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CLERK OF SUPREME COURT  
STATE OF WASHINGTON

No. \_\_\_\_\_  
COA No. 57081-1-1

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,  
Respondent

v.

VASQUEZ DEPAZ,  
Petitioner

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable John P. Erlick, Judge

PETITION FOR REVIEW

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Today I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to attorneys of record of respondent appellant/petitioner containing a copy of the document to which this declaration is attached.

*King County, WA*  
I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

*[Signature]* 8/2/07  
Name Done in Seattle, WA Date

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A. IDENTITY OF PETITIONER

Petitioner Vasquez Depaz, the appellant below, asks this Court to review the following Court of Appeals decision.

B. COURT OF APPEALS DECISION

Depaz seeks review of Division One's decision in State v. Depaz, No. 57081-1-I (July 2, 2007), attached as appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Should this Court accept review where the Court of Appeals affirmance of the trial court's dismissal of a holdout juror conflicts with this Court's decision in State v. Elmore and Division Two's decision in State v. Johnson?<sup>1</sup>

2. Should this Court accept review to determine whether the Elmore rule goes far enough to protect the fundamental need for secrecy in jury deliberations?

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<sup>1</sup> State v. Elmore, 155 Wn.2d 758, 771, 123 P.3d 72 (2005); State v. Johnson, 125 Wn. App. 443, 457, 105 P.3d 85 (2005).

D. STATEMENT OF THE CASE<sup>2</sup>

The state charged petitioner Vasquez Depaz with four counts of rape of a child. The defense presented a substantial case, as the jury ultimately acquitted Depaz of three counts and convicted him of one. See Brief of Appellant (BOA), at 2-7. Substantial problems arose during deliberations, however.

The jury was impaneled on July 7, 2005. Testimony began on July 11, 2005 and the case was submitted to the jury at 11:30 a.m. on July 14, 2005. 5RP 16; 8RP 63. At 10:50 a.m. on July 15, the jury sent a note indicating that it was deadlocked on all four counts and that several jurors would not change their votes. CP 64; 9RP 8. The court responded by instructing the jury to continue deliberations. CP 65. After the lunch break, the court received another inquiry:

One of us overheard another juror at lunch talking on the phone saying "It's all circumstantial evidence. The judge said we have to continue to deliberate. We're at lunch now. I'm just being me, the badgering has begun." Please advise if this requires a change in the composition of the jury or if we should keep going as we are.

CP 40.

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<sup>2</sup> Citations to the record are set forth in full in the Brief of Appellant, at 1-15.

The trial court indicated its intent to question the presiding juror, the juror who overheard the conversation, and the juror who had the conversation. 9RP 8. Defense counsel objected to questioning the jurors because the conversation described in the jury note was not the type of misconduct that injected extrinsic evidence into the deliberations and the alleged comment was made in the context of the length of deliberations. 9RP 9. Furthermore, defense counsel argued that the juror already felt "badgered," and singling her out would put even more pressure on her to change her mind. 9RP 9-10.

Over defense objection, the court questioned the three jurors. 9RP 14-25. Juror 14 testified that she was walking to lunch with Juror 3, who told her that she needed to make a phone call because her grandchild was having surgery. 9RP 16. Juror 14 overheard Juror 3 say "well, we're at lunch; the Judge says we have to keep deliberating; all the evidence is circumstantial; the badgering has started, and I will." 9RP 16. The court then inquired of Juror 3 as follows:

THE COURT: And can you just generally tell use what the nature of the conversation was?

JUROR 3: I asked [my husband] about a grandson who's undergoing some very serious surgery today, how that was going, and then he -- because I had indicated earlier in the day that I didn't know whether we would be through today or not, I had also indicated to him earlier in the day that I thought I was in the minority in my opinion, and let it go at that, and so he asked me that question how things were going and did I -- and would I argue

persuasively to convince others of my view, and that's kind of where it was.

THE COURT: Did you have any substantive conversation about this case at all with your husband? When I say substantive, I mean did you discuss with him the nature of the charges that have been brought or any of the evidence?

JUROR 3: No.

THE COURT: Okay. During the conversation, did you tell him that, in your opinion, the case rested on circumstantial evidence?

