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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 RAYMOND MULLINS,

Appellant.

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

BRIEF OF APPELLANT

LILA J. SILVERSTEIN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711
lila@washapp.org
wapofficemail@washapp.org

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A. INTRODUCTION

During his trial for forgery, resisting arrest, and obstructing a police officer, David Mullins failed to return to court after a lunch recess. He called the court administrator to say he was ill, and defense counsel told the judge Mr. Mullins had felt ill before the break, but the court ordered that trial continue in his absence. Because the Court failed to indulge every reasonable presumption against voluntary waiver of the constitutional right to presence, this Court should reverse the convictions and remand for a new trial.

This Court should also hold the convictions for resisting arrest and obstructing a police officer violate the constitutional right to be free from double jeopardy. Mr. Mullins was convicted of both crimes for the single act of fleeing a police officer who was trying to arrest him.

The Court should further rule the trial court erred in overruling numerous evidentiary objections, including repeated objections to a deputy's opinion that the money at issue was counterfeit. There was no foundation supporting these statements as expert opinion testimony, and their admission as lay opinion testimony violated Mr. Mullins's constitutional right to have a jury determine guilt on the elements of the crimes.

Finally, if this Court does not reverse the convictions it should reverse the sentence. The State failed to prove criminal history, and the court erred in denying the request for a Drug Offender Sentencing Alternative on the basis that Mr. Mullins exercised his constitutional right to trial.

B. ASSIGNMENTS OF ERROR

1. The convictions for resisting arrest and obstructing a law enforcement officer violate Mr. Mullins's right to be free from double jeopardy.

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

3. The trial court erred in overruling hearsay, speculation, and foundation objections to the witnesses' repeated opinion testimony that the bills at issue seemed to be counterfeit.

4. The trial court erred in overruling Mr. Mullins's relevance objections to Deputy Coon's testimony that Mr. Mullins was dressed better than he usually was during his "dealings" with police.

5. The trial court erred in refusing to consider a Drug Offender Sentencing Alternative ("DOSA") on the basis that Mr. Mullins did not plead guilty.

6. The trial court erred in calculating Mr. Mullins's offender score as a "9+" where the State did not present any certified judgments or equivalent documents to prove criminal history by a preponderance of the evidence.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Two convictions violate the constitutional prohibition on double jeopardy if they are the same in fact and law, which means the evidence proving one count is also sufficient to prove the other. Here, for the act of running away from Deputy Coon, Mr. Mullins was convicted of both resisting arrest and obstructing a law enforcement officer. Do the two convictions violate the prohibition on double jeopardy?

2. A defendant has a constitutional right to be present at his trial and, if he is absent, a court must indulge every reasonable presumption against voluntary absence and waiver of the right to presence. Here, Mr. Mullins failed to return to court after a lunch recess; he told the court administrator he was ill and his attorney told the judge he was ill, and he failed to appear at the location where he asked his attorney to pick him up. The court then found he was voluntarily absent. Did the court fail to indulge every reasonable presumption against waiver, thereby violating Mr. Mullins's constitutional right to be present at trial?

3. Hearsay is an out-of-court statement offered for its truth and is inadmissible in a criminal trial. In this case in which Mr. Mullins was being tried for forgery based on his alleged use of counterfeit currency, did the trial court err in overruling Mr. Mullins's objection to Deputy Coon's testimony that a store clerk "confirmed they were in possession of a counterfeit \$100 bill?"

4. Evidence is inadmissible if it is not relevant, and even if relevant, is not admissible if its relevance is substantially outweighed by the danger of unfair prejudice. Moreover, character evidence is never admissible to show action in conformity therewith. Did the trial court err in overruling Mr. Mullins's objections to Deputy Coon's testimony that Mr. Mullins appeared to be dressed more nicely than he usually is when police encounter him?

5. Expert opinion testimony is not admissible unless the offering party lays a foundation for the witness's expert knowledge on the particular topic. Moreover, it is improper for a lay witness to provide an opinion regarding the defendant's guilt on an element of the crime, because the defendant has a constitutional right to have a jury decide such issues. Did the trial court err in overruling Mr. Mullins's numerous objections to witnesses' opinions that the \$100 bills were counterfeit, where the State provided no foundation of specialized expertise and where

the first element of the crime of forgery was whether the currency was fake?

6. A sentencing court's categorical refusal to consider a sentencing alternative for a class of offenders constitutes an abuse of discretion. Moreover, it is error for a court to punish a defendant for exercising a constitutional right. Did the sentencing court err by categorically refusing to consider a DOSA on the basis that Mr. Mullins did not plead guilty?

D. 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, Sheriff's 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 appeared at multiple hearings, but after the jury had been 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. He then called and asked his trial attorney to pick him up, but he was not at the pickup location when counsel arrived. RP 123. Instead of presuming Mr. Mullins was ill, the court found the absence was voluntary and ordered trial to proceed. 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. At sentencing, the prosecutor alleged Mr. Mullins's offender score was 9+, but did not present any certified judgments proving the criminal history. RP 263. The court nevertheless calculated the score as a 9+ and imposed a sentence at the top of the resulting range. CP 105-08. The court denied Mr. Mullins's request for a Drug Offender Sentencing Alternative ("DOSA"), stating, "DOSA's for those who come in and say, 'Look, I'm pleading guilty because I -- I have a problem and I need to get treatment.' And you didn't do that. ... [Y]ou chose to go to trial." RP 266-67.

