IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOHN M. LUNDY, Appellant.	No. 40448-6-II PART PUBLISHED OPINION

Armstrong, J. — A jury convicted John Lundy of possession of a stolen vehicle, two counts of unlawfully issuing bank checks, and two counts of bail jumping. Lundy appeals, arguing (1) the trial court erred by using a modified version of jury instruction 4.01 to instruct the jury on the State's burden of proof; (2) the trial court improperly commented on the evidence; (3) a witness gave impermissible opinion testimony; (4) insufficient evidence supports one of his bail jumping convictions; (5) the trial court erred by admitting propensity evidence without a limiting instruction; (6) the trial court erred by denying his motion for a jury instruction on the "uncontrollable circumstances defense to bail jumping"; (7) the "to convict" bail jumping instructions omitted essential elements of the crime; (8) his counsel ineffectively represented him by failing to object to numerous pieces of evidence; (9) the trial court incorrectly calculated his offender score; and (10) the trial court erred by finding that aggravating factors justified an exceptional sentence without jury findings of fact. Finding no reversible error, we affirm Lundy's convictions. We remand, however, for the sentencing court to reconsider Lundy's exceptional sentence.

FACTS

In March 2009, Lundy wrote several checks that were returned for insufficient funds. On March 7, he purchased a truck from Chris Gay with a $240 down payment and a contract to pay the remaining $2,310 in 10 weekly installments. When Gay attempted to cash Lundy's check, it was returned for insufficient funds. Gay attempted to contact Lundy by e-mail and telephone but received no response. He never received the next scheduled payment for the truck either. After two weeks, Gay reported the truck stolen. On March 27, Lundy was pulled over and taken into custody for possession of a stolen vehicle.

Lundy had also purchased several items from NAPA Auto Parts, including an alternator, with checks written on March 11 and March 13. His friend, Nick Robbins, returned the alternator the next day for a cash refund. Lundy also purchased several items from Rochester Lumber, including a chainsaw, with checks written on March 14 and March 19. Robbins returned the chainsaw the next day and the store issued a refund check. When the stores attempted to deposit Lundy's checks, they were returned for insufficient funds.

The State charged Lundy with possession of a stolen vehicle and two counts of unlawfully issuing bank checks for the checks written to NAPA Auto Parts and Rochester Lumber. When Lundy failed to appear for pretrial hearings on July 1, September 23, and October 19, 2009, the State amended the information to include three counts of bail jumping.

At trial, Paul Lemmon, a fraud investigator for Bank of America, testified that Lundy had opened an account on January 30, 2009. His deposits from January to March 2009 totaled about $420. During that time, he wrote approximately 40 checks totaling $3,800. The State asked how

many checks Lundy had written between January 30 and March 4, and Lemmon listed 21 checks and their amounts. The State asked whether Lundy had sufficient funds to cover any of those checks and Lemmon said no. The State also presented account statements showing that Lundy had generated numerous nonsufficient fund fees during that time period. Gay and employees from NAPA Auto Parts and Rochester Lumber testified to the events described above.

Lundy testified that he opened the account after getting a job through the work release program at the Thurston County Jail. He claimed that he thought he had signed up for direct deposit but later discovered that several checks had not been deposited into his account. He testified that he believed he had sufficient funds to cover the checks that he had written and did not intentionally write bad checks.

In support of the bail jumping charges, the State produced court documents detailing the pretrial hearings and bench warrants issued in Lundy's case. The State called Kelley McIntosh, an employee for Thurston County Pretrial Services, to explain these documents. The State's evidence showed that Lundy's case was called in open court with no response on July 1, September 23, and October 19, 2009. Lundy had signed orders directing him to appear in court on July 1 and October 19. Notice of the September 23 hearing was mailed to him, but was not sent to the correct address.

Lundy acknowledged that he had missed court hearings on July 1 and October 19. He testified that it was difficult for him to keep track of his court hearings because he had ongoing cases in several jurisdictions, including "Pierce County, Chehalis tribal, Chehalis municipal, here [Thurston County] in two different courts, and in Tumwater." II Report of Proceedings (RP) at

295. He and his wife, Josephine Lundy, testified that conflicting court dates and confusion over

where he was scheduled to appear had prevented him from appearing at his hearings in Thurston County. Josephine also testified that she thought Lundy had missed court on one occasion because he was in the Chehalis Tribal Jail for "at least four or five days" around September 12, 2009. II RP at 264-67.

