

Court of Appeals No. 38265-2-II

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

GREG RICHARD HOPKINS,

Defendant/Appellant.

BRIEF OF APPELLANT

**Appeal from the Superior Court of Pierce County,
Cause No. 07-1-05989-1
The Honorable Thomas J. Felnagle, Presiding Judge**

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TABLE OF CONTENTS

Page(s)

A. ASSIGNMENTS OF ERROR.....1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....1-2

C. STATEMENT OF THE CASE.....2-13

1. Procedural History.....2-3

2. Substantive Facts.....3-10

3. Facts Pertaining to Dismissal of Deliberating Juror.....10-13

D. ARGUMENT.....13-31

I. THE SEIZURE OF MR. HOPKINS WAS UNLAWFUL BECAUSE OFFICER WHELAN LACKED A REASONABLE SUSPICION THAT MR. HOPKINS WAS ENGAGED IN CRIMINAL ACTIVITY.....13

II. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF A KNIFE THAT WAS NEITHER PURPORTED TO HAVE BEEN IN MR. HOPKINS' POSSESSION NOR USED IN THE COMMISSION OF THE OFFENSE.....20

TABLE OF CONTENTS (continued)

	<u>Page(s)</u>
III. MR. HOPKINS WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.....	24
IV. THE TRIAL COURT'S DISMISSAL OF JUROR NUMBER 6 WAS CONSTITUTIONAL ERROR THAT DEPRIVED MR. HOPKINS OF THE RIGHT TO A UNANIMOUS AND IMPARTIAL TRIAL.....	26
E. CONCLUSION.....	32

TABLE OF AUTHORITIES

Page(s)

Washington Cases

State v. Brown, 119 Wn.App. 473,81 P.3d 916 (2003).....20

State v. Contreras, 92 Wn.App. 307,966
P.2d 915 (1998).....14,15,19

State v. Elmore, 155 Wn.2d 758,123 P.3d 72 (2005).....27,28,29,31

State v. Holmes, 43 Wn.App. 397, 717 P.2d 766 (1986).....21

State v. Jeffries, 105 Wn.2d 398,717 P.2d 722,
cert. denied, 479 U.S. 922 (1986).....22

State v. Johnson, 125 Wn.App. 443,105 P.3d 85 (2005).....29

State v. Kennedy, 107 Wn.2d 1,726 P.2d 445 (1986).....17

State v. Ladson, 138 Wn.2d 343,979 P.2d 833 (1999).....19

State v. Lloyd, 138 Wash. 8,244 P.130 (1926).....22

State v. Lynn, 67 Wn.App. 339,835 P.2d 251 (1992).....14

State v. McFarland, 127 Wn.2d 322,899 P.2d 1251 (1995).....14

State v. Petrich, 101 Wn.2d 566,683 P.2d 173 (1984).....26-27

State v. Pressley, 64 Wn.App. 591,825 P.2d 749 (1992).....18

State v. Rankin, 151 Wn.2d 689,92 P.3d 202 (2004).....17

State v. Renfrom, 96 Wn.2d 902,639 P.2d 737,
cert. denied, 459 U.S. 842 (1982).....21

State v. Robinson, 24 Wn.2d 909, 67 P.2d 989 (1946).....22

TABLE OF AUTHORITIES (continued)

Page(s)

Washington Cases (continued)

State v. Rupe, 101 Wn.2d 664,683 P.2d 571 (1984) cert. denied,
486 U.S. 1061 (1987), review denied, 487 U.S. 1263 (1988).....22-23

State v. Scott, 110 Wn.2d 682,757 P.2d 492 (1988).....14

State v. Sweeney, 56 Wn.App. 42,P.2d 562 (1989).....20

State v. Williams, 102 Wn.2d 733,689 P.2d 1065 (1984).....17,19

Washington Statutes and Court Rules

RCW 9A.52.030.....2

CrR 3.5.....3

ER 401.....21

ER 403.....22

RAP 2.5.....14,19

Federal Cases

Adams v. United States ex rel. McCann, 317 U.S. 269,275,276,
63 S.Ct. 236, 87 L.Ed.2d 268 (1942).....24

Argersinger v. Hamlin, 407 U.S. 25,92 S.Ct. 2006,32
L.Ed.2d 530 (1972).....24

Duncan V. Louisiana, 391 U.S. 145,88 S.Ct. 1444,
20 L.Ed. 2d 491 (1968).....27

Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792,9
L.Ed. 2d 799 (1963).....24

TABLE OF AUTHORITIES(continued)