Mr. Mullins appeals. CP 120.

E. ARGUMENT

1. The convictions for resisting arrest and obstructing a law enforcement officer violate double jeopardy.

The State alleged that when Deputy Coon tried to arrest Mr. Mullins, Mr. Mullins slipped out of his grip and ran away. For this single incident, Mr. Mullins was convicted of both resisting arrest and obstructing a law enforcement officer. The two convictions violate Mr. Mullins's constitutional right to be free from double jeopardy, requiring vacation of the conviction and sentence for resisting arrest.

- a. A defendant's constitutional right to be free from double jeopardy is violated if he is convicted of two offenses that are identical in fact and law.

The Fifth Amendment to the United States Constitution provides, “No person shall ... be subject for the same offense to be twice put in jeopardy of life or limb....” U.S. Const. amend. V. Similarly, article I, section 9 of our state constitution provides, “No person shall be ... twice put in jeopardy for the same offense.” Const. art. I, § 9. These clauses protect defendants against “prosecution oppression.” *State v. Womac*, 160 Wn.2d 643, 650, 160 P.3d 40 (2007) (quoting 5 Wayne R. LaFave, Jerold H. Israel & Nancy J. King, *Criminal Procedure* § 25.1(b), at 630 (2d ed. 1999)).

To determine whether multiple convictions violate double jeopardy, courts apply the “same evidence” test. *State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995) (citing *Blockburger v. United States*, 284 U.S. 299, 304, 76 L.Ed. 306, 52 S.Ct. 180 (1932)). Under that test, absent clear legislative intent to the contrary, a defendant’s double jeopardy rights are violated if he is convicted of offenses that are identical both in fact and in law. *Id.*; *State v. Freeman*, 153 Wn.2d 765, 777, 108 P.3d 753 (2005). In other words, two convictions violate double jeopardy when the evidence required to support a conviction on one charge would have been sufficient to warrant a conviction upon the other. *Freeman*, 153 Wn.2d at

772; *State v. Ralph*, 175 Wn. App. 814, 823, 308 P.3d 729 (2013), *review denied*, 179 Wn.2d 1017, 318 P.3d 280 (2014). Courts evaluate the elements “as charged and proved, not merely as the level of an abstract articulation of the elements.” *Freeman*, 153 Wn.2d at 777.

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 (2007). Furthermore, if the prosecution has to prove one crime in order to prove the other, entering convictions for both crimes violates double jeopardy. *Id.* In other words, entering convictions for two crimes violates double jeopardy if “it was impossible to commit one without also committing the other.” *Id.*

This Court reviews *de novo* the question of whether two convictions violate double jeopardy. *Id.* at 746. A double-jeopardy violation may be raised for the first time on appeal. *Id.*; RAP 2.5(a)(3).

- b. The convictions for resisting arrest and obstructing an officer are identical in fact and law because both punish Mr. Mullins for fleeing an officer who was trying to arrest him.

Neither the resisting statute nor the obstruction statute expressly authorizes multiple convictions for a single act. RCW 9A.76.020; RCW 9A.76.040. The resisting arrest statute provides: “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(1).

The obstruction statute provides, “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).

In this case, the jury convicted Mr. Mullins of both crimes for running away from Deputy Coon when he was trying to arrest him. In closing argument, the prosecutor described the resisting charge as follows:

So Count 2 is the resisting. That’s Instruction No. 19. And again that on or about April 26, 2018, Dep. Coon told you he was on patrol at that time, and that he attempted to arrest David Mullins in – Safeway, and that Mr. Mullins got away.

RP 243. The prosecutor later described the obstruction charge:

The last crime I’ll be asking you to return a verdict of guilty on is the obstruction. That is Instruction No. 23. And again it happened on April 26, 2018. The defendant willfully hindered, delayed or obstructed a law enforcement officer in the discharge of the law enforcement’s official powers or duties. This is when – again, Dep. Coon testified that he was on duty on April 26, and he had just attempted to arrest him and David Mullins led him on a chase.

RP 244. Simply put, the State urged the jury to convict Mr. Mullins of resisting because Deputy Coon “attempted to arrest David Mullins in Safeway and Mr. Mullins got away,” and 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 243-44. Mr. Mullins was twice convicted for the same offense, in violation of double jeopardy.

Ralph is instructive. There, the defendant was convicted of both robbery and taking a motor vehicle without permission based on the fact that he punched another person and took his truck. *Ralph*, 175 Wn. App. at 822. The defendant argued the two convictions violated double jeopardy, and this Court agreed. *Id.* at 822-23. This Court noted that each of the two crimes at issue had different elements from the other, *id.* at 824-25, but “[u]nder the facts charged and proved here, the evidence supporting Ralph’s robbery conviction was also sufficient to support his TMVWP conviction.” *Id.* at 826. “Ralph punched Hampton in the face and knocked him to the ground to gain possession of Hampton’s truck and drive it away.” *Id.* Because both convictions were based on the same act of taking a truck by force, the two convictions violated double jeopardy. *Id.*

Similarly here, both convictions were based on the same act of fleeing an arresting officer. The two convictions violate double jeopardy.

c. The remedy is reversal of the conviction and sentence for resisting arrest.

