Filed
Washington State
Court of Appeals
Division Two

June 25, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. STEVEN KEITH NELSON, Appellant.	No. 57445-4-II PART PUBLISHED OPINION

MAXA, P.J. – Steven Nelson appeals his sentence of life without release/parole (LWOP) as authorized under the Persistent Offender Accountability Act (POAA), RCW 9.94A.570. Nelson was convicted of second degree assault, and he had two previous strike offenses: separate convictions of first degree assault and second degree assault.

Nelson argues that the POAA is unconstitutional as applied because it is administered in a racially disproportionate manner. He relies on the framework that the Supreme Court used to hold that the death penalty was unconstitutional in *State v. Gregory*, 192 Wn.2d 1, 22, 427 P.3d 621 (2018). He also relies on a declaration from appellate counsel attached as an appendix to his opening brief providing data regarding the number of Black defendants compared to the number of White defendants given LWOP sentences under the POAA. That data was not presented to the trial court, and Nelson did not argue in the trial court that his LWOP sentence was unconstitutional.

The State filed a motion to strike Nelson's evidence in the appendix and all argument based upon such evidence, arguing that the submission of such evidence violated RAP 9.11. The State also argues that Nelson cannot raise this issue for the first time on appeal because his claim

does not constitute manifest constitutional error. On the merits, the State argues that the evidence is insufficient to establish a constitutional violation.

We (1) deny the State's motion to strike because we may take judicial notice of the evidence, the evidence provided was from reputable sources, and the State challenged the reliability of the evidence in its response brief; (2) exercise our discretion to consider Nelson's constitutional argument for the first time on appeal; and (3) hold that although Nelson shows that the POAA may have a racially disproportionate impact, he has not shown that the POAA is administered in a racially disproportionate manner as found in *Gregory*.

Therefore, we hold that the POAA is not unconstitutional as applied. We reject Nelson's additional arguments on the merits in an unpublished portion of this opinion. Accordingly, we affirm Nelson's conviction and sentence, but we remand for the trial court to strike the crime victim penalty assessment (VPA) from the judgment and sentence.

FACTS

In January 2021, Patricia McCray was living on the street and met Nelson outside of her tent. They purchased crack cocaine and went back to Nelson's residence and drank and smoked together. Nelson became agitated and paranoid, and accused McCray of stealing the drugs or his money. He then grabbed a knife and stabbed McCray multiple times.

The State charged Nelson with first degree assault. After a mistrial, a second trial was held and the jury found Nelson guilty of second degree assault while armed with a deadly weapon.

Nelson stipulated that he previously had been convicted of two other felonies that were defined as most serious offenses – first degree assault and second degree assault. RCW 9.94A.030(32)(a)-(b). These convictions are considered strike offenses under the POAA. RCW

9.94A.030(37)(a)(i)-(ii). Because Nelson's current offense of second degree assault while armed with a deadly weapon also was a strike offense, the trial court sentenced Nelson to LWOP.

Nelson appeals his sentence.

ANALYSIS

A. STATE'S MOTION TO STRIKE

The State filed a motion to strike Nelson's evidence in the appendix of his opening brief and all argument based upon such evidence because (1) such evidence was not a part of the appellate record, (2) Nelson's appellate counsel prepared the evidence making it an improper declaration and inadmissible testimony, and (3) the State did not have an opportunity to challenge the reliability of the evidence. We deny the State's motion.

First, although Nelson did not present his evidence in the trial court, we may still consider the evidence as part of the appellate record. Courts "take 'judicial notice of implicit and overt racial bias against [B]lack defendants in this state' and . . . will consider such historical and contextual facts when deciding cases." *State v. Hawkins*, 200 Wn.2d 477, 501, 519 P.3d 182 (2022) (quoting *Gregory,* 192 Wn.2d at 22). The court in *Hawkins* stated,

> We have also recognized the judiciary's role in perpetuating racism within the justice system and have committed to changing that. In line with that appreciation of historical and contextual accuracy, we have considered a wide variety of data when making our decisions. In some cases involving racially disproportionate outcomes, we have considered statistical evidence that was developed as part of the record. In other cases, we have considered available data, history, and context, even if it was not developed as part of the record. In other words, the judicial branch can rely on history and context on issues of race to the same extent that courts have always relied on history and context to analyze all other issues.