	<u>Page(s)</u>
<u>Federal Cases (continued)</u>	
<i>McMann v. Richardson</i> , 397 U.S. 759, 90 S.Ct. 1441,25 L.Ed.2d 763 (1970).....	25
<i>Minnesota v. Dickerson</i> , 508 U.S. 366,113 S. Ct. 2130,2135,124 L.Ed.2d 334 (1993).....	17
<i>People v. Garcia</i> , 997 P.2d 1 (Colo. 2000).....	27
<i>Powell v. Alabama</i> , 287 U.S. 45,53 S.Ct. 55,77 L.Ed. 158 (1932).....	24
<i>Strickland v. Washington</i> , 466 U.S. 668,685,104 S.Ct. 2052,80 L.Ed.2d 674 (1984).....	2,24,25
<i>Terry v. Ohio</i> , 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968).....	1,17,18
<i>United States v. Brown</i> , 823 F.2d 591 (D.C. Cir. 1987).....	27
<i>United States v. Symington</i> , 195 F.3d 1080 (9th Cir. 1999).....	27
<i>United States v. Thomas</i> , 116 F.3d 606 (2nd Cir. 1997).....	27

Constitutional Provisions

Wash. Const. Art. 1, § 3, 7, 21, 22.....	17,19,26
U.S. Const. Amend 4.....	17,19
U.S. Const. Amend. 6.....	24,27
U.S. Const. Amend. 14.....	27

A. ASSIGNMENTS OF ERROR

1. The Superior Court record establishes that the evidence obtained as the direct result of the unlawful seizure of Mr. Hopkins would likely have been suppressed had the motion been made.

2. The evidence that Ms. Webb possessed a knife was inadmissible because it was irrelevant and more prejudicial than probative.

3. Trial counsel's failure to bring a motion to suppress the evidence obtained as the result of the unconstitutional seizure of Mr. Hopkins, and his failure to move to exclude the inadmissible knife evidence, prejudiced Mr. Hopkins.

4. The trial court erroneously dismissed Juror Number 6 where a reasonable possibility existed that her difficulties in reaching a unanimous verdict were the result of her views of the insufficiency of evidence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was the seizure of Mr. Hopkins unjustified under *Terry v. Ohio*, where at the time of the seizure Officer Whelan lacked a reasonable suspicion that Mr. Hopkins had committed a crime?

(Assignment of Error Number One).

2. Was the evidence inadmissible that a companion of Mr. Hopkins had a knife in her possession, where no evidence was presented that Mr. Hopkins was even aware of the knife, let alone used it to commit a burglary? (Assignment of Error Number Two).

3. Is the *Strickland* test satisfied where trial counsel erroneously failed to move to suppress and/or exclude evidence when litigating such motions would likely have changed the result of the case? (Assignment of Error Number Three).

4. Was Juror Number 6 improperly removed where, during she deliberations, she expressed that she could no longer be fair in regards to the State, and where there was a reasonable possibility the reason for her changed position was that she doubted the veracity of the State's evidence? (Assignment of Error Number Four).

C. STATEMENT OF THE CASE

2. *Procedural History*

On November 28, 2007, the appellant/defendant, Greg Richard Hopkins, was charged by Information with one count of second degree burglary pursuant to RCW 9A.52.030 (1). CP 1.

A hearing pursuant to CrR 3.5 was held on July 24, 2008. RP II 18-50, The trial Court ruled that Mr. Hopkins' statements to Officer Whelan were admissible. CP 80-82, RP II 51-53.

Mr. Hopkins was convicted by jury verdict on August 1, 2008. CP 51. On September 4, 2008, Mr. Hopkins received a standard range sentence of thirty-eight (38) months in the Department of Corrections. CP 54-65. A timely Notice of Appeal was filed on the same date. CP 68.

2. *Substantive Facts*

On June 28, 2007, Steilacoom Police Officer Larry Whelan noticed an unoccupied truck that he thought looked out of place in the area near Steilacoom Marina. RP III 82, 123. Officer Whelan noticed the vehicle while driving to work; he lives in the immediate vicinity. RP III 82. His shift begins at 6:00 a.m. Officer Whelan testified that he ran a license plate check on the truck at about 6:30 a.m. RP III 85. RP III 79, RP III 84. The check revealed nothing amiss with the vehicle. It was parked lawfully but inside it was messy. RP III 123. Officer Whelan testified that there is a nearby beach front which was open to the public. RP III 123. Nonetheless, Officer Whelan decided

to investigate further. He began contacting residents of nearby homes. He testified that he arrived at "the marina itself" between 7:30 - 8:30 a.m. RP III 79.

While investigating the "suspicious" vehicle, Office Whelan met a man and woman walking in the area. RP III 82,86. He recognized the man as Greg Hopkins, the registered owner of the truck, because he had just pulled up Mr. Hopkins' photograph via the computer license plate check. RP III 122.

Officer Whelan approached the couple. The woman was "a little embarrassed" but very cooperative and friendly. RP III 86. Mr. Hopkins appeared "agitated" that Office Whelan was questioning them. RP III 87. Officer Whelan observed a flashlight and gloves in Mr. Hopkins' jacket pocket. He called for backup. RP III 90, 94. At some point, Mr. Hopkins protested "Is it fucking illegal for a guy and a girl to walk on the beach?" RP III 125. Mr. Hopkins did, however, comply with Officer Whelan's requests. When Officer Whelan requested identification Mr. Hopkins went to the cab of the truck to obtain his wallet. Officer Whelan proceeded to document the identification information he obtained from both Mr. Hopkins and the

woman, whose name was Michelle Webb. RP III 88-89.

