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NO. 37147-6-III

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ZACKARY STEVEN SKONE, APPELLANT

APPEAL FROM THE SUPERIOR COURT OF GRANT COUNTY

The Honorable, David Estudillo, Judge

BRIEF OF RESPONDENT

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- C. SHOULD THIS COURT REMAND FOR REMOVAL OF A SUBSEQUENT DNA FEE FROM SKONE'S JUDGMENT AND SENTENCE? (ASSIGNMENT OF ERROR No. 3)

II. STATEMENT OF THE CASE¹

The State adopts facts as stated in Skone's Opening Brief, then supplements his statement of the case with additional facts relevant to the issues before this Court. RAP 10.3(b).

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¹ The State cites to the sequentially paginated, two volume verbatim report of trial proceedings prepared by T. Bartunek as RP ____, the report of proceedings prepared by C. Beck as 6/16RP ____ and to the clerk's papers, as CP at ____.

A. FACTS RELEVANT TO THE TRIAL COURT'S RESOLUTION OF JUROR MISCONDUCT

During the jury instruction conference, the bailiff told the court Juror 5 had pulled him aside to ask whether, if the jurors found Skone guilty, they should be scared about possibly being harmed or suffering other repercussions from "the gang." RP 1473. The court told the State and the defense. RP 1473. The court, the State, and defense counsel agreed the appropriate procedure would be for the court to hold a colloquy with Juror 5 on the record to explore the juror's feelings. RP 1487, 1489. Defense counsel's initial impression was that the court needed to excuse Juror 5, saying, "[M]y client is entitled to an impartial juror." RP 1490. From his research over the lunch break, defense counsel was aware the court needed to "gingerly walk that line between not inquiring too much of the jurors and implanting significant bias." RP 1490. The court and counsel all agreed it would be up to the court's discretion whether a particular juror manifested unfitness. RP 1491-92. They discussed the nature of the court's inquiry and the type of questions that could, and should, be asked. RP 1493-94.

Juror 5 was brought, by himself, into the courtroom for the private colloquy. RP 1504. He frankly disclosed he had expressed to the entire jury "a concern for the possibility of gang retaliation against the jurors and

the safety” and that several others shared his concern. RP 1505. “Not a fear, but just a concern.” RP 1505. He said it was in a conversational tone and that he asked around the room if anyone else shared his concern. RP 1505. He did this before he spoke with the bailiff. RP 1506.

He told the court his concern would not affect his judgment at all. RP 1506. He answered, “No sir” when the court asked whether it would impact his ability to evaluate the case based on the evidence and the court’s instructions on the law. RP 1507. He believed he would carefully evaluate the evidence presented and would follow the court’s instructions. RP 1507.

The court, the State, and defense counsel agreed all the jurors needed to go through the same process. RP 1507–08. Asked whether either side had any concerns about Juror 5, defense counsel said he did. RP 1508. He was still processing the situation in terms of bias, noting Juror 5 had disregarded the court’s instructions not to discuss any aspect of the case among themselves. RP 1508. He did not know how that affected Juror 5 “inside of himself in terms of his mind and his decision-making.” RP 1508. He asked the court to come back to the issue after they heard from the other jurors. RP 1509. The court commented:

On the flip side, you know, I kind of think about this out loud to myself, *in 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 1509 (emphasis added). The prosecutor pointed out Juror 5 had asked the other jurors, “ ‘should we be concerned,’ I think, versus ‘are you concerned.’ ” RP 1509. He asked the court to make “that subtle distinction” when questioning the remaining jurors. RP 1509–10.

Juror 1 had not been paying attention to Juror 5, recalling he said he was concerned about, after trial, “like seeing someone out on the street or in public.” RP 1511–12. Juror 1 had no concern about serving on the jury and did not think the parties or the court should be concerned about her service. RP 1512. She felt she could make her decision based on the evidence and the court's instructions. RP 1512. Neither the State nor the defense thought she should be excused. RP 1513–14. Defense counsel, however, commented on the court's observation that jurors will never fully disclose their bias and reiterated he wanted to reserve further comment concerning Juror 5 until having heard from all the jurors. RP 1514.

