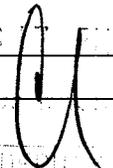


NO. 38265-2-II

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

GREG HOPKINS, APPELLANT

---

Appeal from the Superior Court of Pierce County  
The Honorable Judge Thomas Felnagle

No. 07-1-05989-1

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the defendant waived any suppression issues where they were not raised below?
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B. STATEMENT OF THE CASE.

1. Procedure

On November 28, 2007 the defendant was charged with one count of burglary in the second degree based upon an incident that occurred on

the 28<sup>th</sup> of June, 2007. CP 1. The defense brought no motion to suppress physical evidence. *See* CP 95.<sup>1</sup> The case was assigned to the Honorable Thomas Felnagle for trial on July 23, 2008. CP 96.

After the close of the case, while the jury was still deliberating, the jury sent out a series of questions for the court. *See* CP 42-50; 85-93; V RP 308 to VI RP 334. All of the questions were signed by the juror who turned out to be the presiding juror. CP 44, 46, 48, 50, 51. First, on July 30, 2008, the jury asked to see exhibit 15, a police report. CP 44; 91. The court advised the jury it had all the exhibits admitted into evidence. CP 43. Later that afternoon the jury had a second question whether, “If you lawfully entered a building and then your intent to commit the crime became present, is it still burglary? (*See* rule 5.)” CP 46; 92. After conferring with the parties, the court advised the jury that it had instructed them on the law. CP 45; V RP 308-09. The jury then had another question that same afternoon in which they asked, “Is it illegal for a member of law enforcement to allow a piece of evidence to leave his or her sight.” CP 48, 92; V RP 310-13. The court answered that they had heard all the testimony, received all the exhibits and been instructed on the law and to please refer to those. CP 47.

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<sup>1</sup> In addition to the Omnibus Order expressly stating the defense would not file a motion to suppress physical evidence, after a review of the record the State can find nothing else that indicates a motion to suppress was filed. The court did hear a motion under CrR 3.5 to determine whether statements made by the defendant could be admitted.

The following day the jury deliberated until 2:00 p.m. at which point the jury submitted another note to the court. CP 92. The jury indicated:

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

CP 50.

The court first consulted with the parties, and then interviewed the presiding juror. VI RP316-319. The presiding juror indicated that the juror who felt she could not be fair had asked the presiding juror to disclose that fact to the court. VI RP320, ln. 14-20. The court then interviewed the juror, number six, who claimed she felt she could not be fair. VI RP321-23. The court was very careful in its questioning not to intrude upon the jury's deliberations. VI RP321, ln. 22 to p. 322, ln. 25. The juror indicated that the presiding juror's note to the court was correct. VI RP322, ln. 8-12. The court also asked her if her position had changed since the note was issued to the court, and she indicated that it had not. VI RP322, ln. 13-15. The court also asked her, "Is it the fact that you don't feel you can be fair and impartial to both sides?" VI RP322, ln. 16-18. The juror answered, "Exactly." VI RP322, ln. 19.

The court further conferred with the parties, and at the request of the defense took a fifteen minute recess so the defense could check with a

supervising attorney. VI RP323, ln. 5 to p. 324, ln. 12. After the break, the defense did not agree to the dismissal of the juror and asked the court to keep her on. VI RP324, ln. 13 to p. 325, ln. 18. The court nonetheless removed the juror because the juror indicated that she could not be fair and impartial. VI RP327, ln. 7 to p. 329, ln. 10.

An alternate joined the panel. CP 93; VI RP 332-334. The court issued an instruction to the jury to disregard all previous deliberations and begin deliberations anew. CP 49. The jury returned a verdict of guilty. CP 51.

The defendant was sentenced on September 4, 2008. CP 54-65. This appeal was timely filed that same day. CP 68.

## 2. Facts

On June 28, 2007 as he came on duty at about 6:30 a.m. Steilacoom Police Officer Whalen observed a vehicle that he thought was suspicious and unusual. III RP 79, ln. 12-16; p. 82, ln. 16-22; p. 85, ln. 3-5. Officer Whalen lives in the immediate area and notice a vehicle he had never seen before near the marina. III RP 82, ln. 19-24. The area down by the railroad tracks and marina is mostly abandoned and a lot more property crimes like burglaries and vehicle prowls occur in that area. III RP 83, ln. 13-23.

Officer Whelan went up to the truck to see if anyone was inside it. III RP 83, ln. 25 to p. 84, ln. 1. No one was inside the truck but through the window Officer Whelan could see that it appeared as if someone was living inside the vehicle. III RP 84, ln. 5-6. It was a huge disjointed mess inside with clothes, food, tools, and blankets. Officer Whalen ran the vehicle plates on his mobile data computer which returned with a photo of the registered owner. III RP 84, ln. 10-15; p. 85, ln. 19-23.

Officer Whalen then checked the immediate area to see if someone might have gone down to the woods on one side of the truck to sleep. III RP 84, ln. 16-22. Officer Whalen then did an area check and drove around to see if anyone was walking around but didn't find anyone. III RP 84, ln. 24 to p. 85, ln. 2. He then went and contacted some of the neighbors to see if it was their vehicle. III RP 85, ln. 8-13.

Officer Whalen made contact with one of the neighbors and was coming down the porch from the house on the corner of Martin Street and 5<sup>th</sup> Street when the defendant walked up the street with a woman. III RP 85, ln. 21-22. Officer Whalen immediately recognized the defendant as matching the photo of the registered owner of the vehicle. III RP 85, ln. 21-23. The two were coming from the direction of the marina, although it is also the way people go when they want to stay on the water for walks. III RP 86, ln. 7-13.

The marina nearby was in really bad shape, is rarely occupied, and is secured 90 percent of the time. III RP 80, ln. 22-10. The marina main gate is locked, and then the main doors to the marina are also locked. III RP 81, ln. 21 to p. 82, ln. 1. The marina contains a boat storage area, a store, a mechanical shop, and some living quarters where the owner and her father live. III RP 81, ln. 12-10. However, Officer Whalen didn't know if the store was ever open and said he rarely saw anyone other than the owner and her father coming and going from it any more. III RP 82, ln. 8-10. The marina had been burgled many times, including an incident in 1987 when the owner's husband was murdered. III RP 157, ln. 14-20.

