Supreme Court No.____
Court of Appeals No. 86168-9-I

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

STATE OF WASHINGON,
Respondent,

v.

JOSEPH WIEGERT,
Petitioner.

PETITION FOR REVIEW

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WASHINGTON APPELLATE PROJECT
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A. INTRODUCTION

Juror misconduct is deeply troubling because it threatens all trial rights of the accused. Courts are therefore required to strongly presume juror misconduct was prejudicial unless the State demonstrates beyond a reasonable doubt that it did not affect the verdict.

The Court of Appeals disregarded this rule by putting the onus on Mr. Wiegert to prove a juror's improper outside research of intent affected the verdict. This decision conflicts with long-standing Supreme Court precedent. This Court should grant review to ensure Mr. Wiegert, and all other criminal defendants, are not improperly stripped of fair trials through juror misconduct.

B. IDENTITY OF PETITIONER AND DECISION BELOW

Joseph Wiegert, petitioner here and appellant below, asks this Court, pursuant RAP 13.4(b)(1) and RAP 13.4(b)(2), to accept review of the Court of Appeals' decision of *State of Washington v. Joseph Wiegert*, no. 86168-9-I, entered on April 22, 2024. A motion to reconsider was denied on May 30, 2024. A copy of both are attached as appendices.

C. ISSUE PRESENTED FOR REVIEW

The right to a fair trial is violated when a juror commits misconduct. Reversal is required if a court determines misconduct occurred and the State fails to prove the misconduct was harmless beyond a reasonable doubt. Here, the Court of Appeals assumed misconduct occurred but improperly shifted the burden to Mr. Wiegert to establish prejudice. This Court should grant review because the Court of Appeals'

decision conflicts with multiple Supreme Court and Court of Appeals cases. RAP 13.4(b)(1); 13.4(b)(2).

D. STATEMENT OF THE CASE

Mr. Wiegert was suffering from mental health struggles, including severe paranoia, when he tried to enter the Covington's home. RP 253, 462. The Covingtons realized their sliding glass door was unlocked, so Mr. Covington went to the door and told his wife to retrieve his pistol. RP 255, 257.

Mr. Wiegert was trying to enter when Mr. Covington got to the door. RP 259. There was a short struggle before Mr. Wiegert entered the home. RP 260.

Mr. Covington then shot Mr. Wiegert in the shoulder. The two struggled over the gun and more shots were fired. RP 228, 260, 314. Mr. Covington wrangled Mr. Wiegert into a chair with both men

holding the gun. RP 264. Mr. Covington had his finger on the trigger. RP 264.

Although Mr. Covington always had his hand over the trigger, he believed Mr. Wiegert was trying to point the gun in his direction with the intent to fire it. RP 264. Eventually, Mr. Covington wrestled the gun away from Mr. Wiegert and Ms. Covington hid it in another room. RP 267. Mr. Wiegert went to the back of the home while the Covingtons went outside and waited for the police to arrive. RP 270. When the police arrived, Mr. Wiegert exited the home and surrendered to the police. RP 271–72.

Based on this incident, the State charged Mr. Wiegert with first-degree burglary and first-degree assault. CP 1.

Mr. Wiegert was evaluated by both an expert chosen by his counsel and one selected by the State. CP

79, RP 505. The defense expert, Dr. Alexander Patterson, found Mr. Wiegert had a mental health disorder that affected his ability to form the intent required to commit the charged offenses. CP 99. At trial, Dr. Patterson testified to this conclusion, stating Mr. Wiegert's mental condition impaired his decision-making and ability to perceive reality. RP 409.

The State's expert told the jury Mr. Wiegert did not have a mental health disorder that would have led to diminished capacity. RP 517.

The court instructed the jury on intent and diminished capacity. RP 550–51, 555. The jury did not reach a verdict on the burglary offense or any of its instructed lesser included offenses. CP 40. The jury found Mr. Wiegert guilty of first-degree assault. CP 8.

After deliberations, a juror came forward and explained the jury struggled to understand intent for

the burglary instruction. RP 632. Because of this, the juror told the trial court he conducted independent and outside research where he looked up the definitions of first-degree burglary and first-degree assault. RP 632.

The trial court told the juror to contact both Mr. Wiegert's counsel and the prosecutor. RP 632. The trial court set over the hearing for further investigation. RP 633–34.