JUROR 3: I may have used that word. The other person thought I did so I may have used that word.

THE COURT: Why did you tell him about that?

JUROR 3: Because we were at a point where it was 11 to 1 and I was beginning to feel that I was being badgered by the others.

THE COURT: But what does that have to do with circumstantial evidence or not?

JUROR 3: Probably nothing.

THE COURT: Did you have any substantive discussion about the case at all? In other words, did he know what type of case it was?

JUROR 3: No.

THE COURT: Other than what you talked to him about this afternoon and what you indicated this morning that you weren't sure how long the deliberations were going to go, did you have any other discussions with your husband about this case?

JUROR 3: No. Other than to say I'm in criminal court.

THE COURT: Okay. Did you discuss this case with anyone else other than your husband?

JUROR 3: No.

THE COURT: Did you tell him about being in the minority?

JUROR 3: I did that this morning. When I was leaving the house, he asked me, well, when are you going to be back. We're both very worried about the grandson.

9RP 21-23.

The prosecutor continued the questioning:

MR. HUNG: Good afternoon, ma'am. There's been some testimony that in response to something that your husband said to you, you said I will. Do you remember that part of the conversation at all?

JUROR 3: It was, well, let me know when you're through, and I will. I believe that's the way it ended.

MR. HUNG: Oh, I see. So, at any point, did your husband try and support you in maintaining your position as the minority or anything like that? Did he say anything or offer any advice?

JUROR 3: Not in the phone information, no.

MR. HUNG: Well, in any other aspect?

JUROR 3: No. Nothing other than saying, well, if you feel strongly in that way, you know, in your view, if you feel strongly in that, stick to your guns.

9RP 24.

THE COURT: If the jury were to continue its deliberations, do you feel that you are in a position to continue to deliberate?

JUROR 3: We are continuing to discuss, and we are trying --

THE COURT: Don't get into the substance of your --

JUROR 3: Excuse me. We are continuing to discuss, yes.

THE COURT: And do you feel that you can continue to do so in light of our discussions this afternoon with the presiding juror and with other jurors?

JUROR 3: I'm continuing to participate in the conversation.

9RP 25.

The prosecutor asked the court to excuse Juror 3 "in an abundance of caution," even though he did not think this was a situation where extrinsic evidence was brought into the jury room or where the remaining jurors had been affected. 9RP 27. The defense opposed dismissal, and reiterated that Juror 3's comments were made in the context of discussing her grandson's surgery and when she would be done with the case, and that there was nothing said or done that would impact the deliberative process. 9RP 27-28.

The trial court ruled:

With respect to Juror 3, I'm, obviously, disturbed both that she had this conversation and perhaps more disturbed that we were advised of what the numbers are with respect to their voting. I would prefer not to have known that because I don't want to be influenced by that in any way. The question is whether this rises to the level of misconduct that we conclude that this juror cannot be fair and impartial because she has received outside information or influence, and the case law is

pretty clear on what is improper outside influence and Mr. Hung has identified the type of cases that we look at such as experimentation, going out investigating a scene, looking up words in a dictionary where, essentially the juror is deciding the case on information outside of that presented in the courtroom.

I understand the state's position on this in that the juror's put herself in an unusual situation, which she's disclosed to her husband that she's of a belief as to the guilt or lack of guilt of the defendant, that she feels that perhaps pressure being put on her by other jurors, and then the encouragement by her husband to stick to her guns, and the question then becomes whether or not that creates a marital rift or other problem if she decides -- if she does, in fact, change her mind. I would conclude that this does not rise to the level of misconduct based on the information provided by the three jurors that we interviewed that would require disqualification of Juror 3 at this time based on the information that we have. She's indicated that she believes that they're continuing to discuss the case, and that they continue to deliberate, and I intend to letting them [sic] continue to do so.

State's motion to disqualify Juror 3 is denied. Counsel, I'm going to complete the question that was asked. Is there another question that they're going to have?

9RP 29-30 (emphasis added).

Approximately fifty minutes after the court's written response that the jury should keep deliberating as currently composed, the jury submitted another inquiry, which read:

None of us has changed our opinion since this morning. (enough to get any closer to a verdict) Several of us have various medical and other commitments for next week. One juror has a commitment for Monday she cannot get out of and another has an out of town business trip set for Tuesday through Thursday. We

were asked to commit up to July 15. Where do we go from here?

