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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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NO. 36726-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

WILLIAM G. HOLEMAN,

Appellant.

BRIEF OF APPELLANT

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 ORIGINAL

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court erred when it denied the defendant's motion to suppress evidence the police seized in violation of the defendant's right to privacy under Washington Constitution, Article 1, § 7 and United States Constitution, Fourth Amendment.

2. The trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it entered judgment against him for offenses unsupported by substantial evidence.

3. The trial court erred when it allowed the state to elicit statements the defendant made during custodial interrogation because the state failed to prove that the police properly informed the defendant of his *Miranda* rights.

4. Trial counsel's failure to object when the state elicited inadmissible hearsay concerning the registered owner of a key piece of evidence violated the defendant's right to effective assistance under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment.

5. The court denied the defendant a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it (1) allowed the state to elicit evidence that was more unfairly prejudicial than probative, and (2) refused to give jury instructions

necessary to the defendant's presentation of his case.

6. The trial court's failure to grant a motion for mistrial based upon juror misconduct denied the defendant his right to a fair jury under Washington Constitution, Article 1, § 21 and United States Constitution, Sixth Amendment.

7. The cumulative errors in this case violated the defendant's right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment.

8. The trial court erred when it imposed a community custody condition that was not authorized by the legislature and that was so vague that it violated the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment.

Issues Pertaining to Assignment of Error

1. Does a trial court err if it refuses to suppress evidence seized in violation of a defendant's right to privacy under Washington Constitution, Article 1, § 7 and United States Constitution, Fourth Amendment?

2. Does a trial court violate a defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it enters judgment against him for offenses unsupported by substantial evidence?

3. Does a trial court err if it allows the state to elicit statements the defendant made during custodial interrogation when the state fails to prove that the police properly informed the defendant of his *Miranda* rights?

4. Does a trial counsel's failure to object when the state elicits inadmissible hearsay concerning a key item of evidence violate a defendant's right to effective assistance under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment?

5. Does a court deny a defendant a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment if it (1) allows the state to elicit evidence that was more unfairly prejudicial than probative, and (2) refuses to give jury instructions necessary to the defendant's presentation of a factually and legally available defense?

6. Is a defendant entitled to a new trial based upon jury misconduct when a juror uses the internet to obtain a legal definition for a term used in jury instructions and then shares that definition with the rest of the jury?

7. Is the defendant entitled to a new trial if cumulative errors deny the defendant a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment?

8. Does a trial court err if it imposes a community custody condition not authorized by the legislature and that is so vague that it fails to put the defendant on notice of what conduct it prohibits?

STATEMENT OF THE CASE

Factual History

At about 8:30 in the morning of August 26, 2006, Vancouver Police Officers arrested Shane Grindall when they found him driving a stolen truck. 1RP 8-12.¹ Upon his arrest, Mr. Grindall stated that the canopy to the truck was sitting in the yard at 6604 Oklahoma Drive, that a person by the name of Shane Goodwin lived at that address, and that he had other stolen vehicles at that location. 1RP 8-13. As a result of these claims, Vancouver Officers Jeff Miller and Steven Cocklin went to the house at 6604 Oklahoma Drive. 1RP 13-17, 36-38. Upon arriving, the officers ran the plates on a vehicle parked in front of the house and confirmed that it was reported stolen. 1RP 13-14, 38-41. They also saw the canopy Mr. Grindall identified sitting in the yard. *Id.*

At about this time, the defendant walked out of the house and got something out of another vehicle parked on the street. 1RP 19-22, 42-44. This vehicle had not been reported stolen. *Id.* While the defendant was near this vehicle, the officers ordered him over to their location and ordered him

¹The record in this case includes eight volumes of verbatim reports. “1RP”, “2RP” and “3RP” refer to the transcripts of the CrR 3.5 and CrR 3.6 hearings held on 5/21/06, 6/8/07 and 7/27/07 respectively. “RP” refers to the four volume, continuously numbered transcripts of the trial held beginning on 7/30/07 and ending on 8/1/07. “4RP” refers to the transcript of the sentencing hearing held on 8/30/07.

to identify himself. 1RP 19-22, 30-31, 42-44. When he gave his name, the officers ran a records check, determined that the defendant had an outstanding warrant, and arrested him. *Id.* At about this time one person ran out of the back door, and a number of people walked out the front. *Id.* When this happened, the officers called for assistance and detained everyone who came out of the house. *Id.* At some point, the officers ran the license plate on a vehicle that was sitting in the garage and confirmed that it was also reported stolen. 1RP 29. They did not remember whether they did this before or after initially detaining the defendant, but they assumed it was before. *Id.*

One of the people who came out the front door of the house was Shane Goodwin. 1RP 54-56, 70-71. Mr. Goodwin informed the officers that the residence was his, that he had one roommate, and that he had been allowing the defendant and his girlfriend to “flop” at his house for two days. *Id.* With Mr. Goodwin’s consent, two of the officers entered the house to confirm that no one was left in the residence. *Id.* Although these officers did not find anyone else in the house, they did see a number of what they believed to be methamphetamine pipes sitting in plain view in a number of the rooms. 1RP 22, 33, 56-57, 77. However, they did not seize these items. *Id.* Rather, they exited the house and obtained a warrant to reenter to search for property that had been in the stolen vehicles, as well as methamphetamine

and methamphetamine paraphrenalia. 1RP 69-70, 78-79, 106-108.

Once the officers obtained the warrant, they reentered the house and began their search. 1RP 78-79, 87-88. In the southeast bedroom, they found a computer sitting on a computer table, with a printer attached to it. RP 27-32, 50-56, 90-95. The printer had blue check stock in its tray. RP 28, 36, 95, 141. The check stock in the printer was the same color and type as a "Three Rivers Dairy Queen" check the officers found elsewhere in the house. RP 44-47, 81-88. While still executing the warrant, the officers were able to determine that this check was a forgery. *Id.* The officers also found the following items on the computer table or on the floor under it: (1) a wallet belonging to the defendant, (2) the box for a computer program called Checksoft Personal Deluxe, (3) a methamphetamine pipe, a baggie of methamphetamine residue, and small digital scales, (4) a check book with multiple checks in it belonging to Robert Bishop, (5) a traffic citation and pay stub belonging to Robert Bishop, and (5) a pre-approved credit card application and a loan deferment application belonging to Tiffany Ueltschi, both documents with financial information on them. RP 27-32, 53-56, 94-97, 145-146. Neither Mr. Bishop nor Ms Ueltschi had authorized anyone to possess these documents and checks. RP 181-188, 254-263.