Shortly before closing arguments, defense counsel requested an instruction on the "uncontrollable circumstances defense to bail jumping." II RP at 355. He explained that Lundy was not going to testify initially but had changed his mind during the trial, and argued that Lundy's testimony had brought in enough evidence to warrant giving the instruction. The trial court denied the motion, ruling the request was timely under the circumstances but there was insufficient evidence to support the instruction.

The jury acquitted Lundy of the September 23 bail jumping charge and found him guilty on all other counts. At sentencing, Lundy stated that he had no objection to the State's list of his prior convictions or the State's calculation of his offender score. The sentencing court found that aggravating circumstances under RCW 9.94A.535(2) supported an exceptional sentence for possession of a stolen vehicle and sentenced Lundy to 70 months for that conviction. The court also sentenced Lundy to 29 and 12 months for the unlawful issuance of bank checks convictions, and 55 months for each of the bail jumping convictions, to be served concurrently.

ANALYSIS

I. Reasonable Doubt Instruction

Lundy contends that the trial court erred by using a modified version of the Washington Pattern Jury Instruction (WPIC) 4.01 to instruct the jury on the State's burden of proof. He

argues that *State v. Bennett*, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007), requires trial courts to use WPIC 4.01 and that any deviation from its language requires reversal.

As a threshold matter, Lundy did not object to this instruction at trial. He asserts that the State proposed WPIC 4.01 and the trial court substituted its own instruction without notifying counsel. The State agrees that the trial court "made some minor changes" to WPIC 4.01, but argues that the instruction was still a correct statement of the law. Br. of Resp't at 35. Because the State's proposed instructions were not included in the record before us, it is impossible to verify whether the proposed instruction differs from the instruction given to the jury. But even assuming that the trial court altered the instruction, as the parties agree that it did, we hold that the error was harmless.

In *Bennett*, our Supreme Court held that the reasonable doubt instruction commonly referred to as the *Castle* instruction[1] "satisfied the minimum requirements of due process," but directed trial courts to use only WPIC 4.01 in the future:

> We also exercise our inherent supervisory power to instruct Washington trial courts to use only the approved pattern instruction WPIC 4.01 to instruct juries that the government has the burden of proving every element of the crime beyond a reasonable doubt.

Bennett, 161 Wn.2d at 318. The *Bennett* court reasoned that "[e]ven if many variations of the definition of reasonable doubt meet minimum due process requirements, the presumption of innocence is simply too fundamental, too central to the core of the foundation of our justice system not to require adherence to a clear, simple, accepted, and uniform instruction." *Bennett*, 161 Wn.2d at 317-18.

[1] *See State v. Castle*, 86 Wn. App. 48, 935 P.2d 656 (1997).

The reasonable doubt instruction used here, instruction 9, stated:

> A defendant is presumed innocent. This presumption continues throughout the entire trial unless you find during your deliberations that it has been overcome by evidence beyond a reasonable doubt.
>
> Each crime charged by the State includes one or more elements which are explained in a subsequent instruction. The State has the burden of proving each element of a charged crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

Clerk's Papers (CP) at 29. In contrast, WPIC 4.01 provides:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

11 Washington Practice: Washington Pattern Jury Instructions—Criminal 4.01, at 85 (3d ed. 2008). Thus, instruction 9 modified the WPIC by reversing the order of the first two paragraphs and modifying the first three sentences of the paragraph on the State's burden of proof. Because our Supreme Court has unambiguously directed trial courts to use *only* WPIC 4.01, the trial court erred by modifying the instruction. *Bennett*, 161 Wn.2d at 318.

An erroneous jury instruction, however, is generally subject to a constitutional harmless

error analysis. *State v. Brown*, 147 Wn.2d 330, 332, 58 P.3d 889 (2002). We may hold the error harmless if we are satisfied "'beyond a reasonable doubt that the jury verdict would have been the same absent the error.'" *State v. Bashaw*, 169 Wn.2d 133, 147, 234 P.3d 195 (2010) (quoting *Brown*, 147 Wn.2d at 341). Even misleading instructions do not require reversal unless the complaining party can show prejudice. *State v. Aguirre*, 168 Wn.2d 350, 364, 229 P.3d 669 (2010).

But in *State v. Castillo*, 150 Wn. App. 466, 472, 208 P.3d 1201 (2009), Division One of this court declined to apply a harmless error analysis to a trial court's failure to use the WPIC, reasoning:

> For several reasons, we reject the State's harmless error argument. First, the supreme court issued its decision in *Bennett* on August 30, 2007, some eight months before Castillo's trial. Thus, there can be no argument that the court and counsel had insufficient time to learn of the express directive to lower courts to use WPIC 4.01.
>
> Second, there is nothing ambiguous about the supreme court's directive: trial courts are to use *only* WPIC 4.01 as the reasonable doubt instruction "until a better instruction is approved." The court neither said nor implied that lower courts were free to ignore the directive if they could find the error of failing to give WPIC 4.01 harmless beyond a reasonable doubt.

