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COURT OF APPEALS  
DIVISION II  
00 FEB 19 PM 1:12  
STATE OF WASHINGTON  
BY JW  
DEPUTY

NO. 38251-2-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent.

v.

JEFFREY LLOYD FLOWERS, Appellant.

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APPELLANT'S BRIEF

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PM 2-18-09

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## I. ASSIGNMENTS OF ERROR

1. The trial court erred by convicting Mr. Flowers of bail jumping for failing to appear on October 2, 2007, without sufficient evidence that he actually failed to appear at the appointed time.
2. The trial court erred by convicting Mr. Flowers of possession of a controlled substance with intent to deliver without sufficient evidence that he intended to deliver the .1 gram of methamphetamine in his possession.
3. The trial court erred by permitting the State to introduce evidence of a note found in Mr. Flowers' pocket, purportedly showing the sale price for OxyContin, allegedly to show intent to deliver methamphetamine.
4. The trial court erred by ruling that the OxyContin note was admissible under ER 404(b).
5. The trial court erred by ruling that the OxyContin note was evidence of intent to deliver methamphetamine.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. The State failed to prove beyond a reasonable doubt that Mr. Flowers failed to appear for a pre-trial conference set for October 2, 2007, at 1:30 p.m. where the witness testified only that he polled the gallery at 3:45 p.m. and that he had no personal knowledge of whether a pre-trial conference was held.
2. The State failed to provide sufficient evidence of intent to deliver where the only evidence was the Mr. Flowers possessed only .1 gram of methamphetamine, which testimony revealed was far below a saleable amount.
3. The trial court erred by permitting the State to introduce a note found on Mr. Flowers that purportedly referred to the per pill price of OxyContin, a prescribed drug, where Mr. Flowers was not charged with selling OxyContin and this evidence constituted evidence of propensity, which is excluded by ER 404(b).

### III. STATEMENT OF THE CASE

#### *Facts Relating to Count I: Unlawful Possession of a Controlled Substance with Intent to Deliver*

On May 27, 2007, just after midnight, Jeffrey Flowers pulled his newly-purchased car out of his girlfriend's driveway to allow another friend to pull her car out. RP 59-60, 94. Mr. Flowers saw headlights behind him, so, rather than block the road, he pulled into the cul-de-sac to turn around. The car behind him activated police lights and he stopped. RP 59-60. He was only 40 feet from his house. RP 59-60.

Deputy Robert Tjossem said he saw Mr. Flowers pull out of the driveway and ran a routine license check, finding that the license was expired. RP 153. He did not see a year tab on the license plate. RP 153. He did not see the trip permit displayed in the rear window. RP 34-35, 59, 97-98.

Deputy Tjossem activated his lights and spotlight on Mr. Flowers' vehicle and approached the car. RP 154. The deputy told Mr. Flowers he was stopping the car because it did not have the license year tab on the rear plate. RP 153. He asked Mr. Flowers for his license and registration. RP 154. Mr. Flowers told the Deputy that his license was suspended. RP 154. Deputy Tjossem then told Mr. Flowers that he was under arrest, directed him to shut off his car and step out. RP 154-55. Mr. Flowers

asked to be permitted to return the car to his girlfriend's driveway first, but the Deputy refused. RP 155. Mr. Flowers then complied, stepped out of the vehicle, and was handcuffed by the Deputy. RP 156.

Deputy Andrew O'Neil arrived as Mr. Flowers was being handcuffed, to provide backup. RP 212. He advised Mr. Flowers of his Miranda rights and searched him. RP 214. In Mr. Flowers' pants pocket, in a small nylon bag, they found one baggie with a small rock of methamphetamine, weighing less than one tenth of a gram, two baggies with only residue of methamphetamine and five unused one inch by one inch baggies. RP 159-61, 170, 214, 229-30. Mr. Flowers said he had not known that there was methamphetamine inside the bag, but that if he had, he would have smoked it. RP 162. In another pocket, the Deputy found a digital gram scale with untested residue on it. RP 174, 216. The Deputy also found a collapsible baton in Mr. Flowers' rear pocket, which Mr. Flowers said he carried for his protection. RP 216, 218.

