Supreme Court No. 99654-7
(COA No. 37147-6-III)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ZACHARY SKONE,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR GRANT COUNTY

PETITION FOR REVIEW

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WASHINGTON APPELLATE PROJECT
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A. IDENTITY OF PETITIONER

Zachary Skone, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(2)(b) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Mr. Skone seeks review of the decision by the Court of Appeals dated March 11, 2021. A copy is attached as Appendix A.

C. ISSUE PRESENTED FOR REVIEW

The court must ensure sitting jurors remain impartial and unbiased to protect the accused person's right to a fair trial. Here, the court learned that during the trial, the jurors discussed evidence that Mr. Skone was part of a gang and expressed fears of gang retaliation, offered at trial in an effort to show the aggravating factor of Mr. Skone trying to advance his status as a gang member. When confronted with evidence jurors had prematurely discussed issues they would have to decide regarding a gang's connection to the charges, did the court fail

to ensure the jurors remained impartial and unbiased so that Mr. Skone would receive a fair trial?

D. STATEMENT OF THE CASE

Dale Alexander arranged to sell prescription-grade cough medicine with codeine, known as "lean," to a person named Gabe who messaged him on Facebook. RP 460, 576, 579, 581. Mr. Alexander created a fake bottle of lean and handed the fake drugs to Gabe at a prearranged location. RP 518, 616, 683-84.

Mr. Alexander carried a real-looking Airsoft gun in his pocket. RP 695, 820-21. Mr. Skone was with Gabe at this drug sale, but was standing behind a bush to protect Gabe. RP 1292, 1294. He saw Mr. Alexander reach for his gun and jumped out of the bush and yelled for him to stop. RP 1298. Mr. Skone expected Mr. Alexander to have a gun because he knew him to carry one. RP 1287. When he saw Mr. Alexander point his gun at him, Mr. Skone fired several shots in Mr. Alexander's direction. RP 1299. Mr. Alexander fled, and later realized he had been shot. RP 620. After the incident he claimed he did not know he had his Airsoft gun in his pocket and denied pulling it out or threatening to use it. RP 633-34.

For this incident, the prosecution charged Mr. Skone with assault in the first degree, robbery in the first degree with firearm enhancement. CP 44-45. It also alleged Mr. Skone committed these offenses to obtain, maintain, or advance his position in a gang. *Id.*[1]

The prosecution contended Mr. Skone was either a gang member or wanted to be in the Nortenos gang. RP 411, 415. It offered evidence Mr. Skone called himself Lil Wigga and recorded a video on his phone the day before the shooting in which he said he was doing a "whole lotta gang" stuff. RP 1072, 1076. This video showed a gun and a red bandana, which is a color associated with the Nortenos. RP 1100. Mr. Skone also used terms associated with Nortenos members, like referring to a rival gang as Skraps. RP 1079-80. Mr. Skone denied being in a gang. RP 1431. Mr. Alexander was not a member of any gang and did not hear anyone say anything gang-related during the incident. RP 686, 696-98.

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[1] Mr. Skone was also charged with two counts of unlawful possession of a firearm. The Court of Appeals appropriately ruled these two convictions violate double jeopardy and one must be stricken. Slip op. at 10. This aspect of the case is not challenged here.

During the trial, a juror approached the bailiff to express concern about retaliation from "the gang" if Mr. Skone was convicted. RP 1473. The bailiff told the juror he had a "job to do" and needed to "focus." RP 1474. This juror had already initiated a conversation involving all jurors about whether they should be concerned their verdict would have repercussions for their safety or they should fear retaliation from the gang. RP 1505. Several jurors voiced concerns and some spoke about noticing people they considered to be affiliated with a gang in the courtroom audience or outside the courtroom while the trial was on-going. RP 1505-54.

The jury found Mr. Skone not guilty of robbery. CP 226. It convicted him of assault in the first degree with a firearm but agreed he did not commit the crime to obtain or advance his position in a gang. CP 225.

The facts are further explained in Appellant's Opening Brief, in the relevant factual and argument sections, and are incorporated herein.

E. ARGUMENT

The Court of Appeals disregarded the law governing the presumptively prejudicial effect of jurors discussing fears of being targeted by gang members while the trial was unfolding.

