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NO. 38220-6-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

ROBERT JAMES ROGERS

Defendant/Appellant.

PETITION FOR DISCRETIONARY REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES	ii
CONSTITUTIONAL PROVISIONS	iii
STATUTES	iv
RULES AND REGULATIONS	iv
OTHER AUTHORITIES	v
IDENTITY OF PETITIONER . . .	1
STATEMENT OF RELIEF SOUGHT . . .	1
ISSUES PRESENTED FOR REVIEW . . .	1
STATEMENT OF THE CASE	1
ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.	3
CONCLUSION	18

TABLE OF AUTHORITIES

CASES

<i>Anderson v. Chapman</i> , 86 Wn.2d 189, 543 P.2d 229 (1975).....	7
<i>Seattle v. Klein</i> , 161 Wn.2d 554, 166 P.3d 1149 (2007).....	16, 17, 18
<i>State ex rel. Howard v. Superior Court for Pacific County</i> , 88 Wash. 344, 153 P.7 (1915).....	8, 11, 12
<i>State ex rel. O’Phelan v. Superior Court of Pacific County</i> , 88 Wash. 669, 153 Pac. 1078 (1915).....	9
<i>State v. Ashe</i> , 182 Wash. 598, 603, 48 P.(2d) 213 (1935).....	10
<i>State v. Carroll</i> , 56 Wash 588, 104 Pac. 814 (1909).....	7
<i>State v. Dent</i> , 123 Wn.2d 467, 869 P.2d 392 (1994).....	2, 6, 13
<i>State v. Emmett</i> , 77 Wn.2d 520, P.2d 609 (1970).....	14
<i>State v. Escue</i> , 6 Wn. App. 607, 608, 495 P.2d 351 (1972).....	11
<i>State v. Graham</i> , 14 Wn. App. 1, 588 P.2d 821 (1975).....	8
<i>State v. Hardamon</i> , 29 Wn.(2d) 182 P.(2d) 634 (1947).....	10, 11
<i>State v. Hos</i> , 154 Wn. App. 238, 255 P.3d 389 (2010).....	16
<i>State v. Kells</i> , 134 Wn.2d 309, 313, 941 P.2d 818 (1998).....	16

State v. Lane, 40 Wn.(2d) 734, 246 P.(2d) 474 (1952).....11, 12

State v. McCorkell, 63 Wn. App. 798 P.2d 795 (1992).....2, 6, 12, 18, 19

State v. Miller, 59 Wn.(2d) 27, 29, 365 P.2d 612 (1961).....11

State v. Reese, 112 Wash. 507, 192 Pac. 934 (1920).....9

State v. Stearman, 187 Wn. App. 257, 348 P.3d 394 (2015).....13

State v. Sweet, 90 Wn.2d 282, 581 P.2d 579 (1978).....16

State v. Stegall, 124 Wn.2d 719, 881 P.2d 979 (1994).....15

State v. Thomas, 128 Wn.2d 553, 910 P.2d 475 (1996).....14

State v. Tomal, 133 Wn.2d 985, 948 P.2d 833 (1997).....17

Washington State Highway Commission v. Pacific Northwest Bell Telephone Company, 59 Wn.(2d) 216, 307 P.(2d) 605 (1961).....19

CONSTITUTIONAL PROVISIONS

Const. art I, § 22.....1, 3, 4, 5, 5, 7, 9, 10

Const. art I, § 29.....7, 14

Sixth Amendment to the United States Constitution.....1, 3, 6

10th Amendment to the United States Constitution..... 6

STATUTES

RCW 9.35.020 (8).....1, 5, 6, 17
RCW 9A.60.020 (2).....1, 4, 6, 17
RCW 10.25.010.....6
RCW 10.25.020.....6
RCW 10.25.030.....6
RCW 10.25.040.....6
RCW 10.25.050.....6
RCW 10.25.060.....6
RCW 10.25.110.....6

RULES AND REGULATIONS

CrR 5.1.....5, 6, 17
CrR 5.1 (a).....5
CrR 5.1 (b).....5
CrR 5.1 (c)1, 2, 3, 4, 5, 15
RAP 13.4.....3
RAP 13.4 (b)(3).....19

RAP 13.4 (b)(4).....19

OTHER AUTHORITIES

LAWS of 2001, ch. 217, sec. 9 (4).....6

LAWS of 2003, ch. 119, § 5.....6

WASH PRAC. VOL. 4, RULES PRACTICE (8th ed)6

1. IDENTITY OF PETITIONER

Robert James Rogers requests the relief designated in Part 2 of this Petition.

2. STATEMENT OF RELIEF SOUGHT

Mr. Rogers seeks review of an Unpublished Opinion of Division III of the Court of Appeals dated February 9, 2023. (Appendix “A” 1-19)

3. ISSUES PRESENTED FOR REVIEW

- A. Why does the constitutional right to proper venue not receive the same respect as other rights guaranteed by Const. art. I, § 22 and the Sixth Amendment to the United States Constitution?
- B. Does CrR 5.1 (c) violate Const. art. I, § 22 ?
- C. Do RCW 9.35.020 (8) and RCW 9A.60.020 (2) violate Const. art. I, § 22?

4. STATEMENT OF THE CASE

An Information was filed on November 12, 2019 charging Mr. Rogers with forgery, attempted second degree theft, and

second degree identity theft. All of the offenses occurred in Spokane County. (CP 1)

All of the evidence presented at trial derives from that single act in Spokane County. The immediate consequences of that act occurred in Spokane County.

