Supreme Court No.: 93475-9
Court of Appeals No.: ~~45823-3-II~~ 33229-2-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DONALD LEE,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND THE DECISION BELOW

Mr. Lee requests this Court grant review pursuant to RAP 13.4(b) of the decision of the Court of Appeals, Division One, in State v. Donald Lee, No. 45823-3-II, filed August 13, 2015. A copy of the opinion is attached as Appendix A. Mr. Lee's motion for reconsideration was denied September 29, 2015. A copy of this order is attached as Appendix B.

B. ISSUES PRESENTED FOR REVIEW

1. When a defendant's confrontation rights are violated the error is presumed prejudicial and the State bears the burden of proving it harmless beyond a reasonable doubt. Should review be granted where the Court of Appeals found the trial court erred when it prevented Mr. Lee from cross-examining the complaining witness about a prior, false report of rape she made to police, but failed to apply the harmless error standard applicable to constitutional violations, in contravention of State v. McDaniel?[1] RAP 13.4(b)(1).

2. An accused person is guaranteed his right to a speedy trial by both the federal and state constitutions, and when that right is violated, reversal is required. Should this Court grant review in the substantial

[1] 83 Wn. App. 179, 920 P.2d 1218 (1996).

public interest where the record demonstrated Mr. Lee's case was delayed for four years as a result of law enforcement's negligence and Mr. Lee was prejudiced because an important witness for the defense passed away prior to the trial? RAP 13.4(b)(4).

3. The Court of Appeals declined to remand Mr. Lee's case for consideration of whether he could afford the significant legal financial obligations imposed against him at sentencing despite the fact the trial court gave no consideration to Mr. Lee's ability to pay. Should this Court grant review in the substantial public interest and consistent with this Court's decision in State v. Blazina because the trial court failed to consider Mr. Lee's current and future ability to pay?[2] RAP 13.4(b)(4).

C. STATEMENT OF THE CASE

Donald Lee was arrested on allegations of third degree rape on October 9, 2009. CP 1. The trial court found probable cause to detain Mr. Lee and later set bail at $50,000. RP 2; CP 1-2. Arraignment was set for several days later, but no information was filed. RP 1; CP 4-5. The State authorized his release from custody on October 13, 2009. CP 5.

[2] 182 Wn.2d 827, 344 P.3d 680 (2015).

The City of Kelso initially investigated the allegations against Mr. Lee, but transferred the case to the Cowlitz County Sherriff's Office after determining it was out of Kelso's jurisdiction. RP 187. Although the sheriff's office received a report from the Kelso police department in March 2009, the case "fell through the cracks." RP 200-01. The State did not file an information against Mr. Lee until four years later, in March 2013, after a deputy newly assigned to the detective unit rediscovered the case. CP 6; RP 199. The information charged Mr. Lee with five counts of rape of a child in the third degree, and alleged an aggravating factor that the offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time. CP 6-8. Mr. Lee's trial commenced on December 18, 2013. RP 13.

According to the complaining witness, J.W., she received a phone call from a man during the summer of 2008, when she was fifteen years old. RP 53. She did not recognize the man's voice, but he asked her provocative questions and asked her to meet him in person. RP 56-7. He identified himself as "Rick," gave her his phone number, and asked her to call him later that day or the following day. RP 57-8.

She called him back and they spoke for close to 30 minutes, during which time J.W. agreed to meet him in person. RP 58-59.

J.W. met "Rick," who she later identified as Mr. Lee, in the parking lot of Tam O'Shanter Park. RP 60, 91. She testified that he drove a black Camaro or Thunderbird. RP 61. According to J.W., she told Mr. Lee she was 15 years old and he said he was 32 or 33 years old. RP 63. J.W. testified Mr. Lee expressed concern he might get in trouble, but "pushed [her] up against the hood of his car and – and felt [her]." RP 65. She did not object. Id.

J.W. began meeting Mr. Lee on a regular basis after her summer school class. RP 65. She testified she attended summer school from June to September, and he would pick her up from school "every day." RP 71, 78. The evidence showed Mr. Lee had some access to a black Camaro that summer, though not on a daily basis. RP 167, 181. Some days J.W. and Mr. Lee just sat and talked, but they also had oral and vaginal sex a number of times. RP 66, 80. She estimated having sex with Mr. Lee more than ten times, but fewer than 30 times. RP 82. She described having sex multiple times at Riverside Park, including two instances of vaginal sex that she testified about in greater detail. RP 68-70, 74, 75. She also described having sex at Mr. Lee's

girlfriend's home in Castle Rock and performing oral sex while he drove. RP 71-72, 75.

