IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. GREG RICHARD HOPKINS, Appellant.	No. 38265-2-II PART PUBLISHED OPINION

Van Deren, C.J. — Greg Richard Hopkins appeals his conviction for one count of second degree burglary. He argues that the trial court erred in dismissing a juror during deliberations, that evidence was improperly admitted, including a knife carried by Hopkins's companion, as well as all evidence gathered following Hopkins's purportedly unlawful seizure. Hopkins also claims that his trial counsel was ineffective for failing to seek suppression of the evidence. We affirm.

FACTS

On June 28, 2007, at about 6:30 am Steilacoom Public Safety Officer Larry Whelan observed a suspicious vehicle near the local marina. Whelan lives in the immediate area and had never seen the truck before. He knew that the area near the marina is largely abandoned and prone to burglaries and vehicle prowls.[1]

[1] The marina itself had been burgled many times. The facility included a boat storage area, a

Whelan looked in the truck's window and saw clothes, food, tools, and blankets, suggesting that someone was living in the truck. He then ran the vehicle plates on his mobile data computer, which returned with a photograph of the registered owner. He also checked the immediate area to see if someone might have gone into the nearby woods to sleep. He looked for someone walking around, did not find anyone, and also contacted some of the neighbors to see if the truck belonged to them.

As Whelan was contacting residents in the neighborhood, he observed Hopkins walking up the street with a woman, coming from the marina's direction. He recognized Hopkins from the photograph as the truck's registered owner.

Whelan approached the couple, asked how it was going, and what they were up to. The woman, Michelle Webb, was cooperative and friendly, but she seemed a little embarrassed. Hopkins became agitated about Whelan asking him questions. Hopkins swore at the officer and claimed he was having a romantic stroll on the beach with Webb. But Whelan observed a flashlight and a pair of gloves hanging out of Hopkins's pocket, and Hopkins was quite dirty, as if he had been working on something.

Whelan asked the two for identification. Webb provided her identification. Hopkins at first yelled and stomped and refused to give his identification, but then changed his mind and decided he would give his identification to Whelan, and went to the cab of his truck to retrieve it.

Hopkins's conduct caused Whelan concern for his safety, so he focused his attention on Hopkins as Hopkins reached into the truck cab. As this was occurring, Webb moved around

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seasonal tackle and convenience store, a mechanical shop, and living quarters where the owner and her father lived. The marina kept irregular business hours and was not open on June 28, 2007. That day, the marina's entrance doors and storage areas were locked.

behind Whelan and he saw that she had a knife in her hand. Whelan responded by drawing his gun and ordering the couple to the ground. Whelan called for priority backup. When it arrived, he handcuffed the two, patted them down for weapons, put them into two separate patrol cars, and read Webb her *Miranda*[2] rights.

After he interviewed Webb, Whelan read Hopkins his *Miranda* rights and interviewed him. Hopkins waived his rights and first claimed that he and Webb were just down at the beach for a romantic stroll. But later he told Whelan that he saw a mother raccoon and some babies in the marina, so he went inside to see them. Hopkins said he had the flashlight to see the raccoons and that he had the gloves to protect him from the raccoons. Hopkins told the officer that he had climbed over the main gate and then entered another door to go inside the marina and look around. Hopkins acknowledged that he knew the marina was closed and that he was not supposed to be in there.

Whelan then arrested Hopkins for burglary. When he searched Hopkins's person incident to the arrest, he found some wire in Hopkins's pants pocket.

After Whelan concluded his interview with Hopkins, he investigated the marina. He found a door to the marina forced open, showing indications that it had been kicked in. He also observed other fresh damage around the marina, including other doors that appeared to have been forced open. He also found fishing poles that appeared to have been readied for easy removal in the future.

The State charged Hopkins with one count of second degree burglary.

