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DIVISION II

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STATE OF WASHINGTON
DEPUTY

NO. 36726-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

WILLIAM G. HOLEMAN, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE ROBERT A. LEWIS
CLARK COUNTY SUPERIOR COURT CAUSE NO. 06-1-01993-8

BRIEF OF RESPONDENT

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I. STATEMENT OF THE FACTS

The State accepts the Statement of Facts as set forth by the appellant, for the most part. Where additional information is needed, or clarification needs to be made, it will be done so in the Argument Section of the Brief.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. I

The first Assignment of Error raised by the defendant is a claim that the trial court erred when it denied the defendant's Motion to Suppress Evidence that the police had seized the defendant illegally. There were a total of three suppression hearings under CR 3.6. The one dealing with the stop of the defendant occurred on May 21, 2007. At the end of that, the Judge entered Findings of Fact and Conclusions of Law on Defendant's Motion to Suppress (CP 104). A copy of those Findings of Fact and Conclusions of Law are attached hereto and by this reference incorporated herein. Based on the evidence that the Judge heard at the Suppression Hearing, the Judge not only entered his Findings of Fact but also made further observations on the record concerning what he had heard and how it justified the stopping and questioning of the defendant:

The Court: The officers then went to the residence and -- outside of the residence, and apparently while

standing on the street, at least that's my finding, they were able to observe a canopy which matched the description of the stolen canopy; a vehicle parked on the street in front of the residence, which one officer recognized as a vehicle that he had taken a stolen report on and which dispatch confirmed was, in fact, reported as a stolen vehicle; and they were able to observe in the garage, with the door partially open, the license plate of another vehicle. And that license plate was run and determined to come back to a recently stolen Honda Accord.

That was the information that the officers had available to them at the time Mr. Holeman left the residence and walked up to a car that was not reported stolen, opened the door, reached in, and then exited the vehicle. The officers then motioned to him to come over to them to be questioned. At that time, I'll assume that he was not free to leave and didn't have to make any show of running or anything to make that finding.

I also find that at that point, the officers had reasonable grounds to believe that there was a crime of possession of stolen property going on associated with this residence, that Mr. Holeman was to some extent associated with the residence since he had just come out of it. That gave them sufficient, reasonable, articulable suspicion to believe that he should be questioned about whether or not he knew anything about these stolen items. And that's why they called him over, and they had reasonable grounds to do that. They didn't exceed the scope of it.

They asked him about those things, and he indicated he didn't know anything. And then they did what is certainly a proper thing to do while you're in the course of investigatory stuff is find out who you're talking to by identifying him. Unfortunately for Mr. Holeman, that resulted in a felony warrant being discovered and he was arrested and placed into custody.

(May 21, 2007, Hearing
RP 137, L. 5 – 138, L. 17)

An investigative stop is a seizure and is constitutional only if the officer has an articulable and well-founded suspicion, based on objective facts, that the seized person has committed, is committing, or is about to commit a crime. E.g., Duncan, 146 Wn.2d at 172; State v. Kennedy, 107 Wn.2d 1, 4, 6-7, 726 P.2d 445 (1986); State v. Sieler, 95 Wn.2d 43, 46, 621 P.2d 1272 (1980).

Crime prevention and detection permit police, in appropriate circumstances and in an appropriate manner, to approach a person and investigate possible criminal behavior even though there is no probable cause to make an arrest. Terry v. Ohio, 392 U.S. 1, 22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Said another way, a "well-founded suspicion not amounting to probable cause" to arrest permits police to stop a suspect, request identification, and ask for an explanation of his or her activities. White, 97 Wn.2d at 105 (quoting State v. Gluck, 83 Wn.2d 424, 426, 518 P.2d 703 (1974)). But the standard is rigorous. Police must have a well-founded suspicion based on objective facts that the suspect is connected to actual or potential criminal activity. State v. Sieler, 95 Wn.2d 43, 46, 621 P.2d 1272 (1980). This requires specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the police intrusion. Terry, 392 U.S. at 21. "The reasonableness of an officer's suspicion is determined by the totality of the circumstances known to the

officer at the inception of the stop." State v. Gleason, 70 Wn. App. 13, 17, 851 P.2d 731 (1993).

Articulable suspicion, in turn, is the ability to reasonably surmise from the information at hand that there is a substantial probability that a crime was in progress or had occurred. Kennedy, 107 Wn.2d at 6.

The State submits that the record demonstrates that the police had a well-founded suspicion based on objective facts that criminal activity was being committed at the residence that the defendant had come out of. Therefore, it appeared reasonable to the officers to question the defendant concerning what he knew about it and to also verify his identification. As a practical matter, the defendant testified on his own behalf at the time of trial and indicated to the jury that when the police motioned for him to come over that "I didn't see anything wrong with that." (RP 418, L. 10-11).