1. The right to an impartial jury includes jurors who do not prematurely deliberate and who follow the court's instructions.

The right to be tried by an impartial jury is fundamental to the fairness of the trial and explicitly protected by the Sixth Amendment and Washington Constitution. U.S. Const. amend. VI; Const. art. I, §§ 21, 22. This right "means a trial by an unbiased and unprejudiced jury, free of disqualifying jury misconduct." *State v. Tigano,* 63 Wn. App. 336, 341, 818 P.2d 1369 (1991), quoting *Robinson v. Safeway Stores, Inc.,* 113 Wn.2d 154, 159, 776 P.2d 676 (1989).

Jurors commit misconduct when they consider extrinsic evidence. *State v. Balisok,* 123 Wn.2d 114, 118, 866 P.2d 631 (1994) (quoting *Richards v. Overlake Hosp. Med. Ctr.,* 59 Wn. App. 266, 270, 796 P.2d 737 (1990)). That is especially true where the court's instructions expressly prohibit jurors from

considering extra-judicial information. *Tigano*, 63 Wn. App. at 341.

Consideration of factors outside of the evidence presented in the courtroom is misconduct because "[t]he theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Patterson v. People of State of Colorado ex rel. Attorney Gen. of State of Colorado*, 205 U.S. 454, 462, 27 S. Ct. 556, 51 L. Ed. 879 (1907).

Premature deliberation by jurors is misconduct, even when it does not rest on considering extra-judicial information. *United States v. Resko,* 3 F.3d 684, 688 (3d. Cir. 1993). "Any discussion among jurors of a case prior to formal deliberations certainly endangers that jury's impartiality." *United States v. Yonn*, 702 F.2d 1341, 1345 n.1 (11th Cir. 1983). "[S]uch conversations may lead jurors to form an opinion as to the defendant's guilt or innocence before they have heard all of the evidence, the arguments of counsel, and the court's instructions." *Id*.

Misconduct by jurors is presumed prejudicial. *State v. Boling*, 131 Wn. App. 329, 333, 127 P.3d 740 (2006). To overcome that presumption the State must prove beyond a reasonable doubt that the misconduct, objectively viewed, could not have affected the jury's verdict. *Id*. (citing *State v. Caliguri*, 99 Wn.2d 501, 509, 664 P.2d 466 (1983)). Any doubt about whether the misconduct could have affected the verdict must be resolved against the verdict. *Halverson v. Anderson,* 82 Wn.2d 746, 752, 513 P.2d 827 (1973).

Jurors' testimony that extrinsic evidence is not harmful is not controlling. *United States v. Bolinger,* 837 F.2d 436, 440 (11th Cir.), *cert. denied,* 486 U.S. 1009 (1988). The effect of extrinsic prejudicial evidence on a juror's deliberation may be substantial even though it is not perceived by the juror and "a juror's good faith cannot counter this effect." *United States v. Williams,* 568 F.2d 464, 471 (5th Cir.1978) (footnote omitted).

2. The Court of Appeals failed to apply the correct legal framework when jurors prematurely discuss issues in the case and factors outside the evidence that could shape their verdicts.

From the start of the case and throughout the proceedings, the court instructed the jurors not to discuss any aspects of the trial with anyone else, including the fellow jurors, while the trial was underway. RP 388-89, 403-04, 756. The judge expressly directed the jurors at the outset:

> you're not allowed to talk about the case at all, even amongst yourselves, until we actually have all of the evidence presented to you and you begin your deliberations.

RP 388-89.

The court further directed the jurors they must "keep your mind free of outside influences" as "all times," including "when you go home." RP 394-96; *see also* RP 402-03 ("you must not discuss the case with each other or anyone else or remain within hearing of anyone discussing it" including "anything that happens during the trial.").

The prosecution claimed Mr. Skone was trying to advance his position in a gang, as the reason for his behavior. CP 44-45. Its allegation this was a gang-related shooting rested on the

tenuous idea that Mr. Skone knew gang members and used terms that gang members used. 7/16RP 136; RP 1434-35, 1442. The court came close to dismissing this aggravating factor at the close of the prosecution's case because the evidence was speculative. 7/16RP 136; RP 1254-55.