After hearing the evidence, the trial court's instructions, and closing arguments, the jury

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

retired for deliberations. During deliberations, the jury submitted a note to the trial court stating:

> One of the jurors feels unable to continue this case because of being too emotional regarding the prosecutor and police officer. She feels she can[]not be fair and impartial. She thought she could when being interviewed but can[']t now. She wishes to be dismissed at this time if possible.

Clerk's Papers (CP) at 50.

The trial court first consulted with the parties, then interviewed the presiding juror. The presiding juror indicated that the juror who felt she could not be fair had asked the presiding juror to so inform the court. The trial court then interviewed the juror in question, juror 6. The trial court asked very limited questions to ensure that it would not intrude on the jury's deliberations. Juror 6 indicated that the presiding juror's note was correct. The trial court also asked juror 6 if her position had changed since the note was given to the trial court, and she indicated that it had not. The trial court also asked her, "Is it the fact that you don't feel you can be fair and impartial to both sides?" Report of Proceedings (RP) at 322. The juror answered, "Exactly." RP at 322.

The trial court further conferred with the parties; the defense did not agree to dismiss the juror and asked the trial court to keep her on the jury. The trial court nonetheless removed juror 6 because she indicated that she could not be fair and impartial to both sides.

An alternate juror joined the panel. The trial court instructed the jury to disregard all previous deliberations and begin deliberations anew. The jury did so and returned a guilty verdict.

Hopkins appeals.

ANALYSIS

Dismissal of Juror 6

Hopkins argues that reversal of his conviction is required because the trial court failed to apply the appropriate legal standard when it dismissed a deliberating juror. We disagree.

RCW 2.36.110 provides:

> It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

We review a trial court's determination to remove a juror for abuse of discretion. *State v. Depaz,* 165 Wn.2d 842, 858, 204 P.3d 217 (2009). But the basis of our review of the trial court's determination varies, depending on whether the juror is accused by another juror of engaging in nullification, *State v. Elmore*, 155 Wn.2d 758, 776, 777-78, 123 P.2d 72 (2005), whether there is evidence of juror misconduct and the trial court knows of the deliberating juror's substantive opinion of the case, *Depaz*, 165 Wn.2d at 857, or when no juror misconduct is alleged and the trial court has no knowledge of the juror's opinion about the case, which we have here. *See* RCW 2.36.110.

Hopkins contends that *Elmore* is the controlling case law on the issue of dismissal of a juror during deliberations, and the trial court's failure to apply the "reasonable possibility" standard articulated in that case was error. Br. of Appellant at 30. In *Elmore*, our Supreme Court adopted the rule that "where a deliberating juror is accused of refusing to follow the law, that juror cannot be dismissed when there is any reasonable possibility that his or her views stem from an evaluation of the sufficiency of the evidence." 155 Wn.2d at 778. The *Elmore* court

"emphasize[d]" that the articulated standard "is applicable only in the rare case where a juror is accused of engaging in nullification, refusing to deliberate, or refusing to follow the law." 155 Wn.2d at 778. That is not the case here. No other juror accused juror 6 of engaging in nullification, refusal to deliberate, or refusal to follow the law.

Eleven days before Hopkins filed his opening brief, our Supreme Court reiterated in *Depaz*, that *Elmore* is confined to the rare circumstances where a juror accuses another of nullification, refusing to deliberate, or refusing to follow the law. *Depaz*, 165 Wn.2d at 855. The *Depaz* court held that in cases where such "accusations" are absent, the trial court's decision to dismiss a juror is to be reviewed under RCW 2.36.110. 165 Wn.2d at 855. "Notwithstanding *Elmore*, the standard of review for juror removal during deliberation is abuse of discretion." *Depaz*, 165 Wn.2d at 858. A trial court abuses its discretion when it issues an order that is manifestly unreasonable or based on untenable grounds. *Depaz*, 165 Wn.2d at 858.