Juror 2 recalled the “concern” comment having something to do with “seeing family members or something” outside the courtroom.

RP1516. She had raised her hand when asked whether anyone else felt the same way and said she did, explaining she worked at Safeway and saw a lot of people. RP 1516–17. None of the other jurors responded to her comment. RP 1517. She did not think the parties or the court should be concerned about her serving on the jury and affirmed she could make her decision based solely on the evidence and the court’s instructions. RP 1517. After Juror 2 left the courtroom, defense counsel told the court it “almost sounded as if this was a round table.” RP 1518. He remarked, “[a]pparently no one responded to her by saying, you know, I feel the same way, I work at Safeway, and I see a lot of people.” RP 1518. Counsel wanted to find out whether her comments contaminated other jurors, in terms of their interactions “out in public.” RP 1518. Counsel addressed the larger perspective of prejudice when jurors must deal with cases where gangs are involved, saying, “I don’t know if we’ll ever find a pool of jurors to say, well, now everything is fine.” RP 1520. That, he said, was “the bigger picture in terms of if it’s not this jury, it may be another jury.” RP 1520. He admitted he did not know the answer but said he needed to “hold off” on his decision about Juror 2 as well as Juror 5. RP 1520. The court remarked that jurors are in the public, and Grant County is a small area. RP 1520. The judge frankly wondered aloud whether the issue could ever be addressed in any case. RP 1520.

Juror 3 remembered Juror 5 ask whether anyone was nervous or afraid about being out in public “because of the gang related,” but nothing else. RP 1521. She had responded she was a little nervous, mentioning that when standing outside the courtroom waiting to be escorted in, she had noticed a couple of “inmates, but they’re free.” RP 1522. She told the other jurors she made sure they did not see who she was. RP 1522. She did not say anything else. RP 1522. She recalled another juror talking about where she worked, but nothing from anyone else. RP 1522. She also admitted she did not like “sitting here.” RP 1522. The court apologized, telling her everyone needed to ensure the trial was fair and that both the state and the defense were comfortable with the people on the jury. RP 1522–23. The court explained maybe a juror with a concern should not be on the jury, depending on the nature of their concern. RP 1523. Juror 3 dismissed the court’s unease about whether she should be on the jury, saying it was “just talk” after someone else mentioned it. RP 1524. She told the court neither of the parties should be concerned about her ability to sit on the jury and make a decision based on the evidence and the court’s instructions. RP 1524.

After she left the courtroom, defense counsel said he thought “three will be fine.” RP 1525. He also said it was important to go through the query process with each juror because the comments in the jury room

may have affected different jurors in different ways. RP 1525. The court agreed. RP 1525.

Juror 4 also remembered Juror 5 asking whether anyone else was concerned about retaliation of some kind. RP 1526. Juror 4 had not responded to Juror 5's question and did not remember whether anyone else did. RP 1527. Juror 4 did not have any type of concern about being on the jury and did not think the parties or the court needed to be concerned about his service. RP 1527–28. He said he could decide based solely on the evidence presented and the law. RP 1528. Both the state and the defense agreed he could remain on the jury. RP 1529–29.

Defense counsel then brought up the comment made by Juror 3 about “inmates,” wondering whether the juror referred to trustee inmates. RP 1529. Counsel said he might have seen some trustees earlier that day, young Hispanic males, and hoped “we’re not frightening the jurors when they come in and out every day with inmates.” RP 1529. Counsel clarified this issue should be discussed outside the context of the current proceedings. RP 1529. The court agreed, and the prosecutor mentioned he had just spoken with a jail superintendent about the possibility of restricting or eliminating trustees around the courtroom. RP 1529–30. Defense counsel agreed the parties and the court could address the issue later. RP 1530.