The juror only spoke contacted the State. RP 636. The juror did not appear in person or testify at the hearing. Instead the prosecutor relayed that, contrary to the juror's previous statements, the juror told them that they only looked up the definition of first-degree burglary. RP 637. The trial court denied the motion for new trial. RP 639–40.

The Court of Appeals upheld the trial court's decision. Opinion at 4. Specifically, the Court of

Appeals relied on the lack of evidence indicating the juror had done anything beyond searching for the intent requirements for one or both of the charges. Opinion at 4. Using this, it concluded there was "no evidence that any misconduct prejudiced Wiegert." Opinion at 6.

The Court of Appeals further noted, when addressing Mr. Wiegert's motion to reconsider at the trial court level, that neither Mr. Wiegert's "first motion nor the motion for reconsideration presented any evidence of prejudice." Opinion at 6.

E. ARGUMENT

1. **The Court of Appeals' decision conflicts with long-standing case law regarding the presumption of prejudice from juror misconduct – This Court should grant review to ensure Mr. Wiegert and all criminal defendants are ensured their right to fair trial free from juror misconduct.**

Every criminal defendant is entitled to a fair trial by jury, which must include "an unbiased and unprejudiced jury, free of disqualifying misconduct." *State v. Tigano*, 63 Wn. App. 336, 341, 818 P.2d 1369 (1991); *see also* Const. art. I, § 21. Further, juror misconduct must be taken extremely seriously by courts as it implicates every other trial right. For example, the right to confront witnesses against you is meaningless if the juror uses extrinsic information to determine your guilt. The same is true for any other fundamental trial right.

Accordingly, this Court has fashioned a strong presumption towards reversal when juror misconduct occurs. *State v. Depaz*, 165 Wn.2d 842, 856, 204 P.3d 217 (2009). When the misconduct is the introduction of extrinsic information, a new trial is required unless there is no reasonable doubt the extrinsic evidence did not contribute to the verdict. *Halvorson v. Anderson*, 82 Wn.2d 746, 752, 513 P.2d 827 (1973) (If the trial court had any doubt that the misconduct affected the verdict, it was obliged to resolve that doubt in favor of granting a new trial.); *see also State v. Briggs*, 55 Wn. App. 44, 56, 776 P.2d 1347 (1989) (citing *United States v. Bagley*, 641 F.2d 1235, 1242 (9th Cir.1981); *Llewellyn v. Stynchcombe*, 609 F.2d 194, 195 (5th Cir.1980) ("a defendant is entitled to a new trial unless there is no reasonable possibility that the jury's verdict was

influenced by the material that improperly came before it.").

The Court of Appeals' decision runs counter to this long-standing rule. In reaching its decision, the Court of Appeals not only failed to apply the presumption, but also put the burden on Mr. Wiegert to establish prejudice. This is evident throughout its opinion.

The Court of Appeals could not determine the extent of extrinsic evidence introduced into juror deliberations. It wrote "it is unclear what websites the juror visited or if the information he gleaned was substantially similar to the jury instructions." Opinion at 6. The doubt created by the lack of clarity should have been drawn against the verdict. *Halvorson*, 82 Wn.2d at 752; *Adkins v. Alum Co, of Am.*, 110 Wn.2d 128, 137, 750 P.2d 1257 (1988); *State v. Johnson*, 137

Wn. App. 862, 869, 155 P.3d 183 (2007). Rather, the Court of Appeals faulted Mr. Wiegert for failing to provide further information and choose to rely on an unsworn and contradictory statement relayed through the prosecutor that the juror did not look up the definition of intent for assault. Opinion at 6.

This demonstrates the Court of Appeals fundamentally misunderstood this Court's rulings. A contradiction between two statements, especially when the contradictory statement is unsworn hearsay, means there was a doubt as to what the juror examined. That doubt existed and the Court of Appeals failed to draw it against the verdict. Moreover, the Court of Appeals' focus on Mr. Wiegert not producing new information about the potential prejudicial effect shows it failed to grasp that the State has the burden.

See State v. Boling, 131 Wn. App. 329, 333, 127 P.3d 740 (2006).

