

FILED
Court of Appeals
Division I
State of Washington
4/15/2022 4:38 PM

FILED
SUPREME COURT
STATE OF WASHINGTON
4/18/2022
BY ERIN L. LENNON
CLERK

Supreme Court No. 100843-1
Court of Appeals No. 81930-5-I

IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DAVID RANDALL WRIGHT,

Petitioner.

PETITION FOR REVIEW

MAUREEN M. CYR
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711
wapofficemail@washapp.org

TABLE OF CONTENTS

A. IDENTITY OF PETITIONER/DECISION BELOW 1

B. ISSUES PRESENTED FOR REVIEW 1

C. STATEMENT OF THE CASE 3

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED 13

 1. The trial court erred and violated due process by failing to instruct the jury that the State bore the burden to disprove the defense of good faith claim of title beyond a reasonable doubt 13

 a. The State bore the burden to disprove Mr. Wright’s defense of good faith claim of title beyond a reasonable doubt 14

 b. The trial court erred in failing to instruct the jury that the State bore the burden to disprove Mr. Wright’s defense of good faith claim of title beyond a reasonable doubt 18

 2. The prosecutor improperly viewed privileged attorney-client video visits 20

 3. Numerous continuances granted without Mr. Wright’s approval violated his right to a timely trial 20

 4. Mr. Wright was denied barber services and forced to attend trial with an “unbarbered and unclean look” which may have biased the jury against him 20

 5. Mr. Wright was denied his right to view all of the discovery 21

6. Numerous technical issues with the system allowing the jurors to view the witnesses could have caused the jurors to miss important information and influenced the outcome of the trial	21
7. Mandatory mask mandates and social distancing requirements may have affected the jurors' ability to concentrate on the evidence presented at trial	21
8. Mr. Wright received ineffective assistance of counsel...	21
E. CONCLUSION	22

TABLE OF AUTHORITIES

Constitutional Provisions

Const. art. I, § 3	15
U.S. Const. amend. VI	22
U.S. Const. amend. XIV	15

Cases

<u>Dietz v. Doe</u> , 131 Wn.2d 835, 935 P.2d 611 (1997)	20
<u>In re Winship</u> , 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)	15
<u>Mullaney v. Wilbur</u> , 421 U.S. 684, 704, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975)	17
<u>State v. Acosta</u> , 101 Wn2d 612, 683 P.2d 1069 (1984) 17, 18, 19	
<u>State v. Allen</u> , 182 Wn.2d 364, 341 P.3d 268 (2015).....	16
<u>State v. Finch</u> , 137 Wn.2d 792, 975 P.2d 967 (1999)	20
<u>State v. Hicks</u> , 102 Wn.2d 182, 683 P.2d 186 (1984)	15, 16, 17, 19
<u>State v. Kylo</u> , 166 Wn.2d 856, 215 P.3d 177 (2009)	18, 19
<u>State v. Osborne</u> , 102 Wn.2d 87, 684 P.2d 683 (1984).....	14
<u>State v. W.R.</u> , 181 Wn.2d 757, 336 P.3d 1134 (2014).....	17
<u>State v. Walden</u> , 131 Wn.2d 469, 932 P.2d 1237 (1997)	18

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.
Ed. 2d 674 (1984)22

Statutes

RCW 9A.08.020..... 14, 15, 16

RCW 9A.56.020(2)(a).....16

RCW 9A.56.190.....14

A. IDENTITY OF PETITIONER/DECISION BELOW

David Randall Wright requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Wright, No. 81930-5-I, filed on March 28, 2022. A copy of the Court of Appeals' opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. When a defense negates an element of the crime, the State bears the burden to disprove the defense beyond a reasonable doubt. Failure to instruct the jury regarding the State's burden of proof violates the defendant's due process rights. Here, Mr. Wright raised a defense that negated an essential element of the crime. But the jury was not instructed that the State bore the burden to disprove the defense beyond a reasonable doubt. This violated due process.

2. The prosecutor improperly viewed privileged attorney-client video visits.

3. Numerous continuances granted without Mr. Wright's approval violated his right to a timely trial.

4. Mr. Wright was denied barber services and forced to attend trial with an "unbarbered and unclean look" which may have biased the jury against him.

5. Mr. Wright was denied his right to view all of the discovery.

6. Numerous technical issues with the system allowing the jurors to view the witnesses could have caused the jurors to miss important information and influenced the outcome of the trial.

7. Mandatory mask mandates and social distancing may have affected the jurors' ability to concentrate on the evidence presented at trial.

8. Mr. Wright received ineffective assistance of counsel due to his attorney's inability to keep facts straight or remember the names of people involved in the case.

C. STATEMENT OF THE CASE

One day in February 2019, Brianna Reynolds decided to rob Kodi Anderson, an acquaintance of hers. 9/09/20RP 1345. She knew Mr. Anderson used and sold drugs. 9/09/20RP 1345. She asked Mr. Anderson to come to her motel room, under the pretense that she would buy some heroin and methamphetamine from him. 9/09/20RP 1345-46. Mr. Anderson agreed. 9/09/20RP 1345; 9/10/20RP 1528.

Mr. Anderson arrived, entered the room, and began weighing out some drugs. 9/09/20RP 1347. At that point, two men who had been hiding in the bathroom emerged, pointed a gun at Anderson, and told him to give them his things. 9/09/20RP 1348; 9/10/20RP 1531. When Anderson refused, they hit him with the gun. 9/10/20RP 1531. The men grabbed Anderson's belongings and ran out the door. 9/09/20RP 1531.

The property the men took from Mr. Anderson consisted of some drugs and a small backpack. 9/10/20RP 1530. Inside the backpack were: a Galaxy Note10 electronic tablet, a "Beats

Pill” portable Bluetooth speaker, two personal journals, about 60 dollars in cash, and a drug pouch containing about a quarter of an ounce of meth, a gram and a half of heroin, and a drug scale. 9/10/20RP 1530; 9/14/20RP 1821-24.

Soon after the incident, Ms. Reynolds contacted Mr. Anderson and told him she had not known the two men in the bathroom were going to rob him, which she later admitted was a lie. 9/10/11RP 1437-38. She falsely assured him she would arrange to have his things, or something of equal value, returned to him. 9/10/11RP 1437-38.

