

COURT OF APPEALS OF VIRGINIA

Record No. 0764-25-4

JULIO R. BASURTO, SOMETIMES KNOWN AS
JULIO RICARDO BASURTO
v.
COMMONWEALTH OF VIRGINIA

Present: Judges Raphael, Lorish and Frucci

Argued at Arlington, Virginia

Opinion Issued September 1, 2026*

FROM THE CIRCUIT COURT OF ARLINGTON COUNTY
Daniel T. Lopez, Judge

Meghan Shapiro (Law Office of Meghan Shapiro, on briefs), for appellant.

Matthew J. Beyrau, Senior Assistant Attorney General (Jason S. Miyares,¹ Attorney General, on brief), for appellee.

MEMORANDUM OPINION BY JUDGE LISA M. LORISH

Julio Ricardo Basurto was convicted of abducting and sexually assaulting two different women: A.C. in October 2021 and C.B. in May 2023.² Basurto argues that the trial court erred when it denied his motion to set aside the verdict because the charges for offenses against the two women were improperly joined, because trial counsel had a conflict of interest that

* This opinion is not designated for publication. *See* Code § 17.1-413(A).

¹ Jay C. Jones succeeded Jason S. Miyares as Attorney General on January 17, 2026.

² Parts of the record in this case were sealed. “To the extent that this opinion discusses facts found in sealed documents in the record, we unseal only those facts.” *Brown v. Va. State Bar ex rel. Sixth Dist. Comm.*, 302 Va. 234, 240 n.2 (2023). “Given the sensitive nature of the underlying facts,” we refer to A.C. and C.B. by their initials. *Id.*

amounted to a structural error, and because of a fatal variance in the indictment.³ He also contends that the trial court erred when it allowed the Commonwealth to make certain evidentiary and non-evidentiary arguments during voir dire and opening and closing statements, and that the court erred by referring to and describing that non-evidence (a quote attributed to Fyodor Dostoevsky) at sentencing. The majority of Basurto’s arguments are waived because they were not presented below, and the trial court did not otherwise err, so we affirm the trial court’s judgment.

BACKGROUND⁴

The Abductions and Assaults

Because Basurto does not challenge the sufficiency of the evidence in this appeal, we provide only an overview of the evidence that was presented at trial related to the two abductions and sexual assaults.

In October 2021, A.C. left a bar where she had been drinking with friends and tried to get an Uber to take her home. Surveillance video showed her walking alone about a half mile from the bar, after midnight, when a dark-colored SUV pulled up to the curb and motioned to her. A.C. walked away while on her phone. A similar-looking SUV had passed her on the same road before this interaction. She ultimately woke up, alone in an unfamiliar car, in an unfamiliar place later determined to be on Army Navy Drive, without her underwear, shorts, or cell phone. She did not remember what had happened, but “realized something was wrong” and that she “had been violated in some way.” She ultimately underwent a sexual assault examination, and

³ Before sentencing, Basurto retained new counsel who moved to set aside the verdicts and to continue sentencing.

⁴ We recite the facts “in the ‘light most favorable’ to the Commonwealth, the prevailing party in the trial court.” *Hammer v. Commonwealth*, 74 Va. App. 225, 231 (2022) (quoting *Commonwealth v. Cady*, 300 Va. 325, 329 (2021)).

filed a police report regarding the sexual assault. Police traced the SUV's license plate back to its registered owner, Basurto.

The investigation went "cold" but was reopened in May 2023 after C.B. reported that she "was picked up outside of a bar in Clarendon, was sexually assaulted, and then was located the next morning on Army Navy Drive." C.B. had also been drinking with friends before she left alone at 1:30 a.m. to call an Uber. When a black SUV pulled up to the curb, C.B. assumed that it was an Uber and got into the backseat.

C.B. quickly "realized that something was off," and decided to call someone to pick her up. She asked the driver, later identified as Basurto, if she could charge her dead phone. He allowed her into the front seat to use the phone charger, and then he asked if she had "a way to pay for [the] ride." Realizing that she had no cash and a dead phone, C.B. "freak[ed] out." The driver said she had to pay "somehow," then grabbed her by the back of the head and forced her to give him oral sex. He ultimately "kicked [her] out of his car" on Army Navy Drive and drove away. The next morning, she reported the sexual assault to police.