The Court of Appeals also noted "[d]espite Wiegert's assertion to the contrary there is no evidence that the juror shared the results of his research with the other jurors. There is no evidence that any misconduct prejudiced Wiegert." Opinion at 6. Again, this shows the Court of Appeals' erroneous understanding. The question is not whether there was evidence the juror shared his results, but whether there was evidence the juror ***did not*** share the results. That would have been the proper framing because the burden to overcome the presumption of prejudice was on the State. *See Johnson*, 137 Wn. App. at 869; *Boling*, 131 Wn. App. at 333.

The Court of Appeals' reliance on *State v. Arndt*, 5 Wn. App. 2d 341, 426 P.3d 804 (2018) and *State v.*

Fry, 153 Wn. App. 235, 220 P.3d 1245 (2009) further demonstrates its misapprehension of the rule by ignoring key distinctions in those cases.

In *Arndt*, a juror looked up the definition of "premeditation" online. 5 Wn. App. 2d at 344–45. This juror testified that she believed she got the definition from "Wedipedia" or whatever definition pops up when you Google a word. *Id.* at 345. She further testified that she did not share her research with other jurors. *Id.* The trial court concluded the juror committed misconduct, but the State overcame its burden to show "beyond a reasonable doubt that the extrinsic evidence Juror 2 found did not contribute to the verdict." *Id.* Division Two upheld that decision. *Id.* at 343.

In *Fry*, a juror used her own dictionary to look up the definition of "substantial." 153 Wn. App. at 238. The juror testified that she never shared her dictionary

with other jurors and that the definition had little to do with her verdict. *Id.* The trial court ruled the juror's conduct did not influence the verdict. *Id.* Division Three upheld that decision. *Id.* at 237.

There are obvious differences between what occurred in *Arndt* and *Fry* and Mr. Wiegert's case. In the former cases, the court required the State—not the accused—to overcome the presumption of prejudice. The State did so with sworn testimony from the juror as to the scope of the misconduct and reliable assurances they did not share anything with the other jurors. *Arndt*, 5 Wn. App. 2d at 345; *Fry*, 153 Wn. App. at 238. The trial court, in both instances, knew specifically what the jurors had examined and actually assessed the effect on the verdict. *See Arndt*, 5 Wn. App. 2d at 345; *Fry*, 153 Wn. App. at 238.

By contrast, there were no such assurances in Mr. Wiegert's case. Rather, there were a litany of unresolved questions including what the juror searched for, what resources the juror accessed, what definitions the juror found, and what the juror did with that research. Moreover, where the assurances in *Arndt* and *Fry* were made under penalty of perjury, here the juror's statements were unsworn and wholly contradictory to the statement made to the court the week prior. *See Arndt*, 5 Wn. App. 2d at 345; *Fry*, 153 Wn. App. at 238.

These salient differences illustrate the Court of Appeals' erroneous thinking in Mr. Wiegert's case. It cited cases where any doubts weighed against the verdict until they were resolved by the State in a manner by which the trial court could properly assess

prejudice. But that was obviously not so in Mr. Wiegert's case.

Instead, it disregarded the presumption of prejudice that should have been properly applied. This Court should grant review because the Court of Appeals' decision is unacceptably inconsistent with cases from this Court and the Court of Appeals. RAP 13.4(b)(1); 13.4(b)(2).

F. CONCLUSION

For the reasons articulated above, this Court should grant review pursuant to RAP 13.4(b)(1) and RAP 13.4(b)(2).

I certify this briefing is 2,054 words and complies with RAP 18.17(b).

DATED this 18th day of June, 2024.

Respectfully submitted,

/s/ Colin Patrick

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COURT OF APPEALS DECISION

FILED
4/22/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JOSEPH WIEGERT, Appellant.	No. 86168-9-I DIVISION ONE UNPUBLISHED OPINION

MANN, J. — Joseph Wiegert appeals his conviction for assault in the first degree. Wiegert argues the trial court erred when it denied his motion for a new trial based on juror misconduct. Wiegert also argues that the victim penalty assessment (VPA) should be stricken from his judgment and sentence. We remand to strike the VPA from Wiegert's judgment and sentence. We otherwise affirm.

I

On January 30, 2020, Wiegert, who has a history of mental illness and drug abuse, forced entry into the home of Robert and Ryana Covington.[1] Robert shot Wiegert in the shoulder after Wiegert rushed him. Wiegert and Robert struggled with

[1] For clarity, because they share the same last name, we refer to Robert and Ryana by their first names. No disrespect is intended.

the firearm for several moments and Wiegert grabbed the barrel of the gun and tried to point it at Robert. Ryana managed to retrieve and safely secure the gun. The Covingtons escaped the home before law enforcement arrived.