Officer Whalen approached the defendant and the woman and said, how's it going and asked them what they were up to. III RP 86, ln. 19-22. The female was very cooperative and friendly, but seemed to act a little embarrassed. III RP 86, ln. 22-24. The defendant got really agitated that Officer Whalen was asking him questions about what was going on and what they were doing down there. III RP 87, ln. 1-5. The defendant got right [sic (bright? red?)] in the face, raised his voice and his hands were going around in the air. III RP 87, ln. 4-8. The defendant claimed he was having a romantic stroll on the beach with his gal. III RP 87, ln. 8-9. However, Officer Whalen observed that the defendant was carrying a flashlight and had a pair of gloves hanging out of his pocket. III RP 11-

13. Additionally, the defendant was really dirty, including his hands, as if he had been working on something dirty. III RP 87, ln. 18-22.

As soon as Officer Whalen saw the flashlight and gloves he thought the defendant might be prowling something or trying to break into something. III RP 87, ln. 23 to p. 88, ln. 1. Officer Whalen suspected a crime had occurred, so he called for backup and asked the two for identification. III RP 88, ln. 3-5; p. 90, ln. 2-4.

The female was very cooperative and Officer Whalen was able to identify her. The defendant at first yelled and stomped and refused to give his identification, then changed his mind and decided he would and went to the cab of his truck and provided officer Whalen with is identification. III RP 88, ln. 14-20.

When the defendant stomped off yelling to his truck, Officer Whalen got concerned for his safety as the defendant reached into the cab of the truck. III RP 89, ln. 2-6. As Officer Whalen was over by the truck focused on the defendant, the female went around behind him and Officer Whalen saw a knife in her hand. III RP 88, ln. 23 to p. 89, ln. 16. Officer Whalen didn't know what the female was doing with a knife behind him and it scared him, so he became concerned for his safety, drew his gun and ordered both of them down to the ground. III RP 89, ln. 2-18.

The defendant went to the ground but was yelling at officer Whalen the whole time. III RP 89. Officer Whalen called for priority backup, which meant that backup should come faster with lights and sirens. III RP 90, ln. 2-6. Once backup arrived Officer Whalen handcuffed the two, patted them down for weapons on their persons, put them into two separate patrol cars and went and mirandized the female. III RP 90, ln. 12-16. The female had dropped the knife as she went to the ground, so Officer Whalen retrieved it from the ground and secured it in the trunk of his patrol car. III RP 90, ln. 17-20. Officer Whalen spoke to the woman first because she was cooperative and was looking at the defendant and rolling her eyes the whole time the defendant was jabbering at Officer Whalen. III RP 90, ln. 22-24. The female provided Officer Whalen with information that was useful to his investigation. III RP 91, ln. 4-6.

After he interviewed the female, Officer Whalen mirandized the defendant and interviewed him. III RP 91, ln. 2-13. The defendant first claimed that the two were just down at the beach for a romantic kind of date thing. III RP 91, ln. 18-19. But later he told Officer Whalen that he saw, a mama raccoon and some babies in the marina, so he went inside to see them. III RP 91, ln. The defendant claimed that he had the gloves and flashlight to see the raccoons and that he had the gloves to protect him

from the raccoons. III RP 95, ln. 10-11. The gloves were just cotton gloves dipped in some type of rubber material [the implication being that they didn't appear to provide significant protection]. III RP 95, ln. 12-15.

The defendant claimed that he had climbed over the main gate and then entered another door to go inside the marina and look around. III RP 97, ln. 3-17. He also acknowledged that he knew the marina was closed and that he wasn't supposed to be in there. III RP 103, ln. 5-11.

Officer Whalen arrested the defendant for burglary. III RP 103, ln. 22-25. Upon searching the defendant's person incident to arrest Officer Whalen found snippets of wire in his pants pocket. III RP 104, ln. 13-21.

After Officer Whalen concluded his interview of the defendant he investigated the marina itself. III RP 104, ln. 7-10. There he found a door to the marina that appeared to have been forced open because it showed recent damage consistent with someone kicking it open. III RP 110, ln. 21 to p. 111, ln. 20. Officer Whalen also observed other fresh damage around the marina much of which consisted of doors that appeared to have been forced open. III RP 111, ln. 24 to p. 117, ln. 21. Finally, he found fishing poles which appeared to have been staged to be easily removed at some time in the future. III RP 104, ln. 11-13; p. 136, ln. 3-8.

Later, an electrician for the Town of Steilacoom identified the wire found in the defendant's pocket as a piece that had been cut out of a much

longer coil of wire in the marina. III RP 140-148. The owner of the marina also testified to the damage to the facility and that the defendant did not have permission to be inside or to remove the wire. III RP 156-171.

The defendant also testified. He claimed that he had met the female, Ms. Webb, at a friend's house earlier that morning. IV RP 178-181. After the defendant had worked on his truck, they had left the Parkland area at about 7:00 a.m. to go to the beach at Steilacoom. IV RP 178-181. The defendant claimed he went to the marina to get Ms. Webb a drink at the store. IV RP 181, ln. 8-16. At trial he claimed that the front gate to the marina was unlocked and the store appeared open so he walked up to it and opened the door to the marina, but could see the store was not open, so he left. IV RP 181, ln. 14-25; p. 204, ln. 22 to p. 205, ln. 13. The defendant claimed that upon returning to his vehicle he was contacted by the officer who asked him for identification. IV RP 182, ln. 24 to p. 183,ln. 3. The defendant indicated that he was getting his wallet when Officer Whalen drew his service revolver and ordered the defendant to the ground. IV RP 183, ln. 23 to p. 184, ln. 19. The defendant claimed he laid on the ground for between a half hour and an hour. IV RP 185, ln. 3-5. The defendant claimed he was then in the back of a patrol car for about another half an hour, during which time the officers left him to go to the

marina and returned later carrying fishing poles and laughing. IV RP 186, ln. 16.

The defendant claimed that Officer Whalen never interviewed him or asked him any questions. IV RP 186, l n. 19 to p. 187, ln. 19. This was significant because even though Officer Whalen had testified to the defendant's claim that he was in the marina to look at the baby raccoons, the defendant admitted looking at the baby raccoons while in the marina, but insisted he never told Officer Whalen about that. IV RP 182, ln. 2-5; 187, ln. 2 to ln. 8; p. 217, ln. 4 to 23.

The defendant also claimed that while he possessed gloves, a flashlight and wire on the date of the incident, the ones he possessed were different from those that were admitted as exhibits at trial. IV RP 188-193. This was significant because the electrician from the Steilacoom electrical department testified that the wire admitted as Exhibit 14 was a piece of wire that had been cut out of a much larger bundle of wire he found at the marina and that Exhibit 14 fit the gap in the bundle exactly. III RP 140, ln. 22 to p. 145, ln. 21. The electrician also noted that the wire was probably not cut with an electrical tool, and could have been cut with a knife. III RP 146, ln. 4-15.