The State presented no evidence to indicate where the check was forged. It relied upon Mr. Rogers' possession of the check and his having presented it at WaFed in Deer Park, Spokane County, Washington.

The Court of Appeals decision relies upon *State v. Dent*, 123 Wn.2d 467, 869 P.2d 392 (1994); *State v. McCorkell*, 63 Wn. App. 798, 822 P.2d 795 (1992); and CrR 5.1 (c).

Mr. Rogers sought to have the Court of Appeals overturn the *McCorkell* case. He argued that the analysis contained in the *Dent* case constituted *dicta*. He further contended that CrR 5.1 (c) was unconstitutional.

5. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

RAP 13.4 provides, in part:

A petition for review will be accepted by the Supreme Court only: (1) ... (2) ... (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Mr. Rogers contends that the Court of Appeals decision is adverse to the provisions of Const. art. I, § 22 and the Sixth Amendment to the United States Constitution. It is his further position that CrR 5.1 (c) also violates those same constitutional provisions.

The Sixth Amendment to the United States Constitution provides, in part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed...

Const. art. I, § 22 provides, in part:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel...to have a speedy public trial *by an impartial jury of the county in which the offense is charged to have been committed* and the right to appeal in all cases...

(Emphasis supplied.)

In addition to the constitutional provisions, CrR 5.1 (c) provides, in part: “Any objection to venue must be made as soon after the initial pleading is filed as the defendant has knowledge upon which to make it.”

RCW 9A.60.020 (2) provides,

In a proceeding under this section that is related to an identity theft under RCW 9.35.020, the crime will be considered to have been committed in any locality where the person whose means of identification or financial information was appropriated resides, or in which any part of the offense took place, regardless of whether the defendant was ever actually in that locality.

RCW 9.35.020 (8) states:

In a proceeding under this section, the crime will be considered to have been committed in any locality where the person whose means of identification or financial information was appropriated resides, or in which any part of the offense took place, regardless of whether the defendant was ever actually in that locality.

It is unknown whether Mr. Rogers ever was aware of Const. art. I, § 22 or CrR 5.1 (c).

The subparagraphs of CrR 5.1 are distinct. Subparagraph (c) is dependent upon whether subparagraph (b) was initially utilized. It was not utilized in this case. There is no reference in subparagraph (c) to subparagraph (a).

The record does not reflect that Mr. Rogers was ever advised of his right to have the case tried in Spokane County. It does not appear that either the trial court, the prosecuting attorney, defense counsel or law enforcement recognized the fact that venue in Stevens County was improper.

The Court of Appeals decision determined that Mr. Rogers impliedly waived his right to challenge venue based upon *Dent*, *McCorkell*, and CrR 5.1.

HISTORY

The Sixth Amendment to the United States Constitution was enacted in 1791. There have been no changes to the original enactment.

Const. art. I, § 22 was adopted in 1889. The 10th Amendment, (approved in 1922), added a proviso to it which has no application to the facts and circumstances of Mr. Rogers case.

CrR 5.1 was adopted in 1973. It has not been amended. The rule superseded RCW 10.25.010, .020, .030, .040, .050, .060, .110. *See: WASH PRAC., VOL. 4, RULES PRACTICE (8th ed.)* at 432.

RCW 9A.60.020 (2) was enacted by LAWS of 2003, ch. 119, § 5.

RCW 9.35.020 (8) was enacted by LAWS of 2001, ch. 217, sec. 9 (4).

QUERY: Can a court rule or statute override a mandatory constitutional provision?

Const. art. I, § 29 states: “The provisions of this constitution are mandatory, unless by express words they are declared to be otherwise.” *See also: Anderson v. Chapman*, 86 Wn.2d 189, 192, 543 P.2d 229 (1975).

There is no language in Const. art. I, § 22 to indicate that venue can be in any county other than the county where the offense is committed.

A review of the caselaw involving the issue of venue under Const. art. I, § 22 leads to the conclusion that the courts have deviated from the mandatory language of the constitution.

An early case which does not appear to have ever been overruled, is *State v. Carroll*, 55 Wash. 588, 590-91, 104 Pac. 814 (1909). The Court held that:

“[W]here the constitution of the state provides that the accused in a criminal case is entitled to a trial by an impartial jury of the county in which the offense has been

committed, it has generally been held that a statute giving jurisdiction of a prosecution to the courts of a county other than that in which the offense has been committed is void as denying to the offender the constitutional right of a trial in his county or vicinage.” (citing 9 Am. & Eng. Ann. Cases p. 615)

See also: State v. Graham, 14 Wn. App. 1, 4, 588 P.2d 821 (1975).

The devolution of the mandatory provision appears to have occurred as a result of misapplying and/or misinterpreting the constitutional language.

Two cases that were decided in 1915 are of importance when considering the constitutional venue provision.

In *State ex rel. Howard v. Superior Court for Pacific County*, 88 Wash. 344, 346-47, 153 P.7 (1915) the constitutional right to venue involved a statutory provision involving a change of judge. The Court stated:

...In view of this positive constitutional guaranty, we feel constrained [hold that] only when the accused expressly consents to be tried in a county other than the one “in which the offense is alleged to have been committed” [can there be a waiver].

(Emphasis supplied.)

The second case *State ex rel. O’Phelan v. Superior Court of Pacific County*, 88 Wash. 669, 672-73, 153 Pac. 1078 (1915) involved a similar issue where the presiding judge had been affidavited and reached the same conclusion.