CP 42.

Upon learning of the jury's scheduling issues, the prosecutor renewed the motion to excuse Juror 3. 9RP 32. The prosecutor now argued that Juror 3's hesitation in answering one question and speed in answering another indicated she was not being truthful. 9RP 33. The prosecutor also argued that Juror 3 was failing to deliberate. 9RP 33-34.

The defense responded that nothing had changed since the court's ruling to keep Juror 3 on the panel and also pointed out that the court's own instructions provided that a juror should not change his or her opinion just to reach a verdict. 9RP 36. The court then called out the jury and asked if there was a reasonable probability of reaching a unanimous verdict within a reasonable amount of time. 9RP 38. The presiding juror answered in the negative and the other jurors concurred. 9RP 38. After confirming that the jury was still deadlocked, the court began to reconsider its original decision to keep Juror 3 on the panel:

And it's just that if the misconduct jumped out and I could say this is clear misconduct, and it has nothing to do with this being a hold-out juror, then I would do it. But it's the type of misconduct, and I realize what you are asking me to do, Mr. Hung, which is put that aside, infer that she wasn't being totally transparent with us, which she may not have been; I'm still not persuaded as to her response on why it wasn't circumstantial, about why she was

discussing the fact that it was a circumstantial evidence case –

9RP 39-40.

Prior to adjourning for the weekend, the court called in the jury and verified that Juror 6 would be unavailable all day on Monday. 9RP 38. The court then excused Juror 6 based on her unavailability and deferred making any further decision on whether to excuse Juror 3 until Monday morning. 9RP 51, 53.

On Monday morning, the court questioned the two alternate jurors and determined they both remained able to serve. 10RP 4-10. It was only after deciding that both alternates were fit to serve that the court announced it would reverse its original position and dismiss Juror 3. 10RP 11. The court stated that it would replace Juror 3, concluding she was no longer impartial, had failed to follow the court's instructions, and was improperly influenced by an outside source. 10RP 14.

After replacing both the unavailable juror and the holdout juror with alternates, the newly constituted jury returned a guilty verdict on count I. CP 39.

On July 28, 2005, the defense submitted a motion for a new trial based on the erroneous dismissal of Juror 3. CP 66-72. The court denied the defense motion and imposed an indeterminate sentence

with a minimum term of 100 months and a maximum term of life imprisonment. 11RP 7, 13.

F. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

THIS COURT SHOULD GRANT REVIEW BECAUSE THE COURT OF APPEALS DECISION CONFLICTS WITH THIS COURT'S DECISION IN STATE V. ELMORE AND BECAUSE THE DECISION DENIES DEPAZ' CONSTITUTIONAL RIGHT TO DUE PROCESS AND A UNANIMOUS JURY.

In the Court of Appeals, Depaz primarily relied on this Court's decision in State v. Elmore to support his claim the dismissal of Juror 3 denied him his right to due process and a unanimous verdict. BOA at 16-27; State v. Elmore, 155 Wn.2d 758, 771, 123 P.3d 72 (2005). Depaz's claims are based on the state and federal constitutions. U.S. Const. amends. 6, 14; Const. art. 1, §§ 3, 21, 22; Duncan v. Louisiana, 391 U.S. 145, 177, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968); State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984); see also, 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); People v. Gallano, 290 Ill. Dec. 640, 821 N.E.2d 1214, 1224 (2004).

In Elmore, this Court stated a clear rule:

where a deliberating juror is accused of refusing to follow the law, that juror cannot be dismissed when there is any reasonable possibility that his or her views stem from an evaluation of the sufficiency of the evidence.

155 Wn.2d at 778. See also, State v. Johnson, 125 Wn. App. 443, 457, 105 P.3d 85 (2005) (Division Two held 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").

As explained in Depaz's brief, the trial court failed to apply this rule and erred in several ways. First, it simply cited RCW 2.36.110 to dismiss Juror 3 for alleged "misconduct" without applying the standard this Court set forth in Elmore. For that reason, little deference is owed the trial court's decision. BOA at 19-20; Elmore, at 779-80.