C. ARGUMENT.

1. ANY SUPPRESSION CHALLENGE WAS  
WAIVED WHERE IT WAS NOT RAISED  
BELOW.

It is long and well established under both the State and Federal constitutions that if an objection to evidence that was allegedly obtained illegally is not asserted timely, it is waived. *See State v. Gunkel*, 188 Wash. 528, 535-36, 63 P.2d 376 (1936); *State v. Baxter*, 68 Wn.2d 416, 423, 413 P.2d 638 (1966); *State v. Duckett*, 73 Wn.2d 692, 694-95, 440 P.2d 485 (1968). Where a defendant fails to assert a suppression issue at the trial court level, the defendant has waived that argument and may not raise the issue for the first time on appeal. *State v. Mierz*, 127 Wn.2d 460 468, 901 P.2d 286 (1995); *See also State v. Silvers*, 70 Wn.2d 430, 432, 423 P.2d 539 (1967), *cert. denied*, 389 U.S. 871 (1967). The issue is also waived where a defendant raises a suppression issue at the trial court, but fails to pursue the issue. *State v. Massey*, 60 Wn. App. 131, 803 P.2d 340 (1991). Recently this court again reaffirmed this position. *State v. Millan*, Slip. Op. 37172-3-II, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_, 2009 WL 2414850 (2009).

At the trial court level, any suppression motion must be raised in a timely manner and the court has authority to reject suppression motions that were not made prior to the start of trial. *See* CrR 4.5(d). CrR 3.6 was adopted in 1975 and specifically governs motions to suppress evidence.

Under CrR 3.6, the defendant has the burden of requesting a hearing on suppression issues. *State v. Gould*, 58 Wn. App. 175, 185, 791 P.2d 569 (1990).

CrR 3.6 motions to suppress evidence are heard prior to the time the case is called for trial. See Ferguson, 12 & 13 Washington Practice: Criminal Practice and Procedure, Chap. 23 (3d Ed) (citing CrR 4.5(d)); Tegland, 4A Washington Practice Rules Practice, CrR 3.6. Such a standard is implicit in the language of CrR 3.6, where the rule requires the moving party to set forth in a declaration the facts the party expects to be elicited in the event there is an evidentiary hearing. CrR 3.6(a). A pre-trial hearing is further implicated by the rule's language that, based upon the pleadings, the court is to determine whether an evidentiary hearing is required. CrR 3.6(b). All of this implicitly requires a pre-trial hearing. The requirement of a pre-trial hearing is also consistent with the legal standards in Washington prior to the adoption of rule CrR 3.6. *State v. Simms*, 10 Wn. App. 75, 77, 516 P.2d 1088 (1973) (citing *State v. Baxter*, 68 Wn.2d 416, 422, 413 P.2d 638 (1966); *State v. Robbins*, 37 Wn.2d 431, 224 P.2d 345 (1950)). Moreover, nothing in CrR 3.6 permits or contemplates successive suppression motions.

The interpretation of CrR 3.6 as requiring pre-trial suppression motions is also consistent with CrR 4.5(d), which governs omnibus hearings.

(d) Motions. All motions and other requests prior to trial should be reserved for and presented at the omnibus hearing unless the court otherwise directs. Failure to raise or give notice at the hearing of any error or issue of which the party concerned has knowledge may constitute waiver of such error or issue. [....].

Waiver for failure to raise the issue before the trial court applies to suppression motions even where the claimed issue is a constitutional one, and there is a reasonable possibility the motion to suppress would have been successful if the issue had been raised. *State v. Tarica*, 59 Wn. App. 368, 372, 798 P.2d 296 (1990); *See also State v. Valladares*, 31 Wn. App. 63, 639 P.2d 813 (1982), *rev'd. in part on other grounds, State v. Valladares*, 99 Wn.2d 663, 664 P.2d 508 (1982). This is because the exclusion of improperly obtained evidence is a privilege that may be waived, and the fact that it was not raised *is not* an error in the proceedings below. *See Tarica*, 59 Wn. App. at 372 (citing *State v. Baxter*, 68 Wn.2d 416, 413 P.2d 638 (1966)). (Emphasis added.) In *State v. Baxter*, the court held that the defendant's motion to suppress evidence at the end of the State's case was too late where the defendant was well aware of the circumstances of his arrest at the time the allegedly unlawful evidence was entered. *Baxter*, 68 Wn.2d at 416.

RAP 2.5(a)(3) provides that the court may refuse to review any claim of error which was not raised at the trial court, however the party may raise for the first time a manifest error affecting a constitutional right.

In *State v. Valladares*, the court held that where a defendant raised, and then later withdrew a suppression issue, that it could not be raised for the first time on appeal under RAP 2.5(a)(3) because the rule's discussion of manifest constitutional error contemplates a trial error involving due process rights, as opposed to pre-trial rights. *Valladares*, 31 Wn. App. at 75-76. Moreover, the court in *Valladares* specifically clarified the scope of the exception under RAP 2.5(a)(3) because it was being misconstrued and had been "misread with increasing regularity." *Valladares*, 31 Wn. App. at 75. RAP 2.5(a)(3) is a limited exception to the general rule that issues may not be raised for the first time on appeal. *Valladares*, 31 Wn. App. at 75.

The court in *Valladares* went on to hold that where the defendant failed to pursue a challenge to evidence that might have been suppressible, the admission of that evidence was not a clear violation of the defendant's due process rights, and was therefore not a manifest constitutional error that could be raised for the first time on appeal. *Valladares* 31 Wn. App. at 76 (citing *Baxter*, 68 Wn.2d at 413). Valladares appealed to the Washington Supreme Court, which agreed with and affirmed the Court of Appeal's analysis on this issue of waiver. *See Valladares*, 99 Wn.2d at 671-72. The Supreme Court held that by, "withdrawing his motion to suppress the evidence, *Valladares* elected not to take advantage of the mechanism provided for him for excluding the evidence," and thus waived or abandoned his objections. *Valladares*, 99 Wn.2d at 672.