The Court, in *State v. Reese*, 112 Wash. 507, 192 Pac. 934 (1920) declared a statutory provision involving an offense committed on public transportation (a train) unconstitutional in contravention of the venue provision of Const. art. I, § 22. The statute that was declared unconstitutional later became the current proviso to Const. art. I, § 22. The *Reese* Court concluded at 512:

It seems to us that reason and authority both support the view that the statute

cannot take away from an accused a right guaranteed by the constitution.

The next case to address the venue issue appears to be *State v. Ashe*, 182 Wash. 598, 603, 48 P.(2d) 213 (1935). The *Ashe* Court discussed Const. art. I, § 22 and held:

This constitutional provision was manifestly intended to guarantee the right to a trial by a jury of the “vicinage,” or locality of the county in which it was committed, by defining that vicinage or locality as a county. A crime may be a single act and immediate in all its consequences, and the locality where it was committed is its “vicinage.”

Mr. Rogers three offenses derive from the single act that occurred in Deer Park, Washington. Deer Park is in Spokane County; not Stevens County.

The first crack in the constitutional venue requirement occurs in *State v. Hardamon*, 29 Wn.(2d) 182, 186 P.(2d) 634 (1947). The *Hardamon* Court ruled at 188:

A defendant in a criminal prosecution may waive the right to be tried in the county where the alleged offense was

committed. *State ex rel. Howard v. Superior Court*, 88 Wn. 344, 153 P. 7....

Comparing *Hardamon* and *Howard* it is clear that the *Hardamon* Court misinterpreted the Howard ruling. Thus, the idea of waiver entered into venue analysis.

Even though the *Hardamon* case does not discuss implied waiver, subsequent cases relying upon *Hardamon* created the fiction of implied waiver.

State v. Lane, 40 Wn.(2d) 734, 736, 246 P.(2d) 474 (1952) discusses cases involving waiver of constitutional rights. It includes the *Hardamon* case.

Then, in *State v. Miller*, 59 Wn.(2d) 27, 29, 365 P.2d 612 (1961), referencing the *Hardamon* case, it is stated that: "...[T]he question of venue is waived if it is not challenged."

Further decisions continued to engrain the idea of implied waiver insofar as the constitutional right to venue is concerned. See: *State v. Escue*, 6 Wn. App. 607, 608, 495 P.2d 351 (1972)

(stating that venue is a right which can be waived relying upon *Howard and Lane*).

Finally, the idea of implied waiver was more fully explicated in *State v. McCorkell*, 63 Wn. App. 798, 800, 822 P.2d 795 (1992).

Proper venue is not an element of a crime, [citations omitted] and is not a matter of jurisdiction. Rather, proper venue is a constitutional right which is waived if a challenge is not timely made. *State v. Harris*, 48 Wn. App. 279, 282, 738 P.2d 1059, *review denied*, 108 Wn.2d 1036 (1987);

Direct testimony is not necessary to prove venue. It is enough if it indirectly appears that the venue was properly laid. *State v. Johnson*, 45 Wn. App. 794, 796, 727 P.2d 693 (1986), *review denied*, 107 Wn.2d 1035 (1987)....

The *McCorkell* Court went on to rule at 801:

We hold that a criminal defendant waives any challenge to venue by failing to present it by the time jeopardy attaches. Jeopardy attaches in a jury trial when the jury is sworn and in a bench trial when the court begins to

hear evidence. *State v. Chiles*, 53 Wn. App. 452, 454, 767 P.2d 597 (1989).

The Court of Appeals decision also discusses *State v. Dent*, 123 Wn. 2d 467, 869 P.2d 392 (1992). The problem with the discussion in *Dent* is that it is *dicta* only. The applicable portion of the decision is set out at 478:

Even though the exceptions were not timely and there are deficiencies in the briefs, we are reviewing the venue question to clarify our case law. Our review is solely for future guidance; the indicated deficiencies justify that we not consider the issue at all. Compliance with the RAP remains mandatory.

A more recent case that leans toward the mandatory nature of the constitutional provision on venue is *State v. Stearman*, 187 Wn. App. 257, 272-73, 348 P.3d 394 (2015).

The *Stearman* case involved an issue of whether or not the State had established venue and if so whether or not it was harmless error.

[W]here *no* reasonable jury could have found that venue was proper by a preponderance of the evidence because *no* facts at trial established venue, this error cannot be harmless. That is, if we held that constitutional error about venue were harmless even where *no* facts supported venue in the county where trial occurred, the constitutional right to venue would lose all force....

Mr. Rogers contends that implied waiver of his constitutional right to venue is contrary to Const. art. I, § 29's declaration that constitutional provisions are mandatory. He also contends that implied waiver is inappropriate insofar as constitutional rights are concerned.

Initially, there exists no presumption in favor of a waiver of constitutional rights. *See: State v. Emmett*, 77 Wn.2d 520, 522, P.2d 609 (1970).

“In general, the waiver of a fundamental constitutional right must be made knowingly, voluntarily, and intelligently.” *State v. Thomas*, 128 Wn.2d 553, 558, 910 P.2d 475 (1996).

The implied waiver language of CrR 5.1 (c) does not take into consideration whether Mr. Rogers knowingly, voluntarily, and intelligently waived his right to have his case tried in Spokane County.

