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## **I. ASSIGNMENTS OF ERROR**

1. There was insufficient admissible evidence to convict Mr. Lee of possession of cocaine with intent to distribute where the cocaine was discovered pursuant to an unlawful search of Mr. Lee's vehicle.
2. There was insufficient evidence to convict Mr. Lee of possession of methadone with intent to distribute where there was no evidence indicating that he intended to distribute any drugs.
3. There was insufficient evidence to convict Mr. Lee of fraud for possession of counterfeit money where no evidence of intent to injure or defraud.
4. Was Mr. Lee deprived of a fair trial where the trial court erroneously permitted the secret service agent to testify that counterfeit bills with serial numbers matching the bills found in Mr. Lee's wallet had been passed in previously in Washington and Oregon?
5. Was Mr. Lee deprived of a fair trial where the trial court failed to give the jury a limiting instruction where it admitted evidence of prior forgeries under ER 404(b)?

## **II. ISSUES PRESENTED**

1. Was the warrantless search of Mr. Lee's vehicle lawful where Officer Walsh lacked probable cause to believe that evidence of the crime for which he stopped Mr. Lee would be found inside Mr. Lee's vehicle?
2. Did the State present sufficient evidence to convict Mr. Lee of possession of methadone with intent to distribute where the Sate presented insufficient evidence to establish what Mr. Lee intended to do with the drugs?
3. Did the State present sufficient evidence to convict Mr. Lee of forgery where the State presented no evidence suggesting that Mr. Lee intended to the counterfeit bills to injure or defraud another?

4. Did cumulative error deprive Mr. Lee of his right to a fair trial where the trial court admitted irrelevant and highly prejudicial evidenced and failed to properly instruct the jury?

### **III. STATEMENT OF THE CASE**

#### ***Factual and Procedural Background***

On July 10, 2008, Tacoma Police Officer Doug Walsh was patrolling when he stopped a car for traveling 5 miles-per-hour over the speed limit. RP 101-102, 121. When the car stopped, the driver immediately got out of the vehicle. Based on prior contacts with the driver, Officer Walsh y recognized the driver as Mr. Darrell Lee. RP 102-104. Officer Walsh knew Mr. Lee's driver's license was suspended, so Officer Walsh arrested Mr. Lee and handcuffed him. RP 102-103. Officer Walsh used his computer to verify that Mr. Lee's license was, in fact suspended. RP 105-106.

Officer Walsh searched Mr. Lee incident to the arrest. RP 106, 109. During the search of Mr. Lee, Officer Walsh found 12 pills later determined to be methadone, \$1,295.00 in cash in one of Mr. Lee's pockets, and \$540 in cash in Mr. Lee's wallet. RP 109-110, 114, 156-157, 160. After searching Mr. Lee incident to arrest, Officer Walsh placed Mr. Lee in the back of his patrol car while Mr. Lee was still handcuffed. RP 110.

During the search of Mr. Lee's person, Officer Walsh did not

locate any drug paraphernalia. RP 122. Officer Walsh also did not locate anything indicating Mr. Lee intended to sell the drugs found on his person. RP 122. Officer Walsh then searched Mr. Lee's vehicle incident to Mr. Lee's arrest for driving with a suspended license. RP 103, 110. During the search of Mr. Lee's vehicle, Officer Walsh discovered a baggie containing a single rock of crack cocaine. RP 110, 115, 131, 161. The baggie containing the single rock of cocaine was hidden behind a sliding door on the roof of the vehicle which was below the sunroof. RP 110, 123-124, 131. When Officer Walsh began searching the vehicle, the sunroof door was closed. RP 124. To find the drugs, Officer Walsh had to open the sliding door before he could see the drugs. RP 124. During the search of Mr. Lee's vehicle, Officer Walsh did not locate any drug paraphernalia or any evidence indicating Mr. Lee intended to sell the drugs. RP 122.

Officer Walsh ran the license plate of the stopped vehicle and discovered that Mr. Lee was not the owner of the vehicle. RP 105.

