IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DARRELL MONTAE LEE, Appellant.	No. 39917-2-II PART PUBLISHED OPINION

Worswick, J. — A jury convicted Darrell Montae Lee of possession of methadone with intent to deliver, possession of cocaine, driving with a suspended license, two counts of bail jumping, and forgery. Lee appeals, arguing (1) the cocaine should have been suppressed under *Arizona v. Gant*,[1] (2) there was insufficient evidence to convict him of possession of methadone with intent to deliver, (3) there was insufficient evidence to convict him of forgery, and (4) cumulative error deprived him of a fair trial. We affirm, holding that there was sufficient evidence to support the verdicts and that Lee failed to preserve the suppression issue for review.

[1] ___ U.S. ___, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009).

FACTS

On July 10, 2008, at 2:00 am, Tacoma Police Officer Douglas Walsh stopped Lee for speeding. Officer Walsh recognized Lee and believed that Lee had a suspended driver's license. After verifying this fact, Officer Walsh arrested Lee and searched him incident to arrest, finding 12 methadone pills. Officer Walsh also found $1,295 in cash in Lee's front right pocket and $540 in counterfeit $20 bills in Lee's wallet.

After searching Lee's person, Office Walsh placed Lee in his patrol car. Officer Walsh then searched the interior of Lee's vehicle incident to arrest. Officer Walsh opened the sliding door covering the vehicle's sunroof and inside found a large crack cocaine rock.

The State charged Lee with unlawful possession of methadone and cocaine with intent to deliver (counts I and II), driving with a suspended license (count III), two counts of bail jumping (counts IV and VI), and forgery (count V). On September 23, 2009, the trial court conducted a CrR 3.5 hearing to determine the admissibility of Lee's statements on arrest. Lee's trial counsel did not move to suppress any of the physical evidence against Lee.

Before trial, Lee moved to exclude testimony regarding the counterfeit money. The testimony was expected to show that bills with the same serial numbers as those in Lee's possession had been passed in Washington, although there was no evidence connecting such incidents to Lee. Lee argued that the prejudice of this evidence would exceed any probative value. The trial court found that the testimony was relevant, that it was "very prejudicial," but also that it was "very probative" of "the intent to deliver, as well as . . . the forgery." 2 Verbatim Report of Proceedings at 97.

At trial, Officer Walsh testified about the circumstances that showed Lee's intent to deliver cocaine and methadone. Officer Walsh testified that Lee's intent was shown by (1) the size of the crack cocaine rock, which was larger than the size usually purchased for personal use; (2) the methadone on Lee's person (with no reference as to whether the amount was small enough for personal use); (3) the fact that Lee had multiple narcotics; (4) the large amount of money in Lee's possession; and (5) the lack of any drug paraphernalia.

Also at trial, the State called Special Agent Timothy Hunt of the United States Secret Service. Agent Hunt testified that the $540 in Lee's possession was counterfeit. Over Lee's objection, Agent Hunt testified that bills with the same serial numbers as those in Lee's possession had been passed in Washington, Arizona, and Oregon. Agent Hunt also testified, without objection by Lee, that in his personal experience, counterfeit money was often used to purchase illegal drugs. Lee testified that he had planned to use the counterfeit money to make invitations for his childrens' birthday party.

The trial court gave jury instructions on unlawful possession of cocaine and methadone, instructing the jury to consider these crimes as lesser included offenses. The jury found Lee guilty of all charges except for unlawful possession of cocaine with intent to deliver, but found him guilty of the lesser included offense of unlawful possession of cocaine.

ANALYSIS

I. Suppression of Evidence

Lee asserts that the warrantless search of his vehicle violated the Fourth Amendment to the United States Constitution under *Arizona v. Gant*, ___ U.S. ___, 129 S. Ct. 1710, 1723-24,

173 L. Ed. 2d 485 (2009). He also argues, without citing on-point state law, that the search violated article I, § 7 of the Washington Constitution. The State contends that Lee waived any objection to the validity of the search of his vehicle by failing to raise a motion to suppress at trial. In his brief, Lee did not address whether he preserved this issue for review, but at oral argument Lee argued that we should address the validity of the search for the first time on appeal under RAP 2.5(a).

Our Supreme Court has recently addressed issue preservation in the context of search and seizure. In *State v. Robinson*, 171 Wn.2d 292, 306-07, ___ P.3d ___ (2011), police conducted warrantless vehicle searches that were arguably illegal under *Gant*, 129 S. Ct. at 1723, and *State v. Patton*, 167 Wn.2d 379, 394-95, 219 P.3d 651 (2009). And the trials for both defendants concluded before *Gant* or *Patton* were decided. *Robinson*, 171 Wn.2d at 298, 300. Under these facts, *Robinson* announced a new rule:

> [P]rinciples of issue preservation do not apply where the following four conditions are met: (1) a court issues a new controlling constitutional interpretation material to the defendant's case, (2) that interpretation overrules an existing controlling interpretation, (3) the new interpretation applies retroactively to the defendant, and (4) the defendant's trial was completed prior to the new interpretation.