A number of cases support his interpretation of the rule. As set out in *State v. Stegall*, 124 Wn.2d 719, 725, 881 P.2d 979 (1994):

The validity of any waiver of a constitutional right, as well as the inquiry required by the court to establish waiver, will depend on the circumstances of each case, including the defendant's experience and capabilities. [Citation omitted.] Moreover, the inquiry by the court will differ depending on the nature of the constitutional right at issue. For example, when a defendant wishes to waive the right to counsel, and proceed *pro se*, the trial court must usually undertake a full colloquy with the defendant, on the record, to establish the defendant knew the relative advantages and disadvantages of proceeding *pro se*. [Citation omitted.] A guilty plea, which involves waiving numerous trial rights, is valid only if the record shows not only a voluntary

and intelligent waiver, but also an understanding of a waiver's direct consequences. *State v. Smissaert*, 103 Wn.2d 636, 643, 694 P.2d 654 (1985).

By contrast, no such colloquy or on-the-record advice as to the consequences of a waiver is required for waiver of a jury trial; **all that is required is a personal expression of waiver from the defendant.** [Citations omitted.]

See also: State v. Hos, 154 Wn. App. 238, 249-52, 255 P.3d 389 (2010) (requiring a personal expression of waiver by the defendant that is knowing, intelligent and voluntary.) (Emphasis supplied.)

More recently, in discussing the fugitive disentitlement doctrine, the Court in *Seattle v. Klein*, 161 Wn.2d 554, 556, 166 P.3d 1149 (2007) determined that this doctrine, which involved implied waiver, was unconstitutional. It rejected the doctrine based upon “well established waiver principles found in our previous decisions.” *See: State v. Sweet*, 90 Wn.2d 282, 286, 581 P.2d 579 (1978); *State v. Kells*, 134 Wn.2d 309, 313, 941 P.2d

818 (1998); *State v. Tomal*, 133 Wn.2d 985, 988, 948 P.2d 833 (1997).

The *Klein* Court went on to define waiver and place the burden of proof on the State to prove that a defendant has relinquished or abandoned a constitutional right. The Court continued in its discussion of waiver at 560: “[W]e do not embrace an inadvertent waiver without notice.”

Furthermore, Mr. Rogers asserts that the Legislature, when it enacted RCW 9.35.020 (8) and RCW 9A.60.020 (2), attempted to amend the constitution without approval by the citizens of the State of Washington. Moreover, the Supreme Court, in enacting CrR 5.1, committed the same error.

The constitution does not grant to the legislature the power or authority to define, by legislative enactment, the meaning and scope of a constitutional provision.... The construction of the meaning and scope of a constitutional provision is exclusively a judicial function. Art. 4, § 1 of the constitution, provides that “The judicial power of the state shall be vested in the supreme court, superior courts, justices of the

peace, and such inferior courts as the legislature may provide.

The legislature has no constitutional power to define the meaning and scope of a constitutional provision.

Washington State Highway Commission v. Pacific Northwest Bell Telephone Company, 59 Wn.(2d) 216, 222, 307 P.(2d) 605 (1961).

6. CONCLUSION

There is no indication in the record that Mr. Rogers was ever notified of the proper venue for the trial of his case under Stevens County Cause No. 19-1-00035-33. He was thus deprived of his constitutional right to proper venue.

“...[T]here is no presumption of waiver. In fact, are caselaw mandates that waiver must be affirmatively proved by the State.” *Seattle v. Klein*, supra at 561.

Mr. Rogers contends that the *McCorkell* decision is ripe for reversal. Both early caselaw, as well as current law

concerning waiver of a constitutional right, supplants the *McCorkell* ruling.

There is little doubt that the venue issue is one of constitutional magnitude. As such, it meets the criteria of RAP 13.4 (b)(3).

Additionally, since venue is a critical component of an individual's constitutional rights, the public should be occasionally reminded of these constitutional provisions, whether federal or state.

It is also critical that trial attorneys, appellate attorneys, judges, court commissioners and other criminal justice personnel be reminded that they also have a constitutional duty to protect a criminal defendant's constitutional rights.

Mr. Rogers thus believes that his arguments also meet the criteria of RAP 13.4 (b)(4).

Certificate of Compliance: I hereby certify there are 2921 words contained in this Petition for Discretionary Review.

DATED this 10th day of March, 2023.

Respectfully submitted,

s/ Dennis W. Morgan

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APPENDIX “A”

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

STATE OF WASHINGTON,)	No. 38220-6-III
)	
Respondent,)	
)	
v.)	UNPUBLISHED OPINION
)	
ROBERT JAMES ROGERS,)	
)	
Appellant.)	

PENNELL, J. — Robert James Rogers appeals his convictions for forgery, attempted second degree theft, and second degree identity theft. These convictions pertain to a victim by the name of Keith Funston. We affirm.

FACTS

In July 2019, Robert James Rogers entered Washington Federal Bank in Spokane County and attempted to cash a forged check, ostensibly issued to him by Keith Funston. The teller became suspicious and informed Mr. Rogers that Mr. Funston would need to verify the check. Mr. Rogers told the teller he would leave and retrieve Mr. Funston.

Washington Federal Bank called Mr. Funston and informed him that an unknown male had attempted to cash a check ostensibly issued by Mr. Funston for \$1,400. The next morning, Mr. Funston drove from his home in ²²Stevens County to Washington Federal

No. 38220-6-III
State v. Rogers

Bank and viewed photographs of the man who tried to cash the check. Mr. Funston did not recognize the individual in the video nor had he written him a check. When Mr. Funston returned home, he inspected his checkbook and discovered three checks were missing. Mr. Funston later learned his nephew-in-law and a friend stole the checks while housesitting for Mr. Funston.

Detective Mark Coon of the Stevens County Sheriff's Office was assigned the case involving Mr. Funston's check. He viewed video from Washington Federal Bank and identified Mr. Rogers based on Mr. Rogers's distinctive tattoos and bracelet.

