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No. 36410-1-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

DAVID MULLINS,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. Mr. Mullins's convictions for resisting arrest and obstructing a law enforcement officer violate double jeopardy.

Absent evidence the legislature specifically intended to punish separately two offenses based on the same conduct, multiple punishments for a single act violates double jeopardy. 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). 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.

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 now attempts to parse the deputy's trial testimony to create two separate incidents from this single act of running from the arresting officer. Brief of Respondent at 7-11. However, the dividing of conduct into separate segments to justify two different convictions is exactly the sort of analysis of which the court disapproved in *State v. Jackman*, 156

Wn.2d 736, 749, 132 P.3d 136 (2007) (recognizing prosecutor cannot “divide a defendant’s conduct into segments in order to obtain multiple convictions”). Instead, this single, brief episode in which Mr. Mullins ran from Deputy Coon must be viewed 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. This Court should reverse the conviction for resisting arrest and remand for its dismissal with prejudice.

2. The court violated Mr. Mullins’s constitutional right to be present at his trial.

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. U.S. Const. amends. VI, XIV; Const. art. I, § 22; *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).

The State argues the court properly presumed Mr. Mullins was voluntarily absent and, therefore, no violation occurred. Brief of Respondent at 18-20. But the court presumed Mr. Mullins was absent through his own doing. RP 118-20, 124-26. *Garza* requires the opposite presumption. Instead, the court must presume the defendant is absent due to something outside of his control. *Garza*, 150 Wn.2d at 369. And here, the court had ample reasons 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.

The *Thurlby* case 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. The court also knew that Mr. Mullins had informed the court administrator and his own attorney that he was ill. RP 118-19.

The State also misunderstands Mr. Mullins’s argument by addressing his absence on the second day. Brief of Respondent at 20-21.

However, as Mr. Mullins clearly argued in his opening brief, he asserts a violation of his right to be present with regard to his absence the first day only, not the second. Brief of Appellant at 13. Therefore, the events of the second day are of no import.

The court failed to presume that Mr. Mullins was absent due to events outside of his control, despite its knowledge that 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. This Court should reverse the convictions and remand for a new trial. *Garza*, 150 Wn.2d at 371.

3. This Court should reverse the forgery conviction and remand for a new trial because the court erroneously overruled numerous evidentiary objections.

The court committed three evidentiary errors over Mr. Mullins's objections: improper admission of hearsay statements that the money was counterfeit; improper admission of opinion testimony that the money was counterfeit; and admission of irrelevant, prejudicial character testimony regarding Mr. Mullins's manner of dress.¹

¹ With regard to Deputy Coon's improper testimony, admitted over Mr. Mullins's objection, that Mr. Mullins appeared more "well dressed" than he had been in his other contacts with Deputy Coon, Mr. Mullins relies on the arguments in his opening brief to explain why this testimony was irrelevant, unfairly prejudicial, and improper character evidence. RP 144-45; Brief of Appellant at 27-28.

A store clerk, a deputy, and another witness all testified over Mr. Mullins's objection that the money was counterfeit. RP 134, 139-42, 154-56, 169-71, 204-05. The State responds by arguing this evidence was not hearsay because it was not offered for the truth but to establish chain of custody and to show the effect on the listener. Brief of Respondent at 23-24. The State is mistaken as to both claims.

First, whether or not the bill Mr. Mullins gave the SpoKo Fuel clerk was counterfeit is irrelevant to establishing its chain of custody. Chain of custody requires demonstrating that the object admitted at trial is indeed the relevant object the State claims it to be, here, the same bill given to the clerk. Whether not that bill was counterfeit, or whether the clerk or others believed it to be counterfeit, is irrelevant to establishing that the bill introduced at trial was in fact the same bill Mr. Mullins gave to the clerk.

