Supreme Court No. ____
(COA No. 57528-1-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JACOB DIMAS,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Jacob Dimas, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision, published in part, dated March 5, 2024, for which reconsideration was denied on May 17, 2024. RAP 13.3(a)(2)(b); RAP 13.4(b) (copies attached as Appendix A and B).

B. ISSUES PRESENTED FOR REVIEW

1. Mr. Dimas appeared at every court hearing other than the jury portion of his trial from jail, confined in what the court called a "jail booth." This was done without any individualized justification and without informing him he had the right to speak privately with his attorney. This Court condemned this exact type of undignified and inherently prejudicial treatment of an accused person in *Luthi*.[1] The Court of Appeals likewise ruled such practices impermissibly interfere with a person's

[1] *State v. Luthi*, _Wn.2d _, _ P.3d _, 2024 WL 2967045 (June 13, 2024).

right to confidentially confer with counsel in *Bragg* and *Anderson*.[2] The published Court of Appeals decision ruling it was not error to restrain Mr. Dimas in jail during court hearings, without access to counsel, conflicts with this precedent.

2. Biases predicated on ethnicity or nationality are intolerable at a criminal trial. During Mr. Dimas' trial, a seated juror complained about other jurors who were mocking him based on his nationality. This juror believed the offending jurors held deep-seated biases and Mr. Dimas expressed concern this bias would extend to him due to his skin color. The trial court refused to remove these jurors or inquire into their derogatory comments. The trial court's refusal to ascertain the qualifications of jurors who expressed hostility toward another juror based on his country of origin is contrary to this Court's

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[2] *State v. Bragg*, 28 Wn. App. 2d 497, 536 P.3d 1176 (2023); *State v. Anderson*, 19 Wn. App. 2d 556, 497 P.3d 880 (2021), *rev. denied*, 199 Wn.2d 1004 (2022).

efforts to eradicate the impact of such bias in the legal system, denied Mr. Dimas a fair trial by an impartial jury, and raise an issue of substantial public interest.

3. A person charged with a crime has a due process right to be prosecuted in a timely manner so they may meet the charges against them. The State both negligently and purposefully delayed testing evidence and even after these tests, took years to prosecute Mr. Dimas. This 18-year delay undermined Mr. Dimas' ability to impeach the complainant with her prior crimes of dishonesty and gather evidence from relevant witnesses. The Court of Appeals unreasonably disregarded this prejudice and did not apply the test directed by this Court's precedent, meriting review.

4. The prosecution's closing argument misstated the strength of the DNA evidence, misrepresented the theory of defense, denigrated the defense, faulted the defense for failing to disprove the allegations, and injected facts not in evidence into the case to appeal to the jurors' emotions. The

prosecution's multiple improper tactics denied Mr. Dimas a fair trial and should be reviewed.

5. A deadly weapon sentencing enhancement requires proof a weapon was used in a manner likely to cause death during the incident. The Court of Appeals ruled that the mere threat posed by a weapon satisfies the statutory criteria even though the legislature specifically requires actual evidence of risk of death based on the way the implement was used. This Court should review the Court of Appeals' incorrect interpretation of the controlling statute.

6. RCW 9A.44.020(1) provides that in any prosecution under chapter 9A.44, it shall not be necessary that the testimony of the alleged victim be corroborated. No such provision exists for other criminal offenses. This statutory provision dilutes the prosecution's burden of proof and discourages the prosecution from timely investigating and seeking evidence contradicting the allegations. This Court should review this statutory

provision for the reasons explained in Mr. Dimas' original and supplemental Statement of Additional Grounds for Review.

C. STATEMENT OF THE CASE

1. 2003 Incident.

On September 12, 2003, Gretchen Alfrey left a bar after having several drinks. CP 97. She decided to cut through a park because she thought someone was behind her. *Id.* A man knocked her down and sexually assaulted her. *Id.* She believed from the person's voice he was someone who had asked her for a cigarette when she left the bar. *Id.*

Ms. Alfrey insisted the man raped her anally and vaginally and ejaculated inside her. *Id.*; 1RP 364-66, 373. She said he had a knife that he held to her neck while also holding her hands and he used it to cut her underwear, but the police did not find any such cuts. 1RP 364, 1RP 460.

Two nurses and a doctor took swabs from her vaginal, endocervical, perineal, vulvar, anal, and skin areas, and preserved her underwear. 1RP 398, 414-23, 431. CP 105-06. A

forensic analyst found no semen in the underwear or in any of the other swabs from intimate areas. 2RP 569-71. He only found a "very, very weak" presence of p30, the antigen found in seminal fluid, on a skin swab from the thigh and detected a "few spermatozoa heads" in that swab. 2RP 564, 569-71. The anal swab did not have any spermatozoa and a very weak positive reaction for p30. 2RP 573. The analyst noted the underwear was "so soiled" that it appeared the person "rarely washed," and it may contain evidence unrelated to the incident. CP 54.

A detective contacted Ms. Alfrey to determine her interest in prosecuting the case but he was unable to reach her. CP 54. The police conducted no further investigation until years later. *Id.*

2. Investigation in 2019 and 2020.

In 2013, a federal law offered money to states if they tested evidence from unresolved sexual assaults. CP 55, 92.

In 2016, a police officer reviewed the evidence in Ms. Alfrey's case and sent the swabs for further testing. CP 92. No tests occurred until 2019. CP 93.

In 2019, forensic analyst Whitney Simpson, examined the evidence for possible DNA. 2RP 511. There was some detectable male DNA in various swabs but the amount was so small it was impossible to obtain a DNA profile. 2RP 520-21. The only DNA profile she could locate came from Ms. Alfrey's thigh. 1RP 529-30. From this epithelial sample, Ms. Simpson identified the presence of male DNA and generated a DNA profile. *Id*.

In 2020, another analyst entered this profile in a DNA database and concluded it likely came from Mr. Dimas. 2RP 558; CP 95. In 2021, the prosecution charged Mr. Dimas. CP 1.

3. Trial and sentencing proceedings in 2022.

The State brought Mr. Dimas to Clark County and he appeared in court over video from the local jail, in what the court called a "jail booth," at each hearing other than the jury

trial, without an attorney in the same room. 1RP 2, 9, 19, 21, 30, 64, 78; 2RP 706; Stipulation as to Record on Appeal, 1-2. He was in the "jail booth" and appeared via Zoom on July 30, 2021; August 13, 2021; September 28, 2021; December 1, 2021, December 2, 2021; December 3, 2021; December 10, 2021; February 4, 2022; April 14, 2022; and June 10, 2022. Stipulation of Parties; CP 390-400 (minutes); 1RP 64, 78, 700.

Mr. Dimas was alone and in jail when his lawyer argued a motion to dismiss the case due to the prejudicial effect of the lengthy pretrial delay. 1RP 82-97. He appeared from the jail when the court decided the contested motions in limine governing the evidence that would be admissible at trial. 1RP 98-121.

The trial occurred in April 2022. Ms. Alfrey testified that in 2003, she was in an exclusive relationship with a person in prison and she had not had sexual intercourse with anyone since he went to prison four years earlier. 1RP 356-57. But at the later sentencing hearing, Ms. Alfrey said she was living with

her boyfriend, in a stable relationship, when this incident occurred, and it caused him to break up with her. 2RP 718-19. She did not explain this discrepancy.

Forensic Nurse Klein read from a report prepared in 2003. CP 105; 1RP 394-95, 399. She had no memory of the incident and did not know who the doctor or other nurse were who authored significant parts of the report. CP 105-07. The remaining witnesses also used their reports as the basis of their testimony. 1RP 316, 464, 517, 564, 575.

During the trial, Juror 7 complained about other jurors disparaging him because he was born outside the United States. 2RP 493-96. Juror 7 asked the court to either remove these jurors or excuse him from the case due to the way they mocked him based on national origin. 2RP 493. Mr. Dimas expressed concern the jurors' biases could also impact him because he has darker skin. 2RP 501. The court did not ask the jurors what they said. Instead it told the offending jurors it was important to not tell jokes that might offend people. 2RP 504, 506-07.

Mr. Dimas was convicted as charged. CP 153-54. He was not allowed to come to court in person for his sentencing, even though his attorney tried to arrange an in-court appearance. 2RP 699-701. Rather than postpone sentencing, Mr. Dimas agreed the court had discretion to conduct sentencing while he was held in jail, and appeared over video, but he expressed concern it could negatively influence the court's sentence. 2RP 708. The court imposed a life sentence with a minimum of 150 months to life, near the top of the standard range. 2RP 703-31.

The facts are further explained in Mr. Dimas's opening and reply briefs, incorporated here by this reference.

D. ARGUMENT

1. Contrary to the published Court of Appeals decision, holding Mr. Dimas in a "jail booth" for all hearings without explanation impermissibly prejudiced him, denigrated the presumption of innocence, and interfered with his right to counsel.

a. A person accused of a crime has the right to appear in court in person, unrestrained, and able to confer with counsel.

A person accused of a crime has the right to stand before the court "with the appearance, dignity, and self-respect of a free and innocent man." *State v. Finch*, 137 Wn.2d 792, 844, 975 P.2d 967 (1999); *Deck v. Missouri*, 544 U.S. 622, 631, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (2005); U.S. Const. amends. VI; XIV; Const. art. I, §§ 3, 22.

"[T]he due process right to appear without unjustified restraints is not limited to jury trial" and is not limited to actual metal shackles. *Luthi*, 2024 WL 2967045 at *3-4. Impermissible restraints include holding a person in "an in-court holding cell" in a jail courtroom. *Id*. *6.

An "in-court holding cell clearly undermines the presumption of innocence." *Id.* It involves a "physical separation" between the defendant and everyone else in the courtroom. *Id.* It serves as "a constant reminder of the accused's condition" as a jailee, inviting "negative, prejudicial inferences." *Id.*

Critically, this type of restraint significantly limits a person's "ability to communicate with her defense counsel." *Id.* (citing *Deck*, 544 U.S. at 630-31). A person appearing from a jail booth would necessarily have guards nearby and could not communicate with counsel in writing or orally without broadcasting to all present. *Id.*

Use of a jail-based holding cell also undermines the dignity of the courtroom, "which includes the respectful treatment of defendants." *Id.* The defendant is treated as a spectacle. *Id.*

To the extent any such restraint is constitutionally permissible, "there must be an individualized inquiry before

requiring [the accused] to appear" from any jail-based holding area. *Id*. at *7. This rule applies to all hearings, not only a jury trial. *Id*. at *4-5; *State v. Jackson*, 195 Wn.2d 841, 852-53, 467 P.3d 97 (2020).

Disregarding the established principles on which this Court relied in *Luthi*, the Court of Appeals ruled Mr. Dimas' repeated appearances from a jail booth for all court hearings other than the jury trial could not be viewed as prejudicial or even a manifest error. Slip op. at 7-9. This decision is contrary to this Court's precedent and raises a significant question of state and federal constitutional law. RAP 13.4(b)(1), (3).

b. Mr. Dimas was restrained, in jail, and unable to continuously communicate with counsel at every court hearing other than the jury trial.

The published portion of the Court of Appeals decision also disregarded recent rulings from Divisions One and Three involving jailed defendants who are required to appear from jail by video conferencing.