Mr. Anderson was very angry and frustrated at being robbed. 9/14/20RP 1831. He contacted several friends asking if they knew where he could find Ms. Reynolds so that he could get his things back. 9/10/20RP 1536-37, 1541. A couple of days after the robbery, Mr. Anderson’s friend Christopher Phelps contacted him in the middle of the night and told him that Ms. Reynolds was at the Jack in the Box on Evergreen Way waiting to meet up with Mr. Phelps for a drug deal. 9/10/20RP 1539-40.

Mr. Anderson decided to go there, confront Ms. Reynolds, and try to “get back the things she had taken from [him].”

9/14/20RP 1839-40. His purpose was “not to rob her, but to take back what belonged to [him].” 9/14/20RP 1840. He thought she still might be in possession of his speaker and tablet and he intended to try to retrieve those belongings. 9/14/20RP 1838-39, 1849. The tablet and speaker were both about the same size and could have fit inside Ms. Reynolds’s purse. 9/14/20RP 1820-21; 9/22/20RP 2631.

Mr. Phelps declined to accompany Mr. Anderson but gave him the phone number of his friend, David Wright. 9/10/20RP 1541. Mr. Anderson had never met Mr. Wright. 9/10/20RP 1541. Mr. Anderson called Mr. Wright, who agreed to go with him to the Jack in the Box. 9/10/20RP 1541. Mr. Anderson also called his friend Raymond Tannehill, who agreed to pick up the two men and drive them there. 9/10/20RP 1542.

Mr. Tannehill picked up Mr. Anderson, and then Mr. Wright, and drove them to a Chevron station near the Jack in the Box. 9/10/20RP 1542-45. In the car on the way, the men talked only “[a] little bit” about what they planned to do once they arrived. 9/10/20RP 1544-45. There was no direct conversation about any plan to commit a robbery. 9/14/20RP 1851. Mr. Tannehill heard Mr. Anderson say he intended “to get his stuff back.” 9/15/20(p.m.)RP 71; 9/16/20(A)RP 2043. Mr. Anderson told the others that the plan was “to get back.” 9/14/20RP 1852. Mr. Wright said “[v]ery little” in the car. 9/10/20RP 1544.

Mr. Wright later testified he did not go to the Jack in the Box with Mr. Anderson with the intention of assisting in a robbery. 9/21/20RP 2457. No one ever discussed with him any plan to commit a robbery, and he was never made aware that Mr. Anderson intended to take anything that did not belong to him. 9/21/20RP 2463-65, 2468-69, 2475. Instead, he accompanied Mr. Anderson at Mr. Phelps’s request, “to make

sure that nobody harmed Kodi.” 9/21/20RP 2462, 2468, 2485.

He thought Anderson needed protecting because the people who robbed him earlier “had displayed firearms and harmed him.” 9/21/20RP 2463. Mr. Wright carried a firearm in his waistband for protection. 9/21/21RP 2465-66. Mr. Anderson was unaware that Mr. Wright carried a firearm. 9/10/20RP 1543-44.

Ms. Reynolds was waiting outside of the Jack in the Box with her friend Raul Cuadros. 9/09/20RP 1349, 1358. Mr. Anderson and Mr. Wright approached them. 9/09/20RP 1358. Ms. Reynolds later testified that Mr. Anderson said to her, “[g]ive me your stuff.” 9/09/20RP 1359, 1362. Mr. Anderson testified he said, “give me the shit.” 9/10/20RP 1549. Ms. Reynolds refused to give Anderson anything and said he “could have my stuff when he pries it out of my cold dead hands.” 9/09/20RP 1360. Ms. Reynolds later claimed that when she made that statement, Mr. Wright lifted his shirt to show a handgun in his waistband. 9/09/20RP 1361. Mr. Wright

testified he lifted his sweater to reveal his firearm because Mr. Cuadros had made a threatening statement to Mr. Anderson, which put him on “high alert.” 9/21/20RP 2462. Mr. Wright did not say anything at all during the incident. 9/09/20RP 1361; 9/14/20RP 1797.

Ms. Reynolds and Mr. Cuadros attempted to walk away but Mr. Anderson and Mr. Wright followed them. 9/09/20RP 1361-62. Ms. Reynolds and Mr. Cuadros stopped and turned to face the other two men. 9/09/20RP 1362. When Mr. Anderson grabbed at Ms. Reynolds’s purse, she took a can of pepper spray from her purse and sprayed him in the face. 9/09/20RP 1364; 9/10/20RP 1549. At the same moment, a gunshot rang out. 9/09/10RP 1365; 9/10/20RP 1552. Mr. Cuadros lay on the ground with a gunshot wound in his chest. 9/09/20RP 1365-67. He had a revolver in his waistband. 9/09/20RP 1366. Mr. Cuadros died at the scene. 9/11/20RP 1763.

Mr. Anderson and Mr. Wright ran away and Mr. Tannehill picked them up nearby. 9/09/20RP 1364; 9/10/20RP

1552. Mr. Anderson heard Mr. Wright say he shot Mr. Cuadros because he “flinch[ed] like he was about to grab a weapon.” 9/14/20RP 1796. Mr. Anderson had not seen Mr. Cuadros reach for a weapon, but he was not paying attention at that moment, as he “was getting pepper sprayed.” 9/10/20RP 1555.

The State charged Mr. Wright with one count of first degree felony murder and one count of second degree intentional murder. Both counts carried firearm enhancement allegations. CP 349-50.

At trial, Mr. Wright stipulated he shot and killed Mr. Cuadros. 9/21/20RP 2432-33. But he testified he did so in self defense, after he thought he saw Mr. Cuadros draw a firearm from his waistband and point it at him. 9/21/20RP 2461, 2477-79, 2487.

At trial, the jury was instructed that in order to find Mr. Wright guilty of felony murder, they must find he or an accomplice “attempted to commit robbery,” and he caused the death of Raul Cuadros in the course of or in furtherance of the

attempted robbery. CP 200. The jury was further instructed that the crime of robbery required proof of an intent to commit theft:

An individual commits a robbery when he or she unlawfully and with intent to commit theft thereof, takes personal property from another person, or in the presence of another person in possession of the property, and the taking was against that person's will, by the use or threatened use of immediate force, violence, or fear of injury to that person or to the person or property of anyone. . . .

CP 204. The jury was instructed that "theft" means "to wrongfully obtain or exert unauthorized control over the property of another, with intent to deprive that person of such property." CP 206.