We decline to follow *Castillo*. Although the *Bennett* court cautioned against altering WPIC 4.01, the court did not hold that modifying WPIC 4.01 automatically constitutes reversible error. Absent such a holding, we decline to treat this error as a structural error and instead follow the general rule that erroneous jury instructions are subject to a constitutional harmless error analysis. *See Bashaw*, 169 Wn.2d at 147; *Brown*, 147 Wn.2d at 332.

Accordingly, we hold that instruction 9, although contrary to the *Bennett* court's directive, was harmless beyond a reasonable doubt. By reversing the order of the first two paragraphs,

instruction 9 emphasized the presumption of innocence. Lundy cannot show that he was prejudiced by that emphasis. Furthermore, instruction 9 accurately described the State's burden of proof by clearly instructing the jury that the State must prove each element of the crimes charged beyond a reasonable doubt and that the defendant has no burden of proving that a reasonable doubt exists. Because Lundy cannot show that he was prejudiced by the instruction or that it relieved the State of its burden of proof, we are satisfied beyond a reasonable doubt that the jury verdict would have been the same absent the error. *See Bashaw*, 169 Wn.2d at 147.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

II. Judicial Comment on the Evidence

Lundy next contends that the trial court improperly commented on the evidence by admitting certain court documents into evidence. Lundy complains of statements in (1) the clerk's minutes for the probable cause hearing following his arrest for possession of a stolen vehicle and (2) the bench warrants issued after his July 1, September 23, and October 19 hearings. These documents were admitted into evidence without objection. The clerk's minutes state, "Court found probable cause for initial arrest and detention." Ex. 9. The bench warrants state that "after proper notice the Defendant has failed to appear as scheduled." Ex. 15, 27, 35. Lundy argues that these statements constitute an impermissible judicial comment on the evidence.

Article 4, section 16, of our state constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." This

constitutional provision prohibits a judge from conveying to the jury his personal opinion regarding the merits of the case or a particular issue within the case. *State v. Theroff*, 95 Wn.2d 385, 388-89, 622 P.2d 1240 (1980). The prohibition is intended to prevent a trial judge's opinion from influencing the jury. *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). Because a judicial comment on the evidence violates a constitutional prohibition, failure to object does not prevent a defendant from raising the issue on appeal. *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1231 (1997). A judicial comment is presumed prejudicial unless the State shows that the defendant was not prejudiced or the record affirmatively shows that no prejudice could have resulted. *State v. Levy*, 156 Wn.2d 709, 723, 132 P.3d 1076 (2006).

Here the trial court's probable cause finding does not amount to an improper judicial comment on the evidence. A probable cause finding is not a personal opinion but a legal conclusion that the facts and circumstances within the arresting officer's knowledge supported a reasonable belief that a crime had been committed. *See State v. Lund*, 70 Wn. App. 437, 444-45, 853 P.2d 1379 (1993) (citing *Brinegar v. United States*, 338 U.S. 160, 175-76, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949)). Furthermore, the court's finding addressed only Lundy's initial arrest, which was not a disputed issue in this case, and did not convey the court's personal opinion on whether Lundy was actually guilty of the crimes charged. *See Theroff*, 95 Wn.2d at 388-89.

Additionally, even if the trial court's probable cause finding was a comment on the evidence, a comment does not prejudice a defendant where "overwhelming untainted evidence" supports his convictions. *Lane*, 125 Wn.2d at 840. Here, Lundy's convictions were amply supported by Lemmon's testimony regarding Lundy's deposits and withdrawals, Gay's testimony

regarding Lundy's initial bad check and failure to make any additional payments on the truck, and the NAPA Auto Parts and Rochester Lumber employees' testimony regarding Lundy's multiple purchases with bad checks and his friend's subsequent returns of the merchandise. We are satisfied that "overwhelming untainted evidence" supports Lundy's convictions. *Lane*, 125 Wn.2d at 840.

The trial court's findings supporting Lundy's bench warrants may constitute a judicial comment on the evidence. "[A]ny remark that has the potential effect of suggesting that the jury need not consider an element of an offense could qualify as [a] judicial comment." *Levy*, 156 Wn.2d at 721. By finding that Lundy had "proper notice" of the hearings at issue and "failed to appear as required," the bench warrants appear to conclude that Lundy knowingly failed to appear as required for his scheduled hearings, which is an element of the crime of bail jumping that the State must prove and the jury must determine. Ex. 15, 27, 35; *see* RCW 9A.76.170(1); *State v. Williams*, 162 Wn.2d 177, 183-84, 170 P.3d 30 (2007).

