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STATE OF WASHINGTON

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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

DARRELL MONTAE LEE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Vicki Hogan

No. 08-1-03287-8

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the defendant waived any challenge to the search of his vehicle incident to arrest where he did not raise it below?
2. Whether the trial court exercised reasonable discretion in admitting ER 404(b) evidence?
3. Whether the State adduced sufficient evidence to support the jury's verdicts?
4. Whether after considering the cumulative error doctrine, the defendant received a fair trial?

B. STATEMENT OF THE CASE.

1. Procedure

On July 15, 2008, the State charged Darrell Montae Lee, hereinafter "the defendant," with one count of Unlawful Possession of a Controlled Substance with Intent to Deliver (Methadone), one count of Unlawful Possession of a Controlled Substance with Intent to Deliver (Cocaine), and one count of Driving With a License Suspended in the Third Degree. CP 1-3. On May 20, 2009, the State filed an amended information adding one count of Bail Jumping. CP 6-8. On July 21, 2009, the State filed a second amended information adding a second count of bail jumping and one count of Forgery. CP 11-14.

No suppression motion was filed or heard. *See, e.g.* CP [Omnibus Order 11-17-08]

The case was assigned to the Honorable Vicki L. Hogan for trial. The jury found the defendant guilty of Unlawful Possession of a Controlled Substance with Intent to Deliver (Methadone), Driving With License Suspended in the Third Degree, two counts of Bail Jumping, and Forgery. CP 124, 128, 129, 130, 131. The jury found the defendant not guilty of Unlawful Possession of a Controlled Substance with Intent to Deliver (Cocaine), but did find the defendant guilty of the lesser included Unlawful Possession of a Controlled Substance (Cocaine). CP 126, 127.

The court sentenced the defendant to 120 months total confinement. CP 87-123. From this judgment and sentence, the defendant filed a timely notice of appeal. CP 209.

2. Facts

On July 10, 2008, Tacoma Police Officer Douglas Walsh pulled over a vehicle on East I Street in Tacoma, Washington for speeding. RP 102. The defendant pulled the vehicle into a driveway and got out of the car. RP 103. The defendant did not own the car he was driving. RP 105. Officer Walsh recognized the defendant and believed the defendant had a suspended driver's license. *Id.* After confirming the defendant had a suspended driver's license, Officer Walsh arrested the defendant. *Id.*

Upon arresting the defendant, Officer Walsh searched the defendant's person. RP 109. During the search, Officer Walsh found 12 pills, later identified as methadone, in the defendant's pocket. RP 109, 160. In addition to the methadone pills, Officer Walsh found \$1,295 cash in the defendant's front right pants pocket, and \$540 in twenty dollar bills in the defendant's wallet. RP 109, 112, 116. After searching the defendant, Officer Walsh placed him in the back of the patrol car. RP 110. Incident to the defendant's arrest, Officer Walsh searched the defendant's vehicle. Inside the vehicle's sunroof, between the glass and the manual sliding door, Officer Walsh found a baggie of crack cocaine. RP 110. Officer Walsh testified the large cocaine rock in the baggie was larger than rocks typically possessed for personal consumption. RP 131. Officer Walsh found no drug paraphernalia or cell phones during the search of the vehicle and the defendant's person. RP 123. Officer Walsh also did not find any bank statements, bookkeeping records, pay check stubs, or employment papers. RP 132.

After transporting the defendant to the jail, Officer Walsh booked the items found in the vehicle and on the defendant's person into evidence. When counting the \$20 bills found in the defendant's wallet, Officer Walsh noticed several bills had the same serial number on them. RP 117. Additionally, the texture of the bills differed from the texture of real American currency. *Id.*

United States Secret Service Special Agent Timothy Hunt examined the 27 \$20 bills recovered from the defendant's wallet. RP 137. Agent Hunt testified at trial the bills did not have any security features, such as watermarks, optical variable ink, or security threads found on legitimate currency. RP 138. Additionally, each of the 27 counterfeit bills had one of three serial numbers on them: GD67349747A, GF13342887C, or GD12405680B. RP 143. Legitimate American currency never repeats serial numbers. RP 138. Special Agent Hunt ran a search on the counterfeit serial numbers and learned federal reserve notes with serial number GD67349747A passed no less than 20 times in Washington and Arizona since July 2008. RP 143. Federal reserve notes with serial number GF13342887C passed no less than 20 times in Washington since July 2008. RP 143 Federal reserve notes with serial number GD12405680B passed twice in Washington and Oregon since July 2008. RP 143. Agent Hunt testified most of his recent investigations involving counterfeit money were people printing the counterfeit bills to buy narcotics and illegal drugs. RP 145.

The defendant testified on his own behalf. According to the defendant, on July 10, 2008, he was driving a friend's vehicle when Officer Walsh pulled him over. RP 252. The defendant testified the \$1,295 in his shirt pocket was from his wife's stimulus check money. RP 253. The defendant claimed he obtained the counterfeit \$20 bills from his cousin's friend. RP 278. The defendant testified he planned to use the

fake bills as birthday party invitations for his kids. *Id.* The defendant further testified he did not know about the crack cocaine in the car's sunroof area. RP 255. Additionally, he claimed the methadone pills belonged to a his friend "Gwen." RP 260. The defendant could not remember Gwen's last name. RP 261. He said Gwen asked him for a ride home from a barbeque on July 10, 2008. RP 266. Later while driving around, the defendant testified he received a call from Gwen saying she accidentally dropped her prescription pills in the car. *Id.* The defendant found the pills in a cigarette pack cellophane wrapper next to the passenger seat and put them in his pocket. RP 256. However, according to the defendant, before he could return the pills police officers pulled him over and placed him under arrest. *Id.* Neither Gwen, the defendant's cousin, nor the defendant's wife appeared or testified on the defendant's behalf.

While on the stand, the defendant admitted to several crimes of dishonesty: a 1990 conviction for Possession of Stolen Property in the Second Degree, a 2005 conviction for Theft in the Third Degree, and a 2005 conviction for Burglary in the Second Degree. RP 253. He denied having any intent to distribute the methadone, cocaine, or counterfeit \$20 bills. RP 255, 262, 280.