Special Victims Detective Christin Oesterling reviewed surveillance footage from the last bar that C.B. went to and saw C.B. leave at closing time and get into a black SUV that had pulled to the curb. Oesterling discovered that a license plate reader had recorded Basurto's SUV entering the Clarendon bar area shortly before C.B. got into the black SUV.

The police gathered parking access records and surveillance video from the parking garage at Basurto's apartment complex. Officer Sean Poveda placed a GPS tracker on Basurto's SUV and conducted surveillance on him after the C.B. assault. Poveda followed the SUV as it "loop[ed]" around the bar area. Poveda saw a woman alone on a street corner, "stumbling" and unable to "keep her balance." He watched as Basurto pulled his SUV to the curb near the woman, turned on his hazard lights, and briefly interacted with her before she walked away.

Officers arrested Basurto five days later and seized his cell phone. After securing a search warrant for the cell phone, they conducted a digital forensics examination of the phone and discovered two video recordings of A.C. In the videos, A.C. was visibly unconscious and Basurto repeatedly penetrated her vagina with his fingers. Basurto was indicted in September 2023 for object sexual penetration and abduction with the intent to defile A.C.,⁵ and forcible sodomy and abduction with the intent to defile C.B.

The Trial

Basurto moved for a jury trial on the charges of intent to defile (two counts), forcible sodomy, and object sexual penetration, but the record does not reflect that he moved to sever the charges.⁶ Four days before the scheduled trial date, Basurto moved for a continuance, alleging that the Commonwealth had failed to comply with the discovery order and that his *Brady*⁷ rights had been violated. The trial court reviewed evidence of the Commonwealth's compliance with the discovery order and its *Brady* obligation, including an audit trail from the software the Commonwealth used to disseminate discovery. The audit trail showed that the disputed discovery was sent to Basurto's attorney in a timely manner and that the information had been downloaded.

During the hearing, the Commonwealth argued that Basurto's "true" reason for seeking the continuance was to secure additional time to provide notice of his intent to introduce DNA evidence, because he had not provided notice 21 days before trial as required by Code § 19.2-270.5. The trial court denied Basurto's motion, finding that the Commonwealth had

⁵ The metadata for the videos showed that they were created when the phone was in the City of Alexandria, just outside Arlington County.

⁶ The record does not include a transcript of the October 2, 2023 scheduling hearing.

⁷ *Brady v. Maryland*, 373 U.S. 83 (1963).

complied with its discovery and *Brady* obligations, but did not rule on whether he could introduce DNA evidence without proper notice.

Before voir dire and opening statements, the Commonwealth moved the trial court to preclude Basurto from “mentioning any DNA” during the opening statement because he had not filed the required notice. Basurto’s counsel responded that she “[was] not planning on getting into it at opening,” but that if “it bec[ame] an issue,” she would “address it then.” The trial court granted the Commonwealth’s motion and directed both parties not to refer to “DNA evidence in their opening statement[s].” During voir dire, the Commonwealth told the venire that they were not going to hear “any evidence about like a DNA match in this case like you see on CSI or anything like that,” and asked if any of the prospective jurors believed they could not convict someone “without a DNA certificate or DNA evidence.” Basurto did not object to the question. No member of the venire responded affirmatively to the question.

In its opening statement, the Commonwealth told the jury that Basurto’s internet search history revealed that he had searched for the quote, “The man who lies to himself has an enemy within,” which is attributed to the Russian novelist Fyodor Dostoevsky. Basurto did not object to the Commonwealth’s opening statement.

After identifying Basurto in court, A.C. identified herself in the video of Basurto inserting his fingers into her vagina. She was “unconscious, not asleep” when the videos were made on Basurto’s phone. A.C. had no memory of the assault, did not know Basurto, and never consented to the sexual penetration.