Where two convictions violate double jeopardy, the court must vacate the conviction on the lesser offense. *State v. Weber*, 159 Wn.2d 252, 269, 149 P.3d 646 (2006). Mr. Mullins accordingly asks this Court to

reverse the conviction for resisting arrest, and remand for dismissal of that charge with prejudice, and for resentencing. *See In re Francis*, 170 Wn.2d 517, 531, 242 P.3d 866 (2010) (“Because Francis’ second degree assault conviction violates double jeopardy, we vacate it here and remand to the trial court for resentencing consistent with this holding.”).

2. This Court should reverse the remaining convictions and remand for a new trial because the trial court violated Mr. Mullins’s constitutional right to be present at his trial.

- a. A defendant has a constitutional right to be present at his trial, and courts must indulge every reasonable presumption against waiver of that right.

The state and federal constitutions guarantee the defendant the right to be present at his or her own trial. U.S. Const. amend. VI; Const. art. I, § 22; *State v. Thurlby*, 184 Wn.2d 618, 624, 359 P.3d 793 (2015). A defendant may waive this right, and courts deem a voluntary absence to be an implicit waiver. *Thurlby*, 184 Wn.2d at 624. However, because the right to presence is fundamental, courts must indulge every reasonable presumption against waiver when determining whether an absence is voluntary. *State v. Garza*, 150 Wn.2d 360, 367, 77 P.3d 347 (2003).

Trial courts must determine whether a defendant’s absence is voluntary under the totality of circumstances. *Id.* The court 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 where justified; and (3) afford the defendant an adequate opportunity to explain his absence when he returns. *Id.* (citing *State v. Thomson*, 123 Wn.2d 877, 880, 872 P.2d 1097 (1994)). “The presumption against waiver must be the overarching principle throughout the inquiry.” *Garza*, 150 Wn.2d at 368.

- b. The trial court failed to indulge every reasonable presumption against waiver, where it found voluntary absence despite the fact that both Mr. Mullins and his attorney explained Mr. Mullins was ill.

Mr. Mullins was absent at two different points during this trial. On appeal, he challenges only the trial court’s finding of voluntariness as to the first absence. As to that absence, the trial court violated Mr. Mullins’s constitutional right to presence by failing to indulge every reasonable presumption against waiver.

Mr. Mullins was present for all proceedings until the afternoon of September 27, 2018. The court and parties had finished jury selection that morning and then recessed for lunch. RP 102-17. When the afternoon session began, the court noticed Mr. Mullins was not present and asked defense counsel if he had had contact with Mr. Mullins during the lunch hour. RP 117. Counsel responded:

MR. WHITAKER: Your Honor, I took him to a location over by the car wash—

THE COURT: Okay.

MR. WHITAKER: --at his request—

THE COURT: That would be north Main in Colville, so--.

MR. WHITAKER: And I said to him, “Do you have a ride back,” he said, “Yes, I do.” So I dropped him off at that location, which is less than a mile from here, but -- he had a -- an appointment—

RP 117-18.

The court then noted that “more recently over the lunch hour” Mr. Mullins called the court administrator and told her “he was feeling ill and might be on his way to the hospital.” RP 118. He was walking, and the court administrator told him “he needed to come to the courthouse to see his attorney” before going to the hospital. RP 118.

Defense counsel confirmed Mr. Mullins was sick: “Well, Judge, I can relate that he was expressing some physical discomfort prior to the court going into recess, but I assured him that -- It was about ten minutes to 12:00. I told him that we would get a break soon. He was complaining about nausea.” RP 118.

The court responded that it was 1:56 and trial was supposed to have resumed at 1:30 and Mr. Mullins knew this. RP 118. The court acknowledged that “trial in absentia is disfavored,” but emphasized that

under CrR 3.4(b) “[t]he defendant’s voluntary absence after trial has commenced in his or her presence shall not prevent continuing the trial to and including the return of verdict.” RP 118-19. The court decided to swear the jury in and then “let them go for a half hour, tell them to return at 2:30” and if Mr. Mullins was not in court by then the jury would be instructed not to draw any adverse inferences from his absence. RP 119-20.

The court ultimately dismissed the jury for 40-45 minutes. RP 122. During that time, Mr. Mullins contacted the court administrator and asked that his attorney pick him up at the same location near the car wash, but Mr. Mullins was not there when his attorney went to get him. RP 123. No one looked for him anywhere else, and defense counsel made clear he did not want to try the case in Mr. Mullins’s absence. RP 123. He said, “I would ask the court to allow us to stop at this point, get his medical issues taken care of and then come back.” RP 124.

The State asked the court to find the absence was voluntary and to proceed with trial. RP 124. The court found the absence voluntary:

Mr. Mullins chose not to join us. And I say “choose” because there is some suggestion that there was a[n] 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 125-26.

