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Division III
State of Washington
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No. 36410-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DAVID RAYMOND MULLINS,

Appellant.

BRIEF OF RESPONDENT

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III. STATEMENT OF THE CASE

David Raymond Mullins (hereinafter “Mr. Mullins”) was convicted of one count of Forgery, one count of Resisting Arrest, and one count of Obstructing a Law Enforcement Officer. CP 94-97.

On April 24, 2018, Mr. Mullins used a counterfeit \$100 bill at Spoko Fuel, a gas station near Chewelah, Washington. CP 33. The attendant immediately noticed his error and contacted his supervisor, Mr. Patrick Abrahamson. RP at 185. Mr. Abrahamson immediately recognized the bill as counterfeit. RP at 184, lines 21-25. The person who passed the \$100 bill was believed to be Mr. Mullins. CP 6, 9.

Two days later, on April 26, 2018, Deputy Mark Coon of the Stevens County Sheriff’s Office saw Mr. Mullins in Safeway. RP at 143-44. Deputy Coon tried to place Mr. Mullins under arrest for an unrelated theft. CP 6; RP at 52, lines 19-23. Mr. Mullins resisted and slipped out of Deputy Coon’s grasp. RP at 148, lines 8-9. Mr. Mullins then led Deputy Coon on a foot pursuit. RP at 149, line 4. Deputy Coon was soon thereafter joined by Colville Police Officer Adam Kowal. RP at 150, line 19. Mr. Mullins hid from Deputy Coon and Officer Kowal in the backyard of a nearby house. RP at 151, lines 2-4. When Deputy Coon and Officer Kowal arrested Mr. Mullins in the backyard, they noticed more apparently counterfeit bills.

Law enforcement collected the apparently counterfeit bills. RP at 151, lines 17-23.

By way of *Information*, Mr. Mullins was charged with Forgery, Resisting Arrest, and Obstructing a Law Enforcement Officer. CP 1-2. The State amended its *Information* on May 29, 2018, adding another count of Forgery. CP 11-13. The State later amended again, but changed only the violation date of Count 4. CP 32-34. By July 9, 2018, Mr. Mullins' trial counsel moved for a *Bill of Particulars and for Dismissal*. CP 15-19. After the State's response to both Motions, the Stevens County Superior Court, by Judge Patrick Monasmith, denied Mr. Mullins' Motion to Dismiss, but granted the *Bill of Particulars*. CP 29.

Mr. Mullins presented himself for trial on September 27, 2018, but did not come back after jury selection. RP at 117. Mr. Mullins later reappeared sometime during the testimony of the State's first witness. RP at 159, lines 1-7. Mr. Mullins apparently attended his trial or was in the courthouse for some time after that, but then failed to appear the next morning. RP at 164. Each time Mr. Mullins disappeared, the Stevens County Superior Court, by Judge Patrick Monasmith, paused the proceedings, inquired of counsel, sought to find Mr. Mullins, and ultimately had to make rulings based on what it could gather of Mr. Mullins' absences. RP at 118, 119, 120, 121, 123-26, 159-61, 164-65.

The jury found Mr. Mullins guilty on one count of forgery, one count of resisting arrest, and one count of obstructing a law enforcement officer. RP at 254-55; CP 95, 96, 97. The jury found Mr. Mullins not guilty of one count of forgery; that forgery count stemmed from the apparently counterfeit bills that were found with Mr. Mullins when he was finally arrested in the backyard of a nearby house on April 26, 2018. RP at 256; CP 94.

IV. STATEMENT OF THE ISSUES

- I. Did the jury's conviction of Mr. Mullins for the crimes of resisting arrest and obstructing a law enforcement officer violate Mr. Mullins' double jeopardy right when each crime contains different elements and different facts supported each conviction?
- II. Did the Superior Court violate Mr. Mullins' right to be present at trial when Mr. Mullins voluntarily absented himself twice during the proceedings?
- III. Did the Superior Court correctly overrule objections and allow hearsay, testimony regarding Deputy Coon's opinion of the counterfeit nature of the \$100 bill, and testimony about Mr. Mullins' manner of dress?
- IV. Did the Superior Court properly sentence Mr. Mullins, taking into account Mr. Mullins' refusal to admit his drug addiction?
- V. Did the Superior Court properly calculate Mr. Mullins' offender score, given that the burden of proving prior convictions is a mere preponderance of the evidence?

V. STANDARDS OF REVIEW

Issue I, Mr. Mullins' double jeopardy challenge, is reviewed de novo. State v. Hughes, 166 Wash.2d 675, 681, 212 P.3d 558 (2009).

Issue II, Mr. Mullins' voluntary absence from his trial, is reviewed for abuse of discretion. State v. Thurlby, 184 Wash.2d 618, 624, 359 P.3d 793 (2015); See also State v. Garza, 150 Wn.2d 360, 366, 77 P.3d 347 (2003).

Issue III, the evidentiary rulings made by the Superior Court, are reviewed for abuse of discretion. State v. Saunders, 120 Wash.App. 800, 811, 86 P.3d 232, 238–39 (2004).

Issue IV, denial of a DOSA, is reviewed for abuse of discretion. State v. Grayson, 154 Wash.2d 333, 338, 111 P.3d 1183, 1185–86 (2005).

Issue V, use of certain facts in properly formulating Mr. Mullins' offender score, appears to be reviewed for abuse of discretion. See State v. Mendoza, 165 Wash.2d 913, 205 P.3d 113 (2009); See also State v. Ford, 137 Wash.2d 472, 973 P.2d 452 (1999).

VI. ARGUMENT

1. **In order for a defendant's double jeopardy right to be violated in this case, the two compared charges must be identical in fact and law.**

The jury's convictions of Mr. Mullins for obstructing and resisting do not violate double jeopardy because the convictions were neither the same in law nor in fact.

