Supreme Court No. 98660-6
(COA No. 36410-1-III)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DAVID MULLINS,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR STEVENS COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

David Mullins petitions this Court for review of the Court of Appeals opinion in *State v. Mullins*, No. 36410-1-III. RAP 13.1(a), 13.3(a)(1), (b), 13.4(b). The opinion (filed May 14, 2020) is attached.

B. ISSUES PRESENTED FOR REVIEW

1. Two convictions violate the constitutional prohibition against double jeopardy if they are the same in fact and law. This Court has repeatedly held that courts must apply that test based on the facts as charged and proven at trial and may not divide an individual's conduct into different acts in order to justify separate convictions. Should this Court accept review because the Court of Appeals disregarded this Court's binding precedent and dissected Mr. Mullins's conduct into superficially separate acts in order to affirm his convictions for resisting arrest and obstructing a law enforcement officer, in violation of double jeopardy? RAP 13.4(b)(1), (3).

2. A defendant has a constitutional right to be present at trial and, if he is absent, a court must indulge in every reasonable presumption against voluntary absence and waiver of the right to presence. Here, the court knew Mr. Mullins was feeling ill, yet the court presumed Mr. Mullins voluntarily absented himself from the trial and proceeded without him. Should this Court accept review because the court applied the wrong

presumption and violated Mr. Mullins's constitutional right to be present, contrary to public policy and opinions of this Court? RAP 13.4(b)(1), (3), (4).

3. A defendant has the right to have the jury determine his guilt based on admissible evidence, and the court errs when it admits improper evidence over a defense objection. Here, the court overruled numerous defense objections and admitted improper evidence, including (1) improper and speculative opinion testimony, (2) hearsay evidence that failed to conform to an exception to the rule prohibiting hearsay, and (3) irrelevant and prejudicial evidence. Should this Court accept review where the admission of this testimony violated numerous rules of evidence and denied Mr. Mullins his right to a fair trial and to have the jury determine guilt based on admissible evidence? RAP 13.4(b)(1)-(4).

C. STATEMENT OF THE CASE

David Mullins has struggled with drug addiction and has allegedly committed several property crimes as a result. RP 265-66. In April of 2018, Deputy Mark Coon received a tip regarding a potential use of a $100 counterfeit bill at SpoKo Fuel. RP 132-34. A day or two after he began investigating this allegation, he happened to run into Mr. Mullins, the alleged user of the currency, in a Safeway. RP 143-44. Because he believed he had probable cause to arrest Mr. Mullins for another unrelated

crime, he told him he was under arrest and ordered him to put his hands behind his back. RP 147.

Mr. Mullins initially complied, but then slipped out of Deputy Coon's grip and ran away. RP 147-48. Deputy Coon and another officer caught him within two minutes; he was curled up next to the steps of a house. RP 148-51. The two arrested Mr. Mullins and then found "what appeared to be money" underneath the steps. RP 151. According to the deputy, the bills "appeared to be counterfeit." RP 156.

The State charged Mr. Mullins with four crimes: (1) forgery, for the alleged counterfeit money found under the steps; (2) resisting arrest, for running away from Deputy Coon; (3) obstructing a law enforcement officer, for running away from Deputy Coon; and (4) forgery, for the alleged counterfeit money used at SpoKo Fuel. CP 29, 32-34; RP 238-45. Mr. Mullins attended multiple hearings, but after the jury was selected on the first day of trial, he did not return following the lunch recess. RP 117. He called the court administrator to say he was sick and going to the hospital, but she told him he had to come to court first. RP 118. Mr. Mullins then called and asked his trial attorney to pick him up, but he was not at the pickup location when counsel arrived. RP 123. Despite knowing Mr. Mullins was ill, the court found the absence was voluntary and ordered trial to proceed without him. RP 125-26.

The State's main witness, Deputy Coon, testified in Mr. Mullins's absence that afternoon. RP 127-59. Throughout the trial, the court overruled Mr. Mullins's numerous objections to witnesses giving their opinions about whether the money at issue was fake. RP 134, 139-45, 154-56, 169-71, 205.

The jury found Mr. Mullins not guilty on count one, but guilty on counts two, three, and four. CP 94-97.

D. ARGUMENT

1. The Court of Appeals misapplied this Court's opinions and affirmed Mr. Mullins's convictions for resisting arrest and obstructing a law enforcement officer in violation of the prohibition against double jeopardy.

Multiple punishments for a single act violate double jeopardy, absent evidence the legislature specifically intended to punish separately two offenses based on the same conduct. U.S. Const. amends. V, XIV; Const. art. I, § 9; *State v. Freeman*, 153 Wn.2d 765, 777, 108 P.3d 753 (2005). The same evidence test requires the court to determine if the two offenses are the same in fact and law. *State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995) (citing *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932)). Two offenses are the same in fact and law if the evidence required to support a conviction on one charge is sufficient to warrant a conviction upon the other. *Freeman*, 153 Wn.2d

at 772. If the offenses are the same in fact and law, a conviction for both violates a defendant's right against double jeopardy, absent a clear legislative intent to the contrary. *Id.*

A reviewing court must consider whether the offenses are the same in fact and law not in the abstract but "as charged and proved" at the trial. *Freeman*, 153 Wn.2d at 777. Moreover, prosecutors may not "divide a defendant's conduct into segments in order to obtain multiple convictions." *State v. Jackman*, 156 Wn.2d 736, 749, 132 P.3d 136 (2006).