C. ARGUMENT.

1. THE DEFENDANT WAIVED ANY CHALLENGE TO THE SEARCH OF HIS VEHICLE INCIDENT TO ARREST WHERE HE DID NOT RAISE IT BELOW.

The defendant raises for the first time on appeal a challenge to the search of the defendant's vehicle incident to arrest. Br. App. 8ff. In doing so, the defendant relies upon *Arizona v. Gant*. Br. App. 10 (citing *Arizona v. Gant*, --- U.S. ---, 129 S. Ct. 1710, 173 L.Ed.2d 485 (2009)).

The defense brought no suppression motion below. *See, e.g.* CP [Omnibus Order]. The only evidence found in the vehicle was cocaine that was hidden behind the sun-roof cover. 2 RP 110, ln. 14-25.¹

Division II of the Court of Appeals issued its published [in part] opinion in this case on August 7, 2009. *State v. Millan*, 151 Wn. App. 492, 212 P.3d 603 (2009) (citing *Arizona v. Gant*, ___ U.S. ___, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009)). In that opinion, the court held that where this case was not yet final on appeal, *Arizona v. Gant* applied retroactively to this case, but that where the defendant had failed to raise a

¹ The remainder of the evidence was found on the defendant's person in a search incident to his arrest for driving on a suspended license. 2 RP 109, ln. 13 to p. 110, ln. 8.

challenge to the search of the vehicle incident to the defendant's arrest, the issue was waived and that there was insufficient record for review on appeal. *Millan*, 151 Wn. App. at 496, 499-501.

The court did not reach the State's argument on the application of the good faith exception to the exclusionary rule. *See* Brief of Respondent to Supplemental Brief of Appellant, p. 18ff. Since the issuance of *Millan*, there have been a number of further developments in the case law that are directly relevant to the consideration of these issues under Washington law.

Shortly after the Court of Appeals issued its opinion in *Millan*, On August 24, 2009, the ninth circuit Court of Appeals issued its opinion in *United States v. Gonzalez*, in which in a very brief opinion considered the retroactive application of *Gant* together with the application of the good faith doctrine and concluded that the two were incompatible and retroactivity superseded good faith. *United States v. Gonzalez*, 578 F.3d 1130 (9th Cir. 2009).

A month later, a separate panel of the Court of Appeals issued an opinion in which it rejected the holding in *Millan* as to waiver, holding waiver to be incompatible with retroactivity on the basis that, as the court claimed, it would cause similarly situated defendant's to be treated

differently. *State v. McCormick*, 152 Wn. App. 536, 476, 216 P.3d 475 (2009). The court also went on to consider *Arizona v. Gant* under the Fourth Amendment, the good faith exception to the exclusionary rule and then considered *Gant* under and article I, section 7. *McCormick*, 152 Wn. App. at 477-78. The court in *McCormick* concluded that the search of the defendant's vehicle in that case violated the Fourth Amendment, that the good faith exception did not apply pursuant to *Gonzalez*, and that the search also violated article I, section 7, and that the good faith exception had been rejected in Washington. *McCormick*, 152 Wn. App. at 477-78 (citing *Gonzalez*, 578 F.3d 1130).

In *United States v. Davis*, the 11th circuit Court of Appeals rejected the analysis in *Gonzalez* as legally flawed. *United States v. Davis*, p. 3, 598 F.3d 1259, 1264 (11th Cir. 2010) (citing *Gonzalez*, 578 F.3d at 1132). The court in *Davis* identified two significant errors in the analysis of *Gonzalez*. First, the court in *Davis* concluded that *Gonzalez* mistakenly construed that the United States Supreme Court in *Gant* had endorsed the manner in which the state court had applied the exclusionary rule in *Gant*. *Davis*, 598 F.3d 1259, 1264 (citing *Gonzalez*, 578 F.3d at 1132-33). But, as the court in *Davis* noted, that in neither the Supreme Court's grant of certiorari, nor in any of its subsequent opinions, was the

exclusionary rule discussed. *Davis*, Slip. 598 F.3d 1259, 1264, n. 6 (citing *Gant*, 129 S. Ct. at 1724).

Second, and more importantly, the court in *Davis* noted that constitutional violations and remedies are to be considered separately. *Davis*, 598 F.3d 1259, 1264-65. Thus, the court in *Davis* did retroactively apply *Gant* to the case before it, and then separately considered whether exclusion of the evidence was the proper remedy. *Davis*, 598 F.3d 1259, 1265.² The point of *Davis* is that the court in *Gonzalez* (and thus also *McCormick* which relied on it) mistakenly sought to balance retroactivity and good faith against each other, rather than to apply each rule separately. *Davis*, 598 F.3d 1259, 1265. Moreover, the analysis of the court in *Davis*, that retroactivity and good faith are separate doctrines that should each be considered separately, is even more applicable to the issue of waiver, which is a rule of procedure and not part of the exclusionary rule.

² The court in *Davis* ultimately decided that the defendant was not entitled to relief based upon an application of the “good faith” exception to the exclusionary rule. That doctrine has been rejected in Washington. See, *State v. Afana*, --- Wn.2d ---, 233 P.3d 879 (2010). Nonetheless, the analysis of the court in *Davis*, that the retroactive application of *Gant* and the determination of the availability of any remedy must be separately applied, is also the correct analysis to be used when considering the doctrine of waiver.

It is also worth noting that the consideration of the doctrine of waiver in *McCormick* was orbiter dictum, a.k.a. “dictum.” “[s]tatements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute orbiter dictum and need not be followed.” See, *Association of Washington Businesses v. Washington Department of Revenue*, 155 Wn.2d 430, 120 P.3d 46 (2005)(quoting *State v. Potter*, 68 Wn. App. 134, 150 n. 7, 842 P.2d 481 (1992)(citing *City of Bellevue v. Acrey*, 103 Wn.2d 203, 207, 691 P.2d 957 (1984))). Here, waiver was not an issue upon which *McCormick* was decided because, as the court noted, *McCormick* properly raised and preserved a challenge to the admissibility of the evidence as the fruit of an unlawful search. *McCormick*, 152 Wn. App. at 477.