Juror 6 heard the question to be whether retaliation was possible were Skone to be convicted. RP 1531. He did not respond in the jury room but recalled there had been other comments, comments about possible fear. RP 1531. He could not be more specific. RP 1531–32. The court asked Juror 6 whether, having heard these comments, he had some concern at that point, to which Juror 6 replied he did not. RP 1532. The court asked whether the parties or the court should be concerned about him serving on the jury, and Juror 6 answered, “No.” RP 1532. He assured the court he could make his decision based on the evidence and that he could follow the law. RP 1532. After Juror 6 left the courtroom, defense counsel said: “It sounds fine, your Honor, we have no problem with juror number [six.]” RP 1532. Neither did the State. RP 1532.

Juror 7 recalled Juror 5’s question to have been: “[Does] anyone else feel concern for their safety” but did not recall whether anything further was said. RP 1533–34. He remembered the juror who spoke about working in a certain location and had a concern, but no other comments. RP 1534–35. He saw no reason for the court or the parties to be concerned about him sitting on the jury; he, himself, was not worried about sitting on the jury and said he would make his decision based solely on the evidence and the instructions. RP 1535. Defense counsel said: “No objection to juror number seven, your Honor, continuing to serve.” RP 1535–36.

Juror 8 could not remember exactly what was said, but that it had to do with whether there would be repercussions based on the jury's decisions. RP 1537. Juror 8 did not recall any comments addressing evidence in the case. RP 1537. Juror 8 did not respond to Juror 5's question but remembered two people saying it crossed their minds. RP 1537-38. Some jurors had commented about Skone's family members in the courtroom and about how whether they might park near where the jurors parked. RP 1538. Juror 8 then recalled he or she had mentioned having seen a family member who had been in the courtroom parking near the jurors' parking area but recalled saying nothing else. RP 1538. Juror 8 promised to base his or her decision on the evidence presented and to follow the law and the court's instructions. RP 1539. Juror 8 did not think the court or the parties should be concerned about him or her sitting on the jury. RP 1539. Upon Juror 8 leaving the courtroom, defense counsel said: "Number eight is fine with the defendant, your Honor." RP 1540.

Juror 9 remembered something was said about whether a gang member was in the audience, but nothing more. RP 1541. He said several other jurors felt the same way, and one juror having said, "Yeah, I was thinking the same. RP 1541-42. He agreed one or two other people might have made a similar response. RP 1542. He said there was no reason for the state, the defense, or the court to have some type of concern he should

not be on the jury, and that he had no concern about sitting on the jury. RP 1542–43. Asked whether he would base his decision on the evidence presented at trial, he responded, “I will. Yep.” RP 1543. He said he would follow the law. RP 1543. Defense counsel had no objection to Juror 9.

Juror 10 also recalled hearing Juror 5 wonder whether he would be in danger if Skone were found guilty or not guilty. RP 1544. Juror 10 said a couple of other jurors “laughingly agreed,” but that he shook his head because he did not have that fear. RP 1545. He did not make a verbal statement. RP 1545. He recalled at least two other jurors agreeing they had thought the same thing Juror 5 stated aloud, but that their responses were made laughingly, in a joking manner. RP 1545. Juror 10 had no concern about serving on the jury and did not think the defense, the state, or the court should be concerned about his service. RP 1546. He promised to follow the law and base his decision solely on the law and the evidence presented at trial. RP 1546. Defense counsel had no objection to the continued service of Juror 10.

Juror 11 heard the question as whether jurors “should be fearful of any of these gang members or because of gang activity.” RP 1547. He said Juror 5 asked “for a matter of fact,” along the lines of an earlier expression of his concern about sending his children overseas on a missions project. RP 1547–1548. Juror 11 likened Juror 5’s concern about gang members to

his expressed concern for his family. RP 1548. Juror 5 did not indicate worry about his children in connection with the case. RP 1548. Juror 11 had not responded to Juror 5's question to the jurors. RP 1549. He said one juror had shared Juror 5's concern, but the issue "just kind of went away," and he did not recall any continuing conversation. RP 1549. He admitted it was possible more than one person responded but thought he would have remembered it. RP 1550. He had no concern about being on the jury and did not believe the parties or the court should be concerned about his presence. RP 1550. Asked whether he would make his decision based solely on the evidence and follow the court's instructions, Juror 11 responded, "Absolutely." RP 1550. Defense counsel did not object to Juror 11 continuing to serve. RP 1551.