When Officer Walsh arrived at the jail, he and Sergeant Travis counted the money found on Mr. Lee's person. RP 116. While counting the \$540 found in Mr. Lee's wallet, Sergeant Travis noticed that the bills were counterfeit. RP 116. Many of the bills had the same serial number and the bills were not printed on normal currency material. RP 117.

On July 15, 2008, Mr. Lee was charged with two counts of possession of a controlled substance with intent to deliver and one count of driving with a suspended license in the third degree. CP 1-3.

On May 20, 2009, the charges against Mr. Lee were amended to include two counts of unlawful possession of a controlled substance with intent to deliver, one count of driving with a suspended license in the third degree, and one count of bail jumping. CP 6-8.

On July 21, 2009, the charges against Mr. Lee were again amended, this time to include two counts of unlawful possession of a controlled substance with intent to deliver, driving with a suspended license in the third degree, two counts of bail jumping, and one count of forgery. CP 11-14.

On August 25, 2009, the second amended information was corrected to change the dates of the bail jump charges. CP 16-19; RP 8-25-09, 3-4.<sup>1</sup>

Pretrial, Mr. Lee moved to exclude evidence that counterfeit bills with serial numbers matching the serial numbers of the bills found in Mr. Lee's wallet had been passed previously. RP 91-97. Mr. Lee argued that the evidence was irrelevant and was more prejudicial to Mr. Lee than it was probative of any issue before the jury since there was

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<sup>1</sup> The transcript for the August 25, 2009 hearing is numbered separately from the rest of the transcript of the proceedings. Reference to the August 25, 2009 transcript will be made by giving the date of the hearing followed by the pages referenced.

no evidence suggesting that Mr. Lee had been involved in passing any of the previous counterfeit bills. RP 93-97. The State argued that the evidence was admissible because Mr. Lee was charged with forgery and the fact that counterfeit bills with serial numbers matching the ones found in Mr. Lee's possession had been passed before was relevant to Mr. Lee's intent with regard to the bills he possessed. RP 94-96. The trial court agreed with the State and held that evidence that counterfeit bills with serial numbers matching the counterfeit bills found in Mr. Lee's wallet was admissible under ER 401, ER 402, and "really" ER 404(b) as probative of Mr. Lee's "intent to deliver, as well as to the forgery." RP 97.

Also pretrial, the State gave notice that it intended to use evidence of Mr. Lee's prior convictions under ER 609 should Mr. Lee testify. CP 20-21.

Jury trial in this matter began on September 28, 2009. RP 99.

At trial, Officer Walsh indicated that the size of the single rock of cocaine, combined with the presence of methadone and large quantities of money on Mr. Lee's person and the lack of any drug paraphernalia, indicated that Mr. Lee possessed the drugs with the intent to sell them. RP 131.

At trial, Secret Service Special Agent Timothy Hunt testified that the serial numbers on the counterfeit bills found in Mr. Lee's

wallet had been on counterfeit bills that had been passed numerous times since July of 2008 in Washington, Oregon, and Arizona. RP 140-143. Special Agent Hunt also testified that sometimes people print counterfeit money to buy drugs. RP 145. Special Agent Hunt also testified that he had no evidence indicating that the money found in Mr. Lee's wallet had been used or had intended to be used for drug transactions. RP 149. Special Agent Hunt testified that it appeared that the bills had been printed on a photocopier or an inkjet printer. RP 151.

At trial, Mr. Lee objected to the State being permitted to refer to Mr. Lee's 1990 conviction for possession of stolen property in the second degree on the basis that it was too remote in time to be admissible. RP 177-178. The trial court, though acknowledging that ER 609 "would seem to exclude it," permitted introduction of evidence of Mr. Lee's 1990 conviction and held that the State had met its burden of demonstrating that the probative value of the evidence substantially outweighed the prejudice the evidence would cause Mr. Lee. RP 180.

At trial, Mr. Lee testified that he was driving with a suspended license. RP 253. Mr. Lee testified that the \$1,295.00 in his pocket was his wife's economic stimulus money that she had given him to pay his rent. RP 253. Mr. Lee testified that he knew the money in his wallet was counterfeit, but that he intended to use the money to make invitations to his children's birthday parties. RP 254, 280. Mr. Lee

testified that the vehicle he was driving belonged to a friend of his and he had only been in possession of the vehicle for an hour or so before he was pulled over by Officer Walsh. RP 252. Mr. Lee testified that the 12 methadone pills that were in his pocket were left in the car he was driving by a woman he met at a barbecue earlier in the day and who he gave a ride home. RP 254-255. Mr. Lee testified that he had no idea that the rock of cocaine was hidden in the vehicle. RP 255.