Detective Coon got in touch with Detective Dustin Hughes of the Colville Police Department, who was working on a similar forgery case involving Mr. Rogers. In that case, Mr. Rogers was believed to have cashed or attempted to cash checks in Stevens County ostensibly written by a deceased man, Leroy Buchanan. The two detectives viewed surveillance video from different businesses at which Mr. Rogers attempted to cash forged checks and established probable cause for Mr. Rogers's arrest. He was arrested soon after.

Mr. Rogers was charged in Stevens County with forgery, second-degree attempted theft, and second-degree identify theft in the Funston case. The State separately charged Mr. Rogers with 11 other crimes related to the Buchanan case. The trial court granted the State's unopposed motion to try the Funston and Buchanan cases jointly. In the order

No. 38220-6-III
State v. Rogers

granting the motion, it is noted that Mr. Rogers did not object to consolidating the two cases for trial. During a pretrial hearing, defense counsel commented that separate trials could result in lengthy consecutive sentences. The first trial in February 2021 resulted in a hung jury and the court declared a mistrial. Defense counsel did not meet with the jurors following the mistrial.

In April 2021, the case again proceeded to trial. Prior to trial, defense counsel made an oral motion to sever the Funston and Buchanan cases. The State opposed the motion, arguing that even if the cases were tried separately, much of the evidence would overlap. The trial court denied the motion to sever.

At trial, the State introduced surveillance video of Mr. Rogers attempting to cash the Funston check in Spokane County and cashing one of the Buchanan checks at a gas station in Stevens County. The State also elicited testimony from the detectives assigned to each of the cases regarding how they came to identify Mr. Rogers.

During the jury instruction conference, the court brought up the issue of the joint trial and asked defense counsel if Mr. Rogers wanted to renew his motion to sever. Counsel responded in the negative.

The court provided the jury with an instruction which stated that “knowledge” could be established if a person acts intentionally as to a fact required to prove an element

No. 38220-6-III
State v. Rogers

of the crime. Clerk's Papers (CP) at 343. The jury convicted Mr. Rogers on all counts charged in both the Funston and Buchanan cases.

Sentencing took place on April 27, 2021. On that date, Mr. Rogers faced sentencing not only for the Funston and Buchanan cases, but also convictions in two additional cases involving bail jumping and trafficking in stolen property. At sentencing, the State proffered evidence of Mr. Rogers's foreign convictions, two of which defense counsel agreed were comparable to Washington crimes and should be included in Mr. Rogers's offender score. With respect to the Funston and Buchanan cases, the trial court imposed concurrent sentences of 57 months. The court also imposed a concurrent sentence of 57 months for bail jumping. But the court ordered an exceptional sentence as to the trafficking in stolen property case, in which the court imposed a term of 84 months, to run consecutively.

Mr. Rogers timely appeals his judgment and sentence.

ANALYSIS

Venue

An objection to venue is waived if not timely asserted. *State v. Dent*, 123 Wn.2d 467, 478-80, 869 P.2d 392 (1994); *State v. McCorkell*, 63 Wn. App. 798, 801, 822 P.2d 795 (1992). *See also* CrR 5.1(c) ("Any objection to venue must be made as soon after the

No. 38220-6-III
State v. Rogers

initial pleading is filed as the defendant has knowledge upon which to make it.”). Because Mr. Rogers did not object to venue during the trial court proceedings, he can obtain relief on appeal only if he can establish that his attorney’s failure to object to venue deprived him of effective assistance of counsel.

To establish ineffective assistance of counsel, Mr. Rogers must show (1) “defense counsel’s conduct was deficient, i.e., that it fell below an objective standard of reasonableness” and (2) “the deficient performance resulted in prejudice, i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Counsel’s representation is not deficient if it “can be characterized as legitimate trial strategy or tactics.” *State v. Kylo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). Failure to meet either prong of this test is dispositive of an ineffective assistance claim. *State v. Sosa*, 198 Wn. App. 176, 185, 393 P.3d 796 (2017).

Here, even if Mr. Rogers had a viable venue objection, counsel’s decision to forego an objection was reasonably strategic. Counsel recognized that simultaneous trials in the same venue would have the advantage of concurrent sentencing. There was no discernable downside to proceeding in Stevens County as opposed to Spokane County. Had Mr. Rogers been tried in Spokane County in the Funston Case, that court could have

No. 38220-6-III
State v. Rogers

sentenced him to a consecutive sentence to that of the Buchanan case in Stevens County. Mr. Rogers has not shown his attorney performed deficiently by failing to assert an objection to venue.

Joinder/Consolidation

Mr. Rogers argues the Buchanan and Funston cases were improperly joined for trial. Mr. Rogers also contends that he was deprived of effective assistance of counsel because defense counsel agreed to consolidation and did not renew the motion to hear the two cases separately before or at the close of the evidence.¹ Because Mr. Rogers did not preserve an objection to consolidation at trial, he can obtain relief on appeal only if he can establish his attorney's failure to object deprived him of effective assistance of counsel.

Mr. Rogers's arguments regarding consolidation and severance fail for the same reason as his venue arguments. Mr. Rogers did not preserve an objection to joinder or the motion to sever. And counsel's failure to object to the combined trial is fairly explained by the desire to avoid consecutive sentences.

¹ The parties confuse joinder of offenses under CrR 4.3 with consolidation of related offenses for trial under CrR 4.3.1. Joinder and consolidation are related, yet distinct concepts. See *State v. Bluford*, 188 Wn.2d 298, 305-06, 393 P.3d 1219 (2017). CrR 4.3 governs only the joinder of multiple offenses in a single charging document. CrR 4.3.1 addresses consolidation of offenses or defendants for purposes of trial. This distinction, however, is inapplicable to our current analysis.