Second, the State claims the counterfeit nature of the bill was not hearsay because it was necessary to show the effect on the listener – “that it caused Deputy Coon to have the bill retrieved for evidence.” Brief of Respondent at 24. But *why* the deputies acted as they did was not in question. The deputy's state of mind is not relevant. *State v. Aaron*, 57 Wn. App. 277, 280, 787 P.2d 949 (1990). To the extent the deputies needed to explain their actions, they must do so through nonhearsay

evidence, such as testifying they acted on “information received.” *Id.* at 281.

The State claims the witnesses testified as lay witnesses, not expert witnesses. Brief of Respondent at 25-27. Mr. Mullins does not claim otherwise. However, a lay witness may not opine on the guilt of the defendant on an element of the offense. *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). This is exactly what the witnesses did when they opined the money was counterfeit.

The State also argues that the witnesses’ opinions that the bill was counterfeit was proper because “it helped the jury understand why Deputy Coon was so interested in apprehending Mr. Mullins.” Brief of Respondent at 26. This is incorrect. It is undisputed that the deputies arrested Mr. Mullins not for his alleged involvement in the counterfeit money at issue in this case but based on probable cause for an unrelated crime. RP 145-47. This Court should reject the State’s disingenuous claim.²

The State argues even improper admission of this hearsay and opinion testimony did not prejudice Mr. Mullins because the money was so obviously counterfeit. However, the jury acquitted Mr. Mullins for the

² The State’s own statement of the case acknowledges this fact. Brief of Respondent at 1 (“Deputy Coon tried to place Mr. Mullins under arrest for an unrelated theft.”).

alleged counterfeit money found near him when he was arrested and only convicted him of the alleged counterfeit money used at SpoKo Fuel about which the witnesses improperly opined. The improper testimony overwhelmed the trial. The State cannot prove beyond a reasonable doubt that the improper opinions on guilt did not contribute to the verdict, nor can the State prove the hearsay testimony and improper character evidence did not materially affect the outcome.

The court erred in overruling Mr. Mullins's numerous objections and in admitting improper evidence. The admission of the erroneous evidence prejudiced Mr. Mullins. This Court should reverse the forgery conviction and remand for a new trial.

4. The court erred and violated Mr. Mullins's constitutional rights by categorically denying a DOSA on the basis that Mr. Mullins exercised his constitutional right to a jury trial.

The court categorically denied Mr. Mullins a DOSA because he exercised his constitutional right to trial instead of pleading guilty. Brief of Appellant at 34-40. But the legislature did not limit DOSA eligibility to individuals who plead guilty, and the court's refusal to consider a DOSA sentence on this basis constitutes an error of law. In addition, the court improperly punished Mr. Mullins for exercising his constitutional right.

The State selectively quotes from the sentencing hearing while failing to address the court's comments that a DOSA sentence is for

people who plead guilty, not people who choose to go to trial. Brief of Respondent at 33-34; RP 266-67. But the court's comments that "DOSA's for those who come in and say, 'Look, I'm pleading guilty,'" not for those who "chose to go to trial," and who "chose to say 'I'm not guilty'" demonstrate the court's misunderstanding of DOSA statutory eligibility. RP 266-67. In addition, the court's comments reflect a disregard for the fundamental principle that "A defendant may not be subjected to more severe punishment for exercising his constitutional right to stand trial." *State v. Montgomery*, 105 Wn. App. 442, 446, 17 P.3d 1237 (2001); U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 21, 22.

The court erred when it categorically denied Mr. Mullins a DOSA because he did not plead guilty and instead proceeded to trial. Whether based on a misapprehension of the relevant statute or as punishment for the exercising of his constitutional right, the court's error of law is an abuse of discretion. This Court should reverse and remand for resentencing.

5. The court erred in calculating Mr. Mullins's offender score based on the State's unsupported criminal history allegation.

The court calculated Mr. Mullins's offender score based on the prosecutor's mere allegations that Mr. Mullins was "a nine-plus," without proof of any judgments and sentences or any other supporting evidence.