In *Bragg* and *Anderson*, the Court of Appeals agreed it was a manifest constitutional error to limit the defendant's appearance to a jail-based video screen without affirmatively advising the accused of their right to confidentially communicate with counsel at any time and telling them how to invoke that right on the record. *Bragg*, 28 Wn. App. 2d at 504; *Anderson*, 19 Wn. App. 2d at 562-63.

Bragg ruled the court's failure to set ground rules explaining how Mr. Bragg could confer privately with his lawyer or tell him he had a constitutional right to confer privately with counsel during the hearing manifestly violated his right to communicate with counsel during critical stages of the proceedings. 28 Wn. App. 2d. at 506-09. Mr. Bragg was held in jail and appeared over a video screen when the court ruled on contested issues and the record showed disagreements between the accused and his lawyer. *Id.* The Court of Appeals ordered a new trial due to this presumptively prejudicial treatment of the accused. *Id.* at 512.

In *Anderson*, the defendant also appeared in court by video from the jail for a post-appeal sentencing hearing. 19 Wn. App. 2d at 563-65. The Court of Appeals condemned this practice as a violation of the right to confidentially communicate with counsel. *Id.* at 560, 563-65. It cautioned courts not to use this practice without ensuring the defendant has the ability to confer with counsel. *Id.* at 563. Because that hearing at issue in *Anderson* involved uncontested sentencing corrections, Division Three found the constitutional violation was harmless.

Contrary to *Bragg* and *Anderson*, the Court of Appeals refused to recognize the significant rights at stake and the real risk of prejudice to Mr. Dimas when he was not told in advance of his right to confer with counsel or treated with the dignity afforded to other participants. It disregarded the perception of dangerousness that attaches when the court is continually reminded that the accused person remains confined in jail. It deemed that any error was not manifest because it did

not think his presence in court, without restraints, would not have made a difference in the outcome. Slip op. at 9.

The Court of Appeals gave no weight to the unjustified nature of keeping Mr. Dimas in jail during court hearings. It disregarded the contested substantive issues are stake during these hearings. It ignored the presumptively prejudicial impact on the presumption of innocence and Mr. Dimas' right to confer with counsel during these hearings.

Mr. Dimas was not accorded the individual dignity to which he is entitled before receiving a life sentence. He was not given constitutionally adequate access to counsel. The court had no individualized grounds for these restrictions on his rights. The published Court of Appeals decision encourages trial courts disregard the basic dignity accorded to accused persons and repeatedly conduct substantive court hearings with the accused person in a jail booth. Review should be granted because the Court of Appeals decisions conflicts with other

published Court of Appeals decisions as well as this Court's rulings. RAP 13.4(b)(1), (2).

2. Contrary to this Court's precedent, the Court of Appeals decision disregarded concerns of explicit bias displayed by other jurors based on nationality.

"Whether explicit or implicit, purposeful or unconscious, racial bias has no place in a system of justice. If racial bias is a factor in the decision of a judge or jury, that decision does not achieve substantial justice, and it must be reversed." *Henderson v. Thompson*, 200 Wn.2d 417, 421-22, 518 P.3d 1011 (2022), *cert. denied*, 143 S. Ct. 2412 (2023); *Peña-Rodriguez v. Colorado*, 580 U.S. 206, 222-23, 137 S. Ct. 855, 197 L. Ed. 2d 107 (2017); U.S. Const. amend. XIV.

When a fact-finder invokes and demeans another based on their nationality as "other" than American, the jurors' behavior presents a risk of activating biases against people who appear to not be sufficiently American, which is often a code

word for being not white. *State v. Bagby*, 200 Wn.2d 777, 794-95, 522 P.3d 982 (2023).

Due to the pervasive evil of bias based on race, ethnicity, or nationality, and its difficulty to detect, the impact of such apparent biases are assessed under an objective observer test. *Bagby*, 200 Wn.2d at 793-94; *State v. Zamora*, 199 Wn.2d 698, 718, 512 P.3d 512 (2022); *State v. Berhe*, 193 Wn.2d 647, 665, 444 P.3d 1172 (2019). The court asks whether an objective observer could conclude the jurors harbored racial or ethnic biases, including nationality-rooted prejudices that may impact their decision-making. *Berhe*, 193 Wn.2d at 665. An objective observer is aware of the history of race and ethnic discrimination in the United States and aware of implicit, institutional, and unconscious biases, in addition to purposeful discrimination. *Zamora*, 199 Wn.2d at 718; *Berhe*, 193 Wn.2d at 665.

Neither the Court of Appeals nor the trial court applied this test. When Juror 7 complained that two other jurors were

mocking him based on his country of origin, the trial court told those jurors it assumed they were joking. 2RP 503, 505, 507. It did not try to ascertain what the jurors actually said. By offering the jurors plausible deniability, the court likely reinforced their biases. *Henderson*, 200 Wn.2d at 432.

Yet the offended juror told the court these other jurors' behavior were not mere jokes but likely stemmed from deep-seated biases that could not be erased. 2RP 497-98. These jurors remained and deliberated.

The Court of Appeals decision sidestepped the substantial concern raised about seated jurors who expressed nationality-based hostility toward another juror by claiming Mr. Dimas did not object. Slip op. at 25. However, this is wrong. Mr. Dimas expressed clear concern that the jurors' biases would impact the case, particularly because of his own skin color. 2RP 501. But even if Mr. Dimas had not objected, a "trial judge has an independent obligation to protect" the accused's right to remove a biased juror, "regardless of

inaction by counsel or the defendant." *Irby*, 187 Wn. App. at 193; *see Pena-Rodriguez*, 580 U.S. at 209 ("unaddressed" racial bias displayed by jurors "risk[s] systemic injury to the administration of justice").

A juror who cannot try the issue impartially and without prejudice to the substantial rights of a party is actually biased. *State v. Irby*, 187 Wn. App. 183, 194, 347 P.3d 1103 (2015); *see* RCW 4.44.170(2); CrR 6.4(c). The court did not ensure that no biased jurors served in Mr. Dimas' case. This Court should grant review because the Court of Appeals decision is contrary to this Court's precedent and there is an untenable risk of bias among jurors who served in the case. *Henderson*, 200 Wn.2d at 421-22; *Berhe*, 193 Wn.2d at 663-65.

3. The Court of Appeals misapplied the controlling test where almost two decades of prosecutorial delay in charging Mr. Dimas impacted his ability to defend himself.

The State's delay in bringing charges against a person violates due process if it results from intentional or negligent

actions that are contrary to the fundamental concept of justice. *United States v. Lovasco*, 431 U.S. 783, 789, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977); *State v. Stearns*, _ Wn.2d _, 545 P.3d 320, 325 (2024); U.S. Const. amend. XIV.

As explained in *State v. Oppelt*, 172 Wn.2d 285, 295, 257 P.3d 653 (2011) and affirmed in *Stearns*, the court must consider, de novo, whether: (1) the delay caused actual prejudice to the accused; (2) the reasons for the delay stem from negligent or intentional conduct; and (3) then weighs the reasons for the delay and the prejudice to determine whether the prosecution of the case violates fundamental concepts of justice.

To satisfy the first prong, some slight prejudice suffices. *Stearns*, 545 P.3d at 326. The court does not weigh the extent of the prejudice. *Id*. The loss of potentially relevant testimony by a witness's death may be "slight prejudice," and this satisfied the prejudice prong of the test in *Oppelt*. *Id*. at 325 (citing *Oppelt*, 172 Wn.2d at 296). Likewise, a witness's death, and the loss of

her testimony "caused some actual prejudice to Stearns." *Id.* at 326.

Misconstruing this test, the Court of Appeals agreed Mr. Dimas lost the ability to cross-examine the complainant about her crimes of dishonesty. Slip op. at 23. Yet it decided this prejudice was not important enough to qualify as prejudice. *Id.* The Court of Appeals disregarded the importance of Mr. Dimas challenging Ms. Alfrey's claim that anyone sexually assaulted her, especially where her description of the incident was not supported by forensic evidence.

The Court of Appeals decision is contrary to *Stearns* and *Oppelt* and ignores the prejudice that attached to Mr. Dimas's inability to challenge the complainant's testimony due to the passage of time.

The second prong of the controlling test looks at the reason for the delay. But the Court of Appeals simply forgave the State for delaying the case for almost 20 years, ignoring the fact that the State simply decided not to test the evidence it had.

When it decided to test the evidence it collected for DNA 13 years later, it waited five more years to conduct the test. Even when it found a DNA profile, it waited several more years to see who the profile belonged to and file charges.

This unreasonable delay was negligent at best and purposeful in part. It did not rest on technological advances. This unnecessary delay significantly disadvantaged Mr. Dimas.

Almost 20 years after Ms. Alfrey claimed she was raped, Mr. Dimas could not mount any defense other than the challenge the DNA evidence. This was a valid and viable defense, because the very little physical evidence that existed did not corroborate Ms. Alfrey's claim of the manner in which she was assaulted. But Mr. Dimas should not have been forced to limit his defense to a DNA challenge. He could not let the jury know of Ms. Alfrey's record of dishonesty. He could not locate witnesses or explain his whereabouts.

The delay violates the fundamental conceptions of justice. The Court of Appeals misunderstood and misapplied the controlling test. Review should be granted.

4. This Court should address the way a prosecutor's misrepresentation of DNA evidence is significantly likely to impact the jury and violate the fairness of the proceedings.

Trial proceedings must not only be fair, they must "appear fair to all who observe them." *Wheat v. United States*, 486 U.S. 153, 160, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988). Prosecutorial misconduct violates the "fundamental fairness essential to the very concept of justice." *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974); U.S. Const. amend. 14; Const. art. I, §§ 3, 22.

In no circumstances may the prosecution mislead the jury about the inculpatory nature of its forensic evidence. *Miller v. Pate*, 386 U.S. 1, 7, 87 S. Ct. 785, 17 L. Ed. 2d 690 (1967). Such an argument is the equivalent of knowingly using false evidence. *Id.*; *see Berger v. United States*, 295 U.S. 78, 88, 55

S. Ct. 629, 79 L. Ed. 2d 1314 (1935) (prosecutor is quasi-judicial officer who must rely only on information in the record when presenting closing argument). .

A number of other states have emphasized the prejudicial impact of a prosecutor's misrepresentation of DNA evidence. When a prosecutor overstates the strength of DNA evidence in a case where that evidence is of central importance, it undermines the fairness of the proceedings. *Whack v. State*, 73 A.3d 186, 188 (Md. 2013). "[J]urors place a great deal of trust" in DNA evidence, but it "has the potential to be highly technical and confusing in a way that could unduly affect the outcome of a trial." *Id*. Overstating the strength of DNA evidence is likely to have a "powerful influence on the jury." *People v. Wright*, 37 N.E.3d 1127, 1135 (NY 2015). The prosecution "must abide by the limitations of its own proof and not make claims that its DNA evidence is more probative than the expert's testimony has shown it to be." *Duncan v. Commonwealth*, 322 S.W.3d 81, 96 (Ky. 2010).