"The Double Jeopardy Clause of the Fifth Amendment offers three separate constitutional protections coextensive in Washington." State v. Godsey, 131 Wash.App. 278, 289, 127 P.3d 11, 16 (2006). "One aspect of double jeopardy protects a defendant from being punished multiple times for the same offense." Id. "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not." Id.

"Within constitutional constraints, the legislative branch has the power to define criminal conduct and assign punishment for such conduct." State v. Calle, 125 Wash.2d 769, 776, 888 P.2d 155 (1995). "Therefore, the question whether punishments imposed by a court, following conviction upon criminal charges, are unconstitutionally multiple cannot be resolved without determining what punishments the legislative branch has authorized." Id. "In examining whether the Legislature intended

to authorize multiple punishments for violations of the rape and incest statutes, we start with the language of the statutes themselves.” Id. “Under the ‘same evidence’ rule of construction which this court adopted in 1896, the defendant's double jeopardy rights are violated if he or she is convicted of offenses that are identical both in fact and in law.” Id. at 777. “However, if each offense, as charged, includes elements not included in the other, the offenses are different and multiple convictions can stand.” Id.

“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). Obstructing a law enforcement officer is a gross misdemeanor, thereby punishable by up to 364 days in jail and a maximum fine of \$5,000.00. RCW 9A.04.040(2); RCW 9A.20.010(2); RCW 9A.20.021(2). “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). Resisting arrest is a misdemeanor, thereby punishable by up to 90 days in jail and a maximum fine of \$1,000.00. RCW 9A.04.040(2); RCW 9A.20.010(2); RCW 9A.20.021(3).

Resisting can be obstruction, but does not necessarily have to be. Resisting includes the element that the defendant prevented or attempted to prevent a peace officer from arresting him. CP 82. Obstructing is broader

and contains the element of willfully hindering, delaying or obstructing a law enforcement. CP 86.

The jury was instructed as to the elements of both charges. CP 82, 86. The Superior Court instructed the jury on the elements of resisting arrest. RP at 234-35. The Superior Court then instructed the jury on the elements of obstructing a law enforcement officer. RP at 235-36.

The jury heard argument from the State on both charges and the elements of each. RP at 243, lines 6-12; 244, lines 6-22. Mr. Mullins also provided closing argument to the jury and argued, "...extreme example of that is one can resist arrest without obstructing an officer. One can obstruct a law enforcement officer without resisting arrest. You have to – *each incident individually*, (inaudible) on its own merits. The fact that you may have found that he obstructed doesn't automatically mean he's resisted and vice-versa." RP at 245-46 (emphasis added). Thus, it was apparent even to Mr. Mullins that the resisting and obstructing were distinct events.

In relation to both crimes, Mr. Mullins' behavior was different. Each of the two charges carries different elements and Mr. Mullins' actions satisfied elements in both charges.

Mr. Mullins argues that the Stevens County Deputy Prosecuting Attorney (hereinafter "DPA") argued that the chase of Mr. Mullins was the obstructing and resisting. On the contrary, the DPA argued that, "...[Mr.

Mullins] stiffened up and he slipped away....” RP at 243, lines 7-8. The DPA then argued that the obstructing was the chase. RP at 244. The DPA noted, “[w]hile it may have been a short chase he had to chase him out of Safeway and down the block and eventually slowed down to start looking through yards, which he did. *That* interrupted and hindered his ability to arrest him and move on with his night.” RP at 244, lines 17-19 (emphasis added). It was Mr. Mullins’ pulling away and slipping out of Deputy Coon’s grasp that was resisting and it was Mr. Mullins’ brief jaunt about the neighborhood that was the obstructing.

Regardless of how much detail the DPA used in her argument, the jury was directed to, and presumably did, rely on its memory and its notes. “The lawyers’ remarks, statements and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers’ statements are not evidence.” RP at 227, lines 14-17. Whether or not the DPA went into the same detail as the testifying witness did on direct examination is immaterial; the jury heard Deputy Coon and Officer Kowal’s detailed testimony ast to Mr. Mullins’ conduct relating to each charge. Indeed, the DPA focused on the evidence for each charge, when inquiring with both law enforcement officers.

“At that point I made a little bit of small talk with Mr. Mullins, I advised him to put his hands behind his back, I advised him that he was

under arrest. He slowly began to comply. I helped his arms back behind his back, in accordance with my training, put the backs of his hands together and grabbed the -- was able to grab the top two fingers of his -- of his -- left and right hand while they were behind his back.” RP at 147, lines 18-25. It was at that point in time that Mr. Mullins resisted arrest. The DPA asked Deputy Coon, “[o]kay. And again you – I’m sorry. You advised him that he was under arrest?” RP at 148, lines 1-2.

“I felt his arms tighten up...I told him not to tense up on me. At that point Mr. Mullins was able to jerk his hands free from my hands and he took off running, eventually exiting the store and across the parking lot.” RP at 148, lines 8-12. “What is the importance of tensing up in your – as a – law enforcement officer when you’re trying to arrest somebody.” RP at 148, lines 18-19. “Generally it’s triggering the fight or flight mechanism in the arrestee or the suspect. It’s a -- it’s a--it’s a pre-flight or fight indicator. At that point I’m switching gears from a compliant arrest to -- thinking that this may be -- turning into a non-compliant situation.” RP at 148, lines 20-24. “At that point is when he jerked his hands free from me....” RP at 149, line 1.

Mr. Mullins’ next criminal act was to obstruct law enforcement by hiding from Deputy Coon and Officer Kowal. Deputy Coon and Officer Kowal finally found Mr. Mullins hiding in a backyard.

