NO. 94249-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

EARL ALVIN POLLEY
Appellant.

PETITION FOR REVIEW OF THE COURT OF APPEALS February 28, 2017 DECISION IN STATE V. POLLEY COA# 48289-4-II
AMENDED

LISE ELLNER
Attorney for Appellant

LAW OFFICES OF LISE ELLNER
Post Office Box 2711
Vashon, WA 98070
(206) 930-1090
WSB #20955

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RULES, STATUTES, AND OTHERS

A. IDENTITY OF MOVING PARTY

Petitioner Earl Polley through his attorney, Lise Ellner, asks this court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Mr. Polley requests review of the Court of Appeals February 28, 2017 ruling that the court did not abuse its discretion in failing to investigate juror misconduct and that the misconduct did not violate Mr. Polley's right to a fair trial. A copy of the decision affirming the convictions is in the Appendix at pages 1-18.

C. ISSUES PRESENTED FOR REVIEW

1. The Court of Appeals erroneously ruled that Mr. Polley was not denied his right to a fair trial by juror misconduct because the trial court properly exercised her discretion not to investigate the alleged misconduct regarding a juror deliberating while drunk.

2. The Court of Appeals erroneously ruled that the trial court was not required to investigate the allegation that a juror was intoxicated during deliberations.

3. The Court of Appeals ruling was incorrect that counsel's failure to move for mistrial following allegations of juror misconduct was not prejudicial ineffective assistance of counsel.

D. STATEMENT OF THE CASE

Juror Misconduct

The trial court erred by refusing to investigate juror misconduct. The court of appeals erred by issuing an opinion not supported by law.

a. Trial Facts Related to Juror Misconduct Issue.

Defense counsel informed the court that a friend of Mr. Polley's who was in the galley during the trial observed juror number 11 drunk the morning of the day of deliberations. The trial court refused to investigate.

b.. Trial Court Ruling

The trial court record of the exchange is brief and as follows:

> THE COURT: How may I help any of you?
> MS. CHABOT: Your Honor, I was approached by Matthew Brooks, who's here in the gallery. He's a friend of Mr. Polley's and has been sitting on the trial. **And this morning he says he saw Juror Number 11 coming out of a casino and that he was drunk, and I wanted to make a record of that.**
>
> THE COURT: State, is there anything you wish to say?
>
> MS. VITIKAINEN: Your Honor, there's no incident -- there's been no indication from any of the other jurors that Juror Number 11 was or appeared to be intoxicated. There's no indication from the observations I've made of Juror Number 11 during the course of today that indicate Juror Number 11 may be or is intoxicated or was intoxicated. There's nothing to indicate that Juror Number 11 engaged in any misconduct. There's nothing to indicate that walking out of a casino, if

> he did walk out of a casino this morning, there's nothing to indicate that that is misconduct on the part of Juror Number 11. So at this point, I would ask the Court to find that, based on the information that's been proffered by the defense, that there is nothing to -- there's no basis to take any further action.
>
> MS. CHABOT: Your Honor, I wanted to be sure that it was part of the record.
>
> THE COURT: All right. The Court is not taking any further action at this time. So I am going to send my judicial assistant back into the jury room so that those that wish can come out and sit in the jury box and speak with you. Those who do not wish to do that will have exited.
>
> MS. CHABOT: Okay.

(Emphasis added) RP 566-67.

c. Court of Appeals Decision.

The Court of Appeals determined that the trial court did not abuse its discretion by failing to investigate the juror misconduct issues. The Court of Appeals decision on the issue of juror misconduct is as follows:

> A. JUROR MISCONDUCT
>
> Polley argues he was denied his right to a fair trial when the trial court did not inquire into juror 11's fitness. We disagree. RCW 2.36.110 governs the removal of unfit jurors and provides in pertinent part:
>
> 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.

> Similarly, CrR 6.5 provides, "If at any time before submission of the case to the jury a juror is found unable to perform the duties[,] the court shall order the juror discharged."
>
> Polley's argument fails because while the statute and court rule place an "obligation on the trial court to excuse any juror who is unfit and unable to perform the duties of a juror," they do not create obligations regarding the investigation of alleged misconduct. *State v. Jorden*, 103 Wn. App. 221, 227, 228-29, 11 P.3d 866 (2000), *review denied*, 143 Wn.2d 1015 (2001). Rather, the investigation and resolution of misconduct allegations are discretionary with the trial court. *Turner v. Stime*, 153 Wn. App. 581, 587, 222 P.3d 1243 (2009) ("A trial court has significant discretion to determine what investigation is necessary on a claim of juror misconduct."). Thus, we hold that the trial court did not abuse its discretion here because the trial court and both attorneys had the opportunity to view juror 11 throughout the day's proceedings, and neither attorney nor the trial court determined further inquiry was warranted after the allegation was made. Therefore, because the trial court did not abuse its discretion for failing to inquire into the alleged misconduct, Polley's argument that he was denied a fair trial for the trial court's failure to inquire further fails.

Court of Appeals Decision at page 16.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The trial court erred in ruling that the trial court was not obligated to investigate the alleged juror misconduct and abused its discretion in failing to determine that the misconduct denied Mr. Polley his right to a fair trial.

a. Standard of Review.

"A trial court's authority to entertain a motion, as opposed to its authority to decide that motion, is a question of law that the appellate court's review de novo." *Clarke v. State of Washington, Attorney General's Office*, 130 Wn. App. 767, 780, 138 P.3d 144 (2006) (*quoting Rudolph v. Empirical Research Sys. Inc*., 107 Wn. App. 861, 866, 28 P.3d 813 (2001) (citations omitted)). Here, the trial court's erroneous belief that it was not required to investigate juror misconduct was an error at law which should be reviewed de novo.

