Supreme Court No. ____
COA No. 86857-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

JACOB HELMS,
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 Helms, the petitioner, asks this Court to review the opinion of the Court of Appeals in *State v. Helms*, No. 86857-8-I (Nov. 25, 2024) pursuant to RAP 13.4(b).

B. ISSUES PRESENTED FOR REVIEW

1. The federal and state constitutions protect the right to a fair trial, including a trial free from prejudicial prosecutorial misconduct. U.S. Const. amends. VI, XIV; Const. art. I, § 22. Here, the prosecutor repeatedly referred to the complaining witness as a victim, both during trial and in closing argument. The use of the word "victim" is incompatible with the presumption of innocence and assumes the commission of a crime. This Court should take review pursuant to RAP 13.4(b)(3) to determine whether a prosecutor's repeated use of the word "victim" to describe the complaining witness constitutes reversible misconduct.

2. An information must contain all essential elements of a crime in order to provide the defendant with constitutionally

adequate notice. U.S. Const. amend. XIV; Const. art. I, § 22. The statute criminalizing possession of a dangerous weapon does not include a mental element, but must be construed to include the element of "knowledge" to comport with due process. Here, the information did not include the element of knowledge. This Court should take review pursuant to RAP 13.4(b)(1) and (3) to determine whether the information was deficient for omitting this essential element.

3. Washington law requires discretionary community custody conditions to directly relate to the circumstances of the crime. Here, the court required Mr. Helms to submit to an evaluation for anger management treatment. This condition was imposed in excess of the sentencing court's authority and warrants review pursuant to RAP 13.4(4).

C. STATEMENT OF THE CASE

Mr. Helms was walking from the park with a friend to catch a ride from Mr. Helm's mother. RP 114. On the way, they encountered a man, Anatoly "Tony" Berezhnoy, walking

with two women. RP 114. Mr. Berezhnoy had been drinking throughout the day and was visibly intoxicated. RP 87, 114. When Mr. Helm's friend said something inappropriate to one of the women, Mr. Berezhnoy became infuriated. RP 114.

Mr. Berezhnoy made several threats to Mr. Helms and his friend, including that he was going to "get" them and "kill" them. RP 114, 117. Mr. Berezhnoy then pushed Mr. Helms. RP 115. Mr. Helms was scared. RP 117. When Mr. Berezhnoy briefly turned away, Mr. Helms hit Mr. Berezhnoy in the back of the head while wearing metal knuckles. RP 115-16. Mr. Berezhnoy then tackled Mr. Helms to the ground. RP 108.

Police responding to a separate but nearby incident heard the commotion and quickly arrived on the scene. RP 69. When they arrived, Mr. Berezhnoy had Mr. Helms pinned to the ground and was wielding a metal bar and yelling. RP 70. Police separated the two men and ultimately arrested Mr. Helms. RP 71-72.

Mr. Helms was charged with assault in the second degree and possession of a dangerous weapon – the metal knuckles. CP 5. Following trial, the jury convicted on both counts. CP 35-37.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The prosecutor committed reversible misconduct by repeatedly calling the complaining witness a "victim."

The right to a fair trial is protected by the Sixth and Fourteenth amendments and article I, section 22 of the state constitution. *In re Glasmann*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012) (citations omitted); *see also* U.S. Const. amend. VI, XIV; Const. art. I, § 22. "Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial." *Id.* at 703–704 (citing *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984)). Prosecutorial misconduct requires reversal if it is prejudicial, *i.e.*, if there is a substantial likelihood it impacted the jury's verdict. *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011); *also State v. Lindsay*, 180 Wn.2d 423, 440,

326 P.3d 125 (2014). Even if not objected to, misconduct requires reversal if the remarks were "so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *Lindsay*, 180 Wn.2d at 430.

"The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin v. United States*, 156 U.S. 432, 453, 15 S. Ct. 394, 403, 39 L. Ed. 481 (1895). "[E]very person accused of a crime is constitutionally endowed with an overriding presumption of innocence, a presumption that extends to every element of the charged offense." *State v. Crediford*, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996).

