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Washington State
Court of Appeals
Division Two

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# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>JASON FERGUSON,<br><br>Appellant. | No. 58378-0-II<br><br>PART-PUBLISHED OPINION |

CHE, J. — Jason Ferguson appeals his convictions for second degree assault with a firearm sentencing enhancement, two counts of second degree assault, and fourth degree assault, all with a domestic violence aggravator.

After Ferguson's romantic relationship with his girlfriend, Shayleen "Crystal" Hitz, ended, Hitz contacted the police, who then recorded two calls from Hitz to Ferguson in which Ferguson acknowledged he committed various assaults against her. The State charged Ferguson with multiple counts of assault. Ferguson appeared by video from jail for several pretrial hearings. A jury convicted Ferguson of all charges.

Ferguson argues the trial court (1) unconstitutionally restrained him by requiring him to appear from jail, separated from his attorney and the courtroom, at several pretrial hearings without any individualized assessment or finding of necessity and (2) impermissibly interfered with his constitutional right to counsel when he appeared from jail, physically separated from his attorney, without protocols for confidential communication, at several pretrial hearings.

We hold that (1) merely appearing by video from jail or merely appearing in jail alone is not an unconstitutional restraint that requires an individualized inquiry, and, even if it was, the trial court's failure to conduct an individualized inquiry was harmless error, and (2) Ferguson fails to establish a manifest error under RAP 2.5(a)(3) and thus cannot raise the right to confer with counsel issue for the first time on appeal. We reject Ferguson's remaining arguments, except for his challenges to legal financial obligations (LFOs), in an unpublished portion of this opinion.

We affirm Ferguson's convictions, but we reverse the challenged LFOs and remand for the trial court to strike the crime victim penalty assessment (VPA) and DNA collection fee.

## FACTS

### I. BACKGROUND

Ferguson and Hitz dated from June 2021 to March 2022. The State's charges arise from four distinct incidents.

First, in March 2022, an incident involving a firearm occurred. According to Hitz, she told a male patron at a bar that she was "single," which angered Ferguson. 1 Rep. of Proc. (RP) at 266. Later, at home, Ferguson "took his .22 [caliber pistol]," placed it against his forehead, then walked to Hitz in the kitchen, and put the pistol to her forehead. 1 RP at 267.

According to Ferguson, Hitz's comment to the male patron "rubbed [him] the wrong way." 1 RP at 464. Ferguson and Hitz left the bar together and began arguing when they got home. Ferguson felt frustrated with Hitz and their relationship, and he "finally cracked." 1 RP at 465. He took his pistol, put it against his head, fell to the ground, and then "the pistol went off

into the ground." 1 RP at 466. Ferguson denied pointing a gun at Hitz and threatening her while holding the pistol.

Second, in March 2022, according to Hitz, Ferguson told her that if she was not home when he returned from work, "there was gonna be hell to pay." 1 RP at 254. When Ferguson returned from work, he "grabbed [her] by [her] throat," "threw [her] down on the couch," "threw some things around and yelled at [her]." 1 RP at 256.

According to Ferguson, Hitz had called him at work to say she wanted to leave the relationship. He told Hitz not to leave and said he needed to talk to her before she left. Ferguson admitted that he was upset because "[Hitz] want[ed] to leave [him] again." 1 RP at 472. Ferguson returned home, kicked a magazine rack, but denied touching Hitz.

Third, in August 2021, according to Hitz, she lightly kicked Ferguson's buttocks, and Ferguson responded by grabbing Hitz's hair and "shov[ing]" her against the kitchen cupboard. 1 RP at 248. Hitz did not intend to cause pain to Ferguson when she kicked him.

According to Ferguson, Hitz, unprovoked, gave him a "nice swift kick, right in the thigh." 1 RP at 460. Ferguson denied shoving Hitz against the kitchen cupboard but agreed he grabbed her hair to "made sure she was lookin' at [him] and [ ] said, we're not gonna do this." 1 RP (Jan 18, 2022) at 461. Ferguson was concerned that Hitz would continue to kick him, so he held her "to put a stop to [her actions] period" and "let her know that type of behavior was not acceptable." 2 RP at 518.

Fourth, according to Hitz, one time when she attempted to leave the house, Ferguson chased her down the road, strangled her with his right hand, suffocated her with his left hand,

"dragg[ed]" her back toward the house, and threatened to kill her. 1 RP at 261. Hitz said, afterwards, Ferguson was apologetic to her and felt ashamed of himself.

According to Ferguson, he and Hitz fought before she left the house to enter the recreational vehicle (RV) on the property. Ferguson believed Hitz was going to meet up with her ex-boyfriend and saw her leaving the RV. He was upset and chased after her to let her know that if she wanted to return to her prior romantic relationship, that she should. When Ferguson caught up to Hitz, she started yelling. Ferguson put his hand over Hitz's mouth to stop her from screaming but denied impairing her breathing and grabbing her with his other hand.

After the relationship ended, Hitz contacted the police, who recorded two calls in October 2022 from Hitz to Ferguson. In the first call, Hitz asked Ferguson about the first assault incident and if he was "sorry [he] put a gun to [her] head." 1 RP at 372. Ferguson responded, "Of course, I am." 1 RP at 372. He also acknowledged that they "both did really f[***]ed up shit" in their relationship. 1 RP at 373. Toward the end of the call, Ferguson denied pointing a gun at her.

Ferguson testified that before he had answered the first call, he had just woken up after having stayed up for several days. Ferguson had been "under the influence of methamphetamines, medicating heavily" and did not hear Hitz accuse him of pointing a gun at her until closer to the end of the call. 1 RP at 445.

In the second call, Hitz told Ferguson that she did not deserve him putting his hands around her throat each time it happened. Ferguson responded, "You're right, you didn't, you know what, you didn't deserve any of that, you're right." 1 RP at 384. Hitz also recounted the second incident and said, "[Y]ou came home from work . . . kicked the f[***]ing [magazine

rack] on my foot and hurt my foot . . . I told you [ ] I was leaving . . . and you told me, you better f[***]ing be there or there's gonna be hell to pay." 1 RP at 385-86. Ferguson responded, "Yeah, I did." 1 RP at 386.

Hitz also discussed with Ferguson the fourth incident that took place on the road when she had tried to leave him.