Juror 12 recalled some jurors being concerned about "repercussions" based on how the jury decided the case. RP 1552. He said one person said it, and a few others agreed. RP 1552. His recollection was similar to that of the others—that one person was concerned because of where they worked, and a couple of others admitted having thought about it. RP 1553. "All I know is that they were concerned about their safety when like walking to their car or going home." RP 1553. Juror 12 may have nodded his or her head. RP 1554. Juror 12 admitted being "a paranoid person in general," and said although the situation created a little

anxiety, she did not think anything was going to happen. RP 1554. Juror 12 did not have a concern about being on the jury and making a decision. RP 1554. Juror 12 said the state, the defense, and the court did not need to have a concern and agreed to make a decision based on the evidence and the law. RP 1555. Defense counsel said he was okay with Juror 12 continuing to serve. RP 1555.

After interviewing the alternate, the court returned to the defense counsel's reservations concerning Juror 5 and Juror 2. Counsel said he had no problem with Juror 2, then spoke with his client about Juror 5. RP 1557. He then told the court he and his client had no objection to Juror 5. "We're okay with him continuing. He indicated he'd try to be fair and impartial and follow the court's instructions, you Honor." RP 1558.

The state's only concern, "speaking bluntly," was wanting to avoid an appeal issue. RP 1558. "And so that's the problem." RP 1558. The court replied:

It's a Catch-22. And I'll tell you why. Because if I let him go without a basis, then . . . it could be an appealable issue on appeal. . . . And there could be a claim for ineffective assistance of counsel for agreeing to keep number five on.

RP 1558–59. The State expressed frustration at not knowing what this Court would say about the issue, either way, noting there had not been enough from and about Juror 5 to excuse him necessarily. RP 1559. The

prosecutor recognized Juror 5 had affirmed he could follow the court's instructions and put his fears aside. RP 1559. Ultimately, the State deferred to the court's judgment. RP 1561. Defense counsel provided the court and the State copies of three federal cases addressing jurors expressing fear. RP 1561.

Defense counsel, arguing to keep Juror 5, said he presumed Juror 5 would have expressed fear had he felt it. RP 1561. Juror 5 had said he did not fear some sort of retaliation. RP 1561. Counsel said he was mindful Juror 5 ignored the court's initial instructions in terms of talking about the case but had said he would be fair. RP 1561–62. "We're okay with number five, your Honor." RP 1562.

The court commented it had not heard anything from Juror 5 appearing to manifest unfitness. RP 1562. Juror 5 ultimately agreed he would make his decision solely on the evidence and would follow the court's instructions. RP 1562. The court also noted voir dire with the other jurors established there was no further discussion, and nothing indicated they had discussed the case itself in any form or fashion, nor any of the trial evidence. RP 1562–63. The court found no basis to find Juror 5 unfit.

B. FACTS RELEVANT TO WHETHER SKONE'S TWO CONVICTIONS FOR UNLAWFUL POSSESSION OF A FIREARM CONSTITUTE A CONTINUING COURSE OF CONDUCT.

1. *Facts establishing Skone failed to raise a “same criminal conduct” claim with the trial court.*

Nothing in the record implies Skone objected to his offender score at sentencing. Skone did not argue against his offender score in his sentencing memorandum, nor did he argue his two convictions for unlawful possession of a firearm were the same criminal conduct. CP at 234–248. Defense counsel based his scoring calculations on an offender score of six, with one point for each of the two firearm convictions. CP at 250–252. The Judgment and Sentence recites an offender score of six for each of Skone’s four convictions. CP at 339.

In its sentencing memorandum, the State argued Skone’s two firearm convictions are not the same criminal conduct. CP at 314–315. Nothing in the record establishes Skone responded in any way to this argument. CP 001-365.