The summary of the facts regarding the procedural posture of the case is conspicuously vague. The court indicts that McCormick “... moved to suppress the evidence as the fruit of an unlawful search and the trial court denied the motion.” *McCormick*, 152 Wn. App. at 476. While that summary is unclear as to the specific basis upon which McCormick challenged the search, the court makes clear that she did move to suppress the evidence, but nonetheless the court attempted to ignore that issue and decide an issue that was not properly before it. Indeed, notwithstanding the ambiguity of the basis for McCormick’s suppression motion, what is

clear and conspicuously absent is that the court had any basis to consider the doctrine of waiver in the first place. Accordingly, the court's analysis of waiver is *obiter dictum*.

For all these reasons, this Court should adopt the analysis of *Millan*, and hold that the defendant waived any suppression challenge based on the search of the vehicle incident to arrest where that issue was not raised below.

The Court should be aware that *State v. Millan*, Supr. Ct. # 83613-2 has been accepted for review by the Washington Supreme Court, consolidated with *State v. Robinson*, Supr. Ct. # 83525-0 and is scheduled for oral argument on October 26, 2010.

2. THE TRIAL COURT EXERCISED PROPER DISCRETION IN ADMITTING THE CHALLENGED ER 404(b) EVIDENCE.

The defendant argues that the trial court abused its discretion when it allowed Secret Service Special Agent Hunt to testify that counterfeit currency containing the same serial numbers as the counterfeit currency in the defendant's possession had passed into circulation since July 2008 (circulation evidence). Brief of Appellant at 20; 2 RP 97, 137-144. The trial court did not err.

The defense argued prior to the testimony of Special Agent Hunt that the circulation evidence should not be admitted at trial because it

basically consisted of uncharged offenses, and made the jury speculate as to whether the defendant was involved in the passing of the other bills with the same serial numbers. 2 RP 92, ln. 14-25. The State argued the evidence was relevant to the defendant's intent. 2 RP 94, ln. 24 to p. 95, ln. 11. The Court denied the defense motion to admit the circulation evidence on the basis that it was relevant under ER 401 and 402. The Court briefly said it was really looking at ER 404(b) and that while the evidence was very prejudicial, it was also very probative of the defendant's intent to deliver controlled substances as well as to the forgery 2 RP 97, ln. 14-20.

During direct examination, the defense renewed its objection to the line of questioning and was overruled. 2 RP 142, ln. 3-5. Special Agent Hunt then testified:

Q [II] Could you identify the different serial numbers that you located that you found on the list?

A [Hunt] Yes, Serial number GD67349747A had been passed 20 times in Washington and Arizona since July of 2008.

Q Okay. Any others?

A There were. Serial number GF13342887C had been passed 20 times since July of 2008. All of those passes were in Washington State. Serial number EB16936934B had been passed 20 times in Washington State since July of 2008. And FRN with a serial - - or Federal Reserve Notes with the serial number GD1240568OB had been passed twice in Washington and Oregon since July of 2008.

2 RP 143, ln. 7-18.

The admission or exclusion of relevant evidence is within the trial court's discretion. *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990); *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651, review denied, 120 Wn.2d 1022 (1992). A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object precludes raising the issue on appeal. *Guloy*, 104 Wn.2d at 421. The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. *Rehak*, 67 Wn. App. at 162.

Under ER 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *State v. Sublett*, 156 Wn. App. 160, 198, 231 P.3d 231 (2010) (citing ER 401). Such evidence is admissible unless, under ER 403, the evidence is so prejudicial as to substantially outweigh its probative value, confuse the issues, mislead the jury, or cause any undue delay, waste of time, or needless presentation of cumulative evidence, or unless under ER 402, the evidence is limited by constitutional requirements, statute, evidentiary rules, or other regulations applicable in the Washington courts. *State v. McDaniel*, 155 Wn. App. 829, 853, 230 P.3d 245 (2010) (citing ER 403); *Sublett*, 156 Wn. App. at 198 (citing ER 401; ER 402).

A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. *State v. Thetford*, 109 Wn.2d 392, 397, 745 P.2d 496 (1987). Finally, it is worth noting that this Court can affirm the trial court on any grounds supported by the record below. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

Here, the defense did challenge the admissibility of the evidence below, generally suggesting because they were other bad acts, however without articulating a specific legal basis or identifying specific authority. *See*, 2 RP 91-97. Nonetheless, the Court treated it at least in part as a challenge under ER 404(b).

Any error under ER 404(b) is nonconstitutional. *State v. White*, 43 Wn. App. 580, 588, 718 P.2d 841 (1986). Accordingly, as explained above, the defendant may only challenge the admission of the evidence on the same grounds asserted below.

ER 404(b) provides that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person or to show action in conformity therewith.” However, evidence of other crimes, wrongs or acts may be admissible for other purposes. ER 404(b); *State v. Coleman*, 155 Wn. App. 951, 962-63, 231 P.3d 212 (2010). ER 404(b) is not designed to deprive the State of relevant evidence necessary to establish an essential element of its case, but rather to prevent the State from suggesting that the defendant is guilty because he or she is a criminal type. *State v. Russell*, 154 Wn. App. 775, 782, 225 P.3d 478 (2010).

There are a number of bases upon which evidence of other crimes or bad acts may nonetheless be properly admissible, and those bases are often colloquially referred to as “exceptions” to the 404(b) rule. However, correctly they are not exceptions but rather various forms of evidence that are not barred by the rule. *See*, Tegland, Karl WASHINGTON PRACTICE, VOL. 5: EVIDENCE, 5TH ED. § 404.9 (c. 2007). Said otherwise, they are types of admissible evidence that shouldn’t fall under the rule in the first place. Certainly that would be the case if the rule were applied according to its plain meaning.

However, evidence of other bad acts nonetheless will typically be subject to a 404(b) analysis even where the State seeks to admit the evidence for some purpose other than to prove action in conformity therewith. Such evidence will normally still be subject to a 404(b) analysis because it is necessary to determine that the permissible reasons for admitting the evidence are legitimate. Accordingly, the courts have adopted a four part test to be applied when evidence of other bad acts is to be admitted for some other permissible reason. The trial court must:

- 1) find that a preponderance of the evidence shows that the misconduct occurred;
- 2) identify the purpose for which the evidence is being introduced;
- 3) determine that the evidence is relevant; and
- 4) find that its probative value outweighs its prejudicial effect.

State v. Baker, 89 Wn. App. 726, 731-32, 950 P.2d 486 (1997). The evidence should be excluded in doubtful cases. *Baker*, 89 Wn. App. at 732 (citing *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986)).

a. The Evidence At Issue Does Not Fall Under ER 404(b).