Second, the trial court erred because the record shows at least a reasonable probability Juror 3 was dismissed based on her view of the evidence. BOA at 20-22. Although the trial court made its oral ruling finding a significant possibility Juror 3 had been "tainted" by her contact with her husband, this is simply not sufficient to withstand the strict requirements of Elmore. See Elmore, 155 Wn.2d at 779 (despite finding that complaining jurors were credible and dismissed juror was not credible, the trial court should have applied the heightened evidentiary standard to the conflicting evidence and allowed the juror to continue deliberating where there was a reasonable possibility the dismissed juror's views were based on the sufficiency of the evidence); see also Symington, 195 F.3d at 1083-84 (reversal required even

though other jurors informed the court that dismissed juror was unable to understand and maintain focus, and unable and unwilling to deliberate); Thomas, 116 F.3d at 611, 613-14 (reversal required even though juror had been the subject of numerous complaints about pre-deliberation distractions and had stated that drug dealing was commonplace and done out of economic necessity); Brown, 823 F.2d at 594 (reversing conviction based on erroneous dismissal of a juror who by his own admission said he disagreed with and could not go along with the RICO law). Because the record shows Juror 3 had a valid disagreement about the sufficiency of the evidence, her dismissal could not meet Elmore's "any reasonable possibility" standard. Juror 3's dismissal was reversible error.

Third, the court erred in removing a holdout juror. BOA at 22-24. Elmore held that a trial court's discretion to remove a deliberating juror is very narrowly constrained. Even that limited discretion is further constrained when the parties or the court are aware that a juror is a holdout against conviction. The mere implication that a holdout juror was dismissed because of her evaluation of the evidence can violate the constitutional right to an impartial jury because it suggests to the remaining jurors that the trial court favors a guilty verdict. Elmore, 155 Wn.2d at 772 (citations omitted); State v. Johnson, 125 Wn. App. at 457-59 (court erred in removing a holdout juror for alleged misconduct

in refusing to deliberate); Thomas, 116 F.3d at 625 (a trial court "may under no circumstances remove a juror in an effort to break a deadlock," citations omitted).

There can be little doubt that the trial court and the parties knew Juror 3 was not inclined to convict. The comment attributed to Juror 3 that it was a "circumstantial" case clearly indicated that she was holding out to acquit. The trial court noted that it was "pretty evident" that the state wanted to remove Juror 3 because she was voting to acquit. 9RP 34. The state itself argued that the inference from the "circumstantial" case comment was that Juror 3 did not believe Depaz was guilty. 9RP 44. Juror 3 also explicitly revealed the fact that she was the lone holdout. 9RP 22.

Despite these facts, and despite this Court's decision in Elmore and Division Two's decision in Johnson, Division One affirmed the trial court's dismissal of Juror 3. The court cited pre-Elmore authority for the proposition that a trial court has the duty to excuse a juror who has committed misconduct. Slip op. at 7 (citing RCW 2.36.110 and State v. Jorden, 103 Wn. App. 221, 227, 11 P.3d 866 (2000)). But Jorden involved the trial court's pre-deliberation dismissal of a juror who was sleeping during substantial portions of the trial testimony. Jorden, at 224-26. Jorden therefore stands for the unremarkable proposition that a trial court has broad discretion to dismiss a juror

who fails to pay attention during testimony, and who therefore cannot fairly try the case, before deliberations start. But Jorden is not only factually distinguishable, it predates Elmore and does not apply the correct standard that now governs this issue.

As the Elmore record shows, it is always a delicate matter, and rarely an easy one, when a trial court tries to separate legitimate juror disagreement about the evidence from legitimate claims of juror misconduct. Elmore, at 767-75. The opportunity to avoid a mistrial and lengthy retrial via the expedient dismissal of a holdout juror may appear tempting. But it also unquestionably denies the accused of the right to due process and a unanimous jury. See generally, Elmore, at 771-73; see also, United States v. Symington; United States v. Thomas, United States v. Brown, supra.

The Court of Appeals decision therefore conflicts with this Court's decision in Elmore and Division Two's decision in Johnson. The decision also denies Depaz his constitutional right to due process and a unanimous jury. This Court should accept review. RAP 13.4(b)(1), (2), (3).