J.W. testified "Rick" had one tattoo on his chest or shoulder and one tattoo on his arm. RP 72. However, the evidence at trial showed Mr. Lee did not have a tattoo. RP 272. She also testified that she had visited Mr. Lee's mother's apartment, which was only a block away from her own home. RP 116, 119. She said that she asked for "Rick" and Mr. Lee's mother went and got Mr. Lee in response. RP 117. She did not recall, however, that the apartment was decorated in a Betty Boop theme with purple furniture. RP 117. Mr. Lee's mother passed away prior to trial, so the defense was unable to present evidence from Mr. Lee's mother to refute J.W.'s account. RP 256.

J.W. testified she often wrote notes to Mr. Lee, but that he wrote her only one note in return, a copy of which the State admitted at trial. RP 84, 86. Mr. Lee stipulated that he drafted the note, which did not address J.W. by name, but testified that J.W. was not the intended recipient. RP 269, 340.

Mr. Lee testified he did not know J.W. and had spoken with her only once, when she approached him while he was outside working on

his mother's car and asked if he was married to his ex-wife. RP 260-61. He spoke with her for less than five minutes. RP 261.

Prior to trial, the defense moved to elicit testimony from J.W. that in June of 2008, she had reported to law enforcement that she had been raped, but later retracted her statement and admitted the sex was consensual. RP 20; CP 15-17. The trial court permitted Mr. Lee to cross-examine J.W. only as to the fact that she had made a false allegation, but denied Mr. Lee's request to question J.W. about what the false statement alleged. RP 34.

The jury convicted Mr. Lee of two counts of third degree rape of a child. CP 51, 53. It found him not guilty of the remaining counts, and did not find the aggravating factor. CP 52, 54-60. Mr. Lee was sentenced to 34 months in prison on count I, with 26 months of community custody, and 26 months in prison on count II, with 34 months of community custody. CP 67. The trial court imposed $2641.69 in legal costs, which included $2,041.69 of discretionary costs. CP 65. The Court of Appeals affirmed Mr. Lee's convictions but remanded the case to the trial court in order to strike the unlawful community custody condition requiring Mr. Lee to submit to a penile

plethysmograph at the discretion of a corrections officer. Slip Op. at 1, 13.

D. ARGUMENT IN FAVOR OF GRANTING REVIEW

1. The Court should grant review because the Court of Appeals' decision is contrary to State v. McDaniel, which found that improperly limiting the scope of cross examination constitutes constitutional error.

Mr. Lee was convicted of two counts of third degree rape of a child. CP 51, 53. Prior to trial, Mr. Lee moved to introduce evidence that J.W. had previously accused a boy of rape, and then later admitted the statement she gave to police was false. CP 15-17; RP 20. Mr. Lee provided the trial court with a copy of a report from the Kelso police department which stated J.W. and her mother telephoned the police on June 11, 2008, and claimed J.W. had been raped approximately two weeks earlier. CP 17. However, according to this report, J.W. called again the following day and admitted the sex was consensual and she had lied to police about being raped. CP 17. After a hearing, the trial court permitted Mr. Lee to cross-examine J.W. on the fact she made a false accusation to the police about another person, but denied Mr. Lee the opportunity to elicit that the false accusation was *rape*. RP 33.

This Court of Appeals determined the trial court abused its discretion when it placed this limitation on Mr. Lee's ability to cross-

examine J.W. Slip Op. at 10; see also State v. Harris, 97 Wn. App. 865, 872, 989 P.2d 553 (1999; People v. Franklin, 30 Cal. Rptr. 2d 376, 380 (Cal. App. 4th 1994; Conrad v. State, 938 N.E.2d 852, 855 (Ind. Ct. App. 2010). However, relying on State v. Halstien, it found reversal was required "only if the error, within reasonable probability, materially affected the outcome of the trial." 122 Wn.2d 109, 127, 857 P.2d 270 (1993); Slip Op. at 10. Finding that standard was not met here, the Court of Appeals found the error harmless. Slip Op. at 10.

However, as Halstien makes clear, this standard is appropriate only when the evidentiary error "is not of constitutional magnitude." 122 Wn.2d at 127. When the trial court prevented Mr. Lee from cross-examining J.W. about the fact she had falsely accused another individual of raping her, it violated his Sixth Amendment and article I, section 22 right to confront and cross-examine adverse witnesses. State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002) ("The primary and most important component [of the right to confrontation] is the right to conduct a meaningful cross-examination of adverse witnesses."). "A violation of a defendant's rights under the confrontation clause is constitutional error." State v. McDaniel, 83 Wn. App. 179, 187, 920 P.2d 1218 (1996). Such error is presumed

prejudicial, and the State bears the burden of proving it was harmless beyond a reasonable doubt. Id.; Chapman v. California, 386 U.S. 18, 22, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967).

