

NO. 47376-3-II

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

STATE OF WASHINGTON,

Respondent,

vs.

DYLAN JOSEPH HECKL,

Appellant.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. TABLE OF AUTHORITIES	iv
B. ASSIGNMENT OF ERROR	
1. Assignment of Error	1
2. Issue Pertaining to Assignment of Error	2
C. STATEMENT OF THE CASE	
1. Factual History	3
2. Procedural History	7
D. ARGUMENT	
I. THE TRIAL COURT ABUSED ITS DISCRETION AND DENIED THE DEFENDANT A FAIR TRIAL WHEN IT ADMITTED EVIDENCE UNDER ER 404(b) THAT THE DEFENDANT WAS GENERALLY A DRUG DEALER BECAUSE THAT EVIDENCE WAS MORE UNFAIRLY PREJUDICIAL THAN PROBATIVE	13
II. TRIAL COUNSEL’S FAILURE TO MOVE TO SUPPRESS A COUNTERFEIT TWENTY DOLLAR BILL THE POLICE ILLEGALLY SEIZED FROM THE DEFENDANT’S WALLET DENIED THE DEFENDANT HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL	22
III. THE TRIAL COURT VIOLATED RCW 69.50.410(3)(a) WHEN IT FAILED TO IMPOSE THE SENTENCE THE LEGISLATURE MANDATED FOR A FIRST OFFENSE SALE OF HEROIN FOR PROFIT	31
E. CONCLUSION	38

F. APPENDIX	
1. Washington Constitution, Article 1, § 3	39
2. Washington Constitution, Article 1, § 7	39
3. Washington Constitution, Article 1, § 22	39
4. United States Constitution, Fourth Amendment	40
5. United States Constitution, Sixth Amendment	40
6. United States Constitution, Fourteenth Amendment	40
7. RCW 69.50.410	41
G. AFFIRMATION OF SERVICE	43

TABLE OF AUTHORITIES

Page

Federal Cases

<i>Bruton v. United States</i> , 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968)	13
<i>Church v. Kinchelse</i> , 767 F.2d 639 (9th Cir. 1985)	23
<i>Strickland v. Washington</i> , 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984)	23

State Cases

<i>State v. Acosta</i> , 123 Wn.App. 424, 98 P.3d 503 (2004)	17, 18, 21
<i>State v. Baldwin</i> , 109 Wn.App. 516, 37 P.3d 1220 (2001)	14
<i>State v. Cobb</i> , 22 Wn.App. 221, 589 P.2d 297 (1978)	23
<i>State v. Dugas</i> , 109 Wn.App. 592, 37 P.3d 577 (2001)	27
<i>State v. Escalona</i> , 49 Wn.App. 251, 742 P.2d 190 (1987)	18, 19, 21
<i>State v. Ford</i> , 137 Wn.2d 472, 973 P.2d 472 (1999)	13
<i>State v. Hardman</i> , 17 Wn.App. 910, 567 P.2d 238 (1977)	26
<i>State v. Houser</i> , 95 Wn.2d 143, 622 P.2d 1218 (1980)	26-28
<i>State v. Johnson</i> , 29 Wn.App. 807, 631 P.2d 413 (1981)	24
<i>State v. Kendrick</i> , 47 Wn.App. 620, 736 P.2d 1079 (1987)	14
<i>State v. Montague</i> , 73 Wn.2d 381, 438 P.2d 571 (1968)	24, 25
<i>State v. Neal</i> , 144 Wn.2d 600, 30 P.3d 1255 (2001)	14

<i>State v. Pirtle</i> , 127 Wn.2d 628, 904 P.2d 245 (1995)	18
<i>State v. Pogue</i> , 108 Wn.2d 981, 17 P.3d 1272 (2001)	15, 17, 21
<i>State v. Saltarelli</i> , 98 Wn.2d 358, 655 P.2d 697 (1982)	18
<i>State v. Simpson</i> , 95 Wn.2d 170, 622 P.2d 1199 (1980)	24
<i>State v. Smith</i> , 56 Wn.App. 145, 783 P.2d 145 (1989), <i>review denied</i> , 114 Wn.2d 1019, 790 P.2d 640 (1990)	29
<i>State v. Sweet</i> , 44 Wn.App. 226, 721 P.2d 560 (1986)	26, 27
<i>State v. Swenson</i> , 62 Wn.2d 259, 382 P.2d 614 (1963)	13

Constitutional Provisions

Washington Constitution, Article 1, § 3	13
Washington Constitution, Article 1, § 7	24, 27, 30
Washington Constitution, Article 1, § 22	23
United States Constitution, Fourth Amendment	24
United States Constitution, Sixth Amendment	23
United States Constitution, Fourteenth Amendment	13

Statutes and Court Rules

RCW 9.94A.533	37
RCW 69.50.401	33, 34
RCW 69.50.410	31, 33-37
ER 403	13, 17

ER 404 13, 15, 18, 20
ER 609 20

Other Authorities

5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383 (3d ed. 1989) 15
M. Graham, *Federal Evidence* § 403.1, at 180-81 (2d ed. 1986) 14
R. Utter, *Survey of Washington Search and Seizure Law: 1988 Update*, 11 U.P.S. Law Review 411, 529 (1988) 24

ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court abused its discretion and denied the defendant a fair trial when it admitted evidence under ER 404(b) that the defendant was generally a drug dealer because the evidence was more unfairly prejudicial than probative.

2. Trial counsel's failure to move to suppress a counterfeit twenty dollar bill the police illegally seized from the defendant's wallet denied the defendant his constitutional right to effective assistance of counsel.

3. The trial court violated RCW 69.50.410(3)(a) when it failed to impose the sentence the legislature mandated for a first offense sale of heroin for profit.

Issues Pertaining to Assignment of Error

1. In a case in which a defendant is charged with selling heroin and methamphetamine does a trial court abuse its discretion and deny a defendant a fair trial if it admits evidence under ER 404(b) that the defendant was generally a drug dealer when that evidence is more unfairly prejudicial than probative?

2. In a case in which the defendant is charged with forgery by possessing a counterfeit twenty dollar bill, does a trial counsel's failure to move to suppress that counterfeit bill deny that defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, when the police obtained it by illegally searching the defendant's wallet?

3. In a case in which the state charges the defendant with a first offense sale of heroin for profit under RCW 69.50.410(3), does a trial court err if it fails to impose the sentence the legislature mandated for that offense?