In his subsequent search of the car, Deputy Tjossem found a glass pipe under the drivers' seat. RP 156-57. Mr. Flowers said that it was not his, but he knew that it was used for smoking drugs. RP 158.

Deputy Tjossem testified that the two bags with only residue were clearly not for sale. RP 180. He also testified that the most typical amount of methamphetamine sold on the street was a sixteenth of an

ounce, or 1.8 grams,<sup>1</sup> which would be sold for between \$20-\$40. RP 181. The rock found on Mr. Flowers was much smaller than this typical amount, weighing only .1 gram. RP 184. No money or other drugs were found on Mr. Flowers. RP 200.

Over the defense's objection, the State was permitted to introduce into evidence a hand-written note found in Mr. Flowers' pocket, which said "10 Oxy cotin" and "\$20." RP 171. Deputy O'Neil testified that this was a "crib note" of how much to charge for drugs sold. RP 218. Deputy Tjossem testified that this note "tells [him] that somebody has got \$200 worth of OxyContin to sell." RP 172. Deputy Tjossem further testified that having ten OxyContin pills indicates a drug dealer. RP 173. The defense objected to this evidence, arguing that it violated ER 403 and ER 404(b). RP 164-5. The court permitted the evidence, stating that it was relevant to Mr. Flowers' intent to deliver. RP 166-69.

*Facts Relating to Counts V and VI—Bail Jumping:*

Mr. Flowers was charged with two counts of bail jumping for allegedly failing to appear for court dates on October 2, 2007 and January 8, 2008. CP 8.

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<sup>1</sup> According to the forensic scientist's testimony, there are 28.3 grams in an ounce. RP 241. Therefore, the deputy testified that a typical amount of methamphetamine sold is equal to approximately 1.8 grams. In this case, the amount found was .1 grams. RP 229.

The deputy prosecutor assigned as "barrel deputy" on October 2, Jesse Williams, testified that Mr. Flowers had signed a scheduling order directing him to appear at a pre-trial conference on October 2, 2007, at 1:30 p.m. RP 274-75, 290. Mr. Flowers was released on bail on September 12, 2007. RP 272. On October 2 at 3:45 p.m., Mr. Williams called Mr. Flowers' name inside the courtroom once and received no reply. RP 278-9. A bench warrant was therefore issued. RP 283. Mr. Williams testified that pre-trial conferences are not held in the courtroom or before a judge. RP 293. Pre-trial conferences do not appear on the docket. RP 303. Mr. Williams testified that he does not handle pre-trial conferences, but rather is only responsible for managing the 100-120 cases called during the date in question. RP 294, 302. He had no personal knowledge of whether Mr. Flowers or his attorney appeared on the date in question. RP 297. He did not speak with the prosecutor assigned to Mr. Flowers' case or with Mr. Flowers' attorney on October 2. RP 307-8.

The barrel deputy for January 8, 2008, Neil Horibe, testified that Mr. Flowers had signed an order of continuance that directed him to appear on January 8, 2008, for a continuance hearing at 8:30 a.m. RP 333-34. Mr. Horibe called Mr. Flowers name inside the courtroom at 8:55 a.m. and 10:50 a.m., but received no response. RP 335. A bench warrant was issued. RP 337.

*Convictions and Sentence:*

Mr. Flowers was convicted of unlawful possession of a controlled substance with intent to deliver, unlawful use of drug paraphernalia, and two counts of bail jumping. CP 49-53. The court determined Mr. Flowers' standard range for the UPCS with intent to deliver was 60 to 120 months and for the bail jumping charges was 51-60 months. CP 61. He was sentenced to 72 months, which 60 months each for the bail jumping, concurrent. CP 64.