Here, the prosecutor turned the presumption of innocence on its head by repeatedly using the word "victim" to refer to Mr. Berezhnoy, the complaining witness. For example, in questioning one of the responding officers, the following exchanges occurred:

Q. Okay. So as you approached the location of the yelling, what did you observe?

A. So when I got there, Schoolcraft and Harris got there a few seconds before I did, so when I got there I saw them in the bushes with the Defendant. And I saw Tony, the victim, yelling and kind of being restrained by his two acquaintances.

Q. **And was the victim so Anatoly Berezhnoy, is that the victim you're referring to?**

A. Yeah, sorry.

Q. He goes by Tony?

A. He goes by Tony, yes.

RP 85-86.

Q. And so after you collected evidence, **were photographs taken of the victim on that evening?**

A. Yes.

Q. Did you see his injuries while he was on the scene?

A. Yes.

RP 90. Further, in closing argument, the prosecutor implied that Mr. Berezhnoy's account was credible due to his "victim" status:

Good afternoon, again. Not to belabor the point, you've heard the testimony and it is now your turn to decide what the truth is. So you heard three witnesses, two witnesses **and the victim**, that describe that on August 18th, 2022, about 11:00, 11:30, Tony, Olga, and Oksana were walking from the waterfront to Downtown Vancouver to get a drink and go get some dinner . . .

> The Defendant in this case was wearing metal knuckles and **he struck the victim** in the back of the head. No matter which story, you did hear two today, no matter which one, **he did admit he struck the victim** in the back of the head wearing metal knuckles.

RP 135-36. The prosecutor then concluded by stating:

> The State has proved beyond a reasonable doubt through **the testimony of the victim**, the testimony of the witnesses and the officers that on August 18th, 2022, the Defendant, Jacob Helms, assaulted Tony Berezhnoy both with a dangerous weapon and he recklessly inflicted substantial bodily har[m].
>
> RP 137.

The prosecutor's repeated use of the word "victim" was prejudicial misconduct. As the Supreme Court of Delaware has concluded, "it is incompatible with the presumption of innocence for the prosecutor to refer to the complaining witness as the 'victim,' just as it is to refer to the defendant as a 'criminal.'" *Jackson v. State*, 600 A.2d 21, 25 (Del. 1991). This is because the use of the word "victim" "assumes the commission of a crime." *Id.; accord State v. Mundon*, 292 P.3d 205, 230 (Haw. 2012); *see also e.g., State v. Sperou*, 442 P.3d

581, 590 (Or. 2019) ("[T]he use of the term 'victim' to refer to the complaining witness or other witnesses, in circumstances where the accusers' own testimony is the only evidence that the alleged criminal conduct occurred, conveys the speaker's belief that the accusers are credible."); *State v. Albino*, 24 A.3d 602, 615 (Conn. 2011) ("We are persuaded that, in a case where there is a challenge as to whether a crime occurred, the repeated use of the words victim . . . is improper."); *State v. Devey*, 138 P.3d 90, 95 (Utah Ct. App. 2006) ("[I]n cases such as this—where a defendant claims that the charged crime did not actually occur, and the allegations against that defendant are based almost exclusively on the complaining witness's testimony—the trial court, the State, and all witnesses should be prohibited from referring to the complaining witness as 'the victim.'").

As the prosecutor herself acknowledged, this case came down to credibility and which party was telling the "truth." RP 135-36. Her choice to use the word "victim" to describe Mr.

Helms' accuser primed the jury to presume a crime occurred, and thus prejudiced Mr. Helm's right to be presumed innocent.

"[T]he cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." *Lindsay*, 180 Wn.2d at 430 (quoting *Glasmann*, 175 Wn.2d at 707). As is evident from the transcript, prosecutor's use of the word "victim" was pervasive throughout the trial. Accordingly, no instruction could have cured the resultant prejudice.

The Court of Appeals declined to reverse in part due to the lack of "authority from Washington Courts." Op. at 2. This Court should take review to clarify that a prosecutor's repeated use of the word "victim" at trial is misconduct and warrants reversal of the conviction. RAP 13.4(b)(3).