Neither the resisting arrest statute nor the obstruction statute expressly authorizes multiple punishments for a single act. RCW 9A.76.020, 9A.76.040. Here, as charged and proven at the trial, the prosecutor expressly relied on the same conduct – Mr. Mullins's act of running away from Deputy Coon when Deputy Coon was trying to arrest him – as the basis for both the resisting arrest and obstructing charges. RP 243-44. The State urged the jury to convict Mr. Mullins of resisting arrest because Deputy Coon "attempted to arrest David Mullins in Safeway and Mr. Mullins got away." RP 243. The State urged the jury to convict Mr. Mullins of obstruction because Deputy Coon "attempted to arrest him and David Mullins led him on a chase." RP 244. The State relied on the same evidence and the same act to prove each separate offense.

The Court of Appeals nonetheless rejected Mr. Mullins's double jeopardy challenge. Contrary to this Court's specific directive in *Jackman* warning against dividing an individual's conduct into segments, the court did just that. 156 Wn.2d at 749. The court parsed the deputy's trial testimony to create two separate incidents from Mr. Mullins's single act of running from the arresting officer. Opinion at 7. The court found Mr. Mullins resisted arrest when he "tensed up and jerked his arms away" from the officer and that he obstructed a law enforcement officer when he "ran and attempted to hide" from the police. Opinion at 7.

The dividing of conduct into separate segments to justify two different convictions is exactly the sort of analysis this Court disapproved of in *Jackman*. 156 Wn.2d at 749. The court erred in dissecting this single, brief episode in which Mr. Mullins ran from Deputy Coon, into separate segments instead of viewing it as a whole.

The jury convicted Mr. Mullins of both resisting arrest and obstructing a law enforcement officer for Mr. Mullins's act of running away from Deputy Coon when he was trying to arrest him. Because the same facts and law provide for both convictions, they violate double jeopardy. U.S. Const. amend. V; Const. art. I, § 9. The Court of Appeals affirmed both convictions, in violation of double jeopardy and this Court's precedent. This Court should accept review. RAP 13.4(b)(1), (3).

2. The court violated Mr. Mullins's constitutional right to be present at his trial, and the Court of Appeals opinion conflicts with opinions of this Court.

The state and federal constitutions guarantee an individual the right to be present at his or her trial. U.S. Const. amend. VI; Const. art. I, § 22. A court violates a defendant's right to be present at his trial when it proceeds in a defendant's absence without the court properly determining the defendant knowingly and voluntarily waived his right to be present. *State v. Thurlby*, 184 Wn.2d 618, 624, 359 P.3d 793 (2015). The court may not presume a defendant knowingly and voluntarily waived his presence. In fact, the court must presume the opposite. *State v. Garza*, 150 Wn.2d 360, 367, 77 P.3d 347 (2003); *see also Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 2d 1461 (1938) (noting courts must "indulge every reasonable presumption against waiver of fundamental constitutional rights") (internal quotations omitted).

To decide whether a defendant's absence is voluntary under the totality of the circumstances, the court must: (1) make a sufficient inquiry into the circumstances of a defendant's absence to justify finding whether it was voluntary; (2) make a preliminary finding of voluntariness where justified; and (3) afford the defendant an adequate opportunity to explain his absence when he returns. *Garza*, 150 Wn.2d at 367 (citing *State v. Thomson*, 123 Wn.2d 877, 880-81, 872 P.2d 1097 (1994)).

Here, the court made a preliminary finding of voluntariness without justification. The court presumed Mr. Mullins was absent through his own doing. RP 118-20, 124-26. However, *Garza* requires the opposite presumption. The court must instead presume the defendant is absent due to something outside of his control. *Garza*, 150 Wn.2d at 369. And here, the court had ample reason to support that presumption: the court was aware Mr. Mullins was ill. RP 118-19. Yet the court proceeded without checking any hospitals or doctor offices.

This Court's decision in *Thurlby* is instructive. In *Thurlby*, the court twice contacted local hospitals and jails before concluding the defendant was knowingly and voluntarily absent. 184 Wn.2d at 626. Here, the court made no such efforts. Instead, all the court knew was that Mr. Mullins himself had not informed the court that he was in the hospital. RP 125. But the court knew that Mr. Mullins had informed the court administrator and his own attorney that he was ill. RP 118-19.

The Court of Appeals acknowledged both Mr. Mullins and his attorney told the court he was ill but rejected Mr. Mullins's challenge, noting the court gave Mr. Mullins an opportunity to explain his absence after he returned. Opinion at 9. But the court had already misapplied the presumption and assumed Mr. Mullins voluntarily absented himself

without justification. This also ignores the fact Mr. Mullins did, in fact, explain his absence: he was sick.

The court failed to presume that Mr. Mullins was absent due to events outside of his control, despite its knowledge Mr. Mullins was ill. Instead, the court inverted the required presumption and assumed Mr. Mullins was voluntarily absent from his trial. Thus, the court violated Mr. Mullins's right to be present. U.S. Const. amends. VI, XIV; Const. art. I, § 22; *Garza*, 150 Wn.2d at 371. This Court should accept review. RAP 13.4(b)(1), (3).

3. Numerous evidentiary errors deprived Mr. Mullins of a fair trial and denied him his right to have the jury find the facts based on relevant, admissible evidence.