STATEMENT OF THE CASE

Factual History

On September 3, 2013, local law enforcement officers assigned to the Westnet Drug Enforcement Task Force in Kitsap County met with an informant by the name of Travis Gurno behind a Home Depot in Poulsbo in order to arrange for the purchase of illegal drugs. RP 71-74¹. Mr. Gurno had told them that he could purchase drugs from the defendant Dylan Heckl. RP 173-176. During that meeting the officers searched Mr. Gurno's person and vehicle, found no drugs or money, gave him \$140.00 in pre-recorded "buy" money and gave him a small surveillance camera to wear. RP 73-74. Mr. Gurno then drove to the defendant's house at 16951 Viking Way in Poulsbo, parked in the driveway and went inside. RP 80-81, 173-176. This residence is within 1,000 feet of a school bus stop. RP 252-253. Although a number of officers saw Mr. Gurno drive up to the house they could not see him go in. RP 77-79, 250-251. About 10 minutes after Mr. Gurno arrived the officers saw him return to his vehicle and then drive back to the area behind the Home Depot. *Id.*

¹The record in appeal includes four continuously numbered verbatim reports of the pretrial hearing held in this case on June 30, 2014, as well as the jury trial that occurred on the next three days. These volumes are referred to herein as "RP [page #]." The record on appeal also includes a verbatim report of the sentencing held on August 8, 2014. It is referred to herein as "RP 8/8/14 [page #]."

Once back behind the Home Depot the officers again searched Mr. Gurno and his vehicle. RP 80-81. This search revealed a small baggie of heroin and no money. *Id.* Mr. Gurno then handed over the surveillance camera and told the officers that the defendant had admitted him to the house, took him up to his upstairs bedroom and then sold him the heroin the officer found on Mr. Gurno's person. RP 80-81, 90-93, 173-176. The officers then paid Mr. Gurno \$100.00 for his efforts. RP 95, 179-180. A later review of the footage from the camera showed the interior of the defendant's house, the interior of the defendant's upstairs bedroom and a brief view of the defendant's face. RP 90-93. The recording on the camera did not show the presence of drugs, money or any exchange of drugs for money. RP 130.

The next day the Westnet Drug enforcement officers again met with Mr. Gurno behind the Poulsbo Home Depot. RP 95. This time he claimed he could purchase methamphetamine from the defendant. RP 176-178. On this occasion the officers searched Mr. Gurno's person, found no drugs or money, gave him \$75.00, took him over to a location near the defendant's house at 16951 Viking Way and dropped him off. RP 96. This time surveillance officers saw Mr. Gurno walked up the drive way. About 10 minutes later the officers saw Mr. Gurno walked back down the driveway and down the road. RP 250-251. They then picked him up, took him to the original location behind the Home Depot and searched him. RP 96-98, 176-

178. During this search they found a small baggie with methamphetamine in it and did not find any of the money they had given him. *Id.* After the search, Mr. Gurno stated that the defendant had let him into the house, taken him upstairs to the defendant's room and then sold him methamphetamine. RP 176-178. After receiving this report the officers again gave the defendant \$100.00 cash for his efforts. RP 102, 179-180.

On October 25, 2013, almost two months after the two controlled purchases of drugs, the Westnet Drug Enforcement Officers who had been using Mr. Gurno as an informant received a call from Detective Laurie Blankenship of the Port Orchard Police Department. RP 103-104. Detective Blankenship told them the following: (1) that she had been investigating a crime in which a suspect or suspects would purchase electronics from person's advertising on Craig's list and pay for the items with counterfeit twenty dollar bills, (2) that she had recently obtained information that the person committing the crimes was named Dustin Goodwin, (3) that she had determined that Dustin Goodwin had been living with the defendant at 16951 Viking Way in Poulsbo for at least a few weeks, (4) that she had just obtained a warrant authorizing the search of that residence for evidence of the ongoing counterfeiting activity, and (5) that she had also just learned that the Westnet Officers had made two controlled purchases of drugs out of that residence. RP 103-104, 135-138, 256-259. Based upon this information Detective Beth

Deatherage of the Port Orchard Police Department asked if the Westnet Officers were interested in assisting in the execution of the search warrant. *Id.* They were. RP 105-106.

As a result, on October 25, 2013, Detective Deatherage along with other Port Orchard Police Officers and a number of the law enforcement agents attached to the Westnet Drug Task Force went to the house at 16951 Viking Way to execute the warrant authorizing a search for evidence of counterfeiting activity. RP 105-106, 137-143, 195-196, 262-263. Once the officers drove up to the location they saw a vehicle registered to Dustin Goodwin pull into the driveway and stop. RP 140-143. It had three people in it. *Id.* Mr. Goodwin, the registered owner, was in the back seat. RP 140-142. The defendant was in the front passenger seat. *Id.* The defendant's girlfriend Tiffany Huggart was in the driver's seat. *Id.*

When the vehicle stopped Detective Deatherage and a number of other officers ran up to it with weapons drawn and ordered everyone out. RP 143, 298-299. Detective Deatherage then handcuffed the defendant and told him that he was just being "detained," not "arrested." RP 143. At this point she asked for the defendant's permission to take everything out of his pockets and put them on the hood of the car. RP 143-144. The defendant consented. *Id.* After pulling out the defendant's wallet, Detective Deatherage then asked if he had any money in it. *Id.* The defendant denied that he did. *Id.*

Detective Deatherage then looked inside the wallet without asking his permission and retrieved what she immediately recognized was a counterfeit twenty dollar bill. RP 143-152. She later testified that she did this to protect herself from a claim that there had been money in the wallet and that she had taken it. RP 23-25.

Upon finding the counterfeit bill in the wallet Detective Deatherage told the defendant that he was “under arrest” and read him his *Miranda* rights. RP 144-146. According to Detective Deatherage and another officer, the defendant then (1) admitted that he knew that the twenty dollar bill was fake, (2) admitted that there was heroin and methamphetamine in the vehicle, and (3) that he was a heroin dealer who would routinely get his heroin from another local dealer. RP 109-110, 155-156. A subsequent search uncovered a small amount of heroin and methamphetamine under the front passenger seat of the vehicle. RP 109-110/ The search of the home revealed evidence of an ongoing twenty dollar bill forgery operation in the upstairs bedroom used by Joel Moore, who was the focus of the forgery investigation. RP 262-263.