Wiegert was charged with burglary in the first degree and assault in the first degree. A jury found Wiegert guilty of assault in the first degree. The jury did not reach a verdict on the burglary in the first degree or the alternate charges.

Before sentencing, Wiegert moved for a mistrial asserting that the jury foreperson told defense counsel that he had conducted extrinsic research on legal standards before deliberations.

At a hearing on June 13, 2022, defense counsel conceded that they had yet to interview the juror and wanted to get more details before the court. The State argued that based on what was in front of the court, the trial court should deny the motion. The trial court denied the motion but set the matter for review and potential sentencing on July 11.

When the parties reconvened, defense counsel had subpoenaed the juror without providing the subpoena to the State or filing additional motions. The trial court proposed a continuance to allow the State to speak to the juror and return for argument.

Before the hearing recessed, the juror explained to the court:

> [JUROR]: I actually think it's a very simple one to solve. I don't understand why we want to even drag it on any further, because from what I'm reading right here, what I was served was it says, at this point, we need to know more information about what you research[ed] before deliberations. And that didn't happen. It didn't happen until after deliberations that any research went on.
>
> And what it went on was the actual State's definition of—I believe it was assault one and burglary one. And what we were given was the

> paperwork, and I didn't feel that the definitions and what had the description of what intent was. I was the only one other than—excuse me, there was one other juror, myself and [other juror], that did not want to actually go with the burglary.
>
> THE COURT: So [juror], if I get what you're saying, you didn't look anything up until after you delivered your verdict, is that correct?
>
> [JUROR]: That is correct.
>
> THE COURT: Okay.
>
> [JUROR]: [E]xcuse me, I'm sorry. I apologize. No, I did during deliberation, I did look up burglary one and assault one. That did happen. We didn't understand the term intent under burglary one.

The trial court set the hearing over for a week and asked the juror to reach out to both the State and defense counsel to let them know exactly what occurred.

Wiegert sought reconsideration of his motion for mistrial. At the time, defense counsel had still been unable to interview the juror.

The trial court reconvened on July 18, 2022. The State informed the court that it had spoken to the juror and that:

> [The juror] told me that during the course of deliberations, a question arose about the definition of burglary in the first degree, that they felt the jury instructions did not define the actual crime properly. So he researched. He went to Google and typed in Washington State burglary in the first degree and got a legal definition of burglary in the first degree.
>
> He indicated that he did not do any research—or any outside research about the assault charge. He indicated that that was an easy verdict for the jury to reach. The sole thing that he researched was the legal definition of burglary in the first degree, which, as the Court is well aware, the jury was unable to reach a verdict in this case. So, it would be the State's position that there's no prejudice to . . . Mr. Wiegert in this case.

The trial court determined, "with the juror's comments that the charge that there was a conviction on, there was no research or no discussion outside of the jury instructions

and the jury room deliberations. At this point in time, I'm going to deny again the motion."

Wiegert appeals.

II

Wiegert argues that the trial court abused its discretion when it denied his motion for a new trial based on juror misconduct. We disagree.

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

We review a trial court's investigation of juror misconduct for abuse of discretion. State v. Earl, 142 Wn. App. 768, 774, 177 P.3d 132 (2008). Similarly, we review a trial court's decision denying a motion for a new trial based on juror misconduct for an abuse of discretion. State v. Balisok, 123 Wn.2d 114, 117, 866 P.2d 631 (1994). A court abuses its discretion if its decision is manifestly unreasonable or exercised on untenable grounds. Breckenridge v. Valley Gen. Hosp., 150 Wn.2d 197, 203-04, 75 P.3d 944 (2003).

"A strong, affirmative showing of juror misconduct is required to impeach a verdict." Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App. 266, 271, 796 P.2d 737 (1990). A jury's consideration of extrinsic evidence constitutes misconduct and may justify a new trial. Balisok, 123 Wn.2d at 118. Extrinsic evidence is information that is outside the evidence admitted at trial. Balisok, 123 Wn.2d at 118. A court presumes prejudice upon a showing of misconduct, but "that presumption can be overcome by an

adequate showing that the misconduct did not affect the deliberations." State v. Gaines, 194 Wn. App. 892, 897, 380 P.3d 540 (2016).