This Court reviews a trial court's actual investigation of juror misconduct for abuse of discretion. *State v. Gaines*, 194 Wn. App. 892, 896, 380 P.3d 540 (2016). A trial court abuses its discretion when it acts on untenable grounds or its ruling is manifestly unreasonable. Gaines, 194 Wn. App. at 896.

b. Right to Impartial Jury

A criminal defendant is entitled to trial by a fair and impartial jury. U.S. CONST. Amends. VI, XIV; WASH. CONST. art. I, § 3, 21, 22; *Duncan v. La*., 391 U.S. 145, 177, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968); *Gaines*, 194 Wn. App. at 896.

c. Trial Court Duty To Investigate Juror Misconduct Allegation.

After closing arguments, a friend of Mr. Polley, Mathew Brooks, who was in the galley, reported to the court that he saw juror #11 intoxicated, coming out of a casino that same morning. RP 566. The prosecutor offered that juror #11 did not seem drunk and the court did not make any inquiry. RP 574. The defense did not move for dismissal of the juror or move for a mistrial but just made a record and requested an investigation. RP 566-67.

RCW 2.36.110 requires the trial court to excuse an unfit juror. Id; *State v. Hughes*, 106 Wn.2d 176, 204, 721 P.2d 902 (1986); *Jorden*, 103 Wn. App. at 226-27. This means that the trial court has a **continuous** obligation to excuse any juror who is unfit and unable to perform the duties of a juror. *Jorden,* 103 Wn. App. at 227.

CrR 6.5 provides that in the event a juror is unfit, "the trial judge

may conduct brief voir dire before seating such alternate juror for any trial or deliberations." Id. 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.

Id.

Once the court was aware of the possibility of juror unfitness, to protect Mr. Polley's rights, it was required to make at least some minimal inquiry into the juror's fitness. *State v. Elmore*, 155 Wn.2d 758, 773, 123 P.3d 72 (2005) interpreting RCW 2.36.110 and CrR 6.5. to require trial court to inquire into juror misconduct. The failure to do so denied Mr. Polley his right to a fair trial. U.S. CONST. Amends. VI, XIV § 1; art. I, § 3, 21, 22; *Duncan*, 391 U.S. at 177.

d. Substantive Remedy for Denial of Impartial Jury.

Denial of the right to an impartial trier of fact is a classic structural error, requiring reversal without a showing of prejudice. *Chapman v. California*, 386 U.S. 18, 24, n.8, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) (*citing Turney v. Ohio*, 273 U.S. 510, 535, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (reversing the defendant's conviction despite clear

evidence of guilt because "[n]o matter what the evidence was against him, he had the right to have an impartial judge")).

e. Criteria For Accepting Review

This Court should accept review because the Court of Appeals ruling on this issue was based on inapplicable case law from Division Three that Division Two has expressly distinguished, and the Court of Appeals decision conflicts with Supreme Court case law and statutory precedent.

RAP 13.4(b)(1) provides for review as follows:

> (b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only:
>
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Id.

f. Decision Conflicts With Supreme Court Precedent.

The Court of Appeals decision in this case conflicts with the Supreme Court case *Elmore*, 155 Wn.2d at 773 interpreting RCW 2.36.110, and CrR 6.5 to require ongoing investigation of juror misconduct. The Court in *Elmore* held that:

> RCW 2.36.110, and CrR 6.5. place a "continuous obligation" on the trial court to investigate allegations of juror unfitness and to excuse jurors who are found to be unfit, even if they are already deliberating.

Elmore, 155 Wn.2d at 773 (quoting, *Jorden*, 103 Wn. App. at 227. This Court should accept review under RAP 13.4(b)(1) b

g. Decision Conflicts With Court of Appeals Division Three Precedent.

The Court of Appeals cited to *Turner,* 153 Wn. App. at 589-90, and *Jorden*, 103 Wn. App. at 227, in support of its ruling that the trial court was not obligated to inquire into the juror misconduct. Court of Appeals Opinion at page 16.

Turner, however, addressed whether after verdict, the Court was required to investigate allegations of misconduct during deliberations under the motion for a new trial provision set forth in CrR 59(a)(2).

Turner, 153 Wn. App. at 587. In the context of a post-verdict motion for a new trial in a civil case, the Division Three noted that the Court has

> a trial court has significant discretion to determine what investigation is necessary on a claim of juror misconduct. *United States v. Villar*, 586 F.3d 76 (1st Cir. 2009) (quoting United *States v. Mikutowicz*, 365 F.3d 65, 74 (1st Cir. 2004)).

Id. This Court in *Gaines*, 194 Wn. App. at 897-98, held that *Turner* did not apply to cases such as Mr. Polley's that involve allegations of juror misconduct occurring pre-verdict. Id. Accordingly this Court should accept review under RAP 13.4(b)(2) because he Court of Appeals decision in this case is in conflict with Division Three and its own case law.

h. Court of Appeals Decision is of Substantial Public Interest Because it is Contrary to Precedent.