The court committed multiple evidentiary errors over Mr. Mullins's objections, including: improper admission of opinion testimony from two separate witnesses that the money was counterfeit; improper admission of hearsay statements that the money was counterfeit; and admission of irrelevant, prejudicial testimony regarding Mr. Mullins's manner of dress. The admission of this testimony violated numerous evidentiary rules and deprived Mr. Mullins of his right to a fair trial and to have the jury determine the facts based on proper evidence. This Court should accept review.

a. Deputy Coon and Mr. Hoffman's testimony that the bills were counterfeit was improper opinion testimony that was speculative, lacked foundation, and invaded the province of the jury.

The court admitted testimony from two witnesses opining that the bills were counterfeit. Mr. Mullins repeatedly objected because this testimony was speculative, lacked foundation, and constituted improper opinion testimony. RP 134, 139-42, 154-56, 169-71, 205-06.

Deputy Coons testified he thought the bill felt and looked like a counterfeit bill, and Mr. Mullins objected repeatedly based on lack of foundation, but the court overruled these objections. RP 139-42. Deputy Coon also repeatedly provide his opinion regarding whether the currency was counterfeit. When discussing the money found under the steps, Deputy Coon said the money looked and felt "different than typical U.S. currency." RP 154. Mr. Mullins again objected and the court again overruled the objections. RP 154. In response to the prosecutor's question if Deputy Coon had any suspicions about the bills being counterfeit, Deputy Coon said, "they appeared to be counterfeit." RP 156. The court overruled the objections and permitted the testimony as "lay opinion." RP 156. Deputy Coon also testified it was his opinion the money was counterfeit and not U.S. currency. RP 204-05.

State's witness David Hoffman, who was an acquaintance of Mr. Mullins, also offered his opinion the money was counterfeit. RP 169-71. The court again overruled Mr. Mullins's objections and permitted Mr. Hoffman to testify the money "was fake." RP 172.

The court also erred in overruling Mr. Mullins's numerous objections to witness testimony opining that the currency at issue was counterfeit. As Mr. Mullins noted, the opinion testimony was speculative and lacked foundation. RP 134, 139-42, 154-56, 169-71, 205-06.

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." ER 702. But a party *must* present sufficient foundation to qualify a witness as an expert for purposes of expressing an opinion. *State v. Farr-Lenzini*, 93 Wn. App. 453, 461, 970 P.2d 313 (1999). Thus, in *Farr-Lenzini*, the court held the trial judge improperly allowed a trooper to testify as to his opinion that a driver who was speeding away from him "was attempting to get away from me." *Id.* at 458. Although the trooper was an expert in police procedure and accident reconstruction, the State did not lay any foundation demonstrating he was an expert on determining a driver's state of mind. *Id.* at 461. "Consequently, we find there was an insufficient

foundation to qualify the trooper as an expert for purposes of expressing an opinion as to Farr-Lenzini's state of mind." *Id.*

The same is true here. Although Deputy Coon had 13 years' experience as an officer and had been "trained in criminal procedure, criminal law, evidence gathering, arrest procedures, things like that," he had no training in identifying counterfeit currency. RP 132. And the State laid no foundation for expert opinion testimony as to either the SpoKo Fuel clerk or Mr. Mullins's acquaintance, David Hoffman. RP 134, 168. Thus, as in *Farr-Lenzini*, the court erred to the extent it admitted these challenged statements as expert opinion testimony on counterfeit currency.

After overruling many foundational objections, at the end of Deputy Coon's testimony – and in response to another objection – the court stated it was overruling the objection on the basis that Deputy Coon's opinion was proper "lay opinion" testimony. RP 156. This, too, was error.

Although some lay opinions are permissible, "there are some areas that are clearly inappropriate for opinion testimony in criminal trials." *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). A witness may not provide an opinion on the guilt of the defendant on an element of the charged crime. *Id.* Such testimony invades the province of the jury and violates the defendant's constitutional right to a trial by jury.

Id. at 590; Const. art. I, §§ 21, 22; *accord Farr-Lenzini*, 93 Wn. App. at 459-60 ("Because it is the jury's responsibility to determine the defendant's guilt or innocence, no witness, lay or expert, may opine as to the defendant's guilt, whether by direct statement or by inference.").

Thus, in *Farr-Lenzini*, the court held the trooper's testimony not only failed as expert opinion, but also failed to constitute proper lay opinion. *Id.* at 462. This court noted "the crime of attempting to elude has an element of willfulness" and "the trooper's opinion spoke directly to that issue: 'the person driving that vehicle was attempting to get away from me and knew I was back there and [was] refusing to stop.'" *Id.* at 463.

Similarly, in *Montgomery*, this Court held it was improper for the detectives and a forensic chemist to testify that, based on their experience, they thought the defendants were buying ingredients to manufacture methamphetamine. 163 Wn.2d at 587-88, 594. This Court stated, "the opinions in this case went to the core issue and the only disputed element, Montgomery's intent." *Id.* at 594. The Court noted it is especially important to exclude police officers' opinions regarding guilt on an element of the crime, because officers' testimony "carries an aura of reliability." *Id.* at 595 (internal quotation omitted).

Here, as in *Farr-Lenzini* and *Montgomery*, the opinion testimony was improper and violated the constitutional right to a trial by jury.