Mr. Lee proposed a jury instruction based on WPIC 50.03 which included the language, "Passing control or momentarily handling the drugs is not sufficient to establish dominion and control."CP 74-78. The State objected to this language on the grounds that the facts of the case did not support giving the proposed language. RP 289-290. The trial court sustained the State's objection and did not include Mr. Lee's proposed passing control language in the instruction. RP 295. Mr. Lee objected to the trial court giving jury instruction number 8, the version of the instruction which did not include the proposed language. RP 311.

The jury found Mr. Lee guilty of unlawful possession of methadone with intent to deliver, not guilty of unlawful possession of cocaine with intent to deliver, guilty of unlawful possession of cocaine, guilty of driving with a suspended license in the third degree, guilty of forgery, guilty of bail jump occurring on April 8, 2009, and guilty of

bail jump occurring on July 9, 2009. CP 124-131.

Notice of appeal was timely filed on October 23, 2009. CP 218.

#### IV. ARGUMENT

**1. The State presented insufficient admissible evidence to convict Mr. Lee of unlawful possession of cocaine where the cocaine was discovered pursuant to an unlawful warrantless search.**

*a. The search of Mr. Lee's vehicle was unlawful.*

The Fourth Amendment to the US Constitution provides,

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 or things to be seized.

Article 1, § 7 of the Washington Constitution provides “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

Absent an exception to the warrant requirement, a warrantless search is impermissible under both Article 1 Section 7 of the Washington Constitution and the fourth amendment to the United States Constitution. *See State v. Johnson*, 128 Wn.2d 431, 446-47, 909 P.2d 293 (1996).

“A warrantless search by the police is invalid unless it falls within one of the narrow and well-delineated exceptions to the warrant

requirement [.]” *Flippo v. West Virginia*, 528 U.S. 11, 120 S.Ct. 7, 8, 145 L.Ed.2d 16 (1999); *State v. Smith*, 119 Wn.2d 675, 678, 835 P.2d 1025 (1992).

“The warrant requirement is especially important under Article I, Section 7, of the Washington Constitution **as it is the warrant which provides the ‘authority of law’ referenced therein.**” *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999) (emphasis added) (citing *City of Seattle v. Mesiani*, 110 Wn.2d 454, 457, 755 P.2d 775 (1988)).

A warrantless search of constitutionally-protected areas is presumed unreasonable absent proof that one of the few well-established exceptions to the warrant requirement applies. *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *Ladson*, 138 Wn.2d at 349, 979 P.2d 833.

The US Supreme Court recently made clear that police are not permitted to conduct a warrantless search of a vehicle simply because the police have arrested a recent occupant of that vehicle:

Police may search a vehicle incident to a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee’s vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

*Arizona v. Gant*, 556 U.S. ----, 129 S.Ct. 1710, 1723-1724, 173 L.Ed.2d 485 (2009).

The *Gant* court further held that where a driver is stopped and arrested for a traffic offense, the police may not search the driver's vehicle absent a warrant. *Gant*, 566 U.S. ----, 129 S.Ct. 1710, 1719, 173 L.Ed.2d 485.

Mr. Lee was stopped for speeding. RP 101-102, 121. Officer Walsh discovered the rock of cocaine in Mr. Lee's vehicle during a search of the vehicle incident to Mr. Lee's arrest for driving with a suspended license. RP 103, 110. Thus, Mr. Lee was stopped and arrested for a traffic offense. At the time of the search of Mr. Lee's vehicle, Mr. Lee was handcuffed in the back of Officer Walsh's patrol car, unable to reach into the passenger compartment of his own vehicle. Further, Officer Walsh had no reason to believe that evidence of the traffic offenses of speeding or driving with a suspended license would be found inside Mr. Lee's vehicle. Ergo, the search of Mr. Lee's vehicle was unlawful.