Depaz addressed the circumstance where a trial court dismissed a holdout juror. The status of deliberations and the juror's position became known to the trial court inadvertently, when the court questioned the juror after other jurors had reported the juror's contact with a third party during deliberations. The *Depaz* court declined to extend the *Elmore* standard to this circumstance (i.e., simple misconduct in failing to follow the court's no-contact instruction), and held:

> *[W]here the trial court has knowledge of a deliberating juror's substantive opinion of the case*, trial courts must make a determination regarding prejudice. Prejudice should be determined by concluding whether any misconduct committed by the juror has affected the juror's ability to deliberate before deciding to excuse the juror under RCW 2.36.110. If the court decides that the juror can still deliberate fairly despite the misconduct, the court should not excuse the juror. Only if the misconduct reasonably would have altered the juror's formulated opinion of the case can the court disturb the deliberations that led the juror to

reach such a decision.

Depaz, 165 Wn.2d at 857 (emphasis added).

The *Depaz* court concluded that "[r]equiring a trial court to determine prejudice before it removes a holdout juror protects the defendant's right to a unanimous jury by assuring that the desire for a particular outcome has not influenced the court's decision to remove a juror." 165 Wn.2d at 858. Here, the prerequisite that triggers the trial court's obligation to make a prejudice determination (i.e., knowledge of the deliberating juror's substantive opinion) is absent. Neither *Elmore* nor *Depaz* impose limitations on the trial court's exercise of discretion under RCW 2.36.110 under the circumstances of this case.

Here, juror 6 asked the presiding juror to tell the trial court that she thought she could not be fair and impartial. There was no accusation by any other juror about any misconduct by juror 6. The trial court asked juror 6, "Is it the fact that you don't feel you can be fair and impartial to both sides?" RP at 322. Juror 6 replied, "Exactly." RP at 322. The trial court asked, "Has there been anything that's happened outside your deliberations, any outside influence, that has led you to this conclusion?" RP at 322. Juror 6 replied, "No." RP at 322. The trial court sent juror 6 back to the jury room, heard argument from the parties, and ultimately dismissed juror 6. The court substituted an alternate juror, and instructed the jury to begin deliberations anew. In so concluding, the trial court noted:

> I have been racking my brain for a way to inquire further to try to flesh out the nature of the juror's concern, and I just can't come up with one that is not going to invade the province of the jury to some degree. I am absolutely convinced from observing the juror and the firmness with which she answered and the quickness with which she answered that she truly believes she cannot be fair and impartial. . .
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> Given that fact and given the Hobson's choice that the Court is placed in, I don't see how we can have a fair resolution if we have a juror who I think we have

> to trust cannot be fair and impartial. I am going to propose to excuse the juror and bring back the alternate tomorrow.

RP at 327.

Hopkins's counsel agreed that the trial court could not "really delve any further" but objected to dismissing juror 6, based on his belief that juror 6 had "issues with the credibility of the officer." RP at 324. On appeal, Hopkins argues that the trial court should have applied the "'any reasonable possibility'" standard that the juror's views "'stem from an evaluation of the sufficiency of the evidence.'" Br. of App. at 29 (quoting *Elmore*, 155 Wn.2d at 778). But here, the trigger for applying that standard, accusation by another juror of nullification or misconduct, is absent. Moreover, it is pure speculation that juror 6's conclusion that she could not be fair was related in any way to the evidence presented at trial. No evidence was before the trial court about the basis of juror 6's decision that she should no longer serve on the jury due to her inability to be fair to both parties. If the trial court had asked for the specific basis of juror 6's change of position on being able to deliberate on the evidence fairly and impartially for both parties, it risked intruding on the jury's deliberative process and a likely mistrial.

Given the statutory duty imposed on the trial court to excuse from service any juror who has manifested unfitness by reason of bias, it cannot be said that that the trial court abused its discretion in excusing juror 6 when that juror candidly admitted to such bias, and we so hold.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

ADDITIONAL FACTS

At trial, Whelan testified regarding events on June 28, 2007, as above described. An electrician for the town of Steilacoom also testified and identified the wire found in Hopkins's pocket as a piece that had been cut out of a large coil of wire in the marina. The electrician also testified that the cut was not clean and could have been done with a knife. The marina owner also testified regarding the damage to the facility and stated that Hopkins did not have permission to be inside or to remove the wire.