Whether the currency was fake was one of the core elements of the crime the State had to prove to the jury beyond a reasonable doubt. CP 73; RCW 9A.60.020(1)(b). Yet the court permitted the witnesses, especially Deputy Coon, to repeatedly give their opinions that the currency at issue was counterfeit. The court erred under the rules of evidence and article I, sections 21 and 22.

b. Deputy Coon's testimony the store clerk told him the bill was counterfeit was hearsay, and the court should have sustained Mr. Mullins's objection.

Deputy Coon testified about his conversation with a clerk at SpoKo Fuel. He said, "Upon contacting a clerk there she did confirm that they were in possession of a counterfeit $100 bill." RP 134. Mr. Mullins immediately objected, but the court overruled the objection.

The deputy's testimony that the clerk said the bill was counterfeit should have been excluded as hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. ER 801(c). Hearsay is inadmissible at trial unless an exception applies. ER 802.

The State had no reason to introduce testimony that SpoKo Fuel was "in possession of a counterfeit $100 bill" other than for its truth. The State had to prove that the currency in question was "falsely made,

completed, or altered," and this clerk's statement confirmed this element of the crime. CP 72, 73.

The deputy relayed this statement as part of his answer to the prosecutor's question about what the deputy did in response to information dispatch received from tipster David Hoffman. RP 134. But the deputy could have answered this question without providing hearsay regarding an element of the crime. An officer's "state of mind in reacting to the information he learned from dispatcher is not in issue" and therefore is "not relevant for another [non-hearsay] purpose." *State v. Aaron*, 57 Wn. App. 277, 280, 787 P.2d 949 (1990). If testimony about historical facts is necessary, an officer can simply testify he acted upon "information received." *Id.* at 281. But the admission of hearsay is error. *Id.*

The Court of Appeals dismissed this challenge, finding the testimony was not hearsay because the State offered it only to prove how the clerk and then the deputy came into possession of the bill. Opinion at 10. Whether or not the clerk or others believed the bill was counterfeit is irrelevant to explaining how they came to possess the bill. The court should have sustained the objection.

c. The Court of Appeals correctly concluded the trial court erred in admitting irrelevant evidence about Mr. Mullins's manner of dress but wrongly dismissed this prejudicial error as harmless.

Mr. Mullins also objected to Deputy Coon's testimony about how nicely Mr. Mullins was dressed when the deputy saw him at Safeway. The deputy described Mr. Mullins walking up behind him in line, and the prosecutor asked, "what did you, I guess, what did you notice?" RP 144. The deputy testified he noticed Mr. Mullins was "well dressed." RP 144. He said it struck him as "odd" because Mr. Mullins was dressed better than he usually was in Deputy Coon's "previous dealings" and "prior contacts" with Mr. Mullins, "both professionally and just in the street." RP 144-45. Mr. Mullins twice objected based on lack of relevance, but the court overruled the objections. RP 144-45.

The Court of Appeals properly found the trial court should have excluded as irrelevant evidence the deputy's statements that Mr. Mullins was dressed more nicely than he was during prior contacts. Opinion at 15-16. However, it found the error was of minor significance and therefore harmless. Opinion at 16. This is erroneous.

d. The multiple evidentiary errors require reversal of the forgery conviction.

The court erred in overruling Mr. Mullins's numerous well-taken objections, and the Court of Appeals should have reversed Mr. Mullins's

forgery conviction and remanded for a new trial. Evidentiary errors require reversal if, within reasonable probabilities, had the error not occurred the outcome of the trial would have been materially affected. *State v. Gunderson*, 181 Wn.2d 916, 926, 337 P.3d 1090 (2014). "[W]here there is a risk of prejudice and no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary." *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, 230 P.3d 583 (2010) (internal quotations omitted). As to the improperly admitted opinion testimony, the constitutional harmless error standard applies. Reversal is required unless the State proves beyond a reasonable doubt that the errors did not contribute to the verdict. *Farr-Lenzini*, 93 Wn. App. at 465; *State v. Olmedo*, 112 Wn. App. 525, 533, 49 P.3d 960 (2002).

Under either standard, the improper admission of the evidence was overwhelming and prejudicial. The jury acquitted Mr. Mullins of one of the two counts of forgery. The State cannot prove beyond a reasonable doubt that the jury would not have acquitted him of both counts absent these errors. Accordingly, Mr. Mullins deserves a new trial. This Court should accept review. RAP 13.4.

E. CONCLUSION

For the reasons set forth above, Mr. Mullins requests this Court grant review.

DATED this 15th day of June, 2020.

Respectfully submitted,

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APPENDIX

May 14, 2020, Opinion

State v. Mullins, 36410-1-III

FILED
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. DAVID RAYMOND MULLINS, Appellant.	No. 36410-1-II UNPUBLISHED OPINION

MELNICK, J. — David Mullins appeals his convictions for forgery, resisting arrest, and obstructing a law enforcement officer. He argues that his convictions for resisting arrest and obstruction violate double jeopardy. He also argues that the trial court erred in finding him voluntarily absent from trial and in overruling a number of evidentiary objections. As to his sentencing, Mullins contends that the court erred by categorically denying a drug offender sentencing alternative (DOSA) sentence, and that the State did not prove his prior convictions by a preponderance of the evidence. We affirm the convictions and remand for a new sentencing hearing.