*b. All evidence discovered during the search of Mr. Lee's vehicle was inadmissible.*

Evidence obtained directly or indirectly through exploitation of an unconstitutional police action must be suppressed, unless the secondary evidence is sufficiently attenuated from the illegality as to dissipate the taint.

*Wong Sun v. United States*, 371 U.S. 471, 491, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999) (When an unconstitutional search occurs, Article 1, § 7 requires suppression).

The search of Mr. Lee's vehicle was unconstitutional, therefore, the evidence of the presence of cocaine should have been suppressed.

c. *Without evidence of the crack cocaine, the State had insufficient evidence to convict Mr. Lee of unlawful possession of cocaine.*

In a criminal sufficiency claim, the defendant admits the truth of the State's evidence and all inferences that may be reasonably drawn from them. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Evidence is reviewed in the light most favorable to the State. *State v. Varga*, 151 Wn.2d 179, 201, 86 P.3d 139 (2004). Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068.

In a criminal matter, the State must prove every element of the crime charged. *State v. Teal*, 152 Wn.2d 333, 337, 96 P.3d 974 (2004); *In re Winship*, 397 U.S. 358, 362-363, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A fact finder is permitted to draw inferences from the facts, so long as those inferences are rationally related to the proven fact. *State*

*v. Bencivenga*, 137 Wn.2d 703, 707, 974 P.2d 832 (1999). The existence of a fact cannot rest upon guess, speculation or conjecture. *State v. Carter*, 5 Wn.App. 802, 807, 490 P.2d 1346 (1971), *review denied*, 80 Wn.2d 1004 (1972).

If a reviewing court finds insufficient evidence to prove an element of a crime, reversal is required: “Retrial following reversal for insufficient evidence is ‘unequivocally prohibited’ and dismissal is the remedy.” *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

Mr. Lee was convicted of unlawful possession of cocaine under RCW 69.50.4013(1). CP 190-203. RCW 69.50.4013(1) provides, in pertinent part, “it is unlawful for any person to possess a controlled substance...” Here, all evidence that Mr. Lee “possessed” the cocaine was unlawfully discovered and was inadmissible. Thus, had the evidence of the cocaine been properly suppressed, the State would have had insufficient evidence to establish that Mr. Lee possessed cocaine.

This court should vacate Mr. Lee’s conviction for unlawful possession of cocaine and remand for dismissal of the charge with prejudice.

2. **The State presented insufficient evidence to convict Mr. Lee of possession of methadone with intent to deliver where the State presented insufficient evidence to establish that Mr. Lee intended to deliver the methadone.**

Mr. Lee was convicted of unlawful possession of methadone with intent to deliver in violation of RCW 69.50.401(1)(2)(a).

The elements of possession of a controlled substance with intent to deliver under RCW 69.50.401(1) are (1) unlawful possession (2) with intent to deliver (3) a controlled substance. *State v. O'Connor*, --- P.3d ---, WL 961597 \*3 (2010). Intent to deliver may be inferred where the evidence shows both possession and facts suggestive of a sale. *State v. Hagler*, 74 Wn.App. 232, 236, 872 P.2d 85 (1994). Mere possession of a controlled substance, including quantities greater than needed for personal use, is not sufficient to support an inference of intent to deliver. *State v. Lopez*, 79 Wn.App. 755, 768, 904 P.2d 1179 (1995). At least one additional fact must exist, such as a large amount of cash or sale paraphernalia, suggesting an intent to deliver. *Hagler*, 74 Wn.App. at 236, 872 P.2d 85 (large amount of cocaine and \$342 sufficient to establish intent to deliver); *State v. Lane*, 56 Wn.App. 286, 297-98, 786 P.2d 277 (1989) (one ounce of cocaine, large amount of cash, and scales).

Officer Walsh found 12 pills of methadone in Mr. Lee's possession. No evidence was presented regarding whether or not this was a large quantity beyond an amount needed for personal use. Officer Walsh did not locate any drug paraphernalia or any evidence

indicating Mr. Lee intended to sell the drugs. RP 122.