Only six years after the Court of Appeals in *Valladares* felt the need to clarify “manifest error,” in *State v. Scott*, the Supreme Court again felt the need to clarify the construction to be given to the “manifest error standard.” *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). In *Scott*, the court held that the proper approach to claims of constitutional error asserted for the first time on appeal is that “[f]irst, the court should satisfy itself that the error is truly of constitutional magnitude - that is what is meant by “manifest;”” and second, “[i]f the claim is constitutional then the court should examine the effect the error had on the defendant’s trial according to the harmless error standard. [...]” *Scott*, 110 Wn.2d at 688.

The standard set forth in *Scott* has subsequently been elaborated into a four-part analysis.

First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue. Finally, if the court determines that an error of constitutional import was committed, then and only then, the court undertakes a harmless error analysis.

*State v. Bland*, 128 Wn. App. 511, 515-16, 116 P.3d 428 (2005).

Moreover, under RAP 2.5(a)(3), while an appellant can raise a manifest error affecting a constitutional right for the first time on appeal,

appellate review of the issue is not mandated if the facts necessary for a decision cannot be found in the record, because in such circumstances the error is not “manifest.” *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (citing *State v. Riley*, 121 Wn.2d 22, 846 P.2d 1365 (1993)). Here, there a sufficient record to support review on this issue does not exist. However, the record that does exist supports the position that the suppression motions were without merit.

Notwithstanding all the controlling precedent on RAP 2.5(a)(3), in *State v. Littlefair* the court held otherwise, and ruled that a suppression issue could be raised for the first time on a second appeal because it was a matter of constitutional magnitude. See *State v. Littlefair*, 129 Wn. App. 330, 337-38, 119 P.3d 359 (2005), *review denied*, 149 Wn.2d 1020, 72 P.3d 761 (2003). The court in *Littlefair* seems to have gone astray because it focused on the constitutional right, but failed to consider the definition of “manifest error.” Compare *Littlefaire*, 129 Wn. App. at 338 to *Scott*, 110 Wn.2d at 687 (agreeing with and quoting *Valladares*, 31 Wn. App. at 76 “that the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can ‘identify a constitutional issue not litigated below’”).

The waiver rule serves the interests of judicial economy by requiring the defendant to raise the challenge in a timely manner that permits the court to consider it without unnecessarily wasting resources. See *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 429 (1988).

The defendant argues on appeal that two types of evidence should have been suppressed at trial. First the defendant argues that the initial seizure was unlawful and that all evidence resulting therefrom should be suppressed. Additionally, the defendant argues that the court should have excluded any reference to the knife possessed by the female who accompanied the defendant. However, the defendant failed to raise either suppression challenge below. Accordingly, the issues are waived.

2. PRESUMABLY A SUPPRESSION CHALLENGE WAS NOT RAISED BECAUSE THE INITIAL CONTACT WITH THE DEFENDANT WAS LAWFUL WHERE THE DEFENDANT WAS NOT SEIZED UNTIL HIS ASSOCIATE DISPLAYED A KNIFE AND THE OFFICER HAD A REASONABLE CONCERN FOR HIS SAFETY.

- a. The Defendant Was Not Seized Initially.

When analyzing a police-citizen interaction, the court must first determine whether a warrantless seizure has taken place, and if it has, whether the action was justified by an exception to the warrant requirement. *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004) (citing *State v. O'Neil*, 148 Wn.2d 564, 574, 62 P.3d 489 (2003)). Under article I, section 7 of the Washington Constitution a seizure occurs when, considering all the circumstances, 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.

*Rankin*, 151 Wn.2d at 695 (citing *O'Neil*, 148 Wn.2d at 574). The determination is made objectively looking at the officer's actions.

*Rankin*, 151 Wn.2d at 695 (citing *State v. Young*, 135 Wn.2d 498, 501, 957 P.2d 681 (1998)).

Moreover, a request for identification will generally not constitute a seizure of a pedestrian, while a demand for identification will. *Rankin*, 151 Wn.2d at 697 (citing *Young*, 135 Wn.2d at 511). It should be noted that the court in *Rankin* distinguished between a pedestrian and a passenger in a vehicle and held that for a vehicle passenger only, if an officer requests identification it does constitute a seizure. *Rankin*, 151 Wn.2d at 697.

Here, after he couldn't locate anyone connected to the vehicle, Officer Whalen went and contacted some of the neighbors to see if it was their vehicle. III RP 85, ln. 8-13. He made contact with one of the neighbors and was coming down the porch from the house on the corner of Martin Street and 5<sup>th</sup> Street when the defendant walked up the street with a woman. III RP 85, ln. 21-22. Officer Whalen immediately recognized the defendant as matching the photo of the registered owner of the vehicle. III RP 85, ln. 21-23. The defendant and the woman were coming from the direction of the marina, although it is also the way people go when they want to stay on the water for walks. III RP 86, ln. 7-13.

Officer Whalen approached the defendant and the woman and said, how's it going and asked them what they were up to. III RP 86, ln. 19-22. The female was very cooperative and friendly, but seemed to act a little embarrassed. III RP 86, ln. 22-24. The defendant got really agitated that Officer Whalen was asking him questions about what was going on and what they were doing down there. III RP 87, ln. 1-5. The defendant got right [sic (bright? or red?)] in the face, raised his voice and his hands were going around in the air. III RP 87, ln. 4-8. The defendant claimed he was having a romantic stroll on the beach with his gal. III RP 87, ln. 8-9. However, Officer Whalen observed that the defendant was carrying a flashlight and had a pair of gloves hanging out of his pocket. II RP 11-13. Additionally, the defendant was really dirty, including his hands, as if he had been working on something dirty. III RP 87, ln. 18-22.

As soon as Officer Whalen saw the flashlight and gloves he thought the defendant might be prowling something or trying to break into something. III RP 87, ln. 23 to p. 88, ln. 1. Officer Whalen suspected a crime had occurred, so he called for backup and asked the two for identification. III RP 88, ln. 3-5; p. 90, ln. 2-4.

The female was very cooperative and Officer Whalen was able to identify her. The defendant at first yelled and stomped and refused to give

his identification, then decided he would and went to the cab of his truck and provided officer Whalen with is identification. III RP 88, ln. 14-20.

Up to this point, the defendant was not seized. The officer asked for identification, but did not demand it. This point is borne out by the fact that the defendant himself felt free to refuse to provide his ID as initially he did indeed actually refuse to provide his ID. He then changed his mind and decided he was going to provide it.

Here, Officer Whalen had a valid safety concern where the defendant was belligerent and reaching inside his vehicle while his companion moved behind the officer and displayed a knife.