In addition, the officers found the following items when they opened a black, zippered bag that was sitting on the computer tower: (1) Bank of

America and Wells Fargo checks on a joint account for Karen and Alexis Little, Bank of America and Wells Fargo checks on a separate account for Karen Little, and a car title belonging to Karen Little, (2) a Washington Mutual Bank check in the name of Cynthia Chaffee, (3) an MBNA America check in the name of Darin Warnke, (4) a Unitas Community Credit Union check belong to Sharon Tidwell, and (5) a Washington Mutual check belonging to Razor Back Offroad Company made payable to the defendant William Holeman. RP 98-101. None of these people whose names appeared on the checks and documents gave the defendant or anyone else permission to possess these items. RP 161-169, 188-193, 264-269, 229-243. Neither did the owner of Razor Back Offroad Company make a check payable to the defendant. RP 244-254. In fact, the check was a fake. *Id.*

After finding all of these items during their search for drugs and stolen property, the police returned to the judge who had issued the search warrant and obtained a new search warrant authorizing them to search and seize evidence of financial fraud and forgery. RP 102-103, 110; CP 51-59. This search warrant also authorized the seizure and search of the computer. *Id.* A forensic investigator for the Vancouver Police Department later searched the computer, and determined the following: (1) the administrator account on the computer was under the name of "Bill," (2) the e-mail account on the computer was under the name "cueballvhy@cmail.com," (3) the

administrator had loaded a program on the computer entitled VersaCheck that allowed for the creation of checking accounts and the creation of checks, (4) the check program had created an account for "Three Rivers Dairy Queen" and had printed the fake Dairy Queen check the police had found in another room in the house they had searched, and (5) the hard drive had a directory on it called "Bill's Bad Things." RP 283-284, 299-302, 307-309, 311-321, 323-325.

The directory "Bill's Bad Things" had subdirectories entitled "bank logos," "check with signatures," "driver's license templates," "Washington and Oregon Driver's Licenses," and "Washington and Oregon Identification Templates." RP 323-330. Each of these subdirectories had scanned graphic files in them consistent with the names of the subdirectories. *Id.* One of these graphics was a check belong to Shenna Sigler. RP 339. Ms Sigler had not given anyone permission to have a copy of this check. RP 235-239.

According to the police, the defendant in this case made two separate statements of similar character, the first while in custody in a police vehicle, and the second while at the Clark County Jail. 1RP 76-81; RP 101-106. The substance of the defendant's statements was that (1) he and his girlfriend had been staying in the southeast bedroom of Shane Goodwin's house for two days, (2) the drug paraphrenalia on the computer table belonged to him but the baggie with the residue did not, (3) the wallet on the computer table

belonged to him, but the computer and all of the other items did not belong to him. *Id.*

Procedural History

By amended information in this case, the Clark County Prosecutor charged the defendant Robert Holeman with one count of possession of methamphetamine, one count of possession of instruments used for financial fraud, thirteen counts of second degree identity theft, four counts of unlawful possession of payment instruments, and one count of unlawful production of payment instruments. CP 149-157. Prior to trial, the defense filed and argued three successive suppression motions. CP 30-65, 114-134; 1RP, 2RP, 3RP. The first motion included the testimony of a number of witnesses and was combined with a hearing under CrR 3.5. 1RP 8-121.

In the motions to suppress, the defense argued that (1) the police illegally detained the defendant, (2) the officer's first entry was illegal, (3) that their actions during the first entry exceeded the scope of any permission given. In the second motion, the defense argued that, (4) the affidavit given in support of the first warrant lacked probable cause, (5) that the officer's actions upon their entry pursuant to that warrant exceeded the scope of the first warrant, (6) that the affidavit given in support of the second warrant (or the addendum) lacked probable cause, and (7) that in authorizing the search of the computer, the court violated both state and federal statutes. CP 30-65,

114-134; 1RP, 2RP, 3RP The court denied the motions to suppress. CP 101-103, 104-108, 111-113, 262-264.

As part of the CrR 3.5 hearing, the officer who interviewed the defendant at the scene and at the jail testified that prior to questioning the defendant they read the defendant his “*Miranda*” rights. 1RP 69, 79. However, at no point during their testimony did the officer testify as to just what those rights were. 1RP 69-79. However, the court ruled the statements admissible, and the officers testified to them at trial. CP 101-103.

This case eventually was called for trial before a jury, during which the state called 23 witnesses, including the officers who had performed the searches, the officer who questioned the defendant, and the forensic scientist who searched the computer. RP 25-374. As part of her testimony before the jury, the forensic scientist identified five exhibits (29, 31, 32, 33, and 34) which were printouts of the scanned graphics the expert found in the subdirectories “bank logos,” “check with signatures,” “driver’s license templates,” “Washington and Oregon Driver’s Licenses,” and “Washington and Oregon Identification Templates.” RP 323-330. The defense objected to the admission of these documents, arguing that they were more prejudicial than probative since they dealt with the personal identity material of persons not included in any of the charged counts. *Id.* The court overruled this objection and admitted the exhibits, but gave the jury an instructions stating

that they could only be used when considering the issue of intent. *Id.*

In addition, during trial the state called a witness by the name of Edward Goodlett. RP 59-66. Mr. Goodlett testified that he is the North America Regional Supply Change Security Manager for Hewlett Packard. *Id.* Although he did not claim to be the records custodian for that company, he went on to testify that he had checked the serial number on the Hewlett Packard computer the police seized and that according to Hewlett Packard records, it was registered on August 5, 2006, to a person by the name of Bill Holeman with an e-mail address of cueballdhf@gmail.com. *Id.* The defense did not object to this testimony as inadmissible hearsay. *Id.*

In this case, the state also called five witnesses by the names of Heather and Kyle Baron, Cortney Staehely, Tom Stigum, and Lucetta Paluck. Each of these witness identified Exhibit No. 26 as a photocopy of four checks. RP 203-212, 212-218, 240-244, 194-202. According to the witnesses, one of each of these checks was written on an account belonging to them. *Id.* According to these witnesses, they had not authorized anyone to possess these images. *Id.* The record at trial is silent as to where Exhibit No. 26 originated and where it was found. *Id.* Counsel cannot find any evidence within the record of any other witness identifying or testifying about this exhibit. RP 25-459.

Similarly, the state called another witness by the name of John

McKenzie, who identified Exhibit No. 38 as a photocopy of his driver's license. RP 215-229. Although he also had not authorized anyone to possess this photocopy, the record also appears to be silent about this exhibit, which is not identified by any other witness during trial. RP 225-459.

At the end of the state's case, the defendant took the stand on his own behalf. RP 411-459. He testified that on a previous occasion he had done some work for Shane Goodwin on the computer the police seized from Mr. Goodwin's house. RP 413-414. This work included loading the VersaCheck program. *Id.* However, he had not used the computer since that occasion and he was unaware of any of it being used for any illegal purpose. RP 411-416. He further denied possessing or being aware of any of the checks, documents, or drugs the police found in the southeast bedroom of Shane Goodwin's house. RP 411-442.