As Deputy Coon was chasing Mr. Mullins, Deputy Coon yelled, “David it’s not worth it; you’re making it worse on yourself, just stop,” but Mr. Mullins continued running. RP at 149, lines 13-20. “I continued chasing [Mr. Mullins] into the alleyway between Main and – I think that’s Main and Wynne, where a few addresses up in the alleyway I saw him turn the corner and go into a yard.” RP at 149, lines 22-25. “At that point, with officer safety concerns, I slowed my pursuit a bit so I could (inaudible) corners. I didn’t want to be caught by surprise. Knowing that the flight mechanism’s already kicked in, I was worried that the fight mechanism, once he’s cornered, may be kicked in. So I began scanning blind areas as I – continued pursuit around – the back of the yard and front yard of – of the residence.” RP at 150, lines 3-10. “I got into the front yard, I could see Main Street – It’s really well-lit and wide at that point. I could see nobody – nobody running out there. I looked to my right and noticed the yard continued around to another side yard that was blocked off from the back yard, kind of like a horseshoe by a fence and a – and a garage.” RP at 150, lines 12-17. “At that point [Colville Police Officer] Kowal had arrived on scene as well. We systematically scanned and searched that – that side yard and – and breezeway area.” RP at 150, lines 19-21. Deputy Coon testified that the search took, “[m]aybe two minutes, I think.” RP at 150, line 23.

Deputy Coon and Officer Kowal eventually found Mr. Mullins, “[h]e was adjacent to the steps of the house and the garage man door, curled up, kind of *squatting behind a box and some material.*” RP at 151, lines 2-4. Once Deputy Coon finally found Mr. Mullins, Deputy Coon “...ordered him to show me his hands. I -- advised him again not to resist, that he was under arrest, and after a few commands of me to show him his -- of me -- of him to show me his hands he eventually complied and was taken into custody.” RP at 150-51.

When asked what he did next, Deputy Coon, testified “[o]nce I located him I ordered him to show me his hands. I – advised him again not to resist, that he was under arrest, that he was under arrest, and after a few commands of me to show him his – of me – of him to show me his hands he eventually *complied and was taken into custody.*” RP at 151, lines 6-10.

Mr. Mullins resisted arrest when he jerked his hands out of Deputy Coon’s control, while Deputy Coon attempted to arrest Mr. Mullins in Safeway. Mr. Mullins obstructed Deputy Coon and Officer Kowal by leading the law enforcement officers on a potentially dangerous foot pursuit and by *hiding in a yard.*

Separate elements are contained in each of the crimes of obstructing and resisting, each crime carries a different maximum penalty, and each

charge was supported by separate facts. The jury's convictions of Mr. Mullins do not violate double jeopardy.

2. **Mr. Mullins' convictions should stand because he twice voluntarily absented himself from the trial; the Superior Court did not violate Mr. Mullins' right to be present at trial because Mr. Mullins chose not to remain.**

A defendant's right to be present at his or her own trial is protected by the Sixth Amendment and the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution and article I, Section 22 of the Washington State Constitution, but the right is not absolute. *State v. Thurlby*, 184 Wash.2d, 618 624, 359 P.3d 793 (2015).

"A criminal defendant may waive the right to be present at trial so long as the waiver is knowing and voluntary." *Id.* "A waiver of the right to be present may be express or implied. *Id.* "If a trial has begun in the defendant's presence, a subsequent voluntary absence of the defendant operates as an implied waiver of the right to be present." *Id.* The "...rules of criminal procedure similarly permit the court to continue with trial despite a defendant's voluntary absence, provided that the defendant was present when the trial commenced." *Id.* "[A] trial court need not expressly state the presumption against waiver, nor must it begin its analysis of

voluntariness anew when evaluating the third prong of the Thomson analysis. Id. at 628.

In Thurlby, “the trial court began by inquiring into the circumstances of Thurlby's disappearance. It contacted the local hospital, the local jail, the court's administration, and the clerk's office to no avail. It inquired of both the State and the defense counsel whether they knew of Thurlby's whereabouts.” Id. at 626. “Similar to the court in Thomson, the trial court then waited over three hours for law enforcement to locate Thurlby or for Thurlby to contact the trial court or her attorney.” Id. “Before making its ruling, the trial court again contacted the local hospital, the trial court's administration, and the clerk's office. It also confirmed with the parties that no one had heard from Thurlby.” Id. “The trial court then proceeded to the second step of the *Thomson* analysis and, given the information available that day, made a preliminary finding that Thurlby was voluntarily absent.” Id. “Finally, prior to sentencing, the trial court provided Thurlby with an opportunity to explain her absence and evaluated Thurlby's absence in light of her justification.” Id.

“Specifically, Thurlby argues that her mother's unplanned surgery caused her to miss the conclusion of her trial. However, the trial court expressly addressed this claim. The trial court considered Thurlby's statements and found that her decision to be with her mother was a product

of choice.” Id. at 627. “The trial court reasoned that Thurlby knew her appearance in court was mandatory but failed to contact her attorney or otherwise explain her absence at the time.” Id. “While Thurlby's choice was understandable, the trial court concluded that it was still a voluntary decision. Thurlby has not presented facts to contravene the trial court's findings, nor has she demonstrated that the finding was manifestly unreasonable.” Id.

After jury selection on the morning of September 27, 2018, Mr. Mullins absented himself. RP at 117. The Superior Court noted, “[a]dditionally, I observed that Mr. Mullins is not here. RP at 117, line 9. “Mr. Whitaker, do you have a -- a reason for his absence?” Mr. Mullins’ attorney responded, “[o]nly the reason given to me by the court administrator.” RP at 117, lines 14-15. The Superior Court asked whether Mr. Mullins’ attorney had contact with him over the lunch hour. RP at 117, lines 16-17. The attorney responded: “Your Honor, I took him to a location over by the car wash--...--at his request-- 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 an appointment.” RP at 117-18. The Superior Court responded with, “[m]ore recently over the lunch hour a person identifying himself as Mr. Mullins and who the administrator recognized as Mr. Mullins called her, indicating that he was

feeling ill and might be on his way to the hospital. The -- administrator said he needed to come to the courthouse to see his attorney before he did that. Again, this is about 1:30 -- and that he was walking, was on his way, so he was ambulatory in any event. RP at 118, lines 5-12. The Superior Court eventually directed Mr. Mullins' attorney to attempt contact with Mr. Mullins and the Superior Court advised that it planned on bringing out the jury to update them on why trial was not proceeding as planned:

MR. WHITAKER: 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.