C.B. identified Basurto in court as the person who forced his penis into her mouth. She had never interacted with Basurto before that night. C.B. did not consent to performing oral sex on him.

The investigators and law enforcement officers testified, presenting call detail records and location data that showed Basurto in the area of the bar where C.B. was when she was assaulted, near where her credit card was recovered, and near the location where she was found the next day. They also presented evidence that shortly after Basurto had assaulted C.B., his phone was used to access a website that played the Arlington County Police Department's dispatch calls and to search for crime reports on Arlington Now, a local news website. Additional evidence showed that, prior to C.B.'s assault, Basurto's phone was used to search the internet for the phrase, "The man who lies to himself has an enemy within."

Basurto moved to strike the Commonwealth's evidence as insufficient and argued that venue was improper.⁸ The trial court denied the motion to strike, finding that there was "sufficient evidence, direct and circumstantial, for a reasonable fact finder to conclude that Mr. Basurto is guilty of these charges." Basurto rested his case without presenting evidence. When asked whether there were "any other issues" Basurto wanted the trial court to address, Basurto stated that there were none.

In its closing argument, the Commonwealth stated that, hours before Basurto abducted C.B., he had a "moment of self-reflection" when he searched the internet for the Dostoevsky quote ("The man who lies to himself has an enemy within"). The Commonwealth recited the quote after summarizing its evidence of Basurto's abductions and sexual assaults of A.C. and C.B. in offenses less than two years apart. Basurto did not object at the time nor did he object

⁸ The parties had argued over venue in a motion *in limine*. The trial court found that the Commonwealth's Attorney for the City of Alexandria gave his consent for the case to be tried in Arlington. Basurto's counsel stated that she would not stipulate that C.B. was "transported by the Defendant through Arlington with the intent for sexual assault," but agreed to stipulate that the Commonwealth's Attorney for the City of Alexandria gave consent "to satisfy the second prong of the statute." See Code § 18.2-359(B).

during his closing argument. He did not object when the Commonwealth raised the absence of incriminating DNA results. The jury convicted Basurto of all the charges.

The Motion to Set Aside the Verdict and Sentencing

Upon retaining new counsel, Basurto moved to set aside the verdict, arguing that his “Sixth Amendment right[s] to conflict-free counsel” and to “consultation as to his attorney’s concession at trial” were violated and constituted a “structural error” because trial counsel had a “conflict of interest”; that the charges should not have been joined; and that there was a “fatal variance in the Commonwealth’s trial evidence concerning AC [sic].” The motion asserted that the conflict-of-interest claim should not be “analyzed under the *Strickland*⁹ doctrine”—applicable to ineffective-assistance-of-counsel claims in habeas corpus cases, “which would require deficient performance and prejudice”—but under the framework for structural errors where prejudice is presumed. Basurto argued that the conflict of interest arose from counsel’s intent to “hide her mistake” to avoid a disciplinary complaint or sanction for failing to provide a timely notice of an intent to introduce DNA evidence. He claimed that trial counsel abandoned her original trial strategy of a “complete innocence” defense to the C.B. charges after realizing her mistake. Given his claim that trial counsel’s alleged conflict amounted to a “structural error,” he asserted that he only had to prove an actual conflict of interest for which he did not have to prove prejudice.

In the second part of his motion, Basurto argued that his charges “should not have been joined.” He acknowledged that his trial counsel had not “move[d] to sever the cases,” but said that her decision was driven not by strategy or knowledge of the law but by a clause in the retainer agreement, which “did not provide for an additional [c]ircuit [c]ourt fee in the event the

⁹ *Strickland v. Washington*, 466 U.S. 668 (1984).

CB [sic] and AC [sic] cases were severed.” Basurto also contended that the trial court was required to sever the offenses sua sponte regardless of an agreement to join them.

Finally, Basurto argued that there was a “fatal variance” between the object sexual penetration indictment and the evidence adduced at trial. He noted that the indictment alleged that the offense occurred in Arlington County, but the evidence presented at trial established that the object sexual penetration occurred in the City of Alexandria.