The defense requested the court instruct the jury on Mr. Wright's defense that he was not guilty of felony murder, and no attempted robbery occurred, because Mr. Anderson had a good faith claim of title to the property he attempted to take from Ms. Reynolds. CP 274. The court agreed and instructed the jury: "It is a defense to an allegation of theft that the specific item of property involved was appropriated, or

attempted to be appropriated, openly and avowedly under a good faith claim of title, even if the claim is untenable.” CP 207 (Instruction 16). But the court did not instruct the jury the State bore the burden to disprove the good faith claim of title defense beyond a reasonable doubt. See 9/17/20RP 2200-02.

At trial, the jury heard evidence supporting the good faith claim of title defense. Mr. Anderson testified his purpose in meeting Ms. Reynolds at the Jack in the Box was not to rob her but “to get back what belonged to [him].” 9/14/20RP 1848-49. He never communicated to Mr. Wright any intention of taking property that did not belong to him; they never had any discussion about it. 9/14/20RP 1849-52.

Consistent with Mr. Anderson’s testimony, Mr. Wright testified he was told that Mr. Anderson’s purpose in meeting Ms. Reynolds at the Jack in the Box was “to get his stuff back.” 9/21/20RP 2463.

In closing argument, defense counsel urged the jury to acquit Mr. Wright of felony murder because he was not an

accomplice to attempted robbery. 9/22/20RP 2605, 2607-09, 2620-21. Counsel argued Mr. Anderson's purpose in going to the Jack in the Box to meet Ms. Reynolds was not to rob her but to confront her and demand she return his stolen belongings. 9/22/20RP 2615, 2622. Counsel argued, "[a]ll [Mr. Anderson] wanted to do was get [his] stuff back." 9/22/20RP 2605. Mr. Wright's purpose in accompanying Mr. Anderson was not to assist him in a robbery but rather "to back him up" and "avoid the kinds of problems" that Mr. Anderson experienced during his previous encounter with Ms. Reynolds. 9/22/20RP 2622.

The jury found Mr. Wright guilty of felony murder and second degree intentional murder, both while armed with a firearm. CP 185-88. The court vacated the second degree murder conviction on double jeopardy grounds. CP 35.

Mr. Wright appealed, arguing the trial court violated due process by failing to instruct the jury the State bore the burden

to disprove his defense of good faith claim of title beyond a reasonable doubt.¹ The Court of Appeals affirmed.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The trial court erred and violated due process by failing to instruct the jury that the State bore the burden to disprove the defense of good faith claim of title beyond a reasonable doubt.

Mr. Wright's principal defense to felony murder was that he was not guilty as an accomplice to attempted robbery because Mr. Anderson had a good faith claim of title to the property. 9/14/21RP 1840-41, 1848-54; 9/21/20RP 2457, 2462-65, 2468-69, 2475, 2485; 9/22/20RP 2605, 2615, 2622; CP 207, 274. Mr. Wright had a right to have the jury fully instructed on his theory of defense, including who bore the burden of proof.

Defense counsel proposed an instruction on the good faith claim of title defense that allocated the burden of proof to the State. CP 274. But although the trial court instructed the jury on the defense, it did not instruct the jury that the State

¹ Mr. Wright also raised sentencing issues that are not at

bore the burden to disprove it beyond a reasonable doubt. CP 207. This was error.

The court's failure to instruct the jury that the State bore the burden to disprove the good faith claim of title defense substantially lessened the State's burden of proof and violated due process. This Court should grant review and reverse Mr. Wright's conviction.

- a. The State bore the burden to disprove Mr. Wright's defense of good faith claim of title beyond a reasonable doubt.

Mr. Wright was charged with first-degree felony murder based on the underlying felony of attempted robbery. CP 200, 349-50. The state of mind necessary to prove a felony murder is the same state of mind necessary to prove the underlying felony. State v. Osborne, 102 Wn.2d 87, 93, 684 P.2d 683 (1984).

The mental element of attempted robbery is an intent to steal. RCW 9A.28.020(1); RCW 9A.56.190; State v. Hicks, 102

issue in this petition.

Wn.2d 182, 184, 683 P.2d 186 (1984); CP 203-04. As with all essential elements of a crime, due process required the State to prove this element beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3.

Further complicating the case is that the State prosecuted Mr. Wright under a theory of accomplice liability. CP 201. The State's theory was that Mr. Anderson committed the attempted robbery and Mr. Wright acted as his accomplice. 9/22/20RP 2586, 2591, 2654.

For a person to be liable as an accomplice, he must solicit, command, encourage, or request another person to commit the crime, or aid or agree to aid such other person in planning or committing it. RCW 9A.08.020; CP 201. A person is not an accomplice by aiding *any* crime. State v. Cronin, 142 Wn.2d 568, 578-79, 14 P.3d 752 (2000). The person must act knowledge that his conduct will promote or facilitate the crime charged. Id. An accomplice must have *actual* knowledge that

the principal is engaged in the charged crime. State v. Allen, 182 Wn.2d 364, 374, 341 P.3d 268 (2015).

Thus, for Mr. Wright to be guilty of felony murder, the State had to prove both that Mr. Anderson committed an attempted robbery and that Mr. Wright acted with full knowledge he was assisting an attempted robbery. RCW 9A.08.020; Allen, 182 Wn.2d at 374; Cronin, 142 Wn.2d at 578-79; CP 201.

The good faith claim of title defense is a complete defense to the charge of attempted robbery. Hicks, 102 Wn.2d at 186; RCW 9A.56.020(2)(a). The defense applies when the accused attempts to take property “openly and avowedly under a claim of title made in good faith, even though the claim be untenable.” RCW 9A.56.020(2)(a); CP 207. “A person cannot be guilty of robbery in forcibly taking property from another if he does so under the good faith belief that he is the owner, or entitled to the possession of the property.” Hicks, 102 Wn.2d at

184. This good faith belief negates the essential element of intent to steal. Id.

If a defense negates an element of the crime, due process requires the State to disprove the defense beyond a reasonable doubt. State v. W.R., 181 Wn.2d 757, 765, 336 P.3d 1134 (2014); Mullaney v. Wilbur, 421 U.S. 684, 699, 704, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975). Placing the burden on the defendant to prove the defense violates due process. W.R., 181 Wn.2d at 765.

Because the defense of good faith claim of title negates the essential element of intent to steal, the State bears the burden to prove the absence of the defense beyond a reasonable doubt. Hicks, 102 Wn.2d at 187.

When a defense negates an element of the crime, the jury must be instructed that the State bears the burden of disproving the defense beyond a reasonable doubt. Hicks, 102 Wn.2d at 187; State v. Acosta, 101 Wn2d 612, 619, 683 P.2d 1069 (1984). Thus, Mr. Wright was entitled to have the jury

instructed that the State bore the burden to disprove his defense beyond a reasonable doubt. Hicks, 102 Wn.2d at 187; Acosta, 101 Wn2d at 619.