Robinson, 171 Wn.2d at 305. Because the facts of *Robinson* met all four conditions, our Supreme Court held that issue preservation was "simply not applicable" there. *Robinson*, 171 Wn.2d at 306. The court thus remanded the cases on review for suppression hearings. *Robinson*, 171 Wn.2d at 307.

Here, in contrast, Lee's trial began approximately five months after the United States Supreme Court decided *Gant*. Lee therefore fails the fourth prong of the *Robinson* test and

ordinary principles of issue preservation apply. 171 Wn.2d at 305.

Under RAP 2.5(a), a party may raise manifest error affecting a constitutional right for the first time on appeal. "A failure to move to suppress evidence, however, constitutes a waiver[2] of the right to have it excluded." *State v. Mierz*, 72 Wn. App. 783, 789, 866 P.2d 65, 875 P.2d 1228 (1994) (citing *State v. Tarica*, 59 Wn. App. 368, 372-73, 798 P.2d 296 (1990), *overruled on other grounds by State v. McFarland*, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995)). Because Lee did not move to suppress the cocaine seized from his vehicle under *Gant*, he did not preserve the issue for review and we do not address it for the first time on appeal.[3]

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

II. Sufficiency of Evidence—Methadone

Lee next argues that there was insufficient evidence to convict him of possession of methadone with intent to deliver. He claims that the State presented insufficient evidence of the

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[2] We recognize that in some contexts, the word "waiver" may refer to a voluntary waiver of a known right. *See, e.g., Robinson*, 171 Wn.2d at 305. But in *Tarica*, the court apparently used the term "waiver" to refer to a failure to preserve an issue, not a voluntary waiver of a known right. *See* 59 Wn. App. at 373. The *Mierz* court's holding was based on *Tarica*. 72 Wn. App. at 789. As such, the rule we cite from *Mierz* is more accurately characterized as a matter of issue preservation, not waiver. We do not hold that Lee knowingly and voluntarily waived his rights under *Gant*. Our decision that Lee may not raise *Gant* for the first time on appeal is based solely on his failure to preserve the issue for review.

[3] At oral argument, we asked Lee's counsel why Lee did not raise the issue of ineffective assistance of trial counsel for failure to move to suppress under *Gant*. Counsel replied that the decision not to raise ineffective assistance on direct appeal was tactical, based on the notion that it is more advantageous to save this issue for collateral attack. We therefore do not address the issue.

intent element of this charge. We disagree.

In evaluating the sufficiency of the evidence, we review the evidence in the light most favorable to the State. *State v. Drum*, 168 Wn.2d 23, 34, 225 P.3d 237 (2010). "The relevant question is 'whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt.'" *Drum*, 168 Wn.2d at 34-35 (quoting *State v. Wentz*, 149 Wn.2d 342, 347, 68 P.3d 282 (2003)). A claim of insufficient evidence admits the truth of the State's evidence and all reasonable inferences therefrom. *Drum*, 168 Wn.2d at 35.

RCW 69.50.401(1) prohibits (1) unlawful possession (2) of a controlled substance (3) with the intent to deliver. *State v. O'Connor*, 155 Wn. App. 282, 290, 229 P.3d 880 (2010). Mere possession of a controlled substance is not enough to show intent to deliver. *State v. Nyegaard*, 154 Wn. App. 641, 648, 226 P.3d 783 (2010). The State must introduce evidence of at least one other fact suggesting an intent to deliver, such as sale paraphernalia or large amounts of cash. *O'Connor*, 155 Wn. App. at 290. Sale paraphernalia include such items as scales, cell phones, and address lists. *State v. Slighte*, 157 Wn. App. 618, 627 n.13, 238 P.3d 83 (2010).

Here, Officer Walsh testified that the size of the rock of cocaine found was greater than what would normally be purchased for personal use. He did not testify as to whether the amount of methadone found was too great for personal use. Lee argues that because the cocaine should have been excluded, and because there was no evidence about the amount of methadone, there was insufficient evidence to show his intent to deliver. But because Lee did not preserve the search of his vehicle for review, his argument that the cocaine should have been suppressed fails.

Even without the cocaine evidence however, there was sufficient evidence of Lee's intent

to deliver. Lee possessed 12 methadone pills, $1,295 in cash, and $540 in counterfeit cash. Moreover, there was evidence at trial that counterfeit money is often used in illegal drug transactions. Although the State need show only one factor beyond possession to prove intent to deliver, here the State proved multiple factors. The large amount of cash and the counterfeit money were sufficient facts from which the jury could infer Lee's intent to deliver. Based on these additional factors beyond possession, a rational jury could have found Lee's intent to deliver beyond a reasonable doubt. Lee's claim on this point fails.