2. The information charging possession of a dangerous weapon is missing the essential element of knowledge, requiring reversal of that conviction.

RCW 9.41.250 states that "[e]very person who . . . possesses any instrument or weapon of the kind usually known as . . . metal knuckles" is guilty of a gross misdemeanor. RCW 9.41.250(1)(a). This statute does not explicitly include a mental element. In order to comport with due process, this Court should take review to clarify that knowledge is an essential element of possessing a dangerous weapon. This Court should further take review to hold that the information was deficient for failing to include this element, warranting reversal.

The Court of Appeals misconstrued Mr. Helm's challenge to the information, erroneously assuming that he was challenging the constitutionality of the statute at issue. Op. at 6-10. However, Mr. Helm's assignment of error was unmistakably a challenge to the sufficiency of the information. *See* Brief of Appellant at 1. The Court of Appeals further erred in holding Mr. Helms could not challenge the sufficiency of the

information for the first time on appeal, citing RAP 2.5(a)(3). Op. at 6-7. This is in direct contradiction to this Court's precedent that a constitutional challenge to the sufficiency of the information can be raised for the first time on appeal. *See State v. Pry*, 194 Wn.2d 745, 752, 452 P.3d 536 (2019); *accord State v. Kjorsvik*, 117 Wn.2d 93, 90-91, 812 P.2d 86 (1991). Review is warranted pursuant to RAP 13.4(b)(1) and (3).

a. Knowledge is an essential element of the charge of possession of a dangerous weapon.

"The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *State v. Blake*, 197 Wn.2d 170, 179, 481 P.3d 521 (2021) (alterations, citations, and quotation marks omitted). Further, "the government cannot criminalize 'essentially innocent' conduct" without violating due process. *Id.* In line with these maxims, strict liability crimes are generally disfavored. *State v. Anderson*, 141 Wn.2d 357, 363, 5 P.3d 1247 (2000).

Courts should construe statutes "to avoid constitutional doubt." *Utter ex rel. State v. Bldg. Indus. Ass'n of Wash.*, 182 Wn.2d 398, 434, 341 P.3d 953 (2015). When a statute does not include a mental element, courts may read such an element into the statute to avoid an unconstitutional result. *Blake,* 197 Wn.2d at 189.

Without a mens rea element, RCW 9.41.250 forbids the mere possession of certain weapons, and thus has the potential to criminalize "wholly innocent and passive nonconduct on a strict liability basis." *Blake*, 197 P.3d at 193. For example, "[a] person might pick up the wrong bag at the airport, the wrong jacket at the concert, or even the wrong briefcase at the courthouse" containing one of the prohibited weapons. *Id.* at 184 (citation and quotation marks omitted). The penalization of such "innocent nonconduct" violates due process. *Id.* at 193.

This Court can avoid such a result by holding that possession of dangerous weapons requires the mental element of "knowledge." *See id.* at 189. In other words, the defendant

must know that they are in possession of the dangerous weapon. WPIC 133.31 (pattern to-convict instruction suggesting optional knowledge element). In fact, the jury was instructed to find the element of knowledge in Mr. Helm's trial. CP 30.

b. The information omitted the essential element of knowledge, requiring reversal of the dangerous weapon conviction.

In assessing the validity of the information, this Court applies a two-part test. *Kjorsvik*, 117 Wn.2d at 105. First, this Court considers if the essential elements appear in any form. *Id.* "Essential elements" include both statutory and court-imposed elements. *Id.* at 101. If the information can be construed to contain all of the essential elements, this Court assesses if the defendant was "actually prejudiced by the inartful language which caused a lack of notice." *Id.* at 106.

As previously explained, this Court should hold that knowledge is an essential element of the crime of possessing a dangerous weapon. Here, the information does not contain the mental element of knowledge in any form. CP 5.