The Court of Appeals did not consider whether the State could show the trial court's error was harmless beyond a reasonable doubt. Slip Op. at 10. However, the record demonstrates the State could not have made this showing. In order to determine whether the limitations placed on the scope of cross-examination was harmless, this Court must look to the "untainted" evidence, and determine whether that evidence was so overwhelming that it necessarily leads to a finding of guilt. Id. at 187-88; see also State v. Garcia, 179 Wn.2d 828, 846, 318 P.2d 266 (2014).

The Court of Appeals determined the trial court's error was harmless because the State offered a note into evidence that Mr. Lee admitted to writing and "corroborated J.W.'s version of the events" and because Mr. Lee was permitted to elicit from J.W. that she had made a false allegation without eliciting what that false allegation involved. Slip Op. at 10. However, at a rape trial there is a significant difference between evidence demonstrating the complaining witness has made a prior false allegation, and evidence demonstrating she has made a prior

false allegation of *rape*. Simply because Mr. Lee was permitted to elicit that she had made a false allegation of some kind does not satisfy the State's burden of demonstrating the error was harmless beyond a reasonable doubt. J.W.'s entire testimony was tainted by the court's error.

In addition, the only other evidence against Mr. Lee was a note J.W. said Mr. Lee wrote to her. RP 84. However, this note did not address J.W. by name and Mr. Lee testified she was not its intended recipient. RP 269. This is not sufficient to satisfy the State's burden under a harmless error analysis. This Court should grant review because the Court of Appeals applied the incorrect standard, contrary to both its own decision in McDaniel and this Court's decision in Darden.

2. This Court should grant review in the substantial public interest because Mr. Lee's Sixth Amendment right to a speedy trial was violated when his trial was delayed for four years as a result of the State's negligence.

Mr. Lee was arrested in October 2009 and briefly held on bail. CP 1-1; RP 2. He was not arraigned until March 2013. CP 6; RP 4. An accused person is guaranteed the right to a speedy trial by both the federal and state constitutions. Barker v. Wingo, 407 U.S. 514, 531-32, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972); U.S. Const. amend. VI; Const. art. I, § 22.

This right "is as fundamental as any of the rights secured by the Sixth Amendment." State v. Iniguez, 167 Wn.2d 273, 280-81, 217 P.3d 768 (2009) (quoting Barker, 407 U.S. at 515 n.2). If a defendant's constitutional right to a speedy trial is violated, his case must be dismissed with prejudice. Iniguez, 167 Wn.2d at 282.

The Court of Appeals determined this issue was not manifest under RAP 2.5(a)(3), and therefore ineligible for consideration for the first time on appeal, because the record was unclear about precisely why the delay occurred. Slip Op. at 6. However, a detective testified that the case "fell through the cracks" when it was transferred from the Kelso police department to the Cowlitz County Sheriff's Office. RP 200-01. While the detective did not provide details, it is evident from the record that law enforcement simply forgot about the investigation.

Under Barker, this Court is required to weigh four factors: (1) the length of the delay; (2) the reason for the delay; (3) the extent to which the defendant asserted his speedy trial right; and (4) prejudice to the defendant as a result of the delay. Iniguez, 167 Wn.2d at 283-84. "As a threshold to the Barker inquiry, a defendant must show that the length of the delay crossed a line from ordinary to presumptively prejudicial." Iniguez, 167 Wn.2d at 283. This is a fact-specific inquiry. Id. Once the

defendant has demonstrated the delay was presumptively prejudicial, the remainder of the Barker analysis is triggered. Id.

The Court of Appeals also found that Mr. Lee did not meet the necessary showing to trigger a Barker analysis. Slip Op. at 7. But the prejudice is clear from the record. "[U]nreasonable delay between formal accusation and trial threatens to produce more than one sort of harm, including 'oppressive pretrial incarceration,' 'anxiety and concern of the accused,' and 'the possibility that the [accused's] defense will be impaired.'" Doggett v. United States, 505 U.S. 647, 654, 112 S.Ct. 2686, 120 L.Ed.2d 540 (1992) (quoting Barker, 407 U.S. at 532). The most serious of these forms of prejudice is the last, "because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." Id.

In discussing the balancing of the prejudice factor when considering the other factors, Doggett held:

> Although negligence is obviously to be weighed more lightly than a deliberate intent to harm the accused's defense, it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun. And such is the nature of the prejudice presumed that the weight we assign to official negligence compounds over time as the presumption of evidentiary prejudice grows. Thus, our toleration of such negligence varies inversely

> with its protractedness, and its consequent threat to the fairness of the accused's trial.

505 U.S. at 657. In Mr. Lee's case, fault for the delay clearly lies with the State. Because the trial was delayed for years, both the weight assigned to that fault and the presumption of evidentiary prejudice against Mr. Lee increases accordingly.