III. RESPONSE TO ASSIGNMENT OF ERROR NO. II

The second Assignment of Error raised by the defendant is a claim that six of the charges that he was found guilty of were not supported by substantial evidence. Specifically, the counts in the Third Amended Information (CP 149) were 01, 10, 11, 12, 13 and 20. Count 01 was the charge of Possession of Methamphetamine, Counts 10, 11, 12, 13 and 20 were charges of Second Degree Identity Theft.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, 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). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.* Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The Court will defer to the trier of fact on issues involving conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence." State v. Hernandez, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

Concerning the claim of insufficient evidence to support Count 01 (Possession of Methamphetamine) drug contraband was seized in the area that was being occupied by the defendant. John Dunn, a Forensic Scientist for the State of Washington, testified that the plastic bag contained residue of methamphetamine (RP 71). In close proximity to that bag was also found pipes used to smoke methamphetamine. The defendant, when he testified, indicated that some of the methamphetamine pipes belonged to him (RP 424-425) and that he had used the methamphetamine pipes to smoke methamphetamine while at the house that was the subject of the search. (RP 435). Thus, not only was the methamphetamine found in

close proximity to his other belongings near the computer, but he also acknowledged that he had used methamphetamine while in the residence. To determine whether a defendant was in constructive possession of an object, the Appellate Court looks to the totality of the circumstances. State v. Partin, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977). One aspect of dominion and control is that the defendant may reduce the object to actual possession immediately. State v. Jones, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). While proximity alone is not sufficient to establish constructive possession, proximity coupled with other circumstances from which the trier of fact can infer dominion and control is sufficient to show constructive possession. Jones, 146 Wn.2d at 333.

The State submits that, concerning Count 01 of the Third Amended Information, that there is sufficient evidence to allow the question of constructive possession of the drugs to go to the jury.

The rest of the matters specifically deal with information that was taken off of the computer. The defendant, when he testified, indicated that the computer that was seized was registered to him and that the check writing program contained on the computer was also registered to him. (RP 427). He further indicated that an icon dealing with “Bill” and the password allowing access to these areas of the computer were also put on there by him. (RP 429-430). In reference to that, then, officers testified

concerning what physical items they found around the computer terminal that was located in the bedroom being occupied by the defendant and also on the computer. Sergeant McNicholas indicated that there was a black pouch that was found on top of the computer which contained numerous checks in various names and identities. (RP 54-55; Exhibit No. 8). Officer Martin, found a wallet there which belonged to the defendant (RP 92-93).

Officer Maggi Holbrook, works for the Vancouver Police Department and is an expert in computers. She downloaded the information from the hard drive on the computer and spent time with the jury going through the various directories and subdirectories, folders and subfolders that were found on the hard drive. As explained to the Judge, some of the items in her “slide show” were images taken from the computer hard drive and were subsequently made into exhibits for presentation with the jury along with the contents of the slide show itself. (RP 298). The Judge then took this information and instructed the jury about what they were going to see in this slide show that dealt specifically with the folders and subfolders on the computer.

(The Court): All right, ladies and gentlemen of the jury, I've completed my review of the evidentiary issues that I needed to resolve. The exhibits that you're going to

be shown on this slide presentation are of two types. Some of the slides are copies of pages from exhibits. If those exhibits are admitted, then they will go back with you to the jury room during your deliberation. Some of them are not copies of exhibits, they're offered for illustrative purposes only, in other words, only to help you understand the oral testimony that the witness is giving at the time you're observing the image. So that will be the only time you observe the image. Those images will not go back with you to the jury room.

-(RP 299, L. 2-14)

The defense claims that there is no identification of Exhibit 26. Exhibit 26 is a compilation of four checks that were testified to by the four victims of the identity theft. All four of them indicated that these had been checks they had written to The Oregonian newspaper. The Oregonian newspaper had told them that some of the checks had been stolen. These were images that were taken off of the computer hard drive. Lucetta Paluck was the victim in Count 10 of the Third Amended Information. She was shown Exhibit 26 and the first check on that page dealt specifically with the check that she had written to The Oregonian (RP 196). Heather Baron was the victim of Count 11 of the Third Amended Information. She was shown Exhibit 26 and the second check on that compilation was the check that she had written to The Oregonian (RP 204). Her husband, Kyle Baron, also testified concerning this (RP 209). Courtney Staehely was the victim of Count 12 of the Third Amended

Information. She was shown Exhibit 26 and the third check listed there was the check she had written to The Oregonian (RP 213-214). Tom Stigum was the victim of Count 13 of the Third Amended Information. He was shown Exhibit No. 26 and the fourth check on that compilation was the one that he wrote to The Oregonian (RP 241). Finally, John McKenzie was the victim in Count 20 of the Third Amended Information. He indicated that Exhibits 37 and 38 were identifications dealing with him. Exhibit 37 was his identification with his picture on it (RP 221). However, Exhibit 38 was a photograph of him but the name on the identification had been changed and was somebody he did not recognize (RP 222-223). Exhibit 26 was admitted without objection (RP 244), as were Exhibits 37 and 38.

The defense at the time of trial didn't have any problems with this because they knew exactly where these items had come from. In fact, the defense attorney in his closing argument specifically referred to Exhibit 26 and how it had been gotten off of the computer and had been presented to the jury (RP 537-542). This was also explained to the jury as the subfolders that were on the computer under a heading of "bills bad things" and the subfolder dealing with "checks" (RP 307; 325-326). Exhibits 37 and 38 were part of another subfolder dealing with "Washington and Oregon ID templates" (RP 512).

None of these matters at the time of trial were objected to by the defense nor were any questions raised about authenticity or where these Exhibits had come from. The State submits that this matter is not subject to review.