> HITZ: There's one thing that I have nightmares over, this is the one that really bothers me still is, sorry, I --
>
> [FERGUSON]: It's okay.
>
> HITZ: -- when I was trying to leave and you caught me like two houses down --
>
> [FERGUSON]: Yeah, yeah.
>
> HITZ: -- and you told me, you're going to die, bitch and you covered my mouth and my face and everything and I seriously thought you were going to drag me into the f[***]ing grass. Why did, why wouldn't you just let me leave, why did you have to do that?
>
> [FERGUSON]: Okay, well, the reason why and bad choices regardless, was the fact that it was when you just decided to leave and just leave, at that point it was a - look, at least just come to me and just tell me and then go, but don't go behind my back type of thing, you know what I mean? It just was a, at that point, was a -- look, that's how I felt, that's how I felt.

1 RP at 388.

Later in the call, Ferguson told Hitz, "I made f[***]ing stupid f[***]ing choices, horrible choices." 1 RP at 390.

For the second call, Ferguson testified that he had trouble "understand[ing]" Hitz when she said "[he] covered [her] mouth and [her] face" during the third incident. RP at 458, 388. Ferguson had trouble hearing Hitz because he was driving in his truck, he had the call on speaker, and he and Hitz talked over each other. Ferguson "was agreeing with generally

everything [Hitz] was saying" because he did not "like talking over the phone about th[at] stuff" and was "just being agreeable." 2 RP at 508-09.

An officer who was present when Hitz made the calls thought Ferguson sounded like someone who was alert and oriented.

The State charged Ferguson with second degree assault with a firearm sentencing enhancement, two counts of second degree assault, and fourth degree assault, all with a domestic violence aggravator. The State also charged the felonies as part of an ongoing pattern of abuse.

Witnesses testified at trial consistently with the facts above.

## II. PROCEDURAL HISTORY

Ferguson appeared by video from jail for seven pretrial proceedings: October 13, 2022 (bail and probable cause hearing); October 17, 2022 (court filed information and set next hearing); October 21, 2022 (arraignment); November 1, 2022 (hearing on possible conflict of interest); December 8, 2022 (hearing on motion to continue trial); January 6, 2023 (status conference); and January 13, 2023 (hearing on motion to continue trial and motion for material witness warrant).

During two proceedings, October 13 and December 8, a corrections officer stood in proximity to Ferguson and addressed the court. During the October 13 proceeding, a corrections officer told the judge that he and Ferguson could not hear defense counsel. On December 8, the trial court discussed with a corrections officer how Ferguson could talk with his counsel about a concern. The trial court determined that Ferguson would be transported to the courtroom. Ferguson did not otherwise object to appearing by video from jail.

The jury convicted Ferguson as charged. At sentencing, the trial court found Ferguson indigent as defined in RCW 10.101.010(3)(a)-(c). The court imposed a $500 VPA and a $100 DNA collection fee.

Ferguson appeals.

## ANALYSIS

### I. UNCONSTITUTIONAL RESTRAINT

Ferguson argues that appearing by video from jail was itself a "restraint," and thus, the trial court unconstitutionally restrained him when he alone appeared via videoconferencing from jail for several pretrial hearings without the court conducting any individualized assessment for the necessity of restraints. We disagree.

#### A. *Legal Principles*

Generally, we review alleged constitutional violations de novo. *State v. Lundstrom*, 6 Wn. App. 2d 388, 393, 429 P.3d 1116 (2018). However, we review the trial court's decision to shackle a defendant for an abuse of discretion because this decision is vested within the court's discretion. *State v. Turner*, 143 Wn.2d 715, 724, 23 P.3d 499 (2001). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. *State v. Jackson*, 195 Wn.2d 841, 850, 467 P.3d 97 (2020).

A criminal defendant has a due process right to appear at "every court appearance," including nonjury proceedings, "'free from all bonds or shackles except in extraordinary circumstances.'" *Id.* at 852, 854 (quoting *State v. Finch*, 137 Wn.2d 792, 842, 975 P.2d 967 (1999) (plurality opinion)). But a court has discretion to require restraints in court if it first conducts an individualized inquiry into whether the use of restraints is necessary. *Id.* at 852-53.

"[T]rial courts *must* engage in an individualized inquiry before *every* hearing to determine whether there are extraordinary circumstances justifying courtroom restraints for security reasons." *State v. Luthi*, 3 Wn.3d 249, 265, 549 P.3d 712 (2024).

A defendant's right to a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution is also "implicated by shackling and restraints at nonjury pretrial hearings." *Jackson*, 195 Wn.2d at 852.

Once a defendant demonstrates they were unconstitutionally restrained during a court proceeding, the State bears the burden to prove any error was harmless. *Id.* at 855-56. In other words, it must appear from an examination of the record that the error was harmless beyond a reasonable doubt or that the evidence against the defendant is so overwhelming that no rational trier of fact could find the defendant not guilty. *Id.* at 856.

B. *Merely Appearing by Video from Jail Does Not Violate a Defendant's Due Process Right to Appear Free from Unjustified Restraints*

As a preliminary matter, the State argues that Ferguson waived his right to be present at all critical stages of trial—in person as opposed to by video—by failing to object. But Ferguson does not challenge his right to be present at all critical stages of trial. See Reply Br. of Appellant at 6 ("Mr. Ferguson appeared for court by video conference and was therefore present."). Thus, we turn first to the issue of whether appearing by video from jail violates Ferguson's due process right to appear at all courtroom proceedings free from unjustified restraints.[1]

[1] Ferguson "does not challenge video conference generally as an unconstitutional restraint." Reply Br. of Appellant at 6.

Ferguson relies on *Luthi* to support his argument. In *Luthi*, our Supreme Court held that the trial court violated a defendant's due process rights when it required Luthi to appear in an in-court holding cell during a non-jury revocation hearing without the court having first engaged in an individualized inquiry about whether the use of an in-court holding cell was necessary for courtroom security. *Luthi*, 3 Wn.3d at 265. Luthi objected to appearing for the proceeding in the five feet wide, five feet deep, and eight feet long walled holding cell that was located at the back or side of the courtroom, away from the table where counsel sits, and included both a mesh and glass window. *Id.* at 252-53. The trial court could clearly see the holding cell. *Id.* at 262. In first determining whether the holding cell implicated due process protections against unjustified restraints, the court noted, among other things, that the holding cell significantly limited Luthi's ability to communicate with her counsel. *Id.* at 260. The holding cell required Luthi to communicate "'through glass'" with a corrections officer "standing right next to her," which "would discourage any defendant from discussing confidential matters relevant to their case with counsel." *Id.* at 262.