Following the end of the defendant's case, the court dismissed Counts 9 and 17 without objection by the state. RP 383, 466-467, 471-472. The court then instructed the jury with the defense taking exception to the court's refusal to give the following two instructions:

DEFENDANT'S PROPOSED INSTRUCTION NO. 1

Mr. Holeman has a constitutional right to collect information including financial or personal information. Mere possession of such information is not a crime. A crime requires possession with a criminal intent specifically described for each crime charged.

DEFENDANT'S PROPOSED INSTRUCTION NO. 2

Mere proximity to a controlled substance is not enough to establish constructive possession.

RP 473-474; CP 159-163.

After the court instructed the jury and the parties presented argument, the jury retired for deliberation, which spanned two days. RP 560-593. During this period, the jury sent out a number of questions, including the following.

Can the court provide a legal definition for "aiding and abetting."

RP 570-574.

With the agreement of the parties, the court replied they could not provide further instructions. *Id.* For some reason, this jury question was never filed with the clerk of the court, although four other jury questions were. CP 103-106. After the jury sent out the inquiry concerning the definition for "aiding and abetting," the jury sent out another question, which stated as follows.

Juror #8 looked at the definition of "aid & abet" on Google last night & shared parts [of] the definition with the group. Half of the group did not hear the definition when it was shared & it was not repeated.

CP 167.

Upon receiving this information, the defense moved for a mistrial.

RP 583-593. However, the court denied the motion without first questioning

any of the jurors. *Id.* The jury later returned verdicts of guilty on all remaining counts. CP 168-186. At a later sentencing hearing, the court imposed sentences within the standard range on each count. CP 273-293. The court also imposed a term of community custody, and included the following condition of community custody, among others.

- ☒ 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, cellular phones, police scanners, and hand held electronic scheduling or data storage devices.

CP 282.

After imposition of sentence, the defendant filed timely notice of appeal. CP 294.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE THE POLICE SEIZED IN VIOLATION OF THE DEFENDANT'S RIGHT TO PRIVACY UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 7 AND UNITED STATES CONSTITUTION, FOURTH AMENDMENT.

Under Washington Constitution, Article 1, § 7 and United States Constitution, Fourth Amendment warrantless searches are per se unreasonable. *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980). As such, the courts of this state will suppress the evidence seized as a fruit of that warrantless detention unless the prosecution meets its burden of proving that the search falls within one of the various "jealously and carefully drawn" exceptions to the warrant requirement. R. Utter, *Survey of Washington Search and Seizure Law: 1988 Update*, 11 U.P.S. Law Review 411, 529 (1988).

As one of the exceptions to the warrant requirement, the police need not have probable cause in order to justify a brief investigatory stop. *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968). However, in order to justify such action, the police must have a "reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." *Brown v. Texas*, 443 U.S. 47, 51, 61 L.Ed.2d 357, 99 S.Ct. 2637 (1979) (emphasis added). Subjective good faith is not sufficient. *Terry v. Ohio*, 392

U.S. at 22, 20 L.Ed.2d at 906, 88 S.Ct. at 1880. *See generally* R. Utter, *Survey of Washington Search and Seizure Law: 1988 Edition*, 11 U.P.S. Law Review 411, § 2.9(b) (1988). Furthermore, the stop is only reasonable to the point “the limited violation of individual privacy” is outweighed by the public’s “interests in crime prevention and detection” *Dunaway v. New York*, 442 U.S. 200, 60 L.Ed.2d 824, 99 S.Ct. 2248 (1979).

In the case at bar, the defense argued as part of its suppression motions that the evidence seized as a result of the defendant’s arrest (his statements) should have been suppressed because the officers did not have a reasonably articulable suspicion upon which to base a *Terry* detention of his person. In this case, the state stipulated that the officers detained him when they ordered him to walk over to them and identify himself. Thus, the issue before this court is whether or not those officers had a “reasonable suspicion, based on objective facts,” that the defendant was “involved in criminal activity,” at the time of that detention. This issue has been the subject of numerous appellate decisions in this and other states, as well as numerous federal cases. While the level of proof necessary to meet this standard cannot be precisely quantified, it can be illustrated by this court’s decision in cases such as *State v. Larson*, 93 Wn.2d 638, 611 P.2d 711 (1980). The following examines this case.

In *State v. Larson, supra*, two police officers stopped an automobile

in which four people were riding for commission of a minor traffic violation (parking too far from the curb). The officer then required all occupants to produce identification. As one of the passengers opened her purse to get some identification, one of the officers saw a baggie of marijuana in the purse. The officers then arrested the passenger for possession of marijuana.

Following her arrest, Defendant moved to suppress the evidence on the basis that the police had no reasonably articulable suspicion from which they could justify requiring her to produce identification. At the hearing on Defendant's motion the officers testified that: (1) they stopped the car in a high crime area near a closed park; (2) it was late at night; and (3) the car pulled away from the curb as they approached. Nonetheless, the trial court granted Defendant's motion. The State then sought review, and the Court of Appeals reversed, finding that the cited facts constituted a "reasonably articulable suspicion" that Defendant was involved in criminal activity.

On further review, the Washington State Supreme Court reversed the Court of Appeals and reinstated the dismissal by the trial court. In so ruling the Supreme Court noted: (1) nothing in the record indicated that anyone in the car acted in a suspicious manner; (2) no criminal activity had been reported in the area for three weeks; (3) there was no indication that the occupants of the car had been cruising the area in contemplation of a criminal act; (4) there was no indication that the car had been stopped momentarily;

and (5) although the car started to drive off as the officers approached, it immediately stopped when the police flashed their blue light. The Court then went on to conclude:

When considered in totality, therefore, the circumstances known to the officers at the time they decided to stop the car did not give rise to a reasonable and articulable suspicion that the occupants were engaged or had engaged in criminal conduct, *Brown v. Texas, supra*, but at best amounted to nothing more substantial than an inarticulate hunch. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). This does not meet the constitutional criteria of reasonableness for stopping a vehicle and questioning its occupants.

State v. Larson, 93 Wn.2d at 643.

In *Larson*, the court invalidated a *Terry* stop even though the suspect car was in a high crime area, late at night, and attempted to drive away as the officer approached. In the case at bar, there are even fewer facts to support a *Terry* stop than there were in *Larson*. Actually, in this case, there was only one fact that cast any suspicion on the defendant: that the officer saw the defendant come out of a house that had a stolen car parked in front of it. However, the defendant was not the owner of the house, and he was associated with a vehicle that was not stolen. Thus, at the time the officers detained him, they did not have a reasonable articulable suspicion that he had been involved in criminal activity. As a result, the detention was illegal. Consequently, the trial court erred when it denied the defendant's motion to suppress the statements he made following his arrest.

II. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT ENTERED JUDGMENT AGAINST HIM FOR OFFENSES UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974). The test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

In the case at bar, the defendant argues that his convictions on Counts I, X, XI, XII, XIII, and XX are not supported by substantial evidence. Count I was the charge of possession of methamphetamine. Counts X, XI, XII and XIII were charges of second degree identity theft against Mr. and Mrs. Paluk, Mr. and Mrs. Baron, Courtney Staehely, and Tom Stigum. Count XX was a charge of second degree identity theft against John McKenzie. The following presents appellants argument on this point.