"[W]here the mental state required for an offense is straightforward or where the facts alleged in the charge would be hard to accomplish without the defendant holding the required mental state, the requisite mental state may be inferred under a liberal standard of review." *State v. Level*, 19 Wn. App. 2d 56, 61–62, 493 P.3d 1230 (2021). However, "[w]hen it comes to crimes punishing simple possession of contraband, the mental state required by the law is not a matter of obvious common sense." *Id.* at 62.

Therefore, for crimes that punish possession, the knowledge element must be explicitly included in the charging document. *See State v. Moavenzadeh*, 135 Wn.2d 359, 363-64, 956 P.2d 1097 (1998) (possession of stolen property); *Level*, 19 Wn. App. 2d at 63 (possession of a stolen vehicle); *State v. Marcum*, 116 Wn. App. 526, 533–36, 66 P.3d 690 (2003) (unlawful possession of a firearm). Because the charging document here did not include the essential element of

knowledge, this Court should accept review to clarify it was facially deficient. *Moavenzadeh*, 135 Wn.2d at 363–65.

3. The court exceeded its authority in ordering a community custody condition.

A trial court is authorized to impose discretionary community custody conditions as part of a sentence. RCW 9.94A.703(3). In addition to listing several discretionary conditions, the statute permits a court to impose "crime-related prohibitions." RCW 9.94A.703(3)(f). A "crime-related" prohibition "means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10).

Challenges to community custody conditions are ripe on direct appeal, as they typically cannot be raised once a sentence is final. *See State v. Hubbard*, 1 Wn.3d 439, 452, 527 P.3d 1152 (2023) ("[A]bsent a carefully written condition or grant of express statutory authority by the legislature, there is no avenue

for relief [from a condition of community custody] once a sentence becomes final.")

Here, the sentencing court ordered undergo an evaluation for treatment for anger management. CP 53. This condition is not crime-related. No matter which account the jury believed, there was no indication Mr. Helm's uncontrolled anger led him to commit the crime. Mr. Helms testified he was acting in self-defense. RP 114–15. Mr. Berezhnoy testified that the assault was completely unprovoked and came out of nowhere. RP 106–107. And the sentencing judge apparently believed the assault was related to an attempted robbery. RP 148. However, no matter the circumstances, there is no indication that Mr. Helms' anger was a contributing factor. This Court should take review pursuant to RAP 13.4(b)(4) and strike this condition. *State v. Munoz-Rivera*, 190 Wn. App. 870, 892, 361 P.3d 182 (2015).

E. CONCLUSION

For the reasons stated above, this Court should accept review.

In compliance with RAP 18.17(b), counsel certifies that this brief contains 2,672 words (word count by Microsoft Word).

DATED this 26th day of December, 2024.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JACOB RYAN HELMS, Appellant.	No. 86857-8-I DIVISION ONE UNPUBLISHED OPINION

HAZELRIGG, A.C.J. — Jacob Helms was convicted of assault in the second degree with a deadly weapon and a separate gross misdemeanor charge of possession of a dangerous weapon, following a jury trial. Helms alleges that prosecutorial misconduct deprived him of a fair trial, and the trial court imposed custody conditions that were not crime-related and legal financial obligations that should be stricken due to his indigency. He separately challenges the sufficiency of the charging document and the constitutionality of the statute criminalizing possession of a dangerous weapon. Helms fails to demonstrate error on all but his challenge to the legal financial obligations. Accordingly, we affirm in part, reverse in part, and remand for correction of his judgment and sentence.

FACTS

Jacob Helms and Anatoly "Tony" Berezhnoy were involved in an altercation in Vancouver on the night of August 18, 2022. The impetus of the altercation is disputed between the parties. Berezhnoy claimed that Helms struck him from

behind without warning. Helms later admitted that he struck Berezhnoy in the back of the head with metal knuckles, but asserted that he did so only in self-defense. The two were grappling on the sidewalk when officers who were in the area responded quickly, and ultimately placed both Berezhnoy and Helms into handcuffs to determine what had occurred. Helms was booked into the local jail that night and the State filed charges of assault in the second degree with a deadly weapon and possession of a dangerous weapon, a gross misdemeanor. The case proceeded to a jury trial and Berezhnoy, his wife, Oksana Berezhnoy, their friend Olga Dernovaya, and the responding officers testified for the State. Helms testified in his own defense. The jury convicted Helms as charged and the court sentenced him to 17 months in prison, followed by 12 months of community custody supervision by the Department of Corrections (DOC).