Hopkins also testified. He claimed that he met Webb at a friend's house earlier that morning. After he worked on his truck, he and Webb drove to the beach at Steilacoom. He testified that he went to the marina to get Webb a drink at the store. He said that the front gate to the marina was unlocked and the store appeared open so he walked up to it and opened the door to the marina, but he could see the store was not open, so he left. Hopkins said that as he was returning to his truck, Whelan approached him and asked him for identification. Hopkins said that he was getting his wallet out when Whelan drew his gun and ordered him to the ground. Hopkins claimed that he remained on the ground for 30 minutes to one hour. He said that he was placed in the back of a patrol car for about another one half hour, during which time the officers left him to go to the marina and that they returned later laughing and carrying fishing poles.

Hopkins also claimed that Whelan never interviewed him or asked him any questions. Hopkins testified that, although he possessed gloves, a flashlight, and wire on the date of the incident, his possessions were different from the trial exhibits. The defense brought no motion to suppress physical evidence. The trial court heard a CrR 3.5 motion to determine whether Hopkins's statements to police were admissible. The court ruled them admissible.

ADDITIONAL ANALYSIS

Seizure and Search

Hopkins argues that Whelan unlawfully seized him without reasonable suspicion of criminal activity and thus all subsequent evidence should be suppressed. Hopkins contends that all evidence—including the wire, gloves, and flashlight taken from his person following his arrest, the knife Webb had, as well as his statements to Whelan following advisement of his *Miranda* rights—must be suppressed as fruit of the poisonous tree. We disagree.

We review a trial court's decision to admit or exclude evidence only for abuse of discretion, and we reverse that decision only if no reasonable person would have decided the matter as the trial court did. *State v. Thomas*, 150 Wn.2d 821, 856, 83 P.3d 970 (2004), *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed.2d 177 (2004). An assertion of error is waived if the appealing party did not seek to suppress the evidence before trial or object to its admission at trial. *State v. Mierz*, 127 Wn.2d 460, 468, 901 P.2d 286 (1995); *see also Thomas*, 150 Wn.2d at 856 (proper objection must be made at trial to perceived errors in admitting or excluding evidence and failure to do so precludes raising the issue on appeal).

As a threshold matter, Hopkins sought pretrial suppression only of his statements. Accordingly, by failing to seek suppression of the other evidence, he has waived any challenge

to the admission of that evidence.[3] *See Mierz*, 127 Wn.2d at 468 ("[Defendant's] failure to move to suppress evidence he contends was illegally gathered constitutes a waiver of any error associated with the admission of the evidence and the trial court properly considered the evidence."). Nevertheless, despite the waiver, we address the merits of Hopkins's contention that the evidence should be suppressed in the context of his assertion that he received ineffective assistance of counsel. *State v. Mierz*, 72 Wn. App. 783, 789, 866 P.2d 65, 875 P.2d 1228 (1994), *aff'd*, 127 Wn.2d 460, 901 P.2d 286 (1995).

Our Supreme Court has explained that under article I, section 7 of the Washington State Constitution, a person is seized only when, by means of physical force or a show of authority, his freedom of movement is restrained and a reasonable person would not have believed he or she is either free to leave, given all the circumstances, or free to otherwise decline an officer's request and terminate the encounter. *State v. O'Neill*, 148 Wn.2d 564, 574, 62 P.3d 489 (2003). "The standard is 'a purely *objective* one, looking to the actions of the law enforcement officer.'" *O'Neill*, 148 Wn.2d at 574 (quoting *State v. Young*, 135 Wn.2d 498, 501, 957 P.2d 681 (1998)).