But even if these statements were judicial comments on the evidence, the record affirmatively shows that no prejudice could have resulted. *Levy*, 156 Wn.2d at 723. At trial, Lundy acknowledged that he received notice of the July 1 and October 19 hearings and failed to appear at those hearings. As those facts were not in dispute, Lundy could not have been prejudiced by the statement that he received proper notice of those hearings and failed to appear at them. And because Lundy was acquitted of the third bail jumping charge, he suffered no prejudice there. Accordingly, we hold that the alleged opinion testimony contained in the bench warrants does not constitute reversible error.

III. Opinion Testimony

Lundy next contends that impermissible opinion testimony violated his constitutional right to a jury trial when McIntosh testified that Lundy "did not offer any bona fide explanation for not being present [in court]." Br. of Appellant at 14, 16. He argues that this statement amounted to a "nearly explicit" opinion that McIntosh believed he was guilty of bail jumping. Br. of Appellant at 16.

Improper opinion testimony violates a defendant's constitutional right to a jury trial by invading the fact-finding province of the jury. Wash. Const. art. I, §§ 21, 22; *State v. Montgomery*, 163 Wn.2d 577, 590, 183 P.3d 267 (2008); *State v. Thach*, 126 Wn. App. 297, 312, 106 P.3d 782 (2005). Improper opinion testimony includes expressions of personal belief regarding the defendant's guilt. *Montgomery*, 163 Wn.2d at 591. Although Lundy did not object to McIntosh's testimony at trial, opinion testimony violates a constitutional right and, therefore, a defendant may raise the issue for the first time on appeal if the error is "manifest." RAP 2.5(a)(3); *State v. Kirkman*, 159 Wn.2d 918, 936, 155 P.3d 125 (2007). In this context, "manifest error" requires "an explicit or almost explicit witness statement on an ultimate issue of fact." *Kirkman*, 159 Wn.2d at 936.

Here, the State asked McIntosh whether Lundy had offered an explanation for his failure to appear in court. She testified, "He stated that he had had other conflicting court dates." II RP at 227. The State then asked, "But did not offer any—did he offer any bona fide explanation for not being present, other than the confusion?" II RP at 227. McIntosh said, "No. He just stated that he was out on bail in other matters, had confused the court dates, and wasn't sure. He

was—he confused this court date with another one that he had in another jurisdiction." II RP at 227.

This testimony does not amount to improper opinion testimony. First, the State did not clearly question the veracity of Lundy's explanation when it asked whether he had offered "any bona fide explanation for not being present, other than the confusion." II RP at 227. That question could be read as implying that Lundy had already offered one bona fide explanation, confusion, and the State was asking whether he had offered any additional explanations. Second, McIntosh did not testify to whether she found Lundy's explanation credible, she simply testified that his only explanation for missing court was confusion over conflicting court dates. While the State's use of the phrase "bona fide" was imprudent, we hold that neither the State's question nor McIntosh's response amounts to an "explicit" or "almost explicit" opinion on whether Lundy was guilty of bail jumping. *Kirkman*, 159 Wn.2d at 936.

IV. Sufficiency of Evidence

Lundy next contends that his July 1 bail jumping conviction is not supported by sufficient evidence. The evidence shows that Lundy signed an order directing him to appear for a status hearing at 9:00 a.m. on July 1, 2009. The clerk's minutes for that hearing state that the court called for the defendant at 8:30 a.m. with no response. Lundy argues that, as in *State v. Coleman*, 155 Wn. App. 951, 231 P.3d 212 (2010), this evidence is insufficient to show that he failed to appear at 9:00 a.m., the time stated on his notice.

In *Coleman*, Division Three of this court held that evidence was insufficient to support a bail jumping conviction where the defendant was required to appear in court at 9:00 a.m. and the

clerk's minutes showed that he failed to appear at 8:30 a.m., reasoning that "nothing before the jury established that [the defendant] was absent at the time specified on his notice." *Coleman*, 155 Wn. App. at 964. If the notice and clerk's minutes were the only evidence supporting Lundy's conviction, his argument would have some merit. But Lundy himself testified that he failed to appear at the July 1 status hearing. The State asked Lundy, "And you obviously did not appear on July 1st for your status hearing; correct?" II RP at 313. Lundy replied, "I did not." II RP at 313. Because Lundy acknowledged that he failed to appear in court on July 1, we hold that his bail jumping conviction is supported by sufficient evidence.