- b. The Office Had A Reasonable Articulate Suspicion That The Suspects Were Armed And Dangerous Where One Suspect Was Actually Armed With A Knife And Moved Around Behind The Officer.

A reasonable safety concern may exist for an officer that justifies a protective frisk for weapons when an officer can point to specific and articulable facts that create an objectively reasonable belief that a suspect is armed and presently dangerous. *State v. Collins*, 121 Wn.2d 168, 174, 847 P.2d 919 (1993) (citing *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). The officer need not be absolutely certain that the individual is armed. *Collins*, 121 Wn.2d 174 (quoting *Terry*, 392 U.S. at 27. The test is whether a reasonably prudent person in the

circumstances would be warranted in the belief that the safety of that person or others was in danger. *Collins*, 121 Wn.2d 174 (quoting *Terry*, 392 U.S. at 27). Courts are reluctant to substitute their judgment for that of officers in the field, so all that is required is a founded suspicion, some basis from which the court can determine that the frisk was not arbitrary or harassing. *Collins*, 121 Wn.2d at 173-74 (quoting *State v. Belieu*, 112 Wn.2d 587, 601-02, 773 P.2d 46 (1989) (quoting *Wilson v. Porter*, 361 F.2d 412, 415 (9<sup>th</sup> Cir. 1966)).

Here, when the defendant stomped off yelling to his truck, Officer Whalen got concerned for his safety. As Officer Whalen was over by the truck focused on the defendant, the female went around behind him and Officer Whalen saw a knife in her hand. III RP 88, ln. 23 to p. 89, ln. 16. Officer Whalen didn't know what the female was doing with a knife behind him and it scared him, so he became concerned for his safety, drew his gun and ordered both of them down to the ground. III RP 89, ln. 2-18.

The defendant went to the ground but was yelling at Officer Whalen the whole time. III RP 89. Officer Whalen called for priority backup, which meant that backup should come faster with lights and sirens. III RP 90, ln. 2-6. Once backup arrived Officer Whalen handcuffed the two, patted them down for weapons on their persons, separated them into two separate patrol cars and went and mirandized the

female. III RP 90, ln. 12-16. The female had dropped the knife as she went to the ground, so Officer Whalen retrieved it from the ground and secured it in the trunk of his patrol car. III RP 90, ln. 17-20.

c. Officer Whalen Had A Valid Basis To Arrest The Suspects.

An investigative *Terry* stop is among the specific exceptions to the warrant requirement and is based upon less evidence than is needed for probable cause to make an arrest. *State v. Dorey*, 145 Wn. App. 423, 429, 186 P.3d 363 (2008) (citing *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)); *State v. Day*, 161 Wn.2d 889, 896, 168 P.3d 1265 (2007). Under *Terry*, law enforcement officers may stop and question a suspect if they have a reasonable, articulable suspicion that criminal activity or a traffic infraction has occurred or is about to occur. *State v. Mendez*, 137 Wn.2d 208, 223, 970 P.2d 722 (1999). Courts do not require probable cause for a *Terry* stop because these stops are significantly less intrusive than an arrest. *Mendez*, 137 Wn.2d at 223. Such a stop is justified under the Fourth Amendment of the United States Constitution and Article I, Section 7 of the Washington State Constitution if the officer can specify particular facts and rational inferences that reasonably justify the intrusion. *Mendez*, 137 Wn.2d at 223.

A police officer who observes persons go through series of acts, although each perhaps innocent in itself, but which taken together warrant further investigation, may perform an investigatory *Terry* stop on the individual. *Terry v. Ohio*, 392 U.S. 1, 22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

“A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.” *Adams v. Williams*, 407 U.S. 143; 92 S. Ct. 1921; 32 L. Ed. 2d 612 (1972) (citing *Terry*, 392 U.S. at 21-22); *Gaines v. Craven*, 448 F.2d 1236 (CA9 1971); *United States v. Unverzagt*, 424 F.2d 396 (8<sup>th</sup> Cir. 1970).

*See also State v. O’Neil*, 148 Wn.2d 564, 577, 62 P.3d 489 (2003) (stating that an officer’s reasonable suspicions are relevant once a seizure occurs) [emphasis in original].

The State must demonstrate that a detention was 1) justified at its inception; and 2) reasonably related in scope to the circumstances that justified the interference in the first place. *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999) (citing *Terry*, 392 U.S. at 20).

When reviewing the merits of an investigatory *Terry* stop, a court must evaluate the totality of circumstances presented to the investigating

officer. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). The court takes into account an officer's training and experience when determining the reasonableness of a *Terry* stop. *Glover*, 116 Wn.2d at 514. Subsequent evidence that the officer was in error regarding some of his facts will not render a *Terry* stop unreasonable. *State v. Seagull*, 95 Wn.2d 898, 908, 632 P.2d 44 (1981) ("The Fourth Amendment does not proscribe 'inaccurate' searches only 'unreasonable' ones"). A *Terry* stop is also not rendered unreasonable solely because the officer did not rule out all possibilities of innocent behavior before initiating the stop. *State v. Anderson*, 51 Wn. App. 775, 780, 755 P.2d 191 (1988).

Here, the defendant's car was unattended for a significant period of time and was in an area where car prowls and thefts were common. The two were coming from the direction of the marina, although it is also the way people go when they want to stay on the water for walks. III RP 86, ln. 7-13. The defendant got belligerent when asked what he was doing. III RP 87, ln. 4-8. The defendant claimed he was having a romantic stroll on the beach with his gal. III RP 87, ln. 8-9. However, Officer Whalen observed the defendant's appearance was inconsistent with his claimed behavior. The defendant was carrying a flashlight and had a pair of gloves hanging out of his pocket. III RP 11-13. Additionally, the defendant was really dirty, including his hands, as if he had been working on something

dirty. III RP 87, ln. 18-22. As soon as Officer Whalen saw the flashlight and gloves he thought the defendant might be prowling something or trying to break into something. III RP 87, ln. 23 to p. 88, ln. 1.

Under the *Terry* standard, that alone warranted Officer Whalen in briefly detaining the defendant to determine if he was engaged in unlawful activity. However, Officer Whalen did not detain anyone at that point. Instead, he asked the defendant if he had identification.

The female was very cooperative and Officer Whalen was able to identify her. The defendant at first yelled and stomped and refused to give his identification, then decided he would and went to the cab of his truck and provided Officer Whalen with his identification. III RP 88, ln. 14-20.

When the defendant stomped off yelling to his truck, Officer Whalen got concerned for his safety as the defendant reached into the cab of the truck. III RP 89, ln. 2-6.