ER 103 requires all evidentiary objections to be timely and specific. Failure to raise an objection at the trial court precludes a party from raising it on appeal. DeHaven v. Gant, 42 Wn. App. 666, 669, 713 P.2d 149 (1986) (citing Symes v. Teagle, 67 Wn.2d 867, 873, 410 P.2d 594 (1966)); State ex rel. Partlow v. Law, 39 Wn. App. 173, 178, 692 P.2d 863 (1984). Even if an objection is made at trial, a party may assign error in the appellate court only on the specific ground made at trial. State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985); State v. Boast, 87 Wn.2d 447, 451, 553 P.2d 1322 (1976).

The trial court must be informed of the parties' contentions and theories concerning evidence offered, so that the court may rule on such contentions, consider such theories, and thus avoid committing error. State v. Garrison, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967).

With regard to objections to evidence, it has long been the rule in this jurisdiction that an objection which does not specify the particular ground upon which it is based is insufficient to preserve the question for appellate review. See, e.g., Marr v. Cook, 51 Wn.2d 338, 341-42, 318 P.2d

613 (1957); White v. Fenner, 16 Wn.2d 226, 245-46, 133 P.2d 270 (1943).

"Objections must be accompanied by a reasonably definite statement of the grounds therefor so that the Judge may understand the question raised and the adversary may be afforded an opportunity to remedy the claimed defect." Presnell v. Safeway Stores, Inc., 60 Wn.2d 671, 675, 374 P.2d 939 (1962).

The State submits that this matter was properly presented to the jury because no objections were made to this evidence. The State further maintains that this is not subject to appeal.

IV. RESPONSE TO ASSIGNMENT OF ERROR NO. III

The Third Assignment of Error raised by the defendant concerns the Miranda rights that were given to the defendant.

The Trial Court held a 3.5 Hearing on May 21, 2007, concerning the defendant's statements. As a result of that, the Court ultimately entered Findings of Fact and Conclusions of Law on CrR 3.5 Hearing (CP 101). The defendant, on appeal, claims that there is nothing in the record to support what Miranda rights were read to the defendant. Because of that, the claim is that the use of the statements as substantive evidence caused prejudice to the defendant's case.

However, in this contention the defendant is grossly in error. The Court in its Findings of Fact on the 3.5 indicated that Officer Martin

advised the defendant of his Miranda rights by reading them off a pre-printed card that the officer carries with him (Findings of Fact No. 6, CP 101).

This matter was presented to the Court through the testimony of Officer Martin and the questioning was as follows:

Q. (Deputy Prosecutor) Now, prior to you speaking with him, did you advise him of his rights?

A. (Officer Martin) Yes, I did.

Q. And how did you do that?

A. I did that with the prepared card. Same manner that I did the other people I spoke with that day.

Q. Do you have that prepared card with you?

A. Yes, I do.

Q. Could you please read into the record exactly what you advised Mr. Holeman of that day?

A. Yes. I told Mr. Holeman you have the right to remain silent --- after I read each right, I pause and ask the person if they understand that right, which I receive either a yes or no.

Q. Let's do that exactly how you did it that day.

A. I asked if he understood this right, which he stated yes. Then I said anything you say can and will be used against you in a court of law. I asked Mr. Holeman if he understood this, he also said yes. You have the right to talk to a lawyer and have him or her present with you while you're being questioned. I asked him if he understood this question, he again responded yes -- or statement. If you cannot afford to hire a lawyer, one will be appointed to represent you at no expense. I asked if he understood that, he again said yes. I asked a second time if he understood all of his rights, he again told me, yes. I asked if he wanted to waive the rights to speak to me and he stated, sure do.

Q. Okay. Did he seem confused at all about any of these rights that you read to him?

A. No, he did not.

Q. Did he then speak to you?

A. Yes, he did.

-3.5 / 3.6 Hearing, May 21, 2007,
(RP 76, L. 16 – 77, L. 23)

Miranda warnings must be given before custodial interrogations by agents of the State begin their questioning. If that is not done, then the statements obtained are presumed to be involuntary. State v. Willis, 64 Wn.App. 634, 636, 825 P.2d 357 (1992). In our situation, the defendant was properly advised of his Miranda warnings prior to questioning by the officers. The State submits that there is no error demonstrated in this record.

V. RESPONSE TO ASSIGNMENT OF ERROR NO. IV

The Fourth Assignment of Error raised by the defendant is a claim of ineffective assistant of counsel because the defendant maintains that the defense attorney should have objected to testimony from Mr. Goodlett and Officer Holbrook concerning the computer that the officers seized and, specifically, that the computer was registered to Bill Holeman, the defendant, with an email address of cueballdhf@gmail.com. Mr. Goodlett testified that he was an employee of the Hewlett-Packard Corporation where he had worked for 30 years and held the position of North American Regional Supply Chain Security Manager. He indicated a familiarity with the records kept by Hewlett-Packard concerning business

dealings with the registration of personal computers and discussed specifically this computer and the fact that it was registered to the defendant, Bill Holeman. It also indicated that an email was associated with Mr. Holeman's registration and that email was the cueballdhf@gmail.com that was referred to above (RP 59-61). Officer Holbrook, when she testified, basically indicated the same information.