V. Limiting Instruction on Propensity Evidence

Lundy next contends that the trial court improperly admitted propensity evidence without a limiting instruction, thereby violating his constitutional right to a fair trial. He refers to Lemmon's testimony that he wrote numerous bad checks between January and March 2009, in addition to the checks specifically at issue in this case. Lundy did not object to this testimony at trial or request a limiting instruction. He now argues that this evidence is propensity evidence under ER 404(b) and relies on *State v. Russell*, 154 Wn. App. 775, 225 P.3d 478 (2010), to argue that the trial court had an independent duty to give a limiting instruction, regardless of whether an instruction was requested or not.

A party cannot appeal a trial court's ruling admitting evidence unless the party makes a timely and specific objection at trial. *State v. Perez-Cervantes*, 141 Wn.2d 468, 482, 6 P.3d 1160 (2000); *State v. Avendano-Lopez*, 79 Wn. App. 706, 710, 904 P.2d 324 (1995). And a trial court is not required to give a limiting instruction on propensity evidence if neither party requests one.

State v. Russell, 171 Wn.2d 118, 124, 249 P.3d 604 (2011). Accordingly, the trial court did not err by admitting this evidence or failing to give a limiting instruction.

VI. Uncontrollable Circumstances Instruction

Lundy next contends that the trial court erred by denying his request for a jury instruction on the "uncontrollable circumstances defense to bail jumping." RCW 9A.76.170(2). He argues that, when viewed in the light most favorable to him, the evidence suggested that uncontrollable circumstances prevented him from attending court.

A defendant is entitled to have the jury instructed on his theory of the case if sufficient evidence supports that theory. *State v. Harvill*, 169 Wn.2d 254, 259, 234 P.3d 1166 (2010). Failure to instruct is reversible error. *Harvill*, 169 Wn.2d at 259. We review the trial court's ruling denying the requested instruction for an abuse of discretion. *Harvill*, 169 Wn.2d at 259. In evaluating whether the evidence is sufficient to support the requested instruction, we interpret the evidence in the light most favorable to the defendant. *State v. Ginn*, 128 Wn. App. 872, 879, 117 P.3d 1155 (2005).

Even when viewed in the light most favorable to Lundy, the evidence presented at trial is not sufficient to support his requested instruction. The uncontrollable circumstances defense provides:

> It is an affirmative defense to [bail jumping] . . . that uncontrollable circumstances prevented the person from appearing or surrendering, and that person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.

RCW 9A.76.170(2). "Uncontrollable circumstances" are defined as:

> an act of nature such as a flood, earthquake, or fire, or a medical condition that

> requires immediate hospitalization or treatment, or an act of a human being such as an automobile accident or threats of death, forcible sexual attack, or substantial bodily injury in the immediate future for which there is no time for a complaint to the authorities and no time or opportunity to resort to the courts.

RCW 9A.76.010(4). As these examples show, "uncontrollable circumstances" are sudden, unexpected, debilitating, and generally render a person physically incapable of appearing in court. In contrast, scheduling conflicts and confusion over multiple court dates are foreseeable, preventable, and fall squarely within the defendant's control. These issues do not constitute "uncontrollable circumstances" within the meaning of RCW 9A.76.010(4).

Additionally, Lundy must show that he "did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear." RCW 9A.76.170(2). By failing to keep track of his multiple court dates and notify the court in a timely manner when conflicts arose, Lundy helped create the circumstances that he now claims prevented him from appearing for his scheduled court hearings. Accordingly, Lundy failed to present sufficient evidence to support an uncontrollable circumstances defense and we affirm the trial court's ruling denying the instruction.

VII. Bail Jumping Instruction

Lundy next contends that the "to convict" instructions for the three bail jumping charges failed to instruct the jury on every element of the crime. Although Lundy did not object to any of the jury instructions at trial, failure to instruct the jury on every element of the crime is a constitutional error that a defendant may raise for the first time on appeal. *State v. Aumick*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995).

Jury instructions are sufficient if they allow counsel to argue their theories of the case, are

not misleading, and, when read as a whole, properly inform the jury of the applicable law. *Aguirre*, 168 Wn.2d at 363-64. A "to-convict" instruction must contain all of the elements of the crime charged because "'it serves as a yardstick by which the jury measures the evidence to determine guilt or innocence.'" *State v. Lorenz*, 152 Wn.2d 22, 31, 93 P.3d 133 (2004) (quoting *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003)). "Omission of an element relieves the State of its burden to prove every essential element beyond a reasonable doubt." *Lorenz*, 152 Wn.2d at 31 (citing *State v. Smith*, 131 Wn.2d 258, 265, 930 P.2d 917 (1997)). That the missing element is supplied by other instructions does not cure the defect. *Lorenz*, 152 Wn.2d at 31 (citing *DeRyke*, 149 Wn.2d at 910).