200 Wn.2d at 501 (citations omitted).

Second, the evidence Nelson provides in the appendix does not represent "testimony" of his appellate counsel. Although Nelson's attorney submitted a declaration, it merely states how

and where he gathered the evidence. He maintains that the evidence provided was from reputable sources, such as the Washington State Caseload Forecast Council, the United States Census Bureau, Columbia Legal Services, and the Sentencing Guidelines Commission.

Third, although the State makes a sound argument that they should have an opportunity to challenge the reliability of the evidence, it did so in its response brief. Not only does the State challenge the data, but it provides its own evidence from a task force research working group and the Sentencing Project.

The State notes that in *Gregory*, the Supreme Court granted the State's request to hold a hearing to challenge the report upon which the defendant relied. 192 Wn.2d at 12-13. Although no hearing was actually held, the commissioner solicited additional information through interrogatories, filings, and follow-up questions. *Id.* at 13. But in that case the defendant had commissioned an expert study, and the State had concerns about the researcher's statistical methodology and reliability. *Id.* at 12.

Here, Nelson's attorney did not commission his own study for the purpose of his argument. Instead, he gathered existing statistics and data from reputable sources and submitted them in the format of an appendix. And just like in *Gregory*, the State was still able to express its disagreement and overall assessment of the appendix in its response brief.

Therefore, we deny the State's motion to strike.

B. CONSIDERATION OF UNPRESERVED ARGUMENT

The State argues that Nelson did not preserve the POAA issue for appeal because he did not challenge the constitutionality of the POAA at the trial court. The State claims that the issue does not constitute manifest constitutional error under RAP 2.5(a)(3) because it depends solely

on evidence outside the record that was not submitted to the trial court. We exercise our discretion to consider this issue.

RAP 2.5(a) states that the "appellate court may refuse to review any claim of error which was not raised in the trial court." However, a party may raise a manifest error affecting a constitutional right for the first time on appeal. RAP 2.5(a)(3). And we have discretion to consider unpreserved claims even if they do not involve manifest constitutional errors. *See State v. Clare*, ___ Wn. App. 2d ___, 544 P.3d 1099, 1103 (2024). In addition, we may exercise our discretion to reach the issue presented in order to further clarify the law. *State v. Grott*, 195 Wn.2d 256, 270, 458 P.3d 750 (2020).

The State cites to *State v. Davis*, 175 Wn.2d 287, 290 P.3d 43 (2012), *abrogated in part* by *Gregory*, 192 Wn.2d 1. In *Davis*, the defendant brought a motion to dismiss in the trial court, arguing that the death penalty violated the Washington Constitution. *Davis*, 175 Wn.2d at 343. The motion was based on federal law and uncited statistics. *Id.* On appeal, the defendant supported this argument with statistics and data, but the Supreme Court struck that evidence. *Id.* The court held that the argument was not manifest because the record was insufficient to review it. *Id.* at 344. The court stated, "we have a severe lack of information on the death penalty's implementation, which makes it difficult for us to perform any meaningful analysis." *Id.* at 345.

As in *Davis*, the trial court record is insufficient for us to review Nelson's constitutional claim. And because the trial court was not provided with the data Nelson has submitted on appeal, the alleged constitutional error may not be manifest.

On the other hand, Nelson's argument is based on state law and reputable statistics, which we have decided not to strike. And the Supreme Court has acknowledged that "Black defendants appear to receive [LWOP] sentences at a far greater rate than white defendants."

State v. Jenks 197 Wn.2d 708, 712, 487 P.3d 482 (2021). Therefore, we exercise our discretion under RAP 2.5(a) to consider Nelson's argument that the POAA is unconstitutional.