This Court has not addressed this type of misconduct, based on overstating the strength of DNA evidence. Here the prosecution insisted the DNA evidence pointed only to Mr. Dimas and no one else. It argued, "No one else was identified in this situation. No one." 2RP 660. It added, "The only person identified, again I can't express the importance of this enough, from the sperm fraction, from the sperm . . . the only person that was identified is Jacob Dimas, the defendant." *Id.*

This argument fundamentally misrepresented the available forensic evidence. It implied Mr. Dimas was responsible for all male DNA when this was patently incorrect. The State detected other male DNA from vaginal, endocervical, perineal, and anal swabs, as well as from underwear but had no evidence this belonged to Mr. Dimas. 2RP 521-27, 531-32, 534, 538. It was just as likely it belonged to someone else.

The prosecution took advantage of the complexity of the DNA evidence to overstate its value. Due to the confusing nature of the DNA evidence, jurors would likely trust the

prosecution's assessment. Misrepresenting the strength of powerful scientific evidence is flagrant and ill-intentioned.

It also the type of argument that could not be cured by an instruction from the judge, because telling jurors to rely on their own recollection of the evidence will not remove the impact of the prosecution's interpretation of technical scientific evidence and its overstatement of the DNA evidence's significance. *Whack*, 73 A.3d at 202.

The prosecution committed other related misconduct. Misrepresenting the DNA evidence, it accused Mr. Dimas of concocting a theory that other men's DNA was found, and said this showed he was "trying to somehow blame the victim, somehow indicate, you know, as was said at the beginning, that there were other males involved, which there is absolutely no evidence of." 2RP 655. The prosecution's argument unfairly denigrated the defense and mislead the jury. *State v. Thierry*, 190 Wn. App. 680, 694, 360 P.3d 940 (2015).

In addition, the prosecution repeatedly asserted Mr. Dimas's gave no "other explanation" to disprove Ms. Alfrey's story and prove there was another perpetrator, thereby impermissibly shifting the burden of proof and urging the jury to use Mr. Dimas' failure to testify against him. 2RP 635, 637-39, 647.

It is "flagrant misconduct" for the prosecution "to shift the burden of proof to the defendant." *State v. Miles*, 139 Wn. App. 879, 890, 162 P.3d 1169 (2007). It is also misconduct for the prosecution to use the defendant's failure to testify to infer guilt. *State v. Sargent*, 40 Wn. App. 340, 346, 698 P.2d 598 (1985); *see State v. Ramirez*, 49 Wn. App. 332, 337, 742 P.2d 726 (1987) (reversing based on closing argument comments that would "naturally and necessarily" case jury to focus on defendant's failure to testify).

The prosecution also tried to appeal to juror sympathy by telling them how poor Ms. Alfrey was, even though there was no such testimony. 2RP 716. It told the jury not to "punish" Ms.

Alfrey for having dirty underwear because she could not afford to wash it. *Id*. No such evidence appeared in the record. It is impermissible for the State to bolster its case and appeal to juror sympathy based on facts not in evidence. *See State v. Echevarria*, 71 Wn. App. 595, 598, 860 P.2d 420 (1993).

The Court of Appeals disregarded the significance of this misconduct, particularly the danger of overstating DNA evidence. This Court should grant review to address it.

5. The Court of Appeals improperly blurred the distinction between a deadly weapon for purposes of committing a crime and for an enhancement, misapplying the controlling statutory scheme.

The prosecution bears the burden of proving the essential elements of a crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, §§ 3, 22. For evidence to be legally sufficient, a "modicum of evidence" on an essential element is "simply inadequate." *Jackson v. Virginia*, 443 U.S. 307, 320, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

A deadly weapon enhancement may not be imposed unless the jury finds the essential elements are proven beyond a reasonable doubt. *State v. Recuenco*, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008). To prove the knife Ms. Alfrey claimed Mr. Dimas used met the criteria for the additional penalty imposed as a sentencing enhancement, the prosecution had to prove he used:

> an implement or instrument which has the capacity to inflict death *and from the manner in which it is used, is likely to produce or may easily and readily produce death*.

RCW 9.94A.825 (emphasis added). The prosecution conceded it did not have evidence the knife was a per se deadly weapon because there was no information about the knife's blade. 2RP 662. It agreed it needed to prove it had the capacity to inflict death and was used in a manner likely to produce death. *Id.*

The possibility of causing substantial bodily injury is insufficient for a deadly weapon sentencing enhancement under RCW 9.94A.825. The prosecution must prove the weapon was

in fact used by the perpetrator in a manner likely to produce or readily capable of causing death. *Id.*

Here, the prosecution agreed it lacked evidence of how it met the elements of the deadly weapon enhancement. It conceded this unrecovered knife was probably not sharp. 2RP 662. It gave no specifics to support the deadly weapon enhancement. It offered no description of how this knife was used in a manner "likely" to cause death or in a way that would "easily and readily produce death," as required.

Instead, the prosecution addressed how the knife could satisfy the different elements of first degree rape, which requires a lesser threshold of force or threat of force. CP 146, 148; *see* RCW 9A.44.040(1)(a). Under that other definition, the prosecution only needed to prove Mr. Dimas threatened to use what appeared to be a deadly weapon, and defined deadly weapon as an implement capable of causing "substantial bodily harm." 2RP 627; CP 146. This definition of deadly weapon for purposes of proving first degree rape is markedly distinct from

the sentencing enhancement's requirement that the weapon had the capacity to inflict death and was actually used in a manner likely to cause death. CP 146, 152.

Unlike the deadly weapon element of first degree rape, the sentencing enhancement rests on how the weapon was actually used. CP 152. There was no evidence Mr. Dimas tried to cut Ms. Alfrey. Ms. Alfrey only said he held a knife near her neck but she never said he tried to use it and he did not cause any injuries or leave any marks. 1RP 364. The threat from a weapon is certainly significant, and it elevated the offense to a higher degree, but the weapon enhancement requires more.

The Court of Appeals misunderstood the controlling statutory requirements necessary for a deadly weapon enhancement. This Court should review this error.

6. This Court should review the issues raised in Mr. Dimas's Statement of Additional Grounds for Review, including the improper dilution of the State's burden through the non-corroboration requirement that applies only to sex offenses.

RCW 9A.44.020(1) provides that to convict a person of a sex offense in this RCW chapter "it shall not be necessary that the testimony of the alleged victim be corroborated."

The statute is unique. The legislature has singled out a category of accused persons and *explicitly* authorized conviction and punishment based on mere allegation, undermining the due process requirements of proof beyond a reasonable doubt as required by the Fourteenth Amendment.

This statutory provision gives special privileges to a class of persons without reasonable cause, contrary to article I, section 12 and the Fourteenth Amendment's guarantee of the equal protection of the laws. U.S. Const. amend. XIV. It applies only to offenses charged under RCW ch. 9A.44 and no other crime victims receive this more lenient treatment. This privilege increases the risk that innocent people will be convicted based

on mere allegation. There is no reasonable basis for this treatment as required by the Fourteenth Amendment.

As explained in Mr. Dimas' Statement of Additional Grounds for Review and his Supplemental Statement of Additional Grounds, this Court should grant review and address the constitutionality of RCW 9A.44.020(1).

E. CONCLUSION

Petitioner Jacob Dimas respectfully requests that review be granted pursuant to RAP 13.4(b).

Counsel certifies this document contains 5507 words and complies with RAP 18.17(b).

DATED this 17th day of June 2024.

Respectfully submitted,

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APPENDIX A

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JACOB GABRIEL DIMAS, Appellant.	No. 57528-1-II PART PUBLISHED OPINION

MAXA, P.J. – Jacob Dimas appeals his 2022 conviction of first degree rape, arising from a sexual assault that the victim reported to the Vancouver police department in 2003.

Dimas appeared at all pretrial hearings from a booth at the jail, while his defense counsel either was present in court or appeared remotely over Zoom. Dimas argues that appearing remotely from a jail booth at court proceedings violated his constitutional right to confer privately with counsel.

However, Dimas did not object to this arrangement at any time in the trial court. As a result, he cannot raise this issue for the first time on appeal unless he can establish manifest error affecting a constitutional right under RAP 2.5(a)(3). We conclude that although Dimas asserts a constitutional right, he cannot show manifest error. Therefore, we decline to consider his right to counsel claim. In the unpublished portion of this opinion, we address the remainder of Dimas's claims.

Accordingly, we affirm Dimas's conviction but, as discussed in the unpublished portion of the opinion, we remand for the trial court to strike the community custody conditions prohibiting contact with minors and entering areas where children congregate, community custody supervision fees, and the $500 crime victim penalty assessment (VPA).

FACTS

In September 2003, GA reported to the Vancouver police department that she had been sexually assaulted at knife point. She went to the hospital for a sexual assault exam. A state crime lab technician examined GA's sexual assault kit and located a single sperm. But he stated that it was unlikely that the small amount of sperm could be used to obtain a DNA profile.

The case was dormant until 2016, when GA's sexual assault kit was sent to the Washington State Patrol (WSP) crime lab. A low level of semen was detected. A DNA profile was developed, and in April 2020 it was determined that the profile matched Dimas's DNA. Dimas's DNA was available because he had been required to provide a DNA sample after being convicted of offenses in 2003.

In February 2021 the State charged Dimas with first degree rape while armed with a deadly weapon.

Pretrial Hearings

Dimas appeared remotely via Zoom from a jail booth for his bail, arraignment, and various other pretrial hearings. Whenever Dimas appeared remotely, defense counsel appeared from a different location than him. Dimas did not object to appearing remotely at any of the hearings. However, the trial court never set any ground rules for how Dimas and defense counsel could confidentially communicate during the hearings where Dimas appeared remotely.

At Dimas's bail hearing, the trial court addressed his first degree rape charge and an unrelated fugitive warrant. At the beginning of the hearing, Dimas expressed confusion about the fugitive warrant. The court placed Dimas in a breakout room to talk to his attorney. When they came out of the breakout room, Dimas's attorney stated that they were ready to proceed on both the first degree rape charge and the fugitive warrant. The court appointed defense counsel and set Dimas's bail at $300,000.

At Dimas's arraignment hearing, he entered a not guilty plea, and the trial court scheduled the trial for October 4, 2021, which was within the 60 day time to trial deadline.

At the September 2021 pretrial hearing, the State submitted a discovery request – instead of a search warrant – for a cheek DNA swab from Dimas. Defense counsel did not object to the State's DNA discovery request. The trial court entered an order for obtaining DNA from Dimas. Defense counsel also requested a continuance for trial so he could have additional time to interview witnesses. But defense counsel clarified to the trial court that Dimas was not willing to waive his right to a speedy trial. The court found good cause under CrR 3.3 to go outside the time to trial deadline and permitted a continuance. The court scheduled the trial for December 6.

At the December 2021 pretrial hearing, defense counsel requested another trial continuance. Defense counsel told the trial court that he was unable to see Dimas at the jail unless Dimas had a negative COVID test, due to a new rule by the jail. Defense counsel also noted that he was having a difficult time getting ahold of witnesses and that he still had not been able to interview GA. Defense counsel clarified to the trial court that Dimas was not willing to waive his right to a speedy trial. But the court found grounds for a continuance and at the next pretrial hearing scheduled the trial for February 14, 2022.