While it does not come up often, the facts of this case highlight a preliminary issue that must be considered before the balancing test is applied. That preliminary issue is whether the challenged evidence does indeed involve crimes, wrongs or bad acts that fall under ER 404(b). If they are not, ER 404(b) is completely inapplicable and there is no need to reach the balancing test. The first step in the four-part balancing test essentially assumes that the evidence at issue is indeed misconduct such that it is a crime, wrong or act that falls under ER 404(b). But if the evidence is not a crime, bad act or wrong that falls under 404(b), the four-part balancing test is never reached.

While here the trial court focused its ruling on whether the circulation evidence was admissible under ER 404(b), the circulation evidence does not constitute evidence of “other crimes, wrongs, or acts” attributable to the defendant. Accordingly, the circulation evidence does not fall under ER 404(b).

Here, the fact that other bills had been passed is evidence of a crime other than the one for which the defendant was charged. However,

nothing in the evidence indicated that the other bills were passed by the defendant. So, here, the circulation evidence was evidence of other crimes by some unknown actor or actors. Evidence that counterfeit money bearing the same serial numbers as the counterfeit money found on the defendant was circulated in Washington in July 2008 is not an “other crime, wrong or act” as contemplated under ER 404(b).

There are a few older cases that discuss the admissibility of evidence of a crime with which the defendant is not connected. They predate the 1979 adoption of ER 404(b) in Washington. *See*, Tegland, WASHINGTON PRACTICE, VOL. 5, § 404.1; ER 404(b) (1979). However, ER 404 conforms substantially to the Washington law that predated it, which expression was taken from the federal rules of evidence. Tegland, WASHINGTON PRACTICE, VOL. 5, § 404.1 n. 4; § 404.09.

In *State v. Ranicke*, where the defendant was charged with larceny and burglary at a hospital, the Court held that the trial court did not error in admitting evidence of prior [unsolved] thefts that occurred on days when the defendant’s schedule had him at the hospital, but held that it was improper to admit evidence of prior thefts that occurred on days the defendant’s schedule did not bring him to the hospital. *State v. Ranicke*, 3 Wn. App. 892, 896-97, 479 P.2d 135 (1970). The court did not address the remedy for that portion of the evidence that was erroneously admitted because it reversed the case on other grounds. *Ranicke*, 3 Wn. App. at 896-97.

In *State v. Kindred* the defendant was convicted of arson with regard to the burning of a boat of an Indian fisherman. *State v. Kindred*, 16 Wn. App. 138, 138-39, 553 P.2d 121 (1976). The trial court admitted testimony that there had been ongoing problems for Indian fisherman at that time, and that about four other boats had been lost in a five or six night period. *Kindred*, 16 Wn. App. at 142. The State sought to admit the evidence to show motive. *Kindred*, 16 Wn. App. at 142. The Court of Appeals held that the evidence of the destruction of the other boats was not probative of Kindred's motive, but that the error was not so prejudicial as to deprive the defendant of a fair trial. *Kindred*, 16 Wn. App. at 142.

In *State v. Johnson*, the court held there was no error in a burglary trial by the admission of testimony that the home had previously been entered where the testimony was admitted for the purpose of proving that the alarm was in good working order and the contents of the house had been in their proper place and not in a pile on the floor as they were when the defendants were apprehended. *State v. Johnson*, 195 Wn. 545, 547, 81 P.2d 529 (1938). No attempt was made by the State to connect the defendant with the prior entry so there was no error in the admission of the testimony. *Johnson*, 195 Wn.2d at 547.

A more recent case involves facts that are analogous to those here, however, unfortunately the issue on appeal was whether trial counsel was ineffective for failing to object, and since defense counsel did object, the claim on appeal was without merit. *See, State v. McPhee*, 156 Wn. App.

44, 64, 230 P.3d 284 (2010). In *McPhee*, the defendant was convicted of knowingly possessing stolen firearms. *McPhee*, 156 Wn. App. at 63-64. At trial, the State had admitted evidence that the guns had been stolen in a residential burglary. *McPhee*, 16 Wn. App. at 64. Defense counsel objected on the grounds that the evidence was irrelevant and the trial court considered admission of the evidence in light of ER 404(b). *McPhee*, 16 Wn. App. at 64. However, because the issue on appeal was ineffective assistance of counsel, the court never evaluated the case under ER 404(b). *McPhee*, 156 Wn. App. at 64-65.

Because it did not involve misconduct attributable to the defendant, the circulation evidence is not subject to analysis under ER 404(b).

b. Even If This Court Were To Hold That The Circulation Evidence Did Fall Under ER 404(B), It Was Nonetheless Properly Admitted.

Even if this Court were to hold that the circulation evidence does involve other misconduct such that it falls under ER 404(b), it is nonetheless admissible if the evidence is logically relevant to a material issue before the jury, and the probative value of the evidence outweighs the prejudicial effect. *State v. Boot*, 89 Wn. App. 780, 788, 950 P.2d 964 (1998), citing *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). Evidence is relevant and necessary if the purpose in admitting the evidence is of consequence to the action, and makes the existence of the

identified act more probable. *State v. Dennison*, 115 Wn.2d 609, 628, 801 P.2d 193 (1990).

Again, under the four-part test, before admitting evidence of other crimes or wrongs under ER 404(b), a trial court must: (1) find by a preponderance of the evidence that the misconduct occurred; (2) identify the purpose for which the evidence is sought to be introduced; (3) determine the evidence is relevant; and (4) find that its probative value outweighs its prejudicial effect. *State v. Hernandez*, 99 Wn. App. 312, 321-322, 997 P.2d 923 (1999), *review denied*, 140 Wn.2d 1015 (2000), *citing State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995). In determining relevancy, (1) the purpose for which the evidence is offered "must be of consequence to the out-come of the action", and (2) "the evidence must tend to make the existence of the identified fact more . . . probable." *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986), *citing State v. Salterelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). Admission of evidence under ER 404(b) is reviewed for abuse of discretion. *Hernandez*, at 322, *citing State v. Powell*, 126 Wn.2d 244, 893 P.2d 615 (1995).