The trial court denied Basurto’s motion to set aside the verdicts and declined to hold an evidentiary hearing. It ruled that “the issues and arguments raised in the pleadings are essentially ineffective assistance of counsel claims that are more properly addressed at a habeas hearing.” The trial court found that Basurto’s “structural error” claim was “a very creative way of stating an ineffective assistance claim while straining to keep it within the purview of the trial court.” “[T]here is a line,” the trial court stated, and Basurto’s claim was “just over into the habeas area . . . [and] would better be addressed in . . . the habeas framework.”

On the conflict-of-interest claim, the trial court noted that Basurto’s trial counsel had “professionally, zealously[,] and competently represented” him and that she “did not present [him] as guilty to the jury.” Indeed, trial counsel “presented [Basurto] as not guilty, entered a plea of not guilty, vigorously argued the issue of consent, [and] vigorously attacked” C.B.’s credibility.

Regarding joinder, the trial court ruled that “there is no rule, statute[,] or case law that even suggests that a trial court has a duty to sever cases . . . without the filing of a motion to sever” and that Basurto’s counsel never objected to trying the cases together. Similarly, the trial court found that trial counsel “did not object” to the language of the object sexual-penetration indictment during the trial. It added that the indictment and the prosecution were permitted under Code § 18.2-359.

At sentencing, Basurto's counsel presented a letter from Basurto that he claimed expressed his "deep remorse" for the people "[who] were harmed" and asked the trial court to reduce the low end of the sentencing guidelines to reflect his remorse. The Commonwealth argued that it was not "exactly sure what he is saying that he's sorry for" and that the statement was "vague." The trial court rejected Basurto's letter as an "expression of remorse."

The court heard victim impact statements from A.C. and C.B. expressing the mental, emotional, physical, and financial toll the assaults had taken on their lives. The trial court also reviewed multiple letters from A.C.'s and C.B.'s family and friends describing their experiences supporting the two women through the aftermath of the assaults and the trial process.

Basurto played a video "about the history and characteristics" of his life and an "award he won for his activism." His sentencing memorandum emphasized his "[e]xtraordinary [s]ervice to [c]ommunity," including awards for fair housing activism and a community leader award in 2022. Basurto argued that he had made an "[e]xtraordinary [c]ommitment to [p]arenting and [f]amily" by raising three children with "diagnosed disabilities and special needs" as a single parent. The memorandum claimed that Basurto was "neurocognitively impaired by a traumatic brain injury" and that the stress from "key developmental periods harmed his ability to self-regulate."

Before pronouncing the sentence, the trial court paraphrased the Dostoevsky quote and opined that Basurto had been "hiding in plain sight," doing "wonderful things," but also "victimizing two people a year apart." "[T]he evidence showed beyond [a] reasonable doubt" that Basurto planned, calculated, stalked, and preyed upon vulnerable women, and fell "victim" to his impulses. The trial court determined that the proper sentencing considerations were "protecting the public . . . and provid[ing] for punishment and provid[ing] for rehabilitation." It found that the evidence showed that Basurto was a sexual predator: he planned both crimes and

“delighted” in the crime against A.C. “to the extent that he took a video and kept it . . . for a couple [of] years.” The trial court sentenced Basurto to 140 years’ incarceration, with 110 years suspended. Basurto appeals.

ANALYSIS

I. The trial court properly denied Basurto’s motion to set aside the verdict.

A trial court may “set aside [a jury’s] verdict for error committed during the trial or if the evidence is insufficient as a matter of law to sustain a conviction.” Rule 3A:15(b). The “judgment of the [fact finder] is presumed correct and will not be disturbed unless it is ‘plainly wrong or without evidence to support it.’” *Commonwealth v. Garrick*, 303 Va. 176, 182 (2024) (quoting *Pijor v. Commonwealth*, 294 Va. 502, 512 (2017)).

Basurto argues that the trial court should have set aside the jury’s verdict based on what he claims were trial errors: an improper joinder of charges, a conflict of interest with his counsel, and a fatal variance between the indictment and the facts presented at trial. We address each argument in turn.