To show ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced her. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008, 140 L. Ed. 2d 323, 118 S. Ct. 1193 (1998). Prejudice occurs when there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In other words, counsel's deficiencies must have adversely affected the defendant's right to a fair trial to an extent that "undermine[s] confidence in the outcome." State v. Brett, 126 Wn.2d 136, 199, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121, 133 L. Ed. 2d 858,

116 S. Ct. 931 (1996); State v. Horton, 116 Wn. App. 909, 922, 68 P.3d 1145 (2003) (quoting Strickland, 466 U.S. at 694).

When trial counsel's actions involve matters of trial tactics, the Appellate Court is hesitant to find ineffective assistance of counsel. State v. Jones, 33 Wn. App. 865, 872, 658 P.2d 1262, review denied, 99 Wn.2d 1013 (1983). It presumes that counsel's performance was reasonable. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). The decision of when or whether to object is an example of trial tactics, and only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662, review denied, 113 Wn.2d 1002, 777 P.2d 1050 (1989)

The State submits that there was no reason for objections to be made to this questioning because the defendant testified in his own defense. As indicated elsewhere in this Brief, he testified that the computer in question was registered to him (RP 427). And he further indicated that the email address that he was using to do all this was cueballdhf@gmail.com. (RP 426).

There was no reason for the defense to object to this line of questioning, even if it were improper (which the State maintains it was not) because the defense attorney knew that the defendant was going to be

testifying, admitting and acknowledging that he was the registered owner of the machine and that he used that particular email address. His claim, and defense, was that he did this for a friend and that he did not have access to this machine other than, for example, to play games and things of that nature. (RP 430-431). The decision of when or whether to object to a line of questioning or to a witness is a classic example of trial strategy. State v. Madison, 53 Wn.App. 754, 763, 770 P.2d 662 (1989).

The State submits that there has been no showing of ineffective assistance of counsel.

VI. RESPONSE TO ASSIGNMENT OF ERROR NO. V

The fifth Assignment of Error is a claim that the defendant was denied a fair trial because the State was allowed to admit exhibits which dealt with uncharged crimes of identity theft. Those records were found on the computer and underlying documents around the computer. The other part of this claim is that the Trial Court prevented some jury instructions from being given and thus preventing the defendant from adequately arguing his case to the jury.

The first part of this assignment of error dealing with Exhibits 29, 31-34, is classic ER 404(b).

ER 404(b) provides in relevant part:
“Evidence of other crimes, wrongs, or acts is not
admissible to prove the character of a person in order to

show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”

Before evidence of other crimes, wrongs, or acts can be admitted over proper objection, the trial court must determine that it is logically relevant to a material issue before the jury and that its probative value outweighs its potential for prejudice. ER 401; ER 403; State v. Kelly, 102 Wn.2d 188, 198, 685 P.2d 564 (1984); State v. Saltarelli, 98 Wn.2d 358, 361-63, 655 P.2d 697 (1982); State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982); State v. Clark, 48 Wn. App. 850, 863, 743 P.2d 822, review denied, 109 Wn.2d 1015 (1987). In determining whether evidence is logically relevant, the trial court must find that it has a tendency to make more or less probable the existence of a fact that is of consequence to the action, ER 401; Saltarelli, 98 Wn.2d at 363; see State v. Mutchler, 53 Wn. App. 898, 901, 771 P.2d 1168, review denied, 113 Wn.2d 1002 (1989), State v. Thompson, 47 Wn. App. 1, 11, 733 P.2d 584, review denied, 108 Wn.2d 1014 (1987), and generally that such fact will be similar to those listed in ER 404(b). Saltarelli, 98 Wn.2d at 362; see State v. Goebel, 36 Wn.2d 367, 378-79, 218 P.2d 300 (1950). In weighing probative value against prejudicial effect, the trial court must exercise its discretion, and its decision will be overturned only for abuse of discretion. Robtoy, 98

Wn.2d at 42; Thompson, 47 Wn. App. at 12. State v. Stanton, 68 Wn. App. 855, 861, 845 P.2d 1365 (1993).

The Trial Court was cognizant of the fact that this evidence was limited in purpose and because of that instructed the jury as follows:

Instruction No. 7: Exhibits 31, 32, 33, and 34 and evidence concerning those Exhibits was introduced for the limited purpose of determining the intent of the person in possession of the computer and the software on the computer. You must not consider this evidence for any other purpose.

Court's Instructions to the Jury
(CP 187, Instruction No. 7)

Concerning the instructions that were proposed by the defense but not given by the court, the proposed Defense Instruction No. 1 as set forth in the Brief of Appellant on page 33 is something that is covered in the elements instructions of the crimes charged. That is, that an intent must be shown and demonstrated and is in line not only with the 404(b) evidence but also with the specific jury instructions.

The second defense proposed instruction dealing with proximity to the controlled substance and constructive possession, is adequately set forth to the jury in Instruction No. 11 which reads as follows:

Instruction No. 11: Possession means having a substance in one's custody or control. It may be either actual or constructive.

Actual possession occurs when the item is in the actual, physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession, but there is dominion and control over the substance. Dominion and control need not be exclusive to establish constructive possession.