The Court of Appeals in this case is also in conflict with *Jorden* which it misconstrued to permit the trial court to fail to investigate juror misconduct. An issue is of substantial public importance when it "has the potential to affect a number of proceedings in the lower courts … if review will avoid unnecessary litigation and confusion on a common issue." *In re Personal Restrain of Petition of Flippo*, 185 Wn.2d 1032,

380 P.3d 413, 414 (2016).

The Court of Appeals decision in this case misconstruing *Jorden* is an issue of significant public importance that satisfies the criteria for granting review under RAP 13.4(b)(4), because a trial court's failure to apply the law, and the Court of Appeals failure to properly interpret the law have the potential to affect many lower court proceedings. Further, acceptance of review in this case has the potential to avoid unnecessary litigation and confusion in similar cases. *Flippo*, 380 P.3d at 413-14

Jorden stands for the principle that the trial court has fact-finding discretion, which allows the judge to weigh the credibility of the prospective juror based on his or her observations. *Jorden*, 103 Wn. App. at 870." As with other factual determinations made by the trial court, we defer to the judge's decision." Id. Contrary to the Court of Appeals in this case, the decision in *Jorden* did not permit a trial court to refuse to investigate juror misconduct.

In *Jorden*, the Court refused to impose on the trial court a mandatory format for establishing juror misconduct. *Jorden*, 103 Wn. App. at 870. "Instead the trial judge has discretion to hear and resolve the misconduct issue in a way that avoids tainting the juror

and, thus, avoids creating prejudice against either party." Id. The Court explained that the judge "will act as both an observer and decision-maker. "Id. In *Jorden*, the judge "was a witness and a decision-maker. In deciding whether to grant or deny a challenge for cause based on bias, the trial judge has "fact-finding discretion."" *Jorden*, 103 Wn.2d at 870 (citing, quoting, *Ottis v. Stevenson-Carson Sch. Dist. No. 303*, 61 Wn. App. 747, 753, 812 P.2d 133 (1991)).

The Court in *Jorden* held that the trial court could dismiss a juror without a hearing based on sufficient knowledge of the juror's inattention, *Jorden,* 103 Wn.App. at 869-70. In *Jorden* the court personally witnessed the juror's inattention, "heard argument from both parties and allowed both sides to call witnesses. "*Jorden,* 103 Wn.App. at 869-70. The trial court characterized the juror's behavior as "she was "the most inattentive juror I've seen in six and a half years of doing trials," Id. Based on these facts, the Court held that the court had discretion to dismiss the juror without holding a hearing. Id.

Recently, Division Two agreed that the decision in *Jorden* rested on "the judge's personal observation of the juror sleeping and her dismissal prior to the start of deliberations, facts on which we relied in our analysis". *State v. Berniard*, 182 Wn. App. 106, 119, 327

P.3d 1290 (2016). Here by contrast, the trial court did not have any information regarding the misconduct and refused to make any inquiry. The trial court here did not act as a fact finder and could not fulfill her obligation to ongoing investigation of the juror misconduct without making inquiry.

In sum, *Jorden* does not support the Court of Appeals decision in this case that the trial court properly exercised its discretion to refuse to investigate juror misconduct. Accordingly, this Court should accept review under RAP 13.4(b)(4).

Ineffective Assistance of Counsel-Review Under RAP 13.4(b)(3)

Defense counsel failed to move for a mistrial after the trial court refused to investigate a drunken juror. The Court of Appeals ruled that Mr. Polley did not allege or establish prejudice and that even if he had, he failed to prove he was prejudiced by counsel's failure to mover for a mistrial. Court of Appeals Opinion at page 17. Mr. Polley argued that he was denied his due process right to the effective assistance of counsel by counsel's failure move for a mistrial, and that the denial of due process was prejudicial. Opening Brief at page 28-29. Counsel did not explain the prejudice prong in any detail but

presented the facts and argument sufficient for the for the Court of Appeals to make a ruling. The Court of Appeals decision that Mr. Polley was not prejudiced is incorrect, because counsel failed to require the trial court to protect his constitutional right to a fair and impartial jury which is structural error, requiring reversal without a showing of prejudice. *Chapman*, 386 U.S. at 24 (*citing Turney*, 273 U.S. at 535).

This Court should grant review under RAP 13.4(b)(3) because the Court of Appeals decision that Mr. Polley was not prejudiced by counsel's failure to move for a mistrial is an issue that raises a significant question of law under the Sixth Amendment to the Constitution United States that also implicates Mr. Polley's constitutional right to an impartial jury.

a. Standard of Review

The standard of review for a challenge to the effective assistance of counsel is de novo. *State v. Cross,* 156 Wn.2d 580, 605, 132 P.3d 80, *cert. denied,* 549 U.S. 1022 (2006).

b. Ineffective Assistance Case Law

A defendant has an absolute right to effective assistance of counsel in criminal proceedings. *State v. Grier*, 171 Wn.2d 17, 34,

246 P.3d 1260 (2011); *Strickland v. Washington,* 466 U.S. 668, 684–86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Sixth Amendment to the U.S. Constitution and art. I, § 22.

While counsel is presumed effective, this presumption is overcome where the defendant establishes that (1) defense counsel's representation was deficient; falling below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant. *State v. Sutherby,* 165 Wn.2d 870, 883, 204 P.3d 916 (2009); *State v. McFarland,* 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

More than the mere presence of an attorney is required. *State v. Hawkins,* 157 Wn. App. 739, 747, 238 P.3d 1226 (2010), *review denied,* 171 Wn.2d 1013 (2011). A deficient performance claim can be based on a strategy or tactic when the defendant rebuts the presumption of reasonable performance by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." *Grier*, 171 Wn.2d at 33; citing, *State v. Reichenbach,* 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho,* 137 Wn.2d 736, 745–46, 975 P.2d 512 (1999).