While Mr. Lee was incarcerated for only a few days, this Court must consider the anxiety the State caused when it arrested Mr. Lee, held him on bail, and then released him prior to his arraignment. In addition, it must consider the most serious form of prejudice: the possibility of impairment to Mr. Lee's defense by the passage of time. A showing of actual impairment is not required but where it is shown, there will be a stronger case for a finding of a speedy trial violation. Iniguez, 167 Wn.2d at 295. Actual prejudice is evident here, as an important witness for Mr. Lee, his mother, had passed away by the time of trial. RP 256.

His mother's unavailability at trial was particularly prejudicial because J.W.'s testimony's was, in many ways, puzzling. She appeared to have some intimate knowledge of Mr. Lee's life, describing a visit to Mr. Lee's ex-girlfriend's house and his mother's apartment. RP 71, 82. At the same time, J.W. claimed he had tattoos, which he did not, and

said he picked her up every day in a car he did not have access to on a daily basis. RP 61, 72, 161, 181, 272. She was also unable to describe prominent features of both the ex-girlfriend's and mother's homes. RP 111, 145-146. The jury's verdict indicates it did not fully accept J.W.'s testimony, as it found Mr. Lee guilty of only two of the five charges, and declined to find the aggravating factor. CP 51-60.

Because Mr. Lee's mother passed away prior to trial, he was unable to present her testimony to refute J.W.'s claim that she visited Mr. Lee at his mother's home. Particularly given the inconsistencies in J.W.'s testimony, his mother's absence at trial was highly prejudicial. The Court must presume prejudice to the defendant intensifies over time. Mr. Lee's trial was delayed by over four years, and his inability to call his mother as a witness due to this delay demonstrates actual prejudice. This issue is one of substantial public interest and this Court should accept review.

3. This Court should grant review and require the trial court to consider Mr. Lee's ability to pay his LFOs on remand consistent with State v. Blazina.

The trial court did not consider Mr. Lee's financial circumstances before imposing discretionary legal financial obligations (LFOs). In fact, it did not even mention it was imposing LFOs at

sentencing. RP 427-34. Despite the fact that the Court of Appeals remanded Mr. Lee's case to the trial court to vacate the plethysmograph monitoring condition, it declined to strike the LFOs and require the trial court to consider Mr. Lee's ability to pay any financial obligations. Slip Op. at 1-2.

While this Court found that unpreserved LFO errors are not entitled to review as a matter of right in State v. Blazina, the court emphasized the fact that LFOs have significant consequences for defendants. 182 Wn.2d 827, 835, 344 P.3d 680 (2015). Unpaid costs from a criminal conviction increase recidivism for indigent offenders because they "accrue interest at a rate of 12 percent and may also accumulate collection fees when they are not paid on time"; an impoverished person is far more likely to accumulate astronomical interest than a wealthy person who can pay the costs in a timely manner; and "legal or background checks will show an active record in superior court for individuals who have not fully paid their LFOs," which may "have serious negative consequences on employment, on housing, and on finances." Id. at 836 (internal citations omitted). "LFO debt also impacts credit ratings, making it more difficult to find secure housing." Id. at 837 (citing Katherine A. Beckett, Alexes M. Harris &

Heather Evans, Wash. State Minority & Justice Comm'n, The Assessment and Consequences of Legal Financial Obligations in Washington State (2008), at 43).

In apparent recognition of the serious negative consequences for defendants who are burdened with LFOs they will likely never have the ability to pay, the Supreme Court has recently granted a number of petitions for review only on the issue of the imposition of discretionary legal financial obligations, remanding the cases back to the trial court for consideration. See e.g., State v. Cole, 183 Wn.2d 1013, 353 P.3d 634 (2015); State v. Joyner, 183 Wn.2d 1013, 353 P.3d 635 (2015); State v. Turner, 183 Wn.2d 1014, 353 P.3d 636 (2015); State v. Chenault, 183 Wn.2d 1015, 353 P.3d 637 (2015); State v. Stoll, 183 Wn.2d 1013, 353 P.3d 639 (2015); State v. Bradley, 183 Wn.2d 1014, 353 P.3d 639 (2015); State v. Calvin, 183 Wn.2d 1013, 353 P.3d 640 (2015).

As this Court noted in its orders, remanding these cases to the trial court is consistent with its holding in Blazina, which requires a trial court to consider a defendant's ability to pay before imposing LFOs. Id. This Court should accept review and require the trial court

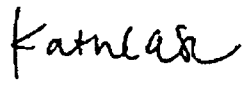
to conduct an individualized inquire into Mr. Lee's current and future ability to pay any LFOs.

E. CONCLUSION

On each of these bases, the Court should grant review of the Court of Appeals opinion affirming Mr. Lee's convictions.

DATED this 29th of October, 2015.