C. CONSTITUTIONALITY OF PERSISTENT OFFENDER ACCOUNTABILITY ACT

Nelson argues that the POAA is unconstitutional as applied because it is administered in a racially disproportionate manner. He argues that we should apply the same analysis the Supreme Court used in *Gregory* to invalidate the death penalty. Although Nelson raises serious concerns about the racially disproportionate impact of the POAA, he has not shown that the POAA is administered in a racially disproportionate manner as found in *Gregory*. Therefore, we disagree.

1. Legal Principles

Article I, section 14 of the Washington Constitution provides, "Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted." "This court has 'repeated[ly] recogni[zed] that the Washington State Constitution's cruel punishment clause often provides greater protection than the Eighth Amendment.' " *Gregory*, 192 Wn.2d at 15 (quoting *State v. Roberts*, 142 Wn.2d 471, 506, 14 P.3d 713 (2000)).

We review constitutional challenges de novo. *State v. Ross*, 28 Wn. App. 2d 644, 646, 537 P.3d 1114 (2023), *review denied*, 2 Wn.3d 1026, 544 P.3d 30 (2024). Statutes are presumed constitutional and the challenger has the burden to show unconstitutionality. *Id.* "An as-applied challenge to a statute's constitutionality requires examination of the statute in the specific circumstances of the case." *Id.* If a court holds that a statute is unconstitutional as applied, the statute is not invalidated, but instead its application is prohibited in the specific context and future similar contexts. *Id.*

Under the POAA, a persistent offender is an offender who has on three separate occasions committed felonies that are most serious offenses. RCW 9.94A.030(37)(a)(i)-(ii). RCW 9.94A.030(32) defines "most serious offense" as any class A felony as well as a number of other offenses. Sentencing courts must count all prior adult convictions for most serious offenses as "strikes." *State v. Reynolds*, 2 Wn.3d 195, 200, 535 P.3d 427 (2023). After three strikes, the offender *must* be sentenced to LWOP. RCW 9.94A.570. A trial court lacks discretion to impose any other sentence. *State v. Crawford*, 159 Wn.2d 86, 101, 147 P.3d 1288 (2006).

Before being convicted of his current offense, Nelson had two separate prior convictions of first degree assault and second degree assault. Both are defined as most serious offenses. RCW 9.94A.030(32)(a)-(b). In addition, Nelson's current offense of second degree assault is defined as a most serious offense. RCW 9.94A.030(32)(b). Because Nelson now has been convicted on three separate occasions for most serious offenses, he fits within POAA's definition of a persistent offender.

2. *Gregory* Decision

Nelson argues that the POAA is unconstitutional as applied under the framework the Supreme Court used for finding the death penalty unconstitutional in *Gregory*, 192 Wn.2d 1.

In *Gregory*, a jury convicted the defendant of aggravated first degree murder. 192 Wn.2d at 6. The same jury, and another jury on remand for resentencing, concluded that there were not sufficient mitigating circumstances to merit leniency and sentenced the defendant to death. *Id.* at 6-7.

At the time, Washington's capital punishment statutes – contained in chapter 10.95 RCW – provided for a special sentencing proceeding where either a judge or a jury would determine

whether there were sufficient mitigating circumstances to merit leniency when a defendant was found guilty of aggravated first degree murder. *Id.* at 10. If such circumstances were present, then the defendant would be sentenced to LWOP. *Id.* If the defendant instead was sentenced to death, then the sentence would automatically be reviewed by the Supreme Court. *Id.* The court was required to determine "(a) whether there was sufficient evidence to justify the judge's or jury's finding in the special sentencing proceeding, (b) whether the death sentence [was] excessive or disproportionate to the penalty imposed in similar cases, considering the crime and the defendant, (c) whether the death sentence was brought about through passion or prejudice, and (d) whether the defendant had an intellectual disability." *Id.*

The defendant in *Gregory* challenged the constitutionality of the death penalty, claiming that his death sentence was random, arbitrary, and impermissibly based on his race. *Id.* at 11. The defendant commissioned a study by Katherine Beckett and Heather Evans (Beckett report) on the effect of race and the county of conviction on the imposition of the death penalty. *Id.* at 12. The Beckett report concluded that "black defendants were four and a half times more likely to be sentenced to death than similarly situated white defendants." *Id.* The State raised concerns about the statistical analysis in the report and filed a report by its own expert. *Id.* at 12-13. The court ordered a hearing before the Supreme Court Commissioner, who provided a report outlining the disagreements between the experts and evaluating the strengths and weaknesses of the defendant's analysis. *Id.* at 13.

