FILED
MAY 14, 2020
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

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	No. 36410-1-III UNPUBLISHED OPINION

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

FACTS

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

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

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

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

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

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

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

RP at 125-26.

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

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

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

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

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

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

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

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

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

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

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

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

Mullins appeals.

ANALYSIS

I. DOUBLE JEOPARDY

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

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

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

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

II. PRESENCE AT TRIAL

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

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

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

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

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

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

III. EVIDENTIARY OBJECTIONS

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

A. Hearsay

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

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

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

B. Foundation and Opinion Evidence

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

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

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

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

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

C. Opinion of Guilt

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

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

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

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

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

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

D. Mullins's Clothing

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

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

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

ER 401 provides that relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 402 provides that evidence that is not relevant is not admissible.

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

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

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

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

IV. DOSA

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

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

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

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

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

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

V. OFFENDER SCORE

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

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

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

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

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

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

Melnick, J.[4]

WE CONCUR:

Korsmo, A,C,J.

Lawrence-Berrey, J.

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