Procedural History

By information filed February 12, 2014, and amended two months later, the Kitsap County Prosecutor charged the defendant Dylan Joseph Heckl with one count of delivery of heroin within 1,000 feet of a school zone

on September 3, 2013, one count of delivery of methamphetamine within 1,000 feet of a school zone on September 4, 2013, possession of heroin and possession of methamphetamine on October 25, 2014, and forgery on that same day. CP 1-7, 10-15. On the first day of trial in this case the parties appeared before the court for a hearing under CrR 3.5, during which the state called Detective Deatherage and Kitsap County Sheriff's Deputy Andrew Ejde as witnesses. RP 20-29, 36-40. The defendant then testified. RP 36-40. Following his testimony and argument by counsel the court ruled that the defendant's statements were admissible. RP 40-44. The court later entered the following findings of fact and conclusions of law on this hearing.

FINDINGS OF FACT

1. That the defendant was contacted on October 25, 2013 at his residence in Poulsbo, Washington, by Detective Beth Deatherage. Detective Deatherage was at his house to serve a search warrant for Forgery. She had information that items involved in the Forgery would be in the defendant's home and the vehicle that the defendant was located in at the time the search warrant was executed. Detective Ejde also had probable cause to arrest the defendant for delivery of heroin.

2. That the defendant was the front seat passenger in the vehicle. Detective Deatherage approached the vehicle and had him step to the back of the vehicle. At this point she did not put the defendant under arrest but he was detained for safety reasons. She asked the defendant if she could remove the items in his pockets and put them on the trunk of the vehicle. The defendant consented to that search.

3. That Detective Deatherage asked the defendant, as part of her standard questions, if there were any monies in his wallet or on his person. This question is not part of an interrogation to seek

incriminating statements but a general question asked to all defendants under investigation or subject to search in an effort to keep an accurate record of money located. The defendant indicated that he did not have any money on him. However, when Detective Deatherage located what at first glance appeared to be a \$20.00 bill, the defendant told Detective Deatherage that it was a fake.

4. That upon the defendant's statement that the \$20.00 was a fake, Detective Deatherage properly gave Miranda warnings to the defendant. The defendant indicated that he understood his Miranda rights and provided multiple statements to Detective Deatherage and Detective Ejde.

5. That the defendant appeared coherent and responsive. He understood the questions. He was not threatened and he never made a request to talk to an attorney. He never indicated that he was unwilling to answer questions.

CONCLUSIONS OF LAW

1. That the above-entitled Court has jurisdiction over the parties and the subject matter of this action.

2. That the Statements made to Detective Deatherage pre-Miranda were made in the court of a Terry stop detention. Thus, Miranda warnings were not required. In addition, the questions were not interrogation but were simply routine questions normally attendant to an arrest.

3. That the statements made after Miranda were made freely and voluntarily. Further, the defendant's waiver of his Miranda rights was a knowing and intelligent waiver of his rights.

CP 136-138.

Following the CrR 3.5 hearing the trial court heard a number of motions *in limine* from both parties, including a motion from the state seeking permission under ER 404(b) to admit evidence that the defendant had

generally admitted to one of the interrogating officers that he was a heroin dealer. RP 4-48. The state's offer of proof on the substance of this evidence was as follows:

Your Honor, the statements that State is referring to are actually the ones that Detective Ejde reported in his police report; the statements that the State sees anyway that could potentially implicate 404(b). And those statements are that the defendant admitted to dealing heroin, that he had a supplier who would give him heroin, and then he would then deal that to other people.

RP 44-45.

Following argument and objection by the defense, the trial court granted the state's motion and held the evidence admissible. RP 44-48. The court stated the following in support of its ruling:

THE COURT: All right. I reviewed the statements and the case law, and they are – because the statements do not directly indicate that they – that he delivered a controlled substance to the CI, they don't come under statements against interest. But the fact that he admits to being a drug dealer, specifically dealing in heroin, certainly is circumstantial evidence of the crime charged, as well as *res gestae* evidence.

So those statements will be admissible under 404(b) as evidence of circumstantial evidence of the crime charged as well as the *res gestae* exception. I find the probative value outweighs any prejudicial effect.

RP 46-47.

During the trial in this case the state called 10 witnesses, including Travis Gurno, Detective Ejde, Detective Deatherage, a forensic scientist who tested the heroin and methamphetamine in evidence, a school district

employee who testified concerning the location of the closest school bus stop to the defendant's house, and other officers who were involved in both the drug investigation and the forgery investigation. RP 58, 63, 135, 170, 184, 215, 234, 244, 256, 276. They testified to the facts contained in the preceding factual history. *See* Factual History, *supra*. In addition, Detective Edge testified that after arrest the defendant stated that he sold heroin generally, that he received it from somebody nearby, that he regularly sold it, and that there was heroin and methamphetamine in the vehicle in which he was riding. RP 109-110.

After the state closed its case the defendant took the stand as the only witness for the defense. RP 290-313. He denied delivering drugs, denied any knowledge of Mr. Moore's counterfeiting activities, and stated that he believes Mr. Moore surreptitiously exchanged one of his fake twenty dollar bills for an authentic twenty dollar bill the defendant had in his wallet. *Id.* The defendant also denied that he ever told the officers that there were drugs in Mr. Goodwin's vehicle. *Id.*

Following the defendant's testimony the court instructed the jury with neither party making any objections to the instructions given. RP 315-320. The parties then presented closing argument, after which the jury retired for deliberation. RP 320. The jury later returned guilty verdicts on each counts, as well as special verdicts that the defendant had committed the first two

offenses (delivery of heroin and delivery of methamphetamine) within 1,000 feet of a school bus stop. RP 124-125.

On August 8, 2014, the court called the case for sentencing. RP 8/4/14 1. During that hearing the state claimed and the defense did not dispute that the defendant had two prior Kitsap County convictions for delivery of oxycontin, both sentenced on the same day. CP 142. The court then calculated the defendant's range on the delivery of heroin for profit charge at 68 to 100 months, which was the range for a seriousness level III drug offense with an offender score of five points. CP 141-151. Based upon this range the court imposed a sentence at the low end of the range and added consecutive 24 months school zone enhancements for an actual sentence of 116 months, with the other shorter term sentences running consecutively. CP 141-143; RP 8/8/14 20-24. The defendant thereafter filed timely notice of appeal. CP 153-164.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION AND DENIED THE DEFENDANT A FAIR TRIAL WHEN IT ADMITTED EVIDENCE UNDER ER 404(b) THAT THE DEFENDANT WAS GENERALLY A DRUG DEALER BECAUSE THAT EVIDENCE WAS MORE UNFAIRLY PREJUDICIAL THAN PROBATIVE.