While Ferguson's video appearances from jail may have required him to communicate to others in the courtroom with a corrections officer standing near him, which could have discouraged him from discussing confidential matters relevant to his case with his counsel, as the holding cell did in *Luthi*, that implicates Ferguson's right to confer with counsel, not his right to appear free from unjustified restraints. The corrections officer's proximity to Ferguson and interjection during a proceeding where the officer addressed the court likewise speaks to Ferguson's right to confer with counsel and is irrelevant to the issue of appearing without unconstitutional restraints.

Even if Ferguson has shown that his video appearances from jail raise the same due process concerns as other courtroom restraints, his video appearances are distinguishable from the holding cell in *Luthi*. Ferguson did not appear from a clearly visible jail cell located inside a courtroom where the trial court could see the physical cell. And there is no indication in the record that the trial court could see the physical indicia of Ferguson's jail cell in the same way that the trial court could see Luthi's in-court holding cell.

Here, the record does not show that Ferguson appeared in physical restraints, such as handcuffs or leg restraints, or behind bars, glass windows, or mesh windows. Therefore, the trial court did not unconstitutionally restrain Ferguson when he appeared by video from jail for several non-jury pretrial proceedings. We hold that merely appearing by video from jail or merely appearing in jail *alone* is not an unconstitutional restraint that requires an individualized inquiry. Thus, Ferguson has not demonstrated that the trial court unconstitutionally restrained him.

Even if merely appearing from jail by video is deemed a restraint, the State has satisfied its burden to prove harmless error because the evidence against Ferguson was so overwhelming that no rational conclusion other than guilt can be reached. *State v. Clark*, 143 Wn.2d 731, 775-76, 24 P.3d 1006 (2001)) (stating that "[t]he test for harmless error is whether the state has overcome the presumption of prejudice when a constitutional right of the defendant is violated when, from an examination of the record, it appears the error was harmless beyond a reasonable doubt, or whether the evidence against the defendant is so overwhelming that no rational conclusion other than guilt can be reached.").

Here, Hitz testified to four incidents where Ferguson committed assaultive acts against her, the trial court admitted two police recorded phone calls wherein Ferguson admitted to assaultive conduct against Hitz, and Ferguson testified to facts regarding the assaults.

In relation to count one, second degree assault while armed with a firearm, Ferguson acknowledged that he put a gun against Hitz's head. *See* RP at 372 (Hitz asking Ferguson if he was "sorry [he] put a gun to [her] head?" and Ferguson responding, "Of course, I am."). In relation to count two, second degree assault, Ferguson acknowledged that he often put his hands around Hitz's throat. *See* RP at 384 (Hitz telling Ferguson that she did not deserve him putting his hands around her throat each time it happened and Ferguson responding, "You're right, you didn't, you know what, you didn't deserve any of that, you're right."). Ferguson also admitted to kicking over a magazine rack, which hit Hitz's foot. RP at 385-86. In relation to count three, fourth degree assault, Ferguson admitted that he grabbed Hitz's hair to "ma[k]e sure she was lookin' at [him]." RP at 461. As for count four, second degree assault, Ferguson did not deny chasing after Hitz when she left the RV. See RP at 388. Indeed, he admitted he made "horrible choices" and that he had put his hand over Hitz's mouth to stop her from screaming. RP at 390, 452; *see also* RP at 373. While Ferguson denied impairing Hitz's breathing, as discussed above, he agreed that Hitz did not deserve all the times he put his hands around her throat.

Because the evidence against Ferguson was so overwhelming that no rational conclusion other than guilt can be reached, even if merely appearing from jail by video is a restraint, any error was harmless.

## II. RIGHT TO CONFER WITH COUNSEL

Ferguson argues that the trial court interfered with his right to confer privately with counsel when he appeared physically separated from his attorney for several pretrial hearings. We hold that Ferguson fails to establish a manifest error under RAP 2.5(a)(3) and thus cannot raise this issue for the first time on appeal.

### A. *Legal Principles*

Under the Sixth Amendment and article I, section 22 of the Washington State Constitution, a criminal defendant has a right to the assistance of counsel during all critical stages in the litigation. *Bragg v. State*, 28 Wn. App. 2d 497, 503, 536 P.3d 1176 (2023). A critical stage is one where a defendant's rights, defenses, or privileges may be waived, where their privileges are claimed, or where the case's outcome is otherwise substantially affected. *Id.* at 503-04.

The constitutional right to the assistance of counsel includes the opportunity for private discussions between a defendant and their counsel during all critical stages of the proceedings. *State v. Anderson*, 19 Wn. App. 2d 556, 562, 497 P.3d 880 (2021); *see also State v. Hartzog*, 96 Wn.2d 383, 402, 635 P.2d 694 (1981). In determining whether a court has violated a defendant's right to confer with counsel, we "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." *Bragg*, 28 Wn. App. 2d at 507.

Under RAP 2.5(a)(3), we may review a court's denial of the right to privately confer with counsel for the first time on appeal if it is a manifest error affecting a constitutional right. *Bragg*, 28 Wn. App. at 504. To raise such an error for the first time on appeal, an appellant must show

that the error is truly of constitutional dimension and is manifest. *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). An error is of constitutional dimension if it implicates a constitutional interest as opposed to another form of trial error. *Id.* An error is manifest if an appellant shows actual prejudice, a "'plausible showing . . . that the asserted error had practical and identifiable consequences in the trial of the case.'" *Id.* at 99 (internal quotation marks omitted) (quoting *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)).

B. *Ferguson Fails to Show Manifest Constitutional Error*

For the first time on appeal, Ferguson argues that the trial court's videoconference hearings denied him of his right to confer privately with counsel. In order to raise this issue for the first time on appeal, Ferguson must show that his claimed error is a manifest error affecting a constitutional right under RAP 2.5(a)(3). In other words, Ferguson must show actual prejudice.