Trial strategies and tactics are thus not immune from attack on

grounds of ineffective assistance of counsel. “The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.” *Roe v. Flores–Ortega,* 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

Prejudice is established if the defendant can show that “there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different.” *State v. Nichols,* 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). If a party fails to satisfy one element, a reviewing court need not consider both *Strickland* prongs. *State v. Foster,* 140 Wn. App. 266, 273, 166 P.3d 726, *review denied,* 162 Wn.2d 1007 (2007). The failure to move for a mistrial in this case cannot be considered tactical because under CrR 6.5 the court was required to investigate the drunken juror. *Elmore*, 155 Wn.2d at 773 (quoting, *Jorden*, 103 Wn. App. at, 227).

The remedy for lawyer's ineffective assistance is to put defendant in position in which he would have been had counsel been effective.” *State v. Hamilton*, 179 Wn. App. 870, 879, 320 P.3d 142 (2014).

In *Hamilton*, the court held that counsel was ineffective to

Hamilton's prejudice by failing to move to suppress methamphetamine obtained through a warrantless search of Hamilton's purse. *Hamilton*, 179 Wn. App. at 878-79. During trial counsel only moved to suppress the methamphetamine based on a warrantless search of the house. *Hamilton*, 179 Wn. App. at 878-79. The Court held that Hamilton was prejudiced because there was no tactical reason not to argue suppression under a warrantless home search and the court would likely have granted the motion. *Hamilton*, 179 Wn. App. at 879-80.

Here, when the trial court refused to inquire into the juror's misconduct, counsel was required to do more than simply "make a record". Similar to *Hamilton*, counsel recognized that there was a need to inform the court of the misconduct, just as counsel in *Hamilton* was aware that he needed to make a motion to suppress. However, in each case, counsel failed to understand the applicable law and move the court for relief based on available law.

In *Hamilton*, the search of the house without a warrant was illegal, and here, the court was required to inquire into the juror misconduct under *Elmore* and *Jorden*. *Elmore*, 155 Wn.2d at 773 (quoting, *Jorden*, 103 Wn. App. at 227). In *Hamilton*, counsel was

unable to protect Hamilton's rights by not moving to suppress on all available grounds, just as here, counsel was unable to protect Mr. Polley's righto a fair trial by simply making a record without moving for a new trial.

In *Hamilton* there was no tactical reason not to follow through with a motion to suppress under the warrantless search of the purse, and here there was no tactical reason not to move for a new trial when the trial court failed to adhere to the law requiring an investigation into juror misconduct under *Elmore* and *Jorden.* When the court refused to investigate, it committed error that counsel should have recognized and objected to in the form of a motion for a new trial.

Mr. Polley establishes prejudice because if counsel had required the court to adhere to the applicable law by investigating the juror misconduct, "there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different." *Nichols,* 161 Wn.2d at 8. The Court of Appeals decision to the is an issue of constitutional concern that fits the criteria for review under RAP 13.4(b)(3). Accordingly, this Court should accept review.

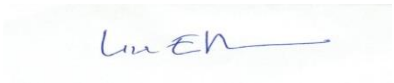
F. CONCLUSION

For the reasons stated herein and in the opening brief, this Court should accept review.

DATED THIS 18th day of April, 2017.

Respectfully submitted,

LAW OFFICES OF LISE ELLNER



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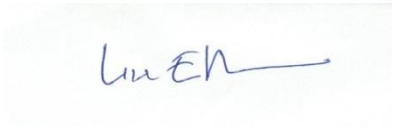
LISE ELLNER, WSBA 20955
Attorney for Petitioner

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County Prosecutor's Office pcpatcecf@co.pierce.wa.us and Earl Polley, DOC# 781500 Airway Heights Corrections Center P.O. Box 2049, Airway Heights, WA 99001 on April 18, 2017. Service was made electronically to the prosecutor and to Mr. Polley by depositing in the mails of the United States of America, properly stamped and addressed.



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APPENDIX

Filed
Washington State
Court of Appeals
Division Two

February 28, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. EARL ALVIN POLLEY, Appellant.	No. 48289-4-II UNPUBLISHED OPINION

LEE, J. — Earl Alvin Polley was convicted of 10 counts of second degree identity theft, one count of forgery, and one count of third degree driving with a suspended license. On appeal, Polley argues that (1) the trial court abused its discretion in admitting text messages without proper foundation and in not admitting other suspect evidence; (2) the State presented insufficient evidence to convict Polley on all of the identity theft and forgery charges; (3) the trial court abused its discretion in failing to investigate alleged juror misconduct; and (4) he received ineffective assistance of counsel when his counsel failed to move for mistrial or to voir dire when the potential juror misconduct was alleged.

We hold that (1) the trial court did not abuse its discretion in making the challenged evidentiary rulings; (2) the evidence presented was sufficient to convict Polley on all of the identity theft and forgery counts; (3) the trial court did not abuse its discretion in failing to inquire into the alleged juror misconduct; and (4) Polley fails to allege or argue that he was prejudiced by his attorney's claimed ineffectiveness. Accordingly, we affirm.

FACTS

A. THE INCIDENT

On March 18, 2015, Polley's aunt, Doreen Silvernail, found an unfamiliar backpack in her garage. Polley's father, Earl Thomas, lived in Silvernail's garage and, despite Silvernail's orders to Thomas that Polley was not allowed on the property, Silvernail caught Thomas letting Polley into the backyard by the garage about a week before the backpack was discovered. Silvernail assumed the backpack belonged to one of her several grandchildren who lived in the area, so she brought it inside her house. Silvernail opened the backpack and discovered checks, mail, W-2 forms, driver's licenses, and Social Security cards. At this point, Silvernail suspected the backpack belonged to Polley and asked Thomas for Polley's phone number.