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 Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, 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 addition, it is fundamental under our adversarial system of criminal justice that "propensity" evidence, usually offered in the form of prior

convictions or prior bad acts, is not admissible to prove the commission of a new offense. See 5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383 (3d ed. 1989). This common law rule has been codified in ER 404(b) wherein it states that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” Tegland puts this principle as follows:

Rule 404(b) expresses the traditional rule that prior misconduct is inadmissible to show that the defendant is a “criminal type,” and is thus likely to have committed the crime for which he or she is presently charged. The rule excludes prior crimes, regardless of whether they resulted in convictions. The rule likewise excludes acts that are merely unpopular or disgraceful.

Arrests of mere accusations of crime are generally inadmissible, not so much on the basis of Rule 404(b), but simply because they are irrelevant and highly prejudicial.

. . . .

The rule is a specialized version of Rule 403, based upon the belief that evidence of prior misconduct is likely to be highly prejudicial, and that it would be admitted only under limited circumstances, and then only when its probative value clearly outweighs its prejudicial effect.

5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383-386 (3d ed. 1989).

For example, in *State v. Pogue*, 108 Wn.2d 981, 17 P.3d 1272 (2001), the defendant was charged with possession of cocaine after a police officer found crack cocaine in a car the defendant was driving. At trial, the

defendant claimed that the car belonged to his sister, that it did not have drugs in it, and that the police must have planted the drugs. During cross-examination, the state sought the court's permission to elicit evidence from the defendant concerning his 1992 conviction for delivery of cocaine. The court granted the state's request but limited the inquiry to whether or not the defendant had any familiarity with cocaine. The state then asked the defendant: "it's true that you have had cocaine in your possession in the past, isn't it?" The defendant responded in the affirmative.

The defendant was later convicted of the offense charged. On appeal, he argued that the trial court denied him a fair trial when it allowed the state to question him about his prior cocaine possession because this was propensity evidence. The state responded that the evidence was admissible to rebut the defendant's unwitting possession argument, as well as his police misconduct argument. First, the court noted that the defendant did not claim that he had knowingly possessed the cocaine without knowing what it was. Rather, he claimed that he didn't know the cocaine was in the car. Thus, the prior possession did not rebut this claim. Second, the court noted that there was no logical connection between prior possession and a claim that the police planted the evidence.

Finding error, the court then addressed the issue of prejudice. The court stated:

The erroneous admission of ER 404(b) evidence requires reversal if there is a reasonable probability that the error materially affected the outcome. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). It is within reasonable probabilities that but for the evidence of Pogue's prior possession of drugs, the jury may have acquitted him.

State v. Pogue, 104 Wn.App. at 987-988.

Finding a "reasonable probability" that the error affected the outcome of the trial, the court reversed and remanded the case for a new trial.

In addition, in *State v. Acosta*, 123 Wn.App. 424, 98 P.3d 503 (2004), the defendant was charged with first degree robbery, second degree theft, taking a motor vehicle and possession of methamphetamine. At trial, the defense argued diminished capacity and called an expert witness to support the claim. The state countered with its own expert who testified that the defendant suffered from anti-social personality disorder but not diminished capacity. In support of this opinion the state's expert testified that he relied in part upon the defendant's criminal history as contained in his NCIC. During direct examination, the court allowed the expert to recite the defendant's criminal history to the jury. Following conviction Acosta appealed arguing in part that the trial court had erred when it admitted his criminal history because even if relevant it was more prejudicial than probative under ER 403.

On review the Court of Appeals first addressed the issue of the

relevance of the criminal history. The court then held:

Testimony regarding unproved charges, and convictions at least ten years old do not assist the jury in determining any consequential fact in this case. Instead, the testimony informed the jury of Acosta's criminal past and established that he had committed the same crimes for which he was currently on trial many times in the past. Dr. Gleyzer's listing of Acosta's arrests and convictions indicated his bad character, which is inadmissible to show conformity, and highly prejudicial. ER 404(a). And the relative probative value of this testimony is far outweighed by its potential for jury prejudice. ER 403.

State v. Acosta, 123 Wn.App. at 426 (footnote omitted).

To admit evidence under an exception to ER 404(b), the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify on the record the purposes for which it admits the evidence, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect. *State v. Pirtle*, 127 Wn.2d 628, 648-49, 904 P.2d 245 (1995). As the court stated in *State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982), “[a] careful and methodical consideration of relevance, and an intelligent weighing of potential prejudice against probative value is particularly important in sex cases, where the prejudice potential of prior acts is at its highest.”

The decision in *State v. Escalona*, 49 Wn.App. 251, 742 P.2d 190 (1987), also explains why evidence of similar crimes denies a defendant the

right to a fair trial. In *Escalona*, the defendant was charged with Second Degree Assault while armed with a deadly weapon, in that he allegedly threatened another person with a knife. In fact, the Defendant had a prior conviction for this very crime, and prior to trial the court had granted a defense motion to exclude any mention of this conviction. During cross-examination, defense counsel asked the complaining witness about a prior incident in which four people (not including the defendant) had assaulted him, and whether or not he was nervous on the day of the incident then before the court. The complaining witness responded: "This is not the problem. Alberto [the defendant] already has a record and had stabbed someone." *State v. Escalona*, 49 Wn.App. at 253. After this comment, defense counsel moved for a limiting instruction, which the court gave, and then moved for a mistrial, which was denied. Following conviction, defendant appealed, arguing that the court abused its discretion in refusing to grant his motion for mistrial.

In addressing this issue, the court recognized the following standard:

In looking at a trial irregularity to determine whether it may have influenced the jury, the court [in *State v. Weber*, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983)], considered, without setting for a specific test, (1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction the jury is presumed to follow.

State v. Escalona, 49 Wn.App. at 254.