- b. The trial court erred in failing to instruct the jury that the State bore the burden to disprove Mr. Wright's defense of good faith claim of title beyond a reasonable doubt.

Due process requires that jury instructions correctly state the relevant law. State v. Kylo, 166 Wn.2d 856, 864, 215 P.3d 177 (2009). Read as a whole, the jury instructions must make the relevant legal standard manifestly apparent to the average juror. State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997).

When the defense presents some evidence to support a good faith claim of title defense, the jury must be "informed in some unambiguous way" that the State bears the burden to prove the absence of the defense beyond a reasonable doubt. See Acosta, 101 Wn2d at 621. If a reasonable juror could mistakenly believe that the State need not disprove the defense, and that the defendant bears some burden of proof on the issue,

the failure to inform the jury of the State's burden is error. Id. at 623.

Here, the court did not instruct the jury that the State bore the burden to disprove the good faith claim of title defense beyond a reasonable doubt. The court instructed the jury:

It is a defense to an allegation of theft that the specific item of property involved was appropriated, or attempted to be appropriated, openly and avowedly under a good faith claim of title, even if the claim is untenable.

CP 207. But nowhere did the court instruct the jury that the State bore the burden to disprove the defense beyond a reasonable doubt.

A reasonable juror could have mistakenly believed that the State need not disprove Mr. Wright's defense, and that he bore some burden of proof on the issue. Thus, the absence of an instruction on the State's burden of proof violated Mr. Wright's due process rights. Kyllo, 166 Wn.2d at 864; Hicks, 102 Wn.2d at 187; Acosta, 101 Wn.2d at 623.

2. The prosecutor improperly viewed privileged attorney-client video visits.

Communications and advice between an attorney and his client are privileged. Dietz v. Doe, 131 Wn.2d 835, 842, 935 P.2d 611 (1997). The prosecutor improperly listened to privileged communications between Mr. Wright and his attorney.

3. Numerous continuances granted without Mr. Wright's approval violated his right to a timely trial.

Criminal defendants in Washington have a right to a timely trial. CrR 3.3. That right was violated when numerous continuances were granted without Mr. Wright's consent.

4. Mr. Wright was denied barber services and forced to attend trial with an "unbarbered and unclean look" which may have biased the jury against him.

A criminal defendant has the right to appear before a jury "with the appearance, dignity, and self-respect of a free and innocent man." State v. Finch, 137 Wn.2d 792, 844, 975 P.2d 967 (1999). Mr. Wright was denied this right.

5. Mr. Wright was denied his right to view all of the discovery.

Criminal defendants in Washington have a right to view the discovery. CrR 4.7. Mr. Wright was denied that right.

6. Numerous technical issues with the system allowing the jurors to view the witnesses could have caused the jurors to miss important information and influenced the outcome of the trial.

Numerous technical issues with the system allowing the jurors to view the witnesses could have caused the jurors to miss important information and tainted the outcome of the trial.

7. Mandatory mask mandates and social distancing requirements may have affected the jurors' ability to concentrate on the evidence presented at trial.

Mandatory mask mandates and social distancing requirements may have affected the jurors' ability to concentrate on the evidence presented at trial.

8. Mr. Wright received ineffective assistance of counsel.

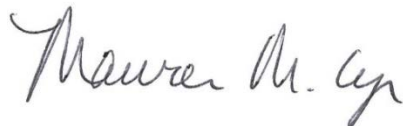
Criminal defendants have a constitutional right to the effective assistance of counsel. Strickland v. Washington, 466

U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); U.S. Const. amend. VI. Mr. Wright was denied this right due to his attorney's inability to keep facts straight or remember the names of people involved in the case.

E. CONCLUSION

For the reasons provided, this Court should grant review and reverse the Court of Appeals.

Respectfully submitted this 15th day of April, 2022. I certify this brief complies with RAP 18.17 and contains 3,554 words, excluding those portions of the document exempted from the word count by the rule.

A handwritten signature in cursive script that reads "Maureen M. Cyr".

Maureen M. Cyr
State Bar Number 28724
Washington Appellate Project – 91052

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 81930-5-I
)	
Respondent,)	DIVISION ONE
)	
v.)	UNPUBLISHED OPINION
)	
DAVID RANDALL WRIGHT,)	
)	
Appellant.)	
)	

ANDRUS, A.C.J. — David Wright appeals his conviction for first degree murder after a jury found that he shot and killed Raul Cuadros during an attempted robbery. Wright contends that the court erred by refusing his proposed good faith claim of title instruction. He also argues that he is entitled to resentencing because his offender score improperly included a point for a prior drug possession conviction, now invalid under State v. Blake,¹ and a point for committing the murder while on community custody for the drug possession conviction. We affirm Wright’s conviction but remand for resentencing.

FACTS

On February 15, 2019, Brianna Reynolds hatched a plan with Raul Cuadros and Oliver Rosales (aka “Grumpy”) to rob her drug dealer, Kodi Anderson.² She

¹ 197 Wn.2d 170, 481 P.3d 521 (2021).

² For clarity, we refer to the participants by their first names.

arranged to meet Kodi at an Everett Motel 6 under the pretense of buying drugs from him. When Kodi arrived, Grumpy and Raul were hiding in the bathroom. As Kodi began weighing out the drugs, Raul and Grumpy came out of the bathroom and demanded that he hand over his "stuff." According to Kodi, one of the men was armed with a firearm and used it to pistol-whip him. Brianna, Raul, and Grumpy fled the motel room with Kodi's methamphetamine, heroin, and backpack containing a Galaxy Note10 tablet, a small speaker, a couple of journals, a drug pouch, and 60 dollars. After being robbed, Kodi and his friend, Raymond Tannehill, drove around looking for the perpetrators but could not find them.

Kodi told his friend, Christopher Phelps, about the robbery and Brianna's involvement in it. On February 17, 2019, Christopher notified Kodi that Brianna had contacted him asking to buy drugs and that she was waiting for him outside a Jack in the Box restaurant. Brianna testified she and Raul planned to rob Christopher when he arrived in retribution for him having robbed her in the past. When Kodi learned of Brianna's whereabouts, he wanted to confront her to "get back [his] stuff and wanted to get back at her." Kodi asked Christopher if he had a gun; Christopher said no and refused to go with him to the Jack in the Box. He told Kodi to call David Wright to go with him. Phone records confirmed Kodi's contact with Wright that night.

