SUPREME COURT NO. 89426-4
COA NO. 68349-7-I

IN THE SUPREME COURT OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

SHANNON TRAYLOR,

Petitioner.

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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Ronald L. Castleberry, Judge

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# PETITION FOR REVIEW

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FEDERAL CASES



STATUTES, CONSTITUTIONS AND OTHERS

A. IDENTITY OF PETITIONER

Petitioner Shannon Traylor, the appellant below, asks this Court to review the following Court of Appeals decision, referred to in Section B.

B. COURT OF APPEALS DECISION

Traylor requests review of the decision in State v. Shannon Traylor, Court of Appeals No. 68349-7-I (slip op. filed Aug. 12, 2013), attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the community custody condition requiring Traylor to "not frequent establishments where alcohol is the chief commodity for sale" is unconstitutionally vague?

2. Whether the community custody condition prohibiting possession of "drug paraphernalia" is unconstitutionally vague?

3. Whether the evidence is insufficient to convict Traylor of second degree burglary?

D. STATEMENT OF THE CASE

Police officers responded to an alarm at a smoke shop at around 2 a.m. and discovered a rock had been thrown through the shop's glass door.

3RP[1] 43, 46. Two people were earlier seen running across the road towards a silver sedan located in a bowling alley parking lot. 3RP 102-03, 110-11. They were not carrying anything. 3RP 107, 116. The two men entered the passenger side of the sedan. 3RP 104. The sedan left the scene after police arrived. 3RP 47-48, 104, 114, 135.

Police followed and then stopped the car, which had three people inside. 3RP 120-23. Traylor was in the front passenger seat. 3RP 205. A portable light, two masks, a hat, gloves and two Tupperware tubs with glass fragments inside of one were in the car. 3RP 124-25, 136, 189-90, 193-97, 200-02, 203. A bandana, ski mask, gloves, and tools were in the trunk. 3RP 190-93.

The State charged Traylor with second degree burglary. CP 101. At trial, the owner of the smoke shop testified that 17 cartons of cigarettes, 25 boxes of cigarettes, and several boxes of cigars were missing. 3RP 157. No cigarette cartons or boxes were found in the vehicle stopped by police. 3RP 126, 198, 208. The police officer that followed the sedan from the bowling alley and ultimately assisted in the stop did not see cigarettes thrown from the car. 3RP 120-21, 128-29. Police did not find any

[1] The verbatim report of proceedings is referenced as follows: 1RP - 2/11/11; 2RP - 5/19/11; 3RP - three consecutively paginated volumes consisting of 10/24/11, 10/25/11, 10/26/11 and 1/9/12.

potential evidence on the side of the road or in the bowling alley parking lot, such as boxes or cartons of cigarettes. 3RP 138-40.

Following a jury verdict of guilty, the court sentenced Traylor to a prison-based Drug Offender Sentencing Alternative consisting of 29.75 months confinement and 29.75 months of community custody. CP 10, 58. The deputy prosecutor recommended a list of self-described "normal conditions" of community custody, which the trial court adopted in the judgment and sentence. CP 11, 17; 3RP 314. These conditions included (1) "do not frequent establishments where alcohol is the chief commodity for sale" and (2) "[d]o not possess drug paraphernalia." CP 17.

On appeal, Traylor argued through counsel that the above specified community custody conditions were vague in violation of due process. Brief Appellant at 2-10; Reply Brief at 1-10. In his pro se statement of additional grounds, Traylor argued the evidence was insufficient to convict. Statement of Additional Grounds at 1. The Court of Appeals affirmed. Slip op. at 1. Traylor seeks review.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. WHETHER THE COMMUNITY CUSTODY CONDITION PROHIBITING TRAYLOR FROM FREQUENTING "ESTABLISHMENTS WHERE ALCOHOL IS THE CHIEF COMMODITY FOR SALE" IS UNCONSTITUTIONALLY VAGUE PRESENTS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW.