2. *Facts concerning the two incidents in which Skone unlawfully possessed a firearm.*

Skone was a convicted felon at the time of the incidents at issue. RP 1280. On January 11, 2018, Seth Wemp was working at a Dutch Brothers coffee drive-through window in Moses Lake when Skone drove up in a white pickup truck and told Wemp he was “running from the pigs.” RP 427–28. Wemp asked what Skone

meant, and Skone said the cops. RP 428. As Skone sat at the drive-through, he picked up a revolver that had been on the passenger seat. RP 428, 437. Skone told Wemp, “these Scraps pulled up on us and we started unloading on them.” RP 442. Wemp took that to mean firing the gun. RP 439. “Skrap”² is a derogatory term for Sureno gang members. RP 1080. Wemp reported the encounter to the police when he got off work at five p.m. RP 435.

The second charged incident involving Skone and a firearm occurred three days later, January 14, 2018, at the Montlake boat launch area on Moses Lake. RP 458, 460–61. Madison Ditto testified she and her then-boyfriend, Dane Alexander, went to that location because Alexander planned to sell someone “codene [sic] and Molly.” RP 466. They pulled up next to a white pickup truck. RP 467. A man was standing outside the white pickup, and Alexander got out of his vehicle and went to where the man was standing. RP 473.

Almost immediately, Skone came out from behind some nearby bushes. RP 475, RP 1292, 1294. He yelled, “Don’t fucking move,” and started shooting. RP 478. Ditto saw muzzle flashes. RP

² Norteno gang members spell Skrap with a “k” because “SK” together stands for Sureno Killer, and is a common bit of Norteno graffiti. RP 1080.

480. Skone admitted he was the person in the bushes, claiming he intended to protect his friend during the drug deal. RP 1292, 1294. He admitted he was the person who fired at Alexander. RP 1299.

Detective Aaron Hintz of the Moses Lake Police Department, 6/16RP 145, interviewed Skone about both the January 11th Dutch Brothers incident and the January 14th shooting. 6/16RP 162, RP 1337. Skone told Hintz he had four guns in his truck when he went through the Dutch Brothers drive-through. RP 1333.³ He said one of the gang members had directed him to pick up the gang's guns on January 11th and take them to another location. RP 1374. He told Hintz the guns in his truck that day belonged to Speedy, Tiny, Little Man, and Heat. RP 1375. He said he later took those guns to the home of another gang member. RP 1211. He told Hintz the firearm he had on January 14th, a black .22 caliber revolver, belonged to him.⁴ RP 1362.

III. ARGUMENT

A. THE TRIAL JUDGE CONDUCTED A THOROUGH FACT-FINDING INQUIRY INTO POTENTIAL PREJUDICE FLOWING FROM JUROR MISCONDUCT, CONSISTING OF PRIVATE, IN-DEPTH INTERVIEWS WITH EACH JUROR, AFTER WHICH DEFENSE COUNSEL, ASSISTED BY SKONE, ACCEPTED THE CONTINUED PRESENCE OF EACH. THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION, ENSURING SKONE RECEIVED A FAIR

³ At trial, Skone testified he lied to Hintz and that all he had in his truck that day was a flare gun. RP 1333.

⁴ At trial, Skone testified this was another lie. RP 1375.

TRIAL BY AN IMPARTIAL JURY, DESPITE SKONE HAVING WAIVED THIS COURT'S CONSIDERATION OF THE ISSUE.

When determining the critical question of whether juror misconduct prejudiced Skone, the trial court focused its inquiry, as it was obligated to do, on whether it was satisfied each of the twelve jurors could disregard any opinions heard or discussed in the jury room. RCW 4.44.190.⁵ The presumption of prejudice flowing from juror misconduct is overcome when the trial court is satisfied that it is unreasonable to believe, when viewed objectively, the misconduct could affect the verdict. *State v. Caliguri*, 99 Wn.2d 501, 509, 664 P.2d 466 (1983). Here, the court thoroughly investigated for what purpose and to what effect Juror 5 raised the extraneous consideration of juror concern about possible gang or family retaliation following a guilty verdict, as required by *State v. Briggs*, 55 Wn. App. 44, 55–56, 776 P.2d 1347 (1989). While jury consideration of extrinsic evidence is misconduct and may be grounds for a new trial, *State v. Balisok*, Wn.2d 114, 118, 866 P.2d 631 (1994), a mistrial is not appropriate when the court is satisfied beyond a reasonable doubt the misconduct will not contribute to the verdict. *Briggs*, 55 Wn. App. at 56;

⁵ **RCW 4.44.190** provides: A challenge for actual bias may be taken for the cause mentioned in RCW 4.44.170(2). But on the trial of such challenge, although it should appear that the juror challenged has formed or expressed an opinion upon what he or she may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially.