This ruling was error, because the court failed to indulge every reasonable presumption against waiver. The court presumed Mr. Mullins was voluntarily absent and expected him to prove otherwise by calling from the hospital or providing a doctor's note. This ruling violated Mr. Mullins's constitutional rights.

Garza is instructive. There, the Supreme Court reversed for a violation of the right to presence. *Garza*, 150 Wn.2d at 363. The defendant was regularly late for trial, necessitating a three-hour recess one day and a 45-minute recess another day. *Id.* The trial judge warned Mr. Garza that he “had better not be late again,” yet on a subsequent trial day “Garza’s counsel informed the court that Garza had called and said that he was running slightly behind, but expected to be in court by 9:20 a.m.” *Id.* at 363-64. The defendant did not appear by 9:20, and trial resumed at 9:25,

with the court finding the absence was voluntary. *Id.* at 364. The court allowed counsel to check his voicemail again at 10:00, but there were no messages. *Id.* Trial concluded that day in the defendant's absence. *Id.* The court and parties later learned that the defendant had been arrested on a bench warrant from another jurisdiction, but the court refused to grant a new trial on that basis given that Garza did not take meaningful steps to contact counsel or the court. *Id.* at 364-65.

The Supreme Court reversed based on the error in the preliminary determination of voluntariness, without reaching the question of whether a new trial should have been granted based on the subsequently learned information about the arrest. *Garza*, 150 Wn.2d at 371. The judge should not have found voluntary absence in the first place, but should have "presumed that something outside Garza's control was delaying him." *Id.* at 369.

The same is true here. Although the court waited 40 minutes rather than five, it similarly failed to presume that something outside Mr. Mullins's control was delaying him. In fact, much more than in *Garza*, here there was reason to make that presumption even apart from the constitutional requirement. Both Mr. Mullins and his attorney had indicated to the court that Mr. Mullins was ill. When Mr. Mullins did not make it back to the courthouse or to the pickup location, the court should

have presumed it was due to illness rather than voluntariness. Indeed, in *Thurlby*, the Court endorsed a finding of voluntariness where the trial court took it upon itself to contact the hospitals repeatedly before making a finding of voluntariness. *Thurlby*, 184 Wn.2d at 626. Here, this did not happen even though the court was on notice that illness was the issue. The court expected *Mr. Mullins* to call from the hospital if he was ill, instead of the other way around. The court's failure to presume that Mr. Mullins's absence was outside his control violated his constitutional rights. *See Garza*, 150 Wn.2d at 369. The remedy is reversal of the convictions and remand for a new trial. *Id.* at 371.

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

If this Court does not grant a new trial on all counts because of the above violation, it should grant a new trial on the forgery count because the trial court erroneously overruled numerous evidentiary objections. The court admitted a store clerk's hearsay statement that the money at issue was counterfeit, opinion testimony by Deputy Coon and David Hoffman that the bills at issue were counterfeit, and irrelevant, prejudicial testimony by Deputy Coon that Mr. Mullins was dressed more nicely than usual. The admission of this testimony violated numerous rules of evidence as well as

Mr. Mullins’s constitutional right to have the jury determine guilt on the elements of the crime. This Court should reverse.

- a. Mr. Mullins repeatedly objected to testimony that was hearsay, irrelevant, speculative, or lacked foundation, but the court overruled the objections.

Mr. Mullins lodged several objections to testimony the State elicited, but the court overruled the objections. When Deputy Mark Coon was testifying 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.¹

Then, 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:

When I first received it from Dep. Peterson, at first glance it looked like U.S. currency, it looked like money. Upon actually being able to hold it, --

MR. WHITAKER: Objection. Foundation.

THE COURT: I’m sorry –

¹ The transcript reads “MR. WHITAKER: Objection. (Inaudible).” Presumably the inaudible word was “hearsay,” though it may also have been an objection for lack of foundation. The transcripts in this case are riddled with “inaudible”s. Although Mr. Mullins assumes the court reporters did the best they could, incomplete transcripts compromise a defendant’s constitutional right to appeal. The courts should consider fixing the recording systems to prevent such problems.

MR. WHITAKER: He's beginning to describe his experience with this bill. To what end?

THE COURT: Overruled. Ask the last question. I didn't hear it clearly.

Q: What did you notice about that from a perspective as a police officer?²

MR. WHITAKER: Objection. Still foundation.

THE COURT: Overruled.

A: I noticed that it felt different than any other U.S. currency that I'd – handled in the past.

Q: Okay. And did you notice anything else about it in relation to – as a police officer in your training and experience – ... Did you notice anything else about it?

A: I did. It appears that in the corners is printed some – in the ink itself it's – it's printed with 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.

Q: Okay. And did you notice anything else about it?

A: At first – at first glance it appears that it's not the correct size of –

MR. WHITAKER: Objection. There's no foundation for this testimony.

THE COURT: I'll sustain that one. Set a foundation, counsel.

² The court reporter used periods instead of question marks after questions, but Mr. Mullins will use question marks when quoting questions in this brief.

MS. GEORGE: Okay.

Q: Dep. Coon, have you handled currency?

A: I have.

Q: Okay. Do you – Are you familiar with what currency feels like?

A: I am.

Q: And what it looks like?