Wright testified that he went along "to make sure that nobody harmed Kodi." Wright was aware Kodi had been robbed and wanted "to get his stuff back," and that the robbers had displayed firearms during the robbery. So, despite having prior felony convictions making it illegal for him to possess firearms, Wright armed

himself with a semiautomatic M&P Shield 9 mm pistol. He did so because he knew there was risk of violence.

Kodi and Raymond picked up Wright, and the three drove to the Jack in the Box. While en route, they discussed that they “were going to rob Bri for what she had.” The plan, according to Kodi, was “just . . . to beat them up and take their shit.”

Kodi and Wright, both wearing bandanas covering the lower half of their faces, walked into the restaurant parking lot and saw Brianna standing with Raul. Kodi approached Brianna and demanded that she “[g]ive me your stuff. Come on, just give it to me. Make it easy on yourself.” He testified, “I attempted to rob her.” Brianna refused, telling Kodi that he could have her stuff “when he pries it out of my cold dead hands.” Both she and Raul tried to walk away. Kodi, angry, followed and grabbed at Brianna’s purse. Brianna saw Wright pull a gun from his waistband. She turned to Kodi and sprayed him with pepper spray. Kodi ducked to avoid the spray, heard a gunshot, and took off running. Wright followed.

Brianna saw Raul on the ground and ran to his side to provide first aid. She discovered a gunshot wound in his chest and a revolver tucked into his pants waistband. She removed the revolver and hid it in her purse. Raul died of a gunshot wound to his chest shortly thereafter.

After fleeing the parking lot, Kodi saw Wright bury his pistol behind an electrical box while they waited for Raymond to pick them up. Raymond dropped them off at Christopher’s house; he swapped the clothing they had worn during the shooting with clean clothing.

During the ensuing investigation, the police interviewed Brianna and learned of Kodi's identity. They also discovered Raul's revolver in her purse. Police recovered Kodi's backpack and journals in the home of Brianna's friend, Jackie Yegge. Surveillance footage, phone records, and an interview with Kodi, led them to Raymond, Christopher and, ultimately, Wright.

The State charged Wright with one count of first degree murder, one count of second degree murder, and two counts of unlawful possession of a firearm. Kodi, initially charged with Raul's murder as an accomplice, entered into a plea agreement with the State in which he pleaded guilty to attempted first degree robbery and testified against Wright at trial. He testified that he intended to take whatever property Brianna had that was of value and would have shared whatever he took with Wright. Brianna, under a grant of immunity from prosecution for the crimes of tampering with evidence for removing the revolver, the robbery of Kodi and the attempted robbery of Christopher, also testified at trial. Both Kodi and Brianna testified that Raul made no threats or threatening gestures toward Kodi or Wright before Wright shot him. The revolver Brianna found tucked in Raul's waistband was unloaded and had visible cobwebs in the barrel when police recovered it from Brianna.

Before the State rested its case, Wright stipulated that he was present with Kodi on February 17, 2019, and that he shot Raul. Wright took the stand and again admitted that he shot Raul but claimed he did so because Raul had pulled the firearm from his waistband and pointed it at Wright. Wright disputed Kodi's version of events, testifying that Kodi had never told him of any plan to rob Brianna. Wright

claimed that, as far as he knew, he was there only to make sure Kodi was not hurt while trying to get his property back. He confirmed that he intentionally shot Raul, knowing that he could kill him.

The jury found Wright guilty of murder in the first degree.³ It also found that he was armed with a firearm in the commission of that crime. Wright pleaded guilty to the two counts of unlawful possession of a firearm.

At sentencing, the trial court found that Wright's offender score for the murder conviction was 12 and his offender score for the two firearm possession convictions was 11. The standard range for the murder, for a score of "9+," was 411 to 548 months, with an additional 60 months for the firearm enhancement. The standard range for unlawful firearm possession, for a score of "9+," was 87 to 116 months. The court sentenced Wright to midrange sentences of 486 months on the murder conviction and 100 months on the two firearm possession convictions.

Wright appeals the murder conviction and his sentence.

ANALYSIS

1. Jury Instruction

Wright first contends the trial court violated his due process rights by refusing to instruct the jury that the State had to disprove his defense of a good faith claim of title. We disagree.

Instruction No. 2 informed the jury that

[t]he defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the

³ The jury also found Wright guilty of the alternative charge of murder in the second degree. The court vacated that conviction on double jeopardy grounds at the State's request.

plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

In Instruction No. 9, the “to convict” instruction for first degree murder, the trial court instructed the jury that the State had the burden to prove beyond a reasonable doubt that “on or about February 17, 2019, the defendant and/or an accomplice attempted to commit robbery; . . . [and] the defendant and/or an accomplice caused the death of Raul Cuadros in the course of or in furtherance of that attempted robbery or in immediate flight from that attempted robbery.” The instruction also contained the standard burden of proof verbiage: “[i]f you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.”

Wright’s theory at trial was Kodi had not intended to commit theft or robbery when he confronted Brianna but was instead merely attempting to recover his own property. He argued that if Kodi’s intent was to recover property that rightfully belonged to him, he was not committing robbery and Wright could not be an accomplice to an attempted robbery. The shooting, he maintained, did not occur in the course of an attempted robbery and instead was an act of self-defense.

Wright requested a good faith claim of title jury instruction based on WPIC 19.08:⁴

It is a defense to a charge of theft that the property or service was appropriated or attempted to be appropriated openly and avowedly under a good faith claim of title, even if the claim is untenable.

⁴ 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 19.08, at 356 (5th ed. 2021) (WPIC)

The State has the burden of proving beyond a reasonable doubt that the defendant did not attempt to appropriate the property openly and avowedly under a good faith claim of title. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty as to the charge of First Degree Murder in Count One.

The trial court modified this proposed instruction in Instruction No. 16:

It is a defense to an allegation of theft that the specific property involved was appropriated, or attempted to be appropriated, openly and avowedly under a good faith claim of title, even if the claim is untenable.

It is not a defense to an allegation of theft that the defendant or an accomplice attempted to take different property that was of a similar or equivalent value to the property to which the good faith claim of ownership applied.

The court explained that the last sentence of Wright's proposed instruction was unnecessary because it was duplicative of language in both the "to convict" instruction, Instruction No. 16, and the burden of proof instruction, Instruction No. 2.