Ferguson primarily relies on *Anderson*, *Bragg*, and *State v. Schlenker*[2] to support his argument. We do not find these cases persuasive. In *Anderson*, while the court found a manifest constitutional error when deciding whether to consider the defendant's right to confer with counsel claim, the court did not address why the error was manifest. 19 Wn. App. 2d at 563. Indeed, the *Anderson* court did not indicate that the defendant showed any practical and identifiable consequence to the proceedings from the asserted error. *Id.*

In *Bragg*, the defendant and his counsel appeared separately without the trial court explaining how they could confer privately. 28 Wn. App. 2d at 502-03, 508. The *Bragg* court only minimally addressed manifest error, footnoting that the State conceded the error was

[2] 31 Wn. App. 2d 921, 553 P.3d 712 (2024), *as amended* Aug. 15, 2024.

constitutional and manifest. *Id.* at 504 n.5. Here, the State does not concede that Ferguson's claimed error is constitutional and manifest.

In *Schlenker*, the defendant and his counsel appeared separately without the trial court identifying a means for them to confer privately. 553 P.3d at 719-20. But Division Three of this court did not determine if any error in the proceedings constituted manifest constitutional error because the defendant preserved his right to raise the issue on appeal by objecting to videoconferencing on at least two occasions. *Id.* at 725. Unlike the defendant in *Schlenker*, Ferguson did not object to videoconferencing at the trial level.

Because *Anderson*, *Bragg*, and *Schlenker* do not meaningfully address manifest error, we are not persuaded by those cases. Instead, we find *State v. Dimas*, 30 Wn. App. 2d 213, 544 P.3d 597 (2024), *review denied*, 3 Wn.3d 1026 (2024) applicable. In *Dimas*, the defendant appeared by video from jail for various pretrial hearings, including for his bail and arraignment, while his attorney appeared from a different location. *Id.* at 216. The defendant did not object to appearing remotely at any of the hearings. *Id.* The trial court did not set any ground rules for how the defendant and his attorney could confidentially communicate during the hearings. *Id.* We held that the defendant did not meet his burden of showing manifest constitutional error because "[t]he record [did] not indicate that the trial court would have made a different decision or that the verdict would have been different if [the defendant] had been given the opportunity to speak privately with defense counsel" during the hearings. *Id.* at 223.

Here, our review of the record shows that the trial court's error was not manifest because Ferguson fails to show that opportunities to confer with his attorney would have made any difference in the proceedings. *Id.* We focus our analysis on seven pretrial hearings where

Ferguson appeared by video while his counsel was in the courtroom: October 13, 2022 (bail and probable cause hearing); October 17 (court filed information and set next hearing); October 21 (arraignment); November 1 (hearing on possible conflict of interest); December 8 (hearing on motion to continue trial); January 6, 2023 (status conference); and January 13 (hearing on motion to continue trial and motion for material witness warrant).

Ferguson's bail and probable cause hearing (October 13) and arraignment (October 21) were not critical stages to which the right to counsel attached because Ferguson's case was not demonstrably affected by his counsel's appearance from a different location than Ferguson. *See State v. Heng*, 2 Wn.3d 384, 395, 539 P.3d 13 (2023) (holding that defendant's preliminary hearing where the trial court set bail, among other things, was not a critical stage because defendant did not lose any rights, did not waive any defenses, nor lose his ability to challenge bail; *see also State v. Charlton*, 2 Wn.3d 421, 427-28, 538 P.3d 1289 (2023) (explaining that probable cause hearings are generally not critical stages in litigation).

At the October 17 hearing, the State filed the information and set the arraignment date. Ferguson does not show that consulting his attorney about the information would have changed the outcome of this hearing, nor does he show that *when* Ferguson's arraignment occurred affected the outcome of the case. *See Dimas*, 30 Wn. App. 2d at 222 (explaining that "[t]here is no indication that [the defendant] consulting with counsel would have changed the outcome of th[e] hearing" and "there is no indication that *when* trial occurred affected the outcome of the case.").

At the November 1 hearing, the trial court addressed a possible conflict of interest and ruled that no conflict of interest existed for Ferguson's counsel. Ferguson does not show he

could have provided any information to his attorney related to the legal issues addressed such that the outcome of the hearing would have changed. *See id.* ("[Dimas's] motion [to impeach the victim with her prior convictions] 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.")

As for the remaining hearings on December 8 (hearing on motion to continue trial), January 6, 2023 (status conference), and January 13 (hearing on motion to continue trial and motion for material witness warrant), Ferguson, like for the October 17 hearing, does not show that an ability to communicate with his attorney would have changed the outcome of those proceedings, nor does he show that *when* the trial occurred affected the outcome of the case. *See id.*

Overall, Ferguson fails to show any practical and identifiable consequence that would have changed the outcomes of these hearings. He therefore fails to show actual prejudice and thus fails to show manifest error. Accordingly, we decline to consider Ferguson's unpreserved claim that the trial court violated his right to privately confer with counsel.

We hold that Ferguson fails to establish a manifest constitutional error under RAP 2.5(a)(3), and thus, he cannot raise this issue for the first time on appeal.

## CONCLUSION

We affirm Ferguson's convictions, but we reverse the challenged LFOs and remand for the trial court to strike the VPA and DNA collection fee.

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 PORTION

Ferguson additionally argues that the trial court denied him his right to counsel because a conflict of interest existed. Further, Ferguson argues that the State's repeated misconduct deprived him of a fair trial and that his LFOs should be stricken.

In the unpublished portion of this opinion, we hold that (1) Ferguson fails to establish a Sixth Amendment violation based on a conflict of interest, (2) his grounds for prosecutorial misconduct were not improper, and (3) as the State concedes, the trial court should strike the VPA and DNA collection fee from Ferguson's judgment and sentence.

ADDITIONAL FACTS

I. POTENTIAL CONFLICT OF INTEREST

At Ferguson's first court appearance (October 13, 2022), the trial court appointed Harry Gasnick to represent him. Gasnick informed the court that he currently represented Hitz on a *Blake*[3] matter and that he had received a proposed agreed order on it, but that he did not believe that this constituted a conflict of interest. The court stated that "[i]t likely [did] not create a conflict of interest." RP at 6. Gasnick asked the court to release Ferguson based on his history of court appearances, lack of warrant history, and history of following court orders, including

[3] In *State v. Blake*, our Supreme Court held that Washington's strict liability drug possession statute was unconstitutional and vacated the defendant's conviction. 197 Wn.2d 170, 195, 481 P.3d 521 (2021).

protection orders. The court denied that request and set bail. Gasnick also represented Ferguson at his second court appearance (October 17, 2022) at which the State filed the information.