After running additional models as requested by the commissioner, Beckett summarized her findings on race as follows:

> "[F]rom December 1981 through May of 2014, special sentencing proceedings in Washington State involving Black defendants were between 3.5 and 4.6 times as likely to result in a death sentence as proceedings involving non-Black defendants

> after the impact of the other variables included in the model has been taken into account."

Id. at 19 (quoting Resp. to Comm'r's Suppl. Interrogs. at 16 (Sept. 29, 2017)). The court gave "great weight to Beckett's analysis and conclusions." *Id.*

The Supreme Court stated that the most important consideration was whether the evidence showed that race had a "meaningful impact on imposition of the death penalty." *Id.* at 20. The court emphasized that it made this determination "by way of legal analysis, not pure science." *Id.* As a result, the court declined to require "indisputably true social science to prove that our death penalty is impermissibly imposed based on race." *Id.* at 21.

The court stated, "Given the evidence before this court and our judicial notice of implicit and overt racial bias against black defendants in this state, we are confident that the association between race and the death penalty is *not* attributed to random chance." *Id*. at 22. The court concluded, "When the death penalty is imposed in an arbitrary and racially biased manner, society's standards of decency are even more offended. Our capital punishment law lacks 'fundamental fairness' and thus violates article I, section 14." *Id.* at 24 (quoting *State v. Bartholomew*, 101 Wn.2d 631, 640, 683 P.2d 1079 (1984)).

The Supreme Court further held that the death penalty failed to serve the penological goals of retribution and deterrence. *Gregory*, 192 Wn.2d at 24. Beckett's analysis demonstrated that there was " 'no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.' " *Id.* at 25 (quoting *Furman v. Georgia*, 408 U.S. 238, 313, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (White, J., concurring)). The court stated, "To the extent that race distinguishes the cases, it is clearly impermissible and unconstitutional." *Gregory*, 192 Wn.2d at 25.

3. Analysis

Nelson argues that the POAA is unconstitutional because it is administered in a racially disproportionate manner. The Supreme Court in *Jenks* acknowledged "serious concerns about the racially disproportionate impact of the POAA." 197 Wn.2d at 712. The court stated, "Black defendants appear to receive [LWOP] sentences at a far greater rate than white defendants" and "the legislature itself acknowledged this in drafting ESSB 5288, noting that '[t]here is racial disparity in how the persistent offender statute is enforced. Four percent of the population [of Washington] is African American yet a disproportionate number have been convicted as persistent offenders.' " *Id.* (quoting S.B. REP. ON S.B. 5288, 66th Leg., Reg. Sess. (Wash. 2019)). But the court stated that the constitutional issue was not before the court and that "[s]uch constitutional consideration must await the appropriate case." *Id.* at 712-13.

Gregory found the death penalty was unconstitutional because of the racial disparity in assessing the death penalty. 192 Wn.2d at 24. However, imposition of a LWOP sentence under the POAA involves a different procedure than the imposition of the death penalty addressed in *Gregory*.

The prosecutor had discretion whether to seek the death penalty. Under former RCW 10.95.040(1)-(2) (1981), the prosecutor had to file within 30 days a notice of a special sentencing proceeding to determine whether the death penalty should be imposed. If no notice was filed, the prosecutor could not request the death penalty. Former RCW 10.95.040(3). The concurring opinion in *Gregory* noted that prosecutors in only three counties had filed death notices since 2000, meaning that where a crime was committed was a deciding factor in whether the death penalty was imposed. 192 Wn.2d at 44 (Johnson, J., concurring).