Wright argues that by giving a good faith claim of title instruction without a statement that the State had the burden to disprove the defense, the trial court impermissibly placed the burden of proof on him, violating his due process rights. The Fourteenth Amendment's due process clause requires the State to prove beyond a reasonable doubt all facts necessary to prove the charged crime. U.S. Const. XIV. A defendant's challenge to the adequacy of specific jury instructions informing the jury of the State's burden of proof requires the court to review the challenged instructions de novo in the context of the instructions as a whole. State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007).

Both parties agree that it is a defense to a charge of theft or robbery that property was “appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable.” RCW 9A.56.020(2)(a). The parties also agree that “[a] person cannot be guilty of robbery in forcibly taking property from another if he does so under the good faith belief that he is the owner, or entitled to possession of the property.” State v. Hicks, 102 Wn.2d 182, 184, 683 P.2d 186 (1984). “Although [Washington’s] robbery statute, RCW 9A.56.190, does not include an intent element, [the] settled case law is clear that ‘intent to steal’ is an essential element of the crime of robbery.” State v. Kjorsvik, 117 Wn.2d 93, 98, 812 P.2d 86 (1991). The difference between robbery and theft is the use or threatened use of force; robbery involves the use of force while theft does not. State v. Farnsworth, 185 Wn.2d 768, 775, 374 P.3d 1152 (2016). Good faith claim of title negates the element of intent to steal for both crimes. Hicks, 102 Wn.2d at 187. Because the element of the defense negates an element of the offense, the State must prove the absence of the defense beyond a reasonable doubt. Id. at 187.

Our Supreme Court has recognized that when the State bears the burden of disproving a defense, a specific instruction to this effect is preferable, “but failure to provide one is not reversible per se so long as the instructions, taken as a whole, make it clear that the State has the burden.” State v. Acosta, 101 Wn.2d 612, 621, 683 P.2d 1069 (1984) (reversing conviction because “to convict” instruction did not tell jury that force used must be unlawful or without justification when self-defense raised). In State v. Imokawa, 194 Wn.2d 391, 397, 450 P.3d 159 (2019), the

Supreme Court stated that, in general, a jury instruction explicitly providing that the State must prove beyond a reasonable doubt that the statutory elements of the crime is sufficient when the defense at issue negates an element listed in the to-convict instruction.

In this case, the intent to “unlawfully” take property from Brianna was an element of Wright’s “to convict” instruction for first degree murder. Instruction No. 16 instructed the jury that the State had to prove Wright or an accomplice “attempted to commit robbery.” Instruction No. 13 provided that “[a]n individual commits a robbery when he or she unlawfully and with intent to commit theft thereof, takes personal property from another person . . . , and the taking was against that person’s will” (emphasis added). Instruction No. 12 stated that “[a]n individual attempts to commit robbery when, with the intent to commit that crime, he or she does any act that is a substantial step toward the commission of that crime” (emphasis added). When these three instructions are read together, it is clear that the State bore the burden of proving, beyond a reasonable doubt, that Wright or Kodi intended to unlawfully (i.e., without a good faith claim of title) take personal property from Brianna.

Wright relies on State v. Acosta to challenge the adequacy of the jury instructions here. That case, however, is distinguishable. In Acosta, the defendant was charged with second degree assault. 101 Wn.2d at 614. He claimed to have acted in self-defense. Id. Acosta proposed, and the trial court refused, an instruction explicitly stating the State had to prove beyond a reasonable doubt that Acosta “was not acting in self-defense, or using lawful force as defined elsewhere

in these instructions.” Id. Our Supreme Court held that even when reading the instructions as a whole, they failed to adequately inform the jury that the State must prove the absence of self-defense because “the jury was not told in the ‘to convict’ instruction that the force used must be unlawful, wrongful, or without justification or excuse.” Id. at 623.

But here, unlike Acosta, the instructions were clear that the State had to prove that Wright or Kodi acted “unlawfully” in their attempt to take property from Brianna. That element clearly negated any contention that Kodi acted lawfully, under a good faith belief that he owned the property he was attempting to take from her.

This case is more analogous to Imokawa, in which the State charged Imokawa with vehicular homicide, vehicular assault, and reckless driving after Imokawa caused a car accident, injuring one person and killing another. 194 Wn.2d at 393. At trial, the court refused Imokawa’s proposed instruction that the State had the burden to prove the absence of a superseding intervening cause. Id. at 395.

On appeal, the Washington Supreme Court rejected Imokawa’s argument that the instructions violated his due process rights. Id. at 403. The court decided that a separate burden of proof instruction was unnecessary because proximate cause and superseding intervening cause are mutually exclusive concepts, and the trial court gave standard instructions defining proximate cause and reasonable doubt, and informing the jury that the defendant was presumed innocent, that the burden was on the State to prove every element of the crimes beyond a reasonable

doubt, and that the defendant had no burden to prove reasonable doubt. Id. This combination of instructions, it concluded, properly stated the law, did not shift the burden of proof to the defendant, did not mislead, and allowed the defendant to present his theory of the case. Id. at 402-03.

As in Imokawa, the intent to unlawfully take personal property of another and the intent to, in good faith, recover one's own property, are mutually exclusive. And as in Imokawa, the trial court defined reasonable doubt, informed the jury that Wright was presumed innocent, made it clear that the State had to prove every element of every crime beyond a reasonable doubt, and indicated that Wright had no burden to prove reasonable doubt. See also State v. Knapp, 197 Wn.2d 579, 592, 486 P.3d 113 (2021) (“[w]hat matters is not whether one jury instruction provides a definition, but whether the instructions as a whole properly inform the jury of the applicable law, are not misleading, and permit the defendant to argue his theory of the case.” (internal quotations omitted)).

Because the jury instructions properly informed the jury as to the law and did not mislead the jury, the trial court did not violate Wright's due process rights in rejecting his proposed instruction.

2. Offender Score

Wright next contends that he is entitled to resentencing because his offender score included a point for an invalid drug possession conviction under State v. Blake, and included a point for committing these crimes while on

community custody for the Blake conviction.⁵ He contends both points should be eliminated from his offender score.

The court reviews a sentencing court's offender score calculation de novo. State v. Griepsma, 17 Wn. App. 2d 606, 619, 490 P.3d 239 (2021).

The offender score cannot include a prior conviction based on a constitutionally invalid statute. State v. Markovich, 19 Wn. App. 2d 157, 173, 492 P.3d 206 (2021). “[A] sentence that is based upon an incorrect offender score is a fundamental defect that inherently results in a miscarriage of justice.” Id. (quoting In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 868, 50 P.3d 618 (2002)). The adequate remedy for this type of defect is resentencing in accordance with the correct offender score. Id.