Helms timely appealed.

ANALYSIS

I. Prosecutorial Misconduct

Helms avers that the prosecutor engaged in "pervasive" misconduct by referring to Berezhnoy as the "victim" several times during trial. In support of this assignment of error, Helms cites six times that the prosecutor used the word to describe Berezhnoy and offers an assortment of out-of-state cases that address the use of the word "victim." However, he presents no analogous authority from Washington courts beyond the basic rules governing prosecutorial misconduct. In response, the State provides an extensive footnote rebutting Helms' characterization of the out-of-state cases and avers the actions of the prosecutor

here were neither flagrant nor ill intentioned. Given that foreign cases offer only persuasive authority, and our state has robust law governing prosecutorial misconduct, Washington jurisprudence is sufficient for us to conclude that Helms' right to a fair trial was not impinged by the prosecutor's conduct.

A defendant who makes a timely objection to prosecutorial misconduct must show that the conduct was "'both improper and prejudicial in the context of the entire trial.'" *State v. Zamora*, 199 Wn.2d 698, 708, 512 P.3d 512 (2022) (internal quotation marks omitted) (quoting *State v. Loughbom*, 196 Wn.2d 64, 70, 470 P.3d 499 (2020)). If the defense does not timely object, we apply a heightened prejudice standard; the defendant must demonstrate the improper and prejudicial conduct was "'so flagrant and ill intentioned that an instruction would not have cured the prejudice.'" *Loughbom*, 196 Wn.2d at 70 (internal quotation marks omitted) (quoting *State v. Walker*, 182 Wn.2d 463, 477, 341 P.3d 976 (2015)). "Under this heightened standard, the defendant must show that (1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'" *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012) (internal quotation marks omitted) (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)).

The parties agreed that Helms struck Berezhnoy with metal knuckles; the reason why was the sole disputed fact. During direct examination, Vancouver Police Officer Shane Weldon referred to Berezhnoy as "the victim" when he

described responding to the scene of the altercation. The following exchange occurred:

> [STATE:] Okay. So as you approached the location of the yelling, what did you observe?
>
> [WELDON:] So when I got there, Schoolcraft and Harris got there a few seconds before I did, so when I got there I saw them in the bushes with the [d]efendant. And I saw Tony, the victim, yelling and kind of being restrained by his two acquaintances.
>
> [STATE:] And was the victim—so Anatoly Berezhnoy, is that the victim you're referring to?
>
> [WELDON:] Yeah, sorry.

Helms did not object any of the times this word was used during the State's examination of Weldon. The remaining four uses of the word victim occurred during the State's closing argument. As the prosecutor walked through the evidence for the jury, she said,

> So you heard three witnesses, two witnesses and the victim, that describe that on August 18th, 2022, about 11:00, 11:30, Tony, Olga, and Oksana were walking from the waterfront to Downtown Vancouver to get a drink and go get some dinner.
> . . . .
> The [d]efendant in this case was wearing metal knuckles and he struck the victim in the back of the head. No matter which story, you did hear two today, no matter which one, he did admit he struck the victim in the back of the head wearing metal knuckles.

The prosecutor later argued, "The State has proved beyond a reasonable doubt through the testimony of the victim, the testimony of the witnesses and the officers that on August 18th, 2022, the [d]efendant, Jacob Helms, assaulted Tony Berezhnoy both with a dangerous weapon and he recklessly inflicted substantial bodily harm." Helms' attorney did not object to any use of the word victim during

closing argument. Accordingly, we review his allegation of prosecutorial misconduct under the heightened prejudice standard.