At the February 2022 pretrial hearing, the trial court heard and denied Dimas's motion to dismiss for preaccusatorial delay. The court also ruled on a number of motions in limine, including the denial of Dimas's request to impeach GA with her crimes of dishonesty that were more than 10 years old.

The trial court again continued the trial date due to a COVID suspension of trials. During a colloquy with counsel, Dimas interrupted the court, stating that he had a question. The court told Dimas that "it's probably not better to address the Court directly, but if you need a moment to confer with your attorney, I would suggest that you let him know that." Rep. of Proc. (RP) at 116. Defense counsel then requested a breakout room to talk to Dimas, which the court allowed. When they returned, defense counsel told the court that Dimas was not willing to waive his right to a speedy trial. The court found good cause to continue the trial date to April 18.

Verdict and Sentence

The jury found Dimas guilty of first degree rape with a deadly weapon sentencing enhancement.

Dimas appeared remotely from a jail booth for his sentencing hearing. Defense counsel told the trial court that Dimas wanted to be present in the courtroom for sentencing. The trial court put Dimas and defense counsel in a breakout room to discuss the issue because the jail had confirmed that it would not be able to bring Dimas in person that day. Dimas agreed to continue with sentencing remotely rather than wait until the following week when he could appear in person.

Dimas appeals his conviction and sentence.

ANALYSIS

Dimas argues that participating in court proceedings from a jail booth violated his right to privately confer with counsel at all critical stages. However, Dimas did not object to this arrangement in the trial court. We hold that Dimas cannot raise this issue for the first time on appeal because he cannot establish a manifest error under RAP 2.5(a)(3).

A. LEGAL PRINCIPLES

A criminal defendant has the right to counsel under both the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington constitution. *State v. Heng*, 2 Wn.3d 384, 388, 539 P.3d 13 (2023). The right to counsel attaches at the defendant's "first preliminary appearance before a judge unless it is simply not feasible for some extraordinary reason." *Id.* at 391.

Failure to have counsel present at a hearing constitutes structural error requiring automatic reversal if the hearing was a critical stage of the prosecution. *Id.* at 392. However, "not all pretrial hearings are critical stages." *Id.*. "[A] critical stage is one where a defendant's rights were lost, defenses were waived, privileges were claimed or waived, or where the outcome of the case was otherwise substantially affected." *Id.* at 394. "[W]e consider if rights were lost in a way that demonstrably affected the outcome of the case." *Id.* at 394-95.

Here, Dimas was provided with counsel at all of the challenged hearings. However, the right to counsel also requires defendants to have the ability to confer meaningfully and privately with their attorneys at all critical stages of the proceedings. *State v. Anderson*, 19 Wn. App. 2d 556, 562, 497 P.3d 880 (2021), *review denied*, 199 Wn.2d 1004 (2022). And it is the trial court's role to ensure that attorneys and clients have the opportunity to privately consult. *Id.* In assessing whether the right to confer has been violated, "reviewing courts should consider the

totality of the circumstances, *including* whether the trial court explicitly established a process for such communications, given the variety of different circumstances that may occur." *State v. Bragg*, 28 Wn. App. 2d 497, 507, 536 P.3d 1176 (2023).

When a defendant is provided with counsel, deprivation of the right to meaningfully and privately confer with that counsel does not trigger structural error. *See State v. Heddrick*, 166 Wn.2d 898, 910, 215 P.3d 201 (2009) (stating that "[a] *complete* denial of counsel at a critical stage of the proceedings is presumptively prejudicial and calls for automatic reversal") (emphasis added). Instead, courts have applied the constitutional harmless error analysis. *Bragg*, 28 Wn. App. 2d at 512; *Anderson*, 19 Wn. App. 2d at 564. Under this analysis, the State has the burden of proving harmlessness beyond a reasonable doubt. *Anderson*, 19 Wn. App. 2d at 564.

Although the deprivation of the right to counsel is a constitutional claim, it can be raised for the first time on appeal only if the claim is manifest, as required by RAP 2.5(a)(3). *Id.* at 562.

In *Anderson*, the defendant and his attorney were not physically located in the same room during a resentencing hearing because the defendant participated by video from the jail and his attorney appeared by telephone from a separate location. *Id.* at 561, 563. The trial court did not set any ground rules for how the defendant and his attorney could confidentially communicate during the hearing. *Id.* at 563. Division Three of this court held that it was not apparent how private attorney-client communication could have taken place and that it was unrealistic to expect the defendant to assume he could interrupt the trial court proceedings when he wanted to speak with his attorney. *Id.* Therefore, the defendant met his burden of showing that there was a manifest constitutional error. *Id.* However, the court held that the State met its burden of showing constitutional harmless error. *Id.* at 564-65.

In *Bragg*, the defendant participated in all pretrial hearings by video while his attorney appeared in court. 28 Wn. App. 2d at 502-03. The trial court never explained how the defendant and his attorney could confidentially communicate and did not inform the defendant of his constitutional right to do so. *Id.* at 508. Although the defendant "continually and impolitely" interrupted the trial court, Division One of this court held that it was error for the trial court to place the burden on the defendant to assert his right to confer with counsel. *Id.* at 511.

The court focused on four critical stage pretrial hearings, including a hearing discussing a plea offer and three hearings discussing DNA evidence. *Id.* at 512. The court held that it could not know beyond a reasonable doubt whether the outcome of the case would have differed if the defendant had availed himself of his attorney's confidential assistance during the four critical stage hearings. *Id.* at 516. Therefore, the court reversed the defendant's convictions and remanded for a new trial. *Id.*

B. MANIFEST ERROR

RAP 2.5(a)(3) states that a party is allowed to raise a "manifest error affecting a constitutional right" for the first time on appeal. To determine the applicability of RAP 2.5(a)(3), we inquire whether (1) the error is truly of a constitutional magnitude, and (2) the error is manifest. *State v. J.W.M.*, 1 Wn.3d 58, 90, 524 P.3d 596 (2023). An error is manifest if the appellant shows actual prejudice. *Id.* at 91. The appellant must make a plausible showing that the claimed error had practical and identifiable consequences at trial. *Id.*

The 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.

Initially, Dimas's bail hearing and arraignment were not critical stages to which the right to counsel attached. *See Heng*, 2 Wn.3d at 395. And Dimas does not explain how consulting with defense counsel would have changed the outcome of these hearings.

At the September 2021 hearing, defense counsel waived his right to refuse to provide a DNA sample without a warrant. However, the State already had Dimas's DNA because of his prior convictions. And when the DNA sample from GA was tested in 2020, a match was declared with Dimas. Therefore, there was enough probable cause for a judge to issue a warrant even if defense counsel had challenged the discovery request. There is no indication that Dimas consulting with counsel would have changed the outcome of this hearing.

At the September 2021 and December 2021 hearings, the trial court granted trial continuances despite Dimas's refusal to waive his speedy trial right. But the trial court had legitimate reasons for granting the continuances, defense counsel informed the court of Dimas's objections, and there is no indication that Dimas's ability to confer with counsel would have changed the result. In addition, there is no indication that *when* trial occurred affected the outcome of the case.

At the February 2022 hearing, the trial court denied Dimas's motion to dismiss for preaccusatorial delay and Dimas claims that he *may* have been able to provide additional information regarding this motion, but he does not identify that information. And Dimas and defense counsel were able to confer prior to the hearing. Therefore, even if Dimas had spoken with defense counsel at the hearing, he fails to show that the result would have been different. *See Anderson*, 19 Wn. App. 2d at 564.

Regarding the motion on Dimas's request to impeach GA with her prior convictions, that motion involved only questions of law. There is no indication that Dimas could have provided any information to defense counsel relating to the legal issues addressed.

The trial court also continued the trial date to a later date at the February 2022 hearing. However, Dimas and defense counsel did speak privately in a breakout room and defense counsel made known Dimas's objection to continuing the trial.

At Dimas's sentencing hearing, before sentencing began Dimas and defense counsel went into a breakout room and discussed whether he wanted to be sentenced remotely from the jail booth or postpone the hearing to the following week when he could appear in person. Dimas chose to continue remotely. Dimas and defense counsel were able to confer privately prior to the hearing and Dimas was able to speak directly to the trial court.

The record does not indicate that the trial court would have made a different decision or that the verdict would have been different if Dimas had been given the opportunity to speak privately with defense counsel during the various hearings. Therefore, Dimas has not met his burden of showing manifest constitutional error.

Accordingly, we decline to consider Dimas's unpreserved claim that his right to counsel was violated.

CONCLUSION

We affirm Dimas's conviction but, as discussed in the unpublished portion of the opinion, we remand for the trial court to strike the community custody conditions prohibiting contact with minors and entering areas where children congregate, community custody supervision fees, and the $500 VPA.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

UNPUBLISHED OPINION

In the unpublished portion of this opinion, we address and reject Dimas's remaining arguments. We hold that (1) Dimas waived his right to be present claim based on his appearances from jail because he failed to object in the trial court; (2) Dimas's preaccusatorial delay claim fails because he did not show actual prejudice as a result of the delay in charging him with first degree rape and the record showed that the delay did not violate fundamental conceptions of justice; (3) Dimas failed to preserve for appellate review the issue of the right to unbiased jurors; (4) the prosecutor's statements during closing argument were not improper; (5) the evidence was sufficient to support the jury's verdict on the sentencing enhancement because the State proved that a deadly weapon was easily accessible during the commission of the crime and that there was a nexus among Dimas, the weapon, and the crime; (6) as the State concedes, the community custody conditions prohibiting contact with minors and entering areas where children congregate must be stricken; (7) as the State concedes, the community custody supervision fees must be stricken because RCW 9.94A.703(2) no longer authorizes the imposition of such fees; and (8) because the recent amendment to RCW 10.01.160(3) provides that the VPA cannot be imposed if the defendant is indigent, the $500 VPA must be stricken.

Dimas also asserts multiple grounds for relief in a statement of additional grounds (SAG) and in an amended affidavit supplementing the SAG. We reject or decline to consider Dimas's SAG claims.

ADDITIONAL FACTS

Background

In September 2003, when GA was 33 years old, GA reported to the Vancouver police department that she had been sexually assaulted at knife point. She gave a detailed verbal statement to a police officer.

GA stated that she left a bar in downtown Vancouver after consuming a few drinks. As she walked past another bar, a man who was standing next to a blonde man in a wheel chair asked her for a cigarette. She told him she did not smoke and kept walking. GA then felt that there was someone following her. She walked through a park and heard something behind her. Someone swept her legs out from under her, causing her to fall to the ground. The person fell on top of her, covered her mouth, and told her to shut up. GA recognized the person as being the same man who asked her for a cigarette.

GA said that the man pulled her pants down. He then produced a large folding knife and cut her underwear to expose her genitals. He again told GA to shut up or he would stab her in the neck. The man penetrated her anally with his penis, then flipped her onto her back and penetrated her vaginally with his penis. GA stated that the man did not use a condom and ejaculated inside of GA's vagina.

GA also stated that when the man finished assaulting her, he grabbed GA's purse and quickly walked away. GA briefly followed him until he realized he was being followed. The man ran away and GA lost sight of him. She found a pay phone to call 911 and reported the incident. GA then went to the hospital for a sexual assault exam.