No. 38220-6-III
State v. Rogers

Sufficiency of the evidence

Mr. Rogers contends the State failed to prove each element of the crime of forgery because it did not provide sufficient evidence to support the conclusion that Mr. Rogers knowingly possessed a forged check.

In order to convict Mr. Rogers of forgery, the State had to prove that he knew the check bearing Mr. Funston's name was forged. RCW 9A.60.020(b). In reviewing Mr. Rogers's challenge, this court considers all of the evidence in the light most favorable to the prosecution. *State v. Scoby*, 117 Wn.2d 55, 61, 810 P.2d 1358 (1991). This court accepts the State's evidence as true and draws all reasonable inferences in the State's favor. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence is as reliable as direct evidence. *State v. Turner*, 103 Wn. App. 515, 520, 13 P.3d 234 (2000). If under these guidelines, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, this court will uphold the conviction. *Scoby*, 117 Wn.2d at 61.

Possession of a forged instrument, alone, is not enough to prove guilty knowledge, but possession together with even slight corroborating evidence can be sufficient. *Id.* at 61-62. A false explanation, or one that is improbable or difficult to verify, can be sufficient corroboration to prove guilty knowledge. *See State v. Ladely*, 82 Wn.2d 172,

No. 38220-6-III
State v. Rogers

175, 509 P.2d 658 (1973) (addressing guilty knowledge in the context of possession of stolen property).

Here, circumstantial evidence supports the knowledge element of Mr. Rogers's forgery conviction. Mr. Rogers falsely claimed to know Mr. Funston when he attempted to cash the check. Testimony at trial disproved this assertion. The fact that Mr. Rogers attempted to cash a check bearing his name and written by a man he did not know seems to be strong evidence that Mr. Rogers did in fact knowingly possess a forged instrument. Mr. Rogers also informed the teller he would leave, retrieve Mr. Funston, and return to cash the check. Because Mr. Rogers did not know Mr. Funston and Mr. Funston had not written the check, this was likely an attempt by Mr. Rogers to avoid suspicion, and serves as circumstantial evidence of knowledge.

A rational trier of fact could have found beyond a reasonable doubt that Mr. Rogers knew he possessed a forged check. Mr. Rogers's sufficiency challenge fails.
Jury unanimity

Mr. Rogers seems to argue that the State did not present evidence that he either falsely made, falsely completed, or falsely altered the check; but nevertheless failed to

No. 38220-6-III
State v. Rogers

elect between the two alternative means of the forgery statute, and therefore the jury did not unanimously convict Mr. Rogers of a specific type of forgery.²

An alternative means crime is one where the statute defining an offense provides more than one method of violation. *State v. Barboza-Cortes*, 194 Wn.2d 639, 643, 451 P.3d 707 (2019). Trial on an alternative means crime can raise unanimity problems if the jury is instructed on more than one alternative means and is not given a unanimity instruction. *See State v. Woodlyn*, 188 Wn.2d 157, 162-64, 392 P.3d 1062 (2017).

Forgery is a crime that may be committed by two alternative means; a person either (1) “falsely makes, completes, or alters a written instrument,” RCW 9A.60.020(1)(a), or (2) “possesses, utters, offers, disposes of, or puts off as true a written instrument which he knows to be forged,” RCW 9A.60.020(1)(b).

Our pattern jury instructions in Washington account for the fact that forgery encompasses two alternative means, and as such provide two distinct instructions. 11A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 130.02, at 655 (5th ed. 2021) (WPIC); WPIC 130.03, at 658. WPIC 130.02 covers forgery under RCW 9A.60.020(1)(a). WPIC 130.03 covers forgery under RCW 9A.020(1)(b).

² This is not a specific assignment of error and arguably does not merit review.

No. 38220-6-III
State v. Rogers

Mr. Rogers received an instruction (jury instruction 14) based on WPTC 130.03. As contemplated by RCW 9A.020(1)(b), jury instruction 14 required the jury to find Mr. Rogers possessed, offered or put off as true a written instrument that had been falsely made.

Because Mr. Rogers was instructed on only one of the two alternative means of forgery, there was no potential unanimity problem. To the extent Mr. Rogers has made a unanimity claim on appeal, that claim fails.

Jury instruction 7

For the first time on appeal, Mr. Rogers assigns error to jury instruction 7. Because this claim has not been preserved, relief can be justified only if Mr. Rogers is able to establish counsel was ineffective for failing to object to the instruction.

At trial, the court read jury instruction 7 to the jury, stating the following:

A person knows or acts knowingly or with knowledge with respect to a fact, circumstance, or result when he or she is aware of that fact, circumstance, or result. . . .

When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

No. 38220-6-III
State v. Rogers

CP at 343; 3 Report of Proceedings (RP) (Apr. 23, 2021) at 874. Mr. Rogers argues that the “intentionally” language in the final sentence of jury instruction 7 requires reversal under *State v. Goble*, 131 Wn. App. 194, 126 P.3d 821 (2005).

In Goble, Division Two of this court analyzed the same “knowledge” instruction at issue here. 131 Wn. App. at 202. *Goble* held that the last sentence in the instruction was confusing under the circumstances of that case because it potentially allowed the jury to find the defendant guilty of third-degree assault against a law enforcement officer if the jury found that the defendant *intentionally* assaulted the victim, but without having to find that the defendant *knew* the victim was a law enforcement officer performing his official duties *Id.* at 202-03. There, the court held the instruction improperly conflated the separate intent and knowledge elements required under the to-convict instruction into a single element and relieved the State of its burden of proving that the defendant knew the victim’s status if the jury found that the assault was intentional. *Id.* at 201.