A: I am.

Q: Visually and how big it is?

A: Yes, Ma'am.

Q: Okay. So knowing all that, did you notice anything about the size?

MR. WHITAKER: Objection, your Honor. That's (inaudible) witness testimony.

THE COURT: Well, overruled. You can deal with it on cross. Go ahead.

MR. WHITAKER: But your Honor, if I may -- ... The point is this: There's been no foundation – that's been laid to say that any of his experience or training as a law enforcement officer allows him to testify as – expert on the topic of fraudulent currency –

THE COURT: She hasn't asked to qualify him as an expert.

MR. WHITAKER: Your Honor, he wants to testify that this object is counterfeit United States currency. All right?

Every other case that you see has a United States Secret Service officer coming in and talking about –

THE COURT: Well, I don't know about that –

MR. WHITAKER: (inaudible)

THE COURT: No talking objections here, counsel. She's not – as I understand she has not asked to qualify him as an expert in counterfeit, that I know of. And again, I feel you can deal with that on cross examination. So, overruled. Go ahead.

MS. GEORGE: Thank you. Q: Having been dealt with – currency, what did you notice about the size?

A: It – it appears slightly smaller than typical U.S. currency I've handled.

RP 139-42.

The State later returned to its theme of having Deputy Coon repeatedly provide his opinion regarding whether the currency was counterfeit. When discussing the money found under the steps, Deputy Coon stated, “I noticed right way that it had the same corner markings, they appeared to be scribbled out this time. It also felt different than typical U.S. currency that I've handled in the past.” RP 154. Mr. Mullins stated, “Objection, your Honor. Same foundation as the other (inaudible).” RP 154. The court overruled the objection, so testimony proceeded along the same lines. Mr. Mullins objected twice when the prosecutor asked if Deputy Coon had any suspicions about the bills being counterfeit and

Deputy Coon said “they appeared to be counterfeit.” RP 155-56. The court overruled the objections, stating, “Overruled, counsel. It’s a lay opinion.” RP 156.

Then, when the State recalled Deputy Coon to the stand he again gave his opinion about whether certain bills were counterfeit. RP 204-05. He testified that he recovered Mr. Mullins’s wallet after arresting him, and said he could “see some other suspected counterfeit money sticking out of the wallet.” RP 205. Mr. Mullins objected based on speculation, but the court overruled the objection. RP 205. So the deputy testified, “It wasn’t ... U.S. currency.” RP 205.

State’s witness David Hoffman, who was an acquaintance of Mr. Mullins, also testified he believed the money was counterfeit. He said that Mr. Mullins “was involved with ... fake money.” RP 169. Mr. Mullins objected based on lack of foundation, but the court overruled the objection. RP 169. Mr. Hoffman subsequently testified, “I could see that there was writing on it that indicated to me that it was fake[.]” RP 171. Mr. Mullins objected based on speculation, but the court overruled the objection. RP 171.

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. Mr. Mullins objected based on lack of relevance, but the court overruled the objection. RP 144. The deputy testified he noticed Mr. Mullins “had a couple grocery items in his hand” and also that he was “well dressed.” RP 144. He said it struck him as “odd” because “through previous dealings ...” RP 144. Mr. Mullins cut him off and objected again based on relevance, but the court overruled the objection. RP 144. Thus, the State continued in the same vein:

Now you said you’ve had prior contacts with him both professionally and just in the street.

A Yes, Ma’am.

Q And -- in those instances do you recall if he had been dressed the same as when you saw him this night in Safeway?

A No.

Q Did—

MR. WHITAKER: Objection. Relevance.

RP 145. The court again overruled the objection, and the deputy again stated that Mr. Mullins was dressed better than he usually was when he saw him “in previous contacts[.]” RP 145.

- b. The objections were well-taken and should have been sustained.

As explained below, Mr. Mullins's objections were proper and the court erred in overruling them. The clerk's statement that the bill was counterfeit should have been excluded as hearsay. The deputy's statements that Mr. Mullins was dressed more nicely than he was during prior contacts should have been excluded as irrelevant, substantially more prejudicial than probative, and improper character evidence. And the numerous witness statements opining that the bills were counterfeit should have been excluded as speculative and lacking foundation. To the extent the court permitted the testimony as "lay opinion," the ruling violated Mr. Mullins's constitutional right to a jury trial.

- i. *The deputy's testimony that the store clerk said the bill was counterfeit should have been excluded as hearsay.*

As noted above, over Mr. Mullins's objection, Deputy Coon testified that the clerk at SpoKo Fuel told him "they were in possession of a counterfeit \$100 bill." RP 134. The court should have excluded this statement because it was 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.

There was no reason for the State 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. As this court has explained, “the 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.* This objection should have been sustained.

- ii. *The deputy's testimony that Mr. Mullins was dressed more nicely than he usually is should have been excluded under ER 402, 403, and 404.*

The objections to the deputy's testimony regarding Mr. Mullins's clothing also should have been sustained. The deputy testified that he was familiar with Mr. Mullins due to previous contacts "both professionally and just in the street," and that he was dressed more nicely than usual. RP 144. Mr. Mullins repeatedly objected on relevance grounds, and the court should have excluded this testimony under ER 402, 403, and 404(b).