As was mentioned above, it is not sufficient for the state to prove that a crime has been committed. Rather, the record must also contain substantial

evidence that it is the defendant who committed the offense. *State v. Johnson, supra*. In the case at bar, this key piece of evidence is missing from the record on Counts I, X, XI, XII, XIII, and XX. First, as regards Count I, the state's evidence proves that the defendant was one of many persons staying in a house that contained many methamphetamine pipes and a small baggie containing methamphetamine residue. Nothing in the evidence points to the defendant as a person who possessed the baggie with the residue, which was the only item tested for drugs. Thus, substantial evidence does not support this conviction.

A somewhat similar deficiency exists in regards to Counts X, XI, XII, XIII, and XX. In the first four counts listed, the witnesses identified Exhibit No. 26 as a photocopy of four checks. Each witness identified one of the checks as belonging to him or her, and went on to testify that he or she did not authorize anyone to possess his or her check. Apparently, each of these checks had been made payable to the Oregonian newspaper and had been stolen at some point. Thus, the existence of the photocopies of these checks seen in light of the testimony of the owners of the checks did constitute substantial evidence that someone had stolen them and thereby committed the crime of second degree identity theft. However, the record is devoid of any evidence that the defendant was that person. In fact, the record is devoid of any evidence of the origin of the photocopy of these checks. No other

witness identified Exhibit No. 26 or testified as to how it came to be in the record. Thus, substantial evidence does not exist to support the convictions on Counts X, XI, XII, XIII.

This same deficiency exists as to Count XX. In this count Mr. McKenzie identified Exhibit No. 37 and Exhibit No. 38 respectively as a photocopy of his driver's license and a photocopy of his driver's license photo with someone else's name under it. He did not given anyone authorization to possess these items. However, as far as counsel can find in the record, no other witness identified these two exhibits. As with Exhibit No. 26, the origin of these exhibits is not addressed in the record. Thus, the record does contain substantial evidence that someone committed identity theft as charged in Count XX, but the record does not contain substantial evidence that it was the defendant who committed this offense. Thus, the defendant's conviction on this count should also be vacated.

III. THE TRIAL COURT ERRED WHEN IT ALLOWED THE STATE TO ELICIT STATEMENTS THE DEFENDANT MADE DURING CUSTODIAL INTERROGATION BECAUSE THE STATE FAILED TO PROVE THAT THE POLICE PROPERLY INFORMED THE DEFENDANT OF HIS *MIRANDA* RIGHTS.

Under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), before a defendant's custodial statements may be admitted as substantive evidence, the state bears the burden of proving that prior to questions the police informed the defendant that: " (1) he has the absolute

right to remain silent, (2) anything that he says can be used against him, (3) he has the right to have counsel present before and during questioning, and (4) if he cannot afford counsel, one will be appointed to him.” *State v. Brown*, 132 Wn.2d 529, 582, 940 P.2d 546 (1997) (quoting *Miranda*, 384 U.S. 436, 86 S.Ct. 1602). The state bears the burden of proving not only that the police properly informed the defendant of these rights, but that the defendant’s waiver of these rights was knowing and voluntary. *State v. Earls*, 116 Wn.2d 364, 805 P.2d 211 (1991). If the police fail to properly inform a defendant of these four rights, then the defendant’s answers to custodial interrogation may only be admitted as impeachment and then only if the defendant testifies and the statements were not coerced. *State v. Holland*, 98 Wn.2d 507, 656 P.2d 1056 (1983).

In the case at bar the state informed the court and the defense that it intended to introduce the defendant’s answers made during custodial interrogation. As a result prior to trial the court held a hearing as required under CrR 3.5, during which the state called Officer Martin, who claimed that he twice informed the defendant of his *Miranda* rights off of a “department issue card.” However, the state did not introduce this card into evidence, and the state did not call upon the Officer to testify as to what rights were included on this card. Thus, there is not evidence in the record that Officer Martin informed the defendant that he had the absolute right to remain silent,

that anything that he said could be used against him, that he had the right to have counsel present before and during questioning, and that if he could not afford counsel, one would be appointed to him prior to questioning. Consequently, the trial court erred when it ruled that the defendant's statements made during custodial interrogation were admissible in the state's case in chief.

In this case the state may argue that Officer Martin's testimony that he read the defendant "his *Miranda* rights" from an "agency approved" card is itself sufficient to prove that he was informed of his "right to silence" and "right to counsel." However any such argument must necessarily fail because there is no evidence that the "agency approved" card that the deputy used was adequate to inform the defendant of his *Miranda* rights. In essence, such an argument begs the question the trial court was called upon to answer. The card Officer Martin used might have been a sufficient statement of *Miranda* and it might not have been. Absent introduction of that card or a reading of that card into evidence, the state failed to prove that Officer Martin adequately warned the defendant of his rights under *Miranda*.

The state may also argue that since the defendant testified, the state was free to use the defendant's custodial statements as impeachment. While this would be a correct statement of the law as mentioned previously, it does not save the error in the case at bar because the state did not introduce the

defendant's custodial statements as impeachment after he testified. Rather, the state introduced them at trial as substantive evidence during its case-in-chief. Thus the fact that the defendant later testified does not resolve the trial court's error in allowing the introduction of the statements. As a result the trial court's ruling and the state's actions introducing the defendant's statements into evidence violated the defendant's right to silence under Washington Constitution, Article 1, § 9 and United States Constitution, Fifth Amendment.

As an error of constitutional magnitude, the defendant is entitled to a new trial unless the state can prove that the error was harmless beyond a reasonable doubt. *State v. Brown*, 147 Wn.2d 330, 58 P.3d 889 (2002). "An error is not harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would have been different had the error not occurred. A reasonable probability exists when confidence in the outcome of the trial is undermined." *State v. Powell*, 126 Wn.2d 244, 267, 893 P.2d 615 (1995) (citations omitted).

In this case at bar, the introduction of the defendant's custodial statements as substantive evidence caused prejudice to the defendant's case. This evidence included the defendant's admission that he was staying in the bedroom where the computer was located. The introduction of this evidence was not harmless; the defendant is entitled to a new trial.

In this case, the trial court entered findings of fact on the CrR 3.5 hearing indicating that Officer Martin read the defendant his *Miranda* rights off of a "pre-printed card." CP 101-103. The defendant has not assigned error to these findings because this is precisely what Officer Martin testified to during the CrR 3.5 hearing. Appellant does not understand these findings to be a statement or claim as to what the words were that were included in the statement that the officer read off of the card. However, to the extent that this court disagrees and believes that the trial court's use of the words "*Miranda* rights" indicates that the officer informed the defendant of the four court rights under *Miranda*, then the defendant does assigned error to Findings 1 through 9 and Conclusions of Law 1 in the trial court's Findings of Fact and Conclusions of Law on the CrR 3.5 hearing. As is discussed above, the record does not support such a conclusion as to just what Officer Martin read to the defendant.