Silvernail called the number and got an automated voicemail. A short time later, Silvernail received a text message from the number asking, "Who's this," to which Silvernail responded,

> Your aunt. I found the backpack and opened it as my grandson is always leaving things here. I am not happy with what I found. You need to . . . get your things out now. If you don't get your things tonight, I will turn . . . them over to the sheriff.

3 Verbatim Report of Proceedings (VRP) at 146 (internal quotations omitted). The response was, "Yep i will n their [sic] is no way u could have found it was put away n if i had a ride i would have already been there to get the back pack [sic]." Clerk's Papers (CP) at 50; *see* 3 VRP at 147. Silvernail reported the incident to law enforcement later that day, and Pierce County Sheriff's Deputy Alexa Moss responded.

Deputy Moss took the backpack and its contents into evidence. In the backpack, law enforcement found financial documents, personal information, mail, and checks belonging to Robert Hoover, Steven McClendon, Jason Lisonbee, Flor Rivera, Peter Dorros, Joesph Baley,

Keith Jester, Dina Franz, Myong Chin, Judson Webb, Michael Lawrence, Aaron Bedker, Willie Horace, Debbie Anderson, Scott Jester, Ronald Chrum, David Estes, Brandon Cohen, Christopher Lennox, and Britney Rader.

On March 27, Polley was stopped by police for driving a vehicle registered to an individual with outstanding warrants. Polley was driving with a suspended driver's license. Polley was arrested and read his *Miranda*[1] rights. Polley acknowledged that he understood his rights and wished to speak with the arresting officer. Polley asked the arresting officer if he was under arrest for driving with a suspended license. The arresting officer told Polley that he was under arrest "for items that he left at a relative's house," not mentioning that the item was a backpack or that it was left at Silvernail's home. 4 VRP at 360. Polley replied, "That wasn't [his] backpack." 4 VRP at 362. When the officer asked Polley what backpack Polley was talking about, Polley said, "The one at my aunt's house." 4 VRP at 362 (internal quotations omitted).

B. THE CHARGES

Polley was charged with 10 counts of second degree identity theft (counts I, III-X, and XII), one count of forgery (count II), and one count of third degree driving with a suspended license (count XI). Counts I and II were for the articles recovered from the backpack that related to Debbie Anderson. These articles included mail addressed to Anderson, checks associated with her Sears MasterCard, and two checks made payable to Polley "for work." 3 VRP at 168. Anderson testified that she had never written a check to Polley, Polley had never done any work for her, she did not

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

know Polley, had not given Polley permission to possess her mail or use her name, and the signature on the checks purporting to be hers was not.

Count III was for articles recovered from the backpack that related to Aaron Bedker. These articles included mail addressed to Bedker, Bedker's driver's license attached to a letter from the Department of Licensing, and a check to be drawn from "Aaron Bedker Trucking, Inc." to "Michael Lawrence." 3 VRP at 206. The letter from the Department of Licensing had what appeared to be a credit card number and another number written on it. Bedker testified that he did not own the trucking company, did not know Polley, and had not given Polley permission to use his name or possess the articles recovered.

Count IV was for articles recovered from the backpack that related to Willie Horace. These articles included checks made out to Polley for "work," and to "Michael Lawrence." 3 VRP at 190-92. Horace died over three years before the checks purporting to be from him were dated.

Count V was for articles recovered from the backpack that related to Scott Jester. These articles included a notebook page containing personal financial information with Scott Jester's name, birthday, mother's maiden name, and Social Security number, along with several of Jester's credit card, debit card, and bank account numbers. Scott Jester testified that he had never met Polley and had never given Polley permission to possess his personal information.

Count VI was for articles recovered from the backpack that related to Ronald Chrum. These articles included Chrum's driver's license, birth certificate, and certification of road test. There was also an e-mail address written on a piece of notebook paper that read "Chrum1971@hotmail." 3 VRP at 258. Chrum testified that he was born in 1971 but that he had

not created that e-mail address. Chrum further testified that he had never met Polley and had never given Polley permission to possess his personal information.

Count VII was for articles recovered from the backpack that related to Keith Jester. Keith Jester is Scott Jester's son. These articles included a piece of notebook paper containing Keith Jester's account numbers, log-in names, routing numbers, birthdate, physical address, e-mail addresses, tax ID number, driver's license number, phone number, social security number, and partial debit card number. Keith Jester testified that he had never met Polley and had never given Polley permission to possess his personal information.

Count VIII was for a W-2 form belonging to David Estes that was recovered from the backpack. Estes's W-2 form contained Estes's Social Security number, physical address, and wages. Estes testified that he had never met Polley and had never given Polley permission to possess his personal information.

Count IX was for a W-2 form belonging to Brandon Cohen that was recovered from the backpack. Cohen's W-2 listed Cohen's Social Security number, wages, and other personal and financial information. Cohen testified that he had never met Polley and had never given Polley permission to possess his personal information.

Count X was for a W-2 form belonging to Christopher Lennox that was recovered from the backpack. Lennox's W-2 listed Lennox's Social Security number, wages, physical address, and other personal and financial information. Lennox testified that he had never met Polley and had never given Polley permission to possess his personal information.

Count XI was for Polley driving with a suspended license when he was pulled over on March 27. Polley does not contest this charge, nor his subsequent conviction for it, in this appeal.

Count XII was for articles recovered from the backpack that related to Brittnay Rader. These articles included a checkbook with several blank checks purporting to be from Rader's bank account, and checks from the same account payable to Polley. Polley endorsed the back of one of the checks made payable to him. The checks had Rader's name at the top, but had a different address, a different phone number, and a signature that was not Rader's. Rader testified that she had never ordered these checks, did not know Polley, had never given Polley permission to possess her personal information, and had never given Polley permission to create a checking account or write a check in her name.