Alex Stalker, a colleague in the same office as Gasnick, replaced Gasnick as Ferguson's counsel. Stalker represented Ferguson at his third court appearance (October 21, 2022), during which the court accepted Ferguson's not guilty plea, set trial dates, and entered a no-contact order. By the end of October, Hitz's pending case had been resolved.

On November 1, 2022, the trial court addressed Ferguson's conflict of interest concern with both Stalker and Gasnick present. Gasnick reiterated that he received an agreed order on Hitz's *Blake* matter to reduce the amount of a refund by a couple of dollars, and "that's all that's been involved on [Hitz's] Blake case." RP at 18-19. Stalker thought his representation of Ferguson presented a conflict under the Rules of Professional Conduct (RPC) 1.7[4] because there was a brief period of time when Gasnick represented Hitz, while Stalker represented Ferguson. Stalker did not think that RPC 1.9[5] applied, stating, "I am not aware of any information that would be relevant pertaining to Ms. Hitz, so I don't have anything that I could use to her detriment, that I would be required to use in advocating for Mr. Ferguson." RP at 23. The court found no conflict existed.

[4] RPC 1.7(a) provides that a concurrent conflict of interest exists if "the representation of one client will be directly adverse to another client" or "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."

[5] RPC 1.9(a) precludes an attorney who has formerly represented a client in a matter from thereafter representing another client "in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing."

## II. STATE'S CLOSING ARGUMENT AND REBUTTAL

The trial court instructed the jury that:

> You are sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. . . .
>
> In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things [they] testif[y] about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of [their] testimony.

Clerk's Papers at 54.

### A. *Closing Argument*

In discussing the evidence, the State argued that "it comes down to how you weigh the evidence and do you find Ms. Hitz' testimony credible, do you take the defendant at his word on that recording." RP at 622. At other points, the State argued, "it's a question of credibility, about how you weigh the testimony in the recording," "it's a question of weighing credibility here," and "you have to evaluat[e] the credibility of the witnesses." RP at 625, 627, 629.

The State also argued that it had proven fourth degree assault beyond a reasonable doubt "because the evidence supports Ms. Hitz' testimony being more credible here." RP at 630. The State then addressed Ferguson's self-defense claim to count three, arguing the following:

> [PROSECUTOR:] [D]uring my questioning [Ferguson] said he [grabbed the back of Hitz' head] to get her attention and I bring that up because later on when [defense counsel] got to ask more questions, there [are] some questions and answers about, well you did it to get her to stop kicking you, you did it to defend yourself, again I'm paraphrasing, and the defendant agreed with that, and you've been given an instructions about when somebody can use self defense related to count [three], because the defendant did say that, some testimony about that, about defending himself, but I remind you that initially he said just to get her attention, just to stop

> the situation. . . . When I first asked him about that and when he testified initially, he never said anything about being worried about another kick, about worrying about he was in danger. He just said she kicked me, it was painful, and so he got up and clasped her hair to get her attention. It was only on after I asked my question about, you know, did you use physical violence to get her attention and he said it could be characterized that way, then counsel asked him about, well, you did it to stop kicking you and implying he was defending himself, he didn't . . .
>
> [DEFENSE]: Objection, counsel didn't testify, the witness did.
>
> THE COURT: Ladies and gentlemen, the statements of the attorneys are meant to help you understand the evidence and the law that's been provided to you. Go ahead.

RP at 627-29.

The prosecutor continued, arguing, "[Defense] Counsel asked [Ferguson] about questions related to [Ferguson's] fears of being kicked again and it was only there, on that redirect of the defendant, you know, [that Ferguson] talked [ ] about being concerned about being kicked again." RP at 629.

B. *Rebuttal*

At the start of rebuttal, the State reiterated, "[C]redibility is huge in this case." RP at 680. The State noted, "[Defense] Counsel spent a lot of time talking about Ms. Hitz' credibility and hardly any time speaking about [Ferguson's] credibility." RP at 689. Further into rebuttal, the State argued the following:

> I would ask you to study [Ferguson's] credibility as well, not just Ms. Hitz, which one's more credible? . . . [defense] counsel, he talked about [Ferguson's] version of events. I would say again, you have to make a credibility finding between the two . . . [S]o it's [Ferguson's] version, his testimony isn't very credible. . . . [T]here's a credibility finding made, did he put that gun to her or not, to her forehead?

RP at 691-92.

Ferguson objected, arguing that "the jury does not need to make any credibility findings in order to determine Mr. Ferguson is not guilty. They're not required to do so." RP at 692. The trial court responded, "[T]he arguments of the attorneys are meant to assist you in understanding the law, the law is contained in my instructions. Go ahead, counsel." RP at 692. The State continued, arguing, "Is [Ferguson's testimony regarding the road incident] reasonable, is that credible or is Ms. Hitz' version of events more credible." RP at 693.

## ANALYSIS

### I. CONFLICT OF INTEREST

Ferguson contends that the trial court violated his right to counsel because an actual conflict of interest existed. Ferguson argues that an actual conflict of interest existed because (1) Gasnick represented Ferguson and Hitz during the first two pretrial hearings, (2) two attorneys from the same "firm" represented both Hitz and him, and (3) the attorney who represented Ferguson worked in the same "firm" as Gasnick, who previously represented Hitz. Ferguson argues that, because an actual conflict existed, we should presume prejudice and reverse his conviction. We disagree.

#### A. *Legal Principles*

Attorneys owe criminal defendants a duty of loyalty and a duty to avoid conflicts of interest. *State v. McDonald*, 143 Wn.2d 506, 511, 22 P.3d 791 (2001). An attorney has an actual conflict of interest if they owe duties to a party whose interests are adverse to the defendant's interests. *State v. Kitt*, 9 Wn. App. 2d 235, 244, 442 P.3d 1280 (2019).

To establish a Sixth Amendment's right to counsel violation based on a conflict of interest, "a defendant must demonstrate that an actual conflict of interest adversely affected

[their] lawyer's performance." *State v. Regan*, 143 Wn. App. 419, 427, 177 P.3d 783 (2008). In other words, a defendant must show both that their attorney actively represented conflicting interests and that the conflict adversely affected their counsel's performance. *State v. White*, 80 Wn. App. 406, 411, 907 P.2d 310 (1995). If a defendant meets this two-prong test, we presume prejudice. *Regan*, 143 Wn. App. at 427.