To establish that Mr. Lee possessed the methadone with intent to deliver, the State relied entirely upon circumstantial evidence. RP 318-319. Specifically, the State relied on Officer Walsh's testimony that the presence of the crack cocaine, the methadone, and the large amount of money combined to support the inference that the possession of the drugs was done with the intent to distribute them. RP 131, 327-330. During closing argument, the State specifically argued that the intent to sell the cocaine was established by Officer Walsh's testimony that the rock would be broken up for resale. RP 329. Without explanation as to why, the State argued "that there was only one intent in having these two drugs, and that was to distribute them." RP 330.

As discussed above, the evidence of the cocaine was inadmissible. Thus, the evidence relied upon by the State to establish Mr. Lee's intent to distribute the cocaine, the size of the single cocaine rock, was inadmissible. The State's argument below tied Mr. Lee's intent regarding the methadone to Mr. Lee's intent regarding the cocaine. While it is true that a large amount of cocaine combined with a large amount of money could support an inference that the cocaine was possessed with intent to distribute, here, the large amount of cocaine was inadmissible. Thus, the large amount of cocaine could not be used to infer Mr. Lee's intent with regards to anything.

Unlike the cocaine, the State did not present any evidence regarding whether or not 12 pills of methadone was a large amount beyond an amount necessary for personal use. Thus, absent the cocaine, the State had insufficient evidence to rely upon to make the argument that Mr. Lee possessed a large enough amount of methadone to support the inference that it was possessed with the intent to distribute.

A fact finder is permitted to draw inferences from the facts, so long as those inferences are rationally related to the proven fact. *State v. Bencivenga*, 137 Wn.2d 703, 707, 974 P.2d 832 (1999). The existence of a fact cannot rest upon guess, speculation or conjecture. *State v. Carter*, 5 Wn.App. 802, 807, 490 P.2d 1346 (1971), *review denied*, 80 Wn.2d 1004 (1972).

Here, the State presented insufficient admissible evidence to support any inference as to Mr. Lee's intent with regard to the methadone pills. No drug paraphernalia was found, no evidence that Mr. Lee was intending to sell the methadone was found, and Special Agent Hunt testified that he had no evidence indicating that the money found in Mr. Lee's wallet had been used or had intended to be used for drug transactions. RP 149. Mr. Lee did possess what some might consider a large amount of money, but there was absolutely no evidence presented with regards to Mr. Lee's intent for the money beyond Mr.

Lee's testimony that it was his rent money. Any inference that the money was possessed as the proceeds of drug sales would have been pure guess, speculation, and conjecture.

The State presented insufficient evidence to support the inference that Mr. Lee possessed the methadone with the intent to distribute it. This court should vacate Mr. Lee's conviction for unlawful possession of methadone with intent to distribute and remand for dismissal with prejudice.

**3. The State presented insufficient evidence to convict Mr. Lee of forgery where the State presented no admissible evidence that Mr. Lee possessed the counterfeit money with the intent to injure or defraud.**

Mr. Lee was convicted of forgery in violation of RCW 9A.60.020(1)(a)(b). CP 190-203. Under RCW 9A.60.020(1)(a)(b), "(1) A person is guilty of forgery if, with intent to injure or defraud: (a) He falsely makes, completes, or alters a written instrument or; (b) He possesses, utters, offers, disposes of, or puts off as true a written instrument which he knows to be forged."

Here, the State presented no evidence that Mr. Lee made, completed, or altered a written instrument, only that Mr. Lee possessed a written instrument. Mr. Lee testified that he knew the \$20 bills in his wallet were counterfeit (RP 280), but that he intended to use the fake bills as birthday invitations for his children's birthday parties. RP 254.

counterfeit bills found in Mr. Lee's wallet was admissible under ER 401, ER 402, and "especially" ER 404(b) as probative of Mr. Lee's "intent to deliver, as well as to the forgery." RP 97. The trial court's ruling admitting the evidence was in error.

i. The evidence of the prior use of the serial numbers was irrelevant under ER 401.

ER 401 defines relevant evidence as "evidence having 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."

"A trial court's relevancy determinations [under ER 401] are reviewed for manifest abuse of discretion." *State v. Gregory*, 158 Wn.2d 759, 835, 147 P.3d 1201 (2006).