This gang evidence prompted jurors to panic about their safety. While the trial was underway, several jurors became concerned they could be victims of gang retaliation based on their verdicts. *See* RP 1505-56, RP 1511, 1516, 1523, 1527, 1531, 1534, 1537-38, 1541, 1544, 1547. They talked about being afraid there was gang members present in the courtroom audience or some had followed them outside the courthouse. RP 1515-16, 1521-22. The jurors had this discussion as a group; although only some participated, all heard it, except for one alternate. RP 1505-56.

The court learned of this discussion when Juror 5 approached the bailiff about his concerns and asked whether the jurors should be scared of being harmed by the gang, or repercussions, if they found Mr. Skone guilty. RP 1473. The bailiff told him to "focus" and do his job. RP 1474.

The court generally questioned all jurors about whether they could decide the case based on the law as instructed and each agreed. RP 1512-54. But the court told jurors not to tell the court their feelings and did not ask more specific questions about whether their fears would affect their perceptions of the evidence, whether they had made up their minds about any aspects of the case, or whether they could exclude all outside influences from their decision-making in the case. RP 1516, 1532.

The attorneys and court had some concern about whether the jurors remained qualified to serve but ultimately decided they had not gathered evidence jurors were manifestly unfit to remain. RP 1563. The court told the jurors that police deputies would escort them to their cars for the rest of the case. RP 1594.

It is the court's role to ensure the impartiality of the jurors. *State v. Irby*, 187 Wn. App. 183, 192-93, 347 P.3d 1103 (2015). Permitting "a biased juror" to serve violates the accused person's constitutional right to a fair and impartial jury, even though the accused person voiced no objection whatsoever. *Id*. at 192-93.

"A trial court has an independent obligation to protect" the right to a fair and impartial jury "regardless of inaction by counsel or the defendant." *Id*. It is manifest constitutional error for a court to seat a biased juror. *Id*. at 193; *see also State v. Guevara Diaz*, 11 Wn. App. 2d 843, 845, 456 P.3d 869 (2020) ("The presence of a biased juror can never be harmless and requires a new trial without a showing of prejudice.").

The Court of Appeals dismissed jurors' improper conversations about the evidence they heard during the trial by speculating it benefitted Mr. Skone, ruling "this belief might have made it more difficult for them to find Skone guilty." Slip. Op. at 6.

This resolution of events is untenable. Gang evidence is unquestionably prejudicial and suggests the defendant is a "criminal-type person who would be likely to commit the crime charged." *State v. Mee*, 168 Wn. App. 144, 159, 275 P.3d 1192 (2012). Jurors spoke to each other about the concerns they had for their own safety and explained the acute sense of vulnerability they left about their role in the case.

The court reinforced the legitimacy of this concern by promising the jury that police deputies would escort them to their cars for the rest of the case. RP 1594.

Juror 5 admitted he voiced concern about retaliation from the gang based on his role as a juror in this case several times. RP 1473, 1505. He spoke of his concern not only to the jurors, but also approached the bailiff to further express his concern with the jurors' safety from the gang. *Id*. One of the contested issues in the case was whether Mr. Skone was a member of a gang and whether he committed the offense to further his position in the gang. Several jurors also had concerns about the gang and their perceptions of gang-involvement among the people in the audience at trial. The court did not inquire into these perceptions or whether they were prejudging the issues in the case. RP 1505-56. Instead, it actively avoided gathering more specific information and compounded the jurors' preconception of dangerousness by offering police escorts to their cars.

These jurors had violated the court's clear instructions not to discuss any aspect of the case with anyone. Several spoke

about “retaliation” and the “repercussions” they faced personally, based on their verdicts. RP 1505, 1526, 1531, 1537, 1552. The conversation rested on the presumption that Mr. Skone was part of a gang even though he denied this allegation.

The Court of Appeals implausibly concluded the jurors would take their fears of gang-retaliation as a reason to free Mr. Skone, when the jurors’ expressed belief in the gang’s interest in the case made it more likely the jurors saw Mr. Skone as a dangerous person who should be convicted.