The bail jumping statute provides, "Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state . . . and who fails to appear . . . as required is guilty of bail jumping." RCW 9A.76.170(1). Here, instruction 20 provided:

> To convict the defendant of the crime of bail jumping as charged in Count 4, each of the following elements of the crime must be proved beyond a reasonable doubt:
> (1) That on or about the July 1, 2009, [sic] the defendant *knowingly failed to appear before a court*;
> (2) That the defendant was charged with one count of possessing a stolen motor vehicle;
> (3) That the defendant had been released by court order or admitted to bail *with the requirement of a subsequent personal appearance before that court*; and
> (4) That any of these acts occurred in the State of Washington. . . .

CP at 37 (emphasis added). Instructions 21 and 22 provided:

> To convict the defendant of the crime of bail jumping as charged in Count 5 [and 6], each of the following elements of the crime must be proved beyond a reasonable doubt:
> (1) That on or about September 23, 2009 [and October 19, 2009,] the defendant *knowingly failed to appear before a court*;

> (2) That the defendant was charged with one count of possessing a stolen motor vehicle;
> (3) That the defendant had been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before that court; and
> (4) That any of these acts occurred in the State of Washington. . . .

CP at 38-39 (emphasis added).

Lundy argues that subsection three of instruction 20 did not properly instruct the jury on the knowledge element of bail jumping because it did not require the jury to find that he was "'released by court order or admitted to bail *with knowledge of* the requirement of a subsequent personal appearance.'" Br. of Appellant at 40-41 (quoting RCW 9A.76.170(1)). He argues that all three instructions are deficient because subsection one did not require the jury to find that he failed to appear "'as required'" before a court. Br. of Appellant at 41 (quoting RCW 9A.76.170(1)). We disagree.

First, instruction 20 did instruct the jury on the knowledge element of bail jumping by requiring the jury to find that Lundy "knowingly failed to appear before a court" on July 1, 2009. CP at 37. Second, all three instructions required the jury to find that Lundy "knowingly failed to appear before a court" on a particular day, and that he had been released with "the requirement of a subsequent personal appearance before that court." CP at 37-39. Thus, it is clear from the context of the entire instruction that the jury was required to find that Lundy knowingly failed to appear on the specified court date, not some other, unidentified court date. These instructions were further reinforced by instruction 19, which informed the jury that "[a] person commits the crime of bail jumping when he or she fails to appear *as required* after having been released by court order or admitted to bail *with knowledge of the requirement of a subsequent personal*

appearance before a court." CP at 37 (emphasis added). Accordingly, we hold that the "to convict" bail jumping instructions included every element of the crime and the instructions, when read as a whole, properly informed the jury of the applicable law. *Aguirre*, 168 Wn.2d at 363-64; *Lorenz*, 152 Wn.2d at 31.

VIII. Ineffective Assistance of Counsel

Lundy next contends that his counsel ineffectively represented him. We review such claims de novo. *Thach*, 126 Wn. App. at 319.

Both the federal and state constitutions guarantee effective legal representation for a criminal defendant. U.S. Const. amend VI; Wash. Const. art. I, § 22. We presume defense counsel provided adequate representation, a presumption that Lundy can overcome only by showing that (1) counsel's representation was so deficient that it fell below an objective standard of reasonableness and (2) the deficient representation prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 690, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Brockob*, 159 Wn.2d 311, 344-45, 150 P.3d 59 (2006). To establish prejudice, Lundy must establish a reasonable probability that the trial outcome would have been different but for counsel's unprofessional errors. *Strickland*, 466 U.S. at 694; *Brockob*, 159 Wn.2d at 344-45.

A. Evidence of Other Bad Checks

Lundy first faults his counsel for failing to object to evidence that he wrote numerous bad checks and was charged multiple overdraft and nonsufficient fund fees. To establish that counsel was ineffective by failing to object to the admission of evidence, Lundy must show that (1) the failure to object fell below prevailing professional standards; (2) the objection would have likely

been sustained by the trial court; and (3) the result of the trial would have likely been different had the disputed evidence been excluded. *In re Davis*, 152 Wn.2d 647, 713-14, 101 P.3d 1 (2004).