A seizure depends on whether a reasonable person would believe, in light of all the

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[3] Moreover, Hopkins's substantive arguments about admission of the knife lack merit. Hopkins contends that the knife was irrelevant. He also contends that by bringing attention to Webb's possession of the knife, the prosecutor intentionally pandered to fears that jurors might have had regarding such a dangerous weapon. But the knife was relevant for two purposes. First, the knife appeared in Webb's hand as she moved behind Whelan and explains why Whelan drew his gun and seized both Webb and Hopkins. Second, the knife was relevant because it was in Webb's possession, Webb was with Hopkins, testimony at trial indicated that the wire found on Hopkins's person matched a portion missing from a spool of wire at the marina, and that the wire strand had been raggedly cut as if by a knife rather than with wire cutters.

Also, the prosecutor's closing argument does not show the pandering that Hopkins claims. The prosecutor mentioned the knife to explain Whelan's seizure of the couple, and the reasonable inferences from that evidence regarding related time periods; thus the prosecutor generally argued that the evidence did not support Hopkins's version of events. Under these circumstances, the trial court did not abuse its discretion in admitting the knife evidence.

circumstances, that he was free to go or otherwise end the encounter. *O'Neill*, 148 Wn.2d at 575. Whether a seizure occurs does not turn on the officer's suspicions; whether a person has been restrained by a police officer must be determined based on the interaction between the person and the officer. *O'Neill*, 148 Wn.2d at 575. The officer's subjective intent is irrelevant to whether a seizure occurred, unless he conveyed that intent to the defendant. *O'Neill*, 148 Wn.2d at 575.

Where an officer commands a person to halt or demands information from the person, a seizure occurs. *O'Neill*, 148 Wn.2d 577. But no seizure occurs where an officer approaches an individual in public and requests to talk to him, engages in conversation, or requests identification, as long as the person involved need not answer and may walk away. *O'Neill*, 148 Wn.2d at 577-78. In other words, "asking for identification from a pedestrian does not constitute a seizure." *State v. Rankin*, 151 Wn.2d 689, 697, 92 P.3d 202 (2004) (citing *Young*, 135 Wn.2d at 511).

Hopkins contends that the record shows he was seized when Whelan approached him. But he is incorrect. Whelan approached Hopkins and Webb as they walked along the road leading from the beach and the marina. He greeted them and said, "[H]ow's it going, what you guys up to?" RP at 86. Hopkins became agitated when Whelan approached them, and Hopkins claimed that they were just having a romantic stroll on the beach. When Whelan requested identification, Webb cooperated, but Hopkins at first declined, and then he went to his truck to retrieve his identification. As Whelan watched Hopkins approach his truck, he noticed Webb moving behind him with a knife in her hand. Whelan testified that he became concerned for his safety, pulled out his gun, and ordered both Webb and Hopkins to the ground. With that display of force, Hopkins was clearly seized, but there was no seizure prior to Whelan using his gun as a

show of force and ordering Webb and Hopkins to the ground. *Rankin*, 151 Wn.2d at 697; *O'Neill*, 148 Wn.2d at 577-78; *Young*, 135 Wn.2d at 511-12.

Hopkins relies on Whelan's testimony during the CrR 3.5 hearing that Hopkins's claim about a romantic stroll did not match his dirty appearance and the rubber gloves and flashlight hanging from his pocket. Whelan testified that, based on the incongruence between Hopkins's appearance and his stated purpose, he intended to investigate further. Defense counsel asked Whelan whether Hopkins was free to go when he requested Hopkins's identification. Whelan responded, "He was not told he was detained. He did not ask if he was detained, but if he would have, hypothetically, asked to leave, then I would have prevented that." RP at 36. Hopkins now contends that he was seized because Whelan "intended to prevent Mr. Hopkins from leaving." Br. of Appellant at 15. But Hopkins misperceives the proper test for detention. As discussed above, an officer's unconveyed, subjective intent is irrelevant to whether a seizure has occurred. *O'Neill*, 148 Wn.2d at 575.