In this case, the State charged the defendant with, *inter alia*, forgery, under RCW 9A.60.020(1)(a)(b). CP 16-19. The elements are that: 1) The defendant possessed or uttered a written instrument which had

been falsely made, completed or altered;³ 2) The defendant knew that the instrument had been falsely made, completed or altered; and 3) The defendant acted with intent to injure or defraud. RCW 9A.60.020(1)(b); *State v. Soderholm*, 68 Wn. App. 363, 373-74, 842 P.2d 1039 (1993) (citing WPIC 130.03); CP 116. Thus, the State had to prove not only the defendant's knowledge the currency was false, but also his intent to defraud. Further, the defendant was also charged with possession of controlled substance(s) with intent to deliver, which required the State to prove the defendant's intent to deliver.

The evidence that other bills had been circulated with the same serial numbers as those found on the defendant was relevant for three reasons. In conjunction with the other evidence, it shows the defendant's intent to circulate the bills. *See, State v. Wilson*, 144 Wn. App. 166, 175, 181 P.3d 887 (2008); *State v. Fisher*, 165 Wn.2d 727, 744, 202 P.3d 937 (2009). It was also relevant to the defendant's intent to deliver controlled substances where the defendant was charged with possession with intent to deliver a controlled substance, and Special Agent Hunt testified that most recently most of his investigations of counterfeit money involved counterfeit money being exchanged for narcotics. 2 RP 145, ln. 17-23. The circulation evidence is also relevant for purposes of impeaching the

³ In the context of forgery "utter" is a technical term of art, meaning to put or send a document into circulation. *See*, BLACK'S LAW DICTIONARY (8th Ed. 2004).

defendant when he testified as to his intent to use the bills as invitations to his daughter's birthday party. *State v. Lillard*, 122 Wn. App. 422, 432, 93 P.3d 969 (2004); *State v. Hernandez*, 99 Wn. App. 312, 321, 997 P.2d 923 (1999); *State v. Brown*, 132 Wn.2d 529, 573-74, 940 P.2d 546 (1997).

i. **The Court Properly Admitted The Evidence To Show The Defendant's Intent**

The State argued the circulation evidence was relevant as it showed the defendant's intent in possessing the counterfeit bills. RP 95. Accepting the State's argument that the evidence was relevant to show the defendant's intent, the court denied the defendant's motion to exclude the evidence. RP 97. The court stated:

In considering the defense motion to exclude, it's denied. It's relevant under 401, 402. It's relevant, and I am really looking at 404(b). Certainly it's very prejudicial. The Court does not dispute that, but it's very probative to two of the crimes charged; the intent to deliver, as well as to the forgery.

RP 97.

In considering the circulation evidence, it is important to consider the temporal aspect connecting the circulation evidence to the defendant's crime. Officers found the counterfeit money in the defendant's wallet on July 10, 2008. Special Agent Hunt testified that since *July 2008*, counterfeit bills bearing identical serial numbers to the defendant's

counterfeit bills passed in Washington more than 40 times. This temporal aspect adds to the relevance of the circulation evidence.

The circulation evidence was relevant to the defendant's intent for the following reasons. The defendant claimed that he had obtained the bills from someone else and that he intended to use them as invitations for his child's birthday party. 3 RP 254, ln. 1-22. That testimony made it clear that the defendant knew the bills were counterfeit. The testimony of Special Agent Hunt showed that other counterfeit bills with the same serial numbers as those the defendant possessed had been passed up to twenty times starting at about the same time the defendant was found in possession of his bills. This suggested that the bills were made to be passed. Where the defendant's bills were found in his wallet, it was a reasonable inference that he too intended to pass his bills. 2 RP 143, ln. 7-19.

Where Special Agent Hunt also testified that he had seen a most of his recent investigations involve situations where counterfeit money was printed in order to exchange it for narcotics, this testimony, combined with the quantity of narcotics the defendant possessed, as well as the large amount of legitimate case, further reinforced the defendant's intent to deliver the controlled substance. A reasonable inference would be that he was either obtaining narcotics to sell with the counterfeit cash, or that he intended to pass the counterfeit cash as change in his drug transactions.

As the challenged evidence was established by a preponderance of the evidence, was admitted for the identified purpose of showing intent to distribute and intent to defraud, was relevant to a material fact at issue in the defendant's case, and the judge made a reasonable determination that the prejudicial effect did not substantially outweigh the probative value, the trial court did not err in admitting the evidence. *See* ER 402 (relevant evidence is admissible). The defendant has failed to show the trial court abused its discretion in this matter.

ii. **The Circulation Evidence Was Admissible For Purposes Of Rebuttal.**

The defendant claimed that he had obtained the bills from someone else and that he intended to use them as invitations for his child's birthday party. 3 RP 254, ln. 1-22. That testimony made it clear that the defendant knew the bills were counterfeit.

The circulation evidence was relevant for purposes of rebuttal to show that the money had been created for the purpose of being circulated, that it was in the defendant's wallet, consistent with an intent to spend it, and that counterfeit bills are connected to the narcotics business and narcotics transactions. All of this served to undermine the defendant's credibility in his testimony. To the extent his testimony was not credible,

it means he was intentionally falsifying it, which in and of itself serves as evidence of consciousness of guilt.

c. Any Error Was Harmless

The harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. *Rose v. Clark*, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L.Ed.2d 460 (1986). The central purpose of a criminal trial is to determine guilt or innocence. *Id.* “Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.” *Neder v. United States*, 119 S. Ct. 1827, 1838, 144 L.Ed.2d 208 (1973) (internal quotations omitted). Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. *Rose*, 478 U.S. at 577. Thus, the harmless error doctrine preserves an accused’s right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). If the error is not prejudicial to the defendant’s case, it is harmless and does not require reversal. *In re: Detention of Pouncy*, 168 Wn.2d 382, 391, 229 P.3d 678 (2010); *State v. Britton*, 27 Wn.2d 336, 341, 178 P.2d 341 (1947).

Harmless error must be addressed in the context of the entire record, including a defendant's testimony. *State v. Martin*, 73 Wn.2d 616, 624, 440 P.2d 429 (1968).