Court's Instructions to the Jury
(CP 187, Instruction No. 11)

The State submits that the jury was adequately informed as to the appropriate case law and there is no showing in this record that the defendant was unable to argue the nature of its defense to this jury. (see Response to Assignment of Error II, above, for case-law and additional argument).

VII. RESPONSE TO ASSIGNMENT OF ERROR NO. VI

The sixth Assignment of Error raised by the defendant is a claim that the Trial Court should have granted a motion for mistrial based on juror misconduct which, they claim, denied the defendant his right to a fair trial. The claim is that one of the jurors looked up the term “aide and abet” on the internet and possibly shared some of this information with other jurors. The claim is that the Trial Court failed to hold an evidentiary hearing to determine just what extrinsic evidence the juror had obtained and how his or her communication of it affected the remainder of the jury. (Brief of Appellant, p. 37).

A jury is expected to bring its opinions, insights, common sense, and everyday life experiences into deliberations. United States v. Howard, 506 F.2d 865, 867 (5th Cir. 1975). Additionally, “[t]he individual or collective thought processes leading to a verdict ‘inhere in the verdict’ and cannot be used to impeach a jury verdict.” Richards v. Overlake Hosp. Medical Ctr., 59 Wn. App. 266, 272, 275, 796 P.2d 737 (1990) (concluding that a juror's introduction of her own theory of the cause of birth defects, based on her medical background, did not constitute extrinsic evidence); see also Cox v. Charles Wright Acad. Inc., 70 Wn.2d 173, 179-180, 422 P.2d 515 (1967).

The defendant must establish prejudice for error to exist. In State v. Vasquez, 130 Ariz. 103, 107, 634 P.2d 391, 395 (1981), the court stated:

"We are only justified in disturbing the verdict of guilty on account of the alleged misconduct of a juror when it is shown that such misconduct was prejudicial to the rights of the defendant, or when such a state of facts is shown that it may fairly be presumed therefrom that the defendant's rights were prejudiced." State v. Adams, 27 Ariz. App. 389, 392, 555 P.2d 358, 361 (1976).

Whether such prejudice exists is a matter of fact within the discretion of the trial court. State v. Young, 89 Wn.2d 613, 630, 574 P.2d

1171, cert. denied, 439 U.S. 870, 58 L. Ed. 2d 182, 99 S. Ct. 200 (1978).
Smith v. Phillips, 455 U.S. 209, 217, 102 S. Ct. 940, 71 L. Ed. 2d 78
(1982)). “A strong, affirmative showing of misconduct is necessary in
order to overcome the policy favoring stable and certain verdicts and the
secret, frank and free discussion of the evidence by the jury.” State v.
Balisok, 123 Wn.2d 114, 117-18, 866 P.2d 631 (1994).

In our case, the Trial Court was alerted that one of the jurors (Juror
No. 8) had looked on the internet for some of the terminology. The Court
held an evidentiary hearing in this matter and called Juror No. 8 into Court
where he was questioned by the Court in front of the parties (RP 585-587).

Defense counsel questioned why the Judge did not allow the
attorneys to question the juror and the Trial Court made it very clear that
he did not want to interfere with the deliberations of the jury.

The Court: Well, that’s because I have to be very
careful, Counsel. I’m not permitted to interfere with the
deliberations of the jury. And one of the things I do plan to
instruct the jury is, to remind them that the purpose of the
jury notes is to ask procedural questions, not to advise the
Court of the discussions going on in the jury room.

-(RP 587, L. 22 – 588, L. 3)

Defense counsel reminded the Court that the theory of aiding and
abetting was not argued by either side in the case. (RP 588, L. 16). The

Court indicated that based on what Juror No. 8 had told them, the term “aid” that the juror had looked up did not appear to be substantially different in understanding than people would commonly have used that phrase. (RP 588-589). The Court indicated that it was willing to give further instructions concerning this to help the jury. The State was opposed to this and also the defense again reiterated to the Court that this theory was not argued by either side and really didn’t want to open that up (RP 590).

With that in mind, the court then had the jury come in and gave them the following oral instruction:

(The Court): Welcome back, ladies and gentlemen. I received another note from you at 11:35. The note read that Juror No. 8 had looked at the definition of aid and abet on Google last night and shared parts of that definition with the group. Half of the group did not hear the definition when it was shared and it was not repeated.

The note is not actually a question, so initially it wasn’t clear to me whether I should respond to it at all. But to the extent that it is an implied question asking for guidance, I can only reiterate to you what I previously indicated in the instructions. To the extent that the Court has a legal definition for a word, that is to be used in this case, the legal definition was provided in the instructions that were given to you. You should consider the instructions as a whole and discuss those instructions, including the definitions provided for words, where it appears that a legal definition was necessary.

All of the legal instructions that you need are contained in the instructions. You should not seek out from any source any additional factual information or any additional legal instructions, including the legal definitions of a word. To the extent that a juror believes that they have a legal definition of a word, you should disregard that if it's not included in the instructions.

Now, of course, there are some words that have common meanings. For example, I don't need to define the word "the" or "State of Washington," or those sorts of things. And you can rely on your individual judgment with regard to common definitions. But to the extent that you need a legal definition of a word, it has been provided to you in the jury instruction.