Here, however, there is no second required mental element to conflate. The *Goble* court’s reasoning was motivated by the concern that the instruction potentially allowed the jury to find the defendant guilty of third-degree assault against a law enforcement officer without having to find that the defendant knew the victim was a law enforcement officer performing official duties if it found the defendant intentionally assaulted the

No. 38220-6-III
State v. Rogers

victim. Here, the jury was required to find Mr. Rogers knew the check was forged. There was not an additional mens rea element regarding what Mr. Rogers knew about the check. As the State points out, *Goble*'s holding has been expressly limited to cases that require the State to prove two mental states. *State v. Gerds*, 136 Wn. App. 720, 728, 150 P.3d 627 (2007); *State v. Boyd*, 137 Wn. App. 910, 924, 155 P.3d 188 (2007).

Goble has no application here. Mr. Rogers's attorney was not ineffective for failing to challenge the knowledge instruction on this ground.

Meeting with jurors

Mr. Rogers contends his trial counsel provided ineffective assistance by failing to meet with the jurors from the mistrial to determine why the jury could not reach a verdict. Mr. Rogers does not point to any authority requiring that defense counsel meet with jurors, nor can he demonstrate prejudice from counsel's failure to do so. While it certainly would be preferable for defense counsel to meet with jurors when the court gives permission to do so, Mr. Rogers points to no authority demonstrating that the failure to meet with jurors constitutes ineffective assistance of counsel.³

³ The initial trial took place in February 2021. We do not know whether COVID concerns may have impacted defense counsel's decision not to meet with jurors.

No. 38220-6-III
State v. Rogers

Comparability of foreign convictions

Mr. Rogers argues defense counsel was ineffective for stipulating to the comparability of the California and Montana convictions without requiring the court to conduct a comparability analysis. Because the record does not show the California and Montana convictions fail the comparability analysis, Mr. Rogers has not demonstrated deficient performance.

Under Washington's Sentencing Reform Act of 1981, chapter 9.94A RCW, out-of-state convictions can be included in a defendant's offender score if they are comparable to a Washington offense. A two-part test governs the comparability analysis. *State v. Thieffault*, 160 Wn.2d 409, 414-15, 158 P.3d 580 (2007). The first part involves legal comparability. The second part looks to factual comparability. *Id.* at 415.

Legal comparability involves an analysis of the applicable elements. If the Washington offense and foreign offense have substantially the same elements or if the elements of the foreign conviction are narrower than those of the Washington offense, legal comparability is met. Should legal comparability be satisfied, the conviction qualifies for inclusion in the offender score and the court need not look to factual comparability.

No. 38220-6-III
State v. Rogers

Factual comparability comes into play if the elements of the foreign offense are broader than the Washington offense. When looking to factual comparability, the question is whether the facts admitted or proven beyond a reasonable doubt in the foreign tribunal would have been sufficient to justify a Washington conviction. *State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998); *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 258, 111 P.3d 837 (2005).

California conviction

The California conviction at issue in Mr. Rogers's appeal involved a violation of sections 2800.1 and 2800.2 of the California Vehicle Code. These statutes provide:

(a) Any person who, while operating a motor vehicle and with the intent to evade, willfully flees or otherwise attempts to elude a pursuing peace officer's motor vehicle, is guilty of a misdemeanor punishable by imprisonment in a county jail for not more than one year if all of the following conditions exist:

(1) The peace officer's motor vehicle is exhibiting at least one lighted red lamp visible from the front and the person either sees or reasonably should have seen the lamp.

(2) The peace officer's motor vehicle is sounding a siren as may be reasonably necessary.

(3) The peace officer's motor vehicle is distinctively marked.

(4) The peace officer's motor vehicle is operated by a peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3

No. 38220-6-III
State v. Rogers

of Part 2 of the Penal Code, and that peace officer is wearing a distinctive uniform.

Cal. Vehicle Code § 2800.1.

(a) If a person flees or attempts to elude a pursuing peace officer in violation of Section 2800.1 and the pursued vehicle is driven in a willful or wanton disregard for the safety of persons or property, the person driving the vehicle, upon conviction, shall be punished by imprisonment in the state prison, or by confinement in the county jail for not less than six months nor more than one year. The court may also impose a fine of not less than one thousand dollars (\$1,000) nor more than ten thousand dollars (\$10,000), or may impose both that imprisonment or confinement and fine.

(b) For purposes of this section, a willful or wanton disregard for the safety of persons or property includes, but is not limited to, driving while fleeing or attempting to elude a pursuing peace officer during which time either three or more violations that are assigned a traffic violation point count under Section 12810 occur, or damage to property occurs.

Cal. Vehicle Code § 2800.2.

The allegedly comparable Washington crime is attempting to elude a police vehicle in violation of RCW 46.61.024:

(1) Any driver of a motor vehicle who willfully fails or refuses to immediately bring his or her vehicle to a stop and who drives his or her vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and the vehicle shall be equipped with lights and sirens.