As a condition of community custody, the court ordered Traylor to "not frequent establishments where alcohol is the chief commodity for sale." CP 17. The condition is unconstitutional because it is insufficiently definite to apprise him of prohibited conduct and does not prevent arbitrary enforcement. Review is warranted under RAP 13.4(b)(3).

The due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the Washington Constitution requires the State to provide citizens with fair warning of proscribed conduct. State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). The doctrine also protects from arbitrary, ad hoc or discriminatory enforcement. State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). A prohibition is therefore void for vagueness if it does not (1) define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited; or (2) provide ascertainable standards of guilt to protect against arbitrary enforcement. Bahl, 164

Wn.2d at 752-53; State v. Sullivan, 143 Wn.2d 162, 181-82, 19 P.3d 1012 (2001).

According to the Court of Appeals, the condition at issue here covers an establishment where alcohol is the "main or most important" good for sale. Slip op. at 3. How is an ordinary person to know whether alcohol is the most "important" good for sale when the importance of something is a subjective determination?

Furthermore, how is an ordinary person to know whether the "main" good for sale in an establishment is alcohol when that standard can be measured in any number of ways, none of which are readily ascertainable to ordinary folks patronizing establishments where alcohol is sold? In many commonplace cases, it is impossible for a reasonable person to determine, before entering an establishment, whether alcohol is the "chief commodity" for sale. While alcohol is obviously the primary commodity sold at dedicated liquor stores or bars, most "establishments" defy such easy classification. It is often quite difficult if not impossible to determine — before entering a neighborhood mini-market, grocery store, or restaurant — whether alcohol is sold there and in what amount. Notice is insufficient where a person would have to interview a property owner before entering an establishment to inquire whether alcohol is a "chief commodity" sold there.

Even more problematic: how does a reasonable person quantify what constitutes a "chief" commodity? Does each individual business owner arbitrarily determine whether they think alcohol is a chief commodity for sale? Does the community corrections officer subjectively determine which establishments qualify under the "chief commodity" standard?

Perhaps the "chief commodity" standard is based on sales receipts that show a certain percentage of the establishment's income comes from alcohol sales? If so, what percentage of sales would establish alcohol as the "chief" commodity? For example, if a restaurant's receipts show that 25% of its sales are alcohol-related, will Traylor violate this condition if he enters to buy a burger?

Maybe the gross quantity of alcohol (number of bottles and cans) sold determines the standard. Costco may well sell more alcohol as a "commodity" than any other comparable "commodity" class. If so, will Traylor violate this condition if he frequents Costco?[2]

Moreover, sales volume of alcohol is not static. It will invariably change from week to week or month to month at any given establishment,

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[2] This is no small concern, particularly after the passage of Initiative 1183 in the November 2011 election. That initiative closed state liquor stores and allows hard liquor sales in new locations, including grocery stores and big box stores like Costco.

which could mean alcohol may be a chief item for sale one day but not another.

Perhaps the "chief commodity" standard is determined by looking at the amount of alcohol consumed by patrons? If so, it is clear that large amounts of intoxicating beverages are sold during various sporting events. Is Traylor therefore prohibited from entering Safeco Field, CenturyLink Field, or similar venues?

As these examples show, a reasonable person cannot describe a standard necessary to avoid arbitrary enforcement. The Court of Appeals, however, transformed this argument into something else: "Failure to designate one of those tests or some other more concrete test, he argues, prevents him from ascertaining which establishment he is prohibited from entering and creates potential for arbitrary enforcement." Slip op. at 4. The Court of Appeals misconstrued Traylor's argument. Traylor gave those examples to illustrate why the condition is vague. They were not offered to show how their inclusion in the judgment and sentence could fix the problem. The vagueness problem is not fixed by these examples, only highlighted by them.