THE COURT: All right. Well, again, it is now 1:56. I had instructed counsel -- and I presume -- I didn't directly address Mr. Mullins but I presumed that you advised him to be here with you at 1:15--

MR. WHITAKER: I actually advised him to be here no later than the jury return time of 1:25.

THE COURT: 1:25. Okay. Well, again, we have a court rule on point here -- don't even know if I brought out; -- sure I did -- It's 3.4(b). The 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. The case law there indicates that while trial in absentia is disfavored, if the defendant's absence is voluntary -- that is voluntary waiving his right to be present -- the trial may continue. now, Mr. Mullins was obviously aware of his -- Well, did you wish to offer argument on any of that, Mr. Whitaker.

MR. WHITAKER: Well, your Honor, I think the only -- only topic/issue I have is that -- and I might be wrong -- the commencement is when the jury's sworn.

THE COURT: Well, I'll come out and swear them in, then.

MR. WHITAKER: He's not present -- during the swearing.

...

THE COURT: Do you have any way of contacting your client, Mr. Whitaker?

MR. WHITAKER: I have his mother's phone number.

THE COURT: Okay. Here's what we're going to do. I'm going to bring the jury back in, I'm going to swear them in, I'm going to let them go for a half hour, tell them to return at 2:30—

RP at 118-119. Later, the following discussion took place between the Superior Court and Mr. Mullins' attorney:

THE COURT: All right. Please be seated, at least momentarily. Mr. Whitaker, any luck locating your client.

MR. WHITAKER: The court administrator has more luck than I. She contacted me by phone and told me my client had instructed -- to come and get him where I left him.

THE COURT: Uh-huh.

MR. WHITAKER: And I made that drive, your Honor. And I am back. Empty-handed.

THE COURT: Okay.

MR. WHITAKER: So, as we were discussing earlier, your Honor, my interpretation of these rules was inaccurate, because my interpretation actually applied to double jeopardy and not to empaneling the jury.

THE COURT: All right. So, did you have a suggestion how to proceed at this point?

MR. WHITAKER: I don't want to try this case. Not like this. I don't.

RP at 123, lines 7-24. Mr. Mullins hid from his own attorney. It is understandable that Mr. Mullins' attorney did not want to proceed, but Mr. Mullins left him in a difficult position. The Superior Court responded with a reasoned approach:

I had read 3.4(b), and I guess a literal reading suggested that -- trial didn't start until the jury was sworn, but in fact the case law, beginning with State v. -- Let's see -- State v. Crafton, 72 Wn.App. 98, 1993, as well as State v. Brown, both -- which is 178 Wn.App. 70, 2013 -- both stand for the proposition that trial begins when the venire is sworn, not the actual empaneled jury. So trial had indeed started when Mr. Mullins chose not to join us. And I say "choose" 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. That's not to say that I'm not without sympathy for Mr. Whitaker. It is a very difficult position to be put in. I wish it was different. But it's not your fault. We all deal with the cards we're dealt. Now, I indicated earlier that should trial continue I intended to provide the jury with this instruction. Before I get to that I intend to swear the jury in, as I failed to do earlier today. I'll also -- have at least a brief discussion with Juror 13 about the nature of being an alternate juror. And then I'll give an instruction which, again-- Members of the jury, the defendant may not be present for the rest of the trial. Trial will continue. He'll continue to be represented by his attorney Mr. Whitaker. You're not to speculate about the reasons for his absence. You're not to draw any inferences against him from his absence, and his absence should not influence your consideration of the evidence

or your verdict in any way. So, I think that's -- the fairer thing to do. Certainly I was persuaded recently that that was a fair thing to do. So, that's what I intend to do, unless I hear some objection and basis for it. Mr. Whitaker?

RP at 125-26. Mr. Mullins' attorney could only respond that he had made a record. RP at 126, line 25. The Superior Court's reliance on WA CrR 3.4(b) was well-placed. Rule 3.4(b) provides, "[i]n prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has commenced in his presence shall not prevent continuing the trial to and including the return of the verdict." WA CrR 3.4(b).

The Superior Court's ruling was not erroneous. The ruling was in accordance with the Thurlby decision and court rules. The Superior Court was confronted with a defendant who had left the trial, provided no particularized explanation for his absence, had contacted the court administrator at least twice, told his attorney to come get him, his attorney had indeed gone to the place where he said he would be, and Mr. Mullins had even prevented his attorney from finding him. The Superior Court had every indication that its preliminary ruling should be that Mr. Mullins absented himself voluntarily. The Superior Court noted that Mr. Mullins was not in a hospital, had contacted the court administrator, and had even dodged his own attorney. Had the Superior Court granted a new trial, as Mr. Mullins suggests on appeal that it should have, the Superior Court's

decision would have been erroneous. Mr. Mullins suggests that the Superior Court should have “presumed that something outside [Mr. Mullins’] control was delaying him.” Brief of Appellant at 17. There were absolutely no facts that indicated anything was delaying Mr. Mullins.

Weighing all of the facts, the Superior Court made a correct preliminary ruling and took the following steps to mitigate the situation Mr. Mullins created, by instructing the jury as follows:

Now, one last thing, folks. You may observe, Mr. Mullins isn’t here. And I want to indicate to you that he may not be here for the rest of the trial. The trial will nevertheless continue, and Mr. Mullins will continue to be represented by Mr. Whitaker. You’re not to speculate about the reasons for his absence nor draw any inference against him from his absence. It should not influence your consideration of the evidence or your verdict in any way.