Respectfully submitted,



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APPENDIX A

COURT OF APPEALS, DIVISION III OPINION

August 13, 2015

FILED
August 13, 2015
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. DONALD ORMAND LEE, Appellant.	)	No. 33229-2-III UNPUBLISHED OPINION

Brown, A.C.J. — Donald O. Lee appeals his two convictions for third degree rape of a child. He contends (1) his speedy trial rights were violated, and the trial court erred in (2) limiting confrontation on the alleged victim's prior false reporting, and (3) sentencing him beyond the maximum allowed, (4) ordering monitoring penile plethysmograph testing, and (5) requiring him, without his objection, to pay legal financial obligations (LFOs) without a finding he had the ability to pay.

We accept without further discussion the State's correct concession to Mr. Lee's third contention that ordering penile plethysmograph testing for monitoring purposes is not permitted. RCW 9.94A.030(10); *State v. Land*, 172 Wn. App. 593, 605, 295 P.3d 782 (2013). Next, we exercise our discretion under *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680, *review denied*, 177 Wn.2d 1016 (2015) and *State v. Duncan*, 180 Wn. App. 245, 255, 327 P.3d 699 (2014) to decline review of Mr. Lee's fourth contention

because he failed to object to the LFOs at sentencing and no extraordinary circumstances exist meriting review at this time. We reject Mr. Lee's first three contentions, affirm his two convictions, and remand for the trial court to vacate the plethysmograph monitoring condition.

FACTS

In March 2009, J.W. reported to her mother that she had a sexual relationship with Mr. Lee during the summer and fall of 2008, when he was 42 years old. J.W. detailed multiple sexual encounters with Mr. Lee and presented a sexually-explicit handwritten note from him. On October 9, 2009, officers arrested Mr. Lee on allegations of third degree rape. The trial court found probable cause to detain Mr. Lee and set bail at $50,000. The State, however, did not file an information and, consequently, released Mr. Lee on October 13. Kelso police officers investigated the allegations but determined the acts did not happen in their jurisdiction and forwarded the matter to the Cowlitz County Sheriff's Department. Sheriff's Deputy Corey Robinson began to work up the case, but transferred the matter to the office's detective unit. Detective Ron Broyles took over, but at the time he was addressing health and family matters. He retired in April 2010, at which time the matter "fell through the cracks." Report of Proceedings (RP) at 201.

In May 2012, Bradley Thurman, a newly appointed detective in the sheriff's office, noticed the case against Mr. Lee was still pending. Detective Thurman contacted J.W. who confirmed Mr. Lee was still in the area. On March 6, 2013, the State charged

Mr. Lee with five counts of third degree rape of a child. The trial date was continued twice at Mr. Lee's request.

Before trial, Mr. Lee asked to present evidence that J.W. previously made a false rape accusation in June 2008 that she recanted. The State objected, relying on the Rape Shield Law, RCW 9A.44.020 and ER 608. The trial court found the false statement relevant to J.W.'s credibility, but not to whether the sex act was consensual. The court ruled it would allow cross-examination of J.W. about whether she falsely accused another person of a crime to police and her motivation in making the complaint. But, the court barred any mention of sexual conduct.

Trial commenced on December 18, 2013. J.W. testified to multiple sexual encounters between her and Mr. Lee. She described having sex multiple times at a park, including two detailed instances of vaginal sex. She described having sex at Mr. Lee's girlfriend's home and engaging in oral sex while he drove. J.W. testified that she had visited Mr. Lee's mother's apartment that was a block away from her own home. Mr. Lee lived with his aged mother. J.W. could not remember the décor of the apartment or the color of the furniture. Mr. Lee's mother passed away before trial. J.W. testified she often wrote notes to Mr. Lee, but that he wrote her only one note in return, a copy of which the State admitted at trial. Mr. Lee stipulated that he wrote the note, but testified J.W. was not the intended recipient and he did not know how she obtained possession of the note.

On cross-examination, defense counsel asked J.W., "You ever made any false accusations about another person to the police." RP at 120. J.W. responded, "Yes" and that she "immediately corrected it." RP at 121. She explained on redirect that her mother made the report to police and J.W. corrected it because she did not "want someone to think that I made a false report. I wanted to make it right." RP at 151.

Mr. Lee testified he lived with his mother in 2008 and she had a purple rocking chair in the living room and a large collection of Betty Boop items. Mr. Lee testified he did not know J.W. and had spoken with her only once, when she approached him while he was outside working on his mother's car. Mr. Lee's step brother testified to their mother's furnishings and decor.

A jury found Mr. Lee guilty of two of the five counts of third degree rape of a child. The court sentenced Mr. Lee to 34 months' incarceration on count one plus 26 months of community custody. The court sentenced Mr. Lee to 26 months' incarceration on count two plus 34 months of community custody. The court ran the sentences concurrently.