IV. TRIAL COUNSEL'S FAILURE TO OBJECT WHEN THE STATE ELICITED INADMISSIBLE HEARSAY CONCERNING THE REGISTERED OWNER OF A KEY PIECE OF EVIDENCE VIOLATED THE DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for

judging claims of ineffective assistance of counsel under the Sixth Amendment is “whether counsel’s conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel’s assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel’s performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel’s conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is “whether there is a reasonable probability that, but for counsel’s errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel’s ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims ineffective assistance based

upon trial counsels failure to object when Mr. Goodlett and Ms Holbrook testified that the computer the officers seized was registered to Bill Holeman with the e-mail address of "cueballvhy@gmail.com." The problem with Mr. Goodlett's testimony was that it was hearsay under ER 801(c), because it "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Thus, under ER 802, Mr. Goodlett did not claim that he had personal knowledge of these facts. Rather, he testified that these facts came from the business records of Hewlett-Packard. Ms Holbrook testified that she obtained this information from someone at Hewlett-Packard, presumably Mr. Goodlett. Thus, under ER 802, this evidence was not admissible absent some exception to the hearsay prohibition.

It is true that there is a "business records" exception to the hearsay rule under RCW 5.45.020. The problem is that the state failed to present any evidence in this case to support it. This statute states:

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

RCW 5.45.020.

In this case, there was not evidence that Mr. Goodlett was "the

custodian of the records at issue". Neither was there any testimony as to the mode of preparation of this evidence, or any testimony as to any of the other requirements for the application of this hearsay exception. Thus, the evidence of who registered the computer and what that person's e-mail was is inadmissible hearsay and trial counsel's failure to object to the admission of this evidence fell below the standard of a reasonable prudent attorney. In addition, as the following explains, this failure caused prejudice.

In the case at bar, the state presented significant evidence that the person who owned and used the computer was engaged in an ongoing and substantial scheme to commit identity theft. The defense did not really dispute this claim. However, the defendant's connection with that computer was very much at issue. On this point, Mr. Goodlett and Ms. Holbrook's testimony on the registered owner of the computer was critical and devastating to the defense. Absent this evidence, the jury more likely than not would have acquitted the defendant on all of the counts. Thus, trial counsel's failure to object to this evidence denied the defendant effective assistance of counsel and the defendant is entitled to a new trial.

V. THE COURT DENIED THE DEFENDANT A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT (1) ALLOWED THE STATE TO ELICIT EVIDENCE THAT WAS MORE UNFAIRLY PREJUDICIAL THAN PROBATIVE, AND (2) REFUSED TO GIVE JURY INSTRUCTIONS NECESSARY TO THE DEFENDANT'S PRESENTATION OF HIS CASE.

While due process does not guarantee every person a perfect trial, *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968), both our state and federal constitutions do guarantee all defendants a fair trial untainted by unreliable, prejudicial evidence. *State v. Ford*, 137 Wn.2d 472, 973 P.2d 472 (1999). It also guarantees all defendants the right to have the court instruct the jury on legally and factually available defenses.

(1) The Evidence of Other Crimes the Defendant's Committed Were More Unfairly Prejudicial than Probative.

While due process does not guarantee every person a perfect trial, *Bruton v. United States*, *supra*, both our state and federal constitutions do guarantee all defendants a fair trial untainted from inadmissible, prejudicial evidence. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963). It also guarantees a fair trial untainted by unreliable, prejudicial evidence. *State v. Ford*, 137 Wn.2d 472, 973 P.2d 472 (1999). This legal principle is also found in ER 403, which states that the trial court should exclude otherwise relevant evidence if the unfair prejudice arising from the admission of the evidence outweighs its probative value. This rule states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 403.

In weighing the admissibility of evidence under ER 403 to determine whether the danger of unfair prejudice substantially outweighs probative value, a court should consider the importance of the fact that the evidence is intended to prove the strength and length of the chain of inferences necessary to establish the fact, whether the fact is disputed, the availability of alternative means of proof, and the potential effectiveness of a limiting instruction. *State v. Kendrick*, 47 Wn.App. 620, 736 P.2d 1079 (1987) . In Graham's treatise on the equivalent federal rule, it states that the court should consider:

the importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, where appropriate, the potential effectiveness of a limiting instruction....

M. Graham, *Federal Evidence* § 403.1, at 180-81 (2d ed. 1986) (quoted in *State v. Kendrick*, 47 Wn.App. at 629).

The decision whether or not to exclude evidence under this rule lies within the sound discretion of the trial court and will not be overturned absent

an abuse of that discretion. *State v. Baldwin*, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

In the case at bar, the trial court admitted exhibits 29, 31, 32, 33, and 34 over defense objection. These exhibits, taken from the computer, showed a number of financial documents and accompanying photographs and signatures taken from a number of named but unidentified people. It was itself evidence of a number of other, uncharged crimes of identity theft. Given the obvious weight that the jury would give to evidence of so many crimes identical to the crime charged, it was impossible for the jury to do anything other than assume that the defendant was guilty of the crimes charged because he had committed the crimes against other people. Thus, the admission of this evidence denied the defendant a fair trial notwithstanding the court's attempt to provide a limiting instruction.

(2) The Court's Refusal to Give the Defendant's Proposed Jury Instructions Prevented the Defendant from Presenting and Arguing Legally and Factually Available Defenses.

As part of this right to a fair trial, due process also guarantees that a defendant charged with a crime will be allowed to present relevant, exculpatory evidence in his or her defense. *State v. Hudlow*, 99 Wn.2d 1, 659 P.2d 514 (1983); *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35

L.Ed.2d 297 (1973). This includes the right to have the jury instructed on legally and factually available defenses. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). In this case, the trial court refused to give the following two instructions proposed by the defendant.

DEFENDANT'S PROPOSED INSTRUCTION NO. 1

Mr. Holeman has a constitutional right to collect information including financial or personal information. Mere possession of such information is not a crime. A crime requires possession with a criminal intent specifically described for each crime charged.

DEFENDANT'S PROPOSED INSTRUCTION NO. 2

Mere proximity to a controlled substance is not enough to establish constructive possession.

RP 473-474; CP 159-163.

In the case at bar, the first instruction was necessary because of the danger of having the jury mistakenly believe that the defendant could be found guilty of possessing printed material protected under the Fourth Amendment without the state proving the requisite criminal intent. Thus, the failure to give this instruction robbed the defense of the ability to effectively argue this point to the jury. The second instruction was particularly important because, under Washington law, mere proximity, without more, is insufficient to show the dominion and control necessary to establish constructive possession. *See, e.g., State v. Amezola*, 49 Wn.App. 78, 741 P.2d 1024 (1987). Since the state in this case did not claim actual possession,

and since the baggie that was tested was found in the proximity of the defendant's wallet, there was a substantial likelihood that the jury would convict the defendant based upon this mere proximity. Thus, the trial court's refusal to give this instruction also denied the defendant the ability to effectively argue this point to the jury.