Ms. Webb walked around Officer Whelan's back side. The officer then noticed "she had a knife in her hands." RP III 89. He promptly pulled his gun and ordered Ms. Webb and Mr. Hopkins to get down on the ground. Both Ms. Webb and Mr. Hopkins complied. Officer Whelan then called a second time for priority back up. When backup arrived, Ms. Webb and Mr. Hopkins were removed from the ground, handcuffed, patted down, placed in separate patrol cars, and *Mirandized*. RP III 90. Ms. Webb and Mr. Hopkins were then interviewed separately. RP III 90-91. Mr. Hopkins was arrested for burglary.

A search of Mr. Hopkins' pants pockets revealed "two snippets of wire." RP III 103-104, 118. Officer Whelan testified that Mr. Hopkins replied that he had been in the marina area looking at racoons, and that he needed the gloves "because of the racoons." RP III 92.

After Mr. Hopkins was "in custody" and in the police car Officer Whelan went to investigate some buildings in the marina. RP III 118. Shortly thereafter, Officer Whelan went through the same area

with Shirley Wang, who is the “marina owner.” RP III 118, 166. Ms. Wang’s marina business includes a moorage, a convenience store, and some storage type buildings. RP III 163. Ms. Wang reported that there was damage to the building area that she believed was not there a day or two before, but she was not certain. RP III 167. The damage was to two doors and a lock. RP III 159-161. Additionally, some fishing poles had been moved from a storage area.

Ms. Wang testified that her marina business, and particularly the convenience store, has no fixed day or hours of operation. She runs it alone with the part time assistance of maintenance people. She believed the store was closed on June 28, 2007.

Ms. Wang testified that entry to the store can be gained through a white gate which has no lock and is always open to the public. RP III 171. Officer Whelan testified the white gate had a lock and chain. RP III 81. Ms. Wang testified that her business had been burglarized “many times.” The worst time was the one in which her husband was murdered in 1987. RP III 157.

Officer Whelan did not describe the marina as a “high crime” area, but testified that some property crimes, such as vehicle prowls

and vehicle thefts, had previously occurred at both the marina area and the area near the railroad tracks. RP III 83.

Shortly after Mr. Hopkins' arrest for burglary Officer Whelan gave a piece of the wire he found in Mr. Hopkins' pants pocket to David Morgan to examine. David Morgan is an electrician who works for Steilacoom's electrical department. RP III 139-140. Mr. Morgan took the piece of wire to Ms. Wang's marina buildings to look for a match. Mr. Morgan took the piece of wire to each of the rooms and in the "third room down" he located a "whole bunch of wire coiled up" on the ground. RP III 144. Mr. Morgan matched the piece of wire to a coil that had a missing section the same length and type as the piece Officer Whelan had given him. RP III 145. Mr. Morgan testified that the piece of wire did not appear to have been cut cleanly with wire cutters, although he had previously told Mr. Hopkins' attorney that he thought a wire cutter had been used. RP III 145, 151. He estimated the value of the approximately twelve (12) inch common piece of wire at less than \$3.00. Mr. Morgan returned the piece of wire to Officer Whelan at some point. RP III 147, 149, 152.

The State's theory of the case was that Mr. Hopkins had broken

into the buildings in the marina area to commit and/or plan a future theft. Mr. Hopkins took only the wire pieces because he intended to return later to take more. Under the State's theory, Mr. Hopkins also moved the fishing poles to a more convenient location for later retrieval. RP V 265, 278.

At trial, Mr. Hopkins testified that on June 28, 2006, he arrived at work at about 5:45 a.m. for a 6:00 a.m. shift, but was told he did not have to work that day. RP IV 178. Mr. Hopkins then drove to a friend's home nearby. His friend, John Duncan, was asleep but Mr. Duncan's three guests were awake. The guests included Mr. Duncan's girlfriend and two other women, one of whom was Michelle Webb, who Mr. Hopkins met for the first time. RP IV 179. Mr. Hopkins conversed briefly with Ms. Webb and then went outside to perform some simple work on his truck. The single piece of wire in his pocket was for that purpose. RP III 180, 189.

Mr. Hopkins and Ms. Webb chatted again while he was working on his truck. The two decided to drive to the water/beach area for a walk. He thinks they left at about 7:00 a.m., but was not wearing a watch, and could not be entirely sure about the time. RP IV 180. Upon arriving at the water area Mr. Hopkins and Ms. Webb walked

along the beach, relaxed, and generally visited for awhile. RP IV 181. Ms. Webb became thirsty. Mr. Hopkins walked to the nearby convenience store that appeared to be open to purchase a soda. The store appeared to be open because two neon lights in the signs of the window of the store were on, and the door to the store was unlocked. RP IV 181. Mr. Hopkins called out, but no one appeared to be manning the store, so he left closing the door behind him. RP IV 182.