C. PROCEEDINGS

Before trial, Polley sought permission to introduce other suspect evidence. Specifically, Polley sought to introduce evidence relating to a person named Daniel Espinoza and another person named Rachel Thorsness. The trial court ruled against the other suspect evidence being proffered, stating, "There isn't the appropriate tendency to show that another person committed the crime." 1 VRP at 16. Based on the trial court's ruling, the State moved to excluded references to Espinoza and Thorsness. The trial court granted the State's motion excluding specific references to Espinoza and Thorsness.

Polley also objected to the admission of the text messages exchanged between Silvernail and the number Thomas provided to her as Polley's phone number. Polley argued that the State could not establish a foundation for Polley being the person responding to Silvernail in the text messages. The trial court admitted the text messages, stating that the defense was still entitled to

argue to the jury that someone other than Polley was the person responding to Silvernail's text messages.

At trial, Polley testified in his own defense. Polley testified that his father did not have his phone number, but he also recited a phone number to the court that he had given his father. Polley said that he did not receive a phone call or text messages from Silvernail at that phone number on March 18, 2015, and that he was not the person who responded to the text messages Silvernail had sent.

Additionally, Polley testified that the officer told him that he was under arrest for driving with a suspended license. Polley testified that he asked the arresting officer "if he was really taking me to jail for driving [with a suspended license] and he said, yeah. Then he said, and for something left at somebody's house." 5 VRP at 445. Polley said that when he asked the officer what it was, the officer responded, "A backpack." 5 VRP at 445 (internal quotations omitted).

Polley was convicted on counts I through XII as charged. After the verdict was read, Matthew Brooks, a friend of Polley's told defense counsel that he had seen juror 11 leaving a casino that morning intoxicated. Defense counsel made a record of Brooks's allegations regarding juror 11 and no further action was taken. Polley appeals.

ANALYSIS

A. EVIDENTIARY RULINGS

Polley argues that the trial court abused its discretion in admitting the text messages and excluding other suspect evidence. We disagree.

1. Standard of Review

We review a trial court's decision to admit or exclude evidence for abuse of discretion. *State v. Franklin*, 180 Wn.2d 371, 377 n.2, 325 P.3d 159 (2014); *State v. Young*, 192 Wn. App. 850, 854, 369 P.3d 205, *review denied*, 185 Wn.2d 1042 (2016). An abuse of discretion occurs when a trial court's decision is manifestly unreasonable or is based on untenable grounds. *Young*, 192 Wn. App. at 854.

2. Text Messages

Polley argues the superior court abused its discretion in admitting the text messages because the State failed to lay a proper foundation. Specifically, Polley argues that the State did not provide sufficient evidence to support its assertion that Polley was the person who sent the text messages to Silvernail and that Polley would likely not have been convicted but-for the admission of the text messages. We hold the trial court did not abuse its discretion.

Polley's lack of foundation argument is grounded in ER 901, which requires authentication as a precondition for admissibility. "The requirement of authentication . . . as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." ER 901(a). When considering verbal electronic transmissions, the "contents, substance, internal patterns, or other distinctive characteristics of the e-mail, taken in conjunction with the circumstances, are sufficient to support a finding that the e-mail in question is what the proponent claims." ER 901(b)(10). The methods for authenticating e-mails apply to text messages. *See Young*, 192 Wn. App. at 856 (citing *In re Det. of H.N.*, 188 Wn. App. 744, 759, 355 P.3d 294 (2015), *review denied*, 185 Wn.2d 1005 (2016)).

The party moving for admission of the evidence need only make a prima facie showing of authenticity for purposes of establishing admissibility under ER 901. A prima facie showing is made "'if the proponent shows enough proof for a reasonable fact finder to find in favor of authenticity.'" *In re H.N.*, 188 Wn. App. at 751 (quoting *State v. Payne*, 117 Wn. App. 99, 108, 69 P.3d 889 (2003), *review denied*, 150 Wn.2d 1028 (2004)). Challenges to authenticity go to weight of the evidence, not its admissibility. *Young*, 192 Wn. App. at 857.

In *Young*, this court held that the recipient's personal knowledge of the sender's phone number and the contents of the texts were sufficient evidence to permit a reasonable trier of fact to find that the defendant was the sender of the text messages. 192 Wn. App. at 857. The recipient of the text messages in *Young* had personal knowledge of the defendant's phone number because it was listed as a contact in the phone, and the content of the text messages corroborated the recipient's testimony describing the defendant's conduct. *Id.*

Here, the State made a prima facie showing of authenticity for the text messages. Silvernail testified that Thomas provided that number as Polley's phone number, establishing the personal belief that the phone number belonged to Polley. The contents, substance, and distinctive characteristics of the text message exchange further establish the prima facie showing. Silvernail responded to, "Who's this," with, "Your aunt" and a detailed explanation of the backpack and its contents, her presumption that the backpack and its contents belonged to Polley, and an order for Polley to come get the backpack and its contents or she would call law enforcement. 3 VRP at 145. The response of, "Yep i will n their [sic] is no way u could have found it it was put away n if i had a ride i would have already been there to get the back pack [sic]," shows confirmation of Silvernail's presumption and acquiescence to Silvernail's order. CP at 50; *see* 3 VRP at 147.

Polley's testimony that he did not respond to Silvernail's text messages and that his father did not have his phone number go to the weight of the evidence, not its admissibility. *Young*, 192 Wn. App. at 857. Therefore, we hold that the trial court did not err in admitting the text messages.