(3) The Trial Court's Errors Caused Prejudice.

In this case, the admission of the exhibits that proved the commission of a number of identical crimes, when seen in the light of the court's refusal to give proposed instructions necessary for the defendant to effectively argue his case, caused prejudice. Absent these errors, there is a substantial likelihood that the jury would have returned verdicts of acquittal. Thus, the trial court's error in admitting the exhibits of other crimes and denying the proposed jury instructions denied the defendant a fair trial.

VI. THE TRIAL COURT'S FAILURE TO GRANT A MOTION FOR MISTRIAL BASED UPON JUROR MISCONDUCT DENIED THE DEFENDANT HIS RIGHT TO A FAIR JURY UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 21 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under Washington Constitution, Article 1, § 21, and under the Sixth Amendment to the United States constitution, every person charged with a felony in the state of Washington has the right to a fair trial in front of an impartial jury of 12 persons who must reach a unanimous verdict before a conviction can be entered. *State v. Seagull*, 124 Wn.2d 719, 881 P.2d 979

(1994); *Smith v. Phillips*, 455 U.S. 209, 71 L.Ed.2d 78, 102 S.Ct. 940 (1982). The trial judge is encumbered with the duty to be watchful for juror irregularities, and to take steps to determine that a defendant's right to a fair trial has not been prejudiced. *Id.* As the United States Supreme Court has stated: "Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Smith*, 455 U.S. at 217.

In *United States v. Bagnariol*, 665 F.2d 877 (9th Cir.1981), the Ninth Circuit Court of Appeals squarely put the duty upon the trial court to hold an evidentiary hearing upon hearing of possible juror misconduct. In this case, the court learned after trial that one of the jurors had conducted his own investigation at a Seattle library. In addressing how the court should have proceeded upon receiving this information, the Ninth Circuit stated:

The trial court, upon learning of a possible incident of juror misconduct, must hold an evidentiary hearing to determine the precise nature of the extraneous information. The defendant is entitled to a new trial if the judge finds a "possibility that the extrinsic material could have affected the verdict."

United States v. Bagnariol, 665 F.2d at 885.

In *State v. Murphy*, 44 Wn.App. 290, 721 P.2d 30 (1986), the court of appeals clarifies the fact that communications by or with jurors are per se misconduct. Furthermore, once established, such misconduct gives rise to a

presumption of prejudice which the State has the burden of disproving beyond a reasonable doubt. *State v. Murphy*, 44 Wn.App. at 296 (citing *Remmer v. United States*, 347 U.S. 227, 229, 98 L.Ed.654, 74 S.Ct. 450 (1954); *State v. Rose*, 43 Wn.2d 553, 557, 262 P.2d 194 (1953)).

For example, in *State v. Rose, supra*, the defendant was convicted of manslaughter, and appealed arguing that the trial court erred in refusing to grant a mistrial upon his complaint of juror misconduct. In support of his motion, the defendant had presented the affidavits of people who had seen communications between jurors and others during the trial and during deliberations. However, the trial court summarily denied the motion. On appeal, the Washington Supreme Court reversed and remanded for new trial, finding that there was a "prima facie presumption of prejudice" and that the burden was on the state to disprove it beyond a reasonable doubt. Since the state had failed to do so, reversal was required.

In the case at bar, the jury first sent out a request that the court provide a definition for the term "aide and abet" as was used in the jury instructions. The use of this term was apparently no small matter to the jury and can well be understood in light of the defendant's testimony that (1) Shane Goodwin owned the computer, and (2) he had helped Shane Goodwin by putting the check program on the computer. Thus, the jury might well have believed the defendant's testimony on this point, but been confused as to whether this

conduct alone would have been sufficient to make him guilty as a person who “aided and abetted” crimes committed by Shane Goodwin. In fact, the definition of this phrase was apparently sufficiently important to the jury that one of the juror’s looked it up on the internet and shared his or her findings with half of the jury. This fact was disclosed in the subsequent jury question that the court received.

The error in this case 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. As the court in *Bagnariol* clarified, the defendant is entitled to a new trial if the court finds a “possibility that the extrinsic material could have affected the verdict.” In this case, the jury’s first request that the court define the term “aid and abet” clarifies that the subsequent extrinsic material not only could have affected the verdict, but probably did affect the verdict. Thus, the trial court erred when it denied the defendant’s motion for a mistrial.

VII. THE CUMULATIVE ERRORS IN THIS CASE VIOLATED THE DEFENDANT’S RIGHT TO A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT.

Under the doctrine of harmless error, a trial court’s error of a non-constitutional magnitude does not warrant reversal of a conviction unless the

defendant can show a reasonable probability that but for the errors, the jury would have returned a verdict of acquittal. *State v. Hamlet*, 133 Wn.2d 314, 327, 944 P.2d 1026 (1997). Absent such a showing, the error is deemed harmless. *Id.* Under the same rule, error of constitutional magnitude does not warrant reversal of a conviction if the state proves beyond a reasonable doubt that without the error, the jury would still have convicted. *State v. Hopson*, 113 Wn.2d 273, 778 P.2d 1014 (1989). If the state meets its burden in this instance, the error is again deemed harmless. *Id.*

However, when the court makes multiple errors, each of which alone is deemed harmless, the defendant is yet entitled to a new trial if it appears reasonably probable that the cumulative effect of those errors materially affected the outcome of the trial. *State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981 (1981) (citing *State v. Russell*, 125 Wn.2d 24, 93, 882 P.2d 747 (1994)); see also *State v. Coe*, 101 Wn.2d 772, 789, 694 P.2d 668 (1984). In such a case, the cumulative effect of the otherwise harmless errors has denied the defendant the right to a fair trial under Washington Constitution, Article 1, § 3. *State v. Jerrels*, 83 Wn.App. 503, 925 P.2d 209 (1996).

For example, in *State v. Johnson, supra*, the defendant was convicted of First Degree Illegal Possession of a Firearm and First Degree Assault out of a single incident in which he allegedly intentionally shot a person in the leg. Following conviction, the defendant appealed, arguing that the trial court

erred in that (1) it admitted evidence of his prior rape conviction, in spite of his willingness to stipulate that he had a conviction for a prior serious offense, (2) it allowed the state to elicit the fact that he had stated a self-defense claim at omnibus (although he did not pursue it at trial), (3) the court did not allow the defense to cross-examine a state's witness on prior inconsistent statements as well as on the issue of bias, and (4) the court allowed the state to impeach a defense witness with the fact of a probation violation.