The trial court imposed community custody conditions, including an evaluation for sex offender treatment and submission to a "polygraph examination and a plethsymograph [sic] as directed by Corrections Officer or treatment provider." Clerk's Papers (CP) at 69. The State concedes error in the Community Corrections Officer monitoring condition. Without objection, the court imposed $2,641.69 in LFOs, including

$2,041.69 in discretionary costs, and as noted above, we decline to review Mr. Lee's LFO concerns in his appeal.

ANALYSIS

A. Speedy Trial

The issue is whether Mr. Lee was denied his right to a speedy trial. He contends, for the first time on appeal, the four years between arrest and trial violated his right to a speedy trial under the Sixth Amendment to the United States Constitution.

The Sixth Amendment provides criminal defendants the right to a speedy public trial. *State v. Monson*, 84 Wn. App. 703, 711, 929 P.2d 1186 (1997). A constitutional right to a speedy trial is a separate right from procedural rules with a time for trial provision. *State v. Hudson*, 130 Wn.2d 48, 57, 921 P.2d 538 (1996). The constitutional right to a speedy trial is not violated by the expiration of a definite time but, rather, by the expiration of a reasonable time. *Monson*, 84 Wn. App. at 711. The Sixth Amendment speedy trial right attaches when a charge is filed or an arrest is made holding one to answer to a criminal charge, whichever occurs first. *State v. Corrado*, 94 Wn. App. 228, 232, 972 P.2d 515 (1999). We review an alleged violation of the constitutional right to a speedy trial de novo. *State v. Iniguez*, 167 Wn.2d 273, 280, 217 P.3d 768 (2009).

When deciding if a trial delay violates the Sixth Amendment, we consider the balancing test in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). The defendant must first demonstrate "that the length of the delay crossed a

line from ordinary to presumptively prejudicial." *Iniguez*, 167 Wn.2d at 283. Next, we consider (1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) prejudice to the defendant. *Barker*, 407 U.S. at 530.

Initially, the State stresses this issue is raised for the first time on appeal. We generally will not consider an issue raised for the first time on appeal unless it involves a "manifest error affecting a constitutional right." RAP 2.5(a)(3). The defendant must show "how, in the context of the trial, the alleged error actually affected the defendant's rights; it is this showing of actual prejudice that makes the error 'manifest,' allowing appellate review." *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (citations omitted). Thus, "[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." *Id.* (citing *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993)).

Detective Thurman testified about how he became involved in the case and the change in investigating officers. After one officer retired, Detective Thurman opined that the matter "fell through the cracks" for a bit although he was not involved at the time and did not know for certain. RP at 201. No testimony explains how the change in investigating officers affected the State's decision to file charges or why the State did not file charges for another 10 months after Detective Thurman became involved. Because Mr. Lee did not raise the issue below, no record exists to review his Sixth Amendment claims, including the *Barker* four-part factual inquiry. Therefore, we cannot conclude the error is "manifest." RAP 2.5(a)(3). While the State's burden is to explain

the delay, the initial burden was on Mr. Lee to assert the claim. The court was not required to inquire about a Sixth Amendment claim on its own. Moreover, Mr. Lee later requested continuances, evidencing waiver of any speedy trial concerns.

Even assuming a sufficient record exists for us to address the *Barker* factors, Mr. Lee does not satisfy his threshold burden of demonstrating "that the length of the delay crossed a line from ordinary to presumptively prejudicial." *Iniguez*, 167 Wn.2d at 283. He claims he became anxious and a key witness passed away. First, a self-serving statement of anxiety does not show prejudice. *See State v. Cox*, 109 Wn. App. 936, 941, 38 P.3d 371 (2002) (after-the-fact, self-serving claims are insufficient to establish prejudice). Next, testimony from Mr. Lee's mother would simply be cumulative to other witnesses' testimony regarding her apartment's décor and furniture colors, and no sexual misconduct was alleged at that location. Mr. Lee denied J.W.'s presence at the apartment before the jury. Any discrepancy in evidence was properly left to the jury. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Without manifest constitutional error, or a showing of presumptive prejudice, Mr. Lee cannot raise nor prevail in a speedy trial violation issue raised for the first time on appeal.[1]

[1] The State invites this court to remand the matter for a reference hearing to create a record for the delay. Generally, this court does not remand matters for a reference hearing when the appellant fails to preserve an issue for review; such actions

B. Right to Confront J.W.

The issue is whether Mr. Lee was denied his right to confront J.W. under the Sixth Amendment. He contends the trial court improperly excluded mention that the alleged falsely reported crime concerned a rape allegation.