This appeal timely follows.

#### **IV. ARGUMENT**

**ISSUE 1: THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT MR. FLOWERS FAILED TO APPEAR FOR A PRE-TRIAL CONFERENCE SET FOR OCTOBER 2, 2007, AT 1:30 P.M. WHERE THE WITNESS TESTIFIED ONLY THAT HE POLLED THE GALLERY AT 3:45 P.M. AND THAT HE HAD NO PERSONAL KNOWLEDGE OF WHETHER A PRE-TRIAL CONFERENCE WAS HELD.**

Due process requires the State to prove all elements of a crime beyond a reasonable doubt. *State v. Aver*, 109 Wn.2d 303, 310, 745 P.2d 479 (1987). Evidence is insufficient to support a conviction when, viewed in the light most favorable to the prosecution, it would not permit a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Under RCW 9A.76.170(1), a person is guilty of bail jumping if he or she is released “with knowledge of the requirement of a subsequent personal appearance” and he or she fails to appear. In this case, the State did not prove that Mr. Flowers failed to appear on October 2, 2007, at 1:30 p.m., as he was ordered to do. The barrel deputy could only testify that Mr. Flowers was not present in the courtroom at 3:45 p.m., when he called. RP 278-79. He had no personal knowledge that Mr. Flowers had not appeared at his scheduling conference and had not even spoken with the prosecutor assigned to the case. RP 297, 307-8. Moreover, scheduling conferences are not placed on the docket because they are not intended to occur before the court, so there was no reason for Mr. Flowers to be sitting in the gallery. See RP 303. The barrel deputy did not call a second time, nor did he check the hallway for Mr. Flowers. RP 278-79, 306. Therefore, there is insufficient evidence that Mr. Flowers actually failed to appear on October 2 and his conviction for bail jumping is erroneous.

**ISSUE 2: THE STATE FAILED TO PROVIDE SUFFICIENT EVIDENCE OF INTENT TO DELIVER WHERE THE ONLY EVIDENCE WAS THE MR. FLOWERS POSSESSED ONLY .1 GRAM OF METHAMPHETAMINE, WHICH TESTIMONY REVEALED WAS FAR BELOW A SALEABLE AMOUNT.**

The statutory elements of possession of controlled substance with intent to deliver are (1) unlawful possession of (2) a controlled substance with (3) intent to deliver. RCW 69.50.401(a)(1)(ii); *State v. Atsbeha*, 142

Wn.2d 904, 918, 16 P.3d 626 (2001); *State v. Sims*, 119 Wn.2d 138, 141, 829 P.2d 1075 (1992).

It is firmly established Washington law that mere possession of a controlled substance is generally insufficient to establish an inference of intent to deliver. *State v. Darden*, 145 Wn.2d 612, 624, 41 P.3d 1189 (2002); see also *State v. Brown*, 68 Wn. App. 480, 483, 843 P.2d 1098 (1993). Rather, at least one additional factor must be present. *State v. Hagler*, 74 Wn. App. 232, 236, 872 P.2d 85; 74 Wn. App. 232, 872 P.2d 85 (1994).

In *Brown*, the court cautioned against the use of opinion testimony to inflate a "naked possession" case into one with stiffer penalties:

The courts must be careful to preserve the distinction and not to turn every possession of a minimal amount of a controlled substance into a possession with intent to deliver without substantial evidence as to the possessor's intent above and beyond the possession itself.

Convictions for possession with intent to deliver are highly fact specific and require substantial corroborating evidence in addition to the mere fact of possession.

*Brown*, at 485; see also *State v. Hutchins*, 73 Wn. App. 211, 868 P.2d 196 (1994).