A trial court abuses its discretion when its decision is "manifestly unreasonable or based on untenable grounds." *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn.App. 92, 99, 38 P.3d 1040 (2002). A court's decision is manifestly unreasonable

if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

*Grandmaster Sheng-Yen Lu*, 110 Wn.App. at 99, 38 P.3d 1040.

Here, there was no evidence that Mr. Lee was in any way

connected to any of the past incidents of counterfeit bills being passed. The fact that someone, at some point post-2008, had used counterfeit bills somewhere in Washington, Oregon, and Arizona was utterly irrelevant to whether or not Mr. Lee committed any of the crimes charged. Without a link between Mr. Lee and the prior instances of counterfeit bill use, such evidence was not of consequence to the determination of any issue before the jury.

The trial court abused its discretion in admitting the evidence of the prior use of the counterfeit serial numbers because there were no facts in the record to establish the relevance of the evidence.

- ii. Because the evidence of the prior use of the serial numbers on counterfeit bills was irrelevant, it was inadmissible under ER 402.

Under ER 402, “All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.”

As discussed above, the evidence that some unknown person or persons in the States of Washington, Oregon, and Arizona had passed counterfeit bills using the same serial numbers as the bills found in Mr. Lee’s wallet was irrelevant to any issue before the jury since Mr. Lee was not connected to these events in any way. Thus, under ER 402, the evidence was not relevant and not admissible.

iii. The trial court erred in admitting the evidence under ER 404(b).

Under ER 404(b), “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”

The State did not file any motion to have the evidence of the prior use of counterfeit bills bearing the same serial number as the bills in Mr. Lee’s wallet admitted under ER 404(b). Despite this, the trial court indicated that in denying Mr. Lee’s motion to exclude such evidence, the trial court was “really looking at 404(b).” RP 97. The trial court’s reliance on ER 404(b) as a basis for the admission of this evidence of prior use of the serial numbers was an abuse of discretion. Further, the trial court failed to conduct the requisite procedural requirements to admit evidence under ER 404(b).

A. *The trial court failed to follow the requisite procedure to admit evidence under ER 404(b).*

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

evidence may have upon the fact-finder. *Saltarelli*, 98 Wn.2d at 362-66, 655 P.2d 697. Further, to avoid error, the trial court must identify the purpose of the evidence and conduct the balancing test on the record. *State v. Jackson*, 102 Wn.2d 689, 693-94, 689 P.2d 76 (1984). Doubtful cases should be resolved in favor of the defendant. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

Regardless of relevance or probative value, evidence that relies on the propensity of a person to commit a crime cannot be admitted to show action in conformity therewith.

*State v. Wade*, 98 Wn.App. 328, 333-334, 989 P.2d 576 (1999).

The trial court held that evidence of the prior use of the serial numbers on counterfeit bills was relevant to proving the intent to deliver the drugs as well as to forgery. RP 97. The trial court did not identify how the evidence was relevant to the forgery, did not identify the purpose for which the evidence was being admitted, and failed to conduct any balancing analysis on the record and failed to clearly identify the purpose of the evidence.

B. *The trial court abused its discretion in admitting evidence of the prior use of the serial numbers under ER 404(b).*

A trial court's ruling under ER 404(b) will not be disturbed absent a manifest abuse of discretion such that no reasonable judge would have ruled as the trial court did. *State v. Mason*, 160 Wn.2d 910, 933-934, 162 P.3d 396 (2007), *cert. denied* 128 S.Ct. 2430, 171 L.Ed.2d 235 (2008).

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“In weighing the admissibility of the evidence to determine whether the danger of unfair prejudice substantially outweighs probative value, a court considers (1) the importance of the fact that the evidence intends to prove, (2) the strength of inferences necessary to establish the fact, (3) whether the fact is disputed, (4) the availability of alternative means of proof, and (5) the potential effectiveness of a limiting instruction.” *State v. Kendrick*, 47 Wn.App. 620, 628, 736 P.2d 1079, *review denied* 108 Wn.2d 1024 (1987).