The confrontation clause guarantees a criminal defendant the right to confront witnesses against him or her in a criminal prosecution. *Crawford v. Washington*, 541 U.S. 36, 42, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). We review constitutional issues like this de novo. *State v. Price*, 158 Wn.2d 630, 638-39, 146 P.3d 1183 (2006). The right to cross-examine adverse witnesses is not absolute, and "[t]he confrontation right and associated cross-examination are limited by general considerations of relevance." *State v. Darden*, 145 Wn.2d 612, 620-21, 41 P.3d 1189 (2002) (citing ER 401, ER 403). We review the trial court's limitation of the scope of cross-examination for an abuse of discretion. *Darden*, 145 Wn.2d at 619.

ER 608(b) allows a party to cross-examine a witness about specific instances of past conduct in order to cast doubt on the witness's credibility. But, a victim's past sexual history is not relevant nor admissible to prove credibility as it has little or no relationship to the ability of the witness to tell the truth. *State v. Hudlow*, 99 Wn.2d 1, 9, 659 P.2d 514 (1983). Moreover, such evidence is not admissible under RCW 9A.44.020, the rape shield statute, for the issue of credibility.

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would be contrary to the purpose of RAP 9.11 (regarding when it is appropriate to request additional evidence on review).

A court may properly prohibit inquiry regarding prior allegation evidence where the prior incident is remote or the proof of the prior allegations and their falsity is weak. *See State v. Demos*, 94 Wn.2d 733, 736-37, 619 P.2d 968 (1980) (evidence of prior allegations is irrelevant absent proof of falsity); *State v. Harris*, 97 Wn. App. 865, 872, 989 P.2d 553 (1999) (evidence that a rape victim has accused others is not relevant and, therefore, not admissible, unless the defendant can demonstrate that the accusation was false); *State v. Mendez*, 29 Wn. App. 610, 611-12, 630 P.2d 476 (1981) (the trial court was within its discretion in excluding prior allegation since the date of the allegation was unknown). Significant here, the prior rape allegation was false as admitted by J.W. during trial. The State argues J.W. explained the rape report had been made by her mother and that J.W. called the police the next day to explain the sex was consensual. There is no Washington case directly on point in such circumstances; nevertheless, cases from California and Indiana are instructive.

In *People v. Franklin*, 30 Cal. Rptr. 2d 376, 380 (Cal. App. 4th 1994), the court held, "[A] prior false accusation of rape is relevant on the issue of a rape victim's credibility." And, in *Conrad v. State*, 938 N.E.2d 852, 855 (Ind. Ct. App. 2010), the court noted that state statutes preclude the introduction of evidence of any prior sexual conduct of an alleged victim of a sex crime, but held, "A common-law exception exists for situations where the victim has admitted the falsity of a prior accusation of rape or where a prior accusation is demonstrably false."

Following *Franklin* and *Conrad*, and the multiple Washington cases noting different treatment for false accusations, Washington's rape shield statute does not preclude introduction of evidence to show that a victim has made prior false accusations of rape because it bears on the victim's credibility. It is noted, nevertheless, that a defendant must make an offer of proof to show falsity if he or she wishes to introduce evidence of prior, false allegations as is in this case. A defendant should not be permitted to engage in a fishing expedition in hopes of being able to uncover some basis for arguing that the prior accusation was false.

Arguably, the court did not have tenable grounds to deny Mr. Lee's request to cross-examine J.W. pertaining to her credibility. Thus, the trial court abused its discretion. The next question then is whether the error was reversible.

Although the trial court arguably erred in not allowing evidence that the prior false allegation was rape, any error was harmless. When a court erroneously excludes evidence reversal is required "only if the error, within reasonable probability, materially affected the outcome of the trial." *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). Both J.W. and Mr. Lee testified regarding their version of the facts. But the State offered a note Mr. Lee admitted writing that was sexually explicit and corroborated J.W.'s version of the events. Moreover, the court allowed evidence showing J.W. made a prior false accusation thereby allowing Mr. Lee to undermine her credibility even without mention of the specific allegation. Given all, we conclude the court's exclusion

of evidence was harmless, does not violate the confrontation clause, and, therefore, does not warrant reversal.

C. Sentence Length

The issue is whether the sentencing court exceeded its authority in concurrently sentencing Mr. Lee to 34 months of confinement on one charge with 34 months' community custody on another. He argues the concurrent sentences could exceed the statutory maximum of 60 months depending on incarceration length.

Whether a sentencing court has exceeded its statutory authority is a question of law we review de novo. *State v. Mann*, 146 Wn. App. 349, 357, 189 P.3d 843 (2008). A challenge to a sentence may be raised for the first time on appeal, and we have the duty and power to correct an erroneous sentence upon its discovery. *State v. Julian*, 102 Wn. App. 296, 304, 9 P.3d 851 (2000).