The Court of Appeals believes ordinary people would know that they could enter certain kinds of establishments but not certain areas within those establishments. Slip op. at 3-4. The condition, as written,

categorically prohibits Traylor from frequenting establishments where alcohol is the chief commodity for sale. CP 17. The Court of Appeals in effect rewrites the language of the condition, opining it is actually fine to "frequent establishments where alcohol is the chief commodity for sale" so long as Traylor does not access certain areas within those establishments.

The Court of Appeals "establishment within an establishment" interpretation of the sentencing condition is strained and does not ameliorate the vagueness problem anyway. According to the Court of Appeals, Traylor can attend a sporting event at a sports venue but is prohibited from entering a beer garden or bar area within the venue. Slip op. at 3. But if Traylor wants to buy a hot dog at the concession stand at Safeco Field while taking in a Mariners game, can he do so in light of the fact that beer is also sold at the concession stand? We don't know. Maybe. Maybe not.

The Court of Appeals further opined Traylor is prohibited from being present in the lounge or bar area of a restaurant, but would not be prohibited from being in a "separate food service area of a restaurant." Slip op. at 4. But what of a restaurant that sells alcohol and has no "separate" food service area? And by what standard is one to ascertain separateness? The bar area in many restaurants is immediately adjacent to the food service area, where patrons may also imbibe, with no wall or other physical structure between the two. An ordinary person would not know what to do in this situation.

This is but one situation that invites ad hoc enforcement by a community corrections officer tasked with enforcing the prohibition.

The sentencing condition says nothing about authorizing Traylor to enter establishments where alcohol is the chief commodity for sale so long as he does not access certain ill-defined areas within the establishment. CP 17. The Court of Appeals, in an effort to save the condition from unconstitutional vagueness, has essentially rewritten it. The condition, even as interpreted by the Court of Appeals, still suffers from vagueness problems for the reasons articulated above.

Traylor takes cold comfort in the fact that the Court of Appeals has made various allowances for where he can and cannot go, but the Court of Appeals is not the entity responsible for enforcing this sentencing condition. The community corrections officer is the enforcer and has the power to immediately arrest and jail Traylor before Traylor ever sees a courtroom to dispute the matter. RCW 9.94A.631(1); Bahl, 164 Wn.2d at 751-52. A sentencing condition that leaves too much to the discretion of an individual community corrections officer is unconstitutionally vague. State v. Sanchez Valencia, 169 Wn.2d 782, 794-95, 239 P.3d 1059 (2010). The condition here is unconstitutional not only because it fails to provide reasonable notice as to what conduct is prohibited but also exposes Traylor to arbitrary, ad hoc enforcement. Bahl, 164 Wn.2d at 752-53.

The Snohomish County deputy prosecutor described this and other conditions listed in Appendix A of the judgment and sentence as "the normal conditions." 3RP 314. This constitutional issue will arise in other cases. Review is warranted under RAP 13.4(b)(3).

2. WHETHER THE COMMUNITY CUSTODY CONDITION PROHIBITING TRAYLOR FROM POSSESSING DRUG PARAPHERNALIA IS UNCONSTITUTIONALLY VAGUE PRESENTS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW AND THE COURT OF APPEALS DECISION CONFLICTS WITH A DECISION OF THE SUPREME COURT.

As a condition of community custody, the trial court ordered, "[d]o not possess drug paraphernalia." CP 17. This condition violates due process because it is not sufficiently definite to apprise Traylor of prohibited conduct and does not prevent arbitrary enforcement. U.S. Const. amend. XIV; Wash. Const. art. 1, § 3. Review is warranted under RAP 13.4(b)(1) and (b)(3).

In Sanchez Valencia, the Supreme Court struck down the following condition as unconstitutionally vague: "Defendant shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, police scanners, and hand held electronic scheduling and data storage devices."

Sanchez Valencia, 169 Wn.2d at 785, 794-95. The Court concluded the provision violated both prongs of the vagueness test: it failed to provide fair notice and failed to prevent arbitrary enforcement. Id. at 794-95.