A. Basurto’s joinder argument is waived because it was not presented before trial.

Whether “an accused, pursuant to Rule 3A:10(c), can be tried in a single trial for all offenses then pending against [him] is a matter resting within a trial court’s sound discretion.” *Commonwealth v. Minor*, 267 Va. 166, 172 (2004). “The abuse of discretion standard draws a line—or rather, demarcates a region—between the unsupportable and the merely mistaken, between the legal error . . . that a reviewing court may always correct, and the simple disagreement that, on this standard, it may not.” *Jefferson v. Commonwealth*, 298 Va. 1, 10-11 (2019) (alteration in original) (quoting *Reyes v. Commonwealth*, 297 Va. 133, 139 (2019)). “Only when reasonable jurists could not differ can we say an abuse of discretion has occurred.”

Bista v. Commonwealth, 303 Va. 354, 370 (2024) (quoting *Commonwealth v. Swann*, 290 Va. 194, 197 (2015)).

A “motion to sever charges is decided on the evidence ‘as it appears before trial,’ not on the evidence that ultimately was adduced at trial.” *Brooks v. Commonwealth*, 73 Va. App. 133, 143 (2021) (quoting *Spence v. Commonwealth*, 12 Va. App. 1040, 1045 (1991)). A “motion for separate trials must be made before trial begins or it is deemed waived.” *Colclasure v. Commonwealth*, 10 Va. App. 200, 202 (1990) (quoting *Burgess v. Commonwealth*, 224 Va. 368, 372 (1982)). Basurto did not move to sever the charges before trial; instead, he moved for a new trial after the jury’s verdict. Consequently, the issue is waived, and the trial court did not err by refusing to grant a new trial on that basis. *Id.*

B. Basurto’s variance argument is waived because it was not presented below.

The purpose of an indictment is to give the accused written notice of “the nature and cause of the accusation against him.” *Scott v. Commonwealth*, 49 Va. App. 68, 73 (2006) (quoting *Hairston v. Commonwealth*, 2 Va. App. 211, 213 (1986)). A variance occurs when the indictment differs from the proof at trial, but “[n]ot every variance is fatal.” *Purvy v. Commonwealth*, 59 Va. App. 260, 266 (2011). “A fatal variance occurs when the criminal pleadings charge one offense and the evidence proves another.” *Commonwealth v. Bass*, 292 Va. 19, 27 (2016). A “‘non-fatal’ variance is one that does not undermine the integrity of the trial and, thus, does not warrant a reversal on appeal.” *Purvy*, 59 Va. App. at 266 (quoting *Morris v. Commonwealth*, 33 Va. App. 664, 668 (2000)).

“[O]nce a verdict has been entered on an indictment, it will be set aside only if the indictment is ‘so defective as to be in violation of the Constitution.’” *Gomez v. Commonwealth*, 72 Va. App. 173, 176 (2020) (quoting *Reed v. Commonwealth*, 281 Va. 471, 480-81 (2011)). The “criminal statute of jeofails, Code § 19.2-227, requires that any [fatal variance] objection to

an indictment, to be a ground for reversal, be made before verdict.” *Id.* at 177 (alteration in original) (quoting *Stamper v. Commonwealth*, 228 Va. 707, 713 (1985)). Failure to present any “objection that is capable of determination without the trial of the general issue . . . before the jury returns a verdict” constitutes a waiver. Rule 3A:9(b)(2).

Renewing the argument made in his motion, Basurto argues that there was a “fatal variance” between the language of the indictment for object sexual penetration and the evidence presented. The record demonstrates that Basurto did not object to the language of that indictment any time before the jury returned its verdict. Thus, “even if the [fatal variance] objection were valid, it came too late.” *Gomez*, 72 Va. App. at 177 (alteration in original) (quoting *Stamper*, 228 Va. at 713). *See also* Rule 3A:9(b)(2); *Booth v. Commonwealth*, 165 Va. 794, 795-96 (1936) (holding that the defendant’s variance argument was “without merit” because he made it “for the first time on appeal”).