No. 38220-6-III
State v. Rogers

The first inquiry is whether the elements of the California offense are substantially similar to the elements of the Washington offense. *Thiefault*, 160 Wn. 2d at 415. Both offenses require proof of the same actus reus, but the mens reas differ.⁴ Washington only requires a defendant drive their vehicle in a “reckless manner.” RCW 46.61.024(1). This entails proof of heedlessness or indifference to consequences. *State v. Roggenkamp*, 153 Wn.2d 614, 622, 106 P.3d 196 (2005).⁵ California, in contrast, requires proof that the defendant drove with a “willful or wanton disregard for the safety of persons or property.” Cal. Vehicle Code § 2800.2(a). This is a “higher mental state” than what is required for recklessness. *Roggenkamp*, 153 Wn.2d at 626. Thus, California’s law is narrower than Washington’s. This satisfies the criteria for legal comparability.⁶

⁴ Mr. Rogers complains that the California law does not require proof that the police officer is wearing a distinctive uniform. He is incorrect. *See* Cal. Vehicle Code § 2800.1(a)(4).

⁵ *Roggenkamp* analyzed the meaning of “reckless” in the context of vehicular homicide and vehicular assault. We have recognized the same definition of “reckless” applies in the context of Washington’s attempt to elude statute. *State v. Ridgley*, 141 Wn. App. 771, 781, 174 P.3d 105 (2007) (holding “reckless” has the same definition in the attempting to elude statute as in the vehicular homicide and vehicular assault statutes).

⁶ Mr. Rogers points to section 2800.2(b) of the California Vehicle Code, which states that “a willful or wanton disregard for the safety of persons or property includes, but is not limited to, driving while fleeing or attempting to elude a pursuing peace officer during which time either three or more violations that are assigned a traffic violation point count under section 12810 occur, or damage to property occurs.” Mr. Rogers was not charged under section 2800.2(b). He was charged under section 2800.2(a) and pleaded guilty as charged. Section 2800.2(b) has no bearing on his case.

No. 38220-6-III
State v. Rogers

We therefore need not look to factual comparability.

Montana conviction

The Montana conviction at issue in Mr. Rogers's appeal involved a violation of Montana Code Annotated section 45-6-301(3):

A person commits the offense of theft when the person purposely or knowingly obtains control over stolen property knowing the property to have been stolen by another and:

- (a) has the purpose of depriving the owner of the property;
- (b) purposely or knowingly uses, conceals, or abandons the property in a manner that deprives the owner of the property; or
- (c) uses, conceals, or abandons the property knowing that the use, concealment, or abandonment probably will deprive the owner of the property.

The allegedly comparable Washington crime is felony possession of stolen property in violation of RCW 9A.56.160:

- (1) A person is guilty of possessing stolen property in the second degree if:
 - (a) He or she possesses stolen property, other than a firearm as defined in RCW 9.41.010 or a motor vehicle, which exceeds seven hundred fifty dollars in value but does not exceed five thousand dollars in value; or
 - (b) He or she possesses a stolen public record, writing or instrument kept, filed, or deposited according to law; or
 - (c) He or she possesses a stolen access device.

The nature of the Montana and Washington offenses are substantially similar once one takes into account Washington's definition of "possessing stolen property," which

means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the

No. 38220-6-III
State v. Rogers

same to the use of any person other than the true owner or person entitled thereto.

RCW 9A.56.140(1).

Nevertheless, Montana's statute is broader than Washington's in that it is not confined by a dollar amount. Felony theft in Washington requires a value of at least \$750. Montana has no similar requirement. An individual convicted of violating Montana's statute has not necessarily violated all the elements of Washington's second degree possession of stolen property statute. Thus, the two statutes are not legally comparable.

Turning to factual comparability, because this claim comes to us in the form of a direct appeal, we do not have all the records pertaining to Mr. Rogers's Montana conviction. We are therefore unable to perform a factual comparability analysis. At Mr. Rogers's sentencing hearing, the State described the Montana conviction as involving possession of over \$1,500 in property. 3 RP (Apr. 27, 2021) at 962. Assuming this clarification was adequately established by Mr. Rogers's Montana records, the offense would have satisfied the factual comparability analysis and it would not have been deficient for trial counsel to fail to object.

On the current record, Mr. Rogers has not established that trial counsel performed deficiently in failing to object to the Montana conviction. If Mr. Rogers has evidence

No. 38220-6-III
State v. Rogers

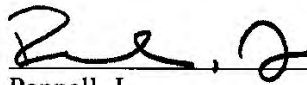
indicating the Montana conviction did not meet the criteria for factual comparability,
he will need to raise this issue in a personal restraint petition.

Mr. Rogers has not shown that the California and Montana convictions were not
comparable to Washington crimes. He therefore has not established counsel performed
deficiently in stipulating to their inclusion in Mr. Rogers's offender score.

CONCLUSION

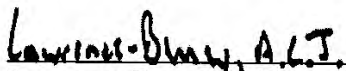
The judgment of conviction is affirmed.

A majority of the panel has determined this opinion will not be printed in
the Washington Appellate Reports, but it will be filed for public record pursuant to
RCW 2.06.040.



Pennell, J.

WE CONCUR:



Lawrence-Berrey, A.C.J.



Staab, J.

NO. 38220-6-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	STEVENS COUNTY
Plaintiff,)	NO. 19 1 00335 33
Respondent,)	
)	CERTIFICATE
v.)	OF SERVICE
)	
ROBERT JAMES ROGERS,)	
)	
Defendant,)	
Appellant.)	
_____)	

I certify under penalty of perjury under the laws of the State of Washington that on this 10th day of March, 2023, I caused a true and correct copy of the *PETITION FOR DISCRETIONARY REVIEW* to be served on:

COURT OF APPEALS, DIVISION III
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Spokane, WA 99201

E-FILE

Stevens County Prosecutor's Office
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