The alleged matters in conflict must be "substantially related." *State v. MacDonald*, 122 Wn. App. 804, 813, 95 P.3d 1248 (2004). This factual context test is a three-prong inquiry:

> First, the court reconstructs the scope of the facts involved in the former representation and projects the scope of the facts that will be involved in the second representation. Second, the court assumes that the lawyer obtained confidential client information about all facts within the scope of the former representation. Third, the court then determines whether any factual matter in the former representation is so similar to any material factual matter in the latter representation that a lawyer would consider it useful in advancing the interests of the client in the latter representation.

*Id.* (internal quotation marks omitted) (quoting *State v. Hunsaker*, 74 Wn. App. 38, 43-45, 873 P.2d 540 (1994)). The mere possibility of a conflict is insufficient to warrant the reversal of a conviction. *State v. Dhaliwal*, 150 Wn.2d 559, 573, 79 P.3d 432 (2003).

We review de novo whether the circumstances demonstrate a conflict under the ethical rules. *Regan*, 143 Wn. App. at 428.

B. *Ferguson Fails to Show a Conflict of Interest That Requires a Presumption of Prejudice*

Ferguson claims that an actual conflict of interest existed because Gasnick represented Ferguson and Hitz during the first two pretrial hearings. We disagree.

Though Gasnick represented Ferguson and Hitz during Ferguson's first two pretrial hearings, there is no indication that Gasnick actively represented conflicting interests. *White*, 80 Wn. App. at 412. The matters were not substantially related. The scope of Gasnick's

representation of Hitz was limited to merely vacating a drug possession conviction under *Blake*. Ferguson's case involved multiple assault charges against Hitz. The scope of the facts learned while entering an order vacating Hitz's unlawful conviction for simple drug possession would likely reveal no information material to Ferguson's representation for the assault charges. *MacDonald*, 122 Wn. App. 804, 813. The *possibility* that an actual conflict existed is insufficient to warrant the reversal of Ferguson's convictions. *Dhaliwal*, 150 Wn.2d at 573.

Next Ferguson claims an actual conflict of interest existed because two attorneys from the same firm represented both him and Hitz. Relatedly, Ferguson also claims an actual conflict of interest existed because Stalker, the second attorney who represented Ferguson, worked in the same "firm" as Gasnick, who previously represented Hitz. Ferguson primarily relies on *MacDonald* in support of his contention that an actual conflict exists.

In *MacDonald*, we held that an actual conflict existed where defense counsel had represented the victim's mother in an unrelated marital dissolution case and the victim's mother was a witness in MacDonald's rape trial. 122 Wn. App. at 812. The attorney claimed he had never received any impeaching information from the victim's mother that he could use against the victim, and the we commented that "[e]ven if true, actual receipt of such information is not the standard for disqualification." *Id.* at 813. Under the factual context test, we assumed that the attorney had received confidential information about the victim in the course of representing her mother. *Id.* at 813-14. Some of this information "was relevant to [the victim's] credibility and, potentially, her current rape accusation [against the defendant]." *Id.* at 814. A conflict existed because the marital dissolution case "would have necessitated receiving information about [the

victim]," the victim's testimony was "the sole evidence against [the defendant]," and the victim's "credibility [was] determinative." *Id*.

Even if we assume that Stalker obtained confidential client information about all facts within the scope of Gasnick's former representation of Hitz, this case is unlike *MacDonald* because, as discussed above, Gasnick's representation of Hitz's was limited to vacating an unlawful conviction for possession of a controlled substance. During Gasnick's representation of Hitz, Gasnick would not have learned anything about Hitz that would be material to Gasnick's or Stalker's representation of Ferguson.

In addition, Hitz's testimony was not "the sole evidence" against Ferguson, and her credibility was not determinative. *Id*. At trial, the State played two police-recorded calls between Hitz and Ferguson in which Ferguson acknowledged that he committed various assaultive acts against Hitz. Further, in relation to the remaining fourth degree assault charge, Ferguson admitted that he grabbed Hitz's hair to "ma[k]e sure she was lookin' at [him]." RP at 461. Therefore, Hitz's credibility was not determinative as was the victim's credibility in *MacDonald*. *See* 122 Wn. App. at 814.

Ferguson fails to show an actual conflict of interest that requires a presumption of prejudice.

C. *Ferguson Fails to Show That the Conflict Adversely Affected Counsel's Performance*

Even assuming an actual conflict existed, Ferguson nonetheless fails to show that any conflict adversely affected defense counsels' performance. To establish that the conflict adversely affected counsel's performance, Ferguson must show the conflict either caused some lapse in representation against his interests or likely affected specific aspects of Gasnick's or

Stalker's advocacy on his behalf. *Kitt*, 9 Wn. App. 2d at 243. Ferguson contends that the conflict likely affected specific aspects of Gasnick's and Stalker's advocacy on his behalf. We disagree.

First, Ferguson asserts that Gasnick's concurrent representation of Hitz in her separate, then-pending *Blake* case "would have prevented him from offering information" to address the trial court's comment about the "limited information on [Ferguson's] ties to the community" and his "employment history" at his bail and probable cause hearing. Br. of Appellant at 57. But Ferguson does not explain how or why this would have been the case. See *State v. Hand*, 199 Wn. App. 887, 901, 401 P.3d 367 (2017), *aff'd*, 192 Wn.2d 289, 429 P.3d 502 (2018) (explaining that we do not make arguments for the parties).

Next, Ferguson asserts that "at the trial, [Stalker's] former representation of [Hitz] would have prevented him from using adverse or embarrassing information to impeach her testimony." Br. of Appellant at 57. As stated above, there is no evidence that Stalker formerly represented Hitz. And Ferguson does not cite to any case in support of the proposition that we can assume Stalker obtained confidential client information about all facts within the scope of *Gasnick's* former representation of Hitz. *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962); *see also* RAP 10.3(a)(6). Therefore, Ferguson fails to show that the conflict adversely affected Stalker's performance.

Thus, we hold that Ferguson fails to establish a Sixth Amendment violation based on a conflict of interest.

## II. PROSECUTORIAL MISCONDUCT

Ferguson argues the State violated his right to a fair trial because of its repeated misconduct—shifting the burden of proof onto the defendant and "denigrating" defense counsel—and that the cumulative effect of the alleged misconduct requires reversal of his convictions. Br. of Appellant at 59. We disagree.