Lundy argues that evidence of other bad checks is inadmissible under ER 402, 403, and 404(b), because it is irrelevant and highly prejudicial propensity evidence. A person is guilty of unlawfully issuing bank checks when, "with intent to defraud," he or she delivers a check or draft on a bank "knowing at the time of such . . . delivery, that he or she has not sufficient funds in, or credit with the bank . . . to meet the check or draft, in full upon its presentation." RCW 9A.56.060(1). We have held that evidence of other bad checks is "clearly relevant" and admissible to prove the absence of a mistake and intent to defraud under RCW 9A.56.060. *State v. Kane*, 23 Wn. App. 107, 109-10, 594 P.2d 1357 (1979).[2]

In *Kane*, the defendant argued that the trial court committed reversible error by admitting evidence of other bad checks that he had written. *Kane*, 23 Wn. App. at 109. We held:

> It is well established that evidence of other criminal acts is generally not admissible. The rule is not, however, absolute. Such evidence is admissible to show (1) motive or intent; (2) absence of accident or mistake; (3) common scheme or plan; (4) identity; or (5) if it is relevant to any other material issue before the jury. In the instant case defendant's closed account and NSF checks were clearly relevant to negating his claim [that] he "accidentally" grabbed the wrong checkbook. In addition, the bad checks were also probative in that they tended to prove defendant knew his checks were worthless, would not be paid upon presentment, and thus his intent to defraud. We find the trial court did not abuse its discretion by admitting this evidence.

Kane, 23 Wn. App. at 109-110 (citing *State v. Sherer*, 77 Wn.2d 345, 462 P.2d 549 (1969)). Similarly, in older cases involving the crime of "grand larceny by check," our Supreme Court has

[2] Although the charges in *Kane* were brought under former RCW 9A.56.060 (1979), the current statute is not substantively different from the former statute. *See* former RCW 9A.56.060 (1979); *Kane*, 23 Wn. App. at 108 n.1.

held that evidence of other bad checks is relevant for proving intent to defraud:

> We have held that evidence that other worthless checks were issued at about the same time as those upon which the prosecution is based is relevant and competent to show a general plan of operations, as well as knowledge that the checks would not be paid upon presentation. We have also held that such evidence is competent to prove intent. The fact that the evidence tends to show the commission of other crimes does not render it incompetent if it is otherwise material and relevant.

Scherer, 77 Wn.2d at 351 (internal citations omitted).

Because evidence of other bad checks is relevant and admissible for the purpose of proving knowledge, the absence of a mistake, and intent to defraud, Lundy cannot show that an objection to that evidence would have likely been sustained by the trial court. Accordingly, he has not established that counsel was deficient for failing to object to evidence that he wrote numerous bad checks. *See Davis*, 152 Wn.2d at 713-14.

B. Failure to Request a Limiting Instruction

Lundy also argues that defense counsel's failure to request a limiting instruction on the evidence of other bad checks constituted ineffective assistance of counsel. Even assuming the failure constituted deficient performance, Lundy has not established a reasonable probability that the outcome of his trial would have differed had defense counsel requested and obtained a limiting instruction. *See Brockob*, 159 Wn.2d at 344-45. The jury was properly instructed that, in order to convict Lundy of unlawful issuance of bank checks, it must find that he wrote checks to NAPA Auto Parts and Rochester Lumber with the intent to defraud and with knowledge that he did not have sufficient funds to cover those specific checks. And there was sufficient evidence to support the jury's findings that he intentionally wrote bad checks on those specific occasions, given the small amount of his deposits and his pattern of immediately returning items of significant value for

a cash or check refund before the stores had an opportunity to deposit his checks.

C. Failure to Object to Inadmissible and Prejudicial Statements

Lundy next contends that defense counsel should have objected to inadmissible and prejudicial statements contained in documentary evidence, including (1) references to his indigency, because "[s]ome jurors may have been prejudiced against poor people," (2) references to no-contact orders, the amount of bail, and the conditions of release, because jurors "may have viewed [that evidence] as evidence of the judge's opinion of Mr. Lundy, the threat he posed to the community, and the victim, and the risk that [he] might fail to appear in court," and (3) the trial court's initial finding of probable cause and its findings that he received proper notice and failed to appear for court as scheduled, because these findings "likely carried great weight with the jury," were irrelevant under ER 401, and were inadmissible under ER 402, 403, and 802. Br. of Appellant at 33-34.

Lundy does not provide a meaningful analysis showing that objections to any of this evidence would have likely been sustained by the trial court. *See Davis*, 152 Wn.2d at 713-14. Nor are his arguments that jurors "may" have been prejudiced or influenced by this evidence sufficient to establish a reasonable probability that the trial outcome would have been different but for defense counsel's failure to object to the evidence. Lundy has failed to show that counsel was ineffective by failing to object to these alleged evidentiary errors or that the alleged errors actually prejudiced his defense. *See Brockob*, 159 Wn.2d at 344-45.