**i. Even If The Circulation
Evidence Was Improperly
Admitted, That Admission Was
Nonetheless Harmless Error.**

Even where evidence of other bad acts has been improperly admitted, reversal is not required where the error is harmless. *See, State v. White*, 43 Wn. App. 580, 587-88, 718 P.2d 841 (1986). The standard of review for an ER 404(b) error is whether it is reasonably probable that the outcome of the trial was materially affected by the improper admission. *White*, 43 Wn. App. at 587-88 (citing *State v. Robtoy*, 98 Wn.2d 30, 653 P.2d 284 (1982)).

**ii. Any Error By The Court
In Applying the Four-Part
Balancing Analysis Was
Harmless**

Under the four-part test, before admitting evidence of other crimes or wrongs under ER 404(b), a trial court must: (1) find by a preponderance of the evidence that the misconduct occurred; (2) identify the purpose for which the evidence is sought to be introduced; (3) determine the evidence is relevant; and (4) find that its probative value outweighs its prejudicial

effect. *State v. Hernandez*, 99 Wn. App. 312, 321-322, 997 P.2d 923 (1999), *review denied*, 140 Wn.2d 1015 (2000), *citing State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995).

A trial court's failure to conduct a four-part analysis under 404(b) will not warrant reversal where the error is harmless. *See, State v. Sublett*, 156 Wn. App. 160, 194-95, 231 P.3d 231 (2010); *State v. Thach*, 126 Wn. App. 297, 310-11, 106 P.3d 782 (2005). *Sublett* involved a case where the trial court completely failed to conduct an analysis. *Sublett*, 156 Wn. App. at 194.

Here, in deciding to admit the evidence, the court stated:

In considering the defense motion to exclude, it's denied. It's relevant under 401, 402. It's relevant, and I am really looking at 404(b). Certainly it's very prejudicial. The Court does not dispute that, but it's very probative to two of the crimes charged; the intent to deliver, as well as to the forgery.

RP 97.

Here, the court's decision revealed that it did apply the four-part balancing test, or at the very least substantially complied with that test. Under the facts of this case where Secret Service Special Agent Hunt presented evidence that other counterfeit bills with the same serial numbers as those possessed by the defendant had been passed starting about the same time the defendant was caught, the issue of whether the

bills had been passed was not seriously in doubt. Certainly the defense did not dispute it. Thus, the first element in the test was not at issue under the facts of this case.

As to the other elements, the court explicitly identified that the evidence was being sought to be introduced to prove the defendant's intent. 2 RP 97, ln. 18-19. The court found that the evidence was relevant. 2 RP 97, ln. 15-17. The court also found the evidence was also prejudicial. 2 RP 97, ln. 17. The clear inference from the court's statements and admission of the evidence is that it weighed the probative value against the prejudice, and determined that the probative value outweighed the prejudicial effect.

Here any error was harmless. The court at least substantially complied with the four-part test, and the court's admission of the circulation evidence was not an abuse of discretion.

iii. **The Court's Failure To Give A Limiting Instruction Was Harmless Error, If Error At All.**

While the trial court is required to give a limiting instruction if requested, where the defense does not request a limiting instruction at trial they waive the right to assign error on appeal. *State v. Williams*, Slip. Ops. 27924-3-III, 27925-1-III, p. 3, --- Wn. App. ---, --- P.3d --- (2010);

State v. Lough, 125 Wn.2d 847, 859-60, 889 P.2d 487 (1995); *State v. Donald*, 68 Wn. App. 543, 547, 844 P.2d 447 (1993); *State v. Ellard*, 46 Wn. App. 242, 244, 730 P.2d 109 (1986). *But see*, *State v. Russell*, 154 Wn. App. 775, 784, 225 P.3d 478 (2010) (“where such evidence is admitted, a limiting instruction “must be given to the jury.””) (quoting *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007)).

This language in *Russell* is mistaken because it quotes *State v. Foxhoven* out of context. When making that quote, the court in *Foxhoven* cited to *Lough*, 125 Wn.2d at 864. In *Lough*, the court more precisely said, as indicated above, that the trial court is required to give a limiting instruction, “if requested.” The court in *Foxhoven* did not need to include the “if requested” language in the quote because it wasn’t at issue in *Foxhoven* where an instruction was in fact given. *Foxhoven*, 161 Wn.2d at 173, 175. To the extent the court in *Russell* interpreted *Foxhoven* to stand for the proposition that a limiting instruction must always be given, it was mistaken.

Here, the defense did not request a limiting instruction, and so has waived the issue on appeal. Moreover, a limiting instruction is not necessary where the evidence is used to impeach the defendant. *State v. Gakin*, 24 Wn. App. 681, 687, 603 P.2d 380 (1979).

Even if the failure to give a limiting instruction were error, it is still subject to a harmless error analysis. See *Russell*, 154 Wn. App. at 786; See also, *State v. Murphy*, 44 Wn. App. 290, 295, 721 P.2d 30 (1986). The court's failure to give a limiting instruction was harmless error here. First, if the court accepts the State's primary argument that the circulation testimony was not ER 404(b) evidence, no limiting instruction was necessary. However, second, if this Court holds the circulation evidence does fall under ER 404(b) evidence, any error pertaining to the lack of a limiting instruction was harmless because the State in closing only argued the evidence in terms of the defendant's intent. 4 RP 332, ln. 19 to p. 333, ln. 4; p. 365, ln. 18 to p. 366, ln. 10.

Finally, where the evidence was also relevant for purposes of impeaching the defendant's testimony, no instruction was needed.

3. THE STATE ADDUCED SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICTS.

Due process requires the State to bear the burden of proving each element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 489, 656 P.2d 1064 (1983); see also *Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the

prosecution, any rational trier of fact could have found the State met the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Challenging the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (*citing State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992); *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (*citing State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. Credibility determinations are necessary because witness testimony can conflict; these determinations

should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

[G]reat deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, if the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld. The defendant challenges the sufficiency of the evidence that he: 1) intended to deliver the methadone, 2) possessed counterfeit money with the intent to injure or defraud, and 3) possessed cocaine. Brief of Appellant at 11, 12, 23.

- a. The State adduced sufficient evidence to support the defendant's Forgery conviction.

To convict the defendant of Forgery, the State had to prove beyond a reasonable doubt that:

- (1) on or about July 10, 2008, the defendant possessed or uttered a written instrument which had been falsely made, completed, or altered;
- (2) the defendant knew the instrument had been falsely made, completed or altered;
- (3) the defendant acted with intent to injure or defraud; and
- (4) this act occurred in the State of Washington.