“Evidence can be admitted under ER 404(b) only if the trial court finds the evidence serves a legitimate purpose, *is relevant to prove an element of the crime charged*, and, on balance, the probative value of the evidence outweighs its prejudicial effect.” *State v. DeVries*, 149 Wn.2d 842, 848, 72 P.3d 748 (2003), *citing State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

Substantial prejudicial effect is inherent in ER 404(b) evidence. *Lough*, 125 Wn.2d at 863, 889 P.2d 487. Therefore, prior bad acts are admissible only if their probative value is substantial. *Lough*, 125 Wn.2d at 863, 889 P.2d 487.

Given that there was no evidence that Mr. Lee was involved with the prior forgery incidents, those incidents have no relevance to the charges against Mr. Lee in this case. The evidence of prior acts of forgery by unknown persons did not tend to prove any fact in this case,

much less any element of any crime charged. Because there was no evidence suggesting that Mr. Lee was involved with any prior forgeries, the evidence was not relevant to establishing and of the common ER 404(b) purposes such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The only possible inference such evidence would support would be the precise propensity inference ER 404(b) permits. The jury would most likely draw one of two, or both, conclusion from the introduction of the extraneous evidence: (1) that Mr. Lee was somehow involved in those prior acts of forgery and, therefore, intended to use the counterfeit bills found in his possession by Officer Walsh to “injure or defraud”; or (2) that people who possess counterfeit bills are criminal types who commit crimes and, therefore, Mr. Lee intended to commit fraud and deliver the drugs in this case.

Given that the evidence of the prior forgeries lacked any probative value to the charges in this case, and given that the evidence was highly prejudicial in that the jury would assume Mr. Lee was a criminal type or had committed forgery before, the trial court abused its discretion in admitting the evidence under ER 404(b).

*b. Without the evidence of the prior unrelated forgeries, the State had no evidence of Mr. Lee's intent regarding the money in his wallet.*

Aside from the irrelevant and inadmissible evidence relating to

prior forgeries committed by unknown parties, the State had no evidence to establish Mr. Lee's intent regarding the counterfeit bills in his pocket. Thus, the State had insufficient admissible evidence to met its burden of establishing that Mr. Lee possessed the bills with the intent to injure or defraud.

*c. Even if the evidence of the prior forgeries was admissible under ER 401, 402, and 404(b), the State still presented insufficient evidence to establish Mr. Lee's intent regarding the bills in his pocket.*

As discussed above, the existence of a fact cannot rest upon guess, speculation or conjecture. *Carter*, 5 Wn.App. at 807, 490 P.2d 1346. Assuming, *arguendo*, that the evidence regarding the prior unrelated acts of forgery was properly admitted, the State still presented no evidence linking Mr. Lee to the prior acts of forgery involving counterfeit bills with the same serial numbers as the bills found in his wallet. Thus, the evidence was irrelevant as to Mr. Lee's intent with regards to the bills in his wallet. Thus, any conclusion that Mr. Lee possessed the counterfeit bills with the intent to injure or defraud would be pure guess, speculation, and conjecture.

The State presented insufficient admissible evidence to establish Mr. Lee's intent with regards to the counterfeit bills in his wallet, much less that his intent was to injure or defraud. This court should vacate Mr. Lee's conviction of forgery and remand for dismissal with

prejudice.

**4. Cumulative error deprived Mr. Lee of his right to a fair trial.**

Where multiple errors occurred at the trial level, a defendant may be entitled to a new trial if cumulative errors resulted in a trial that was fundamentally unfair. Courts apply the cumulative error doctrine when several errors occurred at the trial court level, but none alone warrants reversal. Rather, the combined errors effectively denied the defendant a fair trial.

*State v. Rooth*, 129 Wn.App. 761, | 75, 121 P.3d 755 (2005).

Where the defendant cannot show prejudicial error occurred, cumulative error cannot be said to have deprived the defendant of a fair trial. *State v. Stevens*, 58 Wn.App. 478, 498, 794 P.2d 38, review denied, 115 Wn.2d 1025, 802 P.2d 128 (1990).