If the death penalty was sought, the judge or the jury had discretion as to whether there were sufficient mitigating circumstances to merit leniency from a death sentence. *Gregory*, 192 Wn.2d at 10. And if the defendant was sentenced to death, then it was in the Supreme Court's discretion as to whether the sentence was proportionate. *Id.* Proportionality review was conducted on an individual basis. *Id.* at 26. " 'At its heart, proportionality review will always be a subjective judgment as to whether *a particular death sentence* fairly represents the values inherent in Washington's sentencing scheme for aggravated murder.' " *Id.* (quoting *State v. Pirtle*, 127 Wn.2d 628, 687, 904 P.2d 245 (1995)).

Under the POAA, the prosecutor has discretion whether to charge a strike offense. But after a conviction, the application of the POAA does not involve any discretion of the prosecutor or a judge/jury or a proportionality review. A defendant is sentenced to LWOP when they have been convicted of any felony that is considered a most serious offense and they were convicted on at least two separate occasions of felonies that were considered most serious offenses. RCW 9.94A.030(37)(a)(i)-(ii). The statute provides a list of felonies that are considered most serious offenses, including first and second degree assault. RCW 9.94A.030(32)(a)-(b). In other words, a LWOP sentence is automatic if the defendant has been convicted of three separate most serious offenses.

Because Nelson was previously convicted of first and second degree assault, he was sentenced to LWOP when he was again convicted of second degree assault. The POAA is not administered on a case by case basis as the death sentence was administered in *Gregory*. The POAA is administered the same way no matter who the defendant; *all* offenders who commit three most serious offenses will be sentenced to LWOP. Further, unlike for the death penalty,

the Supreme Court has held that the POAA serves the penological goals of retribution, deterrence, and incapacitation. *State v. Moretti*, 193 Wn.2d 809, 826-30, 446 P.3d 609 (2019).

Like the Supreme Court in *Jenks*, we have serious concerns about the racially disproportionate impact of the POAA. However, this disproportionate impact likely is due to systemic racial injustice throughout the criminal justice system rather than the administration of the POAA. We are not in a position to address these systemic problems.

Nelson has not shown that the POAA is administered in a racially disproportionate manner as in *Gregory*. Therefore, we hold that the POAA is not unconstitutional as applied.

CONCLUSION

We affirm Nelson's conviction and sentence, but remand for the trial court to strike the VPA from the judgment and sentence.

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

In the unpublished portion of this opinion, we hold that (1) the trial court did not violate Nelson's right to counsel when it failed to inquire into his requests for new defense counsel because Nelson never properly filed any motions on which the trial court could rule; (2) regarding the trial court's finding that a witness's prior testimony could be admitted because she was unavailable to testify, Nelson waived his right to confrontation argument on appeal because he failed to renew his objection regarding the sufficiency of the evidence of the witness's unavailability in the trial court; and (3) as the State concedes, the trial court should strike the $500 VPA from the judgment and sentence.

ADDITIONAL FACTS

Relevant Witnesses

Cynthia Davis rented a room in the same house in which Nelson lived. Davis and her boyfriend, Marvin Leikam, were present in the house when Nelson assaulted McCray. They did not witness the assault, but they saw McCray come out of Nelson's room covered in blood.

Mistrial

Nelson's first trial took place in December 2021. The morning before trial began, Nelson expressed that he was unhappy with defense counsel and requested to continue the trial in order to obtain a different lawyer. The trial court stated that Nelson's motion was untimely and that it would not continue the trial nor appoint new counsel.

Davis testified and was subject to cross-examination by defense counsel. The jury was unable to reach a verdict, and the trial court declared a mistrial.

Requests for New Counsel

Shortly after the mistrial, Nelson sent a letter to the trial court requesting assignment of new counsel because there was a breakdown of communication and trust with his defense counsel. The court filed the letter and forwarded copies to the prosecutor and defense counsel. But the court noted that it "does not act on ex-parte letters or improperly filed pleadings. If matters are to be considered by the Court, they must be properly filed and placed on the docket with due notice to all parties and in accordance with court rules." Clerk's Papers (CP) at 141.

Nelson then sent to the trial court a "Motion for Substitution of Assigned Counsel in Lieu of Second Trial." CP at 142-47. It was filed with the court as "Correspondence to Court." CP at 142. Nelson outlined the breakdown of communication between him and defense counsel. The trial court took no action.