I don't want to discourage you from asking procedural questions. However, I do need to remind you that I am not permitted as a judge to interfere in any way with your deliberation. The reason we have jurors deliberate in secret is so that they feel free to discuss among themselves the evidence and instructions given by the Court. And I am not permitted by law to comment on that or those deliberations in any way.

So the purpose of questions is not to advise the Court about what people are saying, but as instructed in the last -- I think it's Instruction No. 46, if you have a procedural question which you cannot resolve by reviewing the instructions, then you can write that question out and submit it to me. And to the extent I can, I will answer it.

With that response, you can return to your deliberations.

-(RP 591, L. 14 – 593, L.13)

The State submits that the Court had satisfied itself as to the nature of the irregularity, discussed it fully with the attorneys and instructed the

jury appropriately. The State maintains that there is no error demonstrated in this record.

VIII. RESPONSE TO ASSIGNMENT OF ERROR NO. VII

The seventh Assignment of Error is a claim of cumulative error in this case.

A defendant may be entitled to a new trial when errors cumulatively produced at trial were fundamentally unfair. In Re Personal Restraint of Lord, 123 Wn.2d 296, 332, 868 P.2d 835, clarified by, 123 Wn.2d 737, 870 P.2d 964 (1994) (citing Walker v. Engle, 703 F.2d 959, 963 (6th Cir. 1983)). The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. Lord, 123 Wn.2d at 332. The cumulative error doctrine applies when several trial errors occur which, standing alone, may not be sufficient to justify reversal but when combined may deny the defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 10 P.3d 390 (2000). It does not apply where the errors are few and have little or no effect on the outcome of the trial. Greiff, 141 Wn.2d at 929.

The state submits that there has been no showing of cumulative errors in this case and therefore, the Cumulative Error Doctrine would not apply.

IX. RESPONSE TO ASSIGNMENT OF ERROR NO. VIII

The eight Assignment of Error deals specifically with a provision in the Judgment and Sentence (CP 273) which indicates as follows:

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.

(Judgment and Sentence, CP 273, page 8)

The defendant maintains that this particular provision of the defendant's sentence is "hopelessly vague". (Brief of Appellant, page 42). Further, he maintains that this matter should be heard at this time and is ripe for decision.

A statute or condition is void of vagueness if it fails to define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prescribed. City of Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). The appellate court presumes that statutes are constitutional and the defendant has a heavy burden of proving that a statute is unconstitutional beyond a reasonable doubt. State v. Smith, 111 Wn.2d 1, 5, 759 P.2d 372 (1988). The fact that some terms in a statute are not defined does not necessarily mean the statute or condition

is void for vagueness. Douglass, 115 Wn.2d at 180. Impossible standards of specificity are not required, and a statute “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.” City of Seattle v. Eze, 111 Wn.2d 22, 27, 759 P.2d 366 (1988).

The State submits that this identical argument and claim was raised recently in State v. Motter, 139 Wn. App. 797, 162 P.3d 1190 (2007). In the Motter case, the defendant challenged the identical provision of his judgment and sentence. He attacked it for vagueness and for the reasons also raised in this appeal. Division II, in the Motter case, indicated as follows:

B. Prohibition on Paraphernalia Possession and Use

Second, Motter challenges the trial court's order that he: 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, cellular phones, police scanners, and hand held electronic scheduling and data storage devices. CP at 149. This condition does not order affirmative conduct. And, as demonstrated above, Motter's crime was related to his substance abuse. Thus, forbidding Motter from possessing or using controlled substance paraphernalia is a “crime-related prohibition” authorized under RCW 9.94A.700(5)(e). Thus, this condition is valid.

Motter argues that “almost any item can be used for the ingestion of controlled substances, such as knives, soda cans, or other kitchen utensils.” Br. of Appellant at 29. A community custody condition may be void for vagueness if it fails to define

specifically the activity that it prohibits. State v. Riles, 86 Wn. App. 10, 17-18, 936 P.2d 11 (1997), aff'd, 135 Wn.2d 326, 957 P.2d 655 (1998). But Motter fails to cite to authority and his argument consists of one unhelpful sentence in the context of a complex constitutional legal doctrine.

Moreover, Motter's challenge is not ripe. In State v. Massey, 81 Wn. App. 198, 200, 913 P.2d 424 (1996), the defendant challenged a condition that he submit to searches. This court held that the judicial review was premature until the defendant had been subjected to a search he thought unreasonable. And in State v. Langland, 42 Wn. App. 287, 292-93, 711 P.2d 1039 (1985), we held that the question of a law's constitutionality is not ripe for review unless the challenger was harmed by the law's alleged error. Here, Motter claims that the court order could prohibit his possession of innocuous items. But Motter has not been harmed by this potential for error and this issue therefore is not ripe for our review. It is not reasonable to require a trial court to list every item that may possibly be misused to ingest or process controlled substances, items ranging from "pop" cans to coffee filters. Thus, we can review Motter's challenge only in context of an allegedly harmful application of this community custody condition. This argument is not properly before this court and we will not address it.

-(Motter, 139 Wn. App. at 804).

The State submits that nothing has been added in this brief to undermine that Motter determination.