The condition here is even less specific. The second prong of the vagueness test — whether a condition provides ascertainable standards of guilt to protect against arbitrary enforcement — is of particular concern. As reasoned in Sanchez Valencia, "'an inventive probation officer could envision any common place item as possible for use as drug paraphernalia,' such as sandwich bags or paper. Supp'l Br. of Appellant at 10. Another probation officer might not arrest for the same 'violation,' i.e. possession of a sandwich bag. A condition that leaves so much to the discretion of individual community corrections officers is unconstitutionally vague." Id. at 794-95. As in Sanchez Valencia, the breadth of potential violations under the condition in Traylor's case offends the second prong of the vagueness test, rendering the condition unconstitutionally vague.

To make matters worse, the condition is written in terms of strict liability. There is no mens rea attached to the condition prohibiting possession of drug paraphernalia. CP 17; see Sanchez Valencia, 169 Wn.2d at 794 ("The Court of Appeals also erroneously read into the condition an intent element. Intent is not part of the condition as

written."). The condition offends the first prong of the vagueness test — whether the prohibition is sufficiently definite to apprise ordinary people cannot understand what conduct is prohibited — because it prohibits mere *possession* of countless number of items that could be used to consume drugs. See Posters 'N' Things, Ltd. v. United States, 511 U.S. 513, 526, 114 S. Ct. 1747, 128 L. Ed. 2d 539 (1994) (in addressing vagueness challenge to federal drug paraphernalia statute, recognizing "a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice . . . that [the] conduct is proscribed.").

The Court of Appeals nevertheless held the statutory definition of the term "drug paraphernalia" in RCW 69.50.102 "provides sufficient guidance for an ordinary person to determine what conduct is prohibited, and it protects against arbitrary enforcement." Slip op. at 7.

The problem is that the sentence condition itself does not reference the statutory definition, and Traylor was not convicted of a crime under the statutory scheme that contains the definition. A statutory definition of a term does not give notice of the term's meaning as used in a sentence unless the definition is contained in the same criminal statute that the defendant was convicted of violating. Farrell v. Burke, 449 F.3d 470, 487 (2d Cir. 2006) (cited by Bahl, 164 Wn.2d at 755); accord United States v. Thompson, 653 F.3d 688, 696 (8th Cir. 2011). Traylor was not convicted

of violating the Uniform Controlled Substances Act (a VUCSA offense), so definition of the term "drug paraphernalia" in the Uniform Controlled Substances Act cannot defeat Traylor's vagueness challenge.

The Supreme Court in Bahl recognized the problem in declining to decide whether the statutory definition of "sexually explicit" alone would be sufficient notice, given that Bahl was not convicted under that statute. Bahl, 164 Wn.2d at 760. Similarly, Justice James Johnson, in his concurring opinion in Sanchez Valencia, maintained a statutory definition of the term "drug paraphernalia" would be sufficient "to dispel vagueness concerns" only where the person was convicted of a VUCSA offense. Sanchez Valencia, 169 Wn.2d at 796 n.1 (J.M. Johnson, J., concurring). Traylor was convicted of burglary. CP 58. No statutory definition of the term "drug paraphernalia" found in the drug offense statute dispels the vagueness problem.

Traylor's case is similar to State v. Moultrie, where the defendant challenged the condition of his sentence prohibiting contact with "vulnerable, ill or disabled adults" as unconstitutionally vague. State v. Moultrie, 143 Wn. App. 387, 396, 177 P.3d 776, review denied, 164 Wn.2d 1035, 197 P.3d 1185 (2008). The State argued the terms "vulnerable" and "disabled" provided sufficient notice of the type of person with whom Moultrie is to avoid contact because those terms were

defined by statute. Moultrie, 143 Wn. App. at 397. The Court of Appeals rejected the State's argument because the statutory definitions were more specific than the general terms used in the no contact condition: "Because there is no indication that the trial court in fact intended to limit the terms of the order to these statutory definitions, we will not presume it did so or otherwise rewrite the trial court's order." Id. at 397-98.