RP at 128, lines 6-14. The trial proceeded and Mr. Mullins did not reappear.

Mr. Mullins eventually came back, sometime during or directly after his attorney’s cross-examination of the State’s first witness, claiming that he had been “puking blood.” RP at 159, lines 16-19. Of course, no one could confirm Mr. Mullins’ medical claim. RP at 159, lines 20-22. The Superior Court inquired as to Mr. Mullins’ medical state at the time of his disappearance and Mr. Mullins stated that he had not been puking blood during voir dire, but he had been nauseated. RP at 159, lines 23-25. The Superior Court was sympathetic and said:

Well, my inclination, counsel, is then to – break for the day, give

Mr. Mullins an opportunity to seek medical assistance. I'll expect him back tomorrow morning if he's not admitted to the hospital. I think also, if you'd like to have him present while the jury comes back in we can do that. Would you prefer to have that happen—

And I would indicate that we're going to – because of – I want to say apparent or claimed illness but I don't want to have any judgment about it, but – a potential medical condition I think is how I'll phrase it – and – that we're going to stop until tomorrow morning at nine o'clock. But I want to be sure Mr. Mullins understands that if he's not admitted to the hospital I expect him here ready to go for trial at nine o'clock.

RP at 160, lines 6-22. Mr. Mullins' response, on the record, after hearing this admonishment, was “[y]es, your Honor.” RP at 160, line 23. All of this was going on while a material witness was in the Stevens County Jail, in custody, waiting to testify. RP at 161, lines 4-7.

The Superior Court convened for the day, with the following instruction to the jury:

As you can see, ladies and gentlemen, Mr. Mullins has rejoined us. However, there is a need to seek medical attention. So what I'm going to do at this point is simply knock off for the day, 45 minutes early. We're going to begin tomorrow morning at 9:00 a.m. So again I'd ask that you be present and accounted for by five 'til. I intend to start at 9:00 sharp, one way or the other.

RP at 161-62.

Mr. Mullins pulled the same disappearing act the next morning, despite having acknowledged the Superior Court's admonishment from the day before. RP at 164, lines 6-9. The Superior Court was advised, “[Colville Police Officer] Kowal checked with the hospital yesterday. He was not

admitted and it was – the information I got from [Officer] Kowal was it appeared that [Mr. Mullins] was there for less than ten minutes once he was transported there to sign papers and be released.” RP at 164, lines 12-16. Mr. Mullins’ attorney did not provide any information in support or rebuttal. The Superior Court agreed that it was obliged to give the same instruction to the jury as he did the day before. RP at 165, lines 1-7.

By the conclusion of the case, Mr. Mullins had not reappeared. Mr. Mullins chose not to present himself for the verdict or the reading thereof. RP at 258-59. The Superior Court granted a warrant for Mr. Mullins’ arrest. RP at 259, lines 6-7. At sentencing, neither Mr. Mullins nor his attorney provided any information relating to Mr. Mullins’ voluntary absences. In nearly five pages of proceedings, Mr. Mullins provided no explanation. RP at 265-270. Mr. Mullins was given the opportunity to directly address the Superior Court. When he addressed the Superior Court, he said nothing of his voluntary absences. RP at 266, lines 15-18. Mr. Mullins even filed a motion for a new trial, based on other grounds, yet said nothing about his voluntary absences. CP 141-43.

Mr. Mullins was given every opportunity to present himself at trial. Mr. Mullins was given every opportunity to explain himself when he absented himself from trial. Mr. Mullins even had the opportunity to request a new trial in his post-verdict filing(s). Mr. Mullins voluntarily

absented himself and the Superior Court's findings should remain undisturbed.

3. The jury's conviction of Mr. Mullins for forgery should stand because the Superior Court correctly overruled evidentiary objections pertaining to hearsay, lay opinion on the counterfeit nature of the bills, and Mr. Mullins' manner of dress.

Mr. Mullins cannot succeed on a general claim about how his right to a fair trial was violated, without pointing to the specific objection(s), how each ruling violated a court rule, and, most importantly, how that violation resulted in demonstrable prejudice.

- i. The Superior Court correctly overruled Mr. Mullins' objections to hearsay, lack of foundation, and Mr. Mullins' manner of dress.

Mr. Mullins appears to assign error to the Superior Court's rulings on approximately three objections: 1. Hearsay, 2. Improper lay opinion testimony or lack of foundation, and 3. Comments on Mr. Mullins' style of dress. Brief of Appellant at 19-24.

Mr. Mullins claims that the Superior Court improperly overruled his hearsay objection. Brief of Appellant at 18, 19. Mr. Mullins claims that the following statement was hearsay: "Upon contacting a clerk there she did confirm that they were in possession of a counterfeit \$100 bill." Brief of Appellant at 19; RP at 134, lines 17-19. Assuming, *arguendo*, that the

statement was hearsay, a review of the remainder of the transcript shows the statement was clearly offered not for the truth of the matter asserted, but was offered for the effect that it had on the listener and the statement was offered to establish chain of custody of the \$100 bill Mr. Mullins used at Spoko Fuel.

Hearsay is any out of court statement offered by the proponent to prove the truth of the matter asserted by the declarant. ER 801(c). A review of the *Report of Proceedings* shows the State used the statement to prove chain of custody and the effect that it had on Deputy Coon, who was the listener.

Mr. Mullins argues that, “[t]here 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.” *Brief of Appellant* at 26. Mr. Mullins is incorrect. There were two reasons to admit that testimony. First, the testimony went to chain of custody. Deputy Coon testified that the Spoko Fuel employee had the \$100 bill. Deputy Coon testified that he did not retrieve the bill, but that Deputy Peterson went and retrieved the bill. RP at 135, lines 19-25. Deputy Coon testified that Deputy Peterson brought the bill to Deputy Coon. RP at 136, lines 1-5. Deputy Peterson testified that he was asked by Deputy Coon to retrieve the bill as evidence. RP at 191, lines 5-6. Finally, Deputy Peterson testified that he brought the bill to Deputy

Coon. RP at 191, lines 12-14.