Initial Investigation

Officer Jane Easter investigated GA's report. Easter viewed GA's underwear in evidence and stated that they looked to be slightly ripped, but it did not appear that the underwear had been cut. Easter later spoke to GA about the assault. Easter then completed and submitted a WSP lab request to send in the sexual assault kit for processing.

In October 2003, officer Stuart Hemstock left two messages for GA to schedule a time for her to come to the office to prepare a composite drawing of the perpetrator. When Hemstock called GA a third time, he discovered that the phone number had been disconnected. In November, he then went to her listed address in Hazel Dell and found the apartment vacant. Hemstock recommended to suspend the case and take "no further action without victim contact/cooperation." Clerk's Papers (CP) at 103.

In December, Hemstock spoke with Kenneth McDermott, a state crime lab technician, about the findings of GA's sexual assault kit. McDermott stated that a single sperm head had been located. McDermott also stated that it was unlikely that the small amount of sperm could be used to obtain a DNA profile. He recommended not to send the sample to Tacoma for testing without a willing and cooperating victim. McDermott stated that he would return the sample to the Vancouver police department for resubmittal if GA later indicated a willingness to assist with the investigation. Hemstock again recommended to suspend the case.

Reopened Investigation

In December 2016, in compliance with a 2013 law, the Vancouver police department conducted an audit on all the sexual assault kits that currently were in evidence. Any kit that had not been tested was sent to the WSP crime lab and the FBI lab.

GA's sexual assault kit was sent to the WSP crime lab and the results stated, "A low level of semen detected on the examined portions of the inner thigh skin and on anal swabs. No indication semen was detected on oral, perineal/vulvar, endocervical/vaginal swabs and underpants." CP at 92.

In March 2019, Sorenson Forensics Lab completed a DNA report. The report stated that male DNA was present in vaginal, endocervical, perineal and vulvar, anal, fingertip, and inner thigh swabs. Male DNA also was present in the inside crotch area of GA's underwear.

A sperm fraction – a mixture of two DNA profiles, one of which was genetically male – was found in the inner thigh swabs. The deduced male DNA profile from the inner thigh swabs were found suitable for a DNA comparison.

In April 2020, the WSP crime lab entered the DNA profile from the sperm fraction into the Combined DNA Index System (CODIS), which declared a match with Dimas. Dimas' DNA was in CODIS from a June 2003 felony conviction.

In June 2020, after several weeks of researching and calling relatives, a Vancouver police officer contacted GA and informed her of the DNA results. GA stated that she did not know Dimas and confirmed that she had not had sexual intercourse with anyone else during the time frame of her 2003 sexual assault. GA also stated that she did not think she would be able to identify Dimas from a photo.

Motion to Dismiss

Before the trial began, Dimas filed a motion to dismiss for preaccusatorial delay under CrR 8.3(b) and the due process clause of the United States and Washington Constitutions. Dimas claimed that he was actually prejudiced by the delay because the State's witnesses would not have an independent recollection of the events that they would be testifying about, there were

unknown witnesses, and he no longer had the opportunity to obtain potential video evidence or speak with potential witnesses.

Dimas relied on interviews with Renee Klein, a registered nurse who was a part of the sexual assault response team that completed GA's sexual assault kit at the hospital in 2003, and McDermott, the state crime lab technician. In her interview, Klein stated that she did not have any independent recollection of her interaction with GA in 2003 and that she would be basing her testimony on the 2003 sexual assault report. She noted that there was a physician's signature on the report but that she did not know who it was. Klein also indicated that another nurse's notes were in the report. McDermott stated that he did not have an independent recollection of his interaction with the test samples in 2003 and that he would be basing his testimony on his 2003 report and notes.

Dimas also claimed that he was no longer able to impeach GA with her criminal history of dishonesty due to the delay. GA was convicted of third degree theft of welfare in 1994, second degree felony possession of stolen property in 2001, felony bail jumping in 2002, and third degree theft in 2007 and again in 2011. But under ER 609(b), a crime of dishonesty generally cannot be used for impeachment if more than 10 years have passed since the witness was released from confinement for the crime.

The trial court found that Dimas did not show any actual prejudice and that the claimed prejudice was speculative. The court also found that the State did not intentionally cause the delay because the delay was "based on the process and structure of the investigatory system at the time of the crime." CP at 241. The court found that there was no due process violation and denied Dimas's motion to dismiss.

Opening Statements

During opening statements, defense counsel stated,

> [T]here will not be evidence presented that my client's DNA is in [GA's] vaginal canal, anal canal. There's [] no proof that my client's DNA was in her perineum, her vulvar – her vulva, excuse me, her fingertip swabs, or her underwear. The DNA experts are going to testify, "Yeah, there's male DNA in these places. We don't know who that is." An unknown male's DNA is in those other places.
>
> Mr. McDermott is going to testify that the underwear . . . does not have any semen on them, had a strong foul odor. Forensic scientist . . . Whitney Simpson will testify that DNA can last for a very long time. And it will last longer if nobody washes it away.

RP at 311-12.

Trial Testimony

On direct examination, GA described the 2003 sexual assault based on what she could remember. She stated that the man who assaulted her had a knife that he held up against her neck. As he was holding the knife to her neck, the man told GA "to shut the f*** up" and that he was "not going to take no for an answer." RP at 369.

The prosecutor asked GA if she had a cell phone in 2003, to which she responded that she could not remember. But she did remember going to a pay phone to call 911 after the assault.

Klein testified that she was a registered nurse in 2003. While testifying she referred to GA's 2003 medical record. Klein noted that a doctor, another SART nurse, and herself documented on the report.

The State presented evidence regarding the DNA testing of the sperm fraction found on GA's thigh and the match with Dimas.

There was evidence that GA's underwear was dirty after the sexual assault. Whitney Simpson is a forensic DNA analyst consultant who was employed at Sorenson Forensics in 2019. She testified that washing clothing would make it less likely to obtain DNA from the clothing

than if it had just been worn and not washed yet. She stated the inside crotch area of GA's underwear was positive for male DNA.

Juror Bias

During trial, the trial court advised both parties that juror 7 made a complaint about how jurors 1 and 2 were treating him and that juror 7 asked that either they both be removed from the jury or he be removed.

Juror 7 told the trial court that jurors 1 and 2 "made some rather odd, disparaging comments about me being from Canada; i.e., one said, oh, it must be his fault. He's from Canada. And the other one laughed." RP at 495. The court asked juror 7 if admonishing jurors 1 and 2 and telling them not to engage in retaliatory conduct would be sufficient to allow him to deliberate freely. Although juror 7 stated that he didn't think the behavior would change, he felt that he could still proceed and do his job.

The trial court asked defense counsel if he had any concerns. Counsel expressed that he had a concern about whether jurors 1 and 2 had actual prejudice against people from different countries. He noted that although Dimas was a United States citizen, he did have "darker skin tones." RP at 501.

The trial court spoke to jurors 1 and 2 separately. The court told juror 1 that juror 7 found his jokes offensive and derogatory and although the court was not going to cross-examine or judge him, it wanted to remind him that as a juror, he must set aside any prejudices or biases that he may have. Juror 1 responded that all he said was "hockey," but that he understood and would refrain. RP at 505. And he apologized.

The trial court made similar statements to juror 2. It reminded him that jurors must have open communication and need to set aside any biases and prejudices. Juror 2 responded, "That's fine." RP at 508.

Once the jurors left, the trial court again asked both parties if they had any concerns. The State and defense counsel both said no.

Closing Arguments

During closing argument, the prosecutor responded to defense counsel's opening statement:

> We heard at the beginning of this case from counsel that we were going to see multiple males' DNA in the testing done relating to the victim. We did not see that. There's no evidence to suggest that at all. We have one male's DNA that was identified in all of the evidence in this case, one male. And that male the State would suggest based on the odds we were given, 16.8 octillion I think for Caucasians at least, was the defendant, Jacob Dimas, 27 zeros. Well, there's only 330 some-odd million people in the U.S. population, and that's what that statistic was based out of. So think about that. We again do not have any evidence at all that was presented to us that there was multiple males' DNA as we were told we would see at all.

RP at 633-34.

The prosecutor also noted that the sperm cell and sperm fraction were the only parts of the DNA that had a profile for a male that was sent for testing because the amounts were too low in the other samples. And the one sample that was tested was the one that matched Dimas.

The prosecutor then commented on the State's theory of the case:

> [W]hat other explanation do we have as to how Jacob Dimas's sperm got on [GA's] inner thigh other than what she told us? The State would submit none. There should be no other reasonable explanation and thus no reasonable doubt as to how a sperm cell that's DNA profile matched Jacob Dimas got on her inner thigh.

RP at 635. The prosecutor further stated, "We heard no other explanation from the victim's story as to how that could have happened. We would submit that based on all of the evidence there is no other reasonable explanation." RP at 637-38.

The prosecutor also made comments regarding the situation that GA was in at the time of her sexual assault:

> Not everybody gets to wash their clothes every day, Ladies and Gentlemen. Not everybody, you know, has the best housing situation. Not everybody gets to afford a cell phone back in 2003. Not everybody can afford their rent and stay in their apartment for as long as it takes for a detective to try and follow up with you later. But nobody should be punished for that.

RP at 635.

The prosecutor again discussed the DNA evidence, stating, "So the sperm fraction – and recall Mr. McDermott told us it was the inner thigh swab that he was able to find spermatozoa through his testing. Okay. And that was the only location he was able to find it he told us." RP at 648. He told the jury that it was Dimas's DNA beyond a reasonable doubt.

The prosecutor again discussed how no other males were involved:

> And we could again make an issue about how dirty [the underwear] is, et cetera. That's just – it's not important at all as to what happened here. That's trying to detract from what happened, trying to somehow blame the victim, somehow indicate, you know, as was said at the beginning, that there were other males involved, which there is absolutely no evidence of.

RP at 655. He further stated,

> No one else was identified in this situation. No one. The only person identified, again I can't express the importance of this enough, from the sperm fraction, from the sperm – the same swab that Mr. McDermott saw spermatozoa, sperm, not skin cell, touch, inner thigh, she's wearing jeans, the only person that was identified is Jacob Dimas, the defendant.

RP at 660.

Dimas did not object to any of these statements. And during Dimas's closing argument, defense counsel responded to the prosecutor's statements. He stated, "I assume counsel is right on this one that I said multiple persons. I guess what I should have said is easily could be multiple persons." RP at 670. And then defense counsel summarized each swab where DNA was found and whether it was Dimas's DNA.

After trial, the jury found Dimas guilty of first degree rape with a deadly weapon enhancement. The trial court sentenced Dimas to 150 months of confinement. The court also imposed community custody conditions prohibiting contact with minors and prohibiting Dimas from entering areas where children congregate.

The trial court determined that Dimas was indigent. But it still ordered Dimas to pay community custody supervision fees and a $500 VPA.

ANALYSIS

A. RIGHT TO BE PRESENT

For the first time on appeal, Dimas argues that the trial court's videoconference hearings regarding bail, arraignment, DNA collection, continuances, trial evidence, and his motion to dismiss deprived him of his right to be present.