Similarly, the term "drug paraphernalia" in Traylor's judgment and sentence is not tied to its statutory definition. As in Moultrie, there is nothing in the judgment and sentence that shows the trial court intended to limit the condition on possession of drug paraphernalia to its statutory definition. As in Moultrie, the sentencing condition is broader than the statutory definition. The condition here prohibits Traylor from merely *possessing* drug paraphernalia, whereas the statutory definition is limited to things that are *used, intended for use, or designed for use* in drug-related activities. RCW 69.50.102(a). Unlike the statutory definition, there is no mens rea or use requirement to the sentencing condition as written.

The Court of Appeals nevertheless asserted, "Unlike in Moultrie, the statutorily defined term here is not more specific than the term imposed by the sentencing court. Rather, the term used in the condition is

identical to the term defined in the Uniform Controlled Substances Act." Slip op. at 8.

The Court of Appeals' attempt to distinguish Moultrie fails and its description of that case is inaccurate. In Moultrie, the statutorily defined terms of "vulnerable" and "disabled" were the exact terms used in the sentencing condition and the condition was still found to be lacking. Moultrie, 143 Wn. App. at 396-97.

The Court of Appeals also claimed "'drug paraphernalia' is a term of art with a specific legal meaning. Traylor has not identified a contradictory or alternate ordinary meaning." Slip op. at 8. The Court of Appeals identified the alternate ordinary meaning: the dictionary definition of "paraphernalia" is simply "personal belongings" or "articles of equipment," which can encompass innumerable items in a person's possession that go far beyond the statutory definition codified in a drug statute that Traylor was not convicted of violating. Slip op. at 7 (quoting Webster's Third New International Dictionary 1638 (2002)).

There is no meaningful difference between prohibiting "drug paraphernalia" without reference to its statutory definition and prohibiting "any paraphernalia that can be used for the ingestion or processing of controlled substances," the latter of which was struck down as unconstitutionally vague in Sanchez Valencia.

The Court of Appeals decision in Traylor's case conflicts with this Court's decision in Sanchez Valencia. RAP 13.4(b)(1). In addition, the issue of whether the "drug paraphernalia" condition is unconstitutionally vague because it is not tied to its statutory definition is a significant question of constitutional law. RAP 13.4(b)(3).

3. WHETHER THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE BURGLARY CONVICTION PRESENTS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW.

In his pro se statement of additional grounds, Traylor argued his conviction for second degree burglary must be reversed due to insufficient evidence. Due process requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. Evidence is sufficient to support a conviction only if, after viewing the evidence and all reasonable inferences in a light most favorable to the State, a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Under RCW 9A.52.030(1), a person is guilty of second degree burglary "if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building other than a vehicle or a dwelling." The Court of Appeals opined, "Traylor was witnessed fleeing the scene of the crime, and the owner of the shop testified that merchandise was missing after the incident. That evidence is sufficient for a rational trier of fact to conclude that Traylor or his accomplices committed theft." Slip op. at 9.

In fact, no witness actually saw where the two men were running *from*, and no one identified Traylor as one of those two men. 3RP 102-03, 110-11. Convictions must be reversed for insufficient evidence where, viewing the evidence in a light most favorable to the State, no rational trier of fact could have found the elements of the crime established beyond a reasonable doubt. Hundley, 126 Wn.2d at 421-22. In determining the sufficiency of evidence, existence of a fact cannot rest upon guess, speculation, or conjecture. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). Traylor's sufficiency argument raises a significant question of constitutional law warranting review under RAP 13.4(b)(3).

F. CONCLUSION

Traylor respectfully requests that this Court grant review.

DATED this 11th day of September 2013.