III. Sufficiency of Evidence—Forgery

Lee next argues that the State failed to present sufficient evidence to convict him of forgery. He claims that the evidence was insufficient to show his intent to injure or defraud. We disagree.

Under RCW 9A.60.020(1)(b), a person is guilty of forgery if (1) with intent to injure or defraud, (2) he possesses a written instrument (3) that he knows to be forged. Intent may be inferred from the surrounding facts and circumstances if it is plainly indicated as a matter of logical probability. *State v. Esquivel*, 71 Wn. App. 868, 871, 863 P.2d 113 (1993) (quoting *State v. Woods*, 63 Wn. App. 588, 591, 821 P.2d 1235 (1991)).

Evidence admitted at trial that (1) counterfeit money is often used to purchase illegal drugs; (2) Lee possessed illegal drugs; (3) the counterfeit money was discovered in Lee's wallet, while the actual currency was located in a separate pocket; and (4) Lee was discovered with this evidence at 2:00 am, is sufficient to prove that Lee possessed the counterfeit bills with the intent to defraud. Lee's claim on this point fails.

IV. ER 401

Lee next argues that Agent Hunt's testimony that counterfeit bills with the same serial numbers as those in Lee's possession had been passed before was inadmissible under ER 401. We disagree.

Under ER 401, evidence is relevant when it makes a material fact more or less probable. The threshold for relevance is very low and even minimally relevant evidence is admissible. *State v. Gregory*, 158 Wn.2d 759, 835, 147 P.3d 1201 (2006). Evidence that is not relevant is inadmissible. ER 402. We review a trial court's relevancy rulings for manifest abuse of discretion. *Gregory*, 158 Wn.2d at 835. A trial court abuses its discretion when it adopts a position that no reasonable person would take, when it applies the wrong legal standard, or when it relies on unsupported facts. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583 (2010). Evidentiary error is not harmless if there is a reasonable probability that but for the error, the outcome of the trial would have differed. *In re Det. of Post*, 170 Wn.2d 302, 314, 241 P.3d 1234 (2010) (quoting *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001) (internal quotation marks omitted).

The testimony here was relevant. That other people had used bills with the same serial number made it more probable that the bills were counterfeit. While this was unequivocally demonstrated by other evidence, the cumulative nature of the testimony at issue did not render it irrelevant. Lee's claim on this point fails.

Any error under ER 401, moreover, was likely harmless. Arguably the testimony at issue could have prejudiced Lee by encouraging the jury to assume that because others had passed

similar counterfeit bills, Lee intended to as well. But as we analyzed above, there was sufficient evidence of Lee's intent to defraud without considering the testimony at issue. As such, there is no reasonable probability that, but for the testimony at issue, the outcome of the trial would have differed. Any error under ER 401 was therefore harmless.

V. ER 404(b)

Lee next argues that assuming Agent Hunt's testimony about bills with the same serial numbers being passed was relevant, it was inadmissible under ER 404(b). He also argues that the trial court erred by failing to instruct the jury sua sponte that it could not infer that Lee had a criminal propensity from the evidence that the same serial numbers had been passed on other counterfeit bills.

ER 404(b) provides, "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." By its plain words, ER 404(b) does not ban evidence unless it is evidence of other crimes, wrongs, or acts offered to show a person's character. Although the trial court found the testimony admissible under ER 404(b), that rule does not apply because the evidence was not evidence about "other acts" by Lee. Lee's claim that the evidence was inadmissible under ER 404(b) therefore fails.

Furthermore, as Lee's counsel conceded at oral argument, our Supreme Court has held that trial courts are not required to give ER 404(b) limiting instructions sua sponte. *State v. Russell*, 171 Wn.2d at 118, 123-24, 249 P.3d 604 (2011). Thus, even if the evidence at issue was ER 404(b) evidence, the trial court would not have erred by failing to give a limiting instruction sua sponte.

VI. Cumulative Error

Lee finally argues that cumulative error deprived him of a fair trial. We disagree. The cumulative error doctrine applies when several errors occurred at the trial court that would not merit reversal standing alone, but in aggregate effectively denied the defendant a fair trial. *State v. Hodges*, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003). The defendant bears the burden of proving an accumulation of error of such magnitude that retrial is necessary. *State v. Yarbrough*, 151 Wn. App. 66, 98, 210 P.3d 1029 (2009). In light of our conclusion that no errors occurred, Lee's claim on this point fails.

Affirmed.

Worswick, J.

We concur:

Penoyar, C.J.

Hunt, J.