A fair trial in a fair tribunal is a basic requirement of due process. *Caperton v. A.T. Massey Coal Co., Inc., et al.*, --- U.S.---, 129 S.Ct 2252, 2259, 173 L.Ed.2d 1208 (2009), quoting *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955). Where a defendant is denied the right to a fair trial, the proper remedy is reversal of the conviction and remand for a new trial. *State v. McDonald*, 96 Wn.App. 311, 979 P.2d 857 (1999), affirmed 143 Wn.2d 506, 22 P.3d 791 (2001).

a. *The trial court erred in admitting the evidence of the prior unrelated forgeries.*

“[T]he improper introduction of evidence may violate due

process if it renders a trial fundamentally unfair.” *Alberni v. McDaniel*, 458 F. 3d 860, 865 (2006), *cert. denied* 549 U.S. 1287, 127 S.Ct. 1834, 167 L.Ed.2d 333 (2007), *see also Brinegar v. U.S.*, 338 U.S. 160, 174, 69 S.Ct. 1302 (1949) (“Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.”

As discussed above, the trial court erred in admitting the irrelevant yet highly prejudicial evidence relating to prior acts of forgeries involving counterfeit bills with the same serial numbers as the bills found in Mr. Lee’s wallet. This improperly admitted evidence highly prejudiced Mr. Lee in that it encouraged the jury to make improper propensity references about Mr. Lee’s intent regarding the counterfeit money in his wallet. The introduction of this evidence rendered Mr. Lee’s trial fundamentally unfair, especially when considered in combination with the error discussed below.

- b. The trial court’s failure to give the jury a limiting instruction regarding the evidence of the prior unrelated forgeries deprived Mr. Lee of a fair trial.*

Where a trial court permits introduction of evidence under ER 404(b), the trial court is required to give the jury a limiting instruction regarding the evidence. *State v. Russell*, --- Wn.App. ---, 225 P.3d 478, 483 (2010), *citing State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). The burden to give this instruction is on the trial court, and the trial court must give the instruction whether or not defense counsel reminds the court an instruction is necessary. *Russell*, -- Wn.App. ---, 225 P.3d at 483, *citing Foxhoven*, 161 Wn.2d at 175, 163 P.3d 786.

Here, the trial court failed to give the jury a limiting instruction regarding the evidence of the prior forgeries. This left the jury free to speculate as to the relevance and impact of this evidence and, as discussed above, to make impermissible propensity inferences. The failure of the trial court to give a limiting instruction prejudiced Mr. Lee and deprived him of a fair trial.

These two errors, admission of irrelevant and highly prejudicial evidence and the failure of the court to properly instruct the jury as to the permissible use of the evidence, combined to deprive Mr. Lee of a fair trial. Without direction regarding the permissible uses of the evidence of the prior unrelated forgeries, the jury was free to make the inevitable yet forbidden propensity reference that Mr. Lee intended to use the bills in his wallet to injure or defraud. Further, the jury could make the propensity inference that because Mr. Lee was going to use

the bills for criminal purposes, he intended to distribute the methadone and cocaine because he was a criminal-type person engaged in criminal activities.

This court should vacate Mr. Lee's convictions and remand for a new trial on all counts.

#### **V. CONCLUSION**

For the reasons stated above, this court should vacate Mr. Lee's convictions and remand his case for dismissal of the drug charges and forgery charge with prejudice. Alternatively, this court should vacate Mr. Lee's convictions and remand for a new trial on the basis that Mr. Lee's right to a fair trial was violated by the introduction of highly prejudicial, yet irrelevant, evidence without a proper limiting instruction.

DATED this 6<sup>th</sup> day of May, 2010.

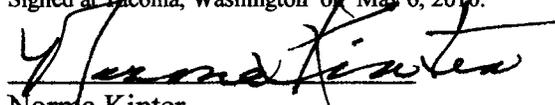
Respectfully submitted,



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**AMENDED CERTIFICATE OF SERVICE**

The undersigned certifies that on May 6, 2010, she delivered in person to the: Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Avenue South, Tacoma, Washington 98402, and by United States Mail to appellant, Darrell M. Lee, 955317, Washington State Penitentiary, 1313 North 13<sup>th</sup> Avenue, Walla Walla, Washington 99362, true and correct copies of this Opening Brief. 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 May 6, 2010.

  
Norma Kinter

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