The second reason to admit the statement was to show the effect that it had on the listener. Obviously, the bill was retrieved and for what purpose: because it appeared to be evidence of a crime. The effect was that it caused Deputy Coon to have the bill retrieved for evidence.

Mr. Mullins next claims that the Superior Court abused its discretion by permitting Deputy Coon to say that the bills looked counterfeit to him. *Brief of Appellant* at 29-32.

“In determining whether this statement is improper opinion testimony, we consider the totality of circumstances in the case, including: “(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact.” *State v. Saunders*, 120 Wash.App. 800, 812–13, 86 P.3d 232, 239 (Div. II, 2004). “The appellant bears the burden of showing abuse of discretion.” *State v. Saunders*, 120 Wash.App. 800, 811, 86 P.3d 232, 238–39 (Div. II, 2004)(citing *State v. Sponburgh*, 84 Wash.2d 203, 210, 525 P.2d 238 (1974)).

From the clear portions of the transcript, Mr. Mullins’ trial counsel made other objections, such as “Objection. Foundation.... He’s beginning to describe his experience with this bill. To what end?” RP at 139, lines 9-12. Mr. Mullins’ repeated objection as to foundation was eventually

sustained by the Superior Court. RP at 140, lines 13-16. The DPA was required by the Superior Court to lay foundation for Deputy Coon's testimony. RP at RP at 140, lines 15-16. Mr. Mullins' trial counsel offered nothing by way of how the State failed to lay proper foundation, except for the fact that, "[e]very other case that you see has a United States Secret Service officer coming in and talking about..." RP at 141, lines 23-24.

Mr. Mullins' attorney at some point appears to switch his objection to that of 'improper lay opinion' or 'improper expert opinion.' RP at 141, lines 7-8. Whether or not Mr. Mullins changed his objection in such a way as to give the Superior Court sufficient notice of his objection, the result is the same: the Superior Court properly admitted Deputy Coon's testimony as the opinion of a lay witness.

Deputy Coon was permitted to testify as to his experience, but was not offered as an expert witness. RP at 142, lines 3-6. Deputy Coon did not testify as an expert witness. In fact, he testified, "[i]t appears slightly smaller than typical U.S. currency *I've handled*." RP at 142, lines 12-13 (emphasis added).

"If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those 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 within the scope of [testimony by experts].” WA ER 701. Deputy Coon testified as to his perceptions, it helped the jury understand why Deputy Coon was so interested in apprehending Mr. Mullins, and Deputy Coon’s testimony was not based on scientific or technical knowledge because Deputy Coon testified about his handling of money and his personal experience. RP at 142.

Admissibility of Deputy Coon’s testimony was properly within the sound discretion of the Superior Court. The Superior Court’s ruling can correctly be summed up as, “[o]verruled, counsel. It’s a lay opinion.” RP at 156, line12.

Next, came the testimony of Patrick Abrahamson, the manager of Spoko Fuel, *without objection from Mr. Mullins*. Mr. Abrahamson testified about Spoko Fuel’s cash handling policies. RP at 183. Mr. Abrahamson testified about going through a “30-page book” with each employee. RP at 183, lines 11-15. Mr. Abrahamson testified in great detail about how he trains his employees to spot counterfeit bills. RP at 183. Mr. Abrahamson testified about the *quality of the paper, the coloration of the bill, the types of markings to look for, and how the paper reacts differently between authentic United States currency and counterfeits.* RP at 187-88. Mr. Mullins, did not object when Mr. Abrahamson testified, “[my employee]

was approximately eight to ten feet away, and he had a bill in his hand, and *I – instantly recognized that it was a counterfeit, just – I’ve seen so many of them....*” RP at 184, lines 22-25 (emphasis added).

Regardless of the objections or the bases for the objections, the evidence presented to the jury was that the \$100 bills had “Asian stamps” on them and “Chinese” characters. RP at 185, lines 16-22 (“But anyway, Joe – showed me the bill – It was a \$100 bill – and I instantly, like I said, just from the coloration of it, the size of it, there was a – a unique, very bright pink – describe as Asian stamp – I don’t know if it was Chinese or Japanese or whatever but there was a stamp on it – And – you know, instantly knew it was counterfeit.”); 187, line 7; 248, lines 3-4. Most likely, if the jury relied upon the lay opinion of Deputy Coon, it was not for long because all the jury had to do was look at the \$100 bills, which were admitted into evidence, and see for themselves that the bills were not official United States currency. RP at 186, lines 2-25 (Plaintiff’s Exhibit 1). Common sense, alone, would have told the jurors that United States Currency likely doesn’t have “Asian stamps” and “Chinese” writing.

Finally, Mr. Mullins claims that Deputy Coon’s testimony as to Mr. Mullins’ manner of dress was both objectionable and somehow unfairly prejudicial.

What Mr. Mullins fails to address under his claimed violation of ER

404, is that Deputy Coon testified, without objection, about his prior contacts with Mr. Mullins:

Q *And how -- how do you know Mr. Mullins.*

A Through previous dealings -- in my career, as well as just out -- out in the community.

RP at 144, lines 5-7. Mr. Mullins provides no explanation of why he did not object during this portion of Deputy Coon's testimony. Turning back to the portions of testimony to which Mr. Mullins objected, he has to now show this Court how *testimony about his clothing* violates ER 403 and ER 404; Mr. Mullins fails miserably at both.