State v. Fry, 153 Wn. App. 235, 239, 220 P.3d 1245 (2009).

Here, the misconduct was discovered and dealt with before the jury started deliberating. RP 1473. “[T]rial courts have wide discretionary powers in conducting a trial and dealing with irregularities which arise.” *State v. Gilcrist*, 91 Wn.2d 603, 612, 590 P.2d 809 (1979). “A mistrial should be granted only when the defendant has been so prejudiced that nothing short of a new trial can ensure that defendant will be tried fairly.” *Id.* at 612. The fact that a juror may have formed or expressed an opinion is, alone, insufficient cause for dismissal from the jury. RCW 4.44.190. The court must be satisfied the juror cannot set the opinion aside and fairly decide the case. *Id.* The trial court’s duty to inquire is not dependent on whether either party challenges a juror or moves for a mistrial. *State v. Davis*, 175 Wn.2d 287, 316, 290 P.3d 43, 55 (2012), *abrogated on other grounds by State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018).

Whether a juror is biased is a preliminary question of fact to which a trial judge must apply the same fact-finding discretion as would be used to resolve any other issue of fact, choosing among reasonable but competing inferences. *State v. Noltie*, 116 Wn.2d 831, 839, 809 P.2d 190 (1991). The trial court should not excuse any juror if it decides “the juror can still deliberate fairly despite the misconduct[.]” *State v. Depaz*, 165 Wn.2d 842, 857, 204 P.3d 217 (2009) (citing RCW 2.36.110). The

standard of review for juror removal during deliberation is abuse of discretion. *Id.* at 852 (citing *State v. Elmore*, 155 Wn.2d 758, 778, 123 P.3d 72 (2009)).

“[T]he trial court is in the best position to determine a juror’s ability to be fair and impartial.” *Noltie*, 116 Wn.2d at 838. “The trial judge is able to observe the juror’s demeanor and, in light of that observation, to interpret and evaluate the juror’s answers to determine whether the juror would be fair and impartial.” *State v. Rupe*, 108 Wn.2d 734, 749, 743 P.2d 210 (1987). 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).

A party complaining of juror misconduct “must show the juror failed to answer honestly where a correct response would have provided a valid basis for a challenge for cause.” *Kuhn v. Schnall*, 155 Wn. App. 560, 574, 228 P.3d 828 (2010). Here, the trial judge conducted an in-depth interview of each juror in the absence of the other jurors, establishing a record of what each had said or done, and how each recalled the statements and actions of the others. RP 1505–1555. The court extracted from each juror a promise to decide the case fairly, solely on the evidence presented and according to the court’s instructions. RP 1505–1555.

Before undertaking this fact-finding, the court astutely observed

juror concerns are likely present in all trials, coming to light only rarely. RP 1509. Here, the court and the parties had the unusual benefit of bringing such concerns into “the daylight” to explore with each juror that which typically remains obscure.

Juror 5’s misconduct produced a further benefit—the court had an opportunity to extract promises from each juror individually, and to impress upon each juror the standards each must apply in reaching a decision. That the jurors acquitted Skone of the gang-related aggravator, CP at 225, is persuasive evidence of the court’s success.

Defense counsel’s agreement that each of the twelve jurors could fairly decide the case cannot be overlooked. Like the judge, counsel had an opportunity to observe each juror’s demeanor and body language, and to assess the sincerity of each juror’s promise the case would be decided only on the evidence and the court’s instructions. In a slightly different context, that of initial jury selection, a party’s acceptance of a juror without exercising any available challenges operates as a waiver to the challenge of that juror on review. *State v. Robinson*, 75 Wn.2d 230, 231–32, 450 P.2d 180 (1969); *State v. Jahns*, 61 Wash. 636, 112 P. 747 (1911). A defense attorney alert to the possibility of bias who, after a thorough examination, does not challenge a juror, strongly suggests that counsel observed something leading to a belief the juror could be fair. *State v.*

Phillips, 6 Wn. App.2d 651, 431 P.3d 1056, *review denied* 193 Wn.2d 1007, 438 P.3d 116 (2018). Here, Skone participated in the decision to approve Juror 5, the juror responsible for bringing safety concerns to the court's attention. He cannot now complain of prejudice and mistreatment when he was in full agreement with the proceedings below.