CP 135-168, Jury Instruction No. 27. *See also* Jury Instruction 21, RCW 9A.60.020; *State v. Tinajero*, 154 Wn. App. 745, 749, 228 P.3d 1282 (2009). The defendant challenges the sufficiency of the evidence that he acted with intent to injure or defraud. Brief of Appellant at 23. Therefore, elements 1, 2, and 4 are not in dispute.

Intent to defraud may be inferred from surrounding facts and circumstances if they “plainly indicate such an intent as a matter of logical probability.” *State v. Esquivel*, 71 Wn. App. 868, 871, 863 P.2d 113 (1993), quoting *State v. Woods*, 63 Wn. App. 588, 591, 821 P.2d 1235 (1991). The unexplained possession of a forged instrument raises an inference of guilt of forgery of the possessor. *Esquivel*, 71 Wn. App. at 871.

When Officer Walsh searched the defendant’s person incident to his arrest he found \$540 in \$20 bills inside the defendant’s wallet. RP 116. Officer Walsh located the wallet in the defendant’s back pants pocket. RP 112. The bills were creased from being kept inside the wallet. RP 153. From these facts and circumstances, a jury could reasonably find the defendant intended to spend the money and therefore intended to use the counterfeit \$20 bills to defraud.

It is reasonable to infer that a reasonable person keeps money they intend to spend inside a wallet. Conversely, it would be unreasonable for a person to keep counterfeit money inside a wallet with no intent to spend it as doing so would increase the chances of accidentally presenting the counterfeit money as payment. Additionally, the jury could reasonably infer the defendant's claim that he intended to use the counterfeit money as birthday party invitations was false as people do not normally keep party invitations in their wallets.

The reasonable inference based on this evidence is the defendant intended to spend the money, and therefore intended to defraud.

Finally, Special Agent Hunt testified, without objection, that many of his recent investigations involved individuals printing counterfeit money to purchase narcotics. RP 145. When that testimony is considered, together with the presence of 12 methadone pills and \$1,295 in real cash also found on the defendant's person, a reasonable jury could conclude the defendant used or planned to use the counterfeit money to buy narcotics and then sell the narcotics for a profit. A reasonable person does not walk around carrying counterfeit currency, illegal narcotics, and large amounts of cash for any legitimate purpose.

Viewing this evidence in the light most favorable to the State, the jury had sufficient evidence to find the defendant intended to defraud.

The ER 404(b) evidence discussed *supra* at 6 provides further support to this reasonable conclusion, but is unnecessary to uphold the jury's verdict.

It should also be noted that the defendant took the stand and denied any intent to defraud. RP 280. According to the defendant's testimony, he obtained the counterfeit bills from an unnamed friend of the defendant's cousin, and planned to use the counterfeit bills as birthday invitations for his kids' birthday parties. RP 278. This testimony required the jury to assess the defendant's credibility in making a determination as to the defendant's intended use of the counterfeit money.

The necessary implication of the jury's verdict is that the jury found that the defendant gave a false explanation for his intended purpose with the counterfeit money, they could use that false statement to infer evidence of his consciousness of guilt. *See, e.g. State v. McDaniel*, 155 Wn. App. 829, 853, 230 P.3d 245 (2010); *State v. Harris*, 154 Wn. App. 87, 101, 224 P.3d 830 (2010); *State v. Clark*, 143 Wn.2d 731, 765, 24 P.2d 1006 (2001). This credibility assessment must be considered when weighing the sufficiency of the evidence.

Accepting the State's evidence as true, and viewing the evidence in the light most favorable to the State, the jury had sufficient evidence and was within their rights to find the defendant intended to defraud.

- b. The jury had sufficient evidence to convict the defendant of Unlawful Possession of a Controlled Substance with Intent to Deliver (Methadone).

To convict the defendant of Unlawful Possession of a Controlled Substance with Intent to Deliver (Methadone), the State had to prove beyond a reasonable doubt that:

- (1) on or about July 10, 2008, the defendant possessed a controlled substance (methadone);
- (2) the defendant possessed the substance with the intent to deliver a controlled substance; and
- (3) the acts occurred in the State of Washington.

CP 135-168, Jury Instruction No. 13. *See also*, Jury Instruction 7, RCW 69.50.401. The defendant challenges the sufficiency of the evidence that he acted with intent to deliver the methadone. Br. App. 12ff.

Again, criminal intent may be inferred from conduct if it is evident “as a matter of logical probability.” *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Intent to deliver may not be based solely on possession of a controlled substance; there must be at least one additional factor to make an inference of intent to deliver. *State v. Darden*, 145 Wn.2d 612, 624-625, 41 P.3d 1189 (2000); *State v. Brown*, 68 Wn. App. 480, 483-484, 843 P.2d 1098 (1993). “The additional factor must be suggestive of sale as opposed to mere possession in order to provide substantial

corroborating evidence of intent to deliver.” *State v. Hagler*, 74 Wn. App. 232, 236, 872 P.2d 85 (1994). A police officer’s opinion that a defendant possessed more drugs than normal is insufficient to act as a corroborating factor to establish intent to deliver. *State v. Lopez*, 79 Wn. App. 755, 768, 904 P.2d 1179 (1995).

This case is controlled by *State v. Hagler*. In *Hagler*, officers pulled over Hagler for speeding and found 24 rocks of cocaine and \$342 cash. *Id.* at 236. The officer testified at trial that the amount of drugs, combined with the large amount of cash, was indicative of drugs sales. *Id.* at 234. The Court held that the amount of drugs and the large amount of cash provided sufficient evidence to satisfy the intent to deliver element of Hagler’s conviction. *Id.* at 236. *Hagler* establishes that a large amount of drugs and cash is sufficient to establish intent to deliver. Here, the defendant had a large amount of drugs and cash. Hence, there was sufficient evidence to support the jury verdict.

When Officer Walsh arrested the defendant, he had 12 methadone pills, not in a valid prescription container, \$1,295 in real cash, and \$540 in counterfeit money. RP 109-110. Officer Walsh found no bank statements, pay stubs, receipts, withdrawal slips, or any other documentation explaining the source of the cash. RP 132. Based on the amount of drugs found on the defendant and the large amount of cash in

the defendant's pockets, Officer Walsh indicated the defendant likely intended to sell the methadone. RP 131. Here, the defendant had much more cash on his person than Hagler.