FACTS

On April 25, 2018, Deputy Mark Coon received a tip from David Hoffman that Mullins used a counterfeit bill at a gas station in Chewelah. The next day, Coon saw Mullins at a grocery store and attempted to place him under arrest for an unrelated theft. Coon told Mullins he was under arrest and told him to put his hands behind his back. As

Coon held Mullins's hands behind his back, Mullins "tighten[ed] up" his arms and shoulders, jerked his hands free, and ran out of the store. Report of Proceedings (RP) at 148. Officer Adam Kowal joined Coon in pursuing Mullins. They found him hiding. Coon found "what appeared to be money" near Mullins. RP at 151. The bills "appeared to be counterfeit." RP at 156.

The State charged Mullins with one count of forgery for the counterfeit bill used at the gas station, resisting arrest, obstructing a law enforcement officer, and a second count of forgery for the counterfeit bills found at the arrest.

Mullins arrived for his trial, but did not return after jury selection. The court questioned Mullins's lawyer about any contact he had with Mullins. The lawyer advised the court that he dropped Mullins off less than a mile from the court, and that Mullins said he had a ride back to the court after the lunch recess.

The court then informed everybody that during the lunch hour Mullins called the court administrator and said he was sick and he might be going to the hospital. The administrator told Mullins that he needed to come to the court first. Mullins's lawyer confirmed that prior to the lunch recess, Mullins said he felt nauseated. The court then recessed for approximately 40 minutes. During that time, Mullins again called the court administrator and requested that his lawyer pick him up; however, when the lawyer arrived, Mullins could not be found.

Mullins's lawyer asked the court to recess until Mullins's medical issues could be addressed. Opposing the motion, the State asked the court to proceed with the trial and to find that Mullins's absence was voluntary. The court ruled that Mullins had voluntarily absented himself. In making this determination the court stated:

> So trial had indeed started when Mr. Mullins chose not to join us. And I say "choose" [sic] because there is some suggestion that there was a illness of some sort that might preclude his appearance. However, there's no indication he's in the hospital, there's no indication of a doctor's note or excuse. He has been in contact at least twice with the court administrator, initially indicating an ability to ambulate towards the courthouse, more recently an ability to meet his attorney in the same spot where he was dropped off during our 30 or 40-minute absence.
>
> Well, neither of those occurred. It was clear that he's still speaking and is not in the hospital or hasn't advised that he's in the hospital, which indeed might be a different—a different—circumstance.
>
> Whereas here, though, in all, the court finds that he has waived his presence to—his constitutional right to be present for trial, trial has begun, and pursuant to rule it will continue.

RP at 125-26.

The trial proceeded in Mullins's absence. Coon testified that he called a clerk at the gas station after learning about a possible counterfeit bill being used. The clerk "confirm[ed] that they were in possession of a counterfeit $100 bill." RP at 134. Mullins objected to this testimony on hearsay grounds.

Coon then testified about the physical characteristics of the bill. He testified "in [his] capacity as a law enforcement officer." RP at 138. The court overruled Mullins's foundation objection. Coon said the bill "felt different than any other U.S. currency that [he had] handled in the past." RP at 139. And, "It appears that in the corners is printed some . . . dash lines that cross out the $100 sign on both sides, as well as some pink—like

oriental writing of some sort that appears to be printed with the bill as well." RP at 140. When Coon began to discuss the size of the bill, the court sustained Mullins's objection and asked the State to lay a foundation. The State elicited from Coon that he had handled currency both in his personal life and as a police officer, and that he knew what currency felt like and its size.

When asked if Coon noticed anything about the size of the bill, Mullins again objected on the basis that it was improper opinion testimony. The court overruled the objection. Coon then stated, "it appears slightly smaller than typical U.S. currency I've handled." RP at 142.

In discussing Mullins's arrest. Coon said that he "noticed [Mullins] was—well dressed" which "struck [him] as odd." RP at 144. The court overruled Mullins's relevance objection. Coon then testified that he had prior contacts with Mullins and on those occasions, he was not dressed the same as the night of his arrest.

After Coon's testimony, Mullins reappeared for trial. The court questioned Mullins who said he was prepared to be present but added that he was "puking blood." RP at 159. In response to the court's questioning, Mullins's lawyer said he had not observed that. Mullins stated that he had been feeling nauseous in the morning but did not explain where he had been.

The court then decided to break for the day to allow Mullins an opportunity to seek medical assistance. The court told Mullins that unless admitted to the hospital, he would be expected in court the following morning. Mullins did not appear the following day.

The State told the court that an officer had checked the hospital and learned that Mullins had been there less than ten minutes and then discharged himself. The trial continued in Mullins's absence.

Hoffman testified that he called the police because he believed the money Mullins possessed was counterfeit. The court overruled Mullins's foundation objection. Hoffman said he knew Mullins was involved in fake money because of the "sleight of hand" Mullins used when telling Hoffman to "check . . . out" the money. RP at 169. He only showed one side of the money. Hoffman said Mullins showed reluctance about going into the gas station.

Hoffman subsequently testified more about the money. "I could see that there was writing on it that indicated to me that it was . . . fake." RP at 171. The court again overruled Mullins's objection. Hoffman also testified that when he saw four more bills, they all had the same serial number. Days after using the bill at the gas station, Mullins bragged to Hoffman about the fake money. The general manager of the gas station testified about his training in recognizing counterfeit bills and explained that he instantly knew it was counterfeit based on the size, the type and quality of the paper, the coloration of the bill, the markings, and the presence of a bright pink "Asian stamp" on it. RP at 185.