RP 262; CP 105-08. As the Washington Supreme Court just reiterated in *State v. Cate*, the State's unsupported summary fails to meet its burden of proving a defendant's offender score. ___ Wn.2d ___, ___ P.3d ___, 2019 WL 6766025 (Dec. 12, 2019). Because the State failed to sustain its burden of proving Mr. Mullins's criminal history by a preponderance of the evidence, this Court must reverse and remand for resentencing.

In *Cate*, the sentencing court found the defendant's offender score was a "9+" where the State "failed to provide copies of the relevant judgment and sentence forms" but instead provided a summary of the defendant's criminal history. 2019 WL 6766025 at *1. The defendant did not object. *Id.* The Washington Supreme Court held:

A prosecutor's unsupported summary of criminal history is not sufficient to satisfy the State's burden. And 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 providing criminal history to the defendant.

Id. at *2 (citing *State v. Hunley*, 175 Wn.2d 901, 910, 912, 287 P.3d 584 (2012)). The Court also noted, "It is irrelevant that the prosecutor summarized criminal history since such a summary does not satisfy the State's burden of proof." *Id.* at * 2 (citing *Hunley*, 175 Wn.2d at 910).

Cate reaffirmed established precedent that bare assertions fail to satisfy the State's burden and that the absence of an objection does not cure this defect. 2019 WL 6766025; *Hunley*, 175 Wn.2d at 910; *State v.*

Ford, 137 Wn.2d 472, 482-83, 973 P.2d 452 (1999). Here, as in *Cate*, the court based Mr. Mullins's offender score solely on the prosecutor's summarized criminal history. Here, as in *Cate*, Mr. Mullins did not object, but the absence of an objection is not an affirmative acknowledgement. 2019 WL 6766025 at *2.

Applying *Cate* and *Hunley*, the State failed to prove Mr. Mullins's criminal history. The State did not present any certified judgments or any evidence of Mr. Mullins's alleged prior convictions. Instead, the State merely listed without support what it claimed Mr. Mullins's prior convictions were. The State's claim that the prosecutor's mere recitation of Mr. Mullins's criminal history, absent any proof, is sufficient to sustain the State's burden, has once again been soundly rejected by the Supreme Court. Brief of Respondent at 36; *Cate*, 2019 WL 6766025. Likewise, the State's claim that Mr. Mullins had an obligation to object to his offender score or make an offer of proof to contradict the State's allegations is entirely incorrect. Brief of Respondent at 36. As the statute itself states, and as the Supreme Court has repeatedly held, it is the *State*, not the defendant, who bears the burden of proving criminal history.

Finally, the State offers no support for its baseless argument that by signing the last page of the judgment and sentence, Mr. Mullins affirmatively agree to his offender score. Brief of Respondent at 36. This

Court should reject the State's claim unsupported by any legal authority. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (declining to consider arguments unsupported by any "citation of authority"); RAP 10.3(a)(6) (providing briefs should contain "citations to legal authority" in support of argument).

The State failed to sustain its burden of proving Mr. Mullins's criminal history by a preponderance of the evidence. This Court must reverse and remand for resentencing.

B. CONCLUSION

Mr. Mullins's convictions for resisting arrest and obstructing a law enforcement officer violate double jeopardy. Therefore, this Court should reverse his conviction for resisting arrest and remand for dismissal of the charge with prejudice and for resentencing.

The court violated Mr. Mullins's constitutional right to be present at trial. Therefore, this Court should reverse the remaining convictions and remand for a new trial. Additionally, numerous erroneous evidentiary rulings require this Court to reverse the forgery conviction and remand for a new trial.

Finally, the State failed to prove Mr. Mullins's offender score, and the court denied Mr. Mullins a DOSA sentence on an improper basis.

Therefore, at minimum, this Court must reverse the sentence and remand for resentencing.

DATED this 30th day of December, 2019.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'K. Huber', with a long horizontal flourish extending to the right.

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

STATE OF WASHINGTON,)	
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v.)	NO. 36410-1-III
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DAVID MULLINS,)	
)	
APPELLANT.)	

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