Furthermore, Basurto first presented this argument to the trial court in his motion to set aside the verdicts. Under Rule 3A:9(d), the trial court could have granted relief from the waiver required by the rule “[f]or good cause shown.” But Basurto did not present the trial court with any reason that his late argument was supported by good cause. Now on appeal, he argues—for the first time—that his counsel’s purported conflict of interest constitutes good cause, but that argument is barred by Rule 5A:18’s waiver provisions. In sum, Basurto’s fatal variance argument is waived. *Gomez*, 72 Va. App. at 176.

C. The existing record does not show that Basurto’s trial counsel had a conflict of interest that amounted to a structural error.

A defendant has a right to effective counsel under the Sixth Amendment of the United States Constitution. *Gideon v. Wainwright*, 372 U.S. 335 (1963). Basurto argues that his trial counsel labored under a conflict of interest that violated his rights to counsel and due process,

and that the trial court erred by viewing his claim as one of ineffective counsel under *Strickland* and thus concluding that it was only addressable through habeas. Basurto argues that his counsel made a critical error when she missed the statutory deadline to give notice that she planned to introduce exculpatory DNA test results at trial—results that showed that there was male DNA on C.B. and that Basurto was definitively excluded from that profile. Basurto asserts that instead of admitting this mistake and asking for a continuance, his counsel shifted trial strategy away from an innocence defense to a defense based on consent of the victims—without consulting him—and that counsel did this to avoid potential disciplinary charges. Thus, Basurto contends, he was effectively denied counsel altogether and this structural error can be reviewed on direct appeal.

It is true that “claims of ineffective assistance of counsel are not reviewable on direct appeal and . . . can be raised only in a habeas corpus proceeding.” *Sigmon v. Dir. of the Dep’t of Corr.*, 285 Va. 526, 533 (2013). But it is also true that the functional denial of counsel has sometimes been addressed on direct appeal. *See, e.g., Browning v. Commonwealth*, 19 Va. App. 295, 297 n.2 (1994) (granting relief on direct appeal after finding that an appellant was constructively denied his right to counsel); *Dowell v. Commonwealth*, 3 Va. App. 555, 557 (1987) (granting relief on direct appeal where appellant was denied right to counsel due to a conflict of interest). This is because the denial of counsel has been recognized as a structural error, meaning a “defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.” *Emmett v. Warden of the Sussex I State Prison*, 269 Va. 164, 168 (2005) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)). Examples of errors that amount to a structural error include the “denial of a public trial, the denial of counsel, the denial of an impartial trial judge, the systematic exclusion of members of the defendant’s race from the grand jury, the infringement upon a defendant’s right to represent himself, and the

improper instruction to a jury as to reasonable doubt.” *Morrisette v. Warden of the Sussex I State Prison*, 270 Va. 188, 192 (2005).¹⁰

Before we can determine that a purported conflict of interest rose to the level of denying Basurto representation altogether, we would have to conclude that the record on direct appeal definitively shows a conflict of interest in the first place. “An actual conflict of interest exists when the attorney’s interests and the defendant’s interests ‘diverge with respect to a material factual or legal issue or to a course of action.’” *Moore v. Hinkle*, 259 Va. 479, 487 (2000) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 356 n.3 (1980)). A successful claim requires “proof of effect upon representation.” *Spence v. Commonwealth*, 60 Va. App. 355, 370 (2012) (quoting *Mickens v. Taylor*, 535 U.S. 162, 173 (2002)). The mere “possibility of [a] conflict is insufficient to impugn a criminal conviction.” *Kenner v. Commonwealth*, 71 Va. App. 279, 297 (2019) (quoting *Cuyler*, 446 U.S. at 350). Successful conflict of interest appeals have involved counsel who impermissibly represented co-defendants, *Dowell*, 3 Va. App. at 561, where trial counsel admitted a conflict of interest and described how it impacted their performance, *Carter v. Commonwealth*, 11 Va. App. 569 (1991), and a situation where the private prosecutor on the defendant’s case concurrently represented the victim in a civil action against the defendant, *Price v. Commonwealth*, 72 Va. App. 474 (2020).