WA Evidence Rule 404 prohibits testimony about "...other crimes, wrongs, or acts...[in order] to prove the character of a person in order to show action in conformity therewith. ER 404(b). Mr. Mullins does not inform this Court *exactly how the testimony about Mr. Mullins manner of dress* on other occasions falls within the categories of other crimes, wrongs, or acts. More importantly, Mr. Mullins only objected to relevance at the time of trial and did not object under ER 404(b), thereby depriving the Superior Court of the opportunity to fully address anything objectionable in Deputy Coon's testimony. Assuming though, *arguendo*, that Mr. Mullins had properly objected and provided sufficient basis for his objection, Mr. Mullins could not then and certainly cannot now show how the Superior Court violated ER 403, by admitting the testimony.

“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice....” On appeal, Mr. Mullins claims that the testimony implied “...that Mr. Mullins was poor and must have acquired his clothing unlawfully.” Brief of Appellant at 27-28. To say that claim is a stretch of logic is a vast understatement; such an understatement as to require indulgence into every possible absurdity one could dream up as a result of any given testimony.

“A danger of unfair prejudice exists when evidence is likely to stimulate an emotional response rather than a rational decision.” State v. Barry, 184 Wash.App. 790, 801, 339 P.3d 200, 206 (Div. III, 2014) (internal quotations omitted). Mr. Mullins does not identify a potential emotional response that would have or could have been elicited from the jury by Deputy Coon’s testimony.

- ii. Even if this Court finds that the Superior Court abused its discretion on any of the various evidentiary rulings, the convictions should be upheld because the error was harmless.

The standard of review for most trial objections is abuse of discretion. “We review the trial court’s evidentiary decisions under an abuse of discretion standard.” State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). “A court abuses its discretion when it exercises such discretion in a manifestly unreasonable way or based on untenable grounds or reasons.”

State v. Valdobinos, 122 Wn.2d 270, 279, 858 P.2d 199 (1993) (citing State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

Appellate courts “...review a trial court's decision on relevance and prejudicial effect for manifest abuse of discretion. State v. Barry, 184 Wash. App. 790, 801–02, 339 P.3d 200, 206 (Div. III, 2014). “Abuse of discretion is discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” Id. at 802. “Any error in a trial court's decision “requires reversal only if, within reasonable probabilities, it materially affected the outcome of the trial.” Id.

Evidentiary error may or may not be of constitutional magnitude. If the evidentiary error is not of constitutional magnitude, it is subject to harmless error analysis. Improper admission of evidence may be harmless error. See State v. Bashaw, 169 Wn.2d 133, 143, 234 P.3d 195 (2010) (overruled on other grounds); see also State v. Dixon, 37 Wn.App. 867, 874–75, 684 P.2d 725 (Div. I, 1984) (erroneous admission of written statement as excited utterance was harmless error where trial judge heard essentially same details in victim's testimony. Error may not be prejudicial if, within reasonable probabilities, the error did not affect the outcome of the trial). “[If the error is not of a constitutional magnitude], error is prejudicial only if, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” State v. Kelly, 102 Wn.2d

188, 199, 685 P.2d 564 (1984); see also, State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981); State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980). “Admission of testimony that is otherwise excludable is not prejudicial error where similar testimony was admitted earlier without objection.” State v. Ramirez-Estevez, 164 Wash.App. 284, 293, 263 P.3d 1257, 1262 (Div. II, 2011).

The standard is different if it is constitutional error alleged; and requires harmless beyond a reasonable doubt. State v. Coristine, 177 Wash.2d 370, 380, 300 P.3d 400 (2013) (citing Chapman v. California, 87 S.Ct. 824, 17 L.E.2d 705 (1967)). However, it does not appear that that Mr. Mullins suggests the claimed errors were constitutional in nature, or even that Mr. Mullins differentiates between the two types of error.

Even if this Court finds that the Superior Court should not have overruled Mr. Mullins’ objections, the error was harmless beyond a reasonable doubt.

Regarding the hearsay objection, the overwhelming indication is that the State used the evidence to show the chain of custody of the \$100 bill at Spoko Fuel and the effect that it had on the listener.

The Superior Court’s acceptance of testimony from Deputy Coon on the appearance of the \$100 bill that Mr. Mullins used at Spoko Fuel was not an abuse of discretion. The jury was able to see the counterfeit nature

of the bills. Furthermore, Mr. Mullins did not object to the more detailed testimony of Mr. Abrahamson. But ultimately, even if this Court were to find an abuse of discretion by allowing Deputy Coon to testify in the manner in which he did, Mr. Mullins is unable to demonstrate even a glimmer of the prejudicial effect it had on the jury's verdict.

Finally, Mr. Mullins claims that the Superior Court should have prohibited Deputy Coon from commenting on how Mr. Mullins was dressed when Deputy Coon saw Mr. Mullins in Safeway. Not only can Mr. Mullins not show how the jury would have misused that testimony, Mr. Mullins is unable to demonstrate any actual effect it had on the jury's verdict.

4. The Superior Court properly exercised its discretion in denying Mr. Mullins the boon of a DOSA because DOSAs are reserved for individuals who qualify, within the sound discretion of the sentencing court.

“As a general rule, the trial judge's decision whether to grant a DOSA is not reviewable. However, an offender may always challenge the procedure by which a sentence was imposed.” State v. Grayson, 154 Wash.2d 333, 338, 111 P.3d 1183, 1185–86 (2005) (internal citations omitted). “In this case, the trial judge failed to exercise any meaningful discretion in deciding whether a DOSA sentence was appropriate for this defendant. While we cannot say that denying Grayson a DOSA was an abuse of discretion, we agree with Grayson that his request was entitled to

actual consideration and, based at least on the record before us, it appears to have been categorically denied.” *Id.* at 335–36.