Under RAP 2.5(a), "[t]he appellate court may refuse to review any claim of error which was not raised in the trial court." However, an exception applies for manifest errors affecting a constitutional right. RAP 2.5(a)(3).

Although defendants have a constitutional right to be present at all critical stages of court proceedings, this right can be waived by failing to object. *Anderson*, 19 Wn. App. 2d at 561. Dimas did not object to any of the videoconference hearings. Therefore, to the extent that the

virtual hearing process implicated Dimas's right to be present, this issue has been waived. *See id.* at 561-62.

Dimas did object to not being physically present at his sentencing hearing. But he waived this right when he agreed to proceed virtually rather than continue the hearing to the following week when the jail would be able to transport him to court.

Accordingly, we decline to consider Dimas's right to be present claim.

B. PREACCUSATORIAL DELAY

Dimas argues that the trial court erred in denying his motion to dismiss because preaccusatorial delay violated his right to due process. We disagree.

1. Legal Principles

"A court will dismiss a prosecution for preaccusatorial delay if the State's intentional or negligent delay violates a defendant's due process rights." *State v. Maynard*, 183 Wn.2d 253, 259, 351 P.3d 159 (2015). We use a three-pronged test to determine whether preaccusatorial delay violated a defendant's due process rights:

> (1) the defendant must show he or she was actually prejudiced by the delay; (2) if the defendant shows actual prejudice, the court must determine the reasons for the delay; and (3) the court must weigh the reasons for delay and the prejudice to determine whether fundamental conceptions of justice would be violated by allowing the prosecution.

Id. Greater prejudice must be shown if the government conduct is negligent rather than intentional. *State v. Oppelt*, 172 Wn.2d 285, 293, 257 P.3d 653 (2011).

In addition, the possibility of prejudice is not sufficient to meet the burden of showing actual prejudice. *State v. Rohrich*, 149 Wn.2d 647, 657, 71 P.3d 638 (2003). " '[A] mere allegation that witnesses are unavailable or that memories have dimmed is insufficient.' " *Id.* (quoting *State v. Norby*, 122 Wn.2d 258, 264, 858 P.2d 210 (1993)).

Whether preaccusatorial delay violates due process is a question of law that we review de novo. *Oppelt*, 172 Wn.2d at 290. We must examine "the entire record to determine prejudice and to balance the delay against the prejudice." *Id.*

In *State v. McConnell*, the defendant was convicted of first degree rape. 178 Wn. App. 592, 595, 315 P.3d 586 (2013). He argued that preaccusatorial delay violated due process when the 12-year delay resulted in his mother no longer being alive to testify. *Id.* at 605-06. But the court held that the defendant did not show actual prejudice because he did not identify what his mother would have said or what her testimony would have shown. *Id.* at 607.

The defendant also claimed that the State should have compared an unknown sample to the DNA database and retested the DNA before 2010. *Id.* at 607. The court held that " ' investigative and administrative delays in the processing of a case are fundamentally unlike delay undertaken by the [State] solely "to gain tactical advantage over the accused." ' " *Id.* at 607-08 (quoting *State v. Alvin*, 109 Wn.2d 602, 606, 746 P.2d 807 (1987)). And the record showed that the WSP crime lab retested DNA profiles only when a specific request was made due to limited resources. *McConnell*, 178 Wn. App. at 608. Therefore, the delay in retesting the DNA was not to gain a tactical advantage and the delay in filing a charge did not violate fundamental conceptions of justice. *Id.*

In *State v. Stearns*, the court determined that dismissal was warranted based on preaccusatorial delay when the State did not charge the defendant until 19 years after the incident. 23 Wn. App. 2d 580, 581-82, 517 P.3d 467 (2022). Prejudice was established because a witness who was critical to the defense had died before trial. *Id.* at 586-90. Further, the State did not have a valid explanation for the fact that 12 years passed between a determination of probable cause to charge the defendant and charges being filed. *Id.* at 590-93. And the court

concluded that the prejudice to the defendant significantly outweighed the reasons for the decision to delay filing charges for 12 years. *Id.* at 593-94.

2. Analysis

a. Prejudice

The first step in the analysis is to determine whether Dimas can show prejudice. *Maynard*, 183 Wn.2d at 259. First, Dimas argues that the preaccusatorial delay prejudiced him because witnesses were unavailable.

Regarding witnesses, a nurse and doctor who performed GA's genital exam in 2003 were unable to be located to testify. But Dimas does not identify what their testimony would have shown. He merely claims that he was unable to ask the nurse questions about GA's exam and was unable to verify the doctor's report. Dimas also claims that he did not have the ability to seek surveillance videos or talk to potential witnesses from the bar where GA's assailant asked her for a cigarette. But he does not show if there were any videos or witnesses even available, or what the videos and testimony would show. Dimas instead speculates about the witness testimony and video evidence that might exist.

This case is different than *Stearns*, where an identified witness who would provide testimony that was favorable to the defendant was unavailable because of the delay. 23 Wn. App. 2d at 585. Here, Dimas can point to no witness or even potential witness who would provide favorable testimony. We conclude that Dimas cannot show prejudice based on the unavailability of witnesses.

Second, Dimas argues that the preaccusatorial delay prejudiced him because he was unable to impeach GA with her crimes of dishonesty under ER 609(b) because more than 10 years had passed.

However, GA's prior crimes were from 1994, 2001, 2002, 2007, and 2011. GA was sexually assaulted in September 2003. If the DNA had been tested and charges had been filed against Dimas in 2003, GA's 1994 conviction likely would have been inadmissible by the time trial was conducted, and the 2007 and 2011 convictions would not have happened yet. And although Dimas claims that GA's 2002 conviction for bail jumping was a crime of dishonesty, no published Washington case has held that bail jumping is a crime of dishonesty.

This leaves GA's 1994 conviction for theft of welfare funds[1] and her 2001 conviction for second degree possession of stolen property. Impeaching GA with these convictions may have helped Dimas challenge GA's credibility. However, GA's credibility was not at issue at trial because Dimas did not dispute GA's testimony that she had been raped. Instead, he argued that he was not the person who raped her. Therefore, Dimas cannot show that not being able to impeach GA with these convictions actually prejudiced him.

We conclude that Dimas cannot show prejudice based on his inability to impeach GA with her prior convictions.

b. Reasons for Delay

Even if Dimas could show prejudice, the next step in the analysis is to identify the reasons for delay. *Maynard*, 183 Wn.2d at 259.

The sexual assault kit was sent to the lab in 2003 and a single sperm head was located. But McDermott stated that it was unlikely that the small amount of sperm could be used to obtain a DNA profile. And he was not inclined to send the sample for further testing without a clear indication that the victim was cooperating. Because the police were unable to contact GA,

[1] It is unclear when GA was released from confinement for the 1994 conviction, and whether that conviction was inadmissible by the time trial was conducted.

they suspended the case until they were able to receive contact and cooperation from GA. These were legitimate reasons for not conducting further investigation at the time. In addition, the record shows that the delay in testing the DNA was due to an investigative delay and not to gain a tactical advantage. This fact is significant in evaluating the reasons for delay. *See McConnell*, 178 Wn. App. at 607-08.

When the investigation was reopened in 2016, technology had advanced to the point that a DNA profile could be obtained from the sperm fraction. A DNA report was completed in March 2019, and the DNA was matched with Dimas in April 2020. Admittedly, this process moved slowly. But once again, the record shows that the delay was due to an investigative delay and not to gain a tactical advantage.

The State did not charge Dimas until February 2021, 10 months after the DNA match. But this delay was not unreasonable and could not have prejudiced Dimas.

c. Fundamental Conceptions of Justice

The final step in the analysis is to "weigh the reasons for delay and the prejudice to determine whether fundamental conceptions of justice would be violated by allowing the prosecution." *Maynard*, 183 Wn.2d at 259.

The facts of Dimas's case do not demonstrate a violation of the fundamental conceptions of justice. The State's decision to delay filing charges against Dimas did not cause an injustice to him with regard to his due process rights. Dimas only speculates about the witness testimony and video evidence that might exist. And although he could not impeach GA with her 1994 and 2001 convictions due to the delay, GA's credibility was not really at issue.

The State's delay in testing the DNA was due to an investigative delay. But the delay did not impact Dimas's ability to fully defend himself against the charge of first degree rape brought

by the State. We conclude that the reason for delay outweighed any potential prejudice to Dimas.

Therefore, we hold that the trial court did not err in denying Dimas's motion to dismiss because of preaccusatorial delay.[2]

C. RIGHT TO UNBIASED JURORS

Dimas argues that the trial court denied his right to unbiased jurors when it conducted an inadequate inquiry into the biases of jurors 1 and 2. The State argues that Dimas did not preserve this issue for appeal because he did not object at the trial court. We agree with the State.

Under RAP 2.5(a), "[t]he appellate court may refuse to review any claim of error which was not raised in the trial court." Because Dimas stated that he did not have any concerns after the trial court spoke with jurors 1 and 2, he failed to raise this issue at the trial court. However, a party may raise a manifest error affecting a constitutional right for the first time on appeal. RAP 2.5(a)(3).

We first determine whether the alleged error is truly constitutional. *J.W.M.*, 1 Wn.3d at 90. Dimas alleges that he was denied his right to an unbiased jury trial, which is constitutional in nature. *State v. Gutierrez*, 22 Wn. App. 2d 815, 819, 513 P.3d 812 (2022).

We next determine whether the alleged error is manifest, which requires a showing of actual prejudice. *J.W.M.*, 1 Wn.3d at 90-91. The record must be sufficient to determine the merits of the claim in determining whether the error was identifiable. *Id.*

[2] Dimas also states that CrR 7.8(b) provides a basis for dismissal. But he provides no argument regarding CrR 7.8(b) that is separate from his due process argument. Therefore, our preaccusatorial delay analysis resolves the CrR 7.8(b) claim as well.

Dimas relies on *State v. Berhe*, 193 Wn.2d 647, 444 P.3d 1172 (2019). In *Berhe*, the defendant was convicted of first degree murder and first degree assault, with firearm enhancements. *Id.* at 650-51. The day after the jury verdict, juror 6 contacted defense counsel and the trial court to express concerns that she had about the case, including specific allegations of racial bias. *Id.* at 651, 654. She reported that other jurors accused her of being partial because she was the only African-American juror in a case involving an African-American defendant. *Id.* at 654.

The defendant filed a motion for a new trial and requested an evidentiary hearing based on alleged juror misconduct involving racial bias. *Id.* at 653. Relying solely on written declarations by some of the jurors, the trial court found that there was insufficient evidence to conclude that juror misconduct based on racial bias occurred. *Id.* at 656. The trial court also found that the defendant failed to make a prima facie showing of juror misconduct and denied his request for an evidentiary hearing and motion for a new trial. *Id.*

The Supreme Court held that the trial court abused its discretion when it failed to exercise adequate oversight, failed to conduct a sufficient inquiry before determining that the defendant did not make a prima facie showing that racial bias influenced the jury's verdict, and denied the motion for a new trial without an evidentiary hearing. *Id.* at 666, 669-70. The court vacated the trial court's order denying the motion for a new trial and remanded for further proceedings. *Id.* at 670.

