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I. STATEMENT OF FACTS

The State accepts the Statement of Facts as set forth by the defendant. Where additional information is needed, it will be set forth in the argument section of the brief.

II. RESPONSE TO ASSIGNMENT OF ERROR NUMBER 1

The first assignment of error raised by the defendant is that the court violated the defendant's right to present a defense by excluding testimony that the informant had previously hidden contraband on her body to deceive law enforcement. When this matter was initially approached with the trial court by the defense, they indicated that they had a witness to testify that the informant had used her body cavities to smuggle paraphernalia into and out of police areas. (RP 7 L. 18 – 22).

However, when the offer of proof was actually made to the trial court it came out that the evidence was the testimony of one witness, Candy Sales, who indicated that the defendant would smuggle clean urine in for drug screening by secreting it in one of her bodily orifices. (RP 381 -382). The court clarified that the testimony would be that Ms. Sales was told about this by the informant and that Ms. Sales had not actually seen her do this (RP 383). The State responded to the offer of proof by arguing

that the exhibits and the way the narcotics were packaged would make it virtually impossible to have stored these items in the manner being described in the offer of proof. (RP 384 – 385). The defense then responded to that that they were not necessarily saying that the contraband was smuggled in her vagina but that it could have been hidden somewhere in the car. (RP 386, L. 13 – 17).

After these discussions with the attorney's, the court made the following observations:

The Court: Alright. I've had the opportunity to hear from both counsels extensively on the issue. My understanding originally was that the testimony was going to be that the witness in this case, Ms. Taskey, [the informant] had previously, according to eye witnesses, concealed controlled substances in her body cavity and smuggled them.

That's not the testimony that I'm receiving. Instead, it is the testimony of a witness who says that on one occasion she observed paraphernalia for smuggling urine, a liquid substance, and that Ms. Taskey indicated that she had on previous occasions and on this occasion smuggled clean urine into an area.

That has extremely slight probative value and it is out weighed by prejudicial effect, so I will not permit that testimony.

You've already elicited that body cavity searches weren't performed in this area. That's – and certainly you're not prohibited from arguing that there is a possibility that there was something in her body cavities, but that's all the speculation I'll allow with regard to that.

-(RP 387, L.17 – 388, L. 14).

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). ““A trial court abuses its discretion

when its decision is manifestly unreasonable or based upon untenable grounds.” State v. Perrett, 86 Wn. App. 312, 319, 936 P.2d 426 (1997).

A witness cannot be impeached on an issue collateral to the issues being tried. State v. Descoteaux, 94 Wn.2d 31, 37, 614 P.2d 179 (1980), overruled on other grounds by State v. Danforth, 97 Wn.2d 255, 257, 643 P.2d 882 & n.1 (1982). An issue is collateral if it is not admissible independently of the impeachment purpose. Descoteaux, 94 Wn.2d at 37-38. Put another way, a witness may be impeached on only those facts directly admissible as relevant to the trial issue. See ER 401 (defining "relevant evidence"); State v. Oswald, 62 Wn.2d 118, 121-22, 381 P.2d 617 (1963); State v. Fairfax, 42 Wn.2d 777, 780, 258 P.2d 1212 (1953). For example, in In re Welfare of Shope, 23 Wn. App. 567, 596 P.2d 1361 (1979), Shope challenged a court finding that he had sexual contact with a 12-year-old child. Shope assigned error to the court's refusal to hear the testimony of two witnesses who would have refuted the victim's testimony that he never engaged in street hustling or appeared in public while dressed in women's clothing. Division One summarily rejected the argument: "The purported testimony of the excluded witnesses would not have affected the result. Whether at another time and place the victim acted in a manner from which a trier of fact might infer that he would

initiate or participate in homosexual activity is not pertinent here." Shope, 23 Wn. App. at 568-69.

The defendant had the opportunity and did cross-examine the informant on all subjects, including her bias and motive to lie. In addition, the record demonstrates that the defense also was able to offer witnesses showing her reputation for dishonesty and also an example of a drug transaction that had occurred during the time that these controlled buys were taking place. The defense was not prevented from cross examining the informant on her bias or her motives and the State submits that the defendant has not demonstrated that the trial Judge's decision to exclude additional evidence which the court deemed to have minimal probative value had denied the defendant a fair trial or an opportunity to present an effective defense.

It is also of interest to note that the defense wanted to use this information as substantive evidence. Yet, the offer of proof indicates that Ms. Sales was not going to testify that she had seen the informant secreting items in her vagina, but merely that she had been told that this had been done. This would clearly be hearsay because it was been offered for the truth of the matter stated and by a person (the informant) who the defense had already targeted as a person with a dishonest reputation. The offer of proof was not as originally vouched for by the defense when it

first raised this question with the trial court and it would appear to have little probative value in relation to all of the other evidence and information in the case. A trial courts ruling is afforded great deference and is reviewed under an abuse of discretion standard. State v. Luvane, 127 Wn. 2d 690, 706 – 706, 903 P.2d 960 (1995). Here, the trial Judge found the proffered evidence to have slight evidentiary value for the defense.

### III. RESPONSE TO ASSIGNMENT OF ERROR NUMBER 2

The second assignment of error deals specifically with a provision in the Judgment and Sentence (CP 126) 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 126, page 8)

The defendant maintains that this particular provision of the defendant's sentence is "hopelessly vague". (Brief of Appellant, page 15). 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 become ripe, the defendant would have the opportunity to file a personal restraint petition to seek some type of other 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).

IV. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 2 day of June, 2008.

Respectfully submitted:

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