In State v. Arndt, 5 Wn. App. 2d 341, 344, 426 P.3d 804 (2018), months after a verdict, a juror admitted to struggling with the term "premeditation" and looking it up on the Internet. The juror provided a defense investigator with websites she may have visited and testified at a hearing on a motion for a new trial. Arndt, 5 Wn. App. 2d at 344-45. The juror testified that she had not shared the research with other jurors. Arndt, 5 Wn. App. 2d at 345. The trial court determined that the juror committed misconduct but found the research did not affect the verdict. Arndt, 5 Wn. App. 2d at 345-46. On appeal, Arndt asserted that the juror's Internet research could have affected the verdict. Arndt, 5 Wn. App. 2d at 348. The appellate court disagreed, holding the trial court did not abuse its discretion in concluding that the definitions the juror viewed were indistinguishable to the jury instructions and the research did not contribute to the verdict. Arndt, 5 Wn. App. 2d at 351.

Similarly, in State v. Fry, 153 Wn. App. 235, 238, 220 P.3d 1245 (2009), a juror looked up the word "substantial" in her dictionary at home, brought the dictionary to deliberations, but did not share the definition or dictionary with the other jurors. The trial court determined that the dictionary and definition did not contribute to the verdict because they were not injected into the jury's deliberations. Fry, 153 Wn. App. at 239. The appellate court affirmed, holding the trial court's decision to deny the motion was based on tenable grounds. Fry, 153 Wn. App. at 239.

Wiegert asserts that the trial court abused its discretion by misinterpreting what the juror said. Wiegert emphasizes that the juror said he looked up intent under both burglary and assault while the trial court found he looked up only burglary.

While the juror told the court on July 11 that he had looked up both burglary and assault, it is unclear what websites the juror visited or if the information he gleaned was substantially similar to the jury instructions. And when the parties reconvened one week later, the defense had no other information to present to the court. The State, however, had spoken to the juror and told the court the juror researched only burglary, the charge the jury did not reach a verdict on.

Nothing in the record reflects that the juror did anything but Google the intent requirements for one or both of the charged crimes. Despite Wiegert's assertion to the contrary, there is no evidence that the juror shared the results of his research with the other jurors. There is no evidence that any misconduct prejudiced Wiegert.

In reply, Wiegert asserts that the trial court should have held another evidentiary hearing. This court does not address matters raised for the first time in reply briefs. RAP 10.3(c); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). In any event, the trial court has the discretion to decide whether an evidentiary hearing is necessary and the trial court may limit the scope of its inquiry where the moving party does not satisfy its burden of proving misconduct or prejudice. State v. Berhe, 193 Wn.2d 647, 657, 444 P.3d 1172 (2019); Earl, 142 Wn. App. at 774-76.

The motion for reconsideration presented no new evidence. In addition, neither the first motion nor the motion for reconsideration presented any evidence of prejudice.

And there is no evidence in the record that the juror shared their research with other members of the jury.

The trial court did not abuse its discretion when it denied Wiegert's motion for a mistrial.

III

Wiegert argues that the VPA should be waived because he is indigent. We agree.

In 2023, the legislature added a subsection to RCW 7.68.035 that prohibits courts from imposing the VPA on indigent defendants as defined in RCW 10.01.160(3); LAWS OF 2023, ch. 449, § 1. Our courts have held that recent amendments to statutes governing legal financial obligations apply retroactively to matters pending on direct appeal. State v. Ellis, 27 Wn. App. 2d 1, 16, 530 P.3d 1048 (2023).

The State does not dispute that Wiegert is indigent and concedes that this matter should be remanded to strike the VPA fee from Wiegert's judgment and sentence. We accept the State's concession and remand.

We remand to strike the VPA from Wiegert's judgment and sentence. We otherwise affirm.

Mann, J.

WE CONCUR:

Feldman, J.

Hazelrigg, ACJ

DENIAL OF MOTION TO RECONSIDER

FILED
5/30/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JOSEPH WIEGERT, Appellant.	No. 86168-9-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Joseph Wiegert moved to reconsider the court's opinion filed on April 22, 2024. The panel has determined that the motion for reconsideration should be denied. Therefore, it is

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Mann, 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. 86168-9-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 / residence / e-mail address as listed on ACORDS / WSBA website:

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MARIA ANA ARRANZA RILEY, Legal Assistant Date: June 18, 2024
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