In *State v. Goodman*, the evidence was found sufficient to show intent to deliver where the police found six baggies of a white powder substance totaling 2.8 grams; three baggies tested positive for

his dealer's representation of the weight of the drugs he purchases. Unlike the other cases cited above, Mr. Flowers had no cash on his person. The testimony of the police officer was that the .1 gram of methamphetamine Mr. Flowers possessed was far below the usual saleable amount of methamphetamine, which is at least 1.8 grams.<sup>2</sup> Thus, even if Mr. Flowers could be proved to have sold drugs in the past, there is no evidence that he possessed sufficient methamphetamine at the time of his arrest to sell drugs in the future.

In sum, the miniscule amount of methamphetamine found in this case was insufficient to support an inference that Mr. Flowers had the intent to deliver and therefore, his conviction must be reversed.

**ISSUE 3: THE TRIAL COURT ERRED BY PERMITTING THE STATE TO INTRODUCE A NOTE FOUND ON MR. FLOWERS THAT PURPORTEDLY REFERRED TO THE PER PILL PRICE OF OXYCONTIN, A PRESCRIBED DRUG, WHERE MR. FLOWERS WAS NOT CHARGED WITH SELLING OXYCONTIN AND THIS EVIDENCE CONSTITUTED EVIDENCE OF PROPENSITY, WHICH IS EXCLUDED BY ER 404(B).**

A trial court's ruling on admission of evidence is reviewed for abuse of discretion. *State v. Ortiz*, 119 Wn.2d 294, 308, 831 P.2d 1060 (1992). A court abuses its discretion when it exercises it on untenable

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<sup>2</sup> The deputy testified that the most typical amount of methamphetamine sold on the street was 1/16 of an ounce, which would be sold for between \$20-\$40. RP 181. According to the forensic scientist's testimony, there are 28.3 grams in an ounce. RP 241. Therefore, the deputy testified that a typical amount of methamphetamine sold is equal to approximately 1.8 grams. In this case, the amount found was .1 grams. RP 229.

grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). An evidentiary error is grounds for reversal only if it results in prejudice. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). An evidentiary error “is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981); see *Bourgeois*, 133 Wn.2d at 403, 945 P.2d 1120. “The purpose of these rules of evidence is to secure fairness and to ensure that truth is justly determined.” *State v. Wade*, 98 Wn. App. 328, 333, 989 P.2d 576 (1998).

ER 404(b) forbids the admission of evidence of prior bad acts that tend to prove a defendant's propensity to commit a crime, but the rule allows bad act evidence for other limited purposes:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

To determine admissibility of evidence under ER 404(b), the trial court must engage in a three-part analysis established in *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). First, the court must identify the purpose for which the evidence will be admitted. Second, the evidence

must be materially relevant. Third, the court must balance the probative value of the evidence against any unfair prejudicial effect the evidence may have upon the fact finder. *Saltarelli*, 98 Wn.2d at 362-66. Further, to avoid error, the trial court must identify the purpose of the evidence and conduct the balancing test on the record. *State v. Jackson*, 102 Wn.2d 689, 693-94, 689 P.2d 76 (1984). Doubtful cases should be resolved in favor of the defendant. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

In this case, a hand-written note was found in Mr. Flowers' pocket, which said "10 Oxy cotin" and "\$20." RP 171. The State argued and the trial court found, over defense objection, that the note found in Mr. Flowers' pocket that purportedly described the per pill price for OxyContin was relevant to show Mr. Flowers' intent to deliver methamphetamine on this date. RP 164-69. In other words, the State argued that because Mr. Flowers knew how much a pill of OxyContin would sell for, he is also guilty of selling methamphetamine. This is simply evidence of propensity, which is forbidden under ER 404(b).

As the court stated in *State v. Wade*, "intent" is not the automatic antidote to ER 404(b):

When the State offers evidence of prior acts to demonstrate intent there must be a logical theory, *other than propensity*, demonstrating how the prior acts connect to the intent required to commit the charged offense. That a prior act "goes to intent" is not a "magic [password] whose mere

incantation will open wide the courtroom doors to whatever evidence may be offered in [its name.]”