In analyzing the defendant's claim under this standard, the court first found that the error was "extremely serious" in light of the fact that it was inadmissible under either ER 404(b) or ER 609, and particularly in light of the "paucity of credible evidence against [the defendant]" and the inconsistencies in the complaining witness's allegations, which almost constituted the state's entire case. Similarly, the court had no problem under the second *Weber* criterion finding that the statement was not cumulative of other properly admitted evidence, since the trial court had specifically prohibited its use.

As concerned the last criterion, the court stated:

There is no question that the evidence of Escalona's prior conviction for having "stabbed someone" was "inherently prejudicial." *See State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). The information imparted by the statement was also of a nature likely to "impress itself upon the minds of the jurors" since Escalona's prior conduct, although not "legally relevant," appears to be "logically relevant." *See State v. Holmes*, 43 Wn.App. 397, 399-400, 717 P.2d 766, *review denied*, 106 Wn.2d 1003 (1986). As such, despite the court's admonition, it would be extremely difficult, if not impossible, in this close case for the jury to ignore this seemingly relevant fact. Furthermore, the jury undoubtedly would use it for its most improper purpose, that is, to conclude that Escalona acted on this occasion in conformity with the assaultive character he demonstrated in the past. *See Saltarelli*, 98 Wn.2d at 362.

While we recognize that in the determination of whether a mistrial should have been granted, "[e]ach case must rest upon its own facts," [*State v. Morsette*, [7 Wn.App. 783, 789, 502 P.2d 1234 (1972) (quoting *State v. Albutt*, 99 Wash. 253, 259, 169 P.2d 584 (1917))], the seriousness of the irregularity here, combined with the weakness of the State's case and the logical relevance of the

statement, leads to the conclusion that the court's instruction could not cure the prejudicial effect of [the alleged victim's] statement. Accordingly, under the factors outlined in *Weber*, we hold that the trial court abused its discretion in denying Escalona's motion for mistrial.

State v. Escalona, 49 Wn.App. at 255-56.

The decisions in *Pogue*, *Acosta* and *Escalona* each explain the unfair prejudice that arises in the minds of the jury when the state is allowed to elicit evidence that the defendant previously committed a crime, particularly one similar to the crime charged. The admission of this evidence is such a strong inducement to the jury to simply find the defendant guilty based upon his propensity to criminal conduct that its admission denies the defendant a fair trial.

In the case at bar the state charged the defendant in counts I and II with the sale of heroin for profit and delivery of methamphetamine, and possession of heroin and methamphetamine in counts III and IV. With such charges it would be difficult to find evidence more unfairly prejudicial and likely to convince a jury to convict based solely upon propensity than evidence that the defendant was a regular heroin dealer who received his supply of drugs locally and then sold it to clients locally. In fact, the primary probative value of this evidence derives from its improper purpose: the propensity argument that the defendant generally sells heroin so he must have sold heroin in the instance charged. In *Pogue* the court found evidence that

the defendant had previously possessed cocaine more prejudicial than probative in a case charging possession of cocaine. This same conclusion follows in the case at bar in which the state was allowed to introduce evidence that the defendant had not only sold heroin in the past but was in fact a current seller of heroin. Thus, in the same manner that the trial court erred when it admitted the propensity evidence in *Pogue*, so in the case at bar the trial court erred when it admitted the propensity evidence in the case at bar.

In *Pogue* the court goes on to note that the error in erroneously admitting this type of evidence requires reversal if “there is a reasonable probability that the error materially affected the outcome” of the trial. Such a reasonable probability exists in this case. In fact, the evidence that the defendant was an active heroin dealer was so unfairly prejudicial that it is likely the jury did not even consider issues such as the credibility of the paid informant and the absence of evidence in the home supporting the claim that the defendant had delivered heroin and methamphetamine in it. Thus, in this case the defendant is entitled to a new trial at which this unfairly prejudicial evidence is excluded.

**II. TRIAL COUNSEL’S FAILURE TO MOVE TO SUPPRESS
A COUNTERFEIT TWENTY DOLLAR BILL THE POLICE
ILLEGALLY SEIZED FROM THE DEFENDANT’S WALLET
DENIED THE DEFENDANT HIS CONSTITUTIONAL RIGHT TO
EFFECTIVE ASSISTANCE OF COUNSEL.**

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 counsel's failure to move to suppress the counterfeit twenty dollar bill Detective Deatherage found in the defendant's wallet when she ostensibly performed a warrantless "inventory" search of it. The following addresses this argument.

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).

One recognized exception to the warrant requirement holds that the police may inventory the items in a defendant's possession at the time of his arrest, including items contained in an impounded automobile in order to protect that property from theft and protect the police from false claims of liability. *State v. Montague*, 73 Wn.2d 381, 438 P.2d 571 (1968). The

justification for this exception is that an “inventory of property” is part of a community caretaking function for the police, and not a “search for evidence.” In *Montague*, the court stated this proposition as follows:

When ... the facts indicate a lawful arrest, followed by an inventory of the contents of the automobile preparatory to or following the impoundment of the car, and there is found to be reasonable and proper justification for such impoundment, and where the search is not made as a general exploratory search for the purpose of finding evidence of crime but is made for the justifiable purpose of finding, listing, and securing from loss, during the arrested person’s detention, property belonging to him, then we have no hesitancy in declaring such inventory reasonable and lawful, and evidence of crime found will not be suppressed.

State v. Montague, 73 Wn.2d at 385.

However, in *Montague*, the court recognized the potential for abuse when the police perform an inventory search as a pretext to find evidence of a crime. In these circumstances, the courts should suppress, even though there was an ostensibly valid reason to inventory. In *Montague*, the court stated as follows on this proposition:

(n)either would this court have any hesitancy in suppressing evidence of crime found during the taking of the inventory, if we found that either the arrest or the impoundment of the vehicle was resorted to as a device and pretext for making a general exploratory search of the car without a search warrant.

State v. Montague, 73 Wn.2d at 385.

One of the determinative factors the courts consider when judging whether or not the police have used an inventory as a pretext to search is the

extent the officers have gone to seek lesser intrusive alternatives to the search which would address the needs underlying the inventory while still preserving the defendant's right to privacy. See i.e. *State v. Hill, supra* (inventory pursuant to impound absent showing that officer pursued lesser intrusive alternative such as leaving the vehicle or allowing another person to take it violated the defendant's right to privacy); *State v. Hardman*, 17 Wn.App. 910, 914, 567 P.2d 238 (1977) (although police need not exhaust all possible alternatives before impounding a vehicle, they must show they "at least thought about alternatives; attempted, if feasible, to get from the driver the name of someone in the vicinity who could move the vehicle, and then reasonably concluded from [their] deliberation that impoundment was in order."); *State v. Houser*, 95 Wn.2d 143, 153, 622 P.2d 1218 (1980) ("It is unreasonable to impound a citizen's vehicle . . . where a reasonable alternative to impoundment exists.")