The State does not dispute that Wright's offender score was miscalculated under Blake. It argues instead that, even if the court erred in including the Blake point in his offender score, the standard range would not change because his offender score remains a 9 or higher. It argues that under In re Pers. Restraint of Toledo-Sotelo, 176 Wn.2d 759, 297 P.3d 51 (2013), Wright need not be resentenced because a reduced offender score would not change the applicable SRA standard range. But the issue in Toledo-Sotelo was whether the error in Toledo-Sotelo's offender score rendered the judgment and sentence “facially invalid,” as required for his personal restraint petition to be timely under RCW 10.73.090(1). Toledo-Sotelo at 768-79. It held that even if the offender score had

⁵ Wright sought and received permission from this court to raise in his reply brief a supplemental assignment of error relating to the point associated with his community custody status for the 2016 possession conviction.

been incorrectly calculated, the trial court would have sentenced him within the same range, the sentence was not facially invalid, and the petition was not untimely. Id. 768-69.

We are asked to review Wright's offender score on direct appeal, not in an arguably untimely personal restraint petition. The more appropriate precedent is Griepsma. In that case, the sentencing court imposed a midrange sentence of 55 months for assault convictions based upon a finding that Griepsma's offender score was "9+." Griepsma, 17 Wn. App. 2d at 611. Griepsma contended on appeal that the State had failed to prove a prior burglary conviction resulting in an incorrect offender score. Id. at 620. This court agreed. Id. at 619. It could not conclude that including the prior burglary conviction in his criminal history was harmless error. Id. at 621. It held that an offender score error is not harmless, even if the sentencing range is the same, if the record does not clearly indicate that the sentencing court would have imposed the same sentence without the erroneous offender score. Id. Because the court could not discern from the record in that case that the court would have imposed the same sentence given the correct offender score, it remanded for resentencing. Id.

We similarly cannot conclude the error in calculating Wright's offender score was harmless. The State sought a high end sentence of 530 months on the murder conviction. Wright sought an exceptional sentence of 180 months. The trial court considered both requests and factored into its sentencing decision Wright's statements of remorse, the apparent lack of any premeditation, and Wright's extensive criminal history. As to the latter issue, it noted

Another factor to consider here is that the defendant has substantial criminal history. That substantial criminal history is already calculated into the standard range, but it is still noteworthy that he has a high offender score. He is in a 9-plus category that appears to be a 12. And whether it's precisely 12 or not, it is still above, really, the 9 which would otherwise trigger the maximum standard range.

In any event, I have considered all possible options including, for example, the possibility of an exceptional sentence downward. But ultimately the Court concludes that a sentence below the standard range or even at the low end is not appropriate. But I do at least agree that the sentence should be significantly below what the State recommends. The bottom line is that the Court will order a term of confinement of 486 months. 486 months or essentially 40.5 years.

This record indicates that the trial court, in selecting the appropriate sentence, assumed Wright's criminal history was more substantial than it actually was. We therefore cannot say that the court would have imposed the same sentence if it had the correct score and criminal history before it. Because the "record does not clearly indicate that the sentencing court would have imposed the same sentence," Griepsma, 17 Wn. App. 2d at 621 (quoting State v. McCorkle, 88 Wn. App. 485, 499-500, 945 P.2d 736 (1997)), resentencing is necessary.

The State also challenges Wright's argument that the community custody point should be excluded from the offender score. It contends the record is unclear as to whether Wright was on community custody for a prior, valid identity theft conviction or the invalid drug possession conviction.

In the amended information, the State alleged that each of the charged crimes "was committed while the defendant was under community custody, as

provided by RCW 9.94A.525(19).”⁶ At trial, the parties stipulated that Wright’s community custody status would be decided by the court at the time of sentencing and did not need to be presented to the jury.

The State’s sentencing memorandum indicated that Wright was convicted of second degree identity theft in August 2013 and sentenced to 12 months of community custody for that crime. It also represented that Wright was convicted of drug possession in 2016 and sentenced to 12 months of community custody for that conviction. The State asked the court to find that Wright was on community custody at the time of the offenses, but did not indicate if this status related to the 2013 identity theft conviction, the 2016 possession conviction, or both. Wright stipulated to the accuracy of the criminal history set out in the State’s sentencing memorandum, but did not indicate the crime for which Wright was on community custody.

While it seems unlikely that in February 2019 Wright would have been on community custody for a 2013 conviction, it is certainly possible, and we cannot make this determination on the record before us. Given that we remand for resentencing to eliminate the Blake point from Wright’s offender score, we defer to the trial court to determine in the first instance whether Wright’s community custody point related to the invalid Blake conviction or the valid identity theft conviction.⁷

⁶ RCW 9.94A.525(19) provides in pertinent part “[i]f the present conviction is for an offense committed while the offender was under community custody, add one point.”

⁷ The State also contends that even if the community custody point resulted from an invalid conviction under Blake, the point should not be excluded from Wright’s offender score. It argues that the judgment and sentence placing Wright on community custody was a valid order at the time he committed the 2019 offenses and the subsequent invalidation of the underlying conviction does not change the fact that he committed the current offenses while under community custody. But we need not reach this issue unless Wright’s community custody status related to drug possession conviction. The State is free to advance this argument before the sentencing court on remand.

3. Statement of Additional Grounds

Wright raises several additional issues in a statement of additional grounds (SAG): (1) the trial court erred by refusing to dismiss the prosecution for discovery violations, (2) the trial continuances violated his right to a speedy trial, (3) the inability to access a barber violated his right to a fair trial, (4) he lacked access to discovery, (5) technical issues with the court's computer monitors violated his right to a fair trial, (6) the mask and social distancing requirements violated his right to a fair trial, and (7) he received ineffective assistance of counsel. We disagree with all of them.

(1) Alleged discovery violations

In SAG #1, Wright asserts that the trial court erred by not dismissing the case based on the prosecutor accessing the contents of a jail phone call between Wright and his attorney. We cannot find support for this accusation in the record. Defense counsel did move orally to dismiss the case based on the allegation that Kodi's attorney had seen, in the State's discovery materials, a recording of a conversation between Wright and his counsel. But defense counsel also informed the court he had yet to review that discovery. The court reserved ruling on any such motion until counsel could investigate and, if necessary, develop the record fully. Defense counsel did not raise the issue again.