Finally, the Elmore rule may not go far enough in protecting the secrecy of deliberations and the right to a unanimous verdict. Since Elmore, at least one commentator has recognized the secrecy of deliberations is of paramount importance when a trial court is asked to

arbitrate claims of juror misconduct. See, e.g., Jason D. Reichelt, Standing Alone: Conformity, Coercion, and the Protection of the Holdout Juror, 40 U. Mich. J.L. Reform 569, 615-22 (2007) (discussing why Elmore may permit more intrusive inquisition into jury deliberations than is constitutionally appropriate). Because the secrecy of jury deliberations is a matter of substantial public interest, this Court should grant review. RAP 13.4(b)(4).

F. CONCLUSION

For the reasons set forth above, this Court should grant review.

RAP 13.4(b), 13.6.

DATED this 1<sup>st</sup> day of August, 2007.

Respectfully submitted,

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# APPENDIX A

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

STATE OF WASHINGTON,	)	No. 57081-1-1
	)	
Respondent,	)	
	)	UNPUBLISHED OPINION
v.	)	
	)	
VASQUEZ DEPAZ	)	
	)	
Appellant.	)	FILED: <b><u>July 2, 2007</u></b>

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**PER CURIAM** – A court cannot excuse a deliberating juror if there is a reasonable possibility that the basis for doing so is the juror’s view of the sufficiency of the evidence. Vasquez Depaz challenges his conviction of one count of first degree rape, contending the trial court erred in excusing a deliberating juror. Because the basis for the decision to excuse the juror was a violation of the court’s instruction to not discuss the case with anyone but the other jurors during deliberations, we affirm.

FACTS

Depaz was charged with four counts of rape of a child in the first degree of 11-year-old M.P. The trial began June 30, 2005. At trial, M.P.’s mother testified that when she discovered that M.P. lied to her about where she was after school, M.P. admitted she was with Depaz and that she had sex with him. M.P. testified that she had sex with Depaz several times in the fall and winter of 2004-2005. A nurse from the Harborview

Center for Sexual Assault told the jury that M.P. had trauma-related injuries from past penetration. Depaz testified at trial. According to Depaz, M.P. was infatuated with him and he denied having sex with M.P.

On July 14, the court submitted the case to the jury for deliberations. On July 15, the presiding juror sent an inquiry to the court, stating the jury was deadlocked on all four counts and there were several jurors who would not change their position. In response, the court instructed the jury to continue deliberating.

After the lunch recess, the presiding juror submitted another inquiry to the court.

The inquiry stated that:

One of us overheard another juror at lunch talking on the phone saying, 'It's all circumstantial evidence. The judge said we have to continue to deliberate. We're at lunch now. I'm just being me, the badgering has begun.' Please advise if this requires a change in the composition of the jury or if we should keep going as we are.

Over defense counsel's objection, the court decided to separately question the presiding juror, the juror that overheard the juror talking on the phone, and the juror who made the telephone call. During questioning, the presiding juror identified Juror 14 as the juror who overheard the phone call. Juror 14 told the judge that while walking to lunch, Juror 3 called her husband on her cell phone. During the phone call, Juror 3 discussed the case and deliberations.

I heard another juror – we were going to lunch, and she was walking down the street with me, and she said she wanted to call because her grandchild was having surgery. So she called, I presume it was her husband, I don't know, and after they got done talking about the surgery, she said, well, we're at lunch; the Judge says we have to keep deliberating; all the evidence is circumstantial; the badgering has started; and I will. I don't know what I will meant. I said to her I'm really concerned about that, that you said that because we're not

supposed to talk about this, and they said okay, something like that,  
or --

...

And I thought she said that we're hung. She said that she didn't say that, but it was really clear by saying that, well, the Judge says that we have to continue deliberating.

Juror 14 said that after lunch, she repeated the conversation she overheard to the other jurors. According to Juror 14, Juror 3 admitted making the telephone call, but did not agree with Juror 14's recitation of the conversation.

When defense counsel asked Juror 14 whether the conversation "has affected the deliberation, or the ability of the jury to deliberate, or is the concern that this just needed to be reported?", Juror 14 responded that the other jurors were not affected but stated: "it was disrespectful of the Court, and the process, and the whole two weeks that we've spent. . . ."