Here, there was no objective basis for Hopkins to feel he was detained until Whelan drew his gun. Accordingly, there was no seizure until that event. Moreover, Whelan's action of drawing his gun was reasonable given Webb's conduct while holding a knife in her hand. Thereafter, Whelan arrested Hopkins and read him his *Miranda* rights. Hopkins waived those rights and talked with Whelan, admitting that he had been in the marina, which was clearly posted as private property, and admitting that he knew he was not supposed to be there. At that point, Whelan arrested Hopkins for burglary. We hold that under these circumstances Hopkins's assertion—that he was unlawfully seized without suspicion of criminal activity and that the evidence seized following his arrest should be suppressed—fails.

Ineffective Assistance of Counsel

Hopkins also argues that his trial counsel was ineffective for failing to move to suppress the knife evidence as well as all evidence gathered after Hopkins was unlawfully seized. We disagree.

To prevail on a claim of ineffective assistance of counsel, Hopkins must show that (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have differed. *In re Pers. Restraint of Hutchinson*, 147 Wn.2d 197, 206, 53 P.3d 17 (2002); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987); *see also Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Hutchinson*, 147 Wn.2d at 208; *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996) (if either part of the test is not satisfied, the inquiry need go no further). In weighing the two prongs of deficient performance and prejudice, we begin with a strong presumption that counsel's representation was effective and we must base our determination on the record below. *Hutchinson*, 147 Wn.2d at 206; *McFarland*, 127 Wn.2d at 335. To succeed on his ineffective assistance of counsel claim, Hopkins must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel. *Hutchinson*, 147 Wn.2d at 206; *McFarland*, 127 Wn.2d at 336.

Here, to prove that failure to object rendered counsel ineffective, Hopkins must show that

not objecting to the admission of the physical evidence fell below prevailing professional norms, that the proposed objection would likely have been sustained, and that the result of the trial would have differed if the evidence had not been admitted. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). Hopkins must rebut the presumption that counsel's failure to object can be characterized as legitimate trial strategy or tactics. He has not done so. Hopkins's seizure was not unlawful and the knife evidence was properly admitted. Hopkins points to no deficient performance and his assertion of ineffective assistance fails.

Statement of Additional Grounds for Review (SAG)

In a SAG,[4] Hopkins raises several issues. He first states only "[n]o [o]mnibus [h]earing." SAG at 1. But the record contains an "Order on Omnibus Hearing," dated May 28, 2008, that purports such hearing occurred on that date and that Hopkins was present. CP at 95-97. Hopkins also signed the order. Accordingly, the record indicates that an omnibus hearing did in fact occur.

Hopkins next contends that he was denied his right to a speedy trial. He refers to continuing trial forms dated May 28 and June 26, 2008, asserting that he objected to the trial continuances and refused to sign the forms. There are no such forms in the record or transcripts regarding hearings on those days. Because Hopkins's argument requires examining matters outside the record, we cannot address it on direct appeal. *See State v. Bugai*, 30 Wn. App. 156, 158, 632 P.2d 917 (1981).[5]

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[4] *See* RAP 10.10.

[5] If the defendant's claim rests on evidence or facts not in the existing trial record, filing a personal restraint petition is his appropriate course of action. *Hutchinson*, 147 Wn.2d at 206-207; *McFarland*, 127 Wn.2d at 335.

Hopkins also contends that the chain of custody was broken as to the wire entered in evidence. Because this issue was not raised below, it is waived. RAP 2.5(a). Moreover, "the government need not prove a perfect chain of custody for evidence to be admitted at trial; gaps in the chain normally go to the weight of the evidence rather than its admissibility." *United States v. Lott*, 854 F.2d 244, 250 (7th Cir. 1988); *see also Melendez-Diaz v. Massachusetts,* ___ U.S. ___, 129 S. Ct. 2527, 2532 n.1, 174 L. Ed. 2d 314 (2009) (quoting *Lott*, 854 F.2d at 250 for the stated proposition).