Nelson again sent another letter to the trial court noting the breakdown of communication between him and defense counsel. The court again filed the letter and forwarded copies to the prosecutor and defense counsel. But the court again noted that it "does not act on ex-parte letters or improperly filed pleadings. If matters are to be considered by the Court, they must be properly filed and placed on the docket with due notice to all parties and in accordance with court rules." CP at 153.

In February 2022, Nelson appeared before the trial court and requested to represent himself due to a breakdown in communication with defense counsel. After a lengthy colloquy, the court determined that Nelson was making this request knowingly and intelligently and allowed Nelson to represent himself. The court appointed the previous defense counsel as standby counsel.

Davis's Prior Testimony

The State filed a motion to admit the prior testimony of Davis from the first trial. The State argued that Davis was unavailable under ER 804(a)(4) because of mental illness, and therefore her prior testimony was admissible under ER 804(b)(1). Because Nelson cross-examined her at the previous trial, the trial court stated that the right to confrontation was not at issue but whether Davis was unavailable was "more of a gray area." Rep. of Proc. (RP) (August 29, 2022) at 32-34.

The trial court heard testimony from Leikam as an offer of proof. Leikam testified that Davis had paranoid schizophrenic disorder, schizoaffective disorder, and attention deficit hyperactivity disorder. He also testified that during the previous nine months, he noticed that Davis's mental health issues had gradually gotten worse to "monumentally worse." RP (August

29, 2022) at 38. Leikam stated that this was because she stopped taking her medications and refused to touch base with treatment providers.

But Leikam also testified that Davis had normal memory and was still grounded in reality. Although she "may not be able to articulate that well or stick to the issues at hand," she had a clear memory. RP (August 29, 2022) at 47.

Nelson argued that Leikam's testimony did not accurately explain what Davis's mental health status was and that her status should be determined by a mental health professional. The trial court ruled that the record did not establish that Davis was unavailable under ER 804.

Two days later, the State brought forward new information regarding Davis's mental health status. The previous night, Davis attempted to light her neighbor's lawn on fire, defecated and urinated in the street, and was involuntarily detained. She would not be released for at least a week.

Jeffrey Thiry, a sergeant with the Tacoma Police Department (TPD), testified that when he tried to locate Davis for trial, he learned that she was suspected of committing arson and that TPD officers had involuntarily committed her. The designated crisis responder told Thiry that Davis had been transferred to the hospital and that she would be transported to a secured facility that night. Thiry stated that Davis would be detained for a week.

Nelson did not cross-examine Thiry. When the trial court asked Nelson if he had "any reason why the Court should not admit the prior testimony" upon finding that Davis was unavailable, he responded, "No, Your Honor." RP (August 31, 2022) at 446. The court then granted the State's motion to admit Davis's prior testimony. Nelson did not object.

A transcript of Davis's testimony from the first trial was read to the jury during the second trial. Nelson did not object.

Conviction and Sentence

The jury found Nelson guilty of second degree assault while armed with a deadly weapon. In October 2022, the trial court sentenced Nelson and determined that Nelson was indigent. However, the trial court imposed the $500 VPA.

Nelson appeals his conviction and sentence.

ANALYSIS

A. RIGHT TO COUNSEL

Nelson argues that the trial court violated his right to counsel when it failed to inquire into his repeated motions for new counsel. We disagree.

1. Legal Principles

Article I, section 22 of the Washington Constitution and the Sixth Amendment to the United States Constitution guarantee a criminal defendant the right to assistance of counsel. When a defendant requests substitute counsel, the request must be timely and stated unequivocally. *State v. Elwell*, 199 Wn.2d 256, 272, 505 P.3d 101 (2022). The trial court must decide whether the relationship between defense counsel and the defendant has completely collapsed. *Id.*

When reviewing the trial court's ruling, we consider " '(1) the extent of the conflict, (2) the adequacy of the [trial court's] inquiry, and (3) the timeliness of the motion.' " *Id.* at 272-73 (quoting *State v. Cross*, 156 Wn.2d 580, 607, 132 P.3d 80 (2006), *abrogated on other grounds by State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018)). When a trial court learns of a conflict between counsel and a defendant, the court has " 'an "obligation to inquire thoroughly into the factual basis of the defendant's dissatisfaction" ' sufficient to reach an informed decision." *State*

v. Davis, 3 Wn. App. 2d 763, 790, 418 P.3d 199 (2018) (quoting *State v. Thompson*, 169 Wn. App. 436, 462, 290 P.3d 996 (2012)).