One of the reasonable alternatives that the police should explore is to offer to allow the defendant to sign a waiver of liability releasing the police from any claims arising from a failure to inventory. In *State v. Sweet*, 44 Wn.App. 226, 721 P.2d 560 (1986), another vehicle impound case, the court noted this as a reasonable alternative, unless the defendant is not in a position to execute such a waiver. The court stated as follows on this issue:

Impoundment as part of the police "community caretaking

function” is proper if the vehicle is threatened by theft of its contents and neither the defendant nor acquaintances are available to move the vehicle. In the instant case, officers were unable to arouse Sweet either to *have him sign a waiver of liability* or to give alternative instructions for disposition of the vehicle. Officers were able to look through the windows of the truck canopy and observe numerous items of potential value, including tools, in the truck bed. Consequently, even if officers had locked the canopy, the potential for theft remained.

State v. Sweet, 44 Wn.App. at 236 (citations omitted) (emphasis added).

In addition, inventory searches, even when justified, are not unlimited in scope. *State v. Houser, supra*. Rather, the permitted extent of an inventory search must be restricted to the purposes that justify their exception to the Fourth Amendment and Washington Constitution, Article 1, § 7. *State v. Dugas*, 109 Wn.App. 592, 37 P.3d 577 (2001). The decision in *Houser* illustrates this limitation.

In *Houser*, the police pulled the Defendant over for a minor traffic violation and eventually arrested him for driving while suspended. After the arrest, the officers decided to impound the vehicle and inventory its contents. As part of the inventory search, one of the officers opened the defendant’s trunk and found a shopping bag. Inside that shopping bag, the officer found a shaving kit. Inside the shaving kit, the officer found illegal drugs. The defendant was later convicted of possession of those drugs and appealed, arguing that the trial court had erred when it denied the defendant’s motion to suppress that evidence because the search of the grocery bag and the

shaving kit exceeded the scope of a valid inventory search. The Washington Supreme Court agreed, stating as follows:

We conclude that where a closed piece of luggage in a vehicle gives no indication of dangerous contents, an officer cannot search the contents of the luggage in the course of an inventory search unless the owner consents. Absent exigent circumstances, a legitimate inventory search only calls for noting such an item as a sealed unit.

State v. Houser, 95 Wn.2d 143.

In the same manner that the shopping bag in *Houser* presented no indication of dangerousness, so the defendant's wallet Detective Deatherage took out of the defendant's pocket after she had placed him in handcuffs in the case at bar presented no indication of dangerousness. Thus, in the same manner that the shopping bag in *Houser* should have been inventoried as a single unit and not opened, so the defendant's wallet in the case at bar should have been "inventoried" as a single unit and not opened. As a result, even if the detective in this case was performing a valid inventory search, her action of looking in the wallet violated the defendant's right to privacy, regardless of the existence or lack of existence of a departmental policy or common practice of performing such a search. Indeed, it is hard to understand how a "protocol" or "policy" of a police department or individual officer, even if one existed in this case, could be seen to overrule the Washington Supreme Court's decision in *Houser* requiring the police to inventory closed items as single units unless there is reason to believe that the contents of the item

might be dangerous, a claim that was not made in this case.

Another of the “jealously and carefully drawn” exceptions to the warrant requirement states that jail personnel may make a warrantless inventory search of a person and his or her belongings prior to booking that person into jail. *State v. Smith*, 56 Wn.App. 145, 783 P.2d 145 (1989), *review denied*, 114 Wn.2d 1019, 790 P.2d 640 (1990). This exception arises from the need to assure safety for jail staff and inmates, and to protect the jail from civil claims. *Id.* The justification for this type of search is identical to the justification behind inventory searches performed by police officers. As such, these searches are under the same limitations that the court set in *Houser*. That is to say, to the extent the jail finds a container that gives no indication of dangerous contents, the container must be inventoried as a whole absent the consent of the defendant. Indeed, it would be an anomaly to allow a jail to search a closed container absent any indication of dangerousness as part of its “inventory” procedures while not allowing a police officer to search a closed container absent any indication of dangerousness. Rather, the point of *Houser* is that even inventory searches are intrusions on the constitutional right to privacy, and that intrusion is no longer reasonable when either the police or the jail encounter a closed container without any indication of dangerousness.

However, the intrusion into the defendant’s wallet in this case suffers

from two more fundamental deficiencies than those that existed in *Houser*. As was revealed during the testimony at the CrR 3.5 hearing in this case, Detective Deatherage went to great lengths to convince the court that at the time she took out the defendant's wallet and looked into it the defendant was not "under arrest." Rather, even though she had probable cause to arrest him for the sale of heroin and the delivery of methamphetamine, she had not done so and she was only detaining him. Of course she had to so testify in order to secure the admission of the defendant's answers to her questions because she had not yet read him his *Miranda* rights. However, if we are to accept her claims, as the trial court did, then those factual claims cut off her argument that she was performing some sort of protective inventory search of the defendant's wallet. Thus, in the case at bar, the evidence presented at the CrR 3.5 hearing makes it clear that Detective Deatherage violated the defendant's right to privacy under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment, when she searched his wallet without permission, without a warrant and without an exception to the warrant requirement.

As the foregoing explains, had the defense in this case simply moved to suppress the counterfeit twenty dollar bill Detective Deatherage seized from the defendant's wallet, the trial court would have been compelled to grant that motion. In this case that counterfeit twenty dollar bill was the

primary evidence the state used to convict the defendant of forgery. It is true that there was evidence of counterfeiting in the defendant's house, however that evidence was all directly associated with the bedroom of the person who was the primary focus of the counterfeiting charges. Thus, there is no possible tactical reason to refrain from moving to suppress this evidence. In addition, given the lack of any counterfeiting evidence in the defendant's bedroom, the trial attorney's failure to move to suppress the counterfeit twenty dollar bill undermines confidence in the verdict on this charge. Thus, trial counsel's failure to move to suppress this evidence denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment. As a result, this court should reverse the defendant's forgery conviction and remand for a new trial.