As Officer Whalen was over by the truck focused on the defendant, the female went around behind him and Officer Whalen saw a knife in her hand. III RP 88, ln. 23 to p. 89, ln. 16. Officer Whalen didn't know what the female was doing with a knife behind him and it scared him, so he became concerned for his safety, drew his gun and ordered both of them down to the ground. III RP 89, ln. 2-18.

It was reasonable at that point for Officer Whalen to order both of them to the ground for safety, which he did.

Once he had secured and mirandized Ms. Webb she gave a statement indicating that the defendant had been to the marina and had apparently found items that he indicated he intended to return to steal. Ex. 15, p. 12. On the defendant's person, Officer Whalen found wire. Those facts further reinforced the basis for Officer Whalen to detain the defendant while he investigated the marina.

After he was mirandized, the defendant first claimed that the two were just down at the beach for a romantic kind of date kind of thing. III RP 91, ln. 18-19. But later he told Officer Whalen that he saw, a mama raccoon and some babies in the marina, so he went inside to see them. III RP 91, ln. 20-24. The defendant claimed that he had the gloves and flashlight to see the raccoons and that he had the gloves to protect him from the raccoons. III RP 95, ln. 10-11. The gloves were just cotton gloves dipped in some type of rubber material [the implication being that they didn't appear to provide significant protection]. III RP 95, ln. 12-15.

The defendant claimed that he had climbed over the main gate and then entered another door to go inside the marina and look around. III RP 97, ln. 3-17. He also acknowledged that he knew the marina was closed and that he wasn't supposed to be in there. III RP 103, ln. 5-11.

Officer Whalen then arrested the defendant for burglary. III RP 103, ln. 22-25. Upon searching the defendant's person incident to arrest Officer Whalen found snippets of wire in his pants pocket. III RP 104, ln. 13-21.

After Officer Whalen concluded his interview of the defendant he investigated the marina itself. III RP 104, ln. 7-10. There he found a door to the marina that appeared to have been forced open because it showed recent damage consistent with someone kicking it open. III RP 110, ln. 21 to p. 111, ln. 20. Officer Whalen also observed other fresh damage around the marina much of which consisted of doors that appeared to have been forced open. III RP 111, ln. 24 to p. 117, ln. 21. Finally, he found fishing poles which appeared to have been staged to be easily removed at some time in the future. III RP 104, ln. 11-13; p. 136, ln. 3-8.

It is also worth noting that Officer Whalen first spoke to Ms. Webb who gave him information that was relevant to his investigation. III RP 91, ln. 2-6. The nature of that information was not detailed in his trial testimony because the information would have been hearsay and therefore was inadmissible against the defendant. Nonetheless, the record makes clear that Officer Whalen had additional information from Ms. Webb that was relevant to his investigation and that may have further supported probable cause for his arrest of the defendant.

Officer Whalen's report was marked as Exhibit 15.<sup>2</sup> It indicates that Ms. Webb advised Officer Whalen that after she and the defendant talked under the covered picnic area for a while the defendant provided her with a pair of gloves and gave the knife to her. Ex 15, p. 12. Webb said the defendant went toward the marina building and returned about ½ hour later and said to her, "There is everything you could ever imagine in that place." Ex. 15, p. 12. Webb told Officer Whalen that she understood that statement to mean that the thought there was a lot to steal and that he intended to return to do so. Ex. 15, p. 12. The report indicates that Webb also signed a written statement to the same effect. Ex. 15, p. 12.

That information would have further reinforced probable cause to support the arrest of the defendant in the event there had been a suppression hearing.

3. THE COURT DID NOT ERR WHEN THE EVIDENCE REGARDING THE ASSOCIATE'S KNIFE WAS NOT EXCLUDED.

As indicated above, this issue was waived where it was not raised below. Even so, it is also without substantive merit.

The admission or exclusion of relevant evidence is within the discretion of the trial court. *State v. Thomas*, 150 Wn.2d 821, 856, 83

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<sup>2</sup> While it wasn't admitted as evidence at trial it is part of the trial record and shows information known to the parties that was not part of the trial record.

P.3d 970 (2004), *State v. Swan*, 114 Wn.2d 613, 658, 700 P.2d 610 (1990). A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Proper objection must be made at trial to perceived errors in admitting or excluding evidence and failure to do so precludes raising the issue on appeal. *Thomas*, 150 Wn.2d at 856; *Guloy*, 104 Wn.2d at 421.

Even when an objection was made at trial, the trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. *City of Kennewick v. Day*, 142 Wn.2d 1, 5, 11 P.3d 304 (2000). An abuse of discretion exists only when no reasonable person would have taken the position adopted by the trial court. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). The appellant bears the burden of proving abuse of discretion. *State v. Hentz*, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), *rev'd on other grounds*, 99 Wn.2d 538, 663 P.2d 476 (1983).

Relevant evidence is:

[E]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

*State v. Wilson*, 144 Wn. App. 166, 176, 181 P.3d 887 (2008) (quoting ER 401). Under that definition, to be relevant evidence must: 1) have a tendency to prove or disprove a fact; and (2) the fact must be of consequence in the context of other facts and the applicable substantive

law. *State v. Sargent*, 40 Wn. App. 340, 349, 698 P.2d 598 (1985) (citing 5 K. Tegland, Wash.Prac., Evidence § 82 at 168 (2d ed. 1982) [now published as 5 K. Tegland, Wash. Prac., Evidence § 401.2 at 258, (5<sup>th</sup> ed. 2007)]. It is also the case that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *Sergeant*, 40 Wn. App. at 349, ln. 4 (citing ER 403).

Here, the defendant claims that,

... the prosecutor attempted to persuade the jury that the knife wielding woman Mr. Hopkins was with served to prove Mr. Hopkins' wrongdoing.

Br. App. 22. However, the record does not bear that that claim out.

The prosecutor discussed the knife on two occasions during argument. The first time, during closing, in discussing how the jury could infer the defendant's improper intent from his responses to the officer the prosecutor stated:

Eventually, the defendant, although he initially refused, was willing to then provide his identification to the officer and he did that. *As he was doing that, Ms. Webb was backing up and apparently pulled a knife on Officer Whalen.* So Officer Whalen then took them down to the ground, and Officer Whalen, as he has testified, said that was for about three minutes, and then the priority backup arrived and the two were placed in separate cars.

And what the defendant told the officer I think is very revealing, especially when you look at the other facts in this case...

V RP 269, ln. 8-19. [Emphasis added.]