As they were walking toward his truck to leave the area, Mr. Hopkins and Ms. Webb encountered Officer Whelan. Mr. Hopkins felt “threatened” by the officer’s questions and tone. RP IV 183. While he was complying with Officer Whelan’s request to obtain his identification from his wallet, Mr. Hopkins heard the officer order him to the ground. Surprised, Mr. Hopkins turned to see the officer’s gun pulled out. He quickly fell to the ground, unaware of what was happening, or that Ms. Webb was holding a knife. RP IV 183-185. Mr. Hopkins remained face down on the ground until more officers arrived. He was then handcuffed, taken to a patrol car, and driven to Steilacoom Police Station. RP IV 185.

Mr. Hopkins denied that piece of wire in his pocket was the

same one that was entered into evidence. RP IV 189. He also denied that he was the owner of the gloves or flashlight that were entered into evidence. RP IV 190-192.

3. *Facts Pertaining to Dismissal of Deliberating Juror*

Mr. Hopkins' jury was plainly experiencing difficulties with its deliberations. The jury's first note/question to the Court came within about one hour of beginning deliberations on July 30, 2008.¹ A second note/question followed about two hours later, and a third soon thereafter (time unspecified). By the next day, a fourth note/question was sent to the Court. CP 27-50; 85-94; Memorandum of Journal Entry, p. 7-8.

Jury note/question number one read: "We would like to see exhibit 15 (police report). Can we obtain the police report?" The second jury note/question read: "If you lawfully entered a building and then your intent to commit the crime became present, is it still burglary? See Rule 5." RP V 308. Jury note/question number three read: "Is it illegal for a member of law enforcement to allow a piece of

1

The jury notes/questions were filed with the Superior Court under the Court's Instructions of the Jury. CP 27-50.

evidence to leave his or her sight.” RP V 310. To each of these questions the Court repeatedly told and wrote to the jury that it must rely on the instructions and evidence already provided. CP 27-50; RP V 310-312. The fourth note/question sent by the jury read:

“One of the jurors feels unable to continue this case because of being too emotional regarding the prosecutor and police officers. She feels she cannot 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.” CP 27-50; RP VI 316.

In response to this turn of events, the Court called out the jury foreperson to determine the identity of the juror who asked if it was possible to be dismissed. RP VI 320-321. Next, the Court confirmed with the juror herself that the note expressed her feelings accurately. RP VI 322. The State’s position was that the juror should be excluded from further deliberations; the defense objected to her removal. RP VI 324. Defense counsel stated.

Defense Counsel: At this time, your Honor, defense is not agreeing to dismissing Juror Number 6. Basically, I believe we can’t really delve any further, but there is still a question, in my mind at least, as to whether the juror is actually having issues of fairness or impartiality or having issues with credibility of the

officer. It's a question as to whether she can't be fair to the State because of the officer's status as an officer or if she just basically does not want to believe what the officer says. So, in this case, we are not agreeing to dismissing the juror.....

At this point, defense's position is that, since they are still deliberating, they could potentially still deliberate and reach a fair and just verdict. So, in essence, we are asking to keep her on as a juror. RP VI 324-325.

The Court decided to remove Juror Number 6, and attempts were made to locate the alternate, whose phone number had changed since the trial's inception. RP VI 327-331. The Court then advised the jury that it would be dismissing Juror Number 6, and that attempts were being made to locate the alternate. RP VI 332. The jury was excused until such time that the alternate became available. RP VI 332-333. The alternate was seated the following day. RP 8-1-08 6.²

Defense counsel reiterated his objection thusly:

2

The VRP dated 8-1-08 is unnumbered. For purposes of clarity this transcripts will, therefore, be referenced by identifying the date of the proceeding, followed by the page number.

. . . . and I just wish to renew that objection on the basis that I don't believe that in looking at inquiry, that she was at that point in such a position that she could [not] engage in further deliberations.

I think that the stress of all the jurors in these types of cases is in many ways very, very difficult, and I believe that she should have been allowed to or required to continue her deliberations in matter. RP 8-1-08 3.

The Court then read Instruction No. 16 to the jury and seated Juror Number 13. CP 27-50; RP 8-1-08 4-6. The Court verbally admonished the jury to "disregard all previous deliberations and begin deliberations anew." RP 8-1-08 7. At 12:50 p.m. the jury began deliberating. Twenty-five minutes later, at 1:15 p.m., the jury reached its unanimous verdict. CP 85-94; Memorandum of Journal Entry, p. 9.

D. ARGUMENT

I. THE SEIZURE OF MR. HOPKINS WAS UNLAWFUL BECAUSE OFFICER WHELAN LACKED A REASONABLE SUSPICION THAT MR. HOPKINS WAS ENGAGED IN CRIMINAL ACTIVITY.

Trial counsel did not move to suppress evidence acquired as the result of Mr. Hopkins' unlawful seizure. The record here, however, is sufficiently developed for this Court to determine the issue despite the lack of a hearing at the trial Court.