### A. *Legal Principles*

We review allegations of prosecutorial misconduct for an abuse of discretion. *State v. Brett*, 126 Wn.2d 136, 174, 892 P.2d 29 (1995).

If a defendant objected to the claimed prosecutorial misconduct below, they must prove that the prosecutor's conduct was both improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). A prosecutor's statement is improper if it undermines the presumption of innocence and shifts the burden of proof to the defendant. *See id.* at 759-60. A defendant shows prejudice if it was substantially likely the misconduct affected the verdict. *State v. Gouley*, 19 Wn. App. 2d 185, 200, 494 P.3d 458 (2021). We review the challenged conduct "'in the context of the whole argument, the issues of the case, the evidence addressed in argument, and the instructions given to the jury.'" *Gouley*, 19 Wn. App. 2d at 201 (quoting *State v. Scherf*, 192 Wn.2d 350, 394, 429 P.3d 776 (2018)).

A defendant who does not object to the prosecutor's remarks waives their prosecutorial misconduct claim unless they show the prosecutor's improper conduct was flagrant or ill intentioned. *Emery*, 174 Wn.2d at 764. When determining whether a nonobjecting defendant has overcome waiver, we "focus less on whether the prosecutor's misconduct was flagrant or ill

intentioned and more on whether the resulting prejudice could have been cured" with an instruction. *Id.* at 762.

In all criminal matters, the State bears the burden of proving each element of the crime charged beyond a reasonable doubt. *State v. Crossguns*, 199 Wn.2d 282, 297, 505 P.3d 529 (2022). It is the jury's role to weigh the evidence to determine whether the State has satisfied its burden. *Emery*, 174 Wn.2d at 760. The jury's role also encompasses making determinations on witness credibility. *Westby v. Gorsuch*, 112 Wn. App. 558, 570, 50 P.3d 284 (2002).

B. *Ferguson's Prosecutorial Misconduct Claims Based on Credibility Remarks Fails*

Ferguson contends that the prosecutor improperly shifted the State's burden when it argued the jury "had to determine whether [ ] Ferguson or [ ] Hitz was more credible in order to reach a verdict."[6] Reply Br. of Appellant at 21-22. We disagree.

The prosecutor told the jury, among other things, "[I]t comes down to how you weigh the evidence and do you find Ms. Hitz's testimony credible, do you take the defendant at his word on that recording." RP at 622. He stated, "So, again it's a question of credibility, about how you weigh the testimony in the recording." RP at 625. He also stated, "[A]nd so again it's a question of weighing credibility here." RP at 627. He further stated, "[Y]ou have to evaluat[e] the credibility of the witnesses." RP at 629.

Ferguson did not object to the prosecutor's credibility remarks made during closing argument or during rebuttal, with the exception of one remark during rebuttal. Thus, Ferguson

[6] Ferguson makes a passing assertion that Hitz's drug use was "directly relevant to the contested credibility issues that arose at trial." Br. of Appellant at 58. But Ferguson does not otherwise develop this into an argument, so we do not address it in this prehearing. *Hand*, 199 Wn. App. at 901.

waives his prosecutorial misconduct claim in regard to these initial closing argument remarks unless he can show they were improper, flagrant, and ill-intentioned; no curative instruction could have remedied their effect; and the comments were substantially likely to affect the verdict. *Gouley*, 19 Wn. App. 2d at 201. Ferguson fails to meet his burden.

In *State v. Fleming*, the court found misconduct where the prosecutor told the jury during closing argument, "'[F]or you to find the defendants . . . not guilty of the crime of rape . . . you would have to find either that [the victim] has lied about what occurred . . . or that she was confused; essentially that she fantasized what occurred.'" 83 Wn. App. 209, 213, 921 P.2d 1076 (1996) (emphasis omitted). The prosecutor's argument misstated the law and misrepresented the jury's role and the burden of proof. *Id*. The court held that "it is misconduct for a prosecutor to argue that in order to *acquit* a defendant, the jury must find that the State's witnesses are either lying or mistaken." *Id.* (emphasis added). Ignoring this prohibition amounts to flagrant and ill intentioned misconduct. *Id.* at 213-14.

Here, the prosecutor did not misstate the law, mispresent the jury's role, or otherwise misrepresent the burden of proof as in *Fleming*. Unlike the statements found improper in *Fleming*, the challenged comments here "did not expressly contrast an acquittal or finding of not guilty with a jury determination that the State's witnesses were lying." *State v. Rafay*, 168 Wn. App. 734, 837, 285 P.3d 83 (2012).

In *Crossguns*, the court found improper the prosecutor's statement to the jury during closing argument that, "'[i]t's your job to determine who's lying . . . [a]nd that's your job entirely,'" and his question asking the jury to decide "'[w]ho is lying and who is telling the truth.'" 199 Wn.2d at 298 (alteration in original). The court stated that "[i]nviting the jury to

decide a case based on who the jurors believe is lying or telling the truth improperly shifts the burden away from the State." *Id*.

And unlike the statements found improper in *Crossguns*, the comments here did not express an invitation to the jury to decide the case based on their determination of who was lying and who was telling the truth. *Id*. Rather, the prosecutor's arguments here spoke to the jury's duty as the sole judges of witness credibility and of what weight to give witness testimony, as articulated in the trial court's instructions to the jury. And we presume jurors follow the court's instructions. *State v. Weaver*, 198 Wn.2d 459, 467, 496 P.3d 1183 (2021). Therefore, Ferguson fails to show that the prosecutor's comments made during closing argument and rebuttal were improper. Furthermore, Ferguson does not argue that the prosecutor's comments were incurable, let alone show that this was the case, and we do not make arguments for the parties. *Hand*, 199 Wn. App. at 901. Thus, his claim "necessarily fails and our analysis need go no further." *Emery*, 174 Wn.2d at 764.

Ferguson did, however, object to one of the prosecutor's credibility remarks during rebuttal. Because Ferguson objected, he need not show that the comment was both flagrant and ill-intentioned nor that a curative instruction could not have obviated the effect of the improper comments. *Gouley*, 19 Wn. App. 2d at 201. Rather, Ferguson must prove only that the comment was both improper and prejudicial. *Emery*, 174 Wn.2d at 756.