3. Other Suspect Evidence

Polley argues that the trial court erred in denying his motion to introduce other suspect evidence. We hold that the trial court did not err in excluding Polley's other suspect evidence.

Both the Sixth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution guarantee the criminal defendant's right to present a defense. *State v. Starbuck*, 189 Wn. App. 740, 750, 355 P.3d 1167 (2015), *review denied*, 185 Wn.2d 1008 (2016). Alleging that a ruling violated the defendant's right to a fair trial does not change the standard of review from abuse of discretion, but an erroneous evidentiary ruling that violates the defendant's constitutional rights is presumed prejudicial unless the State can show the error was harmless beyond a reasonable doubt. *Franklin*, 180 Wn.2d at 377 n.2; *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013). A criminal defendant does not have a constitutional right to present irrelevant or inadmissible evidence. *Starbuck*, 189 Wn. App. at 750.

The standard for the relevance of other suspect evidence is whether it tends to connect someone other than the defendant with the crime. *Franklin*, 180 Wn.2d at 381; *State v. Downs*, 168 Wash. 664, 667, 13 P.2d 1 (1932). Before the trial court admits "other suspect" evidence, the defendant must present a combination of facts or circumstances pointing to a nonspeculative link between the other suspect and the crime. *Franklin*, 180 Wn.2d at 381. The defendant bears the burden of establishing the relevance and materiality of other suspect evidence. *Starbuck*, 189 Wn. App. at 752. A showing that it was possible for the third party to commit the crime is insufficient.

State v. Rehak, 67 Wn. App. 157, 163, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022, and *cert. denied*, 508 U.S. 953 (1993). Importantly, the inquiry focuses on whether the evidence tends to create a reasonable doubt as to the defendant's guilt, and not on whether it establishes the third party's guilt beyond a reasonable doubt. *Franklin*, 180 Wn.2d at 381.

Here, Polley contends that the "other suspect" evidence would have provided that: (1) "Tina James received Mr. Polley's mail for three years but that ended and she gave all his mail and documents to a third party she believed was taking those items to Ms. Silvernail's house"; (2) "Silvernail called 911 to report that [Espinoza] dropped off the backpack at her house"; and (3) "Thorsness and Mr. Espinoza were also charged with possessing . . . Brittany Rader's, identification information." Br. of Appellant at 21. Polley's argument that the trial court erred in excluding the other suspect evidence fails because none of the evidence that Polley argues should have been admitted creates a reasonable doubt as to Polley's guilt.

At best, the evidence that Polley argues should have been admitted supports a theory that Espinoza and Thorsness may *also* be guilty, but does not create reasonable doubt as to Polley's guilt. *Franklin* holds that "other suspect" evidence is relevant where it "'tend[s] to connect' *someone other than the defendant* with the crime," 180 Wn.2d at 381 (quoting *Downs*, 168 Wash. at 677) (emphasis added), but that, when considering the admission of "other suspect" evidence, the proper focus is "'whether the evidence offered tends to create a reasonable doubt as to the *defendant's* guilt.'" 180 Wn.2d at 381 (quoting *Smithart v. State*, 988 P.2d 583, 588 & n.21 (Alaska 1999)). Therefore, we hold that the trial court did not err in excluding Polley's other suspect evidence.

B. SUFFICIENCY OF THE EVIDENCE

Polley argues that the State did not present sufficient evidence to convict him of identity theft or fraud. We disagree.

1. Standard of Review

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence. *Id.* All reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant. *Id.*

2. Identity Theft—Counts I, III-X, and XII

Polley first argues that the State did not present sufficient evidence to convict him of identity theft because the State did not present sufficient evidence to prove that (1) he possessed the victim's personal and financial information, and did so (2) with intent to commit a crime. In support, Polley argues that the State did not prove that the backpack belonged to him, nor that he ever possessed the backpack. We hold that State presented sufficient evidence to establish that Polley possessed the victim's personal and financial information with intent to commit a crime, especially as the truth of the State's evidence is admitted and all reasonable inferences are drawn in the State's favor.

RCW 9.35.020 proscribes identity theft. The statute states in relevant part:

> (1) No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime.
>
> . . . .
>
> (3) A person is guilty of identity theft in the second degree when he or she violates subsection (1) of this section under circumstances not amounting to identity theft in the first degree. Identity theft in the second degree is a class C felony punishable according to chapter 9A.20 RCW.

RCW 9.35.020.

Here, the testimony presented by Silvernail, law enforcement, and the victims was sufficient to convict Polley on all counts of second degree identity theft. Where the truth of the State's evidence is admitted and the reasonable inferences are drawn in the State's favor, the evidence presented in Silvernail's testimony established that: (1) Silvernail found a backpack containing the victims' personal and financial information in her garage; (2) Silvernail assumed the backpack belonged to Polley, based on the several pieces of mail addressed to, and checks made out to, Polley in the backpack; and (3) Silvernail's suspicions were confirmed when Polley responded to Silvernail's text message acknowledging that the backpack was his, disputing how Silvernail could have found the backpack, and his intent to come retrieve the backpack. The testimony of the officer who arrested Polley is further evidence that the backpack belonged to Polley because it was Polley who identified the backpack at his aunt's house when being told he was under arrest "for items that he left at a relative's home." 4 VRP at 360. This evidence is sufficient for rational trier of fact to find that Polley possessed the victims' personal and financial information beyond a reasonable doubt.