Once again, it is important to note the defendant took the stand and denied possessing the methadone with an intent to deliver. RP 255. This means the jury was asked to assess the defendant's credibility in making a determination as to the "intent to deliver" element. By its verdict, the jury clearly found the defendant lacked credibility when he denied possessing the methadone with an intent to sell the drugs. This credibility assessment must be considered when weighing the sufficiency of the evidence. Accepting the State's evidence as true, and viewing the evidence in the light most favorable to the State, the jury had sufficient evidence and was within their rights to find the defendant intended to deliver the methadone.

- c. Assuming this Court finds the search of the defendant's vehicle lawful, the State adduced sufficient evidence to convict the defendant of Unlawful Possession of a Controlled Substance (Cocaine).

Should this Court find the search of the defendant's vehicle unlawful, then the State concedes there would be insufficient evidence to support the defendant's conviction for Unlawful Possession of a Controlled Substance (Cocaine). However, where this Court should hold the search lawful, then this Court should affirm the defendant's conviction

for possession of cocaine. Evidence that officers found a baggie of cocaine tucked above the driver's seat inside the car driven by the defendant is sufficient to support the jury's conviction for Unlawful Possession of a Controlled Substance (Cocaine).

4. DEFENDANT HAS FAILED TO MEET HIS BURDEN TO SHOW CUMULATIVE ERROR.

The cumulative error doctrine applies when several errors occurred at the trial court level, none of which alone warrant reversal, but the combined errors effectively denied the defendant a fair trial. *State v. Hodges*, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003). The doctrine of cumulative error is the counter balance to the doctrine of harmless error. The harmless error doctrine is discussed *supra* at 11. The doctrine of cumulative error, however, recognizes the reality that sometimes numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. *In re Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); *State v. Coe*, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); *see also State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998). The analysis is intertwined with the harmless error doctrine in that the type of error will affect the court's weighing of those errors. *State v. Russell*, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), *cert. denied*, 574 U.S. 1129, 115 S. Ct.

2004, 131 L.Ed.2d 1005 (1995). There are two dichotomies of harmless error relevant to the cumulative error doctrine. First, there are constitutional and nonconstitutional errors. Constitutional errors have a more stringent harmless error test, and therefore they will weigh more on the scale when accumulated. *See Id.* Conversely, nonconstitutional errors have a lower harmless error test and weigh less on the scale. *Id.* Second, there are errors that are harmless because of the strength of the untainted evidence, and there are errors that are harmless because they were not prejudicial. Errors that are harmless because of the weight of the untainted evidence can add up to cumulative error. *See, e.g. Johnson*, 90 Wn. App. at 74. Conversely, errors that individually are not prejudicial can never add up to cumulative error that mandates reversal, because when the individual error is not prejudicial, there can be no accumulation of prejudice. *See, e.g., State v. Stevens*, 58 Wn. App. 478, 498, 795 P.2d 38, review denied, 115 Wn.2d 1025, 802 P.2d 38 (1990) (“Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that no prejudicial error occurred.”).

As these two dichotomies imply, cumulative error does not turn on whether a certain number of errors occurred. Compare, *State v. Whalon*, 1 Wn. App 785, 804, 464 P.2d 730 (1970) (holding three errors amounted to cumulative error), and *State v. Kinard*, 21 Wn. App. 587, 592-593, 585

P.2d 836 (1979) (holding three errors did not amount to cumulative error). Rather, reversals for cumulative error are reserved for truly egregious circumstances when the defendant is truly denied a fair trial, either because of the enormity of the errors, *see, e.g., State v. Badda*, 63 Wn.2d 176, 385 P.2d 859 (1963) (holding that failure to instruct the jury (1) not to use codefendant's confession against Badda, (2) to disregard the prosecutor's statement that the State was forced to file charges against the defendant because it believed the defendant had committed a felony, (3) to weigh testimony of accomplice who was the State's sole, uncorroborated witness with caution, and (4) to be unanimous in their verdicts was cumulative error), or because the errors centered around a key issue, *see, e.g., State v. Coe*, 101 Wn.2d 772, 684 P.2d 668 (1984) (holding four errors relating to the defendant's credibility, combined with two errors relating to credibility of the State witnesses, amounted to cumulative error because credibility was central to the State's and the defendant's case); *State v. Alexander*, 64 Wn. App. 147, 822 P.2d 1250 (1992) (holding repeated improper bolstering of child-rape victim's testimony was cumulative error because the child's credibility was a crucial issue), or because the same conduct was repeated so many times that a curative instruction lost all effect, *see, e.g., State v. Torrest*, 16 Wn. App. 254, 554 P.2d 1069 (1976) (holding seven separate incidents of prosecutorial

misconduct was cumulative error and could not have been cured by curative instructions). Finally, as noted, the accumulation of just any error will not amount to cumulative error – the errors must be prejudicial errors. *See, Stevens*, 58 Wn. App. at 498.

In the instant case, the defendant asserts the court's admission of ER 404(b) evidence, and the court's failure to give a limiting instruction to the jury regarding the ER 404(b) evidence, constitutes cumulative error. Where, for the reasons set forth above, there were no individual errors, the defendant has failed to establish that his trial was so flawed with error as to warrant relief. There were no prejudicial errors, much less an accumulation of them. Therefore, the defendant is not entitled to relief under the cumulative error doctrine.

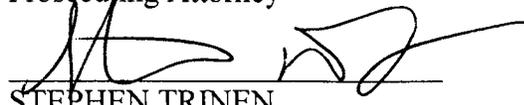
As discussed above, the State adduced sufficient evidence to support the verdicts, even without considering the ER 404(b) evidence. Furthermore, as discussed above, the court's failure to provide a limiting instruction to the jury did not prejudice the defendant considering the nature of the defendant's own testimony in this case. *Supra* at 11. Any error in this case was *de minimis* and not cumulative in nature. As such, the defendant received a fair trial.

CONCLUSION.

For the forgoing reasons, the State respectfully requests this Court affirm the judgment and sentence below.

DATED: August 9, 2010.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



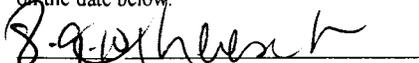
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Amanda Kunzi
Rule 9 Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.


Date _____ Signature _____

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