

Mr. Baggarley is "entitled to benefit from this statutory change." *Ramirez*, 191 Wn.2d at 749. Based on these recent changes in the law, Mr. Baggarley asks this Court to consider this issue and remand the case so the trial court may strike the victim penalty assessment due to his indigence. This is Mr. Baggarley's only opportunity to raise this issue in the course of his constitutionally protected right to direct appeal. And the appeal is not final yet.

RAP 1.2(a) and (c) state that the Rules of Appellate Procedure will be liberally interpreted to

serve the goals of promoting justice and facilitating decisions of cases on the merits. Extraordinary circumstances and the ends of justice favor review of this issue based on the significant change in the law that occurred after the briefing was filed and this Court considered this case. RAP 13.4(b)(4).

The law has materially and significantly changed while Mr. Baggarley's case is on direct appeal and now invalidates these costs. The purpose of these statutory changes is to reduce the barriers that obstruct indigent people from productively re-entering society after their convictions. *Ramirez*, 191 Wn.2d at 747. National and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case. *State v. Blazina*, 182 Wn. 2d 827, 835, 344 P.3d 680 (2015).

Even though Mr. Baggarley has completed paying his LFOs as the State points out, he should receive the benefit of these changes by being refunded what he paid. Answer to Motion to Reconsider, at 3 *citing* App. B, C.

This Court should grant Mr. Baggarley relief on appeal. It best serves the interest of judicial economy and the interest of justice for the court to strike the non-mandatory LFOs imposed upon an indigent person, as directed by the changes in the law.

C. CONCLUSION

The opinion conflicts with several Supreme Court decisions. It also conflicts all the Court of Appeals decisions that reverse for lack of unanimity. RAP 13.4(b)(1), (2). The novel "exclusive focus" exception to the unanimity requirement is a significant question of constitutional law under the Federal and Washington

Constitution and is a matter of significant public importance. RAP 13.4(b)(3), (4). The Court should accept review.

Alternatively, the Court should remand the case to the trial court and direct it to strike the LFOs it imposed that are no longer statutorily authorized, including the $500 VPA and $200 in court costs based on the changes in the law. RAP 13.4(b)(4).

This brief complies with RAP 18.7 and contains 4,798 words.

DATED this 20th day of October 2023.

Respectfully submitted,

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APPENDICES

FILED
SEPTEMBER 26, 2023
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. NICK BAGGARLEY, Appellant.	)))))))))	No. 39021-7-III UNPUBLISHED OPINION

BIRK, J.* — Nick Baggarley appeals from a conviction for first degree robbery, presenting two assignments of error. He asserts, first, a violation of his right to jury unanimity under State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984), overruled in part on other grounds by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988). Baggarley says the State needed to elect which of two items taken from the victim was the basis for the robbery charge. Baggarley argues, second, that the trial court erred in imposing a $200 filing fee at sentencing, asserting this was error because he was indigent. We conclude Baggarley's failure to raise either issue in the trial court precludes review under RAP 2.5(a)(3). We affirm.

I. Jury Unanimity

Review of the trial court proceedings shows the evidence supported that

* The Honorable Ian S. Birk is a Court of Appeals, Division One, judge sitting in Division Three pursuant to CAR 21(a).

Baggarley's party took both a t-shirt and a cell phone from Robert Bain, but the State asserted only that taking the t-shirt was the basis of the robbery charge.

Bain testified he arrived at the Sullivan Scoreboard, a bar, at perhaps 10:30 or 11:00 p.m. on June 27, 2020. He spoke with Justin Yapp about getting in line to play pool. Bain and Yapp exchanged shirts. As the bar began to close, Yapp requested that they return each other's shirts or that Bain pay $50 for the t-shirt he had received from Yapp. A physical altercation began, but bar staff brought it to an end. Bain indicated a friend of his arrived just then, and gave him a ride away from the bar. Bain later set out on foot for the Black Diamond pool hall. Bain received a call from a female caller and thought he recognized the caller as the person who had given him a ride earlier. He asked to be picked up and provided his location. Soon after, a car approached him. Bain observed a woman driving the vehicle. Four men exited the vehicle. Bain recognized one of them as Yapp and at trial identified Baggarley as another. Bain described their "demeanor" as "pound time."

Bain testified Yapp was the first hit him. One of the four choked him, and two took turns kicking and punching him. Bain testified Baggarley hit him and kicked him in the ribs. Bain estimated the beating lasted 10-15 minutes. They took the t-shirt Bain had received from Yapp, and left Bain's original shirt. After they had gone, Bain realized he

no longer had his cell phone.[1] Bain reported the crime to the police. The following morning, Bain used software to locate his phone, and at its location identified the vehicle, its driver, and some of the attackers.