Here, the trial court did conduct an inquiry into the allegations that two jurors were biased against a Canadian juror. However, the record is unclear as to what exactly jurors 1 and 2 said to juror 7. Juror 7 stated that jurors 1 and 2 made some "disparaging comments" about him being from Canada, including "it must be his fault. He's from Canada." RP at 495. And juror 1

stated that "[a]ll [he] said was hockey." RP at 505. And when the trial court spoke to jurors 1 and 2 separately, they both indicated that they understood that they needed to put aside any prejudices and biases that they might have had and keep an open deliberative process between the jurors.

Further, it is unclear how Dimas could have been prejudiced even if two jurors did disparage a Canadian juror. Nothing in the record suggests that Dimas was Canadian or a non-United States citizen.

Because the record is insufficient to demonstrate that any alleged error caused actual prejudice, we hold that Dimas fails to show a manifest error affecting a constitutional right and cannot raise this issue for the first time on appeal.

D. PROSECUTORIAL MISCONDUCT

Dimas argues that the prosecutor engaged in misconduct during closing argument by (1) mischaracterizing defense counsel's opening statement, (2) impugning defense counsel, (3) misrepresenting the forensic evidence, (4) shifting the burden of proof, and (5) arguing facts not in evidence. We hold that the prosecutor's statements were not improper.

1. Legal Principles

To prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial in the context of all the circumstances of the trial. *State v. Zamora*, 199 Wn.2d 698, 708, 512 P.3d 512 (2022). Our analysis considers "the context of the case, the arguments as a whole, the evidence presented, and the jury instructions." *State v. Slater*, 197 Wn.2d 660, 681, 486 P.3d 873 (2021). To show prejudice, the defendant is required to show a substantial likelihood that the misconduct affected the jury verdict. *Id.*

When the defendant fails to object at trial, a heightened standard of review requires the defendant to show that the conduct was " 'so flagrant and ill intentioned that [a jury] instruction would not have cured the [resulting] prejudice.' " *Zamora*, 199 Wn.2d at 709 (quoting *State v. Loughbom*, 196 Wn.2d 64, 70, 470 P.3d 499 (2020)). "In other words, the defendant who did not object must show the improper conduct resulted in *incurable* prejudice." *Zamora*, 199 Wn.2d at 709. If a defendant fails to make this showing, the prosecutorial misconduct claim is waived. *Slater*, 197 Wn.2d at 681.

2. Mischaracterizing Defense Counsel's Opening Statement

Dimas argues that the prosecutor engaged in misconduct by repeatedly mischaracterizing defense counsel's opening statement. We disagree.

During opening statement, defense counsel stated,

> There's [] no proof that [Dimas's] DNA was in [GA's] perineum, . . . her vulva, . . . her fingertip swabs, or her underwear. The DNA experts are going to testify, "Yeah, there's male DNA in these places. We don't know who that is." An unknown male's DNA is in those other places.

RP at 311-12. And during closing argument, the prosecutor stated,

> We heard at the beginning of this case from counsel that we were going to see multiple males' DNA in the testing done relating to the victim. We did not see that. There's no evidence to suggest that at all. We have one male's DNA that was identified in all of the evidence in this case, one male. . . . We again do not have any evidence at all that was presented to us that there was multiple males' DNA as we were told we would see at all.

RP at 633-34. Dimas argues that the prosecutor's statements falsely asserted that defense counsel claimed the evidence would show DNA from multiple males.

"The tactic of misrepresenting defense counsel's argument . . . , effectively creating a straw man easily destroyed in the minds of the jury, does not comport with the prosecutor's duty to 'seek convictions based only on probative evidence and sound reason.' " *State v. Thierry*, 190

Wn. App. 680, 694, 360 P.3d 940 (2015) (quoting *State v. Castenada-Perez*, 61 Wn. App. 354, 363, 810 P.2d 74 (1991)). A prosecutor's improper insinuations are likely to carry more weight against a defendant because the jury places great confidence in the execution of a prosecutor's obligations. *Thierry*, 190 Wn. App. at 694.

Here, the prosecutor did not completely mischaracterize defense counsel's opening statement. One could construe that saying an unknown male's DNA was found means that multiple males' DNA would be presented. And defense counsel responded to the prosecutor's statements during his own closing argument, acknowledging that he may have said that multiple males' DNA were present: "I assume counsel is right on this one that I said multiple persons. I guess what I should have said is easily could be multiple persons." RP at 670. And then defense counsel summarized each swab where DNA was found and whether it was Dimas's DNA.

We conclude that the prosecutor's statements were not improper.

3. Impugning Defense Counsel

Dimas argues that the prosecutor engaged in misconduct by impugning defense counsel. We disagree.

During closing argument, the prosecutor stated,

> And we could again make an issue about how dirty [the underwear] is. . . . That's trying to detract from what happened, trying to somehow blame the victim, somehow indicate, you know, as was said at the beginning, that there were other males involved, which there is absolutely no evidence of.

RP at 655. Dimas claims that these statements impugned defense counsel.

It is improper for a prosecutor to impugn the role or integrity of defense counsel. *State v. Fleeks*, 25 Wn. App. 2d 341, 377, 523 P.3d 220 (2023). Statements that " 'fundamentally undermine' " the role or integrity of defense counsel constitute misconduct. *Id.* (quoting *State v. Lindsay*, 180 Wn.2d 423, 433, 326 P.3d 125 (2014)).

The Supreme Court in *Lindsay* discussed multiple cases where statements by the prosecution were considered to be impugning defense counsel. *Lindsay*, 180 Wn.2d at 433-34. In all of the cases, the prosecutor specifically and negatively commented on defense counsel and their role in the trial. For example, in *Lindsay*, the prosecutor called defense counsel's argument a "crock." 180 Wn.2d at 433-34. In *State v. Thorgerson*, the prosecutor referred to defense counsel's case as " 'bogus' " and "involving 'sleight of hand.' " 172 Wn.2d 438, 451-52, 258 P.3d 43 (2011). The Supreme Court in *Lindsay* and *Thorgerson* held that the prosecutors' statements impugned defense counsel because they implied deception and dishonesty. *Lindsay*, 180 Wn.2d at 433; *Thorgerson*, 172 Wn.2d at 452.

Here, the prosecutor's statements did not impugn defense counsel. The prosecutor merely was arguing why the jury should not consider the dirtiness of GA's underwear when examining that piece of evidence. This was not commenting on defense counsel's role nor did it imply deception.

We conclude that the prosecutor's statements were not improper.

4. Misrepresenting Forensic Evidence

Dimas argues that the prosecutor engaged in misconduct by misrepresenting the forensic evidence when he stated that the DNA only identified Dimas. We disagree.

During closing argument, the prosecutor stated,

> No one else was identified in this situation. No one. The only person identified, again I can't express the importance of this enough, from the sperm fraction, from the sperm – the same swab that Mr. McDermott saw spermatozoa, sperm, not skin cell, touch, inner thigh, she's wearing jeans, the only person that was identified is Jacob Dimas, the defendant.

RP at 660. Dimas claims that these statements misled the jury because the evidence showed that there was unknown DNA found from other parts of GA's body.

It is error for a prosecutor to mislead the jury by misstating the evidence presented at trial. *State v. Meza*, 26 Wn. App. 2d 604, 620, 529 P.3d 398 (2023). However, a prosecutor has wide latitude to assert reasonable inferences from the evidence. *Id.*

Here, the prosecutor accurately stated that the only person *identified* from the DNA was Dimas. The prosecutor previously had discussed how the sperm cell and sperm fraction was the only part of the DNA that the lab found a male profile for, which matched Dimas, because the amounts from the other samples were too low. And the prosecutor again specified that the only spot that McDermott found spermatozoa from was the inner thigh swab that matched Dimas.

We conclude that the prosecutor's statements were not improper.

5. Shifting the Burden of Proof

Dimas argues that the prosecutor engaged in misconduct by improperly shifting the burden of proof when he emphasized Dimas's failure to offer exculpatory explanations, including his failure to testify. We disagree.

During closing argument, the prosecutor stated, "[W]hat other explanation do we have as to how Jacob Dimas's sperm got on her inner thigh other than what she told us? The State would submit none." RP at 635. He again stated, "We heard no other explanation from the victim's story as to how that could have happened." RP at 637. Dimas claims that these statements shifted the burden of proof and urged the jury to use his failure to testify against him.

It is misconduct for a prosecutor to shift the burden of proof to the defendant. *State v. Stotts*, 26 Wn. App. 2d 154, 170, 527 P.3d 842 (2023). " 'A prosecutor generally cannot comment on the defendant's failure to present evidence because the defendant has no duty to present evidence.' " *Id.* at 171 (quoting *Thorgerson*, 172 Wn.2d at 453). But merely mentioning that the evidence is lacking does not shift the burden of proof or constitute prosecutorial

misconduct. *Stotts*, 26 Wn. App. 2d at 171. In addition, a jury can consider whether a witness's testimony was corroborated by other evidence. *Id.*

Here, the prosecutor did not comment on Dimas's failure to present evidence and definitely did not comment on his failure to testify. In fact, the prosecutor did not mention Dimas or the defense at all. Instead, he argued the improbability of a different theory of the case and pointed out that GA's testimony was not corroborated by other evidence. In addition, the prosecutor related this argument back to the reasonable doubt standard.

We conclude that the prosecutor's statements were not improper.

6. Evidence Outside the Record

Dimas argues that the prosecutor engaged in misconduct by arguing evidence outside the record when he stated that GA could not afford to pay rent or regularly wash her clothes.

During closing argument, the prosecutor stated,

> Not everybody gets to wash their clothes every day, Ladies and Gentlemen. Not everybody, you know, has the best housing situation. Not everybody gets to afford a cell phone back in 2003. Not everybody can afford their rent and stay in their apartment for as long as it takes for a detective to try and follow up with you later. But nobody should be punished for that.

RP at 635. Dimas claims that GA never testified that she had financial problems.

It is error for a prosecutor to mislead the jury by misstating the evidence presented at trial. *Meza*, 26 Wn. App. 2d at 620. And a prosecutor commits misconduct by encouraging the jury to consider evidence that is outside of the record. *State v. Teas*, 10 Wn. App. 2d 111, 128, 447 P.3d 606 (2019). However, a prosecutor has wide latitude to assert reasonable inferences from the evidence. *Meza*, 26 Wn. App. 2d at 620.

Here, the prosecutor did not state that GA specifically testified that she could not afford rent or to wash her clothes regularly. He made general statements regarding the situation that GA was likely in at the time of her sexual assault.

During opening statement, Dimas stated that GA's underwear had a "strong foul odor" and Simpson testified that it is less likely to obtain DNA from clothing that had just been washed than if it had just been worn. GA testified that she did not remember if she had a cell phone in 2003 but that she had used a pay phone to call 911 after the sexual assault. And although she testified that she lived in Hazel Dell "[i]n some apartments," Hemstock testified that he was unsuccessful in contacting GA because a phone number that he called several times had been disconnected and GA's listed address was vacant. From this evidence, the prosecutor made reasonable inferences that someone in this situation would be having financial problems.

We conclude that the prosecutor's statements were not improper.[3]

7. Cumulative Misconduct

Dimas argues that the cumulative effect of the prosecution's improper conduct affected the jury's verdict. We disagree.