III. THE TRIAL COURT VIOLATED RCW 69.50.410(3)(a) WHEN IT FAILED TO IMPOSE THE SENTENCE THE LEGISLATURE MANDATED FOR A FIRST OFFENSE SALE OF HEROIN FOR PROFIT.

The power to mandate sentences belongs to the Legislature, not the Judiciary. *State v. Bryan*, 93 Wn.2d 177, 606 P.2d 1228 (1980). A trial court's discretion to impose a sentence is stickily circumscribed by those bounds the Legislature sets. *State v. Ammons*, 105 Wn.2d 175, 713 P.2d 719 (1986). Any sentence a trial court imposes in excess of that authority is void. *State v. Phelps*, 113 Wn.App. 347, 57 P.3d 624 (2002). Finally, questions of

statutory authority, such as questions involving a court's authority to sentence, are reviewed de novo. *State v. Elmore*, 154 Wn.App. 885, 228 P.3d 760 (2010).

Under the rules of statutory interpretation, "if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9–10, 43 P.3d 4 (2002). However, all words "must be read in the context of the statute in which they appear, not in isolation." *State v. Lilyblad*, 163 Wn.2d 1, 177 P.3d 686 (2008). In addition, statutes are only deemed ambiguous if the language is susceptible to more than one reasonable interpretation. *State v. Jacobs*, 154 Wn.2d 596, 115 P.3d 281 (2005). Finally, under the doctrine of *expressio unius est exclusio alterius*, the expression of one thing in a statute implies the exclusion of the other and omissions must be deemed to be exclusions." *In re Det. of Williams*, 147 Wn.2d 476, 55 P.3d 597 (2002).

In the case at bar the jury convicted the defendant in count one of the sale of a Schedule I drug for profit, as charged in the amended information. This amended information alleged:

On or between September 1, 2013 and September 30, 2013, in the County Of Kitsap, State of Washington, the above-named Defendant did knowingly sell for profit a controlled substance or counterfeit substance classified in Schedule 1, to-wit: Heroin; contrary to the Revised Code of Washington 69.50.410.

CP 10.

The first section of the statute cited, RCW 69.50.410, defines this offense as follows:

(1) Except as authorized by this chapter it is a class C felony for any person to sell for profit any controlled substance or counterfeit substance classified in Schedule I, RCW 69.50.204, except leaves and flowering tops of marijuana.

For the purposes of this section only, the following words and phrases shall have the following meanings:

(a) “To sell” means the passing of title and possession of a controlled substance from the seller to the buyer for a price whether or not the price is paid immediately or at a future date.

(b) “For profit” means the obtaining of anything of value in exchange for a controlled substance.

(c) “Price” means anything of value.

RCW 69.50.410(1).

A careful review of this statute reveals that the gravamen of the offense defined is the “sale” “for profit” of a Schedule I drug except marijuana. As subsection 7 of this statute explains, “[t]his section shall not apply to offenses defined and punishable under the provisions of RCW 69.50.401 through 69.50.4015.” The distinction between a “delivery of a controlled substance” under RCW 69.50.401, and a “sale for profit” under RCW 69.50.410 is threefold. First, while a person may violate RCW 69.50.401 by delivering a schedule I controlled substance other than

marijuana, there are many ways to violate RCW 69.50.401 apart from selling a Schedule I controlled substance for profit as is required for application of RCW 69.50.410. Thus, RCW 69.50.410 is more restrictive in its application.

Second and third, while a person may violate RCW 69.50.401 simply by possessing or delivering any controlled substance, delivery of even a Schedule I drug except marijuana is insufficient to secure a conviction under RCW 69.50.410. Rather, to qualify under the latter statute, the state has the burden of proving the extra elements of a “sale” “for profit” as those terms are defined in the statute. Thus, RCW 69.50.410 is significantly more restrictive than RCW 69.50.401.

In addition, while RCW 69.50.410 is more restrictive in its application than RCW 69.50.401, the former statute also provides for its own sentencing scheme separate from the general sentencing scheme found in RCW 9.94A. Although the later statute under RCW 9.94A.518 does define RCW 69.50.410 as a level III drug offense, RCW 69.50.410 also provides a separate sentencing scheme that does not calculate offender scores and does not have graduated ranges. Rather, it creates an alternate mandatory sentence scheme for first and second offenses committed under the statute depending upon the type of schedule I drug sold for profit. The first alternative mandatory sentence scheme is set out in subsection (2) and applies to convictions for the sale for profit of all schedule I drugs except heroin. The

second and more severe alternative mandatory sentence scheme is set out in subsection (3) and applies to convictions for the sale for profit of heroin only.

It states:

(3)(a) Any person convicted of a violation of subsection (1) of this section by selling heroin shall receive a mandatory sentence of two years in a correctional facility of the department of social and health services and no judge of any court shall suspend or defer the sentence imposed for such violation.

(b) Any person convicted on a second or subsequent sale of heroin, the sale having transpired after prosecution and conviction on the first cause of the sale of heroin shall receive a mandatory sentence of ten years in a correctional facility of the department of social and health services and no judge of any court shall suspend or defer the sentence imposed for this second or subsequent violation: PROVIDED, That the indeterminate sentence review board under RCW 9.95.040 shall not reduce the minimum term imposed for a violation under this subsection.

RCW 69.50.410(3).

It is interesting to note that the mandatory sentence for a first offense sale of heroin for profit under RCW 69.50.410(3)(a) is less severe than the sentence that would otherwise be imposed under the SRA while a sentence imposed for a second offense sale of heroin for profit under RCW 69.50.410(3)(b) is more severe than a sentence that would be imposed under the SRA. In the former case, under subsection (3)(a), a person convicted of a first offense sale of heroin for profit “shall receive a mandatory sentence of two years in a correctional facility.” The statute does not state “a mandatory minimum sentence of at least two years.” Rather, it explicitly states “shall

receive a mandatory sentence of two years.” By contrast, under the SRA, a first offense delivery of heroin with an offender score of 0 points would be sentenced under a more severe 51 to 68 months range.