The court failed to ensure a fair and impartial jury when confronted with evidence jurors were afraid based on their conclusions about contested issues, before deliberations started. This error is presumptively prejudicial and undermines the fairness of the trial. This Court should grant review due to the prejudicial effect of having jurors confer during the trial about the evidence they have heard and their premature conclusions as to its truth.

F. CONCLUSION

Petitioner Zachary Skone respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 9th day of April, 2021.

Respectfully submitted,

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APPENDIX A

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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. ZACHARY STEVEN SKONE, Appellant.	)))))))))	No. 37147-6-III UNPUBLISHED OPINION

LAWRENCE-BERREY, J. — Zachary Skone appeals his convictions of first degree assault (with a firearm enhancement), two counts of unlawful possession of a firearm (UPFA), and attempted bribery of a witness. We vacate one of Skone's unlawful possession of a firearm convictions, remand for resentencing, and direct the trial court to strike the deoxyribonucleic acid (DNA) collection fee. We otherwise affirm.

FACTS

On January 11, 2018, Zachary Skone went to the drive-through window of a coffee shop and ordered a drink. He told the barista he was "running from the pigs." Report of Proceedings (RP) at 428. Looking inside Skone's car, the barista saw that Skone had a revolver. The barista reported this to the police.

Three days later, on January 14, Skone shot Dane Alexander at the Montlake boat launch on Moses Lake. Alexander had come to the boat launch as part of a drug deal when Skone attacked him, firing a .22 caliber revolver. Skone admitted to police that he shot Alexander, but claimed he was protecting a friend.

The State charged Skone by amended information with one count of first degree assault, one count of first degree robbery, two counts of first degree unlawful possession of a firearm, and one count of bribing a witness. With respect to the first two counts, the State alleged a firearm enhancement and that Skone had committed the offenses to obtain or advance his position in a gang.

The State contended Skone was either a gang member or wanted to be in the Norteños gang. It offered evidence that Skone called himself "Little Wigga" and recorded a video on his phone the day before the shooting in which he said he was doing a "whole lotta gang" stuff. RP at 1072, 1076.

During the trial, juror 5 approached the bailiff to express concern about gang retaliation against jurors if Skone was convicted. The bailiff told the juror he had a job to do and needed to focus. The bailiff brought this to the trial court's attention, who spoke to the parties about it.

The trial court and the parties agreed that the court should have a colloquy with juror 5 outside the presence of the other jurors. Defense counsel emphasized the court needed to "gingerly walk that line between not inquiring too much of the jurors and implanting that significant bias." RP at 1490. They discussed the nature of the court's inquiry and the type of questions that could and should be asked.

The trial court then questioned juror 5 with the parties present. The juror said he had earlier expressed to the entire jury a concern for the possibility of gang retaliation and the jurors shared his concern. When asked by the court whether his concern would affect his ability to evaluate the evidence and follow the court's instructions of the law, juror 5 said it would not.

The trial court and the parties agreed that all of the jurors needed to go through the same process. Defense counsel seemed satisfied with juror 5 but wanted additional time to process the juror's responses. The trial court remarked:

> [I]n any case a juror is going to have their own thoughts and whether they express it out loud to us ever, we will have no idea. So they will already be thinking, am I nervous about making a decision? Am I nervous about retaliation? I mean that's already probably going through their head in any jury trial that I can imagine. It's just unfortunate, of course, that this person has decided to express it out loud, rather than follow the instructions and just keep it to themselves.

RP at 1509.

The trial court then interviewed the rest of the jurors in the same manner, taking each aside, asking what they had heard or said, and then asking whether their ability to decide the case based on the evidence and the court's instructions on the law would be impaired. During the interviews, defense counsel had initial concerns only about jurors 2 and 5; but afterward, Skone and his counsel agreed there were no issues and the trial could continue without recusing any of the jurors.

The trial court commented it had not heard anything from juror 5 appearing to manifest unfitness. The court also noted that the interviews established there was no further discussion and there was no indication the jurors had discussed the case itself in any form or fashion or any of the trial evidence.

The jury found Skone guilty of first degree assault with a firearm but agreed he did not commit the crime to obtain or advance his position in a gang. It also found him guilty of both counts of first degree unlawful possession of a firearm, as well as attempted bribery of a witness. It found him not guilty of first degree robbery.