Here, the prosecutor told the jury during rebuttal that it "ha[d] to make a credibility finding between [Ferguson and Hitz]." RP at 691. This argument was not improper because the prosecutor correctly conveyed the jury's role of determining witness credibility. *Westby*, 112 Wn. App. at 570 (explaining that the jury's role also encompasses making determinations on

witness credibility). Even assuming that the comment was improper, Ferguson nonetheless fails to show prejudice in light of the overwhelming evidence against him that supports his guilt, as discussed above. Thus, we hold that Ferguson's claims of prosecutorial misconduct based on the prosecutor's credibility remarks fail.

B. *The Prosecutor Did Not "Denigrate" Defense Counsel nor Undermine the Legitimacy of Ferguson's Defense*

Ferguson argues the prosecutor "committed prejudicial misconduct when it tried to discredit [him] and disparaged defense counsel by suggesting [Ferguson] did not properly raise a self-defense claim because the evidence supporting self-defense was elicited by his attorney." Br. of Appellant at 66. We disagree.

A prosecutor may argue that the evidence does not support the defense theory. *State v. Lindsay*, 180 Wn.2d 423, 431, 326 P.3d 125 (2014). But a prosecutor "must not impugn the role or integrity of defense counsel." *Id.* at 431-32. Prosecutorial statements that malign defense counsel are impermissible because they can severely damage a defendant's opportunity to present their case. *Id.* at 432.

Here, the prosecutor told the jury, among other things, that "[i]t was only on [sic] after [he] asked [his] question about, you know, did [Ferguson] use physical violence to get [Hitz'] attention and [Ferguson] said it could be characterized that way, then [defense] counsel asked [Ferguson] about, well, you did it to stop kicking you and implying he was defending himself, he didn't . . ." RP at 628-29. Ferguson objected below, so, to succeed on his prosecutorial misconduct claim based on this challenged comment, he must prove that the comment was both improper and prejudicial. *Emery*, 174 Wn.2d at 756.

In *State v. Warren*, the prosecutor told the jury that there were a "'number of mischaracterizations'" in defense counsel's argument as "'an example of what people go through in a criminal justice system when they deal with defense attorneys.'" 165 Wn.2d 17, 29, 195 P.3d 940 (2008). The prosecutor also portrayed defense counsel's argument as a "'classic example of taking these facts and completely twisting them to their own benefit, and hoping that you are not smart enough to figure out what in fact they are doing.'" *Id*. The court held that the comments were improper because "they commented on defense counsel's role." *Id.* at 30.

In *Lindsay*, the prosecutor stated in closing, in reference to defense counsel's closing argument, "This is a crock. What you've been pitched for the last four hours is a crock." 180 Wn.2d at 433. The court held that this statement "directly impugn[ed]" defense counsel because it was just as egregious as referring to defense counsel's presentation of their case as "'bogus'" and involving "'sleight of hand,'" and "implie[d] deception and dishonesty." *Lindsay*, 180 Wn.2d at 433-34 (quoting *State v. Thorgerson*, 172 Wn.2d 438, 451-52, 258 P.3d 43 (2011)).

Unlike the statements found improper in *Warren* and *Lindsay*, the challenged comment here did not rise to the level of maligning defense counsel. The prosecutor did not denigrate or otherwise impugn the role or integrity of defense counsel because the prosecutor did not contrast the roles of the prosecutor and defense counsel, nor imply that all defense counsel are retained to lie, nor otherwise imply defense counsel's dishonesty. *See State v. Gonzales*, 111 Wn. App. 276, 283, 45 P.3d 205 (2002); *see also Lindsay*, 180 Wn.2d at 433. To the extent that the prosecutor's comments spoke to Ferguson's credibility, this was not improper because prosecutors "ha[ve] wide latitude to argue reasonable inferences from the evidence, including evidence respecting the credibility of witnesses." *Thorgerson*, 172 Wn.2d at 448.

Even assuming that the argument was improper, Ferguson nonetheless fails to show prejudice in light of the overwhelming evidence against him that supports his guilt, as discussed above. Thus, we hold that Ferguson's claim of prosecutorial misconduct based on an allegation that the State denigrated defense counsel and undermined Ferguson's defense, fails.

C. *The Cumulative Effect Analysis is Inapplicable*

Lastly, Ferguson argues that the cumulative effect of the alleged misconduct requires reversal. We disagree.

"[T]he cumulative effect of repetitive prosecutorial misconduct may be so flagrant that no instruction or series of instructions could erase their combined prejudicial effect." *State v. Cook*, 17 Wn. App. 2d 96, 106, 484 P.3d 13 (2021). Because we hold that none of the challenged grounds for prosecutorial misconduct were improper, the cumulative effect analysis is inapplicable.

## III. LEGAL FINANCIAL OBLIGATIONS

Ferguson argues his VPA and DNA collection fee should be stricken. The State concedes that the LFOs should be stricken. We accept the State's concession.

Amended RCW 7.68.035(4) requires that no VPA be imposed if the trial court finds at the time of sentencing that the defendant is indigent as defined in RCW 10.01.160(3). Amended RCW 7.68.035(4) applies to Ferguson because this case is on direct appeal. *See State v. Ellis*, 27 Wn. App. 2d 1, 16, 530 P.3d 1048 (2023). At sentencing, the trial court found that Ferguson was indigent because he receives public assistance and an annual income, after taxes, of 125 percent or less of the current federal poverty level. RCW 10.101.010(3)(a)-(c). Because the trial court

made the specific indigency finding that is necessary under RCW 10.01.160(3) and this case is on direct appeal, we reverse the VPA and remand to the trial court to strike the VPA.

Under former RCW 43.43.7541(1), the trial court must impose a DNA collection fee unless the State has already collected the offender's DNA as the result of a prior conviction. But the legislature has eliminated this provision. LAWS OF 2023, ch. 449, § 4; *see also Ellis*, 27 Wn. App. 2d at 17 (determining that the DNA collection fee is no longer mandatory). Thus, we reverse the DNA collection fee and remand to the trial court to strike the DNA collection fee.

CONCLUSION

We affirm Ferguson's convictions, but we reverse the challenged LFOs and remand for the trial court to strike the VPA and DNA collection fee.

Che, J.

Che, J.

We concur:

J, J

Jet, P.J.

Price, J.

Price, J.