The State called Scott Bonney, a detective with the Spokane County Sheriff's office. Baggarley told Bonney that, while at Sullivan Scoreboard on the night of the incident, Bain had agreed to pay $50 for Yapp's t-shirt. He said when they later confronted Bain he, Yapp, and two others got out of the vehicle. Yapp demanded either the t-shirt or the money. Baggarley said Yapp and Bain started fighting, and Bain started swinging at the others, so all four of them started hitting Bain. Baggarley said he struck Bain "in the face a few times." Baggarley said he took a cell phone that he found on the ground at the fight scene and thought was Yapp's. Yapp denied the phone was his. Baggarley said when he learned the phone did not belong to his friends, he concluded it must have been Bain's, and he said he "threw it outside."

Baggarley testified. He denied seeing Bain at the Sullivan Scoreboard or witnessing the t-shirt exchange. Baggarley testified he was already out in a vehicle at the time when Bain said the first altercation with Yapp occurred at the Sullivan Scoreboard.

[1] Bain additionally told police his wallet was missing. Bain also said that during the assault, one of the four picked up his wireless headphones, but threw them on the ground. Baggarley denied knowledge concerning any headphones.

He testified they "ended up" in the parking lot where the beating later occurred, and he did not recall anything noteworthy about anything being said about where they were going or any other plans. Baggarley testified he "had no idea what was going on." Baggarley said Yapp exited the vehicle and went up to Bain and they started fighting. Baggarley said Yapp "slipped and fell down," so he and the others exited the vehicle. Then Bain "came at us like he was fighting for his life." Baggarley testified after Bain approached him, he hit Bain in the face twice. Baggarley denied hitting Bain while anyone else was holding him, denied kicking him, and denied hitting him while he was on the ground. He testified he did not remember anybody removing Bain's t-shirt and he did not do so. Baggarley testified he found a cell phone on the ground and did not know "why [he] assumed it was one of [his] friends['] instead of" assuming it was Bain's. When it did not belong to any of them, Baggarley testified he gave it to another in their party and denied having anything else to do with that cell phone.

The State charged Baggarley with one count of first degree robbery as an actor or accomplice in unlawfully taking unspecified personal property from the person of Bain. The State also charged one count of second degree assault. In its opening statement, the State indicated the group had "taken the t-shirt off of [Bain's] body, thrown the other shirt back at him and left with his cell phone." In closing, before turning to the specific charged crimes, the State addressed accomplice liability. The State addressed the

evidence that "the defendant unlawfully took personal property from the person of" Bain. The State continued, "Let's start off, again, with Mr. Bain as far as theft, and it was the theft of that t-shirt." After describing the evidence that the five located Bain, the State continued, "They all piled on over a t-shirt. They took that t-shirt from him and they left. . . . Their intent that night was to take that t-shirt. They stole Mr. Bain's t-shirt that night." The State argued Baggarley was responsible for the taking of the t-shirt under accomplice liability principles.

In the defense's closing, Baggarley argued his interaction with Bain's cell phone without knowledge of whose it was indicated he was not a principal actor for purposes of accomplice liability. Generally, his defense was that Baggarley was not privy to a plan to accost Bain and take the t-shirt. In rebuttal, the State argued that it was not required to prove that Baggarley participated in planning the crime, because participating in committing the crime was sufficient for accomplice liability. Nevertheless, the State argued that the jury should find Baggarley's testimony that he had not known of a plan to recover the t-shirt not credible, and that there was circumstantial evidence Baggarley had known of the group's intentions to rob Bain. The State referred to Baggarley's picking up the cell phone as part of its argument concerning his credibility. The State argued reasonable behavior—impliedly, behavior consistent with not having knowledge of criminal intent—would be to ask whose phone he found. Instead, the State argued,

Baggarley's action of pocketing the phone to take it with the departing group was not reasonable behavior. The State concluded this discussion by reminding the jury, "Ladies and gentlemen, you are the sole judges of credibility." In summing up Baggarley's liability as an accomplice, the State argued, "This is a case [where] your friends get out of the car, you get out with them and you participate with your friends on a beat-down of somebody and a shirt is taken . . . . This is a case where Mr. Baggarley is responsible as an accomplice."

No party requested and the court did not provide a unanimity instruction. The jury found Baggarley guilty of first degree robbery and second degree assault. The State conceded for purposes of sentencing the assault conviction merged into the robbery conviction. Baggarley argues on appeal that "the State presented evidence of two possible acts—taking of a t-shirt and taking of a phone—that could support the robbery charge but did not elect a particular act." Baggarley argues his right to jury unanimity was violated. Baggarley does not dispute he did not raise this issue at trial.