First, the deputy's perceptions of Mr. Mullins's attire were not relevant to the questions of whether Mr. Mullins committed forgery or resisted arrest. Thus, they should have been excluded under ER 402 ("Evidence which is not relevant is not admissible."). *See also* ER 401 ("'Relevant evidence' means 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.>").

Second, any marginal relevance was outweighed by the danger of unfair prejudice, and should have been excluded under ER 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice ..."). The deputy implied

that Mr. Mullins was poor and must have acquired his clothing unlawfully. The jury was left to speculate about other crimes Mr. Mullins may have committed and why the deputy had repeatedly seen him dressed poorly. These matters were irrelevant and prejudicial, and should have been excluded.

Finally, this testimony should have been excluded under ER 404, which prohibits admission of character evidence to show action in conformity therewith. The deputy was permitted to testify that Mr. Mullins was dressed nicely relative to other times the two had had “dealings” with each other. Such testimony is not relevant for a proper purpose, but only tends to show the defendant is a bad actor who has regular run-ins with the police and probably acted unlawfully on the current occasion also. *See State v. Smith*, 106 Wn.2d 772, 779-80, 725 P.2d 951 (1986) (reversing where court improperly admitted evidence of three prior burglaries defendant committed to prove the defendant committed rapes at issue; the evidence was not relevant, and “the danger of unfair prejudice looms large.”).

iii. *The witnesses' numerous statements that the bills seemed to be counterfeit should have been excluded as improper opinion testimony that was speculative, lacked foundation, and invaded the province of the jury.*

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*, this 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.* 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.* “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*, this 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 that “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*, the Supreme 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. *Montgomery*, 163 Wn.2d at 587-88, 594. The 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.

- c. The remedy is reversal of the forgery conviction and remand for a new trial.

Because the court erred in overruling Mr. Mullins's numerous well-taken objections, this Court should reverse the forgery conviction and remand for a new trial.³

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

³ Most of the objectionable testimony was relevant only to that crime, not to the resisting/obstruction allegation.

new trial is necessary.” *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, 230 P.3d 583 (2010).

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, this Court should hold the improper admission of the above statements was prejudicial. It is true that the jury was able to view the currency itself and the SpoKo Fuel general manager, for whom the State laid a foundation, testified that the bill was counterfeit. RP 181-86. But the improperly admitted statements overwhelmed the trial – the officer repeatedly testified that he thought the bills were counterfeit, he relayed clerk’s opinion that the bills were counterfeit, and he described Mr. Mullins as a generally poorly dressed person who has frequent dealings with the police. As it is, 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, this Court should reverse the conviction on count four and remand for a new trial.

4. The sentencing 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.

Mr. Mullins requested a DOSA, but the judge denied it on the basis that Mr. Mullins did not plead guilty and instead chose to go to trial. This was error. Although a defendant does not have a right to a sentencing alternative, he does have the right to have the court meaningfully consider such an alternative. The categorical refusal to consider a sentencing alternative for a class of offenders is error, and the refusal to consider a sentencing alternative based on the exercise of a constitutional right to trial is error. For each of these reasons, this Court should reverse the sentence and remand for resentencing.

- a. The legislature created DOSA to treat people with drug addiction and thereby prevent recidivism.

In 1995, the legislature enacted the DOSA program as a “treatment-oriented alternative to a standard range sentence.” *State v. Kane*, 101 Wn. App. 607, 609, 5 P.3d 741 (2000). It is focused on treatment for addicted offenders who do not have a history of violent crime or high-quantity drug offenses. *State v. Bramme*, 115 Wn. App. 844, 850, 64 P.3d 60 (2003). In 1999, the legislature was concerned that the DOSA program was underutilized, so it expanded the program to include not only first-time felons but all felony drug and property offenders.

Engrossed Second Substitute House Bill 1006. The legislature stated, “This is a measure that gets tough on those who have a substance abuse problem, but also stops the revolving door to the prisons. It gives the offender the treatment he needs so he is less likely to offend again, while still requiring confinement.” Senate Bill Report, Engrossed Second Substitute House Bill 1006, at 3.

The legislature intends that drug treatment be used as an alternative to standard sentencing in order to reduce recidivism:

It is the intent of the legislature to increase the use of effective substance abuse treatment for defendants and offenders in Washington in order to make frugal use of state and local resources, thus reducing recidivism and increasing the likelihood that defendants and offenders will become productive and law-abiding persons. The legislature recognizes that substance abuse treatment can be effective if it is well planned and involves adequate monitoring, and that substance abuse and addiction is a public safety and public health issue that must be more effectively addressed if recidivism is to be reduced.

Laws of 2002, ch. 290, § 1.

The legislature granted sentencing courts discretion to impose a DOSA where the defendant meets certain eligibility requirements and the court determines that a sentencing alternative is appropriate. RCW 9.94A.660. A defendant is eligible for a DOSA if (1) his current offense is not a violent offense, a sex offense, or a DUI, and does not involve a firearm or deadly weapon enhancement; (2) his prior convictions do not

include violent offenses or sex offenses; (3) if his current offense is a drug offense it involved only a small quantity of drugs; (4) the defendant is not subject to deportation; (5) the standard range sentence for the current offense exceeds one year; and (6) the defendant has not received a DOSA more than once in the last 10 years. RCW 9.94A.660(1). If the defendant is eligible, the court may order an examination of the defendant to determine, inter alia, “whether the offender and the community will benefit from the use of the alternative.” RCW 9.94A.660(5).