Respectfully submitted,

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# APPENDIX A

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON



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|---|---|
| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>SHANNON CHRISTOPHER TRAYLOR,<br><br>Appellant. | No. 68349-7-I<br><br>DIVISION ONE<br><br>UNPUBLISHED OPINION<br><br>FILED: August 12, 2013 |

APPELWICK, J. — Traylor alleges that two of his conditions of community custody are unconstitutionally vague. In a statement of additional grounds he argues that his underlying conviction is not supported by sufficient evidence. We affirm.

## FACTS

Police officers responded to an alarm at a smoke shop and discovered that a rock had been thrown through the store's glass door. Shannon Traylor and two others were spotted fleeing the store and entering a car. The officers stopped the car and arrested the three men. The State charged Traylor with second degree burglary. At trial, the owner of the smoke shop testified that 17 cartons of cigarettes, 25 boxes of cigarettes, and several boxes of cigars were missing.

The jury found Traylor guilty as charged. The sentencing court sentenced him to 29.75 months of confinement and 29.75 months of community custody.

## DISCUSSION

Traylor challenges two of his conditions of community custody:

> Do not possess or consume alcohol and do not frequent establishments where alcohol is the chief commodity for sale.
>
> . . . .

. . . . Do not possess drug paraphernalia.

He claims that the conditions are unconstitutionally vague.

The due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the state constitution requires that citizens have fair warning of proscribed conduct. State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). A statute is unconstitutionally vague if it does not (1) define the criminal offense with sufficient definiteness so that ordinary people can understand what conduct is proscribed, or (2) provide ascertainable standards of guilt to protect against arbitrary enforcement. Id. at 752-53. The sentencing court has discretion to impose conditions of community custody, and the sentences will only be reversed if manifestly unreasonable. Id. at 753. Imposing an unconstitutional condition is manifestly unreasonable. Id. In a vagueness challenge concerning a condition of community custody, as opposed to a statute or ordinance, there is no presumption of constitutionality. State v. Sanchez Valencia, 169 Wn.2d 782, 792, 239 P.3d 1059 (2010).

In interpreting a condition, we consider terms in the context in which they are used. Bahl, 164 Wn.2d at 754. When a term is not defined the court may consider the plain and ordinary meaning as set forth in a standard dictionary. Id. If persons of ordinary intelligence can understand what the law proscribes, notwithstanding some possible areas of disagreement, the condition is sufficiently definite. Id. In other words, a condition is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct. Sanchez Valencia, 169 Wn.2d at 793.

I. Alcohol Condition

Traylor argues that the term "chief commodity for sale" is unconstitutionally vague because a reasonable person can neither quantify what constitutes a "chief commodity" nor describe a standard necessary to avoid arbitrary enforcement. We disagree.

The dictionary definition of "chief" is "marked by greatest importance, significance, influence." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 387 (2002). It is a synonym of "principal," "main," and "leading." Id. The dictionary definition of "commodity" is "an economic good." Id. at 458. An establishment where alcohol is the chief commodity sold is an establishment where alcohol is the main or most important good for sale. It connotes an establishment whose primary purpose is the sale of alcohol.

Traylor's arguments fall into two broad categories. First, he argues that the condition's ambiguity is highlighted by the fact that it is unclear if he is prohibited from entering sports venues, stores that sell liquor but are not liquor stores, or a given restaurant. An ordinary person would not perceive selling alcohol to be the main or most important aspect of a sports venue, a theatre, or another similar entertainment venue. The chief commodity of those establishments is entertainment, and Traylor is not prohibited from attending a sporting event at a sports venue or a show at a theatre. He is, however, prohibited from entering a beer garden or bar area within those venues. Likewise, despite the privatization of liquor sales, an ordinary person would not perceive liquor to be the chief commodity at grocery stores, convenience stores, or gas stations, even though they may sell a significant quantity of alcohol. Traylor's complaint that it is

unclear whether he could enter a given restaurant is similarly unpersuasive. Alcohol is the chief commodity of a tavern or a lounge or bar area of a restaurant. He is prohibited from being present there, but would not be prohibited from the separate food service area of a restaurant. Some uncertainty is inherent in any condition. For example, even if the condition specified in detail that he was banned from any facility holding specific types of liquor licenses, he would have to make an inquiry about the license of the establishment to be certain. Again, we note that a "condition 'is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct.'" Valencia, 169 Wn.2d at 793 (quoting State v. Sanchez Valencia, 148 Wn. App. 302, 320, 198 P.3d 1065 (2009), reversed by, 169 Wn.2d 782)).