Appellate courts will not review on appeal an alleged error not raised at trial unless it is a "manifest error affecting a constitutional right." RAP 2.5 (a)(3); *State v. Scott*, 110 Wn.2d 682,686-87,757 P.2d 492 (1988). An appellant must show actual prejudice in order to establish that the error is "manifest." *State v. Lynn*, 67 Wn.App. 339,346,835 P.2d 251 (1992). Without an affirmative showing of actual prejudice, the asserted error is not "manifest" and thus is not reviewable under RAP 2.5 (a)(3). *State v. McFarland*, 127 Wn.2d 322,899 P.2d 1251 (1995).

"If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." *McFarland*, 127 Wn.2d at 333. Thus, the defendant must show the motion likely would have been granted based on the record in the trial court. *State v. Contreras*, 92 Wn.App. 307,313-14,966 P.2d 915 (1998), quoting *McFarland*, 127 Wn.2d at 334 n.2. Where the

record is sufficiently developed, an appellate court can determine whether a motion to suppress clearly would have been granted or denied, and thus can review the suppression issue, even in the absence of a motion and trial court ruling thereon. Contreras, 92 Wn.App at 313-14. (“We conclude that when an adequate record exists, the appellate court may carry out its long-standing duty to assure constitutionally adequate trials by engaging in review of manifest constitutional errors raised for the first time on appeal.”) As a result, the appellate court must look to the facts of the seizure and arrest to determine whether a motion to suppress would properly have been granted or denied. *Id.*

The record here shows that Mr. Hopkins was seized at the point where he approached Officer Whelan, and Officer Whelan observed the gloves and flashlight in Mr. Hopkins’ jacket pocket. Officer Whelan testified that once he saw those items he called the first time for backup, and that he intended to prevent Mr. Hopkins from leaving. Mr. Hopkins was not “free to leave.” RP II 36. This seizure occurred before Officer Whelan entered the marina buildings, before he performed the walk-through with Ms. Wang, prior to Officer Whelan

seeing a knife in Ms. Webb's hand, and even prior to Mr. Hopkins' initial protestation to the identification request. RP II 36.

Officer Whelan testified that Mr. Hopkins was being detained because of his "dirty hands, the flashlight, the gloves, the totality of the circumstances, location, time, so, no he was not free to go." "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 II 36. When asked how he would have stopped Mr. Hopkins from leaving, Officer Whelan replied that he would have done so "with his presence and then verbally." If Mr. Hopkins did not respond to either of those incentives, Officer Whelan would have followed Mr. Hopkins. He would also have employed the assistance of the backup officers, and used physical force to stop him, because "a reasonable use of force would be applicable under this situation." RP II 37. Mr. Hopkins testified that he in fact felt threatened at this point. RP IV 183.

Under these circumstances, Mr. Hopkins was plainly seized from the beginning of his interaction with Officer Whelan, which is when Officer Whelan observed the flashlight and gloves. The

question, therefore, is whether the seizure was justified under Terry.

Both the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution protect against unreasonable searches and seizures. State v. Williams, 102 Wn.2d 733,736,689 P.2d 1065 (1984). Warrantless searches and seizures are per se unreasonable. *Id*; Minnesota v. Dickerson, 508 U.S. 366,372,113 S. Ct.2130,2135,124 L.Ed.2d 334 (1993). A seizure occurs when “an individual’s freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer’s use of force or display of authority.” State v. Rankin, 151 Wn.2d 689,695,92 P.3d 202 (2004).

In the absence of a warrant and probable cause to arrest, police may conduct a brief investigative detention known as a Terry stop. Terry v. Ohio, 392 U.S. 1, 19-21,88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968). An investigative stop, although less intrusive than an arrest, is nevertheless a seizure and must therefore be reasonable under the Fourth Amendment to the United States Constitution and under article 1, section 7 of the Washington Constitution. State v. Kennedy, 107 Wn.2d 1,4,726 P.2d 445 (1986).

The initial interference with the suspect's freedom of movement must be justified at its inception in order for a Terry stop to be lawful. *Williams*, 102 Wn.2d at 739 (citing *Terry*, 392 U.S. at 19-20). A Terry stop must be based on a well-founded suspicion drawn from "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21; *State v. Gluck*, 83 Wn.2d 424,426,518 P.2d 703 (1974). The reasonableness of the officer's suspicion is determined by the totality of circumstances known to the officer at the inception of the stop. *Kennedy*, 107 Wn.2d at 6. The level of articulable suspicion required to justify a Terry stop is stated as "a substantial possibility that criminal conduct has occurred or is about to occur." *Id.* The facts justifying a Terry stop must be more consistent with criminal than with innocent conduct. *State v. Pressley*, 64 Wn.App. 591,596,825 P.2d 749 (1992).