*Wade*, 98 Wn. App. at 334 (quoting *Saltarelli*, 98 Wn.2d at 364). To use prior acts for a “nonpropensity based theory,” there must be some unique character to the facts that ties the acts together—a fact in common other than the defendant himself. *Wade*, 98 Wn. App. at 335

In *Wade*, the State introduced evidence that the defendant had been convicted twice in the last year of dealing drugs, purportedly to show Wade’s current intent to deliver a controlled substance. 98 Wn. App. at 332. The Court held that this was erroneous under ER 404(b), stating that there were no facts common between the past convictions and the current charges that raised the inference beyond propensity:

The only reasonable inference to be drawn from Wade’s prior acts is as follows: Because the previous convictions are for the same type of crime, including the requisite intent, Wade was predisposed to have the that same intent on the current occasion. Such evidence and inference merely establish Wade’s propensity to commit drug sale offenses. No matter how relevant such propensity evidence may be, ER 404(b) requires exclusion, absent other permissible purposes.

*Wade*, at 337. The *Wade* court then went on to hold that the error was not harmless because the facts of the case—that Wade possessed 9 rocks of cocaine, totaling 1.3 grams, which he had tossed away upon seeing the police, which the police expert testified was of a quantity consistent with sale rather than personal use—were not sufficient to sustain the conviction

and that the verdict would have been different absent the erroneous propensity evidence. *Wade*, at 338-41.

In this case, the OxyContin note found in Wade's pocket, even if it does truly show that he intended to sell OxyContin illegally, is factually dissimilar to the current charge of intent to deliver methamphetamine. There is no connection between this alleged bad act and the current charge other than the defendant. Thus, it is clearly propensity evidence forbidden by ER 404(b) no matter how much the State wishes to hide it in the label "intent." The trial court erred by permitting the State to introduce this evidence.

Inflammatory and irrelevant material was introduced that had a tendency to prejudice the jury against the defendant and made the trial unfair. *State v. Miles*, 73 Wn.2d 67, 70, 436 P.2d 198 (1968). The conviction must be reversed unless the error was harmless. "Error is not prejudicial unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986) (citing *State v. Cunningham*, 93 Wn.2d 823, 613 P.2d 1139 (1980)).

In this case, the evidence of intent to deliver was very weak (see above). In this respect, this case resembles *Wade*, where even the judge admitted that absent propensity evidence, he would not have been

persuaded that Wade's possession of 1.3 grams of cocaine was held with the intent to deliver.

Furthermore, the introduction of this evidence was more than a passing reference. Both police witnesses were asked to comment on the note. Officer Tjossem testified that the note tells him "that somebody has got \$200 worth of OxyContin to sell." RP 172. Officer Tjossem went on to say that if a person is holding only 10 pills, that indicates he is a dealer. RP 173. Likewise, Officer O'Neil testified that the OxyContin note was a "crib note" on how much to charge for individual pills. RP 218. Then, in closing argument, the prosecutor argued that the jury should consider the OxyContin note as evidence of intent because it indicates "somebody who is in a position of selling drugs and then passing drugs along." RP 403-4. This is a blatant "propensity" argument to the jury.

The trial court's error in introducing the OxyContin note cannot be said to be harmless error. Thus, the erroneous admission of this propensity evidence requires the reversal of Mr. Flowers' conviction for unlawful possession of a controlled substance.

## V. CONCLUSION

The trial court erred by convicting Mr. Flowers of bail jumping on October 2 based solely on the evidence that the prosecutor called his name once, two hours after he was ordered to appear, with no response. This

evidence was insufficient to prove the crime and thus the bail jumping conviction must be reversed.

Further, the combination of insufficient evidence to prove that Mr. Flowers intended to sell the .1 gram of methamphetamine he possessed, as well as the erroneous admission of collateral bad acts to show propensity require the reversal of his conviction for possession of a controlled substance with intent to deliver.

DATED: February 18, 2009

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