Nothing in this reference to the knife suggests that the knife, or Webb's use of it, was evidence of the defendant's wrongdoing. Rather, the reference to the knife identified the point in time when the officer ordered the two to the ground, as well as identifying why he ordered them to the ground.

The second occasion when the prosecutor referred to the knife was in rebuttal. The defendant had testified at trial and gave a very different account of the incident from Officer Whalen. For that reason, the defendant's credibility, and the reasonableness of his testimony was at issue in the case. In that context, the prosecutor said:

Mr. Hopkins said that, when the officer had them both get on the ground *when Ms. Webb pulled the knife on him*, that he was facedown on the ground for 30 to 60 minutes while he waited for priority backup to come. 30 to 60 minutes. That's a half an hour to an hour. It's now 11:25. We have been in session for two hours, actually probably less than that. So half of today's morning is how long Mr. Hopkins was facedown on the ground while these officers were en route. That is the slowest priority backup in the history of the world.

Officer Whalen testified that he called for backup initially right as he saw the defendant walking up, because he saw the gloves and the flashlight sticking out, which was suspicious to him, so he knew he was going to have a contact with a suspect, and he didn't want to be outnumbered. There were two people there, right, so he calls for backup.

So, at that point in time, somebody is on their way to assist another officer in the area. *At the time when Whalen sees Webb pull the knife*, he's then calling for priority backup, and as you recall, Officer Whalen testified that was lights and sirens. That's get-down-there-right-now backup. And that's exactly what happened. Officer

Whelan testified this morning he was down for maybe three minutes. Ms. Webb and Mr. Hopkins were down for three minutes, 30 minutes; three minutes, 60 minutes? Which is reasonable here?

V RP 291, ln. 8 to p. 292, ln. 9

Again, the purpose of the prosecutor's reference to the knife was as a time reference in terms of identifying the point at which Officer Whalen ordered the two to lie down. The issue raised by this argument was that the defendant's claim as to how long he laid down on the ground was not reasonable. Nothing about this argument sought to establish the defendant's wrongdoing by Ms. Webb's possession of the knife.

Continuing with the preceding argument, the prosecutor again referred to the knife, with different purpose, but again with same ultimate end of challenging the defendant's credibility.

Mr. Hopkins [in his trial testimony] even decided to throw in a few jabs at the officer. He said that, after they were both placed in the back of the patrol car, both the officers left these people in the patrol cars, left these two suspects, *one of whom just pulled a knife on an officer*, the other who was a suspect in a burglary, and these two officers leave and they walk down to the marina. And what do they do in there? They are coming back with fishing poles and laughing. So Mr. Hopkins wants you to believe that this officer leaves two suspects alone in patrol cars and just walks away and that they are laughing when they come back. How reasonable is that?

V RP 292, ln. 10-21.

Here, the purpose of the reference is to highlight to the jury how incredible the defendant's testimony was. The point was to emphasize how unlikely it was that the officers left the two unattended for thirty minutes where one of them had just pulled a knife on the officer, and the other was a burglary suspect. Further, the prosecutor's language particularly distinguished the two and their acts as separate. He said, "...the officers left these people in the patrol cars, left these two suspects, one of whom just pulled a knife on an officer, the other who was a suspect in a burglary..." That language clearly distinguished the two and separated their actions from each other. Again, the prosecutor in no way sought to argue the defendant's wrongdoing based on Webb's actions with the knife.

Finally, Webb's possession of the knife was relevant evidence where she was with the defendant and the electrician testified that an electrical tool was not used to cut the wire, but that a knife could have been. III RP 146, ln. 4-15.

#### 4. TRIAL COUNSEL WAS EFFECTIVE.

To demonstrate ineffective assistance of counsel, an appellant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the appellant, i.e., there is a reasonable

probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995).

However, where an appellant claims ineffective assistance of counsel for trial counsel's failure to object to the admission of evidence the burden on the appellant is even higher. To prove that the failure of trial counsel to object to the admission of evidence rendered the trial counsel ineffective, the appellant must show that: 1) not objecting fell below prevailing professional norms; 2) the proposed objection would likely have been sustained; and 3) the result of the trial would have been different if the evidence had not been admitted. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). To prevail on this issue, the appellant must also rebut the presumption that the trial counsel's failure to object "can be characterized as legitimate trial strategy or tactics." *In re Pers. Restraint of Davis*, 152 Wn.2d at 714 (quoting *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002) (emphasis added in original)). Deliberate tactical choices may only constitute ineffective assistance if they fall outside the wide range of professionally competent assistance, so that "exceptional deference must be given when evaluating counsel's strategic decisions." *In re Pers. Restraint of Davis*, 152 Wn.2d at 714 (quoting *State v. McNeal*, 145 Wn.2d at 362). A similar argument

of ineffective assistance based on a failure to bring a suppression motion was recently rejected by this court in *State v. Millan*. *Millan*, Slip. Op. 37172-3-II at 11-12.

Courts engage in a strong presumption that counsel's representation was effective. Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. The burden is on an appellant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below. *McFarland*, 127 Wn.2d at 334.

Here, as indicated in section 2 above, the contact, detention, and arrest of the defendant was lawful. Presumably defense counsel was also aware of the statements Ms. Webb made to Officer Whalen that are contained in Officer Whalen's police report. Those statements also establish probable cause to arrest the defendant. Accordingly, it was a reasonable decision by defense counsel not to pursue a motion to suppress that would be without merit, would be a wasted effort and therefore it was a reasonable tactical decision not to pursue such a motion.

Because there was probable cause to support the defendant's arrest, and where trial counsel's decision not to file a suppression motion was a reasonable tactical decision in light of the evidence, the defendant's claim of ineffective assistance of counsel is without merit.

As to the issue of the prosecutor's closing and rebuttal statements regarding the knife, they were not inflammatory. Rather, they used Webb's display of the knife as a time reference that indicated both when and why Officer Whalen ordered the two to the ground. The knife was also relevant evidence were it could have been used to cut the wire.

The credibility of the defendant's testimony raises a different matter that also undermines the defendant's challenge on this claim. The defendant had the right to testify at trial and elected to do so. His account of the events directly contradicted the officer's as to many of the salient facts. In its closing, the defense sought to challenge the credibility of the officer's account and the quality of his investigation. V RP 282, ln. 9ff. In doing so, the defense relied on the defendant's testimony. *See, e.g.* V RP 282, ln. 14-17

The defendant's testimony about being down on the ground for thirty minutes and detained in the patrol car unattended while the officers went to the marina contradicted Officer Whalen's account and if true, also tended to suggest that Officer Whalen's conduct was unreasonable and his account was not credible.

