NO. 103209-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent
v.
JACOB DIMAS, Petitioner

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT
CAUSE NO. 21-1-00220-6
COURT OF APPEALS, DIVISION II
CAUSE NO. 57528-I

ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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IDENTITY OF RESPONDENT

The Respondent, State of Washington, by and through Lauren R. Boyd, Senior Deputy Prosecuting Attorney for Clark County, provides the following answer pursuant to RAP 13.4(d) to Jacob Dimas's Petition for Discretionary Review.

ANSWER TO PETITION FOR DISCRETIONARY REVIEW

I. Dimas fails to show that review is necessary under RAP 13.4. His case does not present a "significant question of law" and the opinion of the Court of Appeals does not conflict with any opinion of this Court or Court of Appeals.

STATEMENT OF THE CASE

I. Facts

Dimas forcibly raped G.A. at knifepoint just after midnight on September 12, 2003. RP 314, 355, 401. Testimony at trial established that G.A. had been to a bar in downtown

Vancouver, Washington that night. RP 314, 317-18, 355, 401. As she was leaving alone, Dimas, a stranger to G.A., was outside of the bar and asked her for a cigarette. RP 356-59, 362, 375, 379, 401. He then followed her to a park where he tripped her, pushed her to the ground, and held her down. RP 319, 359-62, 374, 379-80, 401-02.[1]

Dimas covered G.A.'s mouth to prevent her from screaming for help. RP 362, 402-03. G.A. thought she was going to die and begged Dimas to stop, but he told her to shut up, said he would not take "no" for an answer, and placed a knife against her neck threatening to stab her. RP 363-64, 369, 372, 377-78, 402, 469. During the struggle Dimas told G.A. that "two girls ha[d] already said no to [him] [and he would] be

[1] G.A. testified that she felt that someone was following her as she left the bar but initially could not determine. RP 359-61, 374, 379-80, 401-02. Eventually, G.A. recognized the rapist as the man who had earlier asked her for a cigarette. RP 362. G.A. did not recognize Dimas at trial. RP 369-70. As discussed below, Dimas was later determined to be the perpetrator by the presence of his DNA on G.A.'s inner thigh. RP 571-72, 529, 531, 557-58.

God dammed if [she did]." RP 402. He continued to hold her down; muffled her yells, which prevented her from breathing; ripped off her clothes; and vaginally and anally raped her. RP 364-66, 402-03. Dimas ejaculated into her vagina and rectum. RP 373. He then grabbed her purse and took off running. RP 366-68, 403.

G.A. possibly attempted to chase after Dimas but eventually made her way to a payphone and called 911. RP 317, 355, 366, 375-76, 387.

II. Medical Treatment and Criminal Investigation

Former Vancouver Police Officer Fugate responded to the scene. RP 314-15, 317. G.A. was crying, scared, and shaking. RP 318, 322-23, 368. Her clothes were in disarray and she was wearing her underwear outside of her pants. RP 324-25, 368. Police deployed a K9 to track Dimas, but they were unsuccessful. RP 321, 351. No evidence was found at the scene. RP 351.

G.A. was transported to the hospital where she submitted to a rape kit. RP 326-27, 352, 370, 398, 403. Hospital personnel noted that her clothes were soiled with dirt and grass. RP 400. Her underwear had potentially been cut. RP 377-78, 86-87, 402, 460. G.A. had an injury to the lateral wall of her vagina. RP 434-35. She told the nurse that at the time of the rape all that she thought was "I don't want to remember this." RP 403.

Law enforcement submitted G.A.'s clothes and the samples collected in the rape kit to the Washington State Patrol Crime Laboratory (WSP) for examination. RP 462. WSP detected a few spermatozoa heads on the swabs taken from G.A.'s inner thigh and reported the swabs were very weak for the presence of p30. RP 571-72. No DNA testing was done in 2003. *See* RP 562-85.

Over the years, DNA testing improved. RP 563. The Vancouver Police Department (VPD) and WSP sent the evidence to Sorenson Forensics in 2019. RP 511. Dimas's DNA

was found in the sperm fraction of the swabs taken from G.A.'s inner thigh. RP 529, 531, 557-58.

III. Procedural History

In February of 2021, the State charged Dimas by information with first-degree rape while armed with a deadly weapon. CP 1. Dimas appeared from a "jail booth" for various pretrial hearings. RP 9, 19, 21, 25, 33, 53, 662, 64, 78-79. He did not object to his remote appearances. *See* RP generally. Trial commenced on April 18, 2022. RP 125. The jury found Dimas guilty of first-degree rape and determined that he had been armed with a deadly weapon. RP 687; CP 153-54. Dimas appeared for sentencing from a "jail booth," waiving any right to appear in person. RP 708. The trial court sentenced him to 150 months in confinement with lifetime community custody conditions. RP 731, 734; CP 180-97.

Dimas timely appealed. CP 251-53. Division II of the Court of Appeals affirmed Dimas's convictions in a part-

published opinion. *State v. Dimas*, __ Wn. App. 2d. ___, 544 P.3d 597 (2023).

ARGUMENT

Dimas asks this Court to accept review of essentially the entirety of the opinion of the Court of Appeals.[2] This Court should decline review as none of the considerations present in RAP 13.4(b) apply here.

RAP 13.4(b) provides

> [a] petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

[2] For obvious reasons, Dimas does not request review of the court's decision to strike community custody fees and conditions on remand to the trial court.

Preliminarily, with the exception of his claims of constitutional violations for his appearance from a "jail booth" and the violation of his right to confer with his attorney, Dimas fails to adequately argue why review should be granted under RAP 13.4. He instead focuses on the merits of his claim without sufficiently showing any conflict with another decision, significant question of law, or substantial public interest.[3] As such, this Court should deny review of Dimas's claims regarding juror bias, preaccusatorial delay, prosecutorial misconduct, sufficiency of the evidence, and jury instructions.