After receipt of the examination report, the court determines whether a DOSA would be an “appropriate” sentence. RCW 9.94A.660(3). If so, the individual serves half of his standard-range sentence in prison where he receives a comprehensive substance abuse assessment and treatment services, and the other half as a term of community custody, with continuing treatment. RCW 9.94A.660(3); RCW 9.94A.662.

- b. Mr. Mullins requested a DOSA but the court denied it on the basis that Mr. Mullins did not plead guilty.

At sentencing, Mr. Mullins requested a DOSA. Counsel explained, “Your Honor, David Mullins is a drug addict. That’s – that’s what he is. And drugs are expensive. And that’s reflected in the property crimes that Ms. George has read to us.” RP 265. He stated, “This is a DOSA sentence

individual, your Honor. This person needs drug rehabilitation desperately, and is asking the court today to impose a DOSA sentence[.]” RP 266.

Counsel argued that a DOSA would be the best way to prevent recidivism.

Id.

Mr. Mullins echoed his attorney’s concerns and endorsed the proposed solution. He said, “I just – if I can – like – possibility I can get a DOSA sentence – I’d ask for it. And – yeah. Hopefully it leads me (inaudible) in the near future.” RP 266.

The court categorically denied the request. The judge said, “Well, I truly hope that you are seeing that there’s some – a connection between the use of drugs and these crimes. But, you know, DOSA’s for those who come in and say, ‘Look, I’m pleading guilty because I – I have a problem and I need to get treatment.’ And you didn’t do that.” RP 266. The court emphasized that witnesses testified they saw him commit the crimes, yet “you chose to go to trial.” RP 266-67. “You chose to say ‘I’m not guilty,’ and then didn’t even stick around to tell the jury that you were not guilty, you chose to leave, chose not to come back. Those are all choices. And that’s why you’re here today, is because of those choices.” RP 267.

The court said it agreed that Mr. Mullins should have had a DOSA many years earlier, “[b]ut today is not that time.” RP 267. The judge said this case was about a person who “chooses to steal[.]” and that Mr.

Mullins should have taken the initiative to obtain treatment for himself outside the context of the criminal justice system. RP 267. “But this history, this continuing activity without any remorse whatsoever, justifies the maximum penalty and that’s what I’ll do.” RP 268.

- c. The court erred by categorially refusing to grant a DOSA instead of exercising its discretion to consider it.

The court erred in categorically denying a DOSA on the basis that Mr. Mullins did not plead guilty. The legislature did not limit DOSA eligibility to those who plead guilty, and a court’s refusal to consider a DOSA for an entire category of offenders is an error of law that necessarily constitutes an abuse of discretion. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005).

In *Grayson*, the defendant had an extensive history of drug felonies, with an offender score of ten. *Id.* at 335-36. He requested a DOSA, and the court reviewed his history and his eligibility screening. *Id.* at 336. The judge denied the DOSA request, stating that his “main reason” was “that the State no longer has money available to treat people who go through a DOSA program.” *Id.* at 337.

The Supreme Court reversed. It emphasized, “while trial judges have considerable discretion under the SRA, they are still required to act within its strictures and principles of due process of law.” *Id.* at 342. Thus,

“where a defendant has requested a sentencing alternative authorized by statute, the categorical refusal to consider the sentence, or the refusal to consider it for a class of offenders, is effectively a failure to exercise discretion and is subject to reversal.” *Id.*

The same should occur here. Here, as in *Grayson*, the judge’s primary reason for denying the DOSA was an improper reason. The court wrongly believed that a DOSA is not available or appropriate for the entire category of defendants who choose not to plead guilty and instead exercise their constitutional rights to a jury trial and proof beyond a reasonable doubt. RP 266-68. Thus, as in *Grayson*, this Court should reverse the sentence and remand for resentencing.

d. The court erred by punishing the exercise of the constitutional right to trial.

The denial of the DOSA was improper for the additional reason that the court punished the exercise of a constitutional right. A criminal defendant has a constitutional right to a trial by jury and a constitutional right to have the State prove the elements of a crime to that jury beyond a reasonable doubt. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 21, 22. “A criminal defendant may not be subjected to a more severe punishment for exercising his constitutional right to stand trial.” *State v. Montgomery*,

105 Wn. App. 442, 446, 17 P.3d 1237 (2001) (citing *United States v. Carter*, 804 F.2d 508 (9th Cir. 1986)).

In *Montgomery*, a jury convicted the defendant of rape of a child in the first degree and child molestation in the first degree. *Id.* at 443. The defendant requested a Special Sex Offender Sentencing Alternative (“SSOSA”), but the trial court denied it on the basis that “Montgomery’s taking the case to trial indicated his unwillingness to acknowledge his problem and thus he was not amenable to treatment.” *Id.* at 444. Although this Court concluded the defendant was not eligible under the statute, the Court condemned the trial court’s reasoning for denying the alternative:

The trial court’s reason for denying SSOSA to Montgomery was that he caused his victim to go to trial. This was a violation of Montgomery’s constitutional rights. Notwithstanding the common belief that an offender must accept past deviancy in order for treatment to be successful, the minimal protections provided by the United States Constitution may not be violated.