In the case at bar, the facts presented were more consistent with innocent conduct than with criminal conduct. Mr. Hopkins' truck was lawfully parked and the beach area was open to the public. Officer Whelan's subjective belief that Mr. Hopkins' trucked looked out of place in his neighborhood, combined with dirty hands, a flashlight and

gloves did not rise to the level of articulable suspicion required to justify a Terry stop, and most certainly not a call for backup officers to assist in preventing Mr. Hopkins from leaving. Officer Whelan's intentions and display of authority are clearly demonstrated in the record at hand. The unlawful seizure of Mr. Hopkins is established by the record. Under the law, the trial Court likely would have granted a defense Motion to Suppress. The error here is manifest and reviewable under RAP 2.5 (i)(3). *State v. Contreras, Supra.*

The proper remedy is exclusion of all incriminating evidence as fruit of the poisonous tree. "When an unconstitutional search or seizure occurs, all subsequently uncovered evidence become fruit of the poisonous tree and must be suppressed." *State v. Ladson*, 138 Wn.2d 343,359,979 P.2d 833 (1999); accord *Williams*, 102 Wn.2d at 742 (suppressing evidence found as a result of unreasonably invasive Terry stop). The exclusionary rule requires suppression of evidence obtained as a result of an unlawful seizure under the Fourth Amendment and article I, section 7 of the Washington Constitution. *Wong Sun*, 371 U.S. at 488.

Here, the wire, the gloves and flashlight, as well as any post-

seizure statements made to the police are all fruits of the poisonous tree that must be excluded as evidence at trial on the grounds that they were obtained as a direct result of an unlawful seizure. The proper remedy under these facts is, therefore, reversal of the conviction and dismissal of the charges. *State v. Brown*, 119 Wn.App. 473,474,81 P.3d 916 (2003); *State v. Sweeney*, 56 Wn.App. 42,51,782 P.2d 562 (1989).

II. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF A KNIFE THAT WAS NEITHER PURPORTED TO HAVE BEEN IN MR. HOPKINS' POSSESSION NOR USED IN THE COMMISSION OF THE OFFENSE.

Officer Whelan testified that he observed a knife in Ms. Webb's hand, which caused him concern for his safety. RP III 89. During closing arguments, the knife was referred to by the prosecution on at least three separate occasions, but not in the context that Mr. Hopkins has used it to commit the crime. The prosecutor told the jury that Ms. Webb "pulled a knife on Officer Whelan." RP V 269. Again, during rebuttal closing, the prosecutor reminded the jury that "Ms. Webb pulled the knife on him," and yet again during rebuttal closing

the prosecutor argued that Officer Whelan saw Ms. Webb “pull the knife.” RP V 291,292. At no point was any evidence admitted that linked Mr. Hopkins to the possession of the knife. The only remotely possible connection of the knife to Mr. Hopkins’ charge would have been the pure speculation that either Mr. Hopkins or Ms. Webb had used the knife to cut the wire, but no such evidentiary link was ever made or even argued to the jury. Notably, Ms. Webb was not jointly tried with Mr. Hopkins, nor was there an indication in the trial proceedings that she had been charged with a crime. The knife evidence was irrelevant and highly prejudicial to Mr. Hopkins.

Relevant evidence is that which tends to make the existence of any fact of consequence to the determination of the action more or less probable than it would be without the evidence. ER 401; *State v. Renfrom*, 96 Wn.2d 902,906,639 P.2d 737, cert. denied, 459 U.S. 842 (1982). Relevant evidence meets two requirements: (1) it must have a tendency to prove or disprove a fact (probative value); and (2) that fact must be of consequence in the context of the other facts and applicable substantive law(materiality). *State v. Holmes*, 43 Wn.App. 397, 399,717 P.2d 766 (1986).

Even if relevant, evidence is still inadmissible if its “probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . .” ER 403.

In the case at bar, the prosecutor attempted to persuade the jury that the knife wielding woman Mr. Hopkins was with served to prove Mr. Hopkins’ wrongdoing. Such reasoning, however, is inconsistent with Washington law. Our courts have repeatedly held that evidence of weapons or other articles not used in the commission of the crime or which are unrelated to the case are inadmissible. *State v. Jeffries*, 105 Wn.2d 398,412,717 P.2d 722, cert. denied, 479 U.S. 922 (1986); *State v. Robinson*, 24 Wn.2d 909,913-15, 67 P.2d 989 (1946); *State v. Lloyd*, 138 Wash. 8,16-17,244 P.130 (1926).

It is unnecessary to balance probative value against the prejudicial impact, as the knife does not have any legally recognized probative value. However, even if the knife had been relevant, its probative value in proving that Mr. Hopkins committed a burglary was overshadowed by the knife’s prejudicial impact.

Washington courts recognize the emotional impact that weapons can have on a jury. In *State v. Rupe*, 101 Wn.2d 664,683 P.2d 571

(1984) cert. denied, 486 U.S. 1061 (1987), review denied, 487 U.S. 1263 (1988), the Supreme Court reversed imposition of the death penalty on the basis that evidence relating to the defendant's gun collection was unfairly prejudicial. The state had argued that any error was non-prejudicial. The Supreme Court disagreed:

Personal reactions to the ownership of guns vary greatly. Many individuals view guns with great abhorrence and fear. Still others may consider certain weapons as acceptable but others as "dangerous." A third type may react solely to the fact that someone who has committed a crime has such weapons.