RAP 2.5(a)(3) allows for consideration of an issue raised for the first time on appeal if it concerns a manifest error affecting a constitutional right. To meet RAP 2.5(a)(3), an appellant must demonstrate "(1) the error is manifest, and (2) the error is truly of constitutional dimension." State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). In other words, the appellant must "identify a constitutional error and show how

the alleged error actually affected the [appellant]'s rights." State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). An error is "manifest" where it had " 'practical and identifiable consequences in the trial of the case.' " State v. Powell, 166 Wn.2d 73, 84, 206 P.3d 321 (2009) (internal quotation marks omitted) (quoting State v. Kirkpatrick, 160 Wn.2d 873, 880, 161 P.3d 990 (2007)).

In witness examinations, opening statement, closing argument, and rebuttal, the State at no time suggested Baggarley was guilty of robbery by taking the cell phone. In opening, the State never explicitly argued that taking the cell phone established robbery, but referred only to Bain's being deprived of his cell phone, which appeared to emphasize that this meant he could not call for help. Rather, the State argued Baggarley was guilty of robbery solely as an accomplice to taking the t-shirt. It referred to Baggarley's interaction with the cell phone in its rebuttal only in response to the defense's argument that that interaction disproved accomplice liability, and only as relevant to assessing Baggarley's credibility. Because the exclusive focus of the robbery charge in trial court proceedings was on the taking of the t-shirt, any error in failing to give a Petrich instruction based on the cell phone evidence was not manifest under RAP 2.5(a)(3), and we do not reach the issue.

II. Filing Fee

Sentencing was held on June 17, 2022. Baggarley did not argue and the court did not find he was indigent at that time. The court's inquiry into Baggarley's financial circumstances was as follows:

> [THE COURT:] Mr. Baggarley, how old are you?
>
> THE DEFENDANT: I just turned 30.
>
> THE COURT: Just turned 30. Yes. Remind me, sir, what kind of work have you done in the past?
>
> THE DEFENDANT: I worked for Odom Corporation delivering beverages in stores. And that was one of the reasons why I took this to trial was because I couldn't have a felony to work there. That didn't work out, so I'm going back to my buddy's moving business once I'm done here is my plan, is to get a hold of him.

Before imposing any legal financial obligations, the court confirmed that Baggarley was working at the time of the incident. The court ordered Baggarley to pay $800, consisting of the $500 crime victim penalty assessment, the $200 criminal filing fee, and the $100 DNA (deoxyribonucleic acid) collection fee. In a later order of indigency entered July 6, 2022, the court authorized Baggarley to seek this appeal at public expense, finding he "lack[ed] sufficient funds to prosecute an appeal," but not otherwise specifying a basis for finding indigency.

On appeal, Baggarley asserts that it was error for the trial court to impose the $200 filing fee because "RCW 10.01.160(3) expressly prohibits courts from imposing discretionary costs on defendants indigent at the time of sentencing." See also RCW 36.18.020(2)(h) ("[T]his fee shall not be imposed on a defendant who is indigent as defined in RCW 10.01.160(3)."). Under RCW 10.01.160(3), a defendant is indigent if they meet the criteria specified in RCW 10.101.010(3)(a) through (c) (among other definitions). Baggarley points to no evidence and presents no argument that would support a conclusion that he was indigent under this statute at sentencing.

We conclude this issue is not reviewable in the circumstances of this case. As stated above, under RAP 2.5(a), we "may refuse to review any claim of error which was not raised in the trial court." A party may raise a claimed error for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3). It is not clear that Baggarley contends the $200 criminal filing fee amounts to a constitutional issue. But even if it would, "[i]f the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The record indicates Baggarley was employed and did not claim he was indigent at sentencing. He was granted leave to appeal at public expense because he lacked funds to prosecute this appeal, but the court entered no findings that would permit or suggest a conclusion of indigency as defined

under RCW 10.01.160(3). In the absence of a more developed record, we are unable to review Baggarley's claimed error.[2]

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Bjelkengren, J.

WE CONCUR:

Lawrence-Berrey, A.C.J.

Staab, J.

[2] Baggarley also does not assert that any new legislation concerning legal financial obligations affects his case. See State v. Ellis, ___ Wn. App. 2d ___, 530 P.3d 1048, 1057 (2023); State v. Wemhoff, 24 Wn. App. 2d 198, 202, 519 P.3d 297 (2022).

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 39021-7-III**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

☒ respondent Alexis Lundgren
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☐ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Paralegal Date: October 17, 2023
Washington Appellate Project

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