Filed
Washington State
Court of Appeals
Division Two

March 5, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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

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

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

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 In the unpublished portion of this opinion, we address the remainder of Dimas's claims.

Accordingly, we affirm Dimas's conviction but, as discussed in the unpublished portion of the opinion, we remand for the trial court to strike the community custody conditions prohibiting contact with minors and entering areas where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

FACTS

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

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

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

Pretrial Hearings

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

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

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

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

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

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

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

Verdict and Sentence

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

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

Dimas appeals his conviction and sentence.

ANALYSIS

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

A. LEGAL PRINCIPLES

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

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

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

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

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

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

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

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

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

B. MANIFEST ERROR

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

The court in *Anderson* found a manifest constitutional error when deciding whether to consider the defendant's right to consult with counsel claim, but did not address in any detail why the error was manifest. *See* 19 Wn. App. 2d at 563. The court in *Bragg* also did not address manifest error. *See* 28 Wn. App. 2d at 504-05. Here, a review of the record shows that the trial

court's error was not manifest because Dimas cannot show that an ability to confer with defense counsel would have made any difference.

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

UNPUBLISHED OPINION

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

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

ADDITIONAL FACTS

Background

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

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

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

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

Initial Investigation

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

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

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

Reopened Investigation

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

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

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

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

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

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

Motion to Dismiss

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

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

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

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

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

Opening Statements

During opening statements, defense counsel stated,

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

RP at 311-12.

Trial Testimony

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

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

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

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

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

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

Juror Bias

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

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

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

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

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

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

Closing Arguments

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

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

RP at 633-34.

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

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

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

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

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

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

RP at 635.

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

The prosecutor again discussed how no other males were involved:

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

RP at 655. He further stated,

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

RP at 660.

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

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

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

ANALYSIS

A. RIGHT TO BE PRESENT

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

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

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

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

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

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

B. PREACCUSATORIAL DELAY

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

1. Legal Principles

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

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

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

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

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

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

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

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

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

2. Analysis

a. Prejudice

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

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

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

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

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

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

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

b. Reasons for Delay

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

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

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

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

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

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

c. Fundamental Conceptions of Justice

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

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

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

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

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

C. RIGHT TO UNBIASED JURORS

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

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

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

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

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

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

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

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

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

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

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

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

D. PROSECUTORIAL MISCONDUCT

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

1. Legal Principles

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

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

2. Mischaracterizing Defense Counsel's Opening Statement

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

During opening statement, defense counsel stated,

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

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

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

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

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

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

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

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

3. Impugning Defense Counsel

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

During closing argument, the prosecutor stated,

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

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

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

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

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

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

4. Misrepresenting Forensic Evidence

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

During closing argument, the prosecutor stated,

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

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

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

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

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

5. Shifting the Burden of Proof

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

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

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

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

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

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

6. Evidence Outside the Record

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

During closing argument, the prosecutor stated,

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

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

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

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

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

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

7. Cumulative Misconduct

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

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

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

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

E. SUFFICIENCY OF EVIDENCE – DEADLY WEAPON SENTENCING ENHANCEMENT

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

1. Standard of Review

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

2. Legal Principles

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

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

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

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

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

3. Analysis

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

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

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

F. CRIME RELATED COMMUNITY CUSTODY CONDITIONS

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

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

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

G. COMMUNITY CUSTODY SUPERVISION FEES

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

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

H. CRIME VICTIM PENALTY ASSESSMENT

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

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

The trial court determined that Dimas was indigent under RCW 10.10.010(3). Therefore, on remand the $500 VPA must be stricken from the judgment and sentence.

I. SAG CLAIMS

1. Lack of Jurisdiction

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

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

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

2. Vague Claims

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

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

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

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

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

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

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

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

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

3. Claims Outside the Record

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

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

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

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

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

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

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

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

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

CONCLUSION

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

MAXA, P.J.

We concur:

LEE, J.

VELJACIC, J.