The jury found Mullins guilty of resisting arrest, obstruction, and forgery for the gas station incident, and not guilty of forgery for the bills found at his arrest. At sentencing, the State calculated Mullins's offender score as "nine-plus" and then recited his prior convictions. RP at 262. The State did not provide documentation of the prior convictions.

Mullins asked for a DOSA. RP at 266. The court denied the DOSA after considering Mullins's criminal history, his apparent lack of remorse, his prior opportunities to seek a DOSA under prior convictions, and determined that "society is served . . . by the maximum sentence." RP at 267-68.

Mullins appeals.

ANALYSIS

I. DOUBLE JEOPARDY

Mullins argues that his convictions for resisting arrest and obstructing a law enforcement officer violate his right to be free from double jeopardy. He contends that both convictions stem from the same act of running away from the officer and are identical in fact and in law. We disagree.

The Fifth Amendment to the United States Constitution and article I, section 9 of the Washington State Constitution provide protections against double jeopardy. *State v. Brown*, 159 Wn. App. 1, 9, 248 P.3d 518 (2010). These double jeopardy clauses prohibit the State from punishing an offender multiple times for the same offense. *State v. Linton*, 156 Wn.2d 777, 783, 132 P.3d 127 (2006). We review double jeopardy claims de novo. *State v. Kelley*, 168 Wn.2d 72, 76, 226 P.3d 773 (2010). Where a defendant is convicted under multiple criminal statutes for a single act, we must determine whether the legislature intended multiple punishments. *In re Pers. Restraint of Borrero*, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007).

"A person is guilty of resisting arrest if he or she intentionally prevents or attempts to prevent a peace officer from lawfully arresting him or her." RCW 9A.76.040. "A person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties." RCW 9A.76.020(1).

Here, we reject Mullins's argument because a single act did not underlie the two convictions. The State argued and proved that each crime stemmed from a different act. Mullins resisted arrest when he intentionally tensed up and jerked his arms away. Subsequently, Mullins obstructed when he ran and attempted to hide, thereby hindering and delaying Coon. Because Mullins was not convicted twice for a single act, we conclude that no double jeopardy violation occurred.

II. PRESENCE AT TRIAL

Mullins argues that the court violated his constitutional right to be present at his trial because it did not indulge every reasonable presumption against waiver when determining whether his absence on the first day of trial was voluntary.[1] He contends that the court presumed the voluntariness of his absence and expected him to prove otherwise by calling from the hospital or providing a doctor's note. He argues that the court knew that he was feeling ill and should have presumed his absence was involuntary. We disagree with Mullins.

[1] Mullins does not argue that the court improperly found his absence voluntary for the second day of trial.

The state and federal constitutions guarantee the defendant the right to be present at trial. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; *State v. Thurlby*, 184 Wn.2d 618, 624, 359 P.3d 793 (2015). A defendant may waive this right expressly or implicitly. The trial court will find the right implicitly waived if the trial began with the defendant present and proceeded with the defendant's voluntary absence. *Thurlby*, 184 Wn.2d at 624. The trial court's decision regarding voluntary absence is reviewed for an abuse of discretion. *State v. Garza*, 150 Wn.2d 360, 365-66, 77 P.3d 347 (2003). An abuse of discretion occurs when the court's "decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." *State v. Woods*, 143 Wn.2d 561, 626, 23 P.3d 1046 (2001).

Trial courts determine whether a defendant's absence is voluntary under the totality of circumstances. *Garza*, 150 Wn.2d at 367. In doing so, it must: "'(1) [make] sufficient inquiry into the circumstances of a defendant's disappearance to justify a finding whether the absence was voluntary, (2) [make] a preliminary finding of voluntariness (when justified), and (3) [afford] the defendant an adequate opportunity to explain his absence when he . . . return[s].'" *Garza*, 150 Wn.2d at 367 (internal quotation marks omitted) (quoting *State v. Thomson*, 123 Wn.2d 877, 881, 872 P.2d 1097 (1994)). In performing the analysis, the court indulges every reasonable presumption against waiver. *Garza*, 150 Wn.2d at 367.

Here, Mullins appeared in court for jury selection, but failed to appear after the lunch recess. Mullins's lawyer said he had dropped Mullins off, and Mullins told him he had a ride back to the court. During the lunch hour, Mullins called the court administrator telling her he was sick and that he might be going to the hospital. Mullins's lawyer confirmed Mullins felt ill. The court recessed to allow Mullins's lawyer to find him. After the recess, Mullins's lawyer told the court that Mullins again called the court administrator, asked to be picked up, and gave a location. But, when Mullins's lawyer arrived at the location, Mullins was not there. The court sufficiently inquired into the circumstances of Mullins's disappearance and made a justified preliminary finding of voluntary absence.

Mullins reappeared after Coon's testimony and the court gave him an opportunity to explain his absence. Mullins told the court that he was ill but did not explain where he had been or why he had not sought medical attention. The court afforded Mullins an adequate opportunity to explain his absence when he returned. The trial court utilized the correct three-part test and we conclude that it did not abuse its discretion in making a finding of voluntary absence.

III. EVIDENTIARY OBJECTIONS

A trial court has considerable discretion when admitting or excluding evidence, and the decision whether to admit or exclude will not be reversed unless the appellant can establish that the court abused its discretion. *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001).