The State and the court also discussed the risks inherent in dismissing jurors without a showing of necessity. RP 1558–59. Improper dismissal of any one of the twelve jurors would have led to reversal and remand for a new trial. *Elmore*, 155 Wn.2d at 781.

This Court should find the trial court carefully and correctly exercised its discretion to ensure Skone was in no way prejudiced by juror misconduct and that, in any event, Skone waived this issue by openly advocating for each juror following the court's fact-finding.

B. SKONE WAIVED THIS COURT'S CONSIDERATION OF "SAME CRIMINAL CONDUCT" REGARDING HIS TWO CONVICTIONS FOR UNLAWFUL POSSESSION OF A FIREARM WHEN HE FAILED TO ASK THE SENTENCING COURT TO MAKE THAT DETERMINATION. THE TRIAL COURT WOULD NOT HAVE CONCLUDED THE TWO CONVICTIONS CONSTITUTED THE SAME CRIMINAL CONDUCT BECAUSE TRIAL EVIDENCE ESTABLISHED SKONE USED TWO DIFFERENT GUNS IN INCIDENTS OCCURRING THREE DAYS APART AT DIFFERENT LOCATIONS.

1. *At sentencing, Skone did not assert his two firearm convictions constituted the same criminal conduct. Skone waived that argument on appeal by failing to present the trial court the opportunity to determine relevant facts and exercise its discretion.*

Skone failed to raise with the trial court the question of whether his two convictions for unlawful possession of a firearm constituted “same criminal conduct.” CP 001–365. By not contesting the issue in the trial court and thereby alerting the court it needed to determine the relevant facts and to make a discretionary call, Skone waived his right to raise the issue now. *State v. Nitsch*, 100 Wn. App. 512, 523, 997 P.2d 1000, *review denied*, 141 Wn.2d 1030 (2000).

Washington courts insist defendants preserve issues by raising them with the trial court to encourage efficient use of judicial resources. *State v. Robinson*, 171 Wn.2d at 304 (citing *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988)). “Issue preservation serves this purpose by ensuring that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals.” *Id.* at 304–05 (citing *Scott, supra*; *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (permitting appeal of all unraised constitutional issues undermines the trial process and results in unnecessary appeals, undesirable retrials, and wasteful use of resources)).

It is the defendant’s burden to establish which crimes constitute the same criminal conduct. *State v. Graciano*, 176 Wn.2d 531, 539, 295 P.3d 219 (2013). Assessment of whether multiple convictions constitute the same criminal conduct requires the trial court to make a factual

determination and involves an exercise of the court's discretion. *Nitsch*, 100 Wn. App. at 52); RAP 2.5(a). Failure to raise below issues involving facts or matters of trial court discretion operates as a waiver. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). A trial court is not required to undertake the same criminal conduct analysis *sua sponte*. *Nitsch*, 100 Wn. App. at 525.

In *Nitsch*, 100 Wn. App. at 518-19, the defendant argued for the first time on appeal the two crimes of which he was convicted, burglary in the first degree and assault in the first degree, constituted the same criminal conduct. However, like Skone, Nitsch had agreed in his presentence memorandum his offender score was calculated correctly.

Nitsch, 100 Wn. App. at 521-22. The *Nitch* court stated:

This is not an allegation of pure calculation error... Nor is it a case of mutual mistake regarding the calculation mathematics. Rather, it is a failure to identify a factual dispute for the court's resolution and a failure to request an exercise of the court's discretion.