Basurto did not demonstrate that his trial counsel labored under an actual, rather than a theoretical, conflict of interest that “adversely affect[ed] counsel’s performance.” *Spence*, 60 Va. App. at 370 (quoting *Mickens*, 535 U.S. at 172 n.5). Basurto’s conflict-of-interest claim

¹⁰ A structural error is one of such a magnitude that it defies analysis by “‘harmless-error’ standards.” *Ray v. Commonwealth*, 55 Va. App. 647, 651 (2010) (quoting *Neder v. United States*, 527 U.S. 1, 7-8 (1999)). Thus, if Basurto was correct that his counsel’s conflict of interest rose to the level of a constructive denial of counsel altogether, he would not need to meet the requirement of *Strickland* that he was prejudiced from his counsel’s defective performance. Instead, prejudice would be presumed.

rests on his bare allegation that his trial counsel acted in her own self-interest to avoid disciplinary action. But “an attorney’s desire to protect himself against a later charge of ineffective assistance of counsel, standing alone, does not constitute a *per se* conflict of interest.” *Moore*, 259 Va. at 490. Recognizing this limitation in his post-trial motion, Basurto asserted that his trial counsel “gaslight[ed] her client and his family” and “switch[ed] an entire trial strategy” to “hide her mistake” in failing to file a timely notice of DNA evidence. Basurto argues that counsel’s decision to switch trial strategy without consulting him was impermissible.

However, Basurto points to no substantive evidence in the existing record to support these allegations or the existence of a conflict. To begin, there was no possibility that any such mistake from counsel could or would remain “hid[den]” if counsel switched trial strategies because the Commonwealth pointed out the failure to give notice of the DNA evidence at the pre-trial motion for a continuance. Beyond that, Basurto himself admits that counsel, in fact, pursued a trial strategy, albeit one that he claims was adopted belatedly. Finally, the trial court found that his counsel vigorously and zealously represented Basurto at trial. Unlike *Carter*, 11 Va. App. at 571-72, there is no evidence in this record about Basurto’s counsel’s side of the story—something that is usually developed on habeas review. Therefore, based on this record, we find that the conflict-of-interest claim is speculative and affirm the trial court’s denial of the motion to set aside the verdict on the grounds of a conflict of interest amounting to a structural error.

II. Basurto waived his arguments related to the Commonwealth’s comments or arguments regarding the lack of DNA evidence.

To preserve an objection to an improper comment by the Commonwealth, “defense counsel must object contemporaneously, state the basis for the objection, ‘articulate . . . clearly the action he desire[s] the court to take’ . . . and point out ‘that the action need[s] to be taken before the jury retire[s].’” *Harvey v. Commonwealth*, 76 Va. App. 436, 458-59 (2023) (first,

second, fourth, and fifth alterations in original) (quoting *Maxwell v. Commonwealth*, 287 Va. 258, 269 (2014)). Errors “assigned because of a prosecutor’s improper comments . . . during argument will not be considered on appeal unless the accused timely moves for a cautionary instruction or for a mistrial.” *Id.* (alteration in original) (quoting *Martinez v. Commonwealth*, 241 Va. 557, 559 n.2 (1991)). There is “no exception in Virginia law to the strict application of this rule.” *Id.* at 459 (quoting *Bennett v. Commonwealth*, 29 Va. App. 261, 281 (1999)).

Basurto claims that the prosecutor’s comments, arguments, and questions about the lack of DNA evidence were improper.¹¹ He adds that these comments “exploit[ed] defense counsel’s failure to file DNA notices and resulting bar on defense counsel’s admission of DNA results.” Basurto did not contemporaneously object to the Commonwealth’s questions or comments during voir dire, or to its closing argument. He did not object during Oesterling’s trial testimony about the evidentiary value of the DNA evidence collected during the investigation. Basurto did not move for a mistrial or request a cautionary instruction as “required to preserve the issue for appeal.” *Bennett*, 29 Va. App. at 281. Thus, the argument is waived. *Harvey*, 76 Va. App. at 458.