D. Failure to Object to Opinion Testimony or Propose Written Instruction

Finally, Lundy contends that defense counsel should have objected to McIntosh's

inadmissible opinion testimony and should have proposed a proper written instruction on the uncontrollable circumstances defense to bail jumping. As discussed above, McIntosh's testimony was not impermissible opinion testimony and the trial court properly rejected defense counsel's motion for an uncontrollable circumstances instruction because there was insufficient evidence to support the defense. Lundy cannot show that an objection or written proposed instruction would have changed the trial outcome in these instances. *See Brockob*, 159 Wn.2d at 344-45.

IX. Offender Score

Lundy next contends that the trial court improperly calculated his offender score. Specifically, he argues that the judgment and sentence shows his criminal history, includes nine class C felonies prior to the end of 1997, and that his next offense was committed in 2007. Because the sentencing court did not make a written finding that he was confined between 1997 and 2007, Lundy asserts that all of his class C felonies should have washed out under RCW 9.94A.525(2)(c).[3]

At sentencing, Lundy stated that he had no objection to the State's calculation of his offender score and, therefore, waived his right to challenge his offender score on appeal. *See State v. Bergstrom*, 162 Wn.2d 87, 94, 169 P.3d 816 (2007). Even if we address Lundy's argument, it fails on its merits. The State submitted a judgment and sentence showing that Lundy was sentenced to 84 months of confinement in 1997, and Lundy confirmed at sentencing that he was confined in prison from 1997 to 2003. Because Lundy was convicted of another crime in 2007, he did not spend the requisite five years in the community without being convicted of a crime and none of his class C felony convictions washed out. RCW 9.94A.525(2)(c). The trial court did not err in calculating Lundy's offender score.

[3] RCW 9.94A.525(2)(c) provides:

> [C]lass C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

X. Exceptional Sentence

Finally, Lundy contends that the trial court violated his constitutional right to a jury trial by imposing an exceptional sentence without a jury determination of aggravating factors. We review this question of law de novo. *State v. Alvarado*, 164 Wn.2d 556, 563, 192 P.3d 345 (2008).

In 2000, the Supreme Court held that any fact, other than the fact of a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). In 2004, the Supreme Court defined the statutory maximum as "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (emphasis omitted). In response to *Apprendi* and *Blakely*, our legislature amended RCW 9.94A.535 in 2005 to provide that a trial court may rely on certain aggravating factors without jury findings of fact. *See* Laws of 2005, ch. 68, § 1; *Alvarado*, 164 Wn.2d at 564.

Here, the trial court relied on RCW 9.9A.535(2)(b) and (c) to justify Lundy's exceptional sentence. The statute provides, in relevant part:

> The trial court may impose an aggravated exceptional sentence *without a finding of fact by a jury* under the following circumstances:
> . . . .
> (b) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.
> (c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

RCW 9.94A.535(2) (emphasis added).

Lundy argues that whether a presumptive sentence is "clearly too lenient" under RCW 9.94A.535(2)(b) is a fact that must still be found by a jury. The State concedes this argument by failing to respond to it.[4] Instead, the State argues that Lundy's exceptional sentence is properly supported by the "free crimes" factor under RCW 9.94A.535(2)(c). Br. of Resp't at 37-38.

In *Alvarado*, 164 Wn.2d at 566-67, our Supreme Court held, "[T]he only factors the trial court relies upon in imposing an exceptional sentence under RCW 9.94A.535(2)(c) are based on criminal history and the jury's verdict on the current convictions. Both fall under the *Blakely* prior convictions exception, as no judicial fact finding is involved." Thus, the State correctly argues that a trial court may rely on the "free crimes" factor under RCW 9.94A.535(2)(c) without jury findings of fact. *Alvarado*, 164 Wn.2d at 566-67. But it is not clear from the record here whether the sentencing court would have imposed the same exceptional sentence based solely on RCW 9.94A.535(2)(c). Accordingly, we remand for the sentencing court to reconsider Lundy's exceptional sentence based solely on RCW 9.94A.535(2)(c).

[4] Additionally, Division Three of this court addressed this issue in *State v. Saltz*, 137 Wn. App. 576, 583-84, 154 P.3d 282 (2007), and held that whether a presumptive sentence is "clearly too lenient" under RCW 9.94A.535(2)(b) is still a factual determination that must be found by a jury, rather than a judge.

We affirm Lundy's convictions but remand to the sentencing court for reconsideration of Lundy's exceptional sentence.

Armstrong, J.

We concur:

Hunt, J.

Worswick, A.C.J.