At sentencing, Skone did not contest the State's sentencing memorandum that argued the two firearm convictions were different criminal conduct nor did he challenge the State's offender score calculation of 6, which showed 1 point for each of the two firearm convictions. The trial court imposed a standard range sentence of 262.5 months.

Skone appealed to this court.

ANALYSIS

JURY BIAS

Skone contends the trial court failed to ensure he received a fair trial by an unbiased jury. He argues that some of the jurors discussed the case before deliberations, the trial court actively avoided gathering more specific information, and it compounded the jurors' preconception of danger by offering police escorts to their cars. We disagree that the trial court did anything improper.

The right to be tried by an impartial jury is fundamental to the fairness of the trial and explicitly protected by the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution. This right "means a trial by an unbiased and unprejudiced jury, free of disqualifying jury misconduct." *State v. Tigano*, 63 Wn. App. 336, 341, 818 P.2d 1369 (1991).

We initially question whether juror misconduct occurred at all. The jurors did not discuss the case. Rather, they discussed their safety. The trial court aptly observed that jurors probably always have some degree of concern if they render a guilty verdict in a criminal case. Here, the trial court and the parties had an opportunity to inquire further

about this concern and make doubly sure the jurors would base their verdict on the facts presented and the law given to them.

Even if misconduct did occur, it likely benefited Skone. Had the jury believed Skone was involved in gangs, this belief might have made it more difficult for them to find Skone guilty.

Also, a mistrial is not appropriate when the trial court is satisfied beyond a reasonable doubt that the misconduct will not contribute to the verdict. *State v. Fry*, 153 Wn. App. 235, 239, 220 P.3d 1245 (2009). Here, defense counsel and Skone were satisfied. So was the trial court.

"[T]he trial court is in the best position to determine a juror's ability to be fair and impartial." *State v. Noltie*, 116 Wn.2d 831, 839, 809 P.2d 190 (1991). Reviewing courts defer to the trial court's determination on this issue. *Ottis v. Stevenson-Carson Sch. Dist. No. 303*, 61 Wn. App. 747, 755-56, 812 P.2d 133 (1991). Moreover, defense counsel's and Skone's agreement that each of the 12 jurors could fairly decide the case cannot be overlooked. We are convinced not only that the trial court did not err but commend the trial court for doing a conscientious job ensuring Skone's right to a fair trial.

DOUBLE JEOPARDY

Skone contends the two unlawful possession of a firearm convictions were based on the same course of conduct without the State showing an intervening event. Because of this, he argues that double jeopardy applies and this court must vacate one of the charges. We agree.

We first address the State's argument that Skone waived his right to raise this argument by not objecting at sentencing to the entry of separate unlawful possession of a firearm convictions or his purported offender score of 6. In support of this, the State cites *State v. Nitsch*, 100 Wn. App. 512, 997 P.2d 1000 (2000). *Nitsch* discussed a statutory "same criminal conduct" analysis, not a constitutional double jeopardy issue.

"A double jeopardy violation claim is distinct from a 'same criminal conduct' claim and requires a separate analysis." *State v. French*, 157 Wn.2d 593, 611, 141 P.3d 54 (2006). Double jeopardy is a constitutional protection, focusing on the "allowable unit of prosecution." *Id.* Same criminal conduct is a statutory sentencing provision, involving the scoring of offenses that examines whether the offenses consisted of the same intent, time, place, and victim. *Id.* at 613 (citing RCW 9.94A.589(1)(a)).

A double jeopardy claim may be raised for the first time on appeal. *State v. Jackman*, 156 Wn.2d 736, 746, 132 P.3d 136 (2006). Whether double jeopardy has been violated is a question of law that we review de novo. *Id.*

The principle of double jeopardy prevents a person from being "twice put in jeopardy for the same offense." WASH. CONST. art. I, § 9; *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 980, 329 P.3d 78 (2014). "The prohibition on double jeopardy generally means that a person cannot be prosecuted for the same offense after being acquitted, be prosecuted for the same offense after being convicted, or receive multiple punishments for the same offense." *Villanueva-Gonzalez*, 180 Wn.2d at 980. It is this last principle that we examine here.