Id. at 446. This Court concluded, “The trial court erred when it denied SSOSA to Montgomery because he took the case to trial.” *Id.*

The same is true here. The trial court erred when it denied a DOSA to Mr. Mullins because he took the case to trial. For this reason, too, this Court should reverse the sentence and remand for resentencing.

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

Another independent basis for reversing the sentence is that the court calculated Mr. Mullins's offender score based on the prosecutor's mere statements, with no supporting evidence. At sentencing, the prosecutor claimed "Mr. Mullins is a nine-plus," and then orally listed alleged prior convictions:

He has a burglary first -- as a juvenile in 2004, and just convictions -- consistent after that. Two malicious mischiefs later in -- excuse me -- at the same time in 2004. And attempt to elude in 2005. A prior escape first in 2005 out of Benton County. A theft second in 2007, a residential burglary in 2007 -- Those are his juvenile convictions.

...

Then we -- continuing move right into his adult history, which starts with a Theft 2 in 2008, a possession of stolen property, a motor vehicle, in 2009, a residential burglary in 2010, a theft of a firearm in 2010, another possession of stolen property second in 2010, another theft second in 2010. He has an escape from community custody in 2011, a theft of a motor vehicle in 2012, and then a burglary second in 2014 for which he was released November 30th, 2017.

RP 263.

No certified judgments or other evidence of the alleged prior convictions were presented. Despite the absence of evidence, the court calculated an offender score of "9+," listed alleged prior convictions with no cause numbers, and imposed a sentence at the top of the resulting range. CP 105-08. As explained below, this was improper.

The Sentencing Reform Act (“SRA”) creates a grid of standard sentencing ranges calculated according to the seriousness level of the crime in question and the defendant’s offender score. RCW 9.94A.505, .517, .518, .525, .530; *State v. Ford*, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). The offender score is the sum of points accrued as a result of prior and other current convictions. RCW 9.94A.525.

A defendant may challenge the offender score for the first time on appeal. *State v. Mendoza*, 165 Wn.2d 913, 920, 205 P.3d 113 (2009). This Court reviews *de novo* the sentencing court’s calculation of the offender score. *State v. Rivers*, 130 Wn. App. 689, 699, 128 P.3d 608 (2005).

It is the State’s burden to prove the existence of prior convictions by a preponderance of the evidence. *Ford*, 137 Wn.2d at 479-80. The best evidence of a prior conviction is a certified copy of the judgment and sentence. *Rivers*, 130 Wn. App. at 698. The State may prove prior convictions by other evidence only if (1) it shows a certified copy of the judgment and sentence is unavailable due to some reason other than the serious fault of the proponent, and (2) the evidence introduced in lieu of certified copies of the judgment and sentence is of comparable reliability. *Id.* at 698-99. The State’s burden is not obviated by a defendant’s failure to object. *Ford*, 137 Wn.2d at 482-83.

In 2008, the legislature attempted to change the above rules by amending the SRA. *See State v. Hunley*, 175 Wn.2d 901, 287 P.3d 584 (2012). But both this Court and the Supreme Court held that relieving the State of its burden of proof violated due process. *Id.* at 905. “[A] sentencing court violate[s] a defendant’s right to due process by basing the imposed sentence on prior convictions demonstrated only by the prosecutor’s written summary and the defendant’s failure to object.” *Id.*

Under *Hunley* and the SRA as constitutionally construed, the trial court erred in calculating Mr. Mullins’s offender score based only on the prosecutor’s summary with no supporting evidence. *See id.* The remedy is reversal of the sentence and remand for resentencing. *Id.* at 906 n.2.

F. CONCLUSION

Because the convictions on counts two and three violate the constitutional right to be free from double jeopardy, Mr. Mullins asks this Court to reverse his conviction for resisting arrest and remand for dismissal of the charge with prejudice and for resentencing. The remaining convictions should be reversed and the case remanded for a new trial because the court violated Mr. Mullins’s constitutional right to be present. Additionally, the forgery conviction should be reversed and remanded for

a new trial on the independent basis that the court erroneously overruled numerous evidentiary objections.

If this Court does not reverse the convictions, it should reverse the sentence and remand for resentencing because the State failed to prove the offender score and the court denied a DOSA on an improper basis.

Respectfully submitted this 29th day of July, 2019.



Lila J. Silverstein – WSBA 38394
Washington Appellate Project – 91052
Attorneys for Appellant

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

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

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<input checked="" type="checkbox"/> DAVID MULLINS 337510 STAFFORD CREEK CORRECTIONS CENTER 191 CONSTANTINE WAY ABERDEEN, WA 98520	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF JULY, 2019.

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Sender Name: MARIA RILEY - Email: maria@washapp.org

Filing on Behalf of: Lila Jane Silverstein - Email: lila@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

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