Under the cumulative error doctrine, the defendant must show that the combined effect of multiple errors requires a new trial. *State v. Clark*, 187 Wn.2d 641, 649, 389 P.3d 462 (2017). The cumulative effect of repeated prosecutorial conduct may be so flagrant that no instruction can erase the combined prejudicial effect. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 707, 286 P.3d 673 (2012).

[3] Even if this argument was improper, Dimas waived this argument by not objecting because a jury instruction could have cured any prejudice.

Here, the instances of alleged prosecutorial misconduct that Dimas challenges were not improper. Accordingly, we hold that Dimas's claim of cumulative error fails.

E. SUFFICIENCY OF EVIDENCE – DEADLY WEAPON SENTENCING ENHANCEMENT

Dimas argues that there was insufficient evidence to support a deadly weapon sentencing enhancement. We disagree.

1. Standard of Review

Whether a defendant was armed with a deadly weapon is a mixed question of law and fact, and is fact-specific. *State v. Sassen Van Elsloo*, 191 Wn.2d 798, 825-26, 425 P.3d 807 (2018). The test for determining the sufficiency of evidence is whether after viewing the evidence and all reasonable inferences in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt that the defendant was armed with a deadly weapon. *Id.* at 826. We decide de novo whether the facts are sufficient as a matter of law to prove that the defendant was armed with a deadly weapon. *Id.* at 825.

2. Legal Principles

Under RCW 9.94A.533(4), the trial court must add time to a sentence if the defendant is found to have been armed with a deadly weapon at the time the offense was committed. RCW 9.94A.825 states,

> In a criminal case wherein there has been a special allegation and evidence establishing that the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, . . . if a jury trial is had, the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime.
>
> For purposes of this section, a deadly weapon is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death.

To establish that the defendant was armed with a deadly weapon for purposes of the sentencing enhancement, the State must prove "(1) that a [deadly weapon] was easily accessible and readily available for offensive or defensive purposes during the commission of the crime and (2) that a nexus exists among the defendant, the weapon, and the crime." *Sassen Van Elsloo*, 191 Wn.2d at 826.

Regarding the first requirement, the presence, close proximity, or constructive possession of a weapon found at a crime scene alone is not enough to establish that the defendant was armed in this context. *Id.* The weapon must be easily accessible and readily available at the time of the crime. *Id.*

Regarding the second requirement, we look to the nature of the crime, the type of weapon, and the context in which it was found to determine if there was a nexus between the defendant, the weapon, and the crime. *Id.* at 827.

3. Analysis

Here, GA testified that Dimas was holding a knife in his hands and that he held it up against her neck. Therefore, there is no question that the knife was "easily accessible and readily available for use for either offensive or defensive purposes" during the commission of the crime. *Sassen Van Elsloo*, 191 Wn.2d at 826.

Further, while Dimas was holding the knife against GA's neck, he told her "to shut the f*** up," "to quit fighting him," and that "he was not going to take no for an answer." RP at 369. Dimas also threatened to stab GA in the neck. Because Dimas actually used the knife in the commission of the sexual assault, there is no question that there was a connection between the knife and the crime.

We hold that the evidence was sufficient to support the jury's verdict that Dimas was armed with a deadly weapon at the time of his offense of first degree rape.

F. CRIME RELATED COMMUNITY CUSTODY CONDITIONS

Dimas argues, and the State concedes, that the trial court exceeded its authority when it imposed community custody conditions prohibiting Dimas from having contact with minors and prohibiting Dimas from entering areas where children congregate. We agree.

RCW 9.94A.703(3)(f) allows a trial court to order discretionary conditions as part of a term of community custody, including ordering an offender to comply with crime-related prohibitions. A crime-related prohibition must "directly relate[] to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10).

Dimas was convicted of first degree rape against an adult. Therefore, the community custody conditions relating to minors are not crime-related. We remand for the trial court to strike its imposition of the community custody conditions prohibiting contact with minors and prohibiting Dimas from entering areas where children congregate.

G. COMMUNITY CUSTODY SUPERVISION FEES

Dimas argues, and the State concedes, that the community custody supervision fees imposed in the judgment and sentence must be stricken. We agree.

Effective July 2022, RCW 9.94A.703(2) no longer authorizes the imposition of community custody supervision fees. *State v. Ellis*, 27 Wn. App. 2d 1, 17, 530 P.3d 1048 (2023). Although this amendment took effect after Dimas's sentencing, it applies to cases pending on appeal. *Id.* Therefore, we remand for the trial court to strike the community custody supervision fees.

H. CRIME VICTIM PENALTY ASSESSMENT

Dimas argues that the $500 VPA should be stricken from his judgment and sentence. We agree.

Effective July 1, 2023, RCW 7.68.035(4) prohibits courts from imposing the VPA on indigent defendants as defined in RCW 10.01.160(3). *Ellis*, 27 Wn. App. at 16. For purposes of RCW 10.01.160(3), a defendant is indigent if they meet the criteria in RCW 10.101.010(3). Although this amendment took effect after Dimas's sentencing, it applies to cases pending on appeal. *Ellis*, 27 Wn. App. at 16.

The trial court determined that Dimas was indigent under RCW 10.101.010(3). Therefore, on remand the $500 VPA must be stricken from the judgment and sentence.

I. SAG CLAIMS

1. Lack of Jurisdiction

In request for relief 5, Dimas asserts that the trial court lacked jurisdiction because he was extradited from Arizona to Washington. We disagree.

The due process clause requires individuals to have " 'fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign.' " *State v. LG Elecs., Inc.*, 186 Wn.2d 169, 176, 375 P.3d 1035 (2016) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)). A state's courts may exercise personal jurisdiction over an out-of-state defendant if the defendant has such minimum contacts with the state that maintaining the suit would not offend traditional notions of fair play and substantial justice. *LG Elecs.*, 186 Wn.2d at 176.

Here, Dimas sexually assaulted GA in Washington. And both GA and Dimas were residents of Washington at the time of the assault in 2003. Therefore, we hold that the trial court did not lack jurisdiction over Dimas.

2. Vague Claims

Under RAP 10.10(c), we will not consider a SAG "if it does not inform the court of the nature and occurrence of alleged errors." Several of Dimas's SAG claims fall under this provision.

In request for relief 1, Dimas states that he did not commit the crime of first degree rape against GA. But he does not explain why the evidence was insufficient to convict him.

In request for relief 2 and 3, Dimas asserts that he filed a CrR 7.8 motion. But he does not make any argument regarding the motion.

In request for relief 4 and 6, Dimas declares that when a court violates constitutional safeguards, it has acted without jurisdiction. But he does not explain which constitutional safeguards the trial court violated or how it violated them.

In request for relief 5, Dimas asserts that the 11 months he spent in pretrial detention after being extradited from Arizona violated due process. But he does not explain how the pretrial detention violated due process.

In request for relief 7, Dimas asserts that the prosecutor engaged in misconduct and that the State engaged in government mismanagement. But he does not explain the misconduct or mismanagement.

In request for relief 8, Dimas asserts that he received ineffective assistance of counsel. But he does not explain how defense counsel was ineffective.

In request for relief 10, Dimas asserts that the assault against GA never happened because GA's testimony was hearsay and the prosecutor used deceptive arguments. But he does not explain how GA's testimony was hearsay or why the prosecutor's arguments were deceptive.

Because these SAG claims do not "inform the court of the nature and occurrence of alleged errors," we decline to address them. RAP 10.10(c).

3. Claims Outside the Record

In request for relief 9, Dimas asserts that the prosecutor and defense counsel were engaged in criminal activity, including false reporting, malicious prosecution, criminal negligence, and conspiracy.

But this assertion relies entirely on matters outside the record. As a result, we cannot consider them on direct appeal. *State v. Alvarado*, 164 Wn.2d 556, 569, 192 P.3d 345 (2008). This assertion is more properly raised in a personal restraint petition. *Id.* Therefore, we decline to consider this claim.

4. Constitutionality of RCW 9A.44.020(1)

In his amended affidavit to his SAG, Dimas asserts that RCW 9A.44.020(1) is unconstitutional. We disagree.

RCW 9A.44.020(1) states, "In order to convict a person of any crime defined in [chapter 9A.44 RCW, sex offenses] it shall not be necessary that the testimony of the alleged victim be corroborated."

We review de novo a challenge to the constitutionality of a statute. *State v. Jackson*, 28 Wn. App. 652, 670, 538 P.3d 284 (2023). Statutes are presumed to be constitutional and the party challenging the constitutionality of a statute bears the burden of proving its unconstitutionality beyond a reasonable doubt. *Id.* Wherever possible, it is our duty to interpret

a statute so as to uphold its constitutionality. *State v. Batson*, 196 Wn.2d 670, 674, 478 P.3d 75 (2020).

Dimas makes several assertions relating to his claim that RCW 9A.44.020(1) is unconstitutional: (1) RCW 9A.44.020(1) allows alleged statements to become evidence, while making a defendant's statements "lip service"; (2) RCW 9A.44.020(1) allows a prosecutor to not engage in a complete investigation before charging; (3) if a defendant does not testify, RCW 9A.44.020(1) prejudices the burden of proof and portrays a not guilty plea as "not evidence"; (4) the State is not required to seek evidence that contradicts the out of court statements of the alleged victim and out of court statements do not hold any strength against trial testimony; (5) prosecutorial misconduct may exist before trial by "overcharging" a defendant; (6) probable cause to arrest and assigning excessive bail are satisfied by a sworn statement to the investigating detective; (7) a defendant has no available pretrial challenges because of the low bar for evidence; (8) RCW 9A.44.020(1) allows a trial to be based on what a State's witness or detective heard or turns a trial into proving their sworn statements; (9) RCW 9A.44.020(1) denies a defendant of their constitutional rights; (10) Washington courts have held that it is reversible error when a trial court gives a jury instruction with the language found in RCW 9A.44.020(1); and (11) RCW 9A.44.020(1) violates the separation of powers because the legislature is "usurping" the judicial branch's discretion to detain and assign bail.

Some of these assertions may describe the ramifications of RCW 9A.44.020(1), but they do not establish that RCW 9A.44.020(1) is unconstitutional. Nor do the other assertions. Therefore, we hold that RCW 9A.44.020(1) is not unconstitutional.

CONCLUSION

We affirm Dimas's conviction, but we remand for the trial court to strike the community custody conditions prohibiting contact with minors and entering areas where children congregate, community custody supervision fees, and the $500 VPA.

MAXA, P.J.

We concur:

LEE, J.

VELJACIC, J.

APPENDIX B

Filed
Washington State
Court of Appeals
Division Two

May 17, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JACOB GABRIEL DIMAS, Appellant.	No. 57528-1-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant moves for reconsideration of the court's March 5, 2024 opinion. Upon consideration, the court denies the motion. Accordingly, it is

ORDERED.

PANEL: Jj. Maxa, Lee, Veljacic

FOR THE COURT:

MAXA, J.

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 – Division Two** under **Case No. 57528-1-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 or residence address as listed on ACORDS:

☒ respondent Lauren Boyd, DPA
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Clark County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Paralegal Date: June 17, 2024
Washington Appellate Project

WASHINGTON APPELLATE PROJECT

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