Finally, Hopkins asserts ineffective assistance of counsel, alleging that his trial counsel failed to subpoena certain witnesses, failed to object to other witnesses, failed to send an investigator to take pictures of the marina for presentation at trial, failed to object to the lack of evidence of the coil of wire at the marina from which a State's exhibit was allegedly cut, and failed to raise a chain of custody objection. We have already noted the required standard and burden on a defendant alleging ineffective assistance. Hopkins does not meet his burden on the assertions in his SAG. He does not show in the record the absence of legitimate strategic or tactical reasons supporting counsel's challenged conduct. *Hutchinson*, 147 Wn.2d at 206. Accordingly, he has not overcome the strong presumption that counsel's representation was

effective. *Hutchinson*, 147 Wn.2d at 206. In sum, Hopkins's SAG provides no basis for overturning his conviction.

We affirm.

Van Deren, C.J.

I concur:

Penoyar, J.

Armstrong, J. (dissenting) — I believe *Elmore*'s "reasonable possibility" standard applies here. And because under such standard, there is a reasonable possibility the excused juror's claimed unfairness stems at least in part from her view of the State's case, I would reverse and remand for a new trial.

In *State v. Elmore*, 155 Wn.2d 758, 123 P.3d 72 (2005), two jurors accused a third of being prejudiced and refusing to follow the law. Upon questioning by the court, the accused juror denied saying that he, in effect, would not follow the law, explaining that what mattered was whether "we believe the witnesses are credible." *Elmore*, 155 Wn.2d at 765. The Supreme Court adopted the Ninth Circuit's test that where the claim of juror bias and refusal to follow the law first arises during deliberations, the trial court cannot excuse the challenged juror if there is any reasonable possibility the juror's views are based on an evaluation of the sufficiency of the evidence. *Elmore*, 155 Wn.2d at 778. But the court limited the "reasonable possibility" standard to the "rare case where a juror is accused of engaging in nullification, refusing to deliberate, or refusing to follow the law." *Elmore*, 155 Wn.2d at 778.

Recently, in *State v. Depaz*, 165 Wn.2d 842, 204 P.3d 217 (2009), the court reiterated its limits on use of the "reasonable possibility" standard. *Depaz* involved juror misconduct clearly unrelated to the jury's deliberations: the challenged juror had talked with her husband during deliberations about the "circumstantial evidence" and being in the "minority." *Depaz*, 165 Wn.2d at 847. The court explained that it adopted the "reasonable possibility" test to allow the trial court to ascertain whether the challenged juror is truly unwilling to follow the law without invading the secrecy of jury deliberations. *Depaz*, 165 Wn.2d at 855. But this conflict does not exist where the court can explore juror misconduct—talking with someone outside the jury room

during deliberations—without delving into juror deliberations. *Depaz*, 165 Wn.2d at 855. Thus, the court refused to apply the "reasonable possibility" standard. *Depaz*, 165 Wn.2d at 855.

Here, we do not have a claim of juror misconduct. Rather, like *Elmore*, the claim centers on possible juror prejudice or partiality. And, like *Elmore*, the trial court could not evaluate the claim without risking invading the jurors' secret deliberative process. I find no meaningful difference between the situation where one juror accuses another of being partial and that where a juror decides during deliberations that she is no longer impartial. In the first situation, the accusing juror may simply want to remove a hold-out juror, and in the second, the self-accusing juror may simply want out of a contentious, confrontational discussion. In either situation, the trial court faces the same dilemma: how to ascertain the true source of the claimed partiality without invading the jury's secret deliberative process. Because the dilemma is the same in either case, I would apply the "reasonable possibility" test here. *See United States v. Symington*, 195 F.3d 1080, 1088 (9th Cir. 1999) (error to dismiss juror because it was reasonably possible that impetus for removal came from her position on merits of case); *United States v. Thomas*, 116 F.3d 606, 624 (2d Cir. 1997) (error to dismiss juror on ground he acted in purposeful disregard of court's instructions where there was reasonable possibility he was simply unpersuaded by government's case against defendants); *United States v. Brown*, 823 F.2d 591 (D.C. Cir. 1987) (error to excuse juror who reported he was unable to discharge his duties after five weeks of deliberations because of possibility that discharge request was based on insufficient evidence to convict).