Rupe, 101 Wn.2d at 708. While Rupe deals with guns, the emotional impact created by a knife certainly equals that of a gun in the minds of many people.

By bringing attention to Ms. Webb's possession of the knife, the State intentionally pandered to the fears of the jury. The emotional impact of this type of evidence cannot be discounted or characterized as harmless error. The State made a point of emphasizing that Ms. Webb had pulled a knife on Officer Whelan. This was a reversible error because the knife evidence was irrelevant to Mr. Hopkins' case, and more prejudicial than probative. Moreover, the prosecutor deliberately mischaracterized Officer Whelan's testimony, implying

that the knife was used as a weapon against Officer Whelan when the testimony suggests that Ms. Webb was merely holding the knife. The inclusion of the knife evidence denied Mr. Hopkins his right to a fair trial.

III. MR. HOPKINS WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A criminal defendant has a Sixth Amendment right to counsel. See Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963); Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). “The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942). If he does not have funds to hire an attorney, a person accused of a crime has the right to have counsel appointed. Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972).

The right to counsel includes the right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759,771,n.13, 90 S.Ct. 1441,25 L.Ed.2d 763 (1970); *Strickland*, 466 U.S. at 686. The proper standard for attorney performance is that of reasonably effective assistance. *Strickland*, 466 U.S. at 687; *McMann*, 397 U.S. at 771. When raising an ineffective assistance of counsel claim, the defendant must meet the requirements of a two-prong test:

First the defendant must show counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687.

Mr. Hopkins' trial counsel rendered ineffective assistance by failing to move to suppress the evidence based on the unlawful seizure and subsequent search of Mr. Hopkins. As stated above, the record shows that Mr. Hopkins' seizure was unlawful and all evidence derived thereof must be suppressed. Trial counsel's failure to so move constitutes deficient performance.

Mr. Hopkins' trial counsel also rendered ineffective assistance

by failing to move to exclude the irrelevant and highly prejudicial knife evidence, which under the law, the trial Court was required to exclude.

Trial counsel's deficient performance prejudiced Mr. Hopkins. Had counsel moved to suppress the evidence on the basis of the unlawful seizure the charge would necessarily have been dismissed. Assuming for the sake of argument that trial counsel was not ineffective for failing to contest the unlawful seizure, counsel's deficient performance in failing to move to suppress the knife evidence, nonetheless, prejudiced Mr. Hopkins. The evidence against Mr. Hopkins was weak and circumstantial. The evidence that Mr. Hopkins' companion was armed with a knife, and according to the prosecutor, used that knife to threaten a police officer, was simply too negative and impermissibly prejudicial to permit a fair trial with a reliable result.

IV. THE TRIAL COURT'S DISMISSAL OF JUROR NUMBER 6 WAS CONSTITUTIONAL ERROR THAT DEPRIVED MR. HOPKINS OF THE RIGHT TO A UNANIMOUS AND IMPARTIAL TRIAL.

The Washington Constitution guarantees persons accused of a crime the right to due process and to a unanimous verdict by a fair and

impartial jury. Const. Art. I §§ 3,21, 22; State v. Petrich, 101 Wn.2d 566,569,683 P.2d 173 (1984). The United States Constitution guarantees the right to a unanimous jury in federal prosecutions, and to due process of law. U.S. Const. Amends. 6, 14. Duncan V. Louisiana, 391 U.S. 145,177,88 S.Ct. 1444, 20 L.Ed. 2d 491 (1968). A trial court's dismissal of a deliberating juror violates the constitutional right to a unanimous verdict if there is any possibility the dismissal stems from the juror's doubts about the sufficiency of the evidence. State v. Elmore, 155 Wn.2d 758,771,123 P.3d 72 (2005) (citations omitted).

Although a court has discretion to determine whether a juror's misconduct constitutes just cause for removal, that discretion is very narrowly constrained in this circumstance. *Id.* at 778. United States v. Symington, 195 F.3d 1080 (9th Cir. 1999); United States v. Thomas, 116 F.3d 606 (2nd Cir. 1997); United States v. Brown, 823 F.2d 591 (D.C. Cir. 1987); People v. Garcia, 997 P.2d 1 (Colo. 2000).

Elmore is the controlling law. In Elmore two jurors separately sent notes to the judge alleging Juror 8 refused to follow the court's instructions and said "[t]he law is shit and I won't convict anyone

based on what the law says.” *Elmore*, 155 Wn.2d at 763. The court then questioned the two jurors who wrote the notes. *Id.* Over defense counsel’s objection, the trial court dismissed Juror 8 without questioning him, based solely on the notes and the testimony of the two complaining jurors. *Id.*, at 764.