Accordingly, it was a reasonable tactical decision not to object to evidence regarding Webb's possession of the knife because it not only shows why the defendant was detained and handcuffed, but also shows his

detention was because of nothing the defendant himself actively did. The defendant was detained and cuffed because it was unknown to Officer Whalen whether he posed a threat where the defendant had been belligerent and was reaching into his vehicle, and where Webb wielded a knife. The defense may have wanted the jury to know that Ms. Webb had the knife so that they did not draw improper conclusions or inferences from the fact that the defendant was arrested. For this reason, the failure to seek the exclusion of the knife was not ineffective assistance of counsel.

Because on the facts of this case the defendant fails to overcome the presumption that the decision not to bring the suppression motion was a valid tactical decision, this defendant's challenge on this issue should be denied as without merit.

5. THE COURT PROPERLY EXCUSED THE JUROR WHERE SHE EXPRESSED THAT SHE COULD NOT BE FAIR OR IMPARTIAL.

RCW 2.36.110 states:

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.

A court's determination to remove a juror is reviewed for abuse of discretion. *State v. Depaz*, 165 Wn.2d 842, 858, 204 P.3d 217 (2009).

However, the determination of whether the court's decision to remove a juror was an abuse of discretion varies depending upon the circumstances.

In *State v. Elmore*, the court held that where a juror has been excused for engaging in nullification, the standard of review consists of a two step test: First, if there is any reasonable possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must not dismiss the juror; Second, if the "reasonable possibility" evidentiary standard of the first step has been satisfied, then the court's decision to dismiss the juror is reviewed for abuse of discretion. *State v. Elmore*, 155 Wn.2d 758, 776, 777-78, 123 P.2d 72 (2005). The court in *Elmore* emphasized that this standard is only applicable in the rare case where a juror is accused of engaging in nullification, refusing to deliberate, or refusing to follow the law. *Elmore*, 155 Wn.2d at 778. In *State v. Depaz* the court re-emphasized that narrow application. *State v. Depaz*, 165 Wn.2d 842, 854-55, 204 P.3d 217 (2009). As the court in *Depaz* noted, the "reasonable possibility" standard applies only to the specified and rare circumstances because:

[...] the court cannot excuse a juror without knowing whether the accusation actually stems from the accused juror's views on the evidence. However, the court also cannot determine whether or not the juror's views stem

from his or her views on the evidence without disrupting the secrecy of jury deliberations.

*Depaz*, 165 Wn.2d at 854.

The court in *Depaz* went on to hold that in most cases of juror misconduct, where the trial court has knowledge of a deliberating juror's substantive opinion of the case, the court must make a determination whether either party is prejudiced by the juror's misconduct. *Depaz*, 165 Wn.2d at 857. Prejudice is determined before deciding to excuse the juror by concluding whether any misconduct committed by the juror has affected the juror's ability to deliberate. *Depaz*, 165 Wn.2d at 857. The requirement of the showing of prejudice prevents a trial court from removing a holdout juror on a technical finding of misconduct without further determining the removal serves a purpose of avoiding prejudice to one of the parties. *Depaz*, 165 Wn.2d at 858.

Here, there was no allegation of juror misconduct. Nor is it clear that the court had knowledge of the deliberating juror's substantive opinion of the case, although there is an argument that such an opinion can be inferred from the record. However, notwithstanding these differences, the standard of review adopted by the court in *Depaz* is appropriate to the facts of this case. That is because the standard in *Depaz* is one of whether there is prejudice to either party, and that standard is clearly satisfied here.

“[B]oth the defendant and the State have the right to an impartial jury.”

*Elmore*, 155 Wn.2d at 773 (citing *State v. Hughes*, 106 Wn.2d 176, 185, 721 P.2d 902 (1986)).

In this case juror six had the presiding juror send out a note that read:

One of the jurors feels unable to continue this case because of being too emotional regarding the prosecutor and police officer. 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 50; VI RP 316, ln. 8-13. The presiding juror indicated that juror six had asked him to submit the note to the judge. VI RP 320, ln. 8-20. Juror six told the court the same thing. VI RP 322, ln. 8-19. Juror six indicated that she continued to feel she could not be fair and impartial to both sides and wanted to be dismissed from the jury. VI RP 322, ln. 13-19. She also indicated that no outside influence had led her to that conclusion. VI RP 322, ln. 20-23.

Juror six indicated to the court via her note that she thought she could be fair and impartial when being interviewed, but subsequently concluded she could not. She then reaffirmed that on the record in open court.

Because juror six stated she could not be fair the trial court did not abuse its discretion when it removed her.

D. CONCLUSION

The suppression motions were waived where they were not raised below.

The officer had a valid basis to contact the defendant and Ms. Webb where their behavior was suspicious. Once Ms. Webb displayed the knife, Officer Whalen properly ordered them to the ground for officer safety. After advising Ms. Webb of *Miranda* and speaking with her, Officer Whalen had probable cause to believe the defendant trespassed on the marina property and committed burglary. The defendant's own statements after *Miranda* warnings only further confirmed that probable cause.

The evidence of the knife was relevant to how the wire was cut. It also provided relevant context for when Officer Whalen ordered Ms. Webb and the defendant to the ground, while at the same time showing that the defendant himself did nothing to cause Officer Whalen to order them to the ground.

There was no valid basis for a motion to suppress the evidence obtained as a result of the detention and arrest of the defendant and Ms. Webb. Nor was there a valid basis for a motion to suppress the evidence of the knife that Ms. Webb possessed. Accordingly, trial counsel was not ineffective for failing to bring those motions. Moreover, the defendant has

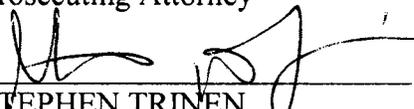
failed to overcome the presumption that the decisions not to challenge the evidence were appropriate tactical decisions.

Finally, the court did not err by excusing juror six where she indicated to the court that she could not be fair and impartial.

Accordingly, the court should affirm the conviction.

DATED: AUGUST 17, 2009

GERALD A. HORNE  
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Prosecuting Attorney

  
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WSB # 30925

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. 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 the date below.

8/17/09 Stephen Trinen  
Date Signature

BY:   
STATE OF WASHINGTON  
COUNTY OF PIERCE  
CLERK OF SUPERIOR COURT