On appeal, the state argued that even if the defendant was correct, the argued errors were harmless. The Court of Appeals did find error, and it agreed that each of the errors standing alone was harmless. However, the court went on to find that the cumulative effect of the errors was not harmless. As a result, the court reversed, stating as follows:

Although none of the errors discussed above alone mandate reversal, it appears reasonably probable that the cumulative effect of those errors materially affected the outcome. *See State v. Russell*, 125 Wn.2d 24, 93, 882 P.2d 747 (1994). First, the admission of Johnson's rape conviction and Johnson's prior claim of self-defense were prejudicial because they improperly allowed the jury to infer that Johnson was a bad character and that his defense was not credible. The refusal to allow the impeachment of Purcell with his prior inconsistent statement implicated Johnson's constitutional rights to confront adverse witnesses and reasonably could have influenced the jury's evaluation of Purcell's credibility. *Russell*, 125 Wash.2d at 93, 882 [950 P.2d 992] P.2d 747. Although the admission of Martin's probation violation appears harmless, it added to the cumulative effect of a fundamentally unfair trial.

The jury reasonably could have reached a different outcome absent these errors. Consequently, we must reverse the conviction.

State v. Johnson, 90 Wn.App. at 74.

Here, as in *Johnson*, the trial court erred when it (1) denied the defendant's motion to suppress, (2) admitted the defendant's statements in spite of the state's failure to prove that the police complied with *Miranda*, (3) admitted unfairly prejudicial evidence of other identical crimes, (4) refused to give legally available jury instructions necessary for the defense to effectively argue its case, and (5) failed to prevent the jury from receiving and considering improper extrinsic evidence. To the extent any one of these errors did not cause prejudice sufficient to warrant a new trial, their cumulative affect did deny the defendant a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment. As a result, the defendant is entitled to a new trial.

VIII. THE TRIAL COURT ERRED WHEN IT IMPOSED A COMMUNITY CUSTODY CONDITION THAT WAS NOT AUTHORIZED BY THE LEGISLATURE, AND THAT WAS SO VAGUE THAT IT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT.

Under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, "a statute is void for vagueness if its terms are 'so vague that persons of common intelligence must necessarily

guess at its meaning and differ as to its application.”” *State v. Worrell*, 111 Wn.2d 537, 761 P.2d 56 (1988) (quoting *Myrick v. Board of Pierce Cy. Comm'rs*, 102 Wn.2d 698, 707, 677 P.2d 140 (1984)). This rule applies equally to conditions of community custody, which has the effect of a criminal statute in that their violation can result in a new term of incarceration. *State v. Simpson, supra*.

As the Washington Supreme Court explained in *State v. Aver*, 109 Wn.2d 303, 745 P.2d 479 (1987), the test for vagueness rests on two key requirements: adequate notice to citizens and adequate standards to prevent arbitrary enforcement. In addition, there are two types of vagueness challenges: (1) facial challenges, and (2) challenges as applied in a particular case. *State v. Worrell*, 111 Wn.2d at 540. In *Aver*, the court explained the former challenge as follows:

In a constitutional challenge a statute is presumed constitutional unless its unconstitutionality appears beyond a reasonable doubt. *Seattle v. Shepherd*, 93 Wash.2d 861, 865, 613 P.2d 1158 (1980); *Maciolek*, 101 Wash.2d at 263, 676 P.2d 996. In a facial challenge, as here, we look to the face of the enactment to determine whether any conviction based thereon could be upheld. *Shepherd*, 93 Wash.2d at 865, 613 P.2d 1158. A statute is not facially vague if it is susceptible to a constitutional interpretation. *State v. Miller*, 103 Wash.2d 792, 794, 698 P.2d 554 (1985). The burden of proving impermissible vagueness is on the party challenging the statute's constitutionality. *Shepherd*, 93 Wash.2d at 865, 613 P.2d 1158. Impossible standards of specificity are not required. *Hi-Starr, Inc. v. Liquor Control Bd.*, 106 Wash.2d 455, 465, 722 P.2d 808 (1986).

State v. Aver, 109 Wn.2d at 306-07.

In the case at bar the defendant argues that the following community custody condition the court imposed in this case violates due process because it is void for vagueness.

- ☒ 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, cellular phones, police scanners, and hand held electronic scheduling or data storage devices.

CP 282.

In this provision the phrase “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” is hopelessly vague. Literally, any item from a toothpick up to a dump truck could qualify under this phrase. The following gives a few examples. Any type of telephone can and are used to facilitate the transfer of drugs. Is the defendant prohibited from using any type of telephone? Any type of motor vehicle can be used for the transfer of drugs. Is the defendant prohibited from using motor vehicles? Blenders can be used to pulverize pseudoephedrine tablets as the first step in manufacturing methamphetamine. Is the defendant prohibited from using a blender? Matches are often used as a source of phosphorous in the manufacture of methamphetamine. Is the defendant prohibited from using or possessing matches? Cigarette paper is sometimes used to smoke marijuana.

Is the defendant prohibited from possessing cigarette paper? Baggies are often used to contain controlled substances. Is the defendant now forced to only use waxed paper to wrap his sandwiches? Except waxed paper can also be used to make bindles, as can glossy pages out of magazines. Perhaps the defendant will be in violation if he possesses waxed paper or magazines with glossy pages. The list is endless and the reason it is endless is because the phrase “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” is so vague as to leave the defendant open to violation at the whim of his probation officer. Consequently, this condition is void and violates the defendant’s right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment.

In a recent decision, this court ruled that constitutional arguments such as these are not ripe for decision given the fact that the state had not sought to sanction the defendant for violation of any of the conditions the defendant herein claims are improper. In *State v. Motter*, 139 Wn.App. 737, 162 P.3d 1190 (2007), this court held:

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.

State v. Motter, No. 34251-2-II (filed 7-24-05)

The defendant herein argues that this decision, while appropriate at the time of *Massey* and *Langland*, is inappropriate now, and that by applying it in *Motter* and applying it in the case at bar this court violates the defendant's right to procedural due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment by denying the defendant appellate review as guaranteed under Washington Constitution, Article 1, § 22. The following presents this argument.

A criminal defendant does not have a federal constitutional due process right to either post-conviction motions or to appeal. *Rheurark v. Shaw*, 628 F.2d 297, 302 (5th Cir.1980), *cert. denied*, 450 U.S. 931, 101 S.Ct. 1392, 67 L.Ed.2d 365 (1981). However, once the state acts to create those rights by constitution, statute or court rule the protections afforded under the due process clauses found in Washington Constitution, Article 1,

§ 3, and United States Constitution, Fourteenth Amendment, have full effect. *In re Frampton*, 45 Wn.App. 554, 726 P.2d 486 (1986). For example, once the state creates the right to appeal a criminal conviction, in order to comport with due process, the state has the duty to provide all portions of the record necessary to prosecute the appeal at state expense. *State v. Rutherford*, 63 Wn.2d 949, 389 P.2d 895 (1964). The state also has the duty to provide appointed counsel to indigent appellants. *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); *State v. Rupe*, 108 Wn.2d 734, 741, 743 P.2d 210 (1987).