After the prosecution sought to bolster the court’s decision for appellate review, the trial court decided to question Juror 8. Juror 8 denied the allegation that he said the law was “shit” and denied refusing to follow the law or refusing to convict regardless of the law. *Id.*, at 765. However, Juror 8 did explain that he made comments regarding the credibility of the evidence and of the witnesses. *Id.* The court’s written findings stated that Juror 8 was not credible, refused to participate, refused to follow the law as instructed, the complaining jurors were credible, and Juror 8’s dismissal was not based on any valid disagreement with other jurors, including disagreements about witness credibility. *Id.*, at 765-66. The court replace Juror 8 with an alternate, and the newly constituted jury found Elmore guilty. *Id.*, at 766.

On appeal, Elmore argued that the dismissal of Juror 8 was error where there was evidence that Juror 8’s disagreement with other jurors

was related to the sufficiency of the evidence. *Id.* The Elmore 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 his or her views stem from an evaluation of the sufficiency of the evidence.

Id., at 778. See also, State v. Johnson, 125 Wn.App. 443,457,105 P.3d 85 (2005) (holding that the trial court erred in dismissing a juror where the record showed, after four days of deliberations, that the juror “disagreed with the other jurors at least in part because she had different views regarding the merits of the case”).

In Mr. Hopkins’ case, the trial Court failed to apply the appropriate evidentiary and legal standard. A trial court may not dismiss a deliberating juror if “there is any reasonable possibility that his or her views stem from an evaluation of the sufficiency of the evidence.” Elmore, 155 Wn.2d at 778. Only after the trial court has applied the “any reasonable possibility” standard will an appellate court review the decision to remove a juror for an abuse of discretion. *Id.* Here, as in Elmore, the record does not indicate that the trial court applied the “any reasonable possibility” standard to its dismissal of Juror Number 6. This in itself is reversible error.

In Mr. Hopkins' case, the Court disqualified Juror Number 6 solely on the basis of the juror's statement that she could no longer be fair and impartial regarding the testifying officer or the prosecution. The record here shows a reasonable possibility that the removal of Juror Number 6 was based on the juror's views of the evidence. In fact, this is the most logical conclusion. The defense presented evidence that, if believed, would have led to the conclusion that Officer Whelan was untruthful. For example, Mr. Hopkins testified that the gloves, flashlight, and wire that Officer Whelan claimed to have confiscated from him never belonged to him. Additionally, the chain of custody of the wire caused enough concern that notes were sent to the Court inquiring as to the lawfulness of a police officer relinquishing possession of a piece of evidence, and expressing a desire to read Officer Whelan's written report. CP 27-50. As the State observed during summations, the clear implication was that evidence planting has occurred. RP V 295.

The testimony of Mr. Hopkins and Officer Whelan was diametrically in opposition. The credibility of Officer Whelan versus Mr. Hopkins was, therefore, a major component in the jury's decision.

During closing arguments, each party emphasized credibility as a crucial factor in determining the sufficiency of the evidence. There is no more reasonable explanation for Juror Number 6's sudden loss of faith in her own ability to be impartial than she now doubted the veracity, and therefore the sufficiency, of the State's evidence. This is precisely the situation contemplated and warned against in the *Elmore* Court's reasoning.

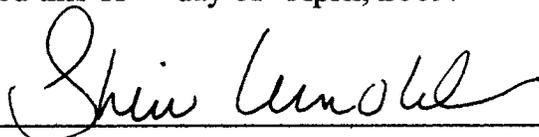
Furthermore, it is entirely possible that Juror Number 6 was a sole holdout for acquittal considering that within twenty-five (25) minutes of her removal a unanimous verdict was reached. Not only did the newly constituted jury reach its verdict quickly, but it did so with no further notes or questions to the Court.

The trial Court had an obligation to direct the jury to continue deliberations. Instead, the apparent obstacle to the otherwise unanimous verdict was removed. The Court's failure to apply the appropriate legal standard deprived Mr. Hopkins of his right to a fair and impartial jury and due process of the law. A reasonable possibility existed that Juror Number 6's struggle stemmed from her evaluation of the evidence.

E. CONCLUSION

For all of the foregoing reasons and conclusions, Mr. Hopkins respectfully requests that this Court reverse his conviction of second degree burglary.

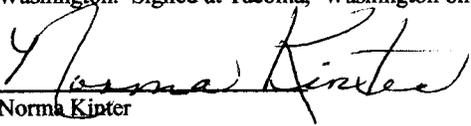
Respectfully Submitted this 13th day of April, 2009.

A handwritten signature in cursive script, reading "Sheri L. Arnold", written over a horizontal line.

Sheri L. Arnold
WSBA No. 18760
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that on April 13, 2009, I delivered in person to the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Ave. South, Tacoma, Washington 98402, and by United States Postal Service to appellant, Greg R. Hopkins, DOC 809748, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, Washington 98520, true and correct copies of this Opening Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on April 13, 2009.


Norma Kinter

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