Regarding Dimas's remaining claims, this Court should deny review as Dimas is incorrect that they conflict with the

[3] For example, in asking this Court to review his claim of juror bias, Dimas argues the Court of Appeals was incorrect in declining review of the issue under RAP 2.5 and separately argues the merits of the claim. Importantly, Dimas does not argue that the Court of Appeals's RAP 2.5 analysis is contrary to a published opinion or presents another basis for review under RAP 13.4.

opinions of this Court or the Court of Appeals. Similarly, they do not constitute a "significant public interest."

I. Dimas's appearance from a "jail booth."

Dimas asks this Court to accept review of his appearance at pretrial hearings and sentencings from a "jail booth" arguing that his appearance conflicts with this Court recent opinion in *State v. Luthi*.[4] This Court should decline review. Dimas never objected to his appearance from a jail booth and there is no indication from this record that the "jail booth" in this case was akin to the "holding cell" present in *Luthi*. The decision of the Court of Appeals in this case is therefore not in conflict with this Court's recent opinion and review is inappropriate under RAP 13.4.

The Court of Appeals declined to review Dimas's claim on appeal that his appearance from a "jail booth" was unconstitutional because Dimas waived the issue by failing to

[4] __ Wn.3d ___, 549 P.3d 712 (2024).

object or by agreeing to proceed virtually. In contrast, the defendant in *Luthi*, explicitly objected to the use of a "holding cell." *Luthi,* 549 P.3d at 714. Because the issue was preserved, this Court was able to reach the merits of Luthi's arguments on appeal. These opinions are not, therefore, in contrast and review under RAP 13.4(b)(1) is thus inappropriate.

Further, the record in this case does not present any suggestion that Dimas appeared from any "holding cell" akin to the in-court holding cell present in *Luthi*. For example, there is no indication that Dimas was "on display" in the same manner as the defendant in *Luthi*. Similarly, there is no indication from this record of any manner of Dimas's appearances other than that he appeared from Zoom in a location separate from his attorney. In other words, the record here prevents this Court from reaching the issue raised by Dimas for review. "A party seeking review has the burden of perfecting the record so that the reviewing court has before it all of the relevant evidence." *State v. Vazquez*, 66 Wn. App. 573, 583, 832 P.2d 883 (1992)

(citation omitted). Dimas chose not to perfect the record when he failed to object to his remote appearances at the trial court and when he agreed to proceed with sentencing virtually. Thus, this Court cannot determine based on this record that Dimas appeared in court in a manner similar to the appearances in *Luthi* and Dimas therefore fails to show how the opinion of the Court of Appeals differs with the precedent of this Court.

As the opinion of the Court of Appeals in this case does not conflict with an opinion of this Court, this Court should therefore decline review under RAP 13.4(b)(1). Moreover, Dimas merely states, but does not analyze, why his appearance from a "jail booth" presents a significant question of constitutional law. As this Court has already issued guidance on the constitutionality of appearance from a "holding cell" and there is no indication in this record that the "jail booth" in this case and the "holding cell" in *Luthi* are alike, this Court should decline review under RAP 13.4(b)(3).

II. Dimas's right to confer with counsel.

Dimas asks this Court to review his claimed violation of his right to confer with counsel arguing that the opinion of Division II of the Court of Appeals conflicts with those of Division I and Division III. Although these opinions may appear to conflict at first blush, because Divisions I and III did not analyze the issue for manifest error, there is no conflict between divisions and Dimas fails to show that review is appropriate under RAP 13.4.

State v. Anderson[5] and *State v. Bragg*[6] reviewed the defendants' claims by presuming the existence of facts to which their records were silent and, in doing so, finding "obvious" error. *Anderson*, 19 Wn. App. 2d at 563 (remarking on the failure of the trial court to, on the record, "set any ground rules for how Mr. Anderson and his attorney could confidentially communicate"); *Bragg*, 28 Wn. App. 2d 497 (finding error by

[5] 19 Wn. App. 2d 556, 497 P.3d 880 (2021).
[6] 28 Wn. App. 2d 497, 536 P.3d 1176 (2023).

citing to the absence of facts on the record). Thus, the courts in *Anderson* and *Bragg* did not consider whether the claimed error was "manifest." In contrast, the Court of Appeals opinion in this case rejected Dimas's claim reviewing the issue entirely for "manifest error" as required by RAP 2.5(a)(3). In declining to review Dimas's claim, the court explained

> [t]he court in *Anderson* found a manifest constitutional error when deciding whether to consider the defendant's right to consult with counsel claim, but did not address in any detail why the error was manifest. *See* 19 Wn. App. 2d at 563. The court in *Bragg* also did not address manifest error. *See* 28 Wn. App. 2d at 504-05. Here, a review of the record shows that the trial court's error was not manifest because Dimas cannot show that an ability to confer with defense counsel would have made any difference.

Because the courts in *Anderson* and *Bragg* did not analyze claims for "manifest error," their decisions are not in conflict with the opinion of the Court of Appeals in this case. This Court should therefore decline review.

CONCLUSION

This Court should deny Dimas's petition for discretionary review.

This document contains 2,057 words based on the word count calculation of the word processing software used to prepare this response, excluding the parts of the document exempted from the word count by RAP 18.17(b). Additionally, I certify that all text appears in 14-point serif font equivalent to Times New Roman. RAP 18.17(a)(2).

DATED this 29th day of July, 2024.

Respectfully submitted:

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