Third degree rape of a child is a class C felony, for which the maximum sentence is five years. RCW 9A.20.021(c); RCW 9A.44.079(2). The sentencing court may not impose a standard range sentence of confinement and community custody that when combined exceed the offense's statutory maximum. *State v. Boyd*, 174 Wn.2d 470, 473, 275 P.3d 321 (2012). Here, the court sentenced Mr. Lee to 34 months' incarceration on count one plus 26 months of community custody and 26 months' incarceration on count two plus 34 months of community custody to run concurrently. He argues that under this sentence he could potentially serve 34 months' incarceration and 34 months in community custody for a total sentence of 68 months, which is 8

months longer than the statutory maximum. But the judgment and sentence states community custody may solely be "extended for up to the statutory maximum term of the sentence." CP at 68.

In instances where the range specified by the court results in a combined total term of confinement and community custody that exceeds the statutory maximum for the crime, our Supreme Court approved a notation like the one in Mr. Lee's judgment and sentence in *In re Personal Restraint of Brooks*, 166 Wn.2d 664, 668, 211 P.3d 1023 (2009). There, the court explained the *Brooks* notation is a provision in the judgment and sentence indicating that the combined term of confinement and community custody 'shall not exceed the statutory maximum. *Id.* at 675. This notation prevents a defendant from serving over his or her statutory maximum sentence and is necessary because "the SRA [makes] it impossible for a trial court to know at the time of sentencing the exact amount of time to be served." *Id.* at 674.

More recently, our Supreme Court held, "When a trial court imposes a sentence of confinement . . . and a sentence of community custody when combined, exceed the statutory maximum for the offense, our holding in *Brooks* still applies. The trial court should include a notation in the judgment and sentence that clarifies that the total term of confinement and community custody actually served may not exceed the statutory maximum." *In re McWilliams*, 182 Wn.2d 213, 218, 340 P.3d 223 (2014).

Here, the concurrent sentence ranges specified by the court results in a combined total term of confinement and community custody that exceeds the statutory

maximum for the crime. The court, however, specified the amount may not exceed the statutory maximum. Based on *Brooks* and *McWilliams*, the court did not exceed its authority by imposing such sentence.

Affirmed, and remanded for proceedings consistent with this opinion.

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.

Brown, A.C.J.

WE CONCUR:

Korsmo, J.

Lawrence-Berrey, J.

KORSMO, J. (concurring) — Although I fully agree with, and have signed, the majority opinion, I write separately to stress that Mr. Lee's claim should have been raised as a pre-charging delay due process challenge rather than as a speedy trial claim. Although arrested and briefly held in 2009, charges were not filed until four years later and he was not held to any conditions of release in 2009. There being no charges filed, there was no speedy trial issue presented here.

The case he cites is not apropos. *State v. Corrado*, 94 Wn. App. 228, 972 P.2d 515, *review denied*, 138 Wn.2d 1011 (1999). There the defendant was incarcerated for 11 months while the State appealed from the dismissal of charges by the trial court after the original conviction had been reversed on appeal. *Id.* at 231-32. Charges having been filed, that case necessarily was a speedy trial issue; the twist there was that the defendant remained incarcerated after the dismissal. *Id.* at 232. As Division Two of this court correctly summed up the situation: "Corrado was under actual restraint, which mandates analysis under the Sixth Amendment." *Id.*

Here, there was no actual restraint. Mr. Lee was arrested on probable cause in 2009 and bail was set, but no charges were filed at that time. He was under no conditions

of release, bail, or any other form of pretrial restraint after the 72 hour period. The Sixth Amendment was not implicated.

Instead, this was a Fourteenth Amendment due process charging delay case, if it was anything. As the majority opinion demonstrates, that issue is not manifest. With that observation, I concur with the majority's resolution of the case.

Korsmo, J.

APPENDIX B

ORDER DENYING MOTION FOR RECONSIDERATION

September 29, 2015

FILED
SEPT. 29, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, STATE OF WASHINGTON, DIVISION III

STATE OF WASHINGTON,	)	No. 33229-2-III
	)	
Respondent,	)	ORDER DENYING MOTION
v.	)	FOR RECONSIDERATION
	)	
DONALD LEE,	)	
	)	
Respondent.	)	

THE COURT has considered respondent's motion for reconsideration of this court's decision of August 13, 2015, and having reviewed the records and files herein, is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, respondent's motion for reconsideration is hereby denied.

DATED: September 29, 2015

PANEL: Jj. Brown, Korsmo, Lawrence-Berrey

FOR THE COURT:

STEPHEN M. BROWN
ACTING CHIEF JUDGE

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. 45823-3-II**, 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 Thomas Ladouceur
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Cowlitz County Prosecuting Attorney

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: October 29, 2015

WASHINGTON APPELLATE PROJECT

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Court of Appeals Case Number: 45823-3

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