III. The trial court did not abuse its discretion in sentencing Basurto by referencing a Dostoevsky quote.

“We review the trial court’s sentence for abuse of discretion.” *Scott v. Commonwealth*, 58 Va. App. 35, 46 (2011). A trial court abuses its discretion “when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; [or] when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment.”

¹¹ In his brief, Basurto claims the prosecutor’s comments were “false” and amounted to “blatant gamesmanship.” But the record shows that the prosecutor was commenting on his own lack of DNA evidence and trying to gauge whether the venire members would be unwilling to convict on a sexual offense absent DNA evidence.

Murry v. Commonwealth, 288 Va. 117, 122 (alteration in original) (quoting *Landrum v. Chippenham & Johnston-Willis Hosps., Inc.*, 282 Va. 346, 352 (2011)); *see also Porter v. Commonwealth*, 276 Va. 203, 260 (2008) (“The abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions.”). Where there is no such procedural error, we will only review a trial court’s substantive sentencing decision if it falls outside “the lawful boundaries of applicable sentencing statutes and constitutional limitations.” *Minh Duy Du v. Commonwealth*, 292 Va. 555, 563 (2016).

“Criminal sentencing decisions are among the most difficult judgment calls trial judges face.” *Id.* “Because this task is so difficult, it must rest heavily on judges closest to the facts of the case—those hearing and seeing the witnesses, taking into account their verbal and nonverbal communication, and placing all of it in the context of the entire case.” *Id.* “For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender.” *Smith v. Commonwealth*, 27 Va. App. 357, 361 (1998) (quoting *Shifflet v. Commonwealth*, 26 Va. App. 254, 259 (1997)).

Relevant factors for sentencing consideration may include the defendant’s criminal history, prior convictions and pending charges, and convictions on appeal. *Thomas v. Commonwealth*, 18 Va. App. 656, 659 (1994). In fashioning a sentence, the trial court is charged with considering “various mitigating, extenuating, or even aggravating circumstances.” *Swain v. Commonwealth*, 28 Va. App. 555, 561 (1998). “It is within the trial court’s purview to weigh any mitigating factors presented by the defendant.” *Khine v. Commonwealth*, 82 Va. App. 530, 558 (2024) (quoting *Keselica v. Commonwealth*, 34 Va. App. 31, 36 (2000)).

Basurto argues that the trial court “heavily considered” the Dostoevsky quote, claiming that the trial court found “it supremely ‘important’ to many if not all of the sentencing factors.” But the record does not support his characterization. The record reflects that during an exchange with defense counsel, the trial court summarized Basurto’s mitigation evidence and argument. It addressed counsel’s objection to the court’s reference to the quote and explained the reference in the context of its responsibility in “balancing individual characteristics of Mr. Basurto, the needs of the community, what’s compatible with the public interest . . . and what sort of individual Mr. Basurto is.” It noted the dichotomy between the actions and accomplishments Basurto had highlighted, such as his community activism and raising his special-needs children, with the trauma and terror he had inflicted on A.C. and C.B. It ultimately stated that its principal considerations were protecting the public, punishing Basurto, and providing for his rehabilitation. In short, the record simply does not support Basurto’s claim that the trial court gave “supreme” importance to the challenged quote.

The trial court found that the convictions reflected the jury’s conclusion that Basurto did not stop to help A.C. and B.C. while they were “intoxicated and vulnerable”; instead, he stopped to “victimize and to terrorize and to traumatize” them. Based on the circumstances of the offenses, the trial court found that Basurto was a sexual predator who “delighted” in his crimes and was a danger to the community, despite his otherwise commendable efforts in his church, his family, and his community. Given the impact of his crimes on the community, the trial court determined that it was obligated to “protect the community” from him. We find that the trial court properly relied on the evidence presented at trial and did not abuse its discretion in rendering the sentence.

CONCLUSION

Accordingly, we affirm the trial court's judgment.

Affirmed.