As a preliminary matter, while the State appropriately concedes in briefing that use of the word "victim" can be improper, depending on context, using the word "victim" six times during a trial consisting of testimony from five witnesses does not constitute "pervasive" use. This is particularly true when four of the challenged instances occurred during closing argument when the State holds significant latitude to argue its theory of the case. More critically, the manner by which this word was used does not establish misconduct by the State. As the State points out in briefing, Weldon was the first to use the term to describe Berezhnoy, and the two times the prosecutor said victim during the presentation of evidence appeared to be in an attempt to clarify the officer's testimony. When the prosecutor described Berezhnoy as a victim in summation, she was arguing to the jurors her position that she had proved the State's case beyond a reasonable doubt. "In closing argument the prosecuting attorney has wide latitude to argue reasonable inferences from the evidence." *Thorgerson*, 172 Wn.2d at 448. The challenged statements do not constitute misconduct.

Finally, Helms fails to provide any compelling reason as to why any potential prejudice from the description of Berezhnoy as a victim could not have been cured by instruction from the judge. Courts routinely correct language used by parties at trial and "[j]urors are presumed to follow the court's instructions." *State v. Weaver*, 198 Wn.2d 459, 467, 496 P.3d 1183 (2021). Helms does not carry his burden to establish entitlement to relief on this assignment of error.

II. Sufficiency of the Charging Document

Helms next asserts that the charging document was insufficient as it failed to put him on notice of all essential elements of the crimes the State accused him of committing. The defendant's right to hear the charges against them is enshrined in the federal constitution and the state constitution. The accused has a right "to be informed of the nature and the cause of the accusation." U.S. CONST. amend. VI. And "to demand the nature and cause of the accusation against [them]." WASH. CONST. art. I, § 22. Thus, the "State must include all essential elements of an alleged crime in the information." *State v. Kosewicz*, 174 Wn.2d 683, 691, 278 P.3d 184 (2021). This rule is intended to "sufficiently apprise the defendant of the charges against them so [they] may prepare a defense." *Id.*

The State responds that this challenge is waived as it was not presented in the trial court, and Helms fails to satisfy the requirement of RAP 2.5(a)(3) to establish a manifest constitutional error that may be presented for the first time on appeal. The State is correct.

We may refuse to review any claim of error which was not raised in the trial court. RAP 2.5(a). However, we may elect to take up an error for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3). The appellant's task is to "'identify a constitutional error and show how the alleged error actually affected the [appellant]'s rights at trial.'" *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009) (alteration in original) (quoting *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007)). To rise to the level of a manifest error the appellant must show actual prejudice. *State v. Kalebaugh*, 183 Wn.2d 578, 584,

355 P.3d 253 (2015). This requires a further showing that the "'asserted error had practical and identifiable consequences in the trial of the case.'" *Id.* (internal quotation marks omitted) (quoting *O'Hara*, 167 Wn.2d at 99).

Helms neither cites RAP 2.5(a)(3), nor attempts to satisfy the standard it requires. Similarly, and more critically, he fails to present authority or argument under the controlling standard of review for such a challenge. In order to demonstrate error on a claim of insufficiency of a charging instrument, the appellant must establish that the document failed to apprise the accused of an essential element of the crime alleged, thus violating their constitutional right to understand the accusation they face.

In *State v. Pry*, our Supreme Court addressed the two-step test for such analysis laid out in its earlier opinion, *State v. Kjorsvik*, 117 Wn.2d 93, 812 P.2d 86 (1991), and explained that reviewing courts first determine whether the "necessary facts appear in any form, or by fair construction can they be found, on the face of the charging document." 194 Wn.2d 745, 752, 452 P.3d 536 (2019). We may consider any other allegations set out in this same charging instrument at this step of the test. *Id.* at 753. If the necessary facts *are* present, the court then considers whether the defendant was nonetheless prejudiced by the State's "inartful language that caused a lack of notice" and may review accompanying affidavits. *Id.* at 752-53. If, after de novo review, the appellate court concludes that the "necessary elements are not found or fairly implied, we presume prejudice and reverse without reaching the second prong and the question of prejudice." *Id.* at 753.