Under RCW 69.50.410(3)(b), a person convicted of a second offense sale of heroin for profit “shall receive a mandatory sentence of ten years in a correctional facility.” By contrast, under the SRA, a second offense delivery of heroin with an offender score of 3 points for the prior would be sentenced under a less severe 68 to 100 months range. In fact, while the SRA would allow for the “washing” of a prior offense of sufficient age to create a much less severe range of 51 to 68 months even for a second offense, under RCW 69.50.410(3)(b) there is no provision for “washing” a prior offense. Under RCW 69.50.410(3)(b) a prior offense will always be on an offender’s record and will always count as a prior offense.

As is apparent, by the plain meaning of its language and by the operation of its provisions, RCW 69.50.410 creates its own sentencing scheme independent of the general sentencing scheme found in the SRA. Under that sentencing scheme, the defendant should have been sentenced under RCW 69.50.410(3)(a) to “a mandatory sentence of two years.” Thus the trial court erred when it sentenced the defendant to 68 months plus two 24 months school zone enhancements for a total of 116 months on Count I, on the sale of heroin for profit charge.

The foregoing analysis of RCW 69.50.410 also precludes the imposition of the sentencing enhancements under RCW 9.94A.533(6). That provision states:

(6) An additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435 or 9.94A.827. All enhancements under this subsection shall run consecutively to all other sentencing provisions, for all offenses sentenced under this chapter.

RCW 9.94A.533(6).

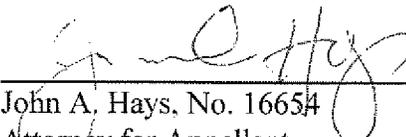
As was already mentioned herein, the sale of heroin for profit is a ranked offense under RCW 9.94A.410. Thus, an offender under RCW 69.50.410 does meet the “for any ranked offense” language found in RCW 9.94A.533(6). However, as the foregoing analysis also explains, there is no “standard sentence range” under RCW 69.50.410. Standard sentence ranges only exist under RCW 9.94A. Thus, since the defendant in this case should be sentenced under RCW 69.50.410, his offense does not meet the “added to the standard sentence range” requirement for application of any enhancements under RCW 9.94A.533(6). As a result, in this case the trial court should have imposed a total sentence of 24 months on Count 1, a first offense sale of heroin for profit, comprised of the 24 months mandated by RCW 69.50.410(3)(a). By imposing a sentence of 116 months on that offense the trial court exceeded its statutory authority.

CONCLUSION

The trial court denied the defendant a fair trial when it admitted evidence under ER 404(b) that was more prejudicial than probative. In addition, trial counsel's failure to move to suppress the counterfeit twenty dollar bill in the defendant's possession denied the defendant his right to effective assistance of counsel on the forgery charge. Finally, the trial court erred when it imposed a sentence on Count I that exceeded the authority the legislature gave it under RCW 69.50.410. As a result, the court should vacate the defendant's convictions and remand for a new trial. In the alternative this court should vacate the defendant's sentence on Count I and remand for resentencing within the limits set in RCW 69.50.410.

DATED this 27th day of February, 2015.

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, § 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 unreasonable 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.

RCW 69.50.410
Prohibited acts: D – Penalties

(1) Except as authorized by this chapter it is a class C felony for any person to sell for profit any controlled substance or counterfeit substance classified in Schedule I, RCW 69.50.204, except leaves and flowering tops of marihuana.

For the purposes of this section only, the following words and phrases shall have the following meanings:

(a) “To sell” means the passing of title and possession of a controlled substance from the seller to the buyer for a price whether or not the price is paid immediately or at a future date.

(b) “For profit” means the obtaining of anything of value in exchange for a controlled substance.

(c) “Price” means anything of value.

(2)(a) Any person convicted of a violation of subsection (1) of this section shall receive a sentence of not more than five years in a correctional facility of the department of social and health services for the first offense.

(b) Any person convicted on a second or subsequent cause, the sale having transpired after prosecution and conviction on the first cause, of subsection (1) of this section shall receive a mandatory sentence of five years in a correctional facility of the department of social and health services and no judge of any court shall suspend or defer the sentence imposed for the second or subsequent violation of subsection (1) of this section.

(3)(a) Any person convicted of a violation of subsection (1) of this section by selling heroin shall receive a mandatory sentence of two years in a correctional facility of the department of social and health services and no judge of any court shall suspend or defer the sentence imposed for such violation.

(b) Any person convicted on a second or subsequent sale of heroin, the sale having transpired after prosecution and conviction on the first cause of the sale of heroin shall receive a mandatory sentence of ten years in a correctional facility of the department of social and health services and no

judge of any court shall suspend or defer the sentence imposed for this second or subsequent violation: PROVIDED, That the indeterminate sentence review board under RCW 9.95.040 shall not reduce the minimum term imposed for a violation under this subsection.

(4) Whether or not a mandatory minimum term has expired, an offender serving a sentence under this section may be granted an extraordinary medical placement when authorized under RCW 9.94A.728(4).

(5) In addition to the sentences provided in subsection (2) of this section, any person convicted of a violation of subsection (1) of this section shall be fined in an amount calculated to at least eliminate any and all proceeds or profits directly or indirectly gained by such person as a result of sales of controlled substances in violation of the laws of this or other states, or the United States, up to the amount of five hundred thousand dollars on each count.

(6) Any person, addicted to the use of controlled substances, who voluntarily applies to the department of social and health services for the purpose of participating in a rehabilitation program approved by the department for addicts of controlled substances shall be immune from prosecution for subsection (1) offenses unless a filing of an information or indictment against such person for a violation of subsection (1) of this section is made prior to his or her voluntary participation in the program of the department of social and health services. All applications for immunity under this section shall be sent to the department of social and health services in Olympia. It shall be the duty of the department to stamp each application received pursuant to this section with the date and time of receipt.

(7) This section shall not apply to offenses defined and punishable under the provisions of RCW 69.50.401 through 69.50.4015.

COURT OF APPEALS OF WASHINGTON, DIVISION II

**STATE OF WASHINGTON,
Respondent,**

vs.

**DYLAN JOSEPH HECKL,
Appellant.**

NO. 47376-3-II

**AFFIRMATION
OF SERVICE**

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Mr. Russell D. Hauge
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Dated this 27th day of February, 2015, at Longview, WA.



Donna Baker

HAYS LAW OFFICE

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Transmittal Letter

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Case Name: State vs Dylan J. Heckl

Court of Appeals Case Number: 47376-3

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

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