Nitsch, 100 Wn. App. at 520 (footnote omitted). The Court noted the same criminal conduct statute was not mandatory and involved both factual determinations and the exercise of discretion. *Id.* 523. The circumstances presented "a textbook example of the problems flowing from review of [the same criminal conduct] issue without benefit of a trial court's consideration." *Id.* at 524. The Court found the effect of permitting the

first-time review on appeal would be “to require sentencing courts to search the record to ensure the absence of an issue not raised.” *Id.* In the context of a same criminal conduct analysis, trial courts would have to review the evidence supporting the State’s offender score calculation and apply the correct legal rules and, at the same time, examine the underlying factual context of the case. *Id.* at 525. It was not the legislature’s directive that the trial court “be required, without invitation, to identify the presence or absence of the issue and rule thereon.” *Id.*

Throughout Skone’s presentencing memorandum, in which he argued for an exceptional downward departure from the sentencing guidelines, CP at 234, 236–248, he calculated his offender score as 6. CP at 250–252.

The State argued in its sentencing memorandum against a finding of same criminal conduct. CP at 314–315. Nothing in the record establishes Skone responded in any way to the State’s argument.

This Court should find Skone waived the same criminal conduct issue by failing to present to the trial court an opportunity to determine relevant facts and exercise its discretion.

2. *Skone’s two incidents of unlawfully possessing firearms are not the same criminal conduct because trial evidence established the gun he had on January 11th was not the gun with which he shot Alexander, and the two incidents occurred three days apart at different locations.*

The facts of Skone’s case make it likely his able and experienced defense attorney recognized there was no issue of same criminal conduct to argue. “Same criminal conduct” requires the simultaneous presence of three elements: the crimes (1) are committed with the same criminal intent; (2) at the same time and place; and (3) involve the same victim. RCW 9.94A.589(1)(a). All three elements must be present. *State v. Simonson*, 91 Wn. App. 874, 885, 960 P.2d 955 (1998) (citing *State v. Williams*, 85 Wn. App. 508, 511, 933 P.2d 1072 (1997) (citing *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992))). Determining whether multiple acts constitute a continuing course of conduct entails a commonsense factual analysis. *State v. Kitt*, 9 Wn. App. 2d 235, 247, 442 P.3d 1280, *review denied*, 194 Wn.2d 1010, 452 P.3d 1239 (2019).

The jury heard evidence—testimony about Skone’s statements to Hintz—that the January 11th incident involved a different gun than the one he used to shoot Alexander on January 14th. Skone told Hintz he had four guns in his truck when he went through the Dutch Brothers drive-through, RP 1333, guns he said belonged to Speedy, Tiny, Little Man, and Heat. RP 1375. He said he later took those guns to another gang member. RP 1211. He told Hintz the black .22 caliber revolver with which he shot Alexander on January 14th belonged to him. RP 1362.

Under different circumstances, it is possible for unlawful

possession of more than one firearm to constitute the same criminal conduct because the victim is always the public at large. *Simonson*, 91 Wn. App. at 885. Here, however, the third essential element is missing. While Skone's criminal intent for each count was the same—to possess a firearm despite being legally prohibited from doing so—the incidents did not occur at the same time or place. The shooting of Alexander took place at a boat launch on Moses Lake, RP 458, 460–461, three days after Skone displayed to Wemp at the Dutch Brothers drive-through window a gun belonging to someone else. RP 427–439.

This Court should find the trial court would have been precluded from concluding the two firearm charges constituted the same criminal conduct by the fact Skone had at least two different guns at two different times and in two different locations. There is no double jeopardy violation.

C. THE STATE CONCEDES SKONE SHOULD NOT BE ORDERED TO PAY A SECOND DNA COLLECTION FEE.

The State concedes Skone's Judgment and Sentence should be amended to remove the DNA collection fee.

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IV. CONCLUSION

This Court should affirm Skone's convictions and remand solely to remove a subsequent DNA collection fee from Skone's Judgment and Sentence.

DATED this 1st day of September 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this day I served a copy of the Brief of Respondent in this matter by e-mail on the following parties, receipt confirmed, pursuant to the parties' agreement:

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Dated: September 1, 2020.


Kaye Burns

GRANT COUNTY PROSECUTOR'S OFFICE

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