In Washington, a criminal defendant has the right to one appeal in a criminal case under both RAP 2.2 and Washington Constitution, Article 1, § 22. *State v. French*, 157 Wn.2d 593, 141 P.3d 54 (2006). Thus, this right includes the protections of procedural due process. At a minimum, procedural due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment requires notice and the opportunity to be heard before a competent tribunal. *In re Messmer*, 52 Wn.2d 510, 326 P.2d 1004 (1958). In the *Messmer* decision, the Washington State Supreme Court provided the following definition for procedural due process.

We have decided that the elements of the constitutional guaranty of due process in its procedural aspect are notice and an opportunity to be heard or defend before a competent tribunal in an orderly

proceeding adapted to the nature of the case; also to have the assistance of counsel, if desired, and a reasonable time for preparation for trial.

In re Messmer, 52 Wn.2d at 514 (quoting *In re Petrie*, 40 Wn.2d 809, 246 P.2d 465 (1952)).

In *Massey* and *Langland* the defendant's procedural due process right "to be heard or defend before a competent tribunal" was not violated even though the court found the defendant's constitutional challenge to certain probation conditions was not ripe. The reason is that in these cases the defendants had the right to contest the constitutionality of those conditions before the court in the future were the Department of Corrections to seek to sanction the defendant for failure to comply with conditions the defendant felt were unconstitutional. The problem with the decision in *Motter*, and the problem in the case at bar, is that probation violation claims are no longer adjudicated in court. Rather, they are adjudicated before a Department of Corrections hearing officer who only has the authority to determine (1) what the conditions were, (2) whether or not DOC has factually proven a violation of those conditions, and (3) what the appropriate sanction should be if the violation was proven.

Under WAC 137-104-050 the Department of Corrections has adopted procedures whereby defendants accused of community custody violations are

tried before a DOC hearing officer on the claims of violation, not before a court. The first two sections of this code section provide as follows:

(1) Offenders accused of violating any of the conditions or requirements of community custody will be entitled to a hearing, prior to the imposition of sanctions by the department.

(2) The hearing shall be conducted by a hearing officer in the department's hearing unit, and shall be considered as an offender disciplinary proceeding and shall not be subject to chapter 34.05 RCW, the Administrative Procedure Act.

WAC 137-104-050.

There is no provision under this administrative code, nor under any of the other sections of WAC 137-104, to allow the defendant to challenge the constitutionality of community custody conditions that the court imposed. In addition, while this administrative code section does grant the right to appeal, it does not grant the defendant the right at the appellate level to challenge the constitutionality of the community custody conditions imposed by the court. This section, WAC 137-104-080, states as follows:

(1) The offender may appeal the decision of the hearing officer within seven calendar days to the appeals panel. The request for review should be submitted in writing and list specific concerns.

(2) The sanction shall be reversed or modified if a majority of the panel finds that the sanction was not reasonably related to the: (a) Crime of conviction; (b) Violation committed; (c) Offender's risk of reoffending; or (d) Safety of the community.

(3) The appeals panel will also examine evidence presented at the hearing and reverse any finding of a violation based solely on unconfirmed or unconfirmable allegations.

WAC 137-104-080.

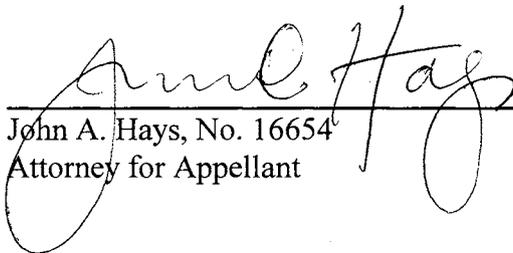
Under WAC 137-104-080 and the procedures by which community custody violations are no longer adjudicated in court, the effect of the decision in *Motter* is to deny a defendant procedural due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment by refusing to hear constitutional challenges to community custody provisions at the direct appeal level (not ripe), and then refusing to hear constitutional challenges at the violation level under WAC 137-104 (no authority to hear the claim). Thus, to comport with minimum due process, this court should find that the defendant's constitutional challenges to community custody conditions may be heard as part of a direct appeal from the imposition of the sentence.

CONCLUSION

The defendant is entitled a new trial based upon the court's erroneous admission of the defendant's statement, the trial court's unfairly prejudicial admission of evidence of other identical crimes, the trial court's failure to give jury instructions necessary for the defense, the trial court's failure to ensure that the jury did not consider improper extrinsic evidence, and trial counsel's failure to object to the admission of critical hearsay evidence. In addition, Counts I, X, XI, XII, XIII, and XX should be dismissed because they are not supported by substantial evidence. In the alternative, this court should vacate the invalid and constitutional vague community custody condition.

DATED this 10th day of March, 2006.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 7**

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 21**

The right to trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases where the consent of the parties interested is given thereto.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**UNITED STATES CONSTITUTION,
FOURTH AMENDMENT**

The right of the people to be secure in their persons, houses, papers, and effects, against reasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized.

**UNITED STATES CONSTITUTION,
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

ER 403

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 801

The following definitions apply under this article:

(a) Statement. A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A 'declarant' is a person who makes a statement.

(c) Hearsay. 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements Which Are Not Hearsay. A statement is not hearsay if--

(1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (iii) one of identification of a person made after perceiving the person; or

(2) Admission by Party-Opponent. The statement is offered against a party and is (i) the party's own statement, in either an individual or a representative capacity or (ii) a statement of which the party has manifested an adoption or belief in its truth, or (iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party, or (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

ER 802

Hearsay is not admissible except as provided by these rules, by other court rules, or by statute.

RCW 5.45.020
Business records as evidence

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

DEFENDANT'S PROPOSED INSTRUCTION NO. 1

Mr. Holeman has a constitutional right to collect information including financial or personal information. Mere possession of such information is not a crime. A crime requires possession with a criminal intent specifically described for each crime charged.

DEFENDANT'S PROPOSED INSTRUCTION NO. 2

Mere proximity to a controlled substance is not enough to establish constructive possession.

WAC 137-104-050

(1) Offenders accused of violating any of the conditions or requirements of community custody will be entitled to a hearing, prior to the imposition of sanctions by the department.

(2) The hearing shall be conducted by a hearing officer in the department's hearing unit, and shall be considered as an offender disciplinary proceeding and shall not be subject to chapter 34.05 RCW, the Administrative Procedure Act.

WAC 137-104-080

(1) The offender may appeal the decision of the hearing officer within seven calendar days to the appeals panel. The request for review should be submitted in writing and list specific concerns.

(2) The sanction shall be reversed or modified if a majority of the panel finds that the sanction was not reasonably related to the:

- (a) Crime of conviction;
- (b) Violation committed;
- (c) Offender's risk of reoffending; or
- (d) Safety of the community.

(3) The appeals panel will also examine evidence presented at the hearing and reverse any finding of a violation based solely on unconfirmed or unconfirmable allegations.