Helms cites none of this authority, nor does he address the language in the information the State filed in his case. "We do not consider conclusory arguments unsupported by citation to authority." *State v. Mason*, 170 Wn. App. 375, 384, 285 P.3d 154 (2012); RAP 10.3(a)(6). "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998). Instead, the entirety of his argument on this issue addresses the true focus of his appeal: his claim that the possession of a dangerous weapon statute is unconstitutional. Because Helms has neither carried his burden to demonstrate manifest constitutional error such that this unpreserved error could be reviewed on appeal, nor provided analysis or argument under the appropriate legal framework, we decline to consider this challenge further.

III. Constitutionality of RCW 9.41.250(1)(a)

Woven into Helms' attack on the charging instrument is a request for this court to hold that knowledge is an essential element of the charge of possession of a dangerous weapon. RCW 9.41.250(1)(a) reads in part, "Every person who: [m]anufactures, sells, or disposes of or possesses any instrument or weapon of the kind usually known as . . . metal knuckles . . . is guilty of a gross misdemeanor." For this challenge, Helms analogizes to the mens rea required for the crime of possession of a controlled substance. Specifically, Helms seeks extension of the reasoning from *State v. Blake*,[1] arguing that offenses based on possession alone risk prosecution of "wholly innocent and passive nonconduct on a strict liability

[1] 197 Wn.2d 170, 481 P.3d 521 (2021).

basis." In response, the State again successfully argues a procedural barrier to our analysis of this assignment of error.

The State properly notes that we presume that statutes are constitutional. *State v. Zigan,* 166 Wn. App. 597, 603, 270 P.3d 625 (2012). When arguing a statute is unconstitutional, the challenger carries a "'heavy burden of establishing its unconstitutionality beyond a reasonable doubt.'" *State v. Haviland*, 186 Wn. App 214, 218, 345 P.3d 831 (2015) (quoting *Amalg. Transit Union Loc. 587 v. State*, 142 Wn.2d 183, 205, 11 P.3d 762, 27 P.3d 608 (2001)). The State correctly contends that to prevail on this claim, Helms must engage in statutory interpretation of RCW 9.41.250(1)(a) to determine whether our legislature meant for it to be a strict liability crime and then apply the factors set out in *State v. Bash*, 130 Wn.2d 594, 925 P.2d 978 (1996) (plurality opinion). The creation of strict liability offenses is a legislative balancing act as they are historically disfavored. In the past, an "'evil-meaning mind'" had to accompany "'an evil-doing hand,'" but the legislature has increasingly turned to strict liability to place "the burden of care on those in the best position to avoid those harms." *State v. Yishmael*, 195 Wn.2d 155, 163-64, 456 P.3d 1172 (2020) (quoting *Morisette v United States*, 342 U.S. 246, 251, 72 S. Ct. 240, 96 L. Ed. 288 (1952)). If "the State was improperly relieved of the burden of proving [the defendant] acted with knowledge . . . reversal would be required." *Id*. at 163. In *Yishmael*, our Supreme Court referenced the factors it had previously set out in *Bash* that are to be considered when determining if "the legislature intended to create strict liability offense." *Id.* at 166. Those considerations are as follows:

> (1) . . . the statute must be construed in light of the background rules of the common law, and its conventional mens rea element; (2) whether the crime can be characterized as a "public welfare offense" created by the Legislature; (3) the extent to which a strict liability reading of the statute would encompass seemingly entirely innocent conduct; (4) . . . the harshness of the penalty[;] . . . (5) the seriousness of the harm to the public; (6) the ease or difficulty of the defendant ascertaining the true facts; (7) relieving the prosecution of difficult and time-consuming proof of fault where the Legislature thinks it important to stamp out harmful conduct at all costs, "even at the cost of convicting innocent-minded and blameless people"; and (8) the number of prosecutions to be expected.

Bash, 130 Wn.2d at 605-06 (quoting 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, SUBSTANTIVE CRIMINAL LAW § 3.8, at 341-44 (1986)). Because Helms fails to properly mount this challenge, we do not consider this assignment of error further.