We review trial court decisions relating to differences between defense counsel and a defendant for an abuse of discretion. *Elwell*, 199 Wn.2d at 273.

2. Analysis

Here, Nelson never properly filed any motions on which the trial court could rule. Nelson sent two letters to the trial court, to which the court responded each time that it would not act on ex-parte letters and that Nelson must properly file a motion. Nelson also sent to the court a motion requesting new counsel, but it was filed with the court as a "Correspondence to Court," and not as a properly filed motion. CP at 142-47.

When the trial court granted Nelson's request to represent himself, Nelson did not ask for substitution of counsel. He only requested to proceed pro se.

Nelson claims that the trial court abused its discretion when it required him to comply with court rules because Pierce County Local Rule (PCLR) 7(a)(3)(A), which states the process for properly filing motions, does not apply to criminal cases. But CR 5, which governs the service and filing of pleadings and other papers in civil cases, also governs the service and filing of written motions in criminal cases. CrR 8.4.

Nelson also claims that the trial court should have inquired into the basis of his request for new counsel once the court learned of the conflict. But Nelson never properly filed any motions and so the issue was never properly before the trial court to give rise to an obligation to inquire into the conflict between Nelson and defense counsel.

Therefore, we hold that the trial court did not violate Nelson's right to counsel.

B. WITNESS UNAVAILABILITY

Nelson argues that the trial court erred when it found Davis unavailable to testify, and therefore violated his right to confrontation when it admitted Davis's prior trial testimony. The State argues that Nelson waived this argument on appeal because he failed to renew his objection regarding the sufficiency of the evidence of Davis's unavailability. We agree with the State.

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

Initially, Nelson objected to the State's motion when he argued that Leikam's testimony did not accurately explain what Davis's mental health status was and that her status should be determined by a mental health professional. But he did not renew this objection when the State presented new evidence two days later.

After Thiry testified about Davis's unavailability, the trial court asked Nelson if he had "any reason why the Court should not admit the prior testimony" upon finding that Davis was unavailable. RP (August 31, 2022) at 446. Nelson responded, "No, Your Honor." RP (August 31, 2022) at 446. And when the court granted the State's motion to admit Davis's prior testimony and a transcript of Davis's testimony from the first trial was read to the jury, Nelson did not object either time.

The record shows that Nelson did not renew his previous objection regarding Davis's availability to testify. Therefore, we hold that Nelson waived this argument on appeal.

C. CRIME VICTIM PENALTY ASSESSMENT

Nelson argues, and the State concedes, that the $500 VPA should be stricken from his judgment and sentence. We agree.

Effective July 1, 2023, RCW 7.68.035(4) prohibits courts from imposing the VPA on indigent defendants as defined in RCW 10.01.160(3). *See State v. Ellis*, 27 Wn. App. 2d 1, 16, 530 P.3d 1048 (2023). For purposes of RCW 10.01.160(3), a defendant is indigent if they meet the criteria in RCW 10.10.010(3). Although this amendment took effect after Nelson's sentencing, it applies to cases pending on appeal. *Ellis*, 27 Wn. App. 2d at 16.

The trial court sentenced Nelson in October 2022 and determined that Nelson was indigent. The State concedes that the VPA should be stricken. Therefore, on remand the trial court must strike the VPA from the judgment and sentence.

CONCLUSION

We affirm Nelson's conviction and sentence, but we remand for the trial court to strike the VPA from the judgment and sentence.

MAXA, P.J.

We concur:

LEE, J.

CHE, J.