Finally, the defendant maintains that under the WAC provisions that this matter would not come back before the court nor would there be an opportunity for review of the conditions once they do become "ripe". However, the State would submit that since this matter is not ripe at this time, that when it becomes ripe, the defendant would have the opportunity

to file a personal restraint petition to seek relief at that time. It would not make any sense to forestall him at that point from raising it.

A petitioner who has had no previous or alternative avenue for obtaining state judicial review need only satisfy the requirements under RAP 16.4. E.g., In Re Personal Restraint of Cashaw, 123 Wn.2d 138, 148-49, 866 P.2d 8 (1994) (a personal restraint petition (PRP) challenging a decision of the Indeterminate Sentence Review Board concerning parole need not meet the threshold requirements for constitutional and nonconstitutional errors because the policy of finality underlying those requirements is absent where the prisoner has had no previous or alternative avenue for obtaining state judicial review of the board decision); see also In Re Personal Restraint of Shepard, 127 Wn.2d 185, 191, 898 P.2d 828 (1995); In Re Personal Restraint of Mattson, 124 Wn. App. 130, 172 P.3d 719 (2007).

Personal restraint petitions are not a substitute for direct review. Petitioners challenging a court judgment and sentence must do more than show legal error; they must either show constitutional error that caused actual and substantial prejudice or nonconstitutional error that inherently caused a complete miscarriage of justice. In Re Personal Restraint of Lord, 152 Wn.2d 182, 188, 94 P.3d 952 (2004) (quoting In Re Personal Restraint of Cook, 114 Wn.2d 802, 812, 792 P.2d 506 (1990)). But when, as here, direct review is not available, we apply a more lenient standard. Dalluge can prevail if he can show he is under “unlawful” (as meant by RAP 16.4(c)) “restraint” (as meant in RAP 16.4(b)). In Re Personal Restraint of Isadore, 151

Wn.2d 294, 299, 88 P.3d 390 (2004) (citing In Re Personal Restraint of Garcia, 106 Wn. App. 625, 628, 24 P.3d 1091, 33 P.3d 750 (2001)). Petitioners are restrained if, among other things, they are confined or are “under some other disability resulting from a judgment or sentence in a criminal case.” RAP 16.4(b); see also In Re Personal Restraint of Cashaw, 123 Wn.2d 138, 149, 866 P.2d 8 (1994).

- (In Re Personal Restraint of Dalluge, 162 Wn.2d 814, 817, 177 P.3d 675 (2008))

The State submits that Motter is the controlling case law and should be applied in this circumstance.

X. CONCLUSION

The Trial Court should be affirmed in all respects.

DATED this 7 day of May, 2008.

Respectfully submitted:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

By:


MICHAEL C. KINNIE, WSBA#7869
Senior Deputy Prosecuting Attorney

APPENDIX "A"

**FINDINGS OF FACT AND CONCLUSIONS OF LAW
ON DEFENDANT'S MOTION TO SUPPRESS**

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FILED

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,

v.

WILLIAM JOSEPH HOLEMAN,

Defendant.

No. 06-1-01993-8

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
ON DEFENDANT'S MOTION
TO SUPPRESS

THIS MATTER, having come duly and regularly before the Court on the 21st day of May, 2007 for hearing pursuant to CrR 3.6 on Defendant's Motion to Suppress, Plaintiff State of Washington appearing by and through Gene A. Pearce, Deputy Prosecuting Attorney, Defendant appearing in person and with his attorney James J. Sowder, and the Court having heard and considered the testimony of witnesses, evidence presented, and the statements and arguments of counsel, makes the following:

FINDINGS OF FACT

1. On August 26, 2006 Vancouver police officer Miller contacted Dale Grendahl and arrested him for possession of a stolen vehicle. During the course of contact Grendahl told the officer that the stolen vehicle was associated with a residence at 6604 Oklahoma Drive,

FINDINGS OF FACT AND CONCLUSIONS
OF LAW ON DEFENDANT'S
MOTION TO SUPPRESS - Page 1 of 5

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1 Vancouver, Washington and that a "Shayne" lived there. Grendahl also told the officer that the
2 canopy from the stolen vehicle he was driving was at "Shayne's" residence.

3 2. Officer Miller spoke with the victim of the stolen vehicle who indicated that the
4 canopy was of a particular type and described the canopy for him.

5 3. The officers went to 6604 Oklahoma Drive, Vancouver, Clark County, Washington.
6 While they were standing on the street they were able to observe the following: A canopy that
7 matched the description of the stolen canopy; a vehicle parked in front of the residence which
8 one officer recognized as a vehicle he had taken a stolen report on and which dispatch confirmed
9 as stolen; and in the garage, with the door partially open, the license plate on another vehicle
10 which dispatch confirmed was stolen.

11 4. As the officers were standing outside they observed the defendant leave the residence
12 and walk up to a car that was not reported stolen. The defendant opened the door of the car,
13 reached in, and then exited the car. As the defendant exited the car the officers motioned for the
14 defendant to come over to them to be questioned.

15 5. The officers asked the defendant if he knew anything about the stolen items observed
16 by the officers. He replied that he did not. The officers requested and obtained the identification
17 of the defendant. Upon running him through dispatch it was discovered that the defendant had a
18 felony warrant for his arrest. The defendant was placed under arrest.