Mr. Mullins claims that the Superior Court’s denial of a DOSA was a “categorical denial”; it was not. Brief of Appellant at 38. An example of a categorical denial is found in Grayson. In Grayson, the Washington Supreme Court found error when the sentencing court concluded that it would categorically refuse to consider Mr. Grayson for a DOSA because of the lack of funding. *Id.* at 342. Such a decision was a refusal to exercise discretion on the part of the sentencing court and was therefore a categorical denial.

Mr. Mullins was denied a DOSA because he is a “...brazen, experienced, and really relentless criminal.” RP at 267, lines 13-15. The Superior Court reinforced its conclusion that Mr. Mullins had every opportunity to seek a DOSA under prior convictions: “I agree that you’re probably three or four felonies down from qualifying for a DOSA. It should have been ten years ago. And, you know, multiple stops in jail or prison since. But today is not that time. Today is about a person who, as the – who, as the prosecutor says, chooses to steal. That’s what you’re about.” RP at 267, lines 8-13. “And this is just the latest in this 14-year history of committing crimes, without remorse, without any thought of, ‘Maybe I do need to get treatment.’ I mean, there’s services out there, without having a

felony, where you can get treatment.” RP at 267, lines 20-24. “*I think society is served in this case by the maximum sentence. I will impose the 29 months.*” RP at 267-68 (*emphasis added*).

The Superior Court neither categorically denied DOSA nor did it deny DOSA solely because Mr. Mullins exercised his right to trial. Even if the Superior Court’s denial of DOSA to Mr. Mullins is reviewable, this Court should uphold the denial because it was a denial based upon an exercise of proper discretion. The Superior Court denied DOSA because Mr. Mullins is a career criminal and society would not have benefitted from Mr. Mullins receiving a DOSA.

5. The Superior Court correctly calculated Mr. Mullins’ offender score, given that calculation thereof requires only proof by a preponderance of the evidence.

“At sentencing, the State bears the burden to prove the existence of prior convictions by a preponderance of the evidence.” State v. Mendoza, 165 Wash.2d 913, 920, 205 P.3d 113, 116 (2009), disapproved of by State v. Jones, 182 Wash.2d 1, 338 P.3d 278 (2014) (disapproval on other grounds). The cases reviewed by the Washington Supreme Court in Mendoza “...provide a foundation for considering what suffices as an acknowledgment in the present context. Importantly, we have emphasized the need for an *affirmative* acknowledgment by the defendant of *facts and*

information introduced for the purposes of sentencing.” Id. at 928. Clearly, “[t]he best evidence to establish a defendant’s prior conviction is the production of a certified copy of the prior judgment and sentence.” State v. Harris, 148 Wash.App. 22, 30, 197 P.3d 1206, 1210 (Div. II, 2008), as amended (Mar. 10, 2009).

“A criminal history summary relating to the defendant from the prosecuting authority or from a state, federal, or foreign governmental agency shall be *prima facie* evidence of the existence and validity of the convictions listed therein. If the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist. All of this information shall be part of the record.” RCW 9.94A.500(1). “Under the SRA, a trial judge may rely on facts that are admitted, proved, or acknowledged to determine any sentence....” State v. Grayson, 154 Wash.2d at 338–39 (citing RCW 9.94A.530(2)). “‘Acknowledged’” facts include all those facts presented or considered during sentencing that are not objected to by the parties.” Id. at 339 (citing State v. Handley, 115 Wash.2d 275, 282–83, 796 P.2d 1266 (1990)). “Under the SRA, where a defendant raises a timely and specific objection to sentencing facts, the court must either not consider the fact or hold an evidentiary hearing.” Id. (citing RCW 9.94A.530(2) (requiring defendant to object)).

Mr. Mullins' claim that no evidence supports his offender score and he did not affirm his criminal history, is misplaced. First, the State, at sentencing, recited the totality of Mr. Mullins' relevant convictions. Such a recitation was sufficient to the Superior Court to conclude that the prior convictions existed. Second, Mr. Mullins adopted the offender score and record of prior convictions by agreeing to the offender score and criminal history, as recited in the Judgment and Sentence.

Mr. Mullins made no objection to his offender score at sentencing. Mr. Mullins made no offers of proof. Mr. Mullins made no argument that the State had improperly reached the offender score assigned to Mr. Mullins. Mr. Mullins not only voiced no objection, he agreed to the offender score because it was contained in the Judgment and Sentence, which Mr. Mullins signed without objection. CP 103-115; 122-34.

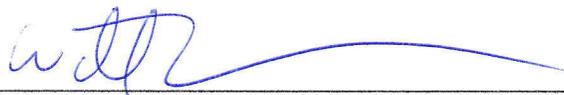
At sentencing on October 22, 2018, the DPA recited Mr. Mullins' convictions at length. RP at 262-64. In fact, a full page of transcript is devoted to the recitation of Mr. Mullins' criminal history and convictions. RP at 263. Not only did the DPA recite every relevant conviction from 2004 through Mr. Mullins' release from prison in 2017, after a second-degree burglary conviction in 2014, the DPA explained how the offender score was calculated. RP at 263-64. At no time did Mr. Mullins object and at no time did he offer any explanation or additional facts to challenge the

State's recitation of prior convictions. The Sentencing Reform Act does not require recitation of all details surrounding each conviction and such a reading of the Act would fly in face of the plain reading. Had Mr. Mullins objected to the recitation of his prior convictions, he most likely would have been granted a hearing under RCW 9.94A.530 and Grayson. The DPA's lengthy recitation of Mr. Mullins' prior convictions should suffice for this Court, as it sufficed for the Superior Court. Nothing in Mendoza or the amendment to the SRA after Mendoza seems to require any information beyond what was offered by the State in Mr. Mullins' case.

VII. CONCLUSION

For the reasons stated above, the State respectfully requests that the convictions and sentencing of Mr. Mullins be affirmed.

DATED this 14th day of November, 2019.



Will Ferguson, WSBA 40978
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