The testimony of Deputy Moss and the victims, where truth of the evidence is admitted and the reasonable inferences therefrom are drawn in favor of the State, is sufficient for a rational trier of fact to find that Polley intended to use the victims' personal and financial information to commit a crime. Deputy Moss testified that the articles relating to each of the victims' personal and financial information were recovered from Polley's backpack. Each victim who was still alive testified that Polley was not given permission to use or possess the articles containing their personal and financial information. One victim did not testify, but the State presented evidence that the victim had passed away over three years before the checks purporting to be from him were dated. The reasonable inference that may be drawn from the numerous articles of personal and financial documents belonging to at least 12 people other than Polley,[2] where Polley did not have permission to be in possession of the articles belonging to at least the 10 victims, is that Polley was possessing the victims' personal and financial information with the intent to commit a crime.

Therefore, we hold that the State provided sufficient evidence to convince a rational trier of fact beyond a reasonable doubt that Polley possessed the victims' personal and financial information with intent to commit a crime beyond a reasonable doubt. *Salinas*, 119 Wn.2d at 201. And, accordingly, we hold that Polley's challenges to the sufficiency of the evidence for his convictions for second degree identity theft fail.

[2] The 12 people are the 10 named victims plus "Steve McClendon" and "Michael Lawrence."

3. Forgery—Count II

Polley argues that the State did not present sufficient evidence to convict him of forgery because it did not present sufficient evidence to prove that he "possessed or altered the fraudulent checks." Br. of Appellant at 13. We hold that Polley's challenge to the sufficiency of the evidence for his conviction for forgery fails.

RCW 9A.60.020 provides in relevant part:

> (1) A person is guilty of forgery if, with intent to injure or defraud:
>
> (a) He . . . falsely makes, completes, or alters a written instrument or;
>
> (b) He . . . possesses, utters, offers, disposes of, or puts off as true a written instrument which he . . . knows to be forged."

Polley's argument is that "[t]he evidence established that the checks were in the backpack in Ms. Silvernail's garage, but there was no handwriting analysis, DNA or fingerprint analysis to connect Mr. Polley to the backpack and checks." Br. of Appellant at 13. However, for the same reasons explained in the preceding subsection, the State present sufficient evidence to establish Polley possessed the forged checks. *See* subsection 2, *supra* (reasoning that when the truth of the State's evidence is admitted and the reasonable inferences drawn in the State's favor, the State's evidence was sufficient to convince a rational fact finder that Polley possessed the backpack and its contents). Therefore, we hold that the State provided sufficient evidence to convince a rational trier of fact that Polley possessed the forged checks beyond a reasonable doubt. *Salinas*, 119 Wn.2d at 201. And, accordingly, we hold that Polley's challenge to the sufficiency of the evidence for his conviction for forgery fails.

C. JUROR MISCONDUCT

Polley argues he was denied his right to a fair trial when the trial court did not inquire into juror 11's fitness. We disagree.

RCW 2.36.110 governs the removal of unfit jurors and provides in pertinent part:

> 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.

Similarly, CrR 6.5 provides, "If at any time before submission of the case to the jury a juror is found unable to perform the duties[,] the court shall order the juror discharged."

Polley's argument fails because while the statute and court rule place an "obligation on the trial court to excuse any juror who is unfit and unable to perform the duties of a juror," they do not create obligations regarding the investigation of alleged misconduct. *State v. Jorden*, 103 Wn. App. 221, 227, 228-29, 11 P.3d 866 (2000), *review denied*, 143 Wn.2d 1015 (2001). Rather, the investigation and resolution of misconduct allegations are discretionary with the trial court. *Turner v. Stime*, 153 Wn. App. 581, 587, 222 P.3d 1243 (2009) ("A trial court has significant discretion to determine what investigation is necessary on a claim of juror misconduct."). Thus, we hold that the trial court did not abuse its discretion here because the trial court and both attorneys had the opportunity to view juror 11 throughout the day's proceedings, and neither attorney nor the trial court determined further inquiry was warranted after the allegation was made. Therefore, because the trial court did not abuse its discretion for failing to inquire into the alleged misconduct, Polley's argument that he was denied a fair trial for the trial court's failure to inquire further fails.

D. INEFFECTIVE ASSISTANCE OF COUNSEL

Polley argues he received ineffective assistance of counsel when his defense attorney did not "move for a mistrial or move to voir dire" when the potential juror misconduct was alleged. Br. of Appellant at 28. We hold that Polley fails to establish he was prejudiced by his attorney's failure to make either motion, and therefore, Polley's argument fails.

The right to effective assistance of counsel is afforded to criminal defendants by the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). To establish ineffective assistance of counsel, Polley must show both deficient performance and resulting prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If Polley fails to establish either deficient performance or resulting prejudice, the court need not inquire further. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). To establish prejudice, Polley must demonstrate that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *McFarland*, 127 Wn.2d at 335.

We hold that Polley's arguments that he received ineffective assistance of counsel fail because Polley fails to argue, or even allege, prejudice. *Hendrickson*, 129 Wn.2d at 78 (holding that failure to establish either deficient performance of prejudice is fatal to an ineffective assistance of counsel claim). Even if Polley had alleged prejudice, his claim would fail because he fails to show that either motion would have been granted had his attorney made either motion. Therefore, we hold that Polley's claim of ineffective assistance of counsel for his attorney's failure to move for a mistrial or to voir dire juror 11 fails.

In conclusion, we hold that the trial court did not abuse its discretion in making the challenged evidentiary rulings or in failing to inquire into the alleged juror misconduct; the evidence presented was sufficient to convict Polley on all of the identity theft and forgery counts; and Polley's ineffective counsel claim fails. Accordingly, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Maxa, A.C.J.

Melnick, J.