I find a reasonable possibility that juror six's claim of partiality arose, at least in part, from her view of the evidence. The majority reports only one note from the jury; the jury actually sent

out four notes. The first asked if the jury could see the police report; the second asked, "If you lawfully entered a building and then your intent to commit the crime became present, is it still burglary?" Verbatim Report of Proceedings (VRP) at 308; the third asked, "Is it illegal for a member of law enforcement to allow a piece of evidence to leave his or her sight?" VRP at 310; and the last note read:

> One of the jurors feels unable to continue this case because of being too emotional reg[arding] the prosecutor and police officer. She feels she can not be fair and impartial. She thought she could when being interviewed but can[']t now. She wishes to be dismissed at this time if possible.

Clerk's Papers (CP) at 50, 92.

Hopkins's defense was that he and his friend were walking on the beach and because they were thirsty, he walked to the store, which was unlocked and appeared to be open. He entered, calling out, and when nobody responded, he left. He explained that he had the piece of wire in his pocket because he had worked on his truck. He denied that the piece of wire entered into evidence was the same wire he had in his pocket.

Officer Whelan testified that he gave the piece of wire from Hopkins's pocket to David Morgan, an electrician who works for Steilacoom's electrical department. Morgan went to the allegedly burgled store where he found a bunch of coiled-up wire. He matched the piece of wire to a missing section of the coiled wire. Morgan testified that the piece of wire did not appear to have been cleanly cut, but he had previously told defense counsel he thought a wire cutter had been used.

The jurors' second question suggests that some had concerns about whether the State had proved Hopkins had the intent to steal when he broke into the store. The third question suggests

that some of the jurors had problems with the State's control and processing of the allegedly stolen wire.

The fourth and critical note then reports that juror six was being "too emotional reg[arding] the *prosecutor and police officer*" and believed she could not be fair and impartial. CP at 50 (emphasis added). In response to the court's questions, juror six agreed to the sentiments stated in note four. But, if we consider the fourth note in light of the jury's first three questions, it is reasonably possible that juror six, either alone or with others, questioned the State's proof as to Hopkins's intent in entering the store and, more importantly, questioned whether the officer's release of the wire to the electrician was legal. This record demonstrates a reasonable possibility that the source of juror six's discontent was the State's evidence. This is particularly likely where the juror expressed no partiality during voir dire, the trial testimony, final arguments, or even the first day of deliberations.

I fully sympathize with the trial court's frustration about how to question juror six. After the juror confirmed that note four accurately reported her feelings, the court asked only whether anything outside deliberations or any outside influence had led her to believe she could no longer be impartial. The juror answered "no," an answer that supports rather than removes a reasonable possibility that her view of the State's case contributed to her partiality. The court's approach followed what other courts have attempted in similar situations and questioned the juror about what, *other than deliberations*, caused the claimed partiality. *Thomas*, 116 F.3d at 620-21. Because some "claims of partiality or bias often arise from some event, or from a relationship between a juror and a party," the court can identify, investigate, and make findings on such matters without intruding into the deliberative process. *Thomas*, 116 F.3d at 621. If nothing

outside of deliberations has caused the juror's partiality, it becomes a near certainty that the deliberative discussions have. Finally, even if the juror inadvertently reveals her views or those of other jurors, this is not fatal to further deliberations. *Depaz*, 165 Wn.2d at 855 n.2.

In conclusion, the court's questions here did not remove the reasonable possibility that juror six's "partiality" stemmed from her view of the State's case. Accordingly, the trial court erred in excusing her in violation of Hopkins's constitutional right to be convicted only by a unanimous jury. *Elmore*, 155 Wn.2d at 781.

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Armstrong, J.