IV. Community Custody Conditions

Helms next contends that the trial court imposed two community custody conditions that are not crime-related and should therefore be stricken as exceeding the court's authority. We review de novo the statutory authority of the trial court to impose community custody conditions. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). If the trial court acted within its statutory authority, the imposition of sentencing conditions is reviewed for abuse of discretion. *State v. Smalley*, 25 Wn. App. 2d 254, 256, 522 P.3d 1037 (2023). "A court abuses its discretion if, when imposing a crime-related prohibition, it applies the wrong legal standard." *In re Pers. Restraint of Rainey*, 138 Wn.2d 367, 375, 229 P.3d 686 (2010).

The first challenged condition states that Helms "shall not possess or consume controlled substances . . . without a valid prescription" during his term of

community custody. However, it appears that Helms has misread RCW 9.94A.703. He contends the prohibition on controlled substances was imposed pursuant to RCW 9.94A.703(3)(f), which pertains to discretionary conditions that must be crime-related.[2] However, the condition restricting his possession and use of controlled substances without a prescription is authorized by RCW 9.94.703(2)(c), which reads, "Unless waived by the court, as part of any term of community custody, the court shall order an offender to . . . [r]efrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions." This community custody condition is waivable by the trial court, but will be imposed if the trial court declines to do so. 9.94A.703(2)(c). Thus, because the statute that explicitly authorizes the imposition of this community custody condition does not require any relation to the crime of conviction, the trial court did not abuse its discretion when it imposed this condition.

The second condition Helms challenges requires that he "undergo an evaluation for treatment of anger management." The felony judgment and sentence (J&S) does not indicate the authority under which this community custody condition was imposed, nor did the judge offer any explanation at the sentencing hearing. Helms again claims that this condition is improper as it is not crime-related. However, RCW 9.94A.703(3) expressly grants a sentencing court discretion to order a defendant to "[p]articipate in crime-related treatment or counseling services," under subsection (c), or "[p]articipate in rehabilitative

[2] Interestingly, Helms does not challenge another condition the court imposed, deemed discretionary by RCW 9.94A.703(3)(e), that ordered him to refrain from possessing or consuming alcohol while on community custody.

programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community," under subsection (d). The jury verdict demonstrates that they found that Helms failed to prove that he acted in self-defense and, instead, credited Berezhnoy's claim that Helms attacked him unprovoked. On that factual basis, and with the clear discretion conferred by RCW 9.94A.703, Helms has failed to demonstrate that the trial court's imposition of the requirement to obtain an anger management evaluation constitutes an abuse of discretion.

V. Legal Financial Obligations

Finally, Helms argues and the State concedes, that the court erred in imposing certain legal financial obligations (LFOs) despite its finding of indigency. At sentencing, the court expressly found Helms indigent, yet on the felony J&S, the judge imposed the then-mandatory $500 victim penalty assessment (VPA) and, on the misdemeanor J&S, ordered that Helms pay supervision fees to DOC and the collection cost of any unpaid LFOs. After Helms' sentencing on December 7, 2022, the legislature amended a number of statutes related to the imposition of LFOs on indigent defendants. *See* former RCWs 7.68.035(4) (2018), *amended by* LAWS OF 2023, ch. 449, § 1; 9.94A.703 (2021), *amended by* LAWS OF 2022, ch. 29, § 8; 10.82.090(1) (2018), *amended by* LAWS OF 2022, ch. 260, § 12. These statutory amendments apply to Helms because they became effective while his case was pending appeal. *State v. Ramirez*, 191 Wn.2d 732, 747-50, 426 P.3d 714 (2018). Accordingly, we accept the State's concession and remand for the trial court to strike the VPA and DOC supervision fees from Helms' J&Ss.

Affirmed in part, reversed in part, and remanded for the trial court to strike the LFOs.

Hazelrigg, ACJ

WE CONCUR:

Díaz, J.

Dwyer, 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. 86857-8-I**, 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:

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☒ petitioner

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MARIA ANA ARRANZA RILEY, Paralegal Date: December 26, 2024
Washington Appellate Project

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