A. Hearsay

Mullins argues that the court should have excluded as hearsay Coon's testimony that a clerk at the gas station said she possessed a counterfeit bill. We disagree.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Unless an exception or exclusion applies, hearsay is inadmissible. ER 802. We review de novo whether a statement is hearsay. *State v. Hudlow*, 182 Wn. App. 266, 281, 331 P.3d 90 (2014).

The statement at issue is the gas station clerk saying she was "in possession of a counterfeit $100 bill." RP at 134. Coon provided this information to the jury in response to a question about what he had done after receiving information from Hoffman regarding the bill at the gas station. Coon contacted the clerk at the gas station to investigate information that he had received from Hoffman and to recover the bill. The testimony established how he came into possession of the bill and was not offered for the truth of the matter. The trial court did not abuse its discretion.

B. Foundation and Opinion Evidence

Mullins argues that the court erred by allowing Coon and Hoffman to testify about the counterfeit nature of the bills because the State did not present sufficient foundation to qualify either as an expert. We disagree.

ER 701 allows lay testimony as to "opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge." "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact at issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." ER 702.

Coon did not testify as an expert on counterfeit bills. However, he did not have to be an expert to give an opinion. The State laid a proper foundation to permit Coon to give his opinion regarding the bills. Coon testified that the bill felt different than "any other U.S. currency that [he had] handled in the past." RP at 139. He testified that he had handled currency personally and in his job as an officer and had familiarity with how currency feels and looks. Coon relied on his personal knowledge, not specialized knowledge. The testimony helped the jury understand his testimony. The court did not abuse its discretion in determining that the State laid the proper foundation for Coon's testimony about the physical qualities of the bill.

Mullins objected to Hoffman's testimony; however, Mullins's argument does not accurately reflect what happened. Hoffman testified that Mullins was involved with the "fake money." RP at 169. The court overruled the objection based on foundation. Hoffman testified how Mullins initially withheld the money from him and how Mullins had reluctance to enter the store to make a purchase. Hoffman also testified that the four

bills had identical serial numbers and pink Japanese appearing characters on them. Hoffman did not give opinion testimony. Hoffman based his testimony on his personal observations. A proper foundation existed for Hoffman's testimony and the trial court did not abuse its discretion in admitting it.

C. Opinion of Guilt

Mullins argues that the court erred in determining that the testimony about the counterfeit nature of the bills was permissible lay opinion because a witness may not provide an opinion on the guilt of the defendant on an element of the charged crime. He contends that the error invaded the province of the jury and deprived him of his right to a jury trial. We disagree.

Generally, a witness may not testify in the form of an opinion regarding the guilt or veracity of the defendant; such testimony is unfairly prejudicial to the defendant "because it 'invad[es] the exclusive province of the [jury].'" *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993) (quoting *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987)). However, "[t]he fact that an opinion encompassing ultimate factual issues *supports* the conclusion that the defendant is guilty does not make the testimony an improper opinion of guilt." *Heatley*, 70 Wn. App. at 579. "[T]estimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony." *Heatley*, 70 Wn. App. at 578.

In *Heatley*, the State charged the defendant with driving while intoxicated. *Heatley*, 70 Wn. App. 575. On appeal, the defendant challenged the arresting officer's testimony that he was "obviously intoxicated and . . . could not drive a motor vehicle in a safe manner." *Heatley*, 70 Wn. App. at 577. The defendant argued that because the officer's opinion encompassed what was essentially the only disputed issue, it was an improper opinion that he was guilty. *Heatley*, 70 Wn. App. at 578. This court disagreed, reasoning that testimony contained no direct opinion on the defendant's guilt, was based on his experience and observations of the defendant's physical appearance and performance on the field sobriety tests, and the evidence "directly and logically" supported the officer's conclusion. *Heatley*, 70 Wn. App. at 579. The court concluded that the testimony was not improper, despite being relevant to an essential element. *Heatley*, 70 Wn. App. at 580.

Here, Coon's testimony was not an improper opinion on Mullins's guilt. The testimony was rationally based on observations of the bill at issue and was based on Coon's familiarity with United States currency, not any specialized knowledge. The testimony was helpful to the jury to the extent that it explained the basis for Coon's investigation into Mullins and the money. Coon's testimony related to an element of a charged crime. However, unlike in *Heatley* the testimony did not go to the "only disputed issue" at trial. Additionally, the testimony contained no direct opinion on Mullins's guilt. The trial court did not abuse its discretion in allowing Coon's testimony.

Mullins cites *State v. Montgomery*, 163 Wn.2d 577, 183 P.3d 267 (2008), and *State v. Farr-Linzini*, 93 Wn. App. 453, 970 P.2d 313 (1999), to support his argument that Coon's testimony was an improper opinion of Mullin's guilt. Both cases are easily distinguishable. In *Farr-Linzini*, the court held that an officer's opinion that the defendant driving the vehicle was attempting to get away was improper because the crime at issue required proof of an attempt to elude and his opinion went to what the defendant was thinking. 93 Wn. App. at 463. In *Montgomery*, the court held that a detective's and forensic chemist's testimony that the defendant's purchases indicated an intent to manufacture methamphetamine was improper. 163 Wn.2d at 594-95. In both cases, the court held that the opinion testimony was improper because they spoke directly to the intent element at issue. *Farr-Linzini*, 93 Wn. App. at 461; *Montgomery*, 163 Wn.2d at 594.[2]

Here, Coon did not opine on Mullins's intent. His testimony was based on physical observations of the bill and the witness's personal knowledge and experience with physically handling money. Coon's testimony was not an improper opinion of guilt and the court did not err by allowing it. Therefore, Mullins's right to a jury trial has not been violated.