Wright failed to preserve this issue for appeal by failing to renew his motion to dismiss. When a court reserves a ruling on a motion, the moving party must "again raise the issue at an appropriate time to insure that a record of the ruling is made for appellate purposes." State v. Noltie, 116 Wn.2d 831, 844, 809 P.2d 190

(1991). Because Wright did not do so, he waived this claim of error.

(2) Alleged speedy trial violation

In SAG #2, Wright alleges his trial counsel erroneously told the trial court that one of the trial continuances was an “agreed continuance” because Wright did not agree to it. But the record shows that three continuances were granted over Wright’s objection. The record does not support his allegation that his trial counsel misrepresented his wishes to the court.

(3) Lack of access to a barber

In SAG #3, Wright asserts that he was denied a fair trial because the prison’s COVID-19 protocols did not allow him access to a barber. We recognize that a criminal defendant has the right to appear before a jury “with the appearance, dignity, and self-respect of a free and innocent man.” State v. Finch, 137 Wn.2d 792, 844, 975 P.2d 967 (1999) (plurality opinion).

Here, Wright concedes the prison allowed him to have a shaving razor. Wright contends, however, that he was forced to choose between an “unbarbered . . . look” and a clean shave. Wright says he chose to attend court with the unbarbered and unclean look” which may have biased the jury against him. Wright did not raise this issue below. When a party fails to raise an issue at trial, that party waives the issue on appeal. State v. Robinson, 171 Wn.2d 292, 304, 253 P.3d 84 (2011). The party can raise the issue on appeal only if the party can show the presence of a “manifest error affecting a constitutional right.” State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

Wright cites no authority for the proposition that it is unconstitutionally unfair

to require a defendant to appear at trial with an “unbarbered look”. While a defendant has the right to appear free from restraints to ensure the presumption of innocence, there is no case law suggesting that this right includes the right to the services of a barber or facial grooming of one’s choice. In general, a defendant’s haircut alone does not constitute an impermissibly distinctive reminder of a person’s incarcerated status or prejudicially mark the defendant as a prisoner. People v. Payne, 285 Mich. App. 181, 186, 774 N.W.2d 714 (2009). We reject the argument that the inability to groom himself for trial somehow prejudiced his right to a fair trial.

(4) Lack of access to discovery

In SAG #4, Wright claims he lacked access to discovery after defense counsel fired their investigator because the investigator often went over discovery with Wright. The record contains no information regarding this issue; neither Wright nor counsel raised this issue before the court. When a claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. McFarland, 127 Wn.2d at 335. If a defendant wishes to raise a claim of deficient representation that requires facts not in the existing record, the appropriate means to do so is through a personal restraint petition. McFarland, 127 Wn.2d at 335. We will not consider this allegation on direct appeal.

(5) Technical issues with jurors’ monitors

In SAG #5, Wright argues the jury may have missed important information during the trial because the jurors’ monitors would occasionally shut off. To accomplish social distancing, the court asked the jury to sit in the court gallery

rather than in the jury box. To provide the jury with a close view of the witnesses as they testified, the court placed monitor screens on both sides of the gallery. During trial, one of these monitors occasionally shut off. When the monitor went into sleep mode, members of the jury or the prosecutor brought the issue to the court's attention and the court had staff fix the monitor.

Wright did not raise this issue during trial and waives the issue on appeal. Robinson, 171 Wn.2d at 304. Wright does not explain how intermittent technical issues with a monitor, placed in the gallery to give jurors a close-up view of witnesses as they testified, affected his right to a fair trial or any other constitutional right. Since Wright did not raise this issue at trial and Wright does not show how the technical issue amounted to a manifest error affecting a constitutional right, we refuse to address it.

(6) COVID-19 mask and social distancing requirements

In Sag #6, Wright argues the trial court's COVID-19 requirements could have distracted the jury, leading to an unfair trial. From the record, we glean that the court's COVID-19 protocols required the jury to wear masks during the trial and to social distance, which the court accomplished by placing the jurors in the court gallery and having spectators seated in the jury box. Wright did not object to any of these COVID-19 protocols.

Wright contends that the jury could have become frustrated by the masks during trial and this could have affected their verdict. Not only did Wright fail to object to the masks on this basis during trial but he is merely speculating on how masks or social distancing may have affected the jury's ability to be impartial.

While RAP 10.10(c) does not require a defendant to refer to the record or cite to authority in a SAG, “the appellate court will not consider [an appellant’s] statement of additional grounds for review if it does not inform the court of the nature and occurrence of alleged errors.” Wright’s allegation does not inform this court of the “nature and occurrence of alleged errors,” making his claim too speculative for us to address.

(7) Ineffective assistance of counsel

In SAG #7, Wright argues that his trial counsel was ineffective because counsel could not recall the names of people involved in his case, suggesting a lack of familiarity with the facts, the witnesses, or the case. The reviewing court will decline to consider a SAG argument due to lack of evidentiary basis when the record does not contain the necessary support for an argument. RAP 10.10(c); See also State v. Bluehorse, 159 Wn. App. 410, 435, 248 P.3d 537 (2011) (holding Bluehorse’s SAG claim regarding the public trial right fails because the cited portions of the record do not support his contention). We can find no evidentiary support in the record for this argument and decline to reach it.

We affirm Wright’s conviction but remand for resentencing.

Andrus, A.C.J.

WE CONCUR:

Smith, J.

Appelwick, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 81930-5-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

respondent Nathaniel Sugg
[nathan.sugg@snoco.org]
Snohomish County Prosecuting Attorney
[Diane.Kremenich@co.snohomish.wa.us]

petitioner

Attorney for other party



MARIA ANA ARRANZA RILEY, Paralegal
Washington Appellate Project

Date: April 15, 2022

WASHINGTON APPELLATE PROJECT

April 15, 2022 - 4:38 PM

Transmittal Information

Filed with Court: Court of Appeals Division I
Appellate Court Case Number: 81930-5
Appellate Court Case Title: State of Washington, Respondent v. David Randall Wright, Appellant
Superior Court Case Number: 19-1-00560-7

The following documents have been uploaded:

- 819305_Petition_for_Review_20220415163748D1474727_2332.pdf
This File Contains:
Petition for Review
The Original File Name was washapp.041522-02.pdf

A copy of the uploaded files will be sent to:

- Diane.Kremenich@co.snohomish.wa.us
- diane.kremenich@snoco.org
- nathan.sugg@snoco.org

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org

Filing on Behalf of: Maureen Marie Cyr - Email: maureen@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20220415163748D1474727