19 6. During the course of the investigation the officers identified Shayne Goodwin as the
20 renter of the residence. Goodwin was advised of his Miranda rights which he acknowledged and
21 waived. Sgt. Creager asked Goodwin if he would consent to a protective sweep of the residence
22 to look for other people who may still be inside. At first, Goodwin stated that he wanted to go
23 with the officers when they did the sweep. Sgt. Creager told Goodwin that that would not be
24 practical because he would not be able to keep track of him while at the same time conduct a
25 sweep of the residence for other people. Goodwin then consented, giving officers permission to
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1 do a protective sweep of the residence to look for other people who may be inside. There is no
2 evidence that officers made a bargain with Goodwin to ignore items of evidentiary value when
3 they performed their sweep.

4 7. Significant in the testimony of the officers is that they did what they said they were
5 going to do; they did a sweep of the residence to look only for people. They did not look into
6 drawers nor did they peek into checkbooks.

7 8. During the sweep of the residence the officers did observe in plain view drug pipes
8 used to inhale controlled substances.

9 9. Based upon their investigation and observations while inside the residence Vancouver
10 Police completed an affidavit for a search warrant. The search warrant, which was signed by
11 Clark County District Court Judge Swanger on August 26, 2006, authorized the police to search
12 for: 1) Evidence of the crime of Possession of Stolen Property, to include things such as keys,
13 titles, registrations, bills of sale, and other items associated with the stolen cars found at the
14 residence, 2) Evidence of the crime of Possession of Stolen Property to include fishing tackle and
15 fishing paraphernalia, also associated with a stolen vehicle, 3) Evidence of the crime of
16 Possession of a Controlled Substance-methamphetamine, which included drug pipes, 4) Personal
17 property to establish and confirm the identity of the defendant, and 5) Personal property to
18 establish dominion and control of the residence.

19 CONCLUSIONS OF LAW

20 1. The Court has proper venue and jurisdiction to hear the above-entitled matter.

21 2. Once the officers arrived at 6604 Oklahoma Drive their observations of the canopy,
22 the stolen vehicle parked on the street, and the license plate on the car parked in the garage, were
23 all "open view" observations. An "open view" observation is an exception to the search warrant
24 requirement under the Fourth Amendment to the United States constitution and Article I, Section
25 7 of the Washington constitution.

1 3. Based upon their investigation and open view observations at the residence the
2 officers had reasonable grounds to believe that there was a crime of possession of stolen property
3 going on and that it was associated with that residence.

4 4. Once the officers motioned for the defendant to come over to them for questioning the
5 defendant was not free to leave.

6 5. Because they observed the defendant coming out of the residence the officers had
7 sufficient, reasonable, and articulable suspicion to believe that the defendant should be
8 questioned about whether he knew anything about the stolen items observed by the officers. The
9 officers did not exceed the scope of the questioning.

10 6. During the course of an investigatory stop it is proper for officers to identify the
11 person they are talking to. The officer's request for identification from the defendant was
12 proper. Also, information regarding contact with the defendant was admissible into the search
13 warrant affidavit.

14 7. Based upon the testimony provided, Shayne Goodwin, who was the renter of the
15 residence, gave voluntary consent to the officers to perform a protective sweep of the residence
16 to search for other people who may still be inside.

17 8. The consent to perform a protective sweep of the residence was to look for people,
18 not contraband. Therefore, the protective sweep was not a "knock and talk" situation so *Ferrier*
19 type warnings were not required.

20 9. The drug pipes observed during the protective sweep were observed in "plain view,"
21 they were admissible, and those observations could be used in the search warrant affidavit. A
22 plain view search is an exception to the search warrant requirement under the Fourth
23 Amendment to the United States constitution and Article I, Section 7 of the Washington
24 constitution.

25 10. In regard to all of the items listed in the search warrant affidavit and search warrant,
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1 there was probable cause to believe that those things may have been in the residence. It is not
2 required that officers be absolutely certain they are in there, but that it is reasonable to assume,
3 based on what the officers knew, that those things might be in there. That includes evidence that
4 relates to the two stolen cars, registrations, bills of sale, keys, other documents, controlled
5 substances including drug pipes, fishing tackle, identity of the defendant, and evidence related to
6 who controls the residence.

7 11. The fact that Goodwin stated that he controlled the residence certainly does not mean
8 that the officers cannot look for things that would corroborate what he is saying. These items are
9 important to establish dominion and control, especially in the event Goodwin later recants his
10 statements or in the event he is covering for someone else.

11 12. In regard to the search warrant and search itself, and based upon the evidence
12 provided, the areas the officers looked in are the sorts of places you would expect to find the
13 things the officers were looking for. There was no evidence that the officers looked in places
14 you would not expect to find such things as documents and/or controlled substances. The
15 officers did not exceed the scope of the search warrant.

16 13. Defendant's motion to suppress is denied.

17 DONE IN OPEN COURT this 6th day of June, 2007.

18
19 

20 THE HONORABLE ROBERT A. LEWIS
21 JUDGE OF THE SUPERIOR COURT

22 PRESENTED BY:

23 Approved as to form:

24 
25 Gene A. Pearce, WSBA #32792
26 Deputy Prosecuting Attorney

27 James J. Sowder, WSBA #9072
Attorney for Defendant