Juror 3 admitted she told her husband earlier that day that she was in the minority and that she called him during the lunch recess.

I asked him about a grandson who's undergoing some very serious surgery today, how that was going, and then he -- because I had indicated earlier in the day that I didn't know whether we would be through today or not, I had also indicated to him earlier in the day that I thought I was in the minority in my opinion, and let it go at that, and so he asked me that question how things were going and did I -- and would I argue persuasively to convince others of my view, and that's kind of where it was.

When the court asked Juror 3 whether she told her husband that the case rested on circumstantial evidence, Juror 3 responded, "I may have used that word. The other person thought I did so I may have used that word." When the court then asked, "[w]hy did you tell him about that?", Juror 3 said "[b]ecause we were at a point where it was 11

to 1 and I was beginning to feel that I was being badgered by the others.” In response, the court asked “but what does that have to do with circumstantial evidence or not?” and Juror 3 replied, “[p]robably nothing.” While Juror 3 said that she had not discussed the substantive nature of the case with her husband, she admitted telling her husband about being in the minority before she left the house that morning. When asked whether her husband told her to stick to her position, Juror 3 replied, “[n]othing other than saying, well, if you feel strongly in that way, you know, in your view, if you feel strongly in that, stick to your guns.”

The prosecutor asked the court to excuse Juror 3 for cause, on the grounds that Juror 3 violated the court’s instruction to not discuss the case and committed juror misconduct. Defense counsel opposed the request to excuse Juror 3, arguing the prosecutor wanted Juror 3 removed because it appeared that Juror 3 was the holdout juror.

The court concluded the other jurors were not improperly influenced by the actions of Juror 3. And, the court denied the State’s motion to excuse Juror 3, deciding that Juror 3’s actions were not misconduct that required disqualification.

Approximately an hour after resuming deliberations, the jury sent out another inquiry stating that:

[n]one of us has changed our opinion since this morning.  
(enough to get any closer to a verdict)  
Several of us have various medical & other commitments  
for next week. One juror has a commitment for  
Monday she cannot get out of and another has an out of town  
business trip set for Tuesday through Thursday. We were asked to  
commit up to July 15. Where do we go from here?

In response, the court asked the presiding juror and the other jurors whether there was a reasonable probability that the jury would reach a verdict. The presiding juror informed the court that there was no reasonable probability that the jury would reach a verdict. The court then questioned the jurors about their scheduling conflicts for the next week, excused the jurors for the weekend, and instructed them to return on Monday. Before releasing the jurors for the weekend, the court admonished them to not discuss the case with anyone.<sup>1</sup>

After the jury was excused for the day, the prosecutor renewed the motion to excuse Juror 3, arguing that Juror 3's testimony about the conversation with her husband was not credible. The court ruled that it would excuse Juror 6, who had a conflict on Monday, but reserved ruling on whether to excuse Juror 3. The court agreed with the State's concerns but said, "I really need to sleep on this and I may actually consult with some other judges as well. I want to make sure this is done right."

On Monday, the court ruled that Juror 3 was not candid and it was clear she had discussed the case with her husband in violation of the court's instructions and RCW 2.36.110. The court excused Juror 3 for cause. After substituting alternate jurors, the court instructed the jury to begin deliberations anew. The jury found Depaz guilty on one count of first degree rape of a child, but not guilty on the other three counts. The court denied Depaz's motion for a new trial and imposed a standard range sentence.

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<sup>1</sup> "I want to underscore the admonishment not to discuss this case. I realize this is frustrating for most of you and I realize that this can be a stressful situation for many of you where don't know whether you can make this decision. But it is your decision. It's not the decision of your friends or your family or your loved ones; it's your decision. And that means that you are the ones that heard the evidence, heard the testimony, have to decide it."

ANALYSIS

Relying on State v. Elmore, 155 Wn.2d 758, 123 P.3d 72 (2005), Depaz argues the court erred in excusing Juror 3 under RCW 2.36.110. Because Elmore is distinguishable, we disagree.