Second, Traylor argues that there are a variety of tests that could be used to determine whether alcohol is the chief commodity of a given establishment. Failure to designate one of those tests or some other more concrete test, he argues, prevents him from ascertaining which establishments he is prohibited from entering and creates a potential for arbitrary enforcement. He argues that an establishment's "chief commodity" could be measured, for instance, as a percentage of income that comes from alcohol sales or from the gross quantity of alcoholic units sold. Thus, Traylor claims he may violate the condition if he enters an establishments whose sales receipts show that 25 percent of its sales are alcohol related, or a store that sells more alcohol than any other "commodity class."

While including such a parameter might exclude other imagined means to determine a violation, it would provide little real guidance. Those conditions would fail

the vagueness test, because sales data is not widely available. It would not be possible for an ordinary person to tell what conduct is proscribed without a specific inquiry of the establishment. Further, the information would vary over time. It could mean that presence one day was a violation and another it was not, and the condition would have to include a temporal element as well as a quantity element to be accurately interpreted. That additional requirement would make it even more difficult for an ordinary person to tell what conduct is proscribed. Such parameters are not necessary for an ordinary person to understand when alcohol is an establishment's chief commodity.

The vagueness doctrine is aimed at preventing the delegation of "basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). This condition adequately addresses that concern. Its ordinary meaning provides both sufficient guidance for an ordinary person to understand what conduct is proscribed and ascertainable standards of guilt.

II. Drug Paraphernalia Condition

Traylor asserts that the condition prohibiting him from possessing "drug paraphernalia" is unconstitutionally vague. His argument focuses on the second prong of the vagueness test, and he relies primarily on Sanchez Valencia. The challenged provision in that case provided:

> "Defendant shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including, scales, pagers, police scanners, and hand held electronic scheduling and data storage devices."

Sanchez Valencia, 169 Wn.2d at 785. The supreme court held that the condition was vague under both prongs. Id. at 793-95.

In determining that the condition did not provide fair notice of what a defendant could or could not do, the court reasoned that the condition referred very broadly to "paraphernalia," as opposed to the more specific term "drug paraphernalia." Id. at 794. It also explained that the condition failed to tie potential violations to the defendant's intent. Id.

The court then concluded that the condition did not provide ascertainable standards of guilt to protect against arbitrary enforcement because an inventive probation officer could envision any common place item as possible for use as drug paraphernalia, such as sandwich bags or paper. Id. at 794. It explained that another officer might not arrest the defendant for the same type of violation and that a condition that leaves that much discretion to individual corrections officers is unconstitutionally vague. Id. at 794-95.

Unlike "paraphernalia," "drug paraphernalia" is a statutorily defined term. The definition in the Uniform Controlled Substances Act provides:

> "[D]rug paraphernalia" means all equipment, products, and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance.

RCW 69.50.102. The statute further provides a lengthy, non-exhaustive list of items that constitute "drug paraphernalia." RCW 69.50.102. That definition ameliorates each of the concerns raised by the Supreme Court in Sanchez Valencia. It refers to the

specific term of art "drug paraphernalia," instead of the general term "paraphernalia." Indeed, the ordinary meaning of "paraphernalia" is simply "personal belongings" or "articles of equipment." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1638 (2002). Also unlike the condition in Sanchez Valencia, the statutory definition contains an explicit intent requirement. RCW 69.50.102. That intent requirement alleviates the Supreme Court's concern that the condition in that case would lead to arbitrary enforcement, because one corrections officer could deem a sandwich bag to constitute paraphernalia while another does not. Sanchez Valencia, 169 Wn.2d at 794. Under the statutory definition, possessing a sandwich bag could only constitute a violation if the defendant used or intended to use the bag for a drug-related activity. RCW 69.50.102.