When examining a purported double jeopardy violation, this court looks to "what act or course of conduct has the Legislature defined as the punishable act." *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998). Unlawful possession of a firearm is a single unit of prosecution even when committed in different places because it rests on a course of conduct rather than a discrete act. *State v. Mata*, 180 Wn. App. 108, 120, 321 P.3d 291 (2014). Therefore, to prove two separate charges, the State must show that Skone's possession of the firearm was interrupted. *Id.*

Here, the State argues it does not need to show Skone's possession was interrupted because the charges were based on possession of different firearms and the evidence supports this. We disagree.

The barista in the drive-through only said he witnessed Skone in possession of a revolver. Three days later, Skone shot Alexander with a .22 caliber revolver. No evidence was presented to show these revolvers were different.

Moreover, the court's instructions never asked the jury to find that Skone possessed different firearms or that his possession was interrupted. The State argued in closing that Skone had a firearm at the coffee drive-through and during the shooting. It claimed the firearm was "a revolver" on both occasions. It disputed Skone's claim that he only had a flare gun at the coffee drive-through. It argued "he had at least one firearm on him . . . that's the one the [S]tate's charged him with." RP at 1633.

"When a person is charged with multiple counts of the same offense, 'each count must be based on a separate and distinct criminal act.'" *State v. Robinson*, 8 Wn. App. 2d 629, 638, 439 P.3d 710 (2019) (quoting *State v. Mutch*, 171 Wn.2d 646, 662, 254 P.3d 803 (2011)). While the reviewing court looks to the entire record, review is "rigorous and is among the strictest" to protect against double jeopardy. *Mutch*, 171 Wn.2d at 664. It must be "'manifestly apparent'" from the record, testimony, and argument that the two

identical charges are based on separate acts. *Id.* (emphasis omitted) (quoting *State v. Berg*, 147 Wn. App. 923, 931, 198 P.3d 529 (2008)).

Here, the State cannot argue to the jury that Skone possessed the same gun for both offenses and make a different argument on appeal. Because the record does not sufficiently show that both unlawful possession of a firearm convictions rest on separate and distinct conduct, one of Skone's unlawful possession of a firearm convictions must be vacated.

DNA COLLECTION FEE

A court may not impose a DNA collection fee if DNA has already been collected. RCW 43.43.7541; *State v. Ramirez*, 191 Wn.2d 732, 745-47, 426 P.3d 714 (2018). Skone contends the trial court erred in imposing a DNA collection fee where one had previously been collected. The State correctly concedes this was in error, and we agree.

When resentencing Skone, the trial court must strike the DNA collection fee.

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW (SAG)

SAG I: LACK OF FOUNDATION

Skone contends there was a lack of foundation regarding the bullet shown to the jury during Detective Aaron Hintz's testimony. There was no objection to the bullet being admitted or the detective's opinion about it. An issue may generally not be raised

for the first time on appeal unless there is a manifest error of constitutional magnitude. RAP 2.5(a)(3). Failure to lay an adequate foundation does not create manifest constitutional error. *State v. Newbern*, 95 Wn. App. 277, 288, 975 P.2d 1041 (1999). Therefore, we will not review this issue.

SAG II: NEW THEORY OF FACTS

Skone contends Alexander was nervous about going to the meeting on January 14 and that was why he carried a fake, but realistic toy pistol. This is a new theory that would have been best raised for the finder of fact to decide. New theories presented for the first time on appeal must be disregarded. *State v. Lyskoski*, 47 Wn.2d 102, 111, 287 P.2d 114 (1955).

SAG III: JUROR COERCION

Skone contends one of the jurors was coerced into changing their verdict on Mr. Skone's assault charge. Skone's argument is based on facts not in the record on appeal. This court will not consider issues raised where the facts referenced are not in the appellate record. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

Remanded for resentencing.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, J.

WE CONCUR:

Pennell, C.J.

Siddoway, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	COA NO. 37147-6-III
	)	
ZACHARY SKONE,	)	
	)	
PETITIONER.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 9TH DAY OF APRIL, 2021, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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WASHINGTON APPELLATE PROJECT

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Appellate Court Case Number:	37147-6
Appellate Court Case Title:	State of Washington v. Zachary Steven Skone
Superior Court Case Number:	18-1-00036-2

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