In Elmore, two jurors informed the court during deliberations that one of the jurors refused to convict the defendant under any view of the facts and refused to follow the law. Elmore, 155 Wn.2d at 762-63. After questioning the juror, the court excused him for cause, ruling that he was not credible and committed misconduct by refusing to follow the law as set forth in the jury instructions. Elmore, 155 Wn.2d at 765-66. After the juror was excused, Elmore was convicted of five felony counts: murder, burglary, kidnapping, assault, and conspiracy to commit robbery. Elmore, 155 Wn.2d at 760.

This court reversed the conviction based on the decision to excuse the deliberating juror. The supreme court affirmed and held that, "where a trial court concludes that there is a reasonable possibility that the impetus for removal of a deliberating juror is disagreement with the juror's view of the sufficiency of the evidence, the trial court must send the jury back to deliberate with instructions that the jury continue to try to reach a verdict." Elmore, 155 Wn.2d at 772.

In Elmore and the federal cases the court cited in the opinion, the record suggested that a majority of the jurors wanted a holdout juror removed to facilitate a

verdict, or that the holdout juror wanted to be removed for that reason.<sup>2</sup> But here, unlike Elmore, the court excused Juror 3 for misconduct in violation of RCW 2.36.110, not because of her views on the sufficiency of the evidence.

RCW 2.36.110 provides:

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

The trial judge has a duty under RCW 2.36.110 to excuse a juror who, in the opinion of the judge, has committed misconduct. See RCW 2.36.110; State v. Jorden, 103 Wn. App. 221, 227, 11 P.3d 866 (2000). The trial court is “uniquely situated to make the credibility determinations that must be made” in investigating alleged juror misconduct. See Elmore, 155 Wn.2d at 778. A juror’s communication with a third party about the substance of the case constitutes misconduct. State v. Brenner, 53 Wn. App. 367, 372, 768 P.2d 509 (1989). Once this type of misconduct is shown, this gives rise to a presumption of prejudice. Brenner, 53 Wn. App. at 372.

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<sup>2</sup> United States v. Symington, 195 F.3d 1080, 1087 (9th Cir. 1999) (after the jury sent the judge a note that they could not continue deliberating with one particular juror because that juror could not properly participate in deliberations based on a host of factors, the court held, “if the record evidence discloses 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”); United States v. Brown, 823 F.2d 591, 596, (D.C. Cir. 1987) (after a juror sent a note to the judge that he would not follow the law under the RICO statute, the court held: “when a request for dismissal stems from the juror’s view of the sufficiency of the evidence that the government offered at trial, a judge may not discharge the juror: the judge must either declare a mistrial or send the juror back to deliberations with instructions that the jury continue to attempt to reach agreement.”); People v. Galliano, 354 Ill. App. 3d 941, 821 N.E.2d 1214, 1224 (2004) (adopting the standard “where the record shows any reasonable possibility that the impetus for a juror’s dismissal during deliberations stems from his views regarding the sufficiency of the evidence, the dismissal of that juror constitutes error.”).

The trial court excused Juror 3 because she was not candid about her discussion of the case with her husband and committed misconduct by discussing the case with him.

I made a credibility judgment on that, which was that I didn't believe her. I was not comfortable with the fact that she had, in fact, not discussed this case with her husband. And my decision on removing her had nothing to do with the fact that we had inadvertently found out that she may or may not have been the hold-out juror.

...  
...after mulling over the decision, I decided that I felt that there was a significant possibility that she had been tainted, as well as influenced by improper outside influence, which was her husband. And she had, in fact, admitted talking to her husband, and I did not believe the scope of her revelation, because I believe it was inconsistent with other evidence. I simply did not find her credible in that issue.

The trial judge was uniquely situated to decide whether Juror 3 should be excused. Further, there is no suggestion in the record that the other jurors wanted Juror 3 removed because of her views on the sufficiency of the evidence. We conclude that the court did not abuse its discretion in excusing Juror 3 and affirm.<sup>3</sup>

FOR THE COURT:

Schindler, ACJ

Appelwick, CJ.

Becker, J.

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<sup>3</sup> The standard of review for juror removal during deliberation is abuse of discretion. State v. Ashcraft, 71 Wn. App. 444, 461, 859 P.2d 60 (1993).