The statutory definition provides sufficient guidance for an ordinary person to determine what conduct is prohibited, and it protects against arbitrary enforcement. But, the sentence condition itself does not reference the statutory definition, and the defendant was not convicted of a crime under the statutory scheme that contains the definition. The issue thus turns to whether the statutory definition is fairly incorporated into the term "drug paraphenalia."

In State v. Moultrie, we considered whether a condition prohibiting contact with "'vulnerable, ill or disabled adults'" was unconstitutionally vague despite the fact that "vulnerable adult" and "developmental disability" are defined by statute. 143 Wn. App. 387, 396-97, 177 P.3d 776 (2008). In particular, we emphasized that "vulnerable adult" and "developmental disability" are specific, legal terms that differ from the general terms "vulnerable" and "disabled." Id. at 397. Without a specific reference to the statutory definitions, we could not conclude that the trial court intended to incorporate them. Id.

at 397-98. We remanded for the trial court to clarify the condition, and ordered the term "ill," which has no statutory definition, stricken as vague. Id. at 398.

Unlike in Moultrie, the statutorily defined term here is not more specific than the term imposed by the sentencing court. Rather, the term used in the condition is identical to the term defined in the Uniform Controlled Substances Act. And, "drug paraphernalia" is a term of art with a specific legal meaning. Traylor has not identified a contradictory or alternate ordinary meaning. Nevertheless, we note that, "'[b]ecause of the inherent vagueness of language, citizens may need to utilize other statutes and court rulings to clarify the meaning of a statute'"—"'[s]uch sources are considered presumptively available to all citizens.'" Bahl, 164 Wn.2d at 756 (quoting State v. Wilson, 160 Wn.2d 1, 8, 154 P.3d 909 (2008)) (alterations in original) (internal quotation marks omitted). We emphasize that the better practice is for the sentencing court to specifically tie the term "drug paraphernalia" to its statutory definition. Doing so avoids appeals such as this. But, even without such an express statutory citation, the condition is not unconstitutionally vague in this case because the only reasonable interpretation is that the sentencing court intended to tie the condition to the statutory definition.

III. Statement of Additional Grounds

Traylor makes two sufficiency of the evidence arguments in a statement of additional grounds. Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Traylor first argues that there is no evidence that he or his accomplices had anything in their hands when they left the store, and the police did not recover any of the missing cigarettes or cigars. But, the State only bore the burden to prove that Traylor had intent to commit a crime against a person or property in the building, not that he actually committed a crime against a person or property in the building. RCW 9A.52.030. Theft is not an essential element of second degree burglary. See id. Further, even if it was, Traylor was witnessed fleeing the scene of the crime, and the owner of the shop testified that merchandise was missing after the incident. That evidence is sufficient for a rational trier of fact to conclude that Traylor or his accomplices committed theft.

Traylor also argues that the owner initially reported that nothing was missing, and later changed his assessment. He claims that a responding police officer likewise did not notice that anything in the store was disturbed. Those arguments go to the weight of the evidence, not its sufficiency. And, as mentioned, actual theft is not an essential element of second degree burglary.

We affirm.

Leach, J.

WE CONCUR:

Ann, J.

Dwyer, J.

## IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>SHANNON TRAYLOR,<br><br>Petitioner. | ) | SUPREME COURT NO. _____<br>COA NO. 68349-7-I |

**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 11TH DAY OF SEPTEMBER 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

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**SIGNED** IN SEATTLE WASHINGTON, THIS 11TH DAY OF SEPTEMBER 2013.

X Patrick Mayovsky