D. Mullins's Clothing

Mullins argues that the court erred by overruling his objection to Coon's testimony that he was better dressed than when he had seen him on previous occasions because the

[2] Mullins also cites *Farr-Linzini* to support the argument that the State did not lay a proper foundation for Coon to testify as an expert witness. However, Coon did not testify as an expert witness, so *Farr-Linzini* is inapplicable on this issue.

testimony was irrelevant. He contends that any marginal relevance was outweighed by the danger of unfair prejudice and that it is improper character evidence under ER 404. We agree with Mullins that the evidence was irrelevant, but the error was harmless.

ER 401 provides that relevant evidence is "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." ER 402 provides that evidence that is not relevant is not admissible.

At trial, Mullins objected to the testimony twice based on relevance, but did not object under ER 403 or ER 404(b). We only consider whether the testimony was relevant because Mullins did not preserve appellate review based on ER 403 or 404(b). *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985) ("A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial."); *State v. Jordan*, 39 Wn. App. 530, 539, 694 P.2d 47 (1985) ("An objection to the admission or exclusion of evidence based on relevance is insufficient to preserve appellate review based on ER 404(b).").

Coon's observations that Mullins was better dressed than usual on the day of his arrest does not tend to make the existence of any fact of consequence to the charges more or less probable. The court should not have admitted this evidence; however, any error was harmless.

A trial court's error in admitting improper evidence is harmless "if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole." *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

Mullins argues the admission of this evidence prejudiced him because it "implied that [he] was poor and must have acquired his clothing unlawfully." Br of Appellant at 27-28. But the admission was of minor significance and overwhelming evidence existed to support the convictions.

IV. DOSA

Mullins argues that the court erred by categorically denying a DOSA on the basis that he did not plead guilty. He contends that a refusal to consider a DOSA for an entire category of offenders is an error of law that constitutes an abuse of discretion, and punishment for the exercise of his constitutional right to trial. We disagree with Mullins.[3]

Generally, a trial judge's decision whether to grant a DOSA is not reviewable, but an offender may challenge the procedure by which a sentence was imposed. *State v. Grayson*, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005).

In *Grayson*, the Supreme Court held that the sentencing court erred by categorically refusing to consider a DOSA sentence. 154 Wn.2d at 343. The sentencing court, rather than considering the facts of the offender's case, denied the motion for a DOSA because

[3] The trial court spoke at length about why it rejected Mullins's request for a DOSA sentence. To the extent it made a brief comment that DOSA is only for those who plead guilty, that statement is incorrect. It is clear the court had valid reasons for rejecting a DOSA sentence.

the "State no longer has money available to treat people who go through a DOSA program." *Grayson*, 154 Wn.2d at 337 (emphasis omitted). The Supreme Court held that the sentencing court's failure "to exercise any meaningful discretion in deciding whether a DOSA sentence [is] appropriate" was an abuse of discretion. *Grayson*, 154 Wn.2d at 335.

Here, the court did not categorically deny Mullins's motion for a DOSA. It considered Mullins's criminal history, his apparent lack of remorse, his prior opportunities to seek a DOSA under prior convictions and determined that "society is served . . . by the maximum sentence." RP at 267-68. The court appropriately considered the facts of Mullins's case, and did not fail to exercise any meaningful discretion. The court properly exercised its discretion in denying a DOSA.

V. OFFENDER SCORE

Mullins argues that the court erred in calculating his offender score because it based the score on the prosecutor's statements rather than supporting evidence. He contends that the State did not meet its burden to prove prior convictions by a preponderance of the evidence. We agree.

In calculating an offender score, the State must prove the criminal history by a preponderance of the evidence. *State v. Hunley*, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012). A prosecutor's summarized criminal history does not satisfy the State's burden of proof. *State v. Cate*, 194 Wn.2d 909, 913, 453 P.3d 990 (2019). Also, it is not sufficient that the defendant does not object to the offender score calculation since such a rule would

effectively shift the burden of proving criminal history to the defendant. *Hunley*, 175 Wn.2d at 912.

The court determined Mullins's standard range based on the offender score calculated by the State. The State did not present any evidence of the prior convictions to support its calculation of Mullins's offender score. The State, therefore, did not meet its burden of proving Mullins's criminal history by a preponderance of the evidence. We remand for resentencing.

We affirm Mullins's convictions but remand for a new sentencing hearing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered

Melnick, J.[4]

WE CONCUR:

Korsmo, A,C,J.

Lawrence-Berrey, J.

[4] The Honorable Richard Alan Melnick is a Court of Appeals, Division Two, judge sitting in Division Three under CAR 21(a).

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	COA NO. 36410-1-III
	)	
DAVID MULLINS,	)	
	)	
PETITIONER.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF JUNE, 2020, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X]	DAVID MULLINS 337510 STAFFORD CREEK CORRECTIONS CENTER 191 CONSTANTINE WY ABERDEEN, WA 98520-9504	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 15TH DAY OF JUNE, 2020.

X_____

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